SEVENTH WILFRED FULLAGAR MEMORIAL LECTURE: "THE BATTERED BABY AND THE LIMITS OF THE LAW"*

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Ten years ago, I came to the Alexander Theatre at Monash University, then recently opened, to hear a public lecture given by my former Oxford tutor, Sir Rupert Cross. It never occurred to me that I would be invited back to Monash as a Visiting Professor and to speak from this same platform.

As if that were not honour enough, I find myself joining a fortunate group, hitherto of great distinction, who have been privileged to deliver a lecture named in memory of Sir Wilfred Kelsham Fullagar. Mr Justice Fullagar's clear and creative judgments contributed much to the reputation of the High Court of Australia in the common law world, and it is fitting that a Fullagar Lecturer should be directed by the University's Regulations to speak "so far as possible . . . in relation to current trends in and developments of legal thought".

But Wilfred Fullagar was first a classical scholar. He would, I hope, have approved of lectures which seek to cross the boundaries which tend to isolate the law from other disciplines. Last year, Sir Richard Eggleston surmounted the daunting barrier between law and probability theory in his lecture on proof, "Beyond Reasonable Doubt".[1] My, more modest, aim is to explore some aspects of the interface between law and social work, using as a focus the problem of child abuse—or, to use its more dramatic title, that of the battered baby. I want to explore the extent to which, and the ways in which, the law does and should seek to deal with this problem.

My interest in this area dates from the time of my earlier visit to Australia in 1968. I was asked to join in a number of seminars which brought together lawyers, medical men and social workers, and which were organized under the (slightly improbable) aegis of that well-known Victorian journal of news and social comment, "Truth". Much more recently, earlier in this present year, I had a new and more immediate involvement with the problem of child abuse while acting as the sole

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1 (1977) 4 *Mon. L.R.* 1.

member of an Enquiry established to investigate the circumstances leading up to the death of a 16-month-old English girl, Karen Spencer.

I want to begin with a short account of that case. It is in one sense a fairly ordinary case of child abuse—and isn't that a chilling remark to have to make? Its ordinariness makes it all the more valuable as an illustration of the issues I hope to discuss in the course of this lecture; and because the Report of my Enquiry contains a very full account of the case, and has been made public,[1a] I can use this illustrative material without any breach of confidentiality.

Karen's parents, David and Marilyn Spencer, were married in 1973 when he was 17 and she almost 22. David Spencer worked as a joiner, and later in the local colliery. He was described as ego-centric, immature, very sure of himself; he always thought he knew best. Marilyn, though 5 years older, was a much more withdrawn and isolated person. At primary school she had scarcely spoken to the other girls, let alone the teachers. She was of borderline subnormality in intelligence, with IQ assessments in a range from 65 to 75.

The Spencer marriage was a violent and unhappy one. The child Marilyn was expecting at the time of the marriage miscarried; the couple separated on two occasions for brief periods; there was much friction caused by their living with in-laws and later in very poor accommodation behind and over a green-grocer's shop. Mrs Spencer made 2, or perhaps 3, suicide attempts in the first two years of her marriage. She was not keen to have children, but was persuaded to start a family in part by the fact that a child would improve the chances of local authority housing being made available to the family.

So Karen was born at the end of 1975. The birth was an extremely difficult one, ending in a breach extraction under general anaesthetic in the course of which Karen was injured. As a result, the baby was kept in hospital for 37 days before being discharged home. During that time the nursing staff noted that the mother seemed uninterested in handling her baby.

When Karen had been home for six weeks she was brought to the local doctor's surgery by her mother, with a story of the child having rolled off the settee and on to the floor, hurting her head in the process. In fact she had a fractured skull, and some other injuries, not all of the same date. Mrs Spencer admitted that she had thrown Karen to the ground when she refused to feed.

It was decided not to take criminal proceedings. Instead the local authority took care proceedings in the juvenile court, and a care order

[1a] *Karen Spencer, a Report to Derbyshire County Council and Derbyshire Area Health Authority*, published by the County Council, May 1978.

transferring custody to the authority was made.[2] Karen was placed with foster-parents.

These decisions were taken by an inter-disciplinary "case conference" at which the hospital staff, the community health workers (the 'Health Visitor'), the police and the social services department were all represented. The case conference also decided to work towards the rehabilitation of the family, with Karen going home for regular weekend visits; and to arrange for a psychiatric assessment to be made of Mrs Spencer. It was never very clear how those two decisions related to one another; and the decision to secure psychiatric help was not implemented.

For some months the parents received regular counselling by a social worker, who used to spend much of his Tuesday evenings with them. Karen was home each weekend, but those visits were not monitored in any way. The case was regarded with very real optimism, an optimism which survived a major incident in mid-year in which, following another miscarriage, Marilyn Spencer, depressed but unwilling to seek outside help, made a further suicide attempt which her husband treated with astonishing unconcern.

In October the Spencers applied to the court for the return of their child, but the application was dropped when it was learned that a council house would soon be made available and that Karen might be returned if all was going well. Her earlier return had been refused by a reconvened Case Conference—but a third and very ill-attended Conference in early 1977 decided "to take a calculated risk", and Karen was home on trial on a full-time basis at the end of March.

On April 16th, Karen was twice injured by her mother. She was struck violently quite early in the morning, and then during the afternoon, in circumstances which are not at all clear, she was twice dropped or thrown to the ground while her mother was taking her along a footpath across a local field. Karen suffered a second fracture of the skull with related injuries and died 3 days later.

Not many years ago, the response to a case involving a serious injury to a child would be the invocation of the criminal law. There is no shortage of cases in the legal literature. There is, for example, a Queensland case, *R.* v. *Smith*,[3] decided in 1908, which exhibits many of the characteristic features of child abuse cases: a series of wounds caused over a period of time; delay in obtaining medical help; a story given to explain the injuries which is not compatible with the observed symptoms. There, a number of open wounds and a missing finger were explained as having been caused by

[2] The effect of this order corresponds to an order making the child a ward of an Australian State Department of Social Welfare (or its equivalent); but the order can be discharged at any time, and the parents can apply to the juvenile court every 3 months with a view to obtaining a discharge.

[3] [1908] Q.W.N. 13.

the 2-year-old child pulling a billy-can of boiling tea over itself. The child died from its injuries and the parents were convicted of manslaughter.

It is significant that the charge was manslaughter. The law did not in 1908, and does not now, have any special category into which child abuse cases may be fitted. If you examine, for example, the broad canvas of the Victorian *Crimes Act*, with its meticulous detail (such as the offence of assaulting a magistrate who is engaged upon his duty of preserving the wreck of any vessel[4]), you will find only one provision dealing with non-sexual offences against children: "whosoever unlawfully abandons or exposes any child being under the age of two years shall be guilty of a misdemeanour".[5] It is not that there is a gap in the law: the offences of manslaughter, wounding and assault are quite adequate to cover the ground.

The current fashion in preparing legislation on the criminal law is to use broad categories, by way of reaction against the excessive particularity of past generations. In England, we talk now about "theft"; the special offences committed by embezzlers and dishonest bailees have lost their distinguishing titles. Perhaps there is something to be said for the old distinctions—which can produce headaches for prosecutors, nightmares for judges, and mean questions for university examiners—but which may reflect a moral judgment, a community sentiment that identifies particular types of theft as having special characteristics. And which may also reflect social science findings about the conduct in question, the circumstances in which, and the persons by whom, it is committed.

If child abuse is an identifiably distinct phenomenon, then it deserves separate consideration in the criminal law. The use of broad undifferentiated labels can mislead prosecutors, and judges, and sentencing and parole authorities.

The old Victorian case of *R.* v. *Duffy*[6] (1880) helps to illustrate my point. It concerned a girl of 14, incapacitated by a hip injury, and unable to get out of bed. She was grossly neglected by her mother, the bed sores from which she suffered ulcerated and became infected, and she died as a result. The girl's mother and step-father were convicted of manslaughter; but the step-father's conviction was set aside on appeal. Stawell C.J. explained why

> "It was the duty of the mother to attend personally on her offspring; to keep her clean and properly nourished, and if necessary to call in medical assistance. The duty of the prisoner [i.e. the step-father] was to provide food and necessaries; and if his attention were called to the fact that the child was not receiving necessary attention, or needed medical advice, to see that they were supplied to her. But I cannot say that it

[4] *Crimes Act* 1958 (Vic.), s. 39.
[5] Ibid., s. 25.
[6] (1880) 6 V.L.R. (L.) 430.

was his duty, in point of law, to visit the room in which the sufferer lay, and to see for himself that his wife discharged her duty."

The form of the judgment was dictated by the emphasis on a duty owed to the deceased which was found in the contemporary understanding of the law of manslaughter. To the modern legal observer it certainly presents an astonishingly narrow view of parental duties. I suspect that many would also share my reaction that, looked at in the whole context of the family, and of the tensions of a step-parent relationship, the case asks the wrong sort of questions altogether—quite apart from arriving at the wrong answers.

In actual practice, I think we do observe some of the distinctions obscured by our legal definitions. Marilyn Spencer was not charged with causing grievous bodily harm to her baby Karen after the first incident of battering. The police decision was influenced by a number of considerations: the child was (at least for the time being) safe; the family would receive the attention and the skilled counselling of a social worker; given Mrs Spencer's personality and the state of the marital relationship, criminal proceedings could do immense harm; and there would be particular risks to Karen if she were seen as, in a sense, the "cause" of the trouble. So the criminal law is put on one side; this particular form of legal intervention is withdrawn in favour of other techniques and the skills of other disciplines.

Writers on social work principles sometimes make great play of the contrast in terms of ideology between a compassionate and non-judgmental approach, focussing on the individual and his needs, and supported, in part at least, by the apparatus of empirical research—a social work ideology—and the archaic crudities of the criminal law, focussing on the observable actions of an individual, measuring his responsibility and applying penal sanctions with a deterrent purpose.[7]

There is, of course, room for a very great deal of debate at the theoretical level in this area. Almost every word in the statement I have just made: "responsibility", "judgment", "deterrence", and even "ideology", is the subject-matter of an extensive literature. I want only to make a simple practical observation, that the operation of the law does not fit the ideological framework attributed to it. Judges and prosecutors act—as did the Police Superintendent of Derbyshire in the Spencer case—in a way which the tidy-minded observer finds unprincipled, but which is perhaps better explained as an attempt by essentially pragmatic people to juggle ideas drawn from several different sets of principles, knowing full well that they conflict, but trying to make the system work. A non-lawyer listening in to the conversations of lawyers would, I suspect, be surprised at the

[7] See, for example, J. Carter (ed.), *The Maltreated Child* (London, Priory Press, 1975); and her contribution to the 1st Australian National Conference on Child Abuse, at p. 65 of the *Proceedings*.

delight lawyers take in the neat cutting of corners, the discreet stretching of statutory language, the deft avoidance of the inconvenient principle—all giving the lie to so much legal rhetoric, and with never a blush.

In the child abuse context, although the criminal law plays a minor part, legal regulation of other sorts exists and continues to grow—often at the urgent request of social work agencies.

In the Karen Spencer case, care proceedings—civil proceedings in the juvenile court—were taken. The form and style of such intervention remains controversial, but the existence of legal coercive powers to remove the legal custody of a child from its parents and to vest it in the State is not seriously challenged. What is sometimes underestimated is the effect which the legal framework has on the practical outcome of individual cases.

In some jurisdictions, proceedings in the juvenile or children's court may result in the child becoming a ward of the State, or of a State agency, until either the child reaches a prescribed age (of 16 or 18) or the State agency otherwise determines. Once the decision is made, the role of the court is discharged, and the parents' rights can only be revived by a social work decision. In other jurisdictions, including England, the courts retain more extensive powers of supervision, so that an order once made can be reviewed, and perhaps discharged, on the parents' application; and such a review can be made as often as once every three months.

This difference in legal framework is usually discussed *either* in terms of the relative power of courts and social work agencies *or* in terms of the need to safeguard the continuing interests of parents. But it has a further and important aspect, its influence on the way in which decisions are made by the social work agency.

Karen Spencer again provides an illustration. The decision of the first Case Conference in her case was to work towards the rehabilitation of the family. One factor may have been a respect for the "blood-tie", until recently strongly emphasized in social work training. But another factor was the knowledge that no firm decision in the opposite direction—to work to secure a final separation of Karen from her natural parents—could be made, given the right of the parents to make repeated applications to the court, and the court's right to determine the outcome, if need be against social work advice.

This serves to illustrate just how important it is for lawyers, judges and magistrates, and social workers to debate across professional boundaries; all too often the debates about civil liberties in this area are uninformed by a real awareness of the detailed practical implications of legal rules.

Another form of legal provision relating to child abuse is the "reporting statute". This is an idea of United States origin, dating from the early 1960s, and which has survived a number of changes of direction to become

in the 1970s a matter of debate, and some legislative action, here in Australia.

The origins of reporting statutes are well documented. Shortly after the second World War, medical literature[8] drew attention to cases in which head injuries to young children (including the type of subdural haemotoma which Karen Spencer sustained) were found together with other forms of injury, notably fractures of arms or legs. After various explanations had been advanced and rejected, it was accepted in the mid-1950s that these injuries were not accidental, or the result of some special weakness in certain children, but were deliberately inflicted by parents.[9]

In the years which followed, comment was directed to the question of the reporting of such cases by medical practitioners (who would inevitably see the serious cases in the course of their work) to the police. Medical men were (and still are) very reluctant to act in this way. Even if they suspect that the case is one of "non-accidental injury" (a significantly euphemistic term), the ethics of the doctor-patient relationship work against any idea of calling in the police. These hesitations are coupled with fears that the parents might retaliate by alleging a breach of medical etiquette, invoking the professional disciplinary jurisdiction, or might even go to court alleging defamation or malicious prosecution or conspiracy. From the doctor's point of view, it is no real answer that, in the great majority of cases, any proceedings will result in his favour. That result may only be arrived at after months or years of delays, and the damage to the goodwill on which a doctor (outside perhaps a National Health Service context) must depend is enormous: "he is being taken to court" says the gossip; "he gives away his patients' confidences; you cannot trust him with anything. . . ."

And so it is that the statutes passed throughout the United States in the period 1963 to 1967, and in three Australian States in this decade, contain elaborate provisions seeking to set at rest the fears of anyone reporting a child abuse case. For example, the *Child Protection Act* 1974 of Tasmania expressly provides that no court or tribunal shall hold the making of a report to be a breach of professional etiquette or ethics or a departure from acceptable standards of professional conduct, and also excludes defamation and the other causes of action which I have mentioned.[10]

The original United States model was directed at medical men, and required the report to go to the police. More recent models depart from

[8] The most cited of papers is J. Caffey, "Multiple Fractures of the Long Bones of Infants suffering from Chronic Subdural Haematoma" (1946) 56 *Am. Jo. Roentgenology* 163. The early history is summarized in convenient form in the *Report of the Child Maltreatment Workshop*, Melbourne 1976.

[9] Woolley and Evans, "Significance of Skeletal Lesions in Infants Resembling those of Traumatic Origin" (1955) 158 *J.A.M.A.* 539.

[10] *Child Protection Act* 1974 (Tas.), s. 8(3).

the prototype on both these points. If a duty to report is imposed by law, the duty rests not just on medical practitioners but also on groups such as probation officers, child welfare officers, school teachers, workers in children's nurseries, and professional workers in mental health, or in alcoholic or drug dependency fields.[11] The first Australian statute, the *Community Welfare Act* 1972 of South Australia referred expressly only to doctors and dentists; but the 1976 amendments[12] to that statute added nurses, teachers and social workers.

The most recent statute—the *Child Welfare (Amendment) Act* 1977 of New South Wales—contains a particularly interesting provision.[13] Classes of persons may be prescribed by reference to their profession, calling or vocation as persons under a duty to report cases of child abuse. One profession, however, is expressly excluded; its members cannot be placed under a duty to report a case. You will have guessed which profession it is: solicitors and barristers are the exempt class. The lawyer will recognize this as an example of legal professional privilege, essential to protect the confidential relationship between lawyer and client, to protect the high standards of legal professional conduct and etiquette and to safeguard the administration of justice. The lawyer can only hope that those phrases are sufficiently high-sounding to obscure the disconcerting similarity between the arguments advanced in the past by the physicians —and rejected—and those which buttress the lawyers' position, now given statutory protection.

The other departure in recent legislation from the early model is that the report is to be submitted not to the police but to a social work agency. This has many advantages, not the least of which is that the factors which most reliably identify the child abuse case are medical and social in nature. The social welfare agency, particularly if the report comes from a medical source, is best placed to investigate the case, and is inevitably the key agency in the ultimate decision as to appropriate action.

Some idea of the relevant social and medical factors can be gathered from any of the very large number of published studies of the child abuse syndrome. The most recent I know of is by Pickett and Maton,[14] and is based on a small sample of 20 cases, probably at the more serious end of the scale, for all had been referred to a Special Unit operated by the National Society for the Prevention of Cruelty to Children. Let me quote from their results; and it is striking how many features of the Karen Spencer case are reproduced.

[11] See, e.g., the list in Tasmania: *Child Protection Order* (No. 2) 1975, S.R. 1975 No. 275.
[12] *Community Welfare Act Amendment Act* 1976 (S.A.). See s. 82d(2)(a)-(g).
[13] *Child Welfare (Amendment) Act* 1977 (N.S.W.), which inserted s. 148B(1)(b) in the *Child Welfare Act* 1939.
[14] J. Pickett and A. Maton, "Protective casework and child abuse: practice and problems" (1978) 9 *Social Work Today* (14 March 1978) p. 10.

"The children who were injured were mostly the first and only child of the family (85 per cent), and their age averaged 14 months. Very often their birth or the preceding pregnancy were associated with something negative. In 75 per cent there had been an abnormal pregnancy; (in 45 per cent abnormal delivery); 30 per cent were separated from their mothers for some period of the early months of their life; and 20 per cent of them suffered neonatal illness. Thirty per cent of the children suffered serious injuries and in 55 per cent of the cases protective action was taken in the juvenile court.

The parents were typically young; 75 per cent of the mothers were under 20 years and 80 per cent of the fathers were aged 18-22 years. Pre-marital pregnancy and unstable sexual relationships characterised the parents' [histories]. Fifty per cent of the mothers were not living with the child's natural father at referral and around 50 per cent of the fathers were not living with the mothers during pregnancy.

In 45 per cent of the cases there was a history of husbands abusing their wives and in 25 per cent of the sample there was reciprocal abuse of the husband by the wife. Thirty per cent of the fathers had a problem with alcohol, and 35 per cent of them had a criminal record. Twenty five per cent of the mothers had made a suicide attempt.

Inadequate accommodation was common. Forty five per cent of the families shared accommodation and 40 per cent of the families occupied one or two rooms. Thirty per cent of the fathers had frequent changes of job and in 35 per cent of the cases there were financial problems."

Although reporting statutes have gone through a considerable process of refinement, there are some features of the Australian States' legislation which are puzzling. Each Act sets out the circumstances in which a report must be made. In New South Wales, it is where the reporter "has reasonable grounds to suspect that a child has been assaulted, ill-treated or exposed".[15] In Tasmania, the reference is to a child who has "suffered injury through cruel treatment",[16] "cruel treatment" being defined to include neglect or failure to perform any act required for the welfare of the child.[17] It seems almost certain that many cases of what is commonly called "emotional abuse" of children (in which a child may be "frozen out", wholly denied that love and support which a parent should provide), potentially as harmful as physical assault, fall outside the reportable categories. The South Australian statute is drafted so that the occasion for making a report is suspicion that someone has committed the offence of maltreating or neglecting a child in a manner likely to subject the child to unnecessary injury or danger.[18] This reference to an offence may well discourage some people from reporting cases as they should; and, because penal provisions in statutes are (at least in theory) strictly construed, it may serve to limit the scope of the duty. The 1976 proposals of the Victorian Child Maltreatment Workshop, not accepted by the Victorian

[15] *Child Welfare Act* 1939 (N.S.W.), s. 148B(3), as substituted in 1977.
[16] *Child Protection Act* 1974 (Tas.), s. 8(1).
[17] Ibid., s. 2(3).
[18] *Community Welfare Act* 1972 (S.A.), s. 82e(1) (as amended in 1976).

State Government, include cases of emotional abuse, but a drafting technique similar to the South Australian is used, cross-referring to grounds for State intervention.

In Tasmania the duty to report a case of cruel treatment is stated to arise when circumstances come to the notice of persons under a duty to report that warrant a report being made.[19] If, as appears to be the case, (arguably in strict law; certainly in practice), this gives the worker a discretion—for he must assess whether the circumstances do warrant the making of a report—the Tasmanian Act is not really a case of mandatory reporting at all. Certainly it is only in New South Wales, of the 3 Australian jurisdictions with legislation, that breach of the duty to report is made an offence.

It is remarkably difficult to assess the effect of mandatory reporting statutes. In one United States jurisdiction, North Carolina, the level of reporting increased almost threefold when a mandatory statute replaced a voluntary one; but a high proportion of the extra reports turned out to be unfounded on investigation.[20] A similar increase in reported child abuse cases was found in New South Wales in the first year after the passing of the 1977 Act; the relevant statistics were published only recently. But in South Australia official statistics for the first three years of mandatory reporting gave some twenty reports a year, appreciably less than the number of cases identified in hospitals as child abuse cases; and *no* reports were received from medical practitioners in the community. I put alongside those figures the total number of new cases reported under a voluntary, non-statutory system in Derbyshire (population 800,000) in 1976 and 1977. There were 387 cases in 1976 and 246 in 1977. And I cannot believe that the population of South Australia is entirely protected from those aspects of human frailty which beset the good people of Derbyshire.

Anyone examining just the Australian statistics, and observing the contrast between the effects of the legislation in South Australia and in New South Wales, might be tempted to conclude that the difference is explained by the criminal sanctions for failure to report which are included in the New South Wales Act. I think that that is an unlikely explanation. The fact of the matter is that successful criminal proceedings would be very few indeed, given that so much must depend on the professional judgment of the doctors or social workers concerned. If you include the English statistics in the picture, it becomes clear that a very high level of reporting can be achieved without any statutory provision, and *a fortiori* without the creation of criminal offences. Reporting practice seems to

[19] *Child Protection Act* 1974 (Tas.), s. 8(2).
[20] M. P. Thomas, "Child Abuse and Neglect Part II: Historical Overview, Legal Matrix and Social Perspectives on North Carolina" (1976) 54 *North Carolina L.R.* 743.

depend upon levels of professional awareness and co-operation, only very indirectly affected by legislative action of any sort.

In England there has been relatively little debate about mandatory reporting. Since the Maria Colwell case in 1974, action has been taken to establish bodies known as Area Review Committees on Non-Accidental Injuries to Children, which provide a forum of an interdisciplinary nature —for doctors, social workers, teachers, and the police—in each local government district, and which are intended to oversee the inter-disciplinary procedures in individual cases. A key part of this administrative structure is the "non accidental injury register" kept in each area.

This keeping of registers is, apart from reporting statutes, the principal legal/bureaucratic response to child abuse cases. Designed originally in the United States to keep track of child abusers who moved from one area to another, registers now have a frankly diagnostic function.

A recent report of the British Association of Social Workers puts this argument[21]

> "The child likely to be at risk of repeated abuse is the one where isolated incidents of violence go unnoticed so that no pattern is seen. A child injured in the past may show no obvious signs of trauma, but on evidence of past abuse a worker may make a different diagnosis when confronted by a further suspicious injury. . . . The register is a simple indication of that history; if readily available it should tighten the 'safety net' and reduce the risk of undiagnosed abuse."

There are, to the lawyer's eye, all sorts of dangers in what amounts to a register of suspicion. And the dangers seem to grow as do the categories of cases eligible for registration. The British Association of Social Workers would include in the registers not just proven or suspected cases of abuse, including emotional rejection and "severe non-organic failure to thrive" but also

> "all [newborn babies] whose parental and perinatal histories, and assessment of the parent/infant relationships suggest a high degree of risk of abuse. (This will include the small group of children whose parents clearly show many of the predictive factors acknowledged to indicate strong potential for child abuse.)"[22]

I concede at once that Karen Spencer would come in this last category in view of what we now know about her parents' history. In other words, she could have been registered at birth, before any injury was caused to her. But in fact the family history as I recounted it earlier was known to no one person in its entirety until Karen was dead and I started accumulating files; so I doubt if it would have happened in the real situation.

But the proposal to register such cases fills me with alarm. The advocates of registers stress that civil liberty aspects are considered; parents are to be

[21] *The Central Child Abuse Register*, para. 3.2.2.(i).
[22] Ibid., para. 3.4.5. IV.

told, if at all possible, that a case of child abuse has been recorded, and so given at least some opportunity of challenging the record. But how would you, in practice, tell the proud parents of a newborn child that it was on the "likely-victim" list? And whatever the practice guidelines say, there is one thing that is well-known to policemen giving cautions—and to lecturers—that there is a wide gap between the announcement of something, which complies with one's duties, and actually communicating to the hearer. . . .

In any case, what do you do when a newborn baby is registered as being at risk? Registers are confidential documents, consulted by a select few for good reason. But a "predictive" entry could only be useful as a warning, something to alert the large group of people who might have dealings with a family that here is a child whose progress needs to be carefully monitored—or, to be more honest, whose parents need to be watched. How can you combine meaningful confidentiality with effectiveness?

In my view, the proponents of register systems are at fault in failing to give sufficient weight to the fear of unjustified labelling of families, particularly where a single register contains cases some of which are cases of proven, or admitted, assault, some of which are cases in which there was unconfirmed suspicion, and some of which are mere predictions based on statistical correlations. The lawyer recognizes a crucial distinction between facts that can be proved and allegations that cannot; he may even give too much weight to it, but the experience of the law teaches that that is the right direction in which to err.

In any event, I have to say that I find the positive case for systems of registration has yet to be made out. Statistics are kept in most English local government areas showing the number of cases registered, and the source of the reports; but there is very scanty information about the use of the register thereafter. It seems almost a matter of pride that your county register is full of names, but the number of enquiries made of the register-keeper, and the sort of information sought and given, are not recorded. I suspect there are relatively few enquiries—in which case most of the claims made as to the value of the register cannot be supported; but the evidence is simply not available.

It is too soon for most register systems to have been tested at one crucial point, that of removing names. Most registers in England were established in 1975, and a period of 3 or 5 years was commonly set for a name to remain upon a register on the basis of a single report; after that period the entry was to be cancelled, or at least reviewed. We are only now moving into the period in which the implementation of those procedures can be placed under scrutiny.

I have been examining thus far what we might call the formal, structural response of the law to a particular social phenomenon. But law is

concerned not just with structures and substantive rules, but also with certain ideas of fairness and justice, certain right procedures and rules as to proof. Lawyers have learned to attach great importance to these ideas, and although we tend to bury them under a mass of detail, and are tempted to reduce them to mere legalism, there is a core of sound common sense which is worth fighting for.

Quite a number of the recent developments in public law are related to these ideas. Attempts to give the citizen a right to official information about him, or to compel administrative bodies to give reasons for their decisions in particular cases, are examples of this trend. We try in a sense to make administrators think like the better sort of lawyer. And that raises the question, can social workers be made to think like lawyers?

We need to recognize that social work decisions are very unlike the typical legal decision. A legal decision is commonly taken after a defined event; the clock has stopped, or is deemed to have stopped. But a social worker must take his decision in the midst of events; and his context is human relationships which will not stand still to suit his convenience. The time element, the cumulative pressure of events, is a special feature of his work.

Let me try to illustrate what I have in mind:

Karen Spencer, you will recall, was boarded out with foster-parents; but went home at weekends. Both these facts have a cumulative effect over a period of time. Two writers on the Californian system, Goodpaster and Angel,[23] describe foster-care as the "chief problem" in this area

> "Long term placement in foster homes and consequent separation from the natural family may have severe psychological effects on the child, including possible identity problems. . . . The natural parents may also suffer and develop resentments; in any event, when the child is removed from the home, they are prevented from interacting with him. This forced separation may to some extent be beneficial since the parents are relieved of the stress of parenting. But while they cannot injure the child again, the parents cannot learn to deal with the child properly."

(One could add, on the same lines, that social work counselling can itself create stresses; one of the factors in the return of Karen Spencer on a permanent basis was the progress the Spencers seemed to make when the social work agencies were at their least active. What that overlooked was that the key question was how the family, and Mrs Spencer in particular, would respond to stress; good performance in the absence of stress was no indicator.)

Home-leave, like fostering, produces a set of effects. Once home visits have been started, it is very difficult to discontinue them, in the absence of positive evidence of further abuse. Once a number of visits have taken

[23] G. S. Goodpaster and K. Angel, "Child Abuse and the Law: the California System" (1975) 26 *Hastings L.J.* 1081, 1100.

place without ill-effects, that fact becomes an argument for the extension of the periods involved, or permanent return home, or a discharge from wardship altogether. In any event, regular twice-weekly changes of care may upset the child who will begin to show signs of being disturbed, and so the argument is further strengthened. This sequence was clearly visible in the Spencer case.

It is not only this question of movement over a period of time which differentiates social work from the lawyer's decisions. Another crucial difference is the type of data upon which the decision must be based.

For example, should a child who has been the victim of an incident of child abuse, and who has been visiting the parents at weekends, be returned home on a full-time basis? It is generally agreed that the sort of question to be examined is whether the parents have learned to enjoy the child's company; whether they now enjoy being parents; whether they feel it is a task they can take on together, in a spirit of mutual support; whether they would willingly seek outside help in a crisis. Almost all the data which constitute the answers to these questions must be supplied by the parents themselves. If a social worker is able to observe the relationship of parent and child, it will only be for a short period of time; and the parents will know that the worker is there, so that the situation is an artificial one. For the rest, the worker must rely upon his interpretation of the parents' own account of the progress they have made. Particularly in cases where only one parent is an abusing parent, but both parents are deprived of the care of the child and both are 'on trial' during a period of home visits, assessment is extremely difficult. In lawyers' terms, all the evidence consists of self-serving statements, and there is no corroboration.

Despite all this, I find that there is a willingness on the part of many practising social workers to listen to the ideas of procedural justice and ideas of evidence and proof developed by lawyers. Social workers are, after all, increasingly familiar with the procedures of the courts; and there are occasions, such as the three case conferences in the Karen Spencer case, when there is a formal review and assessment and a consideration of the future direction of an individual case.

Of course, such a conference could not begin to apply the law of evidence. If social workers were unable to rely on hearsay they would often have no data at all, for almost any social worker's report relies heavily on information gathered from school principals or employers, based in turn on conversations that person has had with colleagues. But that does not mean that the idea behind the hearsay rule is irrelevant when considering conflicting reports; or that information adverse to someone's interests should not be put to that person in advance of an assessment meeting if at all possible. Quite a lot of the "good practice" set out in social work texts can in fact be reinforced by the accumulated experience of the law.

So what are my conclusions? Whenever law is dealing with family relationships it is at best a clumsy instrument. Law cannot make people be wise or responsible or happy or good. In child abuse cases in particular, the criminal law is often, and rightly, rejected, as likely to do more harm than good. Mandatory reporting statutes—probably ineffective—present dangers to individual liberties which are grievously compounded by the administrative implications of registering the reports in certain types of register. The law provides a necessary framework for intervention by social work agencies, but the framework is one which can distort decisions in particular cases.

The positive side may seem more limited, but a lawyer's concern with individual rights, and the need to control and monitor those administrative decisions which most closely and most directly affect the happiness of families must not be dismissed; it lies behind many of the criticisms aired in this lecture. But I also see a positive value in the continual exposure of social workers to lawyers' ideas—and vice versa. As I know from experience, there are professional barriers to overcome, and disciplines have their own languages and styles of debate which need much translation; but the rewards are considerable.

Just as the legal profession has so often been enriched by men trained in the ancient classical disciplines, so now it should seek to maintain dialogue with the professions alongside which it works, to contribute from its store of wisdom, and perhaps even gain a little in return.