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THE LAW'S RESPONSE TO PARENTAL ALCOHOL AND "CRACK" ABUSE

Janet L. Dolgin*

INTRODUCTION

The response of the American legal system to parents who misuse drugs or alcohol is draconian. In most states a showing of harm to the child is a prerequisite for coercive intervention in child abuse or neglect proceedings. But legislatures and courts frequently assume that parental alcohol or drug misuse inevitably entails harm to the child. As a result, in judicial proceedings involving parental substance abuse, a summary finding of parental misconduct too frequently replaces a concrete examination of whether harm to the child has occurred, or is likely to occur. In short, the *assumption* that parents who misuse drugs or alcohol harm their children allows courts hearing neglect cases to curtail or circumvent the process through which harm to the child is identified and evaluated. Consequently, coercive state intervention in such cases is both more prevalent and more harsh than it should be.¹ The result is social injustice, inflicted primarily upon poor people, and upon their children. In order to alleviate this injustice, changes are needed in child abuse and neglect statutes

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¹ Approximately two-thirds of the children involved in abuse or neglect petitions in New York City are removed from their parents and placed in foster care. Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, VI(II) L. GUARDIAN RPT. 1, 7 n.4 (1990).

dealing with parental substance misuse, in the way courts interpret and use statutory authorizations to intervene in such cases, and in the child welfare system as a whole.

That cases exist in which coercive intervention is warranted is self-evident. Such cases involve serious physical or mental abuse or serious neglect of children. In such cases, the state must intervene.² Moreover, in the most serious cases, removal of the child may be the only sane option.³ In these cases, the disadvantages of coercive intervention, including the likelihood that the child will spend a lifetime in multiple foster placements, and will never be allowed to develop stable ties to parent figures, pale beside the danger to the child of remaining in the parents' home.

However, in the majority of cases involving neglect as defined by most statutes,⁴ the disadvantages of coercive intervention far outweigh the benefits. These are cases in which children are not beaten or starved, but in which parents withhold affection, provide no stimulation, maintain dirty, unseemly homes, or behave immorally or marginally. As will be seen, the net result of separating parents and children in such situations is usually negative. And therefore, in most cases, such separations should not occur. Rather, in-home intervention should replace removal as the first response. In-home intervention programs, often ineffective as presently constituted, can be and must be carefully redesigned in light of the particular needs of neglectful parents who misuse alcohol or drugs.⁵

This Article concentrates on cases of parental substance misuse involving children who are neglected, but whose basic health and welfare are not in clear danger. Only by way of comparison does this Article discuss the horrible cases, the cases in which serious harm to the child is demonstrable. Thus, although abuse and neglect are generally discussed together, this Article

² If, for instance, child neglect results in an infant being left in a crib, unfed and unattended, or in an older child's medical needs being ignored, no alternative to coercive intervention exists.

³ One of the primary disadvantages of in-home treatment is the risk that the child will continue to be seriously abused, either physically or mentally. Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 Geo. L.J. 1745, 1801 (1987). When such abuse is likely to occur, the child must be removed.

⁴ See note 6 *infra*.

⁵ See notes 207-225 and accompanying text *infra*.

focuses on cases of neglect alone.⁶

For a number of reasons, substantive and rhetorical, this Article first discusses parental misuse of alcohol, a legal, "respectable" drug,⁷ and then parental misuse of "crack" cocaine,⁸

⁶ To some significant extent, abuse and neglect are discrete phenomena. Parents who neglect their children are not generally the same parents who abuse their children. Black & Mayer, *Child Abuse and Neglect in Families with an Alcohol or Opiate Addicted Parent*, 1 CHILD ABUSE AND NEGLECT 85, 88 (1977); Direct Testimony of Dr. Eli Newberger, *Mass v. Day*, No. CR 13735 at 74-77 (Super. Ct., Oct. 17, 1989) (describing risk factors and characteristics of families in which physical child abuse occurs).

Generally, neglect involves "acts of omission" by parents. Donahue, *Child Abuse and Neglect*, 2 CHILDREN'S LEGAL RTS. J. 13, 16-17 (1981). The most common forms of neglect are lack of supervision, nutritional neglect, medical neglect and emotional neglect. ten Bensel, *Definitions of Child Neglect and Abuse*, 35 JUV. & FAM. CT. J. 23, 25-26 (1984).

A few state statutes define abuse and neglect in terms of each other. In such cases, it is obviously not possible to speak of neglect without speaking of abuse. See, e.g., D.C. CODE ANN. § 16-2301(9)(A) (1989) defining "neglected child" to mean, among other things, a child "who has been abandoned or abused").

A "neglected child" is defined in New York's child protective law as one "whose physical, mental or emotional condition has been "impaired or is in imminent danger of becoming impaired." N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1983). In addition, that impairment must be the result of a parent's failure to provide minimum care. *Id.* The definition narrowed the state's previous definition of a neglected child by requiring that the child's condition be "impaired" or "in imminent danger of becoming impaired." In the earlier provision, a child could be declared neglected without such a showing if the parent failed to provide minimum care. However, the definition broadened the previous definition in that the earlier definition, when it referred to harm, required that the harm be "serious." Besharov, *Practice Commentary*, N.Y. FAM. CT. ACT § 1012 (McKinney 1983). A second form of neglect, involving a child who has been abandoned, is described in section 1012(f)(ii).

In general, neglect remains vaguely defined in state statutes even where "harm" to the child is required before the child can be declared neglected, but usually neglect is defined to be less serious than abuse. M. WALD, J.M. CARLSMITH & P.H. LEIDERMAN, *PROTECTING ABUSED AND NEGLECTED CHILDREN* 211 (1988) [hereinafter M. WALD]. Wald, Carlsmith and Leiderman wrote:

Physical abuse ranges from extreme brutality resulting in severe injuries to cases of overdiscipline resulting in bruises on arms, legs, or other parts of the body. . . . Neglect is even less well-defined. It ranges from inattention resulting in physical injury—for example, inadequate supervision of young children—to inattention that may prompt concern about the social and emotional development of the child. . . .

Id.

⁷ Alcohol is one of the most heavily advertised commodities in the United States. The care a host takes over which wine to serve can signify the host's concern for his or her guests; an expensive bottle of whisky can be a symbol of good living and alcohol can provide a "framework for interaction" at a restaurant or a cocktail party. Sulkunen, *Alcohol Consumption and the Transformation of Living Conditions: A Comparative Study* 7 RES. ADVANCES IN ALCOHOL AND DRUG PROBS. 247, 276-77.

⁸ See notes 38-49 and accompanying text *infra* describing forms of cocaine.

the recent subject of a great deal of media attention, much of it exaggerated, even hysterical.⁹ This procedure does not warrant an assumption that appeals to common sense, but is mistaken, and must therefore be carefully avoided: the assumption that courts are strongly influenced by popular views about a particular substance in deciding cases involving parental substance misuse. For instance, the cases show that parents who use crack are generally not dealt with significantly more harshly than parents who misuse alcohol. Rather, more important than the distinction between legal and illegal drugs, more important than the kind of drug used, often more important than the amount of drug used, and sometimes more important even than the effect of a drug on parenting ability is the social and economic class of the family involved.¹⁰ In effect, statutory authorizations to declare children neglected on the basis of parental drug or alcohol misuse provide a pretext to deprive parents of parental rights because they do not live according to middle-class norms, because they are poor, uneducated or marginal.

Since most people against whom neglect proceedings are commenced are poor, since legislators have not always required a showing of harm to the child, and since courts have, in large part, failed to focus on the actual and future harm to children resulting from parental drug abuse even when required to do so, statutory references to parental drug and alcohol misuse as relevant factors in neglect proceedings operate both overinclusively

⁹ As early as 1983, *Time* began a story about cocaine use with the tale of a couple named Phil and Rita, who smoked freebase cocaine (popularly known several years later as "crack"):

Several times last year Phil stood quivering and feverish in the living room, his loaded pistol pointed toward imaginary enemies he *knew* were lurking in the garage. Rita, emaciated like her husband, had her own bogeymen—strangers with X-ray vision outside the draped bedroom window—and she hid from them in the closet.

Fighting Cocaine's Grip, *TIME*, Apr. 11, 1983, at 22.

The media response to "crack" use has been affected by the government "War on Drugs." The federal government spends five times more on drug control today (\$10 billion) than it did five years ago. Shenon, *The Score on Drugs: It Depends on How You See the Figures*, *N.Y. Times*, Apr. 22, 1990, § 4, at 6, col. 1. And the public views drugs to be the country's most serious problem. *Id.*

¹⁰ Social and economic class and "parenting skills," as perceived by courts or social workers, are often not clearly separated. To some extent, the way a person effects the role of parent is a product of his or her social and economic class. Moreover, views about proper parenting are heavily biased by class affiliations. See, Brazelton, *Why is America Failing Its Children?*, *N.Y. Times*, Sept. 9, 1990, § 6 (Magazine), at 41.

and underinclusively. The references operate overinclusively in that they work to remove custody from parents who would serve their children better than any available alternative; they operate underinclusively in that they fail even to identify a set of cases—mostly involving middle class parents—potentially entailing harm to children as a result of parental drug or alcohol abuse.

This Article begins in Part II by reviewing research about the actual effects of parental alcohol and crack use on children. Part III then considers the statutory and judicial responses to crack or alcohol use by parents in neglect proceedings. The consequences of those responses for children form the focus of Part IV, which suggests that the best interests of the child are often slighted by judicial interpretations which presume that parents and children are adversaries and that identification of parental misconduct is the core of the judicial task in neglect cases. Finally, Part V suggests that statutory schemes be revised to encourage judicial concentration on harm to the child rather than on parental misconduct, that courts be urged to interpret statutory schemes accurately and reserve coercive intervention for cases of abuse or serious neglect, and that new and expanded prevention and treatment services be provided to parents who misuse drugs or alcohol.

Many of the problems highlighted and discussed in this Article inhere in the child welfare system in general, not merely in cases involving parental substance misuse. To the extent that this is so, such cases illustrate forcefully a more general set of problems.

I. PARENTS WHO ABUSE ALCOHOL OR CRACK¹¹

Both alcohol and crack cocaine¹² pose major health

¹¹ For the most part, in this Article the term "drugs" is used to refer to illegal substances such as opiates and cocaine; however, the research for the Article was based largely on cases involving "crack" cocaine. See notes 38-49 and accompanying text *infra* (describing the distinction between crack and other forms of cocaine).

¹² Cocaine is the only drug known to work as a local anaesthetic and as a central nervous system stimulant. A. WASHTON, COCAINE ADDICTION 10, 11 (1989). As an anesthetic, it is similar to novocaine and xylocaine, commonly used in dental work. *Id.* at 11. Cocaine's central nervous system consequences are mediated by its effects on two neurotransmitters, norepinephrine and dopamine. It is currently believed that cocaine increases the release of these neurotransmitters at neural synapses and prolongs their ef-

problems in the United States.¹³ Both have serious economic, social and psychological consequences for users and for society,¹⁴ and both can disturb the functioning of families and of the parent-child relationship. Unfortunately, on the basis of these facts, courts all too frequently utilize alcohol or drug misuse as a handle for depriving poor or working-class parents of their parental rights in cases in which the children's best interests are not served by separation from the parents.¹⁵

A. Alcohol

Alcohol is, and from the beginning has been, *the* American drug.¹⁶ Views of alcohol have been almost as various as its use has been consistent in the United States.¹⁷ There is voluminous

facts. *Id.* at 11-12.

¹³ Pattison & Kaufman, *The Alcoholism Syndrome: Definitions and Models*, in ENCYCLOPEDIA HANDBOOK OF ALCOHOLISM 3 (E.M. Pattison & E. Kaufman eds. 1982) (alcoholism is the third most prevalent public health problem in United States). Alcohol can affect almost every organ in the body and is particularly harmful to the liver, causing or helping to cause fatty liver, alcoholic hepatitis and cirrhosis; U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SEVENTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 107 (1990) [hereinafter ALCOHOL AND HEALTH]; M. GOLD, 800-COCAINE (1984) (describing crack as dangerous because it creates immediate high and is sold in affordable quantities). Shuster, *Hepatotoxicity of Cocaine in Mechanisms of Cocaine Abuse and Toxicity*, in RESEARCH MONOGRAPH 88, 250, (National Institute on Drug Abuse) (cocaine causes fatty necrosis of the liver); American Academy of Pediatrics and Center for Advanced Health Studies, SUBSTANCE ABUSE 140 (1988) [hereinafter SUBSTANCE ABUSE] (cocaine can, but rarely does, cause serious somatic complications including stroke, respiratory arrest, cardiac arrhythmias and hypertension).

¹⁴ ALCOHOL AND HEALTH, *supra* note 13, at 174 (cost of alcohol abuse expected to rise to \$150 billion per year by 1995); Kerr, *Addiction's Hidden Toll: Poor Families in Turmoil*, N.Y. Times, June 23, 1988, at A1, col. 1 (describing disintegrating social fabric in many poor and working-class families due to crack).

¹⁵ Most children adjudged neglected are separated from their parents and removed to foster care. See note 1 *supra*; Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 644-46. Typically, foster care placements are temporary, and children are moved many times among different foster homes. The child is thereby deprived of the possibility of forming any permanent attachments and sense of stability. Donahue, *supra* note 6, at 18 (1981).

¹⁶ Even in the colonial period, Americans used alcohol liberally, but in that time, drunkenness was not linked with "violence, crime, or even rowdiness." H. FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE* 14-15 (1988). Cahalan & Cisin, *Drinking Behavior and Drinking Problems in the United States*, in SOCIAL ASPECTS OF ALCOHOLISM 76 (B. Kassin & H. Begleiter eds. 1976) [hereinafter SOCIAL ASPECTS OF ALCOHOLISM].

¹⁷ SOCIAL ASPECTS OF ALCOHOLISM, *supra* note 16, at 78. The National Household

literature about the effects of alcohol on the spousal relationship.¹⁸ There has been less, though significant, research about the effects of alcohol intergenerationally.¹⁹ Although some reports have associated excessive parental alcohol use with violent child abuse, most parents who drink excessively do not abuse their children. Nonetheless, children of parents who misuse alcohol may be harmed by neglect rather than abuse. It is difficult to draw firm conclusions from the few studies that do report a causal connection between alcoholism²⁰ and serious harm to children because they tend to be methodologically flawed. Many of these studies have relied on populations identified through social service or treatment programs. Relying on the reports of such agencies is risky for several reasons. First, they tend to label as alcoholic, parents (especially fathers) who harm their children and who drink, more quickly than parents who do not harm their children but who drink no less.²¹ Second, they have a correlative tendency to define parental behavior differently in cases

Survey on Drug Abuse reported in 1988 that, in the month before the Survey interviews were carried out, 53.4% of the total American population over age 12 had used alcohol. NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, U.S. Dep't of Health and Human Services, Table 13-A, at 83 (1989). And in 1979, nine million adults in the United States were reported to be alcoholics. Steinglass, *Family Therapy with Alcoholics: A Review in FAMILY THERAPY OF DRUG AND ALCOHOL ABUSE* 147 (E. Kaufman & P. Kaufman eds. 1979).

¹⁸ See, e.g., Orford, *Alcohol and the Family* in RESEARCH ADVANCES IN ALCOHOL AND DRUG PROBLEMS 82-95 (L. Kozlowski et al. eds. 1990) (review of literature on alcohol's effects on marriage); Ablon, *Family Structure and Behavior in Alcoholism* in SOCIAL ASPECTS OF ALCOHOLISM, *supra* note 16 (review of literature on alcohol's effect on husband-wife relationship).

¹⁹ See, e.g., Orford, *supra* note 18, at 95-113 (reviewing literature on alcohol's intergenerational effects); Ablon, *supra* note 18, at 226-27 (reviewing literature about children of alcoholics).

²⁰ "Alcoholism" has been defined as "chronic, heavy drinking that causes social or physical damage." Barry, *A Psychological Perspective on Development of Alcoholism*, in ENCYCLOPEDIA OF ALCOHOLISM 529 (E.M. Pattison & E. Kaufman eds. 1982). However, others argue that it is extremely difficult, if not impossible, to define alcoholism or distinguish "alcoholics from others who drink liquor." Pattison & Kaufman, *supra* note 13, at 4. One commentator on the National Council on Alcoholism's (NCA) diagnostic criteria wrote: "All attempts to identify and define 'alcoholism' have failed because the concept itself is fundamentally flawed. 'Alcoholism' exists in our language and in our minds but not in the objective world around us." Rohan, *Comment on the NCA Criteria Study*, 39 J. OF STUD. ON ALCOHOLISM 211 (1978).

²¹ ALCOHOL AND HEALTH, *supra* note 13, at 174; Leonard & Jacob, *Alcohol, Alcoholism, and Family Violence*, in HANDBOOK OF FAMILY VIOLENCE 383-406 (V. Van Hasselt ed. 1988).

in which it is known that a parent does drink.²² Moreover, most studies reporting a link between parental drinking and serious harm to children have failed to explain what criteria were employed to identify alcohol dependence and to explain whether and how intoxication was determined to have existed at the time harm to the child occurred.²³

Studies that have reported negative intergenerational effects as a result of parental alcohol misuse have often described situations of emotional neglect.²⁴ Often in households in which a parent drinks heavily, children are exposed to significant marital tension. For instance, one study reported that the vast majority of children in homes with an alcoholic parent listed "parental fighting and quarrelling" as their primary worry; only a small minority listed "drinking" or "drunkenness" *per se*.²⁵ And it is often difficult to determine whether alcoholism has caused, or is primarily a response to, family dysfunctions.²⁶ Another study found young adults whose parents had misused alcohol recalled childhoods of "arrangements gone wrong," "lack of social life for the family," "being forced to participate in rows between parents" and "having to take care of a parent."²⁷ As a result of disruption in family life, children of alcoholics have been found to exhibit a variety of psychological problems, but these problems

²² ALCOHOL AND HEALTH, *supra* note 13, at 174.

²³ *Id.*; Orme & Rimmer, *Alcoholism and Child Abuse: A Review*, 42 J. OF STUD. ON ALCOHOLISM 273 (1981).

²⁴ The National Institute of Alcohol Abuse and Alcoholism describes emotional neglect as a situation in which

[t]he child cannot communicate with his parent(s), he gets no emotional support from them, he does not get the feeling that they care about him as a person; the parents ignore the child's basic emotional needs, they do not make an effort to understand him, they spend little or no time with him, they give him no affection or warmth, they build a wall around themselves blocking any communicable interaction.

American Humane Association, *Highlights of Official Child Neglect and Abuse Reporting 1982* (1984) (quoted and cited in ten Bensel, *supra* note 6, at 26). ten Bensel concludes that about one-third of the children living in homes with an alcoholic parent "will have measurable behavioral changes in their school work and intellectual functioning. . . ." *Id.*

²⁵ R. CORK, *THE FORGOTTEN CHILDREN: A STUDY OF CHILDREN WITH ALCOHOLIC PARENTS* (1969); Orford, *supra* note 18, at 96.

²⁶ See Kaufman & Pattison, *The Family and Alcoholism* in *ENCYCLOPEDIA OF ALCOHOLISM* 663, 664-65 (E.M. Pattison & E. Kaufman eds. 1982).

²⁷ Orford, *supra* note 18, at 96.

do not exhibit a single pattern.²⁸

The most consistent finding concerning the intergenerational effects of parental alcohol misuse is that the child of an alcoholic is at risk of becoming an alcoholic.²⁹ This is so whether or not the child is raised by the alcoholic parent. However, the risk of the child's becoming an alcoholic is greater if the child is raised by the parent.³⁰

One study, carried out in Czechoslovakia, compared two hundred children whose fathers had registered at an alcoholic counseling center with children without alcoholic parents.³¹ The research revealed a number of "significant differences" between the two groups of children. In particular, in the families with alcoholic fathers, the fathers were relatively uninvolved in child rearing, and this absence was not compensated by a stronger mother-child bond. In a second report, lower verbal I.Q. scores and more social maladjustment were noted among the children with alcoholic fathers than among the children in the matched control group.³²

Studies on the long-term effects of parental drinking on adults who grew up in homes with alcoholic parents offer inconclusive results. A number of studies have found that excessive drinkers are likely to have had alcoholic parents.³³ Some studies have linked having an alcoholic parent with an increased likelihood of depression and deviance in adulthood.³⁴ However, other studies report that although adults whose parents had drinking problems may remember their childhoods as unstable and unhappy, their adjustment as adults is not significantly different than that of a comparable group of adults whose parents did not

²⁸ Black & Mayer, *supra* note 6, at 86.

²⁹ *Id.*

³⁰ *Id.*

³¹ Matejcek, *Children in Families of Alcoholics, I. The Rearing Situation*, 16 *PSYCHOLOGY PATOPSYCHOLOGY DIETATA* 303-18 (1981) (translated for and described in Orford, *supra* note 18, at 96-97). The results of Matejcek's studies must be interpreted in light of the fact that the families with alcoholic fathers were selected from a population that had registered at an anti-alcoholic treatment center. As a result, the research population may not be representative of most families with alcoholic fathers.

³² Matejcek, *Children in Families of Alcoholics. II Competency in School and Peer Group*, 16 *PSYCHOLOGY PATOPSYCHOLOGY DIETATA* 537-60 (1981) (translated for and described in Orford, *supra* note 18, at 100).

³³ Orford, *supra* note 18, at 103.

³⁴ *Id.* at 112.

abuse alcohol.³⁵ One study, conducted in Iceland, has even suggested that the children of alcoholics may develop special skills and ambitions as a reaction to parental drinking.³⁶

As a whole, the evidence suggests that although the children of alcoholics may suffer a variety of difficulties during childhood and in later years, such children are unlikely to be battered, and often, as adults, are indistinguishable as a group from people whose parents did not misuse alcohol. Certainly, coercive state intervention in cases involving parental alcohol misuse, absent a showing of serious harm to the child, is not warranted on the basis of research on alcohol's intergenerational effects.³⁷

B. Crack Cocaine

Crack, or freebase cocaine, is one of four available forms of cocaine. Coca leaf is the form that provides the gentlest drug. Chewed by workers in the Andes for centuries, the coca leaf diminishes hunger and fatigue and produces a general sense of well-being.³⁸ The second form of cocaine, coca paste, is the first product extracted from coca leaves in the manufacture of cocaine.³⁹ Coca paste or "basuca" is smoked in a pipe or crumbled to form a cigarette and is a dangerous form of cocaine. It is not widely available in the United States at this time.⁴⁰ Traditionally most cocaine available in the United States was sold as cocaine hydrochloride powder, known popularly as "street cocaine."⁴¹ In this form, cocaine can be snorted or injected

³⁵ *Id.* at 108 (reporting results of a study by Velleman and Orford). See also Velleman & Orford, *Intergenerational Transmission of Alcohol Problems: Hypotheses to Be Tested*, in *ALCOHOL RELATED PROBLEMS: ROOM FOR MANOEUVRE* 97-113 (N. Krasner ed. 1984).

³⁶ Karlsson, *Mental Characteristics of Families with Alcoholism in Iceland*, 102 *HEREDITAS* 185-88 (1985) (described in Orford, *supra* note 18, at 108-09). Close relatives of hospitalized alcoholics were overrepresented in *Who's Who in Iceland* and achieved particular success in fields requiring communication or socialization skills.

³⁷ The American Bar Association's STANDARDS RELATING TO CHILD ABUSE AND NEGLECT premise "coercive state intervention" upon "specific harms that a child has suffered or is likely to suffer." Institute of Judicial Administration, American Bar Association, *Juvenile Justice Standards*, A.B.A. Standards Relating to Child Abuse and Neglect 15, § 1.2 (rev. ed. 1990) (prepared under auspices of, but not adopted by, A.B.A.) [hereinafter A.B.A. Standards].

³⁸ D. MACDONALD, *DRUGS, DRINKING AND ADOLESCENTS* 69 (2d ed. 1989).

³⁹ *Id.*

⁴⁰ A. WASHTON, *supra* note 12, at 20.

⁴¹ *Id.* at 11.

intravenously. The fourth form, crack, is prepared from cocaine hydrochloride but unlike the powder, can be smoked, producing a more immediate and intense high.⁴² With the use of baking soda, heat and water, cocaine powder can be transformed easily and inexpensively into crack. Before crack was readily available on the illicit drug market, cocaine could only be smoked by those able to convert cocaine powder into the freebase form.

The effects of smoking cocaine differ in several important ways from the effects of inhaling, or even injecting, the drug.⁴³ Smoking produces an almost instantaneous high and an intense euphoric reaction due to the quick absorption of cocaine through the lungs.⁴⁴ However, the high from smoking cocaine lasts only a few minutes and is followed by a period of depression and irritability.⁴⁵

Smoking cocaine may be an attractive alternative to snorting or injecting the drug in a culture long addicted to cigarettes, relatively complacent about marijuana, and recently fearful of exposure to disease through drug injections. Because crack has been readily available in the United States only since 1985, there are no comprehensive studies of the intergenerational effects of crack use by a parent. To some extent, however, it is possible to reach preliminary conclusions about the effects of crack on the children of users by extrapolating from research about the effects of other drugs on the parent-child relationship, and by relying on a wide set of relatively impressionistic media reports that have considered the intergenerational effects of crack.

Chemically, crack is cocaine. Thus, to the extent that the behavior of parents who use crack results from the drug's chemical effects, those effects should not differ markedly from the effects of cocaine.⁴⁶ Most of the research on cocaine users con-

⁴² SUBSTANCE ABUSE, *supra* note 13, at 137.

⁴³ A. WASHTON, *supra* note 12, at 14-16.

⁴⁴ SUBSTANCE ABUSE, *supra* note 13, at 137. According to Dr. Herbert Kleber of Yale University, "the euphoria is a function not just of the blood level of cocaine but of the rate of change. . . . You can take in a lot of cocaine, like the Indians did when they chewed cocoa leaves all day, and have very high blood levels. But there would be no euphoria. It would have an effect like caffeine. . . . The most efficient way to raise the cocaine level quickly is by smoking cocaine." Kolata, *Drug Researchers Try to Treat a Nearly Unbreakable Habit*, N.Y. Times, June 25, 1988, at A1, col. 4.

⁴⁵ A. WASHTON, *supra* note 12, at 14.

⁴⁶ This statement must be qualified to some extent. Chemically, crack is simply one form of cocaine. However, crack, absorbed through the lungs, has an almost instantane-

ducted in the 1970s and early 1980s dealt with comparatively affluent populations. As a probable consequence of that fact, cocaine users were found to be ambitious and hard working.⁴⁷ Later work with less affluent cocaine users revealed a far greater similarity to the "‘down-and-out’ alcoholic or the ‘street junkie’ state of heroin addiction."⁴⁸ Crack, unlike cocaine hydrochloride, tends to be purchased and used by poor, working-class people.⁴⁹ Snorting remains the mode of ingestion preferred by middle-class and wealthy cocaine users. Thus, to the extent that the effects of a drug are mediated by class and other sociological factors, the intergenerational effects of crack might differ from those of other forms of cocaine.

In general, there has been little research on the effects of illegal substance abuse on the children of users.⁵⁰ However, the research that does exist suggests that, as with parents who use alcohol excessively, those who use illegal drugs, including crack,⁵¹ are much more likely to neglect, than to abuse, their

ous effect on the brain. The sudden burst of cocaine to the brain produces a euphoric reaction in crack users unequalled by that produced in users of other forms of cocaine. It is possible, though at present uninvestigated, that the rapid absorption of crack results in behavioral differences between those who smoke cocaine and those who snort or inject the drug.

⁴⁷ E. KAUFMAN, *SUBSTANCE ABUSE AND FAMILY THERAPY* 18-19 (1985) (describing study of family patterns of cocaine users).

⁴⁸ H. SPITZ & J. ROSECAN, *COCAINE ABUSE: NEW DIRECTIONS IN TREATMENT AND RESEARCH* 209 (1987).

⁴⁹ P. Kerr, *Addiction's Hidden Toll: Poor Families in Turmoil*, N.Y. Times, June 23, 1988, at A1, col. 1.

⁵⁰ There has been more research on the prenatal effects of crack than on the effects of parental crack use on living children. Infants whose mothers used cocaine during pregnancy exhibit low birth weight and below average length and head circumference. Fink, *supra* note 1, at 4. However, by the age of two, such children show normal growth patterns. *Id.* Congenital malformations have been found in babies exposed to cocaine in utero. However, no clear causal connection has been established. In addition, cocaine-exposed babies exhibit neuro-behavioral defects, including problems in relating to their environment. It has not yet been determined whether this damage will be permanent. *Id.*

⁵¹ For several years, media reports suggested that crack is unlike other illegal drugs, that it eviscerates "maternal instinct" and produces violent parents and that crack addiction is uncontrollable. Polsky, *An Instinct for Survival*, Newsday, Nov. 5, 1989 at 6. In fact, the small amount of research, mostly impressionistic, that has been done suggests that crack's behavioral effects are not very different from those of other illegal drugs except that crack's short "half-life"—a crack high lasts only minutes—produces a more immediate need for more. See notes 44-45 and accompanying text *supra*. The media may be starting to shift its tone about crack. Recent reports suggest that the cocaine—including crack—"epidemic" is waning. Treaster, *U.S. Cocaine Epidemic Shows Signs of Waning*, N.Y. Times, July 1, 1990 at A14, col. 1, and that addicted crack users

children.⁵² One study reported that, in general, the effects on children of parental drug use are quite similar to those of parental alcohol use.⁵³ In both cases, the researchers concluded, children are apt to experience anxiety and stress and to exhibit increased antisocial behavior and decreased academic performance as the parent's drug or alcohol use increases. However, there is significant disagreement among researchers about the extent to which drug use correlates with neglect.⁵⁴ Black and Mayer concluded, as the result of a study of two hundred alcoholics and opiate addicts that, although neglect and abuse do occur among the children of such addicts, many such addicts neither abuse nor seriously neglect their children.⁵⁵ Instead, Black and Mayer's research suggests that a set of risk factors correlates with the appearance of child abuse and neglect by addicted parents. These factors include the sex of the addicted parent, the extent of violence between spouses, poverty and the absence of financial and social assistance.⁵⁶ Thus, neither drug use nor addiction, per se, produces neglect. Rather, Black and Mayer's work suggests that neglect is the product of a number of factors, drug use and poverty among them.

Obviously important to good parenting is a person's incentive to be a parent. To the extent that drug use decreases such incentive, a drug user's capacity to be a good parent will diminish. The research about the effects of drug use on users' parental motivation is inconclusive. Although some researchers have concluded that addicts tend to lose parental motivation,⁵⁷ others suggest that drug users are often highly motivated to care for their children.⁵⁸

can be treated successfully. O'Connor, *Getting It Together: Rehab Center Helps Mother Kick Drug Habit, Regain Children*, L.A. Times, Dec. 24, 1989 at B1, col. 2.

⁵² See note 6 *supra*. It is with these children—not those who are physically or mentally abused—that this paper deals.

⁵³ Ziegler-Driscoll, *The Similarities in Families of Drug Dependents and Alcoholics*, in *FAMILY THERAPY OF DRUG AND ALCOHOL ABUSE* 19, 37-38 (E. Kaufman & P. Kaufman, eds. 1979).

⁵⁴ Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 *STAN. L. REV.* 745, 766 (1990).

⁵⁵ Black & Mayer, *Parents with Special Problems: Alcoholism and Opiate Addiction*, 4 *CHILD ABUSE & NEGLECT* 45 (1980).

⁵⁶ *Id.* at 51.

⁵⁷ Robin-Vergeer, *supra* note 54, at 765; Densen-Gerber & Rohrs, *Drug-Addicted Parents and Child Abuse*, 2 *CONTEMP. DRUG PROBS.* 683, 687-93 (1973).

⁵⁸ Carr, *Drug Patterns Among Drug-Addicted Mothers: Incidence Variance in Use*

The recent media attention to crack suggests that crack absolutely deprives parents—especially mothers⁵⁹—of any continuing interest in being parents.⁶⁰ However, other accounts differ and suggest that crack, with certain qualifications, is more similar to other drugs in this regard than different from them.⁶¹ The cycle of compulsive behavior associated with crack use can lead to child neglect. However, that neglect is often not the serious sort that warrants coercive state intervention.⁶²

Although no comprehensive research projects have been conducted yet on how crack affects the parent-child relationship, the evidence that exists suggests that parents addicted to crack may neglect their children physically and emotionally in the compulsive effort to obtain the drug. However, that neglect does not generally justify coercive intervention. Certainly, there is no evidence supporting the automatic or widespread removal of

and Effects on Children, 4 PEDIATRIC ANN. 65 (1975).

⁵⁹ It is argued that crack is more dangerous than other drugs because a disproportionate number of women are crack users. Besharov, *Let's Give Crack Babies A Way Out of Addict Families*, *Newsday*, Sept. 3, 1989 at 4. This assertion can provide a pretext for punishing mothers who use crack before harm to their children is shown. The claim that crack is especially dangerous because women use this drug can have complicated and not entirely expected consequences. The "aura of crisis" surrounding crack babies does not, for instance, appear to be motivated by a real concern with healthy pregnancies or healthy babies. Katha Pollitt writes:

Judges order pregnant [women who use drugs] to jail but they don't order drug treatment programs to accept them, or Medicaid, which pays for heroin treatment, to cover crack addiction. . . . The focus on maternal behavior allows the government to appear to be concerned about babies without having to spend any money, change any priorities or challenge any vested interests.

Pollitt, *A New Assault on Feminism*, *The Nation*, Mar. 26, 1990 at 410-11. Judges, of course, do not have the power Pollitt attributes to them. However, the legal system as a whole, and legislatures, in particular, do.

⁶⁰ Bollinger & Pierson, *Number of Foster-Care Drug Babies Zooms*, *N.Y. Post*, May 10, 1990, at 4, col. 1 (mothers who use crack abandon babies to "run back to their drug haunts"); M. Crosson, *Devastating Effects of the Crack Crisis Infect Every Community in New York*, *N.Y.L.J.*, May 1, 1990, § 3 at 38, col. 3 (some mothers who use crack "do not know how to parent").

⁶¹ Dr. Janet Mitchell suggests that the crucial factor in understanding crack's effects on parents is that crack use, like other drug or alcohol use, is a form of compulsive behavior. As such, the use of the drug can detract from the user's normal and prior interests and activities. To the extent that crack differs from other drugs with regard to its effects on parental motivation, it is because the half-life of crack is very short. As a result, the cycle of compulsive behavior, including the need to obtain increasing quantities of the drug, is speeded up. For instance, a heroin high lasts three to four hours but a high produced by crack lasts only minutes. Telephone interview with Dr. Janet Mitchell, Chief of Dep't of H. Hospital, July 11, 1990.

⁶² See notes 1-5 and accompanying text *supra*.

children from parents addicted to crack.

II. THE LAW'S RESPONSE TO PARENTS WHO ABUSE ALCOHOL OR DRUGS

In the last fifteen years, American family law has undergone an enlightened change in the direction of requiring courts to focus on children rather than parental misconduct in neglect proceedings.⁶³ Increasingly, a showing of harm to the child has become a prerequisite for coercive state intervention. That is, many neglect statutes now preclude intervention except in cases of actual or imminent harm to the child, whatever the other compelling grounds for intervention.⁶⁴ Thus, in theory at least, coercive intervention in many states cannot be predicated upon parental misconduct, however egregious or bizarre, unless actual or imminent harm to the child has been shown.⁶⁵

Unfortunately, however, many state statutes have been formulated to subvert themselves. These statutes do mandate harm—and often a likelihood of future harm—as the precondition of intervention. But by preserving references to parental misconduct, such as drug or alcohol abuse, as factors to consider in neglect determinations, statutory law countenances judicial concentration on parental misconduct, thereby undermining the express requirement that harm to the child be a *sine qua non* of

⁶³ Robin-Vergeer, *supra* note 54, at 759-60.

⁶⁴ The A.B.A. STANDARDS RELATING TO ABUSE AND NEGLECT begin by describing family autonomy: "Laws structuring a system of coercive intervention on behalf of endangered children should be based on a strong presumption for parental autonomy in child rearing. Coercive state intervention should occur only when a child is suffering specific harms. . . ." A.B.A. Standards, *supra* note 37, at 15, § 1.1 (1990). The commentary to the section reads:

[A] presumption in favor of parental autonomy comports with our limited knowledge regarding childrearing and ways to effect long-term change in a given child's development. . . . We have no agreed upon values about the "proper" way to raise a child. The best we can do is establish certain basic harms from which all children should be protected.

Id. at 50.

⁶⁵ The trend today is toward requiring not just a showing of harm to the child but a finding that the child is threatened with future harm as well. For instance, the A.B.A. STANDARDS RELATING TO ABUSE AND NEGLECT provide: "The fact that a child is endangered in a manner specified in Standard 2.1 A.-F. should be a necessary but not sufficient condition for a court to intervene. To justify intervention, a court should also have to find that intervention is necessary to protect the child from being endangered in the future. . . ." A.B.A. Standards, *supra* note 37, at 17, § 2.2.

intervention.

As a result of statutory references to parental misconduct, courts often lose sight of the mutually cognizable and interrelated interests of parents and children in cases involving parents who misuse alcohol or drugs. Consequently, such cases often begin to resemble criminal proceedings against errant parents.

The effects of references to parental misconduct in neglect statutes are intensified by a number of independent factors. For instance, neglect proceedings in general, and those brought against parents who misuse alcohol or drugs in particular, are almost always brought against poor parents, most of whom are receiving welfare.⁶⁶ Longstanding differences in the way American family law treats the rich and the poor⁶⁷ have affected the law's approach to neglect proceedings. Historically, the legal system did not distinguish between poor parents and bad parents.⁶⁸ Today, although the distinction is paramount in theory, it is often blurred in practice. Thus, poor parents who abuse drugs or alcohol are likely to be viewed by courts through a set of negative stereotypes which may appear to obviate the need for careful examination of particular cases.

In contrast, the drug or alcohol habits of middle class families are rarely investigated by the state, or made the subject of neglect proceedings in court. And, if they were, they might well not be considered adequate grounds for neglect determinations in the vast majority of cases.⁶⁹ Courts do, of course, consider al-

⁶⁶ Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 436 (1983); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1020-21 (1975). Wald estimates that "probably 75% of neglecting families seen by agencies have incomes below the poverty level; half may be on welfare. Blacks are highly overrepresented." *Id.* at 1021 n.186.

⁶⁷ Garrison, *supra* note 66, at 432; ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 262 (1964) (referring to the "family law of the poor").

Traditionally, in England and in America until the mid-nineteenth century, children were removed from parental custody because the parents were poor and no heed was paid to the significance of the parent-child relationship. The whole temper of the foster care system as well as the way courts handle abuse and neglect cases to this day is affected by that history. Garrison, *supra* note 66, at 434-37.

⁶⁸ Garrison, *supra* note 66, at 434-37.

⁶⁹ Much less information is available about the way the legal system deals with substance abuse by middle-class parents than by poor parents because such abuse is rarely referred to the legal system in the form of neglect petitions. An investigation of how courts do deal with middle-class parents who abuse alcohol or drugs and a comparison between that situation and the situation of poor parents would offer significant insights.

cohol or drug misuse by middle-class parents in custody cases. These cases differ from the cases with which this Article is concerned because they are initiated by the divorcing parents, not by the state.⁷⁰

Courts also tend to focus on parental misconduct rather than on the harm such misconduct may cause the child, for a simple reason: it is easier. Judges are not trained in psychological theory, nor are they chosen especially for their insights into people.⁷¹ Reaching conclusions about one person's behavior is obviously simpler than reaching conclusions about the effects of behavioral interactions between parents and children.⁷² Correlatively, judges are almost inevitably influenced by their own values. Because the difference between good values and bad ones—or between fairly good ones and fairly bad ones—cannot often be demarcated, courts should be discouraged from focusing on parental misconduct in neglect determinations; they should be discouraged from any approach that permits the parents' values—and the child's welfare—to be subordinated to the judge's values.

In all likelihood, most cases involving middle-class parents that do get referred to the legal system are dealt with quietly and quickly, without formal hearings and permanent case records. To a significant extent, money can mask alcohol or drug abuse, providing a safeguard against official inquiries and state intervention.

In cases in which neglect by poor parents is serious enough to require some form of intervention but not so serious as to warrant removal, intervention should be aimed at providing the parents with the sort of resources and knowledge that typically protect middle-class parents from coercive intervention in the first place. See Garrison, *supra* note 3, at 1809-10 (arguing that poor parents should be allowed to place child in foster care and not thereby lose right to regain custody just as middle-class parents can send child to boarding school or place child with a family member or friend without losing right to bring child home again).

⁷⁰ Judicial responses to alcohol or drug misuse in custody cases is beyond the scope of this Article. However, a comparison between such cases and neglect cases would probably provide insights about the significance of class in both sorts of cases.

⁷¹ See note 83 *infra*.

⁷² To some extent, it is precisely this difficulty that appears to justify legislative delineation of parental misbehaviors. However, the increased ease in judicial determinations is not worth the consequences. Judges should not be encouraged to view the job of resolving neglect determinations as an easy job in any sense. It is clearly a job that, to be done well, requires the greatest perceptivity and remarkable attention to the mutual consequences of human interaction.

Concomitantly, the very difficulty inherent in deciphering the short- or long-term effects of parental behavior on children suggests that courts should refrain as much as possible from focusing on parental behavior and focus instead on protecting children from "certain basic harms." A.B.A. Standards, *supra* note 37, at 50.

A. Statutory Provisions

In 1975, Michael Wald wrote critically that "most neglect statutes define neglect in terms of parental behavior."⁷³ This is no longer the case. Most states now require a showing that a child does or will face harm before the child can be declared neglected and the state can intervene to remove the child from his or her parents.⁷⁴ In reality, however, things have not changed that much. Even those statutes that do explicitly require a showing of harm before a child can be declared neglected still can be, and frequently are, read by courts so that the focus of the proceedings is on parental misconduct, not on harm to the child. Even if a showing of harm is a prerequisite for state intervention, the alleged harm and threat of harm, once identified, are often forgotten while courts make parental misconduct the crucial subject of inquiry.⁷⁵ In short, courts should not be encouraged to *assume* that parental misconduct entails harm to the child. Rather, in cases in which coercive intervention is contemplated, courts must be required to make specific independent findings of harm.

The most enlightened neglect statutes predicate coercive intervention on a showing of serious harm to the child *and* do not refer to parental misconduct, including alcohol and drug misuse, as factors for courts to consider in neglect proceedings. The A.B.A. Standards Relating to Abuse and Neglect offer a model of this kind of statute.⁷⁶ The Standards preclude coercive intervention unless a child has been and will be endangered in a specified manner, and no mention is made of parental misconduct.⁷⁷

In contrast, New York's statute, which follows the Standards in precluding neglect determinations without a showing of harm to the child,⁷⁸ refers explicitly to drug and alcohol use as

⁷³ Wald, *supra* note 66, at 1007.

⁷⁴ Robin-Vergeer, *supra* note 54, at 759-60.

⁷⁵ See notes 95-173 and accompanying text *infra* (reviewing judicial interpretations of statutes naming alcohol or drug use as factor in abuse and neglect cases).

⁷⁶ For an example of such a statute actually in effect see WASH. REV. CODE ANN. § 26.44.020(12) (1990) (defining child neglect to preclude any consequences which do not "indicate that the child's health, welfare and safety is harmed thereby").

⁷⁷ A.B.A. Standards, *supra* note 37, at 16-17 §§ 2.1-2.2.

⁷⁸ N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1983). An exception to the requirement that harm be demonstrated before a child can be declared neglected in New York is the

factors to consider in neglect proceedings.⁷⁹ New York's evidentiary provision for neglect proceedings contains an unusually detailed description of when and how drug or alcohol abuse should be taken into account by courts in neglect cases and is thus a useful statute to examine. The statute provides that in any hearing involving a child protective proceeding,

proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program.⁸⁰

The provision presumes that parental alcohol or drug misuse leading to a specified set of states including intoxication, incompetence or irrationality constitutes harm to the child. The focus in this relatively long description of conduct which, under the statute, warrants further examination and likely intervention is on parental behavior, not on harm to the child. A court, authorized to examine a parent's "irrationality" or lack of "judgment," is compelled to evaluate parental behavior, to focus on

case of abandonment. *Id.* at § 1012(f)(ii).

⁷⁹ Section 1012(f), New York's civil prosecution provision defines a "neglected child" as one

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

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . . by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired. . . .

⁸⁰ N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 1983). The section is an evidentiary provision and does not cover the dispositional phase of neglect proceedings.

the character of the parent, not on the harm that such a parent may or may not inflict on his or her child. Equally important, the provision permits wide interpretive variation. Almost every phrase in the provision can be interpreted differently depending on the particular judge and family involved. For instance, under the statute, a showing that alcohol or drug use produces "disorientation," "incompetence," "a substantial impairment of judgment," or "a substantial manifestation of irrationality," among other things, constitutes *prima facie* grounds for intervention. Terms of this sort invite excessive judicial subjectivity. Any determination of irrationality, for instance, depends on a complicated interplay of social, cultural and psychological factors that inevitably makes one person's decision about another's "irrationality" heavily dependent on subjective factors. In short, a judge asked to identify traits such as "irrationality" cannot avoid basing a decision on his or her own value judgment. Language such as "irrationality" might be applied to parents who beat their children, but it might also be applied to parents whose beliefs about children or child-rearing differ from the judge's own, but are no better or worse than the court's. In addition, terms such as "intoxication" and "hallucination" can be interpreted very differently depending on the particular judge and the particular case.⁸¹ Identifying such states requires objective judgments which judges are, on the whole, untrained to make.⁸²

More seriously, some courts have used the statute to allow an assumption that drug or alcohol use, *per se*, demonstrates parental unfitness and thus constitutes legal neglect. That is to say, careless courts have ignored the statute's terms and interpreted the evidentiary provision to allow coercive intervention on the basis of parental alcohol or drug use alone.⁸³

⁸¹ Although a discussion of the constitutional dimension of abuse and neglect statutes is beyond the scope of this Article, it should be noted that many abuse and neglect statutes can be called into question as susceptible to constitutional attack. *Developments in the Law: the Constitution and the Family*, 93 HARV. L. REV. 1156, 1238 (1980) (questioning, in particular, laws focusing on parental conduct or the suitability of the child's surroundings; suggesting as a "less intrusive alternative" laws that focus only on the condition of the child).

⁸² Wald, *supra* note 66, at 1001 n.98 (describing social workers and judges as having minimal specialized training in fields related to children and child welfare (citing J. HANDLER, *THE COERCIVE SOCIAL WORKER* 138 (1973) and predicting that the situation was unlikely to improve)).

⁸³ See, e.g., *In the Matter of Smith*, 128 Misc. 2d 976, 492 N.Y.S.2d 331 (Fam. Ct.

Finally, the section exempts as *prima facie* evidence of neglect drug or alcohol use by parents who have voluntarily entered rehabilitative programs which they regularly attend. Presumably, an assumption behind this statutory exemption is that such parents are likely to improve with treatment and that their initiative in accepting treatment suggests a wish to care for their children.⁸⁴ However, the exemption, although appearing to provide a safe haven, forces parents to choose between losing their children or entering state-administered or supervised rehabilitative programs. The presumption that such participation is "voluntary" is unwarranted and harms the parties involved. By insisting that treatment is voluntary when it is not, courts and social service agencies erect a set of expectations that cannot be met. Many alcohol and drug rehabilitation programs, especially those built on the model of Alcoholics Anonymous, are unlikely to be successful with unwilling clients.⁸⁵ Forced to enter "voluntary" treatment, such people are less likely than truly voluntary (typically, middle class) clients to be served by the treatment provided. As a result, the legal system is apt to exact punishment from such parents when, unaided by the state-provided treatment programs as they are presently constituted, the parents return to court still addicted. This subjects them to the specious argument that, since they have not responded to treatment,⁸⁶ intervention is justified.

1985). See notes 160-166 and accompanying text *infra* (describing *Smith* court's misreading of New York's provision regarding parents who use drugs or alcohol).

⁸⁴ An argument in favor of the exemption when it was proposed in 1981 was its role in encouraging addicted parents, who might otherwise fear losing custody of their children, to seek treatment. See, e.g., Letter from A. Thomas Storace, Assistant Counsel for the N.Y.S. Division of Substance Abuse Services to The Honorable John G. McGoldrick, Counsel to the Governor (July 9, 1981) (discussing N.Y. proposed bill A.6716-c; Memorandum from N.Y.S. Council on Children and Families concerning proposed bill A.6716-C, July 9, 1981). The argument is sound, but the exemption can only be truly effective if treatment programs are modified to suit the specific needs of neglectful parents seeking treatment, not voluntarily, but as the result of state intervention. See text accompanying notes 207-225 *infra* (recommending that treatment programs be redesigned to meet the special needs of neglectful parents who misuse alcohol or drugs).

⁸⁵ See notes 212-214 and accompanying text *infra*.

⁸⁶ See, e.g., In the Matter of McFarland, No. 88-A-1408 at 6 (Ohio Ct. App. May 18, 1990) (LEXIS, States library, Ohio file) (clear and convincing evidence of father's neglect of his children found. "The record is replete with numerous instances . . . to indicate the mental problems and alcohol abuse problems of the appellant [father] and his failure to ameliorate those problems by taking advantage of medication, services and counseling provided for him."); In the Matter of Ronald Y.Y., 101 A.D.2d 895, 475 N.Y.S.2d 597 (3d

While New York's statute is more detailed than most concerning the relevance of drug and alcohol misuse, it is not atypical in its effects. For instance, the Rhode Island statute premises a neglect determination upon a showing of harm or the threat of harm to the child.⁸⁷ The statute goes on to define a "neglected child" as, among other things, one whose parent fails to provide the child with care because of "social or psychiatric problems or disorders, mental incompetency, or the use of a drug, drugs, or alcohol."⁸⁸ Similarly, in California, parental substance abuse is a factor that courts are directed to take into account in declaring a child a "dependent child of the court." In order to reach such a declaration there must be a "substantial risk that the minor will suffer serious physical harm or illness" or the child must have already suffered such harm.⁸⁹ The comparable Minnesota statute no longer expressly mentions alcohol or drug use but gives courts ample room to terminate parental rights on grounds of excessive substance abuse.⁹⁰ The statute premises termination on a judicial finding that "a parent is palpably unfit to be a party to the parent and child relationship because of a consistent pattern of specific conduct before the child or of conditions directly relating to the parent and child relationship either of which are determined by the court to be permanently detrimental to the physical or mental health of the child."⁹¹

In a number of other states, the likelihood that courts will focus on parental misconduct is even greater because in these states the statutes do not require an independent showing of harm before a child can be declared neglected. For instance, in Kansas, once a child is adjudicated a "child in need of care," parental rights can be terminated if the parent is found unfit. In

Dep't 1984) (children of respondent mother declared permanently neglected; court stresses that petitioner devised treatment program for respondent but respondent failed to benefit from the assistance offered).

⁸⁷ R.I. GEN. LAWS § 40-11-2(2) (Supp. 1989).

⁸⁸ *Id.* at § 40-11-2(2)(e).

⁸⁹ CAL. WELF. & INST. CODE § 300(b) (West 1990) (section operative until Jan. 1, 1992).

⁹⁰ MINN. STAT. § 160.221(b)(4) (1980).

⁹¹ *Id.* The present statute replaced an earlier version which authorized termination of parental rights if "the parents are unfit by reason of debauchery, intoxication or habitual use of narcotic drugs, or repeated lewd and lascivious behavior, or other condition found by the court to be likely to be detrimental to the physical or mental health or morals of the child."

determining that a parent is unfit courts are directed to consider, among other things, "excessive use of intoxicating liquors or narcotic or dangerous drugs."⁹² A child may be declared "in need of care" if the child is, *inter alia*, "without adequate parental care, control or subsistence, "has been physically, mentally or emotionally abused or neglected or sexually abused," or has been "abandoned." Thus, no independent showing of harm to the child is required before parental rights can be terminated. The Kansas legislature appeared to assume that a child "in need of care" was a child being harmed. That assumption, even if correct in some cases, can provide the basis for the termination of parental rights only at great risk that the child's best interests will be curtailed.

In all these cases the statutory scheme allows, even invites, investigations into parental behavior and the possible loss of parental custody or termination of parental rights on the basis of highly subjective judicial determinations.⁹³ Even where statutes require a showing that the child will be harmed before intervention is permitted, the statutes' continued stress on parental behavior encourages courts to shift their attention from the interests of the child to the conduct of the mother or father.

B. *The Judicial Response*

All too often, statutory authorizations to consider drug or

⁹² KAN. STAT. ANN. § 38-1583(b)(3) (1986). The statute directs courts to review "the physical, mental or emotional condition and needs of the child" before terminating parental rights, § 38-1583(e), but does not require an independent showing of harm to the child. Thus, courts can and do determine a child's needs unmet on the grounds that the parent exhibited misconduct, including excessive alcohol or drug use. Kansas courts, following the statute, have not, in fact, premised termination of parental rights on a showing of harm to the child. *See, e.g.*, *In the Interest of B.K.W.*, 787 P.2d 741 (Kan. Ct. App. 1990) (parental rights of alcoholic mother terminated; court assumed harm to child on basis of mother's misconduct); *In the Interest of C.T.*, 777 P.2d 282 (Kan. Ct. App. 1989) (father's parental rights terminated because he had "few social skills and [was] manipulative in aggressive and intimidating ways," *id.* at 3, used drugs and alcohol excessively and failed to achieve adequate communication and contact with children; court assumed harm to children on basis of father's misconduct).

⁹³ Statutory references to parental alcohol or drug abuse can also affect a child's custody in cases in which parents are divorced. For instance, legislation has been proposed in Illinois which would require transfer of custody in cases in which the custodial parent has used marijuana or other illegal drugs. House Bill 3191 would amend Section 610 of the Illinois Marriage and Dissolution of Marriage Act. Heckelman, *Drug Use Would End Parent's Custody: Bill*, *Chic. Daily L. Bull.*, Apr. 2, 1990, at 4.

alcohol misuse as a factor in neglect proceedings provide a pretext for courts to limit or eradicate parental rights without careful consideration of whether that action serves the child's best interests. In cases in which courts are actually concerned about parental poverty or lifestyles⁹⁴ foreign to the middle class, parental alcohol or drug abuse can provide a concrete symbol of "what went wrong." For the most part, statutes no longer allow neglect determinations to be premised on a parent's social, moral or financial marginality. But they often do appear to encourage such determinations when a parent's marginality is combined with drug or alcohol abuse even where there is no convincing evidence that the parent's drug or alcohol habits cause the sort of harm to the child that warrants coercive intervention.⁹⁵ In the vast majority of cases reviewed for this Article, cases in which a parent's alcohol or drug abuse was central to a court's decision to limit or terminate parental rights, the written opinion fails to indicate that parental alcohol or drug use actually harmed the child.⁹⁶ In fact, in many cases, the opinion itself in-

⁹⁴ At one time, neglect statutes were almost all concerned with parental morality, and some states continue to include parental morality as a factor to consider in reaching a child neglect determination. Wald, *supra* note 66, at 1033. This requires courts to focus on parental behavior rather than on the welfare of the child. Moreover, as Wald asserts, "[i]t is unlikely that child-neglect laws can be used successfully to enforce social norms that society in general cannot enforce. More importantly, it is unconscionable to use children as pawns to achieve these ends." *Id.* at 1034 (footnote omitted).

⁹⁵ Because many trial court decisions in cases dealing with family matters are unpublished and the records are unavailable, this Article has relied heavily on appellate decisions. Therefore, it is only possible to know the details on which the trial court relied to the extent that they are contained in the appellate decision. In several cases for instance, dissenting or concurring appellate opinions indicated that the facts were not as clear-cut as the appellate court's easy affirmation of a lower court's termination of parental rights made it appear. See, e.g., In the Matter of C.E.W., 541 A.2d 625, 627 (D.C. 1988) (concurring opinion indicated, as court's opinion had not, that father whose parental rights were terminated had "maintained regular and consistent interest" in the child).

In addition, most cases dealing with child neglect are not appealed, and it is possible that the appellate cases are not representative of most child neglect cases. See Wald, *supra* note 66, at 1033 n.254. I would hypothesize that the bulk of the trial court cases conform to the pattern of response with regard to alcohol and drug abuse suggested in this article even more consistently than the appellate cases. Convincing demonstration of this point would require extensive participant observation in family courts, to the extent that this is possible, and interviewing lawyers and other participants in the family court processes described here about the judicial responses to parental drug and alcohol use. To date, no such study has been conducted.

⁹⁶ This is so even in states in which a showing of harm to the child is a statutory prerequisite for judicial action against the parents.

dicates that the court *really* based its decision on parental inability (or unwillingness) to follow middle-class patterns of life.

1. Cases Involving Parental Alcohol Abuse⁹⁷

All of the cases discussed in this section involve allegations of child neglect connected with alcohol abuse by a parent. For the most part, these cases do not involve serious mental or physical abuse of children.⁹⁸ In every case, alcohol use is named by the court as the reason, or one of the reasons, for a limitation or termination of parental rights, and in each case parental alcohol use serves primarily as a judicial pretext for a determination motivated by other concerns. In many cases, the court's real concern relates rather directly to social class or lifestyle, in others to the court's perception that the parent lacks "parenting skills," and in still others to the parent's failure to cooperate adequately with the court and social service agencies. These three sorts of cases obviously overlap and other concerns are often of relevance as well. However, examination of these three categories of cases reveals the pattern through which courts transform statutory authorizations to consider alcohol abuse into justifications for neglect and termination decisions not always clearly warranted by statutes.

More or less implicitly, most of the cases involving parental alcohol abuse contain a discussion of the parent's social class. In fact, almost all the parents investigated for child neglect are poor.⁹⁹ Most receive welfare, and many ignore middle-class amenities.

One such case, *In the Matter of Mary Ann F.F.*,¹⁰⁰ involved an affirmance of the family court's termination of the mother's parental rights. The child had originally been placed in foster

⁹⁷ This Article will consider cases involving crack and alcohol separately because most of the cases involving parental crack use involve instances of prenatal use and thus respond to somewhat different questions and issues than the cases involving drug or alcohol use by parents of living children.

⁹⁸ Serious mental or physical abuse of children connected with parental drug or alcohol use involves different considerations and conclusions than the neglect alleged in the majority of cases involving parents who use alcohol or drugs. See notes 4-7 and accompanying text *supra*.

⁹⁹ See Donahue, *supra* note 6, at 17; Wald, *supra* note 15, at 629; Wald, *supra* note 66, at 1020-21.

¹⁰⁰ 129 A.D.2d 899, 514 N.Y.S.2d 536 (3d Dep't 1987).

care because of the mother's "mental health problems, her abuse of alcohol and her inability to maintain a stable residence or budget."¹⁰¹ The court affirmed termination of the mother's rights to custody of Mary Ann on the express ground that the mother had failed to "plan for Mary Ann's future."¹⁰² In explaining this failure, the court referred to countless efforts made on the mother's behalf by the county social services department and the mother's consistent failure to obtain counseling "on the need for a stable and secure residence, personal hygiene, budgeting, parenting skills and alcohol abuse."¹⁰³ In addition, the court expressed concern about the mother's frequent change of residence, failure to attend Alcoholics Anonymous meetings and her "overfeeding Mary Ann with sweets and liquids."¹⁰⁴ The court viewed this "evidence" as adequate proof of the mother's inability to plan and provide for her child and, therefore, as grounds for terminating her parental rights. Originally, this mother lost custody of her daughter because of excessive drinking. Several years later, when the social services department sought termination of the mother's rights altogether, the original alcohol problem became one problem among many: hygiene, dietary habits, budgeting problems and changes of residence. Mary Ann's mother lost her parental rights and this child lost her mother not because a continued relationship between the mother and the daughter threatened harm to the child, but because the court disapproved of the mother's social class and of her marginal, difficult life.

In the Matter of Ronald "YY" is another case in which a mother lost custody of her children because she "drank heavily" and provided her children with "inappropriate supervision, housing and hygiene."¹⁰⁵ Despite the fact that the mother "de-

¹⁰¹ *Id.* at 900, 514 N.Y.S.2d at 537.

¹⁰² *Id.* at 902, 514 N.Y.S.2d at 538. The statute defines a permanently neglected child as one

who is in the care of an authorized agency and whose parent . . . 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.

N.Y. Soc. SERV. LAW § 384-b(7)(a) (McKinney 1983).

¹⁰³ 129 A.D.2d at 900, 514 N.Y.S.2d at 537.

¹⁰⁴ *Id.* at 901, 514 N.Y.S.2d at 537.

¹⁰⁵ 101 A.D.2d 895, 896, 475 N.Y.S.2d 597, 598 (3d Dep't 1984).

creased her drinking and terminated her relationship with the individual who had abused both her and the children," the court affirmed the family court's termination of the mother's parental rights on the ground that she had failed to plan for the future of her children.¹⁰⁶ The court pointed to the mother's failure "to plan for the financial, educational and housing needs of the children."¹⁰⁷ Again, a mother originally deprived of custody of her children because of alcohol use was ultimately deprived of all parental rights. And this second and more serious deprivation was based not on harm to the children produced by the mother's alcoholism, not even on the mother's continued alcoholism, but on the court's perception that the mother's plans for her children's futures were inadequate. In effect, the court was willing to mortgage the children's present—and thus, of course, their future also—including their right to continued contact with their mother, to some unknown future presumably replete with budgeting skills and nicer housing.

The decision of the trial court in *In the Matter of the Welfare of B.W.*¹⁰⁸ exemplifies judicial failure to recognize adequately, and thus to respect, socio-cultural differences between the parents and mainstream society. In reversing the lower court, the Minnesota appellate court recognized the effect in such cases of courts' and social workers' cultural biases.

In *B.W.*, Sharon Goose and Cornelius Walker, both American Indians, appealed the termination of their parental rights to their son. The child was originally removed from his parents' home when a county social worker found both parents intoxicated. The lower court found that returning the child to his parents would "cause him emotional and physical harm," and that placement with the paternal grandmother, who wanted the child, would counteract the child's need for stability. The court further determined that the social worker and guardian ad litem who testified against the parents were qualified American Indian

¹⁰⁶ *Id.* at 896, 475 N.Y.S.2d at 599. See note 102 *supra* (quoting N.Y. Soc. SERV. LAW § 384-b(7)(a) (McKinney 1983) on which the court relies in *Ronald "YY"*).

¹⁰⁷ 101 A.D.2d at 896-97, 475 N.Y.S.2d at 599. Parental "failure to plan", along with harm to the child, may warrant coercive state intervention of some sort. It does not warrant termination of parental rights. See notes 217-225 and accompanying text *infra* (recommending development and implementation of new in-home intervention programs for cases such as that of *Ronald "YY"*).

¹⁰⁸ 454 N.W.2d 437 (Minn. Ct. App. 1990).

welfare experts.¹⁰⁹ In considering the qualification of the social worker and guardian ad litem, and deciding that they were *not* qualified as experts in the welfare of Indian children, the appellate court wrote: "Non-Indian lawyers, social workers and judges perceive the necessity of terminating parental rights of Indian citizens through quite different cultural lenses in their attempts to help Indian children."¹¹⁰ The court's admonition pertains not only to Indians, but to any parent facing loss of his or her children when that parent's lifestyle and values may differ from those of the court.

A like set of concerns informed the court's opinion in *In the Interest of Feidler*.¹¹¹ There a trial court removed the Feidler's two children from their custody because the parents had failed to comply with court-imposed conditions that, among other things, the family participate in drug and alcohol abuse evaluation and treatment, and that the two sons be subject to an evening curfew. The appellate court recognized the shortcomings of the trial court opinion when it strongly criticized the tendency to base coercive intervention on parental poverty, illiteracy or marginality. In *Feidler*, justice was effected through the appellate process; it is, therefore, instructive to examine the reasoning of the appellate court in its review of the trial court decision. The appellate court noted the absence of any indication in the record as to which family members had an alcohol or drug problem, and reprimanded the lower court for separating the Feidlers from their children on the basis of a "woefully inadequate record." The court concluded:

¹⁰⁹ *Id.* at 442. The Bureau of Indian Affairs Guidelines provide that a qualified Indian child welfare expert should be a member of the child's tribe and recognized as knowledgeable about tribal customs; or a lay expert with "substantial experience in the delivery of child and family services to Indians" and extensive knowledge about Indian socio-cultural patterns; or a professional with experience in the area of his or her specialty. Guidelines for State Courts, 44 Fed. Reg. 67,593 (1979) (cited in 454 N.W.2d at 442). The Minnesota Department of Human Services manual additionally requires that a professional be one with "substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community." DHS Manual, XIII-3586 (Jan. 30, 1987) (quoted in 454 N.W.2d at 442).

¹¹⁰ 454 N.W.2d at 444. Similarly, the A.B.A. Standards Relating to Abuse and Neglect provide that "[s]tandards for coercive intervention should take into account cultural differences in childrearing. All decisionmakers should examine the child's needs in light of the child's cultural background and values." A.B.A. Standards, *supra* note 37, at 15.

¹¹¹ 392 Pa. Super. 524, 573 A.2d 587 (1990).

Admittedly, the Feidlers are not sophisticated or well educated people, and they may not even be the best of parents, however, it must be remembered always, that the Juvenile Act: "was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take children of the illiterate and crude and give them to the educated and cultured, nor to take the children of the weak and sickly and give them to the strong and healthy."¹¹²

A second set of cases involves parents who abuse alcohol but who are deprived of custody of their children because, in the courts' view, they cannot "parent" adequately.¹¹³ *In the Matter of C.E.W.* illustrates a court's conflation of alcoholic parents and inadequate parents.¹¹⁴ The case involved the termination of parental rights of two parents who abused alcohol. However, the court's primary concern in depriving these parents of their child was its perception that the parents were "unable to meet the . . . special needs" of the child.¹¹⁵ The trial court emphasized the mother's own physical disabilities and its perception that she engaged "in no spontaneous interaction during structured visits" with the child.¹¹⁶ The appellate court, affirming termination of the parents' rights, was convinced by the trial court's finding that "[t]he testimony and demeanor of both parents at the . . . hearing were such that the Court believes they are both seriously deficient in the skills and insight needed to raise [the child]."¹¹⁷

In *In the Interest of A.J.M.*, the court terminated parental rights on the combined grounds that the parents were mentally deficient and abused alcohol and drugs.¹¹⁸ The evidence with re-

¹¹² *Id.* at 533, 573 A.D.2d at 591 (citing *In Interest of S.A.D.*, 382 Pa. Super. 166, 176, 555 A.2d 123, 128 (1989)).

¹¹³ These cases are similar to ones in which parents are deprived of custody or of their parental rights on the ground that they are mentally deficient. Consistently, courts, having once formed a view of a parent as retarded or "deficient in the skills and insight" needed to raise a child, have concluded the interests of such parents are minimal and that their children would be better off never having been born or, once born, would benefit by being removed from the parental home and raised by "normal" parents. Yet many "mentally retarded" parents can be adequate, even good, parents, especially when provided with training and support. See Hayman, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1226 (1990).

¹¹⁴ 541 A.2d 625 (D.C. 1988).

¹¹⁵ The child, born with fetal alcohol syndrome and fetal hydantoin syndrome, required occupational and physical therapy. *Id.*

¹¹⁶ *Id.* at 626.

¹¹⁷ *Id.* at 626-27.

¹¹⁸ *In the Interest of A.J.M.*, No. 64,519 (Kan. App. May 18, 1990) (LEXIS, States

gard to alcohol and drug use included a police report that the father was once found "sleeping next to a plate of marijuana," that he had received in-patient treatment at a drug rehabilitation center, and that he admitted to using alcohol to relax.¹¹⁹ At trial, several experts testified about the parents' "mental deficiency." A social worker declared that the parents "had very limited parenting skills and abilities in as far as their understanding of how children grow developmentally."¹²⁰ A second social worker testified that "parenting lessons" were unsuccessful because the lessons "wouldn't stick from one session to the next."¹²¹ These parents lost all rights to their children on two grounds, each of which the court believed magnified the impact of the other, and neither of which, in fact, established that this family—that these children—would be better off once the children were permanently detached from the parents.

The third category of cases, those involving judicial concern with a perceived failure to cooperate with the court, the child welfare system or some other social service agency, is the most common, and provides the most telling indication of how alcohol abuse can become an excuse for limiting parental rights. Many of these cases involve a court-imposed order, conditioning continued parental rights on the parent's agreement to receive training or treatment, or to refrain from drinking. When the parent fails to comply with the terms of the order, his or her parental rights are terminated, typically without regard to the effects of this action on the welfare of the children involved. As a result, the explicit presumption that family court cases are intended to protect and consider the welfare of the children and the family unit is eviscerated. In its place emerges a proceeding patently intended to exact retribution from disobedient parents, parents who refuse or fail to "take advantage" of governmental aid or treatment.

For instance, in *In the Matter of Brenda "YY,"*¹²² retention of the mother's rights to her child was conditioned on her agreement to "continue in a treatment program at an alcoholic clinic

library, Kan. file).

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.* at 3.

¹²¹ *Id.* at 4.

¹²² 69 A.D.2d 966, 416 N.Y.S.2d 346 (1979).

and not drink to excess.”¹²³ Finding that the mother had “violated” the agreement, the family court awarded custody of the child to the county department of social services. Affirming that decision, the appellate court concluded that “the condition in the stipulation that the appellant not drink to excess was not unreasonable nor invalid.”¹²⁴ In reaching this conclusion, the court utterly failed to entertain the issue of primary importance: the best interests of the child involved. Equally, and concomitantly, the court, opposing itself to this disobedient mother, assumed that the mother’s interests were contrary to those of her child.

Frequently, parents who fail to avail themselves adequately of assistance offered by welfare departments or courts are described as “angry,” a trait interpreted by courts as further suggesting a lack of ability to be a proper parent. For instance, in *Matter of Kevin P.P.*,¹²⁵ the mother’s rights to her children were terminated because she failed to attend court-ordered counseling sessions to learn parental skills and to control chronic alcoholism, among other things, and “maintained a hostile attitude toward all of the persons who sought to aid her and willfully refused to utilize the services and resources offered by petitioner,” the county department of social services.¹²⁶ Here, the benefits for the children of removing them from their mother were assessed on the basis of the mother’s refusal to accept court-ordered counseling and treatment submissively. The mother’s anger at the social services department and the court, which had already deprived her of custody of her children, provided the court with evidence of her essential unfitness to be a mother.

Similarly, in *In the Matter of Susan*,¹²⁷ the family court postponed the mother’s resumption of custody of her daughter

¹²³ *Id.* at 966, 416 N.Y.S.2d at 347.

¹²⁴ *Id.* at 967, 416 N.Y.S.2d at 347. After the order in *Brenda “YY”* conditioning the mother’s parental rights on her agreement to stop drinking and enter an alcohol rehabilitation program, the relevant New York statute relating to the requirements for such orders was revised. The court did not consider the order under the terms of the revised statute. N.Y. Comp. Codes R. & Regs. tit. 22, § 2506.1(b) (1977)(N.Y. Comp. Codes R. & Regs. tit. 22, § 2505.1, repealed eff. Jan. 1, 1977) (cited in 69 A.D.2d at 967, 416 N.Y.S.2d at 347).

¹²⁵ 154 A.D.2d 739, 545 N.Y.S.2d 950 (3d Dep’t 1989).

¹²⁶ *Id.* at 740, 545 N.Y.S.2d at 951.

¹²⁷ 124 Misc. 2d 443, 476 N.Y.S.2d 452 (N.Y. Fam. Ct. 1984).

even though the mother had satisfactorily overcome the alcohol and drug abuse on which the original removal of the child was premised. The court's decision was based on the mother's anger, an anger which the court said antedated commencement of the instant proceedings. Agreeing that the mother had "not consumed any drugs or alcohol," had "regularly participated in a therapy program" and had married and given birth to another child, the court concluded that the mother's anger robbed her of the energy to develop deep personal relationships.¹²⁸ "Only when Mrs. Lowell, [the mother], has faced and forgiven herself," concluded the court, "will she be able to help Susan forgive her."¹²⁹ Originally deprived of her child because of alcohol abuse, the mother, having corrected that dependence, was later deprived of the child because of "anger." "Anger" is hard to identify, hard to define and hard to cure, and none of those tasks is within the province or expertise of judges. If parental rights can be diminished when parents, in a court's view, are angry, the court can intervene against virtually anyone.

2. Cases Involving Parental Crack Use

Crack has been widely available in the United States for only half a decade. Thus, not many cases have considered the effect of crack use on a person's ability to be a parent.¹³⁰ Most of the cases involving neglect determinations on the basis of parental crack use have been based on maternal prenatal crack use.¹³¹ These cases offer additional insights into the assumptions undergirding neglect determinations in general against parents who

¹²⁸ *Id.* at 443-44, 476 N.Y.S.2d at 453.

¹²⁹ *Id.* at 444, 476 N.Y.S.2d at 454.

¹³⁰ Among the cases of this sort that do exist, see, e.g., *In re A.W.*, 569 A.2d 168, 169 (D.C. 1990) (termination of mother's parental rights affirmed; mother had a history of drug use, including "free-basing cocaine"; at birth child suffered from withdrawal symptoms; mother's drug use "impaired her ability to plan for and provide care for the child"); *In re The Matter of R.T.L.P.*, 238 Mont. 384, 777 P.2d 892 (1989) (child declared "youth in need of care" due to mother's use of drugs, including cocaine and heroin and her abuse of the child). *Id.* at 892.

¹³¹ A disproportionate number of cases involving prenatal maternal drug use involve poor, minority women. This is so even though drug use during pregnancy is as common among white middle-class women. Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. Times, July 20, 1990, at A13, col. 1. Explanations for this include that public hospitals, where poor women go, are more likely to test for, and report, maternal drug use and that drug users are generally perceived as poor members of minority groups. *Id.*

use crack or alcohol.¹³²

As a group, the crack cases involve the commencement of neglect proceedings¹³³ on the sole ground that a toxicological screen¹³⁴ administered to the baby at birth detected the pres-

¹³² Relevant cases outside the general scope of this Article have involved criminal proceedings against pregnant women and actions brought by children for infliction of prenatal harm. The first of the criminal cases involved charges against a woman for neglecting the medical needs of her fetus. The mother, Pamela Rae Stewart, was criminally prosecuted for failing to follow her physician's orders to refrain from drugs and sexual relations during the remainder of her high-risk pregnancy and to seek medical help if she began to hemorrhage. Stewart's baby suffered brain damage at birth and died shortly thereafter. Charges against Stewart were dismissed. *People v. Stewart*, M508197 (Cal. Mun. Ct., San Diego Cty.) (1986). By 1990 at least 50 women had faced criminal prosecutions because of drug or alcohol use during pregnancy. *Don't Punish the Troubled Mothers*, *Legal Times*, May 21, 1990, at 20. One woman in Florida was convicted of delivering a controlled substance to two fetuses. The decision was based on the presence of cocaine in the umbilical cords of the woman's two children before severance from the babies at birth. *State v. Johnson*, E89-890-CFA (Cir. Ct., Seminole Cty.) (1989). The court in *Johnson* wrote: "This verdict gives further notice that pregnant addicts have a responsibility to seek treatment for their addiction prior to giving birth. Otherwise, the State may very well use criminal prosecution to force future compliance with the law or, in appropriate cases, to punish those who violate it." *Id.* at 2.

Some commentators and at least one court have recognized civil liability for harm to a child resulting from maternal behavior during pregnancy. See *Grodin v. Grodin*, 102 Mich. App. 396, 301 N.W.2d 869 (1980) (child sued mother for having failed to "seek proper prenatal care"; state appellate court remanded for consideration of reasonableness of defendant mother's use of tetracycline during pregnancy); Annotation, *Right of Child to Action Against Mother for Infliction of Prenatal Injuries*, 78 A.L.R.4th ____ (1990); Note, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK. L. REV. 691 (1988); Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47 (1978).

¹³³ The majority of such cases, like those with parents who misuse alcohol, involve neglect rather than abuse. One psychological examination of the relation between excessive alcohol use by parents and child neglect defined child neglect as "a condition in which someone responsible for the child either deliberately or by extraordinary inattentiveness permits the child to experience avoidable present suffering and/or fails to provide one or more of the ingredients generally deemed essential for developing a person's physical, intellectual and emotional capacities." Polansky, Hally & Polansky, *Profile of Neglect: A Survey of the State of Knowledge of Child Neglect*, DHEW (USA) Publ. 75-23037 (Abst. no. 76109914 Excerpt Med.), as quoted in Orford, *supra* note 18, at 86.

¹³⁴ Perinatal toxicology screening is performed on urine samples. Immunoassay of neonatal urine allows accurate determination of the presence of drugs in a baby's body, but depending on the rate of a drug's metabolism and excretion, the test may not detect the presence of drugs used even several days before a baby's birth. For instance, immunoassay of neonatal urine can detect cocaine ingested prenatally up to four days before birth. Bandstra, *Medical Issues for Mothers and Infants Arising from Perinatal Use of Cocaine*, Drug Exposed Infants and Their Families: Coordinating Responses of the Legal, Medical and Child Protection System 23 (The ABA Center on Children and the Law 1990). Immunoassays of neonatal urine may test for many drugs, including cocaine, marijuana, opiates, amphetamines, barbiturates, benzodiazepines and phencyclidine. How-

ence of drugs in the baby's body.¹³⁵ These cases differ from other cases discussed in this Article because, here, the legal system has grounds for intervention on the basis of the single fact of parental drug use. Thus, the prenatal drug use cases allow investigation of the legal system's response when the *only* issue present is the mother's use of drugs or alcohol.¹³⁶

Determinations of neglect in these cases have been largely based on statutes intended for application to instances of postnatal neglect.¹³⁷ In these cases, courts have relied primarily on the standards and presumptions that typically operate in postnatal neglect cases.¹³⁸ However, the precise theories for applying neglect statutes to cases involving prenatal drug use have not been uniform or, for the most part, clearly articulated. This very lack of clarity can offer insights into presumptions undergirding judicial use of neglect statutes in postnatal parental drug and

ever, a hospital may decide to test only for those likely to be used in the local area. For instance, the University of Miami/Jackson Memorial Medical Center tests only for cocaine, opiates and marijunana since other drugs seem to be used too infrequently in south Florida to warrant a more inclusive perinatal toxicology. *Id.*

¹³⁵ This Article does not address, and is not intended to hold any direct implications for, the proper response of the state to women known to be using potentially harmful drugs while pregnant. In particular, nothing said or implied in this Article about the implications of prenatal maternal drug use for neglect proceedings involving living children is intended to suggest the proper state response *during a woman's pregnancy* to her abuse of drugs or alcohol.

¹³⁶ In examining cases of prenatal drug use, this Article is limited to consideration of cases involving crack. There have, however, been prenatal drug abuse cases that involve both alcohol and other drugs. *See, e.g.,* In the Matter of Milland, 146 Misc. 2d 1, 548 N.Y.S.2d 995 (N.Y. Fam. Ct. 1989) (child determined neglected, not explicitly on basis of mother's prenatal alcohol use but, indirectly on basis of such use, in that mother's use of alcohol during pregnancy was viewed as an indication of her inability to serve as an adequate parent).

¹³⁷ A few state statutes explicitly provide for state intervention in cases of prenatal drug or alcohol use. For instance, Illinois includes in its definition of a neglected child any newborn infant whose blood or urine contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, as now or hereafter amended, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of such substances, the presence of which in the newborn infant is the result of medical treatment administered to the mother or the newborn infant.

ILL. ANN. STAT. ch. 37, para. 802-3(1)(c) (Smith-Hurd 1990). *See also* MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1990).

¹³⁸ The major exception, in this regard, is the presumption, found in a significant group of prenatal drug abuse cases, that the fetus *is* a child or is so like a child that the difference is immaterial for purposes of interpreting the applicability of the relevant abuse and neglect statute. *See* notes 160-167 *infra*.

alcohol misuse cases. Specifically, these cases show a strong tendency of courts to base neglect determinations against parents who misuse drugs and alcohol on the parents' social and financial class, and the extent to which the best interests of children can be lost when class considerations are substituted for concrete, case by case examinations of particular family situations and the harm with which particular children may be threatened.

Correlatively, courts find neglect more easily in cases involving prenatal behavior than in cases involving parental behavior affecting living children.¹³⁹ Indeed, the apparent readiness of courts to impose even criminal sanctions against mothers on the basis of prenatal behavior¹⁴⁰ contrasts with a general judicial reluctance to intervene, even in cases of physical abuse.¹⁴¹ Pregnancy, like drug use, provides a pretext for courts to intervene in cases in which they might otherwise decline to do so, though for different reasons.¹⁴² In this sense, the cases involving prenatal maternal drug or alcohol misuse magnify the force of the moral presumptions that appear in neglect cases involving parents of living children who use drugs or alcohol excessively. In both situations, courts and social service agencies can use those presumptions to justify rapid, dramatic intervention.

One group of cases premises a neglect finding on the implications of prenatal drug use for the future parenting skills of the mother. In *Baby X*, a Michigan court of appeals held that prenatal drug use constituted a ground for establishing jurisdiction based on neglect. The court asserted that "prenatal treatment

¹³⁹ Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1336-37 (1990) [hereinafter *Rethinking (M)otherhood*]; Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1839-42 (1985).

¹⁴⁰ Child welfare agencies have also responded dramatically to remove infants registering a positive toxicology for cocaine and other drugs from their mothers. For instance, in 1988 the Nassau County Department of Social Services promulgated a policy of considering prenatal maternal drug use to constitute child abuse. Under this policy, the Department removed dozens of babies from their mothers on the sole ground that the babies tested positive for illegal drugs. Topping, *Drug Use as Child Abuse*, *Newsday*, Sept. 12, 1988, at 5.

¹⁴¹ See, Schneider, *supra* note 139, at 1838 (explaining the "tradition of noninterference" in American family law).

¹⁴² See, *Rethinking (M)otherhood*, *supra* note 139, at 1337 (arguing that states' willingness to intervene in cases involving pregnant women has worked to "shift the balance of power away from women").

can be considered probative of a child's neglect."¹⁴³ The court relied on an analogy to another case in which prior neglect allegations regarding one child supported a neglect petition concerning a second child. Thus, in effect, the Michigan court in *Baby X* argued that a fetus is like a sibling to the baby that it becomes.¹⁴⁴ The court asserted, in short, that if a mother neglects one child (a fetus), she is likely to neglect a second (the resulting baby), and thus the infant suffering drug withdrawal symptoms "as a consequence of prenatal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court."¹⁴⁵

The *Baby X* court's approach harmonizes with the presumptions typically and correctly brought to neglect determinations involving living children harmed or potentially harmed by parental acts. That is, the court was correct under the state statute to view prior neglect as probative of future mistreatment.¹⁴⁶ The court erred, however, in assuming, without analysis, that this mother's prenatal drug use indicated that the mother would continue to neglect the child after its birth.¹⁴⁷ The court apparently saw no need to investigate whether *Baby X*'s mother was likely to neglect *Baby X*. In lieu of such an examination, the court invoked the proposition that "a child has a legal right to

¹⁴³ In the Matter Concerning *Baby X*, 97 Mich. App. 111, 114, 293 N.W.2d 736, 739 (1980). The drug that affected *Baby X* at birth, heroin, is outside the express scope of this article. However, the theory on which the *Baby X* court based its decision is not specific to the situation of babies born with heroin withdrawal symptoms; it applies equally to crack- or alcohol-exposed fetuses.

¹⁴⁴ The court's analogy obviously suggests that a fetus is a child, simply a *different* child than the baby itself. The implications of the court's analogy between a fetus and a sibling are momentous and potentially determinative, not just for the present case but for a host of other matters including the nature and extent of a woman's right to abortion or the status of frozen embryos or the extent to which reproductive technology, in general, should be controlled by the law. If a fetus is a sibling (or a "child"), then it becomes easy to argue that abortion and the destruction of frozen embryos are murder and reproductive technology should be tightly regulated by the state. The two cases—that involving the quality of life for a fetus and that involving abortion and reproductive technology—can and should be separated for purposes of analysis. However, unless that separation is carefully made, conclusions about one case will carry significant implications for the other. The court's analogy between a fetus and a sibling is, therefore, not acceptable as the linchpin of the court's decision without further, meticulous and explicit analysis.

¹⁴⁵ 97 Mich. App. at 116, 293 N.W.2d at 739.

¹⁴⁶ See *Rethinking (M)otherhood*, *supra* note 139, at 1330.

¹⁴⁷ Robin-Vergeer, *supra* note 54, at 775.

begin life with a sound mind and body."¹⁴⁸ Whatever the validity of that proposition,¹⁴⁹ its moral import is obvious: a mother who denies a child that right is viewed as morally inadequate and therefore incapable of being a good mother.¹⁵⁰

The proposition that a child has a right to be born with a sound mind and body does not necessarily imply that the mother of a child not so endowed—even where the child's disability is due to prenatal maternal acts—will be a neglectful parent. That *may* be the case, but it is not the inevitable correlate of any right to be born with a sound mind and body.¹⁵¹ Anxious to define Baby X as a neglected child, the court established a certain and legally cognizable connection between maternal prenatal behavior and the neglect of a living child. The rule assumes as the answer in such cases what should rightly be the question. As in neglect cases involving parental drug use in the context of a living child, the court should have asked whether

¹⁴⁸ 97 Mich. App. at 115, 293 N.W. 2d at 739 (citing *Womack v. Buchhorn*, 384 Mich. 718, 725, 187 N.W. 2d 218, 222 (1971)). The proposition that a child has a legal right to be born with a sound mind and body was first invoked in *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960) (infant plaintiff entitled to recover for prenatal injury caused by defendant's negligence in causing car accident).

¹⁴⁹ See Robin-Vergeer, *supra* note 54, at 777 n.137 (arguing any such right granted to newborn constitutes denial of rights to mother and is therefore suspect). Even a decision that a fetus does have a legal right to a certain quality of life, holds implications only for the state's right to control a woman's behavior during pregnancy, not for its right to declare the child neglected after its birth. Robin-Vergeer, arguing that harm to a fetus gives little information about the future ability of the living child's parents to care for him or her, writes: "Once the child has been born, the mother's prenatal conduct should be considered only insofar as it, coupled with other risk factors, leads to a strong prediction of future child neglect." *Id.*

¹⁵⁰ The moral impact of the invocation that a child has a right to be born with a sound mind and body becomes obvious in *Department of Social Services v. Felicia B.*, 144 Misc. 2d 169, 171, 543 N.Y.S.2d 637, 638 (N.Y. Fam. Ct. 1989), where the court defined as consistent with the demand of *natural* justice a finding that the child of a woman who used drugs prenatally was neglected. The court wrote:

If the mother herein has committed acts which have impaired the physical, mental or emotional condition of her child by misusing drugs, then there can be a finding of neglect. This simply brings the law of this state into accord with the demands of natural justice, which requires recognition of the legal right of every human being to begin life unimpaired by physical, mental or emotional defects resulting from the neglectful acts of the parent.

Id., 543 N.Y.S.2d at 638 (footnote omitted). That which is defined as "natural" is defined as inevitable. To ignore or contradict natural process is risky, demonstrating moral inadequacy or intellectual hubris. Thus, the invocation of the "natural" (as, of course, of the supernatural for believers) in support of one's case is powerful indeed.

¹⁵¹ See *id.* at 171, 543 N.Y.S.2d at 638.

this baby was threatened with serious harm as a result of maternal neglect. Instead, the court assumed that maternal prenatal drug use signaled a neglectful mother likely to harm her child.¹⁵²

In *In re "Male" R.*¹⁵³ a New York court reasoned similarly. The child was born suffering from drug withdrawal. The commissioner of social services commenced a neglect proceeding at the baby's birth, alleging that Billie R., the child's mother, was addicted to cocaine, barbiturates and alcohol.¹⁵⁴ Petitioner established that Billie R. used barbiturates at the time of the hearing, yet it is not clear from the opinion whether she used cocaine and alcohol as well at that time.¹⁵⁵ Assisted by the New York statute that presumes parental drug abuse to establish neglect,¹⁵⁶ the court determined that Male R. was a neglected child without evidence that the child had been harmed.¹⁵⁷ That is, the court determined that Male R. had been neglected without a showing that maternal drug abuse had actually harmed him.¹⁵⁸ The court found Billie R. neglectful because her use of drugs indicated likely future mistreatment of the child. Moreover, the court stressed the mother's *postnatal* drug use rather than her use of drugs during pregnancy.

Male R.'s focus on the mother's *postnatal* drug use sets it apart from a group of later decisions that based neglect findings on actual harm to a fetus. Either approach is problematic. In cases such as *Male R.*, courts can find neglect by showing that harm to the child is imminent on the basis of parental drug use. But in prenatal drug cases that premise a neglect finding on demonstrated harm to a child, the "child" involved is a fetus.

¹⁵² See Robin-Vergeer, *supra* note 54, at 778.

¹⁵³ 102 Misc. 2d 1, 422 N.Y.S.2d 819 (1979).

¹⁵⁴ *Id.* at 3-4, 422 N.Y.S.2d at 820.

¹⁵⁵ *Id.* at 4-5, 422 N.Y.S.2d at 822.

¹⁵⁶ N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 1983).

¹⁵⁷ Section 1046 of the Family Court Act notwithstanding, one New York court held that prenatal maternal drug use and a positive toxicology for cocaine at the baby's birth were not enough to sustain a child neglect petition. In the Matter of Fletcher, 141 Misc. 2d 333, 533 N.Y.S.2d 241 (N.Y. Fam. Ct. 1988). In *Fletcher*, the court wrote: "Without more, Petitioner's cause of action stands solely on a woman's pre-natal conduct. Does Petitioner argue that the mere use of a controlled substance any time in a parent's life proves inability to parent?" *Id.* at 336, 533 N.Y.S.2d at 243.

¹⁵⁸ It would not have been possible to establish actual impairment due to *postnatal* maternal drug use since between his birth and the hearing, the baby was either in the hospital or in the custody of the commissioner of social services. 102 Misc. 2d at 2, 422 N.Y.S.2d at 820.

Thus, such decisions assume that a fetus is a child for purposes of neglect determinations.¹⁵⁹

In *In re Matter of Smith*, decided in 1985, a court based a neglect finding on harm to a fetus. In *Smith*, a New York family court found an "unborn child" to be a "person," and therefore entitled to the protection of child neglect statutes.¹⁶⁰ The baby in *Smith*, born prematurely, was small in size, jittery and irritable, and exhibited several signs of fetal alcohol syndrome.¹⁶¹ Her mother, who acknowledged a longstanding problem with alcohol, had lost another child to foster care as a result of her alcohol abuse. Under the New York statute, a neglect determination requires a finding that actual physical or mental impairment to the child had occurred, or proof of "imminent danger" of such impairment.¹⁶² Unable to establish actual impairment because the medical records reported that evidence of fetal alcohol syndrome was slight, the court rested its neglect determination on the theory of imminent danger of impairment,¹⁶³ including the danger to the fetus of fetal alcohol syndrome as a result of the mother's prenatal alcohol abuse and failure to obtain prenatal medical care. The court based this decision on an unnecessary subsidiary decision¹⁶⁴ that a fetus is a person for purposes of de-

¹⁵⁹ See note 144 *supra* (considering implications of analogy between fetus and child). A number of state statutes now permit intervention when a child is born with fetal alcohol syndrome or addicted to a controlled substance or at risk for a life threatening condition due to prenatal alcohol or drug use. See, e.g., FLA. STAT. ANN. § 415-503 (West Supp. 1988); IND. CODE ANN. § 31-6-4-3.1 (Burns 1987); see also note 137 *supra*.

¹⁶⁰ 128 Misc. 2d 976, 1001, 492 N.Y.S.2d 331, 335 (N.Y. Fam. Ct. 1985). The mother in *Smith* used alcohol, not crack.

¹⁶¹ Fetal alcohol syndrome, first recognized about fifteen years ago, involves harm to a fetus as a result of maternal drinking. Children affected by the disorder tend to be mentally handicapped and may exhibit a variety of other symptoms including facial dysmorphism and neurological abnormalities. Barr, Darby, Streissguth & Sampson, *Prenatal Exposure to Alcohol, Caffeine, Tobacco, and Aspirin: Effects on Fine and Gross Motor Performance in 4-Year Old Children*, 26 DEV. PSYCHOLOGY 339 (1990); Rosett and Weiner, *Effects of Alcohol on the Fetus*, in ENCYCLOPEDIA HANDBOOK OF ALCOHOLISM 301 (E.M. Pattison & E. Kaufman eds. 1982).

¹⁶² *Smith*, 128 Misc. 2d at 978-79, 492 N.Y.S.2d at 333.

¹⁶³ *Id.* at 978-79, 492 N.Y.S.2d at 333-34.

¹⁶⁴ It was not necessary for the court to reach the issue of the ontological status of the fetus in order to proceed with its neglect determination. The court could have proceeded as the Michigan court did in *In Re Baby X* where the court considered the mother's prenatal use of drugs indicative of future neglect. 97 Mich. App. 111, 116, 293 N.W.2d 736, 739 (1980). However, this would have resulted in a neglect determination without a showing of specific harm to the child.

ciding neglect cases.¹⁶⁵ In sum, the court, unable to show harm to the fetus or the child, found that the mother's prenatal drinking constituted an "imminent danger" of impairment to the fetus. Then, assuming the fetus no different from the child for statutory purposes, the court found the mother neglectful. No harm to the child was ever shown.¹⁶⁶

Similarly, the next year in *In Re Ruiz*,¹⁶⁷ an Ohio court, expressly following *Smith*, ruled that "a viable fetus is a child under the existing child abuse statute."¹⁶⁸ At birth, Luciano Ruiz tested positive for cocaine and heroin. He suffered from irritability, diarrhea and other impairments. On this basis, the court concluded that Luciano had been abused by his mother. As the court interpreted the Ohio statute, it was irrelevant that no postnatal harm to Luciano had even been alleged. Nor did the court examine the implications of Luciano's mother's prenatal drug use for indications of her ability to be a good mother. The abuse petition was granted on the sole ground that Luciano had been injured in utero by his mother's behavior. Prenatal harm to the fetus was considered conclusive of the mother's inability to be an adequate parent. In fact, the court appears not to have had much interest in the child's best interests.

The child's best interests were similarly, though perhaps

¹⁶⁵ *Smith*, 128 Misc. 2d at 979, 492 N.Y.S.2d at 334.

¹⁶⁶ In addition, the decision in *Smith* shows how easily courts can misread New York's evidentiary presumption which makes proof of a parent's use of alcohol or drugs prima facie evidence that a child of such person is neglected if the substance misuse produced a state of "stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality." N.Y. FAM. CT. ACT § 1046(a)(iii)(McKinney 1991). However, the *Smith* court wrote: "[A]fter birth, a child is a person who requires care and supervision, and it may be safely concluded that a mother, who is addicted to drugs would not possess the mental capacities of providing that care because of her continued addiction and use." 128 Misc. 976, 978-79, 492 N.Y.S.2d 331, 334. The New York statute very clearly does not allow courts to "safely" conclude that alcohol or drug misuse does produce such states. However, like the *Smith* court, other New York courts may so conclude. So read, the evidentiary provision makes alcohol or drug misuse, per se, prima facie evidence of neglect.

¹⁶⁷ 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (1986).

¹⁶⁸ *Id.* at 35, 500 N.E.2d at 939. Because *Ruiz* involves an abuse allegation, it is outside the explicit scope of this paper's concern with neglect cases. However, the situation involved in *Ruiz* was essentially identical to that involved in *Smith* and other such cases, and *Ruiz* is an important instance of a judicial decision basing an abuse or neglect determination on a finding of harm to a fetus and lacking a finding of harm to the living child.

even more obviously, disregarded by a New York court in *In the Matter of Stefanel Tyesha C.*¹⁶⁹ The court considered two cases, each involving a baby with a positive toxicology for cocaine at birth and a mother who admitted that she had used cocaine during pregnancy. Like the *Smith* court, the court in *Stefanel Tyesha* interpreted the state's neglect statute to apply to fetuses. The court wrote:

"Nowhere in law are significant state interests unaccompanied by a means of implementation. This is certainly true where the state seeks to prevent death or serious bodily injury. The only reasonable mechanism to implement state interests in the unborn is through existing abuse and neglect statutes. Since these statutes can be construed to include the unborn, protection of legitimate state interests calls for such an interpretation."¹⁷⁰

Moreover, the court found on the basis of the positive toxicologies and the mothers' admitted drug use during pregnancy that both mothers were "repeated users of drugs." The court wrote: "Although the respondents allege that an isolated detrimental act committed during pregnancy cannot constitute neglect, even a single act of misconduct can support such a finding."¹⁷¹

The decision that a woman who uses drugs during pregnancy has no right to the resulting baby is essentially a moral decision. The difficulty with such a decision is that the court's focus shifts away from the best interests of the child, and toward punishing the mother.¹⁷² And the peculiar consequence of such a shift in focus is not only that the mother is punished, but that the court absolutely loses sight of its theoretical goal: providing for the child as adequately as possible. The process is especially obvious in the prenatal maternal drug abuse cases because a pregnant woman who uses drugs provides a potent symbol. That a woman can consciously harm her own fetus can seem so horrible that it encompasses, and substitutes for, the real question

¹⁶⁹ 157 A.D.2d 322, 556 N.Y.S.2d 280 (1990).

¹⁷⁰ *Id.* at 330-31, 556 N.Y.S.2d at 285-86 (quoting Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?* 23 Duq. L. Rev. 1, 29 (1984)).

¹⁷¹ *Id.* at 327, 556 N.Y.S.2d at 283 (citing *Matter of Coleen P.*, 148 A.D.2d 782, 538 N.Y.S.2d 361 (1989)).

¹⁷² It is, of course, possible that punitive measures against the mother *could* be in the child's best interests. However, none of the cases make *that* determination. Rather, the best interests of the child are subsumed by the apparently easier task of punishing the mother.

that should be central in such cases: where, in fact, do the child's best interests lie? And, as this Article next argues, they often do not lie in permanent separation from a parent, even a drug-abusing parent.

III. NEGLECT DETERMINATIONS IN CASES INVOLVING PARENTAL ALCOHOL OR DRUG USE AND THE BEST INTERESTS OF THE CHILD

A statutory or judicial presumption that parental drug or alcohol use harms children more than coercive intervention is consistent with a more vast, and more serious, tendency to envision neglect proceedings—including their dispositional components—as adversarial proceedings. Often, the parent and child are viewed as opposing parties. The rights of the parent are contrasted with the welfare of the child. The parent's interests in remaining a parent are balanced against the benefits to the child of terminating the parent-child relationship.¹⁷³ In contrast to this approach, courts should be urged to recognize that the best interests of the child are frequently the same as the best interests of the parent. Particularly in cases in which intervention is likely to offer little relief from, and may even exacerbate the problems of, a difficult home situation,¹⁷⁴ it is doubly harmful to view the parent and the child as antagonists. For instance, it is rarely recognized expressly in neglect determinations that increasing a parent's sense of defeat, unhappiness and isolation from the mainstream of society is likely to have a direct and negative impact upon the child.¹⁷⁵ In the majority of cases, children would be assisted by official recognition that parents and children facing neglect determinations are not antagonists, but

¹⁷³ See Hayman, *supra* note 113, at 1259 (describing stereotype of the "mentally retarded" parent and traditional rights theory as reinforcing a process in which the parent is defined "in opposition to the child, reducing the parent to a malevolent caricature and inviting empathy with him only at intolerable risk to the child.").

¹⁷⁴ Removing children from their parents and placing them in foster care situations may be more harmful to children who are neglected but whose basic health and welfare are not threatened than letting them remain in their original homes, especially in cases in which the child is likely to be subject to "multiple separations from attachment figures." M. WALD, *supra* note 6, at 188.

¹⁷⁵ This is not to say that making neglectful parents content provides a solution to child neglect. There are cases, those involving the most egregious neglect, in which children are being seriously harmed by parental conduct, where the only reasonable option is coercive intervention, sometimes including removal or termination of parental rights.

that the interests of each depend on augmenting those of the other. Yet, many factors—statutory, historical, economic and socio-cultural—reinforce a judicial tendency to focus on parental misconduct rather than on harm to the child. The consequent delineation and elaboration of types of parental misconduct support the presumption that in neglect cases parents oppose their children, a presumption as devastating for the children in most cases as it is for the parents.¹⁷⁶

Even when parents are not good parents, even when they use drugs or alcohol and that use harms their children, the harm is usually not the sort that justifies removal or the termination of parental rights. Given our present system,¹⁷⁷ most children who risk being declared neglected because their parents misuse drugs or alcohol are better off in their parents' homes than placed in a variety of foster care homes, often with little likeli-

¹⁷⁶ William J. Bennett, former Director of the Office of National Drug Control Policy, proposed by-passing neglect or abuse proceedings altogether. He recommended that children of "inner-city" drug users be placed in foster care or "congregate care facilities." Excerpts from William J. Bennett's Remarks to the National Urban League, July 30, 1990 (supplied by the Office of National Drug Control Policy). Bennett argued that children of drug addicts should be "placed for adoption or foster care or referral and placement in an orphanage or a congregate care facility" and that such action be carried out "quickly" and "aggressively." *Id.* Bennett's plan removes any safeguard that neglect proceedings offer children and their parents and sanctions state intervention, including the limitation or termination of parental rights, on the sole ground of parental substance misuse. The proposal, directly aimed at poor, minority families, would transform into law the assumption that "inner-city" parents who misuse drugs are such bad parents that their children would benefit by removal to orphanages.

In contrast, certain recently established intervention programs operate with the presumption that parents and children are *not* antagonists. One such program, Citizen's for Missouri's Children, set up with the help of a private grant, offers intensive assistance to troubled families. Of the approximately 90 families served by the program through September 1990, almost all remained together. Such programs are less costly than foster care. Barden, *Counseling to Keep Families Together*, N.Y. Times, Sept. 21, 1990, at A18, col. 1. See notes 209-225 and accompanying text *infra* (for consideration of in-home intervention programs as alternatives to removal).

¹⁷⁷ At present, most children declared neglected are removed from their parents' homes. See note 1 *supra*. For those placed in foster care, as most are, the future is dim and growing dimmer. The average number of foster children in each family has doubled in the last ten years. Barden, *Foster Care System Reeling, Despite Law Meant to Help*, N.Y. Times, Sept. 21, 1990, at A1, col. 5. A significant percentage of foster care families are themselves troubled. *Id.* In other cases, governmental support to foster parents is inadequate. *Id.* Multiple placements are common and prevent foster children from developing secure ties to the adults who care for them. See notes 178-207 and accompanying text *infra*.

hood of ever having a permanent "home."¹⁷⁸

Shortcomings of the foster care system are legion and well-known. Intended as a "temporary, safe haven" for children whose parents cannot care for them properly,¹⁷⁹ foster care frequently lasts for years and involves placements in multiple homes.¹⁸⁰ More seriously, foster children are too frequently subject to abuse and neglect in foster care settings.¹⁸¹ And much more frequently, children placed in foster care suffer serious emotional harm as a result.

The abuse or neglect of children in foster care often goes unreported.¹⁸² There have, however, been reports of sexual abuse

¹⁷⁸ See Garrison, *supra* note 66, at 461. On the basis of their study of 80 children from homes declared abusive or neglectful, Wald, Carlsmith and Leiderman concluded that although foster care was not as negative an option as they had originally hypothesized, its advantages outweigh its disadvantages only in certain cases. They concluded that "[u]nless the child cannot be protected at home, it may be less expensive and more efficacious to leave the child at home and work with the entire family." M. WALD, *supra* note 6, at 188.

¹⁷⁹ Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children From Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 204 (1988).

¹⁸⁰ More than fifty percent of children in foster care remain there for more than six years. Besharov, *The Misuse of Foster Care: When the Desire to Help Children Outruns the Ability to Improve Parental Functioning*, 20 FAM. L.Q. 213, 220 (1986).

¹⁸¹ See, e.g., Mushlin, *supra* note 179, at 199-201; Note, *No Tears for Corey Greer: A Review of Foster Care in Florida. Is It Time to Ask the Court for Relief?*, 12 NOVA L.J. 881, 881-85 (1988) [hereinafter *Foster Care in Florida*].

¹⁸² Mushlin, *supra* note 179, at 207 (arguing that "[t]he actual amount of abuse and neglect [of children in foster care] may be much greater than anyone imagines."). Mushlin refers to one study that reported 43% of children in foster care were in "an unsuitable foster home" and 57% were "at serious risk of harm while in foster care." *Id.* (citing D. Caplovitz & L. Genevie, *Foster Children in Jackson County, Missouri: A Statistical Analysis of Files Maintained by the Division of Family Services 83-84* (July 21, 1982) (unpublished report)).

Mushlin describes the abuse of foster children as largely unreported and often ignored when made known. He writes:

In the same state, another foster child was assaulted while in foster care. The state knew of the attack, but did nothing. Within four months, the child was sexually abused by the foster father in the same home. In a third foster home, a four-year-old girl was whipped by her foster mother and made to stand with her hands extended over her head for thirty minutes. The child was being punished for being dirty. Although the caseworker determined that the child had been beaten, and reported this to her superiors, no action was taken and the child was returned to the home.

Mushlin, *supra* note 179, at 200 (footnotes omitted; citing D. Caplovitz & L. Genevie, *Foster Children in Jackson County, Missouri: A Statistical Analysis of Files Maintained by the Division of Family Services 86-87, 89, case 5.6* (July 21, 1982) (unpublished report)).

Children have died as a result of harm inflicted by foster parents. *Foster Care in*

inflicted upon foster care children¹⁸³ and of children in foster care who have died as a result of beatings.¹⁸⁴ A 1986 study by the National Foster Care Education Project revealed abuse rates up to ten times higher than for children in the general population.¹⁸⁵ More frequently, foster care children are neglected, often seriously.¹⁸⁶

In addition to abuse and neglect directly inflicted upon foster care children by their caretakers, such children are threatened by the inadequacies of the bureaucratic system managing foster care placements. This form of mistreatment, known as "program abuse,"¹⁸⁷ results from the foster care system's failure to provide children with secure, stable placements. As presently constituted, the foster care system discourages permanency. Most children in foster care for as little as six months experience multiple placements.¹⁸⁸ Such children are separated from their parents but are unlikely to form secure attachments to substitute caretakers.¹⁸⁹

Foster care is especially harmful for the large class of children for whom foster placement lasts beyond a few months.¹⁹⁰ Long-term foster care damages a child's ability to relate to others, to form relationships, and to value him or herself.¹⁹¹ Besharov writes:

Increasingly, many graduates of the foster care system evidence such severe emotional and behavioral problems that some thoughtful observers believe that foster care is often more harmful than the original home environment. These realities led Marion Wright Edelman, Pres-

Florida, *supra* note 181, at 882-83.

¹⁸³ Mushlin, *supra* note 179, at 200.

¹⁸⁴ Mushlin, *supra* note 179, at 205-07. See *Vonner v. State Dep't of Pub. Welfare*, 273 So.2d 252 (La. 1973) (foster child died as result of beatings).

¹⁸⁵ Mushlin, *supra* note 179, at 206 (citing Department of Health and Human Services, National Analysis of Official Child Neglect and Abuse Reporting 10-11, Table 2 (1978)).

¹⁸⁶ See *Foster Care in Florida*, *supra* note 181, at 881-82 (describing child who died in foster care because foster parents failed to attach heart monitor; the home in question housed twelve foster children at the time).

¹⁸⁷ Mushlin, *supra* note 179, at 207.

¹⁸⁸ M. WALD, *supra* note 6, at 11.

¹⁸⁹ Separation from an attachment figure is likely to have negative consequences for a child's ability to form close relationships in childhood and throughout later life and for a child's intellectual and emotional development. *Id.*

¹⁹⁰ Besharov, *supra* note 180, at 219.

¹⁹¹ *Id.*

ident of the Children's Defense Fund, to call the conditions of foster care a "national disgrace."¹⁹²

New evidence of the psychological scars that foster care can inflict comes from a study of the nation's homeless, a group that includes a disproportionate number of people who lived in foster homes as children.¹⁹³ In general, recent studies suggest that a substantial proportion of foster care children will never achieve stability. A survey in San Francisco indicates that about half the children who leave foster care in that city engage in survival sex, selling sex for food or a place to sleep.¹⁹⁴ Another study found that about one-third of children in foster care will lead "chaotic lives, ranging from homelessness to criminality."¹⁹⁵

Throughout the country, foster care systems lack adequate resources. Consequently, they are unable to provide foster care children with the treatment services they are supposed to receive.¹⁹⁶ Moreover, insufficient funding precludes foster care agencies from screening and licensing potential foster care parents, from training those who are selected, from matching foster children with foster parents and from arranging competent supervision of foster care placements.¹⁹⁷

Only in cases in which a child suffers or will suffer serious harm by remaining in the parental home, are the child's best interests served by placement in the foster care system. And even where parental custody does so obviously threaten harm to the child that removal is the only option and parental rights must be severely limited, involuntary termination of parental rights appears to benefit children only rarely.¹⁹⁸ Continued con-

¹⁹² Besharov, *supra* note 180, at 220 (footnotes omitted).

¹⁹³ Barden, *After Release From Foster Care, Many Turn to Lives on the Streets*, N.Y. Times, Jan. 6, 1991, at A1, col. 1 (reporting results of four studies throughout the country, showing the percent of homeless with foster care background ranging from 38% in Minneapolis to about 13% in rural Ohio).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Besharov, *supra* note 180, at 220.

¹⁹⁷ Mushlin, *supra* note 179, at 209-10.

¹⁹⁸ Garrison, *supra* note 66, at 461-67 (describing advantages for children in foster care of continued contacts with biological parents). The reference here is only to children who know their biological parents and for whom those parents have become "psychological parents" as well. Goldstein, Freud and Solnit define a psychological parent as any parent (biological, adoptive or foster) who, "through interaction, companionship, interplay, and mutuality, fulfills the child's psychological . . . as well as physical needs." J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 98 (2d ed.

tact with a noncustodial parent, even one whose parental rights have been limited, can aid a child in foster care to evaluate, and cope with, his or her situation realistically. Foster children allowed visitation with biological parents are more secure and self-confident than foster children denied such contact.¹⁹⁹

By focusing on parental misconduct, by failing to investigate the parent-child relationship and by ignoring the developmental needs of particular children,²⁰⁰ the legal system has far too often managed to by-pass what should be the core of any neglect determination involving a child whose parent misuses drugs or alcohol: how, if at all, this parent causes serious harm to this child, and what, in light of that examination and of the available options, constitutes the least detrimental situation for the child.

IV. RECOMMENDATIONS

Statutes should be reformed in two ways. First, and most generally, the trend toward requiring a showing of harm as a prerequisite for neglect determinations should become universal. Such a requirement was incorporated in the A.B.A. Standards Relating to Abuse and Neglect. The commentary to this model statute asserts that "the definitions [in the model statute] focus on the child and authorize intervention only for serious harms, where, in general, the remedy of coercive intervention will be beneficial to the child. Thus, not every type of harm from which we might wish to protect children constitutes a basis for intervention."²⁰¹

1981).

The ABA Center on Children and the Law argues, in a report concerned with prenatal drug use, that making rapid termination of parental rights easily available in such cases may appear attractive to child protection workers but discourages such workers from attempting to reunite troubled families. Larsen, *Creating Common Goals for Medical, Legal and Child Protection Communities in Drug Exposed Infants and Their Families: Coordinating Responses of the Legal, Medical and Child Protection System* 11 (The ABA Center on Children and the Law 1990). Moreover, a decision to terminate parental rights may be based on a family's inadequate resources rather than a family's inability to respond positively when provided with adequate assistance. *Id.* A similar argument can be made about parents of living children who abuse alcohol or drugs.

¹⁹⁹ Garrison, *supra* note 66, at 461-63.

²⁰⁰ Generally social service agencies fail to evaluate the academic and developmental needs of a child unless the child has clear behavioral problems. M. WALD, *supra* note 6, at 192.

²⁰¹ A.B.A. Standards, *supra* note 37, at 60-61.

Second, and more specifically, statutes should not refer to parental alcohol and drug abuse as factors for courts to consider in neglect proceedings. Undoubtedly, courts will take parental substance abuse into account in any case; they need not be pressured to do so by statutory formulations which implicitly suggest that parental misconduct should be the focus of neglect cases. And in all states, as long as statutes list substance misuse as evidence of parental misconduct, courts will be tempted to rest neglect decisions involving parental substance misuse on such evidence and will be able to justify inappropriate neglect determinations on the simple ground that a parent misused liquor or drugs.

A multiplicity of forces, including the history of child welfare adjudications, and the social and economic gap that usually separates judges from parents against whom neglect proceedings are commenced, directs courts to concentrate on the parent, on the parent's habits, values and lifestyle. This direction is injurious to children, and should not be further encouraged by a statutory presumption that alcohol or drug use makes a parent so inadequate that coercive state intervention is warranted.

Only if state statutes encourage courts to focus on harm to the child, not parental misconduct, as the primary subject of inquiry, will the best interests of the child emerge routinely as the predominant issue in the disposition of neglect cases. A child whose parents misuse alcohol or drugs may be endangered by parental conduct, but that decision must be the result of an independent determination, not a presumed conclusion on the basis of parental substance misuse.

Omitting alcohol and drug use as statutory factors for courts to consider in neglect cases will have no negative consequences for a child suffering serious harm²⁰² who must be removed from parental custody at least temporarily; it will have only positive effects for a child whose parents misuse drugs or alcohol but who, in light of the child's total situation and the limitations of our current child welfare system, still provide a better home for the child than any alternative. In cases in which

²⁰² State statutes do not routinely describe concretely the level of harm that warrants coercive intervention. Statutes should make clear that intervention is only possible in cases of specific and serious harm. *Id.* at 60-76 (commenting on grounds for intervention outlined in the model statute).

a child is subject to, or threatened with, serious harm, courts need not be informed by state statutes that parental substance abuse threatens children.²⁰³ In such cases, the harm, and risk of harm, to the child are obvious and are generally the result of a number of factors, not of drug or alcohol abuse alone. In such cases, courts should intervene, and children often must be protected by removal from parental custody. However, such removal should never, and need never, be premised upon parental substance misuse. Equally, in cases in which the child is not threatened by serious harm, removal is inappropriate. In the best of worlds, cases not involving serious harm to the child would never get to court. But they do. And statutes should not compound the problem by endorsing, or appearing to endorse, a judicial tendency to rely on parental misconduct in adjudging children neglected. In such cases, a neglect determination, and consequent removal of the child from the parental home, punish the parent without serving the child. Moreover, the majority of neglect petitions should not, as they currently do, result in removal of children from their parents' homes.²⁰⁴ Instead, in-home services should be available to help neglectful or potentially neglectful parents obtain the resources and direction necessary to build stable homes.

If the essence of the judicial endeavor in the adjudicative phase²⁰⁵ of neglect proceedings is to identify harm to children, and in the dispositional phase, to secure the best interests of children, then it becomes harder to mistake poor parents for bad parents, or to view parents who abuse drugs or alcohol as inevitably, or even probably, worse than no parents at all. And the less room state statutes give courts to focus on parental misconduct, the more likely courts are to avoid neglect determinations in cases lacking serious harm to the child.

But what about children not threatened with serious danger in their homes, but who do face continuing neglect, whose inter-

²⁰³ For instance, neglect statutes rarely mention sexual abuse in neglect statutes, but courts frequently intervene for this reason. Wald, *supra* note 66, at 1024.

²⁰⁴ Fink, *supra* note 1, at 7.

²⁰⁵ Many neglect hearings occur in two parts—an adjudicative phase in which the court determines whether or not the child has been neglected and a disposition phase in which the court determines the proper placement for the child. Donahue, *supra* note 6, at 17.

ests are ignored and whose needs are not met?²⁰⁶ Such children can be served only by changes in the child welfare system that avoid both endless foster care placements and—the better but far from perfect solution—returning children to homes in which they will survive but cannot flourish.²⁰⁷

New services are required for children and parents.²⁰⁸ Parental drug or alcohol abuse should be met with appropriate treatment programs. Most commentators and researchers agree that successful treatment programs of some type do exist for most alcoholics.²⁰⁹ Recent media reports notwithstanding, treatment for cocaine, including crack addiction, does exist and can be successful even for woefully addicted users.²¹⁰

²⁰⁶ There is a temptation to intervene in such cases, but as this Article argues, and as the A.B.A. STANDARDS RELATING TO ABUSE AND NEGLECT suggest, few families provide children with "ideal" environments. If intervention is permissible because parents are not sufficiently affectionate, because a home is dirty, because the parents are providing less stimulation than desirable, or because the parents are thought to be "immoral," as defined by judges and social workers, intervention would be pervasive. Yet there is every reason to believe that intervention to protect children from such "harms," especially if removal is the only alternative, would more often result in harms greater to the child than the "harm" from which he/she is being protected.

A.B.A. Standards, *supra* note 37, at 61.

²⁰⁷ Dr. T. Berry Brazelton, a pediatrician and member of the National Commission on Children, appointed by the White House and Congress in 1989, argues that addicted and neglectful parents can and should be "salvaged" for their children's sake. The effort, he acknowledges, will be "expensive and difficult" but must be made. Brazelton suggests that programs be instituted that include staff trained to meet individual family needs and to build trust among the parents involved. Such programs can "enhance parents' desire to nurture their children" so that families will be strengthened and children need not be removed from their parents' homes. Brazelton, *Why is America Failing Its Children?*, The N.Y. Times, Sept. 9, 1990, (Magazine) at 41, 90.

²⁰⁸ New services are needed for families in which the children are best served by remaining in the parental home and for families in which the children's best interests require that they be removed from the parental home, at least temporarily. As our present child welfare system works, there are all too frequently only losers in cases involving serious child neglect. In their study of 80 children who had been subject to abuse or neglect, half of whom were left at home in San Mateo County, California, where special services were available to assist such children, and half of whom were placed in foster care in other counties, Wald, Carlsmith and Leiderman found that "[u]nder present policies, abused and neglected children remain at serious risk in both settings." M. WALD, *supra* note 6, at 200.

²⁰⁹ In 1986-87, more than 1.43 million people were treated in 5,586 alcohol treatment centers in the United States. ALCOHOL AND HEALTH, *supra* note 13, at 261. Alcohol treatment programs may rely on pharmacologic therapy, counseling and marital and family therapy. *Id.*; H. Fingarette, *supra* note 16, at 115 (1988).

²¹⁰ Kirstein, *Inpatient Cocaine Abuse Treatment*, in COCAINE: A CLINICIAN'S HANDBOOK 96, 97 (A. Washton & M. Gold eds. 1987) (recommending inpatient treatment for

In fact, a variety of treatment methods presently exists for alcohol and crack abusers. In both cases, the best results are produced when a treatment method is selected in light of the psychological, social and physical characteristics of a particular addict.²¹¹ Not only must the choice among pharmacologic and psychological therapies be based on these characteristics, but appropriate therapies can only be selected by recognizing that different addicts respond differently to various types of psychological therapy.²¹² Similarly, crack users can be most successfully treated when medical, psychological and social histories are taken into account.²¹³

An important factor to consider in determining the appropriate approach to treatment for a particular alcohol or crack

people who suffer physical addiction, have coexisting medical or psychiatric symptoms, have impaired psychosocial functioning, who binge, resist treatment or fail to be cured in an outpatient treatment program). Washton, *Outpatient Treatment Techniques in COCAINE: A CLINICIAN'S HANDBOOK* 106 (A. Washton & M. Gold eds. 1987); Kleber & Gawin, *Pharmacological Treatments for Cocaine Abuse in COCAINE: A CLINICIAN'S HANDBOOK* 118, 121-31 (A. Washton & M. Gold eds. 1987) (pharmacological agents used to treat cocaine addiction include lithium carbonate, stimulants and dopamine agonists, various kinds of antidepressants and neurotransmitter precursors such as tyrosine). Rosecan, *Contemporary Issues in the Treatment of Cocaine Abuse in COCAINE ABUSE: NEW DIRECTIONS IN TREATMENT AND RESEARCH* 301-02 (H. Spitz & J. Rosecan eds. 1987) (concluding that modes of treatment generally successful with cocaine abusers also work with crack abusers even though crack abusers tend to be severely addicted before they seek treatment). A self-help group for cocaine (including crack) addicts, Cocaine Anonymous, offers cocaine addicts the kind of treatment that Alcoholics Anonymous offers alcoholics.

²¹¹ Biological research has recently identified a gene involved in alcoholism and has discovered that brain irregularities make some people more likely to become addicts. Goleman, *Scientists Pinpoint Brain Irregularities in Drug Addicts*, N.Y. Times, June 26, 1990 at C1, col. 5. Such findings may lead to a myriad of new options for preventing and treating drug addictions including alcoholism. For instance, Dr. Tarter of the Western Psychiatric Institute and Clinic in Pittsburgh suggests that "traditional treatments for alcoholism may be unsuccessful because they do not address the disturbances that predisposed the person to alcoholism in the first place." *Id.*

²¹² Herbert Fingarette, in *Heavy Drinking*, described one study that showed that when an alcoholic in treatment is matched with an appropriate therapist and an appropriate after-care setting, the likelihood of success increases to 77% (from 38% when the alcoholic is mismatched with the therapist and the setting). H. Fingarette, *supra* note 16, at 118 (citing study by McLachlan, *Therapy Strategies, Personality Orientation, and Recovery from Alcoholism*, 19 CANADIAN PSYCHIATRIC A.J. 25 (1974)).

²¹³ Rosecan, *supra* note 210, at 302. Inpatient care is usually not necessary for crack users unless they are physically dependent on other drugs such as alcohol, opiates and tranquilizers, frequently used by crack addicts to relieve the negative effects of crack. *Id.* In this regard, treatment of crack addiction differs from treatment of alcohol or heroin addictions. In the latter cases, withdrawal may produce a set of physical symptoms that can be easily controlled only through inpatient care. *Id.*

abuser is the addict's motivation to receive help. Programs that work for voluntary clients are unlikely to succeed with unwilling clients.²¹⁴ A plan for matching drug or alcohol abusers with appropriate treatment is needed.²¹⁵

Even in cases in which some kind of coercive intervention is warranted, children need not be removed from parental homes if parents can be assisted and treated successfully through in-home intervention. However, forcing reluctant addicts into treatment programs geared for willing, motivated addicts aids no one. The addicted parent remains addicted; the court can proceed to justify removing the child or terminating parental rights despite the parent's having been ordered into an inappropriate treatment program; and the child is separated from his or her parent, sometimes permanently.

Programs must be specifically designed to treat neglectful parents who use alcohol or drugs. To some extent, parents can be motivated to succeed in drug and alcohol treatment programs by the threat that the alternative is loss of their children. However, the ultimate success of such coercive treatment is heavily dependent on the selection and development of treatment programs that aid recalcitrant addicts.

Not only must appropriate treatment programs be matched with addicted parents; treatment programs, in general, must be

²¹⁴ Alcohol and drug treatment programs such as Alcoholics Anonymous and Cocaine Anonymous that depend on the addict's motivation and initiative, are unlikely to be successful with clients referred by the criminal justice or family court system. Fillmore and Delso, *Coercion Into Alcoholism Treatment: Meanings for the Disease Concept of Alcoholism*, 17 J. CONTEMP. DRUG ISSUES 301, 303-05 (1987). On the whole, such clients accept treatment only as an alternative to jail or the loss of their children, and have deteriorated much less than clients who volunteer to enter treatment programs. *Id.* at 305. But modes of treatment geared toward, and successful with, middle-class clients, initiating their own addiction treatment, are often unsuccessful with poor or working-class clients who may not believe that they are in need of help for an addiction and who may resent coercive state intervention.

²¹⁵ See notes 85-87 and accompanying text *supra*. New York City has earmarked \$13.3 million for the treatment of addicts, promising treatment for every interested pregnant addict. Seifman, *Dave Starts \$13.3M Program for Addicted Moms*, N.Y. Post, May 22, 1990 at 11. The mayor's office estimated there are 15,000 addicted pregnant women in New York City, about 6,000 of whom desire help. *Id.* At present, addicted pregnant women have great difficulty locating drug treatment programs that will accept them. According to one recent survey, over half of the drug treatment programs in New York City do not accept pregnant women. Kolata, *supra* note 131, at A13 (referring to survey of New York City's drug treatment programs by Dr. Wendy Chavkin of the Columbia University School of Public Health).

expanded. A year ago, a survey of the National Association of State Alcohol and Drug Abuse Directors indicated that almost sixty-seven thousand people were on waiting lists for drug treatment programs of various kinds.²¹⁶ The House Select Committee on Narcotics and Control has estimated that only 20 percent of the people who need treatment for addiction obtain it.²¹⁷

Perhaps as important as treatment options, especially in large cities like New York, is the coordination of existing programs. At present, scarce resources represent only part of the problem; the other part stems from the duplication of efforts and money by various agencies and institutions and the widescale absence of adequate, general coordination of alcohol and drug treatment programs.²¹⁸

In addition, prevention programs are necessary. A recent study, sponsored by the National Institute on Drug Abuse, suggests that even adolescent cocaine and crack use can be curtailed by drug prevention programs. Prevention programs can work to preclude child neglect as well as drug or alcohol addiction.²¹⁹ The United States Advisory Board on Child Abuse and Neglect, in a 1990 report to Congress, urged that the federal and state governments "ensure that comprehensive, multidisciplinary child abuse and neglect treatment programs are available to all

²¹⁶ Davidson, *Some Addicts Beg For Drug Treatment, But Programs Are Full*, Wall St. J., Sept. 4, 1990, at A1, col. 1.

²¹⁷ *Id.* The Bush administration has consistently emphasized enforcement over treatment in its anti-drug programs. The office of former drug czar William Bennett said that making treatment available for every addict who wants help "would create a costly, unbalanced system that brings no guarantee of higher treatment success rates." *Id.* In the past few years, Congress has appropriated \$140 million, still far less than is necessary, to reduce long waiting lists at drug treatment facilities. At present, Medicaid does not pay for drug treatment. As a result, many people who might obtain treatment cannot. The Senate has recently passed a bill that would have Medicaid pay for drug treatment for at least some poor people. The bill remains in committee in the House. *Id.*

²¹⁸ Telephone interview with Dr. Janet Mitchell *supra* note 61. Similarly, at the national level, resources are misdirected and programs are uncoordinated. For instance, financing under the Juvenile Justice and Delinquency Prevention Act, intended to aid troubled families, has been misdirected. As a result, the law has failed to discourage foster placement, as was intended. Barden, *supra* note 177, at 18.

²¹⁹ The experimental programs on which the report was based were instituted at over 100 middle- and junior-high schools in the Kansas City and Indianapolis areas. According to Dr. Charles R. Schuster, director of the National Institute on Drug Abuse, the research provided the first "time we have data on the impact of prevention programs in reducing the use of cocaine, including crack cocaine." Treaster, *Programs Find Adolescents' Use of Cocaine Can Be Curtailed*, N.Y. Times, June 2, 1990 at A10, col. 2.

who need them."²²⁰ The report then argued that "the thrust of a child-centered child protection system must be to move toward preventing child abuse and neglect before it happens."²²¹ Prevention programs should be instituted alongside, and not substitute for, treatment programs.

Alcohol or drug misuse puts parents at risk for neglecting their children. But parental substance misuse does not constitute such neglect. When combined with other risk factors such as poverty, the likelihood of neglect increases.²²² The best bulwark against child neglect by such parents is the creation of "nurturant environments"²²³ for the children and the parents. As Dr. Eli Newberger writes, "the most important aspect of a social environment is the degree to which it encourages parents to be 'socially connected' and discourages parents from becoming 'socially isolated.'" And he continues:

Psychologist Urie Bronfenbrenner states that our efforts to prevent child abuse and neglect will depend, not so much on how well we educate parents, but on how well we educate those who care for parents. In his view, with which I agree, "The issue is not who cares for children, but who cares for those who care?"²²⁴

The design, implementation and coordination of such treatment and prevention programs is essential.²²⁵ Through such programs, coercive state intervention can be limited. Parents can retain custody of their children. And, most important, children can be given a better chance to develop than that generally afforded by the existing child welfare system.

²²⁰ Dep't of Health and Human Services, U.S. Advisory Board on Child Abuse and Neglect, *Child Abuse and Neglect: Critical First Steps in Response to a National Emergency* 80 (Aug. 1990).

²²¹ *Id.* at 81.

²²² Low socio-economic status is not simply a risk factor for child neglect or abuse. It also causes developmental defects in children. In fact, one study reported that low socio-economic status correlates with developmental impairment as often as abuse does. E. ELMER, *FRAGILE FAMILIES, TROUBLED CHILDREN—THE AFTERMATH OF INFANT TRAUMA* 110 (1977) (cited in Garrison, *supra* note 3, at 1789 n.213).

²²³ E. NEWBERGER, *CHILD ABUSE* 44 (1982).

²²⁴ *Id.* at 47.

²²⁵ Obviously, the effort will be expensive. Yet, in 1990 at least \$6 billion was spent to finance foster care in the United States. At the same time, the federal government, spending more than it ever has, is allotting \$252 million to programs to prevent the need for foster care. Barden, *supra* note 177, at 18.

CONCLUSION

Although parental drug and alcohol misuse can clearly harm children, it often does not cause the sort of harm that warrants coercive state intervention, and even less often does it cause the sort of harm that warrants removal of the child or the termination of parental rights. Yet, children are declared neglected and removed from their parents' homes on the basis of alcohol and drug misuse. Often, such intervention is not even justified under existing state statutes. But because many statutes encourage courts to focus on parental misconduct, thereby reenforcing a historical tendency in American family law, the step from the identification of parental alcohol or drug misuse in neglect cases to a declaration of neglect or removal of the child is often shorter than it should be. The present statutory scheme allows courts to short-circuit the process of determining whether a child is indeed neglected by focusing on clearly visible markers. Identification of parental alcohol or drug misuse all too frequently substitutes for the more difficult process of requiring a showing of serious harm to the child and then—but only then—investigating and examining the parent, the child and the two as they interact in order to provide for the best interests of the child. As a result, coercive intervention in these cases occurs too frequently, and the intervention that does occur is often harsher than it need be. Neither the parent nor the child is served.

Statutes should explicitly stress the need for courts to reach conclusions in neglect cases slowly²²⁸ and to refrain from determining that any child should be removed from his or her parental home or that any parent's rights should be terminated unless serious harm to the child has been demonstrated. State statutes should assist that explicit mandate by omitting express reference to alcohol and drug misuse as factors to be considered by

²²⁸ This is urged despite recognition of the enormous number of cases facing family court judges every day. That burden cannot provide an excuse for separating children from parents whose parenting, though wanting, does not entail serious harm to the child. The presiding judge of the Juvenile Courts in Los Angeles told the National Children's Commission (appointed by the President and Congress to develop a national policy on issues affecting children) that judges in Los Angeles have "an average of ten minutes to spend on each case, to determine each child's fate and each family's future." Barden, *supra* note 177, at 18. Obviously, judges, pressured by time constraints of that magnitude, cannot be expected to consider and determine any child's best interests or, in general, to effect justice.

courts in neglect cases. Courts should heed that change by focusing primarily on harm to children and not on parental misconduct. And carefully designed prevention and treatment programs for neglectful parents who misuse alcohol and drugs must be expanded so that children will be removed from their parents and parental rights will be terminated as seldom as possible.