IMPROVING THE LEGAL RESPONSE OF CHILD PROTECTIVE SERVICE AGENCIES

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INTRODUCTION

This year marks the twentieth anniversary of the first state child abuse reporting laws;[1] such statutes are now in effect in every jurisdiction.[2] These laws have been modified through the years and now share several features, due in part to conditions for state funding required under the Federal Child Abuse Prevention and Treatment Act.[3] Common features include provisions for central child abuse and neglect registries, mandatory reporting of suspected neglect as well as abuse, and guardian ad litem representation for children in judicial proceedings.[4] As a product of these laws and the growing public awareness of child maltreatment, the number of nationally reported abuse and neglect incidents has skyrocketed; official yearly reports now exceed 700,000.[5] Unfortunately, neither the staffing of child protective service agencies (hereinafter referred to as CPS agencies) nor the availability of community treatment and service resources have kept pace with this boom.

Until recently, the absence of an administrative child protective agency in many states encouraged juvenile courts to accept, investigate and resolve complaints of child maltreatment.[6] Given

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1. *See* Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1 (1967); Paulsen, Parker & Adelman, *Child Abuse Reporting Laws — Some Legislative History*, 34 GEO. WASH. L. REV. 482 (1966); Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679 (1966).

2. V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970'S (rev. ed. 1974).

3. 42 U.S.C. §§ 5101-5106 (1976). Under the federal law, states are eligible for federal child abuse grants if they meet ten eligibility requirements. *Id.* at § 5103(b)(2). *See also* 45 C.F.R. § 1340 (1980).

4. For a general overview of contemporary child abuse and neglect reporting statutes, see Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458 (1978).

5. NAT'L CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NAT'L ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 6 (1981).

6. V. DEFRANCIS, THE COURT AND PROTECTIVE SERVICES (1960).

the clear jurisdictional authority of the courts over abused and neglected children, many courts became quasi-service agencies. Now, the combination of reporting laws and federal enactments designed to provide large sums of federal funding for public child welfare programs[7] has resulted in municipal, county or state child protective agencies providing the bulk of the services to maltreated children and their families.[8] Furthermore, the mandatory reporting laws have generally designated a single public welfare agency as having responsibility for receipt of and investigation of reports of abuse and neglect.[9] The earlier scheme of exclusive judicial involvement has therefore given way to a system in which courts are involved with only a small percentage of substantiated child maltreatment cases.[10]

During the coming years, with anticipated reduced or stagnated funding for social services programs, the ability of CPS agencies to meet their new-found legal responsibilities is in jeopardy. Since agencies will be unable substantially to increase their services aimed at family rehabilitation, they must consider other avenues of self-improvement. Two are suggested in this article. The first calls for legislative and regulatory reform aimed at clarifying, or in some cases modifying, the agency's legal responsibilities. The second urges the agency to utilize more effectively the legal talent at its disposal.

I. Liability of Child Protective Agencies

CPS agencies are charged by legislation to investigate reports of abuse and neglect, and, if a report is substantiated, to provide

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7. Subchapters IV-B and XX of the Social Security Act, 42 U.S.C. §§ 620-626 and 1397a-1397 (1976); The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 601, 620-627, 670-676 (1976 & Supp. III 1979).

8. Although most child protective services are now provided by public agencies, in some areas these agencies enter into contracts which delegate their responsibilities to private child welfare programs. Most of the discussion herein concerning agency liability is thus also applicable to the private organizations responsible for delivery of child protective services.

Furthermore, several federal courts have held that private child care agencies are "public in nature" and thus may be found liable under the Federal Civil Rights Act. *See, e.g.*, Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974).

9. *See* Nat'l Center on Child Abuse and Neglect, U.S. Dep't of Health and Human Services, Child Abuse and Neglect—State Reporting Laws (1980).

10. Accordng to a national survey, around 14% of substantiated reports result in a child protective petition in juvenile or family court. Nat'l Center on Child Abuse and Neglect, U.S. Dep't of Health and Human Services, Nat'l Analysis of Official Child Neglect and Abuse Reporting 36 (1980).

assistance to the child and family. CPS agency staff are daily challenged to render decisions which profoundly affect families. Such decisions include whether or not to seek the child's removal from the home, where to place the child, and what services to offer the family. These decisions must be made within the confines of the agency's enabling legislation. There are also state legislative and constitutional limitations. Deviations may subject agencies to legal liability on a variety of grounds.[11]

A. *Failure to Remove a Child*

Once a suspicion of child abuse or neglect has been reported to the child protective agency,[12] it must quickly initiate its investigation[13] to determine whether the child is in imminent danger.[14] Should the child's safety be in jeopardy, the agency will usually take the child into protective custody. If a child is not removed from the home, agency personnel may ultimately be held criminally liable for any subsequent harm to the child. In several cases,

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11. This article does not attempt to distinguish who the plaintiffs might be under a particular action (i.e., parent, guardian on behalf of child); or who the defendants are (i.e., agency administrators, supervisors, or workers). Rather, the term "agency" is used to describe the defendant, since this article attempts to address agency improvement, regardless of where the individual fault may legally lie. Furthermore, no attempt is made to identify the various defenses, since again this clouds the issue of agency improvement. It should be noted, however, that a recurring defense, sovereign immunity, has met resistance in the courts. *See, e.g.*, Elton v. County of Orange, 3 Cal. App. 3d 1043, 1058, 84 Cal. Rptr. 27, 30 (1970); Bradford v. Davis, 290 Or. 855, 860, 626 P.2d 1376, 1382 (1981).

12. State child abuse reporting laws delineate who will receive child maltreatment reports. *See, e.g.*, ARK. STAT. ANN. §§ 42-807(E), 42-808 (1977) (District or State Social Services Division); CONN. GEN. STAT. ANN. § 17-38b (West Supp. 1981) (State Commissioner of Children and Youth Services); VT. STAT. ANN. tit. 13, § 1354 (Supp. 1981) (Commissioner of Social Rehabilitative Services). Many of these laws provide alternative reporting to a law enforcement agency. *See, e.g.*, D.C. CODE ANN. § 6-2102 (1981); GA. CODE ANN. § 74-111(b) (1981).

13. The child abuse and neglect reporting laws further specify those actions which the receiving agency must take upon receipt of a report. The range of statutory instruction varies greatly, from a simple enjoinder to "commence an investigation," MICH. COMP. LAWS ANN. § 722.628(1), to a detailed, eight-step requirement which includes filing preliminary written reports with the juvenile court, submitting reports to the county attorney, and ultimately, offering appropriate services to the family. IOWA CODE ANN. § 232.71 (West Supp. 1981). Many statutes also set time limits for the receiving agency to complete its investigation. *See, e.g.*, VT. STAT. ANN. tit. 13, § 1355(a) (Supp. 1981) (72 hours).

14. Following commencement of the investigation, the child protective agency may take the child into protective custody. A recurring statutory basis for protective custody is that the child is in imminent physical danger or requires protection from future abuse or neglect. *See, e.g.*, N.Y. SOC. SERV. LAW § 398(9) (McKinney 1976). Other authorized personnel who may take the child into custody generally include law enforcement officers. *See, e.g.*, VT. STAT. ANN. tit. 33, § 639 (Supp. 1981).

agency workers were charged with either criminal negligence or official misconduct when the child left at home following the agency investigation subsequently died due to alleged child abuse.

Two such indictments in the past several years have been filed. The first, in Pueblo, Colorado, resulted in a finding of guilt against an agency worker for second degree official misconduct. Due to legal technicalities, however, the case was dismissed by the State Supreme Court, prior to sentencing.[15] The second case concerned three El Paso-based employees of the Texas Department of Human Resources. One month before the trial was to begin, however, the trial court quashed the indictments on all counts as no indictable offense had been charged.[16]

B. *Failure to Place Properly or Supervise a Child in Foster Care*

Several civil suits have litigated both the agency placement decision and subsequent monitoring. Typically, the complaint will allege statutory tort elements; that the agency was under a statutory duty to protect the child, that the defendant violated the standard of conduct imposed by the statute, and that the violation was the proximate cause of injury.[17] The most frequently litigated fact pattern in this category has concerned injuries suffered by a child in foster care. Typical of such cases is a recent ruling by a New York appellate court.[18] In this case, a foster child had been severely scalded due to the carelessness of the foster parent in bathing her. The placing county agency, responding to a negligence action, filed a motion to dismiss based in part upon sovereign immunity. In upholding the trial court's denial of the motion to dismiss, New York Supreme Court, Appellate Division, found several statutory obligations underpinning the agency's affirmative duties to the child. These included statutes addressing the agency's obligation to place neglected children, license foster homes, and review foster care situations.[19]

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15. Steinberger v. District Court, 198 Colo. 159, 596 P.2d 755 (1979). The technicality concerned the trial court's improper granting of "use immunity" to the worker when she was called to testify at the separate trial of her supervisor who was also charged in this case.

16. For a review of the facts behind these cases see Spearly, *Caseworker Indictments — A Closer Look*, 3 NAT'L CHILD PROTECTIVE NEWSLETTER 6 (American Humane Ass'n 1981).

17. *Cf.* Chasse v. Banas, 119 N.H. 93, 399 A.2d 608 (1979) (placement of mental patient in hospital).

18. Bartels v. County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906 (1980).

19. In an unrelated case, the same court overturned a denial of summary judgment

C. *Improper Removal of a Child*

An agency may also be sued for improper removal or retention of a child from his or her home. These civil actions have again relied on statutory grounds; they have typically alleged that the agency removed the child without obtaining the statutorily required pre-removal or post-removal court order,[20] or held the child in care without conducting mandatory periodic foster care review.[21]

Improper removals have also resulted in civil rights actions in federal court. The aggrieved parents have alleged that their constitutional liberty interests in rearing their children[22] have been vio-

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sought by a not-for-profit agency chartered by the State of New York where the agency's undisputed affidavit made a *prima facie* showing that it used due care in selecting a foster parent. In this case, a 13-month old infant was injured when she knocked over and spilled on herself a cup of hot coffee the foster mother had placed on a nearby table. Parker v. St. Christopher's Home, 77 A.D.2d 921, 431 N.Y.S.2d 110 (1980). *But cf.* Bartels v. County of Westchester, 76 A.D. at 521, 429 N.Y.S.2d at 910 (agency had noticed bruises on the child prior to the scalding incident). Other jurisdictions have held the state or its subdivisions liable for injuries sustained by children as the result of negligence in the placement or supervision of foster care. *See* Hanson v. Rowe, 18 Ariz. App. 131, 500 P.2d 916 (1972); Elton v. County of Orange, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970); Koepf v. County of York, 198 Neb. 67, 251 N.W.2d 866 (1977). *But see* Pickett v. Washington County, 31 Or. App. 1263, 572 P.2d 1070 (1977).

20. *See* Wayne S. v. Dep't of Social Services, N.Y.L.J., Aug. 3, 1981, at 13, col. 5 (Aug. 3, 1981). Mother had filed a civil suit seeking damages for mental anguish on behalf of her child and herself, alleging that the agency removed her child from home without a court order. The appellate court refused to dismiss the lower court's denial of summary judgment sought by the agency.

Any decision to take a child into protective custody must at some point be approved by a court if not voluntarily consented to by the parent(s). The statutes vary as to whether this order must be obtained before removal. Most states permit a post-removal court proceeding to ratify the custody, usually within a day or two of the taking. *See, e.g.*, ALASKA STAT. § 47.10.142 (1979) (agency must notify court within 12 hours and a hearing must ensue within 48 hours of notice).

21. Many states require periodic court or administrative review of every foster care placement. *See, e.g.*, OR. REV. STAT. § 419.576 (1979) (as amended by H.B. 2976 (1981)). Furthermore, under the recently enacted Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500-535 (amending 42 U.S.C. §§ 601-626, 670-676 (1976 & Supp. III 1979)) additional obligations have been placed upon the state with respect to these periodic reviews as a condition for receipt of federal matching funds under Titles IV-B and IV-E of the Social Security Act. For example, an internal agency review or judicial hearing must be held every six months, subject to certain additional restrictions and requirements, depending upon the funding source. *See* NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, AMERICAN BAR ASS'N, PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM 769-823 (1981).

22. The Supreme Court has repeatedly recognized that parents have a fourteenth amendment liberty interest in raising their children. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). For an analysis of the Supreme Court's pronouncements on the constitutional

lated when the agency, without benefit of a court hearing, removed and detained their children.[23]

D. *Failure to Provide Services*

For the most part, the first two causes of action listed above have followed the death[24] or serious physical injury[25] of a child under an agency's custody or the subject of its investigation. However, there are other less tangible injuries which have fallen under an even broader sweep of legal scrutiny. These have included injuries to both the child and the parent, most frequently deriving from the agency's failure to provide necessary services. The gravamen of these complaints have been many, including violation of a statutory[26] or constitutional[27] right to treatment.

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protection of family rights, see *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1161-93 (1980).

23. At least one federal court has recognized a cause of action arising under 42 U.S.C. § 1983 (1976) against municipal child welfare agency employees. Duchesne v. Sugarman, 566 F.2d 817, 829 (2d Cir. 1977). In this case, the agency had removed the mother's two minor children and detained them for 36 months without ever having sought a court order, despite the mother's repeated requests that the children be returned home.

24. All criminal negligence indictments handed down have involved the death of a child. Similarly, several of the civil actions have been for wrongful death of a child. *See, e.g.*, Vonner v. State, 273 So. 2d 252 (La. 1973); Koepf v. County of York, 198 Neb. 67, 251 N.W.2d 866 (1977).

25. Bartels v. County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906, 908 (1980) (permanent scarring to 40% of child's body, webbing of fingers of right hand, deformity known as "clawtoe").

26. Decisional law on right to treatment began in the mental health area and remains the principal source of legal argument on behalf of children. For example, an early and still frequently cited case concerned the right to treatment for patients involuntarily committed to a mental health facility. In this decision, a federal appellate court quoted from the 1964 Hospitalization of the Mentally Ill act, 28 U.S.C. § 2241(c) (1976) which provided that "[a] person hospitalized in a public hospital for a mentall illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment." Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966).

27. The constitutional basis of the right to treatment is based upon fourteenth amendment due process and equal protection principles. Due process arguments favoring the right have taken both procedural and substantive forms. Essentially, when the state assumes custody of a person for non-criminal reasons, the only justification for using less than the due process procedures granted in criminal cases is the provision of treatment. Similarly, even if full procedural due process is afforded, substantive due process demands that only treatment can support custody of a person not convicted of a crime. *See* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

These principles have been applied to court decisions which have found unconstitutional certain conditions of confinement of juvenile delinquents. Such holdings have looked to the rehabilitative purpose of delinquency proceedings, which are either rooted in the juvenile court's *parens patriae* justification or are spelled out in state statutes. *See, e.g.*, Morales v. Turman, 364 F. Supp. 166, 174 (E.D. Tex. 1973) (according to Texas Law, Texas Youth Council must provide "a program of constructive training aimed at rehabilitation and

Statutory references to a right to treatment for the child and family involved with a CPS agency may be found in policy clauses prefacing most state child abuse and neglect reporting laws. These clauses tend to mandate services "to strengthen the family and to make the home safe for children whenever possible by enhancing the parental capacity for good child care. . . ."[28] Other sources of statutory authority may exist. For example, the juvenile court code frequently identifies the powers as well as the duties of the state agency having jurisdiction over children who are in need of care and supervision.[29]

Improper removal of a child, or improper continuation of protective custody, has often been a complementary charge in these right to treatment suits. In part, this has arisen from the statutory preference given to providing services within a "family environment."[30]

The agency's failure to provide services may result in legal challenges both to its dispositional recommendation and to its everyday agency practices.[31] The latter challenges have frequently

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reestablishment in society").

The United States Supreme Court has never embraced the right to treatment. In vacating on other grounds an opinion of the Fifth Circuit Court of Appeals which had significantly expanded the right, the Court has cast doubt on the viability of the right to treatment argument. O'Connor v. Donaldson, 422 U.S. 563 (1975). More recently, the Supreme Court has undercut a corollary right—the right to habilitation—when it held that the Developmentally Disabled Assistance and Bill of Rights Act of 1975, which specifically declares that "[p]ersons with developmental disabilities have a right to . . . habilitation," 42 U.S.C. § 6010(1) (1976), does not create, for mental health patients in a state facility, substantive rights to "appropriate treatment" in the "least restrictive alternative." This decision was limited to statutory interpretation and did not address the respondents' constitutional arguments. Pennhurst State School and Hospital v. Halderman, 449 U.S. 814 (1981).

28. VT. STAT. ANN. tit. 13, § 1351 (Supp. 1981).

29. See, e.g., VT. STAT. ANN. tit. 33, § 2591 (Supp. 1981) which provides: "The programs of the department of social and rehabilitation services shall be designed to strengthen family life for the care and protection of children; to assist and encourage the use by any family of all available personal and reasonable community resources to this end . . . ."

30. VT. STAT. ANN. tit. 33, § 631(a)(3) (Supp. 1981) ("whenever possible, care and protection of a child should be achieved in a 'family environment' "). The Supreme Court of Vermont has interpreted this statute, in conjunction with VT. STAT. ANN. tit. 33, § 667 (Supp. 1981) (best interests of the child), to protect the rights of natural parents to the greatest extent possible. *In re* D.R., 136 Vt. 478, 481, 392 A.2d 951, 953 (1978).

31. Several appellate courts have reversed lower court termination of parental rights orders because the agency failed to meet its statutory obligation to provide rehabilitative services to the family. *See, e.g.*, Arizona State Dep't of Economic Security v. Mahoney, 24 Ariz. App. 534, 540 P.2d 153 (1975); *Ex rel.* Taylor, 30 Ill. App. 3d 906, 334 N.E.2d 194 (1975); *In re* Murrell, 79 A.D.2d 866, 434 N.Y.S.2d 557 (1980); *In re* Kimberly, 72 A.D.2d 83, 421 N.Y.S.2d 649 (1979); *In re* Christopher H., 577 P.2d 1292 (Okla. 1978); Weaver v. Roa-

taken the form of class action attacks against the agency's overall handling of these cases.[32] In addition to state statutory underpinnings, the allegations are frequently based upon violations of due process, federal statutes, and even department regulations. Many of these cases have been brought in federal court as civil rights actions.[33]

These civil rights complaints have alleged a variety of agency faults. A lawsuit brought in the U.S. District Court for the Eastern District of Pennsylvania[34] demonstrates this variety. The plaintiff alleged that the agency which placed the child in foster care pursuant to a dependency finding had: prevented parental visitation; failed to provide any services to the mother which were designed to facilitate the child's speedy return home; transferred the child to another foster home fifty miles from the mother's residence; and had not informed the child of his right to counsel or to a placement review.

The above-mentioned challenges to CPS agency practices are

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noke Dep't of Human Resources, 265 S.E.2d 692 (Va. 1980). A general shortage of family services has been cited in nationwide studies of our foster care system. *See* CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES 5-21 (1978).

32. In Lynch v. King, No. 78-2152 (D. Mass., filed August 1978), the plaintiffs, a class of parents and foster parents, have brought a far-sweeping suit, alleging that the Massachusetts Department of Social Services has violated their right to family integrity in its administration of the child protective system. The complaint claims that the defendants have failed to comply with the due process guarantee of the Constitution, 42 U.S.C. §§ 608, 625 (1976) and 45 C.F.R. 1392.00-1392.92 (1980) (Social Security Act provisions and regulations requiring service plans and in-home services where possible). Specifically, the complaint alleges, among other things, that the defendants have failed to: 1) provide ongoing staff training programs; 2) complete a full evaluation of every child referred for foster care; 3) develop and periodically review a service plan for each case; 4) assign a worker to each case; and 5) maintain contact between the child and his or her legal family.

Following a series of preliminary motions, the court affirmed the plaintffs' cause of action under the Aid to Families with Dependent Children - Foster Care Program, Section 408 of Title IV-A of the Social Security Act, codified at 42 U.S.C. § 608 (1976). Specifically, these relate to claims over the provision of services for children removed from home; they include the allegations that the agency failed to develop and periodically review service plans or determine when a child could be returned to his natural family. Lynch v. King, No. 78-2152-K (D. Mass., opinion of June 9, 1981). *See also* Lipp v. Henry, No. F 80-245 (N.D. Indiana, opinion of May 28, 1981) (class of foster children is certified with respect to the claim that defendant child welfare agency failed to develop "written standards for the creation of individual service plans").

33. The civil rights actions are based upon 42 U.S.C. § 1983 (Supp. III 1979).

34. Cameron v. Montgomery County Child Welfare Service, 471 F. Supp. 761 (1979). This case was ultimately settled after the district court denied the defendant's motion for dismissal and summary judgment which had been based, in part, on the county commissioners' claim of legislative immunity.

not meant to exhaust the possible causes of action or list all agency shortcomings. Rather, they are intended to serve as a basis to support the following recommendations which, at relatively low cost, will enhance the agency's role in the child protection area.

II. Improving Statutes and Agency Policy

Many of the cases previously discussed have had, as their cause of action, a statutory tort claim. Consequently, CPS agencies may wish to review the underlying statutes to note problem areas and, if necessary, recommend remedial amendments. More specifically, if the agencies can not satisfy mandated duties, either because there are too few workers or insufficient family services,[35] then the legislature should be encouraged to address the means of reducing the worker-client ratio. Correspondingly, the per-family share of available services should also be increased. Child protective service agencies should also begin to work closely with high-level administrators and legislators to prioritize their responses based upon varying degrees of maltreatment. In turn, this may assure that the most critical cases receive expeditious and undivided attention by the child protective community.

The obvious starting point for a systemic analysis of child protective service-related legislation is the state's reporting laws. The initial enthusiasm for child abuse reporting laws resulted in broad definitional sections; the aim was to encourage extensive reporting.[36] Today, the empirical data suggests that this enthusiasm threatens the agencies' ability to fulfill their mandated duties. According to a national study, roughly 60% of all abuse and neglect reports are determined, upon agency investigation, to be unsub-

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35. A chronic self-criticism of child protective agencies is that they are understaffed, resulting in excessive caseloads per worker. Consequently, "the worker is relegated to the position of case manager." American Humane Ass'n, Child Protective Services Entering the 1980's — A Nationwide Survey 6 (1979). According to the 1979 survey, only 16 states indicated controls on caseload size. *Id.* at 6. Most state agencies, in responding to this survey, indicated a need to reduce their individual worker caseload. The preferred load is 20 to 25 cases per worker. *Id.* at 7.

36. The breadth of these definitions can be observed in the Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5115 (1976 & Supp. III 1979). Here, "child abuse and neglect" includes "physical or mental injury, sexual abuse or exploitation, negligent treatment or maltreatment of a child . . . under circumstances which indicate that the child's health or welfare is harmed or threatened thereby . . . ." 42 U.S.C. § 5102 (Supp. III 1979). This definition is, however, not binding on the states, which are free to draft their own definitions.

stantiated.[37] Yet, the agency must still expend its limited resources by promptly investigating every reported case. Given the immense volume of reports, many agencies are overwhelmed by investigatory functions, thus diminishing their ability to provide supervision and assistance to families in need. The agencies' self-interest, therefore, demands that they help reform the system so that the case intake process is not overwhelming.

How "child abuse" and "neglect" are defined in the reporting laws determines the limits of initial coercive state intervention into the family. Definitional controversies have for many years occupied center stage in debates over the role of the child protection system. First appearing in law review articles and books,[38] the controversy in recent years has affected the development of model acts and standards.[39] Simply stated, the viewpoints are divided into two camps: general and limited interventionists. On the former side are commentators and jurists who believe that the range of child maltreatment is so great that legislators can not possibly provide a concise definition.[40] Their opponents retort that, by focusing on the specific harms to the child in conjunction with parental fault, better legislative guidance and less unwarranted intrusiveness is possible.[41]

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37. AMERICAN HUMANE ASSOCIATION, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 18 (1978).

38. The controversy extends beyond reporting definitions. In fact, most comments are focused on abuse and neglect laws which affect court jurisdiction. *See* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979); Wald, *State Intervention on Behalf of Neglected Children*, 27 STAN. L. REV. 985 (1975); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975); Mnookin, *Foster Care — In Whose Best Interest?* 43 HARV. EDUC. REV. 599 (1973).

39. *See, e.g.*, MODEL CHILD PROTECTION ACT (Draft, National Center on Child Abuse and Neglect, U.S. Dep't of Health and Human Services 1979); STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE (U.S. Office of Juvenile Justice and Delinquency Prevention 1980); JUVENILE JUSTICE STANDARDS RELATING TO ABUSE AND NEGLECT (1981).

40. *See* State v. McMaster, 259 Or. 291, 294, 486 P.2d 567, 571 (1971). ("no need for an explicit statute to 'spell out' how poorly [parents] can treat their child before risking loss of their parental rights"); People v. D.A.K., 596 P.2d 747 (Colo. 1979) (the "ordinarily reasonable parent" knows what it means to "abuse" and "mistreat" children; it is more difficult, "if not impossible," for the legislature to draft a more specific statute both to protect child and give courts flexibility). *See also* Custody of a Minor, 393 N.E.2d 379 (Mass. 1979); *In re* Daniel, 591 P.2d 1175 (Okla. 1979).

41. *See* Alsager v. District Court of Polk County, 406 F. Supp. 10, 18-19 (S.D. Iowa 1975) (language in a termination statute, "Conduct . . . detrimental to the physical or mental health or morals of the child" held unconstitutionally vague); Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976) ("welfare" clause in neglect statute unconstitutionally vague). *See also* Davis v. Smith, 583 S.W.2d 37 (Ark. 1979). The Supreme Court avoided

The agency, as the voice of experience, must help identify a workable middle ground for reporting purposes. It may utilize several sources of evidence at its disposal, including a careful review of previous cases. This entails an examination of common characteristics of *substantiated* versus *unsubstantiated* reports. From this analysis the agency can begin to internally prioritize its cases and suggest complementary legislation and modified agency policy.

For example, the agency may determine that cases involving significant physical injury should always require immediate investigation. Neglect cases with evidence of some physical harm, such as malnutrition, may also command immediate inspection. Marginal cases which do not require immediate investigation may include the familiar "dirty home" scenario where the harm is attributable to the parent's poverty.[42] At some point in this sequence the agency must ascertain a cut-off, below which additional cases can not meaningfully be managed, and where the child is clearly in no risk of serious harm. With reduced caseloads, workers can presumably perform better case monitoring and service duties.

The agency may also wish to study how their local courts have handled abuse and neglect cases: what criteria for maltreatment does the court use? While the authors do not suggest that abuse and neglect definitions for the purpose of reporting should be as stringent as those appropriate for the juvenile court to assume jurisdiction, this exercise may assist the agency's internal prioritization process.[43] For example, if the local courts are dismissing neglect petitions which complain that mother occasionally drinks to excess and habitually sleeps late, or father is rarely home when children awake, or the home is overcrowded and untidy, or the child's siblings have been previously found neglected and placed

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determining whether the Delaware termination of parental rights statute, which permitted termination if the parent was deemed "not fitted," violated constitutional vagueness principles. After accepting review and hearing oral arguments, the Court dismissed the appeal "for want of a properly presented federal question." Doe v. Delaware, 101 S. Ct. 1495, 1496 (1981). *See generally* Day, *Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale*, 16 J. FAM. L. 213 (1977-78).

42. Many states have specifically eliminated cases from their reporting systems where injuries to a child stem from inadequate food, clothing, shelter and medical care caused by parental financial inability, providing the parent did not refuse offered aid. *See, e.g.*, R.I. GEN. LAWS § 40-11-2(2) (1977).

43. It is common for model standards which endorse limited court jurisdiction in these matters also to provide for more limited reporting. *See* JUVENILE JUSTICE STANDARDS RELATING TO ABUSE AND NEGLECT Standards 2.1A, 3.1B (1981).

outside the home,[44] then the agency in investigating future similar cases may anticipate the inappropriateness of protective custody. If resources and manpower pemit, the agency should offer to the family appropriate home-based services in these cases.

Resources must be allocated within the agency so that the most serious cases receive adequate attention. To help assure this allocation, the CPS agencies need to develop investigatory and treatment policies which differ in response to each type and degree of abuse.

After investigation, if a report is substantiated, the agency faces a critical decision: should the child be removed from the home on an emergency basis? Again, failure to remove as well as improper removal can lead to a statutory tort claim. Thus, the agency must look to the underlying statute and agency rules to avoid potential liability. In this area, revised definitions as well as procedural reform may be in order.

Every state law which provides for forcible emergency removal of a child from home demands either a prior court order or an immediate post-removal court hearing to ratify the agency's decision. By and large, the authorizing statutes permit removal only when the child has been abandoned or is in danger.[45] The statutes, however, are often silent as to the degree of harm required for removal, risking arbitrary or inconsistent responses by the agencies. For example, some agencies may routinely seek removal in every case of physical abuse, ignoring individual case peculiarities.[46] Still others may hesitate to remove if the parents seem willing to cooperate with the investigator. Unfortunately, either response permits decisions which, without careful consideration of further evidence, may prove harmful to the child.

Once again, agencies could profit from more exacting legislative or regulatory criteria. A review of existing protective custody

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44. Based upon these factors, the Vermont Supreme Court reversed a juvenile court's neglect holding. The court found that this evidence did not support removal "only when necessary for . . . [the child's] welfare." *In re* J.M., 131 Vt. 604, 609, 313 A.2d 30, 33 (1973) (quoting VT. STAT. ANN. tit. 33, § 631(a)(3) (Supp. 1981)).

45. *See, e.g.*, MISS. CODE ANN. § 43-21-303(1) (Supp. 1980); NEB. REV. STAT. § 43-205.01 (1978); 42 PA. CONS. STAT. ANN. § 6324(3) (Purdon Supp. 1981).

46. One explanation offered for this automatic agency response is that it enables agency personnel to avoid difficult case by case decisions by summarily and routinely removing children from their homes. V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970's 15, 184-85 (rev. ed. 1974).

statutes provides some suggestions. For example, the Alaska statute permits removal for abuse if "immediate medical attention is necessary."[47] Still other statutes require that the agency affirmatively show that the child faces an imminent threat to his or her health and that there are no reasonably available alternatives to removal from the home.[48] Other states have introduced a tort standard. For example, a recent Texas amendment to the Family Code authorizes the agency to take protective custody, prior to a court order, "upon personal knowledge of facts which would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child. . . ."[49]

While more specific definitional and policy criteria may give the agency guidance for taking a child into emergency protective custody, an equally critical need is for the agency to fully utilize the court system when it has made a decision to remove the child from the home. Whether or not the court affords pre-removal or post-removal sanctions, the agency should take necessary steps to assure meaningful hearings. This includes providing notice to parents of reasons for the requested taking and sharing relevant documents with parents, parent's counsel, and the child's attorney or guardian ad litem. More importantly, the agency must seek the court orders required by statute. Suits against CPS agencies for improper removal have alleged that the agency never sought or obtained the statutorily mandated court approval.[50]

In addition to suits over failure of the agency to seek protective custody orders, a second potential source of liability may result if the agency violates foster care review requirements. Many states currently require that every child in foster care have a formal periodic administrative or judicial review of his placement.[51]

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47. ALASKA STAT. § 47.10.142(a)(3) (1975).

48. VA. CODE § 16.1-251(A) (Supp. 1981). *See also* W. VA. CODE § 49-6-3 (Supp. 1980).

49. TEX. FAM. CODE ANN. § 17.03(a)(3) (Vernon Supp. 1980).

50. *See, e.g.*, Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977). The problem of agency policy not taking into account legal responsibilities is illustrated in this case. The Interagency Manual of Policies and Procedures used by the defendants authorized caseworkers to remove children from homes in emergencies without parental consent or a court hearing; furthermore, a prompt judicial ratification of this action was not listed in the manual as a requirement. *Id.* at 823.

51. In Vermont, the agency must file with the court a notice of review every two years for each child in custody. Such notice must also be submitted to the state's attorney and parents. Any party may then request a review hearing. VT. STAT. ANN. tit. 33, § 658 (Supp. 1981).

Under the new Adoption Assistance and Child Welfare Act, more states can be expected to join the fold. Under the Act, eligibility criteria for a state to receive federal Title IV-B and IV-E funds include a foster care review provision. These reviews must occur every six months by a court or administrative body, and must be open to the parent's participation.[52] Further, this requirement, if implemented by the states and adhered to by the agencies, should help assure effective monitoring of treatment. The case review system is designed to assure "placement in the least restrictive (most family-like) setting available. . . ."[53]

III. Improved Collaboration Between Child Welfare and Legal Professionals

> [If] a protective service agency is to use the law properly, it must have competent legal advice, not just occasionally but in virtually every case that comes to its attention. No protective service agency can function effectively without its *own* lawyer.
>
> — Judge James J. Delaney[54]

It has long been recognized that those cases which are brought before the juvenile courts often represent the most serious instances of abuse and neglect.[55] There are several reasons why these cases may require judicial attention. Many matters must be brought to court because state laws mandate that when a child is removed from the parents' custody by the protective agency or the police, a judicial petition must be promptly initiated. In other cases, CPS agencies have become frustrated over the failure of the parents to cooperate voluntarily with the case workers, thereby placing the child in danger of serious harm. Frequently, case workers will go to court to employ the "authority" of the judge and have court orders entered which will assure that particular services are provided to the family.

Whatever the reason for going to court, the process has long engendered confusion and discomfort for the case worker and legal professional alike. When workers are polled on their own perception of training needs, or when criticisms within the child protec-

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52. 42 U.S.C.A. §§ 627(a)(2)(B), 675(5)(B) (West Supp. 1981).

53. 42 U.S.C.A. § 675(5) (West Supp. 1981).

54. Delaney, *New Concepts of the Family Court*, in Child Abuse and Neglect — The Family and the Community 348 (R. Helfer & C. Kempe eds. 1976).

55. Drews, *Child Protective Services*, in The Abused and Neglected Child: Multidisciplinary Court Practice 110 (1978).

tive community are voiced about the outcome of particularly perplexing cases, remarks frequently cite the "legal system" in unflattering terms. Similarly, workers have been criticized by legal professionals for not understanding the legal process or working effectively within it.[56] Social work and child welfare organizations, by their written standards, have recognized the need for improvement in this area.[57]

One method of remedying the problem has been to provide legal training and reference materials for child protective workers.[58] Of course, a far better approach than merely distributing written materials is to make an attorney available for regular consultation with the child protective agency. If for no other reason than to help CPS administrators and their staff avoid the types of litigation discussed earlier, access to a full-time protective services attorney should be deemed essential. Indeed, commentators and federal standards have suggested that the assistance of legal counsel for the agency on an ongoing basis is critical to the child protective process.[59]

An investigation of child abuse and neglect efforts throughout the country conducted by the U.S. General Accounting Office (GAO) revealed that most local child welfare agency officials who were questioned reported problems in obtaining adequate legal assistance. This lack of legal assistance was "causing the agencies to lose valid court cases, thereby hindering their ability to adequately

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56. Delaney, *The Legal Process—A Positive Force in the Interest of Children*, in CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES 173 (1981) (developed by the National Legal Resource Center for Child Advocacy and Protection.).

57. STANDARDS FOR SOCIAL WORK PRACTICE IN CHILD PROTECTION Standards 5, 21 (National Ass'n of Social Workers 1981); STANDARDS FOR CHILD PROTECTIVE SERVICE Standards 4.10-4.14 (Child Welfare League of America rev. ed. 1973).

58. *See, e.g.*, J. BRONN & L. GREENHOUSE, APPROACHING THE BENCH — A PRACTICE BOOK FOR CONNECTICUT PROTECTIVE SERVICES (1978); NAT'L CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD PROTECTION — THE ROLE OF THE COURTS 1980); E. PENA, A COURSEBOOK ON THE LEGAL PROCESS FOR SOCIAL WORKERS (1980); Bell & Mlyniec, *Preparing for a Neglect Proceeding: A Guide for the Social Worker*, PUB. WELFARE, Fall 1974, at 26-37.

59. FEDERAL STANDARDS FOR CHILD ABUSE AND NEGLECT PREVENTION AND TREATMENT PROGRAMS AND PROJECTS Standard B-7 (Nat'l Center on Child Abuse and Neglect, U.S. Dep't of Health and Human Services 1978); Fraser, *The Role of the Petitioner's Attorney in a Case of Child Abuse*, in ADVOCATING FOR CHIDREN IN THE COURTS 9 (ABA, Nat'l Legal Resource Center for Child Advocacy and Protection 1979); Duquette, *Lawyers and Liberty in Child Protection*, in THE BATTERED CHILD 316 (R. Helfer & C. Kempe 3d ed. 1980); Besharov, *The "Civil" Prosecution of Child Abuse and Neglect*, 6 VT. L. REV. 403 (1981).

protect children."[60] In most localities surveyed by the GAO, the protective services unit received legal assistance from the office of the county or district attorney. These offices were reported as understaffed. The attorneys who represented the unit often were inexperienced, poorly prepared and burdened with many other office responsibilities.[61] The GAO report also cited a New York study that surveyed judges' perceptions of the child abuse problem. The study found that the judges "considered the attorneys for the local social service units less well prepared than the attorneys for the child or the parents."[62]

A study of child protective agencies conducted by the American Humane Association also explored the availability of legal consultation services and concluded that "legal services should always be immediately available" to agency staff.[63] The study urged that legal consultants be included on the agency staff so that legal advice would be more accessible and better attuned to the special needs of the agency.

Attorneys for CPS agency staff have been provided from various sources: county attorney or city corporation counsel, local prosecuting attorney, state attorney general, a private attorney or law firm and in-house agency staff. Regardless of their source, it is necessary to assure that each lawyer involved with the CPS agency is sensitive to the purpose of child protective system intervention, the structure of that system, and the dynamics of child maltreatment.

This "protective services attorney" should be involved from the very outset of a case, from the time a report is received by the agency. He or she should be consulted on such issues as: a) whether a child can legally be removed from home; b) the use of voluntary parent-agency service agreements; c) whether a court proceeding should be initiated; d) what evidence will be necessary to prove the case; e) whether some form of case settlement is ad-

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60. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL — INCREASED FEDERAL EFFORTS NEEDED TO BETTER IDENTIFY, TREAT AND PREVENT CHILD ABUSE AND NEGLECT, H.R. Doc. No. 80-66, 90th Cong., 2d Sess., 47 (1980).

61. *Id.* at 48.

62. *Id.* (quoting NEW YORK STATE SELECT COMMITTEE ON CHILD ABUSE, THE STATUS OF CHILD PROTECTION (1978)). "Most New York judges today would make the same assessment." Telephone interview with Jose D. Alfaro, former director of New York State Select Committee on Child Abuse (Feb. 25, 1982).

63. AMERICAN HUMANE ASS'N, CHILD PROTECTIVE SERVICES ENTERING THE 1980'S — A NATIONWIDE SURVEY 37 (1979).

visable; f) the legal requirements of dispositional alternatives; g) formal periodic case review; and h) relations with the other attorneys in the proceeding.[64] The attorney should also be actively involved in community multi-disciplinary child protection councils, committees, or teams.[65] Such participation can help insure that he or she is sensitive to the issues related to abuse and neglect as well as the development of case strategies for work with individual troubled families.

Typically, attorneys handling child protective agency cases have done so as part of a large, diversified caseload. Consequently, their responsibilities to the agency have frequently been limited to writing and filing petitions and appearing in court. Furthermore, many agencies have had no access whatsoever to attorneys, and their workers have had to prosecute their own cases. Agencies which are inadequately assisted by counsel are prone to undertake actions which may be adequate from the standards of normal social work practice but which from a legal viewpoint raise some of the potential liability questions discussed earlier.[66]

Providing agency in-house counsel can help alleviate these problems. In addition to representing the agency in all court appearances, counsel can participate in CPS staff training and can assist the staff during the early stages of their cases, advising them on such matters as whether to seek emergency removal of a child, how to obtain discovery, what services are mandated, and how to document the case record.[67] Some communities, in lieu of in-house

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64. Duquette, *supra* note 58, at 322-26.

65. For an excellent discussion of the attorney's role in these activities, see Bross, *Multi-Disciplinary Child Protection Teams and Effective Legal Management of Abuse and Neglect*, in PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM 495 (ABA, Nat'l Legal Resource Center for Child Advocacy and Protection 1981).

66. *See supra* text accompanying notes 11-33. The criminal negligence cases discussed earlier demonstrate this point. In both instances the agency determined that the workers' actions conformed with good practice. An independent review of Steinberger v. District Court, 596 P.2d 755 (Colo. 1979) by the National Association of Social Workers "failed to identify from a professional social point of view that there was a deliberate mismanagement of the child's case. In fact, there is significant evidence to suggest that two employees facing jail were deeply concerned with the child's well-being and took appropriate action." Denver Post, Nov. 20, 1978 at 23, col. 1 (letter from Ed LaPedis, President, Colo. Chapter Nat'l Ass'n of Social Workers).

67. Agency case records will not be automatically admitted into evidence; rather, each entry or report in the file is generally admissible only if it conforms to the business record exception to the hearsay rule. *In re* Leon RR, 48 N.Y.2d 117, 122-24, 397 N.E.2d 374, 377-78, 421 N.Y.S.2d 863, 867-68 (1979). *But see In re* Lisa Ann U., 75 A.D.2d 944, 945, 427 N.Y.S.2d 863, 867-68 (1979) (entire case file may be admitted as long as parents had time to

counsel, may utilize the services of an attorney member of a child protection team, particularly in rural areas with limited financial and legal resources.

In the few years that it has been in effect, Title XX of the Social Security Act has been an often overlooked source of funding for legal services to child protective agencies. With recent Reagan Administration budget cuts and modifications of the Title XX program, there will be increased competition within the human services field for this money. Yet, Title XX remains, along with Title IV-B and the new Title IV-E of the Social Security Act,[68] the most likely source of federal funds available for the cost of protective services attorneys.

Other allocations for legal services within CPS agency budgets must be made as well. The level and effectiveness of legal services at the state and local agency levels must be assessed. Agencies which are successfully utilizing legal help should be studied, and the information gained should be disseminated. In addition, several demonstration projects should be created to evaluate various approaches towards meeting the legal assistance needs of case workers.

The legal profession must also be encouraged to prepare its own members to handle child maltreatment cases. Continuing legal education programs and local bar associations can form special child abuse committees. These committees should involve both lawyers and CPS agency staff and should be active in planning and training activities.[69] State judicial groups can embark on similar projects. Both the American Bar Association and the National Council of Juvenile and Family Court Judges have developed educational programs to reach large numbers of legal professionals and have cooperated with other organizations that have endeavored to

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review it sufficiently).

68. 42 U.S.C. §§ 670-676 (Supp. 1980). The Department of Health and Human Services, in a Notice of Proposed Rulemaking, has suggested areas in which federal funds may be available for state and foster care programs. For example, the proposed rules specifically permit reimbursement with federal matching funds for preparation and participation in judicial determinations, as an "administrative cost." 45 Fed. Reg. 86841 (1980) (to be codified at 45 C.F.R. § 1356.80(c)(1)(iii). Presumably, this includes cost of legal counsel. The authors believe that legal services for the agency should be reimbursable under the Act, but clarification of this issue will not be possible until the final regulations are issued.

69. The American Bar Association's National Legal Resource Center for Child Advocacy and Protection has provided modest funding to 38 projects.

reach lawyers and judges.[70] Preparing a lawyer for work in the child protection field should begin in law school. Indeed, more law students are beginning their legal education with a background of prior work experience in human services. Universities with both graduate schools of law and social work should explore the possibilities of joint degree programs,[71] joint clinical programs related to children and families,[72] and other opportunities for sharing of ideas and backgrounds. Interdisciplinary understanding and activity is as important in the educational process as it is in later professional work.

Child protective agency workers should also work more cooperatively with attorneys who represent parents and children in child abuse cases. Representing parents and children in these proceedings is a difficult task for legal, ethical and emotional reasons. One typical response of a lawyer was quoted by Judge Justine Wise Polier: "Child abuse cases are the only ones I have begged off taking. When I did take one, I got a dismissal. I never knew whether that was right. I don't know what happened to the child."[73]

In many ways, the most serious conflicts case workers encounter in child abuse proceedings are with attorneys for the parents. The interests and due process rights of parents should entitle them to counsel in these cases.[74] However, as Douglas J. Besharov has pointed out:

> While the attorney's presence is tolerated as a necessary means of "protecting parental rights," the parent's attorney is viewed as an unavoidable encumbrance to the proper and efficient functioning of the court and the child protection agency.

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70. *See, e.g.*, CHILD ABUSE AND NEGLECT LITIGATION — A MANUAL FOR JUDGES, *supra* note 56. For further information contact: The ABA National Legal Resource Center for Child Advocacy and Protection, 1800 M Street, N.W., Washington, D.C. 20036 (202)331-2250; National College of Juvenile Justice, P.O. Box 8978, University of Nevada, Reno, NV 89507 (702)784-6012.

71. Washington University, St. Louis, MO is an example of a school offering a joint degree program.

72. *E.g.*, the University of Michigan's Interdisciplinary Project on Child Abuse and Neglect.

73. Polier & McDonald, *The Family Court in an Urban Setting*, in HELPING THE BATTERED CHILD AND HIS FAMILY (C. Kempe & R. Helfer eds. 1972).

74. The United States Supreme Court has ruled that indigent parents do not have an absolute right to court-appointed counsel in proceedings brought by the state to involuntarily terminate the parent-child relationship. Lassiter v. Department of Social Services, 101 S. Ct. 2153, 2162 (1981).

> If defense attorneys attempt to assert their clients' legal rights, they are often made to feel "unreasonable," an obstacle in the system's benevolent attempt to "help" the parents meet their child rearing responsibilities.[75]

Indeed, child welfare professionals may resent the attorney who refuses to advise a parent to admit the allegations of the court petition and to accept the social services proposed disposition without a hearing. They may also resent being subjected to intense cross-examination or having their recommendations challenged.

Case workers are not the only ones frequently fearful of zealous defense advocacy. Lawyers who represent parents often face a dilemma: they may know that their clients have in fact abused their child and that there may be a risk of further harm, but where the parents insist on their right to a full trial, attorneys have an ethical responsibility to provide the best possible representation.[76]

A different type of conflict often arises between the case worker and the child's court-appointed counsel or guardian ad litem. Prior to 1967, the year the United States Supreme Court issued its historic *Gault* decision,[77] lawyers for children were rarely seen in juvenile court. *Gault* did not establish a constitutional right of representation for abused and neglected children, as distinguished from delinquents. However, almost all states now provide for representation, either through appointment of a legal counsel, or appointment of a lawyer or non-lawyer to serve as a guardian ad litem (GAL) or court-appointed special advocate (CASA). Like the attorney who represents the parents, these advocates often face resentment and hostility from others involved in the case as well as confusion as to their proper role in the court proceedings.[78]

If each of the parties at interest in the case has diligent representation, the court is more likely to have all relevant facts

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75. Besharov, *Parents in Child Protective Proceedings: The Emergent Right to Counsel*, in ADVOCATING FOR CHILDREN IN THE COURTS 42 (1979) (ABA, Nat'l Legal Resource Center for Child Advocacy and Protection).

76. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1979).

77. *In re* Gault, 387 U.S. 1 (1967). In *Gault*, the Court held that in delinquency proceedings where the child is subject to the loss of liberty, the right to self-employed or court-appointed counsel exists. *Id.* at 36.

78. Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 OKLA. CITY U. L. REV. 561 (1980); Davidson, *The Guardian Ad Litem: An Important Approach to the Protection of Children*, CHILDREN TODAY, Mar.-Apr. 1981 at 20.

brought to its attention; representation helps assure that each party is given a meaningful opportunity to be heard. Independent representation for children is also necessary because neither the interest of the child welfare agency nor the parents can safely be assumed to coincide entirely with the interest of the child.[79] Indeed, the attorneys for parents and children have distinctive roles to play in these cases and can assist the agency in assuring that appropriate services are provided to the family.

Frequently, both institutional considerations and individual caseworker perceptions and attitudes constrict the placement and dispositional alternatives investigated and presented to the court by the CPS agency. By raising new possibilities for resolving these cases, legal counsel for the other parties are actually helping to assure that the court considers approaches that may not be coerced by existing contracts between the agency and service providers, or the occasional existence of parent-worker hostility. When all parties have independent advocates to propose alternative disposition plans, the court is able to select the best possible resolution for the family, one which protects the child while providing the least drastic means of agency intervention.

For these reasons, the American Bar Association has taken the position that the "participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings."[80]

IV. Conclusion

Inescapably, child protective service agencies must respect three controlling concepts: the mandate of the law, "family integrity," and "best interests of the child." Fortunately, the law generally attempts to incorporate vigorously the last two concepts into its abuse and neglect codes. Not surprisingly, however, the means

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79. *See* Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub nom.* Moore v. Sims, 442 U.S. 415 (1979); "The interest of the state and the interest of the child differ in . . . [suits affecting the parent-child relationship] that they must be assumed to be adverse until there has been a final adjudication on the merits." 438 F. Supp. at 1194. *See also* Ricketts v. Ricketts, 265 Ark. 28, 29, 576 S.W.2d 932, 933 (1979); *In re* T.M.H., 613 P.2d 468, 471 (Okla. 1980); *In re* Fish, 175 Mont. 201, 203, 569 P.2d 924, 928 (1977).

80. Standards Relating to Counsel for Private Parties § 1.1. *See also id.* § 2.3(b) and accompanying commentary.

to achieving such ends may differ from the legal and social work perspectives. One profession's "due process" can be the other's burden.

Thus, if the interests of children and families are to be served, child protective service agencies must help shape child protection laws so that they may take advantage of the agency's inherent strengths. At the same time, the agencies must appreciate the role of the law in child protection and attempt to comport their practices to the legal system's requirements.