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A BRIEF LEGAL HISTORY OF INSTITUTIONALIZED CHILD ABUSE

BRIAN D. GALLAGHER*

I. INTRODUCTION

*Before you beat a child,
be sure you yourself
are not the cause
of the offense.*

Austin O'Malley¹

A recent archeological discovery in the Andes mountains offered new evidence that throughout history, societies have not always expressed their love for their children in ways that were beneficial to individual children. The perfectly preserved body of a young Inca girl, less than fourteen years old at the time of her death, was found frozen in a block of ice.² “Just about the time Columbus was sailing into the Caribbean, [the girl, who the archaeologists called Juanita] was trudging up the steep slopes of Mount Ampato . . . knowing that her life would come to an end at the summit [H]er sacrifice [was] considered the greatest honor her people could bestow”³

Juanita was found with vomit stains on her clothing and a fractured skull. This lead scientists to believe that the most probable

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¹ WEBSTER'S BOOK OF QUOTATIONS 46 (3d ed. 1992).

² David Schrieberg & Sharon Begley, *Children of the Ice*, NEWSWEEK, Nov. 6, 1995, at 72. Her completely frozen body only weighed about ninety pounds. *Id.*

³ Christine Gorman, *Return of the Ice Maiden; Scientists Find an Inca Girl Frozen for 500 Years*, TIME, Nov. 6, 1995 at 60; see also *A Treasure Wrapped in a Blanket*, U.S. NEWS & WORLD REP., Nov. 6, 1995, at 17; Shanti Menon, *To Appease the Mountain: Frozen Body of Inca Human Sacrifice Victim Found on Peruvian Mountain*, DISCOVER, Jan. 1996, at 22. Juanita was found at an altitude of approximately 20,700 feet, higher than Mount McKinley. Menon, *supra*, at 17. A man on the team who found her has “climbed Everest twice, and he is still impressed” that Juanita and her executioners could get to the site of her grave. *Id.* The location is usually covered with snow, and is only exposed during extreme conditions such as drought. *Id.* The mountain path probably taken by Juanita is normally impassable. *Id.*

method of execution was to gorge her with “*chicha*,” strong alcohol, then crush her head with a heavy club then leave her on the frozen mountaintop.⁴

While the perfectly preserved state of her body⁵ makes the discovery of Juanita’s grave⁶ “the archeological find of a lifetime,”⁷ it shows that individual children have not always benefitted from the love and protection of their elders. Throughout history actions that would ordinarily be defined as abuse or neglect have received the blessing of the child’s community, as was the case with Juanita. As one commentator has noted:

[O]ver the centuries, infanticide, ritual sacrifice, exposure, mutilations, abandonment, harsh discipline and exploitation of child labor have been only some of the ways in which children have been mistreated. Infanticide—the killing of newborn infants with the explicit or implied consent of parents and community—has been a form of birth control, a way of avoiding the embarrassment of an illegitimate child, a method of disposing of a weak or deformed child, and a means of serving religious beliefs. Numerous religions have required that the first born be sacrificed to an angry god. In some societies, female children were sacrificed because they were considered useless. Abandonment or exposure to the elements of a child who was unwanted or who could not be provided for was a form of infanticide that was common in ancient societies.⁸

⁴ John Otis, “*Juanita*: A Mummy Frozen in Time,” *NEWSDAY*, Jan. 9, 1996, at B19. Aside from the skull fracture, she did not have any broken bones or other signs of violence. *Id.* When found, she still was wearing elaborate ceremonial clothes. *Inca Girl’s Body is Found 500 Years After Sacrifice*, *DAILY MAIL*, Oct. 26, 1995, at 31. “Historically, infanticide has usually been accomplished by bloodless methods—strangulation, drowning, smothering, burial alive, and incineration—and often for a ritualistic purpose.” Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 294 (1972).

⁵ “Her eye sockets are empty and the leathery skin on her face is starting to sag. But Juanita still has thick brown hair and strong teeth. And unlike other mummies, which are dried out and deteriorated, Juanita’s body fluids, tissue, and organs are intact, though frozen.” Otis, *supra* note 4, at B19; see also *Archaeologists Uncover Ancient Inca Mummies*, *PHOENIX GAZETTE*, Oct. 25, 1995, at A2; Peter Gorner, *Peru Volcano Unveils 500 Year Old Mummies; Preserved Under Ice, Two Women and a Man Had Been Sacrificed*, *CHI. TRIB.*, Oct. 25, 1995, at 12.

⁶ Juanita was discovered along with two other less perfectly preserved child sacrifices. Gorner, *supra* note 3, at 60; Schrieberg & Begley, *supra* note 2, at 73.

⁷ Schrieberg & Begley, *supra* note 2, at 72.

⁸ Thomas, *supra* note 4, at 294.

This article is not intended to serve as a diary of every child who has been mistreated. "History shows that for centuries youth have had no rights, and maltreatment was socially sanctioned in order to discipline and educate."⁹

Instead this article will focus on "institutionalized child abuse." "Institutionalized child abuse" is defined as official sanctioned mistreatment or abuse of children. "Institutionalized child abuse" includes those situations where children suffer actual physical or emotional harm due to their community's legally accepted manner of raising, educating, and disciplining them. While this definition is not inclusive of all forms of child abuse, it is presented here to alert the reader that other incidence of child physical, sexual, and emotional abuse and neglect are not being discounted, but are merely beyond the scope of this article.

What follows is an overview of the historic, officially sanctioned mistreatment of children. Examples are legion from Isaac¹⁰ to contemporary Asian rug manufacturers.

II. THE BIBLE

The stories of Isaac's sacrifice,¹¹ the drowning of Hebrew infants at the time of the birth of Moses,¹² and Herod's slaughter of the innocents,¹³ provide many examples of child mistreatment sanctioned

⁹ Rodger W. Bybee, *Violence Toward Youth*, 35 J. SOC. ISSUES 1, 2 (1979).

¹⁰ See *infra* text accompanying notes 13–56, 216–37.

¹¹ *Genesis* 22:7 (unless otherwise indicated, all references are to the New American Bible). The birth of Isaac was a miracle, since his father was a hundred years old when he was born, and his mother only slightly younger. *Id.* at 21:1–3. In fact, God promised Abraham that all the nations of the earth would find blessing through Isaac. *Id.* at 18:10. The Lord, however, tested Abraham's faith by requiring him to sacrifice his son to Him. *Id.* Abraham agreed to do so, and brought Isaac to the appointed place, where he tied him to an altar, and pulled out a knife to slaughter his son. *Id.* God, however, sent a messenger to stop Abraham before he could strike. *Id.* at 22:9–13. Because Abraham had shown his devotion, the Lord promised to make his descendants as numerous as the "the stars of the sky and the sands of the seashore." *Id.* at 22:17.

¹² *Exodus* 1:22. Moses was born while the Hebrews were living as slaves in Egypt. *Id.* When their population grew too large, and the Pharaoh feared that they would start an insurrection, he ordered that "[e]very son born to the Hebrews . . . shall [be] cast into the Nile." *Id.* Moses's mother was able to hide her pregnancy and the child until he was three months old. *Id.* At that time, she put him in a basket, and left him floating in the river in a place where he could be found while his sister watched. *Id.* at 1:24. He was adopted by the Pharaoh's daughter, who then unknowingly hired Moses's own mother to nurse him. *Id.* In one of the strangest stories in the Old Testament, Moses was traveling with his wife, Zipporah, when "the Lord came upon Moses and would have killed him. But Zipporah took a piece of flint and cut off her son's foreskin and, touching [Moses's] person, she said 'you are a spouse of blood to me.' Then God let Moses go." *Id.* at 4:24–25.

¹³ King Herod was made aware of the birth of a new king, Jesus, by three magi who were

by that child's community.¹⁴ While this article is not intended to be part of the debate on the historical accuracy of the Bible,¹⁵ both the Old and New Testaments have enormous historical importance, and have greatly affected child rearing for centuries.

Early in the Book of Genesis is the story of Lot, the nephew of Abraham.¹⁶ Lot is best remembered for having a wife who disregarded God's order not to look back at His destruction of Sodom and Gomorrah, and was consequently turned into a pillar of salt.¹⁷ He is also remembered for relationships with his daughters.

Lot settled in Sodom after leaving his uncle's¹⁸ caravan. While residing there, Lot was visited by two angels of the Lord, who appeared to him as ordinary men.¹⁹ He insisted that they stay as his guests, but

[b]efore they went to bed, all the townsmen of Sodom, both young and old—all the people to the last man—closed in on the house. They called to Lot and said to him "Where are the men who came to your house tonight? Bring them out to us that we may have intimacies with them."

[Lot replied,] "I beg you, my brothers, not to do this wicked thing. I have two daughters who have never had intercourse with men. Let me bring them out to you, and you may do to them as you please. But don't do anything to these men, for you know they have come under the shelter of my roof."²⁰

traveling to pay the new king homage. *Matthew* 2:1–8. The magi, who were following the trail of a new star that had risen in the east, had promised to inform Herod of the exact location of the child when they located him. *Id.* They were warned in a dream not to return to Herod, so they returned home by a separate route after paying homage to Jesus. *Id.* at 2:7–12. "When Herod realized that he had been deceived by the magi, he became furious. He ordered the massacre of all the boys in Bethlehem and its vicinity two years old and under . . ." *Id.* at 2:16. Jesus and his family escaped prior to the massacre when his father was warned in a dream to flee to Egypt. *Id.* at 2:13–14.

¹⁴ This is not to say that all cases of child abuse presented in the Bible were part of society or intended to serve some greater purpose. For example, when Joseph's brothers became jealous of him, they threw him in a well hoping to kill him without sheading his blood. *Genesis* 37:17–20. When a caravan of traders passed by, they pulled him from the well and sold him into slavery. *Id.* at 37:27. Also, Abraham banished his first born child, Ishmael, and the boy's mother (Hagar, the maid of Abraham's wife) into the wilderness after the birth of Isaac. *Id.* at 21:9–19. They would have died there had God not provided a well to give them water. *Id.*

¹⁵ See, e.g., David Van Biema, *Genesis Reconsidered*, *TIME*, Oct. 28, 1996, at 66.

¹⁶ *Genesis* 13:1–19:38.

¹⁷ *Id.* at 19:26.

¹⁸ At the time of their parting, Abraham was called Abram. *Id.* at 13:8–13.

¹⁹ *Id.* at 19:1–3. At the time of their arrival, Lot did not realize who they were. *Id.*

²⁰ *Id.* at 19:4–8. Lot's guests revealed themselves as angels when they assisted him in escaping the mob, and then allowed him to escape with his wife and two daughters prior to the destruction

His offer was declined, and he had to leave town while running from an angry mob.²¹

Whatever this story says about Lot's hospitality, it does not say much for him as a father. He was not, however, the only patriarch to put his own interests before those of his children. For example, while doing battle with the Ammonites,²² the judge Jephthah "made a vow to the Lord. 'If you deliver the Ammonites into my power . . . whoever comes out of the doors of my house to meet me when I return in triumph from the Ammonites shall belong to the Lord. I shall offer him up as a holocaust.'"²³ Jephthah soundly defeated the enemy. Quite to his surprise, when he returned home in glory, he was first greeted by his only child, his daughter. Despite great personal sorrow, he "did to her what he had vowed."²⁴ This victory allowed him to become the leader of Israel.

As with Jephthah, the sacrifice of one's child usually had beneficial results for the parent.²⁵ For example, when the Moabite army was about to fall to the Israelites, King Mesha of Moab "took his first born, his heir apparent, and offered him as a holocaust upon the wall."²⁶ "The wrath against Israel was so great that they gave up the siege and returned to their own land."²⁷ In another example, King Manasseh, who along with the reintroduction of pagan worship to Judah, "immolated his sons by fire in the Valley of Ben-hinnom."²⁸ Manasseh had a long reign and lived long enough to repent before the Lord and regain his kingdom after defeat by the Assyrians.²⁹

of the town. *Id.* at 19:15. Later, when Lot and his two daughters believed that they were the last people on earth, his daughters got him drunk and slept with him so that they could have offspring. *Id.* He was so drunk that he did not realize what had happened. *Id.* at 19:31–36.

²¹ *Id.* at 19:15.

²² The Ammonites were, coincidentally, the descendants of the child created by the union of Lot and his younger daughter. *See id.* at 19:31–36.

²³ *Judges* 11:30–31.

²⁴ *Id.* at 11:38. Jephthah's daughter encouraged him to keep his vow to the Lord, but asked for two months to mourn her virginity. *Id.* It became customary for the women of Israel to mourn for her four days of the year. *Id.* at 11:36–40.

²⁵ This situation was not confined to Biblical civilizations. In many societies where kings were worshiped as gods, natural disasters were blamed on the king. Thomas, *supra* note 4, at 296. He was expected to sacrifice himself, but in many instances was allowed to sacrifice a son in his place. *Id.*

²⁶ 2 *Kings* 3:27.

²⁷ *Id.*

²⁸ 2 *Chronicles* 33:6.

²⁹ *Id.* at 33:11–14.

In contrast, sometimes children were killed to punish their parents. When the Babylonian army defeated thirty year-old King Zedekiah of Judah, they murdered his sons before his eyes.³⁰ After the destruction of Jericho, the victorious general Joshua ordered that "any man who attempts to rebuild this city . . . shall lose his first born when he lays its foundation, and he shall lose his youngest son when he sets up its gates."³¹ This promise came to pass when the walls to the city were rebuilt by Hiel of Bethel during the reign of King Ahab of Israel.³² "He lost his first born son, Abiram, when he laid the foundation, and his youngest son, Segub, when he set up the gates, as was told by the Lord through Joshua"³³

Like the Babylonians, the Israelites did not spare the children when they defeated an enemy.³⁴ When Joshua destroyed the city of Jericho, his army "put[] to the sword all living creatures in the city: man and women, young and old"³⁵ They did the same at Ai,³⁶ Makkedah,³⁷ and numerous other cities.³⁸

In addition, when Moses was negotiating with Pharaoh for the release of the Hebrew slaves from Egypt,³⁹ the Lord sent ten plagues upon the Egyptians to encourage Pharaoh to relent.⁴⁰ As the tenth plague, the Lord "slew every first born in the land of Egypt, from the first born of Pharaoh on the throne to the first born of the prisoner in the dungeon . . . there was not a house without its dead."⁴¹ After this, Pharaoh allowed the slaves their freedom.⁴² In addition to the Lord's slaughter of the Egyptians' first born, it must be assumed that some children died because of the plagues.⁴³

On at least one occasion, the Lord's name was used to invoke infanticide. When the prophet Elijah was on his way to Bethel, he cursed a group of children in the name of the Lord.⁴⁴ Two bears then

³⁰ 2 *Kings* 25:7. Zedekiah was then blinded, so that the image of the killing of his sons was the last image he saw. *Id.*

³¹ *Joshua* 6:26.

³² 1 *Kings* 16:34.

³³ *Id.*

³⁴ *Joshua* 7:21.

³⁵ *Id.*

³⁶ *Id.* at 7:25.

³⁷ *Id.* at 11:28.

³⁸ *Id.* at 11:31-43.

³⁹ *Genesis* 12:29-30.

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *Id.* at 12:31-36.

⁴³ *Id.* at 6:5-9:22.

⁴⁴ 2 *Kings* 2:23-24.

appeared, and “tore forty-two of the children to pieces.”⁴⁵ The children’s crime was calling the prophet “Baldhead.”⁴⁶

Although the phrase “spare the rod, spoil the child,” is often stated as having a biblical source, actually, it appears nowhere in the Bible.⁴⁷ On the contrary, the Book of Proverbs includes many passages on the benefits of corporal punishment.⁴⁸ For example, Proverbs instructs parents to “[w]ithhold not chastisement from a boy, if you beat him with the rod, he will not die. Beat him with the rod, and you will save him from the nether world.”⁴⁹ This is because “[f]olly is close to the heart of a child, but the rod of discipline will drive it far from him.”⁵⁰ Finally, “He who spares his rod hates his son, but he who loves him takes care to chastise him.”⁵¹

Not all of the children who appear in the Bible were killed, mutilated, or mistreated. Moses seems to have done well growing up in Pharaoh’s household before leaving to escape punishment for killing an Egyptian construction foreman.⁵² In fact, children were special to Jesus.⁵³ While preaching in Judea, Jesus told his disciples to “[l]et the children come to me; do not prevent them, for the kingdom of God belongs to such as these. Amen, I say to you, whoever does not accept the kingdom of God like a child will not enter it.”⁵⁴ The Biblical civilizations, however, were not the only ancient societies to mistreat their children.⁵⁵

III. OTHER HISTORICAL EXAMPLES

“Until relatively modern times, children were the property of their parents. Parents, and especially fathers, made an initial decision

⁴⁵ *Id.* at 24.

⁴⁶ *Id.* at 23.

⁴⁷ JIM HILL & RAND CHEADLE, *THE BIBLE TELLS ME SO: USES AND ABUSES OF HOLY SCRIPTURE* 55 (1996). The following sections from Proverbs and Paul’s epistle to the Colossians are highlighted in Hill and Cheadle’s book. *Id.* Hill and Cheadle make reference to the King James version of the Bible, rather than the New American Bible which is used for the purpose of this article. *Id.*

⁴⁸ See *Proverbs* 22:15.

⁴⁹ *Id.* at 23:13–14.

⁵⁰ *Id.* at 22:15.

⁵¹ *Id.* at 13:24.

⁵² *Exodus* 2:11–15.

⁵³ See *Mark* 10:13–16.

⁵⁴ *Id.*

⁵⁵ Thomas, *supra* note 4, at 296. Archaeologists have found the bones of Canaanite newborns in jars located in the foundations of buildings. *Id.*

whether their offspring would survive at all.”⁵⁶ A father in ancient Rome held the power of life and death even over adult children.⁵⁷ Children could be sacrificed, abandoned, killed, mutilated, or sold into indentured servitude. Since abandoned children usually died, mothers (who were bound by the edict of the man of the house, and thus prevented from interfering with their husband’s order to abandon a baby), often arranged for the rescue of their infant children.⁵⁸ Legend states that Romulus and Remus, the founders of Rome, were abandoned and rescued by a she-wolf.⁵⁹

The Roman law of child raising was eventually reformed to a certain degree.⁶⁰ Infanticide was banned, but selling into slavery was not.⁶¹ No child could be killed before its third birthday.⁶² A father who killed a child for a crime could be banished.⁶³ Finally, the Emperor Hadrian introduced the concept that “*patria potestas in pietate debet, non in atrocitate, consistere*” (parental authority should be exercised in affection, not in atrocity).⁶⁴

The mutilation of children was often intended to serve a functional purpose. Children in ancient Rome, for example, were mutilated to evoke pity so that they could be more successful beggars.⁶⁵ This practice continues in Ethiopia to this day, where “handlers” of street children continue to maim or blind their charges to increase their profitability as panhandlers.⁶⁶

In ancient Greece, a father literally had the power of life and death over his children. In a ceremony called the Amphidromia, the father was forced to decide whether to receive his child into his family five days after the child’s birth.⁶⁷ Since the law stipulated that the inheritance was to be divided equally among all the male children, there was financial incentive to reject all but the first son so that the

⁵⁶ Margaret F. Brinig, *The Effect of Transactions Costs on the Market for Babies*, 18 SETON HALL LEGIS. J. 553, 560–61 (1994).

⁵⁷ Thomas, *supra* note 4, at 295 (citing WILLIAM BLACKSTONE, COMMENTARIES § 452 (Archhold et al. ed. 1898); G. PAYNE, THE CHILD THROUGHOUT HISTORY, 212–44 (1916)).

⁵⁸ *Id.* at 296.

⁵⁹ *Id.* at 297.

⁶⁰ *See id.* at 295.

⁶¹ *Id.* at 296.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 295.

⁶⁵ *Id.* This practice continued in early industrial England. *Id.*

⁶⁶ U.S. DEP’T OF STATE, ETHIOPIA HUMAN RIGHTS PRACTICES, 1995 § 5 (1996).

⁶⁷ *See* Thomas, *supra* note 4, at 294–95 (citing G. PAYNE, THE CHILD THROUGHOUT HISTORY, 191–98 (1916)).

family's property would remain intact after the death of the patriarch.⁶⁸ Girls were also frequently refused acceptance into the family.⁶⁹ If a child was rejected, it was abandoned, usually left by a slave or a midwife in a public place early in the morning in the hope that it would be rescued.⁷⁰ The slave would often leave a valuable object with the child to entice a rescue.⁷¹

Furthermore, under at least one legal system, children could apparently be used to satisfy damage claims in tort suits. The ancient Irish legal text, the *Cath Maige Rath*, includes a version of a reported case where the King of Ulster demanded the son of the King of Tara as damages in a tort suit.⁷² Congal Caech, the King of Ulster, was blinded in one eye after being stung by a bee from a hive owned by Tara's king, Domhnall Mac Aeda Meic Ainmirech.⁷³ The incident resulted in a lasting feud.⁷⁴

Although legal protection of children has increased significantly in recent years,⁷⁵ children throughout history were not completely unprotected.⁷⁶ Infanticide has long been banned under Jewish, Christian, and Muslim doctrines.⁷⁷ During the early days of Christianity, mothers who were forced to abandon their children usually left their babies at churches so that the priests would find them a home.⁷⁸ After

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 294-95 (citing G. PAYNE, *THE CHILD THROUGHOUT HISTORY*, 191-98 (1916)).

⁷² Anthony P. Callaghan, *The Whole World Was Forfeited for One Apple: A Discourse on Ancient Irish Law 12-13* (Jan. 1997) (unpublished manuscript, on file with the author). Callaghan's article is a brief narrative of the thousand year history of Brehon Law, the ancient Irish legal system. *Id.* Under Brehon Law, all persons were not equal. *Id.* Rather, "[e]ach class of person was distinguished by his 'honour price'—his or her status being equivalent to a measure of property. That measure, however, was not determined by what the person owned. It was calculated from that amount of property one could demand in damages if wronged by another." *Id.* For example, "among freemen, the measure of damages for a major offense ranged from forty-two milk [or milch] cows in the case of the king, to a yearling heifer in the case of a farmer's son." *Id.* at 5-6.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See generally Irene M. Rosenberg, *The Supreme Court's Constitutional Domestication of the Juvenile Courts*, 16 CHILDREN'S LEGAL RTS. J. 2 (1996).

⁷⁶ Bybee, *supra* note 9, at 2 (noting that "there have [always] been advocates for children. Their voices were often weak and went unheard, but changes have been made") *Id.*

⁷⁷ See Thomas, *supra* note 4, at 297. While infanticide was banned in Rome, infants were drowned, buried, and interred in buildings and dikes in China, India, Mexico, Peru, Germany, and Scandinavia. See *id.* at 296. In many of these countries, the practice of killing babies continued until the early part of this century. See *id.*

⁷⁸ *Id.*

saving a child from being mutilated by a beggar, St. Vincent de Paul established an institution to provide parents with an alternative to abandoning their children.⁷⁹

Under English common law, parents could be liable in tort if they physically abused their children.⁸⁰ Parents were criminally liable “if the punishment was viewed as grossly unreasonable, cruel and merciless, or when the child was permanently injured.”⁸¹

Throughout history, children have had relatively generous protections in the United States.⁸² During the colonial settlement of this country, fathers had a legal duty to educate and support their children, and if a child was a problem, the father was liable.⁸³ This rule was codified early on:

All Parents and Masters of Families are obliged by themselves or others, to Teach or Cause to be taught, all their Children, so much Learning as they may be able to read perfectly the English Tonge, [sic] upon penalty of 20 shillings for every Offence [sic].

All Masters of Families, are to teach their Children and Apprentices, the knowledge of the Capital Laws, on penalty of 20 shillings for every offence [sic].

Masters of Families are to Catechize or cause to be Catechized, their Children and Apprentices at least once a week, on the Grounds and Principles of Religion.⁸⁴

Even though parents were responsible for their own children, it was the community’s responsibility to enforce parental obligations.⁸⁵ This responsibility was encouraged through the passage of “Stubborn Child” laws, which allowed parents of incorrigible children to bring

⁷⁹ *Id.*

⁸⁰ Brian D. Gallagher, Note, *Damages, Duress, and the Discovery Rule, the Statutory Right of Recovery for Victims of Childhood Sexual Abuse*, 17 SETON HALL LEGIS. J. 505, 508 n.11 (1993).

⁸¹ *Id.* (citing Karla-Dee Clark, Note, *Innocent Victims and Blind Justice: Children’s Right to Be Free from Sexual Abuse*, 7 N.Y.L. SCH. J. HUM. RTS. 214, 222 (1990)).

⁸² See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 5 (1994); JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 1640–1981, at 13 (1988).

⁸³ MASON, *supra* note 82, at 5; SUTTON, *supra* note 82, at 13. Slave children were not entitled to education. MASON, *supra* note 82, at 5.

⁸⁴ MASON, *supra* note 82, at 6 (quoting AN ABRIDGEMENT OF THE LAWS IN FORCE AND USE IN HER MAJESTY’S PLANTATIONS 23 (R. Parker & R. Smith eds., 1704)).

⁸⁵ MASON, *supra* note 82, at 9.

them before a magistrate.⁸⁶ The court could then sentence the child to death.⁸⁷

IV. CHILDREN IN THE UNITED STATES

Positive developments in the protection of children in America have been coming at a furious pace over the past few years.⁸⁸ Twenty years ago, the Supreme Court determined that due to their lack of experience, vulnerability, and their limited knowledge, children must have a special place in our legal system.⁸⁹ For example, every state has made the sexual abuse of children a criminal offense.⁹⁰

Nevertheless, even American children have historically been subjected to indentured servitude, slavery, forced separation from their parents and even incarceration without trial.⁹¹ One commentator concludes, "Though there are reports of overly harsh treatment of children [throughout history], the subject was by no means a social issue [until recently] since children had virtually no rights."⁹²

⁸⁶ *Id.* at 11.

⁸⁷ For example:

[I]f a man have a stubborn or rebellious son, of sufficient years and understanding, vis. sixteen years of age, which will not obey the voice of his Father or the voice of his Mother, and that when they have chastened him will not harken unto them: then shall his Father and Mother being his natural parents, lay hold on him, and bring him to the Magistrates assembled in Court and testify unto them, that their son is stubborn and rebellious and will not obey their bound and chastisement, but lives in sundry notorious crimes, such a son shall be put to death.

MASON, *supra* note 82, at 11 (citing MASS. RECORDS 3:101 (1854)). Similar laws were passed in Connecticut in 1650, eighteen years later in Rhode Island, and eleven years later in New Hampshire. *Id.*

Even this country has a checkered history in regard to child welfare. *See infra* text accompanying notes 89–184.

⁸⁸ *See generally* JOAN GITTENS, POOR RELATIONS: THE CHILDREN OF THE STATE IN ILLINOIS (1994); MASON, *supra* note 82.

⁸⁹ *Belotti v. Baird*, 428 U.S. 132, 147 (1976).

⁹⁰ Ann Marie Hagan, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 358 (1990); *see also* Jon R. Conte, CHILD SEXUAL ABUSE: AWARENESS AND BACKLASH, 4 THE FUTURE OF CHILDREN 224, 224–50 (1994).

⁹¹ *See generally* GITTENS, *supra* note 88 (profiling the history of the state of Illinois's attempts to address the needs of poor, orphaned, neglected, and abused children); MASON, *supra* note 82; Janet L. Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILDREN'S LEGAL RTS. J. 1, 2 (1995) (describing genesis and development of the best interest standard in America); Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 84–87 (1994) [hereinafter *Indian Child Welfare Act*] (describing the wholesale separation of Native American children from their parents which inspired passage of the ICWA); Rosenberg, *supra* note 75 (outlining the evolution of children's constitutional rights in the United States).

⁹² Bybee, *supra* note 9, at 2.

A. *Indenture and Apprenticeships*

In the early stages of North American colonization, children were chattel.⁹³ The most common vehicle for owning a child's labor aside from parentage was indentured servitude, "a contract binding one person to work for another for a given length of time"⁹⁴ More than fifty percent of the settlers of the Chesapeake colonies were indentured children,⁹⁵ as were more than half of those who settled New England.⁹⁶ "Children were critical to the colonial labor force . . . often children were employed like adult workers, and many, if not most, did not remain in the custody of either parent until adulthood Slave children, who comprised about one-fifth of all children by the end of the eighteenth century, could be sold away from their parents at any time."⁹⁷ In early America, children were a fundamental economic asset to their fathers.⁹⁸ "In labor-scarce America [of the 1600's] the services or wages of a child over ten was one of the most valuable assets a man could have."⁹⁹

The record of involuntary conscription of child laborers in America is as long as the history of this country.¹⁰⁰ In 1620, the Virginia Company sent a letter to the British King's secretary complaining that a statute assigning "one hundred children out of [London's] superfluous multitude to be transported to Virginia . . . to be bound as apprentices"¹⁰¹ was being sabotaged by the unwillingness of the children to be drafted.¹⁰² The English Privy Council's response was to grant the company "permission to do whatever necessary to force the children into the ships,"¹⁰³ noting that:

if any of them shall be found obstinate to resist or otherwise to disobey such directions as shall be given in this behalf, we do likewise hereby authorize such as shall have the charge of

⁹³ See MASON, *supra* note 82, at 6.

⁹⁴ WEBSTER'S NEW 20TH CENTURY UNABRIDGED DICTIONARY 929 (2d ed. 1979).

⁹⁵ A.E. SMITH, COLONISTS IN BONDAGE 12 (1942).

⁹⁶ *Id.* at 31.

⁹⁷ MASON, *supra* note 82, at 2.

⁹⁸ *Id.* at 3.

⁹⁹ *Id.* at 14. Mothers did not share in this benefit and had correspondingly few obligations.
Id.

¹⁰⁰ See *id.* at 1.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

this service to imprison, punish, and dispose of any those children . . . and so ship them out for Virginia with as much expedition as may stand with conveniency.¹⁰⁴

As would be expected, this system was not healthy for the children involved.¹⁰⁵ Infant mortality in the Chesapeake colonies is estimated at between twenty-five and thirty-three percent.¹⁰⁶ In 1622, the London City Council was required to replace the indentured servants they had sent to Virginia in 1619 and 1622 since much of the older recruits had died off, presumably before they fulfilled their contractual obligations.¹⁰⁷

An indenture contract was more like a contract for goods than one for labor.¹⁰⁸ A master's right to the work of his indentured servants passed with his estate if the master died during the term of the contract.¹⁰⁹ The indenture's value to the estate was appraised according to its value relative to a known quantity of goods, such as tobacco.¹¹⁰ If the succession of the master's estate was unclear, a court would pass the indenture along in a way that was most beneficial to the estate, not the child.¹¹¹ Court approval was required if a master wished to sell a child's indenture during the master's lifetime.¹¹²

Aside from use of the child's labor, the master had wide discretion to punish the child.¹¹³ In Massachusetts during the Colonial era, one master who hung his charges by the heels was let off by the court with a mild warning, noting that:

[any person is justified] in giving meet correction to his servant, which the boy deserved . . . [while the court does] not approve of the manner of punishment given in hanging him up by the heels as butchers to beasts for the slaughter, and caution said [master] against such kind of punishment.¹¹⁴

¹⁰⁴ *Id.* at 2 (citing ACTS OF THE PRIVY COUNCIL OF ENGLAND 1916–19 (1930)).

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 32.

¹⁰⁸ *See id.* at 34–35.

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 34–35.

¹¹¹ *Id.* at 35.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 36 (citing RECORDS OF ESSEX COUNTY 8:302–03 (1921)).

Masters were not, however, entitled to kill the child through cruel treatment like whipping.¹¹⁵ Such action could make the master subject to criminal sanction, even capital punishment.¹¹⁶ Furthermore, in the case of voluntary servitude, parents could sue a master for abusing a child.¹¹⁷ Parents, on the other hand, could be held liable to the master if the child came home without fulfilling the contract.¹¹⁸

Children entered indentured servitude in a number of ways.¹¹⁹ Many were voluntarily placed in apprenticeships by parents who could not care for or train them.¹²⁰ The master was entitled to the child's services, and in return was required to train the child for a career.¹²¹ Such arrangements required court approval, and generally lasted until the child reached age twenty-one.¹²²

Involuntary indentured servitude was much less pleasant for the child, and was usually invoked to relieve the community of the financial burden of caring for poor children.¹²³ Children brought over from Europe to serve an involuntary indenture were not entitled to an education or to training.¹²⁴ The master was allowed to use the children's labor as was needed.¹²⁵ Upon the termination of the indenture, the master was required to send the child off with suitable clothing and provisions.¹²⁶

Illegitimacy was a fertile source for involuntary apprentices, since neither mother nor father had rights to a child born of unmarried parents.¹²⁷ Accordingly, the child's community was compelled to assume both financial responsibility and custody of the child.¹²⁸ Unmarried adults who might otherwise be tempted to engage in illicit sexual activity then pass the consequences on to their hometown were dis-

¹¹⁵ MASON, *supra* note 82, at 36.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 38-39.

¹¹⁸ *Id.* at 39.

¹¹⁹ *See generally id.* at 24-39.

¹²⁰ *See id.* at 36-39.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See id.* at 31-36.

¹²⁴ *Id.* at 34.

¹²⁵ *Id.* at 33.

¹²⁶ *Id.*

¹²⁷ MASON, *supra* note 82, at 24-25. English common law defined a child with unmarried parents, a bastard, as *filius nullius*, the child of no one. *Id.* A bastard had no right to inheritance, in opposition to the civil code, which allowed parents to legitimize their bastard offspring through marriage. *Id.*

¹²⁸ *Id.* at 25.

couraged by the passage of the English Poor Law Act of 1576.¹²⁹ This law criminalized sex outside of marriage, and required both mother and father to finance their bastard child's upbringing.¹³⁰ Illegitimate children were nonetheless bound in indenture until age twenty-one.¹³¹

Early on more invidious means of procuring child indentures existed.¹³² For instance, some European children were either tricked into signing for an indenture or were kidnapped by parties who then sold the indenture in America.¹³³ This practice was outlawed in 1664.¹³⁴

Nevertheless, numerous children remained indentured and escaping was very difficult.¹³⁵ Children were harshly punished if they tried to prematurely terminate the indenture unilaterally.¹³⁶ The typical penalty was to extend the indenture from three to five times the length of time the servant was absent.¹³⁷

B. *Indentured Servitude of Black and Mulatto Children*

During the gradual abolition of slavery in the northern American states prior to the Civil War, state statutes did not mandate the emancipation of adult slaves.¹³⁸ To do so would have been a violation of the masters' property rights.¹³⁹ Rather, the children of slaves were placed in a form of indentured servitude, and conditions were set for their eventual release.¹⁴⁰

Pennsylvania, the first state to pass such a law, set the term of indenture for the children of slaves at twenty-eight years, as opposed to the traditional freedom date of age twenty-one.¹⁴¹ Specifically, children born into slavery were required to serve their parents master "until such child shall attain unto the age of twenty-eight years, in the

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 32-33.

¹³⁴ *Id.* The practice of kidnapping children for involuntary service has not been fully eradicated. Kathy Evans, *State Kidnapping Children for Service in Sudan's Civil War*, DALLAS MORNING NEWS, Nov. 5, 1995, at 35A.

¹³⁵ See MASON, *supra* note 82, at 36.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

manner and on the conditions whereon servants bound by indenture for four years are."¹⁴²

Children of mixed race were treated differently.¹⁴³ Since there was an immense fear of miscegenation, as well as the economic losses that would occur if children of white masters and black slave women were given the father's free status, children of slave women were deemed slaves.¹⁴⁴

Children of black men and white women were neither true indentured servants nor slaves.¹⁴⁵ They were held in their masters' service until age thirty-one, as were their children.¹⁴⁶ The state of Virginia codified this rule as follows:

[W]here any female mulatto, or indian [sic], by law obliged to serve 'till [sic] the age of thirty or thirty-one years, shall during the time of her servitude, have nay children born of her body, every such child shall serve the master or mistress of such mulatto or indian [sic], until it shall attain the same age the mother of such child was obliged by law to serve unto.¹⁴⁷

It is unclear whether these quasi-indentured servants had the right to be educated by their masters, or what their rights were upon release from indenture.¹⁴⁸

C. *Slavery*

In discussing the role of child laborers in early America, one commentator noted:

[There is a] clear continuum from indentured child servants and apprentices to child slaves. All of these children were essential elements of the labor force and all were under the control of masters who had almost unlimited rights to the custody and control of their persons. With slave ownership as with contracts of indenture, natural parents forfeited all legal

¹⁴² *Id.* (citing *An Act for the Gradual Abolition of Slavery*, PA. STAT. AT LARGE § 881 (1780)).

¹⁴³ *See id.* at 41.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 41-42 (citing VA. STAT. § 4:433 (1820)).

¹⁴⁸ *See id.*

rights to their children . . . masters of slave children could sell the children without legal restriction¹⁴⁹

Although in some ways related to indentured servitude, slavery was a distinct form of institutionalized child abuse.¹⁵⁰ There were no mutual obligations between master and laborer as there were in the basic indenture contract.¹⁵¹ The master was not required to educate the slave child, the parents had no legal recourse if the master harmed the child, and the child was not freed at the end of a period of years.¹⁵²

An indenture contract was a labor contract with heavy overtones of property ownership while slavery was a form of pure property ownership.¹⁵³ Indentured contracts were not race specific while slavery applied only to blacks.¹⁵⁴

There is surprisingly little written about children and slavery. Children, as with all slaves, could be sold at any time.¹⁵⁵ In the North there was less of a need for large slave populations, so children were sold frequently to avoid the expense of having to raise them.¹⁵⁶ Sojourner Truth, in a speech before a women's rights convention in 1851, told the assembled crowd that she had "borne thirteen children, and seen most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me!"¹⁵⁷ Northern slave children were even given away if a buyer could not be found.¹⁵⁸

In his 1845 autobiography, *Narrative of the Life of Frederick Douglass, an American Slave*, Douglass tells of being:

[s]eparated [from my mother] when I was but an infant—before I knew her as my mother. It is a common custom in the part of Maryland from which I ran away, to part children from their mothers at a very early age. Frequently, before the child had reached its twelfth month, its mother is taken off from it, and hired out on some farm a considerable distance off, and the child is placed under the care of an old woman, too

¹⁴⁹ *Id.* at 39–40.

¹⁵⁰ *See id.* at 40–41.

¹⁵¹ *See id.*

¹⁵² *Id.*

¹⁵³ *See id.* at 45–47.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* In the South, where large slave populations were profitable, slave children were rarely separated from their mothers. *Id.* at 46.

¹⁵⁷ KENNETH C. DAVIS, *DON'T KNOW MUCH ABOUT THE CIVIL WAR* 105 (1996).

¹⁵⁸ *See* MASON, *supra* note 82, at 46.

old for field labor. For what this separation is done, I do not know unless it be to hinder the development of the child's affection towards its mother, and to blunt and destroy the natural affection of the mother for the child. This is the inevitable result¹⁵⁹

Since few slaves could read and write, first person accounts such as Douglass's are extremely rare.¹⁶⁰ One rare account is *The History of Mary Prince, A West Indian Slave, Related by Herself*.¹⁶¹ After a vividly painful depiction of her and her sisters being sold at a young age while her mother watched, Prince relates how:

[t]he next morning my mistress set about instructing me in my tasks, she taught me to do all sorts of household work And she taught me [how can I ever forget it] more things than these; she caused me to know the exact difference between the smart of the rope, the cart-whip, and the cow skin, when applied to my naked body by her own cruel hand

To strip me naked—to hang me up by the wrists and lay my flesh open with the cow-skin was an ordinary punishment for even a slight offense. My mistress often robbed me too of the hours that belong to sleep. She used to sit up very late, frequently even until morning; and then I had to stand at a bench and wash during the greater part of the night, or pick wool, and cotton; and often have I dropped down overcome by sleep and fatigue, 'til [sic] roused from a state of stupor by the whip, and forced to start up to my tasks.¹⁶²

A slave child's only function was to provide labor.¹⁶³ Some slave children continued in this role even after being freed from their masters.¹⁶⁴ During the Civil War, at least one Union company used black children to haul wood, then tortured the children for entertainment when the work was done.¹⁶⁵ The company's sergeant locked the children in a dark storage room which caused "[s]uch a yell of terror

¹⁵⁹ DAVIS, *supra* note 157, at 80–81 (citing FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (1845)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 60–63.

¹⁶² *Id.* at 61–62.

¹⁶³ *Id.* at 45–46.

¹⁶⁴ See REID MITCHELL, CIVIL WAR SOLDIERS: THEIR EXPECTATIONS AND THEIR EXPERIENCES 122 (1988).

¹⁶⁵ *Id.*

as they set up, Pandemonium never heard! They shrieked, groaned, yelled, prayed, and pulled their wool."¹⁶⁶ After allowing the children to escape, "to atone for our fun, I ordered Ben Mercer, the cook, to give them a pot of beans that he had burned too much for us to eat."¹⁶⁷ This supplied further entertainment for the Union troops, as the children burned their hands on "smoking hot beans," and shrieked in pain.¹⁶⁸

Other accounts include a black child who was tossed in a blanket by Union troops until freed by an officer.¹⁶⁹ In another instance, a group of soldiers from Indiana "tipped a child into a hogshead of molasses, 'he nearly drowned before he could get it out of his nose and mouth.'"¹⁷⁰ Even northern civilians got into the act, as many blamed blacks for the war.¹⁷¹ During the Draft Riots in New York City on July 13, 1863, the rioters attacked an orphanage for black children, among other targets.¹⁷²

Unlike other historical instances of either wartime cruelty or racism, the activities of soldiers against black children during the Civil War was widespread enough to become a temporary institution. Children were a cheap source of entertainment and labor, and they were too small to fight back. These remain the most common reasons for communities to abuse their children.¹⁷³

D. Children as Wage Earners

With the eradication of slavery and indenture, child labor was no longer free but it still came cheap.¹⁷⁴ Children came to work in factories and mines for a fraction of what their elders earned.¹⁷⁵ Often, the child's work was much more dangerous than that performed by the older laborers.¹⁷⁶ In the late 1800's during the anthracite boom in

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 122-23.

¹⁷⁰ *Id.*

¹⁷¹ DAVIS, *supra* note 157, at 316.

¹⁷² *Id.*

¹⁷³ Contemporary Asian rug manufacturers prefer to use children to operate the looms because their small fingers tie better knots and they are a cheaper source of labor than adults. See *infra* text accompanying notes 207-46.

¹⁷⁴ See Gene Bylinsky, *Grand Relics of the Industrial Past: America Became Rich and Mighty When These Machines and Factories Hummed . . .*, FORTUNE, May 27, 1996, at 102; Karl Zimmermann, *Mining the Hills of Pennsylvania*, WASH. POST, Sept. 18, 1994, at E1.

¹⁷⁵ See Zimmermann, *supra* note 174, at E1.

¹⁷⁶ See Bylinsky, *supra* note 174, at 102.

Northeast Pennsylvania, many children were employed as Breaker Boys, a “precarious job of separating the coal from the rock and other residuals as it passed by them on conveyor belts. For their efforts, they received 13 cents an hour.”¹⁷⁷ Boys, who went in to the mines at age six,¹⁷⁸ had to compete with men in their forties who were no longer serviceable miners due to injury or black lung.¹⁷⁹

The work of a Breaker Boy was in many respects as difficult as that of a miner. “Photos of their hands, bloodied from endlessly separating slate from coal, helped fan sentiment for the nationwide banning of child labor.”¹⁸⁰ The works of the photographer who took those pictures, Lewis Hine, were recently reissued.¹⁸¹ “Hine’s photographs . . . are as shocking now as they were when he first stunned the nation with pictures of young Breaker Boys at a coal mine, their faces black with dust”¹⁸² Recognition of the plight of the Breaker Boys eventually helped lead to the outlawing of child labor.¹⁸³

V. CONTEMPORARY MECHANISMS OF INSTITUTIONAL CHILD ABUSE AND ITS ECONOMIC BENEFITS TO THE ABUSERS

Research has uncovered few instances where institutionalized child abuse was the result of either misguided beneficence or mere cruelty.¹⁸⁴ Rather, children historically suffer when viewed as an economic asset.

¹⁷⁷ Don Stancavich, *Underground Adventure: Tour Mines Facets of Coal Industry*, BERGEN RECORD (N.J.), June 9, 1996, at T3 (describing a visit through Lackawanna Coal Mine Tour in McDade Park, a retired anthracite mine that is now a state park and National Historic Site in Stancavich’s home town, Scranton, Pennsylvania). The miners, who were all adult men, were paid twenty-one cents per hour. *Id.*

¹⁷⁸ Bylinsky, *supra* note 174, at 102; Virginia S. Wiegand, *Pennsylvania Miner Memorial to Remember Coal’s Victims*, CHARLESTON GAZETTE (W.Va.), Aug. 13, 1994, at 10A (describing incident where fourteen year-old Breaker Boy was killed by coal cart); Zimmermann, *supra* note 174, at E1 (noting that “few regions have been as inextricably linked with a single industry . . . as northern Pennsylvania has with mining anthracite”).

¹⁷⁹ Frank Whelan, *Myths & Mayhem: Molly McGuire Exhibit Explores 19th Century Coal Region Strife*, MORNING CALL (Allentown, Pa.), Nov. 2, 1995, at D1 (describing an anthracite region museum exhibit dedicated to the Molly McGuires, Irish labor organizers who were executed for murder in the 1870’s and 1880’s); *see also* Carroll v. Commonwealth, 84 Pa. 107 (1889) (“The Molly McGuire Case”).

¹⁸⁰ Whelan, *supra* note 179, at D1.

¹⁸¹ *See, e.g., For Young Readers*, BUFFALO NEWS, Feb. 26, 1995, at 7 (reviewing RUSSELL FREEDMAN, LEWIS HINE AND THE CRUSADE AGAINST CHILD LABOR (1995)).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See* Gallagher, *Indian Child Welfare Act*, *supra* note 91, at 84–87 (discussing that well-meaning missionaries and others often kidnapped American Indian children in an effort to “save” them).

Juanita was a payment to the mountain deity so that it would leave her people alone.¹⁸⁵ Abraham was willing to sacrifice Isaac in return for God's favor.¹⁸⁶ Several of the biblical kings previously discussed exchanged their children for military victory.¹⁸⁷ God Himself offered His Son for the salvation of His people,¹⁸⁸ albeit with Jesus's consent.¹⁸⁹ This tradition continues. When children are chattel, they suffer.

A. *Child Soldiers*¹⁹⁰

The United Nations Convention on the Rights of the Child states that "parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."¹⁹¹ This seemingly indisputable imperative is often ignored.

Despite the "universally held ideal that children should not be involved in armed combat," children have been employed as combatants in alarming numbers.¹⁹² During wartime, soldiers are a non-renewable resource. Since trained fighters have to be rationed, children are

¹⁸⁵ See *supra* text accompanying notes 2–8.

¹⁸⁶ In *Romans*, Abraham's behavior toward his son is described as follows:

Indeed if Abraham was justified on the basis of his works, he has reason to boast; but this was not so in the sight of God. For what does the scripture say? "Abraham believed God, and it was credited to him as righteousness." *A worker's wage is credited not as a gift, but as something due. But when one does not work, yet believes in the one who justifies the ungodly, his faith is credited as righteousness.*

Romans 4:1–5 (emphasis added).

¹⁸⁷ See *supra* text accompanying notes 13–45.

¹⁸⁸ Paul described the process as follows:

And all this is from God, who has reconciled us to himself through Christ and given us the ministry of reconciliation, namely, God was reconciling the world to himself in Christ, not counting their trespasses against them and entrusting to us the message of reconciliation.

2 Corinthians 5:18.

¹⁸⁹ While in the garden of Gethsemane on the night of his arrest, Jesus asked His Father to "if possible, let this cup pass from me; yet, not as I will, but as you will." *Matthew* 26:39.

¹⁹⁰ In reviewing the literature concerning children and war, it is difficult to separate the officially sanctioned acts of brutality toward children from the individual acts of cruelty from the instances of children caught in the crossfire. Children, as part of the general civilian population, are often subjected to the same dangers as adults in war zones. See, e.g., *Former 'Comfort Woman' Testifies in Court*, DAILY YOMIURI, July 20, 1996, at 2 (describing a recent suit brought against the Japanese government by Chinese and Filipino women who were forced into prostitution as young girls by the Japanese during World War II); Leigh Montville, "First in War . . ." *SPORTS ILLUSTRATED*, July 22, 1996, at 182 (discussing an incident where two hand grenades exploded in a kindergarten during an uprising in the former Soviet province of Ingush, near Chechnya).

¹⁹¹ Convention on the Rights of the Child, 1989, art. 38, 28 I.L.M. 1448. This section goes on to stipulate that "[i]n recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest." *Id.*

¹⁹² *Sadeghi v. INS*, 40 F.3d 1139, 1145 (10th Cir. 1994) (Kane, J., dissenting) (citing Colleen

an attractive source of labor for jobs like clearing minefields that do not require skill yet are too dangerous for adults.¹⁹³

Child soldiers were also prevalent in the American Revolution and the Civil War.¹⁹⁴ One historian has estimated that approximately ten thousand underage troops served in the Union army, while children made up between ten and twenty percent of the Confederate service.¹⁹⁵ Johnny Clem, who was captured twice by the Confederate army, began serving prior to his tenth birthday.¹⁹⁶ He became a celebrity after he was able to escape his first capture at the Battle of Chickamauga when he managed to kill his captor, a Confederate Colonel, with a sawed off shotgun, then hid among a pile of wounded and dead soldiers.¹⁹⁷ After that incident, which occurred when Clem was either eleven or twelve years old, he was promoted and named to the personal staff of General George H. Thomas.¹⁹⁸ During the American Revolution, the U.S. Navy employed young boys as "powder monkeys," whose job was to bring powder to the ship's cannons.¹⁹⁹

During the Iran-Iraq War, children were encouraged to enlist in the army to become "martyr[s] for God."²⁰⁰ The large number of child recruits was evinced by their representation in Iraqi prisoner of war camps.²⁰¹ During the war, "Iranian authorities [used] their people,

C. Maher, Note, *The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare*, 9 B.C. THIRD WORLD L.J. 297, 300 n.5 (1989)). This is especially true during protracted, expensive wars such as the Iran-Iraq war in the 1980's, or any of the several African civil wars currently being fought. See, e.g., Peter Capella, *Death of Children Becoming War Aim*, LONDON TIMES, Dec. 12, 1995, available in 1995 WL 11878544; Kathy Evans, *State Kidnapping Children for Service in Sudan's Civil War*, DALLAS MORNING NEWS, Nov. 5, 1995, at 35A; Tim McGirk, *In Sri Lanka, Children as Young as 11 Are Being Recruited as Soldiers to the Fanatical Tamil Tigers*, INDEPENDENT, Nov. 12, 1995, at 2; Luis Okamba, *Angola-Politics: Child Soldiers Die in a War No One Talks About*, INT'L PRESS SERV., June 8, 1996, available in 1996 WL 10242958; Edward O'Loughlin, *At Eight They Join in Rapes and are Majors Who Pull Rank in Sierra Leone and Liberia*, IRISH TIMES, July 26, 1995, at 6; Liz Sly, *Child Soldiers: The Scary Truth, Many Learned to Enjoy Killing*, CHI. TRIB., Aug. 9, 1995, at 13; Liz Sly, *War Orphans Find "Family" in Army*, CHI. TRIB., Aug. 9, 1995, at 13.

¹⁹³ *Tamil Rebels Use Children as Cannon Fodder*, AGENCE FRANCE PRESSE, July 2, 1995, available in 1995 WL 7824600.

¹⁹⁴ DAVIS, *supra* note 157, at 333.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 334.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 53.

²⁰⁰ *Sadeghi v. INS*, 40 F.3d 1139, 1140 (10th Cir. 1994) (involving petition for asylum of Iranian immigrant who had left his country to avoid arrest for advising a fourteen year-old boy not to enlist in the army).

²⁰¹ *Id.* at 1146 (Kane, J., dissenting).

particularly the younger citizens, to clear the mine fields with their bodies and sacrifice[] themselves."²⁰²

There is a growing effort among world leaders to address the disturbing issue of children in combat. In July, the United Nations International Children's Emergency Fund (UNICEF) organized a summit of African leaders in Cameroon to address a broad spectrum of problems faced by children in war zones.²⁰³ The leaders were addressed by several children, including one fourteen year-old soldier who admitted fighting and killing since age ten.²⁰⁴ The summit resulted in a resolution to ban child soldiers, and a promise from the Cameroonian President to seriously discuss adoption of the Convention on the Rights of the Child.²⁰⁵

B. *Children in Factories*²⁰⁶

Child labor in factories is a particular form of institutionalized child abuse that has received a great deal of media attention.²⁰⁷ Revelations that clothing lines endorsed by Kathie Lee Gifford and Michael Jordan, among others, were manufactured using child labor has inspired protests and congressional hearings.²⁰⁸ While work aimed at abolishing child labor has been going on for some time, the recent

²⁰² *Id.* at 1145 (Kane, J., dissenting).

²⁰³ Vincent t'Sas, *War Children Blame African Leaders for Their Plight*, REUTERS WORLD SERV., July 9, 1996, available in LEXIS, News Library, Curnws File.

²⁰⁴ *Summit Leaders Gather Amid Stifling Security*, BERGEN REC., July 8, 1996, at A12.

²⁰⁵ t'Sas, *supra* note 203.

²⁰⁶ For a general overview of international child labor, see generally Michael Bonnet, *Child Labor in Africa*, 132 INT'L LAB. REV. 371 (1993); Timothy Brown et al., *The Exploitation of Child Labor: An Intractable International Problem?*, 16 LOY. L.A. INT'L & COMP. L.J. 567 (1994); Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361 (1995); Linda Golodner, *The Children of Today's Sweatshops*, 73 BUS. & SOC. REV. 51 (1990); Susan E. Gunn & Zenaída Ostos, *Dilemmas in Tackling Child Labour: The Case of Scavenger Children in the Philippines*, 131 INT'L LAB. REV. 629 (1992); Maureen Moran, Note, *Ending Exploitative Child Labor Practices*, 5 PACE INT'L L. REV. 287 (1993); Kathleen Forrestier-Walker, *Death and Disease for India's Working Children*, NEW SCIENTIST, Oct. 9, 1986, at 18; Dinah Lee & Rose Brady, *Long, Hard Days—at Pennies an Hour*, BUS. WK., Oct. 31, 1988, at 46; *Suffer the Little Children's Goods*, ECONOMIST, Aug. 14, 1993, at 18.

²⁰⁷ *Horror Stories of Child Labor Aired*, BURLINGTON CO. TIMES (N.J.), June 12, 1996, at 2; Editorial, *Keep the Heat on Sweatshops*, CHI. SUN-TIMES, July 25, 1996, at 41; Mary Ellen Podmolik, *Groups Picket Nike Site Here, Seek Changes at Shoe Plants*, CHI. SUN-TIMES, July 23, 1996, at 44 (describing protest by a coalition of human rights groups in front of Nike Town in Chicago).

²⁰⁸ *Id.* To combat the bad publicity she received for being associated with child labor and sweatshops, Gifford had her husband distribute \$9000 to workers in a New York sweatshop, and joined Labor Secretary Robert Reich when he announced a new federal anti-sweatshop initiative. *Kathie Lee and Jacqueline Smith Defend Clothing Lines* (CNN television broadcast, May 31, 1996).

media attention surrounding the allegations against Gifford has fueled an intensified effort.²⁰⁹

The first steps toward eradicating child labor in the West were taken within the last hundred years.²¹⁰ “Germany, Austria, the Swiss Federal Government, Denmark, Norway, and Russia in the 1870’s, 80’s, and 90’s promulgated regulations prohibiting Sunday employment—in some cases only for women and children”²¹¹ Similarly, the Sunday labor of children in factories was banned in Britain by the Factory and Workshop Act of 1901.²¹² In 1898, the U.S. Supreme Court characterized the status of child labor laws in this country by noting that “State laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some states, they have been generally upheld.”²¹³ The final steps toward banning child labor in the United States were enacted approximately sixty years ago.²¹⁴

While child labor has largely been eliminated in the United States and Western Europe, the number of child laborers in developing countries is staggering.²¹⁵ The International Labor Organization estimates that over 200 million children are employed in conditions that are “dangerous, unhealthy, and often inhumane.”²¹⁶ In India alone, approximately 50 million children between the ages of ten and fourteen work in factories that manufacture shoes, matches, clothing, and rugs.²¹⁷ This number is expected to reach 70 million in the next few years as India’s population of destitute families and the demand for cheap products continue to swell exponentially.²¹⁸

In some countries, nearly twenty percent of all children work outside the home.²¹⁹ The United Nations, noting a lack of reliable

²⁰⁹Ruth Ann Leach, Editorial, *Kathie Lee Gifford Hit Unfairly With Accusations of Child Labor Violations*, NASHVILLE BANNER, May 7, 1996, at A7.

²¹⁰See *McGowan v. Maryland*, 366 U.S. 420, 483 (1961).

²¹¹*Id.*

²¹²*Id.* at 478.

²¹³*Holden v. Hardy*, 169 U.S. 366, 395 (1898).

²¹⁴Joel D. Joseph, Editorial, *Are Americans Aiding, Abiding Child Slavery?*, TULSA WORLD, May 26, 1996, at G6.

²¹⁵Molly Moore, *Factories of Children: Youth Labor Force Growing in Asia to Meet Export Demand, Help Families*, WASH. POST, May 21, 1995, at A1.

²¹⁶*Id.*

²¹⁷*Id.*

²¹⁸*Id.*

²¹⁹*Id.*

statistics, has stated that the number of child laborers throughout the world "could well be in the hundreds of millions."²²⁰ Many of the child laborers are as young as five years old.²²¹ The South Asian Coalition on Child Servitude, a children's rights group, estimates that approximately 300,000 children between the ages of six and fourteen are employed by carpet manufacturers.²²² Asia's hand woven carpet industry is considered to be the most egregious exploiter of child labor in the world.²²³

In Pakistan, where approximately half of all soccer balls sold in the United States are manufactured, about a quarter of these workers are children.²²⁴ In other words, that means that the balls are being assembled by workers younger than the children who use them in America.²²⁵ Reebok has responded to these findings by announcing stricter monitoring of its suppliers, and by building a new manufacturing facility where workers must be at least fifteen years old.²²⁶

In a *Washington Post* article, reporters interviewed an eleven year-old carpet worker who had been working ten-hour days in a mud hut for the past two years.²²⁷ He earned about twelve cents a day, and his labor was used to pay off the interest on a loan his parents had taken from the owner of the loom.²²⁸ A ten year-old boy who had just been rescued from a carpet manufacturer said he was sold by his father for about twenty dollars at age eight, but never received any wages in his year and a half working at a loom.²²⁹ When another reporter began taking pictures of a factory where children were manufacturing clothing allegedly intended for K-mart and Wal-Mart, the foreman ordered the children to hide under the sewing tables.²³⁰

Arguably, the most notorious individual case of child exploitation involves Iqbal Masih, who was sold by his parents to a Pakistani rug-maker for less than sixteen dollars when he was four years old.²³¹ He

²²⁰ *UN Blasts Widespread Child Labor*, CHI. TRIB., June 10, 1996, at 3.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Joseph, *supra* note 214, at G6.

²²⁶ Dean Lunt, *Reebok Takes Steps Against Child Labor: Will Monitor Pakistan Soccer Ball Plant*, PATRIOT LEDGER, June 13, 1996, at 29.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Joseph, *supra* note 214, at G6.

was shackled to a loom, where he tied knots for sixteen hours a day.²³² He managed to obtain his freedom by age twelve, and became a prominent spokesman for the anti-child labor crusade.²³³ In November of 1994, Masih addressed the International Labor Conference in Stockholm.²³⁴ The following month, he received a Youth Action award in Boston.²³⁵ Three months later, he was assassinated in his hometown by a group identified by human rights advocates as "the carpet mafia."²³⁶

The problem, however, is often not the enactment of laws, but their enforcement.²³⁷ According to Indian Finance Minister Manmohan Singh, "We have laws [prohibiting child labor], but the government has found it's not always possible to enforce them in a country as large as India."²³⁸ The situation is similar in other countries. In Ethiopia, for example, a national statute forbids employment of children under fourteen, and prohibits children from working more than seven hours a day.²³⁹ Nevertheless, large numbers of children continue to work in remote areas or as peddlers.²⁴⁰

In the words of U.S. Representative Chris Smith (R-NJ), "The exploitation of children is made possible largely by the things that make it reprehensible Children are vulnerable and largely dependent on adults for sustenance and protection."²⁴¹ Nevertheless, the circumstances that make child labor attractive can be used to eliminate it.²⁴² In one instance, a British chain pulled lines of clothing off the racks after allegations that they were made with child labor.²⁴³ Moreover, the backlash against child labor sparked by the Kathie Lee episode inspired K-mart and Wal-Mart to initiate inspection procedures

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* (quoting Eshan Khan, Chairman of the Bonded Labor Front, a group fighting to eliminate child labor). As of this writing, the crime remains unsolved. Lewis Rice, *Quincy Kids Take Fight to Congress*, PATRIOT LEDGER, May 13, 1996, at 1.

²³⁷ See Moore, *supra* note 215, at A1.

²³⁸ *Id.*

²³⁹ U.S. DEP'T OF STATE, *supra* note 66, at §5 (d).

²⁴⁰ *Id.*

²⁴¹ *Horror Stories of Child Labor Aired*, *supra* note 207, at 2.

²⁴² Joseph, *supra* note 214, at G6. Joel D. Joseph, the Chairman of the Made in the USA Foundation, encourages people to boycott products made in India, Pakistan, Nepal, Bangladesh, Malaysia and Indonesia, since products from those countries are likely to have been made by "a 10-year-old prisoner of a feudal manufacturer." *Id.*

²⁴³ John M. Brown, *M&S Withdraws Wrongly Labelled Clothes*, FINANCIAL TIMES, Jan. 5, 1996, at 6.

to ensure that they not conduct business with apparel manufacturers who use child labor.²⁴⁴

Just as economic pressure may compel destitute families to sell their children, economic pressure may also compel manufacturers and sellers to stop using child labor or vending goods made with child labor. As Robert Hall, Vice President of the National Retail Foundation stated in his testimony before the House Subcommittee on International Operations and Human Rights, retailers work to correct problems with child labor since it is in their best interest to protect the good will of their companies.²⁴⁵

VI. CONTINUING INSTANCES OF INSTITUTIONAL ABUSE: SURGICAL MUTILATION OF GIRLS AND CHILD BRIDES

Some forms of institutionalized child abuse does not seem to benefit either the abuser or the child. A form of genital mutilation of young women, called "clitoridectomy" is "the ritual of female circumcision . . . practiced for centuries in some Muslim countries. Most women are left painfully scarred, and many have died."²⁴⁶ The Muslim religion does not require that this procedure be performed on girls, yet the practice remains widespread as a means to ensure chastity and fidelity.²⁴⁷

According to the American Medical Association (AMA), between 80 and 110 million young women have been mutilated in this fashion.²⁴⁸ The procedure, which is often done with crude instruments and without anesthesia, is described by the AMA as "chilling."²⁴⁹

Although the procedure is usually performed by a midwife or a barber, the surgery is extremely dangerous even when performed by a physician.²⁵⁰ This is evinced by the recent death of a fourteen year-old Egyptian girl, who died from a hemorrhage after having been circumcised by a medical doctor.²⁵¹

²⁴⁴ *Wal-Mart, K-Mart Unveil Anti-Sweatshop Measures*, REUTERS FIN. REP., July 16, 1996, available in LEXIS, News Library, Curnws File.

²⁴⁵ *Horror Stories of Child Labor Aired*, *supra* note 207, at 2.

²⁴⁶ Laura Sydell, *Pulitzer Winners Include First for a Black Composer* (National Public Radio Morning Edition broadcast, Apr. 10, 1996) (announcing the award of a Pulitzer Prize to Stephanie Welsh for her work documenting the practice with photographs).

²⁴⁷ *Female Genital Mutilation*, 38 AM. MED. NEWS 25 (1995), available in 1995 WL 10008684.

²⁴⁸ *Id.*

²⁴⁹ *Id.* For that reason, the description is not included. *Id.*

²⁵⁰ See *Egyptian Girl Dies After Circumcision*, CHI. SUN-TIMES, Aug. 26, 1996, at 14.

²⁵¹ *Id.*

In March 1995, the U.S. State Department declared that despite governmental discouragement, genital mutilation remains widespread in Ethiopia, a country where "abuse of children continue[s] to be a serious problem."²⁵² The procedure is usually performed on the seventh day after birth, although the most extreme forms of female genital mutilation, infibulation, can be performed any time between age eight and the onset of puberty.²⁵³

This is part of a pattern of "societal abuse against young girls" in Ethiopia.²⁵⁴ Girls as young as nine are made child brides in arranged marriages.²⁵⁵ Early marriage, genital mutilation, and other factors combine to give Ethiopia an "extremely high maternal mortality rate."²⁵⁶

In India and other Asian countries, girls are subject to arranged marriages, where they then become a slave for the mother-in-law.²⁵⁷ Nine year-old girls in the Philippines are sold as prostitutes.²⁵⁸

Loyola University of Chicago Law Professor Diane Geraghty recently traveled to Ethiopia to teach at a clinical education seminar for law professors, and to study that country's juvenile court system.²⁵⁹ While there, she managed to get governmental permission to inspect what she described as a youth detention center.²⁶⁰ Despite one's expectation that the center's staff would be on their best behavior in the acknowledged presence of American observers, Professor Geraghty witnessed guards beating two small children, apparently for attempting to escape.²⁶¹ All these stories are just illustrations of the continuing prevalence of institutional child abuse throughout the world.

²⁵² U.S. DEP'T OF STATE, *supra* note 66, at Introduction.

²⁵³ *Id.* "Infibulation" is defined as "sitching together the lips of the vulva or of the prepuce in order to prevent copulation." STEDMAN'S MED. DICTIONARY 705 (4th ed. 1992). While research failed to uncover any modern instances of this procedure being performed on boys, during the Victorian era, boys were subject to a having their foreskin closed with clasps or staples in order to prevent erection. HILL & HEADLE, *supra* note 47, at 48.

²⁵⁴ U.S. DEP'T OF STATE, *supra* note 66, at Introduction.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Dottie Lamm, *What World Will We Leave Our Daughters?*, DENVER POST, Sept. 3, 1995, at D4.

²⁵⁸ *Id.*

²⁵⁹ M.A. Stapleton, *A Land Where Everything Old Waits to Become New*, CHI. DAILY L. BULL., July 26, 1996, at 3.

²⁶⁰ Interview with Diane Geraghty, Professor of Law and Faculty Director of the CIVITAS ChildLaw Center at Loyola University Chicago School of Law, in Chicago, Ill. (Aug. 26, 1996).

²⁶¹ *Id.*

VII. CONCLUSION

In discussing the discovery of Juanita's grave, Jose Chaves, Archaeology professor at Santa Maria Catholic University in Arequipa, Peru, was quoted as saying that while her execution "sounds brutal . . . every culture has its own way of life. Our way of life is also brutal Perhaps more so because we kill in huge quantities and in more sophisticated ways."²⁶² While his second point may be true, his first point is arguably not. Although "[c]ultural relativists may embrace the abstraction that we shouldn't pass judgment on practices that aren't acceptable within our own culture," there are some methods of child raising that are clearly appalling and must be condemned.²⁶³ The practices described above, such as blinding a child to make him a better beggar, can never be explained or excused.

Juanita is typical of many of the children abused by their communities throughout history. Her sense of duty would not allow her to disappoint her elders, yet her elders let her down. Whatever the archeological significance of the discovery of her grave, one cannot help thinking that we would all be better off if she got the chance to play, learn, have fun and grow old. The same is true for the children of American slaves, just as it is for a nine year-old boy who goes off to a rug manufacturer to pay his parents' debts. The attempts of scholars and writers to make Juanita's death sound important ring hollow. She was a fourteen year-old girl, filled with whiskey and left to die on a mountain. Five hundred years later, she is stuck in a refrigerator, while doctors pull her body apart. Her murder served no purpose.

Advances have been made. In most countries children go to school; they no longer go to the coal mine, are sold, or are sacrificed to appease angry gods. In some areas, however, these practices persist and need to be eliminated.

The first step towards eliminating institutionalized child abuse is recognition that the problem exists. Approximately one hundred years ago, the public reaction to the photographs of Lewis Hine encouraged the American public to demand passage of child labor laws. Earlier this year, a talk show host ignited national concern to the problem of child laborers in third world countries. Once public attention was focused, Wal-Mart, K-mart and Reebok instituted procedures to abolish those products from their shelves.

²⁶² Otis, *supra* note 4, at B19.

²⁶³ See, e.g., *Female Genital Mutilation*, *supra* note 247, at 25.

Eliminating the economic incentives to abuse children is another important step. It is reasonable to believe that economic pressure would work to keep clothing manufactured by children out of American stores. This response may be overly simplistic, but it is start.

The laws are already on the books. Their enforcement must be made an economic necessity in a way that will not stimulate new problems. For example, any policy to enforce child labor laws should be supported by a program to place excess children with families looking to adopt.

In other cases, as with genital mutilation, the issue is more difficult. There is no religious or economic reason for the procedure, but some people do it anyway. Public education programs, such as the one instituted in Egypt, need to be encouraged and financed whenever possible.

Perhaps the most important needed development is to adopt Jesus's perspective on children. When His disciples tried to keep parents from bringing their children to Jesus for His blessing, He rebuked them, saying that "the kingdom of God belongs to such as these."²⁶⁴ This is the most important lesson we all can learn when it comes to children.

²⁶⁴ *Luke* 2:16.