

THE LEGAL ASPECTS OF REPORTING KNOWN AND SUSPECTED CHILD ABUSE AND NEGLECT*

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I. INTRODUCTION

APPROXIMATELY ONE MILLION CHILDREN ARE MALTREATED by their parents each year. Of these children, as many as 100,000 to 200,000 are physically abused, 60,000 to 100,000 are sexually abused, and the remainder are neglected. Each year, more than 2,000 children die in circumstances suggestive of abuse or neglect.¹

Accounts of child maltreatment can be found throughout recorded history.² Although concern over the needs of children and families in personal and social distress developed slowly during the eighteenth century, concerted efforts to protect abused and neglected children did not occur until late in the nineteenth century. The creation of the New York Society for the Prevention of Cruelty to Children (SPCC) in 1875 — and its legal recognition through state legislation in the same year³ — are major milestones in society's efforts to remedy the plight of abused and neglected children. Since then, an expanding number of SPCCs, local police agencies, and a developing network of public welfare agencies have shared and divided the responsibility to receive and investigate reports of known and suspected child abuse and neglect.

But until recently, child abuse and child neglect were hidden problems, relegated to understaffed and overwhelmed agencies far from public view. Neither the true seriousness of child maltreatment nor the urgent need to implement effective societal responses was widely recognized. It was only in the 1960's that the plight of "battered" and "maltreated" children was first brought to public

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1. U.S. NAT'L CENTER ON CHILD ABUSE AND NEGLECT, DEP'T OF HEALTH, EDUCATION AND WELFARE, *CHILD ABUSE AND NEGLECT REPS.* 7 (Feb. 1977) [hereinafter cited as *NATIONAL CENTER REPORT*].

2. See, e.g., 1 W. BLACKSTONE, *COMMENTARIES** 452 cited in McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1 n.1 (1965).

3. See An Act for the Incorporation of Societies for the Prevention of Cruelty to Children, ch. 130, 1875 N.Y. LAWS 114.

attention, largely through the efforts of three physicians, Doctors C. Henry Kempe, Ray Helfer, and Vincent J. Fontana.⁴ By 1967, every state had enacted legislation requiring physicians to report child abuse.⁵

However, such reporting laws are only one step toward protecting endangered children.⁶ By 1970, most child protective systems had grown into patchwork systems of blurred responsibility, often based on vague and superficial considerations. Responsibility was frequently passed from one agency or individual to another; continuous referrals caused frequent loss of information and delays in providing services. The inability of existing agencies to protect endangered children was widely admitted. Studies found that children suffered further injury or died after a report was made to the authorities because of administrative breakdowns among "balkanized" agencies.⁷ In response to growing public and professional awareness that existing child protective procedures needed to be strengthened and upgraded,⁸ states began to reform their child protective systems as well as their child abuse reporting laws. As part of this broadening concern, the United States Congress passed the Child Abuse Prevention and Treatment Act in 1974 (Federal Act).⁹ The Federal Act's eligibility criteria for grants to states to help improve their child abuse and neglect services reflect the evolution toward more extensive and detailed child protective laws. Section 4(b)(2) of the Act provides, in part:

(2) In order for a State to qualify for assistance under this subsection, such State shall—

(A) have in effect a State child abuse and neglect law which shall include provisions for immunity for persons reporting instances of child abuse and neglect from prosecution, under any State or local law, arising out of such reporting;

4. See *THE BATTERED CHILD* (R. Helfer & C. Kempe eds. 1968) [hereinafter cited as *THE BATTERED CHILD*]; V. FONTANA, *THE MALTREATED CHILD* (1964).

5. See generally V. DEFRANCIS & C. LUCHT, *CHILD ABUSE LEGISLATION IN THE 1970's* 6 (rev. ed. 1974) [hereinafter cited as DEFRANCIS & LUCHT]; Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 711 (1966).

6. See notes 216-218 and accompanying text *infra*.

7. See, e.g., NEW YORK STATE ASSEMBLY SELECT COMM. ON CHILD ABUSE REPORT 8 (1972) [hereinafter cited as N.Y. SELECT COMM. REP.] reprinted in *THE BATTERED CHILD* 229 (2d ed. R. Helfer & C. Kempe eds. 1974).

8. See Foster & Freed, *Battered Child Legislation and Professional Immunity*, 52 A.B.A.J. 1071, 1073 (1966).

9. Act of Jan. 31, 1974, Pub. L. No. 93-247, 88 Stat. 5 (codified at 42 U.S.C. §§ 5101-5106 (Supp. V 1975)). The Federal Act authorized the Secretary of Health, Education and Welfare to establish the National Center on Child Abuse and Neglect as a clearinghouse for information and research. *Id.* § 5101. The statute also authorizes grants to states to help improve their child protective services. *Id.* § 5103.

(B) provide for the reporting of known and suspected instances of child abuse and neglect;

(C) provide that upon 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;

(D) demonstrate that there are in effect throughout the State, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such administrative procedures, such personnel trained in child abuse and neglect prevention and treatment, such training procedures, such institutional and other facilities (public and private), and such related multidisciplinary programs and services as may be necessary or appropriate to assure that the State will deal effectively with child abuse and neglect cases in the State;

(E) provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians;

. . . .

(G) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian *ad litem* shall be appointed to represent the child in such proceedings.¹⁰

In part because of the impetus of the Federal Act, but more importantly because of public and professional demands for improved child protective systems, at least forty-two states have recently amended their laws and procedures: to require the reporting of suspected neglect as well as abuse; to prescribe procedures for investigations and other aspects of case handling — often a specialized child protective agency is designated or established;¹¹ to provide a guardian *ad litem* for the child; to upgrade central registers of reports; to ensure confidentiality of records; to require independent investigations of institutional child maltreatment; and to mandate professional training and public education efforts. This “second generation” of state child protective laws demonstrates “an

10. 42 U.S.C. § 5103(b)(2) (Supp. V 1975).

11. See notes 217 & 219 and accompanying text *infra*.

increased public concern about child abuse and neglect, and a continually rising level of sophistication in the public response to that problem."¹²

This article examines these "second generation" child protective laws.

II. PROTECTING INDIVIDUAL RIGHTS

A report of known or suspected child abuse or neglect sets in motion an unavoidably stressful investigation which may lead to the removal of a child from his home and the stigmatization of a family within its community. The benign purposes and rehabilitative services of child protective agencies do not prevent them from being unpleasant and sometimes destructive — though well-meaning — coercive intrusions into family life.

Implicit in most recent child protective legislation is the legislative finding that the balance between children's rights and parents' rights must be weighted in favor of protecting children. Yet, it is important to protect traditional American values of freedom and legality while trying to protect endangered children. If society is to intrude into family life without the free consent of parents, it must do so with due regard to parental rights, as well as to the needs of children. Thus, even though the experience of all states shows that only a handful of reports are not made in good faith,¹³ as states seek to improve and upgrade their child protective systems generally, they should also seek to improve the provisions they make to protect the rights of all involved. Legal safeguards can be provided to protect parental rights without unreasonably endangering children.¹⁴ State law should accord to both the child and the parent the full safeguards of fundamental fairness, confidentiality, and due process of law. Coercive intervention into family life should not be authorized unless there is sufficient reason to believe that child abuse and child neglect exist.¹⁵ Moreover, these terms should be carefully defined in state law to minimize their improper application to situations where societal intervention is not justified.¹⁶ All records should be kept confidential¹⁷ to protect both parents and children

12. G. DAHL, TRENDS IN CHILD ABUSE AND NEGLECT REPORTING STATUTES 2 (publication of Educ. Comm. for the States, Rep. No. 95, 1977).

13. Data on file at the National Center on Child Abuse and Neglect, Department of Health, Education and Welfare, Washington, D.C.

14. In particular, parents should have the legal safeguards of confidentiality of records, right to inspect records and to challenge their contents as well as the right to counsel. See notes 242-51, 257-69, 277-79 & 297-300 and accompanying text *infra*.

15. See also notes 254 & 255 and accompanying text *infra*.

16. See notes 84-100 and accompanying text *infra*.

17. See note 257 and accompanying text *infra*.

and should be made available only in clearly defined situations.¹⁸ Furthermore, treatment services should be offered first on a voluntary basis.¹⁹ The child protective agency should resort to court action only if necessary, and when the powers of the court must be invoked to protect the child, a civil proceeding in a juvenile or family court should be sought in preference to criminal court action.²⁰ If a case reaches court, both the child and the parents should have independent legal counsel.²¹

III. PROVISIONS FOR SELF-HELP AND VOLUNTARILY SOUGHT SERVICES

In our society, parents have the prime responsibility of caring for their children.²² Unless a child's health or welfare is endangered, the family's right to privacy and right to be left alone are well established.²³

Encouraging parents to seek help on their own is the most humanitarian, practical, and the least intrusive approach to preventing child abuse and neglect, because helping services are most effective when they are accepted voluntarily. If parents who need help understand their need, they will seek help on their own and will be more willing to accept it when it is offered to them. Moreover, self-help may be the only way to reach large numbers of families who would otherwise not receive help. Because large numbers of cases are never recognized or reported, many situations of abuse and neglect become known only when family members seek outside assistance.

Unfortunately, America's traditional and fundamental reliance on self-help for personal problems and voluntarily accepted social services is being undermined by the continuing expansion of child

18. See notes 262-69 and accompanying text *infra*.

19. See notes 23-31 and accompanying text *infra*.

20. Although referral to criminal court may be appropriate in certain situations, the criminal court can protect the child only by jailing the abusive parent. See Paulsen, *supra* note 5, at 680-93. The juvenile court, on the other hand, can help mobilize social and psychological services necessary to deal with some of the fundamental problems that led to the abuse. See *id.* at 693-703; text accompanying note 208 *infra*.

21. See notes 288-300 and accompanying text *infra*.

22. Moreover, "physical discipline is considered part of the parent's right and duty to nurture his child." Dembitz, *Child Abuse and the Law — Fact and Fiction*, 24 REC. N.Y. CTRY B.A. 613, 620 (1969). See also Paulsen, *supra* note 5, at 686-88.

23. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing that the marriage relationship lies "within the zone of privacy created by several fundamental constitutional grounds"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (recognizing the right of parents to choose how their children shall be educated).

protective systems.²⁴ When elaborate organizational structures are developed to institutionalize the provision of involuntary care and support, the importance of informal, and voluntary, services is easily forgotten.

The need to encourage parents to seek help on their own is only now being addressed by state child protective laws and procedures. Until recently, states sensitive to the need to encourage or protect parental efforts for self-help have reacted by refusing to extend the reach of reporting laws, usually by restricting mandatory reporting to situations of serious physical abuse or by limiting those who must report to a selected group of professionals.²⁵ But today, more positive approaches are being used: by staffing the reporting hotline with social workers who can direct parents to the services that seem most appropriate, a number of states are ensuring that their reporting systems can provide an informed and sensitive response to parents who ask for help.²⁶ There is also a discernible movement to enhance the parents' right to understand the child protective process, by informing them that a report has been made,²⁷ that the report may be amended or expunged,²⁸ that the purpose of the investigation is to protect endangered children and provide needed services, that services may be refused,²⁹ and that the effect of refusing services may be referral to court.³⁰

A commitment to voluntarily-sought helping services should permeate a state's formal and informal child protective system. The years ahead should see greater elaboration of such efforts, as states seek to ensure that families receive the most appropriate services possible with a minimum of state intrusion.³¹

24. Even the offer of help by child protective agencies to parents, presented in the context of the expressed or implied possibility of court action may be seen as coercive and, therefore, not really voluntary. See Paulsen, *supra* note 5, at 708.

25. *E.g.*, PA. STAT. ANN. tit. 11 § 2204 (Purdon Cum. Supp. 1977-1978) (limiting mandatory reporting to situations of "serious physical or mental injury").

26. *E.g.*, MO. REV. STAT. § 210.145(1) (Supp. 1976); VA. CODE § 63.1-248.6(C) (Cum. Supp. 1977); W. VA. CODE § 49-6A-5 (Supp. 1977).

27. *E.g.*, N.Y. SOC. SERV. LAW § 424(6) (McKinney 1976).

28. *E.g.*, ARK. STAT. ANN. § 42-818(A)(8) (Supp. 1975); COLO. REV. STAT. § 19-10-114(8) (Supp. 1975); IOWA CODE ANN. § 235A.19(2) (West Supp. 1975); MICH. COMP. LAWS ANN. § 722.627(2) (Supp. 1976); MINN. STAT. ANN. § 15.165(c) (West 1977); N.Y. SOC. SERV. LAW § 422(8) (McKinney 1976); PA. STAT. ANN. tit. 11, § 2215(d) (Purdon Cum. Supp. 1977-1978); VT. STAT. ANN. tit. 13, § 1356(d) (Cum. Supp. 1977).

29. *E.g.*, COLO. REV. STAT. § 19-10-111(4) (Supp. 1975); IOWA CODE ANN. § 235A.5(8) (West Supp. 1975); N.Y. SOC. SERV. LAW § 424(9) (McKinney 1976); PA. STAT. ANN. tit. 11, § 2217(8) (Purdon Cum. Supp. 1977-1978).

30. *E.g.*, PA. STAT. ANN. tit. 11, § 2217(9) (Purdon Cum. Supp. 1977-1978).

31. See, *e.g.*, note 130 and accompanying text *infra* (provisions to waive full child protective investigation).

IV. REPORTING OF KNOWN AND SUSPECTED CHILD ABUSE AND NEGLECT

A. Purpose

Because helping services are most effective when they are voluntarily sought, all communities encourage parents facing an abuse or neglect situation to seek help in meeting their child care responsibilities. But if parents do not seek help on their own, the responsibility to take protective action falls on others. When a child is endangered, American society is unwilling to rely solely on parents seeking help. Adults who are attacked or otherwise wronged can go to the authorities for protection and redress of their grievances. But the victims of child abuse and neglect are usually too young or too frightened to obtain protection for themselves. Protection for these helpless children is often possible only when a third person — a friend, a neighbor, a relative, or a professional — recognizes the child's danger and reports it to the proper authorities. Reporting begins the child protective process. If a case of suspected child abuse or neglect is not reported, neither the police nor a child protective agency can become involved, emergency protective measures cannot be taken, and a treatment plan cannot be developed. Reflecting the preeminence of reporting in an adequately functioning child protective system, the Federal Act, as a prerequisite for special funding, requires that states "provide for the reporting of known and suspected instances of child abuse or neglect."³²

The purpose of reporting is to foster the protection of children — not to punish those who maltreat them. Hence, child protective laws have no provisions for criminal court prosecution because, in most situations, criminal intent is absent.³³ While criminal prosecution may be appropriate in certain situations, particularly when the child has died or has been severely harmed, or when the child has been abused while in an institution, such cases are dealt with in child protective laws only to the extent of recognizing that they should be referred for or coordinated with a criminal prosecution.³⁴

B. Mandatory Reporting

Unfortunately, many professionals and private citizens fail to report situations suggestive of child abuse or child neglect, thus

32. See 42 U.S.C. § 5103(b)(2)(B) (Supp. V 1975).

33. Which is not to say that technical elements of *mens rea* are not present. See generally text accompanying note 208 *infra*.

34. Cf. MODEL CHILD PROTECTION ACT §§ 7, 16(1), (m), (n), (o) (Aug. 1977 draft). See note 129 *infra*.

subjecting many children to continued suffering and sometimes permanent harm and even death. In 1971, George Wyman, then Commissioner of the New York State Department of Social Services, explained the reasons for underreporting in New York state. They are applicable to all states.

Although many persons will casually accept the possibility that some children may be subjected to abuse, it appears that only the tragedy of death or severe maiming of a child in one's own community with its ensuing publicity and notoriety provides the stimulus for reporting the suspected abuse of other children. Other factors would seem to be: more restrictive definitions being applied [in some areas of the state], i.e., the tendency to report abuse only when injury is severe; diagnostic capabilities not sufficiently well-developed, particularly in areas where medical centers are not involved; reluctance to become involved due to fear of criminal prosecution of parents or automatic removal of children, more personal relationship with one's neighbors in rural communities mitigates against being willing to speak out even though this will protect a child; frustration that reports have not in fact resulted in the desired goals, i.e., rehabilitation treatment for the child and family, or successful adjudication in Family Court; lack of organized, vigorous program of casefinding and interpretation.³⁵

The failure of many professionals to report child abuse and neglect has led all fifty states to pass laws requiring certain professionals or all citizens to report known and suspected child abuse and neglect.³⁶

35. N.Y. SELECT COMM. REP., *supra* note 7, at 28 (remarks of Comm'r Wyman, Oct. 5, 1971).

36. The following 45 states and the District of Columbia, Guam, and Puerto Rico require designated professionals to report: ALA. CODE tit. 27, § 21 (Supp. 1975); ALASKA STAT. §§ 47.17.020, .070(6) (1975); ARIZ. REV. STAT. § 13-362.A (Supp. 1977); ARK. STAT. ANN. § 42-808 (Cum. Supp. 1975); CAL. PENAL CODE § 11161.5(a) (West Supp. 1977); COLO. REV. STAT. § 19-10-104(1)-(2) (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a(b) (West Supp. 1976); DEL. CODE tit. 16, § 903 (Cum. Supp. 1976); D.C. CODE § 2-162 (1973); FLA. STAT. ANN. § 827.07(4) (West 1976); GA. CODE ANN. § 74-111(a) (Cum. Supp. 1977); HAW. REV. STAT. § 350-1 (Supp. 1975); IDAHO CODE § 16-1619 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Supp. 1977); IOWA CODE ANN. §§ 235A.2(4), .3(1) (West Cum. Supp. 1977); KAN. STAT. § 38-717 (Supp. 1977); KY. REV. STAT. § 199.335(2) (1977); LA. REV. STAT. ANN. § 14:403(C)(1) (West 1974); ME. REV. STAT. tit. 22, § 3853(1) (Supp. 1977); MD. ANN. CODE art. 27, § 35A(b)(1), (4), (5), (c) (1976); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1976) (repealing ch. 119, § 39A (1969)); MICH. COMP. LAWS ANN. § 722.623(1) (Supp. 1977); MINN. STAT. ANN. § 626.556(3) (West Supp. 1976); MISS. CODE ANN. § 43-23-9 (Cum. Supp. 1977) (amending § 43-23-9 (1972)); MO. REV. STAT. § 210.115(1), (2) (Supp. 1976); MONT. REV. CODES ANN. § 10-1304 (Cum. Supp. 1977); NEB. REV. STAT. § 28-1502 (1975); NEV. REV. STAT. § 200.502(2) (1973), *as amended* by § 202.502 (1975); N.H. REV. STAT. ANN. § 169:40 (Supp. 1975); N.M. STAT. ANN. § 13-14-14.1(A) (1976); N.Y. Soc.

The appearance of mandatory reporting laws is a relatively recent phenomenon. The United States Children's Bureau first proposed a model reporting law in 1963.³⁷ In "the span of four legislative years all 50 states enacted [such] laws seeking reports of injuries inflicted on children."³⁸ Dean Paulsen comments: "In the history of the United States, few legislative proposals have been so widely adopted in so little time."³⁹

Mandatory reporting laws seek to encourage fuller reporting of known *and suspected* child abuse and neglect: 1) by requiring certain professionals to report their reasonable suspicions of child abuse or neglect;⁴⁰ 2) by providing immunity from liability for those reporting in good faith;⁴¹ 3) by providing penalties for failure to report as required by law;⁴² 4) by providing a convenient and easily useable reporting system;⁴³ 5) by identifying effective investigative and treatment services.⁴⁴

The medical profession was the first, and remains the foremost, target of reporting statutes.⁴⁵ Doctors are considered the profession-

SERV. LAW § 413 (McKinney 1976); N.C. GEN. STAT. § 110-117(5), -118(a) (1975); N.D. CENT. CODE § 50-25.1-03(1) (Supp. 1977); OHIO REV. CODE ANN. § 2151.421 (Page 1976); OKLA. STAT. ANN. tit. 21, § 846(A) (Supp. West 1977); OR. REV. STAT. § 418.750 (1975); PA. STAT. ANN. tit. 11, § 2204 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-6 (Supp. 1976); S.C. CODE ANN. § 20-9-20(a) (1976) (repealed 1977); S.D. COMPILED LAWS ANN. § 26-10-10 (1976); VT. STAT. ANN. tit. 13, § 1353(a) (Cum. Supp. 1977); VA. CODE § 63.1-248.3(A) (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.020(3), (7)-(10), .030(1) (Supp. 1976); W. VA. CODE § 49-6A-2 (Cum. Supp. 1977); WIS. STAT. ANN. § 48.981(1) (West Cum. Supp. 1977); WYO. STAT. ANN. § 14-28.8 (Cum. Supp. 1975); GUAM PENAL CODE § 273(d) (Supp. 1974); P. R. LAWS ANN. tit. 3, § 211M (Supp. 1977); V.I. CODE ANN. tit. 19, § 172 (Supp. 1975), *as amended by* (1976 Act No. 3825, Eleventh Legislature, § 1). The following five states require "any person" to report, which would include all professionals: IND. CODE § 12-3-4.1-2(a) (1976); N.J. STAT. ANN. § 9:6-8.10 (West 1976); TENN. CODE ANN. § 37-1203 (1977); TEX. FAM. CODE ANN. tit. 2, § 34.01 (Vernon 1975); UTAH CODE ANN. § 55-16-2 (Supp. 1977).

37. U.S. CHILDREN BUREAU, THE ABUSED CHILD — PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD (1963).

38. DEFRANCIS & LUCHT, *supra* note 5, at 6.

39. Paulsen, *supra* note 5, at 711.

40. See notes 45-67 and accompanying text *infra*.

41. See notes 103-13 and accompanying text *infra*.

42. See notes 131-50 and accompanying text *infra*.

43. See notes 180-90 and accompanying text *infra*.

44. See notes 194-204 and accompanying text *infra*.

45. *E.g.*, ALA. CODE tit. 27, § 21 (Supp. 1975); FLA. STAT. ANN. § 827.07(4) (West 1976); ME. REV. STAT. tit. 22, § 3852(1) (Supp. 1977); MO. REV. STAT. § 210.115(1) (Supp. 1976); OHIO REV. CODE ANN. § 2151.421 (Page 1976); PA. STAT. ANN. tit. 11, § 2024 (Purdon Cum. Supp. 1977-1978); WIS. STAT. ANN. § 48.981(1) (West. Cum. Supp. 1977).

als most likely to see injured children, and they are presumed most qualified to diagnose the symptoms of abuse and neglect.⁴⁶ The early focus on physicians quickly widened to include most other professionals in the "healing arts,"⁴⁷ such as nurses,⁴⁸ osteopaths,⁴⁹ podiatrists,⁵⁰ chiropractors,⁵¹ dentists,⁵² and pharmacists.⁵³ Some statutes also require optometrists, general hospital personnel, and even Christian Science practitioners to report.⁵⁴ At this writing, at least forty-five states specifically require designated medical professionals to report.⁵⁵ The remaining states require medical professionals to report under reporting mandates which cover all citizens.⁵⁶

Recognizing that other professionals having regular contact with children are also in a position to identify abuse and neglect before a child needs medical care for serious injuries, most states now mandate specific nonmedical professionals to report. Among those commonly required to report are teachers⁵⁷ or other school

46. See McCoid, *supra* note 1, at 27-28; Paulsen, *supra* note 5, at 711.

47. *E.g.*, DEL. CODE tit. 16, §903 (Supp. 1976); HAW. REV. STAT. §350-1 (Supp. 1975).

48. *E.g.*, ALA. CODE tit. 27, §21 (Supp. 1975); COLO. REV. STAT. §19-10-104(2)(i) (Cum. Supp. 1976); MONT. REV. CODES ANN. §10-1304 (Cum. Supp. 1977).

49. *E.g.*, ARIZ. REV. STAT. §13-3620.A (Supp. 1977); ILL. ANN. STAT. ch. 23, §2054 (Smith-Hurd Supp. 1977); KY. REV. STAT. §199.335(2) (1977); N.Y. SOC. SERV. LAW §413 (McKinney 1976); WYO. STAT. §14-28.8 (Cum. Supp. 1975).

50. *E.g.*, GA. CODE ANN. §74-111(a) (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, §2054 (Smith-Hurd Supp. 1977); OHIO REV. CODE ANN. §2151.421 (Page 1976).

51. *E.g.*, CONN. GEN. STAT. ANN. §17-38a(b) (West Supp. 1976); IOWA CODE ANN. §235A.2(4), 3(1)(a) (West Cum. Supp. 1977); PA. STAT. ANN. tit. 11, §2204(c) (Purdon Cum. Supp. 1977-1978).

52. *E.g.*, KAN. STAT. §38-717 (Supp. 1976); Md. ANN. CODE art. 27, §35A(b)(1), (c) (1976); N.Y. SOC. SERV. LAW §41-3 (McKinney 1976).

53. *E.g.*, ALA. CODE tit. 27, §21 (Supp. 1975); WASH. REV. CODE ANN. §26.44.030(1) (Supp. 1976); WYO. STAT. §14-28.8 (Cum. Supp. 1975).

54. *E.g.*, ALA. CODE tit. 27, §21 (Supp. 1975) (hospital personnel); ALASKA STAT. §47.17.020(a) (1975) (practitioners of the healing arts); OHIO REV. CODE ANN. §2151.421 (Page 1976) (hospital resident or intern; religious healer); VT. STAT. ANN. tit. 13, §1353(a) (Cum. Supp. 1977) (hospital administrator, resident, intern).

55. See note 36 *supra*.

56. See IND. CODE §12-3-4.1-2(a) (1976); N.J. STAT. ANN. §9:6-8.10 (West 1976); TENN. CODE ANN. §37-1203 (1977); TEX. FAM. CODE ANN. tit. 2, §34.01 (Vernon 1975); UTAH CODE ANN. §55-16-2 (Supp. 1977).

57. *E.g.*, CAL. PENAL CODE §11161.5(a) (West Supp. 1977); HAW. REV. STAT. §350-1 (Supp. 1975); LA. REV. STAT. ANN. §14:403(C)(1) (West 1974); S.D. COMPILED LAWS ANN. §26-10-10 (1976); VA. CODE §63.1-248.3(A) (Cum. Supp. 1977).

officials,⁵⁸ social workers,⁵⁹ police officers,⁶⁰ child care workers,⁶¹ clergymen,⁶² coroners,⁶³ and attorneys,⁶⁴ as well as others.⁶⁵

The rapid widening of reporting mandates is dramatically documented by a recent survey:

In 1973, 31 states required teachers or other school personnel to make reports. Since that time, six additional states have added education personnel. Also in 1973, only 10 states provided that persons in day care centers or child caring institutions make reports. Currently, some provision is made in 23 states for mandatory reporting from these centers. Thirty-two states, in 1973, mandated social workers to make reports. Four more states have since added this category. Fourteen states, in 1973, required law enforcement personnel to report suspected child abuse or neglect. Currently, 26 states so require.⁶⁶

State laws often contain a limiting phrase requiring professionals to report only situations "known to them in their professional or official capacity."⁶⁷ Thus, for example, if a physician suspects that a neighbor's child, who is not his patient, is abused or neglected, he is not required to make a report — in recognition of the inability to enforce such a provision and the social and community pressures involved.⁶⁸ Nothing, however, prevents the professional from making a voluntary report like any other citizen; and, indeed, he is encouraged to do so.

58. *E.g.*, DEL. CODE tit. 16, § 903 (Cum. Supp. 1976); OR. REV. STAT. § 418.750 (1975); WIS. STAT. ANN. § 48.981(1) (West Cum. Supp. 1977).

59. *E.g.*, ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Supp. 1977); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1976); N.Y. SOC. SERV. LAW § 413 (McKinney 1976); WYO. STAT. § 14-28.8 (Cum. Supp. 1975).

60. *E.g.*, GA. CODE ANN. § 74-111(a) (Cum. Supp. 1977); IOWA CODE ANN. § 235A.3(1)(b) (West Cum. Supp. 1977); MO. REV. STAT. § 210.115(1) (Supp. 1976).

61. *E.g.*, ARK. STAT. ANN. § 42-808 (Cum. Supp. 1975); N.H. REV. STAT. ANN. § 169:40 (Supp. 1975); N.D. CENT. CODE § 50-25.1-03(1) (Supp. 1977).

62. *E.g.*, CONN. GEN. STAT. ANN. § 17-38a(b) (West Supp. 1976); MISS. CODE ANN. § 43-23-9 (Cum. Supp. 1977).

63. *E.g.*, HAW. REV. STAT. § 350-1 (Supp. 1975); KY. REV. STAT. § 199.335(2) (1977); MO. REV. STAT. § 210.115(1) (Supp. 1976).

64. *E.g.*, MONT. REV. CODES ANN. § 10-1304 (Cum. Supp. 1977); OHIO REV. CODE ANN. § 2151.421 (Page 1976).

65. *E.g.*, ALA. CODE tit. 27, § 21 (Supp. 1975) ("mental health professionals"); CAL. PENAL CODE § 11161.5(a) (West Supp. 1977) (administrator of public or private summer day camp); MD. ANN. CODE art. 27, § 35A(c) (1976) (law enforcement officer); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1976) (guidance or family counselors); N.H. REV. STAT. ANN. § 169:40 (Supp. 1975) (psychologist, therapist); OHIO REV. CODE ANN. § 2151.421 (Page 1976) (psychologist, speech pathologist and audiologist).

66. G. DAHL, *supra* note 12, at 5.

67. *E.g.*, N.Y. SOC. SERV. LAW § 413 (McKinney 1976).

68. See Helfer, *The Responsibility and Role of the Physician in THE BATTERED CHILD*, *supra* note 4, at 44.

The continued expansion of reporting laws to include a wider class of mandated reporters theoretically increases the probability that more cases will be detected and reported. Thus, a growing number of states, at least twenty as of this writing, require "any person" to report known and suspected child abuse and neglect.⁶⁹ Overgeneralizing the class of persons who are legally required to report may diminish the impact and enforceability of a reporting law. "If the reporting group as delineated by statute is large, the impact of the reporting requirement may be diffused, and everybody's duty may easily become nobody's duty."⁷⁰

C. *Voluntary Reporting*

Despite all the attention paid to mandatory reporting laws, and despite the constantly expanding coverage of these laws, the great bulk of abuse and neglect reports continue to be made by individual concerned citizens. Private citizens — friends, neighbors, and relatives — though not subject to a mandatory reporting law in thirty states, make about fifty percent of the nation's reports.⁷¹ It is only within this broader context of reporting by private citizens, as well as mandated professionals that the detection of child abuse and child neglect — and hence, the initiation of child protective services — can be understood.

But because these reports are not "mandated," they are often not "accepted" for investigation by child protective agencies.⁷² And even when they are, they often are given the lowest investigative priority⁷³ — regardless of the danger to the child. Distinctions based on who makes a report have no place in child protective efforts; the danger to the child is no less serious merely because the report is made by a private citizen or a nonmandated professional instead of a legally mandated reporter. Reports from any source should be handled in the same way, with the child protective service establishing investigative priorities based only upon the real urgency of the case — not on the basis of who made the report.

Routing all reports through the formal reporting channels established by a reporting law helps ensure that they are duly recorded and promptly investigated. Thus, to combat the tendency to

69. *E.g.*, ALA. CODE tit. 27, § 21 (Supp. 1975); ("any other person called upon to render aid or medical assistance"); KY. REV. STAT. § 199.335(2) (1967); OKLA. STAT. ANN. tit. 21, § 846 (West Supp. 1977); TEX. FAM. CODE ANN. tit. 2, § 34.01 (Vernon 1975). *See also* P.R. LAWS ANN. tit. 3, § 211m (Supp. 1977).

70. *See* Paulsen, *supra* note 5, at 713.

71. NATIONAL CENTER REPORT, *supra* note 1, at 7.

72. *See, e.g.*, N.Y. SELECT COMM. REP., *supra* note 7, at 31.

73. *See, e.g., id.* at 34.

neglect nonmandated reports, at least twenty states have a specific statutory provision requiring,⁷⁴ and at least twenty states have a provision permitting⁷⁵ "anyone" to report. The state eligibility requirements under the Federal Act also recognize this problem and thus require that, in addition to mandating certain persons to report, a state must have "a law or administrative procedure which requires, allows, or encourages all other citizens, to report known or suspected instances of child abuse and neglect."⁷⁶ Voluntary reporting provisions often give the voluntary reporter immunity from liability for a good faith report and abrogate any privileged communication that might otherwise apply.⁷⁷

There are some special considerations involved with voluntary reports. Nationwide, fifty to seventy percent of the reports from mandated professionals are considered "valid" or "founded" — somewhat amorphous and ambiguous terms — after investigation, depending upon the specific profession involved.⁷⁸ Only forty percent of the reports from voluntary reporters, on the other hand, are found to be valid.⁷⁹ Many of these invalid reports are made by spouses or relatives seeking to gain custody of a child.⁸⁰ Thus, while voluntary reports must be accepted and investigated, continuous vigilance on the part of child protective agencies is necessary to deal with inappropriate or biased reports.

Recognizing the concern some professionals and private citizens have about associating their names with child abuse and neglect reports, most states allow anonymous reports by not prohibiting them. Nationwide, thirty percent of these anonymous reports are found to be valid.⁸¹ But states do not encourage anonymity because of the obvious dangers in investigating reports for whom no one is willing to take responsibility. Moreover, when professionals and citizens identify themselves, the investigating agency can often learn more about the case by interviewing the person who made the report.

74. *E.g.*, N.Y. SOC. SERV. LAW § 414 (McKinney 1976).

75. *E.g.*, CAL. PENAL CODE § 11161.6 (West Supp. 1975); GA. CODE ANN. § 74-109 (1973); ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Supp. 1977); MICH. COMP. LAWS ANN. §§ 722.624, .632 (Supp. 1977); MINN. STAT. ANN. § 626.556(3) (West Supp. 1976); OHIO REV. CODE ANN. § 2151.421 (Page 1976).

76. C.F.R. § 1340.3-3(d)(2)(i) (1976).

77. *See* text accompanying notes 106 & 121 *infra*.

78. American Humane Association, Children's Division. These data are on file at the National Center on Child Abuse and Neglect, Department of Health, Education and Welfare, Washington, D.C.

79. *Id.*

80. *See generally* N.Y. SELECT COMM. REP., *supra* note 7, at 62, 64.

81. American Humane Association, Children's Division. *See* note 78 *supra*.

D. *Reporter's State of Mind*

Almost without exception, state reporting laws do not require individuals making a report to be certain a child is abused or neglected. Usually the law is couched in terms such as "has cause to suspect," "reasonably suspects," "has cause to believe," or "believes." Except for the last example, these phrases are all meant to describe degrees of conviction in the reporter's mind between an unfounded suspicion and probable cause to believe. Because of the impracticality of making minute distinctions in subtle child maltreatment cases, there seems to be general agreement that these terms are fundamentally equivalent and represent a lesser quantum of evidence than probable cause.⁸² It has been noted that

[t]he effect of this language is that the reporter's diagnosis need not be absolute. He does not have to prove conclusively, even to himself, that the child is a victim of inflicted injury. If the circumstances are such as to cause him to feel doubt about the history given; if he has cause to doubt the truthfulness of the person who tells him about the alleged accidental cause of the injury; or if X-ray or other examinations reveal symptoms and facts inconsistent with the circumstances described, then he has sufficient "reasonable cause to suspect" that the injuries may have been inflicted rather than accidental. This would be enough to satisfy the requirements of the law.⁸³

The basis for a report can include the nature of the child's injuries; the history of prior injuries to a child; the condition of a child, his personal hygiene, and his clothing; the statements and demeanor of a child or parent — especially if the injuries to the child are at variance to the parental explanation of them; the condition of the home; and the statements of others. After a report is made, the child protective agency is responsible for determining the child's true condition and, if action is necessary, for beginning the process of protection and treatment.

E. *Circumstances Requiring A Report*

Although state laws still vary greatly in specifying what circumstances or conditions must or may be reported, an increasing number of states are going beyond the special attention that was

82. See, e.g., OP. ILL. ATT'Y GEN., S-1298 (Oct. 6, 1977); OP. MASS. ATT'Y GEN. 74/75-66 (June 16, 1975).

83. DEFRANCIS & LUCHT, *supra* note 5, at 8.

earlier given to the "Battered Child Syndrome."⁸⁴ Early reporting laws, generally based on the United States Children's Bureau guidelines,⁸⁵ required reporting of "nonaccidental injuries," and sometimes added the broader phrase "other serious abuse or maltreatment."⁸⁶ However, placing attention on only one form of abuse or neglect establishes false and dangerously misleading distinctions. Child neglect can be just as damaging and just as deadly as child abuse.

Even before the passage of the Federal Act in 1974,⁸⁷ which requires states to provide for the reporting of child neglect as well as child abuse in order to receive special grants,⁸⁸ states had begun to deal with other forms of inadequate parental care of children, including: child battering, physical attack, delinquency, abandonment, emotional maltreatment, failure to provide adequate food, clothing, shelter, and failure to provide proper supervision and care. Either expressly or within broader reporting mandates, at least forty-two states require mandated professionals and allow all others to report child neglect, sexual abuse, and emotional abuse.⁸⁹ Twenty-five states expressly permit any person⁹⁰ and forty-five states, the District of Columbia, and two territories expressly require designated professionals⁹¹ to report some form of neglect. Twenty-two states expressly permit⁹² and thirty-nine expressly require, the

84. The term "battered child syndrome" was proposed by Dr. C. Henry Kempe in 1961 at a symposium conducted by the American Academy of Pediatrics. Radbill, *A History of Child Abuse and Infanticide*, in *THE BATTERED CHILD*, *supra* note 4, at 16. For a detailed history of the development of the concept of the "battered child syndrome," see McCoid, *supra* note 2, at 3-19.

85. See note 37 and accompanying text *supra*; *THE BATTERED CHILD*, *supra* note 4, at 181-83.

86. *E.g.*, MASS. GEN. LAWS ANN. ch. 119, § 39A (West 1969) (amended 1973); N.Y. SOC. SERV. LAW § 383(a) (repealed 1973).

87. See note 9 *supra*.

88. 42 U.S.C. § 5103(b)(2) (Supp. V 1975). For the text of pertinent parts of § 5103, see text accompanying note 10 *supra*.

89. *E.g.*, ALA. CODE tit. 27, § 20(1) (Supp. 1975); FLA. STAT. ANN. § 827.07 (West 1976); OHIO REV. CODE ANN. §§ 2151.03(D), .031(A) (Page 1976); PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978).

90. *E.g.*, CAL. WELF. & INST. CODE § 18951(e)(2)-(5) (West Supp. 1977); CAL. PENAL CODE § 11161.6 (West Supp. 1977); S.D. COMPILED LAWS ANN. § 26-8-6, 10-10 (1976); W. VA. CODE ANN. § 49-1-3, 6A-2 (Cum. Supp. 1977).

91. *E.g.*, FLA. STAT. ANN. § 827.07(1)(b), (4) (West 1976); ILL. ANN. STAT. ch. 23, §§ 2053, 2054 (Smith-Hurd Supp. 1977); IOWA CODE ANN. § 235A.3(1) (West Cum. Supp. 1977); N.J. STAT. ANN. §§ 9:6-8.21(c), .10 (West 1976); TENN. CODE ANN. §§ 37-202(6), (7), -1203 (1977); VA. CODE §§ 63.1-248.2(A)(2), .3(A) (Cum. Supp. 1977).

92. *E.g.*, HAW. REV. STAT. § 350-1 (Supp. 1975); N.Y. SOC. SERV. LAW §§ 412(1), (2), 414 (McKinney 1976); PA. STAT. ANN. tit. 11, §§ 2203, 2205 (Purdon Cum. Supp. 1977-1978).

reporting of sexual abuse.⁹³ Moreover, thirty-five expressly permit,⁹⁴ and at least thirty states expressly require⁹⁵ reporting of emotional abuse or neglect, often using the phrase "mental injury."

While the expansion of reporting requirements has resulted in an increase in the number of abuse and neglect situations coming to the attention of the authorities,⁹⁶ many of the reports now handled within the formal process were previously handled outside the mandated reporting process — by the police, welfare agencies, and the courts. Thus, much of the increase in cases being reported merely reflects a shifting of investigative responsibilities from a haphazard and uncoordinated amalgam of independent agencies to one single, specialized child protective agency.

Although it seems fair to say that traditional definitions, as well as those now emerging, are designed to help protect children from harm, this laudable purpose has not prevented them from being controversial. Such disagreement is a reasonable response to our present state of knowledge. The definition an individual favors is inextricably linked to his or her professional objectives, cultural perspectives, and personal attitudes. Researchers, physicians, social workers, child protective workers, police officers, lawyers, courts, and social planners all have somewhat different objectives. In the absence of a clear and widely accepted definition, these differing objectives naturally color the definitions adopted by individuals and professional groups.

The definition of child abuse and neglect in the Federal Act is a good example of the difficulty inherent in applying one definition to a variety of objectives. The Act defines "child abuse and neglect" as "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"⁹⁷

93. *E.g.*, ALA. CODE tit. 27, §§ 20(1)(1), 21 (Supp. 1975); ARK. STAT. ANN. § 42-808 (Cum. Supp. 1975); R.I. GEN. LAWS §§ 40-11-2(2)(c), -3 (Supp. 1976); WYO. STAT. §§ 14-28.7, .8 (Cum. Supp. 1975).

94. *E.g.*, MO. REV. STAT. §§ 210.110(1)(1), .115(1)(4) (Supp. 1976); S.D. COMPILED LAWS ANN. § 26-8-6, 10-10 (1976).

95. *E.g.*, ALA. CODE tit. 27, §§ 20(1)(1), 21 (Supp. 1975); MONT. REV. CODES ANN. §§ 10-1301(2)(a), -1304 (Cum. Supp. 1977); TENN. CODE ANN. §§ 37-1202, 1203 (1977).

96. Writing in 1973, one researcher noted that "[i]n 1968, reports of child abuse filed in all state registries amounted to approximately 11,000. By 1972, although no precise data are available, the number of reports had more than doubled." Light, *Abused and Neglected Children in America: A Study of Alternative Policies in THE RIGHTS OF CHILDREN* 203 (Harv. Educ. Rev. 1974). By 1978, the American Humane Association estimated that over 400,000 reports were made nationwide. See note 78 *supra*.

97. 42 U.S.C. § 5103 (Supp. V 1975).

This general and broad definition suits research and demonstration activities perfectly. Its breadth, however, has proven disadvantageous to states seeking to comply with the Federal Act's eligibility requirements in order to receive grants in aid.⁹⁸

The dilemma of choosing between general, and therefore somewhat vague, definitions and specific, and therefore potentially over-narrow, definitions will be with us for some time. Listing with precise specificity all those actions that constitute child abuse and neglect raises the possibility of inadvertently excluding dangerous situations that should be included. Generalized definitions risk overbroad applications that include behavior that should not be considered abusive or neglectful. Those who believe that most children and families generally benefit from the child protective process wish to expand the definition. Those less sanguine about the utility of child protective intervention naturally want to restrict the definition.

The statutory definition of reportable child abuse and neglect is no doubt the most controversial issue in child protective theory, if not practice. A detailed discussion of the concerns and considerations in developing specific definitions of child abuse and child neglect — including issues of constitutionally impermissible vagueness — are beyond the scope of this paper.⁹⁹ For the purpose of this paper, it is sufficient to note that the definition of circumstances requiring a report, which also defines the child protective agency's jurisdiction, is now recognized as a sufficiently important issue to justify a separate definitional section in the reporting statutes of forty states and two territories, whereas only eighteen states had separate definitional sections in 1973.¹⁰⁰

There is some question about whether reports should be "accusatory." It is argued that compelling a potential reporter to state whom he suspects is responsible for the abuse or neglect may discourage reporting because: 1) it is often impossible or too early for a potential reporter to make such a determination; 2) the potential reporter may fear possible retribution for blaming a parent; and 3) an accusatory report is inconsistent with the rehabilitative and nonpunitive philosophy of the child protective process.¹⁰¹ The major

98. *Id.* §5103(b)(2). See note 9 *supra*.

99. For a discussion of the problems with definitions in these statutes, see McCoid, *supra* note 2, at 44-50; Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 10-13 (1967).

100. See G. DAHL, *supra* note 12, at 3. See, e.g., FLA. STAT. ANN. § 827.07(1) (West 1976); MINN. STAT. ANN. § 626.556(2)(a)-(d) (West Supp. 1976); OKLA. STAT. ANN. tit. 21, § 845 (West Supp. 1977); VA. CODE § 63.1-248.2 (Cum. Supp. 1977).

101. See DEFRANCIS & LUCHT, *supra* note 5, at 9-10.

arguments in favor of accusatory reports seem to be that: 1) potential reporters will not report injuries unless they have cause to suspect that the parents are responsible; 2) it is unfair to parents who clearly do not abuse and neglect their children to report them to the child protective agency and enter their names in a central register merely because their children have sustained injuries; and 3) it is unfair to the child protective agency to be burdened with so many additional reports of cases in which the reporter has no reason to suspect the parents of any misbehavior. Balancing these various considerations, twenty-eight states expressly require accusatory reports.¹⁰²

V. IMMUNITY FROM LIABILITY FOR REPORTING

Fear of being sued unjustly for libel, slander, defamation, invasion of privacy, and breach of confidentiality is frequently cited as a deterrent to more complete reporting.¹⁰³ This fear exists even though applying existing legal doctrines leads to the conclusion that anyone making a legally mandated or authorized report would be free from liability so long as the report was made in good faith. "[T]he point is that the common law and all of our decisional authority already confers such immunity, and there is no American case that even suggests that there may be liability for a good faith report of the kind required by battered child statutes."¹⁰⁴

Nevertheless, in the experience of many states, only an explicit statutory grant of immunity from liability for reporting in good faith erases the hesitancy of potential reporters. Hence, all states specifically grant mandated reporters immunity from civil and criminal liability for good faith reports.¹⁰⁵ In addition, at least forty states now extend immunity from liability to voluntary reporters, as long as the report was made in good faith,¹⁰⁶ partly in response to the requirements of the Federal Act.¹⁰⁷

To reassure potential reporters further, some states have added a provision to their immunity clause that presumes the good faith of

102. *E.g.*, COLO. REV. STAT. § 19-10-108(2)(b) (Cum. Supp. 1976); FLA. STAT. ANN. § 827.07(5) (West 1976); MD. ANN. CODE art. 27, § 35A(d)(5) (1976). The issue is somewhat ambiguous because its resolution is dependent upon local practice and the format of the official reporting form. See note 237 and accompanying text *infra*.

103. See Paulsen, *supra* note 99, at 31-34.

104. Foster & Freed, *supra* note 8, at 1071, citing McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1, 36-40 (1965). See also Paulsen, *supra* note 99, at 31-34.

105. *E.g.*, N.J. STAT. ANN. § 9:6-8.13 (West 1976) (does not specifically require good faith); TEX. FAM. CODE ANN. tit. 2, § 34.03 (Vernon 1975).

106. *E.g.*, GA. CODE ANN. § 74-111(c) (Cum. Supp. 1977); IDAHO CODE § 16-1620 (Cum. Supp. 1977); N.C. GEN. STAT. §§ 110-118(c), -120 (1975); WIS. STAT. ANN. § 48.981(2) (West Cum. Supp. 1977).

107. See 42 U.S.C. § 5103(b)(2)(A) (Supp. V 1975); 45 C.F.R. 1340.3-3(d)(1) (1976).

those acting under the reporting law.¹⁰⁸ However, such provisions are technically redundant, at best, since a person suing must prove the reporter's bad faith by a preponderance of the evidence in order to recover in a civil action. Furthermore, under the so-called Thayer Rule concerning the rebuttal of presumptions,¹⁰⁹ the presumption of good faith could be rebutted by some credible evidence suggesting that the report was made maliciously. Query: If the presumption is successfully rebutted, does the plaintiff still have the burden of proving bad faith by a preponderance of the evidence? Perhaps the best thing to say is that the presumption of good faith is a public relations provision, designed to soothe potential reporters, which does not take into account how presumptions operate in the law.

At least forty statutes specifically extend the grant of immunity to participation in judicial proceedings¹¹⁰ and at least eight to the performance of other acts authorized by law, such as taking photographs and x-rays,¹¹¹ although this, too, seems legally superfluous.¹¹²

Because fear of lawsuits is frequently cited as a deterrent to more complete reporting, the immunity provisions of state law should be clearly explained in any public and professional education campaign.¹¹³

VI. ABROGATION OF CERTAIN PRIVILEGED COMMUNICATIONS

Child abuse and child neglect usually occur behind closed doors without witnesses. In determining whether a child has been abused or neglected, great reliance is placed, necessarily, on medical evidence and on the statements of the child and the admissions of the parents. However, many of the professionals most likely to see abused and neglected children are subject to statutory privileges making confidential the communications between them and their

108. *E.g.*, COLO. REV. STAT. §19-10-110 (Cum. Supp. 1976); FLA. STAT. ANN. §827.07(9) (West 1976); MONT. REV. CODES ANN. §10-904 (1968) (renumbered §10-1306 (Cum. Supp. 1977)); TENN. CODE ANN. §37-1209 (1977).

109. *See* J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 336 (1898). For a discussion of the development and present statement of the Thayer rule, *see generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §345, at 821 (2d ed. E. Cleary 1972).

110. *E.g.*, DEL. CODE tit. 16, §906 (Cum. Supp. 1976); IND. CODE §12-3-4.1-4 (1976); MO. REV. STAT. §210.135 (Supp. 1976); R.I. GEN. LAWS §40-11-4 (Supp. 1976).

111. *E.g.*, ARK. STAT. ANN. §42-814 (Cum. Supp. 1975); COLO. REV. STAT. §19-10-110 (Cum. Supp. 1976); N.Y. SOC. SERV. LAW §419 (McKinney 1976); TEX. FAM. CODE ANN. tit. 2, §35.04(c) (Vernon Supp. 1976).

112. *See* Paulsen, *supra* note 99, at 34.

113. *See also* notes 314 & 315 and accompanying text *infra*.

clients or patients.¹¹⁴ Depending on the state, statutes establish privileges in relation to the communications between physician and patient, social worker and client, psychologist and client, and priest and penitent.¹¹⁵ There is an exception in some states to the confidentiality rule when a crime has been or will be committed.¹¹⁶ In all states most forms of child abuse and child neglect are crimes.¹¹⁷ Ordinarily, persons subject to such privileges are prohibited from divulging anything told to them within the scope of the privilege, unless the protected person gives permission.¹¹⁸

If the privileged nature of such communications were to remain intact, many cases of known and suspected child abuse and neglect could not be reported. For example, physicians might feel unable to report suspicious injuries without the permission of parents. Investigative efforts would also be hampered if persons having important information about a case were prohibited from revealing it. For example, parents often tell spouses or helping professionals what caused a child's injuries. Unless the spouse or professional can give this information to the protective services worker and can testify about it, a child demonstrably needing protection may not receive it.

Even though a legal mandate to report presumably overrides any other law creating a privileged communication¹¹⁹ — especially if the reporting law was enacted after the law creating the privilege — in order to allay any residual concerns that potential reporters may have about relating information gained as a result of their confidential relationship with clients, many state reporting laws contain specific clauses abrogating statutorily created privileges. Some statutes abrogate the privileges attached to those professionals required to report.¹²⁰ Other statutes abrogate all privileges, even if

114. *E.g.*, ARK. STAT. ANN. §§ 28-601, -606, -607 (Cum. Supp. 1975) (attorneys, ministers, priests, physicians, and nurses); IND. CODE § 34-1-14-5 (1973) (attorneys, physicians, clergymen).

115. *E.g.*, N.Y. CIV. PRAC. LAW §§ 4504, 4505, 4507, 4508 (McKinney Supp. 1976).

116. For example, the attorney-client privilege does not extend to communications in which the client informs the attorney of the intent to commit a crime in the future. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR4-101(C)(3). *See generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 95 (2d ed. E. Cleary 1972).

117. *E.g.*, ILL. ANN. STAT. ch. 51, § 5.1(7) (Smith-Hurd Supp. 1977); WIS. STAT. ANN. § 940.201 (West Cum. Supp. 1977).

118. *E.g.*, ILL. ANN. STAT. ch. 51, § 5.1(3) (Smith-Hurd Supp. 1977) (also listing of other limited exceptions to doctor-patient privilege).

119. *See* MODEL CHILD PROTECTION ACT, § 11 (Aug. 1977 draft); note 129 *infra*.

120. *E.g.*, IND. CODE § 12-3-4.1-5 (1976); MINN. STAT. ANN. § 626.556(8) (West Supp. 1976); N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney 1975); UTAH CODE ANN. § 55-16-5 (1974).

the professionals involved are not required to report.¹²¹ Many reporting statutes also specifically abrogate these privileges for the purpose of participating in judicial proceedings relating to abuse or neglect.¹²² Such provisions appear to be unnecessary unless either 1) the person wishing to testify is not a person required or authorized to report child abuse and neglect or 2) the person wishing to testify has a privilege that does not contain an exemption when a crime has been or will be committed.¹²³

Generally, child protective reporting laws do not abrogate the attorney-client privilege. But in abrogating all privileges, at least five states appear to abrogate the attorney-client privilege because they require everyone to report known and suspected child abuse and neglect,¹²⁴ and "everyone" presumably includes attorneys. Abrogating the attorney-client privilege would destroy the confidence and trust between an attorney and client necessary for a fair trial, and could be held an unconstitutional denial of the right to counsel of due process.¹²⁵ Moreover, abrogation of the attorney-client privilege is probably unnecessary, since the child should have been protected and sufficient evidence obtained long before an attorney is assigned to a case. In those few cases in which the attorney learns of abuse or neglect while representing the family in other matters, the attorney-client privilege would not attach, since the privilege does not apply to future criminal activity known to the attorney, and it is fair to assume that child abuse and neglect, as a course of conduct, would fall under such an exemption.¹²⁶

When a parent is already receiving help from a treatment professional, the need to report abuse or neglect is sometimes questioned because reporting to the child protective agency and testifying in court may only reinforce the insecurity and hostility many abusive and neglectful parents feel and may disturb the treatment already in progress. Obviously, such concerns collide

121. *E.g.*, ILL. ANN. STAT. ch. 23, § 2060 (Smith-Hurd Supp. 1977); MO. REV. STAT. § 210.140 (Supp. 1976) (except attorney-client privilege); N.D. CENT. CODE § 50-25.1-10 (Supp. 1977) (except attorney-client privilege).

122. *E.g.*, IDAHO CODE § 16-1620 (Supp. 1976); MICH. COMP. LAWS ANN. § 722.631 (Supp. 1977); N.M. STAT. ANN. § 13-14-14.2(A) (1976).

123. *See* note 116 and accompanying text *supra*.

124. *See* MONT. REV. CODES ANN. § 10-1304, -1307 (Cum. Supp. 1977) (abrogating all privileges and requiring attorneys to report); NEV. REV. STAT. § 200.506 (1973) (abrogating all privileges and requiring attorneys to report); N.M. STAT. ANN. §§ 13-14-14.1, -14.2(A) (1976) (abrogating all privileges and requiring all persons to report); OKLA. STAT. ANN. tit. 21, §§ 848, 846(A) (West Supp. 1977) (abrogating all privileges and requiring all persons to report).

125. *See* DEFRANCIS & LUCHT, *supra* note 5, at 12. Admittedly, in the context of the comments made about abrogation of other professional privileges, this point must seem self-serving when made by lawyers.

126. *See* note 116 and accompanying text *supra*.

head-on with the abrogation of privileged communications. In order to prevent mandated reporting from disrupting ongoing therapeutic relationships, many treatment professionals do not report known or suspected child abuse and neglect except in extreme situations.¹²⁷ In fact, a large number of local child protective services, and some state child protective offices encourage professionals to disregard the legal requirement to report such cases.¹²⁸ This procedure is both healthy and dangerous, for, while it engrafts necessary flexibility onto absolute legal stricture, it also weakens the imperative of the law without making provision for monitoring its application. Furthermore, most professionals cannot provide the full range of services that a child protective agency can provide. Even when the professional is of the highest quality, he or she cannot become involved in the total family situation, cannot make regular home visits, and may not view the protection of the child as his or her primary responsibility.

A better approach would seem to be to formalize a procedure through which the local child protective agency can review a situation after a report is made to decide whether a full child protective investigation is necessary. Under the Model Child Protection Act (Model Act),¹²⁹ for example, the local child protective agency, though still responsible for handling cases, is authorized to

waive a full child protective investigation of reports made by agencies or individuals specified in the local plan if, after an appropriate assessment of the situation, it is satisfied that (i) the protective and service needs of the child and the family can be met by the agency or individual, (ii) the agency or individual agrees to attempt to do so, and (iii) suitable safeguards are established and observed. Suitable safeguards shall include a written agreement from the agency or individual to report periodically on the status of the family, a written agreement to report immediately to the local service at any time that the child's safety or well-being is threatened despite the agency's or

127. See Helfer, *supra* note 68, at 44.

128. See also, e.g., ME. REV. STAT. tit. 22, § 3853(1) (Supp. 1977). This statute specifically states that it

does not require any person to report when the factual basis for knowing or suspecting child abuse or neglect came from treatment of the individual for suspected child abuse or neglect, the treatment was sought by the individual for a problem relating to child abuse or neglect, and, in the opinion of the person required to report, the child's life or health is not immediately threatened.

Id. See also N.Y. SELECT COMM. REP., *supra* note 7, at 32.

129. MODEL CHILD PROTECTION ACT (Aug. 1977 draft). This act was drafted by the National Center on Child Abuse and Neglect, U.S. Department of Health, Education and Welfare.

individual's efforts, and periodic monitoring of the agency's or individual's efforts by the local service for a reasonable period of time.¹³⁰

In summary, although abrogations of privileges are absolute, protective workers, judges, and prosecutors should apply them with discretion, especially in situations involving communications between spouses and with treatment professionals with whom the parents have developed a trusting relationship.

VII. PENALTIES FOR FAILURE TO REPORT

If provisions for immunity from liability, the abrogation of privileged communications, and public education are the carrots to encourage fuller reporting, penalties for failure to report are the stick to enforce it. Although the ultimate success of a child protective reporting system must depend upon the willing cooperation of professionals and the public, reporting requirements need enforceable provisions for those who refuse to accept their moral obligation to protect endangered children. Thus, at this writing, the reporting laws of at least thirty-nine states contain specific penalty clauses for failure to report. Of that number, thirty provide a criminal penalty only,¹³¹ one provides for a civil penalty only,¹³² and four states and one territory provide both criminal and civil penalties.¹³³ The criminal penalty is normally of misdemeanor level with the potential fine and/or imprisonment ranging from \$100 and/or five days up to \$1000 and/or one year.¹³⁴ Some states provide penalties for failure to take other mandated protective actions, such as the taking of photographs and x-rays of areas of visible trauma.¹³⁵

However, "[w]hile failure to report is criminal in most states, there has never been, nor is there likely to be, a prosecution."¹³⁶ But perhaps there should be a criminal prosecution when the failure to report reflects a willful disregard of danger to a child. In fact, in a few instances known to this writer, police agencies seeking to

130. *Id.* § 16(d).

131. *E.g.*, ALA. CODE tit. 27, § 25 (Supp. 1975); CAL. PENAL CODE § 11162 (West 1970); FLA. STAT. ANN. § 827.07(11) (West 1976).

132. *E.g.*, ME. REV. STAT. tit. 22, § 3853(1) (Supp. 1977).

133. *E.g.*, ARK. STAT. ANN. § 42-816 (Cum. Supp. 1975); COLO. REV. STAT. § 19-10-104(4) (Cum. Supp. 1976); N.Y. SOC. SERV. LAW § 420 (McKinney 1976).

134. *E.g.*, ARK. STAT. ANN. § 42-816(a) (Cum. Supp. 1975) (up to 5 days imprisonment and \$100 fine); CAL. PENAL CODE § 11162 (West 1970) (up to six-months imprisonment and/or fine up to \$500); MO. REV. STAT. § 210.165 (Supp. 1976) (up to \$1000 fine and/or one-year imprisonment).

135. See note 153 and accompanying text *infra*.

136. See Dembitz, *supra* note 22, at 626 n.8.

enforce reporting requirements have brought mandated professionals before magistrates, although only verbal warnings have resulted so far.

A more likely, and, as a consequence, probably a more effective, encouragement to fuller reporting is the prospect of a civil lawsuit for damages arising from failure to report. Although five states and one territory have explicitly legislated civil liability,¹³⁷ such liability probably already exists in all states with a mandatory reporting law. Under common law tort doctrines, the violation of a statutory duty — in this instance the required reporting of known and suspected abuse and neglect — is “negligence per se.”¹³⁸ In 1967 Dean Monrad Paulsen predicted:

[I]t seems likely that reporting statutes which require reporting and which carry criminal penalties create a cause of action in favor of infants who suffer abuse after a physician has failed to make a report respecting earlier abuse brought to his attention. Further, the failure to comply with a mandatory statute which is not supported by criminal penalties may well give rise to civil liability by analogy to the cases upholding recovery based on negligence established by a breach of the criminal law.¹³⁹

The correctness of Dean Paulsen’s analysis has since been established in two recent California cases. In 1972, a lawsuit was brought against the police, a hospital, and individual doctors in California for failure to report a child’s suspicious injuries which had come to their attention.¹⁴⁰ Because they did not report, the unprotected child was further beaten by his parents and suffered permanent brain damage.¹⁴¹ The case was settled out of court for over half a million dollars. The case, and especially the settlement, received wide notice within the medical community.¹⁴² The other case, *Landeros v. Flood*,¹⁴³ was not settled out of court, and the California Supreme Court was called upon to decide whether the plaintiff had stated a cause of action against a doctor who failed to diagnose and report a case of the Battered Child Syndrome.¹⁴⁴ The

137. *E.g.*, ARK. STAT. ANN. §42-816(b) (Cum. Supp. 1975); COLO. REV. STAT. §19-10-104(4)(b) (Cum. Supp. 1976); N.Y. SOC. SERV. LAW §420(2) (McKinney 1976).

138. Failure to comply with a statutory mandate “in itself” establishes the negligence of the act of omission. *See* W. PROSSER, LAW OF TORTS §36 (4th ed. 1971).

139. Paulsen, *supra* note 99, at 36.

140. TIME, November 20, 1972, at 74.

141. *Id.*

142. *Id.*

143. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

144. *Id.* at 408, 551 P.2d at 393, 131 Cal. Rptr. at 73.

child had been brought to the hospital with a broken leg, caused by a twisting force for which there was no natural explanation.¹⁴⁵ Furthermore, the child had bruises and abrasions over her entire body, and appeared fearful when approached by adults. As a result of the physician's alleged negligence, the child was returned to her parents and severely beaten again, suffering permanent physical injury.¹⁴⁶ The California Supreme Court found that the plaintiff had stated a cause of action on theories of both common law and statutory negligence.¹⁴⁷

There are also positive treatment reasons for civil and criminal penalties. Penalty clauses tend to assist mandated reporters in working with parents by making it easier to explain to parents why a report must be made. In addition, experience shows that a penalty clause is invaluable to staff members of agencies and institutions who often must persuade their superiors of the necessity of making a report. For example, nurses frequently relate how the mention of the potential liability for failure to report is the only argument that convinces reluctant hospital administrators to commence protective action.¹⁴⁸

A common basis of liability in state statutes is "knowing and willful failure" to report. Since negligence per se is established by merely proving failure to comply with a statutory mandate,¹⁴⁹ this specific standard of liability may limit the situations in which liability can arise and may narrow the broader common law liability. Most states having adopted this stricter standard of liability seem to do so on the grounds that it is unfair to penalize honest mistakes in interpreting the difficult and ambiguous facts surrounding most child abuse and neglect situations. They conclude that a person must know about his obligations under the reporting law and must intentionally fail to fulfill them before being held criminally or civilly liable. Thus, in those states using the "knowing and willful" test, the mandated reporter must have a conscious suspicion that a child is abused or neglected, and know that he must report and still not do so. Among the situations that could lead to the conclusion that a person "knowingly or willfully" failed to report would be: 1) when a child complains to such a person that he is being abused or neglected, 2) when the parents tell such person about their abusive or neglectful conduct, and 3) when a reputable individual

145. *Id.* at 405, 551 P.2d at 391, 131 Cal. Rptr. at 71.

146. *Id.* at 405-06, 551 P.2d at 391, 131 Cal. Rptr. at 71.

147. *Id.* at 413, 551 P.2d at 396, 131 Cal. Rptr. at 76.

148. See generally N.Y. SELECT COMM. REP., *supra* note 7, at 29.

149. See W. PROSSER, *supra* note 138, at § 36.

warns such a person that a child is being or was abused and neglected and instead of disputing the accuracy of the warning, the person says, in effect: "So what, it is none of my business."

Although penalty provisions are a valuable and necessary component of an effective reporting law, it must be emphasized that ignorance and misunderstanding of the reporting law and of child protective procedures are the main reason for underreporting. The most effective way to encourage full and accurate reporting is through professional and public education about the nature of child abuse and neglect. Private citizens and especially professionals, including child care professionals, physicians, nurses, social workers, and teachers, must be made sensitive to the occurrence of child abuse and neglect, must be able to identify it, and must know how to report it. To make a penalty clause work, there must be a continuing public and professional education and training program.¹⁵⁰

VIII. PHOTOGRAPH AND X-RAY AUTHORIZATIONS

Photographs and x-rays can be crucial to the identification and management of child abuse and neglect cases.¹⁵¹ For example, x-rays often reveal telltale past injuries. Photographs and x-rays also preserve evidence to support subsequent child protective decision-making and possible court action, particularly when case records lack sufficient detail.¹⁵² Long after memories have faded, photographs and x-rays can provide graphic and incontestable documentation of the severity of the child's initial condition. A photograph or x-ray can be worth, as the cliché goes, a thousand words.

Ordinarily, however, there would be some question about the authority of hospital, child protective, and law enforcement officials to take photographs or x-rays without parental permission. Hence, at this writing, at least ten states have enacted statutes authorizing mandated reporters to take, or to arrange to have taken, photographs and x-rays without parental permission.¹⁵³ Sometimes, the head of a medical facility is mandated to take x-rays or photographs of areas of visible trauma.¹⁵⁴

150. See notes 314-16 and accompanying text *infra*.

151. Fontana, *The Maltreated Children of Our Times*, 23 VILL. L. REV. 452-53 (1978).

152. Under rules of evidence, such photographs and x-rays normally can be used in any later court proceedings. See, e.g., FED. R. EVID. 1002. See notes 153-55 and accompanying text *infra*.

153. E.g., COLO. REV. STAT. § 19-10-106 (Cum. Supp. 1976); N.Y. SOC. SERV. LAW § 416 (McKinney 1976); OHIO REV. CODE ANN. § 2151.421 (Page 1976); PA. STAT. ANN. tit. 11, § 2207 (Purdon Cum. Supp. 1977-1978).

154. E.g., N.Y. SOC. SERV. LAW § 416 (McKinney 1976).

To encourage the use of such provisions, at this writing, at least six states provide for the reimbursement, at public expense, of the costs of photographs and x-rays.¹⁵⁵

IX. PROTECTIVE CUSTODY AUTHORIZATIONS

In most child abuse and neglect situations, the child need not be removed from his parents' care in order to protect his well-being and future development. Indeed, in many situations, removal may be harmful to the child. Children identify with their parents at a very early age, seeing them as models for and as part of themselves. Separation from parents can be experienced as a profound rejection, or the child can introject into his own self-image the parental inadequacy that led to the removal.¹⁵⁶ As a result, the child may see separation from his parents as a deprivation or as a punishment for his own inadequacy. The psychological wounds that can be caused by removing a child from his parents have been repeatedly described.¹⁵⁷ The conditions of foster care are frequently not conducive to a child's emotional well-being.¹⁵⁸ Furthermore, removal may hinder treatment efforts with the parents; it may destroy a fragile family fabric and make it more difficult for the parents to cope with the child when he is returned to their care.

But sometimes a child has to be removed from his parents' home for his own safety or as part of an appropriate treatment plan for the parents. When this happens, removing a child with the parents' consent is preferred, because resort to unnecessary legal coercion can be detrimental to later treatment efforts. In recognition of the importance of parental consent, a number of states require that the parents' agreement be sought before protective custody is invoked.¹⁵⁹

Frequently, however, a child must be removed from his home without parental consent, and indeed against parental wishes, to protect him from further harm. In such situations, the preferred method of removing a child is through a court order. As in all situations in which individual discretion is preeminent, there is always the danger of careless or automatic, though well-meaning,

155. *E.g.*, ARK. STAT. ANN. § 42-810 (Cum. Supp. 1975); IOWA CODE ANN. § 235A.11 (West Cum. Supp. 1977); N.Y. SOC. SERV. LAW § 416 (McKinney 1976); W. VA. CODE ANN. § 49-6A-4 (Cum. Supp. 1977).

156. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 19, 20, 33, 40-42 (1973) [hereinafter cited as BEYOND THE BEST INTERESTS OF THE CHILD].

157. *See generally* N. WEINSTEIN, THE SELF IMAGE OF THE FOSTER CHILD (1962).

158. *See* BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 156, at 23-26.

159. *E.g.*, CONN. GEN. STAT. ANN. § 17-38a(e) (West Supp. 1976); N.J. STAT. ANN. § 9:6-8.27 (West 1976); N.Y. FAM. CT. ACT § 1021 (McKinney 1975).

exercise of the power to place a child in protective custody. Prior court review lessens such dangers by ensuring that a judge, an outsider, reviews the administrative decision to place a child in custody. Indeed, police and child protective agencies having authority to remove a child against the parents' wishes are often hesitant to do so without court authorization and often seek court approval before placing a child in protective custody.¹⁶⁰

Nevertheless, sometimes removal must occur before court review is possible because, in the time it would take to obtain a court order, the child might be further harmed or the parents might flee with the child. In all states, the police are authorized to take a child into protective custody, either under specific child protective legislation or through their general law enforcement powers.¹⁶¹ Moreover, under the common law, anyone has the legal authority to use force in the protection of a third person, although this is usually contingent upon the existence of some sort of emergency or imminent danger.¹⁶² In recognition of the prime decisionmaking responsibility of child protective workers, and presumably in the belief that authority should accompany responsibility, a growing number of states, at least thirteen at this writing, also grant protective custody power to child protective agencies.¹⁶³ However, despite the fact that child protective workers make most of the important decisions about the initial handling of child abuse and neglect cases, some observers feel that giving them direct authority to remove children will unduly hamper their efforts to develop trusting treatment relationships with families.¹⁶⁴ In any event, as a practical matter, forcible removal of a child ordinarily is not attempted without police or law enforcement assistance, because of the possible danger to the protective worker.

In the past, most provisions authorizing protective custody were stated broadly, in general phrases such as "necessary to protect the child's life or health."¹⁶⁵ But past practice, in too many situations,

160. When the court is not in session, *e.g.*, at night or on weekends, authorization can usually be obtained by telephoning a judge at home. *See e.g.*, COLO. REV. STAT. § 19-10-107 (Supp. 1976).

161. Specific legislative authorization is found in at least 45 states. *E.g.*, DEL. CODE tit. 10, § 933 (1974); MINN. STAT. ANN. § 260.165 (West 1971); N.D. CENT. CODE § 27-20-13(1) (Supp. 1973).

162. *See* W. PROSSER, *supra* note 138, at § 20.

163. *E.g.*, COLO. REV. STAT. § 19-10-107 (Supp. 1976); MASS. GEN. LAWS ANN. ch. 119, § 51B(3) (West Supp. 1977); TEX. FAM. CODE ANN. tit. 2, § 17.01 (Vernon Supp. 1976).

164. *See* A. SUSSMAN & S. COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION 30 (1975).

165. *See, e.g.*, IOWA CODE ANN. § 232.15(3)(b) (West 1969) ("surroundings or conditions which endanger the health or welfare of the child"); NEB. REV. STAT. § 43-205.01(3) (1974) ("when such child is seriously endangered in his surroundings").

was to remove a child from his home first — and to ask questions later. To prevent the indiscriminate use of protective custody, a growing number of states have placed two limitations on when a child may be taken into protective custody without a court order: 1) a child must be in imminent danger, and 2) there must be no time to apply for a court order.¹⁶⁶ Examples of situations which require immediate action because of imminent danger to the child include: when children are being or are about to be attacked by their parents; when they need immediate food, clothing, shelter, or medical care; when children are left alone or unattended; or when it appears that the entire family may disappear before the facts can be sorted out.

In an interesting legal nuance, a number of states make a distinction between the test for reporting — “reasonable suspicions” — and the test for taking a child into protective custody — “reasonable cause to believe” that the child is in imminent danger.¹⁶⁷ Although seemingly minor, this difference is one of important degree because it signals the difference between the subjective condition of the reporter’s state of mind and the existence of sufficient objective factors to cause a reasonable person to believe that the child must be placed in protective custody.

More recently, a number of states have granted hospitals and similar institutions a protective custody power called “twenty-four hour hold.”¹⁶⁸ This authority is much broader than standard protective custody authorization because there is usually no need to establish that the child is in “imminent danger.”¹⁶⁹ Indeed, the person in charge of such a facility is usually authorized to place a child in protective custody “where he believes the facts so warrant.”¹⁷⁰ Such broad language is designed to give hospitals and similar institutions a flexible tool with which to deal with home situations that appear explosive or dangerous.¹⁷¹ These situations often arise in the middle of the night when outside guidance and

166. *E.g.*, ILL. ANN. STAT. ch. 23, § 2055 (Smith-Hurd Supp. 1977); MO. ANN. STAT. § 210.125(1) (Vernon Supp. 1976) (imminent danger and no possibility of immediate court order); VA. CODE § 63.1-248.9 (Supp. 1977) (same).

167. *E.g.*, ALA. CODE tit. 27, §§ 21, 22(1) (Supp. 1975); N.Y. FAM. CT. ACT § 1024(a) (McKinney 1975); N.D. CENT. CODE § 27-20-13(1)(c) (1973), § 50-25.1-03 (Supp. 1977).

168. *Compare* MICH. COMP. LAWS ANN. § 722.626 (Supp. 1977) (next court day) and MO. ANN. STAT. § 210.125(1) (Vernon Supp. 1976) (20 hours) and N.Y. SOC. SERV. LAW § 417(2) (McKinney 1976) (next court day) and PA. STAT. ANN. tit. 11, § 2208(a)(2) (Purdon Cum. Supp. 1977-1978) (24 hours) with ALA. CODE tit. 27, § 22(1) (Supp. 1975) (72 hours) and CONN. GEN. STAT. ANN. § 17-38a(d) (West Supp. 1976) (96 hours) and VA. CODE § 63.1-248.9 (Supp. 1977) (72 hours).

169. *See* note 166 and accompanying text *supra*.

170. N.Y. SOC. SERV. LAW § 417(2) (McKinney 1976).

171. Frequently, for example, hospital staff are concerned about the safety of a child with suspicious injuries, or are unsure of the child’s real name or address, or fear that the parent will flee before a protective worker can make a home visit.

assistance are unavailable.¹⁷² But because of its radical nature, the "twenty-four hour hold" is an emergency measure to enable other components of a community's child protection system to have enough time to mobilize.

Whatever the initial basis for placing a child in protective custody, there is a real need for a court to review the initial administrative decision. It may have been wrong; it may have been based on incomplete or misunderstood facts, or the situation may have changed since the decision was first made — for example, counseling, homemaker, daycare, or housing services may have succeeded in making the child's home safe for his return. Therefore, the correctness of such decisions should be reviewed by a court as soon as possible. Although many states put no time limit on protective custody before court review,¹⁷³ a number of states do provide a time limit.¹⁷⁴ Twenty-four hours seems to be a reasonable length of time to authorize holding a child without court order. Within that time, there is no reason why a judge cannot be reached. The possibility of disturbing a judge at home is a small price to pay for ensuring that the initial decision is promptly reviewed.¹⁷⁵ The fact that such judicial reviews are frequently perfunctory does not denude them of their value.

In many communities, the dearth of suitable facilities for the temporary care of abused and neglected children has led to their placement in a jail or a facility for the detention of criminal or juvenile offenders. Such practices are wholly inappropriate to the purposes and philosophy of child protective services, and a number of state laws expressly forbid them.¹⁷⁶ Of course, such prohibitions should not apply to situations where an abused or neglected child requires secure detention because of his own misconduct and there is independent legal authority for detaining him.

172. See note 160 *supra*.

173. *E.g.*, ILL. ANN. STAT. ch. 23, § 2055 (Smith-Hurd Supp. 1977); MINN. STAT. ANN. § 260.165 (West 1971); UTAH CODE ANN. § 55-10-90 (1974).

174. *E.g.*, ALA. CODE tit. 27, § 22(1) (Supp. 1975) (72 hours), ARIZ. REV. STAT. § 8-546.01(D) (Supp. 1977) (48 hours); CONN. GEN. STAT. ANN. § 17-38a(e) (West Supp. 1976) (96 hours); MD. CTS. & JUD. PROC. CODE ANN. § 3-815(c) (Supp. 1977) (next court day); N.Y. FAM. CT. ACT § 1021 (McKinney 1975) (3 days).

175. Even in the most rural communities a judge or magistrate is available to hear preliminary criminal matters: Colorado law, for example, facilitates around-the-clock utilization of the "twenty-four hour hold" by allowing authorization by "a person appointed by the juvenile judge, who may be the juvenile judge, a referee, or any other officer of the court." COLO. REV. STAT. § 19-10-107 (Supp. 1976).

176. Compare IND. CODE § 31-5-7-23 (1976) (juveniles must be kept separate from adult criminals) and S.C. CODE ch. 21, 14-21-590(c) (1977) (same) with IOWA CODE ANN. § 232.21 (West 1969) (children requiring detention shall be separated so far as practicable from children requiring shelter) and NEV. REV. STAT. § 62.170(4) (1971) (separation whenever possible).

Protective custody is only the beginning of the child protective process. In utilizing protective custody, officials should bear in mind that subsequent treatment efforts may be impaired if the parents are not accorded full due process, not treated fairly or are not fully informed about what is going on. All of these, of course, are important goals in themselves. Some appropriate person, preferably from the child protective agency, should tell the parents where the child was taken, in order to calm their fears and to enable them to maintain contact with their child. In unusual or severe cases, it may not be prudent to inform the parents of the child's exact whereabouts if it appears that the parents may seek to regain custody of the child forcibly or otherwise interfere with his care. In such cases, contact between the child and parent may have to be limited to highly structured situations. Since the welfare of the child is an added consideration, it is unlikely that failure to notify parents in such cases would be considered grounds to terminate a protective custody placement.

Protective custody must not be considered a final disposition of the case. If not a child protective worker, the person taking a child into protective custody should immediately notify the appropriate local child protective service so that necessary protective, assessment, and treatment efforts can begin. During all stages of the case — whether or not court action is commenced — the need for protective custody should be continually reviewed, and an attempt should be made to return the child to his home, "whenever it seems reasonable and safe to do so."¹⁷⁷ Even after a court proceeding has begun, the child protective agency may still recommend to the court that the child be returned to the parents pending further court action.¹⁷⁸

It would be misleading to end a discussion of protective custody without acknowledging that the undue delays caused by breakdowns in the planning process, overburdened child protective staffs, backlogged courts, inadequate long term alternatives, weak management procedures, and the absence of a host of other needed services can turn temporary protective custody into long term care. Children can be temporarily "parked" for months and even years in foster homes, shelters, and hospitals where, if they are medically ready for discharge, they are called "boarder babies."¹⁷⁹ Sadly, long term planning for children — whether it means preparing the family for

177. MODEL CHILD PROTECTION ACT § 9(e) (Aug. 1977 draft).

178. *E.g.*, N.Y. FAM. CT. ACT § 1026(a) (McKinney 1975).

179. N.Y. Times, Nov. 26, 1976, at 1, col. 4.

the child's return, establishing a long term foster care arrangement, or permanently terminating parental rights — is too frequently neither approached realistically nor completed expeditiously.

X. REPORTING PROCEDURES

Reporting laws usually specify that reports are to be made orally,¹⁸⁰ often also requiring subsequent written confirmation.¹⁸¹ The first generation of reporting laws left the mode of implementing these requirements to administrative decision.¹⁸² Generally, reports were to be made directly to a *local* child protective or law enforcement agency. But ignorance of the local agency's telephone number and the frequent absence of a specialized phone line at the agency remained major stumbling blocks to more complete reporting. Consequently, in the early 1970's, a number of communities and states established centralized reporting hotlines, at least ten through legislation.¹⁸³ Such hotlines were meant to encourage reporting by simplifying the reporting process, by having an easily publicizable telephone number, and by ensuring that qualified personnel would answer the phone at all hours of the day or night. For statewide hotlines, a toll-free number was used to remove the obstacle caused by the cost of a long distance call. A number of states have begun to use facsimile telecopiers and remote access computer terminals to receive and transmit reports.

When considering the establishment of reporting hotlines, states and localities must consider whether to make them local or statewide in scope. Each type has its own advantages and disadvantages, and the final choice is the result of weighing complex programmatic and political considerations. For example, the great economies of scale and management enjoyed by statewide registers must be balanced against the added burden of transmitting reports, made initially to the state, to the local agency. On the other hand, when reports are made locally, they are usually transmitted to the state for recordkeeping purposes. Another factor to consider is the hesitancy of some potential reporters to call a distant statewide number because they want to discuss the situation with someone they know

180. *E.g.*, FLA. STAT. ANN. § 827.07(5) (West 1975); NEB. REV. STAT. § 28-1502 (1975); UTAH CODE ANN. § 55-16-3 (Supp. 1977).

181. *E.g.*, CAL. PENAL CODE § 11161.5(a) (West Supp. 1977); LA. REV. STAT. ANN. § 14:403(D)(4) (West 1974); R.I. GEN. LAWS § 40-11-6(2) (Supp. 1976).

182. *See generally* statutes cited note 216 *infra*.

183. *E.g.*, ARK. STAT. ANN. § 42-818(A)(2) (Supp. 1975); IOWA CODE ANN. § 235A.14(3) (West Supp. 1977); N.Y. SOC. SERV. LAW § 422(2) (McKinney 1976); VA. CODE § 63.1-248.6(C) (Supp. 1977).

or who is known in the community.¹⁸⁴ Therefore, some state laws allow these decisions about where reports are received to be made on a county-by-county basis.¹⁸⁵

Hotlines can perform important, ancillary functions by providing information and assistance to individuals who call. Qualified, professional staff can refer inappropriate reports and self-reports from parents seeking help, can advise potential reporters about the law and child protective procedures, can assist in diagnosis and evaluation, and can consult about the necessity of photographs, x-rays, and protective custody. Thus, whether a state or local system is used,¹⁸⁶ staff answering the telephone should have social-work or comparable qualifications, enabling them to offer effective and sensitive assistance to parents and others calling for help.

Another question concerning reporting procedures is whether written reports should be required in addition to oral reports. Many authorities¹⁸⁷ and some state laws¹⁸⁸ dispense with written reports on the ground that they discourage reporting. Requiring a written report should make a reporter more careful about making a report. And a written report, made some time after the initial telephone report, may provide an early way to update the situation. Moreover, written reports seem to provide added assurance that the initial oral report will be investigated, because they are a physical record that a report was actually made.

There is another factor in favor of written reports. A written report can facilitate the proof of facts concerning early observations of the child when agency records are nonexistent, hard to locate, or vague. Under ordinary rules of evidence, the relevant records of schools, hospitals, social service agencies, and other agencies which establish direct evidence of suspected child abuse and neglect are admissible under the "business records" exception to the rule against hearsay.¹⁸⁹ Unfortunately, the recordkeeping practices of many public and private agencies and institutions leave much to be desired; often, the agency has no clear record of what happened or what was observed. Since the reporter would ordinarily keep a copy

184. See generally N.Y. STATE DEPT. OF SOC. SERV., REPORT ON THE PROVISION OF CHILD PROTECTIVE SERVICES (1977).

185. *E.g.*, ARIZ. REV. STAT. § 8-546.01(c)(1) (1974); N.J. STAT. ANN. § 9:6-8.12 (West 1976); VA. CODE § 63.1-248.6(C) (Supp. 1977).

186. The Model Act envisions a statewide hotline with a toll-free number with immediate transmission to a local agency unless the local plan for child protective services requires "that oral reports . . . be made directly to the local child protective service." MODEL CHILD PROTECTION ACT § 13(a) (Aug. 1977 draft).

187. See, *e.g.*, DEFRANCIS & LUCHT, *supra* note 5, at 180.

188. *E.g.*, IDAHO CODE § 16-1616(e) (Supp. 1977); IND. CODE § 12-3-4.1-2 (1976); N.J. STAT. ANN. § 9:6-8.10 (West 1976); TENN. CODE ANN. § 37-1203 (Supp. 1977).

189. *E.g.*, FED. R. EVID. 803(6).

of a written report, there would then exist a specific, detailed record of his observations available for later reference and possible use in court. At least five states have statutory provisions expressly authorizing the admissibility of written reports.¹⁹⁰ However, even without such legislation, if the normal requirements of the business records rule¹⁹¹ are met, a report of suspected child abuse and neglect would still be admissible. The usual rules of evidence, of course, would have to be complied with, for example, the requirements of testimony establishing a foundation for the admission of the report¹⁹² and the exclusion of any double hearsay.¹⁹³ And, of course, the court would be free to attach whatever persuasive weight to the report that it deemed appropriate.

XI. AGENCIES THAT RECEIVE REPORTS

Without child abuse and neglect reporting laws, reports of child maltreatment would continue to be made, as they were before the passage of such laws, to law enforcement, child welfare or social service agencies, and juvenile courts. When a law requires reports to be made, it also must designate an agency to receive them. The issue of which agency should be designated to receive reports has been described as "one of the most critical elements of the reporting law. The nature and orientation of the agency first receiving the report will often determine the community's reponse to child abuse."¹⁹⁴

Designating the police as recipients of reports, while helping to ensure thorough investigations, has the disadvantage of stressing the punitive tenor of the process and tends to discourage reporting by physicians and other professionals. Designating social service agencies emphasizes the rehabilitative and treatment aspects of the process, but is sometimes seen as a "soft" response to brutal crimes.¹⁹⁵ The first model legislation proposed by the United States Children's Bureau¹⁹⁶ recommended that mandated reports be made to law enforcement agencies, not because criminal prosecution is needed, but because police agencies are available twenty-four hours

190. *E.g.*, COLO. REV. STAT. § 19-10-108(4) (Supp. 1975); N.Y. SOC. SERV. LAW § 415 (McKinney 1976); PA. STAT. ANN. tit. 11, § 2222(1) (Purdon Cum. Supp. 1977-1978).

191. See note 189 and accompanying text *supra*.

192. See FED. R. EVID. 803(6) and Report of the Senate Comm. on the Judiciary following the rule.

193. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 313 (2d ed. E. Cleary 1972).

194. DEFRAUCIS & LUCHT, *supra* note 5 at 11.

195. See Paulsen, *supra* note 5 at 714.

196. U.S. CHILDREN'S BUREAU, THE ABUSED CHILD — PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD (1963).

a day, an essential capability in emergency child abuse cases.¹⁹⁷ The present recognition that only social service agencies have the treatment resources needed to handle maltreatment cases has led most experts to advocate improving the investigative capability of child protective agencies rather than creating a two-stage process of police investigation and social service treatment. Thus, even though child abuse and neglect are crimes in all states,¹⁹⁸ at least thirty-five states now require reports to be made to social service agencies, usually specially designated child protective agencies.¹⁹⁹ Only a few states still require that reports be made solely to law enforcement agencies.²⁰⁰

Often, however, no single agency is designated as the sole agency to receive reports. Sixteen state statutes allow mandated reporters to choose between the police or a child protective agency,²⁰¹ seven states allow mandated reporters to choose between three or more specified agencies,²⁰² and six provide for a joint police and child protective investigation.²⁰³ Four states attempt to cover all contingencies by requiring reports to be made to *two or more* agencies.²⁰⁴

The legislative ambivalence concerning the designation of the agency to receive reports mirrors and magnifies the fragmentation of basic child protective responsibility in most communities. This diversity of overlapping reporting avenues increases the likelihood of lost reports and administrative breakdowns. As cases are misdirected, misplaced, or seriously delayed between agencies, the lives of children who need immediate and sustained protection are endangered.

Even the clearest and most precise law cannot guarantee how reports will be made. The agency to which individuals actually

197. *Id.* See Paulsen, *supra* note 5, at 714.

198. *E.g.*, IDAHO CODE §§ 18-401, -1501 (Supp. 1977); N.J. STAT. ANN. § 9:6-3 (West 1976); WYO. STAT. §§ 14-21 to -26 (1965).

199. *E.g.*, FLA. STAT. ANN. § 827.07(1)(d), (4) (West 1975); HAW. REV. STAT. § 350-1 (1975); MONT. REV. CODES ANN. § 10-1304 (Supp. 1977); WYO. STAT. § 14-28.9 (Supp. 1975).

200. *E.g.*, NEB. REV. STAT. §§ 28-1502, -1503(1) (1975). See D.C. CODE § 2-163 (1973).

201. *E.g.*, GA. CODE ANN. § 74-111(b) (1973); OHIO REV. CODE ANN. § 2151.421 (Page 1976); WASH. REV. CODE ANN. § 26.44.030(1) (Supp. 1976).

202. *E.g.*, ALA. CODE tit. 27, § 21 (Supp. 1975); LA. REV. STAT. ANN. § 14:403(D)(1) (West 1974); TENN. CODE ANN. § 37-1203 (1977).

203. *E.g.*, COLO. REV. STAT. § 19-10-109(4)(a) (Supp. 1975) (agency "may" investigate independently or in conjunction with other investigatory agency); IDAHO CODE § 16-1625(a) (Supp. 1976) ("may" enlist help of police); NEB. REV. STAT. § 28-1504(2) (1975) (same).

204. *E.g.*, CAL. PENAL CODE § 11161.5 (West Supp. 1977); MONT. REV. CODES ANN. § 10-1304 (Cum. Supp. II 1977).

report depends on such diverse factors as their view of the need for criminal prosecution, their view of the community's child protective network, their view of the role and functions of the police and other agencies, and such chance factors as their knowledge of the reporting system and the time of day the report is made. Out of ignorance, self-interest, or inertia, many persons, even when subject to a mandatory reporting law, report to the agency they trust or know best.²⁰⁵

A recent statutory development of some note is the specific requirement in at least twelve states that child abuse and neglect fatalities be reported to medical examiners or coroners and district attorneys.²⁰⁶ Theoretically, at least, these provisions should not be necessary, since all suspicious fatalities of adults as well as children are required to be investigated by such officials.²⁰⁷ However, child fatalities are often not reported to them because of confusion, administrative breakdown, or the assumption that someone else has already reported the case to them. In some respects, this is an example of how the wise decision not to require criminal court action in most child abuse cases has been carried beyond reasonableness — even cases of criminal homicide are not being brought to the attention of law enforcement agencies. One might say that the advocates of the decriminalization of child abuse cases have been too successful. Some cases, especially brutal homicides, must be referred for potential criminal prosecution.

XII. LOCAL CHILD PROTECTIVE AGENCIES

After early emphasis on the "rescue" of children and the prosecution of "offending" parents, there has been an accelerating movement toward the provision of noncriminal and nonjudicial social and rehabilitative services. In the decades after 1875, one can see a slow but steadily increasing acceptance of the proposition that criminal intent is usually not present in child abuse and neglect cases and that treatment and ameliorative services, rather than punishment and retribution, are the best means of protecting endangered children.²⁰⁸ The handling of child maltreatment now has been almost completely decriminalized.

205. In nearly all communities, most reports, whether or not made pursuant to a reporting law, are ultimately referred to child protective agencies. Even if the police are designated to receive reports, they usually forward them to a child protective agency or to the juvenile court for investigation and the provision of services, when needed. See notes 210-11 and accompanying text *infra*.

206. *E.g.*, ARK. STAT. ANN. § 42-809 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 119, § 51A (Supp. 1977); N.Y. SOC. SERV. LAW § 418 (McKinney 1976).

207. See, *e.g.*, PA. STAT. ANN. tit. 16, § 1238 (Purdon 1972).

208. See generally THE BATTERED CHILD, *supra* note 4.

In nearly all communities, most reports are referred ultimately to a child protective agency, regardless of which agency the reporting law specifies to receive reports. Even if the police receive reports, they ordinarily refer them to a child protective agency or to a juvenile court. In some places and for certain types of cases, the police may perform a parallel or joint investigation with the child protective agency.²⁰⁹ The reasons for this reliance on child protective agencies include: 1) the necessity and benefits of providing treatment services which are most readily available through a social service agency like a child protective agency;²¹⁰ 2) the inadequacy of criminal court remedies and the unlikelihood of successful prosecution; 3) the advantage of using social casework skills in the investigation itself; 4) the fact that the family benefits if therapeutic treatment begins during the investigation; and 5) the very existence of child protective agencies, upon which the police can "dump" messy family matters that they do not like to handle.²¹¹ But whatever the motive, when child protective agencies investigate reports and begin the process of helping parents, the underlying causes of the abuse or neglect are most likely to be addressed and a family's ability to nurture and protect its children is most likely to be strengthened.²¹²

The local child protective agency is the heart of any community's child protective system. The local agency focuses state and community efforts to prevent and treat child abuse and neglect. Designating one, single agency in each community to receive and investigate all reports eliminates the confusion and lack of accountability that result when reports are handled by a number of different agencies.²¹³ It is important to emphasize that a new agency need not be established if an existing agency, or part of one, can provide child protective services.

The purpose of child protective intervention is to protect the health and enhance the welfare of children and families by *beginning* the process of helping parents meet their child care responsibilities. Except for certain extremely specialized services,

209. See notes 203 & 204 and accompanying text *supra*.

210. Examples of such assistance include traditional family counselling and mental health services, and such newer, specialized resources for families in trouble as: Parents Anonymous; hotlines, help lines, and other telephone counselling services; child development centers, parent effectiveness training, and infant stimulation centers; and crisis nurseries and drop-in services.

211. See generally D. BESHAROV, *JUVENILE JUSTICE ADVOCACY* 134-38 (1974).

212. See Kempe, *Some Problems Encountered by Welfare Departments in the Management of the Battered Child Syndrome*, in *THE BATTERED CHILD*, *supra* note 4, at 169-71.

213. Cf. Paulsen, *The Law and Abused Children* in *THE BATTERED CHILD*, *supra* note 4, at 191.

treatment is best provided by community human service agencies with a broader and more long-range responsibility for children and families than the child protective service. It would be imprudent to shift this fundamental social welfare responsibility away from community resources and agencies which are already successfully helping children and families, or to discourage the development of additional community-based treatment and prevention programs. To do so would be a costly duplication of existing services not likely to receive the support of budgetary authorities. Such an attempt would probably be doomed to failure anyway, because of the difficulties in attracting the broad range of quality professionals needed for such a narrowly focused service.

Specifically, the child protective agency is assigned the crucial *first steps* of:

- 1) providing immediate protection to children, through temporary stabilization of the home environment or, where necessary, protective custody;
- 2) verifying the validity of the report and determining the danger to the children;
- 3) assessing the service needs of children and families;
- 4) providing or arranging for protective, ameliorative, and treatment services; and
- 5) instituting civil court action when necessary, to remove a child from a dangerous environment or to impose treatment on his family.

The local child protective agency offers the family whatever available services can help the parents or the family. Many of these services, such as financial assistance, day care, or homemaker care, are concrete efforts to relieve the pressures and frustrations of parenthood. Individual and family counseling services are also used to ease the tensions of personal problems and marital strife. Referrals are made to family service agencies, mental health clinics, hospitals, and other social and child welfare services. Recently, a number of Parents Anonymous groups have been established throughout the country, and a referral is often made to one of these groups. If the parent is an alcoholic or drug addict, he may be referred for detoxification to a hospital, a methadone maintenance program, a drug free program, an Alcoholics Anonymous program, or a similar rehabilitation program. Only when such services are refused or are inadequate is court action sought — usually in juvenile or family court.²¹⁴

214. *E.g.*, PA. STAT. ANN. tit. 11, § 2217(9) (Purdon Cum. Supp. 1977-1978).

Until recently, however, insufficient attention has been paid to the need to establish strong and viable child protective systems. In almost all states, child protective responsibility has been blurred. Responsibility to ensure that reports are promptly and effectively investigated and that treatment efforts are initiated is often dispersed among a number of public and private agencies which have many other, often conflicting, duties competing for scarce resources and attention. The result has been breakdowns in communication, delays in the implementation of case plans, and an absence of accountability for the ultimate handling of cases.

Many child protective agencies have been unable to fulfill the life-saving responsibilities assigned to them. After receiving a report of suspected abuse or neglect, the protective agency's investigation must determine whether the child is in danger and what services should be offered to the family. But because abuse or neglect usually happen in the privacy of the home, without any witnesses, gathering information about what happened can be exceedingly difficult. If the parents are looking for help, they may tell the worker what happened, but often they deny any wrongdoing. The worker must then seek whatever information is available from schools, neighbors, relatives, as well as the source of the report. As a result, caseworkers have great difficulty in getting genuine information about families. The staggering responsibilities placed on protective workers, and the unique skills demanded by protective work, require protective agencies to have a specialized, highly qualified staff with sufficient resources to handle the complexities of child maltreatment cases. Yet, many agencies are too understaffed to handle the reports they receive, the number of which increases each year. Furthermore, most agencies are plagued with staff turnovers as high as 100% every year or so, making it all but impossible to develop and maintain qualified staffs.²¹⁵

The strengthening of reporting requirements during the last decade has had detrimental effects on the functioning of some child protective agencies and on the welfare of families enmeshed in the system. Some reporting laws were enacted without ensuring that a system existed to respond to the reports generated by the law.²¹⁶ The

215. See U.S. NAT'L ADVISORY COMM. ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARD 11.7 (1976) (commentary) (Sup. Doc. No. Y3.C86:2J98) [hereinafter cited as U.S. JUVENILE JUSTICE STANDARDS].

216. *E.g.*, ALA. CODE tit. 27, §§ 21-25 (1966) (current version at ALA. CODE tit. 27, §§ 20-25 (Supp. 1975)); ARIZ. REV. STAT. ANN. § 13-842.01 (Supp. 1966) (current version at ARIZ. REV. STAT. ANN. § 38-546.01 (Supp. 1977)); LA. REV. STAT. ANN. § 14.403 (West Supp. 1965) (current version at LA. REV. STAT. ANN. § 14.403 (West 1974)); MICH. STAT. ANN. § 14.564(1)-(s) (Supp. 1965) (current version at MICH. STAT. ANN. §§ 25.248(1)-(16) (Supp. 1976)); PA. STAT. ANN. tit. 18, § 4330 (Supp. 1965) (current version at PA. STAT. ANN. tit. 11, §§ 2201-24 (Purdon Cum. Supp. 1977-1978)).

purpose of reporting known and suspected child abuse and neglect is to bring endangered children, who might otherwise go unprotected, quickly to the attention of agencies who are able to help them and their families. Increased reporting is meaningless, and often actually harmful to the children and families involved, if sufficient services are not available to deal with the problems revealed.

Hence, the most important aspect of recent child protective legislation is its emphasis on the development of expanded and strengthened helping services to respond to increased reporting. A number of states have sought to upgrade the child protective services offered by public child welfare agencies by statutorily designating a single agency to be responsible for all aspects of initial child protective work, including receipt of reports, investigations, and case disposition.²¹⁷ This is a marked departure from earlier statutes that, basically, only provided for reporting.²¹⁸ This recent legislation recognizes that unless a system is established to handle the increased number of cases that inevitably flows from an improved reporting law, stricter reporting requirements and improved reporting techniques can actually work to the detriment of agency and family welfare. Perhaps the most significant aspect of recent legislation has been the degree to which it has detailed the specific responsibilities and functions of child protective agencies.²¹⁹

217. *E.g.*, N.Y. SOC. SERV. LAW §423(1) (McKinney 1976).

218. *E.g.*, statutes cited note 216 *supra*.

219. For example, the New York statute provides:

Each child protective service shall:

1. receive on a twenty-four, seven day a week basis all reports of suspected child abuse or maltreatment in accordance with this title, the local plan for the provision of child protective services and the regulations of the commissioner;
2. maintain and keep up-to-date a local child abuse and maltreatment register of all cases reported under this title together with any additional information obtained and a record of the final disposition of the report including services offered and accepted;
3. upon the receipt of each written report made pursuant to this title, transmit, forthwith, a copy thereof to the state central register of child abuse and maltreatment. In addition, not later than seven days after receipt of the initial report, the child protective service shall send a preliminary written report of the initial investigation, including evaluation and actions taken or contemplated, to the state central register. Follow-up reports shall be made at regular intervals thereafter . . . to the end that the state central register is kept fully informed and up-to-date concerning the handling of reports;
4. give telephone notice and forward immediately a copy of reports made pursuant to this title which involve the death of a child to the appropriate district attorney. In addition, a copy of any or all reports made pursuant to this title shall be forwarded immediately by the child protective service to the appropriate district attorney if a prior request in writing for such copies has been made to the service by the district attorney;
5. forward an additional copy of each report to the appropriate duly incorporated society for the prevention of cruelty to children or other duly

In the past, the enactment of expanded reporting laws was assumed to be the cure for a state's child abuse and neglect problems.²²⁰ But sharply increased case loads, which inexorably flow from strengthened reporting, come as a rude shock to social service systems and state and local administrators. By fully and honestly describing the investigative and treatment services necessary to support a strong reporting law, contemporary child protective legislation seeks to ensure that everyone considering the enactment of such laws also appreciates the need for expanded services, and increased funding, to accompany expanded reporting. All elements of the community should be clearly and unambiguously prepared for the full costs of an effective child abuse and neglect prevention and treatment program. Only if the real issues of prevention and treatment are faced openly can sufficient community and profes-

authorized child protective agency if a prior request for such copies has been made to the service in writing by the society or agency;

6. upon receipt of such report, commence or cause the appropriate society for the prevention of cruelty to children to commence, within twenty-four hours, an appropriate investigation which shall include an evaluation of the environment of the child named in the report and any other children in the same home and a determination of the risk to such children if they continue to remain in the existing home environment, as well as a determination of the nature, extent, and cause of any condition enumerated in such report, the name, age and condition of other children in the home, and, after seeing to the safety of the child or children, forthwith notify the subjects of the report in writing, of the existence of the report and their rights pursuant to this title in regard to amendment or expungement;

7. determine, within ninety days, whether the report is "indicated" or "unfounded";

8. take a child into protective custody to protect him from further abuse or maltreatment when appropriate and in accordance with the provisions of the family court act;

9. based on the investigation and evaluation conducted pursuant to this title, offer to the family of any child believed to be suffering from abuse or maltreatment such services for its acceptance or refusal, as appear appropriate for either the child or the family or both; provided, however, that prior to offering such services to a family, explain that it has no legal authority to compel such family to receive said services, but may inform the family of the obligations and authority of the child protective service to petition the family court for a determination that a child is in need of care and protection;

10. in those cases in which an appropriate offer of services is refused and the child protective service determines or if the service for any other appropriate reason determines that the best interests of the child require family court or criminal court action, initiate the appropriate family court proceeding or make a referral to the appropriate district attorney, or both;

11. assist the family court or criminal court during all stages of the court proceeding in accordance with the purposes of this title and the family court act;

12. coordinate, provide or arrange for and monitor, as authorized by the social services law, the family court act and by this title, rehabilitative services for children and their families on a voluntary basis or under a final or intermediate order of the family court.

N.Y. SOC. SERV. LAW. § 424 (McKinney 1976).

220. See Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16, 18-19 (1976-77).

sional support be developed for the needed long term effort. To do less would be irresponsible and indefensible.

This recent focus on the development of investigative and treatment services is expensive, and, as a result, injects controversy into the legislative and reform process. Many question the wisdom of legislating the provision of investigative and treatment services. They argue that the services prescribed by child protection laws could be implemented administratively, through the promulgation of new agency regulations and the establishment of additional service programs. However, the probable success of such an approach is unlikely given the past inability of program managers to mobilize sufficient support to improve services. In light of the weaknesses in existing child protective service programs, it seems that legislative enactment of improved service programs is essential for the development of effective, statewide child protective systems.

The "Purpose" clause of the Model Child Protection Act is an amalgam of these different concerns. It provides, in part:

Abused and neglected children in this state urgently need protection. It is the purpose of this Act to help save them from further injury and harm. This Act seeks to establish a fair and effective state and local child protection system by providing those procedures and services necessary to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate.²²¹

After the initial child protective intervention, efforts to preserve and improve family stability are, and must remain, the domain of community resources and agencies that have broader and more long range responsibilities towards children and families than do child protective agencies. Reporting should not be used as an excuse to divest these agencies of their traditional responsibilities. Instead, every effort must be made to encourage existing agencies to assume greater prevention and treatment responsibility and to expand their capacity to do so.

XIII. CHILD PROTECTION TEAMS

Child abuse and neglect derive from a wide range of social and psychological problems that cannot be managed by one discipline or one profession alone. Social workers, physicians, nurses, lawyers, judges, psychiatrists, teachers, and many others must all work together if the cycle of abuse and neglect is to be broken. But helping

221. MODEL CHILD PROTECTION ACT § 2 (Aug. 1977 draft).

efforts remain fragmented among various disciplines; communication and coordination are high-sounding watchwords that are difficult to implement, and fear and hostility among competing social agencies and approaches are constant obstacles impeding service delivery.

Although the weight of the literature and developing statutory law agree in assigning prime child protective responsibility to designated social service agencies — “child protective agencies”²²² — optimal diagnostic and treatment efforts require the contributions of a broad range of professional and community agencies. In many parts of the country, the creation of interdisciplinary teams — based on the original Denver model²²³ — has succeeded in bringing the collective expertise of relevant professionals to bear on identification and treatment. Depending on the community and circumstances of individual cases, such teams include representatives of relevant medical, mental health, law enforcement, and social service agencies. Five states specifically mandate and three others permit the creation of such interdisciplinary child protection teams.²²⁴

222. See notes 208-19 and accompanying text *supra*.

223. See Fontana, *supra* note 151, at 448; see, e.g., THE BATTERED CHILD, *supra* note 4.

224. Colorado law, which is the most extensive of such legislation, provides:

(6)(a) It is the intent of the general assembly to encourage the creation of one or more child protection teams in each county or contiguous group of counties. In each county in which reports of fifty or more incidents of child abuse have been made to the state central registry in any one year, the county director shall cause a child protection team to be inaugurated in the next following year.

(b) The child protection team shall review the files and other records of the case, including the diagnostic, prognostic, and treatment services being offered to the family in connection with the reported abuse, and shall make a report to the county department with suggestions for further action or stating that the child protection team has no suggestions. Contiguous counties may cooperate in meeting the requirements of this subsection (6).

(7) The county director shall appoint a representative recommended by the local law enforcement agencies, and a person shall be assigned by the presiding judge of the juvenile court or the district court with juvenile jurisdiction as a representative of the court. All other members shall be appointed by the county director. All members shall serve at the pleasure of the county director.

(8) The county director or his designee shall be deemed to be the local coordinator of the child protection team. In those counties in which child protection teams meeting the requirements of this article are currently functioning, they shall be recognized, with the consent of all members, as the functioning child protection team for that county.

(9) The local coordinator in each county shall forward a copy of all reports of child abuse to the child protection team. The coordinator shall forward a copy of the investigatory report and all relevant materials to the child protection team as soon as they become available. The child protection team shall meet no later than one week after receipt of a report to evaluate such report of child abuse. The local coordinator shall make and complete, within ninety days of receipt of a report initiating an investigation of a case of child abuse, a follow-up report including services offered and accepted and any recommendations of the child

XIV. CENTRAL REGISTERS OF CHILD PROTECTION CASES

Forty-seven states and the District of Columbia have established some kind of central register of child protection cases in order to improve case diagnosis and monitoring or statistical systems, or both.²²⁵ Forty states have established their central registers through legislation,²²⁶ while the others have established them by administrative decision.²²⁷ One writer has noted:

In 1973, 33 states mandated central registries by law, while registries were maintained administratively in 13 other states and the District of Columbia. This in turn compares to 19 mandated registries and 26 administrative ones in 1970. The trend is clearly to enact into law a central registry that was in most cases already functioning.²²⁸

Although the central register in most states is maintained by the state social service agency, in California, it is maintained by a law enforcement agency, the Bureau of Criminal Identification.²²⁹

Verifying to a certitude reports of suspected child abuse or neglect is almost always difficult; often it is impossible. Even the most thorough investigation may not reveal clear evidence of what happened; a medical report describing severe physical injuries that

protection team to the state central registry on forms supplied by the state department for that purpose.

(10) In the event that the local department of the child protection team initiates a petition in the juvenile court or the district court with juvenile jurisdiction on behalf of the child who is the subject of a report, the coordinator shall notify, in writing, the guardian ad litem appointed by the court under section 19-10-113 to represent the child's interest. Such notice shall include:

- (a) The reason for initiating the petition;
- (b) Suggestions as to the optimum disposition of this particular case;

and

(c) Suggested therapeutic treatment and social services available within the community for the subject child and the responsible person.

COLO. REV. STAT. § 19-10-109(6)-(10) (Supp. 1975).

The following statutes mandate the creation of inter-disciplinary child protection teams: LA. REV. STAT. ANN. § 13:1583(B) (West Supp. 1977); MICH. COMP. LAWS. ANN. § 722.629(1) (Supp. 1977); MO. REV. STAT. § 210.145(6) (Vernon Supp. 1976); PA. STAT. ANN. tit. 11, § 2216(d) (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-8 (Supp. 1976). The following states permit the creation of these teams: CAL. WELF. & INST. CODE §§ 18951(d), 18960(f) (West Supp. 1977); COLO. REV. STAT. §§ 19-10-103(2), -109(6) (Supp. 1975); VA. CODE § 63.1-248.6(E) (Supp. 1977).

225. The exceptions are Minnesota, New Mexico and Utah.

226. *E.g.*, FLA. STAT. ANN. § 827.07(7) (West 1975); HAW. REV. STAT. § 350-2 (1968); NEB. REV. STAT. § 28-1506 (1975); N.Y. SOC. SERV. LAW § 422 (McKinney 1976 & Supp. 1976).

227. See DEFRANCIS & LUCHT, *supra* note 5, at 178.

228. G. DAHL, *supra* note 12, at 10.

229. CAL. PENAL CODE § 11110 (West Supp. 1977) (records to be maintained by the Department of Justice).

suggest child abuse may not establish a connection between the parents and the condition of the child. In most cases, then, the protective worker must form an opinion about whether or not the report *appears* to be valid. The opinion will be based upon certain signs or indicators including 1) the child's or sibling's physical condition, 2) the child's or sibling's behavior or demeanor, 3) the parent's behavior or demeanor, 4) the family's home situation, and 5) the prior history of the family, including previous suspicious injuries to the child or siblings.

Often, the most crucial factor in the diagnosis and evaluation of child abuse and neglect situations is the circumstantial evidence showing a pattern of previous suspicious injuries. Since child abuse and neglect are usually part of a repetitive or continuing pattern,²³⁰ information concerning the existence of prior injuries or other manifestations of abuse or neglect can assist physicians and protective workers in determining whether an injury is an isolated accident or one of a series of injuries suggesting abuse or neglect. Knowledge of a previous incident, similar in kind, can turn doubt into relative certainty. Unfortunately, because health and social service agencies in most communities are fragmented and because abusing parents often take their children to different doctors or hospitals to treat the injuries they inflict, a cumulative record of prior suspicious injuries and social service treatment efforts is not ordinarily available.²³¹ By maintaining a community-wide or statewide record²³² of prior reports and treatment efforts and their outcomes, a central register can provide immediate, concrete assistance to child protective workers and others who need such information to assess the danger to a child whom they suspect is being abused or neglected.²³³

Furthermore, even after protective workers, physicians, and law enforcement officials determine that a child is or seems to be abused and neglected, they often cannot assess the immediate danger to the child or the treatment needs of the family. Knowledge of previous reports and their outcome can help in evaluating the seriousness of

230. See Fontana, *supra* note 151, at 451.

231. See generally Paulsen, *The Law and Abused Children* in *THE BATTERED CHILD*, *supra* note 4, at 192.

232. It appears certain that there will be no attempt to form a national central register. Fears of civil liberties complaints together with developing evidence that cross-state information is not necessary except in metropolitan areas that span two or more states make it clear that there will be no real effort in this direction for the foreseeable future.

233. See Paulsen, *The Law and Abused Children* in *THE BATTERED CHILD*, *supra* note 4, at 192-93; text accompanying notes 225-32 *supra*; text accompanying notes 234-42 *infra*.

the family's situation and can be an important factor in determining whether the child is in such danger that he should be removed immediately from his home.²³⁴

Perhaps equally as important, if a central register monitors how reports are handled, it can help ensure that investigations are properly performed and that services are provided. If a register can receive and process reports immediately, and if it can review them for their timeliness, it can monitor and measure the system's overall performance while at the same time presenting at least a partial picture of the problems with which the system must deal. And, as a research tool, a register can help determine the incidence of abuse and neglect in a state or community and the impact of different types of treatment. Once information from a properly functioning register is available, the rational evaluation of agency and human needs can begin.

To summarize, a properly operated central register can:

- 1) assist in diagnosis and evaluation by providing or locating information on suspicious occurrences and prior treatment efforts;
- 2) improve the handling of child abuse and neglect cases by providing convenient consultation on case handling to workers and potential reporters;
- 3) refine diagnosis and encourage further reporting by providing feedback to those who have made reports;
- 4) measure the performance of the child protective service by monitoring follow-up reports;
- 5) coordinate community-wide treatment efforts by monitoring follow-up reports;
- 6) facilitate research, planning, and program development by providing statistical data on the nature and handling of reports; and
- 7) encourage the reporting of suspected child abuse and neglect by providing a focus for public and professional educational campaigns.

However, nothing is so striking as the failure of almost all existing central register systems to fulfill their stated diagnostic, case monitoring, and statistical functions. Nothing is more disappointing than to visit a much heralded central register, as this writer has, only to find it hopelessly overwhelmed by a flood of cases. With insufficient professional and clerical staff, too few telephone lines to enable those calling to reach the register, and too little space in

234. See generally *id.*

which to store the reports received, these registers are unprepared for the veritable avalanche of paperwork a widely advertised reporting law can generate. They are, therefore, immobilized from the day they open. Indeed, there is sometimes a tendency to exploit a register to give the appearance of improving services without spending the really large amounts of money needed truly to do so.

In their present condition, all but a few registers are unused and unusable. The records in them are grievously incomplete, inaccurate, and out-of-date, making the central register a largely ignored appendage of the state's child protection system, one whose existence no one can easily justify. No state can point to more than a handful of instances in which a professional sought a register's assistance in diagnosing suspicious circumstances;²³⁵ most states cannot point to even one instance.²³⁶

Most central registers are also unable to fulfill their research and statistical purposes because they provide one-dimensional, statistical summaries that offer only the roughest profile of limited segments of the protective process in their community or state. The forms used by most protective agencies to send information to the register are brief, containing little more than the rudimentary data mandated by the child abuse reporting law.²³⁷ Hence, the only statistics usually available describe the total number of cases reported, the ages of the children involved, the type of alleged abuse and neglect, the source of the report, and, sometimes, the alleged perpetrator. But this information offers little understanding about the children and families involved; missing are the vital and sensitive data that would explore and document patterns of abuse and neglect and variations in family status, treatment programs, and dispositional alternatives. Because of complicated and fragmented reporting procedures, many reports received by child protective agencies or the police are never forwarded to the central register.²³⁸ In some states, failure to provide printed forms for making uniform reports to the register is an additional obstacle to collecting complete data.²³⁹ The scope of many registers is further narrowed because only cases formally handled through the child

235. Data on file at the National Center on Child Abuse and Neglect, Department of Health, Education, and Welfare, Washington, D.C.

236. *Id.*

237. *But see* NATIONAL CLEARINGHOUSE ON CHILD NEGLECT AND ABUSE, National Standard Form, *reprinted in* D. WALTERS, PHYSICAL AND SEXUAL ABUSE OF CHILDREN 181-84 app. (1975).

238. Data on file at the National Center on Child Abuse and Neglect, Department of Health, Education, and Welfare, Washington, D.C.

239. *Id.*

abuse reporting law are recorded,²⁴⁰ thus excluding "nonmandated reports"²⁴¹ and reports made to other agencies. Thus, most registers cannot reveal even elementary operational needs.

The absence of updated or follow-up information which would indicate whether the initial report was valid is another grave shortcoming of most existing register systems — one with great potential for harm. In order for a central register to perform its possible diagnostic, case monitoring, and statistical functions, its contents must accurately reflect the handling of child protective cases in the community. A register should receive all reports of known and suspected child abuse and neglect made to all agencies in a community that serve a child protective function, and it must have current information on the handling of cases through a series of follow-up reports. Otherwise, protective workers and other professionals will be unable to rely on the register to disclose prior reports or the status of past treatment efforts, administrators will be unable to rely on the register to measure agency performance, and planners will be unable to rely on the register to assess programmatic needs.

The storing of raw, unvalidated data in a register presents another serious problem because it infringes on the civil rights of those individuals and families listed in it. But even when follow-up reports are used to keep a central register up-to-date, a register can still represent a potential threat to the privacy of children and families listed. Many of the reports received, stored, and made easily accessible by central registers prove to be unfounded.²⁴²

The usual response to these civil rights concerns is to say that protecting innocent young children is more important than safeguarding the rights of abusing parents. Indeed, there are legitimate and pressing needs to maintain information in central registers, and the only way to eradicate all danger of inappropriate disclosure of reports would be to abandon their use. But the necessity of storing this information should not forestall efforts to prevent its misuse. While designed to protect helpless and endangered children, the law and the register can also protect children's and families' legitimate rights to privacy. All of the civil libertarian criticisms of central registers, except for the one based on a fear of data banks in general, can be met by intelligent planning.²⁴³

240. See, e.g., N.Y. SELECT COMM. REP., *supra* note 7, at 31.

241. *Id.* Reports are termed "nonmandated" either because the person making the report is not "mandated" by the reporting law to do so or because the nature of the abuse or neglect is not within the definition of the law.

242. See notes 79-81 and accompanying text *supra*.

243. See generally Symposium, *Computerized Criminal Justice Information Systems: A Recognition of the Competing Interests*, 22 VILL. L. REV. 1171 (1977).

Yet, in most states, the subjects of reports are not informed that their names have been entered in the central register; they are not permitted to see the file that alleges derogatory things about them; they cannot have removed from the register charges that have proven to be untrue or unfounded; and they have no right to appeal to a higher administrative authority.²⁴⁴ Often, there is no provision to ensure the security or confidentiality of the data collected, although the state eligibility requirements of the Federal Act have begun to change this in the forty-two states and jurisdictions so far eligible.²⁴⁵

Persons listed in the register should have the statutory right to review the contents of the record on them²⁴⁶ and to make appropriate application to amend or remove information from the register.²⁴⁷ If their application is denied, they should have a right to a court hearing.²⁴⁸ In addition, if reports prove to be unfounded or otherwise invalid, the record should be sealed automatically or all identifying information concerning the subjects of the report should be removed automatically from the register.²⁴⁹ Finally, there should be provision for criminal and civil liability for the unauthorized disclosure of information in the register.²⁵⁰

The need most difficult to satisfy is the need to seal, expunge, or remove invalid reports from central registers. The need to remove records is perceived to be greater in relation to such centralized data banks than to local agency records.²⁵¹ There is a need to develop a reasonable and predictable method for determining whether reports should be removed from the register which is fair to endangered children as well as to accused parents. Unfortunately, contemporary child protective practices are not easily accommodated to this need. In the past, caseworkers did not have to determine the validity of reports before offering help, and, indeed, they still often attempt to avoid this difficult decision because the directed questioning and negative labelling of parents can be destructive to treatment.²⁵²

When workers are unable or unwilling to make a decision, they may try to shortcut the process of decision and avoid confronting the parent, by convincing the parents through persuasion or threats or

244. See notes 246-50 and accompanying text *infra*.

245. See text accompanying notes 258-61 *infra*.

246. See MODEL CHILD PROTECTION ACT § 21 (Aug. 1977 draft); see, e.g., N.Y. SOC. SERV. LAW § 422(7) (McKinney 1976).

247. See, e.g., N.Y. SOC. SERV. LAW § 422(8) (McKinney 1976).

248. *Id.*

249. See, e.g., *id.* § 422(5).

250. See, e.g., *id.* § 422(10).

251. See text accompanying notes 278-80 *infra*.

252. See text accompanying notes 127-28 *supra*.

misrepresentation to accept services "voluntarily" — including "voluntary" placement of the child in foster care, or they may shift the onus of decision by referring the case to juvenile court for a judicial decision.

To protect family rights, recent statutory and administrative changes force the worker to make a prompt formal decision concerning the report's validity. Usually the child protective service is required to report to the central register within a specified time its determination of whether the report was "indicated" or "unfounded."²⁵³ States differ on the test to be applied in determining the validity of the report, from "probable cause"²⁵⁴ to "some credible evidence."²⁵⁵

Central registers are easy to criticize because they raise genuine concerns over unwarranted recordkeeping and potential "Big Brotherism" and because in the past, most have not proven useful. But those who say central registers are dangerous or do not work make a serious miscalculation based on a misunderstanding of their nature and functions. A central register is fundamentally nothing more than an index of cases handled by an agency or a number of agencies. Those who advocate the abolition of central registers do not realize that *all* agencies — as bureaucratic institutions — must have an index of cases if they are to function in any organized fashion whatsoever. Without an index, or register, there would be no way of knowing if a case is currently being handled by an agency unless every member of the agency's staff were polled individually each time a letter or referral arrived at the agency. Each worker would then have to consult his own individual index of cases or rely on his memory. Such a chaotic arrangement would cause far greater harm to children and families needing help. So there can be no question about the need for a register; no agency could do without a master index.

The failings in the establishment and operation of most central registers have made them legitimate targets for criticism. Nevertheless, a central register, properly designed and adequately operated, can be a prime tool for the immediate and long term improvement of a child protection system. Central registers take on their character —

253. *E.g.*, N.Y. SOC. SERV. LAW § 424(7) (McKinney 1976).

254. *Compare* N.C. GEN. STAT. § 110-19(2) (1975) (removal justified where investigation reveals abuse or neglect) *and* PA. STAT. ANN. tit. 11, § 2214(h) (Purdon Cum. Supp. 1977-1978 (same) *with* TENN. CODE ANN. § 37-1205 (1977) ("reasonable grounds to believe").

255. *E.g.*, ARK. STAT. ANN. § 42-818(A)(5) (Supp. 1975) ("some credible evidence"); MICH. COMP. LAWS ANN. § 722.627(2) (Supp. 1977) ("credible evidence"); N.Y. SOC. SERV. LAW § 422(5) (McKinney 1976) ("some credible evidence").

either good or bad — either successful or unsuccessful — according to the data they contain, how the data is maintained, who has access to the data, and how those who have access to the data use it.²⁵⁶

XV. PROVISIONS FOR CONFIDENTIALITY OF RECORDS

The rights and sensibilities of families named in child protective records must be protected, for these records contain information about the most private aspects of personal and family life. Whether or not the information is true, improper disclosure could stigmatize the future of all those mentioned in the report.²⁵⁷

In order to qualify for funding under the Federal Act, a state must "provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians."²⁵⁸ Under the regulations that implement this section,²⁵⁹ a state must have a law "which makes such records confidential and which makes any person who permits or encourages the unauthorized dissemination of their contents guilty of a crime."²⁶⁰ Largely under this impetus, states have moved rapidly in the last three years to provide specific legislative blankets of confidentiality; at least forty states now make unauthorized disclosure a misdemeanor.²⁶¹

Nevertheless, the information in child abuse and neglect records must be available to those who need to make critical child protective decisions. The question is: Who should have access to these records? Limiting access necessarily limits use, while broadening access increases the possibility of misuse.

In general, states take three approaches to access to records. Some statutes prohibit access to anyone outside the child protective agency;²⁶² others make the records confidential, but authorize the responsible state agency to issue regulations allowing some persons access,²⁶³ and others enumerate who has access in the statute itself.²⁶⁴ As a general rule, states that allow exceptions follow the

256. See Symposium, *supra* note 243.

257. See text accompanying note 245 *supra*.

258. 42 U.S.C. § 5103(b)(2)(E) (Supp. V 1975).

259. 45 C.F.R. § 1430.3-1 (1976).

260. *Id.* § 1340-3(d)(5).

261. *E.g.*, ALA. CODE tit. 27, § 22(3) (Supp. 1975); ARK. STAT. ANN. § 42-818(10) (Supp. 1975); N.Y. SOC. SERV. LAW § 422(10) (McKinney 1976); VT. STAT. ANN. tit. 13, § 1356(c) (Supp. 1977).

262. *E.g.*, LA. REV. STAT. ANN. § 46:65(F)(1) (West Supp. 1977).

263. ILL. ANN. STAT. ch. 23, §§ 2061, 5035.1 (Smith-Hurd Supp. 1977); N.J. STAT. ANN. § 9:6-8.11 (West 1976).

264. *E.g.*, D.C. CODE § 16-2331(b) (1973); IOWA CODE ANN. § 235A.15 (West Supp. 1977); N.Y. SOC. SERV. LAW § 422(4) (McKinney Supp. 1976); WASH. REV. CODE ANN. § 26.44.070 (Supp. 1977).

long standing approach taken in the regulations²⁶⁵ implementing Title IV of the Social Security Act.²⁶⁶ These permit access for purposes directly connected with the administration of the program.²⁶⁷ The regulations implementing the Federal Act enumerate the specific persons, officials, and agencies and the specific situations under which the access is deemed directly connected with the administration of the child protective program.²⁶⁸

Theoretically, any person who must decide whether a child is abused or neglected would find information about prior suspicious occurrences and prior treatment efforts helpful in reaching a decision. For this reason, a number of states give access to the central register and other child protective records to all persons who are required to report cases of child abuse and neglect.²⁶⁹ However, when such a large number of strangers have access to records, guarding against unauthorized disclosure of information is all but impossible. More importantly, such enormous and widespread access to personal and family data unreasonably compromises the right of privacy of the children and families involved. Some professionals also see a danger that many of those who would be given such information might not know how to evaluate it intelligently; a potential reporter, for example, might allow the presence or absence of a prior record to influence his actions inordinately.

Although the sharing of information between professionals, as will be discussed below,²⁷⁰ is often a suitable alternative to direct access to records, it is impractical when the protective worker, police officer, or physician needs the information immediately or in the middle of the night.²⁷¹ Therefore, carefully designated professionals who have responsibility for making decisions about protective custody, are often given direct access to information at the time they

265. 45 C.F.R. 205.50(a)(1)(i) (1976).

266. See 42 U.S.C. §§ 601-44 (Supp. V 1975). The Social Security Act and the Federal Act are both administered by the Department of Health, Education and Welfare. See 42 U.S.C. § 301 (1970); 42 U.S.C. § 5101 (Supp. V 1975); note 9 *supra*.

267. 45 C.F.R. § 205.50(a)(1)(i) (1976).

268. *Id.* § 1340.3-3(d)(5).

269. *E.g.*, MD. ANN. CODE Art. 27, § 35A(i) (1976); MASS. GEN. LAWS ANN. ch. 119, § 51E (West Supp. 1977).

270. See text accompanying note 276 *infra*.

271. For instance, a physician seeing a bruised or emaciated child in a hospital emergency room must not only decide whether there is sufficient cause to report but must also decide whether the child should be placed in protective custody. One aspect of such a doctor's dilemma is the need to evaluate the risk that may be incurred if a child is taken home before a protective worker can visit the family. An equally serious problem, particularly for urban hospitals, is posed by the knowledge that, once returned to the parents' custody, the child and family might disappear into the anonymity of the city. In both situations, it can be crucial for the physician to know about prior treatment efforts and the prior history of the family. See also notes 168-72 and accompanying text *supra*.

need it most — when they may be making a life or death decision. Depending on the state, these professionals include child protective workers,²⁷² law enforcement officials,²⁷³ physicians in at least twenty states,²⁷⁴ and other persons authorized to place a child in protective custody.²⁷⁵

Direct access to the records for all other professionals coming in contact with abused and neglected children is not necessary. Protective workers can share relevant information with other appropriate agencies and professionals as a cooperative treatment plan is being developed. Professionals who know and trust each other should be able to discuss a case in their professional capacities.²⁷⁶ Treatment agencies, such as foster care agencies, also need a clear picture of family history in order to develop and implement successful treatment strategies. For this reason, many states specifically authorize their access to the information in these records.²⁷⁷

As a matter of fundamental fairness, if not constitutional right, persons alleged to abuse or neglect their children ought to know what information a government agency is keeping about them.²⁷⁸ Subjects of a report should have access to it because 1) they have a right to know what allegations against them have been recorded by a public agency, even though the record is confidential, and 2) only if they know what is in the record can they pursue their legal rights to

272. *E.g.*, ME. REV. STAT. tit. 22, § 3859(2)(I) (Supp. 1977); N.Y. SOC. SERV. LAW § 422(4) (McKinney Supp. 1976).

273. *E.g.*, IOWA CODE ANN. § 235A.15(2)(c) (West Supp. 1975); NEV. REV. STAT. § 200.5045(3)(D) (1975); OR. REV. STAT. § 418.770(1) (1975).

274. *E.g.*, GA. CODE §§ 99-4302(b)(1) (1976); MD. ANN. CODE art. 27, § 35A(i) (1976); OR. REV. STAT. § 418.770(1) (1975).

275. *See, e.g.*, COLO. REV. STAT. § 19-10-115(2) (Supp. 1976); MICH. COMP. LAWS ANN. § 722.627(1)(D) (Supp. 1976); N.Y. SOC. SERV. LAW § 422(4)(b) (McKinney Supp. 1976).

276. In keeping with this approach, the Model Act provides:

(b) No person, official, or agency shall have access to such records unless in furtherance of the purposes directly connected with the administration of this Act. Such persons, officials, agencies, and purposes for access include:

(i) a local child protective service in the furtherance of its responsibilities under this Act;

(ii) a police or law enforcement agency investigating a report of known or suspected child abuse or neglect;

(iii) a physician who has before him a child whom he reasonably suspects may be abused or neglected;

(iv) a person legally authorized to place a child in protective custody when such person requires the information in the report or record to determine whether to place the child in protective custody.

MODEL CHILD PROTECTION ACT § 24(b)(i)-(iv) (Aug. 1977 draft).

277. *E.g.*, FLA. STAT. ANN. § 827.07(7) (West 1975); MICH. COMP. LAWS ANN. § 722.627(1)(e) (Supp. 1976); NEV. REV. STAT. § 200.5045(3)(c) (1975).

278. *See* text accompanying notes 245-49 *supra*; text accompanying note 279 *infra*.

have the record amended, expunged, or removed from the register and other agency files.²⁷⁹

Perhaps the greatest controversy surrounds the opening of child abuse and neglect records to program administrators, legislators, and researchers in pursuit of their official or professional responsibilities to plan, monitor, audit, and evaluate services or to conduct other research. Some observers have suggested that if those outside of designated investigatory and service agencies are given access to records, the identifying information in the records should be expunged.²⁸⁰ But numerous types of important research, including longitudinal studies and cross-agency studies, require charting the movement of cases as they travel through time or among agencies. Such studies are crucial in gauging the effectiveness of different treatment techniques, and they cannot be performed without information that identifies the case and the individuals in it.

If child abuse and neglect records are to be used to improve services through monitoring and research, it is imperative that the data collected so painstakingly and at such great expense be available to outsiders, including academic policy-planners, legislators and researchers. To do otherwise would deprive these policy-makers of information on how the system actually works and, in the case of higher level administrators and legislators, lack of access would prevent them from acting as informal "ombudsmen" in specific cases. Moreover, child protective agencies need the expertise of universities and other institutions and groups for advice and assistance.²⁸¹

Confidentiality can be exploited to shield the malfunctioning of an agency as well as to protect the privacy of individuals. Various advocate organizations have been denied access to their client's records on the false ground of confidentiality — even when they need the records to protect their client's rights by showing a pattern of bias or discrimination. Recently, lawyers in New York City were denied access to the records of their clients which, they claimed, would prove a pattern of religious and racial discrimination by foster

279. See, e.g., D.C. CODE § 16-2331(c)(2) (1973) (accorded right to inspect record to attorney for parent, guardian, custodian); IOWA CODE ANN. § 235A.19(1) (West Supp. 1977) (same); N.Y. SOC. SERV. LAW § 422(4)(d) (McKinney Supp. 1976) (individual subjects right to inspect record). For a further discussion of these issues, see text accompanying notes 245-55 *supra*.

280. See also, e.g., FLA. STAT. ANN. § 827.07(7) (1975); ME. REV. STAT. tit. 22, § 3860 (Supp. 1976); NEB. REV. STAT. § 28-1506 (1975); N.Y. SOC. SERV. LAW § 422(4)(h) (McKinney Supp. 1976).

281. Those outside the system generally have greater freedom to question long-accepted assumptions, to explore new modes of action, and to conduct long range research that might lead to basic changes in the structure and function of institutions.

care agencies. A court order was necessary to obtain the information sought.²⁸² Legitimate concerns for privacy can be met with adequate provisions to ensure that disclosure of information to outsiders is strictly limited to situations in which the need for personal identifiers is essential to the research purpose and the information will not be improperly shared with others.²⁸³

XVI. PROVISIONS FOR REPORTS OF INSTITUTIONAL CHILD MALTREATMENT

More often than we would like to admit, children are abused and neglected by the institutions meant to care for them. Recognizing this form of maltreatment, the regulations implementing the Federal Act define a "person responsible for a child's care" to include "the child's parent, guardian, or other person responsible for the child's health or welfare, *whether in the same home as the child, a relative's home, a foster care home, or a residential institution.*"²⁸⁴

The inclusion of cases of institutional maltreatment in residential settings is based on two considerations. First, children are more vulnerable in foster homes, shelters, and other residential facilities because parents may be out of touch, uncaring, or deceased. Only a child protective agency would be sufficiently concerned about the child's welfare or would be able to take effective action. Second, when a child has been placed in an agency or home, whether or not with the parent's consent, that agency is as responsible for the child's welfare as any natural parent would be.

Investigating reports of suspected institutional abuse raises special problems. When there is a report of institutional maltreatment, no agency should be allowed to investigate itself.²⁸⁵ Thus, for example, the federal regulations specifically require that if there are allegations of institutional abuse or neglect, "an agency other than the agency, institution or facility involved in the acts or omissions"

282. See generally *Wilder v. Sugarman*, 385 F. Supp. 1013, 1018 (S.D. N.Y. 1974).

283. See MODEL CHILD PROTECTION ACT §§ 24(b), (d) (Aug. 1977 draft).

284. 45 C.F.R. §§ 1340.1-2(b)(3) (1976) (emphasis added). It is important to note that these regulations restrict the definition of institutional abuse and neglect to residential situations. While the federal government and others are concerned about the care of children in nonresidential settings, problems such as unreasonable corporal punishment in the schools, however serious they may be, are not child abuse and neglect within the commonly accepted meaning of these terms.

285. An outside, disinterested agency must perform the investigation and it must have sufficient authority to make meaningful corrective action. Since the child protective agency is administratively linked to residential institutions in many jurisdictions, an investigation by the child protective agency, like one by the institution itself, might be perceived as something less than independent and objective. To provide assurance that the investigation will be thorough and fair, and that it also will appear to be fair, it is essential that an administratively separate agency conduct it.

must investigate the situation.²⁸⁶ Largely as the result of this requirement, at least forty states now have a special procedure which ensures that no agency will police itself in the investigation of reports of institutional maltreatment.²⁸⁷

XVII. LEGAL REPRESENTATION

The involuntary intrusion into family life by courts and child protective agencies can have profoundly important consequences for the children and parents involved. The process itself can be a frightening experience that may ultimately result in the children being removed from their parents and placed in foster care or institutions for months or years. In a few cases, children are permanently removed from their parents and placed for adoption.

A. *Counsel For The Child Or Guardian Ad Litem*

Since the interests of parents and children often conflict in child protective cases, it is important that the child's interest in a safe home environment be represented before the court.²⁸⁸ Partly as the result of the work and writings of Brian Fraser,²⁸⁹ Congress required that states provide a "guardian ad litem to represent the interests of abused and neglected children in judicial proceedings."²⁹⁰ Unfortunately, there has been some question about whether a child should be represented by a guardian *ad litem* or by an attorney. There is some imprecision in using the term "guardian *ad litem*," since it does not require that the guardian be a lawyer, and indeed under traditional practice the guardian *ad litem* would not be an attorney.²⁹¹ Hence, the regulations implementing the act do not require that the guardian be an attorney.²⁹² Nevertheless, although a

286. 45 C.F.R. § 1340.3-3(d)(3) (1976).

287. *E.g.*, ALA. CODE tit. 27, § 20(1).(4) (Supp. 1975); KAN. STAT. § 38-721 (Supp. 1977); OKLA. STAT. ANN. tit. 10, § 1204 (Supp. 1977). Michigan law provides a good example:

If there is reasonable cause to suspect that a child in the care of or under the control of a public or private agency, institution, or facility is an abused or neglected child, the agency, institution, or facility, shall be investigated by an agency administratively independent of the agency, institution, or facility being investigated.

MICH. COMP. LAWS ANN. § 722.628(4) (Supp. 1977).

288. *See, e.g.*, Fraser, *supra* note 220, at 27.

289. *See generally id.*

290. 42 U.S.C. § 5103(b)(2)(G) (Supp. V 1975).

291. For a discussion of the role of the attorney in child abuse and an analysis of the Pennsylvania guardian *ad litem*, see Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521 (1978).

292. 45 C.F.R. 1340.3-3(d)(7) (1976).

lay guardian *ad litem* can perform important functions it is unlikely that courts would give to the guardian the right to settle or concede a judicial proceeding alleging abuse or neglect. But if the guardian *ad litem* does not have this power, it is difficult to distinguish his role from that of the child protective worker, unless he is a lawyer who can represent the child's legal rights and interests. Therefore, the Model Child Protection Act recommends that the guardian *ad litem* should be an attorney assigned to protect the legal rights and to express the wishes of children in child protective court proceedings.²⁹³

As of this writing, at least twenty-four states provide for the mandatory appointment of a lawyer to represent a child.²⁹⁴ And at least ten states provide for the mandatory appointment of a guardian *ad litem* who need not be a lawyer, and is usually a child protective worker or probation officer.²⁹⁵ Seven more states appoint a guardian *ad litem* in all cases as a matter of administrative policy.²⁹⁶

B. Counsel For The Parents

In criminal proceedings, the right to counsel for parents alleged to have abused or neglected their children is well established.²⁹⁷ But the parent's right to counsel in juvenile or family court proceedings is not as widely accepted. Noting the "civil" nature of child protective proceedings, courts are divided on whether parents have a constitutional right to counsel in such proceedings.²⁹⁸ Yet, even in civil proceedings, parents or guardians, in effect, also stand "accused." A finding of abuse or neglect may encourage a criminal prosecution, may result in the removal of a child from parental custody and, ultimately, may result in the termination of parental rights. Even if these more extreme events do not take place, the intrusion on family rights through the proceeding itself, and the possibility of probation or other agency supervision of the home

293. MODEL CHILD PROTECTION ACT § 25(a) (Aug. 1977 draft).

294. *E.g.*, GA. CODE ANN. § 24A-2001 (1976); IOWA CODE ANN. § 232.28 (West 1969); N.Y. FAM. CT. ACT § 249 (McKinney Supp. 1976).

295. *See, e.g.*, ARK. STAT. ANN. § 42-817 (Supp. 1975); OHIO REV. CODE ANN. § 2151.281 (Page 1976); R.I. GEN. LAWS ANN. § 40-11-14 (Supp. 1976).

296. Data on file at the National Center on Child Abuse and Neglect, Department of Health, Education & Welfare, Washington, D.C.

297. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 17-66b, -66c (West Supp. 1976); MD. CTS. & JUD. PROC. CODE ANN. § 3-821 (Supp. 1977); N.M. STAT. ANN. § 13-14-25(F) (1976).

298. Compare *In re B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972) (indigent respondent parents in child protective proceedings have a right to assigned counsel since they face the possible loss of custody of the child) with *In re Robinson*, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), cert. denied sub. nom. *Kaufman v. Carter*, 402 U.S. 964 (1971) (no right to appointment of counsel in civil dependency proceeding).

situation, are reasons enough to conclude that the liberty of parents in child protective proceedings is at stake.²⁹⁹ For these reasons, twenty-two states provide counsel as a statutory right, even in the absence of an apparent constitutional mandate.³⁰⁰

C. Counsel For The Child Protective Agency

The child protective agency also needs legal assistance when appearing in court. Historically, prosecutors played a minor role in child protective proceedings.³⁰¹ If evidence had to be collected or witnesses called to testify, the protective worker did so. As long as juvenile courts were informal with relaxed rules of evidence, the petitioning protective worker did not need legal assistance. But the expanded participation of counsel for the parents has increased the formality of juvenile court proceedings, and protective workers unassisted by legal counsel are at a severe disadvantage. Without counsel to assist the worker in pretrial investigation, case preparation, petition drafting, courtroom presentation, and legal argument, otherwise provable cases are often dismissed when the parent has the one-sided advantage of vigorous defense counsel.³⁰² It might seem to the parents' advantage if the protective worker's case preparation and presentation suffer from a lack of legal assistance. But this is not always so. Fearing that an abused child might be returned unsafely to his parents, judges may feel the "uncomfortable pull toward a prosecutive stance when zealous defense counsel have elicited a one-sided development of case facts with no one to intervene but the judge."³⁰³ Yet, if a judge becomes the advocate of the petitioner's case, and performs the functions of the absent prosecutor, he cannot maintain an unbiased view of the case, and he

299. Cf. *Morrissey v. Brewer*, 408 U.S. 471 (1972) (no entitlement in parole revocation proceedings to the type of full adversary hearing mandated in a criminal proceeding).

300. E.g., ALA. CODE tit. 13A, § 5-124 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 119, § 29 (West 1975); MINN. STAT. ANN. § 260.155(2) (West 1971); OHIO REV. CODE ANN. § 2151.352 (Page 1976).

301. See generally D. BESHAROV, *supra* note 211, at 39-43.

302. Cf. *In re Lang*, 44 Misc. 2d 900, 255 N.Y.S.2d 987 (Fam. Ct., N.Y. Co., 1965) (dictum) (absence of provision for prosecuting counsel in delinquency cases presents grave danger of dismissal merely for lack of proper presentation).

303. Skoler, *Counsel in Juvenile Court Proceedings — A Total Criminal Justice Perspective*, 8 J. FAM. L. 243, 270 (1968). Cf. *Bible v. State*, 253 Ind. 373, 254 N.E.2d 319 (1970) (no right to jury trial in juvenile proceedings, the civil nature of which will be better preserved and impressed on the child by a judge alone). For a number of legislative proposals to deal with this question, see U.S. JUVENILE JUSTICE STANDARDS, *supra* note 215, 15.1-19; Fox, *Prosecutors in the Juvenile Court: A Statutory Proposal*, 8 HARV. J. LEGIS. 33 (1970); Lermert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 432-35.

cannot assess the evidence impartially — or at least that will be the appearance to those involved in the proceeding.

A few states require the presence of an attorney to assist the petitioner in child protective proceedings.³⁰⁴ In other states, however, the law merely provides that the judge may request that a local public law official assist the petitioner.³⁰⁵ In many communities, this function is served by the district attorney or similar criminal court prosecutor.³⁰⁶ But even though many prosecutors understand and strive to achieve the juvenile court's social purpose in child protective cases, a number of communities use the civil law officer to represent the child protective agency in order to minimize the punitive nature of juvenile court proceedings.³⁰⁷ Sometimes, the local agency hires its own counsel or uses internal legal staff.

All attorneys representing the child protective agency must understand the child protective system's emphasis on treatment and ameliorative services³⁰⁸ and must appreciate that their preeminent professional, ethical,³⁰⁹ and constitutional³¹⁰ obligation is to see justice done. In child protective proceedings, this means they must seek to protect, fairly and honestly, the physical and legal rights of the child. If the child's interests seem to conflict with the position of the child protective agency, the attorney must be prepared to disagree and to take appropriate action.³¹¹

To establish eligibility under the Federal Act, a state may designate as the child's guardian *ad litem* the

attorney charged with the presentation in a juvenile proceeding of the evidence alleged to amount to the abuse and neglect, so long as his legal responsibility includes representing the rights,

304. *E.g.*, NEV. REV. STAT. § 128.100 (1975); R.I. GEN. LAWS ANN. § 40-11-14 (Supp. 1976).

305. *See, e.g.*, ARIZ. REV. STAT. § 8-535(E) (Supp. 1976); COLO. REV. STAT. § 19-1-106(3) (1974). *See also* MASS. GEN. LAWS ANN. ch. 119, § 26 (West 1975).

306. *E.g.*, COLO. REV. STAT. § 19-1-106(3) (1974); N.Y. FAM. CT. ACT § 254(b) (McKinney 1975).

307. *E.g.*, N.Y. FAM. CT. ACT § 254 (McKinney 1975).

308. *See* text accompanying notes 208-21 *supra*.

309. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict").

310. *See* Brady v. Maryland, 373 U.S. 83 (1963). According to the Brady Court: "Society wins not when only the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly . . . [the prosecution] wins its points whenever justice is done its citizens in the courts." *Id.* at 87, quoting Address by Sol. Gen. Sobeloff, Judicial Conference of the Fourth Circuit (June 29, 1954).

311. For example, if the agency decides that court action is required, but the attorney concludes that there is insufficient evidence or that the child's interests indicate court action to be inappropriate, he must be free to prevent the commencement of the proceeding, or, if it already has been commenced, to move for its dismissal.

interest, welfare, and well-being of the child; where such appointments are made, the legal opinion of the State Attorney General must specify that such attorney has said legal responsibility.³¹²

While this may not be the best way to ensure that a child's interests are represented before the court, it is one way to do so and a number of states have provided written documentation that attorneys assigned to present child protective petitions in juvenile courts have this authority and responsibility. For example, Arizona law provides: "The county attorney, upon the request of the court, a governmental agency or on his own motion, may intervene in any proceedings under this article to represent the interest of the child."³¹³

XVIII. PUBLIC AND PROFESSIONAL EDUCATION

The keys to real progress in the prevention, identification, and treatment of child abuse and neglect are the efforts of capable, concerned professionals coupled with the support of an informed and aware citizenry. Informing professionals and the general public about child maltreatment has a twofold purpose; to encourage fuller reporting and, to generate the public support necessary to increase child protective services and to break bureaucratic logjams.

Until recently, however, local and state agencies have been largely unable to mount and sustain high quality educational and training programs. In response to this failure, at least thirteen states have enacted specific legislative mandates requiring ongoing public and professional education and training programs.³¹⁴ Furthermore, the Federal Act requires that, in order to receive special funding, a state must "provide for dissemination of information to the general public with respect to the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat instances of child abuse and neglect."³¹⁵

Educational programs seek to make those persons who are required or permitted to report aware of the prevalence of child maltreatment, how to identify it, and how to report it. Such programs generally emphasize that child protective procedures are not punitive in nature and that their purpose is to protect the child

312. 45 C.F.R. § 1340.3-3(d)(7) (1976).

313. ARIZ. REV. STAT. § 8-535(E) (Supp. 1976).

314. *E.g.*, IOWA CODE ANN. § 235A.10 (West Supp. 1977); KY. REV. STAT. § 199.900(1) (1977); MO. REV. STAT. § 210.155 (Supp. 1976); N.Y. SOC. SERV. LAW § 421 (McKinney 1976).

315. 42 U.S.C. § 5103(b)(2)(I) (Supp. V 1975).

and to rehabilitate the family. Efforts are also made to inform potential reporters not only of their legal responsibilities, including penalties for failure to report, but also of their legal rights, including immunity from prosecution and the abrogation of privileged communications. Professionals are also provided information on the availability of community treatment resources and how to use them.

Finally, a growing trend in public awareness efforts is to provide a direct message through mass media to parents who may need help in adequately caring for their children. The messages seek to persuade parents that they are not alone in their difficulty and to inform them where they can get help.

It should be noted that in many states the actual reporting law itself is an obstacle to professional and public understanding. Numerous amendments, engrafting new procedures to existing statutes, have made most reporting laws confusing to both lawyer and laymen.³¹⁶

XIX. CONCLUSION: IMPLEMENTATION ISSUES

After being ignored for so long, the plight of abused and neglected children has become the subject of widespread professional and public concern. As a result, there has been major progress in our ability to protect the abused and neglected child and to assist his family. But we still face enormous gaps between what we want to do to protect children and what we can do.

Although all fifty states have child abuse reporting laws, the legal framework for child protective work is incomplete and unnecessarily complex in most states, thus making it difficult to implement effective programs successfully. Moreover, the financial and institutional support necessary to sustain adequate treatment and preventive services continues to be widely lacking. In almost every community in the nation, there are major inadequacies, breakdowns, and gaps in the child protective process. Preventive efforts are uneven or absent; detection and reporting are haphazard and incomplete; protective investigations are often backlogged or poorly performed; and suitable treatment programs are almost nonexistent for the majority of families needing them. Child protective workers are generally not given the training, skills, and ancillary services necessary to meet the important responsibilities assigned to them; they have unmanageably large caseloads and

316. In many states, persons looking to the law for guidance are perplexed or misled about their responsibilities and powers. Hence, a first priority in many states is a simple redrafting of the reporting law to clarify its meaning and to improve its readability.

show rapid "worker burnout" and consequent high job turnover. Too often, the only treatment alternatives available to them are infrequent and largely meaningless home visits, overused foster care, and unthinking reliance on court action. Lacking suitable long term treatment services, most American communities are faced with a grim choice in cases of serious abuse or neglect — either break up families or leave the children at home without help, where they might be seriously injured or even killed. For far too many endangered children, the existing child protection system is inadequate to the life-saving tasks assigned to it; too many children and families are processed through the system with a paper promise of help.

Yet, despite all the problems facing existing child protective systems, their promise is great. Children can be protected and their well-being fostered by helping parents to "parent." There are programs in all parts of the nation helping parents to cope with the stresses of family life in our modern society. Social casework, psychological and psychiatric services, child abuse teams, lay therapists, parent surrogates, day care, parents anonymous groups, homemaker service, education for parenthood, and a wide range of other concrete services and programs can and do make a difference in the level of family functioning.³¹⁷

The challenge we face is not so much to discover what works; to a great extent we know that. We must now discover how to develop the cooperative community structures necessary to provide needed services efficiently, effectively, and compassionately.

As a society, we have provided a combination of laws and procedures through which professionals and private citizens who come in contact with endangered children can, and in some situations must, take protective action. Laws have established reporting procedures, authorized the taking of children into protective custody, and assigned child protective responsibilities to social agencies and the police. Laws have also created juvenile and criminal court jurisdiction and foster treatment programs — all to protect vulnerable children and assist families in need.

Though not a panacea for the problems of child abuse and neglect, a law can establish the institutional framework for concerted community-wide action. It can enunciate the philosophy which will motivate and guide the child protective system as it deals with individual problems of children and families. Hence, a law lives

317. See U.S. CHILDREN'S BUREAU, DEP'T OF HEALTH, EDUC. AND WELFARE, CHILDREN TODAY (May-June 1975).

in the way it is used. With the dedicated support of those who must implement it, a law can be the essential first step in the development of a community network of prevention and treatment services. But to do so, a law should be enacted only after the broadest possible consultation with professionals and the general public and only after an honest appraisal of the cost to implement it. Those affected by the law have to be involved in its development if they are going to accept the law and work to fulfill its provisions. Only in this way can the essential community and financial support for the law be found. Because implementation of the high-reaching goals of child protective laws is the ultimate challenge, as a reminder to us all, the Model Act provides: "*There are hereby authorized to be appropriated such sums as may be necessary to effectuate the purposes of this Act.*"³¹⁸

But no law is the ultimate answer to child abuse and neglect. No law can eradicate child abuse and neglect. No law can remedy its underlying causes. The causes of child abuse and neglect are too complex. Some stem from individual psychological problems; others have roots deep in our social structure. A law may mandate the treatment of parents, but it cannot rehabilitate them. Thus, no law can wipe out child abuse and neglect. Though an improved law is a necessary step, it is merely one of many steps that must be taken to provide sufficient and suitable helping services for vulnerable children and parents in need. A renewed sense of respect for the human growth of all individuals within the context of the family will do more to lower violence and aggression against the young than any number of social agencies which usually become involved only after the process of family breakdown has progressed almost past the point of irremediable damage. Ultimately, the prevention and treatment of child abuse and child neglect depend less on laws and more on healthy family and community life.

318. MODEL CHILD PROTECTION ACT § 28 (Aug. 1977 draft).

THE RIGHT OF AN ABUSED CHILD TO INDEPENDENT
COUNSEL AND THE ROLE OF THE CHILD
ADVOCATE IN CHILD ABUSE CASES

JAMES R. REDEKER†

I. INTRODUCTION

AT LEAST SINCE THE SUPREME COURT'S DECISION in *In re Gault*,¹ the providing of independent counsel to juveniles who are parties to judicial or quasi-judicial proceedings affecting their liberty has been a subject of great concern and interest to the bar, courts, legislatures and service-delivery systems. Only relatively recently, however, has the focus turned to the right to counsel of juveniles who are subjects of essentially civil processes affecting their custody or quality of life.²

This article treats the issues of whether a child who is the subject of a report of suspected abuse under the Child Protective Services Law of Pennsylvania³ is entitled to independent counsel and, if so, the point in the process that this entitlement attaches, the

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1. 387 U.S. 1 (1967).

2. These civil procedures include, for example, hearings to determine custody and involuntary civil commitment hearings to determine mental competency. See notes 7-32 and accompanying text *infra*.

3. PA. STAT. ANN. tit. 11, §§ 2201-2224 (Purdon Cum. Supp. 1977-1978). The Child Protective Services Law was enacted several years ago, Act of Nov. 26, 1975, P.L. 438, to encourage more complete reporting of child abuse and to establish in each county a child protective service capable of investigating such reports swiftly and competently, providing protection for children from further abuse and providing rehabilitative services for children and parents involved so as to ensure the child's well-being and to preserve and stabilize family life wherever appropriate.

PA. STAT. ANN. tit. 11, § 2202 (Purdon Cum. Supp. 1977-1978). This law defines an "abused child" as a

child under 18 years of age who exhibits evidence of serious physical or mental injury not explained by the available medical history as being accidental, sexual abuse, or serious physical neglect, if the injury, abuse or neglect has been caused by the acts or omissions of the child's parents or by a person responsible for the child's welfare

Id. § 2203. The Child Protective Services Law is administered on the state level by the Department of Public Welfare, which keeps records of all child abuse complaints. *Id.* § 2214. On the county level, the public child welfare agencies establish within themselves "child protective services" to carry out the responsibility of receiving and investigating reports of suspected child abuse. *Id.* § 2216(a). The child protective services are authorized to purchase the services of any appropriate public or private agency. *Id.* § 2216(b). See also notes 9 & 21 *infra*.