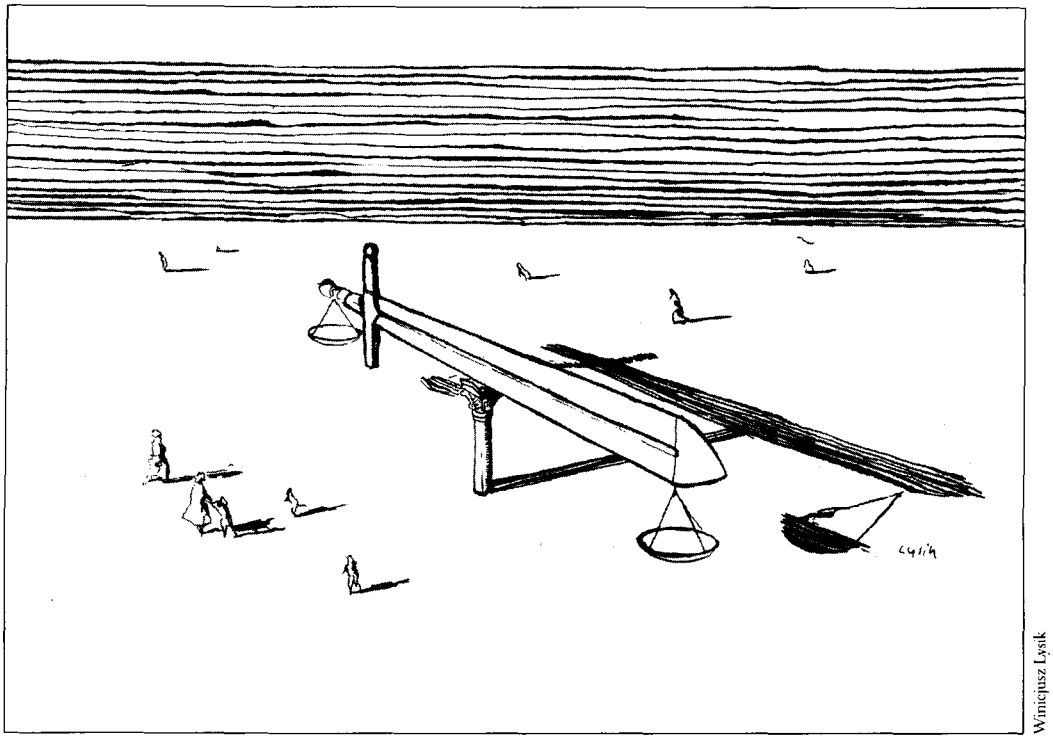


Wincjusz Lysik

Puppets and Their Masters

by Thomas Fleming

A naked boy runs down a crowded Italian street, chased by an angry old man. Grabbing the boy by the back of the neck, the old man shouts: "Just wait till I get you back home." The crowd quickly takes sides against the old man, and when the *carabinieri* arrive, they take him off to jail. The reader of the tale, however, knows that Gepetto is a kind and worthy man, who did not merely sire but actually created the boy, and that Pinocchio, although less than a day old, is on his way to becoming a juvenile delinquent.

The author of *Il Pinocchio* was a patriotic liberal who welcomed the *Risorgimento*, but he and the other patriots soon learned that Piedmontese rule meant foreign tax collectors, strange new laws, and the rifle-toting aliens of Victor Emmanuel's national police force, the *carabinieri* who drag an innocent father off to jail. They make other appearances in the story, when, for example, puppet *carabinieri* arrest first Pinocchio then Arlequino to feed the puppet-master's cook fire—as grisly an image of the modern state as one could wish.

As a matter of fact, the Italian government in the early 1880's had little power to intrude into households. Italy, although it was the homeland of enlightened penology (Beccaria) and scientific criminology (Lombroso) was slow to follow the example of Great Britain and the United States, the pioneers in child protection and juvenile justice.

Rearing children was once a relatively uncomplicated affair. A man and a woman got married, and in due course had children which they fed and clothed and disciplined according to the customs of their people. Relatives and neighbors reinforced parental discipline by telling the same stories, by quoting the same proverbs, and occasionally by admonishing or even beating the wayward child. The social rituals and institutions of the tribe, so far from undermining families, strengthened the authority of parents and—where it was necessary—supplemented their deficiencies.

Parents were unconstitutional monarchs within the household, with a comprehensive authority that often approached the Roman father's *patria potestas*. Despite the erosion of that authority, parents still retain a theoretical right to control their child's upbringing. Up to a point they may supervise his diet and activities, select a school, punish transgressions, and attempt to impose moral or religious instruction. Even today in some states parents may be held liable for torts committed by their minor children, if the children were acting as the parents' agent, entrusted with a dangerous or potentially dangerous instrument, or acting with the parents' connivance or consent. Parents can still claim a child's wages, which can also be claimed by the parents' debtors.

These vestiges of parental responsibility survive like the tip of Mount Ararat looking out upon the deluge that has drowned the works of sinful man. The once-sovereign family, like the

sovereign state of Virginia, is now become an arm of the state, capable of exercising its privileges only so long as it does not run afoul of the higher authority from which it draws its legitimacy.

In earlier times, a parent's responsibilities were coextensive with his rights, or rather the claims of blood required both parents and children to fulfill their duties to each other. Families were responsible for maintaining the child, for protecting him from harm, and—in earlier or unsettled times—for taking vengeance against those who hurt or killed him. Today, vast legal systems in Europe and North America see to it that the man who rapes and murders a child is temporarily incarcerated in a mental institution to protect him from the parents' vengeance, and of the 50 American states it is only Louisiana that requires parents to include children in their wills.

Until the Civil War, American households were still, by and large, fortresses that could shut out the world. When examples of disciplinary severity and excessive punishment were brought to trial, the usual result was an affirmation of parental rights. At the end of the last century, the North Carolina Supreme Court overturned a lower court that had convicted a father of assault and battery, arguing that the application of the "cruel and unusual standard" would

> subject every exercise of parental authority in the correction and discipline of children—in other words, domestic government—to the supervision and control of jurors . . . . [S]uch a rule would tend, if not to subvert family government, greatly to impair its efficiency, and remove restraints upon the conduct of children . . . . [I]t would open the door to a flood of irreparable evils far transcending that to be remedied by a public prosecution.

The first child protection laws were devised by well-meaning English statesmen who wished to save the lives of children. Beginning with Peel's Health and Morals of Apprentices Act (1802), Parliament passed a series of acts to protect working children. The first blow against family integrity was not struck by the politicians who passed child protection statutes but by a social and economic system that drove mothers and children from the sanctuary of their homes, not into the marketplace but into the bowels of mines and factories.

In the United States, the frontier acted as a safety valve that encouraged the poorer classes to trek westward in search of new land. In the older parts of the country, however, industrialization and proletarianization proceeded along English lines. Deteriorating social conditions were exacerbated by the arrival of non-English immigrants. The good Yankees were terrified of Irish Catholics, whose children needed to be Americanized, i.e., protestantized and indoctrinated into habits of thrift, diligence, punctuality, and above all sobriety. These fears and aspirations were translated into legislation: compulsory school attendance laws and agencies designed to "save" potentially "delinquent" children—an elastic term that ran the gamut from criminal to shiftless—by removing them from unsuitable homes.

One key to the process of children's liberation is the concept of *parens patriae*, which can be used to justify state intervention not just in cases of real abuse but even when the choice is only between good and better environments for the child. The concept arose in the English chancery courts that dealt with cases of orphans. As parent of the nation, the king regarded himself as the foster parent of last resort. In a monarchy, where citizenship means personal allegiance to a personal ruler, *parens patriae* is a limited concept that could not be broadened to justify the state's assumption of power over all children. In a modern state, however, the bias is all against particular rights and immunities and in favor of generalized rules that apply to all. Pass a law aimed at aliens or the mentally defective, and it will some day be used against the native-born and normal.

In the United States, *parens patriae* was used to justify the creation of a juvenile justice system. In earlier times, although children over the age of seven might be tried and punished as adults, judges and juries were typically lenient in all but murder cases. In 1899 Illinois passed a statute, widely imitated by other states, establishing a special system for youthful offenders, who were to be tried and punished separately from adults. Since they were now not being treated as criminals, children and adolescents were no longer possessed of constitutional guarantees of due process. The object of juvenile justice was not, after all, the punishment of a criminal but the rehabilitation of a delinquent. For his own good, the youthful offender was removed from undesirable homes and placed in correctional facilities where he learned to mend his ways.

In the absence of a clear, inflexible rule, the courts are free to apply the highly subjective notion of 'best interests,' not only in choosing one of two parents but even in choosing between natural parents and an alternative.

In the course of this century, the powers of the juvenile justice system were considerably broadened to encompass comparatively minor infractions. At the same time, the courts and state agencies began to operate on the assumption that they, rather than parents, could be relied upon to determine a child's best interests. Parents may be supervised, instructed, counseled, and monitored for failing to live up to the state's definition. The ultimate sanction is to remove the child from the home.

The basic fact of children's lives is their dependency—a condition that is material, moral, and legal. Most children do not, indeed cannot, provide for the necessities of shelter, food, and clothing. Morally, they are not even responsible. Since their character and judgment are incompletely developed, they must rely on the guidance or supervision of their elders to teach them how to discern right from wrong.

Parents, by virtue of conceiving and begetting a child, naturally assume the role of guardian without any interference from the state. The problem of custody did not arise except in cases where the family integrity was fractured by death or divorce. If both parents died, their offspring usually went to live

with the closest relatives who were willing and able to take on the responsibility. In a case of separation or divorce, the assumption of Anglo-American law was that the child should remain with the legal head of the family, that is the father.

In one sense the tradition of paternal custody, especially when strengthened by statute and ideology, is a reflection of the Anglo-American patriarchy that was buttressed and shored up in the centuries following the Reformation. More fundamental, perhaps, was the legal identification of the family with its head. In refusing to recognize the mother's claim to her children, judges were not so much siding with the father as they were declining to intervene. In the second half of the 19th century, however, American legislatures and judges began to reverse this tradition, granting women, first, equality in matters of custody and, later, superiority.

There are several reasons for the change. Social and economic developments had led to the creation of a "separate spheres" doctrine, which held that men were competitive, aggressive warriors who entered the marketplace to earn incomes for the family, while women, endowed with a caring and nurturing nature, were better suited to rearing children, cultivating the gentler and finer arts, and nursing the sick and infirm. In this view, children naturally belonged with their mothers, to whom they are typically more attached.

On the other hand, state laws tended to emphasize the rights of women. The Kansas constitution of 1859 provided "for the protection of the rights of women" in matters of property and "for their equal rights in the possession of their children." Oregon's equal custody statute of 1880 bore the significant title "An Act to Establish and Protect the Rights of Married Women." The effect of these laws—and the spate of court cases that ended up awarding children to mothers—was twofold. The mother—so long as she was not an adulteress—was routinely regarded as more fit to serve as guardian of a couple's children, while the father was expected to pay for the support both of his children and of his divorced wife. But a more important change had also taken place. From now on, the state was in a position to judge the fitness of parents and to select one as the guardian. The putative "best interests" of the child became the standard, rather than a rule of blood or even a rule of law, since the rights of the parents would no longer be the basis on which custody was determined.

In the absence of a clear, inflexible rule, the courts are free to apply the highly subjective notion of "best interests," not only in choosing one of two parents but even in choosing between natural parents and an alternative. Of course, there are limits to what the state can do. It is not yet possible, for example, to transfer custody from a pair of merely adequate natural parents to a socially superior couple who wish to adopt a child. This was the significance of the Baby Jessica case so widely misreported in the popular press.

An unmarried Iowa woman, Cara Clausen, gave up her baby for adoption to a Michigan couple, Jan and Roberta DeBoer. The mother, unmarried and estranged from the child's father, Daniel Schmidt, who was never told the facts, induced a current boyfriend to resign paternity rights he did not in fact possess. Reconciled and married, Daniel and Cara Schmidt sued for restoration of their child on the obvious grounds that the father had been unjustly deprived of his rights.

The facts of the case were simple, and the courts should have given an immediate judgment to the natural parents. This decision, however, took two years to reach, during which time the adopting couple was able to win a decision in a lower Michigan court on the basis of the child's "best interests"—a ruling unanimously overturned on appeal.

Justice, albeit delayed, was done in this case, but that cannot be said for the "Home Alone" case in which an Illinois couple were prosecuted for leaving their daughters at home while they went on vacation. The parents were admittedly callous and imprudent, but they broke no law, and the children, who were to all appearances healthy and well brought up, had not been harmed. Many children today are routinely left at home while parents are working, and in earlier periods of American history farm families were sometimes compelled to leave young children at home for days and even weeks. The case was eventually settled by plea bargaining, the details of which have not been made public. The couple, in return for getting their children back, agreed to a term of probation and 200 hours of community service, as well as electronic home monitoring. In the event, the couple preferred to give up their daughters.

In other words, for committing offenses that were not even criminal, the parents were hounded and blackmailed into surrendering their children. Ironically, one key argument used against the parents was that the girls had been traumatized by the experience, but it was the experience not of being left at home but of being forced to testify against their parents in a trial that was the object of as much media attention as a Stalin purge trial.

Big cases, once they have been vulgarized in the *Chicago Tribune*, lead to hasty lawmaking, and Illinois legislators, in the wake of the "Home Alone" case, rushed to criminalize short-term abandonment. The same lawmakers, overreacting to a highly publicized case of a mentally defective mother who murdered her child, hastily amended the Illinois Juvenile Court Act and the Children and Family Services Act to make it easier for the state to remove children from the custody of parents suspected of abuse. In Illinois—as in most (perhaps all?) states—the burden of proof has been on the state, because the fundamental assumption was that it was in the child's best interest to live, wherever possible, within an intact family or at least with a natural parent.

That assumption appears to have been weakened or even eliminated, and Illinois' child protection czar—the "inspector general"—will possess special powers to insure the best interests of Illinois children, and it is "the best interests"—a phrase repeated like a drumbeat throughout the new act—that take precedence over family integrity or parental rights.

Parens patriae has not gone unchallenged in the courts, and the doctrine was dealt an *apparently lethal* blow by the Supreme Court's decision *In re Gault*. This famous case concerned the misdemeanors of a 15-year-old boy, Gerald Gault, who was accused of making obscene telephone calls to a neighbor lady. Since Gerald was already on probation for accompanying a friend who snatched a purse, the Arizona juvenile authorities acted quickly to declare Gerald a delinquent minor. In their appeal, which went all the way to the U.S. Supreme Court, the Gault parents argued that they had not received either sufficient notice or due process.

There is no doubt that both in this case and in many other cases, the juvenile courts run roughshod over their young clients. The parents were not even informed of the nature of their son's supposed delinquency and were given no time to prepare a defense or hire counsel. In a far-ranging decision, the

Fortas Court overturned the original judgment. Writing for the majority, Justice Abe Fortas delivered a stinging rebuke both to juvenile justice procedures and to *parens patriae*. But instead of confining himself to a defense of the parental rights involved, he concluded that minors possess the same constitutional guarantee of due process as adults. "Under our Constitution, the condition of being a boy does not justify a kangaroo court."

Fortas' decision has been hailed as a victory for parents in their struggle against the state, and from one perspective, the damage inflicted upon *parens patriae* may be regarded as a blow struck in defense of the family. Unfortunately, the more important and far-reaching implications of the decision have not been noted. If children are to be guaranteed due process under the Constitution, then presumably their rights are protected by other constitutional provisions. Since most children are not in a position to understand or to assert their own rights, this will mean, inevitably, that their constitutional rights will be protected by government agencies.

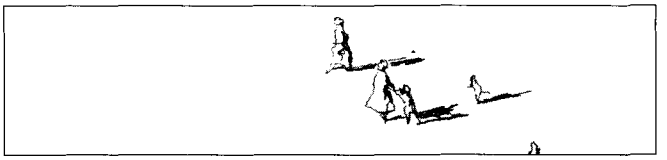
The road to tyranny is paved with human rights. The earliest advocates of natural rights did not include children. For Locke, only rational creatures could possess rights, and to be free in the law, a man needed to be able to understand the laws. "If this made the father free, it shall make the son free too. Till then, we see the law allows the son to have no will, but he is to be guided by the will of his father or guardian, who is to understand for him."

Locke, because of his obsession with rationality, could hardly ascribe rights to children, but in his effort to break the connection between the natural power of the father and the apparently artificial power of the king, he decided to undermine the natural power of the family. Hence, the power of fathers was no longer based on the mystical and interminable bond of blood or divine decree. Marriage, for Locke, was not the merging of two personalities but a covenant that could be dissolved once the children were grown. The object of childrearing was a rational and independent adult who would be free from paternal supervision. In redefining paternity and, therefore, parenthood, Locke made it possible for Rousseau and his followers to regard the family as little more than an instrument for nurturing and educating new citizens who, potentially, possessed all their natural rights.

But if natural affections are merely the result of habits, and if the object of parenthood is the child's independence, who has the responsibility to make sure that parents do not abuse their authority? Wilhelm von Humboldt took the logical next step. It is the parents' obligation, said Humboldt, to rear their children to maturity; at the same time, the children possess "all their original rights as regards their life, their health, their goods . . . and should not be limited even in their freedom, except in so far as the parents may think necessary. . . ." Some parents, however, may not take proper care of their children. In that event, it is up to the state "to provide for the security of the rights of children against their parents."

Humboldt's line of thought leads directly to the rights-based tyranny of the total state. So does the anarchic individualism of Herbert Spencer, who once argued for children's rights on the grounds that without rights, they were not citizens and no harm could be done by murdering them—a position he later retreated from. But, if children do have rights, they can hardly be expected to defend those rights all by themselves. Who will protect the rights of children from bigoted parents? Why, the courts of course, or "children's agents," that is to say, government agents working in the interest of children.

Most children's rights advocates are not calling for absolute political equality—although an adolescent contributor to the *Nation* recently demanded universal suffrage, regardless of age. But even if 12-year-olds were suddenly able to choose between Tweedledum and Tweedledee, their rights would not be any more solid and palpable than they are already. As economic and moral dependents of their families, they could only exercise their rights through the mediation of a force more powerful than that of their parents.



What rights, reasonably, can we expect to see bestowed upon minors? Before her elevation to the White House, Hillary Rodham wrote a highly influential essay laying the framework for a children's rights ideology that is superficially sensible but ultimately as subversive as the sexual liberation propaganda of the pederasts. Careful to define her terms, the First Lady observes that "a legal right is an enforceable claim to the possession of property or authority, or to the enjoyment of privileges or immunities." Since children currently possess few legal rights, the object is to transform their "needs and interests . . . into enforceable rights."

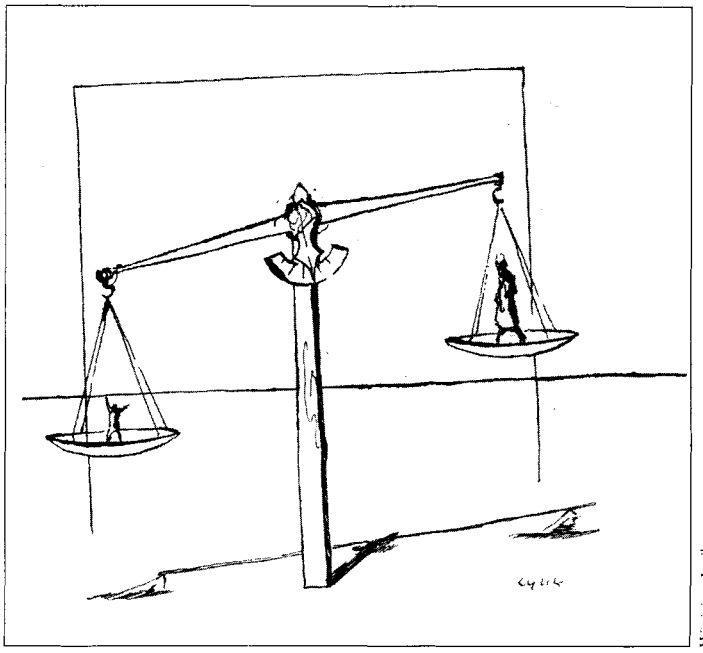
The President's wife used the analogy of condemning property. It took us centuries to recognize the propriety and justice of condemning property in the people's interest, and it has taken us even longer to recognize "that each family at some time needs a certain amount of assistance from the community or government to care for the needs of its members." When this view is, sooner or later, adopted, the state will possess—in the name of children's rights—a social power of eminent domain over families. On such a view, the state would not need evidence of life-threatening child abuse to justify removing a child from a household.

In the short run, the First Lady's position would justify state intervention wherever a family provided inadequately for the child's "needs," and since those needs are broadly construed to include sex education and sensitivity to minorities, no one outside Mrs. Clinton's own social circles would be exempt. But a broader construction of the doctrine is also possible. The greater social good might be improved if talented children were taken away from lower-class homes, if families of different races were compelled to swap kids, or if Republicans were forced to send their offspring to the ideological boot-camps her spouse set up in Arkansas. Why not? Once the state sets out to guarantee a right, it will destroy every obstacle that stands in the way of liberating the oppressed.

Pinocchio had to learn the hard way that, for a child at least, hell really is other people. His friends, the benevolent fox and the self-sacrificing cat, insist that their only happiness is in making other people rich. Plant your coins in the field of miracles and you will be rich overnight. Today, the descendants of that same fox and cat are running the social services and welfare programs of the United States, and anyone who is so woodenheaded that he believes their promises deserves to suffer, as Pinocchio suffered, until sadder and wiser he returned to the house of his father who loved him. c

The Revolution in Civil Rights Law

by Jared Taylor



Wimiejusz Lysik

It has been nearly 30 years since the passage of the Civil Rights Act of 1964. By banning discrimination in employment and public accommodations the law was meant to minimize the role of race in the daily lives of Americans. Its result has been the opposite. The doctrine of "disparate impact" has had the astonishing effect of transforming laws that forbid racial discrimination into regulations that *require* it.

The shift from officially color-blind "equal opportunity" to a form of racial discrimination called "affirmative action" was not inevitable. What made this revolution in the laws possible was a combination of factors: ignorance about the nature of employment markets, unchallenged assumptions about the inveterate "racism" of whites, and—perhaps most important—the almost complete failure of whites to defend their own interests.

Today it is taken for granted that without civil rights laws there would be wholesale job discrimination against blacks. Is that really true? Was it ever true? In his 1992 book *Forbidden Ground: The Case Against Discrimination Laws*, Richard Epstein argues convincingly that antidiscrimination laws are not necessary and that the employment provisions of the Civil Rights Act of 1964 should be repealed. Professor Epstein's thesis can be simply summarized: if some prejudiced employers refuse to hire qualified blacks, the wage at which blacks are willing to work will fall. Unprejudiced employers will soon discover this wage difference and hire blacks at less than the prevailing rates. But if competent blacks can be hired for lower wages than whites, this will bid up the price of black labor to something equal or very close to the price of white labor.

In Professor Epstein's view, it was not the irrational prejudices of whites that kept blacks out of certain jobs in the pre-civil rights South. Government interference kept them out. It was government that instituted inferior schooling for blacks and passed Jim Crow laws to ban them from professions. Indeed, the very existence of Jim Crow laws suggests they were necessary. Blacks were kept out of professions by law because that was the only way to keep them out. Even Southerners of 60 or 70 years ago could not be counted on to pass up a competent carpenter or bricklayer simply because he was black. These laws reflected prevailing prejudices, but prejudices often had to be *forced* upon employers. Even at the height of slavery, white tradesmen had to resort to legal means to keep free blacks from taking away their work. An 1857 petition by whites to the Atlanta city council says, "We refer to Negro mechanics [who] . . . can afford to underbid the regular resident mechanics. . . . We most respectfully request [that the council] afford such protection to the resident mechanics." Even in the antebellum South, prejudice could not be counted on to keep professions white.

The 1896 case of *Plessy* v. *Ferguson* is infamous for having enshrined the doctrine of "separate but equal" facilities for whites and blacks. Long forgotten, however, is the fact that the Louisiana railroad that asked Homer Plessy to ride in the blacks-only car was *forced against its will* to do so by a state law

Jared Taylor is the author of Paved With Good Intentions: The Failure of Race Relations in Contemporary America (1992).