CHAPTER 3

TRENDS IN LEGISLATION AND CASE LAW ON CHILD ABUSE AND NEGLECT

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INTRODUCTION

The recognition of child abuse and neglect as a significant social problem in the United States is a relatively recent development. Although most states had passed specific child maltreatment laws by the early 1920s, it was not until publication of a 1962 article describing the “battered-child syndrome” (Kempe, Silverman, Steele, Droegenmuller, & Silverman, 1962) that legislators and health care professionals paid considerable attention to the problem of child abuse and neglect. Since then, there have been several waves of legislation and judicial activity that have been nearly universal in American jurisdictions but that seldom have had unequivocally positive effects.
JUSTIFICATION FOR STATE INTERVENTION

Parens Patriae Power

To evaluate the trends in law on child maltreatment, a useful starting place is consideration of the broad philosophical and empirical foundation of such policies. Without question, the state has a legitimate interest in the welfare of its citizens. Accordingly, under its parens patriae (sovereign as parent) power, the state may take actions to protect those individuals who are considered unable to protect or care for themselves (e.g., minors, the mentally disabled). In some cases, the state's interest as parens patriae is so compelling that it overrides even fundamental rights, such as the right to family privacy (see, e.g., Prince v. Massachusetts, 1944; cf. Roe v. Wade, 1973). Serious child maltreatment presents just such a situation.

Although the state's parens patriae power is expansive, it is not without boundaries (see, e.g., Pierce v. Society of Sisters, 1925; Wisconsin v. Yoder, 1972). For example, an involuntary intervention to protect child welfare can be justified only if no action less intrusive on family privacy would accommodate the state's compelling interest in the healthy socialization of dependent children. Indeed, family privacy is so fundamental that it must be considered even after children have been removed from the custody of their biological parents because of a demonstrated lack of safety in the home (Melton & Thompson, 1987). In Santosky v. Kramer (1982), the Supreme Court concluded that

> [t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. (p. 753)

Orientation and Scope of Intervention

In the face of a need to balance critical needs to protect both child welfare and family privacy, no consistent orientation exists among child advocates about the nature of child maltreatment, the value of parental autonomy, and the merits of various interventions to prevent harm to children (Bourne & Newberger, 1977; Gelles, 1982; Melton, 1987a; Melton, Petrila, Poythress, & Slobogin, 1987). Accordingly, there is little