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CHILD ABUSE AND NEGLECT
PART I: HISTORICAL OVERVIEW, LEGAL MATRIX,
AND SOCIAL PERSPECTIVES

MASON P. THOMAS, JR.†

Terrible as the thought is to entertain, child abuse may be a regression to a characteristic which comes very close to being "natural" to the human condition.¹

[T]he general history of the child . . . moves as from one mountain peak to another with a long valley of gloom in between.²

The phenomenon of child abuse and maltreatment is deeply rooted in our cultural and religious history. It is as old as civilization itself. Yet the fact of child abuse has remained largely hidden and suppressed. Reform movements that have pointed out the horrors being committed upon children and attempted to provide some protection have occurred at intervals, but in time the shocking facts of mistreatment seem always to have been avoided or forgotten.

One reason for this suppression of facts is our reluctance to believe that parents—whom we expect to love and protect their offspring—could maltreat or abuse their own children, sometimes even fatally.³ Our laws and legal systems have developed over hundreds of years around the expectation that parents will love and protect. Courts have been reluctant to interfere in family government or to restrict the right of parents to correct and discipline their children. Further, they have given parents almost complete immunity from civil liability for

†Professor of Public Law and Government, Institute of Government, University of North Carolina. This article constitutes the first part of a two-part treatment on child abuse and neglect. Part II will deal with the development of legal and social responses to the phenomenon in North Carolina. Financial assistance for this study was provided by the Department of Health, Education and Welfare through a grant to the Division of Law and Order, North Carolina Department of Natural and Economic Resources. The author expresses his appreciation to Thomas F. Taft, third-year student at the University of North Carolina School of Law, who contributed substantially to the research and content of this article.

¹D. BAKAN, *SLAUGHTER OF THE INNOCENTS: A STUDY OF THE BATTERED CHILD PHENOMENON* 56 (1971) [hereinafter cited as BAKAN].

²G. PAYNE, *THE CHILD IN HUMAN PROGRESS* 302 (1916) [hereinafter cited as PAYNE].

³David Bakan, a psychologist, interprets the historical purpose of child abuse as population control and a way of securing a population-resource balance. BAKAN 107, 112-114.

injuries to their own children. One writer has interpreted this general legal situation as a "license to continue to abuse."⁴

Modern X-ray technology, however, has provided new documentation of physical abuse of children that has forced a reappraisal of society's responsibility to protect children, even from their own parents. As a result, child-abuse reporting laws have been adopted in all states in an effort to afford this protection. Two questions that confront one who is considering the problem of child abuse are whether reporting laws are a satisfactory answer and whether the current interest in child protection is only transitory. Will child abuse and neglect fade from public concern as it has in the past?

HISTORIC MALTREATMENT OF CHILDREN

Over the centuries infanticide, ritual sacrifice, exposure, mutilation, abandonment, harsh discipline, and exploitation of child labor have been only some of the ways in which children have been mistreated. Infanticide—the killing of newborn infants with the explicit or implied consent of parents and the community—has been a form of birth control, a way of avoiding the embarrassment of an illegitimate child, a method of disposing of a weak or deformed child, and a means of serving religious beliefs. Numerous religions have required that the first-born be sacrificed to an angry god. In some societies, female children were sacrificed because they were considered useless. Abandonment or exposure to the elements of a child who was unwanted or who could not be provided for was a form of infanticide that was common in ancient societies.⁵

Ancient Greece knew exposure and infanticide well. The favorite figure in the comedy of the fourth century, B.C., was the child who had been exposed, saved, and later found by his parents. In Greece a child was the absolute property of his father, who had to decide whether he would live or die; on the fifth day after birth, at the ceremony of Amphidromia, the father was forced to decide whether or not to receive the infant into the family. Under Greek law property was divided among the

⁴V. DE FRANCIS, *CHILD ABUSE LEGISLATION: ANALYSIS AND STUDY OF MANDATORY REPORTING LAWS IN THE UNITED STATES* 3 (1966).

⁵For an excellent detailed discussion of the fate of children in human history see PAYNE. For a more summary approach see Radbill, *A History of Child Abuse and Infanticide*, in *THE BATTERED CHILD* 3 (1968), [hereinafter cited as Radbill]. See also A. KADUSHIN, *CHILD WELFARE SERVICES* 30-36 (1967) [hereinafter cited as KADUSHIN].

male children. Thus, the father might be inclined to raise the first son, while the second would be exposed in order not to dilute the inheritance. Girls were less important and more frequently exposed. The task of exposing a child was performed by a slave or midwife, who would take him to a public place early in the day, hoping that he might be rescued. Often, valuable objects were left with the child as an inducement to rescue.⁶

Under ancient Roman law the father had a power of life and death (*patria potestas*) over his children that extended into adulthood. He could kill, mutilate, sell, or offer his child in sacrifice. While infanticide was not common in Rome, exposure was widespread. Although the exposed child usually died, he might be rescued for pity or for profit. A Roman mother, who was obliged to follow the order of the father, would sometimes arrange for the exposed child to be rescued. During periods of prosperity a Roman father might sell the services of his son under an arrangement akin to an apprenticeship or a labor contract. Eventually, however, some reforms came about: No child might be killed before the age of three; male children were to be saved, perhaps for military reasons. Later the law permitting infanticide was abolished, although infants could be sold into slavery. Under Emperor Hadrian, a father who had killed his grown son for committing a crime was banished under the maxim "*patria potestas in pietate debet, non in atrocitate, consistere.*"⁷

The Bible contains many references to infanticide. Whatever its historical accuracy, the Bible does reflect man's concerns throughout history. From the Old Testament we have the story of Abraham, whose loyalty to God was tested when he was instructed to offer his son, Isaac, as a burnt offering. A ram was substituted when God was satisfied of Abraham's faith and love.⁸ One writer has interpreted the Jewish tradition of circumcision as a substitute for the religious sacrifice of human life by the command of God to Abraham.⁹ The story of Moses is a Biblical example of abandonment or exposure.¹⁰ Christianity began with

⁶See PAYNE 191-98.

⁷W. BLACKSTONE, COMMENTARIES § 452. This translates to read: Parental authority should consist or be exercised in affection, not in atrocity. For details on Roman law and practices see PAYNE 212-44.

⁸Genesis 22:1-13.

⁹PAYNE 159-60; Genesis 17:10 reads: "This is my covenant, which ye shall keep, between me and you and thy seed after thee; Every man child among you shall be circumcised."

¹⁰Exodus 2:1-10.

the Slaughter of the Innocents, when Christ escaped the order of King Herod that male infants be killed.¹¹ There was a time in many Christian countries when children were whipped on Innocents Day in order to make them remember Herod's massacre.¹²

Historically, infanticide has usually been accomplished by bloodless methods—strangulation, drowning, smothering, burial alive, and incineration—and often for a ritualistic purpose. In China, India, Mexico, and Peru, children were cast into rivers in an effort to bring fine harvests and good fortune. In other early cultures the blood and flesh of slain infants was thought to confer vigor and health, and, as a result, it was fed to expectant mothers or favored siblings. Kings were worshipped as gods in some ancient societies, and, therefore, were expected to assure good crops and prevent public catastrophes. If the king failed in his godly duties, his subjects expected him to give himself in sacrifice. Kings would sometimes offer a son as a sacrificial substitute.¹³

An ancient form of infanticide was the immurement of children in foundations of buildings and other structures. Joshua demanded that whoever rebuilt Jericho should sacrifice his first-born in the foundation and his youngest son under the gates.¹⁴ Archaeological finds under house corners, thresholds, and floors have revealed jars containing the bones of newborn infants of the Canaanites. Pottery furnaces were consecrated in China with the shedding of children's blood. Children were probably immured in the dikes of the German city of Oldenburg until the seventeenth century. The practice of putting children in the foundations of buildings was also common in ancient India.¹⁵

Infanticide was practiced in early Scandinavian cultures and in European countries nearly into the twentieth century. In rare sarcasm Jonathan Swift made a proposal in 1729 to prevent the children of Ireland from becoming a burden to their parents: Infants could be cared for and fattened for human consumption during the first year after birth for two shillings, sold for ten shillings to be eaten, thus giving the mother a profit of eight shillings.¹⁶ An essay contest on how to prevent infanticide, held in 1781 in German-speaking Europe, attracted four hundred

¹¹Matthew 2:16.

¹²Radbill 3.

¹³*Id.* at 9.

¹⁴Joshua 6:26.

¹⁵BAKAN 30.

¹⁶*Id.* at 39-40.

entries.¹⁷ An early edition of the *Encyclopaedia Britannica* indicated that infanticide was common in the leading nations of Europe among farm laborers and domestic servants. It was closely related to illegitimacy but not confined to unmarried mothers.¹⁸ Infanticide was common in China well into the twentieth century.

Some children survived the alternate form of infanticide—abandonment—because of fortunate circumstances. Ancient stories and legends have dramatized the long history of the practice. Romulus and Remus, the legendary founders of Rome, were exposed, rescued, and suckled by a wolf. Many historical figures took pride in their hazardous beginning in life as a foundling. The story of *Hansel and Gretel* describes such an attempted abandonment.¹⁹

The great Semitic religions—Judaism, Christianity, and Islam—have always protested against the slaughter and misuse of children. The early Christians preached against infanticide and exposure as murderous acts, and the church became the place where mothers abandoned their children, knowing that the priest would place the children with someone in the parish.²⁰ In the sixth century the European religious orders began to provide asylums for abandoned children to combat the practices of exposure and infanticide, and St. Vincent de Paul established his first children's institution after rescuing an infant from a beggar who was in the process of deforming its limbs.²¹

Yet these reform movements were manifestly inadequate, and legal interdiction of the abandonment of children that was passed in the sixteenth and seventeenth centuries was largely ineffective. During this Golden Age of France, hungry orphans roamed and begged in the streets of Paris, and a child lying dead in the streets was not uncommon.

Many cultures—not all primitive or ancient—have practiced forms of child mutilation for a variety of religious, medical, cosmetic, or eco-

¹⁷*Id.* at 36.

¹⁸13 *ENCYCLOPAEDIA BRITANNICA Infanticide* 3 (9th ed. 1881).

¹⁹KADUSHIN 31. *See also* BAKAN 65. Some symbolic interpretations of fairy tales have been made in connection with child abuse, abandonment, and exposure. It has been suggested, for example, that *Rock-a-Bye Baby* and *Humpty Dumpty* are infanticidal poems and that *London Bridge* suggests immuring a child in the foundation of the bridge. *Cinderella* and *Snow White* depict stepmothers who abuse children. *Jack and the Beanstalk* portrays a giant who would eat Jack. Children (or child-like beings) are eaten by witches, bears, or wolves in such folk tales as *The Gingerbread Man*, *The Three Little Pigs*, and *Hansel and Gretel*. *See* BAKAN 57-77.

²⁰PAYNE 257-71.

²¹*Id.* at 306-11.

nomic reasons. Mutilation of sex organs and castration was once common. Circumcision, derived from the ancient Jewish tradition, is still performed despite its questionable medical value. Footbinding of girls for aesthetic reasons was common in ancient China and continued until recent times. The American Flathead Indians practiced cranial deformation, and the Solomon Islanders still do. Other forms of mutilation—gouged eyes, deformed feet, and amputated or twisted arms—were inflicted on children in ancient Rome and later in England to evoke pity so they could become successful beggars.²²

Most societies have permitted severe physical punishment of children by parents, teachers, and others acting *in loco parentis*. Such action has been considered necessary to maintain discipline, to establish a proper atmosphere for teaching and learning, to satisfy religious imperatives, or to drive away evil spirits. "Spare the rod and spoil the child" is a Biblical warning of the dangers of parental leniency. Sick children were sometimes beaten for medical reasons to drive out the devil thought to possess them. In India epileptic children were thrashed with a sacred iron chain to expel the demon.²³ Many historical figures have complained of their abuse during childhood.²⁴

Urbanization and the industrial revolution in England and then in America led to other forms of child abuse in the eighteenth and nineteenth centuries through the exploitation of child labor. The factory system meant that children became an economic asset rather than a complete financial burden to their parents. In England children as young as five worked sixteen hours per day, sometimes with irons riveted around their ankles to keep them from running away. Some were starved, beaten, or maltreated in other ways, and many died from occupational diseases. When parents rebelled against these working conditions, pauper children from poorhouses without parental protection were put to work in the mills. During this period children were often employed as chimney-sweeps in English cities. Worked day and night, sometimes hurried along by the master burning straw behind them, these children

²²Radbill 5-6.

²³*Id.* at 4.

²⁴For example, Lady Jane Grey, the sixteen-year-old who was queen of England for nine days, was beheaded by Mary Tudor. 10 *ENCYCLOPAEDIA BRITANNICA* Grey, *Lady Jane* 883 (14th ed. 1929). Frederick the Great of Prussia ran away from home at age eighteen because he was often a victim of his father's violent rages. 9 *id.* *Frederick II* 716.

deteriorated both physically and mentally, being susceptible to "chimney sweep's cancer" (cancer of the scrotum) and tuberculosis.²⁵

The early philosophy of education also contributed to the harsh treatment of children. Children had a duty to learn, and effective learning could occur only under repressive conditions. The Spartans had their whip bearer, who had a high place in the educational system, and many ancient philosophers beat their students unmercifully. Roman schoolmasters used whips made from the stalk of the giant fennel for punishment.²⁶ Educational methods in England and America have fluctuated between harsh use of the birch and restrictions limiting corporal punishment advocated by educational reformers.

ATTITUDES TOWARD CHILD CARE IN EARLY AMERICA

When the colonists came to the New World, they brought two parts of the English legal system that continued to influence American thinking into the twentieth century: the common law rules of family government; and the traditions and child-care practices of the Elizabethan Poor Law of 1601, including the idea that poverty was a sin. During this early period children were separated from their parents by apprenticeship or by placement in an institution primarily because of the poverty of the parents. The early American practices in regard to dependent and orphaned children reflect the beginnings of governmental neglect of children that has continued to the present day.

Common Law of Family Government

Under the early English common law, the father was entitled to the custody of his children as a matter of legal right. His right to custody was considered absolute in some instances, regardless of the welfare of the child. Under the common law as it developed in the colonies, the father had a right to custody that was considered interrelated with his duty to provide support, his obligation to discipline, and his right to the child's services. The father's right to custody was not absolute, but it was considered superior to the custody rights of the mother. On the father's death his rights passed to her.²⁷

²⁵PAYNE 312-31. See also Radbill 11-12.

²⁶Radbill 4.

²⁷These early legal principles are discussed with supporting case citations in an anonymous editorial note, *Custody and Control of Children*, 5 WORDHAM L. REV. 460 (1936), reprinted in *SELECTED ESSAYS ON FAMILY LAW* 607 (1950).

Kent's lectures on the common law in 1827 summarized these common law principles of family government:

The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. This is the true foundation of parental power; and yet the ancients generally carried the power of the parent to a most atrocious extent over the person and liberty of the child. The Persians, Egyptians, Greeks, Gauls, and Romans tolerated infanticide, and allowed to fathers a very absolute dominion over their offspring

The father (and on his death, the mother) is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion, and when the morals, or safety, or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere²⁸

In the colonial family the father ruled over both his wife and his children. Parental discipline of children was both severe and arbitrary. Parents, teachers, and ministers believed in stern correction by the rod, and they found support for this belief in the Bible, which was their constant guide. Both the home and the school were considered appropriate places for "breaking and beating down" disobedient children.²⁹ Parents and teachers had a right to punish children in a "reasonable manner," and the seventeenth and eighteenth century concept of reasonableness was harsh. The courts rarely interfered with these disciplinary practices.³⁰

Poor Law Concepts of Child Care

The English Poor Law tradition included the principle that depend-

²⁸J. KENT, COMMENTARIES ON AMERICAN LAW 203-05 (11th ed. 1867), reprinted in 1 G. ABBOTT, THE CHILD AND THE STATE 51-52 (1938) and 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1600-1865, at 364 (R. Bremner ed. 1970) [hereinafter cited as 1 CHILDREN AND YOUTH].

²⁹HOME AND CHILD LIFE IN COLONIAL DAYS 130 (S. Glubok ed. 1969). Connecticut and Massachusetts had seventeenth century statutes prescribing the death penalty for rebellious children. 1 CHILDREN AND YOUTH 37-39.

³⁰See W. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS § 123 (1869).

ence upon public funds for support should be as unattractive as possible in order to discourage poverty. Children were not excepted from the application of this principle. Because public funds were limited, care for dependent or orphaned children was provided at the least possible cost.

In colonial America the responsibility of a town or country to pay for the care of an abandoned or orphaned child was based on the parents' legal settlement, which was usually acquired by one year's residence. Counties and towns were careful to avoid the responsibility for placement or support of a child who had legal settlement elsewhere. Thus, if relief was requested or if a child required placement because of a family crisis, the family or child was returned to the county or town of legal settlement.³¹

The two primary methods of child care for dependent or orphaned children were apprenticeship to a master by indenture—a contract that contained the terms of the placement—and placement in almshouses or poorhouses, where children were mixed indiscriminately with adult outcasts—paupers and insane and mentally retarded persons.³²

The use of apprenticeships was the primary method of child care during the first one hundred years of colonial America. This approach was suited to a pioneer society in which life was hard, labor was scarce, and children were expected to be useful. An apprenticeship served several purposes. It provided a foster home without cost, for the master agreed to furnish care in return for the child's services. It also provided education and training, for the master agreed in the indenture to teach the child to read or, perhaps, to train him in a trade. Yet children from poor families were frequently apprenticed by the authorities, sometimes over the objections of their parents. Apprenticeships were used by magistrates to secure family placements for children whose parents were unable to provide suitable homes or allowed them to grow up in idleness and ignorance. While the colonists were concerned about the welfare of dependent and orphaned children, the early records show that the desire or necessity for economy overrode all other considerations.³³

During the late eighteenth and early nineteenth centuries, infants

³¹See 1 CHILDREN AND YOUTH 262. For some interesting North Carolina cases that illustrate the significance of legal settlement in determining legal responsibility for a child see *Commissioners of the County of Barbe v. Commissioners of the County of Buncombe*, 101 N.C. 520, 8 S.E. 176 (1888); *State v. Elam*, 61 N.C. 460 (1868); *Ferrell v. Boykin*, 61 N.C. 9 (1866).

³²See 1 CHILDREN AND YOUTH 64-71.

³³*Id.* at 64.

were usually cared for in their own homes through "outdoor relief" or boarded at public expense, provided they could meet the strict requirements of legal settlement and eligibility. During this period these methods largely supplanted the use of apprenticeships for very young children. In an economy that used slaves, few masters were willing to care for infants whose labor was not worth the trouble of providing such care. Thus, poor children were apprenticed beginning at eight years of age. In some areas, under a system that verged on slavery, both child and adult paupers were auctioned off to the lowest bidder under the vendue method of pauper relief. As a result, they were turned over to the person who would care for them for the least cost in public funds.³⁴

The opening of the nineteenth century found the poor-law system of child care—in the almshouse, by outdoor relief, or through apprenticeships—well established in the sixteen states of the union.³⁵ A shocking number of poor and orphaned children received care in almshouses between 1800 and 1875, where they mingled with adult paupers, the insane and the mentally retarded, and persons suffering from venereal disease. Though the reformers of the 1840's, including Dorothea Dix, condemned the indiscriminate mixing of children in these institutions, the number of children in almshouses increased from year to year. Around 1866, the states began to enact legislation to move children from almshouses, but the separation was slow.³⁶ The census of 1880 showed that 7,770 children between the ages of two and sixteen were in almshouses in the United States—fifteen per every 100,000 persons in the general population. By 1890 this figure was reduced to 4,987, or eight per every 100,000.³⁷

Poor children—whether supported at home by "outdoor relief" or placed in almshouses or separate orphan asylums—were usually appren-

³⁴*Id.* at 262-81.

³⁵See E. LUNDBERG, *UNTO THE LEAST OF THESE* 49-50 (1947) [hereinafter cited as LUNDBERG]. See also H. FOLKS, *THE CARE OF DESTITUTE, NEGLECTED, AND DEPENDENT CHILDREN* 1-11 (1970) [hereinafter cited as FOLKS].

³⁶1 CHILDREN AND YOUTH 631-32. See also 2 G. ABBOTT, *THE CHILD AND THE STATE* 7 (1938) which notes:

Reform came slowly in view of the evidence of the serious conditions in the almshouses because public funds had been invested in land and buildings and because of the fatal ease with which children and families could be placed in an almshouse. Moreover, as the number of children in almshouses was large, the problem of what to do with them if this form of care were abandoned was not easily solved. It was not until the last quarter of the nineteenth century that the laws prohibiting this type of care were passed.

³⁷See FOLKS 80.

ticed when they reached an age that was suitable to farmers, tradesmen, sea captains, or housewives. An apprenticed child was often alluded to as representing loneliness, neglect, overwork, and awareness of low esteem. While this system had some merit in that it provided a certain amount of education and training, in its worst form certain of its features (particularly the recapture of run-away apprentices) were reminiscent of slavery. Apprenticed children generally received little protection or attention from public authorities. Some state laws contained provisions intended to offer more protection to apprenticed children (such as a requirement that the overseers of the poor determine whether the terms of the indenture were observed by the master), but these laws were not generally enforced. In a few instances overseers of the poor bound children to work in factories, but apprenticeships for this purpose were more common in England than in America. After 1875 apprenticeships were not often used as a method of care for poor and orphaned children.³⁸

Institutional care of dependent children was thought to be the preferable method of care by the mid-nineteenth century, particularly in separate orphan asylums. By 1830 an embryonic reform movement had begun, and the growing number of orphanages provided an alternative to almshouse care of children. These orphan asylums were supported by both private and public funds. Since the care of dependent children in almshouses and through "outdoor relief" had been considered a public responsibility, it was natural that government continued to share the cost of child care in orphan asylums under private sponsorship. The most common method of financing was by per capita payments from public funds for each child in care. This practice tended to encourage the development of large orphan asylums that kept children in care for long periods of time while discouraging the development of foster-family placements as a method of child care.³⁹

Early Cases

Perhaps the earliest recorded child-abuse case was decided in Massachusetts in 1655. It involved a master's maltreatment of an apprentice named John Walker, age twelve, who died as a result. The description

³⁸1 CHILDREN AND YOUTH 262-67, 572-83.

³⁹FOLKS 72-81, 115-49. *See also* 1 CHILDREN AND YOUTH 631-33.

of the child's injuries sounds contemporary:

[T]he body . . . was blackish and blue, and the skin broken in divers places from the middle to the hair of his head, viz., all his back with stripes given him by his master . . . [with] a bruise of his left arm, and one of his left hip, and one great bruise of his breast. . . . [T]he flesh was much broken of the knees . . . [H]e did want sufficient food and clothing and lodging, and . . . the said John did constantly wet his bed and his clothes, lying in them, and so suffered by it, his clothes being frozen about him . . . [that] in respect of cruelty and hard usage he died . . . and . . . the dead corpse did bleed at the nose.⁴⁰

The master was convicted of manslaughter and ordered "burned in the hand," and all of his goods were confiscated. Two other Massachusetts cases decided in 1675 and 1678 show children being removed from their parents by the courts because the homes were considered unsuitable.⁴¹

Few reported cases decided before the eighteenth century deal with the civil and criminal liability of parents who were too harsh in disciplining their children.⁴² It was well established at common law that a minor child could not sue his parents in tort. Thus, the courts developed the general rule that a parent could not be held liable in a civil suit for excessive or brutal punishment of his children. The courts reasoned that an orderly society depended on parents having discretion in disciplining within the home in order to maintain domestic harmony and family government. In an 1891 case, the Mississippi court said: "The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand."⁴³

The few reported early criminal cases indicate that the criminal law provided very little protection to children from parental cruelty. Parents were considered immune from criminal prosecution except when the punishment was grossly unreasonable in relation to the offense, when the parents inflicted cruel and merciless punishment, or when the punishment permanently injured the child. The legal presumption of the courts

⁴⁰1 CHILDREN AND YOUTH 123-24.

⁴¹*Id.* at 41-42.

⁴²These early cases are summarized in McCurdy, *Torts Between Persons in Domestic Relation*, in *SELECTED ESSAYS ON FAMILY LAW* 421-23 (1950).

⁴³*Hewlett v. George*, 68 Miss. 703, 711, 9 So. 885, 887 (1891).

was generally in favor of the reasonableness of parental action.⁴⁴

The leading criminal case of the mid-nineteenth century arose in Tennessee, where a child's parents were prosecuted for excessive punishment.⁴⁵ The evidence showed that the mother had struck the child with her fists and had pushed her head against a wall and that the parents had whipped her with a cowskin, tied her to a bedpost with a rope for two hours, and switched her. The court reversed the parents' conviction, holding that whether the punishment was excessive was a question of fact for the jury to decide rather than a question of law. Without citing any case authority, the court said

The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, to the good order of society, that no moralist or lawgiver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise, upon light or frivolous pretences. But, at the same time that the law has created and preserved this right, in its regard for the safety of the child it has prescribed bounds beyond which it shall not be carried.

In chastising a child, the parent must be careful that he does not exceed the bounds of moderation and inflict cruel and merciless punishment; if he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess, which constitutes the offence, and what this excess shall be is not a conclusion of law, but a question of fact for the determination of the jury.⁴⁶

An interesting criminal-exposure case arose in 1864 in Boston, where a woman was prosecuted and convicted for leaving a two-day-old girl at a doorstep in mid-winter. The defendant acted with the consent of the father but presumably without the knowledge of the mother, who later identified the child. Although the indictment was defective for improperly alleging criminal exposure or neglect, the conviction was sustained on the basis of a criminal assault on the child.⁴⁷

⁴⁴See TIFFANY, *supra* note 30, § 123, at 246. See also J. MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* 446-49 (1931).

⁴⁵*Johnson v. State*, 21 Tenn. 282 (1840).

⁴⁶*Id.* at 283.

⁴⁷*Commonwealth v. Stoddard*, 91 Mass. (9 Allen) 280 (1864).

THE REFORM MOVEMENT

Early Efforts

Before the nineteenth century courts and public authorities rarely intervened in family life to protect children from parental neglect or abuse except when poor children were apprenticed or placed in almshouses. Beginning around 1825, it became gradually recognized that public authorities had a duty to intervene in cases of parental neglect. These early efforts were considered more preventive than protective, since they were aimed at preventing neglected children from entering a life of crime and becoming a threat to the state.⁴⁸

The first child-saving efforts were institutional—the “Refuge” movement.⁴⁹ The New York House of Refuge was organized by a private corporation in 1824 and opened in 1825, thus becoming the first juvenile reformatory in the United States. Similar institutions were founded in Philadelphia in 1826, in Boston in 1826 (the first public institution, for the New York and Philadelphia Houses of Refuge were established by private corporations that received public funds), in New Orleans in 1845, and in Rochester and Baltimore in 1849. The laws authorized the courts to commit neglected, destitute, abandoned, and vagrant children to the houses of refuge along with child offenders.⁵⁰

New York City took the leadership in developing other child-saving efforts during this period. A new type of institution—the New York Juvenile Asylum—was organized in 1851 to receive poor and neglected children who were placed there by their parents or by court commitment.⁵¹

There were also anti-institutional influences. In the mid-nineteenth century, the Reverend Charles Loring Brace, a New York minister, became concerned with the vagrant, homeless street children of the city, whom he called the “dangerous classes.”⁵² Strongly opposed to any form of institutional care for children, whether in almshouses or separate orphan asylums, Brace organized a child-placement program that stressed free foster placements in the country to prevent these street children from growing up into a life of crime in the city. In 1853 he

⁴⁸FOLKS 169.

⁴⁹*Id.* at 198-226. *See also* 1 CHILDREN AND YOUTH 674-95; LUNDBERG 66.

⁵⁰FOLKS 170-71, 201.

⁵¹*Id.* at 61-62; 1 CHILDREN AND YOUTH 735-37.

⁵²1 CHILDREN AND YOUTH 757; FOLKS 66. *See also* 1 CHILDREN AND YOUTH 669.

organized the New York Children's Aid Society, which was soon followed by similar children's aid societies in other cities (1860 in Baltimore, 1865 in Boston, 1866 in Brooklyn, and 1882 in Philadelphia). The final phase of his program of "moral disinfection" was to send boys and girls to the West to be placed in free foster homes provided by farmers; he did not use apprenticeships.⁵³ Between 1854 and 1875 Brace and his workers placed an average of one thousand children per year in western homes. They came from newsboys' lodging houses, orphan and infant asylums, almshouses, and directly from parents. Brace was so convinced of the rightness of his approach that he urged his workers to use persuasion and high-pressure salesmanship so that children could be deported from the city to the country. The result was that many poor children were separated from their families. These children were sometimes adopted, but many of these hasty and haphazard placements were unhappy.⁵⁴

The New York Foundling Asylum was established in 1869. This institution received 1,392 foundlings during 1873, many of whom died.⁵⁵ At this time some thirty organizations in the city were concerned with children in need of help.

Mary Ellen

The last quarter of the nineteenth century was one of those periods in history when public interest in child abuse and neglect was high, and this interest led to the organization of specialized "cruelty" societies to protect children. It is significant that the first specialized groups to prevent cruelty were organized in behalf of animals. The American Society for the Prevention of Cruelty to Animals was organized in New York City in 1866 by Henry Bergh, who was its president in 1874 when a church worker sought his help in behalf of a child named Mary Ellen Wilson.⁵⁶ Using the legal adviser to the ASPCA, Elbridge T. Gerry, as his lawyer, Bergh initiated court action to protect the child. The case attracted wide public attention through the press, and, as a result, Gerry

⁵³1 CHILDREN AND YOUTH 632; FOLKS 66-67; LUNDBERG 78-79.

⁵⁴KADUSHIN 359.

⁵⁵Radbill 10. *The Medical Register of New York* for 1873 reported that during the year 122 infants were found dead in such places as the streets, alleys, and rivers of the city.

⁵⁶2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1866-1932, at 185 (R. Bremner ed. 1971) [hereinafter cited as 2 CHILDREN AND YOUTH].

organized the New York Society for the Prevention of Cruelty to Children in the same year.⁵⁷ Some historical and legal confusion has resulted from the close relationship between leaders of the animal and child-protection movements in connection with this case. The *myth* of Mary Ellen is an appealing story that often appears in child-protection literature, and it points up the new emphasis on child protection at the end of the last century. The *facts* regarding Mary Ellen, however, document the state of governmental neglect in the mid-nineteenth century child-placement and supervision practices and show the clear relationship between these practices and this child's maltreatment.

The myth goes something like this: The child-protection movement began in the United States in 1875 when the Society for the Prevention of Cruelty to Animals intervened in a child-abuse case involving Mary Ellen, age nine, whose foster parents treated her with shocking brutality. Since there were no laws to protect children, the case was brought to court on the theory that the child was a member of the animal kingdom and thus entitled to protection from the same laws that were intended to protect animals. The child was removed from her foster parents and placed with the church worker who had initially brought the case to the Society's attention.⁵⁸

The historical facts are as follows: The case arose in 1874, when Mary Ellen probably was ten years old. Laws to protect children (criminal laws forbidding assault and statutes dealing with the neglect of children) were not lacking but were not enforced systematically. The case was not brought into court by the Society for the Prevention of Cruelty to Animals on the theory that this child was entitled to the legal protection afforded animals; rather, it was initiated by the founder of this society acting as an individual, using the Society's attorney, by a petition for a writ *de homine replegiando*,⁵⁹ on the basis of which the court issued a special warrant to bring the child before the court. Mary Ellen was not placed with the church worker but instead was placed temporarily

⁵⁷*Id.* at 189-90.

⁵⁸The myth of Mary Ellen appears in a number of sources in child-welfare literature. The most recent is Mulford, *Protective Services for Children*, in 2 *ENCYCLOPEDIA OF SOCIAL WORK Protective Services for Children* 1007 (1971) [hereinafter cited as Mulford]. See also KADUSHIN 206; LUNDBERG 103; Radbill 13.

⁵⁹According to BLACK'S LAW DICTIONARY 480 (4th ed. 1957), this was an old English writ of law directed to remove the custody of one person from another. The use of this writ is discussed in PAYNE 336.

(exactly where is unknown) for seven months pending efforts to locate relatives; when none could be found, she was committed to the "Sheltering Arms," an orphan asylum.⁶⁰

Various issues of the *New York Times* during April 1874 summarize the evidence presented in the several court hearings that involved this case: Mary Ellen Wilson, an infant girl whose birth date apparently was unknown, was left at the office of the Superintendent of Outdoor Poor, Department of Charities, New York City, on May 21, 1864, by a woman who had cared for the child while she received eight dollars per month for her support. When the support stopped, she turned the child over to the Department. When Mary Ellen was eighteen months old, she was apprenticed to Mary and Thomas McCormack under an indenture that required the foster parents to teach her that there was a God, and what it meant to lie, and to instruct her "in the art and mystery of housekeeping." The indenture also required the foster parents to report to the Department annually on the child's condition. The placement was made on January 2, 1866, and the indenture was signed on February 15. When the placement was made, the Department checked with one reference—Mrs. McCormack's physician. Unbeknown to the Department of Public Charities, Mary Ellen Wilson was actually the illegitimate child of Thomas McCormack by a "good-for-nothing" woman whose name was unknown.

The case arose in 1874, when Mary Ellen was about ten years old. By that time Thomas McCormack had died and Mary McCormack had married Francis Connolly. Mary Ellen could not remember having lived with anyone other than the Connollys. She believed that her parents were dead; she did not know her exact age; and she called Mrs. Connolly "Mamma." She could not recall ever having been kissed by anyone.

The Superintendent of Outdoor Poor, who had made the placement, testified that he could remember nothing about the case except what was contained in his written record, since he had placed five hundred children through his department during 1874. Clearly, the Department of Charities had lost contact with Mary Ellen and the Connollys, as only two of the required annual reports on the child's condition had been made between 1866 and 1874.

The evidence indicated both abuse and neglect: Mrs. Connolly had whipped Mary Ellen almost every day with a cane and a twisted whip—a

⁶⁰CHILDREN AND YOUTH 189.

rawhide that left black and blue marks—and had struck her with a pair of scissors (which were produced in court) that had cut her on the forehead; the child was locked in the bedroom whenever “Mama” left home; she was not allowed to leave the room where the Connollys were; she was not allowed to play outside or with other children; and she was inadequately clothed and slept on a piece of rug on the floor.

Mrs. Connolly was prosecuted under indictments for felonious assault with a pair of scissors on April 7, 1874, and for a series of assaults during 1873 and 1874. The jury found her guilty of assault and battery and sentenced her to one year in the penitentiary at hard labor.⁶¹

The New York Society for the Prevention of Cruelty to Children

The philosophy and purpose of the New York Society for the Prevention of Cruelty to Children (NYSPCC) was shaped by its lawyer-founder in the aftermath of public indignation over the case of Mary Ellen. Elbridge T. Gerry found that there were a number of agencies that served dependent and orphaned children and institutions that provided placements. However, he noted that there were no agencies with the specific purpose to seek out and rescue neglected or abused children. Gerry found the police and the courts too busy to give the time and attention required to deal properly with cases that involved the exercise by parents of their legal right to control their children.⁶²

The NYSPCC soon acquired police powers and enormous influence over the lives of the children whom it rescued. It was organized as a private group in 1874 and later incorporated under legislation that authorized cruelty societies to file complaints for the violation of any laws affecting children and that required law enforcement and court officials to aid agents of the societies in the enforcement of these laws.⁶³ The NYSPCC addressed itself to these tasks with vigor. It placed agents in all magistrates' courts to investigate cases involving destitute, neglected, or wayward children. These agents advised magistrates concerning when children should be committed and to which institution. During its first year the NYSPCC dealt with seventy-two children, most of whom were

⁶¹These news stories are reprinted in 2 CHILDREN AND YOUTH 185-89. The facts contained in these stories have been summarized and reorganized to clarify the sequence of events and the relationship between the poor child-placement practices of this period (particularly the lack of any contact and supervision on the part of the public agency) and the child's maltreatment.

⁶²2 CHILDREN AND YOUTH 189-92.

⁶³Ch. 130, [1875] N.Y. Laws 114, reprinted in 2 CHILDREN AND YOUTH 192-93.

committed to institutions.⁶⁴ In 1876 it was influential in securing legislation to prevent the employment of children in certain types of public entertainment (singing and dancing) and to forbid begging.⁶⁵ Further legislation in 1881 gave impetus to its law-enforcement approach by giving the Society's agents the power of arrest and by making it a misdemeanor for anyone to interfere with or obstruct the Society in the performance of its children's work.⁶⁶

Within ten years the NYSPCC attained significant power over the lives of families in the city. Though institutions and orphan asylums had the legal authority to discharge children by apprenticeship, adoption, or return to parents, they were reluctant to do so without consulting the Society, which they perceived to have the real power. By 1890 the NYSPCC controlled the reception, care, and disposition of an average of fifteen thousand destitute, neglected, and wayward children in New York City at an average annual expenditure of 1,500,000 dollars for their support.⁶⁷ The Society's vigorous law enforcement methods greatly increased the number of children who received institutional care in orphan asylums and who became wards of public or private charities. However, their methods tended to discourage adoption or family foster placements. During 1900 the Society placed six children in homes, but 2,407 children were committed to institutions on its recommendations. The Society's influence did much to strengthen and perpetuate the per capita or subsidy system of child support in sectarian institutions through public funds.⁶⁸

Divergence in Philosophy of Child Protection

The organization of the NYSPCC was followed by the establishment of similar societies in other cities between 1875 and 1900. In many instances, societies originally incorporated to protect animals added the child-protection function. In others, humane societies were organized for both purposes. Some twenty "cruelty" societies confined their activities to child protection. In 1887 the societies for the protection of animals

⁶⁴2 CHILDREN AND YOUTH 192-93.

⁶⁵See 2 CHILDREN AND YOUTH 193.

⁶⁶Ch. 676, § 293, [1881] N.Y. Laws 72, reprinted in 2 CHILDREN AND YOUTH 195.

⁶⁷This estimate is given in FOLKS 175. The author of this article interprets the figure to mean that an average of fifteen thousand children at any given time were under the supervision of the NYSPCC.

⁶⁸*Id.* at 176.

organized the American Humane Association (AHA); cruelty societies devoted exclusively to children were not admitted to the AHA until 1887. By 1900 161 societies in the United States were devoted to protecting children or animals or both.⁶⁹

Almost from the beginning, the "cruelty" societies that were devoted exclusively to children had a conflict in their philosophies of child protection.⁷⁰ The NYSPCC, having been organized first, became the model for the law-enforcement approach to child rescue, with its agents exercising police powers under legislative authority. This approach seemed punitive to some reformers since it often separated children from their parents and emphasized the prosecution of parents, who were often punished by jail or prison sentences. Other child-protection groups in Massachusetts and Philadelphia did not approve of the tendency of anticruelty societies to become arms of the police. They were concerned about preventive, remedial, and economic efforts that would strengthen the home so that a child might remain with his parents. These early disagreements provided the seeds for the growth and development of contemporary thinking on effective methods of child protection. The modern social-work approach to protection—protective services—tends to avoid this punitive approach, but these differences in concept and philosophy have continued into the twentieth century.⁷¹

After the period of rapid development of private protective societies for children in the late nineteenth and early twentieth centuries came a period of decline in public interest. Gradually, however, the law-enforcement approach was replaced by the concept of protective services, which was aimed at strengthening the child's own home. Child protection became the legal responsibility of public agencies under federal and state legislation. The first White House Conference on Children in 1909 promoted the idea that a child should not be removed from his own home due to poverty alone and that service and economic programs should be designed to protect that home rather than to prosecute the parents and remove the child. This thinking received support from the emerging professions of child psychology and social work, which

⁶⁹*Id.* at 172-73. See 2 CHILDREN AND YOUTH 201-02; A. PLATT, *THE CHILD SAVERS/THE INVENTION OF DELINQUENCY* 108-09 [hereinafter cited as PLATT] (1969).

⁷⁰See FOLKS 173-78; 2 CHILDREN AND YOUTH 207-08, 214-16; Mulford.

⁷¹KADUSHIN 202-56. For a contemporary view of the present operations of the Philadelphia SPCC, now called the Society to Protect Children see L. RICHETTE, *THE THROWAWAY CHILDREN* 80-100 (1969).

stressed the importance of the child's home in his development.

The growth of private societies peaked around 1922, with fifty-seven SPCC's and 307 humane societies that were interested in both children and animals. By 1942 the *Humane Directory* of the American Humane Association listed only thirty-seven agencies using the name "Prevention of Cruelty to Children," along with the 158 humane societies directed toward the prevention of cruelty to both animals and children. The number of SPCC groups has declined since 1942 because of lack of public interest, funding problems, mergers with other organizations, and the assumption of child-protection services by public agencies.⁷² Between 1956 and 1967, the number of states in which private agencies sponsored protective services for children dropped from sixteen to ten.⁷³

The Mother's Aid movement in the United States between 1910 and 1930 preceded the Aid to Dependent Children program under the Social Security Act of 1935 which offered federal funds to the states on a matching basis for the support of needy children in their own homes when one parent was disabled, absent, dead, or in prison. The Act also fostered the growth of protective programs for children in the states by providing federal funding for the care of "children who [were] dependent, neglected, or in danger of becoming delinquent."⁷⁴ The 1960 Golden Anniversary White House Conference on Children and Youth recommended that the states enact legislation requiring that social agencies receive complaints of child neglect and provide services to parents and children. The 1962 amendments to the Social Security Act required each state to develop a plan to extend child welfare services, including protective services, to every political subdivision.⁷⁵

PARENS PATRIAE—THE EMERGING RIGHT OF THE STATE TO INTERVENE

In the twentieth century the subject of child neglect and protection is usually considered within the framework of the juvenile court, since the court's statutory jurisdiction traditionally includes children alleged

⁷²See KADUSHIN 206-07. See also Mulford.

⁷³Felder, *A Lawyer's View of Child Abuse*, 29 PUB. WELFARE 181, 187 (1971).

⁷⁴42 U.S.C. §§ 601-26 (1970). These developments are discussed in KADUSHIN 123-24, 207.

⁷⁵42 U.S.C. § 625.

Child welfare services are defined to include "preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children." 42 U.S.C. § 625 (1970). See also Felder, *supra* note 73, at 187.

to be neglected. It is important to remember that neglect statutes long antedated the first juvenile court, which was established in 1899. These early statutes were adopted by state legislatures beginning around 1825 as a part of the social reform movement to remove children from prisons, jails, and almshouses. The various names of these early institutions—houses of refuge, reform or industrial schools—likewise suggested a different emphasis in program. These early laws reflected the bias of the period toward institutional care of poor or neglected children and child offenders as a way to prevent them from growing up into a life of crime and to protect them from the evils of urban life and an industrialized society.

The nineteenth-century statutory definitions of children who were subject to institutional commitment were broadly worded under the aegis of the social reform movement. For example, 1875 Wisconsin legislation authorized the commitment of boys under age twelve and girls less than sixteen to industrial schools for indeterminate periods during minority:

[A child is subject to commitment who] is begging or receiving alms, whether actually, or under pretense of selling or offering for sale anything, or being in any public street or place for the purpose of begging or receiving alms; or that is found wandering and not having any home or settled place of abode, proper guardianship, or means of subsistence; or is found destitute either by being an orphan or having a parent or parents who is undergoing imprisonment, or otherwise; or that frequents the company of reputed thieves or of lewd, wanton or lascivious persons in speech or behavior, or notorious resorts of bad characters; or that is found wandering in streets, alleys or public places, and belonging to that class of children called "ragpickers" or that is an inmate of any house of ill fame or poor house, whether in company with its parent or parents or otherwise; or who has been abandoned in any way by his parent or parents or guardians; or who is without means of subsistence, or support.⁷⁶

These early statutes tended to blur the distinctions between poor and neglected children and child offenders, and the terms that they used were later incorporated in juvenile court legislation with different meanings.

⁷⁶Ch. 325, § 5, [1875] Wisc. Laws 633, *quoted in Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328, 334-35 (1876). Some states still have legislation of this type. See Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 467 n.15 (1970).

Consequently, the child legally classified as "dependent" in the nineteenth century would be defined as "neglected" under many twentieth-century juvenile court statutes.

These early statutes typically provided for institutional commitments of children under summary procedures before minor judicial officials (magistrates, justices of the peace, or municipal courts), sometimes without a hearing or notice to the parents.⁷⁷ The child was usually committed until age twenty-one, with the institutional authorities having discretion to place the child during his minority by indenture, in a foster home, or with his parents.

The constitutionality of these nineteenth-century laws was challenged on a number of grounds: the broad definitions of those children who were subject to commitment; the fact that both neglected children and child offenders were subject to commitment and to the same institutions; and on procedural due process of law. With few exceptions these early neglect statutes were found to be constitutional, partly because of the social desirability of placing children in institutions separate from adults. The primary legal rationale for the decisions was the ancient doctrine of *parens patriae*, which had been adopted from English chancery law to justify the state's assumption of a protective parental role that infringed upon traditional notions of the rights of parents and due process of law. These early decisions reflect the courts' struggles to balance competing rights—the traditional rights of parents to the care, custody, and control of their children and the right of the state to intervene in family government to protect children from parental neglect and social evils. In these decisions one also sees the beginnings of judicial struggles to define what constitutes a reasonable standard of parental care under the broad and subjective standards of the statutes of this period.

Early Cases

An early case involved the commitment of an incorrigible girl to the Philadelphia House of Refuge by a justice of the peace on the complaint of her mother.⁷⁸ Her father sought her release, alleging that the statute which established the House of Refuge was unconstitutional because it authorized commitment without a jury trial. The court found the legisla-

⁷⁷See *State ex rel. Olson v. Brown*, 50 Minn. 353, 52 N.W. 935 (1892).

⁷⁸*Ex parte Crouse*, 4 Whart. 9 (Pa. 1839).

tion constitutional, using *parens patriae* as its rationale:

The House of Refuge is not a prison, but a school. Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who would else be committed to a common goal; and in respect to these, the constitutionality of the act which incorporated it, stands clear of controversy. . . . The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation⁷⁹

Several later cases involved commitments of children because of poverty and neglect. The constitutionality of the legislation under which a number of young children (ranging in age from three to nine years who had been inmates of the county poorhouse) were committed to the Milwaukee Industrial School was attacked as "punishment of poverty as a crime" and imprisonment without due process of law.⁸⁰ The court upheld the commitments and the constitutionality of the legislation, relying on *parens patriae* and comparing the state and its school to a parent:

Parental authority implies restraint, not imprisonment. And every school must necessarily exercise some measure of the parental power of restraint over children committed to it. And when the state, as *parens patriae*, is compelled by the misfortune of a child to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the state delegates the nurture and education of the child. The state does not . . . introduce this assump-

⁷⁹*Id.* at 11.

⁸⁰*Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328, 330 (1876).

tion of authority between parent and child standing in no need of it. It assumes it only upon the destitution and necessity of the child, arising from want or default of parents.⁸¹

A broadly worded Massachusetts statute of 1882⁸² authorized the commitment of various types of neglected children to the overseers of the poor under summary procedures without a trial or notice to the parents. In a case in which a four-year-old girl had been committed to the overseers of the poor due to the father's neglect, both the summary procedures and the commitment were upheld on the basis of *parens patriae*:

This is not a penal statute, and the commitment to the public officers is not in the nature of punishment. It is a provision by the Commonwealth, as *parens patriae*, for the custody and care of neglected children, and is intended to supply to them the parental custody which they have lost . . . It does not punish the infant by confinement, nor deprive him of his liberty; it only recognizes and regulates, as in providing for guardianship and apprenticeship, the parental custody which is an incident of infancy.⁸³

The New Hampshire Supreme Court, on the other hand, refused to follow the majority view in an 1885 case involving two brothers, ages sixteen and thirteen, who were committed to industrial school for specified terms (three and two years) by a justice of the peace under an unusual statute that authorized such commitments in a probable cause

⁸¹*Id.* at 338.

⁸²Ch. 181, § 3, [1882] Mass. Acts & Res. 135, *quoted in* Farnham v. Pierce, 141 Mass. 203, 203-04 (1886):

Whenever it shall be made to appear to any court or magistrate that within his jurisdiction any child under fourteen years of age, by reason of orphanage, or of the neglect, crime, drunkenness or other vice of his parents, is growing up without education or salutary control, and in circumstances exposing him to lead an idle and dissolute life, or is dependent upon public charity, such court or magistrate shall, after notice to the state board of health, lunacy and charity, commit such child, if he has no known settlement in this Commonwealth, to the custody of said board, and if he has known settlement then to the overseers of the poor of the city or town in which he has such settlement, except in the city of Boston, and if he has a settlement in said city, then to the directors of public institutions of said city until he arrives at the age of twenty-one years, or for any less time; and the said board, overseers and directors are authorized to make all needful arrangements for the care and maintenance of children so committed in some state, municipal or town institution, or in some respectable family, and to discharge such children from their custody whenever the object of their commitment has been accomplished.

⁸³Farnham v. Pierce, 141 Mass. 203, 204 (1886).

hearing on a felony charge in lieu of posting bond for trial.⁸⁴ The statute was ruled unconstitutional in authorizing commitments without trial or conviction, since it deprived the youths of their right to jury trial. The court strongly criticized an Ohio decision upholding the commitment of a child to a house of refuge in which the proceedings had been conducted in secret without the knowledge or consent of the parents:

The liberty of the minor during the term of his minority, which might be for a period of many years, was made to depend upon the deliberations of a secret tribunal. A judgment rendered upon such an *ex parte* hearing is as little calculated to command the respect of the community as the proceedings of the ancient court of star chamber.⁸⁵

Illinois Cases

The Illinois legislation that authorized institutional commitment of neglected children and the cases that interpreted these laws have both social and legal significance. These nineteenth-century laws reflect the sequential development of institutions under various names in which neglected children were mixed with child offenders. The cases reflect early differences over the meaning of *parens patriae* and its use to justify state interference in family life. The concept of *parens patriae* had become established in judicial precedent in Illinois by the time the juvenile court was established in Chicago in 1899.⁸⁶

The Chicago Reform School was organized in 1855. The legislation that defined its authority authorized justices of the peace to commit two

⁸⁴State *ex rel.* Cunningham v. Ray, 63 N.H. 406 (1885).

⁸⁵*Id.* at 411.

⁸⁶Reforms in the public care of dependent children in Illinois were somewhat slower than in the eastern states. Around 1850 private organizations and "rescue" societies began to supplement the almshouse system of child care. By 1875, however, Illinois had fallen behind the eastern states in adopting legislation to require removal of children.

The child-saving activities in Chicago followed patterns that had developed earlier in the eastern states. The Illinois Society for the Prevention of Cruelty to Animals intervened in 1877 (three years after the case of Mary Ellen in New York City) in behalf of a child named Harry, age six, who was physically abused and neglected by his stepmother. In 1881 the Society changed its name to the Illinois Humane Society when it discovered that it was devoting two-thirds of its time to the investigation of cases involving cruelty to children and to the prosecution of parents. Illinois supported the activities of these private groups with public funds by enacting legislation in 1885, which provided that fines collected from the prosecution of cases involving cruelty to animals and children would be used for these agencies' support. Act of June 23, 1885, [1885] Ill. Laws 200. See 2 CHILDREN AND YOUTH 201-02; A. PLATT, *THE CHILD SAVERS/THE INVENTION OF DELINQUENCY* 108-09 (1969) [hereinafter cited as PLATT].

categories of children between the ages of six and sixteen: criminal law violators and a child who "is a vagrant, or is destitute of proper parental care, or is growing up in mendicancy, ignorance, idleness or vice."⁸⁷ This broad commitment authority was challenged in a case involving Daniel O'Connell, age fourteen, who was committed to the Chicago Reform School in September 1870.⁸⁸ Although the facts of the case were not stated, the court concluded that he had been committed under the general statutory authority to arrest and confine for "misfortune" under the second category above. In a scathing attack on *parens patriae*, the court ordered his release on the grounds that commitment of a poor or neglected child who had committed no crime violated his constitutional rights. In strong words, the court discussed parental rights and the difficulty of defining a proper standard of parental care and reviewed the power of the father under Roman law:

What is proper parental care? The best and kindest parents would differ, in the attempt to solve the question. No two scarcely agree; and when we consider the watchful supervision, which is so unremitting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition. Ignorance, idleness, vice, are relative terms Vice is a very comprehensive term. Acts, wholly innocent in the estimation of many good men, would, according to the code of ethics of others, show fearful depravity. What is the standard to be?

The parent has the right to the care, custody and assistance of his child. The duty to maintain and protect it, is a principle of natural law Another branch of parental duty, strongly inculcated by writers on natural law, is the education of children. To aid in the performance of these duties, and enforce obedience, parents have authority over them. The municipal law should not disturb this relation, except for the strongest reasons Before any abridgement of the right, gross misconduct or almost total unfitness on the part of the parent, should be clearly proved

But even the power of the parent must be exercised with moderation. He may use correction and restraint, but in a reasonable manner. He has the right to enforce only such discipline, as may be necessary to the discharge of his sacred trust; only moderate correction and

⁸⁷Ch. 14 § 8, [1863] Ill. Priv. Laws 134. See PLATT 102-07; People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870).

⁸⁸People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870).

temporary confinement. We are not governed by the twelve tables, which formed the Roman law. The fourth table gave fathers the power of life and death, and of sale, over their children. In this age and country, such provisions would be atrocious. If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity. Can the State, as *parens patriae*, exceed the power of the natural parent, except in punishing crime?⁸⁹

Noting that the confinement in reform school could be from one to fifteen years depending on the age of the child at the time of commitment, the court concluded that executive clemency could not secure the release of a child who had committed no offense and that habeas corpus would not be available:

[T]he State, as *parens patriae*, has determined the imprisonment beyond recall. Such a restraint upon natural liberty is tyranny and oppression. If, without crime, without the conviction of any offense, the children of the State are to be thus confined for the "good of society," then society had better be reduced to its original elements, and free government acknowledged a failure.

. . . .
. . . .

. . . Why should children, only guilty of misfortune, be deprived of liberty without "due process of law?"⁹⁰

The Supreme Court of Illinois was the only court of that period to declare a neglect statute unconstitutional, and its decision involving Daniel O'Connell was regarded as socially irresponsible by the reformers who believed so strongly in institutional care for crime prevention. The State Reform School Act was revised in 1873 to correct the constitutional deficiencies; commitments were limited to criminal offenders, the right to commit during minority was eliminated, and commitments for parental neglect were abolished.⁹¹ While subsequent decisions of the Illinois court have tended to distinguish the case on superficial grounds, the primary significance of the case is its standard for determining when parental conduct justifies state intervention and removal of the child's

⁸⁹*Id.* at 283-85 (footnotes omitted).

⁹⁰*Id.* at 286-87.

⁹¹PLATT 104-05.

custody—"gross misconduct or almost total unfitness on the part of the parent . . . clearly proved."⁹²

Since neglected children could no longer be committed to reform schools, institutions under a new name—industrial schools—were created to care for such children. The industrial school movement began in Illinois around 1875.⁹³ These schools were intended for children who were legally classified as "dependent," with the statutory definitions of this term approximating the idea of a neglected child.⁹⁴ Although they were usually organized by private sectarian groups, they received public funds. The county of residence was required to pay ten dollars per month for the support of each child committed to industrial school from the county.

Between 1882 and 1917, the Supreme Court of Illinois had at least nine occasions to review the constitutionality of the industrial school acts.⁹⁵ The first case involved the commitment of a nine-year-old girl, incorrigible and truant, who lacked parental care and wandered the streets at night. In finding the legislation constitutional, the court distinguished the industrial school laws from the earlier statutes that had established the Chicago Reform School in which commitment was regarded as imprisonment in violation of constitutional rights. In its decision the court relied on *parens patriae* as the legal justification for the state to interfere to protect children whose parents were unfit or had failed.⁹⁶ In a second case decided in the same year, the legislation was again attacked because it permitted the organization of industrial schools for sectarian purposes.⁹⁷ Mary Stoner, age seven, was committed

⁹²55 Ill. at 284-85. See, e.g., *Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328, 338 (1876). In upholding the constitutionality of the Wisconsin statute, the court adopted the standard of the "total failure of the parent to provide for the child."

⁹³See PLATT 110-17.

⁹⁴The industrial school legislation adopted in Illinois in 1879 defines a dependent girl as follows:

Every female infant who begs or receives alms while actually selling, or pretending to sell any article in public; or who frequents any street, alley or other place, for the purpose of begging or receiving alms; or, who having no permanent place of abode, proper parental care, or guardianship, or sufficient means of subsistence, or who for other cause is a wanderer through streets and alleys, and in other public places; or, who lives with, or frequents the company of, or consorts with reputed thieves, or other vicious persons; or who is found in a house of ill-fame, or in a poor house.

Act of May 28, 1879, § 3, [1879] Ill. Laws 309, quoted in *In re Ferrier*, 103 Ill. 367, 369-70 (1882).

⁹⁵PLATT 114.

⁹⁶*In re Ferrier*, 103 Ill. 367 (1882).

⁹⁷*County of McLean v. Humphreys*, 104 Ill. 378 (1882).

as a dependent child to age eighteen unless earlier discharged within the discretion of the institution. One Laura Humphrey made arrangements for the placement, apparently paying some of the expenses that were the obligation of the county of residence. Mrs. Humphrey recovered her thirty-four dollars; the law was again found constitutional; and *parens patriae* was cited as the legal cornerstone.⁹⁸ The sectarian issue came to a head in 1888 when the Cook County Board of Commissioners refused to pay twenty thousand dollars for the care and clothing of seventy-three dependent girls from Cook County who had been committed to the Chicago Industrial School for Girls by the county court.⁹⁹ The school was proved to be merely a paper organization for two Roman Catholic institutions that were actually caring for the children committed to the Chicago Industrial School for Girls. Since the Illinois Constitution prohibited payment of public funds to sectarian institutions, the court ruled for the county. Apparently, however, Cook County later decided to contract with and pay such sectarian institutions for the care of dependent children.

Thus, even before the creation of the juvenile court, the development of public responsibility for the care and protection of neglected children was delayed by the vested interests of sectarian groups that had established child-caring institutions and were receiving public funds for the support of the dependent children in their care. Relying on *parens patriae*, the Illinois Supreme Court reversed its 1870 position in the case of Daniel O'Connell¹⁰⁰ and endorsed the practice of committing neglected children to such sectarian institutions without following traditional concepts of due process of law. The juvenile court was born in an urban community in which the child-saving organizations seemed to agree that there should be no real distinctions between neglected children—then legally classified as “dependent”—and child offenders if society was to achieve a realistic approach to crime prevention.¹⁰¹

⁹⁸It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise.

Id. at 383.

⁹⁹County of Cook v. Chicago Indus. School for Girls, 125 Ill. 540, 18 N.E. 183 (1888). See PLATT 115.

¹⁰⁰People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870).

¹⁰¹PLATT 116-17.

THE REFORM OF THE JUVENILE COURT: RHETORIC OR REALITY

The landmark developments in child welfare during the nineteenth century were the establishment in 1825 of the New York House of Refuge, "the first great event in child welfare,"¹⁰² and the creation of the first juvenile court for Chicago by the Illinois legislature in 1899.¹⁰³ The juvenile court was lauded as "the greatest advance in judicial history since the Magna Charta."¹⁰⁴ Another writer described it as "'one of the greatest advances in child welfare that has ever occurred.'"¹⁰⁵

Recently, however, a new view of the history and performance of the juvenile court has raised questions concerning the validity of these earlier assertions.¹⁰⁶ The major reform achieved by the creation of the juvenile court was the removal of child offenders from the criminal courts—"the invention of delinquency."¹⁰⁷ However, in regard to the problem of protecting neglected or dependent children, the new separate court for children seems to have done little more than confirm and extend the nineteenth-century philosophy of preventive penology that had been initiated seventy-five years before in the house-of-refuge movement. The juvenile court incorporated and continued the *parens patriae* philosophy that justified state intervention in family government under new informal procedures that had been established for it. Like the industrial schools that preceded it, the juvenile court possessed broadly defined jurisdiction over neglected children, with little thought having been given to the rights of parents and children.

¹⁰²D. SCHNEIDER, *THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609-1866*, at 317 (1938), quoted in Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

¹⁰³Act of April 21, 1899, [1899] Ill. Laws 131.

¹⁰⁴This quote, which is attributed to Roscoe Pound, appears in Chute, *The Juvenile Court in Retrospect*, 13 FED. PROBATION 3 (1949) [hereinafter cited as Chute]. Dean Pound also wrote in 1937: "The powers of the Star Chamber were a trifle in comparison with those of our . . . juvenile courts . . ." *Foreword to YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY* at xxvii (1937), quoted in *In re Gault*, 387 U.S. 1, 18 (1967).

¹⁰⁵See Chute 7.

¹⁰⁶See PLATT 101-36; Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) [hereinafter cited as Fox]. This new and well-documented research concerning the history of the juvenile court brings into question the research and findings, heretofore accepted as gospel, of pioneer writers on the juvenile court movement. For some examples of pioneer writers whose enthusiasm for the juvenile court movement affected the objectivity of their findings see H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 2-23 (1927) [hereinafter cited as LOU]; Chute.

¹⁰⁷This is the basic thesis of Platt's book; hence the title, *The Child Savers/The Invention of Delinquency*. See note 86 *supra*.

The juvenile court was also that product of political compromise between private sectarian interests that operated the industrial schools and state welfare authorities who believed strongly in state-operated institutions for dependent and neglected children. The 1899 juvenile court law continued the blurring of distinctions between neglected, dependent, and delinquent children and the practice of mixing these children in the same institutions—sometimes under repressive and punitive conditions.¹⁰⁸

The momentum for the juvenile court came from civic, social, and professional leaders in Chicago. They were primarily women who were concerned over the punitive applications of the criminal law to child offenders and the large number of children who were then confined in local jails and county poorhouses. As early as 1895 the Chicago Woman's Club drafted legislation for a separate children's court, including a probation department, but abandoned its efforts when told that the bill was unconstitutional. In 1898 a committee of social leaders and lawyers was formed to draft a bill and work for its enactment.¹⁰⁹ The bill, entitled "An act to regulate the treatment and control of dependent, neglected and delinquent children," was enacted by the Illinois legislature near the end of its 1899 session.¹¹⁰

The Philosophy Represented in the Juvenile Court Law

The nineteenth-century philosophy of preventive penology, initiated around 1825 with the house-of-refuge movement, can be summarized as follows: society should identify the conditions of childhood which lead to crime, including poverty (thought to be caused primarily by immorality or indolence), parental neglect, idleness, ignorance, and others; legislation should be enacted to authorize commitment of children found in these conditions to such institutions as houses of refuge or industrial schools where techniques and resources were available for effective crime prevention, particularly institutions in which children could learn to work and receive moral training.¹¹¹ The terms "dependent" and "neglected" were used interchangeably in the 1899 juvenile court law, and

¹⁰⁸Lou 172 notes: "In a majority of states there is a failure to provide adequately for the separate care of delinquent and dependent or neglected children, and dependent and neglected children are often committed to institutions intended primarily for the care of delinquents."

¹⁰⁹Chute 4.

¹¹⁰Act of April 21, 1899, [1899] Ill. Laws 131.

¹¹¹See Fox 1232-33.

these terms were defined in words that described conditions which were believed to lead to crime in the early nineteenth century.¹¹² The name of the court was new, but the simplistic philosophy linking poverty, neglect, and crime had remained unchanged. Moreover, it has continued as a major theme of juvenile corrections into the twentieth century.

Political Power of Private Sectarian Interests

Before the juvenile court was established, the dependent or neglected children who had been committed to industrial schools were cared for by private sectarian (either Protestant or Catholic) agencies that received public subsidies. In Illinois many children also lived in poorhouses, which were public agencies. Religious preferences were generally observed in commitments to industrial schools and child-placement agencies. The sectarian interests were opposed to commitment of children across religious lines.¹¹³

The welfare authorities objected to caring for children in industrial schools under private sponsorship. They felt that institutional care for such children should be provided by the state and be under state control. The private sectarian groups, however, had vested interests, since their established institutions received public subsidies for children in care. In deference to these sectarian interests, the new law authorized commitment of dependent and neglected children to industrial schools and required that placements with individuals or institutions be in accordance with the parents' religious preferences.¹¹⁴ Further, the sectarian interests, perhaps out of concern for their own financial interests, may also have

¹¹²The Illinois Juvenile Court Act defined "dependent child and neglected child" as any child under age 16

who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child; and any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the streets or giving any public entertainment.

Act of April 21, 1899, § 1, [1899] Ill. Laws 131. Compare this statute with the 1882 Massachusetts statute authorizing commitment of neglected children to overseers of the poor, note 82 *supra*, or with the Illinois industrial school legislation, note 94 *supra*.

¹¹³PLATT 108-17, 134; Fox 1228-29.

¹¹⁴Act of April 21, 1899, §§ 7, 17, [1899] Ill. Laws 133.

opposed a proviso in the juvenile court law that would have required the removal of children from poorhouses. This requirement was deleted from the law, partly because it would involve additional public funds to establish separate public institutions for children.¹¹⁵

Parens Patriae

The Illinois statute incorporated the concept of *parens patriae* by providing that "the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents"¹¹⁶ It encouraged family placements that would result in adoption, and it gave the individuals or agencies to whom a child was committed broad authority over the child as guardian of the "ward." Such individuals or agencies were given certain parental rights, including the right to place the child in a family home (with or without apprenticeship) and to consent to the child's adoption without notice to or consent from the child's parents.¹¹⁷ Thus, the general thrust of the law was to displace certain broadly defined types of parents who were viewed as failures and to substitute the state as *parens patriae*.

This broad legal approach becomes disturbing when one recognizes that the standards for parental care advocated by the "child savers" were high; they reflected middle-class values. Yet, these standards tended to be applied primarily to poor and immigrant families. The proponents of the juvenile court movement were primarily middle-class women who had access to money and political power and who believed that they were rescuing those less fortunate in the social order. Some were pioneer social workers of national stature—Jane Addams, Edith Abbott, and Sophonisba Breckenridge:

The child savers set such high standards of family propriety that almost any parent could be accused of not fulfilling his "proper function." In effect, only lower-class families were evaluated as to their competence, whereas the propriety of middle-class families was exempt from investigation and recrimination.¹¹⁸

Nevertheless, juvenile court laws in Illinois and those that followed in other states were generally upheld as constitutional. Frequently, the

¹¹⁵*Id.* § 18, at 137; Fox 1224-28.

¹¹⁶Act of April 21, 1899, § 21, [1899] Ill. Laws 137.

¹¹⁷*Id.* at 133.

¹¹⁸PLATT 135.

courts relied upon the concept of *parens patriae* to justify informal procedures that were contrary to traditional notions of due process of law and the rights of parents.¹¹⁹ This doctrine was expanded in the twentieth century to include juvenile delinquency.¹²⁰

Juvenile Court Expansion and Performance

The Chicago juvenile court became the model for juvenile court legislation that was rapidly adopted throughout the United States. By 1909 twenty states and the District of Columbia had enacted such laws, and their constitutionality was well established. By 1920 all but three states had a juvenile court system. Today, some 2,700 juvenile courts hear children's cases throughout the United States. However, these state laws vary in how or whether they define neglect and other parental behavior that would justify court intervention.¹²¹

The law of neglect changed somewhat with the development of the juvenile court. Juvenile court statutes stressed issues of parental fault, parental actions or omissions, moral environment, adequacy of physical care, and a proper home.¹²² In interpreting these statutes, the courts sometimes looked beyond the broad statutory language to incorporate the standard used in civil custody disputes—the “best interests of the child.”¹²³

Because of the expansion of juvenile probation services under the juvenile court movement, the need to remove children from their homes by institutional commitments for protective reasons has declined. The availability of juvenile probation services has provided a new resource for supervising children in their homes.¹²⁴ This function more recently has been assumed by public child welfare agencies in some states.

¹¹⁹Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905). The leading cases upholding the constitutionality of juvenile court acts in various states are collected in LOU 10 n.1.

¹²⁰See Rosenheim, *Perennial Problems in the Juvenile Court*, in JUSTICE FOR THE CHILD: THE JUVENILE COURT IN TRANSITION 8 (M. Rosenheim ed. 1962).

¹²¹LOU 23-25; THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2-4 (1967); Chute 4-5.

¹²²See, e.g., CAL. WELF. & INST'NS CODE § 600 (West 1966); ILL. ANN. STAT. ch. 37, §§ 702-4, 702-5 (Smith-Hurd Supp. 1972); IOWA CODE ANN. §§ 232.15 (3)(a),(b) (1969); LA. REV. STAT. ANN. § 13:1570 (1968); OHIO REV. CODE ANN. § 2151.03 (Page Supp. 1970); ORE. REV. STAT. § 419.476 (1969).

¹²³See Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 469 (1970) [hereinafter cited as *Child Neglect*].

¹²⁴*Id.* at 468.

Most neglect petitions are initiated by institutional petitioners—welfare agencies, probation officers, and schools. The number of neglect and dependency cases in the United States has increased in proportion to the population growth, reaching a high of 161,000 in 1966; however, the incidence of these cases—2.2 per every one thousand children in the population under age eighteen—has remained approximately the same. Most of the children involved are young—ninety percent less than twelve, more than fifty percent less than six. Their families are usually poor, uneducated, from minority groups, and often are public assistance recipients.¹²⁵

Child-neglect cases have been regarded as civil, so that the right to counsel has not been extended to parents or children under court interpretations of the United States Constitution. It seems clear that children of poor, ignorant, and powerless parents are often adjudicated neglected and sometimes removed from their parents partly because counsel is not available. In recent years some of these neglect statutes have been attacked as unconstitutional because of vagueness or broad wording; generally, the attacks have failed.¹²⁶

THE MID-TWENTIETH CENTURY: ANOTHER PERIOD OF RECOGNITION

The history of child protection in the United States indicates that public interest in children is cyclical, recurring between periods of relative indifference. The decade of the 1960's was the first time in a century that wide public interest was attracted by the complex and emotional problems related to protecting children from physical maltreatment by their own parents. The problem had been repressed from public consciousness.

The case of Mary Ellen in 1874 sparked "cruelty" societies under private sponsorship. Juvenile delinquency and institutional reform were the primary concerns during the juvenile court movement of the early twentieth century. During this period only incidental concern was given to child neglect, and then only in an attempt to protect children from poverty and the evils of an industrialized society and, perhaps, to encourage middle-class values. The basic motivation of the juvenile court movement was society's interest in crime prevention under the nineteenth-century philosophy of preventive penology.

¹²⁵*Id.* at 465-67.

¹²⁶*Id.* at 469-70 & n.30 (listing recent cases).

The present interest, however, was not touched off by a sensational case. Recognition of the problem was forced by objective new information that documented child abuse. This new information was largely provided by technology (the X-ray machine) under medical leadership (particularly pediatric radiology). Old phrases were revived—child abuse and neglect—and new ones were coined to attract public attention—“the battered-child syndrome.” After the problem was identified and described by the medical community, sensational cases were discovered in communities throughout the country and brought to public attention.¹²⁷ The reaction was emotional, angry, and quick. Some people attempted to revive the earlier law-enforcement approach of the New York SPCC, which advocated swift justice and sure punishment for the abusive parents. Others advocated a more thoughtful and studied approach. The resulting compromise was the enactment of child-abuse reporting laws that generally supported the contemporary idea that protective services to parents could usually provide child protection without the necessity of removing the child from his own home. The fact that reporting laws have been passed has served to assure the public—perhaps unrealistically—that children are being protected and that parents are being helped.

One important principle seems to be agreed upon. The study, understanding, and development of programs to deal effectively with child abuse and neglect are beyond the professional competence of any one of the related professional disciplines—law, medicine, social work, psychiatry, psychology, and others—and beyond the capacity of any single community resource—law enforcement, welfare programs, courts, hospitals, private family agencies, and so forth. Thus, effective programs will require interdisciplinary efforts and coordination of community resources. Such cooperation and coordination have always been difficult to achieve.

¹²⁷The case of Roxanne Felumero, age three, whose body was found in the East River in New York City on March 25, 1969, is a good example. The press reported that she had been the subject of a petition in the New York Family Court for alleged parental neglect or abuse two months before her death. After the hearing, the judge had released the child in her parent's custody. When recovered from the river, the child's body was bruised and battered and her pockets were weighted with rocks. The resulting public furor led to a judicial investigation of alleged mishandling of the proceedings by two family court judges. The investigating committee concluded that if the family court and the complex of public and private agencies had functioned more efficiently, Roxanne would not have died. See BAKAN, *supra* note 1, at 45-47; Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259, 1274-75 (1971); Felder, *supra* note 73, at 184.

But disagreement exists on many other important aspects of abuse and neglect—including the extent of the problem, its causes, and effective strategies for preventing abuse and protecting children. There is also confusion over the goals—whether society should seek to punish the parents or protect the children or both. Few seem to admit that the state of the art and knowledge in the field is in its infancy.

Beginnings of Recognition

In 1946 a pediatric radiologist first called attention to the common association of subdural hematomas (blood clots around the brain resulting from blows to the head) and abnormal fractures of the long bones in infants.¹²⁸ Parental explanations of these injuries seemed unrealistic, contradictory, and inconsistent with medical findings, but medical researchers were reluctant to say that these injuries were the result of trauma due to parental maltreatment. Not until the mid-1950's did medical researchers and authors acknowledge in medical journals that these injuries were intentionally inflicted by abusive parents and other caretakers.¹²⁹ Several prominent medical leaders sponsored a symposium on child abuse in 1961,¹³⁰ later publishing their findings and popularizing the phrase that they had coined to attract public interest—the “battered child syndrome.”¹³¹ The problem attracted widespread interest in the medical profession, and this recognition led to broader public awareness. Other professionals became aware and involved, and many articles appeared in the various professional journals (social work, medicine, psychiatry, and law), sometimes with contradictory findings concerning the nature and causes of the problem, the number of children involved, and appropriate solutions.

Recognizing the need for interdisciplinary cooperation, the Children's Bureau of HEW in 1962 called a conference of the appropriate

¹²⁸Caffey, *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, 56 AM. J. ROENTGENOLOGY 163 (1946).

¹²⁹Fisher, *Skeletal Manifestations of Parent-Induced Trauma in Infants and Children*, 51 S. MED. J. 956-60 (1958); Silver & Kempe, *The Problem of Parental Criminal Neglect and Severe Physical Abuse of Children*, 98 AM. J. DISEASES OF CHILDREN 528 (1950); Woolley & Evans, *Significance of Skeletal Lesions in Infants Resembling Those of Traumatic Origin*, 158 J.A.M.A. 539-43 (1955).

¹³⁰See Radbill, *supra* note 5, at 16.

¹³¹Kempe, Silverman, Steele, Droegemueller, & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 17, 42 (1962).

professional groups to promote better understanding of the problem.¹³² The principal recommendation of this group was that a model child-abuse reporting law be drafted for use by the states.

Reporting-Law Movement

Five different models for child-abuse reporting laws were proposed by various sponsors between 1963 and 1966. The most significant was the first, which was proposed by the Children's Bureau in 1963 as a result of its conference held the year before.¹³³ This was a mandatory reporting law that required physicians to report cases to police authorities when they had reasonable cause to suspect that a child within the age of juvenile court jurisdiction had suffered serious physical injury by other than accidental means from a parent or other caretaker. Physicians who reported in good faith were given immunity from civil or criminal liability. Any physician who failed to report was punishable under the criminal law for a misdemeanor. The model waived two of the traditional privileges under the law of evidence: the physician-patient privilege and the husband-wife privilege. The physician-patient privilege was waived to permit doctors to report and testify in court without incurring liability for violating the confidentiality of physician-patient communications. The husband-wife privilege was waived so that one parent could testify to the abuse by the other in court proceedings. This waiver was believed necessary because child abuse most often occurs in the privacy of the home.

The Children's Division of the American Humane Association issued similar guidelines for mandatory reporting in 1963.¹³⁴ These two models had the same underlying philosophical purpose—to help parents rather than to punish. The major differences was that the AHA proposed the reporting of child abuse or neglect to public or private child welfare community agencies. The Children's Bureau Model proposed reporting to the police because they are usually available twenty-four hours per day. The Children's Bureau later modified its model to suggest that child welfare agencies receive reports when they had adequate pro-

¹³²D. Gil, *VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES* 21 (1970) [hereinafter cited as *VIOLENCE AGAINST CHILDREN*].

¹³³CHILDREN'S BUREAU, U.S. DEP'T OF HEW, *THE ABUSED CHILD—PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD* (1963).

¹³⁴CHILDREN'S DIVISION, AM. HUMANE ASS'N, *GUIDELINES FOR LEGISLATION TO PROTECT THE BATTERED CHILD* (1963).

tective services; otherwise, reports should continue to go to the police.¹³⁵

The American Medical Association objected to mandatory reporting under penalty of criminal law applicable only to physicians.¹³⁶ They were concerned that abusive parents would be deterred from seeking medical care if doctors were required to report. Thus, the AMA proposed its own model—a voluntary reporting law under which a variety of types of professionals (physicians, nurses, teachers, social workers) were authorized to report to either the police or a child welfare agency.¹³⁷

The Council of State Government published its model in 1965. This model statute represented a compromise between the models of the Children's Bureau and the AHA.¹³⁸ Finally, the Committee on the Infant and Preschool Child of the American Academy of Pediatrics published its approach as legislative guidelines in 1966.¹³⁹ It favored mandatory reporting by physicians to a social service agency. This model also proposed the establishment of a central registry at the state level to accumulate data concerning the extent of child abuse and also to keep track of abused children if parents moved from one place to another.

With speed uncharacteristic of state legislatures, all fifty states adopted some form of child-abuse reporting statute within a four-year period from 1963 to 1967.¹⁴⁰ The mandatory reporting-law approach initially proposed by the Children's Bureau was adopted in forty-four states, and voluntary reporting laws were passed in the remaining six states. A 1970 survey of abuse legislation reported that only four states still had voluntary reporting laws; at least one of these has since enacted mandatory provisions.¹⁴¹

¹³⁵Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 17 (1967).

¹³⁶*Battered Child Legislation*, 188 J.A.M.A. 386 (1964).

¹³⁷AMA, *Physical Abuse of Children—Suggested Legislation* (1965).

¹³⁸COMM. OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, COUNCIL OF STATE GOVERNMENTS, *SUGGESTED STATE LEGISLATION* (1965).

¹³⁹Comm. on Infant and Pre-School Child, *Maltreatment of Children—The Physically Abused Child*, 37 PEDIATRICS 377-82 (1966).

¹⁴⁰See V. DE FRANCIS, *CHILD ABUSE LEGISLATION IN THE 1970s*, at 5-6 (Am. Humane Ass'n 1970); *VIOLENCE AGAINST CHILDREN* 21-22.

¹⁴¹See V. DE FRANCIS, *supra* note 140, at 5-6. North Carolina repealed the voluntary law it had enacted in 1965 and substituted a mandatory law in 1971. See N.C. GEN. STAT. §§ 110-115 to -122 (Supp. 1971); ch. 472, § 1, [1965] N.C. Sess. L. 533. For an excellent review of the medical, legal, and legislative concerns about child abuse up to 1965 see McCoid, *The Battered Child And Other Assaults Upon The Family: Part One*, 50 MINN. L. REV. 1 (1965).

Extent of Child Abuse

Accurate information on the extent of child abuse in the United States is unavailable for many reasons.¹⁴² Abuse usually occurs in the privacy of the home. Further, abusing parents may be isolated from community life by poverty, geography, or social class. Often, the child victims are too young to either complain or understand that their treatment is inappropriate. Moreover, it is comfortable to believe the parental explanation that the child's injuries were accidental. Even when abuse is known or suspected, relatives and neighbors are afraid to intervene, physicians and school officials are reluctant to report, and the courts have difficulties in establishing abuse under traditional procedures. Finally, the legal definitions of reportable child abuse vary from state to state.

The first studies appeared in the early 1960's after the phenomenon of child abuse had been identified. These studies were often based on crude survey methods and resulted in conflicting findings that were ambiguous and confusing.¹⁴³ Some early reports tended to sensationalize the problem. A 1962 editorial in a medical journal identified child abuse as a more frequent cause of death than traditional children's diseases.¹⁴⁴ During that same year a popular magazine implied an annual incidence that approached thirty thousand cases.¹⁴⁵ A study based on newspaper reports of child abuse during 1962 identified 662 cases that involved 557 families, with eighty percent of the abused children less than four years of age and more than half less than two; most of the injuries resulted from beatings with various types of instruments (television antennas, rubber hoses, baseball bats, and chair legs); children were burned with lighted cigarettes, electric irons, and hot pokers; some were strangled with pillows or plastic bags or drowned in bathtubs; others were stabbed,

¹⁴²The best overview of various studies on the extent of child abuse is contained in VIOLENCE AGAINST CHILDREN 18-148. The reader may also want to see V. FONTANA, *THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN 6-9* (2d ed. 1971); Gil, *Incidence of Child Abuse and Demographic Characteristics of Persons Involved*, in *THE BATTERED CHILD* 19 (1968).

¹⁴³There were also local studies during the early 1960's conducted by hospitals and social agencies. See L. YOUNG, *WEDNESDAY'S CHILDREN, A STUDY OF CHILD NEGLECT AND ABUSE* (1964); Bordman, *A Project to Rescue Children From Inflicted Injuries*, 7 *SOCIAL WORK* 43 (1962); Elmer, *Abused Young Children Seen in Hospitals*, 5 *SOCIAL WORK* 98 (1960); Merrill, *Physical Abuse of Children—An Agency Study in Protecting the Battered Child*, in *PROTECTING THE BATTERED CHILD* (Am. Humane Ass'n 1962).

¹⁴⁴Editorial, 181 *J.A.M.A.* 42 (1962).

¹⁴⁵*SATURDAY EVENING POST*, Oct. 6, 1962, at 32.

bitten, shot, or thrown against a wall or floor.¹⁴⁶ A national news program in 1971 reported that child abuse causes more deaths than the three leading children's diseases.¹⁴⁷ A recent news article estimated that 500,000 children in the United States are abused each year—physically, sexually, or emotionally.¹⁴⁸

A 1965 study revealed that three percent of the 1,520 persons who had been surveyed had personal knowledge of an incident of child abuse that resulted in physical injury within a one-year period.¹⁴⁹ By applying this three percent figure to adult population statistics of the United States, the study suggested that 2.53 to 4.07 million adults had personal knowledge of child abuse in 1965. In spite of legitimate questions concerning these statistical methods, this study is often cited to document the existence of two to four million child-abuse cases annually in the United States. The same researcher subsequently conducted a survey to collect data on child-abuse cases that had been reported to central registries in the states and territories during 1967 and 1968.¹⁵⁰ This data showed 9,563 cases in 1967 and 10,931 in 1968. When these data were screened to eliminate cases that did not involve physical abuse, the numbers were reduced by more than one third. Thus, the number of physically abused children was reduced to 5,993 for 1967 and 6,617 for 1968. This information is admittedly incomplete, for not all cases are identified or reported to central registries. The reported cases may include the more sensational "tip of the iceberg." Nevertheless, the general trend in terms of the number of cases reported has been upward.

Causes of Child Abuse

During the last ten years, many professionals have offered explanations of the etiology of child abuse. What causes parents to abuse their own children? What are the characteristics of abusing parents? Can abusing parents be effectively treated? Can their methods of handling children be altered? The answers to these questions have been conflicting and confusing. They have tended to vary somewhat with the professional discipline of the researcher—medicine, psychiatry, psychology, or social

¹⁴⁶V. DE FRANCIS, CHILD ABUSE—PREVIEW OF A NATIONWIDE SURVEY (Am. Humane Ass'n 1963).

¹⁴⁷CBS Evening News, Mar. 25, 1971.

¹⁴⁸N.Y. Times, Aug. 16, 1971, at 16, cols. 1-6.

¹⁴⁹See VIOLENCE AGAINST CHILDREN 58-60.

¹⁵⁰*Id.* at 92-102.

work—and sharp disagreements have occurred within some single disciplines, such as psychiatry.

Some of the studies during the early 1960's were based on small samples that has been selected from children's clinics, hospitals, protective service agencies, psychiatric clinics, and newspaper reports of child abuse. Early medical and social-work studies found that abusing parents often suffered from personality disorders, that often one of several children in a family was selected to be abused, and that the median age of the child victims was seven.¹⁵¹ A 1962 survey by the AHA of newspaper stories of child abuse found that the most serious injuries were inflicted by fathers and were primarily related to efforts to discipline. On the other hand, maternal child abuse seemed to be more related to serious emotional problems. Nevertheless, the study viewed all abusing parents as emotionally immature.¹⁵² During this period medical and social work researchers also identified the repeating cycle of child abuse; many abusing parents had been abused in childhood by their own parents.¹⁵³

The most confusing and conflicting explanations have come from the field of psychiatry.¹⁵⁴ Some researchers have identified the phenomenon of "role reversal" in abusing parents.¹⁵⁵ In its simplest form this psychiatric explanation suggests that the abusing parent distorts reality, becomes a child, perceives his child as an adult or as his own parent who has hurt or failed him, and physically abuses his child when the child fails to meet his own emotional needs. Another psychiatric explanation holds that child abuse results from a parent's inability to handle his own internal conflicts or need for punishment; when he physically mistreats the child, he is symbolically abusing himself.¹⁵⁶ Yet another psychiatrist has noted that the personality disorders identified as causing child abuse are also found in parents who do not abuse their children. Consequently, he concludes that these factors are not a sufficient explanation by them-

¹⁵¹L. YOUNG, *supra* note 143; Kempe, *supra* note 131, at 18; McHenry, Girdany, & Elmer, *Unsuspected Trauma with Multiple Skeletal Injuries during Infancy and Childhood*, 31 *PEDIATRICS* 903-08 (1963); Merrill, *supra* note 143.

¹⁵²See V. DE FRANCIS, *supra* note 146.

¹⁵³See *VIOLENCE AGAINST CHILDREN* 27; Kempe, *supra* note 131, at 18; McHenry, *supra* note 151, at 903-08.

¹⁵⁴The psychiatric explanations discussed in the text accompanying notes 152-56 were presented at a workshop in 1966 at the University of Colorado by Brandt F. Steele and C. Henry Kempe. They were reported in *VIOLENCE AGAINST CHILDREN* 25-35.

¹⁵⁵See, e.g., *VIOLENCE AGAINST CHILDREN* 31.

¹⁵⁶*Id.* at 27-29.

selves. However, he did find that the common denominator among abusing parents was characterized by demands for unrealistic performance from young children to satisfy parental needs.¹⁵⁷ Thus, the abusing parent perceives the child not as an infant but as an adult capable of meeting the parent's need to be mothered, cared for, and listened to. Another psychiatrist has suggested that the present level of psychiatric understanding of the etiology of child abuse is so limited that it cannot be considered as established knowledge.¹⁵⁸

Psychiatrists also have different views of the prognosis for effective intervention and treatment. Some give encouraging reports; however, others seem to feel that psychiatry has little to offer in the treatment of abusing parents.¹⁵⁹

With the increasing availability of data from state registries, it has been possible to develop national surveys and epidemiologic studies of child abuse that give a somewhat different picture. The most thorough national epidemiologic survey, completed in 1968, provided the following findings: The primary incidence of child abuse is in poor families; recidivism is high in abusing families, with patterns of abuse being transmitted from one generation to the next; child abuse is most prevalent in large families and matriarchal households; more older children (as distinguished from infants) are victims than had previously been suggested; the abused child's behavior can be provocative and a substantial factor in abuse; and both abusing parents and their child victims have troubled personal histories.¹⁶⁰

These researchers concluded that child abuse cannot be explained by one set of causal factors. Instead, it should be viewed as resulting from multiple causes that operate singly or in various combinations.¹⁶¹ The basic dimension that was identified (over which other causes were superimposed) was the cultural attitude toward the use of physical force in parent-child discipline and the absence of societal sanctions against

¹⁵⁷*Id.* at 30-31.

¹⁵⁸*Id.* at 29.

¹⁵⁹VIOLENCE AGAINST CHILDREN 42-43 & n.43.

¹⁶⁰This series of studies was conducted under a grant from the Children's Bureau of HEW to the Child Welfare Research Program of Brandeis University. The most significant portions of the series were a nationwide survey of public knowledge, attitudes, and opinions about physical abuse and a survey of every incident of physical abuse reported through legal channels in 1967 and 1968. For a report of the findings see VIOLENCE AGAINST CHILDREN 130.

¹⁶¹*Id.* at 133-37.

this form of interpersonal violence.¹⁶² Closely related were the child-rearing practices of various social classes and ethnic and cultural groups whose traditions included greater use of physical force in achieving child-rearing goals. In addition, there were other related dimensions: chance factors that transformed an acceptable disciplinary incident into an act of child abuse; stress that reduced a parent's control and led to violent reactions or overreactions.

Many advocates of protective services to abusive parents seem to adopt a simplistic concept of causation that is based on the medical model of diagnosis and treatment.¹⁶³ They view abusive parents as sick people who need treatment, and they believe that a range of professionals (psychiatrists, psychologists, but primarily social workers) have the requisite knowledge and skills to treat and cure the sickness. They support the idea of protective services, because under this approach the child can be left in his own home while efforts are being made to correct the causes of parental abuse.¹⁶⁴ Other professionals question the validity of these assumptions and point to the absence of a single set of accepted causal factors, the cultural acceptance of violence in child discipline, and the

¹⁶²The basic thesis of Gil's scholarly and well-documented research—that American disciplinary practices may tend to rear children who are committed to violence as an acceptable pattern of behavior—is both disturbing and provocative. *Id.* at 133-48. Gil feels that since the culturally determined permissive attitudes of using violence in the rearing of children is probably the "common core" of all physical abuse in America, systematic efforts should be made to change this element in parent-child interaction. Also, clear-cut legal sanctions and other prohibitions should be established against the use of violence and force in rearing children.

Violence against children in rearing them may thus be a functional aspect of socialization into a highly competitive and often violent society, one that puts a premium on the uninhibited pursuit of self-interest and that does not put into practice the philosophy of human cooperativeness which it preaches on ceremonial occasions and which is upheld in its ideological expressions and symbols.

Id. at 142. Yet, however well taken this point may be, it seems myopic to present these child-raising practices as uniquely American; the patterns found in American families will have counterparts all around the world.

Gil also found that poverty is very deeply intertwined with the phenomenon of child abuse and that its unconditional elimination is another important element in the route to preventing child abuse. Some of the more important aspects of eliminating poverty would be adequate income, housing, and neighborhoods; comprehensive health care and social services; wide-ranging educational programs fitted to the needs of each student; and cultural-recreational facilities.

Gil would also add comprehensive family planning, family-life education, and counseling programs for adolescents and adults "with the assumption that there is much to learn about married life and parenthood which one does not know merely on the basis of sexual and chronological maturity." *Id.* at 146.

¹⁶³*E.g.*, Silver, *Child Abuse Syndrome: A Review*, 96 MED. TIMES 803-18 (1968).

¹⁶⁴*E.g.*, Kadushin, *supra* note 5, at 202-56.

personality deviations of abusing parents that seem unresponsive to known treatment techniques.¹⁶⁵

THE FRAMEWORK FOR CHILD PROTECTION: LEGAL AND SOCIAL ISSUES

The traditional policy of the law has been that the rearing of children is the responsibility of parents rather than of government. The courts have generally protected the right of parents both to the custody of their children and to discipline them without state interference. Emphasis has been greater on parental rights than on child protection and the rights of children.¹⁶⁶ The right or duty of the state to intervene in family government to protect children has emerged over the last 150 years. The house-of-refuge movement began with broad legislative classifications that authorized state interference under informal judicial procedures that were contrary to traditional notions of parental rights and due process of law. This movement was supported by judicial precedents that upheld the constitutionality of such legislation by reliance upon the doctrine of *parens patriae*, which also became the legal cornerstone for the juvenile court. Legislatures and courts have gradually begun to think more about children's rights as well as their need for protection.

The child-abuse reporting laws of the 1960's have broadened the duty of the community to intervene in family life for protective purposes. The reporting laws were added to an existing legal framework that already provided for state intervention to protect children in specified circumstances. This legal framework included criminal statutes and case precedents that limited excessive parental discipline; civil law precedents that governed child custody disputes; various state juvenile court acts; and state legislation that provided for protective services. The individual parts of this framework have developed somewhat independently so that legislatures, courts, and scholars have seldom examined the framework as a whole in order to evaluate its effectiveness for child protection.¹⁶⁷

The task of legislatures and courts during the 1970's will be to

¹⁶⁵See VIOLENCE AGAINST CHILDREN 42-43 & n.43.

¹⁶⁶One source for the development of the concept of rights of children was the organization of "cruelty" societies to protect children during the nineteenth century. See address by Elbridge T. Gerry, founder of the New York Society, published in the *Proceedings* of the National Conference of Charities and Corrections (1882), reprinted in 2 CHILDREN AND YOUTH, *supra* note 56, at 196-97.

¹⁶⁷The broad legal framework for child protection is discussed in detail in Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679 (1966) [hereinafter cited as Paulsen].

examine the entire framework and to eliminate the conflicting rights and policies. The rights of parents need re-evaluation in the context of contemporary notions of due process of law and the need of some children for protection from their own parents. The traditional legal notion that the state should not interfere in family government seems modified by recent legislative policy that parental abuse and neglect should be identified and reported so that appropriate protection can be provided.

Right of Parents to Discipline

The general thrust of both civil and criminal case precedents is to provide parents with immunity against liability for money damages or criminal prosecution for excessive child discipline. Despite the fact that a child may sue his parents for breach of contract or for damage to his property, most states cling to the old common law rule that an unemancipated child may not sue his parents in tort for personal injuries.¹⁶⁸ While the courts give a number of policy reasons for this rule, the most common is that allowing a child to sue will disrupt family harmony and will interfere with parental rights to care, custody, control, and discipline. The child-parent civil immunity rule has been criticized recently as outmoded.

The criminal cases tend to allow a parent to heed the Biblical warning that to spare the rod is to spoil the child. The parent's right to discipline generally gives him leave to punish for disciplinary reasons without fear of criminal liability.¹⁶⁹ However, the criminal cases are divided on the limits of this privilege. The majority rule imposes criminal liability on parents who use unreasonable or excessive force. A parent may inflict punishment that is reasonable under the facts and circumstances; the question of reasonableness is an issue for jury determination. Many states still follow the older minority rule under which the parent's criminal liability depends upon whether the parent's motives were malicious or whether he inflicted permanent injury to the child. Under this view parental motives are decisive unless permanent injury is inflicted. A parent would not be criminally liable for an error of judgment or

¹⁶⁸The cases are collected and summarized in H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 9.2 (1968). See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 116 (3d ed. 1964); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930); Annot., 19 A.L.R.2d 423 (1951).

¹⁶⁹For a summary of the applicable cases and discussion of the majority and minority rules see Paulsen 686-88.

because the severity of the punishment was disproportionate to the child's misconduct; he would be liable only if the punishment resulted in permanent injury or was inflicted with malice rather than to correct the child for his own benefit.

Parents' Right to Custody

Traditional notions of parental rights have changed somewhat in the emerging judicial concern over the rights of children and child protection. Under the English common law, the father's right to the custody, labor, and services of his child was comparable to a property right; it was superior to the mother's rights and in some instances was enforceable regardless of the child's welfare. This concept of parental custody rights can be found in some early American cases, but it has generally been changed by statutes and judicial interpretations that give both parents similar rights to the custody and control of their children. Many courts now prefer the mother as custodian in custody controversies between parents, particularly when the child is an infant or a girl.¹⁷⁰

Two points of view on the question of custody rights can currently be found in American decisions. The traditional view, still followed by many states, holds that a parent is *prima facie* entitled to the custody of his child unless shown to be unfit. Anyone who alleges that a parent is unfit must establish the unsuitability of the parent. The remnants of the old concept of a parent's property rights in his child are operative under this rule. Under the more contemporary view, the prevailing criteria revolve around the "best interests of the child" or "welfare of the child." Under this rule the court will award custody to the person or agency that the court finds will best promote the child's welfare. While most of the states follow this rule, it has been criticized for its elasticity and ambiguity.¹⁷¹

Some states have recently adopted statutes that authorize termination of parental rights when children are severely neglected or abused.¹⁷²

¹⁷⁰The cases and rules governing custody disputes are collected in Note, *Custody of Minor Children—Award to a Fit Parent May Be Reversed on Appeal*, 7 J. FAM. L. 81 (1967). See also CLARK, *supra* note 168, §§ 17.1-7.

¹⁷¹Note, J. FAM. L., *supra* note 170, at 86.

¹⁷²See, e.g., N.C. GEN. STAT. § 7A-288 (1969). For a discussion of these statutes in various states see Note, *Legislative and Judicial Recognition of the Distinction Between Custody and Termination Orders in Child Neglect Cases*, 7 J. FAM. L. 66 (1967). See also Hansen, *Suggested Guidelines for Child Abuse Laws*, 7 J. FAM. L. 61 (1967), where the writer suggests that since abused children who live through two court hearings seldom survive for the third, it should be presumed at the second hearing that the parents are unfit unless they prove otherwise.

These statutes reflect a legislative policy to separate children from parents permanently in cases of gross neglect or physical abuse and to offer them the possibility of establishing a new legal identity through adoption. The statutes also provide an opportunity for child-welfare agencies to avoid having neglected children, who have been removed by court order from the custody of their parents and placed in agency foster homes, grow up in "legal limbo"¹⁷³ in foster homes at public expense.

Other Criminal Laws

No additional criminal statutes seem necessary in order to deal with the phenomenon of child abuse. The criminal codes of most states now contain ample laws for the prosecution of abusing parents—laws against homicide and assault and battery, cruelty-to-children statutes, and the "contributing" statutes that authorize the prosecution of parents and others who contribute to the neglect of a child. These statutes raise important legal and social issues that are too numerous and too complex to discuss here.¹⁷⁴

The most important issue is the social efficacy of criminal law sanctions in child-abuse cases. Prosecution of parents can result in fines, imprisonment of parents, separation of parent and child, and damage to the family's reputation. If there is hope for a continuing family life that would benefit the children, prosecution is not the answer. Fines reduce limited family financial abilities. Imprisonment separates parent and child. Placement resources are not always available or better than the child's own home; if they are available, they are costly in terms of public funds and can result in emotional damage to the child. Because of the social disadvantages of criminal prosecution, such an approach may be appropriate only in cases of gross physical abuse that involves permanent physical injury or death. One scholar summarized the problem as follows:

¹⁷³This term refers to the legal status of a neglected child who is not legally free for adoption but who has been removed from the custody of his parents by court order and placed in the custody of a child-welfare agency for placement. This occurs when the family situation is so bad that it appears doubtful that the child can ever return to his family. Such a child often grows up in foster care without the roots and security of his own family. He is not legally free for adoption without parental consent in the absence of statutory authority for termination of parental rights.

¹⁷⁴See Paulsen 680-93. These points are also summarized in Paulsen, *The Law and Abused Children*, in *THE BATTERED CHILD* 175 (1968). See also S. FOX, *THE LAW OF JUVENILE COURTS IN A NUTSHELL* § 15 (1971).

Merely beginning a prosecution is likely to mean the end of the chance to improve a child's home situation. Parents are nearly always resentful of the proceeding, and the hostility thus engendered makes casework with the child's family all but impossible. Moreover, a criminal prosecution is a clumsy affair. The defendant must be proved guilty beyond a reasonable doubt, and a criminal trial is subject to a great many rules of evidence that are grounded in policies other than the pursuit of truth and the punishment of crime when crime is found An act of child abuse is not likely to take place openly, and when it does, neighbors are often unwilling to testify. And there are other facts to be faced. The prosecutor's office must take time to investigate and to prepare its case. Postponements at the request of the defense or prosecution, or for the convenience of witnesses or the court, occur often as a matter of course.¹⁷⁵

The prosecutor is more accustomed to thinking in legal than in social terms. One primary legal issue is whether there is enough evidence to establish the offense beyond a reasonable doubt. Also, a prosecutor who thinks primarily in social terms about child protection or the importance of keeping the family together may encounter political problems:

The public prosecutor exercises a very great discretion in the prosecution of criminal cases. Not all parents who have assaulted their child will be tried on criminal charges. In any given case the prosecutor may very well judge that the matter is best handled in a juvenile court or a family court should there be one. Perhaps the biggest difficulty which the prosecutor faces if he decides that the parents should be dealt with by any agency other than the criminal court is the fact that the prosecutor is an elected official who may feel the need to respond to public pressure in a highly publicized and sensational case.¹⁷⁶

Juvenile Court Acts

In most states the statutes that define the neglect jurisdiction of the juvenile court include the abused or battered child. A juvenile hearing that involves child neglect typically includes three determinations: (1) the facts alleged to constitute neglect; (2) whether the established facts come within the statutory definition of neglect; and (3) if neglect is established, the disposition to be made. Generally, the tendency is to construe neglect statutes to authorize court intervention when the evidence shows a need

¹⁷⁵Paulsen 692.

¹⁷⁶Paulsen, *The Law and Abused Children*, in *THE BATTERED CHILD* 176 (1968).

for child protection.¹⁷⁷

Many disturbing social, legal, and constitutional issues arise in child-neglect cases in juvenile courts. The most complex issue concerns the standards of parental conduct that should be applied in determining whether a child is neglected. The most important constitutional question is whether there should be a lesser quality of due process of law in neglect cases than in adjudications of delinquency.

The legal borders of neglect have received little attention in legal writings. One prominent judge urged close attention to statutory definitions, a presumption in favor of the parents, and a standard adopted from the law of negligence—whether the parent exercised reasonable care under the circumstances.¹⁷⁸ He also discussed medical neglect (including cases in which medical care is denied for religious reasons), emotional neglect, physical neglect, educational neglect, and moral neglect and concluded that the field demands both legal and social judgment. The standard of “reasonable care under the circumstances” was later criticized by another scholar who argued that a neglectful parent is one who falls below the minimum acceptable standard of parental behavior: “In practice, the meaning of the neglect standard varies according to the problem, the relationship of the custodian to the child, and the disposition that is sought in the case . . . [T]he meaning of ‘neglect’ turns on the goal of the proceeding.”¹⁷⁹ The struggle for an appropriate standard against which to measure parental conduct is perhaps best summarized by the comments of the New York Joint Legislative Committee concerning the New York Family Court Act of 1962:

“All interested persons agreed that parents ‘neglect’ their children (in a legal sense) when they fail adequately to supply them with food, clothing, shelter, education, or medical or surgical care, ‘though financially able to do so’ The Committee found, however, that interested persons disagreed over the extent to which children whose parents supply the physical needs of life may nevertheless be adjudicated as ‘neglected children.’ Some say when a child suffers from ‘improper supervision,’ others, when he suffers from ‘a parental pattern of not satisfying his emotional needs’; still others, whenever there is a parental pattern of not properly caring for the child. The Committee concluded

¹⁷⁷See Fox, *supra* note 174, § 14; Paulsen 693-703; *Child Neglect*, *supra* note 123, at 472.

¹⁷⁸Gil, *The Legal Nature of Neglect*, 6 NAT’L PROBATION & PAROLE ASS’N J. 1 (1960).

¹⁷⁹Paulsen, *The delinquency, Neglect, & Dependency Jurisdiction of the Juvenile Court*, in JUSTICE FOR THE CHILD: THE JUVENILE COURT IN TRANSITION 74 (M. Rosenheim ed. 1962).

that these differences reflect the diversity of practices and beliefs in our society, and that this diversity was not a proper matter of governmental regulation so long as basic standards were not violated. The Committee also concluded that the Family Court's neglect jurisdiction should be invoked only in situations of serious need."¹⁸⁰

Recent decisions of the United States Supreme Court require that state juvenile courts protect certain constitutional rights of children alleged to be delinquent in the adjudicatory phase of a juvenile hearing in order to assure due process of law. These procedural rights include written notice of the charges before the juvenile hearing, the right to counsel (including the right to assigned counsel at state expense for indigents), the privilege against self-incrimination, the right to confront and cross-examine witnesses, and proof of delinquency beyond a reasonable doubt if the child is charged with an act that would constitute a crime if committed by an adult.¹⁸¹ While there is no right to jury trial,¹⁸² the net effect of these procedural requirements is to provide a higher quality of due process and fairness in an adjudication of delinquency that justifies state intervention than is required in juvenile neglect hearings.

These constitutional rights have not yet been held generally applicable to neglect hearings, which, like hearings to adjudicate delinquency, are labeled "civil." For example, neither the child nor the parent-respondent has a constitutional right to assigned counsel. Some of the typical procedural practices in neglect cases would not be tolerated in civil custody proceedings, criminal trials, or adjudication of juvenile delinquency in the same juvenile court. Perhaps the most serious violation of rights occurs in the admissibility of hearsay evidence, particularly written social, medical, or psychiatric reports in cases in which the writer does not testify in court. The act of admitting this material constitutes a denial of the right to confront and cross-examine a witness whose written statements are accepted in evidence to establish parental neglect.¹⁸³

¹⁸⁰*Child Neglect* 474 (emphasis omitted).

¹⁸¹*In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

¹⁸²*McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

¹⁸³See *Child Neglect* 475-85. Important constitutional and other legal issues in these cases are discussed in a number of sources including Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259 (1971); *Representation in Child-Neglect Cases: Are Parents Neglected*, 4 COLUM. J. LAW & SOC. PROBLEMS 230 (1968); W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS (Children's Bureau Pub. No. 437-1966, 1966). Sheridan states: "No judicial decision should be based upon an undisclosed fact." *Id.* at 74 (emphasis omitted).

The possible consequences to children and parents in juvenile neglect cases are serious. If a child is adjudicated neglected, the court usually may take one of the following courses of action: order supervision of the child in his own home; remove him from the custody of his parents; place him with a public or private agency or in an institution; order that the parents be prosecuted for criminal law violations that emerge in the juvenile proceedings; and in some cases, order termination of parental rights—an action which permanently severs the parent-child relationship.

Parents and children perceive these proceedings as punitive. Even though the proceedings are labeled “civil” or “juvenile,” the parents feel that they are on trial, especially since social agencies in the community often give evidence against them.¹⁸⁴ Therefore, the important legal and social issues revolve about whether it is reasonable to provide a lesser quality of due process in the fact-finding portion of neglect hearings in juvenile court than is required in adjudication of delinquency.

A related problem is the confused legal status of *parens patriae* in adjudication of neglect and delinquency in light of *In re Gault*¹⁸⁵ and contemporary notions of due process of law. In *Gault* the Court seemed more concerned with substance than labels; it stressed the importance of procedure in assuring fairness and required certain procedures in an adjudication of delinquency when a child might lose his freedom by institutional commitment. The Court raised—but never answered—many questions about *parens patriae*:

The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. . . .

The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right “not to liberty but to custody.” He can be made to attorn to his parents, to go to school, etc.

¹⁸⁴*Child Neglect* 475-85.

¹⁸⁵387 U.S. 1 (1967).

If his parents default in effectively performing their custodial functions—that is, if the child is “delinquent”—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the “custody” to which the child is entitled. On this basis, proceedings involving juveniles were described as “civil” not “criminal” and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty . . .

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.¹⁸⁶

The Court continued by stating that “the Juvenile Court Judge’s exercise of the power of the state as *parens patriae* was not unlimited.”¹⁸⁷ These statements cast doubt on the constitutional validity of *parens patriae* to justify informal procedures that violate traditional concepts of due process and fairness.

Protective Services

The federal government has encouraged states to develop “protective services” programs as part of comprehensive child-welfare planning. While this movement began in the 1950’s, the 1962 amendments to the Social Security Act broadened the definition of “child-welfare services” and increased federal funding for this purpose. Some states responded by enacting legislation that established “protective services”. In many respects such legislation has become closely related to child-abuse reporting laws. However, the reporting laws are designed to identify neglected and abused children. On the other hand, the aim of “protective services” is to strengthen the child’s home so that removal from his parents will not be necessary. The state laws vary in their definitions of

¹⁸⁶*Id.* at 16-18 (footnotes omitted).

¹⁸⁷*Id.* at 30. In commenting upon the doctrine of *parens patriae*, the Court cited to two nineteenth-century cases, *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839); *In re Ferrier*, 103 Ill. 367, 371-73 (1882), that have previously been referred to here, notes 78-79, 94, 96 & accompanying text *supra*, as authority for the idea that children have almost no rights. 387 U.S. at 17 n.21. The Court also questioned the credentials of *parens patriae* in criminal jurisprudence. When the nineteenth-century courts interpreted broadly worded statutes that authorized commitment of children to houses of refuge and industrial schools, they were dealing with both neglected children and child offenders who are now termed delinquents. The Court seemed to miss the fact that there was no separate criminal jurisprudence for children. Both neglected children and child offenders were committed to the same institutions by minor criminal courts when the use of the doctrine of *parens patriae* expanded American law in the nineteenth century. See Fox, *supra* note 106, at 1193.

"protective services," in when and how services should be initiated, in the authority of the child-protective agency, and in patterns of administration.¹⁸⁸

The typical strategy of protective services is for a social agency (public or private) to initiate contact with parents whose children are reported to be neglected or abused. The general method is to provide casework and other supportive services to the parents in order to help them make the changes necessary for protection of the children. This is a difficult assignment, for the caseworker must initiate a professional service with clients who have not asked for help.¹⁸⁹ If the parents refuse the service, the usual alternative is court action—a juvenile petition for neglect or a criminal warrant.

There are important legal-social issues in this field. The state legislation should clarify the basis for intervention and the authority of the child-protection agency. A particularly difficult question concerns whether a child who is believed to be neglected or abused should remain in his own home in physical safety while protective services are being provided.

Children are sometimes taken from their homes too hastily. A typical response to neglect and abuse cases seems to be swift removal of the child from his home, followed by confusion and placements of the child in a series of foster homes, after which he is often returned to his parents. It seems, however, that the removal is often unnecessary and that the children return to their homes only after considerable emotional damage and significant investments of public funds in unnecessary foster care. A recent report of the New York State Board of Welfare stated: "The fact that over half of the children discharged from care return to their own families or relatives suggests that many of them might have been cared for at home at great savings, without intervening foster care." ¹⁹⁰

It also appears that judges and social workers sometimes develop "rescue fantasies" in well-intentioned efforts to save helpless children

¹⁸⁸See Paulsen 703-10.

¹⁸⁹Strategies other than protective services are available for working with parents who abuse. See Bean, *The Parents' Center Project: A Multiservice Approach to the Prevention of Child Abuse*, 50 CHILD WELFARE 277 (1971).

¹⁹⁰N.Y. Times, May 16, 1971, § 1, at 57, col. 1. See also Fanshel, *The Exit of Children from Foster Care: An Interim Research Report*, 50 CHILD WELFARE 65 (1971); Tert & Watson, *The Battered Child Rebrutalized: Ten Cases of Medical-Legal Confusion*, 124 AM. J. PSYCHIATRY 1432 (1968).

from bad parents.¹⁹¹ These emotions tend to obscure objective evaluations of the strengths of the child's own home. Further, they may not recognize the strength of the child's identity with his own parents, which makes it difficult or impossible for the child to relate to substitute parents in new settings:

The attachment of children to parents who, by all ordinary standards, are very bad is a never-ceasing source of wonder to those who seek to help them. Even when they are with kindly foster-parents these children feel their roots to be in the homes where, perhaps, they have been neglected and ill-treated, and keenly resent criticism directed against their parents. Efforts made to "save" the child from his bad surroundings and to give him new standards are commonly of no avail, since it is his own parents who, for good or ill, he values and with whom he is identified.¹⁹²

CONCLUSION: ISSUES FOR THE FUTURE

The quick responses of state legislatures in enacting child-abuse reporting laws during the 1960's reflect important legislative policy changes in the legal framework for child protection. The reporting laws are not an effort by the state under *parens patriae* to replace parents who have failed. Rather, they reflect a policy to strengthen the child's own home through state resources and services to parents so that removal will not be necessary for effective child protection. There is an emerging concern that children's rights be balanced with parental rights while child protection is being provided. One of the most important judicial needs for the 1970's is for recognition by the courts of the requirement of due process of law in juvenile neglect hearings as a matter of constitutional dimensions.

We have moved beyond the period of public interest in child abuse of the 1960's into a period of relative complacency. The problem is once more almost suppressed. Child-abuse reporting laws may identify children who need protection, but they do not provide a simple solution to the complex legal and social issues involved in child protection. The legal framework for child protection must be supplemented by providing the

¹⁹¹See Burt, *supra* note 183, at 1278-79.

¹⁹²This passage is from the classic work of John Bowlby on the psychological significance of separating a child from his parents. J. BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* (2d ed. 1965), *quoted in* Burt, *supra* note 183, at 1279.

resources for child protection. Identification of abuse cases through reporting will be meaningless without effective protective services. Some legislatures have enacted reporting laws without providing funds or personnel to implement protective services. Further, the state of knowledge in the field is not yet sufficient to provide effective services or intervention in all cases. Much remains to be learned.

Even if we had the knowledge, adequate reporting laws, and personnel for implementation, the problems of developing an effective protective services program at the community level would be formidable. Such programs would require skilled professionals, interdisciplinary teamwork among several professional disciplines (medicine, psychiatry, social work, law, law enforcement, and others), a sensitive and yet aggressive approach, the ability to work comfortably with authority and authoritative agencies, and the development of new strategies. The coordination of community-level resources for effective implementation is always difficult.

In the end, however, the usefulness of the entire system for child protection—the social agencies, courts, law enforcement, hospitals, doctors, nurses, and others—will depend on the effectiveness of the services themselves and the protection that is provided in a particular case.