

# The Misuse of Foster Care: When the Desire to Help Children Outruns the Ability to Improve Parental Functioning

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In the past twenty years, there has been an enormous expansion of programs to protect abused and neglected children. In 1984, more than 1.5 million children were reported to the authorities as suspected victims of child abuse and neglect. This is about ten times the estimated 150,000 children reported in 1963. Specialized *child protective agencies* have been established in all major population centers.<sup>1</sup>

Although efforts to prevent and treat child maltreatment face severe problems,<sup>2</sup> some of which are discussed below, one cannot review the present status of child protective programs without being impressed by the steady increase in their scope and quality. 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, for example, within five years of the passage of a comprehensive reporting law which also mandated the creation of specialized investigative staffs, there was a 50

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1. See generally Besharov, " 'Doing Something' About Child Abuse: The Need to Narrow the Grounds for State Intervention," 8 HARV. J. OF L. AND PUB. POL. 540, 542-50 (1985). However, this comparison does not reflect the constant increase in the proportion of "unfounded" reports, a separate problem beyond the scope of this paper. *Id.* at 554-57.

2. See generally Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 17 FAMILY L.Q. 165 (1983).

percent reduction in child fatalities, from about two hundred a year to fewer than one hundred.<sup>3</sup>

### The Gap in Child Abuse Services

A major gap, however, exists in this otherwise promising picture. Except for a handful of unusual and richly funded projects,<sup>4</sup> all of the programs that have been so far established provide only short-term, unsophisticated treatment services. (Chart 1 lists the major services offered through child protective agencies.) By definition, these services can be successful only with parents who are already motivated to accept help, or who can easily be encouraged to do so. They do not work with those parents, estimated to be about 40 percent of substantiated cases, who have serious and deeply ingrained personality disturbances. Many neglectful mothers, for example, fit into the *apathy-futility syndrome*, a term coined by Norman A. Polansky, Regent's Professor of Social Work at the University of Georgia. Polansky describes them as "passive, withdrawn, lacking in expression. Upon being interviewed, they showed many schizoid features, resembling in this way a number of patients from more fortunate economic backgrounds with whom we were familiar in private psychiatric hospitals."<sup>5</sup>

**Chart 1**  
**Services Provided Through Child Protective Agencies<sup>6</sup>**

SERVICE	PERCENT OF FAMILIES*
Casework counseling .....	83.0
Homemaker services .....	4.3
Day care services .....	5.8
Foster care .....	11.8
Shelter care .....	8.8
Health services .....	27.0
Juvenile/Family court petition .....	14.4
Criminal action taken .....	4.5
No action taken .....	14.8
Other protective services .....	12.8

\*Multiple responses exist for most families.

3. N.Y.S. DEPARTMENT OF SOCIAL SERVICES, CHILD PROTECTIVE SERVICES IN NEW YORK STATE: 1979 ANNUAL REPORT, Table 8 (1980).

4. The most well established is the residential, Mother-Child Program at the New York Foundling Hospital. See V. FONTANA & D. BESHAROV, THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN 50-51 (1977).

5. N. POLANSKY, M. CHALMERS, E. BUTTENWIESER, & D. WILLIAMS, DAMAGED MOTHERS: AN ANATOMY OF CHILD NEGLECT 39 (1981).

6. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD ABUSE AND NEGLECT REPORTING (1978), p. 36, Table 28 (DHEW 1979). This is the last year for which reliable data are available.

If they are to be reached at all, these “hard core parents,” as child protective workers tend to call them, require intense, sustained, and skilled casework. According to Kaufman, caseworkers often must serve as an “auxiliary ego,” to help these parents “develop modes of functioning which accommodate the impulses of the client, reality demands and community standards.”<sup>7</sup> Based on the clinical experience of programs such as the Bowen Center in Chicago, successful treatment of such parents requires weekly casework home visits for long periods of time—usually for years—coupled with an array of sophisticated and expensive supportive services.<sup>8</sup> Even then, success is mixed, at best. The evaluation of the first round of child abuse demonstration projects found that, to achieve even a minimal reduction in re-incidence, parents must be “in treatment for at least six months” and must be seen “on a weekly basis at least during the first six months of treatment.”<sup>9</sup>

This kind of intensive treatment for parents is simply not available. Child protective agencies cannot provide it, because staff expansions, although substantial, have not kept up with the rapid increase in reported cases. Moreover, few caseworkers have any real training that prepares them for their jobs; many states do not require them to have a college degree, let alone training in social work. With more cases than they can handle, caseworkers do not have enough time to give individual cases the amount of attention they require, as workers must abandon pending cases to investigate the new reports that daily arrive on their desks. Unless the child is placed in foster care, the average family receives approximately six home visits over a six-month period, after which the case is referred to a community social services agency, closed, or ignored in the press of other business.<sup>10</sup> These sporadic home visits are made by inadequately skilled workers under conditions that no knowledgeable observer seriously believes can make a meaningful difference in the functioning of deeply disturbed parents.

Community agencies, such as mental health clinics and family service agencies, also cannot provide the needed treatment services. Some agencies are willing to provide counseling and family support treatment to maltreating parents, but, without additional funding, they do not have the capacity to monitor parental participation and to follow-up when parents drop out of treatment.

There is even less for children. Few child protective programs make

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7. Kaufman, *Psychology Aims of Protective Workers*, in *EGO-ORIENTED CASEWORK* 205 (H. Parad & R. Miller eds., 1963).

8. M. SULLIVAN, M. SPASSER, & G. L. PENNER, *BOWEN CENTER PROJECT FOR ABUSED AND NEGLECTED CHILDREN* (DHEW 1977).

9. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *EVALUATION OF CHILD ABUSE AND NEGLECT DEMONSTRATION PROJECTS, 1974-1977*, Vols. I and II, 123 (1978).

10. See, e.g., Mayberry, *Child Protective Services in New York City: An Analysis of Case Management* 46-47 (Welfare Research, Inc., Albany, New York, draft dated May, 1979).

any effort to meet the maltreated child's heightened need for compensatory emotional nurturance and cognitive stimulation. As Chart 1 indicates, less than 6 percent of all substantiated cases receive a referral to day care or Head Start. The extent to which *child* protective agencies, even with relatively unlimited funds, ignore the basic emotional needs of maltreated children was documented by the evaluation of the first round of demonstration child abuse projects supported by the federal government. It found that 90 percent of the parents received psychological assessments and 50 percent received special treatment. In the very same programs, though, less than 10 percent of the maltreated children received developmental assessments, and less than 1 percent of the children received any treatment to remediate the effects of past maltreatment.<sup>11</sup>

Furthermore, the children's services that are provided are usually viewed as a supportive service for parents (to give them a respite from the stresses of child care) rather than as a treatment service for children. Foster care, it turns out, is the major treatment service for maltreated children, but it is not suited for this role and, in fact, can often aggravate the child's problems, as described in the next section.

Child protective specialists have called for increased funding to fill this gap in services. They call for more supportive services, such as financial assistance, day care, crisis nurseries, and homemaker care, to relieve the pressures and frustrations of parenthood. They call for more parent education services, such as infant stimulation programs and parent aids, to give parents specific guidance, role models, and support for child rearing. And they call for more individual, group, and family counseling and mental health services to ease personal and marital problems.<sup>12</sup>

Past expansions of child protective programs were able to rely on the relative availability of supplementary funds through Title XX of the Social Security Act. During the period of greatest expansion, most states had not yet reached the ceiling in their Title XX allotments, the major federal social service funding program, and thus were able to obtain 75 percent federal reimbursement for any increases in their child protective staffs.<sup>13</sup> As a result, federal expenditures for child protective services rose from a few million dollars a year in 1960 to over \$325 million in 1980.<sup>14</sup>

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11. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *supra* note 9.

12. *See generally* U.S. GENERAL ACCOUNTING OFFICE, INCREASED FEDERAL EFFORTS NEEDED TO BETTER IDENTIFY, TREAT AND PREVENT CHILD ABUSE AND NEGLECT, ch. 3 (1980); U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, ANNUAL ANALYSIS OF CHILD ABUSE AND NEGLECT PROGRAMS (DHHS 1980).

13. *See, e.g.*, BENTON, FIELD & MILLER, SOCIAL SERVICES: FEDERAL LEGISLATION VS. STATE IMPLEMENTATION 72 (The Urban Institute, Washington, D.C., 1978), 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 services category."

14. 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).

Now, at all levels of government, social service programs are being cut back rather than being increased. Funding treatment services in the quantity and quality needed would be enormously expensive, and far beyond anything remotely possible in the present fiscal atmosphere. Consider only the costs associated with supervisory home visits. Increasing the number of home visits for the 300,000 families needing them from the present six to the needed forty a year (at an average cost of \$50 for each visit) would add about half a billion dollars to the nation's bill for child protective services. As one adds the costs for enriched counseling and psychiatric/psychosocial services, the additional investment in treatment services would easily exceed a billion dollars. No level of government is seriously considering this kind of increased spending.

Even if such enormous amounts of new money were somehow forthcoming, there is no assurance that they would substantially raise treatment capabilities. Demonstration treatment projects have been able to prevent the reincidence of abuse or neglect in only about 50 percent of all cases, even when the parents have received intensive services.<sup>15</sup> Carefully conducted studies of other treatment programs report similar disappointing results.<sup>16</sup> The plain fact is that almost half of all maltreating parents are beyond the reach of existing treatment technology.

Up to now treatment for parents has been viewed as the only real response to child maltreatment. When treatment fails to improve parental functioning, as it inevitably must in so many cases, judges and social workers throw up their hands in despair and let the case fade away, not realizing that they could still aid the child. Or, if the situation appears "bad enough,"<sup>17</sup> they place the child in foster care, not realizing that they may be doing more harm than good—and that there is a better alternative.

### The Mixed Quality of Foster Care

Because of the realities described above, there are actually only two forms of child protective intervention: (1) brief periods of home counseling by inadequately skilled caseworkers, and (2) foster care. If the child's home situation is bad enough, the child is removed from the home and placed in foster care. Less than 20 percent of all substantiated cases result in the child's placement in foster care.<sup>18</sup> But this is 20 percent of the

15. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *supra* note 9.

16. See, e.g., Herrenkohl, Seech & Egolf, *The Repetition of Child Abuse: How Frequently Does It Occur?* 3 CHILD ABUSE AND NEGLECT 67-72; Magura, *Are Services to Prevent Foster Care Effective?* 3 CHILDREN AND YOUTH SERVICES REV. 193-212 (1981).

17. This ambiguous and nontechnical phrase is used deliberately to indicate the absence of standards for this crucial decision, as described in the next section.

18. See Chart 1, *supra*, in which "foster care" and "shelter care" are essentially the same service, one long-term and the other short-term.

approximately 400,000 substantiated reports now made each year. Thus, the expansion of child protective efforts has led to a concomitant 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 because of abuse or neglect.<sup>19</sup> In 1980, more than 300,000 children were placed in foster care for these reasons.<sup>20</sup>

Despite recent media publicity about the abuse and neglect of foster children, the vast majority receive substantially better physical care while away from their parents. Stanford law professor Michael Wald reports on his ten-year study of children in foster care:

It appears clear that removal lowers the chances of reabuse or neglect. Although some children are, in fact, injured by foster parents, the rate or reported abuse by foster parents is lower than that of the general population and far lower than the rate of reabuse by those who have once abused a child. Foster parents are less likely to neglect children's physical needs. For the most part, foster parents do not leave children unattended; they virtually always provide adequate food or shelter; they send foster children to school; their households tend to be stable and their care of the child regular.<sup>21</sup>

If foster care is judged solely by its ability to protect children from physical harm, it is undeniably successful.

Moreover, the available research indicates that foster care meets the emotional needs of many children. Many maltreated children do very well in foster care. Wald summarizes the most important research on the subject as follows:

First, several studies of large numbers of adults who grew up in a foster home found no evidence of greater criminality, mental illness, or marital failure than in the general population (Theis 1924; Meier 1965). In a more recent study Festinger (1983) interviewed 277 adults who had spent a substantial period of time in foster care in New York City and had been living with foster families or in group homes when they reached their eighteenth birthday. The majority of participants reported quite favorable views of their foster homes. Festinger concluded that "overall, (the former foster children) were not so different from others their age in what they were doing, in the feelings they expressed, and in their hopes for the future" (p. 294). Other studies have found that children in foster care do not have especially low self-esteem or poor self-concept (Seligman 1979; Lemmon 1975), nor do they have especially high rates of delinquency (Runyan 1985).

Moreover, several recent studies indicate that the impact of foster care may be positive, at least for some children. Kent (1976) reviewed case records of over 500 neglected and abused children who were under court

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19. Author's estimate, based on the U.S. CHILDREN'S BUREAU, JUVENILE COURT STATISTICS 13 (DHEW 1966).

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

21. M. WALD, PROTECTING ABUSED/NEGLECTED CHILDREN: A COMPARISON OF HOME AND FOSTER PLACEMENT 9 (Stanford University Center for the Study of Youth Development 1985).

supervision in Los Angeles. The cases were chosen so as to have an equal proportion of physically abused, sexually abused, and "grossly" neglected children. Using information found in the case records (a significant methodological problem), Kent found that a substantial number of children who had been in foster care at least a year were rated by their social workers as being better off, in terms of physical health and social adjustment, than at the time they entered foster care. Similar results, again using case records, were found by Palmer (1979) with respect to a decrease in "behavior problems" exhibited by foster children from the time of placement until discharge. Leitenberg *et al.* (1981) compared the school attendance and the police contacts of 187 neglected and "unmanageable" children, aged 11–16, some of whom were in their own homes, some in foster homes, some in group homes, and some in a state "reform" school. The children in the foster homes exhibited the lowest level of problem behaviors. There is even evidence that children who remain in foster care exhibit fewer problems than children returned to their biological parents (Fanshel and Shinn 1978; Zimmerman 1982) and that some children prefer foster care over return to their parents. One study of 70 children, aged 12–15, found that 47% preferred foster care while 44% wanted to return home (Lemmon 1975). Bush (1980) found that children in foster care described themselves as generally more satisfied than did a group of children at home who had been in foster care for a period of time.

The most important research is the longitudinal study done by David Fanshel and his colleagues at Columbia University (Fanshel and Shinn, 1978). They assessed the development, over a five year period, of 500 children, ages 6 months to thirteen years, placed in foster care in New York City in 1966. The children were placed for a variety of reasons, with approximately thirteen percent officially categorized as abused or neglected. Although their findings are complex, making it difficult to draw any generalizations, careful analysis of their data indicates that the well-being of the majority of the children improved in terms of physical development, IQ, and school performance after a six month period in foster care. Most children maintained improvement in these areas throughout the five years. The children did not seem to have "identity" problems, nor did most show evidence of serious emotional or behavioral problems associated with the fact of placement. Moreover, the positive findings applied to children who experienced multiple placements as well as those in a single placement. There were, however, significant differences depending on the age at which the child entered care. Younger children adjusted better, especially if they had stable placements.<sup>22</sup>

There is a dark side of foster care, however, as suggested by the last line in the foregoing quotation. The research described above tends to gauge the quality of foster care across all children who are placed. Research shows positive results in foster care because, for many children, foster care is an extremely beneficial experience. But for a large subset (generally children who cannot be quickly returned home or freed for adoption), foster care is very harmful.

In theory, foster care is supposed to be a short-term remedy designed

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22. Wald, *supra* note 21, at 12–13 (full references can be found in the original document).

to protect children from harm while parents have time to respond to treatment. However, because existing treatment programs are usually unable to break deep-seated patterns of child abuse and neglect,<sup>23</sup> the reality is far different. More than 50 percent of the children in foster care are in this "temporary" status for over six years; over 30 percent are away from their parents for over six years.<sup>24</sup> As the U.S. Supreme Court recognized, these children are often lost in the "limbo" of the foster care system.<sup>25</sup>

Although recent efforts to reduce the number of children in foster care limbo through periodic reviews and permanent planning show great promise, even the most extensive and well-funded efforts have resulted in only a 20 percent reduction, and this is largely accounted for by more frequent terminations of parental rights.<sup>26</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>27</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 already weak family fabric that the parents have no chance of being able to cope with children when they are 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 through a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need.<sup>28</sup> A study of foster children in Jackson County, Missouri (which includes Kansas City), found that 29 percent had been in four *or more* homes in less than five years.<sup>29</sup> Increasingly, many graduates of the foster care system evidence such severe emotional and behavioral problems that some thoughtful observers believe that foster care is often more harmful than the original home environment.<sup>30</sup> These realities led Marion Wright Edelman, President of the Children's Defense Fund, to call the conditions of foster care a "national disgrace."<sup>31</sup>

23. See Besharov, *supra* note 2, at 165.

24. NATIONAL STUDY OF SOCIAL SERVICES, *supra* note 20, at 120.

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

26. Lahti, *et al.*, *A Follow-Up Study of the Oregon Project: A Summary* 3, Table 1 (Regional Institute for Human Services, School of Social Work, Portland State University, 1978).

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

28. See, e.g., NATIONAL STUDY OF SOCIAL SERVICES, *supra* note 20, at 117-18, Table 5-4.

29. Mushlin, Levitt & Anderson, *Court-Ordered Foster Family Care Reform: A Case Study*, 65 CHILD WELFARE 141, 146 (March-April 1986); see also WALD, *supra* note 21, at 11.

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

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



The foregoing description of the harmful effects of foster care was not precise in identifying the number of children harmed by foster care, and, instead, used words like *large*, *often*, and *many*. This was not inadvertent. A host of methodological limitations<sup>32</sup> prevent researchers from being more specific and, even, from identifying the factors that lead foster care to be harmful to many children. But, if taken together with other evidence about child maltreatment and child protective decision making, this research provides sufficient information to identify the types of situations in which foster care causes more harm than leaving the child at home and, thus, to identify the situations in which foster care is “mis-used.”

### The Misuse of Foster Care

Foster care is the only action that can protect some children from serious injury, and even death. In fact, child protective agencies have been successfully sued for damages when a child was killed by parents after the agency failed to remove the child.<sup>33</sup>

Therefore, if foster care were used solely to protect children from physical harm, we would have to balance the apparently unavoidable emotional harms suffered by some foster children against the possibility of future physical injury at home. We might well decide that protecting children from serious physical harm is worth the risk. But foster care is also used to protect children from *emotional* harm, and this drastically alters the public policy calculus.

News stories regularly remind us that there are upwards of a million maltreated children (including those that are not reported). This is a reasonably accurate estimate, but the word *maltreatment* encompasses much more than the brutally battered, sexually abused, or starved and sickly children that come to mind when we think of child abuse. In 1979 and 1980, the federal government conducted a National Study of the Incidence and Severity of Child Abuse and Neglect. According to this congressionally mandated study, which collected data for twelve months from a representative sample of twenty-six counties in ten states, only about 30 percent of these maltreated children are physically abused, and only about 10 percent of these children (3 percent of the total) suffer an injury severe enough to require professional care. (Each year, about one thousand children die in circumstances suggestive of child maltreatment.) About 7 percent are sexually abused (probably a low figure) and about 20

32. WALD, *supra* note 21, at 13–17, describes the problems caused by “lack of comparable children,” “mixing populations,” the absence of a “prospective longitudinal design,” and “inadequate measures.”

33. See D. BESHAROV, *THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND FAMILIES*, esp. ch. 3 (1985).

percent are emotionally abused, mainly "habitual scapegoating, belittling and rejecting behavior."<sup>34</sup>

Almost 50 percent of these maltreated children are neglected, a term that includes educational neglect (27 percent of the total); emotional neglect, i.e., "inadequate nurturance" and "permitted maladaptive behavior" (9 percent of the total); failure to provide needed medical care (8.5 percent); abandonment and other refusals of custody (4 percent of the total); and failure to provide food, clothing and hygiene (3 percent of the total). While some forms of child neglect can be just as harmful as physical abuse (more children die of neglect than from abuse), the plain fact is that the vast majority of these children face no real danger of physical injury. In fact, about 55 percent of these neglected children live in single-parent households and are on public assistance. (The comparable figure for abused children is about 35 percent.) Their maltreatment is largely related to their family's poverty and broader social needs. Protecting these children means lifting them from the grinding poverty within which they live.

Extreme cases of parental brutality and neglect make society eager to take prompt and decisive action against child maltreatment. But this emotionally charged desire to protect innocent children obscures the fact that, as the foregoing describes, many forms of maltreatment—and the majority of cases in the system—pose no *immediate* danger of serious or irreparable harm to the child. Rather, the danger they pose, though great, is based on the long-term, *cumulative* effects of inadequate care.<sup>35</sup> For example, children whose parents withhold all food are in imminent danger of death; they need immediate protection. But with few exceptions (for example, infants), children who are given chronically deficient diets are not in immediate danger. The harm caused by poor nutrition is cumulative; it builds as time passes. Certainly, at some point the harm becomes serious and irremediable; and, although these situations, too, need protective state intervention, with few exceptions, emergency action is not necessary.<sup>36</sup>

Recognizing this distinction reveals how foster care is often misused. According to the data collected for the federal government by the American Humane Association, it appears that up to one-half of the children placed in foster care were in no immediate danger of serious physical

34. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT, esp. p. 18 *et seq.* and Table 4-1 (DHHS 1981) [hereinafter INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT].

35. The difference between "immediately" and "cumulatively" harmful situations is not the same as the difference between acute and chronic situations. An acute danger is one that can create an immediate harm, while a cumulative danger is one in which the harm grows as time goes on. A chronic danger is a danger that comes and goes; it can cause either an immediate or a cumulative harm, or both.

36. A fuller presentation of this argument is found in Besharov, *supra* note 1, at 579 *et seq.*

injury.<sup>37</sup> Researchers studying hospital records of 184 maltreated children at the Boston Children's Hospital found similar evidence concerning the decisions of medical personnel to hospitalize maltreated children; they concluded that "children with non-physical injuries are more likely to be removed."<sup>38</sup> In each case, these children are removed from their parents to protect them from cumulative harm (usually because of emotional or developmental neglect).

Many of these children were placed in foster care because their parents have inflicted unreasonable corporal punishment, for example. But in most cases, the punishment posed no danger of serious physical injury to the child, and there is no evidence that it would have grown into severe beatings.<sup>39</sup> The harmfulness of such punishments stems from the long-term effect of assaultive behavior on the child's developing personality.<sup>40</sup>

Even more of these children were placed in foster care because of the low quality of physical care they receive. Usually, though, the poor care posed no real physical threat to the child; the quality of physical care was actually being used as a proxy indicator of the parents' general inability to meet the child's developmental needs. 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 so many cases is emotional danger to the child. Emotional maltreatment is seen as a 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 the

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37. Author's estimate, based on the U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF CHILD NEGLECT AND ABUSE REPORTING: 1979-80, Table 17 (DHHS 1979).

38. Katz, Hampton, Newberger, Bowles & Snyder, *Returning Children Home: Clinical Decision Making in Cases of Child Abuse and Neglect*, 56(2) AMER. J. ORTHOPSYCHIAT. 253, 260 (1986). They suggested three explanations: "One explanation for this result is that non-physical injuries, which include failure-to-thrive and neglect, may be perceived by clinicians as evidence of chronic family problems rather than as a single mishap. Second, the decision to admit a child who does not have a physical injury (and therefore has more limited treatment possibilities) may itself indicate consideration of removal. A third possibility is that clinicians on the surgical services (which see the majority of children with physical injuries) are more likely to send children home after treatment than are clinicians on the medical services (which see the majority of non-physical injuries)."

39. According to data collected for the National Incidence Study, fewer than one in five minor assaults or other examples of poor child care presage anything resembling child abuse or neglect, let alone serious injury. INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT, *supra* note 34, at 18, Table 4-1.

40. See GOLDSTEIN, FREUD & SOLNIT, *supra* note 30, at 73.

appropriate use of foster care unlikely. For, when parental functioning fails to improve, decision makers overreact, concluding that placement is needed to safeguard the child's health and well-being.

Few children living in *cumulatively harmful* situations require foster care on an emergency basis.<sup>41</sup> The danger they face, though great, derives from the long-term (and cumulative) consequences of the inadequate care they are receiving. Regardless of how upsetting their present situation seems to be, they have endured within it for some time already, and it is not necessary to remove them from home in order to help their parents to care adequately for them.

If decision makers recognized 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. For, even when treatment efforts do not succeed in raising the level of parental functioning, the need for foster care often can be obviated through in-home, child-oriented services that compensate for parental deficiencies.<sup>42</sup> *Compensatory services* include *quality* infant stimulation programs, Head Start, therapeutic day care, homemaker care, early childhood or child development programs, nutritional services and youth counseling programs. The failure to use these alternatives to foster care illustrates the telling gap between the fields of child protection and child development.<sup>43</sup>

Despite its formidable risks, foster care is sometimes defended on the ground that it facilitates the parent's treatment. The child's absence from the home is said to provide immediate relief for parents so that, with the help of treatment services, they can concentrate on reordering their lives. This argument is as therapeutically shortsighted as it is harmful to children. For parents, removing the child is also a psychologically jarring experience which often damages their self image and reduces their bond of affection and dedication to the child. In addition, many forms of maltreatment are interactional, that is, they stem from a dysfunction in how the parent and child relate to each other.<sup>44</sup> Except in the most unusual circumstances, separation does not aid in the resolution of such problems.

Moreover, treatment services for the parents of children in foster care are largely nonexistent. In fact, the child's placement usually results in a reduction in the level of services parents receive. For example, the parent's public assistance grant will be reduced by the amount attribut-

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41. The conditions requiring emergency foster care are enumerated at p. 228.

42. See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *EARLY CHILDHOOD PROGRAMS AND THE PREVENTION AND TREATMENT OF CHILD ABUSE AND NEGLECT* (DHEW 1979).

43. See the accompanying text at *supra* note 11.

44. A. KADUSHIN & J. A. MARTIN, *CHILD ABUSE: AN INTERACTIONAL EVENT* (1981).

able to the child, often requiring the parent to move into a smaller, less attractive apartment—from which she will have to move again (to a larger apartment) before she can regain custody of the child. In today's housing market, this is no easy task. In addition, food stamps, homemaker services, and even the intermittent caseworker visits may be suspended during the time the child is in foster care. Only parents who wish to be relieved of the obligations of parenthood gain anything from their child's placement.

Ironically, children removed from cumulatively harmful situations are the ones most likely to be trapped in foster care limbo. They are placed in foster care because of the chronically poor care they received at home. Since parents who are unable to meet their children's basic needs often have the most intractable emotional problems,<sup>45</sup> an improvement in parental functioning is unlikely, thus foreclosing the child's return home. After all, the condition that required the foster care still exists. On the other hand, the termination of parental rights is similarly unlikely. Since the damage to the child is cumulative in nature, there is no specific or particularly outrageous incident, such as a brutal beating, upon which to base a decision to terminate parental rights; nor have the parents evidenced an unequivocal unwillingness or clear inability to care for the child.<sup>46</sup> As a result, these children are trapped in a vicious cycle. Their parents cannot adequately care for them, existing services do not improve parental functioning, they cannot be returned home, and they cannot be placed for adoption. Through it all, the children suffer an inevitably and increasingly harmful foster care experience.<sup>47</sup>

Children in *immediately harmful* situations often must be placed in foster care to protect their physical safety, even if this means putting them at risk of psychological harm. But for most of the children in cumulatively harmful situations, if the choice is between foster care and doing nothing, then they—and society—would be better off if nothing is done. Through some sort of tunnel vision, the system sees the physical improvement of the child's living conditions while in foster care as proof that the child is better off away from his parents. This ignores the often devastating effects of long-term foster care limbo on the child's emotional well-being. As Goldstein, Freud, and Solnit have written: "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>48</sup> In such circumstances, foster

45. See generally POLANSKY, *et al.*, *supra* note 5.

46. Cf. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel after Lassiter v. North Carolina*, 15 FAMILY L.Q. 205, 217-18 (1981).

47. Termination is made more difficult because cases of cumulative harm usually involve emotional or developmental harm to the child, and most workers and judges are unwilling to sever the parent/child bond on this amorphous ground.

48. GOLDSTEIN, FREUD & SOLNIT, *supra* note 30, at 13.

care ceases to be a necessary evil and becomes an unnecessary and unwarranted one.<sup>49</sup>

### Reorienting Child Protective Dispositions

Although more research would be helpful, it appears reasonable to conclude that the provision of compensatory services, especially quality preschool education, would help prevent some number of maltreated children from becoming delinquent. The key to their receiving preschool services is the juvenile court. The court must be made aware of the potential importance of quality preschool programs in the lives of maltreated children and it must be encouraged to consider them a viable alternative to foster care. Hence, this paper's title.

Only "as a last resort" do child protective agencies initiate formal court action (to impose treatment on parents or to remove a child from home).<sup>50</sup> Nationwide, less than 15 percent of all substantiated cases end up in juvenile court.<sup>51</sup> Less than one-half, and in some places less than one-quarter, of these proceedings result in court-ordered foster care. Most children in foster care are there because their parents voluntarily consented to their placement.<sup>52</sup>

Nevertheless, the juvenile court's dispositional orientation shapes the entire system's. Child protective agencies quickly sense what dispositions the court will make, and they conform their own decision making accordingly. Moreover, in most states, all voluntary placements must be approved by the court within a specified period (usually thirty days) and all continued placements are subject to periodic court review.<sup>53</sup>

At the present time, juvenile court laws set no standards governing foster care decisions—beyond the conclusory "best interests of the child." As a result, judges have almost unfettered dispositional authority.<sup>54</sup> Once initial court jurisdiction is established, existing laws set no limits—and, hence, provide no guidance—about which situations

49. This paper has carefully avoided arguing the unconstitutionality of foster care for "cumulatively harmful" situations where the placement does more harm than good. Nevertheless, since parents have been held to have a "fundamental interest" in their children which can be abrogated only upon compelling need, the issue is likely to arise. *See Santosky v. Kramer*, 455 U.S. 745 (1982).

50. *See Besharov, Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. OF FAM. L. 217, 227-29 (1981-1982).

51. *See Chart 1, supra*.

52. However, many parents consent to their child's placement only after being told that their refusal to do so may result in court action to compel placement. BESHAROV, *supra* note 33, at 93.

53. *See generally* FOSTER CHILDREN IN THE COURTS, esp. ch. 5 (M. Hardin, ed., 1983).

54. *See, e.g.,* N.Y. Fam. Ct. Act § 1052 (1983). *See generally* D. BESHAROV, JUVENILE JUSTICE ADVOCACY ch. 12 (1974).

require foster care and which do not. Consequently, "decision-making is left to the ad hoc analysis of social workers and judges."<sup>55</sup>

The absence of standards cuts both ways. As described above, many children are taken away from their parents when there is no apparent need to do so. But, at the same time, many others who need immediate protection are not placed in foster care.

Inconsistent as it may seem, given the broadscale misuse of foster care, child protective workers and judges are deeply conscious of the hazards of foster care. Hence, they hesitate to use it except in the most extreme cases. Unfortunately, they gauge the need for foster care by the perceived degree of the parent's emotional problems rather than on the immediacy of harm to the child. In doing so, they systematically under-react to past parental behaviors which, although they caused only "mild" or "moderate" injuries, signal serious and immediate danger to the child.<sup>56</sup> (When these minor injuries are the result of conduct that could have caused serious injury, they are strong evidence that the parent is likely to again assault the child, this time causing serious injuries.)<sup>57</sup> The result, all too often, is the child's tragic death. Studies in several states have shown that about 25 percent of all child fatalities attributed to abuse or neglect involve children already reported to a child protective agency.<sup>58</sup> Tens of thousands of other children receive serious injuries short of death while under child protective supervision.

To help prevent such failures of protection—as well as to reduce the present misuse of foster care—decision-making standards governing the foster care decision should reflect the distinction between home situations that are *immediately harmful* and those that are *cumulatively harmful*. *Immediately harmful* situations are those in which the parents' behavior 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 injures 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.

*Cumulatively harmful* situations are those in which the parents' behav-

55. Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Standards*, 27 STAN. L. REV. 985, 1001-02 (1975) (footnotes omitted).

56. Of course, some individual judges and caseworkers take the immediacy of harm into account.

57. The criminal law would call such conduct an "attempt" or "reckless endangerment." See Besharov, *supra* note 1, at 579-81.

58. See, e.g., Region VI Resource Center on Child Abuse, *Child Deaths in Texas* 26; Mayberry, *supra* note 10, at 109.

ior 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 conclude that they will eventually.

Immediately harmful situations, *by definition*, require prompt and decisive action to protect the child. 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). Therefore, juvenile court laws should establish a rebuttable presumption that children whose parents have engaged in immediately harmful behavior require foster care. This presumption should 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. Furthermore, if, during treatment, the parent again engages in immediately harmful behavior toward the child, the presumptive need for foster care should be revived.

Cumulatively harmful situations, *by definition*, pose no imminent threat of irreparable harm and rarely require emergency foster care. Juvenile court laws should authorize the emergency removal of children 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, the need for *non-emergency* foster care in cumulatively harmful situations is also limited. The previous section described how foster care often does more harm than good in such situations, and how, in such situations, even when efforts to treat parents fail, the child's well-being can often be better fostered through in-home, child-oriented services that "compensate" for parental deficiencies. There are times, though, when foster care is needed to prevent or remediate serious developmental harm. Therefore, it is not appropriate to establish a blanket prohibition against the removal of children from cumulatively harmful situations.

On the other hand, merely saying that courts should be careful to consider the child's long-term developmental needs would not be sufficient. After all, the law already requires courts to base their dispositional decisions on the child's "best interests." The point must be more forcefully made because of the system's overemphasis on the treatability



of parents. Therefore, juvenile court acts should also establish a rebuttable presumption that, in cumulatively harmful situations, besides treatment for parents, the only authorized disposition is a plan to provide "compensatory," in-home, child-oriented services.<sup>59</sup> This presumption should be rebutted only by evidence that "compensatory" services would not adequately protect the child's well-being, the most common times being when: (1) the parents refuse to accept or cooperate with efforts to provide needed compensatory services;<sup>60</sup> (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 precursor to the termination of parental rights and a subsequent adoption.<sup>61</sup>

Prohibiting easy recourse to foster care for cumulatively harmful forms of maltreatment would reflect the inherent inability of existing treatment programs to improve the functioning of a large proportion of maltreating parents with the overriding need to protect children from serious harm—whether at the hands of their parents or the social service system meant to protect them. This is not meant to suggest that treatment for parents should be abandoned.<sup>62</sup> Far from it. But treatment services for parents should be provided within the context of the system's first responsibility—protecting the safety and long-term development of children. The point is, a more child-oriented<sup>63</sup> approach to treat parents would result in less damage to children than do existing practices, and, in fact, would probably help them.

In addition, this approach might also benefit parents. The system's overemphasis on the treatability of parents often places parents, too, in an impossible situation. The system is structured upon the premise that maltreating parents are emotionally troubled or ill, and that existing treatment services can cure them. Because expectations start so high, when parents fail to respond to the "treatment" that is actually available,

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59. It might appear that such an approach could create a moral hazard problem, with parents maltreating their children in order to obtain services such as day care. However, the stigma of child protective proceedings, and the possibility of a more intrusive intervention, minimize this possibility.

60. Motivating parents to maintain their child's attendance in the program and to be, themselves, involved in the program's activities will be a very real problem.

61. Even in this 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.

62. There is, however, a growing feeling that the movement toward a therapeutic response has gone too far, and that there should be greater resort to criminal prosecution. For an early statement of this position, see McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, AMERICAN CRIMINAL LAW REVIEW 165, 167–68 (1974).

63. This is not inconsistent with a family-oriented response to the problems of maltreatment and delinquency; it merely shifts the central focus of attention. All effective treatment programs for children actively involve parents. See Besharov, *A Proposal to Reorient the Juvenile Court Process*, 7 FAMILY L.Q. 243 (1973).

the system overreacts in the other direction—and (either explicitly or implicitly) labels these parents as “hopeless.” Perhaps some are hopeless, but for most it is more a question of misplaced expectations.

There could be a major social pay-off if child protective decision making was reoriented in the way described above. More children would be provided the emergency protection they need, and many children would avoid the harmful experience of foster care. Furthermore, although the proposed approach would not in itself improve the system’s fundamental inability to treat maltreating parents, it would encourage a greater—and long overdue—focus on meeting the child’s long-term developmental needs.

## Conclusion

For the foreseeable future, the competition for reduced social service funds will be intense. There will be no winners, unless winning means losing less. Programs, like child protective services, that serve the politically powerless are in the greatest jeopardy. So, proposing a major expansion of “compensatory” services for children may seem like whistling into wind.

Foster care, however, is also expensive. Depending on the community, and the child’s need for special care, family foster care costs from \$5,000 to \$15,000 a year, with \$10,000 a general average. Institutional care, involving about 15 percent of the children in placement, costs about \$20,000 a year. Six years of one child’s foster care placement (the national median), costs an average of \$68,000. The placement of each additional child from the same family costs that much more. Nationally, foster care costs states and the federal government almost \$3 billion a year.<sup>64</sup>

Based on American Humane Association’s data cited above,<sup>65</sup> preventing the placement of children from cumulatively harmful situations would reduce foster care rolls by from 30 to 50 percent. This could save as much as \$1 billion.<sup>66</sup>

These funds might well disappear as part of general efforts to reduce government social services expenditures. Nevertheless, it is tantalizing to think that they might somehow be retained within the child welfare system, perhaps through a revolving trust fund. The money saved could be used to fund an expansion of “compensatory” services.

For each child not placed in foster care and, instead, provided, for

64. See NATIONAL STUDY OF SOCIAL SERVICES, *supra* note 20, 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).

65. See the text at *supra* note 37.

66. Given relatively fixed administrative costs, even a 50 percent reduction in foster care rolls would not translate into an equivalent reduction in costs.

example, quality preschool services, there would be about an even trade-off in costs (assuming the period spent in either to be about the same). Child development programs capable of "compensating" for parental inadequacies would be expensive, perhaps as much as \$5,000 per child per year.<sup>67</sup> Although this is about half the cost for family foster care, the substitution of the one for the other would not result in a large net saving of money. A large proportion of children in foster care were on public assistance before their placement; when they are placed, the welfare grant and other cash and noncash benefits to their parents are reduced.

Perhaps all this is wishful thinking. The proposed approach would be a radical departure from current practices. Nevertheless, standards based on the immediacy of harm would be programmatically easy to implement. They do not require additional funds for new service programs; they do not require complicated statutes or agency procedures; and they do not require a leap of faith on the part of policy makers, because they do not depend on the effectiveness of any particular treatment approach or service. Instead, they are based on the present realities of child protective practice.

Moreover, it might be possible to develop wide professional and agency support for the proposed standards. Child protective agencies could support reorienting the system toward meeting the developmental needs of children. Like us all, they would want to do anything that safely reduces the inappropriate use of foster care. Child development professionals, and child advocates generally, could support a concept that seeks to expand the amount of early childhood education programs. It might also be possible to enlist the support of existing child welfare agencies. In the past, these agencies, most of which now provide only foster care services, have felt institutionally threatened by proposals to reform foster care practices and therefore often have lobbied strenuously against them. But they would be well positioned to provide the kinds of compensatory, child development services that could be funded by the money saved by reducing the misuse of foster care.

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67. Head Start costs about \$2,400 per child per year. U.S. Head Start Bureau, "Statistical Fact Sheet," p. 1 (DHHS, Dec. 1985). The Perry Preschool Program costs about \$5,000 per child per year, in constant 1981 dollars. Schweinhart & Weikart, *The Effects of the Perry Preschool Program on Youths through Age 15—A Summary*, in *AS THE TWIG IS BENT . . . LASTING EFFECTS OF PRESCHOOL PROGRAMS*, ch. 3 (Consortium for Longitudinal Studies, ed., 1983); J. BERRUETA-CLEMENT, L. SCHWEINHART, W. BARNETT, A. EPSTEIN & D. WEIKART, *CHANGED LIVES: THE EFFECTS OF THE PERRY PRESCHOOL PROGRAM ON YOUTHS THROUGH AGE 19* (High/Scope Press 1984).