THE PARENT-CHILD DILEMMA IN THE COURTS*

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The kind and blessed gentlemen which is so many parents to you, Oliver, when you had none of your own: are a going to 'prentice you: and to set you up in life, and make a man of you: although the expense to the parish is three pounds ten, Oliver! —seventy shillings—one hundred and forty sixpences!—and all for a naughty orphan which nobody can't love.

Charles Dickens, OLIVER TWIST

As the so-called welfare state has sought to regulate, to an ever greater extent, the affairs of men, it has also turned to the family and concerned itself with reordering the internal affairs and relationships between parents and their children. Perhaps there is an even greater need than ever before for such reordering if we can believe the pessimists who lament that the once strong family bonds characterizing our society have been weakened by its gradual transition from an agrarian to an industrial society. Perhaps the need for some external checks on the absolute powers of parents over their children has always been necessary. Whatever the reason, events of recent years have brought to light victimization of children by their parents and the need for state regulation of the relationship, and even in some extreme cases, an involuntary severance of the family ties.[1] The modern theoretical underpinning for the right of the state to intrude into the home and "castle" of its citizens is the police power, but the right can be traced further back in time to the idea that the sovereign or "king was father to all his liege children, whether born to lord or serf. . . ."[2] A more modern rationalization is found in the idea that the assets of the modern state are found in its machines and the operators of those machines, and the state has an interest in protecting its assets.[3]

The natural parents have the primary custodial right to their children, but the state has tempered that right by the imposition of certain conditions on the manner in which a family may live. The

* Adapted from an article in OHIO LEGAL SERVICES ASSOCIATION COURSE ON LAW AND POVERTY: THE MINOR (1968).

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1 *See generally*, V. FONTANA, THE MALTREATED CHILD (1964) [hereinafter cited as FONTANA].

2 M. PUXON, THE FAMILY AND THE LAW 162 (1963) [hereinafter cited as PUXON].

3 *Id.* at 161.

child must attend a school which meets certain minimal standards and which shall be in session for a period of not less than thirty-two weeks per school year.[4] The state prohibits the employment of minors in certain occupations and strictly regulates the working conditions of those employed.[5] So too, the state scrutinizes the relationship existing between the child and his parents, in those cases where complaints are made, and determines whether or not it should intervene to correct injustices, or whether or not the relationship should be ended. Such decisions are difficult to make because the state, acting through its judiciary, must balance the natural right of the parent to the companionship of his child against the child's right to grow to adulthood without being forever physically or psychologically scarred by a parent who may himself be treading the line between emotional health and mental illness. The purpose of this article is to explore the legal framework which has been constructed to deal with the problems presented by those children who are not properly cared for by their parents or guardians.

I. State Reporting Laws

Behind "closed doors" a countless number of helpless young children and infants are being abused, neglected, and often "battered" by parents or other individuals in the family. These children are beaten with a variety of instruments, ranging from bare fists to baseball bats; others are being burned over open flames, gas burners and cigarette lighters. Some children are strangled, others are suffocated by pillows or plastic bags; and some are being drowned.

Preface to Fontana, The Maltreated Child (1964)

Any normal person who might look at the pictures accompanying the text in Fontana's book would be sickened by the sight which greets him. Children are pictured suffering from bruises, contusions, severe burns and broken limbs, all presumably the result of the direct application of force by a parent to whom the care of the child involved had been entrusted. Although we are not concerned with the "battered child syndrome" as such, it should be noted that abuse of children cases may be preceded by instances of parental neglect, and that the two subjects cannot be easily separated. The person to whom physical disabilities may first be manifest is often someone in a medical capacity. These persons should be alerted to the symptoms

4 Ohio Rev. Code Ann. § 3321.04 (Page 1960).

5 Ohio Rev. Code Ann. §§ 4109.03, 4109.10, 4109.12-14, 4109.18-26 (Page 1965).

which precede cases of direct physical injury to children. Among these symptoms are cases of unexplained malnutrition in infants.[6] Because such symptoms of neglect may precede symptoms of forcible abuse, it is important that laymen be alerted to the problems arising in child neglect cases and be aware of their duties respecting child neglect.

The victim of abuse or neglect is often the youngest child in the family. It has been suggested that this is because the child may be an unwanted addition to the family.[7] The victim may be an unwanted child where there is a single-child family, because there was a pregnancy before marriage, doubt as to the father's paternity, a suspicion of infidelity or because the child is "in the way."[8] The parents of the child have been variously described as immature, impulsive, self-centered, hypertensive and as exhibiting poorly controlled aggression. Their level of intelligence is below average and in most cases there is some defect in character structure.[9] Alcoholism, sexual promiscuity, unstable marriages and minor criminal activities are cited as characterizing them.[10] There is frequently a history of family discord or financial stress.[11] This might suggest that parents who subject their children to abuse or who are neglectful are found primarily in the lower socio-economic stratum. This, however, appears not to be so.[12]

Because a condition of neglect may precede an actual battery and homicide, and because children who are brought into court for two hearings seldom survive to a third, it is important to recognize early symptoms.[13] The following case history is perhaps a typical neglect case which might come to the attention of someone outside the child's family.

> [A] one month old [child] . . . was admitted to the hospital with a diagnosis of malnutrition, dehydration and possible vitamin deficiency. The patient responded well to supportive measures and was discharged in good condition.
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> Two weeks later examination in the pediatric follow-up

6 *See* Cameron, Johnson and Camps, *The Battered Child Syndrome*, 6 MED. SCIENCE & LAW 2, 19 (1966).

7 *Id.* at 14.

8 *Id.*

9 *Id.* at 17.

10 *Id.*

11 *Id.* at 16.

12 *Id.* at 20; *see also* Comment, *Ohio's Mandatory Reporting Statute for Cases of Child Abuse*, 18 WES. RES. L. REV. 1405, 1406 (1967).

13 *See* Hansen, *Suggested Guidelines for Child Abuse Laws*, 7 J. FAM. L. 61, 62 (1967) [hereinafter cited as Hansen].

clinic revealed soft-tissue swellings of the left wrist and left thigh. The patient was admitted to the hospital and X-ray study showed fractures of the distal end of the left radius and ulna. The possibility of pathologic fractures was considered, but laboratory data were all within normal limits.

Inflicted trauma was suspected and data on the medical past history of the patient and [a] sibling was obtained. The "accidental-death" report of the sibling . . . prompted further investigations which confirmed the diagnosis of maltreatment . . . .

The parents persisted in their denials of inflicted trauma and abuse and expressed concern for the welfare of their children. The mother impressed both physicians and social service workers with her affection and care of her four children. Her clinic visits gave further evidence of her "motherly" affection. The children appeared well dressed, and there was no obvious indication of neglect.

In view of the past history of maltreatment in another sibling, the inadequacy of the parent's explanation of the patient's physical findings, this child was kept in the hospital to await court action. The court's decision, in view of the evidence presented, was to place the child in a foster home.[14]

Clearly this one month old child's nutritional deficiencies presage more ominous treatment later, and in Ohio, if the deficiency is discovered by a physician, registered nurse, visiting nurse, school teacher or social worker, acting in an official capacity, any of them is obligated by statute to report the deficiency to a municipal or county peace officer.[15] If necessary, in the judgment of the reporting physi-

[14] FONTANA, *supra* note 1, at 45.

[15] The statute creating the obligation is OHIO REV. CODE ANN. § 2151.421 (Page Supp. 1966), which reads in part as follows.

> Any physician, including a hospital intern or resident physician, examining, attending, or treating a child less than eighteen years of age, or any registered nurse, visiting nurse, school teacher, or social worker, acting in his official capacity, having reason to believe that a child less than eighteen years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child, shall immediately report or cause reports to be made of such information to a municipal or county peace officer. Such reports shall be made forthwith by telephone or in person forthwith, and shall be followed by a written report. Such reports shall contain:
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> (A) The names and addresses of the child and his parents or person or persons having custody of such child, if known;
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> (B) The child's age and the nature and extent of the child's injuries or physical neglect. Including any evidence of previous injuries or physical neglect;
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> (C) Any other information which might be helpful in establishing the

cian and officer, the child shall be removed from the custody of those having charge of him.

This legislation preceded similar legislation passed by state legislatures around the country in response to the problems of child neglect. Certainly it was necessary if the experiences of other states are any indication of conditions existing in Ohio. In New York City, in 1962, over 5,000 dependency and neglect cases came to the attention of the Children's Court.[16] The Children's Division of the American Humane Society studied the number of child abuse cases reported in newspapers around the country in 1962, and inferred that a total of 662 children had been the objects of abuse.[17] The admission rate of physically abused children to Cook County Hospital, which services Chicago and its environs, was approximately 10 a day in 1964.[18]

Other states, notably California and Michigan, have made it a criminal offense for a physician to fail to report what appears to him to be a case of child abuse.[19] It is questionable whether such a stated policy is desirable. The effect of such legislation may be to deter those parents who might otherwise seek assistance for a child who is suffering from parental abuse or neglect. If the state's objective is to encourage reports by physicians and others, it would appear that the immunity from civil and criminal prosecutions granted them by the legislation would be a sufficient encouragement. However, in those cases where physicians actually assist parents to cover up severe instances of abuse or neglect, the physician should be subject to prosecution in Ohio under any criminal statutes which could be invoked against the parents. But Ohio has traditionally not treated accessories after the fact as principals where the state has deemed it politically desirable to press criminal prosecutions against the principals.[20]

Apparently people, particularly physicians, have been reluctant

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cause of the injury or physical neglect.

When the attendance of the physician is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports . . . .

16 *See* FONTANA, *supra* note 1, at 7.

17 *Id.*

18 *Id.*

19 CAL. PEN. CODE § 11161.5 (West Supp. 1967); MICH. COMP. LAWS § 722.575 (Supp. 1964).

20 *See, e.g.*, OHIO REV. CODE ANN. § 1.17 (Page 1953); State v. Lingafelter, 77 Ohio St. 523, 83 N.E. 897 (1908).

to report neglect or abuse cases because of fear of a retaliatory action by a parent or custodian where the complaint proved to be groundless. Such fears were probably never well founded. Certainly it appears improbable that a prosecutor would press criminal charges against the informant, assuming that some viable theory could be conjured up. If the claim were to be a civil claim for defamation, it would be necessary for the parent or custodian to allege and prove that the language used was spoken *of* him, and in those cases where a report was simply made that a child was abused or maltreated without specifying the agent of the harm, this prerequisite would not be met.[21] If the claim were for malicious prosecution or abuse of process, the claimant would have to establish several elements to prove a prima facie case. First, in a malicious prosecution case the claimant would have to establish that the criminal action terminated in his favor.[22] Assuming that the complainant were able to do this, he would still have to show in either an abuse of process case or a malicious prosecution case that the reporting defendant acted with malice and without probable cause.[23] Failure of proof of either of these elements would entitle a defendant to a directed verdict.[24] Any fears of liability along these lines would be quieted by the Ohio statute, which confers a privilege upon any person falling within the guidelines of the legislation, and exempts him from criminal fault or civil liability.[25]

II. TERMINATION OF THE PARENT-CHILD RELATIONSHIP

"The Childrens' Bill of Rights"

For each child, regardless of race, color or creed:

1. The right to the affection and intelligent guidance of understanding parents.
2. The right to be raised in a decent home in which he or she is adequately fed, clothed, and sheltered.
3. The right to the benefits of religious guidance and training.
4. The right to a school program which in addition to sound academic training offers maximum opportunity for individual development and preparation for living.
5. The right to receive constructive discipline for the proper development of good character, conduct and habits.
6. The right to be secure in his or her community against all

21 *See* W. PROSSER, THE LAW OF TORTS 767 (3d ed. 1964).

22 *See* Fortman v. Rottier, 8 Ohio St. 548, 550 (1858).

23 *Id.* at 550-51.

24 *Id.* at 553.

25 OHIO REV. CODE ANN. § 2151.421 (Page Supp. 1966).

influence detrimental to proper and wholesome development.
7. The right to individual selection of free and wholesome recreation.
8. The right to live in a community in which adults practice the belief that the welfare of their children is of primary importance.
9. The right to receive good adult example.
10. The right to a job commensurate with his or her ability, training, and experience, and protection against physical or moral employment hazards which adversely affect wholesome development.
11. The right to early diagnosis and treatment of physical handicap and mental and social maladjustments at public expense whenever necessary.[26]

Certainly every reader would agree that each child in the United States ought to have the kind of treatment outlined by Fontana. On the other hand, the reader's reaction may be that he did not receive the upbringing described and that it would be utopian to expect the state to intervene in every case where a child's home life did not meet these high expectations. Nor ought the state to meddle into the lives of its citizens except in those extreme instances where their welfare demands it. Perhaps the loving care of natural parents is enough to override many adversities faced by children whose home lives do not measure up to these ideals. But where it is apparent to an observer that a child would be better off anywhere else in the world than in its own home and, in less severe cases, where it appears that the interests of the child demand it, then the state ought to terminate the parent-child relationship, either temporarily or permanently. The legislature and the courts have attempted to mark out these boundaries. A child in Ohio who is living in highly unsanitary conditions or who is denied the necessary care, support, medical attention, educational facilities or discipline is deemed to be without proper parental care or guardianship by the Ohio Legislature.[27] A child who suffers from one or more of these maladies might be deemed either "neglected" or "dependent" by an Ohio juvenile court, which exercises exclusive original jurisdiction over such matters, insofar as the civil aspects of a case are concerned.[28]

It is clear that if a parent or guardian abandons a child, with no intention of caring for the child, and refuses to care for the child,

26 FONTANA, *supra* note 1, at 25-26.

27 OHIO REV. CODE ANN. § 2151.05 (Page 1953).

28 OHIO REV. CODE ANN. § 2151.23 (Page Supp. 1966).

then the court may adjudge the child neglected.[29] Further, where a child is physically abused by the parents, sexually assaulted or denied even the barest rudiments necessary to sustain life in an acceptable manner, or where the parents assist, abet or allow others to perpetrate such acts, the court may adjudge the child neglected.[30] If this conduct by the parent results in a finding of neglect or if the child is found to be delinquent, and the parent has contributed to the child's condition, then the parent may be prosecuted under Ohio's criminal laws.[31] The status of a dependent child, however, apparently refers to those situations where a child lacks a proper home life through no fault of his parents, and in those cases the parent should not be subject to criminal prosecution.[32]

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29 OHIO REV. CODE ANN. § 2151.03 (Page 1953) provides:

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "neglected child" includes any child:

(A) Who is abandoned by his parents, guardian or custodian;

(B) Who lacks proper parental care because of the faults or habits of his parents, guardian or custodian;

(C) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals or well being;

(D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition;

(E) Who is found in a disreputable place, visits or patronizes a place prohibited by law; or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others.

30 *Id. See also In re* Gail L., 12 Ohio Misc. 251 (Juv. Ct. Cuyahoga County 1967) (child whose mother does not protect her from the sexual advances of a step-father is neglected).

31 OHIO REV. CODE ANN. § 2151.41 (Page 1953).

32 OHIO REV. CODE ANN. § 2151.04 (Page Supp. 1966) provides:

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "dependent child" includes any child:

(A) Who is homeless or destitute of without proper care or support, through no fault of his parents, guardian, or custodian;

(B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship;

(D) Whose parent or parents or legal guardian or custodian have placed or attempted to place such child in violation of sections 5103.16 and 5103.17 of the Revised Code.

The courts in Ohio have displayed a preference for parental custody as opposed to state custody, and it would appear that the interests of the parents ought to be represented in cases involving determinations as to termination of their custodial rights.[33] Certainly such a proposal makes sense in those instances where a reasonable case can be made for the parents.[34] The purpose of the hearings ought not to be punishment of the parents, with punishment of the children sometimes being a concomitant result. Rather, in those cases where it is possible to rehabilitate the parents, some effort ought to be made to do so.[35] Perhaps a temporary termination of custody may be advisable, followed by simultaneous attempts to rehabilitate wayward parents and to treat children suffering from nutritional and other deficiencies, which may spring in part from a poverty status.[36]

A. *Education*

The English Parliament has deemed it an offense for an adult to go to bed drunk with an infant in his care under the age of three years, if the infant should suffocate; to be drunk in a public place while charged with responsibility for a child under seven; to allow children over four and under sixteen years to live in a brothel and for similar miscellaneous acts to be committed to, or in the presence

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33 *See In re* Masters, 165 Ohio St. 503, 137 N.E.2d 752 (1956).

34 *Id.* In *In re Masters* the Supreme Court of Ohio noted that where a mother was in a mental hospital with no source of income the trial court was not justified in finding her children neglected and awarding permanent custody to a county child welfare board for the purpose of placing them for adoption.

35 *See* Hansen, *supra* note 13, at 64:

> Many times persistent efforts by those involved in the case can bring about significant positive gains in the family. There are reports that sixty-seven percent of the families involved in the Family Centered Project in St. Paul, Minnesota, have made gains. But, a recent report from the Children's Hospital of Philadelphia describes intensive services given to parents of infants who had . . . (severe malnutrition) for which no organic cause could be found. For fifteen of the infants the parents demonstrated response to these services, but for eight the parents lacked the capacity to meet the babies' needs and these infants had to be removed from their parents.

Boardman, *Who Insures the Child's Right to Health?*, CHILD WELFARE, at 123-124 (March, 1963).

36 *See* DAVIS, LET'S EAT RIGHT TO KEEP FIT 31 (1954):

> Many surveys of thousands of persons having enough money to eat as they choose have shown that about 60 per cent get far less protein than is adequate. Since the complete proteins most enjoyed are expensive, persons with low budgets almost invariably suffer from protein deficiency. Yet adequate protein can be obtained even when the budget is extremely limited.

of children.[37] The meanings of neglect and dependency are left for the courts of Ohio to puzzle out, and they have attempted to do so as best they can. Since the Legislature of Ohio has commanded children to attend school, the duty of a parent to educate his child is clear. It is not so clear that the parent's breach of duty need result in a permanent termination of the parent-child relationship, or what conduct may result in a breach. In *In re Hargy*,[38] two minor children were alleged by the State to be dependents because they were not receiving a proper education. The children had been prevented by their father, an otherwise good man, from being vaccinated and on that ground had been excluded from attending public school. At the time of hearing one child was attending school. The court recognized that if the other child was prevented from receiving an education, the child could be made a ward of the court, but stated that under the circumstances of the case that appeared not to be necessary if the father provided the child with a proper education.

B. *Medical Care and Treatment*

If a child is sexually assaulted or beaten by a parent, criminal penalties attach to the conduct involved.[39] Denial of medical treatment in such instances may heighten the aggravation to the victim, but it would not heighten the criminal liability attaching unless it resulted in a more serious injury to the child, as was the case in *Craig v. State*[40] where the parents of a child victim refused to call for medical assistance because of their religious beliefs and the child died. It would appear, however, that less severe cases might be cognizable in the Ohio courts. In *State v. Perricone*,[41] a blue baby was admitted to a hospital in New Jersey. At the time of admission, the mother of the infant instructed that it be noted on the progress record that the parents were Jehovah's Witnesses and that no blood transfusion be given. Blood transfusions later became necessary and were refused by the baby's parents. The Supreme Court of New Jersey affirmed the decision of the Juvenile Court of New Jersey, which took custody of the child after a declaration that it was neglected, and ordered a guardian appointed for the purpose of administering the necessary

37 PUXON, *supra* note 2, at 165.

38 23 Ohio N.P. (n.s.) 129 (Dom. Rel. Ct. Hamilton County 1920).

39 *See, e.g.*, OHIO REV. CODE ANN. § 2901.25 (Page 1953) (assault and battery); § 2903.01 (Page Supp. 1966) (assault upon a minor); § 2905.02 (Page 1953) (rape of daughter, sister, or female under twelve); § 2905.07 (Page 1953) (incest).

40 220 Md. 590, 155 A.2d 684 (1959).

41 37 N.J. 463, 181 A.2d 751 (1962).

transfusions. This order was predicated upon the trial testimony of two doctors who deemed it necessary to save the infant's life. Although the child later died, unlike the *Craig* case, the parents had called for assistance. The court's rationalization for the assumption of custody over the child was that he was a neglected infant.

Less severe cases than those presented by *Craig* and *Perricone* have been ruled on by various courts around the country. What is the situation when the child's life is not threatened, but good medical or social judgment dictates that a certain course of medical treatment ought to be followed and the parents of the child involved refuse the treatment? Some courts have ordered the prescribed treatment after assuming temporary custody over the child. In *In re Vasko*,[42] the Court ordered an eye operation which had been recommended by experts, over the remonstrances of the parents. In *Mitchell v. Davis*[43] medical treatment for arthritis was ordered after refusal to seek assistance for her child by a mother who chose instead to rely on prayer. In *In re Seiferth*[44] the New York Appellate Division held that the Children's Court was empowered to order an operation on a child's harelip and cleft palate over the objections of the father. In each of the latter two cases the courts declared the children neglected. The Ohio test appears to be established by the court in *Hargy*, where the court assumed it had power to take custody of a child refused entrance to school because of a parent's denial of medical treatment if the denial resulted in loss of educational benefits to the child. It would appear that *Hargy* could encompass all of the cited cases from other jurisdictions, including *Seiferth*, where refusal of medical care by a father could have resulted in a denial of access to the society of others for the child, because of a disfigurement.

C. *Undesirable Associations*

Associations by a child which impair his moral strength or which could result in delinquency are condemned by the courts. The Ohio Legislature has defined a neglected child to include those children who are found in disreputable places or in situations injurious to their morals, or who associate with "vagrant, vicious, criminal, notorious, or immoral persons."[45] Often the cases involve undesirable associations with other persons as a result of conduct by a parent

42 238 App. Div. 128, 263 N.Y. Supp. 552 (1933).

43 205 S.W.2d 812 (Texas Civ. App. 1947).

44 285 App. Div. 221, 137 N.Y.S.2d 35 (1955).

45 OHIO REV. CODE ANN. § 2151.03(E) (Page 1953).

which thrusts the child into the association. In *State v. Butler*[46] a fifteen year old boy was left by his mother to "watch" a customer watching the bar while the mother left the bar to attend to other business. While she was gone the boy served liquor to others, including a youth. The court found that the mother had contributed to the child's delinquency and sentenced her accordingly. In *State v. Gans*,[47] the adoptive parents of an eleven year old girl consented to her securing a marriage license and misrepresented her age. Again, the Ohio court found that the parents had acted in such a way as to contribute to her delinquency. It should be noted that in both the latter two cases, the courts were first obligated to find some unlawful conduct on the part of the children, and that neither case was actually prosecuted under the neglected child statute.

A case in which a woman was prosecuted for cohabiting with the father of three young children is *State v. Fullen*.[48] She was found guilty of assisting the father in neglecting his children because her conduct encouraged him to remain away from them for long periods. The opinion does not mention whether she was herself associating with the children, so the case could more properly be viewed as one in which the children were being denied their right of association with their father because of the conduct of the defendant.

Sometimes the conduct of the parents themselves may be such as to lead the court to declare that they are not fit companions with which a child should associate, and thus lead to a finding that the child is either neglected or dependent. In *In re Douglas*,[49] a mother was found by the court to be a woman without either "morals or good sense," and the father was found to be a "conscienceless, selfish monster." The evidence showed that both parents were promiscuous and that the children were sickly and that at least one suffered from nutritional deficiency. The court felt that the main interest of the father in the children was to use them to "beat his wife into submission." Although not necessary to the decision, the court found the children both neglected and dependent, and ordered them committed permanently to the Huron County Welfare Department. In *In re Dake*,[50] two of four illegitimate children were declared to be dependents of the State because the court considered their mother to be a

46 25 Ohio Op. 567, 38 Ohio L. Abs. 211 (Juv. Ct. Tuscarawas County 1943).
47 168 Ohio St. 174, 151 N.E.2d 709 (1958).
48 86 Ohio L. Abs. 300, 176 N.E.2d 605 (Ct. App. Geauga County 1959).
49 11 Ohio Op. 2d 340, 164 N.E.2d 475 (Juv. Ct. Huron County 1959).
50 87 Ohio L. Abs. 483, 180 N.E.2d 646 (Juv. Ct. Huron County 1961).

woman devoid of morals or intelligence, who found it necessary to live on public funds. The children were committed to the permanent custody of the Huron County Welfare Department. It appears that the court was influenced by the mother's dependency on public welfare.[51]

The Ohio Legislature has authorized temporary or permanent placement of a dependent or neglected child after notice to the proper parties and a hearing held on the issue.[52] The statutes authorize such emergency and medical treatment as is deemed necessary.[53] Pending a hearing the child may be remanded to the custody of his parents, or placed with such other person as may be designated by the court.[54] Obviously, placement with relatives is most desirable. After hearing and a finding that the child is delinquent, neglected or dependent, the court may place the child on probation in his own home, or place the child with a relative or in an institution.[55] The child may be temporarily or permanently committed to the department of public welfare or to a county department of welfare, and if ties with the parent are permanently severed, the child may be placed with adopting parents.[56]

III. Prosecuting Abused or Neglected Child Cases

In those cases where no decision has been made to terminate the parent-child relationship, it would not seem desirable to prosecute the parent or custodian of the child because of the strain on an already weak relationship. However, where the court has made a determination that the parent-child relationship ought to be permanently severed, then prosecution of a criminal case against the adult may be in order. Certainly it is called for in severe cases of child abuse, which fall under the heading of sexual offenses, homicide, or lesser offenses such as battery. These crimes are not treated here because their pertinency is only marginal to the main topic. When the state does determine that prosecution is called for by the facts in a particular case, the question of presentation of the case is squarely posed.

What unique difficulties are presented by these cases, and how

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51 *Id.* at 485, 180 N.E.2d at 648-49.

52 Ohio Rev. Code Ann. §§ 2151.28, 2151.35 (Page Supp. 1966).

53 Ohio Rev. Code Ann. § 2151.33 (1953).

54 Ohio Rev. Code Ann. §§ 2151.31, 2151.33 (1953).

55 Ohio Rev. Code Ann. § 2151.35 (Page Supp. 1966).

56 *See In re* Masters, 165 Ohio St. 503, 137 N.E.2d 752 (1956).

are they surmounted by the courts and legislature? The juvenile court has concurrent jurisdiction with criminal courts in the state for the offenses of abusing a child or causing his neglect, dependency or delinquency.[57] In severe cases of maltreatment, the defendant may be bound over to the grand jury for indictment.[58] Of course, the defendant has a right to a jury trial and to bail, the case being handled in the same manner as any other criminal case.[59] The distinguishing features of these cases as compared to other criminal cases are the unique evidentiary problems presented.

When presented with a child abuse case the attorney must attempt to collect certain basic information. Initially he must familiarize himself with the child's background and family relationships. For example, there may be an established pattern of admissions to a hospital for malnutrition or broken bones. Several complaints may have been registered by individuals under the provisions of the reporting statute. Other children in the same family may have been subject to mistreatment at some earlier time. If the prosecuting attorney can show that the defendant was responsible for past injuries to the child in question, or to a sibling, by statutory authorization in Ohio, he may offer such evidence to show the defendant's *mens rea*, even though it may tend to show the commission of another crime by the defendant.[60]

What problems confront the prosecutor if only testimonial evidentiary sources are available to him? It appears that those closest to the child involved will have knowledge of the facts necessary to obtain a conviction. If the child is old enough to testify, the child himself may be the best evidentiary source. The spouse of the defendant may be an important evidentiary source. The examining physician who made the complaint terminating in the criminal proceeding may be the best evidentiary source for the state. These are sources of evidence which present unique evidentiary problems for the lawyer.

A. *Husband-Wife Privilege*

Assuming that the spouse of the defendant is called to testify as a witness, the policy behind the rule barring testimony based on information obtained as a result of the marital relationship is presented by the offer of testimony. The policy behind the rule is to

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57 OHIO REV. CODE ANN. § 2151.23 (Page Supp. 1966).
58 OHIO REV. CODE ANN. § 2151.43 (Page Supp. 1966).
59 OHIO REV. CODE ANN. §§ 2151.46-47 (Page 1953).
60 OHIO REV. CODE ANN. § 2945.59 (Page 1953).

promote marital harmony and to diminish marital discord.[61] It would seem that in those cases where a child is seriously abused, there is already something seriously wrong with the marriage, either because the spouses are already disharmonious or because they are possessed of either sick or criminal mentalities. The Legislature of Ohio has therefore abandoned the husband-wife privilege. Specifically, it has provided that husband and wife are competent to testify against one another in all neglect of children or cruelty to children cases.[62]

B. *Doctor-Patient Privilege*

Although at common law there was no privilege for disclosures made by a patient to his physician in the course of treatment, a privilege was created by statutes in the various states of the United States.[63] Ohio followed other states which had established the statutory privilege. The Ohio statute prohibits a physician from testifying to a communication made to him by a *patient in that relation.*[64] The purpose of the rule is to encourage disclosure by the patient so as to aid the physician in the effective treatment of disease and injury.[65] This rationalization has been criticized as not being the real basis for the rule since patients rarely have in mind later litigation when they consult with their physician.[66] However, this might well be the policy in a child neglect case where the parent would otherwise be discouraged from seeking treatment for a child in need of it if the parent suspects that he might subsequently be prosecuted for his conduct. Even so, it would seem that the parent is not the proper party to assert the privilege on behalf of the child, since the parent is not the patient, properly speaking, in such a case, but merely the person making the contract.[67] In any case the Ohio Legislature has removed all doubt by providing that in these cases the physician-patient privilege is abolished.[68] Whether this will result in suppression of informa-

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61 C. McCORMICK, LAW OF EVIDENCE § 90 (1954) [hereinafter cited as McCORMICK].

62 OHIO REV. CODE ANN. § 2945.42 (1953) provides in part:

> Husband and wife are competent witnesses . . . to testify against each other in all actions, prosecutions, and proceedings . . . [for] failure to provide for, neglect of, or cruelty to *their* children under sixteen years of age. [Emphasis added.]

63 McCORMICK, *supra* note 61, § 101.

64 OHIO REV. CODE ANN. § 2137.02 (1953).

65 McCORMICK, *supra* note 61, § 108.

66 *Id.*

67 *See* Ferguson, *Parent Accused of Child Beating May Not Claim the Doctor-Patient Privilege to Prevent Medical Testimony*, 12 KAN. L. REV. 467 (1964).

68 OHIO REV. CODE ANN. § 2151.421 (Page Supp. 1967).

tion by parents of neglected children consulting physicians remains to be seen. It would seem that it would not because of the existing natural reluctance to disclose fault to a stranger on the part of a parent, and because it is doubtful if the general public is aware of the rules of evidence controlling the handling of lawsuits.

C. *The Child as Witness*

Often the chief source of evidence that the prosecution has to offer may be testimonial assertions made either by the victim of the offense or by a sibling of the victim. Ohio Revised Code Section 2317.01 provides that "all persons are competent witnesses except . . . children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." We are specifically concerned with the child under ten years of age whose testimony is to be offered. Because children of tender years so often are highly imaginative and may conjure up only partially true phantasies, it becomes extremely important to examine the child to discover if he is a qualified witness and whether or not his testimony is to be received into evidence. The trial court is therefore bound to conduct a voir dire, preferably out of the hearing of the jury, as to the child's competency.[69] His competency at the date of the hearing is pertinent, but it is his competency at the date of the occurrence which is controlling.[70] Failure to conduct such a competency hearing constitutes error by the trial court.[71] It is not clear that the burden of proving competency is on the proponent of the witness, but it is clear that the court has the duty of conducting the examination and counsel may not interfere.[72] Apparently, the court may not avoid the duty by ruling that as a matter of law the child was too young at the time of the event in question to be a competent witness.[73]

Once the witness is qualified he may be sworn and may testify.[74] Apparently the Ohio courts have not considered the effect of testimony offered by a child who is too young to be prosecuted for perjury.[75] This dilemma might be avoided if the courts were to rule

69 State v. Wilson, 156 Ohio St. 525, 103 N.E.2d 552 (1952).

70 Huprich v. Paul W. Varga & Sons Inc., 3 Ohio St. 2d 87, 209 N.E.2d 390 (1965).

71 Crouch v. Fishbein, 29 Ohio Ct. App. 573 (1919).

72 State v. Wilson, 156 Ohio St. 525, 103 N.E.2d 552 (1952).

73 Huprich v. Paul W. Varga & Sons Inc., 3 Ohio St. 2d 87, 209 N.E.2d 390 (1965) (child at age four time of event in question).

74 State v. Wilson, 156 Ohio St. 525, 102 N.E.2d 552 (1952).

75 *See* excellent discussion in Stafford, *The Child As a Witness*, 37 WASH. L. REV. 303, 317-19 (1962) [hereinafter cited as Stafford].

that no child too young to be prosecuted for the offense may be allowed to testify. On the other hand, if the child is too young to testify himself, his testimonial utterances which are considered to be res gestae may be offered by the state.[76] For instance, a statement by a child that he or another child is being struck, if the statement is made during a harsh beating administered by one of the parents and is overheard by a competent witness may be offered to prove the beating. Whether or not a court would rule that this denies the defendant the effective right of confrontation granted him by the federal constitution, as applied to the states in *Pointer v. Texas*,[77] remains to be seen.

The general question of competency on the part of the child witness is not significantly different from the question of competency of an adult witness. The memory, sincerity, perception and ability of the child to relate correctly sensory perceptions are at issue.[78] An added difficulty might be the failure of the child to understand the language used by an adult. The examination of the child ought therefore to be conducted in simple language. Counsel should also take care not to coach the witness lest that be brought out by his adversary. Further, if the judge does not immediately order a voir dire when the witness is brought into court, the proponent should request one. This seems to be dictated not so much by the rule that the witness's testimony may be excluded even though no objection is made until after it is offered, as it is by the very practical consideration that an explosive objection during the testimony may be so upsetting to the witness as to impair his ability to testify and thus reduce his effectiveness with the jury.[79] The preliminary examination by the court may range over a wide area and yet may produce important information on the question of competency. For example:

Q. What is your name?
A. Katherine Anne Craig.
Q. How are you feeling today, Katherine?
A. Fine.
Q. What are the names of your mother and father?
A. ———
Q. Do you have any brothers and sisters?

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76 State v. Lasecki, 90 Ohio St. 10, 106 N.E. 660 (1914) (statement of boy "The bums killed pa with a broomstick" part of the res gestae).

77 380 U.S. 400 (1965).

78 *See* State v. Wilson, 156 Ohio St. 525, 102 N.E.2d 552 (1952).

79 *See* Crouch v. Fishbein, 29 Ohio App. 573 (1919); Stafford, *supra* note 75, at 311.

Q. What are their names?
Q. Do they live at home?
Q. By the way, how do you spell your name?
Q. How old are you, Katherine?
Q. When is your birthday?
Q. How did you get here today?
Q. Do you know what building you are in now?
Q. What town are you in now?
Q. Where do you live?
Q. What school do you go to?
Q. How far do you live from school?[80]

These questions cover the child's age and knowledge of her age, her residence and its relation to another place as well as her ability to observe and relate, her understanding of simple questions, her ability to recount her home life, and her memory and general intelligence. These questions may form the basis for a more specific interrogation.

IV. Conclusion

The problems confronting the courts in cases involving abused, abandoned, delinquent, dependent and neglected children are not simple. They involve balancing the interests of the child against those of the parents and society. They involve determinations as to whether a child would be better off with a parent after some rehabilitative efforts on the part of state agents or better off in an institution which cannot supply necessary parental love and, perhaps, face the risk of never being adopted by loving foster parents. Lawyers, judges, social workers and others working in the area must be aware not only of the law, but of the facilities with which they have to work. All that society can demand of them is that they bring to bear on the problems before them all of the humanity and intelligence they can muster, together with their available knowledge and technical skills. Certainly the faults of society are not the faults of its legal agents and they have done their tasks well if their decisions reflect a spirit of enlightened justice.

80 Stafford, *supra* note 75, at 315.