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Symposium: Examining Shaken Baby Syndrome Convictions in Light of New Medical and Scientific Research

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Professor David Moran*

I've been asked to react to Professor Findley's talk, and I just wanted to try to put this in a concrete format that we can understand. In the summer of 2001, when my oldest daughter was about six months old, I put her in a backpack (the kind that you strap to your back) to go for a hike. In trying to get her out of that backpack after the walk, I dropped her, and she landed on her head, and she very briefly lost consciousness. So I rushed her to the University of Michigan Medical Center in Ann Arbor, where I live, and by the time I got her in the car she regained consciousness, and she was fine by the time she was examined at the hospital. The reason I'm not in jail today is because she did not present these three symptoms that Professor Findley and Dr. Barnes are talking about: encephalopathy—in other words, damage to the brain; retinal hemorrhaging—blood in the eyes; and a subdural hematoma—blood underneath the skull in the brain.¹⁰¹

Now, what we've learned in recent years is that, contrary to what generations of doctors were taught, you can have those symptoms and it not be abuse, and in fact, it's probably not abuse. Even if there is a correlation between those symptoms and abuse, because the number of cases of infants suffering head injuries not caused by abuse is so much greater than the number of cases in which it is abuse, any given case is probably not abuse, even if that case includes those three symptoms.¹⁰² But hundreds of people are being prosecuted every year on the basis of these three symptoms and these three symptoms alone—the so-called triad of Shaken Baby Syndrome.¹⁰³ And those of us now who are in the innocence movement, those of us who are working in innocence clinics, are trying to find these cases where people were wrongly convicted, but we're never going to find all of them. We're only going to find a few. And so to summarize what Professor Findley said, there are two things that we've learned that are wrong with this theory. First of all, other

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101. See *supra* text accompanying notes 9–13.

102. See *supra* notes 94–98 and accompanying text.

103. See Emily Bazelon, *Shaken*, N.Y. TIMES MAG., Feb. 6, 2011, at 30, 32. (“There is no exact count of shaken-baby prosecutions, but law-enforcement authorities think that there are about 200 a year. In an estimated 50[%] to 75[%] of them, the only medical evidence of shaken-baby syndrome is the triad of internal symptoms: subdural and retinal hemorrhage and brain swelling.”).

things can produce these symptoms, and I'm very briefly going to tell you about one of our cases we had in Michigan that demonstrates that. And secondly, it's hard to shake a baby hard enough to produce these symptoms without doing profound other damage that's almost never seen: neck fractures and severe bruising to the trunk of the child that would have to be grasped in order to do the shaking.¹⁰⁴

So I'll tell you briefly about a case we had in Michigan. One of the five people that we've exonerated was a woman named Julie Baumer.¹⁰⁵ Her little sister was a methamphetamine addict and had a baby named Philipp Baumer in the summer of 2003, and he was instantly a sick baby. He spent the first week of his life in neonatal ICU; he didn't thrive, and he didn't suck the bottle properly. The mother then went back to her life as a drug addict, and her older sister, Julie, adopted the baby, but the baby was never well.

Julie was constantly taking the baby to the doctor: he wasn't eating, he wasn't gaining weight, and then six weeks later, on October 3, 2003, he crashed. He just lost consciousness. Julie was actually visiting with a priest at the time to talk about formalizing the adoption under Catholic doctrine when the priest noticed that the baby was really doing poorly and urged her to take him to the ER, which she did.

The doctors looked in the baby's brain, and they saw a large amount of blood in the brain, and they looked in the baby's eyes, and they saw retinal hemorrhaging in the eyes, and they identified encephalopathy. That's the triad. Julie ended up being convicted of felony child abuse. The baby survived, but he's profoundly disabled as a result of all the blood in the brain. Philipp will never walk, he'll never talk, and he's blind. Julie was convicted of first-degree child abuse and sentenced to ten to fifteen years in prison merely on the triad and the fact that she was the last person known to be with the baby.¹⁰⁶

Julie's story has a happy ending really by luck. Julie is an extremely devout Catholic, and a nun visited her in prison. This nun, Sister Lois, took an interest in Julie's case and contacted a professor at a Catholic law school, Ave Maria Law School. The professor did something that Julie's attorney hadn't done, which is contact a radiologist. Julie's

104. See *supra* text accompanying note 42.

105. Ms. Baumer's case is described in detail in the Bazelon article, *supra* note 103, at 37, 44, 46, 47. The complete trial transcripts and many other documents are on file with the author.

106. Bazelon, *supra* note 103.

attorney never got a medical expert competent to read the scans that were taken of this baby's brain. When those scans were sent out to, among others, Dr. Barnes at Stanford, all of these people said, "Oh, my God, this is venous sinus thrombosis," which is a type of stroke that is particularly prevalent among small children around Philipp's age, six weeks old.¹⁰⁷

Julie's conviction was overturned, and we ended up participating in the re-trial. On October 15, 2010, Julie was acquitted of all charges after six prominent doctors from around the country, including Dr. Barnes, came to Michigan to testify that this was a case of venous sinus thrombosis.¹⁰⁸ These doctors were so convinced and so disturbed by the misdiagnosis in this case that they all testified for free, a fact that the prosecutor actually tried to use against them: "You're testifying for free, you must be some kind of nut."¹⁰⁹

So, abuse of children, abuse of infants is a real problem. Children are killed by caregivers, children are killed by babysitters, by parents and by others; but it's very important that the science—the medical science—re-examines the evidence to make sure that they are identifying the right cases in which abuse occurs as opposed to something else. And law can help push science and the medical profession to do that re-examination. Dr. Barnes himself is proof of that because he was a believer of the old dogma, and it was a legal case that changed his mind. A case in which a woman was being prosecuted for shaking a baby caused Dr. Barnes to go back and re-examine the evidence and see that the science was not there to support Shaken Baby Syndrome.¹¹⁰ But unfortunately there are still lots of other people who have been trained in the old ways and who are still doing it the old way.

And so I come back, I'll end with my story about taking my daughter in 2001 to the University of Michigan Medical Center. Like I said, I was very lucky that she apparently didn't have all of the symptoms of the triad because, when I was working on the Baumer case, I talked to the

107. See Karen S. Carvalho et al., *Cerebral Venous Thrombosis in Children*, 16 J. CHILD NEUROLOGY 574 (2011).

108. Bazelon, *supra* note 103, at 44.

109. *Id.*

110. The case in question was the high-profile murder prosecution of English nanny Louise Woodward in Massachusetts. Dr. Barnes was a prosecution witness at Ms. Woodward's trial and testified that the baby had been violently shaken to death. Dr. Barnes later changed his mind. See *Frontline, The Child Cases: Interview: Dr. Patrick Barnes*, PBS (June 28, 2011), <http://www.pbs.org/wgbh/pages/frontline/the-child-cases/interviews/patrick-barnes.html>.

head of the Pediatric Child Abuse Unit at the University of Michigan Medical Center. This doctor said to me that if these three symptoms are there, and this is almost an exact quote, “they may be the nicest people in the world, but you know they’re guilty.” That sent chills down my spine, because that woman has testified against scores of people in Michigan, and I know that some of them—not all of them—but some of them are almost certainly innocent.

Thanks very much.