

*Protecting Abused  
and Neglected Children:  
Can Law Help Social Work?\**

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The area of overlap between the concerns of law and social work is often like an ill-defined border between two sovereign nations. Instead of being a middle ground of mutual assistance, too often it is the location of hostile skirmishes as each side seeks to advance its own view of who should govern the territory. Too often, each side seems unable to appreciate the validity of the other's approach, unable to see that it shares goals with the other, and unable to work with the other to achieve these common goals.

Child protective efforts present a vivid example of how law and social work overlap, and, also, of the potential benefits of greater interdisciplinary cooperation. The intent of this article is to describe some of the difficulties social workers experience in dealing with cases of child abuse and neglect, how existing laws contribute to these difficulties, and how laws could be reformulated to help social workers better protect maltreated children.

I hasten to add that I speak of law helping social work, not because of professional jingoism, but because, in child protective work, the law provides the framework for social work action.

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\*The American Humane Association wishes to extend its appreciation to the Bureau of National Affairs for permitting the republication of this article which appeared in the August 21, 1983 issue of the *Family Law Reporter*. Acknowledgment also is given to Loyola University for stimulating this publication as a result of an invitation to Mr. Besharov to give the Third Annual Mathew H. Schoenbaum Lecture on Social Work and Law.

### The Overlap Between Law and Social Work

As a society, we have adopted a predominantly therapeutic, or, in the vernacular, a "social work," response to the problems of child abuse and child neglect. Almost all reports of suspected child maltreatment are made to specialized child protective agencies. (Even in states where the law still permits reporting to the police, most reports are made to, or are referred to, these specialized agencies.)<sup>1</sup>

Usually housed within the public child welfare or social services department, child protective agencies operate in the social work tradition of helping people with their personal problems through a mix of concrete and counseling services. Based on their investigation of the home situation, child protective agencies decide what kinds of mental health and social services a family needs, and then they help the family to obtain them. Many of these services, such as financial assistance, day care, crisis nurseries, and homemaker care, are concrete efforts to relieve the pressures and frustrations of parenthood. Other services, such as infant stimulation programs, parent aides, and parent education programs, are designed to give parents specific guidance, role models, and emotional support in child rearing. In addition, individual, group, and family counseling therapy services are used to ease the tensions of personal problems and marital strife.<sup>2</sup>

However, there is a fundamental difference between classic social work and child protective practice. Social work, in its purest form, is built upon the client's willing participation in the therapeutic process. If the client refuses to participate, the case is closed. This may not be desirable, and the worker may attempt to persuade the client to remain in the program, but ultimately the client decides.

This commitment to the voluntary acceptance of social work services is so pervasive that there even is a "light bulb" joke about it. As every good social worker knows, it takes only one social worker to change a light bulb—but the worker needs a bulb that wants to be changed.

This is not how child protective workers must operate. If the parent declines services—or refuses to cooperate altogether—the worker must decide whether the danger to the child is so great that *treatment must be imposed*. Such "treatment" includes counseling and other traditional social work services, but it also extends to involuntary home supervision, foster care and, ultimately, to the termination of parental rights.

Child protective workers do not impose such "services" by dint of their casework skills alone. They do so through laws—laws that authorize

courts to require parents to participate in treatment programs, laws that authorize courts to remove children from parental custody, and laws that authorize courts to terminate parental rights. Thus, the process of child protection is a social work process set within the law's power to coerce parental cooperation.

The social worker's reliance on legal authority to impose treatment services on unwilling parents, coupled with the law's obligation to regulate the process in a way that protects the rights of both the child and the parents, is what places child protection work on the borderline between law and social work.

### **Twenty Years of Progress**

Over the past twenty years, there has been an enormous expansion of programs to prevent child abuse and child neglect. In 1979, for example, about 1.2 million children were reported to the authorities as suspected victims of child abuse and neglect.<sup>3</sup> This is more than *eight times* the approximately 150,000 children reported in 1960.<sup>4</sup>

Similarly, in 1960, few communities had organized programs to investigate reports and to take protective action when needed. Now, almost all major population centers have specialized "child protective agencies." These agencies receive reports twenty-four hours a day via highly publicized "hot lines" and initiate investigations on the same day, or shortly thereafter.<sup>5</sup>

In this twenty-year period, Federal expenditures for child protection services have risen from a few million dollars a year to over \$325 million annually.<sup>6</sup> In addition, the array of treatment services now routinely available to child protective agencies--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--were largely unheard of in 1960; some had not yet been invented.<sup>7</sup>

This is not meant to suggest that existing investigative and treatment services are sufficient. The expansion of child protective programs, though substantial, has not kept pace with the rapid, and continuing, increase in reported cases. Furthermore, there has been a chronic shortage of those mental health and social services needed to treat both parents and children.<sup>8</sup>

Recent budget cuts at the Federal level have aggravated these problems. Even communities that had developed strong child protective systems are having difficulty keeping up with constantly increasing caseloads.

Nevertheless, one cannot review the present status of child protective programs without being impressed by the steady increase in their scope and quality. Nationwide, there now exists a basic infrastructure of laws and agencies to protect endangered children. And it has made a difference. Increased reporting and specialized child protective agencies have saved many thousands of children from injury and even death. 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% reduction in child fatalities from about 200 a year to under 100.<sup>9</sup> Similarly, Ruth and Henry Kempe report that: "In Denver, the number of hospitalized, abused children who die from their injuries has dropped from 20 a year (between 1960-1975) to less than one a year."<sup>10</sup>

#### Gaps in Protection Remain

Despite this progress, many children suffer further maltreatment *after* their plight becomes known to a child protective agency. Studies in a number of states have shown that about 25% of all child *fatalities* attributed to abuse or neglect involve children already reported to a child protective agency.<sup>11</sup> (Tens of thousands of other children receive serious injuries short of death while under child protective supervision.)

Eight-month-old Kevin, his case cited below, died because decision-makers ignored obvious signals that he was in immediate danger:

At two months of age, Kevin was brought to the hospital with a broken tibia (the upper thigh). His father said that Kevin received the injury by falling off a bed. Five months later, Kevin suffered a fractured skull. This time the father claimed that he had accidentally dropped him.

A court petition alleging child abuse was filed based on these two injuries. The attending physician testified that it was impossible for Kevin to have suffered the broken thigh in the way his father claimed. After a full hearing, the court held that the father had abused Kevin. The child protective agency recommended that Kevin be placed in foster care because his home was at least temporarily unsafe. The judge decided, however, that Kevin could remain at home if the agency made regular home visits. To protect the child, he ordered that Kevin's father was not to be left alone with him.

Shortly thereafter, a protective worker made a home visit. He found the father and Kevin home alone—contrary to the judge's order. But because they were playing happily on the floor, from this brief display he concluded that all was well. He noticed (and recorded in the case file)—but took no action about—what appeared to be a swelling of Kevin's skull.

Two weeks later, Kevin was dead from repeated head beatings inflicted by his father.<sup>12</sup>

Child protective proceedings are confidential, and relatively few of these cases reach the news media. But enough do so that all communities have had their share of news stories about children who have been mercilessly beaten, children who have been cooked in boiling hot water, children who have been sexually brutalized, and children who have been left in locked closets to die—*after* having been reported to the authorities.

These cases—and the media attention that surrounds them—have an impact on child protective workers and child protective practices far beyond what their small number would suggest.

### Blaming Social Workers

Extreme cases of parental brutality and neglect make society anxious to do "something" to protect endangered children.<sup>13</sup> Until recently, horror stories about children being killed were seen as evidence of inadequate staffing and poor administrative procedures. And, as a result, they often sparked major administrative and legislative reforms.

In New York State, for example, complacency over the plight of maltreated children came to an abrupt end in 1969, when the brutal murder of a young girl gained intensive media publicity. For more than a month, New York City newspapers ran numerous frontpage stories about Roxanne Felumero's death, and the tragic mistakes that made it possible.<sup>14</sup> Roxanne had been removed from her drug addict parents after repeated beatings. Subsequently, in the face of clear evidence that her parents were extremely disturbed individuals, Roxanne was returned home—where the beatings resumed. Because agency follow-up was so poor, no one noticed the bruises all over Roxanne's body. Eventually, Roxanne died from these beatings, and her parents dumped her body into the East River. A subsequent investigation performed by the judicial authorities found that: "If the Family Court and the complex of public and private agencies operating within it had functioned more effectively, Roxanne Felumero would probably not have met her tragic death."<sup>15</sup> As a result of the

attention this one case received, the New York State Legislature completely revamped the state's child protective system.<sup>16</sup>

However, it has become increasingly more difficult for the public—and politicians—to see inadequate funding as the main reason for such failures of protection. Twenty years of effort have resulted in an enormous expansion of child protective programs. At any one time, about 400,000 families are under the supervision of child protective agencies<sup>17</sup> and about 500,000 children are in foster care because their home situations were deemed to be dangerous or otherwise unsatisfactory.<sup>18</sup> (By the way, this is a sharp increase from 1960, when about 100,000 children were in foster care.)<sup>19</sup>

As a result, there is a growing tendency to blame individual caseworkers for the deaths of the children in their care. All across the country, workers are being given administrative reprimands, are being fired, downgraded, or reassigned for mishandling their cases.<sup>20</sup> Many are being sued for professional malpractice.<sup>21</sup> And, in at least four instances, caseworkers have been criminally prosecuted for official malfeasance and negligent homicide.<sup>22</sup> Many others have been hauled before investigating grand juries. For example, although it decided not to indict, one New York Grand Jury issued a report finding the caseworkers guilty of "neglect or nonfeasance in public office."<sup>23</sup>

Caseworker concern over civil and criminal liability has grown so great that it has become the most popular topic at professional conferences on child maltreatment. The National Association of Social Workers has recently formed a special committee on caseworker liability, has started publishing materials on the subject, and has encouraged its members to take out insurance to protect themselves from lawsuits.

### Unfair Criticism

Few would deny that social workers should be held responsible for a child's death—if they have been careless or negligent. Everyone should be deeply troubled, for example, by cases in which workers seem to overlook or ignore signals of great—and obvious—danger to children. Fear of civil and criminal liability, and here I am probably speaking like a lawyer, may well serve as a deterrent to the most egregious forms of professional malpractice.<sup>24</sup>

However, in many cases, no one is at fault. No one, not even the most dedicated and competent caseworker, could have prevented the child's death.

*First*, agency decisions often must be based on incomplete and misleading information—as important facts go undiscovered or are forgotten, concealed or distorted. 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.

*Second*, staff shortages limit the extent of investigations and the level of home supervision.<sup>25</sup> With more cases than they can handle, caseworkers do not have enough time to give individual cases the attention required. In the rush to clear cases, many key facts go undiscovered—as workers are forced to perform abbreviated investigations. Moreover, protective agencies are rarely able to monitor dangerous home situations with sufficient intensity and duration to insure a child's safety. The average family under home supervision receives approximately five visits over a six-month period, after which the case is closed or forgotten in the press of other business.<sup>26</sup>

*Third*, home situations often deteriorate sharply—and without warning. It is easy to see the need for protective intervention if the child has already suffered serious injury. But, often, a decision must be made before serious injury has been inflicted. Under such circumstances, assessing the degree of danger to a child requires workers to predict the parents' future conduct. Workers must predict that the parent will engage in abusive or neglectful behavior and they must predict that the child will suffer serious injury as a result. The unvarnished truth is that there is no way of predicting, with any degree of certainty, whether a particular parent will become abusive or neglectful. Besides the limitations imposed by large caseloads and poorly trained staff, such sophisticated psychological predictions are simply beyond our reach. Despite years of research, there is no psychological profile that accurately identifies parents who will abuse or neglect their child in the future.<sup>27</sup> Unless the parent is suffering from a severe and demonstrable mental disability,<sup>28</sup> not even the best clinicians can make a reliable assessment of a parent's propensity to become abusive or neglectful.

The point is that child protective agencies cannot guarantee the safety of all children reported to them. Even if workers placed 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.

Unfortunately, this reality often is ignored in the rush to criticize social workers who have "allowed" a child to die. One case that almost resulted in criminal prosecution illustrates this tendency: A neighbor reported that a six-year-old boy had been locked out of his house without shoes or socks on. Well, 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, but no one, could have predicted that this would happen. The mother had never before physically assaulted the boy; she had never before given any indication of having a serious emotional problem. And yet, for weeks, the local papers 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. Thankfully, cooler heads prevailed, and the prosecution was dropped.

### **Defensive Social Work**

Blaming social workers for deaths that are beyond their control is simply unfair to them. Child protective work is not easy. Workers are well aware of the consequences of a wrong decision. Failure to act may lead to a child's serious injury or, as we have seen, to death. On the other hand, intervening when a child is not in danger can leave lasting psychological scars on the child as well as the parents.<sup>29</sup> Holding workers responsible for deaths that they cannot prevent raises this inherently stressful responsibility to an unattainable, and morale destroying, level of accountability.

Unjustified criticism is also deeply unfair to the children and families in the child protective system because it leads to defensive social work. Workers feel that they will be blamed if there was *any* reason, however minor, for thinking that the child was in danger. Hence, they are under great pressure to take no chances, and to intervene whenever they might be criticized for not doing so. The dynamic is simple enough: negative media publicity—and a lawsuit—is always possible if the child is subsequently killed or injured; but there will be no critical publicity if it turns out that intervention was unneeded. (And how could people tell, anyway?)



The best analogy that I can think of is the kind of defensive medicine practiced by many physicians these days. The ease with which former patients seem to be able to win large cash judgments makes most physicians fearful of malpractice lawsuits. To minimize the possibility of a subsequent lawsuit, many physicians routinely order more medical procedures, x-rays, and other tests than are reasonably needed.

As in the case of defensive medicine, no one knows exactly how much defensive social work goes on. However, most observers agree with Yale law professor Peter Schuck that: "Social workers may more quickly—but prematurely—remove children from troubled families rather than risk being sued on behalf of an abused child."<sup>30</sup> Schultz, a social work professor at the University of West Virginia, found at least one worker (in his survey of child protective workers) who "tries to get state custody of all suspected abuse children just to protect himself from liability."<sup>31</sup> In another state, a program director describes what happened after he was indicted for "allowing" a child to be killed:

Upon learning of the indictments, caseworkers and their supervisors became aware of their own vulnerability. As a result, paperwork increased to account for everyone's actions and for a while more children were removed from their homes. Supervisors told me that these removals seemed unnecessary but the caseworkers were afraid.<sup>32</sup>

### Existing Laws Encourage Unfair Criticism

In the beginning of this discussion, I said that law could help social work, and it can. Law can set the ground rules for decision-making. Law can specify when child protective intervention should occur and when it should not occur. By doing so, law could help protect caseworkers from unfair criticism and, thus, help caseworkers to withstand the pressures toward defensive social work.

But existing laws do just the opposite: they feed the process of unfair criticism and defensive social work.

The vagueness and overbreadth of existing 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>33</sup> But, as I will try to describe, the problem is not that laws vest too much discretion in social workers. Rather, they place *too much responsibility*.

Existing laws give social workers broad authority to intervene on a *preventive* basis. It often surprises people to learn that, in most states, the

law authorizes intervention to prevent *future maltreatment*; past abuse or neglect is not required. Some states, adopting the language of the Federal Child Abuse Act, authorize intervention if the child is "threatened with harm."<sup>34</sup> Other states authorize intervention if the child "lacks proper parental care,"<sup>35</sup> or is "without proper guardianship,"<sup>36</sup> or has parents "unfit to properly care" for him,<sup>37</sup> or is in an "environment injurious to his welfare."<sup>38</sup> And some laws authorize intervention when there is a "substantial risk of physical injury."<sup>39</sup> (Illinois law uses at least three of these phrases.)<sup>40</sup>

The variations are endless. But without exception, such provisions come down to one simple proposition: past child abuse or child neglect is *not a prerequisite to intervention*. Children are being protected from "threatened harm."

Such open-ended grants of *preventive jurisdiction* are usually 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.<sup>41</sup> As a general principle, there is nothing wrong with this preventive orientation. Indeed, it is commendable. Society should not wait until a child is seriously injured before taking protective action. Even those deeply critical of the extent of child protective intervention advocate such preventive jurisdiction. Goldstein, Freud and Solnit, for example, would authorize intervention to protect children who face an "imminent risk of death or serious bodily harm."<sup>42</sup> Wald, another critic of the present level of intervention, explains why he concluded that such preventive jurisdiction is needed:

... (I) t would be unwise to allow intervention only after a child has been seriously injured as a result of inadequate living conditions or supervision. For example, a court must be able to protect a 5-year-old child left unattended for several days, even if the child has avoided injury.<sup>43</sup>

However, by giving workers such broad and unfettered authority to intervene preventively, existing laws greatly overstate the ability of caseworkers to identify children "threatened with harm." Existing laws suggest that workers can protect *all* the children in their care. In effect, these provisions imply that workers can do the impossible—make sophisticated predictions of future parental behavior. Agency policies and public pronouncements do nothing to dispel this totally unrealistic and ultimately counterproductive expectation.<sup>44</sup>

It should come as no surprise that, in this statutory context, the public and the media are harshly critical whenever a child dies.

### Law Can Help

The failure to recognize the limited ability of social workers to identify and protect endangered children is not simply a matter of poor legal drafting. As a society, we have been unwilling to accept that some children cannot be protected from abuse and neglect, that, no matter what we do and no matter how hard we try, for 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.

For the peace of mind of social workers who must make critical life and death decisions, as well as to protect the well-being of children and the rights of parents, child protective laws should be reformulated to reflect the realities of child protective decision-making. Laws should make it clear that caseworkers cannot predict the future maltreatment—and that it is unfair to blame them for failing to do so.

Laws should be redrafted to make it clear that, in most cases, the only sound basis for deciding to take protective action is the parent's *past* abusive or neglectful behavior. This is the Criminal Law's posture, and it has equal validity for child protective intervention. (Only two exceptions come to mind. The first involves parents suffering from *severe and demonstrable* mental disabilities that make them simply incapable of providing adequate care for the child, and this means disabilities such as overt psychoses so severe that the parent is detached from reality.<sup>45</sup> The second exception involves those situations in which the 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.)

Let me not be misunderstood. I am not suggesting that serious injury should be the only ground of intervention. 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>46</sup> Of course not. Society should adopt a preventive orientation toward protecting children. It just should not use the kind of open-ended and unregulated approach that laws now permit.

The parents' behavior need not have caused serious injury for it to be considered "abusive" or "neglectful." If the parent did something which was *capable of causing serious injury*,<sup>47</sup> the parent also has demonstrated that he is a serious threat to the child. The mere fact that the child did not or has not yet suffered serious injury does not reduce the need for protective action. If the parent has already engaged in harmful conduct

toward the child, then it is reasonable to assume that—unless there is a change in circumstance—what he did in the past, he will do again in the future. As the Supreme Court of California said in the landmark case of *Lanieros 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>48</sup>

Thus, a parent demonstrates that he is a continuing threat to a child if he did something whose reasonably foreseeable consequence could have been the child's serious injury—but serious injury was averted by the intervention of an outside force, or perhaps simple good luck. A parent shoots, 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 nothing happens. Although, through some good fortune, such children did not suffer serious injury, it is fair to predict that what the parent once did, he will do again.

Similarly, a parent demonstrates that he is a danger to the child if he is presently engaged in a course of conduct whose reasonably foreseeable consequence will be serious injury to the child—if it continues for a sufficient length of time. A parent provides a nutritionally inadequate diet which, over time, will cause serious health problems for the child; a parent inflicts repeated, but otherwise minor, assaults on the child which, over time, will make him into an easily frustrated, violence prone individual; a parent provides grossly inadequate emotional support and cognitive stimulation which, over time, will lead to severe developmental disabilities. Again, although such children have not yet suffered serious injury, that they will do so is only a matter of time.

It is important to note that minor assaults or marginally inadequate care do not, by themselves, signal future seriously harmful behavior. Almost all parents have physically or verbally lashed out at their children during times of unusual stress; all parents have at least some moments when they neglect to meet the needs of their children. (If actual harm results, it is usually minor; if it is more serious, it is usually transitory.) The vast majority of these situations will never grow into anything resembling child abuse or child neglect, and there is no way of knowing which will become more

serious with the degree of assurance needed to justify involuntary child protective intervention.<sup>49</sup> Therefore, child protective intervention should occur only if the past behavior was *itself* sufficiently harmful, that is, if it was (or, over time, will be) capable of causing *serious* harm. (And, such behavior must be relatively recent; ordinarily, intervention should not be based on behavior from the distant past.)

I believe that the harmfulness of the parents' past behavior often 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 actual serious injuries. This confusion was described by 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 12-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 more 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>50</sup>

I further believe that laws based on the "harmfulness" of past parental behavior provide all the preventive jurisdiction that agencies should have. They would authorize intervention only after there is clear proof of the need to do so.

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. This is a mistake. Even though its purpose is to protect endangered children, child protective intervention is a major intrusion on parental rights which can often do more harm than good. It should be limited to situations in which the need for intervention is supported by clear and sufficient evidence.

This does not mean that situations of less damaging child care do not merit social action. Many would benefit from specific social and community services. But these services should be offered for the parent's voluntary acceptance—or refusal.

### The Foster Care Decision

Up to now, this discussion has not distinguished between those forms of child protective intervention that involve the removal of the child from

the home and those that are limited to the involuntary treatment of parents while the child remains in their custody. This is because the same basic factor is involved—the danger of future serious injury. (As described above, in the absence of “seriously harmful behavior” or “severe mental disability,” neither form of intervention should be considered.) Moreover, even after a child has been removed from the home, the danger of future serious injury must be regularly assessed—to determine whether the child should be returned to the parent’s custody.

At the present time, standards for determining whether foster care is needed are non-existent. Laws give social workers and judges unfettered dispositional authority. Once it appears that the child is “abused” or “neglected,” there are no limits—and hence no guidance—on what situations require foster care, and which do not. Consequently, “decision-making is left to the ad hoc analysis of social workers and judges.”<sup>51</sup>

However, as suggested by the foregoing discussion of “seriously harmful behavior,” all forms of child maltreatment can be divided between those that are “immediately dangerous” and those that are “cumulatively injurious.” This distinction provides an additional group of factors that caseworkers (and judges) should consider in deciding whether to place a child in foster care, and, hence, an additional means through which law can help guide their decisions.

Children whose parents have engaged in “immediately dangerous” behavior continue to face an imminent threat of serious injury. Unless their safety can be assured by some other means, they should be placed in protective custody quickly—and kept there until the home situation is safe (or parental rights are permanently terminated).<sup>52</sup>

On the other hand, children whose parents have engaged in “cumulatively injurious” behavior do not need foster care on an emergency basis. The danger they face, though great, derives from the long-term consequences of the inadequate care that they are receiving. Regardless of how upsetting their present situation seems to be, they have endured within it for some time already, and there is ordinarily no need that they be immediately rescued from it. Instead, there is much more time to help parents to care adequately for the child without removing him from the home. [Children in “cumulatively injurious” situations require *emergency* foster care only when: (1) the parents may flee the jurisdiction taking the child with them, or (2) the child’s condition has deteriorated so much that irreparable injury is imminent.] Moreover, even if such treatment efforts are unsuccessful, in “cumulatively injurious” situations the need for foster care often can be obviated through in-home, child-oriented services that

"compensate" for parental deficiencies. ("Compensatory" services include infant stimulation programs, Head Start, therapeutic day care, homemaker care, early childhood or child development programs, nutritional services and youth counseling programs.)

Therefore, I also would propose that child protective legislation be amended to reflect the different dispositional needs of "immediately dangerous" and "cumulatively injurious" situations.

### **Only a Partial Solution**

The approach that I have proposed will not eradicate the decision-making problems of child protective workers.

"There will always be borderline cases."<sup>53</sup> for which no decision is clearly correct. Moreover, for so long as child protective decisions must be made by human beings, the chances for human error will always be present. Large caseloads and poorly trained staff only exacerbate these realities.

In addition, I have not discussed the second element of child protective decision-making. Social workers also must decide whether the parents' emotional condition has improved sufficiently to return the child to their custody or to close the case entirely. For example, the precipitating cause of the parents' behavior may have disappeared or been removed, the parents may have developed the ability to care for their child (either by themselves or through treatment), or the provision of voluntary services may sufficiently reduce the likelihood of a recurrence to obviate the need for coercive intervention.<sup>54</sup> These are crucial issues, and they raise a host of issues beyond the scope of this presentation.

Nevertheless, I believe that my proposal, by protecting social workers from unrealistic expectations about what they can accomplish, would relieve the unfair tensions under which they presently operate and, at the same time, would help them to make more appropriate decisions.

### **A Word About Interdisciplinary Tolerance**

In closing, I would like to make a few comments about interdisciplinary tolerance.

Many outside observers see social workers intervene in questionable circumstances and conclude that workers are unthinking busybodies

intent on breaking up families. Goldstein, Freud, and Soinit, for example, claim that the present system "invites the exploitation of parents and children by state officials. Acting in accord with their own personal child rearing preferences, officials have been led to discriminate against poor, minority, and other disfavored families."<sup>55</sup>

With this attitude, it is all too easy to suggest simplistic solutions designed to remove all discretion from untrustworthy social workers. For example, Goldstein, Freud and Soinit have proposed that child protective agencies (and courts) be divested of jurisdiction over most cases of physical neglect, emotional maltreatment, and even sexual abuse.<sup>56</sup>

Such proposals have not gained support because they are a classic, and in this context, a literal example of throwing the baby out with the bath water.<sup>57</sup> Physical neglect, emotional maltreatment, let alone sexual abuse, can be just as harmful as actual physical battering. Adopting such proposals would exclude hundreds of thousands of endangered children from the ambit of community protection.

Certainly, lawyers, as a group, tend to feel more strongly about legal rights and procedures than do most social workers. But most social workers share with lawyers a fundamental commitment to traditional American values of due process and family autonomy.<sup>58</sup> To think that social workers want to intrude into family matters—willy-nilly—is to succumb to a gross oversimplification, an oversimplification that forecloses the possibility of realistic reform.

As I have tried to describe, the dynamics of overintervention are much less insidious and, therefore, much more amenable to correction. If people (and here I suppose that I mean lawyers) spent less time being critical, they might have more time to work on constructive solutions to the problems that child protective workers face.

## **Conclusion**

With good cause, social workers usually are leery when lawyers propose the imposition of more legal formalities on their work. But if my analysis is correct, the approach that I have proposed will be a help, not a hindrance, to social work action.

In this article, I have described how social workers often are criticized—harshly—when children under their care are killed, how this criticism is sometimes deeply unfair, and how fear of unfair criticism leads to defensive social work, and, hence, to overintervention into private family



matters. I then argued that existing laws encourage this process, and that laws could be reformulated to help social workers better protect maltreated children.

Although I have limited my discussion to child protective programs, I hope that I also have made a broader point. The field of child protection is only one of many areas in which law and social work overlap. In all of these areas, increased interdisciplinary communication, understanding, and tolerance could help both professions meet their important social responsibilities.

### Footnotes and References

1. U.S. National Center on Child Abuse and Neglect. *National Study of the Incidence and Severity of Child Abuse and Neglect*. U.S. DHHS. 1981, p. 16.
2. See, generally; U.S. National Center on Child Abuse and Neglect. *Annual Analysis of Child Abuse and Neglect Programs*. DHHS. 1980.
3. *National Study of the Incidence and Severity of Child Abuse and Neglect*. *op. cit.*, n. 1, p. 11.
4. U.S. Children's Bureau, *Juvenile Court Statistics*. 1966, p. 13.
5. See, generally; U.S. General Accounting Office. *Increased Federal Efforts Needed to Better Identify, Treat, and Prevent Child Abuse and Neglect*, chapter 3. 1980.
6. U.S. Department of Health and Human Services. "Technical Notes: Summaries and Characteristics of State's Title XX Social Services Plans for Fiscal Year 1980." p. 126 (undated report).
7. Compare, Vincent DeFrancis. *Child Protective Services in the United States: A Nationwide Survey*, The American Humane Association, 1956; Vincent DeFrancis. *Child Protective Services: A National Survey*, The American Humane Association, 1967; with W. Hildenbrand, et al., *Child Protective Services Entering the 1980's*, The American Humane Association, 1981.
8. See, U.S. General Accounting Office, *op. cit.*, n. 5, chapter 4.
9. N.Y.S. Department of Social Services. "Child Protective Services in New York State: 1979 Annual Report." Table 8, 1980.
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11. See, e.g., Region VI Resource Center on Child Abuse. "Child Deaths in Texas." p. 26. University of Texas, Graduate School of Social Work, 1981, p. 26; Mayberry, "Child Protective Services In New York City: An Analysis of Case Management." Welfare Research, Inc., Albany, N.Y., draft dated May, 1979, p. 109.
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13. See, Dembitz. "Child Abuse in the Law—Fact and Fiction." 24 Record of the Association of the Bar of the City of New York 613, Dec., 1969.

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15. Report of the Judiciary Relations Committee of the Appellate Division of the First Department, quoted in: *N.Y.L.J.*, June 30, 1969, 1, column 4.
16. See, N.Y.S. Assembly, *op. cit.*, n. 12, pp. ii-v.
17. Author's estimate based on: U.S. National Center on Child Abuse and Neglect, *National Analysis of Child Neglect and Abuse Reporting*, 1977. The American Humane Association, p. 55, Table 11, DHHS, 1979.
18. U.S. Children's Bureau, *National Study of Social Services to Children and Their Families*, DHEW, 1978, p. 109 and p. 117, Table 5-3.
19. Author's estimate, based on: Juvenile Court Statistics, *op. cit.* n. 4, p. 13.
20. See, D. Besharov, "Criminal and Civil Liability in Child Welfare Work: The Growing Trend," National Legal Resource Center for Child Advocacy and Protection, American Bar Association, 1983.
21. See, e.g., *Mammo v. Arizona*, 24 A.T.L.A. Rep. 76, 1981; *cf. Jacksonville v. Florida First National Bank of Jacksonville*, 339 So. 2d 632, Fla. 1976, involving a suit against the police for inadequately investigating a report of child maltreatment. See also, Comment, "A Damages Remedy for Abuse by Child Protective Workers," 90 *Yale Law Review* 681, 1981; C. Rose, "Some Emerging Issues in Legal Liability of Children's Agencies," CWLA, 1978; Leahy and Barnes, "Private Social Welfare Agencies: Legal Liabilities Facing Workers," *Public Welfare*, Fall 1977.
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35. Utah Code Ann. s78-3A-2(17), 1977.
36. Tenn. Code Ann. s37-202 (6) & (7), 1977.
37. Ark. Stat. Ann. s45-403(4), 1977.
38. Col. Rev. Stat. s19-1-103(20), 1978.
39. N.Y. Fam. Ct. Act s1012 (e)(ii), 1975.
40. Ill. Juv. Ct. Act s2-b(2b), 1981.
41. See, e.g., H. Krause, "Family Law in a Nutshell," pp. 236-237, 1977.
42. Goldstein, Freud and Solnit, *op. cit.*, n. 33, p. 190, para. 10.10.
43. Wald, *op. cit.*, n. 29, p. 1014.
44. See, e.g., U.S. National Center on Child Abuse and Neglect. "Child Protective Services: Inservice Training for Supervisors and Workers, Module III 'Investigations' ". DHHS, 1981.
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46. 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.
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48. *Landeros v. Flood*, 17 Cal. 3d 399, 412, n. 9, 131 Cal. Repr. 69, 551 P. 2d 389, 1976.
49. In fact, according to data collected by the National Incidence Study, less than one in five minor assaults or other examples of poor child rearing will ever grow into anything resembling child abuse or child neglect. *National Study on the Incidence and Severity of Child Abuse and Neglect*, *op. cit.*, n. 1, p. 18, Table 4-1.
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53. J. Giovannoni and R. Becerra, *Defining Child Abuse*, 1979, p. 260.
54. See, e.g., N.Y. Family Court Act s1051(c), 1981, allowing the court to dismiss a proven neglect petition if it determines that its "aid is not required. . . ."
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56. 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. *ibid.* p. 64.

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58. See, e.g., J. Giovannoni and R. Becerra, *op. cit.*, n. 53, chapter 3.