

## A CASE FOR THE DEFENSELESS

### I *Introduction*

An underlying principle of our system of government is the right of the individual to speak out in his own behalf. It has been manifest in great social causes and in selfish business interests, in small sit-ins and powerful lobbies. Woman suffrage, the development of labor unions and civil rights legislation have all resulted from the assertion of this personal right. Yet in an age which has witnessed perhaps its maximum potential, the right has been unavailing for at least one group in this country. Although its cause is legitimate it is unable to organize, lobby or demonstrate. In many instances its members cannot even begin to express their plight, much less bring it to the attention of the public. Their only recourse is to cry—and when their cries are not heard they often die.

The group is the battered children and their cries are the only response to the pain inflicted upon them by their insensitive, cruel or psychotic parents. Although these children constitute an oppressed minority, it is a minority of tragically large numbers.

While the causes of child abuse are numerous and complex, there exists in nearly all cases a recurring theme—the breakdown of parental responsibility. The inevitable result is physical or mental suffering for the child. The efforts to solve the problem have been extensive but have not always been successful because of the difficulties inherent in any probe of the family unit. Too often the damage is done before any knowledge of the incidents come to light. Moreover, the fact that so many of the battered children are so young makes detection of the problem almost impossible.

Once abuse is detected, it is imperative that all the powers of the state intervene to protect the abused child. Unfortunately, the emphasis in the courts and the legislatures has been on keeping the family unit together. This objective, admirable in itself, must be subordinated to the protection of the child. To achieve the necessary protection, certain changes in present legislation must be made. It is the purpose of this paper to study the present status of New Jersey law, and to propose changes on behalf of the battered child.

### II *Historical Sketch*

Under the Roman law a child was treated as the property of his father. This property right vested in the father the power of life and

death over the child.<sup>1</sup> Absolute parental authority over children was rarely questioned in the United States until the end of the nineteenth century. At that time the tragic situation of a young girl, who was found chained to a bed and seriously ill from brutal mistreatment, was brought to the attention of local officials.<sup>2</sup> They felt that they had no right to intervene where the primary rights of parent or guardian were involved. The mission worker who found the girl argued that surely a child was a member of the animal kingdom and should be protected at least as much as a cat or dog. On the petition of the Society for the Prevention of Cruelty to Animals, the child was brought to court and her foster parents were jailed. In the following year, 1875, New York County's Society for the Prevention of Cruelty to Children was established.<sup>3</sup>

Almost one hundred years have elapsed since a child received the protection given to animals. How much progress has been made during this time? The highly publicized New York case,<sup>4</sup> involving Roxanne Felumero, provides some indication of the answer. This child was born out of wedlock in 1965; and, since her mother was not able to take care of her, she was placed in a foster home. When she was ten months old, Roxanne was placed with new foster parents in their suburban home. A few days before Christmas in 1968, after almost two years at the foster parents' home, she was returned to her mother's fourth-floor tenement on Manhattan's lower east side. On January 2, 1969 the foster parents were permitted to take Roxanne out and keep her overnight. When they undressed her for a bath, they discovered marks on her body which appeared to be the result of a serious beating. They reported their observations to the New York Foundling Hospital and on the following day the complaint was heard in the family court.<sup>5</sup> Despite the physical evidence of beatings and Roxanne's supporting testimony that she had been assaulted by her stepfather, she was returned to her mother and stepfather. This action was taken over the objections of both the foster parents and the New York Foundling Hospital. On March 25, 1969 Roxanne's battered body was found in the East River. Roxanne cannot answer the question of how much progress has been made, but perhaps her case gives an indication of society's failure to confront the problem.

---

<sup>1</sup> A. KAHN, *PLANNING COMMUNITY SERVICES FOR CHILDREN IN TROUBLE*, 312 (1963).

<sup>2</sup> *Id.* at 313.

<sup>3</sup> *Id.*

<sup>4</sup> *People v. Poplis*, No. A4638 (Sup. Ct. of N.Y., decided Dec. 15, 1969).

<sup>5</sup> *New York Daily News*, Apr. 11, 1969, at 3.

### III *Scope of the Problem*

Numerous surveys have been conducted to determine the frequency of incidents of child abuse. In a recent article,<sup>6</sup> former Secretary of Health, Education and Welfare, John W. Gardner, reported that:

In 1962, The American Humane Association did a twelve month survey of child abuse cases reported in newspapers. It found 179 dead children and 484 with non-fatal injuries. Later the U.S. Children's Bureau did a similar sampling and found an alarming increase: 164 dead children and 340 with non-fatal injuries in a six month survey of newspaper reports. Though these findings based on newspaper reports cannot be taken as precise data, they clearly support the evidence from other sources.<sup>7</sup>

The Secretary also indicated that according to the most conservative estimates at least 10,000 children are so severely mistreated every year that hospitalization is required.<sup>8</sup> Beatings and other forms of abuse are said to cause more deaths among children than auto accidents, leukemia, cystic fibrosis and muscular dystrophy.<sup>9</sup> The problem is obviously extensive and, therefore, requires affirmative action on the part of all members of the community.

Case studies of parents who abuse their children provide valuable insight into the psychology of abuse. After many such studies and extensive research, Dr. Leontine Young concluded that:

It is not the impetuous blow of the harrassed parent nor even the transient brutality of an indifferent parent expressing with violence the immediate frustrations of his life. It is not the too severe discipline nor the physical roughness of ignorance. It is the perverse fascination with punishment as an entity in itself, divorced from discipline and even from the fury of revenge. It is the cold calculation of destruction which itself requires neither provocation nor rationale.<sup>10</sup>

The parents have been described as "people who are suffering from a strange and skimpily researched form of mental illness"<sup>11</sup> and their actions referred to as "a response to psychological stress."<sup>12</sup> This parent/child relationship has become known as the "Battered child syn-

---

<sup>6</sup> *The Abused Child*, McCALLS, Sept. 1967, at 97.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Battered Child Syndrome*, TIME, July 20, 1965, at 60.

<sup>10</sup> L. YOUNG, WEDNESDAY'S CHILDREN, A STUDY OF CHILD NEGLECT AND ABUSE 44 (1964) (hereinafter referred to as YOUNG).

<sup>11</sup> SATURDAY EVENING POST, Oct. 6, 1962, at 32.

<sup>12</sup> A. KADUSHIN, CHILD WELFARE SERVICES 250 (1965).

drome.”<sup>13</sup> The severity of the beatings the children receive can be seen easily when one considers that the children are beaten with such things as

bare fists, straps, electric cords, T.V. aerials, ropes, rubber hose, fan belts, sticks, wooden spoons, pool cues, bottles, broom handles, baseball bats and chair legs, were burned by lighted cigarettes, gas burners, cigarette lighters, electric irons, hot poker, scalding liquids and were bitten, shot, subjected to electrical shock, thrown against the floor or walls and kicked.<sup>14</sup>

It is astonishing that seventy percent of these children are under age five, with many less than one year old.<sup>15</sup> These statistics support the conclusion of Dr. Young that abusing parents divorce punishment from discipline.

#### IV *The “Criminal” Approach*

The New Jersey Statutes<sup>16</sup> contain provisions which enable the court to place under guardianship any child in the care and custody of the Bureau of Children’s Services where it appears that the best interests of the child so require. However, the court decisions have consistently equated the best interests of the child with the rights of the parents and the emphasis is clearly on family stability rather than on the rights of the abused child.

The public policy of the State of New Jersey requires that all possible efforts be made to solidify the family unit.<sup>17</sup> It is difficult to find fault with this position when considering it as a basic policy. However, when taken from the standpoint of the abused child, the soundness of a strict interpretation of this policy becomes suspect. It should be just as important for a child to have the chance to be free from an environment of cruelty, abandonment or neglect as it is to strive to keep families together. The removal of a child from such an environment is especially important when we consider the likelihood that the child, forced to live with parents who have abused him once, will be abused again.<sup>18</sup>

---

<sup>13</sup> *10,000 Children Battered and Starved*, TODAY’S HEALTH, Sept. 1965, at 24.

<sup>14</sup> YOUNG, *supra* note 10, at 56.

<sup>15</sup> NEWSWEEK, June 3, 1968, at 68. See also Official records on file with the State of New Jersey, Department of Institutions, Bureau of Children’s Services, which report that from January 1969 through November 6, 1969, 66.6% of the reported cases of suspected abuse involved children under the age of six.

<sup>16</sup> N.J. STAT. ANN. 30:4C-15 (1964).

<sup>17</sup> N.J. STAT. ANN. 30:4C-1 (1964).

<sup>18</sup> NEWSWEEK, June 3, 1968, at 68.

If the problem were not one where custody could have such tragic repercussions, there would not be such great need for concern. Research groups, under the auspices of the Children's Bureau of the Department of Health, Education and Welfare, have made extensive studies of child abuse and the court hearings incident thereto. These studies generally conclude that the abused child rarely lives long enough to be the subject of a third court hearing.<sup>19</sup> In effecting its public policy of keeping families together the state appears to be sacrificing the welfare of the abused child. The public policy should not be changed in its general application, but there should be a modification that would give equal emphasis to the rights of abused children to be removed from the source of their abuse.

The rights of parents suspected of child abuse are adequately protected by both state and federal law. Their criminal prosecution is governed by the same rules that apply to other criminal actions. An excellent example of this was the recent case of *State v. Pickles*<sup>20</sup> which involved the prosecution of a mother for the manslaughter of her son. The boy's death was allegedly caused by a punitive hot bath administered by his mother, and subsequent failure of the parents to provide medical treatment for the child. On October 9, 1962, Michael, age 4, was admitted to a hospital in a comatose state. He had third degree burns covering approximately 35% of his body which his mother claimed resulted from urine burns over a period of from five days to two weeks. Michael died on October 12, 1962 of toxic hepatitis as a result of infection from third degree burns. During questioning by the prosecutor, Mrs. Pickles allegedly stated that she had become irritated by Michael's toilet habits and had put him in hot water to punish him. The bath allegedly took place on October 4, 1962 but medical attention was not sought until the child was in critical condition. During the trial there was testimony that the children, including Michael, often begged neighbors for food and had been seen licking

---

<sup>19</sup> Gillespie, *The Battered Child Syndrome: Thermal and Caustic Manifestations*, 5 JOURNAL OF TRAUMA 523, 529.

It is discouraging to note that physicians and the courts have failed to recognize the desperate plight of the recurrently abused child. This is well documented by the example of a child who was hospitalized at age five months with extensive burns of the pharynx and esophagus after having been fed boiling milk. Following the recovery the infant was taken temporarily from the parents and placed in a foster home. The child was returned shortly thereafter by court order, and at age eight months was admitted to another hospital with a cerebral concussion, skull fracture, and nutritional anemia. The silent suffering child was unable to protest the inadequacies of our protective laws and suffered the inevitable consequence, death, at age three.

<sup>20</sup> 46 N.J. 542, 218 A.2d 609 (1966).

crumbs out of empty cookie boxes in the garbage, and were frequently left alone while parents were visiting. The trial court entered convictions for both parents but on appeal the decision was reversed and remanded for retrial. The confession by Mrs. Pickles was rejected as a transgression of her constitutional rights because of her emotional condition at the time it was made. This case exemplifies the difficulty in establishing the criminal responsibility of parents. What protection from horrible punishment can the law provide for their children?

The best interests of the child rule, when strictly construed, can give the children this needed protection. It requires the court to ensure that the parental right to custody yields to the child's best interests when these rights conflict.<sup>21</sup>

In awarding the custody of minor children the court has a difficult duty to perform. The governing principle by which the court must be guided in determining the custody of minor children is that children are not chattels to be disposed of according to the wishes of their parents or anyone else, but that they are intelligent moral beings, and as such their welfare and their happiness is a matter for first consideration. The difficulty in awarding the custody of children arises, not from a difference of opinions with respect to the propriety of this governing principle, but from the application of the rule to the facts and circumstances of each particular case, in which it becomes necessary to endeavor to determine what disposition of the custody of a particular child will best serve the interests and promote the welfare of the child.<sup>22</sup>

The best interests of the child rule has been effectively applied in adoption proceedings in New Jersey. Parents who have voluntarily surrendered or abandoned their natural right to custody have lost this right completely when it has been determined that retention of the right was not in the child's best interest.<sup>23</sup> Where there is no voluntary surrender or abandonment of parental rights, the New Jersey courts have taken an entirely different position. The presumption has arisen that the best interests of the child are served when the child is in parental custody unless the parents have been positively shown to be unfit.<sup>24</sup> In cases involving the battered child syndrome, it is frequently impossible for the complainant to prove unfitness under a standard

---

<sup>21</sup> *Clifford v. Woodford*, 83 Ariz. 257, 320 P.2d 452 (1957). See also: *Paton v. Paton*, 363 Mich. 192, 108 N.W.2d 876 (1961); *Thein v. Squires*, 250 Iowa 1149, 97 N.W.2d 156 (1959); *Giacopelli v. Florence Crittenton Home*, 16 Ill.2d 556, 158 N.E.2d 613 (1959).

<sup>22</sup> *NELSON, DIVORCE AND ANNULMENT* 212-14 (Vol. 2, 1945).

<sup>23</sup> *In Re Adoption of Child by S.*, 57 N.J. Super. 154, 154 A.2d 129 (Essex County Ct. P. Div. 1959).

<sup>24</sup> *Kridel v. Kridel*, 85 N.J. Super. 478, 205 A.2d 316 (App. Div. 1964).

which appears to approximate the criminal law requirement of proof beyond a reasonable doubt.

Medical science has developed techniques which assist in establishing whether a child has been abused or accidentally injured.<sup>25</sup> In spite of this assistance, the prosecuting attorney is confronted with an almost insurmountable task because the abusive acts usually take place behind closed doors. There are rarely witnesses who can testify to actually having seen a parent abuse a child. The prosecutor's evidentiary problem is equally difficult when an abuse case begins with the report of a physician who is treating the battered body or that of a neighbor who has heard the child's screams. "This is true whether the hearing is the first, the second, or (if the child is fortunate to live that long) the third."<sup>26</sup> While legislation should not be encouraged which will infringe upon the constitutional rights of the parents, efforts must be made to establish procedures which will enforce the rights of children to be protected from parental abuse.

The resolution of this problem becomes even more urgent because of the greater number of cases being reported each year.<sup>27</sup> In 1964 an amendment<sup>28</sup> to the New Jersey Statutes granted full immunity from legal action to physicians and hospitals that make reports of suspected cases of child abuse. This immunity is effective whenever a physician is acting in his professional capacity. However, even with the improvements in reporting laws there have been only 191 reported cases of suspected child abuse in New Jersey from January 1967 to November 7, 1969. Some counties have not reported a single case during this time period.<sup>29</sup>

Once a report is completed it is forwarded to the county prosecutor

---

<sup>25</sup> Kempe, *The Battered Child Syndrome*, 188 J.A.M.A. 1, 18 (1962) "The radiologic manifestations of trauma to growing skeletal structures are the same whether or not there is a history of injury. Yet there is reluctance on the part of many physicians to accept the radiologic signs as indications of repetitive trauma and possible abuse. This reluctance seems to stem from the emotional unwillingness of the physician to consider abuse as the cause of the child's difficulties and also because of unfamiliarity with certain aspects of fracture healing, so that he is unsure of the significance of the lesions that are present. To the informed physician the bones tell a story the child is too young or frightened to tell." *Id.*

<sup>26</sup> Hansen, *Suggested Guidelines for Child Abuse Laws*, 7 J. FAM. L. 164 (1967).

<sup>27</sup> Paulsen, *Child Abuse Reporting Laws; The Shape of the Legislation*, 67 COLUM. L. REV. 1 (1967).

<sup>28</sup> N.J. STAT. ANN. 9:6-8.1 (1964). It is declared to be the public policy of this State:

....

(b) that full immunity from legal action should be granted to physicians and hospitals who act in a professional capacity in making reports of such injury in order that protection of such children may be afforded in accordance with the laws of this State.

<sup>29</sup> Official records on file with the State of New Jersey, Department of Institutions and Agencies, Bureau of Children's Services.

for investigation. The Bureau of Children's Services also receives notice<sup>30</sup> and, if a complaint is filed, they may investigate the allegations contained in the complaint.<sup>31</sup> If the results of the investigation indicate that the child is receiving improper care, the Bureau may apply to the Juvenile and Domestic Relations Court for an order making the child a ward of the court and placing him under the care and supervision of the Bureau of Children's Services.<sup>32</sup> The court will issue the order if satisfied that the best interests of the child so require.<sup>33</sup> Another provision<sup>34</sup> permits the court to appoint as guardian the Bureau of Children's Services, where such action appears necessary.

The best interests of the child rule seems to be concerned only with the welfare of children. However, its application to instances of child abuse do not necessarily accomplish this result. In custody proceedings, the New Jersey courts are required to interpret the best interests of the child rule strictly in accordance with the public policy of the State:

(a) that the preservation and strengthening of family life is a matter of public concern as being in the interests of the general welfare;<sup>35</sup>

(b) that the prevention and correction of dependency and delinquency among children should be accomplished so far as practicable through welfare services which will seek to continue the living of such children in their own homes.<sup>36</sup>

In interpreting this policy the courts have taken a position that "the welfare of the child is inextricably bound up with the rights of the parents."<sup>37</sup> Is this position sound when considered from the viewpoint of the abused child?

In a recent case<sup>38</sup> involving alleged abuse and neglect, the court noted that there must be an affirmative demonstration by competent evidence "that the child's 'best interests' will be substantially prejudiced if he is permitted to remain with his parent."<sup>39</sup> While requiring affirmative demonstration, the court insisted that the usual rules governing admissibility of hearsay evidence should apply to oral and written

---

<sup>30</sup> N.J. STAT. ANN. 30:4C-12 (1964).

<sup>31</sup> N.J. STAT. ANN. 9:6-8.5(a) (Supp. Sept. 1969).

<sup>32</sup> N.J. STAT. ANN. 9:6-8.5(b) (Supp. Sept. 1969).

<sup>33</sup> N.J. STAT. ANN. 9:6-8.5(b) (Supp. Sept. 1969).

<sup>34</sup> N.J. STAT. ANN. 30:4C-15 (1964).

<sup>35</sup> N.J. STAT. ANN. 30:4C-1(a) (1964).

<sup>36</sup> N.J. STAT. ANN. 30:4C-1(b) (1964).

<sup>37</sup> *In Re N.*, 96 N.J. Super. 415, 423, 233 A.2d 188, 192 (App. Div. 1967).

<sup>38</sup> *In Re Cope*, 106 N.J. Super. 336, 255 A.2d 798 (App. Div. 1969).

<sup>39</sup> *Id.* at 341, 255 A.2d at 801.



reports from neighbors, police and other persons.<sup>40</sup> How much proof is required to overcome the presumption that "the parental relationship is an integral part of the 'best interest'?"<sup>41</sup> Can we say that failure to convict parents of a criminal charge should substantiate their claim to custody?<sup>42</sup>

Parents should have a right to the custody of their children. However, where the circumstances indicate that they are not accepting their responsibilities, they should be required to prove to the satisfaction of the court that they can and will perform their functions properly. Where reasonable bounds of parental discipline have been exceeded, the state should step in to protect the children.

This approach has been taken on at least one occasion by the Brooklyn Family Court. In that case an infant was found to be suffering from broken ribs and legs. The court invoked the doctrine of *res ipsa loquitur*. Upon failure of the parents to satisfactorily explain the child's condition, custody was awarded to the state.<sup>43</sup> The use of this approach in the custody action involving Roxanne Felumero might have been enough to prevent her tragic death. How many more beatings and deaths could future application of a similar approach prevent?

It is not possible to bring the Roxanne Felumeros back to life, but it is possible to prevent the injury and death of other children at the

<sup>40</sup> *Id.* at 344, 255 A.2d at 803.

<sup>41</sup> 96 N.J. Super. at 423, 233 A.2d at 192.

<sup>42</sup> YOUNG, *supra* note 10, at 64: The "battering parent" tends to be very possessive and is not likely to voluntarily relinquish custody.

<sup>43</sup> In the Matter of S., 259 N.Y.S.2d 164; 46 Misc.2d 161 (Fam. Ct. Kings Cty. 1965).

Proof of abuse by a parent or parents is difficult because such actions ordinarily occur in the privacy of the home without outside witnesses. Objective study of the problem of the battered child which has become an increasingly critical one, has pointed up a number of propositions, among them, that usually it is only one child in the family who is the victim; that parents tend to protect each other and resist outside inquiry and interference and that the adult who has injured a child tends to repeat such action and suffers no remorse for his conduct. Therefore, in this type of proceeding affecting a battered child syndrome, I am borrowing from the evidentiary law of negligence the principal of "*res ipsa loquitur*" and accepting the proposition that the condition of the child speaks for itself, thus permitting an inference of neglect to be drawn from proof of the child's age and condition, and that the latter is such as in the ordinary course of things does not happen if the parent who has the responsibility and control of an infant is protective and non-abusive. And without satisfactory explanation I would be constrained to make a finding of fact of neglect on the part of the parents and thus afford the Court the opportunity to inquire into any mental, physical or emotional inadequacies of the parents and/or to enlist any guidance or counseling the parents might need. This is the Court's responsibility to the child.

I find therefore that a *prima facie* case has been made out by the Petitioner and deny the Respondent's Motion to Dismiss.

*Id.* at 164. (full reproduction of opinion).

hands of their parents. "Under the concept of *Parens Patriae*, the state has an obligation as a parent to all children to defend the rights of the child."<sup>44</sup> Can this protection be given to a battered child when the rights of parents and family stability have priority over the right of the innocent child to be removed from an environment of abuse? A protective law for children must require a literal interpretation of the best interests of the child rule in terms of the well being of the child. Although parental rights and family stability should be considered in determining the child's best interests, they should not be placed in a position superior to the right of the child to be protected from abuse. By having the child protective laws criminally oriented, we find the protective organizations without the authority to remove a child from the home without either parental consent or a custody order from the court. This is true "even in emergency situations which appear so critical that the welfare of the child demands that he be placed away from his home."<sup>45</sup> This leaves the child in a potentially perilous position while he is awaiting court action. If there are strong indications that the home provided by the parents is not safe, there should be procedures for removing the child, immediately.<sup>46</sup> The additional problems of inadequate facilities and finances hinders establishment of such procedures.

In New Jersey during fiscal year 1968, the average cost of maintenance for each child under the care of the Bureau of Children's Services amounted to \$1,283.<sup>47</sup> It has also been reported that "[m]any abuses go unpunished and many children are left in unsavory and dangerous homes because judges know there is nowhere else for the child to go. Even the private shelters which once provided a refuge are filled to capacity."<sup>48</sup> While the number of children in the care of the Bureau of Children's Services is continuously growing, the percentage of state revenue allocated for child care has actually diminished.<sup>49</sup>

---

<sup>44</sup> *Supra* note 12, at 203; *See also In Re Jacques*, 48 N.J. Super. 523, 138 A.2d 581 (Ch. Div. 1958); *Lennon v. State*, 193 Kan. 685, 396 P.2d 290 (1964).

<sup>45</sup> *The Silent Voices Heard, A Description of the Protective Services Program of the Bureau of Children's Services*: BCS 2-1, 10 (1969).

<sup>46</sup> Newark Star-Ledger, Apr. 7, 1969, at 9, col. 2.

In Canada a child welfare agency is given the right to immediately take custody of a child where there is cause to fear for his safety. The Bureau then has ten days to conduct a thorough investigation of the home. If the probe finds no basis for concern, the child is returned. Meanwhile, the child is safe.

<sup>47</sup> 20 Welfare Rptr. 53 (N.J. 1969).

<sup>48</sup> Newark Star Ledger, Apr. 8, 1969, at 12, col. 3.

<sup>49</sup> *Id.*

## V The Problem of Definition

The New Jersey Statute<sup>50</sup> which defines cruelty to children states: Cruelty to a child shall consist in any of the following acts; (a) inflicting *unnecessarily* severe corporal punishment upon a child; (b) inflicting upon a child unnecessary suffering or pain, either mental or physical; (c) habitually tormenting, vexing or afflicting a child; (d) any willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, is caused or permitted to be inflicted on a child; (e) or exposing a child to unnecessary hardship, fatigue or mental or physical strains that tend to injure the health or physical or moral well being of such child.<sup>51</sup> (emphasis added)

At first glance the statute appears to give an excellent definition of cruelty. However, in its application the statute has become ineffective. The word "unnecessary" has taken on a distorted significance which directly relates punishment to discipline. Since this relationship does not exist in the actions of the majority of parents who actually abuse their children, the emphasis upon the word unnecessary is both impractical and confusing. This confusion is clearly demonstrated in *Richardson v. State Board of Control of Institutions*,<sup>52</sup> which involved a child who was punched repeatedly on the back of his neck at the base of his brain, and was beaten across one of his eyes with a form of whip known as a "cat and nine tails." Failure to establish that the punishment administered was unnecessary resulted in a decision in favor of the individual who had inflicted the punishment. The court held that

[w]hat the provision of the statute aims at is to prevent unnecessarily inflicting severe corporal punishment. The offence intended to be prevented by the statute is not the infliction of severe corporal punishment, but *unnecessarily* doing so. The questions to be tried out [in] such a case . . . [are] whether there was a necessity for the punishment and if so was it severe.<sup>53</sup>

This apparently means that the severity of punishment will not be considered by the courts until it has first been established that the punishment was unnecessary. Can the Statute be sensibly applied in this manner to the situation where "a five year old girl wandered innocently on to the porch after being instructed not to do so. She was kicked back into the house, thrown across the room and hit on the

---

<sup>50</sup> N.J. STAT. ANN. 9:6-1 (1960).

<sup>51</sup> N.J. STAT. ANN. 9:6-1 (1960).

<sup>52</sup> 98 N.J.L. 690, 121 A. 457 (Ct. Err. & App. 1923).

<sup>53</sup> *Id.* at 694, 121 A. at 459.

head and face with a skillet,"<sup>54</sup> or one where "the father of a nine month old boy blackened his son's eyes, burned his face, hands and neck and fractured his skull."<sup>55</sup>

Severe is defined as: absolute or rigorous in restraint, punishment or requirement, inclement or harsh.<sup>56</sup> Corporal is defined as: affecting, related to or belonging to the body,<sup>57</sup> and punishment as: retributive, suffering, pain or loss.<sup>58</sup> In studying the definitions it becomes obvious that the use of the word "unnecessary" in the Statute is neither required or desired. It cannot be necessary, under any circumstances, to inflict severe corporal punishment upon a child. To include the concept of necessity is to license cruelty. If we can begin by evaluating the severity of punishment, the degree of pain and suffering, and the extent of mental or physical fatigue, then a great step will have been taken toward the protection of children.

## VI Conclusion

Child abuse is a growing problem which cannot be ignored by society if children are to be freed from its horrors. Some experts in the field expressed the opinion "that abused children may develop into 'the Oswalds and the Dillingers' and often that a battered child grows up into a 'battering parent' who abuses his children."<sup>59</sup>

The history of our country and our state is evidence of our capability to handle the problems that arise in society when a concentrated effort is made. The best way to correct any problem is to meet it before it becomes unmanageable. For the sake of both the abused child and society in general, the time to make the concentrated effort to eliminate child abuse has certainly arrived. It is hoped that the following suggested approaches to the problem will be a contribution to that effort:

1. The decision to either permit a child to remain with his parents or remove him from their custody should be reached by a determination in each case that the action will promote the well-being of

---

<sup>54</sup> *Supra* note 12, at 209.

<sup>55</sup> *Id.*

<sup>56</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1961). See also BLACK'S LAW DICTIONARY 1540 (4th ed. 1957) which defines severe as: sharp, grave, distressing, violent, extreme torture, rigorous, difficult to be endured.

<sup>57</sup> WEBSTER'S, *supra* note 56, at 510.

<sup>58</sup> *Id.* at 1843. See also BLACK'S, *supra* note 56, at 408 which defines corporal punishment as distinguished from pecuniary punishment of or inflicted upon the body, such as whipping on the pillory; the term may or may not include imprisonment according to the context.

<sup>59</sup> *Supra* note 46.

the child. This approach does not preclude the consideration of parental rights and the value of parental custody in appropriate cases. It is intended to remove the presumption in the best interest of the child rule, that parental custody is best, and places a burden upon parents to show that their custody will promote the well-being of the child.

2. The word "unnecessary" can be a license for parents to impose severe corporal punishment upon children and should, therefore, be eliminated from the statute defining cruelty to children.

3. Procedures for temporary removal of children from a home where there is a strong suspicion of child abuse should be investigated.

4. The fiscal policies of the State of New Jersey must be progressive and provide adequate funds to the agencies that maintain and care for children removed from the custody of abusing parents.

The question is not whether children can be protected, but whether we are willing to devote the necessary time, effort and money to eliminate the "Battered Child Syndrome." Can we refuse to help the helpless?

*Robert F. Breslin, Jr.*