

Violence Toward Children: Medicolegal Aspects

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André was wandering the streets of New York City when the police found him. They took him to the station house and finally found out where his mother lived. When they called her, she said "You keep him; I don't want him." The police noticed André had a rash, so they took him to Bellevue Hospital, where the diagnosis was chicken pox. That night in the children's ward, a baby in the crib next to André commenced to cry. When the nurse left the ward for a moment, André got out of bed, seized the crying baby, slammed it against the wall, and threw it on the floor. The crying stopped.

A child psychiatrist at Bellevue reported that although André seemed normal upon admission, after he had killed the baby, he was psychotic. The psychiatrist also learned that in André's home, to cry was bad, and bad children were punished by a beating. André's mother and her assortment of boy friends had made this a fact of life for four-year-old André, one of the youngest known killers on record.

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One of the most interesting medicolegal phenomena of the 1960's was the rush to enact so-called "battered child" statutes. Eventually, every state passed such a law,¹ even though there were existing child abuse and neglect statutes providing criminal sanctions for the termination of parental rights.² The "battered child" statutes, however, differed from former laws in that their emphasis was upon reporting suspected cases and the provision of protective services for the child, rather than upon the punishment of the child abuser. Moreover, these new laws imposed a legal responsibility upon the medical profession³ to report suspected cases. The more sophisticated statutes enlisted the cooperation of mental health professionals to deal with the problem.

The story of André, which was reported to our Law and Psychiatry Seminar at New York University, is a familiar one to most of you.⁴ From clinical and other experience you know that violence begets violence and that the "senseless crimes" perceived by others may make "sense" once one knows the case history of the individual whom police like to call the "perpetrator." In common parlance, André had been programmed so that his violent reaction to the baby's cry was to be anticipated. The conditioning, however, does not explain André's psychotic break nor the guilt feelings he had during the following years while he was labeled a childhood schizophrenic. The psychiatrist who has worked with André now has a guarded optimism about his future as he enters college.

The first point I would make on the topic "Violence toward Children" is that we had better stop as much of it as we can—not only to protect the child, but also in order to protect others as well. My second point is that there are substantial limitations on the efficacy of law as a means of social control. Statutory law rarely is what it should be, from an ideal point of view, and usually it reflects legislative compromise or sometimes caprice. The legal process itself involves prejudice as well as experience, and the

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enforcement and implementation of law is an uncertain thing.

There was no governmental intervention in André's case until the police picked him up. The words of his mother should have alerted them to the fact that André was a child at risk. However, it was the rash that triggered action. Presumably, if during a beating André had cried out loudly enough, police intervention would have occurred earlier and cumbersome legal machinery would have been set in motion. Or if the beatings required hospitalization or medical treatment, a "battered child" report might have been made.

There also is the situation where the existing fragmentation of court jurisdiction leads to judicial dysfunction.⁵ Another case reported to our seminar involved a problem family. The young man in the family worked for the head of the TV-Radio Department of a large department store. They entered into a homosexual relationship, and the department head frequently visited the young man's home. The father was a passive alcoholic, the mother dominated the household, and the twelve-year-old daughter had been acting out sexually. The department head proposed to the mother and daughter that he be allowed to take movies of the daughter in bed with her father, in return for which the mother would get a new color TV and the daughter a portable radio. The father was unaware of the plan, but one day when he was drunk the plan was carried out, and on camera he had sexual intercourse with his daughter. When he sobered up, he immediately went to the police station and turned himself in.

The only governmental intervention in the case was to indict the father for incest and to refer him to Bellevue for a mental status examination. The businessman was not prosecuted. The mother, son and daughter were not brought to the attention of the Family Court. The majesty of the law concerned itself with one of the least significant aspects of the case while major problems were unresolved. All to what purpose or social good?

We should not, however, be too quick to condemn blindfolded justice for seeing only parts of larger problems. As the story of the three blind men and the elephant shows us, that is a human failing. The medical model itself may be susceptible to the same criticism by a patient who is shuttled about from specialist to specialist, and never finds one who will look at the total problem.

To return to our second point, the limitations of law must be reckoned with when we devise child abuse reporting statutes. A recent book by Sussman and Cohen, entitled *Reporting Child Abuse and Neglect*,⁶ sets forth a model act with a commentary on policy considerations. The authors start from the premise that the purpose of such a law should be protection of the child and not punishment of the child abuser, and that there should be coercive state intervention only in the case of physically or sexually abused children. The model act is structured so that physicians and other enumerated professionals *must* report cases where there is "reasonable cause to suspect" physical or sexual abuse but *may* report instances of child neglect.⁷ An "abused" child is defined in terms of "serious physical harm or sexual molestation," and a "neglected child" is one whose "physical or mental condition is seriously impaired as the result of the failure . . . to provide adequate food, shelter, clothing, physical protection or medical care necessary to sustain the life or health of the child."⁸

In justifying their distinction between "abuse" and "neglect," Sussman and Cohen assert that very limited services are available for abused children, that except where the child has been abused as distinguished from neglected, coercive intervention "may be more detrimental than beneficial to the child and his family," and that otherwise there is a real danger of "overreporting."⁹ As an afterthought, they add that it is extremely costly for the state to treat and service maltreated children and their families.

Elsewhere in their book,¹⁰ Sussman and Cohen recognize the problem of emotional abuse and neglect and refer to the literature and cases on the subject.¹¹ However, they accept without protest the proposition that the law has always been reluctant to recognize nonphysical injury as genuine and as the basis for legal action. They concede

that generally the law has lagged behind child developmental specialists and their research on such matters as "maternal deprivation" and "failure to thrive," but insist that expediency demands that neglect cases be excluded from a mandatory reporting law.

It is interesting that the federal Child Abuse Prevention and Treatment Act¹² uses the term "child abuse and neglect" and refers to "physical or mental injury, sexual abuse, negligent treatment or maltreatment of a child." That federal law reflects the conclusion of Dr. Fontana that the distinction between abuse and neglect is "of little value to the child in need of help."¹³

It would appear that the proposed model act is too cautious and overly conservative in its dichotomy between abuse and neglect. Logically the law should adopt and reflect the experience and insights of child development experts. But there is the problem of context. Relatively, it is much easier to adduce admissible evidence where there is physical injury that can be shown by X-ray or picture. "Failure to thrive" may be familiar to a child specialist but unknown territory to a judge. There also is the problem of what persons are required to report suspected cases. The model act expands the duty to include not only physicians but also nurses, dentists, optometrists, medical examiners or coroners, "or any other medical or mental health professional, Christian Science practitioner, religious healer, school teacher or counselor, social or public assistance worker, child care worker . . . or police or law enforcement officer."¹⁴

The fear is that busybodies or intermeddlers will "over-report" and turn in cases which really reflect their own class status or bias,¹⁵ or, in other words, that middle-class professionals will judge the homes of the poor or the homes of other ethnic groups in terms of their own middle-class life style. From a court's point of view, all too often reports of case workers are replete with gossip and hearsay which reflect the bias of the reporter.¹⁶ That is, they are incompetent, irrelevant, and immaterial according to the rules of evidence.

The answer should be that techniques exist to guard against bias and to assure credibility. The baby should not be thrown out with the gossip. The author of the report may be summoned and subjected to cross-examination. Rebuttal testimony may be offered. The danger in child abuse cases still is that of underreporting. Since we are not concerned with jury cases, either an administrative body or eventually a court may be relied upon to determine the facts. Moreover, even though a large caseload of abuse and neglect cases may be a burden, it should not be assumed that the whole system would break down under the load.

Of course, there are problems of logistics in society's efforts to cope with child abuse, and there are priorities as to resources and manpower. The real issue, however, is whether social agencies and the mental health system, not the courts, can handle the load. I am reminded of Mr. Justice Marshall's footnote in the *Powell* case¹⁷ regarding therapy rather than incarceration for public drunks. The Justice pointed out that all of the psychiatrists and psychiatric social workers in the country would not be sufficient in number to treat the known alcoholics of Los Angeles County alone. This does not mean, however, that merely because we cannot cope with the total problem, given present resources, we should relegate emotional abuse to a secondary position. The neglected child also needs help, as does the adult who is responsible for the situation. It also is true that courts may be relied upon to be cautious regarding a finding of neglect which may lead to a temporary or permanent termination of parental rights. To anyone who has read court decisions in this area it is clear that a permanent termination of parental rights requires overwhelming proof because of the drastic consequence to the parent-child relationship. Custodial placements, on the other hand, always are modifiable, hence they lack the same finality and may be made on a lesser degree of proof, and this is so regardless of the quantum of proof theoretically required.

Although the *criminal justice* system is limited as to what it may do with regard to child abuse and neglect cases, the *parens patriae* power of our courts to intervene is

constitutionally limited only by the necessity of a compelling state interest justifying intervention and the requirement that there be a reasonable relationship between the stated objective and the means employed to accomplish such purpose. Under the *parens patriae* power, which also is involved in commitment or certification cases, treatment and program become matters of crucial importance, as you are aware from the so-called "right to treatment" cases.¹⁸ Thus, assuming that there have been procedural due process, reasonable notice and a fair hearing, in a child abuse or neglect case, we then cross the threshold into the adequacy of a particular treatment program, and arrive at the triad of plant, personnel, and program. To express it another way, the consideration for removal of the child from his home was his protection and an affirmative obligation to treat the family. Increasingly, courts are abandoning their traditional "hands off" policy regarding patients, inmates, and prisoners, and in a general way are supervising involuntary institutionalization in terms of fulfillment of objectives.¹⁹

The third point I wish to make in this discussion of violence towards children is that any progress we make will depend upon full and complete inter-professional cooperation. Our legislatures have given us statutory authority and power. However, the implementation of child abuse laws is not automatic, despite criminal sanctions for failure to report and disclaimers of liability for good faith reporting.²⁰ It appears that most professionals are more willing to cooperate with social or health agencies than with law enforcement or judicial agencies.²¹ Ease or informality of reporting is another practical consideration.²² Any success that may be achieved in individual cases depends largely upon the program and personnel of the social work profession, but any one of several professions concerned with child abuse can scuttle the best of programs.

The final point I wish to make is that to some degree child abuse and neglect reflect a general deterioration in the social values of contemporary society. Immediate self-gratification is encouraged by our culture. Today we speak more of "rights" than of responsibilities. Traditional restraints imposed by the family, the church, and other social institutions, such as schools, no longer have an obligatory character, and the superego appears to be out of control. From a sociological point of view we have loosened the bonds of the feudal order so that men, women, and children are relatively free from former duties, but we have not filled the vacuum with any fixed sense of personal responsibility or even accountability. At least some psychiatrists and philosophers have reinforced this new *laissez faire*, and lawyers have implemented it.

This malaise of irresponsibility has many contributing factors but may be seen as a by-product of poverty, hopelessness, and despair, or poor impulse control. The explosive mix in child abuse cases often is the impact of crisis upon immature parents who frequently are isolated from family and society. A typical profile is that where a helpless child is scapegoated by a frustrated parent who in his or her generation was an abused child.²³ Abuse may take the form of either the "battered child" or what has been called the "Beverly Hills syndrome,"²⁴ depending upon the socioeconomic history of the abuser. For cases of this kind reeducation for parenthood is the difficult task.

We should be realistic as we ponder the contributing factors to child abuse. Already we have lost the "war on poverty," and public figures in this Bicentennial Year appear to accept a policy of "benign neglect." The immediate future for social and welfare reform is not promising if it costs money. Probably only a restructuring of our society and a new consensus as to social goals can produce a favorable environment for the nurture of meaningful parent-child relationships. Until that day comes, if it does, the struggle will be to cope with the symptoms of a sick society, not the least of which is the "battered child." The law, meaning statutes and the judicial process, may provide the procedure, but the substance of any program regarding abuse and neglect must come from the medical and social work professions. We have made an inter-professional commitment. Some progress is being made, but there remains much to be done before we can assume that children have a moral right backed up by law to the love, care, and nurture of

responsible parents.

References

- 1 During the 1960's, all 50 states and the territories of Guam and the Virgin Islands enacted child abuse reporting statutes. For a convenient compilation and comparison, see DeFrancis V, Lucht C: *Child Abuse Legislation in the 1970's*. Revised edition, Denver, American Humane Association, Children's Division, rev. ed. 1974
- 2 Prior to enactment of reporting statutes there were criminal statutes covering assault and battery, child neglect, and failure to provide support. In addition, Family Court Acts and domestic relations laws provided for proceedings to terminate parental rights for abuse or neglect.
- 3 See Paulsen, Parker and Adelman: Child abuse reporting laws—some legislative history, 34 *Geo Wash L Rev* 482 (1966), for a discussion of the problem of who should be required to report.
- 4 See Freeman L, Hulse W: *Children Who Kill*. Berkley Medallion paperback, New York, 1962
- 5 See Gelhorn W: *Children and Families in the Courts of New York City*. Dodd, Mead & Co., New York, 1954. See also, Terr and Watson: The battered child rebrutalized: Ten cases of medical-legal confusion, *Amer J Psychiat* 124:10 (1968)
- 6 Ballinger Pub. Co., Cambridge, 1975. This study developed out of the Juvenile Justice Standards Project of the N.Y.U. Institute for Judicial Administration.
- 7 *Id.* at 18, section 3 of the Model Act
- 8 *Id.* at 14, section 2 of the Model Act
- 9 *Id.* at 20-22
- 10 *Id.* at 73-78
- 11 *Ibid.*
- 12 42 U.S.C.A. § 5101 *et seq.*
- 13 Fontana V: *Somewhere a Child Is Crying*. Macmillan, New York, 1973, p. 24
- 14 Sussman A, Cohen SJ: *Reporting Child Abuse and Neglect: Guidelines for Legislation* (1975), p. 18
- 15 For an example, see *In re Rinker* (Pa. Super. 1955), 117 A.2d 780.
- 16 See Foster and Freed: *Child Custody*, 39 *N Y U L Rev* (1964).
- 17 *Powell v. Texas*, 392 U.S. 514 (1968)
- 18 For example, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).
- 19 *Ibid.*
- 20 Section 7 of the Model Child Abuse and Neglect Reporting Law proposes an immunity from civil or criminal liability for a good faith report, and Section 8 makes a knowing failure to report by one having the duty to do so a misdemeanor.
- 21 See Paulsen, Parker, and Adleman, *op. cit. supra* n. 3.
- 22 *Ibid.*
- 23 See Gil DG: *Incidence of child abuse and demographic characteristics of persons involved, in The Battered Child*, Helfner & Kempe, eds., Univ. Chicago Press, 1968.
- 24 See Foster and Freed: *The battered child: Whose responsibility—lawyer or physician?* *Trial*, Dec./Jan. 1967, pp. 33-37.