

THE UNINTENDED EFFECT IN MANDATORY REPORTING LAWS AND AN INCREASED RISK TO A PROTECTED POPULATION

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Insufficient definitions within New York State's mandatory reporting laws have created a "legal-ethical feedback loop" (Johnston, 2015) that can cause an increase in potential victims through the exclusion of certain persons seeking treatment. These non-offending individuals seeking treatment for pedophilia can become subjects of investigations by Child Protective Services because of ambiguous language in the laws, wherein their treatment is jeopardized. This paper will examine how the language of current New York statutes creates a propensity for over-reporting possible abuse cases when they are unfounded, and potentially risks increasing the number of sexual abuse victims because of a lack of access to or trust in licensed clinicians. This paper proposes several alternatives to closing this "feedback loop" and thereby further protecting one of New York's most vulnerable populations: children.

INTRODUCTION

The State of New York has not always been known as a progressive state, but evidence of its forward thinking can be found decades ago. With the passage of the New York State Child Protection Act in 1973, New York solidified the need to have an official role in the prevention and investigation of child abuse. It was a year later that the Federal Government passed its own similar law, the Child Abuse Prevention and Treatment Act of 1974 (42 U.S.C. §5101), requiring states to do as New York and many others already had in legislation. In fact, the need for the protection of children from abuse was so great that most states had already enacted similar legislation by 1967 (Myers, 2008, p.456). The New York Child Protection Act (N.Y. S.O.S. §411) provided licensed professionals, such as therapists, physicians, and social workers a legal route to breaking confidentiality when there were cases of suspected child abuse occurring, knowledge of which was obtained through communications that were regarded as confidential. The law extends the same privilege to laypersons (un- or non-licensed caregivers) concerned with the care of children, such as school teachers and even day care volunteers.

SOCIAL PROBLEM ADDRESSED BY THE POLICY

Prior to the twentieth century, the extent and severity of child abuse is not easily measured because the collected data showcasing the prevalence of child abuse are sporadic, at best. However, there are several sources that depict the prevalence of child abuse, specifically the sexual abuse of minors. According to Mintz (2012) in New York City, between 1790 and 1886, "a third and a half of rape victims were under the age of 19." In 1894, the most common form of sexual abuse was the "rape of children" (Hamilton & Godkin, 1894). Following events in New York City regarding abused children and the government's inability or refusal to protect them, the New York Society for the Prevention of Cruelty to Children (NYSPCC) was formed (Myers, 2008, p.451). It is interesting to note that the NYSPCC was formed, in part, by the founder of the similarly-named American Society for the Prevention of Cruelty to Animals. That a society that was established to protect animals was created before one to protect children speaks to not only how removed the issue of child abuse was to the public, but also to how dire the need for NYSPCC was at the time.

Many other events transpired between the formation of the NYSPCC and 1962 that shifted the public's attention to the issue of child abuse, but it was in that year that what has been described as the "seminal" work addressing the abuse of children was published (Gelles, 1996; Melton, 2005; Myers, 2008). *The Battered-Child Syndrome* (Kempe, Silverman, Steele, Droegemueller, & Silver, 1962) brought attention to the common signs and symptoms of children being physically and sexually abused, as seen by medical professionals, to the public. The work of Kempe et al. (1962) and his pediatrician colleagues were the catalyst for starting the trend across the nation (at the state level) for passing legislation forming child protective services and mandatory reporting laws that required professionals and laypersons alike to report cases of child abuse.

While an in-depth literature review on child abuse is beyond the scope of this paper, there are several known factors that lead up to and contribute to the abuse of children. It is worth mentioning that current mandatory reporting laws do not address the specific causes of child abuse and instead formulates a response to a problem that has already occurred, which is the case with most laws. Many commonly accepted causes of child abuse range from (and are in no way limited to) poverty, poor education, marital strife, food insecurity, and inadequate housing (Department of Human Services, n.d.). Causes of sexual abuse of children are less understood. Previous conjecture stated that individuals who were sexually abused have higher rates of sexually abusing others than non-sexual abuse victims, though recent data shows this may not be the full explanation (Ryan, 2013). There is a correlation between individuals who were abused and their future abuse of others; however, causation cannot be confirmed to such experiences and cognitive deficiencies are now being promoted as more likely causes in many cases of sexual abuse (Ward, Hudson & Marshall, 1995). The causes of child abuse, in particular sexual abuse of children, are important to research further, because understanding what elicits such behavior can lead to interventions that reduce the number of offenders, thereby reducing the number of victims. And just as identifying causes could help reduce offenses, if individuals who suffered from a sexual desire for children could be treated before they became offenders, the number of potential victims would be drastically reduced.

POLICY OBJECTIVES

The objective of the federal Child Abuse Prevention and Treatment Act of 1974, New York's Child Protection Act of 1973, and similar acts from other states, is to acknowledge the ongoing abuse of children and prevent future abuse by identifying those who are at-risk. Furthermore, the mandatory reporting requirements in N.Y. S.O.S. §413 serve to create and promote the framework of reporting abuse and define the roles of the agencies involved in investigating the reports made. According to the New York State Assembly, the "purpose of the Child Protection Act and amendments is to encourage more complete reporting of child abuse and maltreatment" (New York State Assembly, n.d.). By creating the legal ability to break client confidentiality, the law better protects children by granting the ability to report child abuse of any nature by individuals most likely to encounter evidence or indicators of its occurrence.

Beyond the clear and concise stated objectives of the law, there is a covert intention of identifying and punishing any suspected abusers. This is not necessarily negative, per se, but when coupled with the law's failure to address causes of abuse, the law could be interpreted as having an unspoken objective for serving as a punitive instrument for persons attracted to children. In the case of actual abuse, sexual or otherwise, this can be understood. But in cases where abuse did not occur, either because it was stopped prior to its occurrence by confession to a therapist, or no specific child was at risk but a person sought help for pedophilia, this punitive aspect is indeed negative and unnecessarily restrictive. Individuals attracted to children are often defined as pedophiles, and pedophiles are colloquially identified as sexual offenders, but this is not always the case (Blanchard, 2009). There are individuals attracted to children (the basic requirement for a diagnosis of pedophilia) that do not wish to act on their sexual desires, and their desire to not offend often leads them to therapy. These "minor-attracted persons" suffer from a reactionary, punitive aspect of the law that requires the reporting of any abuse, actual or suspected, and herein lies the problem.

EFFECTS OF THE POLICY

The list of professionals required to report abuse—i.e. mandated reporters—is exhaustive (N.Y. S.O.S. §413). It includes every type of professional that would be qualified to offer any form of psychotherapy to an individual seeking treatment for a sexual attraction to children (pedophilia). Again, the distinction must be made that to be considered a pedophile, a sexual act does not have to have been committed, only a sexual attraction or desire (Blanchard, 2009). The "amendments" to the New York State Child Protection Act (1973) spoke of by the New York State Assembly (n.d.) create a loophole that can preclude minor-attracted persons from obtaining the treatment they need.

Section 419 of New York State Social Service Law states that an individual required to report abuse under §413 will be immune from "any liability, civil or criminal" that arises from making the report pertaining to child abuse. The effect of this section is to give mandatory reporters a sense of protection in reporting cases that may be unfounded. However, the section requires the report to be made in "good faith" through the execution of their duties. Further, section 420 (N.Y. S.O.S. §420) goes on to prescribe criminal penalties for any mandated reporter that does not make a report of child abuse when there is "reasonable suspicion" of ongoing or potential abuse. Moreover, a professional who fails to report is liable for civil actions resulting from not reporting. What §419 and §420 combine to form is what Johnston calls a "legal-ethical feedback loop" (2015). There is a legal (and ethical) obligation to report from the overarching policy, while simultaneously conflicting with the ethical obligation for confidentiality and providing services to the person seeking treatment. The protection from liability if the report is unfounded but made in "good faith" (§419) and the criminal and civil liability of they do not report (§420) combine to form this "feedback loop."

In situations where minor-attracted persons seek treatment and share that they are sexually attracted to children, but have not offended and have no intention to offend, the therapist must consider if the clients pose an actual risk to children. Important considerations include proximity through employment, place of residence, and other factors that could potentially place children in harm's way. Their legal obligation is to report if there is a "reasonable suspicion" (§413). Their ethical obligation is to the client and the delivery of treatment for their affliction. However, legal obligations now feed-back to the ethical obligations because they are criminally and civilly liable if they do not report and a child ends up being abused. The current design of the law creates a culture of over-reporting for fear of being criminally charged, rather than allowing for more specificity as to when a report should be made and when a provider can be held liable.

This unintended effect of current policy is not easily recognized even when a great deal of scrutiny is given to the language of the law because these situations tend to arise in specialized circles of professionals. Moreover, each time a non-offending minor-attracted person is reported, the fact that a report was made can serve to prevent other minor-attracted persons in similar situations from seeking treatment themselves. Another unintended effect has been the abuse of the system that allows anonymous reports of child abuse cases to be used begrudgingly during disputes between couples during child custody battles. Blaustain (2013) reports an alarming number of false reports being made, resulting in the removal of children because of horrendous claims made via the anonymous hotline. Unforeseen effects aside, the intended effect of the policy requires little analysis and its name lends its purpose: the protection of children and the reduction of child abuse incidents. The last two years' data available, 2008 and 2009, depict a 2% increase in claims made to child protective services, but the actual number of reports, over 164,000, indicates an extensive amount of child abuse reports (New York State Office of Children & Family Services, n.d.). Given such a large number, and having specified that the cases totaled exclude false reports, it is easily arguable that the policy is having the desired effect of helping promote the reporting of child abuse.

IMPLICATIONS OF POLICY

The implementation of the law, as written, does not specifically call for reallocation of resources or other benefits from individuals or agencies, aside from budgeting considerations. However, with the “legal-ethical feedback loop” (Johnston, 2015), a minor-attracted person under investigation can face problems with current employers or landlords (Lanser & Kubitschek, n.d.). Even if the report is later determined to be unfounded, a minor-attracted person’s employer and landlord may have already been made aware of the investigation. This is especially troublesome for minor-attracted persons that work around or live near children because investigations will more thoroughly explore those areas of the person’s life through a biased lens. The stigma of having had an investigation conducted (and worse if the nature of the investigation was made known) is a consequence that can have far reaching implications for non-offending minor-attracted persons.

ALTERNATIVE POLICIES

There is no question regarding whether there is a need for a policy obligating professionals to make reports of child abuse. Furthermore, an avenue to legally break confidentiality to produce reports of child abuse is necessary and appropriate. The New York Child Protection Act (1973) provides a powerful tool for the prevention and investigation of child abuse. However, the “legal-ethical feedback loop” (Johnston, 2015) needs to be closed to better protect the children of New York State by allowing non-offending minor-attracted persons to seek and obtain treatment without fear of being reported. This will enable minor-attracted persons to seek professional treatment needed to help rehabilitate themselves from their current afflictions. By intervening before a person has offended, the number of potential future victims is reduced, which is made possible if the individual seeking treatment feels that disclosing their pedophilia-like desires will not lead to legal ramifications. When there are cases of actual abuse there is no ambiguity as to the course of action for the mandated reporter. By adding more specific language to the policy, specifically §413 and §419, the “legal-ethical feedback loop” Johnston (2015) identifies can be eliminated. Current language in §413 states that a report should be filed if there is reasonable suspicion “that a child is an abused or maltreated child,” which can be read to mean a specific child, but it can also be interpreted as a “potential” child. Specificity this wording would remove the potential for over-reporting when there is no specific child or children that the therapist deems at risk.

The immunity granted to mandated reporters in §419 is an invaluable part in ensuring that reports of child abuse are made, even if circumstances are not fully clear. If mandated reporters were fearful of reprisal for making an unfounded report, instances of actual child abuse could escape attention and have negative consequences. However, “good faith” (N.Y. S.O.S. §419) should be more clearly defined to specify elements that should be included in determining what is, in fact, “good faith.” Language indicating that consideration must be taken into account as to the existence of an actual at-risk child in determining a “good faith” decision would reduce the amount of over-reporting by forcing deliberation on whom, if anyone at all, is immediately at risk. There is a downside to this, in that modifying the language of §419 could bring back a fear of reporting when a case is questionable. The spirit of the law would seem to be over-reporting than under-reporting, and this writer cannot wholly disagree with that for fear of an actual child abuse case not becoming reported.

An alternative to modification of would be an additional amendment allowing for the creation of a new form of “quiet” investigation that would be less invasive, but provide for exploration of necessary facts of the report so a determination can be made as to whether a full-fledged investigation should be conducted, including employers and landlords being notified. This would require increased budgetary considerations for manpower and resources, as well as determining the logistics involved in what would be deemed a “quiet” investigation.

CONCLUSION

While the alternatives to the current policy presented require careful structuring, they can be made to close the “legal-ethical feedback loop” (Johnston, 2015) that currently exists. By preventing minor-attracted persons to seek treatment due to mandated reporting, the policy serves to place children at more risk. The spirit of the law must be considered when deliberating these changes. By treating non-offenders who are attracted to minors under a quiet investigation, we would protect an increased number of children from future harm. The line between many cases, whether suspected or confirmed, need not be so blurry. Through refining these essential statutes, by clarifying the language, and circumstances that constitute reporting, we can continue to protect one of our most vulnerable populations, while concordantly reducing the number of potential children victimized.

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