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## Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments

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# Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments

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## I. INTRODUCTION

On a December night in 1993, Gregory Bryant-Bruce, age six months, was rushed to Vanderbilt University Medical Center Emergency Room for treatment of severe anemia, shock, and abnormally low hematocrit.<sup>1</sup> A CT scan revealed brain hemorrhaging, and a physical examination showed retinal hemorrhages of varying ages.<sup>2</sup> Retinal bleeding in a young child is almost always caused by trau-

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1. See *Bryant-Bruce v. Vanderbilt Hosp., Inc.*, No. 3-96-0153, 1997 WL 440962, at \*4 (M.D. Tenn. July 3, 1997). Low hematocrit, or low red blood cell count, is usually caused by infection or internal bleeding. See Defendant’s Motion for Summary Judgment at 5, *Bryant-Bruce* (No. 3-96-0153) (citing the affidavit of Dr. Niki Oquist, submitted with the summary judgment motion).

2. See *Bryant-Bruce*, 1997 WL 440962, at \*4.

matic injury, and is considered to be a classic sign of "Shaken Impact Syndrome" ("SIS"), a life-threatening and relatively common form of child abuse.<sup>3</sup> Thus, on the basis of Gregory's symptoms and the inadequacy of his parents' explanation of his injuries, Gregory's doctor suspected child abuse.<sup>4</sup> Gregory's attending physician, a pediatric intensivist, consulted at least five of his colleagues,<sup>5</sup> all of whom agreed that the medical findings "created a high suspicion of abuse."<sup>6</sup> Ultimately, one of the colleagues, a pediatrician, made a diagnosis of SIS and filed a report of suspected child abuse with the local Child Protective Services ("CPS").<sup>7</sup>

The physician was not merely doing what he perceived to be the right thing under the circumstances, nor was he unnecessarily harassing Gregory's parents. Rather, he was complying with his statutory duty to report suspected child abuse to the proper authorities. Under the Tennessee statute,

*Any person, including, but not limited to, any . . . [p]hysician, . . . having knowledge of or called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition which is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or which on the basis of available information reasonably appears to have been caused by brutality, abuse or neglect, shall report such harm immediately . . . to the judge having juvenile jurisdiction or to the county office of the [D]epartment [of Children's Services].*<sup>8</sup>

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3. Shaken Impact Syndrome ("SIS"), also called shaken baby syndrome, is frequently reported as "a leading cause of infant abuse." 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 16.01, at 6 n.9 (2d ed. 1994).

Note that violence is the actual cause of injury, not the cause of abuse. The literature on the subject refers to abuse as if it were a disease, however, typically using such terms as "diagnose" and "symptom." See L. Lee Dowding, Comment, *Immunity Under the California Child Abuse and Neglect Reporting Act: Is Absolute Immunity the Answer?*, 26 CAL. W. L. REV. 373, 377 n.34 (1990).

4. See *Bryant-Bruce*, 1997 WL 440962, at \*10. Dr. Cheryl Bryant-Bruce, Gregory's mother, claimed Gregory had sustained two minor, accidental falls just prior to the SIS diagnosis, one from a bed to a carpeted floor during a diaper change, and the other on a doctor's examination table when the child fell back from a seated position. See *id.* at \*4, \*10. The Vanderbilt doctors concluded that injuries as serious as those Gregory suffered were unlikely to have resulted from falls from such short distances. See *id.* at \*10.

5. The specialists consulted included a pediatrician, a pediatric ophthalmologist, a neurosurgeon, a pediatric hematologist/oncologist, and a neuroradiologist. See *id.* at \*10.

6. *Id.*

7. See *id.* The report was actually made to the Department of Human Services. Tennessee's Child Protective Services are now under the auspices of the Department of Children's Services, created by statute in 1996. See TENN. CODE ANN. § 4-3-101(25) (Supp. 1996) (establishing the Tennessee Department of Children's Services).

8. TENN. CODE ANN. § 37-1-403(a) (1996) (emphasis added).

On the basis of the physician's report, CPS sought temporary custody of Gregory at an ex parte hearing.<sup>9</sup> The juvenile court judge granted CPS temporary custody. The results of CPS's investigation and its findings were then submitted to an independent judicial officer for review. Subsequently, the parents exercised their right to a de novo review by the circuit court.<sup>10</sup> At the second proceeding, the parents were represented by an attorney and had the opportunity to call witnesses, including experts.<sup>11</sup> The circuit court nonetheless determined that by clear and convincing evidence, Gregory was a victim of severe child abuse. The court affirmed the grant of custody to CPS.<sup>12</sup>

Eighteen months later, however, the parents obtained an order granting a new trial on the basis of newly discovered evidence suggesting an alternative explanation for the retinal bleeding which had led to the SIS diagnosis. At that proceeding, the judge determined that the new evidence presented by expert witnesses meant that, although a preponderance of the evidence still supported CPS's allegations, the state could no longer prove child abuse by "clear and convincing evidence."<sup>13</sup> The judge therefore vacated the original order.<sup>14</sup>

Gregory's parents filed charges in federal district court<sup>15</sup> against Vanderbilt Hospital and each of the doctors involved in the SIS diagnosis. The Bryant-Bruces sought to hold the defendants

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9. See *In the Matter of Gregory David Bryant-Bruce*, No. 61-231 (Juv. Ct., Montgomery County, Tenn. Apr. 13, 1994) (order granting temporary custody to CPS) (on file with author). See also TENN. CODE ANN. §§ 37-1-114(a)(2), -117(c), -120, -121(d) (1996) (providing that a court can order a child to be taken into temporary emergency custody prior to a hearing on the basis of a sworn petition or testimony, and that a hearing must be held within three days, unless parents waive their right to a hearing within that time).

10. See *In the Matter of Gregory David Bryant-Bruce*, No. C9-916, slip. op. at 2 app. A (Cir. Ct., Montgomery County, Tenn. Aug. 21, 1995) (setting forth the court's findings of facts and conclusions of law). See also TENN. CODE ANN. § 37-1-159(a) (1996) (providing that an appeal from the juvenile court of record is heard by the circuit court, which must try the case de novo).

11. See TENN. CODE ANN. § 37-1-127(a) (1996) (stating that parents in a custody hearing may introduce evidence and cross-examine adverse witnesses).

12. See *In the Matter of Gregory David Bryant-Bruce*, No. C9-916, slip. op. at 2 app. A (setting forth the court's findings of facts and conclusions of law). See also TENN. CODE ANN. § 37-1-129(c) (1996) (articulating the "clear and convincing evidence" standard).

13. See *In the Matter of Gregory David Bryant-Bruce*, No. C9-916 (Cir. Ct., Montgomery County, Tenn. June 12, 1995) (order setting forth the court's ruling) (on file with author).

14. See *id.*

15. The Bryant-Bruces moved out of state during these proceedings, which established federal diversity jurisdiction. See *Bryant-Bruce v. Vanderbilt Hospital, Inc.*, No. 3-96-0153, 1997 WL 440962, at \*6 (M.D. Tenn. July 3, 1997).

liable for the allegedly erroneous report of child abuse.<sup>16</sup> The court ultimately granted summary judgment to Vanderbilt and the doctors on the basis of a statutory provision that accompanies the mandatory reporting statute: "A person reporting harm [under the child abuse reporting provision] shall be presumed to be acting in good faith and shall thereby be immune from any liability, civil or criminal, that might otherwise be incurred or imposed for such action."<sup>17</sup>

Notwithstanding the many claims, the primary issue in the case was whether Vanderbilt Hospital and the individual doctor who filed the report were immune from liability for making an allegedly unsubstantiated report, and if so, under what standard. While physicians are not the only group required to report child abuse,<sup>18</sup> they are the group most likely to be directly confronted with injuries or ailments suggestive of maltreatment, and are considered experts in recognizing maltreatment.<sup>19</sup> Moreover, as a result of legislative efforts to target health-care professionals in reporting statutes,<sup>20</sup> physicians and other health care professionals are reporters in a high percentage of cases, and are thus more likely to be sued on the basis of an unsubstantiated report.<sup>21</sup>

Because of their presumed expertise, physicians' reports to CPS are likely to have substantial bearing on CPS's decisions regarding the investigations and to carry significant weight in court hearings. As a matter of common sense, a doctor's testimony is likely to carry more weight than a child care worker's or a next door neighbor's testimony. Consequently, in cases of erroneous reports

16. *See id.* at \*1-\*2. Gregory's parents sought damages for professional negligence, negligence, malicious prosecution, abuse of legal process, false imprisonment, invasion of privacy, defamation of character, outrageous conduct, and loss of consortium. *See id.* at \*2.

17. TENN. CODE ANN. § 37-1-410(a) (1996).

18. In Tennessee, everyone is a mandatory reporter. *See id.* § 37-1-403(a). In most states, physicians and other professionals likely to be in contact with large numbers of children are mandatory reporters, while all other people are voluntary reporters. *See infra* note 63 and accompanying text (discussing other states' mandatory reporting requirements).

19. *See* Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 3-4 (1967) (outlining the characteristics of physicians that make them uniquely qualified to detect and report suspected child abuse). *See also* Allan H. McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 MINN. L. REV. 1, 27-36 (1965) (discussing policy arguments in the debate over mandating physician reporting of suspected child abuse).

20. *See* Paulsen, *supra* note 19, at 4 (noting that the first generation of statutory reporting requirements were specifically designed to overcome physicians' reluctance to report).

21. In an informal survey on LEXIS of roughly 50 cases filed against reporters, almost 40% involved charges against physicians or other healthcare workers (21/54). Search of LEXIS, States Library, Courts File (Sept. 1, 1997) ("child abuse" w/50 report! w/50 immun!). The same number of charges were filed against state social services departments, and a negligible number of charges were filed against anonymous reporters (2/54), educational or child care workers (4/54), spouses or former spouses (3/54), and others (3/54). *See id.*

resulting in parental loss of custody, injured and enraged parents may have an inflated perception of the doctor's role in the proceedings. Also as a matter of common sense, physicians are one of the groups that the law most needs to encourage to report suspected cases of child abuse, precisely because physicians are more likely to be exposed to child abuse and to recognize it.<sup>22</sup>

The case of Gregory Bryant-Bruce is typical of cases around the country involving claims against reporters.<sup>23</sup> In particular, this case illustrates many of the tensions between the competing interests inherent in cases of suspected child abuse. First, the onus to report rests disproportionately upon doctors, and they tend to take their responsibility very seriously. Second, reporters face high legal and emotional costs in defending their action, even if the court decides in their favor on summary judgment, and these costs provide a tremendous disincentive for compliance with reporting laws.<sup>24</sup> Third, and perhaps most important, the difficulty of detecting child abuse means that some reports are determined to be "unsubstantiated" even where actual abuse has occurred or is occurring, and CPS agencies' low budgets and understaffing exacerbates this inherent difficulty in detecting abuse. Moreover, reports "substantiated" by CPS may ultimately be "disproven" at the trial or hearing stage because of the high standard of proof required to prove abuse ("clear and convincing

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22. See *infra* note 47 (discussing the reasons why physicians were subject to early mandatory reporting laws).

23. See, e.g., *Brown v. Pound*, 585 So. 2d 885, 886-87 (Ala. 1991) (dismissing the plaintiff's claims against a physician who complied with Alabama's mandatory reporting statute); *Storch v. Silverman*, 186 Cal. App. 3d 671, 675-81 (1986) (dismissing claims as "unsubstantiated" against defendant doctors who were involved in the identification of suspected child abuse but who did not report it, as well as those claims against doctors who did report the suspected abuse to the authorities); *Martin v. Children's Aid Soc'y*, 544 N.W.2d 651, 654-66 (Mich. Ct. App. 1996) (dismissing the plaintiff parents' claim against the Michigan Department of Social Services and against a private organization who provided services to the child at issue in the case), *appeal dismissed*, *Martin v. Zak*, 562 N.W.2d 782, 782 (Mich. 1997).

24. As Dr. Niki Oquist, the physician who reported the suspected abuse of Gregory Bryant-Bruce, stated in his affidavit:

It is my opinion that, if physicians who are required to report possible cases of child abuse are subjected to liability and the stress of lawsuits for having reported possible abuse, reporting of abuse will decline. It is my opinion that physicians concerned about the ramifications of reporting will shy away from reporting those cases where the evidence of abuse is not perfectly clear. It is well known that child abuse goes largely unreported, and I believe strongly that physicians, and others who interact regularly with children, should not be further deterred from reporting possible cases of abuse because of the fear of legal action being taken against them.

Defendant's Motion for Summary Judgment app. 3 at 16, *Bryant-Bruce v. Vanderbilt Hosp., Inc.*, No. 3-96-0153, 1997 WL 440962 (M.D. Tenn. July 3, 1997).

evidence").<sup>25</sup> Fourth, families suffering high emotional costs when a child is removed from parental custody erroneously, or on the basis of a report that is ultimately unsubstantiated, usually have no remedy at law against the reporters or against the state's protective services due to immunity provisions for reporters and state actors. Such immunity provisions, however, do not prevent families from suing, and thus forcing hospitals and other institutions to devote substantial amounts of energy, money, and resources to defend against the charges. These and other factors support the policy of protecting reporters in spite of the potential harm to some innocent parties.

Every state in the country has provisions similar to Tennessee's mandatory reporting law and its immunity provision.<sup>26</sup> Such statutes reflect legislative recognition that child abuse is an enormous problem,<sup>27</sup> and that in order to increase protection of children, it is necessary to encourage reporting. In essence, these laws reflect a fundamental policy decision to afford as much protection to as many children as possible, even at the expense of hurting some innocent parties.<sup>28</sup>

It is the premise of this Note that the policy behind federal and state child protection laws is undergoing a significant shift toward greater protection of parents, at the likely expense of greater harm to abused children. The policy shift is partly the result of the growing strength of "Parents' Rights" groups, and is signaled by the passage of some portions of the federal Child Abuse Prevention and Treatment Act Amendments of 1996 ("CAPTA Amendments"),<sup>29</sup> which the rhetoric of "Parents' Rights" organizations plainly influenced. Part II of this Note briefly examines the historical development of child protective statutes, which culminated in the passage of the Child

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25. It is important to recognize that an "unsubstantiated" report is not necessarily an erroneous report. Gregory Bryant-Bruce's parents were ultimately "vindicated," but there was still no clear evidence that they had *not* abused their child, only insufficient "clear and convincing" evidence that they *had*.

California actually distinguishes between "unfounded" reports (meaning reports "determined . . . to be false, to be inherently improbable") and "unsubstantiated" reports (meaning reports "determined . . . not to be insufficient evidence to determine whether child abuse . . . has occurred"). See CAL. PENAL CODE § 11165.12 (West 1992).

26. See *infra* note 63 and accompanying text (listing other states' mandatory reporting requirements).

27. See *infra* Part II (discussing legislative responses to the problem of child abuse).

28. See, e.g., *Storch*, 186 Cal. App. 3d at 682 ("[I]n the tension between the grant of civil immunity occasioned by a duty to report and the spectre of a false report, some sacrifice is borne by those who may be wrongfully investigated but unable to seek legal redress."). See *infra* Part III (discussing immunity for those reporting child abuse to authorities).

29. Pub. L. No. 104-235, 110 Stat. 3063 (to be codified at 42 U.S.C. §§ 5101-5106i).

Abuse Prevention and Treatment Act of 1974 ("CAPTA").<sup>30</sup> Part III looks at current state statutes passed largely in response to the original CAPTA. This Part discusses judicial interpretations of reporter immunity laws, distinguishing between those states already providing absolute immunity for reporters and those offering only good faith immunity. Part III also considers the state Child Protective Services agencies' role after a report has been made. Part IV describes the legislative history underlying the CAPTA Amendments, and considers the role of "Parents' Rights" groups in pushing legislation that favors parental interests over children's interests. Part V analyzes the probable effect of the CAPTA Amendments and the policy shift they signal in regard to current immunity provisions for private reporters and state protective agencies. Part VI concludes that the CAPTA Amendments' higher immunity threshold and ambivalence toward promoting reporting will ultimately increase litigation, and thus the cost of good faith child abuse reporting, and increase liability for erroneously reporting child abuse. Increased litigation and decreased immunity will likely have a serious chilling effect on child abuse reporting and provide a tremendous disincentive for state agencies to react promptly to reports of suspected abuse.

## II. HISTORICAL BACKGROUND

The first reported criminal cases involving child abuse in the United States date back to the late 1600s,<sup>31</sup> but no documented civil child protection case appeared until 1874.<sup>32</sup> That case moved the petitioner to establish the New York Society for the Prevention of Cruelty to Children.<sup>33</sup> This organization and similar organizations were instrumental in calling attention to the maltreatment of children during the late nineteenth century, in bringing criminal complaints against perpetrators, and in placing thousands of neglected children in institutional care.<sup>34</sup> These organizations also facilitated the implementation of the first juvenile court system in New York in 1899.

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30. Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5106 (1994)).

31. See 2 KRAMER, *supra* note 3, § 16.01, at 6 (discussing the historical background of protections against child abuse).

32. See *id.* at 7.

33. See *id.* The petitioner had previously founded the Society for the Prevention of Cruelty to Animals, which may speak volumes about our priorities.

34. See *id.*

By 1930 every state but two had implemented similar juvenile court systems.<sup>35</sup> From the courts' inception, cases involving child maltreatment in all its various forms were a "major part of these courts' jurisdiction."<sup>36</sup> The early- to mid-twentieth century saw a growing recognition of the "state's responsibility for the ultimate protection of children."<sup>37</sup> The doctrine of *parens patriae*<sup>38</sup> and the

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35. *See id.*

36. *Id.* During the early part of the 20th century, most children involved in serious cases of abuse or neglect were placed in institutions devoted to the care of such children. The child welfare movement of the late 19th and early 20th centuries led to the establishment of the first institutions dedicated to the care of abandoned, abused, neglected, wayward, and delinquent children. Often a child placed in such an "orphan asylum" or "foundling asylum" remained there until adulthood. *See id.* at 8. Foster care, though not unheard of, was a relatively rare solution. *See infra* Part III.B (discussing the use of foster care as a "last resort" in a case of suspected child abuse).

37. 2 KRAMER, *supra* note 3, § 16.01, at 8. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that "[a]cting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control . . . in many ways"). Throughout the 20th century, courts attempted to define the legal parameters of parents' interest in their children. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (holding that a state's interest in universal education must be balanced against "the traditional interest of parents with respect to the religious upbringing of their children"); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that a state may not presume parental unfitness without a hearing on parental qualifications); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (striking down a law mandating attendance at state primary schools because it unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923) (holding that the "power of parents to control the education" of their children falls within the protection of the Fourteenth Amendment). Much of the current debate in the area of children's law focuses on supposed conflicts between parents' constitutional rights, children's constitutional rights, and the state's interest in providing for the health and safety of children. *See, e.g., James B. Boskey, The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. TOL. L. REV. 805, 852 (1995) (arguing that "the relationship between an adult and child should be defined in terms of the interests of the child rather than those of the parent"); Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 40 (arguing that the interests of children are best protected by legislation since the constitutional rights of children have been interpreted to extend no farther than those of adults); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1374 (1994) (arguing that children's rights, rather than parents' rights, should constitute the legal basis for protecting the interests of children); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspective and the Law*, 36 ARIZ. L. REV. 11, 21 (1994) (advocating according children standing in support and custody disputes in order to transform the current understanding of family disputes as conflicts between adult individuals and state interests); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 362 (1994) (arguing that "the law should accord children an independent liberty interest in their relationships with both 'legal parents' and 'nonlegal parents' irrespective of biological ties"); Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 295 (1995) (arguing that conceptions of individual freedom and opposition to state intervention in families fuel a cultural resistance to rights for children); Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 348 (1996) (arguing that strengthening marriage as a social institution will more fully protect children's interests than giving children constitutional rights enforceable against their parents).

“best interests of the child”<sup>39</sup> standard developed in response to this recognition. According to a leading authority, these “two legal doctrines . . . controlled all judicial proceedings affecting abused and neglected children.”<sup>40</sup> Nonetheless, child abuse was not formally identified as a medical condition until the 1962 publication of *The Battered Child Syndrome*<sup>41</sup> (the “Kempe article”). This article stimulated professional recognition of the full dimensions of the child maltreatment problem and helped bring the issue to the general public’s attention.<sup>42</sup> The Kempe article defined child abuse quite simply and narrowly as a “non-accidental physical injury” or “willful trauma.”<sup>43</sup> The article also noted patterns and symptoms of battered children.<sup>44</sup>

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38. Black’s Law Dictionary states that the term “*parens patriae*,” which literally means “parent of the country,” traditionally refers to the:

[R]ole of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, . . . and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents . . . .

*Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants. In the United States, the *parens patriae* function belongs with the states.

BLACK’S LAW DICTIONARY 1114 (6th ed. 1990).

39. “Best interests of the child” refers to “[the] state’s responsibility to assure that its actions are conducive to the best interests of the child.” 2 KRAMER, *supra* note 3, § 16.01, at 8. What exactly constitutes a child’s best interests, who should decide what they are, and when they should be determinative in the outcome of a case are hotly debated topics. *See, e.g.*, Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL’Y 63, 66 (1995) (“We contend that the constitutional standards allowing parents to determine what is in the best interests of their children, so long as parents are willing and able to make these decisions, assure an optimal balance between the interests of family integrity and child protection.”); Jerry A. Behnke, Note, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 739 (1995) (arguing for a federal statute requiring states to recognize the rights and interests of the child above all parental rights whenever a child’s placement is at issue); Elizabeth P. Miller, Note, *DeBoer v. Schmidt and Twigg v. Mays: Does the “Best Interests of the Child” Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 519 (1994) (suggesting that courts should balance the rights of biological parents with those of “psychological parents” in custody proceedings to safeguard the best interests of children); Michael A. Weinberg, Note, *DeBoer v. Schmidt: Disregarding the Child’s Best Interests in Adoption Proceedings*, 23 CAP. U. L. REV. 1099, 1126 (1994) (stating that a child should have standing to bring an action to obtain a “best interest” hearing in custody disputes).

40. 2 KRAMER, *supra* note 3, § 16.01, at 8.

41. *See* C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS’N 17, 17 (1962) (“The battered-child syndrome is a term used by us to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent.”).

42. *See* Barbara Daly, *Willful Child Abuse and the State Reporting Statutes*, 23 MIAMI U. L. REV. 283, 284-85 & n.5 (1969) (referring to the mass media response to the Kempe article).

43. Kempe et al., *supra* note 41, at 23.

44. *See id.* at 24.

Contemporaneous to the publication of the Kempe article, the Children's Bureau of the Department of Health, Education, and Welfare published a model statute that required physicians to report suspected child abuse, and applied criminal sanctions if a physician knowingly and willfully failed to report.<sup>45</sup> State legislatures responded to these two publications by enacting mandatory child abuse reporting laws as part of their child protective codes. By 1967, every state, the District of Columbia, and the U.S. Virgin Islands had enacted some form of child abuse reporting provision.<sup>46</sup> States varied as to how they defined child abuse, whom they required to report suspected abuse, and whether reporting was permissive or mandatory, but all states included physicians among the enumerated reporters.<sup>47</sup> Every state included some immunity provision as an incentive to reporting, but the degree and scope of such immunity varied widely.<sup>48</sup>

In 1974, the federal government enacted the first version of CAPTA.<sup>49</sup> CAPTA allocated money to the states for the identification, treatment, and prevention of child abuse.<sup>50</sup> To be eligible for funds,<sup>51</sup> each state had to provide for the reporting of known or suspected child abuse,<sup>52</sup> provide immunity to reporters from civil and criminal liability,<sup>53</sup> provide for investigation of reports by the proper state authority, and also provide for the health and welfare of any children

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45. See Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L.Q. 141, 142 n.5 (1986) (citing CHILDREN'S BUREAU, U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, *THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD* 11-13 (1963)).

46. See *id.*

47. See Daly, *supra* note 42, at 306 (noting that physician reporting is "permitted or required by all the states"). Physicians were targeted by early reporting laws because of the assumption that they were more likely than other groups to come in contact with injured children. Experience had shown, too, that doctors were less likely to report voluntarily than other groups of professionals who came in contact with abused children. The early reporting statutes were thus meant to overcome the disincentives preventing doctors from reporting. See Paulsen, *supra* note 19, at 3-4 (stating that "[i]t was felt that a good many physicians felt that reporting was either 'meddling' or a violation of a 'professional confidence' " and that many physicians were likely deterred by fear of civil liability as well).

48. See Daly, *supra* note 42, at 327 (providing an overview of the type of immunity offered by each state).

49. See Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5106 (1994)).

50. See 42 U.S.C. § 5103(b)(1) (1994), *repealed by* Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 103, 110 Stat. 3063, 3066.

51. See *id.* § 5103(b)(2), *repealed by* Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 103, 110 Stat. 3063, 3066.

52. See *id.* § 5103(b)(2)(B), *repealed by* Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 103, 110 Stat. 3063, 3066.

53. See *id.* § 5103(b)(2)(A), *repealed by* Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 103, 110 Stat. 3063, 3066.

in the household if abuse is found.<sup>54</sup> Most states already complied with many of the requirements before CAPTA's passage, but the federal statute did have substantial influence on subsequent generations of state reporting statutes.<sup>55</sup>

In particular, it appears that CAPTA brought the immunity provisions to the public's attention and thus led to an increase in the numbers of reports.<sup>56</sup> Also, by enunciating national policy, the Act guided state legislatures in formulating and articulating policy at the local level. For example, in 1973, thirty-four states had a purpose clause in their child abuse statutes, whereas forty states had one by 1977.<sup>57</sup> CAPTA also helped states organize child protective systems designed to respond to reports of suspected abuse and neglect, and it may have brought the need to fund these programs to states' attention.<sup>58</sup>

CAPTA's express purpose was to help states implement programs to deal with the problem of child abuse.<sup>59</sup> The Act responded to a recognition that, in spite of reporting and immunity laws already in place, underreporting still hampered efforts to bring aid to abused children.<sup>60</sup> The legislative history of the Act also indicates a concern that not all states had laws requiring further inquiry or treatment of

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54. See *id.* § 5103(b)(2)(A), repealed by Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 103, 110 Stat. 3063, 3066. Other requirements dealt with administrative procedures; personnel training; confidentiality requirements; ensuring cooperation among law enforcement officials, courts and welfare agencies; guardians ad litem; financing; dissemination of information; and preferencing "parental organizations combating child abuse and neglect." *Id.* § 5103(b)(2)(D)-(J), repealed by Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 103, 110 Stat. 3063, 3066. See Brian G. Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 648 (1978) (discussing the provisions of CAPTA).

55. See Fraser, *supra* note 54, at 649 (noting CAPTA's "substantial impact" on state reporting statutes).

56. An estimated 60,000 reports were made in 1974. In 1993 there were just under 3,000,000. See *Child Welfare: Where Should Our Priorities Be? Hearings Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Economic and Educational Opportunities*, 104th Cong. (1995) (testimony of Anne Cohn Donnelly, Executive Director, National Committee on the Prevention of Child Abuse), available in WESTLAW, USTESTIMONY Database.

57. See Fraser, *supra* note 54, at 651.

58. See Paulsen, *supra* note 19, at 48 (complaining in 1967 that too few states had appropriated additional funds for extending services to new cases revealed by mandatory reporting).

59. See H.R. REP. NO. 93-685, at 2-4 (1973), reprinted in 1974 U.S.C.C.A.N. 2763, 2765-66 (concluding that the federal government needed to take an increased role in supporting state and local child welfare agencies).

60. See *id.* ("Witnesses agreed that most estimates of the incidence of child abuse represent only a small proportion of the number of children who are actually maltreated.")

the reported cases.<sup>61</sup> Thus an important aspect of the Act was its focus on intervention. It was still criticized both for not providing enough funding and for involving the federal government in an area that had thus far been reserved entirely to the states.<sup>62</sup>

### III. STATE JURISPRUDENCE

#### A. Child Abuse Reporting Statutes

##### 1. Overview

Today, all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands have reporting laws.<sup>63</sup> Although each state's laws differ somewhat from other

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61. *See id.* (stating that most state laws did not "require any followup or treatment once a case of abuse has been reported").

62. *See id.* at 4-5 (stating the dissenting views that preventing child abuse was not the responsibility of the federal government and that no new source of revenue was provided to fund CAPTA).

63. *See generally* ALA. CODE §§ 26-14-1 to -13 (1992); ALASKA STAT. §§ 47.17.010 to -.290 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-3620 (West Supp. 1996); ARK. CODE ANN. §§ 9-30-101 to -109 (Michie 1993); CAL. PENAL CODE §§ 11164-11174 (West 1992 & Supp. 1997); COLO. REV. STAT. ANN. §§ 19-13-301 to -316 (West 1990); CONN. GEN. STAT. ANN. §§ 17a-101 to -107 (West 1992 & Supp. 1997); DEL. CODE ANN. tit. 16, §§ 901-909 (1995); D.C. CODE ANN. §§ 2-1351 to -1363 (1994); FLA. STAT. ANN. §§ 415.501-514 (West 1993 & Supp. 1997); GA. CODE ANN. § 19-7-5 (1991 & Supp. 1997); HAW. REV. STAT. ANN. §§ 350-1 to -5 (Michie 1994); IDAHO CODE §§ 16-1601 to -1637 (1979 & Supp. 1997); 325 ILL. COMP. STAT. ANN. 5/1 to 5/11.7 (West 1993 & Supp. 1997); IND. CODE ANN. §§ 31-33-5-5 to -6-3 (Michie 1997); IOWA CODE ANN. §§ 232.67 to -.77 (West 1994 & Supp. 1997); KAN. STAT. ANN. §§ 38-1521 to -1526 (1993 & Supp. 1996); KY. REV. STAT. ANN. §§ 620.010 to -.080 (Michie 1990 & Supp. 1996); LA. REV. STAT. ANN. § 14:403 (West 1986 & Supp. 1997); ME. REV. STAT. ANN. tit. 22, §§ 4001-4017 (West 1992 & Supp. 1996); MD. CODE ANN., FAM. LAW §§ 5-701 to -705 (1991 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 119, §§ 51a-51g (West 1993 & Supp. 1997); MICH. COMP. LAWS ANN. §§ 722.621-.636 (West 1993 & Supp. 1997); MINN. STAT. ANN. § 626.556 (1983); MISS. CODE ANN. §§ 43-21-353, 43-21-355, 43-23-9 (1993 & Supp. 1997); MO. ANN. STAT. §§ 210.110 to -.167 (West 1996); MONT. CODE ANN. §§ 41-3-101 to -208 (1995); NEB. REV. STAT. §§ 28-711 to -717 (1995 & Supp. 1996); NEV. REV. STAT. ANN. §§ 432B.010 to -.320 (Michie 1991); N.H. REV. STAT. ANN. §§ 169-C:1 to -C:40 (1994 & Supp. 1996); N.J. STAT. ANN. §§ 9:6-8.8 to -.20 (West 1993); N.M. STAT. ANN. §§ 32A-4-1 to -22 (Michie 1995); N.Y. SOC. SERV. LAW §§ 411-420 (McKinney 1992 & Supp. 1997); N.C. GEN. STAT. §§ 7A-542 to -551 (1995); N.D. CENT. CODE §§ 50-25.1-01 to -14 (1989 & Supp. 1997); OHIO REV. CODE ANN. § 2151.421 (Banks-Baldwin 1993 & Supp. 1997); OKLA. STAT. ANN. tit. 21, §§ 845-848 (West 1983); OR. REV. STAT. §§ 418.740-.775 (1987); PA. STAT. ANN. tit. 23, §§ 6301-6319 (West Supp. 1991); R.I. GEN. LAWS §§ 40-11-1 to -16 (1990 & Supp. 1996); S.C. CODE ANN. §§ 20-7-480 to -560 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 26-8A-1 to -16 (Michie 1992 & Supp. 1997); TENN. CODE ANN. §§ 37-1-401 to -414 (1996); TEX. FAM. CODE ANN. §§ 261.101 to -.109 (West 1996); UTAH CODE ANN. §§ 62A-4a-401 to -412 (1997); VT. STAT. ANN. tit. 33, §§ 4911-4920 (1991 & Supp. 1997); VA. CODE ANN. §§ 63.1-248.3 to -248.17 (Michie 1995 & Supp. 1997); WASH. REV. CODE ANN. §§ 26.44.010-.080 (West 1997); W. VA. CODE §§ 49-6A-1 to -8 (1996);

states' laws, substantial uniformity in format and in overall effect now exists due at least in part to CAPTA's passage. In general, most reporting statutes include a purpose clause;<sup>64</sup> a definition of child abuse;<sup>65</sup> an indication of who must or may report under the statute;<sup>66</sup> a description of how, when, and to whom one should report;<sup>67</sup> an immunity provision;<sup>68</sup> abrogation of certain privileged communications, such as wife/husband and doctor/patient;<sup>69</sup> and a penalty provision for failure to report. Other portions of state juvenile

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WIS. STAT. ANN. § 48.981 (West 1997); WYO. STAT. ANN. §§ 14-3-201 to -210 (Michie 1997); 19 GUAM CODE ANN. §§ 13202-13212 (1995); P.R. LAWS ANN. tit. 8, §§ 401-437 (1996); V.I. CODE ANN. tit. 5, §§ 2532-2540 (Supp. 1997).

64. For example, the Tennessee code provides as follows:

The purpose of this part is to protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect by requiring reporting of suspected cases by any person having cause to believe that such case exists. It is intended that, as a result of such reports, the protective services of the state shall be brought to bear on the situation to prevent further abuses, to safeguard and enhance the welfare of children, and to preserve family life. This part shall be administered and interpreted to provide the greatest possible protection as promptly as possible for children.

TENN. CODE ANN. § 37-1-402(a) (1996). By way of contrast, the New Jersey statute states simply that its purpose is "to provide for the protection of children . . . who have had serious injury inflicted upon them by other than accidental means." N.J. STAT. ANN. §§ 9:6-8.8 (West 1993).

65. For example, Tennessee defines abuse as "a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian or caretaker." TENN. CODE ANN. § 37-1-102(b) (1996).

66. In Tennessee, for example, "[a]ny person having knowledge of or called upon to render aid to any child who is suffering from [any injury] which is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect" must report. *See id.* § 37-1-403(a). In other states, healthcare workers and any other professionals who routinely come in contact with children in the course of their profession are required to report, while all other people may report. *See, for example, MO. REV. STAT. §§ 210.115 (1986), which imposes certain duties upon:*

any physician, medical examiner, coroner, dentist, chiropractor, optometrist, podiatrist, resident, interu, nurse, hospital or clinic personnel that are engaged in the examination, care, treatment, or research of persons, and any other health practioner, psychologist, mental health professional, social worker, day care center worker or other child care worker, juvenile officer, probation or parole officer, toacher, principal, or other school official, or other person with responsibility for the care of children [who] has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect or observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect . . . .

67. *See infra* Part III.B (outlining stato reporting procedures).

68. *See infra* Part III.A.2 and III.A.3 (discussing state approaches to innmunity for reporters of suspected child abuse).

69. Tennessee's law statos that husband/wife, psychiatrist/patient, and psychologist/patient privileges are inapplicable in child abuse cases. *See TENN. CODE ANN. § 37-1-411 (1996).* *See also* FLA. STAT. ANN. § 415.512 (West Supp. 1997) (abrogating privileges except as between attorney and client). Some states abrogate even the attorney/client privilege. *See Fraser, supra* note 54, at 655 & n.163 (identifying Illinois, Kansas, Montana, New Mexico, and Oklahoma as abrogating all privileged communications in cases of child abuse).

codes deal with the responsibility of CPS agencies to respond to reports and provide for the welfare of the children and the families involved.<sup>70</sup>

The growing number of cases in which reporters are sued for allegedly erroneous reports can perhaps serve as testimony to the efficacy of reporting statutes. Unfortunately, such cases also substantiate potential reporters' reasons for not reporting. Though courts thus far have granted or upheld summary judgment for defendant reporters in nearly every case to reach the appellate level, it remains to be seen whether this trend will continue.<sup>71</sup>

## 2. Interpretations of Good Faith Immunity

The original CAPTA required that states have immunity provisions for reporters.<sup>72</sup> Although the federal statute did not require a specific degree of immunity, the vast majority of states have implemented immunity provisions for "good faith" reporting, with a small minority choosing to provide "absolute" immunity.<sup>73</sup>

Commentators have claimed that immunity provisions are "cosmetic," because to sue successfully, a plaintiff would always have to show that a mandatory reporter acted with a malicious purpose: "To successfully block a suit such as this, it would only be necessary to show that the reporter reported in good faith."<sup>74</sup> The same commentators assert that, even if only cosmetic, the provisions serve the valuable purpose of reassuring those who are required to report but may be afraid to report.<sup>75</sup>

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70. See, e.g., TENN. CODE ANN. §§ 37-5-101 to -406 (1996 & Supp. 1997) (covering the creation, purpose, and powers of the Tennessee Department of Children's Services).

71. See *infra* Part V (discussing a policy shift which may result in increased liability for reporters).

72. CAPTA mandated "provisions for immunity for persons reporting instances of child abuse and neglect from prosecution, under any state or local law, arising out of such reporting [and to] provide for the reporting of known or suspected instances of child abuse and neglect." Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 4(b)(1)(A)-(B), 88 Stat. 4, 6 (current version at 42 U.S.C. § 5106a(b)(1)(A)-(B) (1994)).

73. Every state except California, Alabama, Ohio, and possibly New Jersey, which provide "absolute immunity," has chosen to implement "good faith" reporting immunity provisions. See *infra* Part III.A.3 (discussing the grant of absolute immunity to reporters of suspected child abuse, regardless of the reporter's good faith).

74. Fraser, *supra* note 54, at 664. See also Paulsen, *supra* note 19, at 31 (noting that "[i]t is ironic that legal immunity, a factor so important in the discussions about the need for child abuse reporting legislation[,] is probably unnecessary [and that no] liability, in fact, [exists] for good faith reporting of the sort which the reporting laws now mandate or permit").

75. See Fraser, *supra* note 54, at 664 (asserting that immunity provisions do reassure those with a mandatory obligation to report).

In practice, however, the effect of the provisions has been more than cosmetic. If the immunity provisions were not in place, it is fairly clear that liability would be imposed in some cases for negligent reporting, and more cases would actually go to trial for a factual determination of whether the reporter had acted in good faith. Moreover, courts would likely feel compelled to countenance charges such as those brought in the case of Gregory Bryant-Bruce, in which the plaintiffs brought several claims.<sup>76</sup> Thus, the primary effect of immunity provisions, whether "good faith" or "absolute," is probably to justify disposition of cases on summary judgment. Notably, courts have interpreted the "good faith" statutes to afford immunity for negligent reporting,<sup>77</sup> whereas courts would most likely *not* uniformly accord such immunity in the absence of an immunity provision.<sup>78</sup>

The language in the various opinions considering the issue of good faith immunity also suggests that the provisions are not merely cosmetic. Courts have relied heavily on the wording of statutes and on the legislative purpose behind the statutes to support granting summary judgments. For example, in *Maples v. Siddiqui*,<sup>79</sup> the defendant physician diagnosed a child as suffering from failure to thrive syndrome, attributable to poor parenting skills.<sup>80</sup> The physician's report and subsequent testimony that she had eliminated all physiological explanations for the child's condition resulted in the placement of the child in temporary foster care.<sup>81</sup> Two months later,

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76. See *Bryant-Bruce v. Vanderbilt Hosp., Inc.*, No. 3-96-0153, 1997 WL 440962, at \*4 (M.D. Tenn. July 3, 1997) (dismissing plaintiff's claims of a violation of constitutional rights, negligence, malicious prosecution, abuse of legal process, invasion of privacy, false imprisonment, defamation of character, and loss of consortium). See also Dowding, *supra* note 3, at 379-80 (suggesting that without statutory immunity, reporters might be subject to charges of malicious prosecution, intentional infliction of emotional distress, defamation, false light invasion of privacy, and negligence).

77. See, e.g., *Michaels v. Gordon*, 439 S.E.2d 722, 725 (Ga. Ct. App. 1993) (granting summary judgment in favor of defendant psychologist on the basis that "proof of mere negligence or bad judgment is not proof [of bad faith]"); *D.L.C. v. Walsh*, 908 S.W.2d 791, 799-801 (Mo. Ct. App. 1995) (granting summary judgment for defendant doctors under Kansas law on the basis that the Kansas immunity statute provided immunity for negligent misdiagnosis of suspected child abuse).

78. Some cases suggest that, in the absence of an immunity provision, parents injured by erroneous reports of abuse might prevail against reporting doctors on malpractice claims. Compare *Bird v. W.C.W.*, 868 S.W.2d 767, 772 (Tex. 1994) (holding no liability because the defendant mental health professional owed no duty to parent not to negligently misdiagnose child's condition), with *Montoya v. Bebensee*, 761 P.2d 285, 289 (Colo. Ct. App. 1988) (finding that a "mental health care provider owes a duty to any person . . . who is the subject of any public report," but finding no liability because the statute provided immunity for negligence).

79. 450 N.W.2d 529 (Iowa 1990).

80. See *id.* at 529.

81. See *id.*

the child was diagnosed with malabsorption syndrome, which accounted for his failure to thrive.<sup>82</sup> The parents sued the reporting doctor for malpractice, alleging damages for loss of companionship.<sup>83</sup> The Iowa Supreme Court upheld the district court's grant of summary judgment, finding that courts must assume that legislative grants of immunity are intended to extend to situations where liability would otherwise exist for negligent acts or some other breach of legal duty.<sup>84</sup> The court stressed that holding otherwise would thwart Iowa's immunity statute, the purpose of which is to encourage those who "suspect child abuse to freely report it to authorities without fear of reprisal if their factual information proves to be faulty."<sup>85</sup>

Similarly, courts have relied on "objective" or "subjective" interpretations of good faith in order to further the perceived legislative purpose when upholding summary judgments. In *F.A. v. W.J.F.*,<sup>86</sup> a New Jersey appellate court reversed the trial court's denial of summary judgment in a case against reporters where the plaintiff alleged malice on the part of the reporters. To justify its holding, the court quoted New Jersey's purpose clause and concluded that the legislative purpose of encouraging reporting would be too easily frustrated if reporters were repeatedly subject to "costly and protracted civil litigation."<sup>87</sup> To further the statute's purpose, the court concluded that an objective test should be used to decide whether a report was made pursuant to the statute, and to facilitate "speedy determination by way of summary judgment."<sup>88</sup> Because deposition testimony and the findings of the New Jersey CPS agency showed that the defendants had "reasonable cause" to believe abuse occurred, the court required no factual inquiry into the defendants' motives for reporting.<sup>89</sup>

Another court has applied a "subjective test" to determine that a factual inquiry into the reasonableness of the defendants' action was not required in order to achieve the same outcome: summary judg-

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82. *See id.* at 530.

83. *See id.*

84. *See id.* at 530-31.

85. *Id.* at 530. *See also* *D.L.C. v. Walsh*, 908 S.W.2d 791, 798-99 (Mo. Ct. App. 1995) (citing the purpose clause of the Kansas reporting statute in support of an affirmation of summary judgment for defendant doctors). The *Walsh* court stated that: "To hold otherwise would discourage individuals from reporting suspected child abuse [which was the purpose of the reporting requirement]." *Id.* at 799.

86. 656 A.2d 43, 49 (N.J. Super. Ct. App. Div. 1995).

87. *Id.* at 46-47.

88. *Id.* at 47.

89. *See id.* at 49 (concluding that a factual inquiry into the reasonableness of the defendant's actions was not required by the objective good faith standard applied by the court).

ment in favor of defendants.<sup>90</sup> In that case, plaintiffs argued that an objective assessment of the defendants' conduct raised a question of material fact as to the reasonableness of their actions, and, thus, summary judgment should not have been granted.<sup>91</sup> The reviewing court disagreed, finding that a subjective standard applied: "Reasonableness and the objective (reasonable person) standard are the hallmarks of negligence. Because immunity under [our reporting statute] extends to negligent acts, reasonableness and the objective standard play no part in determining good faith."<sup>92</sup> The defendants' subjective good faith was uncontroverted, so summary judgment in their favor was affirmed.<sup>93</sup>

A number of statutes include a "presumption" of good faith in their immunity statutes,<sup>94</sup> and courts have upheld summary judgments on the basis that such presumptions are indicative of legislative intent to protect reporters' immunity.<sup>95</sup> On the other hand, immunity is rarely denied merely because the statute did not provide for a "presumption" of good faith.<sup>96</sup>

Ultimately, regardless of how courts have interpreted good faith, they have generally found defendants' behavior to fall within the necessary parameters, and they have almost unanimously relied on expressions of legislative purpose to support grants of summary

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90. See *Garvis v. Scholten*, 492 N.W.2d 402, 404 (Iowa 1992) (stating that the defendant's good faith went unchallenged).

91. See *id.* at 403-04.

92. *Id.* at 404.

93. See *id.*

94. At least 17 state statutes provide for a presumption of good faith, including Arkansas, Colorado, Florida, Illinois, Indiana, Maine, Michigan, Mississippi, Montana, New Mexico, New York, North Dakota, Pennsylvania, South Carolina, Tennessee, Wisconsin, and Wyoming. See *supra* note 63 (providing citations to individual state's reporting statutes).

95. See, e.g., *Evans v. Torres*, No. 94-C-1078 1995 U.S. Dist. LEXIS 19472, at \*8 (N.D. Ill. Dec. 27, 1995) (noting Illinois's strong interest in "promoting the welfare of children"), *claim dismissed*, *Evans v. Torres*, No. 94-C-1078 1997 U.S. Dist. LEXIS 14290, at \*1 (N.D. Ill. Sept. 17, 1997); *Young v. Arkansas Children's Hosp.*, 721 F. Supp. 197, 200 (E.D. Ark. 1989) (stating that the Eighth Circuit Court of Appeals has concluded that the "liberty interest in familial relations is limited by the compelling government interest" in protecting children against abuse); *Thomas v. Beth Israel Hosp., Inc.*, 710 F. Supp. 935, 941 (S.D.N.Y. 1985) (discussing New York's protection of reporting physicians through its immunity provision); *Lehman v. Stephens*, 499 N.E.2d 103, 109-110 (Ill. Ct. App. 1986) (recognizing an important state interest in curtailing child abuse); *Warner v. Mitts*, 536 N.W.2d 564, 566 (Mich. Ct. App. 1995) (stating that the purpose of immunity is to facilitate the reporting of suspected child abuse), *appeal denied*, 546 N.W.2d 264, 264 (Mich. 1996).

96. See, e.g., *Freed v. Worcester County Dep't of Soc. Serv.*, 518 A.2d 159, 163 n.12 (Md. Ct. Spec. App. 1986) (stating that although "presumption" is not part of statutory language, there is still a presumption of good faith, because plaintiff has burden of proving bad faith). *But see Hope v. Landau*, 500 N.E.2d 809, 810 n.3 (Mass. 1986) (observing that the reporting statute "provides immunity only for good faith action, which, contrary to the Appeals Court, we believe should not be presumed in favor of defendants [who were not required to report]").

judgment in favor of defendant reporters. Courts in only a few states have gone farther and found statutory justification for granting absolute immunity to reporters.

### 3. States Guaranteeing Absolute Immunity

Alabama, California, Ohio, and possibly New Jersey extend immunity to reporters who are alleged to have knowingly made false reports, or otherwise reported with malicious intent.<sup>97</sup> These states offer "absolute" immunity rather than just good faith immunity. Absolute immunity practically assures summary judgments in favor of doctors and other professional reporters, and theoretically creates a disincentive to plaintiffs from filing suits against reporters. In theory, absolute immunity renders reporting less burdensome and thus encourages reporting better than good faith immunity does.

In reality, the effect of absolute immunity is distressingly slight. California and Alabama distinguish between mandatory and voluntary reporters, according the latter only good faith immunity. For example, in California, only child care custodians, health practitioners, employees of CPS agencies, and commercial film and photographic print processors have absolute immunity as mandatory reporters under the statute.<sup>98</sup> All other people *may* report but are not required to report.<sup>99</sup> The assumption that professionals are unlikely to indulge in "bad faith" reporting supports according them absolute immunity.<sup>100</sup> However, absolute immunity, precisely because it tends

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97. See *Harris v. City of Montgomery*, 435 So. 2d 1207, 1212 (Ala. 1983) (stating that the defendants were made absolutely immune by statute). See also *Brown v. Pound*, 585 So. 2d 885, 887 (Ala. 1991) (reaffirming the *Harris* decision and finding that the Alabama code provides absolute immunity for reporting suspected child abuse, except as to claims alleging damage not related to the reporting of suspected abuse); *Krikorian v. Barry*, 196 Cal. App. 3d 1211, 1218-19 (1987) (providing absolute immunity even for maliciously or knowingly false reports); *Storch v. Silverman*, 186 Cal. App. 3d 671, 678 (1986) (accordng absolute immunity to reporters of child abuse); *F.A. v. W.J.F.*, 656 A.2d 43, 47 (N.J. Super. Ct. App. Div. 1995) (construing the immunity statute "liberally," applying an "objective" test, and focusing on whether a reasonable basis for reporting existed, and encouraging trial courts to use summary judgement procedures); *Cudlin v. Cudlin*, 580 N.E.2d 1170, 1172 (Ohio Ct. App. 1990) (providing absolute immunity for voluntary reporters); *Criswell v. Brentwood Hosp.*, 551 N.E.2d 1315, 1317 (Ohio Ct. App. 1989) (finding that the reporting statute represented a policy decision by the Ohio legislature that the "societal benefits arising from encouraging the reporting and prosecution of child abuse by granting immunity outweigh any individual harm which might arise from false reports").

98. See CAL. PENAL CODE § 11166 (West 1992).

99. See *id.*

100. See *Storch*, 186 Cal. App. 3d at 679-80 (discussing the benefits of absolute immunity).

The *Storch* court stated:

The cost of legal representation to defend, and the human toll in time wasted and anxiety suffered, are sufficient to deter many potential reporters. Since there exist numerous legal and personal impediments to reporting to the detriment of an abused

to protect professionals unlikely to engage in bad faith or malicious reporting, may not offer any substantive protection greater than that afforded by good faith immunity: Reporters can still be sued and generally must still defend against that suit at least to the summary judgment stage. Nonetheless, absolute immunity does perform three important functions: (1) deterring litigation, (2) insuring that most suits that are filed will be dismissed on summary judgment, and (3) reassuring reporters that they will not incur liability.

The absolute immunity standard does leave open one loophole for plaintiffs to sue reporters: Absolute immunity depends on an objective assessment of a reporter's action rather than a subjective one. Theoretically, then, if a mandatory reporter could not show he or she had "reasonable cause" for reporting a suspicion of child abuse, absolute immunity would not attach because the report would not have satisfied statutory guidelines.<sup>101</sup> Practically speaking, however, no cases in absolute immunity jurisdictions have turned on this point.<sup>102</sup>

States providing absolute immunity, like those providing good faith immunity, do so to protect children by encouraging people to report known or suspected child abuse. Nonetheless, reporters in absolute immunity jurisdictions, like those in good faith jurisdictions, remain subject to lawsuits that cost time and money whether or not reporters win on summary judgment.<sup>103</sup>

#### B. "The System": What Happens after a Report Is Made?

Pursuant to CAPTA's requirements, each state operates some form of Child Protective Services agency to receive and respond to reports of suspected child abuse.<sup>104</sup> In Tennessee for example, people may report to the appropriate juvenile judge, to the sheriff's office or the local law enforcement office, or to the local office of the

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child, it is reasonable to eliminate the limitations on civil and criminal immunity for *objective non-biased professionals*.

*Id.* (emphasis added).

101. See, e.g., *F.A.*, 656 A.2d at 47 (applying an "objective" test).

102. The California statute, however, explicitly provides that "reasonable suspicion" means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in like position . . . to suspect child abuse." CAL. PENAL CODE § 11166(a) (West Supp. 1997).

103. At least one other commentator has argued that even absolute immunity is insufficient to protect reporters for this reason. See Dowding, *supra* note 3, at 389-90 (noting that reporters still lose money and time even if suits are dismissed).

104. See Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 4(b)(2)(C)-(D), 88 Stat. 4, 6 (codified as amended at 42 U.S.C. § 5106a(2)-(3) (1994)).

Department of Children's Services.<sup>105</sup> If a judge or law enforcement agent receives a report, he or she must immediately transfer the information to the Department of Children's Services.<sup>106</sup>

The CPS agency's responsibility thus begins with receiving reports of suspected abuse or neglect. In theory, the agency must investigate every report. In reality, CPS workers perform "triage"—generally allocating available resources to investigate the serious allegations and using their discretion to dismiss vague or trivial-sounding reports.<sup>107</sup> Because of reasonable assumptions regarding a physician's expertise in identifying the cause of an injury and a physician's objectivity with regard to the possible perpetrator,<sup>108</sup> CPS workers are likely to take a physician's report seriously and rely on it heavily in a petition for emergency custody. For example, in the case of Gregory Bryant-Bruce, CPS's reliance on the Vanderbilt physician's diagnosis led the agency to seek emergency custody of Gregory before conducting any additional investigation.<sup>109</sup>

In general, following a call, CPS will "promptly" investigate and determine whether there is reasonable or probable cause to believe the child has been abused or neglected.<sup>110</sup> If the investigation reveals maltreatment, the agency's job is to work with parents to correct their behavior and improve their parenting skills.<sup>111</sup> If the maltreatment is severe or the parents will not voluntarily correct the problem, CPS may petition the court for custody of their child. This step may have the intended effect of forcing parents to comply for fear of losing custody of the child.<sup>112</sup> Generally, law enforcement agents and the criminal justice system become involved only in cases of death, serious injury, or sexual abuse. For the most part, the trend

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105. TENN. CODE ANN. § 37-1-403(a) (1996).

106. *See id.* § 37-1-403(d).

107. Telephone Interview with Susan Orr, Court Appointed Special Advocates social worker, Davidson County Juvenile Justice Center (February 21, 1997).

108. Other reporters may be suspected of harboring other motives, however, particularly in the context of divorce and disputed custody.

109. *See Bryant-Bruce v. Vanderbilt Hosp., Inc.*, No. 3-96-0153, 1997 WL 440962, at \*3, \*5 (M.D. Tenn. July 3, 1997) (discussing actions taken by CPS based on a report made by a physician).

110. *See* TENN. CODE ANN. § 37-1-406(a) (1996).

111. Theoretically, an "array of public and private resources may be available to the child protective unit. In many instances, a local multidisciplinary team may be used[,] . . . typically made up of physicians, mental health experts, social workers or caseworkers, nurses, attorneys, and law enforcement personnel." 2 KRAMER, *supra* note 3, § 16.18, at 74. The services made available by treatment agencies may include "home-based services," which may include sending someone to teach parents basic home-making and child-rearing skills, counseling services, and emergency day care. *See id.*

112. *See id.* at 73 (explaining that a petition to a court may force parents to take remedial steps).

has been to de-criminalize child abuse proceedings, under the theory that criminal intent is generally lacking<sup>113</sup> and that prosecution does not help the situation.<sup>114</sup> The child protective agencies' goals, as articulated in legislative purpose clauses, of protecting children first and preserving families whenever possible may justify this trend. Removing children from homes should be considered a last resort. After removal, the agency's goal is to reunite the children with their families as soon as it becomes feasible.<sup>115</sup>

Since the inception of CPS agencies, the agencies have faced criticism for, among other things, inadequate staff training, intervening too late, intervening unnecessarily, failing to investigate properly, lack of coordination among various facets of the child protective "team," bad budgeting, and providing insufficient treatment programs.<sup>116</sup> Also since their inception, the agencies have suffered from inadequate funding which has contributed in large part to the problems for which they have been criticized.<sup>117</sup> In addition to the lambasting they suffer, CPS agents and agencies may face lawsuits charging negligent failure to investigate a report,<sup>118</sup> and, increasingly, negligent investigation of allegedly erroneous reports.<sup>119</sup> Courts

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113. See Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 448, 458 (1978) (stating that the purpose of reporting laws is to foster the protection of children and not to "punish those who mistreat them").

114. See Daly, *supra* note 42, at 297-98 (stating that the decline in criminal prosecutions may be due to the desire to keep families together, as well as the fact that criminal convictions for child abuse are difficult to obtain).

115. See 2 KRAMER, *supra* note 3, § 16.18, at 73.

116. See Fraser, *supra* note 54, at 668 (listing various criticisms of CPS agencies).

117. See Paulsen, *supra* note 19, at 49 ("Without adequate resources to back up a reporting plan the entire effort is an exercise in futility.").

118. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1988), the Supreme Court held that a CPS agency's failure to prevent the permanent impairment of a child by abuse did not violate the constitutional rights of that child, because the Due Process Clause confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interest of which the government itself may not deprive the individual." However, courts have allowed for the possibility, post-*DeShaney*, of negligence causes of action under state law. See, e.g., *Brodie v. Summit County Children Servs. Bd.*, 554 N.E.2d 1301, 1308-09 (Ohio 1990) (holding that the immunity provided social workers by the child abuse reporting statute did not control plaintiff's claim under 42 U.S.C. § 1983 (1994) based on negligence and misfeasance). See generally Laura Huber Martin, Comment, *Caseworker Liability for the Negligent Handling of Child Abuse Reports*, 60 U. CIN. L. REV. 191 (1991) (discussing the relationship between case worker tort liability and the various immunity doctrines).

119. See, for example, *B.W. v. Meade County*, 534 N.W.2d 595, 597-98 (S.D. 1995), which held that a good faith, albeit negligent, failure to further investigate an allegation of abuse would not pierce the statutory grant of immunity. Though not many of them succeed, the number of § 1983 actions brought against social workers for negligent interference with a parent's fundamental interest in directing the upbringing of a child is growing. See, e.g., *Oldfield v. Benavidez*, 867 P.2d 1167, 1172-73 (N.M. 1994) (holding that the constitutionally

resolve most cases against social workers for negligent investigation at the summary judgment stage, but, as is true for reporters, these lawsuits cost agencies time and money, even though the social workers usually win.

Arguably, much of the "negligence" which gives rise to lawsuits against CPS agencies is caused at some level by insufficient funds, and defending these suits causes a tremendous drain on already scarce resources. As noted above, the lack of resources probably results in an inflated number of reports ultimately determined to be "unsubstantiated": If a social worker must decide on the basis of a brief phone call or fifteen minute visit whether a report is true, the margin for error is bound to be fairly high. Unfortunately, both social workers and reporters may become increasingly vulnerable to lawsuits and liability in the wake of the CAPTA Amendments.

#### IV. CHILD ABUSE PREVENTION AND TREATMENT ACT AMENDMENTS OF 1996

Recent legislative efforts have focused extensively on issues regarding children and families in general.<sup>120</sup> Rather than following a coherent pattern of advancing children's interests, however, the various proposed bills reflect legislators' profound ambivalence about whether providing for or protecting children's welfare should be part of the legislators' job.<sup>121</sup> The overall trend at the federal level has

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protected interest in family relations is limited by a compelling government interest in protecting minor children).

120. A total of 437 bills and resolutions were referred to the House Committee on Economic and Educational Opportunities during the 104th Congress, resulting in 28 public laws. According to the Committee's conference report:

With Republicans given the opportunity to lead the House of Representatives and, as such the Committee on Economic and Educational Opportunities, for the first time in 40 years, the Members of the Committee began the process of reforming the maze of hundreds of programs and laws that are well intentioned, but often ineffective in truly helping improve education for children and youth, human services for disadvantaged citizens, and the workplace for employees and employers.

H.R. REP. NO. 104-875, at 1 (1997). The CAPTA Amendments passed through this Committee. For examples of other bills addressing children and family issues that also passed through the Committee, see Family Reinforcement Act, H.R. 11, 104th Cong. (1995); Child Support Responsibility Act of 1995, H.R. 785, 104th Cong.; Family Planning Amendments Act of 1995, H.R. 833, 104th Cong.; Comprehensive Early Childhood Education Act of 1995, H.R. 968, 104th Cong.; Teen Pregnancy Prevention and Parental Responsibility Act of 1995, H.R. 1115, 104th Cong.; Family Privacy Protection Act of 1995, H.R. 1271, 104th Cong.

121. Compare Back to Basics Education Reform Act, H.R. 1883, 104th Cong. (1995) (stating that the bill's purpose was to "strengthen parental, local, and State control of education in the United States by eliminating the Department of Education and redefining the Federal role in education"), with the Comprehensive Early Childhood Education Act of 1995, H.R. 968, 104th

been to pay lip-service to protecting children's interests, while shifting the responsibility for doing so further from the Federal government, thus strengthening the role of parents and state governments.

One example of such legislation is the proposed Parental Rights and Responsibilities Act of 1995 ("PRRA"), introduced in Congress in June of 1995.<sup>122</sup> While it protects parental rights, the PRRA purports to exempt from its scope situations involving traditional understandings of abuse or neglect and cases concerning custody or other disputes among parents.<sup>123</sup> Nonetheless, it would apparently create a federal cause of action against social workers who "negligently" or without meeting the necessary burden of proof, interfere with a parent's "right to direct the upbringing" of the child. Coupled with the fee-shifting provision,<sup>124</sup> the PRRA would create a new disincentive for CPS agents to investigate reports, or, if they do

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Cong. (stating that the bill was intended to "establish comprehensive early childhood education programs, early childhood education staff development programs, [and] model Federal Government early childhood education programs").

122. Parental Rights and Responsibilities Act of 1995, H.R. 1946, 104th Cong.; S. 984, 104th Cong. This bill was introduced in the House on June 28, 1995. See 141 CONG. REC. H6481 (daily ed. June 28, 1995) (noting the introduction of the bill, as well as the bill's House sponsors). It was introduced in the Senate on June 29, 1995. See 141 CONG. REC. S9421 (daily ed. June 29, 1995) (noting the introduction of, and the Senate sponsors of, the bill). The bill's sponsors in the House and Senate were predominantly Republicans, totaling 131 of 139 co-sponsors in the House, and 15 of 15 co-sponsors in the Senate.

The first, and presumably primary, "finding" of the bill states that: "Congress finds that (1) the Supreme Court has regarded the right of parents to direct the upbringing of their children as a fundamental right implicit in the concept of ordered liberty within the 14th Amendment to the Constitution." H.R. 1946, § 2(a)(1). The purpose of the bill is thus "to protect the right of parents to direct the upbringing of their children as a fundamental right." H.R. 1946, § 2(b)(1). The sponsors' perception that this fundamental right needs protection derives from their finding that "some decisions of Federal and State courts have treated the right of parents not as a fundamental right but as a nonfundamental right," H.R. 1946, § 2(a)(4), and that "parents face increasing intrusions into their legitimate decisions and prerogatives by government agencies in situations that do not involve traditional understandings of abuse or neglect but simply are a conflict of parenting philosophies." H.R. 1946, § 2(a)(5). To effectuate this purpose, the bill would prohibit any government official from "interfer[ing] with or usurp[ing] the right of a parent to direct the upbringing of the child." H.R. 1946, § 4. No exception to this prohibition would be made unless the state actor can prove that the "interference or usurpation is essential to accomplish a compelling governmental interest and is narrowly drawn or applied in a manner that is the least restrictive means of accomplishing the compelling interest." H.R. 1946, § 5. The bill creates a federal claim for any parent who believes he or she has been wrongfully deprived of the custody or control of his or her child. See H.R. 1946, § 6.

123. See H.R. 1946, § 4 (stating that the phrase "right of a parent to direct the upbringing of a child" shall not include a right of a parent to act . . . in a manner that constitutes abuse or neglect of a child as the terms have traditionally been defined"). See also H.R. 1946, § 7 (stating that the bill does not apply to "domestic relations cases concerning the appointment of parental rights between parents in custody disputes").

124. See H.R. 1946, § 8 (providing that attorney's fees and expert witness fees may be awarded pursuant to 42 U.S.C. § 1988(b)-(c) (1994)).

investigate, to react unless the indications of abuse are practically indisputable.<sup>125</sup>

The legislative history behind the CAPTA Amendments<sup>126</sup> suggests that many of the same forces were at work here. Congressional testimony points out that "child abuse and neglect is a tragedy of growing proportions,"<sup>127</sup> that over one million children were confirmed victims of abuse or neglect in 1994,<sup>128</sup> and that Department of Health and Human Services statistics indicate that nearly three million children overall, including those not investigated by CPS agencies, were actually abused or neglected in 1993.<sup>129</sup> Other testimony, however, and congressional reports presented by the bill's sponsors focused

125. See Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 397 (1996) (suggesting that the bill would also restrict intervention to cases involving "traditional definitions of abuse and neglect" and to cases involving medical decisions that would result in "danger to the child" or "serious physical injury to the child").

Most of the text of the PRRA was taken from THE CHRISTIAN COALITION, A CONTRACT WITH THE AMERICAN FAMILY: A BOLD PLAN BY THE CHRISTIAN COALITION TO STRENGTHEN THE FAMILY AND RESTORE COMMON-SENSE VALUES 1 (1995). See Woodhouse, *supra*, at 398. Professor Woodhouse's article provides a comprehensive overview of the political context which produced the bill.

Critics of liberal social programs are concerned not only with protecting private rights to the control and education of children, but also with enforcing private responsibilities for the care and support of children. The House Bill presents the other side of the coin, the privatization of family supports that proposed welfare reforms and child support enforcement initiatives sought. See *id.* at 399. The bill originated with the Christian Coalition and has gained support in Congress, even from some Democrats and moderate Republicans. In fact, co-sponsors included Representative Bob Clement, a Democrat from Tennessee; Senator John Warner, a moderate Republican from Virginia; then-Senator Bob Dole, a Republican from Kansas; and Senator Bill Frist, a Republican from Tennessee. Search of LEXIS, Legis Library, bH104 File (Sept. 1, 1997).

The 104th Congress never voted on the bill, and the 105th Congress has not yet reported it from Committee during the first session. See *id.* Nonetheless, its supporters, including such groups as "Of the People," VOCAL (Victims of Child Abuse Laws), and the Heritage Foundation, have sponsored similar legislation at the state level. In Colorado, a Parents' Rights Amendment to the state Constitution was narrowly defeated in a statewide referendum in November 1996, and similar bills are being proposed in state legislatures around the country. According to David E. Rovella, *Colorado Child Abuse Trojan Horse Feared*, THE NAT'L L.J., Nov. 4, 1996, at A6, the Colorado initiative was the first one brought by Of the People on a constitutional level. Supporters placed the proposal on the ballot after supporters obtained 83,000 signatures of registered voters, 28,000 more signatures than required. See *id.* The group has sponsored similar laws, which have either been rejected or are still pending, in at least 27 other states. See *id.* The South Carolina and Virginia legislatures are currently considering similar bills. See, e.g., H.R. 3168, 112th Sess. (S.C. 1997) (containing verbatim the text of the federal PRRA).

126. Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063 (to be codified at 42 U.S.C. §§ 5101-5106i).

127. *Improving the Well-Being of Abused and Neglected Children: Hearings Before the Senate Committee on Labor and Human Resources*, 104th Cong. (1995) (statement of Olivia A. Golden, Acting Assistant Secretary for Children and Families, U.S. Department of Health and Human Services), available in WESTLAW, USTESTIMONY Database.

128. This confirmed a 27% increase over the number found to be victims in 1990. See *id.*

129. *Id.*

extensively on the numbers of parents injured by “false” reports. Senator Dan Coats, one of the bill’s co-sponsors, acknowledged that one million reports of child abuse are substantiated each year, but emphasized the nearly two million “false or unsubstantiated reports . . . that are filed wrongfully and in some cases maliciously.”<sup>130</sup> According to Senator Coats, “[w]hat this means is that case workers, who are already overworked, are conducting [two] million investigations at some level, possibly resulting in inappropriate interventions—including removal of the children from their homes.”<sup>131</sup> Also according to Senator Coats, these investigations are unnecessary and prevent case workers from getting to those children who are truly in need of help.<sup>132</sup> To protect individuals from false reports, the CAPTA Amendments restrict the immunity provisions to good faith reports.<sup>133</sup> According to Senator Nancy Kassebaum, the other co-sponsor, the Amendments also place “a stronger emphasis on training of mandated reporters and case workers . . . by building in an assessment component in the reporting and investigation process.”<sup>134</sup>

Several problems exist with Senator Coats’s assessment. First, he fails to distinguish meaningfully between erroneous and unsubstantiated reports. Second, he seems to assume that any unsubstantiated report is “unnecessary,” which illustrates his conflation of unsubstantiated reports with those that are in fact erroneous. This conflation ignores the fact that reporting statutes deliberately place the degree of suspicion required for reporting at a very low level<sup>135</sup> to encourage reporting and protect as many children as possible.<sup>136</sup> Establishing a low level of suspicion necessarily assumes that enduring some erroneous reports is the price for detecting as much abuse as possible. Establishing a high standard of proof, on the other hand, ensures that some actual cases of abuse will ultimately be considered “unsubstantiated.” Third, he provides absolutely no support for his allegation that many reports are filed “maliciously”—in fact, malice is rarely alleged.<sup>137</sup> Fourth, Senator Coats omits the fact that nearly every state already has “good faith”

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130. 142 CONG. REC. S11581 (daily ed. Sept. 27, 1996) (statement of Sen. Coats).

131. *See id.*

132. *See* 141 CONG. REC. S8257 (daily ed. June 13, 1995) (statement of Sen. Coats).

133. *See* 142 CONG. REC. S11581 (daily ed. Sept. 27, 1996) (statement of Sen. Coats).

134. 141 CONG. REC. S8264 (daily ed. June 13, 1995) (statement of Sen. Kassebaum).

135. In Tennessee, the level is “reasonably indicates.” *See* TENN. CODE ANN. § 37-1-403(a) (1996).

136. *See supra* note 28 and accompanying text.

137. The same informal LEXIS survey cited in note 21 revealed a negligible number of cases in which a credible claim of malice was made.

immunity, which begs the question of what effect the CAPTA Amendments' new "good faith" immunity provision is intended to have outside of directly targeting the few states that provide absolute immunity.

Besides the "good faith" requirement and the new emphasis on assessment, the Amendments supposedly provide a stronger definition of abuse.<sup>138</sup> This requirement is meant to allow states to define abuse more broadly if they wish.<sup>139</sup>

While these changes may seem slight, they nonetheless reflect a significant shift in policy away from encouraging reporting, and away from providing broad immunity for reporters.

#### V. CAPTA'S PROBABLE CHILLING EFFECT ON CHILD ABUSE REPORTING: POLICY RETRENCHMENT ENCOURAGES STATES TO LOWER STANDARDS OF PROTECTION

Since states began enacting reporting laws in the early 1960s,<sup>140</sup> legislatures have continuously amended the provisions as experience reveals areas in need of repair.<sup>141</sup> Just as CAPTA had substantial impact on the evolution of state statutes, the CAPTA Amendments will likely determine the course of a new generation of state child protection laws. The legislative history of the Amendments articulates national policy to a large extent, and indicates how state legislatures and courts should interpret the

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138. The CAPTA Amendments urge states to define "abuse" to include "at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure which presents an imminent risk of serious harm." Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 110, 110 Stat. 3063, 3078 (to be codified at 42 U.S.C. § 5106(h)).

139. The change "follows from the committee's belief that Federal leadership to States must allow States the flexibility they need to protect children rather than perpetuate Federal micromanagement." S. REP. NO. 104-117, at 15 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3504.

140. Enacted in 1963, California's reporting law was the first. See Daly, *supra* note 42, at 303.

141. See Fraser, *supra* note 54, at 650 (discussing the evolution of state reporting statutes). In 1978, Fraser identified three distinct generations of reporting laws, with each generation responding to perceived failings of the prior generation. See *id.* Fraser considered the first generation to focus simply on identification of cases of suspected abuse, and the second generation to focus on identification and investigation. See *id.* The third generation focused on identification and investigation and began to address "the complex issues of intervention [including] the issues of limited resources, limited expertise, lack of coordination, a need to involve the general public as well as the professionals, and the need to establish a planning component." *Id.* (citations omitted). Considering that 19 years have passed since this article was published, current laws are probably in a fourth or fifth generation. The CAPTA Amendments will surely engender yet another generation.

Amendments. Thus, the policy shift at the national level will likely have a reverberating effect in state legislatures.

At least some of the policy shift regarding child protection statutes stems from a legitimate concern that CPS agencies are physically incapable of responding effectively to all reports of suspected maltreatment.<sup>142</sup> Criticisms of this aspect of the system have been voiced almost since the enactment of the first reporting statutes.<sup>143</sup> Adequate funding for community-based prevention programs, better training of CPS staff, and differential methods of treating substantiated abuse or neglect could remedy these problems at least in part.<sup>144</sup> Unfortunately, adequate funding is the key to making those improvements, but is not likely to be forthcoming from either the federal or state governments, and is specifically *not* guaranteed by the Amendments.<sup>145</sup> More troubling, however, is the shift in focus. Besides targeting CPS agencies for responding inadequately, the Amendments also target reporting and reporters as part of the problem. The shift is most plainly visible in the provisions directing that research be carried out "to obtain standardized data on false, unfounded, unsubstantiated, and substantiated reports,"<sup>146</sup> on "causes, prevention, [and] assessment" of child abuse and neglect,<sup>147</sup> and on "the extent to which the lack of adequate resources and the lack of adequate training of individuals required by law to report . . . have contributed to the inability of a State to respond effectively to serious cases of child abuse and neglect."<sup>148</sup>

#### A. "Good Faith" Immunity

The assumption underlying the "good faith" language in the CAPTA Amendments is that *too much* reporting is occurring. This

142. See 142 Cong. Rec. S11581 (daily ed. Sept. 27, 1996) (remarks of Sen. Coats) (expressing a concern regarding overworked caseworkers).

143. See, e.g., Fraser, *supra* note 54, at 668 (referring to criticisms mentioned and citing articles dating from the early 1970s voicing similar concerns).

144. See *Child Welfare: Where Should Our Priorities Be? Hearings Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Economic and Educational Opportunities*, 104th Cong. (1995) (testimony of Anne Cohn Donnelly, Executive Director, National Committee on the Prevention of Child Abuse), available in WESTLAW, USTESTIMONY Database (making the case for prevention).

145. See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 100(6), 110 Stat. 3063, 3064 (to be codified at 42 U.S.C. § 5101) (deleting the phrase "ensure that every community in the United States has" and inserting the phrase "assist States and communities with.>").

146. *Id.* § 104(3)(D)(i), 110 Stat. at 3066 (to be codified at 42 U.S.C. § 5104(c)(1)(C)(i)).

147. *Id.* § 105(a)(1)(D), 110 Stat. at 3067 (to be codified at 42 U.S.C. § 5105(a)(1)(D)).

148. *Id.* § 105(a)(1)(E)(v), 110 Stat. at 3068 (to be codified at 42 U.S.C. § 5105(a)(1)(E)(v)).

assumption signals a significant policy shift. Moreover, as discussed above, the vast majority of states already provide only good faith immunity, thus begging the question of why the addition of good faith language is considered so crucial. In part, the change is probably attributable to a congressional effort to placate parents' rights groups.<sup>149</sup> Senator Coats's statements also suggest that the "good faith" language specifically addresses California, the only state to have actually been confronted with cases involving probable malice. Senator Coats de-emphasizes the fact that of the two-thirds of the reports that are "unsubstantiated," only a very small percentage of these are actually found to be false, and an even smaller number are found to be knowingly false or malicious.<sup>150</sup> He also neglects to acknowledge that subsequent reports ultimately substantiate a significant percentage of these unsubstantiated reports, and that even in "unsubstantiated" cases, there is often evidence that abuse did occur.<sup>151</sup>

To date, policy and presumptions of good faith have encouraged reporting and justified disposition of claims against reporters at the summary judgment stage. Courts have tended to justify the disposition of claims on public policy grounds which the legislative pronouncements manifest. The new language in CAPTA is likely to persuade state courts that they have been providing *too much* immunity for doctors and other reporters. Possible consequences include taking away the presumption of good faith which most defendants have enjoyed. Removing the presumption of good faith would shift the burden of proof to defendants, essentially forcing them to go to trial on the issue of good faith. Perhaps even more harmfully, the policy shift may discourage courts from continuing to recognize *negligent* reporting as falling under the purview of "good faith."<sup>152</sup>

State legislatures might react and confirm courts' and reporters' fears by passing legislation specifically shifting the burden of proof. The CAPTA Amendments will likely precipitate a new generation of amendments to state child protective laws, as did the

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149. See *supra* Part IV (discussing the influence of the parents' rights debate in connection with the enactment of the CAPTA Amendments).

150. In fact, no statistics are available for the percentage of actual knowingly false or malicious reports.

151. See Woodhouse, *supra* note 125, at 409 n.63 (noting that in many "unsubstantiated" cases there is "significant evidence" that abuse did occur).

152. Again, unsubstantiated reports do not necessarily result from negligence. Accurate reports made in good faith may ultimately be found to be "unsubstantiated" for lack of evidence or other reasons. These reports are frequently attacked as negligent, but the terms should not be confused.

original CAPTA in 1974. Federal policy guidelines and heavy lobbying by parents' rights groups could influence state legislatures to change the "purpose" statements preceding child protective statutes, thereby abrogating the former emphasis on protecting as many children as possible.<sup>153</sup> States may also change their immunity statutes to define "good faith" immunity more precisely. In particular, as the Amendments seem aimed at California and other states currently providing absolute immunity to mandatory reporters, legislatures might feel somewhat coerced<sup>154</sup> to add the phrase "good faith" if the phrase is lacking. They might also remove language providing a presumption of good faith, or provide that gross negligence qualifies as bad faith.

Even if these concerns are overstated, the mere possibility of judicial and legislative changes may have a chilling effect on potential reporters. For pediatricians and emergency room physicians in particular, the responsibility to report is already an expensive burden.<sup>155</sup> Currently, most physicians who report know that they have statutory immunity for reporting, but they also know that such immunity does not preclude lawsuits which they must defend. Defending these suits is time-consuming, disruptive, and emotionally draining. Furthermore, if physicians and hospitals face increased doubt that courts would dispose of such suits on summary judgment, they will be much more likely to limit their reporting to injuries they *know* are abuse-related, rather than reporting mere suspicions.

A more appropriate judicial and legislative response would be to provide health care workers with absolute immunity such that courts can routinely dismiss claims against healthcare workers on a motion to dismiss for failure to state a claim.<sup>156</sup> Courts in Alabama and California appear to dismiss claims against mandatory reporters on a similar basis.<sup>157</sup> In addition, California has implemented a fund

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153. I am not suggesting that protecting children is not a priority for most lawmakers. I am suggesting that most lawmakers are unwilling to pay for it—politically or financially.

154. Federal financial aid is predicated on compliance with federal mandates, so states may feel pressure to comply strictly with the new amendments. See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 107(b), 110 Stat. 3063, 3072 (to be codified at 42 U.S.C. § 5106(a)), (requiring that states satisfy certain prerequisites in order to qualify for federal grants).

155. See *supra* notes 87, 103 and accompanying text (discussing the financial burdens that mandatory reporters face).

156. See FED. R. CIV. PROC. § 12(b)(6) (providing that a defense of "failure to state a claim upon which relief can be granted" may be made by motion "at the option of the pleader").

157. See *Brown v. Pound*, 585 So. 2d 885, 886-87 (Ala. 1991) (affirming dismissal of a case filed against a physician on the basis of absolute immunity); *Thomas v. Chadwick*, 244 Cal. App. 3d 813, 819-20, 826 (1990) (affirming a trial court's granting of a defendant physician's motion

for reimbursing mandatory reporters for the legal costs of defending a claim.<sup>158</sup> Reimbursing mandatory reporters is a good idea, but dismissing claims, rather than adjudicating them to a summary judgment, is a much less costly and less time-consuming alternative—as the approximately 200 page tome filed as Defendant's Memorandum in Support of Partial Summary Judgment in the Bryant-Bruce case illustrates.<sup>159</sup>

Increasing the risk of liability for doctors, particularly for those doctors currently in absolute immunity jurisdictions, does nothing to further the goals of detecting and decreasing the incidence of child abuse. Chilling child abuse reporting will undoubtedly result in a decrease in the number of unsubstantiated reports. It will also inevitably result in a decrease in the number of substantiated reports.<sup>160</sup> Closing our eyes to the problem does not mean it will go away, and the net consequence of chilling reporting—recognized early in the evolution of reporting laws—will be an increase in the number of children who fall through the cracks.

### B. *Emphasis on "Assessment"*

The CAPTA Amendments' new emphasis on "assessment" reflects criticisms of the current system that mandated reporters and social workers are inadequately trained to recognize child abuse, and that CPS agencies are therefore required to investigate every report

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for judgment on the pleadings, even accepting as true for purposes of the appeal the plaintiff's allegation that the doctor knowingly made a false report of abuse).

158. See CAL. PENAL CODE § 11172(c) (West Supp. 1997) (providing that mandatory reporters may present claims to a government body for reasonable attorney's fees incurred "in any action against that person on the basis of making a [required] report . . . if the court has dismissed the action upon a demurrer or motion for summary judgment made by that person" or if the mandatory reporter "prevails in the action").

159. See Memorandum in Support of the Vanderbilt Defendants' Motion for Partial Summary Judgment at 1, *Bryant-Bruce v. Vanderbilt Univ., Inc.*, No. 3-96-0153, 1997 WL 440962 (M.D. Tenn. July 3, 1997) (containing affidavits from all the involved doctors and the child's guardian ad litem, as well as the transcripts from the circuit court proceedings and the original order granting temporary custody to the state).

160. Anne Cohn Donnelly, Executive Director of the National Committee to Prevent Child Abuse, has claimed that as reports of abuse have increased, the percentage of substantiated reports has remained fairly constant. See *Child Welfare: Where Should Our Priorities Be? Hearings Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Economic and Educational Opportunities*, 104th Cong. (1995) (testimony of Anne Cohn Donnelly, Executive Director, National Committee on the Prevention of Child Abuse), available in WESTLAW, USTESTIMONY Database. Statistics also suggest that the numbers of children subjected to abuse are actually increasing, not just that more abuse is being uncovered by increased reporting. See *id.* See also Meriwether, *supra* note 45, at 141 (suggesting that reporting of inappropriate cases and nonreporting of appropriate cases are both happening on a large scale).

they receive. Because some reporters report even the most tenuous suspicions, critics argue, "false" claims inundate CPS agencies and drain the agencies' resources, rendering the agencies incapable of responding effectively to dire cases of abuse.<sup>161</sup> This focus on assessment presents the flip side of the "good faith" coin: In theory, if we reduce the number of erroneous reports, and through training increase social workers' ability to distinguish between "false" and "true" reports, then the available financial resources will better help the children and families who really need it.

On the surface, this argument is difficult to dispute. Unfortunately, the assumption that better training will enable CPS agents to distinguish true reports from false reports on the basis of a telephone call is naive. Moreover, Senator Kassebaum's statement regarding the training of mandated reporters is problematic for the many states that require any person who knows or suspects a case of child abuse to report.<sup>162</sup> Even more problematic is the implication that CPS agencies should not be required to investigate every report. The Amendments envision a form of triage without recognizing that necessity already requires triage, and they fail to address the causes of this de facto triage.

Certainly room for improvement exists, and many of the criticisms of the system are valid. However, the CAPTA Amendments selected areas for improvement that are primarily politically motivated responses to the most vocal and best organized critics of the current system.

### *C. Other Changes Signaling Policy Shift*

The CAPTA Amendments provide some other changes. First, in the "Findings" section, "child and family protection" replaces the term "child protection," and the term "family" is inserted after the term "child" everywhere that "child" is listed.<sup>163</sup> Representatives from family rights groups now participate on the national Advisory Board on Child Abuse Neglect, as do children's rights advocates.<sup>164</sup> While enhancing the interests of "families," that is parents, the

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161. See *supra* notes 130-32 and accompanying text (discussing the statements of Senator Coats).

162. See *supra* note 134 and accompanying text (discussing Senator Kassebaum's statement that the CAPTA Amendments emphasize training of mandated reporters).

163. See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 100(6)-(7), 110 Stat. 3063, 3064 (to be codified at 42 U.S.C. § 5101).

164. See *id.* § 102(c)(12), 110 Stat. at 3065 (to be codified at 42 U.S.C. § 5102(c)(12)).

Amendments also provide for "expedited termination" of parental rights—but only in extreme and rare circumstances.<sup>165</sup> For example, it is clear under the new law that states need not require the reunification of a surviving child with a parent who has been convicted of manslaughter of another child of that parent, or who has committed a felony assault resulting in serious bodily injury to the child or another child of the same parent.<sup>166</sup>

The Amendments do not go far enough in facilitating the termination of parental rights, but the new emphasis on "families" is evidence of the influence of parents injured by unsubstantiated reports, of parents' rights groups, and of the religious right. The language is for the most part superfluous, but it contributes to the overall effect of tilting the scales in favor of "parents' rights" over children's protection.

## VI. CONCLUSION

The CAPTA Amendments' higher immunity threshold and ambivalence toward promoting reporting will ultimately increase litigation, and thus the cost of even good faith reporting of child abuse, and will also increase liability for erroneously reporting child abuse. Increased litigation and decreased immunity will likely have a serious chilling effect on child abuse reporting and provide a tremendous disincentive for state agencies to react promptly to reports of suspected abuse. The semantic changes to CAPTA are small overall, but legislators need to consider the substantial ramifications of the policy shift which underlies these changes. Most of the criticism leveled at Child Protective Services is valid and highlights the need for a remedy. The CAPTA Amendments, however, do too little to address the areas most in need of improvement: funding and prevention. It remains to be seen how state legislatures will respond to the Amendments, and whether the next generation of child protective statutes will do more than put another Band-Aid on the perceived ills by attempting to decrease the number of "false" reports. It will also be interesting to see how the states that guarantee absolute immunity under their current child protective laws respond to the new "good faith" mandate.

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165. See *id.* § 107(b)(2)(A)(xi)(I), 110 Stat. at 3074 (to be codified at 42 U.S.C. § 5106a(b)(2)(A)(xi)(I)).

166. See *id.* § 107(b)(2)(A)(xii), 110 Stat. at 3074 (to be codified at 42 U.S.C. § 5106a(b)(2)(A)(xii)).

Even before the CAPTA Amendments, deterrents to reporting existed. Underreporting is still recognized as a problem hampering detection of abuse and efforts to protect abused children.

In order to come to grips with the problem of abuse, the law should encourage states to distinguish between health care providers and other types of potential reporters, and to provide absolute immunity for physicians who do report suspected abuse. Energy should then be focused upon providing social services systems with adequate resources to respond appropriately to allegations of abuse. Societal resources should also aid child abuse prevention by preventing teenage pregnancies and by providing support for young and poor families and those parents afflicted with drug and alcohol addictions. To chill reporting is merely to stick our heads in the sand; ignoring the problem does not make it go away.

The district court granted summary judgment for the defendants in the *Bryant-Bruce* case; nonetheless, it will be understandable if Gregory's doctor hesitates to report the next time he is confronted with a child suffering from a suspicious childhood injury.

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