CHILD ABUSE: THE PROBLEM OF DEFINITION

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It is the position of this writer that child abuse is a unique facet of a larger problem of inadequate parenting[1] and that the gravity of child abuse, as it will be defined hereafter, warrants a mandatory reporting obligation[2] of all persons in the community and a legal system geared for effective resolution of individual cases.

The specific question to be addressed in this article is whether the lack of a precise and limited legal definition of child abuse leads to confusion in reporting and an ineffective or uncertain state intervention. It will be argued that a definition limited to serious physical conditions would insure a concensus of opinion as to the fact of "abuse" and case legislatures and courts to liberalize the rules relating to the investigation and proof of child abuse.

The proposed definition is not intended to be in derogation of recent views concerning children's rights far beyond the right simply to be free from the infliction of serious physical injury[3] or of efforts to improve the function of parenting with reference to accepted norms or values for family life. Rather, the attempt is made to be realistic in terms of what legislatures can and will deal with by official state intervention, leaving the remaining family problems to be dealt with by non-judicial efforts or, if by judicial efforts, then in a different fashion than child abuse.

PARENTAL RIGHTS AND THE MEANING OF NEGLECT

The starting point in any discussion of the question of state intervention in the parent-child relationship must be a recognition

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1. *See* Hays, *Child Abuse: An Overview;* ten Bensel, *The Neglect and Abuse of Children: The Physician's Perspective*, published in this symposium.

2. *See, Mandatory Reporting of Child Abuse in Nebraska*, also published in this symposium.

3. *See* Foster & Freed, *A Bill of Rights for Children*, 4 FAMILY L.Q. 343 (1972).

of the bias in the law in favor of family privacy and presumed parental fitness. The United States Supreme Court has had several occasions on which to voice this policy. The following statement from *Stanley v. Illinois*[4] provides a succinct review of the Court's pertinent holdings:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, *supra* at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, *supra* at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).[5]

Numerous decisions in the state courts have been based on this same policy.[6]

The rights of parents are not absolute, of course; the courts clearly recognize the right of the state to intervene where necessary for the child's welfare.[7] The difficult task becomes that of defining where parental rights end and the states' (or, perhaps more properly, the child's) rights begin. The "neglect" jurisdiction of the courts appears to form the borderline.[8]

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4. 405 U.S. 645 (1972).

5. *Id.* at 651.

6. *See* H. CLARK, LAW OF DOMESTIC RELATIONS §§ 17.2, 17.5 (1968), for a discussion of and citation to a large variety of decisions involving parental right to custody and state intervention on behalf of children. Nebraska has declared by statute that "The father and mother are the natural guardians of their minor children and are equally entitled to their custody, services, and earnings, and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable." NEB. REV. STAT. § 38-107 (Reissue 1974). This statute has been construed to require an affirmative showing of *unfitness* before a parent may be deprived of custody. *Baumann v. Baumann*, 169 Neb. 805, 807, 101 N.W.2d 192, 193, (1960).

7. "Acting to guard the interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *See also* H. CLARK, LAW OF DOMESTIC RELATIONS §§ 17.2, 17.5 (1968).

8. Some jurisdictions define "dependency" separately from "neglect."

The statutes defining neglect speak in terms of lack of "parental care," failure to provide for a child's "mental" or "moral needs," a child's "environment" being "injurous," and habitual use of "profane language" by a parent in the presence of a child.[9] In practice, the situations which may be considered to come within these broad statutory definitions are those such as leaving children alone for hours or days, not sending children to school regularly, indifference to a child or failure to show a child love and affection, filthy housekeeping, overcrowding in a home, an illicit relationship of a parent which is known and understood by a child, and failure to provide necessary medical treatment.[10]

"Neglect," then, can encompass a great variety of situations, but the potentially vast neglect jurisdiction granted by statute is limited by the courts in several ways. First, a neglectful parent is construed as one who "falls below the very minimum of acceptable parental behavior."[11] The courts do not impose their notions on the ideal as the norm:

PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE TASK FORCE REPORT, JUVENILE DELINQUENCY AND YOUTH CRIME 27-28 (1967). Other states may use neither label but simply define the conditions under which a court may intervene on behalf of a child. *E.g.*, NEB. REV. STAT. § 43-202 (Cum. Supp. 1974). All of these types of statutory approaches will be subsumed under the discussion of "neglect" in the text, since the kinds of situations in which a court might exercise its jurisdiction would be generally similar under each type of statute, except perhaps for the element of willfulness. This element is not relevant to this discussion since it is not included in this author's definition (or that of many states) of child abuse, and thus all of these situations might be considered to come within a reporting law which does not require proof of willfulness, if such law were not limited as proposed in this article. *See* text at notes 36-38 *infra*.

9. S. KATZ, WHEN PARENTS FAIL 57-58 (1971), contains an excellent summary of the varying statutory descriptions of neglect and dependency and gives citations at 83-85 to the statutes summarized.

10. *See generally* Banagale & McIntire, *Child Abuse and Neglect: A Study of Cases Reported to Douglas County Child Protective Service, from 1967-1973* (unpublished study on file at the Creighton Law Review Office); NATIONAL COUNCIL OF JUVENILE COURT JUDGES, HANDBOOK FOR NEW JUVENILE COURT JUDGES 42-44 (1973).

11. M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 51 (1974). *See also* New York Family Court Act § 1012 (McKinney Supp. 1974-75) which defines neglect as a failure of parents to "exercise a minimum degree of care in supplying food, clothing, shelter, education and medical care for a child . . ." S. KATZ, WHEN PARENTS FAIL 11 (1971), states:

> The legal prescription of health standards are indicative of what the state will not tolerate: parents who severely deprive their children of physical safety, emotional security, or comfort. Violations of these standards may lead to criminal prosecution, temporary or permanent loss of custody, or state supervision of custody. Courts and legislatures have been less definite, however, as to what the requirements are for furthering a child's physical and emotional

> [T]he statutory criterion of improper and ineffective parental care denotes a fairly extreme case. A dominant parental right to custody of the child pervades our law . . . . Many homes . . . fall short of an ideal environment for children. It may be safely assumed that the Juvenile Court Law was not intended to expose such homes to wholesale intervention by public authorities."[12]

In addition, the disposition is tailored to the conduct, so that a finding of neglect does not automatically mean a change of environment for the child or even substantial interference with parental rights. As Professor Paulsen points out:

> In determining whether the facts proved constitute neglect, judges are likely to be influenced by the consequences of the action to be taken under the court's order of disposition. . . . Juvenile court judges surely are affected by a sense that the action taken pursuant to court order must be related to the seriousness of parental mis-conduct which the evidence has demonstrated. A severe spanking by a mother, harassed by the problems of everyday living, might sustain an adjudication of neglect if the juvenile court were making the adjudication in order to expedite further inquiry or to require supervision of the family by the probation staff, but not to take the youngster away from home. The importance of the relationship between the facts which are offered to establish "neglect" and the disposition which follows an adjudication cannot be minimized. "[C]ourts define 'neglect' or 'dependency' in relation to the purpose for which the terms are to be used. Misconduct of a parent, which might support a finding for the purposes of a relatively minor interference with parental right, might not be regarded as serious enough to justify a final termination of all parental rights." (Citations omitted.)[13]

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well-being *beyond* simply requiring a parent to provide his child with the bare essentials. Whether the parent must take positive steps to ensure the optimal physical and emotional health of the child—for example, by providing it with psychiatric or orthodontal care—is a question which is for the most part left unanswered.

12. *In re* Raya, 63 Cal. Rptr. 252, 255 (Ct. App. 1967). *See also* State v. McMaster, 259 Ore. 291, ___, 486 P.2d 567, 573 (1971), requiring "conduct substantially departing from the norm" before parental rights could be severed.

13. Paulsen, *The Legal Framework For Child Protection*, 66 COLUM. L. REV. 679, 699-700 (1966) [hereinafter cited as Paulsen]. *See also In re* Blaine, 54 Misc. 2d 248, 282 N.Y.S.2d 359, 369 (Family Ct. 1967); State *ex rel.* Juvenile Dep't v. Wiese, 10 Ore. App. 73, 498 P.2d 813 (1972); State v. McMaster, 259 Ore. 291, ___, 486 P.2d 567, 572 (1971). A state may limit the court in its dispositional authority by statute, particularly where termination of parental rights is sought, to very serious or continuing acts or circumstances. *E.g.*, NEB. REV. STAT. § 43-209 (Cum. Supp. 1974).

Finally, the courts tend to require some objective evidence of harm to the child[14] as a definite showing of the impact upon the child of the parent's conduct or living conditions.

Thus, the important point to be understood when considering whether to include "neglect" or a similarly broad term in a reporting law is, that while the term connotes broad powers to interfere in family life, the courts limit its application significantly in practice.

RATIONALE FOR A LIMITED DEFINITION OF CHILD ABUSE

The current trend appears to be for states to include neglect in their definition of child abuse,[15] although many of the statutes through such references to "physical injury" caused by neglect, physical neglect, injury by other than accidental means, or the effects of malnutrition and the like, arguably could be construed much more narrowly than the broad term "neglect."[16] Nebraska's current and proposed reporting statutes on the other hand are significantly different than those statutes which apparently refer only or primarily to physical injury. The current Nebraska statutes do not limit the definition to physical injury, and the pending legislation even includes danger to "mental health."[17] In addition, Nebraska's law appears to require the reporting of potential neglect

14. *See, e.g., In re* Raya, 63 Cal. Rptr. 252, 254 (Ct. App. 1967); *In re* Larry and Scott H., 240 Ohio 2d 334, ___, 192 N.E.2d 683, 686 (1963). *In re* Wardle 207 N.W.2d 554, 562 (Iowa 1973). However, when one child in a family has been shown to have suffered severe abuse, another child may be removed from the home without a showing of abuse. *In re* S, 66 Misc. 2d 683, ___, 322 N.Y.S.2d 170, 183, (Family Ct. 1971); *In re* K.D.E., 210 N.W.2d 907, 910 (S.D. 1973).

15. *See* Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103, 106-08 (1974) [hereinafter cited as Fraser] for discussion of and citations to the various statutes.

16. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-842.01 (1972 Cum. Supp.), "injury or physical neglect not explained by the available medical history as being accidental in nature, ..." Language similar to Arizona's is found in N.D. CENT. CODE ANN. § 50-25-01 (1974). *See also* UTAH CODE ANN. § 55-16-2 (1973 Supp.), "physical injury as a result of unusual or unreasonable physical abuse or neglect"; CONN. GEN. STAT. ANN. § 17-38a (Supp. 1975), "physical injury . . . other than by accidental means or has injuries which are at variance with the history given of them, or is in a condition which is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation, deprivation of necessities or cruel punishment . . ."; ILL. ANN. STAT., ch. 23, § 2042 (Smith-Hurd Supp. 1974), "injury or disability from physical abuse, or neglect inflicted upon him or shows evidence of malnutrition, other than by accidental means . . . ."

17. *See* Comment, *Mandatory Reporting of Child Abuse in Nebraska*, at text accompanying note 37 *infra*, also published in this symposium.

or abuse, based on the reporter's judgment of the "reasonable" result of unspecified "conditions or circumstances."[18]

To the extent that any reporting statute allows an interpretation which covers the broad area of neglect, *i.e.* family functioning short of some ideal, that the statute runs a considerable risk of failure. Reporters have to know wha to report, and neglect is simply not defined precisely enough to render reporting objective. As one commentator has stated:

> Social work as a profession does not provide any clearer criteria. [I.e., than the law provides regarding the definition of neglect]. Its emphasis on the emotional and psychological well-being of the child makes social workers less likely than many judges to interfere with family life on the basis of such forms of value preference such as religion or political beliefs. But their goal of emotional well-being is also based on value preferences. . . .
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> . . . five field workers and three supervisors in Massachusetts [were asked] what criteria their agency used in selecting cases for protective intervention. All agreed that for a woman to live with a man she was not married to was not neglect, but concensus ended there. One worker even responded 'I don't think that's a fair question!' This question is not only fair but vital.[19]

Are doctors, teachers, police officers, or other citizens any better able than social workers to define "neglect"? Most likely not.[20] And yet, in order to protect children who really need it, all persons should be required to report cases of abuse. The problem is that there is simply no concensus of opinion in a community when persons are considering "right and wrong ways to treat children," *i.e.*, "neglect," as opposed to serious physical injury to a child through omission or commission.

For example, while parents have the legal right to use reasonable physical discipline,[21] there are experts in child rearing, and undoubtedly parents, who consider any or most physical discipline harmful to the child, whether or not it results in physical injury.[22]

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18. *Id.*

19. Cheney, *Safeguarding Legal Rights In Providing Protective Services*, 13 CHILDREN 86, 87-88 (1966).

20. S. KATZ, WHEN PARENTS FAIL 52 (1971), asserts:

> The kind of standards used [for state intervention into the family relation] may depend on the identity or, more specifically, the professional identification of the person setting the guidelines for and the purpose of the intervention.

21. *See* Paulsen, *supra* note 13, at 686-88.

22. *See* H. GINOTT, BETWEEN PARENT AND CHILD 107-08 (1965); DREIKURS, CHILDREN: THE CHALLENGE ch. 5 (1974).

In re Diaz[23] involved such a difference of opinion. A distraught mother upset over the disturbance her crying infant was creating in her doctor's office, spanked the child so hard that its buttocks were red.[24] The police were called, the child was removed from the mother and, although no evidence of improper care or harm to the child other than the spanking was shown at the trial, the child was removed from the custody of the mother.[25] The Louisiana Supreme Court reversed and set aside the judgment, holding that the isolated instance involved was not proof of neglect under the applicable statute, which referred to abandonment or lack of "proper custody or guardianship."[26]

Reporting statutes allowing for largely subjective opinions about conduct harmful or potentially harmful to a child waste the time and resources of the police, prosecutors, courts and anyone else involved with the reported cases and create a dangerous potential for excessive interference with family privacy.[27] Furthermore, unrealistic expectations are created in the reporter's mind that a situation which he thinks should be corrected *will* be corrected, but in reality courts significantly limit intervention in neglect cases.[28] One possible result of a reporter's unrealized expectations is that the reporter will not bother to report the next time, and that time may involve a serious situation for a child.

Another reason for a limited definition of child abuse is to foster protective services and other non-judicial approaches to the

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23. 212 La. 700, 33 So. 2d 201 (1947).
24. *Id.* at ___, 33 So. 2d 201.
25. *Id.* at ___, 33 So. 2d 202.
26. *Id.*
27. *See generally* Cheney, *Safeguarding Legal Rights for Providing Protective Services*, 13 CHILDREN 86, 87-88 (1966); Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. PITT. L. REV. 1 (1973). *See also* Paulsen, *Child Abuse Reporting Laws: The Shape Of the Legislation*, 67 COLUM. L. REV. 1, 12 (1967):

> The statutes generally call for the reporting of "physical" injuries. Indeed, many speak of "serious physical" injuries so that rather minor matters can be overlooked on the assumption that they are not significant as an index of danger to the child. Whether the latter limitation is wise may be questioned in the light of respectable opinion supporting the view that the minor injury growing out of the family pathology should not be disregarded. Other factors justify the limitations, however: the states' resources are limited, and a family's privacy ought not to be invaded without a grave reason."
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> Elsewhere Paulsen states: "While a 'minor' injury may signal a pathological family situation, in most cases it will not. To invoke the investigative and child—protective machinery in such instances would be uneconomic." Paulsen, *The Law and Abused Children*, in R. HELFER & C. KEMPE, THE BATTERED CHILD 86 (1968).

28. *See* text at notes 11-14 *supra.*

problem of "neglect" or "potential abuse" or "inadequate parenting."

Juvenile Judge Regnal Garff, writing for the National Council of Juvenile Court Judges, has asserted that:

> there is a crying need for juvenile protective services in the community; services that are administered by a public or private agency directed at offering preventive or corrective services to families prior to a court referral. There is the temptation for the court to offer these services through its probation department, but by so doing it permits the community to abdicate its responsibility and inadvertantly condones the practice of injecting the authority of the state in the private lives of its citizens prematurely. The protective service agency should function as a screening device to sift out those cases that can be helped without the application of authority and then offer casework services to alleviate any neglect situation. If court action is required, the role of the protective service agency would be to bring the matter to the court's attention. If thereafter the court acquires jurisdiction, its disposition might direct the agency to supply protective and casework services.[29]

Protective services, then, plays an important role in getting help to families without court intervention, including, of course, situations in which court intervention would not even be warranted but the families nevertheless *want* help.[30] Parents Anonymous groups and crisis nurseries are other recent innovations to help parents cope with the stresses in their lives and avoid taking their anger and frustrations out on their children.[31] But, when child abuse is defined to include neglect, persons working in these programs find it difficult to avoid reporting those who come for help and seem to fit the neglect definition. To say that the children of these persons *need* protection begs the question. Protection from what? The help these parents *vountarily* seek out will probably be as good and better received as what would result from judicial intervention, if indeed a court would intervene.

Those children whose parents do not seek help and who come within the definition of neglect may still be aided by the courts, if they are in the factual situation which leads the court to the conclusion that they need protection. As discussed, this generally

29. NATIONAL COUNCIL OF JUVENILE COURT JUDGES, HANDBOOK FOR NEW JUVENILE COURT JUDGES 45 (1973).

30. *See* Hays, *Child Abuse: An Overview*, also published in this symposium. *See generally* Paulsen, *supra* note 13, at 703-10.

31. *See* C. KEMPE & R. HELFER, HELPING THE BATTERED CHILD AND HIS FAMILY 47-53 (1972); Fraser, at 123-24.

will mean some objective proof of harm.[32] Unless that "harm" is serious enough to come within the definition of child abuse proposed in the next section of this article, the situation should not be subject to the reporting law. The child who needs *immediate* protection will be within the reporting law. To attempt to bring within the reporting law other children who do not need immediate protection is to become lost in the murky maze of neglect and its potential ill consequences.

PROPOSED DEFINITION AND RULES FOR CHILD ABUSE

THE DEFINITION AND REPORTING STANDARD

> *An abused child is a child*[33] *who has sustained a serious physical injury or condition which has occurred other than by accidental means. "Accidental means" shall be construed with reference to the parental duty to protect the child from a serious injury or condition.*
>
> *Any person who reasonably believes that a child is an abused child shall comply with the reporting requirements of this act.*

The clear policy of this definition and the proposed rules accompanying it is to protect children.[34] Its justification is that the definition is sufficiently limited so that family privacy will be interfered with only in grave situations. The definition leaves some matters open to the interpretation of the reporter, *i.e.*, what is a "serious" physical injury or condition, what are "accidental means," and what is the "parental duty to protect a child." However, it is urged that the risk of error involved is warranted in view of the apparent or assumed need for protection of children suffering serious physical harm who the reporter has "reason to believe" fit the definition. The choice of words describing the nature of the injury is simply based upon the decision to eliminate any words which could be construed as encompassing the broad area of neglect, without requiring that the child be in a life-endangering condition before reporting is mandated.[35]

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32. *See* text at note 14 *supra*.

33. No age limit is suggested here. *See* De Francis, *Child Abuse—The Legislative Response*, 44 DENVER L.J. 3, 9-10 (1967) [hereinafter cited as De Francis], for a discussion of age limits.

34. In this connection, a policy statement introducing the reporting act would be desirable. *See, e.g.*, Laws of New York, ch. 1039 § 411 (McKinney 1973).

35. The use of the term "serious physical injury" has been common in child abuse laws, Paulsen, *supra* note 27, at 12, but the addition of other language serves to open the definition to much broader interpretation. *E.g.*, ARK. STAT. ANN. § 42-802 (Cum. Supp. 1973) refers to "serious

The definition avoids aspects of some state statutes which appear to be undesirable in view of the policy stated above. Some states require the reporter to identify the perpetrator of the child's injury[36] or the perpetrator's state of mind.[37] Since the goal is to protect the child, it seems irrelevant for reporting purposes who the perpetrator is, and the burden of establishing the perpetrator or the perpetrator's state of mind would likely be beyond the reporter's competence.[38] Furthermore, the perpetrator's state of mind is too narrowly defined if willfullness or intent is required, since serious physical injury can be sustained as a result of neglect, *e.g.* malnutrition. Rather than refer to injury due to neglect or to specific conditions such as malnutrition, it seems better to omit state of mind or specific means of injury from the definition,[39] and include the phrase "or condition" after "serious physical injury." This phrase insures inclusion of all serious physical harm occurring by any means without opening the door to confused reporting.

Obviously, a child may be injured due to the act of a third party or a condition beyond the parents' control and parents should not be reported in these instances. But the definition is drafted to create an exception for situations in which parental indifference to the child's welfare caused the injury.[40] For example, a three-year old child may be hit by a car in front of her home, and her parent may be drinking beer and watching television, or her parent may be rescuing another child from a dog in the backyard. The former case warrants reporting and intervention for the child's protection; the latter does not. The reporter may err, but it seems

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physical injury or injuries resulting from abuse or neglect . . ." Montana's definition is closer to the proposed definition: "serious injury or injuries inflicted upon him or her as a result of abuse or neglect, or has been willfully neglected . . . ." MONT. REV. CODES ANN. § 10-902 (1968). However, to the extent that it requires a reporter to identify the state of mind or means by which the injury was caused, it is undesirable, and beyond those requirements the additional language adds nothing. The addition of "other than by accidental means," which is not contained in the Montana rendition, seems preferable.

36. *E.g.*, ARK. STAT. ANN. § 42-802 (Cum. Supp. 1973) and MO. REV. STAT. § 210.105(1) (1969), both referring to the child's condition being caused by "a parent or other person responsible for his care" for reporting purposes; *see* De Francis, *supra* note 33, at 16-17.

37. *See* MONT. REV. CODES ANN. § 10-902 (1968), *quoted supra* note 33; De Francis, *supra* note 33, at 15-16.

38. Paulsen, *supra* note 27, at 11; De Francis, *supra* note 33, at 16-18.

39. *Id.*

40. Paulsen, *supra* note 27, at 11, suggests a proviso allowing reporting to be omitted where someone other than a "caretaker" inflicted the child's injury, but notes that the proviso should not include "parental neglect or complicity." This seems to be a reasonable distinction to make for the full protection of seriously injured children.

more desirable to err in the child's favor when an injury is serious. The parent may be given ample opportunity to explain later.

Omitted from the definition are any references to sexual abuse,[41] mental or emotional injury,[42] or situations in which the reporter would be required to *predict* the occurrence of abuse from conditions observed by the reporter.[43] Each of these areas involves such difficulties in drafting that reporting becomes almost totally subjective. Of course, the objection is lessened if the definition is specific, for example, defining as abuse parental rape of a child or serious psychiatric disturbances caused by parental mistreatment. However, the standard of reporting would require a good deal of information not within the knowledge or competence of most potential reporters or would remain very subjective. Also, the immediate need for protection may not be present in these situations as it is, or can be assumed to be, in the situation where the child has sustained serious physical injuries.

In any event, it is urged that legislatures should thoroughly consider the current state of the relevant medical, psychiatric, psychological and sociological knowledge with reference to the inclusion of sexual, mental or emotional abuse in their definitions. Further, they should consider their ability to frame a sufficiently precise definition with reference to the inclusion of those forms of harm or "predicted" abuse in their statutes.

Lastly, the "reasonably believes" standard for reporting used

41. *See, e.g.*, ALA. CODE tit. 21, § 21, (Cum. Supp. 1973) requiring the reporting of "sexual abuse or attempted sexual abuse," without defining the term sexual abuse; VA. CODE ANN. § 16.1-217.1 (Cum. Supp. 1974), requiring reporting if a child has "suffered harm by reason of neglect or sexual abuse" without defining any of the terms contained in the quoted portion of the statute.

42. *See* Nebraska L.B. 20, currently pending before the legislature defining "abuse or neglect" for reporting purposes as *inter alia*, placing a child or an incompetent or disabled person "in a situation that may endanger his life or physical or mental health" L.B. 20, 84th Neb. Legis., 1st Sess. § 1(3) (1975). *See also* KAN. STAT. ANN. § 38-717 (1972), referring to "serious injury or injuries . . . as a result of physical or mental abuse or neglect." *Quaere* whether the reference to "serious physical injury" really gives any meaning to the term "mental abuse."

43. IDAHO CODE § 16-1641 (1974 Cum. Supp.) refers to a child who "has been abused or . . . [is] being subjected to conditions or circumstances which would reasonably result in abuse . . . ." Idaho's definition of abuse is limited to serious types of injuries specifically set out in the definition, which may aid the prediction. *Id.* § 16-1625(m). NEB. REV. STAT. § 28-1502 (Cum. Supp. 1974) requires reporting when a person covered by the statute is "being subjected to conditions or circumstances which reasonably would result in abuse . . . ." the definition of abuse in Nebraska being quite broad, NEB. REV. STAT. § 28-1501(3) (Cum. Supp. 1974).

in the proposed definition is quite common,[44] the other common standard being "reasonable cause to suspect." *Believe* simply connotes to this writer a stronger, more objective state of mind than *suspect*, with its connotation of engaging in detective work and operating on hunches. Thus, "believe" is preferred even though "suspect" might be modified by "reasonable cause."

PROPOSED RULES

The following rules are both reasonable and desirable in view of the proposed limited definition of child abuse and the focus on the protection of abused children.

Standard for taking a child into custody

The standard for custody should be "reason to believe," not probable cause. There is no reason to require a different standard for custody than for reporting when the purpose is protection of the child.[45]

Temporary detention of the child

The legislature should provide for the temporary detention of children reported as abused where necessary for their protection pending an investigation. Detention could be by *ex parte* order of a court[46] or by decision of a doctor or hospital[47] or anyone else designated by the legislature. Not that such detention may already be possible under juvenile court acts.[48]

Presumption of Abuse

Proof that a child's injury or condition fits within the definition of "abused child" should be sufficient to make out a prima facie

44. The phrase commonly used is "has reason to believe." *See* De Francis, *supra* note 33, at 10-11. The proposed definition uses "reasonably believes" to make sure that it is the reporter's actual state of mind that is required, so that reporters are not penalized for erring on a basis of strict liability. *See* Paulsen, *supra* note 27, at 13.

45. State v. Hunt, 2 Ariz. App. 6, ___, 406 P.2d 208, 214 (1965). *See* NEB. REV. STAT. § 43-205.01(3) (Reissue 1974). *See also* Burt, *Forcing Protection On Children And Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259, 1282-83 (1971), regarding the inappropriateness of a "probable cause" standard for medical examination of an allegedly abused or neglected child.

46. Newton v. Burgin, 363 F. Supp. 782 (W.D.N.C. 1973), upheld such an order as constitutional where a five-day detention period was permitted prior to a hearing at which the parents could present their case.

47. *See* Fraser, *supra* note 15, at 119.

48. NEB. REV. STAT. §§ 43-205.02 & .03 (Reissue 1974).

case and support an adjudication of an abused child.[49] If the parents fail to offer a reasonable explanation, the adjudication should be sustained.[50] The inability of a diligent and competent parent to discover an explanation for the injuries may sometimes be believed and overcome the presumption.

This presumption of abuse evolved from the case of *In re* S,[51] which employed the doctrine of *res ipsa loquitur* to sustain an adjudication of neglect where the evidence of the child's age and condition appeared to dictate such a conclusion absent satisfactory explanation.[52] Paulsen asserts that Judge Felix in that case was willing to employ the doctrine of *res ipsa* because he intended to intervene in a lesser fashion than termination of parental rights.[53] However, a child's unexplained serious physical injury or condition warrants both the use of the prima facie rule and the ultimate termination of parental rights if that appears necessary in a particular case.

Standard of Proof

The preponderance of the evidence rule rather than the requirement of proof beyond a reasonable doubt should be the proof standard, since proceedings to protect children are civil in nature and are not instituted for the purpose of imposing criminal penalties on the parents.[54]

Legislatures enacting the proposed definitions and rules will, of course, have to determine what court would be best suited to exercise jurisdiction over child abuse cases. In Nebraska, for example, the solution may be to add jurisdiction over these cases to the present jurisdiction of the juvenile courts, rather than have

49. *See* Fraser, *supra* note 15, at 117-18 for a discussion of this point and citations to the statutes of several jurisdictions which have enacted this rule. *See also* Comment, *Child Abuse: The Legal Framework in Nebraska*, at text accompanying notes 51-55, also published in this symposium.

50. Fraser, *supra* note 15, at 117-18. The infringement on the privilege against self-incrimination resulting from this rule was raised and rejected by the court in *In* re S, 66 Misc. 2d 683, 322 N.Y.S.2d 170, 177-78 (Family Ct. 1971).

51. *In re* S, 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Family Ct. 1965).

52. *Id.* at ___, 259 N.Y.S.2d at 165.

53. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 699 (1966).

54. *In re* S, 66 Misc. 2d 683, ___, 322 N.Y.S.2d 170, 175 (Family Ct. 1971). Note that *In re* Winship, 397 U.S. 358 (1970), requires proof beyond a reasonable doubt in juvenile court proceedings only where a child is charged with delinquency based on conduct which would be criminal for an adult, and where the adjudication of delinquency could result in confinement in a state institution.

those courts exercise jurisdiction over child abuse cases under their general "neglect" jurisdiction,[55] and to limit the application of the proposed rules specifically to child abuse cases.

CONCLUSION

The definition of child abuse proposed here is designed to enhance the community-wide effort to protect children who are immediately in need of protection and encourage non-judicial efforts in situations in which children are not in immediate need of protection but their families nevertheless need outside help. This does not mean that courts could not continue to exercise jurisdiction in cases of "neglect," however defined, where less formal efforts have failed. However, those cases would not, in this writer's opinion, justify the liberalized rules set forth in the preceding section of this article; rather, more stringent rules should be required for proof of lesser harm than "child abuse" as defined herein or for harm which is only predicted to occur from a particular set of circumstances. The risks of excessive state intervention in family affairs appear to warrant this position at this time.

Finally, the position advanced here with reference to the definition of child abuse and its accompanying rules certainly has not been conclusively established as the ideal approach to the problem of child abuse or as being based upon unassailable legal premises. Those persons dealing with or interested in the problem of child abuse can weigh the arguments made here against their own experience. The goal is to structure the best system possible for protecting children and to create an environment in which they can thrive physically, intellectually and emotionally, without exceeding the limits of our current knowledge or diminishing our integrity as a society.

55. *See* Comment, *Child Abuse: The Legal Framework in Nebraska*, at text accompanying notes 20-23, also published in this symposium.