

CHILD ABUSE: ARREST AND PROSECUTION DECISION-MAKING

by Douglas J. Besharov*

Over the past twenty years, there has been a steady decriminalization of child abuse and neglect. Social services have been expanded and substituted for criminal prosecution as society's primary response to child abuse and neglect. Nationwide, fewer than five percent of all substantiated cases of child maltreatment result in criminal prosecutions.

While social services have helped many maltreated children, their inability to protect many others has led some to argue that the criminal justice system should play a larger role. However, others argue that more prosecutions are not possible because in most cases of child maltreatment a number of factors militate against arrest and criminal prosecution. Two policy questions emerge: What factors explain why only five percent of all cases are prosecuted? And, are the right five percent being prosecuted?

This Article describes the decriminalization of child abuse, the need for greater criminal justice involvement in child abuse cases, and the police role in child protection generally. It describes the criminal justice system's important role in protecting maltreated children through: case finding and reporting, assisting child protective agencies, investigating cases, placing children in protective custody, arresting perpetrators, and prosecuting offenders.

This Article also describes the factors that police and prosecutors should consider in taking these discretionary actions. Particular attention is paid to the factors that determine when the police pursue a child abuse case, and how they do so.

I. THE DECRIMINALIZATION OF CHILD ABUSE

Over the past twenty years, there has been an enormous expansion of child protective efforts. In 1985, almost 1.5 million cases of suspected child abuse or neglect were reported to the authorities. This is approximately ten times the number of cases reported in 1965.¹

Although upon investigation, about sixty-five percent of these reports are determined to be "unfounded,"² there are still about one half million substantiated

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1. See generally Besharov, *Doing Something About Child Abuse: The Need To Narrow The Grounds For State Intervention*, 8 HARV. J.L. & PUB. POL'Y 540, 542-50 (1985) (discussing effect of mandatory child abuse reporting laws).

2. *Id.* at 556-57 (discussing overreporting of "suspected" child abuse reporting laws).

reports each year. Of these substantiated reports, about two thousand children die each year under circumstances suggestive of abuse or neglect, about fifty thousand suffer injuries serious enough to require hospitalization, and another fifty thousand are sexually abused. Research sponsored by the National Center on Child Abuse and Neglect indicates that for every serious case that is reported another goes unreported.³

This increased reporting is largely attributable to the passage of child abuse reporting laws which require, under threat of criminal and civil penalties, a wide array of professionals to report suspected child abuse and neglect.⁴ These reporting laws, first passed in the mid 1960's, were based on a model child abuse reporting law promulgated by the U.S. Children's Bureau.⁵ The model law recommended that reports of suspected child abuse and neglect be made to the police. Most states passed laws to this effect.

A. Child Protective Agencies

Soon after the passage of these mandatory reporting laws, states began to expand the social service agencies that provide child protective services. After years of advocacy, these "child protective agencies" have become society's primary response to child abuse and neglect. Child protective agencies help parents adequately care for their children through a mixture of mental health and supportive services. Based on their investigation of the home situation, child protective agencies decide what kinds of social services a family needs, and then help the family to obtain them.⁶ Supportive services, such as financial assistance, day care, crisis nurseries, and homemaker care, are used to relieve the pressures and frustrations of parenthood. Parent education services, including infant stimulation programs and parent aids, are used to give parents specific guidance, role models, and support. Individual, group, and family counseling are used to ease personal problems and the tensions of marital strife.

Approximately twenty percent of all substantiated cases of child abuse and neglect, including those that go to court, result in the child's placement in foster care;⁷ in the remaining cases, the family is placed under "home supervision," so that a caseworker, through periodic visits, can monitor the child's care while efforts are made to treat the parents.

3. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 18-21, 23 (DHHS 1981) [hereinafter NATIONAL STUDY OF CHILD ABUSE AND NEGLECT].

4. See generally Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458 (1977-78) (discussing "second generation" of state protective laws); U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, STATE CHILD ABUSE AND NEGLECT LAWS: A COMPARATIVE ANALYSIS 1984 (DHHS 1986) (summary of state laws) [hereinafter STATE CHILD ABUSE AND NEGLECT LAWS].

5. U.S. CHILDREN'S BUREAU, THE ABUSED CHILD—PRINCIPALS AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 11-13 (DHEW 1963).

6. See *infra* Appendix 1 (chart indicating various actions taken by child protective agencies). "Foster Care" and "Shelter Care" being essentially the same service, one long term and the other short term.

7. See *id.*

Moreover, to the extent possible, child protective agencies seek to obtain the parent's voluntary acceptance of such services.⁸ Only if the parents do not accept such services, or if it appears that such services will not adequately protect the child,⁹ is involuntary or coercive treatment sought through initiation of a juvenile court action. Nationwide, fewer than fifteen percent of all substantiated cases result in a juvenile court proceeding.¹⁰

Laws that require the reporting of suspected child maltreatment must also designate an agency to receive the reports. The issue of which agency should be designated 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 response to child abuse."¹¹

All states have amended their reporting laws to recognize the leading role played by these social service agencies. In about half the states, the law now requires that reports of suspected abuse and neglect be made only to child protective agencies. In the remaining states, the law gives the potential reporter the choice between the police and the child protective agency.¹² Few reports are made to the police. (In only two jurisdictions—California and the District of Columbia—have the police retained primary responsibility for cases of physical abuse and sexual abuse; however, in these places, they play almost no role in cases of neglect and emotional abuse, which constitute about seventy percent of the total.)¹³

All states require the police to report suspected child abuse and neglect; in about half the states, the police must report their suspicions to the child protective agency. But even when they are not legally required to do so, they usually refer the case to the local child protective agency.¹⁴ Nationwide, police make about twelve percent of all reports received by child protective agencies.¹⁵ While nothing prevents them from performing a parallel investigation, it appears that they rarely do.¹⁶

B. "Treatment" vs. "Punishment"

Child protective agencies can always refer a case to the police for a parallel or joint investigation. Until recently, however, child protective agencies rarely

8. See Besharov, *Representing Abused and Neglected Children: When Protecting the Child Means Seeking the Dismissal of Court Proceedings*, 20 J. FAM. L. 217, 218-19, 227-31 (1981-1982) (discussing parents' voluntary acceptance of services).

9. The child's placement into foster care with the parent's consent is considered a voluntary service. *Id.* at 228.

10. See *infra* Appendix 1 (14.4% result in juvenile court proceedings).

11. V. DEFRANCIS AND C. LUCHT, *CHILD ABUSE LEGISLATION IN THE 1970's* 11 (rev. ed. 1974).

12. See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *TRENDS IN CHILD ABUSE AND NEGLECT LAWS* 26 (DHHS 1981) (reporters have choice in twenty-three states).

13. See *infra* note 159 and accompanying text (indicating that about thirty percent of maltreated children are physically abused).

14. See NATIONAL STUDY OF CHILD ABUSE AND NEGLECT, *supra* note 3, at 11-17 (discussing number of suspected maltreatment victims identifiable from non-child protective agencies).

15. A. RUSSELL AND C. TRAINOR, *TRENDS IN CHILD ABUSE AND NEGLECT: A NATIONAL PERSPECTIVE* (1984). See U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *ANALYSIS OF OFFICIAL CHILD ABUSE AND NEGLECT REPORTING* (1978) (DHEW 1979) (indicating similar percentage of reports by law enforcement officials).

16. Cf. STATE CHILD ABUSE AND NEGLECT LAWS, *supra* note 4, at Table M (describing mandated actions for receiving agency).

considered criminal prosecution as an appropriate response to child maltreatment. These agencies fear that the arrest and possible prosecution of a parent will impair efforts to treat the parent and reunite the family. Broadhurst and Knoeller state: "[t]he desired result is not to punish the parent; rather it is to protect the child from further harm and to teach the parents to be adequate caretakers."¹⁷

The dichotomy between "treatment" and "punishment" is somewhat artificial. A criminal prosecution can provide important rehabilitative services. Conversely, a civil child protective proceeding, which can involve the child's forced removal from the parents' custody and the parents' involuntary treatment, has indisputably punitive aspects. Nevertheless, it is appropriate to adopt this distinction.

Child protective professionals reason that even if such troubled parents could be successfully prosecuted, little would be gained because few criminal courts have access to the supportive and treatment services that can deal with the parents' social and psychological problems. The late Dean Monrad Paulsen wrote:

criminal sanctions are a poor means of preventing child abuse. Day-to-day family life, charged with the most intimate emotions, is not likely to be an area of life easily ruled by the threat of fines or imprisonment. A criminal proceeding may punish an offender who deserves punishment, but it may also divide rather than unite a family. The criminal law can destroy a child's family relationship; it cannot preserve or rebuild it. The most severe cases of child abuse may call for prosecution, but the prosecutors often are not able to arrange for the care a child needs.¹⁸

In addition, child protective agencies believe that criminal prosecutions would deter fearful parents from taking their children for needed medical treatment. A less threatening, more therapeutic response, they argue, encourages parents to seek help on their own. Many parents, in fact, do call child protective agencies (or other social agencies) to say that they are unable to cope with their children, or that they feel that they may hurt or even kill their children. If such parents are discouraged from asking for help, the danger to their children may not be discovered until after serious injury has been inflicted.

Thus, except for especially "serious" cases, an ambiguous and unevenly applied concept discussed below,¹⁹ child protective agencies rarely deem criminal prose-

17. A. BROADHURST AND J. KNOELLER, *THE ROLE OF LAW ENFORCEMENT IN THE PREVENTION AND TREATMENT OF CHILD ABUSE AND NEGLECT* 48 (DHEW 1979).

18. Paulsen, *The Law and Abused Children*, in *THE BATTERED CHILD* (R. Helfer & C. Kemp 2d ed. 1974) at 154 [hereinafter *THE BATTERED CHILD*]. Brian Fraser, first director of the National Committee for Prevention of Child Abuse, summarized this idea in a similar fashion:

From a purely practical point of view, if the parent is convicted and incarcerated, it is usually for a short period of time. When he is released from jail, there is absolutely nothing to stop him from returning to his abusive patterns of behavior. The conditions which precipitated the initial abuse will still be present and may give rise to further instances of abuse.

Fraser, *A Pragmatic Approach To Child Abuse*, 12 AM. CRIM. L. REV. 103, 121 (1974).

19. See *infra* notes 165-67 and accompanying text (discussing MODEL PENAL CODE §§ 210.0 and 211.1).

cution useful, and rarely involve the criminal justice system in efforts to protect abused and neglected children. Nationwide, fewer than five percent of substantiated cases result in a criminal prosecution.²⁰ It is no exaggeration to conclude that, besides the striking increase in reported cases, the most noteworthy aspect of this twenty year expansion of child protective programs is the substantial decriminalization of reported child abuse.

Many believe that child protective agencies are reluctant to refer even serious cases for criminal prosecution. To counter this tendency, about ten states have amended their laws to require that suspected child abuse fatalities also be directly reported to district attorneys and/or medical examiners or coroners.²¹ Theoretically, these provisions should not be necessary, since all suspicious fatalities of children, as well as of adults, require investigation by such officials. The passage of such laws demonstrates the extent to which child protective agencies are perceived as being unsupportive of the criminal prosecution of offending parents.

II. THE CASE FOR GREATER CRIMINAL JUSTICE SYSTEM INVOLVEMENT

If social services adequately protected abused and neglected children, there would be little reason to be concerned about the decriminalization of child maltreatment. But there is clear evidence that it does not do so; this has led to recent recommendations for a return to vigorous prosecution of offending parents.

A. *The Limits of the Social Services Approach*

Despite the substantial expansion of child protective agencies, existing treatment approaches are successful only with parents who are already motivated to accept help, or who can easily be encouraged to do so. They do not work for those parents, estimated to be about forty percent of substantiated cases, who have serious and deeply ingrained personality disturbances.²²

The plain fact is that these parents are beyond the reach of existing treatment technology. Richly funded federal child abuse projects, with all but unlimited treatment resources, have been able to prevent the recurrence of abuse or neglect in only about fifty percent of all cases.²³ Carefully conducted studies of other treatment programs report similarly disappointing results.²⁴ Clearly, some mal-

20. See *infra* Appendix 1 (criminal action taken 4.5% of the time).

21. As of 1979, the states requiring reports of child fatalities to district attorneys or medical examiners were said to be: Arkansas, Maine, Massachusetts, Minnesota, Missouri, New York, Pennsylvania, Virginia, Washington, and West Virginia, as well as American Samoa. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *CHILD ABUSE AND NEGLECT: STATE REPORTING LAWS* 7 n.14 (DHHS 1980).

22. See, e.g., N. POLANSKY, M. CHAMBERS, E. BUTTENWEISER, & D. WILLIAMS, *DAMAGED PARENTS: AN ANATOMY OF CHILD NEGLECT* 161-62 (1981) (discussing whether treatment to bring about personality change can be imposed or must be involuntary) [hereinafter N. POLANSKY].

23. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *EVALUATION OF CHILD ABUSE AND NEGLECT DEMONSTRATION PROJECTS, 1974-1977* 123 (1978).

24. See, e.g., Herrenkohl, Herrenkohl, Seech, & Egolf, *The Repetition of Child Abuse: How Frequently Does It Occur?* 3 *CHILD ABUSE AND NEGLECT* 67-72 (study showing abuse frequently recurs); Magura, *Are Services To Prevent Foster Care Effective?* 3 *CHILDREN AND YOUTH SERVICES REVIEW* 193-212 (1981) (critical analysis of several prevention programs).

treated children must be placed in foster care to protect them from further injury.²⁵ However, as the late Dr. C. Henry Kempe, a leader in building protective programs for battered children, has written, some children are left at home "at the risk of further damage . . . in the mistaken belief that 'there is no such thing as a person we cannot help.'"²⁶

Depending on the community, at least twenty-five percent of all fatalities attributed to child abuse and neglect involve children already known to the authorities.²⁷ Tens of thousands of other children receive serious injuries while under child protective agency supervision. In New York State, for example, the reincidence rate is about twenty-five percent.²⁸ In fact, child protective agencies have been successfully sued for damages when a child was killed or injured by parents after the agency failed to remove the child.²⁹

While many children not placed in foster care will suffer further abuse, there is a dark side to foster care. For a large subset of maltreated children, generally those who cannot be quickly returned home or freed for adoption, foster care can be deeply harmful.

In theory, foster care is a short-term remedy designed to protect children from harm while parents have time to respond to treatment. However, because existing treatment programs are usually unable to break deep seated patterns of child abuse and neglect, the reality is far different. More than fifty percent of the children in foster care are in this "temporary" status for over two years; more than thirty percent are away from their parents for over six years.³⁰ As the United States Supreme Court recognized, these children are often lost in the "limbo" of the foster care system.³¹

While in foster care, children are supposed to receive treatment services to remedy the effects of past maltreatment. Few do. Worse, many are neglected, abused, and even killed by their foster parents.³²

Even when not physically maltreated, children who stay in foster care for more than a short time are often shifted through a sequence of ill-suited foster homes

25. In 1977, there were a total of 502,000 children in foster care, but only about 60% were there because of abuse or neglect. U.S. CHILDREN BUREAU, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES 109, 117, Table 5-3 (DHEW 1979) [hereinafter SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES].

26. Kempe, *Some Problems Encountered by Welfare Departments in the Management of the Battered Child Syndrome*, in THE BATTERED CHILD, *supra* note 18, at 169-70.

27. Besharov, *supra* note 1, at 550-54. See, e.g., REGION VI RESOURCE CENTER ON CHILD ABUSE, CHILD DEATHS IN TEXAS 26 (1981) (study showing families of 38.9% of victims experienced some contact with authorities prior to fatality) [hereinafter CHILD DEATHS IN TEXAS].

28. NEW YORK SENATE, STANDING COMMITTEE ON CHILD CARE, 1985 STUDY OF CHILD PROTECTIVE SERVICES 2 (n.d., c.1986).

29. See D. BESHAROV, THE VULNERABLE SOCIAL WORKER: LIABILITY FOR SERVING CHILDREN AND FAMILIES 51-75 (1985) (discussing liability for inadequately protecting child) [hereinafter THE VULNERABLE SOCIAL WORKER].

30. SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES, *supra* note 25, at 120.

31. *Smith v. Organization of Foster Parents*, 431 U.S. 816, 833-38 (1977) (discussing foster care both in New York and throughout United States).

32. See THE VULNERABLE SOCIAL WORKER, *supra* note 29, at ch. 5 (discussing inadequate foster care services).

and denied the consistent support and nurturing that they so desperately need.³³ A study of foster children in Jackson County, Missouri (which includes Kansas City), found that twenty-nine percent had been in four or more homes in fewer than five years.³⁴ Increasingly, many graduates of the foster care system evidence severe emotional and behavioral problems that some thoughtful observers attribute directly to the foster care experience.³⁵ These realities led Marion Wright Edelman, President of the Children's Defense Fund, to call the conditions of foster care a "national disgrace."³⁶

Therefore, if foster care were the only way to protect children from physical harm, we would have to balance the apparently unavoidable physical and emotional harm suffered by some foster children against the possibility of future physical injury at home. We might well decide that protecting children from serious physical harm is worth the risk. But foster care is often used when the child could be adequately protected by jailing the offending parent. For example, many children are placed in foster care because the mother's live-in boyfriend is dangerous, and she seems unable to prevent him from returning to the house.

B. *The Utility of Criminal Prosecution*

The possibility of incarcerating the offending adult as an alternative to foster care drastically alters the public policy calculus. Supporters of increased criminal prosecution argue that it is often in the best interests of these children to have the offender rather than the child removed from the home. Incarcerating the offending adult, they argue, might also free up funds for treatment of the child. Foster care is expensive. Depending on the community, and the child's need for special care, family foster care costs from \$5,000 to \$15,000 a year, with \$10,000 a general average. Institutional care, involving about fifteen percent of the children in placement, costs about \$20,000 a year. Six years of one child's foster care placement (the national median), costs an average of \$68,000. The placement of each additional child from the same family costs that much more. Nationally, foster care costs states and the federal government almost \$3 billion a year.³⁷

33. See, e.g., SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES, *supra* note 25, at 117-18, Table 5-4 (twenty-two percent of children placed with foster families had been in at least three foster family homes).

34. Mushlin, Levitt, & Anderson, *Court-Ordered Foster Family Care Reform: A Case Study*, 65 CHILD WELFARE 141, 146 (March-April 1986).

35. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 13 (1980).

36. CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE xiii (1978).

37. See SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES, *supra* note 25, at 109 (only twenty-eight percent of children receiving service were in any type of foster care facility). See generally *Problems Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearings Before the Subcommittee on Public Assistance of the Senate Committee on Finance*, 96th Cong., 1st Sess. (1979) (hearings on H.R. 3434, Social Services and Child Welfare Amendments of 1979).

These realities have led to growing complaints that decriminalization has gone too far.³⁸ Citing the failure of social services to prevent reincidence in so many cases, some observers argue that there should be a return to the use of arrest and criminal prosecution as major tools to combat child maltreatment. One child welfare administrator proposed the death penalty in cases of severe child abuse;³⁹ a legislator in Maine went so far as to introduce a bill authorizing, in cases of sexual abuse, the draconian remedy of castration.⁴⁰

Whatever one thinks of these extreme proposals, it seems clear that in some cases criminal penalties may be an appropriate community statement that such behavior toward children is not countenanced.⁴¹ The symbolic importance of affirming the norm against child abuse requires the criminal prosecution of some cases. Dorcas Hardy, Assistant Secretary of the Department of Health and Human Services, has said:

Let us make one thing clear when we are talking about child abuse. We are talking about cruelty, we are talking about a violent action that is a crime. Child abuse is a crime, and the more people know that, the more they might think twice about committing such a crime. The campaign against drunk drivers is effective in some states because the accused knows that an angry society, an angry victim or his family, and an angry court system won't let the driver get away with it.⁴²

Arrest and criminal penalties may also be more effective in deterring certain parents from committing further maltreatment.⁴³ C.J. Flammang, a police sciences researcher and teacher, argues that the possible damage done to rehabilitative efforts by the prosecution of parents is more than countered by the deterrent effect of swift and sure punishment.⁴⁴ Furthermore, according to Jack G. Collins, former Assistant Chief of the Los Angeles Police Department, arrest and prosecution help to enforce a program of rehabilitation.⁴⁵ He points out that police action forces agencies concerned with rehabilitative programs to become involved:

When the police take juvenile victims into protective custody and/or arrest adults suspected of inflicting traumatic injuries on children, the

38. For an early precursor of this position, see McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, 12 AM. CRIM. L. REV. 165, 167-68 (1974) (discussing danger of emotional overreaction by public officials).

39. Chicago Tribune, March 7, 1981, § 1, at 4, col. 1.

40. Bangor Daily News, January 6-7, 1979, at 27, col. 3.

41. See Rosenthal, *Physical Abuse of Children by Parents: The Criminalization Decision*, 17 AM. CRIM. L. REV. 141 (1979) (discussing whether physical abuse of child by parent should constitute crime).

42. Speech by Dorcas R. Hardy, Assistant Secretary for Human Development Services Before the Seventh National Conference on Child Abuse and Neglect in Chicago, Illinois (November 10-13, 1985).

43. Cf. L. SHERMAN AND R. BERK, MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT (1984) (arrest most effective of three standard methods police use to reduce domestic violence; other two methods are advise and sending suspect away from home for few hours).

44. C.J. FLAMMANG, THE POLICE AND THE UNDERPROTECTED CHILD 141 (1970).

45. Collins, *The Role of the Law Enforcement Agency*, in THE BATTERED CHILD, *supra* note 18, at 185.

attention of other agencies is automatically focused on the problem. Prosecuting attorneys, criminal and juvenile courts, probation departments, and other concerned social agencies must necessarily perform their assigned duties. This results in an official review and consideration of child-beating cases by community agencies charged with the responsibility of developing and implementing rehabilitative programs.⁴⁶

As Dr. Kempe has written, "there are clearly situations where a caseworker has to face the fact that reliance . . . on case work therapy will not alone prevent a repetitive injury to the child"⁴⁷

The best known of many recommendations for the expanded use of arrest and prosecution in child abuse cases was made by the Attorney General's Task Force on Family Violence: "Family violence should be recognized and responded to as a criminal activity."⁴⁸ The Task Force also recommended that law enforcement agencies: "[p]resume that arrest, consistent with state law, is the appropriate response to situations of serious injury to the victim . . . or other imminent danger to the victim."⁴⁹

C. The States Respond

In various ways, the states have begun responding. Although the basic framework of requiring initial reports to child protective agencies remains unchanged, to encourage greater numbers of criminal prosecutions, states are passing laws which require child protective agencies to notify law enforcement officials (often the local prosecutors) of certain cases. In some states, local prosecutors have been empowered to require the child protective agency to send copies of all reports to them,⁵⁰ or to send only reports in which the investigators have discovered actual evidence of abuse or neglect.⁵¹

In other states, child protective agencies have been instructed to automatically notify law enforcement agencies of certain more serious types of cases, such as: all reports of "abuse" (ten states),⁵² physical abuse (three states),⁵³ injury or

46. *Id.* at 186.

47. Kempe, *supra* note 26, at 170.

48. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 10 (Sept. 1984) [hereinafter TASK FORCE ON FAMILY VIOLENCE].

49. *Id.* at 17.

50. ALA. CODE § 26-14-7(a)-(d) (1975); ARK. STAT. ANN. § 42-813 (1977 & Supp. 1985); COLO. REV. STAT. § 19-10-109,(1), (2), (4)(a), (5) (1978 & Supp. 1985); IDAHO CODE § 16-1625(a) (Supp. 1986); MD. FAM. LAW CODE ANN. § 5-905(a)-(g) (1984); NEB. REV. STAT. § 28-713 (1985); N.J. STAT. ANN. § 9:6-8.11 (1976); N.Y. SOC. SERV. LAW § 424(3)-(7) (McKinney 1983 & Supp. 1986); WYO. STAT. § 14-3-204(a)(ii)-(iv), (vi) (1978).

51. LA. REV. STAT. ANN. § 14.403(G)(1)-(3) (West 1986); MONT. CODE ANN. § 41-3-202 (1985); N.M. STAT. ANN. § 32-1-15(B)-(C) (1986); S.D. CODIFIED LAWS ANN. § 26-10-12.1 (1984 & Supp. 1986).

52. AM. SAMOA CODE ANN. § 45.2011 (1981); ARIZ. REV. STAT. § 8-546.01(c)(3), (5), (7) (Supp. 1985); CAL. PENAL CODE § 11166(g) (West Supp. 1986); IOWA CODE ANN. § 232.71 (West 1985 & Supp. 1986); N.C. GEN. STAT. § 7A-548 (Supp. 1985); OHIO REV. CODE ANN. § 2151.421 (Baldwin 1984); TENN. CODE ANN. § 37-1-406 (a), (b), (c) (Supp. 1986); TEX. FAM. CODE ANN. § 34.02(c) (Vernon Supp. 1986).

53. FLA. STAT. ANN. § 415.505 (West 1986); KY. REV. STAT. ANN. § 199.335(3) (Michie Supp. 1986); MASS. GEN. LAWS ANN. ch. 119, § 51B(1), (2), (4), (6) (West Supp. 1986).

abuse "so serious that criminal prosecution is indicated" (four states),⁵⁴ sexual abuse (four states),⁵⁵ fatal injuries (six states),⁵⁶ and crimes committed by non-parents (two states).⁵⁷ Florida, for example, requires that "if it is learned during the course of an investigation that the observable injury or medically diagnosed internal injury did occur as the result of abuse or neglect [the agency must] orally notify the state attorney, and the appropriate law enforcement agency. In all cases, the department shall make full written report to the state attorney within three days of the oral report."⁵⁸ In a more extensive listing, Massachusetts requires child protective agencies to notify, in writing, the district attorney for the county in which the child resides if "the department has reasonable cause to believe that any of the following conditions has resulted from abuse or neglect: (a) a child has died; (b) a child has been sexually assaulted; (c) a child has suffered brain damage, loss or substantial impairment of a bodily function or organ, or substantial disfigurement; (d) a child has been sexually exploited . . . ; (e) a child has suffered serious bodily injury as the result of a pattern of repetitive actions by a family member."⁵⁹

III. THE POLICE ROLE IN CHILD PROTECTION

The police play an important role in child protective efforts through: case finding and reporting, assisting child protective agencies, investigating cases, placing children in protective custody, arresting perpetrators, and prosecuting offenders.⁶⁰ This section describes these police functions, but, because all police activities require the exercise of discretion, an introductory discussion of police discretion is appropriate.

A. Police Discretion

For a long time, there was a tendency to see the police as "ministerial officers who enforce all laws,"⁶¹ as Kenneth Culp Davis put it. This blinded many to

54. DEL. CODE ANN. tit. 16, § 905 (1983); HAW. REV. STAT. § 350-2 (1985); KAN. STAT. ANN. § 38-1523(a) (Supp. 1985) ("If the department determines that no action is necessary to protect the child but that a criminal prosecution should be considered, the department shall make a report of the case to the appropriate law enforcement agency."); VA. CODE § 63.1-248.6(D)(5) (Supp. 1986) ("injury to the child in which a felony is also suspected for which the penalty prescribed by law is not less than five years imprisonment . . .").

55. FLA. STAT. ANN. § 415.505 (West 1986); KY. REV. STAT. § 199.335(3) (Michie Supp. 1986); MASS. GEN. LAWS ANN. ch. 119, § 51B(4)(b), (d), (e) (West Supp. 1986); VI. CODE ANN. tit. 5, § 2536(a), (b), (e), (f) (Supp. 1985).

56. FLA. STAT. ANN. § 415.505 (West 1986); MASS. GEN. LAWS ANN. ch. 119, § 51B(4)(a) (West Supp. 1986); N.Y. SOC. SERV. LAW § 418 (McKinney 1983); PA. STAT. ANN. tit. 11, § 2217(2)-(4) (Purdon Supp. 1986); TEX. FAM. CODE ANN. § 34.02(c) (Vernon Supp. 1986); VA. CODE § 63.1-248.6(D) (Supp. 1986).

57. MINN. STAT. ANN. § 626.556(10a) (West Supp. 1986); N.C. GEN. STAT. § 7A-548(a) (Supp. 1985).

58. FLA. STAT. ANN. § 415.505(g) (West 1986).

59. Mass. Gen. Laws Ann. ch. 119, § 51B(4)(a)-(e) (West Supp. 1986).

60. Unfortunately, no reliable statistical data exist on these important police functions. We know that five percent of all substantiated cases result in a criminal prosecution, but we do not know how many are seen by the police that do not result in a prosecution. We do not even know the percentage of parents who are arrested.

61. KENNETH C. DAVIS, DISCRETIONARY JUSTICE 83 (reprint ed., 1980).

the significant discretion vested in the police.⁶² The American Bar Association's *Standards Relating to the Urban Police Function* recognize that, while "full enforcement" might be the formal posture of many police agencies, such a position is impractical, impossible, and perhaps unjust.⁶³ According to the President's Commission on Law Enforcement and Administration of Justice:

Among the factors accounting for this exercise of discretion are the volume of offenses and the limited resources of the police, the ambiguity of and the public desire for nonenforcement of many statutes and ordinances, the reluctance of many victims to complain and, most important, an entirely proper conviction by policemen that the invocation of criminal sanctions is too drastic a response to many offenses.⁶⁴

Police discretion was first recognized in relation to the initial decision to arrest. Presently, however, it is recognized that police officers exercise discretion at almost every point in the criminal process, whether it be investigating a complaint, determining the appropriate disposition of a case, or acquiring relevant evidence to support a prosecution.⁶⁵

B. Case Finding and Reporting

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. These helpless children can be protected only if a third person—a friend, a relative, or a professional—recognizes the child's danger and reports it to the proper authorities. Reporting begins the process of child protection.

Mandatory reporting laws, applicable to the police and many designated professionals, now exist in virtually every state.⁶⁶ Reporting laws do not require that potential reporters be sure that a child is being abused or neglected, or have absolute proof of maltreatment. Instead, reports are required if there is "reasonable cause to suspect" or "reasonable cause to believe" that a child is abused or neglected. (Most legal authorities have concluded that these terms are fundamentally equivalent and represent a lesser quantum of evidence than "probable cause.")⁶⁷ Thus, potential reporters need not be sure that a child is being maltreated and need not have absolute proof of maltreatment.

62. *Id.* at 3-4.

63. STANDARDS RELATING TO THE URBAN POLICE FUNCTION 118 (1971) [hereinafter STANDARDS].

64. K. DAVIS, *supra* note 61, at 86-87 (quoting President's Comm. on Law Enforcement and Admin. of Justice, *The Challenge of Crime in a Free Society* 106 (1967)).

65. STANDARDS, *supra* note 63, at 119-20.

66. *See, e.g.*, CAL. PENAL CODE §§ 11160-11161 (West 1982); KY. REV. STAT. ANN. § 199.335(2) (Michie Supp. 1986); MINN. STAT. ANN. § 626.556(3) (West Supp. 1986); N.Y. SOC. SERV. LAW § 413 (McKinney Cum. Supp. 1986); VA. CODE § 63.1-248.3 (1980). *See generally* Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458 (1977-78).

67. *See, e.g.*, Op. Ill. Att'y Gen. S-1298 (Oct. 6, 1977) (discussing whether term "reasonable cause to believe" is equivalent to term "suspect" in child abuse cases); 12 Op. Mass. Att'y Gen. 157 (1975) (interpreting terms "serious physical or emotional injury" and "reasonable cause to believe").

Such provisions relieve potential reporters, including the police, of the need to make a final or definitive diagnosis of maltreatment, which usually requires a home visit, interviews with parents, and further investigation. Most potential reporters are not in a position to conduct such an extensive inquiry, and waiting for unequivocal proof may place the child at great risk. After a report is made, the child protective agency is responsible for determining the child's true situation and, if protective intervention is needed, for taking appropriate action.

Hence, 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.⁶⁸

Police report approximately twelve percent of the cases received by child protective agencies.⁶⁹ This percentage is about the same as that for such other professional groups as medical (eleven percent), educational (twelve percent), and social services (twelve percent).⁷⁰ Some of the reports made by the police are based on reports made to them by others. Some are discovered by the police themselves as they perform their routine functions, such as responding to domestic violence calls or handling juvenile delinquency matters. Because police officers are in the community and often in people's homes, they are in a unique position to identify cases of abuse or neglect. New York Family Court Judge Nanette Dembitz described one such case:

One of the most heart-sickening neglect and abuse trials I have ever held concerned . . . Somala S., 7 months A policeman who was climbing up a fire escape chasing a suspected mugger, by chance heard Somala crying and saw her lying in a room by herself in a dresser drawer. When he took her to Bellevue Hospital, she was in such a state of malnutrition and dehydration that she is permanently blind and brain damaged⁷¹

Unfortunately, according to the National Study of Incidence and Severity of Child Abuse and Neglect, police, coroners, and sheriffs still do not report fifty-eight percent of what they recognize as child maltreatment.⁷²

C. *Assisting Child Protective Agencies*

As mentioned above, child protective agencies conduct most investigations of suspected child maltreatment.⁷³ Nevertheless, the police are sometimes needed to

68. See *infra* Appendix 2 (discussing grounds for suspecting child abuse or neglect).

69. A. RUSSELL AND C. TRAINOR, *supra* note 15, at 15.

70. *Id.*

71. NEW YORK STATE ASSEMBLY SELECT COMM. ON CHILD ABUSE, *Report* 93 (April 1972).

72. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL STUDY OF INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 34, Table 6-2 (1981).

73. See *supra* note 14 and accompanying text (discussing police practice of reporting most cases to child protection agencies).

help child protective workers perform their functions. Although most maltreating parents are willing to cooperate with child protective workers, some are not. For example, the police may be needed to deal with parents unwilling to allow access to their children or who refuse to permit their children to be placed in protective custody. If warranted by the circumstances, police in all states have the authority to forcibly enter a home, to take emergency protective custody of a child, and to arrest a suspected abuser.⁷⁴

A few parents can be dangerous to the child protective worker and others. Therefore, when a parent becomes belligerent or physically threatening, police assistance may be needed to protect the worker. Situations of actual danger are rare, but when they arise, the presence of the police can prevent a tragedy.

Finally, in serious cases where there is reason to believe that the suspect may flee, the police should be contacted so that they can decide whether an arrest would be appropriate. Some state laws specifically authorize child protective agencies to call on the police for assistance.⁷⁵

These agencies can and often do seek assistance even in the absence of specific legislation. Therefore, the police in all communities should stand ready to assist the child protective agency when necessary.⁷⁶ Since the police must make an independent assessment of the need for the assistance needed, such as forcible entry into the home or removal of the child from parental custody, these important issues are discussed separately below.

D. Investigating Cases

The honest fact is that police agencies do not like to investigate most cases of child maltreatment. The five main reasons why they prefer to refer cases to child protective agencies are:

- 1) the necessity and benefits of providing treatment services which are most readily available through a social service agency like the child protective agency;
- 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.⁷⁷

Nevertheless, the statutory authority granted to law enforcement agencies, their operational capabilities, and the skills and expertise of individual officers make them an important resource for the investigation of child abuse and neglect.⁷⁸

74. See *infra* notes 92-95 and accompanying text (considering placement of children in protective custody).

75. In 1986, the states were said to be: Alabama, Arkansas, New Jersey, New York, and Wyoming. STATE CHILD ABUSE AND NEGLECT LAWS, *supra* note 4, at Table M.

76. See *infra* Appendix 3 (discussing situations requiring police involvement).

77. Besharov, *supra* note 4, at 494.

78. Flammang, *Toward an Understanding of the Police Role in Child Protection* in COOPERATIVE APPROACHES TO CHILD PROTECTION: A COMMUNITY GUIDE 69 (Mary Urzi ed. St. Paul, Minnesota State Department of Public Welfare, 1979).

First, law enforcement agencies are often needed to make after-hours or emergency investigations. Only a few child protective agencies, usually those in large cities, can respond to reports twenty-four hours a day, seven days a week. At night or on weekends, only the police may be available to provide prompt protection for a child in need of immediate protection.⁷⁹ Thus, some state laws require a report to the police if the child protective agency cannot be notified of an apparently emergency situation.⁸⁰ In all places, though, this appears to be the actual practice. But, either way, by the next morning, the matter is usually referred to the child protective agency.

Police assistance is also needed when it is necessary to place a child in protective custody against parental wishes.⁸¹ For example, Iowa requires reports to: "the department of human services . . . If the person making the report has reason to believe that immediate protection for the child is advisable, that person shall also make an oral report to an appropriate law enforcement agency."⁸²

Second, the police are involved in especially "serious" cases, an ambiguous concept discussed below, where a prosecution seems likely. The statutes described above, for example, were all attempts to specify a level of sufficient exigency to justify police involvement.⁸³ Immediate danger is not the only reason for police investigation, though. Other circumstances may indicate the need for police involvement. Minnesota, for example, requires police notification if the abuse is committed by "a person responsible for the child's care outside the family unit," which presumably includes a parent's live-in boy or girl friend, as well as day care workers and teachers.⁸⁴

Investigation is a fact-finding process of interviewing, observing, and evidence-gathering by which a report of suspected child abuse or neglect is verified, and information is gathered for decision making and possible court action. In cases of child abuse and neglect, the police bring expertise in collection and preservation of evidence, in crime scene examination, and in taking admissible statements and confessions.⁸⁵

While many of the skills and techniques used in traditional criminal investigations are the same as those involved in investigations for child protective

79. The reason for the failure to completely remove the police from any activity in abuse cases is the inability of the social agencies to meet the needs of children after closing hours, the limitations of such agencies in responding to called-for service, and the lack of manpower and procedures to adequately protect children during the initial phase of the situation.

C. J. FLAMMANG, *supra* note 44, at 139.

80. In 1983, the states that required a report to the police if the child protective agency cannot be reached were said to be: Alaska, Georgia, Kansas, and Kentucky. STATE CHILD ABUSE AND NEGLECT LAWS, *supra* note 4, at 28.

81. See *infra* notes 86-101 and accompanying text (discussing placement of children in protective custody).

82. IOWA CODE ANN. § 232.70(2) (West 1985).

83. See *supra* notes 50-59 and accompanying text (discussing assistance given to local prosecutors by child protective agencies).

84. MINN. STAT. ANN. § 626.556(10)-(10a) (West Supp. 1986).

85. MISSOURI CHILD ABUSE INVESTIGATOR'S MANUAL 79 (R. Ruddle ed. 1981).

purposes, the aim of investigations of child abuse and neglect is the protection of the child. Adult criminal prosecution is not necessarily the intended outcome; hence, the scope of the investigation is not limited to matters that are admissible in criminal prosecution. The police seek as many facts as possible relating to the background and the circumstances in which the child has been endangered or abused. This information assists the police and the child protection agency in deciding whether further police action is indicated. It also serves as an indicator of whether the case should be referred for prosecution, referred to a child protective agency or some other agency more able to handle the particular problems involved, or closed because there is insufficient evidence upon which to proceed.

E. Placing Children in Protective Custody

Some abused or neglected children are in immediate danger of serious, and perhaps irreparable, injury. Unless their safety can be assured by some other means, they must be placed in protective custody as soon as the danger becomes apparent.⁸⁶ This decision may be a matter of life or death.

In a surprising number of cases, parents will allow a child to be placed in protective care. Some parents have highly ambivalent feelings about their children, and may welcome the relief that placement provides.⁸⁷ Since unnecessary legal coercion can be detrimental to later treatment efforts, many state laws require that the parent's consent be sought before involuntary protective custody is invoked.⁸⁸

1. Prior Court Order

Frequently, though, the child must be removed from the home against parental wishes. This decision should be made with extreme caution. The child's removal from the home is a major intrusion on family integrity, which can leave lasting psychological scars.⁸⁹ Moreover, the great majority of maltreated children do not need to be removed from parental custody, especially on an emergency basis. Most forms of maltreatment do not pose the threat of immediate serious injury. The danger they pose arises from the long term consequences of inadequate child care. There is usually time to work with parents so that they can learn to care adequately for their children.⁹⁰

The preferred method of removing a child from the home is through a court order. As in all situations in which individual discretion is paramount, there is

86. See *infra* Appendix 4 (listing situations suggesting need for protective custody).

87. If the child can be protected adequately through a placement with friends or relatives, parental agreement may be more likely.

88. The foregoing is not meant to minimize the element of coercion inherent in such "voluntary" resolutions. The parent may sense, or be told, that failure to consent may result in formal court action. Nevertheless, there is a qualitative difference between situations in which parents agree to cooperate, for whatever reason, and those in which they do not.

89. See Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 *FAM. L.Q.* 151, 167 (1983) (over time foster care can damage bonds between parents and children).

90. See Besharov, *supra* note 1, at 584-87 (discussing foster care decision).

always the danger of the careless or automatic, though well-meaning, exercise of power. Prior court review lessens such dangers by ensuring that a judge (an outsider) reviews the administrative decision to place a child in custody. Police and child protective agencies which have authority to remove a child against the parents' wishes often hesitate to do so without court authorization. Consequently they may seek court approval before placing a child in protective custody.⁹¹

2. Emergency Removal

Sometimes removal must occur before court review is possible. Deciding whether emergency removal is needed involves a balancing of the possible danger the child faces by remaining in the home (taking into account the ability of in-home services to protect the child) against the possibly traumatic effects of removal from parental care. In some cases, the danger to the child is so great that the need for protective custody is beyond question. But in less severe situations, decision-making is much more difficult. As in so many areas of child protective work, there are no hard and fast rules. The competing considerations are impossible to quantify and the factual information upon which they are based is too uncertain.⁹²

In all states, the police are authorized to take a child into protective custody *without a court order*.⁹³ In about 26 states, child protective agencies also have this power.⁹⁴ (However, as a practical matter, child protective agencies normally do not attempt a *forcible* removal of the child without police assistance, because of the potential danger to the worker.) Many state laws place 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.⁹⁵

Thus, a child should be placed in protective custody without a court order only if it appears that the parents will injure the child in the time it will take for the child protective agency to respond. Police assistance should also be sought if it appears that the parents may flee with the child.

Whenever possible, the decision to place a child should be made upon consultation with the child protective agency. The agency's workers may know more

91. When the court is not in session, for example, at night or on weekends, authorization may be obtained by telephoning a judge at home.

92. See *infra* Appendix 4 (listing situations that suggest need for protective custody). Note that in any of the situations listed in Appendix 4, the younger the child, the greater is the presumable need for protective custody.

93. Cf. *Warder v. Hayden*, 387 U.S. 294 (1967).

94. As of 1983, the jurisdictions giving child protective workers the authority to place children in emergency protective custody were said to be: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Virginia, Washington, Wyoming, American Samoa, and Guam. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, STATE CHILD ABUSE AND NEGLECT LAWS—A COMPARATIVE ANALYSIS 38-39, Table D (DHHS 1983).

95. See, e.g., N.Y. FAM. CT. ACT § 1024(a) (Consol. 1983) (child may be placed in custody without court order if in imminent danger and no time to apply for court order).

about the family and may be able to offer services that obviate the need to remove the child from the home.

3. Prior Reports

Child protective agencies should consider prior reports of abuse in the home (and their outcome) in their decision to remove the child from parental custody. There is a greater need for protective custody if the family situation has deteriorated since a prior report, if the family disappeared after an earlier report, or if it appears that the child protective agency misdiagnosed or lost track of the case. On the other hand, there is a lesser need for protective custody if the family is satisfactorily under care or if the previous report was made by the same person and proved to be unfounded.⁹⁶

Most states have established limited exceptions to the confidentiality accorded to child protective records. Depending on the state, carefully designated professionals, who have the power to place a child in protective custody (predominantly the police), are given a statutory right of access to records of prior reports and their outcome.⁹⁷

4. Liability Questions

Under general legal doctrines, anyone with the legal authority to place a child in protective custody is protected from liability for the removal, as long as it is accomplished in accordance with legal requirements. Even if it turns out that the child was not actually in danger, there is no liability, as long as the decision to remove was not made maliciously, recklessly, or, in some circumstances, negligently. About nineteen states go further, and grant immunity from liability to persons who remove a child from the home in good faith.⁹⁸

5. Next Steps

Police officers may take a child placed in protective custody to a medical facility for evaluation and treatment, or place the child in an emergency foster home or juvenile shelter, generally through a child protective or other child welfare agency.

The dearth of suitable facilities in many communities has led to the placement of abused and neglected children in jails or facilities for the detention of criminal or juvenile offenders. Only as a last resort should maltreated children be placed in adult detention facilities while in protective custody. The practice is statutorily prohibited in some states.⁹⁹

96. For example, if the previous report was made by a disgruntled spouse or vindictive neighbor.

97. *E.g.*, COLO. REV. STAT. § 19-10-115(2)(c) (Supp. 1976); GA. CODE § 99-4302(b)(1) (1976); OR. REV. STAT. § 4 418.770(1) (1977).

98. STATE CHILD ABUSE AND NEGLECT LAWS, *supra* note 4, at 14-15. Officers must also consider their personal liability for leaving children in dangerous situations.

99. *E.g.*, IND. CODE ANN. § 31-6-4-6.5(a) (Burns Supp. 1980); IOWA CODE ANN. § 232.21 (West 1969), NEV. REV. STAT. § 62.170(1) (1981). Of course, such prohibitions do not apply to situations where an abused or neglected child requires secure detention because of his own conduct and there is independent legal authority for detaining him.

Whatever the initial basis for placing a child in protective custody, a court should review this administrative decision. It may have been based on incomplete or misunderstood facts, or the situation may have changed since the decision was made. For example, counseling, homemaker, day care, or housing services may have succeeded in making the child's home safe for his return. Therefore, such decisions should be reviewed by a court as soon as possible. Although many states put no time limit on protective custody before review,¹⁰⁰ a number of states do provide a time limit, generally one to three days.¹⁰¹ At the custody hearing, a judge will review the protective custody status, and either order it continued pending the adjudicatory hearing or revoke it and return the child to his home.

F. Emergency Medical Treatment

Maltreated children sometimes suffer from illnesses or injuries which, if not treated promptly, could cause lasting harm and even death. Whether or not they result from parents' abuse or neglect, some conditions require immediate medical attention.¹⁰²

Usually, parents will consent to the needed treatment. But if parents refuse, or if they are unavailable, the child needs to be taken into custody and the medical care provided. According to the United States National Center for Child Abuse and Neglect, most states have good samaritan laws which authorize medical personnel to provide the needed treatment in emergency situations.¹⁰³ In less urgent situations, an authorization usually must be obtained from a judge. The police can ask the local child protective agency for assistance in seeking a court order. Some states empower the child protective agency itself to authorize medical care for children previously placed in protective custody.¹⁰⁴

G. Arresting Perpetrators

"Probable cause" is the ordinary standard required for arrests by the police. The standard is defined as the reasonable belief that a crime has been committed and that the suspect committed it.¹⁰⁵ Although all forms of child abuse, no matter how minor, are crimes, finding probable cause is only the first step in deciding whether to arrest a parent.

100. *E.g.*, ILL. ANN. STAT. ch. 23, § 5055 (Smith-Hurd Supp. 1983) (10 days after receipt of request from parent, guardian, or custodian).

101. *E.g.*, ALA. CODE § 25-14-6 (1977) (72 hours); ARIZ. REV. STAT. § 8-546.01(D) (Supp. 1983) (48 hours); CONN. GEN. STAT. § 17-38a(e) (Supp. 1982) (96 hours); MINN. STAT. ANN. § 260.171(2) (1982) ("No child may be detained . . . longer than 24 hours . . . unless an order for detention . . . is signed by the judge or referee. No child may be held longer than 36 hours . . . unless a petition has been filed and the judge or referee determines . . . that the child shall remain in detention . . ."); N.Y. FAM. CT. ACT § 1021 (McKinney Supp. 1983) (3 days); UTAH CODE ANN. § 78-3a-30(1) (1983) ("No child shall be held in detention or shelter longer than 48 hours . . .")

102. *See infra* Appendix 5 (listing conditions requiring immediate medical treatment).

103. *See* U.S. NATIONAL CENTER FOR CHILD ABUSE AND NEGLECT, GUIDELINES FOR THE HOSPITAL AND CLINIC MANAGEMENT OF CHILD ABUSE AND NEGLECT III-6 & 7 (DHEW 1979).

104. *Id.*

105. *See, e.g.*, W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 110 (1985) (discussing suspicion levels for arrest).

The arrest of parents for child abuse and neglect is particularly controversial because of the possible negative effects it may have on the treatment of the offender and the rehabilitation of the family situation. This danger strikes at the core of the difference between social service and law enforcement responses to child abuse. Taking the law enforcement approach, for example, former Assistant Police Chief Collins argues:

Obviously, the arrest of child-beating suspects accomplishes an important result—namely, an immediate change in the environment. It is true that this change is often temporary, but by removing the offending adult from the environment, the police protect the child from continued abuse and afford other agencies in the community an opportunity to initiate a more permanent rehabilitative program.¹⁰⁶

IV. THE DECISION TO PROSECUTE

Prosecution of child abuse and neglect cases may be under a statute pertaining specifically to child abuse and neglect or under general criminal statutes against assault, battery, murder, rape, and other felonies or misdemeanors.¹⁰⁷ This means that all substantiated cases, not just five percent, could be the subject of police investigations and criminal prosecutions. No one, however, suggests that arrest and prosecution are appropriate in all cases. For example, the Attorney General's Task Force carefully limited its recommendation of arrest to "situations of serious injury to the victim . . . or other imminent danger to the victim."¹⁰⁸

Thus, in response to growing calls for the increased criminal prosecution of offending parents, some argue that more prosecutions are not possible. In most cases of child maltreatment, a number of factors militate against criminal prosecution. What are these factors? Do they explain why only five percent of all cases are prosecuted? And, is the right five percent being prosecuted?

The remainder of this Article, in essence, is about the "decision to prosecute." This phrase usually denotes the prosecutor's decision of whether to file criminal charges against an individual; however, the police also decide whether or not to arrest or seek prosecution. As one observer pointedly put it: "[t]he decision to prosecute is made by the district attorney. The decision to seek a prosecution is made by the police in the person of the investigating officer."¹⁰⁹

Therefore, when discussing the decision to prosecute, it is appropriate to refer to both police and prosecutor decisions. The police and prosecutors have three basic choices in every child abuse case: (1) dismiss the case altogether; (2) rely on the civil child protective system, which may include court action; or (3) proceed with a criminal prosecution, which may or may not include an arrest.¹¹⁰

106. Collins, *supra* note 45, at 205. See *infra* Appendix 7 (listing conditions which can lead to arrest).

107. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, CHILD PROTECTION: GUIDELINES FOR POLICY AND PROGRAM 84 (DHHS 1982).

108. TASK FORCE ON FAMILY VIOLENCE, *supra* note 48, at 17.

109. C. J. FLAMMING, *supra* note 44, at 58.

110. At any stage, a criminal proceeding can be dismissed, referred for civil handling, or both.

Once the decision to prosecute has been made, the particular offense or offenses to be charged must be selected. There are three approaches to this choice: (1) Charge as severely as the evidence might possibly suggest, whatever the actual strength of the case ("over-charging"); (2) Charge what, in good faith, one could reasonably believe there is evidence to prove ("full-charging"); or (3) Charge only as much as is appropriate given the offense involved and the individual accused ("undercharging"). In selecting the charge or charges, the operative factors are the same as those involved in the initial decision of whether to commence proceedings. Thus, the decision to prosecute is a series of decisions leading to the selection of a charge.

A. *The Need for Discretion*

Authorities agree that the decision to prosecute is not automatic, even when there is sufficient evidence of guilt.¹¹¹ The American Bar Association Standards provide, for example that: "The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction."¹¹²

The decision to prosecute is based on an individual assessment of the social desirability of a prosecution. The American Bar Association explains: "The public interest is best served and even-handed justice best dispensed not by a mechanical application of the "letter of the law" but by a flexible and individualized application of its norms through the exercise of the trained discretion of the prosecutor as an administrator of justice."¹¹³

In some cases, the appropriate disposition is clear. For example, a brutal, premeditated murder would clearly be appropriate for prosecution. A parent's inability to provide adequate food and clothing for a child because of lack of money would be extremely inappropriate for prosecution. In some cases, the absence of any real evidence against the parents may require the dismissal of the case. But many cases are not this clear cut. To understand the police or prosecutor's choice, it is necessary to identify the underlying decision-making factors. These factors can be specified, even though the decision to prosecute is ultimately discretionary.

The American Bar Association's *Standards for The Prosecution Function and the Defense Function*, for example, provide a general listing of the factors that should be considered in the decision to prosecute:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;

111. See, e.g., *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (prosecutor's decision to prosecute is discretionary and may rest on matters of policy separate from questions of probable cause), *cert. denied*, 381 U.S. 935 (1965).

112. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION ch. 3, § 3.9(h) (2d ed. 1979) [hereinafter PROSECUTION AND DEFENSE FUNCTION STANDARDS].

113. *Id.* at ch. 3, § 3.9(b) Comment (b).

- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
 - (iv) possible improper motives of a complainant;
 - (v) reluctance of the victim to testify;
 - (vi) cooperation of the accused in the apprehension or conviction of others; and
 - (vii) availability and likelihood of prosecution by another jurisdiction.¹¹⁴
- These factors need to be modified for application to child abuse cases.

B. The Interaction of Legal and Social Factors

Child abuse prosecutions are different from other prosecutions in two respects. First, in child abuse prosecutions the need to ensure the child's welfare and well-being is at least as important as the need to punish the offender. Hence, there must be an assessment of whether the potential benefits of a prosecution outweigh the possible harm to the child and to future treatment efforts with the parents. Second, the existence of civil child protective measures provide a dispositional alternative which is unavailable in ordinary criminal cases. This means that, in general, a prosecution should be commenced only when its goal is the incapacitation of a dangerous parent.¹¹⁵

The issues of severity of harm to the child and the parent's culpability take on great importance in the decision to prosecute. When these two considerations are added to the police and prosecutors' decision-making calculus, the following five interrelated factors stand out:

- (1) the legal sufficiency of the evidence;
- (2) the "severity" of the maltreatment;
- (3) the "culpability" of the parents;
- (4) the child's welfare;
- (5) exogenous community, institutional and attitudinal forces.¹¹⁶

Sometimes one factor is pre-eminent and a decision is impervious to the other considerations. For example, community pressure for the prosecution of sexual abuse cases may be so great that such cases must be sent to court for trial no matter how weak the evidence or how unlikely the social desirability of court action. Most often, however, these factors are simultaneously weighed and intermingled in the final decision. The sufficiency, or insufficiency, of the evidence may lessen the apparent social desirability of prosecution. Or, the danger to the child may encourage court referral even of weak cases.¹¹⁷

114. *Id.* at ch. 3, § 3.9(b)(i)-(vii).

115. Probation is a less desirable outcome of prosecutions for two reasons. First, the child should not be subject to the traumatic uncertainties of a criminal prosecution unless it will result in a jail term. Second, anything short of incarceration for serious maltreatment negates the symbolic effect of prosecution.

116. See generally D. BESHAROV, *JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT* ch. 3 (1974).

117. Naturally, many cases move through the system without clear or adequate consideration of the relevant factors.

The interdependence of these factors makes their separate elaboration somewhat artificial, but decision-making is best understood in its component parts. Hence, each is discussed separately below.¹¹⁸

V. THE LEGAL SUFFICIENCY OF THE EVIDENCE

A prosecution should not, and ordinarily will not, be initiated unless there is a reasonable likelihood of success. First, there are strong public policy and due process reasons for not pursuing cases which cannot be proven. It is generally regarded as unfair to charge a man who obviously cannot be convicted.¹¹⁹

Second, an unsuccessful prosecution can increase the danger to the child. The parents may regard the acquittal as approval of their conduct and they may continue or escalate the maltreatment. Moreover, the criminal prosecution may so embitter the parents that they become "hostile and resentful of the child and the legal authorities."¹²⁰ At this point, the parent's successful rehabilitation will have become virtually impossible, and the child will be placed in even greater danger.

Both the police and the prosecutor have an interest in avoiding fruitless prosecutions.¹²¹ "Limitations on resources are sufficiently stringent to make prosecutors keenly aware of the need for making the best possible use of them: if a suspect cannot be convicted either by plea or after trial, those resources are likely to be thought of as wasted."¹²²

These considerations, present in all criminal prosecutions, take on added importance in child abuse cases because of the availability of child protective agencies and civil court actions as alternatives. Furthermore, it may be much easier to succeed and protect the child on the civil side, where the required quantum of evidence is lower (a preponderance of the evidence rather than beyond a reasonable doubt)¹²³ and where evidence subject to suppression in the criminal proceeding may be admissible.¹²⁴

A. Sufficient Evidence

There must be sufficient persuasive evidence upon which to base a criminal prosecution. Under child abuse reporting laws, the child protective agency must

118. However, decision-making factors cannot be understood or applied in a vacuum. Therefore, a typology of child abuse and neglect cases is also presented which can be used to understand how the decision-making factors are applied to real cases.

119. F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 22 (1969).

120. Grumet, *The Plaintiff Plaintiffs—Victims of the Battered Child Syndrome*, 4 FAM. L.Q. 296, 307 (1970).

121. See *infra* text accompanying note 136 (discussing special problems of police officer or prosecutor who is convinced of parent's involvement in maltreatment but who is equally convinced that prosecution will be unsuccessful).

122. F. MILLER, *supra* note 119, at 22.

123. See, e.g., R. MCBRIDE, THE ART OF INSTRUCTING THE JURY §§ 4.39, 8.18 (1969) (standard of proof in civil proceedings is preponderance of evidence, while standard of proof in criminal proceedings is beyond reasonable doubt).

124. See, e.g., *In the Matter of Melinda "I", et al.*, 110 A.D.2d 991, 488 N.Y.S.2d 279 (App. Div. 1985) (suppression of statements made by mother not required in civil child abuse proceeding when police questioning was investigatory rather than custodial, and was proper discharge of police duty).

determine whether the report is "indicated" or "unfounded."¹²⁵ The test for a valid report ranges from "probable cause"¹²⁶ to "some credible evidence."¹²⁷ But whichever test is applied, it is certainly not the same as a determination that sufficient evidence exists for a criminal prosecution.

No generally accepted standard exists for the determination of the sufficiency of the evidence for a prosecution, although the American Bar Association's *Model Rules of Professional Conduct* mandate that there be at least "probable cause" before initiating a proceeding.¹²⁸ Miller, in his study for the American Bar Foundation, found that many prosecutors do, in fact, employ a "probable cause" standard.¹²⁹

"Probable cause" is the ordinary standard for arrests by the police. For that purpose, it is defined as the reasonable belief that a crime has been committed and that the suspect committed it.¹³⁰ However, as former United States Supreme Court Chief Justice Burger, then sitting on the District of Columbia Circuit Court of Appeals explained: "The quantum of evidence necessary to sustain an arrest is not, in all circumstances, the same quantum necessary to make out probable cause for charging a person with the crime."¹³¹ More evidence is necessary to justify a prosecution than to justify an arrest.

The American Bar Association's *Standards Relating to the Prosecution Function and the Defense Function*, on the other hand, propose the more ambiguous but more stringent standard of "whether there is evidence which would support a conviction."¹³² This language sounds suspiciously as if the prosecutor must determine whether there will be a conviction, although the Bar Association Standards expressly disapprove of the so-called "convictability" standard.¹³³ Clearly, though,

125. E.g., N.Y. SOC. SERV. LAW § 424(7) (McKinney 1983) ("Each child protective service shall . . . 7. determine, within ninety days, whether the report is 'indicated' or 'unfounded' "). Nomenclature varies. Some states, for example, use a "substantiated"/"unsubstantiated" dichotomy.

126. E.g., TENN. CODE ANN. § 37-1-405 (1986) (requiring reasonable grounds to believe).

127. E.g., ARK. STAT. ANN. § 42-818(A)(5) (1977) ("some credible evidence"); N.Y. SOC. SERV. LAW § 422(5) (McKinney 1983) ("some credible evidence").

128. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1981) (prosecutor in criminal case shall refrain from prosecuting charge that prosecutor knows is not supported by probable cause).

129.

The formal norm for insuring that innocent suspects do not become defendants is stated in substantially the same way as the formal norm for insuring that innocent persons are not arrested. In general, an arrest should not occur, nor should a formal charge be made, unless there is probable cause to believe that the suspected person has committed a crime.

F. MILLER, *supra* note 119, at 4.

130. W. LAFAVE & J. ISRAEL, *supra* note 105, at 110.

131. Goldsmith v. United States, 277 F.2d 335, 343 (D.C. Cir. 1960). Cf. Brinegar v. United States, 338 U.S. 160 (1949) (probable cause may be based upon reasonably trustworthy information, as well as facts and circumstances within officer's knowledge).

132. PROSECUTION AND DEFENSE FUNCTION STANDARDS, *supra* note 112, at § 3.9(a).

133. *Id.* at § 3.9(d) ("In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.") See *id.* at § 3.9(e) ("The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial").

the desire to maintain a good record in gaining convictions leads many police and prosecutors to judge the "convictability" of the suspect before deciding to commence court action.¹³⁴

Many police and prosecutors are tempted to file charges in the hope of "straightening out" the parent by the sobering experience of pre-trial arraignment and, perhaps, pre-trial detention.¹³⁵ And some police and prosecutors use the threat of potential charges to "encourage" an accused to seek out-of-court help or treatment. By this tactic, they hope to obtain at least some rehabilitative treatment for the juvenile.¹³⁶ While one must question this practice, its reality must be kept in mind.

There may be occasions when police and prosecutors have evidence that would justify commencing proceedings and that would probably lead to a conviction, but they are nevertheless not personally convinced of the parent's guilt. In such situations, their personal feelings may influence their decision.¹³⁷ It is unrealistic to expect them to pursue a cause they do not believe in with the same vigor and dedication as one they do; their continued self-esteem requires that they feel that their activities are purposeful and justified. A former Assistant United States Attorney describes the attitude of his former colleagues:

The first and most basic standard was the assistant's view of the accused's guilt of the crime to be charged. It was generally agreed that, regardless of the strength of the case, if the prosecutor did not actually believe in the guilt of the accused, he has no business prosecuting The great majority, if not all, of the assistants, felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt.¹³⁸

Thus, some police and prosecutors will decide not to file charges in a case where they believe the parent to be innocent, despite strong evidence of guilt. Sometimes

^{134.} There is indication that [prosecutors] often use a higher standard than 'probable cause' in deciding whether or not to charge. They are concerned with the likely outcome of a trial. In making their evaluation of the evidence, prosecutors try to anticipate rulings by the court on admissibility of evidence, particularly under the various exclusionary rules, even though it is possible that in a given case the accused would plead guilty or that, for whatever reason, his counsel might not raise the issue.

F. REMINGTON, D. NEWMAN, E. KIMBALL, H. GOLDSTEIN & W. DICKEY *CRIMINAL JUSTICE ADMINISTRATION* 432 (1969) [hereinafter F. REMINGTON]. See F. MILLER, *supra* note 119, at 23 (prosecutor has an interest in good conviction record).

^{135.} Cf. L. SHERMAN AND R. BERK, *supra* note 43 (finding arrest to be most effective method in reducing domestic violence).

^{136.} See *infra* note 222 and accompanying text (once treatment program has begun and child is protected by orders of juvenile court, criminal charges can be temporarily dismissed until goal of treatment is reached).

^{137.} PROSECUTION AND DEFENSE FUNCTION STANDARDS, *supra* note 112, at § 3.9(b)(i).

^{138.} Kaplan, *The Prosecutorial Discretion—A Comment*, 60 Nw. U.L. REV. 174, 178 (1965). See F. MILLER, *supra* note 119, at 22 (prosecutor should file charge when he has honest and reasonable belief in guilt of accused); L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* ch. 14 (3d ed. 1969) (detailing factors which influence decision whether to prosecute).

police and prosecutors decide against a prosecution because of the results of polygraph, or lie detector, tests.¹³⁹

Assessing the likelihood of a conviction requires careful case analysis. There can be no absolute guidelines; case analysis involves the determination and evaluation of all available evidence and legal issues. At a minimum, though, case analysis should include:

- (1) a thorough interview of all witnesses while the facts are fresh in their minds; (A summary of each interview should be made and included in the case file.)
- (2) a determination of all possible charges that might be appropriate under the facts;
- (3) a consideration of all legal, evidentiary and constitutional issues raised by the facts;
- (4) the collection and review of all relevant documents, such as search warrants and medical records;
- (5) a determination of the need for real evidence or photographs or diagrams;
- (6) a determination of the need for additional investigation; and
- (7) a determination of the need for expert testimony.¹⁴⁰

The availability and credibility of evidence are often confused. For example, a confession, though admitted into evidence, may be implausible or in conflict with other proven facts. Hence, the specific wording of the parent's statement can be crucial. It may not be a confession at all, or it may not include all the elements necessary to establish the alleged maltreatment. On the other hand, many statements which are not literally confessions can be equally devastating to the defense. For example, in denying participation in the child's abuse, a parent may inadvertently admit to **being at the scene** or to knowing some significant and otherwise unknown detail of **the maltreatment**.

B. Admissible Evidence

The necessary evidence must be admissible. Police and prosecutors are faced with a severe moral dilemma when they are personally convinced of a parent's abusive behavior but know, or believe, that it cannot be proven in court because of the inadmissibility of crucial evidence. Although there is no legal requirement that the admissibility of evidence be assessed before the decision to prosecute is made, the American Bar Association Standards declare: "The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial."¹⁴¹ Most commentators assert that only if evidence is clearly inadmissible should it be excluded from the decision to prosecute. This probably overstates the test applied, however, especially in cases of child abuse and neglect.¹⁴²

139. See F. BAILEY & H. ROTHBLATT, *INVESTIGATION AND PREPARATION OF CRIMINAL CASES* § 17:28 (2d ed. 1985) (prosecutor may agree to dismiss charge if in examiner's opinion polygraph results demonstrate truthfulness).

140. D. BESHAROV, *supra* note 116, at 210.

141. PROSECUTION AND DEFENSE FUNCTION STANDARDS, *supra* note 112, at § 3.9(e).

142. See F. MILLER, *supra* note 119, at 6, 23 (prosecutor should weigh probability of whether evidence will be admissible). See also F. REMINGTON, *supra* note 134, at 432 (in making evaluation of admissibility of evidence, prosecutors try to anticipate rulings by court).

C. Defenses to Criminal Liability

Potential defenses also play a role in the decision to prosecute. The most common defense used in child abuse cases is justification, in which the parents claim that they were engaged in "reasonable" corporal punishment.¹⁴³

All states recognize the right of parents to discipline their children, as long as the punishment is "reasonable" or not "excessive."¹⁴⁴ As New York Family Court Judge Nanette Dembitz explained: "physical disciplining is considered part of the parent's right and duty to nurture his child."¹⁴⁵ Such beliefs run deep in our culture. The Bible admonishes: "He that spareth the rod hateth his son, but he that loveth him chasteneth him betimes."¹⁴⁶ Thus, the law allows the use of reasonable force for the purpose of promoting the child's welfare.

By definition, a parent who intentionally engages in "seriously harmful behavior" is not engaged in "reasonable" corporal punishment. A child's misbehavior, no matter how egregious, never justifies the purposeful infliction of seriously hurtful or injurious punishment. As McNeese and Hebler have stated:

Any injury that requires medical treatment is outside the range of normal corrective measures. One bruise may be inflicted inadvertently; however, old and new bruises, bruises on the face, or bruising in a child less than one year of age represents abuse. In addition, any punishment that involves hitting with a closed fist or [dangerous] instrument, kicking, inflicting burns, or throwing the child obviously represents child abuse regardless of the severity of the injury sustained as a result.¹⁴⁷

In less extreme cases, though, it is often difficult to distinguish between appropriate parental discipline and child maltreatment. In part, this reflects disagreement within our society. Many people feel that some misbehaving children can be controlled only through corporal punishment and approve of its use, as long as it does not cause serious injury. Other people, though, feel that all forms of corporal punishment, no matter how moderate, are emotionally harmful to children, and should be considered maltreatment.

Although an outsider might disapprove of the parent's conduct, such disapproval does not render the conduct "excessive." As a California statute makes clear: "Cultural and religious child-rearing practices and beliefs which differ from general community standards shall not in themselves create a need for child welfare services unless the practices present a specific danger to the physical or emotional

143. See D. BESHAROV, *PROVING CHILD ABUSE* (1984) (all states recognize right of parents to discipline their children as long as punishment is reasonable and not excessive).

144. Thirty-two jurisdictions have specific provisions excluding reasonable corporal punishment from their definitions of child abuse and neglect. *STATE CHILD ABUSE AND NEGLECT LAWS*, *supra* note 4, at Table II. In other states, the defense is established by court decision.

145. Dembitz, *Child Abuse and the Law—Facts and Fiction*, 24 REC. A.B. CITY N.Y. 613, 620 (1969).

146. *Proverbs* 13:24.

147. M. McNEESE & J. HEBLER, *THE ABUSED CHILD: A CLINICAL APPROACH TO IDENTIFICATION AND MANAGEMENT* 3 (Clinical Symposia, Vol. 29, No. 5, 1977, CIBA Pharmaceutical Company).

safety of the child."¹⁴⁸ Only a parent who has overstepped this legal right to discipline a child should be considered abusive.

Unfortunately, there are few absolute rules about where reasonable discipline ends and maltreatment begins. One must assess a number of factors in deciding whether a particular punishment was "reasonable." These include the child's age and physical and mental condition, the child's misconduct on the present occasion and in the past, the parents' purpose, the kind of punishment inflicted, the degree of harm done to the child, and the type and location of the injuries.¹⁴⁹

In borderline cases people will disagree about whether a particular punishment crossed the line between reasonable discipline and maltreatment. However, in most cases, the application of the factors cited in Appendix 7 will greatly facilitate decision-making. For example, in one widely cited case, *In re Rodney C.*,¹⁵⁰ the court held that twenty-six marks on the back of a seven-year old boy with emotional difficulties, marks which were visible three days after the beating was administered, were evidence of immoderate and unreasonable corporal punishment. The court also held that "punishment administered to an eleven-year-old boy who is undergoing [emotional] therapy; . . . punishment which requires him to hold his ankles and keep his knees straight for variable lengths of time; punishment which causes him to scream [and to vomit], is a punishment beyond the child's endurance and a punishment beyond his capacity to understand as correction . . . [and] a degrading punishment as well."¹⁵¹

Other defenses that, depending on the circumstances, may be raised in cases of child maltreatment are insanity, ignorance, mistake, and coercion.¹⁵² The defenses of ignorance and mistake, if successful, do not result in the dismissal of charges, but, rather, their reduction. Ignorance and mistake negate the mental state of intentional behavior required to establish a material element of certain crimes.¹⁵³ They can be raised as defenses to offenses that require a culpable state of mind. Ignorance, however, is not a defense to charges of criminal negligence.¹⁵⁴

In addition, some jurisdictions have specific statutes creating defenses to certain kinds of abuse. For instance, New York has created an affirmative defense to the failure or refusal to provide proper medical care for an ill child when the parent is a member of, or adherent to, an organized religious group whose tenets

148. CAL. WELF. & INST. CODE § 16509 (West 1986). See COLO. REV. STAT. § 19-10-103(1)(b) (1978) ("In all cases, those investigating reports of child abuse shall take into account accepted child rearing practices of the culture in which the child participates"); WIS. STAT. ANN. § 48.981(3)(c)(4) (West 1984) ("The county agency shall give due regard to the culture of the subjects.")

149. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 390 (1972).

150. 91 Misc. 2d 677, 398 N.Y.S.2d 511 (Fam. Ct. 1977).

151. *Id.* at 682, 398 N.Y.S.2d at 516. See *Monroe v. Blum*, 90 A.D.2d 572, 573, 456 N.Y.S.2d 142, 143-144 (App. Div. 1982) (finding excessive corporal punishment based on evidence of "striking the child with a plastic covered bicycle cord, striking her with a belt and throwing milk on her.")

152. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW Chs. 11, 12, 14 (1947).

153. See, e.g., C. TORCIA, WHARTON'S CRIMINAL LAW §§ 76, 78 (14th ed. 1978) (person who has engaged in penally prohibited conduct due to ignorance or mistake of fact or law is excused from criminal liability if he did not possess culpable mental state required for commission of offense).

154. See *State v. Williams*, 4 Wash. App. 909, 484 P.2d 1167 (Ct. App. 1971) (lack of education and understanding of severity of child's illness insufficient defense to charge of criminal negligence).

prescribe prayer as the principle treatment for illness and the child is treated in accordance with such tenets.¹⁵⁵

D. *A Typology of Factors in Case Analysis*

In both criminal and civil actions, the major factors used to determine the legal sufficiency of the evidence are: (1) the credibility and persuasiveness of witnesses; (2) the admissibility of evidence under the rules of evidence and applicable constitutional exclusionary rules; (3) the availability for trial of complainants, victims and other witnesses; (4) the availability of documentary and physical evidence; (5) the length, uncertainty, and probable complications of the trial; (6) the validity of statutory interpretations and other legal assertions; (7) the predicted or likely outcome of a trial;¹⁵⁶ (8) the availability of defenses to criminal liability; and (9) the decision-maker's belief in the guilt or innocence of the parent.

VI. THE "SEVERITY" OF THE CASE

Extreme cases of parental brutality and neglect make society eager to take prompt and decisive action against child maltreatment. But this emotionally charged desire to protect innocent children obscures the fact that most reported cases are not appropriate for criminal prosecution because they are not "serious" enough.

A. *The Form and Degree of Harm*

The growing concern over increased child maltreatment inspired Congress to mandate a study of the issue. This National Study of the Incidence of Child Abuse and Neglect, using data for twelve months (1979-1980) from a representative sample of twenty-six counties in ten states, found that there are about one million maltreated children (including those that are not reported).¹⁵⁷ Each year, about 1000 children die in circumstances suggestive of child maltreatment.¹⁵⁸

In most discussions, there is a tendency to treat child maltreatment as a single, generic socio-legal phenomenon. But the word "maltreatment" encompasses much more than the brutally battered, sexually abused, or starved and sickly children that come to mind when we think of child abuse. According to the Incidence Study, only about thirty percent of these "maltreated" children are physically abused, and only about ten percent of these children (three percent of the total) suffer an injury severe enough to require professional care. About seven percent are sexually abused, although this is probably a low figure.¹⁵⁹

155. N.Y. PENAL LAW § 260.15 (McKinney 1980).

156. D. BESHAROV, *supra* note 116, at 20.

157. NATIONAL STUDY OF CHILD ABUSE AND NEGLECT, *supra* note 3, at 11.

158. *Id.* at 18-21.

159. *Id.* at 18-19, 23. Ten percent of the physically abused children sustain injuries classified as "serious" by the Incidence Study. "Serious" injuries are those for which professional medical care is required.

Emotional abuse, mainly "habitual patterns of scapegoating, belittling, denigrating or other overtly hostile, rejecting treatment . . ." makes up twenty percent of the total.¹⁶⁰ While this behavior often results in serious psychological harm, emotional maltreatment rarely involves situations that make a criminal prosecution appropriate.

Almost fifty percent of these "maltreated" children are neglected, a term that includes educational neglect (twenty-seven percent of the total number of abused and neglected children); emotional neglect, i.e., "[i]nadequate nurturance . . ." and "[e]ncouragement or permitting of seriously maladaptive behavior . . ." (nine percent of the total); failure to provide needed medical care for a diagnosed health condition (eight and one half percent); abandonment and other refusals of custody (four percent of the total); and providing inadequate food, clothing and hygiene (three percent of the total).¹⁶¹ In fact, fifty-three percent of these neglected children live in households where the annual income is less than seven thousand dollars. (The comparable figure for abused children is thirty-four percent.)¹⁶² Neglect, therefore, is largely related to the poverty and broader social needs of the children's families. Protecting these children means lifting them from the grinding poverty in which they live.

While some forms of child neglect can be just as harmful as physical abuse, the plain fact is that the vast majority of these children face no real danger of physical injury. Thus, police and social agencies respond differently to instances of neglect than they do to abuse, though both forms of maltreatment can seriously harm the child. For the great bulk of cases, then, even if there were a conviction, the parent's offense would rarely lead to incarceration.¹⁶³ The existence of the alternative civil child protective response means that "non-serious" cases will not result in incarceration, or even probation. (Even the symbolic importance of affirming the norm against abuse is only applicable to serious situations.) The laws of several states concerning the criminal justice system's handling of child abuse cases contain some specification of severity, as described above.¹⁶⁴ Given this reality, any attempt to determine the appropriateness of criminal prosecution must consider the parent's behavior and the harm that it caused or could have caused.

B. The Severity of Harm or Danger

The severity of the crime hinges on whether the action was a reasonable punishment or discipline, and whether the harm or danger resulted in "bodily injury" or "serious bodily injury." The Model Penal Code defines "bodily injury" as "physical pain, illness or any impairment of physical condition,"¹⁶⁵ and "serious

160. *Id.* at 22-23.

161. *Id.* at 23, 25.

162. *Id.* at 29-30.

163. N. POLANSKY, *supra* note 22, at 162-69 (discussing public attitudes that support some kind of therapeutic intervention for child neglect).

164. *See supra*, notes 50-59 and accompanying text (discussing state laws).

165. MODEL PENAL CODE Part II Commentaries § 210.0(2) (1980).

bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."¹⁶⁶ Bodily injury as defined by the Code "includes more than the consequences of direct attack. It also covers pain, illness, or physical impairment caused indirectly, as, for example, by exposing another to inclement weather."¹⁶⁷ Bodily injury is distinguished from serious bodily injury by the gravity of the harm and the degree of punishment. Serious bodily injury covers harm which creates a substantial risk of death. This type of action constitutes a felony of the second degree whereas actions which fall under bodily injury are misdemeanors.

The vagueness, or in some state statutes the absence, of definitions for terms outlining what constitutes "serious bodily injury" and reasonable punishment has forced courts to fill in meanings. In *State v. Comeaux*,¹⁶⁸ a mother, convicted of cruelty to a juvenile, appealed her conviction on the ground that the statute under which she had been convicted was vague and therefore she was not put on notice of the criminality of her conduct. Comeaux, after an argument with her boyfriend, "slammed" her small daughter's head into a doorframe.¹⁶⁹ The Supreme Court of Louisiana affirmed the conviction, stating that:

Justification can be claimed when the conduct is reasonable discipline of minors by a parent. Viewed in the conduct of the cruelty to juveniles statute, the challenged words (unjustifiable pain and suffering) are words of limitation. In a parent's case, the application of the statute is limited to mistreatment causing pain and suffering exceeding the bounds of reasonable discipline.¹⁷⁰

In *Bowers v. State*,¹⁷¹ a stepfather convicted of child abuse appealed the court's decision on the ground that the portion of the Maryland statute defining the felony of child abuse as physical injury sustained "as a result of cruel or inhuman treatment" should be void for vagueness.¹⁷² The Maryland Appellate court affirmed the judgement of the lower court, stating that:

So long as the chastisement was moderate and reasonable in light of the age, condition and disposition of the child, and other surrounding circumstances, the parent or custodian would not incur criminal liability for assault and battery or a similar offense. . . . On the other hand, where corporal punishment was inflicted with 'a malicious desire to cause pain' or where it amounted to 'cruel and outrageous' treatment

166. *Id.* § 210.0(3).

167. *Id.* § 211.1, comment 3.

168. 319 So. 2d 897, 899 (La. Sup. Ct. 1975).

169. *Id.* at 899.

170. *Id.*

171. 283 Md. 115, 389 A.2d 341 (1978).

172. *Id.* at 119, 389 A.2d at 344 (Bowers beat his stepdaughter with belt after she skipped school; there were visible welts on her body). Bowers sought to invalidate Md. Laws ch. 835, art. 27, § 35A(b)(7)(A)(1973).

of the child, the chastisement was deemed unreasonable, thus defeating the parental privilege and subjecting the parent to penal sanctions in those circumstances where criminal liability would have existed absent the parent-child relationship.¹⁷³

The actor's intent must also be considered in determining severity. Most state statutes have varying definitions and punishments according to the type of assault or battery committed. Usually the statutes make distinctions between actions which are done "intentionally", "recklessly", or "negligently". New York,¹⁷⁴ Oregon,¹⁷⁵ and Missouri,¹⁷⁶ for example, have separate categories for assaults

173. *Bowers v. State*, 283 Md. at 126, 389 A.2d at 348.

174. The New York Penal Law reads in relevant part:

A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) He recklessly causes physical injury to another person; or (3) With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument. Assault in the third degree is a class A misdemeanor.

N.Y. PENAL LAW § 120.00 (McKinney 1975).

A second degree assault is intent to cause "serious physical injury" or causing physical injury to a peace officer or fireman with the intent to prevent them from performing their lawful duty; or recklessly causing serious physical injury to another person by means of a deadly weapon or dangerous instrument; or "[f]or purposes other than lawful medical or therapeutic treatment, intentionally caus[ing] a stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same." N.Y. PENAL LAW § 120.05 (McKinney 1975). Second degree assault is a class D felony. *Id.*

A person is deemed to have committed first degree assault when:

With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or dangerous instrument; or [w]ith intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or [u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person

N.Y. PENAL LAW § 120.10 (McKinney 1975). First degree assault is a class C felony. *Id.*

175. Oregon has four categories of assaults.

(1) A person commits the crime of assault in the fourth degree if the person: (a) Intentionally, knowingly or recklessly causes physical injury to another; or (b) With criminal negligence causes physical injury to another by means of a deadly weapon. (2) Assault in the fourth degree is a Class A misdemeanor.

OR. REV. STAT. § 163.160 (1985).

(1) A person commits assault in the third degree if the person: (a) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon; (b) Recklessly causes serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or (c) Recklessly causes physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life. (2) Assault in the third degree is a

according to the degree of harm caused and the intent behind the defendant's action. Texas has similar categories to those in these three states, but also includes a special category for injuries to children.¹⁷⁷

Class C felony.

OR. REV. STAT. § 163.165 (1985).

(1) A person commits assault in the second degree if he: (a) Intentionally or knowingly causes serious physical injury to another; or (b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or (c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life. (2) Assault in the second degree is a Class B felony.

OR. REV. STAT. § 163.175 (1985).

(1) A person commits an assault in the first degree if the person intentionally causes serious physical injury to another by means of a deadly or dangerous weapon.

OR. REV. STAT. § 163.185 (1985).

176. Missouri's statute also divides assaults into three degrees with the person's intent and the seriousness of the injury being the key factors in the distinctions.

1. A person commits the crime of assault in the third degree if: (1) He attempts to cause or recklessly causes physical injury to another person; or (2) With criminal negligence he causes physical injury to another person by means of a deadly weapon; or (3) He purposely places another person in apprehension of immediate physical injury; or (4) He recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or (5) He knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative. 2. Assault in the third degree is a class A misdemeanor unless committed under subdivision (3) or (5) or subsection 1 in which case it is a class C misdemeanor.

MO. ANN. STAT. § 565.070 (Vernon 1986).

1. A person commits the crime of assault in the second degree if he: (1) Attempts to kill or knowingly causes or attempts to cause serious physical injury to another person under the influence of sudden passion arising out of adequate cause; or (2) Attempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument; or (3) Recklessly causes serious physical injury to another person; or (4) While in an intoxicated condition or under the influence of controlled substances or drugs, operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause physical injury to any other person, than himself. 2. The defendant shall have the burden of injecting the issue of influence of sudden passion arising from adequate cause under subdivision (1) of subsection 1 of this section. 3. Assault in the second degree is a class C felony.

MO. ANN. STAT. § 565.060 (Vernon 1986).

1. A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person. 2. Assault in the first degree is a class B felony unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony.

MO. ANN. STAT. § 565.050 (Vernon 1986).

177. The Texas Penal Code reads in relevant part:

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with

The key issue is the definition of "serious." New York's Penal Law defines "physical injury" as the "impairment of physical condition or substantial pain," and it defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious or protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."¹⁷⁸ Likewise, the United States National Center on Child Abuse and Neglect, in its Model Child Protection Act, defines physical injury that amounts to child maltreatment as: "death, or permanent or temporary disfigurement, or impairment of any bodily organ or function."¹⁷⁹ It is significant that the National Incidence Study adopted a similar definition of "serious" harm.¹⁸⁰

Moreover, the criminal law does not wait until a child is actually injured before responding, once the danger of serious harm is established. This preventive jurisdiction is exercised through the criminal law concept of an "attempt." At common law, crimes were punished by the severity of the crimes actually committed; unsuccessful attempts to commit serious crimes were treated as misdemeanors. The modern view, expressed in the Model Penal Code, as well as the law of most states, treats an attempt as a crime of only somewhat lesser seriousness than the crime attempted. Thus, the Model Penal Code punishes attempts to harm as part of the assault offense. Serious attempts to cause personal injury are treated at the same level as the completed offense, save for unsuccessful attempts to commit first degree felonies (homicide), which are viewed as completed second degree felonies.¹⁸¹

As also demonstrated by the new laws requiring child protective agencies to notify legal authorities,¹⁸² distinctions must be drawn among the various forms of maltreatment. Sexual abuse is universally considered serious, as is the infliction of substantial physical injuries. However, neglect and emotional maltreatment that has not yet caused substantial harm are not considered serious.

There are many types of child maltreatment, and they cause different forms and degrees of harm to the child. Appendix 9 portrays a typology of cases that reflects the form and degree of harm (or threatened harm) to the child. In addition, as will be seen in the next section, this typology, by also incorporating the element of parental behavior, reflects the level of parental "culpability."¹⁸³

criminal negligence, by act or omission, engages in conduct that causes to a child who is 14 years of age or younger: . . . (1) serious bodily injury; (2) serious physical or mental deficiency or impairment; (3) disfigurement or deformity; or (4) bodily injury. Offenses under Subsection (a)(1), (2), or (3) are felonies of the first degree when committed intentionally or knowingly and felonies of the third degree when committed recklessly.

TEX. PENAL CODE ANN. § 22.04 (Vernon 1986).

178. N.Y. PENAL LAW § 10.00(9)-(10) (McKinney 1975).

179. MODEL CHILD PROTECTION ACT § 4(f) (U.S. National Center on Child Abuse and Neglect 1977).

180. See *infra* Appendix 10 (listing various levels of harm).

181. MODEL PENAL CODE § 211.1 at 184 (1980).

182. See *supra* notes 50-59 and accompanying text (discussing laws requiring child protective agencies to notify legal authorities).

183. See *infra* Appendix 11 (listing forms of child maltreatment).

VII. SUFFICIENT PARENTAL CULPABILITY

The perpetrator's conduct and its effect on the victim is only half of the legal definition of a crime. The other half is the perpetrator's state of mind. (Depending on the circumstances, state of mind is also referred to as the level of intent or "culpability.") Thus, for example, *Black's Law Dictionary* defines an assault as "(a)ny willful attempt or threat to inflict injury when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm"¹⁸⁴

Under the Model Penal Code, the perpetrator's state of mind (and the seriousness of the injury) creates the distinction between aggravated assault, which is a felony, and simple assault, a misdemeanor. According to the Code:

A person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.¹⁸⁵

Simple assault is distinguished from aggravated assault by excluding the requirement of "serious" from the bodily injury attempted or inflicted and not including indifference to human life. The perpetrator's state of mind comes into play when the assault is committed with a deadly weapon; causing bodily harm with a dangerous weapon (paragraph [b]) is a simple assault if it is committed negligently rather than purposely or knowingly.¹⁸⁶

A. *Level of Parents' Intent Controlling When Imposing Criminal Sanctions*

The most severe criminal penalties are usually imposed for behavior that is purposeful or intentional. Behavior is purposeful or intentional when the person's conscious objective is to engage in the harmful conduct or to cause the harm that resulted.¹⁸⁷ Almost all sexual abuse cases involve this level of intent. It would be rare to find a case where an adult had sexual contact with a child and did not consciously do so. (If, for example, sexual contact was unintentional, it would not constitute a criminal act.)

Physical injuries are also often inflicted intentionally or purposefully.¹⁸⁸ A prosecutor may be given wide latitude to prove the existence of intent, in order to obtain a conviction. One such case involved a three-year-old boy in the District

184. BLACK'S LAW DICTIONARY 105 (5th ed. 1979).

185. MODEL PENAL CODE § 211.1(2) (Proposed Official Draft 1962) Aggravated assault under paragraph [a] of the Model Penal Code is a second degree felony and under paragraph [b] it is a third degree felony.

186. MODEL PENAL CODE § 211.1(1) (Proposed Official Draft 1962).

187. MODEL PENAL CODE § 2.02(2)(a) (Proposed Official Draft 1962).

188. Generally, these intentional or purposeful injuries are labeled physical abuse or battering, subject to the defense of reasonable corporal punishment. See *supra* notes 143-51 and accompanying text (discussing defense of reasonable corporal punishment).

of Columbia. The incident began when the boy asked his mother's boyfriend, the defendant, if he could go to the bathroom; the defendant refused to let him go. When the boy wet his pants the defendant undressed him and held him under the shower, making it difficult for the child to breathe. The defendant then removed the child from the shower and repeatedly slapped and kicked him. The following day, when the child had difficulty getting dressed for bed, the defendant picked up a pair of pliers and threw them at the child. One handle of the pliers was imbedded in the child's skull. The defendant was charged with assault with a dangerous weapon and with cruelty to a child. Intent is an essential element of both of these offenses. At trial, the prosecutor told the jury of the defendant's prior conviction for assault against the same child. The Court of Appeals held that this evidence "unquestionably was relevant . . ." in determining whether the defendant "had the requisite intent to support guilty verdicts"; thus the trial court had not abused its discretion in permitting the introduction of this evidence.¹⁸⁹

The required concurrence of intended harm and actual, resulting harm should be kept in mind when dealing with intentional acts. A person is not guilty of purposeful behavior if the intent is to commit one kind or level of harm and another results. For instance, parents who intend a minor assault on their child by shaking them but instead cause damage to the brain stem resulting in death are not guilty of murder, although they may be guilty of reckless or negligent homicide.

Knowing behavior is an intermediate level of criminal culpability. Behavior is "knowing" when the person is aware that the act will almost certainly cause the harm that resulted.¹⁹⁰ Such culpable knowledge "is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."¹⁹¹

For example, a twenty-eight year old man who arranged a beer party for his sixteen year old brother-in-law which resulted in the death of a minor guest who wandered onto a highway was convicted under a statute requiring knowledge of potential harm stemming from his actions.¹⁹² The defendant was charged under a New York penal law provision which read, in part: "A person is guilty of endangering the welfare of a child when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a [child] . . ."¹⁹³

Prosecution and incarceration are much more likely if the parent "intended" to harm the child than if the harm resulted from poverty or emotional stress. Since parents who engage in such intentional behavior are also the least likely to benefit from social services, the threat of incarceration may be a better deterrent. However, cases where there is intentional harm occur less often than cases in which there is recklessness or negligence, and this latter class of cases is least

189. *Robinson v. United States*, 317 A.2d 508, 513 (D.C. 1974).

190. MODEL PENAL CODE § 2.02(2)(b) (Proposed Official Draft 1962).

191. *Id.* § 2.02(7) (Proposed Official Draft 1962).

192. *People v. Bergerson*, 17 N.Y.2d 398, 218 N.E.2d 288 (1966).

193. N.Y. PENAL LAW § 260.10 (McKinney 1986).

likely to result in prosecution. Recklessness and negligence are the most common elements in cases of child maltreatment.

Recklessness is established when a person consciously disregards a substantial and unjustifiable risk that a material element of an offense exists or will result from his conduct.¹⁹⁴ The risk involved must be such that to disregard it would be a gross deviation from the standard of conduct that a law-abiding person in the same situation would observe. The accused need not recognize that the acts are extremely dangerous in order for the conduct to be considered reckless.¹⁹⁵

Many cases of child neglect involve parental recklessness; they are usually prosecuted under specific reckless endangerment statutes.¹⁹⁶ One such case, *Jones v. United States*, involved a defendant who was charged with and found guilty of involuntary manslaughter of an infant.¹⁹⁷ The mother of the child was unwed, so it was agreed that the defendant, a family friend, would take care of the child to avoid the embarrassment of the presence of the illegitimate child in the mother's home. The defendant took the infant to the doctor several times for a bronchial condition and for consultations on the child's diet and health. At the last visit, the doctor recommended that the child be hospitalized. The defendant did not hospitalize the child, nor did she obtain further medical help.

The next month, two collectors for the local gas company saw the infant, along with his older brother, in the defendant's basement. The older child, who was two-years-old, was in a "crib" made of wood, covered with wire screening, and with a hinged top. The "crib" was lined with newspaper which was stained with feces and covered with roaches. The younger child, who was ten-months-old, was lying in a bassinet and was described as having the appearance of a small baby monkey. The authorities apprehended the children and the younger child died of malnutrition the following day. At the time of his death he weighed only fourteen ounces more than he did at birth. The normal weight gain for a child of his age is seven additional pounds.

The defendant's actions constituted recklessness because she was aware that the baby was ill since the baby was visibly underweight, the conditions he was being raised in were obviously not what a reasonable person would expect, and the physician had advised hospitalization. Yet, the defendant chose to disregard all of this information.

The next lowest level of culpability, negligence, is established when a person should, but fails to, perceive a substantial and unjustifiable risk of serious harm to the child. Injury is negligently inflicted in "those situations where harm is the result of a disregard of risk or danger that would have been deemed hazardous by a 'reasonable' person, although it is not recognized as hazardous by the perpetrator."¹⁹⁸ In contrast, injury is recklessly inflicted in those situations where

194. MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962).

195. 7 J. ZETT, *NEW YORK CRIMINAL PRACTICE* 61.2[2][b] (1986).

196. *See, e.g.*, MODEL PENAL CODE § 211.1 (Proposed Official Draft 1962); ILL. ANN. STAT. ch. 38, § 12-5(a) (Smith-Hurd 1968).

197. *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962).

198. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *CHILD PROTECTION: THE ROLE OF THE COURTS* 45 (DHHS 1980).

the harm is the result of a disregard of a known risk or danger of harm; the reckless offender is aware of the substantial risk that such a result may occur but consciously disregards it. The criminally negligent offender is not aware of the substantial risk that such a result will occur.¹⁹⁹

Furthermore, under many state statutes and court decisions interpreting them, the risk involved must be of such a nature and degree that a failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person in the same situation would observe. The Model Penal Code, for example, imposes penal sanctions for any gross breach of parental responsibility.²⁰⁰

Negligence in child abuse is often seen in involuntary manslaughter cases. In one such case, the defendants, husband and wife, were charged and convicted of manslaughter for negligently failing to supply their seventeen-month-old child with necessary medical attention, as a result of which he died.²⁰¹ This case differs from the recklessness case of *Jones v. United States* because the defendants in this case were unaware of any risk of harm to the child. Both parents were Sheshone Indians and had very little education. They were ignorant and did not realize how ill the baby was. They thought the baby had a toothache and gave it aspirin for the pain. The court held that they were negligent in not seeking medical attention for their son and were therefore guilty of manslaughter. In *Jones*, however, the defendant had been advised that the child was in need of hospitalization but disregarded this advice.

Under certain circumstances, leaving children alone in dangerous circumstances can be the basis of a charge of reckless or negligent homicide. In *People v. Rodriguez*,²⁰² a case that is often cited in criminal law textbooks, the court held that no criminal liability should be imposed on a mother of a child who died during a fire in the home while the mother was out for the evening. The court held that there was no way that she could reasonably have foreseen that there was a probability that a fire would occur or that the child would burn to death.

Under very different circumstances, the Supreme Court of Pennsylvania took the opposite view in *Commonwealth v. Skufca*.²⁰³ In *Skufca*, the mother locked her three-year-old and ten-month-old children in a bedroom before she went out with friends. The apartment caught fire and the children suffocated; the mother was convicted of abandonment and involuntary manslaughter. The court held that the mother's action was the legal cause of death because she had effectively prevented the children from escaping or the neighbors from aiding them. It was also relevant that there had been a fire in the defendant's apartment recently, so that she had knowledge of this danger.

Prosecutions for child maltreatment are often brought under criminal statutes against assault, battery, rape, criminal negligence, reckless endangerment, man-

199. 7 J. ZETT, *supra* note 195, at 61-67.

200. "[So] long as the person exercising parental authority acts for the purpose of safeguarding or promoting the child's welfare . . . he is privileged under the Model Code unless he creates substantial risk of the excessive injuries specified in subsection (1)(b)." MODEL PENAL CODE, § 3.08, Comment 2 at 139-40 (Proposed Official Draft 1962).

201. *State v. Williams*, 4 Wash. App. 908, 484 P.2d 1167 (1971).

202. 186 Cal. App. 2d 433, 8 Cal. Rptr. 863 (1960).

203. *Commonwealth v. Skufca*, 457 Pa. 124, 321 A.2d 889 (1974).

slaughter, or murder. These statutes usually specify the requisite level of culpability. Some prosecutions are brought under statutes pertaining specifically to child abuse and neglect.²⁰⁴ Many of these statutes do not specify any requisite state of mind, and are often interpreted as creating strict liability for sufficiently gross deviations from adequate child rearing.²⁰⁵

B. A Typology of the Parent's State of Mind

Certainly, the intentional infliction of serious physical injury to children presents a prime case for criminal prosecution.²⁰⁶ Criminal intent, a prerequisite to guilt for any crime with the exception of strict liability offenses, is strongly indicated in cases of sexual abuse of children and repetitive, prolonged physical abuse of children resulting in death or serious injury.

Many abusive or neglectful parents, though, simply do not have the criminal intent that makes prosecution appropriate or likely to result in the parent's incarceration. "In very few cases is the harm to the child premeditated or intentional."²⁰⁷

Instead, abusive and neglectful parents usually are troubled and disoriented individuals for whom the threat of incarceration is no deterrent.²⁰⁸ For example, a study of child abuse fatalities in Texas found the parents to be "severely troubled . . . who through desperation, inadequate parenting skills, or social alienation, have engaged in abusive or neglectful behavior leading to the death of their children."²⁰⁹ James Q. Wilson and Richard J. Herrnstein made a similar point:

There have been efforts, for example, to distinguish among different kinds of abusive parents. Merrill described four types. First, there are parents who are continually and pervasively hostile and aggressive. Their rage is general, sometimes focused on the world at large and at other times on a particular individual in response to seemingly trivial incidents of everyday life. Second, there are parents who are rigid, compulsive, and cold. They may be obsessed with cleanliness and continuously distressed by the normal messiness and high spirits of children. Third, there are parents who are passive, dependent, and indifferent; their moodiness reflects emotional immaturity. Finally, there are young, intelligent fathers who suddenly find themselves dis-

204. See, e.g., N.Y. PENAL LAW § 260.10 (McKinney 1970) (endangering welfare of child); D.C. CODE ANN. § 22-901 (1973) (defining and stating penalty for cruelty to children). See *infra* Appendix 11 (listing specific state criminal laws on child maltreatment).

205. See, e.g., *State v. Danforth*, 129 Wis. 2d 187, 385 N.W.2d 125 (1986) (man who struck child in abdomen and unintentionally caused child serious damage convicted under Wisconsin child abuse statute where intent not requisite element of crime).

206. Rosenthal, *supra* note 41.

207. Fraser, *supra* note 18, at 121.

208. See generally R. KEMPE & C. KEMPE, CHILD ABUSE 10-24 (1978) (discussing abusive parents' own need for nurturance which must be met to break cycle of abuse).

209. CHILD DEATHS IN TEXAS, *supra* note 27, at 68.

abled and unemployed, forced to assume household duties while their wives work.²¹⁰

Of the third category of parents described by Wilson and Herrnstein, many are neglectful mothers who, for example, fit into the "apathy-futility syndrome," a term coined by Norman A. Polansky, Regent's Professor of Social Work at the University of Georgia. Polansky describes them as "passive, withdrawn, lacking in expression. Upon being interviewed, they showed many schizoid features, resembling in this way a number of patients from more fortunate economic backgrounds with whom we were familiar in private psychiatric hospitals."²¹¹

Therefore, it is important to distinguish among the various states of mind of parents who maltreat their children. There are many ways to do so. The most widely accepted is the one established by the Model Penal Code.²¹²

VIII. THE CHILD'S WELFARE

Since the primary purpose of prosecution is to protect children from maltreatment,²¹³ the child's welfare must be considered before deciding whether to initiate a criminal court proceeding.

A. *The Harmful Effects of the Criminal Court Process*

The trauma of the criminal process may be deemed too great a strain for the child. The experience of testifying in court is inherently traumatic for witnesses of all ages. For a child who is already hurt, fearful, or confused, it can be deeply upsetting. For this reason, most states are adopting a variety of procedural reforms designed to protect child witnesses in cases of child maltreatment.²¹⁴

Nevertheless, these reforms cannot shield children altogether. Therefore, there will be times when a prosecution will be foregone because it presents too great a threat to the child's welfare especially if an adequate non-criminal disposition appears to be available.

B. *The Effectiveness of Non-Criminal Dispositions*

A non-criminal disposition may appear to provide sufficient protection for the child. Given the potential hazards of the child's testifying and the uncertainty of a successful prosecution, law enforcement officials may divert a case if the child can be adequately protected by referring the offender to treatment services. The American Bar Association's *Standards Relating to Urban Police Function* recommend diversion when a non-criminal means is available to resolve the dispute or at least to minimize the chance of further harm.²¹⁵ The American Bar As-

210. J. WILSON & R. HERRNSTEIN, *CRIME AND HUMAN NATURE* 258-59 (1985).

211. N. POLANSKY, *supra* note 22, at 39.

212. Appendix 10 *infra* modifies this typology to clarify its application to child maltreatment.

213. Of course, the general deterrent value of criminal prosecutions is a form of prevention.

214. See generally WITCOMB, *PROSECUTING CHILD SEXUAL ABUSE—NEW APPROACHES*, NATIONAL INSTITUTE OF JUSTICE REPORTS 2 (U.S. Dept. of Justice, May 1986).

215. STANDARDS, *supra* note 63, at 107.

sociation's *Standards Relating to the Prosecution Function and the Defense Function* state:

The opportunity to dispose of a case before or after formal charge or indictment without pursuing the criminal process, by resort to other corrective social processes, should be given careful consideration in appropriate situations. The President's Crime Commission has recommended that prosecutors undertake "(e)arly identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required."²¹⁶

Among the criteria suggested by the Task Force on Courts of the President's Commission on Law Enforcement and Administration of Justice for the determination of when criminal prosecution is appropriate are: "whether there are agencies in the community capable of dealing with his problems; . . . whether there is reason to believe that the offender will benefit from and cooperate with a treatment program; and . . . what the impact of criminal charges would be upon the witness, the offender, and his family."²¹⁷

The police officer deciding how to handle the case is always faced with these considerations. But, the prosecutor must bear these factors in mind as well, particularly when:

- (1) The system malfunctioned and no real attempt was made to screen or divert the case. (This situation might arise when, for example, it appeared that court action was necessary or that there were no out-of-court alternatives available);
- (2) The diversion process was short-circuited by an insistent complainant or initially surly parent who refused an initial offer of services;
- (3) New information about the family has come to light since the case reached the prosecutor's office, which, if known earlier, probably would have led to diversion; or,
- (4) Problems of proof which did not play as great a role in the police or social agency assessment of the case have led the prosecutor to seek lesser charges or a dismissal in return for a referral to an out-of-court social agency.

In cases of child maltreatment, the first issue is the relative availability of services in the civil and criminal systems. The adequate consideration of a non-criminal disposition requires a familiarity with community treatment programs. Therefore, the American Bar Association recommends that "[p]rosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process."²¹⁸

In deciding whether social services are sufficient, the most important determinant is the decision-maker's perception of the effectiveness of such services. In this

216. PROSECUTION AND DEFENSE FUNCTION STANDARDS, *supra* note 112, at 90-91 (quoting President's Commission on Law Enforcement and Administration of Justice, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, 134 (1967)).

217. President's Commission On Law Enforcement and Administration of Justice, *TASK FORCE REPORT: THE COURTS* 7-8 (1967).

218. PROSECUTION AND DEFENSE FUNCTION STANDARDS, *supra* note 112, at 90.

regard, impressions are more important than reality. Even in the absence of clear evidence that a particular program works, police and prosecutors may divert cases to the program if they believe in its effectiveness.

The second factor is the ability of the particular parents to benefit from social services. Many factors go into this assessment. Foremost is the family's willingness to accept such services.

An outright refusal to accept assistance may preordain a decision to prosecute. But even something less than a total lack of cooperation may lead to a prosecution. Decision-makers "often perceive a lack of cooperation as a significant indication of personality disturbance. If their efforts are spurned, this 'ungratefulness' may lead them to cease extra efforts on behalf of the individual."²¹⁹ Thus, the parent's demeanor in interactions with the child protective worker and/or the police can have a decisive effect on the diversion decision;²²⁰ parents who are argumentative or surly may encourage prosecution in an otherwise borderline case.

Ordinarily, the police and prosecutor will be amenable to any suggestions which divert all but the most serious cases. In cases involving first time offenders, law enforcement officials may be more willing to give the parents another chance through social services. Conversely, a history of past maltreatment and of the failure of prior social services can have an overwhelmingly negative impact on the decision to divert the case.

One of the primary purposes of diversion is to preserve the family unit. Thus, diversion is much less likely if the suspect is not the parent. This is why Minnesota requires police notification if the abuse is committed by "a person responsible for the child's care functioning outside the family unit,"²²¹ which presumably includes a parent's live-in companion, as well as day care workers and teachers.

The third factor is the legal sufficiency of the evidence. Without sufficient evidence against the parents, the police or prosecutor may believe that a referral to an out-of-court agency is the only possible resolution short of dismissal.

C. Promoting the Parent's Cooperation with Treatment

While the emphasis is on protection of the child and rehabilitation of the family, in some cases child protective services may believe that the best interests of the child require criminal prosecution. For example, the filing or potential filing of criminal charges can sometimes be used to encourage abusive parents to obtain needed treatment. In some cases, the authority of the court may provide the only assurance that treatment is pursued. Once the treatment program has been started, and the child is protected by an order of the juvenile court, the criminal charges can be deferred until the ultimate goal of treatment is reached, whereupon the charges can be dismissed.²²²

219. D. BESHAROV, *supra* note 116, at 25-26.

220. See generally Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 401 (1970) (discussing legal and extra-legal procedures affecting parental rights with respect to police screening).

221. MINN. STAT. ANN. § 626.556(10a) (West Supp. 1986).

222. Allott, *The District Attorney*, in *HELPING THE BATTERED CHILD AND HIS FAMILY* 256, 259 (C. H. Kemp & R. Helfer eds. 1972).

Normally, when a decision is made to terminate or forego criminal proceedings, it is made in return for a promise by the parent to accept referral to a social agency. Sometimes even a simple warning can achieve substantial results.²²³

D. Gaining One Parent's Testimony Against the Other

The need to prosecute a particularly dangerous parent sometimes justifies not prosecuting a less dangerous suspect in return for the latter's cooperation in the prosecution.²²⁴ In *Negelberg v. United States*,²²⁵ the Supreme Court recognized the propriety of reducing the charges against a criminal defendant in return for his cooperation. In child abuse cases, an arrangement is sometimes made whereby the case is dismissed or the charges reduced in return for one parent's testimony against the other.

IX. EXOGENOUS FACTORS

The general context of decision-making can often influence the decision to prosecute. The forces involved, exogenous to the specific case, are discussed next.

A. Formal Policies

A particular statute, rule, or policy may effect the outcome. As discussed above, an increasing number of states are passing specific legislation that mandates referral of certain types of cases to the police or the prosecutor.²²⁶ Child protective agency rules or policies may accomplish the same result. In New York City, for example, administrative regulations require child protective workers to notify the police in the following situations:

- 1) in cases in which a crime is occurring;
- 2) when the family makes itself inaccessible and there is reason to fear for the safety of the child;
- 3) when speed is essential and police proximity to the child's location gives the police faster access than the child protective service.²²⁷ In addition, the prosecutor may have formal guidelines for determining when child abuse cases should be prosecuted. That the "powers that be" have determined that such cases should be sent to the police or prosecutor increases the likelihood that a prosecution will result. On the other hand, a too general mandate, such as the one above, may not have the desired effect.

B. Personal Attitudes

The personal attitudes, values, or preferences of the individual decision-maker may effect the outcome. Police and prosecutors are not automatons. Their personal

223. F. MILLER, *supra* note 119, at 164-65.

224. PROSECUTION AND DEFENSE FUNCTION STANDARDS, *supra* note 112, at 95-96.

225. 377 U.S. 266 (1964).

226. See *supra* notes 50-59 and accompanying text (discussing laws requiring referral to law enforcement authorities).

227. New York Department of Social Services, *Administrative Directive 83 ADM-70 5* (December 31, 1983).

views about child abuse, child abusers, the utility of social work responses, and the benefits of criminal prosecution and sanctions inevitably affect their decisions.

Admittedly, some of these personal attitudes are unconscious or so subtle that they are not subject to discovery. But some are not, and data about them should be collected.

C. Community Pressures

Community or media pressures may affect the outcome. As mentioned previously, many children die or suffer serious injuries after their plight comes to the attention of the authorities.²²⁸ Child protective proceedings are confidential, so that few of these tragedies come to public attention. But enough do that all communities have had their share of news stories about children who have been "allowed to die."

Until recently, such horror stories were seen as evidence of inadequate staffing and poor administrative procedures. As a result, they often sparked major programmatic and administrative reforms.²²⁹ However, given past expansion of child protective programs, there is a growing tendency to blame individual decision-makers for the deaths or further injury of these children. What follows is a spate of editorials calling for action to protect children, for child abuse laws with "teeth," and, as described earlier, for more criminal prosecution.²³⁰ The effect of this general atmosphere on individual police and prosecutors is as real as a formal policy, and must be assessed.

X. CONCLUSION

Child abuse and child neglect are community problems requiring a cooperative multidisciplinary response by law enforcement, child protective services, and the judicial system. This Article has discussed the significant contributions made by law enforcement agencies in a community program for the protection of children. Police provide a protective function through case finding and reporting. Law enforcement officers have the authority to take children into protective custody, thereby removing them from further risk of harm. Police also have many attributes that are of great value in the investigation and assessment of child abuse and neglect cases. Police have the authority to arrest a parent suspected of abusing a child. Police also are responsible for the initiation of criminal prosecutions. Criminal prosecution affirms society's disapproval of child abuse.

It is increasingly being recognized that law enforcement agencies lack adequate guidelines for making these crucial decisions. Seventeen years ago, the President's Commission on Law Enforcement and Administration of Justice lamented this failing:

228. See *supra* notes 27-29 and accompanying text (discussing child abuse occurring while child is under protective agency supervision).

229. See, e.g., New York State Assembly Select Committee on Child Abuse, *Report*, ii-v (1972).

230. See *supra* notes 38-40 and accompanying text (discussing backlash against decriminalization and call for increased penalties for child abuse).

Many police departments have published "general order" or "duty" or "rules, regulations, and procedures" manuals running to several hundred pages. They deal extensively, and quite properly, with the personal conduct of officers on and off duty, with uniform and firearms regulations, with the use of departmental property, with court appearances by officers, with the correct techniques of approaching a building in which a burglary may be in progress. . . . What such manuals almost never discuss are the hard choices policemen must make every day: whether or not to break up a sidewalk gathering, whether or not to intervene in a domestic dispute, whether or not to silence a street-corner speaker, whether or not to stop and frisk, whether or not to arrest²³¹

The situation described by the President's Commission leaves the patrolman—the lowest ranking officer of the police agency—responsible for making some of the most difficult and complex decisions. The absence of adequate guidance from superiors leaves an officer no choice but to develop his own informal guidelines. As Professor Davis points out: "No other federal, state, or local agency, so far as I know, delegates so much power to subordinates. No other agency, so far as I know, does so little supervising of vital policy determinations which directly involve justice or injustice to individuals."²³²

This Article has attempted to begin filling this gap—by laying out, in broad outline, a typology of arrest and prosecution decision-making factors. But it is only a first step; the factors described in this Article need elaboration and transformation into operational definitions to better guide decision-making by police and prosecutors.

231. STANDARDS, *supra* note 63, at 122 (quoting, The President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 103 (1967)).

232. K. DAVIS, *supra* note 61, at 88.

APPENDIX 1

ACTIONS TAKEN BY CHILD PROTECTIVE AGENCIES*

Service	Percent of Families**
Casework Counseling	83.0%
Homemaker Services	4.3%
Day Care Services	5.8%
Foster Care	11.8%
Shelter Care	8.8%
Health Services	27.0%
Juvenile/Family Court Petition	14.4%
Criminal Action Taken	4.5%
No Action Taken	14.8%
Other Protective Services	12.8%

* U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD ABUSE AND NEGLECT REPORTING (1978) 36, Table 28 (DHEW 1979).

** Multiple responses exist for most families.

*

APPENDIX 2

THE GROUNDS FOR A REPORT OF SUSPECTED CHILD ABUSE OR NEGLECT

Direct Evidence

- Eyewitness observations of a parent's abusive or neglectful behavior;
- Children found in physically dangerous situations;
- The child's description of being abused or neglected;
- The parent's own description of abusive or neglectful behavior;
- Demonstrated parental inability to care for a newborn baby; or
- Demonstrated parental disabilities (for example, mental illness or retardation or alcohol or drug abuse) severe enough to make child abuse or child neglect likely.

Circumstantial Evidence

- Suspicious injuries suggesting physical abuse;
- "Accidental" injuries suggesting gross inattention to the child's need for safety;
- Physical injuries or medical findings suggesting sexual abuse;
- Signs of severe physical deprivation suggesting general child neglect;
- Severe dirt and disorder in the home suggesting general child neglect;
- Apparently untreated physical injuries, illnesses, or impairments suggesting medical neglect;
- Unexplained absences from school suggesting educational neglect;
- Apparent parental indifference to a child's severe emotional or developmental problems suggesting emotional maltreatment;
- Apparent parental condonation of or indifference to a child's misbehavior suggesting improper ethical guidance; or
- Apparently abandoned children.

Source: D. BESHAROV, REPORTING SUSPECTED CHILD ABUSE AND NEGLECT (in press, 1988).

APPENDIX 3

CHILD ABUSE SITUATIONS REQUIRING POLICE INVOLVEMENT

In the following situations, child protective agencies need the assistance of the police:

- when the case appears serious enough to warrant the consideration of arrest or criminal prosecution;
- when the child protective agency cannot be reached (which is often the case at night and on weekends and holidays) *and* an immediate response is needed;
- when speed is essential and police proximity to the child's location gives the police faster access than the child protective service;
- when a child seems to be in *immediate* danger and the child protective worker cannot enter the home or the place where the child is located or the parents otherwise make the child inaccessible;
- when a child must be placed in protective custody against parental wishes;
- when police assistance is needed to protect the person reporting or the child protective worker or to otherwise maintain order (for example, when the parent becomes overly belligerent or physically threatening),
or
- when it appears that the suspect may flee.

Source: D. BESHAROV, REPORTING SUSPECTED CHILD ABUSE AND NEGLECT (in press, 1988).

APPENDIX 4

SITUATIONS SUGGESTING THE NEED FOR PROTECTIVE CUSTODY

- The child was severely assaulted, i.e., hit, poisoned, or burned, so severely that serious injury resulted—or could have resulted. (For example, the parent threw an infant against a wall, but somehow no serious injury resulted.)
- The child has been systematically tortured or inhumanely punished. (For example, the child was locked in a closet for long periods of time, forced to eat unpalatable substances, or forced to squat, stand, or perform other unreasonable acts for long periods of time.)
- The parent's reckless disregard for the child's safety caused serious injury—or could have done so. (For example, the parent left a very young child home alone under potentially dangerous circumstances.)
- The physical condition of the home is so dangerous that it poses an immediate threat of serious injury. (For example, exposed electrical wiring or other materials create an extreme danger of fire or upper story windows are unbarred and easily accessible to young children.)
- The child has been sexually abused or sexually exploited.
- The parents have purposefully or systematically withheld essential food or nourishment from the child. (For example, the child is denied food for extended periods of time as a form of punishment for real or imagined misbehavior.)
- The parents refuse to obtain (or consent to) medical or psychiatric care for the child that is needed to prevent or treat a serious injury or disease. (For example, the child's physical condition shows signs of severe deterioration to which the parents seem unwilling or unable to respond.)
- The parents appear to be suffering from severe mental illness, mental retardation, drug abuse, or alcohol abuse so severe that they cannot provide for the child's basic needs.
- The parents have abandoned the child. (For example, the child has been left in the custody of persons who have not agreed to care for the child for more than a few hours and who do not know how to reach the parents.)
- There is reason to suspect that the parents may flee with the child. (For example, the parents have a history of frequent moves or of hiding the child from outsiders.)
- There is specific evidence that parental anger and discomfort about the report and subsequent investigation will be directed towards the child in the form of retaliation against him. (Such information could be gained through a review of past parental behavior, statements, and behaviors of parents during the investigative interview or reports from others who know the family.)
- The parents have been arrested (for any reason) and there is no one to care adequately for the child.

Note: In any of the above situations, the younger the child, the greater is the presumable need for protective custody.

Source: D. BESHAROV, REPORTING SUSPECTED CHILD ABUSE AND NEGLECT (in press, 1988).

APPENDIX 5

CONDITIONS REQUIRING IMMEDIATE MEDICAL ATTENTION

- loss of movement in an extremity, or other evidence of a broken bone;
- severe or unusual bleeding;
- severe or unusual burns;
- severe or unusual bruises (especially to the head or abdomen);
- head injuries;
- unconsciousness or prolonged and unexplained dizziness;
- unexplained seizures;
- prolonged and severe diarrhea or vomiting;
- symptoms of severe malnutrition or failure to thrive;
- signs of sexual abuse (as much to preserve the evidence as to treat the injuries); and
- serious but apparently unattended medical problems, such as high fever or difficulty in breathing.

Source: D. BESHAROV, REPORTING SUSPECTED CHILD ABUSE AND NEGLECT (in press, 1988).

APPENDIX 6

CONDITIONS SUGGESTING THE NEED TO ARREST A PARENT

Subject to the provisions of state law and the existence of probable cause, the following situations suggest the need to arrest the parent or other suspected perpetrator:

- a criminal prosecution seems likely and there is reason to believe that the suspect will flee;
- the arrest of the perpetrator is the only way to provide reasonable assurance of protection of the child;
- arrest of the suspect will sufficiently protect the child so that the child need not be removed from the home;
- the suspect's arrest is necessary to protect the peace.
- An arrest may also be made in some circumstances without the intent of presenting the case to the prosecutor. For example, an arrest might result during efforts to gain entrance into a home to assess the safety of the child.

APPENDIX 7

FACTORS IN DECIDING WHETHER PUNISHMENT WAS "REASONABLE"

In the absence of parental conduct whose reasonably foreseeable consequence was—or could have been—the child's serious physical injury, the following factors are used to decide whether corporal punishment was "reasonable":

- Was the purpose of the punishment to preserve discipline or to train or educate the child? Or, was the punishment primarily for the parent's gratification, or the result of the parent's uncontrolled rage.
- Did the child have the capacity to understand or appreciate the corrective purpose of the discipline? (Very young children and mentally disabled children cannot.)
- Was the punishment appropriate to the child's misbehavior? (However, no matter how serious a child's misbehavior, extremely hurtful or injurious punishments are never justified.)
- Was a less severe but equally effective punishment available?
- Was the punishment unnecessarily degrading, brutal, or beastly in character, or protracted beyond the child's power of endurance?
- If physical force was used, was it recklessly applied? (Force directed towards a safe part of the body, such as the buttocks, ordinarily is much more reasonable than force directed toward vulnerable organs, such as the head or genitalia.)

Source: D. BESHAROV, REPORTING SUSPECTED CHILD ABUSE AND NEGLECT (in press, 1988).

APPENDIX 8

THE LEVELS OF HARM

To discriminate among the degrees of harm, the National Incidence Study established the following three levels of harm:

- No harm requirement* — acts/omissions having this threshold are assumed to be significantly damaging to the child's emotional health or development and are in-scope, whether or not there is concrete evidence of injury or impairment;
- Moderate injury/impairment* — acts/omissions having this threshold are in-scope only if there is reasonable cause to believe that some actual injury or impairment to the child has occurred during the study period. The injury/impairment must be serious enough to persist for at least 48 hours; or
- Serious injury/impairment* — acts/omissions having this threshold are in-scope only if there is reasonable cause to believe that the act/omission caused or materially contributed to the occurrence or unreasonable prolongation of a "serious" injury or impairment, one: (a) producing significant, long-lasting impairment of bodily functioning or of mental or psychological capacities, or (b) requiring professional medical or other rehabilitative care (e.g., psychotherapy, counseling, special educational services) to relieve acute present suffering or to prevent significant long-lasting impairment.

Source: WESTAT, OPERATIONAL DEFINITION OF CHILD MALTREATMENT, at 2-16 to 2-17.

APPENDIX 9

THE FORMS OF CHILD MALTREATMENT

Physical Battering — physical assaults (such as striking, kicking, biting, throwing, or burning) that caused, or could have caused, serious physical injury to the child;

Physical Endangerment — reckless behavior toward a child (such as leaving a young child alone or placing a child in a hazardous environment) that caused, or could have caused, serious physical injury;

Physical Neglect — failure to provide the food, clothing, hygiene, or other needed care that caused, or over time would cause, serious physical injury, sickness or disability;

Medical Neglect — failure to provide the medical, dental or psychiatric care needed to prevent or treat serious physical or emotional injury, illness or disability;

Sexual Abuse — vaginal, anal or oral intercourse; vaginal or anal penetrations; or other serious forms of inappropriate sexual contacts that caused, or over time would cause, serious emotional injury.

Sexual Exploitation — use of a child in prostitution, pornography, or other sexually exploitative activities that caused, or over time would cause, serious emotional injury;

Emotional Abuse — physical or emotional assault (such as torture and close confinement) that caused, or could have caused, serious emotional injury;

Developmental Neglect — failure to provide needed emotional nurturing and physical or cognitive stimulation that caused, or over time would cause serious developmental problems;

Improper Ethical Supervision — parental behavior that contributes to the delinquency of the child;

Educational Neglect — failure to send a child to school in accordance with the state's educational law;

Abandonment — leaving a child alone or in the care of another under circumstances that demonstrate an intentional abdication of parental responsibility.

Source: Besharov, *Doing Something About Child Abuse: The Need To Narrow The Grounds For State Intervention*, 8 HARV. J.L. & PUB. POL'Y 540, 589 (1985).

APPENDIX 10

THE LEVELS OF INTENT

To discriminate among the various levels/degrees of parental culpability, the ALI Model Penal Code establishes four broad categories of state of mind (or intent):

- Purposely*, when the conduct and the consequent harm is the parent's "conscious object";
- Knowingly*, when the parent is "aware" that the conduct is "practically certain" to cause the resultant harm;
- Recklessly*, when a parent "consciously disregards a substantial and unjustifiable risk" that the conduct will occur or the harm result;
- Negligently*, when a parent "should be aware" (based on a reasonable person standard) of "a substantial and unjustifiable risk" that the conduct will occur or the harm result.

Derived from: MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

APPENDIX 11

SPECIFIC STATE CRIMINAL LAWS ON CHILD MALTREATMENT²³³

PHYSICAL ABUSE 20 JURISDICTIONS

Ala. Code § 26-15-3 (1986) ("torture, willfully abuse, cruelly beat") (1-10 years penitentiary).

Cal. Penal Code § 273d (West 1986) ("cruel or inhuman corporal punishment or injury resulting in a traumatic condition") (2,4, or 6 years in state penitentiary, or in county jail for not more than one year).

Conn. Gen. Stat. Ann. § 53-20 (West 1985) ("any person who, having the control and custody of any child under the age of sixteen years, in any capacity whatsoever, maltreats, tortures, overworks, cruelly or unlawfully punishes or willfully or negligently deprives such child of necessary food, clothing or shelter. . .") (\$500 and/or not more than 1 year).

D.C. Code Ann. § 22-901 (1981) ("Any person who shall torture, cruelly beat, abuse or otherwise wilfully maltreat") (\$250 and/or not more than 2 years).

Fla. Stat. Ann. § 827.03 (West 1984) ("Whoever: (1) Commits aggravated battery on a child, willfully tortures a child, maliciously punishes a child, or willfully and unlawfully cages a child") (2nd degree felony).

Idaho Code § 18-1501 (1979) ("unjustifiable physical pain or mental suffering") (Not more than one year in county prison, not less than one year nor more than ten years in state prison).

Ill. Ann. Stat. ch. 23, § 2368 (Smith-Hurd 1986) ("Any person who shall unnecessarily expose to the inclemency of the weather, or shall in any other manner injure in health or limb, any child") (class 4 felony).

Ky. Rev. Stat. § 508.100 (1985) ("torture, cruel confinement, or cruel punishment", causes serious physical injury, places child in situation that might cause serious physical injury) (class C felony).

Mich. Comp. Laws Ann. § 750.136 (1968) (cruelty to children) (felony).

Minn. Stat. Ann. § 609.377 (West 1986) ("A parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts, evidences unreasonable force or cruelty which causes substantial emotional harm to a child is guilty of malicious punishment of a child" and may be imprisoned for up to one year and/or receive a fine of \$3,000. "If the punishment results in substantial bodily harm, that person may be sentenced to imprisonment for not more than three years or to payment of not more than \$5,000, or both.")

Nev. Rev. Stat. § 200.508 (1981) ("Any adult person who: (a) willfully causes or permits a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect") (gross misdemeanor; 1-20 years in state prison).

N.C. Gen. Stat. § 14-318.4 (1983) (class 1 felony).

Okla. Stat. Ann. tit. 21, § 843 (West 1983) ("Any parent or other person who shall willfully or maliciously injure, torture, maim, or use unreasonable force

233. Prepared by Krista Peterson from materials provided by the Information Clearinghouse of the U.S. National Center on Child Abuse and Neglect.

upon a child under the age of 18" (1-20 years in state penitentiary, or up to 1 year in county jail, and/or \$500-\$1,000).

S.C. Code Ann. § 20-7-70 (1985) ("Whoever tortures, torments, cruelly ill-treats, deprives of necessary sustenance or shelter or inflicts unnecessary pain or suffering upon any child or causes the same to be done") (misdemeanor; 30 days or \$100).

S.D. Comp. Laws Ann. § 26-10-1 (1984) ("Any person who abuses, exposes, tortures, torments or cruelly punishes a minor" in a manner which does not constitute aggravated assault) (class 4 felony).

Tenn. Code Ann. § 39-4-422 (1986) ("A person is guilty of the offense of aggravated child abuse when he commits the offense of child abuse . . . and: (1) The act of abuse results in the serious bodily injury of the child; or (2) A deadly weapon is used to accomplish the act of abuse") (felony; 1-5 years).

Vt. Stat. Ann. tit. 13, § 1304 (1974) ("A person over the age of sixteen years, having the custody, charge or care of a child under ten years of age, who wilfully assaults, ill treats, neglects or abandons or exposes such child") (not more than 2 years and/or up to \$500).

W.Va. Code Ann. § 61-8-24 (1986) ("Any person who shall cruelly ill treat, abuse, or inflict unnecessarily cruel punishment upon, any infant or minor child") (misdemeanor; \$100 to \$1,000 and with court's discretion may be imprisoned in the county jail not exceeding 1 year for each offense).

Wyo. Stat. § 6-4-403 (1983) (No parent, guardian or custodian of a child shall: (i) Abandon the child without just cause; or (ii) Knowingly or with criminal negligence cause, permit or contribute to endangering of the child's life or health by violating a duty of care, protection or support) (first offense: misdemeanor resulting in imprisonment of no more than 1 year and/or a fine of up to \$1000; second offense: no more than 5 years and/or \$5000).

CHILD ABUSE 12 JURISDICTIONS

Colo. Rev. Stat. § 18-6-401(1)(7) (1985) (felony).

Kan. Stat. Ann. §§ 21-3503, 21-3504 (1985) (indecent liberties with a child: class C felony; aggravated indecent liberties with a child: class B felony).

Me. Rev. Stat. Ann. tit. 19, § 218 (1981) (not more than \$100 or 11 months).

Md. Ann. Code art. 27, § 35A(a) (1982) (felony, not more than 15 years in penitentiary).

Mo. Rev. Stat. § 568.060 (1986) (Class C felony, unless in the course thereof the person inflicts serious emotional injury on child, making it a class B felony).

Neb. Rev. Stat. § 28-707 (1982) (class 1 misdemeanor if done negligently, class IV felony if done knowingly and intentionally).

N.J. Rev. Stat. § 639.3 (1974) (\$500 and/or no more than 3 years)

N.M. Stat. Ann. § 30-6-1 (1982) (first offense: 4th degree felony; second and subsequent offenses: 2nd degree felony) (if the abuse results in the child's death or great bodily harm: first offense: 2nd degree felony; second offense: 1st degree felony).

Tenn. Code Ann. § 37-1-157(a) (1984) (misdemeanor; not more than \$50 and/or 11 months and 29 days).

Utah Code Ann. § 78-3a-19 (1986) (class B misdemeanor).
 Vt. Stat. Ann. tit. 13, § 1304 (1974) (2 years or fine of \$500)
 Wyo. Stat. § 6-2-503 (1984) (not more than 5 years in state penitentiary).

ENDANGERING THE WELFARE OF A MINOR 20 JURISDICTIONS

Cal. Penal Code § 273a (West 1985) (misdemeanor). Conn. Gen. Stat. Ann. § 53-21 (West 1985) (\$500 and/or no more than 10 years).
 Del. Code Ann. tit. 11, § 1102 (1979) (class A misdemeanor).
 D.C. Code Ann. § 22-901 (1981) (misdemeanor; \$250).
 Hawaii Rev. Stat. § 709-904 (1976) (misdemeanor).
 Ill. Ann. Stat. ch. 23, § 2370 (Smith-Hurd 1986) ("improper supervision of a child": \$25 fine; 2nd offense: no more than \$50; 3rd offense: class B misdemeanor).
 Iowa Code Ann. § 726.6 (West 1979) (class C felony).
 Kan. Stat. Ann. § 21-3608 (1981) (class A misdemeanor).
 Ky. Rev. Stat. § 530.060 (1975) (class A misdemeanor).
 Me. Rev. Stat. Ann. tit. 17-A, § 554 (1982) (class D crime).
 Mo. Rev. Stat. § 568.050 (1986) (class A misdemeanor).
 Mont. Code Ann. § 45-5-622(1),(3) (1985) (up to \$500 and/or 6 months in county jail; 2nd offense: up to \$1000 and/or 6 months in county jail).
 Neb. Rev. Stat. § 38-117 (1984) (up to \$100 and/or 3 months in county jail).
 N.H. Rev. Stat. Ann. § 639.3 (1983) (child under 16 years old is solicited for the purpose of creating a visual representation or to engage in sexual penetration: class B felony; all other violations: misdemeanor).
 N.Y. Penal Law § 260.10 (McKinney 1980) (class A misdemeanor).
 N.D. Cent. Code § 14-09-22 (1981) (class C felony).
 Or. Rev. Stat. § 163.454 (1981) (class A misdemeanor).
 Pa. Stat. Ann. tit. 18, § 4304 (Purdon 1983) (misdemeanor of the 2nd degree).
 Tenn. Code Ann. § 39-4-402 (1982) (not more than 5 years in the penitentiary or not less than six months in the county jail).
 Va. Code § 40.1-103 (1986) (misdemeanor).

SEXUAL CRIMES 19 JURISDICTIONS²³⁴

Alaska Stat. § 11.41.434 (1983) (sexual abuse of minor in the 1st degree: unclassified felony); Alaska Stat. § 11.41.436 (sexual abuse of minor in the 2d degree: class B felony); Alaska Stat. § 11.431.438 (sexual abuse of minor in the 3rd degree: class C felony); Alaska Stat. § 11.41.440 (sexual abuse of minor in the 4th degree: class A misdemeanor).
 Ariz. Rev. Stat. Ann. § 13-1404 (1985) (sexual assault on child: class 4 felony).
 Colo. Rev. Stat. § 18-3-414 (Supp. 1983) (sexual abuse: felony).
 Fla. Stat. Ann. § 794.011(2) (West 1984) (capital felony or life felony); Fla. Stat. Ann. § 794.011(3) (life felony); Fla. Stat. Ann. § 794.011(4) (felony in the 1st degree).

234. This category does not include sexual exploitation.

- Ga. Code Ann. § 16-6-4 (1986) (child molestation: 1 to 20 years; 2nd and 3rd offense: not less than 5 years; 4th offense: 20 years).
- Idaho Code § 18-1506 (1986) (felony).
- Ill. Ann. Stat. ch. 38 § 12-13 (1986) (criminal sexual assault: class 1 felony; Ill. Ann. Stat. ch. 38 § 12-14 (aggravated criminal assault: class X felony).
- Ind. Code Ann. §§ 35-42-4-5,6 (West 1984) (felony).
- Iowa Code Ann. § 709.3 (1986) (sexual abuse in the 2nd degree: class B felony).
- Kan. Stat. Ann. § 21-3506 (1986) (aggravated criminal sodomy: class B felony); Kan. Stat. Ann. § 21-3517 (sexual battery: class D felony); Kan. Stat. Ann. § 21-3602 (incest: class E felony).
- Ky. Rev. Stat. § 532.045 (1)(a)-(i), (2) (1986) (sexual abuse of child prohibits offender from parole, probation or conditional discharge).
- La. Rev. Stat. Ann. § 14:81.2 (West 1986) (molestation of a juvenile: not more than \$5000 or 1-10 years, with or without hard labor; if the offender had control or supervision over the juvenile: up to \$10,000 or 1-15 years, with or without hard labor).
- Me. Rev. Stat. Ann. tit. 17-A, § 554 (1982) (endangering the welfare of a child: class D crime).
- Minn. Stat. Ann. § 609.342 (West 1986) (criminal sexual conduct in the 1st degree: \$35,000 and/or up to 20 years); Minn. Stat. Ann. § 609.343 (criminal sexual conduct in the 2nd degree: up to 15 years and/or \$30,000); Minn. Stat. Ann. § 609.344 (criminal sexual conduct in the 3rd degree: up to 10 years and/or \$20,000); Minn. Stat. Ann. § 609.345 (criminal sexual conduct in the 4th degree: up to five years and/or \$10,000).
- Neb. Rev. Stat. § 28-320.01 (1984) (sexual assault of child: class IV felony).
- N.H. Rev. Stat. Ann. § 639:3 I, II, V (1983) (class B felony).
- N.C. GEN. STAT. § 14-318.4 (Supp. 1983) (class I felony).
- S.C. CODE ANN. § 16-3-810 (Law Co-op. 1985) (criminal sexual conduct of the second degree)
- UTAH CODE ANN. §§ 76-5-404, 76-5-404.1 (Supp. 1986) (sexual abuse: felony in the 2nd degree, aggravated sexual abuse: felony in the 1st degree, minimum mandatory term of 3, 6, or 9 years and which may be for life).

SEXUAL EXPLOITATION OF A MINOR 47 JURISDICTIONS

A general definition of sexual exploitation which encompasses most of the common elements found in each state statute is:

Knowingly: (a) causing, inducing, enticing or permitting a child [ages varying from state to state from 15 and under to 18 and under] to engage in, or be used for, any explicit sexual conduct for any commercial purpose or the making of any sexually exploitative material; or (b) preparing, arranging for, publishing, producing, promoting, making, selling, financing, offering, exhibiting, advertising, dealing in, distributing, or producing a performance of, any sexually exploitative material. Explicit sexual conduct typically includes: "actual or simulated: (A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) Bestiality; (C)

Masturbation; (D) Sadomasochistic abuse for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals or pubic area of any person."

ALA. CODE §§ 13A-12-196, 13A-12-197 (Repl. Vol. 1982) (class A or B felony)

ALASKA STAT. § 11.41.455 (1985) (class B felony)

ARIZ. REV. STAT. ANN. § 13-3553 (Supp. 1985) (class 2 felony) ARK. STAT. ANN. §§ 41-4207, 41-4208 (Supp. 1985) (class B felony)

CAL. PENAL CODE §§ 311.2(b), 311.4(c) (West Supp. 1986) (felony punishable by 2, 3, or 6 years imprisonment, or fine not exceeding \$100,000, or both)

COLO. REV. STAT. §§ 18-6-403, 18-6-404 (Supp. 1985) (class 3 felony)

CONN. GEN. STAT. ANN. § 53a-196a (West Supp. 1985) (class B felony)

DEL. CODE ANN. tit. 11, § 1108 (Supp. 1984) (class B felony)

D.C. CODE ANN. §§ 22-2012, 22-2013 (Supp. 1986) (felony punishable by fine of not more than \$5,000 or imprisonment for not more than 10 years, or both for 1st offense; or fine of not more than \$15,000 or imprisonment for not more than 20 years, or both for repeat offenders)

FLA. STAT. ANN. § 827.071 (West Supp. 1986) (2nd degree felony)

GA. CODE ANN. § 16-12-100 (1984) (felony, 3-20 and/or \$20,000)

HAWAII REV. STAT. § 707-750 (Supp. 1984) (class B felony)

IDAHO CODE § 18-1507 (Supp. 1986) (felony)

ILL. ANN. STAT. ch. 23, § 2351 (Smith-Hurd 1968), ch. 38, § 11-20.1 (Smith-Hurd Supp. 1986) (class 1 felony)

IND. CODE ANN. § 35-42-4-4 (Burns Repl. Vol. 1979) (class D felony)

IOWA CODE ANN. § 728.12 (West Supp. 1986) (class C felony for any person who "employs, uses, persuades, induces, entices, coerces, knowingly permits, or otherwise causes a child to engage in a prohibited sexual act"; class D felony for any person who "knowingly promotes any material visually depicting a live performance of a child engaging in a prohibited sexual act")

KAN. STAT. ANN. § 21-3516 (1981) (class E felony)

KY. REV. STAT. § 531-310 (Repl. Vol. 1985) (class D felony if the minor so used is less than 18 years old; class C felony if the minor so used is less than 16; class B felony if the minor incurs physical injury)

LA. REV. STAT. ANN. § 14:81.1 (West 1986) (fine of not more than \$10,000 and imprisonment at hard labor for not less than two years or more than ten years, without benefit of parole, probation, or suspension of sentence) ME. REV. STAT. ANN. tit. 17, § 2922 (1983 & Supp. 1985) (class B crime, imprisonment for not less than 5 years if 1st offense; class A crime, imprisonment for not less than 10 years for subsequent offense)

MD. CODE ANN. art. 27, § 419A (Supp. 1985) (felony, fine, of not more than \$25,000 and/or imprisonment for not more than 10 years) MASS. GEN. LAW ANN. ch. 272, §§ 29A, 29B (West Supp. 1986) (imprisonment for not less than 10 nor more than 20 years, and/or by fine of not less than \$10,000 nor more than \$50,000)

MICH. COMP. LAWS ANN. § 750.140 (1968) and § 750.145a (2) (Supp. 1982-1983) (misdemeanor, punishable by imprisonment in the county jail not more than one year or by a fine of not more than \$500)

- MINN. STAT. ANN. § 617.246 (West Supp. 1986) (felony, imprisonment for not more than 5 years, and/or fine of not more than \$10,000 for the first offense, \$20,000 for a subsequent offense)
- MISS. CODE ANN. §§ 97-5-33, 97-5-35 (Supp. 1985) (felony, fine of not less than \$25,000 nor more than \$50,000 and imprisonment for not less than 2 years nor more than 20)
- MO. ANN. STAT. § 568.060 (Vernon Supp. 1986) (class B or C felony, depending on whether serious emotional injury is inflicted)
- MONT. REV. CODE ANN. § 45-5-625 (1983) (fine not exceeding \$10,000 and/or imprisonment not exceeding 20 years)
- NEB. REV. STAT. § 28-1463.03 - .04 (1985) (class III felony for first offense; class II felony for subsequent offense)
- NEV. REV. STAT. §§ 200.710, 200.720, 200.730, 200.740 (1981) (felony, imprisonment for not less than 1 year nor more than 6 years and/or fine of not more than \$5,000)
- N.H. REV. STAT. ANN. § 649-A:3 (Supp. 1983) (class B felony for first offense; class A felony for subsequent offense)
- N.J. STAT. ANN. § 2C:24-4 (West Supp. 1986) (third or fourth degree crime)
- N.M. STAT. ANN. §§ 30-6A-3, 30-6A-4 (1986) (felony)
- N.Y. PENAL LAW § 263.05 (McKinney 1980) (class C felony)
- OHIO REV. CODE ANN. §§ 2919.22, 2907.321-.323 (Page Repl. Vol. 1985) (felony)
- OKLA. STAT. ANN. tit. 21 §§ 1021.2, 1021.3 (1983) (felony, imprisonment for not more than 10 years and/or fine of not more than \$10,000)
- PA. STAT. ANN. tit. 18, § 6312 (Purdon 1983) (felony in the second degree for photographing, felony in the third degree for dissemination)
- R.I. GEN. LAWS § 11-9-1 (1981) (imprisonment for not more than 20 years, and/or fine of not more than \$20,000)
- S.C. CODE ANN. § 16-15-380 (Law. Co-op. 1985) (felony)
- S.D. CODIFIED LAWS ANN. § 22-22-23 (1979) (class 4 felony)
- TENN. CODE ANN. § 39-6-1137 (1986) (felony, imprisonment of not less than 3 years nor more than 21 and fine of not more than \$10,000)
- TEX. PENAL CODE ANN. § 43.25 (Supp. 1983) (third degree felony)
- UTAH CODE ANN. § 76-5a-3 (Supp. 1986) (second degree felony)
- VT. STAT. ANN. tit. 13, §§ 2822, 2823, 2824(a), 2225 (Supp. 1986) (imprisonment for not more than 10 years and fine of not more than \$20,000 for first offense; not more than 15 years and not more than \$50,000 for subsequent convictions)
- VA. CODE § 18.2-374.1 (Supp. 1986) (class 4 or 5 felony)
- W. VA. CODE § 61-8C-1 to -3 (1984) (felony)
- WIS. STAT. ANN. § 940.203 (West 1982 & Supp 1986) (class C felony)
- WYO. STAT. §§ 14-3-102, 14-3-103 (1978) (misdemeanor, fine of not less than \$100 nor more than \$1,000 or imprisonment for not more than 1 year for first offense, not more than 5 years for subsequent offense)

NON-SUPPORT OF A MINOR 25 JURISDICTIONS

ALA. CODE § 13A-13-4 (Repl. Vol. 1982) (class A misdemeanor)

- ARK. STAT. ANN. § 41-2405 (1), (b), (c), (d), (2) (Supp. 1985) (class A misdemeanor or class D felony)
- CAL. PENAL CODE § 270 (West Supp. 1986) (misdemeanor \$2,000 and/or 1 year imprisonment)
- CONN. GEN. STAT. ANN. § 53-20 (West 1985) (\$500. and/or 1 year)
- D.C. CODE ANN. § 22-901 (1981) (misdemeanor punishable by fine of \$250 and/or imprisonment for not more than 2 years)
- GA. CODE ANN. § 16-5-70 (1981) ("cruelty to children when he [parent, guardian, or other person supervising the welfare of the child] willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized"— not less than nor more than 20 years imprisonment)
- GUAM PENAL CODE § 270 (1970) (misdemeanor, \$1,000 or up to 1 year)
- HAWAII REV. STAT. § 709-903 (1976) (misdemeanor)
- IND. CODE ANN. § 35-46-1-5(a) (Burns Repl. Vol. 1979) (class D felony)
- KAN. STAT. ANN. § 21-3605(1)(a), (g) (1981) (class E felony)
- KY. REV. STAT. § 530.050 (1), (2), (5), (6) (Repl. Vol. 1985) (class A misdemeanor, flagrant non-support class D felony)
- LA. REV. STAT. ANN. § 14:74 A, D (West 1986) (\$500 and/or 6 months imprisonment)
- ME. REV. STAT. ANN. tit. 19, § 481 (1981) (\$300 - \$500 fine and/or 11 months - 2 years imprisonment, depending on nature of offense)
- MASS. GEN. LAW ANN. ch. 273 § 1 (West Supp. 1986) (\$500 fine and/or 2 years imprisonment)
- MINN. STAT. ANN. § 609.375(1)-(2) (West Supp. 1986) (fine of not more than \$300 or 90 days imprisonment; if non-support occurred for a period in excess of 90 days, up to 5 years imprisonment)
- N.Y. PENAL LAW § 260.05 (McKinney 1980) (class A misdemeanor)
- N.C. GEN. STAT. § 14-322 (Repl. Vol. 1981) (misdemeanor)
- N.D. CENT. CODE § 14-09-22 (Repl. Vol. 1981) (class C felony)
- OR. REV. STAT. § 163.555(1), (3) (Repl. Part 1985) (class C felony)
- PA. STAT. ANN. tit. 18, § 4321 (1983) (n/a)
- S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985) (misdemeanor— court's discretion as to punishment)
- V.I. CODE ANN. tit. 14, § 481 (1964) as amended by (B) (Supp. 1982) (\$500 or 1 year)
- VA. CODE § 20-61 (Supp. 1983) (misdemeanor—\$500 and/or 12 months or work release employment)
- WASH. REV. CODE ANN. § 26.20.035 (1986) (gross misdemeanor)
- WIS. STAT. ANN. § 52.05 (1) (Supp. 1984) (\$100 and/or 3 months in the city jail)

ABANDONMENT 25 JURISDICTIONS

- DEL. CODE ANN. tit. 11, § 1101 (1979) (class A misdemeanor)
- D.C. CODE ANN. § 22-901 (1981) (\$200 and/or 2 years)
- GA. CODE ANN. § 19-10-1(a)-(b) (1984) (felony—1 to 3 years not reducible to misdemeanor)
- GUAM PENAL CODE § 271 (1970) (1 year and/or \$500)

- HAWAII REV. STAT. § 709-902 (1976) (misdemeanor)
IDAHO CODE § 18-401 (1), (2) (1979) (\$500. and/or up to 14 years)
ILL. ANN. STAT. ch. 23, § 2359 (Smith-Hurd Supp. 1986) (class 4 felony)
IND. CODE ANN. § 35-46-1-4(a) (Burns Supp. 1980) (class D felony)
IOWA CODE ANN. § 726.3 (West 1979) (class C felony)
KAN. STAT. ANN. § 21-3604 (1981) (class E felony)
KY. REV. STAT. § 530.040 (Repl. Vol. 1985) (class D felony)
ME. REV. STAT. ANN. tit. 17-A, § 553 (1983) (class D crime)
MD. CODE ANN. art. 27, § 88(b) (Repl. Vol. 1982) (misdemeanor; \$100 fine and/or 3 years imprisonment)
MASS. GEN. LAWS ANN. ch. 119, § 39 (West 1975) (house of corrections for not more than 2 and one half years or state prison for no more than 5 years)
MICH. COMP. LAWS ANN. § 750.135 (1968) (felony)
MO. ANN. STAT. § 568.030 (Vernon 1979) (class D felony)
NEB. REV. STAT. § 28-705 (1985) (class I misdemeanor)
NEV. REV. STAT. § 200.508 (1985) (gross misdemeanor)
N.J. STAT. ANN. § 9:6-3 (West 1976) (misdemeanor; \$500 and/or 3 years imprisonment with or without hard labor)
N.Y. PENAL LAW § 260.00 (McKinney 1980) (class E felony)
N.C. GEN. STAT. § 14-322.1 (Cum. Supp. 1985) (class I felony) OR. REV. STAT. § 163.535 (Repl. Part 1985) (class C felony)
VT. STAT. ANN. tit. 13, § 1304 (1974) (2 years and/or \$500)
WASH. REV. CODE ANN. § 26.20.030 (1986) (class C felony)
WYO. STAT. § 14-2-301 (1978) (n/a)