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### Protecting Individual Liberties in the Context of Screening for Child Abuse

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# CHILD ABUSE PREDICTION

## Policy Implications

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To Janice, Matthew, and David

# 8 PROTECTING INDIVIDUAL LIBERTIES IN THE CONTEXT OF SCREENING FOR CHILD ABUSE

*Donald N. Duquette*

A central role of the law in our society is to act as buffer between individual citizens and society at large. When personal freedom or liberty is at stake, the law acts as arbiter between individuals and government and allows liberty to be abrogated only after “due process of law.” Due process is an attempt to insure fair treatment of all concerned—a quest for fairness. In what follows due process will be discussed further together with some examples of the due process model as applied to the child protection system. Certain risks to personal freedom are inherent in child protection. A process will be suggested for protecting personal liberty while utilizing screening questionnaires and clinical interviews to predict child abuse or “unusual child-rearing practices.”

The threat to personal liberties could be reduced in one way by identifying certain areas of the community or certain populations as at risk for child maltreatment, rather than identifying specific high risk parents. Then personal liberties problems would be reduced because individuals are not identified. An entire community or population is infused with the requisite preventive medical and social services. Individuals are not labeled and no one is forced to accept the services offered. On the other hand the areas of the community likely to be identified as high risk are fairly predictable—the poor and socially deprived areas. Intervention and prevention services should, of course, be concentrated in such areas.

However, if identification of certain populations results in uninvited or involuntary intrusions into family privacy or labeling or is racially or culturally biased, even identification of “at risk” populations may be objectionable. Nothing further will be said on the topic of mass screening. The focus hereafter will be on individualized screening for “unusual child-rearing practices.”

### DUE PROCESS OF LAW

The U.S. Constitution provides that no state shall deprive a person of life, *liberty*, or property without due process of law. The law does not prohibit deprivations of liberty but provides that such deprivations take place only after “due process.” Interpretations of the U.S. Constitution have found that the right of liberty encompasses and protects the personal intimacies of the home, the family, and child rearing.<sup>1</sup> The Constitution then protects a parent’s right to custody of a child as well as the integrity of the family home from uninvited interference from the state. The child has a concomitant right to be free in his or her home without outside interference and to be with his or her own parents. The liberty of both parents and children are at stake in the child protection context. What does due process of law require before rights of parents or children can be limited?

### DEFINITIONS OF LEGAL NEGLIGENCE: VOID FOR VAGUENESS?

A common theme in the chapters in this book is that the phenomenon of child abuse and neglect must be defined before it can be responded to in a responsible fashion. The difficulty of defining child abuse and neglect in legal terms is an especially acute problem since our conception of fairness, that is, of due process of law, requires definition of proscribed behavior so that reasonably intelligent citizens can know what is expected of them. Definitions of child abuse and neglect have been alleged to be so vague in their descriptions of parental acts as to deprive persons of due process.<sup>2</sup> Parents have contended that the vague statutory definitions of neglect allow selective and discriminatory enforcement by prosecuting officials, social workers, and courts.

Challenges have been made alleging that neglect statutes are unconstitutionally void due to vagueness.<sup>3</sup>

The majority of courts hearing challenges to abuse and neglect statutes on vagueness grounds have ruled that the statutory definitions of abuse and neglect are not unconstitutionally void for vagueness. The courts have bypassed the definition problem by using the following rationale: A statute need not be more specific than is possible to draft under the circumstances. Child neglect, by its very nature, cannot be defined in a precise and detailed manner. Regardless, the state has a compelling interest in protecting children from abuse and neglect and any narrowing of neglect definitions would have the effect of diminishing the rights of children who have no means of protecting themselves. Finally, even though the language of the statutes is general, due process does not require standards more specific than can be reasonably applied.<sup>4</sup>

Many in the legal profession are dissatisfied with the state of the law on the definition question and see reform in statutory definition as very important in child protection law.<sup>5</sup> Two recent federal district court decisions have declared state child neglect laws unconstitutionally void for vagueness.<sup>6</sup> Just as two swallows do not make a spring, two court decisions do not make a legal trend. Attention is being paid to the problem of definition by legal scholars, legislators, judges, and lawyers. Law reform in child abuse and neglect should begin with improvement of the statutory definitions of what behavior is prohibited.

### WHAT PROCESS IS DUE?

Due process generally includes the right to notice and hearing before rights can be infringed. That is to say, a person is entitled to know what actions are prohibited, what charges are made against him or her, and to have a fair hearing before an objective judge before adverse actions are taken. Due process often requires the right to representation by an attorney when a person is subject to serious deprivations of liberty. However, the elements of due process are not fixed as specific requirements of law but vary according to circumstances, the legal interests involved, and the necessities of the situation. Each state is free to establish procedures in its courts or agen-

cies in accordance with the state's own conception of good policy and fairness.

Although the content of due process cannot be defined specifically, its purpose is clear; that is, to insure fair and orderly administration of the laws and fair treatment of citizens. Due process requires that persons subject to deprivation of liberty be given notice of the proceedings and the charges against them; they must be given an opportunity to defend themselves, and the question of the appropriateness of the deprivation under the circumstances presented must be resolved according to some settled course of judicial proceedings.

Due process is a flexible concept depending on the personal rights involved, the risks presented, and the degree of intervention sought by the state. For example, in a case of suspected child abuse most states allow a hospital to detain a child until the next business day of the family or juvenile court even without the parent's permission. Detaining the child in the hospital certainly infringes upon the parents' rights. The infringement on the parents' rights, however, is balanced against the risk to the child and the degree of invasion (usually loss of a child's custody overnight). At the next step the parents have a right to a preliminary hearing before a court at which some proof of the charges against them must be presented. The state need not prove their case completely as they must do at a formal hearing but they must make some showing (probable cause) that certain facts are probably true and the child should be taken out of the parents' custody pending a formal hearing. The parents' rights are further invaded in that they could lose custody of their child during the several weeks needed to prepare for a formal trial. Procedural due process safeguards act to give them an opportunity for a hearing and a chance to have the decision of the hospital or social agency reviewed by an objective court. Thus some short-term check is provided on the hospital or social agency. The hospital or social agency cannot arbitrarily and without court review detain the child and take away the liberties of the parents except for a very brief period of time.

Finally, at formal hearing, the state must prove that child abuse has occurred and present an appropriate plan for protecting the child and dealing with the family problem. The plan may or may not include removal of the child from the parents' custody. The court may order other invasions of privacy and liberty such as supervision by a social agency, counseling, homemakers, and so forth.



## THE DANGER OF AGENCY OVERREACHING IN VIOLATION OF CLIENTS' PERSONAL LIBERTY

Government involvement in family life is restricted by due process requirements under the jurisdiction of the court once a petition is filed in the court. However, a substantial majority of child abuse and neglect cases referred to protective services never reach the courts and therefore do not receive the protection of personal liberty provided by the court. Nationally, only about 15 percent to 20 percent of protective services cases result in court action.<sup>7</sup> Thus, 80 percent to 85 percent of protective services cases are handled outside the court and, therefore, without due process safeguards to protect individual integrity and personal freedom.

The "reaching out" with protective services, whether by a public welfare department or a voluntary agency, presents a problem which the good motives of the agency ought not to obscure. If help is offered when it is not wanted, the offer may contain an element of coercion. There is a danger of overreaching when the agency deals with the most vulnerable members of the community who may easily be cowed by apparent authority. [What is] the extent to which the offering of protective services should be reviewed by some judicial or administrative agency [?]. . . . The privacy of a family ought not to be upset lightly.<sup>8</sup>

The threat of court action is present in every protective services case, whether expressed or implied. Clients may agree to protective services involvement out of fear of protective services authority or fear of court petition. Overestimating the power of protective services, the family may believe that a petition to the court is tantamount to removal of their children, not understanding that they have rights in the legal process too. The exaggerated perception of protective services authority and the fear of the court process may intimidate parents so that they will acquiesce in "voluntary" plans for services or for placement of their child.<sup>9</sup> Such "voluntary" and non-judicial arrangements provide neither safeguards for the rights of the parents and the children nor checks on a possibly overzealous agency or social worker.

Add to the above the fact that protective services clients are often poor and powerless and that the risk is run of arbitrary social work

action, agency or hospital coercion, and overreaching in violation of personal liberty, and the problem looms large indeed. How shall personal freedoms of parents and children be preserved in child protection? Shall procedural safeguards be established within the administrative structure of protective services to protect the privacy and personal liberties of clients?

To meet the danger of agency overreaching some legal scholars have suggested several<sup>1</sup> mandatory procedural safeguards to protect the rights of both parents and children in the child protection system.<sup>10</sup> It has also been proposed that before a protective services worker begins an investigation of alleged child abuse and neglect a warrant must be obtained from an objective magistrate after some showing of reason to believe abuse or neglect has occurred. Upon the first visit to the home the social worker would be required to make a "Miranda-type" announcement such as: "I am a protective services social worker and I am here to help you, but . . . you should know that you need not speak with me, you may remain silent, and anything you say to me may be used against you later in a court of law."

The above procedure will indeed protect the personal liberties of potential protective services clients. The procedure, however, so defeats the benevolent, therapeutic, and rehabilitative goals of child protection that it would be totally unacceptable to most professionals in the field. Personal liberties are protected but at a heavy cost to the valid social goals of child protection. Remember that due process is a flexible concept. What is required by due process of law depends on the risks to personal liberties presented, the degree of invasion sought by the state, and the benefits to be obtained by the government action. The competing interests and the risks and benefits must be balanced against each other. Because child abuse and neglect is of such great societal concern; because the child protection network is seen as essentially benevolent and noncoercive; and because considerable benefit to the families, children, and society generally is seen as resulting from protective services involvement, the law has not yet required extensive procedural safeguards before protective services may be provided. The law has, up to now, run the risk of occasional coercion and perhaps unwarranted invasions of family privacy and personal integrity in exchange for swift identification and response to child abuse and neglect and related family problems. That tolerance of possible invasions of liberty without procedural safeguards may not continue if unwarranted invasions of family privacy and

integrity continue or increase. Professionals in child protection ought to recognize the threat to personal liberty that our activities create and set out to eliminate them in ways consistent with our rehabilitative goals.

### THE EFFECTIVENESS OF GOVERNMENT INTERVENTION IN CHILD PROTECTION CASES

The above calculus depends for its legitimacy on the benefits to be obtained from government intervention. The cost in personal liberty or risks to personal liberty are balanced against the expected benefits to the child and his or her family. Social intervention strategies in child abuse and neglect cases are not very effective. Considerable advances in the state of our understanding of the problems and the resources made available are necessary. How many intervention strategies involve more than foster care and counseling?

Conversely, when the state intervenes, what are the attendant costs to the child and the family? For instance, parents lose welfare benefits when children are removed, parents are placed under additional stresses when brought into court, children face foster placement and, usually, multiple foster placements. Scholars have questioned the effectiveness of state intervention and argued for a presumption in favor of parental autonomy and against state intervention on behalf of allegedly abused and neglected children based largely on an analysis of the ineffectiveness of state interventions on the children's behalf.<sup>11</sup>

The license extended to the child protection system in dealing with the personal rights of children and their parents depends to a large extent on the promise of effective intervention services. Concurrent with inquiries into perfecting means of screening for unusual child-rearing practices must come improvements in our ability to offer effective services to identified at-risk families. The dilemma of the child protection system is exemplified by a story told by Sir T.H. Huxley while addressing the annual meeting of the Royal Society of London in about the year 1893. Huxley was critical of physicians of the time and advocated restraint and caution in the use of their art. He provided the following metaphor: Consider a melee, he said, a fight between two men. One of those men represents nature

and the other disease. They are striking and grappling with one another. A third man walks up to the melee carrying a huge club in his hand and wearing a blindfold. The blindfolded man swings into the melee at random, sometimes hitting nature, sometimes hitting disease. The blindfolded man with the huge club is the physician, said Huxley. I admonish you to step back from the melee, hold back your club until the blindfold is removed, and your blows can be more carefully directed.

In our setting, the blindfolded man with the huge club represents society's intervenors in the child protection system today. Huxley's admonition to step back from the melee and hold our blows until the blindfold is removed is fitting advice considering much of the legal and social response to alleged child abuse and neglect. Of course, it would be irresponsible to conclude that since a perfect system cannot be achieved the endeavor of child protection should be abandoned completely. However, the benefits realized by children and parents in the child protection system do affect the legal calculus in deciding the extent to which personal rights may be abrogated. The limitations of those promised benefits should be realized.

### DUE PROCESS IN PREDICTIVE SCREENING

Having reviewed two contexts within the existing child protection system in which personal liberties and the protective/rehabilitative goals are balanced against one another, the use of screening questionnaires that attempt to classify individuals as those more or less likely to exhibit "unusual child-rearing practices" will be examined. What due process mechanisms will safeguard the personal liberty rights of parents yet allow the screening to take place? What personal liberties are at stake in predictive screening for child abuse or unusual child-rearing practices? Persons scoring as "high risk" may well be reported as suspected abusive parents since, assuming reasonable specificity and sensitivity, the evaluators will have "reasonable cause to suspect child abuse," which is statutory language in most states that sets forth what must be reported. The definition of child abuse in states following the Department of Health and Human Services (HHS) guidelines in their statutes includes "harm or threatened harm" to a child.<sup>12</sup>

Persons identified as high risk will be "offered" services of one kind or another, which they can "voluntarily" accept or reject. The

words “offered” and “voluntarily” are in quotes to reflect the fact that the danger of agency or hospital overreaching in response to a questionnaire is present in a way similar to the overreaching discussed above in the context of child protective services. The clients are likely to be poor and among the powerless of society. The clients may be easily cowed by authority figures unless the true extent of authority is made clear. Additionally, persons identified by the screening as high risk bear the burden of being so labeled. The consequences of that labeling are hard to predict.

Why does screening for parenting skills have different civil liberties implications than other screening and diagnostic procedures such as the Bayley Developmental Scales, sickle cell screening, or amniocentesis? One difference is that as a result of the latter procedures, individuals are given a choice as to whether the information is to be used or not. This individual patient may voluntarily elect to seek additional treatment based on the test results, or may decline treatment. Screening for parenting skills that leads to a high risk identification may result in a social response that is not totally voluntary, for example, reports to child protective services.

There do exist screening and diagnostic measures that may result in loss of liberty, for example, in cases of typhoid, small pox, and hepatitis. If the disease is discovered the person is quarantined in some cases—a clear loss of liberty. But there are some important differences between the diseases mentioned above and unusual child-rearing practices. First, the diseases mentioned above are known and agreed upon. We know what typhoid, hepatitis, and smallpox are, and health professionals agree on those definitions. Second, we know what an effective response to those diseases might be. There is a general agreement among health professionals as to how to treat the illness. Third, the risk to the patient is clear and the risk to the general public is clear. The deprivation of liberty, that is, the quarantine, is for the benefit of the patient and for the benefit of the general public. The risk-benefit balancing is much less ambiguous and clearly more toward the benefit side than is the case in child protection.

### INFORMED CONSENT AS A DUE PROCESS SAFEGUARD

The concept of informed consent requires that a patient be provided sufficient information about the risks attendant upon a particular

course of therapy and that the patient, being aware of risks, consents to the procedure. The theory behind informed consent is, in part, that the patient's personal integrity is to be protected. It is the patient who is to control his or her own person and what is to happen to his or her own person. It is the patient who is to decide what is to happen to him or her and not the physician or other helper. The informed consent concept can apply to administration of predictive questionnaires. A procedure is suggested below whereby a voluntary and truly informed consent could be relied upon to safeguard personal liberties in screening for unusual child-rearing practices.

First, the atmosphere in which individuals are advised of the nature of the parenting screening must be noncoercive, nonauthoritarian, and conducive to the parents making their own decision about participating. In the best situation, the atmosphere created should be supportive of voluntariness. Such an environment would be more likely to be present in a social agency or medical clinic where the parents have gone voluntarily than in an emergency room or as part of protective services activities. The creating of a noncoercive environment conducive to voluntariness in the hospital setting is more difficult, yet mothers and fathers who have just had their first child are ideal choices for screening.

Having achieved the noncoercive environment conducive to voluntariness, the parents should be told of the nature of the screening they are asked to undergo. After informing them of the purposes and goals of the screening, the parents should be specifically told of the risks they face by participating. The screening has four possible results:

1. It may correctly identify them as persons not likely to have unusual difficulty rearing their children;
2. It may incorrectly identify them as persons not likely to have unusual difficulty raising their children (false negatives);
3. It may correctly identify them as parents likely to have difficulty raising their children; or
4. It may incorrectly identify them as parents likely to have difficulty raising their children (false positives).

It seems that only the first possibility is without risk to the parents. The percentage likelihood of each possible result can and should be calculated and communicated to the parents. Possible result of the second item, incorrectly identifying parents as persons unlikely

to have unusual difficulty rearing their children, carries risks to the parents different in kind from the risks presented by possible results of the third and fourth items. After a paper and pencil test and a clinical interview, parents may be incorrectly classified as not at risk and, as a result, may not be offered special or additional services. The additional services may in fact have been helpful or necessary to the parents in preventing later problems including later child abuse and neglect. The parents then run the risk of not being offered supplemental services when they are, in fact, needed. A wise practice might be to offer supplemental services to all primiparous parents who ask but to exert an additional effort to recruit high risk parents.

Parents may be correctly or incorrectly identified as persons likely to have unusual difficulty raising their children. Being so identified they will be offered supplemental services of one sort or another that they can accept or reject.

The informed consent procedure becomes more difficult when the parents are advised of the possibility of a report being made to child protective services. Information obtained by the written questionnaire and the clinical interview may in fact create enough concern in the minds of the evaluators and be reliable enough to create a "reasonable cause to suspect child abuse or neglect" especially when child abuse is defined broadly to include "threatened harm" to a child. Reporting statutes of most states as recommended by HHS contain definitions and language the same as or similar to that quoted above.<sup>13</sup>

The parents should be told of the possibility of a protective services report in states where the reporting statute is consistent with the recommendation of HHS. The protective services involvement may be quite benevolent and nonjudgmental and in fact child protective services may not get involved at all, preferring to defer to the screening agency for provision of services on a voluntary basis. A working relationship between the protective services and the screening agency could be developed whereby cases receiving services are either not reported or reported but not acted upon by the protective services. The parents should be told in percentage terms the likelihood of a report being made and the likelihood of protective services action being taken and the nature of that action when and if it does occur.

The results of the screening questionnaire and the clinical interview that may be part of the screening process may be used in court

if the parents are accused of child abuse and neglect and court jurisdiction is sought. The legally recognized privileged communication is waived in most states in the context of child abuse or neglect although the scope of that waiver has yet to be clearly established by appellate opinion. But we still must consider if the risk of court involvement and the use of the screening information in court are substantial enough to require that the participants be forewarned in the informed consent procedure. Alternatively, it may be that the risk is so collateral and so unlikely to occur that the screening procedure can justifiably omit obtaining informed consent.

In some states an analysis of the law on child abuse and neglect would reveal that there is little or no likelihood of a court taking action based upon a screening questionnaire or even that a questionnaire would be relevant evidence to prove allegations of child abuse or neglect. In such states there would seem to be no reason to include mention of such a risk in the informed consent. In other states, however, the law may vary somewhat and the willingness of courts to act prospectively or based on such evidence may be greater—even though it would still be unlikely. Court action is a severe result. Considering the severity of the risk, its likelihood of occurrence would not have to be large before a duty to inform parents would be required by legal notions of due process fairness and the informed consent doctrine.

Clearly the informed consent procedure could become so extended that no one would freely participate in the screening process. The effects of the informed consent could be mitigated by law reform that would in fact reduce the risks that participating parents would face. Perhaps the most substantial reform would be to reduce the possibility of the use of such questionnaires in court to zero. That could be done legislatively, but an analysis of state law may reveal other less difficult ways to achieve the same end. The risk of going to court as a result of protective services involvement that may be triggered by the screening questionnaire is still there. Another law reform that may be indicated is a narrowing of what must be reported to child protective services so that the results of a screening questionnaire need not be shared beyond the agency or hospital administering it. The hospital or agency is free to provide certain supplemental services on a voluntary basis to both identified potential problem families and to families who request such services. Protective services would still receive reports of actual or suspected child abuse or neglect from existing sources but not as a result of predic-



tive screening. Legislative action would probably be needed to implement this.

Under the informed consent procedure, what should happen to families who refuse to be screened? Nothing. Leave other community resources to respond to the families' needs, if they are in need.

What should happen to parents who are screened who score as high risk but who refuse supplemental services? As discussed above, if the screening is specific enough a high risk evaluation may be sufficient under the state law to trigger a mandatory duty to report to protective services. If the law is changed to exempt predictive screening results from being reported to protective services, nothing should be done by the screening personnel when identified high risk parents refuse supplemental services.

## CONCLUSION

In this chapter, the role of law as arbiter between government and individual persons when personal liberty is at stake has been discussed. The notion of due process as a means to safeguard personal rights was introduced as a flexible concept meant to insure fair treatment of all concerned parties. Due process issues were examined in two contexts of child protection—the formal court process and the informal nonjudicial assessment and intervention of protective services. *Voluntary and informed consent obtained before administering predictive screening was suggested as a mechanism for safeguarding personal liberty while utilizing the developing predictive screening technology.* In order to decrease the personal liberty risks facing parents in predictive questionnaires, I have suggested law reforms to prohibit the use of screening results in court and in suspected child abuse and neglect reporting.

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