

# The Child Abuse that Doesn't Count: General and Emotional Neglect

## INTRODUCTION

*Tony watches "The Late Show" almost every night. His dinner consists of a bag of corn chips and a few cans of soda. His home is dirty and smells bad, but the heater operates and the cupboards contain some food. His parents belittle him. They yell and curse at him, but do not strike him. Tony goes to school without breakfast. He is unwashed and wears dirty, torn clothes. He misbehaves at school, is inattentive, and refuses to do his assignments. His teachers are concerned and frustrated because they cannot convince his parents to help and encourage him. Tony hates himself. He hates the world. Tony is a physically neglected child. He is an emotionally neglected child. But the law refuses to help him.*

In California, general neglect<sup>1</sup> and emotional neglect<sup>2</sup> are noncategories for governmental intervention.<sup>3</sup> The California Penal Code states

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<sup>1</sup> CAL. PENAL CODE § 11165.2(b) (West Supp. 1989) (defining general neglect); *see infra* text accompanying notes 4-5 (quoting this code section). This Comment focuses on California law. However, the general suggestions apply to all states.

<sup>2</sup> *See* Whitting, *Defining Emotional Neglect — A Community Workshop Looks at Neglected Children*, 1976 CHILDREN TODAY 2; *see also* OFFICE ATT. GEN., CHILD ABUSE PREVENTION HANDBOOK 13 (August 1985) [hereafter *Attorney General Report*] (defining emotional neglect as parent's failure to provide child normal experiences of feeling loved, wanted, secure and worthy); Polansky, Hally & Polansky, *Definition of Neglect*, in PROFILE OF NEGLECT: A SURVEY OF THE STATE OF KNOWLEDGE 5 (1977) (defining emotional neglect as a caretaker's failure to provide one or more ingredients generally deemed essential for developing a child's emotional capacities) [hereafter PROFILE IN NEGLECT].

<sup>3</sup> *Compare* CAL. PENAL CODE §§ 11165.1, 11165.2(a), 11165.6, 11166(a) (West Supp. 1989) (defining physical and sexual abuse and severe neglect as bases for prosecution efforts and prerequisites for mandatory reporting to child protective service or law enforcement) *with id.* §§ 11165.2(b), 11166(a),(b), 11169 (West Supp. 1989) (defining general neglect and excluding it from prosecution efforts and mandatory reporting law); *see also* *Attorney General Report*, *supra* note 2, at 13 (explaining that child protective services shall not accept reports of emotional neglect unless form of neglect constitutes legally defined abuse, that is, physical endangerment). A person who *willfully* causes a child to suffer "under circumstances or conditions likely to produce great *bodily* harm or death" is guilty of a felony. *See* CAL. PENAL CODE § 273a(1) (West 1988) (emphasis added). The crime is punishable by imprisonment in a county jail for up to one year or in the state prison for two, four, or six years. *Id.* A person who

that general neglect occurs when a child's custodian<sup>4</sup> negligently fails to provide physical necessities of life.<sup>5</sup> Emotional neglect remains undefined in the code.<sup>6</sup> Under the statute, both forms of neglect must be severe to trigger mandated reporting provisions<sup>7</sup> or prosecutorial efforts.<sup>8</sup> That is, a child must be physically harmed or endangered before child welfare services,<sup>9</sup> law enforcement,<sup>10</sup> or the judiciary will inter-

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willfully causes a child to suffer under circumstances "other than those likely to produce great *bodily* harm or death" is guilty of a misdemeanor. *Id.* § 273a(2) (emphasis added). For a history of section 273a, see Note, *The California Legislative Approach to Problems of Willful Child Abuse*, 54 CALIF. L. REV. 1805, 1821-25 (1966). The distinction between subsections (1) and (2) lies in whether the child (1) is endangered or (2) *may be* endangered. *Id.* The author writes, "[t]he distinction is probably one of degree, depending upon the probability of harm resulting to the child from placing him in a certain situation." *Id.* at 1824 (footnotes omitted).

<sup>4</sup> "Custodians" are persons having the care or custody of a child. See CAL. PENAL CODE § 11165.2(b) (West Supp. 1989).

<sup>5</sup> These necessities include adequate food, clothing, shelter, medical care, or supervision. *Id.*

<sup>6</sup> See *Attorney General Report*, *supra* note 2, at 13.

<sup>7</sup> CAL. PENAL CODE § 11166 (West Supp. 1989). The reporting laws apply only to physical and sexual abuse, severe neglect, or willful and severe emotional abuse which manifests itself physically. See *id.* §§ 273a, 273d (West 1988); *id.* §§ 11165.3, 11165.4 (West Supp. 1989) (defining physical abuse); see also *id.* § 11165.1 (defining sexual abuse); *id.* § 11165.2(a) (defining severe neglect); *id.* §§ 11166, 11166.5 (providing that certain professionals and laypersons having special working relationship or contact with children must report anyone suspected of physical child abuse).

<sup>8</sup> See *supra* note 3; see also *infra* notes 10 & 103-04 and accompanying text (describing prosecutorial involvement).

<sup>9</sup> The legislature mandated that the state establish child welfare services in Welfare and Institutions Code section 16500. CAL. WELF. & INST. CODE § 16500 (West Supp. 1989). For a description of the scope and purpose of child welfare services, see *id.* § 16501.

Social workers hesitate to go to a child's home to investigate child abuse reports unless circumstances objectively indicate that someone physically abused the child. Interview with Paul Harling, Sacramento Child Protective Services, in Sacramento (Oct. 3, 1987) [hereafter *Harling Interview*]. A child's bruised body or broken limbs prompt social workers to consider intervention appropriate. *Id.*

Even if a social worker is convinced that an inspection of a child's home is necessary, legal barriers exist which may prevent an in-home investigation. See generally Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493 (1988).

<sup>10</sup> The legislature has mandated that law enforcement and child protective services coordinate their investigations. CAL. PENAL CODE §§ 11166(g), 11166.3 (West Supp. 1989). Social services requests police action or recommends district attorney involvement only in extreme cases of apparent physical abuse. *Harling Interview*, *supra* note 9.

vene.<sup>11</sup> These severity requirements allow parents to abuse their children, short of physical harm, with impunity.

In 1987 child protective service agencies nationwide received an estimated 2.25 million official reports of child abuse and neglect.<sup>12</sup> Instances of neglect constituted more than fifty percent of these reports.<sup>13</sup> Approximately 10% constituted severe emotional maltreatment.<sup>14</sup> The 1987 child abuse and neglect figures represent a 223% increase from 1976.<sup>15</sup> These figures do not necessarily indicate that more children are members of neglectful families than in the past.<sup>16</sup> However, at the least, the data shows that neglect reports are on the rise, perhaps due to increased societal awareness of neglect's harmful consequences.<sup>17</sup>

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<sup>11</sup> Interview with the Honorable Michael Garcia, Cal. Municipal Court Judge, in Sacramento, Cal. (Nov. 6, 1987) [hereafter *Garcia Interview*]. Judge Garcia decided a general neglect case in which he felt the present law prevented action against the parents since they merely kept a "dirty house." *Id.* The parents kept some food in the refrigerator and they made heat available. *Id.* He found the parents guilty, however, because two broken windows presented the child with an immediate security danger. *Id.* Judges may use such stop-gap measures to justify proper ends. However, in cases in which parents provide safe surroundings or adequate physical facilities but emotionally neglect their children, judges find no legal basis for prosecuting the parents. *Id.*

<sup>12</sup> NATIONAL COMMITTEE FOR PREVENTION OF CHILD ABUSE, FACT SHEET (Oct. 1988) (on file with the U.C. Davis Law Review) [hereafter FACT SHEET]; see *Child Abuse and Neglect in America: The Problem and the Response: Hearing Before the House Select Comm. on Children, Youth and Families*, 100th Cong., 1st Sess. 3 (1987) [hereafter *Select Comm. Report*]. The committee's findings state that "neglect continues to represent the majority of maltreatment cases . . . ." *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see also *Select Comm. Report*, *supra* note 12, at 24 (statement of Dr. Fredrick Green, President, Nat'l Comm. for Prevention of Child Abuse) (stating that in past ten years, child abuse reports have increased 184%) [hereafter Green Statement].

<sup>16</sup> See Mayo, *A Note on Incidence*, in *SEXUAL EXPLOITATION OF THE CHILD: LAW ENFORCEMENT, PROSECUTION, AND TREATMENT PERSPECTIVES* 23 (T. Frost & M. Seng eds. 1986); *Select Comm. Report*, *supra* note 12, at 3. In a survey of 50 states and the District of Columbia, "[n]early every state ranked public awareness as a primary factor resulting in increased reports of child abuse and neglect." *Id.* at 3.

<sup>17</sup> See *infra* notes 21, 39, 43, 45-47 & 53 and accompanying text. Whether more children are being abused or society is becoming more aware of child abuse, "maltreatment is real and the numbers are shocking." *Select Comm. Report*, *supra* note 12, at 57 (statement of Ruth Massinga, Secretary of Human Resources, State of Maryland) [hereafter Massinga Statement].

Reflecting the message of this Symposium, Massinga stated:

We need first to understand the environment in which child abuse and neglect grow. Financial distress is severe and widespread among our families. Over 13 million live in poverty, almost 6 million of these in households with income less than half the poverty level. Almost 60% of children

In recent years, society has focused on the family as a potentially growing arena for state involvement.<sup>18</sup> No one is more deserving of governmental protection than an abused or neglected child.<sup>19</sup> General and emotional neglect result in widespread<sup>20</sup> and serious harm.<sup>21</sup> Thus, the legislature and judiciary must meet the increasing challenge of provid-

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born in 1983 will at some point live with only one parent, and then possibly in a "reconstituted" family with another adult to whom they are not related. In 1983, there were 500,000 births to teens, youngsters still struggling with their own identity and hardly ready for the responsibilities of parenthood.

We need to understand the implications of these trends — that families are under dire stress, that the nature of the "family" is changing, that parenting today is very different from what it used to be.

*Id.* at 60.

<sup>18</sup> See *infra* notes 35-46, 92, 96 & 98 and accompanying text; see also *Select Comm. Report, supra* note 12, at 14, 15 (statement of Richard Krugman, M.D., F.A.A.P., Director of the C. Henry Kempe Nat'l Center for the Prevention and Treatment of Child Abuse and Neglect, Asso. Prof. and Vice Chairman of the Dept. of Pediatrics, University of Colo. School of Medicine, and Chairman of the American Academy of Pediatrics Task Force on Child Abuse and Neglect) [hereafter Krugman Statement]; Green Statement, *supra* note 15, at 32 (stating that in past twenty years, there has been enormous expansion of programs to protect abused and neglected children, in large part encouraged by federal funding).

<sup>19</sup> See generally *Select Comm. Report, supra* note 12. Reports of abuse and neglect have increased in the last five years whereas the system's ability to respond to these reports has not. Krugman Statement, *supra* note 18, at 9; see *infra* notes 91-96.

<sup>20</sup> In California for the year 1987, county social services bureaus or law enforcement agencies received 109,876 reports of general neglect out of a total number of 370,634 cases of child abuse reported. California Department of Social Services, Preplacement Prevention Service Report Form, SOC 291 (May 1988). In July, 1988, child welfare services in California counties received 12,614 general neglect reports out of a total of 39,027 reported child abuse cases. *Id.* (July 1988).

Emotional neglect is not a category on this form. See *id.* Reporting general or emotional neglect is not mandatory. See *supra* note 7 and accompanying text. Thus, one can only assume the actual numbers of generally and emotionally neglected children are much higher. See *Select Comm. Report, supra* note 12, at 47 (statement of Douglas J. Besharov, J.D., LL.M., Resident Scholar at American Enterprise Institute, Washington, D.C.) [hereafter Besharov Statement].

<sup>21</sup> Note, *Emotionally Neglected Children — The Need for an Integration of Law and Child Psychology*, 29 S.D.L. REV. 539 (1984). Anne Cohn, executive director of the National Committee for Prevention of Child Abuse stated that emotional abuse is "probably the most heinous form of child abuse. . . . Broken bones mend themselves. Broken spirits don't very easily." Seligmann, *Emotional Child Abuse*, TIME, Oct. 3, 1988, at 48; see Bostick, *Abusive Parents: Why They Hurt Their Children . . . And How They Can Stop*, SINGLE PARENT, Oct. 1983 (on file with the U.C. Davis Law Review); see also *infra* notes 59-63, 90, 92 & 96 and accompanying text (describing serious consequences of neglect).

ing for generally and emotionally neglected children. This Comment proposes that the California Legislature amend the Penal Code sections that define neglect<sup>22</sup> to include these forms of neglect as reportable<sup>23</sup> and actionable child abuse.<sup>24</sup>

This Comment discusses three major problems that prevent the legislature from including general and emotional neglect as legally actionable. First, as Part I of this Comment describes, state legislatures, courts, and societies historically tended to view psychological, intellectual, social, moral, and emotional injuries as nebulous and insignificant.<sup>25</sup> Lawmakers and judges favor a measurable severity requirement<sup>26</sup> to

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<sup>22</sup> See CAL. PENAL CODE §§ 270, 273a (West 1988); *id.* §§ 11165.2, 11165.6, 11166 (West Supp. 1989). This Comment restricts its discussion to the California legislature. However, the same suggestions apply to all states.

<sup>23</sup> Penal Code section 11166 specifically excepts general neglect from the mandatory reporting provisions. *Id.* § 11166 (West Supp. 1989); *see also supra* note 3 (providing relevant code sections and noting that emotional abuse is not reportable unless it is severe). The legislature should amend section 11166 to include general and emotional neglect as categories for mandatory reporting. The legislature should also define emotional neglect in a separate section or in section 11165.2. *See id.* § 11165.2 (West Supp. 1989) (defining "neglect"). Section 11165.6 defines child abuse as a *physical* injury inflicted on a child by other than accidental means. *Id.* § 11165.6; *see supra* note 2; *infra* notes 57-61 and accompanying text (providing definitions of emotional neglect).

<sup>24</sup> Penal Code sections 270 and 273a presently provide court imposed sanctions for *willful* child abuse that threatens a child with serious bodily harm or death. CAL. PENAL CODE §§ 270, 273a (West 1988); *see also supra* note 3 (describing relevant provisions). The legislature should amend these sections to provide some sanction for non-willful child abuse, to neglect or abuse that does not threaten a child with *bodily* harm. *See infra* notes 155 & 176-78 (describing appropriate sanctions).

<sup>25</sup> *See supra* notes 9 & 11; *infra* notes 40, 41, 52 & 168 and accompanying text; *see also* Goodpaster & Angel, *Child Abuse and The Law: The California System*, 26 HASTINGS L.J. 1081 (1975) (providing overview of California child abuse reporting laws). The authors write:

A significant factor in the underreporting [of physical child abuse] . . . may be the difficulty in determining what constitutes a reportable offense. Reports often require medical judgments for which school staff feel inadequately trained . . . In addition, school administrators indicated that it is difficult to establish specific guidelines for purposes of reporting.

*Id.* at 1103 (footnotes omitted).

<sup>26</sup> Note, *supra* note 21, at 539-40. Courts require evidence of physical injury in many areas of the law. The controversy over the "new" tort of negligent infliction of emotional distress illustrates courts' reluctance to act when a complaining party demonstrates no physical injury. *Id.* Not all jurisdictions even allow such an action, and in those that do, most courts require a physical impact, injury or both. *Id.* Some judges believe that it is impossible to objectively determine whether an emotional injury occurred. *Id.* Furthermore, some judges believe that claims of mental distress alone should not be actionable when a defendant acted unreasonably rather than willfully.

justify governmental intervention in family matters.<sup>27</sup> Moreover, society suspects that persons over-report and exaggerate child abuse.<sup>28</sup> Thus, society does not believe that child abuse merits expanded attention.<sup>29</sup> In answer to these concerns, Part II of this Comment provides specific definitions of general and emotional neglect. This Part presents statistics indicating that perceptions of vast numbers of false reports in child abuse cases are unfounded.

Second, lawmakers and judges hesitate to interfere with family autonomy.<sup>30</sup> The legislature and courts find less justification for intervening when a child is not in physical danger.<sup>31</sup> Part III of this Comment describes this constitutional road-block to legislative action and concludes that the state's interest in protecting child-victims of general and emotional neglect outweighs the constitutional values that protect family autonomy.

Third, as Part IV describes, the current legal system is unable to respond to the mounting problem of physical abuse.<sup>32</sup> This problem casts a shadow of futility over efforts to respond to the less immediately manifested dangers of emotional neglect.<sup>33</sup> Part IV suggests that legislative attempts to combat child abuse should, nevertheless, encompass general and emotional neglect. Specifically, this Part advocates that the

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*See, e.g.,* Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 526 (Fla. Dist. Ct. App. 1985) (holding that if plaintiff suffered no physical impact, physical injury must result from mental distress); *see supra* notes 7 & 11. Dr. Fredrick Green, president of the National Committee for Prevention of Child Abuse, stated, "We know that children are at risk. And we cannot afford the luxury any longer of waiting until children have been abused, have been assaulted. As a matter of fact, if we wait until we see physical evidence, we may be waiting too long." *Select Comm. Report, supra* note 12, at 83.

<sup>27</sup> Note, *supra* note 21, at 539-40; *see infra* notes 76-79 and accompanying text.

<sup>28</sup> Lecture by Professor Lucy Berliner, Seventh Annual Professor Brigitte M. Bodenheimer Memorial Lecture on the Family (Oct. 22, 1987) (video available at University of California, Davis, School of Law) [hereafter *Berliner Lecture*]. For a synopsis of Professor Berliner's lecture, see *The Advocate*, Nov. 23, 1987, at 1, col. 3 (available from the library at the University of California, Davis, School of Law).

<sup>29</sup> *See infra* notes 66-75 and accompanying text.

<sup>30</sup> *See* Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149, 159 (1986); *see also infra* notes 76-79 and accompanying text (discussing Supreme Court's belief that family autonomy is fundamental constitutional right).

<sup>31</sup> *See supra* notes 9-11 & 26 and accompanying text; *see also infra* notes 83-84 and accompanying text (citing U.S. Supreme Court decisions that illustrate courts' preference for physical harm in context of child abuse).

<sup>32</sup> *See infra* notes 66 & 99-152 and accompanying text; *see also supra* notes 12-16 (providing statistics on growing incidence of child abuse).

<sup>33</sup> *See infra* notes 63, 90 & 96 and accompanying text.

legislature amend mandatory child abuse reporting laws to include general and emotional neglect. This Part also suggests appropriate treatment for child abusers.

### I. THE EVOLUTION OF GOVERNMENTAL INTERVENTION INTO CHILD ABUSE AND NEGLECT

Child abuse cases are recorded from as far back as Greek and Roman times.<sup>34</sup> However, governmental protection for children has not been as longstanding nor recurrent.<sup>35</sup> When governments intervened,

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<sup>34</sup> See de Mause, *Our Forebearers Made Childhood a Nightmare*, *PSYCHOLOGY TODAY*, Apr. 1975, at 85, 86; see also V. FONTANA, *THE MALTREATED CHILD* 3 (2d ed. 1971) (observing that child neglect and abuse has occurred since beginning of time); Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 *N.C.L. REV.* 293 (1972). Professor Thomas explains the historical acceptance of child abuse prior to the nineteenth century:

Over the centuries infanticide, ritual sacrifice, exposure, mutilation, abandonment, harsh discipline, and exploitation of child labor have been only some of the ways in which children have been mistreated. . . . Infanticide — the killing of newborn infants with the explicit or implied consent of parents and the community — has been a form of birth control, a way of avoiding the embarrassment of an illegitimate child, a method of disposing of a weak or deformed child, and a means of serving religious beliefs. Numerous religions have required that the first-born be sacrificed to an angry god. In some societies, female children were sacrificed because they were considered useless. Abandonment or exposure to the elements of a child who was unwanted or who could not be provided for was a form of infanticide that was common in ancient societies. . . . Most societies have permitted severe physical punishment of children by parents, teachers, and others acting in *loco parentis*. Such action has been considered necessary to maintain discipline, to establish a proper atmosphere for teaching and learning, to satisfy religious imperatives, or to drive away evil spirits. 'Spare the rod and spoil the child' is a Biblical warning of the dangers of parental leniency.

*Id.* at 294, 298 (footnotes omitted); see also UNITED NATIONS SECRETARY-GENERAL REP., *PARENTAL RIGHTS AND DUTIES, INCLUDING GUARDIANSHIP* 10-14 (1961) (outlining development of child-parent relationships in many nations and discussing Roman institution of *patria potestas* which included *jus vitae necisque* [power of life and death] which male head of family exercised).

<sup>35</sup> One must analyze legislative action in the context of child abuse and neglect century by century because of its slow development. See V. FONTANA, *supra* note 34. In the United States, tracing the development of protection efforts begins with the original thirteen colonies in the eighteenth century. See generally 1 P. BREMNER, *CHILDREN AND YOUTH IN AMERICA* (1971) (observing that many colonies had laws against certain forms of child maltreatment). In the nineteenth century, the New York legislature founded the New York Society for the Prevention of Cruelty to Children. See *An Act for the Incorporation of Society's for the Prevention of Cruelty to Children*, ch. 130,

laws traditionally favored protecting children from immediate physical danger rather than protecting them from mental, emotional, or developmental malnourishment.<sup>36</sup>

In the United States, society largely ignored the phenomenon of child abuse and neglect until the 1960s.<sup>37</sup> In 1962, Dr. C. Henry Kempe's

1875 N.Y. Laws 114. For a discussion of nineteenth century developments toward child protection, see 2 P. BREMNER, *CHILDREN AND YOUTH IN AMERICA* (1971).

In the early twentieth century, the Federal government recognized at least some children's rights by enacting the Child Labor Law. Pub. L. No. 87-30, (codified as amended at 29 U.S.C. § 212 (1984)). Thereafter, most states passed specific laws against child maltreatment and developed rudimentary networks of public and private child welfare agencies. See generally A. KADUSHIN, *CHILD WELFARE SERVICES* (1974); H. LOU, *JUVENILE COURTS IN THE UNITED STATES* (1927); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

The international community became conscious of children's rights in the nineteenth century. See INTERNATIONAL UNION FOR CHILD WELFARE: 50 YEARS, IUCW, No. 7 (June 1970) [hereafter IUCW]; see also U.N. Doc. E/41 Annex 6, Appendix B, at 249 (Report of Temporary Social Committee, Apr. 29-May 14, 1946) (providing Temporary Social Committee's findings on child abuse and neglect worldwide). The Declaration of the Rights of the Child, which the Save the Children International Union adopted in 1923, and the League of Nations adopted in 1924 states:

By the present Declaration of the Rights of the Child, commonly known as the "Declaration of Geneva," men and women of all nations, recognizing that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

1. The child must be given the means requisite for its normal development, both materially and spiritually.
2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn a livelihood, and must be protected from every form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow-men.

*Id.*; see also Cohen, *Freedom from Abuse: One of the Human Rights of Children*, 11 U. DAYTON L. REV. 601-04 (1986) (providing further documentation and analysis).

<sup>36</sup> See V. FONTANA, *supra* note 34; *supra* note 26 and accompanying text.

<sup>37</sup> See *supra* note 35; see also Besharov, "Doing Something" About Child Abuse: *The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 539 (1985) (providing further historical analysis). Child abuse and neglect "remained largely hidden problems, handled by poorly funded and uncoordinated agencies far from public view. Few abused or neglected children were reported to the authorities." *Id.* at 541 (footnotes omitted); see also Myers, *supra* note 30, at 159-60. Professor Myers writes:

published research on the battered child syndrome<sup>38</sup> awakened public consciousness against child abuse.<sup>39</sup> Dr. Kempe and subsequent researchers concentrated on physical abuse.<sup>40</sup> As a result, the first state legislative intervention mandated solely the reporting of physical child endangerment.<sup>41</sup>

In 1963, California became the first state to enact child abuse reporting laws.<sup>42</sup> By 1967, every state had adopted laws requiring or recommending that physicians and persons responsible for the child report suspected cases of physical child abuse to appropriate law enforcement or welfare authorities.<sup>43</sup>

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[T]here are few decisions reported prior to the nineteenth century . . . for the law was hesitant to interfere with parental prerogatives. Extreme cases sometimes invoked a legal response but such intervention was rare.

The nineteenth century saw the gradual emergence of efforts to protect children from various forms of abuse, neglect and immoral influence. During the first quarter of the century, legislatures passed statutes authorizing removal of children from unwholesome, unsafe or neglectful environments.

*Id.* (footnotes omitted).

<sup>38</sup> Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered-Child Syndrome*, 181 J. A.M.A. 17 (1962) [hereafter Kempe].

<sup>39</sup> D. GIL, *VIOLENCE AGAINST CHILDREN* 20-21 (1970).

<sup>40</sup> See Kempe, *supra* note 38; see also D. GIL, *supra* note 39, at 20-21 (providing analysis of Dr. Kempe's study and its effect on later child psychologists' studies).

<sup>41</sup> See Myers, *supra* note 30, at 164-67.

<sup>42</sup> CAL. PENAL CODE § 11160 (West 1982); Note, *supra* note 3, at 1811. Ms. Wooster writes:

California Penal Code section 11160, enacted in 1953, requires hospitals and pharmacies to immediately report any incident in which a person came or was brought to them suffering from an injury inflicted in violation of any penal law of California. . . .

Although these statutes did not relate specifically to cases of child abuse, they included cases "where injuries have been inflicted upon any person in violation of any penal law of this state." California Penal Code section 273a (until 1965) prohibited the willful infliction of unjustifiable pain or mental suffering upon a child, the willful causing or permitting a child to be placed in a situation where its life or limb might be endangered or its health likely to be injured, and, in the case of a custodian of a child, the causing or permitting the child's life or limb to be endangered or his health injured. . . .

It is not clear whether all violations of section 273a fell within the reporting requirements of sections 11160 and 11161.

*Id.* at 1811 (footnotes omitted).

<sup>43</sup> See D. GIL, *supra* note 39, at 20; see also Myers, *supra* note 30, at 165-67 (providing analysis of the evolution of legislative involvement in child abuse prevention). Professor Myers writes:

At the outset, some of the statutes provided for optional reporting but this

Congress did not significantly contribute to child abuse prevention efforts until 1974, when it enacted the Child Abuse Prevention and Treatment Act.<sup>44</sup> The Act established the National Center on Child Abuse and Neglect (NCCAN) within the Department of Health and Human Services.<sup>45</sup> The NCCAN described neglect in its 1978 study<sup>46</sup> as “an act of omission” in which a person responsible for a child’s welfare fails to provide for the child’s physical, emotional, medical, moral, or educational needs.<sup>47</sup>

Unlike the California Legislature, the NCCAN recognized that even

changed quickly because voluntary reporting simply did not work. . . .

The reporting laws, which literally swept the country, centralized reporting in law enforcement and public child protective service agencies, with ultimate decision-making authority as to legal action vested in prosecuting attorneys. . . . While many lawyers shared the view that child abuse should be approached from therapeutic as well as legal perspectives, their tendency to rely on the judicial system placed greater emphasis on prosecution and adversarial intervention.

*Id.* at 165-67 (footnotes omitted).

<sup>44</sup> 42 U.S.C. § 5101 (1976), *amended by* Pub. L. No. 95-266, § 101(1), 92 Stat. 205 (1978). The Child Abuse Prevention and Treatment Act of 1974 has successfully increased public awareness and created an obligation to respond to the problem. *Select Comm. Report, supra* note 12, at 1. The Act remains timely and will continue to serve as a “lightning rod” for improvements in prevention and treatment methods. Green Statement, *supra* note 15, at 26.

<sup>45</sup> 42 U.S.C. § 5101(a) (1976). Congress authorized the National Center on Child Abuse and Neglect to conduct research, support projects, give technical assistance to communities, publish directories of both public and private child abuse agencies, and assist states in obtaining grants to strengthen existing child abuse programs. *Id.* § 5101(b) (1976), *amended by* Pub. L. No. 95-266 § 101(1), (3), 92 Stat. 205 (1978).

<sup>46</sup> NATIONAL CENTER ON CHILD ABUSE & NEGLECT, DEP’T OF HEALTH, EDUC., & WELFARE, NO. (OHDS) 78-30137, INTERDISCIPLINARY GLOSSARY ON CHILD ABUSE & NEGLECT: LEGAL, MEDICAL, SOCIAL WORK TERMS 9, 10 (1978) [hereafter GLOSSARY]. It is significant that the NCCAN included neglect in its study since research, publicity, and reporting laws concentrated on intentionally inflicted physical injury. *See supra* notes 40-41 and accompanying text; *see also* Cohen, *supra* note 35, at 609 (analyzing Dr. Kempe’s study and the later NCCAN report). Cohen writes:

[T]he original criterion on child abuse applied by Dr. Kempe was one of intentionally caused physical injury. It has since been recognized that children can suffer emotional damage as well as physical injury and that the passive injury brought about by neglect can cause harmful results despite the lack of visible physical signs of abuse. In its 1979-80 study, the NCCAN divided what it called “child maltreatment” into three types of . . . neglect, or unintentional injury, . . . physical, emotional, and educational neglect.

*Id.* at 609 (footnotes omitted).

<sup>47</sup> GLOSSARY, *supra* note 46, at 9-10.

though no one physically harms or endangers a child, persons may wrongfully neglect her.<sup>48</sup> Because serious harm results from general and emotional neglect<sup>49</sup> the California Legislature should adopt the NCCAN's position and amend the code sections that define neglect to include neglect without physical injury or physical endangerment.<sup>50</sup>

## II. NEGLECT CAN BE DEFINED WITH PARTICULARITY

Lawmakers believe that they cannot precisely define general or emotional neglect.<sup>51</sup> This perception contributes heavily to legislative paralysis and to societal skepticism in the area.<sup>52</sup> However, a wealth of available data exists to define proper parenting.<sup>53</sup>

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<sup>48</sup> Compare *id.* (providing NCCAN definition of neglect) with *supra* notes 3 & 7 and accompanying text (describing California definitions requiring severity — physical manifestation of harm or physical endangerment).

<sup>49</sup> See *supra* note 21, *infra* notes 59-63 and accompanying text.

<sup>50</sup> See *supra* notes 1, 3, 7 & 22 and accompanying text. A broader definition of neglect might read: "Neglect" means the willful or negligent failure of a parent or caretaker to provide adequate food, clothing, shelter, medical care, adequate supervision, remedial care, or psychological or emotional nourishment even though no physical injury to the child has occurred." This definition combines and paraphrases California Penal Code sections 11165.2(a) and 11165.2(b) and deletes the physical injury requirement. See CAL. PENAL CODE § 11165.2(a)-(b) (West Supp. 1989); see also *supra* notes 1, 3 & 7 and accompanying text (describing these code sections). The suggested definition also deletes the requirements that an abuser act "willfully" and that the abuser put the child in danger of *bodily* harm or death. See CAL. PENAL CODE §§ 270, 273a (West 1988); see also *supra* note 24 (describing sections 270 and 273a).

<sup>51</sup> Interview with W. Yee, Staff Attorney, Municipal Court District of Sacramento, Cal., in Sacramento, Cal. (Oct. 28, 1987) [hereafter *Yee Interview*]; *Harling Interview*, *supra* note 9; see *supra* note 36 and accompanying text.

<sup>52</sup> Some observers claim that it is impossible to develop more precise legal standards to govern protective intervention. Besharov, *supra* note 37, at 573. They cite as insurmountable obstacles the complexity of the parent/child relationship, environmental variables, and the subjectivity of the social values at stake. *Id.* But see *supra* note 2; *infra* notes 55-61 and accompanying text; see also Besharov Statement, *supra* note 20, at 39-41 (stating that we need better definitions of child abuse and neglect that provide real guidance).

<sup>53</sup> See, e.g., R. CORSINI & G. PAINTER, *THE PRACTICAL PARENT* (1975); D. DINKMEYER & G. MCKAY, *RAISING A RESPONSIBLE CHILD* (1973); R. DREIKURS, R. CORSINI & S. GOULD, *FAMILY COUNSEL* (1974); R. DREIKURS & V. SOLTZ, *CHILDREN: THE CHALLENGE* (1964); H. GLENN & J. NELSON, *RAISING SELF-RELIANT CHILDREN IN A SELF-INDULGENT WORLD* (1987); J. NELSON, *POSITIVE DISCIPLINE* (1987); B. SPOCK & M. ROTHENBERG, *DR. SPOCK'S BABY AND CHILD CARE*, 9, 11 (1985) [hereafter *SPOCK*]. For a listing of sources, see NCPA 1988 CATALOG (on file with the *U.C. Davis Law Review*).

ney General used such data in compiling the 1985 *Child Abuse Prevention Handbook*.<sup>54</sup> The handbook lists the symptomologies of general neglect.<sup>55</sup> These factors include excessive sleepiness, hunger or poor nutritional quality of food in the home, a lack of personal hygiene, inadequate clothing, or unsanitary conditions in the home.<sup>56</sup>

Emotional neglect occurs when a parent adopts a pattern of screaming at a child, or of belittling, threatening, rejecting, or blaming a child.<sup>57</sup> In addition, authorities agree that inconsistent parenting is a form of emotional neglect.<sup>58</sup> Psychologists say emotional neglect results

<sup>54</sup> *Attorney General Report, supra* note 2.

<sup>55</sup> *Id.* at 8-9; *see infra* notes 56-57 and accompanying text.

<sup>56</sup> *Attorney General Report, supra* note 2, at 8-9.

<sup>57</sup> Besharov Statement, *supra* note 20, at 47 (stating that this type of emotional abuse accounts for about 20% of total child abuse cases and lesser form of emotional neglect "inadequate nurturance" and "permitted maladaptive behavior" — constitute 9% of total); *Attorney General Report, supra* note 2, at 13. The Report states:

Emotional abuse may be suspected if the child:

- Is withdrawn, depressed and apathetic.
- "Acts out" and is considered a "behavior problem."
- Displays other signs of emotional turmoil . . . no verbal or physical communication with others.
- Unwittingly makes comments such as, "Mommy always tells me I'm bad."
- Refuses to eat adequate amounts of food and is thus very frail.
- Is unable to perform normal learned functions for a given age, *e.g.* walking, talking, etc.
- Displays antisocial behavior (aggression, disruption) or obvious "delinquent" behavior . . . is abnormally unresponsive, sad or withdrawn.
- Constantly "seeks out" and "pesters" other adults . . . for attention and affection.

*Id.* Professor Besharov warns, however, that behavior indicators like these may provide important clues and crucial evidence of abuse, but *alone* they are insufficient for a report. Besharov Statement, *supra* note 52, at 41. "There are many other explanations for such behavior." *Id.*

Parents whose children develop well emotionally do not use epithets like "jerk," "freak," "idiot," "worthless," or "stupid" when addressing their children. *See* Seligmann, *supra* note 21, at 48 (quoting James Garbarino, President, Erikson Inst. for Advanced Study of Child Development). Phrases such as "you always bug me," or "you'll never amount to anything" are equally damaging. *See id.* (quoting Nancy Samalin, Founder and Director, Parent Guidance Workshops). *See generally id.* (describing emotional child abuse).

<sup>58</sup> *Attorney General Report, supra* note 2, at 8-9; *see also* Kinnie & Kelley-Kinnie, *Psychological Evaluation as An Aid in Permanency Planning*, in PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM 543, 545 (1981) [hereafter PROTECTING CHILDREN] (describing emotional neglect).

in long-term fear, anxiety and anger,<sup>59</sup> impaired physical development,<sup>60</sup> withdrawal, apathy, and severe damage to cognitive, emotional, social, and moral development.<sup>61</sup>

Emotional or general neglect may result in easily identifiable physical damage such as physical retardation.<sup>62</sup> However, the danger to victims of neglect generally is not immediately apparent but increases as neglectful treatment continues.<sup>63</sup> Thus, the required showing of immediate physical harm<sup>64</sup> is an inappropriate identification of general or emotional neglect.<sup>65</sup>

Societal skepticism of existing reporting laws may prevent the legislature from replacing the severity requirement with a lower threshold.<sup>66</sup>

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<sup>59</sup> See PROTECTING CHILDREN, *supra* note 58, at 543-45; Bostick, *supra* note 21 (stating that effects of emotional abuse often leave invisible scars that may take years to heal).

<sup>60</sup> Roberts & Maddux, *A Psychological Conceptualization of Nonorganic Failure to Thrive*, 11 J. CLINICAL CHILD PSYCHOLOGY 216, 220 (1982).

<sup>61</sup> Hatfield, *Affectional Deprivation and Child Adjustment*, in CHILDHOOD DEPRIVATION 54 (1974).

<sup>62</sup> See Neal, *Effects of Deprivation on Speech and Language Development*, in CHILDHOOD DEPRIVATION 153 (1974).

<sup>63</sup> Besharov, *supra* note 37, at 581. Professor Besharov writes:

For example, a parent provides a nutritionally inadequate diet for the child which, over time, will cause serious health problems; . . . or a parent provides grossly inadequate emotional support and cognitive stimulation which, over time, will lead to severe developmental disabilities. Again, although such children have not yet suffered serious injury, it is reasonable to infer that they will eventually.

*Id.* (footnotes omitted); see *supra* notes 59-62; *infra* notes 90 & 96 (providing resources and psychologist's data on the cumulative consequences of child neglect).

<sup>64</sup> See *supra* notes 3, 5, 7 & 23 and accompanying text.

<sup>65</sup> See *supra* text accompanying notes 4-5; *supra* notes 56-57 and accompanying text (defining general neglect); *supra* notes 2 & 57-61 and accompanying text (defining emotional neglect); see also *supra* note 26 (quoting Dr. Fredrick Green for support of argument that if child protection personnel wait to intervene until child is physically abused it may be too late).

<sup>66</sup> Despite millions of reports each year nationwide, major problems with the existing reporting process persist. Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 FAM. L.Q. 151, 161 (1983). The main problem is that authorities receive relatively few child abuse reports compared to the large number of cases in which persons endanger children. *Id.* at 161. In fact, persons fail to report large numbers of obviously endangered children. *Id.* According to the 1979 National Study of the Incidence and Severity of Child Abuse and Neglect, professionals required to report, fail to report more than half of the maltreated children that they see. *Id.* Indeed, in 1979, professionals failed to report over 50,000 children with severe observable injuries. *Id.*; see *infra* notes 68-69, 143, 154 & 160 and accompanying text.

The media creates the impression that unfounded reports<sup>67</sup> “flood” child welfare services.<sup>68</sup> Child welfare authorities espouse their belief that only thirty to fifty percent of all child protective services’ cases constitute “child abuse.”<sup>69</sup> However, these officials refer only to “child abuse” as existing law defines it, that is, physical harm to the child.<sup>70</sup> Thus, without education on the present definition of actionable abuse, many people assume that in those cases in which the government did not intervene, no child abuse took place.<sup>71</sup> Nevertheless, one study<sup>72</sup> estimates that falsely reported cases comprise only two to six percent of reported cases of non-actionable child abuse like general neglect.<sup>73</sup> The

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<sup>67</sup> See CAL. PENAL CODE § 11165.12 (West Supp. 1989) (defining “Unfounded Report” as one which child protective agency investigator determines to be false, inherently improbable, involving accidental injury, or not constituting physical child abuse as defined in section 11165.6).

<sup>68</sup> *Berliner Lecture*, *supra* note 28; see Besharov Statement, *supra* note 20, at 37-41.

<sup>69</sup> *Id.*; see *Harling Interview*, *supra* note 9. Mr. Harling stated that social workers believe that many persons who report suspected child abuse have no “reasonable basis” to suspect abuse. *Id.* Due to the present state of the law, social workers deem only physical manifestation of abuse as a “reasonable basis.” *Id.* See Besharov Statement, *supra* note 20, at 39 (stating that we need better definitions of child abuse and neglect that provide guidance).

<sup>70</sup> See *supra* notes 3 & 7 and accompanying text; see also Green Statement, *supra* note 15, at 23. Dr. Green stated that in some cases, child welfare agencies fail to protect children because “the initial investigation may have suggested that the family was indeed at risk of abuse but the parents refused voluntary service referrals and the caseworker had insufficient grounds for taking more forceful action against the family.” *Id.*

<sup>71</sup> *Berliner Lecture*, *supra* note 28 (discussing media attention and general societal reaction to studies of false child abuse reporting). See Besharov Statement, *supra* note 20, at 39, 48. Professor Besharov stated that few reports are made maliciously. *Id.* Most involve an honest desire to protect a child. *Id.* Some involve situations of poor child care that simply do not meet statutory definitions of child abuse or neglect. *Id.* at 39. “In fact, a substantial proportion of unfounded cases are referred to other agencies for them to provide needed services for the family.” *Id.* Moreover, some unfounded reporting is necessary to make the system work. *Id.* at 35. Persons are required to report *suspected* abuse only — not to be certain. *Id.* Thus, an unfounded rate of 30-40 percent is acceptable. *Id.*

<sup>72</sup> See Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27 (1987) (analyzing Denver city-wide study on child abuse and neglect reports). In another study of 576 allegations of all types of child abuse, only 8% were found to be false. See FACT SHEET, *supra* note 12. Of the 8%, only 2% were false reports made by children. *Id.* The other 6% were false reports by adults. *Id.* Even in the face of this evidence that suggests that false allegations of child abuse or neglect are rare occurrences, state agencies who receive reports and investigate consider 50% to be “unsupported” or “unfounded.” *Id.*

<sup>73</sup> See Jones & McGraw, *supra* note 72, at 28.

remaining ninety-four to ninety-eight percent constituted either general or emotional neglect.<sup>74</sup> Therefore, if these statistics are correct, little, if any, over-reporting of child abuse occurs. By lowering the severity threshold to include general and emotional neglect, the legislature will empower child welfare authorities and judges to consider more cases as actual "child abuse."<sup>75</sup>

### III. THE STATE'S INTEREST IN INTERVENING INTO FAMILY MATTERS ON BEHALF OF NEGLECT VICTIMS OUTWEIGHS CONSTITUTIONAL CONCERNS ABOUT FAMILY AUTONOMY

The Supreme Court has stated that the Constitution grants persons protection from unjustified governmental interference in family matters.<sup>76</sup> Thus, a statute that interferes with parental discretion and autonomy is constitutionally suspect.<sup>77</sup> The Court applies a strict constitutional standard of review by balancing parents' interests against state interests of promoting the health and welfare of its citizens.<sup>78</sup> There-

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<sup>74</sup> See *id.*

<sup>75</sup> See *supra* note 11.

<sup>76</sup> See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (stating that decision to marry is among personal decisions protected by right of privacy); *Cary v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that state's forbidding of distribution of contraceptives infringed on persons' right to autonomy in family matters); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (stating that right to marital privacy overrides state's interest in forbidding use of contraceptives); *Boyd v. United States*, 116 U.S. 616 (1886) (stating that Constitution protects against governmental invasions of sanctity of home and privacies of life).

<sup>77</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, the Supreme Court, in the context of termination of parental rights, declared that parents' "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the fourteenth amendment." *Id.* at 753.

The Court clarified the due process interest of the parents and established that the state must prove allegations of parental misconduct by clear and convincing evidence. *Id.* at 769. *But see* *Lassiter v. Dep't of Social Serv.*, 452 U.S. 18 (1981) (holding that due process does not require appointment of counsel for indigent parents in every case in which state seeks to terminate parental status, but only when "fundamental fairness" requires appointment). See generally *Hardin*, *supra* note 9. For further discussion, see *infra* note 81 and accompanying text.

<sup>78</sup> See *Prince v. Massachusetts*, 321 U.S. 158 (1944). The Court stated:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. But the family itself is not beyond regulation in the public interest. . . . [R]ights of parenthood are [not] beyond limitation. Acting to guard the general interest in youth's

fore, government intervention in cases of general or emotional child neglect raises difficult constitutional questions.<sup>79</sup>

However, the extent to which the Constitution protects parental autonomy is unclear.<sup>80</sup> The Court has specifically held that when the state seeks to terminate parental rights, the right to parenthood that emanates from the Bill of Rights entitles parents to procedural due process.<sup>81</sup> The Court provides due process by requiring the state to give the parents a hearing and by mandating that the state prove its case by clear and convincing evidence.<sup>82</sup>

The law protecting parental autonomy is less clear when parents desire to deviate from specific state laws in raising their children.<sup>83</sup> The

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well being, the state as *parens patriae* may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.

*Id.* at 166 (footnotes omitted).

<sup>79</sup> See Note, *supra* note 21, at 546-47 (providing history and analysis of Supreme Court decisions relative to state statutes that intrude into family life).

<sup>80</sup> See Cohen, *Confronting Uncertainty in Child Abuse Adjudication: A Contextual Analysis of Theories of Judicial Role in a Changing Society*, 3 ANTIOCH L.J. 13, 19 (1985).

<sup>81</sup> *Santosky v. Kramer*, 455 U.S. 745 (1982); see *supra* note 77 and accompanying text. See generally Parker, *Dissolving Family Relations: Termination of Parent-Child Relations — An Overview*, 11 U. DAYTON L. REV. 555, 568-71 (1986) (analyzing state statutes addressing termination of parental rights and relevant Supreme Court decisions). For a discussion of California's approach to termination of parental rights, see *infra* note 118 and accompanying text.

<sup>82</sup> *Santosky*, 455 U.S. at 769-70; see Note, *supra* note 21, at 547.

<sup>83</sup> For example, the Court has held that a parent may not violate child labor laws. *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *Prince*, parents challenged the laws on the grounds that the laws unconstitutionally interfered with parents' rights to familial autonomy and to freedom of religion. *Id.* The Court disagreed, stating that the state may restrict parents' control in the interest of children's well-being. *Id.* at 166. Thus, in *Prince*, the Court found that the state's interest in children's health and welfare outweighed *two* strong constitutional interests — that of familial autonomy and freedom of religion.

However, in a later case, the Court held otherwise on the facts of the case. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Wisconsin*, the Court held that Amish families could technically violate child labor laws. *Id.* at 228-29. The Court found no evidence that indicated that the children working on the family farms was deleterious to the children's health. *Id.* at 229. The Court stated that the "employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objections of [child labor laws]." *Id.*

The Court in *Wisconsin* also held that the state could not compel parents to send their children to school beyond eighth grade. *Id.* at 219. The Court held that such acts substantially interfered with the Amish parents' religious beliefs. *Id.*; accord *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding parents have constitutional right to have their

Supreme Court has stressed that when parents physically endanger a child, the child's needs outweigh the parent's constitutional rights.<sup>84</sup> Although the law recognizes broad parental authority<sup>85</sup> in the area of child raising, state and federal legislation has increasingly recognized a child's right to healthy development.<sup>86</sup> As a state citizen, a child has a statutory right to support, maintenance, and education during her minority.<sup>87</sup> Laws against child abuse and child neglect are an implicit recognition that parental rights are not absolute.<sup>88</sup>

Though victims of general and emotional neglect may not be physically in danger, they are in danger.<sup>89</sup> Children whose mental and emo-

children taught German in school).

<sup>84</sup> See, e.g., *Wyman v. James*, 400 U.S. 309, 318 (1971) (holding state may constitutionally condition parents' receiving of public assistance on parents' acceptance of home visits without search warrant); *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968) (stating that state has interest in protecting welfare of children and protecting children from abuse); *Prince*, 321 U.S. at 166.

<sup>85</sup> See *supra* note 78; see also *Stanley v. Illinois*, 405 U.S. 546 (1972) (holding that denial of hearing to father of illegitimate children on his fitness to parent violates due process and equal protection). Justice White wrote:

It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum of respect. . . ."

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights more precious . . . than property rights."

*Id.* at 651 (citations omitted); see *supra* notes 76-84.

<sup>86</sup> See Cohen, *supra* note 80, at 21. See generally *Select Comm. Report, supra* note 12.

<sup>87</sup> CAL. CIV. CODE § 4700 (West Supp. 1989); see Goodman, Oberman & Wheat, *Rights and Obligations of Child Support*, 7 SW. U.L. REV. 36 (providing commentary on children's rights). The authors state:

Sustenance which barely meets animal needs, which does no more than relieve the pangs of hunger, cover nakedness, and afford shelter from the elements, is not support or maintenance. He is obliged to provide such a place of abode, such furniture, such articles of food, wearing apparel, and use, such medicines, medical attention, and nursing, such means for the education of children, and such social protection and opportunity as comport with health, comfort, welfare, and normal living of human beings according to present standards of civilization, considering his own means, earnings capacity, and station in life.

*Id.* at 37-38 n.18 (quoting *State v. Waller*, 136 P. 215, 216 (1913)).

<sup>88</sup> See Besharov, *supra* note 37, at 554; see also *supra* notes 3 & 7 (providing relevant code sections).

<sup>89</sup> See *supra* notes 21, 26 & 56-63 and accompanying text; see also *infra* notes 90 & 96 (providing further data on consequences of neglect); *Select Comm. Report, supra*

tional needs are not met sustain serious life-long injury.<sup>90</sup> Because these children cannot help themselves the state must help them.<sup>91</sup> The state's interest in protecting its minor citizens' rights outweighs constitutionally granted parental rights.<sup>92</sup>

Furthermore, while parents have a constitutional right to raise their children,<sup>93</sup> they have no right to mistreat them.<sup>94</sup> Courts must recognize and uphold a child's right to feel wanted and loved, and to live and

note 12, at 92-100.

<sup>90</sup> See Note, *supra* note 21, at 543-44. The author writes:

[T]he unmet emotional needs of the child result in long-term fear, anxiety and anger. . . .

Social deprivation during infancy, in the form of absent or inadequate care, affection, and mental and tactile stimulation, may result in emotional apathy or withdrawal, mental or physical retardation, serious psychological disturbances such as autism, and even death in extreme cases. Insufficient verbal interaction can contribute to speech and language difficulties. Emotional, economic and environmental deprivations in childhood have been well correlated with later maladjusted and delinquent behavior patterns. An abnormal parent-child relationship based on significant psychopathology of the parent results in substantial emotional conflicts within the child, which in turn produce deviant behavior in the youngster.

*Id.* at 544 (footnotes omitted).

<sup>91</sup> The doctrine of *parens patriae* authorizes the state to protect those citizens who cannot protect themselves. See Parker, *supra* note 81, at 566-68. *Parens patriae* originates from the English common law under which the King had authority to protect persons such as infants and those suffering from mental illness. *Id.* In the United States, this function belongs with the states. *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942) (holding that common law heritage provides basis for state's right to exercise guardianship over child and does not depend on state statute asserting that power). It follows, therefore, that the history of the doctrine gives states substantial interest in protecting children from psychological injury. Note, *The Battered Child: Logic in Search of Law*, 29 SAN DIEGO L. REV. 364, 380 (1971).

<sup>92</sup> See Note, *supra* note 21, at 545-48; see also Parker, *supra* note 81, at 566 (explaining the doctrine of *parens patriae*). Parker wrote:

The modern concept of *parens patriae* has several widely recognized justifications. First, because a child by definition lacks capacity and experience, it is necessary that someone else be ultimately responsible for the child's basic needs. An obvious example is orphaned children. Second, because society as a whole has a stake in the children who will soon be its adult citizens, society has an interest in assuring the child's welfare as well as acculturation to its political values. Finally, a child who is not raised properly may later become a delinquent. . . .

It is widely accepted that children who are abused often become abusers, largely because that is the only role model they have.

*Id.* at 566 (footnotes omitted).

<sup>93</sup> See *supra* notes 76-79 and accompanying text.

<sup>94</sup> See *supra* notes 83, 84 & 86-88 and accompanying text.

grow in a wholesome emotional and physical environment.<sup>95</sup> Moreover, the state has an abiding interest in enabling children to become worthwhile and productive members of society.<sup>96</sup> When parents fail to provide children with physical or emotional necessities,<sup>97</sup> parents' autonomy rights become secondary to the government's right to intervene on children's behalf.<sup>98</sup>

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<sup>95</sup> Note, *supra* note 21, at 548.

<sup>96</sup> See *supra* note 92 and accompanying text. Society gains a worthwhile and productive member when governmental action breaks the cycle of grossly inadequate parent-child relationships. Note, *supra* note 21, at 548 (quoting J. GOLDSTEIN, A. FRAUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 51, 57 (1973)); see also Myers, *supra* note 30, at 172-74 (observing that abused children become runaways, delinquents, and battering parents). See generally SPOCK, *supra* note 53 (discussing the harm that results to child victims of neglect). Dr. Spock and his associate Dr. Rothenberg state:

Studies of delinquents and criminals revealed that most of them had suffered . . . from lack of love in childhood . . . .

. . . [S]trictness is harmful when the parents are overbearing, harsh, chronically disapproving or make no allowances for a child's age and individuality. This kind of severity produces children who are either meek and colorless or mean to others.

*Id.* at 9, 11. A 1975 study at San Quentin prison showed that of inmates serving sentences for violent crime, 100% had been abused as children. *Select Comm. Report*, *supra* note 12, at 6 (written testimony of Dan Coats, Representative in Congress from the State of Indiana and Ranking Minority Member) [hereafter Coats Statement].

The Supreme Court recognized the societal importance of state involvement into children's lives in *Prince v. Massachusetts*, 321 U.S. 158 (1944). The Court said: "The state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, *well rounded growth* of young people into full maturity as citizens, with all that implies." *Id.* at 168 (emphasis added).

<sup>97</sup> See *supra* notes 2, 5 & 53 and accompanying text.

<sup>98</sup> See *supra* notes 84 & 96 and accompanying text; see also Note, *supra* note 21, at 548-53 (discussing necessary legislative reform, judicial responses and attorney contributions to address point at which state may interfere with parents' autonomy right).

California courts have recognized the state's role as *parens patriae*. See, e.g., *In re D.L.C.*, 54 Cal. App. 3d 840, 850, 126 Cal. Rptr. 863, 868-69 (1976) (stating that state not only has compelling interest but also duty to sever parental bonds if necessary to promote child's welfare); *In re Sherman M.*, 39 Cal. App. 3d 40, 113 Cal. Rptr. 847 (1974). The court in *In re Sherman M* stated:

The interest sought to be protected is that of the welfare of a child. Its need to be raised with love, emotional security and physical safety is paramount to any right of a neglectful parent to have the custody and physical proximity of its child. We do not deny appellant's assertion that the right of a parent is dearer than life itself. However, *a child is not a chattel*. In the present case, the issue is best presented not by the question "Who has

## IV. THE INSUFFICIENCY OF CURRENT ACTIONS

In California, state intervention on an abused child's behalf begins with child welfare services.<sup>99</sup> When the state agency receives a child abuse report,<sup>100</sup> social workers investigate<sup>101</sup> to determine appropriate action.<sup>102</sup> Social workers must cross-report suspected cases of willful physical abuse or severe neglect to the District Attorney's office<sup>103</sup>

the right to custody of the child?" but by the question "What will promote . . . the best interests of the child?"

*Id.* at 44-45; 113 Cal. Rptr. at 849-50 (emphasis added).

<sup>99</sup> See *supra* note 9.

<sup>100</sup> See *supra* notes 3 & 7.

<sup>101</sup> See *Harling Interview, supra* note 9. Harling stated that social workers investigate by looking around the home if homeowners admit them, and by talking to family, neighbors, and the child's teachers. *Id.*; see also *Attorney General Report, supra* note 2, at 25-26 (providing a list of types of questions social workers generally ask). For example, social workers may ask, "Who are the caretakers and what are their ages, relationships and sex?" *Id.* at 25. "What is the family income? Is the income sufficient? How is it spent?" *Id.* at 26. "What is the nature of the parental relationship?" *Id.* "Is there agreement between parents on child-rearing techniques?" *Id.* "Are there any family tensions? How are they expressed?" *Id.* "What is the relationship between the child and parents? (Role reversal, supportive, hostile?)" *Id.* "How do family members communicate?" *Id.*

<sup>102</sup> Three programs are available: "Preplacement Preventive Services," "Family Reunification Program," or "Permanent Placement Program." CAL. WELF. & INST. CODE § 16501.1 (West Supp. 1989). Preplacement Preventive Services helps children remain with their families. *Id.* This service includes an Emergency Response Program which provides immediate in-person response for initial intake services and crisis intervention so that the child may remain safely in her own home. *Id.* § 16501.1(a). The Service also includes a Family Maintenance Program which provides time-limited protective services (up to six months) to prevent or remedy neglect (not general neglect), abuse, or exploitation. *Id.* § 16501.1(b). Under the Family Reunification Program, social workers provide counseling to families for a limited time. *Id.* § 16501.2. Under the Permanent Placement Program, if a social worker believes a child cannot safely return home, the social worker must provide an alternate permanent family structure for the child. *Id.* § 16501.3. Permanent Placement services are available to children who are declared dependents of the juvenile court. *Id.* § 16508 (West Supp. 1989).

<sup>103</sup> See *supra* note 3 and accompanying text (providing relevant code sections and discussion). General neglect need not be cross-reported. *Id.*; see also *Attorney General Report, supra* note 2, at 19-20 (providing summary of reporting requirements).

Reports received by child welfare agencies, except for reports involving "general neglect," are cross-reported immediately, or as soon as possible, to the local law enforcement agency and district attorney's office having jurisdiction. Law enforcement is also required to cross-report immediately or as soon as possible, to child welfare agencies and the district attorney's office.

*Id.* (footnotes omitted).

which may decide to prosecute the parents.<sup>104</sup>

This Section describes California's Child Welfare Service programs and the criminal prosecution system. Both "remedies" for the abused child are inadequate.<sup>105</sup> Thus, the legislature should vigorously attempt to improve preventative child abuse measures for general and emotional neglect and for physical abuse.

*A. Child Welfare Services and Court Involvement on Behalf of the Abused Child*<sup>106</sup>

Whenever possible, social workers try to keep the family together by offering in-home visitation and counseling.<sup>107</sup> However, large caseloads, poorly trained staff and inadequate administrative safeguards<sup>108</sup> prohibit child welfare agencies from giving individual cases the necessary attention.<sup>109</sup>

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<sup>104</sup> CAL. PENAL CODE § 273a (West 1988); *id.* § 11166(g) (West Supp. 1989); *see id.* § 1000.12 (West 1985) (stating that in lieu of prosecuting person suspected of physically abusing child, prosecuting attorney may refer that person to public social services or probation department for counseling or psychological treatment).

The legislature granted funds to District Attorney's offices for establishing special prosecution units to enhance prosecution efforts in sexual abuse cases. *See id.* § 999q-999y (West Supp. 1989). However, even in cases of suspected sexual abuse, the prosecutor may opt not to prosecute the suspect, in order to promote the general purposes and intent of the legislature. *Id.* § 999t. The district attorney's office typically prosecutes only severe cases in which "society's demand for justice requires severe punishment." Telephone interview with Kenneth Peterson, Child Abuse and Sexual Assault Div., District Attorney's Office, Sacramento, Cal. (Sept. 25, 1987). Because the District Attorney's Office receives so many reports, they prosecute relatively few. *Id.* Thus, the state prosecutor exercises broad discretion in her decision whether or not to prosecute suspected child abusers.

<sup>105</sup> A report to the authorities does not assure a maltreated child's safety. Studies show that about 25% of all child fatalities attributed to abuse or severe neglect involve children already reported to a child protective agency. Besharov, *supra* note 37, at 551. Tens of thousands of other children suffer serious injuries short of death. *Id.* Professor Besharov wrote, "[R]esearch studies suggest that many fatalities are preceded by obvious warning signals of immediate and serious danger, to which decision-makers should have responded more forcefully. . . . Some children die because of . . . administrative breakdowns and failures of judgment." Besharov, *supra* note 66, at 163-64.

<sup>106</sup> *See generally* Goodpaster & Angel, *supra* note 25 (providing overview of California Statutory and Regulatory Structure).

<sup>107</sup> *Attorney General Report, supra* note 2, at 25; *see supra* note 102 (describing Preplacement Preventive Services).

<sup>108</sup> Besharov, *supra* note 66, at 163-66.

<sup>109</sup> *Id.* An estimated 20 to 40 percent of abusive parents have serious and deeply ingrained personality disturbances. *Id.* at 165. These persons need skilled, long-term, intensive treatment. *Id.* Child protective agencies cannot provide such treatment be-

The inability of in-home treatment programs to improve abusive home situations has led to a major increase in the use and duration of foster care.<sup>110</sup> Under the foster care program, Child Welfare Services places a child in a foster home while social workers provide counseling to the natural family for a limited time.<sup>111</sup> This program may be attractive to social workers since they are immediately able to remove the child from a threat of serious harm.<sup>112</sup>

However, while some children benefit from foster care, a large proportion suffer disgraceful housing conditions<sup>113</sup> and lasting psychological scars caused by separation from their family.<sup>114</sup> Moreover, while

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cause of high caseloads and inefficient deployment patterns. *Id.* at 166. Lack of funding disables other community agencies who are willing to provide counseling and treatment. *Id.* at 166.

<sup>110</sup> *Id.* at 166.

<sup>111</sup> *Attorney General Report, supra* note 2, at 46; *see supra* note 102 (describing Family Reunification Program).

<sup>112</sup> Cohen, *supra* note 80, at 32. Professor Cohen writes: "Unfortunately the system responds less to the needs of the family than it does to the reality that social workers do not have sufficient time to help families very much. It takes less time to break a family apart than it does to keep it together." *Id.*

<sup>113</sup> *See CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE* xiii (1978). Marion Wright Edelman, President of the Children's Defense Fund, says the conditions of foster care are a "national disgrace." *Id.* at 97. *See generally Foster Care, Child Welfare, and Adoption Reforms: Joint Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means and Select Comm. on Children, Youth, and Families, 100th Cong., 2d Sess.* (1988).

<sup>114</sup> Besharov, *supra* note 66, at 167. Professor Besharov writes:

Foster care is an emotionally jarring experience; it confuses young children and unsettles older ones. Over a long period, it can do irreparable damage to the bond of affection and commitment between parent and child. The period of separation may so completely tear the fragile family fabric that the parents have no chance of being able to cope with the child when he is returned . . . . While in foster care, children are supposed to receive treatment services desperately needed to remedy the effects of past maltreatment. Few do. Worse, children who stay in foster care for more than a short time . . . tend to be shifted through a sequence of ill-suited foster homes — denying them the consistent support and nurturing that they so desperately need. Increasingly, the graduates of the foster care system evidence such severe emotional and behavioral problems that some thoughtful observers believe that foster care is often more harmful than the original home situation might have been.

*Id.* at 167 (footnotes omitted); *see also* Cohen, *supra* note 80, at 33. Professor Cohen adds:

Since foster care is still, in theory, a temporary arrangement foster fam-

foster-care services provide time for parents to respond to treatment, real parental behavior modification seldom occurs due to the inadequacy of existing counseling programs.<sup>115</sup>

If the social worker believes that a child cannot safely return home, the state agent must file a petition in the juvenile court to declare the minor a dependent of the court.<sup>116</sup> The court may adjudge the minor to be a dependent of the court if the court finds that returning the child to her home will pose a substantial risk that the minor will suffer *serious* physical or emotional injury.<sup>117</sup>

Before the court permanently terminates parental custody, the judge must find clear and convincing evidence that removal is in the best interests of the child.<sup>118</sup> The decision to remove a child permanently from her home and family is perhaps one of the most difficult decisions a judge must make.<sup>119</sup> Judges often must choose among unattractive alternatives and predict which one exposes the child to the least harm.<sup>120</sup> Furthermore, because the law does not require judges to consider essential factual, social, medical, and psychological information,<sup>121</sup> judges re-

ilies are admonished not to become too attached to the children. Additionally, since most children are moved from foster home to foster home, they are never able to establish the continuity of relationships necessary for healthy development. Many studies show that these disruptions are seriously harmful to children.

*Id.* at 33 (footnotes omitted). In many foster-care cases, children are subjected to abuse and neglect; *see Moss, Foster Care Lawsuits*, A.B.A. J. 23 (July 1, 1988).

<sup>115</sup> Besharov, *supra* note 66, at 166-68 (observing that nationwide more than 50 percent of children in foster care are in "temporary" status for over two years and over 30 percent are away from parents over six years).

<sup>116</sup> *Attorney General Report, supra* note 2, at 46; *see supra* note 102.

<sup>117</sup> CAL. WELF. & INST. CODE § 300 (West Supp. 1989).

<sup>118</sup> CAL. CIVIL CODE § 232(c) (West Supp. 1988); *see In re Angelia P.*, 28 Cal. 3d 908, 623 P.2d 198, 171 Cal. Rptr. 637 (1981); *see also In re Shannon C.*, 179 Cal. App. 3d 334, 344, 224 Cal. Rptr. 516, 521-22 (1986) (stating that removal shall occur only in extreme cases); *In re Tanya F.*, 111 Cal. App. 3d 436, 168 Cal. Rptr. 713 (1980) (describing requirement for clear and convincing evidence).

If the court determines that it should not return the child to the physical custody of his or her parent or guardian, the court must develop a permanent replacement plan for the child. The judge must first consider adoption, then legal guardianship, and finally, long-term foster care. *Attorney General Report, supra* note 2, at 46.

For a discussion of the constitutional implications of terminating parental rights, *see supra* notes 81-82; *see also Parker, supra* note 81, at 563 (providing further analysis).

<sup>119</sup> Note, *supra* note 21, at 541.

<sup>120</sup> *Id.* at 552-53.

<sup>121</sup> Cohen, *supra* note 80, at 38-39; *see also* Note, *supra* note 21, at 541-45 (providing psychologists' definitions of emotional neglect). The legislature, courts, and child care professionals should confront this problem and fashion a reasoned approach to-

sort to their own moral values and personal biases.<sup>122</sup> This reference poses a greater risk of arbitrary decision-making.<sup>123</sup>

Moreover, removing a child from the home is contrary to the prevailing medical and psychological thinking.<sup>124</sup> Child psychiatrists agree that severing parental ties, whether to a "fit" or "unfit" parent, is extremely painful to a child.<sup>125</sup> Additionally, children often believe that judges are punishing them by taking them from their homes.<sup>126</sup> A criminal prosecution further victimizes the child if the court prosecutes her parent.<sup>127</sup>

### B. Criminal Proceedings Against Parents

In response to increased societal awareness of the problem of child abuse in the late 1970s and early 1980s, legislatures enacted harsher criminal penalties for child abusers.<sup>128</sup> In California, severe child abuse is a felony.<sup>129</sup> The district attorney may either criminally prosecute suspected abusers, or refer that person to public social services or the pro-

ward resolution, taking into account the relevant psychological data on the effects of emotional neglect. "In this manner, the legal standard of 'best interest of the child' will be given content and meaning for the emotionally neglected child." *Id.* at 552-53.

<sup>122</sup> Cohen, *supra* note 80, at 17. Professor Cohen writes:

Cultural biases, religious beliefs, and socio-economic differences add yet more dimensions of uncertainty to child neglect cases. Judges, social workers, and other members of society have preconceived notions of what is right and wrong. In cases where we are usually not looking at specific acts but are subjectively evaluating personalities and human relationships, there is an overwhelming tendency for us to impose our own values in judging others. When this tendency is coupled with the urge to intervene on behalf of a helpless abused child, there exists the substantial risk of arbitrary intervention into the family sphere by judges and social workers who are not circumscribed by rules.

*Id.* at 17 (footnotes omitted). Many judges dread child abuse cases since they have few objective standards on which to base a decision. *Yee Interview, supra* note 51.

<sup>123</sup> *See supra* note 122.

<sup>124</sup> *See* Goodpaster & Angel, *supra* note 25, at 1124. *See generally Preventing Out-of-Home Placement: Programs that Work: Hearing Before the House Select Committee on Children, Youth and Families*, 100th Cong., 1st Sess. (1987).

<sup>125</sup> Goodpaster & Angel, *supra* note 25, at 1124.

<sup>126</sup> Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 644-46 (1976); *see* Myers, *supra* note 30, at 182-84.

<sup>127</sup> *See* Myers, *supra* note 30, at 182-84.

<sup>128</sup> *See id.* at 150, 176-77. In 1985, the California legislature established the Child Abuser Prosecution Program. CAL. PENAL CODE § 999r (West Supp. 1989).

<sup>129</sup> CAL. PENAL CODE § 273a(1) (West 1988); *see supra* note 3.

bation department for counseling or psychological treatment.<sup>130</sup>

Criminal prosecution is undoubtedly warranted in physical child abuse cases.<sup>131</sup> Incarceration may be the only method of keeping some abusers away from children.<sup>132</sup> Furthermore, the threat of prosecution may compel some individuals to agree to therapy.<sup>133</sup> Prosecuting child abusers furthers the goals of the criminal law by punishing violence.<sup>134</sup>

However, commentators and judges have sharply criticized the use of the criminal justice system in the context of family matters.<sup>135</sup> First, reliance on the criminal legal system ignores the deep social and psychological roots of abuse.<sup>136</sup> In child abuse cases, effective correction of abusive behavior requires an abuser's participation in long-term prevention and education programs.<sup>137</sup> Thus, the law's "quick sword" is ill-suited to achieving lasting family rehabilitation.<sup>138</sup> Furthermore,

<sup>130</sup> CAL. PENAL CODE § 1000.12(b) (West Supp. 1988) (providing that prosecuting attorney may refer suspect to county welfare department for counseling or psychological treatment).

<sup>131</sup> See generally Adler, *Child Abuse Victims: Are They Also Victims of An Adversarial and Hierarchical Court System?*, 5 PEPPERDINE L. REV. 717 (1978).

<sup>132</sup> Myers, *supra* note 30, at 179.

<sup>133</sup> *Id.* at 178-79. Myers writes, "Many mental health professionals and attorneys share the belief that most child abusers will engage in therapy only if failure to do so leads to the possibility of prosecution. The sanction of involvement in the criminal justice system is needed to overcome resistance and denial." *Id.* at n.102; see Adler, *supra* note 131, at 732. Adler writes, "The very act of child abuse is a cry for help." *Id.*; see Krugman Statement, *supra* note 18, at 14. Dr. Krugman stated:

Over the past five years there has been an increased trend toward the legislation or criminalization of the process of protecting children. Ideally, when it works well, the child protective services system should help keep families together by recognizing the problem and providing needed services (social, medical and mental health) to abused children and their families. In many cases we think it works. If the process becomes adversarial, however, treatment becomes difficult.

*Id.*

<sup>134</sup> See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 5, at 21-25 (1972) (for example, retribution or prevention of assault and battery).

<sup>135</sup> See Adler, *supra* note 131, at 731-34.

<sup>136</sup> Myers, *supra* note 30, at 179. Myers writes, "[C]hild maltreatment is born of social and psychological causes — it is learned behavior . . . ." *Id.* at n.103; see ABUSIVE PARENTS, *supra* note 21.

<sup>137</sup> See Bostick, *supra* note 21; see *infra* note 162; Myers, *supra* note 30, at 179.

<sup>138</sup> Myers, *supra* note 30, at 179. The legal system punishes abusers swiftly. See Note, *supra* note 91, at 382. It does not implement necessary rehabilitation programs. *Id.* "Social Services are not always available following convictions. Prosecution likely ends any chance of improving the child's home life." *Id.*; see also Adler, *supra* note 131, at 732-33. Adler states:

Criminal proceedings accommodate the angry feelings of an outraged

court imposed fines for child abusers may deplete family resources and thus impose an even greater hardship on the child.<sup>139</sup> Families may experience loss of employment and reputation, divorce, and other negative influences.<sup>140</sup> Moreover, labeling a parent as "abusive" or "neglectful" may cause the label to become a self-fulfilling prophecy.<sup>141</sup>

Second, the threat of severe punitive action encourages the abuser and potential reporters to hide the truth.<sup>142</sup> Physicians and other professionals with knowledge of a child abuse case sometimes refuse to comply with reporting laws because they believe criminal prosecution will exacerbate the problem.<sup>143</sup>

Third, the criminal process victimizes the child.<sup>144</sup> She must repeatedly describe the details of the abuse in both depositions and testi-

community, but they do not prevent child abuse. Disclaimers of this position assert that criminal proceedings "get abusers off the streets." While this is true, it is usually a temporary solution. Criminal law in family matters often . . . may signal the end of any hope for rehabilitation.

*Id.* But see *supra* note 133 and accompanying text (suggesting that threat of prosecution is only way to force abusers to seek therapy). Moreover, adversary systems cannot serve as a corrective model for families. See Myers, *supra* note 30, at 178-85. A not-guilty verdict may further reinforce an abuse-prone parent's denial system and serve as a justification for abusive behavior.

<sup>139</sup> See Note, *supra* note 91, at 382. Some writers suggest that poor families experience additional economic and social pressures that result in increased occurrences of child abuse. See, e.g., Bostick, *supra* note 21; Besharov Statement, *supra* note 20, at 47, 60. The House Select Committee on Children, Youth and Families also finds that a positive relationship exists between child neglect and poverty. *Select Comm. Report, supra* note 12, at 6 (Findings). "Insufficient income and inadequate housing are more predictive of neglectful families than abusive families." *Id.* Sixty percent of all states and the District of Columbia ranked deteriorating economic conditions as a primary factor in rising child abuse and neglect reports. *Id.* at 3 (Findings). But see Cohen, *supra* note 80, at 17-18. Professor Cohen warns:

[I]t is very easy to misread the characteristics of poverty as the results of neglect. . . . [T]he families most likely to be the subject of state intervention are poor. This suggests that cultural, social and racial prejudices motivate state agencies in this area.

*Id.*

<sup>140</sup> See Note, *supra* note 91, at 382; see also Besharov Statement, *supra* note 20, at 34 (describing problems of restoring reputation of even innocent parents who had been suspected of child abuse).

<sup>141</sup> Besharov, *supra* note 37, at 567.

<sup>142</sup> *Id.* This Comment suggests that the legislature sanction courts' use of less severe punitive measures and foster the availability of therapy and education to child abusers. See *infra* notes 168-78 and accompanying text.

<sup>143</sup> Myers, *supra* note 30, at 180-81.

<sup>144</sup> *Id.* at 178-93.

mony.<sup>145</sup> The adversary climate of the courtroom further traumatizes the child since she must face her abuser who is also her parent.<sup>146</sup> Because child abuse is often difficult to prove,<sup>147</sup> the trial becomes a contest between the child and the parent in which the trier must decide whom to believe.<sup>148</sup> In this context, many judges suspect that a child's testimony is of questionable competence or reliability.<sup>149</sup>

Moreover, the child cannot win in these proceedings. If the court finds an abusive parent not guilty, the parent may continue to abuse the child.<sup>150</sup> If the court finds the parent guilty, the child faces severed family ties.<sup>151</sup> Placing the parent in prison may make the child's life more unstable, forcing the child to grow into adulthood with the stigma of having a dishonored parent.<sup>152</sup>

### C. *Improvements in the Current System To Encompass General and Emotional Neglect*

The current system inadequately protects victims of physical abuse.<sup>153</sup> Thus, the system does not protect victims of general or emotional neglect.<sup>154</sup> Still, inadequacy in one area is no excuse for legislative paralysis in another. California should amend existing code sections to include general and emotional neglect as actionable child abuse.<sup>155</sup>

<sup>145</sup> *Id.* Investigators from the child protection team question the abused or neglected child. *Id.* Police, doctors, prosecutors and the judge ask similar questions. *Id.* Each time, the child must relive the nightmare. *Id.*

<sup>146</sup> *Id.* at 184-85.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* However, Professor Berliner suggests that generally, children are competent witnesses and that in tests conducted, even when an interviewer tried to mislead a child in testimony, it was very difficult. *Berliner Lecture, supra* note 28.

<sup>150</sup> See Besharov, *supra* note 37, at 567.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See *id.* at 573. See generally *Select Comm. Report, supra* note 12.

<sup>154</sup> See Besharov, *supra* note 37, at 573. Moreover, a generally or emotionally neglected child seldom knows her parents are abusive. Interview with teachers, Robla School Dist. of Sacramento, Cal., Sacramento, Cal. (Sept. 23 and 29, 1988). Thus, using a child's testimony to prosecute her parents for neglect creates evidentiary problems. See *supra* notes 144-49 and accompanying text.

<sup>155</sup> See *supra* notes 3, 7 & 22-24 and accompanying text.

Schools are a likely place where persons can detect general neglect. See Goodpaster & Angel, *supra* note 25, at 1102-03. The authors write that "[s]chools are a likely source of reports of suspected child abuse involving older, school-age children, for such institutions have children under their observation for five or six hours a day, five days a

Although laws against child abuse do not necessarily prevent it,<sup>156</sup> the same justification for punishing physically abusive caretakers applies to generally and emotionally abusive caretakers.<sup>157</sup> Both groups of caretakers inflict serious injury on children.<sup>158</sup> These abusers' behavior should not go unnoticed.<sup>159</sup>

In addition, if the legislature makes general and emotional neglect chargeable offenses, the state can compel guilty individuals to agree to therapy.<sup>160</sup> Experts in family dynamics<sup>161</sup> agree that therapy is necessary or helpful to remedy child abuse or neglect.<sup>162</sup> An abusing or neg-

week." *Id.* (footnotes omitted). In 1985, the legislature imposed training duties on school districts. CAL. PENAL CODE § 11165.7 (West Supp. 1989). These duties include training in child abuse identification and child abuse reporting. *Id.* Since school districts must already provide training related to physical child abuse, it would require little to include training on general neglect.

<sup>156</sup> Goodpaster & Angel, *supra* note 25, at 1085. Professor Goodpaster and Ms. Angel write:

Existing laws against child abuse do not prevent it, for it usually occurs in the privacy of a home and often is not sufficiently serious to require the intervention of third parties who might report it. The child-abuse [sic] reporting laws, which are the legislative response to the problem, are not really remedies. . . . Since abuse or suspected abuse will have already occurred, the preventative function of the reporting laws is not significant except when a report results in the removal of a child from a dangerous situation, or to the extent that potential or repeat abusers are deterred by awareness that they may be reported and prosecuted.

*Id.* at 1085-86 (footnotes omitted).

<sup>157</sup> See *supra* notes 84, 86-87, 89-92, 96 & 131-34 and accompanying text.

<sup>158</sup> See *supra* notes 21, 59-63, 90, 92 & 96 and accompanying text.

<sup>159</sup> See *supra* notes 102, 104 & 134 and accompanying text.

<sup>160</sup> See *supra* notes 104 & 133 and accompanying text.

<sup>161</sup> See *supra* note 53.

<sup>162</sup> Bostick, *supra* note 21; see Note, *supra* note 91, at 386. The author writes: [I]f child abuse cases were handled by . . . counselors, the hesitation of physicians about reporting suspected cases of battered children might be overcome and the treatment of the parents or abusers of the children could be geared toward remediation and correction rather than punishment or removal from the home.

*Id.* (footnotes omitted); see also *id.* at 375 (describing reasons persons abuse children as of the type necessitating therapeutic and educational help). The author also writes:

Beaters of children have been considered to be either unstable and emotionally immature or so self-centered that they view the child as a personal handicap, as well as being mentally ill. Severe child injuries have also been attributed to parental alcoholism, indifference, irresponsibility and immaturity which was manifested in poorly controlled aggressive behavior.

Another study also indicated that the families of battered children

lectful parent suffers from a deep-rooted inability to handle stress,<sup>163</sup> is often mentally ill or emotionally immature<sup>164</sup> and sometimes is inflicted with alcohol or drug problems.<sup>165</sup>

Finally, by codifying specific definitions of general and emotional neglect, the legislature may deter neglect by reminding possible abusers of the consequences of their acts.<sup>166</sup> Moreover, legislative action may lend an aura of state authority to childrearing guidelines that psychologists and experts espouse.<sup>167</sup> At least, the definition may raise caretakers' consciousness as to their responsibilities to children.

The legislature should adopt a definition of neglect that states a threshold and sets boundaries for governmental intervention.<sup>168</sup> For ex-

tended to be lacking in group and community integration and to be in a state of marital discord, of which only one cause was that of premarital conception in slightly less than fifty percent of the cases. In another study the victim of abuse was found to be usually the youngest child in the family, perhaps because the child was an unwanted addition to the family.

The conclusion may be drawn, therefore, that the abuser tends to suffer from emotional pressures which are not directly related to the child himself, focuses his own general feelings of frustration and anger on the one child, and expresses his emotions through an immature and uncontrolled display of . . . abuse . . . .

*Id.* (footnotes omitted); *see supra* note 139.

Many authorities suggest that the best response to child abuse is a therapeutic, educational one. Myers, *supra* note 30, at 261-67; *see supra* note 137 and accompanying text; *see also Select Comm. Report, supra* note 12, at 70-82 (testimony of Patricia D. Raphael, President, Parents Anonymous of Massachusetts) (explaining how Parents Anonymous breaks cycle of intergenerational child abuse through therapy).

<sup>163</sup> *Id.*

<sup>164</sup> *See supra* note 162.

<sup>165</sup> *Id.*

<sup>166</sup> *See supra* note 133.

<sup>167</sup> *See supra* notes 46, 53, 57-63, 90 & 95 and accompanying text.

<sup>168</sup> *See Besharov, supra* note 37, at 541; *see also Coats Statement, supra* note 96, at 5 (stating that many laws dealing with child maltreatment employ broad and subjective definitions that make it difficult to report abuse and neglect); Cohen, *supra* note 80, at 16-18 (discussing the importance of specific definitions of child abuse). Mr. Cohen writes:

Cultural biases, religious beliefs, and socio-economic differences add yet more dimensions of uncertainty to child neglect cases. . . . In cases where we are usually not looking at specific acts but are subjectively evaluating personalities and human relationships, there is an overwhelming tendency for us to impose our own values in judging others. When this tendency is coupled with the urge to intervene on behalf of a helpless abused child, there exists the substantial risk of arbitrary intervention into the family sphere by judges and social workers, who are not circumscribed by rules.

*Id.* at 16-17 (footnotes omitted). *But see supra* notes 2, at 56-63; *infra* notes 169-71

ample, precise elements of emotional neglect may include evidence of a child who consistently misbehaves<sup>169</sup> and a parent who is inattentive,<sup>170</sup> or who fails to recognize the need for help or change.<sup>171</sup> Psychologists' empirical data provides criteria for judges and social workers to determine whether the child's development is similar to that of most other children.<sup>172</sup> Judges and social workers should not only look to whether a child is in immediate danger,<sup>173</sup> but to whether a parent's continued neglectful behavior will cause the child serious harm.<sup>174</sup>

Amending mandatory child abuse reporting laws to include cases of general and emotional neglect will empower Child Welfare Services to investigate the cases.<sup>175</sup> If social workers find the reports founded, Child Welfare should provide in-home counseling and educating services.<sup>176</sup> If the abusing parents refuse to undergo treatment, the state should com-

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and accompanying text (providing specific acts and factors showing general and emotional neglect). For a suggested definition, see *supra* note 50.

<sup>169</sup> See PROFILE IN NEGLECT, *supra* note 2, at 5.

<sup>170</sup> *Id.*

<sup>171</sup> Whiting, *supra* note 2, at 2.

<sup>172</sup> See Note, *supra* note 21, at 544-45. If further evaluation is necessary, psychologists can evaluate a child's emotional status by professional, clinical testing. *Id.* Trained psychologists interview, test and observe a child. *Id.* Psychologists then integrate the material with established psychological principles, the clinician's own professional experience, and evaluations of thousands of other parent-child relationships to interpret the data. *Id.* In certain situations, presently, courts must evaluate whether parents have or will likely "maintain an adequate parental relationship with the child." CAL. CIVIL CODE § 232(a)(7) (West Supp. 1988). Courts attempt to determine the "best interests of the child" by subjectively balancing the child's interest in secure and sufficient parenting with parental interests in family preservation. See *In re Angelia P.*, 28 Cal. 3d 908, 623 P.2d 198, 171 Cal. Rptr. 637 (1981). Thus, courts are accustomed to evaluating cases against subjective and somewhat nebulous standards. Therefore, this Comment suggests that even if courts find existing definitions and experts' opinions of general and emotional neglect to be nebulous, the importance of addressing these child abuses merits adjudication of neglect cases.

<sup>173</sup> See *supra* notes 9-11 & 23-24 and accompanying text.

<sup>174</sup> *Id.*; see *supra* notes 59-63, 90 & 96 and accompanying text (discussing the cumulative effects of neglect).

<sup>175</sup> See *supra* notes 3, 7, 23 & 99-102 and accompanying text. Experienced and qualified social workers must carefully screen and investigate cases. See Besharov Statement, *supra* note 20, at 43-45, 49-50, 52-54.

<sup>176</sup> See *supra* note 162 and accompanying text. For a description of an excellent program that could be funded by the state, see *Select Comm. Report*, *supra* note 12, at 66 (statement of Jeanne Soulis, Child Advocacy Servs. Center, Inc., The Children's Place, Kansas City, Mo.) (describing a non-profit treatment agency for treatment of maltreated children and their families in which parents work with their child and receive counseling).

pel the parents to appear before an administrative tribunal.<sup>177</sup> The administrative tribunal should either levy fines or order the parent to do community service unless the parent consents to undergo treatment or therapeutic counseling.<sup>178</sup>

Improving and expanding Child Welfare Services requires additional funding.<sup>179</sup> However, costs may decrease in the long run.<sup>180</sup> If social workers can detect and treat cases of general or emotional neglect early, social service action may thwart potential physical abuse.<sup>181</sup> Further-

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<sup>177</sup> For a description of the creation and establishment of Administrative agencies and their powers and functions, see 2 CAL. JUR. 3d *Administrative Law* §§ 15-31, 35-247 (1977). The decisions of the administrative body proposed should be subject to judicial review. *See id.* §§ 248-341. The state should not bring the parents before a criminal court because of the dangers of victimizing the child as discussed earlier in this comment. *See supra* notes 144-52 and accompanying text. However, these new definitions must be enforced. *See Besharov Statement, supra* note 20, at 43.

<sup>178</sup> Fines could impose a hardship on some parents and therefore their children. *See supra* note 139 and accompanying text. Therefore, the tribunal should make community service available. This is akin to a court mandating counseling as a condition of probation. "Under [Penal Code section 1203.1] a sentencing court has broad discretion to describe conditions of probation to foster rehabilitation and to protect the public to the end that justice may be done." *People v. Richards*, 17 Cal. 3d 614, 619-20, 552 P.2d 97, 100-01, 131 Cal. Rptr. 537, 540-41 (1976).

A form of the suggested approach for treating neglectful parents is already codified in the California Education Code. *See CAL. EDUC. CODE* § 48200 (West Supp. 1989). Under section 48293, truancy is a misdemeanor. *Id.* § 48293. The court may impose a \$100 fine for a first conviction and up to \$250 for a subsequent conviction. *Id.* § 48293(a)(1)-(2). In lieu of these fines, a court may order the parent to be placed in a parent and education counseling program. *Id.* § 48293(a)(3).

<sup>179</sup> *See Besharov Statement, supra* note 20, at 37, 41-45 (asserting that social workers must be better trained); *see also* Massinga Statement, *supra* note 17, at 61-62 (maintaining that additional funding is part of answer to child abuse problem); *Harling Interview, supra* note 9. Harling says that the number of child abuse reports overwhelm Child Protective Services. *Id.* In Sacramento alone, Child Welfare Services receives 22,000 to 27,000 referrals a year. *Id.* Of those, law enforcement picks up approximately 220, around one-half of which go to the juvenile court. *Id.* For statistics on the number of child abuse cases reported statewide, *see supra* note 20. Monies received from fines could provide additional funding or abusers could perform their required community service for Child Protective Services. *See supra* note 178 and accompanying text.

<sup>180</sup> If Child Welfare Services detect and treat cases effectively, the various layers of law enforcement and judicial involvement are unnecessary. *See supra* notes 102-04 and accompanying text; *see also* Coats Statement, *supra* note 96, at 7 (stating that child abuse prevention is cost-effective from a public policy perspective). "The estimated cost of social services, criminal justice, health, mental health, and other systems intervention for the untreated or undertreated victims of child abuse is enormous." *Id.*; *see Note, supra* note 21, at 539 (discussing the advantages of identifying child abuse early).

<sup>181</sup> *See supra* notes 59-63, 90 & 96 and accompanying text. Under the California

more, children who are helped early in the course of their neglect may not become delinquents for whom social services is partially responsible.<sup>182</sup>

### CONCLUSION

Children enjoy a moral,<sup>183</sup> judicially granted,<sup>184</sup> and statutory right<sup>185</sup> to grow up in a wholesome environment. When a person generally or emotionally neglects a child, society loses a worthwhile and productive individual.<sup>186</sup> Governmental interests in protecting the rights of its minor citizens warrant legislative action to protect the victims of general and emotional neglect.<sup>187</sup>

Therefore, the California Legislature must take an affirmative stand against general and emotional neglect. This Comment advocates that the California legislature codify available definitions of neglect with sufficient specificity to allow social workers and law enforcement officials to intervene, and judges to adjudicate general and emotional neglect cases. Additionally, the legislature should amend the reporting laws to require mandatory reporting of non-physical child abuse. Social service involvement should lead to state provided counseling and educating services for abusive or neglectful parents.

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Penal Code, general neglect occurs when someone negligently fails to provide the child with adequate necessities of life. CAL. PENAL CODE § 11165.2(b) (West Supp. 1989). Severe neglect represents a step beyond general neglect. Severe neglect occurs when someone negligently fails to protect a child from severe malnutrition or medically diagnosable failure to thrive. *Id.* § 11165.2(a). When persons continue to provide a child with an inadequate diet, that is, to generally neglect the child, the child will likely suffer severe neglect. *See* Besharov, *supra* note 37, at 581; *see also supra* note 26 (quoting Dr. Frederick Green's statement that society cannot afford to wait until child is physically abused to act).

<sup>182</sup> Child welfare services "are directed toward the accomplishment of . . . preventing or remedying, or assisting in the solution of problems which may result in . . . the . . . delinquency of children . . ." CAL. WELF. & INST. CODE § 16501 (West Supp. 1989); *see supra* notes 90, 92 & 96 and accompanying text (suggesting that neglected children often become delinquents).

<sup>183</sup> *See supra* note 95 and accompanying text.

<sup>184</sup> *See supra* notes 83-84, 91 & 98 and accompanying text.

<sup>185</sup> *See* Besharov, *supra* note 66, at 168-71; *see also supra* note 87 and accompanying text (describing children's "rights").

<sup>186</sup> Note, *supra* note 21, at 548 (quoting J. GOLDSTEIN, A. FRAUD AND A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 51, 57 (1973)); *see supra* notes 90, 92 & 96 and accompanying text.

<sup>187</sup> *See* Note, *supra* note 21, at 539; *see also supra* notes 83-84, 90-92, 96 & 98 and accompanying text (describing governmental interest in protecting its minor citizens).

*In a nearly perfect world, Tony gets eight hours of sleep a night. He eats from the four basic food groups. His home is clean and he is comfortable. His parents are patient with him. They tell him he is good. His clothes are not new, but they are clean. His work and effort in school pleases his teachers. His parents try to help him with his homework. They encourage him to do his best. Tony likes himself. He likes the world. Tony will become a productive member of society. His parents received counseling from professionals through California Child Welfare Services.*

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