A COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES

ABUSE AND NEGLECT

VOLUME VI OF IX

National Institute for Juvenile Justice and Delinquency Prevention

Office of Juvenile Justice and Delinquency Prevention

Law Enforcement Assistance Administration

U.S. Department of Justice

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VOLUME VI OF IX

Working Papers of the National Task Force
to Develop Standards and Goals for Juvenile
Justice and Delinquency Prevention

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PREFACE TO WORKING PAPERS

Task Force Origin and Mission

The National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention was initiated as part of Phase II of the standards and goals effort undertaken by the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice.

The original portion of this effort (Phase I) led to the establishment of the National Advisory Commission on Criminal Justice Standards and Goals in October of 1971. To support the work of the National Advisory Commission, special purpose Task Forces were created, each concentrating on a separate area of concern in criminal justice. The efforts of the Task Forces resulted in the completion of five reports: Courts; Police; Corrections; Criminal Justice System; and Community Crime Prevention. In addition, the National Advisory Commission itself produced an overview volume entitled A National Strategy to Reduce Crime. Following the completion of these works in 1973, the National Advisory Commission was disbanded.

In the Spring of 1975, LEAA established five more Task Forces coordinated by a newly created National Advisory Committee to carry out the work of Phase II. The five Task Forces were Private Security; Organized Crime; Civil Disorders and Terrorism; Research and Development; and, of course, the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention.

From the beginning there was a recognition that the work of the Juvenile Justice and Delinquency Prevention Task Force was much broader than the other four groups. The charge of the Juvenile Justice Task Force was to supplement virtually all of the work of the Phase I National Advisory Commission with a "juvenile" version of the original adult-oriented standards and goals statements.

In all, the Task Force met ten times, for two or three days each time, in public meetings in various parts of the nation. At these meetings the Task Force was able to solidify its group philosophy, analyze the issues of importance in juvenile justice and delinquency prevention, direct the writing of standards and commentaries, review and modify draft material, and react to National Advisory Committee recommendations. The final results of the Task Force's efforts are set forth in the forthcoming volume on Juvenile Justice and Delinquency Prevention, soon to be published by LEAA.

Throughout its work process, the Task Force had the benefit of staff assistance. The American Justice Institute (AJI) of Sacramento, California, received a grant from LEAA to support the work of the Task Force.

Task Force Working Procedures and Use of Comparative Analyses

The time and resources provided to accomplish the challenging task of producing the standards volume did not allow the Task Force to conduct new research in juvenile justice and delinquency prevention. However, the Task Force did utilize a methodology which assured the incorporation of the best scholarship and state-of-the-art knowledge currently available.

This methodology involved identifying the major issues or questions which needed to be resolved before the Task Force could promulgate standards. Comparative Analyses were then constructed around each of these issues. Each Comparative Analysis begins with a comparison of the positions taken on the issue by other standard-setting organizations--previous Task Forces, Commissions, etc. The Comparative Analyses also consider the current practice of each state with regard to the issue in question.

These background materials were designed not only to make Task Force members aware of the various positions that had been taken with regard to a particular issue, but also to provide the Task Force with a complete analysis of the arguments for and against the full range of options presented.

Using the Comparative Analyses as a basis for its discussion and deliberation, the Task Force then directed the staff and consultants to prepare standards and commentaries in line with the positions which it took in each of these areas. This process proved to be very productive for the Task Force members. It allowed informed consideration of the pertinent issues prior to the adoption of any particular standard.

Compilation of Working Papers

Following completion of the Task Force's work, it was clear to members of the AJI staff and officials at LEAA that the Comparative Analyses prepared to assist the Task Force in its preparation of the standards volume could be useful to other groups. In particular, it was recognized that states and localities which plan to formulate standards or guidelines for juvenile justice and delinquency prevention will need to traverse much of the same territory and address many of these same questions. As a result, LEAA's National Institute for Juvenile Justice and Delinquency Prevention provided the AJI staff with a grant to compile the materials in their present form.

The Comparative Analyses have been organized in a series of nine volumes of Working Papers, each devoted to a particular aspect of juvenile justice and delinquency prevention. (A complete table of contents of each of the volumes is set forth in the appendix.) Some subjects have been analyzed in considerable detail; others, because of limited time or consultant resources, have been given abbreviated treatment. Thus, while it is recognized that these Working Papers do not present a comprehensive examination of all of the important issues in juvenile justice--or even of all of the issues considered by the Task Force--they do represent a useful survey of a wide range of subjects, with a wealth of data on many of the particulars. Using these materials as groundwork, other groups with interests in individual facets of the juvenile system may wish to expand the research as they see fit.

Although the Comparative Analyses should not be taken to represent the Task Force's views--they were prepared by project consultants or research staff and were not formally approved by the Task Force or reviewed by the National Advisory Committee--it was decided that it would be helpful to outline the position taken by the Task Force on each of the issues. Therefore, the AJI staff reviewed each of the Comparative Analyses and added a concluding section on "Task Force Standards and Rationale" which did not appear in the materials when they were considered by the Task Force.

A more thorough exposition of the Task Force's views can be found in the forthcoming volume on Juvenile Justice and Delinquency Prevention, which should, of course, be consulted by those considering these Working Papers.

The efforts of the many consultants and research assistants who prepared the drafts of these materials is gratefully acknowledged. Any errors or omissions are the responsibility of the American Justice Institute, which reviewed the materials and assembled them in their present form.

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VOLUME VI: ABUSE AND NEGLECT

FOREWORD

Over the past ten years, a number of national efforts have developed regarding juvenile justice and delinquency prevention standards and model legislation. After the enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 (Pub. L. 93-415) and in conjunction with LEAA's Standards and Goals Program, many States started formulating their own standards or revising their juvenile codes.

The review of existing recommendations and practices is an important element of standards and legislative development. The National Institute for Juvenile Justice and Delinquency Prevention (NIJJDP) has supported the compilation of the comparative analyses prepared as working papers for the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention in order to facilitate this review. Over one hundred issues, questions, and theories pertaining to the organization, operation, and underlying assumptions of juvenile justice and delinquency prevention are covered in the analyses. These are divided into nine volumes: Preventing Delinquency; Police-Juvenile Operations; Court Structure; Judicial and Non-Judicial Personnel and Juvenile Records; Jurisdiction-Delinquency; Jurisdiction-Status Offenses; Abuse and Neglect; Pre-Adjudication and Adjudication Processes; Prosecution and Defense; and Juvenile Dispositions and Corrections.

The materials discussed in these reports reflect a variety of views on and approaches to major questions in the juvenile justice field. It should be clearly recognized in reviewing these volumes that the conclusions contained in the comparative analyses are those of the Task Force and/or its consultants and staff. The conclusions are not necessarily those of the Department of Justice, LEAA, or NIJJDP. Neither are the conclusions necessarily consistent with the recommendations of the Advisory Committee on Standrds that was established by the Act, although the Committee carefully considered the comparative analyses and endorsed many of the positions adopted by the Task Force.

Juvenile justice policies and practices have experienced significant changes since the creation of the first juvenile court in 1899. The perspective provided by these working papers can contribute significantly to current efforts to strengthen and improve juvenile justice throughout the United States.

James C. Howell
Director
National Institute for Juvenile Justice
and Delinquency Prevention
January, 1977

INTRODUCTION

Volume VI: Abuse and Neglect

Although the materials in this volume of Working Papers cover a wide range of issues related to laws governing child abuse and neglect, they should not be regarded as a comprehensive treatment of this subject. The topics selected for discussion were reflective of the Task Force's approach to this area. It opted to focus principally on the appropriate scope of jurisdiction and to deal with issues related to procedural safeguards, dispositions and post-dispositional processes in an abbreviated manner. Thus, seventeen of the twenty-five Comparative Analyses address jurisdictional issues.

The first paper discusses that basis for jurisdiction which has traditionally been referred to as "dependency" and questions whether cases of this nature should fall within the ambit of the court's jurisdiction at all. The next two Comparative Analyses are particularly important. They focus on wide-ranging philosophical issues: first, whether the concept of "neglect" should be specifically defined; and second, whether the statutory bases for coercive intervention should be defined principally in terms of parental behavior or in terms of specific harms to the child. How these two issues are resolved will have a major impact on one's position with regard to each of the possible criteria for intervention outlined in Comparative Analyses 4 through 17. Those papers discuss virtually all of the current bases for neglect jurisdiction, examining in each instance whether judicial intervention should be authorized on these grounds and, if so, pursuant to what type of statutory language. (For a complete listing of the jurisdictional issues discussed, see the table of contents.)

The eight remaining Comparative Analyses highlight those facets of the pre- and post-adjudicatory processes which the Task Force felt deserved special attention. The first of these considers what criteria should govern emergency removal of neglected children from the home prior to adjudication. Two papers then focus on evidentiary issues: one examines what rules of evidence should be employed in the adjudication of neglect cases; the other considers the appropriate standard of proof in these proceedings. The range of dispositional alternatives which should be available to the court is discussed next. And the following paper examines the appropriate criteria for post-adjudicatory removal of a neglected child from the home.

The last three Comparative Analyses address issues related to the post-dispositional stage. The first explores alternative mechanisms for periodic reviews of neglect cases following the court's dispositional order. The next paper discusses what criteria should govern the decision on whether to return a child to the home once he has been removed after a finding of neglect. The final Comparative Analysis offers an abbreviated treatment of the complex subject of termination of parental rights.

Acknowledgement is gratefully made to Robert W. McCulloh, Esq., of the American Justice Institute staff, who authored the materials in this volume.

1. Issue Title: "Dependency"--Should "dependency" constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

The key issue is whether dependency cases should (1) fall within the ambit of family court jurisdiction or (2) be handled by nonjudicial social agencies. "Dependency"[1] is distinguished from "neglect" in that it involves inability, rather than willful failure, to properly provide for children.[2] If family court jurisdiction over such cases is deemed appropriate, "dependency" may be defined in terms denoting (1) destitution or failure to provide necessities; (2) parental physical or mental incapacity; or (perhaps) (3) lack of parents or guardian.

3. Summary of Major Positions:

Five major standards-promulgating organizations have considered this issue since 1949. All have opted for eliminating dependency jurisdiction. These groups have uniformly concluded that while parental incapacity or financial need often justifies governmental action in the form of assistance by administrative agencies, judicial intervention is inappropriate.[3]

On the other hand, a survey of current statutes indicates that a sizeable number of states authorize court jurisdiction based on parental inability--rather than refusal--to meet children's needs. Although the labels employed often obfuscate the issue,[4] the following table accurately summarizes the positions of the states regarding court jurisdiction over families unable to provide for their children's well-being.

4. Summary of State Practices:[5]

Basis for Jurisdiction	Number of States	Names of States
I. Parent's Financial Incapacity		
A. Authorize jurisdiction because of "destitution" (or equivalent language denoting poverty).	16	AL, AZ, AR, CA, DE, FL, IN, MD;** MT, NH, OK, OR, RI, TX, WA, WV
B. May authorize such jurisdiction since statute* includes "failure to provide necessities" provision which does not affirmatively make poverty a defense.	14	CO, GA, HI, ID, MO, NC, OH, PA, SC, SD, TN, UT, VT, WY
C. Do not authorize jurisdiction in such circumstances.	All other states.	
II. Parent's Mental or Physical Incapacity		
A. Authorize jurisdiction because of parent's mental or physical incapacity.	10	DC, IA, LA, MA, MT, NB, NV, NM, TN, WY
B. Indirectly authorize jurisdiction through language referring to "lack of proper parental care, control or guardianship."	All other states.	
III. Lack of Parents or Guardians		
Authorize such jurisdiction, at least indirectly, through language referring to "lack of proper parental care, control or guardianship."	All states.	

*Table does not reflect judicial constructions of statutory language.
**Applies to only one county.

5. Summary of Positions Recommended by Standards Groups:

NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Recommends that situations involving "so-called dependent children" should "be handled without official court jurisdiction." Further recommends that the definition of neglected children or its equivalent should include those "whose parents or guardians are incarcerated, hospitalized, or otherwise incapacitated for protracted periods of time."	Recommends that cases of dependency "without an element of neglect or where no change of custody is involved should be dealt with by administrative agencies without court action." Authorizes jurisdiction over a child lacking "care necessary for his well-being."	Recommends the provision of public assistance for cases of financial inability, "eligibility to be determined by an executive agency not by a court." Provides jurisdiction over children whose parents "are unable to discharge their responsibilities to and for the child."	Recommends the general availability of voluntary services; authorizes court jurisdiction only on specifically enumerated bases, not including "dependency." Authorizes jurisdiction when "a child who has suffered, or there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury as a result of conditions created by his/her parents or by the failure of his/her parents to adequately supervise or protect him/her."	"Eliminates poverty of of parents as a basis for juvenile court jurisdiction." Provides jurisdiction over a child lacking "care and control necessary for his physical, mental or emotional health, or morals," and authorizes jurisdiction over a child without parents.

Summary of Positions:

I. Financial Incapacity--All five groups recommend excluding cases of dependency based on financial incapacity from court jurisdiction.

II. Mental or Physical Incapacity--Two groups explicitly recommend jurisdiction over cases based on parental physical or mental incapacity: one within the rubric of "neglect"; the other under the label "neglect or its equivalent." Two groups may cover such situations under definitions including "lack of parental care" provisions. One group employs a "failure to adequately supervise" provision that focuses on substantial risk of serious physical injury to the child.

III. Lack of Parents--Four groups explicitly provide jurisdiction over children without parents. One group assumes that where coercive intervention is appropriate these cases will be covered by other bases for jurisdiction.

6. Analysis of the Issue:

The five major standards-setting organizations[6] have uniformly called for the elimination of dependency jurisdiction.[7] Each group has advanced essentially the same rationale for this position. The following excerpt from the Comments to the HEW Model Act illustrates the analysis: "It is believed that the financial inability of parents to care for their children should not be a factor in removing them from their home. Public assistance should be available to meet this need, eligibility to be determined by an executive agency not by a court."[8]

The Task Force Report: Juvenile Delinquency and Youth Crime offers a further exposition of this analysis: "Where the child's dependency stems from his guardian's good-faith failure to cope, what is needed is not the force of law but the assistance of a social agency. Acting as a mere conduit for referral of well-meaning people overwhelmed by life to a source of assistance for their economic and social ills is a burdensome task for any court, and one there is no need to handle judicially. Especially in view of the inevitably stigmatizing effects of going to court, whatever the court and outcome are called, dependency alone should not be a subject for court consideration."[9]

Moreover, at least one commentator[10] has argued that intervention on the basis of poverty may be violative of the constitutional guarantees of equal protection and due process of law.

Nevertheless, a sizeable number of states still authorize judicial intervention on this basis. The original rationale for this position was the belief that the parens patriae doctrine vests the state with the power and responsibility to intervene on behalf of children whose parents have failed to adequately care for them.[11]

The major reason for retaining this category of jurisdiction is presumably that it gives the court power over children without invoking the same degree of stigma which is attached to "neglect" proceedings. Two factors, which are not generally discussed in the literature and which are not referred to in the analyses of past standards groups, illustrate this analysis. First, some states do not have statutes authorizing parents to make voluntary placements of children. This means that in some cases agencies will accept children only if there is a court-ordered placement. In such situations a court may prefer to label a child "dependent" rather than "neglected" to avoid stigmatizing the parents. Moreover, in some cases eligibility for federal matching-funds in foster care programs is predicated on the child having been removed from his home under court order. These cases are also illustrative of instances in which dependency jurisdiction may be invoked to avoid stigmatizing the parents.

* * * * * * *

If intervention in "dependency" cases is viewed as an appropriate judicial function, statutes could authorize jurisdiction on the following bases:

1. a. "destitution" or equivalent language denoting poverty--This language is utilized in a number of state statutes[12] and, although it is sometimes criticized as violative of equal protection,[13] none of these statutes has been held unconstitutional; or

   b. parental failure to provide "necessities of life"[14]--Deleting any reference to "when able to do so" should render this formulation broad enough to cover dependency cases; it might, however, be susceptible to a narrower judicial construction;

2. parental "physical or mental incapacity"[15]--Some states employ this language to identify "dependency" cases; other states utilize the same terminology in "neglect" statutes.[16]

3. lack of parents or guardian--Some commentators[17] identify this as one of the proper interpretations of the term "dependency." Most past standards-setting groups have authorized jurisdiction in such cases without employing the term "dependent."

7. Task Force Standards and Rationale:

Consistent with the recommendations of all past standards-setting groups, the Task Force rejected parents' financial incapacity as a basis for family court jurisdiction on the ground that these cases are more appropriately handled by nonjudicial social agencies. Therefore, none of the Task Force's standards focused explicitly on the subject of "dependency."

This issue is, however, discussed in the commentary to two standards. The commentary to Standard 11.3 on Elimination of Fault as a Basis for Coercive Intervention (see Abuse and Neglect Comparative Analysis 3) states,

> A parent's inability to properly care for a child because of financial or social problems should be a basis for providing voluntary services. But it should not be a basis for coercive intervention.[18]

The commentary to Standard 11.11 on Physical Injury from Inadequate Supervision or Protection (see Abuse and Neglect Comparative Analysis 9) reiterates this position. It also provides guidance for the interim handling of cases where existing statutes obstruct this approach.

> /I/t is wrong to rely on endangered child laws in sporadic and uncoordinated attempts to remedy societal neglect of the poor....
>
> On an interim basis, the foregoing analysis should be subject to one qualification. At present, a number of statutes restrict financial help to wards of a court. Thus, the only way to provide needed services may be if the child is brought under court jurisdiction. These laws should be changed. But until such reforms occur a court might still take jurisdiction under this standard to provide services. In such cases, removal would be barred.[19]

The Task Force's positions on cases involving parental mental or physical incapacity and children without parents are set forth in Abuse and Neglect Comparative Analyses 4 and 6.

Footnotes:

[1]Unfortunately, there is no uniformly agreed upon definition of the term. See S. Davis, Rights of Juveniles: The Juvenile Justice System §2.04 (1974); Thomas, "Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives," 50 N.C.L. Rev., p. 315 (1972).

[2]The inability is generally cast in financial terms and the absence of parental "fault" is stressed. See Campbell, "The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause," 4 Suffolk L. Rev., p. 634 n. 9 (1970); National Advisory Commission on Criminal Justice Standards and Goals, Courts, p. 290 (1973); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, p. 85 (1967); Tamilia, "Neglect Proceedings and the Conflict Between Law and Social Work," 9 Duques L. Rev., p. 584 (1971); Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., p. 985 n. 5 (1975).

Some prominent commentators interpret dependency to also refer to children whose parents are physically or mentally incapacitated; see, e.g., The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, pp. 27-28 (1967); or to children without parents, see e.g., id.; S. Katz, When Parents Fail, pp. 82-83 (1971); Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court," Justice for the Child, p. 64 (M. Rosenheim ed. 1962).

[3]See, e.g., W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs (DHEW Publication No. OHD-OYD 75-26041).

[4]Parenthetically, seven states (Alaska, Arizona, California, Florida, Montana, Ohio and Washington) use the term "dependent child"; five states (Colorado, Kentucky, Louisiana, Mississippi and South Dakota) use "neglected or dependent;" two states (Arkansas and Oklahoma) use "dependent or neglected"; and two states (Kansas and Tennessee) employ the term "dependent and neglected." Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 22-23 (1975). Cataloguing those states which employ the term "dependent" in their definitions of endangered children is, however, quite unenlightening since virtually all such definitions are convoluted to include children who could be labeled "neglected."

[5]Sources: Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 926 ns. 199, 202 (1975). Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[6]Other prominent organizations have reached the same conclusion. See, e.g., President's Commission on Law Enforcement and Administration of Justice, supra note 2.

[7]These groups have, however, not opted for the elimination of jurisdiction over children without parents. They view these children as falling within other statutory categories. But see note 2 supra.

[8]W. Sheridan & H. Beaser, supra note 3, p. 14.

[9]The President's Commission on Law Enforcement and Administration of Justice, supra note 2, p. 28.

[10]Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., pp. 930-931 (1975).

[11]See Campbell, supra note 2, p. 636; S. Katz, supra note 2, p. 145.

[12]See, e.g., Arizona Rev. Stat. Ann. §8-201(10)(b) (1956).

[13]See, e.g., Areen, supra note 10.

[14]See, e.g., Cal. Welf. & Inst. Code §600(b) (West 1972).

[15]See, e.g., La. Rev. Stat. Ann. §13:1569(c) (Cum. Supp. 1973).

[16]See, e.g., D.C. Code Ann. §16-2301(a)(c) (1973).

[17]See note 2 supra.

[18]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[19]Id.

1. Issue Title: Specific Definition--Should neglect be specifically defined?

2. Description of the Issue:

This is a threshold philosophical question of wide-ranging practical importance. The crux of the issue is: (1) should neglect statutes be broadly drafted, vesting courts and social service agencies with considerable discretion in their interpretation and application; or (2) should such laws specifically delimit the permissible bases for intervention?

3. Summary of Major Positions:

Virtually all current state neglect statutes can be accurately characterized as broad or general laws.[1] This fact is widely acknowledged by all commentators[2] and is generally defended as either a laudable facet of the system, in that it provides desirable flexibility in the assessment of each case on its own facts, or as a necessary evil in this unique area of the law. Although past standards-setting organizations have sometimes called for a more specific delineation of the criteria for intervention,[3] scrutiny of their proposed definitions and jurisdictional sections reveals a continued reliance on broad-scoped terminology.

One prominent organization is presently considering a different approach. The 1976 Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards adopts as a "general principle" the position that the statutory grounds for coercive intervention "should be defined as specifically as possible."[4] The draft standards contend that limitations of social science knowledge, the psychologically disruptive impact of well-intentioned intervention, the potential for arbitrary intervention and a number of other factors all argue for narrowly circumscribing the bases for state intervention.

4. Summary of State Practices:

Although varying widely in detail,[5] all current state neglect statutes can fairly be characterized as broad or general formulations. As Professor Sanford Katz observes, "It seems clear that even the most detailed neglect statute, through such phrases as 'unfit home' or 'improper environment,' would be termed 'broad' or even 'vague' in areas other than family law."[6]

All 50 states employ the term "lack of proper parental care, control or guardianship" or its equivalent in delineating the grounds for determining neglect.[7] In addition, 15 states authorize intervention when the home can be characterized as an "unfit place";[8] and, 31 states preface their neglect laws with a purpose clause suggesting that the enactment be liberally construed.[9]

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Authorizes jurisdiction over inter alia any child "who is neglected as to proper or necessary support, or education as required by law, or as to medical or other care necessary for his well-being" or "whose environment is injurious to his welfare."	Comments stipulate that the conditions justifying intervention "should be specifically and clearly delineated." Defines "neglected child" as inter alia one who is "without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide for them."	Recommends that, "The statutory grounds for coercive intervention on behalf of endangered children should be defined as specifically as possible."	Defines "deprived child" as inter alia one who is "without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian, or other custodian:"

Summary of Positions: Two groups recommend greater specificity; however, one of these employs a broad-scoped definition.

Two groups offer generalized definitions and do not comment on the issue of broad or vague statutes.

6. Analysis of the Issue:

The broad nature of neglect statutes has found considerable support among prominent commentators.[10] For example, Professor Sanford Katz has noted, "Statutory words such as 'neglect' ... and phrases such as 'unfit place' ... cannot be easily or mechanically defined ... These standards are subjective. From the legislative perspective, they are designed to give a local judge, who is close to the family situation and knowledgeable about the community, discretion in interpretation and application."[11]

This perspective embodies two relatively distinct claims. First, some proponents of broad statutes argue that it is simply impossible to offer a precise definition of this delicate and multifaceted concept.[12] For example, Judge Gill of Connecticut states, "The parental failure which markedly damages one child might leave another quite untouched. The interaction between the child and his family is the essence of a neglect situation, the imponderable which defies statutory constraints."[13]

Professor Monrad Paulsen outlines another factor which impedes definitional precision. "What one regards as proper care may, indeed, be a matter of dispute reflecting class and cultural differences. Standards of child rearing adequate in one cultural setting may appear appalling in another."[14]

A second line of argument--distinguished more by its focus than content--stresses, not the problems of definitional exactitude, but rather the desirability of broad formulations. According to this view, general statutory language is characterized as "intentionally equivocal."[15] This contention suggests that, "The judge, by virtue of parens patriae, has the freedom and perhaps the responsibility to use his own subjective views. It is the judge's notion of 'neglect' or 'depravity' that is most important. He evaluates the evidence; he decides its weight. It is his subjective response that is important. Judges, again by virtue of parens patriae, are supposed to be endowed with unique insight into the best interests of the child. ... The legislative purpose behind the broad language appears to be to allow judges wide discretion in deciding neglect cases. Presumably, local judges have a knowledge of community resources as well as information about the area which they can call upon in the disposition of a case. At the same time, juvenile and domestic relations judges are considered 'closer' to the issues in any given case and to generally reflect local community attitudes and values."[16]

Judge Tamilia summarizes this position succinctly by concluding, "Neglect, as a concept, permits no degree of certainty, and protection from vagueness must be found in the wisdom of the judges rather than in the detail of the statute."[17] Appellate courts have apparently found this analysis persuasive, for in those few cases in which neglect statutes have been challenged as unconstitutionally vague the courts have unanimously sustained the enactments.[18]

The most comprehensive and thoroughly considered criticisms of broad-scoped neglect laws are found in the Tentative Draft of the IJA/ABA Juvenile Justice Standards,[19] the writing of one of that group's co-reporters,[20] and the work of a number of other commentators.[21] These writers argue that a large amount of evidence from child development specialists indicates that it is nearly impossible to correlate parental behavior or home conditions with long-term harm to a child's development.[22] Therefore, it is argued, to remove a child from a home found "unfit" or on the grounds that he lacks "proper parental care," may prove more harmful to the child than leaving him in that admittedly imperfect environment.[23] Proponents of this position repeatedly chronicle the well-documented failures of foster care and other dispositional alternatives.[24] They argue that in our less-than-ideal world substantial increases in legislative allocations to secure more highly trained personnel and better facilities are unlikely in the foreseeable future.[25] Within this context, they suggest that intervention should occur only if it appears likely that we can improve the child's situation. Thus, the writers advocate limiting intervention to those cases where a child is suffering serious--and specifically definable--harm. In this manner, it is argued that limited resources can be targeted to the areas of greatest need.

Moreover, the psychologically traumatizing impact of even the best forms of intervention is emphasized and very competent authorities are cited to indicate that disruption of the child's continuity of relationships with parental figures is quite harmful.[26] In addition, the state-of-the-art limitations of social services are stressed.[27] Against this background, the writers argue that such broad formulations as "lack of proper parental care" encourage intervention in cases where state involvement will likely worsen rather than improve the situation and thus such general terminology should be viewed with extreme disfavor.

In addition, the commentators attack broad-scoped neglect laws on the ground that they facilitate arbitrary intervention. In the absence of specifically-drawn statutes, decision-making is left to ad hoc analysis by judges and social workers. The writers document these officials' lack of specialized training in child psychology and other relevant disciplines[28] and cite substantial evidence to indicate that their decisions often reflect personal values about child rearing, which are not sustained by competent scientific evidence.[29] Thus, it is argued that jurisdiction over, for example, a child from an "unfit home" may be predicated on a judge's or social worker's personal repugnance with uncleanliness, rather than genuine danger to the child.[30] These writers conclude that nonspecific laws result in unequal treatment, encourage the unwarranted imposition of middle-class values on lower-class families[31] and facilitate intervention which proves harmful to the child or results in his removal from an adequate environment.[32]

Moreover, it is suggested that lack of specified criteria for initial judicial involvement means there is no basis for measuring the success or failure of the intervention.[33] This, it is argued, renders subsequent review of a case by social workers or appellate courts difficult or impossible and results in a general lack of accountability. It is also suggested that due process claims of statutory vagueness should be applicable to neglect laws. The importance of family autonomy and the fundamental right to child rearing are underscored[34] and it is claimed that "intervention should only be permissible where there is a clear-cut decision, openly and deliberately made by responsible political bodies, that the type of harm involved justifies intervention."[35]

7. Task Force Standards and Rationale:

The Task Force found the recent criticisms of broadly drafted statutes persuasive and opted for more specific formulations. Therefore, Standard 11.2 specifies, inter alia,

> The statutory grounds for coercive state intervention should be:
>
> (A) defined as specifically as possible;
> ....[36]

The commentary to this standard emphasizes the inadequacies of non-specific laws outlined above. In particular, it underscores the fact that such laws facilitate arbitrary intervention, impede effective evaluation and embody value judgments which are more appropriately made by a legislative body. Standards 11.8 through 11.16 set forth the Task Force's views on the appropriate grounds for coercive intervention and attempt to operationalize the philosophical premise established in Standard 11.2.[37]

Footnotes:

[1]See, e.g., Cal. Welf. & Inst. Code §600 (West 1972).

[2]See, e.g., Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 932 n. 229 (1975); Gill, "The Legal Nature of Neglect," 6 N.P.P.A.J., pp. 5-6 (1960); S. Katz, When Parents Fail, pp. 59, 62 (1971); Levine, "Cavaet Parens: A Demystification of the Child Protection System," 35 U. Pitt. L. Rev., pp. 17-18 (1973); Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court," Justice for the Child, p. 74 (M. Rosenheim ed. 1962); Tamilia, "Neglect Proceedings and the Conflict Between Law and Social Work," 9 Duques L. Rev., p. 584 (1971); Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., pp. 1001-02 (1975); N. Weinstein, Legal Rights of Children, pp. 6-8 (1974).

[3]See W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs, p. 11 (DHEW Publication No. OHD/OYD 75-26041).

[4]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §1.3 (Tentative Draft 1976).

[5]See Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 75-349 (1975), for a recent compendium of all state child neglect laws.

[6]S. Katz, supra note 2, p. 62.

[7]Katz, Howe & McGrath, supra note 5, pp. 25-27.

[8]Id. The 15 states are Alabama, Arizona, California, Florida, Indiana, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, Washington, and West Virginia.

[9]Id., pp. 17-20. The states are Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, and Wisconsin.

[10]See, e.g., Gill, supra note 2; S. Katz, supra note 2; Levine, supra note 2; Paulsen, supra note 2; Tamilia, supra note 2.

[11]S. Katz, supra note 2, p. 59. It should be noted that Professor Katz expresses concern that such statutes can be improperly applied. Id., pp. 63-7. He emphasizes the importance of focusing on harm to the child. Id., p. 64.

[12]Id., pp. 59, 64. See also Gill, supra note 2; Tamilia, supra note 2.

[13]Gill, supra note 2, p. 5.

[14]Paulsen, "Juvenile Courts, Family Courts and the Poor Man," 54 Calif. L. Rev., p. 699 (1966).

[15]Levine, supra note 2, p. 17.

[16]S. Katz, supra note 2, pp. 59, 62-3.

[17]Tamilia, supra note 2.

[18]See Note, "Child Neglect: Due Process for the Parent," 70 Colum. L. Rev., pp. 469-70 & n. 30 (1970) (listing recent cases); N. Weinstein, supra note 2 (summarizing recent decisions).

[19]IJA/ABA, supra note 4.

[20]Wald, supra note 2.

[21]See, e.g., Areen, supra note 2.

[22]See, e.g., S. White, 3 Federal Programs for Young Children: Review and Recommendations, pp. 86-87 (1973) cited in Areen, supra note 2, p. 918 n. 171; Freud, "Child Observation and Prediction of Development--A Memorial Lecture in Honor of Ernest Kris," reprinted in J. Goldstein & J. Katz, The Family and the Law, pp. 953-54 (1965) cited in id.

[23]See, e.g., J. Bowlby, Child Care and the Growth of Love, pp. 13-20 (2d ed. 1965) cited in Wald, supra note 2, p. 994 n. 48; J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child, pp. 19-20 (1973) cited in id.

[24]See, e.g., Areen, supra note 2, pp. 912-914; Wald, supra note 2, pp. 994-96.

[25]Id., p. 999.

[26]See, e.g., J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child, pp. 31-35 (1973) cited in Areen, supra note 2, pp. 889-90 n. 9.

[27]See, e.g., Wald, supra note 2, pp. 998-99.

[28]See, e.g., id., pp. 998, 1001 n. 98.

[29]See, e.g., id., p. 1001.

[30]See, e.g., Areen, supra note 2, p. 919 & n. 174.

[31]See, e.g., Wald, supra note 2, p. 998 & n. 78.

[32]See, e.g., Id., pp. 1001-02.

[33]Id., p. 1002 & n. 100.

[34]Id., p. 1001; Areen, supra note 2, pp. 931-32.

[35]Wald, supra note 2, p. 1002.

[36]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[37]Id.

1. Issue Title: Parental Behavior vs. Specific Harms to the Child--Should the statutory bases for intervention be defined principally in terms of parental behavior or in terms of specific harms to the child?

2. Description of the Issue:

This issue is intended to focus the attention of the reader on the philosophic parameters underpinning alternative approaches to child neglect laws. The major issue is: should the bases for intervention be defined primarily in terms of parental behavior or principally in terms of specific harms to the child? This topic is closely related to the question of whether or not neglect should be specifically defined. The materials examining that issue (see Abuse and Neglect Comparative Analysis 2) must be read in conjunction with the discussion which follows.

A second issue--related to (but analytically independent of) the question of whether statutes should focus principally on parental behavior or specific harms to children--is: should parental "fault" be regarded as a necessary predicate to neglect jurisdiction?

3. Summary of Major Positions:

Neglect statutes generally allude to "lack of proper parental care" or otherwise focus on parental behavior. Such laws implicitly establish norms for parental conduct[1] and authorize intervention when parental behavior falls below the requisite standard. In addition, such statutes often contain language referring to the moral unfitness or parents or otherwise invoking concepts of parental "fault."

Numerous commentators[2] and at least two standards-setting groups[3] have criticized these approaches. For diverse reasons, they argue that neglect laws should be principally child-centered; i.e., should define the bases for intervention in terms of specific harms to children. These writers also argue that parental culpability should not be viewed as a prerequisite to neglect jurisdiction.

4. Summary of State Practices:

Virtually all present neglect laws focus largely on parental behavior. All 50 states employ the term "lack of proper parental care, control or guardianship" or its equivalent in delineating the grounds for determining neglect.[4] Moreover, many statutory formulations focus explicitly on parental "fault." Eighteen states specify that a parent's moral unfitness constitutes a ground for intervention.[5] And 11 states refer to lack of proper care by reason of parental "faults or habits."[6]

5. Summary of Positions Recommended by Standards Groups:

HEW Model Act (1974)	NCCD Standard Act (1959)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Does not present a general statement on these issues; defines "neglected child" as inter alia one "who is without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian or other custodian."	Does not present a general statement on these issues; jurisdictional section focuses on harm to the child and does not allude to parental fault.	Recommends that intervention should be premised upon specific harms that a child has suffered or may suffer" rather than parental conduct. Jurisdictional section focuses on harm to the child and does not allude to parental fault.	Employs the term "deprived child" to avoid "stigmatization of parents in 'neglect' cases and focuses upon the needs of the child, regardless of parental fault." Defines "deprived child" as inter alia one who is "without proper parental care or control."

Summary of Positions:

I. Parental Behavior vs. Specific Harms to Child

Two groups define neglect in terms of harms to the child.

Two groups offer definitions which include references to parental behavior.

II. Parental "Fault"

One group explicitly disavows reliance on concepts of parental "fault."

One group indicates that the grounds for intervention should be child-centered, rather than based on parental conduct.

One group does not comment on this issue, but makes no reference to "fault" concepts in its definition.

One group defines neglect as inter alia lack of proper care because of parental "fault."

6. Analysis of the Issue:

Neglect laws have traditionally defined the bases for intervention primarily in terms of parental behavior rather than focusing principally on specific harms to the child. Monrad Paulsen makes the following observation on state neglect statutes:

> Although the particular statutory language is important and can account for differences in result from state to state, all formulations of neglect aim at setting a standard of parental practice. The meaning of the standard is given by community minimums in regard to family conduct.[7]

Similarly, Sanford Katz observes,

> From a governmental perspective, state intervention is meant to be a response to parental failure.
>
> ...
>
> Neglect statutes, in many respects, incorporate a community's view of parenthood. Essentially, they are pronouncements of unacceptable child rearing practices.[8]

Those who defend focusing principally on parental behavior fall into essentially three groups.[9] One group argues that children may suffer a wide variety of harms as a result of parental misbehavior and that these harms cannot be accurately defined in advance of an examination of each case.[10] Thus a generalized focus on, for example, "lack of proper parental care, control or guardianship" is viewed as the most appropriate criterion for intervention.[11] A second group emphasizes that a considerable body of theories and evidence from child development specialists indicates that a child's home environment substantially affects his intellectual and emotional development.[12] It is argued that there is a substantial correlation between certain parental attributes or conduct and a child's well-being. Thus, for example, a parent's drug addiction or mental retardation[13] is per se viewed as a basis for family court jurisdiction on the ground that it provides an index to harm to the child. A third group of commentators[14] straddles the two previous lines of analyses. They emphasize the difficulties of definitional exactitude, but also stress the fact that broad definitions can lead to intervention in cases where the child is not suffering actual harm. Thus, they propose defining neglect in terms of parental behavior, but would also require a showing of harm to the child.

Those who argue against the focus on parental behavior offer varied analyses in support of their position. Three lines of argument appear to be central to their ultimate conclusion. First, the commentators argue that available social science evidence indicates that it is extremely difficult to correlate parental behavior or home conditions with specific detriment to the child.[15] The writers cite a great deal of evidence from child development specialists[16] and argue that the assumed correlation is particularly tenuous if it involves predictions of long-term harm from an "unfit" environment.[17] Therefore, the writers contend, since the purpose of the system is to protect the child, it should focus directly on harm to the child in determining whether to authorize jurisdiction. The prevalent concern with parental misbehavior is viewed as a misleading and ineffective index of harm to the child.

Second, it is argued that in the absence of a showing of specific harm to the child, intervention often does more harm than good. And, it is further claimed that even where a specific harm can be demonstrated, intervention may worsen, rather than improve, the situation. The findings of such prominent authors as Joseph Goldstein, Albert Solnit and Anna Freud are cited to support the proposition that intervention can prove psychologically traumatic, since it undercuts what is viewed as a child's primary need, viz., the maintenance of continuity and stability in relationships with parent figures.[18] Moreover, the commentators emphasize the substantial empirical evidence of lack of success of social service and foster care programs.[19] The writers cite evidence indicating that judges and social workers often lack training in the behavioral sciences or other child-related fields,[20] that turnover in social service agencies is high[21] and that social work practice often involves the unwarranted imposition of middle-class values on poor families.[22] These factors, when coupled with the inadequacy of legislative funding and what is viewed as the realistic assumption that substantial increases in public allocations are unlikely, are said to impel the conclusion that we are often unable to improve a child's situation. This analysis is then read in conjunction with the previous argument on our inability to correlate parental behavior to harm to the child to reach an overall conclusion which may be summarized as follows: since we are unable to accurately predict harm to the child if we focus on parental behavior and since the evidence indicates that when we intervene in such circumstances we often worsen the situation, jurisdiction should be narrowed to include only those cases where our actions will likely be successful. This is achieved, it is argued, by focusing principally on the child and intervening only when it is shown that he is suffering serious harm.

Third, these writers contend that our legal and political commitments to privacy, freedom of religion, diversity of ideas and the sanctity and autonomy of the family support the position that state involvement in child rearing should be kept to a minimum.[23] Hence, formulations authorizing intervention because of "lack of

proper parental care" are viewed with extreme disfavor. It is argued that laws which focus on parental conduct can too easily become punitive regulations of adult behavior where children emerge as incidental to a system ostensibly designed for their protection.

* * * * * * *

It should be emphasized that resolving the issue of whether neglect laws should focus principally on parental behavior or specific harms to children does not necessarily decide whether parental "fault" should be viewed as a predicate to neglect jurisdiction. Judge Gill of Connecticut, for example, has long argued that we should focus principally on the child, but nonetheless views neglect as analogous to negligence, implying a concern with parental "fault."[24] This perspective can be defended on the ground that if parents cannot be held at "fault," they ought not be subjected to the stigma attached to neglect proceedings. Most standards groups have rejected this position.[25] Reliance on concepts of parental "fault" is viewed as thwarting necessary intervention. It is contended that judges are sometimes unwilling to intervene to assist an endangered child in the absence of the showing of parental culpability required by statute.[26] The writers conclude that, when a child's well-being is in jeopardy, formal conceptions of parental "fault" ought not block desirable intervention.

7. Task Force Standards and Rationale:

The Task Force concluded that the criteria for coercive intervention should be defined principally in terms of specific harms to the child. Standard 11.2 recommends that,

> The statutory grounds for coercive state intervention should be:
>
> . . .
>
> (B) drafted in terms of specific harms which the child has suffered or may suffer, not in terms of parental behavior; and
>
> (C) limited to those cases where a child is suffering serious harm or there is a substantial likelihood that he will imminently suffer serious harm.[27]

The Task Force was persuaded that the available evidence indicates that we are unable to predict specific detriment to the child on the basis of parental behavior. Therefore, it concluded that parent-focused laws facilitate unnecessary and often harmful intervention. In addition, the Task Force believed that child-centered laws would encourage the formulation of more effective and precise intervention strategies in those cases where coercive action is justified.

The Task Force also recommended eliminating reliance on "fault" concepts. Standard 11.3 indicates,

> Fault concepts should not be considered in determining the need for, or type of, coercive state intervention.[28]

The Task Force felt that an explicit disavowal of reliance on parental "fault" underscored the non-punitive nature of the intervention.

Footnotes:

[1]See S. Katz, When Parents Fail, pp. 56-7 (1971); Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court," Justice for the Child, p. 74 (M. Rosenheim ed. 1962).

[2]See, e.g., Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., pp. 918-19 (1975); Cheney, "Safeguarding Legal Rights in Providing Protective Services," 13 Children, p. 90 (1966); Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., pp. 1001-04 (1975).

[3]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976); National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act (1968).

[4]Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[5]Id. The 18 states are: Alabama, Alaska, Arizona, California, Florida, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, New Mexico, Ohio, Tennessee, Utah, Washington, Wisconsin and Wyoming.

[6]Id., pp. 75-349. The 11 states are: Alaska, Iowa, Louisiana, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, Utah, Wisconsin and Wyoming.

[7]Paulsen, supra note 1, p. 74.

[8]S. Katz, supra note 1, pp. 56-57.

[9]In actual practice the commentators cannot be so neatly categorized. Various commentators present some or all of these arguments. See, e.g., Gill, "The Legal Nature of Neglect," 6 N.P.P.A.J., pp. 5-6 (1960); S. Katz, supra note 1, pp. 63-67 (1971). Nonetheless, the arguments can properly be viewed as analytically independent justifications for focusing primarily on parental conduct.

[10]Cf. Gill, supra note 9, p. 6. Although Judge Gill makes this argument, he emphasizes focusing on harm to the child and thus falls within the third group of commentators identified in the text.

[11]Compare the arguments on whether neglect should be specifically defined, set forth in Abuse and Neglect Comparative Analysis 2.

[12]See, e.g., A. Freud, Normality and Pathology in Childhood, pp. 50-51 (1966); C. Jencks, Inequality, pp. 135-246 (1972).

[13]These cases are usually covered in statutory language alluding to parental "faults or habits" or a parent's "incapacity." See, e.g., Alas. Stat. §47.10.010(5) (1971); Wyo. Stat. Ann. §14-115.2 (Cum. Supp. 1973).

[14]See, e.g., Gill, supra note 9; S. Katz, supra note 1.

[15]See, e.g., Wald, supra note 2, pp. 992-93, 1001.

[16]See, e.g., 1 S. White, Federal Programs for Young Children: Review and Recommendations, pp. 130-367 (1973) (surveying the literature) cited in id., p. 992 n. 41.

[17]See, e.g., Areen, supra note 2, p. 918 n. 171.

[18]See, e.g., id., p. 889-90 n. 9.

[19]See, e.g., id. at 912-14; Wald, supra note 2, pp. 994-96.

[20]See, e.g., J. Handler, The Coercive Social Worker (1973); Smith, "Profile of Juvenile Court Judges in the United States," 25 Juvenile Justice 27 (1974) cited in id., p. 1001 n. 98.

[21]See, e.g., id., p. 998.

[22]See, e.g., id.

[23]See, e.g., id., p. 992.

[24]Gill, supra note 9.

[25]See "Positions of Standards Groups," supra.

[26]See, e.g., Wald, supra note 2, p. 1003.

[27]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[28]Id.

1. Issue Title: Abandonment--Should abandonment constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

Opinion is virtually unanimous that children who have been abandoned by their parents should fall within family court jurisdiction. The only major issues posed by the literature in this area are: (1) for purposes of neglect, should children be labeled "abandoned" or covered under another statutory categorization; and (2) should statutes specify a jurisdictional category of "abandonment," separate from neglect jurisdiction?

3. Summary of Major Positions:

Most states and three of the four major standards groups recommend jurisdiction over cases of abandonment by defining a neglected or deprived child as inter alia one who is "abandoned." The remainder of the states and the 1976 Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards abstain from utilizing the term "abandoned," but employ other statutory categorizations apparently broad enough to cover any abandonment situations in which the child may suffer serious harm.

At least one commentator[1] recommends jurisdiction over an "abandoned child" as one category of jurisdiction and jurisdiction over a "neglected child" as another. Two states[2] appear to employ similar formulations. While the rationale for this approach is not clearly specified, a possible justification for the separate categorization is to insure jurisdiction over children left in voluntary out-of-home placements for extended periods.

4. Summary of State Practices:[3]

Basis for Jurisdiction	Number of States	Names of States
Statute explicitly specifies "abandonment" as a ground for jurisdiction..	40	AL, AK, AZ, AR, CO, CT, DC, FL, GA, HI, ID, IL, IN, IA, KS, LA, MD, MI, MN, MT, NB, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, UT, VT, VA, WV, WI, WY
Statute does not explicitly specify "abandonment" as a ground for jurisdiction, but has other provisions apparently broad enough to cover abandonment situations.	All other states*	CA, KY, ME, MA, MO, NJ, TN, TX, WA

*With the possible exception of Delaware, which includes abandonment in its criminal neglect statute.

Summary of Practices: Forty states explicitly authorize jurisdiction on the basis of "abandonment." The remaining states have other provisions apparently broad enough to cover cases of this nature.

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Recommends jurisdiction over inter alia a child "who is abandoned by his parent or other custodian."	Defines "neglected child" as inter alia a child "who has been abandoned by his parents, guardian or other custodian."	Contains no reference to the term "abandonment"; recommends jurisdiction on a number of bases which focus on serious, specifically defined harms to the child, actual or imminent; also recommends jurisdiction over children who have been in voluntary out-of-home placements for six months.	Defines "deprived child" as inter alia a child who "has been abandoned by his parents, guardian or other custodian."

Summary of Positions: Three groups recommend jurisdiction over "abandoned" children.

One group makes no reference to "abandonment"; recommends jurisdiction on a number of other bases which may cover abandonment situations, including voluntary out-of-home placements of six months duration.

6. Analysis of the Issue:

Most states and three of the four standards-setting organizations grant court jurisdiction over a "neglected" or "deprived" child and define those terms to include inter alia one who is "abandoned." The latter term is not specifically defined. Under this approach further exposition of "abandonment" is accomplished either by judicial construction on a case-by-case basis or by the adoption of a court rule.[4] These approaches can be defended as providing flexibility and an opportunity to tailor the laws to the situation in each community or individual case.

The 1976 Tentative Draft of the IJA/ABA Juvenile Justice Standards do not utilize the term "abandonment"; however, they include a number of bases for jurisdiction which focus on serious, specifically defined harms to the child, actual or imminent. These are probably broad enough to encompass most children who have been abandoned by their parents. The standards also outline detailed regulations for voluntary out-of-home placements and provide for judicial review of such placements after a six-month period.

In general, this approach seems to imply that use of the term "abandonment" is redundant. Moreover, avoiding reliance on the traditional term can be defended as eliminating the potential for confusion which arises from utilizing the same term in reference to neglect jurisdiction and (sometimes in a different sense) in regard to termination of parental rights.

A minority of states likewise abstain from employing the traditional terminology. They cover this situation through such phrases as "lacks proper attention of parent, guardian ..., or custodian"[7] or "for any reason ... lacks the care necessary for his health."[8]

At least one commentator suggests that abandonment, as distinguished from (rather that subsumed by) neglect, should constitute a separate jurisdictional category. The commentator defines "abandoned child" in the following terms: "One whose parents or guardians are not identifiable, or, if known, have made no reasonable effort to care for or arrange adequate substitute care for the child for a period of six months or more, and who fail to appear at the hearing ... /authorizing intervention/."[9]

Two states employ apparently similar formulations.[10] The best rationale for this approach appears to be to provide a basis for jurisdiction over children who have been left in voluntary placements for extended periods of time. As previously noted, the Tentative IJA/ABA Juvenile Justice Standards cover this category of cases by authorizing jurisdiction over any child who has been in voluntary out-of-home placement for six months.[11]

* * * * * * *

The crux of the issue in this area is: Does "abandonment"--either as a subcategory of neglect or as an independent jurisdictional basis--add a necessary element to the court's jurisdiction or is it merely a redundant and potentially confusing term?

7. Task Force Standards and Rationale:

The Task Force felt that judicial intervention should be authorized where there is no adult caretaker available to provide for the child. Standard 11.9 states,

> Coercive state intervention should be authorized when a child has no parent or guardian or other adult to whom the child has substantial ties, available and willing to care for him.[12]

This formulation is somewhat more restrictive than some current state laws on abandonment. The Task Force opted for this position in order to exclude coverage of situations where the child is entrusted to the care of a relative or member of the "extended family." While such a child may be "abandoned" by his parents, the Task Force felt that coercive intervention should not be authorized in these cases unless the child is otherwise endangered. This approach is consistent with respecting differing cultural patterns in child rearing (see Standard 11.4) and seeking to maintain continuity in the child's relationships with parent surrogates (see Standard 11.6).[13]

Footnotes:

[1]Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 993 (1975).

[2]See Ariz. Rev. Stat. Ann. §§8-20, 8-546(A)(1) (Supp. 1973); Idaho Code §16-1625 (Cum. Supp. 1973).

[3]Sources: Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., pp. 920-21 n. 180 (1975); Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27, 75-362 (1975).

[4]See, e.g., D.C. Sup. Ct. Rule 16(b)(2) cited in Areen, supra note 1, p. 921 n. 183.

[5]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §2 (Tentative Draft 1976).

[6]Id. §10.

[7]See Mass. Gen. Laws Ann. ch. 119, §24 (supp. 1974).

[8]See Miss. Code Ann. §43-21-5(h) (1972).

[9]Areen, supra note 1.

[10]See note 2 supra.

[11]IJA/ABA, supra note 5, §10.7.

[12]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[13]Id.

1. Issue Title: Parental Immorality--Should the immorality or socially deviant life-style of a parent constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

This issue involves the question of whether a parent's immorality or socially deviant life-style should constitute a basis for intervention. If judicial action on this basis is viewed as appropriate, it can be authorized by statutes referring to parental "faults or habits,"[1] or parental "immorality or depravity"[2] or a "parent's lack of moral supervision."[3]

3. Summary of Major Positions:

Traditionally, neglect laws were concerned principally with parents' moral conduct.[4] This position reads the protective parental role of the court handling juvenile matters very broadly and argues that the state has a responsibility to intervene when the moral development of children is impaired.

Numerous writers have criticized this approach. They argue that such laws constitute punitive regulations of parental behavior without concern for harm to the child. Moreover, they argue that such formulations facilitate arbitrary and harmful intervention. The commentators contend that efforts to "save" the child often increase the emotional damage. In addition, the writers assail the statutory provisions relating to parental immorality as unconstitutionally vague.

4. Summary of State Practices:[5]

Basis for Jurisdiction	Number of States	Names of States
Specify moral unfitness of parent as a ground for determining neglect.	18	AL, AK, AZ, CA, FL, IN, IA, LA, MD, MI, MN, NM, OH, TN, UT, WA, WI, WY
May authorize intervention in such cases on the basis of "lack of proper parental care, control or guardianship" provision.	All States	

Summary of Practices: Eighteen states explicitly authorize jurisdiction on the basis of parental immorality. The remaining states may authorize such jurisdiction under "lack of proper parental care" provisions.

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Authorizes jurisdiction over inter alia a child whose "environment is injurious to his welfare."	Defines "neglected child" as inter alia one who is "without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian, or other custodian."	Specifies that "coercive state intervention should be premised upon specific harms that a child has suffered or is likely to suffer" and purposely makes no mention of harm to a child's morals.	"Focuses on the needs of the child regardless of parental fault." Defines "deprived child" as inter alia one who is without "other care or control necessary for his physical, mental or emotional health or morals."

Summary of Positions: 2 groups refer to morality: 1 authorizes intervention because of parental "faults or habits"; 1 states that it disavows reliance on "parental fault," but authorizes intervention if a child lacks care necessary for his morals.

1 group does not refer to morality, but authorizes intervention because of an "environment injurious to /the child's/ welfare."

1 group disavows any intervention not based on specific harms to the child and purposely makes no mention of harm to a child's morals.

6. Analysis of the Issue:

Those who favor judicial intervention on the basis of parental immorality adopt certain premises which, if accepted, require little elucidation. They argue that, in keeping with a very broad view of its protective parental role, the court handling juvenile matters has a responsibility to intervene when a child's moral development is jeopardized. Under this rubric courts have removed children from their homes for a variety of reasons. The following cases are illustrative: the mother "frequent/ed/ taverns" or had men visitors overnight;[6] the parents adhered to "extreme" religious practices, or lived in a communal setting;[7] the parent was a lesbian, a homosexual or the mother of an illegitimate child.[8]

If intervention on the basis of parental immorality is viewed as appropriate, it may be authorized by statutory language referring to (1) parental "faults or habits";[9] (2) a parent's "immorality or depravity"[10] or (3) a parent's "lack of moral supervision."[11] Commentators have argued that all of these formulations may be unconstitutionally vague,[12] but none have been invalidated by the courts.

Those opposed to intervention based on parental immorality offer a number of arguments in support of their position. The writers place particular emphasis on the fact that such laws encourage arbitrary intervention. It is argued that in most cases, there is no evidence that the allegedly immoral behavior has harmed the child in any way.[13] It is further contended that the vague nature of these formulations leads to haphazard intervention based on judges' and social workers' personal value judgments. Moreover, the writers cite such noted child development specialists as John Bowlby to indicate that,

> /T/he attachment of children to parents who, by all ordinary standards, are very bad is a never-ceasing source of wonder to those who seek to help them .... Efforts made to 'save' the child from his bad surroundings and to give him new standards are commonly of no avail, since it is his own parents who, for good or ill, he values and with whom he identifies.[14]

In light of such evidence, it is contended that intervention in these cases can prove extremely harmful to the child. It is argued that disrupting the existing relationship with the parents--imperfect though it may be--and placing the child in a foster care system which has demonstrated its inadequacies[15] is very traumatic to a child's psychological development.

7. Task Force Standards and Rationale:

Consistent with its approach of focusing on serious, specifically defined harms to the child rather than parental conduct, the Task Force rejected a parent's immorality or socially deviant lifestyle as a basis for coercive intervention (see Standard 11.2[16] and Abuse and Neglect Comparative Analyses 2 and 3). Its commentary strongly criticizes the open-ended statutes which authorize jurisdiction in such cases as facilitating arbitrary and often harmful intervention (see commentary to Standards 11.2 and 11.11).[17]

Footnotes:

[1]See, e.g., La. Rev. Stat. Ann. §13:1569 (Cum. Supp. 1973).

[2]See, e.g., Tenn. Code Ann. §37-202 (Cum. Supp. 1974).

[3]See, e.g., Mo. Ann. Code §3-801 (1973).

[4]See Thomas, "Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives," 50 N.C.L. Rev., pp. 299-313 (1972).

[5]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[6]See, e.g., In re Yardley, 260 Iowa 259, 149 N.W. 2d 162 (1967); State v. Geer, 311 S.W. 2d 49 (Mo. Ct. App. 1958).

[7]See, e.g., In re Anonymous, 37 Misc. 2d 411, 238 N.Y.S. 2d 422 (Fam. Ct. 1962); In re Watson, 95 N.Y.S. 2d 798 (Dom. Rel. Ct. 1950).

[8]See, e.g., In re Cager, 251 Md. 473, 248 A. 2d 384 (1968); In re C., 468 S.W. 2d 689 (Mo. Ct. App. 1971).

[9]See note 1 supra.

[10]See note 2 supra.

[11]See note 3 supra.

[12]See, e.g., Areen, "State Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 926 (1975).

[13]See Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., p. 1034 (1975).

[14]J. Bowlby, Child Care and the Growth of Love, p. 80 (2d ed. 1965) cited in Burt, "Forcing Protection on Children and Their Parents: The Impact of Wyman v. James," 69 Mich. L. Rev., p. 1279 (1971).

[15]See Areen, supra note 12, pp. 912-14; Wald, supra note 13, pp. 994-96.

[16]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[17]Id.

1. Issue Title: Parental Mental or Physical Incapacity--Should the mental or physical incapacity of a parent constitute a basis for family court jurisdiction; and, if so, how should it be defined.

2. Description of the Issue:

Although here the issue is whether or not a parent's physical or mental incapacity should constitute a basis for neglect proceedings, the analysis is in many respects similar to that previously set forth with regard to dependency cases (see Abuse and Neglect Comparative Analysis 1). In many--though not all--cases of this nature the crux of the issues is: (1) should the case fall within the ambit of the court's jurisdiction; or (2) should it be handled by a nonjudicial social agency? If judicial intervention in these cases is deemed appropriate, a commonly employed statutory formulation is to define "neglected child" as inter alia one "whose parent, guardian or other custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity."[1]

The 1976 Tentative Draft of the Institute for Judicial Administration/American Bar Association Juvenile Justice Standards[2] illustrates a somewhat different approach to the problem. Those standards largely subsume the issue within the rubric of specifically defined harms to the child.

3. Summary of Major Positions:

Ten states and two standards-setting groups explicitly authorize jurisdiction on the basis of a parent's physical or mental incapacity. The rationale for this position is apparently the belief that a broad reading of the parens patriae doctrine vests the state with the power and responsibility to intervene on behalf of children whenever their parents are unable to adequately care for them.[3]

The Tentative IJA/ABA Standards do not explicitly authorize coercive intervention on the basis of parental incapacity. They recommend the general availability of voluntary services for such cases, make allowance for voluntary placements of short duration and argue that if the child is genuinely endangered he will fall within one of the other jurisdictional categories,[4] making this classification redundant.

4. Summary of State Practices:[5]

Basis for Jurisdiction	Number of States	Names of States
Specify mental or physical incapacity of parent as a ground for determining neglect.	10	DC, IA, LA, MA, MT, NB, NV, NM, TN, WY.
May authorize intervention in such cases on the basis of "lack of proper parental care, control or guardianship" provision.	All states	

Summary of Practices: Ten jurisdictions explicitly authorize intervention based on parental mental or physical incapacity. All other states have "lack of proper parental care" provisions which may or may not authorize such intervention.

5. Summary of Positions Recommended by Standards Groups:

NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Recommends that the definition of "neglected child or its equivalent" should include children whose parents are "incarcerated, hospitalized, or otherwise incapacitated for protracted periods of time."	Contains no explicit reference to parental incapacity. Authorizes jurisdiction over inter alia any child "who is neglected as to proper support, or education as required by law, or as to medical or other care necessary for his well-being."	Defines "neglected child" as inter alia one "whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child."	Does not explicitly authorize jurisdiction on the basis of parental incapacity. Recommends general availability of voluntary services. Authorizes coercive intervention inter alia when "a child has suffered, or there is a substantial likelihood that the child will imminently suffer physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury as a result of conditions created by his/her parents or by the failure of his/her parents to adequately supervise or protect him/her."	Contains no explicit reference to parental incapacity. Defines "deprived child" as inter alia one who is "without proper parental care or control" or "other care necessary for his physical, mental, or emotional health, or morals."

Summary of Positions:

Two groups explicitly recommend intervention because of parental incapacity.

Two groups do not explicitly mention parental incapacity, but offer general provisions which may authorize intervention in such cases.

One group does not explicitly authorize intervention on this basis, but recommends the general availability of voluntary services, allows voluntary placements of short duration and employs a "failure to adequately supervise" provision that focuses on substantial risk of serious physical injury to the child.

6. Analysis of the Issue:

The HEW Model Act[6] authorizes intervention on behalf of a child

> whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child.

Similarly, the civil neglect statute for the District of Columbia[7] defines "neglected child" as, inter alia one

> whose parent, guardian or other custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity.

These statutes are apparently grounded on a broad reading of the parens patriae doctrine. Under this philosophy, the state is viewed as having both the power and responsibility to intervene on behalf of children whose parents are unable to care for them.

Consistent with their focus on harms to the child rather than parental behavior (see Abuse and Neglect Comparative Analysis 3), the Tentative IJA/ABA Standards do not explicitly authorize coercive intervention based on parental incapacity. Nonetheless, the Tentative Standards do, of course, address these cases. They recommend the availability of voluntary services to deal with such situations whenever possible.[8] The following excerpt from the President's Commission on Law Enforcement and Administration of Justice illustrates this analysis. Although the report is clearly referring to parental incapacity as a basis for dependency--not neglect--jurisdiction, it can certainly be read as applicable in this context as well.

> Where the child's dependency stems from his guardian's good-faith failure to cope, what is needed is not the force of law but the assistance of a social agency. Acting as a mere conduit for referral of well-meaning people overwhelmed by life to a source of assistance for their economic and social ills is a burdensome task for any court, and one there is no need to handle judicially. Especially in view of the inevitably stigmatizing effects of going to court, whatever the court and outcome are called, dependency alone should not be a subject for court consideration.[9]

The Tentative IJA/ABA Standards also allow voluntary placements of short duration. Thus, if a parent is to be incarcerated or hospitalized for a short period he may voluntarily place the child without

judicial supervision. For those cases not handled by voluntary services or short-term voluntary placements, coercive intervention may be authorized under other jurisdictional sections, as, for example, the following:

> §2.1(b) A child has suffered, or there is a substantial risk that the child will imminently suffer physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury as a result of conditions created by his/her parents or by the failure of his/her parents to adequately supervise or protect him/her.[10]

Thus, from the perspective of the Tentative IJA/ABA Standards statutes which explicitly focus on parental incapacity are redundant: if the child is actually endangered, he will fall within one of the other criteria for intervention; if not, judicial intrusion is viewed as inappropriate.

Certainly all standards groups are agreed that children who are in serious danger and whose parents cannot care for them should be protected in some fashion. The IJA/ABA proposal suggests that explicit reference to parental incapacity is unnecessary. Consistent with their focus on parental behavior, other groups reject that position.

7. Task Force Standards and Rationale:

The Task Force found the IJA/ABA analysis of this issue persuasive. In keeping with its philosophy of focusing on serious, specifically defined harms to the child, the Task Force adopted a standard similar to the IJA/ABA's Tentative §2.1(b) set forth above (see Standard 11.11 and Abuse and Neglect Comparative Analysis 9).[11] The Task Force felt that coercive intervention was justified in cases of parental incapacity only if an imminent and substantial risk of serious physical injury to the child could be demonstrated.

Footnotes:

[1]See, e.g., D.C. Code Ann. §16-2301(9)(c) (1973).

[2]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[3]For a summary of case law on the subject see E. Browne and L. Penny, The Non-Delinquent Child in Juvenile Court: A Digest of Case Law, pp. 14-16 (1974).

[4]IJA/ABA, supra note 2, §2.

[5]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[6]W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs §2(19)(iii) (DHEW Publication No. OHD/OYD 75-26041).

[7]See note 1 supra.

[8]IJA/ABA, supra note 2, §1.1.

[9]The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, p. 28 (1967).

[10]IJA/ABA, supra note 2.

[11]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (Forthcoming).

1. Issue Title: "Lack of Proper Parental Care"--Should "lack of proper parental care" constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

This issue is simply stated: should "lack of proper parental care" constitute a basis for intervention? Proper resolution of the issue depends on the philosophical premises one adopts in drafting neglect laws. The previous analyses of whether neglect should be specifically defined (see Abuse and Neglect Comparative Analysis 2) and whether the statutory bases for intervention should be defined principally in terms of parental behavior or specific harms to children (see Abuse and Neglect Comparative Analysis 3) focus the reader's attention on those premises. One's positions on those questions determine one's decision on the issue discussed here.

If intervention on this basis is deemed appropriate, it should be authorized by such statutory language as "lack of proper parental care, control or guardianship," since a decision to intervene on this basis necessarily calls for a broad-scoped jurisdictional section which focuses primarily on parental behavior.

3. Summary of Major Positions:

All states and the majority of past standards-setting groups authorize intervention when a child lacks "proper parental care." This formulation focuses principally on parental behavior and implicitly establishes norms of acceptable parental conduct.[1] Moreover, this position assumes that a more specific definition of neglect cannot or should not be employed.

The 1976 Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[2] categorically rejects this approach. Those standards argue that it is difficult or impossible to correlate parental behavior to harm to the child and that such broad formulations as "lack of proper parental care" encourage arbitrary or harmful intervention. On the basis of these and numerous other arguments, the standards reject such general constructs as "lack of proper parental care" and advocate defining the bases for intervention in terms of specific harms to the child.

4. Summary of State Practices:

All 50 states authorize the court handling juvenile matters to exercise jurisdiction on the basis of lack of proper parental care. The statutes of each state employ the phrase "lack of proper parental care, control or guardianship" or similar terminology in delineating the grounds for determining neglect.[3]

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Recommends jurisdiction over inter alia any child "who is neglected as to proper or necessary support, or education as required by law, or as to medical or other care necessary for his well-being."	Defines "neglected child" as inter alia one who is "without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide them."	Authorizes jurisdiction only on the basis of specifically enumerated harms to the child; criticizes laws which focus principally on parental behavior; disavows reliance on "vague or general laws."	Defines "deprived child" as inter alia one who is "without proper parental care or control."

Summary of Positions: Two groups employ "lack of proper parental care" provisions.

One group employs an equally broad "lack of other necessary care" provision.

One group authorizes intervention only on the basis of specific harms to the child and criticizes vague or general laws.

6. Analysis of the Issue:

A determination of whether intervention should be authorized on the basis of "lack of proper parental care" hinges on two issues previously discussed: (1) whether neglect should be specifically defined (see Abuse and Neglect Comparative Analysis 2) and (2) whether the bases for intervention should be defined principally in terms of parental behavior or specific harms to the child (see Abuse and Neglect Comparative Analysis 3).

The major argument in favor of nonspecific formulations is twofold. First, it is argued that what constitutes "neglect" varies widely from case to case and hence definitional exactitude is unattainable.[4] Second, lack of specificity is claimed to be a virtue since it enables the judge to use his parens patriae power broadly and vests him with considerable discretion in each case.[5]

The argument which favors defining the bases for intervention principally in terms of parental behavior rather than specific harms to the child is closely related to the defense of nonspecificity. The contention that the multitude of possible harms to the child cannot be accurately delineated in advance is employed to support focusing primarily on parental behavior.[6] Moreover, it is argued that evidence from child development specialists indicates that the home environment substantially affects a child's emotional and intellectual development.[7] Thus, the establishment of implicit norms of parental behavior is deemed the appropriate function of neglect statutes and intervention is seen as justified when parental behavior falls below the requisite standard.[8]

Those who oppose intervention on the basis of the "lack of proper parental care" formulation assail both its nonspecific nature and its focus on parental behavior rather than specific harms to children.[9] The general nature of the formulation is said to facilitate arbitrary intervention. The writers claim that the absence of specific statutory criteria for intervention permits some judges and social workers to intervene on the basis of ad hoc decisions which are reflective of their personal views about child rearing but are not supported by competent scientific evidence. This is said to result in unequal treatment, to encourage the unwarranted imposition of middle-class values on poor families and to facilitate harmful intervention.[10] Moreover, it is suggested that the absence of specific criteria for intervention means there is no basis for measuring the success or failure of actions taken and this encourages a general lack of accountability.[11]

The assault on nonspecific statutes is buttressed by two additional arguments. The same two arguments are also employed to support the contention that neglect should be defined principally in terms of specific harms to the child rather than parental behavior. First, the writers argue that it is very difficult or impossible to correlate parental behavior with demonstrable harm to the child. They cite a great deal of evidence from child development specialists to support this contention and conclude that the assumed correlation is particularly tenuous if it entails predictions of long-term harm.[12] The following excerpt from Harvard psychologist Sheldon White is typical of the extensive psychiatric literature which supports this proposition. White summarizes the findings of his recently completed comprehensive review of existing studies by concluding,

> Neither theory nor research has specified the exact mechanism by which a child's development and his family functioning are linked. While speculation abounds, there is little agreement about how these family functions produce variation in measures of health, learning, and affect. Nor do we know the relative importance of internal (individual and family) versus external (social and economic) factors.[13]

In light of such evidence the commentators conclude that intervention under the general criterion "lack of proper parental care" should be abolished. They argue that the system is designed to protect children and the latter formulation is an ineffective index of harm to the child.

In addition, it is argued that intervention often does more harm than good. Evidence from such prominent authors as Joseph Goldstein, Anna Freud, and Albert Solnit is cited to demonstrate that intervention may prove harmful to the child's important needs for continuity and stability in relationships with parental figures.[14] The writers also chronicle the well-documented shortcomings and failures of foster care and other dispositional alternatives.[15] On the basis of this data, the commentators conclude that we should intervene only when it appears likely that we can improve the situation. The writers argue that this is achieved by intervening only when the child is suffering serious--and specifically definable--harm.

Moreover, it is argued that our legal and political commitments to privacy, freedom of religion, diversity of ideas and the sanctity and autonomy of the family support the position that state involvement in child rearing should be kept to a minimum. The writers conclude that intervention because of "lack of proper parental care" can too easily become a punitive regulation of adult behavior where children are used as pawns in a system ostensibly designed for their protection.[16]

7. Task Force Standards and Rationale:

The Task Force found the foregoing arguments against intervention on the basis of "lack of parental care" persuasive. Therefore, it criticized such formulations in its commentary (see commentary to Standard 11.2[17]) and proposed bases for intervention which advert to serious harms to the child, actual or imminent (see Abuse and Neglect Comparative Analyses 2 and 3).

Footnotes:

[1]See S. Katz, When Parents Fail, pp. 56-7 (1971); Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court," Justice for the Child, p. 74 (M. Rosenheim ed. 1962).

[2]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[3]See Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[4]See Gill, "The Legal Nature of Neglect," 6 N.P.P.A.J., pp. 5-6 (1960); S. Katz, supra note 1, p. 59 (1971); Tamilia, "Neglect Proceedings and the Conflict Between Law and Social Work," 9 Duques L. Rev., p. 584 (1971).

[5]See S. Katz, supra note 1, pp. 59, 62-3.

[6]See Gill, supra note 4.

[7]See, e.g., A. Freud, Normality and Pathology in Childhood, pp. 50-51 (1966); C. Jencks, Inequality, pp. 135-246 (1972).

[8]See note 1 supra.

[9]See, e.g., IJA/ABA, supra note 2; Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., pp. 1007-07 (1975).

[10]See, e.g., id., pp. 998, 1001-02.

[11]Id., p. 1002.

[12]See, e.g., Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 918 (1975); 1 S. White, Federal Programs for Young Children: Review and Recommendations, pp. 130-367 (1973) (surveying the literature) cited in Wald, supra note 9, p. 992 n. 41.

[13]2 S. White, supra note 12, p. 240 cited in Wald, supra note 9, p. 1017.

[14]See, e.g., J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child, pp. 31-35 (1973) cited in Areen, supra note 12, pp. 889-90 n. 9.

[15]See, e.g., id., pp. 912-14; Wald, supra note 9, pp. 994-96.

[16]See, e.g., id., p. 992.

[17]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Physical Abuse--Should nonaccidental physical injury constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

Since the identification of the "battered child syndrome"[1] in the early sixties, the subject of child abuse has received considerable attention in the literature.[2] There is, of course, a consensus that children should be protected from severe physical injuries. On the other hand, our society certainly accepts corporal punishment of children. Thus, the key problem in this area is drawing the line where acceptable discipline stops and physical abuse begins.

The existing statutes and literature present a number of definitional options. One approach is illustrated by definitions which contain generalized references to children who have been "mistreated"[3] or "physically abused."[4] A second approach defines physical abuse by specifically delineating the types of injury which justify intervention.[5] A third approach "defines" the concept of abuse by referring to injuries which are "at variance with the history given" of them or "are not justifiably explained."[6] Although commentators are not explicit on this point, the "definitions" in this third category are, in fact, not definitions at all: they are regulations relating to the burden of proof on the issue of accidental versus nonaccidental injury.

3. Summary of Major Positions:

Those who favor a general[7] definitional reference to "physical abuse" implicitly suggest that intervention ought not be delimited solely to "serious" physical injuries. Probably the best argument in defense of this position is the concept that any injury--"serious" or not--may indicate a pattern of behavior where the child may suffer serious harm if intervention is not authorized.

The 1976 Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards suggests that the basis for intervention should be defined more specifically. Professor Wald cites evidence that we frequently intervene where the child is not suffering genuine harm and emphasizes the negative impact of such intervention.[8] He proposes authorizing intervention in those cases where a child "has suffered" or "there is a substantial risk that a child will imminently suffer" injury which causes or "creates a substantial risk" of specified harms.

A third approach to physical abuse cases "defines" abuse as, for example,

> any physical injury ... inflicted on a child ... which is at variance with the history given of it."[9]

As noted above, this is not actually a definition of abuse but rather an allocation of the burden of proof on the issue of whether the injury was inflicted in a nonaccidental manner.

4. Summary of State Practices:

State practices in the field of nonaccidental physical injury are difficult to summarize because the subject is treated not only in the definitional and jurisdictional sections of civil neglect statutes, but also in criminal neglect statutes and child abuse reporting laws. In their civil neglect statutes 10 states explicitly refer to children who are "physically injured," "abused," "mistreated" or "battered."[10] By virtue of such language as "lack of proper parental care" all other states have civil neglect statutes broad enough to cover abuse situations.[11] In addition, all 50 states have mandatory child abuse reporting laws which define "abuse" with varying degrees of specificity.[12] And, eight states have criminal neglect statutes which cover abuse situations.[13]

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Does not explicitly mention physical abuse. Authorizes jurisdiction over inter alia a child "who is neglected as to ... other care necessary for his well-being" or "whose environment is injurious to his welfare."	Defines "neglected child" as inter alia one "who is physically abused by his parents, guardian or other custodian."	Authorizes jurisdiction inter alia when "a child has suffered or there is a substantial risk that a child will imminently suffer a physical harm, inflicted non-accidentally upon him/her by his/her parent, which causes or creates a substantial risk of causing disfigurement, impairment of bodily functioning or other serious physical injury."	Does not explicitly mention physical abuse. Defines "deprived child" as inter alia one who "is without proper parental care or control necessary for his physical, mental, or emotional health or morals."

Summary of Positions: One group specifically delineates the types of injuries which justify intervention.

One group authorizes intervention for "physical abuse."

Two groups do not explicitly mention physical abuse, but obviously cover such cases under broad-scoped definitions of deprivation or neglect.

6. Analysis of the Issue:

Physical abuse presents probably the clearest case for coercive intervention. There is obviously a consensus that children should be protected from severe physical injuries. Nonetheless, there are difficulties with intervening on this basis. A recent nation-wide survey found that more than half of the reported cases of physical abuse involved only minor bruises or abrasions which did not require treatment.[14] Our society has traditionally accepted corporeal punishment of children. Different cultural and economic groups employ varying patterns of disciplinary practices. In practice, it is sometimes difficult to draw the line where acceptable discipline stops and physical abuse begins.

Thus, the key issue in this area is framing an acceptable definition of physical abuse. The existing statutes and literature present a number of options.

The HEW Model Act[15] and a number of state statutes[16] contain general references to children who have been "physically abused," "abused," "mistreated" or "battered." Under these approaches a more specific definition is left to a case-by-case assessment and judges are vested with wide discretion in the application of the standard. Probably the strongest argument in favor of this option is the analysis that any injury--"serious" or not--may indicate a pattern of behavior where the child may suffer serious harm if intervention is not authorized.[17]

A second approach opts for a more specific definition. Under this analysis the difficulties of distinguishing discipline from abuse are emphasized and the disruptive impact of unwarranted intervention is stressed. It is argued that "/f/amily relations may be significantly disrupted by the trauma of court appearances, social workers' visits, compulsory psychiatric examinations for the parents or the child, and short- or long-term removal of children from the family while the case is being investigated."[18] Thus, it is concluded that "/c/hildren who were not in fact abused may thus suffer significant harm as a result of intervention."[19] To avoid these difficulties while still affording comprehensive protection to endangered children, the Tentative IJA/ABA Standards authorize intervention when

> §2.1(a) a child has suffered or there is a substantial risk that a child will imminently suffer, a physical harm, inflicted non-accidentally upon him/her by his/her parent, which causes or creates a substantial risk of causing disfigurement, impairment of bodily functioning, or other serious physical injury.

The requirement that the (potential) injury be of a serious nature is intended to avert officious intermeddling in parental discipline. Despite this limitation, the standard authorizes intervention when "there is a substantial risk that a child will imminently suffer serious injury" or harm which "creates a substantial risk" of serious injury. This language is employed to insure that "/w/hile courts should certainly be extra cautious in intervening when a child has not actually suffered serious injury, they should not be required to stand by and wait, when future danger is likely, until the child dies or suffers more severe injury."[20]

There is a third approach to physical abuse cases which adverts to a different problem than either of the two options outlined above. In effect, both of the foregoing schemes deal with the severity of the injury: on the one hand, the HEW Model Act and other general formulations authorize intervention for all "abuse," regardless of severity; on the other hand, the IJA/ABA restricts intervention to nonaccidental injuries of a serious nature. The third approach generally ignores the severity of the injury. It "defines" abuse as an injury which is "not justifiably explained" or which is "at variance with the history given."[21] As previously noted, such "definitions" of abuse are not really definitions at all. They are allocations of the burden of proof on the issue of whether the injury was accidental.

This latter approach can, of course, be combined with either a general definition of abuse or a definition which restricts intervention to cases of serious injury. For example, the Education Commission of the States combines a general formulation with the "at variance with the history" concept to define abuse as

> any physical injury ... inflicted on a child other than by accidental means or any injury which is at variance with the history given of it.[22]

On the other hand, the Colorado reporting statute couples the "unexplained injury" concept with a severity requirement by listing particular types of serious injury. It defines "abuse" as

> any case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, sexual molestation, burns, fracture of any bone, subdural hemotoma, soft tissue swelling, failure to thrive, or death and such condition or death is not justifiably explained ....[23]

A final permutation is supplied by Professor Areen who couples the "at variance" concept with the requirement that the injury be of a "serious" nature, but does not specifically define "serious." She defines "abused child" as

> one whose parent, guardian, or primary caretaker inflicts serious physical injuries upon such child; or who is seriously physically injured while in the care of his parent, guardian or primary caretaker and the explanation provided is at variance with the type of injury.[24]

7. Task Force Standards and Rationale:

In keeping with the Task Force's preference for specifically defined bases for intervention, it adopted the following standard on the issue of nonaccidental physical injury:

> Coercive state intervention should be authorized when a child has suffered or is likely to imminently suffer a physical injury, inflicted nonaccidentally upon him by his parent, which causes or creates a substantial risk of disfigurement, impairment of bodily functioning or severe bodily harm.[25]

The Task Force felt that this formulation would provide necessary protection for children in serious danger, while minimizing the potential for harmful and unwarranted state intrusion.

Footnotes:

[1]See Kempe, Silverman, Steele, Draegemuller & Silver, "The Battered Child Syndrome," 181 J. Am. Med. Assoc., pp. 17-24 (1962); V. Fontana, Somewhere a Child is Crying (1973).

[2]See generally National Criminal Justice Reference Service, Child Abuse (1975) for an extensive bibliography.

[3]See, e.g., Ark. Stat. Ann. §45-203 (Cum. Supp. 1973).

[4]See, e.g., Wyo. Stat. Ann. §14-115.2 (Cum. Supp. 1973).

[5]See Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §2.1(a) (Tentative Draft 1976).

[6]Cf. Early Childhood Task Force, Education Commission of the States, Child Abuse and Neglect: Alternatives for State Legislation, p. 18 (1973) (child abuse reporting act).

[7]Compare the overall philosophical arguments on general laws versus specifically defined bases for intervention set forth in Abuse and Neglect Comparative Analysis 2.

[8]Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., pp. 1009-10 (1975).

[9]See note 6 supra.

[10]The 10 states are: Alaska, Arizona, Arkansas, Colorado, Mississippi, Montana, New Mexico, Oregon, Tennessee, and Wyoming. Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 75-349 (1975).

[11]Id.

[12]Id.; Early Childhood Task Force, Education Commission of the States, supra note 6, pp. 1-18.

[13]The 8 states are: Arizona, Arkansas, Florida, Kansas, Louisiana, Minnesota, Nevada, and Oklahoma. Katz, Howe & McGrath, supra note 10.

[14]D. Gil, Violence Against Children, pp. 118-19 (1973), cited in Wald, supra note 8 at 1009.

[15]W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs (DHEW Publication No. OHD/OYD 75-26041).

[16]See note 10 supra.

[17]Cf. Early Childhood Task Force, Education Commission of the States, supra note 6.

[18]Wald, supra note 8 at 1010.

[19]Id.

[20]Id., pp. 1012-13.

[21]See note 6 supra.

[22]Id.

[23]Colo. Rev. Stat. Ann. §22-10-1 (Perm. Cum. Supp. 1969).

[24]Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., pp. 932-33 (1975).

[25]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Unsafe Home Conditions--Should home conditions jeopardizing safety or health constitute a basis for family court jurisdiction; and, if so, how should they be defined?

2. Description of the Issue:

This issue relates to cases where a child's well-being may be endangered, even though the child is not intentionally injured. It covers a wide variety of situations, including, for example, those cases where a child is inadequately fed or exposed to unsafe home conditions such as uncovered electrical wiring or disease related to filth. As in the area of physical abuse, there is certainly a consensus that children in these cases should be protected from serious injury. The key question is: should intervention be authorized by (a) a general statutory formulation, or (b) an enactment which limits intervention to cases which potentially involve serious physical injury?

3. Summary of Major Positions:

The NCCD Standard Act and a number of state enactments authorize intervention when the "environment is injurious"[1] to the child's welfare or when the home is an "unfit place."[2] And, of course, all states authorize intervention based on "lack of proper parental care." The primary objection to such formulations is the argument that they facilitate potentially arbitrary intervention, based, for example, on a judge's or social worker's repugnance with dirty--though not unsafe--homes. For this reason, the 1976 Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[3] offers more specific criteria for coercive action.

4. Summary of State Practices:[4]

Basis for Jurisdiction	Number of States	Names of States
Authorize intervention when the "home is an unfit place."	15	AL, AZ, CA, FL IN, MD, MA, MI, NH, NJ, OH, OK, RI, WA, WV
May authorize jurisdiction in such cases under "lack of proper parental care" provision.	All States	

Summary of Practices: Fifteen states authorize intervention when the home is found to be "an unfit place." All states have "lack of proper parental care" provisions which may cover these situations.

5. Summary of Positions Recommended By Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Authorizes jurisdiction over inter alia a child "whose environment is injurious to his welfare."	Defines "neglected child" as inter alia one "who is without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide them."	Authorizes jurisdiction when inter alia "a child has suffered or there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury as a result of conditions created by his/her parents or by the failure of his/her parents to adequately supervise or protect him/her."	Defines "deprived child" as inter alia one who "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian or other custodian."

Summary of Positions: Two groups recommend jurisdiction based on unsafe home conditions; one includes a severity of possible injury requirement.

Two groups do not explicitly cover such situations, but offer broad formulations which may authorize intervention in such cases.

6. Analysis of the Issue:

In some respects, this issue is closely related to physical abuse (see Abuse and Neglect Comparative Analysis 8). Just as there is a consensus that children ought not suffer severe injury by physical beating, there is certainly agreement that they ought not suffer serious injury because of exposed electrical wiring, broken glass, uncovered fires, etc. However--depending on how one wishes to formulate a standard in this area--this issue may be seen as reaching far beyond cases involving a potential for physical injury and encompassing a wide variety of cases involving inadequate parental care or supervision.

Past standards-setting groups have taken two approaches to these cases. One approach is illustrated by the NCCD Standard Act of 1959 and the HEW Model Act of 1974 which authorize intervention when a child's "environment is injurious"[5] to his welfare or when he "lacks proper parental care."[6] It should be noted that such formulations do not restrict intervention to cases involving potential physical injury. In fact, "/W/hile no empirical studies provide a statistical breakdown of the reasons for intervention in neglect cases, probably the largest category of cases involves persons thought to be 'inadequate parents'."[7] This approach vests the judge with considerable discretion in the application of the statute to the particular case. Those who favor such formulations feel that such an approach gives the judge desirable flexibility in assessing each case on its own facts. (Compare the overall philosphical arguments on general formulations versus specifically defined bases for intervention set forth in Abuse and Neglect Comparative Analyses 2 and 3).

The Tentative IJA/ABA Standards employ a different approach. They reject coercive intervention based on "inadequate parenting," deal with emotional neglect as a separate issue (see Abuse and Neglect Comparative Analysis 12), and restrict intervention based on home conditions or inadequate parental supervision to cases involving the potential for serious injury to the child. Professor Wald suggests,

> /W/hen no injury has occurred, the possibility of unwarranted intervention is increased. A court deciding whether to intervene must predict both the likelihood of the injury's occurring and the likelihood that intervention will be beneficial. There is a great temptation to focus exclusively on the parental behavior and ignore the likelihood of injury. Intervention may be prompted by a social worker's repugnance with regard to dirty homes or may entail substituting a judge's view of childrearing for that of the parents, for

> example, regarding the age at which a child may be left alone safely or at which an older child can care for a younger sibling.[8]

On the other hand, the standards certainly recognize that one ought not wait til injury occurs to authorize intervention; thus, they provide jurisdiction when,

> §2.1(b) A child has suffered or there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury as a result of conditions created by his/her parents or by the failure of his/her parents to adequately supervise or protect him/her."[9]

Professor Wald concludes,

> /W/hen no injury has occurred, the proposed standard requires that the risk be substantial and imminent. These terms should limit the dangers inherent in allowing intervention based on prediction of harm. Of course, such terms are subject to interpretation. ... However, the proposed language does place restraints on court actions and informs the court and welfare workers of legislative policy.[10]

Thus, one can approach the issue of unsafe or injurious home conditions in one of two ways. One can delimit the grounds for intervention to serious physical harm, as the IJA/ABA proposal recommends; or, one can employ a broad-scoped formulation similar to those of HEW or the NCCD.

7. Task Force Standards and Rationale:

The Task Force opted for restricting this basis for jurisdiction to cases which potentially involve serious physical injury. Standard 11.11 provides that,

> Coercive state intervention should be authorized when a child has suffered or there is a substantial risk that the child will imminently suffer disfigurement, impairment of bodily functioning or severe bodily harm as a result of conditions uncorrected by the parents or by the failure of the parents to adequately supervise or protect the child.[11]

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The Task Force felt that more broad-scoped criteria facilitate arbitrary and unwarranted intervention which often proves harmful to the child.

Footnotes:

[1]National Council on Crime and Delinquency, Standard Juvenile Court Act §8.2(b) (1959).

[2]See, e.g., Cal. Welf. & Inst. Code §600(d) (West 1972).

[3]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §2.1(b) (Tentative Draft 1976).

[4]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[5]See note 1 supra.

[6]W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs §2(19)(ii) (DHEW Publication No. OHD/OYD 75-26041); see also Abuse and Neglect Comparative Analysis 7.

[7]Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., p. 1020 (1975).

[8]Id., pp. 1013-14.

[9]See note 3 supra.

[10]Wald, supra note 7, p. 1014.

[11]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Nonsupport--Should failure to provide support (when able to do so) constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

There is certainly a consensus that parents who are financially able to do so should provide support for their own children. In many respects the real question in this area is: what is meant by "support"? Standards which refer to this subject usually do so in a very general way. The previous materials on whether neglect should be defined principally in terms of parental behavior or in terms of specific harms to the child (see Abuse and Neglect Comparative Analyses 2 and 3) set the issue in its larger philosophical context. If one favors defining neglect jurisdiction primarily in terms of parental behavior, an independent statutory provision on this subject may be viewed as important; if one wishes to focus on specific harms to the child, this jurisdictional category will probably be viewed as redundant. Under the latter approach, "support" is, in effect, defined as protecting the child from specifically enumerated harms.

3. Summary of Major Positions:

Twelve states and two past standards-setting groups make explicit reference to parental failure to provide support as a ground for determining neglect. The HEW Model Act and all states have general provisions relating to "lack of proper parental care" which doubtless cover such situations.

Consistent with its child-focused philosophy, the Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[1] does not make an independent reference to parental nonsupport. It subsumes such cases in other jurisdictional categories.

4. Summary of State Practices:[2]

Basis for Jurisdiction	Number of States	Names of States
Authorize jurisdiction for nonsupport when able to support.	12	AR, DC, GA, LA, MN, NJ, NM, NC, ND, OH, PA, VA
Authorize jurisdiction based on "lack of proper parental care."	All States	

Summary of Practices: Twelve jurisdictions authorize coercive intervention for nonsupport when able to do so. All states provide neglect jurisdiction on the basis of "lack of proper parental care."

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Authorizes jurisdiction over inter alia a child "who is neglected as to proper or necessary support, or education as required by law, or as to medical or other care necessary for his well-being."	Defines "neglected child" as inter alia one "who is without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide them."	Does not address the issue of nonsupport as such. Authorizes jurisdiction over children suffering or likely to imminently suffer serious, specifically defined harms.	Defines "deprived child" as inter alia one who "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian or other custodian."

Summary of Positions: Two groups explicitly authorize jurisdiction based on nonsupport when able to do so. One group covers such cases under a broad "lack of proper parental care" provision. One group provides jurisdiction over children suffering or likely to imminently suffer from serious, specifically defined harms.

6. Analysis of the Issue:

Professor Sanford Katz observes,

> One of the most basic obligations of parents toward their children is that of providing financial support. This obligation finds its basis in a general concept of moral responsibility, in natural law, in the common law, and in the statutes of the various states.[3]

Some states explicitly make parental failure to meet this obligation a ground for determining neglect. For example, the District of Columbia[4] defines "neglected child" as inter alia one

> who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health, and the deprivation is not due to the lack of financial means of his parent, guardian or other custodian.

General jurisdictional provisions relating to "lack of proper parental care" also cover these cases.

Numerous commentators have observed that such statutes do not specify what the concept of "failure to provide support" means in practice.[5] How does one determine whether a parent is able to provide support or not? What level of support? According to what community or cultural standard? The open-textured nature of the statutes may be viewed as either virtue or vice depending on one's philosophy regarding neglect laws. In many respects the subject of nonsupport can actually be viewed as a sub-issue of the previous question of whether neglect should be defined primarily in terms of parental behavior or in terms of harms to the child (see Abuse and Neglect Comparative Analyses 2 and 3). Those who advocate laws related to specific harms to the child suggest that formulations of this nature provide a means for intervening inappropriately on the basis of parental poverty alone. Those who favor a parent-focused approach conclude that general formulations are desirable in that they provide the judge with a wide latitude of discretion for case-by-case assessment. (Neither approach really addresses the case where a parent is unable to provide necessities, but adequate state support is not forthcoming. Under both views, this is apparently seen as either a matter to be dealt with by writ of mandate or by legislative policy regarding welfare allocations.)

An example of a child-centered approach is found in the Tentative IJA/ABA Standards.[6] Cases of children who are not receiving proper support would, of course, not be excluded from the

court's jurisdiction under those standards. Rather, the authors of the proposal would argue that such cases would undoubtedly fall within any or all of the following categories:

§2.1(a) /nonaccidental physical injury (which includes willful failure to feed)--See Abuse and Neglect Comparative Analysis 8/

§2.1(b) /unsafe home conditions or inadequate supervision or protection--See Abuse and Neglect Comparative Analysis 9/

§2.1(f) /encouraging or pressuring the child to e.g. fail to attend school--See Abuse and Neglect Comparative Analysis 14/

Thus, the issue in this area boils down to a question of whether one should authorize intervention on the basis of "parental nonsupport" or on the basis of resultant (potential) harms to the child. Under the former approach, the general concept of "support" is defined on a case-by-case basis; under the latter approach, "support" is defined operationally as protecting the child from specifically enumerated harms. As previously noted, this is more than a matter of mere semantics, for it is reflective of one's philosophical posture regarding the criteria for coercive state action.

7. Task Force Standards and Rationale:

The Task Force concluded that a separate standard on this issue was unnecessary. It felt that if the child were faced with a substantial risk of serious harm as a result of parental failure to support him when able to do so, the case would undoubtedly fall within one of the other criteria for coercive intervention.

Footnotes:

[1]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[2]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[3]S. Katz, When Parents Fail, p. 9 (1973).

[4]D.C. Code Ann. §16-2301(9)(B) (1973).

[5]See, e.g., S. Katz, supra note 3, pp. 9-10.

[6]See note 1 supra.

1. Issue Title: Medical Care--Should failure to provide medical care constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

Cases involving this issue generally arise when parents refuse to authorize an operation or blood transfusion because of religious objections. In rare instances the issue is also raised when parents withhold consent because of the risks of the proposed treatment.[1] The important questions in this area are: (1) is coercive intervention appropriate in such cases, and (2) if so, should it be authorized by (a) a general statutory formulation, or (b) a formulation which limits intervention to cases of specifically defined harms of a serious nature?

It should also be noted that this issue is closely related to the subject of emotional neglect (see Abuse and Neglect Comparative Analysis 12). In fact, emotional harm could be treated as a subissue of failure to provide medical care.

3. Summary of Major Positions:

The major objection to coercive intervention when a child is in need of medical care usually stems from the fact that parental refusal to assent to treatment is based on religious beliefs. If there is a serious risk of the child's death, courts virtually always intervene. However, when the danger stems from the potential for a lesser impairment the case law reflects divergent positions.[2]

A general statutory formulation which authorizes intervention when the child is "in need of medical care" potentially allows intervention regardless of the severity of the possible harm. In practice, such a formulation may of course be subjected to a narrowing judicial construction.[3] The 1976 Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[4] rejects broad-scoped formulations and authorizes intervention only in the event of specifically defined harms.[5] The rationale for limiting intervention to cases of serious harm is that since parental cooperation and support are often essential to the success of the proposed treatment, parental wishes should be respected unless the child is in serious danger.

The interrelationship of the subjects of emotional abuse (see Abuse and Neglect Comparative Analysis 12) and failure to provide medical care is illustrated by the fact that three states have statutes which authorize intervention when a child is in need of medical or psychiatric care.[6]

4. Summary of State Practices[7]

Basis for Jurisdiction	Number of States	Names of States
Statute explicitly authorizes jurisdiction for failure to provide medical care.	41	AL, AK, AZ, CA, CO, DE, DC, FL, GA, HI, IL, KY, LA, MD, MA, MI, MN, MS, MO, MT, NB, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, SC, SD, IN, TX, UT, VT, VA, WA, WI, WY
Statute does not explicitly authorize jurisdiction for failure to provide medical care, but such jurisdiction may be authorized under general "lack of proper parental care" provision.	All other states	

Summary of Practices: Forty-one jurisdictions explicitly authorize intervention for failure to provide medical care. The other states may authorize jurisdiction in such cases under general statutes relating to "lack of proper parental care."

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Authorizes jurisdiction over a child "who is neglected as to proper or necessary support, or education as required by law, or as to medical or other care necessary for his well-being."	Defines "neglected child" as inter alia one who is "without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide them."	Authorizes jurisdiction when a child "is in need of medical treatment to cure, alleviate, or prevent him/her from suffering serious physical harm which may result in death, disfigurement or substantial impairment of bodily functions, and his/her parents are unwilling to provide or consent to the medical treatment."	Defines "deprived child" as inter alia one who "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian, or other custodian."

Summary of Positions: Two groups explicitly authorize intervention for failure to provide needed medical care.

Two groups offer broad definitions of neglected and deprived children which probably authorize intervention on this basis.

6. Analysis of the Issue:

When a child is in need of medical care the rationale for coercive intervention--at least where the absence of treatment would cause serious harm--seems straightforward and in some ways similar to that involved in physical abuse cases. The major complicating factor generally arises from the fact that parental objection to treatment is based on sincere religious beliefs.[8] If there is serious risk of death to the child unless treatment takes place, courts virtually always intervene. If the jurisdiction lacks a statute on the subject of medical treatment, courts find that the parental conduct constitutes "lack of proper parental care."[9] When, however, the case involves danger short of death--as, for example, the possibility of serious deformity--courts have adopted divergent positions.[10] Nonetheless, as a practical matter, it can be safely said that "/v/irtually all courts now refuse to recognize the religious claims in cases involving extreme harm."[11]

Statutory authorization of intervention in these cases has been based on two approaches. One approach is illustrated by the NCCD Standard Act which authorizes jurisdiction over a child "who is neglected as to ... medical or other care necessary for his well-being."[12] Such a formulation potentially authorizes intervention regardless of the severity of the risk to the child. It vests the judge with considerable discretion in applying the statute and this may be defended as providing flexibility in case-by-case assessment.

The Tentative IJA/ABA Standards[13] adopt a different approach. They authorize jurisdiction when a child

> §2.1(e) is in need of medical treatment to cure, alleviate, or prevent him/her from suffering serious physical harm which may result in death, disfigurement or substantial impairment of bodily functions, and his/her parents are unwilling to provide or consent to the medical treatment.

The rationale for limiting intervention to cases where the child is suffering or may suffer serious physical injury is the argument that,

> Whenever intervention entails authorizing an operation, parental support may be necessary for the child before, during, and after the operation. If the medical problem involves continuing care, parental cooperation--emotional as well as physical--may be essential. Because parental cooperation is so vital to the child's well-being, parental wishes should be followed unless the potential harm to the child is extremely dangerous .... Absent evidence to the contrary, it is reasonable to assume

> that a parent is particularly sensitive to his child's needs and development. Not only is the parent in a unique position to gauge the likely impact of the proposed action on his child, but the child will also look to the parent in forming his views. Thus, the child may be extremely fearful of any treatment his parents reject.[14]

A final topic worth noting in the area of "failure to provide medical care" is the interrelationship of this subject with emotional neglect (see Abuse and Neglect Comparative Analysis 12). Three state statutes[15] authorize intervention for failure to provide medical or psychiatric care. For example, the Florida statute[16] authorizes jurisdiction over a child

> who is neglected ... as to medical, psychiatric, psychological or other care necessary for the well-being of the child.

One could recommend jurisdiction over cases of emotional neglect by simply promulgating a standard employing similar language. This would certainly be a viable approach to the problem of emotional harm. However, many would argue that in light of the controversial nature of the subject matter it should be treated in an independent standard.

7. Task Force Standards and Rationale:

The Task Force's standard on this subject indicates that,

> Coercive state intervention should be authorized when a child is in need of medical treatment to cure, alleviate or prevent serious physical harm which may result in death, disfigurement, substantial impairment of bodily functions or severe bodily harm and the parents are unwilling to permit the medical treatment.[17]

The Task Force favored the more specific guidelines in this area since some judges are apt to construe their authority quite narrowly in these cases. The commentary to the standard cautions the judge to be particularly sensitive to parental objections in this area. But, consistent with the emerging trend in the case law the Task Force felt that it was inappropriate to limit intervention to matters of life and death.

Footnotes:

[1]See Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., pp. 1028-33 (1975).

[2]See E. Browne & L. Penny, The Non-Delinquent Child in Juvenile Court: A Digest of Case Law, pp. 9-13 (1974); Note, "Court Ordered Non-Emergency Medical Care for Infants," 18 Clev.-Mar. L. Rev., p. 296 (1969) for a thorough review of the case law. See also "Guides to the Judge in Medical Orders Affecting Children," 14 Crime and Delin. Q., p. 107 (1968).

[3]See id.

[4]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §2.1(e) (Tentative Draft 1976).

[5]Compare the overall philosophical arguments on generalized formulations versus specifically defined bases for intervention (see Abuse and Neglect Comparative Analysis 2) and the parallel issues in the fields of physical abuse (see Abuse and Neglect Comparative Analysis 8) and emotional harm (see Abuse and Neglect Comparative Analysis 12).

[6]The three states are Florida, South Carolina and Utah. Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 75-347 (1975).

[7]Id., pp. 25-27.

[8]See Note, "State Intrusion into Family Affairs: Justifications and Limitations," 26 Stan. L. Rev., pp. 1394-1401 (1974); notes 1 and 2 supra.

[9]M. Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court," Justice for the Child, p. 69 (M. Rosenheim ed. 1962).

[10]See notes 1 and 2 supra.

[11]Wald, supra note 1, p. 1028 n. 229.

[12]National Council on Crime and Delinquency, Standard Juvenile Court Act §8.2(a) (1959).

[13]See note 4 supra.

[14]Wald, supra note 1, pp. 1030-31.

[15]See note 6 supra.

[16]Fla. Stat. Ann. §39.01(10)(4) (1974).

[17]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Emotional Harm--Should emotional harm constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

One of the most controversial facets of the debate over reform of neglect laws is the question of whether emotional harm should constitute a basis for intervention. Critics of current statutory formulations argue that there is substantial evidence that children suffer serious emotional damage which present laws ignore.

The subject of emotional harm poses three difficult questions: (1) should emotional neglect constitute a basis for the court's jurisdiction; (2) if so, should it be defined (a) in general terms or (b) by the specific delineation of particular symptoms of emotional harm; and (3) if intervention on this basis is deemed appropriate, should it be restricted to cases where the emotional damage is caused by parental conduct?

3. Summary of Major Positions:

Traditionally, neglect laws have not authorized intervention on the basis of harm to a child's mental health or emotional well-being. Many commentators[1] have criticized this approach and pointed to substantial evidence that children suffer serious emotional harm in the care of neglecting parents.

Those who favor intervening on this basis argue that a child can be cripped or severely damaged emotionally as well as physically and that the law ought not ignore the importance of emotional abuse. The strongest arguments against intervening on this basis are the contentions that the concept cannot be adequately defined and that legislative authorization of jurisdiction on this basis might result in overintervention--i.e., intervention which proves harmful to children or results in their removal from adequate environments.

If intervention on this basis is deemed appropriate, it can be authorized either on the basis of general statutory language referring to the child's "emotional health"[2] or on the basis of a statutory formulation which specifically enumerates symptoms of emotional damage.[3]

Only one past standards-setting group has adverted to the further question of whether intervention should be restricted to cases where parental conduct causes the emotional damage. While making parental refusal to provide treatment a prerequisite to coercive intervention, the 1976 Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards does not require that the emotional damage be caused by parental behavior.

4. Summary of State Practices:

Eleven states[4] have statutes which contain general references to such concepts as "emotional health" or "mental well-being." Typical of these enactments is the statute of the District of Columbia[5] which defines "neglected child" as inter alia one

> who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health ....

Two states offer more specific definitions of emotional harm. The Idaho statute[6] defines "emotional maladjustment" as

> the condition of a child who has been denied proper parental love, or adequate affectionate parental association, and who behaves unnaturally and unrealistically in relation to normal situations, objects or other persons.

And the New York Family Court Act[7] defines "impairment of emotional health" as

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

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Does not explicitly mention emotional neglect. Recommends jurisdiction over inter alia a child who is "neglected" as to "other care necessary for his well-being" or "whose environment is injurious to his welfare."	Does not explicitly mention emotional neglect. Defines "neglected child" as inter alia one who is "without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian or other custodian or their neglect or refusal, when able to do so, to provide for them."	Authorizes jurisdiction over inter alia a child "who is suffering emotional damage, evidenced by severe anxiety, depression or withdrawal or untoward aggressive behavior or hostility toward self or others, and his/her parents are not willing to provide treatment for him/her."	Defines "deprived child" as inter alia one who is "without proper parental care or control ... necessary for his physical, mental, or emotional health, or morals and the deprivation is not due primarily to the lack of financial means of his parents, guardian or other custodian."

Summary of Positions: Two groups recommend jurisdiction on the basis of emotional neglect; one of these groups defines the term specifically.

Two groups do not explicitly mention emotional neglect. They offer generalized definitions of neglect which may or may not include cases of emotional harm.

6. Analysis of the Issue:

Historically, neglect statutes have not authorized intervention on the basis of emotional harm to children. Professor Sanford Katz observes,

> If judges interpret words such as "neglect," "cruelty" or "depravity" to include situations relating to the mental health of the child and parents, it would not be essential to specifically recognize "emotional neglect" in the statute.[8]

After noting the hesitancy of judges to adopt such an approach, Professor Katz concludes,

> It is thus highly desirable that legislative recognition be given to "emotional neglect" as an independent legal standard. This view is a result of experience showing judicial reluctance to carve out categories of neglect that are not clearly provided for in the statute itself. Specific statutory reference to mental health would provide the needed "peg" upon which to hang a finding of emotional deprivation.[9]

The analysis underpinning the contention that intervention should be authorized in cases of emotional neglect is the argument that

> /ā/n increasing body of evidence shows that children who suffer early emotional disturbances often display later mental illness or antisocial behavior. As adults they may be incapable of caring for themselves or their own children. If severely disturbed children are not receiving treatment, the reasons for intervening are little different from those justifying protecting children from physical injury.[10]

Despite the persuasive analysis of numerous commentators who favor intervening on the basis of emotional harm, a strong case can certainly be made for refusing to intervene on this basis. Among the most forceful arguments for not intervening in cases of emotional neglect are the contentions that the concept is difficult or impossible to define and that such intervention necessitates making predictions regarding child development which are simply impossible given the present state-of-the-art. Moreover, it can be argued that authorizing intervention on this basis could encourage extensive

state intrusion. This might result in intervention which proves harmful to children or results in their removal from adequate (though admittedly not optimal) environments.[11] These difficulties when coupled with the demonstrated shortcomings of dispositional alternatives make the decision as to whether or not to intervene on the basis of emotional neglect a difficult one, indeed.

If intervention on this basis is deemed desirable, it can be authorized either on the basis of broad statutory language or on the basis of a formulation which enumerates particular symptoms of emotional damage. An example of a broad-scoped statute is found in Professor Judith Areen's model draft which defines "neglected child" as

> one whose physical or emotional health is significantly impaired or in danger of being significantly impaired, as a result of the action or inaction of his parent, guardian, or primary caretaker.[12]

Professor Areen defends this formulation by arguing that,

> In the future it may be possible to provide more descriptive content to the phrase "emotional health." ... Until the experts in child behavior reach greater consensus, however, a general phrase is most appropriate. Expert testimony in court or legislative hearings should in time provide a suitable list of signs and symptoms.[13]

The 1975 Tentative IJA/ABA Standards reject this analysis and offer a more specific formulation. They authorize intervention when a child

> is suffering serious emotional damage, evidenced by severe anxiety, depression or withdrawal or untoward aggressive behavior or hostility toward self or others and his/her parents are not willing to provide treatment for him/her.[14]

This list of symptoms was formulated after a thorough review of the literature and extensive discussions with psychiatrists, psychologists, psychoanalysts, pediatricians and social workers.[15]

Since intervening on the basis of specifically enumerated symptoms of emotional harm is one of the most controversial aspects of the Tentative IJA/ABA Standards, Professor Wald offers an extensive defense of this approach.[16] While agreeing with the analysis that intervention on the basis of emotional neglect is desirable, he argues that broad-scoped terminology should be avoided since "/s/uch

language invites unwarranted intervention, based on each social worker's or judge's brand of 'folk psychology.'"[17] He argues that this could result in arbitrary overintervention which effectively undercuts the preference for parental autonomy.

Moreover, Professor Wald summarizes the evidence on the immense difficulties of predicting emotional damage on the basis of parental behavior and suggests that "it is particularly essential that intervention with regard to emotional neglect be premised solely on damage to the child."[18] In his view, the difficulties of long-term predictions necessitate a definition which focuses on specific symptoms of serious emotional harm. Professor Wald summarizes his position by noting that,

> Reliance on specific terminology is necessary in order to limit the scope of intervention, to make clear to all decision-makers the types of harm that justify official action, and to place some constraints on expert testimony so that it will not be based solely on individual views regarding proper child development. ... The proposed standard assumes that overintervention and overremoval are more significant problems than underintervention, and that therefore more children will be benefited than will be harmed by restricting coercive intervention.[19]

A final question in the area of emotional neglect is whether intervention should be restricted to cases where the emotional damage is caused by parental conduct. The IJA/ABA is the only past standards-setting group which has specifically considered this issue. Professor Wald argues,

> If a child evidences serious damage and the parent fails to provide help, intervention is justified regardless of the cause of harm. Fault concepts, stemming from the parent orientation of existing law, ... /should be/ discarded, as they add an often unprovable (as well as misconceived) element to factfinding that thwarts necessary intervention.[20]

7. Task Force Standards and Rationale:

After careful consideration of this difficult issue, the Task Force found the IJA/ABA position on the subject to be generally persuasive. The Task Force's standard specifies that,

> Coercive state intervention should be authorized when a child is suffering serious emotional damage, evidenced by severe anxiety, depression or withdrawal, or untoward aggressive behavior toward self or others, and the parents are unwilling to permit and cooperate with necessary treatment for the child.[21]

The commentary emphasizes that intervention on this basis is justified since children can suffer crippling, long-term harm from emotional neglect. But is also stresses that the criteria for intervention should be narrowly defined and periodically reviewed to see how they are working and to incorporate new knowledge.

The Task Force standard differs from the IJA/ABA draft in that it requires the parent to "cooperate with necessary treatment." This stipulation

> is intended to insure coverage of those cases where it is obvious to all concerned that the parents themselves are the sole cause of the child's problems and despite their pro forma assent to the child's treatment they are unwilling to make meaningful efforts to solve the problem.[22]

Footnotes:

[1]See, e.g., S. Katz, When Parents Fail, pp. 60-68 (1971); Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., pp. 1014-20 (1975).

[2]See, e.g., Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 933 (1975).

[3]See, e.g., Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §2.1(c) (Tentative Draft 1976).

[4]The 11 states are: Connecticut, Delaware, District of Columbia, Iowa, Michigan, Minnesota, Montana, North Dakota, Oregon, Pennsylvania, and Tennessee. Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 75-349 (1975).

[5]D.C. Code Ann. §16-2301(9)(B) (1973).

[6]Idaho Code Ann. §16-1626 (Supp. 1973).

[7]N.Y. Family Ct. Act §1012 (McKinney Supp. 1974).

[8]S. Katz, supra note 1, p. 67 (footnote omitted).

[9]Id., p. 68.

[10]Wald, supra note 1, p. 1015 (footnotes omitted).

[11]Cf. id., p. 1017.

[12]Areen, supra note 2, p. 933.

[13]Id.; see also S. Katz, supra note 1, p. 68.

[14]See note 3, supra.

[15]Professor Wald notes, "Undoubtedly other professionals would select other symptoms in addition to or in lieu of those proposed." Wald, supra note 1, p. 1019 n. 181.

[16]See id., pp. 1016-1020.

[17]Id., p. 1016.

[18]Id., p. 1017.

[19]Id., p. 1020.

[20]Id.

[21]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[22]Id.

1. Issue Title: Sexual Abuse--Should sexual abuse constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

Perhaps the most universally condemned behavior of a parent or other family member toward a child involves sexual conduct with the child. If one wishes to authorize coercive intervention on this basis, one's approach to the issue will probably be structured by one's general posture in drafting neglect laws (see Abuse and Neglect Comparative Analyses 2 and 3). If one defines the bases for intervention principally in terms of parental behavior, general references to parental "unfitness" or "lack of proper parental care" would cover these cases. If one authorizes intervention on the basis of harms to the child, a jurisdictional provision on this subject may: (1) refer to "sexual abuse" without defining the term further; (2) refer to "sexual abuse" as defined in the state penal code; or (3) specifically enumerate the conduct one wishes to consider as "sexual abuse."

3. Summary of Major Positions:

While most states do not specifically mention sexual abuse in neglect statutes, courts do regularly intervene on this basis. Most past standards-setting groups have not addressed this issue specifically. This is consistent with their generalized focus on parental behavior.

The Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards,[1] however, specifically authorizes intervention on this basis. It suggests that a state should define "sexual abuse" in accordance with its penal code. Those standards further suggest that criminal proceedings against the parent are generally inappropriate in such cases.

4. Summary of State Practices:

A wide variety of state laws proscribe intra-family sexual relations. Such cases are brought within civil neglect jurisdiction by statutory provisions relating to parental "depravity or moral unfitness,"[2] physical[3] or emotional[4] abuse and "lack of proper parental care."[5] Thus, all states authorize neglect jurisdiction in cases of this type. In addition, such conduct can generally be prosecuted under criminal sex statutes, "contributing to the delinquency" statutes and--in those few states which have them--criminal neglect statutes.

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Authorizes jurisdiction over inter alia a child "who is neglected as to proper or necessary support or education as required by law, or as to medical or other care necessary for his well-being" or "whose environment is injurious to his welfare."	Defines "neglected child" as inter alia one "who is physically abused by his parents, guardian or other custodian or who is without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide them."	Authorizes jurisdiction over inter alia a child who "has been sexually abused by his/her parent or a member of his/her household. /Alternative: A child has been sexually abused by his/her parent or a member of his/her household, and is seriously harmed physically or emotionally thereby./"	Defines "deprived child" as inter alia one who "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian or other custodian."

Summary of Positions: One group explicitly authorizes intervention on the basis of sexual abuse. Three groups offer general formulations which would cover such cases.

6. Analysis of the Issue:

Courts regularly invoke neglect jurisdiction to intervene in cases where a child has been "sexually abused."[6] If the state statute does not mention the subject directly, "/u/ndoubtedly all courts would find that incest behavior makes a parent 'unfit' or the home 'unsuitable'."[7] If one defines the bases for neglect jurisdiction principally in terms of parental behavior, such formulations as "parental unfitness" or "immorality" would suffice to cover these cases (see Abuse and Neglect Comparative Analyses 2, 3 and 5). Under this approach, the potential for definitional difficulties with the term "sexual abuse" may be avoided since the judge may wish to consider a wide range of factors in determining parental fitness. A broad reading of the parens patriae powers clearly supports such an approach.

If, however, one defines the bases for coercive intervention primarily in terms of harms to the child, the issue is somewhat more difficult. Cases of "sexual abuse" may or may not fall within jurisdictional categories relating to "physical abuse"[8] or "emotional neglect," depending on how those categories are defined. A question may also arise as to whether or not a child suffers serious harm in such cases. After a thorough review of the literature on the subject, Professor Wald indicates that "there are very few studies demonstrating the negative impact of "sexual 'abuse'" and that the traumatic impact of intervention may prove more damaging to the child than the parental behavior.[9] Nonetheless, in light of the emotional trauma associated with public disclosure of the situation, the potential for criminal prosecution against the parent and the fact that such cases generally involve a family environment which is problematic in a number of respects, he suggests that coercive intervention is appropriate in such cases. Other commentators disagree with Professor Wald's assessment that the harm in such cases may not be readily demonstrable.[10] These writers advocate intervention based on the specific harm which they conclude children suffer in such cases.[11] Thus, although they employ different lines of argument, the commentators agree that intervention on the basis of "sexual abuse" is appropriate.

It should also be noted that under a system which focuses on harm to the child, intervention would be authorized if the abuse were caused, for example, by a sibling rather than a parent. It is unclear whether such cases would be covered under a formulation relating to "lack of proper parental care." This would presumably be a matter committed to the judge's discretion in interpreting the statute.

Within the context of a child-focused system, the term "sexual abuse" may be: (1) left undefined; (2) read as coextensive with the relevant sections of the state penal code; or (3) defined by the specific enumeration of types of conduct deemed offensive. In

general, there may be some potential for definitional difficulty since,when the activity is less specific that intercourse, it may be difficult to distinguish between appropriate displays of affection and fondling or other possibly disturbing behavior. However, since only the most extreme forms of conduct are generally reported, this difficulty may, as a practical matter, not be too substantial.

An example of the first approach is contained in the child abuse reporting laws of Idaho and Virginia. These laws enumerate specific types of physical harms and include references to "sexual abuse"[12] or "sexual molestation."[13] A similar approach is employed by the Education Commission of the States.[14] This approach charges the judge with the responsibility of defining the terms of a case-by-case basis. The Tentative IJA/ABA Juvenile Justice Standards define "sexual abuse" as it is defined in the relevant sections of the state penal code. This approach may be defended as avoiding definitional difficulties and as encouraging the use of neglect proceedings in such cases rather than criminal prosecutions[15] (although, of course, criminal proceedings could be maintained in lieu of or in addition to a neglect hearing, depending on one's judgment on that issue). There is apparently no illustration of the third approach--a particularized definition of "sexual abuse"--in the existing literature on child neglect. Nonetheless, formulating a definition which specifically enumerates the conduct deemed objectionable is certainly a viable option and could be defended as eliminating potential definitional difficulties.

Finally, it should be indicated that the Tentative IJA/ABA Standards suggest that criminal proceedings against the parent should be eliminated in such cases. Professor Wald argues that when a child is compelled to testify in such proceedings--regardless of the outcome--it is generally very traumatic for the child. He also suggests that recent studies indicate that the parent's incarceration may add to the child's problem by increasing the child's feelings of guilt and precluding meaningful family treatment. He concludes,

> /T/he court in a neglect proceeding is concerned with the well-being of the child and open to a greater range of dispositions than the criminal court. These proceedings will likely be less punative and more treatment-oriented that criminal proceedings.[16]

Other commentators have questioned the value of family-oriented therapeutic endeavors with regard to child sex offenders and suggested that retaining the parent in the home may prove harmful to the child.[17]

In summary, one can authorize coercive intervention in cases of "sexual abuse" on the basis of general formulations regarding parental behavior (without mentioning the issue specifically) or on the basis of child-focused "sexual abuse" provisions. The latter approach can leave the term undefined, rely on the state penal code or enumerate specific types of offensive conduct. Neglect proceedings may or may not be viewed as replacing criminal prosecutions.

7. Task Force Standards and Rationale:

The Task Force felt that intervention in these cases was clearly appropriate and authorized jurisdiction in Standard 11.13.

> Coercive state intervention should be authorized when a child has been sexually abused by a member of the household.[18]

The Task Force concluded that the harms of disclosure, the potential for criminal charges and the other negative factors generally operative in these families all justified granting jurisdiction in cases of sexual abuse. The standard covers sexual abuse by the parent, other caretaking adult or a sibling. On the subject of definition, the Task Force's commentary specifies that,

> It is intended that intervention be authorized whenever the subject action would constitute a violation of the relevant sections of the state penal code (or would have been a violation if those laws have been repealed).[19]

As to the choice between criminal proceedings and intervention on the grounds of sexual abuse, the commentary outlines the harms of criminal prosecutions set forth above and concludes,

> /C/riminal charges for sexual abuse by parents or other family members should be utilized only in extremely rare cases, if at all. From the child's perspective, the availability of endangered child proceedings which focus directly on protecting the child eliminate the need for criminal prosecutions.[20]

Footnotes:

[1]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §2.1(d) (Tentative Draft 1976).

[2]See "Summary of State Practices," Abuse and Neglect Comparative Analysis 5.

[3]See "Summary of State Practices," Abuse and Neglect Comparative Analysis 8.

[4]See "Summary of State Practices," Abuse and Neglect Comparative Analysis 12.

[5]See "Summary of State Practices," Abuse and Neglect Comparative Analysis 7.

[6]See V. Fontana, Somewhere a Child is Crying, pp. 95-99 (1973).

[7]Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., p. 1024 n. 205 (1975).

[8]For an example of a physical abuse statute which includes "sexual molestation" see the Idaho reporting statute. Idaho Code §16-1641 (Cum. Supp. 1973).

[9]Wald, supra note 7, p. 1025.

[10]See, e.g., V. Fontana, supra note 6.

[11]See, e.g., Y. Tormes, Child Victims of Incest (1968); cf. V. De Francis, Protecting the Child Victim of Sex Crimes Committed by Adults (1969).

[12]Va. Code Ann. §16.1-217.1 (Cum. Supp. 1973).

[13]See note 8 supra.

[14]See Early Childhood Task Force, Education Commission of the States, Child Abuse and Neglect: Alternatives for State Legislation, pp. 25-28 (1973) (reporting law).

[15]For a review of existing state laws regulating incest behavior see American Law Institute, Model Penal Code, Tentative Drafts No. 1, 2, 3 & 4 (1965).

[16]Wald, supra note 7, p. 1027.

[17]See Y. Tormes, supra note 11.

[18]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[19]Id.

[20]Id.

1. Issue Title: Delinquent Behavior--Should delinquent behavior (as a result of parental pressure or approval) constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

This issue, of course, in no way suggests that delinquency proceedings should be generally consolidated with neglect jurisdiction; rather, the issue usually refers to that narrow range of cases where, for example, a parent furnishes his minor child with marijuana or secures his assistance in committing a minor theft. In these cases the key question is: should the relationship between the parent's behavior and the child's conduct be examined in (a) criminal proceedings against the parent and/or delinquency proceedings against the minor; or (b) neglect proceedings? If neglect jurisdiction is viewed as appropriate in these cases, it may be authorized (a) whenever a child's delinquent conduct results from "parental neglect" or an "unfit home," or (b) only in those cases where a parent directly approves, guides, supervises or pressures the child to commit delinquent acts.

In a few cases this issue may interface with one's approach to status offenders.

3. Summary of Major Positions:

The NCCD Standard Act, the Uniform Juvenile Court Act and the HEW Model Act do not explicitly address this issue.[1] Thus, under those model drafts either such cases fall within the rubric of "lack of proper parental care" or, in practical effect--if not by implicit intent--those standards suggest that the issue should be considered in a parent's criminal proceedings or a minor's delinquency proceedings or a combination of both.

On the other hand, the laws of at least two states authorize neglect jurisdiction when a child engages in delinquent conduct which "results in whole or in part from parental neglect."[2] The Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[3] rejects the latter formulation as too broad-scoped. It does, however, authorize neglect jurisdiction when a minor commits delinquent acts as a direct result of parental encouragement, guidance or approval.

It should be noted that one's approach to status offenses may, to some extent, overlap with this potential category of neglect jurisdiction. The rubric of status offenses would, however, probably not subsume this entire issue.

4. Summary of State Practices:

State practices in this area are somewhat difficult to summarize because, although apparently only two states have statutory provisions directly on point, all states have formulations which may cover at least part of the issue. Minnesota and Wisconsin authorize jurisdiction when a child commits delinquent acts which result "in whole or in part from parental neglect."[4] In addition, 21 states provide for coercive intervention when the parent fails to send the child to school or the child is habitually truant.[5] Eleven jurisdictions view a minor's violation of child labor laws as a ground for determining child neglect.[6] And, all states have "lack of proper parental care" provisions which may or may not cover a wide variety of cases in this general area.[7]

5. Summary of Positions Recommended By Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Authorizes jurisdiction over inter alia a child "who is neglected as to proper or necessary support, or education as required by law, or as to medical or other care necessary for his well-being."	Defines "neglected child" as inter alia one "who is without proper parental care and control necessary for his well-being because of the faults or habits of his parents, guardian or other custodian or their neglect or refusal, when able to do so, to provide them."	Authorizes jurisdiction over inter alia a child who "is committing delinquent acts as a result of parental encouragement, guidance or approval."	Defines "deprived child" as inter alia one who "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian, or other custodian."

Summary of Positions: Three groups offer general formulations which may authorize intervention in these cases.

One group provides jurisdiction over children who commit delinquent acts as a result of parental guidance or approval.

6. Analysis of the Issue:

When a child violates the law, some form of intervention is justified because the conduct is illegal, and thus, presumably undesirable. In the cases under discussion, the key question is: what type of proceeding should be utilized to examine the relationship between the parent's actions and the child's delinquent conduct and to achieve appropriate results?

One option is to initiate criminal proceedings against the parent. The traditional rationale for "contributing to the delinquency of a minor" charges may be viewed as applying to these cases and the fact of parenthood can be seen as incidental or irrelevant. On the other hand, this analysis can certainly be criticized. For example, it may be argued that,

> The purpose of a criminal trial is to punish the parent, not to protect the child's interest. Court dispositions may actually be harmful to the child. For example, criminal proceedings may result in incarceration of a parent who should be left in the home because of the negative impact of removal on the children. Little, if anything, is done in criminal proceedings to minimize the harmful aspects of the procedures on children. Therefore, criminal proceedings should be utilized only in extreme cases, if at all.[8]

A second option is to raise these issues in a delinquency proceeding against the child--either as an affirmative defense or in the dispositional phase of the proceedings. Those who oppose such an approach argue that it is unfair to stigmatize the minor by labeling him a delinquent when he has in fact acted at the behest of his parents. The commentators also note that the court handling juvenile matters may have fewer dispositional alternatives after a delinquency finding than after a neglect finding.[9]

A third approach is to deal with this category of cases in neglect proceedings. Those who favor this option argue that such proceedings are more protective of the child's interests and may offer a wider range of dispositional alternatives. This approach can be implemented either by a broadly-drafted statute or a formulation which narrowly defines the criteria for intervention. For example, the Minnesota statute[10] illustrates the broad-scoped approach by defining "neglected child" as inter alia one

> who comes within the provisions of subdivision 5, /delinquent/ but whose conduct results in whole or in part from parental neglect.

General formulations regarding "lack of proper parental care" or "unfit homes" may also be read as covering cases of parent-instigated delinquent conduct. Both the approach of the Minnesota statute and the broadly-drafted formulations vest the judge with considerable discretion in applying the standard on a case-by-case basis.

The Tentative IJA/ABA Standards[11] oppose such broad formulations. They authorize coercive intervention only in those cases where a child

> §2.1(f) is committing delinquent acts as a result of parental encouragement, guidance or approval.

Professor Wald suggests,

> /I/t must be recognized that attributing a child's behavior directly to parental influence is often very difficult. ... /A/ social worker or probation officer may file a neglect allegation because he feels that a child's behavior is related to his poor home conditions, even though the parent neither encouraged nor approved of the child's actions.[12]

Arguing against such practices Professor Wald concludes,

> Unless the parents directly encouraged or participated in the delinquent act, it is virtually impossible to show that a minor committed a given offense because his parents were "neglecting" him. Issues of responsibility, causation and the role of the family could arise in all delinquency cases. Therefore, neglect charges should only be permissible when the minor's delinquent acts are directly caused by the parent.[13]

Finally, it should be noted that one's approach to status offenses may, to some extent, interface with this issue. If, for example, violation of compulsory education laws or minimum age laws regarding alcoholic beverages is regarded as a "delinquent act," then such cases might fall within this category and under the rubric of "Families With Service Needs" as well. However, the cases which might be dealt with under a "Families With Service Needs" approach do not exhaust the range of cases covered by this Comparative Analysis. For example, cases where a parent supplied a child with marijuana would usually not be covered by jurisdiction over status offenders.

7. Task Force Standards and Rationale:

The Task Force authorized jurisdiction in this area on the basis of Standard 11.15.

> Coercive state intervention should be authorized when a child is committing delinquent acts as a result of parental pressure, encouragement or approval.[14]

The Task Force felt that requiring a direct causal connection between the parental conduct and the delinquent act was necessary to prevent the ill-considered use of neglect petitions as a "lesser charge." In those cases where a causal link can be demonstrated, the Task Force viewed intervention under Standard 11.15 as preferable to either delinquency proceedings or "contributing to the delinquency of a minor" charges against the parent. Its commentary on this subject generally follows the arguments set forth in the preceding section of this Comparative Analysis.

Footnotes:

[1]Their comments on "education as required by law" may, however, touch on part of the issue--at least indirectly (see "Summary of Positions Recommended by Standards Groups" infra).

[2]See Minn. Stat. §260.015(h) (1971); Wis. Stat. Ann. §48.02(j) (Supp. 1973).

[3]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §2.1(f) (Tentative Draft 1976).

[4]See note 2 supra.

[5]The 21 states are: Alabama, Arkansas, District of Columbia, Florida, Hawaii, Idaho, Kansas, Kentucky, Michigan, Mississippi, Missouri, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Washington and Wyoming. Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[6]The 11 states are: Alabama, Alaska, Arkansas, Kansas, Minnesota, Nebraska, New Hampshire, Rhode Island, South Carolina, Washington and Wisconsin. Id.

[7]Id.

[8]Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stan. L. Rev., p. 1035 (1975) (footnotes omitted).

[9]See, e.g., id., pp. 1035-36.

[10]See note 2 supra.

[11]See note 3 supra.

[12]Wald, supra note 8, p. 1036 (footnotes omitted).

[13]Id.

[14]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Unlawful Placement--Should placement in an unlicensed/inadequate facility constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

This issue is simply stated: if a parent leaves a child in an unlicensed "foster home" or unlawfully places a child for adoption, should this constitute a basis for neglect jurisdiction? The case law on this subject typically involves parents who leave their children with neighbors and then show no further interest in them. Thus, the topic is somewhat related to the issue of abandonment.[1] (See Abuse and Neglect Comparative Analysis 4.)

If jurisdiction on this basis is deemed appropriate, the typical statutory formulation authorizes intervention when a child "has been placed for care or adoption in violation of law."[2]

3. Summary of Major Positions:

The rationale for intervening on this basis is apparently that it provides a mechanism for enforcing state statutes regarding adoption procedures and foster home licensing. Such intervention implicitly presumes that unlawful placement jeopardizes a child's well-being.

There are three major arguments against intervention on this basis: (1) laws regarding foster care and adoption should be enforced directly--not by means of neglect statutes; (2) in practice, intervention on this basis discriminates against lower-class families; and (3) if children in this category are genuinely endangered, the category is redundant; if not intervention may be inappropriate.

4. Summary of State Practices: [3]

Basis for Jurisdiction	Number of States	Names of States
Statute explicitly specifies placement in an unlicensed foster care facility or unlawful placement for adoption as a ground for determining neglect.	11	DC, GA, LA, MN, NV, NM, NC, ND, OH, PA, WI
Does not explicitly authorize jurisdiction on this basis; general statutory provisions regarding "lack of proper parental care" or "abandonment" may or may not cover such cases.	All Other States	

Summary of Practices: Eleven states explicitly authorize jurisdiction on this basis. All other states have broad statutory provisions which may or may not cover such cases.

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Does not authorize jurisdiction on this basis.	Authorizes jurisdiction over any child "who has been placed for care or adoption in violation of law."	Does not authorize jurisdiction on this basis.	Authorizes jurisdiction over any child "who has been placed for care or adoption in violation of law."

Summary of Positions: Two groups authorize jurisdiction on this basis; two groups do not.

6. Analysis of the Issue:

Although two past standards-setting groups[4] have authorized intervention in the event of unlawful placement, neither sets forth a rationale for such intervention. Nonetheless, the argument in favor of intervening on this basis seems quite clear. It consists of two major points. First, it can be argued that such intervention provides a desirable means of enforcing state statutes relating to foster care licensing and adoption procedures. Second, licensing of foster care facilities and formalized adoption procedures are obviously intended to protect children; thus, one can conclude that violation of such laws properly generates the presumption that children placed by the illegal procedure are (potentially) endangered and should fall within the ambit of the court's jurisdiction. Proponents of such intervention argue that the very eixstence of formalized procedures regarding adoption and placement evidences a legislative judgment that deviation from those procedures may jeopardize the child's well-being.

The case against intervening on this basis consists of three arguments. First, it is contended that this is an inappropriate use of neglect laws. Professor Areen suggests,

> Such provisions clearly are designed more to enforce state adoption or licensing statutes than to meet the needs of children. The conceptual clarity of the neglect statutes would be increased if more direct enforcement that did not burden the neglect process were provided.[5]

Second, commentators contend that, in practice, these statutes are applied in a discriminatory fashion against lower-class families. After observing that a poor parent who plac_ his child with an equally poor neighbor may well be charged with neglect, Professor Sanford Katz notes,

> It seems clear, however, that middle- and upper-class parents who leave their children in the care of nursemaids or place them in private boarding schools, failing to visit them for long periods of time, would not be regarded by the community as /"neglectful"7.... In most instances community officials will categorize events that occur in middle- and upper-class families as "social problems," not cases of individual parental neglect.[6]

Third, it can be argued that if children who are unlawfully placed are genuinely endangered, they will be covered under another statutory classification (such as emotional neglect or inadequate supervision), in which case this category of jurisdiction is redundant. On the other hand, if such children are not endangered, intervention may be viewed as inappropriate.

Thus one group of commentators argues that if the child is endangered focusing on harm to the child will bring the case before the court and that a generalized focus on the violation of formal procedures may result in discriminatory enforcement. Another group of writers contends that the legislative judgment in favor of procedural protections should be read as authorizing neglect jurisdiction to insure that violation of the procedural safeguards does not generate the harms the legislature intended to avert.

7. Task Force Standards and Rationale:

The Task Force concluded that authorizing neglect jurisdiction on this basis was inappropriate. It felt that if there were a substantial risk of serious harm to the child the case would fall within one of the other criteria for intervention. Furthermore, it saw no basis for employing the rubric of abuse and neglect to achieve legislative objectives which could be attained through adequate enforcement of existing laws on placement and adoption.

Footnotes:

[1]See S. Katz, When Parents Fail, p. 24 (1971).

[2]See, e.g., Pa. Stat. Ann. §50-102 (ii) (Cum. Supp. 1973).

[3]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[4]See W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs, p. 13 (DHEW Publication No. OHD/OYD 75-26041); National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act §2(5)(ii) (1968).

[5]Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 926 (1975).

[6]S. Katz, supra note 1.

1. Issue Title: Disability--Should the need for special care or educational services because of disability constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

This is a minor issue relating to statutory phrasing and conceptual clarity of neglect laws. A small number of states have statutes which authorize neglect jurisdiction over children who require special medical or educational services because of physical or mental disability. The issue is: should such laws be (a) abolished, (b) consolidated with "failure to provide medical care" provisions, or (c) maintained as separate jurisdictional provisions?

3. Summary of Major Positions:

Laws dealing with this issue are apparently intended to provide assurance that the handicapped are properly cared for. Nine states have statutory provisions on this subject. In keeping with the position that classical "dependency" jurisdiction should be abolished (see Abuse and Neglect Comparative Analysis 1), no past standards-setting group has authorized jurisdiction over such cases.

4. Summary of State Practices:

Only nine states have jurisdictional provisions on this subject.[1] The Minnesota statute is illustrative. It authorizes neglect jurisdiction over a child who is

> without special care made necessary by his physical or mental condition because his parent, guardian, or other custodian neglects or refuses to provide it.[2]

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Does not explicitly address the issue. Authorizes jurisdiction over inter alia a child "who is neglected as to proper or necessary support or education as required by law, or as to medical or other care necessary for his well-being."	Does not explicitly address the issue. Defines "neglected child" as inter alia one "who is without proper parental care and control necessary for his well-being because of the faults or habits of of his parents, guardian, or other custodian or their neglect or refusal, when able to do so, to provide them.	Does not explicitly address the issue.	Does not explicitly address the issue. Defines "deprived child" as inter alia one who "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian or other custodian."

Summary of Positions: None of the four groups explicitly addresses the issue. Three groups employ broad-scoped formulations which may or may not cover such cases.

6. Analysis of the Issue:

Statutory provisions on this subject are presumably intended to provide jurisdictional authority over handicapped children to insure that they receive proper care. The rationale for such laws is probably the same as the analysis underlying classical "dependency" jurisdiction, viz. that a broad reading of the parens patriae power means that the state has judicial responsibility to intervene to insure that children receive adequate care. This position has been rejected by all past standards-setting groups (see Abuse and Neglect Comparative Analysis 1). Although it is apparently not discussed in any of the literature on child neglect laws, there may be an additional rationale for--or, more accurately, practical explanation for the existence of--such statutes. Federal or state funding of aid-to-the-handicapped programs may in some cases have requirements that children be directed to the programs by court order.

Professor Judith Areen argues that statutory provisions of this nature should be abolished. She argues that this type of statute

> apparently is a tool for the effectuation of another policy--aid to handicapped children. ... /T/he provision of direct relief would be preferable because it would reduce confusion in the neglect area, and would avoid the forcible removal of children and the attachment of stigma to the family where only financial aid instead of separation is needed.[3]

If one wishes to retain such statutory provisions they could be (a) retained in their present form or (b) consolidated into a reworded "failure to provide medical care" provision.

7. Task Force Standards and Rationale:

Like the other four standards groups that have reviewed neglect laws, the Task Force saw no reason to authorize jurisdiction on this basis. The Task Force believed that necessary social services should be provided directly by the appropriate nonjudicial agencies without resorting to formal court proceedings (see Abuse and Neglect Comparative Analysis 1).

Footnotes:

[1]The nine states are Alaska, Connecticut, Iowa, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma and Wisconsin. Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 924 n. 193 (1975).

[2]Minn. Stat. §260-015(d) (Supp. 1973).

[3]Areen, supra note 1, p. 924.

1. Issue Title: Improper Occupation--Should a child's engaging in a dangerous or improper occupation constitute a basis for family court jurisdiction; and, if so, how should it be defined?

2. Description of the Issue:

Some states authorize neglect jurisdiction when a child engages in a dangerous occupation or violates the child labor laws. In the absence of an independent statutory provision on this subject, such cases may fall within other jurisdictional categories relating to harm to the child. Thus, the key question in this area is: do such provisions really add anything of importance to neglect jurisdiction or should they be abolished?

Where such jurisdiction is authorized, the typical statutory formulation covers a child who engages "in an occupation dangerous to life or limb or injurious to the health or morals of such child."[1]

3. Summary of Major Positions:

Eleven states authorize neglect jurisdiction when a child engages in what is viewed as a dangerous or improper occupation. Such provisions are apparently intended to serve as an enforcement mechanism for child labor laws and to provide an index of (potential) harm to the child.

No past standards-setting group has explicitly authorized jurisdiction over these cases. And, numerous commentators have advocated abolishing this jurisdictional category and implementing more direct enforcement of child labor laws.[2]

4. Summary of State Practices:[3]

Basis for Jurisdiction	Number of States	Names of States
Explicitly authorize jurisdiction when a child engages in a dangerous or immoral occupation.	11	AL, AK, AR, KS, MN, NB, NH, RI, SC, WA, WI
Do not explicitly authorize jurisdiction on this basis.	All other states	

Summary of Practices: Eleven states explicitly authorize jurisdiction on this basis; the others do not.

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Does not explicitly address the issue. Contains a general provision on lack of "care necessary for [the child's] well-being."	Does not explicitly address the issue. Contains a general provision on lack of "proper parental care."	Does not explicitly address the issue. Authorizes jurisdiction on the basis of specifically enumerated harms to the child.	Does not explicitly address the issue. Contains a general provision on lack of "proper parental care."

Summary of Positions: Three groups do not address the issue; they may or may not cover such situations under general "lack of proper parental care" provisions.

One group does not address the issue, but may authorize jurisdiction under other provisions if the child were suffering or likely to imminently suffer serious harm.

6. Analysis of the Issue:

The Nebraska neglect statute[4] authorizes jurisdiction over a child who has

> engaged in an occupation dangerous to life or limb or injurious to the health or morals of such child.

Similarly, the Wisconsin statute[5] covers a child whose

> occupation, behavior, condition, environment or associations are such as to injure or endanger his welfare or that of others.

The apparent rationale for these statutes is the analysis that if a child engages in a dangerous occupation, he may be harmed and thus should be subject to the court's jurisdiction for his protection. The statutes also provide a means of enforcing child labor laws.

Professor Judith Areen suggests that these jurisdictional provisions should be abolished. She argues that,

> Like the illegal placement provisions, the child labor neglect provisions should be eliminated, and direct enforcement against employers should be instituted. Child labor provisions should not distort the already troubled neglect procedure.[6]

The Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[7] illustrates an approach which makes no reference to a child's occupation, but which may authorize jurisdiction in some of these cases. Since those standards do not rely on concepts of parental "fault" (see Abuse and Neglect Comparative Analysis 3), such cases might fall within the court's jurisdiction under another provision (such as inadequate supervision or protection) if the child were suffering or were imminently likely to suffer serious harm.

Thus, proponents of statutory provisions of this nature suggest that a child's occupational status provides an index of potential harm. Those who oppose such formulations contend that under a system which focuses on harms to the child, reference to the minor's employment status is irrelevant.

7. Task Force Standards and Rationale:

Since the Task Force's standards are drafted in terms of serious, specifically defined harms to the child, the Task Force saw no justification for a separate standard on this subject. It felt that child labor laws should be enforced directly, without resorting to neglect proceedings.

Footnotes:

[1]See, e.g., Neb. Rev. Stat. §43-201(e) (1968).

[2]See, e.g., Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 925 (1975).

[3]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 25-27 (1975).

[4]See note 1 supra.

[5]Wisc. Stat. Ann. §48.13(f) (Supp. 1973).

[6]Areen, supra note 2.

[7]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

1. Issue Title: Emergency Removal--What standards should govern emergency removal of endangered children from the home?

2. Description of the Issue:

To protect children who are genuinely endangered it may be necessary to remove them from the home on an emergency basis. All past standards groups and commentators are agreed that there should be formalized directives for this procedure. There has been little variation in the proposals of past standards groups on this issue. Pertinent questions are: (1) who should be authorized to undertake such removal; (2) on what basis; (3) what time limit should apply between emergency custody and a hearing on the custody and filing a petition; and (4) should other directives be given?

3. Summary of Major Positions:

Some groups have authorized only law enforcement officials to undertake emergency custody. Others have suggested that physicians and social welfare personnel should also have this power.

Removal is generally authorized only to forestall (potential) "illness or injury." Some groups impose a higher level of severity-of-(potential)-injury requirement than others, but all invoke some criteria regarding gravity of harm. Generally, it is suggested that a petition must be filed and a hearing on the custody must be held within 24 to 48 hours after emergency removal. The precise time limit may certainly be varied; the overriding suggestion is that action be taken expeditiously.

In addition, a standard on this subject may authorize emergency medical treatment without parental consent. One group strongly urges the explicit inclusion of a provision on parental visitation rights.

4. Summary of State Practices:

The most recent and comprehensive compendium of state neglect laws[1] does not contain data on this subject; hence it is somewhat difficult to accurately summarize state practices in this area. Many states authorize such procedures informally.[2] Some do so explicitly by statute. Thus, for example, the New York Family Court Act[3] authorizes police officers, physicians, employees of a department of social services or agents of a society for prevention of cruelty to children to temporarily remove children without parental consent if there is "imminent danger to the child's life or health" and "there is not time enough to apply for /a court/ order." One commentator[4] indicates that Massachusetts, Michigan and Virginia have similar statutes.

5a. Summary of Positions Recommended by Standards Groups (Re: Bases and Procedure for Removal):

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Stipulates that "A child may be taken into custody by any officer of the peace without order of the judge ... when he is seriously endangered in his surroundings, and immediate removal appears to be necessary for his protection."	States that "A child may be taken into custody ... by a law enforcement officer having reasonable grounds to believe that the child is suffering from illness or injury or in immediate danger from the child's surroundings and that the child's immediate removal from such surroundings is necessary for the protection of the health and safety of such child" or "that the child has no parent, guardian, custodian or other suitable person willing and able to provide supervision and care for such child."	Provides that "Any physician, police or law enforcement officer, or agent or employee of an agency designated /by the State Department of Social Services (or equivalent state agency)/ should be authorized to take physical custody of a child, notwithstanding the wishes of the child's parent(s) or other such caretaker(s), if the physician, official or agent or employee has probable cause to believe such custody is necessary to forestall the child's imminent death or serious bodily injury and that the child's parent(s) or other such caretaker(s) is unable or unwilling to protect the child from such imminent death or injury ...." Where the risk to the child stems solely from being left unattended at home, requires placing an emergency caretaker in the home. Requires prior court approval for all removals "unless the risk to the child is so imminent that there is no time to secure such court approval."	Stipulates that "A child may be taken into custody ... by a law enforcement officer /or duly authorized officer of the court/ if there are reasonable grounds to believe that the child is suffering from illness or injury or is in immediate danger from his surroundings, and that his removal is necessary."

5b. Summary of Positions Recommended by Standards Groups (Re: Time for Hearing and Filing Petition and Other Directives):

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Stipulates that "no child shall be held ... longer than twenty-four hours, excluding Sundays and holidays, unless a petition has been filed." Within 24 hours after a petition is filed, the child must be released unless an order for continued custody is signed by a judge or referee. The only explicit reference to medical treatment authorizes such care only after court order.	Provides that "a petition shall be filed within 24 hours, Saturdays, Sundays and holidays included" and that a hearing regarding continued custody be held "within 24 hours, Saturdays, Sundays and holidays included" after the petition is filed. Indicates that the person removing the child may "if the child is believed to be suffering from a serious mental health condition, illness or injury, which requires... prompt treatment" secure such treatment and give "expeditious" notice of the action taken.	Requires that "no later than the first business day after taking custody of a child ..., the agency should be required to report such action to a court" and either file a petition or return the child. If a petition is filed, a hearing on temporary custody is to be held "on the same business day if at all practicable, and no later than the next business day." Authorizes "emergency medical care if necessary to forestall the child's imminent death or serious bodily injury, notwithstanding the wishes of the child's parent(s) or other such caretaker(s)." Indicates that "the agency should assure that the child's parent(s) or other such caretaker(s) has opportunity to visit the child, at least every day for the duration of the custody...."	Stipulates that a child should, if feasible be released "with all reasonable speed"; if not, a petition should be filed "promptly," and an informal detention hearing held "not later than 72 hours" after initial placement. Authorizes medical care "if the child is believed to suffer from a serious physical condition or illness which requires prompt treatment" and provides that notice of such treatment should be "promptly" given.

Summary of Positions:

I. Personnel Authorized to Undertake Removal

Two groups authorize only law enforcement officers to take custody; one group includes, in addition, "/duly authorized officers of the court/." The fourth group allows physicians, law enforcement officers or agents or employees of an agency designated by the State Department of Social Services to take action.

II. Basis for Custody

One group authorizes removal to forestall the child's "imminent death or serious bodily injury"; one group does so when the child is "seriously endangered"; the other two groups authorize removal when the child is ill or injured or "in immediate danger from his surroundings."

III. Time Limit for Filing Petition and Hearing on Custody

Three groups require release or filing no later than the next day--2 excluding and 1 including nonbusiness days. These groups require a hearing within one day after filing--2 groups including and 1 excluding nonbusiness days. The other group requires "prompt" release or filing and an informal hearing within 72 hours.

IV. Other Directives

Three groups explicitly authorize emergency medical care without parental consent; the fourth group is silent on the issue. One group specifically directs the agency to assure parental visitation rights.

6. Analysis of the Issue:

A survey of the family courts of New York indicates that a substantial number of children are removed from their homes prior to the filing of a neglect petition.[5] Past standards groups[6] are agreed that formalized procedures should be established to govern such removals. On the one hand, it is clear that some mechanism must be provided to protect children who are seriously threatened; on the other hand, writers[7] and standards groups have stressed the importance of formalized procedures to prevent harmful removals.

a. Personnel Authorized to Undertake Removal

All standards-setting groups have authorized law enforcement officials to carry out emergency removals. The Uniform Juvenile Court Act[8] provides the option of empowering "duly authorized officers of the court" to also undertake such action. And, the Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[9] allow any physician or agent or employee of an agency designated by the State Department of Social Services to execute emergency removal. The argument for extending the power to personnel other than police is simply that they are likely to be the first to encounter a situation which may require immediate action. Professor Burt suggests,

> Unless a variety of people are authorized to remove children--and encouraged to do so, for example, by immunity from subsequent civil liability for "good faith" actions--natural reluctance to interfere with parent-child relationships might predominate to the marked disadvantage of many children.[10]

The counter-argument would presumably be that such a procedure might increase the potential for unjustified intrusion. It might be argued that police officers are more accustomed to dealing with situations involving the infringement of individual rights and thus better qualified to make such decisions.

b. Basis for Custody

Past standards groups vary little on this issue. All require immediate (potential for) harm. The NCCD[11] requires that the child be "seriously endangered in his surroundings and /that/ immediate removal appears to be necessary for his protection." The HEW Model Act[12] and the Uniform Juvenile Court Act[13] do not require that the child be "seriously endangered," but do stipulate that he must be in "immediate danger." They also authorize intervention in the event of "illness or injury." The IJA/ABA draft[14] is, predictably, the most restrictive on this count. It authorizes custody "necessary to forestall the child's imminent death or serious bodily injury."

Thus, in contrast to the area of jurisdiction over physical abuse, all past groups have imposed some level of severity-of-(potential)-injury requirement in this area. The reasons for this are clear. The argument against unwarranted state intrusion is given added weight since here one is dealing with potential removal--a far more significant infringement on the rights of the parents than the mere attachment of jurisdiction. Moreover, such removal may prove quite harmful to the child since short-term holding facilities are usually of the lowest quality.

c. Time Limit for Hearing on Custody and Filing Petitions

The obvious concern here is to expedite matters so a child will not be improperly held for an extended period. Such a removal may prove very damaging to the child. The comments to the HEW Model Act state,

> /I/f a child is not released, a petition /should/ be filed within 24 hours, Saturdays, Sundays and holidays included. This provision is based on the theory that if the situation is serious enough to detain the child, it will generally be found to be serious enough to require the filing of a petition.[15]

The Model Act requires a hearing on continued custody within 24 hours of the filing of the petition. The NCCD[16] procedure is the same as that of HEW. The Uniform Act[17] requires "prompt" filing of the petition and mandates an informal hearing within 72 hours. The IJA/ABA recommends removal only upon court authorization, if at all possible, and requires release or the filing of a petition "no later than the first business day after taking custody." If a petition is filed, a hearing on continued custody is to be convened "on the same business day if at all practicable, and no later than the next business day."[18]

d. Other Directives

Three of the four past standards-promulgating organizations have explicitly authorized emergency medical care without parental consent. (Compare Abuse and Neglect Comparative Analysis 11 on jurisdiction over such cases.) These standards obviously reflect a value judgment based on balancing potential harm to the child and parental wishes. In the absence of such a standard emergency medical care would probably be permissible only under court order.

Finally, it should be noted that the IJA/ABA draft[19] contains one feature not presented by other groups. It stipulates that

> The agency should assure that the child's parent(s) or other such caretaker(s) has opportunity to visit with the child at least every day for the duration of the custody ....

This provision is included to insure the child's continuity of relationships with parental figures to the maximum degree feasible. Moreover, it is argued that there is considerable empirical evidence that frequent visitation is strongly correlated with ultimate reunion of the family. And, it is contended that a specific directive on this subject is necessary because social welfare agencies are often quite lax about encouraging parental visitation and may even discourage it.[20]

Although no one has articulated an argument against this proposal in print, presumably the strongest objection to the provision would be the contention that it represents a substantial administrative inconvenience for social work practitioners.

7. Task Force Standards and Rationale:

The Task Force position on emergency removal from the home is set forth in Standard 12.9.

> Statutes governing emergency removal of endangered children from the home should:
>
> (A) Specifically enumerate the types of personnel authorized to undertake removal;
>
> (B) Allow removal only when it is necessary to protect the child from bodily injury and the child's parents or other adult caretakers are unwilling or unable to protect the child from such injury; and,
>
> (C) Authorize removal without prior court approval only if there is not enough time to secure such approval.
>
> Emergency caretaking services should be established to reduce the incidence of removal.
>
> When removal does occur, the child should be delivered immediately to a state agency which:
>
> (A) Has been previously inspected and certified as adequate to protect the physical and emotional well-being of children it receives;

(B) Is authorized to provide emergency medical care in accordance with specific legislative directives; and,

(C) Is required to assure the opportunity for daily visitation by the parents or other adult caretakers.

Within 24 hours of the time the child is removed the agency responsible for filing Endangered Child petitions should either file a petition alleging that the child is endangered or return the child to the home. If a petition is filed, the court should immediately convene a hearing to determine if emergency temporary custody is necessary to protect the child from bodily injury.[21]

The Task Force was convinced that emergency removal should be employed only when it is absolutely necessary. The requirement that emergency caretaking services should be established to reduce removals and the stipulation that prior court approval should be secured unless there is not enough time to do so are reflective of this concern. Similarly, the direction to either release the child or file a petition within 24 hours and the requirement that a custody hearing be convened "immediately" thereafter are intended to reduce the duration of such custody wherever feasible.

The Task Force was also impressed with the evidence on the importance of assuring visitation rights when removal occurs. In addition, the Task Force felt that more stringent regulations on the quality of the facilities used for emergency placements was essential.

Footnotes:

[1]Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q. (1975).

[2]Cf. Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court," Justice for the Child, p. 71 (M. Rosenheim ed. 1962).

[3]N.Y. Family Ct. Act §§1021-28 (McKinney Supp. 1971).

[4]Burt, "Forcing Protection on Children and Their Parents: The Impact of Wyman v. James," 69 Mich. L. Rev., p. 1269 n. 37 (1971).

[5]Report of the N.Y. State Family Court, 1967-68, cited in id.

[6]In addition to the groups mentioned above, see Child Welfare League of America, Standards for Child Protective Services, pp. 14-15, 25 (rev. ed. 1973).

[7]See, e.g., Burt, supra note 4, pp. 1287-88; Levine, "Cavaet Parens: A Demystification of the Child Protection System," 35 U. Pitt. L. Rev., pp. 37-8 (1973).

[8]National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act §13 (1968).

[9]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[10]Burt, supra note 4, p. 1288.

[11]National Council on Crime and Delinquency, Standard Juvenile Court Act §16 (1959).

[12]W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs §18 (DHEW Publication No. OHD/OYD 75-26041).

[13]See note 8 supra.

[14]See note 9 supra.

[15]W. Sheridan & H. Beaser, supra note 11, p. 27.

[16]NCCD, supra note 10, §17(2).

[17]National Conference of Commissioners on Uniform State Laws, supra note 8, §17.

[18]IJA/ABA, supra note 9, §§4.2(b), 4.3(a).

[19]Id., §4.2(a).

[20]Cf. 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., p. 678 (1976).

[21]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Rules of Evidence--What rules of evidence should be employed in the adjudication of endangered child cases?

2. Description of the Issue:

In some jurisdictions courts may rely on confidential information--usually in the form of letters or reports by absent caseworkers or psychologists--to determine the existence of neglect without allowing counsel for the parents or child to confront and cross-examine the authors of such information. The application of the hearsay rule, which applies to ordinary civil matters, would generally preclude such practice. In formulating a standard in this area one may authorize the admission of (a) "all relevant and material evidence" (which would allow the admission of hearsay reports in the absence of their authors); (b) "all relevant and material evidence," but specify that such evidence could be relied upon only "to the extent of its probative value"; or, (c) all evidence admissible "pursuant to principles governing evidence in civil matters" or all evidence which is "competent, material and relevant in nature." The latter formulation would afford the parents or child the right to confront and cross-examine the authors of various social reports and would preclude the admission of hearsay evidence unless it falls within one of the ordinary exceptions to the hearsay rule.

3. Summary of Major Positions:

The major argument in favor of employing less exacting rules of evidence in neglect and abuse cases than those which are utilized in civil matters is the suggestion that such a procedure comports with the underlying purposes of the court handling juvenile matters, viz. to utilize informal procedures to assist in arriving at individuated judgments. Alternatively, it is suggested that objections to hearsay reports concern the weight or probative value of such evidence, but ought not preclude the admissibility of such evidence in fact-finding proceedings.

In the wake of In re Gault and the imposition of more rigorous safeguards in delinquency proceedings a number of commentators and past standards groups have argued that the admission of hearsay and the refusal of the right to confrontation in the adjudication of neglect cases constitute a denial of procedural due process. In addition, it is contended that strong policy arguments should preclude reliance on hearsay evidence in such proceedings.

4. Summary of State Practices:

Many states do not have statutes which relate to this issue. However, a sizeable number of states have one or more statutory provisions which may be of some relevance. Twenty-eight states have statutes which provide that the neglect hearing should be "informal"[1] and eight states specifically confer broad discretionary rule-making power on the court.[2] These statutes may enable a court to receive hearsay evidence without granting a right to confrontation. On the other hand, 19 jurisdictions specifically authorize the right to cross-examine and present witnesses[3] and eight states specify that the rules of civil procedure should govern neglect proceedings.[4] These statutes may authorize a generalized right of confrontation and preclude the admission of hearsay. A thorough review of state practices would necessitate a review of the case law of the 50 states in order to ascertain how the relevant statutes and case law principles have been applied; such a review is beyond the scope of this Comparative Analysis.[5]

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
"The committee did not draft a section on evidentiary rules, which are being developed in appellate court rulings." The Act does, however, contain the general stipulation that "the hearings shall be conducted in an informal manner." A minority position suggested by the Children's Bureau (but not adopted by the Committee) provides that "findings of fact by the judge of the validity of the allegations in the petition shall be based upon ... evidence admissible under the rules applicable to the trial of civil causes."	Provides that a finding of neglect must be based on evidence which is "competent, material and relevant in nature."	Stipulates that, "In all proceedings regarding the petition, sworn testimony and other competent and relevant evidence may be admitted pursuant to the principles governing evidence in civil matters in the courts of general jurisdiction in this jurisdiction."	Contains no section which specifically addresses the issue. The Comments to the section on social reports indicate, "These reports are for purposes of disposition. Their use during the hearing on the petition would violate the hearsay rule and the due process clause, since cross-examination of the sources of the information contained in the report would not be available." (Section 29 of the act appears to authorize the admission of a wider range of evidence in the dispositional--not fact-finding--phase of such proceedings.)

Summary of Positions: Two groups offer standards which authorize the admission of only "competent, material and relevant" evidence or evidence admissible in civil matters.

The Comments of a third group suggest that they also adopt this position.

The fourth group is silent on this issue.

6. Analysis of the Issue:

At the present time many jurisdictions allow courts to rely on hearsay evidence in the form of confidential information in social reports to determine the existence of neglect.[6] Two lines of argument are advanced in support of this position. First, it is argued that it is necessary to allow the court to explore every available avenue of information in order to insure that it can arrive at a truly individuated judgment.[7] It is further suggested that this is in keeping with the underlying philosophy of the court which holds that informal procedures should be utilized to insure that formalized rules do not preclude tailoring decisions to the individual case.[8] Second, it is contended that confidentiality should be guaranteed to assure that private citizens will report instances of abuse and neglect and that professional personnel will speak and write freely about the cases.[9] Requiring full disclosure of the sources of such information and subjecting them to cross-examination in open court would, it is argued, discourage adequate reporting of cases of endangered children and perhaps thwart desirable intervention. On the basis of these arguments it is suggested that any evidence which is "relevant and material"--regardless of its competency or admissibility in a civil proceeding--should be considered in the adjudication of neglect cases.

Some courts and commentators support the general principles of the analysis set forth above, but place some restrictions on the use of the potentially objectionable evidence. They suggest that "all relevant and material evidence" should be admissible, but that it should be relied upon "only to the extent of its probative value." Thus, it is argued that the fact that the reports may contain hearsay or are prepared by non-experts becomes a matter concerning their weight and probative value, not their admissibility, and since the matter is heard before a judge, rather than a jury, it can be assumed that the judge will disregard any immaterial or incompetent evidence.[10] Some courts have adopted the rubric of "unreliable hearsay" to deal with this issue.[11] Under this approach social reports which contain the findings of the investigator are generally admitted, but reports which contain statements of third parties or general gossip are excluded as unreliable hearsay.

In the wake of In re Gault and the increasing dissemination of procedural safeguards in delinquency proceedings, many commentators[12] and most recent standards groups[13] have attacked the positions set forth above. They suggest that all witnesses favoring state intervention should be subject to cross-examination in open court and only evidence admissible in civil proceedings should be received in the adjudication phase of neglect cases. The writers defend their position with two arguments. First, it is suggested that the proceedings involve a substantial deprivation of rights and thus the reliance on confidential reports in the absence of their authors abridges the right of confrontation and constitutes a denial of due process of law. A good deal of recent case law supports this position.[14]

The writers suggest that Gault indicates that the "informal" nature of juvenile proceedings ought not be used as an excuse to deny important rights.[15] Since the social reports often contain particularly important information, it is argued that to deny counsel for the parents or child the right to confront and cross-examine the authors of such reports is to effectively "deny the litigant his day in court." The HEW Model Act summarizes its position on these issues succinctly when it concludes,

> /The/ rules of evidence calculated to assure proceedings in accordance with due process of law are applicable to children's cases.[16]

Second, it is suggested that important policy arguments should preclude the admission of hearsay evidence in these circumstances. The general purpose of the hearsay rule is, of course, to insure the reliability of evidence. It is argued that confidential social reports may be a particularly unreliable basis for fact-finding. It is contended that such information is likely to be quite judgmental;[17] that it may come from inadequately trained social workers or poorly informed private parties;[18] and, that the report will be written in support of one point of view and the parents will generally be poor and unable to obtain expert witnesses of their own.[19] Moreover, the policy analysis which suggests that the bases for intervention should be carefully scrutinized and specifically defined (see Abuse and Neglect Comparative Analyses 2 and 3) is offered in support of the contention that only competent evidence which is directly relevant to the issue at hand should be admissible.

7. Task Force Standards and Rationale:

The Task Force's Standard 13.6 provides that,

> The adjudicatory phase of Endangered Child proceedings should be conducted in accordance with the general rules of evidence applicable to the trial of civil cases in the courts of general jurisdiction where the petition is filed.[20]

The Task Force believed that this approach was consistent with the dictates of due process. It also felt that the application of the civil rules would enhance the reliability of evidence in the adjudicatory hearing.

Footnotes:

[1]The 28 states are: Alaska, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah and Wyoming. Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 31-33 (1975).

[2]The eight states are: Alabama, Idaho, Louisiana, Mississippi, Missouri, Rhode Island, Virginia and Wisconsin. Id.

[3]The 19 states are: Connecticut, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas and Wyoming. Id.

[4]The eight states are: Florida, Hawaii, Illinois, Louisiana, Montana, Nebraska, South Dakota and Texas. Id.

[5]For an extensive review of the case law see E. Browne and L. Penny, The Non-Delinquent Child in Juvenile Court: A Digest of Case Law, pp. 35-53 (1974).

[6]See Becker, "Due Process and Child Protective Proceedings: State Intervention in Family Relations on Behalf of Neglected Children," 2 Cumber.-San. L. Rev., p. 262 (1971); Burt, "Forcing Protection on Children and Their Parents: The Impact of Wyman v. James," 69 Mich. L. Rev., p. 1269 (1971); Campbell, "The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause," 4 Suffolk L. Rev., p. 655 (1970); Note, "Child Neglect: Due Process for the Parent," 70 Colum. L. Rev., p. 480 (1970); Note, "Dependent-Neglect Proceedings: A Case for Procedural Due Process," 9 Dusquesne L. Rev., p. 657 (1971).

[7]See Note, Colum. L. Rev., supra note 6, pp. 482-83.

[8]See id., p. 481.

[9]See Burt, supra note 6, p. 1285.

[10]Cf. E. Browne & L. Penny, supra note 5, p. 41 /summarizing In re People in Interest of A.R.S., 502 P. 2d 92 (1972)./; see also Becker, supra note 6. This analysis is, of course, applicable only in those jurisdictions--a very substantial majority--which do not allow trial by jury in such cases.

[11]See, e.g., Harter v. State, 260 Iowa 605, 149 N.W. 2d 827 (1967); In re Lee,--Vt.--, 224 A.2d 917 (1966).

[12]See note 6 supra.

[13]See, e.g., W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs (DHEW Publication No. OHD/OYD 75-26041).

[14]See E. Browne and L. Penny, supra note 5.

[15]See, e.g., Note, Colum. L. Rev., supra note 6, pp. 481-83.

[16]W. Sheridan & H. Beaser, supra note 13, p. 11.

[17]See, e.g., Campbell, supra note 6.

[18]See, e.g., Burt, supra note 6, p. 1285.

[19]See, e.g., Note, Colum. L. Rev., supra note 6, p. 480.

[20]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Standard(s) of Proof--What standard(s) of proof should be employed in the adjudication of endangered child cases?

2. Description of the Issue:

In 1970 the United States Supreme Court announced in In re Winship[1] that a minor could be adjudicated delinquent only upon proof "beyond a reasonable doubt." Since that time lower courts have consistently held that In re Winship does not mandate the application of that standard of proof to abuse and neglect cases.[2] Thus, the question of what standard(s) of proof should be employed in the adjudication of endangered child cases is basically a policy choice. One can require (1) "a preponderance of the evidence"; (2) "clear and convincing evidence"; or, (3) proof "beyond a reasonable doubt." One might also employ different standards of proof for different types of cases. For example, one might employ a lesser standard of proof in physical or sexual abuse cases than in other categories of neglect.

3. Summary of Major Positions:

Of those states which have statutes on this subject, a majority specify a "preponderance of the evidence" standard. Most of the past standards-setting groups to consider this issue have opted for a "clear and convincing" standard. At least one commentator has argued in favor of proof "beyond a reasonable doubt" and two states have statutes of this nature.

The choice of one of these options is essentially a question of policy. If one is concerned that the state will not intervene in enough cases, then the "preponderance" standard is most appropriate. If one wishes to carefully scrutinize the state's decision to intervene, one will probably opt for a more rigorous standard of proof.

4. Summary of State Practices: [3]

Standard of Proof	Number of States	Names of States
Statute requires a "preponderance of the evidence."	14	CA, CO, DC, FL, HI, IL, MD, MN, NJ, NY, OR, TX, WI, WY
Statute stipulates that the rules of civil procedure apply.	4	LA, MT, NB, SD
Statute requires "clear and convincing" evidence.	7	GA, IA, NM, ND, OH, PA, TN
Statute requires proof "beyond a reasonable doubt."	2	KY, NB
Statute does not explicitly specify the standard of proof.	All other states	

Summary of Practices: Fourteen states employ a "preponderance of the evidence" standard; four states stipulate that the rules of civil procedure are applicable.

Seven states require proof by "clear and convincing" evidence; and, two require proof "beyond a reasonable doubt."

The statutes of the other twenty-four jurisdictions do not specify a standard of proof.

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Does not address the issue.	Provides for a "clear and convincing" evidence standard in the adjudication of neglect cases.	Stipulates that the "clear and convincing" evidence standard should be applied in the adjudication phase of endangered child proceedings.	Requires proof by "clear and convincing" evidence to support an allegation that a child is "deprived."

Summary of Positions: Three groups recommend the "clear and convincing" evidence standard in the adjudication of such cases.

One group is silent on the issue.

6. Analysis of the Issue:

Two law review writers have considered this question in some detail. Thomas Becker defends a "preponderance of the evidence" standard.[4] He balances the potentially competing rights of the parents, the child and the state as parens patriae and concludes the parents' interests are not of "transcending value." He suggests the law should bend somewhat in favor of intervention in order to protect the child from injury in doubtful cases. Thus, he concludes,

> The social disutility of dismissing a petition when in fact the child is neglected and in need of protection is far greater than that resulting from a finding of neglect when none in fact exists. The dismissal of the petition concludes the proceeding ... an erroneous finding of neglect, on the other hand, is not a final disposition.[5]

Robert Burt, on the other hand, argues for the requirement of proof "beyond a reasonable doubt."[6] In an analysis which scrutinizes the interrelationship of a number of procedural issues relating to abuse and neglect, Burt considers the interests of the parents, the child and the state and suggests an "accommodation" whereby the

> widest access to information be assured to assist in identifying child abuse and neglect, but that rigorous scrutiny be directed to any conclusions derived from that information.[7]

In accordance with this general scheme, Burt argues that a "beyond a reasonable doubt" standard "would appear a salutory exhortation to assure close scrutiny of these cases."[8]

The HEW Model Act,[9] the Tentative IJA/ABA Juvenile Justice Standards,[10] and the Uniform Juvenile Court Act[11] all reject both of the positions set forth above and adopt a "clear and convincing evidence" standard. Although none of these groups set forth an extensive discussion in support of their position, it would appear that each group approached the issue in basically the same manner as Becker and Burt. The questions which emerge are: As between the interests of the state in intervening to protect children and the interests of the parents and child in being free from unwarranted or harmful intrusion, what sort of balance should be struck? Is it worse to err in favor of too much intervention or too little? It should be remembered that--in contrast to the position set forth by Becker--many writers argue that inappropriate intervention can prove quite harmful to the child.[12] The "clear and convincing evidence" standard is apparently viewed as a middle-of-the-road answer to these questions.

Finally, it should be noted that it would be possible to employ different standards of proof for different types of neglect. For example, one could conclude that the potential harm to the child as a result of sexual or physical abuse is so serious that one should employ a "preponderance" standard for these categories while utilizing a more rigorous criterion for other bases for intervention. No past standards-setting group has advocated such an approach for the adjudication phase of neglect proceedings. Nonetheless, it is certainly a viable option.

7. Task Force Standards and Rationale:

The Task Force opted for a "clear and convincing evidence" standard in all cases. Standard 13.7 stipulates,

> In the adjudicatory phase of Endangered Child proceedings, the burden should rest on the petitioner to prove by clear and convincing evidence that the child is endangered as defined /in the standards setting forth the statutory bases for coercive intervention/.[15]

The Task Force felt the "beyond a reasonable doubt" criterion did not provide adequate protection for the child, especially in physical abuse cases. But in light of the substantial parental rights being challenged and the possible harms to the child from intervening, it favored the "clear and convincing" requirement over the "preponderance of the evidence" standard.

Footnotes:

[1]397 U.S. 358 (1970).

[2]For a review of the case law see N. Weinstein, Legal Rights of Children, p. 20 (1974).

[3]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 31-33.

[4]Becker, "Due Process and Child Protective Proceedings: State Intervention in Family Relations on Behalf of Neglected Children," 2 Cumber.-San. L. Rev., p. 247 (1971).

[5]Id., p. 261.

[6]Burt, "Forcing Protection on Children and Their Parents: The Impact of Wyman v. James," 69 Mich. L. Rev., pp. 1285-87 (1971). It should be noted that Professor Burt has since retracted this position. As a co-reporter for the IJA/ABA Project, he now supports a "clear and convincing evidence" standard.

[7]Id., p. 1285.

[8]Id., p. 1287.

[9]W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs (DHEW Publication No. OHD/OYD 75-26041).

[10]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[11]National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act (1968).

[12]See Abuse and Neglect Comparative Analyses 2 and 3.

[13]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Dispositional Alternatives--What dispositional alternatives should be available in endangered child proceedings?

2. Description of the Issue:

Usually disposition in neglect cases is the subject of a separate hearing. It is widely stated that the purpose of such proceedings is to attempt rehabilitation rather than to inflict punishment. Generally speaking, dispositions fall within two classes: those where the child is placed under "protective supervision" (usually in the home) or the court orders supportive services for the child or parents; and, those involving "transfer of legal custody" or "placement" where the child is removed from the home. Standards relating to supportive services or "protective supervision" may be formulated with varying degrees of specificity. (Standards on removal are analyzed in Abuse and Neglect Comparative Analysis 22. And, a discussion of the possibility of "terminating parental rights" at this stage of the proceeding is deferred to Comparative Analysis 25).

3. Summary of Major Positions:

All past standards-setting groups have authorized dispositions of (1) "protective" or "informal" supervision not involving removal and (2) removal of children from the home. Clearly both of these options must be available to the court. Some writers offer only general directives for the first category of dispositions; others specifically delineate options which should be available in order to stress the importance of exploring courses of action short of actual removal from the family home and encourage the development of needed programs.

The HEW Model Act[1] contains a provision explicitly authorizing the court to excuse a minor child from compulsory education laws and authorize his immediate employment.

4. Summary of State Practices:

Dispositional Alternatives	Number of States	Names of States
Authorize protective supervision of the child --in his own home --in the home of a relative or other suitable person --under the auspices of an agency (public or private) --upon condition determined by the court	44	AL, AK, AZ, CA, CO, DL, DC, FL, GA, HI, ID, IL, IN, IA, KS, LA, ME, MA, MI, MN, MS, MO, MT, NB, NV, NH, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, VA, WA, WV, WI, WY
Authorize transfer of legal custody or commitment --to a relative or other suitable person --to a public agency, institution or department --to a private agency, approved or licensed by the state	All states	
Authorize examination or treatment --of the parent --or hospitalization of the child	14	AZ, CA, CN, DL, DC, HI, LA, MD, MT, NM, NY, OH, VA, WI
Authorize any other reasonable order in the best interest of the child and for the welfare and protection of the public	46	AL, AZ, AR, CA, CO, CN, DL, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NB, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VA, WV, WI, WY
	20	AL, CA, DL, DC, IA, KY, LA, ME, MD, MA, MI, MN, MT, NJ, RI, SC, TX, UT, VA, WA

Summary of Practices: 44 states authorize protective supervision in various forms.
All states authorize transfer of legal custody or commitment.
46 states authorize examination, treatment or hospitalization of the child; 14 authorize examination or treatment of the parent; 20 states authorize "any other reasonable order."

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)
Provides for "protective supervision" in the home or "in the custody of a suitable person, elsewhere, upon conditions determined by the court." Also stipulates that "the court may vest legal custody of the minor in a governmental or nongovernmental agency or institution licensed or approved by the state to care for minors, with the exception of an institution primarily for the care and treatment of /delinquents/."	States that the court may make any of the following orders for a neglected child: "permit the child to remain with his parents, guardian or other custodian, subject to such conditions and limitations as the court may prescribe; place the child under protective supervision; transfer legal custody of the child to--(1) the Division of Preventive Services, (2) a /licensed/ local public child-placing agency or private organization or facility willing and able to assume /care at no public expense/, (3) a relative or other individual /found qualified/." Also indicates that unless a child is also found delinquent he shall not be committed to an institution for delinquent children. And, provides that "in the case of any child 14 years of age or older, where the court finds that the school officials have made a diligent effort to meet the child's educational needs, and after study, the court further finds that the child is not able to benefit appreciably from further schooling" the court may excuse the child from compliance with compulsory education laws and permit him to assume employment.	Stipulates that "a court should have at least the following alternatives upon finding a child neglected: wardship with informal supervision; ordering the parents to accept social work supervision; ordering the parent and/or child to accept individual or family therapy or medical treatment; placement of a homemaker in the home; placement of the child in a day care program; placement of the child with a relative, in a foster family or group home, or in a residential treatment center.
Uniform Juvenile Court Act (1968)		
Indicates that the court may "permit the child to remain with his parents, guardian or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child" or "subject to conditions and limitations as the court prescribes" transfer temporary legal custody to "an individual found suitable by the court, an agency or other private organization licensed or otherwise authorized by law to receive and provide care for children" or the child welfare department or an individual in another state. Also stipulates that unless a "deprived child" has also been found delinquent he shall not be committed to an institution for delinquents.		

Summary of Positions:

All four groups permit the court to allow the child to remain in the home under "protective supervision" or "informal supervision" by the court. Two groups stipulate that the court may prescribe "conditions and limitations" in such circumstances. One group specifically enumerates the minimal supportive services the court should be empowered to order.

Three groups authorize transfer of "legal custody" or "temporary legal custody" to a public or private agency. Two of those groups also authorize such transfer to individuals. The fourth group authorizes "placement" with such agencies or individuals or foster care facilities. Three groups explicitly forbid placement with delinquents.

One group also allows exemption from compulsory education laws and authorizes employment of minors deemed unlikely to benefit from further schooling.

6. Analysis of the Issue:

The major question in the dispositional phase of neglect proceedings is usually whether or not the child will be removed.[3] Clearly the court must be authorized both to order supportive in-home services and to effectuate removal. (Specific standards for removal are discussed in Abuse and Neglect Comparative Analysis 22.)

a. Protective Supervision and Supportive Services

In terms of formulating a standard for dispositions, the major issue is whether a standard on supportive services should be a general directive or whether it should specifically delineate dispositional alternatives deemed essential. Examples of general formulations are found in the Standard Act,[4] the HEW Model Act[5] and the Uniform Act.[6] Those proposals simply authorize "protective supervision" or keeping the child in the home subject to "conditions and limitations" prescribed by the court. An example of a more specific approach is found in the Tentative Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards,[7] which--in addition to a general directive--recommend the availability of "at least" the alternatives of casework supervision, individual or family therapy or medical treatment, homemakers and day care programs. Similarly, Professor Judith Areen has authored a model draft which states,

> When a family is found to be in need of intervention ... the court shall fashion an order providing to the family whatever available social services appear necessary to alleviate the conditions which precipitated the intervention, including, but not limited to:
>
> (1) day care services;
> (2) individual, group or family therapy;
> (3) homemaker services; and
> (4) counseling designed to inform the family fully about (a) available services both public and private, (b) how to make arrangements to receive them, and (c) the scope of the court order.[8]

The argument for specifically delineating dispositional options short of removal is two-fold. First, it is suggested such a standard may encourage courts and social welfare agencies to explore such options, thus keeping families together and preserving family autonomy.[9] Second, available social work literature indicates that these should be the minimal services available in all jurisdictions. For those areas which lack some of these options, a statute or recommendation by a standards group might be useful in generating the availability of such programs.

Presumably, the major objection to such a directive would be that it deals with questions of social service policy which are more appropriately committed to social service departments themselves. It might be argued that standards should be of a very general nature since the availability of this or that program is a function of budgetary constraints and other factors most appropriately assessed in social work decision-making.

b. Educational Exemption

Finally, attention should be called to the fact that the HEW Model Act contains a provision[10] which explicitly empowers the court to exempt neglected children from compulsory education laws and authorize their immediate employment if the court finds the child would not benefit from further schooling.

7. Task Force Standards and Rationale:

The Task Force addressed this issue in Standard 14.25.

> Upon finding a child endangered, a court should have available at least the following dispositional resources:
>
> (A) Casework supervision;
>
> (B) Day care services;
>
> (C) Individual, group or family counseling, therapy or medical treatment;
>
> (D) Homemaker services;
>
> (E) Placement of the child with a relative, in a foster family or group home, or in a residential treatment center.[11]

The commentary to the standard emphasizes,

> It is a basic judgment of these standards that intervention is not justified unless there are adequate, high quality resources available to make the intervention beneficial to the child and, to the maximum degree possible, to the parents. It is pure hypocrisy for legislatures to authorize intervention, not provide resources, and still believe children are being protected by Endangered Child laws.

This standard outlines those dispositional resources which, at the very minimum, should be available to the court. The availability of these services is critical to the success of the proposals outlined in this volume.[12]

Footnotes:

[1]W. Sheridan & H. Beaser, Model Acts for Family Courts and State-Local Children's Programs §34(a)(4) (DHEW Publication No. OHD/OYD 75-26041).

[2]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 35-37 (1975).

[3]See Campbell, "The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause," 4 Suffolk L. Rev., p. 635 (1970); see also E. Browne and L. Penny, The Non-Delinquent Child in Juvenile Court: A Digest of Case Law, pp. 57-80 (1974); Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court," Justice for the Child, pp. 71-72 (M. Rosenheim ed. 1962); N. Weinstein, Legal Rights of Children, pp. 17-18 (1974).

[4]National Council on Crime and Delinquency, Standard Juvenile Court Act §24(2)(a) (1959).

[5]W. Sheridan & H. Beaser, supra note 1, §§34(a)(1), (2).

[6]National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act §30(a)(1) (1968).

[7]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children §6.3 (Tentative Draft 1976).

[8]Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., pp. 935-36 (1975).

[9]See, e.g., New York State Assembly, Report of the Select Committee on Child Abuse, p. 73 (April 1972).

[10]W. Sheridan & H. Beaser, supra note 1.

[11]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[12]Id.

1. Issue Title: Removal--What standards should govern the removal of endangered children from the home?

2. Description of the Issue:

When a court finds a child neglected it may provide for supportive services or remove the child from the home. Removal may be authorized on the basis of (a) a "best interests of the child" test; (b) a "parental unfitness" formulation; (c) risk of physical injury; or (d) a provision stipulating that a child may be removed only if it is shown that he cannot be protected from the specific harm justifying intervention if left in the home.

3. Summary of Major Positions:

Most states authorize removal when it is found to be "in the best interests of the child."[1] Supporters of such a formulation contend that it directs the court's attention to the needs of the child, which should be viewed as the paramount concern. A small minority of states authorize removal only if the parent is shown "unfit." This formula is defended as more protective of parental rights.[2]

A number of commentators[3] have attacked the prevailing "best interests" rule, contending that it facilitates removal which proves unnecessary or harmful from the child's perspective. Some writers suggest that removal should be authorized only in the face of risk of physical harm.[4] The Tentative Draft of the Institute of Judicial Administration/American Bar Association, (IJA/ABA) Juvenile Justice Standards[5] authorizes removal only if the child cannot be protected from the specific harm precipitating intervention if left in his own home.

4. Summary of State Practices:

The vast majority of jurisdictions utilize the "best interests of the child" test in determining whether or not to authorize removal.[6] In most states the statute is silent on criteria for removal. The "best interests" formula is generally incorporated by judicial determination.[7]

A small minority of jurisdictions authorize removal when the parent is found "unfit."[8] The latter term is usually not defined specifically.

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)
States that "In placing a child under the guardianship or custody of an individual or of a private agency or private institution, the court shall give primary consideration to the welfare of the child." Also provides that neglected children should not be placed in an institution "primarily for the care and treatment of" delinquents and indicates that "when a choice of equivalent services exists" the court should "whenever practical" place the child with an individual or agency governed by persons of the same religion as the parents or child.	Offers no specific criteria for removal. States that unless a child is also found delinquent, he should not be committed to an institution for delinquent children.	Stipulates that "A child should not be removed from his/her home and placed in foster care unless the court finds (i) the child has been physically abused ... and there is a preponderance of evidence that the child cannot be protected from further physical abuse without being removed from his/her home; or (ii) the child has been endangered in one of the other ways specified by statute and there is clear and convincing evidence that the child cannot be protected from further harm of the type justifying intervention unless removed from his/her home." Prohibits removal when "the child is endangered solely due to environmental conditions beyond the control of the parents, which the parents would be willing to remedy if they were able to do so." Also provides that "Before any child is removed from his/her home, the court must find that there is a placement in fact available in which the child will not be endangered." "Those advocating removal bear the burden of proof on these issues; i.e., it is presumed that children are generally better off if left in their own homes."

Uniform Juvenile Court Act (1968)
Offers no specific criteria for removal. States that transfer of "temporary legal custody" may be "subject to conditions and limitations as the court prescribes." Also indicates that unless a child is also adjudicated delinquent, he should not be committed to an institution for delinquents.

Summary of Positions:

One group states that removal should be governed by "primary consideration /for/ the welfare of the child." One group indicates that removal is appropriate only if the child cannot be protected from the specific harm within the home. Two groups offer no explicit standard.

Three groups explicitly prohibit placement with delinquents; one group offers a religious preference clause.

6. Analysis of the Issue:

Removal of a child from the home upon a finding of neglect is generally regarded as a "transfer of legal custody"[9] and hence most jurisdictions utilize the "best interests of the child" test in such cases as in other matters involving custody disputes. One writer states,

> The rule provides that the court in assigning custody balance the parental environment directly against the available alternatives. An alternative environment need only be judged significantly more conducive to the child's welfare and best interests to sustain a transfer of custody away from the parents.[10]

Another commentator suggests,

> In determining best interest courts evaluate any of a large number of factors including moral fitness of the competing parties; the comparative physical environments offered by the parties; the emotional ties of the child to the parties and of the parties to the child; the age, sex and health of the child; and the articulated preference of the child.[11]

In practice, courts tend to emphasize different factors in each case.[12] Proponents of the test defend this approach as providing desirable flexibility for judicial intuition on a case-by-case basis. They further suggest that focusing on the child's best interests is essential since protecting the child is viewed as the paramount purpose of the proceedings.

A small minority of states utilize an "unfit parent" test for removal. One commentator concludes,

> Basically, an "unfit" parent is one whom the court concludes cannot or very possibly will not meet the minimum standards of responsibility imposed by the neglect threshold.[13]

This test places the burden of persuasion more squarely on the party arguing for removal and is defended as being more protective of parental rights than the "best interests" test.

A number of commentators have offered extensive criticisms of the "best interests" formula based on the child's perspective.[14] Whereas its supporters defend its open-textured nature, these writers suggest that it facilitates reliance on individual views which results in unequal treatment and class bias. In addition, Robert Mnookin argues that to properly apply the test a judge must

> ... compare the probable consequences for the child of remaining in the home with the probable consequences of removal. How might a judge make this comparison? He or she would need considerable information and predictive ability .... /T/he judge would need to predict the probable future behavior of the parents if the child were to remain in his home and to gauge the probable effects of this behavior on the child. Obviously, more than one outcome is possible, so the judge would have to assess the probability of various outcomes and evaluate the seriousness of possible benefits and harms associated with each. Next, the judge would have to compare this set of possible consequences with those if the child were placed in a foster home .... Such predictions involve estimates of the child's future relationship with the foster parents, the child's future contact with natural parents and siblings, the number of foster homes in which the child ultimately will have to be placed ... and myriad other factors.[15]

Professor Mnookin suggests that such intricate predictions are beyond our capabilities.

Moreover, the writers contend that the "best interests" test facilitates removal which is quite harmful to the child. The commentators cite such noted child development specialists as Joseph Goldstein, Anna Freud and Albert Solnit to indicate that removal is quite traumatic for the child emotionally since it disrupts his need for continuity of relationships.[16] In addition, the authors point to the extensive literature on the difficulties of children who have been removed and placed in foster care. They indicate that children often remain in foster care for extended periods of time and are subjected to numerous placements.[17] In conclusion they cite the observations of such prominent child specialists as John Bowlby to indicate that children are generally better off in even very bad homes than in foster placements.[18] Thus, it is suggested that a more restrictive standard should be substituted for the "best interests" test.

An example of such an approach is found in Professor Areen's model draft. The statute contains a list of supportive services not involving removal and suggests

> Only if
>
> (1) the services ... do not within a reasonable time adequately reduce the probability of further neglect or abuse, or

> (2) there is no other way to protect the child from the risk of serious physical injury
>
> shall the child be placed in the care of a suitable relative, or if no suitable relative is available, in foster care.[19]

She notes, "This section is designed to discourage removal of the child when less intrusive measures might suffice."[20]

The Tentative IJA/ABA Standards reject limiting the grounds for removal at the initial dispositional phase to risk of physical injury only as too restrictive.[21] As a general matter, they authorize removal only when it is demonstrated that the child cannot be protected within his own home from the specific harm which precipitated intervention. This approach is defended as providing particularized guidance to courts and welfare agencies, as facilitating even-handed treatment and as promoting attempts to preserve family autonomy rather than remove children precipitously.

In recognition of the gravity of potential physical injury, the standards propose a differential standard of proof on the dispositional issue of removal. In cases of physical abuse only a showing by a "preponderance of the evidence" that the child cannot be protected from the specific harm is required to effectuate removal. In cases involving other types of harm the standard is proof by "clear and convincing evidence." The standards also incorporate a presumption that the child can be protected in the home and place the burden of persuasion squarely on those advocating removal.

In addition the standards require

> Before any child is removed from his/her home, the court must find that there is a placement in fact available in which the child will not be endangered.[22]

This is consistent with the IJA/ABA draft's efforts to discourage harmful or ineffectual intervention (compare Abuse and Neglect Comparative Analyses 2 and 3). Professor Wald argues that the latter provision calls for a considerably more specific decision than the general "best interests" test and clearly indicates the criteria for the decision, viz. the statutory grounds for finding the child "endangered."[23] Others might disagree with this conclusion.

* * * * * * *

Finally, although they do not involve actual criteria for removal, two other types of standards in this area should be noted. The NCCD, HEW and the National Conference of Commissioners on Uniform State Laws all offer standards explicitly stipulating that neglected children should not be placed in institutions for delinquents. In addition, the NCCD's Standard Act[24] and the statutes of a number of states[25] contain "religious preference" clauses regarding removals which result in placements with private agencies or individuals. These clauses stipulate that, when practicable, the child should be placed with those of the same religious convictions.

7. Task Force Standards and Rationale:

The Task Force position on post-adjudicatory removal of the child from the home is set forth in Standard 14.27.

> In the dispositional phase of Endangered Child proceedings, the child should not be removed from the home unless the court finds that:
>
> (A) The child has been endangered in the manner specified in Standard 11.10 and there is a preponderance of the evidence that removal is necessary in order to protect the child from further nonaccidental physical injury; or
>
> (B) The child has been endangered in a manner specified in Standard 11.9 or Standards 11.11 through 11.15 and there is clear and convincing evidence that removal is necessary in order to protect the child from further harm of the type precipitating intervention; and,
>
> (C) There is a placement available in which the child's physical and emotional well-being can be adequately protected.
>
> Those advocating that the child be removed should bear the burden of proof on these issues.

The Task Force felt that the "best interests" test facilitates arbitrary and unwarranted removal; therefore, it opted for an approach very similar to that of the IJA/ABA draft standards. In general, the Task Force's standard is intended to encourage the use of in-home services to the maximum extent feasible and authorize removal only when it is essential for the child's protection.

Footnotes:

[1]See Campbell, "The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause," 4 Suffolk L. Rev., p. 634-35 & n. 12 (1970); 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., p. 631 (1976).

[2]See Campbell, supra note 1; Note, "The Child Custody Question and Child Neglect Rehearings," 35 U. Chi. L. Rev., pp. 484-87 (1968).

[3]See, e.g., Mnookin, "Foster Care--In Whose Best Interest?" 43 Harv. Educ. Rev., pp. 613-22 (1973).

[4]See, e.g., Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., pp. 935-36 (1975).

[5]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[6]See note 1 supra; see also Note, supra note 2, p. 480 n. 15 for a listing of states employing the rule as of 1968.

[7]For a survey of case law see E. Browne & L. Penny, The Non-Delinquent Child in Juvenile Court: A Digest of Case Law, pp. 57-80 (1974); N. Weinstein, Legal Rights of Children, pp. 17-19 (1974).

[8]See note 2 supra.

[9]This of course does not constitute a "termination of parental rights." The latter will be discussed in Comparative Analysis 25.

[10]Note, supra note 2, p. 480.

[11]Note, "Alternatives to 'Parental Right' in Child Custody Disputes Involving Third Parties," 73 Yale L.J., p. 153 (1963).

[12]Id., pp. 153-54.

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[13]Note, supra note 2, p. 486.

[14]See, e.g., Mnookin, supra note 3; Wald, supra note 1.

[15]Mnookin, supra note 3, p. 615.

[16]See J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child, pp. 31-35 (1973) cited in Areen, supra note 4, p. 889 n. 9.

[17]See Id., pp. 912-16; Mnookin, supra note 3, pp. 622-26.

[18]See J. Bowlby, Child Care and the Growth of Love, pp. 13-20 (2d ed. 1965).

[19]Areen, supra note 4, p. 936.

[20]Id.

[21]See Wald, supra note 1, p. 654.

[22]IJA/ABA, supra note 5, §6.4.

[23]See Wald, supra note 1, pp. 658-59.

[24]National Council on Crime and Delinquency, Standard Juvenile Court Act §24(6) (1959).

[25]See Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 35-37 (1975).

[26]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Periodic Review--What type of periodic review should be employed in post-dispositional monitoring of endangered children?

2. Description of the Issue:

A great deal of literature has emphasized the fact that children are frequently "lost" in the foster care system.[1] Often parental rights are not terminated to free the children for adoption and neither are the children returned to their natural parents. As a result, the children are left "in limbo" in foster home placements, often for a period of many years.

One proposal to minimize these difficulties is to require periodic review of cases following the initial dispositional order. If such an approach is deemed desirable, the timing of this monitoring may be set at any regularized period. It is usually suggested that the review occur (a) every six months or (b) annually. A standard for review may also impose substantive requirements as to the nature of periodic monitoring.

3. Summary of Major Positions:

Most states and most past standards-setting groups have not implemented a procedure for periodic post-dispositional review of the status of children in placement. In the absence of specific regulations on this subject, review occurs only upon the petition of a parent or the placement agency.[2]

The HEW Model Act on Prevention and Treatment of Delinquency and Neglect--not the Model Family Court Act--incorporates a procedure for periodic internal review of the status of children in the legal custody of the state department /of social welfare/. Under this approach a summary of findings is transmitted to the court, but no judicial review takes place unless a petition is filed.[3]

Emphasizing the very substantial evidence regarding the long-term nature of foster care and the importance of providing children with permanent placements, the Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[4] recommends judicial review of the status of children in placement every six months. The IJA/ABA draft also outlines factors which should be explored in the proceeding if the child is not returned.

4. Summary of State Practices:

Most states make no provision for periodic post-dispositional monitoring of neglected children.[5] Only 19 states require a periodic review of the status of children in care.[6] In the remaining states reviews occur only upon the infrequent request of either the parent or the placement agency.[7]

In those few states where reviews are authorized, they are generally ex parte and rarely result in changes of placements. Only two states, New York and South Carolina, provide for regular reviews designed to either return children to their natural parents or establish another permanent home for them.[8]

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
Does not specifically authorize periodic review of the status of children in placement. Provides that parties may petition the court for a rehearing to modify the decree. Places a three-year time limitation on orders; and, indicates that such order may be renewed after a hearing until the child reaches majority.	Does not specifically authorize periodic review of the status of children in placement. Provides that a party may petition the court for modification, termination or extension of court orders; and, authorizes extension of the order for an additional year if the court finds the extension "necessary to safeguard the welfare of the child or the public interest." All orders are to terminate when the child reaches 19 years of age. (The Model Act on Prevention and Treatment of Delinquency and Neglect directs the department /of social welfare/ to review cases of children in its legal custody at least every six months and transmit a summary of its findings to the family court. A judicial hearing for failure to conduct such reviews is authorized upon the petition of a party.)	Stipulates that "the status of all children under court supervision should be reviewed by the court at least once every six months following the initial dispositional hearing." Provides that in those cases where the child is not returned home and parental rights are not terminated "the court should establish on record" the following: The services provided or offered to the parent; whether the parent is satisfied with the services offered; the extent to which the parent has visited the child and any reason why he did so infrequently or not at all; whether the agency is satisfied with parental cooperation; whether additional services should be ordered; and when the return of the child can be expected.	Does not specifically authorize periodic review of the status of children in placement. Stipulates that any party may petition the court for modification or vacation of orders. Provides a two-year limitation on orders of disposition; and authorizes a two-year extension after a hearing. All orders are to terminate when the child reaches 21 years of age.

Summary of Positions: Three groups do not authorize periodic judicial reviews of the status of children in placement.

One of these groups authorizes six-month intra-agency reviews.

One group authorizes judicial reviews at least every six months and outlines standards for the conduct of such hearings.

6. Analysis of the Issue:

In a ten-year study of children in foster care in nine counties across the nation, Henry Maas found that 31 percent of the children remained in care for ten or more years, 52 percent were in foster homes for six years or longer, and only 24 percent were in foster care for less than three years.[9] A large number of other studies have confirmed that foster care is by no means "short-term."[10] In light of substantial evidence that maintenance of a permanent placement with continuous, stable relationships with parental figures is very important to the child's development, numerous writers have criticized the present system and opted for periodic reviews of the status of children in placement.[11]

On the basis of such evidence the IJA/ABA draft suggests that the status of children in care should be reviewed by the court at least once every six months, with the aim of either returning the children to their homes or terminating parental rights to facilitate a permanent placement.[12] Others have suggested a different time-frame for reviews. Some commentators have suggested reviews every three months[13] and the New York statute[14] formerly provided for annual review and now stipulates that a hearing should be held 18 months after placement. Ultimately, the choice of a particular time-frame must be somewhat arbitrary. Some writers suggest that a year is simply too long, especially for younger children whose sense of time is quite different from adults.[15] In order to insure that the review is not simply pro forma, the IJA/ABA draft specifies that in those cases where the child is not returned home and parental rights are not terminated,

> §7.5(c) ... the court should establish on the record
>
> (i) What services have been provided to or offered to the parent to facilitate reunion;
>
> (ii) Whether the parent is satisfied with the services offered;
>
> (iii) The extent to which the parent has visited the child and any reasons why visitation has not occurred or been infrequent;
>
> (iv) Whether the agency is satisfied with the cooperation given to it by the parent;
>
> (v) Whether additional services are needed to facilitate the return of the child to his/her parent or guardian; if so, the court should order such services;

(vi) When return of the child can be expected.

Other standards-setting groups have rejected proposals for periodic judicial review. For example, the comments to the NCCD Standard Act[16] state,

> It is presumed that public institutions are carrying out the mandate of the decree transferring legal custody. Accordingly, the court should not review such decree unless evidence to the contrary is brought to its attention by petition of parent or guardian.

At first blush, this analysis seems to ignore the substantial evidence of the long-term nature of foster care; however, the comment need not be read in that manner. It might be argued that the failures of social service agencies should be attacked by increasing funding of such programs and internal improvements in social welfare practices; in short, that judicial review in those cases is time-consuming and inappropriate.

At least one commentator has criticized periodic judicial review hearings on a number of counts.[17] It is argued that such proceedings unnecessarily emphasize the adverse interests of the welfare agency and the parents and that this may be damaging to the agency's ability to work with the parents to facilitate reunion. Moreover, it is suggested that such proceedings may prove harmful to the parents since the judge is likely to rely heavily on social workers' reports while the parents will doubtless be unable to afford expert witnesses of their own.

An approach which eschews periodic judicial reviews is illustrated by the HEW Model Acts. The Model Family Court Act makes no provision for such review, except upon petition by a party. The Model Act on Prevention and Treatment of Delinquency and Neglect, however, contains the following provision on intra-agency review:[18]

> The department shall cause to be made periodic reviews of the case of each child whose legal custody is vested in the department. Such reviews shall:
>
> (a) include a study of all pertinent circumstances of such child's personal and family situation and an evaluation of the progress made by such child since the previous study;

(b) be made for the purpose of ascertaining all relevant facts necessary to determine whether existing decisions, orders, and dispositions with respect to such child should be modified or continued in force;

(c) be conducted as frequently as the department deems necessary, but in any event, with respect to each such child, at intervals not to exceed (six) months; and

(d) a written summary of the findings and conclusions of such reviews shall be transmitted to the child's parent or guardian and to the committing court.

Under this approach, reviews are seen as basically an agency affair and a judicial hearing can take place only upon a petition by a party.

The rebuttal of those who favor periodic judicial reviews to procedures such as those embodied in the HEW Model Acts is the contention that decades of reliance on intra-agency reviews have demonstrated their ineffectiveness in moving children out of foster care.[19] Hence, it is argued, a full-dress judicial hearing is essential.

All parties are agreed that remaining "in limbo" in foster care can prove quite damaging to children. The central question is whether responsibility for reviewing such cases should remain with social agencies alone.

7. Task Force Standards and Rationale:

The Task Force felt that periodic review of the status of children in placement at a formal judicial hearing was essential to minimize the frequency of long-term foster care. Standard 14.30 provides that,

> The court should conduct a hearing to review the status of each child in placement at least every six months.[20]

The commentary indicates that six months should be the maximum allowable interval between judicial reviews and that in some cases additional hearings upon the petition of an interested party may be appropriate. In an approach very similar to the IJA/ABA draft's §7.5(c), the commentary also outlines in detail those issues which the court should fully explore on the record.[21]

In general, the Task Force was quite concerned about the well-documented harms of leaving children in foster care for extended periods and felt that detailed judicial monitoring procedures should be an essential component of vigorous efforts to reduce such practices.

Footnotes:

[1]See, e.g., Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., pp. 912-16 (1975); Maas, "Children in Long Term Foster Care," 42 Child Welfare, pp. 321-23 (1969); Mnookin, "Foster Care--In Whose Best Interest?" 43 Harv. Educ. Rev., pp. 610-13 (1973).

[2]For a thorough review of this approach see, e.g., Foster & Freed, "Child Custody (Part I)," 39 N.Y.U. L. Rev., p. 423 (1964); Katz, "Foster Parents Versus Agencies: A Case Study in the Judicial Application of 'The Best Interests of the Child' Doctrine," 65 Mich. L. Rev., p. 145 (1966); Note, "Alternatives to 'Parental Right' in Child Custody Disputes Involving Third Parties," 73 Yale L.J., p. 151 (1963); Note, "The Custody Question and Child Neglect Rehearings," 35 U. Chi. L. Rev., p. 478 (1968).

[3]See W. Sheridan & H. Beaser, "An Act Authorizing a State-Administered Program for the Prevention and Treatment of Delinquency and Neglect," Model Acts for Family Courts and State-Local Children's Programs §34 (DHEW Publication No. OHD/OYD 75-26041).

[4]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[5]Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., p. 63 (1975).

[6]See 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., p. 632, (1976).

[7]See note 2 supra.

[8]See Wald, supra note 6.

[9]Maas, supra note 1, cited in Areen, supra note 1, pp. 912-13 n. 145.

[10]See, e.g., note 1 supra.

[11]See, e.g., Areen, supra note 1, pp. 918, 920; Mnookin, supra note 1, pp. 633-34.

[12]See IJA/ABA, supra note 3, §7.5. The IJA/ABA draft suggests that parental rights should generally be terminated within six months to one year after placement if the child cannot be returned to his home. (The specifics of this and other proposals regarding termination of parental rights are discussed in Abuse and Neglect Comparative Analysis 25.)

[13]See, e.g., Mnookin, supra note 1, pp. 633-34.

[14]N.Y. Family Court Act §1055 (McKinny 1975); see also In re Bonez, 48 Misc. 2d 900, 266 N.Y.S. 2d 756 (1966).

[15]See, e.g., Wald, supra note 6, p. 695.

[16]National Council on Crime and Delinquency, Standard Juvenile Court Act §26 (1959).

[17]Campbell, "The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause," 4 Suffolk L. Rev., pp. 663-64 (1970).

[18]See note 3 supra.

[19]See, e.g., Wald, supra note 6, p. 681.

[20]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

[21]Id.

1. Issue Title: Return--What standards should govern the return of endangered children to the home?

2. Description of the Issue:

After a child has been removed from the home and placed, for example, in foster care, the question arises as to what standard should govern the decision on whether to return the child to his home. This decision may be based on (a) "the best interests of the child"; (b) whether the parent is "unfit"; or (c) whether the child will be endangered (by the harm which precipitated intervention) if returned home.

3. Summary of Major Positions:

A very substantial majority of states and most past standards-setting groups have opted for the "best interests of the child" test in determining whether to authorize return. This formula vests the trial judge with a wide range of discretion for determining "best interests." A small minority of states test parental "fitness" to determine whether to return the child.

The Tentative Draft of the Institute for Judicial Administration/American Bar Association (IJA/ABA) Juvenile Justice Standards[1] requires return unless the child would be endangered as defined in its jurisdictional section if returned home. It is contended that this approach removes the disincentive to reunion which is generated by the "best interests" test.

4. Summary of State Practices:

Virtually all states deal with the question of whether a child should be returned under the rubric of custody disputes. The vast majority of jurisdictions utilize the "best interests of the child" test in determining whether to return a child to his home.[2] Since most state statutes are silent on this issue, the "best interests" formula is generally incorporated by judicial decisions.[3]

A small minority of jurisdictions deal with the issue within the framework of whether the parent is "unfit."

5. Summary of Positions Recommended by Standards Groups:

NCCD Standard Act (1959)	HEW Model Act (1974)	IJA/ABA Tentative Draft (1976)	Uniform Juvenile Court Act (1968)
States that "A Parent, guardian, or next friend of a minor whose legal custody has been transferred by the court to an institution, agency or person may petition the court for modification or revocation of the decree, on the ground that such legal custodian has wrongfully denied application for the release of the minor or has failed to act upon it within a reasonable time, and has acted in an arbitrary manner not consistent with the welfare of the child or the public interest. An institution, agency or person vested with legal custody of a minor may petition the court for a renewal, modification or revocation of the custody order on the ground that such change is necessary for the welfare of the child or public interest."	Provides that an order may be terminated if, after the filing of a petition by a party, the court finds "the child is no longer in need of care, supervision, or rehabilitation" and that an order may be extended or modified "if it finds such action necessary to safeguard the child or the public interest."	Stipulates that "a child should be returned home unless the court finds by a preponderance of the evidence that the child will be endangered in the manner specified in /the jurisdiction section/ if returned home. When a child is returned, casework supervision should continue for a period for a period of 6 months at which point there shall be a hearing on the need for continued intervention as specified /elsewhere in the standards/."	Provides that on the petition of any party an order may be "changed, modified, or vacated on the ground that changed circumstances so require in the best interest of the child."

Summary of Positions: One group authorizes return unless the court finds that the child will be endangered as defined in its jurisdiction section.

Three groups authorize return upon the petition of the parent or other custodian: one when it is in the "best interest of the child"; one when it is "consistent with the welfare of the child" and one "when the child is no longer in need of care, supervision, or rehabilitation."

6. Analysis of the Issue:

It will of course be noted that the tests employed in determining whether to return a child to the home are essentially the same ones used to ascertain whether to remove the child initially (compare Abuse and Neglect Comparative Analysis 22). However, since the context of application is a very different one, the relative merits of each alternative should be carefully reconsidered for they may well be seen in a different light when the issue is return rather than removal. In particular, the arguments for the "best interests" test may be viewed as stronger at this point than at initial disposition hearings.

It should be remembered that under the "best interests" test

> /a/n alternative environment need only be judged significantly more conducive to the child's welfare and best interests to sustain a transfer of custody away from the parents.[5]

If a child was initially endangered to such an extent that removal was considered necessary and is now doing well in a foster home, a court may be understandably hesitant to return the child even if it appears likely that the harm precipitating removal has been corrected. Returning the child to the home in such circumstances may be viewed as subjecting the child to a "known risk" (regardless of the evidence of improvement) while the foster home may be seen as having "proven its effectiveness." This analysis has been accepted by a large number of courts and commentators and is, indeed, the majority view.[6]

Under the "best interests" test a court may consider a wide range of factors in reaching its judgment. In practice, courts tend to emphasize different factors in each case.[7] Thus, proponents of broad-scoped judicial discretion find this formula quite appealing.[8]

The "best interests" test is, however, not without its critics. It has been attacked by two groups of commentators: one emphasizing the importance of parental rights;[9] the other offering a more broadly-based criticism.[10] The parental rights group argues that the relevant test should be "parental 'fitness'." They argue that the burden of persuasion should rest with the agency to show the parent is "unfit." Otherwise, they contend, a child may be kept from the parents not because they are "bad," but simply because they are "less than ideal." It is claimed that the parents' right to their own offspring should receive greater deference in judicial decision-making.[11]

The IJA/ABA draft likewise rejects the "best interests" formula, but on different grounds. Recognizing that the question is a very close and difficult one, Professor Wald suggests that the child should be returned home at the review hearing unless the court finds by a preponderance of the evidence that the child will be endangered as defined in the jurisdiction standards if returned home.[12] He argues that the wide-ranging discretion inherent in the "best interests" formula should be viewed with extreme disfavor since it facilitates decisions based on individual "folk psychology" and undercuts the objective of even-handed treatment. He also contends that the "best interests" test places an impossible burden on the natural parents since courts are very likely to take the "safe" position of leaving the child where he is doing "well." Perhaps most importantly, he suggests that the "best interests" test creates a positive incentive for agencies and foster parents to resist helping the natural parents.[13] If the child does "well" in foster care, overworked caseworkers can usually be expected to view assisting the neglecting parents as a low priority. Finally, Professor Wald suggests that the IJA/ABA formulation is easier to apply since safety can be tested by returning the child to the home on a gradual basis, starting with short-term visits.[14]

In general, the decision on this issue is a difficult one. Those who favor the "best interests" formula feel that wide-ranging discretion is essential to avoid returning the child to a "high risk" environment. Those who oppose the "best interests" test argue forcefully that it may create a substantial disincentive to reunion.

7. Task Force Standards and Rationale:

The Task Force focused on this issue in Standard 14.22, which provides that,

> The child should be returned to the home when the court finds by a preponderance of the evidence that, if returned home, the child will not be endangered by the harm which precipitated intervention.[15]

The Task Force felt that this would facilitate reunion and hence preserve continuity in parent-child relationships whenever feasible.

Unlike the IJA/ABA draft, which requires return unless the court finds the child would be endangered if returned--thus placing the burden of persuasion on the agency--the Task Force's standard does not take a position on the allocation of the burden of persuasion. In addition, the Task Force's standard focuses on the harm which precipitated intervention, while the IJA/ABA draft apparently

refers to endangerment generally, as defined in its jurisdictional section. This, however, is likely more of a difference of semantics than substance, since under the Task Force's standards a petition alleging that the child would be endangered in another fashion could be filed independently and (probably) examined at the same hearing where the court was reviewing the case.

Footnotes:

[1]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[2]See Foster & Freed, "Child Custody (Part I)," 39 N.Y.U. L. Rev., p. 423 (1964); Levine, "Cavaet Parens: A Demystification of the Child Protection System" 35 U. Pitt. L. Rev., pp. 31-32 (1973); Note, "Alternatives to 'Parental Right' in Child Custody Disputes Involving Third Parties," 73 Yale L.J., p. 153 (1963); Note, "The Child Custody Question and Child Neglect Rehearings," 35 U. Chi. L. Rev., p. 480 (1968).

[3]For a review of the case law see E. Browne and L. Penny, The Non-Delinquent Child in Juvenile Court: A Digest of Case Law, pp. 57-80 (1974); N. Weinstein, Legal Rights of Children, pp. 17-19 (1974); note 2 supra.

[4]See Note, U. Chi. L. Rev., supra note 2, pp. 484-87.

[5]Id., p. 480.

[6]See notes 2 and 3 supra.

[7]See Note, Yale L.J., supra note 2, pp. 153-54.

[8]See generally note 2 supra.

[9]See, e.g., Levine; Note, U. Chi. L. Rev.; Note, Yale L.J., supra note 2 for a review of this position.

[10]See, e.g., IJA/ABA, supra note 1; 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., p. 684-87 (1976).

[11]Cf. Note, "A Fit Parent May Be Deprived of Custody if the Best Interest and Welfare of the Child Would Be Served by Allowing Another Person to Raise Him." 4 Houston L. Rev., p. 131 (1966); note 9 supra.

[12]IJA/ABA, supra note 10.

[13]Wald, supra note 10, p. 685.

[14]Wald, supra note 10, p. 687.

[15]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

1. Issue Title: Termination of Parental Rights--What standards should govern the termination of parental rights?

2. Description of the Issue:

Proceedings to terminate parental rights officially sever all legal ties between parent and child.[1] Of the wide range of issues raised by the subject of termination proceedings, this Comparative Analysis addresses principally one question: what should be the grounds for termination? Broadly speaking, past commentators and standards-setting groups have approached the subject in one of two ways: (1) enumerating criteria for termination upon petition by an interested party;[2] or, (2) providing that termination should generally be automatic after the child has remained in placement for a certain period of time.[3] Standards of the latter variety sometimes suggest different time-frames for children of different ages.

3. Summary of Major Positions:

All states have statutes which authorize termination of parental rights in one or more of the following: (1) the dispositional hearing of neglect proceedings; (2) adoption proceedings; (3) special termination proceedings. A large majority of state statutes and the approaches of a number of past standards groups enumerate specific criteria for termination. The most frequently appearing grounds are: abandonment; the parent's mental incapacity or deficiency; repeated or continuing neglect; parental "unfitness" or immorality; and, nonsupport when able to support. Under this approach termination occurs only upon the petition of an interested party and individual judges are vested with considerable discretion in applying the criteria.

A number of commentators and the Tentative Draft of the Institute of Judicial Administration/American Bar Association Juvenile Justice Standards[4] suggest a different approach. Focusing on harm to the child from continuing foster care placements, they suggest that--subject to certain exceptions--termination should generally occur after a specified period of time. For example, the IJA/ABA draft makes termination generally automatic after six months in placement for children under three and after one year in placement for children over three.

4. Summary of State Practices:[5]

Grounds for Terminating Parental Rights	Number of States	Names of States
ABANDONMENT	35	AL, AZ, AR, CA, CO, CN, FL, GA, HI, ID, IL, IN, IA, KY, MI, MN, MS, MO, NB, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, RI, SK, TX, UT, WI, WY.
NEGLECT	32	AZ, CA, CO, FL, GA, HI, ID, IL, IA, KY, ME, MI, MN, MO, NB, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, RI, SK, TX, VT, WV, WI, WY.
NONSUPPORT WHEN ABLE TO SUPPORT	15	FL, HI, IN, IA, MN, MO, NB, NH, NJ, NM, NY, NC, RI, TX, WI.
MORAL UNFITNESS OF PARENT	18	AL, AR, CA, FL, IL, IA, KS, KY, MN, MS, MO, NB, NV, NJ, NM, OK, VT, WI.
MENTAL OR PHYSICAL INCAPACITY OF PARENT	19	AL, AZ, AR, CA, CN, ID, IN, KY, MI, MS, MO, NB, NH, NJ, NM, OH, OR, RI, WI.
PRISON TERM	5	AZ, CA, MI, RI, WI.
IN THE BEST INTEREST OF THE CHILD	15	CO, CN, FL, ID, IL, IN, ME, MO, NJ, NY, OH, SD, TX, WV, WI.
PARENTAL CONSENT	22	AL, AZ, AR, CO, CN, FL, GA, HI, ID, IL, IA, KY, MN, MO, NB, NJ, ND, OK, RI, TX, VT, WI.
SITUATION UNCORRECTED AFTER FINDING OF NEGLECT	17	AL, CA, CO, CN, IL, IA, ME, MI, MN, NH, NJ, NM, NY, OK, RI, VT, WI.
OTHER	9	AZ, AR, GA, ID, IN, NJ, NM, NC, OK.

Summary of Practices: The most frequently appearing grounds for terminating parental rights are: abandonment, in 35 statutes and neglect in 32. Twenty-two statutes authorize the termination of parental rights with parental consent; 19 do so on the basis of parental mental or physical incapacity; 18 on the grounds of moral unfitness; and 17 because of a situation uncorrected after a neglect finding. Fifteen states authorize termination based on nonsupport when able to support and the same number of states authorize termination of parental rights when it is in the best interest of the child. Five statutes refer to prison terms and 9 specify other grounds for termination.

5. Summary of Positions Recommended by Standards Groups:

Uniform Juvenile Court Act (1968)	HEW Children's Bureau Legislative Guides (1961)	Tentative Draft, Sanford Katz et al Model Termination Statute[6] (1975-76)
Stipulates that "The court by order may terminate the parental rights of a parent with respect to his child if (1) the parent has abandoned his child; (2) the child is a deprived child and the court finds that the conditions and causes of deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral or emotional harm; or (3) the written consent of the parent acknowledged before the court has been given."	States that "A petition for termination of the parent-child relationship ... may be granted where the court finds that one or more of the following conditions exists: (1) that the parent has abandoned the child in that the parent has made no effort to maintain a parental relationship with such child; (2) that the parent has substantially and continuously or repeatedly neglected the child; (3) that the presumptive parent is not a natural parent of the child; (4) that the parent is unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period." Termination is also authorized upon petition by the parent "where the court finds that such termination is in the best interest of the parent and the child."	Authorizes termination when one or more of the following conditions exist: "(1) the parent has abandoned the child. It shall be presumed that the parent intends to abandon the child who has been left by his parent without provision for his identification or who has been left by his parent in the care and custody of another without any provision for his support, or without the communication from such parent for a period of six months. If in the opinion of the court the evidence indicates that such parent has made only minimal efforts to support or communicate with the child, the court may declare the child to be abandoned; (2) That, although the parents are financially able, they have substantially and continuously neglected to provide the child with necessary subsistence, education or other care necessary for his mental, emotional or physical health or have substantially and continuously neglected to pay for such subsistence, education or other care when legal custody is lodged with others; provided, however, it shall not be grounds for termination of the parent-child relationship for the sole reason the parent of said child relies upon spiritual means through prayer in accordance with a recognized religious method of healing in lieu of medical treatment for the healing of said child; (3) The parents subsequent to a finding of neglect, have failed to correct conditions leading to such a finding despite reasonable efforts under the direction of the court to rectify the conditions upon which such finding was based; (4) Because of mental deficiency or mental illness, the parent is and will continue to be incapable of giving the child proper parental care and protection for a longer period of time than would be wise or prudent to leave the child in an unstable and impermanent environment. Mental deficiency or mental illness shall be established by the testimony of either two licensed psychiatrists or psychologists or one of each acting together; (5) That the parents have relinquished their rights to a child to an agency or have consented to the adoption."

5. Summary of Positions Recommended by Standards Groups (continued):

IJA/ABA Tentative Draft (1976)

Sets forth inter alia the following standards re termination: "8.1 The issue of termination of parental rights may be considered at the time of the dispositional hearing following a finding of endangerment and shall be considered at every review hearing thereafter. ... These hearings should be the only forum for considering termination when a child is under court supervision."

"8.2 Termination at the Initial Dispositional Hearing: (a) Except as provided in Sections 8.2(b)(i)-(iii), termination should not be permissible at the dispositional hearing following an initial finding that the child is endangered. (b) A court should be authorized, although not required, to order termination at the dispositional hearing following a finding that the child is endangered only if: (i) The child has been abandoned. A child has been abandoned when he/she has not been cared for or contacted by his/her parents, although the parents are physically able to do so, for [60] days prior to the adjudicatory hearing, and despite efforts to notify the parents, they do not appear at the adjudicatory or dispositional hearing. (ii) The child has been removed from the parents previously ..., has been returned to his/her parents, and after return the child must be removed again. (iii) Court jurisdiction in the present case is based on a finding that the child comes within the standard on [physical abuse], this child or another child in the family has been previously ... [abused], and the parents have received therapy after the first instance of abuse. The party requesting termination should be required to prove that therapy was provided or offered to the parents previously. (c) Regardless of the provisions of Sections 8.2(b)(i)-(iii), termination should not be ordered if any of the exceptions in Section 8.4 infra are applicable."

"8.3 Standard for Termination: (a) For children who were under three at the time of placement, a court should order termination after the child has been in placement for six months if the child cannot be returned home at this point, unless the court finds by clear and convincing evidence that an exception specified in Section 8.4 applies. (b) For children who were over three at the time of placement, a court should order termination after the child has been in placement for one year if the child cannot be returned home at that point, unless the court finds by clear and convincing evidence that an exception specified in Standard 8.4 applies. However, if at the six-month review hearing the court finds that the parents have failed to maintain contact with the child during the previous six months and to reasonably plan for resumption of care of the child, the court may terminate parental rights at that time unless one of the exceptions specified in Section 8.4 applies. (c) Whenever parental rights have not been terminated under Sections (a) and (b) because the child falls within one of the exceptions, the case should be reviewed every six months to determine whether the exceptions continue to be applicable. If not, termination should be ordered."

"8.4 Situations in Which Termination Should Not Be Ordered: Even if a child comes within the provision of Sections 8.2 or 8.3, a court should not order termination if it finds by clear and convincing evidence that any of the following are applicable: (a) Because of the closeness of the parent-child relationship, it would be detrimental to the child to terminate parental rights at this time. (b) The child is placed with a relative who does not wish to adopt the child. (c) Because of the nature of the child's problems, the child is placed in a residential treatment facility, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed. (d) The child cannot be placed permanently in a family environment and failure to terminate will not impair the child's opportunity for a permanent placement in a family setting. (e) A child over age 10 objects to termination."

Summary of Positions:

I. Uniform Act, Children's Bureau Guides, S. Katz et al Tentative Draft.

All three statutes authorize termination in the event of abandonment, with parental consent, and in the face of continuing neglect or deprivation. Two statutes authorize termination for prolonged mental illness or deficiency of the parent. One model draft also authorizes termination for continually failing to provide support when able to do so and one authorizes termination when the presumptive parent is not a natural parent.

II. IJA/ABA Tentative Draft.

In general, termination is automatic for children under three after six months and for children over three after one year (unless the case falls within one of five specified exceptions).

A. Children Under Three.

Termination may occur at the initial hearing if the case involves abandonment, previous removal or previous abuse. Termination is automatic at the six-month review unless such termination would be damaging to the child, residential treatment is required, the child is placed with a relative or a permanent placement is unavailable.

B. Children Over Three.

Likewise, termination may occur at the initial hearing if the case involves abandonment, previous removal or previous abuse. Termination is not authorized at the six-month review unless the parents have not maintained contact with the child and planned for reunion and the case does not fall within the specified exceptions. Termination is, however, automatic at the year review unless such termination would be damaging to the child, residential treatment is required, the child is placed with a relative, a permanent placement is unavailable or a child over 10 objects.

6. Analysis of the Issue:

Focusing at a very general level, the central issue in structuring standards for termination of parental rights is whether the standards should--subject to certain qualifying exceptions--provide for automatic termination after the child has been in placement for a specified period or whether the standards should authorize termination upon petition by an interested party and specify the grounds for termination, but not establish fixed periods for placements.[7]

A. Fixed Time Periods

1. Time Frames

Examples of the first approach are found in the New York "permanent neglect" statute,[8] the Tentative IJA/ABA Standards[9] and the writings of Judge James Lincoln[10] and Professors Judith Areen,[11] Robert Mnookin[12] and Michael Wald.[13] The primary argument advanced in support of this position is that

> /I/n the past, periodic review procedures have not been sufficient to break bureaucratic inertia. Instead, routine extensions have been the rule.[14]

As a result, it is argued that children are often left in foster care for periods of many years--usually unable to establish stable relationships with parental figures and frequently subjected to numerous placements. The commentators indicate that a good deal of evidence demonstrates that if children are not returned within a year to 18 months they tend to remain in foster care for many years, often until their majority, and that this can cause severe psychological damage to children.[15]

The time-frames employed in statutes and suggested by writers have varied from six months to two years and incorporated varying additional criteria. For example, the New York statute indicates that a child may be declared "permanently neglected" and parental rights terminated if

> ...
>
> (c) the authorized agency has made diligent efforts to encourage and strengthen the parental relationship ...;
> (d) the parent or custodian, notwithstanding the agency's efforts, has failed for a period of more than one year following the placement or commitment of such child in the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so; and

> (e) the moral and temporal interests of the child require that the parents' or other custodian's custody of the child be terminated permanently.[16]

Judge Lincoln argues for the largest time-span, suggesting,

> There is need for a clear rule establishing a cut-off point of two years after taking temporary custody during which period minimal efforts to rehabilitate and re-establish a home have been made by the parents.[17]

Shorter periods are suggested by Professors Areen and Wald who contend that termination should generally occur within six months to one year.

2. Developmental Differences

Both Areen and Wald place considerable emphasis on "the child's sense of time"--a factor which has been discussed extensively in developmental literature.[18] Both writers use these findings not only in support of the general argument for setting fixed time-frames, but also to buttress their contention that differing criteria should be employed for children of different ages. They suggest that even separations which appear very short can be quite traumatic for particularly young children and that these children come to view parent surrogates as "psychological parents" more rapidly than older children. Thus, Professor Areen's model draft stipulates,

> The power to consent to adoption in the case of a child who is voluntarily relinquished or involuntarily placed in foster care ... shall vest in the state after a full court hearing, which must occur within six months after such placement if the child is two years of age or less, or within one year if the child is over two years of age unless a reasonable probability that the child will be reunited with his natural parents within a reasonable time is demonstrated to the court. The agency should report at this hearing on all efforts it has made to reunite the original family unit.[19]

The IJA/ABA draft employs similar time-frames but uses age three as the dividing line and incorporates an intricate array of qualifications and exceptions. The relevant standards are set forth in the "Summary of Positions Recommended by Standards Groups" supra.

Briefly summarized (and slightly simplified), they provide that--regardless of the age of the child--termination should not occur at the initial dispositional hearing except in cases involving abandonment, previous removal or previous abuse. Termination may occur in the latter cases, but ought not be ordered if the case falls within one of the specified exceptions discussed below. Thus, as a general matter, the parents of all children are given at least six months to attempt reunion.

Beginning with the six-month review hearing, the standards distinguish between children under three and over three. At this point, termination is automatic for children under three unless the case falls within the specified exceptions. This procedure is in keeping with the anlysis that it is critical to assure very young children stable placements.[20] For older children, however, the standards do not permit termination at this point unless the parent has failed to maintain contact with the child and reasonably plan for reunion. Even in the latter cases, termination need not be ordered if the case falls within the exceptions criteria. Thus, for children over three the termination decision is generally deferred to the year review; for those under three it will usually occur at the six-month hearing.

At the year review, termination is automatic unless the court finds by clear and convincing evidence that the case falls within one of the exceptions categories. Exceptions can be made in cases where: (1) termination would be damaging to the child in light of the strength of the family ties; (2) residential treatment is required; (3) the child is placed with a relative who does not wish to adopt the child; (4) a permanent placement cannot be made and failure to terminate will not jeopardize chances of obtaining a permanent placement; or (5) a child over 10 objects. These exceptions are a very important feature of the IJA/ABA draft. In general, they apply where failure to terminate will not jeopardize the child's continuity of relationships or where attaining a permanent placement is impossible and failure to terminate will not interfere with continuing efforts to secure such a placement.

B. No Fixed Time Periods

The foregoing approaches--most of very recent origin--are not incorporated in the termination statutes of a vast majority of states or in the 1961 Children's Bureau Guides. They are likewise rejected by the Uniform Juvenile Court Act (1968) and the very recent (1975-76) tentative draft of a model termination statute presently being authored under the direction of Professor Sanford Katz and funded by a grant from HEW's Office of Child Development.

Under most existing state laws and under the model standards just mentioned, no time limits are set for termination decisions. (Similarly, there is no fixed time-frame for judicial review of the status of children in placement--Compare Abuse and Neglect Comparative Analysis 23.) Termination occurs upon a petition by the agency or other interested party. In general, this approach is employed in connection with broadly drafted neglect laws. (Compare Abuse and Neglect Comparative Analyses 2 and 3.)

Proponents of this approach strongly support a wide reading of parens patriae powers and favor vesting social service agencies and courts with considerable discretion in applying the standards. A preliminary unpublished memo in support of a tentative draft of the model termination statute drafted under the direction of Professor Sanford Katz emphasizes that

> broad neglect statutes allow judges to examine each situation on its own facts[21]

and states

> Katz defends a variable standard of "neglect." ... /T/his standard has a clear constitutional analogy in the obscenity area. The entire development of the variable obscenity standard was to permit courts to inquire into the marketing and distribution of materials not obscene if marketed to adults but objectionable if marketed to children. It is submitted that variable standards in neglect and termination standards is the only standard sufficiently subtle and sophisticated to be workable and helpful.[22]

The Katz memo repeatedly stresses the importance of relying on "the individualized discretion of the court" and suggests termination laws should provide "minimum guidelines," arguing that

> /t/he nature of "minimum guidelines" has to be understood in context; i.e., some areas of human conduct are so inherently complex that a detailed description of the appropriate mode of conduct is simply impossible to imprison within the confines of a statute.[23]

Statutes which eschew reliance on a fixed time-frame outline a variety of criteria for termination. The most frequently appearing grounds are the following:

1. Abandonment

Almost all of the statutes authorize termination in cases of abandonment. Some laws stipulate a period of time, e.g., six months, after which abandonment will be presumed; others decline to incorporate such a statutory presumption, arguing, for example,

> In connection with termination the criterion should be lack of parental efforts to maintain the parent-child relationship rather than a specific time period of no contact between parent and child. Here the emphasis would be on the parent's intention to foresake the parent-child relationship. This would serve to deemphasize ... rules of thumb ....[24]

2. Parental Mental Deficiency or Incapacity

A parent's mental deficiency or incapacity is likewise a frequently appearing criterion for termination. Here, the statutes vary principally with regard to the mode or level of proof. Some require proof of a nature which would justify judicial commitment of the incompetent;[25] others require testimony by two mental health professions;[26] and still others are silent on the issue.

3. Continuing or Uncorrected Neglect

Most commentators and standards groups recommend that termination should generally not occur at initial dispositional hearings. However, if the neglectful behavior is not remedied despite the provision of services, the termination option is usually opened. For example, the Uniform Juvenile Court Act provides for termination if

> the child is a deprived child and the court finds that the conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm.[27]

The Commission's Comment[28] to this section states,

> /This/ ground goes beyond many statutes in requiring the irremediable character of the deprivation and a serious harm to the child.

4. Nonsupport When Able to Support

This ground for termination appears less frequently, but is found in a number of statutes and incorporated in Professor Katz's recent tentative draft. In an approach which is probably consistent with most other statutes of this nature, the Katz proposal requires that the nonsupport be "substantial" and "continuous."

5. Parental "Unfitness" or Immorality

This ground for termination is found in the statutes of 18 states. (See "Summary of State Practices" supra.) It has, however, been rejected by all past standards groups. The arguments for and against this criterion are largely the same in this area as they are with regard to initial neglect jurisdiction on this same basis. (Compare Abuse and Neglect Comparative Analysis 5.) Those who favor very broad-scoped judicial discretion favor such a criterion; those who opt for a more rule-oriented approach strongly oppose such a formulation.

6. "Best Interests of the Child"

Some state statutes authorize termination when it is in the "best interests of the child."[29] Other states do not posit this criterion as an independent ground for termination, but make it an additional prerequisite to issuance of a termination decree--thus requiring the court to find that the case falls within one of the other criteria and that termination is in the child's "best interests."[30] Where the "best interests" test appears as an independent basis for termination, it vests the court with very wide ranging discretion, indeed.

7. Task Force Standards and Rationale:

The Task Force's Standard 14.32 addresses the issue of termination as follows:

> Statutes governing termination of parental rights should be premised on the child's need for a permanent, stable family home, not on principles related to parental fault. Therefore, termination should be required if the child cannot be returned home within six months to one year after placement depending on the child's age, unless:
>
> (1) Termination would be harmful to the child because of the strength of the child's family ties;

(2) The child is placed with a relative who does not wish to adopt the child;

(3) The child is placed in a residential treatment program and termination is not necessary to provide a permanent family home; or

(4) There is a substantial likelihood that a permanent placement cannot be found and that the failure to terminate will not jeopardize the child's chances of obtaining a permanent placement.[31]

Again, the Task Force's substantial concern about the well-documented harms resulting from extended foster care led it to opt for a more rule-oriented approach.

The Task Force was also impressed by the evidence on children's "sense of time" and developmental differences in children of different ages. The commentary, though not the standard itself, endorses the IJA/ABA draft's recommendation that a six months time-frame generally apply to those under three and a one-year period apply to those over three.

Footnotes:

[1]See generally, V. De Francis, Termination of Parental Rights--Balancing the Equities (1971).

[2]See, e.g., National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act (1968).

[3]Institute for Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children (Tentative Draft 1976).

[4]Id.

[5]Source: Katz, Howe & McGrath, "Child Neglect Laws in America," 9 Fam. L.Q., pp. 47-49 (1975); for a review of the case law see E. Browne & L. Penny, The Non-Delinquent Child in Juvenile Court: A Digest of Case Law, pp. 80-84 (1974).

[6]This statute is currently being drafted under the direction of Professor Sanford Katz, Boston College Law School, under a grant from HEW's Office of Child Development (OCD).

[7]This analysis considers involuntary termination proceedings only and focuses principally on termination at special proceedings and review hearings to monitor neglect cases. Statutes providing for termination at adoption proceedings are not discussed and state statutes providing for termination as a dispositional alternative at the initial neglect hearing are not examined specifically.

[8]N.Y. Family Court Act §614 (McKinney Supp. 1973-74).

[9]See note 3 supra.

[10]Lincoln, "Judicial Considerations in Child Care Cases," 11 Wayne L. Rev., pp. 709-16 (1965).

[11]Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 Geo. L.J., p. 937 (1975).

[12]Mnookin, "Foster Care--In Whose Best Interest?" 43 Harv. Educ. Rev., pp. 633-35 (1973).

[13]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., pp. 695-96 (1976).

[14]Mnookin, supra note 12, pp. 634-35.

[15]Id.; Wald, supra note 13, pp. 626-27.

[16]See note 8 supra.

[17]Lincoln, supra note 9, p. 716.

[18]See, e.g., J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).

[19]Areen, supra note 11.

[20]Wald, supra note 13.

[21]S. Katz, When Parents Fail 61-62 (1971), cited in S. Katz, et al, Unpublished Memo in Support of Tentative Draft of Model Termination of Parental Rights Statute Prepared Under a Grant from HEW's Office of Child Development (1975-76).

[22]S. Katz, et al Memo id.

[23]Id.

[24]H. Goldberg, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children, p. 15 (DHEW 1961).

[25]See, e.g., id., p. 16.

[26]See, e.g., S. Katz, et al, Tentative Draft of Model Termination of Parental Rights Statute (1975-76).

[27]See National Conference of Commissioners on Uniform State Laws, supra note 2 §47(a)(2). This section may--and, on the basis of its context, perhaps should--be read as applying to the initial dispositional hearing (only); the Act is ambiguous on this point. In any case, requiring a showing of "repeated" or "uncorrected" neglect is a common practice among the states. See "Summary of State Practices" supra.

[28]Id.

[29]See Katz, Howe & McGrath, supra note 5.

[30]See V. De Francis, supra note 1.

[31]National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention (forthcoming).

APPENDIX

COMPLETE LISTING OF COMPARATIVE ANALYSES

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