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**\*75** THE PRACTICE OF LAW FOR CHILDREN [\[FN1\]](#)

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Lawyers, I suppose, were children once. [\[FN3\]](#)

### I. Introduction

The selection of Children and the Law as the topic for the James R. Browning Symposium [\[FN4\]](#) in 2004 says something powerful about the status of the practice of law for children and youth. Not so many years ago, this topic would not have been on the radar of symposium organizers, or had it been, it would not likely have been deemed worthy of such important academic attention. But **\*76** children's law [\[FN5\]](#) exists in 2004 as a recognized legal specialty with sufficient rigor to warrant law school symposium scrutiny. Similar to the development of pediatric medicine, the field of children's law has developed into a full academic and practice concentration. Through the development of social awareness, substantive law, law school curricula, standards of practice, and career paths, what was once a fringe professional interest and a cause of social progressives has become a legal specialty.

The importance of the development of children's law is more than academic. Children and youth represent a significant segment of the population [\[FN6\]](#) in need of legal services, which has gone unmet for many years. [\[FN7\]](#) In the juvenile delinquency arena, roughly 1.8 million cases are filed each year. [\[FN8\]](#) There are even more child welfare cases in response to the approximate 4 million children who are reported abused and neglected annually. [\[FN9\]](#) For many of these children, the legal proceedings in which they are involved determine the course of their lives and may be a matter of **\*77** life and death. As lawyers who carry a special responsibility to promote justice, this is a worthy and noble focus of our attention. [\[FN10\]](#)

The failure to provide legal services to this population is devastating. Just outcomes are dependent upon high quality legal advocacy. Unrepresented parties tend to fair poorly in our system. This is particularly true for children who, among various types of clients, are least likely to be able to speak for themselves. Yet historically, this argument has failed in the face of the view that children are not entitled to, or do not need, traditional legal counsel. This view is changing. We are moving from a legal system that valued children out of an occasional sense of benevolence to a system that recognizes the value of children as rights-based citizens.

Precisely where this movement towards recognizing children as rights-based citizens will lead is not clear. This article attempts to trace the evolution of the practice of law for children and provide some guidance for the decision-making that lies ahead in the development of an emerging and important area of law.

### II. The Relationship Between Client Status And The Delivery of Legal Services

Children's law is a new field of practice, and children have been represented by legal counsel for a relatively short time. Although children's interests appear in our early jurisprudence, it was not until the 1970's that we began to see the legitimate delivery of legal services to children. The emergence of lawyers for children in the 1970's is directly connected to the emerging status of children in society at that time. What we learn from this is that the value society places on a client class influences, if not dictates, the level of legal service provided.

**\*78** The evolution of children's status in western culture can be viewed as a movement from children as property, to children as welfare recipients, to children as rights-based citizens. [\[FN11\]](#) The degree of legal services available to children corresponds to these stages. Children viewed as property receive no legal services since property holders may do essentially as they wish with their property. Children as a welfare class will receive such services as the state chooses to grant. These services promote the state's interest, or at best, what the state views as the child's interest. But children as rights-based citizens are situated to receive the full benefit of independent legal counsel as they demand the enforcement of their rights. [\[FN12\]](#)

The importance of viewing children as rights-based citizens is reflected in the current debates within the federal government, state legislatures, advocacy organizations, and court systems over the formation of policy regarding the nature of legal services provided to children in the abuse and neglect court system. [\[FN13\]](#) There is a dilemma over whether to provide legal counsel to children, and if so, what type of legal service to provide. The agreed goal is to produce just outcomes for children, but there is disagreement as to whether legal services improve outcomes, and to the extent they do, which type of legal service is best. The debate centers over whether traditional independent legal counsel empowers children to their detriment, or whether attorneys serving as guardians ad litem [\[FN14\]](#) ultimately serve the state and not the child's interests. [\[FN15\]](#) **\*79** The historic development of children's status provides insight for the debate.

### III. The Historic Growth of Legal Representation of Children

#### A. The Parens Patriae: Children as Property

Pre-sixteenth century service to children was minimal and was provided by the church, if at all. [\[FN16\]](#) Children of that time were seen as property, and as such, warranted no governmental protection from the property holders. [\[FN17\]](#) Infanticide, for example, was sometimes seen as an accepted method for disposing of undesirable children, and some societies condoned the abandonment or killing of illegitimate children. [\[FN18\]](#)

Significant social change occurred in sixteenth and seventeenth century England as the family unit became a greater presence in English society. [\[FN19\]](#) As families moved from communal living arrangements to independence, [\[FN20\]](#) the government was forced to deal with poor and arguably dysfunctional families. As an underclass of poor emerged, communities became alarmed by vagrancy and crime that was attributed to the poor. [\[FN21\]](#) In response, Parliament passed a series of laws culminating in the Poor Law Act of 1601. [\[FN22\]](#) The poor laws authorized the governmental removal of children and the bounding out of children as **\*80** apprentices. [\[FN23\]](#) The action occurred under the government's belief in its authority to care for its citizenry under the emerging doctrine of parens patriae or ultimate parent of the state. [\[FN24\]](#) While there was some element of government service in this context, the primary motivation appears to have been to "clean up" the community. [\[FN25\]](#) The first representative for a child appears in this period of family law in the form of a guardian ad litem, which was used sparingly and typically assisted the state in its actions (usually to facilitate the passage of property and insure the crown received its tax share of any property transfer). [\[FN26\]](#)

The poor law system was transplanted into the American Colonies, and involuntary apprenticeship became an integral part of North American Poor Law. [\[FN27\]](#) At this point, the seeds of American child welfare law were planted. In the seventeenth and eighteenth centuries we saw the beginnings of modern abuse and neglect codes. Massachusetts records from the seventeenth century show, for example, that children were removed from their par-

ents' homes for failure to provide a suitable environment. [\[FN28\]](#) In the eighteenth century, Virginian children could be removed and apprenticed because of the condition of their poverty and because their parents were not providing "good breeding." [\[FN29\]](#)

This poor law system, drawn from England and the doctrine of *parens patriae*, truly begins to take hold in the nineteenth century under similar circumstances that gave rise to the English Poor Laws. The urbanization and industrialization of \*81 America, coupled with the influx of immigrants, gave rise to a significant population of poor families and street children. [\[FN30\]](#) The Society for Prevention of Pauperism issued a statement in 1823 describing the streets of New York as overrun with pauper children. [\[FN31\]](#) In 1825, New York opened the country's first house of refuge. [\[FN32\]](#)

The New York House of Refuge was authorized by New York Law, [\[FN33\]](#) which provided a charter to the Society for the Reformation of Juvenile Delinquents, the successor to the Society for Prevention of Pauperism. [\[FN34\]](#) The authorizing legislation allowed the Society to take children, committed as vagrants or convicted of crimes by authorities, into the house. [\[FN35\]](#) Criminal conviction was not a condition to incarceration. [\[FN36\]](#) Children could be committed by administrative order or application of their parents. [\[FN37\]](#) Nor was there any right to indictment or jury trial, [\[FN38\]](#) and certainly not counsel, as summary conviction of disorderly persons had previously been upheld in New York. [\[FN39\]](#)

In addition to houses of refuge, reformatories, which were entirely state-financed, began to emerge toward the middle of the century. [\[FN40\]](#) Reformatories were to be progressive institutions where, through civic and moral training, the youth would be reformed by a \*82 surrogate parent. [\[FN41\]](#) In reality, reformatories tended to be coercive, labor intensive incarceration facilities [\[FN42\]](#) in which youth, once again, could be placed without due process.

The nineteenth century House of Refuge Movement was validated by the judicial system. In a number of cases during this period, courts affirmed the practice of intervention into the lives of children through the doctrine of *parens patriae*. [\[FN43\]](#) The courts accepted the 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. [\[FN44\]](#)

The 1839 Pennsylvania decision of *Ex parte Crouse* [\[FN45\]](#) may 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. [\[FN46\]](#) The warrant, executed by Mary Ann's mother, provided that it would be in Mary Ann's interests to be incarcerated in the House because she was beyond her parents' control. [\[FN47\]](#) The reported case is an appeal from a denial of the father's subsequent habeas corpus petition for his daughter's return. [\[FN48\]](#) The father argued that the law allowing commitment of children without due process was unconstitutional. [\[FN49\]](#) 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 \*83 leave), and the child was there for her own reformation, not punishment (even though Mary Ann was probably treated harshly). [\[FN50\]](#) The Crouse court sanctioned the state's authority to intervene into the family as ultimate parent via the doctrine of *parens patriae*. [\[FN51\]](#) The case and the doctrine became the cornerstone of juvenile proceedings throughout the century, and through the pre-Gault [\[FN52\]](#) years of the juvenile court. The following language from the court illustrates the view:

[M]ay 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 [sic] with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable one. [\[FN53\]](#)  
The lead of the Crouse court was followed throughout the country. [\[FN54\]](#)

Although in one sense this nineteenth century period reflects an improving status for children, it is hard to say that children had moved out of property status. Yes, the state was intervening and providing a form of welfare, but most scholars agree that this was motivated more by the state's self-interest in clearing the streets of vagrants than by a sense of caretaking. [FN55] And \*84 to the extent that there was a concern by the state of overreaching, that concern was whether the parents' rights were infringed, not the child's. [FN56]

This prevailing view of the time did not go entirely unchallenged. The Illinois Supreme Court issued a decision in 1870 in the case of *People ex rel. O'Connell v. Turner* [FN57] which, if followed, would have repudiated the *parens patriae* refuge system. The court released Daniel O'Connell from the custody of the Chicago Reform School because his confinement as a dependent child was unconstitutional. [FN58] 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 the absorption of the child in, and its complete subjection to the despotism of, the State, is wholly inadmissible in the modern civilized world. [FN59]

The language acknowledges the inherent rights of parent and child vis a vis the state; rights which legal counsel could be retained to guard. Nevertheless, the case was not followed, and was then overruled by *In re Ferrier*, [FN60] which upheld a process-less detention under the traditional *Crouse* logic. A children's law system without due process was firmly in place. The O'Connell logic would not be seen again for another 100 years.

#### \*85 B. The *Parens Patriae*: Child Savers and the Juvenile Court

The events that took place next were something of an aberration, but they did contribute to the evolution of children's status. They also involved, arguably, the first children's lawyer, Elbridge Gerry, who later founded the New York Society for Prevention of Cruelty to Children (NYSPCC). [FN61] Mary Ellen Wilson, a 10-year old girl, had been abused and neglected by her caretakers for years. [FN62] In 1871, a church worker, no longer able to tolerate Mary Ellen's cries, convinced Henry Bergh from the New York Society for Prevention of Cruelty to Animals to help save the child. [FN63] Mary Ellen was beaten routinely, cut with scissors, never allowed outside, locked in a bedroom, and given a small rug on which to sleep. [FN64] Mr. Gerry, who had been Mr. Bergh's legal counsel, eventually devised a writ *de homine replegiando* (similar to a writ of habeas corpus and not the animal rights theory of popular myth in child protection circles) and convinced a New York judge to allow these citizens to save Mary Ellen. [FN65] This case is often thought to be the first child protection case. [FN66] Although Mary Ellen was not the first child protection case, it is significant in that it recognizes that there are degrees of child maltreatment that society will not tolerate. It is not remarkable in its acknowledgment that the state may remove a child from a caregiver. Clearly the state had been exercising that authority for over a century as to vagrant and "pre-criminal" children. The case, and the founding of the NYSPCC, led to the founding of numerous \*86 anti-cruelty to children societies and the extension of the states' *parens patriae* authority to child abuse victims. [FN67] These child abuse cases, however, represent a small number of children's cases as society's focus continued to be vagrant children.

The events of the late nineteenth century brought about the founding of the juvenile court. The first juvenile court was founded in Chicago in 1899, [FN68] and within 20 years almost every state had a similar special court for the treatment of juveniles. [FN69] The court was largely the outgrowth of a late nineteenth century progressive era movement called child saving. [FN70] The bourgeois child savers were moved by the plight of poor children and sought to save them from their circumstances by removing them from their environment. [FN71] They were well meaning, sympathetic (but not necessarily empathetic) activists whose ideology was accepted by the juvenile court. [FN72] The new court was to be an especially kind tribunal, which would care for children, again, as the *parens patriae*. [FN73] The court's jurisdiction typically included both delinquent and dependent children. [FN74] Although cruelty to children was mentioned in state \*87 codes, [FN75] the focus of the courts was delinquent or pre-delinquent children. Mary Ellen type cases were rare as society had not yet recognized child abuse as a large scale problem.

Prior to the 1970s, much of the scholarship of the juvenile court depicts the court as a revolutionary development for children in society. [FN76] More recent scholarship recognizes that, while the founding of the court was an im-

portant historic event, in truth, the court was more a formalization of nineteenth century poor law policy than the development of new ideology. [FN77] It represented progress, though, in that the child savers appear to have been genuinely concerned with children's welfare and were not merely concerned with keeping the streets free of pauper children. [FN78]

The result of the child savers' efforts and the development of the juvenile court was that children became a recognized welfare class, not so much entitled to, as perhaps worthy of, society's service. [FN79] The service was thought to be a kind of benevolent caregiving. [FN80] The child saver philosophy, and that of the early juvenile court, was that middle class adults knew what was best for disadvantaged children and could implement it through a judicial process that did not require procedural safeguards for the child. [FN81] It was thought that such process would only encumber the achievement of knowable beneficial outcomes. [FN82]

With the philosophy of the child savers in place, the juvenile courts throughout the country operated for a half century as largely process-less tribunals, attempting to do what was best \*88 for mostly delinquent and pre-delinquent children. [FN83] Lawyers for children, therefore, were not essential to the system, although they appeared from time to time. [FN84] The Illinois Juvenile Court Act of 1899, for example, provided not for a lawyer, but for the option of appointing "some suitable person to act on behalf of the child." [FN85] Pre-1960's decisions reflect a similar view. A 1944 Alabama Supreme Court case stated that "a guardian ad litem should be appointed to look after the interests of the child . . . ." [FN86] Courts recognized that representatives could be useful to children and help achieve system objectives. Traditional counsel was generally seen as unnecessary and potentially disruptive. [FN87]

### C. The Dissolution of the *Parens Patriae* and the Splitting of the Juvenile Court

The landscape of the juvenile court and the subsequent treatment of juveniles changed dramatically in the 1960's as a result of two landmark U.S. Supreme Court Cases. In 1966, the Court set the stage for dismantling the *parens patriae* authority of the juvenile court when it ruled in *Kent v. United States* [FN88] that the process of transferring juveniles from juvenile to adult court required the application of due process to the juvenile. [FN89] Then, in 1967, the Court struck down the unlimited *parens patriae* authority \*89 of the court as to delinquency cases in *In re Gault*. [FN90] In *Gault*, the Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." [FN91] In the opinion, Justice Fortas reviewed the history of the juvenile court and stated that it was a myth that the juvenile court had produced good outcomes by foregoing due process. [FN92] The Court reasoned that due process, not benevolent intentions, produced justice and was fundamental to our legal system. [FN93] The following language from the *Gault* decision illustrates the rejection of the child saver philosophy:

The child--essentially good, as [the child savers] saw it--was to be made to 'feel that he is the object of . . . care and solicitude.' . . . [FN94]

These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*.

The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme. . . . [FN95]

The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.' . . . If [the child's] parents default in effectively performing their custodial functions--that is, if the child is 'delinquent'--the state may intervene. In doing so, it does not deprive the child of any rights, \*90 because he has none [the child savers believed]. . . . [FN96]

Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in and comparable context. . . . And in practice . . . the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. . . . [FN97]

'There is evidence . . . that there may be grounds for concern that the child receives the worst of both

worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.' [\[FN98\]](#)

. . . . '[T]here is increasing evidence that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority . . .'

[\[FN99\]](#)

It is compelling to note that the offense for which young Gerald Gault was to be imprisoned under this benevolent system was making prank telephone calls. [\[FN100\]](#)

Among the due process rights created by Gault for juveniles accused of delinquency acts were notice of charges, \*91 confrontation, cross-examination, and prohibition against self-incrimination. [\[FN101\]](#) These, in turn, gave rise to an additional right--the right to legal counsel. [\[FN102\]](#) Children under Gault became rights-based citizens under the constitution and could, therefore, demand legal counsel, and legal counsel would have clear responsibilities and a duty to the client. As the U.S. Supreme Court later stated, "[w]hether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person. . . ."

[\[FN103\]](#) From this time forward, juveniles would have an enforceable constitutional right to legal counsel.

Beyond the establishment of due process rights for juveniles, Gault had the additional effect of bifurcating the juvenile court. [\[FN104\]](#) The Gault decision is specifically limited to delinquency cases. [\[FN105\]](#) The Court wrote: "We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state." [\[FN106\]](#) In other words, the abuse, neglect and dependency function of the court, traditionally commingled with the delinquency cases, was unaffected by Gault and, therefore, could continue on as a *parens patriae* system. Remember that the early juvenile court did not distinguish between child abuse and neglect and delinquency. All children were to be saved from lives of crime on the street, although in reality not that many abuse cases came to the court. Now, we have a clear distinction between juvenile offenders (delinquents who would be entitled to legal counsel because they were threatened with a loss of liberty) and juvenile victims (who came to court needing protection from abuse, and ironically, therefore, were not entitled to legal counsel).

#### \*92 D. The Development of Legal Counsel for Maltreated Children: The Reapplication of the *Parens Patriae*

At about the same time the U.S. Supreme Court was bifurcating the juvenile court, society came to understand that children were being victimized by their caregivers to a greater degree and in far greater numbers than had been known. A physician named C. Henry Kempe was intrigued by the large number of children who were seriously injured or killed by "accidental trauma." [\[FN107\]](#) He determined that many of these children were actually victims of abuse and that their injuries were far from accidental. [\[FN108\]](#) In 1962, Dr. Kempe and his colleagues published the landmark article *The Battered-Child Syndrome* in the *Journal of the American Medical Association*. [\[FN109\]](#) Through the article, Kempe and his colleagues exposed the reality that significant numbers of parents, from all economic, social, political, and religious segments of society, batter their children, in some cases to death. [\[FN110\]](#) Kempe's *Battered-Child Syndrome* describes a pattern of child abuse resulting in certain clinical conditions and establishes a medical and psychiatric model of the cause of child abuse. [\[FN111\]](#) The article marked the development of child abuse as a distinct academic subject and 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.

In 1962, in response to *The Battered-Child*, the U.S. Children's Bureau held a symposium on child abuse that produced a recommendation for a model child abuse reporting law. [\[FN112\]](#) By 1966, all but one state had adopted laws requiring physicians to \*93 report suspected child abuse. [\[FN113\]](#) Today, all states must have mandatory reporting laws. [\[FN114\]](#) In 1971, the California Court of Appeals recognized *Battered Child Syndrome* as a medical diagnosis and a legal syndrome in *People v. Jackson*. [\[FN115\]](#) In 1974, Congress passed landmark legislation in the federal *Child Abuse Prevention and Treatment Act (CAPTA)*. [\[FN116\]](#) The act provides states with funding for the handling of child maltreatment cases, conditioned on states' compliance with certain conditions. [\[FN117\]](#)

CAPTA led to a massive influx of dependency cases and the creation of our current child welfare system. Among the components of the new system was a representation scheme eerily reminiscent of the early days of the juvenile court and the child saver philosophy. The new system would be state based and influenced by federal financial incentive legislation. [FN118] As part of that federal incentive, states were required to appoint a representative for the child, not in the form of a traditional attorney as in delinquency cases, but in the form of a best interest representative. [FN119] States were free to provide such representation as they deemed appropriate, and the prevailing model became our old friend, the guardian ad litem, who may or may not be an attorney. Policymakers once again fell back on the notion that the system needed a participant who would serve the system and thereby, it was believed, promote the interests of the child. The results of CAPTA's requirement for child representation have been mixed at best. In some instances, only a lay guardian ad litem is appointed \*94 and the child lacks any legal representation. [FN120] Where a lawyer is appointed as guardian ad litem, [FN121] the lawyer's duty runs to the system as a protector of the child's best interests and not to the child as a truly independent advocate. Research has shown that current attorney/guardian ad litem practice is deficient. [FN122] Either way, in this still developing area of practice, we have failed to learn the lessons of the delinquency court and have fallen prey to a child saving mentality. It is frequently argued that truly independent attorneys for children will not serve the lofty system goal of serving the child's best interests. Lawyers are frequently seen as an impediment to producing good outcomes and the lessons of the pre-Gault years have not been extended to the child welfare arena. Children are still seen in the dependency court as worthy of our welfare, but not as rights-based citizens.

It is admittedly tricky to fashion a system of legal representation for child maltreatment victims. Many are very young or preverbal and simply cannot direct their litigation as a mature client can. And youth as victims of abuse and neglect are frequently ill-equipped to promote their own welfare. Legitimate arguments exist over the precise role and duties of counsel in these cases. [FN123] On the other hand, it is a mistake to assume we serve children as all-knowing benevolent caretakers while avoiding processes that limit the power of the state and empower the individual, a role only a true independent attorney can fill.

Despite the absence of a Gault-like decision in the child welfare arena, which day may still come, [FN124] significant progress \*95 has been made toward the recognition of children as rights-based citizens, and in turn, provision of counsel for maltreated children. Toward that end, in 2002, nine Georgia foster children brought a class action suit against Fulton and DeKalb Counties for failure to provide adequate and effective legal representation. [FN125] In 2005, the Federal District Court for the Northern District of Georgia issued an order denying the defendants' motions for summary judgment, stating that foster children have both a statutory and constitutional right to counsel. [FN126] Whether this represents the beginning of a trend is yet to be seen.

Although frequently appointed in a guardian ad litem capacity, thousands of lawyers across the country do this work for children and thousands more serve as child welfare attorneys representing state agencies and caregivers. [FN127] There is a move to amend CAPTA to require traditional attorney representation for children. [FN128] Additionally, the National Association of Counsel for Children and the American Bar Association Center on Children and the Law have adopted standards of practice promoting independent legal counsel for all children in child welfare cases. [FN129] \*96 These activities represent a realization that abused and neglected children are not only worthy of society's attention and care, they are citizens entitled to justice under the law. It should follow that they will soon be entitled to the full benefit of legal counsel.

#### IV. Conclusion

Children's legal status in America has evolved. In response, a practice of law for children has been born. Tremendous progress has been made in a short time toward the establishment of children's law as a legitimate field of practice. The work is only about three decades old. What began as a cause has become a profession and there is considerable evidence of that. Many law schools now have both delinquency and dependency courses in addition to the traditional family law curriculum, and comprehensive casebooks and treatises exist in both areas. [FN130] At least

one law school has developed a three-year children's law curriculum and offers an LLM in child welfare law. [\[FN131\]](#) There are now nearly 50 law school clinics preparing students to practice in this area. [\[FN132\]](#) In addition, there is a framework of constitutional law which defines the relationship between children, families and the state. Federal legislation has evolved to the point of defining a national model for the juvenile court process, [\[FN133\]](#) and comprehensive standards of practice have been developed for the \*97 lawyers in the field. [\[FN134\]](#) Professional membership organizations promote the practice by providing training and technical assistance to lawyers in the field. [\[FN135\]](#) The federal government funds research and development in the area through projects like the Court Improvement Program. [\[FN136\]](#) The National Council Juvenile and Family Court Judges promote judicial leadership in the area. Perhaps the most compelling evidence of the existence of the new legal discipline is that the American Bar Association recently designated children's law as one of the national legal specialties in which lawyers may become certified. [\[FN137\]](#) And there are more and more opportunities for lawyers to succeed in this work as dedicated children's law offices grow across the country. [\[FN138\]](#) An underserved client population for so many years is being served at last. There is more to do to develop the profession, but like our young clients, we are growing up fast.

[\[FN1\]](#). This article is republished with the permission of the Montana Law Review as it was originally published in the sixty-sixth volume of the Montana Law Review. Marvin Ventrell, The [Practice of Law for Children](#), 66 *MONT. L. REV.* 1 (Winter 2005).

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[\[FN3\]](#). Charles Lamb, Epigraph to Harper Lee, *To Kill a Mockingbird* (Popular Library 1962) (1960).

[\[FN4\]](#). The Browning Symposium honors Judge James R. Browning of the United States Court of Appeals for the Ninth Circuit, who was an original member of the Montana Law Review and served as Editor-In-Chief. It provides the Bar and general public with detailed analyses of important legal issues. Past symposia topics include: The 1972 Montana Constitution: Thirty Years Later; Privacy in Cyberspace; The Militia: Constitutional and Criminal Law Perspectives; The Proposal to Split the Ninth Circuit Court of Appeals; and The Religious Freedom Restoration Act.

[\[FN5\]](#). Also called juvenile law, pediatric law, child welfare law, and juvenile justice law. Children are most commonly represented in juvenile delinquency cases and child welfare (abuse and neglect) cases. Children may also be represented in private custody cases, adoption cases, and in civil damages proceedings. Children's law is distinguished from family or matrimonial law in that its focus is the provision of legal service specifically for children rather than any incidental service provided to children in the context of representing parents in divorce and custody matters.

[\[FN6\]](#). Minors comprise 25% of the total population of the U.S. See U.S. Census Bureau, Statistical Abstract of the United States (2002), Table No. 14: Resident Population by Race, Hispanic Origin and Single Years of Age: 2001, available at <http://www.census.gov/prod/2003pubs/02statab/pop.pdf> (last visited Mar. 1, 2005).

[\[FN7\]](#). See Stacey Violante et al., *America's Children: Still at Risk* 65 (ABA Steering Comm. on the Unmet Legal Needs of Children, 2001).

[\[FN8\]](#). Puzzanchera et al., *Juvenile Court Statistics 1999* ch. 2, p. 6 (Nat'l Ctr. for Juvenile Justice 2003), available at <http://ojjdp.ncjrs.org/ojstatbb/njcda/pdf/jcs99.pdf> (last visited Mar. 1, 2005).

[\[FN9\]](#). U.S. Dep't of Health and Human Serv., Admin. on Children, Youth and Families, *Child Maltreatment 2002* xiii

(U.S. Gov't. Printing Office 2004), available at <http://www2.acf.hhs.gov/programs/cb/publications/cm02/cm02.pdf> (last visited Mar. 1, 2005).

[FN10]. “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibilities for the quality of justice.” Thomas D. Morgan & Ronald D. Rontunda, 2004 Selected Standards on [Professional Responsibility 3 \(2004\)](#).

[FN11]. See Ventrell, *supra* note 2, at 17.

[FN12]. See Robert C. Fellmeth, *Child Rights and Remedies: How the U.S. Legal System Affects Children* 33 (2002).

[FN13]. The Child Abuse Prevention Treatment Act (CAPTA) requires a representative, but not necessarily an attorney, represent a child. CAPTA, [42 U.S.C. § 5105 \(2000\)](#). Some states do appoint attorneys to represent children. See Shirley A. Dobbin, *Child Abuse & Neglect Cases: Representation as a Critical Component of Effective Practice* 43 (Nat'l Council of Juv. & Fam. Ct. Judges 1998).

[FN14]. A guardian ad litem is a “representative” for a child, who may or may not be an attorney. A guardian ad litem is charged with representing a child’s “best interests” rather than necessarily taking client direction.

[FN15]. Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, & Protection Cases* 14 (ABA 1993).

[FN16]. Mary Edna Helfer et al., *The Battered Child* 19 (5th ed. 1997).

[FN17]. *Id.* at 9, 11.

[FN18]. *Id.* at 5.

[FN19]. *Id.* at 16.

[FN20]. *Id.*

[FN21]. 5 Eliz. C. 4 (1562-63) in *The Statutes at Large From the Fifth Year of Queen Mary to the Thirty-Fifth Year of Queen Elizabeth* 159 (Pickering ed., 1763).

[FN22]. 43 Eliz. C. 2 (1601) in *A Collection of Important English Statutes* 76 (3d ed. 1888).

[FN23]. Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 *Stan. L. Rev.* 259, 259 (1964).

[FN24]. *Id.* at 267.

[FN25]. Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* 241 (1997).

[FN26]. *Id.* at 237.

[FN27]. Stefan A. Risenfield, *The Formative Era of American Public Assistance Law*, 43 *Cal. L. Rev.* 214, 223

(1955).

[FN28]. 1 Children and Youth in America: A Documentary History 123-124 (Robert H. Bremner ed., 1970).

[FN29]. Douglas R. Rendleman, *Parrens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. Rev. 205, 212 (1971).

[FN30]. John C. Watkins, Jr., *The Juvenile Justice Century: A Sociological Commentary on American Juvenile Courts* 4 (1998).

[FN31]. Sanford J. Fox, [Juvenile Justice Reform: An Historical Perspective](#), 22 *Stan. L. Rev.* 1187, 1189 (1970).

[FN32]. [Id. at 1187.](#)

[FN33]. *Laws of New York*, 47th Session, Ch. CXXVI at 110 (1824).

[FN34]. Fox, *supra* note 31, at 1189-90.

[FN35]. *Id.* at 1190.

[FN36]. *Id.* at 1191.

[FN37]. Thomas J. Bernard, *The Cycle of Juvenile Justice* 68 (1992). See also Fox, *supra* note 31, at 1205 n. 9.

[FN38]. Fox, *supra* note 31, at 1191.

[FN39]. *Id.* (citing *In re Goodhue*, 1 N.Y. City Hall Rec. 153 (1816)).

[FN40]. Anthony M. Platt, *The Child Savers: The Invention of Delinquency* 47 (2nd ed. 1977); Watkins, *supra* note 30, at 8.

[FN41]. Watkins, *supra* note 30, at 8; See also John E. B. Myers, *A History of Child Protection in America* 42 (2004).

[FN42]. Watkins, *supra* note 30, at 9.

[FN43]. See, e.g., *Ex Parte Crouse*, 4 *Whart.* 9, 11-12 (Pa. 1839); *Fletcher v. People*, 52 *Ill.* 395, 397 (Ill. 1869).

[FN44]. See, e.g., *Illinois Juvenile Court Act of 1899*, 1899, § 1, *Ill. Laws* 131 (current version at 705 *Ill. Comp. Stat.* 405 (1988)); Platt, *supra* note 40, at 8. See also Ben B. Lindsey & Rube Borough, *The Dangerous Life* (1930), for a discussion of Ben Lindsey's view of his role as judge of Denver's Juvenile and Family Relations Court.

[FN45]. [4 Whart. at 11-12.](#)

[FN46]. Fox, *supra* note 31, at 1205.

[FN47]. *Id.*

[FN48]. *Id.* at 1205-06.

[\[FN49\]](#). *Id.*

[\[FN50\]](#). [Crouse, 4 Whart. at 11.](#)

[\[FN51\]](#). Fox, *supra* note 31, at 1206.

[\[FN52\]](#). [In re Gault, 387 U.S. 1 \(1967\).](#)

[\[FN53\]](#). [Crouse, 4 Whart. at 11.](#)

[\[FN54\]](#). See, e.g., [Roth v. House of Refuge, 31 Md. 329, 334-35 \(1869\)](#); [Prescott v. Ohio, 19 Ohio St. 184, 188 \(1869\)](#); [State ex rel. Cunningham v. Ray, 63 N.H. 406, 410 \(1885\)](#); [Milwaukee Indus. Sch. v. Supervisors of Milwaukee County, 40 Wis. 328, 338 \(1876\)](#); [In re Ferrier, 103 Ill. 367, 373 \(1882\).](#)

[\[FN55\]](#). See, e.g., Fox, *supra* note 31, at 1195.

[\[FN56\]](#). See Douglas R. Rendleman, *Parrens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. Rev. 205, 238 (1971).

[\[FN57\]](#). [55 Ill. 280 \(1870\).](#)

[\[FN58\]](#). [Id. at 288.](#)

[\[FN59\]](#). [Id. at 284.](#)

[\[FN60\]](#). [In re Ferrier, 103 Ill. 367, 373 \(1882\)](#) (citing [Crouse, 4 Whart. at 11.](#)).

[\[FN61\]](#). Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. Rev. 293, 307-08 (1972).

[\[FN62\]](#). *Id.* at 308-10.

[\[FN63\]](#). *Id.* at 307.

[\[FN64\]](#). *Id.* at 309-10.

[\[FN65\]](#). *Id.* at 308.

[\[FN66\]](#). This assumption is not accurate because there is at least one other case before Mary Ellen involving the same players. See Stephen Lazowitz & Eric A. Shelman, *Before Mary Ellen*, 20 *Child Abuse & Neglect: The Int'l J.* 235-37 (1996).

[\[FN67\]](#). Thomas, *supra* note 61, at 311.

[\[FN68\]](#). Fox, *supra* note 31, at 1191 (see Illinois Juvenile Court Act of 1899, § 1, Ill. Laws 131 (repealed 1965)).

[\[FN69\]](#). Platt, *supra* note 40, at 10.

[\[FN70\]](#). Id. at 3.

[\[FN71\]](#). Id. at 10.

[\[FN72\]](#). Platt, *supra* note 40, at 3; see also Lindsey, *supra* note 44.

[\[FN73\]](#). Julian Mack, The [Juvenile Court](#), 23 *Harv. L. Rev.* 104, 107 (1909). See also Edmund B. Shea, The Children's Code and the Juvenile Court, 13 *Marq. L. Rev.* 208, 209 (1929).

[\[FN74\]](#). 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. Dependency and neglect was defined, in part, as follows: Any child who for any reason is destitute or homeless or abandoned; Has not proper parental care or guardianship; Who habitually begs or receives alms; Who is found living in any house of ill fame or with any vicious or disreputable person; 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. 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. Illinois Juvenile Court Act of 1899, § 1, Ill. Laws 131 (repealed 1965) (current version at 705 Ill. Comp. Stat. 405 (1988)).

[\[FN75\]](#). See Illinois Juvenile Court Act of 1899, § 1, Ill. Laws 131 (repealed 1965) (current version at 705 Ill. Comp. Stat. 405 (1988)).

[\[FN76\]](#). See, e.g., Mack, *supra* note 73.

[\[FN77\]](#). Fox, *supra* note 31, at 1195.

[\[FN78\]](#). Platt, *supra* note 40, at 46.

[\[FN79\]](#). See Peters, *supra* note 25, at 251; Watkins, *supra* note 30.

[\[FN80\]](#). Platt, *supra* note 40, at 82.

[\[FN81\]](#). Id. at xxii., 18.

[\[FN82\]](#). Id. at 18.

[\[FN83\]](#). See, e.g., Monrad G. Paulsen, Fairness to the Juvenile Offender, 41 *Minn. L. Rev.* 547 (1957).

[\[FN84\]](#). See, e.g., Daniel L. Skoler & Charles H. Tenney, Jr., Attorney Representation in Juvenile Court, 4 *J. Fam. L.* 77 (1964).

[\[FN85\]](#). Illinois Juvenile Court Act of 1899, § 5, Ill. Laws 131 (repealed 1965) (current version at 705 Ill. Comp. Stat. 405 (1988)).

[\[FN86\]](#). Ex parte [Echols](#), 17 *So. 2d* 449, 449 (Ala. 1944).

[\[FN87\]](#). See Donald N. Duquette, [Legal Representation for Children In Protection Proceedings: Two Distinct Lawyer](#)

[Roles Are Required, 34 Fam. L.O. 441 \(2000\)](#) (discussing the ongoing debate on the role of counsel in child welfare proceedings).

[FN88]. [383 U.S. 541 \(1966\)](#).

[FN89]. [Id. at 554](#).

[FN90]. [387 U.S. 1 \(1967\)](#).

[FN91]. [Id. at 13](#).

[FN92]. [Id. at 14-26](#).

[FN93]. [Id.](#)

[FN94]. [Id. at 15](#).

[FN95]. [Id. at 16](#) (italicization added).

[FN96]. [Gault, 387 U.S. at 17](#) (italicization added).

[FN97]. [Id.](#)

[FN98]. [Id. at 18 n.23](#) (quoting [Kent, 383 U.S. at 556](#)).

[FN99]. [Id. at 27 n.37](#) (quoting a National Crime Commission Report).

[FN100]. [Id. at 4](#).

[FN101]. [Gault, 387 U.S. at 33, 55-57](#).

[FN102]. [Id. at 41](#).

[FN103]. [Fare v. Michael C., 442 U.S. 707, 719 \(1979\)](#).

[FN104]. [Gault, 387 U.S. at 12-13](#).

[FN105]. [Id. at 4, 56](#).

[FN106]. [Id. at 13](#).

[FN107]. C. Henry Kempe, et al., The Battered-Child Syndrome, 181 JAMA 17, 17 (July 17, 1962).

[FN108]. [Id.](#)

[FN109]. [Id.](#)

[FN110]. *Id.* at 17-20.

[FN111]. *Id.* at 17-24.

[FN112]. Myers, *supra* note 41, at 284 (citing *Children*, 9(3), 123 May-June, 1962).

[FN113]. Seth C. Kalichman, *Mandating Reporting of Suspected Child Abuse: Ethics, Law, and Policy* 15 (Washington, D.C.: American Psychological Association, 2d ed. 1999).

[FN114]. CAPTA, [42 U.S.C. § 5101-5199c](#) (2000) (amended 1996) (all states must have mandatory reporting laws in order to qualify for funding under CAPTA pursuant to [42 U.S.C. § 5106a](#)); see, e.g., [Colo. Rev. Stat. § 19-3-304 \(2004\)](#).

[FN115]. [95 Cal. Rptr. 919, 921 \(Cal. Ct. App. 1971\)](#); see also [Estelle v. McGuire](#), 502 U.S. 62 (1991); [People v. Henson](#), 304 N.E.2d 358 (N.Y. 1973).

[FN116]. CAPTA, [42 U.S.C. §§ 5101-5119c](#).

[FN117]. *Id.* [§ 5106a](#).

[FN118]. *Id.*

[FN119]. *Id.*

[FN120]. See, e.g., [Fla. Stat. ch. 39.820 \(2004\)](#).

[FN121]. The majority of jurisdictions appoint lawyers as guardian ad litem. See Dobbin, *supra* note 13, at 43.

[FN122]. See, e.g., *Violante*, *supra* note 7.

[FN123]. See, e.g., Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model--The ABA (NACC Revised) Standards of Practice*, in *NACC Children's Law Manual Series* 167 (1999); Donald N. Duquette, [Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required](#), 34 *Fam. L.Q.* 441, 441-66 (2000).

[FN124]. Scholars have argued for the extension of *Gault* to child welfare law on the theory that maltreated children face a similar deprivation of liberty to juvenile confinement in that they are forcibly placed by the state in various settings (albeit "for their own good"). Additionally, the argument is made that children have a due process right to counsel in child welfare cases pursuant to the *Mathews v. Eldridge* test. Jacob E. Smiles, [A Child's Due Process Right to Legal Counsel in Abuse and Neglect Proceedings](#), 37 *Fam. L.Q.* 485, 486-87 (2003).

[FN125]. [Kenny A. ex rel. Winn v. Perdue](#), 218 F.R.D. 277, 283 (N.D. Ga. 2003).

[FN126]. [Kenny A. ex rel. Winn v. Perdue](#), No. CIV.A.1:02-CV-1686, 2005 WL 332417, at \*3-6 (N.D. Ga. Feb. 8, 2005).

[FN127]. Donald N. Duquette & Marvin Ventrell, *Certification of Child Welfare Attorneys: The Next Step in Building a Profession Dedicated to Justice for Children*, 23 *Child. Legal Rts. J.* 53, 56 (2003).

[FN128]. First Star, a national policy advocacy organization, in collaboration with the NACC and the ABA Center on Children and the Law, is working to amend CAPTA. For more information on First Star, see [www.firststar.org](http://www.firststar.org).

[FN129]. D. Katner et al., Nat'l Ass'n of Counsel for Children, NACC Recommendations for Representation of Children in Abuse and Neglect Cases (2001), available at <http://naccchildlaw.org/documents/naccrecommendations.doc>, (last visited Mar. 1, 2005). See also Peters, *supra* note 25.

[FN130]. See, e.g., J. Eric Smithburn, *Cases and Materials in Juvenile Law* (2002); R.D. Goldstein, *Child Abuse and Neglect: Cases and Materials* (1999); Haralambie, *supra* note 15.

[FN131]. Loyola University Chicago School of Law's Citvas ChildLaw Program gives students the opportunity to focus their education in child welfare law and offers a masters program. See [http://www.luc.edu/law/academics/graduate/child\\_family.shtml](http://www.luc.edu/law/academics/graduate/child_family.shtml) (last visited Mar. 1, 2005).

[FN132]. NACC National Child Advocacy Resource Center data (on file with author).

[FN133]. 132. CAPTA, [42 U.S.C. §§ 5101-5119c](#); Adoption and Safe Families Act of 1997, [Pub. L. No. 105-89, 111 Stat. 2115 \(1997\)](#).

[FN134]. See ABA Criminal Justice Section, *Juvenile Justice Standards Annotated: A Balanced Approach* (Robert E. Shepherd, Jr., ed., 1996); Katner, *supra* note 129; Peters, *supra* note 25.

[FN135]. See, e.g., National Association of Counsel for Children, at <http://naccchildlaw.org> (last visited Mar. 1, 2005); American Bar Association Center on Children and the Law, at <http://www.abanet.org/child/home.html> (last visited Mar. 1, 2005).

[FN136]. See Administration for Children & Families, Court Improvement Program, available at <http://naic.acf.hhs.gov/general/legal/legalres/cip.cfm> (last visited Mar. 1, 2005).

[FN137]. On July 26, 2001, the ABA approved the definitions of Child Welfare Juvenile Law and Delinquency Juvenile Law as suitable for specialty certification. On February 12, 2004, the ABA approved the NACC as a certifying body in Child Welfare Juvenile Law. The U.S. Department of Health and Human Services funds the NACC's current certification program. See National Association of Counsel for Children, *Certification*, available at <http://naccchildlaw.org/training/certification.html> (last visited Mar. 1, 2005).

[FN138]. The NACC operates the National Children's Law Office Project which has developed a national network of children's law offices. The program produces best practice guidelines for model office designation. See National Association of Counsel for Children, *The NACC National Children's Law Office Project*, available at <http://naccchildlaw.org/about/nclop.html> (last visited Mar. 1, 2005).