

Raised Bill 6464, An Act Concerning Shaken Baby Syndrome

Children Committee, Public Hearing, February 26, 2013

As attorneys and physicians who research, practice, or have other extensive experience with cases involving infant brain injuries that lead to death, we oppose Raised Bill Number 6464 as both unnecessary and founded upon assumptions and hypotheses that are unsupported in the scientific medical literature. The Bill fails to address the debate within the scientific community regarding Shaken Baby Syndrome/Abusive Head Trauma (SBS/AHT) and, if passed, will result in the prosecution of innocent parents and caregivers.

The raised bill proposes prosecution in situations where infants or young children experience symptoms, "...including, but not limited to, swelling that impedes the supply of oxygen to the brain or any degree of brain damage that results from the infant or young child having been forcefully shaken..."

To begin, the bill is utterly unnecessary, because intentionally or even negligently causing injury to children is already illegal and adequately punished by existing criminal laws. But it is worse than unnecessary; it is counterproductive and dangerous. It is a bad idea because it could potentially sweep within its reach all sorts of conduct that involves shaking or jostling a child that includes no mens rea, or particular state of mind. Simply put, it contains no requirement that a person intended, or even should have known, that the conduct deemed by some accuser to be "forceful shaking" could be used to send a loving and caring caregiver to prison. And this is especially significant given that scientific research has recently established beyond dispute that infants and young children can experience "swelling that impedes the supply of oxygen to the brain" from myriad causes completely unrelated to abuse or maltreatment. This law would effectively create a bias toward assuming abuse through shaking as a charging matter, and could be used to prosecute parents who bounce children on their knees, shake unresponsive children in an attempt to revive them after other injury, or simply play roughly with them in circumstances where some other real, but overlooked, factor actually causes the child's brain injury.

Increasingly, research is establishing that, in the absence of credible corroboration of abuse, allegations of child abuse, particularly those of abusive head trauma, must be made only with proper scientific support. Without such support, innocent individuals are likely to be convicted of crimes they did not commit. Courts have begun to reverse or call into question convictions based on the SBS/AHT hypothesis¹, particularly where they were based largely on medical findings, with little or no corroborating evidence of abuse². When individuals are wrongly accused of child abuse, children, families and communities suffer. Children suffer because the root causes of—and sometimes appropriate treatments for—their symptoms remain unrecognized. Families are torn apart because of false allegations, resulting in the suffering of all family members. Communities are wrongly divided

¹ See, e.g., *State v. Edmunds*, 308 Wis. 2d 374

² See also *Cavazos v. Smith*, 132 S.Ct 2 at 8 (Ginsberg, R., dissenting)

because of false allegations, and relationships between individuals can be badly damaged based on allegation alone.

The SBS/AHT hypothesis can lead to allegations of child abuse when subdural hematoma, retinal hemorrhage, and cerebral edema or encephalopathy are found in the absence of other significant injuries. The hypothesis in its classic form denies the possibility that such head injuries can be caused by circumstances other than shaking or shaking with impact. The hypothesis in its classic form also denies the possibility (or at least likelihood) that a child exhibiting such signs can remain lucid for any period of time between the abuse and the child's collapse. The medical signs alone are thus often used to identify the individual responsible for the alleged abuse as the one who had care of the child at the moment of collapse.

These hypotheses are not sufficiently supported by existing scientific and medical research to permit prosecution without the presence of other direct or corroborating evidence of abuse. It is very difficult to conduct research into the causes and signs of SBS/AHT because it is impossible to conduct controlled, randomized trials on human infants. The difficulties in conducting high-quality, unbiased research in this field cannot, however, justify criminal prosecutions based on a low-quality and highly disputed scientific evidence base, without more. Each of the elements of the SBS/AHT hypothesis is subject to rigorous and legitimate debate in the medical community³. Dr. Norman Guthkelch, one of the first to hypothesize about SBS in 1971, has expressed serious concerns about the frequency and certainty with which doctors diagnose SBS and calls for more research into the evidence base of the SBS hypothesis.⁴

While the raised bill's aim is to protect infants and young children, it may have the opposite effect. If it is accepted that the only cause of subdural hematoma, retinal hemorrhage, and encephalopathy in infants and young children is abuse, then those children who exhibit these medical findings for other reasons, such as infection, accident, seizure, birth injury, genetic defect or pediatric stroke, will be denied the proper medical treatment, or improperly removed from the care of their loving parents.

The following are serious questions about the SBS/AHT hypothesis that are not adequately addressed within Raised Bill 6464:

- 1) The SBS/AHT hypothesis has not been subjected to meaningful scientific examination, free from circularity in reasoning and study design.
- 2) The features commonly associated with SBS/AHT have not been reliably shown to be pathognomonic or highly diagnostic of abuse.
- 3) Features commonly associated with the hypothesis have other documented causes, including, but not limited to: accidents, falls, including falls under four feet, infection, hypoxia, genetic defects, birth injuries, natural disease processes, and pediatric stroke.
- 4) The hypothesis does not meet legal or medical standards of reliability.

³ See Keith A. Findley, Patrick D. Barnes, David A. Moran, and Waney Squier, *Shaken Baby Syndrome Abusive Head Trauma, and Actual Innocence: Getting It Right*. 12 Hous. J. Health L. & Pol'y 209.

⁴ A. Norman Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*. 12 Hous. J. L. & Pol'y 201 at 207.

- 5) The hypothesis does not adequately recognize the reality and possibility of lucid intervals.
- 6) Innocent parents and caregivers have been convicted under the hypothesis.
- 7) The hypothesis alone cannot support guilt beyond a reasonable doubt.

We do not reject the possibility that shaking an infant can cause serious harm or death. We do not, in any way, deny that child abuse is a serious problem and that those who abuse children should be punished. We do, however, reject the notion that criminal statutes should be designed to enforce controversial and inadequately supported scientific hypotheses when other laws already exist that protect children from real abuse and punish their abusers.

Respectfully Submitted,

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March 1, 2013

Co-Chairs Bartolomeo and Urban and members of the Children Committee
Room 011, Capitol Building
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Dear Senator Bartolomeo, Representative Urban, and members of the Children Committee,

Attached please find the updated version of the written testimony submitted on February 26, 2013 regarding Raised Bill 6464.

The testimony has been edited to add the names of Barry Scheck and six others, including an additional physician and six additional professors of law, who have signed onto the testimony in recent days.

The testimony has further been edited to add a citation to a recent writing by Dr. A. Norman Guthkelch, one of the first to publish on the Shaken Baby Syndrome hypothesis, calling for objective, unbiased research on the subject of SBS, and expressing concern about the frequency and certainty with which SBS is diagnosed.

Sincerely,

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