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The Socio-Legal History of Child Abuse and Neglect: An Analysis of the Policy of Children's Rights

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ABSTRACT

The focus of this paper is on the two major axes that have influenced the course of child welfare policy. One upholds corporal punishment as the predominant method of child rearing, that is, "Spare the rod, spoil the child." The other defines the status of the child as property of "loving" parents. Because of these two conceptions, the authors maintain that reliance on parental benevolence or the "benevolent intrusion" of the state will not suffice to protect the child's best interests. On the contrary, the examination of the socio-legal history of child abuse and neglect highlights the authors' warning that children will remain at the mercy of adult authorities unless advocates commit themselves to securing Constitutional safeguards of children's rights. Critical is the child's right to counsel that the authors view as a prerequisite in changing the legal and social power relationship between the child and the adult.
At the first White House Conference on Children in 1909, the central policy recommendations were based upon the principle that children were a precious resource to be protected and treasured. As with so many national resources, the difference between policy and practice has frequently resulted in abuse and exploitation. It is the central thesis of this paper that both policy and practice have evolved around two major axes. The first is based upon the Biblical injunction, "He who spares his rod hates his son..." (Proverbs, viii, 24), and its modern equivalent, "Spare the rod and spoil the child." And the second reflects the concept of the child as property of loving parents who are best able to provide the benevolent protection the child needs. The result of these two conceptions is that the socio-legal history of child welfare policies has been to leave the child vulnerable to abuse and neglect no matter under whose jurisdictions the child fell: the family, or, as we will see, the state. As Thomas states,

Our laws and legal systems have developed over the hundreds of years around the expectation that parents will love and protect (their children). 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 injuries to their own children (1972: 293-94).

Nevertheless, during the nineteenth century the state recognized that those who held traditional legal responsibility for the protection of children were also the frequent source of their neglect and abuse. The sensational case of Mary Ellen (see below for details) increased "concern and awareness" of parental abuse of children and prompted the "benevolent intrusion" by legal authorities under the doctrine of parens patriae as later formulated in some juvenile courts. This "humanitarian" movement to protect or to "save" the child, however, was not completely motivated by altruism. It has been pointed out that the intervention of the state on the grounds of child protection was hard to distinguish from the policy of social control of the "dangerous classes" (Platt: 1969).

By the beginning of the twentieth century the emphasis was more on family preservation and rehabilitation than it was on mere child protection. While the state reserved the right to intervene in only the severe cases of abuse and neglect, the assumption remained
that the natural family was the best locus for child rearing. The "burden" of raising a child, however, was still regarded as the responsibility of the parents. Such parental responsibility was interpreted through middle class standards which made the poor particularly vulnerable to the government's "benevolent intrusion." The general civil rights movement of the 1960's called into serious question this class bias in child welfare policies. Nevertheless, in the child advocacy movement the basic issues about the child's status remained with two divergent perspectives being identified. The issues revolve around the provision of service to children via protective adult intervention or the establishment of children's rights. The question comes down to whether the primary goal of child advocates is the protection of children, with debate focusing on whether the state or parent is best protector, or whether the goal is children's liberation, that is, guaranteeing children the basic rights of citizens.

From the child saving perspective, demands for increased federal responsibility (money and supportive services) for children are made while limitation is placed on the government's intervention into the family unit. Parental benevolence is taken as a given here. On the other hand, those who work for civil rights for children contend that "human childhood inevitably provides a potential basis for exploitation" (Gerzon, 1973:64). Children will remain at the mercy of their families, essentially powerless, to be rescued only by benevolent intrusion, unless fundamental guarantees of children's rights are secured. An increase in children's power, that is, their right to influence the decisions that affect their lives, is the primary step in effectively balancing power among three relevant parties; the state, the parents, and the children.

A brief examination of our Judeo-Christian heritage reveals a pattern that supports our harsh and chattel-like treatment of children. In both the Old and New Testaments, one finds a basis for (1) the attitude toward children as property, (2) the establishment of "proprietary interest" as the basis of the child-parent relationship (Fraser, 1976a:317), and (3) prescriptions of harsh child rearing practices, and abandonment.

Even if we discount the influence of the Judeo-Christian tradition, the pattern of child abuse finds its roots in general
western culture. DeMause (1974) notes that during the middle ages infanticide was common and persisted into the nineteenth century. Earlier the Greeks had developed a wide number of techniques to kill children. They were "thrown into rivers, flung into dung heaps and cess trenches, potted jars to starve to death, exposed on every hill and roadside" (DeMause, 1974:25). Particularly susceptible to such practices were children who were deformed, unwanted, and born to "inferior parents." Other forms of harsh treatment were justified on the "reasonable" grounds that it was a matter of necessity to keep children in their place, appease the gods, or as the best method to educate undisciplined youth.

In the schools of Sumer, five thousand years ago, there was a man in charge of the whip to punish boys upon the slightest pretext... (According to religious beliefs) boys were flogged by their parents before the altars of gods... (And even the enlightened ancient philosophers) beat their pupils unmercifully as the only cure for the 'foolishness bound up on the heart of the child' (Radbil, 1965:3).

Such publicly accepted treatment was supported by laws that legitimated the proprietary interest of the parent-child relationship. Under Greek law, the child was the absolute property of the father who had the authority to determine whether the child lived or died. Prior to the ceremony Amphidromia, that occurred five days after the child's birth and at which time the father's acceptance of the infant into the family was decided, infanticide was quite permissible (Fraser, 1976a: 318; Thomas, 1972:294). Similarly, exclusive paternal dominance was replaced in Roman Law under the doctrine of *patria potestas* whereby the father's authority over the child included infanticide, mutilation, abandonment, and sale of his children. Although reforms were slowly enacted, so that by 374 A.D. killing an infant was considered murder (DeMause, 1974:28) and sale of children was prohibited in 565 A.D. (Fraser, 1976a:319), the authority of the pater-familias and its practices persisted. The strength and tenacity with which *patria potestas* was supported transcended its legal status. It was deeply etched in the norms of the society that "every family was, and of right ought to be one body with one will and executive" (Fraser, 1976a:319).

With this brief review we can see that religiously and culturally institutionalized maltreatment and abuse placed children in a powerless position with the family with legal sanctions upholding the proprietary interests of the parent. This vulnerable socio-
legal position of children in the society was intensified by an ideology that endorsed corporal punishment as the predominant method of child rearing.

English Common Law and the Emergence of Modern Child Care Practices. England was no exception to the medieval traditions that regarded children as property. In England, children were often viewed in hierarchical terms where they were placed at the bottom of the social ladder, a rung below "senile old men, foolish women, and doddering drunks" (DeMause, 1974:229). Upholding the hierarchical system meant that the emphasis was still on parental authority with regard to child rearing practices that inculcated in the child respect for his/her elders. Discipline, viewed as a moral obligation for those parents who loved their children, was a simple variation of the biblical theme already presented.

Parents hoped for obedience based on a rational acceptance of their position as natural in the hierarchical system where the king was the pater patriae for his people in the same way a father had dominion over his wife and children. Legally wives and children held a subordinate position; they were merely things to be used as a father saw fit. Whether he obtained obedience by love and affection rather than through pain and fear by frequently administering beatings mattered little; legally he had the right (DeMause, 1979:246).

Early English law reflected the Roman law's proprietary concept of children to the extent that infanticide was still a sanctioned practice if done a few days after birth (Fraser, 1976a:320-321). Unlike Roman law, however, English law established emancipation from the parents at the age of majority (21), and in the twelfth and thirteenth centuries, there is explicit evidence that children as persons had certain legal rights. While one cannot equate these rights with those free choices accorded citizens, such "negative rights" do at least recognize the child's right to be protected from the decision making of others. For example, under the common law, guardians appointed to handle the property of a child heir could be sued for mismanagement "in propria persona" or with the assistance of a "next friend" who would file a written order on the right to appoint their own counsel, "the practice of next friends under the supervision of the court (was)...institutionalized into a requirement of next friends or guardian ad litem in most actions to which an infant is party" (Kleinfeld, 1970:342). Under
such a system, one that persists today, children's interests were again only recognized through the adult's judgment of when the child's best interests should be protected. "Where an infant has a cause of action in which no sophisticated adult shares an interest, the system provides no means for calling judicial attention to the need to appoint representation" (Kleinfeld, 1970:345). Further, such a system assumed that the next friend, who could be the parent-complaintant, would act in the child's best interests. Even though the judicial system was to protect the child from incompetent or dishonest next friends, "the infant depends upon counsel retained by his next friend or the court to assert his rights under these rules" (Kleinfeld, 1970:346).

The increased emphasis on private property also prompted the state to take more than just a humanitarian interest in children regarding such issues as protection of the child's property right against the guardian. As heirs and potential heirs, the state expanded its role in assuring children's rights, at least to property, by inviting itself into the family unit under the emerging doctrine of parens patriae. Finally, in 1259 England passed a law declaring that "the guardian's profitable rights during his ward's infancy (would be converted) into a trust for the benefit of the child" (Fraser, 1976a:321). Such a law provided the basis for the state to intervene on behalf of a child, first hesitantly and only where property was involved (Wellesley v. Beaufort, 1827) and then as a legitimate third party (In Responce, 1847). The rationale for this was that:

The relationship between the parent and the child was a trust. The right was endowed by the crown as a trust because it was assumed that the parent would discharge faithfully on behalf of his child. If the trust were not faithfully discharged, it would be incumbent upon the crown to intervene and to protect the child's interest... The state would act as a guarantor of the trust (Fraser, 1976:332).

The transition from feudalism to capitalism was marked by an increasing population and economic instability, and thus produced not only vagrancy, but begging as the last recourse of survival. Particularly in periods of economic recession "large numbers of workers (thrown out of work)--and especially their children, who were preferred as beggars for the sympathy they elicited--recurrently took to the streets to plead for charity, cluttering the very doorsteps of the better-off classes" (Priven & Cloward, 1971:10).
Legislation that outlawed vagrancy and begging with harsh penalties invoked for violations did not halt recalcitrant citizens nor safeguard civil order. Neither could overwhelmed private charities handle the increasing numbers needing relief. Thus, the series of legislation outlawing vagrancy combined with the state's recognition of a public responsibility to administer a system of relief culminated in the Elizabethan Poor Laws of 1601 (Piven & Cloward, 1971:8-16; Trattner, 1974:6-10). Basically, the act recognized the moral responsibility and legal obligation of parents to support their children. Thus, it authorized state intervention into the parent-child relationship when such support was inadequate. While establishing the state's residual responsibility to poor families in times of economic hardships, such relief was usually administered by removing the child from his home and declaring him a ward of the state. The strong work ethic that considered idleness to be a sin against the community and, in particular, the limited economic resources of the time, necessitated that the state develop policies that would remove children from the welfare roles as soon as possible. At issue was the burden of children to the state. Thus, productive employment in some form was considered necessary. Apprenticeships, for example, were recognized as an instrument of national policy...Parish overseers of the poor were empowered to set children of indigent parents to work...In reality what this act did was to make each parish responsible for destitute and orphan children. It remained on the books until 1834 (DeMause, 1974:250).

While such a policy served the interests of the state, it was morally sanctioned...that "youth may be accustomed and brought up in labor and work" (Piven & Cloward, 1971, p. 24). The upsurge in the manufacturing industry in the late eighteenth and early nineteenth centuries required a fluid and "free" labor force. As skilled artisans and yeoman revolted against the inhuman mechanization, the state deemed that children needed to be "liberated" from parental practices that kept them out of the labor force. The state rationalized its policies by maintaining that children needed the discipline of work to become good adult members of the society. The state would be remiss in its responsibilities if it did not make such training and discipline available—particularly for the lower classes. Indigent parish children, therefore, were regularly sought as the "ideal" source of labor.

Manufacturers negotiated regularly with the parish authorities,
ordering lots of fifty or more children from the poorhouses...
To secure their acquiescence, the youngsters were told that
once at the cotton mills or ironmongers they would live like
ladies and gentlemen on roast beef and plum pudding...
Moreover, pauper children could be had for a bit of food and
a bed, and they provided a very stable labor supply, for they
were held fast at their labor by indentures, usually until
they were twenty-one (Piven and Cloward, 1971:27-28).

In the name of its benevolent interest in paupers and orphans, the
state sentenced children to work in the mills for sixteen hours a
day, "sometimes with irons riveted around their ankles to keep them
from running away. They were starved, beaten, and...succeeded to
occupational diseases while others committed suicide" (Radbill, 1965:
12). Even child labor reforms, notably led by Robert Owen and Sir
Robert Peel and culminating in the Factory Act of 1802 that outlawed
the "pauper apprentice system", did not halt this exploitation of
children. Such laws applied only to state wards. Unfortunately, it
proved in the parents' best interests to invoke their proprietary
rights and send their children to work in the mills under the same
conditions while pocketing their earnings (Radbill, 1965:12; Fraser,

English law therefore reflects variations of a paternal attitude
toward children that can probably best be understood by comparing the
paternalist view of Thomas Hobbes with that of John Lock (Worsfold,
value only through their servitude to the father. Reflecting the
Roman doctrine of patria potestas, his writings upheld the idea of
absolute paternal dominance with the basis of the parent-child rela-
tionship being one of fear. As DeMause described this relationship
in medieval England "Legally, wives and children...were merely
things to be used as a father saw fit. Whether he obtained obedience
...through pain and fear...mattered little" (1974:246). Hobbes
suggests that there would be no reason to have children unless they
had some utility to the parent. It was a relationship of "mutual
benefit" that existed between parent and child whereby a child invol-
untarily exchanged protection for submission and strict obedience
to the father (Worsfold, 1974:144).

From the Hobbesian view, such protection was equated with harsh
treatment that was recognized as being for the child's own good.
"The child whom the father loves most dear he does most punish ten-
derly in fear" was a popular adage of the fifteenth and sixteenth
centuries (DeMause, 1974:245). Locke's writing later in the seventeenth century modified Hobbe's strict utilitarian view to one of benevolent protection. Locke recognized children's duty to honor their parents but did not view parental authority as one of unlimited discretion in the treatment of children. Locke considered children to have natural rights that entitled them to protection through parental benevolence (Worsfold, 1974:144-145). While upholding this as foremost a parental responsibility, the English law also came to recognize the state's claim in the proprietary interest. As the socio-legal history of England illustrated, whether the period's attitudes toward children approached the strict utilitarian view of Hobbes or the benevolent protection one of Locke, the results of either form of paternalism were similar. In both, the intent of control and the potential for abuse are evident. Indeed, when one examines the results, it is hard to distinguish between admonishments "to punish in fear" and a policy that encouraged similar abuses in child labor by subordinating children's best interests to those of their self-appointed protectors, be they the parents or the state.

The Development of America's Policy of Paternalism

America's treatment of children closely paralleled that of England with their history reflecting a "softening" of the harsh utilitarian attitude to one of benevolent protection.

Early America. Since the colonists modeled their legal system on the Common Law of England, "the common law rules of family government and the traditions and child-care practices of the Elizabethan Poor Law, including the idea that poverty was a sin" (Thomas, 1972:299), were inherent features. The common law of family government recognized the parents' proprietary interest in children. Children were to be a "credit" to their parents by having a God-fearing character, through diligent labor, by assuming the caretaker role in their parents' old age, and by becoming exemplary carriers of the culture (DeMause, 1974:360-363). The relationship of mutual benefit was evident, since these services by children entitled them to their father's support, protection, and control. Administering discipline was an inherent part of these duties, and parents were warned against becoming too fond or familiar with their children, since this bred contempt and undermined parental authority. Absolute obedience was enforced through a variety of ways that upheld the Biblical sanctions. The rod, the whip, "foul tasting medicines,... the dark closet...other painful forms of healing such as bleeding,
"the blisters" were widely employed as necessary means to thwart the evil inclinations of the child and "deliver his soul from hell" (Demause, 369-370; 328). Such duties emanated from the legal rights of the father that were regarded as the "discharge of a sacred trust...the true foundation of parental power" (Bremner, 1970: 364). As in England, Bremner continues, the state was "guarantor of this trust".

"although" the father is entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education..., 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...and place the care and custody of them elsewhere.

Rather than the courts intervening on the side of the children, however, the laws usually upheld severe child rearing methods. For example, laws of Biblical origin, going so far as to invoke the death penalty for a child who cursed his father (Haves, 1971:13) or acts, such as the Stubborn Child Act of 1628, that identified rebellion against the parent as a crime (Sidman, 1972:33-35) proved the rule rather than the exception. In the spirit of the Elizabethan Poor Law with its peculiar disdain for idleness, the state was beginning to assume responsibility for children when parental duty was inadequate or negligent. Usually, inadequacy and negligence were defined as too many waifs and destitute children begging on the streets. Folks (1911) cites an early Massachusetts statute (1735) that sought to remedy the increase in the idle and the poor. According to the statute,

"persons that" were unable, or neglected to provide necessaries for the sustenance and support of their children...and where persons bring up their children in such gross ignorance that they do not know or are not able to distinguish the alphabet, or (allow them to grow up to be idle beggars), the overseers might bind out such children to good families for a decent and christian education (Folks, 1911:167-168).

Besides binding out or apprenticeship, commitment to poor houses was a legally sanctioned method of child care during the eighteenth century that was well established by 1825 (Folks, 1911; Thomas, 1972).
Beginnings of the Child Saving Movement. Several commentators (Folks, 1911; Costin, 1973; Thomas, 1972) cite 1825 as the beginning of a public recognition of not only the duty but the right of authorities to intervene in circumstances of severe parental abuse and neglect. While espousing the state's benevolent interest in protecting the child, the early child savers were also motivated by a fear of juvenile crime and, subsequently, a necessity to control the children of the "dangerous classes" (Platt, 1969).

By the second decade of the nineteenth century, the middle class was perturbed enough by the growing number of children "of poor and abandoned parents...brought up in perfect ignorance and idleness, and what is worse in the street begging and pilfering" (Hawes, 1971: 28) to institutionalize efforts to rescue them. Recognizing that almshouses and penitentiaries, where impressionable youth were mingled with adult criminals and paupers, were only "nurseries of crime", the Society for the Prevention of Pauperism established a separate children's asylum. The New York House of Refuge would be:

an asylum in which boys under a certain age, who became subject to the notice of the Police, either as vagrants, or homeless, or charged with petty crimes, may be received ...and then put to work at such employments as will tend to encourage industry and ingenuity (Hawes, 1971:38).

By the end of the 1820's, incorporation of Houses of Refuge had taken place in Boston (1826) and Philadelphia (1828). In the following decade, however, the constitutionality of the state's benevolence in committing destitute, neglected, and vagrant children to such reformatories was challenged. Commonwealth v. M'Keagy (1831) upheld the public's power to "assume guardianship of children whose poverty had degenerated into vagrancy" (Hawes, 1971:58). Likewise, Ex parte Crouse (1839) recognized the state's power of parens patriae in defining parental negligence and subsequently "snatching (the child) from a course which must have ended in confirmed depravity." Thus, the laws sanctioned not only more reformatories but also state intervention in arbitrarily determined situations of parental negligence.

Between 1860-1900, one of the critical issues aroused by the move towards urbanization and industrialization was the maintenance of social control. Symptomatic of the extraordinary growth and industrialization of the cities and its even more overwhelming increase
in population, were the disorganizing and dehumanizing elements of urban life, epitomized by the city slum. Particularly vulnerable to the astrophy of the city slums were the children who were described as "intelligent dwarfs"...physical and moral wrecks whose characters were predominantly shaped by their physical surroundings" (Platt, 1969:40). The assumption that a child in such an environment would be strongly tempted to enter a life of crime seemed a foregone conclusion. Constant editorializing by the newspapers strengthened the credibility of the relationship between delinquency and the slums. Thus, the increased number of indigent children in the city streets, in particular, the activities of local gangs, posed alarming problems in terms of maintaining social control. Already overburdened city administrations could not respond to the urgent public cry to do something. Maintenance of social control, therefore, became the responsibility of private charitable associations. The leaders of these associations and the subsequent child saving movement were members of the middle class. This problem of social control, therefore was frequently defined in class terms and middle-class reformers interested in child welfare issued class rhetoric as part of their strategy to introduce new programs. Charles Loring Brace, for example, felt his "responsibility to God for...this great multitude of unhappy, deserted and degraded boys and girls" (Brace, 1894, p.3). Brace, however, also considered the threat the children of the poor lower classes posed to the order of middle-class society. "The immense vat of misery and crime and filth in New York challenges one to think of ten thousand children growing up almost sure to be prostitutes and rogues" (1893, 82). Based upon this interpretation of linking urbanization and delinquency he recommended the "placing out" of children in the west, for not only saving these lower class children but also of controlling the dangerous classes. By 1884, the network of Children's Aid Societies claimed the "placing out" of over 60,000 children (Hawes, 1971:102).

We can now consider the case of Mary Ellen. The literature (Kaudushin, 1967; Radbill, 1965; Bremner, 1971; Thomas, 1972; Fontana, 1973) records the sensationalized case of Mary Ellen and subsequent formation of the Society for the Prevention of Cruelty to Children as the origin of Child Protective Services. According to these reports, the plight of Mary Ellen had been discovered by Ellen Wheeler "who had been on an errand of mercy to a dying woman in the house adjoining, the latter asserting that she could not die happy until she had made the child's treatment known" (Bremner, 1971:186). As the trial of the little girl's foster mother revealed, Mary Ellen was
whipped almost every day until her body was now severely bruised; she was extremely undernourished and usually confined to her bedroom, sometimes chained to the bedpost. Ms. Wheeler's efforts to arouse action by the authorities proved futile since legally they were not empowered to supersede the sacred right of the parents to discipline their child as they deemed fit. As a last recourse, Ellen Wheeler appealed to Henry Bergh of the Society for the Prevention of Cruelty to Animals. With the legal assistance of Elbridge T. Gerry, he initiated court action to have the child removed on the grounds that she was a member of the animal kingdom and therefore entitled to the humane treatment accorded other animals. The case generated public outrage that active concern for the humane treatment of animals antedated that of children. Thus, in 1875, the first Society for the prevention of Cruelty to Children, the forerunner of Child Protective Services, was established in New York. Fraser, like others, regards the case as signalling:

(a) that children do have a right of not being cruelly and inhumanely treated; (b) the advent of and impetus for a number of privately funded charities whose task it was to protect children; and (c) the beginning of an era that would see every state adopt neglect statutes to protect children (1976a: 324-325).

In addition to this, however, when one examines some of the facts of the case, rather than its appealing "mythical" version, the negligence of the state's child saving practices is pointedly exposed (Thomas, 1972: 308-309). As revealed in testimony at the trial, the Superintendent of Charities and Correction had indentured the abandoned child to Thomas and Mary McCormack (Bremner, 1971: 187-188). The placement was made on the basis of a single reference, the McCormack's family physician, and without the Department's knowledge that Mary Ellen was actually the illegitimate child of Thomas McCormack. The conditions of the indenture required that the McCormack's not only "instruct the child...that there is a God and what it is to lie" but that they also report on the child's condition yearly to the Superintendent's Office. According to testimony by the former Mary McCormack, now Mary Connolly, she had reported only twice in twelve years to the Superintendent who had about 500 children "passed through his department...(with) no recollection of (Mary Ellen) other than the records of his office record" (Thomas, 1972: 188). While Mary Connolly was sentenced to one year in the Penitentiary at hard labor, Mary Ellen was committed to an orphan asylum, "The Sheltering Arms," as the search for the little girl's grandparents continued. In spite of this insight, the court and
media focused on the shocking parental abuse of the child, overshadowing the contributor negligence on the part of state placement agencies. Overwhelmingly supported, the New York Society for the Prevention of Cruelty to Children (N.Y.S.P.C.C.) was to have primarily a preventive law enforcement orientation unlike previous Children's Aid Societies or asylums that took care of children only after the court placement with the agency. Their mission, according to its President Elbridge Gerry, was to:

seek out and rescue from the dens and slums of the city the little unfortunates whose lives were rendered miserable by the system of cruelty and abuse which was constantly practiced upon them by the human brutes who happened to possess the custody or control of them (Bremner, 1971:180).

This mandate as a law enforcement agency and subsequent exemption from supervision by the State Board of Charities, gave the N.Y.S.P. C.C. powerful control over the lives of poor, neglected, and immigrant children. This control was manifested chiefly by disposing of the abused and abandoned in asylums. In such asylums, however, the latitudes taken by those acting in loco parentis to protect children from the "sin of idleness" often resulted in even greater physical abuse (James, 1975).

It was 1899 with the passage of first the Juvenile Court Act in the State of Illinois that this system of protective control was institutionalized. The Juvenile Court was to be an unusual legal institution that, operating under the power of parens patriae, would act as a guardian with the best interests of the child in mind. However, in its intent to protect the child from evil, it was used as a legitimate instrument of control and perpetrated a different form of child abuse. As Platt comments: "Although the child savers' attitudes to youth were often paternalistic and romantic, their commands were backed up by force and an abiding faith in the benevolence of government" (1971: sv-xvi).

The Child Saving Movement v. The Children's Rights Movement
The Twentieth Century: State's Rights v. Parent's Rights

The twentieth century was marked by controversy over the doctrine of parens patriae. In the beginning of the 1900's, this controversy was generated by the apprehension that perhaps the "benevolence of government intrusion" treaded too closely on the sacred
The socio-legal history of children in this century can be regarded as a perpetual conflict to strike a balance in the precarious relationship between state's rights and parents' rights. Children, presumed incapable of determining their own best interests, looked on as the paternalistic policy of protection resulted in a constant exchange of one master for the other.

The changing focus of protective services indicates that "almost from the start another orientation less legalistic and more social was evident... that the rationale was to help parents, not to punish them, to keep the family together rather than disrupt it" (Kadushin, 1967: 207). Spurred by the developing science of child psychology that emphasized the importance of the home to the child, this exchange was undertaken, again in the name of the child's best interests. An examination of the parent-child immunity legislation, however, reveals more of a legal reaffirmation of the parental right to control the child rather than renewed efforts on his/her behalf. One can speculate that perhaps the middle class reformers were disturbed by the seriousness and tenacity of the N.Y.S.P.C.C.'s child rescuing efforts, and attempted to make sure that such activity was confined to the visible lower class.

According to Andell, "three State supreme court cases established the parent-child immunity rule as American common law" (1970: 98). In Hewellette v. George (1891), the Mississippi Supreme Court established that a minor cannot sue his parent for negligent tort. Dismissing the suit brought by a daughter against her mother for malicious commitment to a mental institution, the court stated:

So long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained... a sound public policy designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. (9 So. 887, Miss. 1891, as quoted in Galligan, 1972: 50).

This case set the precedent for McKelvey v. McKelvey (1903) in which the Tennessee Supreme Court dismissed a child's tort against her stepmother and father for assault and also for Roller v. Roller...
(1905) in which the Washington Supreme Court denied a suit by a daughter against her father for raping her (Andell, 1970: 99; Calligan, 1972: 50-51). Many other jurisdictions followed this example, justifying the doctrine on the grounds of family preservation and protection of parental authority. As the courts pointed out: "in a democracy like ours, the government of a well-ordered home is one of the surest bulwarks against the forces that make for social disorder" (Small v. Morrison, 118 S.E. 15, N.C. 1923 as quoted in Galligan, 1972: 52). It was further argued that the parental right to raise one's children had a constitutional basis guaranteed by the due process clause of the fourteenth amendment. Statutes outlawing the teaching of German in schools (Meyer v. Nebraska, 1922) or requirements that parents must send their children to public schools (Pierce v. Sister Society, 1925) were overturned by the U.S. Supreme Court as violations of the parents' Constitutional rights. These cases were cited later as the basis for reaffirming the sanctity of the family with State encroachment upon parental rights prompted only by "showing a subordinating interest that is compelling" (Bates v. Little Rock, 361 U.S. 516, 524, 1960 as quoted in 70 Columbia Law Review 471, 1970). While reaffirming the parents' rights, such legislation did not restore them to a state of absolutism.

In its place, the concept of presumptive parental rights has arisen... American society presumes that a child's parent(s) wants to act in the child's best interests. It further presumes that a parent does act in his child's best interest... if there is an intervention, the state must show an immediate and pressing danger to the child or to the interests of the state (Fraser, 1976a: 325-326).

Indeed, cases followed that indicated a slow erosion in the absolute parent-child immunity doctrine (Galligan, 1972; 19 Hastings Law Journal 201, 1967; Andell, 1970). Some of the cases (Dunlop v. Dunlop, 1930; Worrell v. Worrell, 1939; Signs v. Signs, 1952) were premised on business negligence and regarded as being outside the parent-child relationship: the suit being between the child and the insurance company (Hastings Law Journal 205, 1967). However, others (Cowgill v. Brock, 1950; Emery v. Emery, 1955; Goller v. White, 1963; Hoffman v. Tracy, 1965; Briere v. Briere, 1966; Gelbman v. Gelbman, 1969) were based specifically on the presumption of parental responsibility and cited negligent or malicious behavior as justification for abandonment of immunity in total or
Such legislation abrogating the absolute parent-child immunity was prompted by the medical and social breakthroughs of the late fifties and early sixties. According to Radbill "Abuse of children has excited periodic waves of sympathy, each rising to a high pitch and then curiously subsiding until the next period of excitation" (1965: 18). This period of excitation was triggered by the neophyte science of pediatric radiology. Although X-rays of infants were taken as early as 1906, it was not until almost thirty years later that detailed reports regarding the radiographic features of infant bone injuries and healing became evident. Contributing to the association of such injuries with willful trauma were

the bizarre radiographic manifestations of recovery from epiphyseal separation during breech extraction ...reported by Snedescor and his associated (and) articles on unusual periosteal reactions in children which were to be differentiated from congenital syphilis (Silverman, 1974: 41-42).

Finally, in 1946, Caffey, upon observation of abnormal changes in the long bones, voiced the obvious implications of such findings. In 1955, Dr. Wooley and Dr. Evan's eight year study and subsequent observation that such traumatic lesions were willfully inflicted were relayed via the media to a subsequently shocked yet somewhat disbelieving public (Radbill, 1965, p. 18). These radiographic indications of an abused child, however, were so specific that when no advocate could be found "they spoke for the child who is unable or unwilling to speak for himself and served to alert the physician to a hazard of considerable magnitude that threatens the life and limb as well as the emotional and intellectual potentialities of the child" (Silverman, 1974: 58). Finally, in the 1960's, an adult advocate, Dr. C. Henry Kempe, was urged to action by his observation of the high number of children admitted to his pediatric center with similar unexplainable injuries. Coining the term "battered child syndrome", he launched a nationwide survey of hospitals and law enforcement agencies in an effort to determine the extent of the abuse. His efforts focused national attention on the phenomenal extent of child abuse and exposed the myth that parents always act in their child's best interests. As a result, between 1963-1967, states enacted legislation that encouraged the reporting of suspected cases of abused children.
In addition to this medically based contribution, the emergence of children's rights was in conjunction with the times. During the 1960's, it was consumers' smoldering discontent with corporations' unresponsiveness and lack of accountability; it was the growing disillusionment with a government who had plunged its country into an unjust war; most of all, it was the mounting oppression of minority groups that culminated and erupted into a movement for social justice. During the era of Johnson's Great Society, the country witnessed a renewed commitment to the rights of the individual regardless of race, sex, sexual orientation, or political stance. Also emphasized was the responsibility of the government to expand services to disadvantaged groups while at the same time recognizing their right to self-determination and participatory democracy. Such aspirations were manifested in consumer protection groups, civil rights legislation, the War on Poverty, anti-war demonstrations, equal opportunity legislation, and increased unionization.

Clearly inspired by the attitudes of the 1960's—erosion of faith in any authority, parents' included; the movements that view all consumers, including children, as having some right to determine what happens to them; and the generally increased awareness of civil rights and civil liberties (Keniston, 1977: 184).

Advocacy was identified as "intervention on behalf of children relative to those services and institutions that impinge on their lives" (Kahn, Kameron, & McGowan, 1972; 63). Its proposed targets were to be those systems that undermined the family unit. Based on the recognition of the increasing dependence of families on government services and entitlements (Advisory Committee on Child Development, 1976), advocates attempted to assist parents in coping with the health, education, and welfare systems, courts and correctional agencies. Thus, as summarized by Kahn, et. al. from their national baseline study:

Child advocacy represents a shift...whereas child welfare agencies and child protective services seek children's welfare by intervening in the parent-child relationship or by substituting for it, child advocacy intervenes into the larger social environment and those institutions that impinge on children's lives (1972: 67).
Internal Conflict in Child Advocacy. While confrontations by adversary groups like the businesses and traditional service organizations were expected by advocates, the bitter internal conflict regarding what constitutes the child's best interests was only hazily foreseen. Now it is quite evident that "child advocates fall into two obviously related groups whose goals both overlap and conflict: on the one hand there are those who are interested in protecting children's rights" (Farson, 1974: 9). In examining the child protection orientation of advocacy, one can identify a strong commitment to restrict government interference into the parent-child relationship. It is presumed that the child's best interests lie in a strengthened family unit. Particularly, advocates perceive the resurrection of yesterday's child savers through child abuse and neglect reporting laws that have the legal potential to terminate the parental rights of the poor. The arguments presented by this group are well-founded as witnessed by past history. As pointed out, one articulated purpose of the child abuse legislation was "to stabilize the home environment, to preserve the family life whenever possible" (Education Commission of the States, 1975: 9). As noted later, however, "Keeping the family unit intact is not the primary purpose of the legislation. Protection of the child takes first priority." The implication of this latter provision, for lower-class families in particular, becomes apparent when the ramifications of the loose and ambiguous definitions of child abuse and neglect are examined. As Katz adequately interprets this: "Child neglect occurs when the expectations of parenthood that are dominant in our culture are not met... (it) connotes a parent's conduct that results in a failure to provide for the child's needs as defined by the preferred values of the community" (1971: 22). Such definitions are handily filtered through a middle class value system beginning with reported community perceptions, with their subsequent enforcement through traditional socio-legal institutions personified by the judge who is granted broad discretion in interpreting the statutes. As some authors (Katz, 1971; Keniston, 1977) point out it is the visible poor because of their reliance on public service agencies, particularly, in this case, public health clinics, that brings them under the purview of society's scrutiny. It is their living conditions, their children's appearance; acting in the "best interests of the child" can impose their norms of morality and bring upon families...Most families accused of abuse and neglect are minority families with low incomes, often "one parent" (1977: 187). Sometimes however, this eagerness to protect the child may cloak punitive attempts to regulate "undesirable" adult behavior that has little to do with one's performance in the parental role. Thus, the family's receipt and management of
government assistance in the visits by the child protective worker without regard to the mother's constitutionally based claim that such accompanying "service" is unwanted and unnecessary (Burt, 1971). Finally, when parental rights are terminated in the child's best interests it usually means an exchange of masters. The result is even worse abuse and neglect in state institutions (James, 1975) or consignment to the "endless limbo of foster care" (Polier, 1977: 505).

While citing biased reporting laws and prosecution of poor parents, these advocates also accuse the present social service system, in particular, the child welfare system of contributory negligence. Charges of inaccessibility, fragmentation of services, inadequate performance, and lack of accountability are well founded. As one advocate put it: "Child welfare may mean foster homes of institutional care only, but not the generally conceded needed diversity of support to help families stay together" (Kahn, 1974: 6). Such advocates are committed to a comprehensive national policy for families that include the families right to an adequate income and to comprehensive support services from a responsive and integrated service delivery system (Advisory Committee on Child Development, 1976: 4-5). These are indeed necessary efforts in securing a child's right to economic security. Such singularly focused efforts, however, ignore a crucial complimentary dimension in a children's rights policy. The policy of parental rights are to be maintained. While several commentators (Gil, 1970; Brown & Daniels, 1968; Mulford & Cohen, 1968; Young, 1964; Sattin & Miller, 1971) cite the sometimes overwhelming pressures of poverty as a cause of child abuse, one cannot presume that if there were no poverty there would be no child abuse or neglect. Indeed, national indices support the fact that this learned response, rather than being an anomaly or a lower class phenomenon, is quite common. Even though "our society protects the privacy of large numbers of families, particularly those in the middle and upper classes... This does not mean that middle and upper class parents do not neglect (or abuse) their children" (Katz, 1971: 23-24). In spite of this and other difficulties in obtaining accurate national indices, Light (1973) estimated an annual rate of 200,000 to 500,000 cases of physical abuse in addition to 465,000 to 1,175,000 cases of severe neglect or sexual molestation. Proportionately, this means "approximately one child in every hundred in America is physically abused, sexually molested, or severely neglected" (Light, 1973: 567). As Gil (1970), Bakan (1971), and Walters (1975) argue, the physical and sexual abuse of children is the "logical outgrowth" of a society that incorporates physical force as a method for rearing and controlling an extremely
little valued part of our population. As Steele suggests: "abusing parents are characterized by the implementation of the culturally accepted goal (in "civilizing" the child) and...this style of parental behavior...can be considered "culture bound" in the sense that it is widespread and is passed from one generation to the next as a socially useful pattern" (1968: 453). It has already been documented how our culture and history, beginning with our Judeo-Christian heritage, sanctions the harsh and chattel-like treatment of children. Even with a policy of social entitlements for the family, the child is still legally considered to be in the care of his parents or the care of the state, and not as belonging to himself. Thus, legally, parental care could be exercised in the form of slapping, yanking, and choosing not to "spare the rod and spoil the child."

Given then, our cultural predisposition to violence, the acceptable use of physical force in our child rearing practices, and the powerless position consigned to children in relation to adults, one can expect the incidence of child abuse and neglect to grow unless there is a reevaluation of what is being done in children's best interests. Children's advocates must begin with the premise that "human childhood provides a potential basis for exploitation..." (Gerzon, 1973: 64). The chief priority then is to change the powerless position of children in relationship to adult authorities. Gamson points out:

The greater the inverse relation between the amount of resources controlled and the amount of discontent among potential partisans, the freer the authorities are from influence. In short, they are most free when those with the most discontent have the least ability to influence (1968: 114).

According to Gamson's social psychological model of power, children's power can be viewed as their ability to exert influence on the decisions made by adult authorities. The basis of such influence or resource must "be controlled by the influencer...(also) he must be able to bring it to bear on authorities in interaction with them" (1968: 73). Continuing to operate on a policy of paternal benevolence and granting children social resources via their parents will not really increase the child's basis of influence. The previous examination of this policy indicated that the appointed protectors cannot be trusted to know and act in children's best interests. It has been clear throughout our history that protection without legal rights is only another form of absolute social control. Decisions
in Miranda v. State of Arizona (1965) where a suspected criminal was denied the rights of the accused and Lessard v. Schmidt (Wisconsin, 1972) that dealt with the unconstitutional commitment of the mentally ill, indicate the court's awareness that worse abuses will result unless an individual's Constitutional rights are guaranteed. Therefore, the critical factor in establishing a basis of influence for children is legal recognition of their Constitutional rights as citizens. The landmark decision of In re Gault (387 U.S. 1, 1967) is considered to be the keystone of the children's rights movement (U.S. News and World Report, 1974: 207). Gerald Gault, tried in the juvenile court, had been committed until his majority (6 years) for a crime (making lewd telephone calls) that for an adult would have resulted in a $5 to $55 fine and a maximum sentence of two months (Richette, 1969: 296-300). In protecting the youth's best interests, the Arizona juvenile court denied Gerald the following: (a) notice in writing of the charges against him; (b) the right to be represented by a lawyer; (c) guarantee of the right to cross examine hostile witnesses; (d) guarantee against self-incrimination (Richette, 1969: 299). In reviewing the decision, the U.S. Supreme Court ruled that "neither the fourteenth amendment nor the Bill of Rights is for adults alone;" a child is entitled to his rights of due process when his liberty is in jeopardy. While In re Gault was a milestone for the children's rights movement, it did not go far enough. In particular, In re Gault guaranteed the child independent representation by counsel only in criminal cases where he is in danger of incarceration (Kleinfeld, 1970; Fraser, 1976 a & b). It was not until 1977 in Kremens v. Bartley that the U.S. Supreme Court ruled that a child facing commitment to a mental institution was entitled to the same constitutional safeguards. Up to this time, some 38 states had laws supporting the parents' "right" to commit their child as a "voluntary" patient (Ferleger, 1977: 89). The Bartley court decision finally recognized that "because parents may at times be acting against the interest of their children," the constitutional guarantees possessed by all adults in civil-commitment proceedings extend also to juveniles" (Ferleger, 1977: 91).

In re Gault also did little in providing counsel when, instead of his liberty, the child's health (both emotional and physical) and his life were endangered (Fraser, 1976b: 21). In civil cases, that is divorce/custody, adoption, and abuse and neglect proceedings, the traditional guardian ad litem system is still employed on the presumption that the adult, be it claimant, defendant, or state, adequately represents the child's interests. Slowly, however, the child's emotional vulnerability to a break in the continuity of the psychological parent-child's relationship (Goldstein, Freud, Solnit,
began to be recognized. As guidelines for placement decisions in divorce proceedings, a few states now legally consider the child's need for individual representation. Regarding cases of child abuse and neglect, when proceedings are initiated under the Child Abuse Prevention and Treatment Act (1974), it is mandatory that the court appoint a guardian ad litem to represent the child (Education Commission of the States, 1975: 59). There are, however, few guidelines as to the qualifications of such persons and it is not a requirement that the guardian ad litem be an attorney (ECS, 1975; Fraser, 1976b).

In conclusion, children's rights advocates are attempting to develop carefully a complete children's rights policy on the basis of such Constitutional safeguards. On the one hand, there are advocates like John Holt or Richard Farson who think that all rights, privileges, and responsibilities of adult citizens should be extended to children. On the other, there are those like Marian Wright Edelman, director of the Children's Defense Fund, who believes that this is a narrow focus that does not consider the special needs of children. Developing a policy that incorporates these different gradations of children's rights is a long and difficult undertaking. There is consensus, however, that a child's right to counsel is critical in the children's rights movement. Not only is the right important in a legal context, since "without counsel, rights not only fail to be vindicated; they fail also to be created" (Kleinfeld, 1970: 324), it is important for its subtle but powerful social implications. This legal recognition of a child's right to be heard and voice his preferences implies that adults will at the very least have to listen to and hopefully talk with the child. Increased communication might then change the trust dimension and thus be reflected in the power relationship between the parent and the child. From the child's perspective, he/she is accorded greater influence over decisions that affect his/her life. From the adult perspective, there is an increased likelihood that control when implemented will be in the form of persuasion rather than physical constraint. Hopefully, such a commitment to protection of children's rights will move us in this direction—beyond the use of adult perceptions alone in deciding the best interests of children.
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