

ABUSE AND NEGLECT: HISTORICAL AND CULTURAL PERSPECTIVES  
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The concept of “Child Abuse and Neglect” and the public response to it reflect historical and cultural influences. Throughout history, the definition has evolved in the United States to provide a justification for local authorities to intervene into families to protect children. While the federal government sets mandatory requirements that each state establish a system to protect children from abuse and neglect, the definition of abuse and neglect is left to the states. Internationally, the United Nations has sought to set minimum guidelines through the Convention on the Rights of the Child and its reporting requirements that attempt to balance both the privacy of the family and cultural diversity with the health and safety of children.

*Intervention into Child Rearing in Colonial America*

Colonial fathers were charged with the proper upbringing of their children, responsible for educating and training them to be productive citizens of the community. Corporal punishment was widely accepted and even expected but children could be considered “neglected” if they were not being raised as upstanding citizens. As early as the 1640s, colonial laws gave community members authority to place children with other families who could raise them in a manner deemed appropriate.

Forasmuch as the good education of children is of singular behoofe & benefit to any Commonwealth; 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 shall have a vigilant eye over their brethren & neighbours, to see, first that none of them shall suffer so much barbarism in any of their families as not to endeavour to teach by themselves or others, their children & apprentices, so much learning as may enable 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.

*(The Book of General Lawes and Libertyes Concerning the Inhabitants of Massachusetts (1648), reprinted in Harvard University, The Laws and Liberties of Massachusetts 11 (1929)).*

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 aforementioned, whereby children and servants become rude, stubborn & unruly; the said Select men... shall take such children or apprentices from them, & place them with some masters... which will more strictly look unto, and force them to submit...

*(Id.)*

There was no generally recognized definition of "abuse and neglect" in colonial times but authorities could intervene into families if children were being "neglected" by not being raised in the strict cultural codes of the time.

### *Progressive Era Intervention Based on Physical Abuse*

In the middle of the nineteenth century, the first reported cases of criminal prosecutions against parents for beating their children changed the notion of child abuse and neglect from negligent upbringing to harm by parents. These prosecutions introduced an era when the legal system began to intervene into

family life to protect children from physical assaults at the hands of their parents.

The early cases prosecuting parents for physical assaults illustrate the historical hesitancy of the court to infringe on parental authority on the basis of allegations of physical beatings by fathers. Courts debated whether it was the state of mind of the parent when perpetrating the beating, the instrument used in the beating, the excessiveness of the beating or the injury caused by the beating that should constitute evidence of abuse sufficient to sustain a prosecution. In *Johnson v. State*, the court reasoned:

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... 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... (*Johnson v. State*, 21 Tenn. 167, 168 (Austin Term 1875)).

Courts searched for objective measures of actionable abuse to avoid over-intrusion into “family government” (Michael Grossberg, *Governing the Hearth* 1985). Some courts relied upon “permanent injury” as an objective definition of criminal abuse:

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 the 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. (*State v. Jones*, 995 NC. 465, 466 (1886)).

These criminal prosecutions are contemporaneous with the 1874 case of *Mary Ellen*. 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. (Neil A. Cohen, "Child Welfare History in the U.S. in Child Welfare," *A Multicultural Focus* 13, (1992); Lela B. Costin, "Unraveling the Mary Ellen Legend: Origins of the "Cruelty" Movement," 1992 *Soc. Services Rev.* 203 (1991); *New York Times*, 10 April, 1874). By 1880, thirty-three such societies existed in the United States, most of them in the business of rescuing both animals and children. ("Linda Gordon, *Child Abuse, Gender and the Myth of Family Independence: Thoughts on the History of Family Violence and Its Social Control 1880-1920*," 12 *Rev. L. & Soc. Change* 523(1983-84)). No statewide definitions of abuse were enforced at this time in history but the understanding that children could be physically mistreated by their parents and that a legal response to such mistreatment was possible was emerging in criminal and civil law.

#### *Twentieth Century State and Federal Legislation to Address Abuse and Neglect*

A seminal event in the history of the definition of child abuse and neglect was the 1962 publication of *Battered Child Syndrome* by Dr. Henry Kempe. 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 child abuse. Each state established its own definition of "abuse" or "abuse and neglect" to trigger the reporting system.

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”). During the hearings, Senator Walter 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 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.

(Mondale Hearings, 300)

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. 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. Despite the limits on the hearings, the definition of child abuse and neglect in CAPTA was “physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare.” Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 1191 Stat., (1974). Under the current CAPTA standards, the definition has been amended to read, “at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious

physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.” 42 U.S.C. sec. 5106g(2).

CAPTA initiated a federal response to child abuse. 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, all had to be reexamined to comply with CAPTA mandates including the broad definition of abuse and neglect in the federal statute in order to receive the federal funding available under the statute.

#### *THE CURRENT CHILD PROTECTION SYSTEM IN THE STATES*

The child protective services system is triggered by a report of abuse or neglect as defined in state law under the requirements of CAPTA. Increasingly, witnessing domestic violence is the basis of reports. Reports are made by voluntary or mandated reporters to hotlines that federal law requires every state to operate. (42 U.S.C. § 5106A(b)). If the reporter provides information to the hotline operator meeting the definition of abuse or neglect, the report triggers investigation by the local child protection agency.

Through mandated reporting, the *parens patriae* power of the state is exercised. Reporters generally are persons who work in professions or roles that bring them into contact with children. (42 U.S.C. § 5106A(b)) but the definition of mandated reporters and the list of professions mandated to report varies from state to state. If these professionals or lay community members suspect or believe that children with

whom they come into contact 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.

### *Current Definitions in International Law*

Article 1 of the 1989 Convention on the Rights of the Child defines child as “[e]very human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” Article 19 defines violence against children as “all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.” The United Nations’ August, 2006 *Report of the independent expert for the United Nations’ Study on Violence Against Children*, also draws upon the definition in the *World Report on Violence and Health* (E.G. Krug et al (eds) 2002, p. 5), “the intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child’s health, survival, development or dignity.” This United Nations’ report quotes the June, 2006 *Global Initiative to End All Corporal Punishment of Children*, “at least 106 countries do not prohibit the use of corporal punishment in schools, 147 countries do not prohibit it within alternative care settings, and as yet only 16 countries have prohibited its use in the home. The report states that “economic development, status, age, sex and gender are among the many factors associated with the risk of lethal violence.”

Citing the *World Report on Violence and Health*, p.5, the United Nations’ report

finds that “studies suggest that young children are at greatest risk of physical violence, while sexual violence predominantly affects those who have reached puberty or adolescence. Boys are at greater risk of physical violence than girls, while girls face greater risk of sexual violence, neglect and forced prostitution.” In addition, “small-scale studies reveal that some groups of children are especially vulnerable...children with disabilities, those from minorities and other marginalized groups, ‘street children’ and those in conflict with the law, and refugee and other displaced children.” (*Report of the independent expert for the United Nations*, August 2006, p. 13). Focusing on abuse and neglect in the home, sexual violence is increasingly acknowledged (*Multi-Country Study of Women’s Health and Domestic Violence*, Geneva, World Health Organization, 2006) and the impact on children of domestic violence against adults in the home is documented. Citing risk rates equal to those in most United States’ estimates, a study in India found that domestic violence doubled the risk of child abuse. (W.M. Hunter et al, “Risk Factors for severe child discipline practices in rural India,” *Journal of Pediatric Psychology*, vol. 25 (200), pp. 435- 447)).