

Journal of Legislation

Volume 9 | Issue 1

Article 7

1-1-1982

Challengenege of Child Abuse Cases: A Practical Approach, The;Note

Kip A. Petroff

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

Recommended Citation

Petroff, Kip A. (1982) "Challengenege of Child Abuse Cases: A Practical Approach, The;Note," *Journal of Legislation*: Vol. 9: Iss. 1, Article 7.

Available at: <http://scholarship.law.nd.edu/jleg/vol9/iss1/7>

This Note is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE CHALLENGE OF CHILD ABUSE CASES: A PRACTICAL APPROACH

INTRODUCTION

Policymakers should concern themselves with the problem of child abuse. It is estimated that in the United States one child dies every four hours as a result of child abuse.¹ Further estimates indicate that 100,000 to 200,000 American children are physically abused by parents or guardians every year² and there is reason to believe that the actual incidence of child abuse is much higher than statistics indicate. Because the frequency of child abuse partially relates to the nation's economy, some researchers predict a rise in child abuse if unemployment increases and the current recession deepens.³ If the incidence of child abuse is to be lessened, the numerous and complex issues that child abuse presents must be addressed.

Child abuse affects the child, the child's family and the entire community. Victims of child abuse tend to experience a higher incidence of drug abuse, teenage pregnancy, and delinquency than do non-abused children.⁴ Moreover, abused children tend to become abusive parents.⁵ By reducing the incidence of child abuse today, therefore, communities may reduce many of tomorrow's social problems.

This note considers the non-accidental physical injury of a person less than eighteen years old.⁶ Its scope is limited to incidences of abuse caused by a parent or someone standing in relation to the child as a

1. Mondale, *Introductory Comments, Child Abuse Symposium*, 54 CHI-KENT L. REV. 635, 636 (1978).
2. "After careful study of a number of surveys, the National Center on Child Abuse and Neglect has come to the conclusion that the figures of 200,000 cases of physical abuse and 800,000 cases of neglect represent a conservative . . . estimate. To this must be added and estimated 600,000 cases of sexual abuse and molestation. . . ." D. J. Besharov, *Child Abuse and Neglect: An American Concern*, in U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES 4 (1981) (hereinafter cited as LITIGATION: A MANUAL FOR JUDGES).
3. "Although reliable statistics are scarce, there is evidence that it [child abuse] is on the rise; there is also evidence that its incidence increases following unemployment and economic recession." K. KENISTON AND THE CARNEGIE COUNCIL ON CHILDREN, ALL OUR CHILDREN 191 (1977) (hereinafter cited as KENISTON).
4. Along with delinquency problems associated with child abuse, "long term physical effects can include mental retardation, loss of hearing or sight, lack of motor control, speech defects and learning and habit disorders." NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT 13 (1975).
5. *Id.* at 17. See also: CHILD ABUSE: INTERVENTION AND TREATMENT xiii (N.B. Eberling and D.A. Hill ed 1975) [hereinafter cited as INTERVENTION AND TREATMENT].
6. The Child Abuse Prevention and Treatment Act defines a child as a person under the age of eighteen. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5102 (Supp. II 1978). Forty-nine states set the age limit of reportable children at eighteen years or younger. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, CHILD ABUSE AND NEGLECT: STATE REPORTING LAWS 5 (1980) [hereinafter cited as HEW REPORT].

parent.⁷ One analysis of child abuse issues and proposed resolutions may apply to all states. Although definitions and standards may vary from state to state, most child abuse reporting statutes have a common purpose and format.⁸ This similarity is largely due to the influence of the federal Child Abuse Prevention and Treatment Act,⁹ which provides federal funding to all states whose child abuse statutes meet the requirements of the Act.¹⁰

This note considers ways to increase the effective reporting of child abuse among various individuals and agencies. Considerations associated with the decision to intervene are also discussed. The purpose of this note is to alert readers to the values of deferred prosecution¹¹ as a means of increasing the possibility of rehabilitating child abusers. It recommends that lawmakers enact statutes that establish a multidisciplinary team to handle child abuse cases.

Problems of the abused child are not the exclusive province of a single profession and can be resolved only through the combined skills of several professionals.¹² One can best understand the "team approach" by examining a common child abuse situation. An examining physician furnishes immediate medical care and reports suspected child

7. When a parent abuses a child, issues must be confronted which may not be present when a stranger abuses a child. For example, a child abused by his parent is generally subject to enormous pre-trial pressure from one or both parents. This pre-trial contact is generally not as likely if the abuser is a stranger. Termination of the parent-child relationship is a delicate decisionmaking process which is not confronted when the abuser is a stranger.

"Parent" will be used to refer to stepparent, mother's or father's paramour, or grandparent. Substantiated reports indicate that the parent-child relationship was represented in over ninety percent of perpetrator-child relationships. See Table I *infra*.

8. Typical statutes include a purpose clause, definitions, and a list of professionals required to inform authorities when they believe a child has been abused. At least one state-wide agency is designated to receive and investigate reports. Immunity is provided to encourage good faith reports. Civil or criminal penalties punish non-compliance. Certain privileged communications are abrogated. See Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHIKENT L. REV. 641, 650-684 (1978).

9. 42 U.S.C. §§ 5101-06 (1976 & Supp. II 1978).

10. 42 U.S.C. § 5103 (1976 & Supp. II 1978).

11. "Deferred prosecution" involves a suspect charged with child abuse, and the charge is held in abeyance while the suspect undergoes rehabilitation. The suspect's participation and progress are monitored, with reports going to the prosecutor's office, which office then makes a determination whether to proceed with prosecution or not. See, e.g., IND. CODE ANN. § 31-6-11-11(f) (West 1979) (filing for termination of parental rights while parent undergoes treatment). See also: N.Y. SOC. SERV. LAW 6, § 424(9), (10) (McKinney 1976); COLO. REV. STAT. 19-11-105(b)I, 19-10-111 (Supp. 1978); THE EARLY CHILDHOOD TASK FORCE OF THE EDUCATION COMMISSION OF THE STATES, CHILD ABUSE AND NEGLECT PROJECT, MODEL LEGISLATION FOR THE STATES NO. 71, § VI [hereinafter cited as MODEL LEGISLATION].

12. Complex problems require combined efforts because some aspects of problems extend beyond the competence of any one profession. The MODEL LEGISLATION, *supra* note 11, at § XII, is representative of a statute requiring a multidisciplinary approach. See IND. CODE ANN. §§ 31-6-11-10 and 14 (West 1979); TEX. FAM. CODE ANN. § 34.05(c) (Vernon 1975); VT. STAT. ANN. Ch. 13, § 1353 (Supp. 1981); N.Y. SOC. SERV. LAW 6, § 423(2) (McKinney 1976 & Supp. 1981). "The problems of the abused or neglected child and his family are not the exclusive province of a single profession or group—be it law, medicine, nursing, social work, or psychiatry. They are problems which have a multiplicity of aspects and which are often, therefore, most responsive to and require the combined skills of many professionals and paraprofessionals." INTERVENTION AND TREATMENT, *supra* note 5, at 161.

abuse to the Child Protection Service.¹³ The police and social service agencies investigate to determine whether child abuse can be substantiated. Social or welfare workers then provide for the child's continued well-being. The prosecutor or district attorney decides whether to implement deferred prosecution. This process involves charging the suspect but holding the charge in abeyance while the suspect participates in mental health programs and rehabilitative counseling. Mental health officials monitor the suspect's progress and keep the prosecutor informed. The suspect's successful completion of rehabilitation programs may convince the prosecutor to drop charges. It is through this multidisciplinary team approach that effective intervention can be achieved in a manner most likely to benefit the family.¹⁴

CHILD ABUSE REPORTING

No child abuse case can be treated or prosecuted without identification of a child as a victim of abuse. Still, identification of victims without informing the appropriate authorities is functionally useless. Most child abuse cases share recognizable characteristics. The following factors are associated with "high-risk" families (i.e., those that exhibit a greater potential for abuse). Many parents who abuse their children come from broken homes, were beaten or deprived as children, or have unreasonably high expectations of their children.¹⁵ Marital discord, chaotic life style, and past history of mental illness are also associated with child abuse. There is increasing evidence that social isolation and lack of family or friends may indicate the potential for abuse.¹⁶

The issues of identification and reporting illustrate that child abuse cannot be curtailed unless a unified approach is taken by those responsible for fighting child abuse. State statutes should mandate reporting at an earlier stage of abuse.¹⁷ The sooner reports are made, the greater the possibility of preventing additional harm to the child.

All states provide some form of civil and/or criminal immunity for persons required to make reports of child abuse.¹⁸ For example, a person making a report may be immune from defamation actions and also immune from prosecution as an accessory or co-conspirator with the principal abuser. At least thirty-two states provide some form of penalty for persons who are required to report but fail to do so.¹⁹ Persons

13. "Child Protection Service" refers to any agency designated to receive child abuse reports.

14. INTERVENTION AND TREATMENT, *supra* note 6, at 161-62.

15. J.R. Hebel, Recognizing Child Abuse 34-35. Lecture given at the National Association of District Attorneys, Houston, Texas, (June 15, 1976).

16. See J. GARBARINO & G. GILLIAM, UNDERSTANDING ABUSIVE FAMILIES 41-48 (1980); see also Table II *infra*.

17. For examples of legislation requiring reports be made when a child is subjected to potential harm, see TEX. FAM. CODE ANN. § 34.01 (Vernon 1975); ARIZ. REV. STAT., § 8-546(A.2) (1974 & Supp. 1980).

18. HEW REPORT (1980), *supra* note 6, at 11.

19. *Id.* at 15. "Failure to report is generally a misdemeanor. The typical penalties range from a low of five to thirty days in jail and/or a \$10 to \$100 fine. The basis of liability giving rise to

required to report cases of child abuse can therefore escape further liability by complying with the state statute. Such statutes, however, have had little effect in increasing reporting.²⁰ Legislators must consider other ways to encourage persons to report child abuse.

Physicians

The problem of physicians failing to report child abuse is extremely important because physicians are in a position to identify child abuse at an early stage. The relatively high validity rate of physicians' reports indicates the value of encouraging increased physician reporting.²¹ One possible avenue to increase reporting by physicians is to make them liable for abusive injuries proximately caused by the physician's failure to report. The leading case upholding this kind of civil liability upon a physician is the 1976 California Supreme Court case of *Landeros v. Flood*.²² In *Landeros*, the defendant doctor released an 11-month old girl to her parents after an examination which revealed signs of brutality, evidenced by unexplained fractures, bruises, and lacerations. The California Supreme Court held that whether a physician's required standard of care included the proper diagnosis and treatment of child abuse was a question to be decided by a jury on the basis of expert testimony, and not as a matter of law.²³ The issue of whether the intervening injuries were reasonably foreseeable by a prudent physician was held to be a fact to be decided from trial testimony.²⁴

State statutes should impose civil liability upon physicians for dam-

a penalty is most often expressed in state law as a "knowing" or "willful" failure to report. The requirement of proving a willful failure to report beyond a reasonable doubt makes successful prosecution very unlikely. Despite the widespread provision for penalties, there are no reported cases of a criminal prosecution for failure to report an abused or neglected child." *Id.*

20. "We know that some doctors still send children home without being sure that the injuries were accidental and not inflicted. We also know that some teachers still feel they should 'mind their own business' rather than report a pupil believed to be abused or at risk. The tip of the 'reporting iceberg' can barely be seen." S. O'BRIEN, CHILD ABUSE: A CRYING SHAME 87 (1980) See also Note, *Civil Liability for Failing to Report Child Abuse*, DET. COLL. L. REV. 135, 136 (1977).
21. Forty-eight percent of all such reports by physicians have been found "substantiated" (i.e., provable). Only reports by law enforcement and school personnel had higher substantiation rates (sixty percent and fifty-two percent, respectively). OFFICE OF HUMAN DEVELOPMENT SERVICES U.S. DEPT. OF HEALTH AND HUMAN SERVICES. NATIONAL ANALYSIS OF OFFICIAL CHILD ABUSE AND NEGLECT REPORTING (1978), 20 (1980). Legislatures should direct reporting statutes primarily at physicians because they are believed to have the skill and expertise needed to detect battered children. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 711 (1966).
22. *Landeros v. Flood*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69, (1976). An unreported California case, C.A. No. 37607 (Cal. Super. Ct. San Luis Obispo, filed Sept. 4, 1970), was discussed in Ramsey & Lawler, *The Battered Child Syndrome*, 1 PEPP. L. REV. 372, 374 (1974). The complaint was based on a negligence per se theory and sought \$5,000,000 in damages against several doctors for damages proximately caused by failure to report. The case never went to trial because the parties arrived at a \$600,000 settlement. California had a statute at the time of both cases making it a misdemeanor for physicians not to report child abuse. CAL. PEN. CODE §§ 11160, 11161, 11161.5 (West 1970).
23. 17 Cal. 3d at 399, 551 P.2d at 394, 131 Cal. Rptr. at 74.
24. *Id.* at 400, 551 P.2d at 395, 131 Cal. Rptr. at 75.

ages proximately caused by their failure to report child abuse.²⁵ Such statutes could increase reporting by providing a financial deterrent to noncompliance with the statute. Numerous authorities have advocated this reform.²⁶

Creating a statutory cause of action against physicians for damages caused by their failure to report carries great potential, but there are practical problems which have not been adequately addressed by the commentators. Adequate provision should be made so that the abusive parent cannot benefit from the cause of action. For example, the state could sue the abusing parent as *parens patriae*, with resulting damages earmarked for a fund to improve the state child protection services. The state could also sue as guardian ad litem, with resulting damages going to a trust for the child. Without any provision for separation of funds, parents may be able to use the recovery money to offset medical expenses. Such "contribution" would be inimical to the purpose of child abuse reporting statutes.

Law Enforcement Personnel

Physical or sexual assault upon a child is a crime in every state.²⁷ The use of police in identifying potential child abuse cases, however, is new. The police traditionally intervene after an act of child abuse has been alleged. However, if properly trained, policemen can be very effective in independently identifying cases of child abuse. Policemen routinely handle family and neighbor disputes and often witness children in living situations that indicate a potential for abuse. Traditional police action may not be justified under the circumstances, but policemen who know that children in these situations may be present or future victims of child abuse can report such a possibility to the appropriate community agency. This response can also earn greater respect and trust for law enforcement within the community.²⁸

Educators and Social Service Personnel

Teachers and day-care workers interact daily with children. They are in an excellent position to identify abuse at an early stage and to

25. Some statutes impose such liability in addition to criminal penalty for failure to report. See, e.g., IOWA CODE ANN. 11, § 232.75 (West Supp. 1981); N.Y. SOC. SERV. LAW 6, § 420(2) (McKinney 1976).
26. See Isaacson, *Child Abuse Reporting Statutes: The Case for Holding Physicians Liable for Failing to Report Child Abuse*, 12 SAN DIEGO L. REV. 743 (1975); Ramsey & Lawler, *The Battered Child Syndrome*, 1 PEPP. L. REV. 372 (1974); Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103 (1974).
27. V. DE FRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970's 332 (1974). See also LITIGATION: A MANUAL FOR JUDGES, *supra* note 2, at 1. Some statutes include the offense as an aggravating factor in a battery statute. See IND. CODE ANN. § 35-42-2-1 (West Supp 1981). Texas has a unique offense which can impose criminal liability for negligently engaging in conduct that causes serious bodily injury to the child. TEX. PEN. CODE ANN. § 22.04 (Vernon 1974).
28. Howell, *The Role of Law Enforcement in the Prevention, Investigation, and Treatment of Child Abuse* in THE BATTERED CHILD 307 (3rd. ed. C.H. Kempe & R.E. Helfer 1980).

report their suspicions to the appropriate agency. Many states require teachers and school employees to report suspected victims of child abuse.²⁹ State officials must convince school administrators that child abuse is an appropriate topic for a workshop or seminar presentation to the teachers. Such a presentation can help teachers to identify victims of child abuse and encourage teachers to report that information. Contact with the educational community may tap a wealth of resourceful personnel that has been missed previously.

There are many social service workers with responsibilities in areas other than child abuse who may come into contact with abused children. These workers, if properly informed about child abuse, are in a position similar to the police regarding their potential to identify abuse at an early stage. By learning the indicators of potential abuse already mentioned³⁰ all social service personnel will be able to identify "high-risk" families. Welfare workers required to make periodic visits to the homes of parents who receive welfare³¹ often see abused children before the children are beaten so badly they require medical aid. Effective, non-accusatory reporting by social service personnel who recognize abuse at an early stage represents a direct step toward protecting the child from future harm. Additional confidentiality safeguards should be imposed, however, to protect people wrongly reported as child abusers. Statutes should provide for limited disclosure to specified persons.³²

STATE INTERVENTION

State intervention into child abuse cases generally takes two forms. Investigation usually precedes disposition. Investigation of child abuse cases is primarily the task of the State Department of Social Services. More than twenty-five state statutes name the Department of Social Services as the sole receiver of child abuse cases.³³ If an investigation uncovers substantiated abuse, then an appropriate disposition must be sought. The investigation and the disposition must satisfy constitutional safeguards.

The United States Supreme Court has not directly addressed the constitutionality of state intervention into a parent's childrearing practices where that parent has been accused of child abuse. If childrearing is found to constitute a fundamental right, state intervention encroach-

29. See, e.g., IND. CODE ANN. 31-6-11-3 (West 1979); MODEL LEGISLATION, *supra* note 11, § III.

30. See notes 35-37, *infra*.

31. Welfare workers have an implied duty to visit the home before making aid determinations and when updating those determinations. See 42 CFR § 601 and 602; 45 CFR § 22.01; Martz, *Indiana's Approach to Child Abuse and Neglect: A Frustration of Family Integrity*, 14 VAL. L. REV. 69, 71 (1979).

32. The Indiana statute provides for confidentiality in the manner recommended in the text. IND. CODE ANN. § 31-6-11-18 (West 1979). To further protect the accused's privacy, there is a provision for expungement of reports subsequently found unprovable. IND. CODE ANN. § 31-6-11-5 (West 1979).

33. LITIGATION: A MANUAL FOR JUDGES, *supra* note 2, at 19.

ing that right must further a compelling state interest in order to be constitutional.³⁴ If a fundamental right is not implicated, state intervention need only be rationally related to a legitimate state interest.³⁵ Fundamental rights can be found in the express guarantees of the Constitution and in the implied guarantees that emanate from those express guarantees.³⁶ Procedurally, the Supreme Court enumerates rights previously held fundamental and then decides whether the claimed right is sufficiently similar to warrant protection.³⁷

U.S. Supreme Court precedent indicates that state encroachment into certain aspects of family life infringes "liberty" interests of the family members.³⁸ In *Meyer v. Nebraska*,³⁹ the Supreme Court listed among the fundamental rights the "right of the individual to . . . marry, establish a home and bring up children."⁴⁰ Several lower courts have held that there is a fundamental "right to family integrity" which the state may abridge only by intervention which is necessary to further a compelling state interest.⁴¹

Although the right to rear children autonomously may involve certain parental rights, the parent may no longer be practicing child-rearing rights when child-rearing practices turn into child abuse. If the parent had an absolute right to treat his or her children any way desired, then no child abuse statute could withstand judicial scrutiny. Parents cannot harm their children with impunity. Therefore, there must be a point where state intervention on behalf of the child is justified. Arguably, the interest of the State in the child's well-being becomes compelling as risk of harm to the child increases.⁴² Until the

34. See Comment, *Roe v. Wade and Doe v. Bolton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628, 639-42 (1973).

35. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

36. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

37. See Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1973).

38. For example, parents have a liberty interest in directing the upbringing and education of children under their control. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1924). In *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding statute proscribing sale of magazines depicting nudity to minors but not proscribing such sales to adults), the Court stated that "constitutional interpretation has consistently recognized that the parent's claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations of obligations the state can neither supply nor hinder.'" *Id.* at 639 (quoting in part *Prince v. Mass.*, 321 U.S. 158, 166 (1944)). See also *Griswold v. Connecticut*, 381 U.S. 479, 485 (1964) (state law forbidding use of contraceptives between married adults violates "the zone of privacy created by several fundamental constitutional guarantees"); *Roe v. Wade*, 410 U.S. 113, 155-56 (1973) ("where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests").

39. 262 U.S. 390 (1923).

40. *Id.* at 399.

41. See *Roe v. Conn.*, 417 F. Supp. 10 (S.D. Iowa 1975) (Alabama's statute authorizing summary seizure of a child found unconstitutional under strict scrutiny); *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975) (parental termination statute infringed fundamental right to family integrity), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

42. The rights of parenthood are not absolute. The state has a "wide range of power for limiting parental freedom and things affecting the child's welfare." *Prince v. Mass.*, 321 U.S. 158, 167

Supreme Court squarely decides a child abuse case involving these issues, however, one cannot be certain under what circumstances a state may intervene into family life in order to protect the child.

A rationale for intervention should be made and implemented so that the form state intervention takes serves the purposes of the state's child abuse reporting statute. Purposes vary from state to state, but the Model Legislation for the States⁴³ is fairly representative:

It is the purpose of this Act, through the complete reporting of child abuse, sexual abuse, and neglect, to protect the best interests of the child, to offer protective services in order to prevent any further harm to the child or any other children living in the home, to stabilize the home environment, to preserve family life whenever possible, and to encourage cooperation among the states in dealing with the problems of child abuse and neglect.⁴⁴

Thus, worthwhile intervention objectives include, but are not limited to (1) acting in the child's best interests, (2) protecting the child, (3) preventing future harm to the child, and (4) providing rehabilitative services for parent, guardian or child.⁴⁵

DEFERRED PROSECUTION

Parents who non-accidentally harm their child must temporarily subordinate their child-rearing rights to the state's interest in protecting the child. Policymakers should ensure, however, that intervention by the state on behalf of the child will benefit the child. Statutory jail sentences for abusive parents or removal of the child from the home may be superficial remedies which actually harm the child and the family.⁴⁶ Because prosecution of abusive parents, in and of itself, is not sufficient to meet the four named intervention objectives, each community must develop and tailor new disposition alternatives to fit its needs.

Deferred prosecution is an alternative means of disposition which is

(1944). In *Ginsberg*, 390 U.S. 629 (1968), the Court recognized that the State's authority to intervene on behalf of the child is broader than its authority to intervene on an adult's behalf. In *Prince*, the Court held that a state statute prohibiting all minors from selling items in public places did not violate the religious freedom of a guardian who furnished a minor ward with religious literature to sell in violation of the statute. The Court reasoned that when "state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary or conducive to some clear or present danger. . . ." 321 U.S. at 167. In the child abuse context, one could argue that, similarly, the existence of a "clear and present danger" represents the point at which the state's interest in the child's well-being becomes compelling.

43. MODEL LEGISLATION, *supra* note 3, at § 1.

44. *Id.*

45. See CONN. GEN. STAT. ANN. § 17-38(a)(a) (1975); IND. CODE ANN. § 31-6-11-1 (West 1979); TEX. FAM. CODE ANN. § 34.01 (Vernon 1975); N.Y. SOC. SERV. 6, § 411 (McKinney 1976); N.H. REV. STAT. ANN. § 169-C: 2 (Supp. 1979).

46. Certain authors have argued that state intervention into family life in abuse cases interferes with the essential continuity of relationships, surroundings, and environmental influences which accompany normal child development. J. GOLDSTEIN, A. FREUD, AND A.J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31-52 (1973). H.E. Martz has argued that current abuse and neglect laws facilitate the destruction of families rather than promoting family integrity. Martz, *supra* note 31, at 71.

consistent with the four objectives of an effective child abuse program. Again, using this procedure, the prosecutor charges the suspect, but holds the charge in abeyance while the suspect participates in rehabilitation programs. A later determination by the prosecutor on the suspect's status is based on the results of the rehabilitation programs. Deferred prosecution provides parents with a greater potential for rehabilitation than the traditional disposition of prosecution and conviction. Parents faced with the possibility of criminal prosecution as well as the loss of their child have strong incentive to participate regularly and actively in rehabilitation programs.

Rehabilitation as a goal of criminal law has received substantial criticism from many authorities in recent years.⁴⁷ Rehabilitation programs conducted in conjunction with deferred prosecution differ, however, from attempts at rehabilitation *through* criminal punishment, which have been shown to be unsuccessful in most cases.⁴⁸ No criminal prosecution is anticipated. Resources normally expended on prosecution can be used for rehabilitation because prosecution ensues only when rehabilitation has not been satisfactory. It has been estimated that eighty to ninety percent of abusive parents can be rehabilitated given adequate treatment and guidance.⁴⁹ The following subsections survey the various forms which rehabilitation can take within a deferred prosecution context.

Prosecutor's Role

Although the prosecutor is technically an agent of the executive branch of the government, his office is actually an administrative agency with quasi-judicial and quasi-legislative functions.⁵⁰ Defining the prosecutor's role in child abuse cases is essential to the multidisciplinary team approach. Policymakers must consider how the prosecuting attorney's office fits into the Child Protection Service.⁵¹ Since child abuse constitutes a crime in every state,⁵² the prosecutor clearly has a duty to participate in child abuse cases. Prosecutors must familiarize themselves with the unique problems associated with child abuse

47. "One trouble with the rehabilitative ideal is that it makes the criminal law the vehicle for tasks that are far beyond its competence." H.L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 55 (1968); see Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 973 (1966).

48. See note 60 *infra*.

49. Kempe, *A Practical Approach to the Protection of the Abused Child and Rehabilitation of the Abusing Parent*, 51 *PEDIATRICS* 804, 808 (1973); 119 *CONG. REC.* 23,903 (1973) (prepared statement of Sen. Mondale).

50. Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 *SO. CAL. L. REV.* 519 (1968-69).

51. See note 13 *supra*. It is beyond the scope of this note to explore all of the constitutional, evidentiary and statutory problems unique to child abuse. For such studies, see McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, 12 *AM. CRIM. L. REV.* 165 (1974-75); Rosenthal, *Physical Abuse of Children by Parents: The Criminalization Decision*, 7 *AM. J. CRIM. LAW* 141 (1979); Comment, *Evidentiary Problems in Child Abuse Prosecutions*, 63 *GEO. L.J.* 257 (1974).

52. See note 27 *supra*.

and work multidisciplinary solutions into an overall prosecutorial policy.

The prosecutor's office should have clearly articulated policies and guidelines for assistant prosecutors handling child abuse cases. The availability of deferred prosecution should be articulated in state statutes. Adopting a "wait and see" approach through deferred prosecution is economically sound. Resources normally spent on prosecution can be saved until rehabilitative efforts have been made. If rehabilitation is successful, the cost of prosecution can be avoided. If prosecution is subsequently pursued, then the overall costs are the same as if prosecution were sought prior to rehabilitation.⁵³

Multidisciplinary Team Rehabilitation

Conflict seems inevitable when social workers, medical personnel, policemen, lawyers, and citizens unite as a problem-solving team. State statutes that advocate organization of multidisciplinary teams⁵⁴ should also outline uniform multidisciplinary team procedures. Front-line workers,⁵⁵ who are responsible for implementing the statute, should have written performance guidelines. Moreover, one manual should contain guidelines for the different members of the team, incorporate all state policies on child abuse and detail the state's recommended mode of action. A comprehensive child abuse manual, formulated by the different professionals on the team, can help to establish cooperation and trust among the diverse disciplines.

Child Abuse Prevention and Treatment Centers. Child abuse treatment centers can provide a community base for parental education and care for poor, usually unwed, mothers. One of the most successful centers is probably New York's Foundling Hospital.⁵⁶ The Foundling Hospital is based on a multidisciplinary "human network" of professionals and paraprofessionals who care for and educate young, poor, unwed mothers. Residence in the hospital is intended to be temporary. Patients gradually go to half-way houses and still later receive out-patient services at their homes. Eventually, rehabilitated parents may rear their children in their own homes without help or interference from the state. The Foundling also has a 24-hour hotline service. Statistics on the Foundling Hospital claim seventy-five percent of families treated have stayed together without further incidence of abuse.⁵⁷

53. If rehabilitation fails, the added expense incurred by the state in bringing the case to trial is insignificant. The suspect has already been charged. Witnesses, usually physicians and family members, also generally remain available.

54. See note 13 *supra*.

55. The term "front-line worker" includes police, caseworkers, emergency room technicians, doctors, teachers, and nurses. Anyone with whom a case can be initiated by a report, except a member of general public, is referred to as "front-line worker."

56. O'BRIEN, *supra* note 20, at 144.

57. This figure may actually understate such a program's potential for success. The Foundling Hospital works with a "hard-core, under-privileged and depressed population." O'BRIEN,

Many communities simply do not have the financial resources to establish a similar hospital. These communities can achieve some of the results of the Foundling program by modifying the scope of its services. For example, a home could be purchased or space could be rented to receive calls, treat children and parents, and generally serve as headquarters for child abuse programs. High maintenance costs can be minimized. Community volunteers can renovate the child abuse facility, solicit funds, or babysit. For example, the elderly may be enthusiastic and eager babysitters. Problems associated with establishing such a center may be substantial, but a unified community effort can be very rewarding.

Self-help Groups. Self-help groups should be especially attractive to communities with limited resources. With a minimum of guidance and direction, participants can help themselves learn socially acceptable behavior patterns.

Parent's Anonymous is one example of a self-help rehabilitation program. Its basic premise is that through group therapy and interaction with persons similarly situated, parents will develop the ability to handle tension and anger, and generally learn more about being good parents.⁵⁸ It was founded by a parent who realized he was caught up in an abusive pattern of behavior.⁵⁹ Although Parent's Anonymous is typically described as a "self-help group"⁶⁰ it could be used effectively in conjunction with deferred prosecution. One commentator notes that Parent's Anonymous has gained increased prominence in recent years due to encouraging results with rehabilitation.⁶¹

Parents or persons standing in relation to the child as parents are advised to attend Parent's Anonymous meetings, which are generally conducted by a leader chosen from within the group. Where deferred prosecution is used, mental health workers may monitor each participant's sincerity and participation. Workers then report to the prosecutor on each person's progress. Thus, participants who know the health worker's function are encouraged to attend and participate.

A truly sophisticated Parent's Anonymous program is conducted in conjunction with another community service and may expose abused

supra note 20, at 144. The success rate in treating a more "mild" population is likely to be higher. No reliable statistics exist in this area, however.

58. J.J. COSTA & G.K. NELSON, CHILD ABUSE AND NEGLECT: LEGISLATION, REPORTING AND PREVENTION 13 (1978).

59. "Adults, like the founder of Parent's Anonymous, realize that they are caught up in an abusive pattern and seek help." *Id.*

60. "A positive attitude should be maintained by the department of social services toward scrutiny of the child protection system and public involvement in the system. This can be accomplished and demonstrated in enumerable ways: . . . (including) encouragement and support of self-help groups (i.e., Parent's Anonymous, Parents United, and other community groups, such as a child protection council)." Carol, *The Function of Protective Services in Child Abuse and Neglect*, in THE BATTERED CHILD 278 (3rd ed. C.H. Kempe & R.E. Helfer 1980).

61. *Id.*

children to "play therapy"⁶² while the parents attend meetings. A psychologist observing the children at play can try to discern patterns of play that indicate psychological problems the abuse may have caused. The psychologist can monitor the play, interact with the children, and even try to modify their behavior.

The self-help program approaches full potential if the parents help the abused child recover psychologically. No psychologist can equal the rehabilitative impact of a parent's care and attention on a child. Not all parents who have abused their children will be capable of this kind of interaction. It is the psychologist's job to select and counsel those deemed most capable of helping their children. Parents should be given advice on how to improve a child's self-image through reinforcement techniques. Not only is the impact on the child rehabilitative, but the positive impact on the parent from participating in the child's psychological recovery can improve the parent, the child, and the parent-child relationship.⁶³

CONCLUSION

The problem of child abuse can no longer be ignored or treated on a superficial level. Inaction will only allow increases in the incidence of child abuse to continue. This note recommends practices which increase the effectiveness of agencies working with child abuse. Deferred prosecution can unite many agencies toward a common rehabilitative goal. Action directed toward the abusive parent may have significant ramifications for the child. The interdependence of the whole decision-making process should be considered before the state intervenes in a child abuse case.

Legislators cognizant of the detrimental effects of child abuse must draft statutes that enhance reporting and incorporate deferred prosecution into the disposition of reported child abuse cases. This can be instrumental in eliminating the physical and psychological problems of the abused children, the psychological problems of abusive adults, and similar problems in future generations.

*Kip A. Petroff**

62. "Play therapy" is defined as the procedure workers follow in order to determine and analyze underlying psychological problems evidenced by the child's play. O'BRIEN, *supra* note 20, at 138-140.

63. This approach is practical for communities with limited funds. Significant resources are saved, because the psychologist's task is effectively shifted to the parent. If actively helping the child rehabilitates the parent, fewer resources are needed to treat the parent.

* B.A. Kent State University, 1980. J.D. Candidate, Notre Dame Law School, 1983.

TABLE 1
 Relationship of Perpetrator and Victim as Indicated by
 Substantiated Reports
 (N=116,806)

PERPETRATOR	PERCENT OF RELATIONSHIPS
Natural Parent	81.7%
Stepparent	7.7%
Adoptive Parent	0.9%
Foster Parent	0.3%
Grandparent	1.1%
Sibling	0.5%
Preschool Care	0.6%
Other Relative	1.4%
Parent Outside of the Home	0.3%
Institutional Staff	0.1%
Teacher	0.1%
Other	5.3%
TOTAL	100.0%

Source: U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1978) 28 (1980). (Reprinted with permission of American Humane Society).

TABLE II
 Stress Factors Present, All Substantiated Reports
 (N=32,842 Families)

FACTORS	PERCENT OF FAMILIES*
Broken Family	45.0%
Family Discord	42.2%
Insufficient Income	35.9%
New Baby/Pregnancy	13.2%
Continuous Child Care	27.1%
Physical Abuse of Spouse	15.6%
History of Abuse as a Child	15.4%
Recent Relocation	6.2%
Inadequate Housing	20.6%
Social Isolation	20.5%
Loss of Control During Discipline	25.2%
Lack of Tolerance	30.2%
Incapacitating Physical Handicap	4.5%
Alcohol Dependency	14.6%
Drug Dependency	4.1%
Mental Retardation	3.5%
Mental Health Problem	18.6%
Police/Court Record	8.8%
Authoritarian Method of Discipline	13.2%

* Multiple responses exist for most families.

Source: U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1978) 28 (1980). (Reprinted with permission of American Humane Society).

TABLE III

Reporting Laws U.S. & Territories

- Alabama - ALA. CODE §§ 26-14-1 to -13 (1975).
- Alaska - ALASKA STAT. ch. 17, §§ 47.17.010 to .070 (1975) *amended by* ch. 17 §§ 47.17.030(e), .040(b), .070(1) (Supp. 1978).
- Arizona - ARIZ. REV. STAT. ANN. §§ 8-546, -546.02, -546.03 (1974); §§ 8-546.01, -546.04 (Supp. 1978); §§ 13-3620 (Supp. 1978).
- Arkansas - ARK. STAT. ANN. §§ 42-807 to -818 (Repl. 1977).
- California - CAL. PENAL CODE §§ 11161.5 to 11161.8, 11110 (West Supp. 1979); § 11162 (West 1970).
- Colorado - COLO. REV. STAT. §§ 19-10-101 to -115 (Supp. 1978).
- Connecticut - CONN. GEN. STAT. ANN. §§ 17-38a to -38c, -38f (Supp. 1978); § 17-38d (1975).
- Delaware - DEL. CODE ANN. tit. 16, §§ 901 to 909 (Supp. 1978).
- District of Columbia - D.C. CODE ANN. §§ 2-161 to -165, -167 (Supp. 1978); § 2-166 (1973); §§ 6-2101 to -2107, -2111 to -2119 (Supp. 1978).
- Florida - FLA. STAT. ANN. § 827.07 (1976), *amended by* § 827.07 (Supp. 1979).
- Georgia - GA. CODE ANN. § 74-111 (Supp. 1978); §§ 99-4301, -4302 (1976).
- Hawaii - HAWAII REV. STAT. §§ 350-1 to -5 (1976), *amended by* § 350-1 (Supp. 1977).
- Idaho - IDAHO CODE §§ 16-1601, -1602, -1619, -1620, -1629 (Supp. 1978).
- Illinois - ILL. ANN. STAT. ch. 23, §§ 2051-2061 (Smith-Hurd Supp. 1978); ch. 51, § 5.1 (Smith-Hurd Supp. 1978).
- Indiana - IND. CODE ANN. §§ 12-3-4.1-2 to -5 (Supp. 1978); § 12-3-2-14 (1976); § 12-3-2-15 (Supp. 1978); §§ 31-5.5-3-1 to -8 (Supp. 1978).
- Iowa - IOWA CODE ANN. §§ 235A-1 to .24 (Supp. 1978).
- Kansas - KAN. STAT. ANN. §§ 38-716, -719 (1973), *amended by* § 38-716 (Supp. 1978); §§ 38-717, -718, -720 to -724 (Supp. 1978).
- Kentucky - KY. REV. STAT. §§ 199.011, .335, .990 (7)-(8) (Supp. 1978); § 199.430 (1975).
- Louisiana - LA. REV. STAT. § 14:403(A), B(1), B(4), C to I (1974); § 14:403B(2), (3) (Supp. 1978).
- Maine - ME. REV. STAT. tit. 22, §§ 3851 to 3860 (Supp. 1978).
- Maryland - MD. CODE ANN. Art. 27, § 35A 91976 Repl. Vol.), *amended by* Art. 27, § 35A (C. Supp. 1978); Art. 72A, §§ 4 to 11 (Supp. 1978).
- Massachusetts - MASS. GEN. LAW ANN. ch. 119, §§ 51A to 51G (1975), *amended by* ch. 119, §§ 51A to 51F (Supp. 1979); ch. 233, §§ 20, 20B (1975), *amended by* ch. 233, § 20B (Supp. 1979).
- Michigan - MICH. COMP. LAWS ANN. §§ 722.621 to -.636 (Supp. 1978),

- amended by* §§ 722.622, .623, .628, .633, P.A. 252, 1978 MICH. LEGIS. SERV. (West) 759.
- Minnesota - MINN. STAT. ANN. § 626.556 (Supp. 1979); § 245.813 (Supp. 1979).
- Mississippi - MISS. CODE ANN. §§ 43-21-5, -11 (Supp. 1978); §§ 43-24-1 to -9 (Supp. 1978).
- Missouri - MO. REV. STAT. §§ 210.110 to .165 (Supp. 1979).
- Montana - MONT. REV. CODES ANN. §§ 10-1300, -1301, -1303 to -1308 (Supp. 1977).
- Nebraska - NEB. REV. STAT. §§ 28-1501 to -1508 (1975).
- Nevada - NEV. REV. STAT. §§ 200.501, .5011, .502, .503, .504, .5045, .505, .506, .507 (1977); §§ 432.100 to .130 (1977); §§ 49.185 to .275 (1977).
- New Hampshire - N.H. REV. STAT. ANN. §§ 169:37 to 45 (Repl. 197).
- New Jersey - N.J. STAT. ANN. §§ 9:6-8.8 to .20 (1976), *amended by* §§ 9:6-8.10a, -8.10b (Supp. 1978).
- New Mexico - N.M. STAT. ANN. §§ 32-1-3, -15, -16 (1978).
- New York - N.Y. SOC. SERV. LAW §§ 411 to 428 (McKinney 1976), *amended by* §§ 412(1), 422(4), 423(3) (McKinney Supp. 1978).
- North Carolina - N.C. GEN. STAT. §§ 110-116 to -123 (1978).
- North Dakota - N.D. CENT. CODE §§ 50.25.1-01 to -14 (Supp. 1977).
- Ohio - OHIO REV. CODE ANN. §§ 2151.421, .99 (Page Repl. Vol. 1976).
- Oklahoma - OKLA. STAT. ANN. tit. 21, §§ 845 to 848 (Supp. 1978).
- Oregon - OR. REV. STAT. §§ 418.740 to .775, .990 (6), (7) (Repl. Part 1977).
- Pennsylvania - PA. STAT. ANN. tit. 11, §§ 2201 to 2224 (Supp. 1978).
- Rhode Island - R.I. GEN. LAWS §§ 40-11-1 to -16 (1977).
- South Carolina - S.C. CODE ANN. ch. 10, §§ 20-10-10 to -100, -130 to -160, -190 (Supp. 1978).
- South Dakota - S.D. COMP. LAWS ANN. §§ 26-10-1.1, -10 to -12.3, -14 (1976); § 26-10-15 (Supp. 1978); § 19-2-1 (1967); §§ 19-2-3, -3.1, -5.1 (Supp. 1978).
- Tennessee - TENN. CODE ANN. §§ 37-1201, -1202, -1204 (1977 Repl. Vol.); §§ 37-1203, -1205 to -1213 (Supp. 1978).
- Texas - TEX. FAM. CODE ANN. §§ 34.01 to .06 (1975), *amended by* §§ 34.02, .05 (Supp. 1978); §§ 34.07, .08 (Supp. 1978); § 35.04 (Supp. 1978).
- Utah - UTAH CODE ANN. §§ 78-3b-1 to -13 (Supp. 1978); § 55-15a-26 (Repl. Vol. 1974); § 55-15b-19 (Repl. Vol. 1974).
- Vermont - VT. STAT. ANN. tit. 13, §§ 1351 to 1356 (Supp. 1978).
- Virginia - VA. CODE §§ 63.1-248.1 to .17 (Supp. 1978).
- Washington - WASH. REV. CODE ANN. §§ 26.44.010 to .900 (Supp. 1977); §§ 5.60.060 (3), (4) (Supp. 1977); § 18.83.110 (Supp. 1977).
- West Virginia - W. VA. CODE §§ 49-6A-1 to -10 (Supp. 1978); § 49-7-1 (Supp. 1978).

Wisconsin - WIS. STAT. ANN., §§ 905.04(4)(e), .05(1), (2), (3)(b) (1975); § 48.981, ch. 355, § 4, 1977-78 WIS. LEGIS. SERV. 1709.

Wyoming - WYO. STAT. §§ 14-3-201 to -215 (1978); § 42-1-116 (1977).

American Samoa - A.S. CODE tit. 21, ch. 29, §§ 2901 to 2914 (Supp. 1978).

Guam - GUAM PENAL CODE § 273(d), (e) (Supp. 1974); GUAM GOV'T. CODE § 9120, 1978 P.L. 14-137, 14th Legislature.

Puerto Rico - P.R. LAWS ANN. tit. 3, § 211 m-r (Supp. 1977).

Virgin Islands - V.I. CODE ANN. tit. 19, §§ 171 to 176 (1976), amended by tit. 19, §§ 171 to 183 (Supp. 1977).

Source: Office of Human Development Services, U.S. Dept. of Health, Education, and Welfare, Child Abuse & Neglect: State Reporting Laws 3-4 (1980).