

HEINONLINE

Citation: 36 Ohio N.U. L. Rev. 819 2010

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Jan 30 12:15:04 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0094-534X](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0094-534X)

Ohio Northern University

Law Review

Article

Castles Made of Sand? Rediscovering Child Abuse and Society's Response

THOMAS L. HAFEMEISTER¹

Table of Contents

I.	INTRODUCTION.....	821
II.	THE NATURE, CAUSES, AND IMPACT OF CHILD ABUSE ...	823
III.	DISCOVERY AND DEVELOPMENT OF SOCIETY'S RESPONSE TO CHILD ABUSE	830
IV.	DEFINING CHILD ABUSE	845
V.	MANDATORY REPORTING	851

1. J.D., University of Nebraska (1982); Ph.D., University of Nebraska (1988); Associate Professor, University of Virginia School of Law; Associate Professor of Medical Education, University of Virginia School of Medicine. The opinions and views of the author of this Article do not necessarily reflect the positions of the University of Virginia School of Law or School of Medicine. This project was partly supported by Grant 2006-WB-BX-0010, which was made available through the U.S. Department of Justice, National Institute of Justice. Many thanks to Kerry Abrams, Shelly Jackson, Gary B. Melton, James E. Ryan, Rebecca Vallas, Walter J. Wadlington, and Lois A. Weithorn for their very helpful comments. Additional thanks to Jessie Kokrda, Kamela Nelan, Bethany Toews, Hillary Ruth Hughes, Ryan Harsch, Olushola Ayanbule, and Jessica Montellese for their exceptional research assistance.

A. Who Must Report.....	851
B. When to Report.....	854
C. To Whom to Report.....	856
D. Immunity from Liability.....	860
E. Penalties for Failure to Report.....	863
VI. RESPONSES TO FILED REPORTS.....	866
A. Investigations of Reports.....	866
B. Remedial Steps Short of Removal	872
C. Removal.....	877
D. Limiting Contact with the Child and the Imposition of Other Conditions.....	885
E. Appointment of a Guardian <i>Ad Litem</i>	887
F. Mandatory Fatality Review	892
G. Central Registry	894
VII. GENERAL CONCERNS ABOUT CHILD ABUSE REPORTING ..	899
VIII. GENERAL CRITICISMS OF THE RESPONSE TO CHILD ABUSE REPORTS.....	904
IX. CONCLUSIONS.....	908

Abstract

Society has come a long way from the “Mary Ellen Wilson” era of the 1870s, when the detection of child abuse was sporadic and random, with poorly-suited tools borrowed to craft a response. For almost 150 years, however, child abuse has been widely recognized as a recurrent, pervasive problem—with potentially tragic short- and long-term consequences for a staggering number of children—that calls for a well conceived and executed societal response. Nevertheless, the consensus is that society is still not adequately preventing or identifying child abuse or appropriately responding to the needs of abused children. This Article provides a comprehensive review of society’s response to child abuse, including legislative efforts to redress it. In particular, this Article describes (1) the nature and impact of child abuse and the factors that contribute to it, (2) the evolution of this country’s response to child abuse and how we currently address it, and (3) how this country can and must do better. As has often been noted, a society should be measured by how well it treats its most vulnerable citizens. Preventing and appropriately managing child abuse should be at the top of any ordered society’s agenda.

CASTLES MADE OF SAND?² Rediscovering Child Abuse and Society’s Response

I. INTRODUCTION

“Child Abuse” — read the phrase and horrific images and tragic circumstances jump to mind. The infant scalded by boiling water. The young child covered in bruises or welts from repeated vicious beatings. The teenager subjected to years of sexual abuse. The withdrawn and emaciated child confined for years in a closet or a basement. The runaway living on the streets who has descended into drug addiction or turned to prostitution after fleeing abuse at home. The violent and explosive youth angry at the world for the abuse experienced as a child.

Perhaps no phrase in the America lexicon is as emotionally laden.³ The response to the utterance of the phrase tends to be immediate and visceral:

2. “And so castles made of sand fall in the sea, eventually[.]” JIMI HENDRIX, *Castles Made of Sand*, on *AXIS: BOLD AS LOVE* (Reprise Records 1967).

3. Although the phrase “sex offender” has similar connotations. See generally ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* (2006).

the responsible adult is a monster and society's responsibility is to immediately remove the child, as well as any siblings, from what is assumed to be a hellacious environment and to place the child somewhere else, where the grateful child will thrive and bloom.

The only problem is, like many of society's identified ills, the nature of the problem, including what constitutes child abuse, is rarely clear-cut; society's response tends to be both over- and under-inclusive, with the child only marginally helped, if not worse off, in many cases and the family structure splintered; and a more nuanced and contextualized approach is rarely forthcoming. Despite valorous and oftentimes heroic individual efforts by well-intentioned caseworkers to provide help, a vast and leviathan-like system has evolved that may satisfy society's outrage at child abuse, but often fails to provide needed assistance and services.

It has been almost 140 years since child abuse⁴ was first "discovered" in this country and almost fifty years since the publication of "The Battered Child," the seminal article that sparked the development of the model that is used predominantly today to identify and respond to child abuse. Even though society periodically "rediscovers" this abuse, or our failure to adequately respond to it, and produces proposals to better prevent or ameliorate this abuse, a staggering number of children continue to experience abuse and questions abound as to the effectiveness of our efforts to redress it.⁵ Many commentators believe that the current approach is flawed because it does not adequately identify, protect, or help the many children who are abused; does not sufficiently deter or prevent child abuse; can ruin the lives of family members if intervention was not justified; and is

4. Throughout this Article, the phrase "child abuse" will generally be used in its generic sense to encompass all forms of recognized child maltreatment, including physical abuse, neglect, sexual abuse, and psychological abuse. "Child maltreatment" is a phrase frequently employed by researchers in the field, in part because of concerns that the use of the phrase "child abuse" will be incorrectly viewed as implying a focus on physical abuse while the more predominant occurrence of child neglect, as well as the other forms of abuse, are overlooked. However, because this Article relies heavily on a historical review and a survey of current statutory language as its foundation, where "child abuse" has been the predominant language employed, this Article will employ the phrase "child abuse" rather than "child maltreatment," although the two phrases are relatively interchangeable in the context of this Article.

5. This Article will focus on the various "civil" rather than "criminal" responses to child abuse, in part because the former is much more likely to be employed and in part because there is relative agreement that criminal penalties for child abuse do little to deter child abuse. See Gary B. Melton, *Doing Justice and Doing Good: Conflicts for Mental Health Professions*, 4 THE FUTURE OF CHILD 102, 110 (1994) (citing a National Academy of Sciences Report, NAT'L RES. COUNCIL OF THE NAT'L ACADS., UNDERSTANDING CHILD ABUSE AND NEGLECT 5, 22-23 (1993)) [hereinafter NAT'L RES. COUNCIL]. For an example of a state statute criminalizing child abuse, see VA. CODE ANN. § 18.2-371.1(A) (2009) ("Any parent, guardian, or other person responsible for the care of a child under the age of 18 who by willful act or omission or refusal to provide any necessary care for the child's health causes or permits serious injury to the life or health of such child shall be guilty of a Class 4 felony.").

a relatively costly system, considering its limited effectiveness and failure to deliver desperately needed services.

To adequately address these criticisms, a comprehensive review, which describes how the child abuse protective system came to be and the current nature of this system, is needed. To that end, this Article explores the evolution of the mechanisms employed, their current status, the questions raised about them, and various proposed reforms. This review is especially germane because these mechanisms are being widely employed to also address the needs of other individuals who may be vulnerable to abuse, particularly the elderly.

Accordingly, Part II of this Article describes research findings pertaining to the nature, causes, and impact of child abuse. Part III provides a brief history of the initial “discovery” of child abuse and traces the associated development of this country’s response to child abuse. This background is necessary to provide an understanding of prior efforts to achieve reform and why the current system fails to meet its laudatory goals. Part IV explores various efforts to define child abuse, a prerequisite to shaping society’s efforts to ameliorate this abuse. In Part V, existing mandatory reporting schemes are dissected and their various approaches examined. Part VI discusses the actual steps taken once a report is submitted, including some criticisms of these responses. Parts VII and VIII survey the concerns expressed about reporting statutes and child protective services in general. Finally, Part IX concludes with some recommendations to ameliorate these concerns.

II. THE NATURE, CAUSES, AND IMPACT OF CHILD ABUSE

Family violence is the most prevalent form of violence in society today.⁶ There were approximately 3.3 million reports of child abuse (involving 6.0 million children) filed in 2008,⁷ with almost 772,000 children determined to be victims of abuse (a figure that represents 10.3 of every 1,000 children in the United States)⁸ and an estimated 1,740 associated deaths.⁹ Roughly 2,400 children are found to be victims of abuse per day, three to five children die from child abuse every day (44% of which are younger than one year of age), and 18,000 children per year sustain

6. Patrick Tolan et al., *Family Violence*, 57 ANN. REV. PSYCHOL. 557, 559 (2006).

7. CHILD. BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2008 xii (2010), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf> [hereinafter CHILD MALTREATMENT 2008].

8. *Id.* at 23.

9. *Id.* at 55.

permanent disabilities as a result of child abuse.¹⁰ The long-term effects of child abuse include possible brain damage and other physical health problems, developmental delay, learning disorders, low academic performance, poor mental and emotional health, including depression, alcohol and drug abuse, problems in forming relationships, teen pregnancy, sexual victimization, aggressive behavior, juvenile and adult criminal behavior, and abuse of their own children.¹¹ Further, the actual number of child abuse cases has been estimated to be as much as 60% higher than the number of confirmed cases.¹² Annual reports of child abuse increased 41% between 1988 and 1997¹³ and rose another 15% between 1998 and 2007.¹⁴ Despite the continued increase in reported cases of child abuse, however, fewer children are actually receiving services.¹⁵ 1.8 million abused children received social services in 1977, while this number dropped to one million in 1994.¹⁶ In 2008, 378,087 child victims received post-investigative services in the forty-four states reporting this data, plus the District of

10. Glenn Lambie, *Child Abuse and Neglect: A Practical Guide for Professional School Counselors*, 8 PROF. SCH. COUNSELING 249, 250 (2005).

11. See *id.* at 250-51; see also CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVICES, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT 4-5 (2008) (one-third will eventually abuse their own children); Lois Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1345 (2005) (47.2% of children admitted to residential treatment centers for emotionally disturbed children had been victims of child abuse); Cathy Widom & Michael Maxfield, *An Update on the "Cycle of Violence,"* RES. IN BRIEF, NAT'L INST. OF JUSTICE, Feb. 2001, at 2-3, 7 (49% of abused children are later arrested for a non-traffic offense and 20% for a violent offense, and commit twice as many crimes).

12. SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW & POLICY 12 (2d ed., 1999); see also CLIFFORD K. DORNE, AN INTRODUCTION TO CHILD MALTREATMENT IN THE UNITED STATES: HISTORY, PUBLIC POLICY, AND RESEARCH 49-65 (3d ed., 2002). Professionals (e.g., physicians, teachers, psychiatrists, law enforcement officers, and child care employees), in particular, are asserted to fail to report about 50% of the suspected child abuse cases that they discover. OLA BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFESPAN: AN INTRODUCTION 186 (2d ed., 2005).

13. KALICHMAN, *supra* note 12, at 11.

14. The Children's Bureau found that 2,806,000 referrals were made in 1998, compared with approximately 3,200,000 in 2007. Compare CHILD. BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., CHILD MALTREATMENT 1999 ch. 3 (2001) [hereinafter CHILD MALTREATMENT 1999], with CHILD. BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2007 6 (2009) [hereinafter CHILD MALTREATMENT 2007]. Referrals increased by 3% from 2007 to 2008.

It should be noted that the rates of some forms of child abuse appear to have declined in recent years, particularly sexual abuse and physical abuse. David Finkelhor & Lisa Jones, *Why Have Child Maltreatment and Child Victimization Declined?*, 62 J. SOC. ISSUES 685, 685-86 (2006) (noting that levels of substantiated child sexual abuse, after being adjusted for population growth, declined 49% from 1990 through 2004, while substantiated physical abuse dropped 43%). However, most of that decline occurred from 1995 to 2000, with the levels of sexual and physical abuse remaining relatively constant since that time. *Id.* at 686 (drawing upon presented chart of "U.S. Maltreatment Trends"). Further, the level of child neglect, which, as will be discussed, constitutes almost two-thirds of the confirmed cases of child abuse, increased by 14% from 1990 through 2003. *Id.* at 690.

15. Victor Vieth, *Unto the Third Generation: A Call to End Child Abuse in the United States Within 120 Years*, 28 HAMLINE J. PUB. L. & POL'Y 1, 12 (2006).

16. KALICHMAN, *supra* note 12, at 157.

Columbia and Puerto Rico (63.3% of all confirmed victims).¹⁷ It should also be noted that the number of children in this country increased 12.9% from 1977 to 2008, further underscoring the significant decrease in the level of services provided.¹⁸

Among children who have been abused, the most common type of child maltreatment is neglect, found in 71.1% of the confirmed cases of child abuse. Physical abuse occurred in 16.1% of the cases; sexual abuse in 9.1%; psychological maltreatment in 7.3%; medical neglect in 2.2%; and a variety of other types of abuse, such as abandonment, threats of harm, or congenital drug addiction, in 9.0%.¹⁹

Those children most likely to be abused are younger children, children with disabilities or medical problems, and children living in families with relationship difficulties, which include poor parent-child interactions, domestic violence, or unskilled parenting.²⁰ Child abuse occurs in all socioeconomic groups and among all races,²¹ but specific identified risk factors include stress on the family; isolation and a lack of social support,

17. CHILD MALTREATMENT 2008, *supra* note 7, at 83 tbl.6-3. In addition, it was estimated that 698,674 "nonvictims" received post-investigative services in these jurisdictions (28.5% of all "nonvictims"). *Id.* Nationally, it was estimated that 331,000 victims and 732,000 nonvictims received in-home services, while 267,000 children were removed from their homes as the result of a child maltreatment investigation. *Id.* at 79.

18. Compare U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES NATIONAL SEX AND AGE, available at <http://www.census.gov/popest/national/asrh/NC-EST2008-sa.html>, with U.S. CENSUS BUREAU, POPULATION ESTIMATES BY AGE, SEX, AND RACE, 1900-1979, available at <http://census.gov/popest/archives/pre-1980/PE-11.html>.

19. CHILD MALTREATMENT 2008, *supra* note 7, at 26. These data total more than 100% because some victims were determined by the investigating case worker to have experienced more than one type of maltreatment. It has been asserted that children frequently experience more than one form of abuse, with one study finding that 90% of the children experienced more than one form of abuse. NAT'L INST. OF CHILD HEALTH & HUMAN DEV., WORKSHOP ON CHILDREN EXPOSED TO VIOLENCE: CURRENT STATUS, GAPS, AND RESEARCH PRIORITIES, WORKSHOP SUMMARY 2 (Analytical Sciences, Inc. ed., 2002), available at http://www.nichd.nih.gov/publications/pubs/upload/children_violence.pdf (summarizing a report made by Penelope K. Trickett).

20. Tolan et al., *supra* note 6, at 569; see also CHILD MALTREATMENT 2008, *supra* note 7, at 25-26 (32.6% of all victims were younger than four years old, 23.6% were ages 4-7, and 18.9% were ages 8-11, with "[v]ictimization . . . split almost evenly between the sexes"). It is widely agreed that domestic violence and child abuse often co-occur. Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 568 (2004) ("It is now commonly accepted that domestic violence and child abuse often occur together in the same households."). It has also been reported that children who are both victims of child abuse and exposed to domestic violence are at greater risk of developing problems than children who experience just one or the other. *Id.* at 571.

21. ANDREA J. SEDLAK & DIANE D. BROADHURST, NAT. CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T. OF HEALTH & HUM. SERVICES, ADMIN., EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT, Distribution of Child Abuse and Neglect by Family Characteristics (1996), available at <http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm#family>; see also Mark Chaffin et al., *Onset of Child Abuse and Neglect: Psychiatric, Substance Abuse, and Social Risk Factors from Prospective Community Data*, 20 CHILD ABUSE & NEGLECT 191 (1996).

particularly emotional support; poverty, especially when associated with stress and limited resources; and high crime levels in the neighborhood where the family lives.²²

The adults who abuse children are generally the parents of the children. Approximately 78% of the incidents of child abuse are caused by biological parents, with biological parents causing 72% of the cases of physical abuse²³ and 91% of the cases of neglect.²⁴ A recent national study similarly found that 80.1% of child abusers were parents of the child — of which 90.9% were biological parents, 4.4% were stepparents, and 0.7% were adoptive parents — with other relatives accounting for an additional 6.5% and unmarried partners of parents accounting for 4.4% of child abuse.²⁵

It is worth noting, however, that although the different types of child abuse tend to be treated as a homogenous mass when crafting society's response to them, different dynamics and characteristics tend to be associated with each type of child abuse. For example, risk factors vary considerably depending on the nature of the child abuse. The individuals who commit physical abuse are frequently single parents who began their families at a young age, with stress, unemployment, and financial problems likely triggering factors.²⁶ Further, child abusers who physically abuse a child have been reported to be more likely to be female, with 55% of them being female and 45% male.²⁷ Possible explanations for this gender differential may be that mothers report suffering from more stress, depression, and anxiety,²⁸ and the tendency of mothers to spend more time with their children than fathers.²⁹

22. Tolan et al., *supra* note 6, at 570.

23. SEDLAK & BROADHURST, *supra* note 21 ("Perpetrator's Relationship to the Child").

24. *Id.*

25. CHILD MALTREATMENT 2008, *supra* note 7, at 66 fig.5-2. The other identified abusers included friends or neighbors (0.5%), child daycare providers (0.5%), foster parents (0.4%), residential facility staff, legal guardians, or other professionals (a combined 0.5%), and "other" (3.7%). An additional 3.3% were unknown or missing. *Id.*

26. Jocelyn Brown et al., *A Longitudinal Analysis of Risk Factors for Child Maltreatment*, 22 CHILD ABUSE & NEGLECT 1065, 1065-67, 1073-75 (1998); see also Richard Krugman et al., *The Relationship Between Unemployment and Physical Abuse of Children*, 10 CHILD ABUSE & NEGLECT 415 (1986); COMM. ON THE ASSESSMENT OF FAMILY VIOLENCE INTERVENTIONS BD. ON CHILD., YOUTH, AND FAMILIES., NAT'L RES. COUNCIL AND INST. OF MED., VIOLENCE IN FAMS. 45 (1998) [hereinafter VIOLENCE IN FAMILIES].

27. BARNETT ET AL., *supra* note 12, at 64. But see SEDLAK & BROADHURST, *supra* note 21 ("children were more [physically] abused by males (67% were abused by males versus 40% by females)"). Across all types of abuse in 2008, 56.2% of child abusers were women, 42.6% were men, and 1.1% were of unknown sex. CHILD MALTREATMENT 2008, *supra* note 7, at 65.

28. Ellen Whipple & Carolyn Webster-Stratton, *The Role of Parental Stress in Physically Abusive Families*, 15 CHILD ABUSE & NEGLECT 279, 287 (1991).

29. RICHARD GELLES & CLAIRE CORNELL, INTIMATE VIOLENCE IN FAMILIES 55 (1985).

Physically abusive parents are also more likely to have unrealistic expectations and negative perceptions of their children, to interact with their children in more critical and controlling ways, to have fewer positive interactions with their children, and to experience spousal conflict.³⁰ Additionally, physically abusive parents may demonstrate distinct traits, such as a predisposition to hyper-reactive responses to stressful stimuli, more health problems and physical disabilities, and a lack of problem-solving skills and cognitive flexibility.³¹

Some common emotional and behavioral characteristics of adults who physically abuse children are anger or impulse control problems, depression, anxiety, antisocial behavior, low frustration tolerance, and substance abuse or dependence.³² Personality disorders — especially antisocial personality disorders and borderline personality disorders — are also more frequent among physically abusive adults.³³ Physical abusers also report more anxiety, life stress, and personal distress in their lives.³⁴ Family and interpersonal characteristics of physically abusive adults include social isolation and a history of violence in the abusing adult's childhood.³⁵

As noted, risk factors vary for different types of abuse and do not necessarily follow the patterns for physical abuse detailed above. For example, sexual abusers are more likely to be male, with 89% of sexually abused children maltreated by males.³⁶ Further, victims of sexual abuse are more likely to be sexually abused by someone outside of their family, with 27% of the victims sexually abused by strangers (including 40% of male victims), 42% of the victims sexually abused by a friend or acquaintance, and only 23% of the victims sexually abused by a family member (with only 2% of the victims sexually abused by a biological parent).³⁷ Risk factors for

30. See BARNETT ET AL., *supra* note 12, at 66; Sandra Azar & Beth Siegal, *Behavioral Treatment of Child Abuse: A Developmental Perspective*, 14 BEHAV. MODIFICATION 279, 281 (1990); Lex Merrill et al., *Childhood Parenting Experiences, Intimate Partner Conflict Resolution, and Adult Risk for Child Physical Abuse*, 20 CHILD ABUSE & NEGLECT 1049, 1050 (1996).

31. See generally Rand Cronger et al., *Child Abuse Related to Life Change and Perceptions of Illness*, 28 FAM. COORDINATOR 73 (1979); see also Madhabika Nayak & Joel Milner, *Neuropsychological Functioning: Comparison of Mothers at High- and Low-risk for Child Abuse*, 22 CHILD ABUSE & NEGLECT 687, 687-89, 698-700 (1998).

32. NAT'L RES. COUNCIL, *supra* note 5, at 111.

33. VIOLENCE IN FAMILIES, *supra* note 26, at 45.

34. Yuk Chan, *Parenting Stress and Social Support of Mothers Who Physically Abuse Their Children in Hong Kong*, 18 CHILD ABUSE & NEGLECT 261, 265 (1994); Whipple & Webster-Stratton, *supra* note 28, at 287-88.

35. See BARNETT ET AL., *supra* note 12, at 66; Chan, *supra* note 34, at 267.

36. SEDLAK & BROADHURST, *supra* note 21 ("Perpetrator's Sex").

37. See David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 CHILD ABUSE & NEGLECT 19, 22 tbl.3 (1990) (combining and recalculating reported data). The remainder of the sexual abuse (7.7%) was attributed to a group of perpetrators categorized as "other."

sexually abused children include having an unhappy family life, living without a birth parent, and receiving no or inadequate formal sexual education.³⁸

In contrast, individuals who are found to have neglected a child are biological parents 91% of the time.³⁹ They are also more likely to be women as 87% of neglected children were neglected by females, while only 43% were neglected by males.⁴⁰ The greatest risk factor for neglect is poverty, with children whose families earn less than \$15,000 per year forty-four times more likely to be neglected.⁴¹ Behavioral characteristics of neglectful caretakers are not depression and anger, as is typically found for physical abusers, but rather they tend to exhibit child-like behavior. Individuals who neglect children are often impulsive, have low self-esteem, and are unable to plan for the future.⁴²

In partial recognition of the differences across the various types of child abuse, typologies of child abusers have been developed. One typology, which focused on parents in California whose children were removed by court order due to severe child abuse, identified six types of child abusers. They included parents who (1) abuse their children out of displaced anger (e.g., anger over a marital conflict), (2) are rigid-compulsive (e.g., possessing overly high expectations and a lack of understanding), (3) are experiencing an identity or role crisis (e.g., the loss of a job), (4) are hostile-aggressive (e.g., impulsive, frustrated), (5) are passive-dependent (e.g., immature, display child-like dependency), or (6) are severely mentally ill (e.g., delusional, suspicious, unpredictable).⁴³

Despite the recognition of these typologies, however, it should not be assumed that there is a readily available and applicable "profile" of a child abuser that can lead to ready detection and amelioration of child abuse. Child abuse is difficult to define, identify, and confirm.⁴⁴ As noted, in 2008, an estimated 3.3 million reports were received that identified 6.0 million children as being at risk, of which only 772,000 (12.9%) were identified as

38. *Id.* at 24-27.

39. SEDLAK & BROADHURST, *supra* note 21 ("Perpetrator's Relationship to the Child").

40. *Id.* The total is more than 100% because children can be neglected by more than one parent. This result undoubtedly reflects the fact that women tend to be the primary caretaker of children and thus are the primary persons held accountable for omissions or failings in caretaking.

41. *Id.* ("Family Income").

42. NAT'L RES. COUNCIL, *supra* note 5, at 112.

43. Michael P. Sloan & John H. Meier, *Typology for Parents of Abused Children*, 7 CHILD ABUSE & NEGLECT 443, 446-48 (1983) (finding that the first three types of child abusers were amenable to treatment, while the latter three were not).

44. Melton, *supra* note 5, at 110-11 (asserting that expert testimony should not be allowed that seeks to establish a particular individual abused a specific child by showing how people often behave in similar situations).

victims of child abuse following an investigation.⁴⁵ A report of child abuse may not lead to a conclusion that abuse occurred for a number of reasons. For one, the report may have been based on a mistaken or incomplete understanding of what has transpired. Potential observers of child abuse are encouraged to err on the side of over-reporting to protect a child's safety. What constitutes "child abuse" is subject to different interpretations. The report may have been spurious in some cases and filed for malicious purposes. Finally, because the privacy of the home and family are afforded great weight and protection by society⁴⁶ and because of the readily concealable nature of child abuse and the difficulty of getting children to substantiate a report of abuse, it is often difficult to discover adequate evidence of abuse⁴⁷ and to prove the occurrence of child abuse.⁴⁸

Mandatory reporting laws, society's primary mechanism for detecting and responding to child abuse, have to some extent exposed the prevalence of child abuse in the nation and raised public awareness of its existence. However, as will be discussed, they have not been the panacea that many hoped they would be.⁴⁹ Their success in identifying a large number of cases of child abuse has been accompanied by an even larger number of reports where child abuse has not been found, a failure to detect a still substantial number of cases of child abuse, limited success in responding to substantiated cases of child abuse, and a failure to prevent and deter future abuse.⁵⁰ For example, these reporting requirements fall primarily upon professionals, but research has suggested that "the more professionals know about the child protection system . . . the less likely they are to report suspected cases of child maltreatment."⁵¹

In addition, the justification for the implementation of a mandatory reporting model is that these reports will trigger a prompt investigation and, where appropriate, the timely delivery of needed assistance and services. However, Child Protective Services (CPS), the social services agency

45. CHILD MALTREATMENT 2008, *supra* note 7, at xii, 23.

46. See Laure Culbertson, Comment, *Child Abuse Investigations in the Twilight of the Fourth Amendment*, 55 LA. L. REV. 361, 362 (1994).

47. Doraine Coleman, *Storming the Castle to Save Children: The Irony Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 419 (2005); see also Katherine Francis, Case Note, *To Hide in Plain Sight: Child Abuse, Closed Circuit Television, and the Confrontation Clause*, 60 U. CIN. L. REV. 827, 851 (1992).

48. Elizabeth Bartholet, *Advocating Change: The Status and Future of America's Child Welfare System 30 Years after CAPTA: Under-Intervention Versus Over-Intervention*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 365, 368 (2005).

49. See e.g., BARNETT ET AL., *supra* note 12, at 20; DORNE, *supra* note 12, at 118; Thomas J. Donovan, *The Legal Response to Child Abuse*, 11 WM. & MARY L. REV. 960, 962 (1970); Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 10 (2005).

50. See Melton, *supra* note 49, at 11-12.

51. BARNETT ET AL., *supra* note 12, at 20 (emphasis in original).

charged with responding to these reports in most states, is frequently criticized for being ill-equipped to effectively respond to, investigate, and follow up on the onslaught of reports they receive (on average, 50,000 reports a day).⁵² As an example of the limitations on the effectiveness of these agencies, although the Counsel on Accreditation for Children and Family Services suggests that a CPS investigative worker should not handle more than eighteen cases at one time (and the Child Welfare League of America suggests a maximum of twelve to fifteen cases per investigative worker), the average caseload across all states is twenty-four, and can range as high as forty or fifty.⁵³ Salaries for caseworkers are frequently low, averaging around \$35,553 per year, and the annual turnover of caseworkers is high, around 22% (which is 76% higher than the median turnover rate for all staff within that agency).⁵⁴ Indeed, the services provided to victims and their families under the best of circumstances are often not considered adequate to meet their needs.⁵⁵ Although the states were quick to enact reporting statutes,⁵⁶ they have not been as responsive in providing the agencies charged with handling these reports the necessary structure, resources, and training to enable them to fulfill their duties.⁵⁷

III. DISCOVERY AND DEVELOPMENT OF SOCIETY'S RESPONSE TO CHILD ABUSE

Although children have been subject to maltreatment since antiquity, attention to their plight only began to emerge in the early 1800s.⁵⁸ As industrialization enhanced the stresses on many families and distressed families became more visible in an increasingly urbanized society, the abuse of children was more frequently noted and child welfare became a greater societal concern. This, in turn, triggered the emergence of the *parens patriae* doctrine, which asserts that the state has the right and a responsibility to protect those members of society who cannot protect

52. DORNE, *supra* note 12, at 151-67.

53. NAT'L ASS'N OF SOC. WORKERS, *Government Relations Update: Child Welfare Workforce*, Aug. 2003, http://www.socialworkers.org/advocacy/updates/2003/082003_a.asp; see also AM. PUB. HUM. SERVS. ASS'N, REPORT FROM THE 2004 CHILD WELFARE WORKFORCE SURVEY 22 tbl.7, (2005), available at <http://www.aphsa.org/Home/Doc/Workforce%20Report%202005.pdf>.

54. AM. PUB. HUM. SERVS. ASS'N, *supra* note 53, at 25.

55. BARNETT ET AL., *supra* note 12, at 180.

56. See *infra* section III and accompanying text.

57. See *id.*

58. Curt Richardson, *Physician/Hospital Liability for Negligently Reporting Child Abuse*, 23 J. LEGAL MED. 131, 132 (2002) ("Greek and Roman records suggest the predominance of child abuse during those times").

themselves.⁵⁹ As a result, states began to enact laws that authorized the removal of children from their families and the placement of neglected, destitute, abandoned, and vagrant children in institutional “houses of refuge.”⁶⁰ The focus of these efforts was on reforming children who appeared to be on a criminal trajectory.⁶¹ Although the ostensible goal was to alter the criminal disposition of these youth, ironically these efforts often resulted in the placement of these children in harsh settings that were relatively indistinguishable from those used to incarcerate adults, which may have enhanced their criminal tendencies and did little to protect and address the needs of children who had been abused or neglected.⁶²

Although non-penal statutes more directly designed to protect children from assault and neglect were often also in place by the late nineteenth century, they were not widely employed.⁶³ Society, acting through its legal system, was generally unwilling to support intrusions into the sanctity of the family and reluctant to second-guess parental⁶⁴ decisions when there was not a perceived link to criminal activity.⁶⁵ In addition, the prevalence and impact of child abuse were not widely recognized.⁶⁶ This began to change somewhat following the publicity associated with the 1874 court proceedings involving the heartbreaking case of “Mary Ellen.”⁶⁷

59. See Mason P. Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 306 (1972).

60. *Id.*

61. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1192 (1970).

62. Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 5-7 (2005); see also DORNE, *supra* note 12, at 35-36 (2002).

63. Thomas, *supra* note 59, at 308.

64. As discussed previously, biological parents are often the source of child abuse (although the prevalence varies considerably with the type of abuse involved), but a wide range of other individuals may abuse children, including guardians, grandparents, step-parents, or the partners or acquaintances of a parent, many of whom will have interacted with the child in a caretaker role. See *supra* notes 24-26 and accompanying text. For the purposes of this Article, the term parental is not limited to a child's biological parents but rather encompasses the range of individuals who have assumed a parental role.

65. LELA B. COSTIN ET AL., *THE POLITICS OF CHILD ABUSE IN AMERICA* 52 (1996) (noting that historically society and the legal system generally presumed that parents acted “reasonably” toward their children and that parents should be free to choose both the forms and severity of punishment).

66. See Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 MISS. C. L. REV. 73, 73, 79 (2005); Ventrell, *supra* note 62, at 11.

67. The following account of the “Mary Ellen Wilson” story is largely drawn from the following sources: AM. HUMANE, *Mary Ellen Wilson: How One Girl's Plight Started the Child-Protection Movement*, <http://www.americanhumane.org> (follow “About Us” hyperlink; then follow “Who We Are” hyperlink; then follow “History” hyperlink; then follow “Mary Ellen Wilson” hyperlink) [hereinafter “AM. HUMANE, *Mary Ellen Wilson*”]; AM. HUMANE, *Account of Etta Wheeler, The Story of Mary Ellen: The Beginnings of a World-Wide Child-Saving Crusade* (originally published in 1934), available at <http://www.americanhumane.org> (follow “About Us” hyperlink; then follow “Who We Are” hyperlink; then follow “History” hyperlink; then follow “Mary Ellen Wilson” hyperlink; then follow “Click here to

Mary Ellen Wilson was born in 1864 in New York City.⁶⁸ Her father died shortly thereafter and her mother, needing to work, boarded the infant with a woman, which was a common practice at the time.⁶⁹ After her mother fell behind in payments and missed scheduled visits with her child, the caretaker turned the two-year-old girl over to the city's Department of Charities.⁷⁰ The Department in turn placed the girl with a married couple.⁷¹ After the husband of this marriage died, his widow remarried and moved to a tenement in the city.⁷² Although neighbors in this apartment building were aware that the woman badly mistreated the child, the family soon moved to another tenement.⁷³

In 1874, one of the neighbors from the first tenement asked a mission worker who regularly visited impoverished residents of the tenements to check on the child.⁷⁴ Working under the guise that she was trying to help a homebound neighbor, the mission worker was able to gain access to Mary Ellen's apartment and observe the child, now ten years of age.⁷⁵ She saw that Mary Ellen had bruises and scars on her arms and legs.⁷⁶ Although New York, at the time, had in place laws that permitted the state to remove children who were abused by their caretakers, city authorities contacted by the mission worker were reluctant to act because they interpreted the law as limiting their authority to intervene under the existing circumstances.⁷⁷ City authorities may have been reluctant to act because at this time courts strongly protected and respected the rights of parents to control their children.⁷⁸ Additionally, before the case of Mary Ellen, investigations and efforts to protect children from abuse were considered tasks for the charitable and religious sectors of society to undertake, not the state.⁷⁹

The mission worker then turned to Elbridge T. Gerry, the attorney for the American Society for the Prevention of Cruelty to Animals, who later went on to found the New York Society for the Prevention of Cruelty to

read Etta Wheeler's account of Mary Ellen" [hyperlink](#)); see also BARNETT ET AL., *supra* note 12, at 8; COSTIN ET AL., *supra* note 65, at 52-56; DORNE, *supra* note 12, at 39; Thomas, *supra* note 59, at 307-10.

68. AM. HUMANE, *Mary Ellen Wilson*, *supra* note 67.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. AM. HUMANE, *Mary Ellen Wilson*, *supra* note 67.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Jill Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 304, 311 (2002).

79. See Mark Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 941 (2004).

Children.⁸⁰ He filed, as a private citizen, a petition for a writ *de homine replegiando*, an old English writ used to remove a person from the custody of another.⁸¹ Gerry also contacted reporters from the *New York Times*, who attended and publicized subsequent hearings.⁸²

At a judicial hearing, held in 1874, Mary Ellen was observed as having bruises all over her body and a deep gash over her eye and on her cheek from being struck by a pair of scissors wielded by the woman with whom she lived.⁸³ In her testimony, the child stated that she did not know how old she was, was whipped and beaten almost every day, had never been kissed or caressed, never went outside, and never spoke to anyone because if she did she would be whipped.⁸⁴ The child was immediately placed in the custody of the court and initially placed in an institutional shelter for adolescent girls.⁸⁵ The woman who had abused her was subsequently tried, convicted, and sentenced to a year in the state penitentiary.⁸⁶ Ultimately, the mother of the mission worker obtained custody of Mary Ellen and provided her with a relatively stable and nurturing family environment that enabled Mary Ellen to lead a quiet life until she died at the age of 92.⁸⁷

The publicity surrounding the beating and neglect experienced by Mary Ellen spurred the establishment of charitable organizations that worked to prevent cruelty to children. For example, in 1875 the New York Society for the Prevention of Cruelty to Children (NYSPCC) was formed,⁸⁸ an action that is considered to have initiated the child welfare movement.⁸⁹ State legislation delegated to the NYSPCC, a private organization, police powers

80. AM. HUMANE, *Mary Ellen Wilson*, *supra* note 67.

81. DORNE, *supra* note 12, at 39. Such writs were typically used to obtain the release of a person from jail or the custody of another by giving security that the person released will answer any charge made. According to William Blackstone, this writ contained so many exceptions that it was generally ineffectual as a means for obtaining a person's release. BLACK'S LAW DICTIONARY 457 (8th ed. 2004). In this case, Gerry and the court used the writ creatively as the basis for generating a special warrant to bring Mary Ellen before the court and under the court's control. Thomas, *supra* note 59, at 308; *see also generally* AM. HUMANE, *Mary Ellen Wilson*, *supra* note 67. This writ was used on occasion in a similar manner during the antislavery movement to release free blacks who had been wrongfully enslaved. *See, e.g.,* *Elkison v. Dellesseline*, 8 F. Cas. 493, 497-98 (C.C.D.S.C. 1823); *see also* Marc Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 36 n.157 (1995).

82. AM. HUMANE, *Mary Ellen Wilson*, *supra* note 67.

83. *Id.*

84. *Id.*

85. *Id.*

86. Thomas, *supra* note 59, at 310.

87. AM. HUMANE, *Mary Ellen Wilson*, *supra* note 67.

88. N.Y. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILDREN (2005), available at <http://www.nyspcc.org/> [hereinafter "NYSPCC"].

89. *See* AM. HUMANE, *Mary Ellen Wilson*, *supra* note 67.

over matters involving destitute, neglected, or wayward children.⁹⁰ The NYSPCC was empowered to investigate complaints of violations of laws protecting children, with law enforcement and court officials required to assist the NYSPCC; it was a misdemeanor to interfere with the NYSPCC's efforts.⁹¹

Similar entities were established in other American cities, such as Chicago, Boston, and Philadelphia. However, their authority and approach often varied from that of the NYSPCC. For example, whereas the NYSPCC advocated criminal punishment for child abusers and largely adopted a law enforcement perspective, the Massachusetts Society for the Prevention of Cruelty to Children focused on family rehabilitation and keeping the child in a family setting.⁹² In 1877, the delegates of twenty-seven organizations from ten states met and founded the American Humane Association, the first national organization specifically focused on the problem of child abuse.⁹³

The Progressive Era of the early twentieth century spawned the commencement of further efforts to redress child abuse. For example, this era featured the establishment across the country of separate courts for juveniles, courts specifically designed to target and help juveniles.⁹⁴ Among other things, under their dependency jurisdiction, these courts could authorize state intervention in families where it was deemed necessary to protect a child from maltreatment by parents or other legal custodians.⁹⁵ However, the primary focus of these courts has been and continues to be the adjudication of juvenile offenders and the protection of society.⁹⁶

More directly relevant to child abuse, in 1909, President Theodore Roosevelt convened the first White House conference to address the needs of children: the Conference on the Care of Dependant Children.⁹⁷

90. NYSPCC, *supra* note 88.

91. DORNE, *supra* note 12, at 39; Thomas, *supra* note 59, at 310.

92. COSTIN ET AL., *supra* note 65, at 85.

93. AM. HUMANE, *How American Human Began*, <http://www.americanhumane.org/about-us/> (last visited Aug. 25, 2010).

94. Thomas L. Hafemeister, *Right to Mental Health Treatment for Juvenile Offenders*, 12 VA. J. SOC. POL'Y & L. 61, 72-75 (2004).

95. Weithorn, *supra* note 11, at 1460 ("[A] finding of dependency gives the [juvenile] courts jurisdiction over the child and substantial authority to order the child's family to follow through with court-ordered intervention, and it permits the court to order any of a range of nonsecure out-of-home placements for juveniles.").

96. Hafemeister, *supra* note 94, at 72-80.

97. COSTIN ET AL., *supra* note 65, at 83. This Conference also emphasized the importance of maternal care, and resulted in many states enacting what were referred to as "mothers' pension" or "widows' pension" laws that allotted meager stipends to "'respectable' poor" mothers, which were generally "white widows," that enabled them to support themselves and their children and avoid the

Stemming from a proposal at the conference, Congress passed legislation to create the United States Children's Bureau in 1912.⁹⁸ This legislation directed the Bureau to do research on "all matters pertaining to the welfare of children and child life among all classes."⁹⁹ However, the Bureau was not authorized to do anything beyond conducting research, and its staff for even that was limited.¹⁰⁰ Nevertheless, the Bureau, drawing on ideas espoused at the 1909 conference that were also emerging in the social sciences, promoted a relatively non-punitive approach to child welfare that advocated keeping abused children in their homes and institutionalizing children only as a last resort.¹⁰¹

In general, however, responsibility for detecting and responding to child abuse during this era continued to be left to private agencies such as the NYSPCC, with 346 such agencies in existence by 1912. However, the quality of the services provided was in many cases known to be "inefficient, inactive, or defunct."¹⁰²

A second White House conference was held in 1919, and similar conferences occurred approximately every ten years thereafter.¹⁰³ Although these conferences addressed a range of child welfare issues, such as child labor laws, the effects of poverty on children, childhood illnesses, and juvenile delinquency, there was little discussion of child abuse until the 1970 White House conference. This inattention may be attributed to several factors: society's failure to recognize child abuse as a widespread social problem;¹⁰⁴ the onset of the Great Depression, which led to a focus on economic relief rather than social issues such as family violence;¹⁰⁵ the eruption of World War II, which necessitated an emphasis on national

children's removal from the home. See Weithorn, *supra* note 11, at 1449 (noting that twenty states enacted such laws by 1913 and another twenty states enacted them by 1920).

98. COSTIN ET AL., *supra* note 65, at 83.

99. BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE 35 (1984).

100. *Id.*

101. *Id.* This principle was also a key element associated with the establishment and functioning of the juvenile justice system. Hafemeister, *supra* note 94, at 72-75, 81.

102. COSTIN ET AL., *supra* note 65, at 92.

103. DORNE, *supra* note 12, at 45.

104. *Id.* at 46; COSTIN ET AL., *supra* note 65, at 88. It has been suggested that the attention given to child abuse during the nineteenth century by cases like that involving "Mary Ellen" diminished as the influence of feminism, the movement responsible for directing public scrutiny toward family relations and enhancing the status of women, declined during the first half of the twentieth century. Indeed, it has been argued that Progressive Era reformers themselves down-played or ignored child abuse because of their concern that support for their proposed reforms might further dwindle because child abuse might be perceived as a product of a weakening of the family unit caused by their reforms. See LINDA GORDON, HEROES OF THEIR OWN LIVES 21-22 (1988).

105. COSTIN ET AL., *supra* note 65, at 97; GORDON, *supra* note 104, at 22-23 (asserting that the Depression shifted attention to and generated sympathy for economically-pressed families and further diverted concern from abuses of children in the home).

security and led to a diminished focus on domestic issues in general;¹⁰⁶ an increased preference for limiting intrusions into the sanctity of the family and for keeping families together as much as possible;¹⁰⁷ and skepticism regarding the ability of juvenile courts — which had become relatively universal during the first two decades of the twentieth century and were society's primary mechanism for responding to child abuse — to reliably and consistently carry out its charge of both curbing delinquent behavior and protecting abused children.¹⁰⁸ Policy makers during this era generally failed to recognize child abuse as common, or even acknowledge it existed in middle and upper class homes, which is why there is frequent reference to the “discovery” — or more precisely the “rediscovery” — of child abuse in the early 1960s.¹⁰⁹

Although not principally focused on child abuse, there were some important landmarks during this intervening era that specifically pertained to child welfare. In 1935, the first Social Security Act¹¹⁰ provided funds, among other things, to facilitate the ability of the states to provide financial assistance to “needy dependent children,”¹¹¹ to extend and improve services for promoting the health of mothers and children,¹¹² to supply services and care for children who are crippled or who are suffering from conditions that lead to crippling,¹¹³ and to extend and strengthen public-welfare services “for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent[.]”¹¹⁴ The funding for the latter was allotted by the Secretary of Labor on the basis of plans developed jointly by the respective state public-welfare agency involved and the Children's Bureau.¹¹⁵ The Children's Bureau was charged with the administration of these grants and with making “such studies and

106. GORDON, *supra* note 104, at 80.

107. COSTIN ET AL., *supra* note 65, at 85 (noting the pronounced split among the various state chapters of the American Humane Association on whether to emphasize the removal of the child from an abusive environment or the provision of services that would enable the child to remain in his or her current home).

108. *Id.* at 90.

109. *Id.* at 107; DORNE, *supra* note 12, at 46; GORDON, *supra* note 104, at 80-81; *see also generally infra* notes 125-50 and accompanying text (discussing the emergence of child abuse as a subject of national discourse in the 1960s).

110. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified at 42 U.S.C.S. §§ 301-1397jj (LexisNexis 2010)).

111. *See id.* §§ 401-06, 49 Stat. at 627-29 (defining “dependent child” as a child under the age of sixteen who has been deprived of parental support or care by reason of the death, the continued absence from the home, or the physical or mental incapacity of a parent, and who is living with a relative of the child).

112. *See generally id.* §§ 501-05, 49 Stat. at 629-31.

113. *See generally id.* §§ 511-15, 49 Stat. at 631-33.

114. *Id.* § 521, 49 Stat. at 633.

115. Social Security Act of 1935, Pub. L. No. 74-271, § 521, 49 Stat. at 620, 633.

investigations as will promote the efficient administration" of these provisions.¹¹⁶ However, the funding for the protection and care of homeless, dependent, and neglected children was required to be used predominantly in rural areas¹¹⁷ and was considerably less than that devoted to other identified needs.¹¹⁸ Furthermore, these efforts did not promote child abuse reporting or any other mechanism as a means to identify or redress child abuse.¹¹⁹ Not surprisingly, societal efforts to curb child abuse remained limited during this era.

A refocusing of attention on child maltreatment in the mid-twentieth century paralleled the development of a means of reliably documenting the existence of the physical abuse of a child, namely, technological advances in radiology, and the support of the increasingly prestigious medical profession for efforts to detect and respond to child abuse. In 1946, Dr. John Caffey published an article that described six cases of multiple fractures in the long bones of infants who had chronic subdural hematomas.¹²⁰ Interestingly, although these were classic signs of physical abuse, Dr. Caffey was initially unwilling to speculate on the causes of the children's injuries, with some commentators suggesting that he, like other physicians at the time, feared legal repercussions, such as libel suits, from identifying parents as child abusers.¹²¹ However, Dr. Caffey later urged early diagnosis of such injuries to protect abused children from further injury and advocated that these children be removed from traumatic environments and their abusers punished.¹²²

During the 1950s, several articles were published about what is now considered to be child abuse,¹²³ but their impact was limited because child abuse was still considered rare and believed to be limited to disadvantaged

116. *Id.* § 541, 49 Stat. at 634.

117. *Id.* § 521, 49 Stat. at 633.

118. A sum of \$24,750,000 was appropriated for needy dependent children. *Id.* § 401. A sum of \$3,800,000 was set aside for maternal and child health services. *Id.* § 501. Additionally, \$2,850,000 was allocated for services for crippled children. *Id.* § 511. \$1,500,000 was marked for child welfare services. *Id.* § 521.

119. KALICHMAN, *supra* note 12, at 9-10; *see also* COMBATING CHILD ABUSE: INTERNATIONAL PERSPECTIVES AND TRENDS (Neil Gilbert ed., 1997).

120. John Caffey, *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, 56 AM. J. ROENTGENOLOGY 163, 163 (1946).

121. ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 166 (1987); Marilyn Heins, *The Battered Child Revisited*, 251 JAMA 3295, 3296 (1984).

122. John Caffey, *Some Traumatic Lesions in Growing Bones Other than Fractures and Dislocations: Clinical and Radiological Features*, 30 BRIT. J. RADIOLOGY 225, 238 (1957).

123. *See, e.g.*, Paul V. Woolley, Jr. & William A. Evans, Jr., *Significance of Skeletal Lesions in Infants Resembling Those of Traumatic Origin*, 158 JAMA 539 (1955).

families.¹²⁴ It was not until pediatrician C. Henry Kempe and four colleagues published the seminal article entitled "The Battered Child Syndrome" in *The Journal of the American Medical Association* in July 1962 that child abuse became a matter of widespread concern.¹²⁵ The article defined battered child syndrome as "a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent."¹²⁶ The article further described the syndrome as a "significant cause of childhood disability and death . . . [that] is frequently not recognized, or, if diagnosed, is inadequately handled by the physician because of hesitation to bring the case to the attention of proper authorities."¹²⁷

The evocative title of the article, its identification of a specific clinical condition with diagnosable symptoms and severe prognoses if left unaddressed, the linkage of the syndrome with parental misbehavior, the recognition that society and physicians are failing the children with this condition, and its publication in a widely circulated and prestigious journal put the issue of child abuse in the national spotlight.¹²⁸ Dr. Kempe and his colleagues also asserted that physicians should report "possible willful trauma" to the police or to children's protective services and educate themselves about the private and public agencies that can protect and assist children.¹²⁹

The response to the article was enormous. Within three years of its publication, 300 scientific articles on child abuse were published, as well as many editorials and stories in the popular press.¹³⁰ A push for state reporting legislation came both from academia and from lobbying efforts by physicians, social workers, members of the legal community, and various

124. Heins, *supra* note 121, at 3296.

125. C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17 (1962); see also generally C. HENRY KEMPE & R. E. HELFER EDS., *HELPING THE BATTERED CHILD AND HIS FAMILY* ix-x (1972) (noting the frustrations experts experienced in attempting to practically respond to "The Battered Child Syndrome," this publication ten years after the JAMA article was an attempt to suggest methods for solving the problems of child abuse).

126. Kempe et al., *supra* note 125, at 17. It should be noted that it has been argued that because Dr. Kempe focused on the physical abuse of children (a focus shared by Dr. Caffey), his enormously influential work had the unfortunate effect of making physical abuse the target of efforts to craft mechanisms to enable society to identify and ameliorate child abuse, even though cases of physical abuse comprise a relatively small minority of all child abuse cases (16.6%) and the response needed for other forms of child abuse may be quite different. Melton, *supra* note 49, at 9-11. See also *infra* sections VII.-VIII. and accompanying text.

127. Kempe et al., *supra* note 125, at 17.

128. Heins, *supra* note 121, at 3295.

129. Kempe et al., *supra* note 125, at 23-24.

130. Heins, *supra* note 121, at 3297-98.

professional and "grass roots" voluntary associations.¹³¹ Only a few months after the publication of the article, the Children's Bureau, which funded Dr. Kempe's research and was receiving an increasing number of reports from pediatricians and hospitals regarding child abuse,¹³² asked Dr. Kempe and his colleagues to join in a symposium in 1962 to promote better understanding of the problem and to discuss possible responses.¹³³ This meeting marked the first time that the concept of a mandatory child abuse reporting law was explored at the national level.¹³⁴

By 1963, the Children's Bureau developed a model child abuse reporting law.¹³⁵ This model was "nearly always consulted by legislators [in the initial drafting of reporting statutes] and only occasionally rejected."¹³⁶ The model reporting law mandated that physicians report child abuse to the appropriate police authority.¹³⁷ The American Humane Association (AHA),¹³⁸ the American Medical Association (AMA),¹³⁹ the Council of State Governments,¹⁴⁰ and the Committee on the Infant and

131. Monrad Paulsen et al., *Child Abuse Reporting Laws – Some Legislative History*, 34 GEO. WASH. L. REV. 482, 491-97 (1966); DORNE, *supra* note 12, at 116.

132. PLECK, *supra* note 121, at 169 (responding to an inquiry as to why the Bureau organized the symposium, Dr. Katherine Bain, deputy chief at the Bureau at the time, said that the increasing number of reports from pediatricians and hospitals regarding the physical abuse of children that the Bureau had been receiving sparked the Bureau's concern and recognition of the need for such a discussion). Prior to the publication of the article by Dr. Kempe and his colleagues, physicians in the Children's Bureau gave limited attention to the physical abuse of children, focusing instead on the causes of "mental retardation" in children. The interest in mental retardation was generated in part by the Kennedy administration's interest in this topic and the research money it provided, which in turn was driven by the fact that President John F. Kennedy's sister Rosemary had an intellectual disability. NELSON, *supra* note 99, at 43. It should be noted that the Bureau was primed to respond quickly to the surge in public and scholarly interest in child abuse in part because Dr. Kempe first presented the JAMA article to the Children's Bureau months before it was ultimately published. Heins, *supra* note 121, at 3297.

133. Heins, *supra* note 121, at 3297; Paulsen et al., *supra* note 131, at 485 (noting that the first symposium, where Dr. Kempe presented his research, led to a smaller meeting later that year where specific recommendations for a model reporting statute were discussed); Thomas, *supra* note 59, at 330; Ventrell, *supra* note 62, at 15.

134. Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L. Q. 141, 142 (1986).

135. CHILD. BUREAU, U.S. DEP'T HEALTH, EDUC. & WELFARE, THE ABUSED CHILD – PRINCIPLES AND SUGGESTED LANGUAGE FOR THE REPORTING OF THE PHYSICALLY ABUSED CHILD (1963) [hereinafter CHILD. BUREAU, 1963 REPORTING REQUIREMENTS]; see also Brian G. Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 649 (1978).

136. Paulsen et al., *supra* note 131, at 486.

137. Thomas, *supra* note 59, at 331; Monrad Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 17 (1967).

138. CHILD. DIV., AM. HUMANE ASS'N, GUIDELINES FOR LEGISLATION TO PROTECT THE BATTERED CHILD (1963).

139. Thomas, *supra* note 59, at 332 n.137 (citing AM. MED. ASS'N, PHYSICAL ABUSE OF CHILDREN – SUGGESTED LEGISLATION (1965)).

140. COUNCIL OF STATE GOV'TS, PHYSICAL ABUSE OF CHILDREN, 24 SUGGESTED STATE LEGISLATION 66 (1965).

Preschool Child of the American Academy of Pediatrics¹⁴¹ also developed model reporting statutes soon after the Children's Bureau did so.

The AHA model differed from the Children's Bureau model in that it recommended mandatory reporting of child abuse to public or private child welfare community agencies instead of the police.¹⁴² The AMA model, however, rejected mandatory reporting in general because of concerns that abusive parents would be deterred from seeking medical care for their children, and instead promoted voluntary reporting by various professionals, including physicians, nurses, teachers, and social workers, who could file reports with either a child welfare agency or the police.¹⁴³ The model reporting law of the Council of State Governments represented a compromise between the Children's Bureau and AHA models by permitting mandated reports to be filed with either an appropriate child welfare agency or the police.¹⁴⁴ Like the AHA model, the American Academy of Pediatrics' model favored mandated reporting to social services agencies, but it was also the first model to call for the creation of central registries at the state level to track abused children.¹⁴⁵ Of these various models, the Children's Bureau's model became the most significant and influential, although this model was later modified to direct the bulk of mandated reports to child welfare agencies and to limit the filing of reports with the police to when the protective services of child welfare agencies were likely to be inadequate to safeguard the child.¹⁴⁶

By 1967, within five years of the publication of the article by Dr. Kempe and his colleagues, every state and the District of Columbia adopted (and continues to employ) a mandatory child abuse reporting statute.¹⁴⁷ To put the rapid proliferation of child abuse reporting laws into perspective, it has been calculated that in contrast it takes an average of 25.6 years for a

141. Am. Acad. of Pediatrics, Comm'n on Infant and Pre-School Child, *Maltreatment of Children — The Physically Abused Child*, 37 PEDIATRICS 377, 381 (1966).

142. Thomas, *supra* note 59, at 331.

143. *Id.* at 332.

144. COUNCIL OF STATE GOV'TS, *supra* note 140, at 67.

145. NELSON, *supra* note 99, at 79; Douglas Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 690-91 (1978); Thomas, *supra* note 59, at 332. Several states had already established central registries at the time of this proposal.

146. Thomas, *supra* note 59, at 331-32.

147. Fraser, *supra* note 135, at 646; Heins, *supra* note 121, at 3295, 3297; Jessica Ann Toth Johns, Comment, *Mandated Voices for the Vulnerable: An Examination of the Constitutionality of Missouri's Mandatory Child Abuse Reporting Statute*, 72 UMKC L. REV. 1083, 1085 (2004); Meriwether, *supra* note 134, at 142. The Virgin Islands, Guam, Puerto Rico, and American Samoa also have in place child abuse reporting statutes.

new legal concept with broad public support to diffuse across the fifty states.¹⁴⁸

The first generation of reporting statutes, enacted in the mid-1960s, focused primarily on enhancing the identification of possible child abuse by mandating that certain professionals, primarily physicians, report suspected cases of child abuse.¹⁴⁹ However, these laws generally failed to dedicate the services needed to investigate these reports to determine which children had been abused and were in need of protection. It was soon recognized that mandating the reporting of possible abuse was only a beginning step and that follow-up efforts were needed to adequately discern who was at risk, who was not, and when to intervene.¹⁵⁰

A second generation of statutes, which began to emerge in the late 1960s and early 1970s, focused both on the identification and the subsequent investigation of possible abuse.¹⁵¹ In addition to pushing for an expansion of the list of mandatory reporters, efforts were made to refine the reporting process and to guide investigations by establishing clearer standards of what constituted child abuse.¹⁵² For example, a 1971 study of New York's protective services found that the statutory definition of neglect was nebulous and difficult to apply.¹⁵³ In 1973, New York amended its laws to require reporting for abuse and "maltreatment," removing the term "neglect."¹⁵⁴

However, these statutes tended to assume that once instances of child abuse were identified and confirmed, existing governmental agencies would provide needed and appropriate help and relief. When mandatory reporting laws were first adopted, lawmakers believed the occurrences of child abuse numbered in the hundreds and therefore the governmental services in place could adequately deal with the reports being filed.¹⁵⁵ Indeed, only one of the fifty states initially adopted an appropriation to accompany its mandated reporting law.¹⁵⁶

148. NELSON, *supra* note 99, at 79.

149. Fraser, *supra* note 135, at 650.

150. *Id.*; see also NELSON, *supra* note 99, at 76.

151. Fraser, *supra* note 135, at 650.

152. *Id.* at 650; see also Alan Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L. Q. 245, 312 (1974) (calling for the second generation of statutes, among other changes, to more clearly define child abuse).

153. Sussman, *supra* note 152, at 262-63 (citing SOLOMON & PESSIRILO, A CHILD'S GUIDE TO PROTECTIVE SERVICES 20 (1971)).

154. Child Protective Services Act of 1973, N.Y. SOC. SERV. LAW § 411, 412 (McKinney 2009); see also Sussman, *supra* note 152, at 263.

155. Melton, *supra* note 49, at 10.

156. *Id.*

This was a great miscalculation. Reports of child abuse increased from 10,000 annually in 1962¹⁵⁷ to 3.3 million in 2008.¹⁵⁸ From 1976 to 1993 alone, child abuse reports increased 347%.¹⁵⁹ Many more resources were needed than were available at the time, creating gigantic new problems of public administration.¹⁶⁰ These agencies were often poorly equipped to supply the needed response and, as a result, often failed to adequately protect the safety of abused children. Intervention tended to be severely lacking because of limited resources, limited expertise, and lack of coordination among agencies and professionals.¹⁶¹ As one commentator noted at the time, “[m]ovement in the direction of expanding services has . . . been very slow.”¹⁶² Further, this flood of reports and the resulting increase in the removal of children from their homes overwhelmed the alternative housing traditionally provided to these children, namely, institutional care, and led to foster family homes, which were relatively unregulated, becoming the predominant placement instead.¹⁶³

During the mid-seventies, a third wave of statutory enactments attempted to facilitate intervention, as well as promote investigation and identification.¹⁶⁴ These statutes attempted to improve coordination between agencies, created child protection teams, provided for the filing of reports by members of the general public, further broadened mandated reporting, and enhanced the delivery of needed services.¹⁶⁵

Because of concerns about the divergent approaches to child abuse being adopted by the states, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.¹⁶⁶ CAPTA provides financial incentives to the states to create comprehensive programs and procedures that address child abuse. To receive this funding, a state was required to

157. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 8 (1994).

158. CHILD MALTREATMENT 2008, *supra* note 7, at 6.

159. Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 *THE FUTURE OF CHILD: PROTECTING CHILDREN FROM ABUSE AND NEGLECT* 23, 29 (1998), available at http://www.futureofchildren.org/futureofchildren/publications/docs/08_01_01.pdf.

160. *Id.*

161. *Cf.* Fraser, *supra* note 135, at 650 (noting that statutory reform attempted to rectify these problems).

162. Paulsen et al., *supra* note 131, at 505 (“The existing statutes will require additional appropriations for expanding child protective services; but very few states have provided the additional funds necessary under the new legislation. It has generally been assumed that the additional services would be financed out of existing budgets. Inevitably, in so far as child abuse reporting legislation is effective, it will add to the existing overburdened case load of the agencies.”).

163. Weithorn, *supra* note 11, at 1450.

164. Fraser, *supra* note 135, at 650.

165. *Id.*

166. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (Supp. IV 1974) (current version at 42 U.S.C.S. §§ 5101-5107 (LexisNexis 2010)). For further discussion of the CAPTA, see Fraser, *supra* note 135, at 648-49.

meet ten conditions,¹⁶⁷ which included establishing provisions for the reporting of known or suspected child abuse;¹⁶⁸ granting immunity to good faith reporters;¹⁶⁹ ensuring the confidentiality of reports;¹⁷⁰ implementing mechanisms that ensure the prompt investigation of reports and the delivery of needed services;¹⁷¹ enhancing cooperation among law enforcement, courts, and state agencies providing services;¹⁷² appointing guardians *ad litem* to represent the children in judicial proceedings;¹⁷³ and disseminating to the public information about child abuse and the mechanisms available to combat it.¹⁷⁴ The Act also created the National Center on Child Abuse and Neglect to serve as a central repository for nation-wide data on the incidence of child abuse.¹⁷⁵

After the passage of CAPTA in 1974, state laws regarding child abuse became more uniform, both because CAPTA made the availability of federal funding contingent on states bringing their legislation into compliance with the CAPTA provisions and because there were continuing efforts to generate model legislation to guide state efforts.¹⁷⁶ In addition, a

167. The ten necessary conditions that a state must meet to receive funding under the CAPTA were originally codified in title 42, section 5103, of the United States Code. See Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5103(b)(2)(A)-(J) (repealed 1996). Section 5103 was subsequently repealed in 1996; however, many of the conditions that were contained therein, as well as a number of others, were subsequently incorporated into section 5106a of the Act as part of the amendments made in 2009. See Child Abuse Prevention and Treatment Act, 42 U.S.C.S. § 5106a(b) (as amended) (these conditions are set forth under the subsection entitled "Eligibility Requirements"). For further discussion of the conditions contained in the 1974 CAPTA, see Susan Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1433-34 (1999) ("Those provisions [in the 1974 CAPTA statutes] concerned reporting, investigating, confidentiality of record keeping, and law enforcement cooperation. They were the earliest version of the more complete and complicated federal-to-state reimbursement system which funds state dependency systems today").

168. Child Abuse Prevention and Treatment Act, 42 U.S.C.S. § 5106a(b)(2)(A)(i) (as amended) (corresponds to 42 U.S.C. § 5103(b)(2)(B) (repealed 1996)).

169. *Id.* subsec. (vii) (corresponds to 42 U.S.C. § 5103(b)(2)(A) (repealed 1996)). For a discussion of the history of the good faith immunity provision, see generally Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183 (1998).

170. Child Abuse Prevention and Treatment Act, 42 U.S.C.S. § 5106a(b)(2)(A)(viii) (as amended) (corresponds to 42 U.S.C. § 5103(b)(2)(E) (repealed 1996)).

171. *Id.* subsec. (iv) (corresponds to 42 U.S.C. § 5103(b)(2)(C) (repealed 1996)).

172. *Id.* subsec. (xi) (corresponds to 42 U.S.C. § 5103(b)(2)(F) (repealed 1996)).

173. Child Abuse Prevention and Treatment Act, 42 U.S.C.S. § 5106a(b)(2)(A)(xiii) (as amended) (corresponds to 42 U.S.C. § 5103(b)(2)(G) (repealed 1996)).

174. *Id.* subsec. (a)(11) (corresponds to 42 U.S.C. § 5103(b)(2)(I) (repealed 1996)). While the dissemination of information to the public was a condition of funding under the 1974 version of CAPTA, it is now listed as one of the ways in which a state should use the funds provided to it.

175. *Id.* §§ 5104-5105 (providing that The National Center on Child Abuse and Neglect is also charged with funding and coordinating research on child abuse).

176. See, e.g., STANDARDS RELATING TO ABUSE AND NEGLECT (Inst. of Judicial Admin. — ABA Joint Commission on Juvenile Justice Standards Tentative Draft 1977); ALAN SUSSMAN & STEPHAN

series of widely reported cases in the 1990s enhanced public concern about child sexual abuse and triggered a series of legislative pushes for increased prosecution and criminal penalties.¹⁷⁷

Post-CAPTA, the primary emerging development in the laws themselves involved efforts to make protective custody orders available following reported child abuse. Inspired by efforts to make these orders available as a response to intimate partner violence,¹⁷⁸ many child abuse statutes gave certain groups, particularly physicians and police officers, the authority to initiate this means of protecting children from further abuse by a caretaker.¹⁷⁹

The federal government, through a series of additional enactments, has also continued to address issues related to child abuse.¹⁸⁰ This legislation has included the Victims of Child Abuse Act of 1990, which sought to improve the investigation and prosecution of child abuse cases;¹⁸¹ the Multiethnic Placement Act of 1994, which provided that adoption or foster care placements could not be denied based on race, color, or national origin;¹⁸² the Adoption and Safe Families Act of 1997, which supplied funding for child welfare and sought to promote reasonable family preservation efforts;¹⁸³ the Child Abuse Prevention and Enforcement Act in 2000, which focused on improving the criminal justice system's response to child abuse;¹⁸⁴ and the Keeping Children and Families Safe Act of 2003,¹⁸⁵

COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION (1975); *see also* NELSON, *supra* note 99, at 88.

177. John Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 878-80 (1994) (noting how these efforts exploded following the case of *State v. Michaels*, 642 A.2d 1372 (N.J. 1994)); *see also* *McMartin v. Children's Inst. Int'l*, 212 Cal. App. 3d 1393 (1989).

178. *See* Thomas L. Hafemeister, *Have We Broken Our Vow? Society's Response to Intimate Partner Violence* (forthcoming) (on file with author).

179. NELSON, *supra* note 99, at 88. For example, a protective order could be issued that limits visits between a parent and an abused child to supervised settings. *See* SUSSMAN & COHEN, *supra* note 176, at 4, 29-33. *See also infra* section VI.B.

180. *See generally* NAT'L ASS'N OF COUNSEL FOR CHILD., CHILD MALTREATMENT, available at <http://www.naccchildlaw.org/?page=ChildMaltreatment>.

181. Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, 104 Stat. 4792 (1990) (current version at 42 U.S.C.S. §§ 13002-13003 (LexisNexis 2010)) (establishing regional and local children's advocacy centers and providing grants for technical assistance and training programs).

182. Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (1994), *repealed by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (current version at 42 U.S.C.S. § 1996b (LexisNexis 2010)) (prohibiting denial or delay of opportunity to become an adoptive or foster parent on the basis of the race, color, or national origin of the individual or child involved).

183. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (current version at 42 U.S.C.S. §§ 670-679 (LexisNexis 2010)); *see also infra* note 610 and accompanying text.

184. Child Abuse Prevention and Enforcement Act of 2000, Pub. L. No. 106-177, 114 Stat. 35 (2000) (current version at 42 U.S.C.S. §§ 14601-14664, 3737, 10601 (LexisNexis 2010)) (calling for the criminal justice system to deliver criminal history records to child welfare agencies and increasing funding for enforcing child abuse and neglect laws); *see also* DORNE, *supra* note 12, at 124-27 (noting the

which encouraged state improvements in the prevention and treatment of child abuse.¹⁸⁶

This federal legislation and the various model acts have had a significant influence on existing child abuse reporting statutes. The sections that follow describe and critique current state efforts to redress child abuse.

IV. DEFINING CHILD ABUSE

Although Dr. Kempe and his colleagues in their discussion of battered-child syndrome focused on “serious physical abuse,”¹⁸⁷ states — primarily through their reporting statutes — have adopted a broader definition of child abuse. “Child abuse” has come to encompass non-accidental physical injury, neglect or abandonment, sexual abuse, and psychological abuse.¹⁸⁸

The definitions of these terms, however, vary among the states.¹⁸⁹ Each State can establish its own definitions of child abuse, although Federal law has established a base set of acts or behaviors that constitute child abuse as a prerequisite for supplemental federal funding.¹⁹⁰

A debate has arisen over whether the definition of child abuse should be broad or narrow in scope.¹⁹¹ The variation in definitions among the states is in part due to divergent views regarding whether the definition should be relatively broad to maximize state interventions to protect at-risk children or relatively narrow to preserve parental rights and family privacy.¹⁹² While a broad definition enables a state to cast a wide net and facilitates the goal of identifying the greatest number of abused children, such an approach may increase the number of unsubstantiated reports of abuse,¹⁹³ requires the dedication of additional resources by the state to respond to these reports,

tension between the family preservation approach, as seen in the Adoption and Safe Families Act, and the use of the criminal justice system, particularly in heinous or sexual abuse cases).

185. Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-136, 117 Stat. 800 (2003) (current version at 42 U.S.C.S. §§ 5101-5116 (LexisNexis 2010)) (providing grants for CPS, training, research, community-based interventions, and mandating that physicians suspecting illegal drug use in pregnant mothers report incidents to social services).

186. See generally *id.*; see also NAT'L ASS'N OF SOC. WORKERS, GOVERNMENT REGULATION UPDATE: KEEPING CHILDREN AND FAMILIES SAFE ACT OF 2003 (2003).

187. Kempe et al., *supra* note 125, at 17.

188. See CHILD MALTREATMENT 2008, *supra* note 7, xi (stating that “[m]ost States recognize four major types of maltreatment: neglect, physical abuse, sexual abuse, and psychological maltreatment”).

189. Meriwether, *supra* note 134, at 143.

190. Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C.S. § 5106g (LexisNexis 2010) (defining child abuse and neglect as, “at a minimum, any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act which presents an imminent risk of serious harm”).

191. Meriwether, *supra* note 134, at 149.

192. DORNE, *supra* note 12, at 122-23.

193. *Id.* at 151.

and, particularly when the occurrence of abuse is not substantiated, raises concerns about potentially negative consequences, including the harm incurred by adults who were inappropriately targeted by these reports and by children who may be removed temporarily or permanently from their home over their objection.¹⁹⁴ States must weigh the potential of wasting scarce resources on unfounded claims and their intrusive effects versus the need to broadly encourage reports of abuse that could protect abused children and provide for early detection and remediation of emerging abuse.¹⁹⁵

Colorado, for example, defines child abuse as any case when, without a justifiable explanation or circumstances indicating an accident, there is evidence of “skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death[.]”¹⁹⁶ The statute also encompasses unlawful sexual behavior with a child (including a series of specifically identified prohibited sexual behaviors), emotional abuse, neglect (including abandonment, maintaining an injurious environment, and omissions of proper parental care such as subsistence, education, and medical care), and the presence of controlled substances.¹⁹⁷

In contrast, Missouri, in establishing its child protection system to respond to reports of child abuse and neglect,¹⁹⁸ defines child abuse simply as “any physical injury, sexual abuse, or emotional abuse inflicted on a child other than by accidental means by those responsible for the child’s care, custody, and control.”¹⁹⁹ Neglect is concisely defined as the failure to provide proper or necessary support, education, nutrition, or medical care.²⁰⁰

States also differ as to the maximum age for a child to be considered a victim of child abuse. In 1970, the maximum age to be considered a “child” for purposes of the reporting statutes varied between twelve and eighteen.²⁰¹ Currently, forty-seven states and the District of Columbia define “child” for the purpose of child abuse reporting as someone under the age of eighteen.²⁰² This may largely be attributable to CAPTA, which defines

194. See *infra* section VI.B.

195. Meriwether, *supra* note 134, at 149.

196. COLO. REV. STAT. § 19-1-103(1)(a)(I) (2008).

197. *Id.* subsecs. (1)(a)(II)-(IV), (VI).

198. MO. REV. STAT. § 210.109 (2009).

199. *Id.* § 210.110(1).

200. *Id.* subsec. (12).

201. Donovan, *supra* note 49, at 968-81.

202. See ALA. CODE § 26-14-1(3) (2009); ALASKA STAT. § 47.17.290(1) (2009); ARIZ. REV. STAT. ANN. § 8-201(6) (2008); ARK. CODE ANN. § 12-18-103(5) (2008); CAL. PENAL CODE § 11165 (Deering 2009); COLO. REV. STAT. § 19-1-103(18) (2008); DEL. CODE ANN. tit. 16, § 902(3) (2009); D.C. CODE § 16-2301(3) (2009); FLA. STAT. ANN. § 39.01(12) (LexisNexis 2009); GA. CODE ANN. § 19-7-5(b)(2)

“child abuse and neglect” as “physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen.”²⁰³

Another definitional issue has been whether corporal punishment constitutes child abuse and, if so, under what circumstances. In 1977, no state prohibited corporal punishment, with only four states mandating that it be reasonable and four other states warning that it must not be excessive.²⁰⁴ Today, fifteen states and the District of Columbia explicitly note that only reasonable physical discipline of a child that causes no bodily injury does not constitute child abuse.²⁰⁵ Nevertheless, most American parents still use,

(2009); HAW. REV. STAT. ANN. § 350-1 (LexisNexis 2009); IDAHO CODE ANN. § 16-1602(7) (2008); 325 ILL. COMP. STAT. ANN. 5/3 (LexisNexis 2008); IOWA CODE § 232.68(1) (2008); KAN. STAT. ANN. § 38-2202(d) (2008); KY. REV. STAT. ANN. § 600.020(8) (LexisNexis2009); La. Child. Code Ann. art. 603(5) (2009) (who is not emancipated); ME. REV. STAT. ANN. tit. 22, § 4002(2) (2009); MD. CODE ANN., FAM. LAW § 5-701(e) (LexisNexis 2009); MASS. ANN. LAWS ch. 119, § 21 (LexisNexis 2009); MICH. COMP. LAWS SERV. § 722.622(e) (LexisNexis 2009); MINN. STAT. § 260C.007(4) (2008); MISS. CODE ANN. § 43-21-105(d) (2008); MO. REV. STAT. § 210.110(4); MONT. CODE ANN. § 41-3-102 (6) (2007); NEV. REV. STAT. ANN. § 432B.040 (LexisNexis 2009); N.H. REV. STAT. ANN. §§ 169-C:3(V) (LexisNexis 2009); N.J. STAT. ANN. § 9:6-8.9 (West 2009); N.Y. SOC. SERV. LAW § 412(1)(a) (Consol. 2009); N.C. GEN. STAT. § 7B-101(1) (2009); N.D. CENT. CODE § 50-25.1-02(3) (2009); OHIO REV. CODE ANN. § 2151.011(B)(5) (LexisNexis 2009); OKLA. STAT. ANN. tit. 10A, § 1-1-105(7) (2010); OR. REV. STAT. § 419B.005(2) (2007); 23 PA. CONS. STAT. ANN. § 6303(b)(1) (i)-(iii) (LexisNexis 2008); R.I. GEN. LAWS § 40-11-2 (2) (2009); S.C. CODE ANN. § 63-1-40(1) (2008); S.D. CODIFIED LAWS § 26-8A-3 (2009); TENN. CODE ANN. § 37-1-102(b)(4)(A) (2009); UTAH CODE ANN. § 78A-6-105(6) (2008); VA. CODE ANN. § 63.2-1508(1) (2009); WASH. REV. CODE ANN. § 26.44.020(2) (LexisNexis 2009); W. VA. CODE ANN. § 49-1-2 (LexisNexis 2009); WIS. STAT. § 48.02(2) (2008); WYO. STAT. ANN. § 14-3-202(a)(iii) (2009). Nebraska, New Mexico, and Texas do not define “child” in their child abuse statutes. See NEB. REV. STAT. ANN. § 28-707(1) (LexisNexis 2009); N.M. STAT. ANN. § 32A-4-2 (LexisNexis 2008); TEX. FAM. CODE ANN. § 261.001 (Vernon 2009). However, they indicate elsewhere that a “child” is a person under the age of eighteen. See NEB. REV. STAT. § 28-709(1) (defining a “child in need of special supervision”); N.M. STAT. ANN. § 32A-1-4(B) (defining a “child” within its Children’s Code); TEX. FAM. CODE ANN. § 101.003(a) (defining a “child” within its Family Code). Connecticut and Indiana define “child” for purposes of child abuse as being any person under sixteen years of age. CONN. GEN. STAT. § 46b-120(1) (2008); IND. CODE ANN. § 31-33-24-1 (LexisNexis 2009). One state defines “child” as “under the age of majority.” VT. STAT. ANN. tit. 33, § 4912 (2009). A number of states also stipulate that the “child” must be unmarried. See, e.g., FLA. STAT. ANN. § 39.01(12); 325 ILL. COMP. STAT. ANN. 5/3; MISS. CODE ANN. § 43-21-105(d); OKLA. STAT. ANN. tit. 10A, § 1-1-105(7); OR. REV. STAT. § 419B.005(2). In addition, a “child” may be excluded if on active duty for a branch of the armed services. See, e.g., 325 ILL. COMP. STAT. ANN. 5/3; MISS. CODE ANN. § 43-21-105(d). In contrast, Ohio expands its protections by establishing that if persons are adjudicated an “unruly child” before the age of eighteen they are a “child” for purposes of these protections until they turn twenty-one. OHIO REV. CODE ANN. § 2151.011(B)(5).

203. Child Abuse Prevention and Treatment Act, 42 U.S.C.S. § 5106g (LexisNexis 2010).

204. Fraser, *supra* note 135, at 652. Critics argued that this statutory language was not very helpful because it was difficult to distinguish between “reasonable” and “excessive.” Marjorie R. Freiman, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 255 (1982).

205. See ARK. CODE ANN. § 12-18-103(2)(C)(i); COLO. REV. STAT. § 19-1-103(1)(b); D.C. CODE § 16-2301(23)(B)(i); DEL. CODE ANN. tit. 11, § 468; FLA. STAT. ANN. § 39.01(2); GA. CODE ANN. § 19-7-5(b)(3)(A); IND. CODE ANN. § 31-34-1-15(1); MINN. STAT. § 626.556(2)(g); MISS. CODE ANN. § 43-21-105(m); MO. REV. STAT. § 210.110(1); OHIO REV. CODE ANN. § 2151.031(C); OKLA. STAT. ANN. tit. 10,

at least on occasion, corporal punishment and courts generally allow parents to use this method of discipline so long as it is "reasonable."²⁰⁶ Corporal punishment has been recognized as an affirmative defense to a claim of child abuse, which necessitates that a court consider the child's age and size, the means used to inflict discipline, where on the child's body the discipline was inflicted, and the degree of injury or pain.²⁰⁷ However, the protections afforded corporal punishment may be eroding as societal views of it have evolved in light of various reports indicating that corporal punishment can have negative consequences and calls for parents to abandon the practice.²⁰⁸

A closely related issue is whether certain parental behaviors, such as corporal punishment, should be excluded from definitions of child abuse when those behaviors are based on a sincere religious belief that the behavior is appropriate. Proponents of such exclusions have focused on the need to respect and protect both religious freedoms and parental autonomy. Particularly controversial have been cases where parents withheld permission for medical treatment for a child because of a religious objection to the treatment being provided.²⁰⁹ CAPTA includes a provision stating that it does not require a parent to provide medical services to their child against their religious beliefs and does not require a state to find abuse in such cases.²¹⁰ However, CAPTA provides that states must permit a child protective services agency to seek legal remedies that will afford medical

§ 7106(A)(2); OR. REV. STAT. § 419B.005(1)(b); S.C. CODE ANN. § 63-7-20(4)(a)(i)-(v); TEX. FAM. CODE ANN. § 261.001(1)(C); WASH. REV. CODE ANN. §§ 9A.16.100, 26.44.015(1), (2).

206. JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC, AND ELDER ABUSE CASES 207, 209 (2005); MURRAY A. STRAUS & DENISE A. DONNELLEY, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS ON CHILDREN 3 (2001) ("more than 90% of American parents hit toddlers and most continue to hit their children for years").

207. MYERS, *supra* note 185, at 209-15.

208. *See id.* at 207. For example, some researchers have found a positive correlation between corporal punishment and later abusive behavior as an adult, including abusive behavior targeting family members. *See* Murray A. Straus, *Discipline and Deviance: Physical Punishment of Children and Violence and Other Crimes in Adulthood*, 38(2) SOC. PROBS. 133, 133 (1991). These researchers conclude that corporal punishment leads to violence later in life because it legitimates violence as a way of dealing with frustration. *Id.* at 134. Ironically, this violent behavior could ultimately form the basis for a domestic violence or elder abuse report.

However, other researchers contest that this correlation does not establish that experiencing corporal punishment as a child causes later violent behavior, arguing that there are a number of other contributing factors. *See, e.g.,* Diana Baumrind et al., *Ordinary Physical Punishment: Is It Harmful? Comment on Gershoff*, 128(4) PSYCHOL. BULL. 580, 580-81 (2002); Robert E. Larzelere, *A Review of the Outcomes of Parental Use of Nonabusive or Customary Physical Punishment*, 98(4) PEDIATRICS 824 (1996) (suggesting that how parents use particular discipline methods may be more important than which ones they use).

209. *See, e.g.,* Newmark v. Williams, 588 A.2d 1108 (Del. 1991) (addressing refusal of parents to authorize medical treatment of their three-year-old son's pediatric cancer because of their Christian Scientists beliefs).

210. Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5106i(a)(1).

care to children facing serious harm or life threatening conditions because of parental objections, including those based on a religious belief.²¹¹

In 1980, forty-three states and the District of Columbia recognized a religious exception in their definition of child abuse, such as recognizing a parent's good faith right to treat a child by religious means (e.g., prayer) rather than by medical treatment.²¹² As of 2009, however, only thirty-two states and the District of Columbia specifically exempted religiously-based parental decisions not to seek medical care for their child.²¹³ Another three states do not exempt religiously-based decisions in general, but do exclude refusals of medical treatment based on the Christian Science belief.²¹⁴ Although a refusal of treatment based on a religious belief is not considered to be child abuse in these states, most of them permit medical treatment over the parent's objection when necessitated by the seriousness of the child's condition.²¹⁵

Finally, in contrast to elder abuse reporting laws, definitions of child abuse do not include financial abuse or exploitation of a child.²¹⁶ This is not

211. *Id.* subsec. (b).

212. Freiman, *supra* note 204, at 255.

213. See ALA. CODE § 26-14-7.2(a); ALASKA STAT. § 47.17.020(d); CAL. PENAL CODE § 11165.2; COLO. REV. STAT. § 19-3-103 (1); DEL. CODE ANN. tit. 16, § 913; D.C. CODE § 16-2301(9)(B); FLA. STAT. ANN. § 39.01(32)(f); GA. CODE ANN. § 19-7-5(b)(3); IDAHO CODE ANN. § 16-1602(25)(a); 325 ILL. COMP. STAT. ANN. 5/3; IND. CODE ANN. § 31-34-1-14; IOWA CODE § 232.68(2)(d); KAN. STAT. ANN. § 38-2202(s)(3); KY. REV. STAT. ANN. § 600.020(1)(h); La. Child. Code Ann. art. 603(16); ME. REV. STAT. ANN. tit., 22, § 4010(1); MICH. COMP. LAWS SERV. § 722.634; MINN. STAT. § 626.556(2)(f)(5); MISS. CODE ANN. § 43-21-105(L)(i); MO. REV. STAT. § 210.115(3); MONT. CODE ANN. § 41-3-102(4)(b); NEV. REV. STAT. ANN. § 432B.020(2)(b); N.H. REV. STAT. ANN. § 169-C:3(XIX); N.J. STAT. ANN. § 9:6-8.21(c); N.M. STAT. ANN. § 32A-4-2(E)(5); N.D. CENT. CODE § 50-25.1-05.1(2); OHIO REV. CODE ANN. § 2151.03(B); OKLA. STAT. ANN. tit. 10, § 1-1-105(20) (defining a "deprived child"); 23 PA. CONS. STAT. § 6303(b)(3); VT. STAT. ANN. tit. 33, § 4912(3)(B); VA. CODE ANN. § 63.2-100(2); W. VA. CODE ANN. § 49-7-7(c); WYO. STAT. ANN. § 14-3-202(a)(vii).

214. See ARIZ. REV. STAT. § 8-201(13)(b); CONN. GEN. STAT. § 46b-120(9); WASH. REV. CODE ANN. § 26.44.020(15).

215. See ALA. CODE § 26-14-7.2(b); COLO. REV. STAT. § 19-3-103(1); FLA. STAT. ANN. § 39.01(44); IDAHO CODE ANN. § 16-1602(25)(a); IND. CODE ANN. § 31-34-1-14; IOWA CODE § 232.68(2)(d); KAN. STAT. ANN. § 38-2202(s)(3); KY. REV. STAT. ANN. § 600.020(1)(h); La. Child. Code Ann. art. 603(16); MICH. COMP. LAWS SERV. § 722.634; MINN. STAT. § 626.556(10e)(h); MO. REV. STAT. § 210.115(3); MONT. CODE ANN. § 41-3-102(4)(b); NEV. REV. STAT. ANN. § 432B.020(2)(b); N.D. CENT. CODE § 50-25.1-05.1(2); OHIO REV. CODE ANN. § 2151.03(B); OKLA. STAT. ANN. tit. 10, § 1-1-105(20); 23 PA. CONS. STAT. § 6303(b)(3).

216. See, e.g., CAL. WELF. & INST. CODE §§ 15610.07(a), 15630(b)(1) (Deering 2009) (defining abuse of an elder or dependent adult to include financial abuse and dictating that mandated reporters report financial abuse in addition to other types of abuse); N.Y. SOC. SERV. LAW §§ 473(1), 473-b(b) (providing protective services for adults who are unable to protect themselves from financial abuse, and establishing that any person who reports an endangered adult who may be in need of protective services shall be immune from liability but not requiring that such reports be made); VA. CODE ANN. §§ 63.2-100, 63.2-1606(A) (mandating reports by various professionals and caregivers if the abuse, neglect, or exploitation of "aged or incapacitated adults" is suspected, and defining adult exploitation as "the illegal use of an incapacitated adult or his resources for another's profit or advantage").

surprising in that parents of children generally have unlimited, unilateral authority to make financial decisions for their children, including disposing of anything given to or earned by their children. However, this authority does not extend to children who have been emancipated or otherwise declared a legal adult: their assets are protected from parental interference.²¹⁷ In addition, California passed “Coogan’s Law” in 1939 to protect children in the entertainment industry from financial exploitation by allowing courts to place the earnings of some children in a trust fund unreachable by their parents.²¹⁸ At least three other states currently have similar provisions to protect children with sizeable assets from financial exploitation.²¹⁹

In general, what constitutes child abuse across the states has gradually expanded over time. This may partially explain why the number of reports of child abuse has continued to increase,²²⁰ notwithstanding that other measures of violence and social dysfunction have decreased in recent years,²²¹ as well as the more archetypal forms of child abuse, namely, physical abuse and sexual abuse.²²²

217. See Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J. L. REFORM 239, 240-41 (1992).

218. See Erica Siegel, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 431-34 (2000).

219. See generally *id.* at 427-39. See also N.Y. ARTS & CULT. AFF. LAW § 35.03; FLA. STAT. ANN. § 743.08; MASS. ANN. LAWS ch. 231 § 85P 1/2(c). California’s current legislation can be found at CAL. FAM. CODE § 6752 (2009).

220. See *supra* notes 12-13 and accompanying text.

221. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY PROPERTY CRIME TRENDS, 1973-2005 (2006), <http://bjs.ojp.usdoj.gov/content/glance/sheets/proptrd.csv> (last visited July 16, 2008) (property crime victimizations per 1,000 households declined from 544.2 in 1976 and 353.7 in 1991 to 154.2 in 2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY VIOLENT CRIME TRENDS, 1973-2005 (2006), <http://www.ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm> (last visited July 16, 2008) (violent crime victimizations per 1,000 households declined from 51.2 in 1994 to 21.0 in 2005); Finkelhor & Jones, *supra* note 14, at 686 (domestic violence declined 49% from 1993 to 2001).

222. Finkelhor & Jones, *supra* note 14, at 685-86 (noting that child sexual abuse substantiations declined 49% from 1990 through 2004, and physical abuse substantiations declined 43% from 1992 through 2004).

V. MANDATORY REPORTING²²³A. *Who Must Report*

Only physicians were required to report suspected child abuse pursuant to the first wave of child abuse statutes passed in response to the article by Dr. Kempe and his colleagues. It was perceived that physicians had the requisite training and expertise to identify abuse and were ideally situated to discern the existence of this abuse.²²⁴ However, limiting mandated reporters to just physicians tends to result in identification only when the child is so badly hurt that the child needs and receives immediate medical attention.

To promote wider and earlier identification of child abuse, the next generation of child abuse statutes implemented during the 1970s broadened the range of mandated reporters. By 1974, thirty-four states required reporting from nurses, twenty-four from teachers, twenty-five from social workers, and nine from police officers.²²⁵ By 1977, forty-eight required reporting from nurses, forty-nine from teachers and school officials, forty-nine from social workers, and forty from law enforcement officers.²²⁶ Currently, all fifty states and the District of Columbia require reporting from medical personnel, teachers/school officials, and social workers, forty-nine and the District of Columbia from law enforcement officers, and forty-one from members of the clergy.²²⁷ Indeed, for example, California now

223. Most states also allow for voluntary reporting by anyone who suspects child abuse, with friends, relatives, and neighbors filing the largest number of child abuse reports. Freiman, *supra* note 204, at 259. However, these "nonprofessional reports" also account for a larger number of unsubstantiated claims. See *infra* note 243 and accompanying text.

224. Fraser, *supra* note 135, at 656.

225. *Id.* at 657.

226. *Id.* at 657-58.

227. See ALA. CODE § 26-14-3(a); ALASKA STAT. § 47.17.020(a) (does not include clergy members); ARIZ. REV. STAT. § 13-3620; ARK. CODE ANN. § 12-18-402(b); CAL. PENAL CODE § 11165.7(a) (including also animal control personnel, firefighters, and film developers); COLO. REV. STAT. § 19-3-304(2) (including also firefighters, veterinarians, and film developers); CONN. GEN. STAT. § 17a-101(b) (including coaches as well); DEL. CODE ANN. tit. 16, § 903; D.C. CODE § 4-1321.02(b) (does not include clergy members); FLA. STAT. ANN. § 39.201(1)(b); GA. CODE ANN. § 19-7-5(c)(1) (does not include clergy members); HAW. REV. STAT. ANN. § 350-1.1(a) (does not include clergy members); IDAHO CODE ANN. § 16-1605(1); 325 ILL. COMP. STAT. ANN. 5/4; IND. CODE ANN. § 31-33-5-1; IOWA CODE § 232.69(1)(a), (b) (does not include clergy members); KAN. STAT. ANN. § 38-2223(a)(1) (including firefighters but does not include clergy members); KY. REV. STAT. ANN. § 620.030(2); La. Child Code Ann. art. 603(15)(a)-(f) (including also film developers); ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(A), (C) (including fire inspectors and film developers); MD. CODE ANN., FAM. LAW § 5-705(a)(1); MASS. ANN. LAWS ch. 119, § 21 (including firefighters); MICH. COMP. LAWS SERV. § 722.623(1)(a); MINN. STAT. § 626.556(3)(a)(1), (2); MISS. CODE ANN. § 43-21-353(1); MO. REV. STAT. § 210.115(1); MONT. CODE ANN. § 41-3-201(1), (2); NEB. REV. STAT. ANN. § 28-711(1); NEV. REV. STAT. ANN. § 432B.220(1)(b), (4); N.H. REV. STAT. ANN. § 169-C:29; N.J. STAT. ANN. § 9:6-8.10; N.M. STAT. § 32A-4-3(A); N.Y. SOC. SERV. LAW § 413(1)(a) (does not include clergy members, with the exception of Christian Science practitioners); N.C. GEN. STAT. § 7B-301; N.D. CENT. CODE § 50-25.1-03(1); OHIO

lists thirty-eight separate categories of mandated reporters, including animal control or humane society officers.²²⁸ Virginia recently added any person employed by a local department of social services who determines eligibility for public assistance.²²⁹

The rationale for this expansion has generally been that the identification of child abuse will be enhanced by mandating reports from people who are likely to be in frequent contact with children and, as a result, should be able to recognize sometimes subtle indicators of child abuse, including changes in the child's behavior, mannerisms, and attitudes, which a physician who infrequently sees a child may not be able to detect.²³⁰ Indeed, the most frequent reporters today of child abuse are teachers (16.9%), police officers or lawyers (16.3%), and social services staff (10.6%).²³¹

One group of professionals for whom designation as a mandated reporter has proven particularly controversial involves mental health professionals.²³² Most of this concern has focused on requirements to report suspicions of child abuse that arise in the course of a therapeutic session.²³³ Information that is disclosed in the course of a therapeutic session is

REV. CODE ANN. § 2151.421(A)(1)(b) (does not include law enforcement or clergy members, but includes someone offering spiritual treatment through prayer); OKLA. STAT. ANN. tit. 10A, § 1-2-101(A)(1); OR. REV. STAT. § 419B.010(1) (including any public or private official having reason to believe abuse has occurred; however, does not include communications with psychiatrist, psychologist, attorney, or guardian ad litem if privileged under state law); 23 PA. CONS. STAT. § 6311(b); R.I. GEN. LAWS § 40-11-3(a); S.C. CODE ANN. § 63-7-310(A); S.D. CODIFIED LAWS § 26-8A-3 (including "religious healing practitioners"); TENN. CODE ANN. § 37-1-403(a)(3); TEX. FAM. CODE ANN. § 261.101(b); UTAH CODE ANN. § 62A-4a-403(1)(A); VT. STAT. ANN. tit. 33, § 4913(a); VA. CODE ANN. § 63.2-1509(A) (2009) (does not include clergy members); WASH. REV. CODE ANN. § 26.44.030(1)(a) (does not include clergy members); W. VA. CODE ANN. § 49-6A-2; WIS. STAT. § 48.981(2); WYO. STAT. ANN. § 14-3-205.

A number of states relieve clergy of their reporting requirements in these provisions if they received relevant information as a confidential communication, during a confession, or while acting in the capacity of a spiritual advisor. *See, e.g.*, ALA. CODE § 26-14-3; ARK. CODE ANN. § 12-18-402(29)(A), (B); ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(A)(27); MD. CODE ANN., FAM. LAW § 5-705(a)(3); MASS. ANN. LAWS ch. 119, § 51A(j); MONT. CODE ANN. § 41-3-201(5)(b), (c); NEV. REV. STAT. ANN. § 432B.220(4)(d); N.D. CENT. CODE § 50-25.1-03(1); OR. REV. STAT. § 419B.010(1); UTAH CODE ANN. § 62A-4a-403(2); VT. STAT. ANN. tit. 33, § 4913(h). *But see* ARIZ. REV. STAT. § 13-3620(L) (requiring clergy to report but otherwise discharging them from being examined as a witness thereafter).

228. CAL. PENAL CODE § 11165.7(a)(1)-(38).

229. VA. CODE ANN. § 63.2-1509(A)(14).

230. Fraser, *supra* note 135, at 658.

231. CHILD MALTREATMENT 2008, *supra* note 7, tbl.2-5 (noting that 57.6% of all child abuse reports are submitted by professionals, 28.6% by nonprofessionals, and 13.8% by unknown or other reporters).

232. *See, e.g.*, CAL. PENAL CODE § 11165.7(a)(21) (psychiatrists, psychologists, marriage, family and child counselors, clinical social workers); VA. CODE ANN. § 63.2-1509(A)(7) ("any mental health professional").

233. *See* Melton, *supra* note 5, at 109.

typically required to be kept confidential, in part because of concerns that disclosures, which are often times seen as the keys to therapeutic progress, will be less forthcoming if the client thinks that this information might be disclosed to others.²³⁴ Moreover, it has been noted that mental health professionals believe that reporting suspected child abuse disrupts treatment and as a result actually increases the risk to the child.²³⁵ Indeed, one study found that 25% of clients withdrew from treatment after a report was made,²³⁶ while another study determined that clients' revelations of incidents of abuse stopped after a mandatory reporting law went into effect.²³⁷ Nevertheless, mental health professionals are now widely required to submit such reports.²³⁸

Some states have broadened the range of mandated reporters even further to include the general public. By 1977, twenty states had passed legislation that mandated that "any person" who suspects child abuse file a report.²³⁹ However, this approach has been criticized for enhancing the likelihood of false and potentially damaging and stigmatizing reports,²⁴⁰ for increasing encroachment on family privacy and parental autonomy,²⁴¹ and for deputizing the entire community to be on the lookout for possible abuse when the general community is not adequately trained to accurately detect indications of child abuse.²⁴² Indeed, whereas non-professionals now submit 28.6% of all child abuse reports, they account for a disproportional number of the reports where the occurrence of child abuse is not substantiated.²⁴³ Currently, only eighteen states require all citizens to report

234. See *Tarasoff v. Regents, Univ. of Cal.*, 551 P.2d 334, 359 (Cal. 1976) (dissent) ("[t]he guarantee of confidentiality is essential in eliciting the full disclosure necessary for effective treatment. . . . [A]ssurance that the confidential relationship will not be breached is necessary to maintain [the client's] trust in his psychiatrist — the very means by which treatment is effected"). The dissent in *Tarasoff* also reported that "five of every seven people interviewed said they would be less likely to make full disclosure to a psychiatrist in the absence of assurance of confidentiality." *Id.* at 359, n.3 (citing Notes & Comments, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Doctrine of Privileged Communications*, 71 YALE L.J. 1226, 1255 (1962)).

235. See Melton, *supra* note 5, at 109.

236. *Id.* (citing Holly Watson & Murray Levine, *Psychotherapy and Mandated Reporting of Child Abuse*, 59 AM. J. ORTHOPSYCHIATRY 246, 246-56 (1989)).

237. *Id.* (citing Fred S. Berlin et al., *Effects of Statutes Requiring Psychiatrists to Report Suspected Sexual Abuse of Children*, 148 AM. J. PSYCHIATRY 449, 449-53 (1991)).

238. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 442 (1997).

239. Fraser, *supra* note 135, at 658.

240. See Meriwether, *supra* note 134, at 164; see also Lesley Wimberly, *The Perspective from Victims of Child Abuse Laws (VOCAL)*, in *THE BACKLASH: CHILD PROTECTION UNDER FIRE* 47, 48-50 (John Myers ed., 1994).

241. See DORNE, *supra* note 12, at 118.

242. See *id.* at 119 (suggesting a high rate of "unsubstantiated" claims of child abuse).

243. CHILD MALTREATMENT 2008, *supra* note 7, at 18-19 tbl.2.5 (relying on the data provided, 62.3% of the reports from professionals are unsubstantiated and 0.05% are determined to be intentionally

suspected child abuse, with one state requiring any public or private official to submit a report.²⁴⁴

B. When to Report

The first generation of reporting statutes required that a report be submitted when a mandated reporter had "reason to believe" a child had been abused.²⁴⁵ However, this tended to limit the requisite filing of a report to when the mandated reporter personally observed something that indicated child abuse had occurred.²⁴⁶

Because this did not mandate a report when the person inferred or deduced the existence of child abuse but lacked actual evidence of this abuse, by as early as 1965 most states had expanded their statutory criteria so that reports were required when there was reasonable cause to think that abuse had occurred.²⁴⁷ This change may have been encouraged by the Children's Bureau model legislation, published in 1963, which required reporting when there was "reasonable cause" to suspect abuse.²⁴⁸ The Children's Bureau defined this standard as similar to what a grand jury is expected to employ when determining whether there is probable cause that a defendant committed a crime and thus can be held for trial.²⁴⁹ The "reasonable cause" standard has been characterized as an objective test (as opposed to a subjective test), where the focus is on whether a reasonable person under similar circumstances would think child abuse had occurred.²⁵⁰ This change was intended to generate more reports and to provide greater protection for children because reporters could not invoke their personal

false, while 72.7%% of the reports from non-professionals are unsubstantiated and 0.17% are determined to be intentionally false).

244. See DEL. CODE ANN. tit. 16, § 903; FLA. STAT. ANN. § 39.201(1)(a); IDAHO CODE ANN. § 16-1605(1); IND. CODE ANN. § 31-33-5-1; KY. REV. STAT. ANN. § 620.030(1); MD. CODE ANN., FAM. LAW § 5-705(a)(1)(i); MISS. CODE ANN. § 43-21-353(1); NEB. REV. STAT. ANN. § 28-711(1); N.H. REV. STAT. ANN. § 169-C:29; N.J. STAT. ANN. § 9:6-8.10; N.M. STAT. § 32A-4-3(A); N.C. GEN. STAT. § 7B-301; OKLA. STAT. ANN. tit. 10A, § 1-2-101(B)(1); R.I. GEN. LAWS § 40-11-3(a); TENN. CODE ANN. § 37-1-403(a)(1); TEX. FAM. CODE ANN. § 261.101(a); UTAH CODE ANN. § 62A-4a-403; WYO. STAT. ANN. § 14-3-205(a). See also DORNE, *supra* note 12, at 118.

245. Fraser, *supra* note 135, at 659. This language was also found in model legislation from the Council of State Governments and the American Medical Association. COUNCIL OF STATE GOVERNMENTS, *supra* note 137, at 67.

246. Fraser, *supra* note 135, at 659; Sussman, *supra* note 152, at 277-78.

247. American Academy of Pediatrics, *supra* note 138, at 377-78; Sussman, *supra* note 152, at 659.

248. CHILDREN'S BUREAU, 1963 REPORTING REQUIREMENTS, *supra* note 132, at 6.

249. *Id.*

250. Sussman, *supra* note 152, at 277.

uncertainty as to whether abuse had occurred as a reason for failing to submit a report if a "reasonable person" would have filed a report.²⁵¹

A similar goal may have underlain parallel model reporting criteria language developed by the Children's Bureau, the American Humane Association, and the American Academy of Pediatrics that mandated a report when a person "suspects" the occurrence of child abuse, rather than waiting until the person "believes" abuse has occurred.²⁵²

At the same time, it has been argued that broadening the reporting criteria has the potential to generate an increased number of erroneous reports, which in turn can result in a waste of scarce investigative and judicial resources, distraction from and failure to intervene in other cases where abuse has occurred, harm to children who are unjustifiably removed from their families, and damage to the reputations of individuals falsely accused of child abuse.²⁵³

Currently, forty-five states and the District of Columbia incorporate the terms "reason" or "reasonable" (e.g., "has reason to believe," "reasonably suspects," or "has reasonable cause to believe" child abuse exists) into their reporting statutes.²⁵⁴

Generally, states provide little additional guidance as to when a report is required. California, however, defines "reasonable suspicion" of child abuse as meaning that "it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect."²⁵⁵ In Nevada, a reporter has "reasonable cause to believe" child abuse exists if, "in light of all the surrounding facts and circumstances which are known or which reasonably should be known

251. Barbara Daly, *Willful Child Abuse and State Reporting Statutes*, 23 U. MIAMI L. REV. 283, 313-14 (1969); Sussman, *supra* note 152, at 277-78.

252. AM. HUMANE, *Mary Ellen Wilson*, *supra* note 66; CHILDREN'S BUREAU, 1963 REPORTING REQUIREMENTS, *supra* note 132, at 6; American Academy of Pediatrics, *supra* note 138, at 379, 381.

253. Sandra Guerra Thompson, *The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 17-18 (2002).

254. The provisions of the five states that do not employ this language are ALA. CODE § 26-14-3(a) (when a child is "known or suspected" to be a victim); DEL. CODE ANN. tit. 16, § 903 (when the reporter "knows or in good faith suspects" child abuse); LA. CHILD CODE ANN. ART. 609(A)(1) (when the reporter "has cause to believe" child abuse exists); N.C. GEN. STAT. § 7B-301 (when the reporter "has cause to suspect" child abuse); TEX. FAM. CODE ANN. § 261.101(a) (when the reporter has "cause to believe" a child was abused). For the citations for the remaining forty-five states and the District of Columbia, see *supra* note 227. The states have split on whether to mandate reports when the individual merely "suspects" that child abuse exists, while others limit this obligation to when the individual "believes" that it exists. Compare CAL. PENAL CODE § 11166 ("knows or reasonably suspects"), and OHIO REV. CODE ANN. § 2151.421(A)(1)(a) ("knows, or has reasonable cause to suspect"), with KY. REV. STAT. ANN. § 620.030(1) ("knows or has reasonable cause to believe") and MINN. STAT. § 626.556(3) ("knows or has reason to believe").

255. CAL. PENAL CODE § 11166(a)(1).

to the person at the time, a reasonable person would believe, under those facts and circumstances, that an act, transaction, event, situation or condition exists, is occurring or has occurred."²⁵⁶

Some commentators have determined that mandated reporters vary widely in the meaning they give to any given standard, and they suggest that the adoption of one standard as opposed to another may not influence the overall level of reporting.²⁵⁷ One study found, however, that physicians were more likely to submit a report under a "reasonable cause" standard than under a "knows or has knowledge of" standard, indicating that the reporting criteria may affect the decision of when to file a report.²⁵⁸ Relatedly, it has also been argued that the wording of the criteria may impact the protection from penalties afforded a mandated reporter who fails to submit a report.²⁵⁹ Enhanced immunity could diminish a person's incentive to submit a report and thereby decrease the level of child abuse reporting. As will be discussed, however, such penalties are rarely imposed.²⁶⁰

C. To Whom to Report

The first wave of reporting statutes required that reports of child abuse be submitted to a local law enforcement agency.²⁶¹ This designation, which was not surprising in light of the focus on physical abuse associated with these statutes, was made because local law enforcement officials were ostensibly available at all times, could respond immediately to protect the children involved, were accustomed to dealing with violence and violent interactions, and had a relatively unquestioned right to enter a home without permission to protect a child who was in imminent danger.²⁶²

256. NEV. REV. STAT. ANN. § 432B.121(1).

257. See KALICHMAN, *supra* note 12, at 26-27; Meriwether, *supra* note 134, at 145-46; Sussman, *supra* note 152, at 276 (stating that "[t]he degree of certainty a reporter must reach before making a report has been a subject of mainly academic concern").

258. Cheryl L. Brosig & Seth C. Kalichman, *Child Abuse Reporting Decisions: Effects of Statutory Wording of Reporting Requirements*, 23 PROF. PSYCHOL. RES. PRAC. 486, 488 (1992).

259. KALICHMAN, *supra* note 12, at 27; Meriwether, *supra* note 134, at 146; Richardson, *supra* note 58, at 135. But see Sussman, *supra* note 152, at 277-78 (citing Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COL. L. REV. 1, 13 (1967)) (stating that "[t]he distinction [in language] is of great importance in other areas of the law, but it is highly unlikely that it would be seriously relied upon to prosecute those who failed to report cases of abuse").

260. See, e.g., *Hazlett v. Evans*, 943 F. Supp. 785, 787 (E.D. Ky. 1996) (concluding that the real issue was not whether the physician had "reasonable cause" to believe child had been abused but rather whether the report was filed in "good faith" as "immunity statutes were designed to insulate . . . health professionals from actions exactly like this one"). See *infra* section V.E. and accompanying notes.

261. Fraser, *supra* note 135, at 660.

262. *Id.* at 660-61. Although currently more circumscribed, the power of law enforcement officials to enter a home without a warrant still exists when there is an objectively reasonable basis for

However, critics of this approach argued that law enforcement officials did not have the training or disposition to deal with a problem as complex as child abuse.²⁶³ In addition, contacting law enforcement officers can result in the suspected abuser being arrested and some commentators, especially those who promoted a "Family Preservation Model," felt that the resulting enhanced likelihood of the removal of the person suspected of abuse from the family was not necessarily in the best interests of the child.²⁶⁴ Criminal prosecution also may not be the most effective way of preventing future harm or remedying current harm, as the child abuser may retaliate against the child or another family member for the entanglement of the abuser in the criminal justice system.²⁶⁵ Further, to avoid this entanglement, the person who abuses a child may not allow injured children to receive needed medical attention.²⁶⁶ Family members may also be reluctant to request the assistance of law enforcement officials because of fears that they may lose needed financial or other forms of support from the person purported to have committed the child abuse.²⁶⁷

As an alternative, the 1963 model legislation guidelines of the American Humane Association were the first to urge child abuse reporting to public welfare agencies.²⁶⁸ In 1966, the model statute of the American Association of Pediatrics similarly favored the filing of mandated reports with social service agencies.²⁶⁹ By 1981, forty-nine states and the District of Columbia directed that these reports be filed with the Department of Social Services (DSS) for that jurisdiction and charged this agency with the investigation of reports and offering protective services to identified victims.²⁷⁰ This entity was generally considered to be the most appropriate to receive and respond to reports because it was believed that it could best provide and train personnel suited for this role; as a non-punitive agency was more likely to receive cooperation from family members, as well as other agencies and professionals; and was likely to already be providing

believing that an occupant is seriously injured or threatened with such injury. *Brigham City v. Stuart*, 547 U.S. 398, 403-04 (2006).

263. Richard H. Hansen, *Doctors, Lawyers and the Battered Child Law*, 5 J. TRAUMA 826, 828 (1965).

264. See DORNE, *supra* note 12, at 122; Richard Wexler, *Take the Child and Run: Tales from the Age of AFSA*, 36 NEW ENG. L. REV. 129, 140-41 (2001).

265. See generally Allison M. Arcuri, Comment: *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 481-82 (2000).

266. Paulsen et al., *supra* note 131, at 503 (quoting Dr. R. J. McKay, Jr., Chairman, Department of Pediatrics, University of Vermont College of Medicine, Nov. 2, 1964).

267. See generally Lynne Olman Lourim, Note: *Parents and the State: Joining Forces to Report Incest and Support Its Victims*, 28 U. MICH. J.L. REFORM 715, 721 (1995).

268. NELSON, *supra* note 99, at 78.

269. *Id.* at 79.

270. Freiman, *supra* note 204, at 260.

services to the family to meet other needs and thus could hopefully intervene before serious injury occurred.²⁷¹

As public awareness of child sexual abuse grew during the 1980s, as well as legislative emphasis on the need to criminally prosecute child abusers, law enforcement agencies once again came to be seen as an appropriate entity to receive child abuse reports.²⁷² Currently, twenty-three states mandate reporting primarily to a state's DSS, or a similar family or child protection agency,²⁷³ twenty-six states and the District of Columbia allow reporting to either such a department or to a law enforcement agency,²⁷⁴ and New York mandates reporting of all oral reports and most written reports to a central registry, which then forwards the reports to the appropriate local child protective service.²⁷⁵

271. Fraser, *supra* note 135, at 662.

272. See *supra* notes 157-59, 177 and accompanying text.

273. See ALASKA STAT. § 47.17.020(c) (if the Department is unavailable and immediate action is necessary, the report shall be submitted to the police); ARK. CODE ANN. § 12-18-301(b) (requiring reports to the child abuse hotline, a division of the DHS); FLA. STAT. ANN. § 39.201(2)(a); GA. CODE ANN. § 19-7-5(e); 325 ILL. COMP. STAT. NN. 5/4; IOWA CODE § 232.70(3) (if immediate action is necessary, reporting must also be made to law enforcement); KAN. STAT. ANN. § 38-2223(c), (c)(2) (if abuse is occurring within the Department, then reports must be made to the police); ME. REV. STAT. ANN. tit. 22, § 4011-A(1); MASS. ANN. LAWS ch. 119, § 51A(a); MICH. COMP. LAWS SERV. § 722.623(1)(a); MISS. CODE ANN. § 43-21-353(1); MO. REV. STAT. § 210.115(1); MONT. CODE ANN. § 41-3-20(1); N.H. REV. STAT. ANN. § 169-C:30; N.J. STAT. ANN. § 9:6-8.10; N.C. GEN. STAT. § 7B-301; N.D. CENT. CODE § 50-25.1-03(1); OKLA. STAT. ANN. tit. 10A, § 1-2-101(A)(1); 23 PA. CONS. STAT. § 6313 (b); R.I. GEN. LAWS § 40-11-3(a); VT. STAT. ANN. tit. 33, §§ 4902(5), 4914; VA. CODE ANN. § 63.2-1509(A); W. VA. CODE ANN. § 49-6A-2 (if serious abuse is occurring, reporting must also be made to the police).

It should be noted that the social service agency to which the initial report is directed may be required to forward the report and other relevant information to a law enforcement agency if the initial report of child abuse is substantiated. See, e.g., N.J. STAT. ANN. § 9:6-8.10a(e) (directing that for incidents determined by the Department of Children and Families to be substantiated, the Department shall forward to the law enforcement agency in the jurisdiction where the child resides the identify of persons alleged to have abused the child, their addresses, the nature of the allegations, and "other relevant information").

274. See ALA. CODE § 26-14-3(a)-(c); ARIZ. REV. STAT. § 13-3620(A) (if the abuser is not the child's caretaker, reporting must be made to police); CAL. PENAL CODE § 11165.9; COLO. REV. STAT. § 19-3-304(1); CONN. GEN. STAT. § 17a-101b(a); DEL. CODE ANN. tit. 16, § 903 (reports may optionally be made to the police in addition to the Division of Family Services); D.C. CODE § 4-1321.02(a); HAW. REV. STAT. ANN. § 350-1.1(a); IDAHO CODE ANN. § 16-1605 (1); IND. CODE ANN. § 31-33-5-4; KY. REV. STAT. ANN. § 620.030; La. Child Code Ann. art. 610(A) (if the abuser is not the child's caretaker, reporting must be made to the police); MD. CODE ANN., FAM. LAW § 5-705(a)(1)(ii); MINN. STAT. § 626.556(3)(a); NEB. REV. STAT. ANN. § 28-711(1); NEV. REV. STAT. ANN. § 432B.220(1)(a); N.M. STAT. § 32A-4-3(A)(1), (2); OHIO REV. CODE ANN. § 2151.421(A)(1)(a); OR. REV. STAT. § 419B.015(1)(a); S.C. CODE ANN. § 63-7-310(B), (D) (if the abuser is not the child's caretaker, reporting must be made to the police); S.D. CODIFIED LAWS § 26-8A-8; TENN. CODE ANN. § 37-1-403(a)(2)(A)-(D) (reports can also be made to the judge of the appropriate juvenile jurisdiction); TEX. FAM. CODE ANN. § 261.103(a)(1)-(2), (c); UTAH CODE ANN. § 62A-4a-403(1)(a); WASH. REV. CODE ANN. § 26.44.030(1)(a); WIS. STAT. § 48.981(3)(a)(1); WYO. STAT. ANN. § 14-3-205(a).

275. See generally N.Y. SOC. SERV. LAW §§ 415, 422. However, if the report alleges acts that may constitute a crime or an immediate threat to the child's health or safety and the report indicates that the person alleged to have committed the abuse does not fall within a given category of care providers (including parents, guardians, custodians, employees or volunteers in a state-run home for children,

For certain types of child abuse that are particularly egregious or that result in substantial harm to the child, such as sexual abuse, reporting laws may permit or mandate the simultaneous filing of a report with a law enforcement agency and the state's DSS, or a similar family or child protective services agency. Such a requirement is generally designed to facilitate the prompt arrest of a perpetrator of child abuse and initiation of the criminal justice process. Currently, two states require reporting to both a social service and a law enforcement agency if the situation is sufficiently serious.²⁷⁶ Critics of this approach argue that reporting to more than one agency or leaving it to the reporter to choose among agencies can lead to a lack of coordination and confusion in responding to child abuse reports.²⁷⁷ For this reason, the twenty-six states noted above that allow reporting to either a social service or a law enforcement agency typically require the agency that initially receives the report to contact the other designated agency and convey this information to it as well.²⁷⁸

However, neither a social service agency nor a law enforcement agency is well-equipped to handle all forms of child abuse, as the needs and challenges raised tend to vary enormously depending on the type of abuse involved and the particulars of a given case. Further, simply providing that both agencies will be routinely involved in responding to a child abuse report does not ensure the relatively nuanced approach that is needed for

daycare employees, or employees of any private or public entity that has regular and substantial contact with children in residential care), then the recipient of the report must transmit the information to a law enforcement agency. §§ 422(2)(c), 412(4)(b).

Many other states employ central registries. See *infra* note 509 and accompanying text. New York, however, does not require initial direct reporting to a law enforcement agency or DSS, but rather requires reporters to submit their report to the central registry. The other states with central registries require that the initial report be submitted to a law enforcement agency or DSS, which in turn are required to forward the reports they have received to the central registry.

276. IOWA CODE § 232.70(3) ("immediate protection for the child is advisable"), W. VA. CODE ANN. § 49-6A-2 ("the reporter believes that the child suffered serious physical abuse or sexual abuse or sexual assault").

277. See Fraser, *supra* note 135, at 663.

278. ALA. CODE § 26-14-3(b), (c); ARIZ. REV. STAT. § 13-3620(H); CAL. PENAL CODE § 11166(j), (k); COLO. REV. STAT. § 19-3-308(4)(b) (requiring social services to report to law enforcement but only if necessary for the protection of the child); CONN. GEN. STAT. § 17a-101b(a); DEL. CODE ANN. tit. 16, § 906(b)(3); HAW. REV. STAT. ANN. § 350-1.1(c); IDAHO CODE ANN. § 16-1605(1); IND. CODE ANN. §§ 31-33-7-7(a)(1), 31-33-8-2(A); KY. REV. STAT. ANN. § 620.040(1)(a), (3); La. Child. Code Ann. art. 610(E)(1), (2) (requiring agencies to report to each other when the accused abuser is the child's caretaker or in a relationship with the child's caretaker); MD. CODE ANN., FAM. LAW § 5-705(b); MINN. STAT. § 626.556(10)(a) (requiring cooperation between agencies); NEB. REV. STAT. ANN. § 28-711(1), (2); NEV. REV. STAT. ANN. § 432B.260(1); N.M. STAT. § 32A-4-3(B); OHIO REV. CODE ANN. § 2151.421(D)(1); OR. REV. STAT. § 419B.015(1)(b); S.C. CODE ANN. § 63-7-320(A); S.D. CODIFIED LAWS § 26-8A-8; TENN. CODE ANN. § 37-1-403(c)(1); TEX. FAM. CODE ANN. § 261.105(a), (b); UTAH CODE ANN. § 62A-4a-403(1)(b); WASH. REV. CODE ANN. § 26.44.030(4), (5); WIS. STAT. § 48.981(3)(a)(1), (2); WYO. STAT. ANN. § 14-3-206(a)(i).

any given case nor address concerns about case leadership and coordination. In an effort to provide a more appropriate response to these reports, many jurisdictions, as will be addressed below, have established Child Advocacy Centers, which explicitly and intentionally incorporate a wide range of expertise, typically including that of both social service and law enforcement agencies.²⁷⁹ Such an entity may be better suited for receiving and screening initial reports of child abuse and directing the response to these reports.

D. Immunity from Liability

To encourage reporting, CAPTA required states that desired federal funding to provide immunity from liability to all reporters of child abuse.²⁸⁰ Because of concerns about spurious or vindictive reports of child abuse, this requirement was amended in 1996 to protect only "good faith" reporters.²⁸¹ Consistent with these requirements, all but two states currently provide that good faith reporters are immune from civil or criminal sanctions, even if their report ultimately is proven to be unfounded.²⁸²

Bad faith exists if a report is submitted that the reporter knew to be false.²⁸³ Some states, such as Colorado, seeking to further encourage the

279. See *infra* notes 628-29 and accompanying text.

280. Child Abuse Prevention and Treatment Act, 42 U.S.C.S. § 5106a(b)(1)(B)(i) (as amended) (codifying Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (1974)).

281. *Id.* subsec. (b)(2)(A)(vii).

282. See ALA. CODE § 26-14-9; ALASKA STAT. § 47.17.050(a); ARIZ. REV. STAT. § 13-3620(J); ARK. CODE ANN. § 12-18-107(a); COLO. REV. STAT. § 19-3-309; CONN. GEN. STAT. § 17a-101e(b); DEL. CODE ANN. tit. 16, § 908(a); D.C. CODE § 4-1321.04; FLA. STAT. ANN. § 39.203(1)(a); GA. CODE ANN. § 19-7-5(f); HAW. REV. STAT. ANN. § 350-3(a); IDAHO CODE ANN. § 16-1606; 325 ILL. COMP. STAT. ANN. 5/9; IND. CODE ANN. §§ 31-33-6-1; IOWA CODE § 232.73; KAN. STAT. ANN. § 38-2223(f); KY. REV. STAT. ANN. § 620.050(1); La. Child. Code Ann. art. 611(A)(1)(a), (B)(2); ME. REV. STAT. ANN. tit. 22, § 4014(1); MD. CODE ANN., FAM. LAW § 5-708; MASS. ANN. LAWS ch. 119, § 51A(g); MICH. COMP. LAWS SERV. § 722.625; MINN. STAT. § 626.556(4)(a)(1); MISS. CODE ANN. § 43-21-355; MO. REV. STAT. § 210.135; MONT. CODE ANN. § 41-3-203(1); NEB. REV. STAT. § 28-716; NEV. REV. STAT. ANN. § 432B.160(1)(a); N.H. REV. STAT. ANN. § 169-C:31; N.M. STAT. § 32A-4-5(B); N.Y. SOC. SERV. LAW § 419; N.C. GEN. STAT. § 7B-309; N.D. CENT. CODE § 50-25.1-09; OHIO REV. CODE ANN. § 2151.421(G)(1)(a); OKLA. STAT. ANN. tit. 10A, § 1-2-104(A); OR. REV. STAT. § 419B.025; 23 PA. CONS. STAT. § 6318(a); R.I. GEN. LAWS § 40-11-4; S.C. CODE ANN. § 63-7-390; S.D. CODIFIED LAWS § 26-8A-14; TENN. CODE ANN. § 37-1-410(a)(7); TEX. FAM. CODE ANN. § 261.106(a); UTAH CODE ANN. § 62A-4a-410(1); VT. STAT. ANN. tit. 33, § 4913(d)(1); VA. CODE ANN. § 63.2-1512; WASH. REV. CODE ANN. § 26.44.060(1)(a); W. VA. CODE ANN. § 49-6A-6; WIS. STAT. § 48.981(4); WYO. STAT. ANN. § 14-3-209. California and New Jersey also afford immunity to reporters, but do not require that reports be submitted in good faith. See *infra* note 285 and accompanying text.

283. See Meriwether, *supra* note 134, at 147. See also Hazlett, 943 F. Supp. at 788 (requiring a showing of "bad intent" at the time the report was filed); Baldwin Co. Hosp. Auth. v. Trawick, 504 S.E.2d 708, 710 (Ga. Ct. App. 1998) (quoting Michaels v. Gordon, 439 S.E.2d 722 (1993)) (defining bad faith as "the opposite of 'good faith,' generally implying or involving actual or constructive fraud; or a design to mislead or deceive another; or a neglect or refusal to fulfill some duty, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive").

filing of reports by providing greater protection to reporters have dictated that good faith on the part of the reporter be presumed.²⁸⁴ Two states go a step further and do not interpose a good faith requirement.²⁸⁵ Courts have generally upheld statutes that afford immunity to health care providers and other professionals that work with children.²⁸⁶

It has been suggested that immunity provisions are relatively superfluous and have more of a symbolic role because proving that a report was filed with a malicious purpose is difficult to establish.²⁸⁷ However, in recent years some civil lawsuits have been pursued for purportedly false or spurious filings and at least one court has held that an immunity provision does not protect a physician who negligently misdiagnosed the existence of child abuse.²⁸⁸

Although largely hypothetical,²⁸⁹ it has been asserted that there are at least three circumstances under which physicians, for example, can face a lawsuit linked to a child abuse report: (1) for filing a report based on

Some states do threaten significant penalties for the knowing submission of false reports of abuse. *See, e.g.*, FLA. STAT. ANN. § 39.206(1) (a fine not to exceed \$10,000 may be imposed for each false report); 325 ILL. COMP. STAT. ANN. 5/7 (first violation punishable by "a term of imprisonment of up to one year, or by a fine not to exceed \$1,000, or by both A second or subsequent violation is [punishable as] a [c]lass 4 felony"); WYO. STAT. ANN. § 14-3-205(d) (knowingly and intentionally filing a false report is a misdemeanor).

284. *See* COLO. REV. STAT. § 19-3-309(a), (c)(1). *See also* NEV. REV. STAT. ANN. § 432B.160(3)(a); D.C. CODE § 4-1321.04.

285. *See* CAL. PENAL CODE § 11172 (only denying immunity to reporters who knowingly or with reckless disregard of the truth made a false report, with reimbursement of incurred legal fees and costs authorized for defending an unsuccessful false report claim), N.J. STAT. ANN. § 9:6-8.13 (stating that "[a]nyone acting pursuant to this act in the making of a report under this act shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed"). *See also* Trost, *supra* note 166, at 196.

286. *See, e.g., Hazlett*, 943 F. Supp. at 787-88 ("courts have determined that the intent of the immunity statutes are to ensure that health care professional[s] and others who work with children will not be stifled and unwilling to report such abuse for fear of reprisal from upset and sometimes wrongly accused parents"); *D.L.C. v. Walsh*, 908 S.W.2d 791, 795 (Mo. Ct. App. 1995) ("Health care providers will be more likely to investigate and report incidents of suspected child molestation if they can be assured of protection under the laws of the state in which they are required to report").

287. *See* Fraser, *supra* note 135, at 664; Trost, *supra* note 166, at 199-200 ("[u]ltimately, regardless of how courts have interpreted good faith, they have generally found defendants' behavior to fall within the necessary parameters, and they have almost unanimously relied on expressions of legislative purpose to support grants of summary judgment in favor of defendant reporters").

288. *See, e.g., Nosbaum v. Martini*, 726 N.E.2d 84, 90-91 (Ill. App. Ct. 2000) (holding, in a case of first impression, that if damages resulted directly from a physician's negligent misdiagnosis and not from the child abuse report itself, immunity under the child abuse reporting statute does not extend to the malpractice). *But see* Doe v. Winny, 764 N.E.2d 143, 150 (Ill. App. Ct. 2002) (rejecting *Nosbaum*, holding that good faith immunity provision shields a physician from liability based solely on a misdiagnosis of child abuse). *See also Hazlett*, 943 F. Supp. at 788 (embracing a line of cases that rejected claims that a physician should be held liable if misdiagnosis of child resulted in a report of suspected child abuse); Richardson, *supra* note 58, at 137.

289. Few such lawsuits are filed and even fewer are successful. *See supra* note 287 and accompanying text.

insufficient evidence of abuse, (2) for relying on evidence from a third party (such as a lab technician) that turns out to be inaccurate as a basis for filing or not filing a report, and (3) for conducting an inadequate examination of a child that provided the basis for submitting or not submitting a report.²⁹⁰ Because the conduct of the examination is directly within the control and expertise of the physician, it has been suggested that the immunity granted to physicians under most mandatory reporting statutes may not cover an improper medical examination.²⁹¹ However, the courts are split on this issue, with some asserting that immunity applies to all acts done in the course of preparing a child abuse report.²⁹² As for the first two hypotheticals, however, immunity can be anticipated because of a desire to facilitate child abuse reports by minimizing reasons why physicians might hesitate to file such a report, and because physicians should not be held accountable if they, in good faith, rely on information someone else generated.²⁹³

Policy makers face a difficult task in deciding whether to afford immunity to reporters of child abuse and, if they do, how comprehensive to make immunity. Without immunity, mandated reporters may withhold reports because of a fear of potential liability should a report not be substantiated.²⁹⁴ Health care providers in particular have shown themselves to be relatively risk adverse in a number of contexts and have been particularly active in lobbying for immunity, arguing immunity is necessary to ensure that reports will be readily forthcoming.²⁹⁵

At the same time, legal action focused on a mandated reporter is rarely pursued.²⁹⁶ Further, even with relatively comprehensive guarantees of

290. See Richardson, *supra* note 58, at 137.

291. See *id.* at 140-42.

292. *Id.* at 140.

293. *Id.* at 138-40, 143-45 (cautioning, however, that "[i]t may be bad faith for a physician to rely on an individual who has previously been inaccurate").

294. Indeed, one study determined that 65% of social workers, 53% of physicians, and 58% of physician assistants were not reporting all cases of suspected abuse. Vieth, *supra* note 15, at 9 (citing Steven Delaronde et al., *Opinions Among Mandated Reporters Toward Child Maltreatment Reporting Policies*, 24 CHILD ABUSE & NEGLECT 901, 905 (2000)). Although beyond the scope of this Article, there are a number of other reasons beyond concerns about a possible lack of immunity that may explain why mandated reporters fail to report suspected abuse as mandated, including vague reporting criteria, a belief that the likelihood of abuse or resulting harm is relatively small and is outweighed by the adverse consequences associated with a filed report of abuse, the burden and inconvenience of filing a report, an expectation that someone else will file a report, or a sense that they can do a better job of managing the case and protecting the child than if the state intervenes.

295. See Jerome P. Kassirer, *Incorporating Patients' Preferences into Medical Decisions*, 330(26) NEW ENG. J. MED. 1895, 1895 (1994) ("[m]any physicians are risk-averse"); Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?* 111 Q. J. ECON. 353, 353-54 (1996); Thomas, *supra* note 59, at 332.

296. See *supra* note 287 and accompanying text.

immunity in place, many professionals are apparently unwilling to submit such reports.²⁹⁷ Questions can also be raised whether reports are, if anything, too readily forthcoming in light of the substantial proportion of them that are determined to be invalid or unsubstantiated.²⁹⁸ At a minimum, it would seem that the broad shield from liability afforded reporters by California and New Jersey is unnecessary, particularly an extension of immunity to bad faith reporters.

It might be argued that the level of immunity should vary with the type of abuse involved. As the assessment of physical and sexual abuse has become more sophisticated and readily available in recent years, such determinations may be more reliable with fewer unfounded reports.²⁹⁹ If a child is at greater imminent risk of harm from physical or sexual abuse,³⁰⁰ to encourage such reports it might be appropriate to afford absolute immunity to mandated reporters when physical or sexual abuse is the focus. In contrast, the immunity afforded a report of neglect or psychological abuse could be limited to when the report was filed in good faith. However, no state makes this distinction, perhaps because a spurious report of physical or sexual abuse can be especially damaging to the reputation of an identified adult, as well as to the children involved who may as a result be unnecessarily removed from their home.

E. Penalties for Failure to Report

Unlike immunity for mandatory reporters, penalties for failing to report were not part of CAPTA, but a number of states in the late 1970s drafted penalty provisions to encourage hesitant reporters to file reports of suspected child abuse.³⁰¹ States generally made criminal penalties, typically

297. See *supra* notes 232-38 and accompanying text (noting the reluctance of mental health professionals to file required reports of child abuse).

298. See *infra* note 550 and accompanying text (noting that just over 75% of reports were determined to be invalid or unsubstantiated in 2005).

299. See, e.g., AMERICAN MEDICAL ASSOCIATION, DIAGNOSTIC AND TREATMENT GUIDELINES ON CHILD SEXUAL ABUSE (1992), 2 ARCH. FAM. MED. 19, available at <http://archfami.ama-assn.org/cgi/reprint/2/1/19> [hereinafter AMERICAN MEDICAL ASSOCIATION, DIAGNOSTIC AND TREATMENT GUIDELINES].

300. See *supra* notes 10-11 and accompanying text. Likewise, it has also been observed that [o]ver the past two decades, the mental health treatment of child victims of sexual and physical abuse . . . has received much attention by both the clinical and research communities. There is now a substantial body of research literature affirming the increased risk that child abuse victims have for various mental health disorders and problems.

NATIONAL CRIME VICTIMS RESEARCH AND TREATMENT CENTER, CHILD PHYSICAL AND SEXUAL ABUSE: GUIDELINES FOR TREATMENT 11 (Benjamin E. Saunders, Lucy Berliner & Rochelle F. Hanson eds., 2004), [http://academicdepartments.musc.edu/nvcv /resources_prof/OVC_guidelines04-26-04.pdf](http://academicdepartments.musc.edu/nvcv/resources_prof/OVC_guidelines04-26-04.pdf).

301. Fraser, *supra* note 135, at 665.

a misdemeanor with a fine or a limited jail sentence, available for a failure to report.³⁰²

Commentators have disagreed as to the value of penalty provisions. Some find them necessary to promote reporting; others assert they have little impact as they are relatively unenforceable due to the difficulty of identifying child abuse; and still others view them as likely to encourage frivolous or unfounded reports.³⁰³

Currently, forty-six states and the District of Columbia have established penalties for mandated reporters failing to report child abuse.³⁰⁴ The applicable penalty is generally a misdemeanor.³⁰⁵ However, Illinois makes

302. *Id.* at 665-66.

303. *Id.* at 666; Robert E. Shepherd, Jr., *The Abused Child and the Law*, 22 WASH. & LEE L. REV. 182, 192 (1965).

304. ALA. CODE § 26-14-13; ALASKA STAT. § 47.17.068; ARIZ. REV. STAT. § 13-3620(O); ARK. CODE ANN. §§ 12-18-201, 12-18-202 (setting forth a "class A" misdemeanor for "knowingly" failing to report and a "class B" misdemeanor for "recklessly" failing to report); CAL. PENAL CODE § 11166(c); COLO. REV. STAT. § 19-3-304(4)(a); CONN. GEN. STAT. § 17a-101a; DEL. CODE ANN. tit. 16, § 914(a); D.C. CODE ANN. § 4-1321.07; FLA. STAT. ANN. § 39.205(1); GA. CODE ANN. § 19-7-5(h); HAW. REV. STAT. ANN. § 350-1.2; IDAHO CODE ANN. § 16-1605(4); 325 ILL. COMP. STAT. ANN. 5/4; IND. CODE ANN. § 31-33-22-1(a); IOWA CODE § 232.75(1); KAN. STAT. ANN. § 38-2223(e)(1); KY. REV. STAT. ANN. § 620.990(1); La. Child Code Ann. art. 609(A)(2); ME. REV. STAT. ANN. tit. 22, § 4009; MASS. ANN. LAWS ch. 119, § 51A(c); MICH. COMP. LAWS SERV. § 722.633(1); MINN. STAT. § 626.556(6)(a); MISS. CODE ANN. § 43-21-353(7); MO. REV. STAT. § 210.165(1); MONT. CODE ANN. § 41-3-207(2); NEB. REV. STAT. § 28-717; NEV. REV. STAT. ANN. § 432B.240; N.H. REV. STAT. ANN. § 169-C:39; N.J. STAT. ANN. §§ 9:6-8.14, 2C: 43-3(c), 2C:43-8; N.M. STAT. § 32A-4-3(F); N.Y. SOC. SERV. LAW § 420(1); N.D. CENT. CODE § 50-25.1-13; OKLA. STAT. ANN. tit. 10A, § 1-2-101(C); OR. REV. STAT. §§ 153.018(1), (2), 419B.010; 23 PA. CONS. STAT. § 6319; R.I. GEN. LAWS § 40-11-6.1; S.C. CODE ANN. § 63-7-410; S.D. CODIFIED LAWS § 26-8A-3; TENN. CODE ANN. § 37-1-412(a); TEX. FAM. CODE ANN. § 261.109(a), (b); UTAH CODE ANN. § 62A-4a-411; VT. STAT. ANN. tit. 33, § 4913(f)(1); VA. CODE ANN. § 63.2-1509(D); WASH. REV. CODE ANN. § 26.44.080; W. VA. CODE ANN. § 49-6A-8; WIS. STAT. § 48.981(6). Maryland, North Carolina, Ohio, and Wyoming have not established a penalty for a mandated reporter who fails to report child abuse. Wyoming does specify that an employer who penalizes an employee solely for making a child abuse report is guilty of a misdemeanor, as well as any person who knowingly and intentionally makes a false report of child abuse. WYO. STAT. ANN. § 14-3-205(c), (d).

305. Thirty-six states penalize failure to report as a misdemeanor. *See* ALA. CODE § 26-14-13; ALASKA STAT. § 47.17.068; ARIZ. REV. STAT. § 13-3620(O); ARK. CODE ANN. §§ 12-18-201(b), 12-18-202(b); CAL. PENAL CODE § 11166(c); COLO. REV. STAT. § 19-3-304(4)(a); FLA. STAT. ANN. § 39.205(1); GA. CODE ANN. § 19-7-5(h); HAW. REV. STAT. ANN. § 350-1.2; IDAHO CODE ANN. § 16-1605(4); 325 ILL. COMP. STAT. ANN. 5/4; IND. CODE ANN. § 31-33-22-1(a); IOWA CODE § 232.75(1); KAN. STAT. ANN. § 38-2223(e)(1); KY. REV. STAT. ANN. § 620.990(1); La. Rev. Stat. Ann. § 14:403(A)(1); MICH. COMP. LAWS SERV. § 722.633(2); MINN. STAT. § 626.556(6)(a); MO. REV. STAT. § 210.165(1); MONT. CODE ANN. § 41-3-207(2); NEB. REV. STAT. § 28-717; NEV. REV. STAT. ANN. § 432B.240; N.H. REV. STAT. ANN. § 169-C:39; N.M. STAT. § 32A-4-3(F); N.Y. SOC. SERV. LAW § 420(1); N.D. CENT. CODE § 50-25.1-13; OKLA. STAT. ANN. tit. 10A, § 1-2-101(C); 23 PA. CONS. STAT. § 6319; R.I. GEN. LAWS § 40-11-6.1; S.C. CODE ANN. § 63-7-410; S.D. CODIFIED LAWS § 26-8A-3; TENN. CODE ANN. § 37-1-412(a); TEX. FAM. CODE ANN. § 261.109(a), (b); UTAH CODE ANN. § 62A-4a-411; WASH. REV. CODE ANN. § 26.44.080; W. VA. CODE ANN. § 49-6A-8.

Four states and the District of Columbia authorize a fine and/or imprisonment without designating it as a misdemeanor. *See* DEL. CODE ANN. tit. 16, § 914(a) (fined not more than \$1,000); D.C. CODE ANN. § 4-1321.07 (fined not more than \$300 or imprisoned for not more than ninety days or both); MISS. CODE ANN. § 43-21-353(7) (fine not to exceed \$5,000, imprisoned for maximum of one year, or both); N.J.

subsequent violations a felony;³⁰⁶ Arizona punishes the offense as a felony rather than a misdemeanor if the failure to report involves certain sexual offenses, such as incest, child prostitution, surreptitious photographing or videotaping of a minor, or solicitation of a child on the internet;³⁰⁷ and Minnesota has established that a failure to report can constitute a felony if a parent, guardian, or caretaker knows or reasonably should know that a child is in serious danger, fails to file a report, and the child dies because of a lack of medical care.³⁰⁸

Seven states also specifically make civil liability available for a failure to report child abuse in their statutory schemes.³⁰⁹ In addition, civil liability for damages to a child subsequent to a failure to report may be predicated on the availability of a criminal penalty in a state's reporting statute under the doctrine of negligence per se or it may be linked to a claim of professional malpractice.³¹⁰

Because penalties for a failure to report are rarely imposed, it is not clear whether their availability encourages the filing of reports of child abuse. However, in light of the frequent reference to these penalties in training materials,³¹¹ and the likelihood that professionals find the possibility of these penalties being imposed, as well as their collateral consequences (e.g., loss of a professional license), quite intimidating, the

STAT. ANN. §§ 9:6-8.14, 2C: 43-3(c), 2C:43-8 (fine of not more than \$1,000, a maximum sentence of six months, or both); WIS. STAT. § 48.981(6) (fine of not more than \$1,000, imprisonment for not more than six months, or both).

Six states limit their penalty to a fine. See CONN. GEN. STAT. § 17a-101a (fined not less than \$500 nor more than \$2,500 and required to participate in educational and training program); ME. REV. STAT. ANN. tit. 22, § 4009 (fine of not more than \$500); MASS. ANN. LAWS ch. 119, § 51A(c) (fined not more than \$1,000); OR. REV. STAT. §§ 153.018(1), (2), 419B.010(3) (maximum fine of \$720); VT. STAT. ANN. tit. 33, § 4913(f)(1) (fine of not more than \$500); VA. CODE ANN. § 63.2-1509(D) (fine of not more than \$500 for the first failure to report).

306. 325 ILL. COMP. STAT. ANN. 5/4.

307. ARIZ. REV. STAT. § 13-3620(O), (P)(4).

308. MINN. STAT. § 626.556(6)(c).

309. See ARK. CODE ANN. § 12-18-206; COLO. REV. STAT. § 19-3-304(4)(b); IOWA CODE § 232.75(2); MICH. COMP. LAWS SERV. § 722.633(1); MONT. CODE ANN. § 41-3-207(1); N.Y. SOC. SERV. LAW § 420(2); R.I. GEN. LAWS § 40-11-6.1.

310. See, e.g., *Ham v. Hospital of Morristown, Inc.*, 917 F. Supp. 531, 537-38 (E.D. Tenn. 1995) (ruling that the Tennessee mandatory child abuse reporting statute creates a private cause of action for a failure to report child abuse and finding that a genuine issue of material fact existed as to the reasonableness of the physician's conclusion that there was no child abuse); *Landeros v. Flood*, 551 P.2d 389 (Cal. 1976); *Nosbaum v. Martini*, 726 N.E.2d 84, 90-91 (Ill. App. Ct. 2000). See also Fraser, *supra* note 135, at 667.

311. See, e.g., AMERICAN MEDICAL ASSOCIATION, DIAGNOSTIC AND TREATMENT GUIDELINES, *supra* 299, at 25 (stating that "[m]ost states also impose criminal penalties for failure to report such cases").

availability of such penalties may enhance the level of reporting.³¹² At the same time, their authorization may result in the premature and unwarranted filing of reports that contributes to the relatively large number of unsubstantiated reports of child abuse.³¹³ As discussed previously with regard to immunity provisions³¹⁴ and as exemplified by the Arizona and Minnesota enactments,³¹⁵ it might be appropriate to limit penalties for a failure to report to certain types of child abuse (e.g., sexual abuse) or to egregious circumstances (e.g., multiple failures to report, children demonstrably at risk).

VI. RESPONSES TO FILED REPORTS

A. Investigations of Reports

After the influence of private societies for the prevention of cruelty to children waned at the beginning of the twentieth century, their role was ultimately filled by public welfare agencies.³¹⁶ The initial impetus for this transformation came from legislation enacted during the so-called New Deal of the 1930s, most prominently the Social Security Act of 1935.³¹⁷ Further, as state statutes began to shift where child abuse reports were to be filed from law enforcement to social services agencies,³¹⁸ the latter also became responsible for conducting most investigations of reported child abuse and for implementing needed responses, with often only sexual abuse and especially heinous child maltreatment cases assigned to the criminal justice system.³¹⁹

Within a state's social services agency, an entity often designated as Child Protective Services (CPS) was generally given primary authority over child abuse cases. Under the predominant approach, CPS workers, sometimes consulting with physicians or various child welfare experts, investigated and determined what steps, if any, were to be taken in responding to reported abuse. Finding an outcome that served the "best

312. *But see* Melton, *supra* note 49, at 14 (noting "the rampant civil disobedience of mandated reporting laws by professionals who are convinced that children are worse off as a result of reports to CPS").

313. *See infra* note 550 and accompanying text (noting that just over 75% of reports were determined to be invalid or unsubstantiated in 2005).

314. *See supra* notes 299-300 and accompanying text.

315. *See supra* notes 307-08 and accompanying text.

316. COSTIN ET AL., *supra* note 65, at 108.

317. *Id.*; *see also supra* notes 110-16 and accompanying text.

318. *See Fraser, supra* note 135, at 660, 662. The latter were sometimes referred to as a social welfare or a health and human services agency.

319. *See DORNE, supra* note 12, at 111.

interests of the child,” rather than punishing the abuser, was the guiding principle for their resolution of cases.³²⁰

As public awareness of the scope and impact of child abuse increased during the 1980s and 1990s,³²¹ emphasis on criminally prosecuting child abuse grew, particularly for sexual abuse.³²² As a result, current reporting laws are more likely to assign at least some responsibility to both social services and criminal justice agencies for responding to child abuse reports.³²³

Nevertheless, the social services agency that provides child protective services generally receives the majority of child abuse reports,³²⁴ which, as noted, currently number nationally around 3.3 million reports per year.³²⁵ This agency, in turn, also initiates and conducts most of the investigations of these reports. Thirty-eight states assign primary responsibility for investigations to a social services agency, while giving a law enforcement agency a supplemental role or assigning it a subset of cases — typically those involving sexual or physical abuse.³²⁶ The other twelve states and the District of Columbia also require their social services agency to respond to reports, but carve out a larger role for law enforcement by providing for

320. See *id.*; Barbara Bennett Woodhouse & Sarah Rebecca Katz, *Martyrs, The Media and the Web: Examining a Grassroots Children's Rights Movement Through the Lens of Social Movement Theory*, 5 WHITTIER J. CHILD & FAM. ADVOC. 121, 134 (2005).

321. See *supra* notes 157-59, 177, and 272 and accompanying text.

322. See Myers, *supra* note 177, at 878.

323. See DORNE, *supra* note 12, at 111. See also *infra* notes 328-31 and accompanying text.

324. As discussed, twenty-three states mandate reporting to the state's social services agency, or an equivalent family or child protection agency. See *supra* note 273. Twenty-six states and the District of Columbia allow reporting to either a social services agency or to a law enforcement agency. See *supra* note 274. One state directs reports to a central registry, which then forwards the report to the appropriate local child protective services agency. See *supra* note 275.

325. See generally *supra* note 7 and accompanying text.

326. See ALA. CODE § 26-14-6.1; ALASKA STAT. § 47.17.030(a), (b); ARK. CODE ANN. § 12-18-601(b); COLO. REV. STAT. § 19-3-308(1)(a), (5); CONN. GEN. STAT. § 17a-101g(a); DEL. CODE ANN. tit. 16, § 906(a); FLA. STAT. ANN. § 39.201(5); GA. CODE ANN. § 19-7-5(e); HAW. REV. STAT. ANN. § 587-21(a)(1)-(2); IDAHO CODE ANN. §§ 16-1616(1), 16-1617(1); 325 ILL. COMP. STAT. ANN. 5/7.3(a); IOWA CODE § 232.71B(1)(a), (3); KY. REV. STAT. ANN. § 620.040(b), (d); La. Child Code Ann. art. 612(A)(1), (2); ME. REV. STAT. ANN. tit. 22, § 4021(1); MD. CODE ANN., FAM. LAW § 5-706(a)(1), (2), (f)(1); MASS. ANN. LAWS ch. 119, § 51B(a) (k)(2), (3); MICH. COMP. LAWS SERV. § 722.628(1), (3)(b); MINN. STAT. § 626.556(3c)(a), (3f); MISS. CODE ANN. § 43-21-357(1); MONT. CODE ANN. § 41-3-202(1); NEV. REV. STAT. ANN. § 432B.260(3); N.H. REV. STAT. ANN. §§ 169-C:34(I), C:38(I); N.J. STAT. ANN. § 9:6-8.11; N.Y. SOC. SERV. LAW § 424(3); N.C. GEN. STAT. § 7B-302(a); N.D. CENT. CODE § 50-25.1-05(1), (2); OHIO REV. CODE ANN. § 2151.421(D)(1), (2), (F)(1); OKLA. STAT. ANN. tit. 10A, § 1-2-105(B)(5); 23 PA. CONS. STAT. ANN. § 6365(b); S.C. CODE ANN. §§ 63-7-920(A)(1), 63-7-980; TENN. CODE ANN. § 37-1-406(a)-(b); TEX. FAM. CODE ANN. § 261.301(a), (f); UTAH CODE ANN. § 62A-4a-409(1)(a), (11)(a)-(b); VT. STAT. ANN. tit. 33, § 4915(a); VA. CODE ANN. §§ 63.2-1505-1507; W. VA. CODE §§ 49-6A-9(b); WYO. STAT. ANN. §§ 14-3-204(a)(ii), 14-3-206(a)(i).

joint investigations in general or by allowing law enforcement to respond independently to reports they receive.³²⁷

As for when the jurisdiction of law enforcement officials is invoked, seven states require that reports involving sexual abuse be immediately turned over to or involve law enforcement.³²⁸ Three states dictate that if the report alleges abuse by someone other than a person exercising custodial control or supervision of the child, law enforcement officials be immediately involved.³²⁹ Six states provide for law enforcement officials to play a role if a report alleges the death of a child or serious injury to a child,³³⁰ while seven states specify a role for law enforcement if a criminal act involving or harming the child is reported.³³¹

Most states direct that social services agencies and law enforcement work together in the investigation through cross-reporting, sharing of

327. See ARIZ. REV. STAT. § 8-817(B); CAL. PENAL CODE §§ 11165.14, 11166(j), (k); D.C. CODE §§ 4-1301.04(a), .05 (c); IND. CODE ANN. §§ 31-33-7-7(a)(2), 31-33-8-2(b) (requiring each entity to report to one another and investigate together); KAN. STAT. ANN. § 38-2226(a); MO. REV. STAT. § 210.145(3), (4) (if social services agency determines a report merits investigation, it shall contact the appropriate law enforcement agency and request its assistance in all aspects of the investigation); NEB. REV. STAT. §§ 28-711(1), (2), 28-713(1) (requiring law enforcement to investigate a call reporting child abuse with the help of the social services agency); N.M. STAT. §§ 32A-4-3(C), 32A-4-4(A) (requiring whichever agency received the report to initiate an investigation, but ultimate responsibility given to the social services agency); OR. REV. STAT. § 418.747(1), (2) (requiring the use of interagency teams to investigate); R.I. GEN. LAWS §§ 40-11-7(a), 40-11-9; S.D. CODIFIED LAWS § 26-8A-9; WASH. REV. CODE ANN. § 26.44.035(1) (allowing the receiving entity to investigate, but requiring that they inform each other of their presence in an investigation); WIS. STAT. § 48.981(3)(a)(3), (b)(1) (allowing receiving entity to investigate, but requiring certain cases to be turned over to law enforcement).

328. 325 ILL. COMP. STAT. ANN. 5/7.3 (b); MD. CODE ANN., FAM. LAW § 5-706(b), (f)(1); MICH. COMP. LAWS ANN. § 722.628(3)(b) (sexual abuse or sexual exploitation); N.H. REV. STAT. ANN. § 169-C:38(I); N.D. CENT. CODE § 50-25.1-05(2); TENN. CODE ANN. § 37-1-406(b); W. VA. CODE § 49-6A-5.

329. Conn. Gen. Stat. § 17a-101g(a) (if the perpetrator was the child's caregiver or a person given access to the child by the caregiver); KY. REV. STAT. ANN. § 620.040(1)(d) (if the report alleges abuse by someone other than a person exercising custodial control or supervision of the child); TEX. FAM. CODE ANN. § 261.301(c) (if report alleges child abuse by a person other than a person responsible for the child's care, custody, or welfare). Alabama specifically charges criminal justice entities with responsibility for investigating cases occurring in institutional settings. ALA. CODE § 26-14-6.1(1), (2) (schools or residential facilities).

330. ARK. CODE ANN. § 12-18-601(b) (severe maltreatment); 325 ILL. COMP. STAT. ANN. 5/7.3(a) (death or serious injury); MICH. COMP. LAWS SERV. § 722.628(3)(a), (c) (death or severe physical injury); NEV. REV. STAT. ANN. § 432B.260(2)(b)-(d) (death, serious injury, or another child has died in that household); N.H. REV. STAT. ANN. § 169-C:38(I) (serious bodily injury); W. VA. CODE § 49-6A-5 (serious physical abuse).

331. IOWA CODE § 232.71B(3) (if a criminal act harming a child is alleged); N.H. REV. STAT. ANN. § 169-C:38(I) (victim of a crime); N.D. CENT. CODE § 50-25.1-05(2) (physical criminal abuse); 23 PA. CONS. STAT. ANN. §§ 6340(a)(9), (10), 6365(c) (various specified crimes against children); S.C. CODE ANN. § 63-7-980(B)(1) (violation of criminal law); TEX. FAM. CODE ANN. § 261.30(f) (victim of conduct that constitutes a criminal offense posing an immediate risk of physical or sexual abuse that could result in death or serious harm); W. VA. CODE §§ 49-6A-5, -9 (assault). In addition, Nevada requires a law enforcement agency to conduct the investigation if the child is five years of age or less. NEV. REV. STAT. ANN. § 432B.260(2)(a).

reports, joint investigations, or multidisciplinary teams.³³² The use of multidisciplinary teams, in particular, which may include law enforcement personnel, protective services workers, school officials, health officials, and prosecutors, has garnered considerable support.³³³ Child Advocacy Centers, which will be discussed in depth below,³³⁴ use this multidisciplinary approach both for investigations and for providing services, which can result in an effective response to reports of child abuse.³³⁵

The investigation of a report of child abuse is generally required to commence within a short period of time after receipt of the report. Of the states that articulate a specified time period for the commencement of the investigation, most states require an investigation “promptly,” “immediately,” or within twenty-four or seventy-two hours.³³⁶

332. For a complete listing of the statutory provisions requiring coordination in some manner between a social services agencies agency and a law enforcement agency, *see generally* ALA. CODE § 26-14-6.1; ALASKA STAT. § 47.17.025(a); ARIZ. REV. STAT. § 8-817; ARK. CODE ANN. § 12-18-601 to -603; CAL. PENAL CODE §§ 11165.14, 11166(j), (k); COLO. REV. STAT. § 19-3-308; CONN. GEN. STAT. § 17a-101g; DEL. CODE ANN. tit. 16, § 906(a); FLA. STAT. ANN. § 39.201(5); GA. CODE ANN. § 19-7-5(e); HAW. REV. STAT. ANN. § 587-21(a); IDAHO CODE ANN. § 16-1616; 325 ILL. COMP. STAT. ANN. 5/7.3; IND. CODE ANN. §§ 31-33-7-7, 31-33-8-2; IOWA CODE § 232.71B(1)(a), (3); KAN. STAT. ANN. § 38-2226; KY. REV. STAT. ANN. § 620.040(b), (d); LA. CHILD CODE ANN. art. 612; MD. CODE ANN., FAM. LAW § 5-706; MASS. ANN. LAWS ch. 119, § 51B; MICH. COMP. LAWS SERV. § 722.628; MINN. STAT. § 626.556(3c); MISS. CODE ANN. § 43-15-51; MO. REV. STAT. § 210.145(3), (4); NEB. REV. STAT. §§ 28-711, 28-713; NEV. REV. STAT. ANN. § 432B.260; N.H. REV. STAT. ANN. §§ 169-C:34, :38(I); N.J. STAT. ANN. § 9:6-8.11; N.M. STAT. §§ 32A-4-3, 32A-4-4; N.Y. SOC. SERV. LAW § 424; N.C. GEN. STAT. § 7B-302; N.D. CENT. CODE § 50-25.1-05; OHIO REV. CODE ANN. § 2151.421(F)(1); OKLA. STAT. ANN. tit. 10A, § 1-2-105(H); OR. REV. STAT. § 418.747; 23 PA. CONS. STAT. § 6365; R.I. GEN. LAWS §§ 40-11-7, 40-11-9; S.C. CODE ANN. §§ 63-7-920, 63-7-980; TENN. CODE ANN. § 37-1-406; TEX. FAM. CODE ANN. § 261.301; UTAH CODE ANN. § 62A-4a-409; VT. STAT. ANN. tit. 33, § 4917; VA. CODE ANN. § 63.2-1505 to -1507; W. VA. CODE §§ 49-6A-5, -9; WIS. STAT. § 48.981(3); WYO. STAT. ANN. §§ 14-3-204, -206. Improving coordination among agencies is also one of CAPTA’s requirements. *See supra* note 172 and accompanying text.

333. *See* William Y. Chin, *Blue Spots, Coining, and Cupping: How Ethnic Minority Parents Can Be Misreported as Child Abusers*, 7 J.L. SOC’Y 88, 109 (2005) (over three-quarters of the states already require multidisciplinary teams); Dixon, *supra* note 66, at 80, 83 (“[t]he multidisciplinary team approach has now been recognized and recommended by experts nationwide for at least twenty-five years” and “represents a new standard of best practice and a more effective response to the problem of child abuse”). *See also* John Doris et al., *Training in Child Protective Services: A Commentary on the Amicus Brief of Bruck and Ceci (1993/1995)*, 1 PSYCHOL. PUB. POL’Y & L. 479, 486 (1995) (stating that “[f]ederal money to establish and enhance multidisciplinary teams is made available to states through the Victims of Crime Act of 1984.”); Shelly L. Jackson, *A USA National Survey of Program Services Provided by Child Advocacy Centers*, 28 CHILD ABUSE & NEGLECT 411, 416 (2004) (noting that while there is widespread acceptance of multidisciplinary teams, they vary considerably from community to community).

334. *See infra* notes 627-34 and accompanying text.

335. Nancy Chandler, *Children’s Advocacy Centers: Making a Difference One Child at a Time*, 28 HAMLINE J. PUB. L. & POL’Y 315, 323-36, (2006); Jackson, *supra* note 333, at 411.

336. *See, e.g.*, FLA. STAT. ANN. § 39.201(5) (mandating investigation with twenty-four hours unless immediate threat, then must commence immediately “regardless of the time of day or night”); IOWA CODE § 232.71B(1)(a) (twenty-four hours); MASS. ANN. LAWS ch. 119, § 51B(c) (investigation shall commence within two hours of initial contact if reasonable cause to believe child’s health or safety

Furthermore, in some states the investigation must also be concluded within a specified period of time. For those states that mandate such a time period, a typical deadline for a determination is sixty days from the filing of the report.³³⁷ Connecticut, Minnesota, and South Carolina require that the investigation be concluded within forty-five days,³³⁸ the District of Columbia and Missouri require that the investigation be completed within thirty days,³³⁹ Iowa requires that a written assessment be completed within twenty business days,³⁴⁰ Massachusetts requires that an initial investigation and evaluation be completed within fifteen working days, but within twenty-four hours if there is reasonable cause to believe the child's health or welfare is in immediate danger,³⁴¹ and New Mexico requires that the investigation be completed within a reasonable period of time.³⁴²

As part of the investigation, state officials are generally empowered to interview suspected victims of child abuse (including sometimes any other children in the same environment), visit the location where abuse is allegedly occurring, have a medical examination conducted of the child, access relevant records, search for any past reports of abuse (involving the same child, other children residing in the same household, or the alleged abuser), and do what is necessary to "prevent further harm."³⁴³ In some

is in immediate danger, otherwise within twenty-four hours); N.M. STAT. § 32A-4-3(C) ("immediate steps to ensure prompt investigation"); TEX. FAM. CODE § 261.301(d)(1)-(3) (immediately for death or cases of substantial harm, twenty-four hours for "highest priority" cases, and seventy-two hours for "second highest priority" cases); W. VA. CODE ANN. § 49-6A-9(b)(3), (4) (allowing up to fourteen days for an interview with the purported victim, but must respond immediately to all allegations of imminent danger with development of a protection plan within seventy-two hours).

337. See FLA. STAT. ANN. § 39.301(17); MD. CODE ANN., FAM. LAW § 5-706(g)(2); MONT. CODE ANN. § 41-3-202(6); N.Y. SOC. SERV. LAW § 424(7)(a); 23 PA. CONS. STAT. ANN. § 6368(c); TENN. CODE ANN. § 37-1-406(i); VA. CODE ANN. § 63.2-1505(B)(5) ("upon written justification by the local department, such determination may be extended, not to exceed a total of 60 days"); WIS. STAT. § 48.981(3)(c)(6).

338. CONN. GEN. STAT. § 17a-101g(a); MINN. STAT. § 626.556(10e)(a); S.C. CODE ANN. § 63-7-920(A)(2).

339. D.C. CODE § 4-1301.06(a); MO. REV. STAT. § 210.145(14) (unless there is good cause for a failure to meet this deadline).

340. IOWA CODE § 232.71B(12)(b).

341. MASS. ANN. LAWS ch. 119, § 51B(1).

342. N.M. STAT. § 32A-4-4(B).

343. See generally, e.g., ALA. CODE § 26-14-7(c); ALASKA STAT. § 47.17.030; ARK. CODE ANN. § 12-12-510; COLO. REV. STAT. §§ 19-3-308(1)-(3); CONN. GEN. STAT. § 17a-101g(b); DEL. CODE ANN. tit. 16, § 906(b); FLA. STAT. ANN. § 39.301(1); HAW. REV. STAT. ANN. § 587-21(a); IDAHO CODE ANN. § 16-1618; 325 ILL. COMP. STAT. ANN. 5/7.4(a-5); IND. CODE ANN. § 31-33-8-2(b); IOWA CODE § 232.71B; KAN. STAT. ANN. § 38-2226(a); KY. REV. STAT. ANN. § 620.040; La. Child Code Ann. art. 612.1; ME. REV. STAT. ANN. tit. 22, § 4021; MD. CODE ANN., FAM. LAW § 5-706; MASS. ANN. LAWS ch. 119, § 51(b); MICH. COMP. LAWS SERV. §§ 722.628 (1), (2); MINN. STAT. § 626.556(10); MISS. CODE ANN. § 43-15-51; MO. REV. STAT. § 210.145; MONT. CODE ANN. § 41-3-202; NEV. REV. STAT. ANN. § 432B.270; N.H. REV. STAT. ANN. §§ 169-C:34, -C:38; N.M. STAT. §§ 32A-4-3 to -4; N.Y. SOC. SERV. LAW § 424-c; N.C. GEN. STAT. § 7B-302; N.D. CENT. CODE § 50-25.1-05; OHIO REV. CODE ANN. §

states, if the initial report of abuse is substantiated, it may be mandated that the report and other relevant information be forwarded to a law enforcement agency.³⁴⁴

Because of the importance of protecting the child without disrupting the family unit unnecessarily, a timely yet comprehensive investigation is imperative. However, with the deluge of these reports, agencies assigned these investigations are often forced to triage reports on the basis of very limited information, which can result both in a failure to identify cases where services are greatly needed and proceeding with unneeded and perhaps counterproductive investigations. Further, the nature of the expertise needed to adequately investigate a child abuse report will vary considerably depending on the type of abuse reported. Unfortunately, these investigations often suffer from limited resources and expertise, with a one-size-fits-all approach too often employed.

Statutory enactments designed to facilitate a multidisciplinary investigation are a step in the right direction as they may bring to bear a more diverse and nuanced approach. However, to the extent that mandated multi-agency involvement becomes a formality rather than a truly integrated approach, this approach can quickly relapse into the relatively limited and uninformed response that initially led to such requirements being enacted.

Mandated time frames can also be a double-edged sword. Although their intent is to ensure a prompt response and assure the child adequate protection, to the extent that cases are opened and closed merely to meet such deadlines, unjustified conclusions may result. Relatively short time frames for completing an investigation can help ensure timely investigations and responses, but must be balanced against their potential to lead to rushed, incomplete, and erroneous results. As demonstrated, states vary considerably on the appropriate time frame.

Also, different types of abuse may call for different approaches and different assignments of responsibility. For example, investigations of physical and sexual abuse may call for a law enforcement-oriented response, while neglect and psychological abuse may require more of a

2151.421(F); OKLA. STAT. ANN. tit. 10A, § 1-2-105; OR. REV. STAT. § 418.747; 23 PA. CONS. STAT. § 6368; R.I. GEN. LAWS §§ 40-11-7 to -9; S.C. CODE ANN. § 63-7-920; S.D. CODIFIED LAWS § 26-8A-9; TENN. CODE ANN. § 37-1-406; TEX. FAM. CODE ANN. § 261.302; UTAH CODE ANN. § 62A-4a-202.3; VT. STAT. ANN. tit. 33, § 4915; VA. CODE ANN. § 63.2-1505; WASH. REV. CODE ANN. § 26.44.050; W. VA. CODE ANN. § 49-6A-9; WIS. STAT. § 48.981; WYO. STAT. ANN. §§ 14-3-204 to -206.

344. See, e.g., N.J. STAT. ANN. § 9:6-8.10a(e) (directing that for substantiated incidents, the Department shall forward to the law enforcement agency in the jurisdiction where the child resides the identity of persons alleged to have abused the child, their addresses, the nature of the allegations, and "other relevant information").

social services approach.³⁴⁵ But even a more nuanced division of responsibility may need to be adjusted depending on the dynamics of a given case, particularly when more than one type of abuse is present.

Furthermore, without needed coordination, involving multiple agencies can prove ineffective and potentially deleterious with cases slipping through the cracks. Initial decisions on how a given investigation should proceed should be charged to a single entity, preferably one where a multidisciplinary perspective can readily be brought to bear. Although Child Advocacy Centers have not traditionally been used to triage and assign responsibility for the investigation of child abuse reports, their multidisciplinary perspective and range of available expertise may make them particularly well suited for this role.³⁴⁶

B. Remedial Steps Short of Removal

If the investigation indicates an occurrence of abuse, state officials are empowered to take various steps to protect the safety of the child, with the responsible agency typically expected to act quickly.³⁴⁷ Although many children are removed from their home as the result of an investigation of child abuse (over 250,000 children were removed in 2008 alone),³⁴⁸ a more-limited order of protection could be employed instead.³⁴⁹

345. See Gary Melton, *Chronic Neglect of Family Violence: More than a Decade of Reports to Guide US Policy*, 26 CHILD ABUSE & NEGLECT 569, 573 (2002) ("Child protection is not simply or even primarily a job for social service agencies").

346. For a further discussion of the role of Child Advocacy Centers, see *infra* notes 627-34 and accompanying text.

347. See, e.g., KAN. STAT. ANN. § 38-2230 ("If reasonable grounds to believe abuse or neglect exist, immediate steps shall be taken to protect the health and welfare of the abused or neglected child"). See also *infra* Part VI.C.

348. CHILD MALTREATMENT 2008, *supra* note 7, at 79 (an estimated 267,000 children were removed from their home in 2008 as part of an investigation of child abuse).

349. Some states use the phrase "protective order," "restraining order," or domestic violence "injunction." A civil order of protection is distinct from a criminal order of protection in that the former is typically issued by a civil or family court and usually employs a preponderance of the evidence standard to justify its issuance, while the latter requires that a criminal court find that the underlying crime justifying the order has been proven by evidence beyond a reasonable doubt. Allie Meiers, Comment, *Civil Orders of Protection: A Tool to Keep Children Safe*, 19 J. AM. ACAD. MATRIMONIAL LAW 373, 375-76 (2005).

In addition to the legal mechanisms that are the focus of the text, a number of alternative social services models are being developed to reduce the need to remove the child from the home, including: (1) Multi-systemic Therapy, which employs a highly-individualized plan for each child and tailors a complex set of interventions to the particular child's and family's needs; (2) a Wraparound Model, which focuses on the family unit and seeks to provide the services and supports needed to promote a family's adaptive functioning; (3) a Systems of Care Model; (4) Intensive Family Preservation Services/Intensive Home-Based Interventions; and (5) Therapeutic Foster Care. For a discussion of these programs and an evaluation of their effectiveness, see Weithorn, *supra* note 11, at 1493-1500.

An order of protection can prohibit an adult from having further contact with or access to a specified child, with an adult suspected of or shown to have abused a child evicted or excluded from the child's residence.³⁵⁰ These orders can allow the child to remain in the familiar surroundings of the family home, thereby providing the child with needed stability, continuity, and support from non-abusive family members.³⁵¹ In contrast, the removal of the child from the family home can inadvertently punish the child or make the child feel like he or she was the wrongdoer.³⁵² Some scholars suggest that removing the abuser is a much more effective solution because offenders should "bear the burden of homelessness" for their acts rather than sending innocent children away from the home that they know and need.³⁵³

Protective orders are likely underutilized in child abuse cases.³⁵⁴ All fifty states have enacted legislation that allows victims of domestic violence to obtain a civil order of protection.³⁵⁵ Domestic violence orders of protection, however, may not be adequately available to the victims of child abuse.³⁵⁶ For example, child abuse may not be included within the definition of domestic violence, which must be shown to exist before an order can be issued, or these orders may only be available to protect someone who is the actual child of the abuser.³⁵⁷ Also, typically the civil order of protection must be pursued by a parent of the child or a legal "next friend"³⁵⁸ and they may be unavailable or unwilling to seek such an order, particularly if they are also being subjected to domestic violence or are dependent on the target of the court order for support.³⁵⁹

Twenty states do give special attention to protective orders for children, either by establishing separate mechanisms for obtaining a child-focused

350. See Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 62, n.261 (2001); see also Judith A. Smith, *Battered Non-wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 100 ("Civil protection orders can require the abuser to stay away from the victim[,] to refrain from contacting, threatening, harassing, or stalking the victim, or from committing acts of violence against her. . . . They can also require a person to seek counseling or drug or alcohol treatment").

351. Meiers, *supra* note 349, at 383.

352. *Id.*

353. Robin Fretwell Wilson, *Sexually Predatory Parents and the Children in Their Care: Remove the Threat. Not the Child*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 39 (Nancy Dowd, Dorothy Singer, & Robin Wilson eds., 2006).

354. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 488-92 (1973).

355. Meiers, *supra* note 349, at 374.

356. See Smith, *supra* note 350, at 108-09.

357. See *id.*

358. See, e.g., ARIZ. REV. STAT. §§ 13-3602(A) ("If the person [filing the petition for an order of protection] is a minor, the parent, legal guardian or person who has legal custody of the minor shall file the petition unless the court determines otherwise"); Dunlap, *supra* note 20, at 614-15.

359. See generally *id.* at 579-80.

order of protection,³⁶⁰ specifying their availability as part of their mandatory child abuse reporting laws,³⁶¹ or making this option a possible remedy in juvenile court proceedings.³⁶² The remaining thirty states and the District of Columbia rely primarily on their domestic/family violence statutes for the authority to issue orders of protection for a child.³⁶³

These orders can generally be issued as necessary to promote the well-being of the victim, but authorizing statutes also frequently identify specific protections that can be included. For example, a person can be required to refrain from specific acts (forty-nine states and the District of Columbia),³⁶⁴ to stay away from or not contact the victim (forty-six states and the District of Columbia),³⁶⁵ to vacate or relinquish possession of a shared residence (forty-one states and the District of Columbia),³⁶⁶ to attend treatment or

360. MO. REV. STAT. §§ 455.500-.538; NEV. REV. STAT. ANN. §§ 33.400-.440; UTAH CODE ANN. §§ 78B-7-201 to -206; WIS. STAT. § 813.122; *see also* Meiers, *supra* note 349, at 374-75.

361. HAW. REV. STAT. ANN. § 587-52; N.H. REV. STAT. ANN. §§ 169-C:1 to -C:28; N.J. STAT. ANN. § 9:6-8.55; N.Y. FAM. CT. ACT §§ 1029, 1056; R.I. GEN. LAWS §§ 40-11-12.4, 15-15-3, -4.

362. ALA. CODE §§ 12-15-138 to -143; COLO. REV. STAT. §§ 19-1-113, -114; GA. CODE ANN. § 15-11-11; 705 ILL. COMP. STAT. ANN. 405/2-1 to -25; KAN. STAT. ANN. 38-2244; La. Child. Code Ann. arts. 617, 618; S.D. CODIFIED LAWS § 26-7A-107; TENN. CODE ANN. § 37-1-152; VT. STAT. ANN. tit. 33, § 5115; VA. CODE ANN. § 16.1-253.4; WYO. STAT. ANN. § 14-3-430.

363. *See generally, e.g.*, ALASKA STAT. §§ 18.66.100 to .180; ARIZ. REV. STAT. §§ 13-3602, -3624; ARK. CODE ANN. §§ 9-15-201 to -216; CAL. FAM. CODE §§ 6200-6390; CONN. GEN. STAT. § 46b-15; DEL. CODE ANN. tit. 10, §§ 1041-1048; D.C. CODE §§ 16-1003 to -1006; FLA. STAT. ANN. § 741.30; IDAHO CODE ANN. §§ 39-6306, -6308; IND. CODE ANN. §§ 34-26-5-1 to -19; IOWA CODE §§ 236.4-.8; KY. REV. STAT. ANN. §§ 403.740-.785; ME. REV. STAT. ANN. tit. 19-A, §§ 4001-4014; MD. CODE ANN., FAM. LAW §§ 4-505, -506; MASS. ANN. LAWS ch. 209A, §§ 3-4; MICH. COMP. LAWS SERV. §§ 600.2950-.2950a; MINN. STAT. § 518B.01; MISS. CODE ANN. §§ 93-21-1 to -29; MONT. CODE ANN. §§ 40-15-201, -204; NEB. REV. STAT. §§ 42-924 to -928; N.M. STAT. §§ 40-13-3 to -6; N.C. GEN. STAT. §§ 50B-2, B-3; N.D. CENT. CODE §§ 14-07.1-02, -03; OHIO REV. CODE ANN. § 3113.31; OKLA. STAT. ANN. tit. 22, §§ 60 to 60.18; OR. REV. STAT. §§ 107.716, .718; 23 PA. CONS. STAT. §§ 6107, 6108; S.C. CODE ANN. §§ 20-4-10 to -160; TEX. FAM. CODE ANN. §§ 85.021-.026; WASH. REV. CODE ANN. §§ 26.50.060-.070; W. VA. CODE ANN. §§ 48-27-501 to -511, -203. Similar statutes may be available in those states that also give special attention to protective orders for children. GA. CODE ANN. § 19-13-4; 750 ILL. COMP. STAT. ANN. 60/201-227; MO. REV. STAT. §§ 455.010-.085; NEV. REV. STAT. ANN. §§ 33.017-.100; UTAH CODE ANN. §§ 78B-7-102 to -116; WIS. STAT. § 813.12.

364. Only Oklahoma does not provide for specific orders, but allows the court to use whatever terms are necessary. OKLA. STAT. ANN. tit. 22, §§ 60 to 60.18. For the respective statutory citations for the other forty-nine states and the District of Columbia, *see supra* notes 360-63.

365. The forty-six states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See id.* for the respective statutory citations.

366. The forty-one states are Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. *See id.* for the respective statutory citations.

counseling (thirty states and the District of Columbia),³⁶⁷ to pay support for the child (thirty-one states),³⁶⁸ or to refrain from possessing or using firearms or deadly weapons (eighteen states).³⁶⁹

In general, states authorize two types of orders of protection. Emergency (sometimes referred to as temporary) *ex parte* orders can be granted without notice to the abusive individual and without a full hearing if the court finds immediate protection is necessary.³⁷⁰ These orders remain in effect for a relatively short period of time.³⁷¹

When emergency protection is not necessary or a previously granted emergency order has lapsed, a petition for a “permanent” order of protection can be filed. Before such an order can be issued, notice must be given to the focus of the order (i.e., the purported abusive individual) and a hearing held.³⁷² Courts are generally afforded broad discretion to grant these petitions if abuse has occurred or if they find the issuance of an order is necessary to protect the child.³⁷³ States, however, vary on the permissible

367. The thirty states are Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Washington, and West Virginia. A number of these states do not authorize an order to attend treatment or counseling in conjunction with a “temporary” as opposed to a “permanent” order of protection (e.g., Illinois, Louisiana, Maine, Maryland, Minnesota, Missouri, New Mexico, North Carolina, Ohio, and Washington). *See id.* for the respective statutory citations.

368. The thirty-one states are Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, West Virginia, and Wyoming. A number of these states do not authorize an order to pay child support in conjunction with a temporary order of protection (e.g., Illinois, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nevada, North Carolina, North Dakota, Ohio, and Rhode Island). *See id.* for the respective statutory citations.

369. The eighteen states are Alaska, Arizona, California, Delaware, Illinois, Indiana, Maine, Maryland, Michigan, Montana, North Carolina, North Dakota, Pennsylvania, Rhode Island, Texas, Utah, West Virginia, and Wisconsin. A number of these states do not authorize an order to refrain from possessing or using firearms or deadly weapons in conjunction with a temporary order of protection (e.g., Maryland, North Carolina, and Rhode Island). *See id.* for the respective statutory citations.

370. Meiers, *supra* note 349, at 380. All fifty states and the District of Columbia authorize emergency or temporary orders of protection. *See also supra* notes 360-63 for the respective statutory citations. A typical criterion for the issuance of such an order is that there is an “immediate and present danger of abuse.” MO. REV. STAT. § 455.513(1).

371. *See, e.g.,* VA. CODE ANN. § 16.1-253.4(C) (an emergency protective order shall expire at 11:59 p.m. on the third day following issuance, unless expiration occurs at a time when court is not in session, in which case the order shall be extended until 11:59 p.m. of the next day the court is in session).

372. Meiers, *supra* note 349, at 379.

373. *See, e.g.* ALA. CODE § 12-15-139 (“necessary to protect”); OKLA. STAT. ANN. tit. 22, § 60.3(A) (“necessary to protect”); 750 ILL. COMP. STAT. ANN. 60/214(a) (if abuse has occurred); KY. REV. STAT. ANN. § 403.750(1) (if abuse has occurred and may reoccur). *See also* Meiers, *supra* note 349, at 379.

maximum length of permanent protection orders³⁷⁴ and the penalty for violating such an order.³⁷⁵

There are a number of factors that have limited the effectiveness of these protective orders. Generally, someone must be willing and able to step forward to initiate and sustain a request for an order and marshal evidence supporting the need for the order. It may be difficult to find anyone within a household where child abuse has occurred who will file this role, and similarly difficult to find someone who will report the violation of a protective order,³⁷⁶ particularly as child abuse is often part of a larger constellation of domestic violence or other problems (e.g., poverty, transportation difficulties, social isolation, dependency on others, psychological disorders, substance abuse) that may constrain the willingness and ability of household members to pursue this course.³⁷⁷ In addition, by leaving the child in the home, should the target of the order choose to disregard its provisions, the child may be at risk of future abuse.³⁷⁸ Finally, the child may be living within a relatively dysfunctional family where it is not simply a single individual who is the source of abuse.³⁷⁹

Nevertheless, in light of the harm that a child can incur following removal from a home,³⁸⁰ using a protective order to keep the abusive individual away from the child can be less invasive and potentially provide a better outcome for the child than removal, particularly if needed services

374. This length typically ranges from ninety days to a permanent order, with most states setting the maximum length at one or two years. See, e.g., GA. CODE ANN. § 19-13-4(c) (permanent); MASS. ANN. LAWS ch. 209A, § 3(c) (one year); MO. REV. STAT. § 455.516(1) (180 days to a maximum of one year); MONT. CODE ANN. § 40-15-202(1) (permanent); TEX. FAM. CODE ANN. § 85.025(a)(1) (two years); W. VA. CODE ANN. § 48-27-505(a) (180 days).

375. Penalties generally include fines, imprisonment, or being held in contempt of court. See, e.g., CONN. GEN. STAT. § 46b-15(c) (fine or imprisonment); DEL. CODE ANN. tit. 10, §§ 1046(h)(1)-(3) (contempt, imprisonment, fine).

376. See Margaret Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 351 (1995); Susan Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?* 15 CARDOZO L. REV. 525, 539 (1993).

377. See Deborah Epstein, Margret Beil, & Lisa Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victim's Long Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 477-78 (2003); see also Dunlap, *supra* note 20, at 585-86.

378. One study suggests that 60% of abusers end up violating orders of protection. Sean Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence*, 4 WYO. L. REV. 271, 276 (2004).

379. A national study found that in 18.5% of neglect cases, 14.2% of physical abuse cases, and 12.3% of sexual abuse cases the abuse is committed by both parents. CHILD MALTREATMENT 1999, *supra* note 14, at fig.3-3. In 2008, for 17.9% of victims in general, the child's mother and father were both determined to have abused the child. CHILD MALTREATMENT 2008, *supra* note 7, at 51 tbl.3-15.

380. See *infra* Part VI.C.

are provided to help family members, including the child, remaining in the home.³⁸¹

C. Removal

States in the 1970s began to authorize emergency removals as part of their response to reports of child abuse.³⁸² Typically, state laws permit courts, law enforcement, or child welfare officials to take steps to effect the emergency removal of children from an abusive environment if there is “imminent” danger to the child, thereby placing the child within the protective custody of the state for a limited period of time.³⁸³ This emergency removal authority has been extended to physicians as well in some states.³⁸⁴

Usually states require that reasonable efforts be made to notify parents or other adults who have custody of the child prior to or upon removal.³⁸⁵ Some states also require that a judge, at the time of removal or shortly thereafter, find that reasonable efforts were made to eliminate the need for removal and that no less drastic alternatives were available that could reasonably and adequately protect the child.³⁸⁶ After removal, either the child welfare agency or a judge will assess the situation to determine whether the child should be returned home or remain in the custody of the state for a longer period of time.³⁸⁷

381. See Melton, *supra* note 345, at 578-79 (stating that “a system that seldom results in delivery of services . . . cannot be expected to improve victims’ well-being[.]” and arguing for increased attention to the family’s needs for social and economic support); Melton, *supra* note 49, at 11, 14 (stating, “families in which maltreatment occurs have a multiplicity of serious personal, social, and economic problems[.]” and that “[v]ast human and fiscal resources that could be spent in prevention or treatment are instead expended in investigations that usually result in significant disruption of family life but little if any benefit”).

382. See NELSON, *supra* note 99, at 88-89.

383. See, e.g., ALA. CODE § 26-14-6 (allowing seventy-two hours of protective custody if “imminent” danger); COLO. REV. STAT. § 19-1-113(4) (“An emergency protection order shall expire not later than the close of judicial business on the next day of judicial business following the day of issue, unless otherwise continued by the court.”); IOWA CODE §§ 232.79(2)(d), (4)(c) (allowing twenty-four hours of protective custody (at which point the court can issue a longer order) in cases of “imminent” danger when there is not time to seek a court order).

384. See, e.g., GA. CODE ANN. § 15-11-15; MICH. COMP. LAWS ANN. § 722.626(1) (until the next business day of the probate court); N.D. CENT. CODE § 50-25.1-07 (keeping the child in the custody of the hospital or medical facility for up to ninety-six hours); TENN. CODE ANN. § 37-1-404.

385. See, e.g., ME. REV. STAT. ANN. tit. 22, § 4023; NEV. REV. STAT. ANN. § 432B.390(7)(b); TENN. CODE ANN. § 37-1-404(b).

386. See, e.g., VA. CODE ANN. § 16.1-252(E)(2) (“alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, home-making or other similar services to the child or family”).

387. See generally, e.g., MO. REV. STAT. § 210.125; S.C. CODE ANN. § 63-7-700.

In 2008, a total of 267,000 children were removed from their homes as the result of a child maltreatment investigation. This represented 20.9% of the estimated 772,000 children identified as victims of child abuse and 3.6% of the 2.5 million children who were the subject of a child abuse report but for whom the existence of child abuse was not confirmed.³⁸⁸ Placement is usually in a foster home or with a relative of the child, with the latter generally preferred but the former, often out of necessity, more frequently employed.³⁸⁹

Foster care is ostensibly designed to provide children with a substitute home environment that will provide the “benefit of living in a family setting” when a child’s home is no longer safe, although whether this goal is generally met has been sharply questioned.³⁹⁰ Of the reported 463,000 children in foster care as of September 30, 2008, 47% (almost 220,000) were in a foster home with a non-relative, 24% in a foster home with a relative, 10% in an institution, 6% in a group home, 4% in a pre-adoptive home, 5% in a “trial home” visit, and 1% in supervised independent living.³⁹¹ The average age of a child in foster care was 9.8 years, with 29% of the children under the age of five at the time,³⁹² the latter a strikingly large number considering the developmental needs of children of that age. Furthermore, on average, children were 8.1 years of age when they entered foster care, with 39% of them below the age of five.³⁹³

A number of concerns have been noted about the use of the removal mechanism. For example, a temporary protective custody order can readily become in effect a permanent custody order if child welfare agencies are slow in returning these children to their home environment, which in turn can further overload the system charged with caring for the child and diminish its responsiveness to cases of abuse in general. In addition, the multiple responsibilities and lack of resources of these agencies may result in their failing to recognize when remedial steps by the child’s family have been completed.³⁹⁴

388. CHILD MALTREATMENT 2008, *supra* note 7, at 79, 86 tbl.6-6.

389. See Weithorn, *supra* note 11, at 1451, n.638.

390. MARTIN GUGGENHEIN, WHAT’S WRONG WITH CHILDREN’S RIGHTS 176 (2005).

391. CHILDREN’S BUREAU, U.S. DEP’T HEALTH & HUMAN SERVICES, THE AFCARS REPORT: INTERIM FY 2006 ESTIMATES AS OF JANUARY 2008(14) (2008), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm (2% ran away) [hereinafter THE AFCARS REPORT]. See also CHILD WELFARE INFORMATION GATEWAY, CHILDREN’S BUREAU, U.S. DEP’T HEALTH & HUMAN SERVICES, FOSTER CARE STATISTICS 3-4 (2010) [hereinafter FOSTER CARE STATISTICS].

392. *Id.*

393. *Id.*

394. See generally NELSON, *supra* note 99, at 89.

Indeed, although these placements generally are supposed to be temporary while efforts are made to improve the home environment, children are in foster care, on average, for 28.3 months, with 13% (67,088 children) in foster care for five years or longer.³⁹⁵ Further, only slightly more than half of the children exiting foster care are reunited with their parent(s) or other primary caretaker(s), with the remainder placed elsewhere or “aging” out of the system.³⁹⁶

Some critics also argue that because over one out of every three children removed from their homes are not found to have been maltreated (41.6% in 2008³⁹⁷), emergency removal policies are unjustified or at least overemployed.³⁹⁸ Supporters of emergency removal are likely to counter that only 3.6% of all children for whom a report of abuse was not substantiated after an investigation were removed from their home³⁹⁹ and some mistaken removals are justified by the need for state agencies to act quickly at an early point in time to prevent or minimize harm to a child. Nevertheless, even this relatively low rate of removal means that 90,000 children may have been inappropriately removed from their homes in 2008.

Others believe that foster care may simply substitute an unknown evil for a known one, worrying that separating children from their natural parents or other caretakers may cause substantial and long-term harm to children that is greater than any harm they were currently experiencing.⁴⁰⁰ Routinely in short supply, placements that are justified by the protection and help they are expected to provide can have the tragic and ironic consequence of actually harming the child, with some studies indicating that foster care may expose children to a greater risk of maltreatment than they experienced at home.⁴⁰¹ Also, concern has been expressed that needed

395. THE AFCARS REPORT, *supra* note 392 (the median length of stay was 15.5 months).

396. *Id.* (53% of the 289,000 children exiting foster care in 2006 were reunited with their parent(s) or other primary caretaker(s)).

397. CHILD MALTREATMENT 2008, *supra* note 7, at tbl.6-6.

398. Paul Chill, *Special Issue: Child Protection in the 21st Century: Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 457 (2003); Weithorn, *supra* note 11, at 1389 (“thousands of children annually are placed in [settings other than their family’s home] unnecessarily.”) (emphasis in the original). Others assert that “more than one million families a year . . . suffer false accusations of child abuse.” Krista MacNevin Jee, *Hearsay Exceptions in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?*, 19 WHITTIER L. REV. 559, 560 (1998) (citing Lesley and George Wimberly, *Don’t Abuse Parent’s Rights*, USA TODAY, May 13, 1993, at 14A) (it should be noted the authors of this editorial in USA TODAY were the president and director, respectively, of Victims of Child Abuse Legislation (“VOCAL”)).

399. CHILD MALTREATMENT 2008, *supra* note 7, at 79.

400. NELSON, *supra* note 99, at 89; Weithorn, *supra* note 11, at 1324.

401. *Id.* at 1324-25. This should not be construed to denigrate the gallant efforts of many foster parents who are dedicated to providing abused children with needed affection and support in a home-like setting.

services and mental health treatment are not being provided to child abuse victims over whom the state has assumed custody, exacerbating the harm they may incur from removal, as well as failing to remedy any psychological trauma they may have experienced in their home environment.⁴⁰² It has been estimated that 60-85% of the children in foster care have significant mental health problems, but that many of these children with emotional, behavioral, and psychiatric impairments are not being provided the mental health services they need and to which they are entitled and that the failure to provide these services is a significant obstacle to family reunification or adoption.⁴⁰³ Relatedly, there are a number of studies that have found that youth who “age out” of the foster care system are at enhanced risk of homelessness, drug and alcohol use, unplanned pregnancies, and poor mental health outcomes.⁴⁰⁴ Because of the marginal utility of foster care, some assert that less reliance should be placed on removal as a remedy to purported child abuse.⁴⁰⁵

Commentators have also tended to note the disproportionate impact of these orders on low income families and racial and ethnic minority populations.⁴⁰⁶ Because child abuse is often connected with poverty,⁴⁰⁷ the removal of a child is often tied to the economic status of the child’s caretaker.⁴⁰⁸ Children from families that make less than \$15,000 a year are twenty-two times more likely than children from families making more than this amount to be placed in the foster care system.⁴⁰⁹ Because racial and ethnic minority families are more likely to have a limited income, it has been asserted that — although not necessarily intentionally discriminatory

402. See *id.* at 1324; see also Melton, *supra* note 5, at 102 (“[abused] children who enter state care rarely receive treatment”).

403. THE BAZELON CENTER FOR MENTAL HEALTH LAW, Public Interest Groups and National Law Firm File Suit Against Nation’s Largest Child Welfare System (July 18, 2002), <http://www.bazelon.org/newsroom/archive/2002/7-18-02lacase.htm>. See generally also *Katie A. v. Los Angeles County*, 481 F.3d 1150 (9th Cir. 2007) (California’s voluntary participation in the federal Medicaid program, in which all states participate, requires it to provide mental health services to children in foster care, which includes screening these children for the existence of certain mental illnesses and taking steps to correct or ameliorate these mental illnesses).

404. See Margot B. Kushel et al., *Homelessness and Health Care Access After Emancipation: Results from the Midwest Evaluation of Adult Functioning of Former Foster Youth*, 161 ARCHIVES PEDIATRIC ADOLESCENT MED. 986, 986 (2007) (noting that youth must leave the foster care system between the ages of eighteen and twenty-one years, depending on state policy, and roughly 20,000 youth “age out” or are “emancipated” annually without being reunited with families).

405. NELSON, *supra* note 99, at 89.

406. See generally, e.g., Chin, *supra* note 333, at 88.

407. See Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring of the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 629 (1976).

408. NELSON, *supra* note 99, at 90.

409. GUGGENHEIN, *supra* note 390, at 192.

— these families are more likely to be the target of these removals.⁴¹⁰ Indeed, while the American population is almost 66% White-Non Hispanic, 12% Black-Non Hispanic, and 15% Hispanic,⁴¹¹ only 40% of the children in foster care were White-Non Hispanic, while 32% were Black-Non Hispanic and 19% were Hispanic.⁴¹² Similarly, children from a racial minority may spend more time in foster care, with the average stay in foster care for black children being forty-two months, while the average time in foster care for white children is twenty-eight months.⁴¹³

Finally, it has been noted that child abuse caseworkers are often given a great deal of discretion in determining whether a child's current placement is dangerous and justifies removal, which leads to inconsistencies in removal determinations and at various times a tendency to either be too quick or too slow in removing children from their home environment. For example, because caseworkers are often under enormous pressures both internally and externally to protect children from harm and to not be responsible for an agency's failure to provide needed protection, and because they must often make "Solomon-like" decisions about the safety of children based on very limited information and with few resources available to aid them in their decision, caseworkers may be unduly quick to remove children from their home environment.⁴¹⁴ This may be particularly likely to occur in cases involving neglect where the indicators of child abuse tend not to be as clear as for physical and sexual abuse, where more subjective determinations must be made by caseworkers, and where questionable parental behavior tends to have occurred over a lengthy period of time making it difficult to definitively ascertain if a child is sufficiently currently at risk to justify removal, which in turn provides greater potential for the caseworker to consciously or unconsciously interject personal views and biases regarding the worth of a given parent. It is perhaps not surprising that although neglect constituted the basis for 59.0% of the confirmed cases of child abuse,⁴¹⁵ neglect was the cited basis for the removal of the child from the home in at least 68.5% of all removals.⁴¹⁶

410. NELSON, *supra* note 99, at 90; Wald, *supra* note 407, at 629.

411. U.S. CENSUS BUREAU, UNITED STATES GENERAL DEMOGRAPHIC CHARACTERISTICS 2008 (last visited July 22, 2009) (calculating from the raw numbers provided).

412. THE AFCARS REPORT, *supra* note 391.

413. RACE MATTERS CONSORTIUM, WESTAT, <http://www.racemattersconsortium.org/docs/whopaper2.pdf>.

414. Nelson, *supra* note 99, at 88-90.

415. See *supra* note 19 and accompanying text.

416. CHILD MALTREATMENT 2008, *supra* note 7, at 79 ("More than two-thirds (68.5%) of the victims who were removed from their homes suffered from neglect, 8.8 percent from physical abuse, and 3.0 percent from sexual abuse. Nearly 16 percent (15.7%) of victims suffered from more than one type of maltreatment.").

Although the shortcomings associated with the use of protective custody and the sometimes inappropriate removal of children reported to be victims of child abuse have been widely noted, these removals of children from their home are authorized in all fifty states and the District of Columbia, with a preceding court order often not required.⁴¹⁷ Lawmakers apparently believe that the benefits of emergency removals generally outweigh any associated harms.

Once the responsible governmental agency completes its investigation and determines that child abuse exists, the agency is authorized to act to protect the child from a dangerous environment, which may include removing the child from the home if the child has not already been removed. If emergency protective custody has not been previously implemented, however, the legal custodians (typically the parents) of the child must be given notice and a hearing conducted before the child can be removed from the home environment at this stage.⁴¹⁸ In cases where the state previously exercised emergency protective custody, a post-removal hearing must be provided,⁴¹⁹ with the time frame dictated by the maximum length of the emergency order.⁴²⁰ As will be discussed in the following

417. ALA. CODE § 26-14-6; ALASKA STAT. § 47.10.142; ARIZ. REV. STAT. § 8-821; ARK. CODE ANN. § 12-12-516; CAL. WELF. & INST. CODE § 305; COLO. REV. STAT. § 19-3-401; CONN. GEN. STAT. § 17a-101g(e); D.C. CODE §§ 4-1301.07, 16-2309; DEL. CODE ANN. tit. 16, § 907; FLA. STAT. ANN. § 39.401; GA. CODE ANN. § 15-11-15 (2009); HAW. REV. STAT. ANN. § 587-22; IDAHO CODE ANN. § 16-1608; 325 ILL. COMP. STAT. ANN. 5/5; BURNS IND. CODE ANN. §§ 31-34-2-3, 31-33-8-8; IOWA CODE §§ 232.78, 79; KAN. STAT. ANN. §§ 38-2231(b), -2242, -2243; KY. REV. STAT. ANN. §§ 620.040(5), .090; LA. CHILD CODE ANN. art. 621; ME. REV. STAT. ANN. tit. 22, § 4023; MD. CODE ANN., FAM. LAW § 5-709; MASS. ANN. LAWS ch. 119, § 51B; MICH. COMP. LAWS SERV. § 722.626; MINN. STAT. § 260C.175; MISS. CODE ANN. §§ 43-21-303, -307; MO. REV. STAT. § 210.125; MONT. CODE ANN. § 41-3-301; NEB. REV. STAT. § 43-248; NEV. REV. STAT. ANN. § 432B.390; N.H. REV. STAT. ANN. §§ 169-C:6, -C:6-a; N.J. STAT. ANN. §§ 9:6-8.16, 8.29; N.M. STAT. § 32A-4-6; N.Y. SOC. SERV. LAW § 417; N.C. GEN. STAT. § 7B-302; N.D. CENT. CODE § 50-25.1-07; OHIO REV. CODE ANN. §§ 2151.31, .33; OKLA. STAT. ANN. tit. 10, § 7003-2.1; OR. REV. STAT. § 419B.150; 23 PA. CONS. STAT. § 6315; R.I. GEN. LAWS § 40-11-5; S.C. CODE ANN. § 63-7-620; S.D. CODIFIED LAWS §§ 26-7A-12, -13; TENN. CODE ANN. § 37-1-404; TEX. FAM. CODE ANN. § 262.104; UTAH CODE ANN. §§ 62A-4a-202.1-.3; VT. STAT. ANN. tit. 33, § 5301; VA. CODE ANN. § 63.2-1517; WASH. REV. CODE ANN. § 26.44.050; W. VA. CODE ANN. § 49-6-3; WIS. STAT. §§ 48.19, .981; WYO. STAT. ANN. § 14-3-208. Among the states not requiring a preceding court order are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and Wyoming.

418. See Chill, *supra* note 398, at 457.

419. *Id.*

420. See, e.g., VA. CODE ANN. § 16.1-253.4(c) (an emergency protective order shall expire at 11:59 p.m. on the third day following its issuance, unless expiration occurs at a time when court is not in session, in which case the order shall be extended until 11:59 p.m. of the next day the court is in session).

section, a number of other remedies can also be imposed at this point that limit the activities of the abusive individual.⁴²¹

In general, the number of removals of children reportedly abused has increased over time in the United States. There were 206,000 removals in 2003 as the result of a child abuse investigation or assessment,⁴²² 268,000 removals in 2004,⁴²³ and, as noted, 267,000 removals in 2008.⁴²⁴ Not surprisingly, the number of children in foster care has also increased, growing from 262,000 in 1982,⁴²⁵ to 483,000 in 1995,⁴²⁶ to 510,000 in 2006.⁴²⁷ Recognizing the potentially damaging effects of placing a child in the foster care system,⁴²⁸ Congress passed the Adoption and Safe Families Act in 1997.⁴²⁹ This law states that “reasonable efforts shall be made to preserve and reunify families,” both before and after the child is placed in foster care.⁴³⁰ In addition, this enactment sought to limit the duration of foster care placements by requiring child welfare agencies to seek parental termination if the child has been in foster care for fifteen of the previous twenty-two months, ostensibly to permit these children to be placed in a more permanent and suitable setting through adoption.⁴³¹

421. See *infra* Part V.D.

422. CHILD. BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2003 ch.6.

423. CHILD. BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2004 ch.6 [hereinafter CHILD MALTREATMENT 2004]. There were 317,000 removals in 2005. CHILD. BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2005 ch.6.

424. CHILD MALTREATMENT 2008, *supra* note 7, at 79.

425. COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, tbl.11-23 (19th ed. 2004), available at <http://waysandmeans.house.gov/media/pdf/greenbook2003/Section11.pdf>.

426. *Id.*

427. THE AFCARS REPORT, *supra* note 391. As of September 30, 2008, this number dropped to an estimated 463,000 children in foster care. FOSTER CARE STATISTICS, *supra* note 391, at 1.

428. For criticisms of the foster care system, see generally, e.g., John Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child’s Right to Permanence*, 54 S. CAL. L. REV. 633 (1981); Wald, *supra* note 407; Editorial, *Suffer the Children*, N.Y. TIMES, Aug. 27, 2006, at 14NJ-12; Theola Labbe, *Nation’s Courts Faulted on Foster Care*, WASH. POST, May 19, 2004, at A10.

429. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997). For a description of state legislation adopted in response to the passage of this law, see NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE CHILD WELFARE LEGISLATION 2006 (Dec. 2007).

430. 42 U.S.C.S 671(a)(15)(B).

431. 42 U.S.C.S. 675(5)(E). Social services agencies often face a quandary with regard to foster care placements as they may be torn between giving children’s parents an opportunity to reform themselves and terminating parental relationships so that adoptive parents can be sought for the children. But for older children in particular, finding adoptive parents can be problematic, which in turn may lead social services agencies to want to extend the period of time available for reform. Concerns that bureaucratic inertia was contributing to these lengthy placements, however, ultimately led Congress, as described, to generally shorten the time social services agencies have to place children in foster care to fifteen months.

Indeed, parental rights had been terminated for 79,000 (15%) of the 510,000 children in foster care on September 30, 2006.⁴³² Nonetheless, there were 129,000 children in foster care on that date waiting to be adopted (25% of the children in foster care), and only 50,379 children were adopted from the foster care system in FY 2006.⁴³³ Furthermore, on average, the children waiting to be adopted had been removed from their parents or caretakers at the age of five and had been in continuous foster care for over three years (39.4 months).⁴³⁴

The Adoption and Safe Families Act has been controversial.⁴³⁵ Some critics claim that this legislation fails to recognize that child abuse and domestic violence may be connected, and that it inappropriately facilitates the termination of the parental rights of a battered spouse for failing to prevent the batterer from also injuring the child.⁴³⁶ The battered spouse may be in a situation where making the necessary changes to the home environment to permit the return of the child placed in foster care is very difficult. For example, the battered spouse may be dependent on the financial support of the abusive partner.⁴³⁷ Others have expressed concern that the mandatory termination of parental rights and the encouragement of earlier adoption “devalues the essentialness of preserving the familial bond.”⁴³⁸ One way in which this legislation devalues family preservation, it has been asserted, is by rewarding states with monetary bonuses for achieving adoptions, but failing to provide bonuses for reunifications.⁴³⁹ In addition, as discussed, large numbers of children continue to languish in foster care and, despite efforts to facilitate termination of parental rights, the number of children in foster care actually increased 5.6% from 1995 to 2006.⁴⁴⁰

432. THE AFCARS REPORT, *supra* note 391.

433. *Id.*

434. *Id.*

435. For criticisms of this enactment, see Sean Ronan, *No Discretion, Heightened Tension: The Tale of the Adoption and Safe Families Act in New York State*, 48 BUFF. L. REV. 949 (2000); Rachel Venier, Comment, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Rights*, 8 AM. U. J. GENDER SOC. POL'Y & L. 517 (2000).

436. Venier, *supra* note 435, at 520-21. Similar concerns have been raised that a battered spouse can lose custody of a child for a “failure to protect” the child because the spouse “permitted” the child to witness the spouse being battered. Dunlap, *supra* note 20, at 566.

437. For a discussion of the impact of domestic violence, see DONALD D. DUTTON, *RETHINKING DOMESTIC VIOLENCE* (2006).

438. Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 N.W. J.L. & SOC. POL'Y 303, 303 (2006) (noting that this devaluation has had a disparate impact on African-American children).

439. Richard P. Barth, Fred Wulczyn, & Tom Crea, *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 377 (2005).

440. See *supra* note 426-27 and accompanying text.

D. Limiting Contact with the Child and the Imposition of Other Conditions

If a child has been removed from his or her home and parental rights (or the custodial rights of a non-parent) have not been terminated, a court may grant visitation rights to the parent (or another adult who had legal custody of the child), even though the removal was the result of reported child abuse by this person.⁴⁴¹ Courts and legislatures are often reluctant to terminate all contact with the child for a number of reasons. For example, (1) an investigation may be ongoing and abuse has not yet been confirmed, (2) abruptly terminating all contact can have a traumatic and deleterious impact on the child, (3) there may be hope that the child can ultimately be reunited with the parent (or other custodial adult), particularly if remedial services are provided, with the maintenance of emotional ties between the two a key to reunification, and (4) until parental or other custodial rights have been terminated, this person retains residual child-related rights that must be respected.⁴⁴²

As a result, supervised access to the child may be permitted, with a judge determining the appropriate level of contact. However, access may be approved only if the visit is supervised, preferably by someone trained to oversee this interaction.⁴⁴³ Further, access may be limited to an approved visitation center to ensure the safety of the child.⁴⁴⁴ A judge may impose other conditions as well before authorizing visitation, such as enrollment in an anger management or parental skills course or participation in some other treatment or counseling program.⁴⁴⁵ A failure to comply with these imposed conditions can result in greater restrictions being placed on access to the child, the termination of all access, or even the termination of all parental rights.⁴⁴⁶

Criticism has been directed at judicial decisions both to limit contact and to authorize limited contact.⁴⁴⁷ The former can sever vital bonds between the child and the parent (or other custodial adult) and thereby

441. See generally Peter Jaffe et al., *Courts Responding to Domestic Violence: Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. CENTER FAM. CHILD. & CTS. 81 (2005); Amy Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?* 47 UCLA L. REV. 813, 817 (2000).

442. See Jaffe et al., *supra* note 441, at 89. See also CAL. FAM. CODE §§ 3027.5, 3048; LA. REV. STAT. ANN. § 9:362(6); N.J. STAT. ANN. § 2A:12-7.

443. Jaffe et al., *supra* note 441, at 89.

444. *Id.* at 89-90.

445. See, e.g., CAL. PENAL CODE § 273.1; LA. REV. STAT. ANN. § 46:2136(A)(4).

446. See, e.g., LA. REV. STAT. ANN. § 9:366(B).

447. Levin, *supra* note 441, at 817.

further traumatize the child, while the latter can enable an abusive parent to gain access to the child and lead to additional abuse or traumatization. Such adverse results may stem from affording judges almost complete discretion in making these decision, while providing them with little guidance or the information needed to make these decisions wisely.⁴⁴⁸

Because of the importance of these decisions, a case-by-case determination based on an informed evaluation of the risks, the costs, and the benefits associated with these contacts and related requirements should be conducted. Recognition should also be given to the fact that the dynamics of child abuse and the resulting impact on and risk to the child vary enormously. If the abuse was minimal or limited, further abuse is relatively unlikely, and future contacts with the child or the imposition of treatment or counseling requirements are likely to benefit the child and enhance the return of the child, such steps should be authorized. Similarly, accompanying services should be ordered that can promote the likelihood of such steps being successful.

Because of a concern about judicial error in making such orders, some critics have called for limiting judicial discretion regarding visitation.⁴⁴⁹ Relatedly, Louisiana enacted the Domestic Violence Relief Act in 1992, which severely limits a court's ability to grant visitation rights to an abusive parent.⁴⁵⁰ This enactment allows supervised visitation only if the parent is participating in a treatment program, and permits unsupervised visitation only when it can be shown that such a visit would not place the child in danger.⁴⁵¹ Louisiana forbids even supervised visitation for sexual abusers unless it has been determined that such a visitation would be in the best interests of the child.⁴⁵²

In addition, although judges have the final say, it has been asserted that CPS caseworkers have come to play an increasingly significant role in influencing these decisions.⁴⁵³ Although ascertaining the child's best interests, the legal standard typically employed in these proceedings,⁴⁵⁴ has

448. *Id.*

449. See Prentice White, *You May Never See Your Child Again: Adjusting the Batterer's Visitation Rights to Protect Children from Future Abuse*, 13 AM. U.J. GENDER SOC. POL'Y & L. 327 (2005).

450. LA. REV. STAT. ANN. §§ 9:361-369.

451. *Id.*

452. *Id.*

453. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 740-44 (1988).

454. See, e.g., DEL. CODE ANN. tit. 13, § 722; see also Devide Ezra, *Sticks and Stones Can Break My Bones, But Tobacco Smoke Can Kill Me: Can We Protect Children from Parents That Smoke?* 13 ST. LOUIS U. PUB. L. REV. 547, 571 (1994); see also generally Mary Kisthardt, *Working in the Best Interests of Children: Facilitating Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REV. 1 (2006).

always been a daunting task,⁴⁵⁵ judicial deference may be driven by the increased caseload of many state judges⁴⁵⁶ and by the fact that caseworkers involved in the removal of the child and subsequent supervision of meetings between the child and the parent (or other legal custodian) have greater first-hand knowledge about the behavior and attitudes, as well as the strengths and weaknesses, of the parent (or other legal custodian). Routine deference to caseworkers, however, may be questioned as it adds yet another responsibility to their already heavy caseload, requires an expertise that arguably extends beyond their training (e.g., interpreting and applying the relevant legal standard), and necessitates that the investigator of the reported abuse, who is expected to err on the side of protecting the child's safety, now assume the neutral and relatively detached role of weighing and balancing the interests of both the child and the parent (or other legal custodian). Nevertheless, input from a range of sources, including information that may be forthcoming from caseworkers, should be made a routine component of these judicial decisions so that judges can best promote and enhance the welfare of the child.

E. Appointment of a Guardian Ad Litem

In an effort to supply another means of protecting abused children, child abuse reporting statutes often provide for the appointment of a guardian ad litem (GAL) to represent the interests of the child during related judicial proceedings. Ohio enacted the first provision for appointing GALs in child abuse cases in 1969,⁴⁵⁷ while New York and Colorado mandated such appointments in 1973.⁴⁵⁸ In 1974, CAPTA mandated that all states seeking supplemental federal funding for their child abuse reporting networks appoint GALs in child abuse cases.⁴⁵⁹ This requirement was based on the belief that the children involved in these cases need an independent voice to advocate for their interests.⁴⁶⁰

455. See generally GOLDSTEIN ET AL., *supra* note 354.

456. Chief Justice E. Norman Veasey, Delaware Supreme Court, *State Justices' Mission Is to Improve System*, 31(12) THE THIRD BRANCH (1999), available at <http://www.uscourts.gov/ttb/dec99ttb/interview.html> ("Yes, [state courts are] swamped by sheer numbers of cases, and yes, we're swamped by the complexity of those cases.").

457. OHIO REV. CODE ANN. § 2151.281(B).

458. Robert E. Shepherd, Jr., & Sharon S. England, "I Know the Child Is My Client, But Who Am I?", 64 FORDHAM L. REV. 1917, 1920 (1996).

459. 42 U.S.C. § 5103(b)(2)(G) (later revised for clarity in 42 U.S.C.S. § 5106a(b)(2)(A)(xiii)).

460. Inga Laurent, Note, "This One's for the Children": The Time Has Come to Hold Guardians Ad Litem Responsible for Negligent Injury and Death to Their Charges, 52 CLEV. ST. L. REV. 655, 660 (2004-05).

Although most states enacted GAL provisions shortly after the passage of CAPTA,⁴⁶¹ states differ as to the role that a GAL is to fill and the requisite qualifications to be a GAL.⁴⁶² In some states, the responsibilities of the GAL are specifically designated, which may include meeting with the child, accessing the child's records, participating in hearings, conducting investigations, interviewing and examining witnesses, making recommendations to the court, explaining proceedings to the child, and reporting and describing the child's wishes.⁴⁶³ In other states, these responsibilities may be stated relatively generically, such as providing representation of the rights, interests, welfare, and well-being of the child.⁴⁶⁴

It has been argued that most states fail to provide sufficient guidelines for GALs because, while the goals to be achieved may be stated, the means that should be used to reach them are not.⁴⁶⁵ Explicit legislative or judicial guidance to GALs can be especially useful when the best interests of the child diverge from what the child wants. In addition, as discussed immediately below,⁴⁶⁶ in some states GALs are not required to have professional training and may include lay volunteers,⁴⁶⁷ and such guidance may be particularly helpful for GALs who cannot rely on their professional training to inform and direct their actions.

With regard to the qualifications needed to serve as a GAL, CAPTA did not specify that GALs must be attorneys and some states began in the late 1970s to use lay volunteers for this role, in part because volunteers were easier and cheaper to recruit and retain than attorneys.⁴⁶⁸ Today, there is considerable variation in who serves as a GAL both among and within the states, with private attorneys, public defenders, Legal Aid attorneys, social workers, Court Appointed Special Advocate ("CASA") volunteers, and other individuals variously used to provide representation for abused children.⁴⁶⁹

Some states do require GALs to be attorneys to ensure that the child receives needed and adequate legal assistance.⁴⁷⁰ However, concerns have

461. Bridget Kearns, *A Warm Heart but a Cool Head: Why a Dual Guardian Ad Litem System Best Protects Families Involved in Abused and Neglected Proceedings*, 2002 WIS. L. REV. 699, 707 (2002).

462. *Id.*

463. *See, e.g.*, MINN. STAT. § 260C.163(5); 42 PA. CONS. STAT. ANN. § 6311.

464. *See, e.g.*, ALA. CODE § 26-14-11.

465. Laurent, *supra* note 460, at 663.

466. *See infra* notes 468-69 and accompanying text.

467. Laurent, *supra* note 460, at 661.

468. *Id.*

469. *Id.*

470. Fourteen states require GALs to be attorneys. ALA. CODE § 26-14-11; ARK. CODE ANN. § 9-27-316(f)(1); COLO. REV. STAT. § 19-1-103(59); KAN. STAT. ANN. § 38-2205; MICH. COMP. LAWS

been raised regarding whether attorneys sufficiently research such cases or devote as much attention to these appointments as GALs who are not attorneys.⁴⁷¹ It has been asserted that attorney GALs are typically young, inexperienced, and working only for the fee provided,⁴⁷² and to be less likely to visit their clients before the court hearing or to thoroughly investigate the case, perhaps because the compensation for these cases is relatively low.⁴⁷³ In some states, attorney GALs receive minimal training (which in some jurisdictions can be satisfied by a single course in law school) and are provided scant guidelines for determining the child's best interests.⁴⁷⁴ Concern has also been expressed that their training is insufficient to prepare them to satisfy the multiples roles they must fulfill, which include the roles of investigator, advocate, facilitator, and mediator, and, as a result, the "average attorney is in no better position than a lay[person] to determine what is in the child's best interests."⁴⁷⁵

The American Bar Association at one point concluded that representatives trained solely in the law may not be the appropriate choice to fulfill the GAL function, with psychologists or social workers perhaps a better choice.⁴⁷⁶ Other commentators, however, have responded that although GALs who are not attorneys may have the time and desire to become more fully involved in these cases, they may not have the necessary legal expertise to enable them to adequately represent the child and make effective recommendations to the court.⁴⁷⁷

Much of the criticism targeted at GALs focuses on their lack of training.⁴⁷⁸ Each state has its own training standards for GAL appointees⁴⁷⁹

SERV. § 722.630; NEB. REV. STAT. § 43-272(3); N.J. STAT. ANN. § 9:6-8.23; N.M. STAT. ANN. § 32A-4-10; N.Y. FAM. CT. ACT §§ 1016, 242; 42 PA. CONS. STAT. ANN. § 6311; TENN. CODE ANN. § 37-1-149; UTAH CODE ANN. § 78A-2-227; VA. CODE ANN. § 16.1-266; WIS. STAT. § 48.235.

471. Kearns, *supra* note 461, at 728-29.

472. Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 111 (2002).

473. Kearns, *supra* note 461, at 728-29.

474. *Id.* at 720-22.

475. Charles T. Cromley, "As Guardian ad Litem I'm in a Rather Difficult Position," 24 OHIO N.U. L. REV. 567, 587 (1998).

476. Kearns, *supra* note 461, at 729-30. More recently, Howard Davidson, Director of the American Bar Association Center on Children and the Law, asserted that the ideal solution would be for each child to have both an attorney and a non-lawyer advocate because of the different contributions they can make. David Crary, *States Urged to Get Abused Kids' Lawyers*, ASSOCIATED PRESS, Apr. 24, 2007, available at www.abanet.org/youthatrisk/4-24-07.doc. As described below, such an approach considerably expands the cost, potential delay, and complexity of these proceedings. See *infra* notes 485-86 and accompanying text.

477. See Kearns, *supra* note 461, at 724-25; see also Crary, *supra* note 476.

478. Ducote, *supra* note 472, at 134.

479. See, e.g., MONT. CODE ANN. § 41-3-112(2) ("The guardian ad litem must have received appropriate training that is specifically related to serving as a child's court-appointed representative.").

and, in some states, GALs are either untrained or receive inadequate training.⁴⁸⁰ Nevertheless, GALs may be entitled to absolute immunity from liability, creating a system where there is little accountability or incentive to provide appropriate representation.⁴⁸¹ Additionally, one study found GALs to be “the professionals least trained about domestic violence of any actors in the civil justice system.”⁴⁸² Because domestic violence and child abuse frequently co-occur,⁴⁸³ GALs who are not attentive to this potential linkage may make recommendations that do not adequately promote the best interests of the child.⁴⁸⁴ For example, they may recommend that a child be returned to a family where violence is relatively pervasive or fail to recognize the challenges faced by a battered spouse in meeting required conditions for the return of a child.

Some commentators promote the use of a dual GAL system where non-attorney volunteers are paired with attorneys, thereby enabling volunteers to couple their desire to help and greater availability with attorneys’ legal expertise.⁴⁸⁵ However, such a system can be expensive, inefficient, and difficult to administer and maintain.⁴⁸⁶

Others advocate eliminating GALs completely and argue that mandating more education for judges and lawyers on domestic violence issues is a better means of protecting these children without unnecessarily undermining parental rights or adding to the costs and complexity of these judicial proceedings.⁴⁸⁷ It should be noted, however, that much of the criticism of GALs has arisen in conjunction with child custody proceedings where GALs unfamiliar with the dynamics of domestic violence inappropriately seek to promote joint custody. The concern raised here is that GALs may fail to recognize that they are facilitating frequent contact between a child and an abusive parent and that the parent who opposes joint custody may be seeking to protect the child rather than attempting to exact revenge on his or her spouse.⁴⁸⁸ This criticism may carry less weight in conjunction with child abuse proceedings where evidence of prior child

480. Ducote, *supra* note 472, at 112.

481. *Id.* at 148.

482. *Id.* at 138 (describing a study by the National Council of Juvenile and Family Court Judges).

483. Dunlap, *supra* note 20, at 568 (“By some estimates, [domestic violence and child abuse] co-exist 45 to 70% of the time.”).

484. Ducote, *supra* note 472, at 135-39.

485. Kearns, *supra* note 461, at 730-33; Crary, *supra* note 476.

486. For an opposing viewpoint, see Kearns, *supra* note 461, at 732.

487. See generally Ducote, *supra* note 472, at 150-51. Typically, the parents or other legal guardians of the child must pay for the services provided by the GAL unless they can show that they cannot afford them, in which case the state may pay for these services. See, e.g., CONN. GEN. STAT. § 46b-129a.

488. Ducote, *supra* note 472, at 135-39.

abuse has been introduced. However, the danger remains that a GAL with a limited understanding of domestic violence can either inadvertently place the child at further risk by promoting an inappropriate or premature return of the child or, alternatively, by unwisely resisting reunification efforts enhance the psychological trauma of the child removed from his or her home and separated from a non-abusive or rehabilitated abusive parent who with proper support services can be entrusted with the welfare of the child.

Some states, in lieu of or to supplement a GAL, appoint counsel for these children and explicitly mandate that they provide them with representation in these proceedings.⁴⁸⁹ A GAL is traditionally expected to advocate for the best interests of the child, which means that the GAL will exercise his or her own judgment to determine what those interests are and how best to achieve them. This could result in a GAL supporting an outcome that is contrary to the expressed wishes of the child. In contrast, an appointed attorney is expected to assume the lawyer's traditional role of legal representative for a client. In the context of child abuse proceedings, this requires advocating for the child's wishes regardless of whether they are in the child's best interest.⁴⁹⁰ One advantage of this approach is that an attorney can be expected to perform better when placed in a familiar role.⁴⁹¹ However, if the position advocated by the attorney is not necessarily in the child's best interests, the separate appointment of a GAL may be appropriate.

Some commentators support a hybrid model where children above a certain age are appointed an attorney who acts at the child's direction, while younger children are represented by an attorney who advocates for the child's best interests.⁴⁹² Alternatively, it has been suggested that if a child is sufficiently mature to be able to give competent direction to an attorney, the attorney should provide representation as he or she would for any other client.⁴⁹³

489. Fifteen states require the appointment of attorneys either in addition to or in lieu of GALs. CONN. GEN. STAT. §§ 45a-620, 46b-129a; 705 ILL. COMP. STAT. ANN. 405/2-17; IOWA CODE §§ 232.71C(1), .89(1); KY. REV. STAT. ANN. §§ 26A.140(1)(a), 620.100(1); LA. CHILD CODE ANN. art. 607; MD. COURTS & JUDICIAL PROCEEDINGS CODE ANN. § 3-813; MASS. ANN. LAWS ch. 119, § 29; MISS. CODE ANN. § 43-21-121; MONT. CODE ANN. § 41-3-425; N.C. GEN. STAT. § 7B-601; S.C. CODE ANN. § 63-7-1620; S.D. CODIFIED LAWS § 26-8A-18; TEX. FAM. CODE ANN. §§ 107.001, .002, .011, .021; W. VA. CODE ANN. § 49-6-2; WYO. STAT. ANN. § 14-3-211.

490. See Laurent, *supra* note 460, at 664; see also Jane M. Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Sonit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L.Q. 393, 393 (2007).

491. Shepherd & England, *supra* note 458, at 1941-42.

492. Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240, 1240-41 (2006); see also, e.g., N.M. STAT. ANN. § 32A-4-10 (requiring a GAL who is an attorney for children under the age of fourteen, and requiring counsel for children over the age of fourteen).

493. Shepherd & England, *supra* note 458, at 1941-42.

Regardless of how the GAL role is structured, the ultimate goal must be to ensure that the judicial decision maker receives all information necessary for and relevant to a full and fair appraisal of the child's needs and interests so that a determination can be reached that best promotes the welfare of the child. At the same time, this structure must facilitate prompt and timely decisions, because delay, particularly in the case of a child removed from his or her home, can itself have deleterious effects on the child.

F. Mandatory Fatality Review

According to the Department of Health and Human Services, an estimated 1,740 children died from abuse during federal fiscal year 2008.⁴⁹⁴ Child fatality review teams charged with investigating the deaths of children have been proposed as a method for preventing both such fatalities and, by examining the root causes of these fatalities, child abuse in general.⁴⁹⁵ These teams generally include prosecutors, coroners, law enforcement personnel, CPS workers, and/or public health care providers.⁴⁹⁶ The first such team is believed to have been established in Los Angeles County in 1978, where it quickly reclassified several cases of child fatalities from "natural or accidental" to "death at the hands of another."⁴⁹⁷ Child fatality reviews have been credited with reopening previously closed cases for needed further investigation and sparking various improvements in policy and procedures across the country.⁴⁹⁸ Currently, all states, but one, have child fatality reviews at the state or local level.⁴⁹⁹ This is in part a response

494. CHILD MALTREATMENT 2008, *supra* note 7, 55.

495. Nanette Elster & M. Gabriela Alcalde, *Currents in Contemporary Ethics: Child Fatality Review: Recommendations for State Coordination and Cooperation*, 31 J.L. MED. & ETHICS 303, 303 (2003).

496. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVICES, CHILD ABUSE AND NEGLECT FATALITIES: STATISTICS AND INTERVENTIONS 6 (2009), available at <http://www.childwelfare.gov/pubs/factsheets/fatality.pdf>.

497. Elster & Alcalde, *supra* note 495, at 303.

498. *Id.*

499. ALA. CODE §§ 26-16-90 to -99; ALASKA STAT. §§ 12.65.120-.140; ARIZ. REV. STAT. § 36-3501; ARK. CODE ANN. §§ 20-27-1701 to -1707; CAL. PENAL CODE §§ 11174.32-.35; COLO. REV. STAT. §§ 25-20.5-401 to -409; CONN. GEN. STAT. § 46a-13L; DEL. CODE ANN. tit. 31, §§ 320-24; FLA. STAT. ANN. § 383.402; GA. CODE ANN. §§ 19-15-1 to -7; HAW. REV. STAT. ANN. §§ 321-341 to -346; 20 ILL. COMP. STAT. ANN. 515/1-515/99; IND. CODE ANN. § 31-33-24-3; IOWA CODE § 135.43; KAN. STAT. ANN. §§ 22a-241 to -246; KY. REV. STAT. ANN. § 211.684; LA. REV. STAT. ANN. § 46:56(F)(4)(a); ME. REV. STAT. ANN. tit. 22, § 4004; MD. CODE ANN., HEALTH-GEN. §§ 5-701 to -709; MASS. ANN. LAWS ch. 38, § 2A; MICH. COMP. LAWS SERV. § 722.627b; MINN. STAT. § 256.01; MISS. CODE ANN. § 43-15-51; MO. REV. STAT. §§ 210.192-.196; MONT. CODE ANN. § 50-19-403; NEB. REV. STAT. § 71-3406; NEV. REV. STAT. ANN. §§ 432B.403-.409; N.H. EXEC. ORDER NO. 91-4, available at <http://ucconline.sos.state.nh.us/EXECUTIVE%20ORDERS/Gregg1991-4.pdf>; N.J. STAT. ANN. § 9:6-8.88; N.M. CODE REG. § 7.4.5; N.Y. SOC. SERV. LAW § 422-B; N.C. GEN. STAT. §§ 7B-1400 to -1414; N.D. CENT. CODE §§ 50-25.1-04.2 to -04.5; OHIO REV. CODE ANN. § 307.621-.66; OKLA. STAT. ANN.

to the enactment of the federal Child Abuse Prevention and Treatment Act Amendments of 1997, which required states seeking to receive grants for their child welfare prevention and treatment programs to conform to federal guidelines requiring child fatality review teams.⁵⁰⁰

However, child fatality reviews have raised some concerns. One is the lack of uniformity in how these reviews are conducted. Inconsistent findings can impair their ability to “identify failures or oversights in care, gaps in service, trends and patterns, and system weaknesses” in the child protective services system.⁵⁰¹ For example, there are a variety of classifications that child fatality review teams use to depict a fatality (e.g., preventable, unexpected, intentional); states also differ in the age ranges of children for whom a fatality review must be conducted.⁵⁰² Another problem is a lack of coordination between jurisdictions, which becomes especially crucial when a child is a resident of one state but dies in another state, or on an Indian reservation or a military base.⁵⁰³

A third impediment is the lack of funding for and resources available to these review teams.⁵⁰⁴ Insufficient funding can delay or limit investigations, stymie their timely completion, and hinder follow-up to protect other identified possible victims of abuse. Furthermore, because of their limited resources child fatality review teams must often rely on professionals who volunteer their time; compensating them could make needed professionals

tit. 22, §§ 1601–03, tit. 10, § 1150; OR. REV. STAT. §§ 418.747–48; 23 PA. CONS. STAT. § 6365(d); R.I. GEN. LAWS § 42-73-7; S.C. CODE ANN. § 20-7-5920; MINNEHAHA COUNTY INFANT AND CHILD MORTALITY REVIEW COMMITTEE, 2002 FINAL REPORT, available at http://www.ican-ncfr.org/library/CDR_SD_Regional_2002.pdf (describing a local child death review team in South Dakota; information on the state program can be found at <http://www.childdeathreview.org/spotlightSD.htm>); TENN. CODE ANN. § 68-142-101 to -111; TEX. FAM. CODE ANN. §§ 264.501–.515; UTAH FATALITY REVIEW COMMITTEE, UTAH DEP’T OF HEALTH, available at <http://health.utah.gov/vipp/childFatality/review.html>; VT. STAT. ANN. tit. 33, § 4917 (establishing multidisciplinary teams to investigate child abuse reports; the Vermont Fatality Review Committee grew out of this legislation, see VERMONT CHILD FATALITY REVIEW COMMITTEE, BIENNIAL REPORT (2000), available at http://www.ican-ncfr.org/library/CDR_VT_1998.pdf); VA. CODE ANN. § 32.1-283.1; WASH. REV. CODE ANN. § 70.05.170; W. VA. CODE ANN. § 49-5D-5; WIS. STAT. § 48.981; WYO. STAT. ANN. §§ 14-3-201 to -215. Idaho established a child fatality review program in 1998, but the state no longer has such a program in place. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T HEALTH & HUMAN SERVICES, CHILD ABUSE AND NEGLECT FATALITIES: STATISTICS AND INTERVENTIONS (2009), available at <http://www.childwelfare.gov/pubs/factsheets/fatality.cfm#comm>.

500. 42 U.S.C.S. §§ 5106a(c)(1)(B)(ii), (c)(4)(A)(iii)(II). See also Assembly Standing Committee on Children and Families, Notice of Public Hearing (2005), available at <http://assembly.state.ny.us/comm/Children/20051114>.

501. Elster & Alcalde, *supra* note 495, at 304.

502. *Id.* at 304–05.

503. *Id.* at 305.

504. *Id.* at 306.

more available and enable these teams to both react more quickly and to spend more time on these cases.⁵⁰⁵

Fourth, because post-fatality review sadly cannot help a child who is subsequently identified to have been the victim of abuse, these determinations tend to call for sanctions to be imposed on those individuals considered responsible for the child's death. But these calls may be attributable at least in part to an understandable sympathy for a child who is now deceased or the twenty-twenty vision of hindsight, while it may have been much more difficult to ascertain the proper course of action at the time the events occurred. Also, although these reviews may have the additional goal of identifying other at-risk children, because abuse tends to be case-specific and intra-familial, this will be a difficult goal to accomplish. Further, an emphasis on assigning fault provides little assistance to family units needing services to prevent future abuse.

Despite these limitations, child fatality reviews can enhance the identification and prevention of child abuse by improving coordination and cooperation among law enforcement, protective services, health agencies, and other relevant bodies.⁵⁰⁶ In addition, because child fatality review teams are comprised of individuals from multiple disciplines and agencies, team members will be exposed to different perspectives, may gain access to information and insights held by different agencies, and can take lessons learned back to their respective agencies.⁵⁰⁷

G. Central Registry

Another possible mechanism to prevent child abuse is to create a central registry that maintains in a single location readily accessible records of reported or confirmed child abuse. As discussed, the American Academy of Pediatrics' model reporting law called for each state to create a central registry to track incidents of abuse.⁵⁰⁸ Currently, forty-two states and the District of Columbia mandate a central registry.⁵⁰⁹

505. *Id.*

506. Chris A. Schutz, *Review of Selected 1997 California Legislation: Child Welfare: Lance's Law: Expanding Who May Look at Child Abuse Reports*, 29 MCGEORGE L. REV. 623, 629 (1998).

507. Elster & Alcalde, *supra* note 495, at 304.

508. As noted, several states had already established central registries at the time of this proposal. See *supra* note 145 and accompanying text.

509. ALA. CODE § 26-14-8; ALASKA STAT. § 47.17.040; ARIZ. REV. STAT. §§ 8-804 to -807; ARK. CODE ANN. §§ 12-18-901; CAL. PENAL CODE § 11170; CONN. GEN. STAT. § 17a-101k; DEL. CODE ANN. tit. 16, §§ 905-06, 923; D.C. CODE §§ 4-1302.01 to .09; FLA. STAT. ANN. §§ 39.201-202; GA. CODE ANN. §§ 49-5-181, -184, -41; HAW. REV. STAT. ANN. § 350-2; IDAHO CODE ANN. § 16-1629; 325 ILL. COMP. STAT. ANN. 5/7.14, 5/7.7, 5/11.1; IND. CODE ANN. §§ 31-33-26-2, -8-13; IOWA CODE §§ 235A.14-.15, .18; LA. CHILD CODE ANN. art. 616; LA. REV. STAT. ANN. § 46.56; MD. CODE ANN., FAM. LAW §§ 5-706.1, -707, -714; MASS. ANN. LAWS ch. 119, §§ 51F, E; MICH. COMP. LAWS SERV. § 722.627; MISS.

In addition, in 2006 Congress directed the Secretary of Health and Human Services, in conjunction with the United States Attorney General, to establish a national electronic registry of substantiated reports of child abuse.⁵¹⁰ Its information is to be accessible only to federal, state, or local governmental entities or agencies that need it to carry out their responsibilities under the law to protect children from child abuse. The information in the national registry is to be drawn from existing substantiated state reports of abuse, but states are not required to modify their existing registries or reports.

The rationale given for establishing a central registry is that it provides a readily accessible, comprehensive list of past reports of child abuse that

CODE ANN. §§ 43-21-257, -261; MO. REV. STAT. §§ 210.145, .150, .152; MONT. CODE ANN. §§ 41-3-202, -205; NEB. REV. STAT. §§ 28-718, -720 to -722, -726, -727; NEV. REV. STAT. ANN. §§ 432.100-.130, 432B.290; N.H. REV. STAT. ANN. § 169-C:35; N.J. STAT. ANN. §§ 9:6-8.11, -8.40a, -8:10a; N.Y. Soc. SERV. LAW § 422; N.C. GEN. STAT. §§ 7B-311, -2902; N.D. CENT. CODE §§ 50-25.1-05.5, -11; OHIO ADMIN. CODE §§ 5101:2-34-08.1, 5101:2-35-16 to -77; OKLA. STAT. ANN. tit. 10, §§ 7111, 7005-1.4; OR. REV. STAT. §§ 419B.030, .035; 23 PA. CONS. STAT. ANN. §§ 6331-44; R.I. GEN. LAWS §§ 42-72-7, -8; S.C. CODE ANN. §§ 63-7-1910 to -2010; S.D. CODIFIED LAWS §§ 26-8A-10, -11, -13; TENN. CODE ANN. §§ 37-1-406, -612; TEX. FAM. CODE ANN. §§ 261.001, -.002; UTAH CODE ANN. §§ 62A-4a-1003 to -1006, -412; VT. STAT. ANN. tit. 33, § 4916; VA. CODE ANN. §§ 63.2-1514, 15; W. VA. CODE § 15-2C-1 to -8 (limited to criminal convictions and registered sex offenders); WYO. STAT. ANN. § 14-3-213, -214. While Kansas law has not specifically established a state registry for child abuse reports, it does create a system for the exchange of information among specifically identified persons and entities “[t]o facilitate investigation and ensure the provision of necessary services to children who may be in need of care and such children’s families.” KAN. STAT. ANN. § 38-2210. In addition, the Kansas Supreme Court has developed a Child in Need of Care (CINC) Information System. CHILDREN’S BUREAU, U.S. DEP’T HEALTH & HUMAN SERVICES, KANSAS: STANDARDIZED COURT ORDERS, EVALUABILITY ASSESSMENT SITE VISIT REPORT (2009), <http://www.acf.hhs.gov/programs/cb/pubs/statecip/volume2/kansas.htm#36>. As will be discussed, Colorado repealed its statute creating a central registry, effective 2004. COLO. REV. STAT. § 19-3-313. See *infra* note 525 and accompanying text.

510. See 42 U.S.C. § 16990 (Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248)). Before creating this national registry, however, this law charged the Secretary of Health and Human Services with conducting and presenting to Congress a study on the feasibility of establishing requisite data collection standards. While work continues on a final report, an interim report on the feasibility of a national registry was published in May of 2009 concluding: (1) the potential benefits of a national registry are largely unknown, (2) there is a lack of incentives for states to participate that could result in a database that includes little information and does not fulfill its intent, (3) modifications were needed for the registry to accurately identify perpetrators, and (4) the authorizing statute was ambiguous on key issues (e.g., whether the national registry would be used for employment and licensing purposes). LAURA RADEL, INTERIM REPORT TO THE CONGRESS ON THE FEASIBILITY OF A NATIONAL CHILD ABUSE REGISTRY (2009), http://aspe.hhs.gov/hsp/09/ChildAbuseRegistryInterimReport/index.shtml#_Toc228951847. See also Associated Press, *Child Abuse Registry Hits Stumbling Blocks: Flaws in State-level Registries Complicate Plans for National Database of Child Abusers*, CBS NEWS, Apr. 26, 2010, available at <http://www.cbsnews.com/stories/2010/04/26/national/main6432571.shtml> (“Combating child abuse is a cause with universal support. Yet a push to create a national database of abusers, as authorized by Congress in 2006, is barely progressing as serious flaws come to light in the state-level registries that would be the basis for a national list.”).

will make it easier to track and apprehend repeat abusers.⁵¹¹ It may also help a social services agency determine whether a pattern of child maltreatment exists within a home, and prevent abusive adults from avoiding detection when they take children to different hospitals for successive injuries or move to different geographical locations.⁵¹²

While most states include all investigated reports in their registry, some only compile substantiated reports.⁵¹³ Many of the states that include all reports in their registries do remove the unsubstantiated reports after a period of time ranging from thirty days to ten years.⁵¹⁴

Because of concerns about the unjustified adverse consequences that may result from including unfounded or dated reports in their registry, thirty-two states specifically provide for the expungement of old or inaccurate reports.⁵¹⁵ Further, because of the sensitive nature of these reports and a related need for confidentiality, most states limit access to the reports submitted to their central registry to specific groups of individuals, such as physicians,⁵¹⁶ researchers,⁵¹⁷ law enforcement,⁵¹⁸ court employees or

511. See Childhelp, *President Bush Signs National Child Abuse Registry into Law* (2006), <http://www.childhelp.org/press-releases/entry/president-bush-signs-national-child-abuse-registry-into-law>.

512. Freiman, *supra* note 204, at 265.

513. Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 17 (2001).

514. *Id.* But see Associated Press, *supra* note 510 ("In North Carolina, an appeals court ruled last month that the registry there is unconstitutional because alleged abusers had no chance to defend themselves before being listed. In New York, a class-action settlement is taking effect on behalf of thousands of people who were improperly denied the chance for a hearing to get removed from the state registry. And the U.S. Supreme Court is scheduled to hear a case this fall arising from the plight of a California couple whose names remain on that state's registry years after they were cleared of an abuse allegation made by their rebellious teenage daughter.").

515. The thirty-two states are Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, and Wyoming. See *supra* note 509 for the respective statutory citations. Five states without central registries also provide for the expungement of old or inaccurate records concerning child abuse investigations. COLO. REV. STAT. §§ 19-3-313.5, -1-307; ME. REV. STAT. ANN. tit. 22, § 4008; MINN. STAT. § 626.556(11c); N.M. STAT. §§ 32A-3B-21, -4-33; WASH. REV. CODE ANN. §§ 26.44.030-.031, .125.

516. Twenty-six states give physicians access (Alabama, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Wyoming). See *supra* note 509 for respective statutory citations.

517. Twenty-three states give researchers access (Alabama, Arizona, Arkansas, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, and Utah). See *id.* for respective statutory citations.

518. Twenty-seven states and the District of Columbia give law enforcement access (Alabama, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, Oklahoma, Oregon, Pennsylvania,

judges,⁵¹⁹ government agencies or entities,⁵²⁰ the subject of the report,⁵²¹ or certain employers, generally in the childcare services, for the purpose of screening potential employees.⁵²² Some states do open these records to the public under certain circumstances, such as in conjunction with a child fatality (or near fatality) or when releasing information would aid an investigation.⁵²³

For some critics, these limitations on access are insufficient. It was noted as early as 1967 that such registries could unfairly tarnish a person's reputation, be exploited to enable unauthorized persons to gain access to child abuse reports, and induce bias in mandated reporters who consult a registry before determining whether to report possible abuse.⁵²⁴ Recently, the Colorado legislature abolished that state's central registry, citing concerns about inaccurate and missing information, different reporting standards among the various social services regions, and underreporting by at least fifty percent.⁵²⁵ In addition, little consideration is given to the

nia, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming). *See id.* for respective statutory citations.

519. Thirty states give judges/court employees access (Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Wyoming). *See id.* for respective statutory citations.

520. Thirty-five states give government agencies or entities, generally those involved in child protective services, access (Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wyoming). *See id.* for respective statutory citations.

521. Twenty-five states and the District of Columbia give the subject of the report access (Arizona, Arkansas, California, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Michigan, Missouri, Montana, Nebraska, Nevada, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, and West Virginia). *See id.* for respective statutory citations.

522. Nineteen states give access to certain employers, generally those providing childcare services, for the purpose of screening potential employees (Alabama, Arizona, Arkansas, California, Connecticut, Illinois, Indiana, Iowa, Louisiana, Maryland, Missouri, Montana, Nevada, New Jersey, New York, South Carolina, Utah, Virginia, and Wyoming). *See id.* for respective statutory citations.

523. Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia (GA. CODE ANN. § 49-5-186), Illinois (325 ILL. COMP. STAT. ANN. 5/11.1a), Indiana (IND. CODE ANN. § 31-33-18-1.5), Iowa, Kentucky (KY. REV. STAT. ANN. § 620.050), Louisiana, Maine (ME. REV. STAT. ANN. tit. 22, § 4008-A), Michigan (MICH. COMP. LAWS SERV. § 722.627d), Mississippi, Missouri, Montana, Nevada, New Jersey, New York (N.Y. SOC. SERV. LAW § 422-a), North Carolina (N.C. GEN. STAT. § 7B-2902), Oklahoma, Rhode Island, South Carolina, South Dakota, and Wisconsin (WIS. STAT. § 48.981). *See supra* note 509 for the remaining statutory citations.

524. Monrad G. Paulson, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 31 (1967); Daly, *supra* note 251, at 333.

525. 2003 Colo. Laws ch. 196, § 1. Although no explanation is provided as to why a concern about underreporting, as opposed to overreporting, triggered this change, it can be speculated that the Colorado legislature concluded that this significant level of underreporting resulted in a central registry that did not provide a sufficiently accurate picture of child abuse to justify its existence.

severity of the abuse or the likelihood of reoccurrence when a report is included in a registry.

The possibility of inaccurate reports being placed in these central registries has also given rise to due process concerns, although courts have generally rejected objections asserting the registries constitute an unconstitutional invasion of familial privacy or autonomy rights.⁵²⁶ However, challenges based on the consequences to one's employment or reputation have been more successful.⁵²⁷ When made accessible to employers, central registries have been described as "governmental blacklisting."⁵²⁸ Registries have also been attacked for providing insufficient procedural protections to individuals who are only suspected of child abuse.⁵²⁹ In addition, some lawsuits have successfully established that a constitutionally deficient standard of proof was used in determining that child abuse occurred as a predicate to inclusion in the registry, or that individuals accused of abuse received insufficient notice of either the commencement of an investigation or the listing of a report in the registry.⁵³⁰ Proposed changes to the registry process have included compulsory, trial-like hearings prior to the placement of a name on the registry, disclosure of all evidence relating to the alleged abuse to the purported abuser, and written decisions by neutral and detached arbiters regarding placement on the registry.⁵³¹

526. See generally, e.g., *Hodge v. Jones*, 31 F.3d 157 (4th Cir. 1994); *Bohn v. County of Dakota*, 772 F.2d 1433 (8th Cir. 1985); *Smith v. Siegelman*, 322 F.3d 1290 (11th Cir. 2003). See also *Hollenbeck*, *supra* note 513, at 20-23. However, although decided on other due process grounds, see *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1176 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 1501 (Feb. 22, 2010) (No. 09-350), where the Ninth Circuit began its ruling by noting, "Appellants Craig and Wendy Humphries are living every parent's nightmare. [Falsely] accused of abuse by a rebellious child, they were arrested and had their other children taken away from them."

527. See *Hollenbeck*, *supra* note 513, at 20-23; see also, e.g., *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1176 (9th Cir. 2009) ("This case presents the question of whether California's maintenance of the [Child Abuse Central Index] violates the Due Process Clause of the Fourteenth Amendment because identified individuals are not given a fair opportunity to challenge the allegations against them. We hold that it does."), *cert. granted*, 130 S. Ct. 1501 (Feb. 22, 2010) (No. 09-350); *Angrisani v. City of New York*, 639 F. Supp. 1326 (E.D.N.Y. 1986).

528. Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139, 150-51, 162-64 (1993).

529. *Id.* See *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1200 (9th Cir. 2009) ("In the end, this is not a difficult case. The lack of any meaningful, guaranteed procedural safeguards before the initial placement on CACI combined with the lack of any effective process for removal from CACI violates the Humphries' due process rights."), *cert. granted*, 130 S. Ct. 1501 (Feb. 22, 2010) (No. 09-350).

530. *Valmonte*, 18 F.3d at 992; *Dupuy v. McDonald*, No. 97 C 4199, slip op. (N.D. Ill. Mar. 30, 2001), available at <http://www.ilnd.uscourts.gov>. See also *Hollenbeck*, *supra* note 513, at 27-29.

531. Phillips, *supra* note 528, at 184-92.

The expungement process can also pose many challenges for individuals whose name has been placed in a central registry but who now seek to clear their name and have it removed from the registry. For example, multiple levels of required appeals — first to the agency that maintains the central registry, then to an administrative or judicial tribunal⁵³² — delay expungement.⁵³³ Further, relief is frequently denied because courts tend to defer to administrative agency decisions, partly because of a general judicial deference to administrative decisions⁵³⁴ and in part because state statutes usually require that the party seeking expungement “show some error in decision-making that undermines the CPS agency’s authority to maintain the record in question.”⁵³⁵ In many states, individuals also have a limited amount of time after placement on a registry to initiate their appeal.⁵³⁶ Although many hurdles to gaining expungement remain, some procedural protections have been introduced in a few states after courts determined that extensive and inexcusable delays in the expungement process are constitutionally problematic without pre-deprivation hearings or provision for expedited appeal.⁵³⁷

VII. GENERAL CONCERNS ABOUT CHILD ABUSE REPORTING

Despite its long history, mandatory reporting remains a controversial approach. Mandated reporters, particularly physicians, often feel they are poorly situated to bear the brunt of this responsibility and believe it is unfair to impose on them this responsibility and the penalties that may result from a failure to report. They point to vague and uncertain criteria; their limited opportunities to observe and investigate possible abuse; nebulous exceptions linked to religious beliefs and corporal punishment; the barriers imposed by uncooperative parents; uncertainty over who is a mandated reporter and when, where, and how to submit reports; confusion about the potential countervailing weight of privacy, confidentiality, and their

532. Hollenbeck, *supra* note 513, at 17-18.

533. Phillips, *supra* note 528, at 144 & n.32.

534. *Id.*

535. Jill D. Moore, Comment, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2083 (1995). For a ruling determining that the procedures for expungement (or, more precisely, the lack thereof) violated the Due Process Clause, see *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1200 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 1501 (Feb. 22, 2010) (No. 09-350).

536. See, e.g., N.Y. SOC. SERV. LAW § 422(8)(a)(i) (90 days after notification of its identification for inclusion); see also Phillips, *supra* note 528, at 143-44.

537. Hollenbeck, *supra* note 513, at 29-30 (discussing *Dupuy v. MacDonald*, 141 F. Supp. 2d 1090 (N.D. Ill. 2001), and *Angrisani v. City of New York*, 639 F. Supp. 1326 (E.D.N.Y. 1986)).

obligations to treat and promote the well-being of patients and clients; and various negative repercussions that may ensue from filing a report.⁵³⁸

There has also been backlash against child abuse reporting laws due to the large number of reports that are not substantiated — 75% of the over three million reports received each year by CPS.⁵³⁹ For example, parents who claim to have been subjected to false accusations of child mistreatment have formed the organization Victims of Child Abuse Laws (VOCAL) and have lobbied for changes in reporting laws.⁵⁴⁰ It has been argued that mandatory reporting should be curtailed.⁵⁴¹ Possible alternative approaches raised include making reports of neglect permissive instead of mandatory (while the reporting of physical or sexual abuse remains mandatory), requiring more certainty before the reporting duty is triggered (e.g., by limiting mandatory reports to when there is actual evidence of abuse rather than mere suspicion), routinely providing educational programs to mandatory reporters to better explain when a report is required and thereby diminishing the filing of frivolous or unfounded reports, and instituting better mechanisms for the prompt review of reports and their dismissal when they are unfounded.⁵⁴²

Other commentators have asserted that mandatory reporting laws have significantly changed society's response to child abuse by turning many professionals "into a white-collar police force."⁵⁴³ They argue that this duty

538. See, e.g., KALICHMAN, *supra* note 12, at 30-34, 47-51, 68 (1999); Russell A. Carleton, *Does the Mandate Make a Difference? Reporting Decisions in Emotional Abuse*, 15 CHILD ABUSE REV. 19, 20 (2006); Louanne Lawson, *Why We Shouldn't Diagnose Child Maltreatment*, 1 J. FORENSIC NURSING 97 (2005).

539. As noted, in 2008, CPS agencies received 3.3 million referrals. Of the reports received, 37.5% were screened out by CPS agencies as not sufficiently valid to justify an investigation. Of the cases that were investigated, 64.7% of them were found to be unsubstantiated. Thus, the total number of invalid or unsubstantiated reports was just over 2.5 million referrals (2,571,938)— about 78% of all reports. CHILD MALTREATMENT 2008, *supra* note 7, at 6, 8.

Substantiated reports were more likely to be forthcoming from professionals than nonprofessionals. In 2008, 57.9% of the reports were from professionals (with 16.9% of all reports from teachers, 16.3% from lawyers or police officers, and 10.6% from social services staff), 8.8% from anonymous sources, 8.1% from "other" sources (including clergy, coaches, camp counselors, etc.), 5.1% from friends or neighbors, 6.7% from parents, and 7.3% from other relatives. *Id.* at 7.

Over two-thirds (70.8%) of the substantiated reports were from professionals, with 29.2% from all other categories of reporters. *Id.* at 9 fig.2-3; see also Wimberly, *supra* note 240, at 47-50.

540. Wimberly, *supra* note 240, at 47-50. Chapters of VOCAL have been established in various states. See, e.g., VOCAL of Missouri, <http://www.vocalofmo.org/index1.htm> (last visited July 24, 2009); Victims of Child Abuse Laws: Montana, <http://www.reocities.com/vocalmt/vocalhomepage.html> (last visited July 24, 2009).

541. RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 274-75, 282-85 (1990) (arguing that neglect is defined so vaguely that cultural and socioeconomic biases influence the decision to remove the child and thus the reporting system should be adjusted so that fewer reports of neglect are generated); Thompson, *supra* note 253, at 6-7.

542. WEXLER, *supra* note 541, at 274-78.

543. Thompson, *supra* note 253, at 5.

to serve as a sentinel for child abuse contravenes society's reluctance to make private individuals their "brother's keeper."⁵⁴⁴ Further, broadening the range of reporters can enhance the likelihood of reports being filed by uninformed or untrained individuals based on mere speculation or driven by cultural, socio-economic, or other biases.⁵⁴⁵ Indeed, in 2008, only 18.5% of substantiated reports came from nonprofessionals — even though they provided 28.5% of all reports — and 56.6% of intentionally false reports came from nonprofessional, as opposed to professional or other report sources.⁵⁴⁶

Another criticism targets the vagueness of the guidelines for investigating reports of child abuse. Critics of these guidelines have asserted that they give CPS officials too much discretion in determining what constitutes abuse and results in inconsistency and the unjustified pursuit of some cases.⁵⁴⁷

Some critics cite anonymous reporting as a significant contributor to the large number of unsubstantiated and sometimes maliciously-filed reports.⁵⁴⁸ Indeed, one study that examined child abuse reports in the Bronx found that only 12.4% of anonymous reports were substantiated after investigation.⁵⁴⁹ In contrast, nationwide, 23.7% of all reports of abuse were substantiated following investigation.⁵⁵⁰ Anonymous reports carry no penalty for the reporter, but can waste valuable caseworker time in an already overburdened system, as well as cause significant harm to the target of the report and affected children.

Another concern is that mandatory reporting can actually lead to an underreporting of child abuse. With the reporting system identifying so many cases that CPS must address (3.3 million cases in 2008) and potential harm resulting from the CPS intervention itself, mandated reporters may refrain from reporting child abuse because they feel they can resolve a given case better than CPS. It has become accepted practice for some professionals to not report abuse if they believe they can mitigate the abuse

544. *Id.*

545. *Id.*

546. CHILD MALTREATMENT 2008, *supra* note 7, at 6, 9 fig.2-3.

547. DORNE, *supra* note 12, at 118.

548. *See, e.g., id.* at 119; WEXLER, *supra* note 541, at 278-79. Although few states report such information and most CPS agencies are not prepared or well-equipped to make such a determination, Delaware indicated that 160 of 6,274 (2.6%) of the reports investigated in 2008 were "intentionally false." CHILD MALTREATMENT 2008, *supra* note 7, at 15 tbl.2-3 (classifying as such 82 of 5693 investigated reports).

549. WEXLER, *supra* note 541, at 109.

550. CHILD MALTREATMENT 2008, *supra* note 7, at 8.

with therapy or other services,⁵⁵¹ particularly when reporting laws are seen to conflict with health care professionals' caregiver role.⁵⁵² Additionally, with so many mandated reporters, some professionals do not report abuse because they assume someone else will do so.⁵⁵³

Underreporting may also occur because the definition of abuse provided by reporting laws is vague and mandated reporters are ill-trained to recognize abuse.⁵⁵⁴ For example, a reporting statute may require a report when there is "reasonable suspicion" of abuse, but what is encompassed by this phrase (or similar standards) is typically not provided.⁵⁵⁵ As a result, one study found that over 80% of physicians were internally inconsistent when asked to indicate when a report is required under the "reasonable suspicion" standard.⁵⁵⁶ Relatedly, in a survey of graduate programs in clinical, school, and counseling psychology, only 11% of them offered courses dealing with child abuse.⁵⁵⁷ A recent study of two medical schools in Texas and Virginia identified a need for improvements in and a more systematic approach to residency training in child abuse.⁵⁵⁸ Many mandated reporters confess that they simply do not have enough knowledge and skills to determine whether child abuse is occurring.⁵⁵⁹ Also, because reporting laws are vague and rarely enforced, mandated reporters are unlikely to be held accountable if they systematically under- or over-report abuse.⁵⁶⁰

This reporting system may also harm those it seeks to help in various other ways. For example, it may deter families from seeking medical care for their children or mental health therapy for adults with a proclivity to abusive behavior if they believe a child abuse report will result.⁵⁶¹ Also, reporting may disrupt or end treatment that abusive individuals are receiving that is intended to prevent future familial violence.⁵⁶² Finally, it may increase distrust among neighbors even though trust and close

551. KALICHMAN, *supra* note 12, at 54-62; Emalee G. Flaherty, *Does the Wording of the Mandate to Report Suspected Child Abuse Serve as Another Barrier to Child Abuse Reporting?*, 30 CHILD ABUSE & NEGLECT 341, 341 (2006).

552. KALICHMAN, *supra* note 12, at 52.

553. Melton, *supra* note 49, at 14.

554. KALICHMAN, *supra* note 12, at 32; Flaherty, *supra* note 551, at 341.

555. Flaherty, *supra* note 551, at 342.

556. *Id.*

557. KALICHMAN, *supra* note 12, at 169.

558. Kurt W. Heisler et al., *Child Abuse Training, Comfort, and Knowledge Among Emergency Medicine, Family Medicine and Pediatric Residents*, 11 MED. EDUC. ONLINE 1, 2, 7 (2006).

559. Flaherty, *supra* note 551, at 341.

560. KALICHMAN, *supra* note 12, at 32-33.

561. Melton, *supra* note 49, at 14.

562. *Id.*

relationships between neighbors is the factor most closely correlated to lower levels of abuse.⁵⁶³

What makes the mandatory reporting mechanism, with its related investigations and responses, of particular concern is that it has become society's primary, and arguably only, means of identifying and responding to child abuse. After being relied on for over forty years and after being the recipient of extensive attention and considerable resources, it may be time to ask whether this is a viable and justifiable mechanism, at least in its current form. For example, great efforts are made to encourage reports, to investigate families, and to remove children at risk of abuse, but far less attention is paid to preventive and educative measures.⁵⁶⁴ The 1993 report of the U.S. Advisory Board on Child Abuse and Neglect declared that "[t]he most serious shortcoming of the nation's system of intervention on behalf of children is that it depends upon a reporting and response process that has punitive connotations, and requires massive resources dedicated to the investigation of allegations. . . . [However,] the system acts in response to allegations — not needs for help."⁵⁶⁵ This system, with its punitive focus, tends to distract from alternative means by which children can be helped and made safer.⁵⁶⁶ Because resources are so focused on investigation and the removal of at-risk children, only 30% of confirmed child abuse victims receive services (beyond being placed in foster care) to aid them and their families.⁵⁶⁷ By responding routinely with relatively draconian measures, the current system ignores the fact that much abuse occurs not because of psychopathology, but because of socio-economic and other factors that have induced intra-familial stress, which can be better handled by other means. Many researchers suggest the response to identified child abuse should instead be focused on improving family relationships and providing services for children and the adults who have abused them.⁵⁶⁸ Social policies and reporting laws continue to focus on what is asserted to be the problem of underreporting, but with over three million reports of abuse a year, the focus

563. *Id.* at 15.

564. U.S. ADVISORY BD. ON CHILD ABUSE AND NEGLECT, U.S. DEP'T HEALTH & HUM. SERVS., *NEIGHBORS HELPING NEIGHBORS: A NEW NATIONAL STRATEGY FOR THE PROTECTION OF CHILDREN 9-10* (1993) [hereinafter *ADVISORY BD. 1993*]; Melton, *supra* note 49, at 12.

565. *ADVISORY BD. 1993*, *supra* note 564, at 9.

566. Melton, *supra* note 49, at 13-14.

567. KALICHMAN, *supra* note 12, at 157.

568. See Melton, *supra* note 345, at 577, 580 (2002) (quoting Gary Melton et al., *Empirical Research on Child Maltreatment and the Law*, 24 J. CLINICAL CHILD PSYCHOL. 47, 49-50, 53 (1995)).

should now shift to how best to respond to, as well as prevent, identified abuse.⁵⁶⁹

VIII. GENERAL CRITICISMS OF THE RESPONSE TO CHILD ABUSE REPORTS

In addition to the critiques of mandatory reporting, much criticism has also targeted CPS agencies, society's primary mechanism for responding to child abuse reports.⁵⁷⁰ CPS agencies have at least four separate areas of responsibility: the investigation of reports of abuse, supplying treatment services to abused children, coordinating the services afforded abused children by other agencies, and providing services to prevent abuse from occurring.⁵⁷¹

Nationally, CPS agencies receive on average more than 60,000 child abuse reports or referrals per week, one-third of which are screened out as providing an insufficient indication of child abuse to justify a subsequent investigation.⁵⁷² The mean annual number of completed investigations was 68.3 per caseworker in 2008, up from 63.1 in 2003,⁵⁷³ with forty-one days being the average time needed to complete an investigation.⁵⁷⁴ Although the recommended maximum number of families assigned to a caseworker ranges from twelve⁵⁷⁵ to forty,⁵⁷⁶ state regulations of maximum caseloads often go unheeded.⁵⁷⁷ In one agency, the average caseload was seventy families, which prompted a caseworker within that agency to remark, "[i]f she worked for our agency for 2 minutes, even Mother Teresa would be a bad worker."⁵⁷⁸

569. Stephen W. Webster et al., *Overreporting and Underreporting of Child Abuse: Teachers' Use of Professional Discretion*, 29 CHILD ABUSE & NEGLECT 1281, 1283, 1293-94 (2005).

570. See, e.g., Weithorn, *supra* note 11, at 1324 ("[T]here is no clear evidence that the child welfare system's interventions, even under the best of circumstances, are effective in remediating those circumstances leading to its involvement, in keeping children safe, or in promoting children's short- and long-term social and emotional well-being.") (citations omitted).

571. BARNETT ET AL., *supra* note 12, at 180.

572. CHILD MALTREATMENT 2008, *supra* note 7, at 5 ("Reasons for screening out a referral include: the referral did not concern child abuse or neglect; it did not contain enough information to enable an investigation or assessment to occur; the children in the referral were the responsibility of another agency or jurisdiction, e.g., a military installation or a tribe; or the alleged victim was older than 18 years.").

573. Compare *id.* at 9, with CHILD. BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2003, Ch. 2, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm03/chaptertwo.htm>.

574. CHILD MALTREATMENT 2008, *supra* note 7, at 79.

575. DORNE, *supra* note 12, at 167 (noting Child Welfare League of America recommendation).

576. *Id.* (citing forty as the purported limit for caseworkers in Illinois); WEXLER, *supra* note 541, at 241 (noting that Pennsylvania limits the number of active cases to thirty).

577. DORNE, *supra* note 12, at 167; WEXLER, *supra* note 541, at 241.

578. DORNE, *supra* note 12, at 167.

Further, in 2008 about 3.3 million children (43.6 of every 1,000 children in the United States) received preventive services from CPS,⁵⁷⁹ while roughly 1 million children (including 63.3% of the children identified as having been abused) received post-investigation services, such as counseling, case management, family-based services, in-home services, or foster care.⁵⁸⁰ Approximately 800,000 children in 2006 were provided with foster care services, a number relatively unchanged from the two preceding years, with 303,000 entering foster care during that year, roughly half a million children in foster care at the end of the fiscal year, and the average length of stay 28.3 months.⁵⁸¹

CPS agencies generally agree that they are provided with insufficient resources to adequately undertake and complete their assigned duties.⁵⁸² They also cite as further complicating their task: a lack of clarification and guidance as to what their responsibilities are, an absence of assistance from other entities and various individuals who could or should be helping address issues associated with child abuse, being asked to respond to reported emergencies based upon incomplete information, being judged by others who have the benefit of “20-20” hindsight, and working under unfair expectations from all sides.⁵⁸³

In addition to concerns that CPS is stretched too thin to adequately fulfill its assigned responsibilities, another expressed criticism is that it intervenes in situations where such “aid” is unnecessary. Even in the early twentieth century, when the societies for the prevention of cruelty to children were gaining strength, the poor in Boston termed their services “the

579. CHILD MALTREATMENT 2008, *supra* note 7, at 77. Preventive services include “respite care, parenting education, housing assistance, substance abuse treatment, daycare, and individual and family counseling.”

580. *Id.* at 78, 83 tbl.6-3.

581. CHILD. BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., ADOPTION AND FOSTER CARE REPORTING AND ANALYSIS SYSTEM, REPORT #14, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm; CHILD. BUREAU, U.S. DEP’T HEALTH & HUM. SERVS., TRENDS IN FOSTER CARE AND ADOPTION 2002-2007, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm; *see also* THE AFCARS REPORT, *supra* note 391, which provides slightly different statistics. A recent report estimated that there were 463,000 children in foster care on a given day in 2008, with 273,000 children entering foster care during the preceding fiscal year and 285,000 exiting it (53% of which had been in foster care for a year or more, 29% for two years or more, 17% for three years or more, and 7% for five years or more). FOSTER CARE STATISTICS, *supra* note 391, at 3, 6.

582. BARNETT ET AL., *supra* note 12, at 180-83; DORNE, *supra* note 12, at 162. They also assert that they are provided with inadequate authority, powers, and alternatives.

583. U.S. ADVISORY BD. ON CHILD ABUSE AND NEGLECT, DEP’T HEALTH & HUMAN SERVICES, A NATION’S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES 49-58 (1995) [hereinafter ADVISORY BD. 1995]; BARNETT ET AL., *supra* note 12, at 182-83; DORNE, *supra* note 12, at 162; Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 615-17 (2004).

Cruelty” because of a perception that unfriendly neighbors and members of the upper classes who felt antagonized or threatened would call these societies to come take their children away.⁵⁸⁴

More recent complaints continue to note instances of unnecessary intervention, analogizing CPS services and increasing media attention to child abuse as analogous to the Salem Witch Hunts or the McCarthy Era Red Scare.⁵⁸⁵ Commentators have also asserted that the child’s interests become secondary in the race to identify alleged abusers.⁵⁸⁶ Other critics, although not using such colorful metaphors, emphasize the dangers stemming from engulfing these children within the criminal justice system, including the trauma children can experience from being required to testify in related judicial proceedings.⁵⁸⁷ Concerns have also focused on the developmental and psychological problems experienced by children removed from their parents too hastily, exposed to lengthy and traumatic interviews, and placed for lengthy periods in unfamiliar and disconcerting foster homes that in some cases may be worse than the child’s original home.⁵⁸⁸

Recurrent criticisms, however, tend to emphasize the underfunding of CPS and the overburdened workers who are presented with vague demands to “prevent” or halt abuse without being provided clear or sufficient means for achieving this goal.⁵⁸⁹ As early as 1990, the U.S. Department of Health and Human Services declared that CPS had “not been given the resources necessary to cope” with the “huge increase” in child abuse cases.⁵⁹⁰ This

584. John E. B. Myers, *Definition and Origins of the Backlash Against Child Protection*, in *THE BACKLASH: CHILD PROTECTION UNDER FIRE* 19 (John E. B. Myers ed., 1994).

585. See, e.g., Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 228-29 (1987); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 564 (1992).

586. ADVISORY BD. 1993, *supra* note 564, at 10; WEXLER, *supra* note 541, at 21.

587. Melton, *supra* note 5, at 109.

588. BARNETT ET AL., *supra* note 12, at 187; WEXLER, *supra* note 541, at 21, 167; Robert E. Emery & Lisa Laumann-Billings, *An Overview of the Nature, Causes, and Consequences of Abusive Family Relationships: Toward Differentiating Maltreatment and Violence*, 53 AM. PSYCHOLOGIST 121, 121-35 (1998); Jean Montoya, *Something Not So Funny Happened on the Way to Conviction*, 35 ARIZ. L. REV. 927, 944 (1993).

589. Sylvia Pizzini, *The Backlash from the Perspective of a County Child Protective Services Administrator*, in *THE BACKLASH: CHILD PROTECTION UNDER FIRE* 35 (John E. B. Myers ed., 1994); Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 315 (2003).

590. U.S. ADVISORY BD. ON CHILD ABUSE AND NEGLECT, DEP’T HEALTH & HUMAN SERVICES, *CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY* xii (1990) [hereinafter ADVISORY BD. 1990].

report, even then, noted that as a result the number of children in foster care was increasing dramatically.⁵⁹¹

Once CPS begins an investigation, another complaint raised is that a pervasive presumption is employed that if a report was filed, child abuse must indeed have occurred. CPS caseworkers are trained, it is argued, to treat all reported adults with suspicion and to “err on the side of the child,” with indications of non-abuse ignored or overlooked.⁵⁹² Some also consider the largely unilateral power afforded caseworkers to remove children from their home to be too great, and that their opinions are given undue weight at hearings to determine or review whether a child should be removed, especially when these caseworkers are not adequately trained or educated to fill this role.⁵⁹³ Further, some commentators contend that racial, gender, and socioeconomic biases prejudice caseworkers’ judgments.⁵⁹⁴ It has also been argued that the legal system too readily endorses claims of abuse because a relatively lax standard of proof is employed at maltreatment hearings⁵⁹⁵ and undue weight is given to statements of hearsay.⁵⁹⁶

Finally, as indicated earlier,⁵⁹⁷ wide-spread criticism has been lodged at the deployment of the remedial efforts undertaken by CPS. It has been asserted that “most [experts] remain unconvinced that conventional forms of intervention by [CPS] make a difference in the lives of children and families.”⁵⁹⁸ Further, it is contended that “substantial [and increasing] numbers of . . . youth . . . receive inappropriate or unduly restrictive intervention, and are bounced back and forth among child service and intervention systems because of poorly conceived, poorly implemented, or poorly funded federal state, and local policies,”⁵⁹⁹ that there is “substantial evidence that the lack of continuity and dislocation process takes a heavy toll on children removed from their homes,”⁶⁰⁰ that the “conditions in some foster homes are substandard and unsafe, and may be more dangerous to the child’s well-being than those in their parents’ homes,”⁶⁰¹ and that

591. *Id.* at xiv.

592. WEXLER, *supra* note 541, at 65, 83, 130, 164.

593. ADVISORY BD. 1995, *supra* note 583, at 55-56; Dorne, *supra* note 12, at 156-57; Wexler, *supra* note 541, at 265, 232-35.

594. Hollenbeck, *supra* note 513, at 31-34.

595. WEXLER, *supra* note 541, at 124; Trisha M. Anklam, Case Comment, *The Price of Justice: In Light of Lavallee, What Should Massachusetts Courts Do When Attorneys Are Not Available to Represent Indigent Parents Involved in Care and Protection Matters?*, 32 N. ENG. J. CRIM. & CIV. CONFINEMENT 111, 114 (2006).

596. Jee, *supra* note 398, at 560.

597. *See supra* sections VI.B.-VI.C.

598. Weithorn, *supra* note 11, at 1324, n.83.

599. *Id.* at 1389.

600. *Id.* at 1452.

601. *Id.*

“[r]emoval from one’s own community, including school, neighborhood, and extended family, all deprive the child of important connections and developmental opportunities.”⁶⁰²

Congress’ passage of the Adoption and Safe Families Act of 1997⁶⁰³ was in part a response to these concerns, reflecting a hope that by requiring “reasonable efforts” to preserve families, this legislation would decrease the number of children in foster care and curb any overreaching tendencies of CPS.⁶⁰⁴ Critics have responded, however, that by not defining “reasonable efforts” and by making it easy for states to avoid the withholding of federal funding, the enactment did little to address existing problems.⁶⁰⁵ Commentators continue to paint a picture of an overburdened system, even claiming that some CPS workers downplay reports of abuse to save resources.⁶⁰⁶ Although emphasis has been placed on the need to increase the funding provided CPS and to decrease workloads by hiring additional caseworkers,⁶⁰⁷ other prominent scholars argue that the existing system is inherently flawed and a dramatically different approach is required.⁶⁰⁸

IX. CONCLUSIONS

Clearly, society has come a long way from the “Mary Ellen” era when the detection of child abuse was sporadic, random, and relied on borrowed, poorly-suited tools to craft a response. Child abuse has now for almost 150 years been widely recognized to be a recurrent, pervasive problem with potentially tragic short- and long-term consequences⁶⁰⁹ that calls for a well-conceived and well-executed societal response.⁶¹⁰ But despite the many efforts to devise an appropriate systemic model to redress child abuse, the

602. It has been asserted that “[m]ost experts believe that the system, in its present form, has failed miserably, and many argue that there is no empirical evidence that the system’s intervention actually benefits those children for whose benefit it allegedly exists.” *Id.* at 1452-53.

603. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (current version at 42 U.S.C.S. §§ 670-679 (LexisNexis 2010)).

604. Crossley, *supra* note 589, at 261.

605. *Id.* at 261-62, 286.

606. Lewis Pitts, *Fighting for Children’s Rights: Lessons from the Civil Rights Movement*, 16 J. L. & PUB. POL’Y 337, 343 (2005).

607. Crossley, *supra* note 589, at 315.

608. See, e.g., Melton, *supra* note 345, at 569; Melton, *supra* note 49, at 9; Weithorn, *supra* note 11, at 1452-53.

609. See generally *supra* notes 10-11 and accompanying text.

610. See ADVISORY BD. 1990, *supra* note 590, at xxv-xxviii.

consensus is that society is not adequately identifying⁶¹¹ or responding to the needs of abused children.⁶¹²

As discussed, society continues to rely heavily on mandatory reporting, despite the many criticisms of it, to discover child abuse and set in motion society's efforts to remedy it.⁶¹³ Factors that contribute to or indicate unnecessary, questionable, or spurious reports need to be identified and means developed to better and more promptly assess their validity. Instead of regularly expanding the list of mandated reporters, studies should also establish who provides the fewest reliable reports and either their mandatory reporting status discontinued or concerted efforts made to improve the reliability of their reports. In addition, providing the necessary resources to conduct prompt and full assessments of all reports is also critical, as well as ascertaining whether some facets of child abuse are being systematically underreported.

Other complaints focus on the competence of the response to these reports, including the adequacy of subsequent investigations, the ability to reach appropriate conclusions in a prompt fashion regarding whether abuse occurred, and the capacity to take meaningful and appropriate steps in a timely manner to redress, remedy, and prevent child abuse.⁶¹⁴

There is also continuing concern that the children who are purportedly the focus of these efforts are not being well-served.⁶¹⁵ The inadequacy of the services that they and their family members are provided has been widely noted and, with over a half million children caught in the legal limbo of foster care, these children have a right to complain about the handling of their cases.⁶¹⁶ Although parents are imbued with constitutionally protected fundamental rights to make decisions concerning the care, custody, and control of their children,⁶¹⁷ a symmetrical fundamental right of children to

611. Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1489 (2007); Weithorn, *supra* note 11, at 1310, 1401.

612. Weithorn, *supra* note 11, at 1321. *See also* Reno v. Flores, 507 U.S. 292, 319 (1993) (O'Connor, J., concurring) ("Childhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives.").

613. *See supra* sections V., VII.

614. *See supra* sections VI., VIII.; ADVISORY BD. 1990, *supra* note 590, at 2, 34-38; Melton, *supra* note 49, at 13-14; Hollenbeck, *supra* note 513, at 17-18.

615. WEXLER, *supra* note 541, at 164-206, 226, 230-32.

616. As noted above, an untold number of other children are left in peril from the abuse they are experiencing because they have not received adequate preventive or remedial services. *See supra* notes 611-12 and accompanying text.

617. Troxel v. Granville, 530 U.S. 57, 65-67 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

direct their family status has not been recognized.⁶¹⁸ The children's voices are often lost in the cacophony associated with these cases and their needs should be the highest priority. Further, a presumption should be employed that their well-being is better served by allowing them to remain in their homes, with placement decisions made on a case-by-case basis and the preferences of the children given strong consideration.

Family members who are falsely accused or are engulfed within the cloud of suspicion that descends upon a family following an allegation of child abuse, notwithstanding that they were not the target of the report, may also have a right to be upset about their treatment within this system. They may be unfairly blamed for allowing abuse to occur and, at a minimum, are likely to experience considerable disruption to their lives despite no established wrong-doing on their part.⁶¹⁹

One major deficiency of the existing child abuse system is its tendency to employ a unitary approach that fails to take into account potentially distinguishing characteristics among purported cases of child abuse. Although the various states may differ in their procedures, within each state there is generally only a monolithic track provided for the processing and management of all reports of child abuse. As a result, key distinguishing characteristics are often overlooked that could have resulted in a more appropriate handling of a given case and enhanced the likelihood of a better outcome for those involved.⁶²⁰ As one distinguished commentator has noted, it is "*the needs of the particular child and family* [that sh]ould determine the nature of the intervention."⁶²¹

Whether the responsible entity is a social services or a law enforcement agency, the tendency is to impose not only a "one-size-fits-all" response to reports of abuse, but also to implement a response that reflects the general orientation and behavioral assumptions of that agency. However, this response may not be appropriate for a given case. Although more

618. Weithorn, *supra* note 11, at 1393. Weithorn does note, however, that the Supreme Court has alluded occasionally to children's *interests* in maintaining the parent-child bond. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 760 (1982)).

619. WEXLER, *supra* note 541 at 95-99. Critics have scrutinized in particular the treatment of women by CPS agencies, claiming gender bias and a tendency to blame mothers who are themselves victims of domestic violence because they are often the primary caretaker and easier to identify and locate. Dunlap, *supra* note 20, at 565, 593-98; Goodmark, *supra* note 583, at 614-15; Evan Stark, *Nicholson v. Williams Revisited: When Good People Do Bad Things*, 82 DENV. U. L. REV. 691, 703 (2005). Such concerns were at least partially validated in *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163, 284-85 (E.D.N.Y. 2002) (imposing an injunction on the CPS agency in New York prohibiting it from removing children and charging mothers with neglect in situations based solely on the fact that domestic violence was occurring in the home and attributing the "double abuse" of mothers to "benign indifference, bureaucratic inefficiency, and outmoded institutional biases").

620. See Weithorn, *supra* note 11, at 1474.

621. *Id.* at 1483 (emphasis in the original).

appropriate referrals may be made later, an initial misstep can result in critical delay, lost opportunities, enhanced injury, and a more complicated and now entrenched perverse family dynamic.⁶²² A better approach may be to assign the initial screening to a more “neutral” entity with a special expertise in child abuse that will enable it to promptly ascertain the most critical factors associated with a case and determine how it can best be managed, including whether a law enforcement, social services, or some mixed response is the most relevant. A multi-track approach following an initial screening will enable the relatively unique features of the various available agencies and services to be quickly deployed as appropriate. For example the social services system with its emphasis on providing needed services and promoting and protecting the familial structure may be the most appropriate for some cases, while the criminal justice system, with its ability to incapacitate, punish, and deter abusers, may be the best option for others.

Indeed, research has indicated that child abuse can be linked to at least two very different sets of cases that require distinct responses.⁶²³ One group includes adults experiencing caregiver stress or some other environmental (i.e., external) force (e.g., extreme poverty, situational stressors) that is primarily responsible for the child abuse.⁶²⁴ If these factors are removed and thereafter avoided or their intensity is significantly reduced, the likelihood of child abuse reoccurring may be minimal.⁶²⁵ For these individuals, providing therapeutic services that teach better coping strategies and that make needed support services and respite available on a timely basis can have a beneficial effect. For this group, it may be more appropriate to refer their cases to a system that focuses on providing services that seek to redress or minimize those external factors that triggered the child abuse rather than remove vulnerable and sometimes fragile children and disrupt and perhaps permanently damage a needed family structure. A second group includes adults who demonstrate some form of

622. ADVISORY BD. 1993, *supra* note 564, at 9-11.

623. Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1390-98 (2005). See also D.P. Southall, M.P. Samuels, & M.H. Golden, *Classification of Child Abuse by Motive and Degree Rather Than by Type of Injury*, 88 ARCHIVES OF DISEASE IN CHILDHOOD 101, 101-03 (2003), available at <http://adc.bmjournals.com/cgi/reprint/88/2/101.pdf> (asserting child abusers can be divided into four categories: (1) those who undertake premeditated abuse for gain; (2) those who impulsively act out of socioeconomic pressures; (3) those who engage in “the universal mild hurts inherent in all parenting;” and (4) those who unintentionally fail to care for (i.e., neglect) the child), and contending that the first category should be subject to criminal sanction, the second category provided professional help, while the third and fourth categories may not require any intervention).

624. Ver Steegh, *supra* note 623, at 1396.

625. *Id.* at 1398.

psychopathology in which the source of the abusive behavior appears to be a trait of or otherwise intrinsic to the person.⁶²⁶ For these individuals, abuse is likely to reoccur even if support services are provided and referral to a law enforcement agency may be needed to punish, deter, and incapacitate the wrongdoer, provide future protection to the child and other family members, and send a signal to discourage other similar potential child abusers.

But there remains a need for a prompt screen by an expert body to determine where a report of abuse should be assigned and handled. One readily available potential option is to employ Child Advocacy Centers (CACs) to undertake this role.⁶²⁷ CACs are local, community-based programs initially developed in the 1980s and now established in many jurisdictions.⁶²⁸ Their primary goal is to “coordinat[e] the investigation, prosecution, and intervention efforts involved in child sexual and physical abuse cases.”⁶²⁹ The programs were initiated in response to criticisms that child protective services, police departments, and courts were frequently causing unnecessary trauma and harm to children when investigating child abuse allegations that limits the forthcoming of related information.⁶³⁰ CACs provide a child-friendly environment in which purportedly abused children are interviewed (frequently by specially trained child interviewers) and examined by physicians and mental health experts.⁶³¹ Other services can include referrals to treatment and family programs, case tracking systems, and case review meetings of the multidisciplinary teams charged with assisting the family and investigating alleged abuse.⁶³² Additionally, it has been reported that because of their greater efficiency, they are 36% less expensive than traditional procedures for investigations and intervention.⁶³³ Over 400 CACs currently exist across the country, obviating the necessity for significant investments in their initial start-up. They are routinely multidisciplinary in their make-up and are encouraged to develop ties with both the social services and the criminal justice systems, facilitating their ability to ascertain whether a report of abuse is better processed through one system as opposed to the other.

626. *Id.* at 1391, 1392-93.

627. Other commentators, albeit in the somewhat different context of the juvenile justice system, have advocated for the establishment of local “Triage Centers.” Weithorn, *supra* note 11, at 1481.

628. Jackson, *supra* note 333, at 412.

629. Cathy Crabtree, *Criminal Justice Attorneys Play Leading Roles with Nonprofits in Texas*, 69 TEX. B.J. 254, 255 (2006).

630. Jackson, *supra* note 333, at 412.

631. *Id.* at 412, 415.

632. *Id.* at 417-18.

633. Chandler, *supra* note 335, at 335.

Although the existing role of CACs is typically limited to conducting evaluations to establish whether child abuse has occurred and they may be relatively closely aligned with law enforcement officials, expanding their role to address where a case should be initially referred for subsequent management would not constitute an endeavor that is substantially outside their expertise. Further, because they are encouraged to undertake a multidisciplinary approach to enhance their insight into the dynamics and causes of child abuse, they are well prepared to understand and serve the needs of all of the parties impacted by a report of child abuse. It has been asserted that children served by CACs “receive a higher value of services” through their enhanced interview skills and ability to facilitate needed follow-up services.⁶³⁴ If it is concluded, however, that introducing another entity into this process adds expense and delay without significantly improving the process, at a minimum, the multi-disciplinary approach employed by CACs should be adopted by whatever agency is given the responsibility to initially respond to a report of child abuse.

Despite the fact that it has been almost 150 years since the case of Mary Ellen initiated a series of reforms to better respond to child abuse, society continues to need to develop better ways of identifying and redressing this abuse. As has often been noted, a society should be measured by how well it treats its most vulnerable citizens.⁶³⁵ Appropriately managing child abuse should be at the top of any ordered society’s agenda.

634. *Id.* at 336.

635. Mahatma Ghandi has been variously quoted as stating “A nation’s greatness is measured by how it treats its weakest members” and “The best test of a civilized society is the way in which it treats its most vulnerable and weakest members.” Alternatively, Aristotle has been attributed to say you can judge a nation by the way it treats its most vulnerable citizens. See <http://askville.amazon.com/measure-civilization-treats-weakest-members-accurate-quote/AnswerViewer.do?requestId=4718239>.