

# “DOING SOMETHING” ABOUT CHILD ABUSE: THE NEED TO NARROW THE GROUNDS FOR STATE INTERVENTION

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The American public is no longer unaware of child abuse and its consequences. Far from it. The feeling that child abuse constitutes a major and growing problem is widespread, as is the mandate for government and individual action.

Americans want something done to prevent child abuse, they may be ready to identify what they can do; it is timely to provide such education.

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## I. INTRODUCTION

News stories frequently remind us that many children are brutally maltreated by their parents, the very persons who should be giving them love and protection. They are beaten until their bodies no longer heal; they are scalded in pots of boiling water; they are so starved and dehydrated that their skin shrivels around their fragile bones; they are sexually assaulted and forced to perform perverted acts of all kinds; and they are locked in closets or chained to bed posts for days on end.

Such horror stories make us eager to “do something” about child abuse and child neglect. As a result, the last twenty years have witnessed a nationwide expansion of child protection programs. However, in the rush to deal with this long-ignored problem, the public, the policymakers, and the politicians have

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1. Summarizing the findings of a poll conducted by his organization. National Committee for Prevention of Child Abuse, *A Survey of Public Perceptions of Child Abuse: The State of the Economy, Risk of Involvement in Juvenile and Adult Crime, and What the Individual Can Do To Prevent Abuse* (Working Paper 003, 1982).

over-reacted. They have sought to protect all children in possible danger of future maltreatment, as if this were even remotely possible. Through a combination of laws, agency policies, and public pronouncements, they have fostered the idea that all children coming to the attention of the authorities can be protected from future abuse, and that, if a child is subsequently injured (or killed), someone must be at fault. Child protective professionals have taken this message to heart. They are now so fearful of "letting a child die" that they intervene into private family matters far more than necessary, often with demonstrably harmful consequences for the children and families involved.

Yet, even this high level of unwarranted intervention does not prevent many obviously endangered children from being killed and injured, even after their plight becomes known to the authorities; ironically, it makes matters worse. The system is so overburdened with cases of insubstantial or unproven risk to children that it does not respond forcefully to situations where children are in real danger.

This article describes how existing laws governing state intervention in child abuse cases set overly ambitious and, ultimately, counterproductive goals. It argues that endangered children would be better protected, and the level of unwarranted intervention reduced, if society were more realistic about what can and cannot be done to prevent future maltreatment. Using the criminal law as a model, it suggests a set of legal standards to serve as a realistic guide for policymakers.

## II. PAST INDIFFERENCE

Child abuse and child neglect are not new problems.<sup>2</sup> Many of the original thirteen colonies, for example, had laws against certain forms of child maltreatment.<sup>3</sup> Similarly, the first specialized "child protective agency," the New York Society for the Prevention of Cruelty to Children, was founded in 1875.<sup>4</sup> By the early 1920's, most states had passed specific laws against child maltreatment, often within the context of their newly es-

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2. See generally S. KATZ, M. McGRATH & R. HOWE, *CHILD NEGLECT LAWS IN AMERICA* (1976); Radbill, *A History of Child Abuse and Infanticide*, in *THE BATTERED CHILD* (R. Helfer & C. Kempe eds. 2d ed. 1974).

3. R. BRENNER, *CHILDREN AND YOUTH IN AMERICA* (1971).

4. See An Act for the Incorporation of Societies for the Prevention of Cruelty to Children, ch. 130, 1875 N.Y. Laws 114.

established juvenile courts.<sup>5</sup> And, by the late 1930's, rudimentary networks of public and private child welfare agencies had emerged in most states.<sup>6</sup>

Nevertheless, until the 1960's, child abuse and child neglect remained largely hidden problems, handled by poorly funded and uncoordinated agencies far from public view.<sup>7</sup> Few abused or neglected children were reported to the authorities. Even children with serious and suspicious injuries went unreported. A 1968 study in Rochester, New York, for example, revealed that ten percent of all the children under five treated in a hospital emergency room fell into the "Battered Child Syndrome" and another ten percent were neglected. The researchers concluded that, had it not been for their study, most of these cases would not have been reported.<sup>8</sup> Two years later, a study in nearby Auburn, New York determined that of 195 hospital emergency room cases, twenty-six (or approximately thirteen percent) involved children with "suspicious injuries" which should have been reported, though none of them were.<sup>9</sup> The failure to report often led to the child's death:

Two-year-old Larry was brought to the hospital by his mother for treatment of a broken arm. According to the hospital record, Larry's body was marked and scarred. But no report of suspected abuse was made and there is no record that anyone in the hospital questioned Larry's mother about these injuries.

A week later, Larry's parents again brought him to the hospital. This time, he had multiple bruises over many parts of his body, scars on his buttocks, and healing lesions on his upper and lower legs. Less than an hour after Larry arrived at the hospital, he died.

The medical examiner reported the cause of death to be internal injuries caused by numerous beatings.<sup>10</sup>

Reporting was so haphazard that even many murdered children were not reported. A 1972 study by the New York City

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5. See generally H. LOU, JUVENILE COURTS IN THE UNITED STATES (1927); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

6. See generally A. KADUSHIN, CHILD WELFARE SERVICES (1974).

7. See, e.g., N.Y. State Assembly Select Committee on Child Abuse, *Report* (April 1972) [hereinafter *Report*], reprinted in *THE BATTERED CHILD* (R. Helfer & C. Kempe eds. 2d ed. 1974).

8. Holter and Friedman, *Child Abuse: Early Case Finding in the Emergency Department*, PEDIATRICS Vol. 42, No. 1 (1968).

9. *Report*, supra n. 7, at 25.

10. *Id.* at 24.

Department of Social Services found that "many children known to the Medical Examiner's Office (as suspected child abuse fatalities) have not been reported to the (Central) Registry as neglected or abused."<sup>11</sup> This was not simply a problem of keeping statistics. When fatalities go unreported, the siblings of these dead children are left unprotected.

### III. THE PASSAGE OF REPORTING LAWS

In the early 1960's, a small group of physicians, led by Dr. C. Henry Kempe, became convinced that the only way to break this pattern of indifference was to *require* certain professionals to report instances of suspected child abuse.<sup>12</sup> In 1963, they persuaded the United States Children's Bureau to draft a model law that required physicians to report children with serious physical injuries inflicted other than by accidental means.<sup>13</sup> The response of states to this model law was far beyond expectations. In the short span of four years, all fifty state legislatures had enacted reporting laws patterned after it.

This first generation of reporting laws was directed solely at physicians, who were required to report "serious physical injuries" or "non-accidental injuries." In the ensuing years, many states expanded their reporting laws: (1) to make more types of child maltreatment subject to reporting requirements, and (2) to increase the categories of professionals required to report.<sup>14</sup> But change was slow and unpredictable, dependent as it was on shifting political priorities and the vagaries of the legislative process in the various states.

The seeds for more rapid change were planted in 1973. In that year, then Senator Walter Mondale held a series of hearings on child abuse and neglect. These Congressional hearings documented the shocking weaknesses in state and local child protective efforts, and clearly moved Mondale and his colleagues. Mondale later wrote that nothing he saw in his nine years as a Senator:

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11. N.Y. City Dept. of Social Services, *Initial Quarterly Progress Report to N.Y.C. Criminal Justice Coordinating Council, Child Abuse Grant C-55934*, 8 (January 1972) [hereinafter *Progress Report*].

12. See generally Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458 (1977-78).

13. See generally U.S. CHILDREN'S BUREAU, *THE ABUSED CHILD—PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD* (DHEW 1963).

14. See generally Besharov, *supra* n. 12.

was as disturbing or horrifying, or as compelling, as the stories and photos of children, many of them infants, who had been whipped and beaten with razor straps; burned and mutilated by cigarettes and lighters; scalded by boiling water; bruised and battered by physical assaults and starved and neglected and malnourished.<sup>15</sup>

The hearings Mondale held served to galvanize Congressional support for action to improve child protective programs.<sup>16</sup> Through Mondale's efforts, as well as those of Representatives Patricia Schroeder, John Brademas and Mario Biaggi, the Congress passed the Child Abuse Prevention and Treatment Act of 1974 (Child Abuse Act).<sup>17</sup>

The new Child Abuse Act required the Secretary of Health, Education and Welfare (now Health and Human Services) to establish a National Center on Child Abuse and Neglect (National Center). The National Center was to serve as a clearinghouse for the development and dissemination of information about child protective research and programs. It received an annual appropriation of \$18.9 million, most of which was used to fund a wide range of research, demonstration, training, and technical assistance projects. Up to twenty percent of each appropriation (about \$3.7 million per year), however, was to be used for special state grants.<sup>18</sup> This small state grant program was, in many respects, the most important aspect of the new Act. In order to obtain one of these special grants, a state had to meet specified eligibility requirements.<sup>19</sup> Only three states were able to satisfy these requirements in 1973. What hap-

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15. Mondale, *Introductory Comments*, 54 CHI.-KENT L. REV. 535, 536 (1978).

16. See generally Nelson, *Setting the Public Agenda: The Case of Child Abuse*, in THE POLICY CYCLE (J. May & A. Wildavsky eds. 1978).

17. 42 U.S.C. §§ 5101-5106 (Supp. V 1975) (originally enacted as Act of Jan. 31, 1974, Pub. L. No. 93-247, 88 Stat. 5).

18. These are only approximate figures. The actual amounts appropriated and available to eligible states varied from year to year.

19. Pub. L. 93-247, *supra* n. 17, at § 4(b)(2), provided that:

In order for a State to qualify for assistance under this Act, a State shall:

(A) have in effect a State child abuse and neglect law which shall include provisions for immunity for persons reporting instances of child abuse and neglect from prosecution, under any State or local law, arising out of such reporting;

(B) provide for the reporting of known and suspected instances of child abuse and neglect;

(C) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or

pened in the next six years was just as remarkable as the rapid adoption of the first reporting laws ten years earlier. Most of the states passed new child protective laws and made the programmatic improvements needed to qualify for federal aid. By 1978, forty-three states, the District of Columbia, Puerto Rico, Guam and American Samoa had established the comprehensive child protective systems required by the Act. By 1984, three more states and the Northern Marianas Islands had also qualified.<sup>20</sup>

The state grants were not substantial in monetary terms, averaging only \$80,000 for the years involved, far less than the costs of these expanded programs, but together with other National Center activities, they served as a catalyst for making the improvements long advocated by child protective specialists. Reformers were able to cite the eligibility requirements as a congressional endorsement for the changes they proposed. Often, though, it took a child's tragic and well publicized death to break legislative and bureaucratic logjams.<sup>21</sup>

Among the Child Abuse Act's eligibility criteria was a re-

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neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect;

(D) demonstrate that there are in effect throughout the State, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such administrative procedures, such personnel trained in child abuse and neglect prevention and treatment, such training procedures, such institutional and other facilities (public and private), and such related multidisciplinary programs and services as may be necessary or appropriate to assure that the State will deal effectively with child abuse and neglect cases in the State;

(E) provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, and the child's parents or guardians;

(F) provide for the cooperation of law enforcement officials, courts of competent jurisdiction, and appropriate State agencies providing human services;

(G) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings;

(H) provide that the aggregate of support for programs or projects related to child abuse and neglect assisted by State funds shall not be reduced below the level provided during fiscal year 1973, . . . ;

(I) provide for dissemination of information to the general public with respect to the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat instances of child abuse and neglect; and

(J) to the extent feasible, insure that parental organizations combating child abuse and neglect receive preferential treatment.

20. Telephone conversation with Jay Olsen, Special Assistant to the Director of the National Center on Child Abuse and Neglect, April 12, 1985. As of that date, the ineligible jurisdictions were: Alaska, Arizona, Indiana, Pennsylvania, Oregon, and the Trust Territories.

21. See, e.g., *Report*, *supra* n. 7, at ii-v.

quirement that states broaden their child abuse reporting laws to require the reporting of *all* forms of child maltreatment. As a result, almost all states now have laws which require medical, education, social work, child care and law enforcement professionals to report suspected physical abuse, sexual abuse and exploitation, physical neglect, and emotional maltreatment; failure to report may trigger civil or criminal penalties. These laws also have provisions which encourage all persons, including friends, neighbors, and relatives, to report suspected maltreatment.<sup>22</sup>

These mandatory reporting laws and associated public awareness campaigns have been strikingly effective. In 1963, approximately 150,000 children came to the attention of public authorities because of suspected abuse or neglect.<sup>23</sup> By 1972, an estimated 610,000 children were reported annually.<sup>24</sup> And, in 1982, more than 1.3 million children were reported.<sup>25</sup> These statistics led President Carter to comment: "One of the most serious blights on the prospects for the children of our country is child abuse and the damage that results from it."<sup>26</sup>

Many people question whether this vastly increased reporting signals a rise in the incidence of child maltreatment. While some observers believe that deteriorating economic and social conditions have contributed to a rise in the level of abuse and neglect, it is not possible to verify this empirically. So many maltreated children have gone unreported in the past that earlier reporting statistics do not provide a reliable baseline against which to make comparisons. However, there is no dispute that the great bulk of reports now received by child protective agencies would not have been made but for the passage of mandatory reporting laws and the media campaigns that accompanied them.

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22. See Besharov, *supra* n. 12.

23. U.S. CHILDREN'S BUREAU, JUVENILE COURT STATISTICS 13 (DHEW 1966) [hereinafter JUVENILE COURT STATISTICS].

24. S. NAGI, CHILD MALTREATMENT IN THE UNITED STATES: A CHALLENGE TO SOCIAL INSTITUTIONS 35 (1977).

25. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL STUDY ON THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 11 (DHHS 1981) [hereinafter NATIONAL STUDY].

26. See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, WORKING TOGETHER: A PLAN TO ENHANCE COORDINATION OF CHILD ABUSE AND NEGLECT ACTIVITIES 1 (DHHS 1980).

## IV. FRAGMENTED INVESTIGATIVE RESPONSIBILITY

In 1963, few communities had organized programs to investigate reports of suspected child maltreatment and to take protective action when needed.<sup>27</sup> Prior to the enactment of mandatory reporting laws, reports of suspected child abuse and neglect were handled by a variety of agencies. People made reports to police, to child welfare agencies and to public assistance agencies, any of which could investigate them or refer them to other agencies. Sometimes people went directly to court and filed child protection petitions.<sup>28</sup>

The flood of new cases caused by mandatory reporting laws soon demonstrated that this system of blurred authority did not work. What one study called "a patchwork system of delegated responsibility, often poorly defined, often based on vague and superficial considerations,"<sup>29</sup> prevented the development of investigative expertise and encouraged administrative breakdowns. As reports were passed from agency to agency, important information about a child's condition was frequently lost. All too often, the result was a child's tragic death. In New York, for example, the State Assembly's Select Committee on Child Abuse found that three-quarters of the child abuse fatalities in 1971 involved children previously known to the authorities.<sup>30</sup> What happened to *Vincent H.* was typical:

Late one January afternoon, a neighbor found 8-month-old Vincent and his four brothers and sisters home alone. The neighbor called her own public assistance worker who, although it was not her responsibility, immediately went to the apartment to verify the complaint. The neighbor's worker found the H's apartment dirty and the children underweight and in apparent need of medical attention; two children had feces on their legs. The neighbor told her worker that, in the past, she had called the police to report similar incidents, but they had never responded.

Concerned about the care of the children, the neighbor's worker reported the situation to the child protective staff of *her own agency*. But they "rejected" her report because the H's were on public assistance and the public assistance staff was the "appropriate" agency staff to perform the investiga-

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27. See, e.g., *Report*, *supra* n. 7.

28. Besharov, *supra* n. 12, at 130-31.

29. *Progress Report*, *supra* n. 11, at 10.

30. *Report*, *supra* n. 7, at 1-2.



tion. The case, therefore, was referred to the H's own public assistance worker. The referral never reached the second worker.

One week later, Mrs. H called the police for help, claiming that Vincent had stopped breathing while she was feeding him. Within five minutes, the police arrived but their attempted resuscitation failed. The medical examiner reported the cause of Vincent's death to be malnutrition, developmental immaturity, and terminal aspiration.<sup>31</sup>

Even many reports that were "accepted" for investigation were, in actuality, simply ignored. Because of staff shortages and limited accountability, the protective staff in the capital city of one western state which must remain anonymous, for example, had established what it called "the Bank." Uninvestigated reports were "put in the Bank." At one point, it contained 140 cases. Workers tried to screen cases, seeking to put aside only less serious or less urgent situations. Nevertheless, a random review of three cases revealed that two involved reports of generalized neglect and one, from a private physician, complained of a child's "severe malnutrition." Yet, six months after this report had been made, it had not been investigated. In other communities, other euphemisms, such as "the pending caseload," were used to describe the uninvestigated cases stacked on workers' desks.

#### V. SPECIALIZED "CHILD PROTECTIVE" AGENCIES

Child protective specialists were uniformly critical of the fragmented investigative responsibility which so weakened child protective efforts. Under the leadership of Vincent DeFrancis of the American Humane Association and Dr. Vincent J. Fontana of the New York Foundling Hospital, they advocated the designation of one central agency to receive and investigate reports. In keeping with their commitment to non-punitive, therapeutic responses to child maltreatment, they urged that this centralized responsibility be vested in the child protective or child welfare staffs of public social service agencies.<sup>32</sup>

At first, child protective specialists had great difficulty persuading states to reform their child protective programs. As

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31. *Id.* at 53-54.

32. See, e.g., V. DEFRANCIS, *CHILD PROTECTIVE SERVICES: A NATIONAL SURVEY* (1981); J. FONTANA, *THE MALTREATED CHILD* (1964).

late as 1973, only a handful of states had established comprehensive reporting and investigative systems, and usually then only in the wake of a young child's tragic death and the sensational media coverage that followed it. In New York State, for example, complacency over the plight of maltreated children ended abruptly in 1969, when the brutal murder of a young girl attracted intensive media coverage. For more than a month, New York City newspapers ran numerous frontpage stories about Roxanne Felumero's death, exposing the mistakes of the agency and courts that made it possible. Roxanne had originally been taken from her drug-addicted parents after they had beaten her repeatedly. Subsequently, in the face of clear evidence that her parents were extremely disturbed individuals, Roxanne was returned home and the beatings resumed. Because agency follow-up was so poor, no one noticed the bruises all over Roxanne's body. Eventually, Roxanne died from these beatings, and her parents dumped her body into the East River. A subsequent investigation performed by the judicial authorities found that "[i]f the Family Court and the complex of public and private agencies operating within it had functioned more effectively, Roxanne Felumero would probably not have met her tragic death."<sup>33</sup> As a result of the attention that this one case received, the New York state legislature completely revamped the state's child protective system.<sup>34</sup>

Passage of the Child Abuse Act<sup>35</sup> in 1974 speeded the creation of specialized child protective agencies. In state after state, federal encouragement (especially grant money) together with recurrent media coverage of child fatalities (or other serious cases) spurred legislative and administrative action. Now, almost all major population centers have specialized "child protective agencies" which receive reports twenty-four hours a day *via* highly publicized "hot lines" and which initiate investigations on the same day, or shortly thereafter.<sup>36</sup> Usually housed within the public social services or child welfare department, these "child protective agencies" receive and investigate al-

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33. REPORT OF THE JUDICIARY RELATIONS COMMITTEE OF THE APPELLATE DIVISION OF THE FIRST DEPARTMENT, *quoted in* New York Law Journal, June 30, 1969, at 1, col. 4.

34. *See Report, supra* n. 7, at ii-v.

35. *See supra* n. 17 and accompanying text.

36. *See generally* U.S. GENERAL ACCOUNTING OFFICE, INCREASED FEDERAL EFFORTS NEEDED TO BETTER IDENTIFY, TREAT AND PREVENT CHILD ABUSE AND NEGLECT ch. 3 (1980).

most all of the 1.3 million reports of suspected child maltreatment made each year. Even in states where the law still permits reporting to the police,<sup>37</sup> most reports are made to these specialized agencies. If the police receive a report, they usually forward it to the child protective agency, though in rare situations, they may perform a parallel or joint investigation with the child protective agency.

The actual organization of child protective agencies varies widely from state to state, and from community to community within the same state. Yet, all child protective agencies perform essentially the same functions. They operate in the social work tradition of helping people with their personal problems through a mixture of concrete and counseling services. (Nationwide, fewer than five percent of substantiated cases result in a criminal prosecution).<sup>38</sup> Based on their investigation of the home situation, child protective agencies decide what mental health and social services the family needs, and help the family to obtain them. Many of these services, such as financial assistance, day care, crisis nurseries, and homemaker care, are concrete efforts to relieve the pressures and frustrations of parenthood. Other services, such as infant stimulation programs, parent aids, and parent education programs, are designed to give parents specific guidance, role models, and emotional support in child rearing. In addition, individual, group, and family counseling therapy services are used to ease the tensions of personal problems and marital strife.<sup>39</sup> To the fullest extent possible, the child protective agency seeks the parents' voluntary consent to the protective measures and treatment services it deems necessary. The agency may seek court authority to impose the plan on parents who do not cooperate, however.<sup>40</sup> Nationally, about fifteen percent of substantiated cases result in a civil court action to impose services or remove a child.<sup>41</sup>

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37. See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, TRENDS IN CHILD ABUSE AND NEGLECT LAWS 26 (DHHS 1981).

38. See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF CHILD NEGLECT AND ABUSE REPORTING (1978) 36, Table 28 (DHEW 1979) [hereinafter NATIONAL ANALYSIS].

39. See generally U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, ANNUAL ANALYSIS OF CHILD ABUSE AND NEGLECT PROGRAMS (DHHS 1980).

40. See generally Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. OF FAM. L. 217, 229 (1982).

41. See National Analysis, *supra* n. 38.

Child protective programs do have grave weaknesses, some of which are discussed below. Nevertheless, one must be impressed by the steady increase in their scope and quality.<sup>42</sup> Nationwide, there now exists a basic infrastructure of laws and agencies to protect endangered children—and it has made a difference. Increased reporting and specialized child protective agencies have saved many thousands of children from death and serious injury. In New York state, within five years of the passage of a comprehensive reporting law which also mandated the creation of specialized investigative staffs, there was a fifty percent reduction in child fatalities, from approximately 200 a year to fewer than 100.<sup>43</sup> Similarly, in Denver, the number of abused children who die from their injuries after being hospitalized has dropped from 20 per year (between 1960 and 1975) to less than one per year.<sup>44</sup>

## VI. GAPS IN PROTECTION REMAIN

Despite the very real progress that has been made, serious gaps in protection remain. Large numbers of obviously abused and neglected children are still not reported, and many of those who are reported do not receive adequate protection. Professionals—physicians, nurses, teachers, social workers, child care workers, and police officers—fail to report more than half of the maltreated children that they see.<sup>45</sup> It is not just minor cases that go unreported. According to a study conducted for the federal government, in 1979 over 50,000 children with observable injuries severe enough to require hospitalization were not reported.<sup>46</sup>

Non-reporting can be fatal to children. A study in Texas revealed that, during a three-year period, over forty percent of the approximately 270 children who died as a result of child maltreatment had not been reported to the child protective authorities, even though they were being seen by a public or pri-

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42. Compare V. DeFRANCIS, *CHILD PROTECTIVE SERVICES IN THE UNITED STATES: A NATIONWIDE SURVEY* (Amer. Humane Assoc. 1956) and V. DeFRANCIS, *supra* n. 32 with W. HILDENBRAND, *CHILD PROTECTIVE SERVICES ENTERING THE 1980's* (Amer. Humane Assoc. 1981).

43. N.Y.S. Dept. of Soc. Serv., *Child Protective Services in New York State: 1979 Annual Report* Table 8 (1980).

44. R. KEMPE AND C. KEMPE, *CHILD ABUSE* 8 (1978).

45. See NATIONAL STUDY, *supra* n. 25, at ch. 6 (note especially p. 36, Table 6-3, and p. 25, Table 5-2).

46. *Id.*

vate agency (such as a hospital) at the time of death or had been seen within the past year.<sup>47</sup> In Los Angeles, for example, a doctor, who apparently knew that a three-year old child had been previously removed from her mother's custody, was prosecuted for not reporting *repeated* evidence of severe abuse. According to court documents, the doctor did not report evidence of abuse in early 1982 and again in June 1983. When he saw the little girl in June 1983, she was "gravely ill" with pneumonia and showed evidence of "old burns on her chest and left leg, and the absence of the nasal . . . septum." A report prepared by two UCLA doctors who are child abuse specialists said that the doctor neither reported the child's condition to the authorities nor admitted the child to the hospital because he wanted to "give the mother a chance" to avoid further contact with social service workers. Instead, he attempted to treat the child in his office and at her home. Thirteen days after he began treating her, she died of a massive chest infection resulting from the pneumonia.<sup>48</sup> In December 1984, the doctor entered a no-contest plea to involuntary manslaughter.<sup>49</sup>

Sadly, however, being reported to the authorities does not assure a child's safety. Studies in several states have shown that about twenty-five percent of all child fatalities attributed to abuse or neglect involve children already reported to a child protective agency.<sup>50</sup> Tens of thousands of other children receive serious injuries short of death while under child protective supervision. In *Buege v. Iowa*,<sup>51</sup> a non-custodial father reported to the Department of Social Services that his three year old daughter had a bruise on her buttocks; he also told the agency that he believed that the bruise was caused by the mother's lover. The agency investigated and substantiated the

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47. REGION VI RESOURCE CENTER ON CHILD ABUSE, CHILD DEATHS IN TEXAS 26 (1981).

48. See *Doctor, Parents Charged in Death of Abused L. A. Child*, Los Angeles Times, Dec. 3, 1983, pt. 1, at 1, col. 5. See also *2 Found Guilty of Not Reporting Child-Abuse Case*, Providence Journal, Dec. 4, 1981, at A-3, col. 3; *Principal Fined for Failure to Report Abuse Suspicion*, Denver Post, March 10, 1982, at A-1, col. 1; *MD charged with Not Reporting Child Abuse*, Toronto Star, June 2, 1983, at A-16, col. 1.

49. *Doctor Pleads No Contest in Girl's Death*, Los Angeles Times, Dec. 1, 1984, pt. 2, at 1, col. 3.

50. See e.g., REGION VI RESOURCE CENTER ON CHILD ABUSE, *supra* n. 47, at 26; Mayberry, *Child Protective Services in New York City: An Analysis of Case Management* 109 (Welfare Research, Inc. 1979).

51. *Buege v. State*, No. 20521, slip op. (Allamakee Co., Iowa, July 30, 1980). But see *Rittscher v. State*, 352 N.W.2d 247 (Iowa 1984) (holding that there is no liability for failing to remove a child from a harmful home environment).

injury, but did not interview the lover. At an agency staffing the next day, two days after the initial report, a decision was made not to remove the child from the mother's custody, and instead, to make follow-up visits coupled with day care, counseling, and other appropriate services. But no follow-up visit was made. Eight days later, the child was hospitalized in a comatose state, with bruises, both old and new, over most of her body. She died within three days. The mother's lover was convicted of second-degree murder.<sup>52</sup> The father subsequently sued the agency alleging negligent investigation and supervision of the case, failure to employ qualified personnel, failure to staff the protective unit sufficiently, and failure to remove the child from the home. The case was settled for \$82,500.<sup>53</sup>

Even when they make follow-up visits, child protective agencies frequently fail to respond to evidence of renewed danger to children. In *Jensen v. Conrad*,<sup>54</sup> a Fourth Circuit panel described the kind of poor monitoring that often takes place:

The plaintiff alleged that Sylvia Brown's plight first became known to Richland County social workers on February 28, 1979, when the four-month-old child was admitted to the Richland Memorial Hospital with a fractured skull. A C.A.T. scan revealed a "healing subdural hematoma." The attending physician immediately became concerned about the possibility of physical abuse by Sylvia's parents. This suspicion, the plaintiff contends, was confirmed after Mrs. Brown and her boyfriend visited Sylvia at the hospital. Hospital social workers received a report that during the visit, Mrs. Brown's boyfriend held the child by the head and neck, and slapped the child in a rough manner.

The following week, a Richland Hospital social worker reported the case to the Richland County Department of Social Services and requested a child protection investigation. After an initial review of the case, the Department of Social Services allegedly reached an agreement with Mrs. Brown requiring her to reside with Sylvia at the home of Sylvia's grandmother. Under the agreement, if Mrs. Brown returned home with her child, Sylvia would be placed in the custody of the Department of Social Services. In addition to this agreement, the Department also decided that an "intensive follow-up and in-home supervision" would be required.

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52. See *State v. Hilleshiem*, 305 N.W.2d 710 (Iowa 1981).

53. The details concerning the settlement are documented in a case summary prepared by Jury Verdict Research, Inc. of Solon, Ohio, dated March 3, 1982.

54. 747 F.2d 185 (4th Cir. 1984), *cert. den.*, — U.S. —, 53 U.S.L.W. 36 (U.S. April 19, 1985).

According to the plaintiff, over the course of the next two months the Department caseworkers failed to supervise adequately the family and carry out the recommendations of department officials and Sylvia's attending physician. The plaintiff claims that Department caseworkers visited Mrs. Brown's house only twice, and on both of those occasions Sylvia was living alone with her mother. Despite the agreement, no action was taken.

On May 11, 1979, Sylvia was brought dead on arrival to the Richland Hospital. An autopsy revealed that brain hemorrhaging had occurred three times in the previous three weeks—the last hemorrhage apparently took place only minutes before Sylvia died. After initially disclaiming responsibility, Mrs. Brown pleaded guilty to involuntary manslaughter.<sup>55</sup>

No one knows how many child fatalities are the result of such administrative breakdowns and failures of judgment. Child protective proceedings are confidential, and relatively few tragic cases reach the news media. But enough do so that all communities have had their share of news stories about children who have been "allowed" to die and editorials calling for reforms which are then echoed by politicians who promise to "do something" about child maltreatment.

Some politicians have proposed a return to more punitive measures to combat child maltreatment. Some have proposed the automatic removal of abused children from the home and the death penalty for parents who kill their children.<sup>56</sup> A legislator in Maine actually introduced a bill authorizing the draconian remedy of castration in cases of sexual abuse.<sup>57</sup> Such proposals have gained little support. Most Americans believe that child maltreatment is primarily a social and psychological ill and that treatment and rehabilitation, not punishment and retribution, are the best means of protecting endangered children.<sup>58</sup> However, if evidence of the system's inability to protect endangered children continues to mount, public support for nonpunitive, child protective programs undoubtedly will erode.

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55. 747 F.2d at 188.

56. See, e.g., *Death Penalty Sought in Severe Child Abuse*, Chi. Tribune, March 7, 1981, § 1, at 4, col. 1. See generally McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, AM. CRIM. L. REV. 165, 167-68 (1974).

57. Bangor Daily News, Saturday-Sunday, January 6-7, 1979, at 34.

58. For a discussion of public attitudes about therapeutic intervention, see N. POLANSKY, E. BUTTENWIESER AND D. WILLIAMS, *DAMAGED MOTHERS: AN ANATOMY OF CHILD NEGLECT* 162 (1981).

Most child protective specialists see such tragedies as evidence that not enough is being done about child abuse and neglect. In response to public criticism, they assert that there should be a further expansion of child protective programs. To increase the level of reporting, they recommend more frequent and more extensive media campaigns. To increase the protective capability of public agencies, they recommend the hiring of more caseworkers to investigate reports. What usually follows is a spate of committee meetings, television messages calling on people to report suspected maltreatment, new brochures for professionals describing their legal responsibility to report, and a small increase in staffing. The main result of these periodic flurries of activity is increased numbers of unfounded reports, as described below. When public attention is diverted to other matters, the child protective system returns to business as usual, and the media and political leaders do not try to determine whether the situation has actually improved. With minor variation, the same process occurs in community after community, year after year.

## VII. UNWARRANTED AND HARMFUL INTERVENTION

Laws against child abuse and child neglect are an implicit recognition that parental rights are not absolute, and that society, through its courts and social service agencies, should intervene into private family matters to protect endangered children. Government action is often the only way to protect children from death and serious injury. Even political conservatives recognize the need for state intervention to protect endangered children. William F. Buckley, Jr. has written:

To the extent that Moral Majority types associate themselves with the notion that in no circumstances does the state have the right to intervene between parent and child, they will lose their moral authority. It is sometimes difficult to draw the line, but a line simply can and must be drawn between domestic discipline and domestic savagery and, if we need federal prosecutors to guard against reversing that line, why let us have them, in such abundance as is necessary.<sup>59</sup>

But in seeking to protect helpless children, it is all too easy to ignore the legitimate rights of parents. As Supreme Court Justice Brandeis warned in a different context, "experience should

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59. Buckley, *The Child Beaters and Their Critics*, 34 NAT'L REV. 449 (1982).



teach us to be most on guard to protect liberty when the government's purposes are beneficent."<sup>60</sup> While trying to protect maltreated children, society must protect the traditional American values of personal freedom and due process. If the community is to intrude into family matters, it should do so with due regard to parental rights, as well as the needs of children.

In our society, parents have the prime responsibility of caring for their children. They have broad discretion to raise them and treat them in the manner of their choice. Many state laws and court decisions recognize and seek to protect parental rights from unwarranted governmental intervention. The Supreme Court's most widely quoted statement on the subject was written by Justice White in *Stanley v. Illinois*:

It is plain that the interests of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "Basic Civil Rights of Man," and "rights more precious . . . than property rights."<sup>61</sup>

As a society, we have adopted a predominantly therapeutic or "social work" response to the problems of child abuse and child neglect. Almost all reports of suspected child maltreatment are made to "child protective agencies," rather than to the police. However, there is a fundamental difference between classic social work and child protective practice. Social work, in its purest form, is built upon the client's willing participation in the therapeutic process. If the client refuses to participate, the case is closed. This may not be desirable, and the worker may attempt to persuade the client to remain in the program, but the client may terminate the therapy at his will.

In child protective practice, however, if the parent declines services, or refuses to cooperate altogether, then the worker must decide whether the danger to the child is so great that *treatment must be imposed*. Such "treatment" includes counseling and other traditional social work services, but it also extends to involuntary home supervision, foster care, and, ultimately, to

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60. *Olmstead v. United States*, 277 U.S. 438, 479 (1923) (Brandeis, J., dissenting).

61. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted).

the termination of parental rights. The need to investigate reports made against parents and to impose treatment services on unwilling parents sets child protective work apart from most other types of social casework, and brings it closer to criminal law enforcement. Child protective workers do not impose such "services" by dint of their casework skills alone. They do so through laws which authorize courts to require parents to participate in treatment programs, to remove children from parental custody, and to terminate parental rights. Thus, the process of child protection is a social work process set within the law's power to coerce parental cooperation.

Until the late 1970's, it was necessary to continue the expansion of reporting programs and child protective agencies. Public and professional awareness needed to be increased and greater reporting needed to be encouraged. Now, however, the level of child protective intervention into private family matters has reached unprecedented levels. Moreover, much of the present high level of intervention is unwarranted and some is demonstrably harmful to the children and families involved. More than sixty-five percent of all reports of suspected child maltreatment—involving over 750,000 children per year—turn out to be "unfounded."<sup>62</sup> Of course, some degree of overreporting is to be expected, as the law requires the reporting of "suspected" maltreatment.<sup>63</sup> However, the present level of overreporting is unreasonably high and is growing rapidly. There has been a steady increase in the number and percentage of "unfounded" reports since 1976, when approximately only thirty-five percent of reports were "unfounded."<sup>64</sup>

Few of these "unfounded" reports are made maliciously; rather, most involve confusion over what types of situations should be reported. Approximately half involve situations of poor child care which, though of legitimate concern, are not sufficiently serious to be considered "child maltreatment."<sup>65</sup> Many reports are made by professionals playing it safe. They know that many of their colleagues have been sued for dam-

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62. See NATIONAL ANALYSIS, *supra* n. 38, at 18, Table 5.

63. See Besharov, *supra* n.12, at 471.

64. AMERICAN HUMANE ASSOCIATION, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1976) 11 (1978).

65. In addition, child protective workers sometimes wrongly determine that a report is unfounded, and they sometimes use the validation process as a means of caseload control. See, e.g., *Jensen v. Conrad*, 747 F.2d at 185.

ages and criminally prosecuted for failing to report, so they take no chances and report many situations simply to protect themselves from subsequent liability.<sup>66</sup>

Unfortunately, the determination that a report is "unfounded" can only be made after an unavoidably traumatic investigation which is, inherently, a breach of parental and family privacy. To determine whether a particular child is in danger, workers *must* inquire into the most intimate of personal and family matters. The parents and children almost always must be questioned about the report. And, it is often necessary to interview friends, relatives, and neighbors, as well as school teachers, day care personnel, doctors, clergymen, and others who know the family.

The intrusive nature of some investigations is illustrated in *E.Z. v. Coler*,<sup>67</sup> where the parents claimed that the male caseworker completely undressed their two year old daughter in the presence of her four-year-old brother and a neighbor. They further claimed that he held her up to a light, spread-eagled, for visual inspection of her vaginal area. He then placed her on a couch and lifted her legs over his head to make a visual inspection of her anus. It is impossible to judge whether the worker's alleged conduct was necessitated by the circumstances, but it certainly was a disturbing experience for the parents and the children.

Whether or not the allegations in a report are true, their disclosure can violate the sensibilities of all those involved and can be deeply stigmatizing. In the words of Justice Hugo Black, the parent "is charged with conduct— failure to care properly for her children—which may be viewed as reprehensible and morally wrong by a majority of society."<sup>68</sup> As researchers have found:

Once an agency . . . labels a parent as abusive, other agencies tend to accept this label and treat the family accordingly. Consistency across agencies occurs even though initially a

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66. See Besharov, *supra* n. 12, at 480-83.

67. No. 82-C-3976, slip op. (N.D. Ill. 1982). However, the court's opinion suggests that there is reason to question the accuracy of this claim. 603 F. Supp. 1546, 1551-52 n.7 (N.D. Ill. 1985). See also *Darryl H. v. Coler*, 585 F. Supp. 383 (N.D. Ill. 1982); *Stone v. Holt*, No. 84-C-351-D, slip op. (W.D. Wis. 1984); but cf. *Del Valle v. Taylor*, No. A2-83-148, slip op. (D.N.D. 1983) (alleged detention facility strip search by male guards of a 17-year-old who claimed to have been sexually abused by her grandfather).

68. *Kaufman v. Carter*, 402 U.S. 954, 959 (1971) (Black, J., dissenting from a denial of certiorari).

second agency may not have labeled the family as abusive by its own criteria. Similarly, informal communication of the label through the family's court appearances or social worker visits may promote adoption of the abuse tag by friends and relatives . . . .<sup>69</sup>

In *Hale v. City of Virginia Beach*, a father sued two caseworkers and their agency for defamation, asking damages of \$100,000. He alleged that "for the ostensible purpose of investigating the promoting the welfare and best interest of the plaintiff's children, [the caseworkers] subjected the plaintiff to a course of conduct amounting to harrassment, including threats of prosecution for crimes and conduct of which the plaintiff was innocent, interference with the plaintiff's family relationships, and interference with the plaintiff's proper efforts to rear and educate his children."<sup>70</sup> The complaint also alleged that the workers "maliciously and falsely addressed remarks to third persons, the substance of which were that the plaintiff was an alcoholic; that the plaintiff was mentally unstable and was 'a very sick man'; that he was guilty of child molestation; that they were going to take his child or children away from him; and that he would be prosecuted criminally."<sup>71</sup> The case was settled when the City, although maintaining that the workers had conducted themselves appropriately, agreed to pay the parents \$4,000.<sup>72</sup>

Furthermore, even after the extensive screening of reports performed by child protective agencies, these agencies still place over 400,000 American families under home supervision.<sup>73</sup> Facing the threat of court action, these families are compelled to accept treatment services. However, a recent study conducted for the U.S. National Center on Child Abuse and Neglect found that in about half of these cases, the parents never actually maltreated their children.<sup>74</sup> In estimating the national incidence of child abuse and neglect, the study was

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69. Parke, *Socialization into Child Abuse: A Social Interactional Perspective*, in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY 183, 184-85 (1977); see generally S. SCHUR, LABELING DEVIANT BEHAVIOR: ITS SOCIOLOGICAL IMPLICATIONS (1971).

70. No. Civ. SO-151-N, Complaint ¶6.A (E.D. Va. 1984) .

71. *Id.* at ¶ 9.

72. Personal communication with D. Craig Smith, Staff Development Coordinator, Virginia Department of Social Sciences, October 1, 1984.

73. See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF CHILD NEGLECT AND ABUSE REPORTING: 1977 55, Table 11 (DHHS 1979).

74. NATIONAL STUDY, *supra* n. 25, at 16, Table 3-5.

forced to disregard all of these cases.<sup>75</sup>

Some degree of intervention is necessary to protect endangered children but overintervention of this magnitude is impossible to justify. Although child protective services are commonly considered a "social service," involuntary removal of the child or the offending adult from the home is always a possible consequence of intervention. Even if removal does not result, the intrusive nature of the initial investigation and the restraints that casework supervision place on parental discretion make this form of "service" a considerable deprivation of liberty for all family members. This is a paradigm of coercive state intervention into family life.

Heightened public and professional concern over child abuse, especially sexual abuse, has led child protective agencies to adopt a number of questionable practices. Some agencies, for example, now authorize (or require) intervention based on the most tenuous of evidence. In *Doe v. Hennepin County*, the parents alleged that the child protective agency had filed a "Petition for an Emergency Warrant" which contained "distorted and false" statements that led to their children's removal.<sup>76</sup> They claimed that the agency violated state law by failing to conduct an appropriate investigation before seeking the removal order. The only contact with the family was when the mother called to say that the report was unfounded. The parents attributed the agency's conduct, in part, to its "policy of treating as true all allegations of abuse, regardless of source and [the fact] that the Hennepin County Child Protection's procedures manual has no reference to the possibility that the maker of a report may have improper motives. This results in a failure to investigate, contrary to statutory duty . . . ."<sup>77</sup> The court ruled that the parents had made a "sufficient showing that fact questions exist concerning whether defendants' actions were reasonable and in good faith"<sup>78</sup> and therefore denied defendant's motion for summary judgment.

There has also been a dramatic increase in the number of children taken away from their parents and placed in foster care. In 1963, about 75,000 children were placed in foster care

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75. *Id.* at 5 and 15.

76. No. 4-84-115, slip op. (D.C. Minn. 1984). *Cf.* *Dick v. Watonwan County*, 562 F. Supp. 1083 (D.C. Minn. 1983), *rev'd*, 738 F.2d 939 (8th Cir. 1984).

77. *Id.*

78. *Id.*

because of abuse or neglect.<sup>79</sup> In 1980, more than 300,000 children were in foster care for these reasons.<sup>80</sup> Many children must be placed in foster care to protect them from serious injury, and many children do benefit from foster care.<sup>81</sup> But for a large proportion of the children taken away from their parents, the conditions of foster care are a "national disgrace," in the words of Marion Wright Edelman, President of the Children's Defense Fund.<sup>82</sup>

In theory, foster care is supposed to be a short-term remedy designed to protect children from harm while parents have time to respond to treatment. However, because existing treatment programs are unable to document improved parental functioning in such a large proportion of cases,<sup>83</sup> the reality is far different. More than fifty percent of the children in foster care are in this "temporary" status for over two years; over thirty percent are away from their parents for over six years.<sup>84</sup> As the U.S. Supreme Court has recognized, these children are lost in the "limbo" of the foster care system.<sup>85</sup> Long-term foster care can leave lasting psychological scars. It is an emotionally jarring experience which confuses young children and unsettles older ones.<sup>86</sup> Over a long period, it can do irreparable damage to the bond of affection and commitment between parent and child. The period of separation may so completely tear the fragile family fabric that the parents have no chance of being able to cope with the child when he is returned.

While in foster care, children are supposed to receive treatment services to remedy the effects of past maltreatment. Few do. Worse, children who stay in foster care for more than a short time, especially if they are older, tend to be shifted

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79. Author's estimate, based on: JUVENILE COURT STATISTICS, *supra* n. 23, at 13.

80. In 1977, there were a total of 502,000 children in foster care, but only about 60% were there because of abuse or neglect. U.S. CHILDREN'S BUREAU, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES, 109, 117, Table 5-3 (DHEW 1979) [hereinafter NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES].

81. See, e.g., D. FANSHIEL AND E. SHINN, CHILDREN IN FOSTER CARE (1973).

82. CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE xiii (1978).

83. See Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 17 FAM. L.Q. 152, 165 (1983).

84. NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES, *supra* n. 80, at 120.

85. *Smith v. Organization of Foster Parents*, 431 U.S. 816, 833-38 (1977).

86. See, e.g., E. WEINSTEIN, THE SELF-IMAGE OF THE FOSTER CHILD (1962); See also S. KATZ, WHEN PARENTS FAIL 90-113 (1971).

through a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need.<sup>87</sup> Increasingly, the graduates of the foster care system evidence such severe emotional and behavioral problems that some thoughtful observers believe that foster care is often more harmful than the original home situation.<sup>88</sup> Yet, according to data collected for the Federal Government, it appears that up to half of these children were in no immediate danger at home and could have been safely left there.<sup>89</sup> In the words of Michael Wald, Professor of Law at Stanford University, "many children are removed from home unnecessarily, sometimes because the state does not offer services that would enable their families to provide adequately without removal and sometimes where the state was wrong to believe the child was endangered in the first place."<sup>90</sup> One court of appeals, for example, recognized a damage claim by a mother who was told that the temporary care of her three children could be arranged only if she signed a six month, voluntary placement agreement. She signed, based on "assurances," apparently later ignored by the agency, "that her children would be returned whenever she found suitable housing."<sup>91</sup> The mother had to bring a lawsuit to regain custody of her children.

In *Duchesne v. Sugarman*,<sup>92</sup> the mother never consented to her children's removal and yet, in violation of state law, the agency refused either to return her children or to seek a court order to legalize its continued custody of them. The day after the mother was unexpectedly hospitalized for emotional problems, the agency had taken custody of her two children, one seven years old and the other six months old. The mother refused to sign a consent form authorizing the agency to continue caring for the children. The caseworker reported the mother's refusal

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87. See, e.g., NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES, *supra* n. 80, at 117-18, Table 5-4.

88. See, e.g., J. GOLDSTEIN, A. FREUD AND A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 13 (1980).

89. Author's estimate, based on: U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF CHILD NEGLECT AND ABUSE REPORTING: 1979 47, Table 17 (DHHS 1979).

90. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of BEFORE THE BEST INTERESTS OF THE CHILD*, 78 MICH. L. REV. 645, 660-61 (footnotes omitted).

91. *McTeague v. Sosnowski*, 617 F.2d 1016, 1017 (3rd Cir. 1980).

92. 566 F.2d 817 (2d Cir. 1977); *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974) (an earlier decision in the same litigation).

to his supervisor, who advised that no consent was necessary at that point. Five days later, the mother was released from the hospital and she "immediately . . . demanded that her children be returned. However, the children were not relinquished."<sup>93</sup> For the next 27 months, the mother unsuccessfully sought to have the agency return her children. But the agency continued to rebuff her and never sought a court order legalizing the situation. Finally, she filed a petition in the New York Supreme Court seeking a writ of *habeas corpus*.<sup>94</sup>

These actual cases provide some support for the belief of many experts that "by its intervention the state may make a bad situation worse; indeed it may even turn a tolerable or even a good situation into a bad one."<sup>95</sup>

## VII. TOO LITTLE AND TOO MUCH

This high level of state intervention might be acceptable if it were necessary to enable child protective agencies to fulfill their basic mission of protecting endangered children. Unfortunately, it does just the opposite; children in real danger of serious maltreatment get lost in the press of the minor cases flooding the system.

Although there has been a remarkable expansion of child protective programs, it should not be exaggerated. Their growth has not kept pace with the rapid and continuing increase in reported cases; there has always been a chronic shortage of those mental health and social services needed to treat both parents and children.<sup>96</sup> Recent budget cuts at the federal level have only aggravated these problems. Past expansions of services were facilitated by federal financial support provided under Title XX of the Social Security Act. Until the late 1970's, most states had not yet reached the ceiling in their Title XX allotments, the major federal social service funding program, and so they were able to obtain seventy-five percent federal reimbursement for their increased expenditures.<sup>97</sup>

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93. 566 F.2d at 828.

94. *Id.* at 823-24 (footnotes omitted).

95. See, J. GOLDSTEIN, A. FREUD AND A. SOLNIT, *supra* n. 88, at 13.

96. See U.S. GENERAL ACCOUNTING OFFICE, *supra* n. 36, at ch. 4.

97. See, e.g., Benton, Field, and Miller, *Social Services: Federal Legislation vs. State Implementation* 72 (The Urban Institute, 1973), stating that: "The majority of (state administrators and federal staff surveyed) agreed that Title XX had the greatest positive impact on the children's protective service category."



Thus, federal expenditures just for "child protective services" rose from a few million dollars a year in 1960 to over \$325 million in 1980.<sup>98</sup> These funds are now under great pressure, as states and localities are called upon to shoulder an increased share of social service expenditures. As a result, even communities that had developed strong child protective systems are having difficulty keeping up with constantly increasing caseloads.

Over-reporting, thus, is more than simply unfair to parents. It places a further burden on chronically understaffed child protective agencies. Forced to allocate a substantial portion of their limited resources to these "unfounded" reports, protective agencies often are unable to respond promptly and effectively when children are in serious danger.

Staff shortages limit the number and extent of investigations. With more work than they can handle, caseworkers do not have enough time to give individual cases the attention required. In the rush to clear cases, workers often perform abbreviated investigations and fail to discover key facts. In *Nelson v. Missouri Division of Family Services*, for example, the non-custodial father alleged that the agency "failed to investigate adequately reports that the Nelson children were being abused by their mother and certain men, and that as a result of defendant's negligence, the children continued to suffer abuse, ultimately leading to the death of eight year old Tammy Nelson."<sup>99</sup> Several callers had reported that "Tammy Nelson was being sold by her mother to an older man for the purpose of having sex, and that Audrey Nelson, the children's mother, forced her children to watch her perform sex acts with various partners and perhaps forced them to participate."<sup>100</sup> Yet, the plaintiff alleged that the agency conducted only a perfunctory interview with the children in front of their mother. The complaint was dismissed, however, on the ground that Missouri's child protective statute, although containing a detailed description of required investigative procedures, did not create a legal duty to the individual endangered child "as opposed to a duty to the

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98. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, TECHNICAL NOTES: SUMMARIES AND CHARACTERISTICS OF STATES' TITLE XX SOCIAL SERVICES PLANS FOR FISCAL YEAR 1980 126 (undated report).

99. *Nelson v. Missouri Division of Family Services*, 706 F.2d 276 (8th Cir. 1983).

100. *Id.* at 277.

general public.”<sup>101</sup>

The need to investigate so many unfounded cases also limits the ability of child protective agencies to supervise dangerous home conditions with sufficient intensity and duration to insure a child's safety. The average family under home supervision receives approximately five visits over a six month period, after which the case is closed or forgotten in the press of other business.<sup>102</sup> Inadequate case monitoring was the basis of a 1976 criminal conviction for official misconduct of a child protective worker and her supervisor in Pueblo, Colorado. They were charged with having allowed a death of a child by their failure to respond adequately to reported maltreatment. The child previously had been placed in foster care and then returned to her parents' custody. During a period when the caseworker was on medical leave, the agency received telephone calls from the child's school and the school nurse. These reports described cigarette burns on the child, wounds to arms of the child, bruises and scratches to a large portion of said child's back, scars from apparent large burns to the child's back, and other injuries. With the child's doctor's permission, the caseworker, who had a B.S.W. degree and ten years experience with the agency, returned to the office for one day to arrange a psychological evaluation of the child. No attempt was made to verify the nature or extent of the reported injuries. Shortly thereafter, the child died of apparent neglect. The worker claimed that she was not told of the school reports.<sup>103</sup> The convictions of both the caseworker and her supervisor were overturned on appeal, however, on the basis of legal issues not related to their conduct.<sup>104</sup>

Overwhelmed by cases of limited danger to children, decision-makers often are insensitized to the obvious warning signals of immediate and serious danger. One study of child abuse fatalities, for example, described how: "In two of the cases, sib-

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101. *Id.*

102. See, e.g., Mayberry, *supra* n. 50, at 46-47; U.S. GENERAL ACCOUNTING OFFICE, *supra* n. 36, at 39-40.

103. Holder, *A Personal View of Casework Liability*, 95, 96, in *MALPRACTICE AND LIABILITY IN CHILD PROTECTIVE SERVICES* (W. Holder & K. Hayes eds. 1984).

104. The caseworker's conviction was overturned because she had been compelled to testify (against the supervisor) before her sentencing. *Steinberger v. District Court*, 596 P.2d 755 (Colo. 1979). The supervisor's conviction was overturned on the ground that the official misconduct statute was "void for vagueness." *People v. Beruman*, 638 P.2d 789 (Colo. 1982).

lings of the victims had died previously . . . . In one family, two siblings of the victims had died mysterious deaths that were undiagnosed. In another family, a twin had died previously of abuse."<sup>105</sup> Though caseworkers often intervene when it is not necessary to do so, they frequently fail to intervene when the situation is serious. In their 1980 book on child abuse, Goldstein, Freud, and Solnit characterized child protective practices as "too little or too much, too early or too late."<sup>106</sup> Unfortunately, this observation proves true in too many cases.

#### IX. "DOING SOMETHING" ABOUT CHILD ABUSE

"Something" must be done to protect the safety and well-being of maltreated children. But both the needs of children and the rights of parents require that that "something" not be simply more of what has gone before. Instead, "something" must be done to reduce the level of unwarranted intervention while giving greater protection to children in real danger.

Deeply concerned about these twin problems, some observers have advocated a sharp cutback in child protective efforts. These critics of existing practices do not deny that some state action is needed to protect children from serious injury, but are uneasy that the level of state intervention into private family matters has reached unprecedented heights. They argue that social agencies and courts, in an over-zealous attempt to protect children, now intervene in many cases that simply do not amount to either child abuse or child neglect.<sup>107</sup> More reporting campaigns and enlarged child protective staffs would, in the opinion of these critics, only increase the level of unwarranted state intervention into private family matters, infringing on parental rights further and flooding the system with so many minor cases that children in real danger would not receive the protection they needed. If there were fewer cases in the system, courts and agencies could concentrate their limited resources on situations where intervention was needed to prevent serious injury to the child.<sup>108</sup>

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105. Confidential report held by author.

106. See J. GOLDSTEIN, A. FREUD AND A. SOLNIT, *supra* n. 88, at 137.

107. See, e.g., *id.*; Wald, *supra* n. 90, at 660-61.

108. These concerns take on even a greater urgency in the current fiscal atmosphere. Pressures to reduce social service outlays are growing. Already, officials in a number of states have announced that they are contemplating substantial reductions of their child protective staffs. If a large proportion of currently active cases can be re-

These critics correctly state the dilemma, but their proposed solution is as unpalatable as the original problem. To improve the system's ability to protect children, they call for sharp roll-backs in child protective efforts. Goldstein, Freud, and Solnit advocate that courts and child protective agencies be divested of jurisdiction over most cases of physical neglect, emotional maltreatment, and even sexual abuse.<sup>109</sup> Until now, such proposals have not gained wide support. Physical neglect and emotional maltreatment, let alone sexual abuse, can be just as harmful as actual physical battering. Adopting such proposals would exclude hundreds of thousands of endangered children from the ambit of community protection.

And yet, continuing the status quo also should be intolerable. The experience in New York illustrates the harmfulness of present trends. Between 1979 and 1983, as the number of reports increased by about 50% (from 51,836 to 74,120), the percentage of substantiated reports fell by almost 20% (from 42.8% to 35.8%). In fact, the absolute number of substantiated cases actually declined by 100. Thus, although more than 20,000 additional families were investigated, fewer children were aided.<sup>110</sup>

The inexorable working of reporting campaigns will make things worse, rather than better. In many communities, as little as one-third to one-half of all abused and neglected children may now be reported; full reporting would obviously double and triple the caseloads. Although more thorough reporting is needed, merely increasing the number of reports would magnify the negative as well as the positive aspects of the present system. As reporting increases, the number of children and parents being helped will increase, but so too will the number being ineffectually and harmfully processed through the system. Unless "something" is done to break this ironic formula, the continued pursuit of fuller reporting will be a cruel palliative both to the community at large as well as the children and parents involved.

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moved safely from the system, then, in this time of budgetary cutbacks, agency resources could be focused on children in real danger.

109. In fairness, it should be noted that neither these authors nor other critics object to government programs that provide *voluntary* treatment services for such problems. See, e.g., J. GOLDSTEIN, A. FREUD AND A. SOLNIT, *supra* n. 88, at 64.

110. Memorandum to Sandy Berman from Charles Root, N.Y.S. Dep't of Social Services, Sept. 14, 1984.

## X. VAGUE AND OVERBROAD LAWS

Reducing the simultaneous over- and under-intervention that now plagues child protective efforts should be our first priority. Most child protective professionals blame the system's decision-making problems on inadequate funding. Certainly, large caseloads, untrained staff, and poor administration contribute to the system's inability to protect obviously endangered children, but the vast amounts of money that would be needed to raise treatment capacities are simply not available in this time of fiscal retrenchment.<sup>111</sup> Furthermore, more money, by itself, will not address the basic cause of the problem.

The major cause of the system's decision-making problems is the vagueness and overbreadth of the legal standards governing state intervention. The expansion of child protective efforts over the past twenty years has not been accompanied by the concomitant development of adequate standards to govern when intervention is needed. As Giovannoni and Becerra note:

Many assume that since child abuse and neglect are against the law, somewhere there are statutes that make clear distinctions between what is and what is not child abuse and neglect. But this is not the case. Nowhere are there clear-cut definitions of what is encompassed by the terms.<sup>112</sup>

The consequences of labelling a child "abused" or "neglected" are momentous. These terms help establish eligibility for an array of voluntary social and mental health services; hence, they have been called a "diagnostic door" through which services are made available to a family.<sup>113</sup> However, labelling a parent as "abusive" or "neglectful" does more than simply obtain services for the family. The resultant stigma may cause the label to become a self-fulfilling prophecy.<sup>114</sup> More importantly, such labelling authorizes public agencies to intervene into a family to protect the child, even if the parents object, and it authorizes courts to impose treatment services, to remove a child from the home, to terminate parental rights, and to impose criminal sanctions.

Most state laws authorize child protective intervention with conclusory phrases such as when the child's "environment is

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111. See, e.g., Besharov, *supra* n. 83, at 168.

112. J. GIOVANNONI AND R. BECERRA, *DEFINING CHILD ABUSE* 2 (1979).

113. J. GIOVANNONI, *WHAT IS HARMFUL TO CHILDREN?* 36-37 (DHEW 1977).

114. See Parke, *supra* n. 69.

injurious to his welfare,"<sup>115</sup> when the child "lacks proper parental care,"<sup>116</sup> or when the parents are "unfit to properly care for such child."<sup>117</sup> Other statutes are blatantly tautological, authorizing intervention when a child has been "abandoned or physically, mentally, or emotionally abused or neglected or sexually abused,"<sup>118</sup> without further defining these terms.

In an attempt to be more specific, some recent statutes speak in terms of failure to provide "adequate" or "necessary" or "proper" food, clothing, shelter, medical care, education, supervision or guardianship.<sup>119</sup> But, again, such statutes do not define the key, but ambiguous, words "adequate," "necessary," or "proper." Furthermore, even definitions like these, which contain lists of relatively more precise examples of child abuse or neglect, also contain a catch-all phrase such as "any other acts of a similarly serious nature requiring the aid of the court . . . ."<sup>120</sup> Such open-ended provisions are usually defended on the ground that it is "unwise, if not impossible, to catalog all the various kinds of abuse and maltreatment that occur; even a long list of specific examples might overlook many situations that are unusual or unique, yet harmful to children. It is imperative that protective workers be able to take action when the facts warrant it."<sup>121</sup>

Broad and imprecise definitions are sometimes defended on the ground that child protective personnel and courts need freedom to exercise their sound judgment in determining, on a case-by-case basis, whether particular child rearing situations should be considered "child maltreatment."<sup>122</sup> Many reported court decisions take the position that, since "neglect" is the

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115. Colo. Rev. Stat. § 19-1-103(20) (1978).

116. Utah Code Ann. § 78-3A-2(17) (1977).

117. Ark. Stat. Ann. § 45-403(4) (1977).

118. Kan. Stat. § 38-802(g) (1978).

119. N.Y. Fam. Ct. Act § 1012(f)(i) (1983).

120. *Id.* at (b)(i)(B). See also Calif. Welf. & Inst. Code § 18950.1(e) (1979) (defines "child abuse" as assaults which cause "serious physical injury" but then goes on to include "willful mental injury, negligent treatment, or maltreatment of the child").

121. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, DRAFT MODEL CHILD PROTECTION ACT Commentary on Section 4(c)(v) (August 1977).

122. See, e.g., S. KATZ, *supra* n. 88, at 64: Broad "neglect statutes recognize that 'neglectful' behavior can also vary, and thus cannot be easily or specifically defined . . . the broad neglect statutes allow judges to examine each situation on its own facts." This is not to say that Katz is not concerned by vague statutes, but he hopes to solve the problem by having judges focus on harm to the child, instead of on parental conduct. *Id.* at 63-67. This is a position accepted by most commentators, even those most critical of the child protective system. See, e.g., Levine, *Caveat Parents: A Demystification of the Child Protection System*, 35 UNIV. OF PITTS. L. REV. 1 (1973).

failure to exercise the care that a child needs, and since such care must vary with the specific facts of the case and the context of the surrounding circumstances,<sup>123</sup> the word "neglect" can have no fixed or measured meaning, and each case must be judged on its particular facts.<sup>124</sup> In a sense, these open-ended statutes and court decisions defending them are a throwback to the juvenile court before the era of the Warren Court, when informality permeated all aspects of court processes.<sup>125</sup> These courts are saying that, although they cannot define child maltreatment, they know it when they see it.<sup>126</sup>

State and local agencies with child protective responsibilities have developed a wide array of materials designed to give more precise meaning to child abuse laws. So have many hospitals, school systems, and other service agencies. But there is little uniformity among these materials, and issues are often treated in a generalized fashion with pat phrases and ambiguous indicators. The noted authority Dr. C. Henry Kempe reflected the feelings of most child protective professionals when he asserted that: "Child abuse is what the courts say it is."<sup>127</sup>

The resulting potential for arbitrary application and the evidence that injustices frequently occur are the reasons why existing definitions of "child abuse" and "child neglect" have been so harshly criticized.<sup>128</sup> The absence of more specific standards for intervention both reflects and increases the general confusion about what is and what is not child maltreatment. Based on a national survey of local programs, Nagi found:

evidence of uncertainty regarding decision making throughout the system . . . . Respondents from protective agencies representing 56 percent of the population served and from police departments representing 64 percent agreed that 'it is

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123. See, e.g., *In re Stille*, 6 Ill. Dec. 873, 363 N.E.2d 873 (1977).

124. See, e.g., *In Interest of Nitz*, 11 Ill. Dec. 503, 368 N.E.2d 1111 (1977).

125. See D. Besharov, *JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT* 10 (1974).

126. Cf. *Jacabelis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J., concurring).

127. *Child in Peril*, Xerox Films (Media Concepts 1972). See also Rosenheim, *The Child and His Day in Court*, in *CHILDREN IN THE COURTS* 150, 161-62 (Newman ed. 1976).

128. See, e.g., *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10, 18 (S.D.Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976) ("Vague standards . . . carry three dangers: the absence of fair warning, the impermissible delegation of discretion, and the undue inhibition of legitimate exercise of a constitutional right."). See generally Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Standards*, 27 STAN. L. REV. 985 (1975).

difficult to say what is and what is not child maltreatment.' Higher proportions of judges and physicians indicated similar uncertainty . . . .<sup>129</sup>

Existing standards set no limits on intervention and provide no guidelines for decision-making. They are a prime reason for the system's inability to protect obviously endangered children, even as it intervenes into family life on a massive scale.

Constitutional challenges on the basis of vagueness and overbreadth to existing standards of intervention have met with little success.<sup>130</sup> Nevertheless, these standards are a major cause of the overintervention that plagues the nation's child protective system. Goldstein, Freud, and Solnit claim that existing definitions "delegate to administrators, prosecutors, and judges the power to invade privacy almost at will" and invite "the exploitation of parents and children by state officials. Acting in accord with their own personal child-rearing preferences, officials have been led to discriminate against poor, minority, and other disfavored children."<sup>131</sup> This is something of an overstatement because, if nothing else, the basic societal consensus about what is and what is not "child maltreatment"<sup>132</sup> operates to exclude most families from the reach of even the vaguest statute. However, there are tens of thousands of less than clear-cut cases on the borderline of social consensus where imprecise definitions force individual decision-makers to apply their personal interpretations and values to the child rearing situations they must judge. Because of wide differences in the way these individuals feel about the needs and rights of children, the rights of parents, and the inadequacies of existing services, imprecise definitions inexorably lead to often unpredictable and unjustified intervention into family life.<sup>133</sup>

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129. Nagi, *Child Abuse and Neglect programs: A National Overview*, CHILDREN TODAY 13, 17 (1975).

130. Compare *Alsager*, 406 F. Supp. at 10 with *Harter v. State*, 260 Iowa 605, 149 N.W.2d 627 (1967); *In re Lager*, 248 A.2d 384 (Md. 1968); *In re McMaster*, 486 P.2d 567 (Ore. 1971); *In re Three Minor Children*, 289 A.2d 434 (R.I. 1972).

131. See J. GOLDSTEIN, A. FREUD AND A. SOLNIT, *supra* n. 88, at 15-17 (footnotes omitted). Accord Fitzgerald, *Rights of Neglected Children and Attempts By the State to Regulate Family Relationships*, in CHILD WELFARE STRATEGY IN THE COMING YEARS 371, 377 (DHEW 1978) ("Given the typical overbreadth of these statutes, every family in the country could be made out to be the proper subject of court jurisdiction, if there were a sufficiently detailed chronical of their behavior.").

132. See J. GIOVANNONI AND R. BECERRA, *supra* n. 112, at ch. 3; Polansky and Williams, *Class Orientations to Child Neglect*, SOCIAL WORK 397, 400 (Sept. 1978).

133. See, e.g., Note, *In the Child's Best Interest: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U.L. REV. 446 (1975).



Because professionals and private citizens do not have a clear idea about the meaning of the terms "child abuse" and "child neglect," they report many minor situations that simply do not amount to child maltreatment. They see an assault on a child, and, whether or not it is serious, they report it; they see marginal child care, and, whether or not the child's basic needs are being met, they report it. Given the breadth of reporting mandates, and the possibility of civil and criminal liability for not reporting,<sup>134</sup> they cannot be faulted for such overreporting.

Although imprecise definitions may seem a happy way to facilitate agency and court intervention, defining "child maltreatment" as any condition that "endangers" a child does not necessarily provide greater protection for children. For, just as imprecise definitions can be read too broadly, they also can be read too narrowly, so as to exclude those conditions that seriously jeopardize a child. Imprecise definitions make caseworkers unsure about whether they should intervene in particular situations. For example:

in some communities public health nurses and hospitals are frustrated by the public social service agency which is unresponsive to cases of failure-to-thrive and to "inadequate" home conditions. Similarly, in some communities the public social service agencies feel constrained by the legal definitions used by the juvenile court and find themselves in cases where there are not actual physical marks on the child.<sup>135</sup>

Much time and energy is wasted as workers seek to apply diverse and inconsistent definitions to the family situations that come before them. Confusion and breakdowns in services are the natural consequence.

In the past, there was a tendency to ignore definitional inadequacies. In fact, some thoughtful observers concluded that efforts to improve definitions should not be made.<sup>136</sup> Ten years ago, when professionals were using narrowly construed reporting laws to avoid taking action to protect obviously endangered children, there may have been some justification for this position. At that time, as the field struggled to build public and pro-

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134. See Besharov, *supra* n. 12, at 480-83.

135. M. HOLMES, CHILD ABUSE AND NEGLECT PROGRAMS: PRACTICE AND THEORY 115 (DHEW 1976).

136. See, e.g., Paulson, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 12 (1967) ("Surely the terms 'abuse' and 'neglect' are best left undefined. The varieties of serious abuse are all embraced by language which speaks of physical injuries.").

fessional awareness and to increase reporting,<sup>137</sup> few were worried about definitional weaknesses.<sup>138</sup> However, now that greater awareness has been achieved, avoidance of definitional weaknesses is a luxury the field can no longer afford, if it ever could. With more than 1.3 million children reported to the authorities for "child abuse" and "child neglect" each year, definitional improvement is a social and political issue of the highest magnitude. "The vagueness and ambiguities that surround the definition of this particular social program touch every aspect of the field—reporting system, treatment program, research and policy planning."<sup>139</sup>

Every day, social workers and courts must apply child abuse laws to determine whether the children before them need societal protection. The consequences of a wrong decision, either against intervention when the child is in real jeopardy or for intervention when the child is not in danger, make improved legal standards essential to an effective and fair child protective program. The safety of children and the rights of parents, as well as the peace of mind of those who daily must make child protective decisions, demand that more precise and more practical legal standards be developed to help agencies and courts distinguish between those situations that require state intervention and those that do not. Reporting campaigns must emphasize what should not be reported as well as what should be reported; child protective workers must be given clear guidance about when state intervention is not justified, and they must be trained to recognize situations of a serious danger; and various laws and administrative procedures must be modified to help insure proper decision-making. None of this activity is now happening.

## XI. A FAILURE OF POLICY

Past efforts to develop more precise and more useful standards for intervention have been largely unsuccessful. Without

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137. Kempe, *Child Protective Workers: Where Have We Been? Where Are We Going?* in CHILD ABUSE AND NEGLECT: ISSUES IN INNOVATION AND IMPLEMENTATION 19 (DHEW 1977).

138. For an example of early concern over definitional vagueness, see A. SUSSMAN AND S. COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION 61-78 (1975).

139. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, ANALYSIS OF RESEARCH I (DHEW 1978).

exception, they have met with controversy and criticism. For example, in the most extensive effort to date, the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association was unable to develop acceptable standards to govern state intervention in child abuse and neglect cases. Michael Wald, a prime author of the ABA Standards, acknowledged that "intervention is inappropriate in many cases which fall under [the] proposed definition."<sup>140</sup> Ultimately, opposition to the Project's proposed Standards was so great that they were withdrawn from ABA consideration.<sup>141</sup>

Some observers claim that more precise legal standards to govern child protective intervention cannot be developed. They cite, as insurmountable obstacles, the complexity of the parent/child relationship and environmental variables and the subjectivity of the social values at stake. Gelles described why he decided not to attempt the "impossible task" of defining child abuse for his study of violence in the home:

The term "child abuse" is a political concept which is designed to attract attention to a phenomenon which is considered undesirable or deviant. As a political term, "child abuse" defies logical and precise scientific definition. Malnourishment, sexual abuse, failure to feed and clothe a child, beating a child, torturing a child, withholding medical care from a child, allowing a child to live in a "deprived or deprived" environment, and helping a child stay out of school have all been defined at various times and in various laws as "child abuse." The definition of child abuse varies over time, across cultures, and between different social and cultural groups.<sup>142</sup>

While these factors make perfectly precise and fully objective standards impossible, the failure to develop more useful standards is not due to the inherent limits of legal drafting; rather, it is caused by a failure of policy.

Existing legal standards and the simultaneous over- and under-intervention they foster are a direct reflection of society's over-ambitious expectations about the ability of social agencies and courts to identify and protect endangered chil-

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140. Wald, *supra* n. 128, at 988.

141. See Besharov, *Behind Closed Doors*, 3 FAM. ADV. 3, 30 (1980).

142. Gelles, *A Profile of Violence Toward Children in the United States*, in CHILD ABUSE: AN AGENDA FOR ACTION 82, 83 (G. Gerbner, C. Ross & E. Zigler eds. 1980).

dren. Society has been unwilling to accept that some children cannot be protected from abuse and neglect and that no matter what policies it adopts, as long as parents raise their children in the privacy of their own homes, some children will continue to suffer serious injuries or death before anything can be done to protect them. This failure to be realistic about child protective capabilities has prevented the development of practical legal standards that balance the need to protect children with the need to prevent unwarranted state intervention.

Extreme cases of parental brutality and neglect make everyone eager to protect as many children as possible from maltreatment. Thus, even those who are deeply critical of the present level of child protective intervention usually advocate *preventive* action. Goldstein, Freud, and Solnit, for example, would authorize intervention to protect children who face an "imminent risk of death or serious bodily harm."<sup>143</sup> Wald, another critic of the present level of intervention, explains why he concluded that preventive jurisdiction is needed:

[I]t would be unwise to allow intervention only after a child has been seriously injured as a result of inadequate living conditions or supervision. For example, a court must be able to protect a 5-year-old child left unattended for several days, even if the child has avoided injury.<sup>144</sup>

This desire to give courts and social agencies preventive jurisdiction explains the open-ended nature of existing legal standards. Laws that authorize intervention if a child "lacks proper parental care," is "without proper guardianship," has parents "unfit to properly care" for him, or is in an "environment injurious to his welfare" are intentionally phrased to authorize intervention before the child has been seriously injured, and even before he has been either abused or neglected.

Recent reform proposals are really neither narrower nor more specific. Typically, they authorize intervention when there is a "substantial risk of [serious] physical injury"<sup>145</sup> or a "substantial risk that a child will imminently suffer [serious] physical harm."<sup>146</sup> While such phrases suggest the reason for preventive concern, they do little to specify when it arises. Fitz-

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143. See J. GOLDSTEIN, A. FREUD AND A. SOLNIT, *supra* n. 88, at 190, ¶ 10.10.

144. Wald, *supra* n. 128, at 1014.

145. N.Y. Fam. Ct. Act § 1012(e)(ii) (1983).

146. INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE STANDARDS RELATING TO CHILD ABUSE AND NEGLECT, § 2.1 A (ABA 1977).

gerald comments that “[t]erms such as . . . ‘imminently,’ and ‘substantial’ are not self-defining. There is still enormous room for judicial discretion.”<sup>147</sup> Consequently, such phraseology is at best a partial solution to the fundamental problem of describing preventive concerns, and at worst, a cosmetic change that gives the illusion of greater specificity while in reality merely substituting one imprecise phrase for another. For, under such statutory constructs, courts and social agencies retain *unrestricted preventive jurisdiction*.

This grant of unrestricted preventive jurisdiction to decision-makers suggests that social agencies and courts can protect *all* the children that come before them by identifying *potentially* abusive or neglectful parents. In effect, existing laws require decision-makers to *predict* whether parents will become abusive or neglectful toward their children. Agency policies and public pronouncements encourage this belief by instructing workers to make sophisticated psychological assessments of future parental behavior.<sup>148</sup> Expecting decision-makers to predict future child maltreatment is completely unrealistic and ultimately counterproductive, however. The unvarnished truth is that there is no way of predicting, with any degree of certainty, whether a particular parent will become abusive or neglectful. Besides the limitations imposed by large caseloads and poorly trained staff, such sophisticated psychological predictions are simply impossible to make. Despite years of research, no one has developed a psychological profile that accurately identifies parents who will abuse or neglect their children in the future.<sup>149</sup>

Preventive intervention cannot be based on a psychological diagnosis that an individual is a “high risk” parent who may maltreat a child in the future. Dr. Ray Helfer has concluded that “the ability to separate out a distinct group of parents (or future parents) who will physically abuse or serious [sic] neglect one or more of their children will probably never be pos-

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147. Fitzgerald, *supra* n. 131, at 381.

148. See, e.g., U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, CHILD PROTECTIVE SERVICES: INSERVICE TRAINING FOR SUPERVISORS AND WORKERS, Module III (DHHS 1981).

149. See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, REVIEW OF CHILD ABUSE RESEARCH: 1979-81 42-105 (DHHS 1981). See generally Cocozza and Steadmen, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976).

sible.”<sup>150</sup> Unless the parent is suffering from a “severe and demonstrable mental disability,”<sup>151</sup> not even the best clinicians can make a reliable assessment of a parent’s propensity to become abusive or neglectful. Furthermore, in many cases, the home situation deteriorates sharply and without warning.

By greatly overstating the ability of social workers and judges to predict future maltreatment, existing laws and agency policies that implement them fail to give practical guidance on when intervention is needed and when it is not. Instead, they encourage reliance on an array of “high risk” indicators that make sound decision-making unlikely. Furthermore, by overstating the ability to predict future maltreatment, existing laws put enormous pressure on social workers and judges to intervene lest they be held liable if a child subsequently suffers serious harm. In part because there are no articulated limits to their preventive jurisdiction and powers, decision-makers are often unfairly criticized for having “allowed” a child to die. Throughout the country, caseworkers have been reprimanded, downgraded, reassigned or fired for mishandling their cases.<sup>152</sup> Many have been sued for professional malpractice.<sup>153</sup> And, in at least six instances, groups of caseworkers have been criminally prosecuted for official malfeasance and negligent homicide.<sup>154</sup> Many others have been subpoenaed to testify before grand juries.

Few caseworkers would try to justify the careless or negligent performance of official duties and most would probably agree that potential civil and criminal liability are a deterrent to the most egregious forms of malpractice. But, on the whole, caseworkers have come to believe that they will be blamed for situations beyond their control. One criminal prosecution illustrates why they feel this way. In 1980, a caseworker in El Paso, Texas, the supervisor, and the agency’s Director of Child Welfare were charged with criminal negligence in the death of an infant. A hospital had informed the agency that a nine-month-

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150. Helfer, *Basic Issues Concerning Prediction*, in *CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY* 363 (R. Helfer & C. Kempe eds. 1976).

151. As defined in AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (1980) [hereinafter *DSM III*].

152. See, e.g., Garbarino and Stocking, *Preface*, in *PROTECTING CHILDREN FROM ABUSE AND NEGLECT* viii (J. Garbarino ed. 1981).

153. See generally D. BESHAROV, *CRIMINAL AND CIVIL LIABILITY IN CHILD WELFARE WORK: THE GROWING TREND* (ABA 1983).

154. See, e.g., *id.* at 8-11.

old child had severe scald burns on the lower back and buttocks. The agency decided not to take custody of the child and that the child could remain at home while the parents received treatment services. Ten months later, the child died of apparent asphyxiation. "Although he was unable to determine the cause of death, the medical examiner testified that the child had very small, circular bruises on the right side of her head and on her chest, abdomen, thighs, and knees. Other doctors testified . . . that she was also suffering from malnutrition."<sup>155</sup> The prosecuting attorney is said to have claimed that "if the [agency] staff had been willing to admit its mistakes [in not removing the child] and cooperate in the removal of the surviving children following their sister's death, the case probably would not have been taken to the grand jury."<sup>156</sup> Though the judge eventually dismissed the indictment,<sup>157</sup> this case and dozens of similar cases have convinced decision-makers that they will be held liable if there was any reason, however minor, for thinking that the child was in danger. Hence, they are under great pressure to take no chances, and to intervene whenever they might be criticized for not doing so. The dynamic is simple enough. If the child is subsequently injured, the worker can face negative media publicity, an administrative reprimand, a lawsuit, even a criminal prosecution; but there will be no critical publicity if it turns out that intervention was unneeded.

A fair analogy to this process is the defensive medicine currently practiced by many physicians. The ease with which former patients are able to win large cash judgments makes most physicians fearful of malpractice lawsuits. To minimize the possibility of subsequent lawsuits, many physicians routinely order more medical procedures, x-rays, and other tests than are reasonably needed. As in the case of defensive medicine, no one knows exactly how much defensive social work exists. However, most observers would agree with Peter Schuck, Professor of Law at Yale University, that "[s]ocial workers may more quickly—but prematurely—remove children from troubled families rather than risk being sued on behalf of an abused

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155. Searly, *Caseworker Indictments—A Closer Look*, National Child Protective Services Newsletter, vol. 3, no. 4, at 1 (Amer. Humane. Assoc. 1981).

156. *Id.* at 9.

157. Horowitz and Davidson, *Improving the Legal Response of Child Protective Agencies*, 6 VERMONT L. REV. 381, 384 (1981).

child.”<sup>158</sup> Leroy Schultz, a social work professor at the University of West Virginia, found at least one worker in his survey of child protective workers who “tries to get state custody of all suspected abused children just to protect himself from liability.”<sup>159</sup> In another state, a program director describes what happened after he was indicted for “allowing” a child to be killed:

Upon learning of the indictments, caseworkers and their supervisors became aware of their own vulnerability. As a result, paperwork increased to account for everyone’s actions and for a while more children were removed from their homes. Supervisors told me that these removals seemed unnecessary but that caseworkers were afraid.<sup>160</sup>

Thus, the fear of criticism and possible civil or criminal liability coupled with an honest desire to protect children leads agencies and courts to view *all* minor assaults and *any* marginally inadequate child care as signs of a parent’s *future* propensity to abuse or neglect a child. Richard Borne was merely expressing the prevailing view in the field when he wrote that: “without appropriate intervention, minor injuries are likely to increase in severity over time. A minor injury, thus forewarns of more dangerous trauma . . . .”<sup>161</sup> As a result, intervention occurs in many minor situations that simply do not amount to child maltreatment. A child is hit by a parent and, whether or not the assault was serious, he is considered “abused.” A child is living in a dirty and disorganized household and, whether or not his basic needs are being met, he is considered “neglected.” As mentioned above, the National Study of the Incidence and Severity of Child Abuse and Neglect found that over fifty percent of all of the reports substantiated by child protective agencies involved nothing more than such minor situations.<sup>162</sup>

While these situations may reflect poor or inappropriate

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158. P. SHUCK, *SUING GOVERNMENT: CITIZENS REMEDIES FOR OFFICIAL WRONGS* 75 (1983).

159. L. SCHULTZ, *MALPRACTICE AND LIABILITY IN WEST VIRGINIA’S CHILD PROTECTIVE SERVICES: A SOCIAL POLICY ANALYSIS* 10 (W. Va. School of Social Work 1981).

160. Gembinski, Casper and Hutchinson, *Worker Liability: Who’s Really Liable?*, in *LOOKING BACK, LOOKING AHEAD: SELECTIONS FROM THE FIFTH NATIONAL CONFERENCE ON CHILD ABUSE AND NEGLECT* 118 (C. Washburne ed. 1982).

161. Bourne, *Child Abuse and Neglect: An Overview*, in *CRITICAL PERSPECTIVES ON CHILD ABUSE* 3 (R. Bourne & E. Newberger eds. 1978).

162. See *supra* n. 73 and accompanying text.



child rearing, they are not of sufficient gravity to justify coercive state intervention. Furthermore, by themselves, they do not reliably signal future child maltreatment. Most parents have physically or verbally lashed out at their children during times of unusual stress; all parents have at least some moments when they neglect to meet the needs of their children. If actual harm results, it is usually minor or transitory. According to data collected by the National Incidence Study, fewer than one in five minor assaults or other examples of poor child care presages anything resembling child abuse or child neglect.<sup>163</sup> Unfortunately, there is no way of knowing with the degree of assurance needed to justify involuntary child protective intervention which instances of poor child care will become more serious.

Child protective agencies and courts simply cannot guarantee the safety of all children that come before them. Even if they placed into protective custody all children who appeared to be in possible danger, a degree of over-intervention that few would support, some children would continue to suffer further injury and even death, because the danger they face would go undetected or unpredicted. At the same time, by not focusing the system's limited resources on children who have already been seriously abused or neglected and who are in clear danger of further maltreatment, existing laws make it less likely that these children will receive the protection they so desperately need. It should be the role of law to establish reasonable expectations about what can be done to protect children. Only in this way will the law be able to guide and limit intervention. Existing laws do just the opposite; they provide powerful incentives for overly intrusive state action.

## XII. "SERIOUSLY HARMFUL" BEHAVIOR

Existing legal standards are usually criticized for giving social workers and judges too much discretion. However, this oversimplification obscures the path to improved standards. As the preceding section described, the real problem with existing standards is that they place *too much responsibility* on decision-makers. Laws should explicitly recognize that social workers

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163. *Id.* at 18, Table 4-1.

and judges cannot predict future maltreatment and that misguided attempts to do so can have serious side effects.

Laws should be redrafted so that child protective intervention is authorized only when the parents have already engaged in abusive or neglectful behavior. Children who have already been abused or neglected are in clear danger of further maltreatment. As the Supreme Court of California said in the landmark case of *Landeros v. Flood*:

Experiences with the repetitive nature of injuries indicate that an adult who has once injured a child is likely to repeat . . . . [T]he child must be considered to be in grave danger unless his environment can be proved to be safe.<sup>164</sup>

Limiting state action to situations of past wrongful conduct is the criminal law's posture, and it has equal validity for child protective intervention where both the future of the individuals and that of the family unit are at stake. Subject to the minor exceptions discussed below, intervention should be based on what the parents did, not on what they "might" do.

There is a way to reflect society's legitimate preventive concerns—and this is the key to reforming legal standards. The parent's behavior need not have already seriously injured the child for it to be considered "abusive" or "neglectful" and for it to be the basis of child protective intervention. Intervention should also be authorized if the parent did something which was capable of causing serious injury.<sup>165</sup> By having engaged in seriously harmful behavior once, parents demonstrate that they are a continuing threat to their children. For, it is reasonable to assume that—unless there is a change in circumstances—what the parents did in the past, they will do again in the future. The mere fact that the child did not or has not yet suffered serious injury<sup>166</sup> does not reduce the need for protective action. Society should adopt a preventive orientation toward protecting such children. It just should not use the kind of open-ended and unregulated approach that laws now permit.

Therefore, child protective intervention should be author-

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164. *Landeros v. Flood*, 17 Cal. 3d 399, 412 n. 9, 551 P.2d 389, 395 (1976).

165. "Harmful," after all, means "causing or capable of causing harm." RANDOM HOUSE DICTIONARY (1973) (emphasis added).

166. This does not mean that the degree of actual harm a child suffers is not an important decision-making concern. Instead of creating, however, a separate reason for intervention, the degree of actual harm should be used as an indicator of a heightened need to intervene given a parental act.

ized whether or not the parent's behavior seriously injured the child, if it was capable of doing so. The criminal law would call such behavior an "attempt" or "reckless endangerment." Such terms, however, are not used in child protection because they imply a higher level of intent than should be necessary where criminal sanctions are not at issue.<sup>167</sup> Further, they exclude many situations of child neglect requiring protective intervention. Hence, this article proposes that child abuse and neglect statutes use the term "seriously harmful behavior" to encompass all the situations (whether or not resulting in actual serious harm to the child) that should nonetheless justify child protective intervention. "Seriously harmful behavior" can be divided into two categories:

(1) "*Immediately harmful behavior*"—parental behavior which could have caused an immediately serious injury but did not do so because of the intervention of an outside force, or simply good fortune. For example, a parent throws an infant violently, but by some good luck, the child is not injured; a parent begins to beat a child brutally, but a relative or neighbor intervenes; a parent leaves a young child home alone in a hazardous environment, but the child is found before he injured himself. Although, through some good fortune, such children did not suffer serious injury, it is fair to conclude that their parents pose a continuing threat to them.

(2) "*Cumulatively harmful behavior*"—parental behavior which will cause cumulatively serious harm to the child if continued for a sufficient length of time. For example, a parent provides a nutritionally inadequate diet for the child which, over time, will cause serious health problems; a parent inflicts repeated, but otherwise minor, assaults on the child which, over time, will make him into an easily frustrated, violence prone individual; or a parent provides grossly inadequate emotional support and cognitive stimulation which, over time, will lead to severe developmental disabilities. Again, although such children have not yet suffered serious injury, it is reasonable to infer that they will eventually.

The harmfulness of the parents' past behavior is the unspoken, and unspecified, basis of many current child protective decisions. Because it is not an articulated concept, however, there is a great deal of unnecessary confusion about the differences

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167. Child protective intervention is needed whenever a parent cannot adequately care for a child, regardless of whether the failure is intentional or not.

between it and the existence of actual serious injuries.<sup>168</sup>

Laws based on the parents' "seriously harmful behavior" would provide all preventive jurisdiction that agencies and courts should have. They would authorize intervention to prevent a child from being seriously injured, but only after there was clear evidence of the need to do so. The appendix contains a generalized listing of the "seriously harmful behaviors" for which preventive child protection intervention might be authorized. Of course, the conceptual definitions listed there need elaboration if they are to provide maximum guidance to agency workers.

Basing intervention on the "harmfulness" of past parental behavior would be directly at variance with the suggestions of those reformers who have argued that standards for intervention should be based on harm to the child. Wald argues that: "Neglect statutes should be drafted in terms of *specific harms* that a child must be suffering or extremely likely to suffer, not in terms of desired parental behavior."<sup>169</sup> But, as the previous section described, statutes that authorize intervention if a child is "extremely likely to suffer" harm are open-ended invitations to overreact to situations of limited danger to children. The only way to reduce over-intervention is to limit the grounds upon which predictions of future maltreatment can be based and this requires that intervention be based on the harmfulness of past parental behavior.

Minor assaults and marginally inadequate child care do not constitute "seriously harmful behavior." To be "seriously harmful," the behavior itself must have been capable of causing serious injury. Heartfelt concern for children leads many people to believe that all forms of inadequate or poor child rearing situations, whether or not they are "seriously harmful," should be grounds for intervention. However, child protective intervention is a major intrusion on parental rights which often does more harm than good and should be limited to situations in which the need for intervention is supported by clear and sufficient evidence. This does not mean that situations of less damaging child care do not merit social action. Many people would benefit from specific social and community services. But these

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168. See, e.g., M. HOLMES, *supra* note 135, at 115.

169. Wald, *supra* n. 128, at 1004.

services should be offered to parent's on a voluntary basis.<sup>170</sup>

There should, however, be two exceptions to this general proposition. First, parents suffering from severe and demonstrable mental disabilities (such as overt psychoses so severe that the parents are completely detached from reality)<sup>171</sup> are simply incapable of providing adequate care for their children.<sup>172</sup> Second, intervention is needed when parents of infants or very young children report that they feel themselves slipping out of control, and that they fear they may hurt or kill their children.<sup>173</sup> There are many degrees of mental disability, however, and a prediction of future serious injury to the child is justified only at the extremes of parental incapacity. To signify that the concept requires careful application, this article emphasizes that the parent's mental disability must be severe and demonstrable.

Finally, child protective intervention in response to the past "seriously harmful behavior" of parents is based on the reasonable assumption that, what the parents did once, they will do again. However, it is possible that circumstances have changed and that the presumption of continued harmful behavior can be rebutted. For example, the precipitating cause of the parents' behavior may have disappeared, or the parents may have developed the ability to care for their child, or the provision of voluntary services may sufficiently reduce the likelihood of a recurrence, obviating the need for coercive intervention. These are crucial issues in determining whether intervention should actually occur.<sup>174</sup> Therefore, standards for intervention must

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170. As defined in *DSM III*, *supra* n. 151.

171. The same is true for parents who suffer from extreme forms of mental retardation. If suitable arrangements have not been made to insure that their children's needs are met, state intervention is essential. To wait until the parents demonstrate their inability to properly care for the child would require that the child be left in the parents' care until the inevitable injury occurred. *See, e.g., Roberts v. State*, 141 Ga. App. 268, 233 S.E.2d 224 (1977) (baby born to mentally retarded, fourteen-year-old mother placed in foster care without regard to any "history of deprivation"). Likewise, extreme forms of alcohol or narcotics abuse which amount to "psychoses" (as defined by *DSM III*, *supra* n. 151) because they impair judgment or coping ability, are other forms of parental disability for which preventive intervention is justified. *See, e.g., N.Y. Fam. Ct. Act § 1046(a)(iii)* (1983).

172. *See D. BESHAROV, PROVING CHILD ABUSE: A GUIDE FOR PRACTICE UNDER THE NEW YORK FAMILY COURT ACT 20* (1984), which argues that a distinction must be drawn between parental threats to kill or harm a child and parental expressions of anger or loss of control, which require further assessment.

173. *See J. GOLDSTEIN, A. FREUD AND A. SOLNIT, supra* n. 88, at 64.

174. *See, e.g., N.Y. Family Ct. Act § 1051(c)* (1983) (allowing the court to dismiss a proven neglect petition if it determines that its "aid is not required . . .").

also require decision-makers to determine whether the parents' emotional condition has improved or whether the factors that led to the parents' past behavior have been nullified.

### XIII. THE FOSTER CARE DECISION

In essence, there are two levels of child protective intervention. The first is the involuntary supervision of the home situation and the provision of treatment services. The second is the removal of the child from the home and the placement of the child in foster care. Approximately 300,000 abused and neglected children are in foster care, at an annual cost of almost \$10,000 for each child or a total of \$3 billion a year.<sup>175</sup>

At the present time, there are no legal standards governing the foster care decision. Juvenile court acts, for example, give judges unrestricted dispositional authority.<sup>176</sup> Once initial court jurisdiction is established, they set no limits—and hence provide no guidance—on which situations require foster care, and which do not. Consequently, “decision-making is left to the ad hoc analysis of social workers and judges.”<sup>177</sup> The absence of standards cuts both ways. Many children who need immediate protection are not placed in foster care, and many other children are taken away from their parents even though there is no pressing need to do so.

The approach to legal standards proposed in this article provides a simple and practical basis for designing standards to determine whether a child should be placed in foster care. As described above, all forms of “seriously harmful behavior” can be divided between those that are “immediately harmful” and those that are “cumulatively harmful.” Legal standards governing the foster care decision should reflect this distinction. Children whose parents have engaged in “immediately harmful behavior” continue to face an imminent threat of serious injury. Unless their safety can be assured by some other means, they should be placed in protective custody quickly—and kept there until the home situation is safe (or parental rights are permanently terminated).

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175. See *National Study of Social Services to Children and Their Families*, *supra* n. 80, at 109. See generally *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearings Before the Subcommittee on the Public Assistance of the Senate Committee on Finance*, 96th Cong., 1st Sess. (1979).

176. See, e.g., N.Y. Family Ct. Act § 1052 (1983).

177. Wald, *supra* n. 128, at 1001-02 (footnotes omitted).

Child protective laws should establish a rebuttable presumption that children whose parents have engaged in "immediately harmful behavior" require foster care. This presumption would be rebutted only by specific evidence that the parents' emotional condition has improved sufficiently or that other services short of removal can adequately protect the child.<sup>178</sup> Furthermore, if, during treatment, the parent again engages in "immediately harmful behavior" toward the child, the presumptive need for foster care would be revived.

On the other hand, children whose parents have engaged in "cumulatively harmful behavior" do not need foster care on an emergency basis. The danger they face, though great, derives from the long term (and cumulative) consequences of the adequate care they are receiving. Regardless of how upsetting their present situation seems to be, they have endured within it for some time already, and there is much more time to help the parents to care adequately for the child without removing him from the home. (Children in "cumulatively harmful" situations require emergency foster care only when: (1) the parents may flee the jurisdiction taking the child with them, or (2) the child's condition has deteriorated so much that irreparable injury is imminent.)

Moreover, even if treatment efforts are unsuccessful, in "cumulatively harmful" situations, the need for foster care often can be obviated through in-home, child-oriented services that "compensate" for parental deficiencies. ("Compensatory" services include infant stimulation programs, Head Start, therapeutic day care, homemaker care, early childhood or child development programs, nutritional services and youth counseling programs.)

According to data from the American Humane Association, as many as 50% of the children in foster care are removed from cumulatively harmful situations.<sup>179</sup> Many children are placed in foster care because their parents have inflicted unreasonable corporal punishment, for example. But in most of these cases, the punishment posed no danger serious physical injury to the child, and there is no evidence that it would have grown into

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178. See Helfer and Kempe, *The Child's Need for Early Recognition, Immediate Care and Protection*, in *HELPING THE BATTERED CHILD AND HIS FAMILY* 10 (C. Kempe & R. Helfer eds. 1972).

179. See *supra* n. 64 and accompanying text.

severe beatings. The harmfulness of such punishments stems from the long term effect of assaultive behavior on the child's developing personality.<sup>180</sup> Similarly, many children are placed in foster care because of the low quality of physical care they receive. Often, though, the physical conditions, though poor, pose no real physical threat to the child. The physical conditions are used as a proxy indicator for the parents' general inability to meet the emotional needs of the child. Sometimes consciously, but usually not, the system concludes that, since the parents are unable to maintain the household, they can hardly be able to meet the child's emotional needs. This conclusion may or may not be valid. The point is that the danger to the child, if there is any, does not constitute an immediate threat.

In part, this failure to recognize that the harm to the child is cumulative in nature stems from the system's unwillingness to admit that the reason for intervention in most cumulatively harmful situations is emotional harm to the child. Emotional maltreatment is seen as vague and amorphous concept, upon which coercive intervention should not be based. Putting aside the merits of this concern, repressing the real reason for intervention makes sound decision-making unlikely. For, when parental functioning fails to improve, as it so often does, the system overreacts, concluding that placement is needed to safeguard the child's health and well-being. Ironically, placing the child to safeguard his health often leads to greater emotional harm, as the child is taken out of the family environment. If standards compelled decision-makers to recognize the absence of immediate danger to the child, they would be more willing to forestall foster care while additional treatment efforts were made with the parents—or while compensatory services were provided to the child.

Child protective laws should prohibit even the non-emergency removal of children from a cumulatively harmful situation unless: (1) the parents refuse to accept or cooperate with efforts to provide needed compensatory services; (2) the child needs specific diagnostic or remedial services that are available only through residential care; (3) the foster care is used in response to an otherwise irreconcilable conflict between the parent and an adolescent child; or (4) the foster care is a planned

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180. See J. GOLDSTEIN, A. FREUD AND A. SOLNIT, *supra* n. 88, at 73.



precursor to the termination of parental rights and a subsequent adoption. Even in the last case, foster care still might not be needed, unless there was a realistic danger that the parents might flee with the child before their rights could be terminated.

#### XIV. CONCLUSION

This article has described the simultaneous over- and under-intervention that now characterizes child protective efforts, and it has placed major blame for the system's decision-making problems on the vagueness and overbreadth of existing legal standards for state intervention. It has argued that the vagueness and overbreadth of child abuse laws is not just an accident of poor statutory drafting. Rather, it is a natural consequence of overly ambitious social policies. Existing laws seek to protect all children from possible maltreatment by authorizing unrestricted preventive intervention, an impossible and ultimately counterproductive goal.

Using the criminal law as a model, this article has proposed a new approach to legal standards which, by minimizing unreasonable expectations about what social workers and judges can accomplish, will help relieve the unfair tensions under which they operate, and, at the same time, will help them to make more appropriate decisions. This more realistic approach to what can be accomplished will help ensure that more children who need life-saving protection would receive it while simultaneously reducing the level of unwarranted intervention into private family matters.

Improved legal standards, though, are only a partial solution. They will not change the fact that child protective decisions often must be based on incomplete and misleading information, and that there are many borderline cases. The chance of human error is always present. Large caseloads and poorly trained staff only exacerbate these realities.

This author remembers vividly a child protective case he was involved in some years ago. A little Chinese girl had been found by her Chinese neighbors with her fingers dreadfully infected and her forearms swollen. The neighbors immediately took the child to a hospital for care. The mother, a recent immigrant from Hong Kong, was unknown in the neighborhood of Chinese-Americans who were largely born in the United

States. She spoke a dialect of Chinese for which the court had no interpreter and we were only able to piece together a vague story of her sticking pins into her child's arms, which we took to be some form of dreadful torture. This episode occurred two years before President Nixon's visit to China. It was not until then that this author learned about acupuncture and to this day, he does not know whether that mother was attempting to harm her daughter or not.

No legal standard for state intervention, no matter how precise, could have changed the outcome of that case. For the foreseeable future, the ultimate protection of the rights of parents and of children must rest in the good faith of those professionals who apply definitions of "child abuse" and "child neglect." So, flexibility, open-mindedness, and broad knowledge of different cultures and lifestyles are prerequisites, and constant vigilance is a necessity.

## APPENDIX

## SERIOUSLY HARMFUL PARENTAL BEHAVIORS

*Physical Battering*— physical assaults (such as striking, kicking, biting, throwing, or burning) that caused, or could have caused, serious physical injury to the child;

*Physical Endangerment*— reckless behavior toward a child (such as leaving a young child alone or placing a child in a hazardous environment) that caused, or could have caused, serious physical injury;

*Physical Neglect*— failure to provide the food, clothing, hygiene, or other needed care that caused, or over time would cause, serious physical injury, sickness or disability;

*Medical Neglect*— failure to provide the medical, dental or psychiatric care needed to prevent or treat serious physical or emotional injury, illness or disability;

*Sexual Abuse*— vaginal, anal or oral intercourse; vaginal or anal penetrations; or other serious forms of inappropriate sexual contacts that caused, or over time would cause, serious emotional injury.

*Sexual Exploitation*— use of a child in prostitution, pornography, or other sexually exploitative activities that caused, or over time would cause, serious emotional injury;

*Emotional Abuse*— physical or emotional assaults (such as torture and close confinement) that caused, or could have caused, serious emotional injury;

*Developmental Neglect*— failure to provide needed emotional nurturing and physical or cognitive stimulation that caused, or over time would cause, serious developmental problems;

*Improper Ethical Supervision*— parental behavior that contributes to the delinquency of the child;

*Educational Neglect*— failure to send a child to school in accordance with the state's educational law;

*Abandonment*— leaving a child alone or in the care of another under circumstances that demonstrate and intentional abdication of parental responsibility.

