

*Section I*

---

# FOUNDATIONS OF MATERNAL AND CHILD HEALTH



---

# CHILDREN'S RIGHTS AND DISTRIBUTIVE JUSTICE IN MATERNAL AND CHILD HEALTH

Lewis Margolis and Jonathan Kotch

*Remember that the human being is the most important of all products to turn out. I am eagerly anxious to do everything I can to wake up our people to the need of protecting the soil, protecting the forests, protecting the water; but first and foremost, protect the people. If you do not have the right kind of citizens in the future, you cannot make any use of the natural resources. Protect the children—protect the boys; still more, protect the girls; because the greatest duty of this generation is to see to it that the next generation is of the proper kind to continue the work of this nation.*

(President Theodore Roosevelt, 1911)

## INTRODUCTION

In 1988, the Institute of Medicine (IOM) published *The Future of Public Health*, a study and critique of the state of the public health field, accompanied by recommendations to enhance its effectiveness as the nation moves into the 21st century. The authors of the report articulated a definition of public health with three components: the mission, the substance, and the organizational framework. The mission was defined as “the fulfillment of society’s interest in assuring the conditions in which people can be healthy” (IOM, 1988, p. 40). The substance was defined as “organized community efforts aimed at the prevention of disease and promotion of health” (IOM, 1988, p. 41). The organizational framework of public health encompasses “both activities undertaken within the formal structure of government and the associated efforts of private and voluntary organizations and individuals” (IOM, 1988, p. 42). Each component of this definition reflects the central

dynamic or tension in the field of public health, that is, balancing the rights of individuals to pursue their private interests with the needs of communities to control the hazards that inevitably arise when groups of people pursue those interests (Beauchamp & Steinbock, 1999; Gostin, 2000; Jennings, Kahn, Mastroianni, & Parker, 2003).

It is only since the evolution of the recognition of children as individuals with interests and rights, potentially separate from those of their parents, that communities and nations have justified and conferred special protections and benefits on children through assorted public health, welfare, and education programs. In the United States, for example, the early-20th-century movement to ban child labor recognized that a child’s right to an education was in conflict with the rights of employers to use child labor and the rights of parents to insist that their children go to work, especially if the family needed the income. Today’s child advocates continue the tradition that argues that children should

never be treated as means to an end. Rather, optimal health, growth, and development in childhood are ends in themselves. This chapter explores ethical principles underlying maternal and child health and relates those principles to advocacy for services on behalf of mothers and children.

## RIGHTS

Rights are defined as valid claims (Feinberg, 1978) that imply a reciprocal duty. Such claims must be validated by rules obligating someone to respond. In the case of moral rights, such claims must be validated by moral rules. Similarly, legal rights are validated by legal rules. Although moral rights may make claims on religion and social conscience, only legal rights are enforceable by the legal apparatus of the state.

Rights are classified as positive or negative according to whether reciprocating a claimed right may require the transfer of resources. Therefore, positive rights are also referred to as subsistence rights or welfare rights, requiring some people to give up something of economic value in order to satisfy the legitimate claims of others. Negative rights, on the other hand, are option rights or rights of forbearance. A positive right is a right to something tangible, whereas a negative right is a right to be left alone.

Philosophers have argued about which came first, positive or negative rights. Historically, negative rights appeared in the U.S. Constitution and the French Declaration of the Rights of Man before positive rights were codified in the United Nations' charter and the constitution of the Soviet Union, but Bandman (1977) claimed that logically some assurance of human subsistence must have preceded liberty, citing the biblical tale of the gleaners, who benefited from the harvesters' moral obligation to leave behind some produce in the fields after the harvest.

The distinction between positive and negative rights may not always be clear cut, especially in the case of children. For example,

the Bill of Rights of the U.S. Constitution articulates negative rights in that Congress is prohibited from passing laws that restrict freedom of speech, freedom of assembly, and the free exercise of religion. These are rights to be left alone, not rights to economic resources. However, the ability of children to exercise negative rights is, more so than for adults, a direct function of education, housing, nourishment, and health care. Satisfying children's valid claims to these goods and services would involve their recognition by society as positive rights. Positive and negative rights are enumerated in the United Nations Convention on the Rights of the Child (Melton, 1991), ratified by the United Nations in 1989. Examples of positive rights are rights to:

- The highest attainable standard of health and access to medical services,
- Access to information and material from a diversity of sources,
- An adequate standard of living,
- Education, and
- Leisure, play, and participation in cultural and artistic activities.

Examples of negative rights are rights to:

- Respect for parents or guardians to provide direction to the child in the exercise of his or her rights,
- Legal protection against arbitrary or unlawful interference with privacy, family, home, or correspondence or attacks on honor and reputation,
- Freedom of association,
- Express an opinion in matters affecting the child and to have that opinion heard, and
- Practice any belief.

Obligations to satisfy rights may clash with one another. For example, participation in cultural activities may conflict with the right to practice any belief. Respect for parents to provide direction may conflict with access to information.

The issue of children's rights is further complicated by the fact that they cannot make claims on their own behalf. In other words, if children are to have rights at all, someone else must claim those rights for them. In fact, a child's first claims are against its own parents, and the rights of parents in their own child derive from a prior duty to satisfy the legitimate needs of that child (Blackstone, 1968). Unlike the case with adults' rights, which require a reciprocal obligation on the part of another, a parent's right in a child requires an obligation on the part of that same parental rights holder. "Parents' rights" therefore imply "parents' duties." Parents who do not satisfy their child's need for subsistence and, indeed, for love and affection as well, risk losing their rights in that child, as in the case of the state's removal of a neglected child from his or her home.

A parent, however, has not been required to act in the best interests of the child until recent history. Many ancient cultures codified aspects of the parent-child relationship by institutionalizing the absolute authority of the parent. Greek city-states condoned infanticide and even required it in the case of unwanted, illegitimate, and deformed children. In classical Sparta, a defective child could be thrown from a cliff without penalty. In the Roman Empire, a father had absolute legal authority over the life and death of his children (and, for that matter, his wife). In Egypt, the Middle East, China, and the Scandinavian countries, children were routinely sold into slavery or, if without value on the open market, strangled, drowned, "thrown from a high place," or abandoned. European laws supported the right of parents to use lethal force in controlling adolescents, who were sometimes flogged or even executed for disobedience. Unwanted European newborns were discarded without penalty. There are accounts of infants left to die on trash heaps and dung heaps or buried alive in the foundations of bridges and buildings for "good luck" (DeMause, 1974; Leiby, 1976; Williams, 1983).

Children were not even depicted in archival art until after the 11th century. The historian Barbara Tuchman has written that medieval illustrations show people in every contemporary human activity—making love and dying, sleeping and eating, being in bed and in the bath, praying, hunting, dancing, plowing, participating in games and in combat, trading, traveling, reading and writing—yet rarely with children. When children did appear, they were portrayed as miniature adults in adult clothing. The concept of childhood as a developmental continuum simply did not exist, and children were pushed into adulthood as quickly as possible. Tuchman surmises that it just was not worth investing in individuals who were apt to die before they could actively participate in the adult struggle to survive. "Owing to the high infant mortality rate of the times, estimated at one or two in three, the investment of love in a young child may have been so unrewarding that by some ruse of nature . . . it was suppressed. Perhaps also the frequent childbearing put less value on the product. A child was born and died and another took its place" (Tuchman, 1978, p. 50).

Intermittently, children came under official protection. The Code of Hammurabi made it a crime for a mother to murder her newborn, and Tiberius ordered the death penalty for those caught sacrificing children to non-Roman gods. In 13th-century England, sleeping parents smothered so many infants that it was made illegal to "bed with a swaddling child" (Pfohl, 1976; Williams, 1983). Furthermore, by the 16th century, there was a dawning recognition of the unique identity and developmental status of children. Christian reformers such as Martin Luther had for some time advocated for social concern and intervention, and there was a trend among contemporary secular philosophers and commentators to romanticize childhood. However, in the main, children were regarded as innately evil little adults or the playthings of adults. There are accounts from the medical literature of injuries resulting from the popular pastime of "child tossing."

and the violent control of children by parents continued largely unabated (DeMause, 1974; Williams, 1983). Since the promulgation of Elizabethan Poor Laws, English tradition has vested ultimate guardianship over those incapable of acting on their own behalf in the sovereign (i.e., the king or queen). In the United States, the states, rather than the federal government, have this power. Hence, the states are ultimately responsible for public education, child welfare, and child protection. The early 20th century saw the passage of a number of child welfare and child labor laws during what has since become known as the Progressive Era in U.S. history. When enacted at the federal level, some of these, such as the National Child Labor Law, ultimately were declared unconstitutional. Although subsequently enacted during the depression of the 1930s, in 1918 the Supreme Court ruled that the federal government had no jurisdiction to intervene in a decision (to make a child go to work instead of school) best left to parents (*Hammer v. Dagenhart*, 1918).

Nevertheless, the children's rights movement continued to gain momentum. The 1930 White House Conference on Children promulgated the Children's Charter, which declared, among other things, that every child should have "health protection from birth through adolescence, including: periodic health examinations and, where needed, care of specialists and hospital treatment; regular dental examinations and care of the teeth; protective and preventive measures among communicable diseases; the insuring of pure food, pure milk, and pure water" (U.S. Department of Health, Education, and Welfare, 1976). Recent Supreme Court decisions established certain constitutional rights of children, such as the right to due process in adult court (*Kent v. US*, 1966) and the same rights as adults in criminal court (*In Re Gault*, 1967), rights that even parents may not overrule (*Planned Parenthood of Central Missouri v. Danforth*, 1976).

Legislation at the federal level has recognized some rights of children. Child abuse

and neglect legislation, for example, establishes that children must be protected from abuse and that parents may be prosecuted for failing to provide necessary food, clothing, shelter, education, medical care, and even love and affection, as determined by state governments (Child Abuse Treatment and Prevention Act, 1973). Protection from abuse corresponds with a negative right, whereas protection from neglect corresponds with the child's positive right to subsistence. Other rights established at the federal level include the right to a free, public education for all handicapped children (Education for All Handicapped Children Act, 1975) and the right to a barrier-free environment for children and adolescents with disabilities, as found in the Americans with Disabilities Act (1990).

Satisfying positive rights to, for example, health care or education requires the expenditure of resources. In the face of limited resources, societies need rules for the fair allocation of resources. Such rules are called the principles of distributive justice.

## THEORIES OF JUSTICE

From the perspective of social policy, it is necessary to justify taking or redistributing resources legitimately earned by one person in order to purchase health care or any other good for another, or in this case, for the child of another. For the purposes of analyzing and assessing distributive justice for children, it is useful to consider two basic theories of justice (for an excellent discussion of ethical frameworks for professionals, see Applebaum & Lawton, 1990). One theory is based on the principle of utility that Jeremy Bentham and John Stuart Mill developed. This theory assumes that individuals act to maximize their own happiness or utility. A just allocation of resources within a community, therefore, derives from the calculation and balancing of positive and negative utilities for each of the individuals in the group. If the total of the positive utilities or benefits



exceeds the total of the negative utilities or costs, then that allocation is deemed to be just or fair. Utilitarian theory is the basis for cost–benefit analysis as a common and powerful tool in policy analysis.

In the United States, the market is the mechanism for maximizing utility. To the extent that it rewards effort, merit, and social contribution, the market is the primary determinant of how healthcare resources are allocated (Arrow, 1963; Epstein, 1997). Economists note, however, that under certain circumstances, markets may not be the most efficient way to distribute resources. For example, markets may result in a distribution of income and other resources that leaves some individuals incapable of meeting their needs (Stiglitz, 2000). Under such circumstances, the distributive principle of need argues that people who are ill or even at risk of becoming ill should have access to more medical care resources (Beauchamp & Childress, 2001; Buchanan, 1984). Public support for health insurance for low-income individuals through the Medicaid program, supplemental security income for people with disabilities, or targeted services for children with special healthcare needs may be considered examples of redistribution of health care according to the principle of need. Another condition that leads to market failure is that of public goods, items for which it does not cost anything for an additional individual to participate in the benefits, and it is impossible to exclude individuals from the benefits. Although children represent the products of private reproductive decisions and parents reap the benefits of children—pleasure, support in old age—to some extent, all members of a community benefit from healthy children. Children grow up to be economically productive, cultivating the resources needed to produce the goods and services that sustain societies in general. Therefore, another justification for redistributing resources to children or to families with children is that as public goods the market may not allocate to them very efficiently.

A second basic theory, articulated by Immanuel Kant, is based on rules or duties. Unlike utilitarian theory that focuses on the consequences of resource allocation, Kant’s focus is on fundamental duties. Kant asserted, “Act in such a way that you treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end” (Applebaum & Lawton, 1990, p. 16). Kantian theory would emphasize individual need or perhaps merit as allocation principles.

Building on the work of Kant, Rawls (1969), in *A Theory of Justice*, described a thought experiment to explain one way that fair rules of distributive justice might be derived. In the “original position,” rational adults come together behind a “veil of ignorance” for the sole purpose of making the rules that govern the distribution of goods and benefits. In such a position, with the decision makers ignorant of their statuses and roles in society, Rawls posited that all would agree with the following: that basic political liberties would be guaranteed, that desirable statuses and roles would be equally accessible to all, and that unequal distribution of resources would be tolerated to the extent that such inequalities benefit the least well off. One implication of this theory, however, is that it is necessary to take resources from those who are “well off”; that is, the effort of some individuals would be used as a means to make others better off, an apparent contradiction of the Kantian view.

Rawls’ formulation provides one test of social policy: Does such policy benefit the least well off? Take the case of infant mortality. For as long as race/ethnicity has been recorded for infant mortality, a marked disparity has existed between white and black rates of infant death. Nevertheless, the rates for both groups have consistently declined, suggesting that the medical, social, and public health resources affecting infant mortality have been distributed in a just manner. On the other hand, one could argue that when disparity increases, that is, infant mortality

rates diverge or decline at different rates, then in the interest of justice resources should be distributed differently.

Building on the work of Rawls, Green (1976) argued that society cannot withhold from children their fair share of healthcare resources. Because children are not considered "rational" from a developmental and legal perspective, they cannot participate in the original position. What would then be a child's "fair share"? Certainly a child's fair share of health care can be no less than that necessary for him or her to grow and develop to be able to exercise fully those political liberties and human rights guaranteed to all.

### **SOCIAL JUSTICE AND SOCIAL POLICY**

Richard Titmuss (1975), the architect of the British National Health Service, has described three models of social policy that reflect the spectrum of political views at play in discussions of the well-being of children and families. One, the Residual Welfare Model, postulates that there are two legitimate ways to meet people's needs—through the family and through the free market. When one or the other breaks down, social institutions temporarily provide the necessary resources to individuals. Under this model, "the object of the welfare state is to teach people to do without it," and beneficiaries are expected to accept society's judgment that in some way or ways they have failed. This view prevailed in the passage of welfare reform in 1996. The transformation of welfare in the United States from an entitlement to a more incentive-based system has been associated with a marked decline in the proportion of children in poverty, especially those children at greatest risk of poverty (Blank & Haskins, 2001; Finegold & Wherry, 2004), although the severe recession of 2007–2009 (and high unemployment continuing into 2011) has seen a return of poverty among children to late 1990s levels.

The second model, Industrial Achievement-Performance, exemplified by the former communist societies and currently represented by North Korea and Cuba, garners little political support in the United States. This model offers the social welfare system as an adjunct to the economy. Benefits are putatively distributed on the basis of need, but political decisions end up allocating welfare benefits based on one's status in the government, civil service, or military bureaucracy.

Third, Titmuss describes the Industrial-Redistributive model, which offers universal services outside of the market economy. Resources are distributed according to the principle of equity based on need, that is, disproportionately more social benefits are allocated to the least well off. Under this model, social welfare is not viewed as short-term charity for individuals, but as an instrument of a social policy that provides for the needs of society as a whole. For Titmuss, this orientation is exemplified by the British National Health Service itself, although this respected institution in Great Britain has been the object of continuous political debate, especially as Britain grapples with the same challenges to health care—aging population, increasing use of technology, and medical cost inflation—that are at play in the United States (Klein, 2001).

Generous support for the older population in Europe and the United States is based on the view that the past social contributions of seniors entitle them to current social benefits. The United States and many European countries have increasingly relied on debt to fund these benefits, especially in response to the severe economic decline beginning in 2008. But as David Walker, former comptroller general of the United States and head of the Government Accountability Office has explained, the current strategy of using debt is unsustainable (Walker, 2010). As of the third quarter of 2010, the debt to GDP ratio for the United States was over 90% (Bureau



of Economic Analysis, 2010; U.S. Treasury, 2010) and greater than 50% of this debt is now held by foreign lenders. As Walker emphasizes, however, these debt figures do not include the unfunded liabilities stemming from entitlement obligations for Social Security, Medicare, and Medicaid to the future demands of retiring Baby Boomers. By Walker's estimates, as of September 30, 2009, the total obligation of debt plus these unfunded liabilities approximated \$63 trillion.

Such staggering fiscal projections pose significant challenges for the field of maternal and child health. Promoting justice for children by securing their rights and distributing resources based on children's needs will be central to assuring the well-being of children and their families. The future of children is dependent on active and vibrant advocacy that articulates the unique value that the children's cause brings to political and economic analysis and policy development.

---

## References

- American Academy of Pediatrics. (2009). AAP advocacy guide. Elk Grove Village, IL: Author.
- American Academy of Pediatrics, Government Affairs Committee. (1981). *Pediatricians and the legislative process: A potent prescription for children*. Washington, DC: American Academy of Pediatrics, Office of Government Liaison.
- Americans with Disabilities Act, US Code Vol. 104, sec. 12101. Pub. L. 101-336 (1990).
- Applebaum, D., & Lawton, S. V. (1990). *Ethics and the professions*. Englewood Cliffs, NJ: Prentice Hall.
- Arrow, K. (1963). Uncertainty and the welfare economics of medical care. *American Economic Review*, 53, 941–973.
- Bandman, B. (1977). Some legal, moral, and intellectual rights of children. *Educational Theory*, 17, 169–178.
- Beauchamp, T., & Childress, J. F. (2001). *Principles of biomedical ethics*. New York: Oxford University Press.
- Beauchamp, D., & Steinbock, B. (Eds.). (1999). *New ethics for the public's health*. New York: Oxford University Press.
- Blackstone, W. (1968). Blackstone on children and the rights and duties of parents. In G. Abbott (Ed.), *The child and the state: Legal status in the family, apprenticeship and child labor* (Vol. 1, pp. 9–13). New York: Greenwood Press.
- Blank, R., & Haskins, R. (Eds.). (2001). *The new world of welfare*. Washington, DC: Brookings Institution Press.
- Buchanan, A. (1984). The right to a decent minimum of health care. *Philosophy and Public Affairs*, 13, 54–78.
- Bureau of Economic Analysis. (2010). Gross domestic product: Third quarter 2010 (second estimate). Corporate profits: Third quarter 2010 (preliminary). Retrieved December 17, 2010 from [http://www.bea.gov/newsreleases/national/gdp/2010/pdf/gdp3q10\\_2nd.pdf](http://www.bea.gov/newsreleases/national/gdp/2010/pdf/gdp3q10_2nd.pdf).
- Child Abuse Treatment and Prevention Act, Pub. L. 93-247 (1973).
- Children's Defense Fund. (1991). *An advocate's guide to lobbying and political activity for nonprofits: What you can and can't do*. Washington, DC: Author.
- DeMause, L. (1974). The evolution of childhood. In L. deMause (Ed.), *The history of childhood*. New York: Psychohistory Press.
- Education for All Handicapped Children Act. Pub. L. 94-142 (1975).
- Epstein, R. (1997). *Mortal peril: Our inalienable right to health care?* Reading, MA: Addison Wesley Publishing Company.
- Feinberg, J. (1978). Rights. In T. Beauchamp & L. Walters (Eds.), *Contemporary issues in bioethics* (pp. 38–43). Encino, CA: Dickerson Publishing Co.
- Finegold, K., & Wherry, L. (2004). *Race, ethnicity, and economic well-being: Snapshots of America's families* (No. 19). Washington, DC: Urban Institute.
- Gostin, L. (2000). *Public health law: Power, duty, restraint*. Berkeley, CA: University of California Press.
- Green, R. (1976). Health care and justice in contract theory perspective. In R. M. Veatch & R. Branson (Eds.), *Ethics and health policy*. Cambridge, MA: Ballinger.
- Hammer v. Dagenhart, 247 US Reports 251, 268 (1918).

- Hill, I. T. (1992). The role of Medicaid and other government programs in providing medical care for children and pregnant women. *Future of Children*, 2, 134–153.
- In Re Gault, 387 US 1 (1967).
- Institute of Medicine. (1988). *The future of public health*. Washington, DC: National Academy Press.
- Jennings, B., Kahn, J., Mastroianni, A., & Parker, L. (Eds.). (2003). *Ethics and public health: Model curriculum*. Rockville, MD: Health Services and Resources Administration.
- Kent v. US*, US 383 541, 16 LE 2d 84, 86 S. Ct. 1045 (1966).
- Klein, R. (2001). What's happening to Britain's national health service? *New England Journal of Medicine*, 345, 305–308.
- Kopelman, L., & Palumbo, M. (1997). The U.S. health care delivery system: Inefficient and unfair to children. *American Journal of Law and Medicine*, 28, 319–337.
- Leiby, J. (1976). History of social welfare. In A. Minahan (Ed.), *Encyclopedia of social work* (18th ed., Vol. 1). Silver Spring, MD: National Association of Social Workers.
- Melton, G. B. (1991). Preserving the dignity of children around the world: The UN Convention on the rights of the child. *Child Abuse and Neglect*, 15, 343–350.
- Michigan Council for Maternal and Child Health. (n.d.). *From vision to action: A citizens' guidebook to grass roots advocacy*. Lansing, MI: Michigan Council for Maternal and Child Health.
- Pfohl, S. J. (1976). The "discovery" of child abuse. *Social Problems*, 24, 310–323.
- Planned Parenthood of Central Missouri v. Danforth*, 428 US 52, 96 S. Ct. 2831 (1976).
- Preston, S. H. (1984). Children and the elderly: Divergent paths for America's dependents. *Demography*, 21, 435–457.
- Rawls, J. (1969). *A theory of justice*. Cambridge, MA: Harvard University Press.
- Roosevelt, T. (1971). The conservation of childhood. In R. Bremner (Ed.), *Children and youth in America* (Vol. 2, pp. 653–654). Washington, DC: American Public Health Association.
- Specter, M. (1998, July 10). Population implosion worries a graying Europe. *New York Times*.
- Stiglitz, J. (2000). *Economics of the public sector*. New York: W. W. Norton.
- Titmuss, R. (1975). *Social policy: An introduction*. New York: Pantheon Books.
- Tuchman, B. W. (1978). *A distant mirror*. New York: Alfred A. Knopf.
- U.S. Department of Health, Education, and Welfare, Office of Child Development, Children's Bureau, National Center on Child Abuse and Neglect. (1976). *Child abuse and neglect: The problem and its management. Vol. 1: An overview of the problem*. Washington, DC: Author.
- U.S. Treasury. (2010). The debt to the penny and who holds it. Retrieved December 17, 2010 from <http://www.treasurydirect.gov/NP/NPGateway>.
- Walker, D. M. (2010). *Comeback America*. New York: Random House, Inc..
- Williams, G. J. R. (1983). Child protection: A journey into history. *Journal of Clinical Child Psychology*, 12, 236–243.