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Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System

SUSAN VIVIAN MANGOLD†

The legal framework underpinning family law traditionally balances the rights of parents, the needs and rights of children, and the authority and obligations of the state. This triangular framework was built in a series of Supreme Court cases challenging state regulation of the family. I coin the phrase public family law to depict cases where the state has intervened into the "private" family to assume some custodial interest from the parents. I argue that in public family law, the triangular, constitutional framework is inadequate to explain the complexity of rights and duties exchanged.

Beyond the three-party structure of the constitutional framework, a body of law has developed which articulates rights of other potential rights holders in the dependency system, such as grandparents and foster parents. This paper traces the role of one of those potential rights holders, the nonprofit private provider agency. It argues that because they provide a variety of services to children and their families, and because they have responsibilities vis-à-vis children, parents, and the state, private agencies should have corresponding rights. Full recognition of the role of private provider agencies and others who have vital relationships with the child and family suggests an alternative framework that recognizes the historic and current roles of private providers and other rights holders.

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Instead of a myopic focus on a triangle of rights, the model should be a more expansive set of concentric circles. The child is in the center surrounded by the small circle of the child's family. Beyond that circle is a concentric circle of supporters from the community, including private providers, who have an important relationship with the child.¹

The parent-child-state constitutional framework was developed in a series of Supreme Court cases that defined when the state could intervene constitutionally in the family. *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Prince v. Massachusetts*, and later *Wisconsin v. Yoder* are considered landmark cases establishing the parameters of state intervention through a balance of rights and responsibilities among parents, children, and the state.²

¹ Barbara Bennett Woodhouse traces the social and legal context of the constitutional framework of parent-child-state but also challenges the framework itself. See Barbara Bennett Woodhouse, *Who Owns the Child?*: *Meyer, Pierce and the Child as Property*, 33 WM. AND MARY L. REV. 995, 1051 (1992). She argues for a more duty-oriented recognition of rights and responsibilities and deconstructs present notions of nuclear family and parental responsibility, exposing the limits of the present framework in recognizing the reality of children's lives and needs. See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Barbara Bennett Woodhouse, *It All Depends on What You Mean by Home*: Toward a Communitarian Theory of the “Nontraditional” Family, 1996 UTAH L. REV. 569 (1996). Hillary Rodham hinted at such an inclusive model in her article *Children Under the Law*. Hillary Rodham, *Children Under the Law*, in *THE RIGHTS OF CHILDREN* 1 (1974). In that piece, she suggested that issues of child placement and review of those placements should be determined by boards made up of persons from the child's community. The boards would include professional workers such as would be employed by provider agencies. At the outset, she adopts the accepted triangle. "These issues of family autonomy and privacy, state responsibility and children's independence are complex, but they determine how children are treated by the nation's legislatures, courts and administrative agencies." *Id.* However, at the conclusion of her article, she challenges the closed triangle. "Without an increase in community involvement, the best drafted laws and most eloquent judicial opinions will merely recycle past disappointments." *Id.* at 28.

² Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972). This parent-child-state framework has been adopted by the major commentators on family law. See *CHILD, FAMILY AND STATE* (Robert H. Mnookin & D. Kelly Weisberg eds., 3d ed. 1995) (assuming, through title and organization, that the parent-child-state balance is the organizing framework); Robert H. Mnookin, *Final Observations, in IN THE INTEREST OF CHILDREN* 511 (Robert H. Mnookin, ed., 1985) ("At the most basic level, the question "Who decides?" concerns the allocation of power and responsibility among child, family and state."); *SAMUEL M. DAVIS, ET AL.*,
particular, this paper challenges that three-party framework as it applies to the dependency system, the social services, and legal system that authorizes and provides for state intervention in the family based on allegations of child abuse and neglect. Two more recent cases, *Wilder v. Bernstein* and *Smith v. Organization of Foster Families for Equity and Reform* ("O.F.F.E.R.") focus on some of the important actors in addition to the parent, child, and state in the dependency system. These "important others," including foster parents and private provider agencies, are discussed in these cases but the parent-child-state doctrinal structure is not explicitly

*Children in the Legal System* 1 (2d ed. 1997) ("How should decision making authority be allocated between child and parent, and equally important, how should that same power be allocated between parent and state? Essentially, the question is 'Who decides what is best for a child?'"). In *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965), Justice White, in concurrence, suggests that the constitutional protection so carefully crafted by the majority and concurrences in the case is obvious.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of the statute [criminalizing contraception] on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children,' *Meyer v. Nebraska*, 262 U.S. 390, 399, and 'the liberty... to direct the upbringing and education of children,' *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35..."

3. This paper will use the term "dependency system" to describe the whole range of social and legal services provided to children at risk of abuse and neglect at the hands of their caretakers. The dependency system is a component of the more comprehensive child welfare system, which includes childcare, health, and nutrition and other publicly funded programs in addition to those targeted to abused and neglected children. The "system" is characterized by paralyzing crisis and lack of coordination. In 1991, the National Commission on Children appointed by then President Bush stated in its report, "If the nation had deliberately designed a system that would frustrate the professionals who staff it, anger the public who finance it, and abandon the children who depend on it, it could not have done a better job than the present child welfare system." *National Commission on Children, Beyond Rhetoric: A New Agenda for Children and Families, Final Report of the Nat'l Comm'n on Children* (1991). The term "child protection" will be used in this paper to describe only the front end of the dependency system—reporting, investigating, and record keeping of allegations of abuse and neglect.

challenged. A review of these cases, along with the history of the dependency system and the current operation of the system, reveal the closed parent-child-state triangle as an incomplete model for the complexity of family law, especially as it applies to abused and neglected children in the dependency system.

The argument for inclusion of private agencies as stakeholders with an important, recognized role in dependency proceedings is ultimately based on the assessment that such inclusion promotes the protection-based best interest of children. Considering all of the implications of this more inclusive framework is beyond the scope of this article, but it does discuss one possible implication, the effect of an enhanced role for private providers on the representation of children.

Part I challenges the accepted theoretical and doctrinal frameworks of family law by reviewing the Supreme Court cases that established the parent-child-state triangular balance of rights. To these jurisprudentially fundamental family law cases are added Smith v. O.F.F.E.R. and Wilder v. Bernstein. These cases challenge the tripartite framework with their exhaustive reviews of the importance of private providers in the dependency system, and expose the limits of the parent-child-state triangle. The tripartite model is incomplete in assessing the true rights and responsibilities borne by participants in the dependency system.

Part II traces the historical development of the legal response to child abuse and neglect, focusing on cases and laws that defined the appropriate roles of the parent, child, and state, and the emergence of private agency participation. Formative codes in colonial America, indenture on behalf of categories of children considered needy, and the emergence of private provider agencies in the late nineteenth century, all predate the development of public child welfare agencies. The ongoing presence of active, intervening individuals and entities challenges the parent-child-state framework from the earliest days of American law. Part Two continues the historical analysis by exploring the emergence of private agencies as key actors in the early twentieth century. It then turns to the federal-state statutory scheme developed in the second half of the twentieth century. This scheme formally embraced the old parent-child-state model but it continued to rely on
private provider agencies.

Part III looks at the current dependency system, focusing on the role of private agencies and on current state laws that allow participation by private agencies in dependency proceedings.\(^5\) Dependency proceedings are considered broadly, from initial child protection hearings through termination of parental rights and adoption hearings, in order to appreciate the scope of private agency participation. The extent of the participation and its influence on the courts will be considered through an analysis of the statutes and case law that invite an active role for private agencies.

Part IV applies the expanded framework by considering the impact of private provider participation in court proceedings. Although the focus of this paper is on the historical and current status of private providers and the inadequacy of the parent-child-state framework because it does not consider that status, the expanded theory is applied to the arguments concerning representational models for children. In particular, the model of representation of children is examined when private provider agencies have an active status in hearings. Through that discussion, this article enters the debate between those concerned with the proper representational model for children’s attorneys. Lawyers should represent the children as competent clients whenever possible and not resort to a paternalistic model of representation whereby the attorney determines the “best” position to take whether or not it is the position the child wishes.\(^6\) The undue influence of children’s attorneys or the incomplete evidence of safety risks diminishes when the role of private providers is factored into the court proceedings. Including knowledgeable private provider agency representatives in hearings will make it safer and therefore easier for the children’s attorneys to assume the traditional attorney role.

5. Courts have repeatedly commented on the complexity and chaos of the dependency system with its many subcontracting private provider agencies. “Even with the best of intentions, the complex foster care system, comprised of state regulatory boards, local DSS offices and myriad private contracting agencies (roughly 80 in New York City) has been shown to fail thousands of children and families.” In re Jonathan D., 412 N.Y.S. 2d 733, 738 (1978).

There are criticisms about the increased participation of private agencies in the dependency system. Historically, cultural bias has been a constant concern. In the current system, that bias remains ever present. Private provider agencies have evolved from their paternalistic predecessors, but they are still institutional actors, often funded and staffed from outside the community where they work. The article attempts an honest portrayal of the agencies, including ongoing cultural bias, and determines that, on balance, their increased visible participation is a positive reform, especially when it is made accountable by participation in dependency hearings.

A second criticism of enhancing the legal role of private provider agencies is that the already complex, chaotic dependency system should not be "fixed" by adding to it another party that brings along attorneys, agendas, and interests separate from those of the children. Again, the article determines that the extensive involvement of private providers is already part of the system. Giving them a voice in legal proceedings will provide more direct access to information and services that can better serve children and their families.

After considering the theoretical, doctrinal, historical, and pragmatic arguments, this paper argues that the limited triangle should be exchanged for a more expansive circle of care for children. Relatives, public agencies, foster parents, private agencies, teachers, and schools may all be part of this community circle. This paper focuses on private providers, who are vital historical and contemporary stakeholders in the dependency system, and argues for both an expanded framework for public family law and an expanded legal role for stakeholders in the dependency system.

I. THE PARENT-CHILD-STATE TRIANGLE

A. Cases Developing the Parent-Child-State Triangle

In the first half of the twentieth century, three Supreme

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7. The author thanks Paul Colomy, a constructive commentator on an earlier draft of this paper presented at the Annual Meeting of the Law and Society Association (June 1998) for raising this issue.
Court cases dealt with the rights of parents or legal guardians to exercise authority and control over the upbringing of their children in the face of state laws limiting that authority. These cases have long been considered key to understanding family law, establishing a tripartite balance of rights and responsibilities among the parent, child, and state. However, the parent-child-state balance of rights fails to account for the other rights holders driving and deciding these cases. Among these additional rights holders are private provider agencies, such as the Society of Sisters, named plaintiff in the second of these cases.

Barbara Bennett Woodhouse has developed the complicated history of the first two foundational family law cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, to dispel the accepted understanding of these cases as liberal icons that protect the rights of parents against the overreaching regulation of the state into the private family. Instead, she asserts that these cases can also be understood as protecting the patriarchal notion of family long embedded in American family law. Martha Minow also questions the accepted wisdom of these cases as beginning a long, consistent line of family law cases developing the parent-child-state balance of constitutional rights. She views this conventional understanding of these cases and their penumbra as ignoring the complicated debates raging within the families and groups that brought the litigation. Parsing out the rights of parents, children, and the state as autonomous and individual rights holders obscures the relational rights inherent between and among these parties.

By questioning the parent-child-state framework assumed in these cases, I build on the work of both Woodhouse and Minow. The accepted doctrinal approach is impoverished because it ignores the complexity of family law inherent in the cases and, later, in their application. The parent-child-state triangle of rights is only part of the story. While Woodhouse points to alternative motivating factors behind the judicial decisions and Minow discusses

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8. See supra note 2.
the limits of the framework, there are other parties exercising vital duties explicitly discussed by the court but somehow lost in the constitutional theory of family that only considers the parent, child, and state.

Private provider agencies were a strong force behind these cases and remain a strong if seldom acknowledged force in family law throughout its history to the present time.\textsuperscript{12} Their rights were explicitly recognized by the Court in \textit{Pierce}, but never fully developed or explored.\textsuperscript{13} They are not merely subcontractors whose rights are properly assumed under the rights and responsibilities of the state. Instead, they are important stakeholders in the dependency system; fulfilling parent and child needs that go beyond mere contract obligations owed to the state.

In \textit{Meyer}, the Court overturned the conviction of a parochial school teacher who violated a state law requiring the teaching of all subjects in the English language until the eighth grade. The \textit{Meyer} Court discussed the liberty interest infringed upon by the statute as, in part, the right "to marry, establish a home and bring up children."\textsuperscript{14} The Court continued: "[C]orresponding to the right of control, it is the natural duty of the parent to give his child education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory law."\textsuperscript{15} The rights implicated included both the teacher's right "to teach and the right of the parent to engage him so to instruct their [sic] child."\textsuperscript{16} The Court also recognized that the state's rights and duties, "to improve the quality of its citizens, physically, mentally, morally is clear but the individual has certain fundamental rights which must be respected."\textsuperscript{17} The Court employed a description of Plato's Ideal Commonwealth where "the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent."\textsuperscript{18} The Court cited extreme state control to assert that some limit of state power must be assumed, "and it hardly will be affirmed that any legislature could impose such restrictions

\begin{footnotes}
\footnotetext[12]{See infra Part III B.}
\footnotetext[13]{See \textit{Pierce}, 286 U.S. at 536.}
\footnotetext[14]{\textit{Meyer} v. Nebraska, 262 U.S. 390, 399 (1923).}
\footnotetext[15]{\textit{Id.} at 400.}
\footnotetext[16]{\textit{Id.}}
\footnotetext[17]{\textit{Id.} at 401.}
\footnotetext[18]{\textit{Id.} at 401-02.}
\end{footnotes}
upon the people of a State without doing violence to both letter and spirit of the Constitution."

Two years later in Pierce, the Court further developed the jurisprudence of state intervention into the parent-child relationship. In Pierce, a state law that required children to attend public school was deemed unconstitutional. Pierce was not brought by parents challenging the law in an effort to stop the state from requiring them to send their children to public school. Instead, the suit was filed by the Society of Sisters.

[The Society is] an Oregon Corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between eight and sixteen.

In the parlance of today, the Society of Sisters would be called a private provider agency. The Court went on to describe the duties performed by this private provider as "a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State."

The Pierce Court recognized the rights of parents and their duty to their children and the state.

Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 [mandating that children attend public schools] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for

19. Id. at 402.
21. Id. at 531-32.
22. Id. at 534.
This oft-quoted phrase recognizes an exchange of rights and duties between parents and the state on behalf of children. The parent-child-state triangular balance is introduced constitutionally. This doctrinal framework is accepted as the constitutional contribution of the Court in \textit{Pierce}, but it ignores the importance of the rights and duties of the provider agency, the Society of Sisters, that were so integral to the \textit{Pierce} decision.

The Court in \textit{Prince} built on the foundation laid by \textit{Meyer} and \textit{Pierce} by further articulating the parent-child-state framework. The \textit{Prince} Court held valid a state child labor law against a legal guardian's assertion that the law violated her right to raise the child as she saw fit, and the child's right to practice Jehovah Witness beliefs by selling religious magazines.\textsuperscript{24} The Court limited the holdings of \textit{Meyer} and \textit{Pierce} to an exchange of rights and duties among parents, children and the state:

Previously, in \textit{Pierce v. Society of Sisters}, 268 U.S. 510, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in \textit{Meyer v. Nebraska}, 262 U.S. 390, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. \textit{Pierce v. Society of Sisters}, supra. And it is in recognition of this that these decisions have respected the private realm of family life that the state cannot enter .... It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare ....

The \textit{Prince} Court focused on the limits of state and parental control over children, thereby obscuring the

\textsuperscript{23} Id. at 534-35.

\textsuperscript{24} Prince v. Massachusetts, 321 U.S. 158 (1944) (appellant is caretaking aunt). The three cases building the parent-state-child framework of rights and responsibilities are all brought by "others." See id; see also Meyer v. Nebraska, 268 U.S. 390, 391 (1923) (stating plaintiff is teacher); \textit{Pierce}, 268 U.S. at 511 (stating plaintiff is private provider agency).

\textsuperscript{25} \textit{Prince}, 321 U.S. at 166-67.
holding in the earlier cases, that included rights and duties of other rights holders, namely teachers, schools, and private providers. By relying on a narrow, three-party holding in *Meyer* and *Pierce*, the *Prince* Court established the parent-child-state framework for considering liberty rights and concurrent duties.

The 1972 case of *Wisconsin v. Yoder*\(^{26}\) posed similar constitutional issues, this time in the context of a successful challenge to compulsory education laws imposed on the Amish. In this case, parents had been convicted under a Wisconsin law requiring attendance at school until the age of sixteen. The parents argued that sending their teens to school past the eighth grade violated their Amish beliefs and lifestyle. The Court agreed with the parents, and relied upon the parent-child-state balance established in *Meyer*, *Pierce*, and *Prince*. The Court stated in relevant part:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious formative years have a high place in our society. (citation omitted)\(^{27}\)

The Court quoted and relied upon *Meyer*, *Pierce*, and *Prince* extensively in a decision that worked within a balance of rights and responsibilities between parents and the state to further develop the triangular doctrinal framework.\(^{28}\)

Indeed it seems clear that if the State is empowered, as *parens*
patriae, to “save” a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in Prince, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.... If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters, in which the Court observed: “Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.... The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.... To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”

In Santosky v. Kramer30 and then in DeShaney v. Winnebago County Department of Social Services,31 parental rights and duties and state rights and duties toward children in the dependency system were addressed by the Supreme Court, and the parent-child-state framework was imposed on public family law. In Santosky, the Court held that the standard necessary to involuntarily terminate parental rights was “clear and convincing evidence.”32 Even when children were in the dependency system and their care was subject to procedural safeguards at each juncture, the importance of the parental right to the care and control of their child could not be severed absent a showing by the state of clear and convincing evidence of unfitness.33 The Santosky Court again relied on a line of cases, beginning with Meyer, Pierce, and Prince to demonstrate historical recognition of parental rights.

[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. The fundamental liberty interest of natural parents

29. Id. at 232-34.
32. Santosky, 455 U.S. at 769.
33. See id.
in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relations are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family matters.34

In DeShaney, the court declined to find a state duty to protect a child who was in the custody of his father, not in state custody, when the child suffered permanent serious injury at the hands of his father.35 Winnebago County Department of Social Services was repeatedly informed of incidents of abuse and the risk of further abuse, but the agency did not remove the young child from his father’s care.36 The Court reasoned that the state right to intervene, to investigate and monitor the situation, did not implicate a duty to protect the child who remained in his father’s care.37 In accordance with the parent-child-state framework developed in the Meyer-Pierce-Prince line, the state had not taken on the custodial right and therefore did not hold the accompanying duty to protect the child. The right of control had been left to the father, and the child could not make out a liberty claim for denial of a duty to protect based on the father’s acts of private violence.

These Supreme Court decisions determined the wide parameters of the parent-child-state relationship. Although the interests of additional parties were present in several cases—the teacher and schools in Meyer, the private provider Society of Sisters in Pierce, the caretaking aunt in Prince—the cases stand for a line of family law cases developing a framework for analyzing parent, child, and state rights and responsibilities in the face of state intervention. Even though the parties were intimately involved in the cases and in the lives of the children affected by the challenged laws, the decisions are accepted as precedents for a family law jurisprudence which operates

34. Santosky, 455 U.S. at 753.
35. For a provocative discussion of the thirteenth amendment as the more appropriate cause of action in this case, see Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 HARV. L. REV. 1359 (1992).
36. See DeShaney, 489 U.S. at 191.
37. See id. at 197.
as if only parents, children, and the state were involved in the cases or hold rights and duties in the lives of children.

B. Cases Developing the Role of Private Agencies

Two cases conceptualize the complexity of the dependency system by depicting the prevalent, often independent role of private provider agencies and, thereby, challenging the traditional parent-child-state framework. In both *Wilder v. Bernstein* and *Smith v. O.F.F.E.R.*, the court considered various aspects of the role of private agencies in the system. In *Wilder v. Sugarman*, later *Wilder v. Bernstein*, the newly formed American Civil Liberties Union (“ACLU”) Children’s Rights Project brought its first suit to challenge the relationship between New York City and religiously affiliated foster care agencies.

The many opinions in the years of the *Wilder* litigation portray a picture in which the private provider is sometimes the same as the public agency, sometimes its more able colleague, and sometimes its adversary. The ACLU maintained that the predominantly Catholic and

38. 848 F.2d 1388 (2d Cir. 1988).
41. *Wilder v. Bernstein*, 645 F. Supp. 1292, 1315 (S.D.N.Y. 1986) (“Plainly, an agency’s decisions relating to the acceptance and care of a child placed with the agency by SSC, where the State and City remain ultimately responsible for the child’s welfare, and where the agency’s decisions are directly circumscribed by state and/or city regulations, contain a ‘sufficiently close nexus [with] the State . . . so that the action of the [agency] may be fairly treated as that of the State itself’”) (citations omitted).
42. *Wilder v. Bernstein*, 848 F.2d at 1341 (stating that “New York City has the option of caring for these children in its own facilities or contracting with private agencies. In pursuance of a long tradition, it has elected to rely heavily on private agencies. At present, more than 90% of the children are placed through private agencies. The city contracts with some sixty private agencies. About ninety percent of the per diem expenses of the children are paid to the agencies from federal, state and city funds.”).
43. In 1992, nineteen private provider agency intervenors were awarded attorneys’ fees from the city. They intervened to challenge the settlement agreed to by the city. *See Wilder v. Bernstein*, 965 F.2d 1196, 1198 (2d Cir. 1992). In 1989, when considering the fees in the lower court, the court stated, “[T]he intervenors consistently and forcefully articulated objections addressed to the constitutional and civil rights issues in this litigation. Their efforts helped to vindicate the civil rights of the children and families in the foster care system which they served, not just their own self interests.” *Wilder v. Bernstein*, 725 F. Supp. 1324, 1332 (S.D.N.Y. 1989).
Jewish foster care agencies favored children of those religions to the detriment of other children in need of placement, arguing that this disproportionately harmed African American children. This claim was based in part on the assertion that the religiously affiliated private agencies provided "better service" via subcontracts with the public agency than the public agency provided directly. The case resulted in a restructuring of the system to place children in foster care in New York City without giving preference based on the religious affiliation of the child or agency.

In Smith v. O.F.F.E.R., the ACLU filed a complaint at the urging of a foster parent, Madeleine Smith, another important "other" kept in the shadows of public family law. She suffered from arthritis but had long cared for the Gandy children as her foster children. The private agency that placed the children sought removal of the children based on the concern that Ms. Smith's arthritis was becoming a problem in her ability to care for the children. The complaint by the ACLU on behalf of Ms. Smith and the children demanded a full hearing before removal.

The private provider agency, Catholic Guardian Society, was a key participant in initiating the removal and in the litigation but it was not represented as a party. Its rights were purportedly subsumed under those of the public agency with which it subcontracted to provide foster care services. Because the city and state responded with due process protections for foster parents at risk of losing the foster children they had raised, the Court did not ultimately reach the question of whether foster parents had a liberty interest at stake. If they did hold such an interest, the court reasoned that the procedures put in place were sufficient to satisfy any such liberty interest.

The Smith v. O.F.F.E.R. Court acknowledged the

44. See Wilder v. Bernstein 49 F.3d 69, 70-71 (2d Cir. 1995).
48. See Chambers & Wald, supra note 45, at 81.
49. See id.
prevalence of private provider agencies when stating that "in New York City, eighty-five percent of the children in foster care are placed with voluntary child care agencies licensed by the state." The Court went on to state that "the foster child’s loyalties, emotional involvement, and responsibilities are often divided among three adult figures—the natural parents, the foster parent, and the social worker representing the foster care agency." This court-created triangle does not include the public agency or state at all. The Court also pointed to potential problems of cultural bias and discrimination in the system by recognizing the overrepresentation of the poor and minorities. Over fifty percent of the children in care in New York City were from female-headed households that were receiving Aid to Families with Dependent Children ("AFDC") at the time of the suit, and over seventy-five percent of the children were black or Puerto Rican.

After Smith v. O.F.F.E.R., the constitutional framework underpinning family law remains limited to the parent-child-state triangular balance of rights and responsibilities. The liberty interest of foster parents and important "others" including the private provider agencies remains unclear. Although the importance and prevalence of private providers was acknowledged and recognized in both Wilder and Smith v. O.F.F.E.R., they do not emerge as rights holders with corresponding duties owed to the parent, child, and state. This myopic view of family law remains, despite the fact that important "others," including private providers, have been an integral part of family life and family law since colonial times.

II. EMERGENCE OF PRIVATE PROVIDERS IN THE DEVELOPMENT OF THE LEGAL SYSTEM TO RESPOND TO CHILD ABUSE AND NEGLECT

Evidence of the role of "important others" in the lives of

50. 431 U.S. at 825 n.11 (citing Brief for Legal Aid Society, Juvenile Rights Division, as Amicus Curiae, 14, n.22). The Court in Wilder v. Bernstein elaborates on the complexity of the roles played by private agencies. Even for the 40% of children placed in kinship care or foster care provided by extended family members, 30% are still supervised by private provider agencies. Wilder v. Bernstein, 49 F.3d 69, 71 (2d Cir. 1995).


52. Id. at 833-34.
families and, in particular, in the identification and protection of children can be traced from earliest colonial days. Several examples of third party intervention into child rearing illustrate the presence and importance of participants outside the parent-child-state triad. Examples are drawn from the last three centuries, not to give a full history of child protection but to emphasize the presence and importance of participants outside the parent-child-state framework.  

In colonial times, community appointees and outside families assisted categories of children deemed in need of protection. These third parties entered into contracts with the child's father or with local authorities who stood in parens patriae to act on the child's behalf. Such arrangements are the precursors of the modern public-private agency contracting which now operates in the dependency system. These contractual relationships continued into the nineteenth century when private provider agencies first emerged during the Progressive Era. The anti-cruelty societies predated the public agencies in investigating and prosecuting child abuse and neglect. Some of the agencies that formed during that era continue to exist today as private provider agencies. Currently, they subcontract with public agencies to provide services on behalf of abused and neglected children and their families.

The next major development in the dependency system occurred in the 1960's when states enacted reporting laws and established public agencies to investigate, prosecute, and treat cases of abuse and neglect. Because private nonprofit groups had done much of the work of the new public agencies for nearly a century, public agencies subcontracted with the private agencies to continue to provide the needed services. The codification of federal requirements to make uniform the state responses to child abuse and neglect began in the 1970s and provided federal dollars to reimburse the states for their own work and for the work the states subcontracted to the private agencies.

These developments are highlighted to illustrate the ongoing, integral role of private providers throughout the history of the dependency system. In the early twentieth

century when Meyer and Pierce formulated the parent-child-state framework, public state dependency agencies did not yet exist but private providers were intervening and providing families with an array of services. Private providers continue to play an active role in the current federal-state statutory scheme.

A. Colonial Indentures to Insure the Proper Raising of Children

Since the earliest colonial days, individuals and entities outside of the family have played a role in monitoring families in the community and offering informal guidance to families deemed ill equipped to raise their children properly. Individuals also contracted with authorities to assume the paternal responsibility to raise children who were involuntarily removed from their parents' homes. The "private" family and the parent-child-state balance of rights and responsibilities belie the role of other caretakers since earliest colonial times. These colonial "others" predate the private providers that emerged as active caretakers of children in the nineteenth century.

Colonial fathers were charged with the proper upbringing of their children, responsible for educating and training them to be productive citizens of the community. Fathers who failed to properly instruct their children could lose custody of the children. As early as the 1640s, the colonial laws authorized public authorities to remove children from their families and place them with other families who could raise them in a manner deemed appropriate. Colonial laws allowed private intervention into the parent-child relationship to assure that child rearing was appropriate for raising employable, moral children. Tightly woven religious communities provided moral guidance and often acted with public authorities to provide supervision of family life.

55. See id. at 28-29.
56. See id. at 27-29.
57. See id.
58. See id.
Forasmuch as the good education of children is of singular behoofe & benefit to any Common-wealth; and whereas many parents & masters are too indulgent and negligent of their duty in that kinde. It is therefore ordered that the Select men of everie town, in the several precincts and quarters where they dwell, shall have a vigilant eye over their brethren & neighbours, to fee, first that none of them shall suffer so much barbarism in any of their families as not to indeavour to teach by themselves or others, their children & apprentices, so much learning as may inable them perfectly to read the english tongue, & knowledge of the Capital lawes . . . Also that all masters of families doe once a week (at the least) catechize their children and servants in the grounds & principles of Religion . . . And further that all parents and masters do breed & bring up their children & apprentices in some honest lawful calling, labour or imploymet, either in husbandry, or some other trade profitable for themselves, and the Common-wealth if they will not or cannot train them up in learning to fit them for higher imployments. 69

In 1642, Massachusetts Bay enacted a law, to be enforced through the courts, that children could be removed from their parents' home involuntarily, based upon the manner in which parents were raising them.

And if any of the Select men after admonition by them given to such masters of families shall finde them still negligent of their dutie in the particulars afore-mentioned, whereby children and servants become rude, stubborn & unruly; the said Select men with the help of two Magistrates, or the next County court for that Shire, shall take such children or apprentices from them, & place them with some masters for years (boyes till they come to twenty one, and girls eighteen years of age compleat) which will more strictly look unto, and force them to submit unto government according to the rules of this order, if by fair meanes and former instructions they will not be drawn unto it. 60

Such children were removed by the town authorities and placed in an apprenticeship or indenture, called "binding out." 61 These indentures, or contracts to bind out children, could be arranged voluntarily by parents seeking training for their children or involuntarily by authorities

60. Id.
61. Id.
that removed children from parents whose child rearing was seen as inadequate. Involuntary indentures required local authorities to contract with families to care for the removed children. These contracts were the first contracting to care for children whose families were considered unable to properly raise them. Because the family unit was considered a form of governance and social control at the time, such involuntary indentures were not really public-private contracting as we understand it today. Yet, such early colonial arrangements are evidence of substitute care for children facilitated by local authorities; the same is true with modern out-of-home care of children.

Methods to remedy perceived dereliction in the raising of children relied on personal persuasion and local authority. Local legal authorities often blurred the line between voluntary and involuntary binding out of children. In 1671, for example, in the cases of the children of Edward Sanderson, the selectman in Watertown, Massachusetts ordered the binding out of the children "with the consent of their parents, if it may be had, and if the parents shall oppose them to use the help of the Magistrate ...."

In 1675, the General Court of Massachusetts created the office of "tithingmen" and charged them with the inspection of families.

[The tithesmen were authorized to] inspect the manner of all disorderly persons, and where by more than private admonitions they will not be reclaimed, they are from time to time to present their names to the next Magistrate, or Commissioner invested with magisterial power, who shall proceed against them as the law directs. As also they are in like manner to present the names of all single persons that live from under family government, stubborn and disorderly children and servants, night-walkers, tipplers, Sabbath breakers by night or by day, and such as absent themselves from the public worship of God on the Lord's days, or whatever else course or practice of any person or persons whatsoever tending to debauchery, irreligion, profaneness, and atheism amongst us, whether by omission of family government, nurture, and religious duties, [or] instruction of children and

63. Id.
The earliest colonial laws included provisions prohibiting excessive corporal punishment of children. The law did not provide for the removal of children for their protection. The Bodie of Liberties addressed the issue of the physical punishment of children by their parents in Chapter 83 stating:

If any parents shall wilfullie and unreasonably deny any childe timely or convenient marriage, or shall exercise any unnaturall severtitie towards them, such children shall have free libertie to complaine to Authoritie for redresse.65

There is, however, no evidence of colonial fathers being punished for excessive corporal punishment alone. In fact, corporal punishment of children was accepted and encouraged in colonial times. The 1674 Records of the Suffolk County Court record two instances, one involving Governor Leveret’s grandson, where parents were ordered to whip their children at home in the presence of the constable as punishment for misbehavior by the children. Even capital punishment for incorrigibility was codified.69 It

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66. See The Body of Liberties of 1641: The Liberties of the Massachusetts Collonie in New England, 1641, in EDWIN POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS: 1620-1692, 533 (1966). It is interesting to note that assaults upon wives, except in self defense, were prohibited, whereas beating children was only actionable if unnaturally severe. “Everie married woeman shall be free from bodilie correction or stripes by her husband, unless it be in his owne defence upon her assalt.” Id. at 542.


68. See Mason, supra note 64; PLECK, supra note 67.

69. See POWERS, supra note 66, at 178.

70. The General Laws of Massachusetts Colony, 1658, state that a son who is “stubborn and rebellious and will not obey [his parents'] voice and chastisement, but lives in sundry and notorious crimes, such a son shall be put to death.” THE GENERAL LAWS OF THE MASSACHUSETTS COLONY 15 (1658)
was inadequate discipline and moral education, not severe corporal punishment, which was remedied by removal and placement with contracting families.

Only in the mid-nineteenth century did legal authorities begin to challenge paternal authority to discipline children; for the first two hundred years of law in America, children could be removed or bound out if their own families did not raise them in what was then seen as an appropriate manner. This subjective interpretation allowed intervention focused mainly on the poor, freed slaves, and child laborers. Physical assaults or injuries to children by fathers were not a basis for intervention until the 1800s.

From the earliest colonial days through the antebellum years, binding out remained the preferred way to deal with children of the poor. Although the first orphanage was established in 1728 in New Orleans, specialized institutional care for children was scarce until the

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(Capital Laws, ch.13.). This provision of the laws cited to Deuteronomy 22.

Before 1640, the ecclesiastical courts in England punished both children who were violent toward their parents and husbands who were violent toward their wives. "The details of family life were in no sense immune from correction and overt regulation by the canon of law." R. H. Helmholz, And Were There Children's Rights in Early Modern England?: The Canon Law and 'Intra-Family Violence' in England 1400-1640, 1 INT'L J. CHILDREN'S RTS. 23, 30 (1993). Yet, those courts in England did not challenge parental authority to prevent child maltreatment.

71. Mary Ann Mason examined the record of two Virginia parishes to provide demographic information on involuntary apprentices. "Orphans constituted 38.1% of all child apprentices; 39.3% were classified poor children; 11% were described as illegitimate; and 12.6% were termed mulatto." Mason, supra note 64, at 326-27. This legacy is evident in the current dependency system, which is disproportionately flooded with cases of neglect as is currently culturally defined. In 1996, of the one million children who suffered confirmed maltreatment, "52 percent suffered neglect; 24 percent physical abuse; 12 percent sexual abuse; six percent emotional maltreatment; and three percent medical neglect." CHILDREN'S DEF. FUND, THE STATE OF AMERICA'S CHILDREN YEARBOOK 64-68 (1999). Similar data from the National Center on Child Abuse and Neglect for 1995 indicates that for all children with substantiated or indicated reports of maltreatment, 47% were neglected, 22% were physically abused, 11% were sexually abused, 4% were either emotionally abused or medically neglected. See CHILD WELFARE LEAGUE OF AMERICA, CHILD ABUSE AND NEGLECT: A LOOK AT THE STATES 30 (1997). "African American children comprised fifteen percent of the total U.S. child population, yet represented twenty-eight percent of the children with substantiated abuse or neglect in 1995." Id. at 19.

72. For a discussion of prosecutions beginning in the mid-1800's, see infra Part II (b).
nineteenth century. Until that time, children of the poor who could not be bound out to private families were placed in almshouses, publicly operated warehouses for the poor not segregated by age.

Michael Grossberg sums up the plight of poor children before and just after the Revolution:

Thus, consistently the reality of poor-law apprenticeship belied the legal ideal. Protective laws were subject to widely fluctuating enforcement, not only among states but also localities, because of the wide discretionary powers granted community authorities. Moreover, poor apprentices as children “of the public,” in the words of a New Jersey justice in 1819, could not veto particular indentures as could youths bound out voluntarily. Statutory requirements mandating practical and moral training appear to have been ignored with impunity, as was evidence of physical and sexual abuse. In some communities, poor children continued to be auctioned off to the lowest bidder along with other paupers. Freed black children endured the most drastic curtailment of rights. States like Kentucky, Missouri, and Indiana passed laws eliminating the educational requirements of their indentures. In other jurisdictions, masters received the right by statute to indenture black children regardless of parental finances. Poor-law


74. In February 1775, of the 622 paupers on the books of the New York City Almshouse, 259 were children, mostly under nine years of age. The authorities made every effort to bind out even these young children. In 1788, laws were passed allowing children in New York City, Albany and Hudson to be bound out without parental consent. The mayor, recorder, or aldermen could approve such an arrangement for any child found begging in the streets. By 1795, 40% of the “inmates” at the almshouse in New York City were children under nine years of age. In 1797, following a yellow fever epidemic that filled the New York City almshouse with widows and their children, a group of women founded the Ladies Society for the Relief of Poor Widows with Small Children. The group was incorporated by law in 1802. In-kind help was given to assist widows in making a livelihood but no relief was granted to women who refused to place out their children who were able to work. By 1800, the Society helped 152 widows with 420 children and in 1803 received state funding, raised by lottery, to continue its work. In 1806, an orphanage was founded by the Society. At the time, it was only the second such institution in the young country, the other being in Charleston, South Carolina. See DAVID M. SCHNEIDER, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609-1866, at 179-189 (1938). Amidst the development of institutional care for children in the mid-nineteenth century, the population of children in almshouses continued to grow. The census of 1880 showed that 7,770 children between the ages of two and sixteen were in almshouses in the United States. See Mason P. Thomas, Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives, 50 N.C. L. REV. 293, 302 n.37 (1972) citing HOMER FOLKS, THE CARE OF DESTITUTE, NEGLECTED AND DEPENDENT CHILDREN 1-11 (1902).
indentures, especially for blacks, resembled involuntary servitude.

Children of blacks also were subject to state "protective" power via involuntary indenture created by emancipation laws. On March 29, 1799, the legislature enacted its first law providing for the gradual abolition of slavery in New York State. After Independence Day of that year, a child born of a slave was born free, but "such child should be the servant of the legal owner of its mother until the age of twenty-eight if a male and until twenty-five if a female, under the same conditions as children 'bound to service by overseers of the poor.'" The law gave the slave owner the ability to abandon his right to the child's service by contacting the town clerk before the child's first birthday. If the master chose not to keep the child as a servant, the child was considered "abandoned." These abandoned children established a new category of "states poor." The state took responsibility for their support in the interval between abandonment by the mother's owner and the time of being bound out as paupers, by the overseers of the poor, from the locality in which the slaveholder resided.

Child laborers brought over from England without their parents were another category of children in need of state protection to insure that their masters fulfilled their contractual obligations.

More than half of all persons who came to the colonies south of New England were indentured servants. Most servants were younger than nineteen years old; the average age was between fourteen and sixteen, and the youngest was six.... While most children were not forcibly imported to the New World without parents, separation from parents and forced labor were common in all of the colonies.

In 1617, the Virginia Company sent correspondence to the City of London seeking boatloads of child laborers to help settle the colony. The Mayor of London agreed that the children would be sent as apprentices until age twenty-one

75. MICHAEL GROSSBERG, GOVERNING THE HEARTH 266 (1985).
76. SCHNEIDER, supra note 74, at 208.
77. See id.
78. See id.
79. Mason, supra note 64, at 317 (citing RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 391 (1946)).
and afterward given fifty acres of land in fee simple for the annual rent of one shilling. The arrangement was a success from the company's point of view. The company wanted more children to be sent for additional labor, and to replace the children who died either in transit or after they arrived in the New World. In response to the company's request for more children, additional loads of 100 children were sought and sent in 1619 and in 1622.

Disciplinary action in lieu of parental authority on the colonial side of the ocean needed to be provided for these child laborers. The Privy Council for Virginia Company declared:

And if any of them shall be found obstinate to resist or otherwise to disobey such directions as shall be given in this behalf, we do likewise hereby authorize such as shall have the charge of this service to imprison, punish, and dispose any of those children, upon any disorder by them or any of them committed, as cause shall require, and so to ship them out to Virginia with as much expedition as may stand with conveniency.

Other children were even less fortunate. They were tricked into service abroad by "spirits" who received a wage for each child delivered for passage. By the middle of the seventeenth century, there is evidence that children were kidnapped from London and transported to the colonies for their labor. "One father obtained a warrant to search the ship for his 11-year-old son whom he claimed had been spirited away. The search uncovered 19 servants, 11 of whom had been taken by 'spirits,' most against their will."

Since many of the children arrived in the New World with no valid indentures, laws were established which required the new master to go before the court to establish the terms of the indenture. The Virginia Legislature established that "[s]uch persons as shall be imported, having no indenture or covenant, either men or women, if they be above sixteen

80. See Mason, supra note 64, at 325 (citing Abbot Emerson Smith, Colonists In Bondage 148 (1965)).
81. See Mason, supra note 64, at 325.
82. See id.
84. Id.
85. See Mason, supra note 64, at 325.
86. Id.
years old shall serve four years, if under fifteen to serve till he or she shall be one and twenty years of age, and the courts to be judges of their ages.\textsuperscript{87}

Throughout the eighteenth century, public authorities acted on behalf of poor, emancipated slave and contract labor children to bind them out to masters who would provide acceptable supervision and training. These arrangements predated a uniform child protection system, but they introduced interventions challenging parental care or providing substitute care that would later be assumed by nineteenth century anti-cruelty agencies. Historical beliefs of appropriate child rearing triggered the colonial interventions. Accepted notions of family life which began to question the propriety of severe corporal punishment and physical assaults prompted the later anti-cruelty agency actions. Interventions to protect children from abuse and contemporary definitions of neglect were more broadly and uniformly applied through a wider array of private agencies, state action, and federal legislation in the twentieth century.

B. Intervention Based on Abuse and The Development of Private Agencies

The middle of the nineteenth century brought cases of criminal prosecutions against parents for beating their children. These prosecutions introduced an era when the legal system began to intervene in family life to protect children from physical assaults at the hands of their parents. At this nascent stage of development of a legal response to child abuse, many children considered "poor" or "neglected" were already under public supervision.\textsuperscript{88} Now, the states began to prosecute cases of physical assaults by parents on their children and to refer some of those children to the community resources available for neglected children.

The early cases prosecuting parents for physical

\textsuperscript{87} Id. (citing CHILDREN AND YOUTH, Vol. I, supra note 54, at 115).

\textsuperscript{88} This dual response invoking the criminal law for abuse and the civil law for neglect has been carried over to the present dependency system, but today, cases of abuse are a small but defining percentage in the civil system as well. Discussed in Part III, cases of neglect make up the vast majority of current caseloads but the system is driven by responses to egregious cases of abuse. Abuse is sometimes concurrently criminally prosecuted. See Part III, infra.
assaults illustrate the historical hesitancy of the court to infringe on parental authority on the basis of allegations of physical beatings by fathers. Such intrusions would challenge the accepted paternal role and parenting prerogatives. The texts reveal a range of legal questions posed by the courts in attempting to redefine the limits of state intervention. Courts debated whether it was the state of mind of the parent when perpetrating the beating, the instrument used in the beating, or the injury caused by the beating which should constitute evidence of abuse sufficient to sustain a prosecution. Courts searched for objective measures of actionable abuse to avoid over-

89. In Stanfield v. State, the court rejected the lower court charge, which focused on the instrument used in the beating, instead focusing on the manner of the Defendant.

The charge asked and given does not mend the matter, which was that the jury could not convict the defendant 'unless the chastisement was done in a cruel or vindictive manner.' Was the correction moderate? If it was, defendant was not guilty of an assault and battery at all (citation omitted). If it was not moderate, but excessive, he was guilty as charged of an aggravated assault and battery by having exceeded the boundary of his legal right as guardian under the law, and placed himself in the attitude of a stranger and not a parent to the child. Whether it is moderate or excessive must necessarily depend upon the age, sex, condition and disposition of the child, with all the attending and surrounding circumstances, to be judged of by the jury. . . .

43 Tenn. 167, 168 (Austin Term 1875).

In Johnson v. State, similar reasoning was used.

The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, to the good 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. But, 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. In chastising a child, the parent must be careful that he does not exceed the bounds of moderation and inflict cruel and merciless punishment; if he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess, which constitutes the offence, and what this excess shall be is not a conclusion of law, but a question of fact for the determination of the jury.

21 Tenn. 291 (No. 283) (noting that the case was decided in Nashville but was unreported. Dates not given).

90. In Neal v. Georgia, the court affirmed that one "lick" with an old saw was "cruel and outrageous abuse of the parental authority and made the perpetrator of it guilty," while also noting that a "very large margin must be left open to the parent." 54 Ga. 281, 282 (1875).

intrusion into family government. Finding evidence of a permanent serious injury was necessary to find a parent guilty.

It will be observed that the test of the defendant's criminal liability is the infliction of a punishment 'cruel and excessive,' and thus it is left to the jury without the aid of any rule of law for their guidance to determine. It is quite obvious that this would subject every exercise of parental authority in the correction and discipline of children— in other words, domestic government— to the supervision and control of jurors, who might, in a given case, deem the punishment disproportionate to the offense, and unreasonable and excessive. It seems to us, that such a rule would tend, if not to subvert family government, greatly to impair its efficiency, and remove restraints upon the conduct of children.... The test then of criminal responsibility is the infliction of permanent injury by means of the administered punishment, or that it proceeded from malice, and was not in the exercise of a corrective authority. We do not propose to palliate or excuse the conduct of the defendant in the present case. The punishment seems to have been needlessly severe, but we refuse to take cognizance of it as a criminal act, because it belongs to the domestic rather than legal power, to a domain into which the penal law is reluctant to enter, unless induced by an imperious necessity.

These criminal prosecutions are contemporaneous with the more famous 1874 case of Mary Ellen.93 The case was championed in the front pages of the New York Times. It was brought by leaders of the New York Society for the Protection of Cruelty to Animals, heralding an era of private philanthropic agencies acting on behalf of abused children.94

The Society leaders argued to the court on behalf of

92. Id.
94. For a summary discussion of earlier foundations of child protection in response to child labor and orphans in colonial times and through the civil war, see Neil A. Cohen, Child Welfare History in the United States, in CHILD WELFARE: A MULTICULTURAL FOCUS 13 (Neil A. Cohen ed., 1992). For a discussion of the emergence of protection of children within the societies for the protection of cruelty to animals before the Mary Ellen case, see Costin, supra note 93.
Mary Ellen, a young girl whose care was at issue, that children, as members of the animal kingdom, were entitled to protections at least equal to those provided animals. The arguments were fashioned by Henry Bergh, founder and president of the Society, and Elbridge T. Gerry, counsel for the Society. The case succinctly depicts the roles that "important others" could assume on behalf of children, awareness of abusive activity in "private" families, investigation on behalf of children, rescue, prosecution, and placement. The New York Times article of April 10, 1874 opened:

It appears from proceedings had in Supreme Court yesterday, in the case of a child named Mary Ellen, that Mr. Bergh does not confine the humane impulses of his heart to smoothing the pathway of the brute creation toward the grave or elsewhere, but that he embraces within the sphere of his kindly efforts the human species also.

The news articles explained that the child had been discovered when a woman, Etta Angell Wheeler, was on an "errand of mercy" to a dying woman. She was told by the woman of the desperate cries of a child in the next tenement building. Wheeler had tried repeatedly to gain entrance to the apartment to see the child. She was eventually let into the flat when Mr. Connolly, the man of the house, was not present, and she was able to observe and have a short visit with Mary Connolly, his wife, and Mary Ellen. Reports indicate that Wheeler went to several institutions to seek help for the child, before she found Bergh and pleaded for his assistance. It was known at the first hearing that Mary Ellen was living with Mary and Francis Connolly and they were charged with cruel abuse.

95. See Costin, supra note 93, at 204.
96. Mr. Bergh Enlarging His Sphere of Usefulness: Inhuman Treatment of a Little Waif—Her Treatment—A Mystery to Be Cleared Up, N. Y. TIMES, April 10, 1874.
97. Perhaps because Mrs. Wheeler's husband was a newspaper man, the case is graphically and fully reported in the paper. See Costin, supra note 93, at 210; N.Y. TIMES, Apr. 10, 1874, at 8; N.Y. TIMES, Apr. 11, 1874, at 2; N.Y. TIMES, Apr. 14, 1874, at 2; N.Y. TIMES, Apr. 28, 1874, at 8; N.Y. TIMES, Dec. 27, 1874, at 12. For a compilation of related articles and papers of the New York Society for The Prevention of Cruelty to Children, see CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, Vol. II, 1866-1932 Parts 1-6, 185-97 (Robert H. Bremner ed., 1971) [hereinafter CHILDREN AND YOUTH, Vol. II, Parts 1-6].
against her, but that they were not her natural parents.\textsuperscript{93} How this casual custodianship affected the willingness of the agency, court and public to champion prosecution of the Connollys is not clear.\textsuperscript{93}

On the second day of the court proceedings, Mrs. Connolly took the stand and detailed how the child came to be in their custody.\textsuperscript{100} Mrs. Connolly testified that she was formally married to Mr. Thomas McCormack who was now deceased. They had three children together, all of whom also were deceased. Mrs. Connolly testified that the Commissioner of Charities and Corrections, who released the child to them, never inquired as to her relation to the child. He had the name of Wilson down as the child's natural mother.\textsuperscript{101} Mrs. Connolly reportedly testified that she never knew the whereabouts of the mother, but from time to time would hear from her husband's drinking buddies that she was still living downtown.\textsuperscript{102} Mrs. Connolly further testified that she never received a cent to care for the child. She reported annually to the Commissioner of Charities and Corrections on the condition of the child, missing the reporting requirement only two times.\textsuperscript{103}

The case was originally prosecuted against both Mr. and Mrs. Connolly. Mary Ellen's ill health, lack of proper clothing and frequent abuse with whips, scissors, and slaps must have been known, if not perpetrated, by both adults in

\textsuperscript{98} See The Mission of Humanity, N.Y. Times, Apr. 11, 1874, at 2; Costin, \textit{supra} note 93, at 207; Children and Youth, Vol. II, Parts 1-6, \textit{supra} note 97, at 187.

\textsuperscript{99} Because he was deceased, this case did not impinge on the rights of Mary Ellen's father. Mary Ellen's mother's rights are not at issue in the prosecution because her mother had abandoned her or had been separated from her much earlier, so her rights are not at issue in the prosecution. Mary Connolly, taking on the custodianship of Mary Ellen as her stepmother, may have been prosecuted because of this legal relationship. It is also possible that she was prosecuted, despite her ultimate willingness to allow Mrs. Wheeler into the flat against the wishes of her husband, because she was the "mother" of the child and was therefore responsible for her care under nineteenth century notions of parenting. Mr. Connolly's drunkenness, violence against Mary Ellen and possible violence against Mrs. Connolly are ignored, perhaps because he had no legal relationship to the child or perhaps because his behavior, as an unrelated "man in the house" was not as shocking to the norms of child care at the time.

\textsuperscript{100} The Mission of Humanity, New York Times, Apr. 11, 1874 at 2.


\textsuperscript{102} See \textit{id.}

\textsuperscript{103} See \textit{id.}
the home. Even if this could not be proven, it was only Mrs. Connolly, on a day when Mr. Connolly was not present, who allowed Mrs. Wheeler into the apartment to discuss Mary Ellen. Only Mrs. Connolly ever appeared in court. Only she was ultimately tried and sentenced for the abuse. This celebrated abuse case targeted the "mother" caretaker. No male was held accountable. The case signals the entry of private philanthropic agencies into the legal system on behalf of abused and neglected children. It also foreshadows the treatment of mothers and lack of attention paid to holding fathers accountable before dependency courts.

The publicity surrounding this case led to important results for the future of child protection. The activities of private provider agencies acting on behalf of abused and neglected children increased significantly. In the same year, a private provider agency, the New York Society for the Prevention of Cruelty to Children, was formed with Elbridge Gerry as its counsel. By 1880, thirty-three such societies existed in the United States, most of them in the business of rescuing both animals and children. As Bergh explained:

The protection of children and the protection of animals are combined because the principle involved, i.e., their helplessness, is the same; because all life is the same, differing only in degree of development and expression; and because each profits by association with the other.

104. See Mrs. Connolly, the Guardian, Found Guilty, and Sentenced to One Year’s Imprisonment at Hard Labor, N.Y. TIMES, Apr. 28, 1874, at 8.
108. See Costin, supra note 93, at 213.
These early efforts were aimed at rescuing children and, sometimes, prosecuting the adults who brutalized them. The societies did not see as their mission the housing or care of children, or treatment of the families. As Gerry explained:

The SPCC was simply created as a hand affixed to the arm of the law, by which the body politic reaches out and enforces the law. The arm of the law seizes the child when it is in an atmosphere of impurity, or in the care of those who are not fit to be entrusted with it, wrenches the child out of these surroundings, brings it to the court, and submits it to the decision of the court—unless, on the other hand, it reaches out that arm of the law to the cruelist, seizes him within its grasp, brings him also to the criminal court and insures his prosecution and punishment. These are the functions of our societies.¹⁰³

The early use of criminal courts to prosecute abuse provided a legal response to child abuse and neglect on two fronts: civil procedures to place "needy" children in public care, and criminal actions on behalf of abused children. Private agencies filled vital roles at each stage of the criminal and civil process: rescuing, placing and working with children and their families to prevent further instances of abuse.¹¹⁰ Philanthropic agencies continued and

109. Elbridge Gerry, Thirty First Annual Meeting of the American Humane Association (Albany, N.Y. 1907), cited in Costin, supra note 93, at 219. At this 1907 speech at the Annual Meeting of the Society, Gerry was also clear that the society’s purpose was to rescue children and refer their parents for prosecution, not to provide treatment. The New York Society for the Prevention of Cruelty to Children ("N.Y.S.P.C.C.") was “not created for the purpose of educating or reforming children, or seeing that they were transported into other homes.” Id. This description was meant in part to differentiate the purposes of the Society from the work of the New York Children’s Aid Society which gathered up children from the industrializing Northeast cities and sent them on “orphan trains” to the rural Midwest where they were given “proper homes” through an informal indenture. These rescue efforts are also distinguishable from turn-of-the-century child protection efforts. Carl Carstens led the first of these agencies, the Massachusetts Society for the Prevention of Cruelty to Children. In 1907, at that Society’s Annual Meeting, Carstens stated the broader mission of child protection: “Children will still need to be rescued from degrading surroundings for many years to come but the society recognizes more definitely that it is a preventive agency.” MASSACHUSETTS SOC. FOR PREVENTION OF CRUELTY TO CHILDREN, 1907 ANNUAL REPORT 27, cited in Paul Gerard Anderson, The Origin, Emergence, and Professional Recognition of Child Protection, 63 SOC. SERVICES REV. 222 (1989).

110. See supra note 109 for earlier examples of the three types of efforts: rescuing (N.Y.), placing (Children’s Aid Soc.) and working with children
grew throughout the early twentieth century, when states also began to play a role in the protection of children, often in concert with the already established agencies.

C. Twentieth Century State and Federal Legislation

Until the mid-twentieth century, private provider agencies championed interventions on behalf of abused and neglected children. States made fledgling efforts on behalf of individual children but neither the civil nor the criminal response was uniform or broadly applied. State criminal prosecutions for abuse continued without any federal legislative guidance into the 1970s.

A seminal event in the history of the legal response to child abuse and neglect was the 1962 publication of *Battered Child Syndrome* by Dr. Henry Kempe.111 Kempe was a pediatrician who worked with pediatrics and radiology to identify causes of suspicious injuries to children.112 With new knowledge about injuries that could only be caused by abusive behavior, states moved to codify their response. Between 1963 and 1967, every state passed a statute requiring some form of reporting of incidents of child abuse. Like early rescue efforts, these laws focused on incidents of abuse, not on treatment, prevention, or larger social issues contributing to child maltreatment.113

In 1971, Dr. Kempe attempted to expand the response to child maltreatment to include harms other than abusive

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113. Barbara Nelson wrote:

   The first people to identify a problem often shape how others will perceive it. Nowhere is this truer than with the issue of child abuse. In "The Battered Child Syndrome," Kempe and his associates define the problem as "a clinical condition in young children who received serious physical abuse, generally from a parent or foster parent." The individually centered psychological construction of the problem made it seem very self-contained. Governmental response to a self-contained, serious, but noncontroversial issue ought to be easy to obtain. And easy it was. [A]buse reporting laws . . . were rapidly passed by all state legislatures.

physical injuries.\textsuperscript{114} "Battered child syndrome must be thought of as only the extreme form of a whole spectrum of non-accidental injury and deprivation of children."\textsuperscript{115} In describing the diagnosis of "failure to thrive," Dr. Kempe referred to the failure to provide adequate "mothering."

Perhaps the most puzzling and important syndrome of infancy is loosely called "failure to thrive," and in our experience in Denver, all the congenital and acquired conditions of paediatric pathology taken together account for only 80\% of these cases. But 20\%, the largest single group, are due to deficiency in mothering, either not enough food, or emotional neglect, or aversion. It is a serious and often missed, form of the battered child syndrome. It does no good to prove to the mother the child is indeed all right, since her seeing the child as being not all right is an important diagnostic tool, and her inability to mother the child successfully is simply reinforced by the hospital demonstration that the nurses do better.\textsuperscript{116}

These early articles had tremendous impact on the recognition of child abuse as a widespread and medically diagnosable problem. Also, language used by Dr. Kempe seemed to reinforce gendered notions of parenting that hold mothers responsible for the well being of children.

Dr. Kempe played an integral role in the 1973 U.S. Senate hearings and in the design of the first federal legislation addressing child abuse and neglect, The Child Abuse Prevention and Treatment Act ("CAPTA").\textsuperscript{117} His early focus on the most extreme forms of abuse, his early clinically contained diagnosis of the problem, and his later gendered discussion of the spectrum of the syndrome were adopted by the legislators looking for a politically plausible bill to address child abuse. This narrow focus fit well into a parent-child-state vision of child abuse and neglect when the key intervention would be by a public agency into a private, abusive family. Even within the framework of this limited ground for intervention, where larger causes of

\textsuperscript{114} See Kempe, \textit{supra} note 112.

\textsuperscript{115} Id.

\textsuperscript{116} Id. at 31. At times in the article, Dr. Kempe does refer to mothering as a problem of mothers and fathers, but the term "parenting" or "caretaking" is not chosen. The gendered reality of whom is seen as responsible for the care of the children is clear. The failure of "mothering" is emphasized throughout. See, \textit{e.g.}, \textit{id.} at 30.

abuse and neglect and service-oriented responses were not considered, private individuals played a key role in being delegated to report abuse.

In 1973, the Senate Subcommittee on Children and Youth of the Committee on Labor and Public Welfare held hearings in Washington and at children’s hospitals around the country on the proposed Act. Bills were introduced in both the House and Senate, but the Senate subcommittee chaired by Walter Mondale held the main hearings. In a letter of transmittal to the Senate Committee Chairman, Mondale explained the need for the legislation:

The Subcommittee held hearings in Washington, New York, Denver and Los Angeles. Members of the Subcommittee personally visited victims of child abuse in hospitals and observed firsthand the operations of multi disciplinary child abuse teams in several cities. We were appalled to learn how many abused and neglected children there are and how little is being done to help them and their troubled families. Statistics vary widely, but there is little question that thousands and thousands of youngsters suffer severe physical and emotional abuse every year. This is a problem that cuts across social and economic barriers. It occurs in all kinds of neighborhoods. Yet there was no focused Federal effort to deal with the problem. Nowhere in the Federal government could we find one official assigned full time to the prevention, identification and treatment of child abuse and neglect.

Toward the end of the hearings in Denver, Mondale explicitly explained his reasons for limiting the discussion to the most serious cases of physical abuse:

You know, I agree that the problem of child neglect and disadvantage goes far beyond the abnormal battering that we have discussed. But as one who has tried to take the total view and failed, I feel more and more we have to attack these problems one by one. I worked for 5 years on the Child Development Act, which was my bill, and I fought for it. It was designed to focus on disadvantage and the problems of welfare and working-mothers, the strengthening of the family, the nutrition problem, the health problem, the health of the mother during pregnancy, the whole bag.... What distresses me is that the environment we are working in couldn’t be worse, because we have a President who


119. Id. at 2 (letter of Walter Mondale to Hon. Harrison A. Williams).
says that human programs are romanticism, that they are robbing America of its God-given belief in self-reliance. You know, I thought what we were trying to do was to assist people to be self-reliant, to help them with problems which destroy their capacity for that objective in American life. So we not only had the child care bill vetoed but we had some very harsh rhetoric about how we were trying to break up the American family, installing a national system of communal living; you’ve heard all the rest.120

Under Mondale’s tight stewardship, the hearings on the first federal legislation to address child abuse were limited to examining child abuse as instances of deviant, severe physical abuse within families by parents, depicted as mothers.121 These could be contained and addressed with a limited governmental response, that was, in Mondale’s view, all that was politically feasible at the time.122 The larger role of service providers in alleviating the causes and consequences of abuse and neglect were kept out of the discussion.

Instead of adopting a model for government involvement which sought to help children and their mothers by identifying the context for abuse and providing a circle of community responses to help prevent abuse and neglect,123 the law focused on the politically acceptable

120. Id. at 300.
121. The hearings began in Washington in March 1973. They were opened by Senator Mondale, who began with the story of the recent conviction of the stepmother of Donna Stern from nearby Maryland. Referred to by Mondale as the “stepmother of Donna Stern” and never by name, the horrible acts perpetrated on the child by the stepmother were related to the subcommittee by Mondale. They were told that: “Ugly as it sounds, this is not an isolated case.” Id. at 1 (opening statement of Sen. Mondale). Newspaper articles on the case are included as Press Reports in the Hearing Report. Id. at 671-82.
The second witness on the first day of the hearings was Jolly K., founder of Parent’s Anonymous. In response to questions by the senators, Jolly K. described in clear detail the “extreme physical abuse” which she perpetrated against her daughter. Id. at 49-50. Jolly K. was the only abusive or formerly abusive parent to testify at the hearings. The abusive mother, as personified by Jolly K. and the Donna Stern case, perpetrating severe physical abuse, dominated that first day of hearings and became a reference point for the subsequent hearings. Id.
123. See Barbara Bennett Woodhouse, “It All Depends on What You Mean by Home”: Toward a Communitarian Theory of the “Nontraditional” Family,” 1996 UTAH L. REV. 569 (discussing the changing identity of the family in the United States). Martha Minow has championed a more expansive discourse of children’s rights, linking children’s and women’s rights to describe a “new
mechanisms of reporting incidents and investigating them, thereby mandating a police-like response which focused on state investigation of "private" families. This focus on mandating state intervention followed the parent-child-state framework. Justification for intervention was key to the inquiry, not maintenance of the welfare of children. The state's role was to intervene into the family, perpetuating the triangular framework and ignoring the larger community context for abuse and neglect and community resources for treatment.

CAPTA initiated a federal response to child abuse. It formulated the mandates for the development of a bureaucracy within the Department of Health, Education, and Welfare ("HEW") (now called the Department of Health and Human Services) to gather information and expertise on the problem of child abuse, a largely undocumented subject at the time. It also provided funding through HEW for state demonstration projects that were broadly defined in terms of federal directives for their operation. Most important in terms of the subsequent history of the federal/state relationship in addressing child abuse, CAPTA contained provisions that established a grant program. Unlike the demonstration projects, eligibility for grants required states to follow a series of mandates in order to receive the funds. Those provisions concerned reporting, investigating, confidentiality of record keeping, and law enforcement cooperation. They were the earliest version


124. In 1996, 3.1 million children were reported abused and neglected. Investigations of those reports resulted in a finding by the public agency that nearly one million children were abused and neglected. CHILDREN'S DEF. FUND, supra note 71, at 85. This means that while the state apparatus collects reports on over three million children and investigates those cases which could possibly meet the legal definition of abuse or neglect, only one-third of those cases proceed past the investigation stage. Of that one million, only a fraction receives any services. The public agency is largely a reporting, investigation, and record keeping system.

125. See Mondale Hearings, supra note 118 (Letter of Transmittal).


127. See id.

128. See id.

129. See CAPTA, § 4(b)(3). Reference in this section is to Parts A and B of Title IV of the Social Security Act, which contained provisions for Aid to
of the more complete and complicated federal-to-state reimbursement system which funds state dependency systems today.

The key state response to child abuse became the mandatory reporting, investigating, and record keeping system that is commonly known as the child protective services system. While all states had some form of reporting law in place before CAPTA, few met the more rigorous CAPTA requirements before 1974. CAPTA, in effect, maintained continuing attention on reporting laws, confidentiality, and investigation.

By limiting the scope of the 1973 hearings to address the most serious forms of physical abuse, the subcommittee members created a dialogue with witnesses. The position of the legislators made a child protective services system, not a treatment system, necessary and viable. By focusing exclusively on the extreme end of the abuse/neglect spectrum, the Senators logically responded with the police power of the state justified by the parens patriae power. They did not consider the preventive, treatment, and placement services provided by private agencies and other community resources because, perhaps accurately, such an approach was not politically feasible at the time.

Following passage of CAPTA, the numbers of children reported as abused and neglected exploded, and state-based foster care systems were flooded with children placed as a result of reporting and investigation through child protective services. Senator Cranston summarized the situation before the Senate in 1979:

The number of children in foster care in 1977 was approximately 500,000—nearly three times the number of children in foster care as compared to 1961. In only one of every five cases does the services plan for these foster children recommend a specific length of placement. In other words, the so-called temporary provision of foster care has no definite target date for ending the placement and for placing the child in a permanent family setting. Over half the children in foster care have been away from their families for more than 2 years—about 100,000 children have spent more than 6 years of their lives in foster care. Nearly one-fourth of the children have been in three or more foster family homes. Even in cases where the agency had developed a plan for returning the child to

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Families with Dependent Children and Medicaid.
130. See Mondale Hearings, supra note 118, at 49.
his or her home, in one-third of the cases, there was no plan for visits between the child and the parent or another person who would care for the child if returned home. There are more than 100,000 children in foster care awaiting adoption. In many cases, reports and investigations were prompted by cases of neglect—usually children left unattended—but without the development of a spectrum of services to assist families, foster care was the expedient and perhaps sole resource to address the children's safety. Concerns that children were being unnecessarily placed outside their homes and were languishing without permanency in foster care led to passage of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"). This federal law imposed the mandate that states provide a plan to the federal government requiring the state-based public agency to make "reasonable efforts" to prevent placement or achieve reunification for children temporarily placed in foster care. The law also provided for adoption subsidies to encourage the adoption of children out of foster care who could not be reunified. State laws codified the reasonable efforts language in their laws. If states failed to meet the mandates of the law, they would not be eligible for matching federal reimbursement for their foster care expenses.

As a consequence of the fiscal incentives offered in AACWA, family preservation efforts flourished and the number of children in foster care began to decrease. Private provider agencies were an integral component of the dependency system that was now increasing its focus on prevention and treatment. They provided not only foster care but also an array of in-home services such as case management, homemaker services, childcare, and mental health services. As the menu of needed preventive services increased because of the new focus on family preservation, the work of private provider agencies expanded.

In the 1990s, the number of children in foster care

132. See id.
began to increase once again. While the reasons for this are complex, the increase is usually attributed to the crack epidemic in the inner cities and the increasing percentage of children living in desperately poor conditions with young, unmarried mothers. A series of highly publicized brutal deaths of children who were “known to the public agency” and provided with preventive services instead of being placed in foster care led yet again to an outcry for reform of the system.

The Adoption and Safe Families Act of 1997 (“ASFA”) was a partial response both to the outcry for swifter removal from abusive homes and for expedited adoptions. The new law provides exceptions to the reasonable efforts requirement when “aggravated circumstances” are present. The section providing for the exceptions appears uncontroversial at first glance, citing torture, death of another child, or sexual abuse as examples; but a more broad exception may come from leaving it to the states to define “aggravated circumstances.” The operational effect of the law is yet unclear, but it is significant in signaling the first mandated retreat from reunification efforts. Likewise, the effect of this mandate in compressing the spectrum and volume of preventive services is unclear. Since private provider agencies also provide placement and adoption services, the agency emphasis may shift, but their role will remain integral to the functioning of the dependency system and the well-being of children.

The federal and state legislative and executive branches regulating the changes to the dependency system from 1960 to the present recognized the states’ reliance on private

137. See id.
138. See, e.g., NEW YORK STATE COMMISSION ON CHILD ABUSE, FINAL REPORT (1996).
141. Id.
142. We do not yet know the effect of allowing states to limit the cases in which reunification services are provided. State laws were recently amended to clarify the new reasonable efforts requirements. See, e.g., 1999 N.Y. Laws Ch. 7 (A-962-A) (amending N.Y. SOC. SERV. LAW § 358-a). A broad amendment by states to the requirement of providing reunification services could further shift the balance in focus by private providers away from reunification and toward removal, placement, and adoption for more children. Effect of such a shift on the arguments made in this paper is yet unclear.
provider agencies. Concurrent with the development of a federal-state regime to mandate and regulate the provision of services to abused and neglected children were changes in federal law that eventually allowed public agencies to contract with private providers for services reimbursed with federal dollars. In 1962, amendments to the Social Security Act allowed public agencies to subcontract with other public agencies to deliver needed services. In the 1967 amendments to the Social Security Act, subcontracting was extended to allow contracts between public agencies and private agencies.

As the states established public systems to respond to abuse and neglect, the federal government, through Social Security Act amendments, allowed reimbursement for needed services provided by private agencies via subcontracts with public agencies. The federal mandates in 1974 and 1980 put even more pressure on state-based public agencies to provide an array of services, and therefore to subcontract with private agencies available to provide those services. Federal law simultaneously removed obstacles to reimbursement for these services by allowing federal dollars to reimburse the public agencies for these subcontracted services.

Recently, the law has changed to expand the range of agencies eligible for reimbursable dollars. The 1996 Personal Responsibility and Work Opportunity Act, commonly known as “Welfare Reform,” quietly amended the Social Security Act to allow for-profit agencies to subcontract with public agencies to provide child welfare services. No concurrent legislation or regulations have been promulgated regarding limits or oversight for the for-

145. For a fuller discussion of these amendments, see Peter M. Kettner & Lawrence L. Martin, Accountability in Purchase of Service Contracting, in THE PRIVATIZATION OF HUMAN SERVICES: POLICY AND PRACTICE ISSUES 183-201, (Margaret Gibelman & Howard Demone eds., 1998); Ronald P. Burd & Julius B. Richmond, The Public and Private Sector: A Developing Partnership in Human Services, 49 AM. J. ORTHOPSYCHIATRY 218 (1979).
146. See 42 U.S.C. § 672(c).
profit entities. Unlike the private non-profit agencies that have provided services in a variety of ways since the mid-nineteenth century, these for-profit interests are new players in the child welfare system. Their impact on the role of private providers in the dependency system is uncharted, but their presence suggests interesting comparisons and contrasts for future research.148

III. CURRENT SYSTEM ALLOWING PARTICIPATION BY PRIVATE PROVIDERS

A. The Current System

The child protective services system, the front end of the dependency system, is triggered by a report of abuse or neglect as defined in state law under the requirements of CAPTA. Reports are made by voluntary or mandated reporters to hotlines that federal law requires every state to operate.149 Voluntary reports can be made by neighbors, friends, family members—anyone who suspects child abuse or neglect on the part of a caretaker.150 If the reporter provides adequate information to the hotline operator, the report triggers investigation by the local child protection agency.151 Private individuals are vitally involved in activating the child protective services system through reporting, but hotlines are maintained and initial investigations are done by the public agency.

Mandated reporters are crucial to the child protective services system. Through mandated reporting, the parens patriae power of the state is exercised to conscript professionals who work with children to become partial state agents in protecting children from harm. These reporters generally are persons who work in professions or

148. Private corporations have been providing placement services in the juvenile justice system and have raised concerns about the quality of services provided and the profits extracted from the system. See, e.g. Fox Butterfield, Profits at a Juvenile Prison Come with a Chilling Cost, N.Y. TIMES, July 15, 1998, at A1.

149. See 42 U.S.C. § 5106A(b).

150. Abuse by a non-caretaker can only be pursued criminally. The civil system is reserved for intra-familial violence.

roles that bring them into contact with children. If these professionals suspect or believe that children with whom they come into contact in the course of their employment are suffering from abuse or neglect, confidentiality and privilege are forfeited and the professionals are mandated to report the abuse or neglect to the state operated child protection system. Some states require that professionals who work with parents and have reason to suspect abuse are also mandated to report.

These professionals are not merely invited to participate on behalf of children; they are required to do so regardless of their professional opinion as to the wisdom, value, or safety of reporting. In effect, the state forces professionals to participate and invites the non-professional community member, the modern day Etta Angel Wheeler, to make reports voluntarily. This reporting system was not a novel creation in the 1960's; rather, it was an evolving codification of the child protection system developed since colonial times and expanded by private philanthropic agencies at the turn of the century.

In 1996, the last year for which statistics are available, approximately 3 million children were reported abused or neglected. Depending on the severity of the allegations, child protective services workers must respond within the period of time required by state law to determine whether there is sufficient evidence to support the allegations. If the workers find that there is not sufficient evidence, the reports are considered "unfounded" and the cases are closed. Of the three million reports in 1995, investigation by agencies confirmed that abuse or neglect had occurred in approximately one million cases. In other words, each year, over two million cases are investigated but no further action is deemed necessary.

152. See 42 U.S.C. § 5106A(b).
155. See CHILDREN'S DEF. FUND, supra note 71, at 92.
157. See id. § 424(7).
158. See CHILDREN'S DEF. FUND, supra note 71, at 68; CHILD WELFARE LEAGUE OF AM., supra note 71, at 3.
159. In New York, as a result of the death of Eliza Izquierdo, the law was amended to keep records of unsubstantiated reports for use in future investigations. The law is known as "Eliza's Law." N. Y. SOC. SERV. LAW §
Among substantiated reports, data shows that African American children are over-represented; African American children comprise fifteen percent of the population, but make up twenty-eight percent of the children with substantiated reports. Neglect is the allegation substantiated for most children in the dependency system. In 1995, forty-two percent of the substantiated cases were classified as neglect while only twenty-two percent were classified as abuse. Sexual abuse was the confirmed allegation in eleven percent of the cases.

If a public agency worker confirms a report, often referred to as "indicating" or "substantiating" the report, the agency decides what further action is necessary. In many cases, the perpetrator is removed from the home by the time the investigation is completed, so no further services or supervision is required. In other instances, the family may be given the option of "voluntarily accepting services" from the agency, services that are often delivered by a private provider agency as a subcontractor to the public agency. These services may range from parenting classes and periodic visits to the home to out-of-home placement of the child. By federal law, the agency must make reasonable efforts to keep the family together, but if services are not available to keep the child safely at home despite reasonable efforts to provide such services, the child may be removed. Data compiled from thirty-five states show that 130,685 children were removed due to abuse and neglect in 1995. As of March, 1998, there are approximately 520,000 children in out-of-home placements as a result of removal due to allegations of abuse and neglect.

Once a child is removed to out-of-home placement, the case must be reviewed periodically by the court or by administrative review. If the family refuses voluntary services in the home or refuses to voluntarily place the child, the public agency may petition the court to find that

160. See CHILD WELFARE LEAGUE OF AMERICA., supra note 71, at 19 (providing data from 39 states).
161. See id. at 30.
163. See CHILD WELFARE LEAGUE OF AMERICA, supra note 71, at 38.
164. See CHILDREN'S DEF. FUND, supra note 71, at 86.
the child is abused or neglected and to mandate a disposition. The disposition can include services in the child's home and/or out-of-home placement for the child. A system of procedural requirements comes into play to provide periodic dependency hearings on the parent's rehabilitation, the agency's efforts, and the child's safety. The judge in such proceedings rarely considers the arguably important issues of child support, joint custody, or domestic violence in formulating mandatory orders, but advocates against domestic violence are increasingly encouraging such considerations. The ultimate protective tool of the system is removal of the children from the home. In extreme cases, this can lead to termination of parental rights, an order that frees a child for adoption.

Private provider agencies participate by delivering both voluntary and court ordered services to families. Unless they are already involved in an ongoing way with a family when new allegations arise, they do not usually participate in the front end of a case. It is the public agency that receives reports, investigates, and maintains records on perpetrators and children. Private agencies enter at the point of disposition and deliver the services that are agreed upon or mandated. In larger cities, the public agency may subcontract with over two hundred different private agencies to provide foster care, counseling, a variety of family supervisory functions, and a host of other services targeted to improve parenting and to protect children.

States operate dependency systems directly or they funnel state/federal reimbursement to state regulated county-based systems. It is difficult to discern the number

169. While inquiries into violence against the mother in the home may be part of a risk assessment at the outset of a case, the focus is on the children. If the violence threatens the children, the children can be removed. A referral may be given to the mother to tell her how to remove the perpetrator through the domestic violence system and her swiftness and success in doing so may determine how she is judged as a parent. She will also be given a variety of tasks to work toward reunification with her child. Often, she is required to maintain a stable home and income. This may make it difficult for her to remove a batterer who is the family's source of income. See generally NATIONAL CENTER ON WOMEN AND FAMILY LAW, supra note 105.
of subcontracting private agencies from the central state agency. In New York State, there are approximately 225 private foster care agencies. In Pennsylvania, 209 approved agencies providing foster family care services contract with the sixty-seven county agencies in the state. In Massachusetts, there are eighty-six separate private agencies. Florida estimates that there are seventy licensed child-placing agencies that offer foster, group, and/or shelter placements. Including those that offer only adoption services, there are 104 licensed child-placing agencies in Florida. In some states, private providers have come together to negotiate joint or collaborative contracts with the public agencies.

The work of private non-profit provider agencies predated the establishment of state-based child protection systems and dependency systems. With the breadth of federal and state mandates, the complexity of each individual case and the growing volume of cases, the modern dependency system could not function without these private providers.

B. Court Participation by Provider Agencies

Laws governing the operation of dependency proceedings in the states often allow for participation by private providers before the courts. Without these laws, private providers, as subcontracting agents of the public

173. Telephone Interview with Susan Bane, New York State Dep't of Soc. Services (May 7, 1998).
176. Some states additionally allow for the participation of foster parents who are agents of the private agencies. This paper deals only with the impact of private provider agencies in dependency proceedings. For a discussion of foster parent participation, see, e.g., Smith v. O.F.F.E.R., 431 U.S. 816 (1977); Teresa Lazo-Miller, Foster Parents, Children and Youth Services, and the Court: Can Foster Children Escape the Bermuda Triangle?, 6 WIDENER J. PUB. L. 181 (1996); Michael G. Walsh, Standing of Foster Parents to Seek Termination of Rights of Foster Child's Natural Parents, 21 A.L.R. 4th 535 (1981).
child welfare agency would not have an independent role in dependency proceedings. They would remain background actors who deliver services to children in their homes or in out-of-home placements, depending on the dispositional plan for the child. By granting a voice to private providers in the courts, the dependency proceeding changes from one where the parent, child, and state are before the court to one where an interested additional stakeholder participates. By allowing an additional participant in determining the dispositional needs of a child, a unique and important voice of the best interest of the child is heard by the court.

States allow private agencies to participate at three main junctures: dispositional reviews, termination, and adoption hearings. Laws designed to encourage permanency and move children toward adoption enhance any court involvement for private agencies. If the laws instead focused on keeping cases out of court, children at home, and preservation services in the home, then private providers would remain in the legal shadows, acting behind the scenes as providers of those services. Termination and adoption bring cases into court, and give private providers a presence in the courtroom. In this way, the state laws bring before the court direct information on the delivery of services from the point of view of the provider of the service.

It is important to note that states usually allow private provider participation at the dispositional and post dispositional phase of the proceedings. It is less common and more controversial, in light of the rights of parents, for such agencies to participate at the adjudicatory stage where the jurisdiction of the court and the right of the public agency to intervene into the parent-child relationship is first tried and established. When private provider agencies are involved with families, it would help to have them involved at the earliest possible hearings, in order to

177. This paper considers only the independent role of private providers before the court in dependency proceedings. For a discussion of the independent role of private providers in the context of a tort action for arising from the death of a child in foster care see Cooper v. Montgomery County Office of Children and Youth, 1993 WL 477084 (E.D. Pa. 1993).

178. See Joseph Goldstein, ET AL., IN THE BEST INTEREST OF THE CHILD, 91 (1986) (rejecting assignment of attorneys for children until after the court has authorized the intervention by the public agency as proper. Previously, they argued that the parent, not the public agency or the child, should have a voice in the child's care).
provide necessary information to the courts. The private providers should be active participants in all proceedings, not only in post-adjudicatory hearings, although they would be involved before the adjudicatory hearing only in those cases where the families are under the supervision of public agencies before petitions are heard at the adjudicatory stage. In such instances, provider information from earlier involvement with families is important and should be before the courts.

Without private agency presence, the public child welfare agencies would retain the responsibility of proving or disproving the continuing need for services and the manner of those services, using the providers to help with the case if necessary. Giving direct access to the providers allows a view of a child's best interest unfiltered by a public agency's resource allocation concerns.

A few states by law make private providers full parties once children are in placement. Other laws require that they receive notice of all dispositional review hearings and be allowed by the court to participate in the hearings. A few states mandate a dispositional review report from the private provider, as well as from the public agency.


182. Eighteen-month review written report required in Arkansas, Nebraska; dispositional report in Missouri, New Hampshire, North Carolina, Texas; report
these laws allow participation by a fourth actor in the system. That actor, the private provider agency, is closer to the delivery of services than the public agency in many cases. A single private provider agency or a variety of private providers working with a single family have access to the parents, children, and information gleaned from different clinical settings. The laws bring the private providers in because they are in a position to inform courts on the needs and welfare of the children, and to help move the cases more swiftly to permanent disposition.

Many states allow private agencies to petition the courts to terminate the rights of parents. This is the most


In fact, there can be more than one private provider before the court and they can each take independent stands from the public agency with whom they subcontract. A uniquely complex line-up of litigants was present in In re Deborah S. In that case, the court explained:

The Catholic Home Bureau, the private agency which supervised Deborah's foster-care by the Ruizes as well as the natural mother's care of the child after her return from them and attempts to rehabilitate the mother during both those periods, urges this Court to direct resumed foster-care by the Ruizes. On the other hand, the City's Commissioner of Social Services, who contracts with the private agencies and distributes funds to them for foster-care, advocates Deborah's continuance in her present foster-home [via Angel Guardian Home] in the hope of another eventual return to the mother; the natural mother joins in this position. Only the attorney assigned as Law Guardian for the child, who has conscientiously represented her since 1976, has entirely changed his position from that he then took in favor of Deborah's return to the biological mother. Based on the continued demonstration of the mother's fundamental incapacities, the Law Guardian now argues that return to the Ruizes represents the only hope of Deborah's securing the stable, nurturing care which she urgently needs.


184. ALA. CODE § 26-18-5 (1992); ALASKA STAT. § 25.23.180 (Michie 1996); ARIZ. REV. STAT. ANN. § 8-533 (West 1997); CONN. GEN. STAT. ANN. § 45A-715 (West 1993 & Supp. 1997) (However, in Connecticut, an Attorney General opinion stymied efforts of a joint public-private agency collaboration to place hard-to-place children for adoption. The opinion stated that the Attorney General's office could not perform the legal work for the termination of parental rights if the petition was filed by the private agency, as was called for in the project plan. The opinion reasoned that this would be representation by the
final of the *parens patriae* actions of the state. Agencies seeking termination of parental rights are often the same agencies that are entrusted with providing reunification services to families until parental rights are terminated. The complexity of the private provider's role can result in allegiances with any of the other parties before the court. In *Melissa M.*, the foster care agency opposed return of a child to her natural father after she had been in foster care for four and one half years. The foster parents sought visitation with the child after her return and at the hearing

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185. The concurring opinion in *Wilhelm v. Spokane Community Mental Health Ctr.* discussed the unique nature of the termination petition in finding that the *parens patriae* power of the state to file the petition could not be delegated absent explicit legislative authority to do so. *Wilhelm v. Spokane Community Mental Health Ctr.*, 726 P.2d 479, 481 (1986). This delegation was considered by the court in *New Hope v. Ramquist*. 765 P.2d 30 (1988). In that case, the court found that the private agency had standing to file the termination petition and that the *New Hope* concurrence was not binding. *Id.*

186. This dual role can result in the same private provider agency being responsible for providing reunification services while seeking termination of parental rights. In *In re Derek W. Burns*, the court found that such competing interests were properly addressed on an individual case-by-case basis and that "obvious contradiction in plans for termination and reunification by the same agency" was appropriate in the case at hand. 519 A.2d 638, 643 n.5 (1986).

187. In *In re Marilyn H.*, the foster parents who had cared for a child for nearly twelve years petitioned the court for termination. The foster parents were agents for a private provider agency that opposed the petition, along with the respondent mother and the public child welfare agency. The guardian ad litem appointed to represent the child joined with the foster parents in advocating for the adoption, which was granted. The court stated that according to the guardian ad litem, the child strongly desired her adoption. *See In re Marilyn H.*, 436 N.Y.S.2d 814, 815 (1981).

considering the request for visitation, the foster parent, foster care agency, and public agency all had separate counsel.\textsuperscript{189} The burden is on the public child welfare agency to provide services, but it is often the private agency that is actually delivering services and in frequent contact with the family. When the private agency is allowed to petition for termination, in effect it acts to release the public agency from the responsibility of providing further reunification services. The decision to allow and grant the petition for the termination of parental rights is the most permanent decision in the dependency system. Allowing the private provider, not just the public agency, to make this petition avoids resource conflicts for the public agency and helps to insure that the petition is in the individual child’s best interest.

Some states’ laws allow for private providers to participate in court proceedings after the rights of parents have been terminated.\textsuperscript{190} This gives the courts access to the service providers in an effort to keep children who are legally without parents from languishing in foster care. These laws have no effect on parental rights, because the courts have already terminated those rights. At this late stage of the proceedings, children’s wishes are important as to which placement they wish to make a permanent home, but questions of reunification are no longer before the courts. It is private providers who usually investigate adoptive homes and prepare home studies for the courts.

The laws that include private providers in post-termination proceedings bring the private providers before the courts and before other parties to a greater or lesser extent, depending on the latitude of the statutory scheme.\textsuperscript{191} State attorneys general also play a role in auditing the activities of nonprofit agencies, including private provider agencies.\textsuperscript{192} The additional accountability through active participation in dependency proceedings adds protection for

\textsuperscript{189} See id.
\textsuperscript{191} Historically, private agencies were accountable only to donors and boards of directors. See ABA GUIDEBOOK FOR DIRECTORS OF NON-PROFIT CORPORATIONS 12-15 (George W. Overton, ed., 1993).
\textsuperscript{192} See id.
those services that are mandated by law and then subcontracted for performance by private providers.193

Amidst concern that private agencies were overzealously seeking to receive purchase of service contracts that might alter their independent mission, the Council on Accreditation of Services to Families and Children in 1997 included standards titled “Contractual Relationships and Provider Alliances” for both public and private agencies. The first standard for private agencies requires that “contracts and formal alliances or networks entered into by the organization [be] related to the organization’s purpose and congruent with the policies of the governing body.”194

Independent participation by private agencies protects their autonomy. Private providers preceded the existence of public child welfare agencies and they often provide discrete services or access to an under-served community.195 These important roles could be diminished if the private agencies increasingly tailor their spectrum of services in response to public contracts.

Private and private nonprofit agencies under contract with government have consistently been shown to be more flexible, more responsive, less “stigmatizing,” and better able to satisfy consumers of their services than have state agencies. The preference for private provision of service has been attributed to a number of factors, most of them not mutually exclusive: the higher status of many private providers; a rationalization based on the need to see services as effective; the smaller size of most private service providers; lower expectations of small, funds-limited, private agencies; the personal, idiosyncratic, or culturally specific nature of some private providers; the sense of greater confidentiality and safety (e.g., information gathered and services

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193. For a fuller discussion of the accountability generally required in the contracting process, see Margaret Gibelman, Theory, Practice and Experience in the Purchase of Services, in THE PRIVATIZATION OF HUMAN SERVICES: POLICY AND PRACTICE ISSUES, VOL. I, 1-46 (Margaret Gibelman & Harold W. Demone eds., 1998) [hereinafter Theory, Practice and Experience]. In earlier work, Gibelman rethinks the position of social work education in light of the changes in public agency services delivery. Given the increasing role of subcontracting agencies, she argues that public administration or business management may be more relevant. See Margaret Gibelman, Social Work Education and the Changing Nature of Public Agency Practice, 19 J. Educ. for Soc. Work 21 (1983).


195. See supra Part II.
provided by a private agency are less likely to instigate action by protective service workers or a cutoff of benefits); the increased sense of freedom to use or not use a privately provided service; and the increased sense of empowerment and influence that recipients experience in small, private organizations.\footnote{John O'Looney, Beyond Privatization and Service Integration: Organizational Models for Service Delivery, 1993 SOC. SERV. REV. 501, 502, 531 nn. 4 & 5 (citations omitted). This paper does not consider the economic forces that weigh on the accountability and autonomy of private providers in the dependency system. For a discussion about how competitive market forces favor private provider agencies that most clearly match public agency demands, and suppress their own autonomy, see Kristen Gronberg, Ted Chen, & Matthew Stagner, Child Welfare Contracting: Market Forces and Leverage, 1995 SOC. SERV. REV. 583 (1995). In the economic framework, loss of distinctive mission or autonomy can be seen as an organizational cost of subcontracting. See Ralph Kramer, Voluntary Agencies and the Contract Culture: Dream or Nightmare, 1994 SOC. SERV. REV 33, 35 (1994); see also Ralph Kramer, From Voluntarism to Vendorism: An Organizational Perspective on Contracting, in SERVICES FOR SALE: PURCHASING HEALTH AND HUMAN SERVICES, VOL. I, 97-111 (Harold W. Demone & Margaret Gibelman eds., 1989).}

Autonomy of the private subcontracting agencies from the public agency with which they contract is best maintained when the private providers can independently address the court in a voice separate from that of the public agency. This autonomy, despite a subcontracting status, is important to maintain the unique mission of private providers:

IV. IMPACT OF AN ENHANCED ROLE FOR PRIVATE PROVIDERS IN DEPENDENCY PROCEEDINGS—REPRESENTATION OF CHILDREN

Because of their historic importance and their current vitality, private provider agencies should be given a role commensurate with their duties in dependency proceedings. Having private providers fully and independently represented before the court would have many implications for the child welfare system. One effect would be on the representation of children. Allowing private providers an independent voice in the courtroom makes it less problematic for a child advocate to represent the child's wishes rather than the advocate's notion of the child's best interest.

Part II described the early history of responses to child abuse and neglect. There were no proceedings to address
the disposition of the child; laws authorized colonial agents to watch over communities of families and to move children into apprenticeships if they were not being raised in accordance with the norms of the community.\textsuperscript{197} Court proceedings addressing abuse and neglect did not begin until the mid-nineteenth century and those proceedings were criminal in nature. They did not deal with the civil custody or placement of the child. Even when private philanthropic agencies began rescuing children from abusive homes in the last quarter of the nineteenth century, custody and placement of children were not addressed by the courts. With the development of a civil child welfare bureaucracy in the 1960s and 1970s, dependency proceedings with procedural safeguards, including the appointment of a lawyer for the children, became widespread. Even today, most children in the dependency system are served in their homes by public and private providers; their cases are not in court. Only those cases involving substantiated allegations of abuse which trigger court-mandated services or placement require court involvement, including appointment of an advocate.

The Child Abuse Prevention and Treatment Act ties delivery of federal matching funds to the requirement that a guardian ad liter be appointed for children in all dependency court proceedings.\textsuperscript{198} Regulations promulgated to interpret this provision of CAPTA state that the guardian ad liter must "represent and protect the rights and best interests of the child."\textsuperscript{199} The ambiguity in this terminology has left open to interpretation whether attorneys must be appointed to represent children or if others in the community can take on this role.\textsuperscript{200} Even when an attorney is appointed, as is required in many states, the role of that attorney in the proceedings is unclear. Must the lawyer operate in a traditional lawyer-client relationship to fully protect and exercise their child client's rights or can

\textsuperscript{197} See id.


\textsuperscript{199} 45 C.F.R. sec. 1340.14(g) (1998).

\textsuperscript{200} For a discussion of the advantages of employing social workers and others specifically trained to work with children, especially young children, see Annette R. Appell, \textit{Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children}, 64 \textit{FORDHAM L. REV.} 1955 (1996).
the lawyer generally, or at least in some instances, represent some notion of the child's best interest?[^203]

Scholarship and commentary on the appropriate model of representation of children in dependency proceedings assumes one of two positions[^202]. The first posits that children should be treated as autonomous clients and their positions should be zealously represented before the court. This is called the "autonomy," "empowerment," or "expressed interest," view. A second position advocates that children, as not fully competent clients, need to be protected and a position of their "best interest," whether or not it coincides with their expressed interest, should be advanced in dependency proceedings[^203].

Proponents of the autonomy or empowerment model advocate that children should be carefully interviewed and their attorneys should put their expressed interests before the court. This view, prevalent in legal literature[^204], argues...
that a lawyer’s professional role dictates such advocacy on behalf of the client and that any other model which allows for the opinion of the lawyer to dictate the proper position is not legitimate.\(^{205}\)

There are many commentators who state their preference for an autonomy-based model of representation but import a variety of caveats. Some argue that a lawyer should be excused from following her client’s wishes when the client is too young, the matter is too important, or the proceeding is too chaotic to assure that all proper information will be before the court.\(^{206}\) Usually these concerns are most keen when the issue before the court is whether a child should be returned to her parents. The concern is that young, impressionable children will wish to return to their parents against their own best interest. Some commentators suggest that when these concerns are present in a case, the child’s attorney should take a position that seeks to protect the lawyer’s opinion about what is in the child’s “best interest.”\(^{207}\) Others argue that the lawyer should act as an investigator and objectively insure that all information is in evidence before the court so that a judge can properly decide what is in the child’s best interest.\(^{208}\) At least one commentator urges that lawyers for young children follow the dictates of the underlying substantive law.\(^{209}\)

The first caveat, that capacity must be considered before a child can be represented as an autonomous client, is the most prevalent. It has led to a debate over the proper age at which capacity can be presumed,\(^{210}\) who should

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205. See Katherine Hunt Federle, *supra* note 203.


209. See Guggenheim, *supra* note 203. Guggenheim advocates a traditional lawyer-client relationship for unimpaired children in any legal context. For impaired children, the underlying substantive law should inform the lawyer’s representation.

210. See Ramsey, *supra* note 206, at 312 (suggesting a presumptive age of 7).
determine capacity, and the attempts a lawyer can make to discern a sense of the child’s wishes even when the child is considered impaired.

The second caveat, that a child’s lawyer can be excused from the traditional lawyer role when the stakes are too high for the child’s safety, usually imagines a situation where placement or reunification is before the court and the child is urging a position which would place her with her parents. This occurs at the dispositional or dispositional review stage of proceedings, precisely when the private provider can begin to play an active part in the court process. The active participation of a private provider lends a second voice, in addition to that of the public agency, to a position opined to be in the child’s best interest. It can also bring before the court the agent that could keep a child at home with additional safeguards. Children’s lawyers should advocate for an active role by private providers both to free them to properly represent their child client’s wishes and to bring before the court all the relevant parties that can protect the child’s welfare.

The active participation of private provider agencies also alleviates the third caveat. In the chaotic, crisis driven dependency system, the concern is raised that the adversarial system cannot be presumed to act properly. Critics suggest that not all of the information will be brought out by the overburdened child welfare agency, and the child’s position, if prepared in a thorough and aggressive manner, will be given undue weight. Even if both the parental representatives and the public agency prepare fully, the child’s attorney can be seen as a third party whose decision lends determinative weight to the position of one or the other party. This can be problematic when the child’s attorney follows her client’s wishes instead of her own opinion about what is in the child’s best interest, and the other parties do not fully develop the facts and

213. See Ramsey, supra note 206, at 309-20 (suggesting that a determination of capacity can be tied to the risk presented by the position: if the risk is high, a higher degree of capacity can be required before the lawyer must be bound by the client’s position. Ramsey acknowledges the subjectivity inherent in this position).
present dangers which lead the attorney to reach that opinion.

Participation by private providers can counter this concern by creating an additional stakeholder in the proceeding. As was noted in Part III, the private provider does not merely take the position of the public agency. State laws giving private agencies the authority to petition the court and prepare reports for the court contemplate an independent, knowledgeable voice. As the participant closer to the delivery of services than the public agency, the private agency is in a position to put valuable information before the court. Many state laws mandate such a report.

Other commentators see the role of a child advocate, even an appointed attorney, to be to represent a child's best interest regardless of the child's expressed interest. This position finds the possible incompetency, underlying substantive law, and nature of the proceedings to be persuasive in releasing the lawyer from her traditional role and taking a subjective "best interest" approach.

Arguments for a "best interest" approach are diminished when the influential role played by private providers is considered. When an actor in addition to the public agency is charged with coming before the court to plan for the child's best interest and is given authority to plan for permanency, attorneys representing children can more safely represent their child client's wishes zealously. This is especially true whenever the wishes of the child are opposed to the professional social work or mental health opinions that argue for permanent removal. The social worker or caseworker for the private agency is in a position to critique the needs of the child and the capabilities of the parents in a professional, daily, clinical manner. A guardian ad litem is not in a position to duplicate this kind of approach.

Private providers should have a role in an expanding array of hearings, so that they may represent the best interests of the child before the court. This is a positive development both in protecting the needs of children and in encouraging zealous advocacy by attorneys appointed to represent children. First, by adding additional stakeholders to the balance in the adversarial process, the child no longer sits as the third, often decisive party whose position

214. See Peters, supra note 203 (discussing the best interest model).
may be given undue weight if his attorney supports the parent or public agency position. Second, the private provider is often closer to the delivery of services than the public agency and is free from concerns about public resource allocation and other distractions which may influence a public agency's position. Private agencies can provide a useful perspective regarding the best interests of the child. Third, the evidence presented by the private agency can help the judge make an informed decision. The independent participation of private providers should be encouraged at dependency proceedings.

CONCLUSION

Private provider agencies have played a vital role in the protection of abused and neglected children for over one hundred years. The integral role played by a variety of actors outside of the family, especially the role of private provider agencies, challenges the myth that the parent, child, and state exclusively share rights and responsibilities. The role of foster parents, relatives, and other non-traditional caretakers in raising children has been acknowledged, but the role of private provider agencies is one also worthy of legal recognition. By opening the closed triangle of the parent-child-state framework to include other caretakers, responsibility and resources for children can be more clearly explored and understood. Private providers are an integral part of this wider circle and can provide valuable services and evidence to better serve dependent children and their families.

The important, unique role played by private agencies has largely been ignored in legal literature. Because the literature assumes that private agencies are subcontracting agencies of the public agencies, it does not consider the independent impact that private providers have on the traditional parent-child-state tripartite balance of rights or on the representation of those rights before the court. Their role in the dependency system affects the authority and accountability of the public agency as well as their own autonomy. It also has implications for the protection of children's best interests and for the rights-based representation of children in dependency cases. Because of their central role in the dependency system both historically and currently, private provider agencies should
be given an active role in dependency proceedings after children have been adjudicated. This public positioning of the private agencies makes them more accountable to the court and other parties and serves the best interests of children by bringing directly into evidence the intimate information the providers have on children and their families.

Private providers are representatives of the community beyond the “private” family. State-operated agencies, on the other hand, are recent entrants in the dependency system, consolidating the public authority that has long supported the work of private agencies. Control of the design and content of services to families by public agencies is neither accurate nor desirable; other community voices are vital in the exercise of protecting children. The public agency should not be seen as an equal with parents and children in determining the rights and responsibilities of family members. By eliminating the imagery of the triangle, the core autonomy of families is better visualized. Similarly, by placing that family within a larger circle of the community, the public agency is just one of the many actors in the community that are involved in the protection of the child and other family members. The private agency is a key component of the community resources available to children and their families, and the law should recognize its crucial role in this circle of care.