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THE ABUSED CHILD AND THE LAW

ROBERT E. SHEPHERD, JR.*

"He was found dead in his crib by a family friend who had stopped in at the home. A bottle of sour milk was in his crib and maggots were crawling around in his soiled diaper. The mother had gone to visit an aunt, leaving the child alone, and did not learn of the child's death until she was called two hours later. When she was interrogated by police she stated that she had noticed 'nothing unusual wrong' with the baby and that she fed him regularly and bathed him daily. Although she had been advised to bring the child to the well-baby clinic, she had never done so because she 'just didn't get around to it.'"¹

This brief case history exemplifies the neglect, or omission, aspect of a growing medico-legal problem, involving both acts of commission and omission, which has just begun to capture the public's attention and concern. The other, or commission, aspect is represented by the following example:

"A six-week-old infant was admitted to the hospital because of swelling of the right thigh of four days' duration. The mother stated to the examining physician that the child had fallen from its crib and struck its right leg on the floor. X-ray examination revealed complete fracture through the mid-shaft of the right femur with posterior displacement of the distal fragment. The patient was in Bryant's traction for two weeks and was discharged in good condition after application of a hip spica.

"A few weeks later the child was admitted to another hospital with multiple contusions and abrasions. Investigation by the social service department indicated that the father had thrown the child on the floor, shattering the cast and inflicting serious head trauma resulting in bilateral subdural hematomas. The child was recently seen in the pediatric clinic, where multiple signs of intracranial damage were noted. The child is now blind and mentally retarded."²

Hardly a day goes by now when we can pick up the newspaper without reading of some child having been admitted to a hospital with

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¹Adelson, *Homicide by Starvation*, 186 J.A.M.A. 458, 459 (1963). The child was seven months and two days old at its death and weighed 7.7 pounds as compared with a normal weight of 17 pounds and its birth weight of 6.1 pounds.

²Fontana, *The Maltreated Child: The Maltreatment Syndrome in Children* 45-46 (1964) (hereinafter cited as Fontana).

either severe malnutrition or multiple injuries.³ This is not a new problem; it is as old as mankind. However, it is just in the past few years that society has concentrated on the problem and actively sought to discover some practicable solutions.

The first suggestion of the problem of overt child abuse was made by Dr. John Caffey in 1946 when he noted the coincidence of long bone fractures and subdural hematomas; he felt that in the absence of a reasonable history of trauma, many of these cases raised the possibility of intentional ill treatment.⁴ Four year later, Lis, Frauenberger and Smith once again brought these injuries to the attention of the medical community.⁵ Upon the foundation laid by these medical pioneers, further studies expanded upon, and confirmed, Caffey's initial reaction.⁶ The medical profession responded rapidly and late in 1961 the American Academy of Pediatrics scheduled a symposium on the problem at its annual meeting. Dr. Charles H. Kempe and his colleagues in Denver published a definitive study of the problem and established several valuable guideposts for the diagnosis of this syndrome which they christened, "The Battered Child Syndrome."⁷

Other professions, particularly social workers, met the challenge

³While writing this article the Richmond, Virginia, newspapers reported two aggravated cases of suspected child abuse. In the first case, a five-month-old girl was admitted to a Richmond hospital with "broken bones in both legs, both knees, her right ankle, her right arm and several broken ribs. The child also had second degree burns over part of her body and bruises around her eyes..." Richmond News-Leader, Mar. 15, 1965, p. 6, col. 2. A couple of weeks later it was reported that a policeman in Fairfax County, Virginia, had been charged with the murder of his seven-month-old daughter by beating her in the stomach. Richmond Times-Dispatch, Mar. 28, 1965, p. 8-B, col. 5.

⁴Caffey, Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma, 56 Am. J. Roentgen. 163 (1946).

⁵Lis & Frauenberger, Multiple Fractures Associated with Subdural Hematoma in Infancy, 6 Pediatrics 890 (1950); Smith, Subdural Hematoma with Multiple Fractures, 63 Am. J. Roentgen. 342 (1950).

⁶Altman & Smith, Unrecognized Trauma in Infants and Children, 42A J. Bone Joint Surg. [Amer.] 407 (1960); Bakwin, Multiple Skeletal Lesions in Young Children due to Trauma, 49 J. Pediat. 7 (1956); Caffey, Some Traumatic Lesions in Growing Bones other than Fractures and Dislocations: Clinical and Radiological Features, 30 Brit. J. Radiol. 225 (1957); Fisher, Skeletal Manifestations of Parent-Induced Trauma in Infants and Children, 51 Southern Med. J. 956 (1958); Jones & Davis, Multiple Traumatic Lesions of the Infant Skeleton, 15 Stanford Med. Bull., No. 3, p. 259 (1957); Miller, Fractures Among Children: Parental Assault as Causative Agent, 42 Minnesota Med. 1209, 1414 (1959); Silverman, The Roentgen Manifestations of Unrecognized Skeletal Trauma in Infants, 69 Am. J. Roentgen. 413 (1953); Woolley & Evans, Significance of Skeletal Lesions in Infants Resembling Those of Traumatic Origin, 158 J.A.M.A. 539 (1955).

⁷Kempe, Silverman, Steele, Droegemueller & Silver, The Battered-Child Syndrome, 181 J.A.M.A. 17 (1962) (hereinafter cited as Kempe).

posed by these perceptive physicians. Leontine Young, Helen Boardman, Elizabeth Elmer and others presented different perspectives and posed challenging questions about what could or should be done once the syndrome has been identified.⁸ The Children's Bureau of the U. S. Department of Health, Education and Welfare called a conference of experts to formulate recommendations for meeting these challenges, and this group recommended to the states the adoption of mandatory reporting legislation.⁹ However, before considering proposed statutory schemes, it is desirable to examine the law relating to abuse, and the hallmarks of abuse.

It has been observed, with perhaps a tinge of the dramatic, that the laws dealing with child abuse have been far less numerous and less stringent than the laws pertaining to animal abuse. It is fact that one of the earliest and most publicized cases of child abuse pointed up the element of truth in the previous statement. Late in the last century a church worker, while visiting in a tenement, was informed that a young child, named Mary Ellen, in the same building was beaten daily and appeared to be seriously malnourished. Investigation proved these reports to be true and the church worker sought to have Mary Ellen removed from this environment. Her efforts with the police and the district attorney's office met stone walls and in desperation she turned to the Society for the Prevention of Cruelty to Animals. She argued that Mary Ellen was being treated like an animal and was, after all, a member of the animal kingdom. With its assistance, an action was brought based on this theory and the unfortunate child was removed from her parents.¹⁰

Blackstone pointed out that under Roman law a father had the absolute power of life and death over his children, but that under English law the father "may lawfully correct his child, being under age, in a reasonable manner; (d) for this is for the benefit of his education."¹¹ In this country the courts have taken two different approaches with respect to the limits of parental discipline. One is that the parent, or one *in loco parentis*, is the sole arbiter as to the degree

⁸Boardman, A Project to Rescue Children from Inflicted Injuries, 7 Soc. Work, No. 1, p. 43 (1962) (hereinafter cited as Boardman); Elmer, Abused Young Children Seen in Hospitals, 5 Soc. Work, No. 4, p. 98 (1960); Elmer, Identification of Abused Children, 10 Children 180 (1963); Morris, Gould & Matthews, Toward Prevention of Child Abuse, 11 Children 55 (1964); Young, Wednesday's Children (1964) (hereinafter cited as Young).

⁹Children's Bureau, U.S. Dep't of Health, Education & Welfare, The Abused Child (1963).

¹⁰Fontana at 8-9.

¹¹1 Blackstone, Commentaries *452.

of punishment and all punishment is *per se* reasonable which does not result in disfigurement or permanent injury, or is not inflicted maliciously.¹² The other approach, and the one preferred by the majority, is that the parent has a "right to punish a child within the bounds of moderation and reason, so long as he does it for the welfare of the child; but that if he exceeds due moderation, he becomes criminally liable."¹³ If the punishment is excessive, the perpetrator may be guilty of either assault and battery, or murder, depending upon the results of the beating.¹⁴ However, when an unintentional killing results from an unlawful assault, the usual rule is that the person inflicting the injuries and causing the death is guilty of involuntary manslaughter.¹⁵ Some states provide by statute that a homicide is excusable if caused by a parent while lawfully correcting a child, if the bounds of moderation are not exceeded.¹⁶ Many states now provide penalties for a distinct offense of child abuse.¹⁷

The problem of neglect is somewhat different from a legal standpoint as it is largely based on statute. However, even without a statute, it is held to be the rule that if a child dies as a result of the parents' failure to provide food, shelter or clothing, and the parents are able to provide these necessities, then the parents may be guilty of manslaughter or, if the deprivation is willful, murder.¹⁸ The law of neglect has developed into a broad enough field to command the attention

¹²Nicholas v. State, 32 Ala. App. 574, 28 So. 2d 422 (1946); Dean v. State, 89 Ala. 46, 8 So. 38 (1889); Boyd v. State, 88 Ala. 169, 7 So. 268 (1889); State v. Jones, 95 N.C. 588, 59 Am. Rep. 282 (1886).

¹³Carpenter v. Commonwealth, 186 Va. 851, 44 S.E.2d 419, 423 (1947). See also Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Hinkle v. State, 127 Ind. 490, 26 N.E. 777 (1890); State v. Fischer, 245 Iowa 170, 60 N.W.2d 105 (1953); State v. Washington, 104 La. 443, 29 So. 55 (1901); People v. Green, 155 Mich. 524, 119 N.W. 1087 (1909); State v. Koonse, 123 Mo. App. 655, 101 S.W. 139 (1907); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Richardson v. State Board, 98 N.J.L. 690, 121 Atl. 457 (1923); State v. Liggett, 84 Ohio App. 225, 83 N.E.2d 663 (1948); Stanfield v. State, 43 Tex. 167 (1875); State v. McDonie, 89 W. Va. 185, 109 S.E. 710 (1921); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925); State v. Spiegel, 39 Wyo. 309, 270 Pac. 1064 (1928); Annot., 89 A.L.R.2d 396 (1963); Perkins, Criminal Law 878-880 (1957); 1 Wharton, Criminal Law and Procedure § 344 (1957).

¹⁴1 Wharton, supra note 13, at § 259.

¹⁵40 C.J.S., Homicide § 58 (1944); Karl v. State, 144 So. 2d 869 (Fla. Dist. Ct. App. 1962); State v. Tornquist, 254 Iowa 1135, 120 N.W.2d 483 (1963).

¹⁶4 Vernier, American Family Law § 232, pp. 19-20 (1936); State v. England, 220 Ore. 395, 349 P.2d 668 (1960).

¹⁷See, e.g., Va. Code Ann. § 40-112 (Repl. Vol. 1953); Cal. Pen. Code § 273a (1964 Cum. Pock. Part). However, the offense is normally just a misdemeanor. The California offense was raised to a felony as recently as 1963.

¹⁸1 Wharton, supra note 13, at § 297; Biddle v. Commonwealth, 206 Va. 14, 141 S.E.2d 710 (1965).

of a separate article, encompassing in its civil and criminal aspects such things as medical treatment, education, emotional neglect and many other varied problems.¹⁹

Affording the foundation for these statutory and common-law rules is the principle that the interests of the state as *parens patriae* are superior to the rights of the parents, or those *in loco parentis*.²⁰ This is a somewhat unpalatable doctrine in a democracy because it connotes totalitarianism, and it has consequently been balanced in the courts by the constitutional rights of the parents.²¹ In modern American society, it is not used as a device for the aggrandizement of the state, but rather as a shield for the protection of the child.

We have seen how the problem first received general attention and have briefly explored the law pertaining to abuse, but how serious is the problem? There have only been two surveys which sought to determine the extent of child abuse on a nationwide level. In 1962, the Children's Division of The American Humane Association initiated a project to obtain data on child abuse cases reported in the newspapers.²² From January through December of 1962, a total of 662 cases were reported in newspapers in 48 of the states and the District of Columbia.²³ Over 55 per cent of the children were under 4 years of age, and of the 178 children who died from their injuries almost 54 per cent were children under two years of age.²⁴ Parents were responsible for some 72 per cent of the injuries and 75 per cent of the fatalities.²⁵ Another survey resulted in the reporting from 71 hospitals of 302 cases of abuse, with 33 deaths and 85 instances of permanent

¹⁹39 Am. Jur., Parent and Child §§ 103-121 (1942); 67 C.J.S., Parent and Child §§ 91-99 (1950); 4 Vernier, American Family Law § 234 (1936); 1 Wharton, supra note 13, § 298; Levy, Neglected Children in Mississippi, 29 Miss. L.J. 165 (1958); Mulford, Emotional Neglect of Children (1958); Note, Compulsory Medical Treatment—Another Step in the State's Expanding Power over Children?, 41 Geo. L.J. 226 (1953); Note, The Law of Parent and Child in New England, 36 B.U.L. Rev. 622 (1956); Note, The Neglected or Delinquent Child: On Appraisal of New York's Juvenile Court System, 36 Cornell L.Q. 156 (1950).

²⁰30 Am. Jur., Parent and Child § 15 (1942); 67 C.J.S., Parens Patriae (1950); 67 C.J.S., Parent and Child § 10 (1950); 43 C.J.S., Infants § 4 (1945); Note, Compulsory Medical Treatment—Another Step in the State's Expanding Power over Children?, 41 Geo. L.J. 226, 226-27 (1953).

²¹30 Am. Jur., Parent and Child § 16 (1942). "We have not yet adopted as a public policy the Spartan rule that children belong, not to their parents, but to the state." In re Tuttendario, 21 Pa. Dist. 561, 563 (1911).

²²Children's Div., The American Humane Assoc., Child Abuse—Preview of a Nationwide Survey 3 (1963).

²³Id. at 4.

²⁴Ibid.

²⁵Id. at 5.

brain injury, in one year.²⁶ The same survey elicited from 77 District Attorneys the information that they had knowledge of 447 cases with 45 deaths and 29 cases of brain injury in a similar period.²⁷ And yet none of these surveys even purport to be complete.

One hospital in the District of Columbia reported 40 cases of "battered" children in a four-year period.²⁸ Figures kept by the Massachusetts Society for the Prevention of Cruelty to Children in 1960 showed well over 100 cases in that state alone.²⁹ The Coroner of Cuyahoga County, Ohio, revealed that in a seventeen-year period there were 46 homicides of young children there.³⁰ In a six-month period, 71 cases were reported to child welfare workers and public health nurses in Iowa.³¹ In 1960, the Children's Hospital of Los Angeles reported 14 young patients to the authorities with careful documentation of abuse, and in only the first six months of 1961, 11 cases were identified.³² An Arkansas poll resulted in replies from 71 physicians, of whom 65 per cent reported having treated battered children, with most having done so two or three times.³³ An intensive study was conducted by the 25 members of the pediatric staff of one hospital over a two-week period when they saw 5,039 children in offices, hospitals, clinics, or homes and 90 suspected cases of battering were seen as out-patients and 31 more among the hospitalized children.³⁴ The Children's Hospital of Pittsburgh reported 50 cases in a ten-year period from 1951-1960.³⁵ The Cook County Family Court reports receiving about 100 abuse cases each month, and the admission rate of abused children at Cook County Hospital is up to about 10 a day.³⁶ The Tidewater Division of the Office of the Chief Medical Examiner of Virginia reports 14 deaths from abuse or neglect between July of

²⁶Kempe at 17.

²⁷Ibid. Official statistics for 1963 reflected 389 homicides of children under five years of age. U.S. Dep't of Health, Education and Welfare, 2 Vital Statistics of the United States—1963, Part II, table 1-25 (1965).

²⁸Symposium: Battered Child Syndrome, 20 Clin. Proc. Child. Hosp. (Wash.) 229, 231 (1964).

²⁹Fontana, Donovan & Wong, The "Maltreatment Syndrome" in Children, 269 New Eng. J. Med. 1389 (1963).

³⁰Adelson, Slaughter of the Innocents, 264 New Eng. J. Med. 1345 (1961).

³¹The Child-Abuse Problem in Iowa, 53 J. Iowa Med. Soc. 692 (1963).

³²Boardman at 44.

³³Potts & Forbis, Willful Injury in Childhood, 59 J. Arkansas Med. Soc. 266, 267 (1962).

³⁴Platou, Lennox & Beasley, Battering, 23 Bull. Tulane Med. Fac. 157, 161 (1964) (hereinafter cited as Platou).

³⁵McHenry, Girdany & Elmer, Unsuspected Trauma with Multiple Skeletal Injuries during Infancy and Childhood, 31 Pediatrics 908 (1963).

³⁶Fontana at 7.

1963 and January of 1965.³⁷ These local statistics readily demonstrate that what national statistics we have are only the visible part of the proverbial iceberg. And yet the bulk of these local statistics relate only to battering and not to neglect. In 1962 the National Society for the Prevention of Cruelty to Children in England dealt with 24,716 cases of neglect and 4,118 cases of abuse.³⁸ In New York City alone, in 1962, over 5,000 dependency and neglect cases came to the attention of the children's courts.³⁹

The magnitude of the problem in numbers alone can scarcely be doubted. In fact, it has been stated that if complete statistics were available, the maltreatment of children could be a more frequent cause of death than leukemia, cystic fibrosis and muscular dystrophy, and it may rank with automobile accidents and encephalitis as causes of disturbances of the central nervous system.⁴⁰

The emotional and psychological trauma of "battering" and neglect may be more serious than the physical aspects of the syndrome, and certainly much more costly to society. For example, in Sheldon and Eleanor Glueck's classic analysis of juvenile delinquency it was discovered that 13.5 per cent more of the mothers and 23.7 per cent more of the fathers of delinquents were erratic in their disciplinary techniques than the parents of nondelinquents.⁴¹ Similarly, 17.1 per cent more of the fathers of the delinquent group were overstrict, 21 per cent more of the mothers, and 33.1 per cent more of the delinquent's fathers resorted to physical punishment than in the nondelinquent group.⁴² As Professor Glueck pointed out, "[T]he delinquents were much more the victims of the indifference or actual hostility of their fathers and mothers, and were in turn, less attached to their parents."⁴³ One study of seven boys who had made murderous assaults and one boy who had committed murder revealed definite evidence that three of the boys had been severely beaten periodically by their parents and there was some evidence that the others had likewise suffered beatings.⁴⁴ Another study of six prisoners of middle-class backgrounds convicted of

³⁷Letter from H. H. Karnitschnig, M.D., Deputy Chief Medical Examiner of Virginia, with autopsies attached, March 23, 1965.

³⁸Editorial, *Brit. Med. J.* 1544 (Dec. 21, 1963). These statistics show that this is not just an American problem. See also Selander, *Kroppslig Misshandel av Smabarn (Willful Injuries to Infants)*, 70 *Nord. Med.* 1192 (1963).

³⁹Fontana at 7.

⁴⁰*Id.* at 6.

⁴¹Glueck & Glueck, *Unraveling Juvenile Delinquency* 131 (1951).

⁴²*Id.* at 131-132.

⁴³*Id.* at 133.

⁴⁴Easson & Steinhilber, *Murderous Aggression by Children and Adolescents*, 4 *Arch. Gen. Psychiat.* (Chicago) 27, 29-32 (1961).

first degree murder revealed that four of the six men had been badly abused by their parents.⁴⁵ Several sources, including those cited above, have theorized that there is a causal connection between child abuse and subsequent antisocial conduct by the youthful victims.⁴⁶ A high proportion of the parents inflicting abuse were themselves maltreated as children.⁴⁷

The tolls of neglect and abuse are indeed terrible—in twisted minds and lives as well as twisted bodies. It is an awesome challenge to society. Thus far the challenge has been met part way through the advocacy of mandatory reporting legislation for cases of child abuse. As previously pointed out, the Children's Bureau of the Department of Health, Education and Welfare was a moving force behind the drive for this legislation. Basically, the Children's Bureau statute consists of six sections, as follows: 1) A statement of purpose; 2) A requirement that physicians, interns or residents must report any injuries to a minor child they have reasonable cause to suspect were inflicted by other than accidental means; 3) An oral report to an appropriate police authority is required immediately and a report in writing shall follow; 4) Civil and criminal immunity from liability and freedom from participating in any judicial proceeding is granted to anyone making such a report in good faith; 5) A provision that neither the physician-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence; and 6) A penalty provision making a knowing and willful violation of the act a misdemeanor.⁴⁸ This model act, with variations, has been the basis for most of the statutes passed. California was the first state to provide for mandatory reporting of injuries intentionally inflicted by any means,⁴⁹ but it was not until recently that a statute was passed specifically pertaining to injuries to children.⁵⁰ Through the 1964 sessions, twenty state legislatures,

⁴⁵Duncan, Frazier, Litin, Johnson & Barron, *Etiological Factors in First-Degree Murder*, 168 *J.A.M.A.* 1755, 1758 (1958).

⁴⁶Curtis, *Violence Breeds Violence—Perhaps?*, 120 *Amer. J. Psychiat.* 386 (1963); DeFrancis, *Interpreting Child Protective Services to Your Community* 23-24 (1957); DeFrancis, *Protective Services and Community Expectations* 9-10 (1961); Miller, *supra* note 6, at 1212; Rheinsteinst, *The Child at Law, Report of the Twenty-eighth Ross Pediatric Research Conference* 70 (1958). Fontana at 9 quotes Dr. Menninger as believing that every criminal was an unloved and maltreated child.

⁴⁷American Humane Assoc., *Guidelines for Legislation to Protect the Battered Child* 4-5 (1963); *The Battered-Child Syndrome*, 4 *The Sciences*, No. 7, 12 (Dec., 1964); Fontana at 18-19; Kempe at 18.

⁴⁸Children's Bureau, *supra* note 9, at 11-13.

⁴⁹Cal. Pen. Code Annot. §§ 11160-11162. This statute was originally enacted in 1929.

⁵⁰Cal. Pen. Code Annot. § 11161.5 (Supp. 1964).

including California, had passed reporting legislation,⁵¹ with many other states considering such legislation in the 1965 sessions of their legislatures.

A number of different approaches have been taken in the drafting of these statutes. Some states have amended pre-existing statutes,⁵² while others have passed wholly new laws.⁵³ A number of the states have incorporated their acts into the penal or criminal laws,⁵⁴ and other states have placed them in the general or welfare laws.⁵⁵ However, the bulk of the states have more or less followed the pattern established by the Children's Bureau Act.

It is very definitely felt that the purpose clause of any such Act should state that the legislature intends for the provision of protective services by the appropriate agencies, under rules established by the agency. One criticism of many of the enactments is that they are too penal in nature, reflecting an emphasis on punishing the parent or abuser, rather than protecting the child.⁵⁶ Also, many physicians felt that the mere reporting of abuse is futile unless some system is established to insure that positive and effective action is taken to fol-

⁵¹Ariz. Rev. Stat. Ann. § 13-842.01 (Supp. 1964); Colo. Rev. Stat. Ann. §§ 22-13-1-7 (1963); Fla. Stat. Ann. § 828.041 (Supp. 1964); Idaho Code Ann. § 16-1641 (Supp. 1963); Ky. Rev. Stat. Ann., House Bill 118 (1964 Legis. Issue); Md. Ann. Code, art. 27, § 11A (Supp. 1964); Mass. Gen. Laws Ann., ch. 119, §§ 39A-39B (Supp. 1964); Mich. Stat. Ann. §§ 14-564(1)-(5) (1964 Current Mat.); Minn. Stat. Ann. § 626.52 (Supp. 1964); N.J. Stat. Ann. §§ 9:6-8.1-8.7 (1964) (Sess. Law Serv.); N.Y. Pen. Laws § 483-d (Supp. 1964); Ohio Rev. Code Ann. § 2151.421 (Baldwin Supp. 1964); Ore. Rev. Stat. §§ 146-710-740 (1963); Pa. Stat. Ann. § 4330 (Supp. 1964); R.I. Gen. Laws Ann. §§ 40-13-1-1-6 (Supp. 1964); S.D. Code, Ch. 90, §§ 1-5 (1964); Tenn Code Ann. 38-601 (Supp. 1964); Wis. Stat. Ann. § 325.21 (Supp. 1965); Wyo. Stat. Ann. §§ 14-28.1-28.6 (Supp. 1963); In addition, Indiana and Oklahoma have either enacted or amended statutes solely defining the crime of child abuse: Ind. Ann. Stat. §§ 10-813-815 (Supp. 1964); 21 Okla. Stat. Ann. § 843 (Supp. 1964).

⁵²California, Indiana, Maryland, Minnesota, Ohio, Pennsylvania, Tennessee and Wisconsin. See Children's Div. American Humane Assoc., Review of Legislation to Protect the Battered Child 2 (1964).

⁵³Arizona, Colorado, Florida, Idaho, Kentucky, Massachusetts, Michigan, New Jersey, New York, Oklahoma, Oregon, Rhode Island, South Dakota and Wyoming. *Ibid.*

⁵⁴Arizona, California, Indiana, Maryland, Minnesota, New York, Oklahoma, Oregon, Pennsylvania, Tennessee and Wisconsin. *Ibid.*

⁵⁵Colorado, Florida, Idaho, Kentucky, Massachusetts, Michigan, New Jersey, Ohio, Rhode Island, South Dakota and Wyoming. *Ibid.*

⁵⁶Conference, Richmond, Virginia Community Council, March 29, 1965; Editorial, 1 *Lancet* 543 (1964); Editorial, 266 *New Eng. J. Med.* 1063 (1962); Harper, *The Physician, The Battered Child and the Law*, 31 *Pediatrics* 899 (1963) (hereinafter cited as Harper); Hoel, *The Battered Child*, 46 *Minnesota Med.* 1001 (1963); Letter to Editor, 267 *New Eng. J. Med.* 572 (1962); McCort & Vaudagna, *Visceral Injuries in Battered Children*, 82 *Radiology* 424 (1964); Young at 136.

low through on the reports.⁵⁷ Second, despite the criticism by some groups,⁵⁸ it is felt that the statute should be limited to hospitals, clinics, and members of the healing professions, principally for the reason that these cases are often admittedly difficult to identify and these groups are best equipped to exercise the necessary discretion.⁵⁹ Next, the report should be made as soon as practicable in writing, possibly preceded by an oral report if it is felt that time is of the essence, to an official agency charged with the responsibility for protective services in the community. This has been the most controversial aspect of these statutes since most of the acts provide for the report being made to the police, thus emphasizing the punitive aspect of the legislation.⁶⁰ A clause should provide for immunity from civil and criminal liability resulting from such a report, although there is probably little practical need for such immunity since malice would have to be proved to render the reporting physician or other person liable for defamation under existing law.⁶¹ The value of such a clause is largely psychological in encouraging reports, although it would also preclude the rather remote possibility of having to defend a claim.⁶² It does seem unfortunate that it is necessary to provide for legal immunity in order to secure the performance of a humane act.⁶³ In states with the physician-patient privilege, a clause should probably be included to place reports of child abuse outside the ambit of such privilege. Once again, this provision is probably not necessary since this

⁵⁷Editorial, 188 J.A.M.A. 386 (1964); Report of Committee on Maternal and Child Care, AMA, 190 J.A.M.A. 358 (1964).

⁵⁸Ibid.

⁵⁹Young at 136.

⁶⁰Id. at 138; Braun, Braun & Simonds, *The Mistreated Child*, 99 Calif. Med. 98, 102 (1963); Delsordo, *Protective Casework for Abused Children*, 10 Children 213 (1963); Editorial, 269 New Eng. J. Med. 1437 (1963); Ten Bense & Raile, *The Battered Child Syndrome*, 46 Minnesota Med. 977 (1963). One solution would be a special unit of police such as that used in Los Angeles. Boardman at 48-51; Erwin, *The Battered Child Syndrome*, 130 Medico-Legal Bulletin 5-6 (1964); Swanson, *Role of the Police in the Protection of Children from Neglect and Abuse*, 25 Fed. Prob. 43 (1961); Young at 138.

⁶¹Harper at 902; Erwin, *supra* note 60, at 6-7; Ferguson, *Battered Child Syndrome*, 65 J. Kansas Med. Soc. 67 (1964). The general rule is that there is a qualified or absolute privilege in favor of reports of suspected criminal violations. 33 Am. Jur., *Libel and Slander* § 137 (1941); Prosser, *Torts* § 95, esp. p. 620 (2d ed. 1955); Schoepfer, *Legal Implications in Connection with Physical Abuse of Children, in Protecting the Battered Child* 29-30 (1962); Shartel & Plant, *The Law of Medical Practice* §§ 4-04 -05 (1959). See also Louisell & Williams, *Trial of Medical Malpractice Cases* para. 8.13 n.57 (1965 ed.).

⁶²Harper at 902.

⁶³Louisell and Williams have discussed this unfortunate trend with respect to the so-called "Good Samaritan" statutes. The rationale expressed therein is equally applicable here. Louisell & Williams, *supra* note 61, at para. 21.42.

privilege is almost always personal to the patient, and the patient would be the child and not the parent or person inflicting the injuries.⁶⁴ However, as before, such a clause would have a beneficial effect in dissipating to a certain degree the physician's natural reticence to make such a report.⁶⁵

Finally, it is felt that such a statute should *not* have a penalty clause. The identification of an abused child is obviously not as simple as the recognition of a gunshot wound.⁶⁶ To provide a penalty for the failure to report a case of child abuse when its identification requires the exercise of a considerable amount of judgment and discretion is unduly harsh. Also, realistically, such a provision is unenforceable and therefore useless. The efforts of a number of brilliant pediatricians and radiologists have made the identification of the "battered child" an easier task through the application of the following indices of suspicion: 1) age characteristically under three years; 2) general health of child indicative of neglect; 3) characteristic distribution of fractures; 4) disproportionate amount of soft tissue injury; 5) evidence that injuries occurred at varying times and are in different stages or resolution; 6) cause of recent trauma; 7) suspicious family history; 8) history of previous similar episodes; and 9) no new lesions occur during the child's hospitalization.⁶⁷ However, even with

⁶⁴Harper at 900-902; Annot., 2 A.L.R.2d 645, 647 (1948); McCormick, Evidence § 105 (1954); Payne, The Physician-Patient Privilege in Virginia, 1 U. Rich. Law Notes 26, 29 (1958); Shartel & Plant, supra note 61 at § 7-16; Stetler & Moritz, Doctor and Patient and the Law 252-274 (4th ed. 1962); 8 Wigmore, Evidence § 2386 (McNaughton rev. 1961). See *State v. Tornquist*, 254 Iowa 1135, 120 N.W.2d 483, 494-495 (1963). See also, Note, Exception to Use of Physician-Patient Privilege in Child Abuse Cases, 42 U. Det. L.J. 88 (1964). See *State v. Tornquist*, 254 Iowa 1135, 120 N.W.2d 483, 494-95 (1963).

⁶⁵This reticence on the part of physicians is, of course, the major reason that reporting legislation has been, and is, deemed necessary. This slowness to recognize the problem is largely due to a natural reluctance to believe a parent capable of abusing his own child. See Dodge, Medical Implications of Physical Abuse of Children, in *Protecting the Battered Child* 23 (1962); Kempe at 19. Also, many physicians feel that this is a problem involving only the lower socio-economic classes. Boardman at 44. That this is not necessarily true may be seen in the reports of numerous cases involving children from higher groups. Barta & Smith, Willful Trauma to Young Children, 2 Clin. Pediat. (Phila.) 545, 553 (1963); Kempe at 18. One suspected case has been mentioned in the literature involving the child of a physician and his nurse wife. Crawford, The Battered Child Syndrome, 14 Juv. Ct. Judges J., No. 3, 18, 18-19 (1963).

⁶⁶Hoel, supra note 56. However, there are statutes requiring reports of gunshot and knife wounds, communicable diseases and suspicious injuries. 41 Am. Jur., Physicians and Surgeons § 10 (1942); Shartel & Plant, supra note 61, at § 7-08; Stetler & Moritz, supra note 64, at 81.

⁶⁷Fontana at 22; Fontana, Donovan & Wong, supra note 29, at 1393; Connell, The Devil's Battered Children, 64 J. Kansas Med. Soc. 385, 391 (1963); Teng, Singleton & Daeschner, Skeletal Injuries of the Battered Child, 6 Amer. J. Orthoped. 202 (1964).

the application of these indices, and others, identification still requires a considerable amount of judgment. For example, the Tulane study⁶⁸ revealed that of two physicians who each saw about 250 patients under similar circumstances, one reported 17 suspected cases of battering and the other reported none.⁶⁹

Mandatory reporting legislation is not the unanimous choice of all persons concerned about child abuse and it is not a panacea.⁷⁰ The great need is for programs for protective services because society cannot stop with the mere reporting of a case.⁷¹ However, it is a first step, and an essential first step. Over 50 per cent of these children will be subjected to additional injuries if returned to their previous environment without some action being taken.⁷² Many medical societies have advocated the passage of such legislation, perhaps with some reservations, but with a surprising amount of agreement.⁷³ My recom-

⁶⁸Supra note 34.

⁶⁹Id. at 161.

⁷⁰In fact, there is a very good argument that such legislation is theoretically unnecessary. For example, the Attorney-General of Kansas has rendered an opinion which would make the enactment of reporting legislation in that state redundant. He advised that—1) a physician was already under an obligation to report cases of child abuse, as they constituted violations of the law, and particularly in view of Section nine and ten of the Code of Ethics; 2) the physician's testimony would not be subject to a claim of privilege by anyone other than the child; and 3) there would be no personal liability on the part of the physician if he rendered and reported only his medical opinion. Ferguson, supra note 61. A reporting statute could create some problems as it would tend to concentrate attention on the abused child to the exclusion of his siblings. Also, the legislation could increase the danger to the child if its emphasis were penal because it could cause the child's parents to neglect bringing him for medical treatment from fear of prosecution. Reinhart & Elmer, *The Abused Child*, 188 *J.A.M.A.* 358, 360 (1964).

⁷¹Child Welfare League of America, *Standards for Child Protective Service* (1960); DeFrancis, *Children Who were Helped Through Protective Services* (1960); DeFrancis, *Community Cooperation for Better Child Protection* (1959); DeFrancis, *The Court and Protective Services* (1960); DeFrancis, *The Fundamentals of Child Protection* (1955); DeFrancis, *Interpreting Child Protective Services to Your Community* (1957); DeFrancis, *Protective Services and Community Expectations* (1961); Delsordo, supra note 60; Philbrick, *Treating Parental Pathology Through Child Protective Services* (1960); Wald, *Protective Services and Emotional Neglect* (1961).

⁷²Fontana at 21; Erwin, supra note 60, at 4.

⁷³Dodge, supra note 65, at 25; Editorial, 115 *J. Louisiana Med. Soc.* 322 (1963); Editorial, 269 *New Eng. J. Med.* 1437 (1963); Editorial, 47 *Rhode Island Med. J.* 89 (1964); Montana, *The Neglect and Abuse of Children*, 64 *New York J. Med.* 215, 219-220, 223-224 (1964); Hoel, supra note 56; Mintz, *Battered Child Syndrome*, 60 *Texas J. Med.* 107 (1964); Pascoe & Peterson, *Protective Law Needed for Battered Child Reports*, 60 *Texas J. Med.* 887 (1964); Schrotel, *Responsibilities of Physicians in Suspected Cases of Child Brutality*, 42 *Cincinnati J. Med.* 408 (1961); Report of Committee on Maternal and Child Care, *AMA*, 190 *J.A.M.A.* 358 (1964). This latter report was adopted by the House of Delegates of the American Medical Association in June, 1964. Several other statements have reported the legislation and pleaded for the attention of the medical profession and others. The Child Abuse Problem in

mendations for a statute which would meet the qualifications set forth above are as follows:⁷⁴

"Section 1—*Purpose*. In order to protect children whose health and welfare may be adversely affected through the infliction, by other than accidental means, of physical injury, or through physical neglect, requiring the attention of a physician, the legislature hereby provides for the mandatory reporting of such cases by physicians or institutions to the appropriate public authority. It is the intent of the legislature that, as a result of such reporting, protective social services shall be made available in an effort to prevent further abuse or neglect, safeguard and enhance the welfare of such children, and preserve family life wherever possible.

"Section 2—*Reports by Physicians and Institutions*. Any physician, including any licensed doctor of medicine, licensed osteopathic physician, intern or resident, having reasonable cause to suspect that a child under the age of—⁷⁵ brought to him or coming to him for examination, care or treatment has had serious physical injury or injuries inflicted upon him other than by accidental means, or is suffering from serious physical neglect, shall report or cause reports to be made in accordance with the provisions of this Act; provided that when the attendance of a physician with respect to a child is pursuant to the performance of services as a member of the staff of a hospital, clinic or similar institution he shall notify the person in charge of the institution or his designated delegate who shall report or cause reports to be made in accordance with the provisions of this Act.

"Section 3—*Nature and Content of Report; to Whom Made*. A report in writing shall be made, and an oral report if, in the judgment of the attending physician, time is a material factor in preventing further abuse or neglect, to an appropriate protective services agency. Such reports shall contain the following information if known: (a) The address and age of the child; (b) The address of the child's parents, step-parents, guardians, or other persons having custody of the child; (c) The nature and extent of the child's injury or injuries, or evidence of neglect; (d) Any evidence of previous injuries or neglect, including their nature and extent; and (e) Any other information which in the opinion of the physician may be help-

Iowa, *supra* note 31; Editorial, *The Battered Child Problem*, 181 J.A.M.A. 42 (1962); *Physical Abuse of Children*, Virginia Welfare Bull., p. 4 (Oct. 1963); Platou at 157; Sheriff, *The Abused Child*, 60 J. S. Carolina Med. Ass'n 191 (1964); Toland, *Abuse of Children—Whose Responsibility*, 28 Conn. Med. 438 (1964).

⁷⁴See Children's Div., American Humane Assoc., *Guidelines for Legislation to Protect the Battered Child* (1963).

⁷⁵The maximum age utilized in the state for Juvenile Court jurisdiction should be inserted here.

ful in establishing the cause of the child's injury, injuries or neglect.

"Section 4.—*Immunity from Liability*: Anyone participating in the making of a report pursuant to this Act shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed.

"Section 5.—*Evidence Not Privileged*. The physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries or neglect, or the cause thereof, in any judicial proceeding resulting from a report pursuant to this Act.⁷⁶

It has previously been pointed out that this article cannot hope to encompass the complete scope of child abuse, active or passive. It is a broad field and one which has largely been neglected by the legal profession in general, and legal writers in specific. The whole field of child law cries out for intensive and careful study. As the Journal of the American Medical Association expressed it:

"For centuries the young child has been regarded as a chattel of his parents. By making abortions illegal except under limited circumstances, civilized society now protects the child in utero. It should continue giving adequate protection through the early years of life when the child is still too young to defend himself."⁷⁷

The law must seek greater interdisciplinary communication in attempting to solve the problems of a mobile and rapidly changing society. The subject of this article represents one area in which the law has lagged somewhat behind medicine and social work in seeking solutions to a growing problem of acute concern. The channels of communication between the professions must be kept open and cooperation must be deliberate and continuing, rather than coincidental and sporadic.

⁷⁶A separate section should provide for the establishment of protective services through the existing or proposed public welfare agencies, or duly licensed private agencies, and under rules prescribed by the State Board of Welfare or other comparable agency.

⁷⁷Editorial, *The Battered-Child Syndrome*, 181 J.A.M.A. 42 (1962).

