

1991

Protecting Children--and Their Families--From Abuse: The Cleveland Crisis and England's Children Act 1989

Robert E. Rains

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

Recommended Citation

Robert E. Rains, *Protecting Children--and Their Families--From Abuse: The Cleveland Crisis and England's Children Act 1989*, 23 Case W. Res. J. Int'l L. 255 (1991)

Available at: <https://scholarlycommons.law.case.edu/jil/vol23/iss2/3>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Protecting Children—and Their Families—From Abuse: The Cleveland Crisis and England's Children Act 1989

Robert E. Rains*

I. INTRODUCTION

On November 16, 1989, Queen Elizabeth II gave her Royal Assent to the Children Act 1989, thereby approving a comprehensive revision of English law regarding children.¹ Divided into twelve main parts, the Children Act 1989 addresses such issues as custody, change of a child's name, public (local authority) support for children of families, day care and, importantly, the handling of cases of suspected child abuse. It is this last area, protection of children, which undoubtedly provided the greatest impetus for this broad legislative initiative. This article will describe the prior child protection laws, explore the unfortunate events that focused public and political attention on gross deficiencies in the pre-existing law and practices relating to child abuse cases, discuss the new provisions relating to protection of children, and attempt to highlight considerations which should be of concern to American legislatures when contemplating the "toughening" of state statutes on child abuse.

II. PRIOR LAW ON PROTECTION OF CHILDREN

Prior to the new law, removal of neglected and abused children was governed by several statutes, principally the Children and Young Persons Act 1969 and the Child Care Act 1980.² These acts authorized local authorities to protect children at risk through the use of a number of different legal mechanisms that may be bewildering to the American family lawyer.

* Professor of Law and Co-Director, Family Law Clinic, The Dickinson School of Law. J.D., Harvard Law School (1974). This article is the product of a sabbatical visit to the Leicester Polytechnic School of Law, Leicester, England, in January 1990. The author wishes to express his appreciation to Prof. Richard Card, Head of School, and to the faculty of the Leicester Polytechnic School of Law, particularly R.D. Mackay who was instrumental in arranging the visit, and Deborah Ogbourne and Richard Jones for their invaluable aid in providing materials and reviewing drafts. All opinions expressed herein are those of the author.

¹ *Forward to HER MAJESTY'S STATIONERY OFFICE, DEPT. OF HEALTH, AN INTRODUCTION TO THE CHILDREN ACT 1989* at iii (1989) [hereinafter *INTRODUCTION TO THE CHILDREN ACT*]. The Children Act 1989 is generally applicable in England and Wales. *Id.*

² The prior law is described in the past tense for the sake of clarity, although it will remain largely in effect until October 1991. *Id.*

A. Care Orders

The Children and Young Persons Act 1969 (1969 Act) authorized a local authority, constable or authorized person to seek an order from the juvenile court committing a child to its care. Under Section 1, "Care proceedings in juvenile courts," if the court was of opinion that any one of several conditions was met, and that the child or young person was in need of care or control which he was unlikely to receive unless the court made an order, the court could issue a "care order." The conditions were:

- (a) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated; or
- (b) it is probable that the condition set out in the preceding paragraph will be satisfied in his case, having regard to the fact that the court or another court has found that that condition is or was satisfied in the case of another child or young person who is or was a member of the household to which he belongs; or
- (bb) it is probable that the condition set out in paragraph (a) of this subsection will be satisfied in his case, having regard to the fact that a person who has been convicted of an offence mentioned in Schedule 1 to the Act of 1933, including a person convicted of such an offence on whose conviction for the offence an order was made under Part 1 of the Powers of Criminal Courts Act 1973 placing him on probation or discharging him absolutely or conditionally is, or may become, a member of the same household as the child or young person;
- (c) he is exposed to moral danger; or
- (d) he is beyond the control of his parent or guardian; or
- (e) he is of compulsory school age within the meaning of the Education Act 1944 and is not receiving efficient full-time education suitable to his age, ability and aptitude (and to any special educational needs he may have); or
- (f) he is guilty of an offence, excluding homicide.

Despite the benevolent sound of the phrase "care order," in fact a care order issued under the 1969 Act had draconian consequences. Such an order for compulsory care not only required the local authority to receive the child into its care, notwithstanding any claim by his parents, but also vested all parental rights in the local authority with the only exceptions that the local authority could not change the child's religion and the parents retained the right to consent to adoption.³

³ Child Care Act, 1980, §§ 10(3), 10(5).

The care order remained in effect until the child attained the age of eighteen (or age 19 if the child was 16 or older when the order was entered).⁴

Prior to amendments in 1983, the parents had no statutory right to access to (visitation with) a child in care.⁵ Even with the 1983 amendments, parental access might be terminated in some circumstances.⁶

Note that while the parent retained the right to consent to adoption, this right was not absolute. Pursuant to section 16 of the Adoption Act 1976, the court could dispense with the parent's consent if consent was unreasonably withheld or the parent had neglected the child or persistently or seriously ill-treated the child. It was not uncommon for a court to find that once a child had been away from a parent pursuant to a care order for a substantial period of time, particularly in light of the parent's limited access to the child, it was unreasonable for the parent to withhold consent to adoption. This is precisely what happened in *Re F. (a minor)*.⁷ The trial judge had found that a reasonable mother would conclude that it would be beneficial to the child to have contact with his mother and that the prospect of contact would be slender if the child was adopted. He therefore denied adoption and granted the mother access. The Court of Appeal reversed. Having the welfare of the child as the first consideration and applying an objective test, the higher court found that a reasonable mother would not refuse her agreement to the adoption.

Despite the drastic impact on parents of a care order, the parents were not themselves considered to be parties to the proceedings. This lack of party status could severely affect a parent's ability to challenge issuance of a care order, as demonstrated by the Queen's Bench Division decision in *R. v. Worthing Justices, ex parte Stevenson*.⁸ In this case a two-year-old child was the subject of care proceedings brought by the West Sussex County Council. Legal aid was granted to the child to enable her to be represented at a hearing. The child's solicitor informed the court that, in his opinion, there was a conflict between the child's interests and the mother's interests. The mother was unemployed and separated from her husband. As the mother could not afford to pay counsel, the child's solicitor made application to the court for legal aid for the mother under the Legal Aid Act 1974. The lower court justices expressed the view that, while they wished to see the mother legally represented and it was desirable in the interests of justice that she be so represented, as a matter of law they had no power to grant legal aid to

⁴ Children and Young Persons Act, 1969, § 20(3).

⁵ Child Care Act, 1980, §§ 12A-12G.

⁶ *Id.* § 12B.

⁷ 1 All E.R. 321 (1982).

⁸ 2 All E.R. 194 (1976).

her as she was not a party to the proceedings as defined in the Legal Aid Act 1974. The child's solicitor applied to the Queen's Bench Division for an order of mandamus directing the justices to grant the mother legal aid. Lord Widgery, recognized that:

In proceedings of this kind the real issue is nearly always between the local authority and the parents, and one will expect therefore to find machinery whereby the parents become entitled to legal aid for the purpose of the proceedings.⁹

Nevertheless he concluded that the mother was not a person brought before the court. Hence, she was not a party, and therefore she was not entitled to legal aid.¹⁰

Furthermore, although a parent or guardian was not a party to a care proceeding and although the hearsay rule applies in juvenile court, the Queen's Bench Division subsequently ruled that, in a care proceeding, witnesses could testify to out-of-court statements by a parent or guardian of ill treatment of a child as if the parent or guardian were a party.¹¹ Thus, the parent was not treated as a party when it would benefit her and be in the interests of justice, but was treated as if a party when it operated to the parent's detriment.

The most obvious and devastating consequence of the parent's position as non-party was that the parent had no standing herself to appeal the imposition of a care order. The parent was limited to filing an appeal on behalf of the child.¹² Where an order had been entered pursuant to section 32A of the 1969 Act that there was a conflict between parent and child, it is questionable whether the parent could file such an appeal.

It was not until the Children and Young Persons (Amendment) Act 1986 that parents were fully granted party status in care proceedings in this one circumstance.¹³ The 1986 Act provided that a parent assumed party status if an order were made under section 32a of the 1969 Act to the effect that it appeared to the court that there may be a conflict of interest between parent (or guardian) and child. Without such a conflict order, the parent remained a non-party.¹⁴

⁹ *Id.* at 196.

¹⁰ The appellate court suggested that new provisions in the Children Act 1975 would have provided for legal aid to a parent in a care proceeding, but that this case arose before the effective date of the 1975 Act. *Id.* at 196.

¹¹ *Humbly Grove County Council v. R.*, 1 W.L.R. 1251 (1977).

¹² *B. v. Gloucester County Council*, 2 All E.R. 746 (1980).

¹³ The Children Act, 1975, § 64, added a section 32A to the Children and Young Persons Act, 1969, to increase procedural protection for parents. Section 32A provided that if the court entered a conflict order, the parents could have separate representation. For financial reasons, this was never fully implemented.

¹⁴ Child and Young Persons (Amendment) Act, 1986, § 3. See *The Law On Child Care and Family Services*, 1987 Cmnd. 62, p.14, para. 55.

B. *Interim Care Orders*

In the situation where there was insufficient evidence to support one of the conditions for issuance of a care order, the local authority could seek, and the court could grant, an interim care order under the 1969 Act.¹⁵ This order committed the child to the care of the local authority.¹⁶ The statutory provision was silent as to whether any evidence at all was necessary for such an order. Rather, it only provided:

If the court before which the relevant infant is brought in care proceedings is not in a position to decide what order, if any, ought to be made under the preceding section in respect of him, (the court may make - (a) an interim order; or (b) an interim hospital order within the meaning of (section 38 of the Mental Health Act 1983), in respect of him; but an order shall not be made in respect of the relevant infant in pursuance of paragraph (b) of this subsection unless the conditions which, under (the said section 38), are required to be satisfied for the making of an interim hospital order in respect of a person convicted as mentioned in that section are satisfied in his case so far as they applicable).¹⁷

The maximum duration of an interim care order was twenty-eight days.¹⁸ However, the local authority could seek and obtain repeated interim care orders in the same case. The Act set no limit on the number of interim care orders in any one case. Further because each order expired within twenty-eight days, the limited rights to appeal an interim order could readily be frustrated. As noted in *Regina v. Birmingham Justices, Ex parte S.*¹⁹: "But where the statute only allows adjournments of up to twenty-eight days at a time, it is clear that old orders may be replaced by new orders and that from time to time the right of appeal will be lost."²⁰

C. *Place of Safety Orders*

Another temporary removal order under the prior law was the "place of safety" order. Section 28(1) of the Children and Young Persons Act 1969 provided:

(1) If, upon an application to a justice by any person for authority to detain a child or young person and take him to a place of safety, the justice is satisfied that the applicant has reasonable cause to believe that -

¹⁵ Children and Young Persons Act, 1969, § 2(10).

¹⁶ *Id.*, § 22(2).

¹⁷ *Id.*, § 2(10).

¹⁸ *Id.*, § 20(1).

¹⁹ 1 W.L.R. 618, 623 (1984).

²⁰ *Id.*

(a) any of the conditions set out in section 1(2)(a) to (e) of this Act is satisfied in respect of the child or young person; or

(b) an appropriate court would find the condition set out in section 1(2)(b) of this Act satisfied in respect of him; or

(c) the child or young person is about to leave the United Kingdom in contravention of section 25 of the Act of 1933 (which regulates the sending abroad of juvenile entertainers), the justice may grant the application; and the child or young person in respect of whom authorization is issued under this subsection may be detained in a place of safety by virtue of the authorization for twenty-eight days beginning with the date of authorization, or for such shorter period beginning with that date as may be specified in the authorization.

Note that the application for a place of safety order went to a single justice and that the justice needed only to find that the applicant (not the justice) had reasonable cause to believe that the child was at risk.

As with interim care orders, place of safety orders effectively could not be appealed by parents. This is illustrated by the decision in *Nottinghamshire County Council v. Quick*.²¹ Here, as was usually the case, the local authority had obtained a place of safety order detaining a child. The parents applied to the court for the child's release under section 28(6) of the 1969 Act which provided:

If while a person is detained in pursuance of this section an application for an interim order in respect of him is made to a magistrates' court or to a justice, the court or justice shall either make or refuse to make the order and, in the case of a refusal, may direct that he be released forthwith.²²

The parents' application was ultimately denied. Justice Eastham reasoned that the parents were attempting to use section 28(6) to make an appeal and that this was an abuse of process as Parliament had provided no appeal from a place of safety order.²³ Sir John Arnold P. concurred in the result noting "that it was universally held that it was a pity that there was no right of appeal against a place of safety order but two wrongs did not make a right."²⁴

In another variation, a constable was authorized by section 28(2) of the 1969 Act to commit a child to a place of safety if he believed that one of the conditions for a care order was satisfied. In this situation the child could be detained for up to eight days with no judicial hearing whatsoever.²⁵

²¹ 12 Fam. L. 145, (1982).

²² Children and Young Persons Act, 1969, § 28(6).

²³ *Supra* note 21.

²⁴ *Id.*

²⁵ *See, e.g., R. v. Bristol Justices ex parte Broome*, 1 All E.R. 676, 1 W.L.R. 352 (1987).

D. Parental Rights Resolutions - Section 3 of the Child Care Act 1980

Another mechanism for involuntarily vesting parental rights in a local authority was found under Section 3 of the Child Care Act 1980. Under Section 2 of the 1980 Act a parent could voluntarily place a child in the care of a local authority on a temporary or indefinite basis. For example, a single mother might place her children with a local authority because she was about to be hospitalized. The danger to the parent was that, if it then appeared to the local authority that the parent was unfit or disabled from caring for the child, the local authority could pass a Parental Rights Resolution under Section 3 of the 1980 Act vesting in the local authority the parental rights and duties with respect to the child. This Resolution thereby changed the child's placement from voluntary to involuntary on the part of the parent.

Indeed, if a parent voluntarily placed her child in the care of a local authority and subsequently notified the local authority of her desire to resume care of the child, the power of the local authority to care for the child did not automatically terminate. The House of Lords ruled, in *London Borough of Lewisham v. Lewisham Juvenile Court Justices*,²⁶ that the local authority could continue to hold the child and either pass a parental care resolution or take out a wardship summons.²⁷

Note that a Section 3 resolution was an internal mechanism of the local authority. It did not require an application to a court. The parent was to receive notice and could object to the resolution within thirty days.²⁸ Such a counter-notice authorized the local authority to file a complaint in juvenile court which would trigger a hearing. The resolution would remain in effect until a determination of the complaint at the hearing as to whether the grounds for such a resolution existed.²⁹ If the juvenile court found that such grounds existed, it could order that the resolution not lapse.³⁰ For obvious reasons this type of intervention, effected without initial judicial process, had been subjected to strong criticism.³¹

E. Wardship Proceedings

Another vehicle for removing parental authority from parents was

²⁶ 2 All E.R. 297 (1979). This case arose under prior statutes, but the decision remained applicable under the Child Care Act 1980.

²⁷ For a discussion of wardship proceedings, see Section II, E, *infra*.

²⁸ Child Care Act, 1980, § 3(2)-(4). Under the Act a resolution only applied to one parent. If the local authority wished or needed to proceed against both parents, two resolutions were required.

²⁹ *Id.* §§ 3(5)-(6).

³⁰ *Id.* § 3(6).

³¹ See A. BAINHAM, CHILDREN, PARENTS AND THE STATE 78-89 (1988); Maidment, *Administrative Procedures for the Removal of Parental Rights: The Child Care Act, 1980, Section 3*, PROVIDING CIVIL JUSTICE FOR CHILDREN (H. Geach and E. Szwed eds. 1983).

to be found in the use of wardship proceedings. Although wardship proceedings could be initiated by a local authority, the end result was somewhat different from that under the previously discussed mechanisms, as wardship vested control of the child with the court rather than the local authority.

What is striking to the American family lawyer is that a local authority, having failed to make out a case for a care order, could initiate wardship proceedings and succeed, with no change in the underlying family situation. This is precisely what happened in *Re D. (a minor)*.³² The local authority had obtained a care order in 1972, pursuant to the Children and Young Persons Act 1969, but on the parents' petition in 1976, the court discharged the care order, subject to a supervision order for three years. The local authority was dissatisfied with the supervision order. Accordingly, the local authority made the child a ward of court and applied in the wardship summons for a care order to be made in its favor.

The court noted that different standards apply under the 1969 Act than under wardship proceedings. Under the 1969 Act, the court must first find that one of the conditions of a care order exists and that the child is in need of care and control before considering the welfare of the child. (But do these two findings not directly relate to the welfare of the child?)

In a wardship proceeding, on the other hand, the court opined that the welfare of the child is considered "first, last and all the time." The court not only granted the wardship, but encouraged local authorities to apply for wardship in other cases "because in very many of these cases it is the only way in which orders can be made in the interests of the child, untrammelled by the statutory provisions of the Children and Young Persons Act 1969."³³

F. Matrimonial Proceedings

Finally, under the Matrimonial Causes Act 1973, a court was ordinarily to enter a custody order before making absolute a decree of divorce or nullity of marriage.³⁴ Where, however, the court found "exceptional circumstances making it impractical or undesirable for the child to be entrusted to either party to the marriage," the court had authority on its own motion to commit the child to the care of a local authority.³⁵

Moreover, even after the decree absolute, the court had ongoing au-

³² 3 All E.R. 481 (1977).

³³ *Id.* at 486.

³⁴ Matrimonial Causes Act, 1973, § 41.

³⁵ *Id.* § 43.

thority to modify a prior order granting custody to one parent and vest care in the local authority. This is precisely what occurred in *R. v. G (Surrey County Council intervening)*.³⁶ In that case there was a continuing custody dispute between two parents who were divorced in 1979.³⁷ In 1984, after hearing the dispute between the parents on several occasions, the court committed both children to the care of the local authority.³⁸ Although both parents appealed, seeking to have the children placed with the father,³⁹ the court of appeal upheld the trial judge. The court of appeal noted that the standard of review of such an order was that it not be overturned unless "plainly wrong" or "wholly wrong."⁴⁰ Interestingly, the court had vested the care of both children in the local authority, even though the local authority intended to leave one of the children with the father. The father argued that this intention demonstrated that it was not "impractical or undesirable" for this child to be entrusted to him. The court of appeal disagreed, noting that the order would allow the authority to remove the child from him "promptly and without the expense of further recourse to the court. . . if their experiment proves to be unsuccessful."⁴¹

* * *

This multiplicity of legal mechanisms with differing standards and procedures for protecting and removing children at risk from their parents understandably had been criticized by various commentators.⁴² Indeed, a government White Paper, "The Law on Child Care and Family Services" published in January 1987, was highly critical of the "lack of clarity" in the child care laws; it called for rationalization and simplification of existing legislation.⁴³ However, it was not until the events in 1987 that became known as the "Cleveland Crisis" that there arose a real public outcry for change.⁴⁴

III. THE CLEVELAND CRISIS

After significant media attention, Mr. Stuart Bell, Member of Parliament for Middlesbrough and a member of the Bar, raised in Parliament in June 1987 his concerns over the extraordinary events which were

³⁶ 3 All E.R. 460 (1984).

³⁷ *Id.* at 463.

³⁸ *Id.* at 464.

³⁹ *Id.*

⁴⁰ *Id.* at 462.

⁴¹ *Id.* at 466.

⁴² See, e.g., Cole, *Care Proceedings in the USA - Some Lessons for the UK?*, 13 FAM. L. 224 (1983); see also BAINHAM, *supra* note 31; Maidment, *supra* note 31.

⁴³ HER MAJESTY'S STATIONERY OFFICE, DEPT. OF HEALTH AND SOCIAL SECURITY, THE LAW ON CHILD CARE AND FAMILY SERVICES 3 (1987).

⁴⁴ See A. BAINHAM, CHILDREN, THE NEW LAW, THE CHILDREN ACT 1989 3-4 (1990).

then culminating in his district.⁴⁵ In July 1987, the Secretary of State for Social Services ordered that a Statutory Inquiry be established to look into the arrangements for dealing with suspected cases of child abuse there in the Cleveland area.⁴⁶ The Inquiry was announced in the House of Commons by the Minister for Health on July 9, 1987, to examine the "unprecedented rise in the diagnosis of child sexual abuse during the months of May and June 1987 in the County of Cleveland, principally at Middlesbrough General Hospital."⁴⁷

The Right Honourable Lord Justice Elizabeth Butler-Sloss chaired the Inquiry. There were seventy-four days of testimony, and in June 1988, Lord Butler-Sloss delivered to the government her Report and recommendations, over 300 pages in length.⁴⁸ The scenario described in the Cleveland Report combines undoubted cases of extremely serious child abuse, numerous cases of false or unsubstantiated charges of child abuse, over-reliance on medical signs of debatable significance, breakdown of relationships among governmental units, overwhelming of public facilities to care for children, misuse or questionable use of the legal mechanisms described above, and real harm to children—and their parents—caused by over-zealous individuals earnestly seeking to protect abused children.

The Cleveland Crisis, in retrospect, can be traced back to the appointment of Dr. Marietta Higgs to the newly created post in consultant pediatrics to the Northern Regional Health Authority effective January 1, 1987.⁴⁹ Dr. Higgs is a specialist in pediatrics with a special interest in child abuse.⁵⁰ In 1986, Dr. Higgs attended a conference in Leeds on child sexual abuse arranged by the British Association for the Study and Prevention of Child Abuse and Neglect (BASPCAN) where she heard a lecture by Dr. Jane Wynne, another pediatrician.⁵¹ Dr. Wynne advocated that child sexual abuse is more common than generally believed, that it is deleterious to children, and that anal abuse might be detected by physical examination of the anus.⁵² The critical sign which purportedly is indicative of anal abuse is known by various terms but was commonly referred to as reflex anal dilation (R.A.D.).⁵³

The lecture made a great impression on Dr. Higgs, and she did not

⁴⁵ HER MAJESTY'S STATIONERY OFFICE, DEPT. OF SOCIAL SERVICES, REPORT OF THE INQUIRY INTO CHILD ABUSE IN CLEVELAND 1987, 163, ¶¶ 9.3.8, 9.3.9, 9.3.10 (1988).

⁴⁶ *Id.* at 1, ¶1

⁴⁷ *Id.* at 1, ¶2.

⁴⁸ *Id.* at 169, ¶ 9.4.12.

⁴⁹ *Id.* 111, ¶ 8.5.1.

⁵⁰ *Id.* at 131, ¶¶ 8.8.1-8.8.6.

⁵¹ *Id.* at ¶¶ 8.8.5, 13.1, app. B.

⁵² *Id.* at 131, ¶ 8.8.6.

⁵³ Normally, when a child's buttocks are separated during a medical examination, the external sphincter contracts tightly and then returns to its previously tonal position. With R.A.D., the anal

later recall that Dr. Wynne's views were controversial.⁵⁴ One month later Dr. Higgs made her first diagnosis of child sexual abuse relying in large part on the finding of R.A.D.⁵⁵

Upon taking the position of consultant pediatrician, Dr. Higgs was based mainly at the Maternity Hospital and at Middlesbrough General Hospital. At the latter, she joined among others Dr. Geoffrey Wyatt, also a pediatrician.⁵⁶ In March 1987, Dr. Wyatt first examined a child with Dr. Higgs for suspicion of child abuse. Dr. Higgs called Dr. Wyatt in, and it was the first time that he observed R.A.D. Although he was senior to Dr. Higgs, he "deferred to her greater experience in child abuse" and presumed, greater knowledge of child sexual abuse.⁵⁷ On April 7, 1987, Dr. Wyatt made his first diagnosis of child sexual abuse in one of his patients, based in part on observation of the R.A.D. sign, and referred the case to Social Services.⁵⁸

Meanwhile, tension and "fundamental differences of view" had already arisen between Social Services and the Police. Two cases in particular crystalized the breach.⁵⁹ On February 17, 1987, a six-year-old girl was seen at a clinic at a health center, having physical signs which caused her mother to believe that she was being abused.⁶⁰ Dr. Higgs and a police surgeon conducted an examination and, based on Dr. Higgs' presumed expertise, they diagnosed sexual abuse.⁶¹ The child later identified her grandfather as the perpetrator.⁶²

The police arrested the grandfather; and although he protested his innocence, "he was charged and subsequently bailed by the Magistrates Court on condition that he live in a bail hostel."⁶³ The child returned home, "but then on [March 10], during a check-up at the hospital, Dr. Higgs diagnosed further anal abuse during a period when the grandfather had no access to the child."⁶⁴ At a case conference on March 11, the senior police surgeon, Dr. Alistair Irvine, asked if he could examine the child but Dr. Higgs would not agree to a further examination.⁶⁵ "The child then remained in the hospital where, on [March 16], Dr Higgs diag-

canal muscles are weak and over-stretched, or have lost their normal tone, and the anal canal opens.
Id. at 186, §§ 11.13-11.15.

⁵⁴ *Id.* at 131, ¶ 8.8.5, 8.8.6.

⁵⁵ *Id.* at 131-32, ¶ 8.8.7.

⁵⁶ *Id.* at 14, ¶ 3; 145, ¶ 8.9.1; 260, App. B.

⁵⁷ *Id.* at 146, ¶ 8.9.7.

⁵⁸ *Id.* at 146, ¶ 8.9.8.

⁵⁹ *Id.* at 58, ¶ 4.36.

⁶⁰ *Id.* at 58, ¶ 4.37; 91-92, ¶¶6.30-6.33.

⁶¹ *Id.* at 91, ¶ 6.30.

⁶² *Id.* at 92, ¶ 6.31.

⁶³ *Id.*

⁶⁴ *Id.* at 92, ¶ 6.31.

⁶⁵ *Id.*

nosed yet further recent abuse."⁶⁶ The child then recanted her accusation against her grandfather and named her father as the perpetrator.⁶⁷ The police withdrew proceedings against the grandfather and began to entertain serious doubts about the reliability of Dr. Higgs.⁶⁸

A second case occurred on March 19, 1987, when Dr. Higgs diagnosed anal sexual abuse of, first, a two year old boy and subsequently his older sister and brother.⁶⁹ The police then conducted a very lengthy interview of the older brother in the presence of his father, as they suspected that the brother was the perpetrator.⁷⁰ The social workers were critical of the way the police handled the referral, and the police remained dubious of Dr. Higgs, although later examinations by other pediatricians viewed the children's physical signs as consistent with sexual abuse.⁷¹

Starting in April, 1987, diagnoses of child sexual abuse primarily by Dr. Higgs, secondarily by Dr. Wyatt, sometimes confirmed by other doctors, began to multiply.⁷² On April 30, Dr. Higgs diagnosed two children in foster care as having been sexually abused.⁷³ The three children of the foster parents were likewise found by her to have been sexually abused.⁷⁴

A decision was made to initiate wardship proceedings for the five children.⁷⁵ The police, however, determined that there was insufficient basis to pursue criminal proceedings.⁷⁶ Within a few days, Dr. Higgs had examined nine children who had been in the foster home and determined that eight of them showed signs consistent with anal abuse.⁷⁷ During the period of May 1 to 8, twenty-three children were admitted to Middlesbrough General Hospital, most of whom were made subjects of place of safety orders.⁷⁸ Many were part of the foster home investigation; others were diagnosed by Dr. Higgs as showing signs of sexual abuse after being examined during their attendance at pediatric out-patient

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 92, ¶ 6.32. Remarkably, after the child was removed from her family and placed in foster care, on June 23, Dr. Higgs diagnosed that she had been sexually abused yet again. *Id.* at 92, ¶6.33.

⁶⁹ *Id.*, p. 59, ¶¶ 4.38-4.44; 92, ¶¶ 6.34-6.36.

⁷⁰ *Id.*

⁷¹ *Id.* at 92, ¶ 6.34.

⁷² *Id.* at 59, ¶ 4.46.

⁷³ *Id.* at 59, ¶ 4.47.

⁷⁴ *Id.*

⁷⁵ *Id.* at 59-60 ¶ 4.48

⁷⁶ *Id.*

⁷⁷ *Id.* at 60, ¶ 4.53.

⁷⁸ *Id.* at 61, ¶ 4.56.

clinics.⁷⁹ The large number of children admitted in this period began to strain available resources for them.⁸⁰ Foster placements after release from hospital were at a premium.⁸¹

On the weekend of May 22-24, 1987, there was a second wave of fourteen children admitted to the hospital with suspected sexual abuse.⁸² By this time the "Cleveland Crisis" was in full swing. The Police refused to rely upon the diagnoses of Dr. Higgs.⁸³ Indeed on May 29, the Chief Constable "issued a directive advising officers to treat any diagnosis of Dr Higgs based on 'anal reflex dilation' with caution and to look for substantial corroboration of her findings before taking positive steps."⁸⁴ Yet the Inquiry concluded that despite her general denial, in fact, Dr. Higgs had refused to allow the police surgeon to examine the children concerned, at least in some cases.⁸⁵

There was a third wave of twenty children suspected of having been sexually abused admitted to the hospital on the weekend of June 12-13, 1987.⁸⁶ Between June 12 and June 20, a total of thirty-three children from seventeen families were admitted to Middlesbrough General Hospital on diagnoses of sexual abuse.⁸⁷

The mass admission of children on suspicion of child abuse—plus the doctors' methods—had adverse effects upon the hospital's nurses. Nurses on the wards complained about the activities of Drs. Higgs and Wyatt.⁸⁸ One nurse complained that the doctors wanted to wake up and examine a child in the middle of the night, "who had not been admitted for sexual abuse . . . to provide a control to compare [to] the abused children."⁸⁹ Nurses complained that children were being given intimate examinations late at night.⁹⁰

They complained that the parents were asking them what was happening with their children, but that the doctors had not informed nurses either.⁹¹ The wards were overloaded with children suspected of being sexually abused, "making the care of . . . physically ill children . . . extremely difficult."⁹² Dr. Higg's response was to "get more nurses," not

⁷⁹ *Id.* at 61, ¶¶ 4.56-4.57.

⁸⁰ *Id.* at 61, ¶ 4.59.

⁸¹ *Id.* at 62, ¶ 4.67.

⁸² *Id.* at 62, ¶ 4.69; 64, ¶ 4.79.

⁸³ *Id.* at 65, ¶ 4.87.

⁸⁴ *Id.*

⁸⁵ *Id.* at 166, ¶ 9.3.22, (para. ¶ 3(b)).

⁸⁶ *Id.* at 125, ¶ 8.7.46.

⁸⁷ *Id.* at 72, ¶ 4.137.

⁸⁸ *Id.* at 125, ¶ 8.7.46.

⁸⁹ *Id.* at 126, ¶ 8.7.56.

⁹⁰ *Id.*

⁹¹ *Id.* at 126, ¶ 8.7.53.

⁹² *Id.* at 128, ¶ 8.7.70.

understanding that there was no money in the budget for more nurses.⁹³

By mid-June 1987, a state of crisis also existed in the Social Services Department.⁹⁴ "[A]ll the foster homes were entirely full and . . . appropriate childrens' homes were almost full."⁹⁵

At about this time, Mr. Stuart Bell, MP, became involved in the Crisis. He visited Middlesbrough General Hospital on June 19 and 20, and spoke to parents.⁹⁶ Parents had multiple complaints. They complained that their children were brought to the hospital for examination and then they waited long periods before Dr. Higgs arrived.⁹⁷ They complained that their children were taken from them late at night to be taken for late night examinations at the hospital.⁹⁸ They complained that their children were examined and, in some instances, photographed without their consent.⁹⁹ Some complained of complete lack of access to their children.¹⁰⁰ The Inquiry later concluded that there was a general isolation of parents who were left alone and with no professional support.¹⁰¹

Mr. Bell's concerns were heightened when the police surgeon, Dr. Irvine, stated on television on June 26 that the Police had been excluded from investigations into sexual abuse.¹⁰² Also that evening another television show carried the story of magistrates who had refused a care order on three children alleged to have been sexually abused.¹⁰³ Mr. Bell then called for the suspension of Drs. Higgs and Wyatt.¹⁰⁴ He was outraged when he later learned that the three children were not reunited with their parents after the magistrates court hearing, but that the local authority made them wards of court.¹⁰⁵ In July, Mr. Bell was quoted as saying that no parent should take a child to the Middlesbrough General Hospital without first seeking legal advice.¹⁰⁶

Understandably given the nature of the accusations against the parents, the questions about the doctors and the sheer number of cases, the media became deeply involved in the Cleveland Crisis. They played an important role at all stages, and by the end of June, the Crisis was being brought to national attention in Britain by television, radio and

⁹³ *Id.* at 127, ¶ 8.7.57.

⁹⁴ *Id.* at 77, ¶ 4.174.

⁹⁵ *Id.*

⁹⁶ *Id.* at 76, ¶ 4.170.

⁹⁷ *Id.* at 37, ¶ 2.9.

⁹⁸ *Id.*

⁹⁹ *Id.* at 38-39, ¶ 2.12-2.18.

¹⁰⁰ *Id.* at 41, ¶¶ 2.30, 2.34.

¹⁰¹ *Id.* at 46, ¶¶ 2.64.

¹⁰² *Id.* at 164, ¶ 9.3.20.

¹⁰³ *Id.* at 163, ¶ 9.3.12.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 164, ¶ 9.3.21. *See supra* Section II, E.

¹⁰⁶ *Id.* at 156, ¶ 8.13.9.

newspapers.¹⁰⁷

Under the bright light of Parliamentary scrutiny and intense media interest, the Regional Health Authority took steps to bring the Crisis under control. On June 25, Dr. Liam Donaldson, the Regional Medical Officer, directed Drs. Wyatt and Higgs "not to undertake any examinations to look for signs of sexual abuse in children without parental knowledge and permission except in circumstances where a court order removes the necessity for such permission."¹⁰⁸ On June 28 the Regional Health Authority decided to establish a mechanism for all new cases to be seen by a second pediatrician and, wherever possible, a child psychiatrist.¹⁰⁹ Dr. Donaldson resisted pressure to suspend Drs. Higgs and Wyatt, but they were relieved of their clinical duties by mid-September 1987 because of their involvement with the Parliamentary Inquiry.¹¹⁰

As of June 1988, the Inquiry found the following overall statistics arising from the Crisis:

In total 125 children were diagnosed as sexually abused between February and July 1987, 121 of them by Dr Higgs and Dr Wyatt - 78 by Dr Higgs, 43 by Dr Wyatt. 67 of the children became wards of court. In the wardship cases 27 were derailed and went home with the proceedings dismissed; 24 went home on conditions which included supervision orders on the children and conditions as to medical examination of the children and 2 of them went home on interim care orders. 9 other children who are wards of court remain in the care of the County Council and away from their families. Of those children not made wards of court, a further 27 were the subject of place of safety orders. In all 21 children remain in care. We understand that out of the 121 children, 98 are now at home.¹¹¹

The Inquiry also noted the role of the courts in this Crisis. Obviously the sheer number of cases placed pressure upon the courts. Many of the problems with the court system noted in Part II, *supra*, were illuminated and perhaps magnified. While the statistics are not free of ambiguity, it appears that in most cases the local authority gained control of children through place of safety orders. All but one application for such an order were made *ex parte*, and all such applications were granted.¹¹² There was virtually no recourse for parents who were refused access or had access restricted under place of safety orders or interim care orders.¹¹³ Moreover, the number of cases exacerbated delays within the

¹⁰⁷ *Id.* at 168, ¶ 9.4.1; 76, ¶ 4.166.

¹⁰⁸ *Id.* at 115, ¶ 8.5.24.

¹⁰⁹ *Id.* at 115, ¶ 8.5.27.

¹¹⁰ *Id.* at 117, ¶¶ 8.5.38-8.5.41.

¹¹¹ *Id.* at 21, ¶ 64.

¹¹² *Id.* at 172, ¶ 10.6.

¹¹³ *Id.* at 174-75, ¶ 10.19; 178, ¶ 10.38.

system. There were difficulties in finding and appointing guardians ad litem.¹¹⁴ The Inquiry also noted the use of wardship proceedings where a care order had been refused.¹¹⁵ The Inquiry endorsed substantial changes in the child protection laws including many of the recommendations contained in the government White Paper, *The Law on Child Care and Family Services*, 1987 (Cm. 62).¹¹⁶

IV. THE NEW ACT

Within less than a year and a half of publication of the Report of the Cleveland Inquiry, Parliament had enacted the Children Act 1989. While the care provisions of the Act do not precisely track the recommendations in either the 1987 White Paper or the Report, nevertheless the Act clearly shows the impact of the Cleveland Crisis and those two documents.

The Act reenacts the welfare principle, that when a court determines any question with respect to a child's upbringing or property, "the child's welfare shall be the court's paramount consideration."¹¹⁷ However the Act also adds the principle of non-intervention:

Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.¹¹⁸

The non-intervention principle is aimed not only at removing the courts from intervening in amicable custody arrangements in divorce cases, but also ensuring that they will not enter care or supervision orders except where such orders can be expected to improve the child's situation. There was concern that, in the past, courts entered such orders when the statutory grounds were met without adequate regard to the ultimate benefit or detriment to the child.¹¹⁹

Part III of the Act governs voluntary services by local authorities to children and their families; Part IV governs compulsory care.¹²⁰ The Child Care Act 1980 is entirely repealed, as are relevant sections of the Children and Young Persons Act 1969.¹²¹ Under the new Act, there is a sharp distinction created between voluntary provision of services and

¹¹⁴ *Id.* at 176, ¶ 10.26; 178-79, ¶¶ 10.39-10.44.

¹¹⁵ *Id.* at 177, ¶ 10.36.

¹¹⁶ *Id.* at 252-53; 306-311.

¹¹⁷ Children Act, 1989, § 1(1).

¹¹⁸ *Id.* § 1(5).

¹¹⁹ *Introduction to the Children Act*, *supra* note 1, at 3. See also A. BAINHAM, *supra* note 41, at 15-16.

¹²⁰ Children Act, 1989, §§ 17-42.

¹²¹ See A. BAINHAM, *supra* note 44, at 59.

compulsory care. The former procedure for converting a voluntary placement into compulsory care by means of an administrative resolution no longer exists, and has not been replaced.¹²²

The distinction between voluntary services and involuntary care is highlighted by the different terminology used in Part II and Part IV. A child voluntarily placed by a parent with a local authority is not "in care;" rather services are being provided.¹²³ The authority does not assume parental responsibility over a child who is a voluntary placement; rather such a child is being provided "accommodation" if placed for a continuous period of more than twenty-four hours.¹²⁴ The authority has only specified duties toward such a child, and has not legally replaced the parents.¹²⁵ "Thus, the authority has only those decision-making powers over upbringing which parents (or others with parental responsibility) delegate to it expressly or impliedly for the purpose of looking after the child. . . ." ¹²⁶

To make clear the distinction between voluntary accommodation and involuntary care, Part III expressly precludes a local authority from providing accommodation where a parent objects who is willing either to provide accommodation or arrange for accommodation of the child.¹²⁷ Because the local authority does not assume parental responsibility over a child in voluntary placement, there is no longer a requirement that a parent give notice twenty-eight days in advance of removing such a child after six months ¹²⁸ To the contrary, the new Act provides:

Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.¹²⁹

This effectively overrules the *Lewisham* case.¹³⁰

Moreover Part III imposes a duty of consultation on local authorities with regard to any child whom they are looking after or proposing to look after. Before making any decision with regard to such a child,

. . . a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of -

¹²² *Id.* at 59-60.

¹²³ See especially Children Act, 1989, § 22(1) (and titles of Parts III, IV).

¹²⁴ *Id.* § 22(2).

¹²⁵ *Id.* §§ 22-23.

¹²⁶ A. BAINHAM, *supra* note 44, at 91.

¹²⁷ Children Act, 1989, § 20(7).

¹²⁸ A. BAINHAM, *supra* note 44, at 60.

¹²⁹ Children Act, 1989, § 20(8). This does not apply where there is a residence order in force and the person or persons in whose favor that order is made agree(s) to the accommodation, nor where the child is held by virtue of an order under the High Court's jurisdiction. *Id.* See A. BAINHAM, *supra* note 44, at 68-69.

¹³⁰ See *supra* note 26.

- (a) the child;
- (b) his parents;
- (c) any person who is not a parent of his but who has parental responsibility for him; and
- (d) any other person whose wishes and feelings the authority consider to be relevant, regarding the matter to be decided.¹³¹

This requirement is in stark contrast to the complaints of Cleveland parents of being kept uninformed as to what was happening with their children.

The new Act eliminates the multitude of pre-existing mechanisms for involuntary control over a child by a local authority and replaces them with essentially one statutory provision: care and supervisions orders. The Act provides:

On the application of any local authority or authorised person, the court may make an order -

- (a) placing the child with respect to whom the application is made in the care of a designated local authority; or
- (b) putting him under the supervision of a designated local authority or of a probation officer.¹³²

The same legal standard is required for imposition of either a care or supervision order:

A court may only make a care order or supervision order if it is satisfied -

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of harm is attributable to -
 - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or
 - (ii) the child's being beyond parental control.¹³³

Although the courts are not entirely divested of wardship jurisdiction, such jurisdiction has been so restricted as to preclude its use for compulsory care.¹³⁴ Thus *Re D. (a minor)* is vitiated.¹³⁵

¹³¹ Children Act, 1989, § 22(4).

¹³² *Id.*, § 31(1).

¹³³ *Id.*, § 31(2). By allowing the court to enter a care order on the basis that the child "is likely to suffer" significant harm, the act expands prior law. Case law had held that an order could not be based solely on perceived risk of future harm. *Essex County Council v. TLR & KBR (Minors)*, 8 Fam. L. 15 (1978). See A. BAINHAM, *supra* note 44, at 99.

¹³⁴ The Children Act, 1989, § 100(2) provides:

- No court shall exercise the High Court's inherent jurisdiction with respect to children -
- (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
 - (b) so as to require a child to be accommodated by or on behalf of a local authority;

In addition to care and supervision orders, there are four mechanisms for investigation and emergency protection. A court may grant to local authority a "child assessment order" where the local authority has reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm.¹³⁶ The court may provide that the child be kept away from home if it is necessary for the purposes of the assessment.¹³⁷ A child assessment order is limited to seven (7) days.¹³⁸ A court may grant to any person an "emergency protection order" if there is reasonable cause to believe that a child is likely to suffer significant harm if he is not removed.¹³⁹ Such an order is limited to eight (8) days, but may be extended another seven (7) days.¹⁴⁰ A constable may also take a child at risk of suffering significant harm into police protection for no more than seventy-two (72) hours.¹⁴¹ The court may also issue an interim care order or interim supervision order if it is satisfied that there are reasonable grounds for believing that the standards for a care or supervision order exist, but the proceedings are adjourned or the court orders an investigation.¹⁴² Under no circumstances can an interim order be effective for more than eight weeks.¹⁴³

Subject to these time-limited exceptions, therefore, a care order is the sole basis for a local authority to hold a child involuntarily. The new Act clarifies the legal effect of such an order:

While the care order is in force with respect to a child, the local authority designated by the order shall -

- (a) have parental responsibility for the child; and
- (b) have the power . . . to determine the extent to which a parent or guardian of the child may meet his parental responsibility for him.¹⁴⁴

Although the local authority assumes parental responsibility over a child in care, the Act creates a strong presumption in favor of reasonable contact with the child by his parents.¹⁴⁵ As with children in voluntary

-
- (c) so as to make a child who is the subject of a care order a ward of court; or
 - (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

¹³⁵ See *supra* note 32.

¹³⁶ Children Act, 1989, § 43.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*, § 44.

¹⁴⁰ *Id.*, § 45.

¹⁴¹ *Id.*, § 46.

¹⁴² *Id.*, § 38(1), (2).

¹⁴³ *Id.*, § 38(4).

¹⁴⁴ *Id.*, § 33(3).

¹⁴⁵ *Id.*, § 34(1).

accommodation, there is a duty on the local authority of consultation regarding decisions concerning children in care. The local authority must, as far as reasonably practicable, consult with the child and his parents.¹⁴⁶ The local authority's parental responsibility does not include the right to consent to adoption, change a child's religion nor remove a child from the United Kingdom.¹⁴⁷

The Act tackles one procedural problem and sidesteps another. Under prior law a parent could not petition in his own name to discharge a care order; rather he could only do so in the child's name. This lack of independent standing had significant implications for the parent. For example, a guardian *ad litem* could defeat any effort of a parent to appeal the denial of a discharge application.¹⁴⁸ Under the new Act, a child or any person who has parental responsibility for the child may apply for a discharge order.¹⁴⁹

The Act is far less clear with regard to party status generally for parents. As noted above, lack of party status has significantly impaired parents' procedural rights in the past. Rather than tackle this problem, the Act defers it to be addressed in future Rules of Court. Such rules may, in particular, make provision—

as to the persons entitled to participate in any relevant proceedings, whether as parties to the proceedings or by being given the opportunity to make representations to the court.¹⁵⁰

It is anticipated that the Rules (not available at this writing) will rectify this situation consistent with the recommendations in the White Paper.¹⁵¹

¹⁴⁶ *Id.*, § 22(4). See *supra* text accompanying note 131.

¹⁴⁷ Children Act, 1989, §§ 33(6), 33(7).

¹⁴⁸ *A.R. v. Avon County Council* 16 Fam. L. 150 (1985). See A. BAINHAM, *supra* note 44, at 121.

¹⁴⁹ Children Act, 1989, § 39(1).

¹⁵⁰ *Id.*, § 93(2)(b).

¹⁵¹ A. BAINHAM, *supra* note 44, at 187. Paragraph 55 of the White Paper states:

The Government recognise the advantages of involving in the proceedings anyone who has a proper interest in the child's future and his welfare. Some movement has been made in that direction by the Children and Young Persons (Amendment) Act 1986, under which a parent or grandparent can, in certain circumstances, be made a party to the proceedings in addition to the child and the applicant. That change in the law removed the more obvious shortcomings in the present arrangements. For the future, the position will be further improved. Anyone whose legal position could be affected by the proceedings will be entitled to party status. Hence, those who already have legal responsibility for the child, normally parents or the child's legal guardian, will be parties. In addition, anyone who is permitted to seek and is seeking legal responsibility for the child in the proceedings will be able to be a party. This will include anyone seeking a custody order such as a parent or stepparent or a person who is qualified to apply for a custodianship order. If the first two limbs of the proposed grounds for a care order (see paragraph 59) are satisfied, anyone who

V. CONSIDERATIONS FOR FUTURE EFFORTS TO DEAL WITH CHILD ABUSE

Unquestionably, the Children Act 1989 represents a progressive legislative achievement by the Parliament. Not yet implemented, it should protect children, but also protect their parents and thus foster the family unit. There is of course an inherent conflict between these two goals. If the law errs on the side of protection, abuse will be suspected where it does not exist, children will be removed from their families, and harm to all will result. If the law errs on the side of a severe definition of abuse and procedural protections, abuse cases will be undiscovered or unrectified and harm—if not actual tragedies—will result.

The “beyond a reasonable doubt” standard in criminal law effectuates our societal preference that it is better that a criminal go free rather than an innocent person be wrongfully convicted. While the public may theoretically agree with this policy choice as a general principle, the thought of innocent and defenseless children being harmed by those who are supposed to nurture them might well cause the public’s balancing to be tipped if the suspected crime involves child abuse. Wherever we draw our lines, they will be both underinclusive and overinclusive.

Child abuse will go unpunished and uncorrected in some cases, and will be wrongly imputed in others. Perhaps the only way to eliminate parental child abuse entirely is to remove all children from the care of their parents, a course rejected by the United States Supreme Court over sixty years ago.¹⁵² In any event such draconian measures could not preclude abuse by the alternative care givers.

The inability to resolve this dilemma does not justify inaction, and the United States certainly cannot be accused of inaction in this area. Child abuse has been the focus of much legislative activity¹⁵³ and judi-

establishes he has a proper interest in the child and who wishes to have custody of the child will be able to be a party. *See also, supra* note 43.

¹⁵² *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (rejecting notions of child rearing propounded by Plato and practiced in ancient Sparta).

¹⁵³ In the Commonwealth of Pennsylvania where the author supervises a family law clinic, the General Assembly has enacted in recent years: PA. STAT. ANN. tit. 11, § 2223.1 (Purdon 1988) (child care administrators must do background search on prospective employees for child abuse); *Id.* tit. 24, §§ 1-111 (background checks for school teachers); *Id.* tit. 18, § 2711(a) (arrest in domestic violence cases without warrant if officer has probable cause without having witnessed incident); *Id.* tit. 42, § 5984 (videotaped depositions, testimony by closed circuits television, use of anatomically correct dolls in child abuse cases); *Id.* tit. 11, § 2204 (funeral directors mandated to report suspected child abuse); *Id.* tit. 35, § 10182 (multiple amendments to Protection From Abuse Act making it easier to file actions); *Id.* tit. 11, § 2231 (establishing Children’s Trust Fund to finance programs and services for child abuse prevention); *Id.* tit. 42, § 5985 (out of court statement by child abuse victim made admissible under certain circumstances); and *Id.* tit. 23, § 5303 (limiting custody and visitation orders to parents with a history of child abuse).

cial scrutiny in recent years.¹⁵⁴

As American law continues to grapple with this problem, it behooves us to consider how the law went awry in Cleveland. The most obvious disparity between American and British law is the lack of a British constitutional mandate of due process of law. The American constitutional guarantee of due process, articulated in the Fifth and Fourteenth Amendments to the United States Constitution,¹⁵⁵ has long been held to apply to a parent's interest in maintaining care and control of a child. As the U.S. Supreme Court noted in *Lassiter v. Department of Social Services*:¹⁵⁶ "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' " is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection."¹⁵⁷

In a series of decisions the Supreme Court has applied the due process clause to parents in the context of termination of parental rights, albeit with mixed results.¹⁵⁸ Only one due process case has reached the Supreme Court involving removal of a child from a parent without the actual termination of parental rights. In *Stanley v. Illinois*, the Court grappled with removal of illegitimate children from their father upon the death of their mother without a hearing regarding the father's fitness. The children were made wards of the state and placed with court-appointed guardians. The Supreme Court held:

We conclude that, as a matter of due process of law, Stanley was

¹⁵⁴ At the U.S. Supreme Court level recent decisions related to child abuse include: *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (right of accused to in camera examination of investigation file by trial judge); *Coy v. Iowa*, 487 U.S. 1012 (1988) (right to confront accuser violated by closed circuit television testimony of victim); *DeShaney v. Winnebago County Social Services*, 489 U.S. 189 (1989) (damages not available for returning child to abusive father); *Baltimore City Department of Social Services of Bouknight*, — U.S. —, 110 S. Ct. 900 (1990) (duty of parent to comply with court order to produce child); *Idaho v. Wright*, — U.S. —, 100 S. Ct. 3139 (1990) (doctor's hearsay testimony of child abuse prohibited by Sixth Amend. absent particularized guarantees of trustworthiness); and *Maryland v. Craig*, — U.S. —, 100 S. Ct. 3157 (1990) (closed circuit testimony by child abuse victims allowed where there is a case-specific finding of necessity).

¹⁵⁵ Applicable to the Congress and the States respectively.

¹⁵⁶ 452 U.S. 18 (1981).

¹⁵⁷ *Id.* at 27

¹⁵⁸ *Quilloin v. Walcott*, 434 U.S. 246 (1978) (absent father's due process rights not violated by state adoption procedures); *Lassiter v. Dept. Soc. Services*, 452 U.S. 18 (1981) (no automatic right to counsel in termination proceedings); *Santosky v. Kramer*, 455 U.S. 745 (1982) (clear and convincing evidence required to terminate parental rights); *Lehr v. Robertson*, 463 U.S. 248 (1983) (natural father's rights not violated by state adoption procedures); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (man claiming to be natural father of child born to married woman not entitled to hearing on paternity over husband's objections). Additionally, in *Caban v. Mohammed*, 441 U.S. 380 (1979), the Court found that a state's adoption procedures violated the Equal Protection Clause of the Fourteenth Amendment, and therefore did not reach the due process issue.

entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.¹⁵⁹

Against this background, it is fortunately unthinkable that American courts would countenance the legal fiction that parents are not parties to child care proceedings, cannot fully engage in cross-examination, cannot challenge lack of access or cannot appeal the taking or continued holding of their children by a local authority.

However, Cleveland raises important issues not satisfactorily resolved in American law. While the beyond a reasonable doubt standard applies to criminal proceedings involving alleged child abuse, the Supreme Court has never addressed the burden of proof for removal of children from their families on a temporary basis (which all too often stretches out indefinitely). In *Santosky v. Kramer*,¹⁶⁰ the Court found that clear and convincing evidence is required for termination of parental rights. Considering the devastating effects on children and parents¹⁶¹ of a wrongful removal because of an inaccurate claim of child abuse, it is time that legislatures and courts delineate the burden of proof for court-ordered removals under child protective services acts.

Likewise the Court has never addressed the right to counsel in proceedings for removal of children. In *Lassiter*,¹⁶² the Court declined to find an automatic right of a parent to counsel in proceedings to terminate parental rights. Given this background, it is unlikely that the Court would find such a right in child removal proceedings. Yet surely the Cleveland Crisis demonstrates that the private interests at stake, the government's interests in protecting children but also avoiding wrongful removals, and the risks of erroneous decisions,¹⁶³ all warrant serious consideration by state legislatures of heightened due process procedures including right to counsel.

Directly related to due process concerns is the over-reliance on medical findings and testimony. It is noteworthy that in Cleveland, as the crisis developed, the norm was that the only medical testimony (or statement) proffered was that of the physician diagnosing child abuse. Indeed when the police surgeons began to doubt the accuracy of the diagnoses,

¹⁵⁹ 405 U.S. 645, 649 (1972).

¹⁶⁰ 455 U.S. 745 (1982).

¹⁶¹ Beyond the obvious sundering of the family relationship and the labelling of parents as child abusers, state statutes frequently contain secondary punishments such as prohibitions on visitation and on employment in areas such as schools and day-care centers. See *supra* note 153.

¹⁶² 452 U.S. 18 (1981).

¹⁶³ These are the factors utilized in *Lassiter*, as originally propounded in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

they were simply denied the opportunity to conduct second examinations. Parents were ill-equipped or unequipped to combat the medical testimony which presumably was based upon scientifically valid tests. As noted above, one of the steps which ended the Cleveland Crisis was the establishment of a second opinion panel.¹⁶⁴

Finally, by mid-June 1987, a court was for the first time presented with conflicting medical testimony regarding whether a child had been abused. "It was the first time (in the experience of the Chairman of the Juvenile Panel) that Teesside magistrates had been invited to assess the quality of conflicting medical evidence provided by experts in child abuse."¹⁶⁵ Contrast the situation of a jurist in a child abuse case where the only medical evidence is that a child has been sexually violated, with the situation of conflicting medical testimony.

Understandably, in the first case, any jurist is likely to credit the medical expert over the parent claiming innocence. The jurist likely will have no way of knowing if the scientific basis of the testimony is controversial within the medical community.¹⁶⁶ Without the conflicting medical testimony, if valid conflicting testimony could be offered, the jurist has insufficient evidence to assess the facts. The medical sign relied upon to diagnose anal abuse of children in Cleveland remained the same from the beginning to the end of the crisis. The way that sign was treated by the legal system ultimately changed, but only after many families' lives were disrupted, perhaps forever.

The United States has not recognized a due process right to a second medical opinion in child abuse cases. In light of Cleveland, the importance of such an opinion can hardly be doubted. In this regard it is critically important that the second medical opinion come from a physician who is truly independent of the physician making the original diagnosis. Two colleagues at the same hospital or other institution cannot be expected to bring the appropriate degree of objectivity. In the Inquiry, parents complained that Dr. Higgs and Dr. Wyatt had purported to provide second opinions as to each other's diagnoses. For obvious reasons, parents viewed this as a "farce."¹⁶⁷

Often the parents who are subject to allegations of child abuse are those least able to arrange and afford a second medical opinion. Legislatures must consider establishing statutory procedures for second examinations and opinions in appropriate situations.

Ironically, in 1983, the article "Care Proceedings in the USA—

¹⁶⁴ See *supra* note 109.

¹⁶⁵ Report of the Inquiry into Child Abuse in Cleveland 1987, 173, §§ 10.12-10.13.

¹⁶⁶ See *supra* notes 54 & 57.

¹⁶⁷ Report of Inquiry, at 37-38, §§ 2.10-2.11.

Some Lessons for the UK?"¹⁶⁸ warned of the lack of procedural safeguards in the U.K.'s child care laws and suggested British consideration of American due process ideas. Sadly it took the Cleveland Crisis to persuade the U.K. of the desirability of fully recognizing the parental interests involved. The Report of the Inquiry into the Cleveland Crisis unequivocally concluded, ". . .there was disruption of the lives of people, with serious consequences to the children and families concerned. . . ." ¹⁶⁹ The fact the Inquiry further found no intention to make a fundamental attack on family life¹⁷⁰ in no way mitigated the terrible damage inflicted. One must hope that the as yet unpublished Rules of Court implementing the Children Act 1989 fully effectuate due process for parents in England.

One must also hope that the dire consequences of lack of due process for the parents of Cleveland will give pause to American legislatures in their zeal to protect children in future legislation. The heinous nature of child abuse, particularly child sexual abuse, can all too readily evoke an emotional response that causes the law to fail to sustain Constitutional guarantees in the tide of prevailing current opinion.¹⁷¹ If and when this happens, children and their families can be seriously harmed.

¹⁶⁸ Cole, *supra* note 42.

¹⁶⁹ Report of the Inquiry into Child Abuse in Cleveland 1987, 165, § 9.3.22.

¹⁷⁰ *Id.*

¹⁷¹ *Maryland v. Craig*, — U.S. —, 110 S. Ct. 3157, 3171 (1990) (Scalia, J., dissenting).

