
A Brief History of Child Custody Issues Related to Abuse and Neglect

Children who came to America as indentured servants without parents were an important part of the story of the colonies' settlement. Although most children who emigrated to New England did so as part of a family, more than half of all persons arriving in the southern colonies were indentured servants and, according to historian Richard B. Morris, most of these were less than 19 years old. The average age was from 14 to 16, and the youngest was six.¹ Many were orphans or poor, thus their indentures were involuntary.

Involuntary apprenticeship was another source of immigrant child labor. In 1617 the Virginia Company asked London's lord mayor to send poor children to settle the colony. He authorized a charitable collection to grant five pounds apiece for equipment and passage; the children would apprentice until age 21 and afterward have 50 acres in the plantation.² This arrangement was initiated again in 1619 for "one hundred children out of the multitude that swarm in that place to be sent to Virginia."³

Authors' note: This chapter is condensed and adapted with permission from *From Father's Property to Children's Rights: The History of Child Custody* by Mary Ann Mason, copyright ©1994 Columbia University Press. We would recommend Dr. Mason's excellent book most highly to anyone wanting to learn more about the origins and development of contemporary child custody issues in the United States.

Children, like all settlers, did not survive long in deadly Virginia, and in 1622 London sent yet another 100 children, “being sensible of the great loss which [the plantation] lately susteyned [sic] by the barbarous cruelty of the savage people there.”⁴

Similarly, in New Netherland (later New York) the West India Company obtained several shiploads of poor and orphaned children from Amsterdam. One official asked for more children in 1658. “Please to continue sending others from time to time: but, if possible, none ought to come less than fifteen years of age and somewhat strong, as little profit is to be expected here without labor.”⁵

Other children were tricked into indentured servitude by “spiriter” who won a healthy profit for each child they could deliver to the colonies. By the mid-17th century, victims were being kidnapped and held prisoner until the ship sailed. One father obtained a warrant to search a ship for his 11-year-old son. The search found 11 children taken against their will.⁶ The spirit trade provoked public outrage and fear, and in 1664 Charles II’s attorney general established a central registry of all servants leaving for the colonies. Those caught spiriting were fiercely prosecuted.

Many children arrived in America with irregular indentures or none at all. Would-be masters had to go to court to set the terms of the indenture. Most common was the term set by the Virginia legislature: “Such persons as shall be imported, having no indenture or covenant, either men or women, if they be above sixteen years old shall serve four years, if under fifteen to serve till he or she shall be one and twenty years of age, and the courts to be judges of their ages.”⁷ Other colonies set age 18 or marriage as the end-date of indentures for girls. The law did not require masters to teach these children a trade, but rather put the children to whatever service they wished. When the indenture term ended, masters had to give the servant clothes and some provisions.⁸

Although most children were not forcibly imported to the New World without parents, separation from parents and forced labor were common in all the colonies. Many children lost both parents through death or abandonment. Many, if not most, did not stay in either parent’s custody until adulthood.⁹ Parents very often apprenticed or sent out their children to serve another family at around age 10. Illegitimate children were routinely separated from their mothers when weaned and bound out to a master. Slave children, about one-fifth of the entire child population by 1800, could be sold away from their parents at any time.

Following the first decades of intense immigration, children in New England and some mid-Atlantic colonies were most often involuntarily apprenticed when their parents couldn't or wouldn't care for them properly. Legal adoption did not yet exist and orphanages and child asylums were rare until the late 1700s. The child's settlement town was responsible for his or her welfare, and no town wanted such a burden unnecessarily.

Voluntary apprenticeships occurred when the parent or guardian made a court-approved agreement with a master. Courts treated disobedient and runaway apprentices harshly, extending their indentures from three to five times the number of days they were absent. Rewards were offered for runaway apprentices.

The Father: A Master's Rights

The harsh manner in which colonialists treated children reflected the English law tradition, to which colonial law was firmly tied. Courts frequently were asked to intervene into families on grounds of abuse or neglect, particularly in New England, but they often focused on labor-oriented neglect. Masters and fathers risked losing children if they failed to prepare them for a role in the labor economy. Parents also lost their children if they could not provide economic support. Such children were quickly sent into labor as apprentices in other households.

Children were crucial to the colonial labor force and were often employed like adult workers. Children were seen as economic producers; in the labor-hungry colonies, small hands could not be idle. A child's labor was a commodity that could be sold or hired out by fathers and assigned by masters. The mutual obligations of a master-servant relationship best describes the legal bonds between the man who held custody and the child, who held rights similar to those of an employee. The household head, whether father or master of indentured servants, had complete rights to the children's labor and strict obligations for their training and education. The right to a child's labor was seen as recompense for the father's support. This mutuality was a relatively recent development. Ancient English tradition required only that the father control the child's education and religious training. The Elizabethan poor laws added the duty of maintenance and support.¹⁰ Mutuality was contrary to Roman law, where the father enjoyed absolute power, and in the early Roman republic, according to the historian Dionysius, "the atrocious

power of putting his children to death, and of selling them three times in an open market, was vested in the father.”¹¹

Colonial America expanded these mutual obligations beyond the English tradition. The duty to educate and provide religious training was enlarged to include vocational training. In New England, local governments insisted that parents train their children to be literate, religious, and economically productive citizens.

Colonial fathers had paramount rights to the association and labor of their children. Association included the right to send the child to live with another relative or family or to apprentice the child; the father did not need the mother’s consent for either action. By today’s standards, this marked legal emphasis on the father’s role to the mother’s exclusion may seem out of touch. However, the colonial father performed many tasks that today are shared or handled by the mother. Most 17th- and 18th-century fathers were farmers, the rest mostly artisans or tradesmen who worked at or near home. According to historian John Demos, fathers were not only a daily visible presence but took charge of their children’s education and moral supervision. Children turned to their fathers for guidance, not to their mothers.

The Mother: Legal Impotence

The mother was an assistant with few enforceable rights or responsibilities toward her children. Although mothers played a larger role with infants, and necessarily worked closer with their daughters, they were not the central figure in their children’s lives. Blackstone stated the English common law simply: the father had a natural right to his children and the mother “was entitled to no power [over her children], but only to reverence and respect.”¹² A free white mother could lose her children on account of poverty, divorce, widowhood, or illegitimacy. A slave mother’s child could be sold away at any moment.

The colonial mother also had few obligations toward her children. A New England mother only needed help the father teach the children to read, but Virginia women also helped with religious education.

Under English common law, a married woman could not own real or personal property. All that she brought to her marriage became her husband’s. She could not make a contract, execute a deed of gift or write a will unless her husband consented.¹³

Early in the new republic, judges in custody disputes relied more on English precedents than their own newly emerging case law. Fortunately

those precedents offered choices, letting judges be flexible. No known English court gave custody to a mother over an unfit father until 1774. In *Blisset's Case*, chancellor Lord Mansfield let a mother keep her six-year-old when the bankrupt father mistreated them both.¹⁴ Lord Mansfield put forth the innovative notion that “the public right to superintend the education of its citizens necessitated doing what appeared *best for the child* (our italics), notwithstanding the father’s natural right.” This case planted the germ of what became the best interest standard in America, though it established no lasting change at the time. On the other hand, *Rex v. DeManneville* (1804)¹⁵ exemplified the doctrine of a father’s paramount right to his children. When a mother ran away from an allegedly brutal father, Lord Ellenborough of the King’s Bench returned the child to her father, even though “she was an infant at the breast of the mother.”

Although individual children may have been loved and protected—even spoiled—the law principally enforced the labor relationship and paid little heed to their need for nurturing. The best interests of the child slowly developed as a legal concern in the new republic when, for a growing class of parents, child labor needs became less urgent, and children were assigned an emotional value, enhanced by the romanticization of mothers.

Child Custody Law in the New Republic, 1790–1890

The legal and social status of the child was slowly and relentlessly transformed during the first century of the republic. The colonial view of children as helping hands gave way to a view that children had interests of their own. Increasingly, these interests became identified with the nurturing mother. This significant shift in perspective changed the legal forms of custody in the 1800s. As a transitional period in child custody law, the century was filled with contradictions and inconsistencies. Women’s rights were suspect, yet motherly love was idealized. In the same state, one court might uphold the primacy of fathers’ rights and another would defend mothers as the natural guardians of young children. Although seen to need protection and nurturing, children were regularly apprenticed or sent to factories at age 10 or 11.

The modern legal arrangement of adoption was developed to meet the needs of children for family nurturing. Most changes favorable to children, though, were confined to private disputes over child custody. Children who became dependents of the state due to their parents’ death,

abandonment, or poverty did not fare as well, nor did slave children freed during the Civil War. Until the late 1800s most communities' guiding principle was to relieve the public of economic burdens rather than cater to a child's best interests. Poor law officials wielded almost unlimited custodial control with little legislative or court supervision. By 1900, many judges still recited the common law maxim that "the natural right is with the father, unless the father is somehow unfit."¹⁶

Early U.S. Cases

In the earliest cases, the child's best interest was associated with the mother's special capacity to guide and nurture. In 1809 in *Prather v. Prather*, the first published decision to defy the paramount rights of fathers, the court awarded the youngest child, a five-year-old girl, to the mother.¹⁷ The husband had turned out his wife and brought another woman into the house in open adultery. Incensed by the injustice to the mother, the South Carolina court described her as "a prudent, discreet and virtuous woman." The court, in fear of defying the weight of common law, passed the responsibility of strictly enforcing it to higher courts. "The Court is apprised that it is treading on new and dangerous grounds, but feels a consolation in the reflection that if it errs, there is a tribunal wherein the error can be redressed."¹⁸

In 1842 New York's highest court, in *Mercein v. People*, replaced the common law tradition of paternal authority with a natural law argument in favor of mothers, stating: "By the law of nature, the father has no paramount right to the custody of his child."¹⁹ The court gave custody of a sickly three-year-old daughter to her mother, explaining that the law of nature gave her "an attachment for her infant offspring which no other relative will be likely to possess in an equal degree, and where no sufficient reasons exist for depriving her of the care and nurture of her child, it would not be a proper exercise of discretion in any court to violate the law of nature in this respect."²⁰

In a vivid illustration of the seesaw-like ambivalence of 19th-century courts, the state's supreme court two years later delivered custody of the little girl to her father. This court rebuked the natural rights reasoning, claiming that father's right should prevail because "it has not been denied that he is the legal head of the whole family, wife and children inclusive; and I have heard it urged from no quarter that he should be brought under subjection to a household democracy. All will agree, I

apprehend, that such a measure would extend the right of suffrage too far.”²¹ Joining in the opinion, a second judge invoked divine law. “It is possible,” he wrote, “that our laws relating to the rights and duties of husband and wife have not kept pace with the progress of civilization . . . But I will not enquire what the law ought to be . . . I will, however, venture the remark . . . that human laws cannot be very far out of the way when they are in accordance with the law of God.”²²

In 1850, 80% of the population lived rurally, and most remained so by century’s end.²³ Child labor was an economic necessity in those areas. Nevertheless, courts across the country, from the deep rural south to pioneering California, increasingly showed concern for the child’s welfare and endorsed the mother’s nurturing nature.

My own explanation of why even rural judges shared this growing solicitude is the development of a uniform culture based on mass circulation magazines and books. Between 1784 and 1860, at least 100 new magazines appeared, most devoted to women’s interests.²⁴ Communication among the colonies had been limited, so cultural differences and social values developed independently. But the newly united republic began to develop a mass middle-class culture extending from fashion to child raising, aimed at the literate urban housewife with the leisure time to read. Literate women in small towns and farms read the magazines as well. Judges were certainly part of this new middle-class elite, even in small rural towns.

Maria Barbour, age nine, was indentured to Benjamin Gates in 1865 by her mother, a widow. The indenture was set to last until Maria turned 18, but after three years her mother, in a better position, asked to have the child returned. She claimed the indenture contract was technically defective, citing defects in its execution. Dismissing the defects, the judge found that the mother had indeed severed her right to legal custody, but nonetheless found her the better custodian, “because of all the affection she must feel for her offspring.”²⁵ The court returned the child to her mother, claiming, “The laws of nature have given her an attachment for her infant offspring which no relative will be likely to possess in equal degree.” In this decision the court rejected well-established indenture law, under which the child had no rights and the contracting parent could sue only on the terms of the contract.²⁶ The judge looked to the child’s interests rather than the imperfections of the contract, and determined on the basis of natural law that the child’s nurturing was best performed by her mother.

In those times, women fought for property rights that had been held exclusively by their husbands. These included the rights to control their

own wages and inheritance, to equal control of their children's custody—and complete control when their husbands died—as well as an equal right to make indenture contracts that bound their children.

Thus, a fundamental ideological conflict developed between a strategy seeking legal and civil rights for women directly, and a judicial deference to the cult of motherhood that gave women limited benefits only in relation to their children's interests. By 1887, 30 states had granted women rights to wages, property, litigation, and contracts, but few states expanded women's rights to their children.

By century's end, only nine states and the District of Columbia gave mothers the statutory right to equal guardianship.²⁷ Most men and even some women's rights advocates feared too many rights would tempt women to take their children and leave the family. The California legislature used just this argument to defeat an equal guardianship bill.²⁸ Many judges still recited the common law maxim that "the natural right is with the father, unless the father is somehow unfit."²⁹ However, the laws regarding bastardy, custody following divorce, testamentary guardianship, and voluntary and involuntary apprenticeship were fundamentally altered by the new attitude toward children.

In addition, the modern legal arrangement of adoption was developed to meet children's newly recognized needs for family nurturing. The common law emphasis on bloodlines connection had been the major barrier to legal adoption in England, but had long been permitted in countries with civil codes and different attitudes toward inheritance. Led by Massachusetts's landmark adoption law of 1851, by the end of the 19th century, virtually every state gave adopted children the same rights as birth children in a family. The spirit of equal opportunity enabled a new definition of family, based not on blood but on nurture.³⁰

The new adoption statutes usually included two elements: judges must deem the adoptive parents fit, and the natural parents, if alive, had to consent.³¹ Exceptions to the latter were made where, as in the New York statute, a father or mother "adjudged guilty of adultery or cruelty and who is, for either cause, divorced, or is adjudged to be an insane person or an habitual drunkard, or is judicially deprived of the custody of the child on account of cruelty or neglect."³²

The Courts

The courts increasingly awarded children to their mothers in custody disputes—not under the dangerous doctrine of women's rights but rather

under the newly developing rule of the best interests of the child. But such disputes were usually related to divorce or separation.

Since the beginning of the republic, judges had wielded individual discretion in all matters of family law. They established what historian Michael Grossberg terms a judicial patriarchy, where they used their own judgment to interpret English common law and their state's legislative mandates. They were supported in this by the English courts' increasing use of chancery courts to determine the welfare and property of minors under the doctrine of *parens patriae*. The English chancery courts had sometimes overridden common law provisions, which gave fathers paramount control, in order to protect children whose fathers were grossly immoral or heretical.³³

In America, judges gradually extended this equitable tradition to consider the interests of the children against those of their parents, even when there was not gross abuse. With slight regional differences, judges all over the growing nation shared the same emerging middle-class values about the family's role, the need for child nurturing, and the special moral and religious capacities of women as mothers.

Evolution of Best Interests Standard and Tender Years Doctrine

Torn between common law rights of the father and the child's best interests, judges eventually favored the best interests standard. For very young or female children, this became associated with the mother. Courts' tendency to award infants to their mothers became known as the Tender Years Doctrine. The almost universal exception occurred when the mother was considered unfit, usually on moral grounds.³⁴

Perhaps the greatest legal advance for children and their mothers (or at least for mothers with means of support) occurred with the transformation of bastardy laws. The common law definition of an illegitimate child as *filius nullius* gave way to legal recognition of the mother-child bond. Mothers frequently raised their illegitimate children, but had not been supported by the law. By 1900 most states declared the child a member of his or her mother's family, with a right to inherit from the mother.³⁵ The mother, in turn, gained what had been the father's prerogatives when parents were married.

Indenturing of minors was fast disappearing as the 19th century ended. Taking children from their families to live in a stranger's home was no longer approved. In apprenticeship disputes, judges began releasing

minors to their families if they considered it in the child's best interests. The concept of nurture also forced some courts to reject apprenticeship arrangements in favor of child welfare.

The changing demand for child labor also helped break the back of voluntary apprenticeship. Artisans and small tradesmen were being replaced by factories and mass production, and child labor was particularly suited to routine and repetitive tasks. The southern textile industry was based largely on child labor. From 1880 to 1910, manufacturers reported one-fourth of their workforce was under 16 years old, and many cases of child labor went unreported. Children of seven or eight commonly doffed spun cotton and performed casual labor.³⁶ By 1880 the Census Bureau estimated that 17% of children aged 10 to 15 worked outside the home. This ignored the children under 10 and those working in home production or on consignment from manufacturers.³⁷ Children still worked, perhaps in greater numbers and under worse conditions than before, but now they remained in the custody of their own parents; their employer had only limited control over them at the workplace and no obligation for their welfare.

“Placing Out”

Although voluntary apprenticeships waned, most involuntary apprenticeships changed legal form to “placing out” and became the primary custody arrangement for tens of thousands of abandoned and indigent children in the late 1800s. Most were placed in rural homes where their labor was exchanged for room, board, and education. Although custody and control remained with the association, and it could terminate the arrangement at any time,³⁸ the hope was that some children would be adopted by their placement family. In this sense, placing out attempted to straddle the line between the economic arrangement of involuntary apprenticeship and the child-nurturing focus of adoption.

Charles Loring Brace, founder of the New York Children's Aid Society in 1853, introduced the placing out system in America as a good, cheaper alternative to the asylum, almshouse, or house of correction. In its first 25 years, the society placed 40,000 homeless or destitute children from New York City into farm homes.³⁹ Other associations placed untold thousands as well. After an initial screening to weed out “the mentally defective, diseased and incorrigibles,” children ages five to 17 were sent to rural communities in East Coast, western, and southern states. Farm families quickly took the children, but the experience was

not always positive and many critics denounced the system. Lyman P. Alden, school superintendent in Coldwater, Michigan, observed that

It is well known by all who have had charge of the binding out of children that the great majority of those who are applying for children over nine years old are looking for cheap help; and while many, even of this class, treat their apprentices with fairness, and furnish them a comfortable home, a much larger number of applicants do not intend to pay a quid pro quo, but expect to make a handsome profit on the child's service.⁴⁰

The State as Superparent: The Progressive Era, 1890–1920

The rich cannot say to the lowly, “You are poor and have many children. I am rich and have none. You are unlearned and live in a cabin. I am learned and live in a mansion. Let the State take one of your children and give it a better home with me. I will rear it better than you can.” The deepest, the tenderest, the most unswerving and unfaltering thing on earth is the love of a mother for her child. The love of a good mother is the holiest thing this side of heaven. The natural ties of motherhood are not to be destroyed or disregarded save for some sound reason. Even a sinning and erring woman still clings to the child of her shame, and though bartering her own honor, will rarely fail to fight for that of her daughter.⁴¹

Thus Georgia's appellate court reversed a trial court that had awarded custody of Mrs. Moore's three illegitimate children to an orphanage. The trial court had relied on a Georgia statute that any child under 12 could be removed to an orphan asylum or other charitable institution if it “is being reared up under immoral obscene or indecent influences likely to degrade its moral character and devote it to a vicious life.” Without questioning the statute, the appeals court said the trial court had failed to prove Mrs. Moore was “of an immoral character, unsuitable and unable to rear the children.”⁴²

In this case, the court struggled with two powerful, sometimes contradictory principles. One was a belief in the importance of preserving the family, no matter how poor. The other was the conviction that the state must intervene to protect children from abusive, neglectful, or immoral parents. These two principles had a profound effect on child custody decisions in the first two decades of the 20th century. They

prompted state courts like Georgia's to abandon the common law doctrine allowing the exploitation of children. Instead, both courts and legislatures formulated new rules aimed at protecting children.

For example, the concept of the child's best interest was extended to poor children. In a radical departure from traditional poor law principles, the state tentatively committed to allow poor but worthy mothers to keep custody of their children. Poor children who would have been bound out to a master in return for labor in the colonial years, and placed out to labor on a midwestern farm or sent to an almshouse or orphan asylum in the 19th century, were now more frequently supported in their mothers' homes. (Rarely was support provided if the father were present.) If that failed, or if they had no suitable parent, children were increasingly placed in a foster home, which was considered a substitute family rather than an orphanage, or put up for adoption by a new family.

State legislatures also acted to protect children in other important ways during this era, adopting a huge amount of child welfare legislation. The hours and the workplaces where children could labor were closely regulated; other laws dictated the establishment of public schools and required attendance of all children. A juvenile court system was put in place in many states. State legislatures diluted judicial discretion in dealing with the welfare of children, confining it within an elaborate statutory scheme.

At the same time, the divorce rate was exploding, and both courts and legislatures were concerned about the impact this social change might have on the future of the family. Legislatures passed strict laws, often buttressed with severe criminal penalties, to compel child support from all fathers, including those who lost their children by judicial decree following divorce. Overall, both courts and legislators paid far less deference to fathers, virtually ignoring their common law rights to the custody and control of their children.

In effect, the state became the superparent, generous and nurturing, but judgmental. It made the final decisions on how children should be raised and with whom they should live. In assuming this role, the state finally shattered the common law relationship between parents and children. Child labor legislation now severely restricted the right to the child's services. The right to custody, once absolute, could now be severed if the father or mother misused their authority in an abusive or neglectful manner. Finally, the obligation to educate passed from the parent to the state. The public school teacher, not the father or mother, would control the child's education and a good deal of the child's socialization.

Child Saving and Childsavers

The new concern for the welfare of the children was part of the larger, broader reformist movement placed historically in the Progressive era. During this era, states intruded into the privacy of families in a manner not seen since the selectmen of Massachusetts visited homes to determine whether children were behaving well and receiving religious and civic training. Childsavers, as they were called, were originally a large and very active coalition of volunteer philanthropists, Women's Club members, and assorted urban-based professionals who rallied against the mistreatment of poor and abused children toward the end of the 19th century. In the Progressive era, the child-saving movement was increasingly dominated by the developing profession of social work. In contrast to the volunteer child savers, social workers were trained, paid, and career minded. They focused more on providing services to support a child within his or her family, rather than simply removing a child from a cruel environment.

Julia Lathrop, the first chief of the Children's Bureau, created by President Howard Taft in 1912, had been the first woman member of the Illinois Board of Public Charities in 1892, the organization responsible for orphaned, abandoned, and neglected children, and in 1899 helped found the Chicago Juvenile Court, the first in the country and the model for the nation. Thereafter, her career soared with the rapidly evolving child welfare movement. Her commitment to children was deeply felt. "Sooner or later," she declared, "as we choose, by our interest, or its lack, the child will win."⁴³

She was a member of a dedicated group referred to as social feminists, who turned away from the 19th-century feminists' focus on individual property and civil rights for middle-class women, and instead focused their attention on poor children and their families.

By supporting rather than challenging the family and the role of women within it, social feminists achieved important political gains, including suffrage and equal custodial rights for mothers—goals that had eluded their more individualistic 19th-century predecessors. Most of the leading social feminists of the early 20th century supported women's suffrage, but based their argument on family welfare rather than individual rights. The nonthreatening argument that the vote was a means for mothers to promote the family, not their own political interests, proved to be the winning strategy in persuading all-male legislatures to grant female suffrage.

This same argument in favor of mothers promoting their children's interests permitted the passage of legislation giving mothers equal custody rights to fathers—a victory not attainable by the first wave of feminists, who fought for equal rights for married women. Social feminists, allied with philanthropists, juvenile court advocates, and other reform-minded groups, pushed for a broad program of child protection and support legislation that often benefited their mothers as well. Legislative emphasis on children's rights rather than those of their parents was a winning approach. As Florence Kelley remarked in regard to the common law as interpreted by Blackstone, “nowhere in the Commentaries is there a hint that the common law regarded the child as an individual with a distinctive legal status.” However, she believed that the Progressive era began by recognizing “the child's welfare as a direct object of legislation.”⁴⁴

Social feminists promoted family interests while redefining the relationship between children, parents, and the state. They abandoned the 19th-century policy of family privacy, which effectively gave parents or, most often, fathers, the right to complete control of their children, as long as they supported them. Instead, the social work profession recognized the role of the state as parent as well. In fact, the state, as represented by its agents, child welfare workers, became the superparent, determining the conditions under which natural parents could raise their children. Critics of the newly developing “helping profession” of social work claim that social workers set out to undermine the family culture of poor immigrants and replace it with their own middle-class values. Historian Christopher Lasch maintains that social workers, through children's aid societies, juvenile courts, and family visits, “sought to counteract the widespread ‘lack of wisdom and understanding on the part of parents, teachers, and others,’ while reassuring the mother who feared, with good reason, that the social worker meant to take her place in the home.”⁴⁵

Still, the new social work philosophy emphasized maintaining poor children in their families, if fit. This was probably the most significant shift in American poor law philosophy on child custody since the Elizabethan Poor Laws of 1601 mandated the apprenticing of poor, idle, or vagrant children.⁴⁶ Propelling this was the emerging belief that poverty did not necessarily reflect moral weakness; social conditions could force otherwise worthy people into poverty. Much of the debate in the Progressive era focused on how to support parents so they would not be forced to give up their children. The first White House Conference on

the Care of Dependent Children, called by President Theodore Roosevelt in 1909, offered this agenda:

Should children of parents of worthy character, but suffering from temporary misfortune, and the children of widows of worthy character and reasonable efficiency, be kept with their parents—aid being given to parents to enable them to maintain suitable homes for the rearing of the children? Should the breaking of a home be permitted for reasons of poverty, or only for reasons of inefficiency or immorality?⁴⁷

Reformers quickly took the position that poverty alone did not justify removing a child from his or her parents; only severe physical abuse or neglect or lack of moral fitness provided sufficient grounds.

During the Progressive era, for the first time the state took seriously its role as child protector. All states wrote legislation defining abuse and neglect and sanctioning child removal. Theoretically the state had been permitted to intervene to protect children under the English common law doctrine of *parens patriae* as defined in the 17th-century *Blisset's Case*; in reality family privacy and parental autonomy had held sway. The state was represented by local poor law officials who were ill-equipped to handle even abandoned and orphaned children. They had little energy left for children in families.

The stirrings of child protection grew out of work for the protection of animals. Starting in 1874 with the New York Society for the Prevention of Cruelty to Children, such societies sprang up about the country. Popularly called the Cruelty, at first they were staffed by volunteers whose mission was to look after poor children in the streets and bring those who were ill-used or hired to beg before the courts.⁴⁸ Later, most Cruelties, staffed with paid social workers, supervised troubled families and provided them a variety of services.

After the initiation of the first juvenile court in 1899, cases of dependent, neglected, and delinquent children under 16 soon moved to the new courts. Loosely written laws gave much discretion to juvenile court judges as protectors of children, including the power to remove children and make them wards of the state. In 1915 the Cook County Juvenile Court handled 1,886 cases of dependency—which included parental neglect, abuse, and abandonment—compared with 3,202 charges of delinquency.⁴⁹ Criminal abuse complaints against parents were handled in the criminal courts.

Ironically, although Cruelties began in reaction to cruel treatment of children by parents, children were rarely removed because of physical

cruelty. Nor were their parents punished. Acceptance of corporal punishment in the name, at least, of discipline was such that laws were more likely to protect parents than punish them.

Furthermore, according to historian Elizabeth Pleck, the anticruelty societies worked more on investigating complaints against drunken and neglectful parents than on rescuing physically abused children. Of the Pennsylvania Society to Protect Children from Cruelty, Fleck found that from 1878 to 1935 only 12% of its cases concerned child cruelty. The society intervened, she claims, mostly in immigrant poor and working-class homes. The occasional investigation into a middle-class home was handled gently, with slight risk of removal.⁵⁰

By the end of the era, only five western states (California, Montana, North Dakota, Oklahoma, and South Dakota) included excessive use of parental authority as a reason for removing a child. Eighteen states defended parents' rights to use physical discipline, and nine excused them from murder if death occurred while lawfully correcting the child. (If excess force was used, manslaughter could be charged.) South Carolina apparently even defended the use of knives in discipline. "Provisions on killing by stabbing do not apply to a person, who in chastising or correcting a child chances to commit manslaughter without intending to do so."⁵¹ South Dakota presented a curious hybrid:

Abuse of parental authority subject to judicial cognizance in civil action brought by child, relative, or office of poor. Child may be freed from dominion of parent. Homicide excusable when committed by accident or misfortune in lawfully correcting child, with usual and ordinary caution, and without unlawful intent.⁵²

More often, neglect rather than abuse prompted intervention and sometimes removal of children during the Progressive era. Neglect included parental incompetence, not properly caring for the needs of a child, and parental unfitnes, usually immoral behavior or drunkenness.

Neglect based on parental incompetence, the most common ground for removal, was most problematic for Progressive reformers and the courts. Parents who could not properly clothe and feed their children were most often victims of poverty, yet the new view of child nurture was that poverty alone should not be the basis for the removal of a child. At the same time, public and private support of poor parents was often inadequate for the basic obligations of parenting. Courts struggled to reconcile this new doctrine rejecting poverty as the ground for removal with the fact that children were indeed neglected when their parents were extremely poor.

Child Placement

What happened to children when they were removed from their families because of abuse or neglect or abandoned by their parents through illness or inability to support? They were often removed temporarily and then returned home. For many children, this became a familiar pattern. The Cruelty often sponsored temporary shelters and churches and other charities sponsored orphan asylums. There was, however, a steady move toward placing children in homes. With the Progressive focus on family as the best institution for raising children, placing out was widely adopted and modified by the proliferating children's home societies.

Adoption was the hoped-for goal of a child placed out. By the Progressive era, it was clear that few orphaned and neglected children would be adopted. Most adoptive parents preferred healthy children under four years of age. Strict adoption laws in most states meant birth parents kept their rights unless convicted of abuse or neglect (a rare event), and both parents had to consent for the child to be adopted. Courts exercised wide discretionary powers in considering the adopting parents' race, sex, age, wealth, and religion.⁵³

For most dependent or neglected children, a family situation could only be achieved by placing out. As reformers passed laws restricting the use of children in factories and as street peddlers, children's aid societies were sending them to hard labor on faraway farms in western states. Such children were seldom well supervised, and agencies frequently lost contact with placement parents. Newly organized children's home societies sought to end child labor exploitation, using placing out to meet families' emotional rather than economic needs. These homes came to be known as foster homes. A popular women's magazine, the *Delineator*, campaigned for home placement in the early 1900s.

Despite such campaigns, free placements could not be found for many children, compelling children's home societies to consider paid placements. Homer Folks, a major figure in child protection, advocated paying for children's board in families when necessary, the model for the contemporary foster care system. To the claim that there were more free home placements available than children to fill them, Folks replied,

It is true as regards healthy infants, and in some seasons of the year, for children evidently able to work. It is not true with regard to ordinary boys from four to eight or ten years of age, it is not true as regards delicate or unattractive children, or children who may be reclaimed by parents.⁵⁴

Initially paid placements or boarding out were opposed on grounds of cost and that they countered the spirit of charity. The children's home societies claimed that paying families was soulless and commercial. But the only alternative for children of the wrong age or sex, unattractive or beset with physical or emotional disabilities was orphan asylums. The above included most children, and orphanages continued to provide for the majority. In the 1923 census, the first accurate account of child placing, 64% of dependent and neglected children were still in orphan asylums, 23% were in free home placements, and 10% were in paid placements.⁵⁵ The number of adopted children was not reported.

In the Best Interests of the Child? 1960–1990

By the late 20th century, child custody law had permeated the casual discourse of everyday life; indeed, few households were untouched by a custody matter. A child born in 1990 had about a 50% chance of falling under court jurisdiction involving where and with whom the child would live. Unlike previous eras, in which custody involved orphans or neglected children, most custody matters resulted from the exploding divorce rate. The state increasingly intervened, sometimes removing children from their families, as the number of single-parent families below the poverty line swelled.⁵⁶

Divorce, increasing poverty, and a startling upsurge in illegitimacy once again rearranged the tentative symmetry between mother, father, and the state. State legislatures and courts weakened divorcing mothers' claims to child custody, systematically wiping out the maternal preference or tender years doctrine and leaving only the vague best interests of the child standard. Procedures changed as well; mothers, fathers, and the court called expert witnesses, usually mental health professionals, to help the court choose between legally equal adults, and mediation was increasingly an alternative. Children remained the silent party in custody disputes, rarely given voice until adolescence. Some states did provide for the appointment of a child advocate in custody disputes. The duty of the advocate was to speak for what he or she determined to be the child's best interests.

The state took an ever more active role as superparent, providing more economic support while dictating stricter standards of behavior to mostly poor families. As single-parent poor families grew rapidly, the state no longer distinguished between worthy and unworthy mothers as a criteria for support; however, its social service arm vigilantly supervised

the behavior of those it supported, with the threat of removal and ultimately termination of parental rights.

New custodial issues forced a redefinition of parenthood. Many nonbiological parents with no legal rights to custody and control played central nurturing roles for the children who lived in their homes. Foster homes became the state's preferred choice for its dependent children, but foster parents, who sometimes raised the children until adulthood, held the legal status of a vendor under contract. Finally, new reproductive technology tested the legal definitions of *mother* and *father*.

Removal of Children and Termination of Parental Rights

By the second half of the 20th century, child protection organizations initiated by the Progressive era's volunteer child savers had become large publicly funded bureaucracies staffed by social workers. The third wave of feminists showed little interest in child welfare, instead focusing on equal opportunity for women outside the family. In all fairness, little room existed for volunteers in the well-organized world of child protection. The state as *parens patriae* had almost completely assumed the role of child protector, intervening in families to supervise conduct toward their children and, often, to remove them temporarily or permanently. Following an adjudication of abuse, neglect, or dependency (parents unable or unwilling to care for the child), the court appointed a temporary or permanent guardian who could be an individual, a state agency, or a private institution. The guardian was responsible for the child's well-being, but this did not involve terminating all parental rights nor necessarily a transfer of custody. Sometimes the state would claim custody and place the child in a foster home. More often, the child would be returned home under the guardian's supervision. In both circumstances, the natural parents still claimed residual rights and obligations, including visitation, the right to refuse adoption, and the duty to support. Ultimately, if the child was removed from the family for a lengthy time, the state determined whether to terminate parental rights.

The balance between the state as child protector and parents' rights to custody and control tilted toward the state. The state intervened at an unprecedented rate, providing support and sometimes removing children when the support could not, in the state's opinion, cure the families' problems. Publicly supported child protection agencies still enjoyed some autonomy, but federal control grew, exacted by Supreme Court decisions governing removal and termination of parental rights, and by laws mandating uniform requirements in return for federal funds.

Perhaps the greatest federal contribution to child protection, mandatory reporting began in 1974 with passage of the Child Abuse Prevention and Treatment Act.⁵⁷ This act offered funds to states that required their medical professionals, educators, social and childcare workers, and police to report suspected physical and sexual abuse, physical neglect, and emotional maltreatment. Failure to report triggered civil or criminal penalties. The general public was also encouraged, but not required, to report suspicion of child abuse. Many states already had such laws; most others followed suit.

The effects were immediate and dramatic. In 1963, about 150,000 children had come to the attention of public authorities; by 1982, it soared to 1,300,000. Social service organizations increasingly intervened in custodial matters; removing children and terminating parental rights also became more common. After thorough screening of child protective agency reports, more than 400,000 families came under home supervision.⁵⁸

Responding to this rapid rise of intervention into private homes, parents' rights advocates and critics of child protection philosophy questioned the state's procedures. How were agencies defining abuse and neglect? Were definitions based on an ethnocentric vision of middle-class family life? Was foster care in the best interests of the children?⁵⁹ Were mothers on Aid to Families with Dependent Children (AFDC) getting unfair scrutiny while richer families escaped the attention of child protection agencies? And was the basic right of parenthood being terminated without due process?

At the core was the fundamental question of what constituted neglect and abuse. Severe physical abuse certainly existed in broken bones and serious bruises, but other manifestations of abuse and neglect were more difficult to measure.

Meanwhile, a new category of abuse made a powerful entrance in the 1980s. Child sexual abuse, unknown in previous abuse and neglect statutes, became prominent in child removal allegations. The states rewrote the laws to include this category. Reports increased dramatically, but whether the reporting requirements had uncovered abuse that had always existed, or a new and real upsurge, was unknown. Child sexual abuse allegations differed from neglect, or even many physical abuse complaints, in that criminal convictions were sought even when the offender was a parent. Even if a jury could not convict beyond a reasonable doubt, a civil action could mandate removal for the child's safety. Criminal and civil trials of sexual abuse were notoriously difficult to pursue because the child was often the only witness, and frequently under age five with limited language skills. Physical evidence was often ambiguous

or nonexistent, so courts commonly relied on sexual abuse experts who interviewed the child. Courts viewed such testimony skeptically, but a sexual abuse allegation almost always triggered a child's removal, at least temporarily, from custody of the suspected adult. Sometimes this meant placing the child in the custody of social services.

Children of poor parents were more likely to be removed for reasons of abuse and neglect. The law no longer recognized poverty alone as a ground for removal, but several factors made poor parents more vulnerable to state intervention and removal. First, immigrant and minority parents were more likely to be poor, and some of their cultural styles were unacceptable to the white middle class. Second, parents on public assistance were scrutinized by social workers in a way other parents were not. Third, poverty was sometimes linked with patterns such as drug or alcohol abuse that could provoke child neglect or abuse.

To complaints about cultural bias, courts usually held up the state's action on the basis of the best interests of the child. A New York court, for example, rejected the argument that "impossible barriers" were created for poor black parents by making them comply with "bourgeois urban" customs in maintaining a visitation schedule, "To accept [this argument] would constitute regression to the period when the rights of parents were treated as absolute, and would negate the rights of children."⁶⁰

The Supreme Court addressed social service intrusiveness into the privacy of families receiving public assistance in 1971. The plaintiff, Barbara James, refused to allow a scheduled home visit by a caseworker as a condition of continuing AFDC payments for her son Maurice, age two. The mother refused the visit on Fourth Amendment grounds of unreasonable search and seizure.⁶¹ She introduced affidavits from 15 other AFDC recipients who complained of intrusive and unannounced visits by social workers. Writing for the majority, Justice Blackmun noted as an aside that Maurice showed evidence of a skull fracture, a dent in his head, and a possible rat bite. The Fourth Amendment did not cover the home visit because it was made by a caseworker, during working hours, with no forced entry or snooping, Blackmun stated, "The caseworker is not a sleuth but rather, we trust, is a friend to one in need."

The final and most dramatic step the state took as *parens patriae* was termination of parental rights. With this step, the state, as the social service agency, could retain guardianship and place the child in long-term foster care or, when possible, assign full custody and control to adoptive parents. Natural parents became legal nonentities, foregoing even visitation rights. Government agencies had to make

reasonable efforts to restore children to families after removal. But for many families, in the judgment of social workers, reunification was not possible.

What right did parents have to protect against such agency decisions? What kind of due process? Ultimately, the Supreme Court in *Santosky v. Kramer* considered the procedures affecting termination of parental rights.⁶² The Santosky family had pursued the case through several appeals. Petitioners John Santosky II and Annie Santosky were the natural parents of Tina and John III. In 1973, after incidents reflecting parental neglect, Kramer, commissioner of Ulster County's Department of Social Services, initiated a neglect proceeding and removed Tina from her home. Ten months later he placed John III with foster parents. Simultaneously, Annie Santosky bore a third child, Jed, who was immediately transferred to a foster home on grounds of imminent danger. Two more children were born later and remained in their parents' custody.

In October 1978 Kramer petitioned the Ulster County Family Court to terminate the Santoskys' parental rights of the three children. Acknowledging that the Santoskys had maintained contact with their children, the judge found those visits "at best superficial and devoid of any real emotional content." After deciding that the agency had made "diligent efforts" to encourage and strengthen the parental relationship," he concluded that the Santoskys were incapable, even with public assistance, of planning for the future of their children. Termination of parental rights was granted, and this decision was affirmed on two procedural appeals, but the U.S. Supreme Court disagreed:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.⁶³

The court insisted on a standard of clear and convincing evidence, demanding more than a preponderance of evidence but less than the beyond reasonable doubt required in criminal matters. In another case involving termination of parental rights, however, a divided court decided that parents do not have right to counsel in termination hearings because their physical liberty is not at stake.⁶⁴

Foster Care and Adoption

A child relinquished by parents, or removed through state intervention, was placed in one of three custodial situations: guardianship (usually with a relative), short- or long-term foster care, or adoption. Through the 19th century, guardianship was the only alternative to orphan asylums or binding out for children whose parents could not care for them. Guardianship probably would have been informal, with no court involvement. Adoption and foster care evolved in the second half of the 1800s in an effort to replace apprenticeships and orphanages with a family model.

Adoption was not an option for all children. As mentioned previously, child advocate Homer Folks argued that “delicate” and “unattractive” children or children that might be reclaimed by parents were harder to place. Older children were particularly difficult to place in the late 20th century because there was no longer a demand for their labor. Minority and mixed race children were also more difficult to place, as were children with emotional or physical disabilities.

Early in the 20th century, most unplaceable children would have gone to an institution run by a voluntary agency. By the second half of the century, the state had nearly usurped the role of private voluntary (usually religious) agencies, and the familial model of foster homes replaced the institutional model of orphanages. In addition to sheltering orphans or abandoned children, foster homes provided short-term care for children under the state’s protective jurisdiction who were returned to their parents when the home situation improved. Many parents also voluntarily placed their children in foster homes without court intervention. It was not always clear how voluntary these placements were, in the face of social worker persuasion.⁶⁶ In theory, foster homes were a temporary respite until return to family or adoption. In fact, many children spent nearly all of their childhood in the twilight zone of temporary foster care.

Foster families usually were licensed by the state, which regulated home size, number of children, and age of parents. The social service agency paid a monthly fee for each child, but kept legal responsibility for the child and could terminate the foster relationship. Like stepparents, foster parents had physical custody but no legal claim to the children. For many, this was extremely frustrating; they had developed familial ties—sometimes over many years—yet their foster children could be removed at will.

A class action suit filed to correct this inequity claimed that foster parents had a constitutionally protected interest in the children they cared for, which demanded a full hearing before children were removed from their care. The suit eventually reached the U.S. Supreme Court, but only words of solace were the result:

The importance of the familial relationship, to the individuals involved and the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in “promoting a way of life” through the instruction of children, as well from the fact of blood relationship. . . . For this reason we cannot dismiss the foster family as a mere collection of unrelated individuals.⁶⁷

Despite these words of solace, the court deemed New York’s procedures adequate and did not provide the sought relief. Nor did it say that foster parents had a constitutional right to continued custody of their foster children.

Summary

The history written by Mary Ann Mason reveals how views of what matters in determining the “best interests” of children at risk have changed over time—sometimes because of legal decisions and sometimes because of cultural shifts in priorities or ways of seeing what can be called our moral duty to children.

We learn from this work, too, that how we see what matters is influenced by the times in which we live and that we should always be aware of the sources of our attitudes so that we do not inadvertently harm children. We should be aware, too, as we’ll discuss in Chapter 8, of how political views influence our care of children, that is, whether we prioritize their care or allow, by distraction or dismissal, their issues and concerns to vanish from our consciousness.

Endnotes

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4. Quoted in Smith, *Colonists in Bondage*, 149.
5. *Documents Relative to the Colonial History of New York* (Albany, 1856–1887), 2:52, in Bremner, *Children and Youth in America*, 1–23.
6. Smith, *Colonists in Bondage*, 73.
7. *Virginia Statutes at Large*, 1:441–42, quoted in Bremner, *Children and Youth in America*, 1:23.
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12. William Blackstone, *Commentaries on the Law of England*, 3rd ed. (New York, 1900/1758), 1:453.
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17. 4 Desau. 33 (S.C. 1809).
18. *Ibid.*, 44.
19. *Mercein v. People ex rel. Barry* 25 Wend. 64,101 (N.Y.) 1840.
20. *Ibid.*, 104.
21. *People v. Mercein*, 3 Hill 399, 418 (N.Y.) 1842).
22. *Ibid.*, 422.
23. Ansley J. Coale and Melvin Zelnick, *New Estimate of Fertility and Population in the United States* (Princeton, NJ: Princeton University Press, 1963), 34–35.
24. Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (New York: Oxford University Press, 1980), 277.
25. *People v. Gates*, 57 Bard. 291, 296 (N.Y. 1869).
26. Many states had laws that allowed the child to reject a voluntary indenture, but only after the age of 14.
27. Michael Grossberg, *Governing the Hearth: Law and Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), 247.
28. Reta Dorr, *What Eight Million Women Want* (Boston: Small, Maynard & Company, 1910), 94.

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62. *Santosky v. Kramer*, 455 U.S. 745 (1982).

63. *Santosky v. Kramer*, 455 U.S. 745 (1982), at 754.

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