The Devil's Advocate

The symposium and transcript on Child Custody reprinted in this issue of the *Bulletin* illustrate some of the problems inherent in the utilization of expert testimony within an adversary format. The wishful thinking of most of the contributors is that if the law would only reform, cordial inter-professional relations would be established and problems would evaporate. Judge Lindsley as well as Drs. Goldzband, Rodgers, and Trunnell speak from that point of view.

The Devil's Advocate shares the view of Judge Bazelon regarding the efficacy of cross-examination of experts and rejects the concept that child custody matters should be excluded from the adversary process so that the experts will feel more comfortable and less threatened by the system that otherwise applies. The image that the reformers have in mind may be that of the European forensic science institute where the opinions of the senior professor go unchallenged.

A few years ago we visited such an Institute in Utrecht. Following conviction, all felons were reviewed by the behavioral experts of the Institute. Depending upon the felon's attitude at interview, and the expert's prognosis as to rehabilitation, the felons were routed to maximum or minimum security institutions or centers, to be held there indefinitely at the Queen's pleasure. Holland has no writ of *habeas corpus*. The "experts" were in complete charge of sentencing and program. There were no checks and balances; little if any civil rights; and no meaningful appeal. Moreover, senior members of the Institute completely dominated decisions; juniors rarely if ever voiced disagreement, and if they did, their views were dismissed as less expert than those of the senior professor.

Although the forensic institute or medical model may have wide appeal to insecure professionals, it is essentially authoritarian because of the absence of appropriate checks and balances. It is the system of checks and balances and the doctrine of judicial supremacy which distinguish our form of government. Maintenance of this system is especially urgent in those areas of law where the reliability of human prediction is uncertain or at best tenuous. Human behavior, being what it is, and the variables, being so many, make prediction of "best interests" a risky business.

Moreover, in questions of custody, as in criminal matters, we are dealing with judgments and conclusions. Judgments or conclusions are relatively meaningless, whether they come from judges or experts, unless the bases for them are laid out for examination and evaluation. Cross-examination is the time-tried method for ferreting out the bases and reasons for conclusions. No witness, expert or not, is or should be immune from this procedure, which reflects principles of credibility and fairness. It was reaction to the trial of Sir Walter Raleigh which gave rise to the Anglo-American concept of a right to confrontation and to cross-examine, and the principle is so important under our system that it should never be discarded for reasons of expediency.

The judicial system in the United States insists upon written opinions by judges so that all parties will be aware of the *ratio decidendi* and so that there may be a basis for an appeal. All too often, however, experts are loath to set forth the basis for conclusions in reports or on the witness stand. May there be something in medical training that engenders a desire for insulation from challenge?

Dr. Goldzband in his contribution to the symposium obviously "cops out" from the adversary system. He sets up and knocks down various strawmen, such as "law as logic"

and Freud's "unreasonable" unconscious. A reading of Holmes and Cardozo would have led Dr. Goldzband to the discovery that logic is but one tool among many used in the judicial process and that the consequence of decision often is the unarticulated major premise. Any experienced trial lawyer would tell Dr. Goldzband that it's as important to know your judge as to know the law, as Judge Lindsley intimates. In a sense, Dr. Goldzband, and others, are saying "If you won't let me set the rules, I won't play in your ball game. I'll take my ball and go home, unless you allow me five strikes, while others have only three."

The Devil's Advocate also is disturbed by Dr. Rodgers' suggestion that the lawyer adopt the role of "helping agent." If I am involved in litigation, I don't want a "helping agent" representing my interests. Whether I am in the dock charged with crime, or am struggling to regain custody of my son, I want my own counsel, not a disinterested neutral, to represent me. If I didn't, my lawyer would have a fool for a client.

All of the above does not mean that there may be no adaptation of the usual adversary format in order to accommodate for litigation involving the placement of children. Adaptation may be had within the process. For example, in many states the court hearing a placement issue has access to the investigations, reports, and testimony of court-appointed professionals. Under proper procedure, such professionals may be cross-examined by counsel for any party and may be called upon to give reasons for conclusions. The risk here is that the court-appointed experts may be clothed in an inappropriate "mantle of infallibility" so that they preempt the field of testimony. The right of confrontation and cross-examination is a protection against that risk, as is the privilege of introducing rebuttal testimony.

It also may be fair and wise to have independent counsel appointed to represent the interests of children in custody and other placement cases. The adversary process should require that there be such independent representation. Otherwise, the danger of a conflict of interests is too great. In other words, there is and should be room for Dr. Trunnell's lawyer as "friend of the court," but not at the expense of depriving a party of individual representation and expert testimony.

The contributors to the symposium are long on sincerity and short on humility, as were the authors of *Beyond the Best Interests of the Child*. The contributors seem to posit absolute truth and verity arrived at in a clinical setting as contrasted with special interest and mistake as arrived at in a court of law. Yet, a recent study optimistically concluded that most dispositions in custody disputes, and most legal principles where applied, were psychologically sound. [See Bradbrook: The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes. 11 J Fam Law 557 (1972)]. The fact is that determining the best interests of a child is a prediction, as is the conclusion that a court has chosen the least detrimental alternative. Because of this, and other reasons, the law wisely refrains from making a conclusive and final determination but leaves the door open for future modification of custodial terms, at least if there is a substantial change of circumstances.

Of course, the medical contributors to the symposium generally are free to refuse to appear as experts except in the role of "friend of the court." There may be no such option, however, if they are treating therapists. Moreover, perhaps there should be a critical evaluation of why such a limited role is desirable. The lawyer's alternatives in a custody case are to proceed with the case and to try to win for his client, or, if such success would be a disaster for the children, to decline the case or to withdraw. The expert on child behavior has the same option. Where convinced that the party calling him is entitled to custody and that such placement would further the best interests of children, why should he feel any hesitancy to appear for one side? There is nothing ignoble about furthering the ends of justice.

It is time that the expert face up to the interface of law and psychiatry. And look it

squarely in the eye. The law cannot assure you that your testimony will be written on stone tablets, or that designation as *amicus curiae* will give you an ego trip. Nor can it assure you that your court appearance will be comfortable and pleasant. The best the law can do is to say that if your testimony is prudent and accurate it will be difficult for opposing counsel to "lay a glove on you" and it may be a rewarding experience and exercise in good citizenship, for which there may be token remuneration. Sure, the legal process is a "game," but one supposes that psychiatrists are experts on "games people play" and occasionally like to become participants in a spectator sport. The lesson psychiatrists need to learn is that they do not set the rules of the game, at least not in the legal arena. Judge Bazelon tried to tell psychiatry this in *Washington (Washington v. U.S.*, 390 F.2d 444 (D.C. Cir. 1962)), but had to give up in *Brawner (U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972)). One wonders if psychiatrists really listen.

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