Who Will Speak for the Children: The Case That Shaped Child Protection in America

by
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Once, the protection of children from abuse was almost inconceivable. Certainly, it resembled nothing like what society expects today. Just as "the course of true love never did run smooth,"[1] so too the path through western history for the children has been a bumpy road. But, in the United States, there was a moment in time where the "perfect storm" developed to create a national movement by not just individuals, but organized groups and government systems at both the state and eventually federal levels, towards the investment in the health, safety, and happiness of children. That moment came in the nineteenth century, in New York, in the form of a nine-year-old girl named Mary Ellen Wilson. While history has largely forgotten her name, her story is, in many ways, the bedrock on which modern child protection stands.

The history of children in Western society cannot be judged by modern standards. The sentimentality towards childhood and innocence and the accompanying protective impulses are, for the most part, an invention of the last 175 years. Prior to the middle of the nineteenth century, the law did not seek to protect children from what society currently considers harm.[2] Children were considered chattel, the property of their fathers, and an economic asset.[3] Morally, since the Church became the epicenter of ethics in

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1 William Shakespeare, A Midsummer Night's Dream, Act 1, Scene 1.

2 *See, e.g.,* Holly Brewer, By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority 1 (2005) ("In sixteenth-century England, children over the age seven were of 'ripe age' to marry. . . . Four-year-olds could make wills to give away their goods and chattels. Children of any age could bind themselves into apprenticeships.").

3 Herbert C. Covey, The Smallest Victims, A History of Child Maltreatment and Child Protection in America 5, 71, 179 (2018).

Western society, children were considered inherently evil, easily led astray, or a *tabula rasa*.[4] The result of those views were moral and legal expectations and rights of parents that included "hardening" children to the world, breaking their wills, beating them into upstanding, obedient citizens, and sending them out to work (taking advantage of their economic value and minimizing their economic drain) at ages that would "shock the conscious" of modern society.[5]

Throughout the seventeenth and eighteenth centuries in America, the law allowed parents, or apprentice/indentured service masters, to use severe corporal punishment to ensure children grew up morally correct.[6] While the law cautioned against being overly severe in beatings, other laws in the colonies allowed adults with charge of children to seek the death penalty for older children who did not respect their parents.[7]

It was not until the nineteenth century, with the rise of the middle class and the progressive movement, that the view of children as innocent and worthy of protection became more commonplace.[8] Even then, this view arose and resonated mostly with the growing middle and upper classes. In the lower socioeconomic strata and among the immigrant communities, children as an economic asset, and the chattel of their parents, had not changed. There was an entire world between the lower and upper classes and for much of the nineteenth century, the struggles of the lower classes were unknown. But Progressives in the nineteenth century, such as Jane Addams, Henry Bergh, and others began to consider morality in a different sense.[9] How people treated others, the relationship between poverty and crime, immigrant assimilation, and similar concerns turned the attention of the middle class to the situation of the lower class.

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4 *Id.* at 38, 180.

5 *Id.* at 10-12, 40-47, 178-80.

6 *See generally* Myra C. Glenn, Campaigns Against Corporal Punishment: Prisoners, Sailors, Women, and Children in Antebellum American (1984).

7 Covey, *supra* note 3, at 183-87.

8 *Id.* at 92, 138.

9 *See* Graham Culbertson, *Jane Addams's Progressive Democracy: Hull-House and the Ethics of Reform*, 95 Soundings: Interdisciplinary J. (2012), https://muse.jhu.edu/pub/2/article/467443.

In the middle of this period, the issue of child maltreatment suddenly drew national attention. While there had been lesser-known individual cases addressing maltreatment by guardians throughout the nineteenth century, it was a young, poor girl named Mary Ellen, and her saviors, the nationally famous Henry Bergh and his attorney Elbridge T. Gerry, who began the changes that led to modern child protection.

It is a tragedy that Mary Ellen, without whom child protection would not be what it is, has been largely forgotten to time. Her story is imperfect, and questions must remain about whether the right persons were brought to justice and what really happened, but of the abuse she suffered there can be no doubt. Although this article presents more questions than it answers about the evidence and testimony given in Mary Ellen's case, its aim is to again make Mary Ellen known to a world shaped in large part by what she endured, and the lessons learned from her rescue.

Long before Mary Ellen, Henry Bergh, the aimless son of a shipping magnate found his calling in protecting animals from cruelty and abuse.[10] He started the American Society for the Prevention of Cruelty to Animals (ASPCA), and pushed legislation in New York to protect trolley horses, stop dog fights, and ensure better treatment for livestock being driven to market. Bergh became known for citizens arrests and dragging offenders to court, where his success rate was mixed, but his name became well known in the press.[11] As time went on, Bergh met Elbridge T. Gerry, a local attorney who volunteered to assist the ASPCA with its legal efforts.[12] While these men were making a name for themselves in New York and the world beyond, a few mere miles away a little girl who would change the world was born.

The story of Mary Ellen Wilson has mostly been pieced together principally from the testimony in her dependency case. Given when the case occurred (including fires that destroyed many municipal court records), the lower socioeconomic status of the participants, and the clear-cut visual evidence of abuse, the record

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10 Ernest Freeberg, A Traitor to His Species: Henry Bergh and the Birth of the Animal Rights Movement 22-23 (2020).

11 *Id.* at 26-27.

12 *See* Janet M. Davis, *The History of Animal Protection in the United States*, Organization of American Historians, https://www.oah.org/tah/november-2/the-history-of-animal-protection-in-the-united-states/ (last visited Dec. 23, 2024).

is full of contradictions as to the first nine years of Mary Ellen's life. Testimony was given by many people, including Martha Score, a woman who cared for Mary Ellen for approximately the first year of her life; John Conner, Mary Ellen's second cousin; Mary Connelly née McCormick, Mary Ellen's adoptive mother and abuser; George Kellock, the administrator of the orphanage from which Mary Ellen was adopted; Etta Wheeler, the aid worker who ensured that Mary Ellen was rescued; and Mary Ellen herself.

The records show that Mary Ellen was born to Frances Wilson, née Connor, in about 1864.[13] Her father is supposedly one Thomas Wilson. Thomas Wilson was Frances's husband and a soldier in the Civil War according to both the testimony of Martha Score, Mary Ellen's first "foster mother," and an affidavit given by John Connor, Frances's cousin.[14] Conversely, testimony offered by Mary Connolly, Mary Ellen's foster mother, states that her first husband, Thomas McCormick, prompted her to adopt Mary Ellen. According to Mrs. Connolly her husband often told her that Mary Ellen and at least two other children in the almshouse from which they adopted Mary Ellen were his children by a mistress.[15]

There is not enough information to confirm who Mary Ellen's biological father was. Neither John Connor nor Martha Score appear to have had any acquaintance or particular knowledge of Thomas Wilson beyond what Frances told them. He was dead before Martha took charge of Mary Ellen.[16] John Connor's testimony indicates that he met Thomas Wilson at least once, enough to testify to what he looked like.[17] But John Connor's only testimony regarding Thomas was to his appearance and where he had served. There is no testimony that John attended the wedding or had, on any occasion, spoken with Thomas. Additionally, research has revealed inconsistencies in what happened to Thomas. John Connor's testimony as to the units Thomas Wilson served in during the civil war

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13 Eric A. Shelman & Stephen Lazoritz, The Mary Ellen Wilson Child Abuse Case and the Beginning of Children's Rights in 19th Century America 213-14 (2005).

14 Affadavit of John Connor, June 8, 1874, reprinted in Shelman & Lazoritz, *supra* note 13, at 106-10; *see also* Testimony of Martha Score, April 21, 1874, reprinted in *id.* at 179-86.

15 Testimony of Mary Connolly, April 10, 1874, reprinted Eric A. Shelman & Stephen Lazoritz, Case #1: The Mary Ellen Wilson Files at 180-83 (2012).

16 Testimony of Martha Score, *supra* note 14, at 181.

17 Affidavit of John Connor, *supra* note 14, at 106.

do not match up with the records of those units.[18] The testimony would also put Mary Ellen at approximately three weeks old at some indeterminate time around 1863 while other research has put her birth date much closer to March 1864.[19]

Regardless, both Martha Score's testimony and John Connor's state that Frances told them that Thomas had died fighting in the war.[20] Martha Score's testimony further corroborates this story, since at one point Frances paid her for the upkeep of Mary Ellen by giving her a widow's relief ticket given to soldier's wives, known as a soldier's relief ticket, during the war.[21]

There seems to be no doubt that Thomas and Fanny knew each other. They met, according to the testimony, while they both worked at the St. Nicholas Hotel.[22] Thomas was an oyster shucker and Frances a laundress there.[23] The soldier's relief ticket certainly seems to indicate that they were married. But some portion of their marriage was spent with Thomas fighting in the South. Frances had worked, and went back to work at one point, at a hotel. There is no record, one way or the other to suggest that Frances Wilson knew Thomas McCormack. But there is a possibility that Frances did know Thomas McCormack, and that he, and not Thomas Wilson, was Mary Ellen's father.

Once Thomas Wilson had died, Frances was forced to go back to work as a laundress. Mary Ellen was still very young at the time, and in need of regular care. Frances could not take her to work; and she could not stay home with her and afford to keep her. She put her into the care of Martha Score.[24] Martha appears to be part of a group of women in the nineteenth century who, for pay, fostered infants from lower socioeconomic class parents. That said, there is no evidence that Martha was one of the foster mothers known as "baby farmers," who took in poor infants, and then

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18 Shelman & Lazoritz, *supra* note 13, at 20-21.

19 *Id.* at 21.

20 Affidavit of John Connor, *supra* note 14, at 106-07; *see also* Testimony of Martha Score, *supra* note 14, at 181.

21 Testimony of Martha Score, *supra* note 14, at 182-83.

22 Shelman & Lazoritz, *supra* note 13, at 20.

23 *Id.*

24 *Id.* at 21-22.

committed infanticide, whether with or without the understanding of the parents themselves.[25]

Martha testified that she was introduced to Frances Wilson through a neighbor who also worked as a laundress at the St. Nicholas.[26] Frances paid her two dollars a week to take care of Mary Ellen.[27] For some time, Frances visited Mary Ellen regularly and showed her affection on her visits.[28] At some point, however, Frances stopped visiting and stopped paying.[29] Martha approached the neighbor and together they managed to track down Frances. Frances gave Martha the relief ticket to cover further payment.[30] There is no account of Frances visiting Mary Ellen after that point. It seems that the relief ticket may have run out thereafter or Martha could no longer afford to keep the child.[31] She took the child to George Kellock, the superintendent of Outdoor Poor.[32]

Sometime after Frances gave Martha the relief ticket, according to John Connor's affidavit, Martha told Frances that Mary Ellen had died.[33] Martha's testimony does not directly address that accusation, but does state that at some indeterminate point, possibly after Martha had given up the child, she met Frances on the street and told her "about the child and she told me [Martha] the child was alright."[34] The language could be read to say that Martha told Frances she had given the child up to an orphanage and Frances told her that Mary Ellen was doing well at the orphanage. If that is true, then it is possible, despite later testimony to the contrary, Frances Wilson did visit Mary Ellen after she had been placed in the almshouse that served as an orphanage.

Records produced during George Kellock's testimony at trial give the date Mary Ellen was placed with the state as July 7, 1865, and listed her age at eighteen months.[35] They corroborate Martha's testimony regarding her care of Mary Ellen and that Frances

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25 Shelman & Lazoritz, *supra* note 13, at 34.
26 Testimony of Martha Score, *supra* note 14, at 179-81.
27 *Id.* at 179.
28 *Id.* at 183-84.
29 *Id.* at 185.
30 *Id.* at 182-83.
31 Shelman & Lazoritz, *supra* note 13, at 23.
32 *Id*.
33 Affidavit of John Connor, *supra* note 14, at 106-07.
34 Testimony of Martha Score, *supra* note 14, at 183.
35 Shelman, Case #1 at 35.

had disappeared. However, the notation indicates an affidavit of Martha that was never found.[36] Mary Ellen was placed in an almshouse where she resided for six months.[37]

At the end of that six months, Thomas and Mary McCormack, who would later remarry after her husband's death and become Mary Connolly, came and adopted Mary Ellen.[38] According to her testimony, Thomas McCormack told his wife that Mary Ellen was one of three children he had by a mistress.[39] Ironically, Mrs. Connolly's testimony regarding her husband's children stated him as having two girls and one boy; this is the same number and genders of the children she, herself bore to him, all of whom had died.[40]

Mary Connolly's testimony was full of strange and suspicious contradictions. She told the court that there were three children, all belonging to her husband, by the same woman, and that the woman's name was Wilson.[41] Then she went on to say that she only knew the woman's name was Wilson because that was Mary Ellen's last name.[42] She told the court that she picked Mary Ellen out of the three. But when questioned about the names of the other children, she didn't know them. She could not even tell the court if their names were all Wilson, only that she assumed they must have been.[43]

George Kellock's testimony stated that every child in the almshouse had a facsimile of their name, age, and entrance record on file in the individual houses.[44] Presumably, if Mary Connolly had seen all three children and picked Mary Ellen out of the three, she would have had to know at the very least the last name before she went to the almshouse. Otherwise, there would have been no way to know whether the child she was looking at was her husband's. The last two obvious flaws in Mrs. Connolly's testimony are that she stated she had first heard of Mary Ellen in 1855, nearly

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36 Testimony of George Kellock, April 13, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 171.

37 *Id.* at 172.

38 Testimony of Mary Connolly, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 115-30.

39 *Id.* at 123.

40 *Id.* at 115, 123.

41 *Id.* at 121-22.

42 *Id.* at 122.

43 *Id.* at 123.

44 Testimony of George Kellock, *supra* note 36, at 173.

ten years before Mary Ellen was born; also, she testified that she wanted a little girl and picked out Mary Ellen herself when, earlier in the her testimony, she very specifically told the court that she asked her husband if there was a boy and he told her that it would make no difference and that they would get "that one."[45] Regardless of the flaws and the lies, one thing is clear: on January 2, 1866, Thomas and Mary McCormack, later to be Mary Connolly, took Mary Ellen Wilson home as their own.[46]

From that point on there is little concrete information regarding Mary Ellen's life until her rescue. Seven years after Mary Ellen was adopted, Etta Wheeler learned of Mary Ellen.

Etta Wheeler was one of many "proto" social workers who became common in the mid-nineteenth century in America. Building on the examples of Jane Adams and even Henry Bergh, middle class women, through churches and aid societies, began going into the tenements and poor areas of urban centers like New York, to provide "aid" to the poor.[47] Their philosophy was that delinquency, crime, and other undesirable attributes, were directly tied to poverty and a lack of education.[48]

In the winter of 1873, Mrs. Wheeler, who worked as a missionary for St Luke's, was approached by a woman regarding a child for whom she and the other members of her tenement housing were concerned.[49] The woman told Mrs. Wheeler the story of a family who lived in the rear tenement with a child who appeared to be five or six years old.[50] Testimony would show that despite her appearance, Mary Ellen was nine years old at the time.[51] At the time that Etta Wheeler was told about Mary Ellen, the Connollys had lived in that tenement house for the prior two years but had moved to another tenement recently. According to the neighbor, the child had been imprisoned in the house and often whipped; no one seemed to know what to do.[52]

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45 Testimony of Mary Connolly, *supra* note 38, at 119, 123.

46 *Id.* at 119.

47 Covey, *supra* note 3, at 17, 169.

48 *Id.* at 139-40.

49 Etta Angell Wheeler, *The Story of Mary Ellen: The Beginnings of a Worldwide Child-Saving Crusade, reprinted in* Shelman & Lazoritz, *supra* note 15, at 21.

50 *Id.*

51 Shelman & Lazoritz, *supra* note 15, at 14.

52 Wheeler, *supra* note 49, at 21.

Mrs. Wheeler first investigated the house in which the family had lived for two years and heard very similar stories from the other tenants.[53] She then went to the family's new tenement building.[54] She confirmed that the Connollys did live in the building and went to the apartment that shared the floor with theirs.[55] Inside she found Mrs. Smitt, an immigrant woman who was dying.[56] Giving aid and comfort to the ill and infirm was within the normal social services provided by community workers like Mrs. Wheeler, and she used the opportunity to her advantage. Mrs. Wheeler visited with Mary Smitt that day and at other times during Smitt's dying months.[57] During those visits they spoke of Mary Ellen. Mary Smitt had never talked to Mary Ellen and only seen her twice.[58] However, she had heard the beatings. According to Mrs. Wheeler, Mary Smitt told her that Mary Ellen was beaten nearly every morning and often more times during the day.[59] During the beatings she could be heard screaming up and down the apartment by Mrs. Smitt.[60]

Etta Wheeler took this information and then used Mrs. Smitt's illness to further her investigation. She left her first meeting with the dying woman and went next door to Mary Connolly.[61] She entered the apartment without invitation and proceeded to ask Mrs. Connolly to look in on Mrs. Smitt from time to time.[62] She used the opportunity to observe Mary Ellen surreptitiously.[63] Mary Ellen ignored their guest and their guest appeared to ignore her.[64] At the time Mary Ellen was washing dishes, some nearly twice

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53 *Id.*

54 *Id.*

55 Testimonies of Etta Wheeler, Mary Smitt and Mary Webb, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 160-61.

56 *Id.* at 161.

57 *Id.* at 160-61.

58 Testimony of Mary Smith, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 164.

59 *Id.*

60 *Id* at 164-65.

61 Wheeler et al., *supra* note 55, at 161.

62 *Id.* at 161-62.

63 Etta Angell Wheeler, *The Story of Mary Ellen: The Beginnings of a Worldwide Child-Saving Crusade*, *reprinted in* Shelman & Lazoritz, *supra* note 15, at 14.

64 Wheeler et al., *supra* note 55, at 161-62.

her size, and there was a rawhide whip lying across the table.[65] Mrs. Wheeler visited other times before Mary Ellen's rescue and observed Mary Ellen doing chores and the whip sitting near her wherever she was.[66]

Etta Wheeler spoke with many people regarding what to do about the little abused girl.[67] Unfortunately, no one was willing to intervene.[68] Finally one of Etta Wheeler's nieces suggested that she asked Mr. Henry Bergh, the animal rights activist, to help.[69]

Henry Bergh heard Mrs. Wheeler's information and admitted to being interested in the case.[70] He requested that Mrs. Wheeler send him an affidavit regarding her information so that he could peruse it in his own time.[71] Bergh then sent his own man to investigate.[72] Apparently satisfied that the allegations of child abuse were justified, on April 8, 1874, Bergh sent a petition to the court alleging abuse and requesting a proceeding on the custody of Mary Ellen.[73] The interesting thing about the petition is that it evidently invoked an obscure section of the Habeas Corpus Act of 1679 in order to get Mary Ellen taken out of the home before Francis and Mary Connolly could escape the jurisdiction with Mary Ellen or injure her further.[74] The act states in part:

> Whenever it shall appear by satisfactory proof that any one is held in illegal confinement or custody, and that there is good reason to believe that he will…suffer some irreparable injury before he can be relieved by the issuing of a *habeas corpus* or *certiorari*, any court or officer authorized to issue such writs, may issue a warrant. . . [and] bring him before such court or office to be dealt with according to the law.[75]

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65 *Id.*

66 *Id.* at 162-63.

67 Wheeler, *supra* note 63, at 24; *see also* Jacob Riis, Children of the Poor ch. IX (1892), *reprinted in* Shelman & Lazoritz, *supra* note 13, at 191-92.

68 Wheeler, *supra* note 63, at 24.

69 *Id.* at 25.

70 *Id.*

71 *Id.*

72 *Id.*

73 In the Matter of the Custody of a Child Called Mary Ellen [*Bergh's Petition and Judge Lawrence's Response*], April 8, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 112-13.

74 Peter Stevens & Marian Eide, *The First Chapter of Children's Rights*, Shelman & Lazoritz, *supra* note 13, at 217; Shelman & Lazoritz, *supra* note 15, at 48.

75 *See* Shelman & Lazoritz, *supra* note 15, at 48, edited for brevity and emphasis added.

Other sources have indicated that the provision used was a *writ de homine replegiando*.[76]

The *writ de homine replegiando* dates back to the English courts of the eleventh century where it was used as a remedy to imprisonment, either private or public.[77] In fact, the only notable difference between the *writ of habeas corpus* and the *writ de homine replegiando* is that the latter can grant a jury trial.[78] Both writs are used to liberate illegally held individuals, although initially *de homine replegiando* required the detainee to post bail.[79] The writ transferred with the rest of English Common Law to the states.[80] It was used often in slavery cases prior to the Civil War, especially in dealing with the Fugitive Slave Act.[81]

It is possible that the writ was incorporated legislatively into the Habeas Corpus Act at some point in U.S. history, given their similarity. However, as a case from South Carolina indicates, it is more likely the writ was used concurrently by the states for the same purpose as *habeas corpus,* because the Judiciary Act of 1789 reserved use of *habeas corpus* for prisoners "where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into some court to testify."[82] The judge in the case noted that given that provision of the act, he could not use of a *writ of habeas corpus*) to free a black sailor captured under a law passed in South Carolina detaining free blacks who entered South Carolina as crewmembers on board ships.[83] The act detained them in jail until the ship was ready to leave again and required the captains to pay for their detention.[84] If the captain did not then set

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76 Marvin Ventrell, *The Practice of Law for Children*, 66 Mont. L. Rev. 1, 9 (2005).

77 William F. Duker, A Constitutional History of Habeas Corpus 16 (1980).

78 Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 Golden Gate U. L. Rev. 219, 248 (2007).

79 *Id.* at 245.

80 *Id.* at 249-52.

81 *Id.*

82 Elkison v. Deliesseline, 8 F. Cas. 493, 496 (C.C.S.C. 1823), quoting the Judiciary Act of 1789.

83 *Id.* at 493.

84 *Id.*

the captive free, blacks were sold into slavery.[85] The judge, in hearing the case for illegal detention, noted that while *habeas corpus* had been reserved for use by the federal government, the *writ de homine replegiando* was still available to him, having been incorporated into South Carolina's laws.[86] The judge further cited use of the writ in other states, including New York.[87] It is likely the writ was used in similar manner in other states, given the fact that the *writ of habeas corpus* was confined to use by the federal courts.[88] What was reported in Mary Ellen's case was merely that "Judge Lawrence issued, not an ordinary writ of habeas corpus, but a special warrant, provided for by section 65 of the Habeas Corpus act, whereby the child was at once taken possession of and brought within the control of the court."[89]

Either way, the use of the writ to rescue a child from captivity by her parents was considered novel and Elbridge T. Gerry, the ASPCA general counsel and board member who actually tried the case, was heralded for his ingenuity.[90]

On April 10, 1874, Mary Ellen's case began in the Supreme Court of New York. Several newspapers covered the trial, which lasted nearly three weeks. On the first day that Mary Ellen was brought in, she wore a threadbare dress and was covered in a coach blanket. The scratch down the side of her face was a fresh cut.[91] Mary Ellen gave her statement to the judge in chambers[92]:

> My name is Mary Ellen McCormack. I don't know how old I am; My mother and father are both dead; I have no recollection of a time when I did not live with the Connollys; I call Mrs. Connolly mama; I have never had but one pair of shoes, but can't recollect when that was. I have had no shoes or stockings on this winter; I have never been allowed to

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85 *Id.*

86 *Id.* at 497.

87 *Id*.

88 *Id.* at 496.

89 *Mr Bergh Enlarging His Sphere of Usefulness: Inhuman Treatment of a Little Waif – Her Treatment – A Mystery To Be Cleared Up,* N.Y. Times, April 10, 1874, *reprinted in* Shelman & Lazortiz, *supra* note 15, at 102.

90 Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Minefield,* 11 J. Am. Acad. Matrim. Law. 1, 2-3 (Winter 1993); *see also* Stevens & Eide, *supra* note 74, at 217.

91 *A Case for Charitable Interference—Henry Bergh Rescues a Little Girl from Her Inhuman Parents-Proceedings in the Supreme Court*, N.Y. Daily Trib., April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 75.

92 Shelman & Lazoritz, *supra* note 15, at 19.

> go out of the rooms where the Connollys live except in the nighttime, and then only in the yard; I have never had on a particle of flannel. My bed at night is only a piece of carpet, stretched on the floor underneath a window, and I sleep in my little undergarment, with a quilt over me. I am never allowed to play with any children or have any company whatever. Mama has been in the habit of whipping and beating me almost every day. She used to whip me with a twisted whip, a raw hide. The whip always left black and blue marks on my body. I have now on my head two black and blue marks which were made by mama with the whip, and a cut on the left side of my forehead which was made by a pair of scissors in mama's hand. She struck me with the scissors and cut me. I have no recollection of ever having been kissed, and have never been kissed by mama. I have never been taken on my Mama's lap, or caressed or petted. I never dared to speak to anybody, because if I did I would get whipped; I never had, to my recollection, any more clothing than I have on at present, a calico dress and skirt; I have seen stockings and other clothes in our room, but I am not allowed to put them on; whenever mama went out I was locked up in the bedroom; the scissors with which mama struck me are those now shown by Mr. Evans; I don't know for what I was whipped; mama never said anything to me when she whipped me; I do not want to go back to live with mama, because she beats me so; I have no recollection of ever being in the street in my life.[93]

Although it is possible the statement she gave to the judge was in response to questions, there does not appear to be a transcript of her testimony and the newspapers that printed her comments printed them as an independent statement. It has been reprinted that way ever since. It is interesting to note how well-spoken Mary Ellen is. By her foster mother's testimony, Mary Ellen had only really been taught her letters, simple words, and the Lord's Prayer.[94] Yet her statement to the judge, reprinted so often, is articulate and verbose. It can no longer be determined if her statement was "cleaned up" by the press or even coached. But the physical abuse was too clear to ignore. The picture from her rescue showed legs covered in welts and a cut down the side of her face that ran dangerously close to her eye.[95] It showed a thin dress which historical accounts agreed was far too threadbare to provide any warmth and

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93 Shelman & Lazoritz, *supra* note 13 at 75-76.

94 Testimony of Mary Connolly, *supra* note 38, at 126-27.

95 Shelman & Lazoritz, *supra* note 15, at 22 (photo of Mary Ellen Wilson dated April 9, 1874, reprinted courtesy of the George Sim Johnston archives of the New York Society for the Prevention of Cruelty to Children).

protection.[96] As the famous journalist, Jacob Riis (who attended the trial), recalled, "I was in a court-room full of men with pale, stern looks. I saw a child brought in, carried in a horse blanket, at the sight of which men wept aloud. I saw it laid at the feet of the judge, who turned his face away."[97]

Two separate cases led from Mary Ellen's first statement. There was a custody case in front of the judge who had issued the writ, Judge Abraham R. Lawrence, and a criminal case against Mary Connolly, which was heard before Recorder Hackett.[98] Mary Ellen's foster/step-father was never charged criminally, nor does he appear to have been involved at all in the case.[99] That said, the testimony in the two cases appears to have been predominately repetitious.[100]

The two police officers who executed the warrant to rescue Mary Ellen and an officer in the ASPCA who went with them, Mrs. Wheeler, and the police matron who cared for Mary Ellen during the trial all testified about the cuts and bruises and general appearance of Mary Ellen.[101] Additionally, the neighbors from the first tenement house and Mrs. Smitt testified to hearing crying and beatings and that how Mary Ellen was barred and locked in, even during the hot days, and often for several hours at a time.[102]

Despite testimony by Mrs. Wheeler and others describing the raw hide whip, when the officers returned to the house after removing Mary Ellen and searched later that same day the whip was never found.[103] The first neighbor to testify admitted she had never seen Mrs. Connolly harm Mary Ellen, only that she had heard Mary Ellen crying very loudly when she would pass by the door.[104]

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96 *Id.*

97 *Id.* at 16.

98 *Trial of Mary Connolly for a Cruel Assault upon 'Little Mary Ellen' – She Is Convicted of Assault and Battery and Sent to the Penitentiary for One Year*, N.Y. Herald, April 28, 1874, reprinted in Shelman & Lazoritz, *supra* note 13, at 98-99.

99 Stevens & Eide, *supra* note 74, at 217.

100 *Trial of Mary Connolly*, *supra* note 98, at 98-99.

101 Transcripts of testimony *reprinted in* Shelman & Lazoritz, *supra* note 13, at 131-86.

102 *Id.*

103 Testimony of Christian B. McDougal, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 138.

104 Testimony of Charlotte Feihling, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 144.

Additionally, she related an incident where she saw Mary Ellen out in the yard one day going to the outhouse without stockings or shoes on and that Mary Ellen, on that day, was black and blue.[105]

The next neighbor to testify, Catherine Kemp, lived on the same floor as the Connollys.[106] Mrs. Kemp claimed that the child was locked in all the time, except when she was allowed to go to the outhouse, or when Mrs. Connolly was out and only Mr. Connolly was home.[107] During those times she was allowed to run out into the hall.[108] Mrs. Kemp never heard any beatings or noticed any marks in the few times she saw the child.[109] On the other hand, the neighbor in the adjoining building never saw anything, but unlike Mrs. Kemp, Mrs. Studer heard sounds of a child crying and being beaten.[110]

The landlady, Margaret Bingham, testified that the house was kept locked up with the blinds down and that the very rare times someone saw Mary Ellen she always ran to the back room of the apartment.[111] She admitted to hearing the crying but not the beating and made the assumption that Mrs. Connolly must have taken her to the back rooms to beat her.[112]

Margaret Bingham's daughter, Jane Slater, testified that Mary Ellen was always locked in and after the one time she managed to open the window and Mrs. Connolly found out about it, Mrs. Connolly had latches put on the window, despite the heat, so Mary Ellen could not open them again.[113] It was never clarified how Jane Slater knew that Mrs. Connolly had the latches put on the window. Furthermore, Jane admitted that she had once seen Mary Ellen properly dressed and playing in the yard, and that her mother claimed Mary Ellen was taken out of the apartments by

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105 *Id.*

106 Testimony of Catherine Kemp, April 10, 1874, reprinted in Shelman & Lazoritz, *supra* note 13, at 146.

107 *Id.* at 145-46.

108 *Id.*

109 *Id.*

110 Testimony of Mary Studer, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 148-49.

111 Testimony of Margaret Bingham, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 150.

112 *Id.* at 151.

113 Testimony of Jane Slater, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 157.

a woman who may have been Mrs. Connolly's sister, and on that day she was well dressed.[114] Only Mrs. Wheeler and Mrs. Smitt ever testified to seeing the cowhide and Mrs. Smitt only saw it once.[115] Some witnesses heard the crying and the beatings, while others who should have been able to, did not. All the witnesses from the first tenement house testified that the child was locked in and never let out, yet several witnesses saw her out on one occasion or another and the only information they had as to how the child had gotten out or why she was ill dressed or bruised came from Mary Ellen herself.[116]

Perhaps most intriguing is what the newspapers reported about the disposition of Mary Ellen. According to the articles surrounding the trials, after her rescue Mary Ellen exhibited a sunny disposition and showed little to no fear of Mrs. Connolly when she met with her in the courthouse.[117] Later recollections from Mary Ellen's daughters cast that dichotomy between the Mary Ellen's behavior and her abuse in more confusion. Articles have stated that Mary Ellen told her daughters little of her life before her rescue.[118] Her youngest daughter did recall her mother mentioning an incident involving Mrs. Connolly burning Mary Ellen with a hot iron.[119] However, another article attributes the same daughter recalling that when Mary Ellen spoke in later years about her abuse, however rarely, she mentioned a man inflicting the injuries, not a woman.[120]

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114 *Id.* at 158.

115 Wheeler et al., *supra* note 55, at 161-62; Smith, *supra* note 58, at 165.

116 Transcripts of testimony, *supra* note 101, at 131-86.

117 *A Child's Sufferings: Mr. Bergh's Protégé in Court Again – The Story of Mary Ellen's Step-Mother*, N.Y. Daily Trib., April 11 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 83; *The Courts: Little Mary Ellen McCormack: A Bevy of Ladies Attend Her in Court – New Clothes for the Waif and New Joy in Her Heart – Her Condition When Taken to Police Headquarters – The Indenture from the Commissioners of Charities and Correction – Arrest of Mrs. Connolly*, N.Y. Herald, April 14, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 89-90.

118 Stephen Lazoritz, *Whatever Happened to Mary Ellen?,* 14 Child Abuse & Neglect 143 (1989).

119 *Id.*

120 Stevens & Eide, *supra* note 74, at 220.

This leaves a number of questions. Despite the fact that Francis Connolly was never charged or even seemingly tried, could he have been more involved? Why was he not indicted as well? Was Mary Connolly less the abuser than perhaps an equally abused party, put upon to take the fall for her husband's activities? Unfortunately, there are no answers to those questions and history says that although many of the witnesses contradicted each other and the rawhide whip described by Mrs. Wheeler was never found, the bruising and general obvious maltreatment of Mary Ellen seemed to speak enough to damn her foster mother.[121]

Mary Connolly was indicted on twelve counts of felonious assault.[122] She was tried on two counts, one count of felonious assault with a pair of scissors (the incident that caused the cut over Mary Ellen's eye), and another for the series of assaults committed over the prior year.[123] On April 28, 1874, Mary Connolly was found guilty of the lesser offense of assault and battery from her treatment of Mary Ellen and sentenced to a year in the Tombs.[124]

Mary Ellen was removed from her foster mother's care. A number of supposed relatives came forward claiming to be related to Frances Connor, Mary Ellen's mother.[125] The judge who had overheard the case, Judge Lawrence, looked through the letters from these supposed relatives and ascertained that they were generally false claims of relation, and that any known relatives able to take Mary Ellen were not capable of being found.[126] Mary Ellen was eventually taken to Etta Wheeler's family home in Upstate New York and there she thrived.[127] She grew up, lived a quiet life

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121 Transcripts of testimony, *supra* note 101, at 131-86.

122 *The Counts Against Mary Connolly*, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 235-40.

123 *Mary Ellen Wilson: Mrs. Connolly, the Guardian, Found Guilty and Sentenced to One Year's Imprisonment at Hard Labor*, N.Y. Times, April 22, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 94.

124 *Trial of Mary Connolly for a Cruel Assault*, *supra* note 98, at 98-101.

125 *Letters and Affidavits*, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 102-11.

126 Stevens & Eide, *supra* note 74, at 219; *see also Little Mary Ellen Finally Disposed Of*, N.Y. Times, December 27, 1875, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 101.

127 *Letter to Mr. Henry Bergh from Etta Wheeler June 24, 1875*, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 189-90.

in Upstate New York, and had two daughters and a foster daughter that she raised.[128]

Because of Mary Ellen, her attorney Elbridge T. Gerry and Henry Bergh founded the New York Society for the Prevention of Cruelty to Children.[129] Other cities followed New York's lead: "There were thirty-seven SPCCs by 1880, and 161 by 1902."[130] While the early societies were nonprofits that focused primarily on the conviction of offenders, it is from them and the work of progressives like Etta Wheeler that America's modern system of child protection was formed.[131]

For all its potential flaws, the case of Mary Ellen was a perfect storm. The existence in New York of such progressives as reporter Jacob Riis who covered the trial, Henry Bergh, and Elbridge T. Gerry, the rising tide of progressive reform, and sentimentality towards children from the middle and upper classes, a seemingly articulate little girl so severely treated (with physical evidence that could not be denied), and a case worker determined not to see such a child go back to her abuser, made Mary Ellen the model for child protection.[132] Unlike earlier children who had been returned to convicted guardians when no other relative stepped forward, Mary Ellen was put in the care of a non-relative third party. Unlike earlier cases, the judicial officers and law enforcement personnel were motivated to do more. Perhaps they were roused by the roughly decade long history of Henry

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128 Lazoritz, *supra* note 118. Mary Ellen Wilson's later story is uplifting:

> At 24, Mary Ellen married Louis Schutt. The couple had two children of their own, along with three children of Schutt's from a previous marriage, and Mary Ellen passed on her good fortune by adopting an orphan girl. By all accounts, she was a superb and caring mother. She died in 1956, at 92.

Howard Markel, *Case Shined First Light on Abuse of Children*, N.Y. Times (Dec. 14, 2009), https://www.nytimes.com/2009/12/15/health/15abus.html.

129 Covey, *supra* note 3, at 135.

130 Elizabeth D. Katz, *Fostering Faith: Religion and Inequality in the History of Child Welfare Placements*, 92 Fordham L. Rev. 2077, 2123 (2024).

131 Covey, *supra* note 3 at 142-43.

132 A newspaper article offered this description of Mary Ellen and analysis of one facet of the impulse toward child protection: She was "a self-possessed 10-year-old . . . who finally put a human face on child abuse and prompted a reformers' crusade to prevent it and to protect its victims, an effort that continues to this day." Markel, *supra* note 128.

Bergh pushing a sentimentality towards the defenseless into the minds of New Yorkers. Perhaps it was simply that the physical evidence was too overwhelming. Whatever the reason, the rescue of Mary Ellen was novel enough to start a national movement,[133] which continues today as it seeks to protect children by all the means at its disposal.

133 This is a movement that has had numerous landmark steps forward:

> By 1935, issues regarding child welfare were included in the Social Security Act. In 1962, Drs. C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller, and Henry K. Silver published an article called *The Battered-Child Syndrome*, an analysis of the clinical condition found in young children who experienced serious physical abuse, resulting in permanent injury or death. In response to this article and others like it, the Children's Bureau of the Department of Health and Human Services pushed for the passage of child abuse reporting laws. By 1967, all states had similar laws on the books. In 1974, Congress passed the federal Child Abuse Prevention and Treatment Act (CAPTA).

Anabelle Tolgyesi, *Examining* DeShaney*: Child Abuse, Due Process, and State-Sanctioned Violence*, 14 U. Miami Race & Soc. Just. L. Rev. 226, 228 (2024).