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THE CRIMINALIZATION OF CHILD WELFARE IN NEW YORK CITY: SPARING THE CHILD OR SPOILING THE FAMILY?

*Alison B. Vreeland**

INTRODUCTION

Recently, in New York City, increasing numbers of parents have been charged with "[e]ndangering the welfare of a child"[1] and prosecuted in criminal court for acts of child neglect that were traditionally handled through child protective services and the family court. Historically, the police have arrested and prosecuted parents and custodians for child abuse, including sexual abuse. But in cases of suspected neglect, the Administration for Children's Services ("ACS")[2] would respond to complaints of child neglect reported to the State Central Registry.[3] The police are acting under a directive by New York City Police Commissioner Howard Safir to "take action . . . when [they] see children in dangerous situations."[4] Opponents assert that this recent trend in criminal prosecutions is an expansion of the "mandatory arrest policy" used in cases of domestic violence.[5]

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1. N.Y. PENAL LAW § 260.10 (McKinney 1998).

2. ACS is the child welfare agency for the City of New York. In the past, ACS has also been known as the Bureau of Child Welfare and the Child Welfare Agency. *See* ACS, *Protecting the Children of New York: A Plan of Action for the Administration for Children's Services* (visited Nov. 3, 1999) <http://www.ci.nyc.ny.us/html/acs/html/frames1.html>.

3. The State Central Registry is the intake center in Albany that receives reports and complaints from all over the state and refers the cases to local agencies to investigate. All complaints are accepted if the allegations could constitute maltreatment. *See* N.Y. SOC. SERV. LAW § 422(2)(a) (McKinney 1992).

4. Joanne Wasserman, *More Kids Left Alone, State Says*, N.Y. DAILY NEWS, July 27, 1997, at 4.

5. In 1994, the New York State Legislature amended section 140.10 of the New York Criminal Procedure Law to address the failure of police to arrest an offending party in cases of domestic violence unless the victim chooses to press charges. *See* N.Y. CRIM. PROC. LAW § 140.10(4)(c) (McKinney 1998). The new mandatory arrest policy requires police to arrest the offending party, rather than the previous practice of having them take a walk to cool off. *See id.*

There is a growing debate over this criminalization of child welfare. Increasing numbers of arrests for child endangerment indicate that the police are more inclined to automatically arrest parents suspected of neglect.[6] Often the perpetrators arrested are parents who, because of poverty or poor judgment, have committed comparatively minor offenses such as leaving children unsupervised, at home or on the street.[7] The debate over the police policy centers on whether or not arrest and criminal prosecution are the most appropriate responses to child neglect.

This new policy is, in part, a response to tragic, high-profiled child abuse cases where a child reported to the child welfare system died at the hands of her parents.[8] In an effort to avoid other unnecessary deaths, Mayor Rudolph Giuliani has reinstated the long-abandoned practice of using police power to arrest and prosecute parents when there is probable cause to believe a parent has endangered the welfare of a child.[9] As a result, the criminal court system is confronting more and more of these cases.[10]

The criminalization of child welfare law is having a dramatic effect on the rights of children within the family. This Note addresses the debate over whether increased police involvement in, and criminal prosecution of, acts of child neglect adequately preserves the rights of the child. Part I discusses the criminalization trend and the fundamental differences between how the family court and the criminal court handle neglect. Part II presents the

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6. In 1990, there were 303 total arrests for the primary charge of "Endangering the Welfare of a Child." In 1998, there were 1111. *See* app. *infra*, tbl.5.

7. *See* Rachel L. Swarns, *In a Policy Shift, More Parents Are Arrested for Child Neglect*, N.Y. TIMES, Oct. 25, 1997, at A1 (discussing instances where mothers who had left their children unattended were arrested for child endangerment).

8. *See* Martin G. Karopkin, *Child Abuse and Neglect: New Role for Criminal Court*, N.Y. L.J., Feb. 28, 1996, at 1 (discussing how "[a] few highly publicized events have worked to change" the approach to child neglect that preferred the family court over the criminal court). One such case was that of Elisa Isquierdo. In November 1995, six-year-old Elisa died at the hands of her crack-addicted mother after months of abuse and torture. Despite countless reports by the child's teachers, neighbors and friends, New York City child welfare workers failed to remove the child from her mother. *See* Mona Charen, *With Kids, the Cautious Seldom Err*, DENV. ROCKY MOUNTAIN NEWS, May 22, 1997, at 67A.

9. *See infra* Part I.B.

10. *See* Karopkin, *supra* note 8. Judge Karopkin asserts that a few highly publicized incidents of child abuse have led to fundamental changes in the way child welfare cases are handled by police and prosecutors. *See id.* "These changes have brought a steady stream of criminal cases where the injuries are less severe or where there is no injury and the charges involve allegations of neglect." *Id.* Statistics support Judge Karopkin's observation. Arrests for the criminal charge of "endangering the welfare of a child" have more than tripled since 1990. *See* app. *infra*, tbl.5.

arguments for and against increased police involvement and criminal prosecution of neglectful parents. It examines the child's liberty interest in the parent-child relationship, a right that is implicated when a child is removed from her parents. Part II further compares how this constitutional right is affected in family court neglect proceedings and in criminal court child endangerment prosecutions. Part III argues that the criminalization of child welfare does not reflect the status that children have achieved as rights-bearers,[11] in that the child has no voice and no right to self-determination in the parent's prosecution. Part III furthers argues that this criminalization trend poses a threat to any interest of the child that is independent of that of the State and that of the parent. The child's rights are presumed protected by either the parent or the State, although her true interests often do not fully align with either, leaving her voiceless in child endangerment prosecutions.

This Note concludes that the criminal justice system, by focusing on the parent's claims against the State and the State's interest in child protection, is inadequate in accommodating the constitutional rights of the child to self-determination. Therefore, child neglect is best adjudicated in family court under the New York Family Court Act ("FCA"), which provides the child with legal representation and thereby protects the child's right to self-determination as well as her liberty interest in the parent-child relationship.

I. THE CRIMINALIZATION TREND

A. How Neglect Cases Are Handled Through Child Protective Services and the Family Court

While child abuse and neglect have existed throughout history,[12] it has only been in the last fifty years that public awareness of this problem has grown,[13] prompting State intervention on behalf of

11. The term "rights-bearer" refers to individuals who have a set of rights under natural, common or statutory law. *See, e.g.*, Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 WAKE FOREST L. REV. 409, 426 (1999) (describing how "the provision of rights to individuals necessarily animates the generation of classes of rights-bearers"); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 48 (1991) (discussing the "image of the rights-bearer as a self-determining unencumbered individual . . . .").

12. *See generally* Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972) (discussing child maltreatment throughout history).

13. *See* Douglas J. Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 539 (1985).

children.[14] Today every state has established child protective services agencies to receive reports of abuse and neglect.[15]

In New York, the Child Protective Services Act of 1973[16] regulates the provision of protective services to abused and maltreated children.[17] In 1998, 57,842 cases of child abuse and neglect were reported in New York State.[18] These cases come to the state's attention through the New York State Telephone Hotline ("Hotline"). These reports are received by the Statewide Central Registry of Child Abuse and Maltreatment ("State Central Registry").[19] Anyone can call in a report to the Hotline. The caller must simply have "reasonable cause" to make a report of suspected child abuse or maltreatment.[20]

Under New York law, certain individuals are mandated to report any suspicion of child abuse or neglect.[21] These "mandated reporters" include school officials, physicians and police officers.[22] Once a report is received, a state worker at the State Central Registry makes a preliminary determination of the validity of the allegations.[23] If it is determined that the allegations received by the Hotline constitute a report of abuse or maltreatment, the state becomes obligated to report the matter to a local agency.[24]

The standard for determining the validity of an allegation is whether the allegation "could reasonably constitute a report of

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14. *See* Jill D. Moore, *Charting a Course between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2064 (1995).

15. *See id.* at 2070-78.

16. N.Y. SOC. SERV. LAW § 411 (McKinney 1992 & Supp. 1999).

17. *See id.*

18. *See* app. *infra*, tbl.1.

19. The term "maltreatment" is broader than "neglect" as defined in section 1012 of the FCA because it covers children in foster care and state run institutions. *See* N.Y. SOC. SERV. LAW § 412(2).

20. *See id.* § 414.

21. *See id.* § 413(1). Section 413(1) of the New York Social Services Law provides that mandated reporters must:

> report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child . . . .

Id.

22. *See id.* (containing an exhaustive list of mandated reporters).

23. *See id.* § 422(2)(a).

24. *See* Boland v. State, 638 N.Y.S.2d 500, 502-03 (App. Div. 1996).

child abuse or maltreatment."[25] If this standard is met, the case is then referred to local child protection agencies.[26] In New York City, the borough offices of ACS receive these reports.[27] Within twenty-four hours of receiving a report, ACS must commence an investigation.[28] This investigation includes conducting a home visit with the family, evaluating the environment of the child named in the report and any other children living there, assessing the risk to the children, as well as determining the nature, extent and cause of any condition enumerated in the report.[29] The caseworker typically interviews the child or children, determines their names and ages and evaluates their condition.[30] The case worker must then "forthwith notify the subjects of the report and other persons named in the report in writing of the existence of the report and their respective rights . . . ."[31] Part of the decision-making process includes deciding whether the facts alleged are sufficient to establish neglect.[32]

Under existing guidelines, ACS must make a preliminary report within seven days.[33] ACS must complete its investigation and determine whether the report is "indicated" or "unfounded" within sixty days.[34] An "indicated" report means that some credible evidence of maltreatment exists, whereas an "unfounded" report means there is no credible evidence to support it.[35] On average, the number of indicated reports is less than half of the number of total reports.[36] When a report of suspected child neglect is indicated by ACS, the Agency assesses what, if any, preventive services might be put in place for the family.[37] Before a petition is filed against the parent in family court, ACS must have conducted an

25. N.Y. SOC. SERV. LAW § 422(2)(a).

26. *See id.* § 422(2)(b).

27. *See id.*

28. *See id.* § 424(6).

29. *See id.*

30. *See id.*

31. *Id.*

32. *See id.* § 422(2)(b).

33. *See id.* § 424(3).

34. *Id.* § 424(7).

35. *See id.* § 412(11), (12).

36. For example, in 1997, 40% of all mandated reports were indicated. *See* app. *infra*, tbl.3.

37. *See* N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) ("[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home.").

investigation, assessed the threat to the child and attempted to provide the family with assistance.[38]

If the Agency determines that the child faces imminent risk, a neglect petition can be filed in family court or the child may be removed under emergency conditions.[39] Article 10 petitions are filed in only a fraction of the total cases.[40] When a child is removed under emergency conditions, the child is taken into the protective custody of the Commissioner of the Administration for Children's Services, and ACS must file a petition in family court.[41] The parents would then be served with a summons and a copy of the petition containing the allegations against them.[42] Under these circumstances, the parent is entitled to an immediate hearing to be held within three days at which the court will assess if there is imminent risk to the child.[43]

The court later holds a "fact-finding hearing" to decide whether the child has been abused or neglected.[44] At this hearing, ACS may present evidence and witness testimony in support of the allegations in the petition.[45] If the court finds that the allegations have not been proven, the petition is dismissed and the child is returned home.[46] If the court "makes a finding," that is, finds that the allegations are true and that the child has been abused or neglected, a dispositional hearing is held to determine what is in the best inter-

38. The assessment of conduct employs the standard established by the FCA and requires the following inquiry: does the parent fail to exercise "a minimum degree of care" so that the child's physical, mental or emotional condition has been impaired or is in imminent danger of being impaired? N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1999).

39. ACS may remove the child from the home prior to filing the petition if the child is in "imminent danger." *Id.* § 1024.

40. In 1998, 57,842 abuse and neglect reports came in, but only 11,000 petitions were filed. *See* app. *infra*, tbls.1, 4.

41. *See* N.Y. SOC. SERV. LAW § 424(10).

42. *See* N.Y. FAM. CT. ACT § 1036.

43. "Imminent risk" is the statutory language and standard by which the family court judge is to assess the removal of a child. *See id.* § 1027(b)(i). Under section 1027(a) of the FCA, when a child has been removed without a court order, a hearing must be held to determine if the child should remain in the custody of ACS pending the fact-finding trial. If the court finds that removal is necessary to avoid imminent risk to the child's life or health, the court should continue the removal. *See id.* § 1027(b)(i). The respondent parent can then apply for the return of the child. *See id.* § 1028(a). The court shall grant the application unless it finds the return presents an imminent risk to the child's life or health. *See id.* § 1027(b)(i).

44. *Id.* § 1044.

45. *See id.* § 1046.

46. *See id.* § 1051.

ests of the child.[47] If the child has not already been removed from the home before the fact-finding, once a finding has been made, the court can remove the child from the home and "remand" her to the custody of ACS.[48] Following a finding, the court will order an investigation of the child's home and family by ACS.[49] The court will hear the results of this investigation at the dispositional hearing and make a determination about the child's disposition based on the child's best interests.[50] Possible dispositions may include returning the child to the home on certain conditions or placing the child in foster care[51] while services are provided to the parents.[52] This traditional approach to child neglect has recently changed in New York City.

B. Current Police Policy and the Trend Towards Criminalization

Prior to 1977, New York family courts had exclusive jurisdiction over acts between family members that would constitute crimes if they were between strangers.[53] In 1977, the New York Legislature amended the Criminal Procedure Law to give the criminal court concurrent original jurisdiction over these acts.[54] Once a case was brought in one of these two courts, the complainant had three days in which to decide whether to transfer the case to the other court.[55]

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47. *Id.* §§ 1047(a), 1052. Judge Cardozo first enunciated the "best interests of the child" standard. *See* Harvey R. Sorkow, *Best Interests Of the Child: By Whose Definition?*, 18 PEPP. L. REV. 383, 384 n.75 (1991) (citing LeAnn Larson LaFave, *Origins and Evolution of the "Best Interest of the Child" Standard*, 34 SAN DIEGO L. REV. 459, 467 (1989)). While the standard is not clearly defined, it typically requires an examination of factors relating to a child's safety, happiness and physical, mental and moral welfare. *See id.* at 384 (citing Fantony v. Fantony, 122 A.2d 593, 598 (N.J. 1956)).

48. *See* N.Y. FAM. CT. ACT § 1052(a)(3).

49. *See id.* § 1034 (authorizing the family court judge to order the child protective agency to conduct a child protective investigation in any proceeding under Article 10).

50. *See id.* § 623 ("'[A] dispositional hearing' means a hearing to determine what order of disposition should be made in accordance with the best interest of the child.").

51. A child may be placed in foster care for a period of up to one year. This placement can be extended if a petition is filed by the foster care agency, and a hearing is held in which the court decides whether or not continued placement is necessary. *See id.* § 1055.

52. *See id.* § 1057; *see also* COMMITTEE ON CHILDREN AND THE LAW, ASS'N B. N.Y.C., INTRODUCTORY GUIDE TO THE NEW YORK CITY FAMILY COURT 27-30 (1997).

53. *Criminal Court Loses Jurisdiction, As Complainant Chooses Family Court;* People v. Damon McCoy, N.Y. L.J., Sept. 25, 1998, at 25.

54. *See id.* (discussing the amendment to section 530.11 of the New York Criminal Procedure Law).

55. *See id.*

The case could not be heard by both courts simultaneously.[56] If the complainant chose to transfer the case to family court, the district attorney could not prosecute.[57] However, this policy was not well-received, and in 1994, the Family Protection and Domestic Violence Intervention Act was passed.[58] This Act provided that incidents involving disorderly conduct, harassment (first and second degree), aggravated harassment in the second degree, menacing (second and third degree), reckless endangerment, attempted assault and assault (second and third degree) between family members could not be prosecuted in both courts simultaneously.[59] The stated purpose of this amendment was "to give greater protection and choice to the victims of domestic abuse, not less."[60] The amendment did mark a new development in domestic violence law by enabling the district attorney to pursue a criminal case even over the direct wishes of the complainant that the matter be brought in family court.[61]

In 1994, the New York State Legislature amended the Criminal Procedure Law to address the common police practice of failing to arrest the offending party in cases of domestic violence.[62] The new policy is referred to as a "mandatory arrest" policy, which requires the police to arrest an offending party rather than permit him to "cool off."[63] The new policy is intended to provide endangered women with a reliable source of assistance.[64] The police no longer may ask the complainant whether she wishes to press charges in order to execute an arrest.[65]

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56. *See id.*

57. *See* People v. Fisher, 580 N.Y.S.2d 625 (Justice Ct. 1991); People v. Falzone, 537 N.Y.S.2d 773 (Crim. Ct. 1989).

58. *See* 1994 N.Y. Laws ch. 222.

59. *See Criminal Court Loses Jurisdiction*, *supra* note 53, at 25.

60. *Id.*

61. *See id.*

62. *See* N.Y. CRIM. PROC. LAW § 140.10(4)(a) (McKinney 1999) (mandating police officers to arrest, not attempt to reconcile the parties or mediate, where an officer has reasonable cause to believe that a felony has been committed by one family member against another).

63. Section 140.10(4)(c) of the New York Criminal Procedure Law provides that where an officer has reasonable cause to believe that a misdemeanor constituting a family offense has occurred, the officer shall arrest the offender, and "shall not attempt to reconcile the parties or mediate . . . ." N.Y. CRIM. PROC. LAW § 140.10(4)(c).

64. *See* JILL M. ZUCCARDY, BROOKLYN B. ASS'N VOLUNTEER LAW. PROJECT, OVERLAPPING JURISDICTION AND ORDERS OF PROTECTION: CRIMINAL, CIVIL AND FAMILY COURT (1997).

65. *See* N.Y. CRIM. PROC. LAW § 140.10(4)(c).

In the last two to three years, the New York Police Department has played a more active role in child welfare. As a result, more and more parents are being arrested and charged with the misdemeanor crime of "endangering the welfare of a child" for acts that constitute child neglect.[66] This Note addresses only the arrest and criminal prosecution of parents for acts of neglect that do not include abuse or excessive corporal punishment. The offending behavior in many child endangerment cases includes, for example, leaving a child alone, failing to ensure school attendance or poor house-keeping.[67] There is a growing sentiment that the police have actually expanded the "must arrest" policy used in domestic violence cases to child welfare matters as well.[68] Regardless of whether this sentiment is true, the criminal court system has seen more cases of child neglect in recent years than it has in the past.[69] Statistics show that while arrests for acts constituting criminal child endangerment have nearly tripled in the last eight years, the number of petitions filed in family court for neglect have not similarly increased but have instead decreased.[70] This outcome may indicate that the increased number of arrests are not due to increased neglectful behavior, but rather increased enforcement of the criminal statute and police arrests.

In *People v. Smith*,[71] a mother of four was arrested in her home and charged with "endangering the welfare of a child" for leaving her four children, ages five, seven, twelve and thirteen, home alone for two hours.[72] In the decision, the judge noted that "there are an increasing number of these so called 'home alone cases' appearing

66. *See* app. *infra*, tbl.5. The number of arrests where "endangering the welfare of a child" was the primary charge has nearly quadrupled since 1990. *See id.*

67. *See infra* notes 71-87 and accompanying text.

68. In her testimony before the New York State Assembly on December 16, 1997, Jill Zuccardy argued against "the New York Police Department policy of using 'must arrest' as a justification for acting independently of ACS in cases of alleged child neglect . . . ." Public Hearing, *infra* note 134.

69. *See* Karopkin, *supra* note 8. In his article, Judge Karopkin discusses how the Criminal Court generally only saw severe cases involving child or sexual abuse, but that this practice has changed because a few highly publicized cases of abuse have brought attention to the issue. *See id.* Now the Criminal Court sees more cases where the injuries are less severe, or the allegations are of neglect alone. *See id.*

70. *See* app. *infra*, tbls.4, 5.

71. 678 N.Y.S.2d 872 (Crim. Ct. 1998).

72. *See id.* at 873. The police found the children home alone when they went to the house in response to a 911 call placed by an unidentified caller. The defendant was arrested and held overnight in jail. *See id.* at 874. At the arraignment, the judge refused the people's request for an order of protection for the children, and the defendant was released on her own recognizance. *See id.* The court granted the defendant's motion to dismiss on the grounds that the defendant's action failed to make out

in Criminal Court which are charged under section one of Penal Law 260.10, which provides no such guidance."[73] This trend is significant because it shows that the police may now be making arrests for poor decision-making or lack of resources among parents.

Unlike the defendant in *Smith*, Laura Vanegas was arrested and jailed overnight in July of 1997 when the police found her two sons alone outside of their aunt's apartment in East Harlem.[74] The children were placed in foster care, but the charge of child endangerment was later dropped.[75]

In 1997 and 1998, there was much discussion in the press about increasing numbers of arrests in New York City for acts of neglect.[76] This attention sparked criticism of the new police policy.[77] The criticism was that the circumstances did not seem egregious enough to warrant arrest.[78] In 1997, Sourette Alwysh, a thirty-four-year-old mother, was arrested for living with her five-year-old son in a roach-infested apartment without electricity or running water.[79] Ms. Alwysh, a Haitian immigrant, had been living in a foreclosed building.[80] When the police discovered this fact they took her away in handcuffs and placed her son in foster care.[81] In 1997, Sidelina Zuniga, thirty-nine, was arrested for leaving her two

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any cognizable crime under section 260.10(2) of the New York Penal Law. *See id.* at 875.

73. *Id.*

74. *See* Rachel L. Swarns, *In a Policy Shift, More Parents Are Arrested for Child Neglect*, N.Y. TIMES, Oct. 25, 1997, at A1.

75. *See id.*

76. *See id.*; Joanne Wasserman, *More Kids Left Alone, State Says*, N.Y. DAILY NEWS, July 27, 1997, at 4; Bill Egbert & Henri E. Cauvin, *Charged Mom Left Six Kids at Home*, N.Y. DAILY NEWS, Aug. 17, 1998, at 6; John Schultz, *Mom Charged in Child Abandonment*, N.Y. NEWSDAY, Nov. 16, 1998, at A20; Timothy D. May, *Boy Found in Park to Live with Dad; Agency Probing Paterson Mom*, RECORD, July 15, 1997, at L01; Graham Rayman, *Mom Charged in Child Neglect*, N.Y. NEWSDAY, Aug. 17, 1998, at A20; Associated Press, *Teen Mother Arrested After Leaving Infants Alone*, BUFF. NEWS, Dec. 22, 1997, at 6A; Henri E. Cauvin, *B-lyn Mom Busted in Home-Alone Case*, N.Y. DAILY NEWS, Mar. 23, 1998, at 16; Cerisse Anderson, *Leaving Children in Auto May Be Prosecuted as Crime*, N.Y. L.J., Feb. 24, 1998, at 1; Associated Press, *2 Sons Alone; Mom Arrested*, N.Y. NEWSDAY, July 2, 1997, at A52; Mirta Ojito, *Mother's Neglect Arrest Called No Surprise*, N.Y. TIMES, June 12, 1997, at B3.

77. *See, e.g.*, Ilze Betins, Letter to the Editor, *Child Welfare Doesn't Belong in Police Hands*, N.Y. TIMES, Oct. 30, 1997, at A30; Brian Harmom & Lama Bakri, *Mom's Arrest Sets Off Debate on Child Neglect*, DET. NEWS, May 15, 1997, at C1; Katha Pollitt, *Killer Moms, Working Nannies; an Increase in Arrests of Mothers Charged with Child Neglect, Some on Ridiculous Charges, Highlights the Need for Working Mothers to Stand Up for Their Rights*, NATION, Nov. 24, 1997, at 9.

78. *See* Pollitt, *supra* note 77.

79. *See* Swarns, *supra* note 74.

80. *See id.*

81. *See id.*

sons, ages ten and four, at home for an hour and a half while she shopped at a grocery store.[82] In September of 1997, Lucia Savarin, forty-one, was arrested for losing sight of her four-year-old son, who wandered outside into the night while his mother helped a friend move into a new apartment.[83] Ms. Savarin had trusted a friend to watch her son, but somehow the boy was unattended long enough to make it outside.[84] Samantha Stevens, thirty-three, was charged with six counts of child endangerment in August of 1998 when she left her six children home alone for five hours.[85] The children ranged in age from five-months to eleven-years-old.[86] They were discovered after the three-year-old slipped outside and was found on the street.[87]

Until recent years, mothers who had committed similar acts of child neglect would have been referred to ACS, where they would have received counseling and services, but probably not have been arrested.[88] In fact, "[b]efore the change in policy, police officers who found children briefly left home alone or living in substandard housing would call child welfare workers, who would arrange for counseling, day care, housing subsidies or, in extreme cases, place the children in foster care. The parents were rarely arrested."[89] Typically, after social services had been notified, the family would have been monitored by social workers.[90]

Statistics have indicated that the New York Police Department is more likely to make an arrest in cases of child neglect than in prior years.[91] By 1998, the number of arrests for child endangerment had more than tripled since 1990.[92] The rise in arrests has been attributed to Police Commissioner Howard Safir's directive to the police to "take action . . . when [they] see children in dangerous situations."[93] While child advocates promote dealing with child neglect through social services, Commissioner Safir has indicated that

82. *See id.*
83. *See id.*
84. *See id.*
85. *See* Rayman, *supra* note 76.
86. *See id.*
87. *See id.*
88. *See* Swarns, *supra* note 74.
89. *Id.*
90. *See id.*
91. *See* app. *infra*, tbl.5.
92. *See id.*
93. Wasserman, *supra* note 76 (quoting New York City Police Commissioner Howard Safir).

he would prefer that cops be aggressive.[94] "Quite honestly, I would much rather be accused of overreaction than underreaction," he stated in 1997.[95] This new police initiative has led to a sixty percent increase in misdemeanor arrests for endangering children since 1995.[96]

The practices used by the police when investigating suspected child neglect can differ substantially from those of ACS. The police receive their policy dictates from sources including the *Police Student's Guide*,[97] a training manual, and the *Police Patrol Guide*,[98] a practice manual. Under the *Police Student's Guide*, when an officer responds to a domestic incident, the investigation includes determining if there are any children present who may be victims of neglect, abuse or maltreatment.[99] If the officer "reasonably suspects" a child of being abused, neglected or maltreated, they first must prepare a Report of Suspected Child Abuse or Maltreatment[100] and notify the State Central Registry.[101] If the police feel that there is probable cause to believe the crime of endangering the welfare of a child has been committed, the parent is arrested and removed from the home.[102] The *Student Guide* defines "probable cause" as "[a] combination of facts, viewed through the eyes of a police officer, which would lead a person of reasonable caution to believe that an offense is being or has been committed."[103] After the arresting officer has called the State Central Registry, the normal procedure is presumably followed and the case is investigated

94. *See id.*

95. *Id.*

96. *See* Swarns, *supra* note 74.

97. *See* POLICE DEP'T N.Y.C., POLICE STUDENT'S GUIDE (on file with the author).

98. *See id.*

99. *See* POLICE DEP'T N.Y.C., PATROL GUIDE, PROC. NO. 110-38: FAMILY OFFENSES/DOMESTIC VIOLENCE 2 (1989) (on file with the author).

100. *See* POLICE DEP'T N.Y.C., PATROL GUIDE, PROC. NO. 106-15: EMERGENCY REMOVALS OR INVESTIGATION AND REPORTING OF ABUSED, NEGLECTED OR MALTREATED CHILDREN 5 (1989) (on file with the author).

101. *See supra* note 3 (State Central Registry); *see also supra* note 21 (mandated reporters).

102. *See supra* note 100, at 3.

103. POLICE DEP'T N.Y.C., POLICE STUDENT'S GUIDE, INTERIM ORDER NO. 10, at 25 (1995) (on file with the author). The U.S. Supreme Court has stated that probable cause for an arrest exists where the facts and circumstances within the arresting officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to convince a man of reasonable caution that an offense has been or is being committed. The evidence need not be sufficient to establish guilt, although the officer's mere suspicion or good faith belief is not enough to constitute probable cause. *See* Henry v. United States, 361 U.S. 98 (1959); Ker v. California, 374 U.S. 23 (1963).

within twenty-four hours.[104] The *Police Student's Guide* is silent regarding what is to be done with the child for those twenty-four hours.

The *Patrol Guide* authorizes the emergency removal of children deemed to be abused, neglected or maltreated.[105] The definitions of "neglect" and "abuse" are taken from the FCA.[106] Under this *Patrol Guide* procedure, an officer who has reasonable cause to believe that the child's continued presence within the home presents an imminent danger to the child's life or health has the authority to remove the child after requesting the response of a patrol supervisor.[107] The child is then taken to the station house or to the hospital if deemed necessary.[108] The arresting officer then refers the child to ACS and reports the case to the State Central Registry.[109]

Under New York Criminal Procedure Law, when a criminal action involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household is pending, the court may issue a temporary order of protection.[110] The court may issue this order *ex parte* upon the filing of an accusatory instrument and for good cause shown.[111] The defendant is entitled to an opportunity to be heard only if recognizance or bail is involved.[112] It is common practice in criminal prosecutions for the prosecutor to request the court to issue such an order of protection barring the parent from contact with the child.[113] There is no provision in the criminal statutes that give the defendant an opportunity to be heard where an order of protection has been requested.[114] The order of protection prevents the parent from contacting the child, but the parent still

104. *See supra* Part I.A.

105. *See* POLICE DEP'T N.Y.C., PATROL GUIDE PROC. NO. 106-15, *supra* note 100, at 1.

106. N.Y. FAM. CT. ACT § 1012(e), (f) (McKinney 1999).

107. *See* POLICE DEP'T N.Y.C., PATROL GUIDE PROC. NO. 106-15, *supra* note 100, at 2.

108. *See id.* at 3.

109. *See id.* at 3, 5.

110. *See* N.Y. CRIM. PROC. LAW § 530.12(1) (McKinney 1999).

111. *See id.* § 530.12(3).

112. *See id.* § 510.20.

113. *See* Jane Golden, *Is Social Work Losing Child Welfare?*, CUSSW CENTENNIAL CELEBRATION, June 12, 1998.

114. A defendant is only entitled to an opportunity to be heard if recognizance or bail is involved. Otherwise, the criminal court can issue a temporary order of protection ex parte. *See* N.Y. CRIM. PROC. LAW §§ 510.20, 530.12(3).

retains legal custody.[115] It is necessary for the arresting officer to have contacted ACS and initiated child protective custody, or else the child remains in limbo, without a custodian. The criminal court system has no legal mechanism to provide for the child while the parent is detained.[116] It is necessary for ACS to file a petition in family court for the child to be placed in foster care.[117]

C. FCA "Neglect" v. Penal Law "Child Endangerment"

The concepts of "abuse," "neglect" and "maltreatment" are by no means universal. Article 10 of the FCA defines what behavior by adults constitutes child abuse or neglect.[118] However, Article 10 child protective proceedings do not protect children against the behavior of all adults. Under the FCA, the child is protected from the improper behavior of the child's custodian, guardian or any other person legally responsible for the child's care at the time.[119] A "person legally responsible" can include any adult who is living in the household and has regular contact with the child.[120] This definition may include a relative or paramour living within the home.[121]

Under section 1012 of the FCA, a child is a neglected child if the caretaker fails to exercise a minimum degree of care in providing for specified basic needs of the child, with the result that the child's physical, mental or emotional condition is impaired or in danger of

115. Under section 530.12 of the New York Criminal Procedure Law, "when a criminal action is pending involving a complaint charging any crime or violation between . . . parent and child . . . the court . . . may issue a temporary order of protection . . . ." *Id.* § 530.12(1).

116. *See* N.Y. SOC. SERV. LAW § 374 (McKinney 1999). While section 1024 of the FCA provides that:

> a peace officer . . ., police officer, or law enforcement official, or an agent of a duly incorporated society for the prevention of cruelty to children or a designated employee of a city or county department of social services shall take all necessary measures to protect a child's life or health including . . . taking or keeping a child in protective custody," only an authorized agency may place a child in foster care.

N.Y. FAM. CT. ACT § 1024(a) (McKinney 1999).

117. *See* N.Y. FAM. CT. ACT § 1026.

118. *See id.* § 1012(e), (f).

119. *See id.* § 1012(g).

120. *See, e.g., In re* Yolanda D., 673 N.E.2d 1228 (N.Y. 1996) (holding that the uncle of the subject children was a person legally responsible where the subject child visited him every other week during the time in question and the uncle was regularly present at the child's own house); *In re* Heather U., 632 N.Y.S.2d 285 (App. Div. 1995) (holding that the mother's live-in paramour was a person legally responsible for the subject child in that he had been living in the home for three years).

121. *See In re* Heather U., 632 N.Y.S.2d at 285.

impairment; or if the child is abandoned by the caretaker.[122] While the statute does not set thorough guidance for the care of a child, it sets a bare minimum standard to be met by the caretaker. The child must be provided with adequate food, clothing, shelter, education and medical care.[123] The statute requires that a causal connection be established between the lack of care and the impairment of the child.[124] An important element of the FCA definition of neglect is that it takes into account the financial ability of the parent to provide for the child.[125] A failure to provide a child with basic care can only be found after a determination that the parent is "financially able to do so or [has been] offered financial or other reasonable means to do so . . . ."[126]

New York Penal Law criminalizes behavior that endangers the welfare of a child.[127] A person is guilty of child endangerment when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child under the age of seventeen.[128] Violation of the statute also occurs when a parent, guardian or other person legally charged with the care or custody of a child under eighteen fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," under Articles 10, 3 and 7 of the FCA.[129] Child endangerment can encompass a broad range of acts.[130] In fact, under the statute, no actual harm need result; rather, the course or conduct alleged must be likely to be injurious.[131] Despite the breadth of conduct the statute

122. N.Y. FAM. CT. ACT § 1012(f).

123. *See id.* § 1012(f)(i)(A).

124. A preponderance of the evidence must show parental failure to exercise a minimum degree of care, impairment or imminent danger of impairment to the child and a causal connection between the two. *See In re* T. Children, 621 N.Y.S.2d 25 (App. Div. 1994).

125. *See* N.Y. FAM. CT. ACT § 1012(f)(i)(A).

126. *Id.*

127. *See* N.Y. PENAL LAW § 260.10(1) (McKinney 1999).

128. *See id.* The statute also criminalizes directing or authorizing a child to engage in an occupation involving a substantial risk of danger to his life or health. *See id.*

129. *See id.* § 260.10(2). Article 10 of the FCA governs child protective proceedings; Article 3 governs juvenile delinquency; and Article 7 governs persons in need of supervision.

130. *See* Karopkin, *supra* note 8.

131. *See* People v. Doe, 512 N.Y.S.2d 636, 638 (Crim. Ct. 1987) (stating that although "the alleged conduct of the defendant did not involve physical contact with the child [this] does not lead to the conclusion that such conduct was not 'likely to be injurious to the . . . mental or moral welfare' of the child" (citing N.Y. PENAL LAW § 260.10(1)).

covers, challenges claiming unconstitutional vagueness have failed.[132]

The penal law refers to the FCA for its definition of neglect.[133] Therefore, acts sufficient to establish neglect would also be sufficient to establish child endangerment. As a result, the difference lies not in the statutes, but rather in how the offending behavior is prosecuted under each. The primary difference between how neglect cases are handled in criminal court and how they are handled in family court is a result of the nature of these two different courts.[134] The family court is a rehabilitative setting that aims to identify families in crisis, protect the parties in danger and provide services to the family.[135] In addressing child abuse and neglect, courts have struggled to accomplish several goals. In making dispositional orders, judges are bound to consider the child's best interest first and foremost.[136] However, the preservation of families also is a prominent goal in federal and New York State legislation.[137]

The Adoption Assistance and Child Welfare Act of 1980 requires states receiving federal foster care funds to make "reason-

132. *See, e.g.*, People v. Padmore, 634 N.Y.S.2d 215, 216 (App. Div. 1995).

133. *See* N.Y. PENAL LAW § 260.10(2) ("[A]n 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision,' as those terms are defined in articles ten, three and seven of the FCA.").

134. "Criminal jurisdiction looks at the question what happened. Civil jurisdiction looks at the question what is likely to happen in the future." Transcript, Examining and Defining the Role of Law Enforcement in Child Welfare Matters: Public Hearing on N.Y.S. Assembly Bill 7068 before N.Y.S. Assembly Standing Comm. on Children and Families, 220th Legis., Dec. 16, 1997 [hereinafter "Public Hearing"] (statement by Prof. Martin Guggenheim, N.Y.U. School of Law).

135. *See* People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994) (noting that the family court's duty was to protect the child and if possible work toward the future rehabilitation of the family, whereas in criminal proceedings the state is primarily concerned with the determination of the guilt of the accused).

136. The standard at a dispositional hearing is the child's best interests. *See* N.Y. FAM. CT. ACT § 623 (McKinney 1999) ("'dispositional hearing' means a hearing to determine what order of disposition should be made in accordance with the best interests of the child"); *id.* § 1052(b)(1)(A) (obligating judge in dispositional order to consider whether continuation in the child's home would be contrary to the best interests of the child); *In re* Anthony "OO," 685 N.Y.S.2d 494, 496 (App. Div. 1999) ("It is . . . well settled that unless all parties consent to dispense with such, a dispositional hearing is required to determine the appropriate order of disposition to be entered upon an adjudication of permanent neglect, and at the dispositional hearing the sole criterion is the best interest of the child . . . ." (citations omitted)).

137. *See* N.Y. SOC. SERV. LAW § 384-b[1][a][iii] (McKinney 1998) ("[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home."); *see also* Adoption Assistance and Child Welfare Act of 1980, *infra* note 138 (requiring state agencies to make reasonable efforts to keep families together).

able efforts" to prevent a child from entering foster care and to develop a case plan for each child in foster care that assures the provision of services designed to facilitate the child's return to her parents.[138] New York's compliance with this mandate is represented in the New York Social Services Law.[139] New York case law reflects a policy of preserving the parent-child relationship where ever possible, while still acting in the child's best interest.[140]

In 1997, Congress passed the Adoption and Safe Families Act ("ASFA").[141] This federal act shifted the priority of the child welfare system from family reunification to child protection.[142] The federal law clarifies that efforts at reunification are not required where a child's health or safety would be endangered.[143] Under the Act, if certain aggravating circumstances are present, social workers no longer have to make a reasonable effort to preserve families.[144] The Act emphasizes expediting the procedure through which a child is freed for adoption.[145] Before ASFA, New York law required officials to undertake "reasonable efforts" to reunify foster children with their parents.[146] Once ASFA was passed, New

138. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980). In the 1970s, the foster care system was criticized because the predominant approach to dealing with neglect and abuse was to separate the child from the parent. *See* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975). This approach was criticized for failing to consider that the child's emotional health was at risk when the child was separated from her family. *See id.* In response to this type of criticism, Congress passed the Adoption Assistance and Child Welfare Act, which made a priority of reuniting families whenever possible. *See* Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2289 nn.38-40 and accompanying text (1998).

139. *See* N.Y. SOC. SERV. LAW § 384-b[1][a][iii] (requiring the state to provide families with services to prevent its break-up); *see also id.* § 131[3] ("As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life.").

140. *See In re* Dickson, 423 N.E.2d 361, 363 (N.Y. 1981). "Consistent with the constitutional protection of family integrity, Congress and the New York State Legislature have expressed a clear preference for the preservation of the family unit by enacting laws to further this goal." Martin A. v. Gross, 524 N.Y.S.2d 121, 124 (Sup. Ct. 1987). *See also In re* Sayeh R., 693 N.E.2d 724, 736 n.7 (N.Y. 1997).

141. Pub. L. No. 105-89, 111 Stat. 2115 (1997).

142. *See* Bailie, *supra* note 138, at 2286 ("This federal legislation significantly changed the goals of the child welfare system which, prior to this law, focused mainly on reuniting families.").

143. *See* AFSA, *supra* note 141.

144. *See* 42 U.S.C. § 671(a)(15)(D) (1999).

145. *See id.* 671(a)(15)(F).

146. *See* N.Y. SOC. SERV. LAW § 409-a (McKinney 1999); N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4 (1999).

York, along with other states, was required to pass its own implementing legislation in order to receive federal funding.[147] New York stood to lose $450 million in funding if the legislation was not enacted.[148] That legislation came in February of 1999, but not before the New York Assembly missed three deadlines that Congress had set.[149] Disagreement among Democrats and Republicans of the Assembly caused the delays.[150] Assembly Democrats feared that the legislation would go too far in allowing for the termination of parental rights.[151] The new law allows for the termination of parental rights if a child has been in foster care for fifteen out of the last twenty-two months.[152] The state will also seek to terminate parental rights if a parent abandons a newborn or assaults or kills a child.[153]

ASFA and New York State's implementing legislation has fed the debate over what role family preservation should play in child protection. This question is paramount to the issue of criminalization because a shift toward child protection, and away from family reunification, will embrace the increased role of law enforcement in child welfare matters.

While this legislation made great strides for those who felt that efforts at family preservation were hindering foster care children's access to stable adoptive homes, the statute continues to require that unless the aggravating circumstances are present, reasonable efforts must be made to preserve and reunite families.[154]

In the last two decades, judges and social workers have placed a priority on keeping families together.[155] The goal of family preservation is evidenced by New York Social Services Law, under which ACS is required to offer and provide services to prevent the break-

147. *See* Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 681-83 (1999) (noting that Congress conditioned federal funding for states on compliance with the federal legislation).

148. *See* Shannon McCaffrey, *New York Dragging Its Feet on Meeting New Federal; Child-Welfare Guidelines*, BUFF. NEWS, Jan. 19, 1999, at 3A.

149. *See* Lara Jakes, *Funds to Follow Adoption Law Passage*, TIMES UNION, Feb. 12, 1999, at B2.

150. *See* McCaffrey, *supra* note 148, at 3A.

151. *See id.*

152. *See* ASFA, *supra* note 141, at 2118 (amending 42 U.S.C. § 675(5)).

153. *See id.* at 2116-17. Where the child has been subjected to such aggravated circumstances, reasonable reunification efforts are not required. *See id.*

154. *See* Social Security Act, 42 U.S.C. § 671(a)(15) (1994).

155. *See* Lara Jakes, *Saving Kids by Splitting Families*, TIMES UNION, Aug. 23, 1998, at A1.

up of families.[156] Courts are left to strike a delicate balance between adequately protecting a child and fulfilling the obligation to preserve families. The legislature has set out means to achieve this balance by prescribing both preventive and protective services.[157]

Since New York enacted the Child Welfare Reform Act in 1976,[158] programs that provide "preventive services" have been available to families in crisis. One of the purposes of the Act was to provide "increased emphasis on preventive services designed to maintain family relationships rather than responding to children and families in trouble only by removing the child from the family."[159] The services include counseling, therapy, drug and alcohol abuse treatment, parenting skills training and homemaker services.[160]

The Department of Social Services' regulations in conjunction with section 409 of the Social Services Law do not impose a nondiscretionary duty on social service officials to provide preventive services in all cases.[161] However, the statute indicates the preference for family preservation whenever possible.[162] A child may not be placed in foster care before preventive services have been provided to the family.[163] However, if the services have been refused, placement is ordered by the court, the child is at serious risk of harm by the parent or the parents are unavailable, the child may be immediately removed.[164]

In addition to these statutory provisions that define the family court as rehabilitative in nature, family court judges have authority over ACS to ensure that the statutory mandates were followed.[165] The family court must inquire into what reasonable efforts were made and what preventive services were offered prior to removal

156. *See* N.Y. SOC. SERV. LAW §§ 409-a, 424 (McKinney 1999); N.Y. COMP. CODES R. & REGS. tit. 18, § 423.4 (1998).

157. *See* statutes cited *supra* note 136.

158. N.Y. SOC. SERV. LAW § 409 (McKinney 1992).

159. Governor's Memo, 1979 N.Y. Laws 1814.

160. *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2(b)(1)-(18) (1997). New York State Department of Social Services regulations provide that the provision of preventive services shall be considered mandatory where children are in foster care, are at risk of placement in foster care, or are at risk of return to foster care. *See id.* § 430.9.

161. *See* Grant v. Cuomo, 518 N.Y.S.2d 105, 112 (App. Div. 1987).

162. *See* N.Y. SOC. SERV. LAW § 409.

163. *See* Adoption Assistance and Child Welfare Act, *supra* note 138.

164. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.10 (1999).

165. *See* N.Y. FAM. CT. ACT §§ 1022(a), 1027(b), 1028(b), 1052(b)(i) (McKinney 1999).

of the child and at every stage of the proceedings by the agency.[166] The family court has the authority under the FCA to compel ACS to conduct an investigation and report to the court.[167] In family court, ACS supervises the respondent parent and may impose conditions upon that parent.[168] Moreover, ACS is a party to the case and is required to appear and to comply with family court orders.

In contrast to the family court setting, the criminal court is a punitive setting, designed to punish individuals for unlawful acts, not to mend families.[169] In the criminal adjudication, the state is the prosecutor and the perpetrator is the defendant; the victim has little or no involvement in determining the course the prosecution takes.[170] There is no legislated requirement that reasonable efforts be made to offer preventive services to the offender in the family before criminal proceedings are initiated.[171] The criminal court has no jurisdiction over ACS and cannot compel ACS to conduct an investigation or oversee the family's progress. Often the district attorney prosecuting the case has had no direct contact with the child and knows little about the home situation.[172] The effort that ACS must make under the FCA and the Social Services Law to preserve families whenever possible is not considered in criminal adjudications, and is rather left to the domain of the concurrent, if any, family court proceeding.[173]

II. THE DEBATE OVER CRIMINALIZATION

The growing prevalence of child endangerment arrests has spawned a debate that questions what is the most appropriate approach to child neglect. Historically, children enjoyed very little

166. *See id.*

167. *See id.* § 1034.

168. *See id.* § 1039.

169. *See* N.Y. PENAL LAW § 1.05(5) (McKinney 1998) (stating the purpose of the penal provisions is to provide "an appropriate public response to particular offenses . . . ."); *see also Criminal Court Loses Jurisdiction, As Complainant Chose Family Court; People v. Damon McCoy*, N.Y. L.J., Sept. 25, 1998, at 25.

170. *See Criminal Court Loses Jurisdiction*, *supra* note 169.

171. *See* N.Y. PENAL LAW § 1.05(5) (stating "[a] criminal prosecution is punitive and is not designed to heal or mend the family").

172. *See* Karopkin, *supra* note 8.

173. *See* People v. Pettiford, 516 N.Y.S.2d 586 (Sup. Ct. 1987). A person can face a civil proceeding under the FCA and criminal prosecution under New York Penal Law for the same acts. This rule does not violate the double jeopardy clause because the family court action is a civil proceeding instituted for the protection of children and does not bar subsequent criminal prosecution. *See id.*

protection from violence within the home.[174] Children were seen as the property of their parents.[175] Child-rearing was left to the parents' discretion and unfettered corporal punishment was the prevailing means of discipline.[176] As child advocates have made the case for the state's role in child protection,[177] the legislature and the courts have attempted to define what is acceptable treatment of a child.[178] Child protectors have advocated that children have rights and that the state has an obligation to protect those rights.[179] Both criminal and civil legislation has reflected this sentiment. In New York, Article 10 of the FCA has defined what acts constitute impermissible neglect.[180] In addition, section 260.10 of the New York Penal Law protects the child by criminalizing acts that endanger the welfare of a child.[181]

On December 16, 1997, the New York State Assembly Standing Committee on Children and Families held a public hearing on the issue of law enforcement involvement in child welfare matters.[182] The hearing was chaired by Assemblyman Roger L. Green, and was held partly to discuss Assembly Bill 7068, which had been introduced by Green in 1996.[183] The Bill was intended to codify into law the role of police and other law enforcement officials, in the form of multi-disciplinary teams, to investigate cases of child

174. *See* Justin Witkin, *A Time for Change: Reevaluating the Constitutional Status of Minors*, 47 FLA. L. REV. 113, 115 (1995) (stating that "[f]or many centuries, children were seen as chattels; they were mere property which was created and could be sold or destroyed by their fathers").

175. *See id.*; *see also* Barbara B. Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1043 (1992) (stating that "[t]he notion of the child as property is at least as old as the Greek and Judeo-Christian traditions identifying man as a procreative force").

176. *See id.* at 1046.

177. *See* Moore, *supra* note 14, at 2066-67 n.25 (1995). The history of child protection is thought to have begun with the story of Mary Ellen Wilson in 1974. *See id.* at 2066 n.25. Mary Ellen was an eight-year-old girl who was chained, starved and beaten by her adoptive parents. *See id.* The founder of the Society for the Prevention of Cruelty to Animals advocated on behalf of this child, claiming that, as a member of the animal kingdom, she should be free from abuse. *See id.*

178. *See supra* Part I.C.

179. *See* Hon. Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?*, 17 OHIO N.U. L. REV. 543, 545 (1991) (discussing the first children's rights movement called the "child-saving" movement).

180. *See* N.Y. FAM. CT. ACT § 1012 (McKinney 1999); *see also supra* Part I.C.

181. *See* N.Y. PENAL LAW § 260.10 (McKinney 1999); *see also supra* Part I.C.

182. *See* Public Hearing, *supra* note 134.

183. *See id.*

abuse.[184] The hearing was intended to examine the existing policies.[185]

Assembly Bill 7068 was part of a package of bills entitled "Safe Homes, Safe Children."[186] One reason for the hearing was to examine "the emergence of what appears to be a new policy within the New York City Police Department, which has resulted in a number of arrests of parents and custodians for alleged instances of neglect."[187] Assemblyman Green expressed a concern that the new "must arrest" policy was being expanded to apply to child neglect cases.[188] In light of this possibility, the Assembly decided to examine the police policy's purpose and discern its impact on investigations conducted by Child Protective Services.[189] Bill 7068 recommended that "law enforcement personnel should participate in inter-agency, multi-disciplinary teams and they should be charged with the responsibility of investigating cases of sexual abuse and other severe instances of child abuse in accordance with the state statutes."[190] The speakers who appeared to testify at the public hearing included legal professionals from child welfare and criminal practices.[191]

A. Arguments for Increased Police Intervention and Criminal Prosecution of Neglect Cases

Of all of the "great sins against children," neglect is often considered to be less severe than physical and sexual abuse.[192] While more than a half of the children in child protective services agen-

184. Assembly Bill 7068 was amended and enacted as section 422(14) of the New York Social Services Law to allow disclosure of certain information of the statewide central register of child abuse and maltreatment for the purpose of prosecuting a charge of falsely reporting an incident in the second degree under section 240.55 of the New York Penal Law.

185. *See* Public Hearing, *supra* note 134.

186. *See id.* at 7.

187. *Id.* at 8.

188. *See id.*

189. *See id.*

190. *Id.*

191. Those in attendance included representatives of the Juvenile Rights Division of the Legal Aide Society, the New York Society for the Prevention of Cruelty to Children, New York University Law Professor Martin Guggenheim and New York City Criminal Court - Kings County Judge Martin Karopkin. The Assembly was disappointed to find that neither New York City Police Commissioner Howard Safir nor ACS Commissioner Nicholas Scoppetta attended the public hearing. Neither sent a representative in his place.

192. Deborah Blum, *Attention Deficit: Physical and Sexual Child Abuse Grab All the Headlines. But What You May Not Realize is That Neglect Can Be Worse*, 24 MOTHER JONES 58 (1999).

cies are victims of neglect, it is physical and sexual abuse that draw the most attention and the most serious reaction from the public.[193] However, a growing number or researchers are finding that neglect may in fact have a more severe long-term impact on a child than either physical or sexual abuse.[194]

Advocates of active police involvement in, and criminal prosecution of, child neglect assert that the civil FCA and the criminal Penal Law are separate and necessary legislation to deal with the growing problem of child neglect.[195] The child protection system serves the important purpose of rehabilitating families in crisis.[196] The criminal justice system maintains order by restraining perpetrators, and deterring and punishing crime.[197] Ann Reiniger of the New York Society for the Prevention of Cruelty to Children stated the following in support of proposed New York Assembly Bill 7068:

> The role of the police is to enforce the law on behalf of children through the arrest of offenders followed by criminal prosecution and punishment for the violation of the law. The role of child protective services is to protect children by assessing risk as it impacts on the child and providing services with the authority to remove children, if necessary.[198]

This distinction exemplifies the different purposes embodied in the civil and criminal systems. These different purposes are thought to justify separate systems dealing with the same problem.

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193. *See id.* (stating that neglect accounts for 52%, abuse 24% and sexual abuse 6%, with the remaining attributable to medical abuse, emotional maltreatment and unidentified factors).

194. *See id.* Studies by Bruce Perry, chief of psychiatry at Texas Children's Hospital in Houston and Susan Rose, professor at the School of Social Welfare at the University of Wisconsin in Milwaukee have indicated that victims of child neglect may suffer more severe developmental delays than victims of other kinds of abuse. *See id.* Penelope Trickett, a child abuse expert at the University of Southern California has studied the developmental consequences of physical abuse, sexual abuse and neglect and concluded that neglected children exhibit the most severe delays in learning and social development. *See id.* Perry even offers physical proof of the damage done by neglect. His proof consists of a slide of a child's brain who was a victim of global neglect. The slide shows the ventricles of the brain, which should be small at the stage of development captured, to be tripled in size and filled with fluid because the surrounding brain did not grow to its full potential. He attributes this developmental delay to the neglect. Other studies have indicated similar developmental delays associated with neglect. *See id.*

195. *See supra* notes 180-181 and accompanying text.

196. *See supra* Part I.C.

197. *See supra* note 169.

198. *See* Public Hearing, *supra* note 134 (statement of Ann Reiniger).

Children have the right to be free from harm or risk at the hands of their parents. Proponents of criminal sanctions for child neglect argue that because endangerment is a criminal act, the state has an obligation to protect children from it, and prosecute offenders.[199] The police can take an offender into custody upon making a determination of probable cause.[200] The New York City "must-arrest" policy in cases of domestic violence has already proven that safety within the home is a public matter, and has helped ensure that safety.[201]

Violence in the home no longer enjoys the privacy and protection that historically sheltered abusers from prosecution.[202] This development reflects society's disapproving sentiment toward violence in the home, which, in turn, enforces the value society places on safe homes.[203] Children, as victims, are less able to protect themselves and are more deserving of state intervention.

In home alone cases, the police will contact ACS or bring the child to the precinct to await the arrival of child protective services.[204] An arrest warrant is issued for the parent, who, when found, will be charged with child endangerment.[205] The police take this action, rather than simply calling ACS, because they fear the child's safety will be jeopardized if ACS engages in a lengthy investigation. The police act swiftly so as to ensure that if a mistake is made, they will have erred on the side of caution. Police Commissioner Safir has stated that "even if we make a mistake in an intervention, that's a mistake that doesn't really harm a child."[206]

Criminal prosecution advocates support a multidisciplinary approach to child protection.[207] This approach involves social work-

199. *See In re* Maria F., 428 N.Y.S.2d 425 (Fam. Ct. 1980) (noting that the state has an obligation to protect the health, safety and well-being of children).

200. *See* POLICE DEP'T N.Y.C., PATROL GUIDE, PROC. NO. 106-15, *supra* note 100.

201. *See* Donald Bertrand, *Domestic Violence Up*, N.Y. DAILY NEWS, Jan. 5, 1998, at 1 (quoting Queens District Attorney Richard Brown that the police department's mandatory arrest policy has helped increase public awareness about domestic violence and provide help to victims).

202. *See supra* Parts I.A-B.

203. *See* Cathy Young, *Domestic Violations*, REASON, Feb. 1998, at 24 (discussing how, in the campaign against domestic abuse, many states have instituted policies of mandatory arrests in domestic violence cases; and how these policies have increased arrests and addressed the problem of domestic violence).

204. *See supra* Part I.B.; *see also* POLICE DEP'T N.Y.C., PATROL GUIDE, PROC. NO. 119-05: CHILDREN OR MINORS REQUIRING SHELTER (1995) (on file with the author).

205. Interview with Carmen Melendez, Spokesperson for the New York City Police Department Office of Media Relations (Mar. 1999).

206. *See* Golden, *supra* note 113, at 5.

207. *See* Public Hearing, *supra* note 134 (statement of Ann Reiniger).

ers, law enforcement and medical personnel working together to identify and address both neglect and abuse.[208] Ann Reiniger advocated increased collaboration between the New York Police Department and ACS: "Our goal should be to protect children by combining the punitive and the rehabilitative approaches."[209] She did assert, however, that arrests should not be made without first consulting with Child Protective Services.[210]

One element of the criminal procedure law that can be helpful in child protection is a temporary order of protection. Under New York Criminal Procedure Law, when a criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, parent and child or between members of the same family or household, the court may issue a temporary order of protection.[211] The court may issue this order *ex parte* upon the filing of an accusatory instrument and for good cause shown.[212] It is common practice in criminal prosecutions for the prosecutor to request the court to issue such an order of protection barring the parent from contact with the child.[213] Nothing in the criminal statutes requires that the defendant be given an opportunity to be heard where a temporary order of protection has been requested. As a result, the temporary order may be issued without a hearing.[214] If convicted of endangering the welfare of a child, the punitive nature of criminal prosecutions allows for the levying of a punishment that fits the crime.[215]

B. Arguments for the Child Protective System and Family Court as More Appropriate Adjudicator of Child Neglect

The family court was designed and created to deal with the unique and complex problems facing families.[216] Opponents of the

208. *See id.*
209. *Id.*
210. *See id.*
211. *See* N.Y. CRIM. PROC. LAW § 530.12(1) (McKinney 1999).
212. *See id.* § 530.12(3).
213. *See* Golden, *supra* note 113.
214. *See* N.Y. CRIM. PROC. LAW § 530.12 (3).
215. Upon entering a guilty verdict for child endangerment, the judge can levy a sentence of up to one year imprisonment. Under section 260.10 of the New York Penal Law, "endangering the welfare of a child" is a class A misdemeanor. *See* N.Y. PENAL LAW § 260.10 (McKinney 1999). Under section 70.15, a sentence of imprisonment for up to one year can be levied for a class A misdemeanor. *See id.* § 70.15.
216. *See* WALTER GELLHORN ET AL., ASS'N B. N.Y.C., CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY: A REPORT AND STUDY ON THE ADMINISTRATION

criminalization of child neglect focus on the inability of the criminal justice system to adequately accommodate the unique needs of the family.[217] They cite the historical development of child protective services and family court jurisdiction as a sophisticated and appropriate response to the fragile nature of family offenses.[218]

The FCA recognizes the need for specialized attention for families. Under the Act, the family court has "exclusive original jurisdiction" in abuse and neglect proceedings, except for the jurisdiction retained by the supreme court.[219] Judge Karopkin of the New York City Kings County Criminal Court points out that where an arrest is made and a criminal court prosecution pursued, "the Criminal Court becomes the first court to address issues involving removal of the child from the parent. This practice seems to ignore the FCA and fails to make use of procedures that are already in place to protect the interests of the child and the parent."[220]

As a unique and fragile institution, the family has been deemed deserving of specialized attention and services.[221] The family court and ACS have well-developed services and procedures to protect children and to assess and treat families in crisis. Through the use of such practices, the child welfare system protects the psychological and emotional well-being of a child as well as maintains the unity of the family.

The family court has jurisdiction over ACS and can compel the agency to provide services or even to investigate allegations.[222] This power gives the court the benefit of the input of trained child welfare professionals in determining the needs of the child.[223] Child protection workers and family court judges are guided by statutes that strike a delicate balance between the goals of family preservation and child protection.[224] This balance gives these child

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OF LAWS RELATING TO THE FAMILY IN THE CITY OF NEW YORK (1954) (documenting the history of the "urbanized family" in New York City and the development of a children's court and a family court to deal with the unique and complex problems of families). In 1933, the Domestic Relations Court Act of the City of New York combined the children's court with the family court, which had previously been a branch of the magistrates' court. *See id.* at 27.

217. *See supra* Part II.A.

218. *See id.*

219. *See* N.Y. FAM. CT. ACT §§ 114, 115 (McKinney 1999).

220. *See* Karopkin, *supra* note 8.

221. *See* GELLHORN ET AL., *supra* note 216.

222. *See* N.Y. FAM. CT. ACT §§ 1034, 1039 (McKinney 1999).

223. *See In re* Tashyne L., 384 N.Y.S.2d 472 (App. Div. 1976).

224. New York Social Services Law promotes family preservation by requiring ACS to provide preventive services to families in need and by requiring caseworkers to

protection workers the latitude to use their discretion and make informed decisions on a child by child basis.[225] Child protective workers are obligated under the New York Social Services Law to preserve families wherever possible.[226] However, because the best interests of the child are paramount in child protection decisions,[227] there are due process protections in family court procedure that prevent the unnecessary separation of parent and child.[228] While there are due process protections in criminal court, they are for the individual. They are not for the family as a unit.

One important indicator of the "best interests of the child"[229] standard in family court adjudications is the appointing of a law guardian to all children who are the subjects of abuse and neglect cases.[230] The FCA provides that, at the first court date, all subject children be appointed a law guardian who is assigned to represent the child in the child protective proceedings.[231] The theory behind this practice is that the most thorough and effective prosecution of a neglectful parent in family court does not always allow for the effective representation of the child's best interests.[232] In his prosecutorial role, the Commissioner of ACS seeks a finding of neglect or abuse against the parent.[233] Independent representation

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create a family service plan whenever a child is considered for foster care placement. *See* N.Y. SOC. SERV. LAW § 409-a-e (McKinney 1999). New York Social Services Law promotes child protection by empowering social services officials to investigate complaints of abuse and neglect and to offer protective services to prevent injury to children. *See id.* §§ 397, 398.

225. New York Social Services Law gives public welfare officers the power to investigate the family circumstances of *each* child reported to them in order to determine what, if any, assistance is needed. *See id.* § 398(6)(a).

226. Section of 409-a of the New York Social Services Law identifies family preservation as a priority in requiring ACS to provide preventive services when foster care placement of a child is threatened. *See id.* § 409-a.

227. *See* N.Y. FAM. CT. ACT § 623.

228. *See, e.g., id.* § 1027(a) (providing that in any case where there has been an emergency removal of a child, the court shall hold a hearing as soon as practicable after the filing of the petition to determine whether the child's interests require protection pending a final order of disposition).

229. *See supra* note 47 and accompanying text for a discussion of the best interests standard.

230. *See* N.Y. FAM. CT. ACT § 1033-b.

231. *See id.*

232. *See generally* Robert E. Shepherd, Jr. & Sharon S. England, *I Know the Child is My Client, But Who Am I?*, 64 FORDHAM L. REV. 1917, 1920 (1996).

233. *See* COMMITTEE ON CHILDREN AND THE LAW, N.Y. ST. B. ASS'N, LAW GUARDIAN REPRESENTATION STANDARDS 111 (1996) [hereinafter "LAW GUARDIAN STANDARDS"].

> Prosecution or presentment of the petition is not the law guardian's function – the County Attorney or county Department of Social Services counsel fulfills that purpose. Equally, defending a client against charges is not the law

for the child is necessary to give the court a full picture of the family and its needs, as well as an informed child perspective.[234] The law guardian is charged with putting the interest of the child first and foremost.[235]

Section 249 of the FCA governs the appointment of law guardians.[236] The proceedings in which law guardians are appointed have been slowly expanded by the legislature and the courts.[237] This expansion is due to recognition that because of the possibility of adversity between the interests of the parent and the child, it would be difficult for one attorney to represent them both.[238] That a law guardian is appointed by the court to represent the minor, and not retained by the parent, ensures true independence of representation.[239]

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guardian's responsibility – the attorney for the respondent fulfills that purpose and the child is the alleged victim rather than the accused. Thus, neither the parents, parents' counsel, Department of Social Services and its counsel, nor the Court can properly represent the child.

Id.

234. *See id.* at 112.

The law guardian's primary statutory function is to articulate and litigate the child's position, and to protect the child's legal interests. In addition, the law guardian should insure that every fact in support of the child's position which may be relevant to preliminary orders, fact-finding proceedings or dispositional remedies, is presented to the Court.

Id.

235. *See id.* at 111 ("The law guardian's representation must be confined to the interests of the child – and only the child.").

236. *See* N.Y. FAM. CT. ACT § 249(a) (stating "in a proceeding under articles 7, 3 or 10 or under § 384(b) of the Social Services Law . . . or when a minor is sought to be placed in protective custody under § 158, the Family Court shall appoint a law guardian . . ."). When the New York Supreme Court has before it a case under the FCA, it enjoys the power to appoint a law guardian. *See* Borkowski v. Borkowski, 396 N.Y.S.2d 962 (Sup. Ct. 1977).

237. *See* N.Y. FAM. CT. ACT § 249(a) (commentary by Douglas J. Besharov).

238. "[I]t is generally assumed that parents should not and . . . cannot engage counsel to represent their own children in child protective proceedings initiated against them or in which they are an interested party because the appearance of a possible conflict of interest and the danger of an actual conflict is too great to tolerate." *Id.*

239. *See* LAW GUARDIAN STANDARDS, *supra* note 233, at 112 ("By requiring the law guardian to protect the child's 'interests' (rather than promote the 'best interests' of the child), the Legislature clearly intended law guardians to perform a function distinct from the judicial assessment of the best interests of the child."). Under section 623 of the FCA, when a judge makes a dispositional order, the best interests of the child are the paramount concern. *See id.* at 113.

The law guardian's role at trial, or fact-finding hearing, is extensive, and frequently crucial. Recent caselaw imposes a high burden of effective representation, including the responsibility of proving or disproving child abuse or neglect when appropriate. The law guardian must be a full participant, introducing evidence and effectively examining and cross-examining witnesses.

Id.

The FCA and Social Services Law also contain provisions for protecting parents' rights to due process. When child protective services has removed a child in cases of suspected abuse or neglect without a court order, a hearing must be held as soon as practicable after the petition is filed.[240] The petition must prove imminent risk to the child's life or health and that protective custody is necessary to avoid this risk.[241] While parents need not be present at this hearing, their due process rights are protected by the procedure set forth in section 1028 of the FCA for the return of a child temporarily removed.[242] Upon the request of a parent, a section 1028 hearing must be held within three days of the parent's application for an order returning a child who has been removed.[243] At such a hearing, the court must assess imminent risk to a child's life or health.[244]

Because a child is represented by a law guardian at these hearings, the child's due process rights are protected as well.[245] In 1987, section 1028 was amended to authorize the law guardian to make an application for the return of a child.[246] With the law guardian as the voice of the child in the courtroom, the child can now participate in this important stage of child protective proceedings.[247]

Opponents of the trend of criminalizing neglect make a clear distinction between abuse and neglect. They are concerned that in many of the cases currently prosecuted for child endangerment, the alleged offending acts are merely symptoms of poverty.[248] They assert that police practices are outdated examples of state paternalism and that the police are not properly trained to deal with child

240. *See* N.Y. FAM. CT. ACT § 1027.

241. *See id.* § 1027(b).

242. *See In re* Z., 339 N.Y.S.2d 3 (App. Div. 1972).

243. *See* N.Y. FAM. CT. ACT § 1028(a).

244. *See id.*

245. The appointment of the law guardian in family court protects the child's due process rights by giving her a voice. *See, e.g., In re* Orlando F., 351 N.E.2d 711 (N.Y. 1976).

246. N.Y. FAM. CT. ACT § 1028(a).

247. *See id.* Under section 1028, the application for an order mandating the return of the child need not be made within any prescribed time limit, so long as it is made before an adjudication of abuse or neglect. *See id.* § 1028, at 42 (commentary by Douglas J. Besharov). Therefore, the timing of requesting a 1028 hearing often involves important strategic considerations. *See id.* at 45. Before this amendment, the timing was largely under the discretion of the parents, and the child had no mechanism to bring on request to be returned. *See id.* The amendment now provides such a mechanism. *See id.* § 1028(a).

248. For example, home alone cases often are instances where the parent was at the store or at work and could not afford childcare. *See* Swarns, *supra* note 74.

neglect, which is often difficult to identify.[249] While a collaborative effort between the police and ACS may assist caseworkers in dealing with massive case loads, critics of criminalization are concerned that the police are showing little discretion in implementing the policy on child protection.[250]

In her opinion in *People v. Smith*,[251] Judge Smith expressed concern over the increasing number of "home alone cases" appearing in criminal court.[252] She pointed out that the statute, section 260.10 of the New York Penal Law, provides no guidelines on this subject.[253] Judge Smith discussed how leaving non-infant children within the care of responsible twelve- and thirteen-year-old siblings is a "common and well established tradition,"[254] and further that "[t]his practice is not based purely on economic factors, but rather, touches on the very essence of the concept of family and child rearing goals aimed at fostering and encouraging independence, responsibility, love and support among siblings."[255]

In dismissing the charges, Judge Smith stated:

> Until such time as the legislature clarifies its intentions with respect to these often troubling "home alone" cases, so that the public in general, and unwary parents in particular, can be made aware of the legal ramifications of leaving children home alone; well established and traditionally accepted community standards must continue to be carefully applied on a case by case basis.[256]

Opponents of criminal prosecution argue that there is an identifiable harm in zealous prosecution of child neglect.[257] For one, it restricts the commissioner of ACS's discretion in filing a neglect

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249. *See* Public Hearing, *supra* note 134 (statement of Professor Martin Guggenheim).

> It is nothing short of astonishing to observe the Mayor of the City of New York in 1997 enter the fray as a new kid on the block and come up with the atavistic, long-rejected concept of using the police power to arrest, finger print, detain, arraign and prosecute parents merely because the police have probable cause to believe a parent has endangered the welfare of a child.

Id. "[T]he assessment of neglect requires a professional assessment by trained personnel, social workers, caseworkers, and we need to know what role should law enforcement have in making assessments of child abuse and of child neglect." *Id.*

250. Jill Zuccardy argues against the "misuse of the 'must arrest' statute [and] the New York Police Department policy of using 'must arrest' as a justification for acting independently of ACS in cases of alleged child neglect . . . ." *Supra* note 68.

251. 678 N.Y.S.2d 872 (Crim. Ct. 1998).

252. *Id.* at 875.

253. *See id.*

254. *Id.*

255. *Id.*

256. *Id.* at 876.

257. *See* Public Hearing, *supra* note 134.

petition.[258] If a parent is arrested for child endangerment, a neglect petition will most likely have to be filed. The fact that the parent has been accused of acts that endanger the welfare of the child, and that the parent has been taken into police custody can provide the impetus for ACS to file regardless of the agency's own assessment of the allegations.[259] Once a family court proceeding is initiated, it is difficult to stop.[260] Heavy caseloads and backlogged dockets make the proceedings move slowly, and children can languish in foster care indefinitely.[261] This delay is a problem because under the new federal regulations, the New York codifications of the Adoption and Safe Families Act, the longer a child remains in foster care, the more likely parental rights termination proceedings will be initiated.[262]

There is also another concern about criminalization that arises when, despite an arrest and prosecution, no family court petition is filed by ACS. The concern is that if there is no concurrent family court case, the orders of protection issued by criminal court will be the only standing order in the case, and it is an order that does not take into account the best interests of the child.[263] Often judges in criminal court will issue orders of protection with a clause that makes them "subject to family court," which relies on the family court judge to ameliorate the situation.[264] Here, the concern is not that the arrest initiates a family court case, but rather that, without a concurrent family court case, a full protection order remains in place, barring the parent from seeing the child. Judge Karopkin

258. *See id.*

259. According to the ACS Office of Public Information, under ACS policy, the arrest of a parent does not necessarily lead to ACS intervention or to the filing of a petition. However, when speaking with a Emergency Children's Services worker, the author was informed that, in practice, if a parent is arrested for child endangerment, this creates a presumption of neglect, and the agency will take action.

260. *See* Megan M. O'Laughlin, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 VAND. L. REV. 1427, 1433 (1998) (stating that, according to statistics, children removed from their homes and placed in foster care spend an average of three years in the system, and that one in ten will spend more than seven years in foster care, and attributing these delays to the complex foster care system).

261. *See id.*

262. Under the New York Social Services Law, if a child has been in foster care for fifteen of the last twenty-two months, ACS may be required to file a petition to terminate parental rights. *See* N.Y. SOC. SERV. LAW § 392(6)(i) (McKinney 1999).

263. Telephone interview with Martin Karopkin, J. (Apr. 13, 1999).

264. *Id.*

found this concern to be so compelling that, as a result, he often issues limited, rather than full, orders.[265]

Opponents of criminalization point out that arresting parents for neglect is one of many contradictions of the New York City child welfare system.[266] While the public may like the image of police rescuing children in danger, most people do not consider the consequences of this police action.[267] Often, the charges are dropped, and even when they are not, the criminal prosecution does little to mend the family.[268] There is also a concern that parents who face poverty will be less likely to reach out and ask for assistance and services if they feel that drawing attention to themselves will leave them vulnerable to arrest.[269] If parents are not willing to access the available services that provide housing and child care, then children will suffer.[270]

While many criminal acts committed against children, including physical and sexual abuse, require criminal prosecution and punishment, neglect is often the product of poor parenting skills, poverty or cultural barriers.[271] These barriers are problems that can be overcome through social work counseling, court supervision and access to services.[272] In these cases it is often in the child's best interests to remain with the family – in such a case, family preservation is a viable priority because it *is* the child's best interest.[273] Since the 1970s, child protective services have rejected separation of parent and child as the predominant approach to abuse and neglect.[274] Reasonable efforts at preserving families replaced the

265. *See id.*

266. *See* Ilze Betins, *Child Welfare Doesn't Belong in Police Hands*, N.Y. TIMES, Oct. 30, 1997, at A30 (Ilze Betins is the program director at El Faro Beacon Youth and Family Service.).

267. *See id.*

268. *See* app. *infra*, tbl.5.

269. *See id.*

270. *See id.*

271. *See* Bailie, *supra* note 138, at 2294 ("[F]amilies involved in neglect proceedings are overwhelmingly poor.").

272. *See* N.Y. SOC. SERV. LAW § 131(3) (McKinney 1999) ("As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life.").

273. *See id.* The Social Services Law contains a presumption that family preservation is often in the child's best interest, and therefore remains a primary goal of the regulations. *See id.*

274. *See* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 889 (1975) (noting that the predominant approach to protecting children in the 1970s was to separate the child from the parent).

"child rescue philosophy" of the 1970s.[275] This pro-family sentiment acknowledged that separating a child from her parents can be damaging to a child's emotional health.[276]

In child endangerment cases, the police and the criminal court have the ability to interfere with the parent-child relationship by determining when acts of neglect constitute criminal activity and by issuing orders of protection that prevent the parent from contacting the child.[277] The debate over criminalization must consider to what degree this policy jeopardizes the constitutional right to the parent-child relationship. This debate raises the question of what rights the child has to remain with her family. That determination involves weighing the child's liberty interest in family autonomy and unity with the state's interest in a thorough and expeditious prosecution of criminally-neglectful parents.

C. The Constitutional Rights Implicated by Criminalizing Child Welfare

1. *The Constitutional Status of the Family*

The integrity of the family unit has found protection in the due process clause of the Fourteenth Amendment, equal protection clause of the Fourteenth Amendment and the Ninth Amendment.[278] While the State has a substantial interest in protecting minor children, parents and children have a constitutional right to remain together with limited governmental interference.[279] In

275. *See* Bailie, *supra* note 138, at nn.43-47 and accompanying text.

276. *See id.* at 2290. *See generally* Areen, *supra* note 138.

277. *See infra* notes 291-295 and accompanying text.

278. *See* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981) (holding that "[t]his Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for a right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and . . . protection.'" (citations omitted)); Stanley v. Illinois, 405 U.S. 645, 651 (1972). *See also* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

279. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (Powell, J., plurality opinion) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (emphasizing the "'private realm of family life which the state cannot enter'")); *see also* Stanley v. Illinois, 405 U.S. at 645; Pierce v. Society of Sisters, 268 U.S. 510 (1925) (establishing the right of parents to control the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923); Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977).

1923, the U.S. Supreme Court first recognized the right of child-rearing in *Meyer v. Nebraska*[280] when it struck down a statute that made it unlawful to teach foreign languages to grade school children.[281] A few years later, the Court struck down an Oregon statute requiring public school attendance that effectively outlawed private and home schooling in *Pierce v. Society of Sisters*.[282]

The concept of family autonomy has been incorporated into the modern right to privacy, which is considered part of the First Amendment's "penumbra" of associational privacy.[283] These "penumbral rights ensured that the specific rights stated in the Bill of Rights would remain secure."[284] In *Roe v. Wade*, Justice Blackmun stated that the Court has recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist in the Constitution."[285] The origin of the right of privacy is both in property rights as well as liberty rights.[286] Historically, privacy in the constitutional (as opposed to tort) sense was defined not as an individual right, but rather a right belonging to the institutions of marriage and family.[287] Eventually, privacy developed into an individual right.[288] The modern right to privacy was primarily cultivated by the Court in the 1960s and 1970s.[289]

Historically, the family unit enjoyed a great deal of autonomy from the State. Family members existed in gender-based roles, and the family as an institution maintained a great deal of privacy.[290] However, increasing public concern for women and children within

280. 262 U.S. 390 (1923).

281. *See id.*

282. 268 U.S. 510 (1925).

283. *See* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (holding that several of the Bill of Rights' guarantees protect privacy interests and create a zone of privacy). Douglas' majority opinion described *Meyer* and *Pierce* as part of the First Amendment's penumbra. *See id.* at 482-83.

284. David Fisher, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 426 (1997).

285. 410 U.S. 113, 152 (1973).

286. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47-66 (1991).

287. *See id.*

288. *See id.* ("*Eisenstadt* marked the elevation to constitutional status of an individual's right to be let alone.").

289. *See* Fisher, *supra* note 284, at 407. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (declaring the right of a married couple to receive and use contraceptive devices); NAACP v. Alabama, 357 U.S. 449 (1958) (upholding the right to privacy and freedom to associate).

290. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 267 (1990).

the home has led to increased state involvement over the years.[291] Today, the State has tremendous power to intervene in the family on behalf of a child.[292] While this power represents the State's important interest in the safety of children, it has been criticized because zealous advocacy can often result in the witch-hunting of parents.[293] In response to increased State involvement, parents have actively pursued the right to autonomous decision-making and freedom from State interference.[294] As a result, modern discourse on the family and familial obligations has centered on the parents' rights versus those of the State, i.e., the right to care for children, to direct their education, and to have custody.[295] Child advocates argue that this focus has lost sight of the child's interest in these very same rights, the elements that make up the parent-child relationship.[296]

2. *The Constitutional Status of the Child*

Children have always held a unique status in the context of constitutional rights.[297] While they are members of a family and therefore have some entitlement to the family autonomy that the Supreme Court has recognized, they are not adults and therefore retain a status that is not wholly independent.

As the law has progressed, children have been held to have certain constitutional rights. The U.S. Supreme Court has recognized the "personhood" of children.[298] In *Tinker v. Des Moines In-*

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291. *See id.* at 271.

292. In New York, section 1024 of the FCA provides for emergency removal of a child if the child is in "imminent danger." *See supra* note 39 and accompanying text.

293. *See supra* part I.B.

294. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (Powell, J., plurality opinion) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (emphasizing the "'private realm of family life which the state cannot enter'")); *see also* Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (establishing the right of parents to control the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923).

295. *See supra* note 294.

296. *See, e.g.*, Melinda A. Roberts, *Parent and Child in Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485 (1996). "The liberal model considers adults to have the right to make choices for themselves because they are both independent and rational. Lacking these distinctive characteristics, children are not considered, within the liberal model, rights-bearers." *Id.* at 491.

297. *See* Justin Witkin, *A Time for Change: Reevaluating the Constitutional Status of Minors*, 47 FLA. L. REV. 113 (1995).

298. Protectors of children's rights have promoted a theory of human rights and human dignity in the struggle to establish constitutional personhood for children. *See* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 26 (1994). In *A Time for Change: Reevaluating the*

dependent Community School District,[299] the Court stated that minors are included in the constitutional concept of "person" and that children are possess fundamental rights that the State must respect.[300] In *In re Gault*,[301] the Court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[302]

The concept of children having rights within the constitution is well-grounded. Advocates of children's rights often think the inadequacy of those rights is grounded in the failure of society to identify children as "persons" in the constitutional sense.[303] Despite the Court's acknowledgment of the personhood of children, a barrier has remained that prevents children from participation equal to that of their social status, ability and need. Liberalism and the triumph of individual rights and autonomy have developed the modern concept of parental rights in such a way as to focus child welfare disputes on a parent-versus-state model.[304] This model has

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Constitutional Status of Minors, Justin Witkin presumes a liberal interpretive theory is necessary to protect the rights of children. *See* Witkin, *supra* note 297, at 131. Witkin embraces a "human rights theory" to understand the scope of the protections provided to children by the Constitution. *See id.* at 132. He advocates that "human dignity mandates that the Constitution provide equal protection for the autonomy and capacity for autonomy of all children that it provides for adults." *Id.* at 135. "The Constitution might be seen as guaranteeing that adults will 'have a voice' in processes which affect their person and/or property. This guarantee should apply to children as well." *Id.* at 135, n.182 (citing Charles R. Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1312-14 (1988)).

299. 393 U.S. 503 (1969) (recognizing children's First Amendment rights and holding that a school could not prohibit students from wearing black armbands to protest the Vietnam War).

300. *Id.* at 511.

301. 387 U.S. 1 (1967).

302. *Id.* at 13.

303. *See* Fitzgerald, *supra* note 298, at 26.

> The liberal constitutional view of persons as autonomous individuals and the popular view of children as anything but autonomous individuals clash irreconcilably. As a result, when deciding constitutional issues involving children the Supreme Court has inadvertently demonstrated the inadequacy of the liberal model of personhood for children.

Id.

304. Some constitutional theorists have asserted that the liberal movement has defined the individual by the individual's relationship with the State. *See id.* at 23. Under traditional liberal theory, government "should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends." MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 4 (1996). Some authors assert that interpreting the Constitution by reference to the liberal model leads to a constitutional system that favors the parents' interests as against the child's. *See* Roberts, *supra* note 296, at 491. Parents have fought for their liberty and privacy rights under the Fourteenth Amendment, and typically the conflict was between the parents' and the State's perception of

spawned a debate that alleges that liberalism leaves the child voiceless in determinations that gravely affect the child's status as a person and as a family member.[305] This critique of liberalism asserts that while liberalism has been a successful vehicle for the triumph of individual rights for parents, it has failed to encompass individual rights for children.[306] This dubious victory is because the emphasis on individuals' rights and autonomy has focused family law debates on parents' rights versus the State.[307] The child has legitimate and enforceable rights to liberty and due process, which indicate that she deserves representation when a court makes a custodial determination.[308] However, it is presumed that either the State or her parent has her best interests accurately identified and adequately represented.[309]

Proponents of children's rights assert that it is no wonder that children have a level of participation that is unequal to that of their status, ability and needs.[310] They claim that the constitutional imbalance between the rights of parents and the rights of children is the result of a liberal theory of constitutional interpretation.[311] Under liberal political theory, the prevailing political philosophy of the time, the government "should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends."[312] The State is to remain neutral on the subject of what is "the good life" in order to respect

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the child's best interest. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding the state's interest in universal education is subject to a balancing test when it infringes on fundamental rights – here the right of parents to handle the religious upbringing of their children, after Amish parents refused to send their children to public school in violation of state law); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (establishing the right of parents to control the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding parents' rights to determine their children's education). In this way, the liberal model, which focuses on the parent as an individual, has focused the family matter disputes on a parent-versus-state model. *See* Sandel, *supra* note 304.

305. *See* Fitzgerald, *supra* note 298.

306. *See id.*

307. *See supra* note 286.

308. *See supra* notes 279-282 and accompanying text.

309. Melinda Roberts asserts that "cases in which children have been taken to have constitutional rights are cases in which the parents' and child's interests typically coincide." Roberts, *supra* note 296, at 492 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)). David Fisher asserts that part of the reason for this development is the presumption that parents act in the best interests of their children, a presumption that has been upheld by the Court even in cases involving abuse and neglect. *See* Fisher, *supra* note 284, at 412.

310. *See* Fitzgerald, *supra* note 298, at 23.

311. *See id.*

312. Sandel, *supra* note 304, at 4.

the individual rights of persons.[313] The liberal movement has defined the individual by the individual's relationship with the State.[314] Proponents of this interpretation advocate the notion of the State respecting the autonomous individual's choices and decision-making.[315] The republic's role in enforcing liberty is predominantly procedural; it is charged with ensuring the dignity and autonomy of individuals.[316] The individual, as an "unencumbered self,"[317] is free to make decisions without State intervention. The State may only interfere with autonomy to the degree that it is necessary in order to preserve the autonomy of others.[318]

3. *The Child's Constitutional Rights within the Family*

The constitutionally protected liberty interest in the parent-child relationship extends to the child as well as the parent. It is "the right of the family to remain together without the coercive interference of the awesome power of the state."[319] A child has a liberty interest in remaining with a parent. It has been decided that the forcible removal of a child from parents constitutes seizure subject to the Fourth Amendment requirements.[320] While removing a parent from a child may not restrict the child's liberty interest in her freedom, it does restrict the child's liberty interest in remaining with her family. In *Quillion v. Walcott*[321] the Court stated: "We

313. *See id.* at 92.

314. *See* Fitzgerald, *supra*, note 298, at 24.

315. *See id.* at 23.

316. *See id.*

317. Sandel criticizes the liberal model because it promotes the notion of the unencumbered self, and ignores the individual's responsibilities as a member of a community. He promotes a civic republicanism that focuses more on membership, participation and contribution, rather than on insulation. He proposes that "[t]he public philosophy by which we live cannot secure the liberty it promises, because it cannot inspire the sense of community and civic engagement that liberty requires." Sandel, *supra* note 304, at 6.

318. *See* Fitzgerald, *supra* note 298, at 24.

319. Robison v. Via, 821 F.2d 913, 920 (2d Cir. 1987) (quoting Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977)). Other circuit courts agree that a "child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest." Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991) (quoting Smith v. City of Fontana, 818 F.2d 1411, 1419 (9th Cir. 1987)). "The integrity of the parent-child relationship is harmed by depriving children of adult care . . . ."

320. *See* Soldal v. Cook County, 506 U.S. 56 (1992); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

321. 434 U.S. 246, 255 (1978).

have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."[322]

However, the constitutional status of the child within the family is not considered wholly secure by some child advocates.[323] There is concern that especially within the acute situation where the State's over-protective inclination aims to remove a child from her parent, the parent's rights are balanced with the State's interest, and this balance neglects the *child's own* rights and interest.[324] This view can be critiqued in that it is not a comprehensive approach to the family's right to privacy and autonomy because it fails to acknowledge the child as a central bearer of those rights.[325] It is argued that when a court sides with a parent or with the State, it is justified by the assertion that the prevailing party's interest in the child represents the best interest of the child herself, but that the child's interest is rarely represented in and of itself.[326]

The debate over criminalizing child welfare in New York City has involved various articulations of the core problem, and propositions for the most appropriate solution.

III. CRIMINALIZING CHILD WELFARE DOES NOT ADEQUATELY PROTECT THE RIGHTS OF CHILDREN AND FAMILIES

A. Identifying the Problem with Criminalization

Child neglect is a severe societal ailment. While it is different from child abuse, it is no less harmful and may have more long-term effects.[327] The evolution of the child protective system signifies that society will not tolerate child neglect.[328] This development also signifies that the family and the child are unique and that a unique approach and a specialized system are necessary to deal with problems.[329] This specialized system is necessary because traditional criminal justice does not address the problem of preserving families and does not take into account the best interest of

322. *Id.*

323. *See* Fitzgerald, *supra* note 298, at 17, 22-23.

324. *See id.*

325. *See id.*

326. *See* Roberts, *supra* note 296, at 492 n.16 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)) (asserting that "cases in which children have been taken to have constitutional rights are cases in which the parents' and child's interests typically coincide.").

327. *See supra* Part II.A.

328. *See supra* Part I.A.

329. *See supra* Part II.B. for an overview of family court.

the child. The child protective system and the family court as governed by the FCA are specifically designed for this consideration.

Opponents of the criminalization trend argue that the police have no role in child welfare.[330] However, because neglect is a crime under the child endangerment statute, and because the problem of neglect affects all of society – as do most crimes – law enforcement must play a role. Society cannot demand public attention to child welfare and then exclude law enforcement. In addition, while many of the arrests made are truly erring on the side of caution, many others are justified.[331] Even in home alone cases, there is a broad range of benign circumstances leading up to this neglect. Some unfortunate parents, on account of a lack of daycare resources, have merely left children in the care of an older sibling or alone briefly for a trip to the market. Here, poverty is often the primary cause of the "neglectful" actions, and poverty should not indiscriminately be mistook for neglect.[332] Other egregious circumstances have uncovered parents' blatant disregard for their children's well-being.[333] It would be inappropriate to lump these cases together.

From 1990 to 1998, the number of arrests where the primary charge was "endangering the welfare of a child" has more than tripled.[334] It is important to identify the significance of this increase. Does it mean that there is more neglect and therefore more arrests? Answering this question requires a look at the number of abuse/neglect reports that came into the child protective system. From 1990 to 1998, the number of these reports has in-

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330. *See supra* Part II.B.

331. The arrests are often justified in that the parents have left the child in a dangerous situation. *See, e.g.*, Associated Press, *Teen Mother Arrested After Leaving Infants Alone*, BUFF. NEWS, Dec. 22, 1997, at 6A (describing how a teenager in Harlem was arrested for leaving one-year-old and two-year-old alone with food smoldering on stove while she went out partying all night).

332. New York Social Services Law acknowledges poverty as a factor that may result in conditions that are symptomatic of, and therefore mistaken to be, neglect. *See* N.Y. SOC. SERV. LAW § 131[3] (McKinney 1999) ("As far as possible, families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life.").

333. For example, in 1997 a Russian couple were arrested for endangering the welfare of a child when they left their four-year-old daughter home alone all night while they were out partying in an upscale Manhattan club. *See* Barbara Ross et al., *Party Parents Busted for Leaving Girl*, N.Y. DAILY NEWS, Apr. 5, 1997, at 4.

334. *See* app. *infra*, tbl.5. In 1990, the number of arrests was 303, whereas in 1998, it was 1111.

creased only slightly.[335] In addition, while the number of reports coming into the State Central Registry has increased slightly, the number of Article 10 petitions filed has actually gone down substantially.[336]

Overall, these numbers seem to indicate that it is not that there is *more* neglect, it is that the police are making more arrests. While it is exactly this "trend" that has concerned some child and family advocates, the increase in arrests may not be as alarming as is feared. That is because the number of arrests is still minute compared to the number of reports – founded or unfounded. The 1111 arrests in 1998 represent only 1.9% of the 57,842 reports that year and 1.01% of the 11,000 petitions filed.[337] Therefore, even if the police are arresting more neglectful parents, they are still only reaching a fraction of the problem.

The real concern with this "trend" emerges when one looks at the arrest statistics in and of themselves and asks whether this new police policy is appropriate and effective. Its appropriateness is a policy question, but whether it is effective is best determined by looking at the dispositions of the arrests. Among the arrests for which disposition information is available, the rate of dismissal is extremely high.[338] Of the cases that are prosecuted, the overwhelming majority plead out and never go to trial.[339] On average, only two to three people a year (of the reported dispositions) go to trial and get a verdict.[340] It is hard to determine what increasing arrests accomplish because few offenders serve any time or even receive probation or fines.[341]

The real problem with the recent trend of arresting parents and prosecuting them for acts of neglect is that the criminal justice system is not equipped to deal with families in the way in which society decided families should be dealt when it created the child protection system. The criminal justice system can only help victims and society by keeping perpetrators away from their victims and possibly away from society. However, this policy conflicts with

335. *See* app. *infra*, tbl.1. In 1990, the number of reports was 55,158, whereas in 1998, it was 57,842.

336. *See* app. *infra*, tbl.4. In 1990, 21,719 Article 10 petitions were filed. In 1997, the number was 11,154 (based on this number the projected figures for 1998 are 11,000).

337. *See* app. *infra*, tbls.3-5.

338. *See* app. *infra*, tbl.5.

339. *See id.*

340. *See id.*

341. *See id.*

the priority that society has given to the preservation of families.[342] The goals of family preservation and the child's best interests dictate that the most effective means of addressing child protection must involve more than simply punishment and protection.

Families are too complicated to fit into the rigid two-party system of criminal justice prosecutions. Where an act of neglect has taken place, the three parties involved, the parent, the child and the State, may have different goals. Often the parent's goal is to be reunited unconditionally with the child. Likewise, the State's goal may be to keep the child from the parent, thereby ensuring her safety and reducing state liability. The child, however, has interests that may intersect with both those of the parent and the State, but are not completely represented by either. Where the parent has been neglectful by failing to properly supervise or by being unable to fully provide for the child due to poverty, such non-violent behavior may not justify placing the child in foster care. In New York City, ACS has the ability to provide multiple services to the family, short of foster care placement of the child, to help the parent remedy the neglectful behavior.[343] The child may wish to remain with her parent. However, she would not want this reunion to be unconditional, which would relegate her to the powerless position of Joshua DeShaney.[344] She may want a reunion conditioned on her parent's compliance with State-offered parenting services, and effective supervision of that compliance by child protective workers.

Under the Fourteenth Amendment, parents have been accorded various liberty and privacy rights with respect to the custody and care of their children.[345] In the cases that gave rise to these rights, there was typically a conflict between the parent's and the State's perception of the child's best interest, and the matter was litigated

342. *See supra* Part I.C.

343. *See supra* note 145.

344. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). Joshua DeShaney was a four-year-old boy who was left profoundly retarded after several beatings by his father. Social Services had become involved with the family after Joshua's physician notified them of suspected abuse. *See id.* at 192. He was temporarily removed, but returned on the condition that his father comply with the agency's proffered services. *See id.* Social Services failed to take action, despite the fact that while Joshua was under their supervision the caseworker noticed unusual bruises, the father failed to comply with services and Joshua went to the emergency room twice with injuries. *See id.* at 192-93. The Court held that the due process clause conferred no affirmative right to governmental aid, even where such aid may be necessary to secure a life, liberty or property interest, of which the government itself may not deprive the individual. *See id.* at 196.

345. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

focusing on those two positions. Little consideration was given to whether the parents accurately represented the child's *actual* best interest, or merely asserted their *own* interest.[346] The result is that the focus on the rights of parents, and parents' interest in the child versus the State's interest in the child, has left the child powerless as a rights-bearer. Children's rights are generally thought to be represented insofar as they align with either the interest of the State or the interest of the parents.[347]

The conflicting goals of parents, children and the State are not well accommodated in criminal court. The child has no advocate in the criminal court proceedings because victims are never independently represented in criminal prosecutions, and the prosecutor is not obligated to abide by the victim's requests. Without representation, the court lacks input on what is in the child's best interests when making a ruling.

In child endangerment cases, the criminal court makes determinations that inevitably affect the custodial status of the child. Because the child's fundamental rights of due process and liberty are affected, the question becomes to what extent does the child have a right to remain with her parent.[348] If that right is limited, then per-

346. *Pierce* and *Meyer* were decided without reference to the interests of the child, reinforcing the concept of children as property. In *Meyer*, the Court's decision that the state could not forbid the teaching of foreign languages in public schools centered on the Court's assertion that such a law would infringe upon the liberty rights of parents and teachers. The child's interest in an education that included foreign language instruction was not discussed. *See Meyer*, 262 U.S. 390. In *Pierce*, the Court similarly limited its discussion to the liberty interests of parents and teachers. *See Pierce*, 268 U.S. 510.

347. This development is often blamed on the presumption that parents act in the best interest of their children. This presumption also has been embraced by advocates for parents and family preservation. *See, e.g.*, Fisher, *supra* note 284, at 399. "Even in cases involving parental abuse and neglect, the Court has upheld the presumption that parents act in their children's best interest. In *Santovsky v. Kramer*, this presumption was expressed by requiring a heightened standard of evidence to terminate parental rights." *Id.* at 412. As deference to parents' rights expands, courts tend to reject children's claims if they conflict with those of their parents. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here . . . ."). *See also* Fitzgerald, *supra* note 298, at 26.

> The liberal constitutional view of persons as autonomous individuals and the popular view of children as anything but autonomous individuals clash irreconcilably. As a result, when deciding constitutional issues involving children the Supreme Court has inadvertently demonstrated the inadequacy of the liberal model of personhood for children.

Id.

348. This paper does not advocate raising the child's status to a level equal with that of adults. In the modern welfare state it is sound policy to acknowledge the

haps it is acceptable that a child endangerment prosecution disregards family preservation and the child's best interest in pursuit of retribution and deterrence. The child's best interests may be peripherally considered when the court or the jury determines if the State has proved beyond a reasonable doubt that the crime of endangerment was committed. However, if the child's right to the parent-child relationship is substantial, then perhaps it dictates that the only appropriate forum for adjudicating child neglect is one that is free to consider the child's best interest first and foremost, as well as strive for family preservation when possible. This consideration is simply not possible within the confines of a criminal prosecution with its own burden of proof and standard for review. If the child's right to the parent-child relationship is fundamental, it may demand that the child be represented in any court proceeding that affects her custodial status. The expansion of the law guardian's role in family court matters exemplifies the importance of representation for the child.[349] However, victims are not independently represented in criminal prosecutions.

Ultimately the question is whether the child's right to remain with her family is so compelling that the forum in which that right will be best protected is the forum that should be chosen for neglect adjudications. If it is, then clearly neglect belongs in family court. Such a determination should involve weighing the child's liberty interest in family autonomy and unity with the state's interest in prosecuting criminally-neglectful parents. The debate around criminalization then will turn on the constitutional implications of each policy. The child's liberty interest is protected under New York Social Services Law, the FCA and federal legislation that requires that the best interests of the child be the overriding consideration,[350] and that family preservation remain a goal where ever possible.[351] In a criminal prosecution, however, such considerations are absent.[352] In this way, the criminal prosecution of child neglect does not adequately represent the status that children have achieved as rights-bearers. The state can separate a parent and

patriarchal role of the State and family in the lives of children. Instead, this paper asserts that children have interests independent of the State and their parents and that protection of these interests requires legal representation and some degree of autonomy in decision-making.

349. *See supra* Part II.B.

350. *See supra* note 136.

351. *See supra* notes 155-160.

352. *See supra* Part I.C.

child without any attempt to safeguard the parent-child relationship.

B. Why Criminalization Does Not Adequately Protect the Rights of Children and Families

The child protection system and the family court should be used to address the problem of neglect because under the child protection system, the child's constitutional right to the parent-child relationship is best considered and protected.

Law enforcement should certainly play a role because child endangerment is a crime. However, social workers should be included in criminal investigations of child neglect to make sure that the child is considered at all stages. Police and caseworkers together conduct a thorough investigation. Caseworkers often employ the assistance of police when making home visits or removing children in order to ensure the safety of everyone involved.[353]

The problem with criminalization is not that the police are playing a more active role in child welfare. The problem is what happens *after* the arrest. The defendant-parent may go through a criminal prosecution and receive some form of punishment, without receiving any help to change the root of the problem. The retribution and the punishment that is achieved by a criminal prosecution may be valuable for society, but it may have little value to the family itself. The parent ultimately goes back to the home and the child, still ill-equipped to remedy the neglectful behavior that is the root of the problem.

Opponents of criminalization assert that the police are expanding the domestic violence "must arrest" policy to neglect.[354] It is difficult to determine if this assertion is really the case. The New York Police Department's position is that they have always responded to child neglect the way they have in recent years.[355] This response would indicate that the increased number of arrests is simply due to a higher rate of neglect. However, the numbers reported by child protection services do not indicate this claim.[356]

353. *See* MARC PARENT, TURNING STONES: MY DAYS AND NIGHTS WITH CHILDREN AT RISK 146 (1996) (recounting the use of police assistance in removing children by the author, a former New York City Emergency Children's Services caseworker).

354. *See supra* note 61.

355. *See supra* note 169.

356. *See* app. *infra*, tbl.1 (showing that the number of reports has increased very little in the last eight years).

Regardless of the *policy* behind the arrests, the *result* is where the real problem lies.

Family advocates should reject the criminalization of child welfare not because it is a wholly bad option, but because there is a better option. The child protective system and the FCA promote family preservation and the child's best interests, and promote society's goal for safe and stable families for all children. The criminal prosecution of child endangerment can achieve separation of the victim and the offender and punishment of the offender. However, this outcome is not in the best interests of children and parents because it does not provide for family preservation and unification.

What, if anything, does criminal prosecution achieve that family court cannot? In cases of abuse, where the harm to the child is more immediate, prosecution under the assault statute provides an immediate remedy. Neglect, however, poses more of a long-term threat. Whether the neglect is a product of poor parenting skills, poverty or other ailments, a civil remedy designed to address the harm that has been done, and prevent harm in the future, may be more effective in the long-term.

The New York City child protective system may not be perfect, but it is designed to look out for the best interests of the child and to preserve families whenever possible.

Essentially, this choice is a policy question: Who is better equipped to handle the problem of neglect? The answer depends on what resolution society wants for families in crisis. If family preservation is to remain a priority, then family court proceedings are more appropriate. If punishing the crime and preventing further offense is more important, then criminal prosecution may be more appropriate. This Note supports the legislative goals of family preservation and child protection as identified in the New York Social Services Law and the FCA, and for this reason supports the use of family court proceedings to address child neglect, its causes and effects.

The child has a recognizable liberty interest in the parent-child relationship. The exclusion of the child from the criminal prosecution does not reflect the status that children have achieved as rights-bearers in that the child has no voice and no right to self-determination in proceedings that affect custodial status.[357] Criminal prosecution creates a chasm in the relationship between the

357. *See supra* Part II.B.

parent and child, and there are no provisions that address this problem. It is not sufficient to presume that the child's interest is represented by the parent or the State because it is precisely this presumption that was discarded when the role of the law guardian was created in the family court system.[358]

Because the criminal context is centered around a strict two party system – parent versus the State, the child is left voiceless. Her rights are presumed protected by either the parent or the State, although her true interests often do not fully align with either. The lack of protection for the child's best interest that currently exists in a criminal prosecution seems to call for a procedural remedy. One possibility would be for the criminal court judge to hold an automatic hearing before an order of protection is issued. Essentially, this goal can be achieved if defense counsel requests the hearing. However, the standard by which to judge the criminal charges still will fail to encompass an assessment of what is best for the child. Thus, the child should be represented by legal counsel in a child endangerment prosecution and the child's best interests should be considered before an order of protection is issued. However, to add the role of a law guardian in child endangerment cases is implausible because victims generally have no independent representation in criminal prosecutions. Such an expansion would set a precedent of the victim as a party to criminal prosecutions. While this is not the direction in which the criminal justice system is likely to move, it would certainly help the criminal prosecution of child neglect achieve a holistic remedy for families.

Within the constraints of the criminal justice system families are not treated as a rights-bearing unit. Therefore, the most appropriate forum for neglect adjudication is family court, where the child is better represented, and the standard is the child's best interests.

CONCLUSION

As child protection comes to the forefront of law-enforcement, the legislature, judicial scrutiny and the criminal justice system must reassess the effectiveness of the traditional two-party system in proceedings that affect the custodial status of non-party children. Because the child has traditionally been the victim in neglect cases, the rights of children have been discussed and developed in the context of asking, what rights does a child have *against* her parent? That is, when is corporal punishment excessive, what constitutes

358. *See id.*

neglect, to what extent can a parent control the child's education, medical care and so forth. This discussion, while an important one, has neglected to encompass the question of what rights does a child have to be *with* her parent? Addressing this point requires a balancing of interests – the State's interest in protecting children, the parents' interest in raising their children and the child's interest in both safety and a parent-child relationship.

The trend in child welfare has been to err on the side of protection, often considered erring on the side of the child. While this approach may have been appropriate to overcome a long history of State abstinence from involvement in the family domain, it has been under-inclusive in protecting the child's fundamental right to a parent-child relationship. A delicate balance must be struck between family autonomy and State intervention. This balance is best achieved in the family court when the child's best interest is represented and the family is addressed as a whole. Under traditional criminal procedure, which focuses on the parent-defendant versus the State, one of these two parties is presumed to represent the child's best interest. This presumption effectively precludes the notion that the child may have an interest that is independent of either the parent or the State. The result has left the child voiceless, dependent on the judgment of the parent, the State or a court. This judgment will always be under-informed without input from the child. This Note concludes that the criminal justice system, by focusing on the parent's claims against the State and the State's interest in child protection, is inadequate in accommodating the constitutional rights of the child to self-determination. Neglect is more appropriately adjudicated under the FCA, which considers the best interests of the child first and foremost, and which strives for family preservation.

APPENDIX

TABLE 1
ABUSE AND NEGLECT REPORTS
FY 1990-1998[359]

Abuse/Neglect Reports: Total number of all reports recorded by the State Central Register (SCR), for the Fiscal Year received.

Children: Total of all children in reports

	1990	1991	1992	1993	1994	1995	1996	1997	1998 [360]
Abuse/Neglect Reports	55,158	52,985	52,504	52,458	49,129	47,571	52,994	53,567	57,842
Children	88,334	84,540	83,295	86,651	77,238	75,017	85,432	86,852	89,719

TABLE 2
MANDATED/NON-MANDATED REPORTS
CY 1990-1997[361]

	1990	1991	1992	1993	1994	1995	1996	1997
Total Mandated	31,970	33,139	32,699	33,927	31,521	30,202	32,858	39,572
Total Non-Mandated	19,746	19,210	19,728	17,026	15,348	16,356	19,185	16,559

TABLE 3
PERCENT OF INDICATED ABUSE/NEGLECT CASES BY REPORTING SOURCE
CY 1990-1997[362]

Indicated Abuse/Neglect Reports: Percent of reports, determined upon investigation to have credible evidence of abuse or neglect.

	1990	1991	1992	1993	1994	1995	1996	1997
Total Mandated	50.1%	43.5%	34.4%	33.2%	34.8%	36.0%	40.1%	40.0%
Total Non-Mandated	26.3%	22.5%	16.7%	16.5%	17.6%	18.1%	16.7%	17.4%

359. For the source of this data, see ADMINISTRATION FOR CHILDREN'S SERVS., OUTCOME AND PERFORMANCE INDICATORS (June 1998) (deriving data from State Central Register Monthly Reports).

360. The 1998 figures are projected.

361. For the source of this data, see ADMINISTRATION FOR CHILDREN'S SERVS., OUTCOME AND PERFORMANCE INDICATORS (June 1998) (deriving data from State Central Register Monthly Reports).

362. For the source of this data, see *id.*

TABLE 4

ARTICLE 10 PETITIONS FILED ANNUALLY FY 1990-1998[363]

	1990	1991	1992	1993	1994	1995	1996	1997	1998 [364]
Article 10 Petitions Filed	21,719	16,200	12,837	10,798	9,646	8,554	9,381	11,154	11,000

TABLE 5

STATE OF NEW YORK – DIVISION OF CRIMINAL JUSTICE SERVICES OJSA/BUREAU OF STATISTICAL SERVICES

ARRESTS FOR ENDANGERING WELFARE OF A CHILD (PL 260.10)

NEW YORK CITY[365]

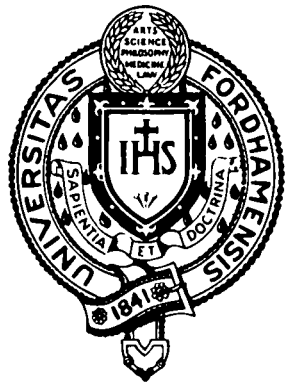
ARREST YEAR	1990	1991	1992	1993	1994	1995	1996	1997	1998
TOTAL ARRESTS	303	335	419	424	486	644	872	1052	1111
UNREPORTED DISPOSITIONS	26	30	32	27	51	67	80	204	492
% OF ARRESTS	8.6%	9.0%	7.6%	6.4%	9.9%	10.4%	9.2%	19.4%	44.3%
NOT PROSECUTED	17	14	42	29	51	63	59	66	71
PROSECUTED	260	291	345	368	387	514	733	782	548
CONVICTED	108	120	142	172	192	195	308	272	283
—PLEA	105	117	134	171	192	189	299	271	282
—VERDICT	1	1	5	0	0	4	6	0	1
—UNKNOWN	2	2	3	1	0	2	3	1	0
DISMISSED	148	167	197	187	187	310	420	498	250
ACQUITTED	1	0	3	5	4	1	1	3	1
OTHER DISPOSITION	3	4	3	4	4	8	4	9	14
SENTENCES TO:									
PRISON	1	1	1	0	1	1	1	2	2
JAIL	9	11	26	14	21	19	31	28	26
TIME SERVED	17	6	7	7	6	9	9	7	14
JAIL + PROBATION	1	0	3	0	4	3	9	8	8
PROBATION	12	17	12	27	21	16	30	29	13
FINE	11	5	17	7	10	15	20	20	20
COND. DISCHARGE	55	78	73	116	127	126	202	171	189
OTHER	0	0	0	0	0	0	2	2	1
UNKNOWN	2	2	3	1	2	6	4	5	10

363. *See id.*

364. The 1998 figures are projected.

365. For the source of this date, see COMPUTERIZED CRIMINAL HISTORY (Jan. 1999).

CONVICTION RATE (% OF DISPOSED)	39.0%	39.3%	36.7%	43.3%	43.8%	33.8%	38.9%	32.1%	45.7%
INCARCERATION RATE (% OF CONV)	25.9%	15.0%	26.1%	12.2%	16.7%	16.4%	16.2%	16.5%	17.7%
% OF CONVICTION TO:									
FELONIES	0.9%	0.8%	3.5%	1.2%	0.5%	1.0%	0.6%	0.7%	0.7%
MISDEMEANORS	32.4%	35.0%	37.3%	38.4%	35.9%	42.6%	33.1%	44.5%	33.9%
LESSER OFFENSES	66.7%	64.2%	59.2%	60.5%	63.5%	56.4%	66.2%	54.8%	65.4%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