A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings

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The right of parents to the custody and care of their children is well established in the law.[1] This right, however, is not unconditional,[2] as there are other interests involved in the parent-child relationship which must be considered. The child has a reciprocal right to a secure and adequate upbringing.[3] The state, in addition to its role as enforcer of the minor's rights, has its own interest to protect—that of seeing that children are brought up to become well-adjusted, law-abiding citizens.[4]

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1. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

2. It may be considered as the settled doctrine in American courts that all power and authority over infants are a mere delegated function, intrusted by the sovereign state to the individual parent or guardian, revocable by the state through its tribunals, and to be at all times exercised in subordination to the paramount and overruling direction of the state.

Fladung v. Sanford, 51 Ariz. 211, 217, 75 P.2d 685, 687 (1938); *see In re* Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 590, 536 P.2d 197, 199 (1975). A somewhat less sweeping view of the state's role was espoused in *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839): "The right of parental control is a natural, but not an unalienable one. . . . [A]nd it consequently remains subject to the ordinary legislative power . . . ."

3. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-201(10)(a)-(b), -531(8)(c) (1974); D.C. CODE ANN. §§ 16-2301(21)(B)-(C) (1973); TEX. FAM. CODE ANN. §§ 12.04(2)-(4) (1975). *See also* Hernandez v. State *ex rel.* Dep't of Econ. Security, 23 Ariz. App. 32, 35, 530 P.2d 389, 392 (1975); ARIZ. DEP'T OF ECON. SECURITY, FAMILY AND CHILD WELFARE MANUAL, PROTECTIVE SERVICES, § 4-1404 (1970) [hereinafter cited as WELFARE MANUAL].

4. In regard to the constitutional status of the relationship between the state, children, and parents, "[i]t is clear that the [state] has an interest in the health and education of children that in many respects is superior to the interests of parents or the wishes of children." Meek v. Pittenger, 374 F. Supp. 639, 652 (E.D. Pa. 1974). Because the perpetuation of the state is of primary importance, parental authority must be subordinate to this supreme power where the welfare and education of future citizens is concerned. *See* Wilson v. Mitchell, 48 Colo. 454, 465, 111 P. 21, 25 (1910); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1383-84 (1974). One commentator feels, based on experiences as a juvenile court judge,

To the extent necessary to protect society's interests as well as those of the child, the state has the power to interfere with the parent-child relationship, such intervention varying from the minimal requirement of compulsory school attendance[5] to the drastic step of legal termination of parental rights.[6]

The neglect proceeding is one very direct form of state intervention in the parent-child relationship.[7] To remain free from such intervention, parents must fulfill certain minimum obligations, such as providing the child with food, shelter, clothing, education, and medical care.[8] Child neglect[9] legally occurs when these statutory requirements are not met,[10] the possible effect being loss of the child's custody.[11] The degree of state intrusion and the severe consequences of a neglect adjudication make it imperative that serious consideration be given to the differing due process rights of both parents and the child in such a proceeding.

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that unreported neglect during a child's early years is an important cause of delinquency. *See* Dembitz, *The Good of the Child Versus the Rights of the Parent: The Supreme Court Upholds the Welfare Home-Visit*, 86 POL. SCI. Q. 389, 392 (1971). It is important then that the state be given the means to supervise the upbringing of children where parents have failed.

5. *See* ARIZ. REV. STAT. ANN. § 15-321 (1975). The state's power is not unlimited, even in the area of education. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); LeRoy v. Odgers, 18 Ariz. App. 499, 501, 503 P.2d 975, 977 (1972); Pendley v. Mingus Union High School Dist. No. 4, 17 Ariz. App. 512, 515, 498 P.2d 586, 589 (1972).

6. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-531 to -544 (1974); ORE. REV. STAT. §§ 419.523-.529 (1973); TEX. FAM. CODE ANN. §§ 15.01-.07 (1975).

7. When one observes the expanding power of government into the family sphere, one must begin to readjust one's legal concept of family relationship, especially that of parent and child. . . . From a legal perspective, that relationship is probably the least secure in the family constellation. No appropriate legal remedy is available to readjust or terminate an ongoing husband-wife relationship against the wishes of the spouses. . . . But the parent-child relationship is susceptible to subtle, indirect, and sometimes direct intrusions.

S. KATZ, WHEN PARENTS FAIL 5 (1971).

8. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-531(8)(c) (1974); D.C. CODE ANN. § 16-2301(21)(C) (1973); ILL. ANN. STAT. ch. 37, § 701-12 (Smith-Hurd 1972); TEX. FAM. CODE ANN. § 12.04 (1975). *See also* UNIFORM JUVENILE COURT ACT § 38 (adopted in North Dakota, N.D. CENT. CODE §§ 27-20-01 to -59 (1974), and Georgia, GA. CODE ANN. §§ 24A-101 to -3901 (Cum. Supp. 1975)).

9. There seems to be confusion in the statutes of different jurisdictions as to the difference between neglect and dependency. See text & notes 30-35 *infra*. For purposes of this Note, the term neglect will include both terms, although Arizona statutes incorrectly use dependency as the all-inclusive term. *See* ARIZ. REV. STAT. ANN. § 8-201(10) (1974).

10. In Arizona, a neglected child is one who is adjudicated to be:

(a) In need of proper and effective parental care and control and has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control.

(b) Destitute or who is not provided with the necessities of life, or who is not provided with a home or suitable place or abode, or whose home is unfit for him by reason of abuse, neglect, cruelty, or depravity by either of his parents, his guardian, or other person having his custody or care.

(c) Under the age of eight years who is found to have committed an act that would result in adjudication as a delinquent or incorrigible child if committed by an older child.

ARIZ. REV. STAT. ANN. § 8-201(10) (1974); *see, e.g.*, CAL. WELF. & INST'NS CODE § 600 (West 1972); D.C. CODE ANN. § 16-2301(9) (1973); GA. CODE ANN. § 24A-401(h)(1) (Cum. Supp. 1975).

11. *See* ARIZ. REV. STAT. ANN. §§ 8-241(A)(1)(b)-(g) (1974).

The scope of due process rights in any situation is inextricably bound to the circumstances,[12] varying with the nature of the interests affected and the extent of the government intrusion.[13] For example, procedures that may satisfy due process in a welfare termination hearing or a driver's license revocation hearing would fall short of the procedures required to satisfy due process in a criminal trial.[14] In the area of juvenile law, due process requirements also vary with the nature of the proceeding. In some jurisdictions a delinquency proceeding may closely resemble a criminal trial; the procedures sufficient to satisfy due process in each, however, are by no means identical.[15] A parallel distinction should be drawn between neglect and termination proceedings. A termination proceeding may result in permanent severance of the parent-child relationship, and it therefore is unwise to assume that every procedure necessary to satisfy due process in that proceeding is likewise required in a neglect proceeding, which interferes only temporarily with the custody of the child. The failure to draw this distinction, however, is an error commonly found in case law and commentaries alike.[16]

This Note will focus solely on the due process requirements in a neglect proceeding, keeping in mind the distinction between such limited intervention and the more drastic step of terminating the parent-child relationship. It will examine the power of the juvenile court to order temporary intervention in the relationship and suggest what procedures are necessary to assure that such interference comports with the due process rights of both parent and child.

NEGLECT JURISDICTION—A HISTORICAL PERSPECTIVE

The common law has long recognized the right of the state to

12. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 650 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Madera v. Board of Educ., 386 F.2d 778, 780 (2d Cir. 1967).

13. *See* United States v. Kras, 409 U.S. 434, 445-46 (1973); Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

14. *Compare* Bell v. Burson, 402 U.S. 535 (1971), *and* Goldberg v. Kelly, 397 U.S. 254 (1970), *with In re* Gault, 387 U.S. 1, 59-60 nn.1-4 (1967) (Black, J., concurring), Klopfer v. North Carolina, 386 U.S. 213 (1967), Pointer v. Texas, 380 U.S. 400 (1965), *and* Gideon v. Wainwright, 372 U.S. 335 (1963).

15. *See In re* Gault, 387 U.S. 1, 30 (1967). *See also Special Project—Juvenile Justice in Arizona: Adjudication*, 16 ARIZ. L. REV. 325 (1974).

16. *See* Caruso v. Superior Court, 2 Ariz. App. 134, 143, 406 P.2d 852, 861 (1965), *vacated*, 100 Ariz. 167, 412 P.2d 463 (1966); *Ex parte* Johnny G., 512 S.W.2d 821, 822 (Tex. Civ. App. 1974); Thomson v. Harrell, 271 S.W.2d 724, 727 (Tex. Civ. App. 1954); Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause*, 4 SUFFOLK U.L. REV. 631, 656-57 n.99 (1970); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 985 n.5 (1975); Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 465 n.1 (1970) [hereinafter cited as Note, *Child Neglect*]; Note, *The Requirement of Appointment of Counsel For Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. FAMILY L. 223 (1974).

intervene in the parent-child relationship when necessary to protect the rights of minors who are being abused or neglected.[17] According to this parens patriae theory, which had its origins in 18th century English law,[18] the Crown had the power to protect those subjects who were unable to protect themselves, such as mental incompetents and children.[19] Besides protecting minors incapable of asserting their own rights, this doctrine also served to promote the public's interest in seeing that children were raised to become useful citizens.[20] The parens patriae concept expanded over the years and was eventually transported to this country along with other common law doctrines,[21] with the state replacing the Crown as promoter of the best interests of children.

During the early developmental period in American history, courts exercising their parens patriae powers made virtually no distinction in their treatment of delinquents and neglected children.[22] Reformers likewise made no distinction, seeking only to separate juveniles from adults in different institutions; there was no attempt to establish separate facilities for neglected versus delinquent children.[23] Not until the enactment of the Illinois Juvenile Court Act in 1899 were neglected children distinguished from delinquents, both by definition and in terms of treatment.[24] Hailed as signaling a new era in the history of criminal justice,[25] the new Illinois children's court was quickly imitated by other states and countries.[26] During this period the public was especially

17. *See* Johnstone v. Beattie, 8 Eng. Rep. 657, 687 (H.L. 1843); Wellesley v. Beaufort, 38 Eng. Rep. 236, 241 (Ch. 1827); Eyre v. Shaftsbury, 24 Eng. Rep. 659, 659 (Ch. 1725).

18. *See* Eyre v. Shaftsbury, 24 Eng. Rep. 659 (Ch. 1725).

19. "[T]he Crown, as parens patriae, was the supreme guardian and superintendent over all infants." *Id.* at 659. *See* Fladung v. Sanford, 51 Ariz. 211, 217, 75 P.2d 685, 687 (1938).

20. *See* Wellesley v. Beaufort, 38 Eng. Rep. 236, 239 (Ch. 1827); Eyre v. Shaftsbury, 24 Eng. Rep. 659, 660 (Ch. 1725).

21. Many American jurisdictions adopted the English common law in force at the time of the Revolution as their substantive law. *See, e.g.*, N.Y. CONST. art. I, § 14; PA. STAT. ANN. tit. 46, § 152 (1969); R.I. GEN. LAWS ANN. § 43-3-1 (1971); VT. STAT. ANN. tit. 1, § 271 (1972). For Arizona's reception statute, see ARIZ. REV. STAT. ANN. § 1-201 (1974).

22. S. FOX, MODERN JUVENILE JUSTICE 19 (1972). For a detailed discussion of early attempts to provide treatment for neglected and delinquent children prior to the development of juvenile courts, see *id.* at 15-53.

23. "All [children] may be classed together under this age [14], for there is no distinction between pauper, vagrant, and criminal children, which would require a different system of treatment." S. FOX, *supra* note 22, at 19, *quoting* Mary Carpenter, a 19th century reformer.

24. §§ 1, 7, 9, [1899] Ill. Laws 131, 133 (now ILL. ANN. STAT. ch. 37, §§ 702-2, -4, -5, 705-2(1)(a), (c)-(d) (Smith-Hurd 1972)).

25. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104 (1909). "The past decade marks a revolution in the attitude of the state toward its offending children, not only in nearly every American commonwealth, but also throughout Europe, Australia, and some of the other lands." *Id. See also* S. FOX, *supra* note 22, at 47-48.

26. [S]ince [the enactment of the Illinois Juvenile Court Act] similar legislation has been adopted in over thirty American jurisdictions, as well as in Great Britain and Ireland, Canada, and the Australian colonies. In con-

receptive to change in the treatment of delinquent and neglected children and welcomed the more family-based forms of rehabilitation[27] afforded children under the new children's court system.[28] Following Illinois' lead, every state has now enacted legislation providing both separate courts and separate treatment for delinquent, dependent, and neglected children.[29]

Although the state's power to intervene in the parent-child relationship in cases of alleged neglect is now set forth in juvenile statutes, the exact scope of this power unfortunately is not so clearly articulated. One problem in determining the extent of state power in this area is definitional. Because the labels for neglect and dependency situations vary from state to state, it is often difficult to determine what the legislature is attempting to deal with. For example, while Arizona has eliminated the term "neglect" from its definitions and uses the term "dependency" to cover all situations where a child is receiving inadequate care,[30] Texas has dropped both terms in favor of the phrase "suits affecting the

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tinental Europe and also in Asia the American juvenile courts have been the object of most careful study, and either by parliamentary or administrative measures similar courts have been established . . . .

Mack, *supra* note 25, at 107-08.

27. This act shall be liberally construed, to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child be placed in an improved home and become a member of the family by legal adoption or otherwise.

§ 21, [1899] Ill. Laws 137 (now ILL. ANN. STAT. ch. 37, § 701-2(1) (Smith-Hurd 1972)).

28. An era of progressivism helped to generate receptivity for any strongly supported welfare proposal . . . . A widespread sense of failure in the century-long effort to provide for "the best interests" of lower-class children and a realization that reform schools—family as well as congregate—had struck out dismally could have led to a discomforting awareness that the American social and economic system needed reform as much as did deviant parents and their offspring. . . . [S]uch factors would have created a profound need for the dawn of some new era.

S. FOX, *supra* note 22, at 48 (emphasis omitted).

29. Statutory citations are given in Sullivan, *Child Neglect: The Environmental Aspects*, 29 OHIO ST. L.J. 85, 85 n.1 (1968). *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-201(10), -202 (1974); CAL. WELF. & INST'NS CODE § 600 (West 1972); D.C. CODE ANN. §§ 11-1101(13), 16-2301(9) (1973); GA. CODE ANN. §§ 24A-301(a)(1)(C), -401(h)(1) (Cum. Supp. 1974).

30. *See* ARIZ. REV. STAT. ANN. § 8-201(10) (1974). Arizona has dropped the term "neglect" because of its stigmatizing effect upon parents. The objective is to focus on the needs of the child, regardless of parental fault. Interview with Norman Spindler, Pima County, Ariz., Juvenile Court Investigator, in Tucson, Ariz., Sept. 6, 1974. This change of terminology is an attempt to follow suggestions set forth in the UNIFORM JUVENILE COURT ACT § 2(5), Commissioner's Note. The Uniform Act, however, eliminates both the neglect and dependency labels, substituting the entirely new term "deprived child." Arizona, by retaining the dependency label has only succeeded in confusing the distinction between the two terms. The confusion is also compounded by retaining the term "neglected" in its adjectival sense in the termination statutes. *See* ARIZ. REV. STAT. ANN. § 8-531(9) (1974). Arizona formerly maintained a statutory distinction between neglect and dependency. *See* ch. 80, § 2, [1941] Ariz. Laws 157 (Ariz. Rev. Stat. § 8-201(5) (1956)).

parent-child relationship."[31] For the sake of uniformity and ease of interpretation, these terms should be kept separate. The term "neglect" should be used only with reference to parental culpability, whatever its manifestations; neglect should connote a willful refusal to provide for the child's well-being, willful physical abuse, or total abandonment.[32] Dependency, on the other hand, should refer to the case of a child whose parents are financially or physically unable to care for him.[33] It is important to maintain this distinction in order to insure that parental inability to provide care will never be the sole reason for submitting either parent or child to the court's jurisdiction.[34] Instead, such problems should be handled nonlegally as they come to the attention of social agencies. Arizona's statutory framework is deficient in this regard, allowing parents to be brought before the court for purely nonwillful, unavoidable failings in the upbringing of their children.[35]

A second definitional problem which causes confusion in the literature and case law is the effect of a finding of neglect upon the rights and duties of parent and child. This question involves the legal definitions of guardianship and custody. A finding of neglect should affect only the parents' legal custody of the child.[36] Permanent termination of parental rights, on the other hand, concerns the guardianship of the child and takes place in a proceeding entirely separate from a neglect hearing.[37] Legal custody and guardianship are distinct concepts involv-

31. TEX. FAM. CODE ANN. § 11.01(5) (1975). While section 11.01 expressly sets forth what parental rights are forfeited when a legal custodian (possessory conservator) is appointed in a hearing, *id.* § 14.04, one must look elsewhere in the child abuse statutes to discover under what circumstances such custodial rights will be forfeited by the parents and turned over to a conservator. *Id.* § 34.01. For a discussion of the Texas statutes, see Smith, *Parent and Child—Title 2 of the Texas Family Code*, 8 FAMILY L.Q. 135 (1974).

32. *See* Note, *Dependency and Neglect: Indiana's Definitional Confusion*, 45 IND. L.J. 606 (1970); Note, *Neglected Children and Their Parents in Indiana*, 7 IND. L. REV. 1048 (1974).

33. *See* UNIFORM JUVENILE COURT ACT § 2(5), Commissioner's Note; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, LEGISLATIVE GUIDES FOR DRAFTING FAMILY AND JUVENILE COURT ACTS § 2, Comment (1969); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT § 8, Comment (1959) [hereinafter cited as STANDARD ACT]; NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARDS FOR JUVENILE AND FAMILY COURTS 34 (1966) [hereinafter cited as COURT STANDARDS]; N.Y. JOINT LEGISLATIVE COMM. ON COURT REORGANIZATION, THE FAMILY COURT ACT 7 (1962); THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, U.S. DEP'T OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 27-28 (1967). Dependency, rather than neglect, is also involved where the child has no surviving parent or guardian. *See* ILL. ANN. STAT. ch. 37, §§ 702-1, -5 (Smith-Hurd 1972).

34. A good argument has been made that dependency cases are more properly matters to be handled administratively by social agencies. *See* authorities cited note 33 *supra*.

35. *See* ARIZ. REV. STAT. ANN. §§ 8-201(1)(a)-(b) (1974).

36. Arizona statutes provide that a child who has been adjudicated dependent will be "awarded" to one of the individuals or agencies listed. *See id.* § 8-241(A)(1). The definition of "award" is "assign legal custody." *Id.* § 8-201(4).

37. *Compare id.* §§ 8-201 to -248 *with id.* §§ 8-531 to -544. Some of the circumstances that would call for the more drastic termination proceeding include total

ing different rights and responsibilities to a child. Custody concerns the day-to-day care of the child and includes such obligations as providing food, shelter, clothing, and education.[38] It cannot be acquired by mere physical possession of the child, but rather must be judicially vested before it can be exercised by anyone other than a parent.[39] Even if custody is removed after a finding of neglect, the parent, as guardian, still retains the power to make important decisions affecting the child, such as consent to major surgery, adoption, marriage, or enlistment in the armed services.[40] If a court feels that these rights need also be removed, it must permanently terminate the parent-child relationship and name a guardian for the child;[41] simple removal of legal custody is not enough.[42] When guardianship is awarded to an individual or agency, the guardian has the right to make major decisions regarding the child's future, a power which would be retained by the parent if only custody were removed.[43] As with custody, guardianship can be transferred only through judicial proceedings, [44] even when parents voluntarily relinquish their rights.

When there is a finding of neglect and the child is committed temporarily to the care of another, only legal custody is transferred and this only until the home situation is improved.[45] If there is no such improvement, the state may later choose to move against the parents by commencing a termination proceeding.[46] It is important, then, that custody and guardianship be distinguished.[47] Without a clear understanding of the differences between these concepts, an agency that has been awarded custody of a neglected child might assume unwarranted powers over the minor's welfare, improperly usurping the remaining rights of the parents. Further, distinguishing the two terms is crucial to

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abandonment of the child, willful abuse, and parental inability to care for the child due to an indeterminately prolonged mental illness or imprisonment. *See id.* § 8-533.

38. *See, e.g., id.* § 8-531(8); ILL. ANN. STAT. ch. 37, § 701-12 (Smith-Hurd 1972); D.C. CODE ANN. § 16-2301(21) (1973).

39. *See* COURT STANDARDS, *supra* note 33, at 18.

40. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-531(6)(a) (1974); D.C. CODE ANN. § 16-2301(20)(A) (1973); TEX. FAM. CODE ANN. §§ 14.02(b)(5)-(6) (1975); COURT STANDARDS, *supra* note 33, at 19.

41. *See* ARIZ. REV. STAT. ANN. § 8-538(B) (1974).

42. *See id.* § 8-531(6)(a); D.C. CODE ANN. § 16-2301(20)(A) (1973).

43. *See* statutes cited note 40 *supra.*

44. *See* ARIZ. REV. STAT. ANN. § 8-538(B) (1974); COURT STANDARDS, *supra* note 33, at 19.

45. *See* ARIZ. REV. STAT. ANN. §§ 8-201(4), -204(A) (1974).

46. *See* Hernandez v. State *ex rel.* Dep't of Econ. Security, 23 Ariz. App. 32, 530 P.2d 389 (1975).

47. In Arizona, while guardianship and custody are distinguished in the newer statutes concerning termination of the parent-child relationship, *see* ARIZ. REV. STAT. ANN. §§ 8-531(6), (8) (1974), there is no comparable definitional section found in the neglect statutes. It is important that the distinction be maintained in both sets of statutes so that the parent, the agency, and the court clearly understand the extent of their rights and responsibilities to the neglected child in both situations.

an analysis of the due process rights involved in a neglect versus a termination proceeding. The removal of legal custody from the parents is a lesser intrusion into the parent-child relationship than terminating guardianship rights, and need not, therefore, invoke the same due process standards.

DUE PROCESS & NEGLECT PROCEEDINGS— A CONSTITUTIONAL PERSPECTIVE

The parent-child relationship is not a property or contract right, but a status that can be altered or abrogated by the state acting in furtherance of societal concerns for the protection of children.[48] Originally courts allowed such intervention under the theory that the child was primarily a ward of the state; during this period states exercised broad discretion, deciding both the extent of the parents' control over the child and when it would end.[49] In more recent decisions, following the lead of the United States Supreme Court,[50] courts have treated maintenance of the parent-child relationship as a fundamental right, subject to all the protections of due process.[51]

The Supreme Court has consistently recognized that the parents' right to direct the upbringing of their children is basic to the structure of our society.[52] The child's reciprocal right to this parental support is

48. *See* Fladung v. Sanford, 51 Ariz. 211, 216-17, 75 P.2d 685, 687 (1938); text & notes 2-6 *supra*.

49. *See* Shumlay v. Farley, 68 Ariz. 159, 163, 203 P.2d 507, 510 (1949); Fladung v. Sanford, 51 Ariz. 211, 216-17, 75 P.2d 685, 687 (1938); Wilson v. Mitchell, 48 Colo. 454, 458-59, 111 P. 21, 25-26 (1910); Gardner v. Hall, 132 N.J. Eq. 64, 81, 26 A.2d 799, 809 (Ch. 1942). See discussion note 2 *supra*.

50. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 512 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

51. *See, e.g.*, Mattis v. Schnarr, 502 F.2d 588, 594 (8th Cir. 1974); Smith v. Wickline, 396 F. Supp. 555, 564 (W.D. Okla. 1975); White v. Minter, 330 F. Supp. 1194, 1196 (D. Mass. 1971); Boone v. Wyman, 295 F. Supp. 1143, 1150 (S.D.N.Y. 1969); *In re* New England Home for Little Wanderers, — Mass. —, —, 328 N.E.2d 854, 860-61 (1975); State *ex rel.* Wallace v. Lhotan, 80 Misc. 2d 464, 469, 363 N.Y.S.2d 425, 431 (Sup. Ct. 1974); *In re* Willis, — W. Va. —, —, 207 S.E.2d 129, 136 (1973).

52. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639 (1968); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Mattis v. Schnarr, 502 F.2d 588, 594 (8th Cir. 1974). In *Meyer* the Supreme Court stated in dicta that the term "liberty," when used in the context of due process, includes an individual's right to establish a home and bring up children. Meyer v. Nebraska, *supra* at 399. In Prince v. Massachusetts, *supra*, it was said that "custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166. More recently the Court has expanded these concepts by applying them to less conventional family relationships not legitimized by marriage ceremonies. In Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court held that appellant, the putative father of illegitimate children, could not be denied custody without a hearing and proof of neglect. *Id.* at 658.

also involved.[53] Whether these are protected interests within the meaning of the fourteenth amendment, however, is a different question. When analyzing procedural due process issues, it is necessary to go through a two-step test. It must first be established that the interest involved is of such a nature as to be included within the protection of the fourteenth amendment.[54] Once this is resolved affirmatively, the interests of the parties are examined to determine the form and scope of the procedures necessary to provide due process.[55]

When applying the due process test to a neglect proceeding, the initial inquiry is whether the parents' interest in their child's care and control is of such a nature that any governmental interference absent due process of law would violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[56] The Supreme Court has firmly established that the parent-child relationship is indeed fundamental in our society[57] and that the parents' right to the child's custody is a liberty which must be afforded the protection of due process.[58] Custody, care, and nurture of children must always reside first in the parents; establishing a home and bringing up children is a basic freedom, so much so that even less conventional family relationships not legitimized by marriage ceremonies will also be afforded protection.[59]

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53. *See, e.g.*, Gomez v. Perez, 409 U.S. 535, 536 (1973); Shumway v. Farley, 68 Ariz. 159, 163, 203 P.2d 507, 510 (1949); Barrett v. Barrett, 44 Ariz. 509, 513-15, 39 P.2d 621, 622-23 (1934); TEX. FAM. CODE ANN. § 4.02 (1975); *cf.* ARIZ. REV. STAT. ANN. § 8-601 (Supp. 1975-76).

54. The due process clause protects against infringements of life, liberty, or property without due process of law, and is applicable only where one is deprived of one of these protected interests. *See* Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Jensen v. Olesen, 353 F.2d 825, 829 (8th Cir. 1965).

55. *See* Board of Regents v. Roth, 408 U.S. 564, 570 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The rights and relationships involved in the parent-child relationship are not among those expressly enumerated in the Bill of Rights so as to provide an independent basis for limiting government interference. Use of the fourteenth amendment due process clause is thereby of increased importance.

56. Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring), *quoting* Powell v. Alabama, 287 U.S. 45, 67 (1932); *accord*, Mattis v. Schnarr, 502 F.2d 588, 593 (8th Cir. 1974). The term "liberty" in the fourteenth amendment is not confined merely to freedom from bodily restraint. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

57. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 512 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

58. " '[P]arenthood is a substantial interest of surpassing value and protected from deprivation without due process of law'—a fundamental legal right." Mattis v. Schnarr, 502 F.2d 588, 595 (8th Cir. 1974), *quoting* White v. Minter, 330 F. Supp. 1194, 1197 (D. Mass. 1971); *accord*, Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring); Department of Pub. Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956); Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931); Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922).

59. *See* Stanley v. Illinois, 405 U.S. 645 (1972); discussion note 52 *supra*.

Having determined that the parent-child relationship is fundamental and thus protected by due process,[60] it is necessary to take the second analytical step of ascertaining what procedural safeguards are required in order to comport with due process. This determination depends upon the nature of the proceeding and the rights that may possibly be affected.[61] Weighing the competing interests has long been the test employed to determine the procedural formalities needed to ensure due process of law.[62] In a neglect proceeding it is necessary to consider all three of the interests involved: those of the parent, the state, and the child. The welfare of the child, however, should be the prime consideration of the juvenile court in such cases.[63] When a child is subjected to or threatened with serious physical or emotional harm, the right of the

60. It must be remembered, however, that even when an interest is constitutionally protected, there is still the problem of determining what degree of interference will trigger the court's protection. For example, in Boddie v. Connecticut, 401 U.S. 371 (1971), the Supreme Court held that states are prohibited by due process from denying indigents access to divorce courts by charging filing fees.

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

Id. at 374. In United States v. Kras, 409 U.S. 434 (1973), however, the Court refused to apply the *Boddie* holding in the case of bankruptcy filing fees. One of the reasons given was that a denial of access to the courts in a bankruptcy situation does not involve the same degree of interference with a constitutionally protected right as that involved in *Boddie*. The *Kras* Court stated that "the Government's control over the establishment, enforcement, or dissolution of debts [is not] nearly so exclusive as Connecticut's control over the marriage relationship in *Boddie*." *Id.* at 445; *cf.* Sosna v. Iowa, 419 U.S. 532, 547 (1975).

This line of reasoning seems equally applicable in the area of state inteference with the parent-child relationship. Although this relationship is constitutionally protected, the courts may look to the facts to determine if the state's actions in a particular situation are of such a nature as to constitute an interference of constitutional dimensions. For example, compulsory vaccination of school children would probably not be considered a severe interference with the parent-child relationship. On the other hand, removing an allegedly neglected child from his home is certainly a drastic measure and would invoke constitutional protections. In addition to determining whether due process protection is called for at all, the degree of infringement also dictates the level of procedural protection required. "The extent to which procedural due process must be afforded . . . is influenced by the extent to which [one] may be 'condemned to suffer a grievous loss.'" Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970), *quoting* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., dissenting). The due process standards to be applied to neglect proceedings, therefore, would be less stringent than in the case of a termination proceeding due to the even greater degree of state interference with the parent-child relationship in the latter situation.

61. *See* Stanley v. Illinois, 405 U.S. 645, 650 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Madera v. Board of Education, 386 F.2d 778, 780 (2d Cir. 1967); Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973); Vail v. Board of Education, 354 F. Supp. 592, 602 (D.N.H. 1973). The procedure a state chooses "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or give a surer promise of protection . . . ." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

62. Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

63. *See* Bartlett v. Bartlett, 221 F.2d 508, 511 (D.C. Cir. 1945); Clifford v. Woodford, 83 Ariz. 257, 262, 320 P.2d 452, 455 (1957); *In re* Pima County Juvenile Action No. J-31853, 18 Ariz. App. 219, 220, 501 P.2d 395, 396 (1972).

parents to deal with the child as they see fit must give way to the state's interest in protecting children.[64] Once the child has been adjudicated legally neglected, the state as parens patriae[65] may intervene to remove the child from the dangerous situation, abrogating any right the parents have to custody.[66] In taking such action the state's purpose is twofold: protecting the child from neglectful parents and enforcing its own interest in having children raised as healthy, law-abiding citizens.[67]

It is thus clear that the parents' interests in the parent-child relationship are of such nature as to warrant constitutional protection from state intervention without due process of law. It is equally clear, however, that the child and the state also have important interests in the child's situation and treatment which must be carefully considered by the court in a neglect proceeding. The scope and form of the procedures needed to permit state interference in the parent-child relationship by means of the court's neglect jurisdiction can now be determined by analyzing how each stage of a neglect proceeding, beginning with prehearing procedures, affects the various interests involved.

PREHEARING DUE PROCESS: NOTICE, INVESTIGATION, AND DISCOVERY

Not every state interference with the parent-child relationship will require a hearing prior to implementation.[68] For example, the state, by promulgating general laws affecting all persons in the jurisdiction, may enact compulsory school attendance laws or other statutes interfering with the parents' right to raise their child as they see fit. Such statutes are not subject to attack for failure to afford the parent a hearing.[69] On the other hand, when the parent-child relationship is affected under statutes which are invoked only upon a showing of specific facts, as in

64. *See* Note, *Child Neglect, supra* note 16, at 471.

65. *See* text & notes 17-21 *supra.*

66. *See, e.g.*, Carqueville v. Woodruff, 153 F.2d 1011, 1012 (6th Cir. 1946); *In re* Stuart, 114 F.2d 825, 832 (D.C. Cir. 1940); Orezza v. Ramirez, 19 Ariz. App. 405, 409, 507 P.2d 1017, 1021 (1973); *In re* Pima County Juvenile Action No. J-31853, 18 Ariz. App. 219, 220, 501 P.2d 395, 396 (1972). *See also* Note, *Child Neglect, supra* note 16, at 472.

67. *See* authorities cited note 4 *supra.*

68. "[D]ue process of law does not require a hearing in every conceivable case of government impairment of private interest." Stanley v. Illinois, 405 U.S. 645, 650 (1972), *quoting* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894 (1961). *See also* United States v. Husband R. (Roach), 453 F.2d 1054, 1062 (5th Cir. 1971); Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967).

69. The parents may protect their rights in these situations by exercising the right to vote. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915). If such a statute were arbitrary or capricious, however, it could be attacked on principles of substantive due process. *See generally* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1973); Zemel v. Rust, 381 U.S. 1 (1965); Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 171-73 (1975).

the case of neglect, there must be a hearing.[70] To satisfy minimum due process requirements, then, it would appear that parents must be afforded adequate notice and an opportunity for a hearing appropriate to the nature of the case[71] before being deprived of their child's custody because of specific allegations of neglect. All steps required by due process preliminary to a hearing are aimed at providing parents with adequate notice so that they will have the opportunity to avoid state intervention by voluntarily accepting state supervision,[72] or to prepare a proper defense in the event the court's powers are invoked. Without such notice any subsequent hearing would be meaningless.[73]

Intake Procedure in Arizona: Notice and Vagueness

Generally, anyone—a neighbor, relative, teacher, police officer, doctor, or parent[74]—may report what they believe to be a case of neglect. In Arizona all complaints are referred to the Protective Services Division of the Department of Economic Security,[75] which conducts

70. A party has the right to be heard when official action against him is based upon "individual grounds," but not necessarily when official action is based upon general grounds; that is, there is a right to a hearing when the facts are adjudicative, but not when they are legislative. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.03 (1972). *Compare* Londoner v. Denver, 210 U.S. 373 (1908) (invalidating a street repair assessment against certain property, levied without a hearing for the owner), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (upholding a 40 percent across-the-board property tax increase effected without a hearing).

71. Procedural due process at a minimum requires that the individuals be afforded notice and a hearing. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971); Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). See text & notes 139-43 *infra*.

72. *See* text & note 78 *infra*.

73. "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *accord*, Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

74. From July to October 1973, abuse and neglect complaints in Arizona were received from the following sources: law enforcement—25%; neighbors—22%; relatives—18%; hospitals and physicians—10%; social agencies—12%; and others—13%. Arizona Dep't of Econ. Security, Division of Family and Child Welfare, Interoffice Memo, Nov. 27, 1973.

To encourage public participation in reporting suspicious cases, some states grant immunity to those who in good faith report suspected cases of physical abuse. *See* ARIZ. REV. STAT. ANN. § 8-546.04(A) (1974); TEX. FAM. CODE ANN. § 34.03 (1975); Daly, *Willful Child Abuse and State Reporting Statutes*, 23 U. MIAMI L. REV. 283 (1969).

The issue of child abuse ("battered child syndrome") is beyond the scope of this Note. For a discussion of that topic, see McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, 12 AM. CRIM. L. REV. 165 (1974); Raffalli, *The Battered Child: An Overview of a Medical, Legal and Social Problem*, 16 CRIME & DELIN. 139 (1970); Note, *Child Abuse and the Law: A Mandate for Change*, 18 HOW. L.J. 200 (1973)

75. In 1971 the State Department of Economic Security was designated as the agency responsible for providing protective services to neglected, abused, or abandoned children. *See* ARIZ. REV. STAT. ANN. § 8-224(B) (1974). "Protective services" is a program of specialized child and family-oriented casework, designed to preserve the family unit by focusing on families where unresolved problems have produced visible signs of dependency or abuse. The objective is to strengthen parental capacity to provide good child care. *Id.* § 8-546(5). For a detailed study of the development of

a preliminary inquiry.[76] Where this investigation reveals the existence of adequate grounds to follow through on the complaint,[77] a protective services worker will decide whether it is desirable to file a neglect petition or, instead, to adjust the matter informally through the parents' voluntary acceptance of protective services for their child.[78] If informal adjustment is not possible,[79] the worker must file a neglect petition with the juvenile court.[80] The filing of this petition officially institutes the state's suit against the parents in the name of their child and thereby commences the neglect proceeding.[81]

In order for the adjudication to have binding effect upon the parents' future right to custody, however, they must be notified of the pendency of the action,[82] as notice to parties whose rights are being affected by judicial proceedings is an essential element of due process.[83]

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protective services across the country, see CHILDREN'S DIVISION, THE AMERICAN HUMANE SOCIETY, CHILD PROTECTIVE SERVICES, A NATIONAL SURVEY (1967).

76. Upon receiving a report of dependency, abuse, or neglect, a protective services worker must make a preliminary investigation within 48 hours to determine if the situation appears urgent. *See* ARIZ. REV. STAT. ANN. § 8-546.01(C)(3) (1974); WELFARE MANUAL, *supra* note 3, at §§ 4-1403, -1406. If the child is in physical danger, he may be removed immediately from the home prior to such investigation. *See* ARIZ. REV. STAT. ANN. § 8-546.01(C)(4) (1974).

In Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court ruled that children may not be removed from their parents' custody prior to a hearing, absent a countervailing state interest. *Id.* at 649, 651. Although the parent might regain custody after a subsequent hearing, the temporary deprivation suffered by both parent and child cannot be "undone." *Id.* at 647; *cf.* Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). If a child is suffering from illness or injury, or is in immediate danger from his home situation, however, states have the duty to remove the child from the home immediately.

> Children . . . who have been abandoned or neglected and are in distress cannot wait for attention indefinitely while search is being made throughout the country for their parents and service is had on them. Delay might be runious [sic]. It is a matter of importance that action be taken at once for the protection of the child."

DeWitt v. Brooks, 143 Tex. 122, 127, 182 S.W.2d 687, 690 (1944). See text & note 198 *infra*.

77. Approximately 50 percent of all reported neglect complaints have no basis in fact. Interview with James Henry, former Yuma County, Ariz., Welfare Director, in Tucson, Ariz., Sept. 5, 1974.

78. *See* ARIZ. REV. STAT. ANN. § 8-546.01(C)(6) (1974). Roughly 85 percent of all neglect cases are adjusted informally without ever involving the courts. Interview with James Henry, *supra* note 77.

79. *See* ARIZ. REV. STAT. ANN. § 8-224(B) (1974).

80. The worker will file a complaint with the juvenile court if the family declines to accept or participate in the offered services, or if the worker otherwise believes that such action would be in the best interests of the child. *See id.* § 8-546.02(B).

81. *Id.* § 8-221(2). In some jurisdictions, conducting a neglect hearing when no petition has been filed is grounds for reversal. *See In re* Toler, 262 La. 557, 566, 263 So. 2d 888, 891-92 (1972).

82. Armstrong v. Manzo, 380 U.S. 545 (1965); Farnham v. Pierce, 141 Mass. 203, 6 N.E. 830 (1886). "[A]s to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies." Armstrong v. Manzo, *supra* at 550.

83. Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Denton v. Ellis, 258 F. Supp. 223, 229 (E.D.N.C. 1966). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

One means whereby the parents are notified that a neglect action has been commenced on behalf of their child is through the petition,[84] which is required by law in Arizona to contain a short statement of facts essential to establishing that the child is neglected.[85] In order to satisfy due process, the notice given by the petitioner must reasonably apprise the affected parties of the reasons for their being subjected to judicial proceedings.[86] In most jurisdictions the adequacy of a civil petition is determined by whether the issues have been made clear; specific facts need not be alleged.[87] In delinquency proceedings, on the other hand, the allegations must be set forth with particularity.[88] The requirements for neglect proceedings should fall between those two standards. Due to the serious consequences of a neglect proceeding and the absence of discovery rules,[89] a higher standard than that required in civil matters should be applied to bring about a clear delineation of the facts in issue. On the other hand, because neglect is not as susceptible to public detection as delinquency and is of an inherently chronic nature,[90] applying the particularity standard necessary in delinquency and criminal cases would be unduly burdensome and could unnecessarily impair the state's efforts to protect neglected children. Instead, it would appear that for notice to be adequate in neglect cases, the substance of the petition should fall somewhere between the parameters in civil and criminal cases.[91] At a minimum, the facts which triggered the initial

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them an opportunity to present their objections." Armstrong v. Manzo, 380 U.S. 545, 550 (1965). See text & note 71 *supra*.

84. In Arizona the neglect petition is to be generally in the form of and contain the information required by delinquency petitions. *See* ARIZ. R.P. JUV. CT. 4, 15(a).

85. *Id.* 15(a). How detailed the statement in the petition must be is not clear. An examination of neglect petitions in Pima County reveals that specific incidences or patterns of neglect are rarely mentioned, except for cases of physical abuse reported by medical authorities. Most allegations are couched merely in statutory terms, because it is felt that alleging specific facts in the petition would make it accusatory in nature, creating hostility on the part of parents. Interview with Phyllis Sugar, former Assistant Attorney General for the Arizozna Dep't of Econ. Security, in Tucson, Ariz., Oct. 1, 1974.

86. *See* Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Sullivan v. Choquette, 420 F.2d 674, 676 (1st Cir.), *cert. denied*, 398 U.S. 809 (1969); Matthews v. Jones, 149 F.2d 893, 894 (5th Cir. 1945); Hackner v. Guaranty Trust Co., 117 F.2d 95, 98 (2d Cir.), *cert. denied*, 313 U.S. 559 (1941).

87. *See* FED. R. CIV. P. 8(a)(1); ARIZ. R. CIV. P. 8(a)(1); Campbell, *supra* note 16, at 668. This test for adequacy is followed in notice-pleading jurisdictions, that is, those which follow in general form the federal rules on pleading.

88. *In re* Gault, 387 U.S. 1, 33 (1967); ARIZ. R.P. JUV. CT. 4(a)(1).

89. *See* text accompanying note 128 *infra*.

90. Although a neglect action may be triggered by the occurrence of a specific event, the event is usually significant only as a means whereby the neglect was discovered. Neglect itself is chronic in nature, occurring over a long period of time. *See* Note, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 GEO. L.J. 257, 258 (1974).

91. As long as discovery is permitted in neglect proceedings, due process can be satisfied even though the petition itself may not be deemed adequate notice. Discovery affords the respondent a means to uncover information needed to prepare his defense in addition to that provided by the petition's charges. *Cf. Special Project*, *supra* note 15, at 338.

complaint should be enumerated so the parents are aware of the reason for court intervention. However, it should not be necessary to force the petitioner to detail all the facts uncovered during the course of the caseworker's investigation upon which the petition was filed; adequate notice does not require such detail.

Once a petition has been filed with the court clerk, a citation is sent to the respondent[92] along with a copy of the petition.[93] The rules in Arizona do not specify a time limit for service of the citation and petition, but to satisfy the requirements of due process notice must be received in time for the parents to prepare their case.[94] Where the child has been removed from the home prior to the hearing, the hearing cannot be scheduled sooner than 10 days from the date of the filing of the petition unless the parties agree upon an earlier date.[95] Providing notice is sent soon after filing, this requirement of a 10-day period between filing and hearing allows for more than adequate preparation time;[96] however, the Arizona rule does not require that notice be so promptly provided.[97]

Another problem which arises regarding notice is whether the charge in the petition is stated with sufficient specificity properly to notify respondents of the substance of the charges against them. The petition often merely quotes the language of the neglect statute, which varies greatly in specificity among jurisdictions.[98] In fact, several statutes defining neglect have been challenged on vagueness grounds.[99] It

92. It is unclear whether notice must be given to the child as well as to the parents. The rules for neglect cases provide only that the petition be served as set forth in rule 5 for delinquency petitions. *See* ARIZ. R.P. JUV. CT. 15(a). Subsection C of rule 5 provides that notice be served upon children 14 years or older. It would appear, therefore, that notice must be given at least to children over 14 years of age in a neglect proceeding. *See id.* rule 5(c). *See also* D.C. CODE ANN. § 16-2306(a) (1973). One commentator has said that there is no constitutional requirement that the child be given notice of neglect proceedings because the child is not a necessary party to the action. *See* Campbell, *supra* note 16, at 666. Merely because the child's presence is not required in court, however, does not change the fact that the child is a party in the action whose interests may be adversely affected by the outcome of the proceedings.

93. ARIZ. R.P. JUV. CT. 5, 15.

94. Adequate and timely notice is essential. *See* authorities cited note 73 *supra.*

95. ARIZ. R.P. JUV. CT. 15(b). The Arizona rule contains no similar requirement where the child has not been removed from the home.

96. Two days' notice has been deemed adequate by some authorities. *See* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS rule 20, at 44 (1969) [hereinafter cited as MODEL RULES]; COURT STANDARDS, *supra* note 33, at 65. The Arizona statutes provide no assurance that notice will be sent soon after the petition has been filed. This should not be left to the discretion of court personnel. What constitutes adequate notice in terms of a time period needs to be determined and clearly set forth by statute.

97. *See* ARIZ. R.P. JUV. CT. 15.

98. *Compare* LA. REV. STAT. ANN. §§ 13:1570(1)-(2) (West 1968), TEX. FAM. CODE ANN. § 17.04 (1975), *and* W. VA. CODE ANN. § 49-1-3 (1966), *with* N.J. STAT. ANN. § 9:6-1 (1960) *and* WASH. REV. CODE ANN. § 13.04.010 (1962).

99. *See, e.g., In re* Daniel R., 274 Cal. App. 2d 749, 79 Cal. Rptr. 247 (Dist. Ct. App. 1971); State v. Mattiello, 4 Conn. Cir. Ct. 55, 225 A.2d 507 (1966); S**** S****

is not always preferable, nor necessary, however, that a forbidden action be set forth in specific language in order to afford proper notice.[100] On the other hand, if no standard of conduct is specified at all, respondents will be unable to prepare an adequate defense.

The Arizona neglect statute defines neglect with such phrases as "in need of proper and effective parental care and control," "destitute," and lacking a "suitable place of abode."[101] Taken out of context these terms might be considered to be too vague, but they should survive constitutional attack because the normative standards imposed upon parents by our society give meaning to the terms.[102] It is also doubtful that the use of such terms fails to give parents adequate notice of what conduct will or has brought them under the court's scrutiny. The due process question is not whether the statute contains nonspecific language, but whether it is so vague and indefinite as to constitute no notice at all.[103]

Investigation and Warrantless Searches

The fourth amendment guarantee against unreasonable searches and seizures, enforced in criminal proceedings by exclusion of evidence seized illegally,[104] may also be applicable to neglect proceedings as a matter of due process. Although the parents are not being held criminally liable in a neglect case and the ultimate penalty is less severe than in termination hearings, it is arguable that such protection should be provided. The degree of governmental intrusion is greater in the case of parental termination proceedings, making a stronger argument for extending fourth amendment protections; however, this does not mean

v. State, 299 A.2d 560 (Me. 1973); Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389 (1971); State v. L.N., 109 N.J. Super. 278, 286-87, 263 A.2d 150, 155 (App. Div.), *cert. denied*, 402 U.S. 1009 (1971); *In re* Black, 3 Utah 2d 315, 283 P.2d 887 (1955).

100. Notice can also be satisfied through use of discovery. See text at p. 1074.

101. ARIZ. REV. STAT. ANN. §§ 8-201(10)(a)-(b) (1974). See statute note 10 *supra*.

102. A statute will be deemed void for vagueness and therefore in violation of due process not because the required or prohibited conduct is imprecise, but rather when no standard of conduct is specified at all. *See* Coates v. Cincinnati, 402 U.S. 611, 614 (1971); *accord*, S**** S**** v. State, 299 A.2d 560, 568 (Me. 1973). In a concurring opinion to a recent Arizona case, Justice Struckmeyer briefly addressed and rejected a vagueness challenge to Arizona's neglect statute:

> The . . . statute . . . simply says that a dependent child is a child who has no parent willing or capable of exercising proper and effective parental care and control. The words "proper and effective" provide only the most nebulous of guidelines. Obviously their meaning will shift from judge to judge and case to case. Equally obvious, the statute would be unconstitutional for vagueness were it not interpreted in the light of those commonly understood rights of parents prior to its adoption in 1970.

In re Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 536 P.2d 197, 206 (1975) (Struckmeyer, J., concurring in part).

103. *See* Coates v. Cincinnati, 402 U.S. 611, 614 (1971).

104. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

the intrusion in neglect investigations is de minimis and the illegal evidence thereby per se admissible.[105]

The United States Supreme Court held in *Camara v. Municipal Court*[106] and *See v. City of Seattle*[107] that home health and safety inspections, although not aimed at discovery of criminal evidence nor personal in nature, are nonetheless limited by the fourth and fourteenth amendments.[108] The main reason the Court made the fourth amendment applicable to these inspections was due to the fact that they are often enforced by criminal sanctions.[109]

More recently, however, in *Wyman v. James*,[110] the Supreme Court refused to extend the *Camara* and *See* reasoning to welfare home visits. While stating that this type of entry does not constitute a search within the meaning of the fourth amendment,[111] the *Wyman* Court held that in any event the investigation was not unreasonable because of the mildness of the invasion[112] and the importance of the state interests involved—protecting children from abuse, preventing welfare fraud, and furthering the rehabilitation of welfare recipients.[113] The Court, in holding the fourth amendment inapplicable to welfare home visits, emphasized that the primary purpose of such visits is not criminal in

105. *See* Wyman v. James, 400 U.S. 309, 318 (1971); Terry v. Ohio, 392 U.S. 1, 9 (1968).

106. 387 U.S. 523 (1967).

107. 387 U.S. 541 (1967).

108. *See* See v. City of Seattle, 387 U.S. 541, 545-46 (1967); Camara v. Municipal Court, 387 U.S. 523, 534 (1967). The fourteenth amendment due process clause is used as a vehicle for applying to the states certain provisions of the Bill of Rights, otherwise applicable only federally. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Wolf v. Colorado, 338 U.S. 25 (1949).

109. Camara v. Municipal Court, 387 U.S. 523, 530-32 (1967).

110. 400 U.S. 309 (1971). In this case a mother receiving Aid to Families with Dependent Children refused a caseworker's request to allow a home visit as required by the New York welfare laws.

111. 400 U.S. at 317-18. See text & notes 114-17 *infra*.

112. The Court described the New York welfare visit procedures as follows: "Mrs. James received written notice several days in advance of the intended home visit. The date was specified. . . . Privacy is emphasized. . . . Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the same are [*sic*] forbidden." *Id.* at 320-21. In contrast, a warrant "could be applied for ex parte, its execution would require no notice, it would justify entry by force, and its hours for execution would not be so limited as those prescribed for home visitation." *Id.* at 323-24.

113. 400 U.S. at 318-19. The basic difference between the majority and dissenting opinions in *Wyman* appears to be the majority's focus on the child's rather than the mother's interests. *See* Dembitz, *supra* note 4, at 394. The majority stated: "There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate these needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights." 400 U.S. at 318.

One commentator has suggested that the child has an interest in the home visit separate from the parents' and may even have the right to consent to the worker's entry. As a joint occupant of the premises, the child should be deemed to have a right to consent to a search in all contexts, just as he should have the right to object. A welfare mother's child might even be considered the primary tenant in a case such as *Wyman*, where the rent allowance is granted the mother only because of the child's residence in the home. *See* Dembitz, *supra* note 4, at 396 n.17.

nature but rather rehabilitative;[114] if welfare fraud or child abuse is discovered inadvertently, it is only coincidental.[115] Moreover, refusal to permit the home visit will result only in cessation of benefits.[116] The Court felt *Camara* and *See* were not controlling because of the absence of criminal sanctions.[117] Justice Marshall, in dissent, felt the decision should have followed *Camara*, pointing out that the threat of cessation of benefits is not the only consequence of being forced to allow home visits—there is also the possibility of criminal prosecution.[118] In those states where welfare fraud and child abuse constitute felonies and their discovery is one of the purposes behind the home visit, a constitutional argument can be made that fourth amendment protections are applicable.[119]

It is not necessary, however, to belabor the wisdom of the *Wyman* decision in order to argue the applicability of the fourth amendment to home visits by protective service workers or the police in neglect cases. *Wyman* is clearly distinguishable, and the reasoning of *Camara* and *See* instead should control. In fact, there is a stronger case for applicability of fourth amendment protections in the neglect situation. Although in *Camara* and *See* the investigations were not personal in nature nor aimed at collecting evidence for possible judicial proceedings,[120] these are clearly the objectives of a neglect investigation. Once a neglect complaint is filed, a protective services worker is sent to the home to conduct an investigation. The parents, of course, have a right to refuse entry. Realistically, however, this is not truly an option, for such refusal would only result in the immediate filing of a neglect petition and the beginning of court proceedings.[121]

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114. *See* 400 U.S. at 317-18, 319. "The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding." *Id.* at 323.

115. *Id.*

116. *Id.* at 318.

117. *Id.* at 325.

118. *Id.* at 339. Marshall also implied that there may be an equal protection argument involved in *Wyman*.

> Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children?

Id. (Marshall, J., dissenting).

119. *Id.* Another court has addressed the problem of searches in civil cases in terms of the right to privacy. *See* District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd*, 339 U.S. 1 (1950).

> The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common law right of a man to privacy in his home . . . . It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected.

Id. at 16-17. *But see* State v. Hunt, 2 Ariz. App. 6, 12, 406 P.2d 208, 214 (1965).

120. *See* text accompanying note 108 *supra*.

121. Interview with Phyllis Sugar, *supra* note 85. The filing of court proceedings as

Although the parents are arguably not initially subject to criminal sanctions when a neglect investigation originates, this may nevertheless be the ultimate result. Similar to the reasoning in *Camara* and *See* that evidence found in a safety inspection may ultimately be used against the individual in a criminal proceeding, so may the evidence uncovered by the protective services worker or the police in a neglect investigation be used against the parents if the state decides to proceed under its criminal statutes rather than the neglect laws.[122] Several states, including Arizona, still retain criminal neglect statutes in addition to juvenile court neglect statutes, thus threatening parents with criminal prosecution based upon evidence obtained during neglect investigations.[123]

The stated goal of the court in neglect cases, is to encourage the cooperation of parents,[124] but this cannot be achieved if parents feel they may face incarceration in exchange for their cooperation. To promote cooperation, while at the same time protecting parents from the possibility of criminal prosecution based upon evidence uncovered in warrantless searches, the criminal neglect statutes should be repealed. Alternatively, once the state chooses to proceed with a civil neglect proceeding, parents should be granted immunity from criminal prosecution in return for their cooperation, as is done in other civil and administrative hearings. This solution would seem to best protect the interests of all parties.[125] In the case where extremely serious abuse is involved, the state will be able to proceed under the criminal rather than civil neglect statutes. On the other hand, where the situation is not so serious, it is probably better for the child that the case be tried as a civil proceeding due to the less stringent standard of proof;[126] in such cases, a grant of immunity from criminal prosecution seems called for.

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a consequence of refusal of entry was precisely the aspect which troubled the Court in *Camara* and *See*. See text accompanying note 109 *supra*.

122. One commentator has suggested that the implications of *Wyman, Camara*, and *See* pose far more problems in the area of neglect than they do in the area of delinquency since a large number of neglect problems are first uncovered by the type of administrative search involved in *Wyman*. *See* Young, *Searches and Seizures in Juvenile Court Proceedings*, 25 JUV. JUSTICE, May, 1974, at 26, 29.

123. "A parent who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter or medical attention for his or her minor child is guilty of a misdemeanor . . . ." ARIZ. REV. STAT. ANN. § 13-801(A) (Supp. Pamphlet 1973); *accord*, GA. CODE ANN. § 74-9902 (1973); ME. REV. STAT. ANN. tit. 19, § 481 (Supp. 1975-76); TEX. PENAL CODE ANN. § 25.05 (1974). "A person having custody of a minor under sixteen years of age who willfully causes or permits the life of such minor to be endangered, its health to be injured or its moral welfare to be imperiled, by neglect, abuse or immoral associations, is guilty of a misdemeanor." ARIZ. REV. STAT. ANN. § 13-842 (Supp. Pamphlet 1973). These statutes currently are being enforced in Arizona. *See* State v. Swafford, 21 Ariz. App. 474, 520 P.2d 1151 (1974).

124. *See* ARIZ. REV. STAT. ANN. §§ 8-546(A)(5), -546.01(C)(6) (1974).

125. Interview with Phyllis Sugar, *supra* note 85.

126. *See* text & notes 232-34 *infra*.

Discovery

In Arizona discovery is available in both civil and criminal proceedings.[127] No specific provision has been made, however, for its use in neglect proceedings.[128] Few courts have ruled on whether discovery procedures should be available in juvenile courts, although some have held them applicable in delinquency proceedings.[129] Jurisdictions which have no standardized juvenile discovery rules, but which require that such proceedings be conducted according to civil rules,[130] should logically allow discovery in neglect proceedings.

The applicability of discovery to neglect proceedings has been specifically ruled upon by one New York court.[131] The petitioner had argued against pretrial disclosure in neglect situations on the grounds that it is inappropriate in juvenile courts, that such trials must be speedily prosecuted, and that disclosure would cause delay in the hearings.[132] The New York court rejected these arguments, ruling that the seriousness of neglect charges would not be passed upon lightly or hastily, and that the parent must be afforded an adequate opportunity to prepare his case.[133] Ordering petitioner to answer an interrogatory, the court held that parents are entitled to use discovery procedures in neglect cases.[134]

Discovery serves two very important functions in neglect proceedings. In cases where the petition does not contain specific facts concerning the alleged neglect, discovery becomes an important means of complying with due process notice requirements, providing a means whereby the respondent can learn the full details of the charges against him. Admittedly, if notice of the charges were the only purpose of discovery, informal access by permission of the court to its social files would be sufficient to satisfy requirements of due process and further discovery rules would be unnecessary. Discovery serves another pur-

127. *See* ARIZ. R. CIV. P. 26-37; ARIZ. R. CRIM. P. 15. For a discussion of the new criminal discovery rule, see Note, *Arizona's New Rules of Criminal Procedure: A Proving Ground for the Speedy Administration of Justice*, 16 ARIZ. L. REV. 167, 181-92 (1974).

128. Discovery rules were recently promulgated for the Maricopa County juvenile court. These rules, however, apply only to delinquency proceedings. *See* MARICOPA COUNTY [ARIZ.] LOCAL R.P. JUV. CT. 1.1-.7.

129. *See, e.g.*, Joe Z. v. Superior Court, 3 Cal. 3d 797, 478 P.2d 26, 91 Cal. Rptr. 594 (1970); People *ex rel.* Hanrahan v. Felt, 48 Ill. 2d 171, 296 N.E.2d 1 (1971); *In re* R., 60 Misc. 2d 355, 303 N.Y.S.2d 406 (New York County Fam. Ct. 1969). For further discussion of the applicability of discovery rules in delinquency proceedings, see *Special Project, supra* note 15, at 335-40.

130. *See* ARIZ. REV. STAT. ANN. § 8-537(B) (1974); TEX. FAM. CODE ANN. § 51.17 (1975).

131. *In re* B., 52 Misc. 2d 400, 275 N.Y.S.2d 997 (Kings County Fam. Ct. 1966).

132. *Id.* at 401, 275 N.Y.S.2d at 999.

133. *Id.*

134. *Id.*

pose, however, in allowing the parent an opportunity to prepare his case on a more equal ground. A neglect proceeding is similar to delinquency proceedings in one very important respect: in both situations the state is the petitioner. The state, unlike the normal plaintiff in a civil action has vast resources at its disposal including expert witnesses and government counsel, which it will employ to win its case.[135] Without access to the petitioner's information and investigative files through discovery, the respondent-parent would be at a distinct economic and time disadvantage. It would seem, therefore, that the parents' interests would be better protected in Arizona if civil discovery rules were statutorily mandated in neglect proceedings.[136]

In Arizona the only juvenile rule pertaining to discovery, juvenile rule 16(a), provides that "[p]rior to a hearing of a neglect or dependency action, the court may examine the social records of any person or agency with reference to the child and make the same available to all interested parties and their counsel prior to the hearing."[137] Although rule 16(a) provides a means whereby parents and their attorneys can gain access to discoverable materials, the effect of allowing court officials to see these materials, which contain social information relevant only to disposition, is highly prejudicial to the respondent and should not be permitted at the adjudicatory stage of the proceeding.[138] The value of rule 16(a) as a discovery tool, therefore, is outweighed by its

135. In Arizona the petitioner, the Protective Services Division of the Department of Economic Security, is represented by an assistant attorney from the State Attorney General's Office. The court may also use the services of the County Attorney's Office when needed.

136. For an example of such rules promulgated by one court, see D.C. FAM. CT. (NEGLECT) R.P. 2 (published in volume 8 of *District of Columbia Code Encyclopedia* (Supp. 1975-76)).

137. ARIZ. R.P. JUV. CT. 16(a). This rule gives the judge discretion to permit access to these records. In both Pima and Maricopa counties lawyers and parties are given free access to all records and reports in the court's social file. Interview with Fred Hickle, attorney, in Tucson, Ariz., Sept. 6, 1974; interview with Norman Spindler, *supra* note 30; interview with Hon. Gerald Strick, Maricopa County, Ariz., Juvenile Court Judge, in Tucson, Ariz., Jan. 21, 1975.

138. Interview with Hon. John Collins, Pima County, Ariz., Juvenile Court Judge, in Tucson, Ariz., Nov. 7, 1974; interview with Hon. Gerald Strick, *supra* note 137. See text & notes 215-20 *infra*. These materials would normally be barred from evidence at the adjudicatory stage, though not at disposition, by the hearsay rule. *See generally* "Standards for the Admission of Evidence at Sentencing," 17 ARIZ. L. REV. 639, 805, 809-11 (1975). Judges Collins and Strick expressed concern over the prejudicial effects of seeing the information in the social file prior to the hearing and, as a personal policy, will not examine the materials prior to disposition. Merely because the judge declines to view such materials, however, does not mean that the parties are also denied the opportunity to see them.

In a recent Arizona case, the Arizona supreme court interpreted rule 16(a) to allow the introduction of such hearsay materials into evidence unless it is specifically objected to. *In re* Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 593, 536 P.2d 197, 202 (1975). The court, however, did not address the issue of the prejudicial effects caused the respondent by allowing the trial judge to view these hearsay materials prior to the hearing.

prejudicial effect upon the respondent-parents' case and the rule should be amended.

HEARING DUE PROCESS: AN OPPORTUNITY TO BE HEARD

In determining the required nature of the hearing itself in neglect proceedings, the real issue becomes what procedures are necessary to provide the parent with a meaningful opportunity to be heard.[139] A procedural rule that satisfies due process in one context may not necessarily satisfy it in another;[140] in each context the interests must be balanced to determine the necessary degree of formality.[141] In a neglect proceeding, for example, the child's interest in having the matter handled as informally and expeditiously as possible must be weighed against the parents' desires to have their interests afforded the formal safeguards due any fundamentally protected right. Neglect hearing procedures vary from jurisdiction to jurisdiction, but they are generally more informal than criminal or many civil proceedings.[142] Informality under these statutes, however, is regarded judicially in Arizona as "simply legislative authorization for the court to disregard technical matters of procedure which do not affect the fundamental rights of litigants to due process of law."[143]

In light of recent developments in delinquency hearing procedures[144] following the Supreme Court's *In re Gault*[145] decision, there may be a tendency to extend *Gault* formalities to neglect hearings as well, without really taking into consideration how this hearing is distinguishable from delinquency or even termination proceedings. Courts should not automatically extend formalities to neglect proceedings without first considering the impact such procedures may have in the context of neglect versus delinquency hearings. Otherwise, juvenile law will

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139. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971); Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

140. *See* Bell v. Burson, 402 U.S. 535, 540 (1971).

141. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

142. *See* COLO. REV. STAT. ANN. § 19-1-107(2) (1973); ARIZ. R.P. JUV. CT. 16(e). *See also* UNIFORM JUVENILE COURT ACT § 24(a); STANDARD ACT, *supra* note 33, § 19.

143. Department of Pub. Welfare v. Barlow, 80 Ariz. 249, 254, 296 P.2d 298, 301 (1956).

> While the constitution provides some distinctive procedure in juvenile matters, there is no language used from which an intention can be inferred to dispense with the fundamental rights of parents appearing before it when as a court of general jurisdiction it is exercising its constitutional powers in a juvenile matter.

Id.

144. *See* McKeiver v. Pennsylvania, 402 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970); Kent v. United States, 383 U.S. 541 (1966).

145. *In re* Gault, 387 U.S. 1, 13-14 (1967). The Supreme Court held that the fourteenth amendment does not protect adults alone; a juvenile in a delinquency proceeding has a right to counsel, notice of charges, confrontation and cross-examination of witnesses, and a privilege against self-incrimination. *Id.* at 31-57.

come full circle to the situation existing during the 19th century, when the courts made no distinction between delinquent and neglected children.[146]

Nature of the Neglect Hearing

Most courts, following the general model of delinquency proceedings, provide for a bifurcated neglect hearing.[147] In this two-step process the court first examines the neglect charges on factual grounds. If an adjudication of neglect is made, the court then proceeds to the second step and determines what disposition is in the best interests of the child.[148] The two hearings may be separated in time or follow closely, depending upon the nature of the case and whether the allegations are contested by the parent.[149] If the allegations are admitted at the initial hearing, the court usually will determine disposition immediately.[150]

At the adjudicatory hearing, which is the factfinding stage, the judge considers the evidence to determine whether the facts presented constitute a proper basis for a finding of neglect. Although a neglect proceeding is brought on behalf of the allegedly neglected child, the focus of this hearing is solely on the parents' behavior rather than any effects such behavior may have had upon the child. The only issue at the adjudicatory stage is whether the parent committed or omitted certain acts as alleged in the petition.[151] At the initial hearing the petition is read to the parents who are asked to admit or deny the allegations.[152] If the parents admit the allegations, the court immediately makes its finding and proceeds to disposition.[153] If counsel is

146. *See* text & note 22 *supra*.

147. *See* ARIZ. R.P. JUV. CT. 16(c)-(e); *accord*, COLO. REV. STAT. ANN. §§ 19-3-106(6), -109 (1973); *cf. Special Project—Juvenile Justice in Arizona: Jurisdiction and Waiver*, 6 ARIZ. L. REV. 293, 321 (1974).

148. ARIZ. R.P. JUV. CT. 16(e).

149. *Id.* 16(c), (e); *cf. Special Project—Juvenile Justice in Arizona: Jurisdiction and Waiver*, *supra* note 147, at 321 n.158.

150. *See* ARIZ. R.P. JUV. CT. 16(c).

151. A neglect adjudicatory hearing is not to be a fishing expedition; the neglect issue must be confined to the specific facts alleged in the petition. *See In re* Pima County Juvenile Action No. J-31853, 18 Ariz. App. 219, 222-23, 501 P.2d 395, 398-99 (1972).

152. ARIZ. R.P. JUV. CT. 16(b). In Arizona the parties must be advised at this stage of their right to representation, including the right to court-appointed counsel if they are indigent. This advice is also given informally by the caseworker during investigation of the complaint. *See* WELFARE MANUAL, *supra* note 3, at § 4-1409. For a full discussion of the right to counsel in neglect proceedings, see text & notes 169-86 *infra*.

153. ARIZ. R.P. JUV. CT. 16(c). Only about 20 percent of neglect cases are contested. Interview with Norman Spindler, *supra* note 30. Therefore, in reality, the entire legal process prior to disposition may be over in a few minutes. The large number of uncontested adjudications seems to reflect the court's effort to elicit parental cooperation in resolving these matters informally through acceptance of protective services, thus avoiding the guilt and anger which may result from full-blown trials. Contested hearings make disposition more difficult since protective services workers are placed in the awkward position of being both accuser at the hearing and rehabilitator after disposition.

requested or responsibility denied, the court will hear the matter at a later date appropriate to the circumstances.[154]

Arizona procedure provides that a contested neglect hearing is to be conducted as a civil nonjury trial.[155] The individuals present at this trial may include the respondents and their counsel, the child's counsel,[156] the Protective Services Division as petitioner,[157] counsel from the state and possibly county attorneys' offices,[158] and the court investigator.[159] If petitioner fails to sustain its burden of proof, the court must dismiss the petition.[160] If the court finds the allegations supported by the evidence, however, it will order that an adjudication of neglect be entered in the record and a dispositional hearing be held.

The purpose of the dispositional hearing is to determine an appropriate remedy to protect the neglected child. During this stage the protective services worker reads the dispositional recommendation of the department, and the parent or counsel is permitted to voice any objections and the reasons therefor.[161] In Arizona the court's choices as to disposition of the child are statutorily limited.[162] The child may be returned to the parents' care, subjected to protective services supervision, turned over to relatives willing to provide him with proper care, or placed in foster care or an institution licensed to care for children.[163] If the child is placed in foster care, the juvenile court is required to review its dispositional orders periodically,[164] affording parents an opportunity to show that they are fit to resume their responsibilities. After review, it may order the child's return or continue legal custody elsewhere, which-

154. ARIZ. R.P. JUV. CT. 16(d).

155. *Id.* 16(e). In Pima County many contested cases are now settled in pretrial conferences. Interview with Norman Spindler, *supra* note 30. This procedure is allowed by PIMA COUNTY [ARIZ.] LOCAL R.P. JUV. CT. 14.

156. The child need not be brought into the court in a neglect hearing; instead, the child's interests are represented by his counsel and the court. *Id.* 19; interview with Norman Spindler, *supra* note 30.

157. *See* ARIZ. REV. STAT. ANN. § 8-546.02(B) (1974).

158. *See* ARIZ. R.P. JUV. CT. 20(b).

159. Before the Division of Protective Services was created in Arizona, the function of investigating neglect complaints was handled by a court investigator. Since the creation of protective services, many juvenile courts have eliminated this court administrative position. The Pima County juvenile court still employs a court investigator, however. Interview with Norman Spindler, *supra* note 30.

160. ARIZ. R.P. JUV. CT. 16(e).

161. When objections are made, they usually consist of disagreements as to the length of time the Division of Protective Services will retain legal custody before another review of the matter is made. Based on the author's personal observations at neglect proceedings during the period August to October, 1974.

162. *See* ARIZ. REV. STAT. ANN. § 8-241(A)(1) (1974).

163. *Id.* The agency's recommendation is usually discussed and explained to the parents before the hearing, which probably constitutes one reason for so few contested hearings. Interview with Norman Spindler, *supra* note 30.

164. *See* ARIZ. REV. STAT. ANN. § 8-515(C) (1974) (after one year). *See also* N.Y. FAM. CT. ACT § 1054(b) (McKinney 1975) (after 18 months). In Arizona foster homes are licensed and supervised by the Department of Economic Security. *See* ARIZ. REV. STAT. ANN. §§ 8-509, -514, -516 (1974).

ever is determined to be in the continuing best interests of the child.[165] Reviews also may be conducted at any time upon written request of any interested party,[166] and the court may informally terminate its jurisdiction whenever it feels such a step to be appropriate.[167] Irrespective of its final decision, the juvenile court's jurisdiction over the child formally ends upon his attaining majority.[168]

The Right to Counsel

One area in which the concern for children's due process rights generated by *Gault* has spilled over into neglect proceedings involves representation by counsel and the right to court-appointed counsel if indigent. It is arguable that the reason for extending sixth amendment rights to delinquents applies equally to neglected children.[169] However, the right to counsel of the parent-respondent, though equally critical, is more often overlooked. Even though threatened with loss of their children, indigent parents in neglect proceedings are without the assistance of counsel in some states.[170]

The basis for the argument against extending the right of court-appointed counsel, whether referring to child or parent, is that a neglect proceeding is civil, not criminal, and there is thus no constitutionally protected right to counsel.[171] The civil-criminal dichotomy, however, has been rejected by both the Supreme Court[172] and several state courts[173] as irrelevant to the determination of what safeguards are

165. *See* ARIZ. REV. STAT. ANN. § 8-515(C) (1974).
166. Interview with Norman Spindler, *supra* note 30; interview with Phyllis Sugar, *supra* note 85.
167. *See* ARIZ. REV. STAT. ANN. § 8-202(D) (1974).
168. *Id.* § 8-246.
169. *See* Campbell, *supra* note 16, at 676.
170. *See, e.g., In re* Joseph T., 25 Cal. App. 3d 120, 101 Cal. Rptr. 606 (Ct. App. 1972); *In re* Cager, 251 Md. 473, 248 A.2d 384 (1968); State *ex rel.* Underwood v. Adamson, 62 Tenn. App. 474, 463 S.W.2d 952 (1970); *In re* Neglected Child, 130 Vt. 525, 533-34, 296 A.2d 250, 255 (1972); *cf.* State v. Jamison, 251 Ore. 114, 444 P.2d 1005 (1968) (right to counsel only in termination proceedings).
171. *See In re* Robinson, 8 Cal. App. 3d 783, 785-86, 87 Cal. Rptr. 678, 679-80 (Ct. App. 1970), *cert. denied*, 402 U.S. 964 (1971). Whether the parent and child have the right to representation by counsel of their own choosing is not at issue here. Failure to permit participation of retained counsel would constitute a denial of due process.

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932). *See also In re* Minor, 250 F.2d 419 (D.C. Cir. 1957); Department of Pub. Welfare v. Barlow, 80 Ariz. 249, 252-53, 296 P.2d 298, 299-300 (1956); *In re* Aronson, 263 Wis. 604, 58 N.W.2d 553 (1953).
172. "Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal'. The Court carefully has avoided this wooden approach." McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971).
173. *See* Danforth v. State Dep't of Health & Welfare, 303 A.2d 794, 799 (Me. 1973); *In re* Ella B., 30 N.Y.2d 352, 353, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972); State v. Jamison, 251 Ore. 114, 444 P.2d 15 (1968). Although Oregon has

needed to satisfy due process requirements in juvenile court proceedings. Because even a loss of temporary custody may detrimentally affect the family relationship, any analysis of the necessity of counsel in neglect proceedings should not be based simply on civil-criminal distinctions; the real issue is whether the assistance of counsel is necessary to afford a fair hearing.[174]

In neglect proceedings parents and children are confronted by the state with all its resources, experts, and the services of salaried attorneys.[175] Neglect proceedings, much like delinquency and criminal hearings, do not involve conflicts between private litigants but rather are an expression of a strong public interest to which the state will devote its full resources.[176] A gross imbalance of experience and expertise would exist, therefore, if indigent parents were not allowed the assistance of court-appointed attorneys. Without counsel the indigent parent, often uneducated and unsophisitcated in the law, would be at a loss when faced with problems of procedure and evidence, and would be effectively denied the right to a fair hearing.[177] Due process thereby would seem to require that counsel be provided for indigent parents. As soon as the caseworker files a petition formally bringing the court into the matter, the parents should be informed of their right to counsel, including court-appointed counsel if indigent.[178] This could be handled most

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legislated a discretionary provision for court-appointed counsel, *State v. Jamison* was decided on nonstatutory, due process grounds. *Id.* at 117, 444 P.2d at 17. For a discussion of *In re Ella B.*, see Note, *In the Matter of Ella B.—A Test for the Right to Assigned Counsel in Family Court Cases*, 4 COLUM. HUMAN RIGHTS L. REV. 451 (1972).

174. *See* Danforth v. State Dep't of Health & Welfare, 303 A.2d 794, 799 (Me. 1973), *noted in* 5 TEX. TECH. L. REV. 857 (1974). The Supreme Court has stated: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963), *quoting* Powell v. Alabama, 287 U.S. 45, 68-69 (1932). One state court has also concluded:

> [A]n indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges, is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer. To deny legal assistance under such circumstances would . . . constitute a violation of his due process rights . . . .

In re Ella B., 30 N.Y.2d 352, 356-57, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972).

175. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 556 (1967). "In a neglect proceeding the full panoply of traditional weapons of the state are marshalled against the defendant parents." Danforth v. State Dep't of Health & Welfare, 303 A.2d 794, 799 (Me. 1973). See text & note 135 *supra.*

176. Note, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROB. 230, 250 (1968).

177. *See* Danforth v. State Dep't of Health & Welfare, 303 A.2d 794, 799 (Me. 1973)

178. In Arizona, the court is not required to inform the indigent respondent of his right to court-appointed counsel until the initial hearing. *See* ARIZ. R.P. JUV. CT. 16(b).

easily and effectively by including such information in the notice sent to the parents.[179]

The question whether parents and children are entitled to court-appointed counsel has been resolved in a growing number of states,[180] including Arizona,[181] by enactment of statutes and rules of procedure providing such a right. In Arizona parents are first advised of their right to court-appointed counsel by the protective services worker during investigation of the neglect complaint,[182] and then formally advised by the court at the initial hearing.[183] In cases where a conflict of interest is involved, counsel is also provided for the child.[184] Appointment of separate counsel for the child is especially important in neglect cases, as the child is usually not present during the hearing.[185] By providing court-appointed counsel for the child as well as the indigent parents in contested neglect proceedings, Arizona is far ahead of other jurisdictions which continue to hold the right to counsel not applicable to civil proceedings.[186]

The Right to a Speedy Hearing

The right to a speedy trial is constitutionally guaranteed to criminal defendants under the sixth and fourteenth amendments.[187] Besides this specific guarantee in criminal trials, the due process clause also requires that any hearing be conducted within a meaningful time.[188] It is this latter element of due process which may be violated if the neglect hearing is not scheduled as expeditiously as possible.[189] In the context

179. Interview with Phyllis Sugar, *supra* note 85.

180. Twelve jurisdictions now provide for court-appointed counsel for parents, children, or both, in neglect and termination proceedings. Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. FAMILY L. 223, 238 n.51 (1973-74); *see, e.g.*, COLO. REV. STAT. ANN. §§ 19-1-106(1)(a)-(c) (1974); D.C. CODE ANN. § 16-2304(b) (1973) (parent only); N.Y. FAM. CT. ACT § 262(a)(i) (McKinney 1975); ORE. REV. STAT. § 419.498(2) (1974) (termination proceedings only).

181. *See* ARIZ. REV. STAT. ANN. § 8-225(A) (1974); ARIZ. R.P. JUV. CT. 20(a).

182. *See* WELFARE MANUAL, *supra* note 3, at § 4-1409.

183. *See* ARIZ. R.P. JUV. CT. 16(b).

184. *See* ARIZ. REV. STAT. ANN. § 8-225(A) (1974). In neglect cases where the child's and parents' interests are almost always conflicting, it is arguable that counsel should always be afforded the indigent child. For this reason, in Pima County, Arizona, counsel is automatically provided, in cases of indigency, for both parent and child. Interview with Norman Spindler, *supra* note 30. See discussion note 152 *supra*.

185. The court is allowed the discretion to exclude children from the courtroom in neglect hearings. ARIZ. R.P. JUV. CT. 19. In such cases the child's attorney is the only person present responsible for advancing the minor's interests, as the judge cannot act as counsel for the child. *See In re* Gault, 387 U.S. 1, 36 (1967).

186. *See* text & notes 170-71 *supra*.

187. *See* Smith v. Hooey, 393 U.S. 374 (1969); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

188. *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

189. Not being a criminal action, the neglect proceeding is not subject to the sixth amendment guarantee.

of criminal trials, the Supreme Court has established only imprecise standards for determining when the right to a speedy trial has been denied.[190] The right does not necessarily require that a maximum number of days be set forth within which a hearing must be held—rather, prejudice to the defendant caused by the delay must be balanced against the exigencies of the situation.[191] This same constitutional test can be applied in neglect hearings to determine whether parents and children have been denied due process by the juvenile court's failure to schedule hearings as expeditiously as possible.

Unlike most other proceedings, in neglect hearings the public's interest runs counter to the desire for speedy trials. In order to best protect the child's interests, protective services workers must have adequate time to work with parents in hopes of solving family problems without court intervention. Informal resolution could not be accomplished if the workers were required to file formal petitions within a short period of time following the complaint, such as 5 or 10 days. It must be remembered that the objective in neglect cases is not to punish the parents; rather, the preferred method for treating the problem is to obtain parental cooperation in voluntarily accepting protective services.[192] Working out these arrangements takes time, and the worker's efforts should not be impeded by arbitrary dates within which petitions must be filed and hearings held.[193]

There are other interests involved, of course, which also must be considered—those of the parent and child. If a hearing is scheduled too far in the future, parents unassisted by counsel[194] may be pressured by their caseworker during the delay to relinquish their right to custody or to accept restrictions on their parental rights without a hearing. Many parents when confronted by an offer to accept protective services will acquiesce, even though their child may not be neglected, rather than face the threat of court action.[195] Unsure of their legal position, they may voluntarily abdicate their parental rights indefinitely to the agency.[196] The child's interest also requires protection. Due to heavy

190. *See* Barker v. Wingo, 407 U.S. 514, 521 (1972).
191. *Id.* at 523.
192. *See* ARIZ. REV. STAT. ANN. §§ 8-224(B), -546(5) (1974).
193. Interview with Norman Spindler, *supra* note 30.
194. In Arizona, counsel is not provided indigent parents until after the initial hearing. *See* ARIZ. R.P. JUV. CT. 16(b).
195. Interview with Norman Spindler, *supra* note 30.
196. To partially safeguard against the possibility of parents unknowingly relinquishing their parental rights to the agency, in the absence of a juvenile court order children can be placed in foster homes voluntarily for only 3 weeks. After this period the child must be returned to the parent, or a petition filed and hearing held to determine the legal status of the parent-child relationship. *See* ARIZ. REV. STAT. ANN. § 8-515(A) (1974).

caseloads, protective services workers may be unable to ensure that the child is not still abused or neglected during any delay in instituting proceedings.

There is a need in Arizona for a statute or rule to limit the discretion now given the juvenile court in setting hearing dates.[197] Protective services workers do need time to work with parents in an attempt to adjust these cases informally, but the child is also entitled to be removed from a harmful or neglectful situation when voluntary adjustment is not succeeding.[198] This problem can best be solved by specifying a period, such as 15 or 30 days, within which protective services workers can attempt to informally adjust the case. If the matter has not been settled satisfactorily at the end of this period, a hearing should be held to adjudicate the problem formally. Heavy caseloads and understaffed agencies are no excuse for denying both parents and child their right to have the matter settled as expeditiously as possible.

The Right to a Jury Trial

Due process does not necessarily require a jury trial in all cases.[199] Indeed, this right can be modified by states or abolished altogether in civil actions.[200] In *McKeiver v. Pennsylvania*[201] the Supreme Court refused to extend the right to a jury trial to the adjudicatory stage of delinquency proceedings. According to the four-justice plurality opinion, jury trials would end the informal nature of juvenile proceedings, bringing delays, rigidity, and public trials.[202] The Court also was influenced by the absence of any recommendations of jury trials in the various model acts, by prior decisions that a jury is not necessary to

197. Arizona juvenile court rules provide for a hearing to be held not less than 10 days after the filing of a petition, but only in those cases where the child has already been removed from the home prior to trial. ARIZ. R.P. JUV. CT. 15(b). There is no maximum time limit set, however. In all other cases, the date of the hearing is left to the discretion of the court: "[w]hen counsel is requested or responsibility denied, the court shall hear the matter at a date and time appropriate to the circumstances." *Id.* 16(d). In Pima County the local rules for delinquency proceedings specify the number of days within which a petition must be filed and a hearing held. PIMA COUNTY [ARIZ.] LOCAL R.P. JUV. CT. 5-6. No comparable provisions are made for neglect hearings. For the protection of both parent and child, a maximum limit should also be set forth in the rule applicable to all juvenile court hearings. Interview with Hon. John Collins, *supra* note 138.

198. In Arizona a child can be removed from the home prior to a hearing only in extreme cases of emergency, such as serious abuse or malnutrition. *See* ARIZ. REV. STAT. ANN. §§ 8-223, -546.01(4) (1974); ARIZ. R.P. JUV. CT. 15(b). Chronic forms of abuse or neglect not of emergent nature, although equally harmful in the long run, can be dealt with only informally with the parents' cooperation, or formally through court proceedings.

199. *See* Southern Ry. Co. v. Durham, 266 U.S. 178, 179 (1924); Olesen v. Trust Co., 245 F.2d 522, 524 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957).

200. *See* Olesen v. Trust Co., 245 F.2d 522, 524 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957).

201. 403 U.S. 528 (1971).

202. *Id.* at 550.

every part of the criminal process, and by the great majority of state cases and statutes denying such a right to juveniles.[203]

Justice Brennan, in a concurring opinion, viewed jury trials as essential to due process and fair treatment in all cases, such as juvenile court proceedings, where the hearing is closed to the public;[204] he felt juries act as a check on judicial abuse. According to Justice Brennan, some alternative must be provided to protect parents and children from biased and eccentric judges if jury trials are not to be permitted in juvenile court proceedings.[205] He proposed as one alternative the opening of juvenile hearings to the public, thus assuring fair trials by focusing the community's attention on the juvenile proceeding.[206]

In Arizona, neglect proceedings are conducted without juries[207] and hearings may be closed to the public.[208] Used together, these two provisions could impair the parents' and child's right to a fair hearing by removing neglect proceedings from public scrutiny. In order to ensure a fair hearing, however, it may not be necessary to require jury trials, with all their concomitant problems,[209] or to open the neglect proceeding[210] to the general public. Instead, advisory juries[211] could be used.[212]

203. *See id.* at 545-50. Statutes in 29 states and the District of Columbia deny the right to a jury trial in juvenile court proceedings. *Id.* at 548 n.7. *See, e.g.*, D.C. CODE ANN. § 16-2316(a) (1973); ORE. REV. STAT. § 419.498(1) (1974); TENN. CODE ANN. § 37-224(a) (Supp. 1974). Other states deny such a right by judicial decision, *see* McKeiver v. Pennsylvania, 403 U.S. 528, 549 n.8 (1971), or court procedural rule. ARIZ. R.P. JUV. CT. 16(e).

204. 403 U.S. at 554. The question whether the parents should be afforded the opportunity for jury trials in neglect proceedings is primarily academic. In states that do extend the right, few juries are ever requested. *See* Brief for Public Defender Service for the District of Columbia as Amicus Curiae at 14-16, *In re* Burrus, 403 U.S. 528 (1971). The District of Columbia Public Defender Service, filing an amicus brief in *McKeiver*'s companion case, *In re* Burrus, 403 U.S. 528 (1971), presented the results of a survey conducted in 10 states requiring jury trials. The 30 courts surveyed processed over 75,000 cases a year. It was discovered that over a 5-year period there were 15 or fewer requests for jury trials in 22 of these courts. Brief for Public Defender Service for the District of Columbia as Amicus Curiae, *supra.*

205. 403 U.S. at 554.

206. *Id.* at 555. Public trials, however, could be more harmful than beneficial. Opening individual hearings to public view would further alienate parents from the court, and would be hardly conducive to the court's professed goal of parental cooperation. The publicity could also be harmful to the child, who is totally innocent of wrongdoing in the neglect situation. Another means of achieving the goal of keeping the public aware of judicial conduct in neglect hearings would be through the mass media. However, again because children are involved and the court's goal is to seek the parents' cooperation whenever possible, such publicity could only worsen the situation.

207. *See* ARIZ. R.P. JUV. CT. 16(e).

208. *Id.* 19.

209. *See* text accompanying note 202 *supra.*

210. An analysis of the necessity for jury trials in neglect proceedings does not parallel the analysis in the case of a termination proceeding. Due to the more drastic effects of permanently severing the parent-child relationship, a stronger argument can be made for the necessity of jury trials in termination proceedings.

211. In Texas, for example, juries may serve in an advisory capacity in neglect cases. *See* TEX. FAM. CODE ANN. § 11.13(b) (1975). One California superior court has held that juvenile courts have an inherent power and right to impanel an advisory jury for factfinding assistance. *See In re* Whelan, 16 CRIM. L. REP. 2507 (Cal. Super. Ct. Jan. 31, 1975).

212. Advisory juries would be welcomed by at least one Arizona juvenile judge,

Advisory panels could be selected to serve on an extended basis, thereby eliminating the delays caused by the selection and impanelling of regular juries. An advisory jury also would serve the function of providing a check on procedural abuses in juvenile courts without opening hearings to general public view.

Rules of Evidence

Courts have not yet developed a formalized set of evidence rules for nonjury cases.[213] Instead, judges sitting without juries, as in neglect cases, have the discretionary power to follow or depart from jury-trial rules.[214] Evidence problems in neglect hearings generally have focused on the hearsay rule and its exceptions. The fundamental objection to the admission of hearsay evidence in a jury trial is not that it cannot be material or relevant, but that it is not subject to the safeguards of cross-examination.[215] Because of this objection, Arizona, as well as other jurisdictions, will not allow social files[216] or reports to be used as proof to support allegations of neglect.[217] These reports should be used only

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Interview with Hon. John Collins, *supra* note 138. In a neglect case where the fact issues are complex or involve serious cases of child abuse, advisory juries can be impanelled to hear the evidence and then render either special verdicts or advisory findings of fact which the judge may follow at his discretion in rendering a general verdict.

213. *See* K. DAVIS, *supra* note 70, § 14.03. *See also* 5 J. MOORE, MOORE'S FEDERAL PRACTICE § 43.02[2] (1974).

214. *See* K. DAVIS, *supra* note 70, § 14.04, at 275.

215. *See* Colorificio Italiano Max Meyer, S.P.A. v. S/S Hellenic Wave, 419 F.2d 223, 224 (5th Cir. 1969); Rossville Salvage Corp. v. S.E. Graham Co., 319 F.2d 391, 396 (3d Cir. 1963); Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 391 (5th Cir. 1961); NLRB v. Imparato Stevedoring Corp., 250 F.2d 297, 302 (3d Cir. 1958).

Whenever facts are in dispute, the affected party must be afforded an opportunity to rebut adverse evidence and "confront his accusers." *See* Beard v. Stahr, 200 F. Supp. 766, 775 (D.D.C. 1961); Thompson v. Whittier, 185 F. Supp. 306, 313 (D.D.C. 1960). While the sixth amendment right to confrontation applies only to criminal prosecutions, *see* Pointer v. Texas, 380 U.S. 400, 406 (1965), the protections afforded by confrontation and cross-examination are so basic that they have been extended to other proceedings as well under the due process clause. *See* Willner v. Committee on Fitness, 373 U.S. 96, 103-04 (1963). The Arizona supreme court has recently held that a dependency hearing, due to its civil nature, does not involve sixth amendment confrontation problems. *See In re* Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 592, 536 P.2d 197, 201 (1975). Nevertheless, it did not condone the submission of medical or psychiatric reports into evidence where counsel for either party objects, holding instead that the usual procedures for admission of evidence in civil cases must be followed. *Id.* at 593, 536 P.2d at 202.

216. A social file is prepared by the caseworker and contains the information gathered during the investigation of the complaint. If the family has received prior services, it will contain former records as well. The file may contain anything from school complaints, to public health records, medical reports, psychiatric evaluations, and complaints by neighbors and relatives. Interview with Hon. John Collins, *supra* note 138.

217. *See, e.g., In re* Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 593, 536 P.2d 197, 202 (1975); Caruso v. Superior Court, 100 Ariz. 167, 173, 412 P.2d 463, 467 (1966); *In re* Cromwell, 232 Md. 409, 415-16, 194 A.2d 88, 91 (1963); *In re* Baum, 8 Wash. App. 337, 506 P.2d 323 (1973). A Colorado court has held that even verified social and investigative reports could not stand alone as proof absent supporting

when there is no alternative means of introducing the evidence—such as calling the author of the report as an expert witness. Social reports and opinions should never be admissible, however, if the author is not an expert in the matter and could not be called to testify in person.[218] Even though neglect proceedings are informal in nature,[219] care must be taken to insure that they do not become summary by forcing parents to defend themselves against inanimate social reports when their authors are available to testify.[220]

Another evidence problem which arises in the context of neglect proceedings concerns the admissibility of previous findings of neglect or abuse. Such evidence, while not irrelevant, may unduly prejudice the defendant.[221] The problem is one of balancing prejudice to the defendant against the necessity of arriving at the truth through presentation of all material facts.[222] If the need for the proffered evidence does not outweigh its prejudicial effect, its admission is an abuse of discretion.[223] Neglect, unlike statutory crimes, consists of an ongoing process and evidence of prior acts is often crucial.[224] For this reason, proof of the abuse or neglect of one child should be admitted as evidence on the issue of the abuse or neglect of another.[225] The use of prior acts

testimony or exhibits. *See* C.B. v. People, 30 Colo. App. 269, 276, 493 P.2d 691, 694 (1971). In California, however, unverified reports of probation officers are deemed official judicial records when filed and are fully admissible as evidence. *See In re* Halamuda, 85 Cal. App. 2d 219, 223 192 P.2d 781, 783 (Dist. Ct. App. 1948).

218. *See* Standard Oil Co. v. Moore, 251 F.2d 188, 214 (9th Cir. 1957).

219. ARIZ. R.P. JUV. CT. 16(e).

220. *In re* Maricopa County Juvenile Action No. J-74449A, 20 Ariz. App. 249, 250-51, 511 P.2d 693, 694-95 (1973); Caruso v. Superior Court, 100 Ariz. 167, 173, 412 P.2d 463, 467 (1966). In Pima County, pretrial conferences are held so that counsel may stipulate whether it will be acceptable to admit social reports into evidence or whether witnesses must be called instead. PIMA COUNTY [ARIZ.] LOCAL R.P. JUV. CT. 14.

In Arizona the court may examine the social records of any person or agency with reference to the child prior to a neglect hearing. *See In re* Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 591-93, 536 P.2d 197, 200-02 (1975); ARIZ. R.P. JUV. CT. 16(a). There is much hearsay material in these social files, however, which should never be seen by the trier of fact prior to an adjudication of dependency. Interview with Hon. John Collins, *supra* note 138; *cf. In re* Maricopa County Juvenile Action No. J-75482, *supra* at 594-600, 536 P.2d at 203-09. Although the file may never be introduced into evidence, judges may be swayed by their contents, thereby effectively denying parents their rights to confrontation and cross-examination. The parents may not even be aware of the existence of the reports and thereby would have no opportunity to rebut this adverse evidence. *See In re* Maricopa County Juvenile Action No. J-75482, *supra* at 594-95, 536 P.2d 203-04. Rule 16(a) should therefore be repealed or be more narrowly drawn to prevent judges from examining incompetent testimony prior to adjudication.

221. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 447 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

222. *See* United States v. Phillips, 401 F.2d 301, 305-06 (7th Cir. 1968); DeVore v. United States, 368 F.2d 396, 397-98 (9th Cir. 1966); United States v. Bozza, 365 F.2d 206, 213 (2d Cir. 1966).

223. United States v. Phillips, 401 F.2d 301, 306 (7th Cir. 1968).

224. "[T]he court under its role of parens patriae must be microscopic not casual in its ascertainment of facts based on credible evidence." *In re* S., 66 Misc. 2d 683, 686, 322 N.Y.S.2d 170, 173 (Richmond County Fam. Ct. 1971) (emphasis omitted).

225. *See* N.Y. FAM. CT. ACT. § 1046(a)(1) (McKinney 1975).

should be allowed to show that the neglect presently in question could not have been inadvertent or accidental because of the existence of similar acts or incidents in the past.[226] To avoid the problem of undue prejudice caused by unproven allegations, however, evidence of prior acts should be limited to those that were adjudicated through procedures in which due process requirements were observed.[227]

Quantum of Proof

Because of the civil nature of juvenile court proceedings, the quantum of proof necessary to satisfy due process was traditionally held to be a preponderance of the evidence. Six years ago the Supreme Court changed this to require the more stringent "beyond a reasonable doubt" test in delinquency adjudicatory hearings.[228] As yet, no comparable rule has been established for neglect hearings, although most model acts adopt the middle ground standard of clear and convincing proof.[229] Subsequent to the Arizona *Gault* opinion,[230] Arizona courts held that clear and convincing evidence was the appropriate test for dependency and neglect hearings.[231] When the new Arizona Rules of Procedure for the Juvenile Court were promulgated in 1970, however, the standard was lowered to the preponderance measure,[232] retaining reasonable doubt only for delinquency and incorrigibility cases.[233] In Arizona neglect proceedings, therefore, the petitioner need offer only a preponderance of the evidence to support the allegations of neglect.[234]

226. *See* United States v. Ross, 321 F.2d 61, 67 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963). *See also* McCORMICK, *supra* note 221, § 190, at 450.

227. For a parallel argument in criminal trials, see Burgett v. Texas, 389 U.S. 109 (1967). *See also* Note, *The Evidentiary Use of Constitutionally Defective Prior Convictions*, 68 COLUM. L. REV. 1168 (1968).

228. *See In re* Winship, 397 U.S. 358 (1970). *See generally* "The Standard of Proof at Juvenile Probation Revocation Proceedings," 17 ARIZ. L. REV. 639, 846 (1975).

229. *See* UNIFORM JUVENILE COURT ACT § 29(c); MODEL RULES rule 26, *supra* note 96; NAT'L COUNCIL ON CRIME AND DELINQUENCY, PROCEDURE AND EVIDENCE IN THE JUVENILE COURT 68 (1962).

230. Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965), *rev'd on other grounds*, 387 U.S. 1 (1967). "Acknowledging the non-criminal nature of the proceeding, yet mindful of the fact that a parent may be deprived of his child and the child of his liberty, we think the juvenile judge must be persuaded by clear and convincing evidence that the infant has committed the alleged delinquent act." *Id.* at 192, 407 P.2d at 768. The United States Supreme Court in reversing the Arizona court, did so on other grounds; it did not address the quantum of proof issue until the *Winship* case 3 years later. *See In re* Winship, 397 U.S. 358 (1970).

231. "Petitioner in the Juvenile Court . . . had the burden of proving that the infant was dependent . . . . Moreover, it had to carry the burden by clear and convincing evidence." Caruso v. Superior Court, 100 Ariz. 167, 173, 412 P.2d 463, 467 (1966); *cf.* Application of Gault, 99 Ariz. 181, 192, 407 P.2d 760, 768 (1965), *rev'd on other grounds*, 387 U.S. 1 (1967).

232. ARIZ. R.P. JUV. CT. 17(a)(2). *See also* COLO. REV. STAT. ANN. §§ 19-1-103 (1), -3-106(5) (1973); N.Y. FAM. CT. ACT § 1046(b)(i) (McKinney 1975); TEX. FAM. CODE ANN. § 11.15 (1975).

233. ARIZ. R.P. JUV. CT. 17(a)(1).

234. *Id.* 17(a)(2). An Arizona court of appeals decision has recently reaffirmed the preponderance standard in termination proceedings. *See* Hernandez v. State *ex rel.* Dep't of Econ. Security, 23 Ariz. App. 32, 530 P.2d 389 (1975).

The reasonable doubt standard plays a vital role in criminal procedure, reducing the risk of convictions resting on factual error.[235] If the lesser, preponderance measure were used, factual errors would create a greater risk of convicting innocent persons.[236] In civil cases between two private litigants, however, the reasonable doubt safeguard is not necessary, since an erroneous finding against the defendant would be no more harmful than an erroneous finding against the plaintiff.[237] It would appear that neglect cases fall somewhere in between these two cases. They are unique both because of the severe penalties involved and because the interests of the parties affected by the state proceeding, the parents and the child, are often themselves in conflict. At all times, however, the innocent child must be protected; it is far less serious for the parent to lose temporary custody of the child while further investigation is being made than to allow possibly neglectful parents to retain custody and abuse the child further as a result of the state's inability to produce the high quantum of proof necessary to satisfy the reasonable doubt quantum of proof. A lesser standard of proof would be fairer to all interested parties.

Some courts are now using variants of negligence theory in neglect cases, especially in instances of physical abuse. Often called the *LaBrenz*[238] doctrine, this rule applies civil tort concepts of res ipsa loquitur to the neglect proceeding. Under the doctrine it is first established that the respondent owes a duty of care to the child. Proof is then offered of physical injury or neglect which was caused through no fault of the child. Once these elements are shown, there is an inference of neglect or abuse and the burden of proof shifts to the respondent-parent who must negate the presumption.[239] Although the use of negligence theory in neglect proceedings allows the state to shift the burden of proof to the parents, the circumstances would seem to militate in favor of this result. It is important that juvenile courts allow the use of negligence principles in cases where there is little proof beyond circumstantial evidence, but a child has been seriously injured. Many cases of serious child abuse occur behind closed doors, making it difficult to prove the cause of injury. Parental infliction of the injury need not always be an element of neglect; acts of omission, such as failing to protect children from exposure to dangerous situations, may also

235. *See In re* Winship, 397 U.S. 358, 363 (1970).
236. *Id.* at 371.
237. *Id.*
238. People v. LaBrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952).
239. *In re* S., 66 Misc. 2d 683, 690, 322 N.Y.S.2d 170, 177-78 (Richmond County Fam. Ct. 1971).

be grounds for the finding.[240] The favorable aspects of using negligence theory to determine neglect seem, therefore, to outweigh those which are adverse.

CONCLUSION

Parents rarely intend to be neglectful, but a child may nevertheless be harmed when parents are forced to direct their energies and attention towards other pressing problems.[241] Once neglect is an issue, however, the juvenile court must seek to balance the respondent-parents' due process rights against both the child's interests and the state's interest in protecting children from neglect and abuse. The juvenile court faces a dilemma in neglect cases; any mistake can seriously affect important rights—rights which are obviously in conflict.[242] It is particularly important, therefore, that any step taken be pursuant to clearly articulated rules and statutory procedures. Without such limitations, there is too great a tendency for social workers and judges to intervene whenever a child is suffering some harm, without adequately protecting the fundamental rights of parent and child.

240. *Id.* at 694, 322 N.Y.S.2d at 181.

241. OHIO STATE LEGAL SERVICES ASS'N, COURSE ON LAW AND POVERTY: THE MINOR § 4.02 (1968).

242. Becker, *Due Process in Child Protective Proceedings: State Intervention in Family Relations on Behalf of Neglected Children*, 2 CUMBER.-SAM. L. REV. 247, 258 (1971).