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NOTES

INDIANA'S STATUTORY PROTECTION FOR THE ABUSED CHILD

INTRODUCTION

Children in our society are subjected to a great deal of pushing, pulling and scolding by those entrusted with their care. Most children have been punished physically at least one time in their life. Carried to its extreme, this pattern of child-rearing produces the abused child.¹

Recognition of the problem of child abuse² is a relatively recent phenomenon. The breakthrough in the identification of child abuse as a major problem of society came in 1962 when Kempe, Silverman, Steele, Droegemueller and Silver alerted fellow physicians to consider it as a potential diagnosis.³ This pioneering study also in-

1. A degree of violence against children is patterned into the child-rearing philosophies and practices of nearly all adults. This general attitude with respect to children is discussed in G. GIL, *VIOLENCE AGAINST CHILDREN* 7-17 (1970) [hereinafter cited as GIL]. For historical treatment of adult violence against children see Radbill, *A History of Child Abuse and Infanticide*, in *THE BATTERED CHILD* 3 (R. Helfer & C. Kempe eds. 1968); Solomon, *History and Demography of Child Abuse*, 51 *PEDIATRICS* 773 (1973).

Child abuse is just a variant form of this parent-child interaction: From early in infancy the children of abusing parents are expected to show exemplary behavior and a respectful, submissive, thoughtful attitude toward adult authority and society To be sure, such ideas are extremely prevalent in our culture and are essentially acceptable ideals of child rearing. Parents feel quite justified in following such principles. The difference between the non-abusing and abusing parent is that the latter implements such standards with exaggerated intensity, and most importantly, at an inappropriately early age.

Steele & Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children*, in *THE BATTERED CHILD* 103, 110 (R. Helfer & C. Kempe eds. 1968).

2. For the purpose of this note child abuse is defined simply as the intentional infliction of physical injury upon children by adults.

3. Kempe, Silverman, Steele, Droegemueller, & Silver, *The Battered-Child Syndrome*, 181 *J.A.M.A.* 17 (1962). They developed the term "battered child syndrome" and defined it as "a clinical condition in young children who have received some physical abuse, generally from a parent or foster parent." *Id.* at 17. Before 1962, the condition had been referred to in medical journals as "unrecognized trauma." See, e.g., Silverman, *The Roentgen Manifestations of Unrecognized Skeletal Trauma in Infants*, 69 *AM. J. ROENTGENOLOGY* 413 (1953). The term "battered child" has been criticized for its connotations of cruelty approaching sadism. Elmer, *Hazards in Determining Child Abuse*, 45 *CHILD WELFARE* 28, 29 (1966). Other terms that have been suggested as more accurate conceptually include: "maltreatment syndrome in

cluded some startling findings. Of 302 cases of child abuse reported in hospitals nationwide, 33 of the children died and 85 suffered permanent brain injury.⁴ District attorneys disclosed 447 cases of abuse in a similar one-year period. Of these, 45 resulted in death and 29 in permanent brain damage.⁵ An editorial in the same issue of the *Journal of American Medical Association* speculated that child abuse may be a more frequent cause of death in infants than leukemia, cystic fibrosis and muscular dystrophy.⁶

Each year an increasing number of cases of child abuse come to the attention of public authorities in Indiana. In 1967 there were 106 reports of abuse received in the state.⁷ The number grew to 125 in 1968⁸ and 273 in 1972.⁹ An enormous increase was registered in 1973, with 745 reports of abuse received during the year.¹⁰ These increases in reported cases are probably attributable to greater reporting rather than to a growing incidence of the problem in the state.¹¹

One vital part of Indiana's machinery for dealing with child abuse is the law. Indiana provides statutory protection for the abused child primarily in four ways: (1) a law requiring all persons to report suspected incidents of child abuse to public authorities; (2) provisions in the criminal law designed to punish the perpetrator of the abuse; (3) juvenile law provisions allowing abused children to be placed under protective supervision or removed from their home;

children," Fontana, Donovan, & Wong, *The "Maltreatment Syndrome" in Children*, 269 N. ENG. J. MED. 1389, 1389 (1963); and "child abuse syndrome," Silver, *Child Abuse Syndrome: A Review*, 96 MED. TIMES 803, 805 (1968).

4. Kempe, *et al.*, *supra* note 3, at 17.

5. *Id.*

6. Editorial, *The Battered-Child Syndrome*, 181 J.A.M.A. 42 (1962). The true incidence of death resulting from child abuse is obscured by classification of many infant deaths as accidental. Fontana, Donovan, & Wong, *supra* note 3, at 1389.

7. GIL, *supra* note 1, at 93. Gil conducted a survey of every incident of child abuse reported through legal channels throughout the United States in 1967 and 1968. The survey was initiated and funded by the Children's Bureau of the Department of Health, Education, and Welfare.

8. *Id.*

9. INDIANA STATE DEP'T OF PUBLIC WELFARE, BATTERED CHILDREN RECEIVING SERVICE (1972).

10. INDIANA STATE DEP'T OF PUBLIC WELFARE, BATTERED CHILDREN RECEIVING SERVICE (1973).

11. This explanation was offered for increases in reported cases nationwide. See GIL, *supra* note 1, at 96.

and (4) authorization for a program of child welfare services for dependent and neglected children through each county department of public welfare. It is the purpose of this note to discuss each of these general statutory provisions.¹²

THE REPORTING LAW

Abused children and abusing adults cannot be helped if their condition remains undetected. As a result, Indiana and all other states recently enacted legislation requiring the reporting of suspected cases of child abuse to public authorities.¹³ These statutes are designed to provide the state with the first indication that something is wrong in a particular child's environment. Only then can the protection and services of the state be invoked to aid in the resolution of the problem.

Indiana's reporting law,¹⁴ enacted in 1965,¹⁵ was patterned closely after the model statute developed by the Children's Bureau of the Department of Health, Education and Welfare.¹⁶ This first

12. Discussion throughout is hampered by a lack of reported cases in the area. Cases in juvenile court are not reported and apparently rarely appealed. Criminal prosecution of the perpetrators of child abuse is infrequent. An Indiana judge with juvenile court duties encountered the same difficulty in investigating Indiana law on neglected and dependent children. See Rakestraw, *Legal Aspects of Neglect*, RES GESTAE, October 1965, at 5.

13. Surveys of all the state reporting laws can be found in Daly, *Willful Child Abuse and State Reporting Statutes*, 23 U. MIAMI L. REV. 283 (1969); DeFrancis, *Child Abuse — The Legislative Response*, 44 DENVER L.J. 3 (1967); McCoid, *The Battered Child and Other Assaults upon the Family: Part One*, 50 MINN. L. REV. 1 (1965); Paulsen, *Child Abuse Reporting Laws: The Shape of Legislation*, 67 COLUM L. REV. 1 (1967); Comment, *The Abused Child: Problems and Proposals*, 8 DUQUESNE L. REV. 136 (1970); Note, *The Legal Response to Child Abuse*, 11 WM. & MARY L. REV. 960 (1970).

Individual state reporting laws are discussed in Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45 (1973) (Illinois); Comment, *The California Legislative Approach to Problems of Willful Child Abuse*, 54 CALIF. L. REV. 1805 (1966) (California); Note, *The Battered Child — Louisiana's Response to the Cry*, 17 LOYOLA L. REV. 372 (1971) (Louisiana); Note, *Parent and Child — Child Beating — Recent Legislation Requiring Reporting of Physical Abuse*, 45 ORE. L. REV. 114 (1966) (Oregon); Comment, *Oregon's Child Abuse Legislation: Some Additional Proposals*, 5 WILLAMETTE L.J. 131 (1968) (Oregon); 15 DEPAUL L. REV. 453 (1966) (Illinois); 18 U. FLA. L. REV. 503 (1965) (Florida); 18 WEST. RES. L. REV. 1405 (1967) (Ohio).

For an excellent description of the growing sentiment and lobbying that led to the enactment of child abuse reporting laws in the states see Paulsen, Parker, & Adelman, *Child Abuse Reporting Laws — Some Legislative History*, 34 GEO. WASH. L. REV. 482 (1966).

14. IND. ANN. STAT. §§ 52-1426 to -1431 (Cum. Supp. 1973), IND. CODE § 12-3-4.1 (1973).

15. Ch. 268, §§ 1-7, [1965] Ind. Acts 737 (repealed by Pub. L. No. 170, §§ 1-6, [1971] Ind. Acts 679).

16. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, *THE ABUSED*

attempt at child abuse reporting legislation in Indiana was soon found to be inadequate. In 1971 the law was repealed¹⁷ and replaced with a substantially different version.¹⁸

CHILD — PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD (1963).

For a discussion of the Children's Bureau model statute and other proposed models see Paulsen, *supra* note 13.

17. Pub. L. No. 170, §§ 1-6, [1971] Ind. Acts 679 (codified at IND. ANN. STAT. §§ 52-1426 to -1431 (Cum. Supp. 1973), IND. CODE § 12-3-4.1 (1973)).

18. The current reporting law reads as follows:

12-3-4.1-1. Protection of children from abuse—Purpose.—The purpose of this chapter is to provide protection for children who are cruelly treated by those responsible for their care and protection.

12-3-4.1-2. County department of public welfare—Report of abuse—Penalty for failure to report.—(a) It shall be the duty of any person who has reason to believe that a child has had physical injury inflicted upon him other than by accidental means by a parent or other person responsible for his care to report such information to the county department of public welfare or the proper law enforcement agency. Upon discovery of such injury, a report immediately shall be made providing such information, as may be available to the person making such report, including his own identification. In the event the person making the report is licensed to administer medical assistance, the report shall also include the nature and extent of the child's injuries including any evidence of previous injuries, and any other information that such person believes might be helpful in establishing the cause of the injuries and the identity of the perpetrator.

(b) Any person who consciously fails to make the report required by subsection (a) shall be guilty of a misdemeanor and upon conviction thereof may be fined not more than one hundred dollars, or imprisoned for a determinate period not to exceed thirty days, or both.

12-3-4.1-3. Investigation of report—Determination of probable cause.—(a) Upon receiving a report required by section 2 of this chapter, the law enforcement agency or county department of public welfare receiving such report shall immediately cause an investigation into the facts contained therein and upon completion thereof, if the facts so warrant, shall submit a written report to the prosecutor in the county where the injury or injuries were inflicted.

(b) Upon receipt of such report the prosecutor shall determine whether the facts contained therein constitute probable cause that any act prohibited by IC 1971, 35-14-1 or as hereafter amended, has been committed.

12-3-4.1-4. Immunity from civil or criminal liability.—Any person, other than a person accused of infliction of physical injury on a child, who makes a report pursuant to this chapter, or who at a judicial proceeding brought pursuant to this chapter or IC 1971, 35-14-1 testifies or otherwise produces evidence against a defendant shall have immunity from any civil or criminal liability that might otherwise be incurred or imposed as a result of such report or participation in the judicial proceeding: Provided, however, That such immunity shall not attach for any person who has acted maliciously or in bad faith.

12-3-4.1-5. Physician-patient privilege—Husband-wife privilege.—Neither the physician-patient privilege nor the husband-wife privilege shall be grounds for ex-

Generally, the current reporting law seeks to facilitate the discovery of child abuse by requiring all persons to report suspected cases to the county department of public welfare or a law enforcement agency.¹⁹ Failure to report is a misdemeanor.²⁰ To further encourage compliance with the statute, anyone who reports in good faith is given immunity from civil or criminal liability which might result from the report.²¹ The physician-patient and husband-wife privileges are abrogated in any judicial proceeding initiated in response to a report of abuse.²²

Who Shall Report

Indiana places the duty of reporting incidents of child abuse on "any person."²³ It is one of four states to provide for required universal reporting.²⁴ The more usual approach is to require reporting only of physicians and allied medical personnel, or, in some states, others who come in contact with children in a professional capacity.²⁵ Extension of the reporting duty to all persons was one of the principal changes effected by the repeal of the 1965 reporting statute.²⁶

Commentators do not agree on who should be required to report incidents of child abuse. Those that argue for limiting the duty to physicians stress that most cases of child abuse first come to the attention of physicians,²⁷ that physicians are particularly qualified

cluding evidence in any judicial proceeding under this chapter and IC 1971, 35-14-1. 12-3-4.1-6. Child competent to testify.—Any child may testify at a judicial proceeding under this chapter 12-3-4.1-1—12-3-4.1-6 and IC 1971, 35-14-1 when such child, regardless of age, is deemed competent to testify by the court.

IND. ANN. STAT. §§ 52-1426 to -1431 (Cum. Supp. 1973), IND. CODE § 12-3-4.1 (1973).

19. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973).

20. IND. ANN. STAT. § 52-1427(b) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(b) (1973).

21. IND. ANN. STAT. § 52-1429 (Cum. Supp. 1973), IND. CODE § 12-3-3.1-4 (1973).

22. IND. ANN. STAT. § 52-1430 (Cum. Supp. 1973), IND. CODE § 12-3-4.1-5 (1973).

23. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973).

24. The three other states that require reporting by all persons are Nebraska, Tennessee and Utah. NEB. REV. STAT. § 28-481 (Supp. 1973); TENN. CODE ANN. § 37-1202 (Supp. 1973); UTAH CODE ANN. § 55-16-2 (Supp. 1973).

25. Comparative charts of the state reporting laws can be found in Comment, *The Abused Child: Problems and Proposals*, *supra* note 13, at 146-47; Note, *The Legal Response to Child Abuse*, *supra* note 13, at 968-81.

26. Under the 1965 reporting law, the duty was limited to physicians, interns, residents, laboratory technicians, nurses, pharmacists, chiropractors or other persons furnishing medical aid. Ch. 268, § 1, [1965] Ind. Acts 737.

27. Paulsen, *supra* note 13, at 3. A commentator that favors universal reporting agrees with this assertion. DeFrancis, *supra* note 13, at 18.

to determine cases of physical abuse²⁸ and that they need special encouragement to report because of professional problems with reporting not faced by others.²⁹ In addition, those favoring limited

Statistics confirm that physicians are usually the first source of help for abused children. In a special sample of a nationwide survey, it was found that hospitals, clinics or private medical doctors were the first source contacted for help subsequent to an abusive incident in 51.3 percent of the cases. GIL, *supra* note 1, at 123.

28. McCoid, *supra* note 13, at 27-28; Paulsen, *supra* note 13, at 3-4.

An important aid for the physician in cases of suspected child abuse is the radiologic examination. The findings allow a diagnosis of trauma even where the clinical history is otherwise. See, e.g., Kempe, *et al.*, *supra* note 3, at 23. However, a warning was given that patient and systematic study still needs to be done to determine actual abuse. See Elmer, *Hazards in Determining Child Abuse*, 45 CHILD WELFARE 28 (1966).

One physician has developed a physician's index of suspicion:

History

1. Parents often relate story that is at variance with clinical findings
2. Multiple visits to various hospitals
3. Familial discord of financial stress, alcoholism, psychosis, perversion, drug addiction, etc.
4. Reluctance of parents to give information
5. Admittance to hospital during evening hours
6. Child brought to hospital for complaint other than one associated with abuse and/or neglect, e.g., cold, headache, stomach ache, etc.
7. Date of injury prior to admission
8. Parent's inappropriate reaction to severity of injury
9. Inconsistent social histories

Physical Examination

1. Signs of general neglect, poor skin hygiene, malnutrition, withdrawal, irritability, repressed personality
2. Bruises, abrasions, burns, soft-tissue swellings, hematomas, old healed lesions
3. Evidence of dislocation and/or fractures of the extremities
4. Coma, convulsions, death
5. Symptoms of drug withdrawal

Differential Diagnosis

1. Scurvy and rickets
2. Infantile cortical hyperostosis
3. Syphilis of infancy
4. Accidental trauma

Radiologic Manifestations

1. Subperiosteal hemorrhages
2. Epiphyseal separations
3. Periosteal shearing
4. Metaphyseal fragmentation
5. Previously healed periosteal calcifications
6. "Squaring" of the metaphysis

Fontana, *The Diagnosis of the Maltreatment Syndrome in Children*, 51 PEDIATRICS 780, 781 (1973).

29. It is argued that the medical profession has a particularly strong tradition of professional confidentiality. See McCoid, *supra* note 13, at 28-29; Paulsen, *supra* note 13, at 4, 7.

required reporting contend that diffusing the duty to report to all persons makes the duty no one's duty.³⁰

In contrast, proponents of universal reporting argue that it is a moral duty of all persons to aid abused children.³¹ Legislatively mandating this moral duty maximizes casefinding, enabling protective services to be extended to more children.³² Finally, proponents of a universal duty contend that most reporting is done by non-physicians, and the reporting law, with its immunity grant for reporting, would encourage even more reporting from these sources.³³

In its change in those required to report, Indiana may have achieved by indirection the benefits pointed to by both sides. Physicians in the state were made aware of a special duty on them to report by the 1965 law. The 1971 law, while extending the potential for casefinding to all persons, may not have mitigated the importance of this special duty in the mind of the individual physician. The result makes universal reporting particularly valuable in Indiana.

Whatever the statutory language, physicians appear to avoid

30. Paulsen, *supra* note 13, at 6. Paulsen's solution is to require only physicians to report, but to grant to all other reporters in good faith immunity from civil and criminal liability resulting from the report. *Id.*

Diffusing the reporting duty may also have positive effects, however. When the duty to report is only on physicians, abusive parents or caretakers may be reluctant to seek medical help for their child because of fear of being reported by the physician. A wider class of required reporters may lessen this fear. Reinhart & Elmer, *The Abused Child*, 188 J.A.M.A. 358, 360 (1964).

31. DeFrancis, *supra* note 13, at 20.

32. *Id.* Paulsen counters this argument as follows:

Although such a moral duty may be admitted, a reporting statute's proper function is neither to enlarge the potential for casefinding, nor to articulate a moral duty, but to spur reporting and, hence, actual casefinding. Arguably, physicians encounter the great bulk of the most serious child abuse cases, yet fail to report many of them. If physicians can be persuaded to report the cases which come to their attention, a most important gain will have been made.

Paulsen, *supra* note 13, at 5-6.

33. DeFrancis, *supra* note 13, at 20. Non-medical sources account for nearly one-half of all child abuse reports. Of the sample group of Gil's nationwide survey, 49.2 percent of the reports came from other than medical personnel. GIL, *supra* note 1, at 123. Statistics from Massachusetts confirm the great amount of reporting done by the general public. In one year before the state's reporting law was enacted, relatives of the child were responsible for 24 percent of all reports and neighbors for 22 percent. Bryant, Billingsley, Kerry, Leefman, Merrill, Senecal, & Walsh, *Physical Abuse of Children — An Agency Study*, 42 CHILD WELFARE 125, 127 (1963).

reporting incidents of child abuse. In a special sample of a 1967 nationwide survey, it was found that private medical doctors were the initial source contacted for help with abused children in 5.1 percent of the cases, but they filed only 2.8 percent of all reports of abuse.³⁴ Indiana physicians are probably no exception.

Although reporting is an unavoidable duty of all persons, any failure of physicians to report cases of child abuse is particularly inexcusable.³⁵ They have both special competence to detect abuse and a professional responsibility to help the abused child and his family. Helping abused children cannot be limited merely to treating existing injuries, but must be concerned with the child's future safety. If physicians ignore this responsibility for the child's continued welfare at home, 25 to 50 percent of the victims of child abuse will be permanently injured or killed within several months of their return home.³⁶ Besides this moral obligation, the reporting law places upon the physician a clear legal obligation to report cases of child abuse.³⁷

Grounds Requiring a Report

Reports are required under the Indiana law where a person "has reason to believe" the child has been abused.³⁸ This is an objective standard dependent on what the reasonable man would do rather than what the individual involved actually thinks. Such an objec-

34. GIL, *supra* note 1, at 124. Even more startling are findings from New York City in 1969. Of the 2,600 cases of child abuse brought to the attention of authorities during the year, only 11 were reported by private physicians. Solomon, *supra* note 1, at 775.

35. The common excuses given for the failure of physicians to report instances of child abuse include: (1) difficulty in believing that parents could have attacked their children (*See, e.g., Kempe, et. al., supra* note 3, at 19); (2) lack of knowledge on the subject (*See, e.g., Silver, supra* note 3, at 814); (3) belief that abuse must be proved to be reportable (*See, e.g., Reinhart & Elmer, supra* note 30, at 359); (4) respect for the ethic of privileged communication (*See, e.g., Reinhart & Elmer, supra* note 30, at 359); and (5) past experience or frustrations encountered when dealing with community or legal agencies (*See, e.g., Silver, supra* note 3, at 814).

36. Helfer, *The Responsibility and Role of the Physician*, in *THE BATTERED CHILD* 43, 51 (R. Helfer & C. Kempe eds. 1968). This essay is an excellent guide to the physician's function in cases of child abuse.

37. In Indiana, a failure to report child abuse is a misdemeanor. IND. ANN. STAT. § 52-1427(b) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(b) (1973). Civil liability may also be incurred for failure to report. Children who suffer abuse after a physician has failed to report an earlier incident may have a cause of action against the physician. Paulsen, *supra* note 13, at 34-36.

38. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973).

tive standard encourages the reporting of all borderline cases by physicians and others since an individual opinion of non-abuse would not be a defense for failure to report if most others would have filed a report. Increased reporting of borderline cases may uncover incidents where there is a concerted effort to conceal the abuse. The objective standard offers, then, greater protection for the child. It is also easier to apply than a subjective standard.

Age

Age of the victim is no longer important in determining whether a report of abuse is required in Indiana. The protection of the statute extends to all incidents involving a "child."³⁹ Under the 1965 law, reporting was required only for incidents involving children under 16 years old.⁴⁰ Presumably, the designation "child" extends at least to 18 year olds, the upper limit for juvenile court jurisdiction.⁴¹ Since approximately 6 percent of child abuse victims are age 15 and over,⁴² some of these children would not have been protected by the 1965 law.

Identity of the Perpetrator

Unfortunately, a provision of Indiana's reporting law limits required reporting to incidents involving abuse "by a parent or other person responsible for his care."⁴³ This places upon the reporter what is essentially an investigative task — determining the relationship of the perpetrator of the abuse to the child. Investigation is more properly a function of public agencies. In addition, the statutory wording fails in its effort to protect children since it emphasizes the abuser's identity rather than the child's environment. If a child

39. *Id.*

40. Ch. 268, § 2 [1965] Ind. Acts 737.

41. County departments of public welfare are directed to interpret "child" to mean persons under 18 years of age. DIVISION OF CHILD WELFARE SERVICES, INDIANA STATE DEP'T OF PUBLIC WELFARE, BULLETIN No. 43 at 2 (1971) [hereinafter cited as CHILD WELFARE SERVICES BULLETIN].

42. See GIL, *supra* note 1, at 105. Earlier studies had found that child abuse was mainly limited to the very young. Bryant, *et al.*, *supra* note 33, at 128 (one-half less than seven years old); Cameron, Johnson & Camps, *The Battered Child Syndrome*, 6 MED., SCI., & LAW 2, 5 (1966) (79 percent less than two years old); Elmer, *supra* note 28, at 30 (one-half under nine months of age). Gil explained that these earlier findings were principally from hospital studies with a bias toward more severely injured abused children, who are likely to be young. Gil, *supra* note 1, at 105.

43. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973).

is in a potentially abusive situation, the precise perpetrator of that abuse matters little.⁴⁴ The statutory language is based on the assumption that most abusive incidents are attributable to the parents themselves and that the parents will protect their child from abuse by those outside of the family. While this assumption is generally correct,⁴⁵ those few cases where the parent either refuses or is unable to do anything when his child is abused by an outsider justify a change in the statutory language to require a report regardless of the perpetrator's relationship to the child.

Nature of the Injuries

Another judgment required for reporting under the Indiana law is that the injury be inflicted on the child "other than by accidental means."⁴⁶ Since the usual explanation offered for a child's injuries is one of accident or accidents,⁴⁷ the important factor becomes whether the reporter believes such an explanation is valid. Only physicians are competent to evaluate the validity of any explanation for the child's injuries in most cases. The wording "other than by accidental means" is a result of a law initially directed only at physicians. As such, it should have been eliminated when the duty to report was made universal in 1971.

There is also a question as to the viability of Indiana's statutory language since some accidental injuries ought to be reported. Gross parental or caretaker negligence is often as dangerous to the child as is intentional injury and surely may require state intervention for the child's protection.⁴⁸ An objection to requiring reports when parental negligence is involved is simply that parents are not capable

44. "Child abuse in most situations is a family affair. It is not helpful to waste time by trying to determine which parent beats the child. You know that if one parent does the act, the other, in some way, permits it to happen." Helfer, *The Etiology of Child Abuse*, 51 PEDIATRICS 777, 777-78 (1973).

45. In 86.8 percent of the sample group of Gil's nationwide survey, the perpetrator was a parent or parent substitute with whom the child had been living. GIL, *supra* note 1, at 116.

46. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973).

47. Indeed, the discrepancy between clinical findings and parental explanations is a major diagnostic feature of child abuse. Kempe, *et al.*, *supra* note 3, at 18. A table contrasting the probable truth with the original explanation given by the parent in 29 cases can be found in Cameron, Johnson, & Camps, *supra* note 42, at 6.

48. Severe or gross child neglect, included in which would be failure to protect a child from injuring himself, is probably more widespread than child abuse. Solomon, *supra* note 1, at 774.

of watching over their children at all times. Nevertheless, gross parental indifference should be cause for reporting if protection of the child is the foremost goal. Parents reported unnecessarily can subsequently show that they acted reasonably.

The Indiana statute calls for the reporting of "physical" injury.⁴⁹ This implies any physical injury. Thus, there is no requirement that the injuries be serious, as in some states.⁵⁰ Such wording provides an important protection for the child since minor injuries may be the first clue to an environment with the potential for serious abuse. Early discovery is crucial for providing help for the parents or caretakers as well.

What Indiana and all other states have seemingly overlooked is reporting for cases which result in death.⁵¹ It is obviously too late to help the victim when child abuse results in death. However, in addition to any statistical importance, the reporting of deaths due to child abuse may protect other children in the same family. In a sample group of a 1967 nationwide study, abuse to siblings of the currently abused child occurred in 27 percent of the cases.⁵²

Recipient of the Report

In Indiana, reports of abusive incidents may be made "to the county department of public welfare or the proper law enforcement agency."⁵³ Allowing the reporter a choice may encourage reporting by those who would be reluctant to report to either of the alternatives. In practice, the Indiana Department of Public Welfare has apparently preempted the role of the police or sheriff's department in receiving reports from hospitals and physicians. Reporting forms of the welfare department are automatically supplied to hospitals and are given to physicians upon request.⁵⁴ Reports from the general

49. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973). Besides physical abuse, emotional and social abuse are simply too vague for the law at present. For this reason, the reporting laws are limited to physical abuse or neglect. Silver, *supra* note 3, at 805. Mental cruelty is included, though, in Indiana's definition of criminal cruelty to children. IND. ANN. STAT. § 10-813 (Repl. 1956), IND. CODE § 35-14-1-2 (1971).

50. Twenty-four states require reporting only when the injuries are "serious" or "severe." A list of these states can be found in Daly, *supra* note 13, at 318 n.182.

51. Paulsen, *supra* note 13, at 12. Paulsen adds that deaths resulting from child abuse may have to be reported by implication in Arkansas where coroners must report. *Id.*

52. GIL, *supra* note 1, at 114.

53. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973).

54. Interview with Phoebe Leeds, Director of Child Welfare Services, Porter County

public often come to the police,⁵⁵ however, perhaps because law enforcement agencies are the usual recipients of reports of a crime. In addition, the police often discover instances of child abuse themselves while investigating family quarrels.⁵⁶

Commentators seem to agree that reporting to the department of public welfare is the most desirable,⁵⁷ although law enforcement agencies are valuable recipients of reports because they are available on a 24-hour basis.⁵⁸ As a result, the choice in Indiana's law seems to provide a solution.⁵⁹ It has been suggested, however, that allowing a choice of report recipients has the disadvantages of confusion, difficulty in keeping accurate statistics and the possibility of uneven treatment of cases.⁶⁰ At least in smaller communities in the state these disadvantages have not been troublesome. The police and the sheriff's department refer the cases reported to them to the department of public welfare with the result that both groups are involved at once.⁶¹ This practice of referral to the welfare department is valuable in eliminating the disadvantages of allowing a choice of recipients and so should be a requirement of the reporting law.⁶² In addition, mandatory referral to the welfare department

Department of Public Welfare, in Valparaiso, Indiana, Feb. 4, 1974 [hereinafter cited as Leeds Interview].

At Porter Memorial Hospital in Valparaiso, Indiana, the hospital's Director of Social Service completes the forms supplied and forwards them to the county department of public welfare. Hospital policy is not to notify any law enforcement agency, but to report solely to the welfare department. Interview with Arthur Malasto, Administrator, Porter Memorial Hospital, in Valparaiso, Indiana, Feb. 1, 1974.

55. Interview with Lee Miller, Chief of Police, Valparaiso, Indiana, in Valparaiso, Indiana, Feb. 5, 1974 [hereinafter cited as Miller Interview].

56. *Id.*

57. The reasoning is that reports should go directly to the agency that provides protective services for children. See Daly, *supra* note 13, at 325-26; DeFrancis, *supra* note 13, at 22-23; McCoid, *supra* note 13, at 51-56; Paulsen, *supra* note 13, at 44-45.

58. Paulsen, *supra* note 13, at 44.

59. Alabama, Connecticut, Utah, and Wisconsin provide the same choice between welfare department and law enforcement agency as does Indiana. ALA. CODE tit. 27, § 21 (Supp. 1969); CONN. GEN. STAT. ANN. § 17-38a(c) (Supp. 1973); UTAH CODE ANN. § 55-16-3 (Supp. 1973); WIS. STAT. ANN. § 48.981(1) (Supp. 1973).

60. Daly, *supra* note 13, at 323. This position is based on the assumption of lack of cooperation of the various agencies involved in child abuse, an assumption which may not always be true.

61. Leeds Interview, *supra* note 54.

62. Illinois has such a requirement. Reports may be made to law enforcement agencies, but, if this is done, the welfare department must be informed. ILL. ANN. STAT. ch. 23, § 2043 (1968).

ensures that the services of the department will not be overlooked.

Contents of the Report

A report of child abuse in Indiana needs to include only "such information, as may be available to the person making such report, including his own identification."⁶³ The law contains no requirement that the reporting person make a report in writing. Under the 1965 reporting law, the county department of public welfare was required to provide forms on which reports were to be made.⁶⁴ These forms, no longer required by the current law, are still in use.⁶⁵ They include two sections. The first is to be completed, as nearly as possible, by all persons, while the second section is directed to medical personnel only.⁶⁶ If the reporter does not elect to write his own report, the county department of public welfare is responsible for reducing the report to writing on the proper form.⁶⁷

The reporting law's requirement that the reporter identify himself creates unnecessary problems. No action can be taken when anonymous telephone calls are made to the department of welfare or the police,⁶⁸ and some reporters continue to insist on remaining anonymous even when informed of their duty under the reporting law.⁶⁹ This requirement of identification, evidently designed to ensure reliability of the reporter, may prevent the protection of a child

63. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973).

64. Ch. 268, § 3, [1965] Ind. Acts 738.

65. The forms were revised to conform to the 1971 reporting law. CHILD WELFARE SERVICES BULLETIN, *supra* note 41, at 3.

66. *Id.*

67. *Id.* at 3-4.

68. The Indiana State Department of Public Welfare does not recommend a literal reading of the reporting law, however. A bulletin interpreting Indiana's reporting law for the staff provides:

As in any protective service case, the failure of a reporting person to identify himself does not justify the ignoring of his report by the county department. If enough substantive information can be obtained by the county department to indicate that the anonymous claim of child abuse may be bona fide, an investigation is to be made.

CHILD WELFARE SERVICES BULLETIN, *supra* note 41, at 4.

69. Leeds Interview, *supra* note 54. When a county department of public welfare encounters an anonymous reporter, the procedure is as follows:

There may be some reports of abuse in which the reporting person will not give his identity. Whether the person conforms to the law in this matter is his own decision. If the anonymous report is given in person or by telephone the department should interpret the requirement in the law that provides for identification of who is making the report and an effort made to help the person feel secure in giving his identity.

CHILD WELFARE SERVICES BULLETIN, *supra* note 41, at 4.

from abuse.⁷⁰ An informer as to criminal activity need not always identify himself before the police may investigate.⁷¹ Telephone hot-lines for reporting drug pushers and crime allow callers to remain unidentified. Since child abuse may involve criminal penalties,⁷² the same rule should apply to investigation of the child's situation. The identification requirement also may discourage legitimate reporting by neighbors and others who do not want to take an accusatory role. A much more effective manner of dealing with malicious reports of child abuse than requiring the reporter to identify himself is the exercise of good discretion by the welfare department and police in investigating complaints. Before initiating investigation, either agency should be convinced that the unidentified reporter had at least some first-hand knowledge of the abuse.⁷³

Besides identifying themselves, licensed medical personnel must supply additional information when making a report. This includes "the nature and extent of the child's injuries including any evidence of previous injuries."⁷⁴ Such information may be valuable in a proceeding to remove the child from his home or in a criminal prosecution of the perpetrator. Also valuable, but only required when the medical reporter believes it might be helpful, is information "establishing the cause of the injuries and the identity of the perpetrator."⁷⁵

Action Upon Receipt of a Report

Upon receipt of a report, the law enforcement agency or welfare

70. Indiana Gov. Otis R. Bowen recently complained that the identification requirement "makes it difficult to act on child abuse instances." Gary Post-Tribune, Feb. 27, 1974, at A-5, col. 3.

71. The requirements of competency and credibility of a police informant, as set out in *Aguilar v. Texas*, 373 U.S. 108 (1964), apply to applications for search or arrest warrants, not investigations themselves. For investigation of an incident of child abuse, a search warrant would not ordinarily be necessary. In addition, there is a trend toward permitting the issuance of a search warrant without regard to particularized considerations of reliability when the informant is an ordinary citizen, as opposed to a regular police informant. See Thompson & Starkman, *The Citizens Informant Doctrine*, 64 J. CRIM. LAW & CRIMIN. 163 (1973). Since all reports of child abuse come from ordinary citizens, relaxed standards of reliability would be applicable to the reporters.

72. Criminal penalties for child abuse are discussed notes 122-85 *infra* and accompanying text.

73. Indiana State Department of Public Welfare procedures already take this position. See note 68 *supra*.

74. IND. ANN. STAT. § 52-1427(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(a) (1973).

75. *Id.*

department "shall immediately cause an investigation into the facts contained therein."⁷⁶ This statutory language permits each agency to do its own investigation. This may not be the best provision for investigation of child abuse incidents. By profession, and often by nature, social workers of the welfare department are not adept at the necessary investigation for possible criminal prosecution. In the same manner, police agencies are not adept at identifying social and psychological problems, assessing family functioning and estimating the adequacy of child care. Since both sets of agency skills are necessary in cases of child abuse, combined investigation seems to be the answer. In many communities of the state, combined investigation may be what is happening in practice.⁷⁷

After the investigation is completed, the Indiana reporting law gives little direction as to what is to be done next. Its only instructions are unfortunately directed at criminal prosecution of the perpetrator. "If the facts so warrant," a written report of the investigation is to be made to the county prosecutor.⁷⁸ While such a report should certainly be made, provision for protection of the child should also be required. Accordingly, language which invokes the protective services of the state would be appropriate. Practically speaking, the welfare department will certainly provide such services where necessary without statutory language to that effect. However, stressing criminal prosecution to the exclusion of protective services for the child may give the statute a retributive tone that discourages reporting.⁷⁹ It is also inconsistent with the purposes of the reporting law "to provide protection for children."⁸⁰

A glaring omission from the statutory directions for action to be taken upon receipt of the report is the failure to suggest that protection may be needed for other children in the family as well

76. IND. ANN. STAT. § 52-1428(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-3(a) (1973).

77. This is especially so in smaller communities. In Valparaiso, a caseworker and the police often make the first visit to a reported family together. Miller Interview, *supra* note 55.

78. IND. ANN. STAT. § 52-1428(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-3(a) (1973).

79. Few persons favor criminal prosecution of the perpetrators of abuse. In a nationwide opinion survey, only 27.1 percent of the survey population believed that perpetrators of child abuse should be jailed or punished in some other way. GIL, *supra* note 1, at 66. As a result, if there is stress upon criminal prosecution resulting from a report, reporting may be discouraged from those favoring treatment and supervision rather than punishment.

80. IND. ANN. STAT. § 52-1426 (Cum. Supp. 1973), IND. CODE § 12-3-4.1-1 (1973).

as for the abused child.⁸¹ When the child that is the target of abuse is removed from the home, there is great danger of attack upon the child's siblings.⁸² Abusive parents or caretakers frequently shift the focus of their abuse to the remaining children in the family.⁸³ This suggests that protection of all children in the family of the child reported to be abused may be necessary. The reporting law should clearly stress this concern in its directions for action to be taken by the welfare department or law enforcement agency when receiving a report of abuse.

Immunity Granted to Reporters

Those who report incidents of child abuse under Indiana's reporting law are granted immunity from any civil or criminal liability resulting from the report or subsequent judicial proceedings.⁸⁴ This immunity extends only to reports made in good faith.⁸⁵ Although the immunity provision applies to all reporters,⁸⁶ it is primarily designed to encourage reporting by physicians who would otherwise be fearful of legal liability for reporting.⁸⁷ Commentators have pointed out that statutory immunity for reporting is probably unnecessary.⁸⁸ An Indiana appellate court decision suggests that this is true. In *Rhiver v. Rietman*,⁸⁹ the court recognized the immunity of a physician from civil liability for submitting a report on the plaintiff's mental condition in a proceeding to commit the plaintiff to a mental institution. Since no statutory immunity is granted for civil commitment proceedings, the court found immunity as a matter of public policy:

As a matter of public policy immunity must attach to witnesses aiding commitment proceedings. If it were otherwise the cooperation of physicians, who *by statute* are called upon to offer expert judgment upon the sanity of another,

81. Reinhart & Elmer, *supra* note 30, at 360.

82. In Gil's nationwide survey, 27 percent of the sample families included siblings who had been victims of abuse prior to the reported incident. Gil, *supra* note 1, at 114.

83. Shifting abuse can be assumed since child abuse is considered a pattern of child-rearing. See generally note 1 *supra*.

84. IND. ANN. STAT. § 52-1429 (Cum. Supp. 1973), IND. CODE § 12-3-4.1-4 (1973).

85. *Id.*

86. *Id.*

87. Daly, *supra* note 13, at 328; DeFrancis, *supra* note 13, at 32; McCoid, *supra* note 13, at 39; Paulsen, *supra* note 13, at 31.

88. McCoid, *supra* note 13, at 37-39; Paulsen, *supra* note 13, at 31-34.

89. 148 Ind. App. 266, 265 N.E.2d 245 (1970).

would be lost. Fear of vexatious litigation would thwart the power of the state to provide for protection of the community against the psychopathic mentally ill, and for the protection of the mentally ill individual against himself.⁹⁰

The same policy reasons exist for granting immunity in cases of child abuse. Nevertheless, the reporting law's statutory immunity is valuable in making certain that immunity exists for the reporter.

Abrogation of Evidentiary Privileges

By statute, Indiana establishes the physician-patient and husband-wife privileges.⁹¹ The reporting law abrogates both of these privileges in proceedings pursuant to the report and in prosecutions for cruelty to children and allied offenses.⁹² To obtain information as to the child's injuries, abrogation of the physician-patient privilege is not technically necessary since the child, not the perpetrator of the abuse, is the patient. An early decision of the Indiana Supreme Court, *Hauk v. State*,⁹³ established that the physician-patient privilege is to protect only the patient. In a prosecution for an unlawful abortion, the court found that testimony against the defendant by an examining physician as to the fact that an abortion had been induced was admissible. The court stated:

The rule declared by the statute, which forbids a physician to reveal in evidence matters discovered by him in the course of professional attendance or treatment of a patient, is intended to protect the latter, and not to shield one who is charged with perpetrating an unlawful act upon the patient.⁹⁴

The rationale of the privilege may, though, still be applicable to cases of child abuse. In *North American Union v. Oleske*,⁹⁵ a physician was precluded from testifying as to a statement made to him by a patient's wife concerning the patient's condition. Since the patient was unconscious, he was unable to give the physician any account of the cause, origin or history of his ailment.⁹⁶ The court

90. *Id.* at 271, 265 N.E.2d at 248.

91. IND. ANN. STAT. § 2-1714 (Repl. 1968), IND. CODE § 34-1-14-5 (1973).

92. IND. ANN. STAT. § 52-1430 (Cum. Supp. 1973), IND. CODE § 12-3-4.1-5 (1973).

93. 148 Ind. 238, 46 N.E. 127, 47 N.E. 465 (1897), *overruled on other grounds in White v. State*, 234 Ind. 209, 125 N.E.2d 705 (1955).

94. 148 Ind. at 260-61, 46 N.E. at 134.

95. 64 Ind. App. 435, 116 N.E. 68 (1917).

96. *Id.* at 442, 116 N.E. at 70.

held that where the intervention of a third person is necessary for the patient to communicate with the physician in order to receive effective treatment, the physician-patient privilege is applicable to the information so communicated.⁹⁷ Communication through parents may be the only manner in which a physician can get the information necessary to treat an abused child, especially if the child is young. The physician-patient privilege, under the reasoning of *Oleske*, could be applicable to such situations. However, the abrogation of the privilege by the reporting law removes any doubt as to the existence of a privileged communication.

The abrogation of the physician-patient privilege in the reporting law may be more sweeping than simply the elimination of the privilege so as not to exclude evidence of the child's injuries. The 1965 reporting law specifically limited the abrogation to "evidence regarding a child's injuries, or the cause thereof."⁹⁸ On its face, the current law abrogates the physician-patient privilege without limitation as to subject matter in any judicial proceeding under the child abuse reporting chapter or in criminal prosecutions for cruelty or neglect of children.⁹⁹ Conceivably, the physician-patient privilege could not be invoked to exclude the testimony of a psychiatrist who treated the perpetrator of the abuse.¹⁰⁰ It is unclear whether the legislature intended to extend the scope of the abrogation to this extent by its revision. However, two factors support a wide interpretation of the reporting law's abrogation of the physician-patient privilege. First, the privilege is in disfavor both generally¹⁰¹ and in Indiana.¹⁰² Second, since the child's welfare under the custody of the

97. *Id.*

98. Ch. 268, § 7, [1965] Ind. Acts 738.

99. IND. ANN. STAT. § 52-1430 (Cum. Supp. 1973), IND. CODE § 12-3-4.1-5 (1973).

100. Normally, the physician-patient privilege would be applicable to a psychiatrist, as a licensed physician, under IND. ANN. STAT. § 2-1714 (Repl. 1968), IND. CODE § 34-1-14-5 (1973). A psychologist has been found to be not normally included in the physician-patient privilege in Indiana. *Elliott v. Watkins Trucking Co.*, 406 F.2d 90 (7th Cir. 1969) (applying Indiana law). However, the legislature has established a limited psychologist-client privilege, IND. ANN. STAT. § 63-3617 (Cum. Supp. 1973), IND. CODE § 25-33-1-17 (1971). On the psychologist-client privilege in Indiana see Olson, *A Look at Indiana Code 31-1-14-5: Indiana's Physician-Patient Privilege*, 8 VAL. U.L. REV. 37, 42-43 (1974).

101. See C. McCORMICK, *McCORMICK ON EVIDENCE*, § 105 (Cleary ed. 1972); 8 J. WIGMORE, *WIGMORE ON EVIDENCE*, § 2380 (McNaughton ed. 1961).

102. See generally *Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95 (1971); *Alder v. State*, 239 Ind. 68, 154 N.E.2d 716 (1958); *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949); Myers

perpetrator of the abuse is at issue in proceedings to remove the child from his home, it is valuable to have unimpeded access to evidence of the psychological condition of the perpetrator. The need for this evidence outweighs any chilling effect abrogation of the physician-patient privilege would have on the perpetrator's free discussion in counseling sessions with a psychiatrist.

Abusive incidents often involve one parent acquiescing in the other's mistreatment of the child.¹⁰³ In addition, over 90 percent of the incidents occur in the child's home.¹⁰⁴ For these reasons, the reporting law's abrogation of the husband-wife privilege is important.¹⁰⁵ To disqualify the testimony of one parent as to the other's misconduct would be inadvisable when he or she is usually the only witness to the actual abuse.

Child's Competence to Testify

Indiana's reporting law provides that a child may testify in a judicial proceeding concerning an abusive incident when the child, regardless of age, is deemed competent by the court.¹⁰⁶ This provision was evidently thought to be necessary to overcome the statutory rule¹⁰⁷ that children under 10 years of age are not competent witnesses unless they understand the nature and obligation of an oath.¹⁰⁸ In reality, the two provisions seem to say the same thing. Whatever the effect of the reporting law's assertion of competence, the necessity of its application will be rare. Children subject to abuse are usually either too young to tell the story or too fearful of parental retribution for doing so.¹⁰⁹

A Central Registry

No central registry of reported child abuse cases in the state is

v. State, 192 Ind. 592, 137 N.E. 547 (1922); Gen. Accident Fire and Life Assurance Co. v. Tibbs, 102 Ind. App. 262, 2 N.E.2d 229 (1936). See also Olson, *supra* note 100; Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256 (1952).

103. Helfer, *supra* note 44, at 777-78.

104. GIL, *supra* note 1, at 118.

105. IND. ANN. STAT. § 52-1430 (Cum. Supp. 1973), IND. CODE § 12-3-4.1-5 (1973).

106. IND. ANN. STAT. § 52-1431 (Cum. Supp. 1973), IND. CODE § 12-3-4.1-6 (1973).

107. IND. ANN. STAT. § 2-1714 (Repl. 1968), IND. CODE § 34-1-14-5 (1973).

108. McCormick contends that if the words "understand the nature and obligation of an oath" are applied literally, the most intelligent witness could hardly meet the standard, much less a child. The rule confuses a religious standard with a mental standard. C. MCCORMICK, *supra* note 101, at § 62.

109. Kempe, *et al.*, *supra* note 3, at 18.

required under the Indiana statute. However, as part of administrative procedure, each county department of public welfare forwards monthly reports of abusive incidents to the state department.¹¹⁰ These reports are solely for statistical purposes.

It has been suggested the central registries be established for the additional purpose of facilitating identification of abused children.¹¹¹ Since abusive parents or caretakers frequently skip from one hospital or physician to another in an effort to avoid detection,¹¹² a central registry serves as a clearinghouse for multiple reports of abuse involving the same child or family. Physicians or others unsure of abuse in regard to a particular child may check with the registry under the child's name for additional evidence to confirm their suspicions. But, central registries involve important questions of privacy and fairness.¹¹³ Access to their information must be limited so as to prevent widespread invasion of family privacy. In addition, there is a question whether a reporter should make the decision to report on the basis of anything other than the child's present condition. If a report was made in regard to a particular child in the past, this may cause an unsure reporter to conclude unjustifiably that abuse is now present.¹¹⁴ Yet, for conducting an adequate investigation, the department of public welfare or law enforcement agency must have information on prior incidents of abuse.¹¹⁵ Each county department of public welfare has information in its files on any prior incidents within the county. As part of administrative procedure, the state department should maintain a central registry

110. Leeds Interview, *supra* note 54.

111. Paulsen, *supra* note 13, at 24-25.

112. Fontana, Donovan, & Wong, *supra* note 3, at 1391; Reinhart & Elmer, *supra* note 30, at 360. After a few months of operation, no evidence of this commonly assumed phenomenon was found in Illinois' central registry, however. Ireland, *A Registry on Child Abuse, CHILDREN*, May-June 1966, at 113, 115.

113. Paulsen gave the following warning:

The existence of a central registry used for anything but statistical purposes raises sensitive issues of privacy. Some means should be found to remove from the registry the cases in which abuse was found not to have occurred. An entry in the registry can bring an unjustified loss of reputation. Authorized persons are, after all, human beings who react adversely to parents listed in the registry; further, no firm assurances can be given that the registry will only be available to authorized persons.

Paulsen, *supra* note 13, at 30-31.

114. *Id.* at 31.

115. A description of the workings and value of Illinois' central registry, access to which is limited to welfare department personnel, can be found in Ireland, *supra* note 112.

of cases to enable the county departments to check on prior abusive incidents for children and families not already in their files.

Penalty for Failure to Report

It is a misdemeanor for anyone to consciously fail to report an instance of child abuse in Indiana.¹¹⁶ The penalty is a fine of not more than \$100 or imprisonment for not more than 30 days, or both.¹¹⁷ Although a prosecution for failure to report is highly unlikely, especially since the failure must be a conscious one,¹¹⁸ the provision for penalties serves as a spur to reporting by all persons. It also has two subsidiary practical effects. First, the existence of criminal penalties provides the reporter with an excuse when he is criticized for reporting or begged not to report.¹¹⁹ Second, reporters who attempt to remain anonymous, thus preventing investigation, can be reminded that it is a misdemeanor not to report.¹²⁰

Even with its weaknesses, Indiana's reporting law is important in triggering the state's responses to child abuse. These responses take two general forms: criminal prosecution of the perpetrator and civil protection of the child. The criminal response will be discussed next.

THE CRIMINAL LAW

Commentators are nearly unanimous in agreeing that criminal prosecution of the perpetrator is not the answer to preventing child abuse.¹²¹ The threat of criminal penalties provides little deterrent to the motivations of most adults who cruelly ill-treat children.¹²² Yet,

116. IND. ANN. STAT. § 52-1427(b) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-2(b) (1973).

117. *Id.*

118. The language is as follows: "Any person who consciously fails to make the report required" *Id.*

119. Daly, *supra* note 13, at 336; Paulsen, *supra* note 13, at 9.

120. This is the procedure used by county departments of public welfare. See note 69 *supra*.

121. Daly, *supra* note 13, at 297-99; DeFrancis, *supra* note 13, at 5-6; Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 692-93 (1966); Note, *The Battered Child — Louisiana's Response to the Cry*, *supra* note 13, at 382-83; Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364, 382-83 (1971). *Contra*, Collins, *The Role of the Law Enforcement Agency*, in *THE BATTERED CHILD* 201, 201-02 (R. Helfer & C. Kempe eds. 1968).

122. Perpetrators of child abuse have psychological difficulties that are not susceptible to the workings of the criminal law:

in serious cases, criminal prosecution of the perpetrator may be justified. Perpetrators of child abuse in Indiana can be prosecuted either under general criminal law provisions for homicide¹²³ and assault and battery¹²⁴ or under a set of statutes dealing specifically with crimes against children.¹²⁵

Homicide

When abuse leads to the death of the child, Indiana's homicide statutes¹²⁶ become applicable. In two reported cases involving abused children, convictions for second degree murder have been affirmed. The killing must be done "purposely and maliciously" to qualify as murder in the second degree.¹²⁷ In *Mobley v. State*,¹²⁸ the earlier of the two cases, a catalog of horrors both as to injuries and methods of their infliction is presented. Although it is little discussed in the opinion, the Indiana Supreme Court seemed to imply malice from the extent of the injuries themselves as well as from the evidence as to the manner in which the injuries were received.¹²⁹ The concurring judge was more explicit on the question of malice. He

On the other hand, conviction followed by punishment does nothing to really change the parent's character structure and behavior; rather, it is one more reinforcing repetition of the experience of being disregarded, attacked, and commanded to do better — the very things which led him to be an abuser in the first place. As one of our patients put it, "As soon as I get out of the penitentiary, we're going to get out of this state to where we aren't known. Then we'll have some kids and raise them the way want to."

Steele & Pollock, *supra* note 1, at 145.

123. IND. ANN. STAT. § 10-3401 (Cum. Supp. 1973), IND. CODE § 35-13-4-1 (Cum. Supp. 1973) (first degree murder); IND. ANN. STAT. § 10-3404 (Cum. Supp. 1973), IND. CODE § 35-1-54-1 (1971) (second degree murder); IND. ANN. STAT. § 10-3405 (Cum. Supp. 1973), IND. CODE § 35-13-4-2 (1971) (manslaughter).

124. IND. ANN. STAT. § 10-403 (Cum. Supp. 1973), IND. CODE § 35-1-54-4 (1971) (assault and battery); IND. ANN. STAT. § 10-410 (Cum. Supp. 1973), IND. CODE § 35-13-3-1 (1971) (aggravated assault and battery); IND. ANN. STAT. § 10-401(a) (Cum. Supp. 1973), IND. CODE § 35-13-2-1 (1971) (assault or assault and battery with intent to kill).

125. IND. ANN. STAT. §§ 10-812 to -16 (Cum. Supp. 1973), IND. CODE §§ 35-14-1-1 to -7 (Cum. Supp. 1973); IND. ANN. STAT. § 10-807 (Cum. Supp. 1973), IND. CODE § 35-14-3-1 (Cum. Supp. 1973).

126. IND. ANN. STAT. § 10-3401 (Cum. Supp. 1973), IND. CODE § 35-13-4-1 (Cum. Supp. 1973) (first degree murder); IND. ANN. STAT. § 10-3404 (Cum. Supp. 1973), IND. CODE § 35-1-54-1 (1971) (second degree murder); IND. ANN. STAT. § 10-3405 (Cum. Supp. 1973), IND. CODE § 35-13-4-2 (1971) (manslaughter).

127. IND. ANN. STAT. § 10-3404 (Cum. Supp. 1973), IND. CODE § 35-1-54-1 (1971).

128. 227 Ind. 335, 85 N.E.2d 489 (1949).

129. *Id.* at 343, 85 N.E.2d at 492.

explained that in beating the three-year-old child the mother and her boyfriend are presumed to have "intended the natural and probable consequences of their acts."¹³⁰ Since the child had been beaten severely on several previous occasions,¹³¹ the presumption was easily drawn.

The issue of the requisite malice produced two dissenting judges in *Corbin v. State*.¹³² There, apparently with his fists, a father beat his one-month-old daughter to death.¹³³ As in *Mobley*, the majority depended on the nature of the attack to imply malice:

Anyone with reasonable judgment would know that one of the blows of the magnitude of any of these numerous blows could have fatally injured this child, which apparently was sick at the time. Where such blows of such magnitude are repeated, any jury would have the right to conclude that the perpetrator intended to kill. Malice as a legal inference may be deducted from a perpetration of any cruel act, and the law presumes an individual intends the consequences of his acts.¹³⁴

A fact aiding in this inference in cases involving child abuse is the disparity in size between the perpetrator and the child. The court explained that intent "may be inferred particularly in view of the relative size, age and strength of the defendant and the victim."¹³⁵

The dissenters disagreed with the majority as to the presence of malice because the defendant had made several statements about losing his temper with the child. Such statements, the dissenters argued, clearly showed lack of purpose to kill.¹³⁶ To the majority, the defendant's statements about losing his temper were just one part of the evidence. In addition, the majority responded that it is common knowledge that a person may lose his temper and still intend to kill.¹³⁷

130. *Id.* at 345, 85 N.E.2d at 493 (Emmert, J., concurring).

131. *Id.* at 341-43, 85 N.E.2d at 491-92.

132. 250 Ind. 147, 234 N.E.2d 261 (1968).

133. *Id.* at 150, 234 N.E.2d at 262.

134. *Id.*

135. *Id.* at 151, 234 N.E.2d at 262.

136. *Id.* at 160, 234 N.E.2d at 267 (Mote, J., dissenting; Jackson, J., concurring in dissent).

137. *Id.* at 152, 234 N.E.2d at 263.

A particularly instructive revelation made in *Corbin* was that the defendant had been previously convicted of cruelty to his daughter and another child.¹³⁸ This was apparently only one instance in a "long history of child abuse" by the defendant.¹³⁹ In fact, the fatal incident involved in the case occurred just a few weeks after the defendant's release from a six months' term at the Indiana Farm.¹⁴⁰ Two obvious conclusions can be drawn from these facts. First, the protective machinery of the state was grossly inadequate. Second, criminal penalties for child abuse were not effective. Dissenting Judge Mote was so disturbed as to plead that "[a] new statute to govern childbeaters and family abusers is needed for the protection of family life and society in general."¹⁴¹

Less than a year before *Corbin*, the Indiana Supreme Court reduced a conviction for second degree murder to involuntary manslaughter in *Hutchinson v. State*.¹⁴² The critical difference seemed to be the lack of evidence as to the actual manner of the infliction of the injuries. The defendant admitted punishing the child with a belt, but there was little explanation for the child's lacerated liver.¹⁴³ As a result, the majority suggested that a conviction for second degree murder "would necessitate an inference upon a speculation, which the law does not permit."¹⁴⁴ In dissent, Judge Hunter found five factors from which an inference of malice would be permissible. He pointed out that a liver is normally ruptured by forceful impact; that there was no other explanation for the ruptured liver; that there was evidence of previous acts of violence to the child by the defendant; that neighbors heard the child's screams; and that there was evidence of the defendant's jealousy toward the child.¹⁴⁵

Due to the secretive nature of child abuse,¹⁴⁶ the incomplete

138. *Id.* at 151, 234 N.E.2d at 263.

139. *Id.* at 158, 234 N.E.2d at 267 (Mote, J., dissenting).

140. *Id.* at 157, 234 N.E.2d at 266.

141. *Id.* at 159, 234 N.E.2d at 267.

142. 248 Ind. 226, 225 N.E.2d 828 (1967).

143. *Id.* at 231, 225 N.E.2d at 831.

144. *Id.* at 232, 225 N.E.2d at 832.

145. *Id.* at 243, 225 N.E.2d at 838 (Hunter, J., dissenting).

146. A pathologist and deputy coroner of Cuyahoga County, Cleveland, Ohio, has explained that investigation of homicides involving children differs in several major ways from the exploration of the unlawful killing of adults. First, the victim's youth and inability to communicate put investigating officials under a severe handicap. Second, nearly all of the

evidence in *Hutchinson* as to the manner of the infliction of injuries would seem to be typical. *Hutchinson* indicates that convictions for second degree murder will be difficult to obtain without more evidence than that the child was injured by means unexplained other than by intentional infliction of injury. This is so even where there is evidence of previous abusive incidents. There must be definite evidence of infliction of injury by the defendant, as in *Mobley* and *Corbin*, before malice may be implied by the jury.

Where the death of a child results from parental neglect rather than active abuse, prosecution for involuntary manslaughter is possible.¹⁴⁷ In *Eaglen v. State*,¹⁴⁸ parents were convicted of involuntary manslaughter when their four-month-old child died from pneumonia induced by malnutrition. The court rejected the father's contention that the criminal neglect of his wife was an excuse for his failure to provide for the child. "If anything," the court insisted, "one parent's duty to look after his children increases when the other is guilty of neglect."¹⁴⁹ This reasoning may be equally applicable to cases where one parent is present and acquiesces in the other's abuse of a child. In such cases, any parent or caretaker could conceivably be prosecuted for involuntary manslaughter when the abuse results in death whether or not that parent or caretaker was the actual perpetrator of the abuse.

Assault and Battery

Another criminal law category not dealing specifically with crimes against children is assault and battery. Perpetrators of child abuse in Indiana may be conceivably prosecuted for assault and battery,¹⁵⁰ aggravated assault and battery¹⁵¹ and assault and battery with intent to kill.¹⁵² It was decided in an early Indiana case¹⁵³ that

assaults resulting in homicides occur in the home, where there is often little indication of violent abuse. Finally, upon questioning, the child's parents or caretakers offer a variety of explanations for the death. Adelson, *Slaughter of the Innocents*, 264 NEW ENG. J. MED. 1345, 1348-49 (1961).

147. IND. ANN. STAT. § 10-3405 (Cum. Supp. 1973), IND. CODE § 35-13-4-2 (1971).

148. 249 Ind. 144, 231 N.E.2d 147 (1967).

149. *Id.* at 150, 231 N.E.2d at 151.

150. IND. ANN. STAT. § 10-403 (Cum. Supp. 1973), IND. CODE § 35-1-54-4 (1971).

151. IND. ANN. STAT. § 10-410 (Cum. Supp. 1973) IND. CODE § 35-13-3-1 (1971).

152. IND. ANN. STAT. § 10-401(a) (Cum. Supp. 1973), IND. CODE § 35-13-2-1 (1971).

153. *Hinkle v. State*, 127 Ind. 490, 26 N.E. 777 (1891).

the existence of criminal provisions relating specifically to cruelty to children does not preclude prosecution for assault and battery. The county prosecutor has, then, a choice of two different routes of prosecution.

The right of parents to punish their children was raised as a defense against prosecution for assault and battery in *Hinkle v. State*.¹⁵⁴ There a father had kept his 12-year-old daughter chained by the ankle to a sewing machine as punishment.¹⁵⁵ The Indiana Supreme Court acknowledged such a parental right to punish children, but insisted that it extended only to "proper and reasonable chastisement," not "brute force and abuse."¹⁵⁶ The court went on to say what is reasonable is a question for the jury.¹⁵⁷ With this case, Indiana joined those states that follow the "objective" rule which holds parents to the standard of what is reasonable under the circumstances.¹⁵⁸ As long as punishment does not exceed that which the ordinary parents would administer if faced with the same situation, it is allowed under this rule.¹⁵⁹

Punishment exceeding the standard becomes assault and battery. A later Indiana case,¹⁶⁰ in which a father used a buggy whip to punish his son, contains a concise statement of the rule:

The law is well settled that a parent has the right to administer proper and reasonable chastisement to this child without being guilty of an assault and battery; but he has no right to administer unreasonable or cruel and inhuman punishment. If the punishment is excessive, unreasonable, or cruel it is unlawful.¹⁶¹

Since all incidents of genuine child abuse are excessive, unreasonable or cruel by definition, they clearly violate the rule. Therefore,

154. *Id.*

155. *Id.* at 491-92, 26 N.E. at 777.

156. *Id.* at 492-93, 26 N.E. at 778.

157. *Id.* at 492, 26 N.E. at 778.

158. The older rule holds parents liable if the punishment is inflicted with malice or results in permanent injury to the child. A North Carolina case presents the leading exposition of this rule. *State v. Pendergrass*, 19 N.C. 365 (1837).

159. Paulsen, *supra* note 121, at 687.

160. *Hornbeck v. State*, 16 Ind. App. 484, 45 N.E. 620 (1896).

161. *Id.* at 485, 45 N.E. at 620.

the right to discipline children is no defense in any criminal prosecution for abusing a child.

Cruelty to Children

Perpetrators of child abuse can also be prosecuted under Indiana's statutes dealing specifically with cruelty to children and child neglect.¹⁶² These cruelty and neglect statutes overlap considerably the general assault and battery provisions since the typical case of child abuse could certainly be characterized as an assault and battery. However, the more particularized statutes also capture acts of cruelty difficult to define as assault and battery. *Helwig v. State*¹⁶³ is an example. There a father was convicted of cruelty to his three children when he left them in the car for several hours on a winter day while he was in a tavern.¹⁶⁴

A definitional section¹⁶⁵ sets out four specific offenses against children: abuse,¹⁶⁶ abandonment,¹⁶⁷ cruelty¹⁶⁸ and neglect.¹⁶⁹ The

162. IND. ANN. STAT. §§ 10-812 to -16 (Cum. Supp. 1973), IND. CODE §§ 35-14-1-1 to -7 (Cum. Supp. 1973); IND. ANN. STAT. § 10-807 (Cum. Supp. 1973), IND. CODE § 35-13-4-1 (Cum. Supp. 1973).

163. 238 Ind. 559, 153 N.E.2d 437 (1958).

164. *Id.* at 562, 153 N.E.2d at 438.

165. IND. ANN. STAT. § 10-813 (Repl. 1956), IND. CODE § 35-14-1-2 (1971).

166. Abuse is defined as follows:

Abuse of a child shall consist in any of the following acts: (a) disposing of the custody of a child contrary to law; (b) employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb, or contrary to the laws of this state; (c) employing or permitting a child to be employed in any occupation, employment or vocation dangerous to the morals of such child; (d) the habitual use by the parent or by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language; (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child, or (f) permitting or allowing any other person to perform any indecent, immoral or unlawful act in the presence of the child that may tend to debauch or endanger the morals of such child.

Id.

167. Abandonment is defined as follows:

Abandonment of a child shall consist in any of the following acts by any one having the custody or control of the child: (a) wilfully forsaking a child; (b) failing to care for and keep the control and custody of a child so that the child shall be exposed to physical or moral risk without proper and sufficient protection; (c) failing to care for and keep the control and custody of a child so that the child shall be liable to be supported and maintained at the expense of the public, or by child caring societies or private persons not legally chargeable with its or their care, custody and control.

Id.

168. Cruelty is defined as follows:

normal case of child abuse would be included not under the statutory definition of abuse, but under the cruelty definition. Included in this broad definition of cruelty are both the infliction of physical and mental injury and both acts of commission and omission. Custody or control of the child is necessary for the offenses of abandonment and neglect, while abuse and cruelty may be committed by any person.

Since two separate sections¹⁷⁰ impose different penalties for these offenses against children, they result in a confusing overlap and the potential for uneven treatment of perpetrators. An 1889 statute makes it a misdemeanor for any person to "cruelly ill-treat, abuse, overwork or inflict unnecessary cruel punishment" upon anyone under age eighteen or for any person having care, custody or control to "wilfully abandon or neglect" a child under age eighteen.¹⁷¹ This penalty section corresponds well with the definitional section.¹⁷² The offenses of abuse and cruelty are included in the clause of the penalty provision applicable to "any person," while punishment for abandonment or neglect is limited to those having care, custody and control of the child by the second clause. The

Cruelty to a child shall consist in any of the following acts: (a) inflicting unnecessarily severe corporal punishment upon a child; (b) inflicting upon a child unnecessary suffering or pain, either mental or physical; (c) habitually tormenting, vexing or afflicting a child; (d) any wilful act of omission or commission whereby unnecessary pain or suffering, whether mental or physical, is caused or permitted to be inflicted on a child; (e) or exposing a child to unnecessary hardships, fatigue or mental or physical strains that may tend to injure the health or physical or moral well-being of such child.

Id.

169. Neglect is defined as follows:

Neglect of a child shall consist in any of the following acts by anyone having the custody or control of the child: (a) wilfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being: Provided, however, that no provision of this act shall be construed to mean that a child is neglected or lacks proper parental care whose parent, guardian or custodian in good faith selects and depends upon spiritual means or prayer for the treatment or cure of disease or remedial care of such child.

Id.

170. IND. ANN. STAT. § 10-807 (Cum. Supp. 1973), IND. CODE § 35-14-3-1 (Cum. Supp. 1973); IND. ANN. STAT. § 10-815 (Cum. Supp. 1973), IND. CODE § 35-14-1-4 (Cum. Supp. 1973).

171. IND. ANN. STAT. § 10-807 (Cum. Supp. 1973), IND. CODE § 35-14-3-1 (Cum. Supp. 1973).

172. IND. ANN. STAT. § 10-813 (Repl. 1956), IND. CODE § 35-14-1-2 (1971).

definitional section contains this same division since the offenses of abandonment and neglect are based on a duty owed to the child.

A second statutory section¹⁷³ provides different penalties for abuse, abandonment, cruelty and neglect. Originally misdemeanors,¹⁷⁴ the offenses became felonies under this section in 1963.¹⁷⁵ A perpetrator of child abuse can be prosecuted, then, under this 1945 penalty section or under the 1889 misdemeanor statute. A readily apparent result of this choice is the potential for uneven treatment of cases. A parent who physically abuses his child may be convicted of a felony in one county, while a second parent may be convicted of only a misdemeanor in another county. To prevent this variation, the 1889 misdemeanor statute should be repealed.^{175.1} If criminal prosecution is appropriate in a particular case, the level of the penalty should be that of a felony. Prosecution for a misdemeanor may result in a penalty as small as a \$5 fine.¹⁷⁶

Wording changes enacted in 1971¹⁷⁷ may render the entire 1945 felony provision only applicable to those having the care, custody and control of the involved child, however. As it now reads, the penalty applies to "[a]ny parent, guardian or person having the care, custody or control of any child who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall be deemed to be guilty of 'cruelty and neglect of children.'"¹⁷⁸ The offenses of abuse, abandonment, cruelty and neglect are included for persons having care, custody or control of the child, but not for "any person." Instead, the penalty has general applicability only if the person is guilty of "cruelty and neglect of children."¹⁷⁹ It can be argued that to be guilty of cruelty *and* neglect, a person must stand

173. IND. ANN. STAT. § 10-815 (Cum. Supp. 1973), IND. CODE § 35-14-1-4 (Cum. Supp. 1973).

174. Ch. 218, § 4, [1945] Ind. Acts 1011.

175. Ch. 114, § 1, [1963] Ind. Acts 98.

175.1 The proposed final draft of Indiana's Penal Code consolidates the two existing penalty sections into one which makes willful cruelty to a child a class D felony. INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE § 35-16.1-1-3 (Proposed Final Draft 1974).

176. IND. ANN. STAT. § 10-807 (Cum. Supp. 1973), IND. CODE § 35-14-3-1 (Cum. Supp. 1973).

177. Pub. L. No. 456, § 1, [1971] Ind. Acts 2093.

178. IND. ANN. STAT. § 10-815 (Cum. Supp. 1973), IND. CODE § 35-14-1-4 (Cum. Supp. 1973).

179. *Id.*

in a relation of care, custody or control to the child since the word "neglect" implies a duty. If this interpretation of the statute is correct, a person other than one having the care, custody or control of the child could be prosecuted only under the 1889 statute with a misdemeanor penalty or under general assault and battery provisions.¹⁸⁰

Two factors suggest that such a restrictive reading of the penalty provision may be incorrect. First, under that interpretation, the language of the second clause in the penalty section would be mere surplusage. Since the first clause refers to those having care, custody or control of the child, it would be a meaningless duplication if the second clause were interpreted to mean the same thing. Second, the language of the provision prior to 1971 gives an explanation of the meaning of "guilty of 'cruelty and neglect of children.'" Before 1971, the clause read in part: "or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be guilty of 'cruelty and neglect of children.'" ¹⁸¹ This explanation in the earlier and more expansive penalty provision suggests that care, custody or control is not necessary for any person to be guilty of "cruelty and neglect of children." By implication, *Ault v. State*¹⁸² supports this conclusion. In *Ault*, the Indiana Supreme Court found that charging the defendant, who did not have care, custody or control of the child involved, under both the contributing to delinquency statute¹⁸³ and the felony statute for cruelty and neglect would be invalid because of duplicity. This indicates, then, that prosecution of the defendant could have been made separately under the felony provision for cruelty and neglect despite the lack of care, custody or control.

The joining of cruelty and neglect with the copulative conjunction "and" instead of with the disjunctive conjunction "or" fosters needless confusion. Until this is remedied by the legislature, the courts should interpret "guilty of 'cruelty and neglect of children'"

180. IND. ANN. STAT. § 10-403 (Cum. Supp. 1973), IND. CODE § 35-1-54-4 (1971) (assault and battery); IND. ANN. STAT. § 10-410 (Cum. Supp. 1973), IND. CODE 35-13-3-1 (1971) (aggravated assault and battery); IND. ANN. STAT. § 10-401(a) (Cum. Supp. 1973), IND. CODE § 35-13-2-1 (1971) (assault or assault and battery with intent to kill).

181. Ch. 218, § 4, [1945] Ind. Acts 1011.

182. 249 Ind. 545, 233 N.E.2d 480 (1968).

183. IND. ANN. STAT. § 10-812 (Repl. 1956), IND. CODE § 35-14-1-1 (1971).

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to mean guilty of either abuse or cruelty of children.^{183.1} Such a reading of the penalty section would coordinate it with the definitional statute for the offenses against children. By definition, any person may be guilty of abuse or cruelty to children, while care, custody or control of the child is necessary to be guilty of the offenses of abandonment and neglect.¹⁸⁴ Since the first clause of the penalty section applies to those persons having care, custody or control of the child that are guilty of abuse, abandonment, cruelty or neglect, the second clause should apply to any person guilty of abuse or cruelty.

Two important sections were added to the provisions on crimes against children in 1971.¹⁸⁵ These deal with the custody of the child involved both while the criminal prosecution is pending and after its conclusion. When an arrest for abuse, abandonment, cruelty or neglect is made, either the prosecuting attorney or county department of public welfare may file a petition or motion with the court having criminal jurisdiction to have the child removed from its parents or caretakers. Any removal is effective only pending determination of the accused person's guilt. If the accused is acquitted, or the charges dismissed, the court must return the child unless the welfare department petitions the juvenile court to retain custody on civil grounds. If the accused is convicted, the juvenile court is to determine the child's disposition.

The value of these custody provisions for cases of abuse, abandonment, cruelty and neglect is readily apparent. However, they overlook the equally important need of protecting other children under the control or custody of the accused person. These other children may already need protection, or they may become targets of parental or caretaker abuse once the particular child involved is

183.1 Such a reading of the statute should be necessary only for a short time. The unified penalty section for cruelty to children in the proposed final draft of Indiana's Penal Code is applicable only to those who have the care, custody or control of the child. Comments to the section indicate that the intention is to cover acts of cruelty to a child by those without the care, custody or control of the child in the proposed sections on crimes against the person. INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE § 35-16.1-1-3 (Proposed Final Draft 1974).

184. IND. ANN. STAT. § 10-813 (Repl. 1956), IND. CODE § 35-14-1-2 (1971).

185. IND. ANN. STAT. § 10-816 (Cum. Supp. 1973), IND. CODE § 35-14-1-5 (Cum. Supp. 1973); IND. ANN. STAT. § 10-816(a) (Cum. Supp. 1973), IND. CODE § 35-14-1-6 (Cum. Supp. 1973).

removed from the home.¹⁸⁶ Although normal civil wardship proceedings can be initiated for the protection of these children,¹⁸⁷ their disposition would be more conveniently handled with the disposition of the actual victim.

THE JUVENILE COURT

Whether the perpetrator of the abuse is punished under the criminal law or not, the state has an obligation to protect the child from further abuse. This protective function is exercised through the juvenile court. The purpose clause of Indiana's juvenile care chapter recites that children under the jurisdiction of the juvenile court "are entitled to the protection of the state, which may intervene to safeguard them from neglect or injury."¹⁸⁸

The Power to Act

Protection of a child from abuse may extend even as far as removal of the child from his parents or caretakers. In *Van Walters v. Board of Children's Guardians of Marion County*,¹⁸⁹ the Indiana Supreme Court upheld the constitutionality of removing a child from its home where the parents are unfit:

It is therefore proper to assume that our constitution, and our laws enacted under it, sanction and confirm the great principle of the sovereign's guardianship of the children within the dominions of the sovereign. But while it is true that this great principle is thus sanctioned and confirmed, it is still true that the equally great principle that natural right vests in parents the custody and control of their children is confirmed and enforced. This high and strong natural right yields only when the welfare of society or of the children themselves comes into conflict with it; but where there is such conflict the supreme right of guardianship asserts itself for the protection of society and the promotion of the welfare of the wards of the commonwealth¹⁹⁰

186. As to this danger see notes 81-82 *supra* and accompanying text.

187. IND. ANN. STAT. § 9-3208 (Cum. Supp. 1973), IND. CODE § 31-5-7-8 (1973).

188. IND. ANN. STAT. § 9-3201 (Repl. 1956), IND. CODE § 31-5-7-1 (1973).

189. 132 Ind. 567, 32 N.E. 568 (1892).

190. *Id.* at 569, 32 N.E. at 569.

A later case¹⁹¹ reaffirmed this principle for the present statute¹⁹² authorizing the state's supervision of children improperly cared for by their parents or caretakers.

More specifically, the juvenile court has authority to act in regard to abused children under its jurisdiction over neglected children.¹⁹³ Two separate statutory sections in Indiana's juvenile law define neglected child in essentially the same way.¹⁹⁴ The 1945 definition includes a child who "[b]y reason of neglect, cruelty or disrepute on the part of parents, guardians or other persons in whose care the child may be is living in an improper place" or "is in an environment dangerous to life, limb or injurious to the health or morals of himself or others."¹⁹⁵ An abused child would fall under either of these two clauses of the 1945 definition as well as the nearly identical clauses of the 1907 definition.¹⁹⁶

Invoking the Power of the Juvenile Court

Independent of Indiana's child abuse reporting law, cases of child abuse may be brought to the attention of the juvenile court. "Any person may and any peace officer shall" report dependent,

191. *Egoff v. Bd. of Children's Guardians of Marion County*, 170 Ind. 238, 84 N.E. 151 (1908).

192. IND. ANN. STAT. § 52-504 (Repl. 1964), IND. CODE § 12-3-3-1 (1973).

193. Three different statutes authorize the juvenile court to hear cases concerning dependent or neglected children. IND. ANN. STAT. § 9-2808 (Cum. Supp. 1973), IND. CODE § 31-5-5-3 (Cum. Supp. 1973); IND. ANN. STAT. § 9-3208 (Cum. Supp. 1973), IND. CODE § 31-5-7-8 (1973); IND. ANN. STAT. § 52-505 (Repl. 1964), IND. CODE § 12-3-3-2 (1973). The first two statutes are part of Indiana's juvenile law article (IND. ANN. STAT. §§ 9-3201 to -3224 (Cum. Supp. 1973), IND. CODE § 31-5 (1973)), while the third is in the newly created child welfare article (IND. CODE § 12-3 (1973)).

194. The following two definitional sections correspond with two of the statutes authorizing the juvenile court to hear cases concerning dependent and neglected children: IND. ANN. STAT. § 9-2807 (Repl. 1956), IND. CODE § 31-5-5-2 (1973); IND. ANN. STAT. § 9-3206 (Repl. 1956), IND. CODE § 31-5-7-6 (1973). The authorization statute in the child welfare article has no corresponding definitional statute.

195. IND. ANN. STAT. § 9-3206 (Repl. 1956), IND. CODE § 31-5-7-6 (1973).

196. IND. ANN. STAT. § 9-2807 (Repl. 1956), IND. CODE § 31-5-5-2 (1973). These clauses are:

[O]r whose home, by reason of neglect, cruelty or depravity on the part of its parent or parents, guardian or other person in whose care it may be, is an unfit place for such child; or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship.

It is interesting to note that the 1907 definition applies only to boys under 16 years old and girls under 17 years old, while the 1945 definition extends to all children under 18 years old.

neglected or delinquent children to the court.¹⁹⁷ Since abused children fall within the definition of neglect, this allows reporting of cases of child abuse to the juvenile court in addition to the reports required by the reporting law. The reporting law serves, then, to make the reporting of a specialized group of neglect cases mandatory. These are cases involving purposeful infliction of injury upon children. In response to the growing recognition of the active battering of children, Indiana, as all other states, singled out such children for special protection in the form of mandatory reporting.

A formal petition to have the child declared dependent and neglected can only be filed by the probation officer of the court or the department of welfare.¹⁹⁸ Limiting the filing of wardship petitions to the probation officer of the court and the department of welfare is designed to prevent insubstantial petitions. In 1957, the Indiana Court of Appeals,¹⁹⁹ anxious to protect parents and caretakers from unnecessary proceedings with a penal tone, construed the intent of the legislature to be that no one other than the juvenile court's probation officer could file a petition. The legislature responded two years later with an amendment authorizing filing by the county department of public welfare.²⁰⁰ This extension was both logically and practically necessary since the welfare department is given supervision of all dependent and neglected children by statute²⁰¹ and is generally best qualified to evaluate the necessity for filing a wardship petition.

If cases of child abuse are reported to the juvenile court under the broad designation of neglect, the court is to conduct, as far as possible, "a preliminary investigation of the home and environmental situation of the child, his previous history and the circumstances of the condition alleged."²⁰² This provision for investigation by the juvenile court makes it possible for an alleged incident of child abuse to be investigated by three separate agencies: the county

197. IND. ANN. STAT. § 9-3208 (Cum. Supp. 1973), IND. CODE § 31-5-7-8 (1973).

198. *Id.*

199. *Shupe v. Bell*, 127 Ind. App. 292, 141 N.E.2d 351 (1957).

200. Ch. 76, § 1 [1959] Ind. Acts 155 (codified at IND. ANN. STAT. § 9-3208 (Cum. Supp. 1973, IND. CODE § 31-5-7-8 (1973))).

201. IND. ANN. STAT. § 52-504 (Repl. 1964), IND. CODE 12-3-3-3 (1973).

202. IND. ANN. STAT. § 9-3208 (Cum. Supp. 1973), IND. CODE § 31-5-7-8 (1973).

department of public welfare,²⁰³ a law enforcement agency²⁰⁴ or the juvenile court. Spreading investigatory powers so widely is unnecessary. In addition, it is inappropriate for the machinery of the juvenile court to investigate the same cases that it may have to decide later. The solution is to strip the juvenile court of its preliminary investigatory powers in regard to dependent and neglected children. Indiana's mandatory reporting law could then be expanded to require reporting of cases of neglected children in its more broad meaning. The classification "dependent children" should be eliminated since its definition is included in the current definition of neglect.²⁰⁵ With these changes, all cases of neglected children, including both acts of commission and omission, could be investigated pursuant to the reporting law. Consolidated reporting and investigation will both provide more even treatment of cases and concentrate state resources for maximum effectiveness.

Hearings

In child abuse cases it is often imperative that the child be immediately removed from his home. Emergency removal before a hearing is possible in Indiana in two ways. First, an officer of a law enforcement agency can take a child into custody if the child's "surroundings are such as to endanger his health, morals or welfare, unless immediate action is taken."²⁰⁶ This action must be reported to the juvenile court.²⁰⁷ Second, the juvenile court may issue an emergency wardship order.²⁰⁸ In either case, a formal hearing is held within several days.²⁰⁹ Parents or caretakers are given the necessary notice of the hearing²¹⁰ and are advised as to where they can seek both legal²¹¹ and rehabilitative help.²¹² By this time, the services of

203. IND. ANN. STAT. § 52-1428(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-3(a) (1973).

204. *Id.*

205. Note, *Dependency and Neglect: Indiana's Definitional Confusion*, 45 IND. L.J. 606, 611 (1970).

206. IND. ANN. STAT. § 9-3212 (Repl. 1956), IND. CODE § 31-5-7-12 (1973).

207. *Id.*

208. IND. ANN. STAT. § 9-3209 (Repl. 1956), IND. CODE § 31-5-7-9 (1973).

209. Interview with Alfred Pivarnik, Indiana Circuit Court Judge with juvenile court duties, in Valparaiso, Indiana, Feb. 6, 1974 [hereinafter cited as Pivarnik Interview].

210. IND. ANN. STAT. § 9-3209 (Repl. 1956), IND. CODE § 31-5-7-9 (1973).

211. Counsel is not provided in Indiana, although there is a trend in that direction in several states. Note, *Parents' Right to Counsel in Dependency and Neglect Proceedings*, 49 IND. L.J. 167, 180 (1973).

212. Pivarnik Interview, *supra* note 209.

the county department of welfare have also been made available to the parents or caretakers.²¹³

The hearings on a wardship petition are conducted in the informal manner of juvenile court.²¹⁴ This informality is important in avoiding an accusatory tone that may make the parents or caretakers refuse rehabilitative help. In fact, two authorities on child abuse suggest that more satisfactory dispositions are made when the hearings are held in the judge's chambers with attorneys, parents, welfare personnel and physicians simply discussing all aspects of the case.²¹⁵

Evidence

Indiana has no special evidentiary rules in child protection hearings. Two such New York rules have particular value in protecting children from abuse and should be adopted in Indiana. The first²¹⁶ is designed to provide protection for other children in the home of an abused child:

[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent.²¹⁷

The potential for protection provided by this rule is obvious. At least half of the child abuse victims in a sample of a nationwide survey in 1967 had been prior victims of abuse.²¹⁸ Between 30 and 40 percent of the parents had been perpetrators of abuse in the past.²¹⁹ Siblings of the currently abused child had been victims of abuse prior to the present incident in 27 percent of the sample families.²²⁰ As was concluded from these findings, "physical abuse

213. The services of the county department of public welfare are to be extended during initial investigation following a report of abuse. CHILD WELFARE SERVICES BULLETIN, *supra* note 41, at 6.

214. IND. ANN. STAT. § 9-3215 (Cum. Supp. 1973), IND. CODE § 31-5-7-15 (1973).

215. Helfer & Kempe, *Editors' Note* to THE BATTERED CHILD at 200 (R. Helfer & C. Kempe eds. 1968).

216. N.Y. FAM. CT. ACT § 1046(a)(i) (McKinney Supp. 1973).

217. *Id.*

218. *Id.*, *supra* note 1, at 108.

219. *Id.* at 114.

220. *Id.*

of children is more often than not an indication of a prevailing pattern of caretaker-child interaction in a given home rather than of an isolated incident."²²¹ Protecting children from such a pattern of abuse is the aim of the New York rule.

New York's family courts have vigorously applied this evidentiary rule. In fact, in their eagerness to protect other children in the home of the abused child, the family courts may have gone beyond the New York legislature's intent. The rule states that evidence of proof of previous abuse to one child shall be *admissible* to determine the abuse or neglect of another child of the parents or caretakers.²²² There is no statutory language indicating that the previous evidence of abuse is alone sufficient to establish the neglect of another child. Yet, this is how the rule has been read:

Although there is not one scintilla of evidence to show abuse or neglect of the child Richard, to remove the child from the home is not a violation of due process or a violation of their constitutional rights.²²³

In another case a neglect petition filed just five days after a child's birth successfully relied on the evidentiary rule to obtain a removal.²²⁴ This rule has even been applied to remove a child before it arrived home from the hospital after birth.²²⁵

Although the New York legislature may not have intended the judicial interpretation given the rule,²²⁶ the result seems eminently fair. It allows the state to protect not only those children who have been abused, but also those that are likely to suffer serious harm

221. *Id.* at 108.

222. N.Y. FAM. CT. ACT. § 1046(a)(i) (McKinney Supp. 1973).

223. *In re Edwards*, 70 Misc. 2d 858, 861, 335 N.Y.S.2d 575, 580 (1972).

224. *In re Baby Boy Santos*, 71 Misc. 2d 789, 336 N.Y.S.2d 817 (1972).

225. *In re J*, 71 Misc. 2d 815, 335 N.Y.S.2d 815 (1972). However, a petition to obtain custody at birth of a later child in the same family was denied when the court found that the parents had stabilized themselves. *In re J*, 72 Misc. 2d 683, 687, 340 N.Y.S.2d 306, 310 (1972).

226. Two commentators have suggested that the rule would provide that evidence of abuse of one child shall constitute *prima facie* proof of neglect of another child in the same family if it was intended to be interpreted as the courts have interpreted it. They contend that the effect of the interpretation is to allow insubstantial petitions to be filed "in hope that subsequent investigation will produce sufficient evidence to justify the judicial intervention into the family that has already occurred." Ellison & Occhialino, *Family Law*, 1971 *Survey of New York Law*, 23 SYRACUSE L. REV. 675, 700-701 (1972).

from improper guardianship. Family court Judge Dembitz has supplied the most telling argument in favor of the evidentiary rule as applied:

Cases like the instant one of maltreatment of a prior child present one of the few situations in which this Court, and social agencies at its instance, can be alerted to take before-the-fact protective measures.²²⁷

Other judges in the family court have talked of invoking state intervention when there is "clear and present danger" of abuse to a child.²²⁸ Such preventive action by the courts is necessary if the state is to be truly effective in executing its duty to protect children from abuse.

Louisiana,²²⁹ Montana²³⁰ and South Dakota²³¹ have judicially developed rules that evidence of prior abuse by particular parents or caretakers may be sufficient for a determination of neglect as to another child in the same home. Justification for the rule has been found in the environment clauses of the dependency and neglect definitions of the Montana and South Dakota statutes.²³² The South Dakota Supreme Court insisted it could not "allow the health, safety or life of a young child to be placed back into an environment conclusively proved, as evidenced by the treatment of her brother, to be wholly unfit and improper."²³³ There is no necessity for evidence as to the abuse of the other children to be removed from an abused child's family since the emphasis is on the potential for abuse rather than actual abuse. With no evidence of the mistreatment of the sister of a severely abused boy, the Montana Supreme Court stated:

The question to be resolved in this case was whether or not the adoptive parents were fit and proper parents and since

227. *In re G*, 74 Misc. 2d 606, 610, 344 N.Y.S.2d 422, 426 (1973).

228. *In re Edwards*, 70 Misc. 2d 858, 862, 335 N.Y.S.2d 575, 581 (1972); *In re S*, 66 Misc. 2d 683, 698, 322 N.Y.S.2d 170, 185 (1971).

229. *In re State ex rel. Thaxton*, 220 So. 2d 184 (La. App. 1969).

230. *In re Phelps*, 145 Mt. 557, 402 P.2d 593 (1965).

231. *In re K.D.E.*, ____ S.D. ____, 210 N.W.2d 907 (1973).

232. *In re Phelps*, 145 Mt. 557, 559, 402 P.2d 593, 595 (1965); *In re K.D.E.*, ____ S.D. ____, 210 N.W.2d 907, 910 (1973).

233. *In re K.D.E.*, ____ S.D. ____, ____, 210 N.W.2d 907, 910 (1973).

we concur with the trial judge that they are not, we concur in his actions with respect to the little girl.²³⁴

Such a rule could be formulated in Indiana. The Indiana definition of neglected child includes both a dangerous environment clause and language concerning "living in an improper place" due to neglect, cruelty or disrepute on the part of parents or caretakers.²³⁵ These clauses seemingly allow removal of a child from an environment shown to be abusive on the basis of previous incidents involving other children in the family.

A second important New York evidentiary rule creates a presumption of abuse or neglect from the circumstances of the abusive incident.²³⁶ It provides:

Proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible.²³⁷

This presumption is similar to the doctrine of *res ipsa loquitur* in the area of negligent torts.²³⁸ Before this presumption was enacted by the New York legislature in 1970,²³⁹ a family court judge had recognized the value of the concept of *res ipsa loquitur* in cases of child abuse. He "borrowed" the concept so as to let the condition of an abused child speak for itself.²⁴⁰

Such an evidentiary rule is necessary for cases of child abuse since the child is usually either too young or too fearful to tell what happened, and the parents seek to protect each other.²⁴¹ Outside

234. *In re Phelps*, 145 Mt. 557, 559, 402 P.2d 593, 595 (1965).

235. Both the 1907 and 1945 definitions contain such language. IND. ANN. STAT. § 9-2808 (Cum. Supp. 1973), IND. CODE § 31-5-5-3 (1973); IND. ANN. STAT. § 9-3206 (Repl. 1956), IND. CODE § 31-5-7-6 (1973).

236. N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney Supp. 1973).

237. *Id.*

238. For a description of *res ipsa loquitur* see W. PROSSER, TORTS § 39 (4th ed. 1971).

239. Ch. 962, § 9, [1970] Laws of N.Y. 2033.

240. *In re S*, 46 Misc. 2d 161, 162, 259 N.Y.S.2d 164, 165 (1965).

241. Adelson, *supra* note 146, at 1348-49.

witnesses of an abusive incident are rare.²⁴² If the child is to be properly protected, it seems justifiable to draw an inference of abuse or neglect from the child's age and condition. Applying the concept of *res ipsa loquitur*, a child with bruises and broken bones is not in the physical condition which in the ordinary course of things would exist if the parent who is responsible for the child is not abusive. A child returned wrongly to an abusive environment has a 25-50 percent chance of re-injury.²⁴³ This fact necessitates adoption of the presumption in Indiana.

The effect of the New York statutory presumption is to shift the burden of explaining the child's injuries to the parents or caretakers once evidence of the child's condition has been established by medical and other testimony. In reality, this may be what happens in Indiana's wardship hearings even without the presumption. After learning of the extent of the child's injuries, the juvenile judge may turn to the parents and ask simply, "What happened?" The presumption does make a difference when the parents or caretakers fail to give any or an adequate explanation, however. With the New York statutory presumption the condition of the child is *prima facie* evidence of abuse or neglect, and absent an adequate explanation, abuse or neglect is established.²⁴⁴ On the other hand, the inference provided by borrowing *res ipsa loquitur* or an informal call for explanation once the condition of the child is established, do not theoretically allow the child to be declared abused or neglected even if no explanation is given.²⁴⁵ The value of the statutory presumption thus becomes apparent.

Since this presumption of abuse or neglect is made in civil proceedings, there is little problem with its constitutionality on due process grounds. All that is necessary is that, judging the conveniences,²⁴⁶ it is fair to place on the child's parents or caretakers the

242. *Id.* at 1348.

243. Helfer, *supra* note 36, at 51.

244. 32A C.J.S. *Evidence* § 1016 (1964).

245. PROSSER, *supra* note 238, at 228.

246. The test of comparative convenience was suggested in *Morrison v. California*, 291 U.S. 82 (1933). There in referring to presumptions in criminal cases, the Supreme Court said: The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities

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burden of providing an explanation as to the child's injuries.²⁴⁷ Since the parents or caretakers have care and control of the child, it is certainly more fair to have them explain the injuries than for the welfare department to attempt such an explanation. Neither is New York's statutory presumption invalid as a violation of the parents' or caretakers' privilege against self-incrimination. Citing *Yee Hem v. United States*,²⁴⁸ a family court judge upheld the constitutionality of the presumption on the ground that there is no mandatory requirement that the parents or caretakers provide an explanation or even testify.²⁴⁹ The constraint is merely by force of circumstances if they wish to retain custody of the child.²⁵⁰

Disposition

If the hearing results in a determination of neglect, the juvenile court may place the abused child under supervision in his own home or make him a ward of the court, the department of welfare or a child care agency.²⁵¹ Wardship may last indefinitely in Indiana; its duration is usually related to the progress made by the parents or caretakers in counseling with the county department of public welfare or other service agency.²⁵² If rehabilitative efforts succeed, the wardship may be dissolved, and the child returned to his home.²⁵³ On the other hand, if the parents are completely unreceptive to help or make no progress in rehabilitation, the juvenile court may be petitioned to hold a hearing on termination of parental rights.²⁵⁴ This permanent termination of the rights of the parents or caretakers in the child is considered a severe remedy.²⁵⁵

for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Id. at 88-89.

247. For a discussion of the constitutionality of statutory presumptions in civil cases see Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 538-41 (1955).

248. 268 U.S. 178 (1925). In *Yee Hem*, the Supreme Court upheld a statutory presumption that all smoking opium found in the possession of an individual had been imported contrary to law. The presumption was not found to violate the privilege against self-incrimination.

249. *In re S*, 66 Misc. 2d 683, 690, 322 N.Y.S.2d 170, 177 (1971).

250. *Id.*

251. IND. ANN. STAT. § 9-3215 (Cum. Supp. 1973), IND. CODE § 31-5-7-15 (1973).

252. Pivarnik Interview, *supra* note 209.

253. IND. ANN. STAT. § 9-3216 (Repl. 1956), IND. CODE § 31-5-7-17 (1973).

254. IND. ANN. STAT. § 3-120(a) (Cum. Supp. 1973), IND. CODE § 31-3-1-7 (1973).

255. Pivarnik Interview, *supra* note 209.

Wardship is not easily dissolved. The burden is on the parents or caretakers to show that they have significantly changed and are now able to provide a safe environment for the previously abused child. In a recent case²⁵⁶ involving a child found to be dependent, the Indiana Supreme Court stated:

Once the child is found to be a "dependent child," and the parental relationship is severed, the change of the state of mind, habits, and circumstances of the parent essential to provide a fit home for the child is a matter solely up to the parent. The burden of going forward with the evidence should be, and is, upon the parent to show such a change of conditions and reformation that the best interests of the child would be served by returning the child to the parent.²⁵⁷

Placing such a heavy burden on parents or caretakers seeking to have a previously abused child returned to them is appropriate for two reasons. It both ensures adequate protection for the child and encourages the parents or caretakers to seek rehabilitative help if they want to have the child returned to them.

Criminal Sanctions

Whenever any child is found to be dependent or neglected, the parents or caretakers of that child or any other person responsible for or contributing to that child's condition may be convicted of a misdemeanor in juvenile court.²⁵⁸ However, there is an important proviso. The juvenile court has the power to suspend judgment and put the defendant on probation for two years.²⁵⁹ Conditions of the probation are that the defendant personally appear in juvenile court when ordered to do so and follow the court's instructions as to the care of the dependent or neglected child.

This 1907 statutory section should be repealed. It overlaps unnecessarily with the criminal law provisions for cruelty and neglect

256. *In re Collar*, ___ Ind. ___, 294 N.E.2d 179 (1973).

257. *Id.* at ___, 294 N.E.2d at 182.

258. IND. ANN. STAT. § 9-2809 (Repl. 1956), IND. CODE § 31-5-5-4 (1973).

259. *Id.*

of children.²⁶⁰ In addition, punishing the parents or caretakers of an abused or neglected child is not a proper function for the juvenile court. Juvenile courts are to provide protection for children in an atmosphere that is not made overly accusative in nature by the threat of criminal sanctions against the child's parents or caretakers. Further, the supervision provided by placing the parents or caretakers on probation can be achieved by the juvenile court in its normal disposition of the child.

PROTECTIVE SERVICES

In addition to the protection offered by its reporting law, criminal law and juvenile courts, Indiana provides protective services for abused children through each county department of public welfare.²⁶¹ These services are designed to first evaluate and then help to manage the family problems of abusive parents or caretakers. Other than a general statement of a duty,²⁶² the law offers little direction in the provision of protective services for children that are abused or neglected. It is odd, for example, that Indiana's child abuse reporting law requires the county department of public welfare to "investigate" the incident,²⁶³ but not to offer its social services to the parents and caretakers of the child.

In practice, social services are made available when incidents of child abuse are reported to the department of welfare.²⁶⁴ For those families already receiving assistance from the department for other reasons, help is offered through their regular caseworker.²⁶⁵ The department's section on child welfare also becomes involved with the child itself, but not the parents or caretakers. If the family is not

260. IND. ANN. STAT. §§ 10-812 to -16 (Cum. Supp. 1973), IND. CODE §§ 35-14-1-1 to -7 (Cum. Supp. 1973); IND. ANN. STAT. § 10-807 (Cum. Supp. 1973), IND. CODE § 35-14-3-1 (Cum. Supp. 1973).

261. IND. ANN. STAT. § 52-504 (Repl. 1964), IND. CODE § 12-3-3-1 (1973).

262. *Id.*

263. IND. ANN. STAT. § 52-1428(a) (Cum. Supp. 1973), IND. CODE § 12-3-4.1-3(a) (1973).

264. Directions from the state department to all county departments of public welfare include:

In addition to investigation, the child and family involved in each such case will be provided the benefits of the child welfare program including casework services, home-maker services, medical assistance and foster care as indicated by the needs and circumstances of the case.

CHILD WELFARE SERVICES BULLETIN, *supra* note 41, at 9.

265. Leeds Interview, *supra* note 54.

receiving other assistance from the department, the child welfare section works with both parents or caretakers and the child.²⁶⁶

Since protective services are offered without court order, they raise serious questions of privacy and due process. It is easy for an offer of services to an abusive parent or caretaker to become coercive, especially if the family is already receiving other assistance from the department. In addition, Indiana law fails to provide basic guidelines to safeguard the legal rights of families faced with intervention by the welfare department. The power of the county department of public welfare to intervene is not precisely delineated by statute. No provision is made for a hearing to decide the continued necessity for protective services once they have been voluntarily accepted by the family.²⁶⁷ Neither must notice be given of right to counsel.²⁶⁸ Due process may require such fundamental safeguards since state intervention in providing protective services approaches the category of a constitutionally protected search.²⁶⁹

CONCLUSION

Indiana has the basic statutory framework necessary for protecting the abused child. However, this framework needs thoughtful additions, revisions and consolidations. Implementation should begin with the enactment of a broad child protection article as part of Indiana's family law. At the beginning of the article should stand the mandatory reporting law,²⁷⁰ newly enlarged to require reporting of cases of child neglect as well as abuse. The provisions on depen-

266. *Id.*

267. One commentator has suggested that a hearing be held within 60 to 90 days after services are first offered by the welfare department. He does not favor a prior hearing since it "would be indistinguishable from the present protective supervision used by the juvenile court, and would introduce the element of coercion so apt to produce hostility in parents." Cheney, *Safeguarding Legal Rights in Providing Protective Services*, CHILDREN, May-June 1966, at 86, 91.

268. Cheney contends that there should be provision for counsel, if requested, at hearings on the continuation of protective services, and that clients should be informed of this right on the initial contact with them. *Id.* at 92.

269. See generally *Wyman v. James*, 400 U.S. 309 (1971), where the Supreme Court found that required visits to welfare recipients' homes were not searches in the traditional criminal law context, but indicated that home visits may have some of the characteristics of a traditional search.

270. IND. ANN. STAT. §§ 52-1426 to -1431 (Cum. Supp. 1973), IND. CODE § 12-3-4.1 (1973).

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dent and neglected children, currently found in three separate chapters²⁷¹ and overlapping each other considerably, could be consolidated. Hopefully a single definition of neglect would also be part of the article. Finally, statutory presumptions of prior abuse as evidence of an abusive environment and the child's condition as *prima facie* evidence of abuse or neglect must be included as part of a child protection article.

The law is only one part of the answer to the problem of child abuse. It is also, by nature usually called in after the damage has already been done. Recognition of these limitations does not make the role of the law unimportant, however. It should rather spur all those involved to make the impact of the law felt most effectively where it is needed in dealing with child abuse.

271. IND. ANN. STAT. §§ 52-504 to -508 (Repl. 1964), IND. CODE § 12-3-3 (1973); IND. ANN. STAT. §§ 9-2806 to -2809 (Cum. Supp. 1973), IND. CODE § 31-5-5 (1973); IND. ANN. STAT. §§ 9-3201 to -3224 (Cum. Supp. 1973), IND. CODE § 31-5-7 (1973).

