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I. INTRODUCTION

Child abuse is a problem needing the attention of not only the many professionals who serve children and families, but also the community at large. It is a legal, social, and psychological phenomenon that, in a very fundamental sense, affects the safety and well being of all of us.

Abused children inevitably grow up to be a threat to themselves or others in their environment. Children who are the

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victims of prolonged maltreatment are prone to violence in later life. The economic and social costs of child abuse are high and include such tragic residuals as delinquency-prone and recalcitrant minors, homicidal and mentally-ill adults, and generational violence. It has been established that such infamous assassins as Sirhan B. Sirhan, Lee Harvey Oswald, and James Earl Ray were childhood victims of severe abuse and/or neglect.[1]

Members of the American Academy of Child Psychiatry recently reported on the accelerating rate of children's crime.[2] Nearly 75,000 juveniles were arrested nationwide for violent crimes in 1976 compared with less than 41,000 ten years ago.[3] Dr. Michael G. Kalogerakis, New York state's associate commissioner for children and youth, reported that commonly youngsters who commit crimes have been victims of or witnesses to violence.[4] The most likely place for children to be subjected to violence is in their own homes.

The immense negative impact of child abuse has recently aroused the concern of many government and community leaders. The subject is receiving much attention in the media. Federal and state legislative activity has increased in respect to the number of bills passed which are directed toward child abuse identification, treatment, and prevention.[5]

Abuse of children is not a new phenomenon in the history of mankind. However, the problem is exacerbated by such present realities as: accelerated population growth; increasing rate of family breakdown; loss of extended family support systems;

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1. V. FONTANA, SOMEWHERE A CHILD IS CRYING, 112-16 (1973). Dr. Fontana, a pediatrician, provides biographical sketches of some of history's famous criminals, illustrating how traumatic childhood experiences played an important role in their adult lives.

2. Timnick, *Young Killers: Can They Be Rehabilitated?*, Los Angeles Times, October 30, 1977, Part I, at 1, col. 3.

3. *Id.*

4. *Id.*

5. The Child Abuse Prevention and Treatment Act, P.L. 93-247, was signed into law on January 31, 1974 and created the National Center on Child Abuse and Neglect (NCCAN) which is located in the Children's Bureau of the Department of Health, Education, and Welfare. Under this act the Secretary of Health, Education, and Welfare has made grants to, and entered into contracts with, public agencies or non-profit private organizations (or combinations thereof) for demonstration programs and projects designed to prevent, identify, and treat child abuse and neglect. California in 1974 established an Office of Child Abuse Prevention because the Legislature found and declared that child abuse is a growing concern in the state. CAL. WELF. & INST. CODE § 18950 (West Supp. 1977). Assembly Bill No. 1058, Chapter 958, was approved by the Governor on September 21, 1977 and filed with the Secretary of State. This Act amends Sections 11161.5 and 11161.7 of the Penal Code and, in effect, adds marriage, family or child counselors, psychologists, peace officers, and probation officers

introduction of such cultural shocks as drugs, rapid mobility, and urbanization.

The prevention of child abuse and the protection of children require widespread community understanding and support. Professionals can deal with abusing families when crises occur, to wit: police conduct criminal investigations upon receiving reports that children are abused and remove children from their homes if they are in danger; hospitals admit battered children and provide emergency medical care; social workers respond to reports of abused and neglected children by going to the home, evaluating the family situation, and providing or arranging for necessary services; the courts seek to process child abuse cases so that dispositions result in a plan that protects children from further harm. These are all important aspects of child abuse intervention, but the child has already been traumatized. A preventive approach in designing child abuse programs needs to include public education and the integration of many involved professionals in order to appreciably diminish the incidence of nonaccidental injury to children. There is intellectual consensus that the protection of children requires the united efforts of many disciplines. Yet the achievement of this objective is often sporadic and stubbornly elusive.

The premise of this article is that basic impediments to achieving the necessary integration of effort are not attributable to weak convictions or low motivations among professionals; rather, the impediments are related to system deficiencies.[6] Differing professional perspectives and practices contribute to confusion in our handling of child abuse cases. The punitive approach is powerfully persistent, even though it does not have lasting benefit for children.

This article addresses the role of the court system in the handling of the pervasive problem of child abuse. It is suggested

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to the list of persons required to make child abuse reports. Every state has a law that requires reporting of child abuse and neglect to a designated public agency. *See* HURT, CHILD ABUSE AND NEGLECT, A REPORT ON THE STATUS OF RESEARCH, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE No. 74-20.

6. There are factual indicators, despite idealistic statements to the contrary, that we do not ascribe high priority to the needs of children. This is especially true with respect to rewards and resources accruing to those persons who provide services for children. Consider the low salaries of elementary school teachers vis-à-vis college professors; the minimal economic rewards

that system adjustments could facilitate productive communication among all professions who deal with child abuse and could contribute to fostering a value structure that would ascribe higher priority to the needs of children. Addressed herein are system adjustments related to the adversary system and court hierarchies.

II. Child Abuse and the Court System: Definitions, Descriptions and Perceptions

A. Child Abuse—What Is It?

Child abuse is variously defined on a continuum ranging from a disorderly home to severe physical abuse. Within these parameters are cases of chronic situational neglect, medical neglect, dangerous lack of supervision, emotional abuse, and sexual molestation. Differing values and cultural perspectives create controversy when a determination must be made as to where suitable parental discipline ends and child abuse begins. Philosophies on child rearing vary from culture to culture and from generation to generation. Further, each person's concept of appropriate child rearing is intimately related to his/her childhood experiences. Thus, perspectives on parenting have deep personal and psychological roots and it should be no surprise that the fact of child abuse elicits emotions that are alternately angry and compassionate, vindictive and supportive.

Acknowledging that varying parental value systems affect perspectives on child abuse, two working definitions follow.[7] One is the definition used by the Orange County Child Abuse Registry,[8] a central reporting system, which is governed by California Penal Code sections pertaining to the reporting of

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available to child care workers and full time homemakers; the status differential between juvenile and adult courts; and the relatively small renumeration given foster home parents.

7. Mental suffering, or emotional abuse, will not be delineated herein since it would require a lengthy analysis in both legal and behavioral terms. However, emotional abuse is not necessarily a matter of lesser consequence for the well being of children. Emotional abuse is associated with such parental behavior as severe rejection, withholding of love, severe and constant criticism, and total lack of responsiveness to a child's problems. The full ramifications of emotional abuse are yet to be determined. There is strong reason to believe that emotional scars can produce even longer lasting trauma than physical scars.

8. Effective February 3, 1975 Orange County, California instituted a Child Abuse Registry that receives and records reports of child abuse; provides consultation to reporting persons; coordinates treatment referrals; follows through on referrals; releases pertinent information to authorized persons; conducts on-going public education programs; and, maintains statistical information.

child abuse;[9] the other is the definition proposed by the National Institute for Advanced Studies in their report on recommended standards prepared for the National Center on Child Abuse and Neglect.[10]

The Orange County Child Abuse Registry defines child abuse, in accordance with applicable Penal Code sections, as any case in which it appears from observation of the minor (under 18 years of age) that the minor has physical injury or injuries which appear to have been inflicted upon him by other than accidental means; that the minor has been sexually molested; that it is suspected that the minor, under circumstances or conditions likely to produce great bodily harm or death, has suffered willful infliction or unjustifiable pain or mental suffering; that the minor, while in the care and custody of any person, has been placed in such a situation that his/her person or health is endangered.

The National Institute for Advanced Studies offers a broad conceptual definition of child abuse that states "[A]n abused or neglected child means a child under the age of 18 whose physical or mental health or welfare is harmed, or threatened with harm by the acts or omissions of the parents or other persons responsible for his welfare."[11]

Reports of children to the Orange County Child Abuse Registry in 1976, in accord with the definition stated, numbered 1,675. Approximately 90% of these situations required intervention by law enforcement and/or child welfare services. Physical abuse

9. California law requires that certain professionals report suspected child abuse to both the local police authority and the juvenile probation department or to either the county welfare department or the county health department. In Orange County the designated recipients of reports are the local police authority and the Department of Social Services (Child Abuse Registry). Persons required to report include: physicians, surgeons, dentists, residents, interns, podiatrists, chiropractors, religious practitioners, registered nurses, school officials, teachers, social workers, child care workers, psychologists, marriage counselors, family or child counselors, probation officers, and peace officers. CAL. PENAL CODE § 11161.5 (West Supp. 1978). Section 273a establishes penalties for and describes actions that are deemed willful cruelty toward a child and endangering of life, limb, or health. CAL. PENAL CODE § 273a (West Supp. 1978).

10. *See* NATIONAL INSTITUTE FOR ADVANCED STUDIES, REPORT ON RECOMMENDATIONS FOR REVISIONS TO STANDARDS, REVISION TO FEDERAL STANDARDS ON THE PREVENTION AND TREATMENT OF CHILD ABUSE AND NEGLECT (1977).

11. *Id.* Chapter II, at 11.

accounted for 41% of the reports; severe neglect, 41%; mental suffering, 13%; sexual abuse, 5%. The major source of reports (79%) were public agencies, police, and schools. Approximately 60% of children reported were under seven years of age.[12] The incidence of reported child abuse in Orange County has been steadily increasing to the extent that there has been an 80% increase since February, 1975, at which time the reporting system was implemented.[13]

It is clear that child abuse as documented in Orange County is a problem of considerable dimensions that requires the intervention of a broad segment of the professional community. There is no reason to believe that Orange County is unique in respect to the incidence of child abuse.

B. Child Abusers—Who Are They?

There is general consensus among professionals who work with abusive families that abusers almost always have themselves been abused as children. Drs. Steele and Pollock in reporting on a five and one-half year study of sixty abusing families at the University of Colorado state, "Without exception in our study group of abusing parents, there is a history of having been raised in the same style which they have recreated in the pattern of rearing their own children."[14] Victims of child abuse usually grow up feeling exceedingly unworthy.

Dr. Steele, a psychiatrist who has worked with abusing families for many years, delineates seven characteristics of the abusive parent: immaturity and associated dependency; low self-esteem and a sense of incompetency; difficulty in seeking pleasure and finding satisfaction in the adult world; social isolation; misperceptions of their infant leading to role reversal (expecting child to nurture parent); fear of spoiling infants and belief in punishment; lack of ability to be empathically aware of the infant's condition.[15] This is an accurate profile of the child abuser in the opinion of most child welfare workers.

There are punitive aspects of our heritage and socio-economic arrangements that negatively activate persons who are high

12. Official Orange County Child Abuse Registry Statistics, Department of Social Services, Santa Ana, California (1976).

13. *Id.* (1975 and 1976).

14. Steele & Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children*, in THE BATTERED CHILD 89, 97 (R. Helfer & C. Kempe eds. 1974).

15. B. Steele, *Working With Abusive Parents, A Psychiatrist's View*, CHILDREN TODAY 3, 4 (May-June, 1975).

risk for child abuse and these include the literally interpreted doctrine of "spare the rod and spoil the child," corporal punishment in schools, and violent activities depicted and detailed in the media.

In Orange County, California the Child Abuse Registry recorded in 1976 that 42% of reported abuse occurred in homes where both natural mother and natural father were present; 40% involved homes of mothers alone with their children; 9% involved stepparents. Reported abusers were natural mothers 44% of the time; natural fathers, 17%; both natural fathers and natural mothers, 15%.[16] Thus, natural parents are the primary perpetrators of child abuse in Orange County. When abuse is perpetuated by only one parent in a two parent home, we still have both an active and a passive participant. That is, one parent may inflict the abuse, but the other parent permits it to happen. Child abuse then becomes a mutually reinforcing and collusive activity within the family.

Abusers, characteristically, do not voluntarily seek help. Dr. Fontana, a pediatrician, points out that the majority of these people are probably hoping that help of some kind will seek them out and this usually happens only after they have maltreated their children.[17]

The primary, and not wholly irrational, reason that abusive parents do not seek help is because they are fearful of negative consequences if they admit to being an abusive parent. The guilt associated with giving up a child also contributes to avoidance of outside intervention. Unfortunately, as long as abusers believe it is unsafe to seek help, their children remain endangered—unless and until outside intervention is forced upon them. Authoritative outreach to abusing families must include treatment for parents; if treatment is not utilized, or is not effective, children must be removed from unsafe homes.

C. The Adversary System in Juvenile Court: A Method of Fact Finding

Historically, the juvenile court[18] has struggled with the dilemma of whether to view the dependent, abused, and neglected

16. *Supra* note 12.
17. *Supra* note 1, at 91.
18. The adversary process has had a long tenure in our legal structure. No

child as primarily a social problem or as a legal dispute.[19] Prior to *In re Gault*,[20] which brought due process and adversary proceedings into juvenile court, the court was often described as more of a social agency than judicial setting. The juvenile court, as the wise and benevolent parent under the concept of *parens patriae*, was a brave, new approach in the early 1900's. Children were then seen as needing a legal structure totally separate from that of adults. Legal safeguards were minimal and procedures were informal. The "social agency" ambience had legitimate deficiencies and *Gault* replaced *parens patriae* in 1967. Despite disclaimers to the contrary, some observers believe that neglect or child abuse proceedings normally partake of most of the essential elements of an adversary proceeding.[21]

Prosecutions of parents are pursued either under specific statutes that make child abuse a crime, or under general criminal statutes such as those that govern homicides and assaults. Child abuse is difficult to prove. Usually there are no witnesses; the child is either too young or too frightened to testify; a spouse will deny knowledge of the incident; a physician who may have knowledge will be reluctant to testify.[22] Judge Delaney, Juvenile Court Judge in Colorado, comments that a criminal proceeding once set in motion is "formidable, impersonal and unrelenting." Furthermore, aims are primarily punitive.[23] The effect of *Gault* on abused and neglected children has been, it appears, to throw

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attempt is being made in this article to address the adversary process as it relates to adult court procedures. Adversary proceedings in juvenile courts have received primary attention in the examination of juvenile delinquency issues; however, there have been spill-over impacts on child abuse and neglect cases.

19. Welfare and Institutions Code Sections 300(a)-(d) establish the conditions for persons under the age of 18 that will bring them within the jurisdiction of the juvenile court. Section 300(a) describes minors who are in need of proper and effective parental care or control and who have no parent or guardian willing to exercise or capable of exercising such care or control; 300(b), minors who are destitute or not provided with the necessities of life; 300(c), minors who are physically dangerous to the public; 300(d), minors whose home is an unfit place by reason of neglect, cruelty, depravity, or physical abuse. CAL. WELF. & INST. CODE §§ 300(a)(b)(c)(d) (West Supp. 1978).

20. In re Gault, 387 U.S. 1 (1967). Gerald Gault, a minor, had been committed as a juvenile delinquent in Arizona. The Supreme Court, per Justice Fortas, held that the fourteenth amendment requires that minors in juvenile delinquency proceedings have a right to notice of the charges filed prior to the hearing on the merits; the right to counsel at these proceedings; to cross-examination of witnesses; and the privilege against self-incrimination.

21. Isaacs, *The Role of the Lawyer in Child Abuse Cases*, in HELPING THE BATTERED CHILD AND HIS FAMILY 220-25 (C. Kempe & R. Helfer eds. 1972).

22. A. SCHUCHTER, CHILD ABUSE PREVENTION 16 (1976).

23. J. Delaney, *The Battered Child and the Law*, in HELPING THE BATTERED CHILD AND HIS FAMILY 187, 189 (C. Kempe & R. Helfer eds. 1972).

out the baby with the bath water. There remains the unmet need of replacing excessive reliance on behavioral science with a system that achieves an optimal balance between behavioral science and legalistic methodology. In child abuse cases, particularly, fact finding cannot depend on legalisms alone; nor can adjudications be effectively arrived at without procedural safeguards. Douglas Besharov, presently Director of the National Center on Child Abuse and Neglect, expresses the opinion that the net result of the *Gault* decision has been that we now have reformed juvenile courts so that they resemble the worst lower criminal courts. He believes the freedoms of informal procedures are no longer possible.[24]

The development of our legal system is more advanced than our resources for children. Due process in this context becomes a mirage, because a community that does not have sufficient alternatives for endangered children renders due process more of a procedural than a substantive protection. The due process structure should correct the pre-*Gault* injustices caused by the sometimes arbitrary and unilateral decisions of judges in handling delinquency cases. Abused and neglected children have a special need for a court that enriches due process with utilization of resources and knowledge provided by the many disciplines involved in child abuse intervention.

The role of the attorney in juvenile court is subject to polarization, as described by two attorneys who analyze the merits of both the adversary and non-adversary approach.[25] One polar position is that the juvenile attorney should adopt a single minded adversarial stance similar to the criminal attorney. The opposite pole reflects the unique features of juvenile proceedings and represents the view that the juvenile attorney's role should be that of a participant in a nonadversary activity.[26] This issue continues to be debated.

Proceedings associated with neglect and abuse cases are becoming increasingly formalized, similar to delinquency proceedings. The trend in both case law and legislation is being

24. D. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT 4 (1974).

25. R. Kay & D. Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1401-24 (1973).

26. *Id.*

viewed as clearly in the direction of more formality and additional rights for litigants. Neglect hearings have distinctly adversary procedures although not all of the characteristics of a delinquency or criminal trial.[27]

It is interesting to reflect on Mr. Justice Stewart's dissenting opinion in 1967 at the time of *In Re Gault*. He raised the following fundamental questions: 1) why has the court fallen short of the hopes and dreams of its courageous pioneers; 2) why has the court not even approached the ideal; 3) why has not more been done in the administration of public juvenile and family agencies—in personnel, in planning, in financing, perhaps in formulation of wholly new approaches. Justice Stewart's position was that the answer did not lie in the court's ruling in *Gault* which he saw as serving to convert a juvenile proceeding into a criminal prosecution.[28]

Justice Stewart's comments imply a concern about insufficient resources for children. This remains a concern of many professionals. There is a need for increased placement and treatment resources for abused and neglected children as well as a legally endorsed structure that facilitates multi-disciplinary input to the courts; otherwise, juvenile courts are disadvantaged in arriving at dispositional orders for abused children.

D. Juvenile Court and Family Court: Structure and Status

Structure. There is some substance to the belief that structure can determine performance. Juvenile courts maintain adversary foundations that require a number of attorneys to represent different family members. For example, a child abuse case in Orange County, California can involve three attorneys: the district attorney who defends the child and prosecutes the parent; the county counsel who represents the Department of Social Services; the public defender or private attorney who represents the parent/guardian.

Family court structures seek to dilute the adversary ambience by incorporating all matters of family law into a separate court; or by structuring divisions or departments devoted to family

27. *See* S. FOX, THE LAW OF JUVENILE COURT IN A NUTSHELL 54-55 (2nd ed. 1977). The adversary process in neglect and abuse cases has not had particularly salutary effects for children. This will be further discussed as it relates to the paradox of an adversary court process interacting with an abuse situation that is in itself the product of an adversary environment.

28. *See* Lunden, *The Orphaned Juvenile Court*, Vol. 7 No. 5 TRIAL 20 (1971). Professor Lunden takes the position that juvenile courts have been disserved by the *Gault* decision and it is in this context that he summarizes Justice Stewart's concerns.

law as part of a court of general jurisdiction. The family court concept, essentially, is designed to avoid splintering family matters among many courts, which can have the effect of intensifying an already fragmented family situation.

The role of the counsel for the child under the New York Family Court system expands this role beyond mere advocacy. The attorney for the child, designated a law guardian, is not required to take an adversary position. He is not called on to either prosecute or defend but to insure that the court receives all relevant facts that will serve the best interests of the child.[29] Attorneys for children in particular litigations, as opposed to guardianship of a child's person or property, are also referred to as guardians ad litem. In child abuse and neglect proceedings: "Functioning properly, the guardian ad litem is a nonadversarial party whose duty is to protect the child's short range legal interests and the child's short range and long range interests."[30]

The family court concept has received recent support from two sources: the Juvenile Justice Standards project[31] and the State Social Welfare Board.[32] The Juvenile Justice Standards project envisions a court of this nature as having jurisdiction over such matters as juvenile law violators, neglected and abused children, adoption, termination of parental rights, and divorce proceedings.[33] The State Social Welfare Board recommends the family court in consideration of the fact that family related problems have origins as social problems rather than purely legal disputes.[34]

The fragmented and violent family is a reality reflected in the increasing incidence of both reported child abuse and juvenile crime. The assignment of family problems to a wide variety of unrelated courts with representation handled by a wide variety of attorneys is perceived by reformers as illogical. Family

29. *Supra* note 21, at 229.
30. Fraser & Martin, *An Advocate for the Abused Child*, in the ABUSED CHILD—A MULTI-DISCIPLINARY APPROACH TO DEVELOPMENTAL ISSUES AND TREATMENT 165, 174 (H. Martin ed. 1976).
31. *See* note 27 *supra*.
32. STATE SOCIAL WELFARE BOARD, UNPLANNED PARENTHOOD: A STUDY OF UNWED PARENTS AND THE POTENTIALLY ENDANGERED CHILD 67-69 (April 1974).
33. *See* note 27 *supra*.
34. *Supra* note 32, at 68.

courts permit a central file on family litigation that can prevent tragic dispositions. A famous example of this involved a little child who died of malnutrition. She was an adopted child whose adoptive parents had been charged with neglect in one court prior to the adoption which was granted in another court.[35] Similarly, family courts can facilitate identification and referral of potential abuse situations from one area of family law to another. For example, abuse potential can be identified in a child custody dispute that is heard in a jurisdiction other than juvenile court. The referral of such a situation to a juvenile court jurisdiction can be a cumbersome and time consuming matter. Vital information is subject to loss and separate systems for related family matters result in a disservice to children.

The family courts that exist in this country vary in structure, extent of jurisdiction, and degree of success. It is difficult to draw firm lines of jurisdictional demarcation between family courts and other courts. No family court exists that has jurisdiction wide enough to encompass all matters that affect the family and this may not be a reasonable expectation. In New York the family court is still divided, with separate functions in separate places. Critics contend the system remains fragmented. However, judges enjoy longer terms. Judges are appointed for life in Rhode Island's family court; ten year terms in New York; six year terms in Hawaii's family court.[36]

The concept of a single forum in family law remains attractive to juvenile court reformers who seek the integration of human services and specially trained judicial personnel as the best way to rehabilitate families.

Status. The low status of juvenile and family courts is disheartening to persons seeking to protect children from abuse. The reality of this low status makes a statement about the depth of our commitment to the welfare of children. Historically, family matters have been viewed as either private or social agency matters; not characterized by the legal challenges inherent in criminal trials and business or property litigation. Juvenile courts tend to be viewed as inferior courts by attorneys and judges. There is no real opportunity, it is believed, to make

35. E. Dyson & R. Dyson, *Family Courts in the United States*, 8 J. FAM. L. 505, 516 (1968) *citing* Goldberg & Sheridan, *Family Courts: An Urgent Need*, 8 J. PUB. L. 337 (1959).

36. *Supra* note 35, at 505-86. The authors discuss development of family courts and support the concept of one court for family law matters as necessary to replace archaic methods of dealing with family problems.

prestigious impacts in the pure legal sense. For most judicial personnel, juvenile court is a passageway to higher status assignments. Court action on behalf of children does not lend itself to the precise legalisms of adult courts; in fact, within juvenile courts, the cases of dependent, abused, and neglected children do not lend themselves to the precise legalisms of juvenile delinquency cases. There seems to be a positive correlation between court proceedings that achieve maximum legal precision and ascribed status. The social and behavioral aspects of child abuse tend to confound those who seek legally traditional adjudications.[37]

In considering the low status of Juvenile Courts, the concept of power is pertinent. By and large the users of juvenile and family courts are from the lowest socio-economic sectors of the population. Persons of affluence, when confronted with family difficulties, can purchase private services that preclude the need for court involvement. Thus, the families that reach juvenile and family courts are essentially powerless. In sociological research, status is closely linked to power and power is closely linked to economic affluence. The net effect of this status hierarchy is to render abused children the most powerless of all groups; an irony being that these children can, especially if numbers continue to increase, pose an eventual threat to the established system.

Statistics indicate that the judicial system allots 95% of the court's time to criminal matters and commercial law and 5% to juvenile and family problems.[38] The physical plants occupied by juvenile and family courts are generally of lesser quality than those occupied by adult courts. In New York the family court has been described as a poor man's court.[39] An argument for not

37. Child abuse lends itself to subjective reactions and is not always compatible with an orderly legal process. Witness: the welfare of children still tends to be viewed as the primary responsibility of women with the concomitant stereotypes of emotionality and non-global significance.

38. *Supra* note 23, at 204.

39. M. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694, 694-97 (1966). Paulsen's description of the New York family court is a sad commentary upon the response of the judicial system, in form as well as in substance, to the needs of abused children and their parents. He finds that the court has a "cold atmosphere [that] only intensifies the feelings of helplessness, fear, and frustration which accompany poverty." *Id.* at 694.

giving this court jurisdiction over adoptions has been that the nice middle class people involved in adoptions would be exposed to the shabbiness of family court waiting rooms.[40] Juvenile courts have also been described as an orphan among courts, neglected by judges and attorneys who are busy with mounting case loads and many other judicial problems.[41]

In 1965 a Wisconsin attorney wrote "[J]uvenile courts are the lowest rung of the judicial ladder. Rarely does the court attract men of maturity and ability. In courts of mixed jurisdiction judges seek to avoid assignments to the juvenile division and rotation must be employed."[42] There is no evidence that these facts have significantly changed.

It has been estimated that there are as many as 150,000 neglect cases each year in the nation's courts.[43] Only seventeen states and the District of Columbia have assigned juvenile jurisdiction to trial courts of general jurisdiction. Nationwide there has been support for juvenile cases being tried by specialized judges who are part of trial courts of general jurisdiction. Courts that spend all of their time on juvenile and family cases are found in eight states. A survey of court organizations was conducted by the Law Enforcement Assistance Administration in 1973. They found that only 2% of the limited and special jurisdiction juvenile courts spend more than three-fourths of their available judge time on juvenile cases.[44] These facts lend credence to the belief that juvenile and family courts are ascribed second class status in the judicial system, which translates into second class status for dependent, abused, and neglected children.

III. Issues, Impacts, And Alternatives

A. *Dynamics of the Abusing Family and Adversary Procedures: An Anomaly*

The abusive family, by nature of the dynamics discussed earlier, requires stabilization, unification, limit setting, supportive services, and treatment. Termination of parental rights must be pursued when services are either refused or ineffective and children remain endangered. Severe cases require prosecution.

Children are sometimes asked to testify against their parents.

40. *Supra* note 35, at 523.
41. *Supra* note 28, at 20.
42. J. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, Wis. L. Rev. 7, 17 (1965).
43. *Supra* note 27, at 8.
44. *Supra* note 27, at 9.

In sexual molest cases this can be particularly traumatic because a high level of guilt and ambivalence is involved. Although action to control parental behavior is imperative, some judges feel civil court is ineffective for this purpose. Judges are more optimistic about child abuse cases that are handled by family courts which are part of a trial court or higher jurisdiction. Criminal filing is sometimes viewed as necessary only in response to public pressures rather than the needs of the child.[45]

Court procedures can be harsh, reinforcing the abusive parent's proclivity toward punitive behavior. There tends to be an atmosphere of depersonalization that adds to the parent's already low self-estimate. Parents are on the defensive, expecting that their children will be taken from them. This, indeed, may happen. However, if the process is unrelentingly severe and the parent immediately or eventually re-assumes a parenting role, without benefit of treatment, their children remain at risk. Vulnerable parents simply see the child as the cause of their increased problems and vent their anger accordingly.

The California dual judicial system, civil and criminal, leads to duplication of all processes and investigations. Since it is a fact that very few adult prosecutions materialize in child abuse cases, it would make sense to consolidate these cases in a family court proceeding.[46] An irony of the present system is that, unwittingly, the child can be scapegoated in the court process somewhat like he has been in the abusive home environment. The court exerts power on the parents through the child by implied or direct threats of removal of the child and/or termination of parental rights. The child's scapegoat status thus becomes legitimated. As an alternative, family court proceedings can permit a pre-judicial review by a multi-disciplinary team which supports a court mandated treatment plan without the heaviness of implied or direct threats. This approach stresses unification, rather than division, and provides a model of integration that is suitably corrective for the family. It is a matter of emphasis and focus.

Removal of children from their homes, when there are no

45. *Supra* note 22, at 14.
46. *Supra* note 22, at 15.

other options, does not necessarily lead to fragmentation of the family. Most abusive parents vigorously seek to retain custody of their children and deny abusive behavior because of the fear and guilt associated with being labelled a "bad" parent. Yet, hard as it is to discern, such parents often seek limits on their behavior. The very act of child abuse is a cry for help. We should not be put off by their denial. In this context a court order for removal can be a well disguised relief for abusive parents. The writer recalls working with several natural mothers who legally relinquished children and then returned to the agency requesting withdrawal of the relinquishments claiming they had made a mistake. However, the basic problem was the guilt associated with the giving up of their children. When counselling was provided and the legal finality of the relinquishments was reinforced, it became clear that this was all they needed; a final limit setting.

Adversary systems have intrinsic vulnerabilities. In Judge Delaney's words, "[S]uspicion supplants trust; tactics and strategy replace openness; competition supplants cooperativeness."[47] A judicial environment of competing attorneys and tactical operations is not unlike the behavior of abusive families who characteristically use non-cooperation and denial as a defense against detection. In this sense the adversary court environment cannot serve as a corrective model for families.

A judicial decision can, in effect, absolve a parent of wrongdoing when evidence is insufficient to substantiate abuse. Yet the parent may be abuse-prone and the legal absolution accommodates the parent's already well entrenched denial system. Reality for the parent becomes increasingly elusive. The "not-guilty" pronouncement is construed as a justification of the behavior. If the parent is punished, other factors merit consideration. The parent in time may regain custody of the child or have more children. Punishment without treatment only intensifies danger to children upon reunification of families. The underlying dynamics that have contributed to the abuse problem may be shrouded by procedural exigencies.

Many professionals who work closely with abusing families, including authorities, agree that criminal proceedings do not deal with the personal and family problems underlying the child abuse syndrome.[48] Criminal proceedings accommodate the an-

47. J. Delaney, *New Concepts of the Family Court*, in CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 335, 357 (1976).

48. *See* J. Polier & K. McDonald, *The Family Court in an Urban Setting*, in

gry feelings of an outraged community, but they do not prevent child abuse. Disclaimers of this position assert that criminal proceedings "get abusers off the streets." While this is true, it is usually a temporary solution. Criminal law in family matters often has the effect of dividing a family and may signal the end of any hope for rehabilitation. Aside from the basic truth that, whenever possible, children are best nurtured in their own homes, there are some practical reasons for focusing on family rehabilitation. These reasons involve the reality of shrinking alternatives. Communities have not been producing sufficient foster homes and group living facilities for children. Foster home payments are minimal and considerable accountability is involved due to inevitable bureaucratic needs. Because of economic necessity, increasing numbers of women, who once might have opened their homes to foster children, are working. Additionally, communities are fearful of "problem children" occupying residential facilities in their neighborhoods and impose restrictions on the licensing of such facilities. A further exacerbation of the problem is the unhappy fact that children are presenting increasingly severe behavior problems to social agencies, taxing the skills of existing facilities. Thus, it becomes a pragmatic, as well as theoretical, necessity to marshal all pertinent resources and implement all appropriate procedures that will focus on prevention and assist in safely maintaining children in their own homes.

Psychologically, the child carries into adulthood the burden of the prosecuted and untreated abusive parent, even if family ties are permanently severed. Prosecution alone only preserves for the child a spectre of a dishonored and disliked parent which can be a harbinger of adult maladjustment.

Court procedures and the abusive syndrome have curious juxtapositions. The power struggle in the courtroom, characterized by opposing attorneys, is duplicated within the family when parents encourage the child not to cooperate with prosecutors. In a child's mind the double messages are confusing. If an attorney knows of the child's injury but is to defend the parent, danger to the child is perpetrated. On the other hand if an attorney reveals knowledge of the parent's responsibility,

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HELPING THE BATTERED CHILD AND HIS FAMILY 208-24 (C. Kempe & R. Helfer eds. 1972). Judge Polier has been a family court judge in New York for many years.

duty to the client is breached.[49] The win-lose situation in court stacks the psychological odds against children. In a sense, even if they win, they lose.

Arguments supportive of adversary procedures are based on the belief that they ensure due process and thorough fact finding. Detractors claim that the adversary system is not conducive to the presentation of underlying family dynamics that are at the core of the child abuse problem. The alternative approach of a pre-judicial review in a family court setting, with fact finding pursued on a multi-disciplinary basis, has promise. This exists to some degree in many juvenile courts, since it is recognized that a sole judge cannot be expected to render decisions on complex family matters without ancillary contributions. However, formalization and legitimation of multi-disciplinary supports to the court still is lacking in many jurisdictions.

The issue of children's rights versus parent's rights is often used as a call to action. This issue tends, by emotionalism and polarization, to obscure the real needs of children. Rights of children and rights of parents do not have to totally cancel out each other, if unification of the family is a goal and sufficient treatment resources are made available.

B. Multi-disciplinary Input to the Courts and Child Abuse Prevention

Multi-disciplinary input to the courts should be a readily identifiable and highly respected component of the juvenile court process. Child abuse, unlike other judicial issues, cuts across many professional lines. Judge Delaney asserts that courts must yield to or at least share with another system in which other disciplines also participate in fact finding. The battered child has to be more than a legal problem.[50] Territorial imperatives should yield to the common ground goal of optimally protecting children. Customary inhabitants of this common ground are social workers, probation officers, mental health professionals, public health nurses, medical personnel, school officials, law enforcement, and providers of residential facilities for children.

Judge Orlando summarizes the similarities of *Kent*,[51] *Gault*,[52]

49. H. Eger & A. Popeck, *The Abused Child: Problems and Proposals*, 8 DUQUESNE U.L. REV. 136, 150 (1970).

50. *Supra* note 23, at 193.

51. Kent v. United States, 383 U.S. 541 (1966). The Supreme Court first confronted the juvenile court system in *Kent v. United States*. In this case the juvenile, Kent, was transferred to adult court jurisdiction by juvenile court waiver. However, the Supreme Court later held that Kent should have the

and *McKeiver*[53] by stating that these decisions dealt with: procedural safeguards; criticism of juvenile courts for either absence of or inadequate treatment programs; conclusions derived from data obtained in part from the Children's Bureau, and the Health, Education and Welfare office of juvenile delinquency as well as the report of Law Enforcement and the Administration of Justice, "A Challenge of Crime in a Free Society." He suggests that the social sciences have failed to provide courts with proper dispositional alternatives.[54] It is the responsibility of all disciplines to educate the community on the need for alternatives. Foster homes, group homes, day care, treatment facilities, and in-home supportive services are alternatives that cost money, and taxpayers must be willing to pay for them. Willingness to pay is generally predicated on the credibility of those who identify needs. Formalized structures for multi-disciplinary input to the juvenile court system can be a mechanism to accurately identify current resources and needs. Ultimately, primary prevention requires community endorsement of parenting resources for both functional and dysfunctional families.

Sanford Katz, in analyzing the bases for parental failure, recognizes that treatment systems are inadequate. He comments that the mere asking of aid from other disciplines is not sufficient. Child abuse evokes emotional responses in decision making. The task is not for decision makers, particularly judges, to suppress these responses; rather they should be aware of the influence of their emotions on their decisions and should recognize when emotions are interfering with objectivity.[55]

Fathers are reluctant to accept counseling; yet when both parents are involved, treatment is of no lasting value without the father's cooperation. The availability of male counselors for reluctant fathers has promise for progress. Resistance of

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protection of certain procedural and legal safeguards before such a transfer of jurisdiction could be made.

52. 287 U.S. 1 (1967).

53. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). *McKeiver* endorsed some non-adversary aspects of juvenile courts by not holding jury trials as a fundamental element of due process in juvenille cases and by emphasizing the right of states to deal with juveniles in a way different from the way adults are treated.

54. Orlando, *The Judge's Angle*, Vol. 7 No. 5 TRIAL 21, 23 (1971).

55. S. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 146 (1971).

fathers is based in great measure on cultural prohibitions against masculine demonstrations of weakness; competent male counselors can best overcome this obstacle.

Under certain limited provisions the court can mandate counseling for parents when children are adjudicated dependents of the court. Primarily, this applies to abused children who remain in the custody of their parents.[56] Prevention of abuse could be maximized by extending the mandate to include counseling for abusive parents whose children are not in their custody, but perhaps in temporary placement, as well as for children who are made dependents of the court for reasons of lack of parental control.[57] Court ordered treatment plans should provide for follow-up supervision to ensure prevention of further abuse.

C. Judicial Personnel: Training and Experience in Child Abuse

A Department of Justice official notes that there is a lack of experience with child abuse on the part of judicial personnel. Often untrained referees must handle child abuse cases. Specialization in child abuse cases by either judges or referees is not common.[58] Often judges are rotated in the juvenile court system which results in little or no continuity in the handling of cases and in court policies. Attorneys, characteristically, view juvenile court activities as less professionally rewarding than adult cases. Turnover is high among county government counsels assigned to child welfare services; they either move on to other areas of government law or to private practice. It is also interesting to observe that few Departments of Social Services, responsible for dependent children of the court, have their own attorneys for child welfare matters despite heavy caseloads that require considerable legal support.

Attorneys are said to avoid juvenile court because lawyers cannot really act like lawyers in this setting; an adversary system does not really exist; juvenile court judges respect social workers and resent lawyers; it is not possible to represent a child as one does an adult; the child's lawyer is more of a guar-

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56. CAL. WELF. & INST. CODE § 727 (West Supp. 1978).

57. CAL. WELF. & INST. CODE § 300(a) (West Supp. 1978). This section provides for minors who are in need of proper and effective parental care or control and encompasses a wide range of problem behavior on the part of both parents and juveniles whereby counseling can be a significant preventive measure. Abusing parents, who temporarily do not have custody of children, require counseling if families are to be reunited.

58. *Supra* note 22, at 16.

dian than an advocate.[59] This position seems to imply that juvenile courts should be purely adversary so that attorneys can realize their perceived role expectations as traditional advocates. An alternative concept to consider on behalf of the child abuse victim is encouragement of a judicial system that attaches status to the attorney trained in family law with a specialty in child abuse and neglect. Precedents exist for this approach when we consider the status and respect attached to medical specialities. Law schools might well have a vital part to play in elevating the practice of family law by developing comprehensive curriculums that deal with the significance of child welfare issues.

D. Untapped Potential of the Juvenile Court System

The tendency of most professions, if left to themselves, is to operate in relative isolation. This is counter-productive for purposes of child abuse prevention. In the sense that professional isolation produces a lack of connectedness to a wider support system, it emulates the isolation of the abusive family. Juvenile courts can advance child abuse prevention by exchanging isolation, where it exists, for involvement in community activities. Courts need not be viewed only as judicial forums, but also as contributors to positive social change. One way of increasing the protection of children is to legitimate its importance through visible court participation.

Since the advent of *Gault*, courts have dealt with child abuse as an issue intertwined with delinquency in legal and structural configuration. Without attempting herein to discuss the merits or demerits of the existing structure for delinquency matters, it is suggested that we have yet to deal comprehensively with the fundamental problems of child abuse and neglect. One basic issue is the lack of sufficient supports to the court in respect to dispositional alternatives for the protection of children. Absorption with procedural issues tends to obscure this reality.

Judge Orlando, in commenting on truants, observes that public education facilities need to accept the fact that for many young people purely academic settings are not the answer and

59. Wizner, *Defense Counsel: Neither Father, Judge, Probation Officer or Social Worker*, Vol. 7 No. 5 TRIAL 30, 31 (1971).

to suspend a truant rather than design programs to meet the needs of these students only turns them loose on the streets full of hostility and resentment which is often turned against the public.[60] Similarly, child abuse victims, for whom there are insufficient alternatives, continue to be a threat to the public by their harboring of hostility and resentment that eventually must be vented. The courts have a solid data bank on the plight of abused children. They can speak out on this issue with high credibility. In the long run the development of alternatives not only protects children, but reduces the costs of correctional facilities needed to contain the violent behavior that is an outgrowth of unchecked child abuse.

IV. Summary And Conclusion

Child abuse is a problem that is surfacing increasingly as a precursor to generalized societal violence. This is a powerful reason for addressing the issue in the context of prevention and rehabilitation.

Child abuse is, of course, not only the problem of the law and the courts. This article has been written in the spirit of recognizing the undue demands on juvenile courts to resolve ever burgeoning problems in tandem with a supply of community resources that cannot keep up with the demand. The basic premise has been that, in order to guarantee children a safe environment, integration and cooperation of all human services is essential. In this milieu the courts can be a potent force in contributing both leadership and knowledge for the purpose of protecting children from abuse.

Reformers believe that the time has arrived for the modification of traditional structures. The need for structural change was predicted by Lawrence Sidman when he discussed juvenile court deficencies and stated that "new and widely differing structures must be created to offer a range of distinctive treatments. Court clinics and community treatment facilities represent the first tentative steps in that direction."[61]

It is suggested that in order to ameliorate child abuse, certain structural modifications can remove impediments to the required integration of effort. Professionals are dedicated to protecting children from harm. System deficiencies, in great measure, derive from honest differences of opinions among disci-

60. *Supra* note 54, at 23.

61. L. Sidman, *Massachusetts Stubborn Child Law: Law and Order in the Home*, 6 Fam. L.W. 33, 57 (1972).

plines as to the best methods of dealing with the problem of child abuse. System adjustments can facilitate and nurture ongoing communication among all the involved professions for the dual purpose of increasing our knowledge base and capacity for constructive action.

Two aspects of the juvenile court system that merit examination have been addressed: the adversary system and the lesser status of juvenile courts in comparison to adult civil and criminal courts. Victims of child abuse are also victims of these systems. Adversary proceedings can have the effect of reinforcing and perpetuating family pathology. Differing perspectives on child rearing are presented in a win/lose context rather than in a milieu that deals with underlying causation. Insufficient attention is paid prevention and dispositional alternatives when absorption with procedural safeguards is allowed to obscure the basic needs of children.

The second class status of juvenile and family courts is reflected in the frequent rotation of judges and referees, insufficient specialized training for judicial personnel, and reluctance of attorneys to accept and/or sustain assignments to juvenile court matters.

Specific adjustments that can have the effect of child abuse prevention and rehabilitation are: wider utilization of a family court structure; formalized and legitimized pre-judicial conferences on a multi-disciplinary basis; expanded use of court ordered treatment plans for non-cooperative parents with provision for sanction if there is non-compliance.

Juvenile courts can elevate their status and respond to the needs of children by increased participation in the community. The court can assist in educating the public on the unmet needs of children. The law schools can elevate the study of family law by developing curriculums that include emphasis on child welfare specialties. Structure and status is interrelated with the values of society. Higher status for juvenile and family courts translates into higher status for children. The goal of protecting children from child abuse and neglect deserves the consolidated effort of all institutions serving families and children.