EVOLUTION OF THE DEPENDENCY COMPONENT OF THE JUVENILE COURT

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***Introduction*: Acknowledging a Dependency Court History**

On the occasion of the 100th anniversary of the founding of the Illinois Juvenile Court, the modern juvenile court is comprised of two distinct components: delinquency and dependency.[1] As we celebrate and evaluate the juvenile court at the end of the 20th century, it is appropriate that we focus, as we do, on the 1.7 million delinquency cases that occupy the court's time each year.[2] As part of that focus, it is appropriate to concern ourselves with the increasing number of delinquency cases which are waived into adult criminal court, and the increasingly punitive, criminalized delinquency court which many believe is losing its mission to treat children differently than adults. At the same time, however, we cannot assess the value of the juvenile court without an examination of dependency proceedings which serve to adjudicate the millions of reports of child abuse and neglect in this country each year.[3]

Like modern juvenile court legislation, the Illinois Juvenile Court Act of 1899, which served as the prototype for legislation throughout the country establishing special juvenile courts,[4] included both delinquent and dependent children in its jurisdictional mandate.[5] Unlike today's juvenile courts, however, the early courts had no separate process for dependent children. The focus of the early juvenile court was "saving" potentially criminal children from becoming criminal, irrespective of whether the condition which brought them to the court was delinquent conduct or dependent status. While it would be unfair to say that the focus of the juvenile court founders was in no way altruistic, it is a misunderstanding of history that the dependency component of the court was a movement to protect abused and neglected children. It is, therefore, somewhat anachronistic to attempt to study the dependency component of the early court.[6] No component, as we currently define dependency, existed.

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[1] Delinquency refers to "juvenile offending" or that component of the juvenile court which handles violations of the law committed by minors, such as theft or assault. The delinquency component of the court may also include "status offenses," such as truancy, running away or alcohol possession. Dependency refers to that portion of the juvenile court which handles the victimization of children through child abuse and neglect. Some jurisdictions refer to the dependency component as abuse and neglect, dependency and neglect, child welfare or child protection. Although not the focus of this article, it is important to note that the categorization of children as delinquent or dependent, offenders or victims, is to a significant degree arbitrary. We know, for example, that some children run away from home, that is they become status offenders, because they are physically or sexually abused. We also know that delinquent children suffer abuse and neglect at greater rates than the general population. *See* Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge,* JUV. FAM. CT. J., Vol. 43, No. 2, 5 (1992). *See also* Children's Defense Fund, *A Children's Defense Fund Budget: FY 1989*, 220-23 (1988) cited by Edwards, *supra*.

[2] M. SICKMUND, A. STAHL, T. FINNEGAN, H. SNYDER, R. POOLE, AND J. BUTTS, JUVENILE COURT STATISTICS 1995 (1998). [Hereinafter cited as Sickmund.]

[3] Howard A. Davidson of the ABA Center on Children and the Law reports "[i]n the past two decades, their [child maltreatment cases] increase in volume and the number of hearings associated with them have far surpassed juvenile delinquency proceedings. . . ." M. HELFER, R. KEMPE, AND R. KRUGMAN, THE BATTERED CHILD (1997). [Hereinafter cited as Helfer.]

[4] J. WATKINS, JR., THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS (1998); *But see* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970), arguing the Cook County court was not simply emulated by all other juvenile courts. Fox notes the Denver court, for example, under Judge Lindsey, was unique in its personalized and individualized treatment of juveniles.

[5] Act of Apr. 21 1899, [1899] Ill. Laws 131.

[6] Professor Sanford Fox argues that to classify children's behavior in 19th century and early juvenile court as delinquent or dependent is anachronistic because all children deemed appropriate for "saving" were viewed as one group. Fox, *supra* note 4 at 1192.

Yet the dependency system of the late 20th century did not just appear one day; it too has a history. Dependency jurisdiction did, in fact, exist in the early juvenile court, and while the founders may not have been the enlightened child protectors once suggested,[7] they did create a court system which was designed to treat children, not as small adult offenders, but as child victims less accountable for their condition and more entitled to rehabilitation than punishment.

Commentary on the dependency court frequently begins with the case of "Little Mary Ellen" toward the end of the 19th century, followed by society's recognition of the magnitude of child abuse and neglect in the 1960's, culminating in the federal Child Abuse Prevention and Treatment Act in 1974. No doubt, these were significant events leading to the current dependency system, but they do not explain the whole story. The newly created dependency system of the post-*Gault* era fit into the juvenile court structure because of the existing dependency jurisdiction and philosophy, which is traced to the founding of the juvenile court. The history of the dependency court is, in that way, the same history as the delinquency court and warrants scrutiny in the context of the development of child maltreatment law.

A thorough history of the development of dependency law has yet to be written[8] and this is not it. What follows is an attempt to summarize and give some context to existing research[9] on the development of a crucial piece of the juvenile court.[10]

Dependency law is complex. Child welfare law and policy are often controversial and politicized. Controversy over the policies of protecting children and preserving families dominates the dialogue. An informed dialogue on the operation of the dependency court is necessary to produce good outcomes for children and families. The anniversary of the court provides an opportunity to study history as a means of improving the dialogue.

Evolution of the Dependency Court

A. Dependency Court Jurisdiction

The dependency court is that part of the juvenile court which handles child maltreatment cases. A child who has been adjudicated maltreated or is under state custody is referred to as a dependent child.[11] Child maltreatment is the general term used to describe all forms of child

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[7] Commentary on the juvenile court, particularly of the early 20th century may have viewed the court and its 19th century advocates through rose colored glasses. *See e.g.*, Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909). Revisionists have commented that the founders ("child savers") may have been part of a less altruistic movement, and more of a puritanical regression to English and Colonial poor policy**.** *See e.g.*, Fox, *supra* note 4 at 1195; DiFonzo, *Deprived of "Fatal Liberty": The Rhetoric of Child Saving and the Reality of Juvenile Incarceration***,** 26 U. TOL. L. REV. 855 (1995); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. CAROLINA L. REV. 205 (1971).

[8] JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS app. (1997).

[9] This analysis relies heavily on the scholarship of Sanford J. Fox (Professor of Law, Boston College School of Law); Jean Koh Peters (Clinical Professor of Law, Yale University School of Law); John C. Watkins, Jr. (University of Alabama); Mason P. Thomas, Jr. (Professor of Public Law and Government, Institute of Government, University of North Carolina); and Douglas R. Rendleman (Professor of Law, University of Alabama School of Law).

[10] I would like to thank NACC Law Student Interns Laoise King and Margaret Hansen from the University of Denver College of Law for their assistance on this paper.

[11] *See* I. SAGATUN & L. EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 17 (1995). Sometimes dependency is used synonymously with neglect.

abuse and neglect which give rise to dependency court jurisdiction.[12] There is no one commonly accepted definition of "child abuse and neglect." The federal government defines child abuse and neglect in the Child Abuse Prevention and Treatment Act as "the physical and mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened."[13] Each state provides its own definition of child abuse and neglect.[14] Child maltreatment encompasses physical abuse, sexual abuse, neglect and emotional abuse, which can be defined as follows:

- **Physical Abuse**

Nonaccidental physical injury as a result of caretaker acts. Physical abuse frequently includes shaking, slapping, punching, beating, kicking, biting and burning.[15]

- **Sexual Abuse**

Involvement of dependent, developmentally immature children and adolescents in sexual activities which they do not fully comprehend and to which they are unable to give informed consent. Sexual abuse includes touching, fondling and penetration.[16]

- **Neglect**

Failure of caretakers to provide for a child's fundamental needs. Although neglect can include children's necessary emotional needs, neglect typically concerns adequate food, housing, clothing, medical care and education.[17]

- **Emotional / Psychological Abuse**

The habitual verbal harassment of a child by disparagement, criticism, threat and ridicule. Emotional or psychological abuse includes behavior which threatens or intimidates a child. It includes threats, name calling, belittling and shaming.[18]

The foregoing categories make up the jurisdiction of the modern juvenile dependency court. The dependency categories of the 1899 Illinois Juvenile Court were quite different.[19] The word "abuse" does not appear in the act, although there is mention of parental neglect and cruelty. While with a little ingenuity, modern categories of child abuse and neglect can be made to fit the 1899 categories, the jurisdictional dependency language of the early court suggests a different emphasis. Tracking the evolution of current dependency court jurisdiction begins with a review of the historical treatment of children.

B. Origins of Child Maltreatment and Protection

1. Maltreatment

There are approximately 1 million substantiated cases of child abuse and neglect

[12] *Id.*
[13] 42 U.S.C. § 5102 (1974).
[14] *See*, 1 NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT STATE STATUTES SERIES (1996) for a compilation of state maltreatment statutes.
[15] R. K. OATES, THE SPECTRUM OF CHILD ABUSE (1996). *See also* Sagatun & Edwards, *supra* note 10.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] The dependency categories of the 1899 court are discussed in detail in section F. 1, herein.

in the United States each year and millions more reported cases.[20] Child maltreatment is not a recent phenomenon, nor is it unique to certain nations and cultures.[21] It appears children have always been abused and neglected.[22] A number of studies of the history of child maltreatment have begun with the now familiar quote by psychohistorian Lloyd De Mause:

> The history of childhood is a nightmare from which we have only recently begun to awake. The further back in history one goes, the lower the level of child care and the more likely children are to be killed, abandoned, beaten, terrorized and abused.[23]

History seems to bear out De Mause. Evidence of infanticide (the practice of intentional killing of a child condoned by parents and society), for example, exists in much of ancient history. Infanticide had been an accepted procedure for disposing of undesirable children.[24] Robert Ten Bensel notes evidence of infanticide in 7000 BC with the finding of remains of infants interred in the walls at the city of Jericho. Siculus, a Greek historian of the first century, reported the putting to death of weak, infirm and those who lacked courage. A second century Greek physician instructed midwives to examine children and dispose of the unfit. The Roman Law of Twelve Tables prohibited the raising of defective children. Infanticide, which existed as late as the 19th century in parts of Europe, was justified in two ways. First, because children were considered parental "property," parents, as property owners, were entitled to destroy that property. Second, infancy (historically -- birth to age seven) was by definition a period of time before the right to live vested.[25]

Illegitimacy is another historical cause of child maltreatment. Many societies outlawed illegitimacy, and illegitimate children were ostracized, abandoned and killed.[26]

Child maltreatment must be defined in historical context. 20th century definitions of maltreatment include previously accepted child-rearing practices. Severe physical punishment of children is part of our history of the family. Severe beatings by parents and teachers have been considered effective moral training.[27] Likewise, that which clearly constitutes sexual abuse in 20th century America, may have been accepted practice. As fathers were property owners of their children, daughters could be lent to guests for sexual purposes, and sons and daughters could be sent to the streets to raise family income through prostitution. It was not unlawful to engage in sexual intercourse with a young girl in 16th century England unless she was under age ten.[28]

Given the acceptance of such harsh treatment of children historically, many of the incidents of maltreatment which justify intervention today, such as excessive corporal punishment, could not have been considered inappropriate.

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[20] U.S. Department of Health and Human Services, Children's Bureau, *Child Maltreatment 1996: Reports From the States to the National Child Abuse and Neglect Data System* (Washington, DC: U.S. Government Printing Office, 1998).
[21] Helfer, *supra* note 3.
[22] *Id.*
[23] DE MAUSE, THE HISTORY OF CHILDHOOD (1974).
[24] LANGER, HISTORY OF CHILDHOOD Q.(1973).
[25] Helfer, *supra* note 3.
[26] *Id.*
[27] Helfer, *supra* note 3.
[28] Helfer, *supra* note 3.

2. Protection

Pre-sixteenth century legal and humanitarian efforts to protect maltreated children were minimal. To the extent services or prohibitions against maltreatment were afforded children, the work was private or church driven. A review of some historic pro-child developments does reveal a gradual increase in child protection and children's rights. Ten Bensel[29] reports that esteem for the child slowly began to appear in the following historic events:

- The Bible commands, "Do not sin against the child" (Gen. 42:22).
- The laws of Solon, in 600 BC, required the commander of an army to protect and raise, at government expense, children of citizens killed in battle.
- Athens and Rome had orphan homes.
- The Christian church fathers in the fourth century, in line with the Judaic injunction "Thou shalt not kill," equated infanticide with murder. A succession of imperial edicts after that guaranteed a child's right to life.
- *Brephotrophia* were mentioned in 529 in the laws of Justinian.
- By the sixth century, the *brephotrophia* at Trier included a marble receptacle in which a child could be safely deposited.
- The first foundling hospital was established by Datheus, the archpriest of Milan in 787.
- The Hospital of the Holy Spirit was started by Pope Innocent III in 1066.
- The next major foundling hospital was established in Florence in 1444, and was known as the Hospital of the Innocents.
- The next major foundling hospital was started in Paris by the priest Vincent de Paul. In 1650, he became extremely concerned about the number of children being abandoned on the steps of the Cathedral of Notre Dame.

While these events may in some way represent the origins of modern child protection, it is difficult to argue that children's status, even as late as the 16th and 17th centuries, was such that children were meaningfully protected from maltreatment. Certainly the family's autonomy to do essentially as it saw fit with its children was untouched. The first direct link with juvenile dependency court protections appears in 16th century England.

C. 16th and 17th Century England: Creation of a System of Family Law

The development of American family law most likely has its origins in the 16th and 17th centuries when society moved from communal living arrangements to family groups.[30] From there, it is argued that the relationship of those family groups to the church and state, and the institutions that resulted therefrom, form the basis of the law which led to the creation of the juvenile court.[31] This period is characterized by non-intervention into the family except to the extent a driving social policy warranting intervention arose.[32] The two driving policies which justified intervention were the regulation of poverty and the regulation of wealth.

Jacobus tenBroek describes family law of 16th and 17th century England as a "dual

[29] *Id.*
[30] *Id.*
[31] *See e.g.* Rendleman, *supra* note 7.
[32] Peters, *supra* note 8.

system."[33] More recently, Jean Koh Peters has supplemented this analysis by reviewing the theory of the dual system of family law in the context of the development of child protection law.[34] The theory of the dual system of family law is that, to the extent that families of 16th and 17th century England experienced legal intervention, they experienced one of two distinct types of intervention according to their social class. On one side of the spectrum was a legal system designed to ensure the orderly passage of property of the rich. On the other side of the spectrum was a legal system of intervention designed to control the family relationships of the poor. In the middle were the majority of people who experienced no legal intervention into the accepted patriarchal system.[35]

1. Family Law System One – Wealth

Under system one, the wealthy experienced no family intervention except to the extent it was necessary to insure the passage of wealth. The state had an interest in taxing the transfer of property from one generation to the next. Under primogeniture, court or crown involvement was generally unnecessary. However, where a patriarch died prior to his heir's majority, or where there was a dispute as to the identity of the heir, or the character of land tenure, the crown became interested in the child to ensure proper passage of wealth and to collect tax on the property. It is in these proceedings that we first see the appointment of a representative for the child in the form of the guardian *ad litem*.[36]

2. Family Law System Two – Poverty

As the chancery court was deciding the property and custody issues of the aristocracy, a statutory scheme dealing with the custody of poor children was developing.[37] Two concepts began to emerge in 16th century England out of what became the Elizabethan Poor Laws, which serve to connect this period in history to the juvenile court. The first is the government's assumption of the authority and obligation to care for poor children as a kind of ultimate parent. The second is the mechanism of apprenticeships as a means of that parentage.

At the decline of the feudal age, motivated by the emergence of an underclass of poor children, and the vagrancy and crime attributed to the poor, combined with the post reformation decline of the church as an instrument of social welfare, Parliament passed the Statute of Artificers[38] in 1562 and later the Poor Law Act of 1601.[39] The Statute of Artifices provided that poor children could be involuntarily taken from their parents and apprenticed. 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 a local resident as an apprentice until the age of majority.[40] In addition to this forced labor, the Poor Laws also provided for cash for those unable to work.[41] These laws resulted in considerable family intervention and are seen as the beginning of "state-run welfare."[42]

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[33] tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status,* 16 STAN. L. REV. 257 (1964).
[34] Peters, *supra* note 8.
[35] *Id.*
[36] tenBroek *supra* note 33, quoted by Peters *supra* note 8.
[37] Rendleman, *supra* note 7, at 210.
[38] 5 Eliz. c. 4 (1562).
[39] 43 Eliz. c. 2 (1601).
[40] tenBroek, *supra* note 33, at 274, 279-82.
[41] Rendleman, *supra* note 7, at 211.
[42] Peters, *supra* note 8, at 238.

The Elizabethan state-run welfare program was cleverly structured without state funding. The law provided that each community, through its parish, would administer the law by providing relief, removing children, apprenticing children and using punishment.[43] Peters points out that the Poor Laws effected the poor in three basic ways:[44]

1. Labor. The Poor Laws controlled labor of the poor by mandating that an unmarried laborer could not refuse work in his apprenticed trade; laborers' wages were capped; women who labored had to be over 12, under 40 and unmarried; there were to be restrictions on both apprenticeship and laboring; rules were to be adopted regarding the dismissal of an apprentice; and the apprenticing of non-poor children was to be regulated by provided rules.

2. Travel. Poor person's travel and residency were restricted. They were often restricted from moving to healthier economies. The parish had the authority to remove the poor. Regulations determined who were local and foreign and not the responsibility of the parish.

3. Family Support. The Poor Laws shaped family life for poor persons by the doctrine of intra-familial support which demanded three generations of ascending and descending support and mandating parental support of children; restricting the poor's freedom to marry through tactics to prevent the poor from marrying and producing children; and restricting a poor woman's right to bear children through bastardy laws which could result in punishments for mothers of illegitimate children of up to one year labor in a house of corrections.[45]

It is generally accepted that the Poor Laws authorized significant intervention into the lives of the poor in exchange for poverty relief. In truth, the Poor Laws served less as a system of welfare and more as a mechanism of social control of the poor.[46]

In a frequently used quote, William Blackstone summarized the dual system of family law and the rise of the state as the ultimate parent:

> Our laws . . . have in one instance made a wide provision for preceding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children (w): and are placed out by the public in such manner, as may render their abilities . . . of the greatest advantage to the Commonwealth . . . the rich, indeed, are left at their own option whether they will breed up their children to be ornaments or disgraces to their family.[47]

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[43] 43 Eliz. c. 2 s.1. (1601).
[44] Peters, *supra* note 8, at 239-240.
[45] Mothers could also be forced to pay relief to the state for having an illegitimate child and then receive no state assistance with which to feed the child. This practice led to an increase in infanticide, which was itself punished. HOFFLER & HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND, 1558-1803 (1981), quoted by Peters, *supra* note 8, at 249, note 76.
[46] Peters, *supra* note 8, at 241.
[47] W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 452 (1826), quoted by Peters, *supra* note 8 and Rendleman, *supra* note 7.

D. Colonial America: Transplanting and Developing the English System

The English dual system of family law was transplanted with the colonists into 17th and 18th century America[48] and then modified in a number of ways.[49] For the majority of colonists, there continued to be little or no intervention into patriarchal, autonomous family life. Only the rich and poor were effected, and the rich only minimally. In fact, it is argued that system number one in colonial America is characterized by even less intervention than occurred in England. Peters argues that the American colonists actually expanded the autonomous, nuclear patriarchal family for the non-poor through two major changes:

1. Abolition of feudal land tenures. The most significant example of this was the creation of private bequeathal such that property passed not by primogeniture, but by the choice of the testator. In this way, the transfer of property bypassed any feudal structure which ensured payment of taxes to the government.

2. Correspondingly, private property matters were taken away from church or crown control and placed in local secular chancery courts.

These actions seem consistent with the view that colonists settled America in rejection of excessive governmental and religious intervention into their lives.[50]

System number two, however, English Poor Law, was transplanted firmly into the colonies and even enhanced. Mobility restrictions were transplanted as part of the colonial poor laws. The New Plymouth code required settlements to take responsibility for their poor and restrict settlement; the Massachusetts Bay code prohibited new settlers coming in without town council approval; Connecticut codes required proof of property ownership for settlement; and New York provided relief to poor non-residents only if they brought proof that their community had no funds to support them.[51]

Involuntary apprenticeship of poor children became an integral part of colonial North American Poor Law.[52] Such apprenticeships were frequently used throughout the colonies.[53] Douglas Rendleman makes the case that it is at this point we see an enhancement of English Poor Law into a "poor plus" system.[54] In 18th century Virginia for example, children could be removed and apprenticed not only because of their poverty but because their parents were not providing "good breeding, neglecting their formal education, not teaching a trade, or were idle, dissolute, unchristian or uncapable."[55] Rendleman suggests this is an example of the state's belief that poor children needed to be protected, not just from poverty, but from certain environmental

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[48] Risenfield, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175 (1955).
[49] Rendleman, *supra* note 7 at 211, 212; Peters, *supra* note 8, at 242.
[50] Peters, *supra* note 8, at 242; *See* Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins, 14(2)* OXFORD J. LEGAL STUD. 159, 164-65 (1994); H.B. Taylor, *Law of Guardian and Ward* 23-24 (1935).
[51] Peters, *supra* note 8, at 243. *See e.g.,* Areen, *Intervention Between Parent and Child: A Reprisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. LAW J. 887, at 899-900 (1975); Neuman, *The Lost Century of American Immigration Law 1976-1875)*, 93 COLUMBIA L. REV. 1833, 1846 (1993); Riesenfeld, *supra* note 48; *id.*, n.179 at 206; *id.* at 212; *id.* at 219.
[52] Risenfield, *supra* note 48, at 214.
[53] M. JERIGAN, THE LABORING AND DEPENDENT CLASSES IN COLONIAL AMERICA 157 (1960).
[54] Rendleman, *supra* note 7, at 212.
[55] Jerigan, *supra* note 52, at 104, 151, 149, 161 cited by Rendleman, *supra* note 7, at 212.

influences commonly associated with the poor.[56] Apprenticeships were in many ways the ideal anchor in the poor law system because the child paid his own way, kept relief costs down, was trained in skilled labor, and society experienced reduced idleness and unemployment.[57] As a reflection of the state in the role of beneficent ultimate parent, however, the system left much to be desired, as the quality of the child's care was suspect and the child operated frequently as nothing more than a slave subject to a business proposition.[58]

In addition to Rendleman's "poor plus" modification of the dual system of family law, Peters has recently suggested that an additional condition unique to the colonies created a third system of family law for the black slave family.[59] Prior to the civil war, there was no legal recognition of the black slave family. Blacks were not legally persons, but were instead property of their masters, and secondarily subject to all white people.[60] Black men and woman living in a long-term committed relationship were not recognized as lawfully married and their children were, therefore, considered illegitimate.[61]

Peters points out that it was even difficult for blacks to maintain a *de facto* family life as the white master exercised total control over the slave's education, labor, diet, living arrangements, mates and children. The result was the creation of a unique "family relationship" where slave families lived apart and children were regularly sold away from their biological parents. A third system of family law clearly did exist in the colonies as to black slave families, a system which prohibited traditional family relationships for an entire segment of society.[62]

While governmental intervention due to child abuse per se was exceptionally rare in colonial America, Robert Bremner has recorded three 17th century American cases. The 1655 Massachusetts case of twelve-year-old apprentice John Walker who was killed by his master may be the first recorded American case of child abuse. John was brutally beaten and neglected until his death. His master was convicted of manslaughter. In addition, in Massachusetts, Samuel Morison in 1675 and Robert Styles in 1678 had their children removed by the court for failure to provide suitable homes.[63]

In summary, the developing American system of intervention into the life of the child was characterized by the absence of intervention except on very rare occasion or where the very poor were concerned. Family autonomy for the self-sufficient was paramount. The majority of children in Colonial America received no protection from abuse and neglect. The Massachusetts Stubborn Child Law of 1646, for example, even allowed parents to classify their child as stubborn and seek state punishment, including capital punishment.[64] In the case of the poor, the state felt authorized to remove poor children and apprentice them for the common good. It was in no way, however, a system designed to protect maltreated children, and little welfare was actually

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[56] Rendleman, *supra* note 7, at 212
[57] *Id.*
[58] *Id.*
[59] Peters, *supra* note 8, at 243.
[60] *Id.*; *See also* G. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY 154 (1856).
[61] Peters, *supra* note 8, at 244; *see also* H.GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750-1925, 9 (1976).
[62] Peters, *supra* note 8, at 245. (Peters also points out the importance of studying this neglected area of the development of child intervention law as black families struggle for normalcy and develop family models following the civil war.)
[63] 1 R. BREMNER, CHILDREN AND YOUTH IN AMERICA 123-124; 41-42. (1970).
[64] Shurtleff, *Records of the Governor and Company of the Massachusetts Bay in New England 1628-1686,* 101 (1854).

provided to children and their families in exchange for lost autonomy. This doctrine remained intact and was emulated in the states and territories of the west through the 18th century.[65]

E. Nineteenth Century America: The Rise of the *Parens Patriae* System

Although children in the 20th century exist as a recognized social class,[66] children first developed class identification in the 19th century. The child's identity as it developed was as both a resource and a danger to society.[67]

Major social change is a theme of the 19th century. Early 19th century America was dominated by the "rural-communitarian-protestant triad."[68] That triad began to come apart in the 19th century with the industrialization and urbanization of America. Additionally, the industrialized urban areas became populated with European and Asian immigrants. An 1824 report concluded, for example, that there were approximately 9,000 children under age 14 living in poverty in New York State, and that three-fourths of the children receiving public relief were immigrant children.[69] The response to this condition gives rise to a special system for treatment of children.

1. The House of Refuge Movement

In response to the creation of the underclass of urban poor children, the House of Refuge Movement, a movement that has been called the first great event in child welfare, was launched.[70] The movement began with the Society for Prevention of Pauperism, which believed that poverty was a cause, if not the primary cause, of crime committed by children. The Society issued a report in 1819 raising concern for the number of children confined with adults in Bellevue Prison, and in 1823 the Society issued a now famous statement describing the streets as overrun with pauper children in need of saving. On January 1, 1825, New York City opened the first "House of Refuge."[71]

The New York House of Refuge was authorized by New York Law[72] which provided a charter to the Society for the Reformation of Juvenile Delinquents, the successor to the Society for Prevention of Pauperism.[73] The authorizing legislation allowed managers of the Society to

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[65] Rendleman, *supra* note 7, at 212; *See e.g.*, J. GILLIAN, POOR RELIEF LEGISLATION IN IOWA (1914); KELSO, HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS 1620-1920 (1922); I BRUCE AND E. EICKHOFF, THE MICHIGAN POOR LAW (1936); tenBroek discusses the legislation of New York; tenBroek *California's Duel System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 900, at 965 (1964); *See generally* Riesenfield, *Lawmaking and Legislation Precedent in American Legal History*, 33 MINN. L. REV. 103 (1949).

[66] Whether we treat the class of children empathicly, or merely as a "reflection of adult concerns and agendas" is debatable, but children are seen in the 20th century as an identifiable interest group. *See*, Peters, *supra* note 8, at 249.

[67] Watkins, *supra* note 4, at 3.

[68] *Id.* at 4.

[69] Fox, *supra* note 4, at 1200; *See also* J. YATES, REPORT OF THE SECRETARY OF STATE IN 1824 ON THE RELIEF AND SETTLEMENT OF THE POOR, *reprinted in* I NEW YORK STATE BOARD OF CHARITIES, ANNUAL REPORT NO. 34, at 937, at 942.

[70] Fox, *supra* note 4, at 1187; *See also* DE SCHNEIDER, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609-1866, at 317 (1938).

[71] Watkins, *supra* note 4, at 4.

[72] Laws of New York, 47th Session, Ch. CXXVI at 110 (1824).

[73] Fox, *supra* note 4, at 1190.

take into the house children committed as vagrants or convicted of crimes by authorities. Criminal conviction was not a condition to incarceration in the House of Refuge. Children could even be committed by administrative order or application of their parents.[74] Neither was there any right to indictment or jury trial,[75] as summary conviction of disorderly persons had previously been upheld in new York in the case *In re Goodhue*.[76]

It is a mistake to assume that the House of Refuge served as a haven for youth otherwise guilty of serious crime. Those youth were still maintained in the adult system. In the first two years of operation of the New York House of Refuge, approximately 90% of the children were housed as a result of vagrancy or minor offenses.[77] And it is unlikely that these children would have been consequented without a House of Refuge as such minor offenses tended to go unpunished by the law.[78]

Neither, however, was the Refuge movement one to protect abused children from their caretaker's authority. There is no evidence that children were placed as a result of caretaker cruelty. To the contrary, severe corporal punishment was clearly part of the House of Refuge system. In fact, conditions in many Houses were quite abusive by modern standards, including solitary confinement and beatings.[79]

Poor "vagrant" children were the focus of the Refuge movement. In short, seriously criminal children tended to remain in the adult system, the majority of children in families saw no intervention, and children who might today be considered status cases, were rounded up off the streets. The Refuge movement was a pre-delinquency movement, which focused on saving "salvageable," probably neglected, poor children. In that sense, as Sanford Fox has pointed out, the Refuge movement was, although motivated in part by humanitarianism, very much a "retrenchment in correctional practices" and "a regression in poor-law policy."[80] The movement also involved a coercive religious intolerance, as all children were required to adopt the Protestant teachings of their reformers.[81] When viewed in the context of protection for abused and neglected children, it did not represent progress. It did represent continued intervention, but little welfare, for neglected poor children.

The Refuge movement spread from New York to Boston (1826) to Philadelphia (1828) to New Orleans (1847) to Baltimore (1849) to Cincinnati (1850) to Pittsburgh and St. Louis (1854). By 1860, 16 Houses of Refuge were opened in the United States.[82] Legislation authorizing the intervention and placement of delinquent and dependent children similarly spread throughout the jurisdictions.[83]

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[74] T. BERNARD, THE CYCLE OF JUVENILE JUSTICE (1992).
[75] Fox, *supra* note 4, at 1191.
[76] 1 N.Y. City Hall Recorder 153 (1816).
[77] Fox, *supra* note 4, at 1192.
[78] *Id.* at 1194.
[79] *Id.* at 1195; *See generally* SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 3 (1828), *reprinted in* SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, DOCUMENTS RELATIVE TO THE HOUSE OF REFUGE 13 (N. Hart ed. 1832); *see also* R. PICKETT, HOUSE OF REFUGE 67 at 24 (1969).
[80] Fox, *supra* note 4, at 1195.
[81] *Id.* at 1195.
[82] Watkins, *supra* note 4, at 5
[83] *Id.* at 7.

In addition to Houses of Refuge, Reformatories, which were entirely state-financed, began to emerge toward the middle of the century. John Watkins points out that the reformatory movement was initiated by a number of influential individuals who believed the House of Refuge system had not slowed the rate of delinquency.[84] Reformatories were to be progressive institutions where, through civic and moral training, the youth would be reformed by his/her surrogate parent. In reality, Reformatories tended to be coercive, labor intensive incarceration.[85]

Houses of Refuge dominated the first half, and Reformatories the last half of the century. They were characterized by an ultimate parent philosophy toward the poor, which ties the movement to the poor laws. Another link to the past was the use of apprenticeship in the Refuge movement. As Houses of Refuge became overcrowded, many children were "placed out" by being transported to rural areas of the state or placed on trains headed to the developing west where they were apprenticed to age 21. It was thought, or at least stated, that rural agrarian lifestyle would reform children from the effects of urban poverty.[86]

2. *Ex parte Crouse* and *Parens Patriae*

The House of Refuge movement may not have had significant impact on the ultimate development of the juvenile court if the judicial system had not validated it. 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 Reformers' logic that they were entitled to take custody of a child, regardless of the child's status as victim or offender, without due process of law, because of the state's authority and obligation to save children from becoming criminal.

The 1839 Pennsylvania decision of *Ex parte Crouse*[87] is thought to be the first case upholding the Refuge System. The Child, Mary Ann Crouse, was committed to the Philadelphia House of Refuge by a Justice of the Peace Warrant. The warrant, 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 parent's control." The reported case is 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, not punishment (even though Mary Ann was probably treated very harshly, a fact the court did not review). The court essentially accepted the rhetoric of the representatives of the House of Refuge. In doing so, the court acknowledged and sanctioned the state's authority to intervene into the family as ultimate parent via the doctrine of *parens patriae.* The case and the doctrine become the cornerstones of juvenile proceedings throughout the century and through the pre-*Gault* years of the juvenile court. The case was generally relied on to support "the right of the state to make coercive predictions about deviant children."[88] Although the distinction may have been irrelevant at the time, the case involved a dependent, not delinquent child, and in dicta, as Rendleman points out, the court argued that the state has authority to intervene into the parent-child relationship for the good of the child:

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[84] *Id.* at 8.
[85] *Id.* at 9.
[86] *Id.* at 7.
[87] 4 Whart. 9 (Pa. 1839).
[88] Fox, *supra* note 4 at 1207.

> To this end . . . may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? . . . That parents are ordinarily intrusted with it because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held as they obviously are, at its sufferance? **The right of parental control is a natural, but not unalienable one.**[89]

The *Crouse* court was making the case for state intervention into the family where the parents fail, in the state's view, to perform adequately, and the state is needed to care for the child. The reality that the state was probably caring for the child very poorly does not diminish the precedent for intervention in dependency cases.

The lead of the *Crouse* court was followed in a series of cases involving delinquent and dependent children. In Maryland, *Roth v. House of Refuge*,[90] in Ohio, *Prescott v. State*,[91] in New Hampshire, *State ex rel. Cunnigham v. Ray*,[92] in Wisconsin, *Milwaukee Indus. School v. Supervisors of Milwaukee County*,[93] and in Illinois, *In re Ferrier*,[94] courts adopted the *Crouse* policy that the state's *parens patriae* duty and authority permitted seemingly unlimited intervention into family autonomy, including the child's deprivation of liberty.

The 1882 Illinois *Ferrier* case is particularly illustrative of the development of child protection law for two reasons. First, it involved a very young dependent, rather than delinquent, child. Nine-year old Winifred Bean came to the court's attention, in significant part because her parents were viewed as incompetent to provide necessary parental care. Testimony was even taken that the parents were neglectful. Winifred was adjudicated dependent by a jury and committed to an industrial school for girls. In language typical of *Crouse* and its progeny, the court approved of both the state's authority to interrupt the rights of parents and children to the parent-child legal relationship, as well as the right to deprive the child of a degree of personal liberty through a state placement. While acknowledging that the Refuge movement did not distinguish between dependent and delinquent children (as the focus was delinquency prevention, not humanitarian protection), *Ferrier* was not just another case of picking up a vagrant child. It was a case of forced removal due to parental neglect.

Second, *Ferrier* repudiated a serious effort to create precedent limiting the state's *parens patriae* authority. Twelve years earlier, the Illinois court had issued a decision which, if followed, would have repudiated the *parens patriae* Refuge system in *People ex rel. O'Connell v. Turner*.[95] The Illinois court released Daniel O'Connell from the custody of the Chicago Reform School because his confinement as a dependent child was unconstitutional. The court wrote: "in our solicitude to form youth for the duties of civil life, we should not forget the rights which inhere both in parents and children. The principle of absorption of the child in, and its complete subjection to the despotism of, the State, is wholly inadmissible in the modern civilized world."[96] The case, however, was not followed, and was then overruled by *Ferrier*. "The decision was

[89] Crouse, 4 Whart. (Pa.) at 9 (emphasis added).
[90] 31 Md. 329 (1869).
[91] 19 Ohio St. 184 (1869).
[92] 63 N.H. 406 (1885).
[93] 40 Wis. 328 (1876).
[94] 103 Ill. 367 (1882).
[95] 55 Ill. 280 (1870).
[96] *Id.* at 284.

ultimately looked upon as an aberrant pronouncement that could not and would not stand in the way of Progressive social engineering."[97]

As the final third of the 19th century approached, state legislatures had created and the courts had approved, a system of family law and intervention which focused on "saving," by removal and placement, children of the expanding poor urban population. In doing so, authorization was given to disrupt the parent-child legal relationship and infringe on children's liberty solely because the child was not, in the state's view, cared for properly. The focus of the intervention was status offending poor street children, with an occasional neglect scenario and (although an occasional reference to parental cruelty was made) little if any intervention for the abused child.

3. Special Cases of Child Abuse

Absent from many histories of the dependency court, but present in histories of child abuse and neglect, are the several documented 19th century cases of legal intervention on behalf of children who were physically abused by their caretakers. Clearly, these are not the types of cases the Reformers of the 19th century envisioned as part of the movement to save children. Society did not view even severe corporal punishment or discipline as beyond the autonomy of the family, except in particularly heinous cases. In addition, even in such cases, criminal punishment of the parent, rather than removal and care of the child, was the focus.[98] Mason Thomas points out that the lack of civil cases can be explained in part by the then existing common law doctrine that a minor could not sue his parents in tort. The view that, at best, a child may get protection by way of criminal prosecution of parents was stated in the 1891 Mississippi case, *Hewlet v. George*, where the court wrote: "The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, **and this is all the child can be heard to demand**."[99]

Why these cases did not come to the developing *parens patriae* court's attention is not entirely clear, but the explanation is probably basic -- those officials in charge of executing the Reformers' child saving plans did not include caretaker-abused children within their net and society did not view even brutal treatment of children by their non-poor caretakers as outside the bounds of family autonomy. Such an illustration is found in the 1840 Tennessee case, *Johnson v. State*, where the court reversed the parents' criminal conviction for the brutal treatment of their daughter. The court's analysis of whether the parents' exceeded their authority to control and discipline included the following language:

> The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, to the good order of society, that no moralist or lawgiver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise, upon light or frivolous pretenses. However, at the same time that the law has created and preserved this right, in its regard for the safety of the child it has prescribed bounds beyond which it shall not be carried.[100]

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[97] Watkins, *supra* note 4, at 25.
[98] 2 R. BREMNER, CHILDREN AND YOUTH IN AMERICA 119-124 (1971).
[99] *See* Hewlett v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891) cited by Thomas, *Child Abuse and Neglect*, 50 N.C.L. REV. 293, 304 (1972)(emphasis added).
[100] Johnson v. State, 21 Tenn. 282 (1840) cited by Thomas, *supra* note 99, at 305.

Nonetheless, some jurisdictions specifically mentioned cruelty as a justification for removal in their reform laws, and those which did not could have accommodated abused children in their dependency statutory scheme. However, they did not, and these "abuse" cases have existed, incorrectly, outside the analysis of the development of the juvenile court.

Which brings us to the myth that the Mary Ellen case is the first documented child abuse case. That is not accurate for the reasons just discussed. Additionally, it now appears there was a similar case, also involving Henry Bergh (who intervened for Mary Ellen), before Mary Ellen. Steven Lazoritz and Eric Shelman recently published an article entitled *Before Mary Ellen*[101] which, based on the unpublished notes of the biographer of Henry Bergh, recounts the story of the intervention to protect the child Emily Thompson several years before the case of Mary Ellen. As the biographer's notes go, according to Lazoritz and Shelman, in June of 1871, a woman approached Henry Bergh, founder of the Society for Prevention of Cruelty to Animals, and sought his assistance to save 8-year old Emily Thompson, whom she said she frequently observed from her window being brutally beaten and whipped for up to an hour at a time. Bergh sent investigators who found the child to be battered. Additional neighbors came forward to confirm the almost daily beatings. Bergh acquired a writ (probably the same writ later used in Mary Ellen's case) and the child was removed. Emily was presented to New York Court of Special Sessions Judge Barnard who took jurisdiction, apparently as a criminal matter. Although the child was visibly battered, Mary Ann Larkin (her non-biological caretaker) denied the abuse, as did Emily. The judge found Ms. Larkin "guilty," suspended her sentence and returned the child to her care. Later however, Emily's grandmother, who thought the child dead, read a newspaper account of the matter and contacted Bergh. Bergh brought Emily again to Judge Bernard on a writ. Judge Bernard then removed Emily from Ms. Larkin and placed her with her grandmother. It is not indicated whether the court viewed the removal and placement as a continuation of the criminal action against the caretaker or under some theory of protection jurisdiction. The trial level action was apparently never reviewed.

As for Mary Ellen, the case has traditionally been used to support the proposition that at the time of the case, society had no child protection law, and after the case, due to the clever use of an animal rights theory and sympathy created by the case, child abuse protection began. As we have seen, that proposition is not supported by historical fact. New York, Mary Ellen's residence, as we have seen, had a massive child welfare scheme, albeit not focused on removing middle class children, but prevalent enough, as it turns out, to have had a hand in placing the child in the abusive setting in the first place. Using Bremner's documentary history, Thomas sorted out the facts as follows:

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

[101] Lazoritz & Shelman, *Before Mary Ellen*, 20 CHILD ABUSE & NEGLECT: THE INT'L J. 235-37 (1996).

none could be found, she was committed to the "Sheltering Arms," an orphan asylum.

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

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

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

The evidence indicated both abuse and neglect: Mrs. Connolly had whipped Mary Ellen almost every day with a cane and a twisted whip – a rawhide that left black and blue marks – and had struck her with a pair of scissors (which were produced in court) that had cut her on the forehead; the child was locked in the bedroom whenever "Mama" left home; she was not allowed to leave the room where the Connollys were; she was not allowed to play outside with other children; and she was inadequately clothed and slept on a piece of rug on the floor.

Mrs. Connolly was prosecuted under indictments for felonious assault with a pair of scissors on April 7, 1874, and for a series of assaults during 1873

and 1874. The jury found her guilty of assault and battery and sentenced her to one year in the penitentiary at hard labor.[102]

The Mary Ellen case, together with the founding of the New York Society for Prevention of Cruelty to Children (NYSPCC), did have significant impact on child welfare. Its founder, Elbridge Gerry, recognized the void in the Refuge system for abused and neglected children outside the pre-delinquency net. He also recognized that law enforcement did not typically become involved in "family matters." Eventually, the NYSPCC acquired police power and controlled the welfare of many of New York's abused and neglected children. By 1900, 161 similar "cruelty" societies existed in the United States.

By the end of the 19th century, there was a developing *parens patriae* jurisprudence which enabled saving children from the effects of poverty and a related movement to begin to concern itself with child abuse and neglect within the family.

4. A Scientific Development

An important scientific development in the recognition of child abuse and neglect occurred in France in 1860. A French physician, Ambrose Tardieu, conducted a study of 32 children whom he believed died of child abuse. Tardieu's findings describe medical, psychiatric, social and demographic features of the condition of child abuse as a syndrome.[103] This groundbreaking work went largely unrecognized until the Mid 20th century.

F. The Juvenile Court: Institutionalizing and Developing the *Parens Patriae* System

1. Founding and Dependency Philosophy

The events of the last decades of the 19th century which lead to the founding of the first juvenile court were very much an extension of the 19th century refuge / reform movement, which, in turn were an outgrowth of poor law policy. While the founding of the court has traditionally been treated as a revolutionary humanitarian advancement for children, more recent scholarship has shown the inaccuracy of that belief.[104] This is not to say the founding of the court was not an historic event; it was just not a revolutionary one. It was a culmination of, not a departure from, 19th century reform.

The legislation, which led to the creation of a special tribunal which came to be called the juvenile court, was "An Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children."[105] The Juvenile Court of Cook County, Illinois opened on July 1, 1899.[106] Although it is accurate that the Cook County Court was the first fully formalized tribunal of its kind, Massachusetts in 1874, and New York in 1892 had actually passed laws separating minors' trials from adults. While it is a mistake to assume all subsequent juvenile courts simply copied

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[102] Thomas, *supra* note 99, at 308-310, (citations omitted); see also for a description of what happened to Mary Ellen years later S. Lazoritz, *Whatever Happened to Mary Ellen?*, 14 CHILD ABUSE AND NEGLECT: THE INT'L J. 143-149 (1990).
[103] TARDIEU, ETUDE MEDICO-LEGALE SUR LES SERVICES ET MAUVAIS TRAITEMENTS EXERCES SUR DES ENFANTS (1860), IN S. M. SMITH (ED.), THE BATTERED CHILD SYNDROME.
[104] Fox, *supra* note 4.
[105] Act of Apr. 21, 1899, [1899] Ill. Laws 131.
[106] Watkins, supra note 4, at 43.

the Illinois legislation, it did serve as a model, and in less than 20 years, similar legislation had been passed in all but three states.[107]

The Illinois legislation was largely the product of a Progressive Era movement called Child Saving. The Child Savers were individuals who viewed their cause of saving "those less fortunately placed in the social order"[108] as a matter of morality. The Child Savers were dominated by bourgeois women, although many were considered liberals. The movement, which was supported by the propertied and powerful, "tried to do for the criminal justice system what industrialists and corporate leaders were trying to do for the economy -- that is, achieve order, stability, and control, while preserving the existing class system and distribution of wealth."[109] The Child Savers' rhetoric envisioned a juvenile court which would serve children and society by removing children from the criminal law process and placing them in special programs.[110] The movement in Chicago was supported by the Illinois Conference of Charities, The Chicago Bar Association and the Chicago Woman's Club.

The Illinois act provided for jurisdiction in a special court for delinquent and dependent and neglected children. A delinquent child was any child under age 16 who violated a law or ordinance, except capital offenses.[111] Dependency and neglect was defined as follows:

1. Any child who for any reason is destitute or homeless or abandoned;
2. Has not proper parental care or guardianship;
3. Who habitually begs or receives alms;
4. Who is found living in any house of ill fame or with any vicious or disreputable person;
5. Whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child;
6. Any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the street or giving any public entertainment.[112]

The categories are remarkably familiar to the Refuge movement conditions of eliminating vagrancy through confinement. As Fox has noted, the juvenile court was very much a continuation of a system of coercive predictions begun at the beginning of the century.[113]

There also appears to be little, if any, support for the proposition that the juvenile court began a system of benevolent caretaking of youth by substituting a kind of therapeutic jurisprudence for harsher and limiting criminal procedure. First, serious older offenders stayed in the adult criminal system. Second, the 19th century case law reveals that juveniles brought to court under delinquency and dependency concepts received no due process. *Crouse* served to inform us they were entitled to none.

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[107] A. PLATT, THE CHILD SAVERS 10 (1977).
[108] *Id.* at 3.
[109] *Id.* at xxii.
[110] *Id.* at 10.
[111] Act of Apr. 21, 1899, [1899] Ill. Laws 131.
[112] Act of Apr. 21, 1899, [1899] Ill. Laws 131.
[113] Fox, *supra* note 4.

Not to suggest the juvenile court was a step backward. It was progress in the form of codification and institutionalization of the 19th century *parens patriae* system. As an institution, the juvenile court stressed centrality for dependent children. Rather than being subject to random placements without follow up, it was believed that a court could function as a centralized agency responsible for all such children from start to finish. The new court implemented the concept of probation and the founders made minimal progress toward improving placement conditions for children. Dependent children could be placed with an agency or put on probation. To at least some extent, the Child Savers' mission of creating a juvenile "statutory, non-criminal, stigma-neutral, treatment-oriented" system was achieved.[114]

As for abused and neglected children, although cruelty societies helped, state intervention under the juvenile court acts was modest. The condition of poverty, which brought children into the Refuge system, continued as a *de facto* prerequisite for juvenile court intervention. Saving non-poor abused and neglected children from their lawful caretakers was not a goal of the Child Savers either. Nonetheless, the *parens patriae* authority to do so became the central component of the juvenile court.

The early years of the court were characterized by continued commingling of dependency and delinquency under the courts' *parens patriae* authority. Minimal numbers of appeals validated that authority. Families remained autonomous.

2. *Gault* and the Transformation of Delinquency Out From *Parens Patriae*

The delinquency and dependency components of the juvenile court, historically connected by a "child saving" philosophy, began to separate into distinct functions in the 1960's. Driven by judicial process in delinquency, and social progress in dependency, both components were transformed.

The delinquency component of juvenile court was transformed in the late 1960's by two U. S. Supreme Court cases. In 1966, in *Kent v. United Sates*, the court set the stage for dismantling the *parens patriae* authority of the juvenile delinquency court by holding that the action of transferring a juvenile to criminal court required procedural due process.[115] Then, in 1967, the Court struck down the *parens patriae* authority of the juvenile court in the context of delinquency adjudication in *In re Gault*.[116] The Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[117] In his famous opinion, Justice Fortas reviewed the shortcomings of the juvenile process which had been in operation since the founding of the court. Justice Fortas stated that the belief that the juvenile court could best care for children without the distractions of due process was a myth, and that due process, not benevolent intentions, produced justice. Among the rights *Gault* created for juveniles were notice of charges, confrontation and cross-examination, prohibition against self-incrimination, and the right to counsel. The decision continues to be hailed by some as a great advancement in children's rights and by others as the criminalization of the juvenile court and the beginning of the end of the court's authority to treat children like children rather than adults. The difference of opinion goes to the heart of the debate over the purpose and future of the delinquency court.

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[114] Watkins, *supra* note 4 at 50.
[115] 383 U.S. 541 (1966).
[116] 387 U.S. 1 (1967).
[117] Gault, 387 U.S. at 13.

While *Gault* did not instruct juvenile courts across the country to wholly substitute adult criminal procedure for juvenile practice, that is very much what happened. The delinquency court separated from the dependency court and the traditional commingling of all children in a predelinquency / criminal prevention program began to come to an end.

For the future of dependency proceedings, it is critical to focus on what *Gault* did *not* do, and *Gault* did not dismantle, or even touch, the *parens patriae* authority of the dependency court. The *Gault* Court focused on juvenile misconduct, as opposed to victimization and stated, **"[w]e do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state.**"[118] The state was, therefore, free to continue separately "saving" dependent children, whoever they may be, under the *parens patriae* duty and authority of the state.

3. *The Battered Child*, CAPTA and the Evolution of Dependency Within *Parens Patriae*

The dependency court, too, underwent a transformation in the last half of the 20th century, not away from, but within the state's *parens patriae* authority. Grounded in a new public awareness of the need to protect children from maltreatment, the dependency court moved from a system of coercive predictions for poor dependent children to a system of intervention into the family to protect abused and neglected children. This "evolution" can be seen in the following historic events:[119]

- In 1912, as a result of President Roosevelt's 1909 White House Conference on Children, Congress created the United States Children's Bureau.

- In 1921, Congress passes the Shappard-Towner Act, which established Children's Bureaus at the state level and promoted maternal-infant health.

- In 1944, the Supreme Court of the United States confirmed the state's authority to intervene in family relationships to protect children in *Prince v. Massachusetts*.[120]

- In 1946, Aid to Dependent Children was added to the Social Security Act.

- In 1946, Dr. Caffey, a pediatric radiologist in Pittsburgh, published the results of his research showing that subdural hematomas and fractures of the long bones in infants were inconsistent with accidental trauma.[121]

- In 1962, following a medical symposium the previous year, several physicians headed by Denver physician C. Henry Kempe, published the landmark article *The Battered Child Syndrome* in the Journal of the American Medical Association. Through the article, Kempe and his colleagues exposed the reality that significant numbers of parents and caretakers batter their children, even to death. The Battered Child Syndrome describes a pattern of child abuse resulting in certain clinical conditions and establishes a medical and psychiatric model

[118] Gault, 387 U.S. at 12. (emphasis added).
[119] *supra* note 11, at 10-12 (many of the following events were identified and described by Sagatun and Edwards).
[120] 321 U.S. 158 (1944).
[121] Caffey, *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, 56 Am. J. Roentgenology 163 (1946).

of the cause of child abuse. The article marked the development of child abuse as a distinct academic subject. The work 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.[122]

- In 1962, in response to *The Battered Child*, the Children's Bureau held a symposium on child abuse, which produced a recommendation for a model child abuse reporting law.

- By 1967, 44 states had adopted mandatory reporting laws. The remaining six states adopted voluntary reporting laws. All states now have mandatory reporting laws. Generally, the laws require physicians to report reasonable suspicion of child abuse. Reporting laws, now expanded to include other professionals and voluntary reporting by the public, together with immunity for good faith reporting, are recognized as one of the most significant measures ever taken to protect abused and neglected children. Reporting is recognized as the primary reason for the dramatic increases seen in cases of child abuse and neglect.

- In 1971, the California Court of Appeals recognized the Battered Child Syndrome as a medical diagnosis and a legal syndrome in *People v. Jackson*.[123]

- In 1974, Congress passed landmark legislation in the federal Child Abuse Prevention and Treatment Act (CAPTA; Public Law 93-273; 42 U.S.C. 5101). The act provides states with funding for the investigation and prevention of child maltreatment, conditioned on states' adoption of mandatory reporting law. The act also conditions funding on reporter immunity, confidentiality, and appointment of guardians *ad litem* for children. The act also created the National Center on Child Abuse and Neglect (NCCAN) to serve as an information clearinghouse. In 1978, The Adoption Reform Act was added to CAPTA. In 1984, CAPTA was amended to include medically disabled infants, the reporting of medical neglect and maltreatment in out-of-home care, and the expansion of sexual abuse to include sexual exploitation.

- In 1980, Congress passed the Adoption Assistance and Child Welfare Act (Public Law 96-272; 42 U.S.C. 420) designed to remedy problems in the foster care system. The act made federal funding for foster care dependent on certain reforms. In 1983 the act was amended to include "reasonable efforts." The reasonable efforts amendment provided for special procedures before removing a child and reunification strategies after removal. Important provisions for case review were also included. The act and its amendment essentially provided fiscal incentives to encourage states to prevent unnecessary foster care placements and to provide children in placement with permanent homes as quickly as possible. The law also gave courts a new oversight role.

- In 1981, Title XX of the Social Security Act was amended to include the Social Services Block Grant to provide child protective services funding to states. This became the major source of state social service funding.

- In 1986, Congress passed the Child Abuse Victims' Rights Act, which gave a civil damage claim to child victims of violations of federal sexual exploitation law.

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[122] Kempe, Silverman, Steele, Droegmueller & Silver, *The Battered Child Syndrome*, 181 JAMA 17 (1962).
[123] 13 Cal. App. 3d 504 (1971); *see also* Estelle v. McGuire, 502 U.S. 62 (1991) and State v. Henson, 33 N.Y.2d 63 (1973).

- In 1991, Congress passed the Victims of Child Abuse Act of 1990, aimed at improving the investigation and prosecution of child abuse cases.

- In 1993, as part of the Omnibus Budget and Reconciliation Act, Congress provided funding for state courts to assess the impact of Public Law 96-272 on foster care proceedings, to study the handling of child protection cases, and to develop a plan for improvement. Funds were made available to states through a grant program called the State Court Improvement Program. The program was the impetus behind a nationwide movement to improve court practice in dependency cases.

- In 1997, Congress Passed the Adoption and Safe Families Act of 1997 (ASFA; Public Law 105-89). ASFA represents the most significant change in federal child welfare law since the Adoption Assistance and Child Welfare Act of 1980. The act includes provisions for legal representation, state funding of child welfare and adoption, and state performance requirements. In general, ASFA is intended to promote primacy of child safety and timely decisions while clarifying "reasonable efforts" and continuing family preservation. ASFA also includes continuation funding for court improvement.[124]

These events, particularly recognition of the "battered child," mandatory reporting and the passage of CAPTA, exemplified a new recognition of both the presence of child maltreatment and the need to protect its victims. As a result, the dependency court, once reserved primarily for pre-delinquent vagrant children, was transformed into an active tribunal to determine whether a child is abused and neglected, and if so, what disposition is appropriate. Criminal prosecutions of adults for child maltreatment was no longer viewed as the child's exclusive "remedy."

As juvenile court legislation was transformed in the delinquency context to provide procedures to satisfy the *Gault* requirements, the dependency court was left to continue its *parens patriae* jurisdiction over children and families. Within that context, states' dependency codes were modified to provide special processes for the intake, adjudication and disposition of the newly recognized class of maltreated children. The result is child protection codes containing language describing child abuse and neglect rather than the early dependency language describing social conditions warranting intervention. Although vestiges of the commingling of delinquency and dependency can still be seen in some juvenile codes, the combination of the *Gault* influence on delinquency and the recognition of child maltreatment on dependency cause a clear separation of the two components of the juvenile court.[125]

4. The Dependency Court at the End of the 20th Century

The late 20th century dependency court is very different from the "vagrancy" dependency court which began the century. Child abuse and neglect cases, once unrecognized, dominate the court calendar.

a. Incidence of Maltreatment

Although it is difficult to accumulate precise statistics for child

[124]Rollin, L*egislative Update*, ABA Child Law Practice, Vol. 16, No. 11, 166-171 (1998).

[125] It is even uncommon for attorneys representing children to "cross-over" from one forum to the other. Katner, *Addressing the "Unmet Need" for Counsel to Handle Delinquency As Well As Dependency Cases*, GUARDIAN, Vol. 20, No. 2, 3 (1998).

maltreatment nationally, methodology has been developed for accumulating incidence of child maltreatment from the states.[126] Once thought to be a problem involving only a few thousand children a year, child maltreatment has since been identified as nothing less than a national emergency.[127] The U.S. Department of Health and Human Services, Children's Bureau reported the following incidence of child maltreatment for 1996:[128]

- 3 million children (based on 2 million reports) were reported[129] as alleged victims of maltreatment and referred for investigation.

- The national rate of children reported was 44 per 1,000.

- Professional reporters including educators, law enforcement, medical professionals, social service personnel, and child care staff accounted for 52 percent of all reports. Educators provided the largest proportion of reports at 16 percent followed by law enforcement at 13 percent. Medical personnel were responsible for 11 percent of reports.

- Of the 3 million children reported, following investigation, approximately 1 million children were determined to be victims of maltreatment, making the substantiated or indicated incidence of abuse 15 per 1,000.

- Approximately two-thirds of the substantiated or indicated reports were made by professional reporters.

- 52 percent of victims suffered neglect, 24 percent physical abuse, 12 percent sexual abuse, 6 percent emotional maltreatment and 3 percent medical neglect.

- 53 percent of victims were white, 27 percent African American, 11 percent Hispanic, 2 percent American Indian and 1 percent Asian. African American and American Indian percentages were approximately twice their representation in the general population.

- 1,077 children died as a result of maltreatment, 76 percent of whom were under age four.

- 88 percent of all perpetrators of child maltreatment were family members of the child (77 percent parents and 11 percent other relatives).

- Based on data from 36 states, 16 percent of victims were removed from their homes.[130]

- Based on data from 26 states, juvenile court dependency type proceedings were initiated for 14 percent of the victims.[131]

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[126] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (1996) [hereinafter cited as NIS-3]; *see also* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU, CHILD MALTREATMENT 1996: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (1998) [hereinafter cited as NCAN].

[127] U.S. Advisory Committee on Child Abuse and Neglect.

[128] NCAN, *supra* note 126

[129] It is commonly acknowledged that many incidence of child maltreatment are never reported. Additionally, states sometimes fail to report nationally information reported to the state. NCAN, *supra* note 126.

[130] This important information needs to be developed more fully.

[131] *Id.*

It was in response to growing evidence of this maltreatment that state legislatures enacted child protection processes within their juvenile dependency codes. The juvenile dependency court became the primary forum for the oversight and the resolution of these child maltreatment cases. Where once child maltreatment cases occupied little, if any, of the juvenile dependency court's time, they became the business of the dependency court.

Today's abused children were simply not part of the early dependency court. Likewise, the current dependency system reaches far beyond the neglected "pauper" children of the pre- and early juvenile court. A significant number of abused and neglected children come to the system from the middle class.[132] These statistics reflect a legal and social willingness to intervene into the family and protect children. The dependency court can no longer be classified as a system of coercive predictions for pre-delinquent children. The poor law philosophy, which clearly found its way into the early court, no longer dominates the dependency court. Nonetheless, the Third National Incidence Study of Child Abuse and Neglect (NIS-3) reports the highest correlation of family income to maltreatment exists in families with an annual income of $15,000 or less, and the lowest correlation in families with annual income of $30,000 or more.[133] This and the disproportionate representation of minority children in dependency cases should be taken seriously, particularly in light of the medical view that child abuse knows no class or race boundaries.[134] Whether reporting accurately captures maltreatment in higher income households, and whether intervention is racially and culturally competent, are issues which warrant investigation.[135]

b. Dependency Court Operation: Best Interests and Family Preservation

While *parens patriae* continues as the underlying authority for intervention, the modern dependency court is not without process. The process is designed, within limitations protecting family autonomy, to serve "the best interests of the child." The best interests standard is the governing principle of the modern dependency court. "Best interests" represents an advancement in child protection compared with the early court, which tended to view child welfare through society's eyes. "Best interests" is a child-centered principle which represents real progress in the dependency system.

"Best interests" is not, however, an entirely objective standard, and as we are quick to congratulate the current court for the principle, we must recognize that the litigants' perspectives influence the position taken on the child's interests. The caretakers' interest in parental rights and the state's fiscal concerns may prohibit empathic consideration from the child's perspective. One of the most significant innovations of the modern juvenile court is the use of a representative for the child whose function is to view the best interests standard through the eyes of the child. CAPTA requires the appointment of a guardian *ad litem,* a vestige of system number one of the dual system of family law, to protect the child's interest.[136] Whereas attorney representatives for children were absent from the early court, there is now consensus among dependency court

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[132] NIS-3, *supra* note 126, at 5-3.
[133] *Id.*; *see also* Petit & Curtis, *Child Abuse and Neglect: A Look at the States*, Child Welfare League of America (1997).
[134] Helfer, *supra* note 3, at 29-48.
[135] Apart from *parens patriae* jurisdiction, this may be the thread that ties the late 20th century dependency court to its poor laws heritage.
[136] 42 U.S.C. § 5106(a) (1988).

professionals that quality legal representation for children is necessary to a high functioning court process.[137]

Coexisting with the "best interests" is the dependency court policy of "family preservation and reunification." Begun as an amendment to the federal Adoption Assistance and Child Welfare Act, the policy continues, as modified, in the federal Adoption and Safe Families Act. While keeping child safety paramount, the policy calls for recognition that families should be kept together. While more and different types of families experience intervention in the modern dependency court, the intervention occurs within the context of a policy of family integrity.

Operating with "best interests" and "family preservation" as guideposts, the dependency court processes child maltreatment cases through five proceedings: preliminary, adjudication, disposition, termination and adoption. Cases begin with the filing of a petition alleging a child is dependent. A preliminary hearing is held (quickly if the child has been removed) in order to determine safety, custody and visitation issues pending further proceedings. Reasonable efforts to avoid removal and the provision of family preservation services should become issues at the preliminary hearing and throughout the process.

Many cases are dismissed or settled without further proceedings. Otherwise an adjudicatory hearing is held to determine whether the child is dependent based on the abuse or neglect allegations of the petition. The adjudication hearing resembles a traditional trial under rules of civil procedure and evidence. States bear the burden of proving dependency generally by a preponderance of the evidence standard. If the state fails to meet its burden, the case is dismissed and the caretakers regain full control of the child. If an adjudication is made, the court typically issues orders calling for further investigation, evaluations and treatment.

A dispositional hearing is generally held within a short time of the adjudication in order to implement a course of action designed to serve the child while preserving the family if possible. The state agency's case plan (including placement and services) or some version of it is typically adopted at this time. A child may be home or in a group, foster or kinship care placement at this time. The period following disposition is often lengthy and the court should hold periodic review hearings. The dispositional process may conclude with successful completion of the case plan, dismissal of the case and return of the child home. Other disposition options include long term foster or kinship care, continued supervision of the family with the child in the family's care or custody to the state.

If the family cannot be preserved, the case moves to a termination of parental rights hearing where the state must prove parental unfitness by no less than clear and convincing evidence. Termination proceedings are to be followed by adoption proceedings.

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[137] American Bar Association Center on Children and the Law, Court Improvement Progress Report (1998). Additionally, the representation of children in the dependency court has also evolved from the 1970's paternal model to the current tendency toward an independent child's attorney. *See, e.g.*, Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16 (1976); Haralambie, *Current Trends in Children's Legal Representation*, 2 CHILD MALTREATMENT 193 (1997); Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L. J. 287 (1995).

c. Criticism and Improvement

Criticism of the juvenile dependency court tends to take two forms. The first is a "parental rights" criticism which seems to come from a vocal minority and suggests that the child protective system overreaches into the autonomy of the family and that families should be allowed, without governmental interference, to raise, educate and discipline children as they see fit. The criticism is flawed in two basic ways. First, the position requires one to accept either that children are not seriously maltreated by their caretakers, or that society should allow over 1 million children a year to be maltreated by their caretakers as a price of parental autonomy. In reality, child maltreatment data, if flawed, is probably understated.[138] Further, an argument that societal tolerance of large-scale child abuse and neglect is the legitimate price of parental autonomy is morally unacceptable.

The second flaw of the "parental rights" criticism is found in the absence of data showing overreaching. While system accountability and awareness of abuse of authority must be part of the process, there is a lack of evidence that the child protective system unfairly intrudes into the American family. The vast majority of families will simply never experience any form of intervention from the state. It is a myth that the state possesses unfettered authority to substitute its parenting judgment for that of parents. States may not substitute judgment of a child's interests except in rare circumstances. The "best interests of the child" standard is invoked only where a threshold finding of abuse or neglect is supported through a judicial determination after a hearing in which parental fitness is presumed. Further, even where dependency adjudications are made, the majority of children are never, even temporarily, removed from the home. The state's authority to terminate the parent-child legal relationship is even further restricted. Family preservation remains the underlying policy of the juvenile court under federal law.[139] Additionally, parents have a constitutionally protected right to raise their biological children and the minimum burden of proof required to terminate parental rights is clear and convincing evidence. Under the due process clause of the Fourteenth Amendment, "the fundamental liberty interest of natural parents…does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state."[140]

The second primary criticism of the dependency court process is that it does not produce adequate outcomes for many children. While many children are well served by the system, on some level, this criticism is valid. Problems including failure to remove children in danger, inappropriate removal, inadequate services to children at home and in placement, lack of competent legal representation for children, untimeliness of proceedings and failures to develop permanent solutions exist and must be acknowledged and corrected. Efforts such as the State Court Improvement Program are addressing these issues. Placing the entire blame for these issues on an overburdened and under-resourced juvenile court, however, is not the answer. The juvenile court remains uniquely qualified as part of the judicial branch of government to provide fair and objective disposition of contested child protection issues. Further, the court's ability to incorporate improvements in these areas, and ultimately produce good outcomes for children, is directly tied to its resources.

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[138] NCAN, *supra* note 126.
[139] Rollin, *supra* note 124.
[140] Santosky v. Kramer, 455 U.S. 745, 753 (1982).

***Conclusion*: The Challenge of Evolving Dependency Philosophy**

The modern juvenile dependency process is an outgrowth of early juvenile court dependency jurisdiction, which itself has origins in the 19th century reform and child saving movements. The current dependency court, grounded in the *parens patriae* jurisdiction of the early court, evolved from a system of criminal predictions, to a comprehensive child welfare system. As such, it represents an evolving dependency philosophy where children are protected legally from child maltreatment to a greater extent than ever before.

Perhaps the greatest challenge facing the current court is the historical challenge presented by the competing interests of children and families. Increased child protection requires increased family intervention and the court continues to grapple with the balance of child and family. The court comes under fire from the public for overreaching into the family (and ironically, on occasion for failing to reach far enough to protect a child). System professionals debate the best interests of the child versus family preservation.

It may be helpful to recall that the family autonomy struggle is an historical one. While the focus of child saving and the early dependency court was much narrower than today, controversy over intervention into family autonomy is not new. Intervening for children while preserving parents' constitutional right to be parents has been a difficult challenge of dependency law from the beginning. The balancing of interests in a democratic society is tricky business. The *parens patriae* authority of the court seeks out the balance by limiting, but not usurping, parental discretion. As the *Crouse* court said in 1839, "[t]he right of parental control is a natural, but not unalienable one."[141] While the family autonomy challenge continues, the court's authority to intervene *is* constitutionally recognized and the issue becomes less a concern with public education and awareness of the occurrence of child maltreatment.

Additionally, the theme of family autonomy has evolved in the current court from an "either / or" proposition to a blending proposition. The issue has become less a balancing of opposed, polarized interests, and more a blending of competing interests. Rather than serving either children's or parents' interests, the goal of the current dependency court is to serve children's interests *through* the family. "Family preservation and reunification" is the underlying federal policy which coexists with the policy to protect children's best interests. The policy recognizes that children thrive in their own families, but that efforts to continue that ideal cannot take place at the expense of children.

As the dependency component of the juvenile court continues its function into the 21st century, the balancing and blending of children's interests with family autonomy seems a predictable and manageable challenge.

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[141] Crouse, 4 Whart. (Pa.) at 9.

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