

How Child Abuse Programs Hurt Poor Children: The Misuse of Foster Care

by Douglas J. Besharov

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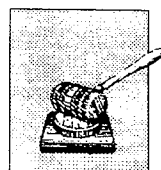
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A new monthly column, "Closing Statement" will feature short articles expressing different points of view on issues affecting legal services.

In the past 20 years, there has been an enormous expansion of programs to protect abused and neglected children. A large part of this expansion has been encouraged by federal funding. In 1986, more than 2.2 million children were reported to the authorities as suspected victims of child abuse and neglect. This is more than 11 times the estimated 150,000 abused children cases reported in 1963. Specialized "child protective agencies" have been established in all major population centers. Federal and state expenditures for child protective programs and associated foster care services now exceed \$3.5 billion a year.¹

Nationwide, there exists a basic infrastructure of laws and agencies to protect endangered children—and it has made a difference. Although about 65 percent of all reports are deemed "unfounded,"² increased reporting and specialized child protective agencies have saved many thousands of children from death and serious injury. The best estimate is that, nationwide, child abuse deaths have decreased from 3,000 per year to about 1,500 per year. In New York State alone, within five years of the passage of a comprehensive reporting law, which also mandated the creation of specialized investigative staffs, there was a 50 percent reduction in child fatalities, from about 200 per year to fewer than 100.³

There has been a negative and deeply troubling side to this progress, however. In their zeal to protect maltreated children, courts and social agencies are overreacting to cases of social deprivation among poor children. These children, in no real danger of physical injury, are unnecessarily placed in foster care. Languishing for years in emotionally traumatic conditions, hundreds of thousands of poor children suffer more harm in foster homes than if they were simply left at home. The following article describes how this happens, and what can be done about it.

I. The Poverty Connection

Child abuse and child neglect are serious national problems. But the words "abuse" and "neglect" are used by child welfare agencies to encompass much more than the brutally battered, sexually abused, or starved and sickly children that come to mind when we think of child maltreatment. In 1979


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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.L. & PUB. POL'Y 540, 542-50 (1985).
2. *Id.* at 554-57.
3. N.Y. STATE DEP'T OF SOCIAL SERVS., CHILD PROTECTIVE SERVICES IN NEW YORK STATE: 1979 ANNUAL REPORT, Table 8 (1980).

and 1980, the federal government conducted a National Study of the Incidence and Severity of Child Abuse and Neglect.⁴ According to this congressionally mandated study, which collected data for 12 months from a representative sample of 26 counties in 10 states, only about 30 percent of all "maltreated" children are physically abused, and only about ten percent of these children (three percent of the total) suffer an injury severe enough to require professional care. Thus, nine tenths of the cases labelled "physical abuse" are really situations of excessive or unreasonable corporal punishment, which, although a matter of legitimate government concern, are unlikely to escalate into a serious assault against the child.⁵

Sexual abuse makes up about seven percent of the total of all abuse cases. This is probably a low figure; major efforts are being made to increase the reporting of suspected child sexual abuse.



In their zeal to protect maltreated children, courts and social agencies are overreacting to cases of social deprivation among poor children.

Physical neglect makes up about 17 percent of all abuse cases. The three largest categories of physical abuse are: failure to provide needed medical care (nine percent); abandonment and other refusals of custody (four percent); and failure to provide food, clothing, and hygiene (three percent). Physical neglect can be just as harmful as physical abuse. More children die of physical neglect than from physical abuse. But, again, the number of cases in which serious physical injury has occurred is low, perhaps as low as four percent of neglect cases.⁶

The remainder of these cases, about half,⁷ are forms of educational neglect and emotional maltreatment. Educational neglect (27 percent of the cases), is the single largest category of cases. Emotional abuse, mainly "habitual scapegoating, belittling and rejecting behavior," accounts for about 20 percent of the total. Various forms of emotional neglect, defined as "inadequate nurturance" and "permitted maladaptive behavior," comprise nine percent of the total. While some forms of emotional maltreatment are deeply damaging to children, most cases do not create the need for aggressive intervention as do cases of serious physical abuse or neglect.

Therefore, almost 85 percent of all cases of "child maltreatment" involve excessive corporal punishment, minor physical neglect, educational neglect, or emotional maltreatment. These are really forms of emotional or developmental harm to children that pose no real physical danger. Moreover, an over-

4. U.S. NAT'L CENTER ON CHILD ABUSE AND NEGLECT, STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT, *see especially* 18 *et seq.* and Table 4-1 (DHHS 1981).
5. Other data from the Incidence Study indicate that fewer than one in five of these cases presages anything resembling child abuse or neglect, let alone serious injury to the child. *Id.*
6. AMERICAN ASS'N FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING: 1984 16, Table 6 (1986).
7. The total comes to 110 percent because there is a slight overlap among categories of cases. *Id.*

whelming number of these cases, which are most accurately considered forms of "social deprivation," involve poor and minority families. Compared to the general population, families reported for maltreatment are four times more likely to be on public assistance⁸ and almost twice as likely to be black.⁹ Furthermore, maltreating parents tend to be the "poorest of the poor." Most research confirms one study's finding that, comparing maltreating and nonmaltreating families, the former "lived under poorer material circumstances, had more socially and materially deprived childhoods, were more isolated from friends and relatives, and had more children."¹⁰ About 30 percent of abused children live in single-parent households and are on public assistance; the comparable figure for neglected children is about 45 percent.¹¹

Given these realities, many commentators blame poverty for the parents' abusive or neglectful behavior. Certainly, "poverty exposes parents to the increased likelihood of additional stresses that may have deleterious effects upon their capacities to care adequately for their children."¹² However, lest all families be stigmatized, it is important to remember that most poor families do not abuse or neglect their children. In any one year, fewer than one in five welfare families are reported for suspected abuse or neglect.¹³

Norman A. Polansky, Regent's Professor of Social Work at the University of Georgia, is the nation's foremost expert on the relationship between poverty and child maltreatment. Through 15 years of research, he and his colleagues have conclusively demonstrated that "[n]eglectful parents differ from other parents at the same socioeconomic level Neglectful parents suffer pervasive and profound character disorders, of which the two most frequent are the Apathy-Futility Syndrome and the Impulse-Ridden Character."¹⁴ Thus, the poverty/child maltreatment connection is a complex interaction: "parental personality plays a major role in determining how much income is available [to a family], as well as how it is handled."¹⁵ Polansky's research depicts maltreating parents as:

a group of people with a modal personality: less able to love, less capable of working productively, less open about their feelings, more prone to living planlessly and impulsively, but also susceptible to psychological symptoms and to phases of passive inactivity and numb fatalism. The image is one of men and women who do not cope well with life.¹⁶

These parents are extremely difficult to reach and consequently almost impossible to treat successfully. As Polansky concludes, programs "aimed simply at increasing income will not solve the problem of child neglect."¹⁷

II. Poor Children in Foster Care

Less than 20 percent of all substantiated cases result in the child's placement in foster care.¹⁸ But this is 20 percent of the approximately 800,000 substantiated reports 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.¹⁹ In 1985, more than 120,000 children were placed in foster care for these reasons. Each year, more than 440,000 children spend at least some time in foster care.²⁰

Placement in foster care is sometimes the only thing that can prevent a child's serious injury or death. Child protective agencies have been successfully sued for damages when children were subsequently abused because the agency failed to remove them from parental custody.²¹

But contrary to common assumption, children who suffer social deprivation, rather than physical abuse, are the ones most likely to be placed in foster care. Although there are no specific statistics on the subject, this is a widespread belief among practitioners, and is corroborated by the information that is available. Indeed, a national study of child welfare agencies found that social workers recommend foster care almost a third more often (31 percent versus 23 percent) in cases of neglect than in cases of abuse.²² According to a study of the records of the Family Division of D.C. Superior Court in 1985, 74 percent of the neglected children brought before the court were placed in foster care, while only 41 percent of abused children were placed in such care.²³

Some children, rich or poor, must be removed from their parents for their own safety. But according to the data collected for the federal government by the American Humane Association, it appears that up to half of the children placed in foster care were in no immediate danger of serious physical injury.²⁴ Similarly, Harvard Medical School researchers studying the records of 184 maltreated children at the Boston

17. *Id.* at 25.

18. U.S. NAT'L CENTER ON CHILD ABUSE & NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD ABUSE AND NEGLECT REPORTING 1978-36, Table 28 (Dep't of HEW 1979). This is the last year for which reliable data are available.

19. Author's estimate, based on U.S. CHILDREN'S BUREAU, JUVENILE COURT STATISTICS 13 (Dep't HEW 1966).

20. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE STATISTICAL FACT BOOK Table 1, at 2 (1983).

21. D. BESHAROV, THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND FAMILIES, *see especially*, ch. 3 (1985).

22. U.S. CHILDREN'S BUREAU, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES 92-95 (Dep't of HEW 1979). In 94 percent of the cases, the court followed the caseworker's recommendation. *Id.* at 110.

23. ESSAYE, DAMAGED CHILDREN OF THE FOSTER CARE SYSTEM 6 (Georgetown University Law Center, Nov. 11, 1986).

24. Author's estimate based on U.S. NAT'L CENTER ON CHILD ABUSE & NEGLECT, NATIONAL ANALYSIS OF CHILD NEGLECT AND ABUSE REPORTING: 1979-47, Table 17 (Dep't of HHS 1979).

8. AMERICAN HUMANE ASS'N, TRENDS IN CHILD ABUSE AND NEGLECT: A NATIONAL PERSPECTIVE 24, Table IV-3 (1984).

9. *Id.* at 97, Table A-IV-7.

10. HOROWITZ & WOLOCK, *Maternal Deprivation, Child Maltreatment, and Agency Interventions Among Poor Families*, in THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT, 137, 138, 161 (1981).

11. AMERICAN HUMANE ASS'N, *supra* note 8, at 97, Table A-IV-7.

12. GIOVANNONI & BILLINGSLEY, *Child Neglect Among the Poor: A Study of Parental Adequacy in Families of Three Ethnic Groups*, 49 CHILD WELFARE 196, 204 (1970).

13. Author's estimate based on SOCIAL SECURITY BULLETIN (1984), which reported that, in 1983, 3,721,000 families received AFDC.

14. C. HALLY, N. POLANSKY, & N. POLANSKY, CHILD NEGLECT: MOBILIZING SERVICES 8 (Dep't of HEW, U.S. Nat'l Center on Child Abuse & Neglect 1979) [hereinafter HALLY].

15. N. POLANSKY, M. CHALMERS, E. BUTTENWIESER, & D. WILLIAMS, DAMAGED PARENTS: AN ANATOMY OF CHILD NEGLECT 25 (1981) [hereinafter Polansky].

16. *Id.* at 109.

Children's Hospital found similar evidence concerning the decisions of medical personnel to hospitalize maltreated children: they concluded that "children with nonphysical injuries are more likely to be removed."²⁵ Of the children studied, 17 percent who had physical injuries were placed in foster care, compared to 31 percent who had nonphysical injuries.²⁶ Furthermore, socially deprived children are disproportionately taken from families living in poverty. In 1980, about 100,000 of the 300,000 children in foster care were on AFDC before their removal.²⁷

Cynical observers blame the disproportionate number of poor children in foster care on the child welfare system's class bias.²⁸ However, these children's removal seems to have more to do with their perceived social deprivation, because even among the AFDC population, the same abuse/neglect differential emerges: only 28 percent of abused children in foster care were from AFDC families, while almost 40 percent of the neglect cases were from such families.²⁹ The same is true for race: of abused children in foster care, 19 percent were black, 10 percent Hispanic, and 67 percent white. For neglect, 27 percent were black, 8 percent Hispanic, and 63 percent white.³⁰

Even for physically abused and physically neglected children, the real reason for foster care is rarely the low quality of physical care that they receive, because in most cases it poses no real physical threat to the child. Instead, inadequate physical care is used as a proxy indicator of the parents' general inability to meet the child's emotional and developmental needs. Sometimes consciously, but usually unconsciously, the system concludes that, since the parents are unable to maintain the household, they can hardly be expected to meet the child's social 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 physical threat.

Neglected, socially deprived children are more likely to be placed in foster care than are abused children because their parents are harder to treat. Existing treatment programs are successful only with parents who are already motivated to accept help, or who can easily be encouraged to do so. These programs do not work for those parents who have serious and deeply ingrained personality deficits. As a recent grant notice

25. Katz, Hampton, Newberger, Bowles, & Snyder, *Returning Children Home: Clinical Decision Making in Cases of Child Abuse and Neglect*, 56(2) AM. J. ORTHOPSYCHIATRY 253, 260 (1986). They suggested three explanations:

One explanation for this result is that nonphysical 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 nonphysical injuries)."

26. *Id.* at 258, Table 1.

27. STAFF OF SENATE FINANCE COMM., 99TH CONG., 1ST SESS., STAFF DATA AND MATERIALS RELATED TO FOSTER CARE, ADOPTION ASSISTANCE ACT AND CHILD WELFARE SERVICES UNDER THE SOCIAL SECURITY ACT 6 (June 1985).

28. See, e.g., CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE 11 (1978).

29. U.S. CHILDREN'S BUREAU, *supra* note 22, at 86.

30. *Id.* at 8, Table 4-1.

from the U.S. National Center on Child Abuse and Neglect points out: "National data (1976-1982) show that casework counseling was provided to 80 [percent] of all families served by child protective service agencies and that counseling is the service typically provided to neglectful families, although there is no evidence that this service is effective with chronically neglecting parents."³¹ Many neglectful mothers, for example, fit into the "apathy-futility syndrome," a term created by Norman A. Polansky. He 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. Their workers found them disorganized in their lifestyles and child caring; they were frustrating because, although they did not oppose the suggestions offered, neither did their care [of the child] improve. The agency personnel did not know what to make of them or how to treat them and neither did we.³²

The national study of child welfare agencies described above found that social workers more frequently recommended foster care in neglect cases because they viewed abusive parents as more amenable to treatment.³³ Harvard researchers reached a similar conclusion. They suggested that "nonphysical 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."³⁴ When treatment efforts fail, as they inevitably must in so many cases, the most socially deprived children are placed in foster care.³⁵

III. Trapped in Foster Care

In theory, foster care is supposed to be a short-term remedy designed to protect children from harm while parents have time to respond to treatment. However, the reality is far different. More than 50 percent of the children in foster care are in this "temporary" status for over 2 years; more than 30 percent are away from their parents for over 6 years.³⁶ As the U.S. Supreme Court recognized in *Smith v. Organization of Foster Parents*,³⁷ these children are often lost in the "limbo" of the foster care system.

31. Office of Human Development Servs., U.S. Dep't of HHS, *FY 1987 Coordinated Discretionary Funds Program; Availability of Funds and Request for Applications; Notice*, 51 Fed. Reg. 189 (Jan. 3, 1986).

32. POLANSKY, *supra* note 15, at 39.

33. U.S. CHILDREN'S BUREAU, *supra* note 22, at 92-95. In 94 percent of the cases, the court followed the caseworker's recommendation. *Id.* at 110.

34. Katz, *supra* note 25, at 260.

35. One must be careful not to exaggerate here. There is extensive screening of cases so that most maltreated children, including most socially deprived ones, are not placed in foster care.

36. U.S. CHILDREN'S BUREAU, *supra* note 22, at 120.

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

Since parents who are unable to meet their children's basic emotional and developmental needs often have the most intractable emotional problems, 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.

More than 50 percent of the children in foster care are in this "temporary" status for over 2 years; more than 30 percent are away from their parents for over 6 years.

A root cause of foster care limbo, like the initial decision to place the child, is the inability of existing treatment programs to break deep-seated patterns of child abuse and neglect among poor families, again reflecting a racial differential. In 1983, 36 percent of white children and 55 percent of the black children in foster care had been there for 2 years or more.³⁸

On the other hand, the termination of parental rights—the solution for intractable cases of serious physical and sexual abuse—is also unlikely in cases of social deprivation. 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 a unequivocal unwillingness or absolute inability to care for the child.³⁹ Most social workers and judges are simply unwilling to sever the parent/child tie on the ground of emotional or developmental deprivation.

As a result, these socially deprived 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.

Long-term foster care can leave lasting psychological scars. It is an emotionally jarring experience that confuses young children and unsettles older ones.⁴⁰ 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. 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.⁴¹ 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.⁴² 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.⁴³ In fact, when these children start to engage in antisocial behavior caused by these traumatic conditions, they are often dumped back on the parents.

These realities led Marion Wright Edelman, President of the Children's Defense Fund, to call the conditions of foster care a "national disgrace."⁴⁴

IV. Past Good Intentions

The harmful use of foster care for what is, in essence, a poverty problem is another example of good intentions gone awry. Socially deprived children living in poor families have been known to public welfare agencies for decades. Until the mid-1970s, these children were the responsibility of the welfare caseworkers assigned to each AFDC recipient family. However, at that time, the provision of cash assistance was separated from the delivery of social services.

Besides providing a more efficient means of distributing AFDC funds, the separation of income maintenance from social services was meant to upgrade the quality of the social services for poor families. The planners had dreams of a greatly expanded network of specialized family service agencies to replace the all-purpose welfare caseworker. Unfortunately, this network of services was never established. But the need did not disappear, and as a consequence the caseload found itself transferred to the rapidly growing child protective system. At the same time, state child abuse reporting laws were being amended to require the reporting of child neglect, including emotional neglect. Thus, responsibility for AFDC children whose needs were not being met by their parents was assumed by the newly expanded child protection system.

There was a major difference, however, between cases handled by the child protection system and those handled by the welfare system. The welfare caseworker saw the family as the client and was inclined to view inadequate child rearing as a correlate of poverty, requiring aid to the family as a unit. The child protective worker, on the other hand, rightly saw the child as the client, with inadequate child rearing as a reason for coercive state intervention. And, most significantly, the two caseworkers had an entirely different orientation to foster care and court ordered removal. Welfare caseworkers were rarely in court; they were not trained—nor deployed—for easy access to court and court ordered removal of children from the home. Child protective workers are.

In the context of heightened concern for the "abused" child, giving child protective agencies responsibility for these

38. Gershenson, *Child Welfare Research Note #1: 1983 Trends of Children in Foster Care* (1985).

39. Cf. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel after Lassiter v. North Carolina*, 15 FAM. L. Q. 205, 217-218 (1981).

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

41. See, e.g., U.S. CHILDREN'S BUREAU, *supra* note 22, at 117-18, Table 5-4.

42. Mushlin, Levitt, & Anderson, *Court-Ordered Foster Family Care Reform: A Case Study*, 65 CHILD WELFARE 141, 146 (Mar./Apr. 1986); see also WALD, *PROTECTING ABUSED/NEGLECTED CHILDREN: A COMPARISON OF HOME AND FOSTER CARE PLACEMENT* 11 (Stanford University 1981).

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

44. CHILDREN'S DEFENSE FUND, *supra* note 28, at xiii.

poverty-related cases of social deprivation inexorably led to more poor children being placed in foster care. In addition, greater federal funding for foster care, as opposed to in-home services, created an added incentive to resort to foster care.

V. Endangering Abused Children

Ironically, this overreaction to poverty-related "child maltreatment" endangers children who are in real jeopardy. Inconsistent as it may seem given the broad-scale 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, after dealing with so many cases of social deprivation, caseworkers become desensitized to the obvious warning signals of immediate and serious physical danger. Many children are left in the custody of parents who have repeatedly abused them. One study of child abuse fatalities, for example, described how "[i]n two of the cases, siblings of the victims had died previously. . . . In one family, two siblings of the victims had died mysterious deaths that were undiagnosed. In another family, a twin had died previously of abuse."⁴⁵

The result, all too often, is the child's tragic death. Studies in several states have shown that about 35 to 55 percent of all child fatalities attributed to abuse or neglect involve children already reported to a child protective agency.⁴⁶ Tens of thousands of other children receive serious injuries short of death while under child protective supervision.

Eight-year-old Tammy Nelson was one of these children. An appeals court summarized the evidence presented in her noncustodial father's suit against the child protective agency for inadequately investigating a report of her maltreatment:

[The Missouri Division of Family Services] allegedly received several hotline calls concerning the Nelson children, but it appears that only two were investigated. . . . The callers in both instances identified the Nelson children and gave information as to the nature of the alleged abuse and the names of witnesses. ([It was alleged] that the callers informed DFS that Tammy Nelson was being sold by her mother to an older man for the purpose of having sex, and that Audrey Nelson, the children's mother, forced her children to watch her perform sex acts with various partners and perhaps forced them to participate.) Plaintiffs assert, however, that the investigators failed to conduct a thorough investigation as required by statute. Both investigations basically consisted of a brief interview of Audrey Nelson and a brief interview of the children, possibly within hearing distance of Audrey. The children, as well as Audrey, denied the allegations of the callers. At least one witness testified that children often deny, especially in the presence of the

abuser, that they are being abused. The investigators seem not to have interviewed the children individually or apart from their mother, nor did they interview possible witnesses or request physical examinations for the children.⁴⁷

The father's suit was dismissed on the ground that Missouri's child protective statute did not create a legal duty to the individual endangered child "as opposed to a duty to the general public."⁴⁸

VI. Least Detrimental Disposition

Children in physically dangerous 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 socially deprived children, if the choice is between foster care and doing nothing, then they—and society—would be better off if nothing was done. Through some sort of tunnel vision, the system perceives the physical improvement of the child's living conditions while in foster care as proof that the child is better off away from his or her 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."⁴⁹

Despite its formidable risks, foster care is sometimes defended on the ground that it facilitates the parents' 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 the parents, removing the child is also a psychologically jarring experience that often damages their self esteem 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. 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 attributable to the child, often requiring the parent to move into a smaller, less attractive apartment—from which the parent will have to move again (to a larger apartment) before he or she can regain custody of the child. In today's housing market, this is not an 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.

There can be no denying that the emotional and developmental deprivation of poor children requires government

45. Confidential report held by author.

46. See, e.g., Alfaro, *What Can We Learn from Child Abuse Fatalities?* in *PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE* (D. Besharov ed. 1988).

47. *Nelson v. Missouri Div. of Family Servs.*, 706 F.2d 276, 277 (8th Cir. 1983).

48. *Id.*

49. GOLDSTEIN, *supra* note 43, at 13.



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concern—and intervention. Most of these children suffer serious long-term harm. But our present response to the plight of these children is actually more harmful to the children than if nothing were done. As long as we are not willing to terminate parental rights in such cases, we should not place these children in foster care. As the White House Working Group on the Family recently stated, when it comes to government intervention into the family, we should remember the ancient medical maxim: *primun, non nocere*.⁵⁰

VII. A Realistic Alternative

That the emotional and developmental deprivation of children is a problem of poverty does not make it any less harmful to children. These children need help—for their own good—and for the good of society. But what we should recognize is that foster care is not appropriate and that a different response is necessary. Polansky and his colleagues aptly summarize the dilemma and point to the realistic solution:

The majority of neglecting parents are not people who have generally been well functioning individuals; the neglect of their children is an extension of the morass in which they have increasingly found themselves. The children are extensions and evidence of self neglect made worse as the debris of a planless, marginally self-preserving life piles up. For those families in which the danger, disorganization, and inadequacies in child rearing are not so great as to warrant permanent removal of the children, the alternate is long-term supplementary treatment.

In a poorly functioning family, it is necessary to be quite realistic regarding problems which must be dealt with, what is intended, and why a particular treatment method is selected. . . . It is unrealistic to hope that the outcome of treatment will be a "model" family. Parents this dysfunctional will probably never be able to fulfill the needs of their children sufficiently to reach the primary goal of breaking the cycle of neglect. Rather, it is hoped that there will be enough improvement or stability to see the children through to adulthood without great damage being done to them.⁵¹

Unless their parents are unable or unwilling to cooperate, socially deprived children need in-home, child-oriented services that compensate for parental deficiencies. "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.⁵² These services can, in Polansky's words, help "see the children through to adulthood without great damage being done to them."

Few child protective programs now offer such services in sufficient amount or quality. At the present time, less than six percent of all substantiated cases receive a referral to day care (or Head Start).⁵³ 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 ten percent of the maltreated children received developmental assessments, and less than one percent of the children received any treatment to remediate the effects of past maltreatment.⁵⁴ The failure to use these alternatives to foster care illustrates the gap between the fields of child protection and child development.

Yet, the available evidence indicates that quality preschool programs can make lasting improvements in the social and educational functioning of the poor children they serve. In the best known program, the Perry PreSchool Project of Ypsilanti, Michigan, researchers began tracking 123 three- and four-year-old students in the 1960s to determine whether a five-day-a-week, two-and-one-half-hour-a-day program (for one or two years), reinforced by teacher visits to the home, would make a difference in the lives of impoverished children.

The Project found that children who had the preschool experience fared much better than a control group without this exposure. On a test of functional competency in adult education

51. HALLY, *supra* note 14, at 19-20.

52. See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, EARLY CHILDHOOD PROGRAMS AND THE PREVENTION AND TREATMENT OF CHILD ABUSE AND NEGLECT (Dep't of HEW 1979).

53. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *supra* note 18, at 36, Table 28. This is the last year for which reliable data are available.

54. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, EVALUATION OF CHILD ABUSE AND NEGLECT DEMONSTRATION PROJECTS, 1974-1977, Vols. I and II, 123 (1978).

50. WHITE HOUSE WORKING GROUP ON THE FAMILY, THE FAMILY: PRESERVING AMERICA'S FUTURE 6 (1986).

courses, those who went through the program were more than 50 percent more likely to score at or above the national average than those who did not. More importantly, employment and postsecondary education rates were almost double, the high school graduation rate was almost one-third higher, teenage pregnancy rates were almost half, and arrest rates were 40 percent lower.⁵⁵

Many other preschool programs have reported impressive success in raising the social and educational functioning of disadvantaged children. The Consortium for Longitudinal Studies, whose central staff was located at Cornell University, for example, examined the long-term effects of 12 preschool programs, and it found that their graduates, after 6 to 13 years, were significantly less likely to have failed a grade in school or to have been assigned to special education classes than children who did not attend a preschool.⁵⁶ Similarly, the Frank Porter Graham Child Development Center at the University of North Carolina reports that, when the more than 90 children they studied completed the second grade, those who were in their program averaged almost 10 I.Q. points higher than the children who were not, and they experienced only half as many school failures. In addition, the program was found to have sharpened children's language skills and to have increased their achievement test scores from the bottom 25 percent to near the national average.⁵⁷

For the foreseeable future, the competition for reduced social service funds will be intense. There will be no winners, unless winning means losing less. Since programs such as child protective services that serve the politically powerless are in the greatest jeopardy, expecting a major expansion of "compensatory" services for children may seem futile.

Foster care is also expensive. Depending on the community, and the child's need for special care, family foster care can cost from \$5,000 to \$15,000 a year, with \$10,000 as 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.⁵⁸

Preventing the placement of emotionally neglected poor children would reduce foster care rolls by 30 to 50 percent.

This could save state and federal governments as much as \$1 billion.⁵⁹

These funds may well disappear as part of the 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.



... the available evidence indicates that quality preschool programs can make lasting improvements in the social and educational functioning of the poor children they serve.

For each child not placed in foster care and instead provided with quality preschool services, for example, there would be approximately an even trade-off in costs (assuming the period spent in either program to be about the same). Child development programs capable of "compensating" for parental inadequacies would be expensive, costing perhaps as much as \$5,000 per child per year.⁶⁰ Although this is about half of 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, and when they are placed, the welfare grant and other cash and noncash benefits to their parents are reduced.

There could be a major social payoff if poverty-related cases of emotional and social deprivation were handled without recourse to foster care. More children would be provided the emergency protection that 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.

In addition, this approach might also benefit parents. The system's overemphasis on the treatability of parents often places parents 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, 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.

All of this may be wishful thinking. On the one hand, the proposed approach would be a radical departure from current practices. On the other hand, it would not require complicated statutes or agency procedures. Moreover, it might be possible to develop wide professional and agency support for

55. 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) [hereinafter Berrueta-Clement].
56. See generally Royce, Darlington, & Murray, *Pooled Analysis: Findings Across the Studies*, in *AS THE TWIG IS BENT... LASTING EFFECTS OF PRESCHOOL PROGRAMS* (Consortium for Longitudinal Studies ed. 1983).
57. Bridgman, *A 14 Year Study of Preschoolers Finds Long Term Gains for Disadvantaged*, *EDUC. WEEK*, Oct. 23, 1985, at 8, col.3.
58. See U.S. CHILDREN'S BUREAU, *supra* note 22, 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).

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

60. Head Start costs about \$2,400 per child per year. U.S. HEAD START BUREAU, *STATISTICAL FACT SHEET 1* (Dep't of HHS, Dec. 1985). The Perry Preschool Program cost about \$5,000 per child per year, in constant 1981 dollars. Schweinhart & Weikart, *supra* note 55; BERRUETA-CLEMENT, *supra* note 55.

the proposed standards. Child protective agencies could support reorienting the system toward meeting the developmental needs of children. Of course, these agencies 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 have often 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.

VIII. The Role of Counsel

The laws of most, if not all, states expressly prohibit adjudications of child neglect based simply on the parents' poverty. The D.C. Code, for example, excludes from its definition of child neglect "deprivation . . . due to the lack of financial means . . ." ⁶¹ The New York statute requires a finding that the parents are "financially able" to supply their children with adequate care or have been "offered financial or other reasonable means to do so." ⁶²

Courts have expressed similar sentiments. A New Jersey court warned that decisionmaking focused on the family's poverty might result in "mass transfers of children from ghettos and disadvantaged areas into more luxurious living accommodations but with resultant destruction of the natural parental bond." ⁶³ A Pennsylvania court addressed this issue by stating in 1955:

Under our system of government children are not the property of the state to be reared only where and under such conditions as officials deem best. . . . A child cannot be declared [neglected] merely because his condition might be improved by changing his parents. The welfare of many children might be served by taking them from their homes and placing them in what officials may consider a better home. But the Juvenile Court Law was never intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated, nor to take the children of the crude and give them to the cultured. . . . ⁶⁴

Nevertheless, as we have seen, such statutes do not prevent well-intentioned—though harmful—foster care place-

ments of poor children. Faced with this reality, what should lawyers for children and parents do to protect their clients? A motion to dismiss is always a possibility, but for the reasons described above, a court is unlikely to turn its back on an emotionally or developmentally deprived child. A potentially more effective strategy is to argue that compensatory services are a *more appropriate* dispositional alternative to foster care in cases of social deprivation.

The argument for compensatory services in lieu of foster care need not be grounded on a specific statutory provision. All courts are under a general obligation to fashion the most appropriate dispositional orders—that is, orders that adequately protect the child while minimizing the level of intervention. Many states, though, have specific statutes on the subject. For example, the D.C. Code prohibits placements "unless the [court] finds the child cannot be protected in the home and there is an available placement likely to be *less damaging to the child than the child's own home*." ⁶⁵

California uses a different statutory construction to impose a similar limitation. It prohibits a placement unless there is "clear and convincing evidence" that:

(1) There is a substantial danger to the physical health of the minor or would be if the minor was returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parents' or guardians' physical custody.

(3) The minor is suffering severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, and there are no reasonable means by which the minor's emotional health may be protected without removing the minor from the physical custody of his or her parent or guardian. ⁶⁶

A major reason for the dearth of compensatory services and the overuse of foster care is simple institutional inertia. What can counsel do to make it more likely that DHS will provide these needed services? Although ultimately the availability of services is a function of agency funding, it is nevertheless true that agencies establish priorities for how they spend the funds that they have. Therefore, it is important that counsel not meekly accept the statement that there are no compensatory services available.

65. D.C. CODE ANN. § 16-2320(a)(3)(C) (Supp. 1986) (emphasis added).

66. CAL. WELF. & INST. CODE § 361(b)(1) & (3) (West Supp. 1987); cf. VA. CODE ANN. § 16.1-252(E)(2) (Cum Supp. 1987) (requiring, for a removal, that:

[r]easonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably and adequately protect the child's life or health pending a final hearing on the petition. The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking, or other similar services to the child or family or the issuance of a preliminary protective order. . . .)

61. D.C. CODE §§ 16-2301(9)(B) (1981), 16-2301(24) (Supp. 1987).

62. N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 1983). *Accord* DEL. CODE ANN. tit. X, § 901(11) (Supp. 1984); D.C. CODE ANN. § 16-2301(9)(B) (Supp. 1987); FLA. STAT. ANN. § 415.503(7)(f) (1986); IOWA CODE ANN. § 232.68(2)(c) (1985).

63. Doe v. G.D., 370 A.2d 27, 33 (N.J. Super. Ct. App. Div. 1976).

64. *In re Rinker Appeal*, 180 Pa. Super. 143, 148, 117 A.2d 780, 783 (Pa. Super. Ct. 1955).

The court should be pressed to require the child protective or child welfare agency to provide the most appropriate in-home services consistent with the child's need for protection. Once again, although a specific statutory provision is unnecessary, many states have specific legislation authorizing the judge to order the agency to provide appropriate services. The D.C. Code, for example, authorizes the court to "(i) order any public agency of the District of Columbia to provide any service [it] determines is needed and which is within such agency's legal authority and (ii) order any private agency receiving public funds for services to families or children to provide any such services when [it] deems [such service] is in the best interests of the child and within the scope of the legal obligations of the agency."⁶⁷

Of course, courts cannot conjure up services in a vacuum. Nevertheless, case law is slowly developing toward a practical application of this mandamus-like power.⁶⁸ In *In re*

67. D.C. CODE ANN. § 16-2320(a)(5) (1981); cf. CAL. WELF. & INST. CODE § 361.5(a) (West Supp. 1987) (under certain circumstances, the court must order provision of child welfare services to minor and to minor's parents to facilitate reunification).

68. For a full discussion of the application of such mandamus-like provisions, see Besharov, *Practice Commentary to Section 255*, N.Y. FAM. CT. ACT (McKinney 1983 & Supp. 1986).

D.I.,⁶⁹ for example, the court ordered the "District of Columbia through its executive agencies, to provide suitable housing or, in the alternative, financial resources sufficient to secure suitable private housing, in order to reunite the I. family."

The court should be pressed to require the child protective or child welfare agency to provide the most appropriate in-home services consistent with the child's need for protection.

IX. Conclusion

Many child welfare professionals are working to improve the system's treatment of socially deprived poor children. But if the past is any guide, they cannot do it alone. Legal advocacy of the sort outlined above can help them in their overall reform efforts and can be crucial to the welfare of individual poor children.

69. *In re D.I.*, 113 Wash. L. Rep. 1293 (June 26, 1985) (D.C. Super. Ct., May 6, 1985); see also *In re L.H. and E.P.*, N-183-79 (D.C. Super. Ct., June 29, 1982).



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