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Child Abuse and Neglect Reporting Legislation in Missouri

Kathryn Marie Krause

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CHILD ABUSE AND NEGLECT REPORTING LEGISLATION IN MISSOURI

KATHRYN MARIE KRAUSE*

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I. INTRODUCTION

Child abuse is a major problem in the United States today. It is a family problem, a social problem, a medical problem, and increasingly, a legal

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problem. In the last 15 years literature on the subject has been voluminous.\(^1\) The abuse of children has a much longer history, however.\(^2\)

In 1946 a radiologist named Caffey noted a correlation between subdural hematoma (blood clots around the brain, usually resulting from some trauma to the head) and long bone fractures in young children.\(^3\) He hypothesized that the relationship between the two types of injuries was traumatic in origin but did not speculate on or articulate the source of the trauma.\(^4\) For quite some time, in fact, what is currently denominated child abuse, with rather specific symptoms and indicia of abuse, was diagnosed by physicians, social workers and other child care personnel as "unrecognized trauma,"\(^5\) accident proneness, and occasionally, some type of rare blood or bone disease.\(^6\)

In 1962 a physician named Kempe formalized the first medical "profile" of an abused child,\(^7\) and brought to the attention of the medical profession the realization that doctors, more than any other group of professionals, were most likely to confront, be able to identify, and report the abuse of children.

According to Kempe, the battered child syndrome should be considered in any child exhibiting evidence of possible trauma or neglect (fracture of any bone, subdural hematoma, multiple soft tissue injuries, poor skin hygiene, or malnutrition) or where there is a marked discrepancy between the clinical findings and the historical data as supplied by the parents. In cases where a history of specific injury is not available, or in any child who dies suddenly, roentgenograms of the entire skeleton should be obtained in order to ascertain the presence of characteristic multiple bony lesions in various stages of healing.\(^8\)

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8. Id. quoted in McCoid, supra note 4, at 10, n.28.
Although to the legal mind, the word “battered” implies some kind of intentional and affirmative act, Kempe’s explication of the symptoms of the syndrome was more far-reaching. The profile, by concentrating on the appearance of the child, described a child “in need of care and treatment,”9 one who would be in such need by virtue of the nature of his injuries alone, regardless of whether the mental state of the perpetrator was sufficient to find he “battered” the child.10 For the remainder of this article, the reader should keep in mind that whereas the physically “battered child” may be the easiest “maltreated child” to identify, neither the concern of the medical nor social science professions, nor the legal response, has been so narrowly circumscribed. The concern has been, almost from the beginning, with the “maltreated child.”

Prior to the 1960’s, the law dealt with the problem of child abuse, if at all, through the criminal law, generally. There may have been a specific prohibition against the mistreatment of children, as there is in the Missouri criminal statutes,12 or the act of abusing a child may have been prosecuted under the general criminal assault and battery statutes.

In the early 1960’s, however, laws requiring the reporting of child abuse were introduced in state legislatures. These laws dealt directly and specifically with one type of assault and battery—an act of abuse perpetrated against a child—and were, for the most part, meant to operate outside of the criminal justice system. The general purpose of such reporting laws was to provide some agency with information about the condition of a victim of a crime, rather than to report on the bad act of the perpetrator. The receiving agency was to act to protect the child-victim primarily, not to punish the adult perpetrator.13

In 1963 there was no child abuse reporting law in any state. In 1967 there was one in every state.14 The reporting laws were far from uniform15 and were in a constant state of flux, each new proposed law being “better”

9. § 211.031(1), RSMO 1969. See also Sussman, Reporting Child Abuse, 8 FAM. L.Q. 245, 311 (1974).
11. The expansive definition of “abuse” and “neglect” found in § 210.110.1(1), (5), RSMO (1976 Supp.), has provided the basis to enlarge the scope of concern.
13. Some of the earlier statutes, such as Law of June 3, 1965, §§ 1-4 at 359, [1965] Mo. Laws (repealed 1969) did provide for the local law enforcement agency to act as the receiving agency, but such a system was not considered by most child care experts to be the best solution. See Sussman, Reporting Child Abuse, 8 FAM. L.Q. 245, 280-84, 310; see also note 78, infra.
than the last. The reporting laws attempted to define abuse (the reportable event), abusers (a delineated group of persons who might be held legally responsible for committing the reportable event), the reporters (those charged with a duty to report or relieved of tort liability for so reporting), and the agency charged with receiving the reports. Since these early laws, the reporting laws have gone through various stages of refinement. Legal commentators began to join the ranks of medical personnel and social service workers in attempting to point out problems in the existing laws and suggesting improvements.

The reporting laws were, and continue to be, statements of social policy; a policy meant to be remedial rather than punitive. This policy having been adopted by state legislatures, however, was elevated to something more than just policy: it became law. As legal commentators began writing about child abuse and the various legislative responses to it, it became evident that as well as articulating a social policy, the reporting laws were an intrusion into the privacy of the family. Thus, in drafting reporting laws, where often the report was the least onerous intrusion compared to that which followed the making of the report, there was a need to strike a delicate balance among the family's right to be let alone, the states' duty to protect children, and the child's right to be protected.

For illustrative purposes, it would be helpful to outline briefly the extent of the states' intrusion in this area as described by the most recent Missouri legislation. Let us assume a child, suffering from physical injuries as a result of having been beaten by his parents, is taken to a hospital for treatment. Under the current Missouri statute, the treating physician is required to report that this child has been abused and the identity of the person who has abused the child. If warranted, he is also permitted to hold the child temporarily, without parental consent, for 24 hours.

16. The current Missouri legislation is the third piece of legislation in this area since 1965. See text accompanying notes 51, 55, infra.
20. AM. BAR ASSOC., MODEL CHILD ABUSE AND NEGLECT REPORTING LAW 2 (Jan. 3, 1975) [hereinafter cited as ABA MODEL ACT].
22. § 210.115.1, RSMo (1976 Supp.).
23. § 210.130.2, RSMo (1976 Supp.).
24. § 210.125, RSMo (1976 Supp.).
The physician will report the abuse on a hot-line telephone to the Division of Family Services25 and will probably ask for a check of the central registry (a compilation of all reports of abuse made on any child).26 to see if there have been prior reports of injury to this child or his siblings. Immediately after the physician has reported, the Division of Family Services will report the abuse to the local office in the geographical area where the parents are located.27 Within 24 hours of receipt of this report, a local officer will go to the home to investigate the report, see whether the child is in need of protection, and determine whether the report of abuse is substantiated.28 If it is, the local officer will take whatever action is necessary to protect the child from further abuse, if the child is at home, and will attempt to work with the family to prevent a further occurrence by offering a host of different services designed to end the abusive behavior.29 If the local officer is unsuccessful in working with the parents, a suit may be brought to remove the child from the custody of the parents.30

It is apparent, then, that the intrusion into the privacy of the family is substantial. In addition, even if for some reason the initial report is unwarranted, the family is still caught up in the bureaucratic procedures of the state. There exists a report somewhere in the central registry which will undoubtedly require some effort by the family to remove.

An additional potential intrusion into the privacy of the family is created by the fact that in most jurisdictions the physical abuse of a child would be not only grounds to trigger a report of child abuse, but also grounds for the state to intervene more directly in the family through a neglect or termination proceedings.31 An additional tension is created by the fact that physical abuse of children probably also violates some criminal statute as well.32 Thus, a report of child abuse could conceivably involve the perpetrator in the criminal process, a solution which many social workers decry and many parents undoubtedly fear.

Much of the early commentary regarding the problem of child abuse was predominantly a product of the medical and social science professions who presented graphic (often emotional)33 illustrations of the problem, stressed the necessity of protecting the child, and urged some kind of remedial state action. It was this "first generation of commentators . . .

25. §§ 210.130, .145.1, RSMo (1976 Supp.).
26. § 210.150, RSMo (1976 Supp.).
27. § 210.145.3, RSMo (1976 Supp.).
28. § 210.145.4, RSMo (1976 Supp.).
29. § 210.145.5-.6, RSMo (1976 Supp.).
30. § 211.031(1) RSMo 1969.
31. For example, § 211.031, RSMo 1969 (neglect); § 211.441, RSMo 1969 (termination).
32. § 559.340, RSMo 1969 (mistreatment of children). The Notes of Decisions show a number of cases dealing with the unreasonable use of force in punishing a child.
[who] alerted us to the nature and dangers of child abuse in our society."34 It was largely a result of their efforts that what began as mere reporting laws have been extended to include treatment and prevention procedures.

The hope has been expressed that a "second generation" of literature35 would concentrate on the legal ramifications of what has become one of the states' most important tools for intervening in the life of the family: the mandatory abuse and neglect reporting laws. There has been some response. The legal commentators approached the social policy behind the child abuse reporting laws from a different perspective and with a different language of analysis from the social scientist or the medical profession. The language of analysis changed from that of parental pathology36 to due process,37 from doctors' reports as the best evidence to support a case of child abuse to questions of hearsay,38 from a stress on the doctor's moral obligation to report39 to a stress on his legal obligation to do so and his liability for failure to do so,40 from the seemingly unquestioned right of the state to intervene in family matters in the area of child abuse to a serious debate on the extent to which the "coercive intervention"41 of the state should be limited and strictly scrutinized and the privacy of the family protected.42

This article is meant to perform a dual purpose. First, it is meant to be informational, to provide a working knowledge of the current Missouri child abuse legislation.43 The current child abuse law is more than a "reporting" law; it is aimed at the underlying causes of, and prevention of, child abuse. The need for this type of expansive child abuse legislation was discussed by the "first generation" commentators, and liberal reference will be made to their comments.44 Secondly, this article is meant to give those

34. Sussman, supra note 19, at 313.
35. Sussman, supra note 19, at 313.
37. Sussman, supra note 19, at 308-06.
40. Daly, Willful Child Abuse and State Reporting Statutes, 23 MIAMI L. REV. 283, 335-36 (1969) [hereinafter cited as Daly].
41. ABA MODEL ACT, supra note 20, at 2. "Coercive intervention" [sic] is there defined as: "the response of the state to the reported suspicion of child abuse or neglect under less than totally voluntary circumstances. This includes an investigation of a report of abuse or neglect as well as services provided under coercive terms. It also includes the listing of a name of a child or an adult on a form or register, whether or not the subject of the report is aware of its existence."
42. See note 21 supra.
43. §§ 210.110-.165, RSMo (1976 Supp.).
44. Sussman, supra note 19, at 313, 310 n.391, used the phrase "first generation" to describe the literature which concentrated on the nature and extent of child abuse. He comments that the most prolific group of persons writing this literature were persons in the social science profession.
persons—reporters, parents, and the lawyers of both—an understanding of some unresolved issues in the law as currently written. In some crucial respects, the current Missouri legislation is badly written. At the very least, this is bound to produce confusion. Confusion, however, is probably the least onerous result. The law, as currently written, also has the potential of intruding on basic due process rights. It is, at one and the same time, both vague and seriously intrusive into the private family arena. It is the "second generation" of commentators who concentrate on this particular difficulty in the new laws, and frequent reference will be made to their comments as well.

During the course of this article, liberal reference will be made to three works. The first is an excellent overview of the first generation child abuse literature and includes extensive comments on the medical, social, and legal writings on the subject of child abuse. The article is by Alan Sussman and is entitled "Reporting Child Abuse: A Review of the Literature." Although a researcher on the subject would want to read many of the works cited by Sussman in their entirety, for most persons dealing with the subject of child abuse, it is an excellent legal reference into the literature.

Mr. Sussman was also the Project Director of the American Bar Association Juvenile Justice Standards Project which promulgated a Model Child Abuse Reporting Law. The primary purpose in citing this ABA Model Act is that it is the most conservative proposal for model legislation this author could locate. The final draft was proposed after the 1974 Federal Child Abuse Prevention and Treatment Act, but the model act seems not to conform to the broad requirements of that legislation, and it is by far more restrictive than the Missouri scheme. It is a good example of the kind of "drawing back" approach which is finding articulation in the second generation of literature. In addition, this model act is most concerned with legal considerations and the comments are replete with legal discussions concerning such issues as vagueness and due process.

The third work is a model act drawn up by the Education Commission of the States. It was written to conform with, and provide an example of,

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45. Stanley v. Illinois, 405 U.S. 645, 651 (1972), extended constitutional protection to the privacy of the family. The Court said:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential"... The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. . . .

46. The ABA MODEL ACT, supra note 20, will be cited as the primary example of the "second generation" response to child abuse legislation. See text accompanying note 48. See also Wald, supra note 14.

47. 8 FAM. L.Q. 245 (1974).

48. ABA MODEL ACT, supra note 20. This was one reference source in drafting the current Missouri legislation.


50. EDUCATION COMMISSION OF THE STATES, CHILD ABUSE AND NEGLECT
the legislative mandates of the 1974 Federal legislation dealing with child abuse. This model legislation takes a fairly liberal attitude regarding the states' interference with the family because or suspected abuse or neglect and also to the extension of protective services for children.

This article will first discuss the prior Missouri legislation in this area in an attempt to point out some of the "mischief" which the current legislation meant to alleviate. The concerns, recommendations, and suggestions of the first generation of commentators which eventually led to the current and more expansive child abuse reporting, treatment, and prevention statutes also are relevant here and have been included. It is hoped that this analysis will provide a helpful framework for examining some of the equally serious concerns regarding the "second generation" child abuse laws as discussed by the more recent commentators. By this method of analysis, it is further hoped that the reader will gain not only an understanding of what the legislature intended to do, but also a sense of whether the current legislation can fulfill its purpose in a manner consistent with traditional legal theories regarding the family and with any real hope for success.

II. PRIOR MISSOURI LEGISLATION

The first generation of child abuse laws were predominantly reporting laws: that is, they required certain persons, or classes of persons, upon discovery or identification of child abuse to report it to some specified agency.

In 1965 the Missouri legislature enacted a child abuse law\(^\text{51}\) which required the report of child abuse by physicians only if the abuse was perpetrated by the child's parents and only if the abused child was under twelve years of age.\(^\text{52}\) In addition, the statute was one known as a "permissive" statute in that the physician had no legal or statutory duty to report the abuse of a child; rather, the physician was permitted to report the abuse\(^\text{53}\) with a corresponding freedom from civil or criminal liability if he did so. This type of statute seemed aimed not so much at protecting the child as the physician.\(^\text{54}\)

By 1969, the concern over child abuse had gained considerable momentum and the legislature enacted new child abuse legislation\(^\text{55}\) which greatly expanded the list of persons expected to report child abuse, this time making such reporting mandatory. The list included:

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\(^{51}\) Model Legislation for the States (1975) [hereinafter cited as ECS Model Act]. This was one reference source in drafting the current Missouri legislation.


\(^{53}\) De Francis, Child Abuse—The Legislative Response, 44 DENV. L.J. 3, 10 (1967), comments that the legislatures may have felt that children over 12 could defend, or speak for, themselves.

\(^{54}\) Id. at 305.

any physician, surgeon, dentist, chiropractor, podiatrist, christian science or other health practitioner, registered nurse, school nurse, teacher, social worker, or others with the responsibility for care of children for financial remuneration, having reasonable cause to believe that a child under the age of seventeen years brought to him for examination, care, or treatment has suffered injury or disability from physical abuse, or neglect inflicted upon him other than by accidental means.56

Those classes of persons with a duty to report had increased from that group generally considered most qualified and most likely to spot child abuse—the physicians57—to almost every group of professionals likely to come in contact with children.

Even with this more expansive legislation, however, the statute was perceived to remain deficient.58 Children were reported only "after the fact;"59 no provisions were made for reporting children likely to be subject to abuse—e.g., siblings of a child visibly abused. It was also claimed that whereas teachers and school nurses were mandated to report, they were often told internally to first report to school principals, who had no duty under the statute to report. Often no report would ever be forthcoming.60 Furthermore, many persons required to report were actually ignorant of their duty to do so because of woefully inadequate public dissemination either as to the problem or the mandatory reporting law itself.61

It was not so much the inadequacies of the previous child abuse laws or the desire to strike a more delicate balance which resulted in the current Missouri legislation, however. It was, rather, the advent of Federal legislation with its promise of grants to states who complied with the federal statutory requirements.62

III. FEDERAL LEGISLATION

In January, 1974, PL 93-247 (hereinafter referred to as National Act) was passed by Congress.63 This law went beyond the boundaries of a

56. Id. at 350.
59. Id.
60. Id.
61. Id.
62. House Bill 578, 78th Gen. Ass., 1st Sess., stated that because it was necessary in order to prevent certain federal funds from being cut off from payment to the State of Missouri and because there are available other federal funds if this act is passed this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act . . . .
"reporting law" and mandated certain remedial and therapeutic steps be taken upon receipt of a child abuse report. Basically, it adopted the proposition that a statutory scheme designed to find cases should provide some kind of help when the cases are found; that there should be "case work, not merely case carrying." The legislative history of the Act indicates its broader concerns: "to provide financial assistance . . . for the prevention, identification, and treatment of child abuse and neglect . . . ." In this statutory scheme, the report is only the first step in a comprehensive plan to remedy the problem of child abuse.

The law also set up a National Center on Child Abuse and Neglect. The Center is to act as an information clearing-house for public and private agencies attempting to develop programs to aid in the prevention and treatment of child abuse. It is also to be active in researching the causes of child abuse and neglect, in compiling national statistics on the incidence and extent of child abuse and to publish an annual summary of its research and findings.

The main impact of this federal law is at the state and local levels. The Act provides a grant system whereby not less than 5 per cent nor more than 20 per cent of the moneys appropriated pursuant to the Act are to go to the states "for the purpose of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs." It should be noted that by 1974 all states had some sort of child abuse reporting legislation. Thus the federal money was a deliberate attempt to expand the concern of the state agencies beyond the mere reporting of the injury and to require some remedial action be taken pursuant to the report.

In order to qualify for federal grants, the new state child abuse statutes have to meet ten conditions. Only two conditions address the initial report of child abuse itself. First, the state law must provide immunity "from prosecution, under any State or local law," for any person reporting instances of child abuse. As to those persons mandated to report, immunity from prosecution was already a basic part of most reporting laws. Second, the state statute must provide for the reporting of known and

66. 42 U.S.C.A. § 5101(a) (Supp. 1976). This should not be confused with the National Center for Prevention and Treatment of Child Abuse and Neglect in Denver, Colorado.
70. See text accompanying note 14 supra.
suspected instances of child abuse.\textsuperscript{73} This provision required expansion of the basic Missouri coverage.\textsuperscript{74}

The remaining eight conditions imposed on the states to be eligible for grant money include:\textsuperscript{75} (1) a prompt investigation must be made following a report of child abuse to determine the accuracy of the report and immediate steps must be taken to protect the abused or neglected child or any other children under the same care of the suspected abuser; (2) administrative procedures must be established which are aimed at the enforcement of the child abuse and neglect reporting laws, and the general neglect laws, and which make ample provision for trained personnel, treatment facilities, and “multidisciplinary programs and services”; (3) a system must be instituted which will preserve the confidentiality of all records; (4) a system must be provided for the cooperation of law enforcement agencies, courts and state agencies offering “human services”; (5) a guardian ad litem must be appointed for a child where there is a judicial proceeding which results from a report of abuse or neglect; (6) any cutback or state monetary appropriations to deal with child abuse and neglect is prohibited; (7) information must be disseminated to the general public concerning the problem of child abuse and the facilities available for prevention and treatment; and (8) the Act suggests that “to the extent feasible,” the state insure that parental organizations combating child abuse and neglect receive perferential treatment, presumably as regards financial assistance.

IV. CURRENT MISSOURI LEGISLATION ON CHILD ABUSE AND NEGLECT

A. Statement of Purpose

The National Act had as its purpose providing financial aid for programs “for the prevention, identification, and treatment of child abuse and neglect . . . .”\textsuperscript{76} Although a statement of clear purpose is a desired part of legislation,\textsuperscript{77} neither the former nor the current Missouri law contains such a clause.\textsuperscript{78} The absence of a statement of purpose is not seriously detrimental to the discovery of a legislative purpose, but as has been pointed out, “[s]tatutes which authorize the conditions, methods and extent of state

\textsuperscript{74} See text accompanying notes 190-92 infra.
\textsuperscript{76} See note 65 supra.
\textsuperscript{77} Sussman, Reporting Child Abuse 8 FAM. L.Q. 245, 247 (1974). Both the ECS MODEL ACT and the ABA MODEL ACT contain sample purpose clauses.
\textsuperscript{78} De Francis, supra note 52, at 5, 27, inferred that the implied purpose behind the former Missouri statute was penal because reporting was to be done to the local law enforcement agency, and there was no contrary statement of purpose. Cf. § 211.011, RSMo 1969, which articulates the purpose of §§ 211.011-.431 to “facilitate care, protection and discipline of children who come within the jurisdiction of the juvenile court.” It provides that the act “shall be liberally construed . . . to the end that each child . . . shall receive such care, guidance and control, preferably in his own home, as will conduce to the child’s welfare and the best interests of the state . . . .”
interference into the privacy of the family should . . . be written with careful and constant reference to the purpose legitimizing such intervention." It is clear that one cannot make constant reference to a statement of purpose where none exists. From the discussion to follow in the remainder of this article regarding the Missouri law, it will be clear that the legislation could have profited from a well-written purpose clause.

B. The Reporters

The noticeable trend in child abuse legislation has been to broaden the base of reporters required to make a report of child abuse.\(^7^9\) There are commentators who feel that because the physician is in the best position to identify child abuse and is the person most likely to cull out accurately accidental from non-accidental injury, mandatory reporting should be limited to this specific group.\(^8^1\) But the trend has been consistently toward expansion; for an ever-increasing class of persons there has arisen a statutory duty to report child abuse. The classes have expanded from physicians to other types of medical and health care personnel, non-medical child care personnel, and teaching personnel.\(^8^2\) Sussman claims that "[i]t appears . . . that none of the states which expanded the base of required reporting is dissatisfied with the results."\(^8^3\)

Some of the more significant additions to the list of reporters in the current legislation (over those already mandated to report by the 1969 act)\(^8^4\) are juvenile officers, probation and parole officers, peace and law enforcement officials.\(^8^5\) Under the 1969 statute, in addition to the specifically enumerated classes of persons required to report, any other person responsible for the care of children "for financial remuneration" was required to report.\(^8^6\) This provision has been deleted. This indicates that the list of those required to report under the current statute is exclusive.

Under prior Missouri law, the classes of persons one might have expected to have made the most reports of child abuse were actually responsible for the least number of reports.\(^8^7\) During a five year period,

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79. ABA MODEL ACT, supra note 20, at 2. See Sussman, supra note 77, at 248, pointing out that recent legislation in the child abuse area has been absent any purpose clause.
80. Sussman, supra note 77, at 272.
82. Those in favor of such expansion include: Daly, supra note 40, at 342; Grumet, The Plaintifffsفلף, 4 FAM. L.Q. 296, 305 (1970); Note, Oregon's Child Abuse Legislation: Some Additional Proposals, 5 WILLAMETTE L. REV. 131, 134-35 (1968); Legislative Notes, Privileged Communications—Abrogation of the Physician-Patient Privilege to Protect the Battered Child, 15 DE PAUL L. REV. 453, 460 (1966).
83. Sussman, supra note 77, at 272.
84. See text accompanying note 56 supra.
85. § 210.115.1, RSMo (1976 Supp.).
87. BACKGROUND PAPER—HOUSE BILL 578, supra note 58, at 2.
"no cases were reported by surgeons; physicians reported only 5 per cent of the total reported cases; hospitals, 12.8%; registered nurses, 0.9%; school nurses, 2.7%; and teachers, 5.8%. The remainder of the cases were reported as follows: 21.7% by social workers, 12.3% by relatives; 10.7% by police; 6.3% by neighbors; 21.8% by miscellaneous others.89 Relatives, police, neighbors and others were under no legal duty to report and yet they reported more cases than those mentioned in the first group of statistics who were required by statute to report.

Another significant addition to the statute is the fact that the coroner must report any deaths which he has reasonable cause to believe resulted from child abuse or neglect.90 The fact that he was not required under most statutes to report child deaths which may have resulted from abuse was viewed as a weakness of prior legislation. From a treatment and prevention viewpoint, a report helps to protect other children in the home.91 The fact that the coroner was not required to report was also seen as a source of "hidden statistics" which resulted in an understatement of the incidence of child abuse.92

The current legislation also mandates that any person required to make a report of abuse or neglect must report to the coroner any deaths suspected to have resulted from such abuse or neglect. The coroner, in turn, must report his findings to the police, juvenile officer, prosecuting attorney, or Family Services Division (and, if the report was made by a hospital, to the hospital).93

Though there are those who feel that the world at large should be required to report cases of child abuse, legislative action has not been consistent with that theory. There is, undoubtedly, a fear "that everybody's duty may easily become nobody's duty."94 However, the trend is to permit anyone to report child abuse and to grant them the same type of immunity as is granted those required to report. The new Missouri legislation is consistent with this approach and specifically provides for permissive reporting by anyone with reasonable cause to believe abuse or neglect has occurred.95

C. The Report

The Division of Family Services maintains a "Hot Line" ("a single,

88. Id. This is apparently not an isolated phenomenon, and is "especially true of private or non-hospital based physicians. In New York City, a total of 2,223 reports of suspected abuse were recorded in 1970; of these . . . only eleven . . . were from private physicians." Sussman, supra note 77, at 270-71.
89. BACKGROUND PAPER—HOUSE BILL 578, supra note 58, at 2.
90. § 210.115.1, RSMo (1976 Supp.).
91. ECS MODEL ACT, Comments, supra note 50, at 19.
92. Id.
93. § 210.115.5, RSMo (1976 Supp.).
95. § 210.115.4, RSMo (1976 Supp.).
statewide toll free number") to receive oral reports of abuse or neglect from any source. Those persons mandated to report must follow up the telephone report within 48 hours with a written report. The written report must include the name and address of the child; the name and address of the parents of those responsible for his care, if known; the age, sex and race of the child; the nature and extent of the child’s injuries and whether he is abused or neglected, including “any evidence of previous injuries, abuse or neglect to the child or his siblings” and the persons responsible for the previous infliction of injuries, if known. The report should also state the family composition.

The person making the report must also give some information about himself and his activities. He must state his own name and address, his occupation, and where he can be reached. He must also state any action that was already taken in regard to the abused or neglected child such as photographs, radiologic examinations, temporary protective retention or removal of the child, notification of the coroner and “other information” the reporter “believes may be helpful in the furtherance of the purposes of [the act].”

The section of the Missouri statute dealing with the actual making of a report does not deal with provisions for self-reporting. However, a later section dealing with publicity of the child abuse law and the treatment and prevention programs states that one of the goals is to “encourage self-reporting and the voluntary acceptance” of remedial and therapeutic services. This seems a laudatory goal in the abstract. However, the statute on the whole is not designed to provide for, or to protect, a self-reporting individual. For example, there is no provision made for anonymous self-reporting. Presumably such reports would be accepted on the hot line, but whether such reports would be followed up with the statutory protective services is questionable. In terms of time allocation, they would probably be placed at the bottom of priorities.

A Model Child Abuse and Neglect Reporting Law promulgated by the American Bar Association Juvenile Justice Standards Division provides for anonymous self-reporting as a method of directing an abusing parent to a voluntary treatment program in the geographical area of the parent, or as a method of getting the parents in touch with a caseworker or someone to whom they may speak confidentially.

Should a parent report himself as an abusing parent and identify himself, he would be making an admission, admissible in evidence against

96. § 210.145.1, RSMo (1976 Supp.).
97. § 210.130.1, RSMo (1976 Supp.).
99. Id.
100. § 210.155.1, RSMo (1976 Supp.).
102. Id.
him should there be any subsequent neglect or termination proceeding.\textsuperscript{103} There is no general social worker-client privilege to protect this type of communication.\textsuperscript{104} One could make the argument, however, that a person who reports himself as an abuser and identifies himself becomes "a person . . . making a report."\textsuperscript{105} If so, you could claim that this person is shrouded with a good faith immunity "from any liability, civil or criminal, that otherwise might result by reason of such actions."\textsuperscript{106} The self-reporting abuser might claim that he has a defense to any civil neglect or termination proceeding, or to any criminal assault proceeding. The statute does not preclude such an argument. However, its success would depend on the court's elucidation of legislative intent. The court could find that the grant of good faith immunity from "any liability" was not meant to extend to a self-reporting individual.

Self-help programs only seem beneficial when they are conducted totally outside a framework which involves, in case of failure, judicial interference. If a person wants judicial interference, e.g., if a parent wants custody removed from him temporarily, he can ask for it. But a self-help program under the current law would require, to some extent, state intervention regardless of whether the individual agreed with the nature or extent of the involvement.\textsuperscript{107} There is no doubt the Division of Family Services hopes a family will voluntarily accept services, especially if they have reported themselves. However, once the report is made, what must be "voluntarily" accepted is no longer bound by what the family wants, but by what the state considers best.

D. The Reportable Events

1. Abuse

The National Act focuses attention on "child abuse and neglect" as one singular problem, and defines this conjunctive phrase as "the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen . . . ."\textsuperscript{108} Because the states ultimately were bound to formulate their definitions after those of the National Act, one could have hoped for greater specificity, for language less "laced with ambiguity."\textsuperscript{109} Daly, although recognizing that the lack of clear definition

\textsuperscript{103} In Interest of M.J.M., 483 S.W.2d 795 (Mo. App., D. St. L. 1972).
\textsuperscript{104} § 210.140, RSMo (1976 Supp.), would render the privilege inapplicable in any event.
\textsuperscript{105} § 210.135, RSMo (1976 Supp.).
\textsuperscript{106} Id. See text accompanying notes 224-230 infra.
\textsuperscript{107} In Interest of M.J.M., 483 S.W.2d 795 (Mo. App., D. St. L. 1972). The agency brought termination proceedings after the mother refused to comply with the psychiatric treatment recommendations of the agency. Although the mother had voluntarily initiated the contact with the agency, once initiated, she was no longer sole determiner of the services to be provided to "help" her. See also In re C — F — B — , 497 S.W.2d 831 (Mo. App., D.K.C. 1973).
\textsuperscript{109} Sussman, supra note 77, at 250.
makes writing about child abuse difficult, feels that it is best to have "no arbitrary limits" on the definition.\(^\text{110}\) She states, "Society knows what abuse is, even without a specific definition, and may thus approach the problem with the individual characteristics and the best interests of the child as the primary considerations."\(^\text{111}\) However, there is some question whether society really does have a clear idea as to what constitutes abuse. For example, in 1967 Paulsen wrote "Surely the terms 'abuse' or 'neglect' are best left undefined. The varieties of serious abuse are all embraced by statutory language which speaks of physical injuries."\(^\text{112}\) In 1974, however, the National Act added mental injury to the definition of child abuse.\(^\text{113}\) There was a vigorous dissent to this extension of the definition of abuse, as well as to the failure of the Act to provide any concrete definition at all of "abuse and neglect."\(^\text{114}\) Upon examination of the current Missouri statute one can better appreciate some of the difficulties which present themselves as a result of the absence of a clear definition of the observable conditions which are meant to trigger a child abuse report.

Under the current Missouri law, abuse is defined as "any physical injury, sexual abuse, or emotional abuse inflicted on a child other than by accidental means by those responsible for his care, custody, and control . . . ."\(^\text{115}\) A background paper which accompanied the Missouri statute when it was first presented as House Bill 578 makes the following comment:

The definitions of child abuse and neglect determine the conditions which constitutes [sic] reportable circumstances; they are not meant to constitute definitions under which a child may be adjudicated abused or neglected. For purposes of reporting, the terms as defined describe the conditions of the child, not the acts or omissions of those responsible for the child's care. The terms "physical injury", "sexual abuse", and "emotional abuse" are meant to be interpreted according to their common understanding.\(^\text{116}\)

From the perspective of a person mandated to report abuse or neglect it would be best that "the terms as defined describe the conditions of the child, not the acts or omissions of those responsible for the child's care." However, that is not what the statute says, despite the above comment. In fact, the statute does the opposite. Nowhere is there a description of the "reportable circumstances"—physical injury, sexual abuse, emotional abuse or 'neglect, per se. Rather, the meaning of these conclusory terms is

\(^{110}\) Daly, Willful Child Abuse and State Reporting Statutes, 23 Miami L. Rev. 283, 284 (1969).

\(^{111}\) Id.


\(^{115}\) § 210.110.1(1), RSMo (1976 Supp.).

\(^{116}\) BACKGROUND PAPER—HOUSE BILL 578, supra note 58, at 3-4 (emphasis in original).
to come from "common understanding." What is added to these terms to become the statutory definition of "abuse" and "neglect" is a requirement that they be done or omitted by someone responsible for the child's care.117 If the ground for reporting abuse or neglect is "that of manifest harm to the child,"118 then it seems reasonable to require that the definitions of the harm be described in terms of their manifestations, not the behavior of some third person.

a. "Other Than By Accidental Means"

The definition of abuse contained in the Missouri statute requires that the abuse be inflicted "other than by accidental means."119 The "accident" exception was undoubtedly meant to protect families from state intervention where there was no culpability at all. However, the degree of culpability required to render the injury "non-accidental" is not defined in the statute. Reasoning from general tort principles, it is likely that the statute meant to differentiate accidental from negligent, rather than from deliberate and intentional infliction of injury. For example, if a parent uses unreasonable force in disciplining his child, he has behaved negligently towards his child. Thus, the resulting injury has occurred negligently, "other than by accidental means," even if the parent did not "mean" or "intend" or have the purpose of harming the child.120

The determination as to whether abuse occurred by accident will often be made by noting an incongruity between the physical symptoms manifested by the child and the verbal account of the occurrence by the person who brings him in for treatment; by self-contradictions or discrepancies when the story relating the circumstances of the injury is told; by x-rays that show signs of seeming past abuse and make the fact of an accident in this case less likely.121 Still the reader should ask himself whether a school teacher, a person mandated by the statute to report abuse, would have any information as to causation of the injury on which to base a reasonable belief that what is observed was caused other than accidentally, and thus qualifies as abuse. One court felt that persons other than physicians were "not adequately equipped to determine from the appearance of an injury whether it was caused by accidental or nonacciden-

117. § 210.110.1(1), (5), RSMo (1976 Supp.).
118. ABA MODEL ACT, supra note 101, at 5, has an almost identical comment to that mentioned in the text accompanying note 116, supra and yet claims the standard for intervention should be "manifest harm to the child."
119. § 210.110.1(1), RSMo (1976 Supp.). This is not found in the National Act.
120. This line of reasoning finds support in case law. Section 559.340, RSMo 1969, deals criminally with mistreatment of children. It appears that the unreasonable infliction of punishment gives rise to criminal culpability. State v. Black, 360 Mo. 261, 227 S.W.2d 1006 (1950). Surely, then, an injury resulting from an unreasonable act would be a reportable injury.
121. McCoid, The Battered Child and Other Assaults on the Family, 50 MINN. L. REV. 1, 28 (1967). But see id. at 47.
tual means . . . ." According to the technical language of the Missouri statute, if the school teacher were unable to form a belief as to this element of the definition, arguably there would be no reportable abuse.

The "other than by accidental means" qualification should be eliminated from the definition of abuse as it applies to a person mandated to report child abuse. Perhaps it is an issue of importance to a person attempting to treat abuse, prevent a reoccurrence, or remove a child from custody, but its inclusion in the definition of reportable abuse requires "the reporter to make an impossible and unnecessary judgment, [and] undermine[s] the purpose of a reporting law."

b. Physical Injury

Under the current Missouri statutory scheme, abuse occurs when there is a physical injury "inflicted on a child other than by accidental means by those responsible for his care, custody, and control." There is probably little dispute that the term "physical injury" is one of common understanding. It would include such things as bruises, lacerations, abrasions, welts, choke marks, burns, bites, and fractures. In fact, the use of such language to define abuse, as opposed to some technical, clinical description, has found support in at least one case. The court said:

the incident to be reported is not a fuzzy conglomerate of clinical symptoms making up the battered child syndrome but observable external injury or injuries which are properly recognizable through the expertise of a physician.

It is not surprising that even those most skeptical and cautious about the states' interference in the privacy of the family see little difficulty in

123. Sussman, supra note 77, at 253. See also Daly, supra note 110, at 319; McCoid, supra note 57, at 49; Paulsen, Child Abuse Reporting Laws: The Shape of the Legislation, 67 COLUM. L. REV. 1, 11 (1967). The ABA MODEL ACT, supra note 101, at 7, has eliminated the clause "caused other than by accidental means" in order "to relieve the reporter from the responsibility of ascertaining the intent . . . of the abuser, which is more properly the task of those who conduct the investigation of the reported incident."

124. § 211.110.1(1), RSMo (1976 Supp.).
125. Landeros v. Flood, 50 Cal. App. 2d 189, 123 Cal. Rptr. 713 (1975). There may be little reason to catalogue, either in medical terms or in laymen's language, those specific manifestations of a child which lead a reporter to conclude the child has been physically injured, therefore abused. But sight must not be lost of the process by which someone comes to the conclusion that a child has been abused. The reporter must observe something in order to conclude the child has been physically injured. Only after observing the manifestations of the child can he conclude from the evidence that the child has been physically injured; and, only then that he has been abused. It may not be important to describe the "underlying something" which the reporter must observe to conclude there is physical injury, but as will be seen subsequently in the discussion of other "injuries" which constitute abuse, the failure to define the injury in terms of the process involved which eventually leads to the conclusion of abuse leaves the statute subject to challenges of vagueness.
justifying such interference to protect children from physical injury.\textsuperscript{126} The only issue is at what point the state should be permitted to intervene.

Neither the current nor the most recent past Missouri legislation has contained any requirement that the physical injury suffered by the child be serious, although some statutes do so provide.\textsuperscript{127} Those supporting the absence of any "degree of injury" standard do so for at least two reasons. First, if included the reporter would be required to determine whether the injury is serious, giving him too much discretion with too few guidelines by which to make that determination.\textsuperscript{128} Second, the determination of the seriousness of an injury seems more treatment-directed than preventive. A report of a non-serious injury may prevent the occurrence of a more serious injury later on.\textsuperscript{129} Undoubtedly, in light of the preventive purpose behind the National Act and the most current state legislation, the base of reportable injuries was meant to be expanded. The additional requirement that the injury be "serious" would be counter-productive.

There is support, however, for the proposition that only a "serious" injury warrants the intrusion of the state into the privacy of the family. The ABA proposal has such a requirement on the theory that the state's intrusion is itself a serious matter and should be permitted only when there is an equally serious problem.\textsuperscript{130} In an article by one of the ABA reporters, Michael Wald, serious physical injury is defined as "an injury . . . which causes or creates a substantial risk of death, disfigurement, or impairment of bodily functioning."\textsuperscript{131} He contends that such a definition works to insure that the focus is on the child's condition, that is, on the consequences to the child for parental action and not merely the fact that the parent has committed an act which might be denominated "serious."\textsuperscript{132}

As was pointed out, however, a standard which requires abuse to be "serious" to warrant its reporting is a standard applied after-the-fact of injury. That is, the person observing the child determines that this specific child has been seriously abused. Such a standard does not advance the preventive aspects of the current Missouri or National legislation. That legislation ideally hopes to prevent a serious case of abuse from arising by being notified of cases of abuse early, and hopefully treating the abusing parent before he does seriously abuse this child or any of his siblings. In such a statutory scheme, it is not likely that a standard requiring "serious" injury would advance the basic purposes behind the legislation. The legis-

\textsuperscript{128} Daly, \textit{supra} note 110, at 318, 343; Sussman, \textit{supra} note 77, at 252.
\textsuperscript{129} Daly, \textit{supra} note 110, at 343; Sussman, \textit{supra} note 77, at 252; McCoid, \textit{The Battered Child and Other Assaults Upon the Family}, 50 MINN. L. REV. 1, 50-51 (1965).
\textsuperscript{130} ABA MODEL ACT, \textit{supra} note 101, at 2, 5-7; \textit{See also} Sussman, \textit{supra} note 77, at 252; Paulsen, \textit{supra} note 112, at 12.
\textsuperscript{131} Wald, \textit{supra} note 126, at 1011-12.
\textsuperscript{132} \textit{Id.} at 1012.
lation is victim-oriented and as such is meant to protect the victim from a serious physical injury; it is not meant to await the point at which a parent or custodian inflicts serious injury to offer its remedial services.

c. Sexual Abuse

The current Missouri statute specifically mentions sexual abuse as a circumstance giving rise to a general finding of "abuse." The statute nowhere defines "sexual abuse," perhaps because "[t]here is now agreed-upon definition" of the term.

The term "sexual abuse" is commonly used but vaguely defined. It clearly encompasses incest . . . and acts such as oral copulation. Beyond this, its confines are not clear. . . . In addition to intercourse, intervention may be justified when there has been fingering or fondling of genitals, excessive fondling of breasts, or when the parent engages in sexual misconduct with the child.

Though not specifically defined in the child abuse statute, the term "sexual abuse" can, perhaps, be given some "confines" by reference to Missouri's criminal statute, which prohibits "molesting [a] minor with immoral intent." If a specific act was sufficient to warrant prosecution and conviction under this provision of the statute, it is undoubtedly sufficient to be denominated "sexual abuse." The following acts have been found sufficient to be considered "molestation": sexual intercourse, fondling of genitals, indecent exposure, photographing a nude child engaging in

133. § 210.110.1(1), RSMo (1976 Supp.).
134. Wald, supra note 126, at 1024.
135. Id. at 1024 n.203 and 1027 n.223.
136. § 563.160 RSMo 1969 provides:

Any person who in the presence of any minor shall indulge in any degrading, lewd, immoral or vicious habits or practices; or who shall take indecent or improper liberties with such minor; or who shall publicly expose his or her person to such minor in an obscene or indecent manner; or who shall by language, sign or touching such minor, suggest or refer to any immoral, lewd, lascivious or indecent act, or who shall detain or divert such minor with intent to perpetrate any of the aforesaid acts, shall be considered as annoying or molesting said minor and shall upon conviction be punished by imprisonment in the penitentiary for a period not exceeding five years, or be punished by imprisonment in the county jail for a period not exceeding one year, or be fined in a sum not to exceed five hundred dollars or by both such fine and imprisonment.

137. An additional advantage of making reference to this statutory provision is that it has been upheld against constitutional attack on grounds of vagueness. State v. Kornegger, 363 Mo. 968, 255 S.W.2d 765 (1953).

138. State v. Chittim, 261 S.W.2d 79 (Mo. 1953). For a case brought under the neglect section where, as a result of sexual intercourse with the father, a child was considered in need of care and treatment, see In the Interest of T.J.A., 407 S.W.2d 573 (K.C. Mo. App. 1966).

139. State v. Chappelle, 462 S.W.2d 707 (Mo. 1971); State v. Frankum, 425 S.W.2d 183 (Mo. 1968); State v. Mathews, 328 S.W.2d 642 (Mo. 1959); State v. Kornegger, 363 Mo. 968, 255 S.W.2d 765 (1953); State v. Frazer, 363 Mo. 77, 248 S.W.2d 645 (1952).

140. State v. Daegele, 302 S.W.2d 80 (Mo. 1957).
lewd activities, and masturbating in the presence of a child with no physical contact. Incest is also made a felony by a separate provision and would undoubtedly qualify as abuse.

In 1973, it was reported that an American Human Association study had determined that over 87% of the victims of this type of abuse were female children. In 25% of the cases, the perpetrator was a stranger; conversely in 75% of the cases the perpetrator was a “member of the household, a relative, a close friend of the parents or someone in the neighborhood who is known to the child” (27% suffered at the hands of the mother’s paramour).

Because sexual abuse “is a phenomenon that thrives and proliferates in darkness,” increased sensitivity by medical personnel that such activity exists is the only way to generate reports of this type of abuse. It has been pointed out that diagnosis of sexual abuse is the “least popular diagnosis” and that “[r]ecognition of sexual molestation in a child is entirely dependent on the individual’s inherent willingness to entertain the possibility that the condition may exist.”

This is the same type of problem which confronted such medical pioneers as Kempe and Helfer who attempted to raise the consciousness of medical personnel to the fact that “unrecognized trauma” may have been a “child beaten by his parents.” The same kind of education will be necessary to educate the public to the signs and symptoms of a sexually abused child.

d. Emotional Abuse

The current Missouri legislation adds emotional abuse to the list of reportable conditions. Presumably, this was an adaptation of the “mental injury” element of the National Act’s definition of “abuse and neglect.” This addition will undoubtedly come under severe attack because the new reportable condition remains basically undefined and open to challenges of vagueness. This was, in fact, one of the main attacks levied in dissent against the National Act.

141. State v. Cutler, 499 S.W.2d 387 (Mo. 1973); State v. Withers, 347 S.W.2d 146 (Mo. 1961).
142. State v. Schubkegel, 261 S.W.2d 933 (Mo. 1953).
143. § 563.220, RSMo 1969.
146. Id. at 19.
147. Id. at 20 (emphasis deleted).
148. § 210.110.1(1), RSMo (1976 Supp.).
150. See the legislative history in 1974 U.S. CODE CONG. & ADMIN. NEWS 2772, where it is claimed that for some persons there is “ample evidence that sensitivity training programs funded under Title III of the Elementary and Secondary Education Act constitute mental injury.”
Emotional abuse, or as it is often called, emotional neglect,\textsuperscript{151} is undoubtedly a form of child maltreatment which, no less than physical abuse, leaves it own kind of permanent scarring. It has been postulated that much delinquent behavior faced by juvenile courts is a result of emotional neglect.\textsuperscript{152} Including such abuse in the statute seems to indicate a desire that the state be able to intervene in some kind of preventive capacity at an earlier state, before the child has been sufficiently damaged to be a behavior problem.\textsuperscript{153}

As early as 1958, Robert Mulford\textsuperscript{154} became a proponent of the extension of protective services to those persons who were not necessarily physically abused or neglected "but who suffer from emotional deprivation and may well be permanently injured."\textsuperscript{155} Mulford attempted a definition of emotional neglect:

Emotional neglect might be defined as "the deprivation suffered by children when their parents do not provide opportunities for the normal experiences producing feelings of being loved, wanted, secure and worthy, which result in the ability to form healthy object relationships."\textsuperscript{156}

Mulford felt that a broad interpretation of most general neglect laws could include emotional neglect.\textsuperscript{157} Furthermore, by requiring early referral of the problem, reporting laws could enable the use of protective services at a time when the child's problem was "perhaps more amenable to treatment."\textsuperscript{158}

The particular language used by Mulford, i.e., "emotional starvation," deprivation, failure to provide, suggests that "mental injury" might have been better incorporated into the category of the statute dealing with mandatory reporting of neglect rather than that dealing with abuse.\textsuperscript{159}

\textsuperscript{151} R. MULFORD, EMOTIONAL NEGLECT OF CHILDREN (Am. Humane Assoc., Children's Div. 1958); Sussman, supra note 77, at 263-69; Wald, supra note 126, at 1014.


\textsuperscript{153} Arthur, Protecting Neglected and Abused Children—A Community Responsibility, in SECOND NATIONAL SYMPOSIUM ON CHILD ABUSE 6-8 (Am. Humane Assoc., Children's Div. 1973); See also Wald, supra note 126, at 1016.

\textsuperscript{154} R. MULFORD, EMOTIONAL NEGLECT OF CHILDREN (Am. Humane Assoc., Children's Div. 1958).

\textsuperscript{155} Id. at 1.

\textsuperscript{156} Id. at 4. See also Roberts, Studies of Children Deprived of Human Contact, Interaction and Affection, in CHILDHOOD DEPRIVATION 19 (A. Roberts, ed. 1974); Hatfield, Affectional Deprivation and Child Adjustment, in CHILDHOOD DEPRIVATION 54 (A. Roberts, ed. 1974).

\textsuperscript{157} Mulford, supra note 154, at 1. See In re C — F — B —, 497 S.W.2d 831 (Mo. App., D.K.C. 1973), where the court construed § 211.031, RSMo 1969, and stated that neglect covers the situation where a parent fails and refuses to get a child necessary medical attention, including treatment for mental and emotional ills.

\textsuperscript{158} Mulford, supra note 154, at 1.

\textsuperscript{159} Id. Mulford's original proposition was that general neglect laws were
general the concept of neglect is thought to imply that some required conduct has been omitted (e.g., a child has malnutrition because he was not fed properly).\textsuperscript{160} Mulford's definition is one of omission—someone has not provided the child with sufficient emotional supports. The child will usually exhibit some physical manifestations even of a predominantly emotional injury. A child who exhibits signs of such physical-psychological phenomena as failure to thrive\textsuperscript{161} or maternal deprivation\textsuperscript{162} would probably come within the ambit of most general neglect laws and the "neglect" portion of the abuse and neglect reporting laws solely on the basis of the physical manifestations. The emotional neglect per se, is probably discounted whereas the deprivation of certain tangible items is stressed: lack of adequate food, clothing, space, fresh air. Mulford states that the grounds of "emotional neglect" as the sole basis upon which the state might interfere in the family would probably only come into play when the parents appeared \textit{in fact} to be providing all the physical minimum supports, but the child continued to deteriorate in spite of such supports.\textsuperscript{163}

Whether one required to report emotional abuse has the expertise to ascertain whether a parent has failed to "provide opportunities for the normal experiences producing feelings of being loved, wanted, secure and worthy,"\textsuperscript{164} is debatable, especially with no standards outlined in the statute. In fact, it is questionable whether in any specific case the above would necessarily or even probably amount to emotional abuse. And if reporters do not have the expertise to determine what is emotional abuse, it is questionable that they should be able to involve a family in the "coercive intervention" of the state, \textit{i.e.}, the report and the investigation which will follow the report. The states' intrusion is a serious one and without adequate guidelines in the statute, a report of abuse can be based on an individual's arbitrary feelings of what constitutes "normal experiences."

Sussman points out that while it is readily recognized that children can and do suffer from emotional, as well as physical, injuries "legislatures and courts are hesitant to include in the formulation or interpretation of criminal or civil statutes a type of harm which is either non-observable or

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\textit{See} text accompanying note 171-82 \textit{supra}.

\textsuperscript{160} \textit{In re Ayres}, 513 S.W.2d 731 (Mo. App., D. St. L. 1974). The court states that the basic goal of the neglect law is to prevent the social, physical and psychological deterioration of children.

\textsuperscript{161} Sussman, \textit{supra} note 77, at 268: "Failure to thrive' children are those whose vital growth declines even though they appear to have adequate care. The condition is well recognized by pediatricians from signs of malnutrition and growth failure despite the presence of adequate food."

\textsuperscript{162} Sussman, \textit{supra} note 77, at 267: "Maternal deprivation is a term used to describe the lack of an infant's normal contact with his mother, and the lack of appropriate external stimulation."

\textsuperscript{163} Mulford, \textit{supra} note 154, at 7.

\textsuperscript{164} \textit{Id.} at 4.
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extremely difficult to demonstrate and prove." However, the Missouri legislature seems to have done precisely that.

This type of legislative action prompts criticism. It is contended that legislators

should not permit intervention based on ideas of normality. Intervention should be restricted to cases where the child's intellectual development or the development of his capacities is seriously retarded . . . . The risk of harm through intervention on the basis of little understood factors should not be tolerated. 166

Wald contends that the focus must be on the child's manifestations of the emotional abuse, rather than on the behavior of the parents. 167 This makes obvious sense in the context of reporting laws because without some evidence of damage to the child there is nothing to give the reporter reasonable cause to believe or suspect that abuse has occurred. Wald attempts to add some specificity to an otherwise extremely vague area by proposing that state intervention be permitted only when "the minor is suffering serious emotional damage, evidenced by severe anxiety, depression or withdrawal, or untoward aggressive behavior or hostility towards others, and the parents are unwilling to provide treatment for the child." 168

From a legal perspective, it would seem obvious that for a report to issue upon a finding of emotional abuse there must be something observed, some evidence of abuse to lead to such a finding. Emotional abuse is only a label, a conclusion of the reporter that, based on certain manifestations of the child, the child is suffering from emotional abuse. The statute nowhere describes what observations should lead to this conclusion. 169 A background paper which accompanied the current law stated that the term "emotional abuse" was "meant to be interpreted according to common understanding." 170 Although there may be a common understanding as to what constitutes physical abuse of a child, such that even absent a definition the term would not be vague, there is no such common understanding as to what constitutes emotional abuse. This portion of the statute could be unconstitutionally vague and should be re-written to define emotional abuse in terms of the child's condition; that is, to describe those things which would give a reporter "reasonable cause to believe" that he is observing emotional abuse and is thus required to report.

167. Wald, supra note 126, at 1020. In fact, he makes a point of saying that there is no requirement that the harm be caused by the parents, only that they will not seek help.
168. Id. at 1019. See also In re C — F — B —, 497 S.W.2d 831 (Mo. App., D.K.C. 1975), discussed in note 157 supra.
169. See note 125 supra.
2. Neglect

The other major reportable circumstance listed in the statute is neglect, which is defined as a "failure to provide . . . the proper or necessary support, education as required by law, or medical, surgical, or any other care necessary for [the child's] well-being."171 This definition focuses on the inaction of some person "responsible for the care, custody, and control of the child."172 Although the background paper which accompanied this legislation claimed, "the terms as defined describe the conditions of the child, not the acts or omissions of those responsible for the child's care,"

173 this is obviously not the case. This legislation does not attempt to define or describe manifestations which might be exhibited by the child and which would indicate the child was suffering from neglect. Yet, without some observable phenomena of neglect, a reporter would have no "reasonable cause to believe" anything was wrong with the child, and thus have no reason to report.

As might be expected, the comments in the ABA proposal posit some serious concerns about the approach taken by the Missouri legislation.

Neglect is traditionally seen as the non-performance of parental duties which endanger the life, health, education, morality, emotional well-being or welfare of a child. As such, judicial determinations of neglect are usually contingent upon some finding of fault or negligence on the part of those who are obliged to perform such duties. For the purposes of reporting child neglect . . . notions of proper parental behavior are to be discarded in favor of the standard of manifest harm to the child . . . . [A] neglected child is . . . one whose physical or mental condition is impaired due to the lack of adequate food, shelter, clothing, protection or medical care necessary to sustain the life and health of the child.174 The proposed ABA statutory definition of neglect, for reporting purposes, is similar to Missouri's but with an important distinction. In the ABA proposal, neglect is not defined as a "failure to provide;"175 rather, it is defined as a serious physical or mental impairment exhibited by the child which was caused by someone's failure to provide something.176 The issue

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171. § 210.110.1(5), RSMo (1976 Supp.). There is an exception in the statute which provides that a child who does not receive specified medical treatment because of the parents' (or custodians') religious beliefs shall not, for that reason alone, be considered an abused or neglected child. § 210.115.3, RSMo (1976 Supp.).

172. § 210.110.1(5), RSMo (1976 Supp.).

173. BACKGROUND PAPER—HOUSE BILL 578, supra note 170, at 4.

174. AM. BAR ASSOC., MODEL CHILD ABUSE AND NEGLECT REPORTING LAW 7 (Jan. 3, 1975) (emphasis added).

175. § 210.110.1(5), RSMo (1976 Supp.).

176. ABA MODEL ACT, supra note 174, at 7.
is "what signs does the child exhibit which indicate that his health or welfare is threatened?"

Malnutrition, maternal deprivation and failure to thrive are some frequently mentioned types of neglect.\textsuperscript{177} Failure to thrive and maternal deprivation are forms of neglect which manifest physical symptoms, but which are also indicative of emotional neglect (or abuse). A description will best indicate the commonality.

At first, it appeared that babies with failure to thrive were mourning . . . . These infants showed apprehension, sadness, loss of contact, rejection of environment, withdrawal, retardation or re
gression of physical and personality development, slowness of movements, and apathy. Also, they refused to eat, lost weight, were irritable, vomited and had diarrhea.\textsuperscript{178}

Maternal deprivation is basically a lack of "mothering" stimuli in the child's environment, and such deprivation produces many of the same physical and psychological effects as those children suffering from failure to thrive. In fact, a child may fail to thrive precisely because of inadequate mothering. The effects include:

- metabolic disorders, growth retardation, delayed osseous bone maturation and retardation of motor development. These children were found to be suffering from damaged emotional or personality structures as well, manifest in lethargic, apathetic, withdrawn, and . . . autistic behavior.\textsuperscript{179}

It seems clear, then, that there are some rather definite indicia of neglect. However, the reporting statute does not define what constitutes neglect. The reporting statute mentions only the parental failure to act, ignoring any demonstrative signs by the child that he is suffering from the failure to act.\textsuperscript{180}

If one reads the reporting statute literally, a reporter must first personally ascertain whether the child exhibits signs of neglect (even though the statute is silent as to what are the signs of neglect, without some there would be no reason to report). The reporter must then determine if the

\textsuperscript{177} Sussman, supra note 165, at 262, 266-68. For a graphic description where children were adjudicated neglected, see White v. DeSpain, 453 S.W.2d 697 (K.C. Mo. App. 1970).

\textsuperscript{178} Barbero, Morris & Redford, Malidentification of Mother-Baby-Father Relationships Expressed in Infant Failure to Thrive, The Neglected Battered Child Syndrome—Role Reversal in Parents 22-23 (1963). See also note 161 and accompanying text supra.

\textsuperscript{179} Sussman, supra note 165, at 267-68. See also note 162 and accompanying text supra.

\textsuperscript{180} Cf. § 211.031, RSMo 1969, which is the general neglect statute. Although the Background Paper accompanying House Bill 578, supra note 170, at 4, claimed that the standard outlined in the statute dealing with mandatory reporting of child abuse and neglect were not standards under which a child could be adjudicated neglected, the language of the definition of "neglect" for both sections is strikingly similar.
child's condition is a result of a "failure to provide the proper or necessary support, education . . . or medical, surgical, or any other care necessary for [the] well-being"\(^{181}\) of the child by someone charged with the responsibility for providing such care.

Although these added requirements may seem like "mere legal technicalities," they show a definite and distinct confusion over the function of a reporting law. What is of basic concern to the reporter is the condition of the child, \(i.e.,\) what signs of neglect does this child exhibit. If the reporter were to go to the statute to determine whether what he sees is neglect, he would be stymied. There is nothing in the statute which correlates to what he is observing; there is only a description of what some other person failed to do. This failure is basically of no concern to those interested in working with the family to prevent a further occurrence of neglect. Thus, as currently written, the child abuse statute requires the reporter to make some inferences on his own as to the cause of the injury and of the person responsible for the injury before what he is observing fits within the statutory definition of "neglect." As Sussman points out, these types of inferences are not really appropriate to the reporting state;\(^{182}\) rather they are of importance to the investigator.

3. "By Those Responsible for His Care, Custody, or Control"

The last definitional limitation on the reportable conditions of both abuse and neglect is that they must be perpetrated by someone who is "responsible for the care, custody, and control of the child."\(^{183}\) The statute itself states that the phrase is meant to include—but is not limited to—"the parents or guardian of a child, other members of the child's household, or those exercising temporary or permanent care of a child."\(^{184}\) Thus, the Missouri standard is not limited to legal custody, but is "meant to include persons exercising temporary custodial care (teacher, baby sitter, day care operator, sibling, etc.), as well as a boyfriend/girlfriend of a parent, who may live with and abuse the child."\(^{185}\)

In order to comply with the technical definitions of abuse and neglect, the reporter would have to ascertain who perpetrated the harm in order to determine whether the perpetrator fits within that group of persons definitionally capable of committing abuse or neglect. By including this clause relating to the identity of the abuser within the definitions of reportable abuse and neglect per se, it is arguable that the legislature intended that

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\(^{181}\) § 210.110.1(5), RSMo (1976 Supp.).

\(^{182}\) Sussman, supra note 165, at 253.

\(^{183}\) §§ 210.1101(6) (1), (5), RSMo (1976 Supp.).

\(^{184}\) § 210.110.1(6), RSMo (1976 Supp.).

\(^{185}\) BACKGROUND PAPER—HOUSE BILL 578, supra note 170, at 4. See also State v. Smith, 485 S.W.2d 461 (Spr. Mo. App. 1972), construed a similar phrase in § 559.340, and held that whether the boyfriend of the mother was a "person having the care and control" of the child was a question of fact, but clearly permissible by the statute.
unless the abuse or neglect was perpetrated by one of these responsible parties (or at least the reporter has reasonable cause to believe it was), then abuse which is required to be reported has not occurred.

Sussman claimed that only 10 states include an "identity of the abuser" clause in their definitions in 1975. It is generally felt that such clauses "can only serve as an impediment to ready reporting." However, the National Act included such a "responsibility clause" and this will undoubtedly result in an increase—rather than the hoped-for elimination—of such clauses. This is unfortunate because it is one more example of the basic confusion of function between the reporter, the preventer, and the treater. It encourages unwarranted speculation by the reporter of something which is of little concern to him. It is, or should be, the function of the investigating state agency to determine responsibility for the abuse, not that of the reporter. However, the way the current law is written, words are defined in such a way that the reporter must enter into this field of responsibility. Arguably, if the reporter does not think that a person "responsible for the care, custody, and control of the child," caused the injury, he is not observing abuse or neglect, which must be reported (regardless of what physical manifestations the child displays) and there is no duty to report.

E. State of Mind of the Reporter

Under the present statute, before a reporter is required to report child abuse or neglect he must have "reasonable cause to believe" that a child has been or may be subjected to abuse or neglect. Prior Missouri law required a report be made when the reporter had reasonable cause to believe a child "had suffered" or was "suffering" from physical abuse or neglect. The current broader coverage for suspected abuse is required by the National Act. Though the difference appears substantive, there may be little significant difference because in most cases the reporter will have to have some evidence that the child "has been" or is "suffering" from abuse or

186. See text accompanying notes 190-96 infra.
187. Sussman, supra note 165, at 257.
189. The National Act requires the perpetrator to be "a person who is responsible for the child's welfare." 42 U.S.C.A. § 5102 (Supp. 1976). The language of the National Act was specifically chosen "to underscore the fact that this legislation is directed at not only the legal parent or guardian but also to those who have responsibility for children of a custodial nature." See the legislative history, 1974 U.S. Code Cong. & Admin. News 2767.
190. § 210.115.1, RSMo (1976 Supp.). In addition, if a reporter observes a child being subjected to conditions or circumstances which would reasonably be expected to result in abuse or neglect, a report must be made. Cf. the ABA Model Act, supra note 174, at 10 which requires a mandated reporter to report suspected abuse but not suspected neglect.
neglect for him to suspect future abuse. This expanded coverage could be significant where there is one child who appears abused, and there are other siblings in the home. It would seem reasonable to suspect these children "may be" subject to abuse. In this circumstance a report legitimately could be made under the current Missouri statute, whereas one would not have been proper under the previous law.

The exact statutory language in various jurisdictions as to the state of mind standard may differ, but the substantive element in most of them is the same: the reporter need not know, or be certain, that what he sees is abuse or neglect; at the least, he need only be suspicious. From a legal perspective, a standard of belief written in language of "reasonable cause" indicates that what is at issue is "what reasonable men in similar circumstances would believe to be the case, whether or not the individual in question actually formed the belief." Sussman explains the significance as follows:

[A] charge could be made against a physician for failing to report if it could be proven that a reasonable physician in similar circumstance should have suspected and reported an abuse even though the doctor in question did not personally form the belief that the child was abused.

Sussman felt that, although the distinction is of great importance in other areas of the law, it was "highly unlikely that it would be seriously relied upon to prosecute those who failed to report cases of abuse."

F. Criminal Prosecution of the Reporter

There is a criminal penalty for violation of the child abuse and neglect reporting statute. The violator may be guilty of a misdemeanor and, if convicted, may be punished by a fine of not more than $1,000 or imprisonment in the county jail for not more than a year or both. The statute mentions no specific mental state required for a violation. Thus it would appear that not only a knowing violation of the statute is punishable, but also an unreasonable failure to report could result in a criminal violation.
A person could violate the statute in a number of ways: failing to make a report where one was warranted; violating one of the requirements necessary for the exercise of temporary protective custody; or violating one of the provisions relating to the confidentiality of reports kept in the central registry. Because the primary purpose of the statute is to protect children by requiring certain specified persons likely to come into contact with them to report any abuse or neglect that has occurred to a child, the clearest violation of the statute would occur where a report was clearly warranted but not made.\(^{199}\)

Where a reporter had reasonable cause to believe that a child had been physically injured, that the injury had occurred other than by accidental means, and that the injury had been perpetrated by someone responsible for the care, custody or control of the child, a report is surely warranted. Failure to make such a report would be a clear violation of the statute and criminal prosecution could result.

Suppose, however, that a reporter, a teacher for example, had reasonable cause to believe a child had been physically injured, but had no facts upon which to base a belief as to the perpetrator of the injury or the accidental nature of that injury. The teacher makes no report. If an attempt were made to criminally prosecute the teacher, would there be a violation of the statute? Probably not, if the terms of the statute are construed literally and narrowly. For example, a court could find that the teacher had no reasonable cause to believe two of the three statutory definitional requirements of abuse. Because criminal statutes are usually construed narrowly against the state, a court could find that even though the child had obviously suffered physical injury, this teacher had no duty under the statute to report because the definitional elements of reportable abuse required something more than the mere observance of a physical injury before the duty to report arose. The court could find that the duty to report itself did not arise until the reporter had some reasonable cause to believe that the injury was non-accidental and perpetrated by some responsible party.

At least one author has expressed skepticism about the existence of a penalty provision in a child abuse statute on the grounds that it is virtually unenforceable, and in any event unwise.

The identification of an abused child is obviously not as simple as the recognition of a gunshot wound. To provide a penalty for the failure to report a case of child abuse when its identification requires the exercise of a considerable amount of judgment and discretion is unduly harsh.\(^{200}\)

This position has met with opposition, however.\(^{201}\) There are claims

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199. Sussman, supra note 165, at 295-96.
201. Sussman, supra note 165, at 296.
that the penalty provision provides the physician with an incentive to report by imposing a penalty to which he will be vulnerable unless he does so report.202 The penalty provision is also thought to make reporting easier on the physician psychologically203 and aids him in explaining to the parents why he made the report.204

It should be pointed out that the purpose of the statute is to impose on certain individuals a duty to report child abuse and neglect. The statute is not meant to prohibit reports by others, and in fact permits reports by any person. A person who makes a report in good faith, even if the report is not substantiated as abuse is granted an immunity “from any liability, civil or criminal, that otherwise might result by reason of such actions.”205 A person who makes a malicious report would undoubtedly be deprived of immunity.206 This does not mean, however, that this person would have violated the child abuse reporting statute. Nothing in that statute prohibits the making of a malicious report; it merely deprives the person who makes one of any immunity from other civil or criminal liability.

G. Civil Liability of the Reporter

A person mandated to report child abuse or neglect could find himself involved in civil litigation in two distinctly different situations. First, he could unreasonably fail to make a report, a violation of his statutory duty.207 The most likely situation for this type of lawsuit to arise is when a non-custodial parent sues a person for failure to report abuse inflicted by a custodial parent. If the child were returned to the custodial parent, and suffered re-injury, the non-custodial parent would sue on some kind of a negligence theory.208 Second, a reporter could be sued for the making of a malicious, unfounded report. This act would deprive him of any good faith immunity under the statute and he would thus subject himself to a wide variety of civil liability.209

The first situation arises when the reporter has reasonable cause to believe that the child has suffered physical injury, that the injury occurred non-accidentally, that someone responsible for the care, custody and control of the child perpetrated the injury, but still fails to make a report. Normal tort concepts would not require the person observing such abuse to take any action to protect the child, treat him, or report the fact of his

202. Id.
204. Paulsen, supra note 198, at 163.
205. § 210.135, RSMo (1976 Supp.). See also text accompanying notes 224-30 infra.
206. The statute does not define “good faith” but presumably a malicious act is not included. See Sussman, supra note 165, at 294.
207. § 210.115.1, RSMo (1976 Supp.).
208. See text accompanying note 211, infra.
209. See text accompanying notes 221-23, infra.
injury. But the existence of the child abuse reporting statute, with criminal penalties for violation, imposes on the reporter the duty to so report.

If an injured (and unreported) child is one of the class of persons which a criminal statute was intended to protect, and the harm suffered was one of the type the statute was intended to prevent, a violation may permit a claim for civil damages.\textsuperscript{210}

The mere violation of the statute is not sufficient in and of itself to impose liability, it merely establishes the duty. It stands as a legislative pronouncement that in a given situation a certain danger exists and therefore some action is required to reduce the risk of that danger. The failure to act in this situation is unreasonable, \textit{ergo} negligent. A litigant would still have to show that the violation of the statute was the proximate cause of the injury. This would entail a showing that if the defendant had complied with the statute and made a report, the child would not have been injured further.

Sussman cites a case where a father of an abused child (who was in the custody of his mother) sued four doctors for failure to report the abuse of his child and the city police for failure to adequately investigate once a report was made. The out of court settlement was said to be over one-half million dollars.\textsuperscript{211}

In \textit{Landeros v. Flood}, \textsuperscript{212} a minor, through her guardian \textit{ad litem}, brought suit against a doctor and a hospital alleging four causes of action: common law malpractice, two causes of action based on the alleged violation of the reporting statutes, and one based on punitive damages. All four were dismissed by the trial court on demurrer. On appeal, the two causes of action based on the reporting statutes were reinstated.\textsuperscript{213} The court went on to find that the elements of a negligence per se cause of action were present. However, the court made it a point to explain that the mere presence of a cause of action that could withstand a demurrer did not necessarily mean that the plaintiff would be able to carry her “unusually heavy burden” of proof and ultimately recover.\textsuperscript{214}

The plaintiff’s problems were two-fold. First, under the California statute in force at the time, the standard of belief required of the reporter was a personal, subjective belief, \textit{i.e.}, “it appears to the physician.” In a footnote, the court notes that “this standard of liability is unusual,” and that the plaintiff will have to make out her case using “testimony and evidence extracted from the defendant” himself.\textsuperscript{215} The court goes on to caution:

\textsuperscript{210} Sussman, \textit{supra} note 165, at 297.

\textsuperscript{211} \textit{Id.} n.306.

\textsuperscript{212} 59 Cal. App.3d 189, 123 Cal. Rptr. 713 (1975), a case of first impression in the United States. The official report was deleted from the Cal. App. series; therefore, the following citations will be solely to the Cal. Rptr. edition. The case subsequently went up to the California Supreme Court, the citation \textit{Landeros v. Flood}, 17 Cal.3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

\textsuperscript{213} 123 Cal. Rptr. at 724.

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} \textit{Id. at} 725 n.11.
In our opinion, potential liability based upon an objective standard would impose an intolerable and unfair burden upon those persons described in the reporting statute . . . .\textsuperscript{216}

The court noted that the list of mandated reporters includes "numerous other persons" besides physicians who although not adequately equipped to determine from the appearance of an injury whether it was caused by accidental or non-accidental means, are nonetheless under the same statutory duty to report as are doctors and other medical professionals. We profoundly believe that the possible extension of civil liability to these persons for mere failure to report would raise serious questions of fairness and would subject the statute to a constitutional challenge for unreasonableness, uncertainty and vagueness.\textsuperscript{217}

The court might have said that because these other reporters were "not adequately equipped" to make determinations as to the "accident" element of abuse, that there never was a duty to report, and thus have avoided the constitutional issues. This would correlate with the narrow interpretation which might be given the statute under a criminal prosecution.\textsuperscript{218}

Missouri's statute is written in objective terms. Perhaps a lawsuit by a non-custodial parent or a guardian \textit{ad litem} against a physician for an unreasonable failure to report has the greatest chance of success in the courts. A lawsuit against some of the other reporters would leave the plaintiff with the difficult job of showing the reporter should have had reasonable cause to believe there was abuse as literally defined in the statute.

\textit{In Landeros v. Flood,} the plaintiff's second problem was one of causation.\textsuperscript{219} The court said that she would have to prove that the making of the report would have prevented the injury. This would be troublesome because the removal of a child from the custody of his parents is ultimately discretionary with a court (not with the physician) and "is a matter of last resort and should not be ordered unless other means have failed . . . .\textsuperscript{220}

A second situation in which a reporter may find himself in a civil lawsuit is if a report was made maliciously, without good cause. In such a case, the good faith immunity granted under the statute would not be available to him.\textsuperscript{221} The reporter would not have violated the child abuse

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\item\textsuperscript{216} \textit{Id.}
\item\textsuperscript{217} \textit{Id.} at 725.
\item\textsuperscript{218} See pt. IV F. of this article \textit{supra}. See also \textit{Landeros v. Flood,} 17 Cal.3d 399, 551 P.2d 389, 397, 131 Cal. Rptr. 69, 75 (1976).
\item\textsuperscript{219} 123 Cal. Rptr. at 725.
\item\textsuperscript{220} \textit{Id.} See also \textit{In re Stephen} ---, 446 S.W.2d 467 (K.C. Mo. App. 1969). \textit{But see} \textit{Landeros v. Flood,} 17 Cal. 3d 399, 551 P.2d 389, 395, 131 Cal. Rptr. 69, 75 (1976).
\item\textsuperscript{221} Sussman, \textit{supra} note 165, at 294. See also text accompanying note 226 \textit{infra}.
\end{itemize}
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reporting statute,222 but because he has no claim to immunity would become vulnerable to other types of civil litigation. "There might be civil . . . liability for deamamation of character, civil liability for invasion of privacy by the disclosing of 'private facts,' malicious prosecution by placing parents in a 'false light,' or civil liability for breach of confidence."223

H. Immunity

The Missouri statute provides for a two-tiered type of immunity.224 The first tier relates to actions giving rise to the making of a report per se. The second tier relates to participation in some subsequent judicial proceeding resulting from the report.

The Missouri statute provides "good faith . . . immunity from any liability, civil or criminal, that otherwise might result" from the making of a report not only to any mandated reporter but also to "[a]ny person, official or institutions participating . . . in the making of a report, the taking of color photographs and/or making radiologic examinations" pursuant to statutory authority. Immunity is also given to physicians, peace officers, and law enforcement officers who take temporary protective custody of a child.225

The main difficulty with this provision of the statute is that "good faith" is not defined. At a minimum, it means that a reporter must act honestly in fact. Conversely, a report motivated by malicious intent would seem to be outside the legislative grant of immunity.226

The major issue remaining, however, is the breadth of the protection provided by good faith immunity. For example, if a report was made and the reporter subjectively believed that the child had been physically injured, non-accidentally, by its parents—even if those beliefs were unreasonable—the reporter would undoubtedly have good faith immunity. If, on the other hand, the reporter only had a subjective belief regarding the child's physical injury—with no belief as to causation or responsibility—would the reporter be able to claim immunity? Arguably, the report was unwarranted ab initio because the reporter did not have at least a subjective belief as to all of the definitional requirements of abuse.

It should be noted, however, that the language of the immunity section of the statute appears to be broader than that section which imposes a duty on certain persons to report. The latter section requires a report be made when one of the denominated reporters has reasonable cause to believe abuse or neglect has occurred.227 By using these terms, the section would seem to incorporate by reference the definitions of abuse and neglect as

222. See text accompanying note 206 supra.
224. § 210.135, RSMo (1976 Supp.).
225. Id.
226. Sussman, supra note 223, at 294.
227. § 210.115.1, RSMo (1976 Supp.).
stated in the statute.\textsuperscript{228} This in turn could be understood to mean that the reporter should have, at least, some belief as to each definitional element of abuse or neglect before a duty to report arises.

The immunity section, on the other hand, grants immunity to any person\textsuperscript{229} who makes “a report” in good faith.\textsuperscript{230} The statute does not say “a report of abuse or neglect.” The absence of the words “of abuse or neglect” in the immunity section seems to indicate that this section does not incorporate by reference the definitions of abuse and neglect. Thus, a person who reports what may appear to him to be abuse or neglect, because of the physical manifestations alone, with no belief as to whether such abuse was perpetrated non-accidentally by a responsible party, would still be able to claim good faith immunity.

The National Act requires that the state statutes include provisions for immunity “for persons reporting instances of child abuse and neglect from prosecution, under any state or local law, arising out of such reporting.”\textsuperscript{231} If one considers private litigation to be a form of “prosecution” (e.g., a negligence lawsuit), then the Missouri scheme would seem to be only as extensive as that required by the federal law. If, however, “prosecution” is meant to refer only to those situations in which the state brings an action as the aggrieved party, then the Missouri grant of immunity is more extensive than that required by federal law.

I. Temporary Protective Custody

The new Missouri statute provides for a non-judicial procedure whereby a child can be retained or taken into “temporary protective custody” without parental consent by a policeman, law enforcement officer or a physician.\textsuperscript{232} Temporary protective custody is defined as “temporary placement within a hospital or medical facility or emergency foster care facility.”\textsuperscript{233}

The perimeters of this protective custody are fairly well circumscribed.\textsuperscript{234} (1) the parents, guardian, or those responsible for the child must be advised; and (2) “conditions are such that there exists an imminent

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\item \textsuperscript{228} \S\ 210.110(1), (5), RSMo (1976 Supp.).
\item \textsuperscript{229} For the applicability of this immunity section to a self-reporting abusing parent, see text accompanying notes 105-06 supra.
\item \textsuperscript{230} \S\ 210.135, RSMo (1976 Supp.). One could argue, however, that \S\ 210.115.4, RSMo (1976 Supp.), which provides for permissive reporting by any person having reasonable cause to believe abuse or neglect occurred does incorporate the definitions of abuse and neglect found in \S\ 210.110.1(1), (5), RSMo (1976 Supp.); and thus, even a reporter not mandated to report must have some belief as to the definitional elements of causation and responsibility as found in \S\ 210.110.1(1), (5), RSMo (1976 Supp.).
\item \textsuperscript{231} 42 U.S.C.A. \S\ 5103(b)(2)(A) (Supp. 1976).
\item \textsuperscript{232} \S\ 210.125.1, RSMo (1976 Supp.).
\item \textsuperscript{233} \S\ 210.125.3, RSMo (1976 Supp.).
\item \textsuperscript{234} \S\ 210.125.1-.2, RSMo (1976 Supp.).
\end{itemize}
danger to the health or life of the child"; and (3) a court order must not be immediately obtainable; and (4) such temporary protective custody cannot exceed 20 hours and (5) the Division of Family Services must be informed and must request the juvenile officer to immediately initiate child protective proceedings.

There are two types of temporary protective custody: retention of the child and removal of the child. Early commentators expressed reservation and concern over this type of provision. With respect to the retention facet of temporary protective custody, it has been said:

The intent is obvious . . . . But, the remedy is questionable. The only excuse for granting this authority is that it may be difficult to obtain a temporary court order at night or over week-ends. It would seem more in keeping with due process, however, for the legislature to have sought that a judge, or referee [sic], or someone delegated by the judge, be available around the clock to pass on the merits of a temporary "hold order" to prevent the discharge of a child under circumstances which indicate danger or hazard for him.235

The author indicates that hospital administrators would probably be reluctant to take this "rather drastic measure,"236 but perhaps this is sometimes done by claiming that additional medical treatment is required237 or that the child is still recuperating.

The holding of a child under a specific statutory grant of authority, given the fact that "[t]he question of whether custody should be denied a parent is a triable issue, and requires judicial determination,"238 is the most troublesome aspect of temporary protective custody. This legislative grant of authority is particularly disturbing in a jurisdiction such as Missouri where the parents have the benefit of a presumption that they are the best custodians of their children;239 they have the benefit of no such presumption before a physician.

It can be argued, however, that in order for there to be a true incidence of abuse, someone "responsible" for the child must also have been the perpetrator of the abuse.240 If, in fact, a reporter has "reasonable cause" to believe this particular element of abuse is met, the authority to hold the child is not such an unwarranted infringement on the custodian's rights as would first appear.

235. De Francis & Lucht, supra note 188, at 184.
236. Id.
237. EDUCATION COMMISSION OF THE STATES, CHILD ABUSE AND NEGLECT MODEL LEGISLATION FOR THE STATES 24 (1975). The Comments specifically state that this is not required.
239. See In re M — P — S —, 342 S.W.2d 277 (St. L. Mo. App. 1961); State v. Pogue, 282 S.W.2d 582 (Spr. Mo. App. 1955).
240. § 210.110.1(1), RSMo (1976 Supp.). See also text accompanying notes 183-85 supra.
The objections to protective removal of a child are basically similar to those against his retention: "the protection of children cannot, and need not, be accomplished at the expense of violating fundamental rights of parents."\footnote{241} Fundamentally, the court order is the parents' basic protection, as it requires someone to make a showing that irreparable injury may occur to this child if he is not retained or removed.\footnote{242} In order to come within the statutory protective provision, the child need only have been the subject of a child abuse report. Yet a report of abuse can come from anyone. Those persons mandated to report are not the only ones who trigger the follow-up investigatory provisions of the Act.\footnote{243} A neighbor can make a report claiming the child's health or life is "imminently threatened," yet have very little factual information on which to base this opinion. The normal requirement of a court order "positions an independent judge between the rights of parents and possible arbitrary and precipitous action on the part of overzealous officials" or neighbors.\footnote{244}

The basic fears of temporary protective custody provisions are that of intemperance, inexperience and the by-passing of the judicial machinery which was set up to deal with custody questions.

The danger posed by an explicit statutory recognition of the authority to enter and remove a child is that it may become a routine method of reacting to emergency or pseudo-emergency situations by the less skilled and less experienced worker. It is much easier and causes less discomfort for the newcomer to Child Protective Services to enter and summarily remove the child than to make what are often difficult decisions on a case to case basis.\footnote{245}

When a child has been physically or sexually abused, the strongest case can be made for holding him or removing him from the injurious environment. The statistics on re-injury demonstrate a real risk of further harm, including death, and the child should not be forced to assume this risk.\footnote{246}

On the other hand, a child suffering from "emotional abuse" is responding

\footnotesize{\begin{itemize}
  \item[241.] De Francis & Lucht, \textit{supra} note 238, at 184-85. \textit{See also} McCoid, \textit{supra} note 203, at 49-50.
  \item[242.] De Francis & Lucht, \textit{supra} note 238, at 184; McCoid, \textit{supra} note 203, at 55.
  \item[243.] \textit{See} § 210.115.4, RSMo (1976 Supp.). \textit{See also} text accompanying note 95 \textit{infra}.
  \item[244.] De Francis & Lucht, \textit{supra} note 238, at 184. \textit{See also} E. THOMSON, \textit{et. al}, \textit{CHILD ABUSE: A COMMUNITY CHALLENGE} 34, 39 (1971), "Non-medical reporting sources tend to over-react to abuse . . . ."
  \item[245.] De Francis & Lucht, \textit{supra} note 238, at 185. The fact that under the Missouri statute the child cannot be removed by the social worker alone but by a "police officer, a law enforcement official, or any physician." § 210.125.1, RSMo (1976 Supp.), may offer some degree of protection of parental interests.
\end{itemize}}
to a mode of treatment which has undoubtedly gone on for some period of time, usually sufficiently long to have produced some physical manifestations. Anyone seeking to remove a child on the grounds of emotional abuse would have to weigh the damage to the child from removal versus the damage to the child from leaving him where he is.\(^{247}\) This is the kind of decision which has traditionally been left to the court. It is the kind of decision which demands evidence, judgment and discretion to protect the interest of both parties involved.\(^{248}\) It is doubtful that in this balancing process parental interests would be given sufficient weight by someone deciding whether to exert temporary protective custody.

The language of the current Missouri statute establishes a rather broad standard for the exercise of temporary protective custody: "imminent danger to the health or life of said child."\(^{249}\) The Comments to the ECS Model Act suggest that this allows protective custody to be exerted in less-than-urgent situations:

> With the addition of the word "health," the minimum requirement is simply that if the child were released, there would be a possibility that the child might suffer further injury. There is no requirement that the injury be "serious."\(^{250}\)

Whether the statute allows for this much flexibility is debatable. "A possibility" of reinjury is certainly not necessarily equivalent to "imminent danger." In the area of physical abuse, the re-injury statistics tend to lend credence to such a correlation,\(^{251}\) but in the area of neglect or emotional abuse it is doubtful that "a possibility" of further neglect or emotional abuse can be considered an "imminent danger" even to health. The conditions which gave rise to these injuries have already gone on for some time and it is difficult to see how the danger could become "imminent" merely by the fact that someone has observed the injury.

The "imminent danger to life or health" standard was mentioned as an "alternative proposal" in the ABA Standards but was rejected.

> [I]t is suggested that conditions constituting a danger to the "health" of a child . . . [is] so vague and elusive that [it] would permit a greater degree of discretion on the part of the person taking the child than ought to be granted by law. Without strict conditions, virtually any reason could serve to justify . . . removal of a child from his family.\(^{252}\)

It should be pointed out that it is the duty of the person taking or retaining the child to inform the parents, guardians or custodians, and the


\(^{248}\) McCoid, *supra* note 203, at 55.

\(^{249}\) *ECS MODEL ACT, supra* note 237, at 24 (emphasis added).

\(^{250}\) See note 246 and accompanying text *supra*.

\(^{252}\) *AMER. BAR ASSOC., MODEL CHILD ABUSE AND NEGLECT REPORTING LAW* 23 (Jan. 3, 1975).
Division of Family Services, concerning the exercise of protective custody.253 In the subsequent custody proceedings brought by the juvenile officer, it is not the officer's function to defend the action of the policeman or physician, but to determine what is to be done currently.254 Under another provision of the law, immunity is extended to the physician or policeman provided they exercised the protective custody in good faith.255

J. Central Registry

The Missouri statute authorizes the creation and maintenance of a central registry.256 This is "a single depository of reports and findings of child abuse,"257 In the central registry is compiled all past reports of abuse and neglect on any particular child by a particular perpetrator, if known. The same basic information which is required to be included in the current report258 will be found in the central registry as to any past reports. In addition, the records in the registry should reflect the findings of the protective services investigation259 which followed any prior report of abuse. Thus, the record will show whether, upon investigation, the abuse or neglect was "established" or "unsubstantiated."260

When a report is made to the Division of Family Services, the Division is required to check with the central registry to ascertain "whether previous reports have been made regarding actual or suspected abuse or neglect of the subject child, of his siblings, and the perpetrator, and relevant dispositional information . . . ."261 The Division is then to pass on to the local office the fact that a report of abuse has been made and any other "relevant information" contained in the central registry.262

After the local office conducts its investigation,263 and within 30 days

254. ABA MODEL ACT, supra note 252, at 21.
255. § 210.135.RSMo (1976 Supp.). See also text accompanying note 225 supra.
256. § 210.145.2, RSMo (1976 Supp.).
257. Sussman, supra note 223, at 300.
258. See text accompanying notes 98-99 supra.
259. § 210.145.4, RSMo (1976 Supp.). See also text accompanying notes 314-21 infra.
260. A finer distinction could also be made. A Missouri Child Abuse Statistical Report, prepared by the Division of Planning and Research, Research and Statistics Section, for the period Oct. 13, 1969 to Feb. 28, 1975, provides the following breakdown: "Injuries Confirmed: Not Substantiated as Abuse"; "Injuries Confirmed: Substantiated as Abuse"; "Injuries not Confirmed". Although at first glance one might question the designation "Injuries Confirmed: Not Substantiated as Abuse," the technical requirements of the statute—non-accidental, perpetrated by one responsible for the care, custody and control—are such that one might run across a badly injured child, but one who does not meet the statutory definition of "abuse".
261. § 210.145.3, RSMo (1976 Supp.).
262. Id.
263. § 210.145.4, RSMo (1976 Supp.). See also text accompanying notes 314-21 infra.
of the initial oral report made to the Division of abuse or neglect, the local office must file a report containing certain information which is in turn placed in the central registry. The report filed by the local office should contain: (1) the facts ascertained, (2) a description of any service offered and accepted, (3) the persons who are in fact responsible for the care of the child and (4) other relevant dispositional information, for example, whether a finding of abuse or neglect was substantiated.\(^\text{264}\)

The statute itself does not deal at great length with the central registry. Basically, it authorizes its existence and maintenance,\(^\text{265}\) specifies what should be contained in the reports,\(^\text{266}\) provides that the information in the registry should remain confidential,\(^\text{267}\) provides access to the information contained therein to a small and limited group of persons,\(^\text{268}\) and sets a punishment for improper use of the registry.\(^\text{269}\) The statute authorizes the Division of Family Services, to the extent the act is silent, to “promulgate rules and regulations governing the operation of the central registry.”\(^\text{270}\)

The statute provides that all reports and records made pursuant to the act are confidential.\(^\text{271}\) There is, however, provision for limited access to the information in the registry files.\(^\text{272}\) From the reporting aspect of the statute, the most important of these provisions is that of giving access to the records to physicians who reasonably believe a child has been abused or neglected.\(^\text{273}\) It should be noted that access is not made available to all persons mandated to report abuse or neglect, but only to physicians, and then only if the child is before them.\(^\text{274}\)

There are three basic arguments in support of a central registry. The first two arguments clearly seem most beneficial to the physician-reporter. The first is the “tracing” function of the central registry. By accumulating reports of child abuse in one single depository, the maintenance of a central registry greatly diminishes the ability of parents to hide abuse by

\(^{264}\) § 210.145.8, RSMo (1976 Supp.).
\(^{265}\) § 210.145.2, RSMo (1976 Supp.).
\(^{266}\) § 210.145.3, .4, .8, RSMo (1976 Supp.).
\(^{267}\) § 210.150.1, RSMo (1976 Supp.).
\(^{268}\) § 210.150.1(1)-(5), RSMo (1976 Supp.).
\(^{269}\) § 219.150.2, RSMo (1976 Supp.).
\(^{270}\) § 210.145.9, RSMo (1976 Supp.).
\(^{271}\) § 210.150.1, RSMo (1976 Supp.).
\(^{272}\) § 210.150.1(1)-(5), RSMo (1976 Supp.).
\(^{273}\) § 210.150.1(1), RSMo (1976 Supp.). Cf. ABA MODEL ACT, supra note 252, at 45. The proposed Act would not grant access to physicians. One of the alternative proposals would grant such access.
\(^{274}\) The statute seems to operate on the assumption that despite the enlarged base of mandated reporters, the physician is the most probable one to discover the abuse and the most expert at identifying it. He alone has access to the registry; and only if you have access to the registry could you (except in unusual circumstances) comply with that portion of § 210.150.2 which requires that the current report of abuse include "any evidence of previous injuries, abuse, or neglect to the child or his siblings." (emphasis added).
taking the child to different hospitals on different occasions. The report follows the child to whatever hospital he is treated. This tracing aspect then gives rise to the second argument in favor of the registry: "previous records of alleged or determined abuse may strengthen a reporter's suspicions about a current injury." Thus, where a physician is faced with what he might consider a borderline case of abuse, "an allegation or finding of abuse in the past may provide the 'reasonable belief' in . . . abuse of the same child under present examination."277

From the point of view of the physician-reporter, these are the most important functions of the central registry. It aids him in identifying and diagnosing an injured child as an "abused" or "neglected" one. It should also provide him with some guidelines as to whether releasing this child at this time could result in "imminent danger to his life or health."278 Thus, it aids him in deciding whether to exercise his right under the statute to detain temporarily the child.279

The third argument in favor of a central registry is that it provides a source of statistics on the actual extent of child abuse and the seriousness of the problem. In line with this informational aspect of the registry, the statute provides limited access for the staff members of the Division of Family Services and "any person engaged in a bona fide research purpose." Persons using the central registry as a research tool must first receive permission from the Director of the Division of Family Services. The fact that the researcher has received permission to peruse the records, however, does not mean that he has access to all the information contained in them. The researcher is prohibited from having any "information identifying the subjects of the report and the reporters . . . ." The researcher will receive no information identifying either the child or the parent, guardian, or other person responsible for the child, who is mentioned in the report. Thus, from the aspect of research gathering and reporting, anonymity is the rule.

The National Act requires that the state "provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or his guardians." A provision setting up anonymi-

276. Id.
278. § 210.125.1, RSMo (1976 Supp.).
279. Id.
280. Sussman, supra note 275, at 301.
281. § 210.150.1(5), RSMo (1976 Supp.).
282. § 210.150.1, RSMo (1976 Supp.).
283. § 210.150.1(5), RSMo (1976 Supp.).
284. Id.
ty is only one side of preserving the confidentiality of reports; criminal liability for violation of this requirement is the other. Thus, to insure compliance with the confidentiality requirements of the National Act, Missouri’s statute provides that anyone who violates the confidentiality requirements of the statute by permitting or encouraging “unauthorized dissemination of information contained in the central registry” shall be guilty of a misdemeanor.286

The question of an individual’s right to privacy has arisen in regard to such data bank devices as a central registry. In order to allay some of the fears of unwarranted invasion of privacy,287 the statute provides access to the records to “any person who is the subject of a report,”288 which includes “the child and any parent, guardian, or other person responsible for the child, who is mentioned in a report.”289 Access is also made available to the guardian of any subject when the subject is a minor, mentally ill, or otherwise incompetent.290

In light of the initial investigative intrusion291 into the privacy of the family which follows a report of child abuse, and perhaps a further intrusion through the “coercive intervention” of the state in a subsequent judicial proceeding,292 the subjects of reports are permitted access to them to discover the report’s contents and especially what information might be used against them in a subsequent neglect or termination proceeding. The Missouri statute does not state what specific information contained in the report is available to a subject. It is reasonable to assume, however, that the subject of a report will not be given information as to the identity of the reporter. Both the ABA Model Act and the ECS Model Act contain such a limitation on the access of a subject to the report in the registry.293

By allowing access to the subjects of reports, undoubtedly it is hoped that this is sufficient due process protection of their right to privacy to

286. § 210.150.2, RSMo (1976 Supp.).
287. ABA MODEL ACT, supra note 252, at 44 states: “Access to individuals who are the subjects of reports is required by the constitutional guarantees of adequate notice and due process of the law.”
288. § 210.150.1(3), RSMo (1976 Supp.).
289. § 210.150.1, RSMo (1976 Supp.).
290. § 210.150.1(3), RSMo (1976 Supp.).
291. § 210.145.4, RSMo (1976 Supp.). See also text accompanying notes 314-21 infra.
292. The reports are also available to “a grand jury, juvenile officer, juvenile court or other court conducting abuse or neglect or child protective proceedings.” § 210.150.1(4), RSMo (1976 Supp.).
293. AM. BAR ASSOC., MODEL CHILD ABUSE AND NEGLECT REPORTING LAW 43 (Jan. 3, 1975), does permit a subject to move, in a separate legal proceeding, to discover the identity of the reporter if the subject has reason to believe the report was motivated by malice. See also EDUCATION COMMISSION OF THE STATES, CHILD ABUSE AND NEGLECT: MODEL LEGISLATION FOR THE STATES 48 (1975) and MISSOURI DEPARTMENT OF SOCIAL SERVICES, CHILD ABUSE AND NEGLECT: PROPOSED RULES (1976).
insulate the maintenance of a central registry from challenge. The parental right to privacy will then be weighed against the best interests of the child, his protection from abuse or neglect.

Missouri's statutory provisions dealing with the central registry are seriously deficient in at least two respects. First, the statute makes no provision whatever for the expungement of records. Second, it contains no authorization for a parental challenge to the accuracy of the initial report or to its continued existence in the registry, nor does it contain a procedure for such a challenge.

As stated above, the Missouri statute itself contains no provision for the expungement either of identifying material or the physical report itself where a report is determined to be unfounded, closed, or merely old. The statute does require, however, that the Division of Family Services promulgate rules and regulations governing the operation of the central registry.

According to the Division's proposed regulations, all unsubstantiated reports would be removed from the registry after two years. A substantiated report would be removed after five years, provided no additional report was made during that period. An unsubstantiated report is one where there is no credible evidence of abuse or neglect. If there is some evidence of abuse, but no information as to the accidental nature of the injury, or the identity of the perpetrator, the report is considered suspicious. There is no independent "suspicious" category, however, and such reports are denominated "substantiated." Doubts seem to be resolved, then, in favor of finding abuse or neglect, thus subjecting the report to a longer life in the central registry.

Both the ECS Model Act and the ABA Model Act establish in the statute itself certain designating labels to be used on reports. Under both proposals, if a report is labelled "unfounded" after investigation, the "names, addresses, and all other identifying characteristics of all persons named

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294. ABA MODEL ACT, supra note 293, at 44 states: "Access to individuals who are the subjects of reports is required by the constitutional guarantees of adequate notice and due process of the law."

295. § 210.145.9 RSMo (1976 Supp.).


297. The following information was derived per a telephone call with the Child Abuse Section of the Division of Family Services. Presumably this would mean the absence of any physical phenomena of abuse or neglect. See ECS MODEL ACT, supra note 293, at 51, which uses this standard but does not define it. Cf. ABA MODEL ACT, supra note 293, at 39 which specifically states that this "quantum of proof" must lead to the report being maintained in the registry as Unfounded.

298. ECS MODEL ACT, supra note 293, at 47 uses three categories: Under Investigation; Founded/Unfounded; Closed. ABA MODEL ACT, supra note 293, at 38 also uses three categories: Suspected, Unfounded, Indicated.
shall be expunged immediately." 301 Furthermore, under the ABA proposal, a report must be classified as unfounded unless there is a preponderance of the evidence that it is substantiated. 302 Even when substantiated, the report is to remain in the registry only while the plan of services for the child and his family are in operation. 303

The ECS Model Act would provide for immediate expungement of unfounded reports and the expungement of all closed reports at the end of seven years. 304 It would also "seal" reports when a child reaches 18, and access to these reports would be limited to instances where a sibling or offspring of the child is reported as abused or neglected. 305

Under the ABA proposal the report would remain in the file to aid the statistics gathering function of the central registry (i.e., how many unfounded reports there were), but the identifying portions would all be expunged. 306 Even the reports which have indicated abuse was present would be expunged of all identifying material after seven years. 307

The retention of unfounded reports may cause innocent adults and children to suffer from being associated with child abuse matters at a later date. Surely few labels are as emotionally (and negatively) charged as that of "child abuser" . . . .

It is also required that inactivated reports be similarly expunged . . . . Such a provision would not only serve to remove the burden of disapprobation from the abuser after the passage of a reasonable amount of time, but to remove the label of "abused" from the child as well. 308

Sussman comments on the inherent hazards of data storage, which is only exacerbated by a failure to provide for proper removal procedures: the rather zealous long-term record keeping practiced in most governmental agencies may unduly stigmatize a child as "abused" or his family as "abusers" when only a suspicion of abuse has been recorded. The dangers of labelling so often denounced in the field of juvenile delinquency have only recently been perceived in the process of child abuse reporting. 309

As the ABA proposal indicates there is a common assumption that child abuse is learned behavior and that abused children grow up to be

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299. ABA MODEL ACT, supra note 293, at 39. A proposal to physically destroy the reports was rejected but is listed as an alternate proposal. See also ECS MODEL ACT, supra note 293, at 47.
300. ABA MODEL ACT, supra note 293, at 39. "Quantums of proof below that level . . . must result in an Unfounded report . . . ."
301. Id. at 40.
302. ECS MODEL ACT, supra note 293, at 47-48.
303. Id.
304. ABA MODEL ACT, supra note 293, at 40.
305. Id. at 39-40. Cf. ECS MODEL ACT, supra note 293, at 47-48 which dates the seven years from the date the report was closed which is not the same as when it was received.
306. ABA MODEL ACT, supra note 293, at 40.
307. Sussman, supra note 275, at 312.
abusing parents.\textsuperscript{308} Thus, one of the dangers in massive storage and retention of old records is that the child himself "may be unduly 'watched' and unfairly examined for the purpose of determining, predicting or preventing later deviant behavior."\textsuperscript{309}

The invasion of privacy through the collection and storage of information on the family of an alleged abused child can be a rather constant intrusion of the state into the family. The Missouri law should be amended to provide in the statute itself for the expungement of records from the registry. Such due process protection of the family's right of privacy should not be left to the discretion of the Division of Family Services under their rule-promulgating authority. The legislature, not the Division of Family Services, should provide the standards for expungement. The legislature should determine what, if any, justification there is for holding an unfounded report in the registry for two years.\textsuperscript{310} If the purpose is to provide statistical information only, then all identifying material could be expunged immediately, leaving available only the fact that a report was made and such report was unfounded.

In addition, the legislature should determine what standard is to be applied in determining whether a report is substantiated. The legislature should determine whether doubts should be resolved against the parent or guardian and in favor of substantiating a suspicious report of abuse, as would seem to be the current practice of the Division,\textsuperscript{311} or, whether the standard should be one that resolves doubts in favor of the parents and against a finding of abuse, the position taken by the ABA Model Act which requires substantiation by a preponderance of the evidence.\textsuperscript{312}

Finally, the legislature should authorize some means by which the subject of a report can challenge the existence, the accuracy or the continued maintenance of a report in the central registry. If the report is denominated unfounded, a subject should be able to challenge the continued existence of that report in the central registry at all, at least with any identifying characteristics. If the report is denominated substantiated, the subject of the report should have some means to challenge whether the information contained in the report meets the standard set by the legislature as a prerequisite to a finding of substantiation. In all cases, the subject of a report should be able to challenge the accuracy of the information contained therein.\textsuperscript{313}

\textsuperscript{308} ABA MODEL ACT, \textit{supra} note 293, at 40. \textit{See also} ECS MODEL ACT, \textit{supra} note 293, at 50 which comments that this is often the case.

\textsuperscript{309} ABA MODEL ACT, \textit{supra} note 293, at 40.

\textsuperscript{310} \textit{See} text accompanying \textit{supra} note 296 \textit{supra}.

\textsuperscript{311} \textit{See} note 297 \textit{supra}.

\textsuperscript{312} ABA MODEL ACT, \textit{supra} note 293, at 39. \textit{See also} text accompanying note 300.

\textsuperscript{313} \textit{See} ABA MODEL ACT, \textit{supra} note 293, at 43. \textit{See also} ECS MODEL ACT, \textit{supra} note 293, at 48-49, which not only authorizes a subject to challenge a report but also places the burden of proof of its accuracy on the state agency maintaining
K. The Investigation

Upon the receipt of a report of child abuse, usually made on the hot-line to the Division of Family Services, the state officer “shall immediately communicate such report to its appropriate local office. . . .”\(^{314}\) The communication is made by telephone, and it is made only after the central registry is checked for any “relevant information” regarding previous reported instances of abuse or neglect to this child or his siblings.\(^{315}\)

The local office of the division is then required to make a thorough investigation “immediately or no later than 24 hours after receipt of the report from the division . . . .”\(^{316}\) The primary purpose of this investigation is to protect the child.\(^{317}\) The report of the investigation should include, but is not limited to, the nature, extent and cause of the abuse or neglect; the identity and age of the person responsible for the abuse or neglect; the names and conditions of other children in the home; a description of the home environment generally, the relationship of the child to his parents or others responsible for his care and custody, and any other pertinent information.\(^{318}\)

Once the initial investigation has been made, and the nature and extent of the injuries ascertained, the local office is required to make a report to the juvenile officer, and may make a report to the appropriate law enforcement authority.\(^{319}\) The local office must file a written report with the Family Services Division within 30 days from the date of the initial oral report, outlining its findings, what services were offered and which have been accepted.\(^{320}\) The written report is required to be updated at periodic intervals for as long as the child and his family are receiving services.\(^{321}\)

L. Reporting to Law Enforcement Agency

There is very little support for the making of a report to a law enforcement agency.\(^{322}\) The generally accepted purpose of the child abuse legislation is preventive and curative, not punitive.\(^{323}\) It is felt that “[I]f we recognize the mental, physical, and emotional inadequacies of . . . [abusers] then we must also recognize that prosecution and punishment

\(^{314}\) § 210.145.3, RSMo (1976 Supp.).
\(^{315}\) Id.
\(^{316}\) § 210.145.4, RSMo (1976 Supp.).
\(^{317}\) Id.
\(^{318}\) Id.
\(^{319}\) § 210.145.7, RSMo (1976 Supp.). See also text accompanying notes 322-38 infra.
\(^{320}\) § 210.145.8, RSMo (1976 Supp.).
\(^{321}\) Id.
\(^{323}\) Id. at 286.
does not change their behavior."\textsuperscript{324} It is also felt that the more appropriate receiving agency is a social service agency.\textsuperscript{325}

The basis for these recommendations is a firm belief that the problem of child abuse is fundamentally psychological or sociological rather than legal or penal. This, in turn, rests on the proposition that abuse can be better prevented by focusing on treatment of the victim and his family rather than by punishing the perpetrator.\textsuperscript{326}

There are a number of reasons why reporting to a law enforcement agency, which may subsequently move to punish the perpetrator of abuse, is not considered the most appropriate disposition of a child abuse case.\textsuperscript{327} First, in any given criminal case a great deal of discretion is vested in the prosecutor whether to proceed with the case. Thus, criminal action against abusers is likely to be non-uniform in application.\textsuperscript{328} Second, "[s]uccessful prosecution (conviction) for willful abuse is rare."\textsuperscript{329} It is claimed that convictions are obtained "in only 5-10 percent of the cases prosecuted."\textsuperscript{330} A criminal proceeding requires a higher standard of proof—beyond a reasonable doubt—than does a civil proceeding, thus it may be simpler to proceed along civil rather than criminal avenues. Third, if the abuser is acquitted, he may feel reinforced in his behavior\textsuperscript{331} or may view the child as the source of his problems, thus further aggravating the problems leading to the abuse itself.\textsuperscript{332} Fourth, if the abuser is convicted, he may be punished by being sent to jail where he may receive no treatment. This may, in addition, reinforce a negative self-image in the abusing parent.\textsuperscript{333} If the abuser is put on probation, the probation officer may be ill-equipped to deal with his rehabilitation\textsuperscript{334} because such rehabilitation must involve both

\begin{itemize}
\item \textsuperscript{325} Sussman, \textit{supra} note 275, at 285.
\item \textsuperscript{326} Id. at 286.
\item \textsuperscript{327} Id. at 282-84.
\item \textsuperscript{328} Delaney, \textit{The Battered Child and the Law} in HELPING THE BATTERED CHILD AND HIS FAMILY 187, 190-91 (C.H. Kempe & R. Helfer, eds., 1972). Delaney states that "based on the custom and culture of a community, variations may occur in deciding where an exercise of reasonable parental authority stops and child abuse begins. Community attitudes toward different racial and ethnic groups may also cause variable standards in the law's application.
\item \textsuperscript{329} Sussman, \textit{supra} note 275, at 283.
\item \textsuperscript{330} Id. at 283 n.217.
\item \textsuperscript{331} Delaney, \textit{supra} note 328, at 188.
\item \textsuperscript{334} Delaney, \textit{supra} note 328, at 191. He claims that few probation officers have training in, or an understanding of, the pathology of child abuse and thus probation services rarely have any therapeutic effect on the abuser.
\end{itemize}
the abusing party and the child who is abused. Finally, the best interests of the child are likely to be subordinated to the system of criminal vindication.\textsuperscript{335} It is stressed that:

To deal effectively with child abuse, all parts of the system must have the same goals. These include the immediate protection of the child, ascertaining the reasons for parental abuse, treatment of such causes and, ultimately, a permanent return of the child to a well-adjusted home, preferably his own.\textsuperscript{336}

There is some support for criminal prosecution where the child victimized by abuse is severely injured (or dies).\textsuperscript{337} Punishing the parent in such a case may be appropriate and warranted; but even then the best interests of the child should be not be ignored. Traditionally, the criminal justice system is defendant-oriented, not victim-oriented. It strives to punish or rehabilitate the defendant, not protect the victim. If an act of abuse is serious enough to warrant proceeding criminally against the abuser, then in order to protect the best interest of the victim—the child—a civil court should be much more willing to terminate parental rights.\textsuperscript{338} If the abuse is sufficient to warrant criminal prosecution in societal retribution, then it is also sufficient to terminate parental rights. Otherwise, a child (or his siblings) is left at the mercy of his punished, and perhaps vindictive, parent.

M. Protective Services

After the local office makes the initial investigation, the "preventive" and "treatment" aspects of the second generation statutes manifest that the new law is much more, and has different motivating purposes, than a reporting law per se. The law is quite explicit in its directives and is stated in mandatory, not discretionary, terms:

Protective social services shall be provided by the local office of the division to the subject child and to others in the home to prevent further abuse or neglect, to safeguard their health and welfare, and to help preserve and stabilize the family whenever possible. The juvenile court shall cooperate with the division in providing such services. Multidisciplinary services shall be utilized whenever possible in making the investigation and in providing protective social services, including the services of the juvenile officer, the juvenile court, and other agencies, both public and private.\textsuperscript{339}

Although explicit as to the mandated actions, the Missouri statute is not precise as to what kinds of services shall constitute "protective social services" or "multidisciplinary services."

The ABA proposal is likewise not very specific in its proposed statutory language as to what services should be provided, but the comments

\textsuperscript{335} Grumet, supra note 324, at 308. See also Sussman, supra note 275, at 282.

\textsuperscript{336} Grumet, supra note 324, at 308.

\textsuperscript{337} § 210.145.5--6, RSMo (1976 Supp.).
indicate the kind of multidisciplinary approach apparently contemplated in its proposed statute:

It is the intent of the Section to foster cooperation among persons, groups and agencies in the community who participate in the various legal, social, educational, medical and psychological aspects of child protection. . . . In order to encourage community participation and cooperation, it is suggested the local Child Protective Services Agencies create an inter-disciplinary child abuse and neglect advisory committee, composed of representatives from community groups and from the educational, legal, judicial, law-enforcement, medical and psychiatric fields. While it is not the purpose of this Act to detail the particular services that are to be provided, they should be family oriented and should strive to correct the environment where the child is found . . . . Such services might include individual and family counselling, day-care and homemaker services, or parental training in child care in the home . . . . The Agency should, of course, be prepared to deliver such immediate and essential services to maltreated children such as medical care, food, shelter and clothing.\(^{340}\)

The ECS Model Statute, is quite explicit as to what immediate services should be offered, details the number of reports required, and details instructions on removal procedures of the child if such action is warranted. It also creates a “multidisciplinary child protection team” including: the director of the local child protective service or his representative, a representative of the local law enforcement agency, a representative of the juvenile court, a physician, a lawyer, and a mental or public health representative. The team must have not less than three nor more than nine members.\(^{341}\)

N. Publicity

The Missouri statute requires the Division of Family Services to “undertake and maintain” programs to inform the general public, and specifically those classes of persons mandated to report, of the nature and extent of abuse and neglect.\(^{342}\) This provision is necessary in order to comply with the National Act which requires the state to “provide for dissemination of information to the general public with respect to the problem of child abuse and neglect.”\(^{343}\) The National Act also requires that information regarding the remedial aspects of the new legislation—“the facilities and prevention and treatment methods available to combat instances of child abuse and neglect”\(^{344}\)—be disseminated. The Missouri statute complies by requiring dissemination of information regarding remedial and therapeutic services.\(^{345}\)

340. ABA MODEL ACT, supra note 293, at 36, 35.
341. ECS MODEL ACT, supra note 293, at 39-42.
342. § 210.155.1, RSMo (1976 Supp.).
344. Id.
345. § 210.155.1, RSMo (1976 Supp.).
As indicated previously, this section also states that one of the goals of the publicity program is to encourage self-reporting and the voluntary acceptance of remedial services. A custodian contemplating reporting himself, however, should seriously consider the wisdom of such action. There could be a point in the process where he feels that no more services are needed, but he can no longer control what “voluntarily” must be accepted.

This same section makes provision for ongoing training programs for agency staff, thus conforming to the requirements of the National Act, and for the publication of the hot-line telephone number.

O. Evidence

It is generally believed that despite the broad base of reporters required to report child abuse, physicians are in the best position to accumulate evidence of such abuse. The child is usually before them and, to a limited extent, under their control. They can order x-rays, do blood tests, and take photographs. Indeed, the Missouri statute specifically authorizes the taking of color photographs of the physical abuse and, if necessary, a radiologic examination of the child. If a suit is subsequently brought to remove the child from the custody of his parents, the medical examiner can testify as to the injuries, and the x-rays and the photographs can be admitted into evidence.

The “evidence” which the physician compiles, however, will not usually be limited to real evidence such as photographs and x-rays. At the hospital, abusing parents “are likely to display a set of characteristics, reactions and attitudes as distinctive as those exhibited by the child.” Some of these signs include failure to volunteer information, evasiveness and contradictions, critical or unduly solicitous behavior, inquisitiveness and prying. In addition, there may be anger with the child for being “clumsy” and having been injured, little sign of remorse, visitation only seldom, and when visitation occurs, little sign of affection. It is also

346. See text accompanying notes 100-101 supra.
347. § 210.155.2, RSMo (1976 Supp.).
349. § 210.155.3, RSMo (1976 Supp.).
351. § 210.120, RSMo (1976 Supp.).
352. See In Interest of J.L.L., 402 S.W.2d 629 (Spr. Mo. App. 1966) admitting black and white photographs into evidence.
possible, though perhaps improbable,\textsuperscript{355} that parents will admit having abused the child. The physician’s report should undoubtedly state any admissions by the parents.\textsuperscript{356}

It is important to fully understand the role of the physician as an “evidence gatherer” because the evidence he obtains will be used in any preventive treatment program worked out by the Family Services Division. It may also be used, if the circumstances warrant, in an action to remove the child from the custody of his parents or in a termination proceeding.\textsuperscript{357} In support of the proposition that the physician is not only an “identifier” of abuse but also an “evidence gatherer,” one author has stated:

The only meaningful detective work to provide substantial evidence of abuse must be done by medical personnel . . . . If there is going to be any evidence to substantiate suspicion of abuse, it would probably come from the parents at the time the child is brought to the doctor . . . . If disparity between the injuries and explanation thereof do exist, the physician’s report of suspected physical abuse and his medical statement indicating why should be considered the strongest evidence that abuse exists . . . . The physician’s medical report and belief that the injury to a child could not have been caused in the manner claimed is the only reliable evidence that abuse exists.\textsuperscript{358}

One of the main indicators of child abuse to the physician is the incompatibility of the story by the party bringing the child in for treatment as to how the accident occurred. If there is a later admission by the custodian, or a change in the original story, the earlier misrepresentation may be used against the parent in a neglect or termination proceeding, if one is warranted.\textsuperscript{359} Also, the number of different stores offered and the concomitant discrepancies can be used in evidence.\textsuperscript{360}

Clearly, one of the first places an attorney should go in checking what evidence there is against an abusing parent is to the medical records of the doctor who observed the child, reported him, or treated him. If the parents become involved in a subsequent neglect or termination proceeding, the initial making of the report might be attacked by claiming the reporter

\textsuperscript{355} E. THOMSON, et. al, CHILD ABUSE: A COMMUNITY CHALLENGE 34 (1971).
\textsuperscript{356} Daly, supra note 355, at 342.
\textsuperscript{357} See In Re D.L.W., a minor, 530 S.W.2d 388 (Mo. App., D.K.C. 1975); In the Interest of J — O — , 372 S.W.2d 512 (St. L. Mo. App. 1963). For a criminal prosecution, see State v. Minnix, 505 S.W.2d 70, 71 (Mo. App., D.K.C. 1973).
\textsuperscript{358} E. THOMSON, et al., supra note 355. But see Paulsen, Child Abuse Reporting Laws: The Shape of the Legislation, 67 COLUM. L. REV. 1, 10 (1967) commenting that physicians ought not be asked to play detective.
\textsuperscript{359} See In the Interest of J — O — , 372 S.W.2d 512 (St. L. Mo. App. 1963), relating to admissions. See also H. — v. D. — , 373 S.W.2d 646, 654 (Spr. Mo. App. 1968). It is said in that case that: “Deliberate misrepresentation of facts by one or another party to a custody action indicates that the party is probably an unsuitable custodian of the child . . . .”
\textsuperscript{360} In Interest of J.L.L., 402 S.W.2d 629, 632-33 (Spr. Mo. App. 1966).
never had reasonable cause to believe abuse as defined by the statute.\textsuperscript{361} The parents could also claim that the reporter was not—in any event—\textit{competent} to form such a "reasonable" belief.

[A] lawyer may legitimately question whether the licensed physician is trained to differentiate between "accidental" and "intentional" ... injuries, or whether he is equipped by his experience to determine whether these injuries were inflicted by a parent or others responsible for the child's care rather than by some irresponsible sibling or some other third person. "Multiple lacerated wounds due to blows by a blunt instrument" seems a permissible medical opinion, "a blow ... non-accidentally struck by A.B." is not ... a permissible \textit{medical} opinion.\textsuperscript{362}

It seems unlikely that a parent would find much success in this situation. If the case has progressed to a neglect or termination proceeding, then, despite the lack of reasonable belief in the beginning, a fairly strong case of abuse probably has been substantiated. A court would have to apply a theory similar to the "fruit of the poisonous tree" criminal law exclusionary rule, holding that if the initial report of abuse was unwarranted, everything else that followed was tainted and could not be used against the parents. Because the neglect proceeding would undoubtedly be brought in the best interests of the child, it is doubtful that a court would gamble with the child's current situation because of a procedural irregularity in the beginning.

\section*{P. Statutory Exceptions to Privileged Communications}

Under the current Missouri statute, "[a]ny legally recognized privileged communication, except that between attorney and client when the client is alleged to be a perpetrator of abuse or neglect, shall not constitute grounds for excluding evidence at any proceeding regarding abuse or neglect or the cause thereof."\textsuperscript{363} The two most likely claims of privileged communications to fall victim to this statutory exception are the physician-patient privilege and the husband-wife communications privilege.

There is case law in Missouri providing that the physician-patient privilege cannot be used by a parent for his own benefit by claiming to assert it on behalf of the child when the parent is defending in a neglect proceeding.\textsuperscript{364} The privilege technically belongs to the child-patient. Although a child's parent or guardian can usually raise the privilege on behalf of the child, to allow a parent charged with abuse or neglect to do so

\textsuperscript{361} See text accompanying notes 190-96 supra.

\textsuperscript{362} McCoid, \textit{supra} note 350, at 47.

\textsuperscript{363} § 210.140 RSMo (1976 Supp.). This section would not make the privilege inapplicable to a civil suit for damages. See State \textit{ex rel.} McNutt v. Keet, 432 S.W.2d 597 (Mo. En Banc 1968).

\textsuperscript{364} \textit{In Re M — P — S —}, 342 S.W.2d 277 (St. L. Mo. App. 1961).
would work contrary to the purpose of allowing the privilege. The privilege is meant to protect the interests of the child. In a neglect proceeding, the parent is charged with having violated the child's best interests. To allow the privilege to be asserted in such a situation would work not to further the child's best interests but to their detriment.

There is, however, no longer any need to rely on case law to receive an attending physician's testimony into evidence. The statute creates an exception to the normal physician-patient privilege, regardless of whom one might argue the privilege belongs to—the child or the parent on behalf of the minor child.

The report by the attending physician, if it complies with all the necessary requirements, would constitute a business record and thus would be admissible as an exception to hearsay. Statements by the parent or the child could be admissible under a number of exceptions to the hearsay rule. A statement made by an abusing parent indicating he had abused, or observed the abuse of, the child would constitute an admission, and would thus be admissible. If the party bringing the child in for treatment was not the abusing parent, any statements which are relevant to diagnosis or treatment made by this party could be admissible as statements made to an attending physician for the purposes of securing treatment for the child. Statements made by the child himself could also constitute statements made for the purpose of securing treatment, and thus be admissible.

A child's statements to an attending physician could also be admitted into evidence as statements relating to his bodily condition at the time he was admitted. Statements made by the child indicating his state of mind at the time he was admitted could also be admissible to show that he was in

366. § 210.140, RSMo (1976 Supp.).
370. Melton v. St. L. Pub. Serv. Co., 363 Mo. 474, 251 S.W.2d 663, (En Banc 1952); "the entries . . . indicate *how plaintiff was injured.* We believe the record of the statement made by the patient . . . in the instant case, insofar as the statement recorded was relevant, and helpful to or of aid in the diagnosis and treatment of the patient's injury, was admissible . . . The hospital wanted to know how the patient got hurt. This was helpful to the hospital because it aided in determining the nature and extent and proper treatment of the plaintiff's injury." (emphasis in original) *See also* 6 Wigmore, *Evidence* §§ 1719-20; McCormick, *Law on Evidence* (2d ed.) § 292.
pain.\textsuperscript{372} If the parents were charged with having emotionally abused the child, such statements could also be admitted to show the mental state of the child and, \textit{ergo}, the extent of the emotional abuse.\textsuperscript{373}

The current statute will also undoubtedly affect the privileges relating to the husband-wife relationship as well. The "privileges" inhering in the marital relationship are of two types: the privilege against being compelled to testify against one's spouse ("the adverse testimony rule") and the privilege to refrain from testifying as to confidential communications ("the confidential communications rule").\textsuperscript{374}

Currently in Missouri the "adverse testimony rule" applies only to criminal proceedings.\textsuperscript{375} Furthermore, in 1957 the Missouri Supreme Court held that this privilege was not available to a defendant accused of mistreatment of his child.\textsuperscript{376} The rationale of the court seemed to be that a crime against a child was equivalent to a crime against one's spouse. Even at common law there was no privilege to prevent one's spouse from testifying against a criminal defendant if in fact the crime had been perpetrated on the spouse. The court merely extended the common law exception to include crimes against one's children.\textsuperscript{377} In any event, it would not exclude evidence in a proceeding to terminate parental rights since that is not a criminal proceeding.

The Missouri child abuse legislation does not direct itself to the "adverse testimony rule," because it is not a "communication" privilege. The statutory exception contained in the current child abuse legislation is directed at the "confidential communications privilege."\textsuperscript{378} Other sections of the Missouri statutes specifically provide for such a privilege.\textsuperscript{379} The ability to claim the privilege seems to belong to either the communicating spouse or the spouse receiving the communication, so that either one could claim the benefit of the privilege and prevent the testimony of the other spouse under normal circumstances.\textsuperscript{380} The section contained in the child abuse legislation would eliminate the ability of either spouse to claim the benefit of the privilege. Thus either spouse will be required to testify to any admissions made by the other spouse as to abuse of their child.

According to the language of the statute, the only privilege which can be claimed is the attorney-client privilege where the "client is alleged to be a

\textsuperscript{374} Erickson, Testimony by Husband and Wife in Missouri, 24 Mo. Law Rev. 546, 547 (1959).
\textsuperscript{375} Id. at 549. See § 546.260 RSMo 1969.
\textsuperscript{376} State v. Kollenborn, 804 S.W.2d 855 (Mo. En Banc 1957).
\textsuperscript{377} Id. at 864. see also Erickson, supra note 376, at 549.
\textsuperscript{378} § 210.140, RSMo (1976 Supp.).
\textsuperscript{379} § 491.020, RSMo 1969 deals with civil suits; § 546.260, RSMo 1969 relates to criminal prosecutions.
\textsuperscript{380} Erickson, supra note 374, at 550. See Berlin v. Berlin, 52 Mo. 151 (1873).
perpetrator of the abuse or neglect."381 Where the client is not the actual abuser, but for example the spouse of an abuser, some question arises as to the ability to claim the evidentiary attorney-client privilege. First of all, it is conceivable that in neglect or termination proceedings a spouse who stood by and allowed abuse to occur without an active attempt to alleviate the abusing conduct would be classified as a "perpetrator of abuse or neglect" in the neglect petition. Thus, anything told to an attorney by a client's spouse would qualify for the claim of privilege. This would probably also be true if the neglect petition were directed at the parents as a unit.

If for some reason, however, the bystander spouse was not so classified, then under the literal language of the statute, this spouse, as well as this spouse's attorney, could be called to testify against the allegedly abusing spouse. Suppose, for example, that the non-abusing spouse in contemplation of divorce had confided to her attorney that her husband had sexually molested their daughter. Subsequently a criminal action is brought against the father for abuse. The wife is called as a witness and denies any knowledge of the alleged abuse. Could the state call the wife's attorney to impeach the wife's in-court testimony? The wife is not "the alleged perpetrator." The attorney is being asked to testify to what would otherwise be a "legally recognized privileged communication." There could be no hearsay objection because his testimony is not being elicited to prove the truth asserted, but to prove the lack of credibility of the wife's testimony. This could place the attorney in an ethical dilemma.

"The scope of the ethical principle of confidentiality may be broader than the protection afforded by the testimonial privilege."382 According to one author:

Where the client is not the abuser but another member of the family, the immediate disadvantage to the client may be less obvious, but the professional confidence may be nonetheless significant. Where the client's interest is advanced by disclosure and the imposition of legal authority between the abuser and the child, or the imposition of some sanctions against the abuser, the disclosure may be compelled by the professional obligation of the attorney . . . to serve the client's interests. But even here the desire or dictate of the client as to the maintenance of confidentiality may prevail.383

Ethically, an attorney may feel that the desire of the nonabusing parent should prevail, but whether he can allow that desire to prevail legally, and be protected under the statute, is debatable.

Q. Guardian Ad Litem—Legal Counsel

The current Missouri legislation provides that "[i]n every case involving an abused or neglected child which results in a judicial proceeding," a

381. § 210.140, RSMo (1976 Supp.).
382. McCoid, supra note 350, at 50 n.71.
383. Id. at 31.
guardian ad litem shall be appointed for the child. An appointment shall also be made for a parent, but only if that parent is a minor, mentally ill, "or otherwise incompetent."

There can be little criticism against the inclusion of such a provision as a basic minimum protection of the child's interests. But there is concern over whether such a provision actually goes far enough. Traditionally, the distinction between the guardian ad litem and the legal counselor has been that the former uses his independent judgment in determining the "best interests" of his ward, while the latter advocates for his client what his client determines to be his own best interests. The concern has been posited that, "Without counsel appointed to serve in the traditional role as an advocate for the child's legal interests . . . the child's rights [might not be] fully protected in judicial proceedings." It has been pointed out that a guardian ad litem need not necessarily be an attorney. The ultimate concern, then, about the inclusion of this type of provision is that it "may give rise to the spurious assumption that sufficient protection has been provided for the child."

The appointment of a "guardian" rather than an "advocate" gives the child no assurance that his wishes as to his disposition will be those articulated or heeded. The guardian, rather, must make an independent determination as to whether the child's wishes are in fact in the child's best interests. One author states:

Children have very real and legitimate feelings and are entitled to have those feelings respected. At minimum, this requires procedures which insure that the child has meaningful input into the process which determines his future. Since it is the judicial process which ultimately makes such a determination, the child needs someone to serve effectively as an advocate for his wishes and feelings in the judicial forum. Such a function is best performed by an attorney acting in the traditional role of an advocate in an adversary context.

384. § 210.160.(1), RSMo (1976 Supp.).
385. § 210.160.(2), RSMo (1976 Supp.).
387. Id.
388. Id.
389. Id.
390. Isaacs, The Role of the Lawyer in Child Abuse Cases, in Helping the Battered Child and His Family 225 (C.H. Kempe & R. Helfer, eds., 1972), stating that the best interests of the child is "now often evaluated in medical and psychiatric terms." See A Missouri Child Abuse Statistical Report, prepared by the Division of Planning and Research, Research and Statistics Section, which reported that for the month of February, 1975, 62.4% of abused children were under the age of 5, median age 4.1. It is questionable whether the wishes of a child this age would always be in his best interests.
391. V. De Francis & C. Lucht, supra note 386, at 186. See also ABA Model Act, supra note 293, at 49-50.
It is undoubtedly a complex question—the guardian or the advocate? But it seems far from clear that the appointment of a guardian would hamper or frustrate "meaningful input" from a child as to his feelings and desires. Indeed an abused child's desires to return home should, in certain circumstances, be frustrated. It is possible that "strict adherence to traditional ethical concepts of advocacy might ultimately result in exposing a child to further and more serious injury."392 One juvenile judge declared that one of the things "wrong with our legal system of handling child abuse cases is . . . the adversary system."393 In his opinion, the accusatory nature of an adversary hearing fails to uncover and deal with the "subtleties and under the surface things that need to be brought out . . ."394 If in a given situation, however, the child's best interests required that he be represented by an advocate, it can be argued that it would be the guardian's duty to the child to secure such representation.

Even if one does not adhere to an "adversary" role for that person representing a child, undoubtedly some legal training would be beneficial: the question is how much? Early in the development of "juvenile law" it was thought that lawyers, because of their basic adversary training, would be nothing more than obstructionists,395 ill-equipped to deal comfortably with the informal procedures and broader issues involved in juvenile adjudications. In the juvenile court, the question was not so much "who's right and who's wrong," as "what's best to be done." But re-thinking in this area has taken place,396 aided by the United States Supreme Court's decision in In Re Gault.397 The idea of involving the lawyer in juvenile proceeding is no longer an anathema.

How would a lawyer serve a child who is, or is likely to become, a subject of juvenile court jurisdiction because of abuse or neglect? If he were involved early enough, he could encourage parents to undergo treatment and perhaps avoid the initiation of judicial proceedings at all.398 If the proceedings were already pending, he could act as a spokesman as to whether, based on his own independent best judgment and the child's wishes, the child should be temporarily removed, or if already removed, whether a return to the home might be best.399 Once involved in the actual hearing, the lawyer could assure that a "full and objective presentation of the facts" were made400 and, fundamentally, he could "protect the child [and] the whole process from arbitrary action and prejudice."401 The

392. Isaacs, supra note 390, at 226.
393. Delaney, Problems in Court Processing of Abuse, in A NATIONAL SYMPOSIUM ON CHILD ABUSE 62, 63 (Am. Humane Assoc., Children's Div. 1972.)
394. Id.
396. Isaacs, supra note 390, at 227.
397. 387 U.S. 1 (1967).
398. Isaacs, supra note 390, at 230.
399. Id.
400. Id. at 231.
401. Id. at 232.
lawyer would also be available for pursuing appellate review, if warranted; and for any subsequent re-hearings of the case as progress was made.402

Because the lawyer would seem to be so capable at providing services and protection for the child's interests, the next question would be whether or not he could provide essentially the same services and protections to the alleged abusing parents, and if so, if counsel ought not be provided for such parents. "The parents right to an attorney is even more energetically demanded by commentators but is probably less legally secure than the child's."403

Under the Missouri statute, parents are not provided with legal counsel, and even the more limited protection of a guardian ad litem is only afforded parents in special circumstances.404 A different portion of the juvenile code, dealing with termination of parental rights, requires that parents be informed of their right to an attorney, and that one be appointed for them if they are unable to afford one.405 There is no comparable provision in the general section dealing with "children in need of care and treatment" which delineates neglected children as one class of such children. Whereas termination of parental rights is undoubtedly a serious intrusion on parental freedom, thus warranting full due process protection, a finding that a parent has "neglected" his child is also a serious allegation. The consequences of such a finding "may result in a child's removal from his home and placement with a public or private agency or in an institution . . . ."406 A finding of abuse "may render parents liable for criminal prosecution" as well.407 Despite the fact that the hallmark of the court's jurisdiction in a neglect proceeding is the best interests of the child, to the parents this "benevolent deprivation is just as real as a malevolent one."408

There seems little question that a parent's interest would be better protected by legal counsel than by an appearance on their own behalf.

Observation of the actual activities of counsel in the ultimate disposition of neglect and child abuse cases has indicated at least eight separate functions which the lawyer can productively perform . . . .(He) can insure impartiality by acting as a counterbalance to the hostility and pressures exerted on the court by the very nature of the issues. He can assure that the basic elements of due process are preserved, such as the the circumstances which shed light upon the otherwise unspeakable conduct of his client are adduced. He can test expert opinion to make certain that it is not

402. Id.
404. § 210.160.(2), RSMo (1976 Supp.), provides for a guardian ad litem only when the parent in question is a minor, is mentally ill, or is otherwise incompetent.
405. § 211.471, RSMo 1969.
406. Sussman, supra note 403, at 305.
407. Id. See text accompanying notes 327-38 supra.
based on mistakes either arising from the factual premises on which it rests or the limited expertise or lack of it on which the conclusions derived from these facts are based. He can give the frequently inarticulate parent a voice in the proceeding by acting as his spokesman. His relationship with the parents may even enable him to give the probation department or other auxiliary staff of the court new and meaningful insights into the family situation. Finally, and equally important, he can interpret the court and its processes to the parent and thus assist the parent in genuinely accepting a proper disposition by the court.409

The current Missouri legislation should be amended to provide for counsel for the parents of a child who is the subject of a neglect or abuse judicial proceeding. Fundamental fairness would seem to require that when the state so pervasively regulates an area, as it has done with the subject of child abuse, some counter-balancing protection should be afforded those persons who may be caught up in the "coercive intervention" of the state, sometimes without cause. Surely a parent deserves legal counsel when his child may be removed, even temporarily, to insure the integrity and fairness of the judicial system.410

V. CONCLUSION

This has been a rather extensive discussion of the current Missouri legislation dealing with child abuse and neglect. It is hoped that by considering prior Missouri law on the subject, by liberal reference to numerous

409. Isaacs, supra note 390, at 236-37. See Comment, The Attorney-Parent Relationship in the Juvenile Court, 12 ST. L.J. 603, 608-24 (1968). Although this Comment deals with the attorney-parent relationship within the framework of a delinquency proceeding, it does point out the type of functions a lawyer could provide to parents, stressing particularly his ability to "explain the purposes and objectives of the juvenile court," and his ability to alleviate much of the conflict among the parties—the parents, the child and the state. Id. at 603. See also Levine, Cavat Parentis: A Demystification of the Child Protection System, 35 U. PITT. L. REV. 1 (1973); Note, Child Neglect: Due Process for the Parent, 70 COLUM. L. REV. 465 (1970).

410. See State v. Couch, 294 S.W.2d 636, 640 (St. L. Mo. App. 1956). The "restriction of parental rights must be in accordance with due process and limited to the extent necessary to achieve the most desirable goal, wherever possible, of re-instating the natural and normal parent and child relationship." See Isaacs, supra note 390, at 234: "[I]f the client insists upon his innocence, it is the function of the court and not the lawyer to determine the issue of guilt or innocence . . . . The role of trial advocate should not, however, be permitted to obscure the equally important role of the lawyer as counselor. Advice to a client to admit culpability and even to waive some legal rights is not always a violation of a lawyer's professional trust . . . . [I]n child abuse cases, the lawyer, in his role as counselor to the parent, may properly look beyond the immediate outcome of the case to the ultimate rehabilitation of the family. For example, could it be seriously argued that a lawyer is derelict in professional responsibility if he advises his client to admit responsibility (even where such culpability might not be established at a trial) when the lawyer knows that, without some therapeutic intervention, his client will be continuously exposed to the temptation of inflicting even more serious injuries on his child and will subject himself to more serious punishment in the future?"
commentaries, and by discussing examples of some of the "model legislation" in the area, the reader has been able to discern the progression of this type of legislation. It has become increasingly more protective and, simultaneously, more intrusive into the privacy of the family.

Throughout the article, difficulties inherent in the current statutory scheme have been indicated. In addition, certain suggestions have been made that, perhaps, would be appropriate additions or clarifications to the existing statute. The recommendations have been made in keeping with the primary purpose of the legislation—to protect the abused and neglected child—and yet with a view to a more balanced accommodation between the interests of the state and those of the family. In closing, these recommendations and suggestions have been collected in one section in the hope that the major objections to the current statute will be clarified.

The definitional section of the statute should be re-written. In re-writing this section, the legislature should pay particular attention to two difficulties found in the current statutory scheme. First, the absence of any observable phenomena as part of the definition of abuse or neglect leaves a party required to report child abuse or neglect with no guidelines as to what, in fact, must be observed before reportable abuse or neglect has occurred. Although this is not particularly troublesome when dealing with physical abuse or neglect of a child, it becomes essential when the statute also requires the reporting of emotional abuse. The current statute would seem to be unconstitutionally vague as to what, in fact, constitutes emotional abuse, and it would appear highly unlikely that this particular term is one of common understanding. In deference to all involved—the reporter, the investigators, and particularly the family—those things which constitute "reportable events" should be clearly defined in terms of the underlying phenomena involved.

Second, the definitions of abuse and neglect should be re-written to eliminate the non-observable requirements currently found there, such as the fact that abuse must have caused "other than by accidental means." In addition, the requirement that abuse and neglect must have been perpetrated by someone responsible for the "care, custody, or control" of the child should be eliminated from the "definitions" of abuse and neglect altogether. If not eliminated, the statute should specifically state that these are not criteria relevant to the initial reporting of the abuse or neglect, but are relevant to the investigator, in determining whether to substantiate any given injury as abuse or neglect, and to the one responsible for treatment, in determining who in fact should be treated.

A clear statement of what constitutes abuse and neglect for reporting purposes would also clarify the circumstances in which good faith immunity is applicable. By

411. See note 125 and accompanying text supra.
412. See text accompanying notes 148-70 supra.
413. See text accompanying notes 119-23 supra.
414. See text accompanying notes 183-89 supra.
clearly stating what elements of abuse are relevant to the reporter, as opposed to the investigator or treater, the statute would also clarify precisely what a reporter must have "reasonable belief" of before being required to report abuse, and under what circumstances good faith immunity will be available to him if a given report is later determined to be unsubstantiated as abuse or neglect. This type of simple clarification would improve the current statute immeasurably.415

The current statute should be amended to provide for, and facilitate, voluntary, anonymous self-reporting. The current statute seems to express a desire to provide for voluntary reporting of instances of child abuse and for voluntary acceptance of treatment.416 However, the statute makes no provision for anonymous self-reporting. As suggested by the ABA Model Act,417 the inquiring parent could be permitted to call up anonymously, and could then be directed to a prevention and treatment program in his geographical area. The parent could then take steps to become involved in such program. In this case, all the "bureaucratic" elements of the current statutory scheme—including an entry in the central registry and control of the therapeutic program by the state agency—would be by-passed.

The current statute should be amended to provide for the expungement of certain records from the central registry, and to provide for parental challenges to the existence and accuracy of reports contained in the registry.418 The provisions dealing with the expungement of records should provide for the expungement (at least as to any identifying characteristics) of (1) unfounded reports and (2) closed reports. The latter category would include cases that have been successfully treated and are no longer active, those where parental rights have been terminated and the child removed and where there are no other siblings in the home, and those where the family has left the jurisdiction of the state and its whereabouts is unknown. Such provisions should also provide for the expungement of records where there has been no contact between the family and any agency regarding treatment or prevention within some specified period of years. In addition, the legislature should set what standard is to be applied in determining whether a report is to be classified unfounded or substantiated. Finally, the statute should be amended to provide authority for, and a procedure by which, parents can challenge the existence, accuracy, or maintenance of a report in the central registry.

The legislature should reconsider whether a guardian ad litem sufficiently protects the interests of the child in an abuse or neglect proceeding.419 Upon reconsideration of this question, it may be that legal counsel would be more advantageous to the child, especially to an older child. The question is a complex one, and in no event should the limited protection of the guardian

415. See text accompanying notes 224-31 supra.
416. See text accompanying notes 100-01 supra.
417. See text accompanying note 102 supra.
418. See text accompanying notes 295-313 supra.
419. See text accompanying notes 384-402 supra.
ad litem be eliminated without providing for some other kind of representative for the child.

The current statute should provide for a right of legal counsel for any parent of an abused or neglected child. Such a provision need not necessarily be included in those specific statutory provisions relating to mandatory reporting of abuse or neglect. For example, such a provision could be added to the general statutory section dealing with children “in need of care and treatment.” However, legal counsel for parents should be an integral part of any abuse or neglect proceeding. A parent should be informed of this right, and if he is unable to afford an attorney, one should be appointed for him. To a parent, the loss of a child, even temporarily, is potentially a serious deprivation of the parent’s liberty and happiness. In addition to assuring an underlying fundamental fairness to such proceedings, a lawyer could be quite helpful in acting as a mediator and conciliator between the parents and the state. By explaining to the parents not only what the law says, but why it says it, and how it ultimately is meant to benefit all the involved parties—the child, the family, and the state—the lawyer can in fact bring to the current statutory scheme the balancing of interests that may be absent at the present time.

There is undoubtedly a need for some type of reporting law for children who have been subjected to serious physical or sexual abuse. Beyond that, however, the decision as to how far the reporting law should go is a matter of legislative prerogative. However, “considering the seriousness of the decision to intervene from the parents’ perspective, intervention should only be permissible where there is a clear-cut decision, openly and deliberately made by responsible political bodies, and the type of harm involved justifies intervention.”

Whether or not the Missouri legislature engaged in “clear-cut” decision-making is debatable. Legislation relating to child abuse is no longer an isolated phenomena dealing solely with the reporting of a specific injury to a specific child. Rather, it has become the first step into a complex relationship between the parents, acting under their own autonomy as parents, and the state, acting under its parens patriae power. Caution and clarity should be the primary tools through which the legislature develops its policy in this area. It may be true that

[the sympathetic appeal of beaten, malnourished, or helpless children is a strong inducement for expanded intervention. However, because legislators and judges presume the beneficence of such intervention, there is great temptation to intervene too often, and restraints placed on the exercise of coercive state power elsewhere are minimized or disregarded in the child neglect area.

420. See text accompanying notes 403-10 supra.
421. See note 409 accompanying text supra.
Since our society values the principle of family autonomy and privacy, we should carefully examine any decision to coercively limit parental autonomy in raising children. We must define the goals we seek to achieve by coercive intervention and the costs we are willing to absorb in the process. In addition, we must ask whether the resources exist, or can be developed, to make intervention into family affairs useful.\textsuperscript{423} There are a number of questions that should be asked and answered before a legislature embarks on such a comprehensive reporting, treatment, and prevention scheme as that outlined in the current child abuse legislation. First, can the state through its intervention actually do anything to alleviate the problem which gave rise to the initial report? in regard to the underlying problem of why abuse occurs and how to stop it, the state has a number of alternatives.

The state agency charged with treating abusive or neglectful parents can take steps to remove the child from the home.\textsuperscript{424} But where will the child go? What facilities are available? What evidence is there that the removal will not in fact be more harmful for the child? What affirmative evidence is there that removal will actually be of benefit to him?

The state agency could stop short of removal. It could attempt to treat the problem by providing "protective" and "multidisciplinary" services.\textsuperscript{425} But, can the agency in fact provide the services that might be required to alleviate the problem? Can it provide financial aid and medical care? Can it get a frustrated, out-of-work parent a job? Or, are the services to be provided the family in the nature of "soft" services\textsuperscript{426}—individual and group counseling or parent education programs? It has been claimed that "[d]espite approximately 70 years of experience, there is remarkably little evidence demonstrating the usefulness of social work intervention, particularly with 'soft' services."\textsuperscript{427} The question remains, does any real benefit inure to the child or the parent as a result of this type of intervention?

If the statutory scheme requiring the reporting of child abuse and neglect does not envision the mandatory removal of children from their homes, it must envision that some success will ensue as a result of the protective and multidisciplinary services which will be extended to the family. Whether these services are "offered" and "voluntarily" accepted, or are placed on the family as "conditions" to keeping the child at home, some basic issues should be faced regarding this serious, though concededly limited, intervention:

\begin{itemize}
  \item \textsuperscript{423} Id. at 987.
  \item \textsuperscript{424} Id. at 995-96.
  \item \textsuperscript{425} See Wyman v. James, 400 U.S. 399 (1971) which seems to indicate that this type of intervention is less intrusive than removal on the liberty and privacy of the family.
  \item \textsuperscript{426} Wald, supra note 422 at 997.
  \item \textsuperscript{427} Id.
\end{itemize}
(a) Do these types of intervention entail less danger that the child will be harmed as a result of the state action?  
(b) Is there evidence that such services, even if not harmful, are beneficial enough to justify the substantial financial costs and interference with family privacy that extending the scope of coercive intervention entails?  Based on current evidence, it appears that both these questions must be answered negatively.  

Is the legislature willing to adequately fund the programs under which these services are to be provided? Even more fundamentally, would the legislature be prepared to provide rather basic kinds of help, monetary and otherwise, which would make the necessity for the "soft" service programs obsolete. So far, "our societal commitment to child welfare has not extended to guaranteeing all families adequate income to assure that all children can receive basic nutritional and medical care, adequate housing, or any of the other advantages we would like parents to provide."  

These questions are not the result of some utopian naivete. Rather, they are a natural result of a statutory scheme which, on its face, does not indicate a considered or critical choice of words, and which does not seem to provide adequate protection to the families who will become involved with a state after a report of abuse or neglect is made. Although there is no doubt that a legislature need not act to remedy an entire problem at once, and can proceed one step at a time, there should be some ultimate goal that is being approached and that is reasonably and practicably attainable. No such ultimate and practicable goal is evident in the current child abuse and neglect reporting, treatment, and prevention statute.

428. Id. at 996.  
429. Id. at 1000.