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ABSTRACT

The first and central issue in children's services is the extent to which government may limit or supplant parental action in the control, nurture, and direction of children. Three major governmental approaches include prohibiting behavior; prescribing behavior; and taking direct protective action. There are two legal issues related to prevention of child maltreatment. First, government may use its power to spend to promote pro-social attitudes and values through public awareness campaigns for prevention. However, government may not ban anti-social attitudes and violence from the content of the media. Second, there is the issue of neonatal home visitation for prevention of maltreatment. Although it has been promoted this method raises significant issues of due process. Risk assessment for child protection is in a very rudimentary state. Much of the child welfare class action litigation has focused on the failure of the public child welfare agencies to use "reasonable efforts" to reunify families whose children are in foster care, or to terminate parental rights in a timely manner so that the child may be adopted. Poor families are disproportionately represented in the child protection and child welfare systems. In child protection systems in the year 2000 the emphasis will be on a private-public, community-based, multidisciplinary, coordinated approach to primary prevention. There will also be continued emphasis on a multidisciplinary approach to non-coercive secondary prevention. (ABL)

LEGAL PERSPECTIVES ON SERVICES TO ADDRESS CHILD ABUSE AND NEGLECT

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I have been asked to present a legal perspective on child abuse and neglect services during the 1990's. In preparing to do so, I found myself exploring issues that touch both on the policy that informs our child abuse decisions and the way that policy is put into practice. In fact, from a legal and a practical standpoint, examining the way children's services are evolving presents opportunities to consider a number of policy choices and social trends that will shape our nation's future.

The first and central legal issue in children's services is the extent to which government -- whether federal, State, or local -- may limit or supplant parental action in the control, nurture, and direction of children. Here there are conflicting policy values.

On the one hand we hold a strong belief that parents have a fundamental human right to raise their children without government interference. As stated by the Supreme Court:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder..." *Prince* v. *Massachusetts*, 321 U.S. 158 (1944)

And, fortunately, society's adherence to this principle works tolerably well for most children. Most parents provide their children with necessary food, clothing, shelter, education, and

medical care. Most parents love their children and discipline them appropriately when necessary.

On the other hand, it s equally clear that Americans want to protect children from maltreatment. The latest data indicate that an estimated 2.7 million American children suffer each year at the hands of their parents or other caregivers. Since at least 1874, in the famous case of Mary Ellen, Americans have expected their governmental institutions to protect vulnerable children when the parents cannot or will not.

The development of social policy with respect to maltreated children is one manifestation of a continuing tension in American political thought: how to address major social problems while protecting personal liberty and privacy. From a legal perspective, government must show a compelling interest before it may intrude into an area of fundamental personal liberty or privacy.

> Liberty "includes the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390 (1923)

This compelling governmental interest in a protected area of fundamental human liberty is called "substantive due process."

Nearly half a century ago, the Supreme Court provided the authority for a compelling governmental interest in protecting children:

> "But the family itself is not beyond regulation in the public interest...the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare..." *Pri v. Massachusetts*, 321 U.S. 158 (1944)

Assuming then, that government may act in order to protect the welfare of children, the legal issue is how government may do this, or what lawyers call "procedural due process analysis."

Under the Constitution, a scheme of government action must be linked rationally to the harms that the government seeks to prevent or the benefits it seeks to promote. There are three major approaches:

(1) First, government may prohibit behavior,

(2) Second, government may prescribe behavior, and

(3) Third, government may take direct protective action.

Let us look at each in turn.

First, it is clear that government may and does prohibit some acts, including various forms of child maltreatment. Government authorities investigate and prosecute alleged violations and punish or rehabilitate offenders. Government may even engage in censorship in matters of the creation, shipment, and possession

of pornography depicting children. Judging from anecdotal evidence -- letters to the editor, call-in radio shows, and television talk shows, the general public clearly believes that child maltreatment is criminal behavior at least if committed by someone other than themselves.

The second approach that the government may use is to prescribe behavior. It does this through the power to spend for the general welfare: the "carrot" of funding is offered to public and private agencies that have regulations, policies and program direction that match the prescribed policy. There is also a "stick" of no funding or a loss of funding for those agencies that do not follow the prescribed policy. In children's services, examples of this approach are the federal grants to States under Title IV of the Social Security Act and under the Child Abuse Prevention and Treatment Act. Such grants directly support services to strengthen and preserve families, prevent child abuse and neglect, and ameliorate the effects of maltreatment. To receive funds, States must have statutes, regulations, and procedures that comply with Federal regulations put out by the Children's Bureau and the National Center on Child Abuse and Neglect (NCCAN), both of which are in the Administration on Children, Youth, and Families of the Administration for Children and Families, U.S. Department of Health and Human Services. The Department conducts periodic reviews of State statutes, regulations, and procedures, including

a sampling of case records, to determine whether they are in compliance with Federal requirements.

When a State is found to be out of compliance, the Department may determine it to be ineligible for future grant awards, seek to reduce the amount of an award, or it may try to recover funds previously awarded, depending on its statutory and regulatory authority. If a State was not in compliance due to confusion about the interpretation of the requirements, the Department may choose to forego a declaration of ineligibility or a financial sanction but may order appropriate remedial measures within a specified period of time.

One of the hottest current issues in the area of compliance with Federal law is that of "religious exemptions to medical neglect". NCCAN is engaged in a major effort with the States to ensure that their statutes, regulations and procedures provide that the alleged failure of a parent to give medical care to a child due to the parents' religious practices is reportable as suspected neglect. Further, we want to ensure that the child protective services ("CPS") agency has the authority to investigate such reports and seek legal remedies for the provision of appropriate conventional medical care.

NCCAN has the same concerns about infants with disabilities and life threatening conditions from whom medically indicated

treatment and appropriate nutrition, hydration and medication are withheld. We are working with one of our sister agencies, the Administration on Developmental Disabilities, to ensure this is reportable as suspected neglect and that the CPS agency has authority to investigate and seek legal remedies. We also want to make sure that the CPS agency acts in coordination with the State Protection and Advocacy system, which has concurrent authority.

The third approach is direct governmental action, which must be set in motion through regular procedures codified in statutes, regulations, and policies, and not merely through arbitrary and capricious action. Moreover, the government must assure that individuals and groups receive equal protection from invidious discrimination. Government must give individuals notice of a proposed action and the right to contest it; if an emergency requires immediate action, the government may step in and act so long as the affected individuals are given notice and a hearing as soon as possible. When individuals are aggrieved by the government action, they have the right to appeal. All State child protective service systems have such policies, whether created by statutes and regulations or rules of court.

Issues of substantive due process (<u>when</u> can government intervene) and procedural due process (<u>how</u> can government intervene) interrelate in the current child protection system, and in the

services that are offered to children and their families under its auspices. Let me explain with a few examples.

There are two legal issues related to prevention of child maltreatment. First, government may use its power to spend to promote pro-social attitudes and values through public awareness campaigns for prevention. However, government may not ban anti-social attitudes and violence from the content of the media, including films, television, and rock music, or even require warning labels for purchasers. Such censorship is considered to be a substantive due process issue under the First Amendment. Thus, even if there is widespread belief that violent media messages may stimulate abusive behavior, there is little that government can do about it directly.

Second, there is the issue of neonatal home visitation for prevention of maltreatment. This method has been promoted by both the National Committee for the Prevention of Child Abuse and the U.S. Advisory Board on Child Abuse and Neglect. However, it raises significant questions of substantive due process. On the whole, these programs have not been rigorously evaluated in the U.S. to identify the difference in results between programs using health professionals and those using paraprofessionals, those with different levels of training provided to the home visitors, and those with other philosophies and services.

Even if there were clear results, mandatory home visitation programs may be seen as an inappropriate intrusion into the protected privacy of family life. This would be especially true if the purpose of the visitor was to "snoop" on the parents who are not suspected of having abused or neglected their child, rather than to provide services to parents who want or need them.

Neonatal home visitation may also raise questions of procedural due process. For example, if visitation were mandatory for some families but is not universally required, equal protection must be considered. If the visited families were not suspected of having abused or neglected their children, the programs might be open to claims of unfair discrimination. From a legal perspective, I believe that we need conclusive evidence that the risk assessment instruments used by targeted home visitation programs are valid and reliable before they are used to predict what families should be included in mandatory home visitation programs.

If we look at government intervention directed toward protecting a child after an allegation of abuse or neglect has been made, we find a similar linkage between substantive and procedural due process concerns.

The official policy for intervention in child protection and child welfare is set forth in the Child Abuse Prevention and

Treatment Act and the Adoption Assistance and Child Welfare Act of 1980, which are grant programs to States mentioned earlier. This policy says we must accurately assess the risk to the child of being abused again if he or she remains in the home while reasonable efforts are made to improve the parents' child-rearing practices. The goal is to preserve the family unit, if possible. Conversely, if the child is shown to be at such high risk for more maltreatment that efforts to treat the parents are likely to be unsuccessful, or if reasonable efforts to protect the child in the home have failed, the government can place the child into foster care, terminate the parents' rights, and proceed with the adoption of the child into a permanent family.

The American Humane Association summarizes the policy like this:

> "Today's child protection programs are based on the conviction that protection of children is primarily the responsibility of parents and when, for whatever reason, parents fail, and children are harmed, the state must intervene to correct the situation and protect the child...Because children have a right to be with their own parents, the ultimate objective of child protective services is to protect children through stabilizing and strengthening families whenever possible through working with parents to help them do a better job. Each instance must be assessed to determine the potential for change and evaluate the risk to the child. Child protection, thus, is a child centered family focused service." (American Humane Association, *Child Protective Services Standards*, 1977)

This policy rests on two assumptions: one--that child protective services caseworkers can accurately predict the risk of re-abuse of the child, and two--that we know enough about the outcomes of treatment methods to permit selection of appropriate treatment.

Both of these assumptions are questionable, given the current state of the art.

Let me discuss risk assessment briefly. Risk assessment is not a substitute for a caseworker's good clinical judgment, but it provides information upon which the caseworker can base such judgment. Nor is risk assessment a substitute for a holistic evaluation of the family's strengths and weaknesses. Instead, it should be based upon such an evaluation.

Unfortunately, risk assessment for child protection is in a very rudimentary state. NCCAN convened a symposium on this topic last December. The discussion revealed that most of the risk assessment instruments marketed by national child welfare organizations and those developed by States are relatively poor at predicting the risk of additional maltreatment. Moreover, most of these instruments are not sensitive to cultural differences in family practices or to varying socioeconomic levels. In addition, States have had difficulty training caseworkers to use even the more effective instruments properly.

The accuracy of risk assessment also has legal implications. State liability under the Federal Civil Rights Act for failure to protect a child has been clarified by a recent U.S. Supreme Court decision, *DeShaney* v. *Winnebago County Department of Social*

Services, 489 U.S. 189 (1989). The Supreme Court held that State failure to protect a child who has not been taken into custody is not a Federal due process violation although there may be liability under State law.

This required link between liability for failure to protect and State custody of the child may potentially make the process of risk assessment by the investigating child protective services caseworker more dangerous for the child. Since caseworkers are aware that State custody of the child is the logical outcome of an assessment of high risk, they may unconsciously lower their assessment of risk to reduce the exposure to liability.

As a result of our concern with the state of the art in risk assessment, over the next several years NCCAN will be sponsoring research, demonstration projects, and training to improve caseworkers' risk assessment process.

Let me turn now to treatment outcome. Much of the child welfare class action litigation has focused on the failure of the public child welfare agencies to use "reasonable efforts" to reunify families whose children are in foster care, or to terminate parental rights in a timely manner so that the child may be adopted. The assumption of this litigation is that the agency can provide appropriate treatment for the parents because the agency knows which treatment approaches are most likely to be

successful. Thus, it is assumed that using "successful" treatment strategies will permit the child to remain with his or her family while the problem is fully resolved, or, if the child had been removed, that using such strategies will allow the agency to reunify the family, and then revert to a monitoring role.

Unfortunately, the state of the art with respect to the evaluation of treatment of the child and the parents is less fully evolved. The Child Abuse Treatment Working Group of the Coordinating Committee on Child Abuse Issues for the American Psychological Association has recently reported that we know relatively little about what types of treatment work for what families under what conditions and when what types of maltreatment have occurred. It is equally clear that there is little information on successful treatment approaches that are culturally sensitive. This report confirms NCCAN's views.

If we know so little about how to measure success of treatment approaches, we may justifiably question whether anyone can judge whether the State made "reasonable efforts". As you may know, this past spring the Supreme Court decided the case of *Suter* v. *Artist M.*, holding that there is no private right of action to bring a lawsuit in Federal court for a State's alleged failure to use "reasonable efforts."

In addition to APA, a number of organizations and Federal agencies are concerned about how much we know about treatment outcomes in child maltreatment cases. The National Academy of Sciences is working under an NCCAN grant to develop a comprehensive research plan for us. I anticipate that new research in the area of treatment outcomes will be high on our list for the rest of the decade.

There are other procedural due process problems with services to parents and children, including unlawful discrimination on the basis of race. Since minorities are over-represented in the child welfare system, we may see allegations during the 1990's that the failure to use treatment approaches that are culturally sensitive constitutes such a violation of due process.

Poor families are also disproportionately represented in the child protection and child welfare systems. In the 1988 Study of National Incidence and Prevalence of Child Abuse and Neglect, 76 percent of the families in which child neglect occurred for whom income data was available had incomes under $15,000. Put another way, the incidence of neglect in families with incomes under $15,000 was 36.8 per 1,000, a rate nearly nine times higher than the rate in families with incomes greater than $15,000. Poverty also affects the rates of physical abuse. Sixty-one percent of families in which physical abuse occurred had incomes under $15,000, an incidence rate of 19.9 per 1,000, or a rate nearly

five times higher than the rate in families with incomes greater than $15,000.

Such over-representation may not rise to the level of illegal discrimination from a procedural due process perspective. Nevertheless, from a substantive due process perspective we should be concerned about this over-representation. Families whose children do not receive a middle class standard of parenting due to the parents' lack of income should not be stigmatized as being neglectful; the child protection system should not be used by well-meaning professionals as a substitute for services that should be provided by the child welfare system. Instead, child protection should focus on families who fail to provide the same level of parenting as other families in comparable economic circumstances.

There is another troubling aspect to the link between child maltreatment and poverty. The child protective services case plan for a maltreating family identifies services to improve the conditions that contributed to the abuse or neglect. These services are provided free if the family is eligible. However, the case plan usually does not directly look for ways to help the family escape poverty, and intensive collaboration between a child protective services caseworker and the family's welfare caseworker happens infrequently. So, despite the fact that

poverty may be a major underlying cause of the child maltreatment, the focus unfortunately remains on the effect.

The Administration for Children and Families is making a major effort to see that this happens less often. In addition to promoting economic self-sufficiency for people on welfare, a primary goal of the Administration for Children and Families is to forge stronger links among programs that address the broad range of problems that families experience. I anticipate that we will see greater collaboration during the 1990's among the various HHS bureaus that are responsible for helping families become stronger, including those that attack the problem of poverty. We hope that by doing so, we will be better able to support States in their efforts to treat clients as people with interrelated needs rather than as collections of funding categories.

We are also seeing increased efforts to coordinate programs across Federal departments. The Inter-Agency Task Force on Child Abuse and Neglect, which I chair, has developed working groups to coordinate Federal research programs, help clearinghouses and resource centers disseminate information related to child maltreatment more effectively, and evaluate parenting education curricula. The goal of all of these efforts is to reduce duplication, maximize results for families and minimize wasteful spending.

I want to leave you with a vision of a child protection system for the year 2000, based on some fundamentally different concepts from those abroad in 1992.

First, in the year 2000, the emphasis will be on a private-public, community-based, multidisciplinary, coordinated approach to primary prevention. This is consistent with the principles of substantive due process: the community will give all families the information they need, give them the opportunity to learn and then apply their new knowledge, before the system intervenes. We will make it easier for people who are already parents to learn about sexuality, home management, and parenting. And, before they become parents, we will begin with the young, in schools--by providing elementary school education in child safety and child care; secondary school education in sexuality, conflict resolution skills, home management skills, childbirth, and child care skills. We will improve provision of pre and postnatal care and instruction by medical and social services professionals. We will establish easily accessible resource centers with workshops, libraries of audiovisual materials, books, public service announcements, and other material that is helpful to families.

Second, there will be continued emphasis on a multidisciplinary approach to non-coercive secondary prevention including child abuse prevention programs encouraging disclosure; locally-based volunteer or paraprofessional aides to parents; and

structured non-punitive assistance for abusive and neglectful parents who voluntarily seek help before or after a report of maltreatment occurs.

Third, when coercive intervention is required, it will be narrowly tailored to be consistent with the requirements of substantive due process. Multidisciplinary teams will operate in every jurisdiction at both the local and state levels to set intervention policies and procedures, provide quality assurance (training, case review, and policy monitoring), and conduct joint law enforcement-CPS investigations. As law enforcement, child protective services and other agencies become clearer about their respective responsibilities, role conflict should decrease and service delivery should improve.

Fourth, judicial proceedings will support substantive and procedural due process. Juvenile court judges will demonstrate knowledge or training in child development and family relations as a condition of holding office; an attorney and special advocate ("CASA") will be appointed for the child for all judicial hearings; all legal proceedings arising from allegations of maltreatment, especially domestic relations proceedings and criminal prosecutions, will be consolidated or coordinated; procedural and evidentiary reforms will be used to minimize the harmful effects of judicial proceedings on children; judicial orders will specify objective measurable expectations of changed

parental behaviors, not merely parental compliance with case service plans; and court orders will clearly specify expectations of the social services agency and its contractors for the services to be rendered to the parents and child.

I believe that such a new system would be a major improvement over our existing one. I look forward to discussing this vision with the APA and other organizations over the next few years, to refine it and to begin the arduous task of making it a reality. For our children, we can do no less.

Thank you.