

From Cause to Profession: The Development of Children's Law and Practice

by Marvin Ventrell

This column is sponsored by the CBA Juvenile Law Section to apprise practitioners of substantive and procedural information concerning the field of juvenile law.

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About The Author:

This month's article was written by Marvin Ventrell, Executive Director of the National Association of Counsel for Children ("NACC"), headquartered in Denver. He is the author of numerous publications on children, families, and the law and is the recipient of the 2002 ABA National Child Advocacy Award. For more information on children and the law, contact the NACC at (888) 828-6222 or visit <http://www.naccchildlaw.org>, or the Colorado Office of the Child's Representative at (303) 860-1559; <http://www.coloradochildren.com>. See also the October 2002 issue of *The Colorado Lawyer*, featuring articles and resources on children and the law.



Over the past forty years, the practice of law for children developed from a cottage-age industry to a sophisticated legal specialty. This article, the first in this Juvenile Law specialty column, traces the evolution of a body of law regarding children and the practice of law that arose from it.

The term "child saving" is used to describe the work of late nineteenth century social reformers who sought to "save" poor, neglected, abandoned, or abused children from the effects of poverty brought on primarily by the industrial revolution.¹ Typically, the "saving" took the form of removal of children from their families and placement in reformatories. There, through an inculcation of white, Protestant, middle-class values, it was believed that these children could become proper citizens. Undoubtedly, some children avoided lives of destitution and death because of the child savers. At the same time, there is little evidence that most of these children lived healthier or happier lives; rather, they grew up without family and in harsh work environments that provided little opportunity for quality of life.

The child savers' paternalistic and authoritarian methods do not withstand the scrutiny of modern social progressive thought. They exercised unbridled discretion over the lives of children and families. Due process of law was ignored and perceived as an impediment to producing good outcomes. The child savers believed that they knew what was best for children and unilaterally implemented their own solutions.

Given the benefit of historical hindsight, it is easy to criticize the child sav-

ers as self-important and misguided. However, their genuine sympathy for the plight of children formed the foundation for the child advocacy movement in the twentieth century. The child savers were the early child advocates from which current child advocacy practice has grown. They identified and began a cause that has grown into a profession—a practice of law for children.

Attorneys and policy-makers seeking to define and understand the profession of children's law in the twenty-first century should be both students and critics of the child savers. Children's attorneys are moved to action by the same sympathy for children that motivated the child savers, yet the experience of over a century has taught that children deserve more than sympathy; they also deserve fair processes that respect their autonomy as individuals, family members, and rights-based citizens.

This article is the first in a new juvenile law column in *The Colorado Lawyer*. It examines the history and development of children's law and observes how the corresponding practice of law for children has grown from a laypersons' social movement to a professional legal discipline. This article, and future articles that appear in this column, will discuss complex issues and identify unresolved legal problems pertaining to children.

The Development Of Children's Law

This section covers the developing body of law that deals with issues affecting children.² Children occasionally have been represented by legal counsel throughout U.S. history. However, what could be called a practice of law for children did not begin until the 1960s and 1970s. A legal specialty requires a body of law at its base; until society and the law began to view children as having protectable legal interests, there was not much for lawyers to do. That body of law developed through a series of stages reflecting the changing view of children from parental and societal chattel to children as a protected underclass, and finally to children as rights-based citizens.³

Children as Property

The first English-language book on children and the law, *Law Both Ancient and Modern Relating to Infants*, published in 1697, described children as chattel.⁴ Children were parental property, and the property owner had the right to use, maltreat, or destroy that property. Because infancy was defined as the period of time before the right to live vested (typically birth to age seven), killing an infant, for example, could not be unlawful.⁵ In fact, infanticide was an acceptable practice and existed in parts of Europe until as late as the nineteenth century.⁶

The historic physical and sexual abuse of children at this time also is significant. Severe beating was seen as effective moral training. Sexual abuse was common practice.⁷ As property owners, fathers could lend daughters to guests for sexual purposes; sons also could be sent to the street to earn income through prostitution. As late as sixteenth century England, it was lawful for adults to engage in sexual intercourse with girls as young as ten.⁸

The English "Poor Laws"

With the emergence of an underclass of poor children, vagrancy, and crime attributed to the poor, and the post-Reformation decline of the church as an instrument of social welfare, Parliament passed the Poor Law Act of 1601.⁹ The Poor Laws were a series of statutes authorizing the removal of poor children from their parents at the discretion of overseer officials and the "bounding out" of children to local residents as apprentices until the age of majority. These laws are seen as the beginning of state-run welfare. The appointment of a "representative" for the child, called a guardian

ad litem ("GAL"), first appears in this context.¹⁰

Colonial America

The English Poor Laws were transplanted into the American colonies. Involuntary apprenticeship of poor children became an integral part of North American life throughout the colonies. For example, in eighteenth-century Virginia, children could be removed and apprenticed not only because of their poverty, but because their parents were not providing "good breeding."¹¹

House of Refuge and Reformatory Movement

In the nineteenth century, America's industrialized urban areas became populated with European and Asian immigrants. In response to the creation of an underclass of urban poor children, the House of Refuge Movement, known as the first great event in child welfare, was launched.¹²

The New York House of Refuge law, for example, provided a charter to the Society for the Reformation of Juvenile Delinquents, which authorized managers to take into the house children who were either convicted of crimes by authorities or committed as vagrants. Criminal conviction was not a condition for incarceration in the House of Refuge. Children could be committed by administrative order or application of their parents.¹³

In addition to Houses of Refuge, reformatories began to emerge toward the middle of the century. Reformatories were to be progressive institutions where, through civic and moral training, youth would be reformed by a surrogate parent. In reality, reformatories tended to be coercive, labor-intensive forms of incarceration. Houses of Refuge dominated the first half of the nineteenth century and reformatories, the last half. Each was characterized by an "ultimate parent" (*see below*) philosophy toward the poor, which ties the children's law movement to the Poor Laws.

Ex parte Crouse and Parens Patriae

The House of Refuge movement was validated by the judicial system. In a number of cases during this period, courts affirmed and authorized the practice of intervention into the lives of children through the English doctrine of *parens patriae*, which means "ultimate parent" or "parent of the country." The courts accepted the logic that society was entitled to take custody of a child without due process of law, regard-

less of his or her status as victim or offender, because of the state's authority and obligation to save its children from becoming criminal.

The 1839 Pennsylvania decision of *Ex parte Crouse*¹⁴ is thought to be the first case upholding the House of Refuge system. The child, Mary Ann Crouse, was committed to the Philadelphia House of Refuge by a justice of the peace warrant. The warrant, which was executed by Mary Ann's mother, essentially provided that it would be in Mary Ann's interests to be incarcerated in the House because she was "beyond her parents' control."

The reported case was an appeal from a denial of the father's subsequent *habeas corpus* petition for his daughter's return. The father argued that the law allowing commitment of children without a trial was unconstitutional. The court summarily rejected the father's argument on the basis that the House was not a prison (even though Mary Ann was not free to leave), and the child was there for her own reformation and not for punishment (even though Mary Ann probably was treated harshly). Thus, the court acknowledged and sanctioned the state's authority to intervene into the family as ultimate parent via the doctrine of *parens patriae*. *Ex parte Crouse* and the *parens patriae* doctrine became the cornerstones of juvenile proceedings for well over 100 years.

Emily and Mary Ellen

In the midst of the development of the state's *parens patriae* authority, two "modern" child protection cases were heard. Prior to these cases, proceedings initiated purely to protect children, contrasted with the more common vagrancy cases, were essentially unknown. The two cases, entitled *Emily* and *Mary Ellen*, never reached the appellate level to create child protection law. However, they did have significant long-term impacts.

The cases are strikingly similar; both involved Henry Bergh, the founder of the New York Society for Prevention of Cruelty to Animals. Both children were observed being severely beaten by their caretakers: Emily in 1871 and Mary Ellen in 1874. Using a writ *de homine replegiando* (similar to a writ of *habeas corpus*),¹⁵ Bergh was able to remove the girls and ultimately have them placed by the New York Special Sessions Court in safe care. It is not clear under what authority the court acted; it probably saw itself as exercising its equitable authority, having taken criminal jurisdiction over the abusers.¹⁶

The *Emily* and *Mary Ellen* cases also are important because they spawned the founding of the New York Society for the Prevention of Cruelty to Children. That state agency ultimately acquired police power and controlled the welfare of many of New York's abused and neglected children. By 1900, 161 similar societies existed in the United States.¹⁷

Founding of the Juvenile Court

The preceding history reaches to the end of the nineteenth century, just before the founding of the modern juvenile court system. The founding of the juvenile court was the culmination of the work of the child savers and the *parens patriae* movement. Its role was to be the ultimate parent for children in need, with nearly unbridled discretion to care for children without the obstacles of adult due process courts.

The first juvenile court opened on July 1, 1899, in Chicago. Although it is a mistake to assume that all subsequent juvenile courts copied the Illinois legislation, it did serve as a model. In less than twenty years, similar legislation was passed in

all but three states. Denver is thought to have established the second juvenile court in 1901, which was formed by the colorful Judge Benjamin Barr Lindsey.¹⁸

The juvenile court had authority both to handle delinquent behavior and to protect dependent children. However, early juvenile courts commingled those concepts and maintained the Refuge system under *parens patriae* authority. Despite a few cases in the vein of *Emily* and *Mary Ellen*, abused children were not the focus. The condition of poverty, which brought children into the Refuge system, continued as a *de facto* prerequisite for juvenile court intervention.

Delinquency and In re Gault

The juvenile court operated as an ultimate parent tribunal for more than half a century until it was transformed in 1967, when the U.S. Supreme Court struck down the unlimited *parens patriae* authority of the juvenile court in the context of delinquency in *In re Gault*.¹⁹ The era of the child saver was coming to an end. In its famous opinion, the Court reviewed the shortcomings of the juvenile child-saver process. It

stated that due process, not benevolent intentions, produced justice.

The Court reviewed over half a century of process-free benevolent proceedings and concluded that children often were unjustly brought into the system and treated unjustly once involved. Among the rights *Gault* created for juveniles were notice of charges, confrontation and cross-examination, prohibition against self-incrimination, and the right to legal counsel.

Although children in delinquency proceedings now had a constitutional right to legal counsel, it is critical to realize that *Gault* did not extend that right to dependent children nor did it dismantle the *parens patriae* authority of the dependency side of the court. The state still was free to continue "saving" dependent children under its *parens patriae* authority. At this point, the two components of the juvenile court, delinquency and dependency, historically commingled, begin to operate as clearly separate components. The dependency component, however, still primarily focused on controlling "pre-delinquent" children, remained relatively inactive until a medical discovery changed it.

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The Battered Child Syndrome

At about the same time the U.S. Supreme Court was restructuring the delinquency component of the juvenile court, a medical discovery would transform the child protection component of the court. Denver physician C. Henry Kempe and several of his colleagues wrote a landmark article, "The Battered Child Syndrome,"²⁰ which was published in the *Journal of the American Medical Association* in 1962. In this article, the authors exposed the reality that significant numbers of parents and caretakers batter their children—even to death.

"The Battered Child Syndrome" described a pattern of child abuse resulting in certain clinical conditions. It further established a medical and psychiatric model of the cause of child abuse. The article, marking the development of child abuse as a distinct academic subject, is generally regarded as one of the most significant events leading to professional and public awareness of the existence and magnitude of child abuse and neglect in the United States and throughout the world.

Rise of Child Protection Law and Policy

In response to "The Battered Child Syndrome," the U.S. Children's Bureau held a symposium on child abuse, which produced a recommendation for a model child abuse reporting law. With Colorado leading the way, forty-four states had adopted mandatory reporting laws by 1967. In 1974, Congress passed landmark legislation through the Child Abuse Prevention and Treatment Act ("CAPTA").²¹ CAPTA provides states with funding for the investigation and prevention of child maltreatment, conditioned on states' adoption of a mandatory reporting law. Under CAPTA, funding is conditioned on the appointment of a representative for the child.

Armed with a comprehensive awareness of child maltreatment and a federal statutory scheme that funded intervention, states began in the 1970s to develop social services and legal processes to protect abused children. These processes were founded on the principle of the "best interests of the child," and the legal processes began to fill the dependency side of the juvenile court. What began as part of the state's authority for controlling poor, vagrant children became an effective mechanism of true child protection. For the first time in U.S. legal history, children were being protected from maltreatment on a significant scale.

By 1980, some critics felt that the system had gone too far and that children were being unnecessarily removed or kept in foster care too long. In response, Congress passed the 1980 Adoption Assistance and Child Welfare Act ("Act").²² The Act was designed to remedy problems in the foster care system. It made federal funding for foster care dependent on certain reforms. In 1983, the Act was amended to include "reasonable efforts." That amendment allowed for special procedures to protect against unnecessary removal of the child from the home and to provide reunification strategies after removal.

In 1982, the U.S. Supreme Court announced the *Santosky v. Kramer*²³ decision. *Santosky* established parentage as a fundamental liberty interest, which required clear and convincing evidence of unfitness before parental rights were to be terminated. Congress then passed the Adoption and Safe Families Act of 1997 ("ASFA").²⁴ ASFA is intended to promote primacy of child safety and timely decisions while clarifying "reasonable efforts" and continuing family preservation. Child protection dependency law by this point had achieved a balance, addressing children's protective concerns based on serving children's best interests with a fundamental respect for family relationships.

The Development of Children's Lawyers

As a body of law regarding children developed, a corresponding practice of law evolved. Although the first child representative appeared during the period of the English Poor Laws in the form of a GAL, there is little evidence of what could be referred to as a "child's attorney" prior to the twentieth century.

The early child representatives were lay advocates of the child-saving movement. They were passionate advocates driven by a single-minded vision of what was best for children. They functioned without legal process or professional standards. Although they undoubtedly helped many children, their service was limited—and even harmful to some. This informal role changed with the development of the juvenile court, heightened by the advances made by the *Gault* case and the development of child protection laws.

Delinquency and child protection cases are now resolved in a rights-based legal process where unrepresented parties do not fair well. Today's juvenile system is premised on the notion that competing in-

dependent advocacy produces just results. Courts' decisions are only as good as the information on which they are based. Information comes to the court through the presentation of evidence by trained legal advocates. Litigants are not qualified to "speak for themselves" in this complex arena. Children, even more than adults, are unable to speak for themselves in court. They require legal counsel, particularly when considering that the outcomes of these proceedings involve basic human needs, family relationships, and safety decisions that can be a matter of life and death.

It is estimated that nationally, approximately two million juvenile delinquency cases are heard every year,²⁵ each requiring legal counsel pursuant to *Gault* and pertinent state law. Throughout the United States, there are more than two million reports of child maltreatment involving approximately three million children each year.²⁶ An estimated one million of those reports are substantiated.²⁷ Colorado alone substantiated over 14,000 cases of child maltreatment in 2000.²⁸ CAPTA mandates a representative for these children, and Colorado law requires that the representative be a licensed attorney.

At the same time, children's law has become an increasingly complex area of practice. Advocates must understand complex federal and state law and procedure. In addition, they must understand detailed institutional information regarding child welfare funding streams, treatment and placement options, medicine, mental health, and child development. All of this invariably takes place in a context of horrible abuse, neglect, and poverty.

Child advocacy in both the delinquency and dependency contexts has become a job for highly trained and skilled legal counsel. It is no longer enough to be a passionate advocate. The role of the modern child's attorney is that of a zealous, competent attorney who can provide the full benefit of legal counsel.²⁹

Conclusion

Children's law has arrived as a distinct legal specialty. Delinquency and dependency law courses exist in nearly every law school curriculum. Scholarship concerning the practice of children's law has blossomed, while national and state standards of practice have been developed. Continuing legal education training programs continue to grow. Moreover, the nation's first juvenile law attorney certification program

has begun.³⁰ Certifying lawyers as specialists is a sure sign of the coming of age of juvenile law.

What was once a cause has become a profession. However, the profession is still young and imperfect. Unresolved issues center on the reality that children are not simply small adults. As a result, assumptions and rules of lawyering are not automatically transferable to the child-law context. Some critics still do not see children as citizens vested with the right to counsel. Others accept the general proposition but are unwilling to fund the representation. During difficult financial times, it is occasionally even suggested the system substitute lay advocacy for lawyers, a return to the child-saver mentality, as a means of saving money.

Trickier still is the debate within the children's bar over the role of the child's attorney. Surprisingly, some hold a view that children's attorneys should not be required to see their clients before court as part of their duty to provide competent representation. That position, however untenable, is brought about by the fact that children's attorneys are so poorly compensated that

it is extraordinarily difficult for attorneys to provide proper legal service and survive economically.

The result is that while the practice of law for children has arrived as a legal specialty, there is much work to be done to make the system highly functional. Lawyers and policymakers have an obligation to create such a system and serve this unempowered client population. As those in the profession struggle to do so, lessons learned from the past should prove to be useful.

NOTES

1. Platt, *The Child Savers, The Invention of Delinquency* (Chicago, IL: University of Chicago Press, 1969 and 1977).

2. This section is adapted from Ventrell, "Evolution of the Dependency Component of the Juvenile Court," Vol. 49, No. 4, *Juvenile and Family Court Journal* 17 (1998).

3. Ventrell, "Preface" in Fellmeth, *Child Rights & Remedies: How the U.S. Legal System Affects Children* (Atlanta, GA: Clarity Press, 2002).

4. Juvenile court historian Sanford J. Fox believed this to be the first English book on law

relating to children. Bross and Freeman Michaels, eds., *Foundations of Child Advocacy* (Longmont, CO: Bookmakers Guild, Inc., 1987) at xi.

5. Ten Bensel, Rheinberger, and Radbill, "Children in a World of Violence: The Roots of Child Maltreatment," in Helfer, Kempe, and Krugman, eds., *The Battered Child*, 5th ed. (Chicago, IL: University of Chicago Press, 1997).

6. *Id.*

7. *Id.*

8. *Id.*

9. 43 Eliz. c. 2 (1601).

10. TenBroek, "California's Dual System of Family Law: Its Origin, Development and Present Status," 16 *Stan. L.Rev.* 257 (1964).

11. Rendleman, "Parens Patriae: From Chancery to the Juvenile Court," 23 *S. Carolina L.Rev.* 205 (1971).

12. Fox, "Juvenile Justice Reform: An Historical Perspective," 22 *Stan. L.Rev.* 1187 (1970).

13. *Id.*

14. *Crouse*, 4 Whart. 9 (Pa. 1839).

15. The story is often told, erroneously, that an animal rights theory was used in these cases.

16. Lazowitz and Shelman, "Before *Mary Ellen*," 20 *Child Abuse and Neglect: The International Journal* 235-37 (1996); Thomas, "Child Abuse and Neglect," 50 *N.C. L.Rev.* 293, 304 (1972).



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17. *Supra*, note 2 at 26.

18. Fox, "A Contribution to the History of the American Juvenile Court," Vol. 49, No. 4, *Juvenile and Family Court J.* 6 (1998); *see also* Rodgers, "Six of the Greatest: Benjamin Barr Lindsey," 22 *The Colorado Lawyer* 1427 (July 1993); Rodgers, "Judge Ben B. Lindsey and the Clan," 5 *The Colorado Lawyer* 1633 (Nov. 1976).

19. *Gault*, 387 U.S. 1 (1967).

20. Kempe *et al.*, "The Battered Child Syndrome," 181 *JAMA* 17 (1962).

21. Pub. L. 93-273; 42 U.S.C. § 5101.

22. Pub. L. 96-272; 42 U.S.C. § 420.

23. *Santosky*, 455 U.S. 745, 753 (1982).

24. Pub. L. 105-89.

25. Juvenile Court Statistics 1997 (2000), U.S. Dept. of Justice/Office of Juvenile Justice and Delinquency Prevention, Wash., D.C.

26. U.S. Dept. of Health and Human Services, Admin. on Children, Youth and Families, *Child Maltreatment 2000* 23-46 (Wash., D.C.: U.S. GPO, 2002).

27. *Id.*

28. *Id.* at 32-33.

29. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* (Chicago, IL: American Bar Association, 1993).

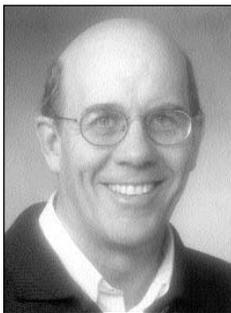
30. The National Association of Counsel for Children recently received funding from the U.S. Dept. of Health and Human Services and preliminary approval from the American Bar Association to pilot the nation's first Juvenile Law Attorney Certification program. At the completion of the program, an initial group of juvenile law attorneys will be certified as specialists in Juvenile Law—Child Welfare. For more information on the Juvenile Law Attorney Certification program, visit <http://www.naccchildlaw.org/training/certification.html>. n

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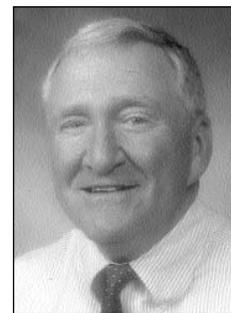
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