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LEGISLATING CHILD PROTECTION

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The balance to be struck in framing child protection[1] legislation is an exceedingly delicate one. On one hand is the desire to provide protection to children who need it; on the other hand are important rights of parent and child.[2] Invoking general police powers and, more specifically, the doctrine of *parens patriae*,[3] it seems clear that a state may act to protect its child-citizens when those charged

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1 The abuse/neglect distinction in child protection seems to be one whose time has passed. Whether a child has been damaged through affirmative physical mistreatment (the classic "abuse" situation) or through the passive withholding of life's essentials (the classic "neglect" situation), the child may need protection. By asking the question, *"Does this child need protection?,"* instead of attempting to discover who did what to whom, the focus is shifted from past events (the acts of abuse or neglect) and other people (the abusing or neglecting parent) to the child. *See,* GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, at 5 (1973) in which the authors argue that the question should be *"Is this a wanted child?."* One longtime expert in the field put the matter this way:

> Although we realized that it was useful, from the point of view of diagnosis and treatment to be able to categorize physical abuse as one thing and neglect as another, we felt that such a distinction was really of little value to the child....
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> We kept coming back to that question of definition and decided that we were simply playing with words. . . . [F]rom the child's point of view, it is all maltreatment.
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> So we enlarged upon the "battered baby" concept and came up with the "maltreatment syndrome in children."

FONTANA, SOMEWHERE A CHILD IS CRYING, at 23 (1973).

In modern legislation, the trend seems to be to continue using the words abuse and neglect without attempting to distinguish the two. *E.g.*, Ch. 119 [1974] Laws of N.J. 304 [compiled, but not yet published, at N.J. STAT. ANN. 9:6-8.21], which speaks consistently of the "abused or neglected child." Similarly, the federal Child Abuse Prevention and Treatment Act, 88 Stat. 4 *et seq.*, 42 U.S.C.A. § 5101 *et seq.* (June 1974 Supp.) simply defines a series of events and circumstances as "child abuse and neglect" with no attempt to indicate which is which.

2 On a number of occasions, the Supreme Court has noted that the freedom to marry and/or raise a family free of the state's interference is protected by the Constitution. Myer v. Nebraska, 262 U.S. 390 (1922), Pierce v. Society of Sisters, 268 U.S. 510 (1925). In

with that responsibility fail. However, no state has the right to intervene cavalierly in the lives of its citizens; neither does a state act properly where it attempts what the Supreme Court has described as the standardization of children.[4]

Child protection legislation provides a legal framework for the identification of and response to children in need of protection. However, the enactment of effective child protection legislation is only prologue. Legislation can guarantee the possibility of child protection; but in and of itself, legislation has little to do with the reality of child protection. As one author pointed out:

> Overcrowding in the courts, lack of suitable placement facilities, lack of appropriate medical and psychiatric facilities often make the law a mockery in practice. . . . Without the community services and facilities . . . much of the law is meaningless.[5]

Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Goldberg, joined by Chief Justice Warren and Justice Brennan noted that:

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Id. at 495.

The matter was put succinctly by the Nebraska Supreme Court in In re Godden, 158 Neb. 246, 63 N.W.2d 151 (1954):

> The best intentions and the greatest zeal to care for neglected, dependent or delinquent children do not justify the violation of the constitutional provisions as to due process that are involved in removing a child from the custody of its parent.

Id. at 252-53, 63 N.W.2d at 156.

In Roe v. Wade, 410 U.S. 113 (1973), the court, in broad *dicta,* observed that the constitutionally-protected right to privacy extends to "family relationships . . . and child rearing. . . ." *Id.* at 153 (citations omitted). *But cf.* Wyman v. James, 400 U.S. 309 (1971). *See also,* Note, *Child Neglect: Due Process for the Parent,* 70 COL. L. REV. 465 (1970).

[3] In In re Gault, 387 U.S. 1 (1967), the *parens patriae* rationale was summed up as follows:

> If . . . parents default in effectively performing their custodial function . . . the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.

Id. at 17. While *parens patriae* seems firmly, if unnecessarily (in light of a state's broad police powers), entrenched as the rationale for child protection legislation, the contents and origin of the doctrine are by no means clear. In In re Gault, 387 U.S. 1 (1967), the court commented on the doctrine and its use:

> The Latin phrase [*parens patriae*] proved to be of great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.

Id. at 16. *See,* Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers,* 27 U. PITT. L. REV. 894 (1966).

[4] Pierce v. Society of Sisters, 268 U.S. 510 (1925) at 535.

[5] Issacs, *The Law and the Abused and Neglected Child,* 51 PEDIATRICS 783, 789 (April 1973).

It is not the purpose of this article to develop a model child protection statute. Such models abound.[6] Rather, it is the intention of the authors to alert the drafter of child protection legislation to issues which arise of their own force as the state seeks to enter a restricted area—the family[7]—to protect those least able to protect themselves.[8]

The Problem

In his *Ideal Commonwealth,* Plato suggested that children be taken from their parents at birth to be raised in the prescribed manner by the commonwealth's "proper officers."[9] In the contemporary United States—a society at least nominally committed to democratic values—the Platonic suggestion is unacceptable. Inherent in the rejection of Plato's "ideal" is the concept that society will tolerate a range of child-rearing practices. The events and circumstances which place a child in need of the state's protection define the boundaries of the tolerated range. The state should not interfere with a particular family's method (or lack of method) of raising children until the point is reached at which the state's interest in the child's protection may justifiably be said to outweigh the parent's interest in directing (or ignoring) his or her child's upbringing.[10]

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[6] *E.g.,* THE NATIONAL CENTER FOR THE PREVENTION AND TREATMENT OF CHILD ABUSE AND NEGLECT, MODEL LEGISLATION: MANDATORY REPORTING STATUTES OF CHILD ABUSE (A MULTI-DISCIPLINARY APPROACH) (1974 Revision); GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 1, at 97-101; COUNCIL OF STATE GOVERNMENTS, PROGRAM OF SUGGESTED STATE LEGISLATION (1965); U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, CHILDREN'S BUREAU, THE ABUSED CHILD—PRINCIPLES & SUGGESTED LANGUAGE FOR REPORTING OF THE PHYSICALLY ABUSED CHILD (1963). *See also,* materials collected in Sussman, *Reporting Child Abuse: A Review of the Literature,* 8 FAM. L. Q. 245, 246-47 (1974).

[7] *See* note 2, *supra.*

[8] Children, obviously unable to protect themselves from the attacks of an adult parent or guardian are equally helpless in the face of ineffective or incompetent attempts to help them. For a thoughtful look at the child-traps into which many ostensibly child-saving systems have evolved, *see* MURPHY, OUR KINDLY PARENT THE STATE, THE JUVENILE JUSTICE SYSTEM AND HOW IT WORKS (1974).

[9] In the Platonic scheme, the following was to be law:

> [T]he wives of our guardians are to be common and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious unknown place, as they should be.

PLATO'S REPUBLIC 179-183 (Jowett Translation, Modern Library Edition).

[10] Courts have not been consistent in attempts to fix the point where the balance tips in favor of state intervention. In In re Adoption of H., 69 Misc.2d 304, 330 N.Y.S.2d 235 (Fam. Ct., N.Y. Co. 1972) Judge Dembitz concluded that the state should stay out unless there was an absence of even minimal care. In pursuit of answers in this area, courts

The indicators of the particular point at which state intervention is justified are elusive.[11] As a consequence, the definition section of child protection legislation must be drafted in broad language.[12] Concededly, past judicial handling of broad definitions has led to indefensible results,[13] but it is probably equally true that a judge determined to vent his or her own prejudices will be little deterred by even the most carefully structured legislation.

The problem of definition is compounded by the fact that by and large, the people making what might be termed "critical stage" decisions[14] in the area of child protection are not lawyers or

have made occasionally startling observations. In Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), without citation to authority or supporting data, the court said:

> We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child.

Id. at 156.

11 The word "intervention" is used in its broadest sense. Whether a state seeks a judicial decree that parental rights are terminated or simply to enter a person's home to investigate allegations that a child may need protection, intervention has occurred.

> The fact that the State's motives are beneficent and designed to provide what, at least in its view, the child and its parents need, should not be allowed to obscure the fact that in taking a child from his parents, or placing him in an institution or even subjecting him to probation and supervision, the State is invoking its power to interfere with the lives of individuals as they choose to lead them.

THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, at 85 (1967).

12 Because of the problems inherent in defining the problem, thirty-three states do not even attempt a definition. Sussman, *supra* note 6, at 249-50. It is, however, the opinion of the authors that the failure of a legislature to confront the definition problem on the grounds that "everybody (or nobody) knows" what the problem is represents an abdication of legislative responsibility. It is in the difficult process of attempting to define the events and circumstances which may place a child in need of protection that many of the less obvious issues in the field first arise.

The most intractable aspect of the attempt to reduce the problem to specifics is that, ultimately (absent a "confession"), an exercise of judgment involving a reconstruction of past events is required. Consider the following attempt to define abuse in specific terms:

> [A]ny case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, sexual molestation, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive, or death and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or circumstances indicate that such condition may not be the product of an accidental occurrence.

COLO. REV. STATS. ANN. § 22-10-1 (4) (1969 Perm. Cum. Supp.). All of the events and circumstances described with particularity in the first part of the statute may be explained—to a greater or lesser extent—in terms other than parental malice or ineptitude; hence the need for the qualifying language in the second part of the statute.

13 *E.g.*, In re Dake, 87 Ohio L. Abs. 483,180 N.E.2d 646 (Juv. Ct. 1961) holding that a woman who had had a series of illegitimate children was, for that reason, not entitled to retain custody of her children.

14 Probably the most important decision made in a child protection context is the decision to report the child's apparent need for protection. [Reporting is discussed generally *infra* at nn. 25 *et seq.* and accompanying text.] With certain exceptions (*e.g.*, an attorney

judges.[15] While definitions must be specific enough to meet constitutional standards and guide persons unskilled in the law,[16] they must simultaneously be flexible enough to cover situations unforeseen at the time of drafting.[17] The definition section can set the tone for the manner in which the state attempts to protect its children.[18] Finally the definition section can virtually assure that the state keep out of a family unless there is serious danger to the child.[19]

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who specializes in juvenile defense or prosecution), lawyers and judges are no more or less likely than anyone else to come into contact with children who may need protection.

The second "critical stage" decision in child protection is whether information developed from an initial investigation warrants further action. That decision, typically, is made by a social worker.

15 Brown, *et al., Medical and Legal Aspects of the Battered Child Syndrome,* 50 CHI-KENT L. REV. 45 (1973):

> . . . [A]lmost all cases of child abuse are "settled" at, or before, the original court hearing.

Id. at 69. It has been estimated that in ninety per cent of cases, there is a "voluntary" decision to permit state intervention. DEFRANCIS, PROTECTIVE SERVICES AND COMMUNITY EXPECTATIONS, at 13 (1968). Because of doubts as to how "voluntary" the decision to accept services is, one author suggests that court review be made mandatory after 60 to 90 days of voluntary services. Cheney, *Safeguarding Legal Rights in Providing Protective Services,* 13 CHILDREN 86, 91 (1966).

16 *E.g.,* the phenomenon of the new-born addict.

17 In recent years, several state statutes have been challenged on the ground that they were unconstitutionally vague. With one century-old exception, the attacks have been unsuccessful. *E.g.,* Commonwealth v. Skufca, 222 Pa. S. 506, 321 A.2d 889 (1974); State v. McMaster, 259 Or. 291, 486 P.2d 567 (Ore. 1971); Harter v. State, 260 Iowa 605, 149 N.W.2d 827 (1967); In re Cager, 251 Md. 473, 248 A.2d 384 (1966); Belisle v. Belisle, 27 Wis.2d 317, 134 N.W.2d 491 (1965). The only court ever to declare a child protection statute unconstitutional on vagueness grounds was the Illinois Supreme Court. In People ex rel. O'Connell v. Turner, 55 Ill. 280 (1870), the court was called on to construe a statute providing for the commitment to reform schools of children who were found to be, *inter alia,* "destitute of proper parental care." *Id.* at 282. In refusing to give the quoted language effect, the court said:

> The best and kindest parents would differ in the attempt to solve the question. [What is proper parental care.] No two scarcely agree; and when we consider the watchful supervision which is so unremitting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition. . . . Before any abridgement of [the parent's custody rights], gross misconduct or almost total unfitness on the part of the parent should be clearly proved.

Id. at 283-85. *But cf.* Gesicki v. Oswald, 336 F.Supp. 371 (S.D.N.Y. 1971), *aff'd* 406 U.S. 913 (1972), in which a New York criminal procedure statute was declared unconstitutionally vague. The statute in question defined a "wayward minor" as a person between the ages of 16 and 21 who was either "willfully disobedient . . . morally depraved . . . or in danger of becoming morally depraved. . . ." The court applied the void-for-vagueness doctrine despite the argument that the state proposed to help the juvenile, not punish her. *See* Comment, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-for-vagueness Doctrine,* 4 SETON HALL L. REV. 184 (1972).

18 The authors favor the term "child in need of protection."

19 In view of the fact that the decisions made in the vast majority of child protection cases are never reviewed by a court (note 15 *supra*), it is naive to suggest, as has one

In that regard, consider New Jersey's definition of an "abused or neglected child":

> . . . [A] child less than 18 years of age whose parents or guardian . . . (1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of any bodily organ; (2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; or (3) commits or allows to be committed an act of sexual abuse against the child; (4) or a child whose physical, mental or emotional condition has been impaired or is in imminent danger of being impaired as the result of the failure of his parent . . . to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other means to do so, or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; *or by any other acts of a similarly serious nature* requiring the aid of the court; or (5) who has been willfully abandoned. . . .[20]

Whatever doubts there might be as to the meaning of the phrase "emotional condition," it is clear from the repeated adjectives—"substantial"; "serious"; "protracted"—that the legendary "dirty apartment complaint" is not included. What distinguishes the New Jersey definition from other attempts to define the prob-

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author, that "protection from vagueness must be found in the wisdom of judges rather than in the detail of statute." Tamilia, *Neglect Proceedings and the Conflict Between Law and Social Work,* 9 DUQUESNE L. REV. 579, 584 (1971).

There is a debate in the literature with at least one author questioning whether abuse and neglect ought to be defined in terms of *serious* events and circumstances, arguing that the qualifying adjective may deter reports. Daly, *Willful Child Abuse and State Reporting Statutes,* 23 U. MIAMI L. REV. 283, 314 (1969). The counter argument is that limiting the definition to serious events and circumstances helps minimize premature or unwarranted intrusion into a family. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation,* 67 COL. L. REV. 1, 12 (1967).

[20] Ch. 119 [1974] Laws of N.J. 304-05 [compiled, but not yet published, at N.J. STAT. ANN. § 9:6-8.21] (emphasis added).

lem[21] is not so much the particular events and circumstances encompassed by the definition as it is the emphasis which New Jersey places on the *gravity* of the circumstances which justify intervention.

A broad range of conditions and events may place a child in need of protection.[22] Hence, it is preferable to define those events and circumstances broadly, while emphasizing the compelling level to which those events and circumstances must rise prior to justifiable intervention. It seems fair to conclude from the cases that no modern court is going to strike down child protection legislation simply because the problem is defined broadly.[23] It is, therefore, the responsibility of the legislature to make it clear to the

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[21] In BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 1 at 98, the authors define a "Wanted Child" as follows:

> A wanted child is one who receives affection and nourishment on a continuing basis from at least one adult and who feels that he or she is and continues to be valued by those who take care of him or her.

The Child Abuse Prevention and Treatment Act, *supra* note 1, defines the problem in the following terms:

> For the purposes of this chapter, the term "child abuse and neglect" means the physical or mental injury, sexual abuse, negligent treatment or maltreatment of a child under the age of eighteen, by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary [of Health, Education and Welfare].

88 Stat. 5, 42 U.S.C.A. § 5102 (1975 Supp.).

The definition offered by Goldstein *et al.* is probably as fine and succinct an ideal of general parenting to come along in a long while. It is, however, an ideal which the state has no business attempting to enforce.

The federal government, in the opinion of the authors, commits too much of the legislative responsibility to the executive branch. (It should be emphasized, however, that the federal legislation does not authorize federal intervention in a family for the purpose of investigating allegations of child mistreatment or the provision of treatment or services. The act provides for federal asistance to state programs designed to prevent and treat child abuse and neglect as defined in the act. 88 Stat. 6, 42 U.S.C.A. § 5102 (1975 Supp.).) In H. Rep. No. 93-685, Education and Labor Committee member Landgrebe dissented to the favorable reporting out of the Child Abuse Prevention and Treatment Act in the following words:

> To give the government *total,* unconditional authority to prescribe regulations empowering the state to take children away from parents may be characteristic of a totalitarian state such as Nazi Germany or Soviet Russia.

93 *U.S. Code Cong. & Admin. News* 28 (2nd Session) (emphasis in original).

[22] *E.g.,* Fontana, *The Diagnosis of the Maltreatment Syndrome in Children,* 51 PEDIATRICS 780 (April 1973):

> The neglect and abuse of children denotes a situation ranging from the deprivation of food, clothing, shelter and parental love to instances in which children are physically abused and mistreated resulting in obvious physical trauma and often leading to death.

Id.

[23] Note 17, *supra,* and accompanying text.

courts and social service agencies that the privacy of the family[24] is not lightly to be invaded.

Reporting

It is axiomatic that a child cannot be protected until his or her need for protection is discovered and reported. Every state now has a statutory mechanism for the reporting of child abuse.[25]

The first decision which must be made by a legislature in enacting a reporting statute is the designation of the agency which is to receive the report. It seems clear that a wide variety of agencies should be mandated to accept reports of abuse and neglect, but those reports should be immediately funneled to a single receiving agency expert in the field.[26] In essence, no public or private agency with colorable authority should be permitted to turn away a caller with red tape. A person perceiving a bureaucratic runaround may give up the attempt entirely.

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[24] *See generally,* note 2 *supra.* Although the matter is rarely discussed, it should be clearly understood that a state's respect for the privacy of its citizens will yield occasional tragic results. Unless it is the policy of the state to remove every child from every home where there is a potential for danger—a clearly unacceptable policy—tragedy will sometimes strike before intervention could have been justified. Probably every jurisdiction could recount an instance of a child returned or permitted to remain with his or her parents by the courts or a social agency and then killed. Predicting human behavior is a difficult task. It is irresponsible, however, to use the tragic aberration to justify wide-ranging interference in the private lives of citizens.

[25] Sussman, *supra* note 6, at 270. All states require physicians to report. In addition, there is a trend to expand the base of those required to report. *Id.* at 272. *See* note 41 *infra* and accompanying text.

[26] Kempe, the Colorado pediatrician who in 1961 coined the phrase "battered child syndrome," (*see* note 64 *infra*), recently noted:

> We've come to feel that there is nothing worse than our own situation in Denver where a social worker from Child Welfare gets the case from the hospital social-worker who turns it over to the court social worker who works for the probation department who turns it over to the social worker concerned with foster home care. So far that is "just" four social workers.

Kempe, *A Practical Approach to the Protection of the Abused Child and Rehabilitation of the Abusing Parent,* 51 PEDIATRICS 804, 807 (April 1973).

Another author summed up the argument this way:

> A multiplicity of efforts may lead only to confusion, with agencies working at cross purposes, or worse, no one working at all because each thinks the other is attending to the task.

Sussman, *supra* note 6, at 290 (footnote omitted).

Ideally, the agency empowered to respond initially to a report should be the same agency to take the case, if that is the decision, and follow it. The "good guy/bad guy" problem (the bad guy investigating agency later becomes the good guy helping agency) is probably more apparent than real. Perhaps the people should be different. Realistically, however, when the state chooses to step into a family's life, the name of the agency through which the state operates is probably an irrelevancy to the people whose lives are being disrupted.

The choice of the agency which will bear the ultimate responsibility to act on the report should not be made lightly. One author states flatly, "The entire success of a reporting statute is contingent on the nature of the agency charged with receiving the reports."[27] Another called the issue "the most sensitive area of the whole discussion or reporting,"[28] and the "most confused in terms of legislative action."[29]

In general, the three most commonly advanced alternatives are: (1) law enforcement agencies (police and prosecutors); (2) the juvenile court; and (3) child welfare agencies.[30]

The arguments in favor of police assumption of primary responsibility for responding to reports of child abuse and neglect seem inextricably tied to the argument that child abuse and neglect should be dealt with in the criminal courts.[31] Other arguments for police responsibility—principally that the police are the only agency capable of an around-the-clock response—lose their validity if an effective, professional team of child protection specialists is made available. In the final analysis, it is almost universally agreed that the police are not the appropriate agency in which to vest primary responsibility for responding to reports of child abuse.[32]

The arguments in favor of using the courts as the primary agency involve the ability of the courts to back up their decisions with the

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27 Sussman, *supra* note 6, at 280.

28 DeFrancis, *The Status of Child Protective Services,* in HELPING THE BATTERED CHILD & HIS FAMILY 140 (Kempe & Helfer, Eds. 1972).

29 *Id.*

30 Sussman, *supra* note 6, at 280.

31 The question of criminal penalties for the parent or guardian who places his or her child in need of protection is discussed *infra* at pp. 11-12.

32 Sussman, *supra* note 6, sums up the arguments as follows:

> 1) Once arrested, or even when questioned by police, parents become uncooperative and less favorably disposed to treatment aimed at the eventual reunion of the family.
>
> 2) Successful prosecution (conviction) for willful abuse is rare. Most criminal actions result in a settlement in favor of the accused, or outright acquittal. . . .
>
> 3) When a conviction is obtained, punishment will usually fail to solve the psychological problems of the abuser and will expose the child to even greater hostility.
>
> 4) Police departments simply cannot provide the services necessary to arrive at a diagnosis of the problem, treat the child, devise a plan to protect him in the future, and treat the family or parents if possible.
>
> 5) Early police investigation may unnecessarily involve in the law enforcement process those about whom incorrect or unfounded reports have been made.
>
> 6) Fear of conviction leads parents to avoid seeking assistance for themselves and medical attention for their injured child.
>
> 7) Physicians and others are more reluctant to make reports to law enforcement officers than they would be to report suspected cases of abuse to welfare agencies or child protective societies.

Id. at 283-84 (footnotes omitted).

authority of a court order.[33] The argument is weak in the first place, given the ability of other parties to go to court and seek orders where they are seen as necessary or desirable. In addition, there are very strong policy reasons for keeping the courts, potentially the final tribunal in any child protection case, out of the information and evidence-gathering phases of any child protection action.[34]

Most of the commentators in the field agree that the ultimate responsibility to act on reports should be placed with child protection departments in social service agencies. The American Humane Association, in taking that position, noted:

> Of all the possible investigative agencies in a community to which reports of child abuse might be made, the Child Protective Agency is best qualified to focus on the problem of "what happens to children" in these circumstances. This involves a professional and skilled evaluation of the continuing hazards and dangers to child victims of abuse and whether removal from parental custody is indicated. Where removal of children is considered necessary, such action will be commenced in the appropriate court. Where removal is not seen to be necessary the community would be assured that services are extended to parents to help remove the causes of their abusive behavior and to help them assume more responsible parent roles.
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> In making this position statement the committee is fully aware of and recognizes the responsibility of the police and other law enforcement agencies in assessing the community's action against the parents; and the decisive role played by the Juvenile Court, particularly when immediate protection and removal of custody are made necessary by the risk of continuing hazard to children.[35]

The above description of the child protective agency is at best an ideal. It has certainly not achieved widespread acceptance in this country.[36] However, in terms of having the *potential* to do an adequate job in responding to child protection reports, the public social services agency is the best hope.[37]

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33 *Id.* at 284.

34 *Id.* at 285, quoting U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, CHILDREN'S BUREAU, STANDARDS FOR JUVENILE & FAMILY COURT 13 (1966).

35 THE AMERICAN HUMANE ASSOCIATION, CHILDREN'S DIVISION, GUIDELINES FOR LEGISLATION TO PROTECT THE BATTERED CHILD 10 (1963). Quoted in Sussman, *supra* note 6, at 285.

36 *E.g.*, Issacs, *supra* note 5, at *id.*

37 The recent trend favors the single agency multidisciplinary approach. *E.g.*, Kempe & Helfer, *The Consortium: A Community-Hospital Treatment Plan*, in HELPING THE

The centralized system, though easing the burden of reporting, leaves one problem unresolved. What of the person who becomes aware of a child's need for protection but who fails to report that need? Setting out a general requirement that "any person" with knowledge of a child in need of protection report that need[38] with criminal or quasi-criminal sanctions for the failure to report is not the best solution. There are serious due process questions raised by criminal statutes which seek to punish the failure to do something.[39] On a more practical level, such a penalty would be rarely, if ever, invoked.[40]

On the other hand, there does seem to be a good argument for singling out a rationally selected class of people[41] required to report a child's potential need for protection. The concommitant creation of criminal or quasi-criminal penalties for the failure to report might well create an *in terrorem* effect motivating people

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BATTERED CHILD & HIS FAMILY, *supra* note 28, at 182. The trend received major reinforcement with the enactment of the Child Abuse Prevention and Treatment Act. 88 Stat. 4 to 9, 42 U.S.C.A. §§ 5101 to 5106 (1975 Supp.). The Act authorizes the expenditure of federal funds for, *inter alia*:

> [T]he establishment and maintenance of centers, serving defined geographic areas, staffed by multidisciplinary teams of personnel trained in the prevention, identification, and treatment of child abuse and neglect cases, to provide a broad range of services related to child abuse and neglect. . . .

88 Stat. 6, 42 U.S.C.A. § 5103 (a) (2) (1975 Supp.).

38 *E.g.*, N.J. STAT. ANN. § 9:6–8.10 (1974-75 Supp.).

39 Even though "ignorance of the law is no excuse" is a generally accurate statement, the government does not have the right to punish conduct which the average person would not conclude was a crime unless it can be shown that the person knew about the law. *See, e.g.*, Lambert v. California, 355 U.S. 225 (1957), (conviction under ordinance which required convicted felons to register with local police would be reversed in the absence of proof of *scienter*).

40 *E.g.*, Shepherd, *The Abused Child and the Law*, 22 WASH. & LEE L. REV. 182, 192 (1965). But, the fact that the penalty would not be invoked does not dispose of the arguments in favor of a penalty on the books. See note 42, *infra*, and accompanying text.

41 The rationale employed in the selection of the class would be to single out those people who, because of their occupations, would be more likely to come into contact with children in need of protection. New York's reporting statute is striking for the broad range of people required to report:

> Any physician, surgeon, medical examiner, coroner, dentist, osteopath, optometrist, chiropractor, podiatrist, resident, intern, registered nurse, hospital personnel engaged in the admission, examination, care or treatment of persons, or Christian Science practitioner having reason to [suspect child abuse, must report their suspicion].
>
> [In addition] any social services worker, school official, or day care center director . . . shall report.

N.Y. Soc. SERVS. LAW § 413 (McKinney's 1974-75 Supp.).

The class of people singled out above nearly all belong to active professional associations which would be likely to disseminate the law's requirements, obviating the Due Process problem discussed in note 39, *supra*.

otherwise reluctant to report their often well-founded suspicions that a child needs protection.[42]

A corresponding issue raised in the context of reporting is the frequent suggestion that states keep a central registry of child protection reports.[43] As is true of all government data banks, a clear demonstration of the need for maintaining such a collection of facts should precede the collecting. In the case of child protection records, it appears that the only reasonable rationales would be: (1) the use of such information as a statistical tool; (2) use as a diagnostic (or evidentiary) device to determine if there is a pattern of injury to a particular child or in a particular family;[44] or (3) as a repository of information on a particular family situation which could be relevant to decisions made in the provision of services.

Legislatures contemplating a central registry should provide for the expunction of reports that prove unfounded. Unfortunately, when registries are set up, there is often no attempt by the lawmakers to spell out the justification for such registries or even the use to which they may be put.[45]

Responding to the Report

Although evaluating the weight of a report is an awesome responsibility, that responsibility must be assumed and legislation should spell out very clearly where the responsibility lies.[46] At the

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42 It seems clear that the phenomenon of child abuse and neglect are seriously under-reported. One author suggests that a reason for under-reporting is:

> [T]he discomfort and resistance which the reporting person himself feels when he is confronted with a battered child and his parents.

Sanders, *Resistance to Dealing with Parents of Battered Children,* 50 PEDIATRICS 853, 854 (1972).

In order to move people beyond their discomfort, it may be quite valid to leave an unenforcible penalty clause on the books. The clause itself can remove the psychological barriers to reporting. McCoid, *The Battered Child and Other Assaults on the Family,* 50 MINN. L. REV. 1, 43 (1965).

43 Recently, there has been a suggestion that a nationwide registry be established. FONTANA, SOMEWHERE A CHILD IS CRYING, at 248 (1973).

44 The impetus for a central registry stems in part from the realization that an aspect of the maltreatment syndrome is the parent's attempt to avoid detection. This often results in the parent taking the child to a different doctor or different hospital every time there has been an injury. Fontana, *The Diagnosis of the Maltreatment Syndrome in Children,* 51 PEDIATRICS 780, 781 (April 1973).

45 For example, N.J. STAT. ANN. § 9:6–8.11 (1974-75 Supp.) provides that all reports of child abuse must be forwarded to the "Central Registry of the Bureau . . . in Trenton." No other reference to the registry appears. There are no legislative guidelines for use of the information in the registry; control of access to the registry; expunction of unfounded reports.

46 Note 26, *supra.*

very least, legislation should require the immediate expert evaluation of every report.[47] While the typical phone call from a concerned neighbor may not contain enough information to decide whether or not there is real danger present, it seems obvious that any reasonable doubt should be resolved in favor of an immediate investigation.[48]

In recognition of the fact that there may arise situations where summary action on the part of the person responding to a report of a child in need of protection may be required, several states now authorize the temporary emergency removal of the child from the home.[49] The commentators have generally viewed the use of summary protective custody as a dangerous but necessary option.[50] It is not terribly difficult to develop hypothetical situations illustrating the kind of situation where emergency action might be

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[47] In order to qualify for federal funding under the Child Abuse Prevention and Treatment Act, a state must, *inter alia*, provide that:

> [U]pon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect;

88 Stat. 6, 42 U.S.C.A. § 5103 (b) (2) (C) (1975 Supp.).

[48] Arguments in favor of police response to reports cite the ability of police to make immediate and expert investigations, as well as the legal authority of the police to enter homes under reasonable circumstances. *See* arguments and authorities summarized and collected in Sussman, *supra* note 6, at 282.

[49] *E.g.*, N.Y. Soc. Servs. Law § 417 (McKinney's 1974-75 Supp.) authorizes a designated class of people (consisting principally of peace officers and social workers) to remove a child summarily from the place where he or she is residing:

> [I]f the circumstances or condition of the child are such that continuing in his place of residence or in the care and custody of the parent, guardian, custodian or other person responsible for the child's care presents an imminent danger to the child's life or health.

Additionally, physicians, as well as peace officers and social workers may retain custody of a child and refuse to return the child to the parents under the above circumstances.

[50] *E.g.*, Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 Col. L. Rev. 1, 46 (1967). *Contra*, DeFrancis & Lucht, Child Abuse Legislation in the 1970's at 15 (1974 rev. ed.):

> There is no question but that the highest of motives prompted the enactments which seek to deal with emergency situations. But we cannot afford to substitute good motives for effective and skilled services. [Emergency removal] measures are, in our judgment, unnecessary and may even be antithetical to the development of truly skilled and effective protective service workers.

Enactment of emergency removal statutes may be, in fact, unnecessary in view of the general tort principle that one may act without civil liability in the defense of another. Restatement (Second) of Torts § 76.

warranted.[51] However, it is clear that the power is one which should be stringently circumscribed by legislation to situations clearly emergent in character. Indiscriminate use of the power will only reinforce prevailing attitudes that child welfare agencies are "child-snatchers."[52] If a legislature decides to join those few states now authorizing emergency removal,[53] it should resolve, and reduce to clear legislative formulation, the following issues:

(1) What criteria are to be used in deciding whether to exercise the power or not? (2) Who may exercise the power? (3) How long may such a removal continue before the decision to remove is subject to judicial review? (4) What immediate remedies are available to a person aggrieved by the "seizure" of his or her child?

Of a less controversial nature are the "physician hold" statutes.[54] In recognition of the fact that releasing a child from medical care to the very people who had necessitated the care in the first place may place the child in need of protection, physicians

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[51] The "hot line" receives a call from neighbors that the children in the next apartment appear to have been abandoned. The child protection worker arrives on the scene. The door is open. The parent is not present. A three and four-year-old are wandering the apartment unfed. The parent hasn't been seen for two days.

[52] It is the opinion of the authors that the power to remove summarily a child from his or her home on grounds that the child needs immediate protection should be granted—if at all—only to professionals who are expert at evaluating such circumstances. Whether those professionals are employees of the child welfare agency or the emerging multi-disciplinary "consortiums" (*see* note 37, *supra*), they are in the best position to make the decision and assume responsibility for it. This would not mean that the police or any other person coming upon an emergency situation would be forbidden to act. *See*, State v. Cruz, 76 N.J. Super. 325, 184 A.2d 528 (App. Div. 1962) in which the court held that a police officer had not acted improperly in attempting to remove children from a home where a dangerous situation had evolved from a domestic quarrel.

> It is unrealistic to say that [the police officer] should have attempted to secure some kind of warrant before dealing with such an urgent and pressing situation.

Id. at 329, 184 A.2d at 530 (App. Div. 1962).

[53] New Jersey appears to have been the seventh state to have adopted such a measure. *See* 1974 N.J. SESS. L. SERV. 306 [compiled, but not yet published, at N.J. STAT. ANN. § 9:6-8.27, 28]; *cf.* Sussman, *supra* note 6, at 291.

[54] *E.g.*, N.J. STAT. ANN. § 9:6-8.16 (1974-75 Supp.) providing that:

> Any physician examining or treating any child, or the director or his designate of any hospital or similar institution to which a child has been brought for cure or treatment, is empowered to take the said child into protective custody when the child has suffered serious physical injury or injuries, and the most probable inference from the medical and factual information supplied, is that said injury or injuries were inflicted upon the child by another person by other than accidental means and the person suspected of inflicting or permitting to be inflicted the said injury upon the child is a person into whose custody the child would normally be returned.

The physician's hold provision, however, may not be widely-used. As one author points out, it is "seldom necessary" to invoke the law, since parents can usually be convinced to

and hospitals are permitted under certain circumstances to hold the child for a specified period.[55]

Going to Court

One of the more disturbing aspects of child protection is the fact that as many as 90 percent of the decisions made, ranging from simple permission to accept social services in the home to permanent surrender of parental rights, are made without judicial review as to the voluntariness of the decisions or even whether or not the decisions are understood.[56] However, in the relatively uncommon event that the state is determined to intervene in a family and the family disputes that decision, a justiciable controversy is presented, with the state bearing the burden of persuading a court that its decision should prevail.[57]

There is virtually unanimous agreement in the field that a criminal court is an inappropriate forum in which to protect children.[58] What has traditionally been denominated child abuse or child neglect is difficult to prove in a criminal court.[59] The effect of an acquittal may place a child in even greater danger than prior to the state's involvement:

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admit their child. Joyner, *Child Abuse: The Role of the Physician and the Hospital,* 51 PEDIATRICS 799, 800 (April 1973).

55 In legislating this power, many of the issues involved in enacting emergency removal powers must be considered here. See n. 49 *supra,* and accompanying text.

56 Even the most petty criminal offender must appear before a judge or magistrate in order to enter a guilty plea. The judge or magistrate, in turn, must satisfy him or herself that there is a factual basis for the guilty plea—*i.e.* the person did what the law proscribes—and that the person understands the consequences of his or her plea. While voluntarily accepting the assistance of a social services agency is not equivalent to pleading guilty to a crime, the "voluntariness" of the decision should be subject to the inquiry of a neutral and detached magistrate. *See* note 15, *supra.*

57 As one commentator noted:

> . . . [N]eglect laws, as with delinquency and criminal statutes, are not an attempt to resolve disputes between private litigants, but are an expression of a definite state interest, and the state uses a panoply of resources to vindicate its interests.

Note, *Representation in Child-Neglect Cases: Are Parents Neglected,* 4 COL. J. OF LAW AND SOC. PROBS. 230, 250 (1968).

58 *See* Sussman, *supra* note 6, at 283.

59 *E.g.,* Issacs, *The Law and the Abused and Neglected Child,* 51 PEDIATRICS 783 (April 1973):

> To link the child's injuries with illegal conduct on the part of parents often requires evidence that is difficult to acquire.

Id. at 787. *But cf.* State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973). In that case, the defendant was convicted of manslaughter for the death of his infant son. During the course of the trial, expert testimony was allowed in that the child exhibited signs of having been a "battered" child and that the father fit the psychological profile of a "battering parent." The Minnesota Supreme Court held that the evidence had been properly admitted. The case is noted at 42 FORDHAM L. REV. 935 (1974).

> A parent accused of the crime of child abuse if acquitted generally feels that he has been vindicated, that his conduct was justified, and the jury has, in effect, found his "corrective" measures acceptable. Thus, the parent's battering tendencies may be reinforced although his ordeal will prompt him to become more cunning and subtle.[60]

If the aim of the state is to protect children (as distinguished from punishing parents), the focus of any judicial proceeding should remain firmly on the child. Where the focus is instead permitted to shift to the assignment and assessment of an adult's criminal culpability, the child, *per force*, takes a back seat.

The arguments in favor of retaining criminal penalties[61] are inexorably bound with the public fear and loathing which surrounds child abuse. There was a "battered child syndrome" long before Kempe named it.[62] However, the conclusion that injuries in children resulted from longtime and continuing brutal treatment by their parents had long been resisted.[63] That resistance is explicable, in no small measure, by the reluctance of researchers to accept the obvious conclusions to be drawn from that data. That reluctance continues today, even among physicians.[64] The realization that parents can and do inflict horrible, deliberate injury on their own children stirs public anger. However, if that anger is to be given positive effect, the courts and the legislatures must firmly insist that allegations of child abuse be proved within the constraints of due process, consistent with the enormity of the rights being litigated.

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[60] Delaney, *The Battered Child and the Law,* in HELPING THE BATTERED CHILD AND HIS FAMILY, *supra* note 28, at 190-91.

[61] The arguments seem to reduce to the statement that murder and assault are crimes. *E.g.,* materials collected in Sussman, *supra* note 6, at 281. Even that argument may not be correct. So long as society permits a parent—within reasonable limits—to use corporal punishment on the child, assault of a child is *not* a crime.

[62] *E.g.,* Solomon, *History and Demography of Child Abuse,* 51 PEDIATRICS 773 (April 1973).

[63] The first authoritative indication of a battered child "syndrome" came in 1946 with the publication of a paper noting an unexplained coincidence of long bone fractures and subdural hematoma in children. Caffey, *Multiple Fractures in the Long Bones of Children Suffering from Chronic Subdural Hematoma,* 56 AM. J. OF ROENTGENOLOGY 163 (1946).

However, despite numerous subsequent papers making the conclusion more and more inescapable [see materials collected in Sussman, *supra* note 6, at 245-246 nn. 1-10] it was not until Kempe and his colleagues presented their paper to the American Academy of Pediatrics in 1961 that the problem received serious attention. Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome,* 181 J.A.M.A. 17 (1962).

[64] Kempe, *Pediatric Implications of the Battered Baby Syndrome,* 46 ARCHIVES OF DISEASE IN CHILDHOOD 34 (British Medical Association 1971):

> Physicians will go to enormous lengths to deny a possibility of physical abuse of a child by his parents. Rare bleeding disorders, osteogenesis imperfecta tarda,

It is sometimes stated that a child protection proceeding ought to concern itself with "the best interests of the child."[65] However, the "best interests" test is not properly invoked until the second stage of the proceedings, that is, after a determination that the child needs protection. While it may arguably be in the best interests of every child to grow up in an intellectually stimulating two-parent home located in a quiet, leafy neighborhood, it would be approaching the interdicted Platonic suggestion[66] to decide that a state should supervise the upbringing of a particular child on the grounds that the child is not being treated as we would prefer all children be treated.[67]

The nature of the two-tiered proceedings was explained with admirable clarity by the Oregon Supreme Court in *State v. McMaster*.[68] Anna McMaster, at age two months, had been taken from her natural parents and placed in a foster home and remained there for four years.[69] At that point, the foster parents expressed their desire to adopt Anna. The natural parents refused to relinquish their parental rights voluntarily; as a consequence, court action was initiated. Applying a statutory declaration that a person was not fit to be a parent who "by reason of conduct or condition [was] seriously detrimental to the child,"[70] the trial court terminated parental rights.

The Oregon Supreme Court, after first determining that the definition of unfitness as quoted above, was constitutionally valid, reversed the termination of parental rights.[71] In so doing, the court agreed that the following facts about the McMaster family had been properly found: the McMasters quarrelled frequently;

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obscure endocrine diseases, "spontaneous" subdural hematoma, or malabsorption syndrome are invoked. All are an attempt to deny the fact that failure to thrive or injuries could be due to pathological mothering.

Id. at 34. One study reported that of 7,000 abuse reports received in New York City in 1972, a total of eight came from physicians in private practice. Note, *Child Abuse and the Law: A Mandate for Change,* 18 How. L. J. 200, 203 (1974).

65 The test has long been used in private custody disputes. Where two or more people with established "claims" to a child dispute who should have custody of the child, it seems appropriate to inquire as to the interests of the child.

The analogy in a child protection context breaks down. The state—unlike the natural mother and father involved in the typical custody dispute—does not possess even a colorable "claim" to the child. Unless and until that claim is established by demonstrating the unfitness of the private party, the test is inapposite.

66 Note 9, *supra.*

67 *See* Goldstein *et al.,* BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 21, at *id.*

68 486 P.2d 567 (Ore. 1971).

69 *Id.* at 572.

70 *Id.* at 569.

71 *Id.* at 571-572.

Mr. McMaster had never held a job for longer than one month; the family usually subsisted on welfare; Anna had been born illegitimate; Mr. McMaster would often disappear with the welfare check, leaving the family without funds. The circumstances, in the opinion of the court, did not justify termination of parental rights:

> We are of the opinion that the state of the McMaster family is duplicated in hundreds of thousands of American families—transiency and incapacity, poverty and instability. [The child welfare worker] was undoubtedly correct when he stated that living in the McMasters' household would not "allow this child to maximize her potential." However, we do not believe that the legislature contemplated that parental rights could be terminated because the natural parents are unable to furnish surroundings which would enable the child to grow up as we would desire all children to do. . . . The legislature had in mind conduct substantially departing from the norm and, unfortunately for our children, the McMasters' conduct is not such a departure.[72]

The court recognized that it could not concern itself with the living situation which would allow Anna to "maximize her potential"[73] until and unless a responsible finding had been made that the conduct of the natural parents exceeded the bounds which the law would tolerate. To justify the termination of the McMasters' parental rights would be to justify the termination of parental rights of hundreds of thousands of people for the condition of poverty. It is probably not in the "best interests" of any child to grow up poor. It is certainly and emphatically not in society's best interests to terminate parental rights on the bare ground of poverty.

Although a child protection proceeding is not criminal in nature, many courts have taken note of the importance of the issues litigated. In *In re Custody of a Minor*,[74] Chief Justice (then judge) Burger, writing for a divided court, noted that:

> . . . the proceeding as a whole is one which deals with important rights, the natural right of parents to rear and educate their own children in the parental home and the natural right of the children so to be reared.[75]

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[72] *Id.* at 572-573.
[73] *Id.* at 572.
[74] 250 F.2d 419 (D.C. Cir. 1957).
[75] *Id.* at 420.

At issue in *Custody of a Minor* was whether the child had a constitutional right to counsel. The court reserved opinion, noting that the child had been well-represented by the social services agency.[76] In *Cleaver v. Wilcox*,[77] the factors to be balanced in considering the appointment[78] of counsel for an indigent parent were laid out precisely:

> Whether the proceeding be labelled "civil" or "criminal" it is fundamentally unfair, and a denial of due process for the state to seek removal of the child from an indigent parent without according that parent the assistance of court-appointed and compensated counsel. . . . Since the state is the adversary . . . there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel. The parent's interest in the liberty of the child, in his care and in his control, has long been recognized as a fundamental interest. . . . Such an interest may not be curtailed by the state without a meaningful opportunity to be heard, which in these circumstances includes the assistance of counsel.[79]

Interestingly, the necessity for providing legal counsel for the child has received more legislative attention than the provision of counsel for the parent.[80] New York, the first state to recognize the child's need for an attorney, made the following finding of fact:

> [C]ounsel is often indispensable to a practical realization of due process of law and may be helpful in making

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[76] *Id.* at 421.

[77] 40 U.S.L.W. 2658 (N.D. Cal. 1972).

[78] The issue is *appointment* of counsel, not *presence* of counsel. No court would exclude retained counsel.

[79] Cleaver v. Wilcox, 40 U.S.L.W. 2658 (N.D. Cal. 1972) at 2659.

[80] *See* DEFRANCIS & LUCHT, CHILD ABUSE LEGISLATIVE IN THE 1970's (Rev. Ed. 1974) *passim*. The Child Abuse Prevention and Treatment Act requires states wishing to qualify for federal assistance to

> ... provide that in every case involving an abused or neglected child which results in judicial proceedings a guardian ad litem shall be appointed to represent the child in such proceedings.

88 Stat. 6, 42 U.S.C.A. § 5103 (b) (2) (G) (1975 Supp.). It is unclear from the federal legislation whether "guardian ad litem" means legal counsel. In the traditional use of the phrase, a guardian ad litem is appointed by a court to represent an infant's interests in any suit to which he or she was a party. Where the guardian *ad litem* is not an attorney, it would seem obvious from the fiduciary nature of the relationship that the very first thing he or she would do would be hire an attorney. Be that as it may, it is possible that the federal legislation is deliberately vague on the question in order to give states room to experiment with independent representation of the child. *Compare* CONN. GEN. STAT. ANN. § 17-38a (f) (2) (1974-75 Supp.):

reasoned determinations of fact and proper orders of disposition.[81]

When the issues are potential termination of the parental relationship and disruption of a child's life, the necessary parties, parent and child, have the right to be heard effectively.[82] Children and parents, around whom a protection hearing swirls, face the loss of liberty in many senses of the word. Counsel may indeed cramp the state's style. However, as a 1967 study concluded:

> [O]f course law is an irksome restraint upon free exercise of discretion. But its virtue resides precisely in the restraints it imposes upon the freedom to follow [a] course without having to demonstrate its legitimacy or even the legitimacy of . . . intervention.[83]

The issue of counsel for the child has probably been laid to rest by the Child Abuse Prevention and Treatment Act.[84] Refusal to appoint counsel to represent the indigent parent seems indefensible.[85]

There are two remaining issues amenable to legislative resolution: the burden of persuasion to be met by the party seeking to

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> [T]he child may be represented by counsel appointed by the court to speak in behalf of the best interests of the child, which counsel shall be knowledgeable about the needs and protection of children . . .

and COLO. REV. STAT. ANN. § 22-10-8.(3) (1971 Cum. Supp.):

> The court in every case filed shall appoint a guardian ad litem for the child. . . . The guardian ad litem shall be given access to all reports relevant to the case made to or by any agency or person . . . and to reports of any examinations of the child's parents or other custodian pursuant to this section. The guardian ad litem shall make such further investigation as he deems necessary to ascertain the facts, interview witnesses, examine and cross examine witnesses in both the adjudicatory and dispositional hearings, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree appropriate for adequately representing the child.

[81] N.Y. FAM. CT. ACT § 241 (McKinney's 1963). *See generally,* Issacs, *The Role of the Lawyer in Child Abuse Cases,* in HELPING THE BATTERED CHILD AND HIS FAMILY, *supra* note 28 at 225.

[82] *E.g.,* Cleaver v. Wilcox, *supra* note 79. *Compare* Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area,* 13 J. FAM. L. 223 (1973-74) and TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967):

> Nor does reason appear for the argument that counsel should be provided to the child in some situations but not in others; in delinquency proceedings for example, but not in neglect. Wherever coercive action is a possibility, the presence of counsel is imperative.

Id. at 33.

[83] TASK FORCE REPORT, *supra* note 82, at *id.*

[84] *Supra* note 80.

[85] *See* Catz & Kuelbs, *supra* note 81. *See generally,* Note, *Child Neglect: Due Process for the Parent,* 70 COL. L. REV. 465 (1970).

intervene in the family, and the character of the evidence to be used in meeting that burden. Because of the magnitude of the rights involved, only reliable and relevant evidence should be heard.[86] Hence, the rules of evidence should apply as usual. One variation that has been suggested is the adoption into the law of child protection of the tort doctrine of *res ipsa loquitor.*[87] Thus, where a child is found in a condition that would not normally obtain in the absence of abuse or neglect, and that condition is otherwise unexplained, the burden of explanation (and the risk of non-persuasion) shifts to the parent.

Concerning the burden of persuasion, it seems clear that there is no constitutional requirement that the burden to be met is proof beyond a reasonable doubt. However, given the rights involved, it may be preferable to establish a somewhat greater burden than the relatively easy "preponderance of the evidence" needed to prove an automobile negligence case.[88]

Disposition

Once the court has made its determination that a child is in need of protection, the question to be answered is what form that protection should take. In some instances, the home situation will be so dangerous that any disposition short of jailing the child is

[86] In re Cope, 106 N.J. Super. 336, 255 A.2d 798 (App. Div. 1969), in a proceeding to terminate parental rights, the trial court's decision to terminate was reversed because of the character of the evidence admitted below.

> In the present case it appears that several of the [child welfare] Bureau's witnesses testified from written reports prepared by other Bureau personnel. None of these reports was placed in evidence (despite a request by counsel . . . that they be offered) and we have no way of knowing from the record whether the testimony fully and accurately reflected their contents. . . . None of the authors of these reports were called to testify and nothing was introduced to establish the circumstances under which they were prepared. The testimony of the witnesses was "double" (sometimes "triple") hearsay, making verification of its accuracy virtually impossible.

Id. at 344, 255 A.2d at 803 (App. Div. 1969).

[87] *See, e.g.*, In re Young, 50 Misc.2d 271, 270 N.Y.S.2d 250 (Fam. Ct., Westchester Co. 1966). The adoption of the doctrine into child protection will ease state intervention into a family. *Cf.* State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973) discussed *supra,* note 59.

[88] *See, e.g.*, In re Guardianship of B.C.N., 108 N.J. Super. 531, 262 A.2d 4 (App. Div. 1970):

> Normally and logically, the blood relationship should be continued in the absence of parental consent unless and until the proposed adopters clearly and convincingly establish the unfitness of the opposing parent. . . .

Id. at 537, 262 A.2d at 7 (App. Div. 1970). *But see* 1974 N.J. SESS. L. SERV. 311 [compiled, but not yet published, at N.J. STAT. ANN. § 9:6–8.46 (b) (1)] which sets out the following less rigorous burden of persuasion:

> In a fact-finding hearing, any determination that the child is an abused or neglected child must be based on a preponderance of the evidence. . . .

preferable to a return home. In other situations, a return home might be justified immediately with the proviso that the parents receive treatment or that a child protection agency supervise the home situation carefully.

One thing is clear about disposition and treatment—under no circumstances will any public or private agency, or any combination of the two, ever have the resources to do the job in the orthodox casework sense. Dr. Kempe's description of the treatment needed to make a home safe for a child makes this clear:

> The averaging number of hours spent in the home the first week [after the child has been removed from the home] is 15. That is not homemaking, but just holding hands, being on the phone, coming back, helping with minor problems of getting through life, and being very sympathetic.
>
> The second week the average time is ten hours. The third week is about four. After that it stays at four hours a week for six to eight months.
>
> . . . No social worker in our society has the time to do that. If you carry more than two cases, you are not carrying any. . . . Therefore, a social worker working for a city institution, that carries 15 or 20 or 30 such cases is not doing it.[89]

Hence, when a legislature is considering how to spend limited resources, it should resist the temptation to be swayed by pleas that the caseloads of the public child welfare agencies be reduced. Realistically, they are not going to be reduced to a level such that the job can be done effectively. It is probably fair to state that a reduction by fifty percent—accomplished through a doubling of salary appropriations—of the caseloads of most public child welfare agencies would not increase the agency's effectiveness by whatever reasonable criteria effectiveness is measured.

There are two things a legislature can do in child protection, once effective legislation is in force. First, spend money on qualified psychologists and psychiatrists. Kempe argues as follows:

> Early on you need a very careful diagnosis of family dependent abnormality. About eighty percent of our cases are inadequate, yearning people. . . . About ten percent are frankly, mentally ill. These are paranoid schizophrenics and psychopathic personalities, aggressive psychopaths who don't communicate except through bashing. . . .

[89] Kempe, *A Practical Approach to the Protection of the Abused Child and the Rehabilitation of the Abusing Parent,* 51 PEDIATRICS 804, 808 (April 1973).

> [T]hey bash their friends, their neighbors, and their children indiscriminately.[90]

Having determined that a child needs protection, a judge is likely to make vastly different orders of disposition depending on whether the parent is a dangerous psychotic, or, instead, simply an inadequate person who might be taught "parenting" in a reasonable period.[91] The second thing a legislature can do is to spend the state's money on the development of the many, surprisingly cheap, surprisingly effective[92] alternatives to orthodox casework.[93]

Conclusion

It should be abundantly clear to anyone considering legislating child protection that the exercise is a careful balancing act. The cruelest and most cynical of hoaxes, however, is for a legislature to enact sweeping statutory change—to create a "model" child protection act— and then do nothing by way of providing support facilities except to heap added responsibility on already overburdened and ineffective courts and public agencies.

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90 *Id.* at 806.

91 Kempe estimates that eighty per cent of children removed from their homes for their protection may be returned safely within eight months *if* the parents are actually given treatment. Kempe, *supra* note 89, at 808.

The question of a "reasonable period" is by no means one amenable to legislative resolution. *See generally* Goldstein *et al.*, BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 1, at 32-34. Goldstein and his colleagues argue persuasively that the age of the child is probably the crucial factor to be taken into consideration in making orders of disposition.

92 *See* Kempe, *supra* note 89, at 807:

> While a lot of skill is required in diagnosis, much less skill is required in treatment if skill is defined in terms of organized, educated, learned kinds of professions. We have given up having anyone get psychiatric treatment or case work treatment in the social work sense in our unit.
>
> Psychiatrists Dr. Steele and Dr. Pollack, who are analysts, have had in analysis a number of people who are rich and motivated and battered their children. They did no better at $35 an hour than we have done with our mothering aides, family aides, who have training in two different ways. They have had the training of having had a loving mother and father. Then they have been a loving father or mother. They have not gone to any courses. They have not had any indoctrination. We pay them $1.35 an hour. I suppose it would be $2 in New York, but even that's cheap; and they do well.

The implications of Kempe's remarks are that a major restructuring of most state's child welfare agencies—taking professionals out of treatment and limiting their responsibilities to initial intervention and diagnosis—is a way of increasing the effectiveness of child welfare agencies with little—if any—additional cost.

93 The Child Abuse Prevention and Treatment Act makes federal funds available for

> innovative programs and projects, including programs and projects for parent self-help . . . .

88 Stat. 6, 42 U.S.C.A. § 5103 (a) (4) (1975 Supp.).

Kempe, *supra* note 89 *passim*, describes in some detail the following methods of treating and preventing child abuse and neglect: crisis nursery, day care facilities, foster home therapy, homemakers, lay therapists, parents anonymous and a hot line.