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The Rights of Children: A Trust Model

Connie K. Beck

Greta Glavis

Susan A. Glover

Mary Barnes Jenkins

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The Rights of Children: A Trust Model

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Pts. I & IV(A) prepared by Mary Barnes Jenkins; pt. II by Connie K. Beck; pt. III by Richard A. Nardi; pts. IV(B) & V by Susan A. Glover, pt. IV(C) by Greta Glavis; assistance by Robert P. Oppenheim and Karen Schneider Herzog.

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COMMENTS
THE RIGHTS OF CHILDREN:
A TRUST MODEL

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I. Introduction

This Comment analyzes the problematical legal status of children. It incorporates knowledge derived from other disciplines and from other areas of the law to assess the child's present place in the legal system. The common thread running through the discussion is the analogy drawn to the broad equitable principles of trust law as a model for defining the rights and duties existing among the child, his parents, and the state. The trust model constructed upon these principles assumes that the child has the full rights of an adult, but that his rights are held in trust by the parent or the state until the child develops the full rational powers of an adult. This approach requires that the child's parents and the state be not merely responsible for the child but, in some respects, responsible to him for decisions made regarding his welfare during his minority.

The institution of childhood itself has been described as a relatively recent development.\(^1\) In medieval times, the young child, once freed from strict physical dependence upon his mother or nurse, was introduced into the world of adults.\(^2\) Between the ages of five and seven, he began participating in adult work and recreation.\(^3\) This undifferentiated role was changed when the moralist philosophers of the seventeenth century put a new emphasis on the responsibility of the parent in ensuring the physical, and above all the spiritual, training of the child.\(^4\) The resulting withdrawal from adult life into a protective sphere of family privacy and control gave the child a more important place in the family.\(^5\) But it also effectively "quarantined" him from early participation in adult activities that had earlier been available to him.\(^6\) Parents began to exercise strong measures of physical domination early in the child's life to inculcate a tradition of passive obedience.\(^7\) This was a preventive measure to avoid later rebellion against critical decisions about marriage and occupation which the parent could make even if the child had become an adult by the time such decisions were made.\(^8\) Even upon reaching maturity, one was expected to show signs of obedience verging on servility to one's parents.\(^9\) Therefore, it can be seen that the same historical roots gave rise both to the concept of childhood as a distinct period of life and to the concept of the family as an institution bearing a special protective responsibility for that period.\(^10\)

Because of the child's presumed incompetence arising from his physical and intellectual immaturity, the law governing families initially vested power over

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2. Id. at 128.
3. Id. at 329.
4. Id. at 412.
5. See id. at 398.
6. Id. at 412.
8. Id. at 45.
9. Id. at 41.
10. See Ariès, supra note 1, at 403.
the child in the father as an adult and legally responsible person. Even constitutional decisions recognized the parents' fundamental "right" to make child rearing decisions free from governmental interference, in the absence of physical abuse or gross neglect of the children in that parent's care. Since it was thought inappropriate to extend adult rights to the child, the child had few rights of his own. This lack of rights, the unilateral nature of decisions regarding a child's welfare, and the exclusivity of parental custody and control gave the child a legal position comparable to that of a chattel. The major problem with the present legal status of children is that it allows parents and, increasingly, the state to assert their own legally recognized interests over a child without any system of checks and balances to ensure that these interests are in fact exercised to protect and promote the child's development into a mature, productive citizen. Accordingly, any re-evaluation of the child as a legal person must do at least two things, and these are the objectives of this Comment. First, a re-evaluation must define those interests that are unique to a child as a child and require legal protection of them as recognized rights. Second, it must formulate a workable concept that will allow adults to exercise rights on behalf of the child until such time as he is capable of exercising his own rights. It is in this second area that the trust model may help to define guidelines.

At the outset, the appropriateness of the trust model requires discussion. A basic premise in this Comment is that children do have rights. The Supreme Court has given express recognition to this proposition in recent years, noting that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." Yet it is clear that the child himself, in his early years, has not yet developed sufficient intellectual powers to exercise such rights or, in some cases, even to recognize their existence and the alternatives available in their exercise. What is missing under present law is some

12. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents may send children to private rather than public schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (parents may require that a child have the opportunity to study particular subjects). But see Prince v. Massachusetts, 321 U.S. 158 (1944) (parents may not require a child's participation in religious activities that might be harmful to the child).
13. See Ladd, Civil Liberties for Students—At What Age?, 3 J.L. & Educ. 251, 251 (1974) ("Adults have many rights, including the kind that go along with merely being citizens . . . . The very young, on the other hand, have few rights, and almost no civil liberties.").
15. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (upholding the right of a minor under the age of eighteen years to have an abortion without the consent of her parents). See also Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (recognizing a minor's substantive first amendment right to freedom of speech absent a showing by the school authorities that the prohibited conduct would materially and substantially interfere with appropriate school discipline); In re Gault, 387 U.S. 1 (1967) (a juvenile charged with a crime is entitled to the same due process protection as an adult).
16. It has been found that only in adolescence does a child begin to use mental processes similar to those of an adult and to understand the patterns and motivations of human behavior on an adult level. See J. Flavell, Cognitive Development 114-43 (1977); note 38 infra and accompanying text.
conceptual mechanism which explains why rights may be exercised in the child's interest until such time as his own capacity has developed. Traditionally, parents have exercised control over a child as part of their own adult prerogatives within the family, thus isolating the child from the recognition or exercise of his own rights. In addition, the state, by undertaking compulsory education and by administering a system of juvenile justice, plays an increasingly important role in determining the status of the child. With the advent of discretionary and in some cases mandatory child advocates in legal proceedings, there is yet another significant adult to exercise a child's rights on his behalf. Consideration of the trust model in defining the parent-child, state-child, or advocate-child relationship provides several advantages.

The corpus of the trust, which the trustee must protect and develop in the beneficiary's behalf, consists of the body of rights which are, or should be, ascribed to children. It should be clear that the trust law is used here only as a conceptual analogy, since no conventional trust could be formed with such an unconventional res as a person's rights. One strength of such a conceptual model is that it reinforces the fact that the rights in question belong to the child as beneficiary and not to either the parent or the state as trustee. To take one example, a parent, as a practical matter, must decide whether to send his child to a public or parochial school because children of grammar school age would be unable to make a reasoned choice between the two schools. Because the parent makes the decision, it might be concluded that it is the right of the parent to determine what kind of education the child should receive. Under the trust model, however, the parent would be allowed to decide for the child not by virtue of his own right but only by virtue of his position as trustee.

The right to choose between two schools, as a corollary of the right to receive an education, would be treated under the trust model as part of the corpus

21. See generally Keith-Lucas, "Speaking for the Child": A Role-Analysis and Some Cautions, in The Rights of Children 218-31 (A. Wilkerson ed. 1973), which distinguishes five roles which the child advocate might be called upon to fill in a child's behalf, namely: 1. Direct representation of a child or of his established rights; 2. Parental intervention in cases of alleged neglect or dependency; 3. Representation of the child's stake in the proceedings; 4. Expert witness to a child's beliefs; 5. Permanent representative, or guardian." Id. at 230.
23. See id. § 95, at 343-50; notes 28-30 infra.
24. But see Bogert & Bogert, supra note 22, § 25, at 69 ("[A]ny transferrable interest, vested or contingent, legal or equitable, real or personal, tangible or intangible, may be held in trust.").
25. The Supreme Court has not squarely ruled on the question of whether the right to direct a child's education belongs to the parent or to the child. See Wisconsin v. Yoder, 406 U.S. 205 (1972). But the Court has stated in dicta that the right belongs to the parent. See id. at 230-32; Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (referring to "the liberty of parents and guardians to direct the upbringing and education of children under their control").
27. See pt. III infra for a discussion of a child's rights within the compulsory education system.
The rights which belong to the child. The fact that the rights which a parent exercises belong not to him but to the beneficial owners imposes two important limitations upon the exercise of such rights. At the same time it offers two additional conceptual advantages to the use of the trust model to define children's rights.

The first limitation upon the exercise of power by parents or the state under the trust model would be the standard of care and loyalty imposed upon those in fiduciary relationships. Property law imposes a particularly stringent standard of care upon a trustee. Since the law imposes such a high standard upon the caretaker of mere property, it is not unreasonable to suggest that a somewhat higher standard of conduct might also be required of a person in charge of a living child. The analogy is especially appropriate because in many respects the family resembles a fiduciary relationship. This relationship is an intimate one, in which the beneficiary must "place great confidence in the [party who exercises] a high degree of control over the affairs of the beneficiary." A court asked to redefine the duties of parents or the state might well look to the duty of loyalty imposed by the law of trusts for a conceptual analogue. A trustee is required to exercise the powers given him solely in the interests of the beneficiary, allowing neither his own self-interest nor even the interests of other beneficiaries to color his decisions. Similarly, where the child's needs are distinct from the adult's, a court might require that the parents give full consideration to the child's best interests by exercising the child's rights in a manner that will protect and preserve the child's future options. A vegetarian parent, for example, who cannot adequately nourish a growing child, must be willing to modify his own strict compliance with what may be an adequate regimen for adult growth to meet the nutritional needs of the child. As in any fiduciary relationship, the courts should be empowered to oversee the proper execution of the trust, to enforce, where necessary, the trustee's fiduciary duties, and to intervene actively in the relationship when it determines that there has been an abuse of the trustee's discretion in handling the trust powers. Thus the use of a trust model would

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29. Id. § 1, at 2.
30. Id. § 95, at 343-50.
31. Justice White, for example, argued that, although the Constitution prohibits state interference with a parent's discretion to direct the education of his child, the parent is not free to reduce the child's future options to choose among available occupations and life styles by subjecting him to the parent's "idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (concurring opinion). "A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose . . . ." Id. at 240. A court might, therefore, in a decision compatible with Justice White's view, recognize that a parent has a duty to choose the type of education for his child that will maximize the child's options for future participation in society, regardless of the parent's preferences in life style. See also Richards, Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication, 41 U. Chi. L. Rev. 32, 41-49 (1973).
32. See Bogert & Bogert, supra note 22, § 89, at 321-25.
allow a court to draw upon an existing body of law as a conceptual analogy in re-defining the child's legal relationship with adults or with the state. By introducing the concept of loyalty to the interests of the beneficiary, the trust model would direct the attention of the trustee and the enforcing court to the child whose rights are being exercised.

The second limitation on the power of a parent or the state to exercise a child's rights which can be derived from the trust model concerns the duration of the trustee's powers. The law presently defines childhood in a monolithic way, choosing an arbitrary date for majority at which time the child is recognized as having achieved adulthood with an abruptness comparable to an armed Athena leaping fully grown from the head of Zeus. Yet it is clear from child development studies and from ordinary observation that a child's capacity to understand, to define his own interests, and to exercise independent judgment develops gradually, and, in certain matters, matures well before the designated date of majority. Under the trust model, a trust terminates when its purposes have been accomplished. Taking each right of the child individually, it is possible to emancipate a child in stages rather than in an abrupt and arbitrary fashion. As the child demonstrates the capacity to exercise a right himself, the underlying rationale for entrusting the exercise of that right to an adult—to protect the child from the consequences of his own imprudent decisions—is eliminated.

33. The monolithic treatment of the concept of majority by legislatures has been criticized as encouraging a similar "off-on" arrangement for the recognition of rights and liberties under which the adolescent is given no legally recognized opportunity to determine his own actions up to and including the day before his majority. See Ladd, Civil Liberties for Students—At What Age?, 3 J.L. & Educ. 251, 252 (1974).

Since children today may be exposed to influences which even adults were sheltered from at the beginning of the century, it is not surprising that the Supreme Court has recognized that a "competent minor mature enough to have become pregnant" should be allowed to decide for herself whether or not to have an abortion. See Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976) (striking down a statute requiring parental consent for abortions). In Danforth the Court
the relevant right should be withdrawn from the corpus of the trust and vested in the child whose reason has developed sufficiently for him to exercise the right prudently on his own behalf.\footnote{38}

In order that the child may eventually be able to exercise his rights prudently, the trust must be structured to ensure him broad opportunities to develop the full capabilities of an adult.\footnote{39} In making decisions as trustees, the parent or state agency should therefore avoid any action that might obstruct the development of a child's ability to reason abstractly, his capacity to form emotional relationships, his motivation to achieve goals, or other such skills necessary for adult life. When presented with alternative courses of action on the child's behalf, the trustee should make the choice that forecloses the fewest future opportunities for the child.\footnote{40}

The analogy from trust law may be carried further to provide a theory behind the establishment of a trust involving a child's rights. Although the state has played an increasing role as trustee, in its legislative functions it recognized that a child has a fundamental right of privacy protected by the Constitution. \textit{Id.} at 74. In terms of the trust model, it could be said that as long as a young child lacks the ability to exercise her right of privacy prudently, the right is held in trust and exercised on her behalf by her parents. By comparison, a girl who is old enough to bear children, and who has undertaken the risk of becoming pregnant, should no longer be given any greater legal protection than an adult is given from the consequences of her own possibly imprudent decisions. The purpose of the trust—to protect the child—has terminated, and the child must be allowed to exercise her right of privacy on her own behalf.


\footnote{39} One essential element in a child's development is the achievement of a sense of self-esteem. \textit{See} E. Hurlock, \textit{Adolescent Development} 340-41 (4th ed. 1973); S. Samuels, \textit{Enhancing Self-Concept in Early Childhood} 33-35 (1977). Without a sense of self-esteem a child will be unable to form rewarding personal relationships or to participate effectively in society. \textit{See} J. Conger, \textit{Adolescence and Youth}, \textit{Psychological Development in a Changing World} 227 (2d ed. 1977). \textit{See also} McKeiver v. Pennsylvania, 403 U.S. 528, 566 (1971) (Douglas, J., dissenting); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); J. Rawls, \textit{A Theory of Justice} 440 (1971). A child develops a sense of self-esteem, especially during adolescence, by making important decisions for himself, thereby building a sense of personal competence and initiative. J. Horrocks, \textit{The Psychology of Adolescence} 343-44, 349 (4th ed. 1976). To ensure that a child has the maximum opportunity to develop his self-esteem, the law, under the trust model, should allow the child to exercise his rights in his own behalf as soon as the child is able to make a prudent decision with respect to the right involved. When a child is competent to exercise the right in his own behalf, the purpose of protecting the child by keeping the right in trust is no longer relevant, and the trust should terminate.

\footnote{40} \textit{See} note 31 \textit{supra} and accompanying text.
operates also as settlor of the trust. By enacting statutes regulating such matters as custody, the age of majority, and the parental duties of financial support of dependent children, the state has acted much like the settlor of a trust in determining the dimensions of the fiduciary relationship between adult and child. Such laws, in effect, define who shall be given the powers and responsibilities of child care.

Thus, the trust model provides a conceptual framework for analyzing the conditions upon which the parent or the state may exercise the child's rights and the proper duration of such exercise. The sections below investigate in greater detail the nature of children's rights. The area contains conceptual difficulties not encountered in dealing with other historically oppressed groups. The situation of children is complicated by the fact that adults often romanticize their own childhoods, and tend to forget the serious and troubling problems a child faces as he grows and attempts to absorb and understand the adult world. While it is proper to be concerned with the development of adult capabilities, such concern should not be grounds for withholding from children the respect and dignity we accord adults. "Childhood is a stage of life itself, not just an apprenticeship."

The individual sections below will define in detail some of the basic rights that should be accorded to children. For introductory purposes, it will suffice to state that this Comment is largely devoted to those rights relating to childhood and development, namely, education, custody, nurturing, and freedom from abuse. However, extensive treatment will also be given to legal procedural rights, which were once assumed to belong only to adults.

II. A Child's Rights in the Juvenile Justice System

Separate court systems for adults and juveniles have existed in the United States since 1899. The present separation is based on the belief that children

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41. Cf. Bogert & Bogert, supra note 22, § 1, at 1 ("The settlor of a trust is the person who intentionally causes the trust to come into existence.").
43. See, e.g., N.Y. Dom. Rel. Law § 2 (McKinney Supp. 1977) ("A 'minor' or 'infant' . . . is a person under the age of eighteen years.").
47. See pt. III infra.
48. See pt. IV(B) infra.
49. See pt. IV(A) infra.
50. See pt. IV(C) infra.
51. See pt. II infra.

1. A juvenile court system developed because reformers were appalled by the application of adult procedures and penalties to children. In re Gault, 387 U.S. 1, 15 (1967). However, the belief that, under adult law, children were severely punished for trivial offenses is more an unjustified impression than a reality. Sanders, Some Early Beginnings of the Children's Court
must be protected. A protective philosophy has validity, but experience has shown that a protective system fosters as many abuses as the traditional system which subjected children to adult procedures and penalties.  

Movement in England, in Juvenile Justice Philosophy: Readings, Cases, Comments 42 (F. Faust & P. Brantingham eds. 1974); see A. Platt, The Child Savers 193-212 (2d ed. 1977). There is considerable evidence that for centuries child offenders have been treated with leniency. Sanders, supra at 43. In fact, if the juvenile justice system had been such a radical concept, it is unlikely that it would have been so readily accepted. Platt, supra at 194.


3. The status of youth differs from the status of adulthood. Youth is a status of dependence which "carries with it certain privileges and special protections not accorded adults." W. Stapleton & L. Teitelbaum, In Defense of Youth 11 (1972) [hereinafter cited as Stapleton]. A child is a "developing person" who starts life completely helpless and must slowly learn to live in society. Id. Adult perception of the dependent status of children has not changed significantly in centuries. John Locke, in the seventeenth century, wrote that children must be under their parents' control until they learn to take care of themselves. When they achieve the ability to understand "the principles by which they are governed," they may become independent. Worsfold, A Philosophical Justification for Children's Rights, 44 Harv. Educ. Rev. 142, 144 (1974); see pt. IV(A) infra.

Reformers sought to protect children from adult courts by the establishment of a separate court system for children. Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547, 547-48 (1957). Thus, the juvenile court proceeding was developed as an informal, civil, nonadversarial hearing directed to the child's best interests. See Ketcham, The Unfulfilled Promise of the Juvenile Court, 7 Crime & Delinquency 97, 98-99 (1961); Paulsen, supra at 549. The informalities of a nonadversarial proceeding were intended to spare the child from "psychological trauma and to facilitate a new focus on the child's condition rather than on his guilt." D. Katkin, D. Hyman & J. Kramer, Juvenile Delinquency and the Juvenile Justice System 12-13 (1975); Platt, supra note 1, at 47; National District Attorneys Ass'n, Juvenile Law and Procedure 2 (1973) [hereinafter cited as NDAA]; Flicker, Standards for Juvenile Justice, 8 N.Y.U. Educ. Q. 15 (1977); Note, The New York Juvenile Justice Reform Act of 1976: Restrictive Placement—An Answer to the Problem of Seriously Violent Youth?, 45 Fordham L. Rev. 408, 409 (1976) [hereinafter cited as Fordham Note].

4. Modern abuses are not as flagrant as the hanging of an eight-year-old for stealing candy, but nevertheless exist. In In re Gault, 387 U.S. 1 (1967), for instance, because Gerald Gault was 15 when he was taken into custody for making lewd phone calls, and therefore subject to the jurisdiction of the juvenile court, he was committed to custody for a maximum of six years. Id. at
Juvenile court procedure substitutes flexibility and informality for the formality of the adult system. It had been presumed that the juvenile court afforded juveniles special protection which made constitutional protections unnecessary. In recent years, however, juvenile delinquents have been guaranteed most due process rights, because courts realized that the flexibility of the juvenile court proceeding had resulted in the arbitrary handling of juveniles. Status offenders, on the other hand, have not been guaranteed due process. The Court has been reluctant to grant full constitutional protections to all juveniles and risk destroying the juvenile justice system.

7. If Gerald has been over 18, his maximum punishment for the same offense would have been a fine of no more than $50 or imprisonment for two months. Id. at 29.

5. See note 3 supra. For example, intake, a procedure in the juvenile system which does not occur in adult proceedings, is an informal screening by court officials and probation officers of the complaints filed against children. These officials then decide whether the case should be referred to the juvenile court for a formal hearing. Experts estimate that one-half of the complaints are disposed of at intake and not sent to the juvenile court. A Sussman, The Rights of Young People 90-91 (1977).

6. See notes 10, 15-20 infra and accompanying text.

7. In re Gault, 387 U.S. 1, 21 (1967). "It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process." Id. Thus, juveniles became, constitutionally, non-persons. Stapleton, supra note 3, at 11; Kravitz, Due Process in Ohio for the Delinquent and Unruly Child, 2 Cath. U.L. Rev. 53, 55 (1973).

8. A child is considered to be a juvenile delinquent if he violates state laws, federal laws, or local ordinances. Johnson, supra note 3, at 32.

9. See note 115 infra.

10. See In re Gault, 387 U.S. 1, 18-19 (1967); Kent v. United States, 383 U.S. 541, 555-56 (1966). "There is evidence, in fact, ... that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." 383 U.S. at 556.

11. Juvenile status offenses are acts which are not prohibited for adults, "they are just for kids." W. Sanders, Juvenile Delinquency 64 (1976); Sussman, supra note 5, at 53. Status offenses include violations of ordinances such as curfew, truancy, tobacco and alcohol laws, Sanders, supra at 64, and acts demonstrating incorrigibility, idleness, and immorality. Sussman, supra at 53; see, e.g., N.Y. Fam. Ct. Act § 712(b) (McKinney Supp. 1977); Ohio Rev. Code Ann. § 2151.022 (Page 1976).

12. McKeiver v. Pennsylvania, 403 U.S. 528, 532-33 (1971); McNulty & White, The Juvenile's Right to Treatment: Panacea or Pandora's Box?, 16 Santa Clara L. Rev. 745, 753 (1976) [hereinafter cited as McNulty]. Contra, Note, Persons in Need of Supervision: Is There a Constitutional Right to Treatment?, 39 Brooklyn L. Rev. 624, 629 (1973) [hereinafter cited as PINS] (The author of the note has read Gault beyond its limited holding. The Court specifically stated that it was not considering "the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state." 387 U.S. at 13. The Court went on to say that it was only considering the problems of juvenile delinquency proceedings. Id.)


14. Id. at 551; see In re Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting). Juveniles fully protected by the Constitution would need no other substitute protection from fatherly judges, informal hearings, and parens patriae. Perhaps the ultimate dissolution of the
and its special protective nature.\textsuperscript{15}

Courts in the nineteenth century rationalized the absence of constitutional safeguards in juvenile cases by distinguishing civil from personal liberty,\textsuperscript{16} but the distinction was never fully developed. This section will develop the distinction between civil and personal liberty and a child's right to each. Further, this section will propose that the distinction can serve as a means to approach the conflict between the special protections afforded juveniles and the need for due process protection for status offenders.

\textbf{A. Personal Liberty and Civil Liberty}

Most Americans believe that they know what liberty is\textsuperscript{17}—but, then, they have never tried to define it. Those who attempt to define it resort too frequently to a mere listing of its elements.\textsuperscript{18} One author came close to defining liberty when he wrote:

\begin{quote}
[Liberty's] unique quality is that it seeks to accomplish no fixed end, but only seeks to provide a process of living by which each man can work out for himself his own life and his own conception of his own destiny, provided he stays within an area which will allow others to have such right equally with him.\textsuperscript{19}
\end{quote}

This "definition" suggests two aspects of liberty: an individual's freedom to make decisions about his own life, and possible limitations on that freedom to assure the freedom of others. The individual's right to make decisions about his own life will be referred to in this section as his right to \textit{personal} liberty. The individual's right to fair treatment when his personal liberty is limited by the rights of others will be referred to as his \textit{civil} liberty.

The Bill of Rights guarantees such personal liberties as freedom of speech, association, \textit{religion},\textsuperscript{20} and a right of \textit{privacy},\textsuperscript{21} but personal liberty is broader

\footnotesize

\textsuperscript{16} See, e.g., \textit{In re Ferrier}, 103 Ill. 367, 373 (1882); People v. Turner, 55 Ill. 280, 284 (1870); \textit{Ex parte Crouse}, 4 Whart. 9, 11 (Pa. 1839).


\textsuperscript{19} Brown, supra note 17, at 291.

\textsuperscript{20} See U.S. Const. amend. I.

\textsuperscript{21} The Supreme Court has said that even though the word "privacy" is not mentioned in the Bill of Rights or the Constitution, other specifically named guarantees have "penumbras" that include the protection of individual privacy. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); see \textit{Time, Inc. v. Firestone}, 424 U.S. 448, 452-57 (1976); \textit{Roe v. Wade}, 410 U.S. 113, 152 (1973).
than this. Personal liberty includes the right to order one's life as one wishes as long as one does not violate the rights of others. "[A]n individual may do what he wants to do, be who he wants to be, and think and act for himself."\textsuperscript{22} An individual is free to acquire knowledge, marry, have children, worship a god, live and work where he chooses, engage in a lawful occupation, enter contracts, and generally pursue happiness.\textsuperscript{23} Personal liberty exists when an individual has a substantial freedom of choice\textsuperscript{24} and a meaningful range of alternatives,\textsuperscript{25} but an element of restraint is also a part of liberty.\textsuperscript{26}

Internal restraint—whether it be called self-discipline, self-control, morality, or conscience\textsuperscript{27}—allows an individual to be free.\textsuperscript{28} If a person cannot control himself, he is not free to order his own life through personal choice.\textsuperscript{29} External restraint is also necessary to personal liberty. An individual cannot expect to be free from the constraints of mores\textsuperscript{30} and the duties imposed by positive law.\textsuperscript{31} Without external restraint, human action would be chaotic, with the powerful enslaving the less fortunate,\textsuperscript{32} and no one exercising personal liberty.\textsuperscript{33}

An individual can only exercise his personal liberty to an extent consistent


\textsuperscript{23} Id. at 70-71; accord, Booth v. Illinois, 184 U.S. 425, 428-29 (1902). These enumerated rights are not a finite listing, but are suggestive of the body of rights that make up an individual's personal liberty.

\textsuperscript{24} Foley, supra note 18, at 397: Simonton, A Definition of Liberty, 50 A.B.A.J. 337, 339 (1964).

\textsuperscript{25} Foley, supra note 18, at 397.

\textsuperscript{26} Id. at 398. Foley suggests four essential elements of liberty: "a living, purposive, choosing human being," alternatives from which to choose, a relationship to another human being, and restraint. Id. at 397-98.

\textsuperscript{27} Id. at 398.

\textsuperscript{28} Id.

\textsuperscript{29} If a person is, for example, subject to fits of uncontrollable anger or compulsive acts, which he cannot restrain, he is not free to exercise personal choice. Id.

\textsuperscript{30} Society's mores are its "numerous customs, morals, taboos and traditions," Simonton, supra note 24, at 337-38. When an individual violates these he subjects himself to disgrace or loss of reputation. Id. at 338.

\textsuperscript{31} Id. at 337. Positive law is defined as "[l]aw actually and specifically enacted or adopted by proper authority for the government of an organized jural society." Black's Law Dictionary 1324 (4th ed. 1968). A violation of positive law results in a direct personal penalty, usually a fine or imprisonment. Simonton, supra note 24, at 337.

\textsuperscript{32} Foley, supra note 18, at 399.

\textsuperscript{33} The less fortunate would be subject to the will of the powerful and the powerful would not be free because of their constant effort to coerce others. Id. Thomas Hobbes espoused such a dominant-subservient relationship between a child and his parents in the seventeenth century. He argued that the relationship must be founded on fear and that children must be completely dependent. Hobbes wrote that "like the imbecile, the crazed and the beasts, over . . . children . . . there is no law." 3 T. Hobbes, Leviathan 257 (Molesworth ed. 1839-45), quoted in Worsfold, supra note 3, at 144. The father, in Hobbes' view, had the power of life and death over his children, and thus the children must obey. Id.
with the exercise of personal liberty by others. When an individual goes beyond this limitation, his exercise of personal liberty may be constrained. This interference must be conducted, however, in a fair way. In our society, this right to fair treatment is the right to procedural due process, which rests upon the mandate of the fifth and fourteenth amendments that no person be deprived of his liberty without due process of law. The right to procedural due process is the civil liberty of which this section speaks. Thus, a person's civil liberty exists to protect the fair exercise of his personal liberty.

B. The Child's Right to Personal Liberty

An adult can exercise personal liberty to an extent not inconsistent with the rights of others, but a child's right to exercise personal liberty is more limited. Because of the child's condition of dependence and helplessness, parents are generally entrusted with the care, custody, and education of their children. In order for the parent to perform his duty of rearing his children he may exercise a reasonable degree of force and restraint over them. A parent may interfere with a child's right to exercise personal liberty because it is presumed that children are not mature enough to make

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34. See notes 19, 22 supra and accompanying text.
35. See Foley, supra note 18, at 401, 417-418.
36. U.S. Const. amends. V, XIV.
37. It is almost impossible to give a comprehensive definition of due process. Its meaning can best be ascertained by a case-by-case analysis. See Twining v. New Jersey, 211 U.S. 78, 99-100 (1908). For a discussion of its general principles, see id. at 100-05.
39. See note 3 supra. See also pt. IV(A) infra.
40. It has been asserted that a child has a right to custody—the right to have someone take care of him. Shears, supra note 3, at 720; see pt. IV(B) infra.
41. See In re Gault, 387 U.S. 1, 17 (1967); In re Ferrier, 103 Ill. 367, 372 (1882); People v. Turner, 55 Ill. 280, 284 (1870); Ex parte Crouse, 4 Whart. 9, 11 (Pa. 1839). Parents are ordinarily given the responsibility "because it can seldom be put into better hands," 4 Whart. at 11, and it is done "upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education." 103 Ill. at 372; see pt. III infra.
42. This discipline may be exercised by a parent or one who stands in the place of a parent. See, e.g., Calway v. Williamson, 130 Conn. 575, 579, 36 A.2d 377, 378 (1944) (for certain purposes a teacher stands in loco parentis); Gorman v. State, 42 Tex. 221, 222 (1875) (a stepfather can exercise a parent's discipline and control). One acting in loco parentis is someone other than the parent who has assumed parental duties and responsibilities. Howard v. United States, 2 F.2d 170, 174 (E.D. Ky. 1924); Meisner v. United States, 295 F. 866, 868 (W.D. Mo. 1924).
44. A parent can select the school to which his child will go, decide whether to put a child up for adoption, regulate when a child goes out and stays in, and much more. See Wald, Making Sense Out of the Rights of Youth, 4 Human Rights 13, 16-17 (1974).
rational judgments about what is in their best interests. If the traditional patterns of family control fail or children are not being properly cared for and educated by their parents, the State assumes these functions. This interference with the parents' right to rear children is justified by the State's role as parens patriae. The parent's right is subject to limitation by the State—the ultimate parent of all children within its borders—when in a court's opinion the best interests of the child demand it. The State also has its interest in the development of its citizens as justification for assuming the care and custody of a child.

It was previously stated that the State may only interfere with the parent's right to rear his children when the best interests of the child demand it. This limitation guards against arbitrary State interference.

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45. Id. at 17. Much of what is done for children is said to be done in the child's best interests, but, in reality, often what is done is in the best interests of society or parents. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973). See generally pt. IV(B) infra.

Juvenile courts acknowledge the importance of a child's best interests, but they continue to balance those interests against those of parents and the public. Johnson, supra note 3, at 13.


47. Stapleton, supra note 3, at 12.

48. Parents have a constitutional right to "bring up children," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and to "direct the upbringing and education of children," Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). This right is subject to State intrusion only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

49. The doctrine of parens patriae was borrowed from the English chancery court. Ketcham, supra note 3, at 97; Rendleman, Parens Patriae: From Chancery to the Juvenile Court, in Juvenile Justice Philosophy: Readings, Cases, Comments 72, 74 (F. Faust & P. Brantingham eds. 1974). As parens patriae, the king, through his chancellors, assumed the protection of all the infants in the realm. Ketcham, supra at 97. When the doctrine was incorporated into American law, the state and federal governments took the place of the crown. Id. at 98. As one aspect of parens patriae, the chancery court dealt with neglected or dependent children, not with children accused of criminal violations. Nevertheless, "it is as inheritor of the chancery court's protective powers that the juvenile court in this country has been most commonly justified." President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 2 (1967) [hereinafter cited as Pres. Comm'n].

50. Johnson, supra note 3, at 11-12.

51. If the State must intervene in the case of any child, it exercises its power of guardianship over the child and provides him with the protection, care, and guidance that he needs. Id. See also Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187, 1193 (1970).

52. "[T]he public has a paramount interest in the virtue and knowledge of its members." Ex parte Crouse, 4 Whart. 9, 11 (Pa. 1839); see Stapleton, supra note 3, at 13. It is the child's interest, and the community's, that children be protected from abuse and guided to develop into worthwhile citizens. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

53. See In re Ferrier, 103 Ill. 367, 371-72 (1882); Milwaukee Indus. School v. Supervisors of Milwaukee County, 40 Wis. 328, 338 (1876).
statutes, however, allow the State broad discretion in its involvement in family problems.54

C. Status Offenses and the Right to Personal Liberty

1. Adult Status Offenses

Status offenses are crimes that are defined in such a way that the essential element is not a proscribed action or omission,55 but a personal condition or character.56 "Status" is an ambiguous word used to indicate "a certain personal condition, as evidenced by certain facts."57 For example, one might be found to occupy the status of a common drunkard because he is idle and habitually found intoxicated.58 The principal justification for taking action against status offenders is that it prevents crime because these offenders are potential criminals.59 The principle presupposes criminal status, not on the grounds of a specific offense, but on the grounds of an intent, "sufficiently manifested by overt acts," to commit a crime in the future.60

Status offense statutes have been invalidated on grounds of being unconstitutionally vague61 and restrictive of personal liberty.62 Although the vagueness argument has been the more successful,63 the early cases were concerned with the particular language of the statutes rather than the concept of crimes

54. See note 137 infra.
55. "A crime may be generally defined as the commission or omission of an act which the law forbids or commands . . ." J. Miller, Handbook of Criminal Law 16 (1934).
56. Cuomo, Mens Rea and Status Criminality, 40 S. Cal. L. Rev. 463, 463 (1967); Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203, 1203-04 (1953); see note 11 supra.
57. Lacey, supra note 56, at 1204.
58. See Note, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality, 37 N.Y.U.L. Rev. 102, 110 (1962). Other examples include: vagrancy, begging, loitering, prostitution, gambling, brawling, and engaging in an unlawful calling. Id. at 109-111.
59. Cuomo, supra note 56, at 464; Lacey, supra note 56, at 1217. Other purposes are to isolate undesirable people from society, to prevent people from becoming public charges, and to encourage industry. Cuomo, supra at 464.
60. State v. Gaynor, 119 N.J.L. 582, 587, 197 A. 360, 363 (1938); see Robinson v. California, 370 U.S. 660, 683 (1962) (Clark, J., dissenting) ("Although none of these acts are harmful to society in themselves, the State constitutionally may attempt to deter and prevent them through punishment because of the grave threat of future harmful conduct which they pose.")
61. Cuomo, supra note 56, at 480; Lacey, supra note 56, at 1221-22; see, e.g., Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) (vagueness as to what conduct forbidden); Winters v. New York, 333 U.S. 507 (1948) (vagueness as to punishment which may be imposed); Lanzetta v. New Jersey, 306 U.S. 451 (1939) (vagueness as to what persons within scope of statute).
62. Lacey, supra note 56, at 1220-21. The infringement of liberty charge often relates to those clauses of statutes pertaining to loitering, idleness, and association with known criminals. See Ex parte Hudgins, 86 W. Va. 526, 103 S.E. 327 (1920) (statute outlawing vagrancy held to be unconstitutional restraint on liberty).
63. Cuomo, supra note 56, at 480.
of personal condition. The statutes were held void for not clearly defining the conduct forbidden. The Supreme Court has stressed that everyone is entitled to be informed of what the law commands or forbids.

A third ground for voiding the statutes is that they inflict cruel and unusual punishment. The Court, in Robinson v. California, held that a statute making the status of narcotic addict a crime, without any showing that the defendant had ever used narcotics within the state, inflicted cruel and unusual punishment. The Court's discussion of the constitutionality of a statute defining a crime in terms of status, rather than an act, can be read to cast doubt on the constitutionality of all status offense statutes.

The California statute in question in Robinson did not punish the purchase, sale, or possession of narcotics, nor the "antisocial or disorderly behavior resulting from their administration," but punished the status of narcotic addiction. Under the statute a person could be continuously subject to prosecution "at anytime before he reforms" even if he had never used or possessed narcotics or been guilty of antisocial behavior within the state. Although the Court noted that narcotic addiction is an illness, a fact that raises additional considerations, the plight of other status offenders is not so different from that of the addicted to make comparison unreasonable. For example, if a person is arrested for vagrancy because he momentarily paces back and forth on a public street, but commits no criminal act, it appears that he is no better off than an addict, in the eyes of the law. He is

64. Lacey, supra note 56, at 1221; see, e.g., Lanzetta v. New Jersey, 306 U.S. 451 (1939) (attacking the word "gang"); Phillips v. Municipal Court, 24 Cal. App. 2d 453, 75 P.2d 548 (1938) (attacking the word "loiter"); State v. Harlowe, 174 Wash. 227, 24 P.2d 601 (1933) (attacking the words "ilewd," "disorderly," and "dissolute"); cf. State v. Starr, 57 Ariz. 270, 275, 113 P.2d 356, 358 (1941) (attacking the word "loiter": The court stated that "[i]f it be suggested that a person could not know when he [is] violating the law, the answer is that anyone should know if he had any business on the school grounds or thereabouts.").

65. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) ("fails to give a person of ordinary intelligence fair notice that his ... conduct is forbidden") (quoting United States v. Harris, 347 U.S. 612, 617 (1954); Winters v. New York, 333 U.S. 507, 520 (1948) ("Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."); In re Newbern, 53 Cal. 2d 786, 793, 350 P.2d 116, 123, 3 Cal. Rptr. 364, 371 (1960) (citizens not sufficiently warned by vague language as to what course of conduct is denounced).


68. Id. at 667.

69. Id. at 665-66.

70. The Court specifically held that a person afflicted with narcotic addiction may not be imprisoned if he or she has not used drugs or committed some other unlawful act. Id. at 667.


72. 370 U.S. at 666.

73. Id. (quoting statute).

74. Id. at 667.

75. These considerations include questions of the state's role in health and welfare and compulsory treatment. Id. at 664-66.

continuously subject to prosecution until he reforms, even if he never commits a criminal act within the state.

In Powell v. Texas, the appellant sought to overturn his conviction for public drunkenness by application of the cruel and unusual punishment ruling announced in Robinson. The Court found that the case did not fall within the holding because the state had not attempted to punish a status, but had imposed a sanction on undesirable public behavior. Justice Black, however, in his concurring opinion, discussed the Robinson holding and its application to pure status crimes. He indicated that the holding was not limited only to status offense statutes punishing those afflicted with the disease, and said: "Punishment for a status is particularly obnoxious ... because it involves punishment for a mere propensity ... This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established ...."

2. Juvenile Status Offenses

Similarly, juvenile status offense statutes punish a condition rather than a specific act. For example, a child may be charged as a status offender because he endangers his morals. He is subject to this charge at any time before his reformation even though he is not found in a disreputable place or associating with immoral persons. It is his habitual behavior which subjects him to this, not a present, specific, criminal act. Although a child, in the past, may have been disobedient or associated with persons whom his parents felt were immoral, he is not subjected to the jurisdiction of the status offense statutes on the basis of any one past or present act. The child becomes a status offender as a result of his cumulative record of noncriminal, but "wayward" and "immoral" acts.

As with adult statutes, statutes which label a child "incorrigible" or "wayward" are vague because they do not give a child adequate notice of the conduct prohibited. Juveniles neither know the limits on their conduct nor

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77. 392 U.S. 514 (1968).
78. Id. at 532.
79. Id.
80. Id. at 541-44 (Black, J., concurring).
81. Id. at 543 (Black, J., concurring) (footnote omitted).
82. See Sussman, supra note 5, at 53.
83. See note 85 infra and accompanying text.
86. PINS, supra note 12, at 629.
87. Sussman, supra note 5, at 53.
89. Sussman, "Children in Need of Supervision" Laws Discriminate Against Females, 1 Children's Rights Rep. 5, 7 (Nov. 1976) [hereinafter cited as Children's Rights Rep.].
the circumstances in which they will be charged with wrongdoing. Yet, statutes which allow the above have been repeatedly held to be constitutional. One explanation for the different treatment of adults and children arises from the difference in their right to personal liberty. While adult status offense statutes are held invalid because they create an unreasonable restraint on personal liberty, status offense statutes applied to juveniles are held valid because such a restraint on a child's personal liberty is reasonable.

It is not unreasonable to restrain a child's freedom to be on public streets and in public places, to choose his place of abode, or to move about at will. A juvenile is seen as an immature, dependent being whose character must be shaped by parents and society. This necessitates restrictions that may

90. Id.; see, e.g., N.Y. Family Ct. Act § 712(b) (McKinney Supp. 1976-1977) (a person in need of supervision is one who is incorrigible, ungovernable, habitually disobedient, and beyond the lawful control of his parents); Ohio Rev. Code Ann. § 2151.022 (Page 1976) (an unruly child does not subject himself to reasonable restraint of parents by being wayward or habitually disobedient). Inconsistency is increased because conduct frequently is not labeled a status offense until a parent objects to it, and parents have differing views about children's behavior. Children's Rights Rep., supra note 89, at 7. Ironically, many of the offenses are actually parent offenses and a child has a reasonable justification for his actions. A girl may run away to avoid sexual advances by male relatives, K. Wooden, Weeping in the Playtime of Others 81 (1976); Meyers, Bad Girls Before the Law, 6 Student Law. 34-36 (1977), or a child may be considered incorrigible because he is seventeen and does not want to be home early every night, see Wald, supra note 44, at 21.


92. Although adult status offense statutes have been found invalid on the separate grounds of vagueness and restraint on the exercise of personal liberty, see notes 61-62 supra and accompanying text, the two grounds appear closely related. Courts that have invalidated such statutes because they create an unreasonable restraint on personal liberty speak of an individual's right to be on public streets and in public places, see City of Huntington v. Salyer, 135 W. Va. 397, 63 S.E.2d 575 (1951), the individual's right to choose his place of abode, see Renker v. Village of Brooklyn, 139 Ohio St. 484, 40 N.E.2d 925 (1942) (Hart, J., dissenting), and the individual's "power of locomotion, of changing situation, or removing one's person to whatever place one's inclination may direct," id. at 490, 40 N.E.2d at 930; accord, Ex parte Hudgins, 86 W. Va. 526, 103 S.E. 327 (1920). Courts that have found such statutes void for vagueness speak of citizens not being fairly warned by ambiguous language as to what conduct is forbidden, see Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); In re Newbern, 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960), and of vague language making an innocent act criminal, see Winters v. New York, 333 U.S. 507, 520 (1948). If a citizen is not fairly warned of what he cannot do, an innocent act may be criminal, and he will suffer a restraint on his personal liberty. For example, a person who risks arrest for vagrancy and loitering simply by being on a public street may decide not to travel on the public streets. This decision is not a free one, but is motivated by fear of arrest. Personal liberty is being restrained by the vague language of the statute. In sum, one can broadly view adult status offense statutes as creators of unreasonable restraints on an adult's exercise of his personal liberty.

93. See notes 3, 39-41 supra and accompanying text.

94. See notes 41-49, 52-53 supra and accompanying text.
impinge upon his personal liberty. The doctrine of *paens patriae* allows the State to act according to what it believes is best for the child, in order to produce responsible citizens. Status offense statutes are one means to that end. Such statutes are often justified as a method of identifying potential delinquents and preventing their future criminal acts, thus operating as a means of achieving the goal of rehabilitation fundamental to the juvenile justice system. Rehabilitation, as a fundamental goal of juvenile justice, seeks to save children from the consequences of persisting on the path of waywardness. No matter how reasonable the restraint, however, it must be fairly imposed. A child has a right to expect to be treated fairly, but there is currently no requirement of fair treatment imposed on the court when it deals with juvenile status offenders.

D. The Child's Right to Civil Liberty

A parent may restrain his child's exercise of personal liberty according to his personal standards of behavior, but the parent must act reasonably.

95. See notes 43-45 *supra* and accompanying text.
96. See notes 50-51 *supra* and accompanying text.
97. McNulty, *supra* note 12, at 752; Sussman, *supra* note 5, at 53. According to a recent series of studies, however, it is unlikely that juvenile courts can predict with any accuracy which status offenders are potential delinquents or demonstrate that court intervention was a significant factor in restraining such misfits. McNulty, *supra* at 752-53.


Others disagree. For example, the argument has been made that the force of the court is needed to keep youngsters in line, and that "informal handling by non court agencies leads to infringements on basic rights." Katkin, *supra* note 3, at 313. This argument was made by Judge Maurice Cohill, a juvenile court judge active in the National Council of Juvenile Court Judges. *Id.* This position generally assumes that dealing with status offenders in juvenile court is best for all concerned. But while it may be best for society, it is not necessarily so for the children. See PINS, *supra* note 12.

100. See note 166 *infra* and accompanying text.
101. See note 12 *supra* and accompanying text.

While it may be absurd to allow children to run to court for an injunction whenever they feel their parents' rules are unreasonable, an argument can be made that society should not lend its authority—through the juvenile courts—to enforcement of "arbitrary parental commands." Wald, *supra* note 44, at 21. No court should threaten a teenager with incarceration if he does not go to church or go to bed early every night. *Id.*
Under the trust model, the parent as trustee has a duty to properly execute the trust and not abuse his discretion in the exercise of his trust powers. The parents' unreasonableness could be considered an abuse of trustee discretion. Such an abuse would justify the State's decision to intervene, removing the parent as trustee and assuming the duties of the trust.

The State, as well, should act reasonably when it interferes with a child's right to exercise his personal liberty. But the question arises whether the State is held to a more specific standard than that of reasonableness, that is, the constitutional standard of due process.

Since the parent is not bound by constitutional due process standards when he temporarily deprives his child of personal liberty, it is argued that neither is the State required to proceed according to these standards when it performs the parents' function. There are, however, arguments for the State being held to a stricter standard than parents when it interferes with the child's right to personal liberty and consequently for status offenders having the right to civil liberty. One argument is that parents have a greater power than the State to limit a child's exercise of personal liberty because of their own constitutionally recognized right to rear children, while the State's justification for infringing on the child's personal liberties rests on its responsibility as parens patriae. Secondly, when the State assumes the parental duty, it denies the child the right to remain with his family and limits the parent's right to rear his child. Thirdly, the greater intensity and immediacy of the parent-child relationship requires more flexibility in that relationship than in the State-child relationship.

108. See notes 51-52 supra and accompanying text. The Court in Prince v. Massachusetts, 321 U.S. 158, 166 (1944), said that it is cardinal "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."
109. See note 48 supra.
110. The right of parents to raise their children is compatible with a "child's biological and psychological need for unthreatened and unbroken continuity of care by his parents." Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L.J. 645, 649 (1977). The State does not have the ability to replace the parent in the "complex interpersonal bonds between parent and child." Id. at 650. The parent deals with the child on a day-to-day basis. The State, on the other hand, cannot deal with the consequences of its decisions or with the speed required to deal effectively with children. Id.
1. Civil Liberty When the Child Is Declared a Status Offender

A standard justification for State intervention into family rights is the rehabilitation of children. Just as a parent is justified in restricting his child's exercise of personal liberty because he has the responsibility of developing the child into a productive citizen, when the State intervenes as substitute parent, the parental responsibility to develop is shifted to the State. Under the trust model, this would occur when the parent-trustee is removed for failure to carry out the trust purpose. The child should be guaranteed that not only the initial State decision to intervene, but also all subsequent decisions on placement, treatment or supervision be fairly made.

The Supreme Court has granted juvenile delinquents most due process safeguards because it found that the absence of such safeguards had not protected children, but had subjected them to arbitrariness. In weighing the protections afforded juveniles by "benevolent unbridled discretion" against the protection afforded by due process, the In re Gault Court found discretion to be a "poor substitute" for procedural due process. The Court noted that the juvenile court without due process had not reduced crime nor rehabilitated delinquents, but had been unfair to children. The Court, however, has been reluctant to extend civil liberty to status offenders. Because juvenile status offenses focus on family problems rather than criminal behavior by the child, and because in these cases the State assumes the role of parent to protect, care for, and educate the child, no need for due process has been recognized in status offense proceedings.

111. See note 156 infra and accompanying text.
112. See notes 40-41 supra and accompanying text.
113. See notes 49-51 supra and accompanying text.
115. The Supreme Court has specifically held that: 1) a child and his parents are entitled to written notice of charges, In re Gault, 387 U.S. 1, 33 (1967), 2) the child and his parents must be notified of the right to be represented by counsel, id. at 41, 3) the fifth amendment privilege against self-incrimination is applicable in juvenile delinquency cases, id. at 55, 4) the child must have the opportunity for confrontation and cross-examination, id. at 56-57, and 5) proof beyond a reasonable doubt is "essential" when a juvenile is charged with an act that would constitute a crime if committed by an adult, In re Winship, 397 U.S. 358, 368 (1970). On the other hand, in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court held, 5-4, that the right to an impartial jury in all criminal prosecutions guaranteed by the sixth amendment is not applicable to juveniles because the juvenile court proceeding is not a criminal proceeding. Id. at 540-41.
116. See In re Gault, 387 U.S. 1, 18-19 (1967); Kent v. United States, 383 U.S. 541 (1966). In Kent, the Supreme Court, for the first time suggested that constitutional principles were applicable to juvenile court proceedings, holding that "the [juvenile court] hearing must measure up to the essentials of due process and fair treatment." 383 U.S. at 562; see Katkin, supra note 3, at 272.
117. 387 U.S. at 17-29.
118. Id. at 18.
119. Id. at 22.
120. See id. at 19-21.
121. See note 11 supra and accompanying text.
122. In re Gault, 387 U.S. 1, 17 (1967); In re Ferrier, 103 Ill. 367, 372 (1882).
123. Id.
124. See note 12 supra and accompanying text.
The treatment of juvenile delinquents and juvenile status offenders has been distinguished. While there may be a punishment element involved in the handling of juvenile delinquents especially the ones who commit felony-type crimes—the handling of status offenders presumably remains a protective rehabilitative endeavor. If status offenders are given civil liberty, the courts fear that any special protective quality left in the juvenile system would be destroyed. In fact, however, affording juveniles the protection of civil liberty need not interfere with the beneficial aspects of the juvenile system, nor compel the abandonment of special safeguards for juveniles. The aim of guaranteeing civil liberty to juveniles is to ensure their fair treatment, not to destroy the juvenile system.

Since in practice there is little difference in the State treatment of status offenders and juvenile delinquents, it is reasonable that status offenders be guaranteed at least the same civil liberty. The Supreme Court has struggled with the protective philosophy and guaranteed juvenile delinquents civil liberty. All of the arguments for due process for delinquents also apply to status offenders. Status offenders are subjected to flexible hearings and are institutionalized without rehabilitation. Status offenders are also generally subject to the same dispositional alternatives as delinquents: probation, placement with another family or an agency, and commitment to a farm, camp, or training school. As with delinquents, the goal, however inadequately realized, is rehabilitation and assisting the child in becoming a


126. "If they are big enough to commit vicious crimes against society, they are big enough to be punished by society. ... Detention may not help the juvenile, but it will certainly help his potential victims." Shubow & Stalin, Juveniles in Court: A Look at a System in Flux, 61 Mass. L.Q. 193, 193 (1977) (quoting the former President of the United States); see The Trib, Jan. 17, 1978, at 10, cols. 1-4.

127. See McKeiver v. Pennsylvania, 403 U.S. 528, 550-51 (1971); In re Gault, 387 U.S. 1, 21, 24 (1967). Carrying the argument one step further leads to the fear that, if there is no protective quality left in the juvenile system, there is no need for a separate juvenile system. 403 U.S. at 551; In re Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting). Juveniles fully protected by the Constitution would need no other substitute protection from fatherly judges, informal hearings, and parens patriae. Cf. Nejelski, Juvenile Justice in the United States 6 (27th Int'l Conf. in Criminology, Sept. 15, 1977).

128. 397 U.S. at 365; 387 U.S. at 21, 24. "The observance of due process standards, intelligently and not ruthlessly administered will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." 387 U.S. at 21. The states can continue to label a child a delinquent or status offender to avoid the label "criminal" and its stigma, id. at 23, and continue to keep a child's record confidential, id. at 25, for example, and not conflict with the protection due process affords.

129. See notes 130-33 infra and accompanying text.

130. Nejelski, supra note 127, at 9-10; see Meyers, supra note 90, at 39.

131. Johnson, supra note 3, at 38; Sussman, supra note 5, at 58.

132. Sussman, supra note 5, at 58.
responsible adult.\textsuperscript{133} Since status offenders have not even committed a crime,\textsuperscript{134} but are institutionalized more often than delinquents,\textsuperscript{135} it would seem that they are in even greater need of due process protection than delinquents.

Another reason for guaranteeing procedural due process to status offenders is the ease with which status offense statutes allow the concept of rehabilitation to be used as a smokescreen for placing undesirable children out of the community.\textsuperscript{136} Status offense statutes allow authorities broad discretion which often results in misuse.\textsuperscript{137} For example, New York City is planning to have teenage prostitutes processed in Family Court as status offenders instead of juvenile delinquents in an attempt to remove them from the streets.\textsuperscript{138} A juvenile now processed as a delinquent for prostitution faces a maximum of eighteen months in a detention facility.\textsuperscript{139} A girl declared in need of supervision could be placed in a facility for up to two and a half years,\textsuperscript{140} without procedural due process. Status offense jurisdiction thus is used in place of a charge of delinquency where the alleged criminal act cannot be proved,\textsuperscript{141} and provides a device to strip the child of the constitutional rights he would have had as a delinquent.\textsuperscript{142}

Another alarming misuse of status offense jurisdiction is by parents who use it to divest themselves of undesirable or unwanted children.\textsuperscript{143} At their discretion, parents "can march their kids to court any time, armed with evidence to ensure they stay there," and the court will respond to the parents' plea.\textsuperscript{144} But, the State's desire to cleanse society and families should not be
enough to allow the deprivation of a child's personal liberty, in the name of rehabilitation, without the protection of civil liberty. The parent, and the State as substitute parent, as trustee has the duty of care and loyalty to the child, and the duty to act solely in the best interest of the child beneficiary. A child should be guaranteed fair treatment, both at the time the State decides to intervene in the child's life, and during the time the State is acting as substitute parent, developing and rehabilitating the child.

2. Civil Liberty While the State Rehabilitates the Status Offender

Rehabilitation is an important aspect of the special protection philosophy for juveniles. The belief is that troublesome children can “be trained to become useful, productive citizens,” but by restriction of their personal liberty as any parent would do. Reformation is to be achieved by teaching the principles of morality and religion, by teaching a skill with which to earn a living, and by separating the child from corrupting influences. But, rehabilitation has not occurred and the young offenders frequently receive treatment that is a “repudiation of rehabilitation.”

If the State institutionalizes a status offender to rehabilitate him, the State is merely depriving the child of his personal liberty as any parent would. But if the State fails to rehabilitate, it has lost its justification for intervention. However, although juveniles are frequently committed to reformatories and training schools for the purpose of rehabilitation, little rehabilitation actually occurs. Most juvenile institutions have not demonstrated a capacity to

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145. Mr. Chief Justice Burger, concurring in O'Connor v. Donaldson, 422 U.S. 563 (1975), said that permitting an individual to be confined simply because the state is willing to treat him raises grave constitutional problems. Id. at 585 (Burger, C.J., concurring). The majority found that the deprivation of a person's liberty could not be constitutionally justified by “mere public intolerance or animosity.” Id. at 575.

146. Bogert & Bogert, supra note 46, § 95, at 343-50.

147. Id.

148. Id.

149. See text accompanying note 111 supra.

150. Paulsen, supra note 15, at 4; Platt supra note 1, at 47.

151. See Johnson, supra note 3, at 12-13; Platt, supra note 1, at 47; NDAA, supra note 3, at 2-3; Flicker, supra note 3, at 15; Fordham Note, supra note 3, at 409.

152. See note 156 infra.

153. See Ex parte Crouse, 4 Whart. 9, 11 (Pa. 1839); Flicker, supra note 3, at 16.


155. Rubin, supra note 125, at 81.

156. “[I]n exercising a wholesome parental restraint over the child, [the State] can be properly said to imprison the child, no more that the tenderest parent exercising like power of restraint over children.” Milwaukee Indus. School v. Supervisors of Milwaukee County, 40 Wis. 328, 338 (1876); see In re Ferrier, 103 Ill. 367, 368-69 (1882); Roth v. House of Refuge, 31 Md. 329, 334 (1869); Ex parte Crouse, 4 Whart. 9, 11 (Pa. 1839).

157. Nejelski, supra note 127, at 5; Ohlin, Coates & Miller, Radical Correctional Reform: A Case
rehabilitate, and, in fact, have punished and abused children. Educational programs and recreational facilities in the institutions are often insufficient or nonexistent. In addition, the national recidivism rate—a failure rate—is extremely high for juveniles. Thus, the institutionalization amounts to nothing more than custody. As parents have the right to restrain, but not to imprison, so too the State as parens patriae is not justified in imprisoning children. When a child’s personal liberty is restrained by the State in order to rehabilitate that child, a child needs the protection of procedural due process, i.e., civil liberty, to ensure that his personal liberty is not being unfairly denied.

Thus, even if a child is rehabilitated by the State, he has a right to expect fairness as well. A child has a right to both benevolent concern and justice from the State. Due process can assist in the achievement of rehabilitation. "The child who feels that he has been dealt with fairly . . . will be a better prospect for rehabilitation."

The protective philosophy that created the juvenile court system had a valid and honorable basis, but its goals are not always achieved. The State can be concerned with the quality of its citizenry and thus protect children.
from a wayward life by restricting their personal liberty. At the same time, however, the child needs civil liberty—protection from the State’s acting arbitrarily in its restraint of his liberty. Children have the right to expect fair treatment. After all, the Constitution is not for adults alone.168

III. A Child’s Rights in the Compulsory Education System

In recent years in the United States, public primary and secondary schools have come under attack for their apparent inability to provide adequately for the education of school children.1 As student performance in many schools continues to deteriorate,2 critics of the present system have noted that receiving a high school diploma may be evidence of time served rather than successful completion of a program of study.3 In light of such criticism, a reexamination of the states’ continued reliance upon compulsory education4


2. See, e.g., Newsweek, Sept. 5, 1977, at 82, col. 2. Scores on the Scholastic Aptitude Test, the exam used by many colleges as a criterion in selecting those applicants to be admitted, have been steadily declining since 1963. Id.


and a large highly structuralized school complex is necessary if the states are to provide for the intellectual needs of the nation's students.

Over the past decade, the central controversy in education has been whether there exists a fundamental right to an education. While the Supreme Court in *San Antonio Independent School District v. Rodriguez* held that education is not a fundamental constitutional right, this section will suggest that despite the Court's holding, there exists authority to allow a court to find that under the present compulsory educational system a student has certain rights, and the school the duty to protect, preserve, and promote those rights. In order to protect these rights, courts should recognize that students forced to attend assigned public schools have the right to an education which will allow them to develop intellectually and achieve a sense of dignity and self-respect. It will be argued that in the extreme situation where it can be established that a particular school is not providing students with an education, a court may intervene, and impose upon the school the duties which will secure these rights. In determining the appropriate duties, a court could refer to the trust model to conceptualize the relationship between the student and exempt those who are physically or mentally incapable of regular attendance. See K. Alexander & K. Jordan, *Legal Aspects of Educational Choice: Compulsory Attendance and Student Assignment* 11-12 (1973).

6. *Id.* at 18. In *Rodriguez*, however, the Court indicated that certain minimal standards of education might be constitutionally mandated. The majority stated that "[t]he argument here is not that the children . . . are receiving no public education." *Id.* at 23. *Rodriguez* has been the target of much criticism, see, e.g., Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. Chi. L. Rev. 32, 60-64 (1973), and rather than foreclosing the controversy, it has served merely to focus upon the failure of our present educational system to provide a relatively equal education to those subject to compulsory education laws.


8. As of 1975, nine out of ten students were attending public schools. Sugarman, *supra* note 3, at 199. The authors also point out that most private schools are quite expensive. *Id.* at 203. In light of the high percentage of students attending public schools and the high cost of private schools, it is submitted that for many children there exists no practical alternative other than attending tuition-free public schools.

9. *See*, e.g., *N.Y. Times*, June 13, 1977, at 33, col. 1. This article discusses the conditions at Samuel Gompers Vocational-Technical High School in the South Bronx section of New York City. The author states that students and teachers told her that required courses were not being offered, and that in the first term there were between forty and fifty classes a day without teachers. They also told the author that programming errors had resulted in scheduling some students for subjects in which they lacked basic prerequisites, and one teacher stated in a memorandum that in the spring of 1975 five hundred misprogrammed students attended no classes for several weeks and had to spend the school day sitting in the auditorium.
Because of the assumed inability of children to make decisions for themselves, they traditionally have been reduced to a dependent status, and are treated as the "domain" of their parents, the schools, or the state. The trust model provides an alternate framework, familiar to the courts, in which the student's rights could be protected—that is, held in trust, until he is able to exercise them intelligently. In such a framework, the school, as trustee, would be obligated to act in the best interest of the student, the beneficiary of the trust. This section will draw an analogy to recent decisions dealing with the rights of individuals who have been involuntarily committed to state institutions. If it can be shown that a school system subjects students to abuses as grave as the ones in those cases, the courts should grant a remedy rather than continuing to defer to the expertise of educators in school administration.

Courts have used the concept of a trust, or fiduciary relationship, when dealing with education in the past. In New York City School Bd's Ass'n v. Board of Educ., 39 N.Y.2d 111, 347 N.E.2d 568, 383 N.Y.S.2d 208 (1976), the court stated that both the local school boards and the board of education each perform fiduciary responsibilities, and that, in any controversy between them, the primary concern should be the welfare of the students. Id. at 122, 347 N.E.2d at 575, 383 N.Y.S.2d at 215. Similarly, in Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. at 133 (Juv. & Dom. Rel. Ct. 1937), the court stated that a parent's right to custody of his child and to direct his education could not be treated as a property right, but is similar to a trust reposed in the parent by the State for the welfare of the child. Id. at 84-85, 189 A. at 133.

The duties traditionally imposed upon a trustee include the duty to act solely in the interest of the beneficiary, to preserve, protect, and promote that which is held in trust, to account to the beneficiary, and to terminate the trust when its purpose has been accomplished. See Office of Education, U.S. Dep't of Health, Education, and Welfare, Pub. No. (OE) 76-00004, The Education of Adolescents 30 (1976) (hereinafter cited as The Education of Adolescents). This report was written by the National Panel on High School and Adolescent Education. The panel was appointed in 1972 to determine the current status of secondary education in the United States. Its task was to pinpoint the inadequacies in adolescent education, and make recommendations as to what changes would be necessary to correct any shortcomings. Id. at vii. The panel draws upon both scholarly and field research in reaching its conclusions and making its recommendations, and its report is a valuable source of current information concerning the effectiveness of adolescent education in America.

Under a trust model, the State, as settlor of the trust, would repossess the school, as trustee, the duty to provide for the student's education until he was sufficiently prepared to enter society. The student, as beneficiary of the trust, would be entitled to make his own management of his education, and could petition for court supervision of the trust if the school's actions were damaging to his intellectual development or infringed upon any of the personal rights guaranteed by the Constitution. The student's rights would be held in trust until he is able to control his own development. See pt. 1 supra, notes 15-44 and accompanying text.

These decisions will be referred to as the treatment cases.
will be argued that the decisions dealing with institutions have formulated a constitutional basis upon which students forced to attend school may demand and enforce certain rights.17

A. A Student's Rights Within the System

1. The Right to Intellectual Development

Providing the type of instruction which will encourage intellectual development should be at the very heart of our compulsory educational system.18 Education prepares a child to enter society as a self-sufficient and self-reliant individual.19 It is, therefore, incumbent upon the school to provide students with the instruction and environment necessary to enable them to realize their intellectual potential. Education's influence upon an individual's ability to exercise his constitutional rights also requires that the instruction provided broaden the student's intellectual capacity.20 The information and ideas to which a student is exposed in school may enhance his ability to enjoy the rights of free speech and association, and may provide him with the tools necessary for the exercise of his right to vote.21 Moreover, since a student's adult life most surely will be affected by the quality of his schooling,22 a system of compulsory education which does not focus upon intellectual development takes its toll not only upon the student, but also upon the society he soon will enter. The deleterious effects of such a system are even more

Arkansas, 393 U.S. 97, 104 (1968). Judicial intervention also has been impeded by the belief that the administrative officials are more qualified than the courts to carry out the task of educating students, and that courts lack the expertise to question the wisdom of their decisions. See Wood v. Strickland, 420 U.S. 308, 326 (1975). The treatment cases set forth in note 70 infra illustrate how the courts can improve education without taking over the operation of schools, and how the judiciary may obtain the expertise necessary to examine the advisability of school policy. The methods which were successful in the treatment cases that are adaptable to schools are discussed in pt. III(C) infra.

17. See pt. III(B)(1) infra.

18. See Wisconsin v. Yoder, 406 U.S. 205 (1972), where Justice White states that "the State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children, . . .: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance." Id. at 239 (White, J., concurring).

19. Id. at 221. The best known expression, by the Court, concerning the importance of an education to an individual's entry into society can be found in Brown v. Board of Educ., 347 U.S. 483 (1954), where Chief Justice Warren stated: "Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Id. at 493.


21. See id. at 113 (Marshall, J., dissenting).

22. C. Silberman, Crisis in the Classroom 325 (1970) (quoting Jerome Bruner's statement that "[t]he conduct of life is not independent of what it is that one knows" nor "of how it is that one has learned what one knows").
pronounced when one considers that adolescence is the period during which an individual is capable of the most intense intellectual stimulation and development. It is suggested that if a student is to receive any long-term benefit from forced attendance, and if society is to continue to look upon schools as the principal transmitter of American heritage, the development of children should be the guiding force of compulsory education.

Circumstances present in some of the existing public school systems, however, may actually stifle intellectual development. For example, as a result of the huge expansion in the number of students enrolled in public schools, the priorities of management in crowded schools have overridden the needs of the student. "Institutional imperatives of orderly movement," standardization, administrative convenience, and economic efficiency have been the most important determinants of organizational policy. Emphasis on these factors has resulted in a structure which is often unresponsive to the needs of a vastly expanded and increasingly complex student population.

Emphasis should be turned away from a highly structured school system and focused upon providing comprehensive intellectual development. The present system's almost exclusive reliance upon large schools and classroom instruction isolates the student, and forces the school to serve custodial as

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23. The Education of Adolescents, supra note 11, at 21. Data on physical, sexual, and neurological development as well as intelligence, problem solving, and cognitive and moral development, reveal an apparent peaking and leveling off in adolescence. See also Silberman, supra note 22, at 325.

24. The Education of Adolescents, supra note 11, at 2.

25. As of 1973, American secondary schools served upwards of 18,000,000 students. Id. at 1.

26. Id. at 3.

27. Id. at 8.


29. Sugarman, supra note 3, at 205.

30. The Education of Adolescents, supra note 11, at 25.

31. See Hechinger, An Exploded Myth, N.Y. Times, Feb. 17, 1976, at 31, col. 2, where the author states that until recently the New York City School Board viewed expenditures for maintenance, lunches, pensions, and transportation as uncontrollable items in the school budget. As a result of this policy, spending cuts had to be made in areas which had a direct effect upon the quality of the instruction provided the student. Actions such as this demonstrate the low priority often given to the intellectual development of the student, and run contrary to Justice White's admonition that the State should not maintain an educational system "as an end in itself." Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring).

32. The Education of Adolescents, supra note 11, at 1.

33. Report of the Twelfth Annual Conference on Civil and Human Rights in Education, Humanizing Education in the Seventies: Imperatives and Strategies 18 (1974). The speaker, noting that zero population growth could lower school size, expressed the fear that instead of allowing schools to shrink naturally to a decent size, administrators would prefer to combine the smaller ones. Id.

34. While the majority of the state statutes require formal instruction in a public or qualified private school, several states allow education to be provided outside the classroom as long as it is substantially equivalent to the statutory guidelines. See, e.g., N.J. Stat. Ann. § 18A:38-25 (West
well as educational functions. Intellectual development requires a more personal and diverse environment than can be offered in one building housing hundreds or, in some cases, thousands of students. It is submitted that less structured schools would be more likely to prepare a student for entry into society, and would deemphasize the institutional imperatives which often narrow educational goals and detract from the student's intellectual development.

2. The Right to Dignity and Self-Respect

Intellectual development will be difficult to achieve in an environment which does not afford the individual a right to dignity and self-respect. The school atmosphere plays a crucial role in the intellectual development of a student. In addition, adolescents are maturing more quickly today than ever before. In light of this, the courts should recognize that students are entitled to a "sphere of personal liberty" as to those aspects of their behavior which do not substantially detract from the school's ability to provide the student body with an education. The fourteenth amendment's guaranty of liberty however, has left the student with no practical alternative to formal school instruction. See, e.g., In re Thomas H., 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Fam. Ct. 1974); Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (Juv. & Dom. Rel. Ct. 1937). But see State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (Law Div. 1967). See also Comment, Compulsory Education in the United States: Big Brother Goes to School, 3 Seton Hall L. Rev. 349, 364 (1972).

35. The Education of Adolescents, supra note 11, at 22. The Final Report and Recommendations of the National Panel on High School and Adolescent Education points out that during colonial times and the nineteenth century, schools were but one of the institutions responsible for the education of children. The family and the community also took part in the shaping of the nation's youth. Id. at 7. It is suggested that by allowing the family and community to get involved again today, society would not place the entire educational burden upon the schools, and that their role as a custodian would therefore diminish.

36. The Education of Adolescents, supra note 11, at 28. The National Panel's Report states that recent evidence suggests that the crucial educational determinants of a student's development are the climate of the school, the student's sense of involvement, and his identification with the purposes of the faculty. The Report goes on to say that the impersonal atmosphere which exists in many large schools causes students to become alienated from their peers and their environment. Id. On the basis of this information, one may question the possibility of intellectual development in many of our nation's urban schools, which often have a large enrollment.

37. The Education of Adolescents, supra note 11, at 10, 12-13.

38. Id. at 28.

39. Id. at 20.

40. Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970) (suspending a student from school for refusing to cut his hair violated his personal liberty).

41. A school may infringe upon the personal liberties of a student if it can show that the student's action substantially interferes with the educational process. Jackson v. Dorrier, 424 F.2d 213, 216 (6th Cir.) (per curiam), cert. denied, 400 U.S. 850 (1970) (students suspended for violation of hair regulation). See also Brown, Hair, the Constitution, and the Public Schools, 1 J.L. & Educ. 371, 377 (1972); Smith, The Constitutional Parameter of Student Protest, 1 J.L. & Educ. 39, 55 (1972).

42. "[N]or shall any State deprive any person of life, liberty, or property . . . ." U.S. Const. amend. XIV § 1.
should be extended to afford students the right to be free from school regulations which do not serve educational goals and which therefore unnecessarily restrict a student's ability to develop as an individual.\textsuperscript{43}

Critics of the present system have noted that its reliance upon large comprehensive institutions has rendered many American schools incapable of providing for the needs of the individual.\textsuperscript{44} The school's need for orderly movement of thousands of students has often led to a preoccupation with order and control,\textsuperscript{45} and has resulted in a situation in which conformity is rewarded,\textsuperscript{46} and creativity frequently is looked upon as an expensive and potentially disruptive luxury.\textsuperscript{47} In answer to this criticism, school officials cite the need for an ordered atmosphere in which educational goals can be achieved.\textsuperscript{48} To create this atmosphere, administrators say they must promulgate reasonable rules regarding student discipline.\textsuperscript{49} While in principle such rules are desirable and necessary, in practice they often can be demeaning and create an atmosphere of fear and apprehension among the student body.\textsuperscript{50}

\textsuperscript{43} In Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), the fourteenth amendment's guaranty of liberty was extended to give students the right to govern the length of their hair. The court stated that "'liberty' seems... an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects... which have no direct bearing on the ability of others to enjoy their liberty." \textit{Id.} at 1284-85. Following such reasoning, school regulations which are no more than expressions of personal taste and custom, that is, which do not serve educational goals, would be violative of the student's constitutional right to liberty. For example, in Parker v. Fry, 323 F. Supp. 728 (E.D. Ark. 1970), a school official testified that he thought a hair code was reasonable because "anything out of the ordinary attracts attention and therefore could be disruptive of the educational process." \textit{Id.} at 735 (quoting school superintendent). It is submitted that this type of reasoning carried to its logical end would allow a school to suspend a student who was so tall or short that he attracted attention. Moreover, extension of the liberty guaranty would open unnecessarily restrictive school rules to constitutional attack. For example, in Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970), the school justified its hair regulation on the grounds that long hair contributed to unsanitary conditions and created a safety problem. The court, however, found these to be insufficient reasons for forcing male students to cut their hair since caps could be worn to prevent any danger. \textit{Id.} at 1266.

\textsuperscript{44} The Education of Adolescents, \textit{supra} note 11, at 28.


\textsuperscript{46} The Education of Adolescents, \textit{supra} note 11, at 68-69.

\textsuperscript{47} Silberman, \textit{supra} note 22, at 137.

\textsuperscript{48} \textit{See, e.g.}, Bannister v. Paradis, 316 F. Supp. 185, 186-87 (D.N.H. 1970) (school board chairman testified that the relaxed atmosphere induced by wearing work clothing to school did not fit the atmosphere of discipline and learning).

\textsuperscript{49} \textit{See} Parker v. Fry, 323 F. Supp. 728 (E.D. Ark. 1970). The court conceded that school authorities have the right and power to promulgate rules and regulations reasonably related to educational processes and objectives. \textit{Id.} at 729. For a recent survey of school disciplinary rules, see E. Bolmeier, \textit{Legality of Student Disciplinary Practices} (1976).

\textsuperscript{50} \textit{See} Ingraham v. Wright, 498 F.2d 248, 264 (5th Cir. 1974), rev'd, 525 F.2d 909 (5th Cir. 1976), \textit{aff'd}, 430 U.S. 651 (1977). Dr. Scott Kester, an assistant professor at the University of Miami, stated that corporal punishment could damage a child's development by engendering anxiety, frustration, and hostility. \textit{See also} Reitman, Fallman & Ladd, \textit{Corporal Punishment in the Public Schools} 15 (ACLU Report 1972) [hereinafter cited as Reitman].
The wide latitude granted educators in drafting and implementing such regulations is easily abused, and has contributed to the retention of scheduling practices and disciplinary procedures which have not kept pace with the earlier maturation of the child. As a result, the school atmosphere often suppresses the individuality of the student, and makes it difficult for him to develop a sense of dignity and self-respect.

Although it must be recognized that going to school is a "collective experience" in which the rights of the individual must necessarily be balanced against the needs of the institution, enrollment in school need not result in a total loss of one's sense of identity and self-worth. It is submitted that order can be maintained without fostering an atmosphere which alienates the student. If students were given a greater ability to influence their environment and to assume adult responsibilities, they would develop the sense of self-worth necessary for intellectual development and would face less personal frustration, which has been found to be a frequent cause of disruptive student behavior.

B. The Educator's Duty To Preserve the Student's Rights

Some commentators on the educational system have concluded that there are schools in our country where students simply are not learning. A sampling of school systems that contain more than half of the nation's primary and secondary student population showed that the average achievement scores of students above the third or fourth grade level have declined, and that each year the same children continued to drop below the norm as they progressed through the grades. While this decline could be the product of factors unrelated to the

53. The Education of Adolescents, supra note 11, at 23.
54. See generally Haney & Zimbardo, It's Tough To Tell a High School from a Prison, Psychology Today, June 1975, 26, 106 [hereinafter cited as Haney] (authors state that students take refuge in the anonymity of the crowd).
55. See The Education of Adolescents, supra note 11, at 5. The National Panel's Report states that schools contain controls and supervisory practices inconsistent with developing the potentials and increasing maturity for self-direction of young adults. Id.
56. Silberman, supra note 22, at 123.
57. See generally Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969), where the Court states: "In our system, state-operated schools may not be enclaves of totalitarianism . . . students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."
58. The National Panel states that an individual's ability to influence his environment seems to contribute to the identity necessary in establishing a sense of self-worth. The Education of Adolescents, supra note 11, at 65. See also Ladd, Civil Liberties for Students—At What Age?, 3 J.L. & Educ. 251, 255 (1974) (suggesting that schools use a system whereby students acquire more freedom and responsibility as they get older).
59. See The Education of Adolescents, supra note 11, at 66.
60. See generally Armbruster, supra note 1.
61. Id. at 9, col. 2.
school, such as changes in American home life, the proliferation of one-parent families, or a less motivated student, the quality of the instruction provided plays an important role in a student's performance. This evidence, coupled with the indications that some schools fail to teach adequately even such basic skills as writing and reading, would justify a court in intervening in the affairs of a school with an extremely poor record of performance in order to define minimum academic duties.

64. In the report of an independent study headed by former Secretary of Labor Willard Wirtz, it was observed that "[l]ess thoughtful and critical reading is now being demanded and done and . . . careful writing has apparently about gone out of style." Newsweek, Sept. 5, 1977, at 82, col. 2 (quoting College Examination Board Study). These observations are parallel to those made by the National Assessment of Educational Progress. Based upon two samplings of high school essays, the Assessment found that only 50% of the 17-year-olds tested could organize their ideas on paper, and that, in general, the students were using a primer-like vocabulary. N.Y. Times, Feb. 23, 1977, § B, at 6, col. 1.

The Wirtz study's criticism of reading instruction is also substantiated by results of standardized reading exams. The following table shows the results for New York students. The exam was given nationally, and it was expected that 50% of the students in an average school district would be above grade level.

<table>
<thead>
<tr>
<th></th>
<th>1976</th>
<th>1975</th>
</tr>
</thead>
<tbody>
<tr>
<td>at or above the nat'l aver.</td>
<td>42.6%</td>
<td>45.2%</td>
</tr>
<tr>
<td>less than 1 year below</td>
<td>15.9</td>
<td>17.3</td>
</tr>
<tr>
<td>one to two years below</td>
<td>17.0</td>
<td>16.4</td>
</tr>
<tr>
<td>two or more years below</td>
<td>20.6</td>
<td>17.5</td>
</tr>
<tr>
<td>not tested</td>
<td>3.9</td>
<td>3.6</td>
</tr>
<tr>
<td>100.0</td>
<td></td>
<td>100.0</td>
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</tbody>
</table>


Results of the 1977 test show that only 40.1% of the students are reading at or above grade level. Precise comparison, however, with the 1975 and 1976 statistics is difficult since in 1977 the California Test of Basic Skills was used while in the earlier two years, the Stanford Achievement Test was used. N.Y. Times, Jan. 11, 1978, § A, at 1, col. 1, & § B, at 6, col. 1.

65. It is quite possible that the state legislature would be a more appropriate forum than the courts for definition of the school's duties. As the representative branch, it is "best qualified to apportion scarce resources among various state needs." Comment, Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment, 86 Harv. L. Rev. 1282, 1300 (1973) [hereinafter cited as Adequate Treatment]. Judicial intervention is proper, however, where legislative inaction has led to constitutionally repugnant conditions. Id. A recent article discussing the role of the judiciary in reforming state institutions points out that often state administrators rely upon courts to pressure legislatures and to impose needed reform. Note, Implementation Problems in Institutional Reform Litigation, 91 Harv. L. Rev. 428, 430 (1977) [hereinafter cited as Implementation Problems]. In light of this, and the lack of legislative guidance concerning the duties of schools, judicial involvement in the present situation is necessary to protect the educational rights of the student.
1. The Source of the Duty

The school's duty to provide the instruction and environment necessary for intellectual development is arguably contained in the fourteenth amendment's due process guaranty. If the state requires students to attend a school in which the educational program has deteriorated to the point where it provides no effective education, it is arguable that the due process prohibition of arbitrary confinement has been violated. This argument has been accepted in another context by at least one court, which stated that forced attendance during a teacher strike, or at any time when the teaching staff was drastically reduced, might result in "confinement" without due process. An insight as to whether noneducational forced attendance is a denial of due process may be gained from an analysis of the arguments raised in a series of decisions (the "treatment cases") dealing with the due process rights of those involuntarily committed to state institutions.

Initially, it must be recognized that restrictions placed upon the student's liberty are not as pervasive as those imposed upon patients in a mental hospital. The student, unlike the patient, is not deprived of the freedom "to be with family and friends and to form the other enduring attachments of normal life." It is submitted, however, that this distinction does not preclude an application of the arguments discussed in the treatment cases, at least where a student can establish that his attendance at school is "in the nature of a 'confinement.'" Moreover, the fact that students are not totally segregated from society should not lead to the conclusion that there are no similarities between the way state hospitals treat patients and the way schools treat students.

66. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

67. See, e.g., note 9 supra. See also The Education of Adolescents, supra note 11, at 22.

68. See Note, The Right to Education: A Constitutional Analysis, 44 U. Cin. L. Rev. 796, 807-09 (1975) (hereinafter cited as The Right to Education). See also notes 69, 82, 95 infra (discussing compulsory education as a denial of due process).


71. See The Right to Education, supra note 68, at 808 (noting that students only spend a part of their day in school).


74. See Silberman, supra note 22, at 146, and Haney, supra note 54, where some of the
patients are granted only limited personal liberties, and since it is rare that either the student or the patient will be fully cognizant of his rights, or how best to assert them, both must rely upon others to insure that they are adequately protected—the student because of his years and the incompetent because of his mental condition. Also, vindication of the rights of either a student or a mental incompetent may force a court to inject itself into the internal operations of state institutions rather than deferring, as courts have traditionally done, to the expertise of administrators. Finally, the most important similarity stems from the fact that restrictions imposed upon students and mental patients have a similar justification and, consequently, an analogous purpose. The State commits the mentally ill in order to protect society from potentially dangerous individuals, and for the purpose of rehabilitating or treating them so that they may reenter society. The State likewise forces the child to attend school in order to protect society from the dangers likely to result from an uneducated citizenry, and for the purpose of preparing the child to take his place in an adult society. Consequently, if commitment without treatment is a denial of due process, then forced attendance without education is also at least arguably a denial of due process.

The courts have used two theories of due process in finding that mental patients are constitutionally guaranteed a right to treatment. These are the *quid pro quo* theory and the *parens patriae* theory. While each has been interpreted differently, it is possible to state generally that the first sees treatment as

similarities between schools and closed institutions like state hospitals are discussed. Also, it appears that the New York legislature has found that a teacher's need to control students is somewhat similar to the needs of a prison warden, since both are given the same privilege to discipline those under their control. See N.Y. Penal Law § 35.10 (McKinney 1975).

75. Silberman, supra note 22, at 146.
77. These problems will be discussed in pt. III(C) infra.
78. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190 (1974) [hereinafter cited as *Civil Commitment*]. When a state acts to protect society, it is exercising its police power, and when it acts in the best interests of the individual, it is exercising its *parens patriae* power. *Id.* at 1326.
80. See note 19 supra.
81. See notes 88-93 infra and accompanying text.
82. See notes 94-97 infra and accompanying text. An argument similar to this was raised over ten years ago by John Holt, a well-known school reformer. He stated that compulsory education should be challenged whenever its effects upon a student are negative. See *J. Holt, The Under-Achieving School* 75 (1969).
84. *Id.* at 521.
85. Almost all of the treatment cases cite Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966),
a justification for confinement with less than full due process safeguards, and the second sees treatment as the only permissible purpose for involuntary commitment.

The *quid pro quo* theory stems from the fact that civilly committed adults as well as children within the juvenile justice system, are not given the full panoply of procedural safeguards. To justify this abridgment of constitutional grounds for a right to treatment. In deciding these decisions is the right to treatment discussed at length, and several different theories are set forth by the court.

In *Rouse*, the right to treatment was established through an interpretation of the 1964 Hospitalization of the Mentally Ill Act. The court, however, also mentioned that there were possible constitutional grounds for a right to treatment. It stated that the summary nature of civil commitment proceedings and the provision of treatment as a justification for confining the appellant longer than would have been possible had he been found criminally responsible raised due process questions when treatment was not being provided. The court went on to state that indefinite confinement without treatment may be so inhumane as to be cruel and unusual punishment. *Id.*

The *Wyatt* court, however, specifically found a constitutional right to treatment. In doing so, the court appears to have followed the *Rouse* court by applying both a due process and eighth amendment rationale. While the court noted the summary nature of civil commitment, and held that a person so committed "unquestionably" had a right to treatment, it also mentioned the possibility that commitment without treatment was cruel and unusual punishment, and that since treatment was the sole purpose for involuntary hospitalization, it necessarily could be the only constitutional justification for civil commitment. *Id.*

The more recent decisions appear to construct two arguments from the three in *Wyatt* and *Rouse*. These arguments are fully developed in *Donaldson v. O'Connor*, 493 F.2d 507, 520-25 (5th Cir. 1974), vacated, 422 U.S. 563 (1975). One requires treatment when the State exercises either its police or *parens patriae* power in order that the confinement relate to its purpose, and the other requires treatment as the *quid pro quo* for the patient's commitment without full due process safeguards and for an indefinite time. *Id.* at 521-22. Few of the other treatment cases discuss the right as clearly as did the Fifth Circuit, and it is difficult to categorize them as accepting or rejecting one or the other of the *Donaldson* arguments. See, e.g., *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 761 (E.D.N.Y. 1973), enforced sub nom. *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1976). All of the decisions, however, do employ some variation of one or both of the rationales expressed in finding that a right to treatment is guaranteed. See, e.g., *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972), enforced, 359 F. Supp. 478 (S.D.N.Y. 1973); Inmates of the Boys' Training School v. Affleck, 346 F. Supp. 1354, 1367, 1371-72 (D.R.I. 1972).

Finally, it should be noted that although *Donaldson* was vacated by the Supreme Court in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the majority did not deal with the arguments discussed by the Fifth Circuit and decided the case narrowly upon its particular facts. *Id.* at 575. But see *id.* at 578-89 (Burger, C.J., concurring).


tional rights, the State must provide a *quid pro quo*, and that *quid pro quo* is rehabilitative treatment. Thus, where it can be shown that treatment is not provided, the abridgment of rights is no longer justified, and continued confinement violates due process.

Under the *parens patriae* theory treatment is the only permissible purpose for the confinement resulting from civil commitment. The underlying rationale is that when the State exercises its *parens patriae* power by confining an individual who is not guilty of any offense solely because of his mental condition, treatment is the only constitutionally permissible purpose for his confinement. Thus, where either a mentally ill adult who has been committed because of a need for treatment or a juvenile who has been confined because of a need for supervision can establish a lack of rehabilitative treatment, his confinement does not bear a reasonable relationship to its purpose, and his due process rights are thereby violated. Of the two theories, the second is more adaptable to the instant discussion of compulsory education, and could be employed by a court to find that noneducational compulsory attendance is a denial of due process. Just as the State, as *parens patriae*, commits the mentally ill because treatment is in their best interests, it also compels students to attend school because receiving an education is in their best interests. Thus, if a student can establish that he is

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90. *Adequate Treatment*, supra note 65, at 1287.


93. The requirement that the confinement bear a reasonable relationship to the purpose for which the individual is committed stems from the Supreme Court's holding in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). The Court, ruling on the constitutionality of an Indiana pretrial commitment statute for incompetent criminal defendants, held that indefinite pretrial commitment of a defendant who had little hope of attaining mental capacity violated due process. *Id.* at 717, 738. See pt. II(C) supra for a discussion of the constitutionality of juvenile status offenses.

94. This argument is better suited to education because the State exercises its *parens patriae* power when it compels a student to attend school for his best interests. See note 96 infra. It should be noted that the *quid pro quo* argument has been criticized as unsound. See *O'Connor v. Donaldson*, 422 U.S. 563, 585-89 (1975) (Burger, C.J., concurring); *Civil Commitment*, supra note 78, at 1325 n.39.

95. See *In re John R.*, 79 Misc. 2d 339, 341, 357 N.Y.S.2d 1001, 1003 (Fam. Ct. 1974), where the court, discussing the constitutionality of New York's compulsory education statute, stated that if the statute were of no benefit to those it purported to aid, forced attendance would violate due process. The court held that the statute was a valid exercise of the State's *parens patriae* power since it was intended to aid truants, and evidence showed that some benefited from mandatory attendance. *Id.* at 342, 357 N.Y.S.2d at 1004. It is suggested, however, that the statute is intended to aid all students, and if a student could show that he received no benefit from forced attendance, the court might find compulsory education a denial of due process.

96. See *Alexander & Jordan*, supra note 4, at 19-20 (discussing State's exercise of its *parens
not receiving an education, his compelled attendance, that is, his limited
confinement, does not bear a reasonable relationship to its purpose, and his
due process rights are thereby violated. The result of such a finding would
be the imposition of a duty upon educators to provide students with the type
of education that bears a reasonable relationship to the purpose of their forced
attendance. That purpose traditionally has been to prepare students to
become self-sufficient and self-reliant participants in society, and provide
them with the tools necessary to exercise their rights and to assume their
duties as citizens. It is submitted that the type of education which bears a
reasonable relationship to this purpose would guarantee the student a right to
intellectual development and a "sphere of personal liberty" in which he
would be able to develop a sense of dignity and self-respect.

2. Defining the Scope of the Duty

A court called upon to define the scope of the school's duty might gain
guidance from an examination of the relationship between a trustee and a
beneficiary. The school, as trustee, would have a duty to protect, preserve,
and promote the intellectual development and dignity and self-respect of the

patriae power in education. It should be noted that the State also compels students to attend
school under the police power rationale of protection of society. Here, providing an education
would justify the State's infringement of the student's right to liberty. Where, however, a student
could establish a failure to educate, his confinement would not bear a reasonable relation to its
purpose since, in his case, forced attendance would not be insuring society an educated citizenry.
See discussion note 93 supra. The State also exercises its police power when it commits those
dangerous to society. See Civil Commitment, supra note 78, at 1327 & n.46.

97. See note 95 supra. Following the reasoning employed by the New York family court,
continued mandatory attendance would not benefit the student and would violate his due process
rights.

It should be noted that a student attempting such an attack of our compulsory educational
system will have to establish that his liberty has been violated to an extent that merits
constitutional protection. See The Right to Education, supra note 68, at 808. The author also
points out that a student must demonstrate that a court is capable of defining standards for a
minimal education. Id. The competency of a court to set specific standards will be discussed in
pt. III(C) infra.

98. See Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Prince v. Massachusetts, 321 U.S.
158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be
given opportunities for growth into free and independent well-developed men and citizens.").

dissenting) ("Education may instill the interest and provide the tools necessary for political
discourse and debate."); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[S]ome degree of
education is necessary to prepare citizens to participate effectively and intelligently in our open
political system . . . ."); School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J.,
concurring) ("Americans regard the public schools as a most vital civic institution for the
preservation of a democratic system of government.").

100. See pt. III(A)(1) supra.

101. See note 40 supra.

102. The courts have used the concept of a trust relationship in the past when dealing with
the education of children. See note 10 supra.
The school would have wide discretion in carrying out its responsibilities. Its actions, however, could be challenged upon a showing of an abuse of discretion, and a court could either direct the school to reconsider its decision, or instruct the school as to what action it should take. The student, as beneficiary, could require the school to justify any action which had a significant effect upon his intellectual development.

3. Judicial Recognition of Rights and Duties

The duty to preserve the student's right to dignity and self-respect would necessitate at least a reexamination of the school's continued use of corporal punishment as a means of disciplining misbehavior. Although it has been held constitutional, corporal punishment is considered by many an ineffective and psychologically damaging means of discipline, which tends to discourage the development of a more humane disciplinary policy. Critics of corporal punishment have noted that restrictions placed upon its use often are ignored, and teachers tend to resort to it impulsively rather than employing less physical forms of discipline. On the practical level, the National Education Association Task Force on Corporal Punishment has

103. Id.
105. See id. at 323.
106. See id.
107. See id. § 141. Of course, not every action taken by the school would be subject to attack by the student. For example, a student would probably not be allowed to question such school decisions as whether to offer algebra to the tenth grade and geometry to the ninth. He probably could, however, ask a school to justify its doing away with mathematics instruction after the eighth grade, or its shortening the school day by 50% without providing some complementary instruction elsewhere. Possible ways by which a court may determine what actions have a significant effect upon a student's educational development will be discussed in pt. III(C) infra.


110. See generally Farson, supra note 108, at 120; The Task Force, supra note 52, at 9; Reitman, supra note 50, at 13.
111. The Task Force, supra note 52, at 12; Reitman, supra note 50, at 15.
113. The Task Force, supra note 52, at 7.
found that rather than controlling the student body, it may, in fact, increase disruptive behavior. Moreover, schools which have discontinued its use have attained delinquency records superior to those still relying upon it. In addition, evidence exists which shows that corporal punishment has a dehumanizing effect upon older students and teaches students in general that physical violence is an appropriate way to resolve conflicts and enforce demands. Finally, its harmful effects upon a student's sense of dignity and the existence of less damaging forms of discipline might allow a court to find that a school has violated the due process requirement that deprivations of personal liberties be the least restrictive necessary to accomplish their objective, thereby forcing the school to adopt a more effective and less restrictive disciplinary procedure. For example, instead of using physical punishment to deter tardiness, violations of dress codes or failure to observe rules in classes, a school might deter such behavior through such less restrictive alternatives as revocation of student privileges or detention of students after school.

115. The Task Force, supra note 52, at 10.
116. Id. at 12.
117. Id. at 7.
118. Reitman, supra note 50, at 15-16.
119. Id. at 16.
120. The Task Force, supra note 52, at 17.
121. Reitman, supra note 50, at 16.
122. The Task Force, supra note 52, at 27.
123. This requirement is discussed in Civil Commitment, supra note 78, at 1328 n.49.
124. The fact that less restrictive procedures could accomplish the school's objective of maintaining discipline and order would allow a court to find the use of corporal punishment a violation of due process. For example, in Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974), rev'd, 525 F.2d 909 (5th Cir. 1976), aff'd, 430 U.S. 651 (1977), students were punished severely for behavior such as tardiness in leaving a school stage, failing to wear white socks in gym classes, accidentally breaking glasses in sheet metal classes, and wiping dust off a seat in the school auditorium. Id. at 256-58. One student was severely beaten with a wooden paddle while being held down by two men, and other students were thrown into walls by school officials. Id. While the Supreme Court failed to find these instances cruel and unusual punishment, 430 U.S. at 671, it did not address the question of whether such action was the least restrictive form of discipline possible. This principle, which arises under the due process clause, requires that deprivations of a student's liberty be no greater than is necessary to keep order in schools. Thus, in Ingraham, if less restrictive conduct would have achieved the objective of disciplining these students, due process was violated. See Civil Commitment, supra note 78, at 1328 n.49. It is submitted that less restrictive types of discipline could have been employed to correct these minor infractions of school rules. Revocation of student privileges or detention after regular school hours would have accomplished the school's objective without the damaging effects of a severe beating.

Finally, it is suggested that as long as Ingraham remains the definitive holding, the least restrictive alternative analysis could be employed as a criterion for ascertaining the constitutionality of corporal punishment. A court, taking into consideration the gravity of the student's misbehavior and the severity of the discipline handed out, would have to decide if a less
Imposition of a duty to preserve the student's right to intellectual development may subject administrators or school boards to civil liability for the school's failure to educate. Recently, students have brought actions against their former high schools for allowing them to graduate functionally illiterate. These actions have been dismissed on the ground that schools owe students no common law or statutory duty of reasonable care in providing them with an education. The courts' failure to find a legal duty resulted largely from the public policy considerations raised by these actions, the most important of which is the potentially crushing financial burden that could result from recognition of a duty owed by the school.

As an alternative, however, students might bring actions against school administrative officials under section 1983 of the Civil Rights Act of 1970, or against school boards directly under the fourteenth amendment, where it would be alleged that the school's failure to educate resulted in a confinement restrictive alternative could have served the school's purposes. If one existed, the student's due process rights were violated, and the school would be forced to explore other forms of discipline.


128. 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The success of a § 1983 action will depend upon the outcome of the ongoing controversy concerning the scope of § 1983 liability. The Supreme Court has held that a § 1983 action was inappropriate where an adequate state remedy existed, or where the state official's action was merely a mistake in judgment. See Bishop v. Wood, 426 U.S. 341, 349-50 (1976); Paul v. Davis, 424 U.S. 693, 697 (1976). The Court also has extended to certain state officials absolute immunity from § 1983 liability. Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1199 (1977) [hereinafter cited as Developments]. Moreover, lower federal courts have held that individual acts of negligence by state officials do not give rise to § 1983 liability, id. at 1205, and the Supreme Court has recognized a good faith defense or immunity for state executive officials, id. at 1209.

without due process of law. The Supreme Court has held that school officials are subject to section 1983 liability if they know, or should know, that their actions violate a student's constitutional rights, or if the school official acts with a malicious intention to injure a student. In addition, recent developments in the law may allow actions to be brought against a school board or school district. In the past, the vast majority of such actions have been dismissed. These dismissals, however, were based upon the courts' finding that school boards are either municipal corporations or political subdivisions, both of which are presently outside the scope of section 1983. Actions brought directly under the fourteenth amendment would avoid this obstacle, and may be successful in light of the large number of lower court decisions which have held municipal governments subject to liability. The federal actions also may be more successful since the monetary considerations justifying dismissal of the state claims would not as easily allow a court to dismiss violations of a student's constitutional rights. The federal actions, however, would require the student to show a confinement without education in order to establish a violation of his due process rights, whereas the malpractice claim would require only that there be a deviation from the professional community's standard of care.

The ultimate success of either action is not as important as is judicial recognition that schools which provide no effective education violate a legally enforceable duty owed to the students. The refusal of some courts to impose that duty, however, has resulted in a situation where schools are held blameless when they graduate students who are unable to perform even the most rudimentary intellectual functions. It is suggested that the courts should no longer condone this situation, and that acceptance of either the state or a federal cause of action would encourage school officials to take appropriate steps to insure at least basic intellectual development.

130. See notes 94-97 supra and accompanying text.

131. Wood v. Strickland, 420 U.S. 308, 322 (1975). It should be noted that the Court made its ruling within the specific context of school discipline. Id. It is submitted, however, that since the students in Wood were asserting a violation of their due process rights, id. at 310, the case provides authority for a violation of due process in the present situation.

132. Developments, supra note 128, at 1195.

133. Id. See also Note, Suing the School Board Under Section 1983, 21 S.D.L. Rev. 452, 458-61 (1976).

134. See cases cited in Note, supra note 129, at 928-29 nn.40-46.


136. For example, the youth involved in one of the suits complained of being unable to fill out a job application, or to read a restaurant menu. See N.Y. Times, Apr. 24, 1977, at 33, col. 1; N.Y. Times, Feb. 20, 1977, at 1, 56, col. 2.

137. Many states have adopted, or are in the process of adopting, minimum competency requirements for high school graduation. See, e.g., 8 N.Y.C.R.R. § 3.45 (1976). There is some question, however, as to whether these requirements will have any substantial effect upon the quality of school instruction. See generally N.Y. Times, Feb. 13, 1978, at 1, col. 1.
C. Enforcement Through the Courts

Before a court may take affirmative action which will possibly interfere with the operation of a local school, the claimant must demonstrate that the controversy is justiciable.138 This will require him to persuade the court that there exist standards by which it can determine the rights and duties of the parties, that judicial resolution of the controversy will not violate the separation of powers doctrine, and that the court is capable of effectuating an adequate form of relief.139 A discussion of how these elements were satisfied in the treatment cases will illustrate how the judiciary may protect a student's right to intellectual development and personal dignity without disregarding the requirement of justiciability.

In education, as in mental health, it is difficult to determine which method of teaching is the most effective.140 As a result of this, courts have been reluctant to challenge the educational expertise of school officials,141 and rarely question more than their good faith and the reasonableness of their decisions.142 The treatment cases, however, have demonstrated the courts' ability to scrutinize the wisdom of a state institution's therapeutic actions,143 and have shown that courts can establish constitutional standards in areas that require scientific knowledge.144

In the treatment cases, the courts, rather than choosing one form of care over another, have set down certain guidelines under which effective treatment could be provided to all patients.145 They reviewed the structure, atmosphere, and personnel of the institutions,146 and initially decided whether rehabilitative treatment was possible under existing conditions.147 The expertise needed to make this decision was provided by stipulation of the parties.148
comparison with published standards and accepted practice, and through suggestions of amici such as the American Psychiatric Association. A similar approach might be used to determine whether conditions in a particular school rendered intellectual development impossible. Examination of the administrative structure, classroom environment, and the quantity and quality of teaching staff would expose at least the poorest schools where little more than custodial care is provided. Also, educational expertise could be gathered through the same means used in the treatment cases. This approach would enable a court to protect the student's right to intellectual development and, at the same time, respect the school administrator's expertise.

Justiciability also requires that judicial resolution of the controversy should not distort the proper pattern of relationships between the federal government and the states. This limitation has led to a reluctance on the part of the courts to enter mandatory decrees which may, in effect, assume the administrative functions of state agencies. In the treatment cases, however, this reluctance has been overcome by a system of periodic review of recommendations made by court-appointed observers such as ombudsmen or human rights committees. These individuals advise the court of conditions existing in the institution, and report on the administration's progress in attempting to comply with the court's decree. With such information, courts have been able to monitor the effectiveness of their decrees without assuming daily operation of the state institution.

A similar mechanism could be employed where a court found noneducational confinement in a particular school. Indeed, court orders requiring school officials to comply with desegregation decrees have been enforced through the use of masters without violating the sovereignty of the state. In light of this precedent and the experience of the treatment cases, judicial enforcement of a student's right to intellectual development need not usurp the responsibilities vested in state institutions.

149. Right to Treatment, supra note 146, at 517.
150. Adequate Treatment, supra note 65, at 1298.
151. See, e.g., In re Skipwith, 14 Misc. 2d 325, 339-42, 180 N.Y.S.2d 852, 866-70 (Dom. Rel. Ct. 1958) (because of a high percentage of substitute teachers, educational opportunities provided by a school found inferior).
152. Adequate Treatment, supra note 65, at 1299.
153. Id.
154. Civil Commitment, supra note 78, at 1337, 1340.
155. See The Wyatt Case, supra note 76, at 1351, 1353.
156. Adequate Treatment, supra note 65, at 1301.
158. The State's right to regulate education was recently reiterated in Chance v. Board of Examiners, 561 F.2d 1079 (2d Cir. 1977). The issue raised in Chance was whether the procedure employed in the selection of school supervisory personnel discriminated against blacks and Puerto Ricans. Id. at 1081-82. The Second Circuit directed the district court to relinquish jurisdiction
It might be argued that no court could entertain a claim that a public school confined students without due process because the State has not given its consent to be sued in such actions. The rationale of this contention is that the court's decree would impose obligations upon the defendant which could not be carried out without appropriations of state funds. This argument, however, has been criticized as unsound and the best known decision accepting its validity has been reversed by the Fifth Circuit.

In conclusion, much of the past controversy over the nation's reliance upon a compulsory educational system has been an attempt to balance the right of the parents with the right of the State to govern the instruction of children. Under a compulsory system of education, however, the interests of the student should be superior to the interests of the institution. Administrative concerns should be served in addition to, rather than to the exclusion of, the needs of the student. Judicial recognition of a right to intellectual development and dignity and self-respect would raise the priority given to student needs, and judicial enforcement, at least in extreme situations, would encourage inadequate schools to provide the instruction and atmosphere which best suits those needs.

IV. A Child's Rights Within the Family

Dean Pound noted two generations ago that the law has not adequately recognized the interests of children as family members. He attributed this failure of recognition to the law's preoccupation with two competing interests. First, society itself values the family as the institution best equipped to assume the burdens of child rearing. Second, parents, whose own rights as individuals and family members have been legally recognized, display what

over the matter since racial discrimination had not been established. Id. at 1091-92. The court also recognized that the state has a vital interest in running its own schools. Id. at 1091. It limited that interest, however, by requiring that the state do so "in a constitutional manner." Id. It is submitted that this limitation would allow a court, confronted with a case of noneducational confinement, to find compulsory education a denial of due process without violating the state's interest recognized in Chance.


160. Id., supra note 65, at 1301-02.

161. Id.; The Wyatt Case, supra note 76, at 1341-42 n.15.


2. Id. at 186.
Pound characterized as a certain "tenderness" about any readjustments in the balance of legal interests within the family. In short, parents resist any proposed change in the recognized rights of other family members which might impinge on their own interests. In the presence of the established interests of parents and society in the status quo, the law, noted Pound, has "proceed[ed] with great caution in securing the interests of children against their parents." This portion of the Comment will discuss three rights which the child has, or should have, against his parents, namely: (A) nurturing—the right to affirmative acts of personal care to promote a child's normal physical and emotional development; (B) custody—the right to be cared for by adults chosen for their capacity to meet the child's needs and protect his interests; and (C) freedom from abuse—the right to family interaction which is not damaging, harmful, or threatening to a child's physical integrity.

A. The Right to Nurturing

Insofar as our society recognizes early child care as a duty almost exclusively of parents, the law should begin to recognize affirmative parental duties to provide personal care. The characteristics of, and rationale for, this duty will be developed below. The duty will be called parental nurturing. It may be defined as the duty to ensure that a child have every reasonable opportunity for normal physical and emotional development.

The law presently focuses on the quality of physical care which the parent is required to deliver. Through neglect statutes and other child-protective legislation, the law protects children against physically abusive or grossly neglectful parents. The question will be raised whether this minimum standard of care is in fact compatible with the provision of reasonable opportunities for development. The courts and legislatures have also taken a...
restricted approach to the issue of emotional care of children, especially in cases where failure of such care does not produce observable physical effects. This restriction in the scope of legally enforced parental duties contrasts sharply with the emphasis in other disciplines on a child's emotions during his early years and the close relationship between the child's physical and emotional development. It will be suggested below that the availability of remedies less drastic and more flexible than the termination of custody may eliminate one of the courts' principal reasons for hesitancy in recognizing a child's right to nurturing. As was noted in the Introduction to this Comment, the trust model is used at several points as a conceptual framework for defining the duty of nurturing and for redefining the parent-child relationship through recognition of that duty.

1. Physical and Emotional Nurturing

Research into early child development has demonstrated that a child internalizes his environment to a degree nearly incomprehensible to the adult mind. An infant reaches the age of three months before he begins to differentiate between himself and the outside world. Until the age of seven years, he is the ultimate egocentric—all experience is perceived as an expression of his own needs, wishes, and fantasies.

It is not surprising then that the development of a child who is otherwise well cared for will be severely retarded if he is deprived of emotional care, even for short periods, during his crucial early years. This was dramatically revealed to researchers who discovered that infants in impersonal institutions suffered severe emotional and psychological damage, even though they received high quality physical care. It was found that children who had been institutionalized for more than a brief period between the ages of six months and seven years grew up to be emotional ciphers. As they grew, such children were unable to form emotional attachments to adults or to other children and, in some cases, even exhibited active antisocial behavior in later years.

11. See notes 90-135 infra and accompanying text.
12. See notes 15-31 infra and accompanying text.
13. See notes 136-59 infra and accompanying text.
16. Id. at 357-64; see M. Beadle, A Child's Mind 122-40 (1971).
17. The debilitation of institutionalized infants is called "marasmus." Its incidence has declined as institutions have attempted to adopt a more personalized approach to infant care. M. Ribble, The Rights of Infants 11-12 (2d ed. 1965). See also J. Bowlby, Maternal Care and Mental Health (1st Schocken paperback ed. 1966).
18. Bowlby, supra note 17, at 16, 23. Although there is some debate about the three-month figure, Bowlby notes the research of Spitz and Wolf in which depressive symptoms were observed among babies between the ages of three and six months upon separation from a mothering figure. Id. at 23.
19. Id. at 32-33. Bowlby calls the personality disorder arising from such early institutional experiences "affectionless character." See id. at 33.
By its very nature, an institution fails to provide a child with a caretaker who can, on a regular basis and through frequent contact, develop a sensitivity to that particular child's needs and his preferences in gratification. Such sensitivity is the product of continuing contact and some degree of emotional commitment by the adult. Researchers defined the cause of malaise among institutionalized children who lacked such continuous emotional contact as complete maternal deprivation, upon the presumption that mothers provide this emotionally satisfying care.

In fact, a similar syndrome has been found among children in intact homes under the care of their biological mothers. "Masked deprivation" in intact families most often results from the mother's inability to interact appropriately with her child. Either the child has no meaning at all to the mother, or he has an inappropriate meaning, in which, for example, the mother sees the child as a mere extension of her own needs. In either case, such a parent is incapable of perceiving and fulfilling the child's actual needs. Physical care may be adequate in a custodial sense, but the relationship is emotionally barren, with little if any affection between mother and child.

The adverse effects of inadequate emotional care include growth retardation, delay in intellectual achievement, and near-autistic social responses.
Such data provide two persuasive reasons for early identification of, and intervention in, inadequate parent-child relationships. First, the effects of early deprivation on a child's physical and emotional development are not totally reversible. Even after the deprivation is cured and some degree of catch-up growth is achieved, deprived children remain behind their chronological peers in physical size, intellectual acumen, and emotional maturity.28 On the positive side, though, there appears to be a correlation between the promptness in treatment and success in minimizing the residual effects.29 Second, as a parent himself, the emotionally and psychologically impoverished child will be unable to provide his children with the care and affection necessary for their own development.30 The cycle of inadequate emotional parenting, self-perpetuating from one generation to the next, is similar to the cycle of child abuse inflicted by parents who were themselves battered children.31 The development of a preventive law approach is clearly called for in both areas.

a. The Right to Physical Nurturing

The idea that a parent has a duty to render physical nurturing to children in his care is not a concept foreign to the law. In Blackstone's words, parents have "by their own proper act, in bringing [children] into the world . . . entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved."32 Similarly, the Supreme Court has stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."33

Perhaps the most unequivocal legal recognition of the parental duty to provide for a child's maintenance is the financial obligation of child support which legislatures and courts seek to enforce vigorously.34 In some jurisdic-
Support laws reflect legislators' reluctance to have the government assume the financial burden for a child when a parent can, but fails to do so. The emphasis on the duty of financial support is so strong that it is considered preferable, for example, to have a mother put her child in a day care facility and go to work rather than to disrupt the family's financial independence by direct government grants specifically for child care, as is common in some European nations.

There is arguably also a recognition of parental duty to provide physical nurturing in the Supreme Court's constitutional revision of the legal relationship between the fetus and its mother which began in *Roe v. Wade*. By recognizing the power of the state to prohibit abortions after the point of fetal

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36. The Senate, in its report on the 1974 Social Services Amendments, P.L. 93-647, listed the five goals towards which the states would be expected to work in providing Aid to Families with Dependent Children. See S. Rep. No. 93-1356, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 8133, 8146-47 (failure of effective enforcement is "not an area of jurisprudence about which this country can be proud." *Id.* at 8146).

37. Provision of child care services to the single parent in America is one necessary evil occasioned by the State's emphasis upon economic independence of the family unit. Child care is generally administered through welfare channels, incorporated into welfare reform to encourage the poor to work, and is only coincidentally concerned with the child. M. Steinfels, *Who's Minding the Children?* 16-17, 219 (1973).


39. Most European countries provide regular family allowances for each child, payable directly to the mother. Unlike the American system of Aid to Families with Dependent Children, which limits its payments to families that are not self-supporting, child care allowances in Europe are paid regardless of family income level. They are intended to counteract the depressing of family income by the increased burden of child care costs. While it is not contended that such allowances, in fact, cover these costs entirely, the burden is at least somewhat relieved thereby. Maternity and housing allowances are also available. *See generally Part III: Cross-National Perspectives on Child Care*, in Child Care: Who Cares? 133-213 (P. Roby ed. 1973); Reinhold, *In Europe, More Than the Poor Get Welfare*, N.Y. Times, Aug. 7, 1977, § 4, at 2, col. 3. It should be noted that, from a child's point of view, the European approach is preferable. Personal physical and emotional nurturing by a parent is central to a child's development, while the source of economic means is clearly irrelevant to him.

40. 410 U.S. 113 (1973).
viability, Roe permits the inference that at that point in her pregnancy, a mother's responsibility to provide continued physical nurturing to the fetus outweighs whatever conflicting interests she may have, short of her own physical health. The Court designated viability as the point at which the interests of the fetus become the proper subject of protective state legislation to prevent the mother from aborting the child. A fiduciary as well as a physical relationship can be said to exist—the mother is like a trustee who, under the duty of loyalty, must allow no self-interest to interfere or conflict with the interests of the beneficiary.

Moreover, this duty of loyalty can be extended backwards from viability to the earlier stages of pregnancy. It would not interfere with a woman's recognized privacy in childbearing decisions to require that until such decision is reached, she do nothing of her own volition which might jeopardize the normal growth process of the fetus. In fact, the definition of nurturing as the provision of every reasonable opportunity for normal development cannot logically exclude the first five months of human growth. The woman's decision to continue the pregnancy to term is therefore nothing more than a decision to continue the duties of nurturing which antedate the decision itself.

The legal recognition of the parent's duty to provide physical nurturing which will be the main focus of this section is chiefly a legislative recognition, given expression in the neglect statutes. Such statutes provide both a rationale for an extended definition of parental duties to nurture and a mechanism for enforcement of such duties. First, some form of neglect statute exists in every state, representing a universal recognition of the role of the state in ensuring

41. The opinion in Roe v. Wade addresses the question primarily in terms of balancing the interest of the State against a woman's privacy in childbearing decisions. See id. at 164-65.
42. Id. at 163-64.
43. Id.
44. A. Loring, A Trustee's Handbook 6, 67 (Farr Revision, 6th ed. 1962); Restatement (Second) of Trusts § 170 (1959).
45. See notes 86-89 infra and accompanying text.
46. See text accompanying note 8 supra.
47. There are parallels between the choices made in childbearing and in taking on duties as a trustee. The following quotation is taken from a discussion of the seriousness of a trustee's duties, but it might well be applied to the decision to bear and raise children: "[A potential trustee] had best examine the trust property, his own property and his walk of life to make certain in advance that his personal interests will not conflict with his duties as trustee, for it well may be that the relationship is not compatible with the continuation of what he needs to do in order to take care of his own interests properly." Loring, supra note 44, at 7.
that children receive proper care when their parents have manifestly failed in their responsibilities. Second, the neglect statutes provide a means of finding children who are not properly cared for and intervening in their behalf. Child abuse and neglect reporting systems have been mandated legislatively to


require that persons outside the family who have access to children report apparent cases of neglect or abuse to public agencies.\textsuperscript{50} Such statutes are found in all jurisdictions and provide a means of identifying the problem and providing protection and support for families and children on a case-by-case basis.

Neglect statutes prohibit certain types of parental behavior.\textsuperscript{51} For example, they prohibit "cruelty, depravity, or physical abuse" by a parent,\textsuperscript{52} and classify neglecting parents as those who are "unable to discharge their responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity."\textsuperscript{53} Neglect statutes have been described as specifying what is undesirable, while leaving "to inference what is desirable."\textsuperscript{54} The negative cast of this type of legislation avoids setting up exact positive guidelines for parental behavior. This lack of specificity has been criticized,\textsuperscript{55} but an argument can be made that it is this very absence of strict standard-setting by the legislature that preserves the constitutionally


50. Few reporting statutes are limited only to the reporting of actual physical injuries sustained by a child. As of 1975, only nine states (California, Georgia, Indiana, Maine, Maryland, Michigan, Rhode Island, Vermont, and Wisconsin) had statutes which would exclude the reporting of neglect. See Katz, Howe & McGrath, \textit{Child Neglect Laws in America}, 9 Fam. L.Q. 1, 63 (1975).

51. See Katz, supra note 38, at 57-58.


54. Katz, supra note 38, at 57.

protected areas of family privacy. By reserving to the parents the discretion to make basic decisions regarding the way a child is brought up, at least while the child is incapable of reaching a rational decision of his own, the state respects the integrity of the family unit, and initially protects the child's right to nurturing by enhancing the stability of the family as a source of protection, continuity, and care.

Constitutional recognition for and guarantee of parental autonomy is not intended, however, to shield the parent who fails to provide his child with adequate physical care. The autonomy accorded parents is premised upon the use of parental power to benefit the child. Once the exercise of parental autonomy can no longer be harmonized with the promotion of the child's interests, as when parents violate the negative prohibitions of a neglect statute, parents have abused their discretion. A court of proper jurisdiction then has the opportunity to begin to define in positive terms those duties which parents owe their children under the neglect statutes. This judicial task will be facilitated by language in some neglect statutes which suggests that affirmative parental conduct may be required. The statute in Idaho, for example, defines a neglected child as one who "is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well being because of the conduct . . . of his parents." The statutory definition of neglect in Montana closely parallels the definition of nurturing, stating that neglect is the "commission or omission of any act or acts which materially affect the normal physical or emotional development of a youth."

Courts have construed neglect statutes to find an affirmative duty on the part of parents which resembles that imposed on a trustee by the courts of equity. One definition of neglect, for example, formulated by the Illinois

56. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents may send children to private schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (parents may require that a child have the opportunity to study particular subjects). See also Kleinfeld, The Balance of Power Among Infants, Their Parents and the State, Part II, 4 Fam. L.Q. 410 (1970).


59. Parental discretion in the exercise of a child's rights is, in fact, analogous to the discretion a trustee enjoys in administering the corpus of a trust. As long as the trustee does not abuse his discretionary powers, he is free of judicial intervention. The court obtains jurisdiction upon a breach of fiduciary duties in administration. See Loring, supra note 44, at 103-09.

60. Most neglect statutes provide for exclusive original jurisdiction of a family or juvenile court in proceedings involving a neglected child living or found in the state. See, e.g., Idaho Code § 16-1603 (Supp. 1977); N.Y. Fam. Ct. Act § 1013 (McKinney 1975).

61. Idaho Code § 16-1602(1)(b)(vi)(Supp. 1977). A similar, but more detailed, provision is N.Y. Fam. Ct. Act § 1012(b)(vi) (McKinney 1975), which states that a neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education . . . or medical, dental, optometrical or surgical care . . . , or (B) in providing the child with proper supervision or guardianship . . . ."

Supreme Court and cited with approval by other courts, states that neglect is the "failure to exercise the care that the circumstances justly demand. . . . It is not a term of fixed and measured meaning. It takes its content always from specific circumstances, and its meaning varies as the context of surrounding circumstances changes." This flexible and affirmative obligation resembles that of a trustee who must act with the "care and skill [of a person] of prudence, discretion and intelligence . . . in the light of circumstances existing at the time [of] the act . . . ." Courts have applied such a reasonably prudent parent standard in determining if a parent with a low IQ has neglected her children. The Supreme Court of Iowa, in In re McDonald, removed the children from the custody of the mother not merely because of the mother's marginal intelligence, but because the court found clear and convincing evidence that the mother's subnormal intelligence impaired her ability to evaluate circumstances with the judgment of an ordinarily prudent person. Her mental incapacity threatened the physical well-being of her children, and there was no indication that training or assistance would alleviate the problems arising from the mother's incapacity. In short, no matter how minimally one defined the affirmative duties of physical nurturing, the mother in McDonald was not capable of making ordinary discriminations to act as a reasonably prudent parent on a day-to-day basis.

Another application of the reasonably prudent parent standard to define the limits of parental discretion arises in cases reviewing parental decisions about medical care for a child. One court stated the general rule: parents are allowed discretion in not seeking medical care for every trivial complaint.

65. Loring, supra note 44, at 87.
66. 201 N.W.2d 447 (Iowa 1972).
67. The mother's IQ was 47. Id. at 449. The court heard testimony by a visiting nurse, a social worker, and another member of the family who had helped care for the children while they were in the mother's custody.
68. The witnesses heard by the court in McDonald expressed serious reservations about the mother's ability to make decisions in subtle judgmental matters such as proper care during childhood illnesses and the mother's capacity to give her apparently normal children adequate stimulation to promote their intellectual development. Id. at 449-51.
69. The witnesses testified, for example, that the mother had required considerable training to master such basic matters as bathing the babies and making their formula. Id. at 451.

A factually similar case came before the Iowa courts in In re Wardle, 207 N.W.2d 554 (Iowa 1973). The mother in Wardle had an IQ of 60 and was described as being easily depressed by parental duties, which bewildered and confused her. A psychologist described the mother as having little ability to evaluate her surroundings accurately and a lack of impulse and emotional control. The social worker in Wardle waited four years before suggesting termination of the parent-child relationship "to give the child and parents every chance possible to see if there would be improvement." Id. at 559. While it is possible to understand the social worker's sympathy for the mother, it is difficult for this author to ignore the adverse developmental effects on the children arising from the additional time spent in a less than adequate family situation. See In re Sampson, discussed notes 79-85 infra and accompanying text.
provided such discretion is exercised in such a manner and on such occasions as “an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery,” would provide. In passing on parental judgment concerning provision of health care for their children, the court looks to specific treatment alternatives available, and the risks and benefits which attach to each alternative. In cases in which the risks are such that a reasonably prudent parent might choose not to pursue a hazardous course of treatment, the court will not override parental refusal of consent.

There are, however, situations in which a court will intervene to order medical treatment for a child where the parent has refused such treatment on the child's behalf. In order to justify the court's intervention, there must be some abuse of parental discretion. The cases are not always clear on what rationale the court adopts, but a rationale may be developed from the definition of nurturing used herein. If the duty to nurture requires that a parent ensure every reasonable opportunity for normal physical development, parents who ignore the medical and developmental consequences of refused medical treatment are abusing their discretionary powers. A parent who, for example, refuses a relatively safe blood transfusion for his newborn child because of his own religious convictions, and ignores the fact that his refusal will lead to the child's death or severe mental retardation, has abused his discretion because he or she has denied the child an opportunity for normal physical development.

Just as a trustee will not be permitted to act in his


71. Among the factors considered by the courts are: danger to the child's life from the existing medical condition, the danger involved in the proposed treatment, the probable success of the treatment, the degree of cooperation necessary from the child to ensure minimum success, and the burden on the community if the condition goes untreated. Note, Judicial Power To Order Medical Treatment for Minors over Objections of Their Guardians, 14 Syracuse L. Rev. 84, 89-90 (1962). In medical care cases, the court reviews a single parental decision and does not call into question the soundness of the entire parent-child relationship. See Santos v. Goldstein, 16 App. Div. 2d 755, 755, 227 N.Y.S.2d 450, 451 (1962). In declaring a child neglected purely for surgical consent purposes, the Santos court stated that its neglect determination “in no way imports a finding that these parents failed in their duty to the child in any other respect.” Id.

72. See In re Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942). An eleven-year-old girl suffered from a hypertrophic left arm, which was approximately ten times the extremity's normal size. An older sibling had brought the child to the court's attention in order to compel the parents to consent to amputation of the useless and disfiguring limb. Because the arm was not in any way life-threatening in a medical sense, the court refused to overrule the parental decision. The girl was essentially isolated at home, having been withdrawn from school because she was an object of thoughtless curiosity to the other children. She was taught at home, but her older siblings were convinced that her deformity would keep her “out of life, . . . out of everything eventually.” Id. at 715, 126 P.2d at 784 (Simpson, J., dissenting) (quoting the child's thirty-year-old sister).

73. See, e.g., People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952). The parents, Jehovah's Witnesses, refused a blood transfusion for their eight-day-old child who would have died or suffered severe brain damage without it. Since time was of the essence for the effectiveness of the proposed treatment, the court below had appointed a guardian to consent to the transfusion, and permitted the parents to appeal without mootness. The issue of surgical consent was felt to be of significant social impact to allow a ruling in the context of a concluded episode.
own self-interest when it conflicts with the interests of his beneficiary, a parent should not be allowed to reject medical treatment arbitrarily, for reasons which are not relevant to the child's developmental well-being. The court's intervention and review of the prognosis with and without treatment is nothing more than an act in the child's behalf, "uninfluenced by the whims or arbitrary determination of parents." 76

In cases in which the alternatives are less clearly defined than life or death, the court should look again to the parent's duty to nurture the child in deciding whether or not to honor the parent's decision to withhold medical care. That duty requires the parent to take all reasonable steps to ensure that the child will develop normally. The principle of decision in such cases should be a choice of the course of action which forecloses the fewest possibilities for the full development of the child. 77 If the child's right to make a decision to receive medical care is thought of as held in trust, the parent-trustee has a duty to preserve the options of the child until he develops the rational powers of an adult and can choose for himself whether his physical health or devotion to religious precepts is personally more important. 78 An example of such an approach is In re Sampson, 79 in which the court was asked to make a decision concerning surgical treatment of a fifteen-year-old boy with an extensive facial

74. Loring, supra note 44, at 6.

75. While religious beliefs are clearly constitutionally protected, religious practices that are contrary to law may be regulated. As the Supreme Court stated in a much quoted portion of its opinion in Prince v. Massachusetts, "[p]arents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children . . . ." Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

76. In re Vasko, 238 App. Div. 128, 130, 263 N.Y.S. 552, 555 (1933) (mother refused removal of a child's cancerous eye on the ground that "God gave her the baby and God can do what He wants"); accord, In re Elwell, 55 Misc. 2d 252, 284 N.Y.S.2d 924 (Fam. Ct. 1967) (parents financially able to immunize their children refused to do so; children unable to attend public school until immunized against polio).

77. See In re Weberlist, 79 Misc. 2d 753, 360 N.Y.S.2d 783 (Sup. Ct. 1974), in which the court gave permission for surgical repair of a cleft palate and other congenital malformations for a severely retarded twenty-two-year-old male, who had been institutionalized and was without family contact. The court noted that "the court must decide what its ward would choose, if he were in a position to make a sound judgment. Certainly, he would pick the chance for a fuller participation in life rather than a rejection of his potential as a more fully endowed human being." Id. at 757, 360 N.Y.S.2d at 787.

See also Goldstein, supra note 21, at 53-64, where it was argued that the principle of decision in child custody cases should be "the least detrimental alternative" to the child. Similarly, in child neglect cases, use of such a standard would direct the court's attention to the degree of obstruction to a child's development that various decisions about physical and medical care would produce. The court would then be most likely to choose the alternative which foreclosed the fewest possibilities for full development.

78. See In re Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955), in which a fourteen-year-old boy refused corrective surgery for his cleft lip and palate because he, like his father, believed in the healing power of "natural forces."

deformity caused by an overgrowth of folds of facial tissue. His gross physical condition was not life-threatening, but it was so disfiguring that his family had withdrawn him from extra-family activities to protect him from public curiosity and cruelty. The surgical remedy available could reduce the disfiguring condition significantly, though a fully normal appearance was not possible. The doctors were willing to undertake the considerable risks of surgery only if the mother would give consent to intra- and post-operative blood transfusions. The mother had consented to surgery but, for religious reasons, had withheld consent for transfusion therapy, which effectively barred the corrective surgical procedure. The mother, the child's law guardian, and one of the testifying surgeons advocated waiting until the child reached the age of consent to agree to the operation on his own behalf. Had the case been decided purely on the basis of the propriety of the exercise of parental discretion, the mother's decision would probably have withstood judicial review as the refusal of consent for a hazardous operation when no life-threatening condition existed.

The court in Sampson, however, focused upon the effects of postponing the surgical procedure upon the boy's personal development in the intervening years, and found those potential effects less than benign. It was not simply a matter of a static condition which would be equally amenable to surgical correction after the passage of six or more years. The delay in treatment until the boy's majority would lengthen the time during which he would have to restrict his activities and remain isolated at home. His entire development would continue to be nothing more than adjustment to his deformity, which the court characterized as "an overriding limiting factor militating against his future [normal] development. . . . [U]nless some constructive steps [were] taken to alleviate his condition, his chances for a normal, useful life [were] virtually nil." By giving permission for the surgery, the court enforced the parent's duty to provide affirmative care. The court expressly addressed the child's right to have every reasonable opportunity for normal development when it noted that delay in surgical correction would "totally [ignore] the developmental and psychological factors stemming from [the boy's] deformity which the court deems to be of the utmost importance in any consideration of the boy's future welfare . . . ."

The mother's refusal to give consent for a transfusion necessary for her son's surgery in Sampson can be seen as an abuse of her discretion in the performance of her duty to nurture since the refusal did not protect the future

80. The boy in Sampson had been withdrawn from school at the age of nine. Although intellectually capable, he was functionally illiterate. He was described as shy and exceedingly dependent for his age. Id. at 660, 317 N.Y.S.2d at 644.
81. Id. at 672, 317 N.Y.S.2d at 665.
82. It has traditionally been felt that "the father knows far better as a rule what is good for his children than a Court of Justice . . . ." In re Agar-Ellis, 24 Ch. D., 317, 338 (1878) (opinion of Lord Justice Bowen), cited at length in In re Hudson, 13 Wash. 2d 673, 692, 126 P.2d 765, 774 (1942).
83. 65 Misc. 2d at 660, 317 N.Y.S.2d at 644.
84. Id. at 672, 317 N.Y.S.2d at 665.
developmental opportunities which correction of the deformity might provide. By analogy to the trust model, the court has the power to scrutinize and even revise a trustee's decision which does not adequately reflect the beneficiary's interests.85

This same concern for preserving developmental opportunities can be applied to define prenatal maternal responsibilities in the care of unborn children. Presently, many pregnant women violate the fetus' developmental interests by failing to take advantage of available prenatal and obstetric care. If untreated, maternal malnutrition, complications of pregnancy, or excessive use of drugs or alcohol are known to increase the risk of infant mortality and morbidity.86 Thus New York courts have found neglect where an infant is born with withdrawal symptoms from her mother's drug use during pregnancy.87 A recognition of a child's right to developmental opportunities cannot logically exclude the critical early months after conception. A first step towards such recognition could be the provision of a legal deterrent patterned after the New York court's finding of prenatal neglect. If, upon the birth of her child, a mother can be held responsible for injury caused by her voluntary malfeasance during pregnancy, she may be less likely to act in such a manner as to incur penalties.88 As noted earlier,89 imposing a duty of care upon a woman to preserve the possibility of normal development for the fetus does not impinge on the privacy of her childbearing decision. It merely defines a protectable right of the fetus as a potential legal person, leaving the decision of nurturing that potential life in the hands of the woman herself.

To summarize, the legislatively-defined standards of parental care will be adequate protection for a child's right to physical nurturing only if the courts are willing to find affirmative duties corresponding to the circumstances of each child.

85. G. Bogert & G. Bogert, Law of Trusts § 89, 322-23 (5th ed. 1973) (the court in reviewing a trustee's discharge of discretionary duties may direct the trustee to reconsider his actions or may even go so far as to instruct him as to how he should make a new decision).

86. "The prospective mother should have a well-balanced diet, with adequate minerals and vitamins. Prenatal examinations should be regular and include screening for maternal disease and blood group incompatibility. Drugs should be avoided, [as should contact] with individuals suffering from infectious or contagious diseases . . . " The Merck Manual 883 (12th ed. 1972).

Uncertainty of causation has been, until recently, a major factor precluding recovery for prenatal injury. Because of research into the effects of maternal disease, malnutrition, and drug use upon the unborn child, there is now probably no greater burden of medical proof in prenatal cases than in other actions involving medical judgments. The intrafamily nature of the cause of action appears to be the principal objection raised in articles on the subject of liability for prenatal injury. See, e.g., Note, The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries, 110 U. Pa. L. Rev. 554, 583-86 (1962).


88. A biological approach seems to be the trend in theories for protecting the not-yet-viable fetus: until birth the fetus is treated as a biologically separate entity whose legal personality is recognized only after birth. Liability for injury is only conditional before birth. See Comment, Negligence and the Unborn Child: A Time for Change, 18 S.D.L. Rev. 204, 217-18 (1973).

89. See notes 40-47 supra and accompanying text.
b. The Right to Emotional Nurturing

The law has created an artificial dichotomy by attempting to protect a child's physical well-being without giving similar recognition and protection to his emotional health. It is clear from empirical research that the two are closely related. Emotional nurturing is essentially the provision of those intangible aspects of parental care, such as affection, guidance, and discipline, which distinguish the parent-child bond from other intimate social relationships. A strong presumption exists in the law that a child receives emotional as well as physical care from his biological parents. This presumption underlies the statutory provisions in wrongful death statutes and dram shop acts of some states in which the loss of parental society, comfort, and protection due to the tortious interference of a third person is a discrete item of recovery accruing to the child.

Some neglect statutes have incorporated provisions relating to emotional neglect. For example, the Michigan statute includes in the definition of a neglected child one who "is deprived of emotional well-being." New York includes in its neglect definition impairment or potential impairment of a child's emotional condition—including "a state of substantially diminished psychological or intellectual functioning . . . provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the [parent] to exercise a minimum degree of care toward the child." While such provisions are a step toward recognition of the emotional aspects of child care, many courts still may be willing to find emotional neglect only in two limited situations—where it causes adverse physical effects or where it exists...
in conjunction with demonstrated physical neglect.99

A child's right to emotional nurturing by a parent has been given independent recognition by the courts of three jurisdictions in suits based upon alienation of parental affections.100 Where a third party had enticed a parent away from the home and thereby deprived the child of anticipated parental care and guidance, the third party has been held liable to the child for that deprivation.101 These courts have therefore recognized that the child has a legally protectable right to the maintenance of the emotional support of the family relationship.102 The judges who favored adoption of parental affection actions viewed parental love as a major factor in the development of a child's

99. The Michigan Court of Appeals, before the 1972 statutory amendment which produced the provision referred to above in note 96 and accompanying text, found neglect in "[t]he repeated failure to care for the physical needs of the child, together with a marked lack of affection and marked preference for another child." In re Franzel, 24 Mich. App. 371, 375, 180 N.W.2d 375, 377 (1970) (emphasis added).

100. The jurisdictions are: (1) Illinois: Daily v. Parker, 152 F.2d 174 (7th Cir. 1945) (decision by federal court in the acknowledged absence of applicable Illinois law); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947); (2) Michigan: Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949); and (3) Minnesota: Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949). For a general discussion of these four cases, in which a suit for alienation of parental affections was allowed, see Note: The Child's Right To Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent, 56 B.U.L. Rev. 722 (1976).

101. Recognition of a child's cause of action for alienation of parental affections was, no doubt, impeded by the courts' conceptual difficulties with the cause of action between spouses for alienation of affections upon which the child's suit was modeled. Actions for alienation of affections are no longer available to adult litigants in states which adopted Heart Balm statutes. These statutes abolished the common law liability for breach of a promise to marry and for alienation of affections, seduction, and criminal conversation. States enacting such legislation have effectively foreclosed infant litigants from bringing similar suits. Katz v. Katz, 197 Misc. 412, 413, 95 N.Y.S.2d 863, 865 (Sup. Ct. 1950); cf. Taylor v. Keefe, 134 Conn. 156, 163, 56 A.2d 768, 771 (1947) (denied child's suit for alienation of maternal affection, noting that alienation of affections as a cause of action had been eliminated by statute in twelve states since 1935). Jurisdictions which have abolished suits based upon a breach of a promise to marry include: Alabama, California, Colorado, Florida, Indiana, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, and Wyoming. See Annot., 73 A.L.R.2d § 1 n.1 (1960). But see Russick v. Hicks, 85 F. Supp. 281, 286 (W.D. Mich. 1949) (distinguished suit by infants for wrongful invasion of family relationships from the specific husband-wife relationship covered by the heart balm statute in Michigan). Other courts have noted that alienation of affections is rooted in the right of consortium, which is peculiar to the marital relationship and not capable of expansion to parent-child relationships. See Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958) (denying a child recovery for loss of care because of a third person's negligent injury of plaintiff's mother); Nelson v. Richwagen, 326 Mass. 485, 95 N.E.2d 545 (1950) (infant plaintiff denied recovery for loss of maternal care because of defendant's enticement of the mother to leave home; while desertion is a marital wrong, a minor child has no legal right to the personal care of his parent).

102. As one dissenter in a case refusing recognition noted: "The fact is that, unless interfered with, service, care and affection flow as a matter of course from the relationship of parent and child." Kane v. Quigley, 1 Ohio St. 2d 1, 7, 30 Ohio Ops. 2d 1, 4, 203 N.E.2d 338, 342 (1964) (Gibson, J., dissenting).
character, disposition, and abilities, which therefore has a major impact upon society. As one opinion noted, "it is of the highest importance to the child and society that its right to receive the benefits derived from its mother be protected."

While a court that might recognize a child's right to emotional nurturing today could do so under the authority of the legislative mandates contained in the neglect statutes, the courts which recognized a cause of action for loss of parental affections found arguments sufficiently compelling to reach such a result without statutory authority. Since cases seeking relief for alienation of parental affections were cases of first impression, and there was no strictly applicable legislative statement on the subject, courts which accepted the cause of action, beginning with Daily v. Parker, justified their unprecedented holdings by embracing the philosophy of judicial empiricism. This jurisprudential theory holds that the common law is sufficiently elastic to respond to changed circumstances rather than adhere to precedents which are no longer relevant. The courts which accepted the cause of action proposed by these infant litigants rejected the archaic model of the family in which the rights of all family members were vested in the husband/father. In such changes as the statutory emancipation of women, these courts saw a trend toward recognition of the distinct rights of other family members.

Although the cases lack any reference to sociological data which might support the existence of this trend, the courts were satisfied that changes in society provided an adequate basis for recognition of the child as an individual whose rights to the tangible and intangible benefits of family life are entitled to protection.

The parental affection cases are the closest judicial analogue to the right of emotional nurturing proposed in this section. The discrete interest of a child in adequate emotional care from his parent is common to both. The cases

104. Miller v. Monsen, 228 Minn. 400, 403, 37 N.W.2d 543, 545 (1949).
105. See notes 48-85 supra and accompanying text.
107. See cases cited note 106 supra. While Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949), does not specifically use the term "judicial empiricism," the decision does state that the "common law does not consist of absolute, fixed, and inflexible rules, but rather . . . its principles have been determined by the social needs of the community and have changed with changes in such needs." Id. at 406, 37 N.W.2d at 547 (dictum).
109. See, e.g., Miller v. Monsen, 228 Minn. 400, 408, 37 N.W.2d 543, 548 (1949).
110. Id.
accepting the cause of action against third party interference with the parent-child relationship were in an admitted minority when they arose thirty years ago. But the flexibility of the common law which those courts espoused should probably be reconsidered in evaluating suits protecting the child's interests in the intangible benefits of family life. Courts which initially rejected such suits raised a number of objections to the parental affection action. However, these arguments against recognition of a child's right to recover from a third person for loss of parental affection are less compelling when directed against recognition of a child's right of action against a non-caring parent for emotional nurturing. Arguments raised against actions for loss of parental love fall into three basic categories: (1) the lack of power to enforce what is essentially a moral right, (2) the lack of common law or legislative precedent, and (3) potential practical problems arising from recognition of such a cause of action.

The provision of parental love has been characterized as merely a moral or social obligation, incapable of legal enforcement. As one New York court put it, "[t]he law cannot require a parent to love or train a child. It forbids abuse and abandonment but it does not compel devotion." But since the parent is the only person in a position to provide critical early emotional care, to deny relief to the child is to leave the child without an alternative emotional relationship as a remedy. Unlike the remedy of money damages sought as compensation for loss of parental care in actions for alienation of parental affections, remedies more appropriate to the character of the right could be fashioned in emotional nurturing actions, such as psychological care and follow-up to overcome an inadequate capacity for emotional parenting. While the state cannot enforce love, it can reinforce it by providing social services which encourage formation or maintenance of parent-child ties.

While no court considering a cause of action for alienation for parental affections has admitted that the mere novelty of the claim effectively barred a child's recovery, some courts have felt that recognition of a new right in a child was a policy decision affecting a major portion of the population, and therefore required legislative action to define the right. In fact, however, most legislatures have already recognized a series of duties running from parent to child under neglect, support, and wrongful death statutes. By finding an obligation to provide for the child's emotional well-being as part of

112. Cox v. Stretton, 77 Misc. 2d 155, 160, 352 N.Y.S.2d 834, 840 (Sup. Ct. 1974) (action for medical malpractice in which, inter alia, siblings of a child born after the father had been vasectomized claimed deprivation of a portion of parental care, affection, and training each would have received if the unplanned brother had not been born).

113. See remedies discussion, notes 136-59 infra and accompanying text.


116. See notes 34-39 & 93-94 supra and accompanying text.
those duties, courts will be carrying out the legislatures' intent to protect the child.

The loss of parental affection action was also thought to be contrary to the policy of family repose\textsuperscript{117} which bars intrafamily tort litigation. In fact, intrafamily immunities have been in increasing disfavor in the decades since many of the parental affection actions were decided,\textsuperscript{118} and therefore constitute a less persuasive basis for refusing recovery. While family repose may be a justifiable policy to discourage legal actions which might disrupt an intact family, it offers no reasonable protection in a situation in which a child has experienced such a deprivation of parental affection that he seeks legal redress. The family life of such a child has deteriorated significantly before legal action is even initiated.

Courts have also expressed uncertainty about practical problems in determining an adequate remedy for loss of parental affections, most especially the problems of assessing monetary damages\textsuperscript{119} and of defining the extent and duration of the right\textsuperscript{120} to parental affection in light of the changing status of the child vis-à-vis his parents as he matures. The first problem is minimized in action for emotional nurturing by confining the award of monetary damages to very limited circumstances and upon conditions that would militate against family collusion for fraudulent gain.\textsuperscript{121} The second problem could be solved by adjusting the remedy to the child's age at the time of injury and to the type and extent of damage which has resulted. For example, if the child were an infant, the most appropriate remedy might be psychological counseling for the parent to improve nurturing skills, while a more appropriate remedy for an adolescent might be to allow him to choose a supplemental guardian.

Courts which have denied actions for loss of parental affection have also

\textsuperscript{117} "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent." Small v. Morrison, 185 N.C. 577, 579, 118 S.E. 12, 13 (1923) (quoting Hewellette v. George, 68 Miss. 703, 9 So. 885, 887 (1891)).

\textsuperscript{118} Intrafamily negligence actions in tort have been increasingly allowed under the theory that family members should have the same access to remedies as other persons injured by a parent's negligence. See Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Annot., 41 A.L.R.3d 904, 970-80 (1972) (setting forth the rationale from cases limiting or abrogating the parental immunity doctrine).

\textsuperscript{119} In Henson v. Thomas, 231 N.C. 173, 176, 56 S.E.2d 432, 434 (1949), the court expressed fear that actions among family members for monetary damages would "convert the home into a commercial enterprise." It is ironic that the very courts which express this fear usually emphasize financial support when discussing responsibilities enforceable against parents. "Although the common law recognized the right of a child to support and maintenance from his parents by virtue of the family relationship, it recognized no enforceable right to damages for loss of personal care . . . ." Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 472-73 (D.C. Cir. 1958) (denying recovery for loss of parental care because of injury to parent by negligent third person).

\textsuperscript{120} Taylor v. Keefe, 134 Conn. 156, 161, 56 A.2d 768, 770 (1947).

\textsuperscript{121} See remedies discussion, notes 136-59 infra and accompanying text.
expressed fear of a flood of litigation. The fact is, however, that if the recognition of a new cause of action should result in large numbers of suits, provided that the possibility of fraudulent suits is minimized, that would simply go to show a genuine need for a remedy. Moreover, it will be proposed below that the existing machinery of the social service bureaucracy should deal with cases of emotional neglect. This would insulate the courts from having to bear the entire burden of increased litigation. It is estimated that the social service mechanism presently deals with 80% of neglect cases without recourse to the courts in a state like New York.

Recognition of a right to emotional nurturing would focus on providing a child with a stable parent-child relationship that satisfies the child's need for early emotional security. Whereas infant litigants usually sue through a "next friend" who is customarily one of the infant's parents, the child himself with a legal guardian of his own interests would be a necessary party in a suit in which the quality of his emotional care is at issue. Independent suit could be brought by a minor of sufficient maturity to determine that his parents are presently contributing to his emotional maladjustment. The child protective system, which requires reports of child neglect by those who are in a position to acquire knowledge of neglect, could be used to raise the claims of younger emotionally neglected children. Grandparents and adult siblings are already frequently the parties who raise the question of the quality of a child's care.

In actions brought by or on behalf of emotionally neglected children, the court would bear the burden of making a thorough and expeditious investigation of the child's existing affectional ties to determine where an emotionally


123. See remedies discussion, notes 136-59 infra and accompanying text.

124. Besharov, Practice Commentary, N.Y. Fam. Ct. Act § 1011 (McKinney Supp. 1977-1978). This author does not mean to suggest that the already heavily burdened social service bureaucracy or family court judicial personnel can be expected to assume still greater responsibilities without increased manpower and funding. Only "[w]hen we, as a society, are prepared to commit as much money to children as we do to alcohol (approximately $34 billion a year), [will] we then stand to assure our children a much safer environment in which to grow than we provide now." Letter from Allen R. Walker, Univ. of Rochester School of Medicine to the New York Times (N.Y. Times, Sept. 16, 1977, at A24, col. 4).

125. See notes 15-31 supra and accompanying text.

126. See, e.g., Fed. R. Civ. P. 17(c).

127. Under some state laws, a child of fourteen years of age has the controlling voice in custody disputes between his parents or potential guardians. See, e.g., Ga. Code Ann. §§ 30-127, 74-104 (1977); pt. IV(B) infra, notes 131-217 and accompanying text.

128. All jurisdictions have statutorily established child neglect and abuse reporting systems. See note 49 supra.

129. See, e.g., People ex rel. Gallinger, 55 App. Div. 2d 1036, 391 N.Y.S.2d 248 (1977) (custody of child awarded to paternal grandparents who had devoted time and care to raising her); In re Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942) (question of neglect raised by child's adult sister).
nurturing relationship exists or would be most likely to arise.\textsuperscript{130} The court's methods would be analogous to those already used by some courts in deciding custody questions in connection with dissolution of marriages.\textsuperscript{131} The court would consider, for example, the expressed preference of the child\textsuperscript{132} if the child is of sufficient age and intelligence to communicate it free of pressures from other family members. If the child is an infant or otherwise unable to communicate his preferences directly, the court might rely upon observation\textsuperscript{133} of the child's interactions with the adults concerned, to determine where the most positive interactions take place. Time would be of the essence in such proceedings. The usually protracted course of judicial proceedings could itself be damaging to the child's emotional health since a child is not able to tolerate delay in matters which he feels strongly about.\textsuperscript{134} Younger children in particular are least able to tolerate conflict among adults to whom they are attached, and are least capable of dealing with emotional insecurity in their relationships.\textsuperscript{135}

2. Remedies for Failure to Nurture

Once the court has jurisdiction over a neglected child, it must exercise its own discretionary\textsuperscript{136} powers and determine the child's future disposition. While it is customary for courts to state that they exercise their powers in the child's "best interests,"\textsuperscript{137} it has been suggested that "the least detrimental alternative"\textsuperscript{138} should be used as the proper guideline in determining the needs of the child in deciding disposition. The use of the latter test would serve as a reminder to courts of a fact underlying all solutions to family

\textsuperscript{130} A full discussion of court investigation of affectional ties during custody proceedings may be found in the Note, \textit{Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties}, 73 Yale L.J. 151 (1963). See also Goldstein, \textit{supra} note 21, at 17-20, where a psychological parent is defined as an adult who, "on a continuing, day-to-day basis, through interaction . . . and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." \textit{Id.} at 98. It is the psychological parent whom the court is attempting to identify in addressing custody or emotional nurturing problems from this point of view.

\textsuperscript{131} The child's rights in custody matters is a separate subject addressed in this Comment. \textit{See} pt. IV(B) \textit{infra}. It should be noted at this point, however, that emotional nurturing appears to be one of the relevant factors in awarding custody under the Uniform Marriage and Divorce Act § 402 (1971 version), which states: "The court shall consider all relevant factors including: . . . 3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest . . . ."

\textsuperscript{132} \textit{See} Note, \textit{Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties}, 73 Yale L.J. 151, 162 (1963).

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} Goldstein, \textit{supra} note 21, at 40.

\textsuperscript{135} \textit{Id.} at 12.

\textsuperscript{136} Loring, \textit{supra} note 44, at 108-09.

\textsuperscript{137} "The rationale of \textit{pares patriae} is that the State must intervene in order to protect an individual who is not able to make decisions in his own best interest." \textit{In re Weberlist}, 79 Misc. 2d 753, 756, 360 N.Y.S.2d 1783, 1786 (Sup. Ct. 1974).

\textsuperscript{138} \textit{See} Goldstein, \textit{supra} note 21, at 53-64; pt. IV(B)(2)(b) \textit{infra}, notes 116-30 and accompanying text.
disruptions involving a child—namely, that none of the available alternatives are free from potential emotional harm for the child.\textsuperscript{139} It is a matter of determining which remedy is most likely to have the least harmful effects. "The least detrimental alternative" approach will generally focus on providing a secure emotional attachment between the child and some adult who is committed to caring for him.\textsuperscript{140} A primary consideration is the need to minimize "the possibility of [future] frequent and perhaps continuous judicial intervention into the life of the child."\textsuperscript{141}

The court may go so far as to dissolve the family relationship by removing the child from the home and placing him in foster or institutional care. Although removal of the child is not the only remedy for neglect, it may seem so drastic that the court is deterred even from finding neglect lest it be obliged to invoke the removal remedy. Thus, in practice, the remedy may determine the extent of both the parent's duty and the child's right. The court may, for example, avoid finding neglect by minimizing the parental duty so that present levels of parental performance may be deemed adequate.\textsuperscript{142} Whenever the court lowers the standard of parental conduct, however, it also diminishes the child's right to nurturing, namely, the provision of every reasonable opportunity for normal physical and emotional development. Where the child's physical safety or health is seriously threatened by the parent's inadvertent or willful neglect,\textsuperscript{143} the court can readily harmonize the protective aspects of removal from the family with the least detrimental alternative standard by weighing the adverse effects of removal against the probabilities of continued deterioration in the child's physical welfare. Where the child is suffering deprivation of intangibles, such as stimulation, discipline,\textsuperscript{144} or affection,\textsuperscript{145} the immediate adverse effects are less readily observ-

\textsuperscript{139} Goldstein, \textit{supra} note 21, at 54. Any child who has been neglected to the degree that his custody has been made the subject of litigation has already suffered some emotional, and therefore developmental, damage.

\textsuperscript{140} \textit{Id.} at 99.

\textsuperscript{141} Katz, \textit{supra} note 38, at 146.

\textsuperscript{142} \textit{See, e.g., In re Wardle}, 207 N.W.2d 554 (Iowa 1973), \textit{discussed} note 144 \textit{infra} and accompanying text.

\textsuperscript{143} Examples of willful or inadvertent neglect include \textit{In re Robbins}, 230 N.W.2d 489 (Iowa 1975), where a mother's behavior was characterized by the court as a series of deliberate choices destructive of the welfare of her children, and \textit{In re Price}, 13 Wash. App. 437, 535 P.2d 475 (1975), in which the failure of parents to cooperate with welfare agencies in providing proper medical and physical care for their children constituted neglect. The court attributed the parents' lack of response to "a combination of low intellect, stubborn distrust of dedicated public employees, bad judgment, and poverty." \textit{Id.} at 441, 535 P.2d at 478 (footnote omitted).

\textsuperscript{144} In \textit{In re Wardle}, 207 N.W.2d 554 (Iowa 1973), the court terminated Miss Wardle's custody over her two-year-old son because she was unable to meet his physical needs. In contrast, the court returned custody of her five-year-old daughter to Miss Wardle because it had found no evidence that the daughter's physical well-being was in danger. But the girl did have a history of behavior problems, which the social worker attributed to lack of consistent discipline, and an inadequate vocabulary for her age, which a nursery school teacher predicted would cause difficulty when the child entered the first grade. Yet the court felt that the school system would remedy the problems, whether the child was living with her mother or with foster parents. The
able, and the court may feel constrained to avoid invocation of a seemingly excessive remedy.\textsuperscript{146}

But a mechanism for providing remedies other than removal for inadequate physical and emotional nurturing already exists in many states, where broad child protective services\textsuperscript{147} have been made available to deal with physical neglect and abuse. With the intent of reducing the resort to courts and law enforcement agencies, many state legislatures have mandated provision of social and financial assistance to children who are neglected or whose general welfare is threatened by parental conduct.\textsuperscript{148} A typical broad child protective program will receive any referral or complaint "from a public or private agency or from any person having reasonable cause to know that the welfare of a child is endangered."\textsuperscript{149} This reporting system and the services offered through it could be expanded to encompass emotional protection of children as well.

Direct assistance to the family unit is clearly preferable to the harsh step of removal of the child from the home for placement in foster or institutional care. In the initial stages of a neglect procedure, for example, it should be customary to allow the parent to retain custody upon the condition that he cooperate in state intervention\textsuperscript{150} to ensure that the neglect does not continue

\footnotesize

\textsuperscript{145} See notes 90-135 supra and accompanying text.
\textsuperscript{146} It may be contended, for example, that removal of a child from a mother because of the mother's subnormal intelligence amounts to punishment for a lack of judgment which it is not within the mother's capacity to exercise. This is a necessary conclusion only if one equates custody with ownership, and the loss of custody with punitive deprivation of property. Under a trust model, breach of the fiduciary duty to meet the best interests of the child, whether willful or innocent, requires judicial consideration of the question of the continuation of the trust, if its purposes cannot be served. See Loring, supra note 44, at 293.
\textsuperscript{147} One example is California, which set up a broad program of children's protective services in 1968. Cal. Welf. & Inst. Code § 16501 (West Supp. 1977) reads, in part: "(C)hild protective services shall include casework and related services designed to forestall or reduce the need for action by law enforcement agencies, probation departments and courts, and to render these services in behalf of children who are without parents, proper guardianship, or custody, or who are being neglected or whose general welfare is being damaged by the conduct of parents, guardians, or custodians, whether willfully or otherwise."
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} See, e.g., \textit{In re Welcher}, 243 N.W.2d 841 (Iowa 1976), in which a woman whose two previous illegitimate children had been permanently removed from her care appealed the removal of her four-year-old son. The court allowed resumption of custody on condition that the mother continue to undergo psychiatric treatment, that she cooperate with the Department of Social Services in attending child care and vocational training classes, and that she allow the Depart-
unabated. Parents may be required to undergo psychological counseling, attend classes on home and child care, accept homemakers’ services to supplement their own efforts, and agree to social service department visits to monitor their progress.\footnote{151}

If with support and guidance the parent does not improve his level of care and concern for the children,\footnote{152} or if support and guidance measures are refused unreasonably,\footnote{153} the court may consider permanent severance\footnote{154} of the parent-child relationship in order to place the child in a more appropriate home setting, with some security. Similarly, in the trust model, removal of a trustee is one alternative remedy, where the trust’s purpose is not being met.\footnote{155} It should be emphasized that where emotional ties exist between the parent and the child, every attempt must be made to correct other shortcomings in the provision of child care, since emotional attachment is the most difficult aspect of child care to preserve through transplanting of a child.\footnote{156}

There are additional remedies which might be made available for failure of physical or emotional nurturing. The possibility of early or partial emancipation may be extended to adolescents who are capable of making rational choices about their relationships with adults. It has been suggested that a system of secondary guardianships be permitted whereby a child of adequate discretion and an adult can reach an express voluntary agreement to enter into a guardianship relationship.\footnote{157} This would provide a continuing adult role in an adolescent’s life while giving the adolescent himself a choice as to which adult will exercise discretionary powers over him. In some jurisdictions this is already in practice—the expressed preference of a child fourteen years or older is controlling in custody disputes.\footnote{158}

ment of Social Welfare to make periodic observations of the quality of care she was giving the child. \textit{Id.} at 845.

The question of the constitutional propriety of caseworker’s visits was addressed in Wyman v. James, 400 U.S. 309 (1971), in which the Supreme Court noted: “The focus is on the \textit{child} and, further, it is on the child who is \textit{dependent}. There is no more worthy object of the public’s concern. The dependent child’s needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.” \textit{Id.} at 318.

\footnote{151}{\it In re Welcher, 243 N.W.2d 841, 845 (Iowa 1976).}
\footnote{152}{\it In re Robbins, 230 N.W.2d 489 (Iowa 1975).}
\footnote{153}{\it In re Price, 13 Wash. App. 437, 535 P.2d 475 (1975); see note 143 supra.}
\footnote{154}{Adjudication of permanent neglect sufficient to justify termination of the parent-child relationship usually requires that, for a period of one year, a parent fail to maintain contact with the child “notwithstanding the [placement] agency’s diligent efforts to encourage and strengthen the parental relationship.” N.Y. Fam. Ct. Act § 611 (McKinney 1975).}
\footnote{155}{It is possible to conceive of parental behavior which parallels grounds for termination of a trust, \textit{i.e.}, improper use of power (child abuse), improper self-interest (refusal of medical care for personal religious reasons), failure to maintain the beneficiary according to the terms of the trust (statutory physical neglect), and even bad habits which jeopardize the trust (prostitution or drug abuse to which children are exposed). \textit{See} Loring, supra note 44, at 29-30. \textit{See also} pt. IV(C)(2) infra.}
\footnote{156}{Goldstein, supra note 21, at 20.}
\footnote{157}{J. Holt, \textit{Escape from Childhood} 156-57 (1974).}
\footnote{158}{\textit{See}, e.g., Ga. Code Ann. §§ 30-127, 74-107 (Supp. 1977).}
The possibility of a monetary recovery for lack of nurturing should be limited to adult plaintiffs. Adults who have physical or emotional dysfunctions traceable to parental failures should not be denied some compensation. Here again an analogy may be found in the trust model, where liability for misdoings under a trust remains enforceable indefinitely. Monetary awards would be insulated from fraudulent use by stipulating that money so recovered be put to use specifically to remedy the alleged damage, to pay for psychiatric care for personality disorders, or medical care for complications arising from untreated physical conditions.

B. The Child's Rights in Custody Disputes

Childhood, like slavery in the ante bellum South, is a "peculiar institution" because the child's status as property is incompatible with his status as a person. Despite the recent agitation for the recognition of children's rights, the law continues to view children as human property which benevolent, well-intentioned adults have the right to possess and control. The child's paradoxical status as human property is evident in the area of child custody adjudication, which is essentially a determination of ownership rights to the child. This section will first analyze the predominance of the ownership concept in current practice and then develop the rights the child must have in order for custody adjudication to become an adjustment of personal rights rather than a determination of ownership rights.

1. The Child's Status as Property in Custody Adjudication

The issue that courts have traditionally grappled with in a custody dispute is essentially the same issue they confront in a dispute over the ownership of a chattel, that is, whose expectations with regard to this thing should the law protect? Under what might be called the law's ownership model of parentage, two branches of custody law emerged: disputes in which the claimants are the mother and father, and disputes in which the claimants are the biological parent and an interested party. Each branch developed its own set

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159. Loring, supra note 44, at 7.

1. Kenneth Stampp has characterized slavery in the ante bellum South as "the peculiar institution." K. Stampp, The Peculiar Institution (1956). One of the aspects of slavery which caused Stampp to so characterize it was the dual character of the slave as property and as person. Id. at 192-93. It is only in this respect that the analogy between childhood and slavery has been drawn.


3. See pt. IV(A), (C).

4. See notes 9-95 infra and accompanying text.

5. The author is indebted to John Humbach, Professor of Law, Pace University School of Law, who advanced this theory of property law when he was an associate professor of law at Fordham Law School.

6. Cf. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indetermi-
of preferences. While courts were certain that the law should protect the biological parents' expectations over those of outside parties, because of the biological parents' natural right in the child, they had difficulty deciding which biological parent's expectations to protect since both had a natural right in the child.

a. Disputes Between Mother and Father

The law has consistently treated the relationship between parents and child as one that exists for the benefit of the parents. Viewing the relationship from this perspective necessitated the development of preferences between the two biological parents because the benefits of parenthood which were shared during the marriage could not be shared when the marriage disintegrated.

In early-nineteenth-century England, as well as in a few jurisdictions in the United States during the mid-nineteenth century, adjudication of a custody dispute between the father and the mother was governed by a single preference: the superior right of the father. The father's right was superior because he had the natural and legal obligation of supporting and protecting the child. Jeremy Bentham's definition of "father" is useful in clarifying the rationale underlying the paternal preference. Bentham described the father as both master and guardian of the child. When the parent-child relationship is seen from the perspective of the father as master, the advantages to the father are considered, whereas when the relationship is seen from the perspective of the father as guardian, the advantages to the child are considered. Custody was regularly awarded to the father even when the child was very young and the separation was compelled by the father's abuse of the mother, the father was incarcerated, or the child had been in the exclusive custody of the mother for four years. It is evident that the courts were looking at the custody decision from the perspective of the father as master who is entitled to
the child's services and earnings as compensation for his duty of support and maintenance.\textsuperscript{17} Spousal fault, the standard used in those American jurisdictions in which the paternal preference rule was not followed,\textsuperscript{18} also did not focus on the child's needs; instead, it looked to which spouse was guilty of bringing about the dissolution of the marriage. Here the courts operated under the presumption that the child would "be best taken care of [and instructed] by the innocent party."\textsuperscript{19} The rationale underlying the fault rule appears to be a variation on the legal maxim that a wrongdoer may not profit from his own wrong.\textsuperscript{20} The courts refused to protect one of the parent's expectations, not because of any demonstration of parental unfitness, but because that parent, being the party responsible for the dissolution of the marriage, had brought about the custody dispute, and therefore was not entitled to receive custody.\textsuperscript{21} More often than not, the fault standard became one of maternal preference since social mores demanded that the wife institute the suit for divorce, and in so doing she had to establish fault on the part of her husband.\textsuperscript{22}

In the twentieth century, the "tender years" approach emerged.\textsuperscript{23} The courts protected the mother's expectations with regard to the child because it was assumed that the mother naturally has a greater inclination and ability to nurture the young child than did the father. As one court put it, "[t]he child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give."\textsuperscript{24} This approach, like the spousal fault rule which preceded it, appeared to represent a shift in focus from the parents' to the child's interests, as it was premised on the assumption that one class of parents was better suited to care for the child than another class of parents. Whereas the spousal fault rule assumed innocent spouses were better parents than guilty spouses,\textsuperscript{25} the "tender years" approach assumed females were better parents than males.\textsuperscript{26} In actuality, the "tender years" approach was only a rebalancing of interests between the parents themselves, focusing this

\textsuperscript{17} Inker & Peretta, supra note 11, at 231; see 2 Kent's Commentaries 205 (6th ed. New York 1848) (1st ed. New York 1826).
\textsuperscript{18} Mnookin, supra note 6, at 234.
\textsuperscript{20} See id. at 561 ("[W]hen the court pronounces for a divorce on the prayer of the wife, and gives her the custody of the children; then, in respect to their support, the rule would apply to the husband, that no man shall profit by his own wrong, and to the wife, the corresponding rule, recognized by good-sense, if not so formally received among the maxims of the legal family, that no one shall suffer for doing right; in pursuance of which, the husband should be charged with the full burden of maintaining the children committed to the wife's care.").
\textsuperscript{21} Becker v. Becker, 79 Ill. 532, 534 (1875); Welch v. Welch, 33 Wis. 534, 542 (1873).
\textsuperscript{22} Mnookin, supra note 6, at 234-35.
\textsuperscript{23} Id. at 235; Schiller, supra note 8, at 243.
\textsuperscript{24} Ullman v. Ullman, 151 App. Div. 419, 424-25, 135 N.Y.S. 1080, 1083 (1912).
\textsuperscript{25} See notes 18-22 supra and accompanying text.
\textsuperscript{26} See, e.g., Miner v. Miner, 11 Ill. 43, 49-50 (1849); Ullman v. Ullman, 151 App. Div. 419, 424-25, 135 N.Y.S. 1080, 1083 (1912).
time on the sex of the custodial parent. The "tender years" approach only expressly reaffirmed what had been tacitly recognized under the spousal fault rule: the mother had the superior ownership right.27

The "tender years" approach has recently come into disfavor as founded upon "outdated social stereotypes rather than on current theory of what is in the best interests of the child."28 As one family court judge observed, "[t]he simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide."29 The women's liberation movement and economic necessity has prompted an increasing number of mothers to enter the employment ranks.30 As a result, the daily responsibility of caring for children has been delegated to relatives, day care centers, or housekeepers.31 Recognizing this change in the role of women and its effect on family life, some courts and legislatures have established the "best interests of the child" standard as the method by which custody disputes between the mother and the father are to be resolved.32 The standard is nonsexist in that no preference is given either parent.33 Instead, a court is supposed to assess the relationship between the child and each of his parents and then decide which of the two relationships better serves the child's physical and emotional needs.34

Although the standard appears child-oriented, the "best interests" test has not served its intended purpose of protecting the child's rights.35 The courts are unable to give full expression to the child's "best interests" because they generally conflict with the property notions that have traditionally been used

27. Mnookin, supra note 6, at 235; Schiller, supra note 8, at 243.
30. Mnookin, supra note 6, at 236; Schiller, supra note 8, at 243; Molinoff, Life with Father, N.Y. Times, May 22, 1977, § 6 (Magazine), at 13.
31. Schiller, supra note 8, at 243-44; Molinoff, supra note 30, at 13.
34. The Uniform Marriage & Divorce Act § 402 provides: "The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including: (1) The wishes of the child's parent or parents as to his custody; (2) The wishes of the child as to his custodian; (3) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) The child's adjustment to his home, school, and community; and (5) The mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."
35. 2 H. Foster & D. Freed, Law & the Family in New York 29:6 (1967); Goldstein, supra note 2, at 54; see Hansen, The Role and Rights of Children in Divorce Actions, 6 J. Fam. L. 1, 7 (1966); Inker & Perretta, supra note 11, at 231-32; Note, A Case for Independent Counsel To Represent Children in Custody Proceedings, 7 New Eng. L. Rev. 351, 351 (1972) [hereinafter cited as A Case for Independent Counsel].
to define the parent-child relationship, and when such a conflict occurs, the firmly established, administratively convenient property notions will usually prevail.36

Operating within the framework of the ownership model of parentage, the “best interests” test only succeeds in equalizing the competing parents' expectations. In effect, the ascendancy of the “best interests” test in custody adjudication involving a mother and father is no more than legal recognition that men, as well as women, have a need and a right to nurture their children.37

In seeking the “best interests of the child,” courts embark upon a quixotic search for the benevolent owner. The hallmark of benevolence is “fitness,” or the ability to provide adequate care and affection for the child.38 An examination of fitness does not serve the “best interests of the child” because both parents usually pass the fitness test, and therefore the courts generally must resort to the maternal preference, “tender years” approach, to resolve the dispute.39 The father must establish that the mother is unfit. If he fails to carry his burden of proof, the mother is awarded custody, and the father's fitness is irrelevant.40 Irrespective of the outcome, it is difficult to see how the

36. See 2 H. Foster & D. Freed, Law & the Family in New York 29:6 (1967); Goldstein, supra note 2, at 54-64.
37. See State ex rel. Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973); Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W.2d 185 (1965); Podell, Peck & First, Custody—To Which Parent?, 56 Marq. U.L. Rev. 51, 56 n.23 (1972) (citing cases in which the parents were treated equally and the father was awarded custody); Molinoff, supra note 30, at 13.
38. See Inker & Perretta, supra note 11, at 232; Solomon, supra note 28, at 33-34; Molinoff, supra note 30, at 14.
39. Solomon, supra note 28, at 33-34; Molinoff, supra note 30, at 14; see, e.g., Spada v. Spada, 47 App. Div. 2d 586, 363 N.Y.S.2d 161 (1975) (lower court's finding that awarding custody to the mother was in the “best interests” of the children upheld, even though that court had ignored the statutory provision excluding any prima facie right to custody in either parent, when the record indicated that mother was fit and not neglectful, afforded the children good home surroundings, and minimized the effects of trauma associated with divorce on the children). But see, e.g., Salk v. Salk, 89 Misc. 2d 883, 393 N.Y.S.2d 841 (Sup. Ct. 1975), aff'd, 53 App. Div. 2d 558, 385 N.Y.S.2d 1015 (1976) (sustained lower court's finding that although both parents exhibited love and affection for their children, the father was the fitter parent and therefore should be given custody).
40. Solomon, supra note 28, at 33-34; Molinoff, supra note 30, at 14. The problem with establishing the “best interests” of the child by demonstrating the mother's unfitness is that the court's decision is reached by a process of elimination; it decides that it would not be in the “best interests” of the child to award custody to the mother. See Inker & Perretta, supra note 11, at 232.

See T. v. U., 36 App. Div. 2d 665, 318 N.Y.S.2d 110 (1971) (custody awarded to father where mother had been frequenting bars, admitted committing adultery, and was pregnant by another man); In re Horgan, 20 App. Div. 2d 859, 248 N.Y.S.2d 238 (1964) (custody returned to, and permanently vested in, mother when it subsequently appeared she was mentally fit to take care of children); Borges v. Borges, 77 Misc. 2d 985, 354 N.Y.S.2d 507 (Fam. Ct. 1974) (custody retained by father when he presented evidence showing that mother had continually failed to change the child's diapers and that the child had been well cared for while in his exclusive custody). But see Salk v. Salk, 89 Misc. 2d 883, 393 N.Y.S.2d 841 (Sup. Ct. 1975), aff'd, 53 App. Div. 2d 558, 385 N.Y.S.2d 1015 (1976) (although both parents exhibited love and affection for their children, the father was the fitter parent and therefore should be given custody).
child benefits from having one of his parent's declared unfit. Thus, while the courts pay lip service to the "best interests of the child," they continue to protect the mother's expectations with regard to the child.

Further, the courts' determination of custody, a decision purportedly turning on benefit to the child, is in fact based on evidence offered from the perspective of the feuding parent-claimants rather than from that of the child himself. Each parent's attorney attempts to establish that it is in the "best interests of the child" that his client receive custody. In most jurisdictions, no one is charged with the duty of advocating the child's position in the determination of who will be responsible for his mental and physical development. Although it is often mandated that courts consult the child's wishes, the weight these wishes are accorded in the resolution of a custody dispute is discretionary. As a result, a court often recognizes the child's preferences when they coincide with what the court has already concluded are the child's "best interests," and ignores them when they conflict by claiming that the child does not have sufficient mental capacity to make an intelligent choice.

Although some recognition is given to the child's interests in contested custody cases, the child's interests are virtually ignored when custody is uncontested. The courts generally rubberstamp their approval of uncon-

41. Solomon, supra note 28, at 33.
42. Inker & Perretta, supra note 11, at 231-32, 235-36; A Case for Independent Counsel, supra note 35, at 351-52.
43. Each parent's attorney is obligated to represent his client's interests. ABA Canons of Professional Ethics No. 7.
44. Goldstein, supra note 2, at 65-67; Hansen, supra note 35, at 7; Inker & Perretta, supra note 11, at 235-36; Juvenile Rights Litigation Project, Children's Rights in Domestic Disputes, Youth Law Center, 10 Clearinghouse Rev. 956, 956 (1977); A Case for Independent Counsel, supra note 35, at 351-52.
46. See, e.g., In re Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974).
47. See, e.g., Davis v. Davis, 355 P.2d 572 (Okla. 1960). In Davis the court stated: "[Both parents] have catered to her whims and wants, although the mother has exercised a greater degree of discipline. The child is bright and inquisitive and no doubt recognized that she might have more latitude with her father than with her mother which appears to be the basis for her wanting her father to have custody of her. However, the whims, wants and desires of a minor child are not the criteria for determining which parent should be granted custody of a minor child, although the court or judge may consider the preference of a child who is of sufficient age to form an intelligent preference. In determining the custody of a minor child in a divorce case, this Court has consistently held the best interests of the child should be the paramount consideration, and where it does not appear that the trial court has abused its discretion, this Court will not reverse the order of the trial court." Id. at 574-75.
48. Hansen, supra note 35, at 2; see A Case for Independent Counsel, supra note 35, at 351-52.
tested custody agreements— the manner in which approximately ninety percent of all custody disputes between mothers and fathers are resolved. By bestowing judicial approval on a custody arrangement without first determining if it is in the "best interests of the child," the court confirms the child's status as the chattel of his parents.

The law generally prefers the private resolution of disputes in the belief that the parties are better able to achieve a mutually satisfactory resolution than are the courts. Additionally, in this particular kind of out-of-court settlement, judicial noninterference is often seen as an act of benevolence toward the child. The policy of noninterference is based on two assumptions: (1) the parents have considered the child's needs in reaching the agreement, and (2) the child should be spared the agony of being directly involved in his parents' legal battle to win custody.

This justification fails to recognize, however, that uncontested custody agreements frequently begin as custody battles in which the child's "best interests" are only one of many factors considered by the parties to a broken marriage. The agreement is hammered out between the parents' attorneys. During the negotiations, each attorney is primarily concerned with achieving his client's desires; he is not concerned with the child's needs or preferences. Furthermore, while the child may be spared the painful experience of a courtroom appearance, it is only in the unique case that he is protected from being intimately involved in his parents' often bitter attempts to win the custody battle. As one family court judge has written, "[t]he distinction between being a chattel or possession of the parties and being a proper subject

49. Hansen, supra note 35, at 1.
50. Id. at 2; Molinoff, supra note 30, at 13.
52. See generally Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery, in 43 F.R.D. 211, 220 (1967); W. Glaser, Pretrial Discovery and the Adversary System 9-12 (1968) (out-of-court settlement is one of the purposes of discovery).
54. See id.
55. See Parker v. Parker, 467 S.W.2d 595, 597 (Ky. 1971) (court should have wide latitude in protecting the child from the trauma that would be suffered if the child is called as a witness); Marshall v. Stefanides, 17 Md. App. 364, 359, 302 A.2d 682, 685 (1973) (in-chambers interview of the child minimizes as much as possible the psychological impact of participation in the custody dispute).
56. "Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice." Ford v. Ford, 371 U.S. 187, 193 (1962).
58. Despert, supra note 53, at 200-01; Inker & Perretta, supra note 11, at 235-36; Juvenile Rights Litigation Project, Children's Rights in Domestic Disputes, Youth Law Center, 10 Clearinghouse Rev. 956, 956-57 (1977); see Hansen, supra note 35, at 7-8.
59. See Molinoff, supra note 30, at 13.
of court concern becomes a matter of words, not deeds,\textsuperscript{60} when the courts routinely accept uncontested custody agreements.

b. Disputes Between Biological Parent and Interested Party

In the early nineteenth century, the \textit{parens patriae} power of the state was believed to be great enough to permit equity courts to terminate the parents' possessory right to the child and to give that right to another.\textsuperscript{61} Today, the \textit{parens patriae} power is embodied in statutory neglect\textsuperscript{62} and abandonment laws.\textsuperscript{63} These statutes are the primary source of limitations on the biological parents' ownership rights.\textsuperscript{64} However, the state's interest in protecting children from parental neglect represented by these statutes has not been a significant counterbalance to the primacy of the biological parents' rights to the child.\textsuperscript{65} This is still true despite such recent encroachments as the introduction of the "best interests" test into neglect statutes\textsuperscript{66} and a trend toward giving less weight to the claims of biological parents in abandonment proceedings,\textsuperscript{67} because of the state's strong interests in family autonomy.\textsuperscript{68}

\textsuperscript{60} Hansen, \textit{supra} note 35, at 2.
\textsuperscript{61} Mnookin, \textit{supra} note 6, at 240.


\textsuperscript{64} Hafen, \textit{supra} note 7, at 629. Abuse statutes are another primary source of limitations on the biological parents' rights. \textit{Id.}; \textit{see} pt. IV(C) \textit{infra}.

\textsuperscript{65} \textit{See} notes 74-95 \textit{infra}; \textit{see} pt. IV(C) \textit{infra}.


\textsuperscript{67} The "best interests" test has also been praised as a necessarily vague standard which permits the court to consider each situation on its facts. When Parents Fail, \textit{supra} note 62, at 64.

\textsuperscript{68} Chambers, \textit{Adoption Without Consent}, Trial, Oct. 1977, at 29; Mnookin, \textit{supra} note 6, at 244-46; \textit{see}, e.g., \textit{In re Sanjivini K.}, 40 N.Y.2d 1025, 359 N.E.2d 1330, 391 N.Y.S.2d 533 (1976); \textit{In re Orlando F.}, 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976); \textit{In re Patricia A. W.}, 89 Misc. 2d 368, 392 N.Y.S.2d 180 (Fam. Ct. 1977); \textit{In re Roy}, 90 Misc. 2d 35, 393 N.Y.S.2d 515 (Fam. Ct. 1977). These New York cases deal with what is referred to as "permanent neglect" in New York; the difference between "permanent neglect" and "abandonment" is discussed \textit{infra} note 83.

Neglect is an elusive concept. The draftsmen of neglect statutes have not specifically defined the term, and, as a result, the task of definition has fallen on child welfare agencies and courts. The usual situations which warrant a state-initiated challenge to the biological parents' right to the child on grounds of neglect are: "inadequate supervision or housekeeping, emotional neglect, inadequate parenting, . . . failure to provide medical care, immoral or unconventional parental behavior, and parental conduct that constitutes contributing to the delinquency of a minor." The neglect statutes authorize a court, usually a juvenile court, to determine whether it is in the "best interests" of the child who has been neglected to remove him from parental custody or to appoint a child welfare agency to supervise that custody. Despite the use of the "best interests" test, the child continues to be treated as human property in neglect proceedings for two reasons—first, because the courts see the preservation of the biological parents' ownership rights as being in the child's "best interests," and second, because the courts are concerned with protecting the state's interest in nurturing its citizens.

69. Mnookin, supra note 6, at 242-44; Wald, supra note 68, at 1000-04.
70. For typically vague statutory definitions of neglect, see, e.g., Cal. Welf. & Inst. Code § 300 (West Cum. Supp. 1977); N.Y. Fam. Ct. Act § 1012(f) (McKinney 1975); Ohio Rev. Code Ann. § 2151.03 (Page 1976). The California definition of a neglected child is one: "(a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control. (b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode. (c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality. (d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is." Cal. Welf. & Inst. Code § 300 (West Cum. Supp. 1977).
71. Mnookin, supra note 6, at 241; Wald, supra note 68, at 1001-02; see L. Young, Wednesday's Children 141-42 (1964).
72. Wald, supra note 68, at 1007-08. The primary inadequacy of the current statutory definitions of "neglect" is that, to the extent "neglect" is defined, it is defined in terms of parental behavior and not in terms of the detriment effects parental behavior has on the child. Consequently, children are removed from the custody of their parents when the neglectful behavior does not have damaging effects on the child. See Wald, supra note 68, at 1002-04.
73. Mnookin, supra note 6, at 240-41; Wald, supra note 68, at 993-1000.
The biological parents' expectations with regard to the child are protected in neglect proceedings because it is assumed that the child is better reared by the individuals who have the natural obligation to support and protect him than by strangers appointed by the state. This assumption is unjustified in the context of neglect proceedings which arise because there is some doubt that the biological parents' natural instincts to care for the child are functioning properly.

The court, exercising the parens patriae power in a neglect proceeding, must also consider the state's interest in having the child become a well-balanced citizen by proper nurturing. Thus it frequently orders supervision by a child welfare agency. In ordering parental possession supervised by a child welfare agency, the court simultaneously protects the biological parents' ownership rights by permitting retention of possession, and fulfills the state's need to nurture its citizens by insuring that the child is nurtured by the parents under the guidance of, or with the assistance of, a professional. However, the limited availability of services such as homemakers, tutors, and psychologists usually requires that the court suspend parental possession in order to protect the state's interest in the child's nurturing. As a result, the child is placed under foster care, where, however, the biological parents' right to repossession is protected by the child welfare agency's policy of regularly changing such placements to prevent the development of emotional bonds between the child and the foster parent. Thus the needs of the child are subordinated to the interests of the biological parents and the state. Although the relationship between the child and the biological parent has been effectively severed by such foster care, the child is nevertheless denied the opportunity to develop a parent-child relationship with any other adult. Again, it seems clear that when the "best interests of the child" are determined in the ownership model context, the possessory rights of the parents will generally prevail.

Although the "best interests" test is frequently used in neglect cases to suspend or supervise parental possession, it is not applied in abandonment cases to terminate biological parents' rights over their child. In deciding to

76. See Goldstein, supra note 2, at 17; Hafen, supra note 7, at 649; note 75 supra and statutes cited therein.
77. This assumption of an instinctive positive tie between the biological parent and the child, however, ignores the evidence of "infant-battering, child neglect, abuse, and abandonment." Goldstein, supra note 2, at 17; see note 72 supra and accompanying text.
78. See note 75 supra.
81. See Glasser, supra note 79, at 13; Goldstein, supra note 2, at 39.
82. Abandonment is the usual basis for the involuntary, permanent termination of parental
terminate these rights because of abandonment, adult-centered standards are applied—the focus is on the parents’ intent to abandon the child. Intent to abandon is measured in terms of frequency of visitation and communication with the child. In addition, not less than one year of neglect is usually required to establish intent to abandon. Since the abandonment process has been viewed as a continuing one that can be reversed by the estranged parents’ express declaration of intent not to abandon, the child can be left in the uncertainty of foster care for years. Another possible consideration is whether the child welfare agency has been diligent in encouraging and strengthening the relationship between the child and the estranged parents.


"5. (a) For the purposes of this section, a child is 'abandoned' by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(b) The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child. In making such determination, the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a) of this subdivision.

"7. (a) For the purposes of this section, 'permanently neglected child' shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into 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, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.” N.Y. Soc. Serv. Law § 384-b(5), (7)(a) (McKinney Supp. 1977-1978).

The textual discussion of “abandonment” applies to “permanent neglect” in the context of New York law. The confusion the distinction between “permanent neglect” and “abandonment” has created is discussed in Carrieri, The Foster Child—Major Case Revisited, 127 N.Y.L.J., Nov. 1, 1977, at 1, col. 2; Carrieri, The Foster Child and Rights of Parents, 127 N.Y.L.J., May 9, 1977, at 1, col. 2.


E.g., In re Graham, 239 Mo. App. 1036, 199 S.W.2d 68 (1946).


The agency's dereliction of its duty can prevent a court from finding abandonment even though the child "has been abandoned psychologically for many years." In short, a finding of abandonment is not based upon the effect parental absence has on the child's perception of his relationship to his biological parents, but instead upon the parents' intention to reassume parental duties and the child welfare agency's ability to encourage the parents to communicate and visit with the child.

The relative insignificance of the child's interests in neglect and abandonment proceedings is also evidenced by the absence of representation on behalf of the child. The courts are presumed capable of protecting the child's interests despite the glaring deficiency in the evidence upon which their custody decision is made—no evidence is offered exclusively from the child's perspective. The courts have the mammoth task of discerning where each party's interests end and the child's interests begin. All parties necessarily claim that they are acting in the child's "best interests," but that does not alter the reality that each is pursuing his own interest as well: the biological parents are interested in retaining their ownership rights, the state is interested in molding future citizens, the child welfare agency is interested in keeping children under its supervision, and the foster parent is interested in retaining possession.

2. Elevating the Child's Status from That of Property to Person

Some of the inadequacies of the present system of determining custodial arrangements can be eliminated by introducing a new perspective into the determination—that of the child. For the custodial decision to reflect the

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Ann. § 15-7-7 (Supp. 1976). As indicated in note 83 supra, the New York provision concerns "permanent neglect." Rhode Island's provision also concerns "permanent neglect."

88. Goldstein, supra note 2, at 47-48.
89. Id. at 48-49.
90. See id. at 65.
91. The biological parents, the state, and the foster parents share the responsibility for the guardianship of the child. In juvenile court proceedings, all three maintain that the positions they advocate are identical to the position which best protects the rights and interests of the child. The court reaches its decision without the benefit of having the case presented by an independent representative of the child. See id. at 65-67.
92. See id. at 65-66; notes 76, 77, 83-86 supra and accompanying text.
93. See notes 78-81 supra and accompanying text.
95. See, e.g., Organization of Foster Families v. Dumson, 418 F. Supp. 277, 279 (S.D.N.Y.), rev'd sub nom. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) ("Plaintiffs [foster parents] further assert that the statistical evidence as to the length of the average child's stay in foster care creates an 'informal tenure' system raising legitimate expectations that their role as foster parents will not be abruptly terminated.").
96. See Goldstein, supra note 2; When Parents Fail, supra note 62; Foster & Freed, A Bill of Rights for Children, 6 Fam. L.Q. 343 (1972).
interests of the child, as well as those of the parents and the state, the ownership model of parentage should be abandoned and replaced by the trust model.97

The state assumes that the child is an incomplete being who is not fully capable of determining and protecting his interests. Therefore the state recognizes the child's need for intimate care "by the adults who are personally committed to assume such responsibility."98 The recognition of the child's need for adult care and supervision has given rise to the erroneous assumption that there is always an identity of interests between the parent and the child.99 Ironically, a divergence of interests between the parent and the child can result in the child's interests being sacrificed in the name of protection.100 Viewing the parent-child relationship as one of trust would simultaneously preserve the parents' wide discretion in rearing the child and protect the child's individual interests because the parents would have a fiduciary duty to exercise their discretion solely for the child's benefit.101

a. The Trust Model

The full development of the child is a well-recognized aim of child rearing.102 This right to develop would constitute the corpus of the trust, and

99. See, e.g., In re Guardianship of Faust, 239 Miss. 299, 305, 123 So. 2d 218, 220 (1960) ("The kind and extent of education, moral and intellectual, to be given to a child and the mode of furnishing it are left largely to the discretion of the parents. Certainly judicial machinery is inadequate to the task of educating children, and should not interfere with a parent's right in this regard except to correct abuses or protect the minor. Unless shown to the contrary, the presumption is that natural parents will make the best decisions for their offspring." (citations omitted)); Matarese v. Matarese, 47 R.I. 131, 132-33, 131 A. 198, 199 (1925) ("Anything that brings the child into conflict with the father or diminishes the father's authority or hampers him in its exercise is repugnant to the family establishment, and is not to be countenanced save upon positive provisions of statute law.").
100. See Goldstein, supra note 2, at 54 (although cloaked in terms of the "best interests" of the child, many custody decisions are made to fulfill the needs and desires of the adult claimants); Holt, supra note 2, at 27 (many of those who champion the family "do not see it as an instrument of growth and freedom but of dominance and slavery, a miniature dictatorship (sometimes justified by 'love') in which the child learns to live under and submit to absolute and unquestionable power"); Inker & Perretta, supra note 11, at 231-32 (child's welfare sacrificed when divorce custody proceeding becomes a "last-ditch" effort to preserve the family).
101. See generally Law of Trusts, supra note 97, § 95 (trustee's duty of loyalty).
the parents, as co-trustees, would be jointly responsible for nurturing the child to independence. As long as they are fulfilling their responsibilities, the parents would continue to act as co-trustees until the purpose of the trust has been achieved—the child becomes fully mature. The state as settlor of the trust could challenge the trusteeship whenever it appeared the trust was not being administered according to its terms, that is, when the child appeared to be neglected or abandoned.

In contrast to the ownership model in which the child is viewed as the chattel of parents whose ownership rights are protected by the state, the trust model would elevate the child's status from that of chattel to person by recognizing that, as the beneficiary of a trust, he has interests which are separate and distinct from his parents' interests as trustees and the state's interests as settlor. Thus, under the trust model, the need for protection, as well as the need for limitations on that protection, is fulfilled.

b. The Child's Rights as Beneficiary of the Trust

The child has an enormous stake in who acts as his trustees because achievement of the desired state of full development depends almost exclusively on the care and nurturing he receives during the trust period. Recognition of the child's interest in who serves as his trustee requires a definition of the rights that the child should have in the removal and appointment of trustees.

Two important considerations in determining what those rights should be are the level of ability and the need of the child to determine his own interests. Although the state presumes that children as a group are not fully capable of determining their interests, it is obvious that wide gradations of incapacity exist, not only between individual children, but more importantly.

103. "A trust is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another." Law of Trusts, supra note 97, § 1.

104. Id. § 91.

105. See note 102 supra.

106. Cf. Law of Trusts, supra note 97, § 95 (trustee has a duty of loyalty—to administer the trust in beneficiary's interest alone; if the trustee breaches this duty equity will grant relief). The trust model recognizes that the state has a legitimate interest in seeing that children become well-balanced citizens and permits it to protect that interest by creating a trust for "minor" citizens. Cf. Law of Trusts, supra note 97, §§ 25-33 (creation of the trust).

107. See notes 5-95 supra and accompanying text.

108. See note 103 supra.

109. See, e.g., Goldstein, supra note 2, at 6; N. Polansky, R. Borgman & C. DeSain, Roots of Futility 121-77; S. White, Federal Programs for Young Children: Review and Recommendations 80-129; MacFarlane, Clausen & Yahares, Childhood Influences upon Intelligence, Personality and Mental Health, The Mental Health of the Child: Project Reports 131 (1971).

110. "The [common] law did not distinguish between the infant and the mature teenager, treating them both as the property of their parents, who could make all decisions affecting them." Poe v. Gerstein, 517 F.2d 787, 789 (5th Cir. 1975), aff'd mem. sub nom. Gerstein v. Coe, 428 U.S. 901 (1976); see notes 98-100 supra and accompanying text.
between different age levels—particularly between pre-adolescents and adolescents.\textsuperscript{111} Furthermore, it is more important for some age groups to determine who their guardian will be than for other age groups. For example, the more dependent younger child is more likely to be satisfied with having his parents determine his interests.\textsuperscript{112} The adolescent, on the verge of adulthood, has a greater need to make his own choices.\textsuperscript{113} The adolescent's capability and strong desire to determine his interests arise from his increased cognitive and intellectual powers.\textsuperscript{114} He is in the process of developing the ability for abstract and theoretical thinking, and, as a result, begins to experience the need for, and to seek, a sense of personal autonomy; he begins to develop attitudes and goals independent of his parents'.\textsuperscript{115}

Because of the pre-adolescent's relative inability to determine his own interests and his need for supervision and direction,\textsuperscript{116} he should have the right to have the trust decision, that is, the removal and appointment of trustees, made on the basis of the "least detrimental alternative"\textsuperscript{117} standard whenever the trusteeship is brought into the issue by his parents because of divorce or by the state because of neglect or abandonment.

The "least detrimental alternative" is:

that specific placement and procedure for placement which maximizes, in accord with the child's sense of time and on the basis of short term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.\textsuperscript{118}

The first criterion that must be fulfilled under this standard is that the child's trustee should be the adult who is, or will become, his psychological parent.\textsuperscript{119} Normally, begetting a child has deep psychological significance for the parents,\textsuperscript{120} and thus the biological parents are presumed to have an instinc-
tive positive tie to the child. In contrast to adults, children have no psychological conception of a blood relationship until late in their development. What is important to the child is the daily interaction with the adult who takes care of him. An adult who could fulfill this need would qualify as trustee; an adult who was absent and inactive would not.

The second criterion is that the child's trustee should be the adult by whom the child is "wanted." Whereas the psychological parent criterion assesses the child's emotional attachment to the adult, the "wanted" child criterion assesses the adult's emotional attachment to the child. The child is "wanted" when the trustee's attachment to the child is based upon respect for the child as an individual.

The final criterion used to make a trust decision under the "least detrimental alternative" standard is the child's sense of time. Because the child's perception of time largely determines his ability to deal with parental absence, it is a key consideration in cases of neglect and abandonment and in determining with what expediency the law should act in those cases and in divorce cases.

As the law now stands, in theory but not necessarily in practice, the child has the right to have a custody dispute arising from divorce or neglect determined in his "best interests." Therefore, in such cases the use of the


122. Goldstein, supra note 2, at 12, 16-17.


124. Goldstein, supra note 2, at 19.

125. Id. at 20-21.

126. Id. at 21. An adult's emotional attachment can be measured along a scale of "wanting." At one end of the scale, the adult's "wanting" is founded upon a self-centered motive, as, for example, when the parent "wants" the child for the purpose of retaliation against a divorcing spouse. The child is viewed as a means to an end and not as an individual. As a result there is a good possibility that he will experience doubts about his worth. At the opposite end of the scale, the adult's "wanting" is based on an overvaluation of the child. Since the child is viewed as a central figure in the adult's life, he will frequently have a well-developed self-esteem, but may also be overly secure and egotistical. Id.

127. Id. at 40-49.

128. Id. at 42. The time it takes a child to sever an old psychological attachment and to form a new one depends upon the child's stage of development. For the very young child, time is measured by the "egocentric part" of the mind. This part of the mind is determined to achieve gratification and therefore a relatively short parental absence is perceived by the child as a permanent loss. For the adolescent child, time is measured by the "reasoning part" of the mind; therefore he is able to cope with considerably longer parental absence. Id. at 41.

A closely related factor is continuity of relationships. Continuity of relationships is well recognized as essential to the child's growth because it is a source of stability during a time when the child's internal, mental and emotional, processes are in flux. Id. at 31-39; J. Bowlby, Child Care and the Growth of Love 13-20 (2d ed. 1965). This continuity seems to be one of the primary indicia of the existence of a psychological parent-child relationship.

129. See notes 32-41, 73-80 supra and accompanying text.
"least detrimental alternative" standard is not the recognition of a new right, but the clarification of what an existing right should mean through the use of a standard that clearly defines criteria for safeguarding the child's interests in the trust decision. In cases of abandonment, on the other hand, the use of the "least detrimental alternative" standard would recognize a new right of the child.\textsuperscript{130}

Since, as noted earlier,\textsuperscript{131} the adolescent has a significantly greater need and ability to determine his own interests than the pre-adolescent, he should have the right to choose his trustee whenever the trust is brought into issue by his parents because of divorce. Such a right in the adolescent to choose his custodial parent is well established in Georgia,\textsuperscript{132} which for over one hundred years has permitted an adolescent to make this decision upon reaching the age of fourteen. The statute presently reads in part:

In all such cases [of divorce granted] and in cases where a change in custody is sought, where the child has reached the age of fourteen years, such child shall have the right to select the parent with whom such child desires to live and such selection \textit{shall be controlling} unless the parent so selected is determined not to be a fit and proper person to have the custody of said child.\textsuperscript{133}

Neglect is difficult to detect in an adolescent and as a result, neglected adolescents are more likely to be deemed "incorrigible."\textsuperscript{134} In the case of a pre-adolescent, neglect is frequently discovered by means of indicators such as malnutrition and unkempt appearance.\textsuperscript{135} These indicators generally are not useful in detecting neglect when the child is older because, at that stage of development, the child has learned to care for himself and therefore usually does not suffer physical neglect.\textsuperscript{136} Instead, he is usually the victim of emotional neglect which generally goes undetected until the adolescent manifests its damaging effects in the form of incorrigible behavior.\textsuperscript{137}

Recognizing that such behavior is often only a manifestation of emotional neglect, the court ought to be required to determine whether the adolescent's incorrigibility arises from parental neglect.\textsuperscript{138} If the court so finds, then the

\textsuperscript{130} See notes 82-89 \textit{supra} and accompanying text.
\textsuperscript{131} See notes 111, 113 \textit{supra}.
\textsuperscript{132} Texas is the only other state that gives controlling force to the preference of a child who is fourteen or older, with nothing else considered but the basic fitness of the parent chosen. Tex. Fam. Code Ann. tit. 2, § 14.07 (Vernon 1975 & Supp. 1976).

The term "incorrigible" is used here to refer to cases concerning noncriminal behavior. \textit{See} Rosenberg & Rosenberg, \textit{supra} at 1100-01.
\textsuperscript{135} See pt. IV(A)(1) \textit{supra}.
\textsuperscript{137} See note 134 \textit{supra}.
\textsuperscript{138} New York permits the substitution of a neglect petition at any stage of a PINS ("person in need of supervision") proceeding. \textit{See} N.Y. Fam. Ct. Act § 716(b) (McKinney 1975).
adolescent's ability and desire to determine his own interests\textsuperscript{139} also should entitle him to resolve the trusteeship issue which arises because of neglect. The adolescent ought to have the right to choose between having the biological parents' trusteeship supervised by a child welfare agency and having a foster parent appointed as a co-trustee who assumes the responsibility of nurturing.\textsuperscript{140} Permitting the adolescent to exert control over the course of his life at this juncture avoids compelling him either to live with adults who cannot fulfill his emotional and physical needs or to revolt against those adults by becoming a run-away, truant, or some other sort of status offender.

If he chooses placement with a foster parent, such foster care would be a temporary arrangement,\textsuperscript{141} which the adolescent should have the right to terminate on request and either return to his biological parent or be freed for adoption on the basis of being abandoned by them. In this way, a finding of abandonment would center upon the effect parental absence has on the adolescent, and not upon either the intent of the estranged biological parents, or the diligence of a child care agency in encouraging the re-development of the parent-child relationship.\textsuperscript{142} Recognizing this right reflects the shift in emphasis under the trust model from the parents' rights to the child's rights by focusing on the \textit{effect} of the biological parents' conduct on the child and not on the \textit{motives} underlying that conduct.

The period of time during which the adolescent could exercise his right to terminate foster care should be statutorily prescribed in order to maximize the adolescent's opportunity to establish a psychological parent-child relationship with at least one adult.\textsuperscript{143} Accordingly, if the adolescent should not exercise his right within the allotted time, he would become available for adoption as soon as appointing an adoptive parent as the trustee became the "least detrimental alternative"\textsuperscript{144} for the adolescent. In this way the abandoned adolescent does not remain in foster care indeterminately,\textsuperscript{145} and of equal

\textsuperscript{139} See notes 111-15 supra and accompanying text.

\textsuperscript{140} If, for example, an adolescent were adjudicated neglected because his parents failed to assist and support him in his schoolwork and thereby contributed to his truancy, he would be able to remain at home with the supportive service of a tutor or live with a foster parent.

These are the same two alternatives available under the present system. See note 73 supra and accompanying text. Under the trust model, effective protection of the existing parent-child relationship, as well as protection of the child, is achieved by supervision. See Glasser, supra note 79, at 12-15.

\textsuperscript{141} Foster care has been defined as "[a] child welfare service which provides substitute family care for a child when his own family cannot care for him for a temporary or extended period and when adoption is neither desirable nor possible." Child Welfare League of America, Standards for Foster Family Care 5 (1959). However, children frequently remain in foster care for much longer than they should under the theory that foster care is a temporary arrangement. Mnookin, \textit{Foster Care—In Whose Best Interest?}, 43 Harv. Educ. Rev. 599, 610-13 (1973); Wald, \textit{State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights}, 28 Stan. L. Rev. 623, 662-63 (1976).

\textsuperscript{142} See notes 83-89 supra and accompanying text.

\textsuperscript{143} See notes 118-28 supra and accompanying text.

\textsuperscript{144} See notes 118-28 supra and accompanying text.

\textsuperscript{145} See note 86 supra and accompanying text.
importance, the adolescent who remains psychologically attached to his biological parents after the expiration of the statutory period is not prematurely, permanently separated from them.146

The adolescent who cannot or does not want to decide his custodial arrangement in cases of divorce, neglect, or abandonment should have the right to have it chosen by others on the basis of the "least detrimental alternative" standard.147 Such an option should be available in order to avoid burdening the adolescent who has severe loyalty conflicts with guilt feelings about choosing his trustee arrangement.148

The child's presently recognized right to develop fully149 can be expanded under the trust model to encompass not only the right to freedom from neglect and abandonment, but also the right to develop independent judgment because the trust model requires that the trust be administered exclusively in the child's interests.150 Growth from childhood to adulthood is a gradual evolution from dependence upon adult authority to autonomy.151 Adolescence has traditionally been viewed by psychologists as a kind of bridge between childhood and adulthood because the achievement of autonomy is a goal of adolescence.152 One of the most significant obligations of the parents is preparing the child to assume the responsibilities of adult life.153 In the case of the adolescent, this obligation has two dimensions which tend to conflict. On the one hand, the parents must continue to instill values as they have done throughout the adolescent's childhood because the adolescent does not always use his newly acquired reasoning ability and often resorts to earlier forms of thinking.154 On the other hand, the parents must begin to permit the adolescent to choose his own values and make his own decisions.155 Fulfilling this dual obligation is not a simple task; however, parents who continue to impose their values and standards on the unwilling adolescent, without permitting him to develop reasoning ability, encourage blind reliance on authority and do not prepare their child for the responsibilities that come with adulthood.156

When the adolescent is not permitted to develop his own values and
attitudes, but is forced to conform to those of his parents, the parents are not fulfilling their obligation to help the child achieve independence, that is become a self-sufficient individual capable of thinking for himself and making intelligent decisions. Because the ultimate purpose of the trust is for the child to achieve independence, parents who consistently compel their unwilling adolescent to conform to their values and attitudes would be in breach of the trust; the adolescent would be entitled to initiate a challenge to his parents' trusteeship. The adolescent who could establish this failure to encourage his development would be entitled to have a foster parent appointed as co-trustee.

The Supreme Court of Washington appears to be the first court to recognize the right to institute a challenge to parental custody. In the case of *In re Snyder*, a sixteen-year-old asked the court to declare her incorrigible in order to remove her from the custody of parents who had imposed strict limitations on her activities, such as "restricting her choice of friends, and refusing to let her smoke, date, or participate in certain extracurricular activities within the school." The court's finding of incorrigibility was based primarily on the adolescent's refusal to live with her parents and the possibility that she might run away if compelled to remain with them. As a result, the adolescent was permitted to remain in foster care where she had been placed by the juvenile court.

The trust model is characterized by its recognition of the child's need for protection and for the limitations it places on that protection. Therefore instead of requiring the adolescent to ask the court to declare him incorrigible, the adolescent should be permitted to challenge parental custody directly when he believes his parents' efforts to protect him are jeopardizing his development. Although the law's overwhelming interest has been to fulfill

157. See notes 102, 103 supra and accompanying text.
158. See *In re Snyder*, 85 Wash. 2d 182, 532 P.2d 278 (1975), discussed notes 160-63 infra and accompanying text; Holt, supra note 2, at 160 (the child should have the right to choose his guardian).
159. Once the foster parent is appointed co-trustee, the adolescent would have the same rights as a neglected adolescent who chooses to have a foster parent appointed as co-trustee. See notes 140-45 supra and accompanying text.
161. Id. at 183, 532 P.2d at 279. Having decided that he needed assistance in controlling his daughter, Cynthia Snyder's father brought her to the Youth Service Center, which in turn placed her in a receiving home. To avoid returning to her parents, Cynthia filed a petition alleging she was a dependent child. As a result, she was placed in the custody of the Department of Social and Health Services. The juvenile court found that Cynthia was not a dependent child and returned her to the custody of her parents. After she experienced further difficulties at home, Cynthia went to the Youth Service Center and the director of the intake program at the center filed the petition alleging Cynthia was incorrigible as defined in Wash. Rev. Code § 13.04.010(7). Id. at 184-85, 532 P.2d at 279-80.
162. Id. at 185-87, 532 P.2d at 281.
163. Id. at 185, 187, 532 P.2d at 280, 281.
164. See notes 97-108 supra and accompanying text.
165. See notes 111, 113, 149-59 supra and accompanying text.
the child's need for protection, a concern evinced by the ascendancy of the "best interests" test in divorce and neglect law, there are promising indications in other areas of the law that the need for limitations on protection is beginning to be perceived.

In *Planned Parenthood v. Danforth*, the Supreme Court, in a 5-4 decision, struck down a Missouri statute requiring parental consent to an abortion for an unmarried minor except when the abortion was necessary to preserve the life of the pregnant minor. The majority opinion, delivered by Justice Blackmun, suggests that competent minors may have a constitutional right of privacy that would serve to limit parental intervention into the abortion decision.68

A suggestion that there should be limitations on the parents' right to protect their child also appears in Justice Douglas' partial dissent in *Wisconsin v. Yoder*. In that case the Court held that a state compulsory attendance statute as applied to require Amish children to attend school in contravention of their parents' religious beliefs infringed on the parents' freedom of religion. Justice Douglas was compelled to dissent in part because of the failure to determine whether the high school-aged children of two of the defendants shared their parents' religious beliefs and desire that the children not attend high school. The opinion indicated that a mature child may have a first amendment right to freedom of religion that would prevent his religiously-motivated parents from prohibiting him from attending high school.

The movement toward placing limitations on parental prerogatives has aroused concern that the recognition of children's rights heralds the end of the

166. See notes 32-34, 73 supra and accompanying text.
168. "One suggested interest [of the state in imposing a parental consent provision as a prerequisite to a minor's termination of her pregnancy] is the safeguarding of the family unit and of parental authority. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Id. at 75 (citation omitted and emphasis added).
170. Id. at 230-31.
171. Id. at 244-45 (Douglas, J., dissenting in part).
172. "[N]o analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views . . . . As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections." Id. at 242 (Douglas, J., dissenting in part) (emphasis added).
The increasing concern with the rights of children has been described as "a conflict between two of our most fundamental cultural traditions—family life and individual liberty." The Snyder and Danforth decisions and the Yoder dissent have been criticized because they treated children as if they were adults and thereby abandoned children to their rights. Such a characterization, however, tends to overlook the significance of the ages of the children who were the subjects of the decisions. The child's status as an adolescent was a significant common factor in these cases because it accounted for the limitations to be placed on parental protection. These cases did not treat children as adults in resolving the issues, but as children, who, because they were on the verge of adulthood, were entitled to exercise some control over the course of their lives. Nor did these cases forecast the destruction of the family tradition. On the contrary, the family's role of preparing the child for independence was reaffirmed, but subordinated to the adolescent's critical need to be protected from his parents' well-intentioned attempts to protect him. The application of an "egalitarian" theory to children has been said to

175. See Hafen, supra note 7, at 644-50; Puberty, Privacy, and Protection, supra note 98, at 1387.
176. See Hafen, supra note 7, at 644-50; Puberty, Privacy, and Protection, supra note 98, at 1387-88.
177. The adolescent in Snyder was sixteen. 85 Wash. 2d at 183, 532 P.2d at 279. Danforth concerned the rights of pregnant women under the age of eighteen. 428 U.S. at 72-75. The adolescents in Yoder were fourteen and fifteen. 406 U.S. at 207.
178. But see note 175 supra and accompanying text.
179. See notes 164-72 supra and accompanying text.
180. But see note 175 supra and accompanying text.
181. See Planned Parenthood v. Danforth, 428 U.S. at 75, quoted note 168 supra; Wisconsin v. Yoder, 406 U.S. at 244-45 ("On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from Amish tradition.") (Douglas, J., dissenting in part); In re Snyder, 85 Wash. 2d at 188-89, 532 P.2d at 282 (juvenile court did not disregard parents' rights in declaring child incorrigible and did fulfill its responsibility to assist in achieving a reconciliation between parents and child).
182. See notes 149-72 supra and accompanying text.
183. Hafen coined the term "egalitarian" for the theory that all individuals should be treated equally by the law. He argues that the Snyder and Danforth decisions and the Yoder dissent applied this "egalitarian" theory to children because in those cases they were treated as adults. See note 175 supra and accompanying text. The textual use of the term "egalitarian" theory should not be interpreted as an acceptance of Hafen's position that these cases treated children as adults. The term is only used as a convenient method of referring to the way in which courts are beginning to recognize that children sometimes need to be protected from well-intentioned parental efforts to protect their children.
raise "basic new questions about the nature of parental responsibility." An argument has been made that under an "egalitarian" theory the state would stand in the same relationship to children as to adults, and therefore it could assume responsibility for nurturing children. This would mean that the state could revoke or limit its delegation of responsibility for child nurturing to adults. The possibility of the state assuming full control over the nurturing of children would not ripen into actuality under the trust model because the trust must be administered exclusively in the child's interest. Since the child's primary interest is the development of a parent-child relationship, in order for the trust to be administered exclusively in the child's interest, the trustee must be that adult with whom the child has, or can establish, a parent-child relationship. Furthermore, the state's role is limited to that of the settlor of the trust who may challenge the trusteeship only when the child is not being nurtured because of parental neglect or abandonment. In the case of an adolescent who challenges the trusteeship by claiming that his parents are unduly restricting his development, it would be for the child as beneficiary to institute the challenge. This would not be the obligation of the state, because only the adolescent would be aware of this particular deficiency in the parent-child relationship.

A related objection to limiting parental protection is that it will result in parental ambivalence toward the child either because "parents [will] believe they have no right to give direction to their children, or . . . they fear that in giving them direction they might meet [some] kind of state-supported resistance." Under the trust model, not only do parents, as the trustees, have the right to give direction to their children, they also have an obligation to do so. But there is a limitation placed on this right when the child is an adolescent because of his need to develop his own attitudes and goals. This limitation is that parental direction must not inhibit the adolescent's development of independent reasoning ability. Parents who exercise this right, and thereby fulfill their obligation as trustees, need not be concerned that the adolescent will institute a challenge, and they have no basis for fearing that the state, whose only involvement in the child-initiated challenge would be limited to the impartiality of judicial adjudication, will uphold unsupported claims. The trust model of parentage would encourage parental responsibility.

184. Puberty, Privacy, and Protection, supra note 98, at 1386. See also Hafen, supra note 7, at 654-55.
185. Puberty, Privacy, and Protection, supra note 98, at 1386; Hafen supra note 7, at 654-55.
186. Puberty, Privacy, and Protection, supra note 98, at 1386.
187. See notes 101-06 supra and accompanying text.
188. See notes 109, 118-28 supra and accompanying text.
189. See notes 118-28 supra and accompanying text.
190. See notes 107-08 supra and accompanying text.
191. See notes 159-72 supra and accompanying text.
192. Hafen, supra note 7, at 655.
193. See notes 101-06 supra and accompanying text.
194. See notes 111, 113 supra and accompanying text.
195. See notes 159-72 supra and accompanying text.
and uphold the child's right to be reared to independence by permitting the child, for whose benefit the trust exists, to seek relief when his development of independent reasoning ability is impeded.

c. Implementation of the Child's Rights as Beneficiary

A basic requirement in implementing the rights discussed in the preceding subsection is the child's right to be a party and to be represented in any proceeding affecting his trust interest. 196

Under the trust model, the child is an indispensable party to any proceeding concerning the removal and appointment of trustees because any judgment rendered in his absence would severely prejudice his rights. 197 In the case of the adolescent beneficiary, his right to choose his custodial arrangement whenever it comes into issue because of divorce, neglect, or abandonment would be denied. In the case of the pre-adolescent beneficiary, his right to have the trust decision made on the basis of the "least detrimental alternative" 198 standard would be prejudiced because no other party to the proceeding, trustee or settlor, has interests identical to the beneficiary's, 199 and therefore the court has no way of determining what the "least detrimental alternative" would be.

The child is entitled to a representative who protects the child's rights and advocates his interests. 200 Parents are inappropriate representatives of the child because of the conflict of interest that arises when their obligations as trustees are at issue. 201 The state cannot adequately safeguard the child's right because in exercising its parens patriae power, its concern is the molding of good citizens, 202 and this objective is not always identical to the child's interests in establishing a parent-child relationship with at least one adult. 203

Representation and protection of the child's interests by an adult not otherwise interested in the proceedings is not a new idea. New York's legislature has recognized the need for independent legal representation of the

197. See Fed. R. Civ. P. 19(b); cf. Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704 (D. Colo. 1966) (court refused to dismiss action brought by contingent beneficiaries under testamentary trusts against trustee where other beneficiaries could not be joined but should have been parties under the requirements of Rule 19(c), because the corpus of the trust would increase for the benefit of all the beneficiaries if the plaintiff/beneficiaries succeeded); Law of Trusts, supra note 97, § 31, at 104 (beneficiary is a necessary party to a proceeding brought by the trustee to be relieved of the trust).
198. See notes 118-28 supra and accompanying text.
199. See notes 42-60, 90-95 supra and accompanying text.
200. See Goldstein, supra note 2, at 65-67; Hansen, supra note 35; Inker & Perretta, supra note 11, at 236-40; Juvenile Rights Litigation Project, Children's Rights in Domestic Disputes, Youth Law Center, 10 Clearinghouse Rev. 956 (1977).
201. See notes 42-60, 92-97 supra and accompanying text.
202. See Areen, supra note 68, at 893-94; Cogan, supra note 75; Thomas, supra note 75, at 313-22.
203. See Inker & Perretta, supra note 11, at 230-32; notes 75, 78-81 supra and accompanying text.
child in neglect and abandonment proceedings by providing for the appointment of a law guardian at the discretion of the family court judge.204 Similarly, the Family Court of Milwaukee appoints a guardian ad litem in contested custody disputes arising out of divorce.205 Commentators have even suggested that this practice ought to be extended to include uncontested custody agreements to insure that courts actually conduct an inquiry into whether the arrangements worked out by the parents protect the children's interests.206

The rights described in the preceding subsection207 indicate that the function of the child's representative will differ markedly depending on whether the child is an adolescent or pre-adolescent. When the child is an adolescent beneficiary, the representative should inform him of his right to choose his trust arrangement or to have the decision made on the basis of the "least detrimental alternative."208 If an action for neglect is brought against the parent-trustees, the child must be apprised of the legal ramifications of choosing to have a foster parent appointed co-trustee. The adolescent must know that although he may later terminate the co-trusteeship (to have the parents re-assume the exclusive administration of the trust or to have an adoptive parent appointed as trustee), if that right is not exercised within a statutorily defined period of time, the co-trusteeship will end and an adoptive parent will be appointed as soon as appointment becomes the "least detrimental alternative."209 Furthermore, before removal of the trustees is sought, the representative should inform the adolescent of the possible legal consequences of removal: loss of the child's right to inherit from his parents210 or receive support from them.211 When the child is a pre-adolescent who chooses to have the trust decision made on the basis of the "least detrimental alternative,"212 the representative will have the responsibility of determining what the "least detrimental alternative" is for the child; he must then advocate that alterna-

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206. See Hansen, supra note 35; A Case for Independent Counsel, supra note 35.

207. See notes 109-95 supra and accompanying text.

208. See notes 118-28 supra and accompanying text.

209. Id.


212. See notes 118-28 supra and accompanying text.
Here the representative should seek the assistance of everyone, including the child, who can give him insight into the child's relationship with his trustees.  

The primary inadequacy of the present system of custody adjudication is that, in an effort to protect the child's interests, the law presupposes an identity of interest between child and parents or child and state. This presupposition results in a custody resolution that often does not reflect the child's interests because the parents and the state usually are so intent on securing their own rights and fulfilling their own needs that the child's interests do not receive adequate representation. The trust model of parentage will help to cure this inadequacy because it clearly defines the child's, the parents', and the state's respective rights and interests in the parent-child relationship.

C. The Child's Right to Freedom from Abuse

"Speak roughly to your little boy,
And beat him when he sneezes;
He only does it to annoy,
Because he knows it teases."

That parents may, on occasion, beat their children for annoying behavior, or for more serious transgressions, is not news. A parent's right to use corporal punishment for the discipline and control of his offspring is part of the body of family rights recognized and protected by the Constitution as well as by long-established social tradition. But when parents beat to the

213. ABA Canons of Professional Ethics No. 7.
215. See notes 99-101 supra and accompanying text.
216. See notes 99-100, 109-95 supra and accompanying text.
217. See notes 102-08 supra and accompanying text.

1. L. Carroll, Alice's Adventures in Wonderland.
3. Parental control over the rearing of children has found constitutional support in, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (barring unreasonable interference with the "liberty of parents and guardians to direct the upbringing and education of children under their control"), and in Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (defining the right of an individual to "establish a home and bring up children" as a "liberty guaranteed . . . by the Fourteenth Amendment").
4. The unquestioned acceptance of the use of physical force as a disciplinary measure in the socialization of children is indicated by the existence of a common term in our vocabulary for the practice, i.e., "spanking"; by the existence of the proverb "spare the rod and spoil the child" to connote a perfectly valid school of thought on child rearing, Model Penal Code § 3.08, Comment, at 72 (Tent. Draft No. 8, 1958); D. Gil, Violence Against Children 8 (1973); Paulsen, The Legal Framework for Child Protection, 66 Colum. L. Rev. 679, 686 (1966); and by the casual acceptance of corporal punishment in public schools by the Supreme Court in Ingraham v. Wright, 430 U.S. 651, 659-63 (1977).
point of brutality, or otherwise deliberately inflict the serious physical injuries described in the literature of child abuse, this disciplinary privilege is challenged by the child’s interest in personal security and by society’s interest in protecting its weakest and most vulnerable members.

Because of the child’s dependent position in the family, and because, in child abuse cases, his natural protector is the one from whom he needs protection, it is usually necessary that protection of the child’s interest come from outside the family. However, this runs counter to a fundamental bias, of constitutional dimensions, against such intrusion into the “private realm of family life.” This bias is so deeply imbedded in the national psyche that when a choice must be made between protecting a child by interfering in a threatening home situation or protecting his parents’ right to family

5. Clinical studies of child abuse report a range of injuries from minor, superficial cuts and bruises to burns, scaldings, fractures, internal injuries, intentional starvation, dismemberment, and severe injuries to the brain and nervous system. Gil, supra note 4, at 2. Although sexual abuse is sometimes considered with other forms of abuse, see, e.g., Summary of N.Y. Child Protective Services Act of 1973, at Intro. 1 (issued by the Dept of N.Y.C. Special Serv. for Children on Sept. 1, 1973), it is usually classified as child abuse only when it involves the use of force, Gil, supra note 4, at 6.

6. The right to be free from “unjustified intrusions on personal security” is one of the “historic liberties” recognized at common law and incorporated into the Constitution in the fifth and fourteenth amendments. Ingraham v. Wright, 430 U.S. 651, 673 (1977). The child enjoys this right, although it is limited by the requirements of reasonable discipline. People v. Curtiss, 116 Cal. App. 771, 782, 300 P. 801, 805 (Super. Ct. 1931); Carpenter v. Commonwealth, 186 Va. 851, 862, 44 S.E.2d 419, 423 (1947); W. Prosser, Law of Torts § 27 (4th ed. 1971).

7. Child abuse is, by definition, the abuse of a child by someone standing in the position of parent to that child, and does not include injury inflicted by strangers or those with a minimal supervisory role, such as teachers. The definition used in an influential nationwide study conducted under the aegis of the Children’s Bureau of the U.S. Department of Health, Education, and Welfare was: “Physical abuse of children is the intentional, nonaccidental use of force, or intentional, nonaccidental acts of omission, on the part of a parent or other caretaker interacting with a child in his care, aimed at hurting, injuring, or destroying that child.” Gil, supra note 4, at 6.

8. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.” Prince v. Massachusetts, 321 U.S. 158, 166 (1944); accord, Pierce v. Society of Sisters, 268 U.S. 510 (1925).


10. Reluctance of medical personnel to intrude on the privacy of family affairs by investigating the circumstances behind the injuries to young patients inhibited early attempts to gather statistics on child abuse. Paulsen, Child Abuse Reporting Laws: The Shape of the Legislation, 67 Colum. L. Rev. 1, 1-4 (1967). See also D. Besharov, Juvenile Justice Advocacy 126 (1974). The persistence of this attitude is reflected in the comment of a professional homemaker, assigned by court order to a couple later accused in the child-abuse death of their 105-day-old infant. The boy suffered from broken ribs, fractured skull, and severely burned buttocks and feet. Although the homemaker actually witnessed rough handling by the father, and was in the home almost daily up to three days before the child’s death, she failed to see injuries inflicted during the period she was in daily contact with the child. She told an interviewer, in explanation, that she “tries not to be overly intrusive to the parents she serves.” N.Y. Times, Sept. 6, 1977, at 75, col. 5.
privacy, the parental right will frequently prevail. One explanation may be that in weighing the interests involved, many analysts consider the child's right to personal security—particularly, to be free of abuse from a parent or parent-substitute—as outside of, and subordinate to, the body of protected family rights. As a result, while deploring the sacrifice of the child's interests, they reluctantly permit it if necessary to preserve the integrity of the family. For example, even where it is fairly certain that a particular parent will engage in dangerously abusive behavior, courts have not prevented him from gaining or keeping custody of his child, but have preferred to wait for conclusive evidence of abuse before interfering in the parent's natural right to custody. This frequently means a child must undergo serious injury before his right to protection is recognized. One need not be unsympathetic to the sound reasons for guarding the family from officious meddling by outside agencies to question the results in these circumstances.

This section will be concerned with the ultimate remedy currently provided

11. In the case referred to in note 10 supra, the infant was returned to the custody of a handicapped mother who had been diagnosed as "severely disturbed, irrational and angry . . . [and] extremely self-destructive" and whose "severely impaired judgment pose[d] a grave threat to her baby's safety and life," and to a father with a history of violence. The baby's death, fewer than three months later, from injuries inflicted by the father, raised a storm of protest. However, the court's decision on custody was defended as necessary to preserve parents' rights to the care and custody of their children. N.Y. Times, Sept. 6, 1977, at 41, col. 1, 75, col. 1; Letter of R. Uviller, Director, Juvenile Rights Project, ACLU, to the New York Times (N.Y. Times, Sept. 20, 1977, at 40, col. 4) [hereinafter cited as Uviller].

12. The child's right to freedom from abuse is generally treated as an aspect of the common law right to freedom from the "corporal insults of menaces, assaults, beating, and wounding," rather than as a right of the child in the family. Ingraham v. Wright, 97 S. Ct. 1401, 1407 (1977) (quoting Blackstone's Commentaries).

13. E.g., The Short, Unhappy Life of Rubin Almeyda, N.Y. Times, Sept. 6, 1977, at 41, col. 1, 75, col. 1. The court ruled that the Bureau of Child Welfare had not proved conclusively that the infant was in "imminent danger." Id. at 75, col. 3. The validity of predictors of abusive behavior has been challenged as a basis for denying custody by one child advocate who expressed the view that protection of the rights of parents justifies the risk of injury to children. Uviller, supra note 11, cols. 5-6 ("If 50 percent of the parents about whom future violence is predicted do not fulfill the prophecy, should they too lose their children in order to protect the other 50 percent?"). Whether society is, in fact, willing to risk subjecting some of its children to the treatment described in the Almeyda case as the price of preserving the rights of some parents may soon have to be decided. Researchers have reported development of a set of 17 indicators of abusive traits which, in a limited study, was able to classify correctly 77% of the parents studied. Predicting and Preventing Child Abuse, Psych. Today, Jan. 1978, at 99.

14. While the necessity for discretion, flexibility, and immediacy in meeting the needs of a child's everyday life argue persuasively for keeping control in the hands of the party closest to the situation, a more compelling argument for parental autonomy is that outside regulation would permit the moral, social, and economic values of the dominant class to be imposed on the rest of the society. For example, zoning regulations defining "family" according to the "nuclear family" model familiar to white, middle-class society, to the exclusion of the "extended family" tradition of black Americans, could be seen as a preference for one class' standard of normal family life and an attempt to make that standard universal. Moore v. City of E. Cleveland, 431 U.S. 494, 506-13 (1977) (Brennan, J., concurring.)
for the protection of abused children—removal from the home and placement in institutional or foster care.\(^\text{15}\) Despite the well-documented dangers of removal,\(^\text{16}\) when it appears that other techniques for protecting the child—supervision of the family, court-ordered counseling for the parent—will not be effective, the abused child is removed from his home and family. The abusing parent remains at home in full enjoyment of his family rights. This section will discuss the child's interest in personal security as an integral part of the constitutionally-protected body of family rights and will suggest that under such an analysis, it is proper, in some circumstances, to remove the abusing parent before resorting to removal of the abused child.

1. The Child's Interest in the Family Relationship

The existence of a body of rights centering on the family has been established in a long line of Supreme Court decisions,\(^\text{17}\) which have deemed the family relationship to be as "old and as fundamental as our entire civilization,"\(^\text{18}\) and the preservation of the integrity of that relationship, to be a function of the ninth and the fourteenth amendments.\(^\text{20}\)

While enumerating certain particular rights—the right to marry,\(^\text{21}\) to bear,\(^\text{22}\) or not to bear,\(^\text{23}\) children, to educate them according to one's own beliefs;\(^\text{24}\)—the Court has made clear that these are but examples of a broader

\(^{15}\) Typical language in abuse and neglect statutes directs that all other possible remedies should be tried before resort is made to removal of the child. See, e.g., Del. Code tit. 10, § 502 (1974) ("the home will, if possible, remain unbroken"); Mass. Ann. Laws ch. 119, § 1 (Michie/Law. Co-op 1975) ("to provide substitute care of children only when the family . . . is unable to provide the necessary care and protection"); Minn. Stat. Ann. § 260.011 (West 1971) ("removing [the child] from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal"); Mont. Rev. Codes Ann. § 10-1300 (Cum. Supp. 1975) ("preserve the unity . . . of the family whenever possible"); N.M. Stat. § 13-14-2(C) (1976) ("separating the child from his parents only when necessary for his welfare or in the interests of public safety"); Tenn. Code Ann. § 37-201 (1977) ("separating the child from his parents only when necessary for his welfare . . ."); Wis. Stat. Ann. § 48.01(2)(c) (West 1957) ("Protection of children from unnecessary separation, either temporary or permanent, from their parents").

\(^{16}\) See notes 42-44 infra and accompanying text.


\(^{19}\) Id. (Goldberg, J., concurring).


concept of rights that each individual has in the family relationship;\(^2\) and that the source of these rights lies in the function of the family in providing the "custody, care and nurture of the child."\(^2\) Because it has so often been the case that the parent is the party whose rights are vindicated,\(^2\) it is easy to overlook the mutual nature of the family rights involved, and to conclude that the parent has exclusive claim to those rights. It should be noted, however, that the cases upholding the integrity of a family against intrusion involved not the parent's right alone but the family members' rights against outside interference.\(^2\) For example, the education cases explicitly upheld the parent's right to educate and the child's right to learn in religious schools,\(^2\) or in a foreign tongue.\(^3\) The child's inclusion among those having a protected interest in the family is explicit in Levy v. Louisiana,\(^1\) which declared unconstitutional a Louisiana statute that denied to illegitimate children a wrongful death action for the death of their mother, and in Moore v. City of East Cleveland\(^3\) where the concept of the "extended family," including children, grandchildren, and other relatives, was held to be protected from state interference.\(^3\)

Since the cases establishing the primacy of these family rights involved the family against the state, they should not be used to establish the primacy of the rights of individual family members against each other, as seems to be happening when the family right to privacy is used to close off or limit efforts to protect a child from his parent.\(^3\) Rather, when the rights of parent and

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27. E.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (parents' right to preserve religious values by terminating the "formal education" of their children after the eighth grade); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents' right to educate their children in parochial schools).


29. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty...excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.").

30. Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (barring interference by the state with, inter alia, the "opportunities of pupils to acquire knowledge" in German).


33. A housing ordinance of the City of East Cleveland limited occupancy of "dwelling units" to single families and defined "family" as, in effect, the "nuclear family"—i.e., essentially a couple and its dependent children. A grandmother who lived with her son and two grandsons, who were cousins rather than brothers, was convicted of criminal violation of the ordinance. In overturning her conviction and finding that the ordinance deprived her of her liberty in violation of the fourteenth amendment, the majority stated: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." Id. at 504.

34. In the few cases where the issues have been framed as parent against child, the Court has not come down on the side of the parent, even where the parent couched his argument in terms of protection of the family. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976), where
child in the family relationship conflict, the interests of each should be weighed and analyzed as in any nonfamilial conflict, and the resolution reached should be that which is least restrictive of the rights of all parties.

Certain rights in the family relationship have been explicitly recognized as belonging to the child, but they should be seen as examples of the broader interest in the family relationship based upon the nurturing function of the family. Just as the parent's authority over his child is predicated upon his right and duty to rear the helpless infant to responsible adulthood, the submission of the child to parental authority is predicated upon the latter's need for care, training, discipline, and guidance from his parent in order to achieve the goal of responsible adulthood. That the child has a right to a certain level of care from his parents can be deduced from the neglect and abandonment statutes which set minimum standards for parental conduct, and there is increasing evidence of the recognition of more positive rights in the child to a level of nurturing that will promote his maximum development.

The importance to that development of a safe, stable home environment has been well established. It is recognized in the neglect and abandonment statutes which provide that removal of a child from his home should be the remedy of last resort. It is recognized in the sociological literature detailing the importance of continuity in a parent-child relationship and the trauma arising out of disturbance of that continuity. It is recognized in the reluctance of courts to disrupt a family relationship, even an "unconventional" one. Where the parent's abusive behavior is the cause of the problem, the child should not have to choose between his physical safety and his family ties. He should, wherever possible, be able to preserve both, even at the cost of some restriction of his parent's interest in those same family ties. According to a pregnant minor to obtain an abortion without parental consent was upheld, despite strong objections that this interfered with the parent's right to control his family.

35. See text accompanying notes 29-33 supra.

36. E.g., Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977). ("[T]he importance of familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children.")

37. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).


40. See pt. IV(A) supra.

41. See note 15 supra.

42. E.g., J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 31-35 (1973).


44. See, e.g., People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952).
ingly, where abuse by a parent has created a situation threatening to the child's safety and development, the child's interest in his family rights—his interest in remaining in a safe, stable family situation—should require that whenever the family unit can be maintained without the presence of the abusing adult, the right to stay at home should be preserved to the child and the abusing parent should be removed instead.

2. The Proposed Alternative: Removal of the Parent

Where there is the possibility of another adult maintaining the family unit—for example, a nonabusing parent, grandparent, older sibling, other relative or close family friend, or even court-appointed guardian or foster-parent—leaving the child at home under the supervision of such an adult would result in several beneficial effects while diminishing greatly the harmful effects of uprooting the child from his familiar environment.

The child would continue to reside in familiar surroundings without interruption of school or friendships. The supervising adult would often be a relative or friend known to the child and familiar with his daily routine. This would promote the child's sense of security with minimal disruption of his lifestyle. Continuation of the child in his own home would reduce the stigma attached to abused or neglected children and would thus relieve much of the child's embarrassment, in particular the embarrassment caused by being "foster." 45

In addition to the beneficial effects mentioned above, removal of the abusing parent rather than the abused child would focus the remedy on the wrongdoer rather than on the victim. This should relieve the child of much of the guilt felt by children who are removed from their homes. 46 It would also emphasize to the abusing parent the wrongful nature of his conduct, and would prevent future abuse of the abused child's siblings without removing all children, whether abused or not, from the home. 47

If the proposed remedy were adopted, social work and psychiatric services could be provided to the abusing parent. Since the parent would be relieved

45. Children cared for by child care systems are often placed in foster homes. As these children become more aware of their status as "foster children," they often become increasingly embarrassed by this status. Their embarrassment is shown in their reluctance to disclose their status, in adoption of the foster parents' surname, and in their conversations with each other (e.g., "Are you foster?"). See, e.g., Wald, supra note 43, at 994-95 (1975); 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. 625, 644-46, 667-72 (1976) [hereinafter cited as Wald, Standards for Removal.]

46. Abused children cared for by child care systems often feel at fault for their own abuse. They may feel that they are bad, unlovable, or in some way responsible for their removal. Thomas, Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspective, 50 N.C.L. Rev. 293, 347-48 (1972). See also J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 11-12 (1973).

47. An additional benefit to the family would result from the continued support services provided when the court leaves a child in the home, services which would cease when the abused child is removed. Wald, Standards for Removal, supra note 45, at 630-31.
of the task of caring for the children, treatment could focus more directly on the parent's problems and frustrations with minimal interference from the anxiety-provoking home situation. Additionally, visitation to the child could be provided for, either within or without the home. Since there would be a resident supervising adult in the home, all visits could be supervised and, if the resident adult were a relative or friend, visits would be less threatening for the parent, and therefore more enjoyable and reassuring for both parent and child.

a. Bases for Removal of the Parent

The remedy of physical removal of a wrongdoer is not new to the law. Indeed, removal is central to the notions of retribution and rehabilitation in the criminal law. More specifically, by statute in a number of states, a person found guilty of abusing a child is guilty of a crime and may be incarcerated for the offense. The goals of retribution and rehabilitation focus on punishing the wrongdoer and on conforming his behavior.

An equally important goal of the criminal law is deterrence, or the protection of society against the wrongdoer's harmful acts. This goal focuses on the innocent and recognizes a right to be free from the harmful acts of others. It is particularly appropriate to recognize this goal of protecting the innocent in a discussion of children's rights since children are inherently vulnerable and unable to protect themselves.

There is also precedent in the family law area for removal of wrongdoers. This precedent is found in statutes empowering the court to issue orders of protection against "family offenders." These orders of protection typically set forth certain reasonable conditions of behavior to be observed for a

48. Parents who visit their children in foster homes often feel inadequate and threatened. Additionally, foster parents are often wary of parental visits, especially if they have grown attached to the child and view such visits as a preliminary to the child's return to the care of his parents. Wald, Standards for Removal, supra note, 45 at 674-75. These underlying fears and anxieties often make visiting traumatic and unpleasant, and thus parental visiting may actually work against the return of the child to his parents' care. Id. at 644-46, 667-72, 672 n.197.

49. See, e.g., N.Y. Penal Law § 260.10(2) (McKinney Supp. 1977), which provides that a person is guilty of endangering the welfare of a child when "[b]eing a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child' [or] a 'neglected child,' " and further provides that "[e]ndangering the welfare of a child is a class A misdemeanor." (The statute had been amended in 1970 to delete a differentiation in parental duty with regard to the child's age and sex: "male child less than sixteen years old or . . . female child less than eighteen years old.").

50. See, e.g., N.Y. Penal Law § 70.15(1) (McKinney 1975), which provides: "A sentence of imprisonment for a class A misdemeanor shall be a definite sentence . . . , fixed by the court, and shall not exceed one year."

51. See note 6 supra.

specified time by a person before the court. Such conditions may include an order to stay away from the home, spouse, or children. Statutes providing for orders of protection in matrimonial actions are also common.53

However, these orders are not issued lightly. To deny a person access to the home, spouse, or children, it must appear that such access represents a danger to the safety of the other persons in the home. A single incident of aggression occurring during an altercation is not enough for the court to issue an order of protection,54 nor is conduct which is merely alarming, annoying, or disturbing.55 The conduct must be such that it would constitute disorderly conduct, harassment, menacing, reckless endangerment, assault or attempted assault as these crimes are defined in the penal law.56

Some states have enacted statutes empowering the court to issue orders of protection in child protective proceedings.57 These orders typically set forth reasonable conditions of behavior to be observed by a parent or other person legally responsible for the care of the child who is before the court. They may require the parent or custodian to stay away from the home or the child;58 to permit a parent to visit the child at stated periods;59 to abstain from offensive conduct against the child, his parent, or any person to whom custody of the child is awarded;60 to give proper attention to the care of the home;61 to cooperate in good faith with a child caring agency having custody of a child;62 or to refrain from acts of commission or omission which tend to make the home an improper place for a child.63 Such orders of protection may be issued during the pendency of child protective proceedings64 for the purpose of

53. See, e.g., N.Y. Fam. Ct. Act § 446 (McKinney 1975), which provides for orders of protection in support proceedings.
54. Downing v. Downing, 31 App. Div. 2d 913, 298 N.Y.S.2d 374 (1969). Downing was decided under § 842 of the New York Family Court Act. The wife claimed that her husband had slapped her once during an altercation which she had instigated. The court found no order of protection was warranted.
56. Id. at 236, 339 N.Y.S.2d at 598.
protection of children until final disposition of the action or as a part of the final judgment. 65

b. Removal of the Parent—Expansion of an Existing Remedy

Adoption of the proposed alternative of removing the abusing parent from the home would actually require no more than recognition and effectuation of the order of protection remedy now in existence in those states which have empowered their courts to issue such orders in child protective proceedings. At the present time such orders of protection are rarely issued against an abusing parent unless there are also grounds to justify a legal separation between the parents. 66 This is because exclusion of an abusing parent from the home enforces a separation between the spouses, and there must be legal grounds under matrimonial law to justify such action. 67 If both parents are, or a "single parent" is, the abusers, the usual procedure is to remove the child and place him in a child care facility.

Under the proposed alternative, one or both parents could be excluded from the home during the pendency of an abuse action and at final judgment. Throughout the proceedings, the child would remain in the home, thus protecting the child against the harmful physical effects of abuse and also minimizing the harmful emotional effects of removal and placement.

c. Removal of the Parent and the Trust Model

The trust model can provide an effective means of implementing the proposed alternative—removing the abusing parent or parents from the home rather than removing the abused child. Courts have long recognized the similarity between the parent-child and the trustee-beneficiary relationships: "In dealing with the custody and control of infants, their welfare and happiness . . . is the primary consideration. The natural right of the [parent] to the custody of [the] child is not an absolute property right, but rather a trust reposed in the [parent] by the state." 68 The trust relationship between parent and child arises from the "trust and confidence . . . reposed on the one side, and influence and control . . . exercised on the other . . . ." 69

The inherent nature of the parent-child relationship is that of an active trust imposing upon the parent the power and duty to guide the child's growth and development. The parent as trustee must, as must all trustees, exercise


66. See note 65 supra and accompanying text.


68. Gardner v. Hall, 132 N.J. Eq. 64, 81, 26 A.2d 799, 809 (Ch. 1942) (quoting Lippincott v. Lippincott, 97 N.J. Eq. 517, 519, 128 A. 254, 255 (Ch. Err. & App. 1925)).

sound discretion in the carrying out of his duties, and the trustee's duty of loyalty prohibits him from doing anything harmful to the interests of the child as beneficiary. Generally, abuses of trust relationships may be found by viewing the good faith, arbitrariness, capriciousness, maliciousness, or improper motive in light of all the circumstances. In the context of a parent-child relationship, it would be desirable to impose particularly strict standards on the conduct of the parent trustee because of the vulnerability of the child.

The courts have utilized the trust analogy before in granting relief where a parent-child relationship is abused. Thus they have noted that the parent-child trust relationship "requires the [parent] to refrain from all selfish projects. 'The general principle is, if a confidence is reposed, and that confidence is abused, Courts of Equity will grant relief.'" Relief for abuse of the parent-child relationship is often granted through invocation of the doctrine of "parens patriae." This doctrine roots the authority of the State to regulate the custody of infants found within its jurisdiction in the protection that is due to the incompetent or helpless. However, while the parens patriae doctrine supplies the justification for the State's right to intervene in the parent-child relationship if that relationship is abused, the remedy employed by the courts has typically been removal of the child from the home of the abusing parents.

Removal of the child for abuse of the parent-child trust relationship is a remedy at odds with the remedy usually employed in abuse of trust cases. In a typical trust relationship, if a trustee abuses his position of trust, the court has the power to remove him and to appoint a successor trustee. The rights and

70. See, e.g., McCarthy v. Tierney, 116 Conn. 588, 591-92, 165 A. 807, 808 (Conn. Super. Ct. Err. 1933) ("They [courts] will not, however, interfere with the exercise of the discretionary powers of trustees in the absence of a showing of fraud, bad faith, or abuse of discretion. So long as the discretion is fairly and honestly exercised, the court will not deprive a trustee of [his] power . . . . The court may, however, review the exercise of judgment and determine whether the trustee has exceeded the liberty given him."). Williams v. Hund, 302 Mo. 451, 258 S.W. 703 (1924); In re Vohland's Estate, 135 Neb. 77, 280 N.W. 241 (1938). See also Marburg v. Safe Deposit & Trust Co., 177 Md. 165, 167, 9 A.2d 222, 223 (1939) ("Unless there has been a clear abuse of power or neglect of duty by the trustee . . . or a violation of the trust, courts should not and will not interfere . . . ."); City Bank Farmers Trust Co. v. Smith, 263 N.Y. 292, 295, 189 N.E. 222, 223 (1934) ("The manner in which a trustee shall exercise his function rests ordinarily within his discretion. If he exceeds his powers, acts negligently or abuses his discretion, a beneficiary injured thereby may have redress.").

71. Highberger v. Stuller, 21 Md. 338, 352-53 (1863) ("Whenever a fiduciary relationship exists, legal or actual, . . . trust and confidence are reposed on the one side, and influence and control are exercised on the other . . . . One of the most familiar examples is that of parent and child . . . ."). See also cases cited note 68 supra.


74. May v. May, 167 U.S. 310, 320-21 (1897) ("The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between [him and his cotrustee or the beneficiaries] that his
circumstances of the innocent beneficiary remain untouched. Similarly, it can be argued that, if a parent abuses his position as guardian of a child, the court should be empowered to remove the abusing parent and to appoint a substitute. Under this analogy, the rights and physical circumstances of the innocent child would remain untouched and only the guilty parent's rights would be affected. Since courts have long recognized their power to remove a wrongful trustee, the time is past due for them to recognize their power to remove a wrongful parent.

It should be recognized that there may be due process problems in excluding a parent from access to his home. Aside from the arguable position that removal of a parent deprives him of a property interest in his child (i.e., in actual physical custody of his child), there is the argument that exclusion of a parent from his home deprives him of his property interest in his house. It would be essential, therefore, that due process requirements be met before excluding a parent from access to his home.

Assuming due process requirements are met, there is some precedent in the law for depriving a party of possession of his home as a result of his wrongful conduct. Under New York law, in an action for divorce, separation, etc.

continuance in office would be detrimental to the execution of the trust.

75. The motive propelling the court to order removal is not the punishment of the abusive trustee, but the protection of the injured beneficiary. See Moore v. Bowes, 8 Cal. 2d 162, 165, 64 P.2d 423, 424 (1937); Restatement (Second) of Trusts §§ 107-08 (1959).

76. There can be no serious argument that the state may never interfere in the parent-child relationship. Although the Supreme Court has repeatedly recognized that the right to direct the upbringing of one's children is within the concept of liberty set forth in the Bill of Rights, see Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923), and related to the right of privacy, see Griswold v. Connecticut, 381 U.S. 479 (1965), it is clear that this right is not absolute, see Wisconsin v. Yoder, 406 U.S. 205, 233 (1972). The state has an interest in protecting the safety of its citizens, Gitlow v. New York, 268 U.S. 652 (1925), and it may be argued that in the area of child abuse, where the victim is often helpless, its interest is compelling. In these circumstances, the state may legislate to provide for orders of protection if such orders are necessary to protect its compelling interest in the safety of its citizens.

77. See Lerner v. Lerner, 21 App. Div. 2d 861, 862, 251 N.Y.S.2d 400, 402 (1964), where the court stated: "The argument on unconstitutionality ignores the fact that the order merely directs temporary possession pending the outcome of the separation action."

78. N.Y. Dom. Rel. Law § 234 (McKinney 1977) provides: "In any action for divorce, for a separation, for an annulment or to declare the nullity of a void marriage, the court may (1) determine any question as to the title to property arising between the parties, and (2) make such direction, between the parties, concerning the possession of property, as in the court's discretion justifies requires having regard to the circumstances of the case and of the respective parties. Such direction may be made in the final judgment, or by one or more orders from time to time before or subsequent to final judgment, or by both such orders and final judgment." See also Mumma v. Mumma, 280 A.2d 73 (D.C. App. 1971); Klebba v. Klebba, 108 Ill. App. 2d 32, 246 N.E.2d 681 (1969); Jetter v. Jetter, 66 Misc.2d 879, 323 N.Y.S.2d 305 (Sup. Ct. 1971); D.C. Code Encycl. § 16-910 (West 1966) ("The court may award the property to the one lawfully entitled thereto or apportion it in such manner as seems equitable, just, and reasonable."); Ill.
Annulment or to declare the nullity of a void marriage, the court may make a
direction, between the parties, concerning the possession of property, includ-
ing the marital home. While ordinarily it is the owner of the premises who has
the right to remain in possession,\textsuperscript{79} the sole owner in fee can be excluded if
there is some reason why he should be deprived of his property.\textsuperscript{80} Thus, the
New York courts have granted exclusive possession of the marital home
where the conduct of the excluded party created the danger of violence from
continued cohabitation.\textsuperscript{81} Exclusive possession of the home has also been
granted where it was needed as a home for the children and where it was
located in a neighborhood in which the children had resided all their lives.\textsuperscript{82}
Thus it appears that exclusion of a dangerous parent from the home and
maintenance of continuity of environment for the children has found some
support in the law. Assuming due process requirements are met, removing the
parent from the home would seem to be the least harmful remedy for child
abuse. It would minimize the harm to the child and to his emotional growth
and development and would infringe least on the body of rights enjoyed by
parent and child. Exclusion of the abusing parent would recognize the child's
right to be free from physical and emotional abuse and is also consistent with
recognition of the parent's right to regain custody of the child when the parent
no longer poses a danger to the child.

V. CONCLUSION

This Comment is premised on the assumption that children have, or should
have, rights. Considerable attention has been given to defining those interests
unique to the child that require protection as legally recognized rights. The
trust model has been introduced to reconcile the assertion that children have
rights with the fact that in many instances children are incapable of prudently
exercising those rights. Certain basic elements of trust law have been used as
an analogy to conceptualize the proper relationship between the child and his
parents or the state. The trust model would allow a court to recognize that
children have rights and to still permit parents or the state to exercise those

\footnotesize{Ann. Stat. ch. 52, § 5 (Smith-Hurd 1967) ("In case of a divorce, the court granting the divorce
may dispose of the homestead estate according to the equities of the case."); Nev. Rev. Stat. §
125.150(1) (1973) ("disposition of the community property of the parties, as appears just and
equitable").


Smith, 49 Cal. App. 2d 716, 122 P.2d 346 (1942) (temporary order excluding a husband from the
marital home was justified because he had discharged a gun in the home).

2d 614, 323 N.Y.S.2d 627 (1971); Mayeri v. Mayeri, 26 Misc. 2d 6, 208 N.Y.S.2d 44 (Sup. Ct.
1960).

rights on the child's behalf until such time as the child is capable of exercising them for himself.¹

The interests which should be recognized as legally enforceable rights constitute the corpus of the trust which is held by an adult party, either parents or state, as trustee for the benefit of the child.² The trust model places two significant limitations on the trustee's power by virtue of the fact that the rights exercised by the trustee are not his own but belong to the beneficial owner—the child.³ The first limitation is that in exercising the rights on behalf of the child, the trustee must meet a high standard of care and loyalty—a standard which might be developed by analogy with the duty imposed upon fiduciaries.⁴ The second limitation is that the duration of the trust is determined by the child's ability to exercise, protect, and enforce his own rights.⁵ As the child develops the capacity to exercise each right on his own behalf there is no longer any need to protect him from the imprudent exercise of the right. The trustee then relinquishes to the child his control of the right, and the trust terminates in much the same way that a property trust automatically terminates when the purpose of the trust is achieved. Ultimately, the trust is completely terminated when the child is able to exercise all of his rights.⁶

The corpus of the trust is composed of rights which have been organized into three general areas: rights in the juvenile justice system,⁷ rights in the compulsory educational system,⁸ and rights within the family.⁹

The child's rights in the juvenile justice system, particularly with regard to the rights of the status offender, should include the right to personal liberty¹⁰ and the right to civil liberty.¹¹ The right to personal liberty, defined in its broadest terms, is the right to make decisions concerning one's own life.¹² The right to civil liberty is the right to fair treatment when personal liberty is limited in order to protect the rights of others.¹³ While the State's justifiable concern with the quality of the citizenry can require restricting the personal liberty of a child in order to protect him from a wanton life, the child has a right to expect unimpaired civil liberty.¹⁴ The child is entitled to be protected from the arbitrary restraint of his personal liberty—restraint that has traditionally passed for state paternalism.¹⁵

¹. See pt. I supra, notes 15-40 and accompanying text.
⁵. See pt. I supra, notes 33-40 and accompanying text.
⁶. See id.
⁷. See pt. II supra.
⁸. See pt. III supra.
⁹. See pt. IV supra.
¹⁰. See pt. II(A), (B) supra.
¹¹. See pt. II(D) supra.
¹². See pt. II(B) supra.
¹³. See pt. II(A), (D) supra.
¹⁴. See pt. II(B), (D) supra, notes 47-51, 102-10 and accompanying text.
¹⁵. See pt. II(D)(1), (2) supra, notes 111-15, 149-65 and accompanying text.
Within the compulsory education system the child should have a right to intellectual development and a right to dignity and self-respect. Recognition of these rights requires a shift in emphasis from the interests of parents and the State in education toward the interests of the individuals for whose benefit the institution of compulsory education was created—children. The recognition of these rights would impose a duty on the State to design an educational system which would advance rather than stifle a child's rights. Traditionally the courts have refrained from imposing duties on state educators, who have been allowed wide discretion to use their expertise to design educational programs. But just as a trustee's broad discretion to manage a trust is terminated when the court finds he has breached his fiduciary duty, the judiciary should no longer defer to the discretion of an educator once he has breached his duty to the child. A child's right to due process should protect him from arbitrary confinement. If it were shown that compulsory education statutes result in confinement without education—as might well be the case in some urban schools—the courts would be justified in granting a remedy.

The child's interests within the family which deserve legal recognition are parental nurturing, affirmative participation in custody decisions, and physical security. A right to nurturing would guarantee the child every reasonable opportunity for normal physical and emotional development. Recognition of this right would require the courts to expand the affirmative duties of parents in providing physical care, and to acknowledge the parental role in safeguarding the emotional health of the developing child. The parent's duty to nurture, which is conceptually analogous to the trustee's affirmative duty to develop the corpus of the trust, may be found in its incipiency in the state neglect statutes. The courts should be capable of protecting the child's right to both physical and emotional care in neglect cases by choosing supportive remedies such as family counseling rather than disruptive remedies such as revoking custody. In this way, the legal view of

16. See pt. III(A) supra.
20. See pt. III(C) supra, notes 141-42 and accompanying text.
21. See pt. III(B)(1), (3) supra, notes 60-101, 128-35 and accompanying text.
22. See pt. III(C) supra.
23. See pt. IV(A) supra.
24. See pt. IV(B) supra.
25. See pt. IV(C) supra.
26. See pt. IV(A) supra, note 8 and accompanying text.
27. See pt. IV(A)(1)(a) supra.
29. See pt. IV(A)(1)(a) supra.
30. See pt. IV(A)(2) supra.
a child’s development would be more closely aligned with the view held by other disciplines which stress the crucial importance of early parental care.31

The child should also have a right to have his interests in the parent-child relationship respected in custody proceedings.32 Although the interests of the child are generally deemed to be the paramount consideration in custody decisions,33 the interests of the parents usually prevail because it has been assumed that an identity of interests exists between parents and child.34 The trust analogy can help to make the child’s interests the paramount consideration in practice and still preserve the wide parental discretion necessary for child rearing. By viewing the parent-child relationship as one of trust, the child’s individual interests and the parent’s discretion are both protected because the parent would have an obligation, akin to a trustee’s duty of loyalty, to exercise his discretion solely for the child’s benefit.35 The institution of a divorce, neglect, or abandonment proceeding would cast doubt on the parent’s ability to fulfill this obligation.36 In these difficult situations the court should place the child in the care of the adult who has the ability to exercise discretion for the child’s benefit.37 The child should be guaranteed affirmative participation in the custody decision to insure that his interests are the touchstone of that decision.38 The nature of the child’s involvement in the resolution of the custody issue depends on the extent to which the purpose of the trust has been achieved—that is, the extent to which the child is capable of determining his own interests.39 The blanket presumption of incapacity that presently applies to all children should be replaced by a system that draws a distinction between pre-adolescents and adolescents, taking into account the pre-adolescents’ need for supervision and direction and the adolescents’ ability to determine their own interests.40 Recognition of the child’s right to have his interest in the parent-child relationship respected could be accomplished by giving the pre-adolescent the right to have the custody decision made on the basis of the “least detrimental alternative”41 and the adolescent the right to choose his custodial arrangement.42 In addition, the adolescent should also have the right to initiate a challenge to his parents’ custody when he can establish that they have breached their obligation to exercise their discretion for his benefit by actively preventing him from developing his own attitudes and goals.43

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32. See pt. IV(B) supra.
33. See pt. IV(B)(1) supra, notes 32-34, 73 and accompanying text.
34. See pt. IV(B)(1)(b), (2) supra, notes 81, 98-100 and accompanying text.
35. See pt. IV(B)(2) supra, notes 101-08 and accompanying text.
36. See pt. IV(B)(1) supra.
37. See pt. IV(B)(2)(b) supra, note 109 and accompanying text.
38. See pt. IV(B)(2)(b) supra.
40. See id.
41. See pt. IV(B)(2)(b) supra, notes 116-30 and accompanying text.
42. See pt. IV(B)(2)(b) supra, notes 131-48 and accompanying text.
43. See pt. IV(B)(2)(b) supra, notes 149-95 and accompanying text.
The third right the child deserves in the family relationship is the right to a safe, secure home environment, free of abuse by parent or guardian. When a parent exceeds the limits of reasonable discipline and abuses his child, the child's right to physical security is infringed. When, as a result of such abuse, the state removes the child from his home, his interest in a stable home environment is infringed and the parents' right in the family is protected. If the child is to share equally in the rights of the family, his interests in remaining in his home, free from abuse, is as important as his parent's right to family autonomy, and should prevail when a conflict between the two is caused by the parent's abusive behavior. By analogy with trust law, there should be a mechanism for removing the trustee who has abused his position. Therefore, if necessary to preserve the child's physical security, the abused child should remain in his familiar home environment and the abusing parent should be removed.

Connie K. Beck  
Greta Glavis  
Susan A. Glover  
Mary Barnes Jenkins  
Richard A. Nardi

44. See pt. IV(C) supra, notes 35-44 and accompanying text.  
45. See pt. IV(C) supra, text accompanying note 16.  
46. See pt. IV(C)(1) supra, notes 28-34 and accompanying text.  
47. See pt. IV(C)(2) supra.  