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Big Mother: The State's Use Of Mental Health Experts In Dependency Cases

George J. Alexander*

INTRODUCTION

This Article centers on child dependency proceedings. It is designed principally to examine the use of mental health (psychological and psychiatric) professionals in that context.¹ Child dependency proceedings are the process by which the state examines allegations that children are abused, mistreated or subject to improper care. As a result of determinations made in these proceedings, parents may be required to reform their treatment and care of their children, may be temporarily deprived of custody, or may have their parental rights permanently terminated.

There is some overlap in the use of mental health professionals in dependency and their use in other fields. Thus, after a brief statement of the rationale for the role of psychologists/psychiatrists in dependency proceedings, this Article will survey how such specialists have performed in other contexts. As a counterweight to the abuses in fields, such as testimony concerning the insanity defense, involuntary commitment and conservatorship, this Article notes the rise of criticism and attempts to moderate the impact of mental health testimony.

Thereafter, this Article sketches the child dependency issues which regularly draw mental health expert testimony and evaluate the impact of such testimony. The Article reviews the literature on deficiencies in mental health expertise and practical pressures on experts which seem to make the use of testimony of psychiatrists

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1. The author hopes to address other aspects of child dependency proceedings in later articles under the Big Mother umbrella.

and psychologists inappropriate for many of the issues in which it is routinely used.

CHILD PLACEMENT AND THE CALL FOR
PSYCHOLOGICAL/PSYCHIATRIC EXPERTISE

It is clear that there is now, and has for a long time been, dissatisfaction with the resolution of child placement cases. While there is a long standing commitment to the overriding interests of children,² there is no certainty about how best to insure that children are protected from abuse and neglect by their caretakers. Ubiquitous child abuse reporting laws insure that even merely suspicious circumstances be made known to the authorities.³ In consequence of these laws and other policies, numerous children⁴ are processed by courts to determine whether they ought to be placed in homes other than their present ones, either permanently or merely for a short period in which to allow their caretakers to resolve any current problems and retake them.⁵ Believing, as conventional wisdom has it, that bonding with a parent or substitute

2. Concern for children has overridden the protection of the home in child pornography cases. It has conquered doctrines of free speech when children are part of the audience. It has justified a school system in which administrators are allowed to suppress literature, silence speech, and demand conformity. As this Article will remind, it has overridden the rights of parents to raise their children.

3. See generally Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L. Q. 141 (1986), reprinted in DOUGLAS J. BESHAROV, PROTECTING CHILDREN FROM ABUSE AND NEGLECT 9 (1988).

4. See generally NATIONAL COMMITTEE FOR PREVENTION OF CHILD ABUSE, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES (1990) (reporting the results of the 1989 annual fifty state survey, which compares a total of 7,559 reports of sexual abuse to reporting agencies in 1976 with a total of 200,000 reported in 1986, the last year for which comprehensive national figures are available).

5. CAL. WELF. & INST. CODE § 300(d) (West Supp. 1993).

caretaker is essential,⁶ laws typically provide a relatively short period in which to make final dispositional decisions.⁷

The child placement process customarily involves a court, and may involve a number of attorneys.⁸ Despite the number of attorneys attempting to resolve the custody issue, it is often impossible to ascertain uncontested accounts of the conduct of the child or of the child's caretakers.⁹ Since such issues are usually crucial to the resolution of dependency cases, a variety of experts are regularly employed to help the court. Of interest to this Article is the use of mental health professionals: psychiatrists and psychologists. Precisely because these professionals have a forensic role in the resolution of other types of legal issues, this Article will also address them. Whenever the expertise of mental health professionals is invoked, it is usually, as here, because there is a desire to have certain conduct evaluated or to obtain help in recreating the past or predicting the future conduct of one of the persons in whom the court is interested.

If one could only know more about an individual child's needs and the prospects for its development in alternative settings, that would help the dependency process a great deal. If only we could be sure which options would best serve the development of happy, healthy and productive adults, we might be inclined singlemindedly

6. See JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 6 (1979) (Every child needs the "unbroken continuity of [an] affectionate stimulating relationship with an adult."); see also John Batt, *Child Custody Disputes and Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Somit Position and the Group's Painter v. Bannister Jurisprudence*, 16 NOVA L. REV. 621, 627-29 (1992) (discussing the "Beyond the Best Interests" paradigm involving the concepts of "continuity" and "psychological parent").

7. See CAL. WELF. & INST. CODE § 319 (West 1984) (providing for a period not exceeding fifty days).

8. In California, the law provides for resolution of the issues in court. CAL. WELF. & INST. CODE §304 (West Supp. 1993) (court jurisdiction); *id.* § 317 (West Supp. 1993) (appointment of counsel). Therein, the county typically provides three attorneys (there may be more): a Deputy District Attorney, representing the child; a Deputy Public Defender, representing one or both of the caretakers (usually parents); and a third attorney, representing the social worker. Given the scarcity of resources in the entire procedure, the social worker's attorney seems a curious luxury.

9. See, e.g., Judge Leonard P. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201, 201-02 (1987).

to adopt them.¹⁰ Unfortunately, all general solutions appear to have substantial potential for harm. If only one could be certain about how good the parents of the child were in some more pervasive manner than simply whether they committed some alleged bad acts, that also would be of great help. Actually, certainty about specific acts in the past could, at least, advance the inquiry. Unfortunately, since the primary witnesses are young children, they may be unable to answer questions, and older ones may be relatively unreliable witnesses.¹¹

The above combination of circumstances almost write a job description for an expert. As has been true of other aspects of the law with equally difficult questions, we have enticed mental health workers to provide that expertise. Thus, a number of issues are, thus, left for psychiatric/psychological testimony.

SURVEY OF FORENSIC PSYCHIATRY/PSYCHOLOGY IN OTHER CONTEXTS

Child dependency is not unique in its reliance on mental health specialists. Indeed, there appears to be an inverse relationship between the delegation of legal issues to psychological resolution and the ability to handle them with traditional tools. Unfortunately, the problems are so complex and varied that all attempts at bright line standards have failed to solve the problem.¹²

10. One of the sources of frustration in this field is the fact that coercive process applies almost exclusively to the poor. That suggests that many problems could be solved by wealth redistribution and, perhaps, that they will not be solved in its absence.

11. See STEPHEN J. CECI ET AL., CHILDREN'S EYEWITNESS MEMORY 210 (1987) ("Children traditionally have been viewed as suspect eyewitnesses because of widely held perceptions that they are suggestible and can be easily manipulated, have difficulty distinguishing truth from fantasy, and are frequently uncooperative.").

12. See generally Kathleen M. Quinn et al., *Resolved: Child Sex Abuse Is Overdiagnosed* 29 J. AM. ACAD. CHILD AND ADOLESCENT PSYCHIATRY 789 (1989) (stating that inadequate investigations lead to an overdiagnosis of child sexual abuse); Diana Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse*, 41 DUKE L.J. 691 (1991); Douglas J. Beshrov, *Unfounded Allegations, A New Child Abuse Problem*, PUBLIC INTEREST, Spring 1986, at 18; L. B. Suski, *Child Sexual Abuse: An Increasingly Important Part of Child Protective Service Practice*, 3 PROTECTING CHILDREN 3 (1986); Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983); Robert J. Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L.Q. 383 (1989); Dirk Lorenzen,

Consider some other issues in which psychological/psychiatric evidence is central to resolution. The insanity defense to crime,¹³ incompetency,¹⁴ and institutionalization¹⁵ in mental health wards have the best developed relationship. To a lesser extent, insanity and incompetence are wild cards in most fields of law.¹⁶ It is difficult to reconcile legal norms with the absence of free will that has been associated with mental aberration. An accommodation to the logic that demands notice of the alteration of mental functioning by some has generally been provided by creating different rules for those who are mentally ill or insane.¹⁷

Mental illness and insanity are, of course, quite different. They come from radically different sources, and accomplish fundamentally different ends. Mental *illness* is a claim that non-conforming human conduct is the product of a process of being ill.¹⁸ The term invites a "cure" response and, more importantly to law, implies a lack of responsibility on the part of the sick person. For mental health professionals, mental illness is an important concept because the heart of their professional preparation has been in "healing."

This Article shall not rehearse the argument that mental illness is a myth,¹⁹ as the literature on that point is extensive.²⁰ Nor will

Comment, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033 (1988).

13. See Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 625 (1990).

14. See generally Jan E. Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818 (1992); George J. Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003 (1979) (hereinafter *Premature Probate*).

15. RALPH REISNEER & CHRISTOPHER SLOBOGIN, *LAW AND THE MENTAL HEALTH SYSTEM* 597-604 (2d ed. 1990).

16. See *infra* notes 22-44 and accompanying text.

17. See Seymour L. Halleck, M.D., *PSYCHIATRY AND THE DILEMMAS OF CRIME: A STUDY OF CAUSES, PUNISHMENT AND TREATMENT* 210, 222 (1967) ("The most important reason for psychiatric participation in the criminal trial is a humanitarian zeal to temper the harshness of punishment.").

18. See PAUL R. MCHUGH, M.D., *THE PERSPECTIVES OF PSYCHIATRY* 5 (1983).

19. See THOMAS S. SZASZ, M.D., *IDEOLOGY AND INSANITY* 12-24 (1970).

this Article belabor the brooding question of the extent to which any human conduct is truly the product of free will, recognizing that the rationale for disparate treatment for the mad often expresses a belief that they are different in the extent of their control of their conduct.²¹ It is unlikely that there will be a popular consensus on this point and, therefore, law must struggle with a system which at best accommodates to this necessary uncertainty. At best, one can hope for a pragmatic solution to current problems.

In that regard, it is interesting to note the similarity of occasions where mental health professionals have been chosen to help the law resolve important issues. For example, take the insanity defense. In fact, the defense has little application to real life. It is urged in very few cases, and is unsuccessful in most of the ones in which it is asserted.²² Nonetheless, it comes in handy as a safety valve for the rigors of a legal system that is often seen as quite harsh. Many criminal defendants have committed crimes

20. See THOMAS S. SZASZ, M.D., *THE MYTH OF MENTAL ILLNESS* 262 (rev. ed. 1974) ("Mental illness is a myth. Psychiatrists are not concerned with mental illnesses and their treatments. In actual practice they deal with personal, social and ethical problems of living."); THOMAS S. SZASZ, *LAW LIBERTY AND PSYCHIATRY* 18 (1963) ("[P]sychiatric and sociological descriptions and explanations may offer promotive statements regarding the guised of cognitive assertions. In other words, while allegedly *describing* conduct, psychiatrists often *prescribe* it.") (emphasis in original); see also G. Gulevich & D. Bourne, *Mental Illness and Violence*, in *VIOLENCE AND THE STRUGGLE FOR EXISTENCE* 27 (D. Daniels et al. eds., 1970). Gulevich and Bourne conclude their review by commenting that "an individual with a label of mental illness is quite capable of committing any act of violence known to man, but probably does not do so with any greater frequency than his neighbor in the general population." *Id.* at 323. See generally LEE COLEMAN, *THE REIGN OF ERROR* (1984).

21. Moral theorists have identified four principal conditions that must be satisfied under the liberal paradigm before someone deserves moral blame for their conduct. A (1) moral agent must be implicated in (2) the breach of a moral norm that (3) fairly obligates the agent's compliance under circumstances where that (4) breach can be fairly attributed to the agent's conduct. Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 *SOC. PHIL. & POL'Y* 59, 60 (1990). Arenella writes:

To qualify as a blameworthy moral agent, the individual must have the capacity to make moral judgments about what to do and how to be and the ability to act in accordance with such judgments. We view moral evil as a corruption of this human potential for moral concern, judgment and action. Thus, individuals do not deserve moral blame if they lack these moral capacities.

Peter Arenella, *Convicting the Morally Blameless. Reassessing the Relationship Between Legal and Moral Accountability*, 39 *UCLA L. REV.* 1511, 1518 (1992).

22. See William Bennet Turner & Beverley Ornstein, *Distinguishing the Wicked from the Mentally Ill*, *CAL. LAW.*, Mar. 1983, at 42.

for reasons that society cannot honor, but that many can understand. Some are driven by poverty to steal so as to provide food for themselves or their loved ones.²³ Others are driven to rage by societal discrimination.²⁴ We do not excuse crime because of such factors, but invariable conviction would also strike some as excessive when imposed on those whose conduct seems understandable. While it would be seen as frivolous to dismiss every hundredth case to show societal compassion, it is acceptable to find a very small number of persons legally irresponsible.²⁵ No harm is done to the societal desire to punish because, quite commonly, the "acquitted" person is placed in a mental institution.²⁶ Indeed, mental confinement may exceed the involuntary incarceration allowed by the penal system.²⁷ At the same time, since the mental health system is defined as therapeutic and not oriented toward punishment, the result leaves the appearance of compassion. It is difficult to imagine how differently the objects of that "compassion" view what is happening to them.²⁸

Using mental health professionals as the necessary experts in such cases also allows attorneys to wash their hands of the dubious conclusions elicited. Mental health experts are notoriously bad witnesses, and many lawyers have considerable luck in discrediting them in cross examination.²⁹ In part, this is so because of the lack of reliability and validity of diagnoses discussed below. Experts can

23. For a classic example, see VICTOR HUGO, *LES MISERABLES* (1862).

24. See, e.g., George J. Church, *The Fire this Time*, *TIME*, May 11, 1992, at 18.

25. This point is, of course, a limited one and depends on the absence of societal condemnation of the specific person chosen. When John Hinkley was acquitted by reason of insanity in the shooting of President Ronald Reagan, there was mass protest.

26. HENRY STEADMAN, *BEATING THE RAP IN THE REIGN OF ERROR* ix (Lee Coleman ed., 1979) (stating that every year thousands of citizens accused of crimes though not convicted by a court are confined in mental institutions).

27. See *Jones v. United States*, 463 U.S. 354, 368-69 (1983).

28. A client the author represented, Roy Schuster, was released from a state mental health facility because of constitutional infirmities in his hospital incarceration. *United States ex. rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969), cert. denied, 396 U.S. 847 (1969). In seeking certiorari, the state urged that the result would cause unmanageable dislocations. Apparently, when word of Schuster's release from the hospital spread through the institution, most of the inmates immediately sought to be returned to prison in preference to remaining in therapy.

29. See JAY ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 3 (1981).

easily be confronted by opposing expert testimony. When someone is acquitted, the psychiatrists can be blamed.

Another legal problem in which mental health professionals play a large part is conservatorship (guardianship). Unlike the insanity defense, conservatorship proceedings are quite common.³⁰ The stated goal of the procedure is to identify persons who are incompetent to handle their personal or financial affairs, and to provide a court appointed conservator (guardian) to act for them.³¹ As the author has written on numerous occasions,³² conservatorship proceedings, in fact, accomplish many other objectives because they control the ward's wealth. For example, these proceedings may provide support for children or may be a means of disadvantaging those who are not in the family but are receiving some of its assets.³³

Conservatorship criteria, like those in dependency, are rich in vague concepts. In conservatorship, often the chief criterion is mental illness itself.³⁴ Some individuals are made wards expressly because of their old age,³⁵ a concept not so much vague as it is cruel.³⁶ As with the application of the insanity defense, it would

30. COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, AMERICAN BAR ASS'N, *GUARDIANSHIP OF THE ELDERLY: A PRIMER FOR ATTORNEYS* 1 (1990).

31. See generally GEORGE J. ALEXANDER, *WRITING A LIVING WILL: USING A DURABLE POWER-OF-ATTORNEY* (1988).

32. E.g., George Alexander, *Avoiding Guardianship*, 2 J. ELDER ABUSE & NEGLECT 163, 164 (1990); ALEXANDER, *supra* note 31, at 25; George Alexander, *Premature Probate: Who Benefits from Conservatorship?*, 13 TRIAL 30, 32 (1977); GEORGE J. ALEXANDER & TRAVIS H. D. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* 3 (1972).

33. The plight of Ben Weingart is a good example. See ALEXANDER, *supra* note 31, at 2.

34. E.g., CAL. WELF. & INST. CODE §§ 5350-5371 (West 1991 & Supp. 1993) (statutory procedures for Lanterman-Petris-Short (LPS) conservatorship for someone with a "mental disorder or impairment by chronic alcoholism"); see also Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 275 & n.4 (1988); cf. CAL. PROB. CODE § 1801(a),(b) (West 1991) (Conservatorship requires a finding that the person lacks the ability to properly provide for "his or her personal needs for physical health, food, clothing, or shelter" and/or "manage his or her own financial resources or resist fraud or undue influence.").

35. See Friedman & Savage, *supra* note 34, at 279.

36. When the ABA Committee on Uniform State Laws proposed to move its Uniform Guardianship and Protective Proceedings Act for adoption by the House of Delegates, the ABA Commission on Legal Problems of the Elderly (of which the author was then vice-chair) unanimously (one abstention) opposed it because, if allowed, the declaration of guardianship was based on the old age of the prospective ward. It also asked for time to debate the issue in the House of Delegates. It was not given time, and the House of Delegates adopted the provision summarily. When the

be difficult to achieve the desired results without taking advantage of there being people willing to assess decisions as being irrational irrespective of their surface reason. History attests to the fact that one need not be mad to have an affair, at least in the sense that there appear to have been many more affairs than could be accounted for by even the most pessimistic assessment of the degree of madness.³⁷ It takes a mental health professional to classify certain sexual choices as the product of mental incapacity, thus having one partner placed in conservatorship, which does not incidentally rescue family resources from the outside influence.³⁸ In such cases, the expert's role is to "medicalize" what would otherwise be understood as perfectly human behavior.

The bulk of those declared incompetent are relatively poor and powerless.³⁹ This is not only true because a richer person's resources can often be marshalled to defeat the process, but even more so because relations rarely initiate proceedings against those who are still productive wage earners; presumably because they benefit more from sharing in income than they would by trying for a share of prior earnings. The conventional view of conservatorship proceedings is that they provide a private remedy. It was surprising to the author, when I first did field work, to find that the state was the most frequent petitioner.⁴⁰ Later work has proven the state's dominant role to be typical.⁴¹ At first, one wonders why that should be the case since usually, the state is not petitioning for incompetency for those who have wealth that they might mismanage. In fact, the wards are typically destitute.⁴²

For those who are accustomed to using incompetency for family members who want to prevent waste of assets, the state's

Commission persisted in its complaints, the ABA Committee on Uniform Laws declared the age provision "optional."

37. FRANK PITTMAN, M.D., *ROMANTIC AFFAIRS: TEMPORARY INSANITY* 184 (1989) ("Many of us really do seem to believe that the best thing in life is the intense disorientation ('the picturesque unusualness') of being in love.").

38. See *supra* note 33 and accompanying text.

39. ALEXANDER & LEWIN, *supra* note 32, app. at 158 (Table 3).

40. *Id.* app. at 157 (Table 1) (noting that 282 of 419 cases were instituted by the state).

41. See Friedman & Savage, *supra* note 34, at 280.

42. *Id.* at 280.

interest is sometimes perplexing when pointed out. While it is still not clear to me how bringing such proceedings is routinely justified, it is at least obvious that creating a conservator-ward status creates great management efficiency for the state. The state, once it becomes the conservator, can make many decisions for the ward that may reduce the expense of his or her indigence.⁴³ Perhaps a greater reason still is that conservatorship allows the state to assent in the name of the ward to its own procedures.⁴⁴

The dark side of involuntary commitment, much like conservatorship, provides another opportunity for taking action against the bothersome, but powerless. For example, in the criminal field, the involuntary commitment process allows locking up defendants against whom there is inadequate evidence for conviction.⁴⁵ It is possible to combine civil commitment and criminal process by charging people with a crime, but having them incarcerated as incompetent to stand trial. If they are found incompetent to stand trial, they need not be convicted. While criminal law demands substantial evidence before anyone can be taken from the streets, many whose dangerousness is much more dubious can be placed in institutions for their supposed benefit and, of course, the benefit of the state. Thus, society has a useful mechanism for its own protection.

This procedure has also been used to remove people who are not dangerous to society, such as people who are "in need of treatment" or suicidal.⁴⁶ Sometimes it even permits removing

43. See, e.g., CAL. PROB. CODE § 2900 (West Supp. 1993) ("The public guardian may take immediate charge of the property within his county of persons referred to him for guardianship or conservatorship when such *property is being wasted, uncared for, or lost.*") (emphasis added). See generally George Alexander, *Premature Probate: Who Benefits From Conservatorship*, 13 TRIAL 30, 32 (1977).

44. As these explanations are based on conjecture rather than empirical research, it would be interesting to study why conservatorship cases are brought by the state. The study should include not only the stated reasons but also a tracing of the uses made of conservatorship once it is in state hands.

45. See Carol A.B. Warren, *Involuntary Commitment for Mental Disorder: The Application of California's Lanterman-Petris-Short Act*, 11 LAW & SOC'Y 629, 631 (1977).

46. Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1218-19 (1974).

otherwise powerful people from prominence.⁴⁷ It obviously accomplishes two things simultaneously. First, it removes the incarcerated person from contact with the rest of the populace. Secondly, it stigmatizes, and thus minimizes, that person's utterances.

The political use of psychiatry is easiest to appreciate in a totalitarian country. Thus, the example of the former Soviet Union proves particularly useful. There, the use of incarceration in mental hospitals in the service of the state's political ends became so notorious that the nation was threatened with expulsion from the World Psychiatric Association.⁴⁸ Yet, if one examines the success of the Soviet practice, it becomes clear how useful it can be in achieving social goals. It should not surprise anyone that it has been used in this country against some prominent political figures in what appears to be a similar manner. Ezra Pound,⁴⁹ General Walker and many others⁵⁰ were removed from prominence through hospitalization. Others have made the point that the medical aspects of those cases (as opposed to their political facets) are extremely weak.⁵¹ There are a number of other cases of politically prominent figures who were disposed of behind the bars of institutions but, as in the other forms of alleged madness, the bulk of those disposed of have been relatively powerless.

What makes involuntary commitment, especially commitment premised on danger to society, even more pernicious is the fact that the imprecision of diagnosis of future danger is so great that it

47. See *infra* notes 49-51 and accompanying text.

48. They resigned, instead. See *Censure Soviets on Mind Abuses*, BERKELEY GAZETTE, Sept. 1, 1977, at 1.

49. See THOMAS S. SZASZ, *THE THERAPEUTIC STATE: PSYCHIATRY IN THE MIRROR OF CURRENT EVENTS* 138, 161-64 (1984) (describing the trial of Ezra Pound in which he was declared "insane and mentally unfit for trial" and involuntarily committed as a mental patient for twelve years).

50. Szasz names Secretary of State Forrestal, Governor Earl Long, Ernest Hemingway and Mary Todd Lincoln as persons removed from prominence through hospitalization in the United States. He also names Margo Krupp (wife of Fritz Krupp, the German industrial magnate) and Ignaz Semmelweis. *Id.* at 236-37.

51. See *id.* at 18, 141, 178.

forces health professionals to overpredict dangerousness,⁵² thus locking up many who never prove to be a danger.⁵³ This aspect of mental health law stands in sharp contrast to the criminal law ideal of accepting the improper release of twenty guilty people if necessary to prevent the incarceration of a single innocent person.⁵⁴

While none of the legal principles sketched were expressly designed to accommodate *state* needs, it is apparent that they nonetheless do so. In general civil law, the state is usually more detached from the results. In fact, other than insuring that disputes can be settled justly and peacefully, the state may well be indifferent as to whether plaintiffs or defendants succeed in litigation. In civil litigation, the results of alleged mental illness are handled less consistently. In tort law, madness is largely irrelevant.⁵⁵ In contracts, it is sometimes exculpating.⁵⁶ Foolish consistency is the hobgoblin of little minds when the state does not have its own needs.

52. Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 711-16 (1974).

53. Usually, there is no way to determine whether those involuntarily placed are, in fact, more dangerous than the general population because no one is inclined to experiment with allowing dangerous conduct. On occasion, however, mandated release provides such an opportunity. In *Baxstrom v. Herold*, 383 U.S. 107 (1966), the United States Supreme Court allowed the release of some prisoners who had clinically been determined to be especially dangerous and not afforded a review of their commitment by jury trial because they were civilly committed after the termination of a prison sentence. *Id.* at 110, 114-15. A follow up study tracking the men in question found them to be no more dangerous than the population at large. See generally Henry J. Steadman & Gary Koeses, *The Community Adjustment and Criminal Activity of the Baxstrom Patients 1966-1970*, 129 AM. J. PSYCHOL. 3 (1972).

54. Researchers have found that psychiatric predictions of dangerousness are often based on the psychiatrist's desire to "play it safe." According to John Monahan, "[i]f one overpredicts violence, the result is that individuals are incarcerated needlessly. While an unfortunate and, indeed, unjust situation, it is not likely to have significant ramifications for the individual responsible for the overpredictions." John Monahan, *The Prevention of Violence*, in COMMUNITY MENTAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM 13 (John Monahan ed., 1975).

55. See George J. Alexander & Thomas S. Szasz, M.D., *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME L. REV. 24, 28 (1967).

56. George J. Alexander & Thomas S. Szasz, M.D., *From Contract to Status via Psychiatry*, 13 SANTA CLARA L. REV. 537, 538 (1973).

EFFECT OF STATE REGULATION ON FORENSIC
PSYCHOLOGY/PSYCHIATRY

There is also an economic side to the use of professional expertise which tends to entrench professional opinions. The apparently private aspect of diagnosis and healing of madness is a distinctly regulated industry. Not only does the practice of medicine require a license, it is probably the most expensive general license in the country. To become a physician, it is necessary to complete college, be admitted to and graduate from medical school, usually a four year process in this country, and then to complete a residence in medicine and, often, to do further work to be accepted into a specialty such as psychiatry.⁵⁷

It is, consequently, understandable that there is pressure from those licensed to insure that their practice is monopolized by those with similar investments. It was inevitable that, when psychologists made a claim to participating in the healing of the "mentally ill," there was strong resistance from the organized medical association.⁵⁸ To this date, the physicians (psychiatrists) have the exclusive right to physical treatment such as surgery, electro-convulsive therapy, injections of medicine and, usually, prescribing medicine.⁵⁹ They attempted to have exclusive access to the major source of health treatment resources, insurance, by having insurers require that all billing by psychologists go through physicians (who presumably exacted a monopolist's fee for the service). Antitrust

57. See generally THE FEDERATION OF STATE MEDICAL BOARDS OF THE UNITED STATES, A GUIDE TO THE ESSENTIALS OF A MODERN MEDICAL PRACTICE ACT (1956).

58. *E.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 468-69 nn.2, 4 (1982) (providing psychotherapy treatment under Blue Shield Plans).

59. Medical practice acts are regulatory statutes that prohibit the practice of medicine by any person without a license. There are many language variations in the state laws, but they all contain similar provisions. They all provide for the creation of a board charged with the duty of examining applicants for medical licensure. C. JOSEPH STETLER ET AL., *DOCTOR AND PATIENT AND THE LAW* 15 (1962).

concerns for competition, however, blocked that use of monopoly power.⁶⁰

The inclusion of psychologists as suppliers of healing for those mentally ill did not radically affect the field except to the extent that the supply of healers was increased. The costs of credentials are almost as high as a physician's. To be a licensed psychologist generally requires a college education followed by admission to and graduation from a doctoral program in psychology and, usually, an extensive apprenticeship.⁶¹ Thus, psychologists also have a substantial investment in keeping groups of prospective "patients" and, consequently, in characterizing those under discussion as mentally *ill*. Furthermore, the high costs of entry has deprived these professions of substantial numbers of practitioners with contrarian perspectives. Once having earned licensure, their motivation to deny the utility of professional testimony is greatly diminished.

The other group who influences the legal outcomes of claims of madness are attorneys. Attorney licenses, as most readers of this Article know, are also very expensive, and lawyers are no more anxious to share their market power with others than are psychiatrists and psychologists. Some mental health issues are cast in ways that uniquely fit legal skills. For a determination that someone is insane, as in the defense to crime, it is necessary to deal with such issues as knowledge of right and wrong,⁶² capacity to form "intent,"⁶³ and the causal relationship between mental state and the act in question.⁶⁴ Such issues are understandably not ones that mental health professionals want to address.

60. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 478-79, 484-85 (1982) (holding that customer who received psychotherapy treatment from a psychologist suffered sufficient injury under antitrust laws for not being able to recover payment from insurance company due to policy that reimbursement would only be allowed if treated under a physician's referral).

61. See, e.g., CAL. BUS. & PROF. CODE § 2914 (West 1990).

62. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975); *In re Winship*, 397 U.S. 358, 361 (1970); *Davis v. United States*, 160 U.S. 469, 491 (1895); *Daniel M'Naghten's Case*, 8 Eng. Rep. 718, 719-21 (1843).

63. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, § 135, at 1073 (5th ed. 1984).

64. George Anastaplo, *Psychiatry and the Law: An Old-Fashioned Approach*, in *BY REASON OF INSANITY: ESSAYS ON PSYCHIATRY AND THE LAW* 167 (Lawrence Zelic Freedman ed., 1983).

Healing is regulated, but it is not necessarily performed in such regulated facilities as hospitals that can exclude unlicensed competitors. Law is exclusively enforced in regulated institutions and, while unlicensed advice may transgress on the preserve of attorneys, key resolutions must be achieved in (or sanctioned by) courts.⁶⁵ Thus, the legal profession may be more generous in sharing its definition of aberrant behavior with others, as it knows it retains monopoly control of outcomes.

The mental health system, in general, is a system that reflects very traditional views, and is not structured to tolerate divergence of perspectives. It provides the sorts of previously mentioned societal management mechanisms.⁶⁶ It has found resistance in well established civil rights and their spokespeople. Thus, after a history of unfettered use of the involuntary commitment mechanism, a procedural due process wave created some counterbalance.⁶⁷ Advance directives have begun to counteract the threat of improper conservatorship.⁶⁸ The criminal system has been modified in minor ways to protect against improper intrusion of madness issues.⁶⁹

65. E.g., CAL. PROB. CODE §§ 1801-1803 (West 1991) (conservatorship); *id.* §§ 7000-12591 (West 1991 & Supp. 1993) (administration of estates of decedents); CAL. CIV. CODE §§ 4350-4385 (West 1983 & Supp. 1993) (dissolution of marriage); CAL. WELF. & INST. CODE § 300 (West Supp. 1993) (juvenile dependency).

66. See *supra* notes 22-53 and accompanying text.

67. The California Legislature enacted the Lanterman-Petris-Short Act, an example of legislation implementing due process reforms to involuntary commitment laws. CAL. WELF. & INST. CODE §§ 5000-5523 (West 1984 & Supp. 1992). Carol Warren describes the reform effort:

The Lanterman-Petris-Short Act provides for two initial stages of involuntary civil commitment: a 72-hour hold for treatment and evaluation by mental hospital personnel, and a 14-day commitment period for a person who as a result of a mental disorder, is a danger to others, or to himself or gravely disabled. (LPS §§ 5150, 5250). It then authorizes additional commitments for mental disorder: 90 days (renewable for additional 90-day periods) for persons dangerous to others (LPS §§ 5300, 5304); 14 days (not renewable) for persons dangerous to themselves, and a 30-day temporary (LPS § 5352.1) and one-year subsequent (LPS § 5361) conservatorship which may be reviewed each year for persons gravely disabled (LPS § 5350).

Warren, *supra* note 45, at 630.

68. The use of advance directives for this purpose was first suggested by me in *Premature Probate*. See Alexander, *supra* note 14, at 1027-33.

69. See Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 386, 389-892 (1985) (discussing modifications such as allowing defense motions, discovery, and obtaining pretrial release despite the defendant's incompetence). Bennett refers to the chapter entitled *Criminal Justice Mental Health*

FORENSIC PSYCHIATRY/PSYCHOLOGY AND CHILD DEPENDENCY

As applied to children in dependency cases, madness has a very significant role. In part, this role derives from the state's strong interest in protecting children. Not only does the state provide the normal range of protection through age neutral provisions of criminal law and its process, it also has established special criminal code sections that punish child abuse⁷⁰ and provisions requiring many who would likely notice such abuses to report them.⁷¹ The state also provides express exceptions to standard privileges to assure that reports be made.⁷² In addition to criminal process, the state uses a civil procedure to take children from abusive parents, and to place the children elsewhere, often in foster care. The procedure is very broadly cast. In California, a juvenile court obtains jurisdiction on finding at least a substantial risk of non-accidental physical harm by parents or guardians, or such harm by failure to adequately supervise, or that the child is depressed because of parental/guardian conduct. The above represents merely a few reasons sufficient to begin the process. Once the court has

Standards which appears in ABA STANDARDS FOR CRIMINAL JUSTICE 2 (2d Supp. 1986).

70. *E.g.*, CAL. PENAL CODE § 270 (West 1988) (failure to provide); *id.* § 271 (desertion of child under 14 with intent to abandon); *id.* § 271(a) (abandonment or failure to maintain child under 14); *id.* § 273a (willful cruelty or unjustifiable punishment of child; endangering life or health); *id.* § 273d (corporal punishment or injury of child). *See generally* Lucy A. Younes & Douglas J. Besharov, *State Child Abuse and Neglect Laws: A Comparative Analysis*, in PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE 353, app. at 413-15 (Douglas J. Besharov ed., 1988) (compiling state-by-state list of criminal sanctions for criminal acts against children).

71. *E.g.*, Child Abuse and Neglect Reporting Act, CAL. PENAL CODE §§ 11164-11174.3 (West 1992) (requiring reports by "child care custodians," "health practitioners," and the "employee of a child protective agency" among others). *See generally* Younes & Besharov, *supra* note 70, app. at 357-58, 366-89 (describing state reporting law procedures).

72. *E.g.*, CAL. EVID. CODE § 972(d)-(e)(1) (West Supp. 1993) (exception to marital privilege for dependency proceedings or child of either spouse); *id.* § 985(a) (exception to privilege for confidential marital communications for crimes committed against a child of either spouse). *See generally* Younes & Besharov, *supra* note 70, at 409-10; Wayne F. Foster, Annotation, *Competency of One Spouse to Testify Against Other in Prosecution for Offense Against Child of Both or Either*, 93 A.L.R. 3d 1018 (1979).

jurisdiction, the streamlined process of a dependency case begins.⁷³

Dependency cases dispense with a number of rules that otherwise apply to litigation. In California, to protect children from the glare of public proceedings, the hearings are not held in open court. The record is sealed.⁷⁴ The principal report, by a social worker, is admitted into evidence despite its recitation of hearsay, and may, in fact, provide the principal evidence used to determine jurisdiction. Thus, evidence otherwise inadmissible may, in fact, be determinative.⁷⁵ All of these practices are based on the desire to protect children as well as the inherent limitations in the sort of case the state would be able to bring if criminal law standards or their equivalent were imposed.⁷⁶

In dependency proceedings, a crucial issue often is presented through psychological or psychiatric evidence. If child abuse has been alleged, professional testimony will quite regularly be used to establish the fact of the abuse having occurred and the identity of the perpetrator.⁷⁷ Such testimony is often necessary in dependency cases because the child victim is too young to testify.⁷⁸ Other issues also call for mental health expertise. Whether the caretaker will be a threat to future care of the child, whether she is an alcoholic or uses drugs, and how responsible she is in general are issues of this sort. Indeed, in California, there are specific grounds for granting a change of caretaker when the parents are

73. E.g. CAL. WELF. & INST. CODE §§ 300-395 (West 1984 & Supp. 1992) (jurisdiction and procedure statutes for dependency). See generally Younes & Besharov, *supra* note 70, at 358-60, 403-12.

74. E.g., CAL. WELF. & INST. CODE §§ 389, 826-830 (West 1984 & Supp. 1992) (statutory procedures for destruction, release, and sealing juvenile court records). See generally Younes & Besharov, *supra* note 70, at 397-400.

75. See *In re Malinda*, 51 Cal. 3d 368, 376, 795 P.2d 1244, 1247, 272 Cal. Rptr. 787 (1990).

76. See Robert J. Levy, *Using "Scientific" Testimony To Prove Child Sexual Abuse*, 23 FAM. L. Q. 383, 385-86 (1989); Michael Fine, Comment, *Where Have All the Children Gone? Due Process and Judicial Criteria for Removing Children from Their Parents' Homes in California*, 21 SW. U. L. REV. 125, 126-28 (1991).

77. See Veronica Serrato, Note, *Expert Testimony in Child Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 166 (1988).

78. See Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 496-97 (1989).

incompetent to raise the child.⁷⁹ A finding under that provision expressly requires taking the testimony of a mental health professional.⁸⁰

Current dependency procedures are certainly zealous. One cannot doubt that the state has expressed its concern for the welfare of children. It has streamlined procedure, coerced information through compulsory reporting laws and waiver of privilege, and provided for secret and informal testimony in assessing the relevant facts. It often finds claims of innocence as merely proof that the child is endangered.⁸¹

A recent Grand Jury in San Diego called its system "out of control."⁸² The Grand Jury estimated that up to sixty percent of the cases that resulted in removing children from their homes should not have been decided as they were. It is difficult to

79. CAL. CIV. CODE § 232(a)(6) (West Supp. 1992). This section, in pertinent part, provides: An action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions . . . (6) [w]hose parent or parents are mentally disabled and are likely to remain so in the foreseeable future.

Id. See generally Paul Berstein, *Termination of Parental Rights on the Basis of Mental Disability: A Problem in Policy and Interpretation*, 22 PAC. L.J. 1155 (1991) (criticizing broad judicial interpretation of the provision).

80. CAL. CIV. CODE § 232(a)(6) (West Supp. 1992) ("The evidence of any two experts, each of whom shall be either a physician and surgeon, . . . or a licensed psychologist . . . shall be required to support a finding under this subdivision.").

81. The Grand Jury reports:

If the [dependency] court believes a molest occurred and the family member *could have been responsible* a "true finding" is made and wardship declared. If a father denies molest and a true finding is made, he suffers the ultimate Catch-22 -- he can either admit and take a chance that the department will allow him to begin reunification with his family or he can deny and no reunification will occur.

But the irony does not end there. If the spouse supports her husband's denial, she cannot be trusted to protect the child and she too will not be allowed to reunify with the child., a current assertion is that the mother must have known all along and failed to protect. That then becomes a protective issue and reason to remove the child from the mother.

Still worse, if the child denies the molest, this can be seen as part of a "child abuse accommodation syndrome and an additional reasons why the child should have no contact with the parents. . . . Thus, all members of the family can deny a false molest allegation and, in each instance, the system uses the denial as evidence of guilt.

SAN DIEGO COUNTY GRAND JURY, CHILD SEXUAL ABUSE, ASSAULT, AND MOLEST ISSUES, Report Nos. 8, 2, 3 (June 29, 1992) (citation omitted).

82. Leonard Bernstein, *Social Workers Look for a Solution*, L. A. TIMES, Feb. 8, 1992, at B1.

evaluate this report.⁸³ Even assuming that it was correct as to the current situation in San Diego, there is no assurance that San Diego is representative of programs in other cities.

Some general questions do suggest themselves, however. The preeminent one appears to be whether the dependency process provides better protection for children than would occur in its absence. That, in turn, requires an assessment of the adequacy of the criminal system that punishes child abuse independently. It also requires a judgment of the cost, psychological and financial, paid by children who are forcibly removed from the homes of parents who have not abandoned them, and by their parents. One should also recognize the societal costs of providing the procedure and its enforcement, and inquire whether those funds could better be spent in counselling children and parents.

After accounting for the costs of having a process, one must evaluate the likely improvement when children are removed from their parents and placed in foster or other alternative care. To do this, one would need to know the accuracy of decisions in dependency cases.⁸⁴ Just as there are many anecdotes concerning the serious plight of children being raised by abusive parents, so there are others about terrible foster care arrangements.⁸⁵ Only if, on balance, it seems likely that foster care will be superior to the care of what are almost always natural parents should it be attempted. The law assumes that the process is concerned with ultimately improving the home environment for children. In theory, the law uses the dependency process as an intermediate step to ultimate reunification; however, substantial dislocations are involved in both the interim separation and the supervision of reunification. In fact, many children are not reunited with parents who want them.⁸⁶

83. *Bernstein*, *supra* note 82, at B1.

84. If, for example, the San Diego Grand Jury is correct that more child removal cases are inappropriate than appropriate, that would seem to suggest a clearly negative answer.

85. See *Fine*, *supra* note 76, at 128-29 & n.25.

86. See Margaret Beyer & Wallace J. Mlyniec, *Lifeline to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, in *PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE* 166 & n.30 (Douglas J. Besharov ed., 1988).

The most pressing question, however, would appear to be whether the process is worth the personal costs for all involved. Several factors suggest it might not be. First, children need both attachment to parental figures and permanence in relationships as part of growing up well adjusted.⁸⁷ Second, parents are usually strongly emotionally attached to their children, and their anguish at having them removed must be considered as well.

In viewing the system as it functions in California, several questions leap to mind. First, one must consider whether a process that is so deprived of resources can be expected to work well. Currently, the attorneys and social workers involved in the dependency process have a staggering number of simultaneous cases.⁸⁸ Even if there were no overload, one is left to wonder how the decisions could be correctly resolved given the complexity of the question of alternative parenting of small children. So many intangible considerations affect good parenting that the responsibility for finding substitute parents is daunting.

Second, one is also led to reexamine the law's rejection of so many safeguards of the criminal justice system. It cannot be true that society lacks zeal in eradicating crime, thus there must be reasons other than softness on crime that explain why criminal defendants enjoy so many protections that accused parents do not.⁸⁹ If there is concern that innocent people not be criminally convicted, why is there not concern that innocent parents are deprived of their children? While one can easily agree that children

87. See GOLDSTEIN ET AL., *supra* note 6, at 6 (every child needs the "unbroken continuity of [an] affectionate and stimulating relationship with an adult."); see also Beyer & Mlyniec, *supra* note 86, at 164-65 (stressing that preserving the relationship to the "biological" parent should be given greater attention because of its importance in child development).

88. See, e.g., William W. Patton, *Forever Torn Asunder: Chartering Evidentiary Parameters, the Right to Competent Counsel and the Privilege Against Self-Incrimination in California Child Dependency and Parental Severance Cases*, 27 SANTA CLARA L. REV. 299, 300 n.1 (1987) (noting that, in 1985, 17,913 child abuse or neglect proceedings were instituted in Los Angeles).

89. See Levy, *supra* note 76, at 385-87 & n.13 (discussing how dependency proceedings do not include a requirement for proof beyond a reasonable doubt, a federal constitutional right to counsel for indigent parents, and the right to confront all witnesses due to special hearsay provisions); see also Patton, *supra* note 88, at 303-51 (discussing differences in the right to counsel, privilege against self-incrimination, and the rules governing admissible evidence in dependency proceedings).

should be protected, why is there not equal solicitude for the predictable victims of future crimes?

In the final analysis, cases that do not appear to involve ongoing physical or sexual abuse, which could be established in criminal court, turn on difficult questions of how to evaluate prior conduct and how to predict future conduct. Not surprisingly, these questions are delegated to social workers.⁹⁰ Social workers, in turn, often use psychologists or psychiatrists to make such decisions.⁹¹

While the process leaves many brooding doubts about which the author hopes to comment in future installments, this Article focuses on the portion that involves mental health professionals. As in other matters of law in which they have allowed themselves to be embroiled, mental health professionals bring dubious clarity to the difficult problems in child dependency. In a sense, it is curious that this point must be made so often in so many contexts. Civil commitment, the largest mental health related field in the middle of this century, suffered all of the vagaries of mental health testimony for a long time before the reformers of the sixties convinced legislatures how unreliable and invalid psychiatric testimony was likely to be.⁹² While current law still relies excessively on such testimony, some safeguards are in place to counteract its impact and to assure that psychiatric prediction and recreation of the past are not alone sufficient to incarcerate people for indefinite periods.⁹³ Despite that fact, the use of mental health opinions in child placement cases appears to be innocent of any of

90. See CAL. WELF. & INST. CODE §§ 272, 280-281 (West 1984 & Supp. 1992) (provisions allowing social workers to prepare social study report); Fine, *supra* note 76, at 127, 138 (stating that judges depend mainly on social workers to make dependency decisions).

91. See Edwards, *supra* note 9, at 226 ("Evaluations are often provided by medical or psychological experts utilized by the investigators.").

92. SAMUEL J. BRAKEL & RONALD S. ROCK, *THE MENTALLY DISABLED AND THE LAW*, 55-59 (1971).

93. See *supra* note 67 and accompanying text (discussing due process safeguards); see also Grant H. Morris, *The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment*, 60 TUL. L. REV. 927, 933-36 (1986) (discussing *O'Connor v. Donaldson*, 422 U.S. 563 (1975)).

the doubts that affected comparable testimony in mental hospitalization.

Are there factors in child placement that make it likely that mental health expertise is more appropriate to this field? It is not likely that psychological predictions of future behavior are any better here than in other relationships. For example, whether a father is likely to abuse his children, be violent in their presence, or inadequately provide for his children's needs is no clearer to a professional than whether a person accused of being mentally ill will be dangerous in the future--the clearest example of unreliable psychiatric testimony.⁹⁴ Indeed, a professional cannot improve on the findings of a non-psychologist investigator in determining what has happened in the home in the past.

On the other hand, unlike her role in the problems of adults, a properly trained expert may be able to inform a court about how well adjusted a child is in its present setting, and whether any psychological problems may require treatment.⁹⁵ Without considering whether maladjustment is a disease that these experts are qualified to treat, it, at least, is a matter that relates to their training and experience. Their opinion may well provide one factor that would be useful to the courts in making a placement decision. One should not confuse this comment with a suggestion that the testimony might also indicate which parent made the child happier or whether one or the other performed specific acts, good or bad. As the last section of this Article demonstrates, those issues are well beyond the ability of experts.

Furthermore, in many child placement cases, even though the child is the party most interested in a proper outcome, the child is often unable to assist directly in its resolution. Young children may not understand or be able to communicate important facts.⁹⁶ Some facts may be unduly upsetting to youngsters.⁹⁷ This obvious problem has created great frustration in a system attempting to

94. See Ennis & Litwack *supra* note 52, at 699-708, 711-16.

95. See Edwards, *supra* note 9, at 227.

96. JOHN E.B. MEYERS, CHILD WITNESS LAW AND PRACTICE §§ 3.1-3.28 (1987).

97. *Id.* §§ 2.10, 4.2.

assist children. It may be appropriate to call on mental health workers to report the state of knowledge concerning victim silence or other behavior. For example, it is useful for a jury to know that a molestation victim may not want to talk about the events for one of several reasons.⁹⁸ It is useful to report that unusually disruptive behavior may be linked to conflict within a child.⁹⁹ The temptation is, of course, to press an additional step and invite the worker to testify that a given silence indicates a specific child's having been abused or that disruptive behavior is the equivalent in any given case of testimony of harm caused by the primary caretaker.

The latter testimony would be much more decisive. On the other hand, it is precisely the type of information that the worker is unable to provide accurately. Even if the worker could understand the past by observing present child behavior or could elicit a story from the child after establishing a relationship with her, several very serious problems would attend such an effort. Prescinding from the lack of scientific basis for the finding and a pattern of excessive certainty about conclusions, what is ultimately elicited is essentially what would not have been admitted in the first place: The impressions of a small child about its surroundings and about traumatic events in its life. It seems strange to have a high threshold of testimonial competency for young children and then to admit a version of their stories sifted through still another mind.

Even if the mental health worker is totally neutral, the testimony is untrustworthy but there is no reason to expect neutrality since most of the workers who participate in the dependency process do so regularly.¹⁰⁰ Consequently, they are likely to have expectations of outcome derived from prior cases. After deciding that a number of prior children were abused by their fathers, for example, the next father seen will more likely be found

98. See *id.* § 4.9 (describing how to deal with delays in reporting sexual abuse).

99. *Id.* §§ 4.15, 4.17 (describing how to use the "sexually abused child syndrome" to bolster credibility of a victim).

100. See Levy, *supra* note 76, at 390.

to have also abused the child even though the evidence is much weaker.¹⁰¹ Confounding that problem, mental health workers as a group are quick in making a decision and surprisingly confident in their conclusions.¹⁰²

So far, the author has assumed a lack of intentional bias in the decision. In life, unfortunately, that is often unrealistic. Those who are paid for their testimony are doubtless influenced by the viewpoint of those who pay for their services. Of course, that is to some extent true of all paid experts. The difference between mental health experts and others lies in the fact that so much less certainty attends the sort of information they present.

Beyond the possible distraction of one's client's interests, mental health workers are also subject to broader pressures. As is the finding of "dangerousness" in the involuntary commitment cases, testifying that a given parent presents problems is relatively safe. If the testimony results in denying child custody, the expert will never be proven wrong. If custody is granted or retained anyway, and nothing untoward happens, it simply means that the alleged culprit is on guard as a result of the expert testimony and the scrutiny it has brought. On the other hand, if the expert testimony makes the custodian out as well qualified, and the custodian subsequently strikes the child or has sexual relations with it, the psychologist/psychiatrist will be blamed.

One must also consider political correctness as public attitudes about child abuse matters change. Recently, far fewer complaints have been made, presumably because of the conventional wisdom that child complaints about abuse were mostly incorrect and that children simply invented such stories.¹⁰³ Now, at least as far as fathers sexually abusing their female children is concerned, the claim is popularly conceived of as true even though the data is

101. Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329, 341 n.51 (1992) (citing a study which concludes that clinicians from state mental hospitals are likely to overestimate the number of paranoid schizophrenics in hospitals and to overdiagnose paranoid schizophrenia).

102. *Id.* at 347 n.83.

103. See generally, Arthur H. Green & Diane H. Schetsky, *True and False Allegations of Child Sexual Abuse in Child Custody Disputes*, 25 J. AM. ACAD. CHILD PSYCHIATRY 449 (1986).

scanty.¹⁰⁴ No data suggests that there has been any substantial change in the actual rate of such conduct,¹⁰⁵ and I doubt that there has. Given the public preference to believe that fathers are abusers, that testimony will be better accepted than its opposite. Thus, there is yet another reason making it preferable to come to one conclusion as opposed to the other.

Finally, and perhaps most perniciously, social class may provide pressure. Dependency cases do not exclusively relate to children of the underclass. Nonetheless, they so often concern children of poor families¹⁰⁶ that it is not much of an overstatement to consider this branch of law uniquely focused on the children of poverty. In some part, the selection of cases is influenced by the fact that many of the children are called to the attention of state officers because they are on welfare rolls.¹⁰⁷ In part, children of richer parents can be siphoned from the system by satisfactory private contractual arrangements for child care. I doubt that those factors and other neutral ones sufficiently explain the selection of cases. Many, I suspect, are the product of society's greater eagerness to supervise the powerless. At least, they are explained by the fact that the poor are less able to marshal resources to resist the forces of the government.

Once dependency proceedings are initiated, parents are given strict prescriptions for their lives should they want their children back. They must be drug free and limit the use of alcohol. Their homes must be clean and orderly, and they must adequately provide for the children's needs and wants.¹⁰⁸ Sometimes, the

104. *Id.*; see also Levy, *supra* note 76, at 387.

105. See Levy, *supra* note 76, at 387-88 & nn. 21-22 (discussing data showing that while report rate of child sexual abuse has increased, so has the number of false or unsubstantiated allegations, usually in divorce custody disputes).

106. See Roy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, in *THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT* 23, 24-30 (Leroy H. Pelton ed., 1981).

107. See *id.* at 26-27 (noting that reports of child abuse among poor people may be influenced by fact they are subject to "public scrutiny" by receiving welfare). But see *id.* at 29, 36 (arguing that the higher rate of child abuse is more due to the effects of poverty than being subject to public scrutiny).

108. See Beyer & Mlyniec, *supra* note 86, at 167-68.

sheer burden of the requirements, such as required classes,¹⁰⁹ makes it impossible for parents to qualify. Of course, the social workers who administer the system are typically middle class, as are their mental health worker colleagues.¹¹⁰ The author gets the uncomfortable feeling that some of the evidence is based on a general notion that children deserve to be elevated from their lower class lives to something more approaching the lives of those who testify about them. Mental health workers have been asked to fill in gaps in information by examining the actions of young children and deducing "abnormalities" from them. In their assessment of norms, it is critical whether mental health workers consider lives of impoverishment normal for poor people. Otherwise, achieving the norm will simply have to be accomplished by taking the children from the parents and placing them somewhere where there are more adequate resources.

Regardless of the parent's social class, one need not accommodate violence or child neglect. If the issues of deprivation are clearly presented to the judge, the judge can distinguish between instances in which the child is deprived of necessary support by parents who have enough funds to do better, and cases in which parents not providing ideally for the child are limited by their available resources. The latter clearly does not warrant removing the child from its home in any but the most appalling circumstances. The same standard must apply when there is a problem, such as drug use or alcoholism, but the problem has been eradicated. That appears often not to be the case. Once the state starts imposing conditions on wayward parents, it commonly strays from those designed to assure that the original problem is solved

109. The San Diego Grand Jury report notes that reunification plans will invariably require that the offending spouse complete Parents United. *SAN DIEGO GRAND JURY*, *supra* note 81, at 3. If drug use or excessive use of alcohol is alleged, the parents are customarily required to attend the program appropriate to their problem as well. Most, but not all, support services are paid for by the state without parental reimbursement. Edwards, *supra* note 91, at 226.

110. Stuart Butler, *A Conservative's War on Poverty; Razing the Liberal Plantation*, *NAT'L REV.*, Nov. 10, 1989, at 27 ("The Great Society spawned a vast middle-class poverty industry: public housing managers, social workers, job-training specialists, day-care providers, and the like.").

to other issues insuring "better" parenting.¹¹¹ The ability of parents to accommodate the latter appears often to be overlooked as an issue.¹¹²

Once one departs from descriptions of behavior that can be readily understood by the judge and views the child's welfare from the standpoint of its psychological well being, there is considerably less necessary focus on the economic implications. The judge may accept the conclusion without recognizing its foundation.

EVALUATING PSYCHIATRIC/PSYCHOLOGICAL EXPERTS

Studies of psychological/psychiatric testimony have demonstrated some facts with amazing consistency. Mental health workers are notoriously unreliable. In their inability to find a language that communicates with others in their field, they make it very difficult to share experience. The studies are legion in which diagnoses were found unreliable.¹¹³ While the profession continues to hope that the next iteration of their core work, the Diagnostic and Statistical Manual of Mental Disorders (DSM), will

111. One author notes that social workers often recommend services such as mental health and parenting education classes that are not acceptable to the parents or needed and criticizes agencies for not directing resources at the parents' perceived needs for adequate housing, increased income, medical care, and day care. Cecilia E. Sudia, *What Services Do Abusive and Neglected Families Need?*, in *THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT* 268, 280-83 (Leroy H. Pelton ed., 1981); see also LEROY H. PELTON, *FOR REASONS OF POVERTY* 172 (1989).

112. NIGEL PARTON, *THE POLITICS OF CHILD ABUSE* 196 (1985) (noting that the "financial cost of maintaining parental contact" should not be overlooked when a child is removed from the home).

113. See generally David Faust & Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 *SCIENCE* 31, 31 (1988) (referring to studies that show disagreement of experienced psychiatrists over diagnosis, success of military recruits despite psychiatrists' recommendation for discharge, and the inability of clinicians to separate persons with actual brain damage from those with simulated brain damage).

cure the problem, there is little reason to believe that it will do so.¹¹⁴ Similar claims about the predecessor volumes failed.¹¹⁵

Without reliability, the ability to call the same condition by the same name, there is no hope of knowing whether diagnoses are valid, that is, whether they actually identify disorders. As has been pointed out, mental health workers, despite these facts, make diagnoses very quickly compared to physicians in other fields, and have great confidence in their correctness.¹¹⁶ Furthermore, once mental health workers have formed an impression, it is difficult to convince them of alternatives.¹¹⁷ In that regard, they may not differ greatly from the general population. The use of their testimony is not inappropriate because it is likely to be less accurate than the assessment of other witnesses. Rather, it is inappropriate because it is likely to be given greater weight than that of lay people. Testimony is likely to be expressed in scientific terms that make it easier to accept, and in which the judge may be more reticent to challenge.

Serious problems exist in making the diagnoses reliable. For example, the psychologist's or psychiatrist's repeated exposure to child abuse is permanently likely to increase his or her propensity to find such abuse.¹¹⁸ Stereotypical factors, such as certain kinds of drawings by children, are assumed to relate facts in a manner wholly unwarranted by data on their validity.¹¹⁹ Interviewing is, itself, a notably unreliable technique for prediction, but it is,

114. *Id.* at 31-32. Faust and Ziskin wrote:

Psychiatry has been continuously plagued by difficulties in achieving reliable classification. The American Psychiatric Association has revised the official diagnostic manual at a quickened pace. The first *Diagnostic and Statistical Manual of Mental Disorders* (DSM-I) was published in 1952, DSM-II in 1968, DSM III in 1980, and DSM-II-Revised in 1987. The next revision, DSM-IV, is slated for publication. . . .

The initial DSM-III field trials appeared to demonstrate improved diagnostic reliability, but serious methodological shortcomings raised doubts about the results.

Id. at 31.

115. *Id.* at 31, 32.

116. Bersoff, *supra* note 101, at 347 & nn. 82-83.

117. *Id.* at 347 n.83.

118. Bersoff, *supra* note 101, at 340-41.

119. *Id.* at 342.

nonetheless, greatly relied upon by mental health professionals.¹²⁰ It should also be remembered that clinicians are taught to focus on their patient's subjective reality. When they change focus to objective reality, they perform far more poorly.¹²¹ One would expect clinicians to improve in their assessments with experience in the field or education, and, as a group, they certainly think they do. In fact, they do not.¹²²

When an impressionable child is brought to a mental health clinician, there is yet another problem that may result. After the sessions between child and therapist, it may be difficult to find out which way the information passed. It is likely that the child presented some information to the therapist that becomes part of the therapist's report. But there are no safeguards against the therapist having brought the information into the relationship.¹²³ It has been pointed out that, despite evidence against its validity, mental health workers tend to trust their conclusions doggedly.¹²⁴ At some point, they may discover that truth as they believe it to exist is not mirrored by what the child relates to them.

When adult patients fail to agree with their therapists, psychological terms help the therapist explain that the patient is

120. Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237, 249 (1973).

121. Faust & Ziskin, *supra* note 113, at 32.

122. It is yet another way to recognize the limitations of their work to note that, in a recent study of professionals who specialize in assessments of brain behavior, there was no significant difference in accuracy between two groups. The members of one group had almost 25 times as much experience as the members of the other. *Id.*

123. It is difficult to produce examples in this field given the secrecy of hearings and sealing of records. A set of cases were reported in Report No. 8 of the San Diego Grand Jury Report. SAN DIEGO GRAND JURY, *supra* note 81. They are used in this article merely as concrete examples of the problem. No claim is made that they are representative. Each of the cases identified were examples of the system's abuse. One case was spotlighted because there was conclusive evidence of parental innocence. It was the subject of a separate, more detailed report.

A daughter of a military father was raped, and he was accused of having been the rapist. He denied the charge and was joined in the denial by the steadfast assertion of his eight-year-old daughter, Alicia, that a stranger raped her. Alicia was removed from the home while the case progressed. After what the Grand Jury described as 13 months of prodding by a psychologist, Alicia was willing to admit that her father was the rapist. After two and one half years, the Department finally tested the semen sample they had kept. It was incompatible with the father's semen. A REPORT OF THE 1991-92 SAN DIEGO COUNTY GRAND JURY, THE CASE OF ALICIA W., Report No. 6 (June 23, 1992).

124. See *supra* note 102 and accompanying text.

wrong. She may be seen as *projecting* her own problems or *denying* reality, to illustrate two professional buzzwords. Indeed, the vocabulary of mental illness is almost entirely comprised of different diseases or abnormalities to explain that there is something untrue or inappropriate about the patient's ideas and conduct. It is the role of some forms of therapy to make the patient aware of these distortions and to help the patient overcome them. Once a therapist has decided that the therapist knows the truth and the child denies it, it may seem appropriate to insure that the child gains insight into its error.¹²⁵ Such sessions create the obvious danger that the therapist will ultimately convince the child, and then will report the newest version to the court. Short of that, professionals commonly report their own notions as the truth and give the contradiction short shrift.

A perhaps less obvious result of sessions of the sort just mentioned is their impact on the child, and, since this Article concerns dependency cases, the child's later testimony. If the mental health worker has been active in seeking the child's reconsideration of events, what will emerge later? Will it be the child's true perception of events? Will it be the child's adopted story taken from the therapist? Will it be some amalgam? Can anyone be certain? At least, the intermingling of the therapists ideas with the child's will leave later testimony ripe for harsh cross examination centered on making recollection out as having been manipulated. The use of experts might thus jeopardize the later use of the child's testimony.

The opposite is, of course, also quite possible. A child may well be pretending abuse when none has occurred. This could be the result of a rich fantasy life, comments made by an older sibling, or anger for one of the many things that parents do in raising children. Would the mental health worker know that the injury was falsified? Probably not. Several studies make the same point: Clinicians are poor at detecting malingering even when they are expressly looking for it.¹²⁶ When they are not led to look for

125. See REISNER & SLOBIGIN, *supra* note 15, at 597-604.

126. Bersoff, *supra* note 101, at 368, 369; Faust & Ziskin, *supra* note 113, at 32.

it, results are, of course much worse. In a now famous study, the experimenter asked children to lower their test performance. He then showed the results to appraisers asking for their diagnosis, and most found the results abnormal and diagnosed the test takers as being brain damaged. Although malingering was listed as one of three possible causes, not a single practitioner chose that correct result.¹²⁷

Not only does the use of mental health professionals lead to additional expense, the potential for error and other problems, it also expressly substitutes for the litigational system. There are many problems in litigation, but as Professor Bersoff points out, a day in court provides the persons involved in the procedure more satisfaction.¹²⁸ For all of its well known faults, the normal adversary system brings a sense of appropriateness and closure that no administrative substitute achieves. Although, dependency cases are heard by a court, so much testimony is presented by professional expert testimony that parents and children old enough to understand what is happening will be disappointed in how different the hearing appears from their model of judicial fact finding. Testimony is summarized and likely cannot be directly challenged. Witnesses "testimony" may have been summarized by others so that the witness cannot be cross-examined. In short, many of the attributes of trials which conventional wisdom suggests lead to truth are gone. Parties will frequently leave the hearing with the feeling that they did not have a day in court.

CONCLUSION

Child placement in dependency cases is difficult work. It can be, and often is, done badly. The cost in the emotions of parents, their children, and perhaps a number of other potential parents, is enormous. There is no evidence that, on balance, the lives of children are improved. Though there are wonderful success stories, horror stories also abound. The recent Grand Jury report on the

127. Faust & Ziskin, *supra* note 113, at 32 (reporting on a test by Faust and others).

128. Bersoff, *supra* note 101, at 363-68.

practice in San Diego is a reminder that failures in the system are not obvious and require unusual dedication to document.

No one relishes the thought of children abused or neglected in the homes of uncaring or even sadistic parents. Such images fire the imagination and lead to typically American interventionist responses. Whether the financial and emotional cost of the intervention process is worth the price, however, appears at least to be an open question. In any event, there is no reason to saddle a difficult system with the same form of expertise that caused devastating results in the confinement and conservatorship cases.