Positively identifying children as citizens: A call for parallel due process rights

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POSITIVELY IDENTIFYING CHILDREN AS CITIZENS:
A CALL FOR PARALLEL
DUE PROCESS RIGHTS

by

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Bachelor of Arts
Southern Illinois University at Carbondale
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A thesis submitted in partial fulfillment
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ABSTRACT

Positively Identifying Children as Citizens: A Call for Comparable Due Process Rights

by

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This work addresses the need for parallel due process rights for children by investigating the nature of juvenile welfare policies that affect abused and neglected children by focusing on the Adoption Safe Families Act. Upon the settlement of the U.S., common law from England, known as parens patriae, has governed the juvenile justice system. This common law has recognized children are indeed a State interest and that a child is a different type of citizen than an adult. Because children are dependant on their parents and not seen as full-fledged citizens, the State has assumed the responsibility of ensuring that children live in safe environments. In 1899, the Illinois Juvenile Court Act was enacted to protect children entering the system due to abuse, neglect or delinquency. Although formed to help and protect children, the 1899 Act has not been adopted by every state, and the states that have adopted Juvenile Court Acts have disabled child rights more than they have assisted them. Under the Due Process Clause,
all citizens are to be afforded the same protections and procedures under the Constitution, but children are not considered full-fledged citizens and therefore they lack these important protections; this does not mean that children should not or cannot have due process rights. Previous and current methods have failed in the protection of child welfare as they have used ambiguous terms and political trade-offs to protect undefined rights of children. Currently policies, such as the Adoption Safe Families Act, attempt to protect the welfare of children and protect undefined rights by using monetary incentives to get agencies to comply with policy provisions and quotas. Children may be considered citizens-in-training and therefore they should have parallel due process protections that ensure that they will be treated fairly and justly by the state. Children lack the experience and rationality that adults have and therefore children are unable to politically participate; this affects their level of representation and due process protections as potential or future citizens. It is our duty as adults and representatives of children to ensure that the juvenile justice system is policed by a set of due process protections that are parallel to the protections adults have, especially in cases of State supervision and guardianship. By allotting parallel due process protections to abused and neglected children by enacting a Dependency Clause for minors, we can ensure that the State will follow procedure in the name of rights protection and not in terms of balancing budgets or meeting quotas.
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I would like to dedicate this thesis to my professors and my family for believing in me and sticking with me throughout this extended process.
INTRODUCTION

Liberty issues have always been at the center of American interests. Often adults do not consider that children also face liberty issues, such as in cases of State intervention in the lives of abused and neglected children. Although our current system strives to protect the welfare of abused and neglected children, there seem to be many injustices that occur regardless of State intentions. All children born in the United States, whether they have a family or not, will become full functioning citizens one day. It is our duty as full fledged citizens to protect the interests of our “citizens-in-training” if we want to ensure a healthy and prosperous future for ourselves and our children. Currently abused and neglected children encounter several liberty issues while in State custody such as: extended stays, high recidivism rates, low standards of care, lack of knowledge of disposition, lack of contact with family members, and institutionally based living.

Currently, children’s welfare and their legal rights as future citizens have been set apart from adult-centered rights through the Illinois Juvenile Court Act of 1899. This has effectually hindered their due process and legal rights protections, especially with regard to cases dealing with foster children. The jurisdiction of children’s legal issues should be separate from adults due to their dependency as children, but they are left without the privilege of oversight and review in processing protections within the juvenile welfare system. If the state can take an interest in children by removing children from unsafe
families, then the responsibility of the government should be to ensure that children are still afforded comparable protections as citizens, while keeping child welfare in mind. This paper will expose problems that exist within the past and current child welfare system, by first examining the root of these various problems and then reasonable solution based on values of citizenship will be provided. Our legislative system and juvenile justice system attempt to work together under the pretext of parens patriae by separating the venues of adult and juvenile courts, yet current juvenile policy functions by mimicking the very system it has tried to avoid.

Interest in child welfare policy from both the public and politicians has fluxed up and down throughout different eras in American history; this has left juvenile justice with an unstable foundation. The original intentions of juvenile justice and child welfare policy makers have diverged from the foundations of their formations. At first, the recognition of child welfare and rights formed from genuine concerns and intentions to help and save children, but throughout history child welfare issues have developed into political bargaining tools and media spectacles.

Intentions of policy-makers have not always been centered on the interests of the children. Parens patriae has demonstrated State interest in the welfare of children as citizens by intervening in their lives with the pretext of protection of children’s best interests. What has resulted is child welfare policy being formed in the interests of policy makers and lobbyists, not of children. Such policies have made it difficult for foster care to run efficiently in protecting the needs and rights of children. This, in addition to bureaucratic problems within the child welfare system, has resulted in several due process rights violations, including: long waits for adversarial proceedings, privacy
violations, not being notified of one’s rights, and neglect of the right to appropriate
counsel, the right to be heard, the right to fair and equal representation and the right to
appeal. Ordinarily, when the State uses the power to intrude on a citizen’s privacy it
becomes a matter protected by Constitutional law, therefore it should be required that
when the State takes interest in the welfare of children and their rights, it must be
comparably legally defined and protected under federal guidelines.

Children are potential citizens, but they are not treated as such because of their
status as dependants. We must address oversight issues in the representation of children.
Plato once questioned, who would police the police? Who is policing the juvenile justice
system if a portion of it does not fall under Constitutional protections? Can foster
children understand their rights and utilize these protections? Maybe, but there should be
an avenue that sets out to ensure that each facet of the child welfare system is watched
over in order to ensure that not one child falls through the cracks.

Children who have been abused or neglected have a high risk of growing up to be
criminals, drug addicted, or homeless. Connecticut officials have estimated that seventy-
five per cent of youths in the state’s criminal justice system were once in foster care.
Before some children become adults, they make their way through the juvenile justice
system as “junior criminals” breaking laws before they have a chance to comprehend
them. A 1991 federal study of former foster care wards found that twenty-five percent
had been homeless, forty percent were on public assistance and fifty percent were
unemployed. It was also was found that eighty percent of prisoners (four out of five
prisoners) in Illinois had spent time in foster care. These are not the aims nor outcomes

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1 Rick Thoma, “A Critical Look at the Foster Care System,” Lifting the Veil: Examining the Child Welfare,
Foster Care and Juvenile Justice Systems, 2002.
that have been set by Human Services or the Department of Family and Youth Services, nor are they what the American public wants for its foster children. This is not a very successful outcome for foster care policies, or for the pocketbooks of taxpayers who have to support foster children not only when they are young, but when they grow up to be adults either homeless, dependant on public aid or in correctional facilities. And finally, these children’s potential for growth and contribution is stunted or lost.

Today the focus of growing concerns is child welfare and their Constitutional rights such as due process rights. Children in foster care have the least level of potential representation due to the absence of stable guardians, it is of utmost importance that citizens on the lower tier of representation get the proper representation. The children’s rights movement stands apart from other movements of the past because children are categorized as minors under the age of eighteen, leaving them with less legal control over their welfare and rights protections than adults. Should solutions to children’s rights issues involve the children of the nation, so as to stand up to adults and taking them to court? Should foster children gather together in a civil lawsuit and sue their abusive and neglectful parents and legal representatives? Should we give children more representation on top of the many children’s advocates, guardian ad lietems, attorneys, Court Appointed Special Advocates (CASA) and litigators? Unfortunately class action lawsuits and additional child representatives will not address the current problems we are facing today within child welfare and their rights. Children are neither fully rational nor capable of raising millions of dollars for their interest groups or to contribute to legislator’s campaigns, and they certainly cannot vote legislators that support their policies into office. In addition, children are incapable of protecting their interests.
because they lack proper understanding of how the social contract functions in terms of state and federal rights, as well as in terms of legal duty or obligation. This leaves them subject to the powers of *parens patriae* and to states that have adopted Juvenile Court Acts similar to the Illinois Juvenile Court Act of 1899, which have no reference to nor avenue protecting any defined rights. Some states have not adopted a Juvenile Court Act as states vary in terms of processing juveniles.

Therefore, children should have parallel due process rights with regard to human rights, moral rights and legal rights. Children are people who deserve to be treated with dignity, because processes of state intervention can affect the psychological and emotional development of a child. Children are not hot potatoes nor abandoned pets who need only shelter, they are developing people who deserve be recognized as future citizens. It is also important to recognize the social interest in maintaining parallel due process rights for children because it costs the public and the State resources to care for abused and neglected children while they are in the system and possibly when they leave the system, as statistics mentioned display that a good fraction of abused and neglected children grow up to still rely on State resources as adults. Finally, it is important to ensure due process rights for children because they are potential citizens who are unaware of their status as citizens due to the function of our current system. Children are part of the public sphere from the time of birth and they cannot avoid contact with the political world, especially abused and neglected children who are within State Custody. Confrontation of the political world does not begin once one becomes 18, it begins the moment one is born, for example crossing the road, following rules of society and the
social contract, being required to go to school, and sitting in a child safety seat, to name a few.

In order for a problem to be addressed, the problem must be first recognized and it must have a history. Chapter Two will show how philosophies in child welfare and interest in the legal rights have been inconsistent and have conflicted, other than the trend toward increasing government intervention. In the quest to ensure the welfare of children and protect children’s rights, the focus has veered on and off from genuine interest in the welfare of children and their rights, to the obscurement of child welfare and rights issues via media exploitation, through hasty policy decision-making in response to the concerns of the constituency. This chapter will consist of three sections.

Section One of Chapter Two will focus on the beginning of interest in child welfare, from the founding of this country to the 1899 Juvenile Court Act. This will include an historical investigation of the American political interest in children and an introduction to the basis for child welfare policy, parens patriae, which established the state’s interest and the right to intervene in the lives of children. The Industrial Revolution and an increase in immigration in the 1800’s marked the beginning of the Child Welfare movement, as it was discovered that the numbers of children living in poverty were increasing dramatically. It will be shown that children were of little political interest until the late 1800’s, or during the Industrial Revolution, when the Juvenile Court Act of 1899 was established, placing children under the jurisdiction of the Juvenile Court rather than the criminal courts. Until then, children had only been subjects of their household. It will also be pointed out how shifting attitudes towards children affected children and the child welfare movement during this early era in child welfare.
Section Two of Chapter Two will address how lack of focus and consistency within the child rights movement has impeded enactment of effective legislation and recognition of due process rights with regard to juveniles. After the Industrial Revolution, children were seen as burdens to the family rather than as contributing assets. Poverty in families as well as immigration increased, correlated to the increase in perceived juvenile crime and vagrancy of children.

Section Three of Chapter Two will address modern concerns of child welfare and children's rights. This section will address how previous policy based on paresis patriae has affected policy today. It will also introduce policies such as the Juvenile Court Act of 1899, which addressed the dependency status of children. Political issues that were raised during the 1900's and affected child welfare policy will show how children's welfare issues have been dealt with. Ideas of modern political scientists such as Jeremy Roche and Joseph M. Hawes will be addressed as they have recognized the exploitation of child welfare and rights issues by emphasizing the need for the protection of children's rights.

The culmination of these sections within Chapter Two will demonstrate that citizens and politicians have both provided an unstable foundation for interests in the welfare and due process rights of children. Citizens have blindly put their faith in a system that provides the state unrestricted power in child welfare issues. This, along with media exploitation of children's issues and politicians using children's issues as political platforms, has resulted in an embarrassing failure of the child welfare system and disregard for children's due process rights. Unstable public support of children welfare policy has provided the state indiscriminate power over the rights of children, canceling out due process protections that American citizens hold so dear.
In Chapter Three I will discuss general policy issues that plague the juvenile justice system. The most current significant piece of legislation is The Adoption Safe Families Act of 1996 (ASFA), which was established to expedite child welfare cases; it utilizes financial incentives rather than establishing compliance by legal force. ASFA has once again been produced as a policy that claims to be in the best interest of children, yet it functions only as a budget-balancing tool for child welfare workers and not as a policy ensuring that any legal rights of children are defined nor protected. Unfortunately many due process issues of many foster children are also impeded through bureaucratic flaws including: lack of personnel, high turnover of personnel, and legal officials not properly trained to work with juveniles and their families. Many children wait for years if they ever get a home. In Chapter Three I will provide examples of the downfalls of the Adoption Safe Families Act relating it to reasoning addressed in Chapter Two. It will be shown that ASFA relies on monetary reward in order to get states to comply with policy provisions. Some may say that the ASFA greatly improves the protection of children's rights by imposing goals and deadlines to legal procedures, and it has, but there are still ever increasing numbers of children that enter foster care and policies like ASFA are unable to address these children's needs.

Chapter Four will compare the relationship adults have with the State versus the relationship children have with the State. This comparison will be primarily focused on the custodial relationship the state has with dependants by drawing on cases such as the Nancy Cruzan case. It will be demonstrated that positive law defining the due process

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³ National CASA Association “Why Children Are in Foster Care”, Excerpted from an October 1995 newsletter of the Child Welfare League of America, Foster Care F.Y.I.
rights of children can act as a reference point for child welfare policies. It will be shown the children have been and are still left with very few means to remedy wrongs against them in terms of basic human rights violations and violations of their dignity as persons and citizens of a social contract and that positive law may be the remedy to policy issues. As shown in Chapter Two, policies have been enacted in reaction to rapidly rising rates of children being taken from their homes due to abuse and neglect, but these policies have had little if any result. If the same result is repeated throughout generations of policy-making then the method or root of that policy process must be examined. Chapter Four will also address the ethical issues that are involved with children’s rights. In this chapter the concepts of rights, citizenship, and equality will be exposed and discussed. This chapter will address any conflicts of interests that may arise between the due process rights and interests of the family, the child, and society as they will be weighed against each other as the question is asked, why should the public care about the rights of children, foster children or their families? A correlation can be made between foster care and the future despair that involves a life of poverty, drug abuse, or crime. The public must recognize that this connection exists. Children are not pets who need shelter, they are people who need love, trust and stability to form healthy relationships and have a solid start in life. Finally this chapter will address that significant child welfare policy suffers from the same problems other policies have had, resulting in infringements of children’s due process rights as citizens with a lack of legal regard to their welfare.

Chapter Five will provide my solution of a Dependency Clause to the Illinois Juvenile Court Act of 1899, which will address the status of partial citizenship that children hold and their need for due process rights. It will be demonstrated that citizens
who cannot engage in democratic processes still need a comparable level of due process rights that addresses their incapability of political practice. This solution can affect child welfare policies like the ASFA and promote children’s due process rights. The public must recognize that children, like dependent adults, require protections of their best interests. In this chapter the concept of junior citizenship will be introduced. What the state may perceive to be in the child’s interest may not be what the child or family perceives, and this can create a conflict between the child, the family, and the state. It is the state’s responsibility to ensure that the child and his or her family understand children’s status as future citizens and the position of the state, which includes the basis of interest it has in that family or child. If juvenile court settings are not going to be as formal as the proceedings for adults, then there needs to be a comparable means of addressing the needs of the child, the family, and the state that has the definitiveness and strength of positive law.

Current methods and child rights representatives have not been able to remedy the amount of mishandling policy practice, which has resulted in rights infringement that occur to foster children. Children cannot represent what their needs are, because unlike women, minority groups and the handicapped who have been able to represent their needs in terms of Constitutional rights protections, children are not adults. Politically, the latter groups have represented themselves through support of legislation and interest groups or through legislative testimony. But they were only recognized when the injured parties personally stood up for themselves and made political “noise”. Some children have had a positive experience growing up in foster care, but in actuality a majority does not. There are success stories, but they are rare and not the norm. Therefore an
alternative solution that addresses the needs of minor dependents must be investigated. Children’s due process rights need to be positively defined by law. The State must positively recognize that children are indeed partial citizens, and as partial citizens they deserve definition and protection of parallel due process rights that are appropriate to their status as dependent partial citizens. This thesis will suggest that a Dependency Clause be utilized to assist in protection of children’s due process rights.
CHAPTER 2

AN HISTORICAL PERSPECTIVE ON CHILD WELFARE IN THE U.S.

Numerous socio-legal developments have impacted our modern child welfare system, requiring continuously increased government intervention. This chapter will provide an historical overview of child welfare policy. It will reveal that without positive law defining due process rights of abused and neglected children, children in turn, are left subject to insufficient policies\(^4\), such as the Adoption Safe Families Act. It will be demonstrated that previous and current child welfare policies have not followed a consistent philosophy, which has effectively left holes in the system by providing the state with ineffective discretionary powers. Within the socio-legal status as dependents, children should still be afforded the opportunity as junior citizens to benefit from and exercise due process rights that protect them from overly intrusive state powers that do not inherently satisfy their best interests. It will be demonstrated in this historical synopsis that the absence of concrete positive rights has impeded the development of successful child welfare policies.

No solutions have been sufficiently effective to improve child welfare in the absence of posited due process rights with regard to children, as many foster children linger in foster care for years. Children continue to have no traditionally-styled homes to go to, as many foster children live in overcrowded institutions. Many abused and

\(^4\text{With regard to social intentions.}\)
neglected children are also often placed with unqualified foster parents, while some remain to be abused by incompetent adults. Abused and neglected children must not be let down by a failing child welfare system. It is necessary to explore the impact of child welfare policies by addressing how the public, the public officials, and government agencies have not supplied the juvenile welfare system with a sufficient focus or definition of children's due process with regard to abused and neglected children.

The next three sections address three important historical aspects that affect child welfare policy today. Section One will present parens patriae, which is the foundation for child welfare policy in the United States and the initiation of the classification of children as legal dependents. This section will define this doctrine and provide a legal perspective of child welfare until the 1899 Illinois Juvenile Court Act. Section Two will explore the social impacts of the Progressive Era on child welfare policy. It will be demonstrated that a philosophy of excessive idealism and moral absolutism dominated this era; reform movements focused on child labor law rather than on overall child welfare, thus degenerating the social impact of child welfare reformers. Failing philosophies and a failing economy provided the opportunity for unchecked power to be left to legislators, whose interests were largely influenced by economic recovery and not rights definition of children. Finally, Section Three will address the 1899 Illinois Juvenile Court Act by discussing its legal impacts and implications. Through this Act, the jurisdiction of courts over juvenile proceedings has been separated from jurisdiction over adults, yet the specific due process rights of children went undefined. This act set the citizenship-status of children by denying them full Constitutional protections. Consequently, the 1899 Illinois Juvenile Court Act is effectively anti-legal in that it
encourages minimal procedural formalities, which in turn, leaves children unprotected from procedural flaws. This legal separation has resulted in lax judicial proceedings and several due process violations of abused and neglected children, demonstrating that children lack a defined status of citizenship, which is essential to rights definition and protections.

This historical investigation reveals that the inconsistent philosophies of child welfare reformers and lack of law, such as a Bill of Rights specifically defining the rights of children, have resulted in various ineffective juvenile welfare policies throughout American history. Children’s welfare policies were not created wholly in vain, but they have lacked appropriate follow-through. The two legal foundations for child welfare, parens patriae and the Illinois Juvenile Court Act of 1899, do not provide enough democratic framework to act as a proper basis for policies governing how abused and neglected children should be processed throughout the child welfare system. A concrete definition of children’s due process rights must be provided in order to ensure that the best interests of abused and neglected children are in fact being protected. In the sections that follow, we explore these ideas deeper.

Section 1

This section indicates common law parens patriae as the basis for child welfare policy today. This section will also provide an historical legal analysis of this power in the United States. It will be demonstrated through review of court cases that although intended in benevolence, the courts have allowed juvenile welfare processing open to too
much discretion without positive due process law, leading to a tendency of malevolent effects on child welfare.

The root of child welfare policy lies in parens patriae or government as parent, granting the state the power to act prior to recognition of due process protections. This foundational philosophy, along with changing social roles of children and the division of juvenile and conventional law, as established in the Illinois Juvenile Court Act of 1899, has defined children’s due process rights with vague statutes and vague provisions. This has left abused and neglected children without the capability of redress, if or when procedural error has been made, while under state guardianship. As we shall see, juvenile court history has demonstrated that “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principled procedure.”

The tradition of state interest in the lives of abused, neglected, and delinquent children is founded from common law parens patriae. “For a long time, one of the characteristic privileges of sovereign power was the right to decide life and death. In a formal sense, it derived no doubt from the ancient patria potestas that granted the father of the Roman family the right to ‘dispose’ of the life of his children and his slaves; just as he had given them life, so he could take it away.” By the time the right to life and death was framed by classical theoreticians, patria potestas was considerably diminished in form. Parens patriae as English common law maintains that the state, in interest of its citizens, may act paternally as a kind and loving “parent” for its citizenry. Under the power of parens patriae, the state, in instances of children who do not have competent guardians to care for them, may assume custodial possession. By the eighteenth century,

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this English common law established the legal basis for state intervention in the relationship between children and their families here in the United States. It is important to note that parens patriae, a common law, acted and still acts as legal precedent, even though no express framework of legislation positively enacted this power of intervention.

Insofar as parens patriae is a derivative of patria potestas, the implementation of this forcible power has been used to control populations rather than function in the morally justified interest of dependents. In the early 1800’s, recognition of abused and neglected of children became more general. In 1825, Homer Folks, a minister, noted that public authorities have both the right and the duty to intervene in the cases of parental cruelty or gross neglect of children, and “to remove the children by force if necessary, and place them under surroundings more favorable for their development”\(^7\).

Although rooted in common law, numerous kinds of policies and formal legislation make reference to parens patriae. Most child welfare policies and practices are supported by parens patriae under the Illinois Juvenile Court Act. References to federal parens patriae legislation can be found in Title 15 of the United States Code. Very few policies exist however, to limit this power because powers of parens patriae precede many due process rights. In actuality, most child welfare policies and practices support parens patriae by practice of the Illinois Juvenile Court Act, even though it is not a positive policy, leaving it and practices that follow from it incapable of review by law.

Powers of parens patriae and Constitutional issues in terms of child welfare and the legal rights of children have been brought into question before the court. Several court cases throughout the history of child welfare have scrutinized the powers of parens

and due process protections through dissection and definition. The power of parens patriae was firmly established in 1838 as it was held in Ex Parte Crouse\(^8\) that the Bill of Rights did not apply to juveniles, re-affirming the powers of parens patriae. This ruling afforded judicial review to all juvenile cases, without the guidance of any proper framework or positive law defining referable rights of juveniles; it merely affirmed the power of the state to intervene. Court rulings regarding juvenile delinquency based placements on acts of benevolence rather than punishments, therefore denying Constitutional due process claims that usually come with punitive procedure of full-fledged citizens. It had also deemed that the parents had no standing because they did not have custody of the child; the state retained custody due to negligence on behalf of the parent. The influence of parens patriae was demonstrated once again in the 1905 Commonwealth v. Fisher decision, when it was effectively ruled that parens patriae always trumped children’s due process protections in child welfare and, once again, that the Bill of Rights did not apply to juveniles. Here it was assumed that anything the government does for a child in custody is always better than what a negligent parent could provide. It has been demonstrated that conflicts existed with regard to traditional due process rights for children in that there has been no standard set in cases of loss of liberty. Defined due process rights have not been afforded to children who have been taken into custody under parens patriae powers, leaving the state with unbridled discretion over matters concerning children.

\(^8\) When a father challenged the Philadelphia House of Refuge’s right to hold his daughter who had been committed there by the mother. The Pennsylvania Supreme Court stated that such placement was not punishment but benevolence, therefore no due process claim could be made by the father, and that the father had no standing anyway because the state had a legal obligation to step in whenever the parents are irresponsible. (1838)
Due process protections—fundamental, procedural, and systematic practices—act as legal safeguards, protecting the rights of anyone who comes in contact with legal authorities. Under parens patriae, however, these many due process rights are rendered fruitless for children. In the end, children within state custody are not provided full constitutional protections, which could be utilized to protect a citizen’s basic human rights. Children should at the very least be afforded a set of standards when confronted with state intervention and processes. We seem to be able to save children from abusive homes but are unable to avoid abuses from the system.

In the 1960’s, the first full legal examination of the child welfare system occurred in Kent v U.S and in In re Gault. In Kent, the tone of child welfare changed as the Supreme Court recognized juveniles’ Constitutional rights as issues of due process. The Kent case focused on the concept of parens patriae. Kent provided the right for attorneys representing juveniles to have access to juvenile records, for the necessity of denoting reasons for transfer in delinquency cases. Fourteenth Amendment rights of children had not been considered until they were finally introduced to child welfare through In re Gault, which provided some due process procedure by affording the right to an attorney to juveniles. The landmark case added formality to juvenile court proceedings by providing Miranda rights, adequate notice of charges, the right to confront and cross-examine accusers, assistance of counsel, and the rights of sworn testimony and appeal, once again establishing that the state afforded some Constitutional protections to children. The Court held that the proceedings for juveniles had to comply with the requirements of the Fourteenth Amendment, affording some legal recognition to children.

as protected citizens. The Court also found that the procedures used in Gault's case met none of these requirements. Most Supreme Court decisions that followed Gault did clarify the rights of juveniles. Nonetheless, then and today there have been no formal guidelines, boundaries, or concrete definitions that state what legal rights children have with regard to child welfare other than with processes with regard to courts procedure.

Although the application of parens patriae came into question in the 1960's and 1970's, legal attempts to remedy the often-deplorable situations of perceived juvenile delinquency and neglected children have failed. If children are subject to the power of parens patriae, then a guideline that restricts or delineates the state’s duties to children while in state custody must be established in order to utilize this power in a fashion that enhances its function and prevents its abuse. It should be noted that juveniles, as junior citizens, need comparable protection from arbitrary paternal procedures and ad hoc policies.

Attempts have been made both in the past and in the present to improve the lives of children in unfortunate circumstances. Parens patriae and notions of paternalism by the State have helped abused, neglected and abandoned children, but how effective have they been? Parens patriae has defined children as dependants, but has not provided a standard for processing dependents. Unfortunately, the interest that the state has shown in the lives of American children through the legacy of parens patriae has not ensured nor secured the best interests of said dependents, rather this power has superceded important Constitutional protections that Americans hold so dear. Without Constitutional protections, dependent citizens such as foster children are left without avenues of review and recourse, and are incapable of reforming the child welfare system in a way so as to

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10 Many children deemed delinquent have actually been found to be abused or neglected.
legally protect their fundamental human rights. Although the Constitution is the "supreme law of the land", parens patriae remains a powerful building block for child welfare theory that seems to supercede our "supreme law" which was created to guarantee procedural rights. The issue then becomes whether rights of children or any dependent citizens come prior or post social contract. The next section will address how social attitudes toward abused and neglected children affected the way in which child welfare policies were created.

Section 2

The interplay between the applications of parens patriae and shifting social attitudes during the Progressive Era of American history is revealing. This section will explore the effect of conflicting ideals that existed during this era as reformers focused more on the social interests of capitalism and the elimination of social evils, which were not in the best interests of children and their welfare. It will be shown that during this time excessive idealism and moral absolutism affected the focus of reform movements by acting more as an obstacle than in assisting with the formation of child welfare policy.

Although to a lesser degree than the days of patria potestas, at the beginning of our country's history child welfare was primarily a matter for the home and the patriarch. The state seldom initiated interventions into the lives of families and children until the early eighteen hundreds and near the beginning of the Industrial Revolution. Child abuse and neglect had not yet been rigidly defined nor recognized as public issues, and resources to support child welfare issues were largely unavailable. The father, as the head of the household and its maintenance, held the power to discipline family members, but
each member of the household still had subordinate duties and responsibilities. Throughout the 1700's and 1800's, a large part of the populace worked in agriculture. Children at this time retained levels of significant responsibility towards the family and the community that do not exist today since they provided a good deal of labor. Hawes states, "Children were very much a part of this world and became productive members of it as soon as they were capable (typically around the age of 7)." Legally and socially children were seen and treated as little adults by their families and by their communities.

Instead of recognizing children as important contributing members to their families and community, their social status was diminished from contributor to full-on dependent. Even though politically they were powerless, children were previously recognized as persons capable of providing income or other meaningful contribution, but economic and social changes induced by the Industrial Revolution affected children by changing the status of children in society. This change in status resulted in a romanticized view of children thus initiating strict protection of said status.

It had not been until 1870 that the U.S. government had taken official notice of children's employment outside of the home, when it was noted by Census figures that one-eighth of children between the ages of ten and fifteen were employed. Most middle class families, who could afford to keep their children in school and out of work, were alarmed when census figures and media accounts exposed the terrible conditions under which some children worked. Socialites alarmed by census statistics responded by lobbying for restrictions on child labor as a matter of child welfare. By 1900, the number

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13 Philanthropic members of high society that mingled closely with businessmen and legislators, often providing financial support though social functions such as fundraisers and charity balls.

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of working children had risen from one-eighth to one-sixth. Instead of calling to action a defined standard of the treatment of children as a whole, the public digressed by focusing on only one aspect of many child abuses. High public interest in child labor, although necessary at the time, diverted energies away from establishing child welfare policies that could have protected children not only from abuse of child laborers, but possibly abuses from families and other institutions.

Political interest in juvenile issues was nominal until problems of vagrancy and delinquency among children were addressed during the Progressive Era. Due to child labor restrictions in the late eighteenth century, many children had to find alternative means of earning income, leading many to work on the streets as vendors or entertainers, and thus resulting in yet more interest in the vagrancy and truancy of juveniles. Changing social roles of children contributed to the perception that delinquency and vagrancy were on the rise. Frederick Wines had suggested the societal impact of the Industrial Revolution when he stated, "I think that the invention of machinery has changed not only the appearance of the world, but also the relations of man to man." He went on to state, "Our recent sudden and rapid development in the several directions [labor saving machinery, growth of cities and the emancipation of women] may account in some degree for the present measure and manifestations of pauperism, insanity, and crime." The focus of reformers was on children who were continually found in the streets, child labor issues, children who were deemed delinquent, and those children who were

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16 Ibid.
incarcerated with adults. Many children perceived to be homeless or delinquent came from impoverished families.

Initiation of the children's rights movement in the early 1800's was primarily a philanthropic cause of wealthy socialites. Even though reformers showed high interest in the lives of needy children, very few subsidies had been set aside to aid them. Societies of wealthy businessmen and others influenced by the reform philosophies of both the Progressive Era and the Age of Enlightenment became known as Child Savers. Child Savers founded reformation homes for homeless and delinquent children, which were established to "correct and reform" homeless juveniles. However, such institutions were later found to be abusive, overcrowded, and ineffective in decreasing the rates of orphaned and delinquent children. Funding for such institutions was scarce, aside from institutions for children of veterans; the first tax-supported efforts in the field of childcare were subsidies granted around 1899 by the state to individual institutions in the form of one-time lump sums, which also happens to be at the same time the Illinois Juvenile Court Act of 1899 was enacted. State funds were directed toward business and farm subsidies, and not public welfare; this left children subject to policies of orphanages and almshouses for assistance. Nevertheless, even though reformers showed high interest in the lives of needy children, very few subsidies had been set aside to aid them.

Public interest in the welfare of children about this time appeared to stem from a larger interest in the protection of society from the future of unacceptable classes of citizens, that is, the poor. Moreover, competition for employment and wages sparked

20 Ibid.
public interest in child welfare as an increase in child labor in factories resulted in weakened and breakdown of family control, the separation of work from education, and a gradual change from a rural environment to the urban setting. In this way, many children of poor families were intensely affected by the anti-child labor movement. Rather than ensuring the protection of children as victims of crimes committed against them, focus remained on children of lower income families under the guise if ridding society of social evils of vagrancy and delinquency.

Most historians have shared the view that the nineteenth-century reformers were fundamentally benevolent, but some historians have failed to recognize that they were imposing impossible ideals of fulfilling the American Dream. Many of the children considered delinquent were not delinquents at all, but in fact were children attempting to supplement their family incomes. At times these children were found either habitually working on the streets, or were actually orphaned, runaways, or abandoned. Child savers felt that it was their duty to save children from the evils of urban settings and work environments in order to ensure the future with viable, productive American citizens. Unfortunately some reformers’ opinions of inner-city children were not favorable as children from impoverished inner-city environments were considered “intellectual dwarfs and physical moral and wrecks (sic) whose characters were predominantly shaped by their physical surroundings.” Immigrants were also considered unsocialized. Compounded with the impersonality, isolation, and degradation of cities, social

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relationships between citizens were a far cry from the way they stood during Colonial times.

Many children, whether orphaned or not, did end up in detention or reformatory homes founded by child saving philanthropists, but some child’s rights advocates found these conditions unacceptable. Minister Charles Loring Brace founded the Children’s Aid Society in response to the deplorable status of child welfare. He started the first orphan trains, rescuing orphaned and impoverished children from so-called reformation homes. Brace took trainloads of orphaned children at reduced fares, mostly poor children, immigrants or those considered delinquent, across the country to auction the children off in various towns.\(^{23}\) His reform philosophy included emphasis on an education in preparation of an industrial discipline in the greater interest of public order and public safety. In many instances, these children were not orphaned per se, but again just like many considered to be delinquent, were habitually found on the streets. Many of these children and their parents retained hope of reunification once their parents’ lives were more stable, but this was not often the case. There was no turning-back once the children left their home. At each town, the children were washed, brought to the town square, and a brief description was given of each child to farmers, merchants, townspeople, or anyone who would bid on the children and provide a home for them. Some children did find homes,\(^{24}\) some became children of loving families, and some worked as hands or assistants to guardians. Many, however, remained in bleak situations.

It may be that crusaders, in their call for rights for children, had been over-zealous and incapable of comprehending differing social practices considered to be normal in the

\(^{23}\) Ibid.
\(^{24}\) Between 1853 and 1929, 31,081 children were placed in homes for orphan trains.
lives of the impoverished. Wealthy child savers continued to establish organizations in response to the increasing numbers of abused and neglected children living in the streets or imprisoned. By 1875, the New York Society for the Prevention of Cruelty to Children (SPCC) was established and, by 1898, more than 2000 Societies existed. These organizations assisted in the investigation of alleged cruelty and neglect, in the presentation of the facts to the courts, and in assistance to police and public prosecutors in bringing justice to adults who were responsible for crimes against children. Some views of the early SPCC’s are positive, claiming that SPCC’s were helpful in the quest for protection of child welfare and children’s rights, while, “According to other students of the SPCC movement, the society’s development was widely perceived as an attack on the family economy of the poor.”25 The intentions of the SPCC’s may have been displaced, as they possessed stigmatizing and tainted views of orphaned children as members of a lower social class who were in need of reformation and rehabilitation. This psychological mechanism is not uncommon in our history comparable to the reasoning that was used to justify racism or sexism. The impoverished were thought to have “brought their misery upon themselves through idleness, laziness, or character defect.”26 What some may have perceived as a crude way of living, was a normal way of life to others, such as allowing children to work on the streets as paperboys or match girls. Solutions offered by the child welfare activists did not directly reflect the best interests of children, rather to address child welfare activists undertook to push their own views by enacting education acts.27 Children should be required to attain a certain level of

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26 Ibid. 40
27 Ibid.

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education, but this solution is ineffective in protecting the welfare of abuse and neglected children.

It seems that influential members of the upper class may have tried to set standards for society that really were unattainable for lower-class members at this time. Clement points out that before 1850, only the most well-to-do could afford to keep their children from performing labor in the field, home or factories. Clement also goes on to point out that children’s labor ensured some families’ survival and even contributed to the purchase of the family home, which provided a level of security against poverty and homelessness. He also notes, “The sharp division that developed between parents who could afford to keep their children out of the labor market, and parents so poor that child labor was essential to family survival culminated in the anti-child labor movement of the nineteenth century.” What reformers didn’t recognize was that it was easier for children of upper class families to get their education, than it was for children who had to get state required education and assist in supporting their families. Reformers never made the connection that ensuring education was not the solution for protecting children from abuses and neglect by adults and their systems.

In addition, adults sought to further protect the rights of children by placing restrictions on child labor. The prohibition of child labor established the moral right for a child to be a child. In 1904, the National Children Labor Committee viewed childhood as sacred. Child labor had been common until it was nearly banished by the New Deal during the Great Depression. The idea that children are fragile and needy, not a viable source of assistance to the family and familial income, reveals that Americans came to

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29 Ibid.123.

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believe that the labor supply derived from removing children from intact families was a social ill. Again, enacting child labor restrictions did protect children from abuses by employers, but it lacked, just as Education Acts, the influence to protect children from abuses by society and the state as a whole. These Acts protected aspects of child rights but they did not address or define what the basis of children's rights were.

During the Industrial Revolution there was a profound increase in poor and homeless children, one that lasted through the years of the Great Depression, this affected attitudes towards child welfare. Protections of children's fundamental rights were not the main interest during this Era; economics and politics were. During the Industrial Revolution, capitalism had a major influence on policy formation as well. Key political actors wanted to maintain and secure political interests and economic arrangements by lobbying for policies that favored business over social interests and the needs of poor families and their children.

Supporters of child welfare rights influenced political platforms and political decision-making. The upper class was concerned more about the “best interests” of their own children rather than the children of the poor or children in general. During the presidential campaign of 1912, Roosevelt favored national child labor legislation, while Wilson opposed it. Later, in the election of 1916, Wilson changed his platform and gave his support at the last minute, possibly in reaction to influences of campaign financers and supporters. Child labor had been used as a political bargaining tool as Edward Keating notes that the Republicans had claimed that Democrats would sacrifice child labor to the interests of the southern mill owners. The Keating-Owen bill of 1916

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31 Ibid.
regulated child labor, but it was later found to be unconstitutional as child labor was interpreted to not be a matter of interstate commerce. Keating demonstrated through his comments and policy-making practice that child labor was indeed a bargaining tool and not necessarily an issue of deep concern for politicians. Using child labor as a political bargaining tool had a great effect on how the public and the legislators dealt with protection of children’s rights. This inconsistency suggests that politicians may have been reacting to the interests of lofty constituents and economic concerns rather than in concern for the best interests of children.

In response to the troubles of the Great Depression, the National Recovery Administration sought to regulate child labor in 1933 through the use of codes regulating labor relations. In 1935, the passage of the Federal Social Security Act finally made Federal funds available to states for children’s services. During the New Deal, the prohibition of child labor became a standard feature in virtually all individual state labor laws adopted. The Fair Labor Standards Act of 1938 encapsulated the notion that the government firmly believed that child labor was a social evil.

The attempt to eliminate rather than examine what was considered to be an evil of society reflects that reformers’ philosophies had a tendency to overlook fundamental issues of child welfare rather than attempting to remedy foundational aspects of children’s welfare issues. Focuses of reformers diverted from protecting children from abuses of society to specifically protecting children from abuses by employers. Due to social changes during the Industrial Revolution the current romanticized social construction of the dependant child formed, and the view that a child was not to be recognized as a rights bearing citizen of the community continues and affects policies
that attempt to protect unposited due process rights of abused and neglected children. While the abolition of child labor and inception of Education Acts could be viewed as a means of driving out societal evils of pauperism by producing a class of educated, working citizens, this proved to divert the interest of reformers. High public interest in child labor and education, although necessary at the time, diverted energies away from establishing child welfare policies that could have protected children not only from abuse of child laborers, but possibly abuses from families and other social institutions.

In turn, the bottom line of child welfare issues for politicians was balancing budgets in the economy through political trade-offs. Politicians used child labor and education as political bargaining tools by enacting policies that provided monetary incentives to comply with favored policies, which is still quite prevalent today. These issues will further be discussed in the next chapter, as we examine current policies such as the Adoption Safe Families Act, where these attitudes just mentioned will be found.

Section 3

Current legal perspectives towards children have been the result of both parens patriae and socially progressive attitudes that existed throughout the eighteen- and early nineteen hundreds. It was not until the 1899 Illinois Juvenile Court Act that the jurisdiction of adult courts and child welfare were separated into distinct spheres in an overall attempt to rationalize child welfare reforms into a succinct system of child welfare and juvenile justice. Court decisions reflected what was perceived to be in the best interests of children and their welfare. Benevolent-minded, but ineffective and piecemeal, laws were established in reaction to abuse and neglect and child labor, but
were not proactive in defining what children’s rights are. Influenced by the Progressive Era, various legal institutions concerning juveniles were created as practical means of social control readjusting themselves to conform to the influences of the emerging capitalist system.

Since the Illinois Juvenile Court Act of 1899 formally separated the jurisdiction of children from adults, it has subsequently been determined that children are not fully protected by the Constitution, thus permitting and encouraging informal legal practices within the juvenile court system. The Juvenile Court Act movement went beyond a humanitarian concern for the special treatment of juveniles. Once the Illinois Juvenile Court Act was adopted various states followed by adopting Juvenile Court Acts as well. It was not by accident that the jurisdiction of issues selected by child savers were primarily directed towards children of lower class and immigrant families. Support for the Illinois Juvenile Court Act was mostly led by class-conscious sectors of “monopoly capital [sic] who recognized the necessity for far reaching economic, political and social reforms.”

Not all reformers, however, supported the informality of the juvenile court system. A juvenile court judge, Judge Mack, had advised juvenile court judges to dispense justice with the same “ordinary trappings” of the courtroom. He also stressed that a child should be made aware of his confrontation with the power of the state. This did not occur then, and it insufficiently occurs today. The informality of juvenile court proceedings would later prove to hinder and not to enhance the rights of children as the juvenile court system sought to personalize the administration of justice by removing many aspects of due process.

34 Ibid
Without the same procedures, protections of due process that are essential in today’s concept of justice, due process rights are overlooked. “Although the youth’s treatment was in fact given separate attention by the courts, the informality of the proceedings under parens patriae also deprived juveniles of the same legal rights provided to adults.” Even though separate attention by courts was given to juveniles, this did not ensure the same legal procedures and protections. The Illinois Juvenile Court Act incorporated informal social aspects of the family life within the process of adjudication. By removing all cases involving juveniles from the jurisdiction of criminal courts it affected how children were processed through the judicial system; various shortcuts and legal informalities would be practiced that impinge on the protection of children’s legal and civil rights.

Instead of receiving special attention by the courts, the separation that the 1899 Illinois Juvenile Court Act instituted led to a system that is more lax in its procedures, thus leaving children, as partial citizens, protected from abusive families but not abuses by state procedure, which would normally be protected by due process rights. Some courts were in fact made to resemble dens or living rooms, and judges were expected to act affectionately with children while still providing a sense of adjudication.

The protection of the best interests of children needs to have the self-same and self-evident protections that any other group or citizen has had in relation to state custody and legal procedure, regardless of citizenship status. The decision of the Warren Court...
resulted in litigation over procedure. It has been shown that the nature of the judicial hearings and purposes of the judgments are rarely explained to the children, who only sometimes realize the seriousness of their circumstance and have no way of knowing whether the testimony offered against them was in fact legal. Then, and even now, the transcripts of court proceedings do not exist and are found to be incomplete, which makes appeal to higher courts difficult. Due process rights are legally positive rights that should protect rights of all citizens of the United States.

Children who are abused or neglected have little means of taking adults or guardians to court to review or remedy damages inflicted by their guardians or the state, nor have they had the right to appeal decisions about state placements. During the Warren Court era the Supreme Court delineated the parameters of due process by insisting that the rules did not apply to juvenile proceedings since they were not adversarial in nature. Children were offered assistance and guidance, but judicial records were not available to the press or public, hearings were conducted in relative privacy, proceedings were informal, and most importantly, due process safeguards were not applicable under the court’s jurisdiction. By intervening in the life of a child, the state is expressing that the quality of a child’s welfare is not acceptable, therefore it implies that children have the right to some standard of welfare. When the state uses its power to intervene in the life of a person, especially a child, it must ensure due process protections of that person’s best interests, and not only protect the welfare of this person. The definitions of welfare and interests are very different; it is the responsibility of the state to ensure that they are not defined as one and the same.

Conflict exists between the idealized goals of reformers and operating realities. State powers in *parens patriae* and the Illinois Juvenile Court Act have set vague guidelines on the welfare of children under the care of their guardians, but no legal parameters defining due process rights have been established with regard to child welfare policy. Throughout American history, the state has used the legal legacy of *parens patriae* to give the Juvenile Court the power to intervene in the lives of children who have been abused and neglected as the basis for child welfare policy. The partial introduction of due process through *In re Gault* into the juvenile court had little effect on the effective administration of justice in the juvenile court. Child welfare advocates agree; in 1966 Justice Abe Fortas commented on the effects of the 1899 Illinois Juvenile Court Act as a reaction to a strong punishment given to a child. He indicated that children were receiving the worst of both worlds, neither receiving adult nor child protections. “What had been designed as a benevolent system to handle child abuse, neglect and delinquency so as to protect children from the trauma of the adult’s legal system was found to be constitutionally deficient.” Justice figures had recognized that a romanticized stigma had been attached to the child. In this way, the Act did little to change the quality of the institutional life of children even though it acted as the very vehicle under which children were institutionalized. The Illinois Juvenile Court Act has assisted in the requirement that children should be raised in a suitable environment, even though appropriate funding was not provided through legislation or other resources to

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provide alternative suitable environments. This appears contrary to the Act’s special provisions.\textsuperscript{41}

Since the earliest recognition of child welfare and their human rights, there have been many procedural problems standing in the way of children’s rights. It is recognized that children are incapable of effectively expressing themselves politically, as well as protecting themselves legally due to their age and inexperience; this fact has contributed to the enactment of laws protecting children, but it is not the source of law. Legal justice can only function with a defined conception of rights, and according to our Constitution, rights stem from citizenship status and status as a person. As juveniles, children are not seen as full-fledged citizens, thus affecting due process rights definition and protection. In the past, when confronted with despotic state-power, populations thought to be inferior, such as women, African-Americans, and the handicapped, were capable of utilizing democratic means to assert political change because they are adults. Foster children, as dependent citizens, are unable to utilize these courses of action effectively because they are either incapable of understanding or incapable of action. Not only is it important that all citizens, young and old, have the means to protect themselves from overly obtrusive government practices, it should also be ensured that the state will effectively act in everyone’s best interest.

Influences of political decision makers have largely been in response to economic, legal, and social trends, rather than in the best interest of children. It has been demonstrated throughout this chapter that this key issue has affected the status of citizenship of children, which increased the chances for procedural defects that exist

today in child welfare policies. It has been demonstrated that there was insufficient focus by decision makers into the nature of the socio-legal rights of children. The focus primarily remained on humanitarian philosophies which are based on moral law and not positive law; providing aid and assistance versus empowerment by the establishment of legal rights and their protections. It has also been revealed that Supreme Court decisions have had little success in affecting procedural flaws that many foster children face while under state supervision. Many policies such as the Adoption Safe Families Act (ASFA), address timelines and requirements for funding of care, rather than addressing what procedural rights abused and neglected children do have. Although policies such as the ASFA attempt to expedite placement processes of abused and neglected children, they still fail to follow a concrete legal standard as to how the state should protect total processing of abused and neglected children. The third chapter will provide the most current examples of policy affecting children today and demonstrate how the policies, like the ASFA, have provided little solution to the growing number of foster children who continue to suffer.
CHAPTER 3

CURRENT LEGISLATIVE TRENDS
IN CHILD WELFARE

It has been demonstrated that child welfare policy has existed without any formal guidelines, boundaries, or concrete definitions establishing any legally positive rights for abused and neglected children. Throughout the history of child welfare the attempt to eliminate rather than examine what was perceived to be social evils reflects the tendency of policy makers to overlook the best interests of children. What is lacking are defined due process protections that go beyond boundary of simple court procedure. Policies that have provided the foundation for juvenile welfare policy, such as parens patriae and the Juvenile Court Act, all too often have provided the courts with too much discretion and not enough guidance into what is, legally, in the best interest of children. Little room has been left for review of judgments or for recourse of procedural errors while in state care. This chapter will examine current significant policies, such the Adoption Safe Families Act, and demonstrate that the lack of an established positive guideline has been a repeated historical flaw, which essentially exists today as well.

It will be asserted that the sheer number of children in the child welfare system alone attests to the fact that the system is not working. The inconsistent philosophies of policy makers have revealed that both legislation and the means of care have been unable

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to adapt to issues in child welfare resulting in an increase of various problems. Assurance of children’s welfare is certainly in some degree the responsibility of the adult population, since the power to ensure their own protection and welfare lies beyond the purview of children’s own means. As demonstrated in Chapter Two, neither the assurance of child welfare, nor the assurance of children’s rights have been explicitly guaranteed by social contract, such as provided to adults via the Constitution. This chapter will also demonstrate that recent philosophies of policies created conflict with each other in terms child welfare and their best interest. Finally this chapter will examine *The Adoption Safe Families Act* as the most recent significant piece of child welfare legislation. This piece of legislation encourages agencies to comply with guidelines by offering financial rewards for timely placement of foster children rather than acting as a policy that withholds funding for noncompliance. As with previous legislation, this policy is not enough to ensure that children’s best interests are actually met, agencies only need to comply with such policies to receive aid through funding, not uphold any delineated rights of children. It will be revealed that a proper definition of children’s due process rights is still lacking, and child welfare policies continue, as they have in the past, to fail to meet the needs of children who deserve to have their interests met; political incentives to protect ambiguous definitions of rights such as ‘best interests’ or ‘reasonable efforts’ are in fact insufficient, redundant, and useless in terms of upholding any child rights.

Until 1964, child welfare services by the state had developed slowly; the majority of dependent and neglected children were served mainly by volunteer agencies, demonstrating that child welfare had not become of full legal interest even though
advocates had been protecting children’s ‘rights’ since the 1800’s. Until this time, many courts operated placement programs, mostly for children of veterans.

Maintenance of consistent interest in issues of child welfare remains in question, as children’s rights have taken second seat to interests of reformers during the 19th and 20th century social movements. In the period of the 1950’s and 1960’s, activism on behalf of children was complicated and in part overshadowed by the Women’s Liberation Movement. Women wanted to fully be themselves, having the freedom of equal employment, the choice to have or not to have children, or to marry or to not marry. At the same time, children’s rights advocates insisted on children having the right to full-time mothers. In this way, philosophies of feminists and child rights advocates clashed as one side demanded adherence to socially constructed responsibilities, and the other demanded that any responsibilities undertaken are a matter of choice and should not be state mandated. These changing lifestyles and philosophies imitated the shifting focus that existed during the child labor movement. Improving children’s human rights and welfare in child welfare policy was still primarily focused on the removal of children from abusive homes and placement elsewhere, rather than based on their needs and legal rights while in custody.

A defined standard within our system must be set in terms of processing juveniles as philosophies and statistics continue to change. During the 1970’s the National Center on Child Abuse and Neglect had supplanted the U. S. Children’s Bureau because of increasing levels of children found within the juvenile court system in gathering information and data about the relative incidence of child abuse in the United States.\(^\text{43}\) It was found that the majority of children under state custody have been placed there due to

forms of neglect rather than the actual presence or threat of physical harm or danger. Of the groups that they studied, sixty-four percent had suffered from some form of deprivation, twenty-five percent had suffered from physical injury, seventeen percent from emotional maltreatment, six percent suffered from sexual abuse, and nine percent suffered from other circumstances. This report reveals that most reported cases involve neglect rather than actual physical abuse. In terms of legal status, a standard has not even been set regarding a clear policy toward protecting the welfare of children in terms of first level or core human rights, such as immediate safety and survival. What then are the standards and guidelines a state must follow in order to protect children, and from what? Roberta Gottesman tells us that the primary goals of modern child legislation are three-fold: a reporting system to assist in the discovery of child abuse, protective services for the child, and rehabilitative services for the family. These three requirements provide a good reference for assessing whether the children’s welfare is at issue or whether policy makers are continuing to enact ineffective policies.

There must be a system of defined rights to ensure that children’s best interests are protected throughout every process while under state supervision, from removal from the home, to court processes, and placement procedures. The emotional effects of taking a child from his or her home and placing him or her in an institutional setting or an unfamiliar family can be irreversible in terms of psychological development; these involve emotional attachment and its relation to intellectual and moral development. Children have the right to stay with their families if possible, and if the state does not

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44 Ibid.
46 MCDS Families - Supporting Families - FAQs
have a better alternative. Even so, many children have been saved from horrendous living conditions, such as literally eating and living in trash, living with animal and human feces found in their living quarters, malnutrition and not receiving proper medical treatment. Still, these conditions are potentially repairable and reversible, and the effects of these conditions may be addressed with proper adjudication and counseling. Children must also be protected from mistreatment from the state in terms of errors in processing paperwork and follow up on institutional procedures. These examples reaffirm the aforementioned studies that show that abuse is not positive; rather, it is a negative form of abuse-as-neglect.

Our social contract utilizes legal means to protect our due process rights as citizens, thus defending many self-evident human rights with legal rights. Adults, as full-fledged citizens have the Constitution, the judicial system and their appointed legislators (a three-tiered system) to rely on for remedy of conflicts of interests. In recent years, few federal and state agencies have funded programs to improve the legal representation of juveniles, thus adding to the hindrance of the protection of children's best interests and due process rights. Furthermore, federally funded training efforts have focused on disposition and placement issues rather than on funding efforts to safeguard the legal rights of juveniles. The emphasis, in short, has been on where to house youngsters, rather than how to help them. Children continue to suffer as junior citizens that have no legal support in their best interests.

Child welfare reformers continue to call for investigation into children's due process rights issues because problems within children's welfare continue to go unsolved. No policy boundaries have been established nor have any guidelines been set for agencies
to follow in terms of treatment of children and their rights while under the protection of
the state. Studies performed by the *Due Process Project* of the Office of Juvenile Justice
and Delinquency Prevention (OJJDP) prove once again that children are getting the
"short end of the stick" in terms of standards of due process rights protections. The
OJJDP, known as the center for analysis for children's rights and policy, was established
to ensure "the child's right to fair notice of charges, the right to be represented by
counsel, and the right to be confronted and cross-examined by witnesses, the right to be
protected from self-incrimination are protected (sic)." In doing so, the *Due Process
Project* examined the causes of inadequate counsel and offered solutions to protect
children's legal rights, which included philosophies of interagency collaboration. The
establishment of this project proves that children have minimal due process rights
protections; it demonstrates that child advocates still feel the need to investigate rights
issues in child welfare. If a problem did not exist, there would be no need to address it.

Incentive dollars within policies reflect states' interests in balancing budgets
versus the desire for legal clarification of the best interests of children. Legislative
attempts were once again made during the 1980's in response to rising statistics of
children ending up and remaining in foster care for extended periods of time. The
*Adoption Assistance and Child Welfare Act*, enacted in 1980, mandated that 'reasonable
efforts' be made to keep families together. 'Reasonable efforts' were not specifically
defined, thus leaving interpretation of this policy open and unstable. Federal support, in

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47 Jodi Lane and Susan Turner, "Interagency Collaboration in Juvenile Justice; Learning From
48 Ibid.
49 In 1985, almost three hundred thousand children were in foster care. That number nearly doubled by
1996. Of five hundred thousand children currently in foster care, about one-third will not go home;
therefore, a safe and healthy place is needed for this third of the population of foster children
Susan Whitelaw Downs, Child Welfare and Family Services; Policies and Practice, 6th Ed. (New York:

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the form of financial incentives by the government, was given to agency efforts in preservation of the family. Those incentive dollars reflected interests in bringing states to balance budgets rather than interest in assisting in the protection of children’s best interests and their due process rights. It is difficult to comply with rights protections if there is no definition of rights. The focus of our Constitution and strength of our democracy was to assign rights to all citizens and to the state, not focus on balancing budgets in exchange for rights. Incentive dollars do not hold the strength of positive policy in the definition and protection of due process rights.

In order to appease growing dissatisfaction with child welfare systems and in recognition of reform efforts, the Adoption Safe Families Act (ASFA) was enacted November 19, 1997. It is considered the most significant piece of legislation affecting foster children today. ASFA was enacted to clarify the ‘reasonable efforts’ requirement in processing abused and neglected children. ASFA was enacted to ensure that children are placed in a timely manner. If children are placed in permanent homes within the guidelines set by ASFA, then federal funding will be allocated for each child that exceeds the minimum number of children placed from the previous year. For every child adopted beyond the number of adoptions in the previous year, the federal government pays states a bonus of four thousand dollars per each special needs child and six thousand dollars for foster care adoption programs. Considering this, the separation of children from their families may be more likely since budgetary incentives are provided for timely permanent placements, thus overlooking best interests of children that the Juvenile Court Act tried to address.

Legal dignity must be afforded to children by ensuring that they are treated justly by the state. While many cases involving improper living environments are related to drug abuse or mental health related issues,\(^52\) it is also very difficult for professionals to assess when it is appropriate to take children out of (what are considered) substandard environments, away from the only family the children have known. Nonetheless, when making and processing these decisions, there should be a certain standard that professionals can follow, one that goes beyond a set of ambiguous guidelines and definitions like “reasonable efforts.” These guidelines must address the fact that taking a child out of an unfit home is not parallel to saving an abused pet; it is not as simple as replacing shelter. Children are rational emotional creatures and must be recognized as such. We must take into consideration that in order for children to grow up healthy and have a fair start in life, they need to bond and to trust for healthy emotional, intellectual, and moral development.\(^53\) There must be a humane alternative that provides dignity to children by ensuring that they are treated sensitively by both their parents and by the state.

Provisions of the ASFA require that it must be found at the first court ruling concerning the child’s removal from home\(^54\) that a continuation in the home is contrary to the welfare of the child. If the state fails to make this necessary ruling, then the child’s stay in care is ineligible for any Title IV-E funding delineated by the Social Security Act.\(^55\) The state agencies depend largely on this funding to meet budgetary needs, but this

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\(^{54}\) Whether temporary or not.

\(^{55}\) Social Security Act (42 USC 670)
does not mean that they must comply with the provisions of the policy; they only need to comply if they want to qualify for funding. If the state fails to make the necessary rulings then it cannot be remedied at a later date, unless a brand new case is brought before the court regarding a new set of circumstances.

The ASFA also shortens deadlines to speed permanency hearings that require the courts to establish a permanent living arrangement for the child. Plans for permanency include the return of the child to his or her parents, initiation of proceedings to terminate parental rights, placing the child up for adoption, referring the child for legal guardianship, or placing the child with a fit and willing relative. Other options require the state agency to document a plan of compelling reason to be filed with the court within the first thirty days of the child coming into state custody. Findings for permanent placement must be made within twelve months upon entrance into foster care. If a state fails to hold a permanency hearing for a child it would be out of compliance with the guidelines set by ASFA, but the agency would still be eligible for Title IV-E funding. Again, compliance to ASFA is not required unless the agency wants to qualify for funding. There is no legal form of redress if agencies do not place children in a timely manner or comply with other ASFA requirements. This leaves no consequence when States’ employees mis-handle situations including other bureaucratic flaws involving the life of already traumatized children. No responsibility is taken for errors and the only one that suffers is the child who is waiting to go home. This child not only suffers, but also has no means to check or remedy the misfortune of systemic flaws within the current child welfare system, which is our concern here.
The priority of the current juvenile justice system is to get the child out of the child welfare system as soon as possible, but this has been through funding incentives rather enactment of policies that positively protect their best interests. Now, with the emphasis on permanency, too many children are separated from loving but disadvantaged families, which also contradicts the Adoption Assistance and Child Welfare Act, enacted just 19 years earlier, which focused on keeping families together. Ensuring that a child's stay in state care is protected by a minimum standard of core rights' due process protections must be addressed. The underlying premise of ASFA is to get the child a home quickly, but this process seems to overlook the legal dignity of a child.

If the Juvenile Court Act established that children should be dealt with in a certain manner by the courts and if we must consider that the focus was to be sensitive to the type of persons children are, then shouldn't the juvenile court continue with that tradition by establishing standards of children’s due process rights and protect their best interests, especially in terms of placing children who have no homes? It is doubtful that the aim of the state is to find a place to for a child to “crash” until a stable home is provided. State standards must be established. The intent is to ensure that the child’s rights are protected and that the child is treated with as much dignity as possible while under the circumstances that he or she might be in. This is a rupture between intent and result as a systematic flaw.

Ambiguous terms and weak child welfare policies govern how the state processes abused and neglected children today. “Although trends are emerging from case law, the

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decisions with respect to these issues are not uniform,"^{57} states author Dorothy Roberts. Neither the *Adoption Assistance and Child Welfare Act* nor *ASFA* clearly define what ‘reasonable efforts’ are. They do not define in law the “compelling reasons why termination of parental rights would be in the child’s best interests.”^{58} These two policies illustrate the split between intentions, by providing another example of shifting organizational logic, in that the former encourages reunification with the family and the latter encourages permanent placement, entailing separation from the family. It has been revealed that without a proper definition of children’s rights, child welfare policies have continued and will continue to fail to meet the needs of abused and neglected children who deserve due process rights protections; political incentives that protect ambiguous references to rights such as ‘best interests’ or ‘reasonable efforts’ fail in their function.

Recent policy history suggests that both the philosophy of child welfare and the means of care have continued to adapt to social trends, while the number of emotionally charged issues increases as they go without reasonable or effective care. Very few effective monitoring mechanisms of the Juvenile Court exist today as, “Mistaken or malevolent uses of state power have rarely been considered as possibilities demanding measures or concern.”^{59} Mistakes made in the development of child welfare are repeated today as philosophies of child welfare polices continue to conflict, child welfare policies are used as political bargaining tools, or the policies lack positive strength to uphold law. Efforts have been made throughout the history of child welfare policy to address the socio-legal issues resulting from the largely unchecked powers of *parens patriae* and the

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Juvenile Court Act of 1899, but they have not resulted in an effective definition of any children’s rights. Current policies like The Adoption Safe Families Act continue to lack effective means of protecting the rights of children, as they do not hold the power to enforce law. Instead, policies are used as bargaining tools that utilize monetary incentives to get states to protect the interests of children. The states’ compliance in balancing budgets and using monetary incentives only reveals that states may comply, if they so desire, to policy demands, but are not subject to policy demands. This is not in the best interest of abused and neglected children.

Rather then increasing the opportunity for children and the families to exercise their due process rights, public agencies have instead limited access to rights protections by separating their status as citizens. The next chapter will compare the nature of the relationship that the state has with adults as citizens versus the relationship the state has with children as junior citizens in terms of human rights protections and definition of due process rights. The main focus will demonstrate that adults with the aid of positive law have the opportunity, wisdom, and comradery necessary to induce change in the system that affects them, while children lack the power to utilize these democratic means to initiate and affect change in policy that affects them. The next chapter will demonstrate and determine the need for positive law by definition of children’s due process rights.
CHAPTER 4

THE NEED FOR POSITED RIGHTS
IN CHILD WELFARE

It will be shown in this chapter that the legal philosophy of juvenile justice and child welfare must change. Currently child welfare relies too heavily on moral principles and unposited rights. These elements of law rest upon the philosophy that has also influenced Ronald Dworkin, leaving the best interests of children protected not by structural and procedural requirements, but by policies that are subject to the whims and changing philosophies of society. As shown in Chapters 2 and 3, the current philosophy that child welfare rests upon has proven to be unsuccessful as numbers of abused and neglected children continue to rise and their needs go unmet. In order to protect them, a positive definition of due process rights for children must be enacted.

It will be shown that by enacting due process rights, we are following the true philosophy of the social contract, and that children do not need equal rights, they need parallel rights. Law can act as an avenue of definition and protection of children's best interests. When confronted with state intervention in their liberty, abused and neglected children deserve the assurance of posited due process rights. Positive definition of children's due process rights will provide a distinct guideline or reference in protecting

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60 Political philosophy based on moral reading of the Constitution. Dworkin argues that the Bill of Rights must be understood as setting out general moral principles about liberty and equality and dignity. Ronald Dworkin, "Natural Law Revisited," 34 U. FLA. L. REV. 165 (1982).

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junior citizens of the social contract, rather than relying on the ambiguity of the current method, which utilizes policies such as the ASFA to get states to comply with procedural requirements and philosophies in child welfare.

It is the overall responsibility of the state and the citizens to ensure that rights are articulated and protected when liberties are at issue. Because children are not constitutionally recognized, liberty issues lose their significance because they are not protected by the Bill of Rights. The concern then, is political interests that are an effect of policies that are founded in paternal powers. To further our discussion, the concepts of social contract, rights, law, and citizenship will be addressed in order to establish where children's rights fit in. The ideas of Mary Anne Glendon in her book Rights Talk, and Brian Orend in Human Rights, Concept and Context will be used to clarify these concepts.

It must be recognized that even if children are not able to hold Constitutional autonomy, they are still deserving of parallel Constitutional protection in cases of state intervention or invasion. Protection of rights under our social contract requires democratic processes. When excluded from these processes, the rights of certain populations (children) are left subject to paternal policies, which can interfere with liberty if the system lacks oversight. In legal decision-making, a standard requiring clear and convincing evidence in individual cases (instead of the current measure of reasonable efforts in terms of child welfare) should be in place. Currently, child welfare policies rely on ambiguous terms in policy enforcement. It is nowhere defined what "reasonable efforts" are in the Adoption Safe Families Act or the Child Welfare Act of 1980 or

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61 Invasion, in our case refers to children being taken into state custody.
anywhere else. The measure of clear and convincing evidence establishes a standard when weighing interests against each other in terms of positive rights. Because children are incapable of making many legal and constitutional rights claims, there should be a high standard for invasion of their privacy, not an undefined measure such as “reasonable efforts”.

The adoption of responsibility by the state for the welfare of children has increased with time, but the scope of this paternal responsibility has never been adequately defined. Once the state intervenes in the life of a child his or her rights become a matter of public interest. In cases of abuse and neglect, when children are taken from their parents, their rights are shifted from the private realm to the public realm of rights. Both public and private rights must be protected. The direct responsibility for children’s lives is assumed by the state, a social institution, under the doctrine of parens patriae. Social institutions result from and act to balance state and private interests and they must be regulated in liberty issues of all citizens. Children are incapable of being rationally responsible for duty or obligation to law; therefore we must recognize that they are incapable of checking influential powers. In order to hold social institutions accountable, Brian Orend suggests that there must be a system of democratic entitlement, a division of power that acts as a system of checks and balances, and the number of institutions needs to be controlled. This follows one of the concepts of the social contract, namely the power of oversight by citizens.

The philosophy of our entire legal system is based on the notion of the social contract. All legal policies and practices follow from this philosophy. The social contract protects rights, making appeals to justice couched in terms of rights. Rights

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rhetoric plays a key role in terms of establishing due process rights within our social contract. In order to secure the protection and stability of an effective government that upholds coveted rights, members or the social contract agree to give up certain private rights. Our Constitution defines and protects our rights as citizens, but this only applies to adults. This does not mean that the philosophy of the social contract stops with adults, as children are still members of our society even if they are not politically active. All our justice and political systems follow from this philosophy. Our children are future citizens and are owed some measure of respect and fairness as children.

Law provides formal procedures for review and redress. Rights of children are implied through state protection but they are never defined. To define what due process rights children have or should have we must first address what rights are and what type of rights will be the focus our discussion. Rights are not property; they are reasons to treat people in certain ways. Orend defines a ‘right’ as something that is morally or socially correct, a fair claim, and an entitlement to a privilege or immunity.63

There are three main categories of rights: natural, legal, and moral. Natural rights are first level rights and they are rights retained by every person. Our Constitution protects natural rights through law. In order to secure rights we must act according to the social contract. The venue of child welfare relies heavily on moral law as it functions under no positive definition of children’s due process rights. Some philosophers, such as Klaus F’ber, claim that the definition of law “must be entirely free of moral notions,” 64 because moral law contains no concrete avenue to enforce socially accepted norms. Legal rights and moral rights can both be socially constructed norms of a society. The

64 Jules L. Coleman (Editor), Kenneth Himma (Editor), Scott J. Shapiro (Editor), Oxford Handbook of Jurisprudence and Philosophy of Law (Oxford, Oxford University Press, 2002), 4.
difference is that legal rights are positive in that they are rights certified by law, backed with force and sanction. The center of Hart's argument for rights and law is liberty. He proposes that if one has any special rights, then one must have a general right to liberty. Orend explains this reasoning by stating, "For anyone to make use of a specific entitlement to do, or have, something, that person must at least have a general background entitlement to the very freedom required to do that something, or come to have as the case may be...Thus if someone has any special rights at all, be they moral or legal, then that person must also have the human right to liberty."65

Until now, the Juvenile Court has failed to show steady levels of positive outcomes because it functions by retaining only some legal values and some moral values. Moral rights are unwritten rules that society heeds as a code of conduct. Moral rights can be the roots of legal rights, as in the case of battering another person. Legal rights on the contrary do not need to be morally justifiable, such as paying one's taxes. Legal philosophers will argue whether law can function without a moral basis. H.L.A. Hart and Ronald Dworkin differ in their philosophies as to whether law is based on merit and where morality stands in terms of law. Our rights are legally protected under the function of a positivist philosophy. Where there is law there can also be morality. Just because it is posited that law and morality can be intertwined does not mean that it does so well. The issue is whether rights, if posited, can be protected or confined. The lack of positive due process rights for children has had an influence on the repeated failures of the child welfare system. Therefore the system must change. To do so we must turn to positive rights.

Law obligates. Legal validity requires citizens to do or abstain from actions. Children cannot be obligated to perform duties due to their age and inexperience. Law requires citizens to act without regard to our individual self-interest and to act in the public interest. "To make moral demands on their compliance is to stake out a certain territory, to invite certain kinds of support and, possibly opposition. It is precisely because law makes these claims that doctrines of legitimacy and political obligation take the shape and importance that they do." Law acts as a reference that can correct policies that rely upon such ambiguous terms as "reasonable efforts".

While it is possible that moral values can stem from the existence of law, legal positivism requires only that it be in virtue of its facticity rather than its meritoriousness that something is law, and that we can describe that facticity without assessing its merits. Ambiguous terms within policies decrease force. Solid commands of law, whether correct or not, act as definition and as a reference. There may be no claims to basic governmental services in the Constitution, but the state must not fail in the duties it assumes under the power of parens patriae.

The absence of a legally positive framework has left too much opportunity for the influence of fashionable reform philosophies in juvenile welfare, and of judicial discretion in child welfare cases. One factor that persists and distinguishes the American welfare state from many others is the absence of a constitutional commitment to affirmatively protect the well-being of its citizens: no promises are made. Our Constitution is an avenue for citizens to have their interests met. By denying parallel protections of parallel positive rights, the child welfare system contradicts the very

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philosophy that is the center of the American legal system; it ignores the fundamental aspects of the social contract.

Social contract philosophy implies that if the state takes an interest in citizens, then citizens must have some rights; it does not assume that all citizens have the same rights. One of the objects of the social contract is to protect majority and minority interests equally, yet our current dialogue regarding rights does not address different classes of citizens. Marc Jans states, "Children and the living conditions of children are fundamentally determined by the same economic, political and social powers that constitute the context of the life of adults. . . . By exalting autonomy the way we do, we systematically slight the very young, the severely ill or disabled, the elderly, and those who care for them and impair their own ability to be independent in so doing."^68 Law is manufactured according to certain social conventions. Legal validity is a function of certain social facts as posited by such philosophers as Jeremy Bentham. He argues that the principal distinguishing feature is the presence of a sovereign, in our case the people. ^69 Legal rules empower societies to structure their legal relations within a coercive framework. Nowhere in the philosophy of the social contract does it refer to excluding certain classes from rights protections. The law tells us what we must do, but it does not tell us how to be virtuous. Law can be an open normative system as it adopts and enforces many other standards including social norms by promoting certain values and repressing others.

The proper functioning of procedure follows from clearly defined rights and through enactment of law. When duties and responsibilities of parties are clearly defined

by law, it will be easier to prove in court that compliance did or did not occur. Once the
state has intervened, it creates an obligation to provide service. Without definition of
rights through positive law there will be no opportunity to measure injustices. The fault
of the juvenile court is not the rejection of adult rights to protect children, but its failure
to connect procedural requirements to parallel obligations by the state. Due process
rights can protect citizens who are confronted with liberty issues. Children within state
custody should be afforded parallel protections from state error.

Law in child welfare resembles adult law even though the philosophy behind each
is supposed to be different. Due process protections of juveniles stem from the adult list
of criminal procedural protections. While venues are separate and safeguards differ,
practices imitate procedure from the adult court system. “Focused exclusively on adult-
derived rights, the Court produced a juvenile justice system whose procedures are poorly
designed to meet its goals and out of step with childhood.”70 When defining due process
procedures for children it is possible to address children’s needs in compliance with the
philosophy of the legal system as a whole. Currently some due process protections do
exist for children, but they mimic the rights essential in an adult court and do not properly
address the needs of juveniles.

The Illinois Juvenile Court Act only states that children should be dealt with
differently by a different legal system; it does not sufficiently define how. In order to
protect the welfare of children, any new policies created must follow a guideline of law
that defines and protects procedural rights, even if those rights are different than the
rights of adults. It is impossible to make a claim on something that is neither defined nor

70 Emily Buss, “The Missed Opportunity in Gault,” University of Chicago Law Review 39, (Chicago:
University of Chicago, 2003) 2.
recognized. According to Hans Kelsen, law is an indirect system of guidance: it does not tell subjects what to do; it tells officials what to do to subjects under certain conditions.\textsuperscript{71} By not legally defining children’s due process rights, their best interests go unprotected, but it is possible that by defining rights, avenues will shut down. That is the risk. However, through our system, when we want to protect something we characterize it as a right. Rights rhetoric can go both ways; the definition can either clarify or confine interests. Glendon states that legal positivism “makes people’s rights utterly contingent on whether their society has written such rights into law, it makes human rights utterly dependent on the whims and wishes of the most powerful in society, who exert strong influence in the legislatures and courts.”\textsuperscript{72} Glendon notes the centrality of rights to the discussion by saying that when strong feelings about political issues are present we resort to the language of rights.\textsuperscript{73} Children’s rights need to be defined; furthermore they must be stated through positive law.

Legal validity depends on morality, not due to interpretation but because it may be customarily recognized as the determinant of legal validity. There is a great deal of moral reasoning in the adjudication of law under social contract, but courts are required to decide the validity of law by “explicit or implicit requirement of statute or common law.”\textsuperscript{74} Glendon states that rights talk is a language of “no compromise.”\textsuperscript{75} The codification of rights in law makes the practice of such laws contingent on rights rhetoric. American public discourse is not only defined by what is stated but also by what is omitted. The interests of children will have to be balanced with the interests of adults.

\textsuperscript{73} Mary Ann Glendon, Rights Talk, (New York: The Free Press, 1991) 5.
When a positive right is claimed, a negative right can be assumed out of omission, entailing the logic of inclusion and exclusion. Orend defines legal positivism of rights as holding that "only those rights that have been effectively codified into law, which count as real and legitimate." Law distinguishes acts from omissions. This philosophy requires that moral issues be argued in legal terms, which makes it difficult to review cases of unjust actions towards children because no definitive guideline exists. What is not stated is not protected. If philosophies remain as ambiguous and elastic as they have been in juvenile welfare policy then it will be difficult to regulate omissions of practice. The current method to regulate child welfare issues is in the form of funding for compliance with favored policies. Policies that allow the state the choice to comply contain no strength in rights protections. A positive law delineating the rights of children will provide a good measure as to what the expectations of the state by its citizens are. By not stating what is required of citizens, law makes no promises, thus out of omission creating negative rights. Negative rights are rights from certain things, usually freedoms from abuse or coercion by others, as opposed to positive rights, which are the rights or guarantees to certain things.

Once rights are founded, then they can be brought before the courts and reviewed and changed if necessary. Hart’s rule of change does not entail change in rights, only change in law to protect founded rights. According to H.L.A. Hart’s view, every society with a functioning legal system retains a rule of recognition that expresses the criteria for legal validity, which includes provision for making, changing, and reviewing law. The source in determining law is the rule of recognition, which specifies the ultimate criteria.

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of validity in a legal system. It is the rule that officials appeal to in arguments about what
standards they are bound to apply. "Positivism identifies law, not with all valid reasons
for decision, but only with the source-based subset of them. It is not part of the positivist
claim that the rule of recognition tells us how to decide cases, or even tells us all the
relevant reasons for decision." 78

Ronald Dworkin denies that there can be any general theory of the existence and
content of law. He believes that law requires merit; it does not rest wholly on facts.
Rather than law being based on political organization, he argues that law starts with an
“abstract ideal regulation of the conditions under which governments may use coercive
force over its subjects.”79 For Dworkin, legal requirements are consistent with the
interpretation of its legal practices which shows them to be best justified in light of an
animating ideal. The coerciveness of policies such as the Adoption Safe Families Act
does not have the strength to act as an animating idea, nor do other current child welfare
policies.

Without a proper framework, child welfare policies are incapable of following a
succinct philosophy. Children are recognized by the enactment of policies addressing
their population, but these policies fall under no defined boundary. As shown in Chapter
3, within 10 years two significant child welfare policies enacted consisted of conflicting
their families, while the 1990 Adoption Safe Families Act did not encourage reunification
but rather permanent placement. These policies are not held under a unifying framework

78 Ibid. 7.
79 Ibid. 6.
that spells out the rights of children. In doing so, rights are redefined when a new policy is created.

There must be a legal means to correct these unjust practices without being retributive. On both ends, either the parent is punished too harshly, or not harshly enough while children linger in the system. Courts have been willing to hold government agencies liable when found negligent in their duties, especially if liberty is an issue in negligence. Cases regarding child welfare have been brought before the Supreme Court, but very few cases have based their findings on Constitutional validity. Mary Ann Glendon accurately describes the negative effects, "Lacking an adequate linguistic or conceptual apparatus to deal with the intermediate institutions that stand between the individual and the state, we regularly overlook the effects of laws and policies upon the environment within which societies flourish and the settings upon which individuals depend for their full and free development."

The venue of child welfare relies too heavily on the moral notions of treatment of children; these moral notions have no strength without legal definition to back them up. Legal validity depends on morality because morality is customarily recognized as an ultimate determinant in establishing law. First, it cannot be held that qualities of law are philosophically relevant because societal sources of the moral ideas claim it as such. Moral language in judicial decisions does not establish moral tests for law because sources can come from various avenues but still influence decisions according to legal rules. Law must define what due process rights children have as junior citizens; this will provide the opportunity for claim and redress. If there is nothing to claim, then one can state that there is no issue at hand, but

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it is clear that there are many unjust practices within the child welfare system that have been continually repeated from one generation to the next.

The Juvenile Court leaves much discretion to its judges. Both the state’s attorney and the parent’s attorney can cite “best interests” but both have a different underlying agenda and fundamental incentives concerned with representing their client’s proper service. It is very difficult for redress due to lack of Constitutional guidelines if there is an error in a decision or other procedures that follow from intake. This leaves few options to children who suffer from poor decision-making on the part of judges, and poor policy practice while children linger in the system. “We assign blame and responsibility differently when we think that a bad decision was mandated by law than we do when we think that it flowed from a judge’s exercise of moral or political judgment”\textsuperscript{61}. We must stay away from confusing personal notions of morality with what is legal or not legal. Pojman argues, “Law is defeasible in term of morality (but not vice versa).”\textsuperscript{62} He goes on to point out that law distinguishes itself from morality in reference to scope and sanction to adhere to. He argues that the concern of law is “acts versus attitudes”. Oliver Wendal Holmes Jr., in \textit{The Path of Law}, denounced the confusion between legal and moral ideas as he asserted that a distinction between them was of the first importance for rights study and mastery of law.\textsuperscript{63}

Judges can make decisions under a legal duty to make them in a certain way. This does not mean that their decision will always have the same outcomes; it only provides the same boundaries to justification. Law is not an end, as it does not make

\textsuperscript{63} Steven J. Burton (Editor), Gerald Postema (Editor), \textit{The Path of the Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.}, (Cambridge: Cambridge University Press, 2000).
decisions; it should only provide a means to outline reasoning in decisions. Law cannot address the multiple issues that abused and neglected children are faced with, but it can be used to provide an outline as to how children’s welfare issues are handled. Juvenile welfare policy lacks defined oversight, which acts to check and balance those various and oftentimes opposing interests that propel the child welfare system.

Not only should rights be defined for the sake of definition, but children’s due process rights must be also be defined because they are a special class of citizens as defined in the Illinois Illinois Juvenile Court Act. The status of citizenship children have must be recognized in its current manifestation even if it is defined as partial. Says Roche, people do not enter society with coming of age, and “they are constituted in part by society, and in turn constitute it.” Minority groups of the population, such as children, need the same rights definition and protection as the majority of citizens, at least to some extent. Mary Ann Glendon tells in her book Rights Talk, that rights dominate the notion of citizenship from top to bottom. Citizens are afforded certain protections as members of a social contract. By the state showing interest in the welfare of its citizens, it creates a relationship under the social contract that necessitates guidelines within that contract. As future citizens, children deserve parallel protections from the abuse of overly paternal policies that have no oversight. She points out that the Supreme Court refers to citizenship as the right to have rights. Therefore future citizens should have the first beginnings of rights rather than none at all.

Roche tells us that the language of citizenship and rights can be used to critically analyze the ways in which children are treated and positioned within our society since

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"children are often rendered silent and invisible by attitudes and practices of adult society."86 Their social position makes it difficult for them to claim these rights. The traditional response to children traps them in a position of simply being governed."87 It is difficult to correct an error in processing abused or neglected children. As junior citizens, children should be protected from this error.

There have been some court cases bringing to question what rights children do have. As well, policies have been formed in an attempt to define child rights. But none have specifically defined what rights children do have. When considering what rights children have one must consider, as we have discussed, the types of rights that exist and the rhetoric of rights. The possession of rights entails correlative duties and obligations as implicated in the social contract. Some may say that because children cannot be obligated to the social contract, that they should not have rights; having rights entails obligations. It is understood through action of the Illinois Juvenile Court Act that children are incapable of performing correlative duties, but that does not mean that they should not have rights. That is to say that when one claims to have a right to something they must have a well-grounded concrete claim on the actions of other people, because when a right is claimed it affects not only the possessor but also those around him who must respect this right. The problem that the juvenile court faces is that analysts rely on the rhetoric of rights, which allows only adult rights or no rights. To determine what kind of rights children are entitled to we must also determine if children are citizens and define what type of citizen they are. Neither adult rights nor no-rights will secure fairness in

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87 Ibid. 12
child welfare procedures. A coherent set of rights must be established through citizenship, then due process rights can be posited through positive law.

In our case, children are the minority subset that needs the protection by the majority, adults. The design of government was meant for the main protection of individual or minority rights from the tyranny of the majority. If adults cannot clearly define what rights children do have, then it is even more difficult for children to have their interests protected. “Our legal and political vocabularies deal handily with rights-bearing individuals, market actors, and the state, but they don’t afford us a ready way of bringing into focus smaller groups and systems where the values and practices that sustain our republic are shaped, practiced, transformed, and transmitted from one generation to the next.”

Currently, children are incapable of making rights claims, which makes them dependent on the rhetoric of rights and on adults to act as representatives to protect their due process rights. Effectively, adults often claim citizenship rights for children by doing so on their behalf.

There are three main types of citizenship: civil, political, and social. Civil citizenship involves personal liberties such as freedom of speech. Children have potential civil citizenship, and recognition of the rights that derive from civil citizenship increase as children get older. Political citizenship entails participation such as voting. Children have little if any participation in political citizenship; they can voice their views openly, and freely assemble but not vote. The social dimension of citizenship entails not only the basic issues of economic welfare but it also includes the right to live life according to the standards of society.

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as their interests are recognized by society. Citizenship is linked to the concern for rights. Although children are not participating citizens, the state still does recognize them as potential citizens by taking an interest in them; we will refer to children as ‘junior citizens’.

The interest that our state holds in its citizens is proof that the state is compelled by responsibility for its citizens’ welfare. This includes children as dependents, as provided by the doctrine of parens patriae. When identifying how the law treats its dependents one can consider the legal case of Nancy Cruzan. Cruzan was an adult, but became a dependent once she was unable to thrive on her own or communicate her needs. Children are dependents as well, and it is not reasonable to compare them to the dependency of persons in prison, as children are not criminals. Child rights could also possibly be examined through investigation of the rights of the mentally disabled, but for the purposes of our discussion the case of Nancy Cruzan will be more helpful.

Nancy Cruzan was a young woman who was critically injured in an automobile accident. Her parents sought a court order directing the withdrawal of their daughter’s artificial feeding and hydration after it became apparent that she had no chance of recovering her cognitive functions. It was found that the United States Constitution does not forbid Missouri to require an incompetent’s wishes as to the withdrawal of life, as sustaining treatment was to be proved by a standard of clear and convincing evidence. In 1988 the Missouri Supreme Court had recognized a competent person’s right to refuse treatment as part of the doctrine of informed consent. For decisions to be made on behalf of an incompetent patient, however, the court required “clear and convincing” evidence that the patient would have wanted treatment terminated under such circumstances. As

90 Cruzan v. Director, Missouri Dept. of Health 110 S. Ct. 2841 (1990)
an adult, Cruzan had defined her desires; these were protected, unlike children who could never articulate their desires or interests. Regardless of her desires, the courts sought to balance her interests through proper process of law. The court decided to "err on the side of life," where what was at issue was not Nancy’s "right to die," but the right of others to take her life. Children’s rights should be defined as much to give children due process rights, as to define how the state handles juvenile processes under state care. The decision and the reasoning for the Cruzan decision have many important factors that can be used in considering the definition of child rights and definition of the protections of due process rights. It established what a state must do when the interest of a citizen’s rights comes to question. A dependent person like Cruzan was considered to be partially within the custody of the state as are foster children. In both cases, interests among the state, the guardians and the dependents were at issue and have some weight in the disposition of the original interest (Cruzan, or foster children).

The Cruzan case established that the duty of the state is to protect the interest the state has in its dependents, which has been the case in child welfare. It has been shown that the strength of child welfare policies has been embedded in the state’s interest in child welfare rather than the protection of child welfare interests. This is not a play on rhetoric, it is a recognition of how child welfare philosophy functions. When coming to the decision in the case of Cruzan, the state took into consideration the rights of Cruzan as a citizen with dignity, not as a non-functioning adult. This is not how child welfare policies are practiced. Children, as defined by the Illinois Juvenile Court Act of 1899, are specified as different citizens, and are addressed this way. The Cruzan case does not even permit this reasoning. It may be because she was an adult who defined her wishes
prior to her accident, but the fact remains that just like a child, she required others to act as guardians to protect her best interests.

The reasoning in this case was reviewed in comparison with the other case of medical disability, *In re Quinlan*. The case of Karen Quinlan also brought to issue the right of privacy of dependents. The reasoning of the decision balanced the right of Quinlan versus asserted state interests. It was noted that the state’s interest weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and in Quinlan’s case the prognosis dims. But to pursue the parallel, it can be said that when the state takes custody of a child the degree of bodily invasion is high, even if it is not full medical dependency; it is dependency for everything that a growing child needs, making it quite invasive. In addition, when a child lingers in foster care for years into possible adulthood, the prognosis for the child can also be dim as shown in the earlier chapters’ evidence of statistics.

Again, it is recognized that these women were not children, but adults who are protected by full Constitutional rights. But their rights were protected by law because they were defined positively; not specifically as dependents but as citizens. In comparison, these women were as helpless as infants who are left to foster care. These women had the same level of social contractual obligation of an infant. It is posited that children cannot be defined as full citizens because they cannot make binding legal decisions nor enter into contract, but neither could Ms. Cruzan or Ms. Quinlan. Still, the state took interest in their welfare because they were citizens, not because there was a certain type of citizen (as does the *Illinois Juvenile Court Act*).

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91 *In re Quinlan* 10, 355 A.2d 647

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A child is considered incompetent; philosophers and psychologists have claimed for thousands of years that children are not fully rational and that their irrationality is the basis for adult guidance. In protection of child welfare, this same reasoning should be recognized and utilized. It has been shown that the current method of reasoning has been quite unsuccessful if not unjust. Children are not invalids, they are not prisoners, they are not immigrants; they are junior citizens, and deserve the recognition as potential citizens who are incapable of independence but are deserving of legal dignities and something more positive than “no-rights”.

Just because the legal definition of children differs from adults, it should not mean that the legal system should lack a parallel framework that establishes guidelines for law. Autonomy should not be a precondition for any individual’s protection of rights. The only real precondition is that the community is willing to recognize and allow the individual to make claims and participate in the shifting of boundaries. Due to indeterminacy or conflict of legal rules, judges are left to exercise discretion to make new law. Vague statutes like the Adoption Safe Families Act, do not define what “reasonable efforts” are, and so they often provide the courts with too much discretion and may not reflect the best interests of children. This may, and does lead to decisions that are not in the best interest of either children or their families or subsequently society in general. “Judges fail to understand that they are often using their own middle-class scale values to determine neglect. As a result, the child is often hurt more severely by being removed unnecessarily from his home.” 92 Discretionary arguments are not wholly arbitrary. Effective decisions must be guided by merit-based considerations. They can also be guided by law even if there is no specific law pertaining to the issue at hand. Judges may

have to make new decisions, but they have to make them in a particular way, according to the way law functions, such as in conformity to the spirit of the law or with positive moral standards.

It is possible that the definition of children’s rights through establishment of law may have little effect on the intrinsic processes that govern child welfare. But since there are so many injustices within the child welfare system, there must be a guideline to address these injustices even if it may later be found to be needing improvement. There must be a fixed point of reference to assist the juvenile system in its functioning. In this way, “Hobbes is right: any order is better than chaos and in some circumstances may be achievable only through positive law.” Legal systems appraise what is just or unjust. If there is no law, there can be no measure of justice.

Law is necessary in defining what is expected from the state and its citizens. It has been shown in this chapter that current child welfare policies recognize children as citizens, but they do not define how children as citizens should be addressed, other than through a separate legal venue. Law must be established as an avenue defining what kind of due process rights children do have. Law acts as a measure of state and civil conduct. Glendon states, “Highly visible acknowledgements of governmental obligations to the aid of citizens in need, and judicial affirmations of those obligations, can help to promote responsiveness and responsibility in the political process”. This must also apply to children. Moves to promote the welfare of children, which include a commitment to the child’s view of their welfare, can be supportive of a practice, which is respectful of the

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rights of children. The context will often shape the extent to which the child’s voice will be determinative.

In order for the state to meet the best interests of children, this analysis has demonstrated that the current philosophy governing children’s rights (or lack thereof) and laws protecting their rights cannot steer far from the philosophy of the social contract. It has been shown that the lack of positive law defining children’s legal rights in child welfare conflicts with the legal philosophy of our current political system. It has also been demonstrated that positive law not only sets standards for the conduct of citizens, but also functions in setting a standard of conduct by the state. Finally, it was shown that American legal philosophy relies on the power of the people to protect both the majority and the minority as well by recognizing levels of citizenship. Positive definition of children’s due process will establish a means to the rights needed in child welfare. Once an avenue is established, there will be a reference point to rights; adults have the Bill of Rights, children have nothing. The next chapter will discuss possible solutions in positively defining children’s rights properly.
CHAPTER 5

IDENTIFICATION OF CHILDREN'S DUE PROCESS RIGHTS

It has been demonstrated throughout this thesis that children's due process rights with regard to abused and neglected children (rather than delinquents) have not been thoroughly identified by positive law at the state or federal level, thus preventing policies from protecting the best interests of children. This chapter will suggest enactment of a Dependency Clause to child welfare laws throughout the states that addresses concepts of participation, representation, and citizenship in relation to children as dependents. Without positive reference for children's due process rights, policies like ASFA, which use monetary coercion along with the vague defenses in the child's best interests; these inevitably lack strength in protection of abused and neglected children with regard to juvenile justice. To ensure due process rights protections of dependents, it must be posited by law that dependents are a certain type of junior citizen that need due process protections and representation that are parallel to the adult system.

The Illinois Juvenile Court Act has demonstrated that children do not have equal rights, yet some adult due process rights have been afforded to them, thus creating conflict by reverting to the very system the law had tried to avoid. Unlike adults who retain rights under the Bill of Rights, children's rights are ambiguous, as "reasonable efforts" are cited when acting in the best interests of a child. At times, children can be
unjustly taken from families for unreasonable periods of time, thus leaving them to linger in the system. This chapter will demonstrate that children need due process rights that comply to their system as established by the Illinois Juvenile Court Act, not the adult system. This can be accomplished by recognizing and defining the status of citizenship children have by enactment of law. Once the level of citizenship for children is legally defined, proper due process rights can be assigned. This will be completed by establishing a level of citizenship that does not require participation. Classifications of citizenship demonstrate that the definition of citizenship encompasses many dimensions. Roche agrees when he states, "If citizenship entails membership in the community and membership implies forms of social participation, then citizenship is about the involvement of people in the community in which they live, and people have been barred from citizenship on grounds of class, gender, race and age among many other factors. Accordingly, the debate on citizenship requires us to think about the very nature of the conditions of membership and political participation." 95

Currently, children are not citizens in the Constitutional sense, which is why they are unable to bring rights issues to the legal system. But children are social citizens as they enter the public sphere the day they are born. The various Child welfare laws throughout the country have assigned them some adult due process rights; this conflicts with the intended separation created by the Illinois Juvenile Court Act. This separation implies that a different status of citizen does exist, but it does not define how to process this "type" of citizen. That does not mean that all laws dealing with and affecting children should be different, it just means that laws and legal protections should be afforded to them as citizens and they must be positively defined. Without posited legal rights we, by

omittance, permit discrimination against children. What rights are the state trying to protect when children have been treated unjustly by the state? Rights must be defined by positive law in order for them to be protected and reviewed.

One of the issues that confronts juvenile justice is representation, and the inability of children to participate in democratic processes. Jeremy Roche provides a solution to this dilemma by positing that children should be able to participate. It has been posited that children should be able to represent themselves in some form, even if not by full participation. Jeremy Roche notes that because participation is such an important aspect in the practice of democracy, children should also be able to have some sort of means of participation. Children are affected by politics and this is one of the qualifications that should permit their political involvement. It is true that participation is an inevitable requirement of American democracy, but many would agree that children have little if any capability to participate. One can argue that in order for policy to be effective it must reflect the needs of the people it is trying to affect. Is it possible for children to participate in political processes and effectively affect the current system? Let us examine this issue with reference to ASFA.

Arguments made about the mental capacity of children refer to their ability to participate. Just because they are capable it does not make it necessary. Capability does not qualify necessity. Marc Jans argues that learning is a life-long process and, "It no longer exclusively belongs to the domain of school and no longer is restricted to the phase of youth."^ Marc Jans, Children and Active Citizenship, (Meise: Research Center of Childhood and Society, 2002) 3. Therefore, with reference to mental capabilities, philosophers like Jans argue that adults and children are capable of participation but are just not at the same maturity level. Is he positing that maturity and experience are not preconditions for

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^ Marc Jans, Children and Active Citizenship, (Meise: Research Center of Childhood and Society, 2002) 3.
political participation? According to this argument, since both subsets are capable of learning, both can be trained to participate. Realistically, this of course does not qualify children to participate, because philosophers like Laura M. Purdy believe that political participation requires experience.

Adults, whether they are educated or not, have life experience and rights and are responsible to duties and obligations of the social contract. Children, even with proper education, although capable of learning, do not have enough life experience to provide them with rational decision-making skills that are ripe for participation in political processes, nor are they capable of legal duties nor of legal obligation. Unfortunately, children have to start from where they are socially positioned.

Libertarians argue that the burden of proof should be on those trying to limit freedom. They assume that children are capable of quickly coming to function at least at the level of the average contemporary adult. Jans cites Hengst\(^7\) in arguing that the difference between children and adults can no longer be indicated by classic modern frame concepts or social constructs. Hengst also argues that children should not be classified as qualifying and adults as fully qualified. Purdy disagrees by stating that although children have the potential for rationality, they are in the process of becoming rational. Being in the process of something does not qualify it as something. An acorn is not a tree until it grows and matures under certain conditions.

Children are not qualified to participate; they may be educated and prepared to participate one day, but not while they are children. This is not to argue that adults, once eighteen are educated or rational enough to make sound decisions\(^8\), it is just to state that

\(^7\) Marc Jans, Children and Active Citizenship, (Meise: Research Center of Childhood and Society, 2002) 3.

\(^8\) There are a lot of “bad apples” out there.
children, for the most part, do not have the maturity or experience to participate in political processes. In proving that children are not yet capable of political practices, Purdy points to the development of children by stating, “Despite its apparently moral basis, the debate about equal rights for children has been blind to an essential element in human development. The good life depends on moral character.” Yet, philosophers like Jeremy Roche claim that children should have a measurable political influence in the processes that govern them. He suggests that children should be able to provide some input in political processes not only because they are capable, but also because they are citizens and they have the right to have a say in the world that governs them. Even if children were allowed to participate, it would only be to a small degree, which would not provide the effective force needed to affect the necessary influence on policies. The idea to allow children to participate in political process seems irrational to most adults in our system today.

There are adults that retain their rights as citizens even though they are incapable of participation - like children they are unable to vote or enter into contract. Quatrup argues that both children and adults are affected by the same environments, as he points out, “Childhood and the living conditions of children are fundamentally determined by the same economic, political, and social powers that constitute the context of adults.” Currently, only adults represent themselves in political processes, such as: voting for candidates, supporting candidates through contributions, initiation of political action, or choosing to run for office themselves. But there are adults who are unable to vote because either they are incapable or their level of citizenship is less than others; this includes

100 Marc Jans, Children and Active Citizenship, (Meise: Research Center of Childhood and Society, 2002) 1.
adults who are incarcerated, deemed mentally incapable, or have severe medical
disability. As mentioned earlier, certain philosophers like Jeremy Roche believe that
children’s rights may be defined through the political participation of children. But is
participation of dependents really necessary? It was demonstrated in Chapter Four that
one who is without the conventional function of a ‘normal’ citizen can still qualify and be
defined as a citizen, whereas law can recognize them measurably, as in the cases of
Cruzan and Quinlan.

It must be also argued that if direct representation were a precondition for
affecting political processes then cases like Nancy Cruzan (who was in a vegetative state
and was completely reliant on feeding tubes and breathing machines), would not have
access to the courts. Infants, certain of the handicapped, and persons like Nancy will
never be able to vote or appeal to public officers in their own defense. This case
demonstrates that autonomy is not a precondition for legal rights. Even if Ms. Cruzan did
state that she did not want to be kept alive by machines if an accident happened, Ms.
Cruzan’s rights were protected not because she had desires that were expressed, but
because she had rights as a citizen - a right to have her best interests protected via due
process protections. Without due process rights, her prerequested desires would never
have been at issue, the state would have taken a paternal stance in her interest. Therefore,
it is possible for dependent individuals to rely on representatives and law to protect their
interests while still recognizing them as rights-bearing citizens.

Adults, without the participation of children, can represent the needs of children
just as in the case of Nancy Cruzan who, like a child, had been represented through her

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101 Such as those who are in a comatose state like Nancy Cruzan. Marc Jans, Children and Active
Citizenship, (Meise: Research Center of Childhood and Society, 2002).
parents and by the state, but note that they relied upon positive law. Adults often claim
citizenship rights for their children and do so on their behalf, but this is not enough
because foster children do not have parents to represent them, they have strangers who
are social workers and lawyers protecting their interests; moral intentions do not protect
like positive reference to law. Intentions do not have the strength nor the linearity of
positive law. The devotion of a family member and the devotion of a legal representative
differ greatly from something as definitive as law. Families represent out of love, the
system’s representation does not fall under a commitment of loyalty or kinship but out of
devotion to the law. Therefore law must be in place to ensure that children’s rights are
defined and protected. Legal representatives may have moral intentions but their jobs are
to uphold law, not their moral convictions. In the protection of child welfare, one’s
intentions can only go as far as the law. If we are to protect children with policies like
ASFA, we must attain force by positing how and what rights are to be protected.

Policies like ASFA are not as effective as citizens may believe as they do not
define nor protect the due process rights of children. Not only do they contain ambiguous
provisions, but they are only effective for the duration of a child’s stay within the system;
they only contain the force of persuasion rather than concrete provision. In order for
policies to be effective, there must be rights posited at the federal level, which will guide
processes that may differ from state to state. Otherwise, as Roche points out, children
may “languish in foster care because neither the agency nor the child’s parents initiate the
necessary action for change.”

Legal advocates for foster children only have the power to act during state intervention, not prior nor post. For example, the role of guardian at

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when procedure is done, and they have very little influence to ensure that
the processes that legally govern abused and neglected children were fair, just or
expedient. Legal rights guide representatives. Legal rights will exist before and after
legal procedure is complete, they will ensure that processes are performed with review
and reference to structure. Legal rights delineated from the federal level will guide states
in their function of processing children who come into contact with the state. It is the job
of the State at the federal level to provide a guideline for the states to carry out.

Once a child has been removed from the home, the focus changes from protecting
the parents’ legal rights to determining what is in the best interests of the child, but under
what definition of rights? Without posited law, advocates, lawyers, judges and policies
act according to undefined guidelines under what they term “reasonable efforts”. These
types of phrases are ambiguous and can be interpreted to mean whatever the actor wants
them to mean, whether within policy formation or for a child’s supposed defense. In
defense of children’s best interests the phrase “reasonable efforts” has been cited in many
forms of legal arguments, but there is no basis or line connecting it to the same definition
or philosophy of child rights; there are too many gray areas that can differ from state to
state. A federal law sets boundaries. The phrase “reasonable efforts” encompasses too
many forms and definitions to be used to protect the best interests of a child. Roche
agrees by stating, “Often under the guise of upholding the ‘child’s best interest’ judicial
decisions are made which may adversely affect children. All types of social and legal
decisions are ultimately rationalized to reflect the ‘best interests of the child.’”

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103 Child welfare advocates who are appointed for adjudicatory and dispositional hearings.
Therefore positive law delineated by the federal system along with better representation would be a strong first step in protecting the welfare of children within State custody.

If children need stronger representation and are recognized as different 'persons' by the states' Juvenile Court Acts, then the state must recognize and address this; although children are different 'persons' they are still citizens and should still have some legal rights to assist in the processing of children as dependent citizens in distress. To define the rights of children, we must take into question the adult-centered rights rhetoric. Citizenship is the qualifying condition that necessitates action of government and protection of posited due process rights as put forth by social contract. Our state must recognize differing levels of citizenship in order to recognize due process rights of children. Children should therefore be afforded partial citizenship at the very least. This will get them the recognition they need by the government that goes past the need to intervene.

Children can be considered to be citizens-in-training. Partial citizenship can act as a bridge connecting the first two levels of citizenship, which most adults possess, with the third and fourth levels of citizenship. To understand the differing levels of citizenship children have we can refer to Jans as he mentions Aries' (1962 pg. 9) concepts of citizenship in his book *Children and Active Citizenship*. In it, he states that there are four levels of citizenship. The first level is citizenship as a whole of rights, which qualifies for the right to vote; law-abiding adults are at this level. The second level is citizenship as a whole of responsibilities; this entails understanding of the social contract by not breaking posited law; adults and adolescent children are at this level. The third level of citizenship is citizenship as identity, which qualifies citizens to their country of origin; this is every
legal citizen of a country, including children. The final level of citizenship is citizenship of participation, which recognizes community involvement; this includes all persons living within a community that affect that community.

It was displayed in Chapter Four that the qualifications of the social contract display that a sovereign takes interests in its citizens as *parens patriae* qualifies children as citizens, therefore they must have some rights as citizens. Jeremy Roche points out that partial citizenship "permits an avoidance of the zero-sum thinking that characterizes," the current rhetoric of rights. He calls for us to recognize that society is not comprised of two classes of social beings, citizens and non-citizens. The fact is that there is a spectrum of levels of citizens. By enacting a legal definition of children’s citizenship through either a bill or declaration, we will be ensuring a good future for all children, especially with regard to the abused and neglected. Justice is not just about preserving the good life here and now, it is also about securing a good foundation for a just future. It is possible for there to be different levels of citizenship with different levels of rights defined. Children are citizens and in turn should have rights according to our social contract through interest shown by the state as displayed by *parens patriae*.

Some philosophers argue that the "constant referencing of children to the future potentials and possibilities belittles their present actions." Children may be considered to be citizens-in-training. We also need to escape from the language of ‘futures’. The process of law does not take into consideration what might be, only what is. If law was based in this consideration we can posit that adults are tombstones-in-training, they will die, just as children will become adults. Law would then be based on the morrow and not the present. Law confronts the issues of its citizens directly, not potentiality or what will

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be at another time. With regard to children we must act in the here and now. It can be argued that although children have potentiality, it must not overshadow the fact that they exist as children today. One day they will be adults, but this does not mean that the law should look at what they will be in the future. Current law should not be created to function in protecting children as future adults; law should protect children as a different subset of citizens who deserve to be treated with dignity by the legal system. The Illinois Juvenile Court Act states that we should recognize children as a different legal person, therefore law must focus on this different legal status.

Currently child welfare policy works to protect adults or adult social order “against disturbances from the presence of children,” as the context of rights determines the extent of the child’s voice. In order to define due process rights through positive law one must consider that if children have empowering rights, then adults will have to devote their energies to protecting these interests. A conflict of interest may exist between parents or adult rights and children’s rights. These conflicts can only be discovered and remedied through practice and judicial review. It must be ensured that children have a voice, and that the root of protection be defined and protected by adults, as representatives for children (dependents). Empowerment of children’s legal rights will call for adults to balance their interests with the interests of children. The baseline of protections will have to be administered and policed by adults, not for adults but for the welfare of everyone equally. State courts will address issues if and when they come up. Child welfare policy must be created at the federal level in order to make life better for both children and adults, not either/or. If interests conflict, then a level playing field within these confines must exist in order for them to be examined and not pushed aside.

Therefore a Dependency Clause should be added to Child welfare laws throughout the country, that recognizes the dependent underage citizen which also delineates due process rights that are parallel to adult due process rights and appropriate for the juvenile justice system. If posited law mandated what the legal rights of children were, then there would be a clear statutory entitlement to those services; this can be done by identifying children as dependent citizens, who are incapable of participation. Policies like ASFA would be effective in terms of children’s legal rights rather than in compliance with budgetary incentives. We must state that through law children’s due process rights can be secured by legally identifying their level of citizenship while still maintaining the protections that come along with being recognized as a minor. Children must still be recognized as minors if we wish to retain the special protections that come along with being classified as a “minor” such as keeping court records closed and trying children as adults. It will not be possible for children to take responsibility for themselves in rights protection; they rely solely on their representatives. It must be legally recognized that there are citizens who are entirely dependent on second-hand representation. Our social contract does not take this into consideration as it has made the representation of society contingent on legal positivism as Kantean theory has placed high value on autonomy. Adults must act to define children’s due process rights through law by first establishing a definition of citizenship that addresses citizens as dependents, this can be established through a Dependency Clause that is attached to child welfare laws throughout the country.

To influence states to adopt child welfare laws with a Dependency Clause it is possible for the national legislature to withhold funding for other interests than child
welfare. Rather than withholding funding to child welfare programs, legislatures could withhold funding for such things as highway repair or other legislative interests that do not directly harm the children. ASFA provides financial incentives to get states to comply with legislative desires, although this does not hurt the program it does not ensure protection of children’s best interests. It is possible that the legislature can tap into other legislative interests when trying to get states to comply with desirable policies.

To emphasize the importance of state responsibility in the welfare of its citizens Mary Ann Glendon in her book, Rights Talk, brought up the concept of Programmatic rights that currently exist in Europe. Programmatic rights are statements of public goals and aspirations. She agrees with the need to posit the rights of populations of those who are dependent. Glendon states that, “Highly visible acknowledgements of governmental obligations to the aid of citizens in need and judicial affirmations of these obligations, can help to promote the responsiveness and the responsibility in the political process”. Enacting a law or declaration that defines dependents as a certain type of citizen will then commit the state to defining rights, rather than relying on ambiguous terms within policies which are shaped and formed according to circumstance.

Alternative solutions have been posited such as various universal declarations have already called for the rights of children, such as in the Universal Declaration of Human Rights, but the United States has not actively followed such declarations. In order to create and adopt a defined version of children’s due process rights adults must step forward and recognize that no federal legislation exists protecting the due process rights of children. Until then, the rights of children will remain a loose thread in the

108 General Assembly resolution 217 A (III)
welfare. Once a federal measure is in place, then we will be capable of review of its justness and applicability at the state level. Until then, children’s interests are left to the whims of legislatures, judicial discretion, and political processes, which can vary from state to state.

Some also may call for equal rights for children, but this can hurt children by taking away much needed protections that the legal status of “child” holds, such as making records public or trying children as adults; this does not seem rational. If children were given equal rights, their rights will then conflict with parents’ rights and the way parents raise children; this seems unreasonable and unattainable.

It may be possible to provide more training to all members that act within the juvenile welfare system such as judges, lawyers, representatives and caseworkers. But training professionals within a system that has no definitive guideline for due process procedure seems futile. Professionals would at the very least be trained in the psychology of children, which will assist in handling of children but still not effect their due process rights. A final alternative that also seems irrational is allowing children to seek compensation from the system if it as been fallible while the child was in State custody. This also seems ineffective because it is possible that an enormous number of adults who were previously foster children may seek compensation for perceived injustices that may not even have legal backing; this will only create hostility towards the system and backlog of more court cases. It is also impossible to compensate for damaging a potential life.

Buss puts it into perspective when she states, “The fault of the juvenile justice system’s design, then, was not in its rejection of admittedly ill-fitting adult set of
procedures, but in its failure to replace those procedural requirements with others more true to the juvenile justice system.”

It is our responsibility as adults to represent children and ensure that under the Illinois Juvenile Court Act of 1899 policies like ASFA will function under defined legal rights of children, not ambiguous phrases like ‘child’s best interest’ or ‘reasonable effort.’ The thing about being a ‘child’ is that by definition there is little one can do for his or herself. In order to ensure that their needs are met and due process rights upheld we must posit through law what rights they do have. Orend agrees when he states, “To have a right is to have something more specific and meaningful than abstract rightness on one’s side. It is a well grounded and concrete claim on the actions of other people and on the shape of social institutions in particular governments.”

As dependent citizens children are incapable of bringing forth political action to insist on definition and protection of rights, therefore as adults we must act in their interest and define these rights through federal law, amendment or declaration.

It will be difficult to legally define what children’s legal rights should be without conflicting with the already established legal rights of adults. It is to create a law that defines partial citizenship that does not rely on, nor require political participation. A law defining partial citizenship will contain within it the implication that partial citizens rely solely on representation, which require special due process protections that fit their circumstance as dependents, as determined by the Illinois Juvenile Court Act.

Law has been a significant tool in protection of due process rights. We as members of the social contract must utilize this path of legal recognition in order to

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protect any moral rights and convictions, and to prevent future injustices from occurring to abused and neglected children. With reference to ASFA, this act attempts to protect undefined rights of children by enforcement of permanent placement of children within a certain time limit without legal force; it merely utilizes budgetary coercion for compliance. This is not the way to protect the best interests of abused and neglected children. Positive law can be beneficial in that is acts as a reference point that defines and creates a standard. Once a law is set in place it can act as a litmus test that is not abstract and if it is unjust it will can be proven in a court of law.

Until a law sets the standard for state conduct in protection of dependent children as partial citizens, policies enacted will continue to change in their philosophies and goals, as has been demonstrated in the Child Welfare Act of 1980 and ASFA. What needs to be recognizes is that if the State can set a standard for citizens' conduct then a standard must also be set for State conduct. Without legal recognition by a Dependency Clause or Law that recognizes children as future or partial citizens there can be no posited child rights, and this lack will allow the interpretation of child rights to differ from state to state and policy to policy. Policies will continue to conflict in their objectives, functions, and definitions of children's rights until we recognize that children as dependents are a different "type" of citizen. The Illinois Juvenile Court Act has already implied that children are a different type of citizen by the mere separation of jurisdiction of courts, but nowhere does it state how to properly process dependent, under-age citizens.

The best solution is found in preventative maintenance, and this would be by positively identifying children as partial citizens who require parallel due process rights, and this could be through adding a Dependency Clause to child welfare laws throughout
the country. Once a state adopts this clause it is possible that other states might follow its example just as other states adopted the Illinois Juvenile Court Act of 1899. Some due process rights afforded to children have been defined under the adult system of rights yet utilized under the children's system. Children as dependents need due process rights, but the current system under which they are receiving due process rights is not affecting the situations of abused and neglected children properly. As has been demonstrated, the philosophies of child welfare policies have conflicted from era to era. Provisions within policies do not have the force of law, leaving children subject to idealistic fads of reformers' philosophies with little legal strength to define and protect rights. The state must address the status of the child as a dependent, who is unable to politically participate, by positing child's legal rights through legal definition of partial citizenship.
CHAPTER 6

CONCLUSION

It has been displayed throughout this thesis that current methods have not been able to remedy inefficiencies and injustices in the mishandling of child welfare practices. This has resulted in due process rights infringement occurring to children, in our case, abused and neglected children. It is a fact that adults have been able to democratically represent themselves as citizens through participation with support of legislation and interest groups or through legislative testimony, while children are unable to do so. It has been proposed that the alternative is to address the many procedural problems standing in the way of children's rights by defining children as junior citizens via positive law. Children are citizens incapable of effectively expressing themselves politically because it is difficult to legally represent themselves. This has allowed for the enactment of laws such as the Adoption Safe Families Act, which were created to protect undefined rights of abused and neglected children. But the ASFA only contains the force of budgetary incentive rather than providing positive legal definition in the protection of child welfare, thus never providing parallel due process rights to children.

It has been demonstrated that with regard to juveniles, legal processes can function more efficiently with a defined conception of rights, as according to our Constitution; rights that stem from citizenship status. As juveniles, children cannot be recognized as equal citizens, thus affecting due process rights definition and protection.
This thesis has shown that it is important that all citizens, no matter the status of citizenship or capability of participation, must have some means of protecting themselves from unchecked government practices. It should be ensured that the state would effectively act in everyone’s best interest. If the state can set a standard for conduct of its citizens then a standard must be set for the conduct of the State as well.

Chapter Two introduced the basis for consideration of children as citizens by addressing the philosophy behind *parens patriae*. This common law implies that children are in fact some sort of citizen as the state does take interest in their welfare. In the second Section of Chapter Two, it discussed that many influences of political decision makers have been in response to economic, legal, and social trends, rather than in the best interest of children. This key issue has affected views on the status of citizenship of children, increasing the chances for procedural defects that exist today in child welfare policies. Focuses primarily on perceived humanitarian philosophies based on moral rather than positive law have not assisted in protection of child welfare. Throughout the history of child welfare, as has also been revealed in Sections Two and Three, Supreme Court decisions have had little success in affecting procedural flaws that many foster children face while under state supervision. Section Three then addressed how the Juvenile Court Act was enacted to separate the legal status of children by addressing them under a system that recognized children’s needs. It was shown in this chapter that philosophies and interests in child welfare have repeatedly gone back and forth on assigning adult rights which are not even applicable to juveniles according to the spirit of the Juvenile Court Acts.
It was then shown in Chapter Three that current policies such as the Adoption Safe Families Act (ASFA), simply address the expediting of cases through compliance in qualifying for funding of care, rather than protecting or defining rights for children through positive law. Although policies such as the ASFA attempt to expedite placement processes of abused and neglected children, they still fail to follow a definitive legal standard as to how the state should protect custodial processing of abused and neglected children. These policies have only repeated the same mistakes that previous child welfare policies have by not providing legal strength in protection of child welfare.

Chapter Three addressed ambiguous terms and weak child welfare policies which govern how the state processes abused and neglected children today within policies enacted to protect the best interest of children. Neither the Adoption Assistance and Child Welfare Act nor ASFA clearly define what “reasonable efforts” are nor do they define in law the “compelling reasons why termination of parental rights would be in the child’s best interests.” This has provided an example of shifting organizational logic within the child welfare system. Therefore Chapter Three demonstrated that a succinct philosophy of children’s rights requires a legal definition of child rights in order to address child welfare in their best interest. It has been argued that children do deserve appropriate due process rights as citizens, regardless of status. Political incentives that protect ambiguous references to rights such as ‘best interests’ or ‘reasonable efforts’ lack the force and guidance needed in the protection of child welfare for abused and neglected children.

Therefore chapters Two and Three demonstrate that continued mistakes in philosophical approaches conflict with the purpose of the Juvenile Court Act. This has

contributed to largely unchecked powers that stem from *parens patriae* and the Juvenile Court Act of 1899. It must be understood that child welfare policies cannot be used as bargaining tools, nor can they rely on monetary incentives to get states to comply in protecting the interests of children. *ASFA* is just another example of a policy that does not address responsibility for errors in procedure from intake to release, the misconduct of civil employees and child representatives, and the ambiguity of policy guidelines with regard to child welfare. Chapters Two and Three exposed that states’ compliance to policy demands through monetary or budgetary incentive are not in the best interest of dependent underage citizens who cannot protect themselves.

Chapter Four points out that juvenile justice has functioned without a positive legal definition and that the alternative may be enacting positive law in the protection of children’s best interests. Chapter Four argued the nature of the relationship that the state has with adults as citizens differs from the relationship the state has with children as junior citizens with regard to definition of legal rights and due process protections. It was argued that rather than increasing the opportunity for children to exercise their rights, children instead have limited access to due process rights protections due the separating of their status as citizens. The main focus demonstrated that adults, as full-fledged citizens, can induce change in the system that affects them, while children lack the power to utilize democratic means to initiate and effect change in policy that affects them, leaving juvenile law to action without proper oversight. Chapter Four emphasized that not all citizens need equal status or rights to have their interests protected.\(^\text{113}\) It was also emphasized that positive law is the next best solution in addressing children’s due

\(^{113}\) As demonstrated through both the Cruzan and Quinlan cases.
process issues because law acts as a reference point that acts as a standard of reviewable measure.

The solution of a Dependency Clause was then given in Chapter Five as it addressed issues in citizenship that make it possible for due process rights to provide protection for children. What is needed is the recognition of children as partial or junior citizens that do not have the ability to politically participate, this requires due process rights that are parallel to the adults system's. It was shown that even thought the legal of children is different from adults, it does not mean that the legal system should lack a comparable framework that established guidelines for law; autonomy does not have to be a precondition for due process protections. It must be recognized that individuals should have a means to make claims that does not require political participation (since dependents have no way of participating). Recognition of the citizenship status of children as junior citizens will allow for philosophies within the child welfare system to change. Chapter Five addresses that decisions may not be made in the best interest of either children or their families or subsequently society in general without powers contained within positive law. Legally defining junior citizens through legal provision will aid in the assignment of rights appropriate to children, as the current due process rights only deal with juvenile issues through adult-based protection.

This thesis has demonstrated that law is the best alternative in defining what is expected from the state and its citizens with regard to juvenile justice. Child welfare policies have failed in protecting children as citizens. It has not been legally defined how children as citizens should be addressed, when placed under the jurisdiction of a separate legal venue. Previous methods have failed as current statistics have shown that the
amount of abused and neglected children languishing in the system continues to increase. Law establishing an avenue in definition of what kind of rights children have through use of positive law can act as a measure of state and civil conduct. This analysis has demonstrated that the current philosophy governing children’s rights (or lack thereof) and laws protecting their rights conflicts with the function of our current political system. Positive law can set standards not previously set by functioning in setting a standard for the state. Positive definition of children’s due process will provide a means to protect much needed due process rights in child welfare; this can be done by establishing children as junior citizens.

Without posited child rights, the interpretation of children’s due process rights will continue to differ from policy to policy and state to state as philosophies of society shift. Policy guidelines can set the standard for dependent children by establishing and recognizing them as junior citizens. Influences of social trends in policy formation can conflict in objective, function, and definition of children’s rights. We must address the issue that children as dependents are a different “type” of citizen as displayed through the Juvenile Court Act. Although child welfare issues have been separated through the Juvenile Court, rights afforded to children have still been defined under the adult system of rights, which conflicts with the intention and function of the Juvenile Court Act.

Children should have parallel due process rights because they are people who deserve dignity and respect as humans, they are a public interest, and because they are junior citizens that are confronted with social contract and the public from the time that they are born. Children as dependents need due process protections, especially if abused or neglected; they need rights that address their issues within the juvenile court, not adult
rights in a child welfare system. When the state takes an interest, as it does under the guise of *parens patriae*, it implies that the interests are based on a status of citizenship. The current system under which children are receiving due process rights is not justly approaching the interests of abused and neglected children properly. Positing child’s due process rights through legal definition can be possible by legally defining junior or partial citizenship; this status of citizenship will address dependents which are incapable of political participation.

By challenging unstated norms and recognizing that children are social beings, who are in fact future citizens, we can recognize that they necessitate defined due process rights. The answer is not found in assigning equal rights to children, as it is not possible due to the function of our current system. King states, “It is the very inequality and the continuation of this inequality between children and adults which gives children, so to speak, a right to rights.” Therefore children should have due process rights because they do not have and cannot expect to have full citizen’s rights. The way to children’s rights is to first recognize and define children as junior or partial citizens, thus establishing special definition and protections, which will in turn define due process rights for dependents. It must be recognized that children are social beings, who are in fact a special type of citizen, which necessitate comparable, but not the same, due process rights adults; this will lead to a system that can protect the interests and welfare of abused and neglected children more justly and more efficiently. A Dependency Clause that recognizes children as non-participating citizens that require due process protections must be established.


MCDS Families - Supporting Families – FAQs


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