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# Rights

## *The Dilemma of Child Protection*

BY DOUGLAS J. BESHAROV

LAWS DEFINING ABUSE AND NEGLECT HAVE NOT  
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BALANCE BETWEEN PROTECTION AND PRIVACY.

**C**hild protective agencies are justifiably proud of their accomplishments. Over recent years, as greater and greater numbers of suspected victims of abuse and neglect have been reported, millions of children have been saved from serious injury.

These children have not been protected without cost, however. The very same laws that rescue abused and neglected children also bring grief to innocent parents—when these laws entangle already overburdened caseworkers in the pointless endeavor of making investigations that are unwarranted and unnecessary.

There has been an unprecedented increase in the level of state intervention into private family matters over the past twenty years. Such intervention often is needed to protect children from serious injury and even death. But just as often state intervention appears to be unnecessary—and sometimes it is demonstrably harmful to the children and families involved. And yet, even this high level of intervention does not prevent many obviously endangered children from being killed and injured—after their plight becomes known to the authorities.

The problem—either too much or too little intervention—is caused by the overly broad laws that govern state child protective efforts. This article describes an approach to intervention that will help ensure that children who need life-saving protection will receive it. At the same time, this approach would reduce the level of unwarranted intervention into private family matters and prevent the resultant grief and trauma to innocent families.

The problems of child abuse and child neglect are not new. Until the early 1960s, however, they were largely ignored, relegated to poorly funded agencies far from public view. Over the last twenty years, though, there has been a major expansion and improvement in child protective programs.

In 1963, no state had a law requiring the reporting of suspected child abuse. Now, all fifty states have such laws. Broad categories of professionals, under threat of criminal and civil penalties, must report known and suspected abuse, sexual abuse, neglect, and emotional maltreatment of children.<sup>1</sup> These laws have been effective. In 1982, over 1.3 million children were reported to the authorities as suspected victims of abuse and neglect.<sup>2</sup> This is almost nine times the approximately 150,000 children reported in 1963.<sup>3</sup>

Increased reporting and specialized child protective agencies have been effective. In New York State, for example, after the passage of a comprehensive reporting law that also mandated the creation of specialized child protective staffs, there was a 50 percent reduction in child fatalities, from about 200 a year to under 100.<sup>4</sup> Similarly, Ruth and Henry Kempe report: "In Denver, the number of hospitalized abused children who die from their injuries has dropped from 20 a year (between 1960 and 1975) to less than one a year."<sup>5</sup>

Treatment services for maltreated children and their parents also have been markedly improved. In 1963, few communities had organized child protective programs. Now, almost all major population centers do. Specialized child protective agencies receive reports twenty-four hours a day via highly publicized hot lines and initiate investigations on the same day, or shortly thereafter.<sup>6</sup>

The breadth of treatment services now routinely available—such as Parents Anonymous, homemaker care, parent surrogate and parent education programs, multidisciplinary treatment teams, community mental health and counseling programs, therapeutic day care, respite care and crisis nurseries, and infant stimulation programs—was virtually nonexistent in 1963. Some had not yet been invented.<sup>7</sup>

Federal expenditures for child protective services (CPS) have risen from a few million dollars in 1963 to over \$325 million in 1980.<sup>8</sup> Unreimbursed state and local expenditures were almost as high. 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>9</sup>

## Unwarranted Intervention

**U**nfortunately, protection for abused and neglected children has been purchased at the price of enormous governmental intervention into private family matters. Often this intervention is unwarranted, and in many cases it is demonstrably harmful to the children and their families.

About 60 percent of all reports of suspected child maltreatment turn out to be unfounded.<sup>10</sup> Yet few of the unfounded reports are made maliciously. Most are made because of confusion over what types of situations should be reported. About half, for example, involve situations of poor child care that, though of legitimate concern, are not sufficiently serious to be considered child maltreatment.

Regrettably, the determination that a reported case is unfounded usually is made after an unavoidably traumatic investigation in which a CPS worker has questioned friends, relatives, and neighbors, as well as school teachers, day-care personnel, doctors, clergy, and others who know the family. This not only is unfair to parents but burdensome to workers in already understaffed child protective agencies. Forced to allocate a substantial portion of their limited resources to these unfounded reports, agencies often are unable to respond promptly and effectively when children are in serious danger.

Even after the extensive screening of reports that takes place, at any one time roughly 400,000 families across the country are being supervised by child protective agencies.<sup>11</sup> Under threat of court action, these families are compelled to accept treatment services. A study conducted for the U.S. National Center on Child Abuse and Neglect found, however, that in about half of these cases the parents never actually maltreated their children.<sup>12</sup>

Increased reporting has led to a dramatic rise in the number of children who are taken away from their parents and placed in foster care. In 1963, about 75,000 children were put in foster care because of abuse or neglect.<sup>13</sup> In 1980, the figure had ballooned to more than 300,000.<sup>14</sup> Of these children about half had been in care for at least two years, and roughly one-third for over six years.<sup>15</sup> Yet, according to data collected for the federal government, it appears that up to half of these children were in no immediate danger and could have been safely left in the care of their parents.<sup>16</sup>

# Inadequate Protection

**I**n spite of this high level of apparently unnecessary state intervention, large numbers of obviously abused and neglected children still are not reported. 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. And it is not just minor cases that go unreported. According to one study in 1979, over 50,000 children with observable injuries severe enough to require hospitalization were not reported.<sup>17</sup>

Nonreporting can be fatal to children. A study in Texas revealed that, during a three-year period, over 40 percent of the approximately 270 children who died as a result of child maltreatment had not been reported to the authorities—even though they were being supervised by a public or private agency at the time of death or had been seen within the past year.<sup>18</sup>

Sadly, the mere filing of a report to the authorities does not assure a child's safety. Studies in a number of states have shown that about 25 percent of all child fatalities attributed to abuse or neglect involve cases already reported to a child protective agency.<sup>19</sup> Tens of thousands of other children receive serious injuries short of death while under child protective supervision. In their book on child abuse, *Before the Best Interests of the Child*, Joseph Goldstein, Anna Freud, and Albert J. Solnit characterize present child protective practices as "too little or too much, too early or too late."<sup>20</sup> For far too many children, they are right.

The inexorable working of reporting campaigns only exacerbates these problems. As reporting increases, the number of children and parents being helped increases. So does the number of families being unnecessarily—and often harmfully—processed through the system. Unless something is done to break this ironic equation, the continued pursuit of fuller reporting will produce a cruel trade-off—to the community as well as to the children and parents involved.

## Vague Laws

**A**lthough inadequate funding seriously undermines most child protective programs, a major cause of inappropriate intervention is the inadequacy of laws 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 govern-

ing intervention. As Jeanne M. Giovannoni and Rosina 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>21</sup>

Most state laws authorize child protective intervention with phrases such as: when the child's "environment is injurious to his welfare,"<sup>22</sup> when the child "lacks proper parental care,"<sup>23</sup> or when the parents are "unfit to properly care for such child."<sup>24</sup> Other statutes are blatantly tautological, calling for intervention when a child has been "abandoned or physically, mentally, or

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emotionally abused or neglected or sexually abused"<sup>25</sup> without further defining these terms. In an attempt to be more specific, some recent statutes address the failure to provide "adequate" or "necessary" or "proper" food, clothing, shelter, medical care, education, supervision, or guardianship.<sup>26</sup> But, again, these statutes do not define the key—but ambiguous—words: "adequate," "necessary," or "proper."

These laws 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 in family life on a massive scale.

The vagueness and magnitude of the laws have been widely criticized. Goldstein, Freud, and Solnit, for example, have written that existing laws "delegate to administrators, prosecutors, and judges the power to invade privacy almost at will."<sup>27</sup> Unfortunately, past efforts to develop more precise and more useful standards for intervention largely have been unsuccessful. Without exception, they have met with controversy and

criticism. For example, in the most extensive effort to date, the Juvenile Justice Standards Project for the Institute of Judicial Administration and the American Bar Association (ABA) were unable to develop acceptable standards to govern state intervention in child abuse and neglect cases. Ultimately, opposition to the project's proposed standards was so great that the guidelines were withdrawn from ABA consideration.

State and local agencies with child protective responsibilities have developed a wide range of materials designed to define child abuse laws more precisely. So have many hospitals, school systems, and other service agencies. But there is little uniformity among these efforts; and issues often are treated in a generalized fashion, using pat phrases and ambiguous indicators. C. Henry Kempe reflected the feelings of most CPS professionals when he asserted: "Child abuse is what the courts say it is."<sup>28</sup>

The field's apparent inability to develop more precise standards has led some critics to propose the removal

must make these critical child protective decisions require that more precise and more practical legal standards be developed.

## A Failure of Policy

Some observers claim that it is impossible to develop more precise legal standards to govern child protective intervention. They cite as insurmountable obstacles: the complexity of the parent/child relationship, environmental variables, and the subjective nature of social values. While these factors may make precise and fully objective standards impossible, the failure to develop more useful standards is not attributable to the inherent limits of legal drafting. Rather it is caused by failure of policy.

Existing legal standards—and the excessive and inadequate intervention they foster—are a direct reflection of society's overambitious expectations about the ability of social agencies and courts to identify and protect endangered children. Our society has been unwilling to accept the fact that some children cannot be protected from abuse and neglect. So long as parents raise their children in the privacy of their own homes, some children will continue to suffer serious injuries—and some will die before anything can be done to protect them. This failure to be realistic about child protective capabilities has impeded 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 us all eager to protect as many children as possible from maltreatment. Even those who are deeply critical of the present level of intervention 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>30</sup> Michael S. Wald, another critic of the present level of intervention, explains why preventive jurisdiction is needed: "It 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 five-year-old child left unattended for several days, even if the child has avoided injury."<sup>31</sup>

This desire to give courts and social agencies preventive jurisdiction explains the open-ended nature of existing legal standards. Laws that allow intervention if a child "lacks proper parental care," or is "without proper guardianship," or has parents "unfit to properly care" for the child, or is in an "environment injurious to the child's welfare" are intentionally phrased to

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of whole categories of child maltreatment from child protective jurisdiction. Goldstein, Freud, and Solnit, for example, have proposed the exclusion of most cases of emotional maltreatment, physical neglect, and even sexual abuse.<sup>29</sup> Yet, each of these forms of abuse can be just as harmful as physical battering. Adopting such a proposal would exclude hundreds of thousands of endangered children from the ambit of community protection.

Every day, social workers and judges must apply state child abuse laws to determine whether children 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—are enormous. The improvement of legal standards is imperative if child protective programs are to be effective and fair. The safety of children, the rights of parents, and the peace of mind of those who daily

authorize intervention *before* the child has been seriously injured. In fact, they make intervention possible even *before* the child has been either abused or neglected.

Recent reform proposals are no narrower nor more specific. Phrases that authorize intervention when there is a "substantial risk of [serious] physical injury"<sup>32</sup> or a "substantial risk that a child will imminently suffer [serious] physical harm"<sup>33</sup> are merely another way of giving courts and social agencies *unrestricted preventive jurisdiction*. This grant of unrestricted preventive jurisdiction usually is defended on the ground that caseworkers and judges need freedom to exercise their professional judgment in determining, on a case-by-case basis, whether the child needs protection. This approach, however, is fundamentally flawed. Such unrestricted preventive jurisdiction 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* parental behavior. Agency policies and public pronouncements encourage this stance by instructing workers to make sophisticated psychological assessments of future parental behavior. Expecting workers to do this is unrealistic—and counterproductive. The truth is that there is no way of predicting whether a particular parent will become abusive or neglectful. Such sophisticated psychological predictions are beyond the capability of anyone. Despite years of research, no psychological profile can accurately identify parents who will abuse or neglect their child in the future.<sup>34</sup>

Based on his own work on the subject, and after reviewing the work of others, Ray Helfer concluded that "the ability to separate out a distinct group of parents [or future parents] who will physically abuse or seriously neglect one or more of their children will probably never be possible."<sup>35</sup> Unless the parent is suffering from a severe and demonstrable mental disability, not even the best clinicians can make a reliable assessment of that person's propensity to become abusive or neglectful.<sup>36</sup>

By greatly overstating the ability of social workers and judges to predict future maltreatment, existing laws and agency policies fail to provide practical guidance on when intervention is needed—and when it is not needed. Instead, laws and policies encourage reliance on an array of high-risk indicators that make sound decision making unlikely.

Existing laws that overstate the validity of predictions of future behavior put enormous pressure on social workers and judges to intervene—lest they be blamed if a child subsequently suffers serious harm. With no articulated limits on preventive jurisdiction (and powers), decision makers often are criticized unfairly for having "allowed" a child to die.

The following case that almost resulted in a criminal prosecution illustrates this tendency. A neighbor reported that a six-year-old boy who was not wearing shoes and socks had been locked out of his house. It

was early spring; and, although the worker felt that the mother needed some counseling on how to handle her son, there were no other indications that the child was in serious danger. Six weeks later, the child was dead as a result of a brutal beating from the mother. *No one* could have predicted that this would happen. The mother had never before physically assaulted the boy; the mother had never before given any indication of having a serious emotional problem. And yet, for weeks the local newspapers were filled with stories and editorials criticizing the worker and the agency for mishandling the case. The local prosecutor investigated and brought the case before a grand jury, calling as witnesses the caseworker, his supervisor, and his supervisor's supervisor. Ultimately, cooler heads prevailed, and the prosecution was dropped.

Because child protective proceedings are confidential, only a relatively small proportion of child fatalities are reported by the news media. But enough cases are reported that decision makers feel they will be blamed if there was any reason, however minor, for thinking that the child was in danger. Hence, CPS professionals are under great pressure to take no chances. The dynamic is simple: negative media publicity, an administrative reprimand, a lawsuit, even a criminal prosecution are possible if the child is subsequently killed or injured. But there is no bad publicity if it turns out that intervention was unneeded.

The fear of criticism—and possible civil or criminal liability—coupled with an honest desire to protect children, generates great concern in the CPS community. Given the legal atmosphere, it is not surprising that agencies and courts interpret minor assaults and marginally inadequate child care as signs of a parental inclination to abuse or neglect a child.

Richard Bourne 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>37</sup> Too often, intervention occurs in many minor situations that simply do not amount to child maltreatment. A child is hit by a parent; whether or not the assault was serious, the child is considered "abused." A child is living in a dirty and disorganized household; whether or not the basic needs of the child are being met, the child is considered "neglected." You will remember that the National Study of the Incidence and Severity of Child Abuse and Neglect found that over 50 percent of all the reports substantiated by child protective agencies involved nothing more than such minor problems.<sup>38</sup>

There are thousands of situations that reflect poor or inappropriate child rearing, but they do not justify coercive state intervention. Furthermore, they do not signal future child maltreatment. Even the most conscientious parents physically or verbally lash 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. But, according to data collected for the national incidence study, fewer than one in five minor assaults, or other examples of poor child care, will ever develop into anything resembling child abuse or child neglect.<sup>39</sup> And there is no way of knowing which cases will become more serious and clearly require intervention.

Ironically, existing laws make it less likely that children who already have been abused or neglected will receive the protection they so desperately need. Such children get lost in the press of minor cases that flood the system. Overwhelmed by cases in which there is limited danger to children, decision makers can become desensitized to the warning signals of immediate and serious danger. One study of child abuse fatalities, for example, stated: "In two of the cases, siblings of the victims had died previously. . . . In one family, two siblings had died mysterious deaths that were undiagnosed. In another family, a twin had died previously of abuse."<sup>40</sup>

Child protective agencies and courts simply cannot guarantee the safety of all children who come before them. Even if they took into protective custody all children who appeared to be in possible danger—a degree of overintervention 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.

The role of law should be to establish reasonable expectations about what can—and what cannot—be done to protect children. Only in this way will law be able to guide and limit intervention. But existing laws do just the opposite; they feed the process of inappropriate decision making.

## Seriously Harmful Behavior

**E**xisting legal standards often are criticized for giving social workers and judges too much discretion. This is an oversimplification, however, that obscures the path to improved standards. The real problem with existing standards is that they place too much responsibility on decision makers.

Laws should reflect the realities of child protective decision making. They should make it clear that, subject to minor exception, social workers and judges cannot predict future maltreatment and threat, and that it is unfair and unwise to expect them to do so.

Children who already have been abused or neglected are in clear danger of further maltreatment. Laws should be redrafted so that child protective intervention is au-

thorized only when the parents have already engaged in abusive or neglectful behavior. 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>41</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. There are only 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 detached from reality,<sup>42</sup> are simply incapable of providing adequate care for the child. Second, intervention is necessary 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.

Appreciation of one central point is the key to reforming legal standards is this: parents need not already have seriously injured the child for the behavior to be considered "abusive" or "neglectful" and for it to be the basis for child protective intervention. Intervention should be authorized if the parent did something that *could have caused serious injury*.<sup>43</sup> By having engaged in seriously harmful behavior once, parents demonstrate that they are a continuing threat to their children. It is reasonable to assume that parents will repeat something they have done in the past, unless there is a change in circumstances. The fact that the child did not suffer serious injury does not reduce the need for protective action. As Alfred Kadushin, professor of social work at the University of Wisconsin, asks: "Do we sit by impassively if a parent shoots [at] a child but misses?"<sup>44</sup> Of course not. Society must adopt a reasonable preventive orientation toward protecting such children. The open-ended and unregulated approach that today's laws permit, however, is not the answer.

Child protective intervention should be authorized if the parent's behavior was capable of seriously injuring the child. The criminal law calls such behavior an "attempt" or "reckless endangerment." Such terms are not applicable to child protection because they imply a higher level of intent than is necessary and because they seem to exclude situations of child neglect. Hence, to encompass all situations that should be the subject of child protective intervention, the law should recognize two categories of seriously harmful behavior.

► "*Immediately harmful behavior*" by parents shows that they are a continuing threat to a child if they did something that could have caused an immediately serious injury, except that *serious injury was averted* by the inter-

## Seriously Harmful Parental Behaviors

**Physical Battering**—physical assaults (such as hitting, 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, and other needed care that caused or over time would cause serious physical injury, illness, 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 forms of inappropriate sexual contacts that caused or over time would cause serious emotional injury.

**Sexual Exploitation**—the 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** (sometimes misleadingly called “emotional neglect”)—failure to provide the emotional nurturing and physical and cognitive stimulation needed to prevent serious developmental deficits.

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

**Educational Neglect**—failure to send a child to school in accordance with the state’s education law.

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

vention of an outside force or perhaps simple good luck. For example, a parent shoots at a child but misses; a parent throws an infant against a wall, but by some good luck the child is not injured; a parent begins to brutally beat a child, but a relative or neighbor intervenes; a parent leaves a young child home alone in a hazardous environment, but the child is found before any injury occurs. Although, through some good fortune, such children did not suffer serious injury, it is fair to predict that what the parents did once, they will do again.

► “Cumulatively harmful behavior” on the part of parents demonstrates that they are a continuing threat to a child if they engage in a course of conduct that will cause cumulatively serious harm to the child if it continues for a sufficient length of time. For example, a parent provides a nutritionally inadequate diet for a child that, *over time*, will cause serious health problems; a parent inflicts repeated, but otherwise minor, assaults on the child that, *over time*, will make the child into an easily frustrated, violence-prone individual; or a parent provides grossly inadequate emotional support and cognitive stimulation that, *over time*, will lead to severe developmental disabilities. Again, although such children

have not yet suffered serious injury, that they will do so is only a matter of time.

The harmfulness of the parent’s past behavior is the unspoken and unspecified basis of many child protective decisions. But because it is not an articulated concept, there is a great deal of unnecessary confusion about the difference between it and the existence of actual, serious injuries. This confusion was described by Monica B. Holmes.

In some communities the use of any object which leaves marks on a child’s body is considered abuse; in other communities this depends on the age of the child, so that a strapping of a twelve year old may be defined as nonabusive whereas the strapping of an infant is ipso facto evidence of abuse. Similarly, some programs take into account the location of the injury and are most likely to apply the label “abuse” in cases of physical marks to the face and genitalia than to marks on other areas of the body.<sup>45</sup>

Laws defining “seriously harmful behavior” by parents would provide all the preventive jurisdiction that agencies and courts require. Such laws would authorize intervention to prevent a child from being seriously injured—but only after clear evidence of the need is established. (See box for a list of “seriously harmful behaviors” for which preventive child protective intervention should be authorized.)

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. It is possible that circumstances have changed, however. For example, the precipitating cause of the parents' behavior may have disappeared or been removed. Perhaps the parents have developed the ability to care for the child. Maybe the provision of voluntary services has sufficiently reduced the likelihood of a recurrence. These are crucial issues in determining whether intervention should actually occur—and how long it should last.<sup>46</sup> Therefore, standards for intervention also must require decision makers to determine whether the parents' emotional conditions have improved or whether the factors that led to the parents' past behavior have been nullified.

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; but, given the social and personal costs, such intervention would not be justified. This does not mean that incidences of poor child care do not merit social action. Many families stand to benefit from specific social and community services. But these services should be offered for the parents' voluntary acceptance—or refusal.

Child protective intervention is a major intrusion on parental rights, which often can do more harm than good. Therefore, it should be limited to situations in which the need for intervention is supported by clear and sufficient evidence.

## *The Foster Care Decision*

**I**n practice 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.

At the present time, there are no legal standards governing the foster-care decision. Juvenile court acts, for example, give judges unrestricted dispositional authority. Once initial court jurisdiction is established there are no limits as to 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>47</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 the need for such action is not pressing.

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for state intervention  
can prevent all  
▶ abuse and neglect, ◀  
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decision making.

Child protective laws should ensure that foster care is provided for children whose parents have engaged in immediately harmful behavior. 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>48</sup> Furthermore, if, during treatment, the parents again engaged in immediately harmful behavior toward the child, the possibility of foster care should be revived.

Children who have been victims of cumulatively harmful behavior do not need emergency foster care. The danger these children face, though great, derives from the long-term consequences of inadequate care. Regardless of how upsetting their present situation may be, they have endured it for some time already, and ordinarily they need not be rescued immediately. Rather, there is time to help the parents learn to care adequately for the child without removing the child from the home. Children in cumulatively harmful situations require emergency foster care only when the parents may flee the jurisdiction taking the child with them, or the child's condition has deteriorated so much that irreparable injury is imminent.

Rather than removing the child when treatment efforts are unsuccessful in cumulatively harmful situations, child-oriented services that compensate for parental deficiencies can be employed. These 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 percent of the children in foster care have been removed from their homes because of cumulatively harmful situations.<sup>49</sup> Many other children are placed in foster care because their parents



have inflicted unreasonable corporal punishment. In most of these cases, the punishment posed no danger of immediate serious physical injury to the child. Rather, the long-term effect would be on the child's developing personality.<sup>50</sup>

Similarly, many children are placed in foster care because of the low quality of physical care they receive. Often, however, the care, though poor, poses no real physical threat to the child. Instead, it is used as a proxy indicator for the parents' general inability to meet the emotional needs of the child. Sometimes consciously—but usually not—workers conclude that, since the parents are not able to maintain the household, they can hardly be able to meet the child's emotional needs. The conclusion may or may not be valid. The point is that the danger to the child in such cases, if there is any danger, is of a cumulative, nonemergency nature.

Emotional maltreatment is seen as a vague and amorphous concept upon which intervention should not be based. Workers who do not take this concern into account as a real reason for intervention will have a difficult time making decisions. For, when parental functioning fails to improve—as it so often does—the system overreacts, concluding that placement outside the home is needed to safeguard the child's health and well-being. If standards required the presence of specific conditions of immediate danger to the child, CPS professionals 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 the removal of children from cumulatively harmful situations unless: the parents refuse to accept or cooperate with efforts to provide needed compensatory services; the child needs specific diagnostic or remedial services that are available only through residential care; foster care is used in response to an otherwise irreconcilable conflict between the parent and an adolescent child; or foster care is a planned precursor to the termination of parental rights and a subsequent adoption. (In the last situation, foster care still might not be needed unless there is a danger the parents might flee with the child before their rights could be terminated.)

## Not a Panacea

**T**his approach to standards for state intervention would minimize unreasonable expectations about what social workers and judges can accomplish, helping to relieve the unfair tensions under which they work. At the same time, the approach should help workers and judges make more appropriate decisions. In fact, besides simplifying and expediting decision making, such standards should

- cut down the number of unfounded reports made each year, perhaps by as much as 50 percent;
- encourage the fuller reporting of children in serious danger;
- reduce sharply child protective caseloads, perhaps by as much as 25 percent;
- increase the level of protection for children in immediate danger of serious injury; and
- prevent large numbers of children from being placed in foster care, perhaps by as much as 40 percent of the children now removed from parental custody.

Improved legal standards are only a partial solution, however. Even if this approach is successful, it will not be a panacea. Other realities will intrude.

Many child protective decisions must be based on incomplete and misleading information: important facts often are concealed, distorted, or forgotten. Child maltreatment usually occurs in the privacy of the home; unless the child is old enough—and not too frightened—to speak out or unless a family member steps forward, it is often impossible to know what really happened.

Staff shortages limit the scope of investigations and the level of home supervision. With more cases than they can handle, caseworkers' performance is systematically impaired. In the rush to clear cases, key facts sometimes go undiscovered. Moreover, protective agencies are rarely able to monitor dangerous home situations with sufficient intensity and duration to ensure 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>51</sup>

Sometimes no decision is clearly correct. "There will always be borderline cases . . ." Giovannoni and Becerra remind us.<sup>52</sup> Large caseloads and poorly trained staff only exacerbate the chances for human error.

No legal standards for state intervention can prevent all abuse and neglect, nor can they guarantee flawless decision making. Ultimately, the 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." But all concerned—parents, children, workers, and judges—will benefit when clear legal standards are established. PW

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Douglas J. Besharov, J.D., LL.M., is a visiting scholar at the American Enterprise Institute for Public Policy Research, Washington, D.C. He was the first director of the National Center on Child Abuse and Neglect, 1975-79.

This article was adapted from "Protecting Children from Abuse and Neglect: The Need to Narrow the Grounds for State Intervention" in the Harvard Journal of Law and Public Policy (in press).

For "Notes and References," see back of magazine.

Right vs. Rights

1. See generally Besharov, "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect," 23 *Villanova Law Review* 458 (March 1978).
2. American Humane Association, *Reported Child Maltreatment: 1981* (1982); see also U.S. National Center on Child Abuse and Neglect, *National Study of the Incidence and Severity of Child Abuse and Neglect*, 11 (DHHS 1981).
3. U.S. Children's Bureau, *Juvenile Court Statistics*, 13 (DHEW 1966).
4. New York State Department of Social Services, *Child Protective Services in New York State: 1979 Annual Report*, Table 8 (1980).
5. Kempe and Kempe, *Child Abuse* (Cambridge, Mass.: Harvard University Press, 1978):8.
6. See generally U.S. General Accounting Office, *Increased Federal Efforts Needed to Better Identify, Treat, and Prevent Child Abuse and Neglect*, 20-32 (April 29, 1980).
7. Compare DeFrancis, *Child Protective Services in the United States: A Nationwide Survey* (American Humane Association 1956); DeFrancis, *Child Protective Services: A National Survey* (American Humane Association 1967); with Hildenbrand et al. *Child Protective Services Entering the 1980's* (American Humane Association 1981).
8. 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).
9. Author's estimate, based on: U.S. Children's Bureau, *National Study of Social Services to Children and Their Families*, 109 (DHEW 1978). See generally U.S. Senate, "Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care," *Hearings Before the Subcommittee on Public Assistance of the Committee on Finance*, (September 24, 1979).
10. U.S. National Center on Child Abuse and Neglect, *National Analysis of Official Child Abuse and Neglect Reporting: 1978*, at 18, Table 5 (DHEW 1979).
11. Author's estimate, based on: U.S. National Center on Child Abuse and Neglect, *National Analysis of Official Child Abuse and Neglect Reporting: 1977* at 55, Figure 11 (DHEW 1979).
12. *National Study of the Incidence and Severity of Child Abuse and Neglect*, supra n. 2, at 16, Table 3-5.
13. Author's estimate, based on: *Juvenile Court Statistics*, supra n. 3, at 13.
14. 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. *National Study of Social Services to Children and Their Families*, supra n. 7, at 117, Table 5-3 (DHEW 1978).
15. *National Study of Social Services to Children and Their Families*, supra n. 9, at 120.
16. Author's estimates, based on: *National Analysis of Official Child Abuse and Neglect*

- Reporting: 1979, supra n. 11, at 47, Table 17.
17. *National Study of the Incidence and Severity of Child Abuse and Neglect*, supra n. 2, at chapter 6. See especially at 36, Table 6-3, and at 25, Table 5-2.
18. Regional VI Resource Center on Child Abuse, *Child Deaths in Texas*, 26 (University of Texas, Graduate School of Social Work 1981).
19. See, e.g., Region VI Resource Center on Child Abuse, supra n. 18, at 26; Mayberry, "Child Protective Services in New York City: An Analysis of Case Management," 109 (Welfare Research, Inc., Albany, N.Y., draft dated May 1979).
20. Goldstein, Freud, and Solnit, *Before the Best Interests of the Child*, (New York: The Free Press, 1980):37.
21. Giovannoni and Becerra, *Defining Child Abuse*, (New York: The Free Press, 1979):2.
22. Colo. Rev. Stat. sec. 19-1-103(20) (1978).
23. Utah Code Ann. sec. 78-3A-2(17) (1977).
24. Ark. Stat. Ann. sec. 45-403(4) (1977).
25. Kan. Stat. sec. 38-802(g) (Supp. 1978).
26. N.Y. Fam. Ct. Act sec. 1012(f)(i) (1983).
27. Goldstein, Freud, and Solnit, supra n. 20, at 16-17.
28. Kempe, *Child in Peril*. Xerox Films (Media Concepts, 1972).
29. Goldstein, Freud, and Solnit, supra n. 20. 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. *Id.* at 64.
30. Goldstein, Freud, and Solnit, supra n. 20, at 190, para. 10.10.
31. Wald, "State Intervention on Behalf of 'Neglected Children': A Search for Realistic Standards," 27 *Stanford Law Review* 985, 1014 (1975).
32. N.Y. Fam. Ct. Act sec. 1012 (e)(ii) (1983).
33. Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Child Abuse and Neglect*, Standard 2.1 A (Tent. Draft 1977).
34. See U.S. National Center on Child Abuse and Neglect, *Review of Child Abuse Research: 1979-1981*, 42-105 (DHHS 1981). See generally Coccozza and Steadmen, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence," 29 *Rutgers Law Review* 1084 (1976).
35. Helfer, "Basic Issues Concerning Prediction," in Helfer and Kempe, eds., *Child Abuse and Neglect: The Family and the Community* (Cambridge, Mass.: Ballinger, 1976):363.
36. As defined by the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM III) (1980).
37. Bourne, "Child Abuse and Neglect: An Overview," in Bourne and Newberger, eds., *Critical Perspectives on Child Abuse* (Lexington, Mass.: Lexington Books, 1978):3.
38. See supra n. 12.
39. *National Study of the Incidence and Severi-*

- ty of Child Abuse and Neglect*, supra n. 2, at 18, Table 4-1.
40. Confidential material held by author.
41. *Landeros v. Flood*, 17 c. Cal. 3d 399, 412, n. 9, 131 Cal. Rptr. 69, 551 p. 2d 389, 395 (1976).
42. Severe substance and alcohol abuse are other demonstrable disabilities justifying intervention.
43. "Harmful," after all, means "causing or capable of doing or causing harm." *Random House Dictionary*, 1973. Emphasis is added.
44. Kadushin, "Emotional Abuse," unpublished paper presented at a joint U.S. National Center on Child Abuse and Neglect and National Institute on Mental Health Workshop on Emotional Maltreatment, Houston, Texas (April, 1976).
45. Holmes, *Child Abuse and Neglect Programs: Practice and Theory*, 115 (National Institute of Mental Health 1977).
46. See, e.g., N.Y. Fam. Ct. sec. 1051(c) (1983) allowing the court to dismiss a proven neglect petition if it determines that its "aid is not required. . . ."
47. Wald, supra n. 31, at 1001-1002. Footnotes omitted.
48. See Helfer and Kempe, "The Child's Need for Early Recognition, Immediate Care and Protection," in Kempe and Helfer, eds., *Helping the Battered Child and His Family* (Philadelphia, Lippincott, 1972):70.
49. See supra n. 16.
50. See Goldstein, Freud, and Solnit, supra n. 20, at 73.
51. See, e.g., Mayberry, supra n. 19, at 46-47; U.S. General Accounting Office, supra n. 6, at 39-40.
52. Giovannoni and Becerra, supra n. 21, at 260.

Disturbed Clients

1. See, for example Joan Bowker, ed., *Education for Primary Prevention in Social Work* (New York: Council on Social Work Education, 1983); Milton Nobel, ed., *Primary Prevention in Mental Health and Social Work* (New York: Council on Social Work Education, 1981); Martin Bloom, *Primary Prevention: The Possible Science* (Englewood Cliffs, N.J.: Prentice-Hall, 1981); and Michael Roskin, "Integration of Primary Prevention in Social Work Practice," *Social Work* 25 (May 1980): 192-196.
2. Gerald Caplan, *Principles of Preventive Psychiatry* (New York: Basic Books, 1964).
3. Mervyn Susser, *Causal Thinking in the Health Sciences: Concepts and Strategies of Epidemiology* (New York: Oxford University Press, 1973).
4. See Thomas Holmes, "Life Situations, Emotions and Disease," *Journal of the Academy of Psychosomatic Medicine* 19 (December 1978): 747-753; and Barbara S. Dohrenwend and Bruce P. Dohrenwend, eds., *Stressful Life*