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PROTECTING CHILDREN FROM ABUSE: SHOULD IT BE A LEGAL DUTY?*

*Douglas J. Besharov***

I. INTRODUCTION

Over the past twenty years, there has been an enormous expansion of programs to prevent child abuse and child neglect.[1] Almost all major population centers now have specialized "child protective agencies" to investigate reports of child abuse and neglect.[2]

The actual organization of child protective agencies varies widely from state to state and from community to community within the same state. But these differences are less substantial than they may at first seem. All child protective agencies perform essentially the same functions. They receive and screen reports (Intake);[3] they investigate reports and determine whether child protective action is needed (Investigation); they determine whether the child requires immediate protection (Emergency Services); they determine what long-term protective measures and treatment services are needed and then seek the parents' consent for such measures and services (Case Planning and Implementation); when a maltreated child is left at home or is returned home after having been in foster care, they supervise the parents' care of the child and monitor the provision of treatment services (Case Monitoring); and, finally, they close the case after it appears that the parents can properly care for the child or after parental rights have been terminated and the child has been placed for adoption (Case Closure). To the fullest extent possible, child protective agencies seek the parents' voluntary consent for the protective measures and treatment

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1. *Compare* V. DEFRANCIS, CHILD PROTECTIVE SERVICES IN THE UNITED STATES: A NATIONWIDE SURVEY (1956) *with* W. HILDREBRAND, CHILD PROTECTIVE SERVICES ENTERING THE 1980's (1981).

2. *See* U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, ANNUAL ANALYSIS OF CHILD ABUSE AND NEGLECT PROGRAMS (1980); U.S. GENERAL ACCOUNTING OFFICE, INCREASED FEDERAL EFFORTS NEEDED TO BETTER IDENTIFY, TREAT, AND PREVENT CHILD ABUSE AND NEGLECT ch. 3 (1980).

3. The parenthetical notations used are the labels generally attached to the functions described.

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services deemed necessary. If the parents do not agree to the agency's plan, the agency may seek court authority to impose the plan on the parents (Court Action). Child protective agencies differ only in the degree to which these functions are separated and assigned to different staff units. The extent to which functions are separated is determined by the size of the agency. The larger the agency, the greater the efficiency and, hence, the likelihood of specialization.

Although inadequate funding is a continuing problem, increased reporting and specialized child protective agencies have saved thousands of children from injury and even death. In New York, for example, after the passage of a comprehensive reporting law that also mandated the creation of specialized child protective staffs, there was a fifty percent reduction in child fatalities.[4] The city of Denver, Colorado, has experienced a similar reduction as reported by Drs. Ruth and Henry Kempe: "In Denver, the number of hospitalized abused children who die from their injuries has dropped from 20 a year (between 1960 and 1975) to less then 1 a year."[5]

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 approximately twenty-five percent of all child fatalities attributed to abuse or neglect involve children already reported to a child protective agency.[6] Tens of thousands of other children receive serious injuries while under child protective supervision.

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

Until recently, such horror stories were seen as evidence of inadequate staffing and poor administrative procedures. As a result, they often sparked major administrative and legislative reforms. Given past expansions of child protective services, however, there has been a growing tendency to blame the child's subsequent maltreatment on the agency's or caseworker's improper or inadequate performance. Consequently, child protective workers and their agencies may face civil law-

4. N.Y.S. DEPARTMENT OF SOCIAL SERVICES, CHILD PROTECTIVE SERVICES IN NEW YORK STATE: 1979 ANNUAL REPORT Table 8 (1980).

5. R. KEMPE & C.H. KEMPE, CHILD ABUSE 8 (1978).

6. *See, e.g.*, REGION VI RESOURCE CENTER ON CHILD ABUSE AND NEGLECT, CHILD DEATHS IN TEXAS 26 (1981)[hereinafter cited as CHILD DEATHS IN TEXAS]; _. Mayberry, Child Protective Services in New York City: An Analysis of Case Management 109 (May 1979)(unpublished manuscript).

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suits, criminal prosecutions, or both, whenever a child suffers further maltreatment after having been reported to the authorities. The key word here is "after," for there is no liability for injuries that occur before something can be done to protect the child.

This article initially examines three major ways a legal "duty" may be established as the basis of liability in suits brought against caseworkers and agencies for the failure to protect children from abuse and neglect: "special relationships," statutory mandates, and federal civil rights law. The question of immunity is also discussed, focusing on two broad categories of immunity: the ministerial/discretionary dichotomy and prosecutorial immunity. Finally, the article addresses the need to deter wrongful conduct balanced against the danger of defensive social work, recommending that child protective workers be granted qualified immunity.

II. THE QUESTION OF DUTY

Lawsuits against child care professionals and the state or local agencies that employ them have become frequent in recent years. Claims are being brought in state courts on the theory of negligence for failing to carry out duties owed to children, as well as in federal courts on the theory of a violation of the Civil Rights Act.[7] In spite of this expansive legal vulnerability, social workers may escape liability on the basis that their conduct is protected under the doctrine of immunity.[8] Nevertheless, children in the state's custody have engendered judicial concern, and courts are often ready, with little or no discussion of immunity, to hold the state or other public entity responsible for injury suffered by a child.

A. Special Relationships

Under general tort law, negligence liability is established through proof that a person breached a duty owed to another and that the breach proximately caused the latter's subsequent injury.[9] Such a duty may arise by virtue of a special relationship existing between the parties. In the area of children and social service agencies, some courts apply the general duty/special duty doctrine[10] to determine when an agency has a duty to protect an individual.[11] Under this doctrine, a

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7. *See infra* notes 143–86 and accompanying text.

8. *See infra* notes 187–218 and accompanying text.

9. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984)(hereinafter cited as PROSSER AND KEETON).

10. *See generally* Annot., 38 A.L.R. 4th 1194 (1985).

11. Many cases support the view that liability of a government entity for torts committed against an individual be premised on the violation of a special duty owed to the individual rather

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governmental entity is not liable for injury to an individual citizen where liability is alleged on the ground that the entity owes a duty to the public in general, as in the case of police or fire protection.[12] However, there are instances where an individual citizen becomes singled out from the general population and a special relationship is established between the governmental agency and the individual. This creates a special duty to the individual, a breach of which may result in liability for the injuries suffered by the individual.[13]

Recognition of a special governmental duty to a particular individual is often justified on the basis of public policy. " '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' "[14] Several policy concerns may be considered when a court determines whether a duty should exist:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[15]

Consideration of these various factors will militate in favor of or against liability in any particular situation.

1. Divided Authority on the Duty To Investigate Reports Adequately

When an individual, such as a child, is legally entrusted to the care and protection of a governmental agency, public policy favors the imposition of a special relationship between the parties and an affirma-

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than on the violation of a general duty owed to the public as a whole. *See, e.g.*, Williams v. State, 34 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983); Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); Sussman v. New York, 88 A.D. 2d 993, 451 N.Y.S.2d 830 (1982); Shelton v. Industrial Comm., 51 Ohio App. 2d 125, 367 N.E.2d 51 (1976); Chapman v. Philadelphia, 290 Pa. Super. 281, 434 A.2d 753 (1981).

There are cases, however, that have held that the general duty/special duty doctrine is no longer viable and that the duty owed by the government entity to the injured party should be determined on the basis of common law principles. *See, e.g.*, Ryan v. State, 184 Ariz. 308, 656 P.2d 597 (1982); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979); Brennen v. City of Eugene, 285 Or. 401, 591 P.2d 719 (1979); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976).

12. *See* Annot., 38 A.L.R. 4th 1194, 1197–1203 (1985).

13. *See id.*

14. Smith v. Alameda County Social Serv. Agency, 90 Cal. App. 3d 929, 935, 153 Cal. Rptr. 712, 715 (1979) (citation omitted).

15. Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

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tive duty to protect the child from harm.[16] Factors which may be considered in a special relationship analysis include whether the victim was in legal custody at the time of or prior to the alleged negligent conduct, whether the state has expressly indicated its desire to provide affirmative protection to a particular class or specific individuals, or whether the state knew that the victim was or would be in a position of danger.[17]

Courts have been especially apt to hold agencies civilly liable for the injuries or deaths of children when the agency created a special relationship by assuming the responsibility for the control, supervision, and protection of the child, yet later failed to take reasonable action to protect the child from danger. For example, in *Mammo v. State*,[18] the Arizona Court of Appeals held that a state welfare agency was under a duty to act with reasonable care when it received information from the non-custodial parent concerning threats to his child's safety.[19] This duty was imposed by an Arizona statute that required the agency to promptly investigate any reports which suggested that the child was in danger and should be removed from the custodial parent's home.[20] The court added that the deceased child was individually identified to the agency in charge of her protection and thus a relationship emerged between her and the state so that failure on the part of agency employees to perform their duty worked a special injury to her.[21]

The State Department of Public Welfare in Louisiana was also held liable for negligence in *Vonner v. State*.[22] The mother of the deceased child initiated an action against the foster mother, the foster mother's husband, and the department of public welfare when her child died of a beating inflicted by the foster mother. The welfare department had been aware of the mistreatment of the child based on complaints issued by the child's mother and the fact that two older siblings ran away from the foster home to avoid beatings. Nevertheless, the agency failed to conduct a medical examination of the children and failed to visit the foster home as required.[23] The court held that the welfare department had legal custody of the children and, therefore, had the responsibility of providing for the physical, mental, moral, and

16. *See* Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985).

17. *Jensen*, 747 F.2d at 194–95 n.11.

18. 138 Ariz. 528, 675 P.2d 1347 (Ct. App. 1983).

19. *Id.* at ___, 675 P.2d at 1350.

20. *Id.* at ___, 675 P.2d at 1350–51. *See* ARIZ. REV. STAT. ANN. § 8-546.01 (Supp. 1985).

21. *Mammo*, 138 Ariz. at ___, 675 P.2d at 1351.

22. 273 So. 2d 252 (La. 1973).

23. *Id.* at 254.

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emotional well-being of the individual child.[24]

In *Jensen v. Conrad*,[25] the United States Court of Appeals for the Fourth Circuit held that an injured child or a deceased child's estate might have a cause of action under 42 U.S.C. section 1983[26] against a social service agency and/or the assigned caseworker based on a special relationship between the parties.[27] Although the Fourth Circuit declined to impose liability on the defendants in this instance, it so declined only because it found that a recognized special relationship between the parties, thus giving rise to an affirmative duty of protection, had not yet emerged at the time the alleged violations occurred.[28] A discussion of this decision is illuminating.

Jensen, at the appellate level, arose from two district court decisions.[29] The plaintiff in these cases was the administratix of the estates of two children, Sylvia Brown[30] and Michael Clark,[31] who had died as the result of child abuse.[32] The children's deaths occurred *after* the relevant social agencies had been notified of the abuse the children were receiving from their respective parents.[33] At trial, the administratrix contended that the South Carolina Child Protection Act[34] created " 'a special relationship' between the state and [the deceased, abused children] by imposing an affirmative duty on the state . . . 'to save [suspected victims] from harm.' "[35] A breach of this duty, the administratrix contended, gave rise to an action under section 1983 for a deprivation of liberty by the state, as guaranteed by the fourteenth amendment of the United States Constitution.[36] The district court dismissed the case involving the estate of Sylvia Brown, holding that because the complaint did not allege custody or control on the part of the state, a section 1983 claim based on state action did not exist.[37] In the case involving the estate of Michael Clark, the district court granted the defendants' motion for summary judgment, concluding that the de-

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24. *Id.* at 256.
25. 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985).
26. 42 U.S.C. § 1983 (1982).
27. *Jensen*, 747 F.2d at 194–95.
28. *Id.* at 194.
29. Jensen v. Conrad (Jensen I), 570 F. Supp. 91 (D.S.C. 1983), *aff'd*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985); Jensen v. Conrad (Jensen II), 570 F. Supp. 114 (D.S.C. 1983), *aff'd*, 747 F.2d 185 (4th Cir. 1984), *cert.denied*, 105 S. Ct. 1754 (1985).
30. *Jensen I*, 570 F. Supp. at 91.
31. *Jensen II*, 570 F. Supp. at 114.
32. Jensen v. Conrad (Jensen III), 747 F.2d at 187–88.
33. *See id.*
34. S.C. CODE ANN. §§ 20-7-480 to -690 (Law. Co-op. 1985 & Supp. 1985).
35. *Jensen III*, 747 F.2d at 189.
36. *Id.* at 189. *See* U.S. CONST. amend. XIV, § 1; 42 U.S.C. § 1983 (1982).
37. *Jensen I*, 570 F. Supp. at 91.

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fendants were immune from liability as there was no case law that gave notice to the defendants of potential liability.[38]

The Fourth Circuit affirmed both decisions, although it indicated that liability on the part of state agencies might arise in the future.[39] Following a lengthy analysis of section 1983 cases that recognized liability grounded upon the existence of a special relationship between an individual and the state (and its representatives),[40] the court concluded that the case law that developed prior to the fatal injuries to Michael Clark and Sylvia Brown related solely to the rights of prisoners and, thus, the imposition of an affirmative duty of care on the government, prior to 1979,[41] was limited to prison settings where eighth amendment concerns were involved and state employees had acted with deliberate indifference.[42] Thus, the defendants could not be liable because at the time the acts/omissions occurred which allegedly gave rise to their liability, there were no specific guidelines which defined the special relationship that the administratrix asserted existed between the defendants and the deceased children.[43]

Nevertheless, the Fourth Circuit did recognize that a special relationship could be found to exist between a social service agency and an abused child, based on case law that developed after 1979.[44] In addition, the court offered a list of factors that should be included in a "special relationship" analysis:

> 1) Whether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident . . .
>
> 2) whether the state has expressly stated its desire to provide affirmative protection to a particular class of specific individuals . . .
>
> 3) whether the State (sic) knew of the victim's plight.[45]

In short, the case law indicates a "special relationship" may be created between a child protective agency and a child such that an affirmative obligation arises on the part of the agency to protect the child from harm. This duty may be imposed by either the active assumption of responsibility by an agency for the child's welfare or by statutory mandates.

Criminal prosecutions are also possible for the breach of duties

38. *Jensen II*, 570 F.Supp. at 127–28.
39. *Jensen III*, 747 F.2d at 187.
40. *Id.* at 190–94.
41. The alleged violations occurred in 1979. *Id.* at 190.
42. *Id.* at 190–91.
43. *Id.* at 194 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
44. *Id.*
45. *Id.* at 194–95 n.5.

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imposed by the "special relationship" situation. In 1980, for example, a caseworker in El Paso, Texas, the caseworker's supervisor, and the agency's director of child welfare were charged with criminal negligence.[46] The agency had become involved with the family when a hospital record reported that a nine-month-old child had severe scald burns on the lower back and buttocks. The agency decided that the child could remain at home while the parents received treatment services. Ten months later, the child died of apparent asphyxiation. "Although he was unable to determine the cause of death, the medical examiner testified that the child had very small, circular bruises on the right side of her head and on her chest, abdomen, thighs, and knees. Other doctors testified . . . that she was also suffering from malnutrition."[47] The prosecuting attorney is said to have claimed that "if the [agency] staff had been willing to admit its mistakes [in not removing the child] and cooperate in the removal of the surviving children following their sister's death, the case probably would not have been taken to the grand jury."[48] One month before the trial was to begin, on preliminary motions, the trial court quashed the indictment on the ground that "no indictable offense had been charged."[49]

In the same year, a child protective worker in Louisville, Kentucky, and the worker's supervisor were charged with official misconduct[50] following the death of a three-year-old child from hot water scald burns. Hospital physicians treating the child did not make a report, but a policeman on the scene called the child protective agency because he suspected abuse. During the previous month, the agency had received two reports alleging abuse of the child's two older siblings, but it had decided that the reports were not valid and it was in the process of closing its case on the family. A subsequent investigation revealed that six months earlier, the dead child had suffered a broken leg, determined to be a "wringer injury" which is strongly suggestive of abuse. The hospital had also not reported this injury. At the trial, all charges were dismissed after the prosecution presented its case and before the defense presented any evidence. In dismissing the case, the trial judge is quoted as saying: "It offends my sense of fairness that these three people were chosen [for prosecution] when everyone else

46. *See* J. Spearly, *Caseworker Indictments—A Closer Look*, National Child Protective Services Newsletter, Winter 1981, at 1.

47. *Id.* at 4.

48. *Id.* at 9.

49. *See* Horowitz & Davidson, *Improving the Legal Response of Child Protective Agencies*, 6 VT. L. REV. 381, 384 (1981)(discussing the case).

50. *See* Gembinski, Casper & Hutchinson, *Worker Liability: Who's Really Liable?*, in LOOKING BACK, LOOKING AHEAD: SELECTIONS FROM THE FIFTH NATIONAL CONFERENCE ON CHILD ABUSE AND NEGLECT (C. Washburne ed. 1982).

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who came into contact with the child could have been charged as well."[51]

While there is good reason to question the propriety of these two prosecutions, some children unnecessarily do suffer further maltreatment because of a caseworker's inexcusably bad judgment. For example, children are often left at home "at the risk of further damage . . . in the mistaken belief that 'there is no such thing as a person [i.e. an abusive parent] we cannot help' "[52] Research studies suggest that many fatalities are preceded by obvious warning signals of immediate and serious danger, to which decision-makers should have responded more forcefully.[53]

The allegations in a civil lawsuit against a caseworker and the Missouri Department of Social Services illustrate how signs of serious danger to a child can be overlooked or ignored. According to the complaint, the caseworker, over the course of twenty-six visits during a five-month period, "negligently failed to recognize severe and permanently damaging neglect of the child."[54] It was alleged that, during the period in question, the two-year-old child "failed to thrive and in fact reduced from a weight of approximately twenty-three [23] pounds to a weight of approximately thirteen [13] pounds."[55] Damages amounting to four million dollars were sought for the child's subsequent injuries. The case was eventually settled. The terms of the agreement included the state's having to promise to provide extensive medical and psychiatric care for the child, even past majority; post-secondary school educational assistance to the child; and subsidy payments in the event of the child's adoption.[56]

There are definite warning signals, such as evidence of sexual abuse or abandonment, that suggest the need to place a child in protective custody.[57] The presence of any one of these factors is a clear indi-

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51. *Id.* at 116. In addition to the child protective worker and the supervisor, an attending physician was also indicted.

52. Henry, *Some Problems Encountered by Welfare Departments in the Management of the Battered Child Syndrome*, in THE BATTERED CHILD 169, 170 (R. Helfer & C. Kempe eds. 1968).

53. *See, e.g.*, CHILD DEATHS IN TEXAS, *supra* note 6, at 26; _. Mayberry, *supra* note 6, at 109.

54. Complaint, Maupin v. Maupin, No. _____ (D. Mo. filed _____, 1979).

55. *Id.*

56. Much of the case information pertaining to children is sealed under court order or is disseminated for limited use under a requirement of confidentiality. This was one such case.

57. Situations suggesting the need for protective custody include:

1. The child was severly assaulted, i.e., hit, poisoned, or burned so severely that serious injury resulted or would have resulted but for the intervention of some outside force or simple good luck (i.e., the parent threw an infant against a wall, but somehow no serious injury resulted).

2. The child has been systematically tortured (i.e., the child was locked in a closet for long

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cation that the child faces an imminent threat of serious injury. Unless the child's safety can be assured by some other means, the child should be placed in protective custody quickly—and kept there until the home situation is safe or until parental rights are permanently terminated.[58] The basis of liability is established by proof that a worker ignored or negligently overlooked one of these factors and thereby failed to place into protective custody a child who suffered subsequent maltreatment. If the worker noted these warning signals, the existence of liability depends on whether appropriate protective action was taken.

In *Buege v. Iowa*,[59] the non-custodial father reported to the department of social services that his thirty-four-month-old daughter had a bruise on her buttocks and that he believed the bruise was inflicted by the mother's lover. The agency investigated and substantiated the injury, although the lover was not interviewed. At an agency staff meeting the following day, two days after the initial report was received, a decision was made not to remove the child from the mother's custody, but instead, to make follow-up visits coupled with day care, counseling, and other appropriate services. However, *no follow-up visit was ever made.* Eight days later, the child was hospitalized in a comatose state, with bruises, both old and new, over most of her body. The

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periods of time; forced to eat unpalatable substances; or forced to squat, stand, or perform other unreasonable acts for long periods of time).

3. The parent's reckless disregard for the child's safety caused serious injury or could have done so (i.e., the parent left a very young child home alone under potentially dangerous circumstances).

4. The physical condition of the home is so dangerous that it poses an immediate threat of serious injury (i.e., there is exposed electrical wire, upper-story windows are unbarred and easily accessible to young children, or there is an extreme danger of fire).

5. The child has been sexually abused or sexually exploited.

6. The parents have purposefully or systematically withheld essential food or nourishment from the child (i.e., the child is denied food for extended periods of time as a form of punishment for real or imagined misbehavior).

7. The parents refuse to obtain (or consent to) medical or psychiatric care for the child that is needed to prevent or treat a serious injury or disease (i.e., the child's physical condition shows signs of severe deterioration to which the parents seem unwilling to respond).

8. The parents appear to be so out of touch with reality that they cannot provide for the child's basic needs (i.e., the parents are suffering from *severe* mental illness, mental retardation, drug abuse, or alcohol abuse).

9. The parents have abandoned the child (i.e., the child has been left in the custody of strangers who have not agreed to care for the child for more than a few hours and do not know how to reach the parents).

10. There is reason to suspect that the parents may flee with the child (i.e., the parents have a history of frequent moves or of hiding the child from outsiders).

D. BESHAROV, REPORTING CHILD ABUSE AND NEGLECT ____ (1986). In any of the above situations, the younger the child, the greater the presumable need for protection.

58. *See* Helfer, Henry & Kempe, *The Child's Need for Early Recognition, Immediate Care and Protection*, in HELPING THE BATTERED CHILD AND HIS FAMILY 69, 70 (1972).

59. No. 2052 (Allamakee, Iowa, July 30, 1980).

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child died after three days of unsuccessful treatment. The mother's lover was subsequently convicted of second degree murder.[60] The father sued the agency, alleging negligent investigation and supervision of the case, failure to employ qualified employees, failure to staff the protective unit sufficiently, and failure to remove the child from the home. The case was eventually settled for $82,500.00.[61]

Staff shortages and overwhelming caseloads naturally limit the degree and duration of case monitoring that agencies can provide. Therefore, as with initial investigations, the agency only has an obligation to conduct reasonable monitoring, as determined by the danger to the child *and* by the agency's monitoring standards. Thus, the level of necessary monitoring becomes a question of professional judgment, and the plaintiff must establish, through expert testimony, the unreasonableness of the agency's conduct. Sometimes, however, the plaintiff is relieved of this burden of proof. In *Buege*, for example, the inadequacy of the case monitoring was established by the agency's failure to fulfill its own plan to protect the child.

In some cases, the necessary level of monitoring is established by a pre-existing court order. *Kevin R.*[62] is an example of what can happen when a court order requiring close home supervision is violated:

> At two months of age, Kevin was brought to the hospital with a broken femur (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. Only after this second injury did the hospital make a report of suspected child abuse.
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> 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 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 Ke-

60. *See* State v. Hilleshiem, 305 N.W.2d 710 (Iowa 1981).

61. Jury Verdict Research, Inc., *Case Summary* (5325 Naimer Parkway, Solon, Ohio).

62. Confidential material held by author.

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vin's skull.

Two weeks later, Kevin was dead from repeated head beatings inflicted by his father.[63]

At all times, child protective agencies must respond to renewed evidence of danger to the child. Again, there are a number of definite warning signals that will suggest the need to consider protective custody.[64] In addition, the parents' failure to fulfill one of the conditions under which the child was left at home or returned there[65] should cause the agency to reconsider its treatment plan. The alleged failure to do so led to a major lawsuit in South Carolina, *Jensen v. Conrad*.[66]

> The plaintiff alleged that Sylvia Brown's plight first became known to Richland County social workers on February 28, 1979, when the then four month old child was admitted to the Richland Memorial Hospital with a fractured skull. A C.A.T. scan revealed a "healing subdural hematoma." The attending physician immediately became concerned about the possibility of physical abuse by Sylvia's parents. This suspicion, the plaintiff contends, was confirmed after Mrs. Brown and her boyfriend visited Sylvia at the hospital. Hospital social workers received a report that during the visit Mrs. Brown's boyfriend held the child by the head and neck, and slapped the child in a rough manner.
>
> The following week, a Richland Hospital social worker reported the case to the Richland County Department of Social Services and requested a child protection investigation. After an initial review of the case, the Department of Social Services allegedly reached an agreement with Mrs. Brown requiring her to reside with Sylvia at the home of Sylvia's grandmother. Under the agreement, if Mrs. Brown returned home with her child, Sylvia would be placed in the custody of the Department of Social Services. In addition to this agreement, the Department also decided that an "intensive follow-up and in-home supervision" would be required.
>
> According to the plaintiff, over the course of the next two months the Department caseworkers failed to supervise the family adequately and carry out the recommendations of department officials and Sylvia's attending physician. The plaintiff claims that Department caseworkers visited Mrs. Brown's house only twice, and on both of those occasions Sylvia was living alone with her mother. Despite the agreement, no action was taken.[67]

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63. *Id.*

64. *See supra* note 57.

65. For a discussion of such conditions, see *infra* note 80 and accompanying text.

66. *Jensen III*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985).

67. *Id.* at 187–88 (footnote omitted). Nevertheless, the defendants in this case were not found liable for their inaction. *See supra* notes 25–43 and accompanying text.

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2. The Special Case of Children Once in Custody

As suggested by the court in *Jensen*, whether a child was in the custody of a child protective agency at the time of an incident or prior to it may be an important factor to focus on in determining whether a "special relationship" has been created.[68] 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 parents' custody. Caseworkers must decide whether the parents' emotional condition has improved sufficiently to return the child to their custody or even 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, either by themselves or through treatment, to care for their child; or the provision of voluntary services may sufficiently reduce the likelihood of a recurrence of the problem to obviate the need for foster care.[69] These are crucial issues, and they must be weighed carefully before returning a child to parental custody.

As noted by Wayne Holder, "[f]requently children are returned home, are reinjured (or killed) and the agency cannot demonstrate sufficient accountability in terms of appropriate case planning, service provision and evidence of client behavioral change."[70] The mix of subjective factors that must be considered in deciding whether to return a child makes it unlikely, however, that liability will be imposed for a decision that turns out poorly—unless the decision was clearly negligent or inconsistent with prevailing professional standards.

There are at least two situations in which the child should not be returned to his or her home because of obvious danger. First, a child should not be returned if the parent demonstrates a continuing inability to care properly for the child. Further abuse of the child during trial home visits is the most unequivocal evidence of continuing danger to the child. To ignore such re-abuse would be unconscionable. Nevertheless, that seems to be what happened in a case investigated by a Brooklyn Grand Jury.[71] According to the grand jury's report, seven-month-old Fay had been removed from her fifteen-year-old mother's custody after a hospital discovered a fresh double fracture of her left arm and

68. *Jensen III*, 747 F.2d at 194 n.11.

69. *See, e.g.*, N.Y. FAM. CT. ACT § 1051(c) (McKinney 1983) (allowing the court to dismiss a proven neglect petition if it determines "its aid is not required").

70. Holder, *A Personal View of Caseworker Liability*, in MALPRACTICE AND LIABILITY IN CHILD PROTECTIVE SERVICES 10 (W. Holder & K. Hayes eds. 1984).

71. *See* Office of Kings County District Attorney, Report of the Term V 1983 Extended Grand Jury on the Failure of New York City Child Protective Services to Protect the Abused Children of Jane Doe (Apr. 6, 1984) (unpublished report) (all quotations from this report).

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an older, untreated fracture of her right arm. A month later, Fay was returned home on the basis of her mother's promise to attend a counseling program. Between the mother's first counseling session and her second session—a matter of weeks—Fay was again brought to the hospital. This time, she was dead on arrival. "There was a lump on Fay's forehead and new and old bruise marks on her body."[72] The mother was later prosecuted for Fay's death and subsequently pled guilty.

Over the next two years, the mother had two more children, Kim and Tammy. At birth, each was removed from her custody. Because the mother's treatment program reported that she had "made substantial progress," however, her two children were soon returned for a ninety-day trial discharge. Forty-five days into the trial discharge, a worker from the treatment program noted that "one-and-a-half year old Kim had a swollen jaw and a black mark under her eye. [The mother] gave a series of implausible explanations . . . . No action was taken."[73]

Two-and-one-half months later, the worker observed additional injuries: "Kim had several bruise marks on each cheek and swelling at her right temple."[74] Ten days later, Kim's father twisted her arm in a struggle between him and the mother. The children were again removed from the home. A doctor's examination of Kim, who was not yet two years old, revealed "linear marks on her lower abdomen and buttocks resembling strap marks."[75]

Fourteen months later, there was another ninety-day trial discharge. Over the next three months, a worker "observed injuries on Kim and Tammy on three separate occasions. Despite [the mother's] known history of abuse and lying, [her] explanations of the injuries as accidental were accepted without medical verification. No child abuse reports were filed."[76]

A month after this trial discharge was extended, Kim, now three years old, "sustained serious injuries—a gash under the chin, a bruise on the left side of the face, scrape marks across the forehead and two teeth knocked out."[77] The treatment agency held a case conference and decided that the foster care agency should be contacted regarding Kim's "accident proneness." Again, Kim and Tammy stayed in their mother's questionable custody.

Two months later, the trial discharge was made final. In the same

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72. *Id.* at ___.
73. *Id.* at ___.
74. *Id.* at ___.
75. *Id.* at ___.
76. *Id.* at ___.
77. *Id.* at ___.

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month, the children were re-injured. "Tammy's eye was injured. Kim suffered a swollen lip."[78] Still, they remained at home.

The next month, Tammy, then two-and-one-half years old, was "severely scalded. She had second and third degree burns on her feet, left hand and buttocks. Fifteen percent of her body was burned. As a result of her burns, several of Tammy's toes on both feet had to be amputated."[79]

At this point, with the intervention of the district attorney's office, both children were finally placed in protective custody. Besides providing an example of the egregiously inadequate decision making by the agency involved, for which civil liability would be likely, the grand jury's report documents numerous apparent violations of New York's reporting laws—for which a criminal prosecution would be possible.

The second situation in which a child should not be returned home is when the fundamental conditions upon which the discharge is premised are violated. For example, the return of children is often conditioned on the parents' participation in a suitable treatment program or on the departure from the home of the person responsible for the abuse, usually an unrelated adult but sometimes one of the parents. Of course, it may be impossible to ensure that the parents are successfully treated or that the wrongdoer does not eventually reappear. Agencies do not have sufficient resources for such long-term monitoring. But certainly, before placing the child back in the home, the agency should have a reasonable basis for believing that the conditions are at least initially being met. Indeed, the failure to make a sufficient inquiry establishes possible liability.

If a maltreated child is left in parental custody, or if he or she is returned home, regular follow-up visits are necessary to determine how the parents are doing—and to see whether the child has been re-abused. Inadequate monitoring of home care can be the difference between the child's life and death, and give rise to civil and criminal liability. As one commentator explains:

> One error commonly committed by child protection workers during lengthy investigations is worker inactivity. It is possible for investigators to fail to meet the urgent needs of a particular family while waiting for the case to be assigned for ongoing treatment. This in-between period from investigation to treatment sometimes may vary from a week to a month due to bureaucratic red tape, work backlog, consultations with supervisors, consultations with attorneys, and other priorities. It is a risky period. If something happens to the child during this time the

78. *Id.* at ___.

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> worker and the agency are liable. If there is any question to insuring continuing care, it is therefore recommended that the investigator be actively involved with the family in meeting their most pressing needs, such as making arrangements for a homemaker, day care for the child, medical check ups, employment, or food stamps to mention a few.[80]

A criminal prosecution for inadequate case monitoring is possible. For instance, in 1976, Kathy Steinberger, a child protective worker in Pueblo, Colorado, and her supervisor, Adolph Beruman, were *convicted* of official misconduct, after being charged with having allowed the death of a child by their failure to respond adequately to reported maltreatment[81]—as mandated by state law. The child had previously been placed in foster care, but was subsequently returned to her parents' custody. During the time when Steinberger was on medical leave, the agency received new reports of suspected abuse from the child's school and the school nurse. In the words of the indictment against the supervisor, the reports consisted of "telephone contacts . . . wherein a report was made of cigarette burns on the child, wounds to arms of the child, bruises and scratches to a large portion of said child's back, scars from apparent large burns to the child's back, and other injuries . . . ."[82] With her doctor's permission, Steinberger, who had a B.S.W. degree and ten years of experience with the agency, returned to the office for one day to arrange a psychological evaluation of the child. She made no attempt, however, to verify the nature or extent of the reported injuries, claiming that she was not told of the school's reports.[83] Shortly thereafter, the child died of apparent neglect. The convictions of both Steinberger and Beruman were overturned on appeal because of legal issues not related to their guilt.[84]

B. Statutory Mandates

Liability may also exist by virtue of a specific statutory provision that is interpreted to create a duty toward those they are designed to aid. In such a case, the court will simply evaluate the terms of the statute to ascertain whether the conduct of the social worker or the

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80. Mouzakitis, *Investigation and Initial Assesment in Child Protective Services*, in MALPRACTICE AND LIABILITY IN CHILD PROTECTIVE SERVICES 81 (W. Holder & K. Hayes eds. 1984).

81. *See* Steinberger v. District Court, 198 Colo. 59, 60, 596 P.2d 755, 756 (1979); People v. Beruman, ___ Colo. ___, ___, 638 P.2d 789, 790–91 (1982).

82. *Beruman*, ___ Colo. at ___, 638 P.2d at 793.

83. *See* Holder, *supra* note 70, at 95–96 (discussing Steinberger's conviction).

84. Steinberger's conviction was overturned because she had testified against her supervisor under a grant of immunity prior to her sentencing. *See Steinberger*, 198 Colo. at 62–63, 596 P.2d at 757–58. The grant of immunity aborted her conviction. *See id.* at 63, 596 P.2d at 758. Beruman's conviction was overturned on the ground that the official misconduct statute was "void for vagueness." *Beruman*, ___ Colo. at ___, 638 P.2d at 794.

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agency violated it. The failure of workers to adequately perform two of the functions of child protective agencies, accepting reports for investigation and the subsequent investigation of such reports, provides a useful vehicle to analyze the creation of a duty through statutory mandates.

1. Mandates to Accept Reports for Investigation

State laws generally require child protective agencies to receive reports twenty-four hours a day, often by means of highly publicized "hot lines."[85] These laws also require the agencies to initiate an investigation on the same day or shortly thereafter.[86] Violation of these statutory duties can establish the basis of a lawsuit. As Iowa's attorney general has written: "We will never know if a report of child abuse is valid or not until the appropriate investigation is made. Failure to perform a duty imposed by statute may have serious tort consequences."[87]

Mammo v. Arizona[88] illustrates the potential liability for failing to accept a report of suspected child maltreatment. The facts, as described by the court, were as follows:

> [When the Mammos divorced, the mother received custody of their three children: Sirgute, age three, Tamiru, age one, and Messeret, an infant. The father] was granted weekly visitation, which he exercised one day each weekend. He normally would visit with Messeret for only a short time at her mother's home because of her young age and would keep the two older children for a whole day.
>
> Over the course of two weekends in late June and early July of 1977, [the father] observed bruises on the bodies of the two older children. He learned from Tamiru that all three children had been beaten by their mother and her live-in boyfriend. [The father] became concerned for Messeret, whom he had not been allowed to see for the past two weeks. [He] took the two older children and reported his fears and concern for Messeret's immediate well-being to the police. The investigating officer relayed [the father's] allegations to [the Arizona Department of Economic Security (DES)] and told [the father] to retain custody of the two older children. A DES agent was to call him the next day.
>
> The following day, [the father] called DES himself and spoke with an intake unit supervisor for Child Protective Services. DES took no action except to recommend that [the father] retain an attorney to contest [the mother's] custody of the children.
>
> [The father] did consult with an attorney, which resulted in an action being immediately filed to restrain Barbara Mammo from exercising

85. *See, e.g.*, N.Y. SOC. SERV. LAW § 422(2) (McKinney Supp. 1986).
86. *See, e.g., id.* § 424(6).
87. 1978 Op. Att'y Gen. 681, 683 (Iowa 1978).
88. 138 Ariz. 328, 675 P.2d 1347 (Ct. App. 1984).

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> custody over the children. Messeret Mammo, however, remained in her mother's custody. Barbara Mammo did not appear for the July 15, 1977, hearing. Her counsel advised the court that she and Messeret were on a vacation in the East. The hearing was reset for July 28, 1977.[89]

Messeret Mammo died on July 24, 1977.[90] She was the victim of an apparent homicide. According to the investigating police officer's report, "the cause of Messeret Mammo's death was homicide at the hands of either Barabara Mammo or her live-in boyfriend."[91]

The father filed a wrongful death action against the DES claiming negligence and breach of the department's statutory duties to accept and investigate reports.[92] At trial, the jury returned a verdict for one million dollars. The trial judge, deciding that the verdict was excessive, reduced it to three hundred thousand dollars.[93] The award was affirmed on appeal.[94]

In affirming the lower court's holding, the appellate court applied the test stated in *Massengill v. Yuma County*[95] for determining tort liability. "*Massengill* established the rule that a breach of duty by the government owed to the public is not actionable unless the conduct involved gave rise to a special relationship which narrowed the public duty to a private duty owed to the plaintiff."[96] DES did not argue that it had no duty to act, but contended that "[its] duty was one owed to the general public and not to an individual."[97] The court disagreed noting that the statutory duties of the protective service workers were quite specific and were clearly for the protection of threatened individuals.[98]

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89. *Id.* at ____, 675 P.2d at 1349.

90. *Id.*

91. *Id.* at ____, 675 P.2d at 1352.

92. *Id.* at ____, 675 P.2d at 1349. The Arizona statute required protective service workers to, *inter alia*, immediately "[m]ake a prompt and thorough investigation of the nature, extent and cause of any condition which would tend to support or refute the allegation that the child should be adjudicated dependent and the name, age and condition of other children in the home." ARIZ. REV. STAT. ANN. § 8-546.01(C)(3)(b) (Supp. 1985).

93. *Mammo*, 138 Ariz. at ____, 675 P.2d at 1348.

94. *Id.* at ____, 456 P.2d 1352.

95. 104 Ariz. 518, 456 P.2d 376 (1969), *overruled*, Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982).

96. *Mammo*, 138 Ariz. at ____, 675 P.2d at 1350 (citing *Massingill*, 104 Ariz. 518, 456 P.2d 376 (1969)).

97. *Id.* at ____, 675 P.2d at 1351.

98. *Id.* The test enunciated in *Massengill* was overruled by the Arizona Supreme Court after briefing in the *Mammo* appeal. Ryan v. Arizona, 134 Ariz. 308, 656 P.2d 597 (1982). In *Ryan*, the court abandoned the public/private duty doctrine, stating: "We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery." *Id.* at ____, 656 P.2d at 599.

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While it is somewhat unfair to make a judgment based only on the court's description of what happened, it appears that the child protective agency viewed Mr. Mammo's report as reflecting the exaggerated concerns of a disgruntled spouse (at best) or as a tactical manuever in a custody battle (at worst) rather than as a sign of serious danger to the child. In effect, the father's report was being screened in accordance with a well-known fact—the vast majority of reports from noncustodial parents prove to be unfounded.

Overreacting to cases like *Mammo*, some agencies assume that they should not screen reports at all; rather, they must assign all reports for investigation. This is a mistake. Considering the large number of unfounded reports (from all sources), social work professor Chris Mouzakitis concluded: "Much of what is reported is not worthy of follow-up."[99]

Just as agencies have a duty to investigate reports made appropriately to them, they also have a duty to screen out inappropriate reports. Indeed, the failure to screen reports can lead to liability for an unnecessary intrusion into family privacy.[100] The proper lesson to be drawn from *Mammo* is not that screening reports should be disallowed, but rather, that decisions to reject a report must be made with great care. In *Mammo*, it appears that there was no individual assessment of the report either because of heavy workloads or careless decision making. The father's report was simply disregarded—even though his claims were corroborated by the bruises on the bodies of two older children and by the actions of the investigating police officer.

Child protective agencies must accept and investigate all reports made properly to them. An individual reporting suspected child abuse or neglect need not prove, on the telephone, the correctness of his or her allegations. A reporter need only show a *reasonable basis for suspecting* that the child is maltreated.[101] Even anonymous reports cannot be automatically rejected. Although there are obvious dangers to investigating reports for which no one is willing to take responsibility,[102] many people simply will not give their name, especially because the agency cannot guarantee that the parents will not learn the reporter's identity. Moreover, given the handicaps imposed on workers investigating anonymous reports, a surprising number are substantiated by the

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99. Mouzakitis, *supra* note 80, at 75.

100. *See generally* D. BESHAROV, THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND FAMILIES ____ (1986).

101. *See* Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV 458, 471 (1978).

102. *See* Adams, Barone & Tooman, *The Dilemma of Anonymous Reporting in Child Protective Services*, 61 CHILD WELFARE 3 (1982).

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subsequent investigation. About twenty-five percent of all anonymous reports are substantiated, as compared to thirty-five percent of reports from other nonprofessional sources.[103]

Thus, while child protective agencies have an affirmative obligation to screen reports, they should reject a report only if an investigation would be patently unwarranted. For example, the caller may not provide sufficient information with which to investigate a report—usually the child's name or location is not given. Or the caller's allegations simply do not amount to child abuse or child neglect—often, the family has a problem more appropriately referred to another social service agency.

Knowing when to reject a report in the foregoing situations is relatively easy to assess. Of more difficulty to assess are reports that appear to be made falsely and maliciously by an estranged spouse, by quarrelsome relatives, by feuding neighbors, or even by an angry or distressed child. As a general rule, unless there are sufficient grounds for concluding that the report is being made in bad faith, any report that falls within the agency's legal mandate must be investigated. Even a history of past unsubstantiated reports may not be a sufficient basis, on its own, for rejecting a report. There may be a legitimate explanation for the failure of previous investigations to substantiate the reporter's claims. If the agency determines that the report is being made maliciously, consideration should be given to referring the case for criminal prosecution or to notifying the parents so that they can take appropriate action.

The conditions under which a child protective agency should consider rejecting a report include:

1. Reports in which the allegations clearly fall outside the agency's definitions of "child abuse" or "child neglect," as established by state law;

2. Reports in which the caller can give no credible reason for suspecting that the child has been abused or neglected;

3. Reports in which insufficient information is given to identify or locate the child;

4. Reports whose unfounded and malicious nature is established by specific evidence.

The absence of one of the foregoing conditions may suggest that a report was wrongfully rejected. Such a rejection may signify both the

103. *See generally* DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1978). One pending lawsuit, Covert v. Reightnour, No. MCA-80-263 (N.D. Fla. filed Dec. 26, 1980), challenges the authority of the Florida Department of Health and Rehabilitative Services to investigate anonymous reports of child abuse or neglect.

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violation of a state law and the possible establishment of civil liability.

2. Mandates to Investigate Reports Fully

Accepting a report only fulfills the first stage of a child protective agency's legal responsibility. The report must next be investigated in accordance with the detailed provisions of state law and agency regulations.

Outright failures to investigate reports of maltreatment by parents are rare,[104] so there are few lawsuits making such a claim.[105] Reports of institutional maltreatment present a different picture. For well-documented reasons, reports of institutional maltreatment raise political and programmatic problems that most agencies have yet to resolve.[106] As a result, such reports often languish in administrative limbo because effective procedures to insure investigative accountability have not been developed.

Brasel v. Children's Services Division[107] was a wrongful death action brought by the parents of eighteen-month-old Desha Brasel, who died in a day care center certified by the Oregon Children's Services Division. The parents alleged that the Division was negligent in:

> (1) failing to properly investigate the day care facility in which their daughter was injured before issuing a certificate of approval for its operation . . .; (2) failing to investigate an incident of child abuse alleged to have occurred at the facility *before* plaintiffs placed their daughter there; (3) failing to halt operation of the center following the incident; [and] (4) failing to inform plaintiffs of a previous incident . . . .[108]

The defendants successfully argued in the trial court that the children services division (CSD) was immune from liability based on an Oregon statute that conferred immunity on public employees acting within the scope of their employment or duties for "any claim based upon the performance of or failure to exercise or perform a discretionary func-

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104. *See generally* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 2.

105. One of the few cases on the subject, dismissed for failure to state a cause of action under the Federal Civil Rights Act, is Davis v. Casey, 493 F. Supp. 117 (D. Mass. 1980). *See infra* notes 177–80 and accompanying text.

106. *See* THE INSTITUTIONAL ABUSE OF CHILDREN AND YOUTH (_. Hanson ed. 1982).

107. 56 Or. App. 559, 642 P.2d 696 (1982).

108. *Id.* at 561, 642 P.2d at 697 (emphasis added). The parents had also alleged that CSD was negligent in "allowing them to rely upon representations that the day care facility was a safe and secure place for their child when defendant knew that it was not." *Id.* The Oregon Supreme Court upheld the dismissal of that claim on the ground that the state law that prohibited public access to reports and records of child abuse also applied to prospective users of a day care center. *Id.* at 565, 642 P.2d at 699–70. Thus, under state law, the agency was "not authorized to advise the parents" of the previous reports of child abuse at the center. *Id.*

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tion or duty, whether or not the discretion is abused."[109] The appellate court reversed and remanded in part, ruling that without more information as to the actual process CSD utilized in its licensing decisions and "without knowing how, and by whom, any subsequent decision not to halt operation was made, it could not be said that the decisions were ones involving the making of policy, for which defendant enjoys immunity."[110] The defendant also claimed that the plaintiffs failed to plead a breach of duty.[111] The appellate court first noted the existence of Oregon statutes authorizing CSD to establish health and safety standards for day care centers and to ensure compliance by inspection and investigation.[112] The court then stated: "By alleging that defendant issued a certificate to a center which did not meet these qualifications, and that plaintiffs subsequently entrusted their daughter to that center, plaintiffs have sufficiently alleged both a duty owed to them as members of the protected class and a breach of that duty."[113]

On the issue of the investigative responsibilities of CSD, the defendant argued that the plaintiffs were required to "make a claim that if the alleged child abuse had been investigated, it would have led to a closure of the facility, i.e., uncovered conditions sufficiently harmful to mandate immediate suspension under CSD rules."[114] The court held that the pleadings were written with sufficient specificity to state a cause of action.[115]

Brasel makes it clear that in Oregon a child protective agency can be held liable for failure to adequately investigate reports of child abuse at day care facilities. It is also clear that promptly investigating a report can mean the difference between a child's life or death. Therefore, most child protective agencies are required to commence investigations within a short time. The wording of this requirement varies; common formulations are: "promptly," "immediately," "within twenty four hours," "within seventy-two hours," and "as soon as possible."

The failure to commence an investigation within the time specified opens the door to liability and to administrative sanction. For example, one child protective worker "was suspended without pay for a month as punishment for failing to investigate a reported case of maltreatment within the mandated seven days. (The child's body was found soon

109. *Id.* at 561–62, 642 P.2d at 697. *See* OR. REV. STAT. § 30.265(3)(c) (1981) (amended 1981).

110. *Brasel*, 56 Or. App. at 563, 642 P.2d at 698.

111. *Id.* at 564, 642 P.2d at 699.

112. *Id. See* OR. REV. STAT. §§ 418.820–.825 (1985).

113. *Brasel*, 56 Or. App. at 564, 642 P.2d at 699.

114. *Id.* at 564–65, 642 P.2d at 699.

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after.)."[116]

The ability to comply with such mandates (even when they allow seven days) depends on the resources available to investigate new cases. Staff shortages compel many agencies to ignore time limits and to assign priorities among reports. Situations requiring emergency action are given priority status and are then assigned for immediate investigation. Most child protective agencies are now able to make emergency investigations during evenings and on weekends, either by having caseworkers on call, by making arrangements for police assistance, or both.

In general, any situation suggesting the need for protective custody requires an emergency response. The difficulty lies in identifying such situations—often on the basis of a telephone call from someone who may have an incomplete or distorted sense of what is happening to a child. As Vincent DeFrancis, Director Emeritus of the American Humane Association's Children's Division has written, workers must make such decisions based only "on the information on hand and on interpretation of these facts based on experience with similar situations. One can never be sure of arriving at the correct answer."[117]

By far the greatest number of lawsuits for inadequately investigating a report allege that the agency failed to conduct a sufficiently careful or thorough inquiry. Many investigations are closed because the child or family cannot be located. *Jensen v. Conrad*[118] illustrates the dangers involved:

> On February 28, 1980, the principal of New Prospect Elementary School informed the Anderson County Department of Social Services that the older brother of Michael Clark showed signs of child abuse. A caseworker from the Department immediately met with Michael's brother. The child was bruised about the face and told the caseworker that his father had hit him on several occasions. After conferring with teachers at the school, the caseworker concluded that a meeting with Mrs. Clark was necessary. Between March 6, 1980, and April 28, 1980, the caseworker and the Department attempted repeatedly to contact Mrs. Clark. Letters and telephone calls went unanswered, and seven visits to various addresses failed to locate the Clark family. After sixty days the Department classified the case as "unfounded" and officially closed the investigation.
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> On June 23, 1980, Michael Clark was beaten to death by Mrs.

116. Garbarino & Stocking, *Preface* to PROTECTING CHILDREN FROM ABUSE AND NEGLECT at viii (1981).

117. V. DEFRANCIS, THE FUNDAMENTALS OF CHILD PROTECTION: A STATEMENT OF BASIC CONCEPTS AND PRINCIPLES 19 (1955).

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118. 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985).

Clark's boyfriend, Wayne Drawdy. Drawdy was subsequently tried and convicted for the child's murder.[119]

The suit against the agency and workers was dismissed by the district court because the defendants were immune from liability.[120] Nevertheless, the case underscores not only the potentially serious dangers to children of an inadequate investigation, but also the potential liability that may arise through a section 1983 action.[121]

Another case, *Nelson v. Missouri Division of Family Services*,[122] serves to illustrate that once a family is located, the investigation must be designed to gain information about the child's care, not obscure it. In *Nelson*, the non-custodial father alleged that the defendant-child protective agency employees and administrators "failed to investigate adequately reports that the Nelson children were being abused by their mother and certain men, and that as a result of defendant's negligence, the children continued to suffer abuse, ultimately leading to the death of eight-year-old Tammy Nelson."[123] The appellate court summarized his allegations:

> DFS [Division of Family Services] allegedly received several hotline calls concerning the Nelson children, but it appears that only two were investigated, one in November 1978, and the second in May 1979. The callers in both instances identified the Nelson children and gave information as to the nature of the alleged abuse and the names of witnesses. [n. 2. Appellants allege that the callers informed DFS that Tammy Nelson was being sold by her mother to an older man for the purpose of having sex, and that Audrey Nelson, the children's mother, forced her children to watch her perform sex acts with various partners and perhaps forced them to participate.] Plaintiffs assert, however, that the investigators failed to conduct a thorough investigation as required by the statute. Both investigations basically consisted of a brief interview of Audrey Nelson and a brief interview of the children, possibly within hearing distance of Audrey. The children, as well as Audrey, denied the allegations of the callers. At least one witness testified that children often deny, especially in the presence of the abuser, that they are being abused. The investigators seem not to have interviewed the children individually or apart from their mother, nor did they interview possible witnesses or request physical examinations for the children.[124]

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119. *Id.* at 188.

120. *Jensen I*, 570 F. Supp. 114, 127–28 (D.S.C. 1983), *aff'd*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985). *See supra* notes 29–43 and accompanying text.

121. For a discussion of liability questions under the Federal Civil Rights Act, see *infra* notes 143–86 and accompanying text.

122. 706 F.2d 276 (8th Cir. 1983).

123. *Id.* at 276–77.

124. *Id.* at 277.

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The district court granted summary judgment in favor of the defendants on the ground that a Missouri statute, although containing a detailed description of required investigative procedures, did not create a legal duty to the individually endangered child "as opposed to a duty to the general public."[125]

Other courts might take a different view of the duty that child protective agencies and their employees have toward individual children. In assessing the adequacy of an investigation, they would look first to see whether the applicable statutory or administrative requirements were fulfilled. In *Florida First National Bank v. City of Jacksonville*,[126] the bank, acting as the guardian of the children's property, sued the city for the alleged failure of the police to respond to numerous reports of suspected abuse in violation of various state laws as well as the department's own internal procedures.[127] Although the case involved a police investigation,[128] it illustrates how the failure to follow established agency procedures may result in an action alleging a negligent investigation.

In *Florida*, two children had been severely abused over a long period of time.[129] The complaint alleged that numerous reports concerning the abuse were made to the police, yet a proper investigation was never conducted.[130] The plaintiff further alleged:

> At all times mentioned herein the defendant City of Jacksonville, Florida, was under a duty to protect and keep minor children, residing or present within the municipality, safe from abuse and maltreatment and in the performance of that duty was obliged to respond to reports of child abuse or neglect in accordance with . . . accepted and established police procedures . . . .[131]

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125. Nelson v. Freeman, 537 F. Supp. 602, 611 (D. Mo. 1982), *aff'd sub nom.* Nelson v. Missouri Div. of Family Servs., 706 F.2d 276 (8th Cir. 1983). *See* MO. ANN. STAT. § 210.145 (Vernon 1983).

126. 310 So. 2d 19 (Fla. Ct. App. 1975).

127. *Id.* at 24–25.

128. Another case alleging the failure of police to investigate possible child abuse properly is Robinson v. Wical, Civ. No. 37607 (Cal. Sup. Ct. Sept. 4, 1970).

129. *Florida*, 310 So. 2d at 21–25 n. 8.

130. *Id.*

131. *Id.* The procedures mentioned by the court were:

a. to make a prompt and thorough investigation of all reports of child abuse including:

1. a physical examination of each child in the family;
2. an interview with each child in the family;
3. an interview with each parent;
4. a complete check of the condition of the house;
5. an interview with the person who made the report or complaint; and
6. a review of the police and juvenile court records concerning prior com-

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The *Florida* court of appeals held that the lower court erred by dismissing the case based on a finding the plaintiff had failed to "show that the defendants [police] owed a special duty to the children named . . ., but that the duty owed [the] children was no different from the general duty owed to all children in the community."[132] The appellate court noted that but for the specific undertaking with respect to the children in this case by the police, other persons who were in a position to aid the children refrained from rendering help.[133]

If state law or agency rules do not provide guidance about how an investigation (or particular issue) should be handled, courts may look to state-of-the-art professional standards or practices for a yardstick with which to judge the agency's performance. If the failure to conduct an adequate investigation leads the child protective agency to miss important information bearing on the danger to the child, potential liability is established. This seems to have happened in a subsequent Florida case. The Florida Department of Health and Rehabilitative Services was ordered to pay sixty thousand dollars to the father of a five-year-old boy who was beaten to death by the child's mother and stepfather. Apparently, the jury's award was based on a finding that the agency inadequately investigated numerous reports of the child's maltreatment.[134] The detailed nature of legally mandated child protective functions and, hence, the scope of possible liability they create are best illustrated by the provisions of the model legislation recommended by the U.S. National Center on Child Abuse and Neglect.[135] Actual state

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* * *

c. to take into immediate custody and bring before the juvenile court for protection, care and treatment any child with marks or bruises indicating abuse or mistreatment or whose environment was such that the welfare of the child required that the child be taken into custody.

Id.

132. *Id.* at 27.

133. *Id.* at 26.

134. 5 FAM. L. RPTR. 2100 (Dec. 15, 1978). While most lawsuits involve the worker's alleged failure to take adequate protective measures, sometimes the worker's conduct may actually contribute to the child's maltreatment. Wayne Holder, former director of the American Humane Association's Children's Division, provides an example of how this can happen:

> Upon receiving a sexual abuse referral the worker interviews the female teenage victim and subsequently the father who is the alleged perpetrator. The worker doubts the victim and is intimidated by the father. In the presence of the father the worker admonishes the daughter, but warns the father if any such thing were to go on there would be serious consequences. The worker goes on to advise that since there seemed to be no evidence, he would disqualify the referral. Subsequent to the worker's exit the father goes into a rage over the daughter's disclosure and beats her severely.

Holder, *supra* note 70, at 12.

135. For example, the section addressing investigations provides:

> For each report it receives, the local agency shall perform a child protective investigation within the time limits specified . . . to determine the composition of the family or

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laws and administrative rules are generally of equal or greater specificity.[136]

Statutory mandates will not always result in common law liability for state officials if such provisions are interpreted by courts as providing for exclusive remedies. For example, in *Dryden v. Coulon*,[137] a father brought suit on behalf of his daughter alleging that a representative of the statutorily provided "friend of the court act" failed to execute his responsibilities under the act and such failure resulted in permanent mental, physical, and emotional injury to the girl.[138] During custody proceedings the statute required the "friend of the court" to investigate and "ascertain whether dependent minor children . . . 'are receiving the proper care, maintenance and education and whether they are liable to become a public charge.' "[139] The father sought damages of thirteen million dollars.[140]

The Michigan appellate court relied on what it described as "a well-settled rule of law in Michigan that, when a statute creates a new right or imposes a new duty having no counterpart in the common law, the remedies provided in the statute for its violation are exclusive and not cumulative."[141] The court held the administrative remedies provided by the Act were the plaintiff's only remedy and "a judgment for monetary damages was not contemplated by the Legislature for the

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household, including the name, address, age, and race of each child named in the report, and any siblings or other children in the same household or in the care of the same adults, the parents or other persons responsible for their welfare, and any other adults in the same household; (ii) determine whether there is reasonable cause to believe that any child in the family or household is abused or neglected, including a determination of harm or threatened harm to each child, the nature and extent of present or prior injuries, abuse or neglect, and any evidence thereof, and a determination of the person or persons apparently responsible for the abuse or neglect; (iii) provided that there is probable cause determine the immediate and long-term risk if each child were to remain in the existing home environment; and (iv) determine the protective treatment, and ameliorative services that appear necessary to help prevent further child abuse or neglect and to improve the home environment and the parent's ability to care adequately for the children. The purpose of the child protective investigation shall be to provide immediate and long-term protective services to prevent further abuse or neglect and to provide, or arrange for, and coordinate and monitor treatment and ameliorative services necessary to safeguard and insure the child's well-being and development and, if possible, to preserve and stabilize family life.

U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, MODEL GUIDELINES FOR CHILD PROTECTIVE LEGISLATION ____ (1983).

136. *See, e.g.*, N.Y. SOCIAL SERVICES LAW § 424 (McKinney 1983 & Supp. 1986).

137. 145 Mich. App. 610, 378 N.W.2d 767 (1985).

138. *Id.* at 611, 378 N.W.2d at 767–68. *See* MICH. COMP. LAWS ANN. §§ 552.251–.255 (West 1967)(repealed 1983).

139. *Dryden*, 145 Mich. App. at 611, 378 N.W.2d at 768 (quoting MICH. COMP. LAWS ANN. § 552.252 (West 1967)(repealed 1983)).

140. *Id.*, 145 Mich. App. at 612, 378 N.W.2d at 768.

141. *Id.* at 613, 378 N.W.2d at 769.

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failure to perform the investigative and reporting duties imposed by the Friend of the Court Act."[142]

C. *Federal Civil Rights Law*

Cases alleging negligence on the part of a state agency or its employees[143] may also be brought in federal court under section 1983 of the Civil Rights Act.[144] To state a claim under 42 U.S.C. section 1983, the plaintiff must allege conduct under color of state law that has subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the United States Constitution.[145] Fundamental to any claimed violation under this section is that the harm resulted from state action or action taken under color of state law.[146] There is no doubt that governmental agencies, such as those responsible for child care, are creatures of state law.[147]

It is also important to a successful action that the state or its officers have deprived a person of his or her rights or privileges without due process of law. Purely private conduct which deprives a person of his or her rights or liberties is not prohibited by the fourteenth amendment.[148] The United States Court of Appeals for the Seventh Circuit made this point in *Bowers v. DeVito*:[149]

> [T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution.[150]

Thus, any alleged violations of section 1983 must arise from the public officials' affirmative and personal involvement in the wrong.[151] The official must have also acted with deliberate indifference to the safety of the individual under his or her care to establish culpability under sec-

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142. *Id.*

143. The United States Court of Appeals for the Tenth Circuit has held "that a guardian ad litem is not acting under color of state law for purposes of § 1983." Meeker v. Kercher, 782 F.2d 153, 155 (10th Cir. 1986).

144. 42 U.S.C. § 1983 (1982).

145. *Id.*

146. Estate of Bailey v. County of York, 580 F. Supp. 794, 795 (M.D. Pa. 1984), *vacated*, 768 F.2d 503 (3rd Cir. 1985).

147. *Id.* at 795.

148. *Id.*

149. 686 F.2d 616 (7th Cir. 1982).

150. *Id.* at 618.

151. *See* Davis v. Casey, 493 F. Supp. 117, 120 (D. Mass. 1980). *See also* Rizzo v. Goode, 423 U.S. 362 (1976); Maiorana v. MacDonald, 596 F.2d 1072 (1st Cir. 1979); Martinez v. State, 85 Cal. App. 3d 420, 149 Cal. Rptr. 519 (1978).

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tion 1983.[152]

A section 1983 action does not require a specific state of mind for actionability.[153] However, "a court must examine closely the nature of the constitutional right asserted to determine whether a deprivation of that right requires any particular state of mind . . . ."[154] For example, in cases alleging state interference with familial associations, one court concluded "that an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under section 1983."[155]

The United States Supreme Court has made it clear that a mere "negligent act of an official causing unintended loss of or injury to life, liberty or property" does not implicate the due process clause of the fourteenth amendment. The Court, in *Daniels v. Williams*,[156] addressed what it viewed as "inconsistent approaches taken by lower courts in determining when tortious conduct by a state official rises to the level of a constitutional tort . . . ."[157]

In *Daniels*, the plaintiff, allegedly injured when he slipped on a pillow left on a prison stairway, argued that a correctional deputy's negligence deprived him of his liberty interest of freedom from bodily injury.[158] The Court noted: "Historically . . . [the] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property."[159] In rejecting the plaintiff's contentions, the Court held that to recognize the plaintiff's claim in this case as "a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law."[160]

The Court did state, however, that "we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care in order to hold, as we do, that such conduct does not implicate the Due Process Clause of the Fourteenth Amendment."[161] Additionally, the Court indicated that it was not deciding

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152. *Bailey*, 580 F. Supp. at 796.

153. *See* Parratt v. Taylor, 451 U.S. 527, 534 (1981). *See also* Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1189 (10th Cir. 1985).

154. *Trujillo*, 768 F.2d at 1189. The court in *Trujillo* noted that deprivations of equal protection require proof of discriminatory intent, deprivations under the Eighth Amendment require a showing of deliberate indifference, and some deprivations of First Amendment rights require an intent to repress an individual's protected speech or association. *Id.*

155. *Id.* at 1190.

156. 106 S. Ct. 662 (1986).

157. *Id.* at 664.

158. *Id.* at 663.

159. *Id.* at 665.

160. *Id.*

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"whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause."[162]

The allegations in *Estate of Bailey v. County of York*[163] illustrate the kind of liability that can be claimed on the part of a child protective agency. According to the plaintiff, the defendant-child protective agency received a report that five-year-old Aleta Bailey had been physically abused. After taking Aleta into custody, the agency had her examined at a hospital where evidence of abuse was found and it was determined that she was being excessively disciplined by her mother's sometime live-in boyfriend. Aleta was placed with her aunt but was returned to her mother two days later on the condition that the boyfriend move from the home and the mother deny him access to Aleta. Five days later, Aleta was dead. Her mother and boyfriend were subsequently convicted of her murder.[164]

The father brought a section 1983 action against the child protective agency alleging that the defendant failed to "ascertain" whether the boyfriend continued to live with the mother and followed various enumerated institutional policies and procedures that were defective.[165] It was "alleged that defendant's action deprived Aleta of her constitutional right to life and [the father] of his constitutional right to parenthood."[166]

The district court dismissed the suit for failure to state a cause of action under section 1983.[167] The court described the circumstances in which a state and its agencies may be chargeable with allegedly unconstitutional conduct resulting from omissions in specific circumstances: "These include instances of injuries which occur while the injured party is in the legal custody of the state and cases in which the actor whose affirmative conduct causes the harm is under the direct control or supervision of the state."[168]

On appeal, *Bailey* was vacated and remanded by the United States Court of Appeals for the Third Circuit.[169] In its opinion, the appellate court rejected the district court's limitations on when a state may become liable for unconstitutional conduct.[170] However, the court eschewed "any comprehensive limning of the parameters of the 'special

162. *Id.* at 667 n.3.
163. 580 F. Supp. 794 (M.D. Pa. 1984), *vacated*, 768 F.2d 503 (3rd Cir. 1985).
164. *Id.* at 794.
165. *Id.* at 795.
166. *Id.*
167. *Id.* at 797.
168. *Id.*
169. 768 F.2d 503, 511 (3rd Cir. 1985).
170. *Id.* at 508-11.

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relationship' that suffices to place on an agency an affirmative obligation to persons not in custody."[171]

In reaching its decision the appellate court distinguished *Martinez v. California*[172] wherein the United States Supreme Court, in affirming the dismissal of a suit seeking damages for the torture and death of the appellant's decedent caused by a parolee who had been paroled by the defending state officials,[173] held that section 1983 liability could be imposed on a state actor on a finding of a special relationship. While the Court in Martinez affirmed the lower court dismissal, it stated: "We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole."[174]

Distinguishing *Martinez*, however, the appellate court noted: "The significant difference between this case and *Martinez* is the fact that the victim in *Martinez* was a member of the public at large while here the agency was aware of a 'special danger'. . . [to the victim]."[175] The court saw the question of the remoteness of the state's action as one of proximate cause to be determined by factual development on remand.[176]

The difficulty in stating a claim for violation of federal rights in this context is exemplified by *Davis v. Casey*.[177] In *Davis*, an injured child's father brought an action under section 1983 to recover for her injuries resulting from physical abuse by her adoptive parents. The father claimed that he was deprived of his daughter's childhood and youth, as well as her society, companionship, and affection.[178] He also claimed that his daughter was deprived of the right to be protected from harm.[179] Denying relief, the district court summarized that the complaint alleging that employees of the state welfare department breached their duty by failing to prevent a third party from endangering the physical well-being of his daughter failed to state a claim absent allegations that the named defendants abused the child, that af-

171. *Id.* at 511.

172. 444 U.S. 277 (1980).

173. *Id.* at 285.

174. *Id.*

175. *Bailey*, 768 F.2d at 511.

176. *Id.*

177. 493 F. Supp. 117 (D.Mass. 1980). *See also* Lesher v. Lavrich, No. 84-3930 (6th Cir. 1986) (suit based on Adoption Assistance Act where parent's complaint alleging failure of state to follow procedures of Act resulted in unlawful application of state's child protection procedures was held not to state a cause of action because the Adoption Assistance Act was merely a funding statute and did not create private causes of action).

178. *Davis*, 439 F. Supp. at 118.

179. *Id.*

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firmative state action played any part in her injury, or that the child's attacker was employed or supervised by the state agency.[180]

Another section 1983 action that failed was *Bohn v. County of Dakota*,[181] where suit was brought by parents alleging, *inter alia*, that state officials had misrepresented what procedures were available to them in terms of appeal rights.[182] The plaintiffs had been investigated by the Dakota County Department of Social Services which concluded there was substantial evidence of child abuse.[183] In their attempts to clear the record, the plaintiffs alleged that the agency had denied them due process by misrepresenting to the plaintiffs their rights of appeal.[184] The appellate court denied the parents relief, stating that under "the circumstances, we cannot say . . . that state officials so misrepresented the availability of the procedures that the Bohn's attorney ought not to have been able to ascertain the proper method for obtaining review."[185] However, the holding was confined to the facts of the case and the court indicated "more serious misdirection by state officials which nullifies a complainant's right to appeal might well contribute to a due process violation."[186]

III. THE QUESTION OF IMMUNITY

In spite of conduct which appears to make a state agency or its employees liable for injury suffered by a child, the state agency may be free from liability based on the doctrine of immunity. Although immunity originated from the notion that the King can do no wrong,[187] it has continued, supported by the notion that public employees should be free to perform their duties without intimidation or fear of retaliation.[188] Nevertheless, many states have abolished sovereign immunity or substantially altered the vitality of the doctrine. Some states have technically retained immunity by not allowing suits against the state in law courts, but instead allow claims through administrative agencies created for the purpose of hearing and determining claims against the state.[189] Another group of states have waived immunity in particular classes of cases, e.g., motor vehicles, or have employed the governmen-

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180. *Id.* at 120.
181. 772 F.2d 1433 (8th Cir. 1985).
182. *Id.* at 1434.
183. *Id.* at 1434–35.
184. *Id.* at 1435.
185. *Id.* at 1441.
186. *Id.* at 1442.
187. *See generally* PROSSER AND KEETON, *supra* note 9, at 1056; Snyder, *Legal Liability: The Social Worker and Juveniles*, 9 J. JUV. L. 2, 36 (1985); Annot., 38 A.L.R. 4th 1194 (1985).
188. *See* Stevenson v. State, 290 Or. 3, 619 P.2d 247 (1980).
189. *See* PROSSER AND KEETON, *supra* note 9, at 1044.

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tal/proprietary distinction.[190] Finally, most states have essentially abolished sovereign immunity. Some, however, maintain the ministerial/discretionary distinction along with other specific immunities.[191] One important absolute immunity that may be invoked by child protective workers is known as prosecutorial immunity.

A. The Ministerial/Discretionary Dichotomy

In states that have abrogated sovereign immunity while retaining the ministerial/discretionary distinction, the question of whether immunity is available to a governmental agency or employee depends upon the nature of the function exercised.[192] In general, immunity extends only to an employee who, while acting within the scope of his employment, exercises a discretionary function, as opposed to a ministerial function.[193] As such the immunity is only a qualified immunity. Under the discretionary/ministerial dichotomy, a state employee who fails to perform a merely ministerial duty will be held liable for the proximate results of his failure of performance.[194] On the other hand, state employees who perform discretionary actions enjoy at least qualified immunity.[195]

Ministerial acts are those which give the employee little choice as to when, how, where, and under what circumstances the acts are to be done.[196] Such acts involve little personal decision or judgment, or if judgment is required, it is of little importance to the validity of the act. Discretionary acts are thoses which require the exercise of judgment, personal deliberation, and decision, and involve some fairly high level of policy making.[197] It is important to avoid a broad, literal interpretation of "discretionary" because the potential exists to define all actions as discretionary. As indicated by the California Court of Appeals, in *Ham v. County of Los Angeles*,[198] "it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."[199]

Child care agencies and employees tend to argue that functions

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190. *Id.* at 1044–45.

191. *Id.* at 1045.

192. *See* National Bank of South Dakota v. Leir, 325 N.W.2d 845 (S.D. 1982).

193. *Id.* at 848; PROSSER AND KEETON, *supra* note 9, at 1060.

194. See *National Bank*, 325 N.W.2d at 848; PROSSER AND KEETON, *supra* note 9, at 1060.

195. *See National Bank*, 325 N.W.2d at 848; PROSSER AND KEETON, *supra* note 9, at 1060.

196. *See* RESTATEMENT (SECOND) OF TORTS, § 895D comment h (1977); Snyder, *supra* note 187, at 40.

197. *See* PROSSER AND KEETON, *supra* note 9, at 1060.

198. 46 Cal. App. 148, 189 P. 462 (1920).

199. *Id.* at 162, 189 P. at 468.

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performed by them fall within the discretionary function exception. The findings by courts in this regard have been mixed. In *Brasel v. Children's Services Division*,[200] the Oregon Court of Appeals found that the state agency having reponsibility for certifying that private day care facilities operating in the state meet certain standards of health and safety for licensing purposes engages in discretionary policy decisions. The court distinguished acts of governmental discretion which involved policy judgment from acts which do not involve the making of public policy but which do involve the use of discretion in the sense that a choice must be made.[201] Only those policy-making decisions in which discretion was actually exercised are insulated from liability.The appellate court's discussion of whether the Children Services Division's licensing activities involved a discretionary function is instructive:

> In *Stevenson v. State of Oregon* . . ., the Supreme Court noted that the traditional distinctions between the discretionary acts of a highway department, *i.e.*, maintenance, 'involve the exercise of two very different kinds of judgment.' . . . Acts of governmental discretion, the court said, are acts which involve policy judgment, for instance, the decision to build a highway rather than a railroad track. These, it said, are the kind of acts for which the legislature intended tort immunity. . . . On the other hand, the court said, acts which do not involve the making of public policy, but which perhaps also involve the use of 'discretion' in the sense that a choice must be made, are insulated from liability only if they actually involve exercise of policy judgment. . . . The burden is on the state to establish its immunity, either by (1) the nature of the function, or (2) evidence of how the decision was made. . . . The second requirement has been interpreted to mean a showing that discretion *was actually exercised* in making the decision which is challenged.[202]

Other courts are similarly hesitant to hold governmental agencies immune from liability on the basis of discretionary decision making. In *Johnson v. State of California*,[203] the California Supreme Court held that a public agency must demonstrate that its employee consciously exercised discretion in connection with the negligent acts or omissions charged to invoke the qualified immunity available for discretionary acts.[204] "Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and

200. 56 Or. App. 559, 642 P.2d 696 (1982). For an extensive discussion of *Brasel*, see *supra* notes 107–15 and accompanying text.

201. *Id.* at 562, 642 P.2d at 698.

202. *Id.* (citations omitted).

203. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

204. *Id.* at 794–95 n.8, 447 P.2d at 360 n.8, 73 Cal. Rptr. at 249 n.8.

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advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."[205]

In a South Dakota action against social workers, the social workers claimed immunity for their actions in the care, placement, and follow-up of children in foster homes.[206] The South Dakota Supreme Court agreed that some discretion in the literal sense is involved in foster care, but added that social workers do not make policy decisions involving foster care placement. Essentially, the social workers are merely carrying out policies and standards that have already been established. As such, the social workers are performing routine, ministerial functions and the doctrine of immunity cannot be used to preclude liability based on their actions.[207]

B. Prosecutorial Immunity

The concept of prosecutorial immunity was first applied at common law to protect prosecuting officers from suits for damages when such persons were acting within the scope of their prosecutorial duties.[208] The prosecutorial immunity is an absolute immunity and has been recognized by the United States Supreme Court.[209]

In *Imbler v. Pachtman*,[210] the Supreme Court recognized that "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."[211] Justice Powell, writing for the Court, noted that a prosecutor must exercise broad discretion and should not be hampered in the exercise of that judgment.[212]In *Whelehan v. County of Monroe*,[213] the district court applied the reasoning of *Imbler* to extend prosecutorial immunity to civil child protective prosecutions.[214] The *Whelehan* court noted that the importance of the child protective functions performed was beyond ques-

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205. *Id.*

206. *National Bank*, 325 N.W.2d 845 (S.D. 1982).

207. *Id.* at 849–50.

208. *See* Imbler v. Pachtman, 424 U.S. 409, 422–24 (1976).

209. *Id.* "The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." *Id.* at 419 n.13.

210. 424 U.S. 409 (1976).

211. *Id.* at 424–25 (Powell, J.).

212. *Id.* at 426.

213. 558 F. Supp. 1093 (D.N.Y. 1983).

214. *Id.* at 1098.

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tion.[215] After reviewing the relevant provisions of the state statute under which the workers functioned, the court concluded:

> [T]hat a social services worker is indeed called upon to exercise discretion at crucial points in cases of suspected child abuse or neglect—*i.e.*, in deciding whether the available information warrants removal of a child from the home either by order of a court or as an emergency measure, and the filing of a petition charging child abuse or neglect, thereby initiating court proceedings. If social services workers were required to guard against possible section 1983 claims arising from such decisions, their evaluation of the information at hand could easily be colored and, it may be expected, sometimes at the expense of the life or well-being of abused or neglected children. Such a result cannot be countenanced for the administration of remedial child-protective laws any more than for prosecutors' enforcement of the criminal laws.[216]

Based on decisions such as *Whelehan*, child protective workers may be able to claim absolute immunity for their decisions to institute child protective enforcement proceedings. However, not all courts are in accord with the holding of *Whelehan*[217] and it has been pointed out that "[t]he *Imbler* Court, while granting absolute immunity to the prosecutor as an advocate, declined to decide whether the prosecutor acting as an administrator or an investigator was entitled to absolute immunity."[218]

IV. POLICY CALCULUS

In all parts of the country, workers are being given administrative reprimands and are being fired, downgraded, or reassigned for allegedly mishandling their cases. As this article has described, hundreds of workers (and their agencies) have been charged with professional malpractice or violation of their client's rights. Clients' claims for monetary damages range anywhere from a few thousand dollars to millions

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215. *Id.*

216. *Id.* at 1099 (footnote omitted).

217. *See* Myers v. Scott County, 618 F. Supp. 1534 (D.Minn. 1985). In reacting to the extension of the *Imbler* Court's reasoning to social service workers, the district court in *Myers* stated:

> This proposition, however, is contrary to the majority of case law. . . . The argument that social workers need protection from lawsuits can also be made on behalf of police officers, because police officers have a similar potential for becoming defendants in actions commenced by the individuals they arrest. . . . The Supreme Court has declared, moreover, that courts cannot create new forms of absolute immunity under section 1983 because certain officials need protection from the constant threat of retaliatory litigation. . . . If sound policy reasons exist for establishing new forms of absolute immunity, Congress, not the courts, must do so.

Id. at 1565 (citations & footnotes omitted).

218. *Id.* at 1552.

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of dollars.

A. Unfair Blame

Few would deny that social workers should be held accountable for careless or slothful conduct. Everyone should be deeply troubled, for example, when a child dies because a worker overlooked or ignored signals of great—and obvious—danger. Civil and criminal liability might well deter the most egregious forms of professional malpractice.

For the fear of liability to deter wrongful conduct, however, the imposition of liability must bear some reasonable relationship to culpability. The culpable must be held accountable, and the faultless protected. In the area of services for children and families, neither is happening. As a result, the deterrent impact of liability is, at best, deflected and, at worst, misdirected—toward defensive social work.

Some lawsuits involve shockingly poor casework practices. No one should attempt to defend the reckless and insensitive conduct of some social workers and their agencies, but this sad truth should not obscure the larger reality. In most of the cases, the workers were being blamed for situations simply beyond their control, for performing their professional and official responsibilities under the most difficult conditions. And, in some cases, the workers were being made scapegoats for failures at higher levels of government.

First, child maltreatment is inherently difficult to detect or predict. In many cases, no one is at fault. No one, not even the most dedicated and competent caseworker, could have prevented the child's subsequent maltreatment. Child protective decisions must often 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.

In addition, some home situations deteriorate sharply—and without warning. It is easy to see the need for protective intervention if the child has already suffered serious injury. Often, however, 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. The worker must predict that the parent will engage in abusive or neglectful behavior and that the child will suffer serious injury as a result. The untarnished truth is that there is no way of predicting, with any degree of certainty, whether a particular parent will become abusive or neglectful. Even setting aside the limitations imposed by large caseloads and poorly trained staff, such sophisticated psychological predictions are simply beyond reach. Moreover, sometimes no decision is clearly correct. "There will always

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be borderline cases . . . ."[219] As long as child protective decisions must be made by human beings, the chances for human error will always be present. Thus, social workers and agencies cannot guarantee the safety of all children known 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.

Second, many child protective tragedies are the inevitable result of inadequate funding. There is not enough money to attract the most qualified workers, pre-service and in-service training is largely nonexistent or superficial, the size of investigative staffs does not keep pace with the rapid and continuing increase in reported cases, and there is a chronic shortage of the mental health and social services needed to treat both parents and children.

With more cases than they can handle, poorly trained 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 ensure a child's safety. The average family under home supervision receives approximately five visits over a six-month period, after which the case is closed or forgotten in the press of other business.[220]

Blaming social workers for conditions beyond their control is simply unfair. In child protective work, most workers "are just government employees doing a difficult, often unpleasant job, and because they deal with volatile, unpredictable family situations, injuries are sometimes unavoidable."[221] Unjustified criticism of social workers is also deeply unfair to the children and families in the child protective system because it leads to defensive social work.

B. The Costs of "Winning"

Even when child welfare workers win in court, they lose. Legal vindication comes at a high price. Newspapers carry stories about the suit (usually focusing on the untested allegations), about the pretrial maneuvering, and about the trial testimony. Workers are often suspended, placed on administrative leave, or transferred, pending resolu-

219. J. GIOVANNONI & R. BECERRA, DEFINING CHILD ABUSE 260 (1979).

220. *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 2, at 39–40.

221. Horowitz, *Improving the Legal Bases in Child Protection Work—Let the Worker Beware*, in MALPRACTICE AND LIABILITY IN CHILD PROTECTIVE SERVICES 17, 24 (W. Holder & K. Hayes eds. 1984).

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tion of the case. A trial—and all that goes with it—is confusing, stressful, and time-consuming. "Whether or not a social worker is ultimately found liable, the time spent in preparation of pleadings, depositions, interrogatories, briefs, and courtroom testimony can be both financially and emotionally taxing . . . . [T]ime lost can never be regained.[222]

Legal fees have to be paid, whether one wins or loses. Lawyers' bills can range from $5,000 (when the case is dismissed quickly) to over $50,000 (when a trial and appeal are necessary). For example, in one El Paso criminal prosecution before the charges were dropped, the indicted child protective workers incurred legal fees of $15,000—for which they were solely responsible. Rarely are victorious defendants reimbursed for these costs, although the worker's agency or an insurance policy may do so. And, for a long time afterward, friends, colleagues, and clients remember that the social worker's conduct, judgment, and ability were challenged in court.

C. *Defensive Social Work*

The harmful effects of unfairly blaming social workers go far beyond the individuals involved. These cases are well known in the field. They—and the media coverage that surrounds them—have convinced social workers that the imposition of liability is a haphazard and unpredictable lottery having little to do with individual culpability. Ordinarily, the deterrent impact of civil and criminal liability might improve child protective practices. In the present atmosphere, however, with workers and agencies being unfairly blamed, the prospect of such liability worsens practices, because it causes defensive social work.

Defensive social work leads to over-intervention. 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 are always possible if the child is subsequently killed or injured; but there will be no critical publicity if it turns out that intervention was unnecessary. Joanne Selinske, formerly director of the American Public Welfare Association's child abuse project, characterized this approach as the " 'better safe than sorry' attitude that pervades the child protection system."[223]

A fair analogy to this process is the defensive medicine practiced by many physicians these days. The ease with which former patients

222. Sharwell, *Learn 'Em Good: The Threat of Malpractice*, J. SOC. WELFARE 46 (Fall–Winter 1979–1980).

223. Selinske, *Protecting CPS Clients and Workers*, 41 PUB. WELFARE 31 (Summer 1983).

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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. There is no denying, however, that it affects all aspects of child protective decision making. Many of the great number of unfounded reports now flooding the system, for example, reflect the "better safe than sorry" syndrome. Educational materials that emphasize liability for failure to report, as well as immunity for incorrect reporting, foster this process.

Removal decisions are also distorted by liability concerns. Most observers would agree with Yale Law School Professor Peter Schuck that "[s]ocial workers may more quickly—but prematurely—remove children from troubled families rather than risk being sued on behalf of an abused child."[224] Another researcher discovered in his survey of child protective workers at least one worker who "tries to get state custody of all suspected abused children just to protect herself from liability."[225] In another state, a program director described what happened after he was indicted for "allowing" a child to be killed:

> Upon learning of the indictment, 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 that caseworkers were afraid.[226]

Ironically, this kind of defensive decision making is breeding further litigation as parents have begun to sue workers and their agencies for violating their civil rights. One Minnesota case was settled for $15,000; a Virginia case for $4,000. In several pending cases, much larger settlements—up to a million dollars—are in prospect.

D. "Good Faith" Immunity

The best way to protect social workers from the high costs of unwarranted litigation would be to reform the entire tort system, because many other professions also face problems similar to those plaguing so-

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224. P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 75 (1983).

225. L. Schultz, Preface to WEST VIRGINIA UNIVERSITY SCHOOL OF SOCIAL WORK, MALPRACTICE AND LIABILITY IN WEST VIRGINIA'S CHILD PROTECTIVE SERVICES: A SOCIAL POLICY ANALYSIS at preface (1981).

226. Gembinski, Casper & Hutchinson, *Worker Liability: Who's Really Liable?* in LOOKING BACK, LOOKING AHEAD: SELECTIONS FROM THE FIFTH NATIONAL CONFERENCES CHILD ON ABUSE AND NEGLECT 118 (C. Washburne ed. 1982).

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cial work. Real reform would mean a comprehensive reformulation of the rules concerning attorneys' fees, standards of liability, court procedures, evidence, and so forth. However, such extensive changes are, for the present, not realistically contemplated. The complexity of the issues and the strong objection of entrenched interests require a much more intensive and broadly based effort than has heretofore been made.

Nevertheless, for child welfare workers, protection is possible through more modest reform. They should be given immunity for their good faith efforts to serve children and families. The *Restatement (Second) of Torts* describes good faith immunity as meaning that "the officer is not liable if he made his determination and took the action that harmed the other party . . . in an honest effort to do what he thought the exigencies before him required."[227]

Reflecting the need to protect public officials who must exercise their best judgment in performing their duties, state and federal law grant public officials good faith immunity for their "discretionary" actions.[228] Some court decisions go further and grant public officials absolute immunity.[229] But these cases are decidedly in the minority and they seem to go too far. Absolute immunity precludes liability even when the official's misconduct results from actual malice or a reckless disregard of legal requirements. As the cases in this article sadly demonstrate, there are times when civil and even criminal liability may be justified.

For either good faith or absolute immunity to be granted, the official's act must have been "discretionary." All other acts are "ministerial," for which there is no immunity. A description of the difference between the two was given by the New York Court of Appeals: "[D]iscretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."[230]

If the existence of immunity were solely determined by applying such word formulations, all child welfare workers would be protected because no one could reasonably disagree with the description of child protective work provided by James Cameron, Executive Director of the New York State Federation on Child Abuse and Neglect: "Protective workers are called upon to make extremely difficult decisions which can

227. RESTATEMENT (SECOND) OF TORTS § 895D, at 414 (1979).

228. *See* PROSSER AND KEETON, *supra* note 9, § 132, at 1059.

229. *See, e.g.*, Whelehan v. County of Monroe, 558 F. Supp. 1093 (W.D.N.Y. 1983); Bauer v. Brown, No. 82-0076-L (W.D. Va., August 30, 1983). *Cf.* Tango v. Tulevech, 61 N.Y.2d 34, 459 N.E.2d 182, 471 N.Y.S.2d 73 (1983).

230. *Tango*, 61 N.Y.2d at 41, 459 N.E.2d at 186, 471 N.Y.S.2d at 77.

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have an enormous impact in often unpredictable ways upon the welfare of children and the continued viability of a family unit. Field workers must examine their best judgment in each case."[231]

Most courts, however, refuse to apply the discretionary-ministerial dichotomy mechanically because they realize that if they did so, it "could be invoked to establish immunity from liability for every act or omission of public employees . . . ."[232] In most jurisdictions, deciding whether an act is "discretionary" or "ministerial" is, as the *Restatement (Second) of Torts* explains, "a legal conclusion whose purport is only somewhat incidentally related to the definitions of the two words composing it. Instead of looking at a dictionary, therefore, the court must weigh numerous factors and make a measured decision . . . ."[233] The *Restatement* provides a list of the factors that should be considered:

> (1) The nature and importance of the function that the officer is performing. . . .
>
> (2) The extent to which passing judgment on the exercise of discretion by the officer will amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government. . . .
>
> (3) The extent to which the imposition of liability would impair the free exercise of his discretion by the officer. . . .
>
> (4) The extent to which the ultimate financial responsibility will fall on the officer. . . .
>
> (5) The likelihood that harm will result to members of the public if the action is taken. . . .
>
> (6) The nature and seriousness of the type of harm that may be produced. . . .
>
> (7) The availability to the injured party of other remedies and other forms of relief.[234]

Whatever their theoretical validity, these factors are inherently subjective and invite idiosyncratic application. As a result, for all forms of official conduct, judicial decision making is confused and unpredictable.[235] In regard to various aspects of child welfare work, some courts have held that decision making is "discretionary"; others have concluded that it is "ministerial." People familiar with child welfare services, but unfamiliar with how judges reason, will be surprised to learn

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231. Letter from James Cameron, Executive Director of the New York State Federation on Child Abuse and Neglect, to Austin Campriello (January 31, 1985).

232. Elton v. County of Orange, 3 Cal. App. 3d 1053, 1057, 84 Cal. Rptr. 27, 29–30 (1970).

233. RESTATEMENT (SECOND) OF TORTS, § 895D, at 416 (1979).

234. *Id.* § 895D, at 416–17.

235. *See* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. (1963).

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that some courts have found no discretion involved in the decision to accept a report for investigation, the decision to initiate court action, and the decision to place a child with particular foster parents.

To be fair, certain child welfare decisions are, in fact, "ministerial." No real discretion is needed, for example, to decide that an apparently abandoned infant should be placed in protective custody. In addition, courts are sometimes misled by the overambitious mandates of statutes, agency policies, and professional standards. Mandates to "investigate immediately," "protect endangered children," and "supervise foster care" are taken as literal absolutes, rather than as general descriptions of programmatic responsibility. Moreover, the truth is that many of these court decisions are outcome-oriented. That is, the judge, believing that there should be liability, decides that the activity was "ministerial." Unfortunately, certain extreme cases get translated into a general rule of no good faith immunity. Thus, to create liability for placing a child with foster parents known to be dangerous, courts have labeled the placement decision itself "ministerial," rather than more accurately holding that the particular decision was unreasonably careless.

Case-by-case granting of immunity is supposed to lead to decisions more precisely tailored to the situations before the court. But such fine tuning is really not possible. As Schuck has convincingly shown, court rulings are usually made "on the basis of distinctions that bear little relationship to protecting vigorous decision making."[236]

Moreover, because these distinctions do not lead to predictable results, no one knows which activities will be granted immunity and which will not. This increases litigation against caseworkers as lawyers test the outer bounds of liability. This constant testing tends to wear down judicial reluctance to impose liability. Moreover, even when such suits are ultimately unsuccessful, they increase workers' fears about their legal vulnerability. These are legitimate fears because, as described above, "defending any suit, even those that predictably will fail, is costly and subject to outcome-uncertainty."[237]

E. Immunity Statutes

Dissatisfaction with the case-by-case approach has already led nine states,[238] Puerto Rico, and the Virgin Islands to pass legislation granting child protective workers blanket good faith immunity for all

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236. P. SCHUCK, *supra* note 224, at 89.

237. Book Review, 82 MICH. L. REV. 1036, 1037–38 (1984) (reviewing P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983)).

238. Florida, Illinois, Minnesota, Missouri, New York, North Carolina, North Dakota, South Dakota and Wyoming.

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their official actions.[239] All states should do the same. In fact, similar laws should be passed to protect all child welfare workers. This author proposes that the following statutory language be adopted:

All employees of the [insert name of public agency here] required or authorized by the laws of this state to perform child protective or child welfare functions shall, if acting in good faith, be immune from any civil or criminal liability that might otherwise result from the performance of their official duties.

Substantial precedent for overruling the judicial, case-by-case application of good faith immunity exists in other areas of the law. For example, there are laws giving good faith immunity to guardians ad litem who appear in child protective proceedings, to psychiatrists who institutionalize patients, and to public officers who release dangerous individuals from custody.

F. *Not An Absolute Bar*

Good faith immunity does not give child welfare workers carte blanche authority to act wrongfully. They are still subject to liability when they act in callous or reckless disregard of their official duties. Some courts also hold that the unreasonable failure to follow legal mandates is a form of bad faith. For claims under the federal Civil Rights Act, the United States Supreme Court has held that a claim of good faith is defeated if the defandant "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . ."[240]

Thus, good faith immunity does not prevent the filing of lawsuits. The plaintiff can always allege bad faith, so long as there is a sufficient basis for doing so. But good faith immunity does make groundless or unwarranted suits much less likely—and much more easily dismissed at an early stage. Therefore, the establishment of good faith immunity would be a major reform.

G. *Judicial Action Also Necessary*

State immunity legislation does not affect lawsuits under the federal Civil Rights Act or other federal statutes—major avenues of litiga-

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239. Absolute immunity is too strong a remedy. It precludes liability even when the official's misconduct results from actual malice or a reckless disregard of legal requirements. As many cases sadly demonstrate, there are times when civil and even criminal liability may be justified.

240. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)) (emphasis in original).

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tion against child welfare workers. Therefore, barring congressional action, which is unlikely, federal courts will continue to determine whether worker activities are "discretionary" on a case-by-case basis. One can only hope that federal judges will become more aware of the realities of child welfare work and, hence, be more willing to grant workers good faith immunity,[241] and that state court judges, in jurisdictions that do not adopt immunity legislation, will do the same.

241. *See, e.g., Whelehan*, 558 F. Supp. 1093 (W.D.N.Y. 1983).

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