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*The author thanks William Henry, Elizabeth Hoffmann, and Ben Huber for their thoughtful comments and critiques. He is grateful to Martha Minow, Kristin Kelly, Jeffrey Kahana, and Susan Gallagher for their encouragement of ideas presented here.

† This research received support from the British Academy, the U.S. National Science Foundation, and a W.P. Jones Presidential Fund for Faculty Development, College of Arts and Sciences, Case Western Reserve University. The author thanks Associate Dean Stephen Haynesworth for his support of this project and the working conference from which this symposium issue was developed.

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Mending a Public-Private Gap: Children's Rights and the Children's Ombudsperson

“Public” and “private” are regularly used to organize social life, designating responsibilities and expectations. Gaps between public and private social worlds exist where responsibilities and expectations are unclear. Some social groups, such as children, are vulnerable to falling into public-private gaps. With mixed success, “law” is often used to mend these public-private gaps. This article examines a social policy in which law is used to mend public-private gaps for children: the children’s ombudsperson. This article presents results from a comparative study of the children’s ombudspersons of Northern Ireland, Scotland, Wales, and a bill to establish this office in England. This study examines the legislated powers these children’s ombudspersons possess to mend public-private gaps. This article concludes with a discussion of how law is used to mend public-private gaps for children’s interests and welfare.

Introduction

Where do gaps exist between public and private social policies? Who falls into these gaps? How is "law" used to fill these social-policy gaps? This article introduces a social-policy innovation, the children's ombudsperson. The development of offices of children's ombudspersons raises questions about who falls into public-private gaps and how law is employed to fill these gaps. This article reviews different meanings of public and private in general, then for social policy in particular. It examines examples of public-private collaborations, then describes gaps between public and private social-policy provision and concerns arising from these gaps. It identifies children's interests as falling into a public-private gap, then discusses different ways law is used to overcome these public-private gaps. This article then presents the office of children's ombudsperson as an example of how law is used to try to fill a public-private gap. This article arises from a comparative study of the four United Kingdom countries to evaluate the impact of children's ombudspersons on children's rights and interests. This article concludes with a discussion of the impact of the children's ombudsperson on children's interests and rights.

Partners, Not Rivals

Enthusiasm for Martha Minow's (2002) extraordinary book, *Partners, Not Rivals: Privatization and the Public Good* motivates many questions this project seeks to answer. *Partners, Not Rivals* makes a significant contribution to studies of American social policy. Rather than concentrate on either public or private provision, Minow offers provocative analyses of collaborations among public and private providers of social services and benefits. She concludes that these collaborations often effectively and efficiently serve U.S. social policy interests. Minow cautions, however, that these collaborations can and sometimes do raise concerns for American values. When we provide services and benefits through public-private collaborations,

public interests, such as democratic accountability, and private interests, including choice, may be slighted.

While certainly not downplaying these public-private concerns, this article introduces another: public-private gaps. Public-private collaborations sometimes fail some social groups. Certain social groups are more vulnerable to falling into gaps between public and private social policy programs and services. Falling into a public-private gap can lead to disastrous consequences. Some groups are more vulnerable to falling into public-private gaps. One social group that is often overlooked in social policy studies, but on which laws and social policy can have an extraordinary impact, is children, particularly children who have been abused or neglected. This article presents results from the first comparative research on children's ombudspersons. A social-policy innovation, an office of a children's ombudsperson is often designed and then established to prevent children from falling into gaps between public and private providers of social services and benefits. Designated independent of public and private authorities, children's ombudspersons are usually responsible for enhancing children's welfare and ensuring their rights are enforced. The office of children's ombudsperson is an example of a social-policy innovation in which laws and legal institutions are used to fill a gap between public and private sectors.

What is Public and Private?

Before examining the public-private gap, it is important to discuss what is meant by public and private. It is impossible to give all meanings of public and private or to come to a neat conclusion about sources of ideas of what is public and private. Instead, this section's objective is to offer an overview of how we often think of what is public and private, and to raise questions about what is meant by public and private.

We start with common notions of what is public and private. Fraser (1999: 128) reviews typical conceptions of public and private.

"Public," for example, can mean (1) state-related, (2) accessible to everyone, (3) of concern to everyone, and (4) pertaining to a common good or shared interest. Each of these corresponds to a contrasting sense of "private." In addition, there are two other senses of "private" hovering just below the surface here: (5) pertaining to private property in a market economy and (6) pertaining to intimate domestic or personal life, including sexual life.

Fraser's notions of public seem to revolve around either the state or something that involves everyone. Her notions of private appear to be non-state, not to involve everyone, or to pertain to private property or intimate relations.

Fraser's (1999), like others' conceptions of public and private, probably has a basis in Aristotle's ideas. In his *Politics*, Aristotle sets out the basis of a state, delineating categories: the citizen, the household, the village, and the state. In Aristotle's conception, the state subsumes the village, the household, and the citizen. Rather than a dichotomy between state and non-state actors and institutions, the state is built on the village, which is based on households capable of fulfilling daily needs. A state is a community based on an organization of villages. A village is formed when several households unite to fulfill more than basic needs, thereby allowing household members to manage concerns beyond their own households. Outside Aristotle's household, as a citizen, a male household member participates in public affairs arising between other households and the village and state they form.

A household consists of master and servant, husband and wife, and father and children. Aristotle offers some directions on how a household should be governed. Inside this household, the male citizen as husband, father, and master, governs his wife, children, and to a less degree his servant, respectively. The relationship between husband and wife is constitutional rule. According to Aristotle, the husband should govern his wife as a citizen leader governs another citizen, with the expectation that they will take turns governing, although the husband's rule never ceases. The father should govern his children royally. A royal government for Aristotle means the

father should rule his children as a loving parent. His children, in turn, should submit to him out of love and respect for his royal government. Regarding servants, although the male member owes responsibilities beyond mere ownership, the bottom line is that the servant is the master's property. For Aristotle, the state is based on and subsumes the village and the household; within the household the male citizen governs.

Gobetti (1997: 103) suggests that the public-private dichotomy "has its roots in the modern contractual theorists." She points to the distinction between public and private jurisdictions. The private jurisdiction belongs to the "citizen/subject" and the public jurisdiction belongs to the group that makes decisions for a "politically unified group" (1997: 103). The private jurisdiction extends to all activities in which an "adult engages without harming or endangering others," whether by commission or omission. When harm is done, the public authority can then legitimately intrude into an individual's private jurisdiction. Behanbib (1999: 91-92), on the other hand, contends that the male bourgeois citizen's "relations in the household were defined by nonconsensual, nonegalitarian assumptions. Questions of justice were from the beginning restricted to the public sphere, whereas the private sphere was considered outside the realm of justice."

In *The Structural Transformation of the Public Sphere* (1991), Habermas conceives of a public sphere, the state, and the economy or market place. His focus is on the public sphere, which he describes as a place where people are socially integrated and rational, critical discourse can take place about state and economy. Integration into this public sphere occurs through communication, not domination (Calhoun 1999: 29; see Calhoun 1999 for an excellent overview of this book). In the public sphere, individuals are to participate together, through communication, in debating issues of authority of the state and market place. Habermas' private sphere is the household. Compared to Aristotle, the public sphere is the site where all individuals can exchange ideas and opinions to exercise control over state and market sectors. It is not clear

in Habermas' conception whether communication in the public sphere is expected to be used to control the private sphere.

Behanbib (1999: 92) criticizes Habermas for failing to identify power differences in intimate relations found in the private sphere. The women's movement, according to Behanbib, is making private issues into public issues (1999: 92) by noting power differences "on which sexual division of labor has rested" (1999: 92). As a result, lines between public and private are under negotiation. She is troubled, however, by how these private issues are managed in public. "When, however, issues like child rearing...domestic violence...child abuse...go public in our societies, more often than not a 'patriarchal-capitalist-disciplinary bureaucracy' has resulted. These bureaucracies have frequently disempowered women and have set the agenda for public debate and participation" (Behanbib 1999: 94).

An important conceptual contribution to the public-private dichotomy is the social sector. Fraser (1989: 156) identifies the social, which she says is different from family and official economy, as well as Habermas' public sphere. "Rather, the social is a site of discourse about people's needs, specifically about those needs that have broken out of the domestic and/or official economic spheres that earlier contained them as 'private matters.'" It is a place of conflict "in which conflicts among rival interpretations of people's needs are played out" and discussed (Fraser 1989: 156-157). She (1989: 157) identifies three major ways needs are discussed in the social arena: "(1) *experts* such as social workers and policy makers identifying people's needs; (2) *oppositional movements* identifying people's needs; and, (3) *reprivatization constituencies* that seek to move "newly problematized needs to their former domestic or official economic enclaves" (italics mine). Fraser's social is similar to Habermas' public sphere in that it is a site of communication, but less of integration. While Habermas may hope that everyone enters the public sphere as equals, experts and groups dominate Fraser's social sector

These different conceptions suggest many important thinkers have devised different conceptions of what is public and private, and that these conceptions sometimes conflict. Fraser

(1999: 131) advocates taking harder looks at "public" and "private." "These terms, after all, are not simply straightforward designations of societal spheres; they are cultural classifications and rhetorical labels. In political discourse they are powerful terms frequently deployed to delegitimize some interests, views, and topics and to valorize others." Turkel (1992: 222) contends that the public-private "division is increasingly determined by social forces," but that the public-private distinction is incoherent. This incoherence "occurs along with increases in societal power that make the individual and the private sphere a zone of surveillance, manipulation, and intensive technological control." Yet the public-private dichotomy is a double-edged sword. To deny the utility of the public-private boundary can result in the weakening of the boundary, permitting the state and others to intrude into private life. On the other hand, affirming the boundary can discourage new responses to problems the public-private boundary denies (Turkel 1992: 222-223; see Fraser 1999: 137).

What is meant by public and private includes both relationship and place. Aristotle described relationships between state, village, and household. Male household leaders negotiated these relationships, as well as relationships within the household. Roles of other household members, including wife, child, and slave, were conceptually limited to intra-household relationships. The male household leader participated in public and private sectors, while participation of women, children, and slaves was limited to the private sector. Habermas is concerned that state and economic marketplace will overwhelm the public sphere, which is a site of social integration that can encourage individuals to participate in controlling authority of the state and economic marketplace. In his later work, Habermas goes further to express concern that the state and economic marketplace will intervene in and to some degree control the private sphere. Habermas conceives that everyone will participate in the public sphere, but as his critics note, he fails to consider barriers and abilities to participation. These barriers may be erected in the state and economic marketplaces as well as within the household (see Gobetti (1997: 105)).

What is Public and Private for Social Policy?

When studying social policies, "public" and "private" are regularly used to characterize actors and institutions sponsoring social programs and providing social services. In the United States, major public programs support retirement security (e.g., Social Security), health (e.g., Medicare and Medicaid), education (e.g., public elementary schools), and personal development (e.g., Head Start). Programs benefiting government employees are extensive too. Federal employees are entitled to life insurance, health insurance, and long-term care insurance. The Federal Employees Health Benefits program provides benefits to eight million employees and their dependents. For the year 2001, over 500,000 people were receiving retirement benefits as former federal employees, which cost taxpayers \$10 billion each year (U.S. Office of Personnel Management ND).

Some analysts may disagree with this public characterization of programs and services benefiting federal employees and veterans. This placement under the public heading is meant to challenge how we conceptualize public and private social policy. Merely focusing on sources of funding, for example, would suggest that Medicaid and government employees' health insurance and retirement pension programs are public because taxpayers pay for them. Focusing on funding sources would suggest two of the biggest public programs (considering their expense and coverage), Social Security and Medicare, seem more private than public. Like private pensions, employees (6.2% of their wages) and their employers (6.2% of their employees' wages) pay for Social Security and Medicare (self-employed individuals pay 12.4%). Taxpayers do not directly contribute to either Social Security or Medicare. Solely focusing on funding sources indicates neither of these programs can be designated public.

Christopher Howard's (1997) path breaking book, *The Hidden Welfare State*, demonstrates the limited utility of relying on funding sources as a means of identifying policies as public or private. Howard focuses on tax expenditures, examples of which include tax deductions and claims against income taxes. Howard highlighted that some private social policies, such as

retirement pensions (including 401(k) plans and Individual Retirement Accounts) and health insurance, have substantial costs for federal taxpayers. Updated data mirroring Howard's 1997 analysis indicate that tax expenditures, such as tax deductions, benefiting employer-sponsored retirement benefits will cost taxpayers \$120 billion and for health insurance \$112 in 2005 (EBRI 2004). In comparison, Medicaid programs cost federal taxpayers \$240 billion in 2002. Tax expenditures muddy the public-private distinction for social policy. If the focus is strictly limited to who pays for the social-policy program, many private, social-policy programs in the United States should be characterized as public because taxpayers foot part of their bills.

Another factor on which both policy analysts and Americans focus in determining whether a social policy is public or private is access to benefits. Public often means a benefit is available to everyone; private usually means a benefit's availability is restricted. The Social Security retirement pension is often considered universal; its benefits are available to all Americans. Private pensions are restricted to contributors and potentially their heirs. Historically, the Social Security retirement pension was not available to all Americans. It excluded agricultural and casual laborers, which effectively meant many African Americans could not qualify for Social Security (Quadagno 1994). The current Social Security retirement pension excludes “[c]asual agricultural and domestic employees” (Social Security Programs Throughout the World 2003). Qualifying conditions require an individual to contribute to Social Security for forty quarters. Qualifying conditions mean the Social Security retirement pension is not necessarily available to all individuals who reach age 65. Who does not qualify for the Social Security retirement pension? People who do non-paid work, including parents caring for children and children caring for parents, do not qualify for Social Security or Medicare. Employees and their employers who do not pay federal payroll taxes do not qualify for Social Security. Some people may satisfy the contributory requirements of Social Security, but will not reach the qualifying age when they are entitled to receive the Social Security retirement pension benefits (Steuerle, Carasso, and Cohen 2004).

Perhaps one of the most important differences between public and private social-policy programs is that public programs legally mandate participation and private programs do not. By law, most employees and employers are required to pay taxes to the Social Security and Medicare programs, even if it is reasonable to expect that the employee will never qualify for or receive Social Security and Medicare benefits. Taxpayers generally are required to pay taxes in support of public schools, even if they do not have children attending the public school they are financially supporting. Review of these three criteria, sources of funding, access, and legal mandate, suggests that the boundary separating public and private social policies is fuzzy at best.

Conceivably the greatest difference is accountability. Public programs tend to be democratically accountable while private pensions are not. Although Americans do not directly vote on issues surrounding public social-policy programs like Medicare, we do usually vote on public school issues, such as levies and bonds in support of local schools. For Social Security and Medicare, rather than directly vote on these programs, we elect representatives who are accountable for these programs. In the context of low electoral turnouts (in the 2000 presidential elections, 51.3% of the voting-age population voted (Infoplease 2004)), however, it is reasonable to ask whether Americans truly move beyond hypothetical to practical accountability. Nevertheless, Americans have political rights to govern these programs. Private programs, in contrast, are less accountable. Despite the substantial reliance on private pensions and health insurance, and their potential growth in coverage and role in providing income and health security, these private programs can be conceived as based in contracts agreed to by employee and employer. Muddying the waters, however, public entities do have a say and responsibility in the accountability of these private social-policy programs. If a private pension program fails, the Pension Benefit Guarantee Corporation, a federal government agency, to some degree protects beneficiaries, with taxpayers footing the bill. In 2003, PBGC had \$2.5 billion in claims with 459,000 payees (PBGC 2003: 7).

These four qualities, who pays, who has access, who is required to participate, and who holds a program accountable, initially seem useful for characterizing a social-policy program as public or private. This brief examination, however, indicates that these four criteria actually make labeling a program difficult. Instead, consideration of these four qualities suggests public and private actors and institutions collaborate for many U.S. social-policy programs.

Public-Private Collaborations for Social Policy

As the above examples suggest, many public and private U.S. social programs can be better characterized as public-private collaborations. Minow (2000; 2002) has made path-breaking contributions to studies and debates of social policies produced by public-private collaborations. Minow points to the extraordinary number of ways public and private actors collaborate to produce social-policy systems.

An important example of a public-private collaboration is a school voucher system. A state government can provide vouchers that enable a student to enroll in a private school of their parents' choosing. School vouchers are paid by taxpayers, but a child's parent makes the decision to accept the voucher, then the decision of to which school, public or private, to apply the voucher (Minow 2002: 21). School vouchers were the focus of the recent U.S. Supreme Court case, Zelman v. Simmons-Harris, 536 U.S. 639, 122 S. Ct. 2460; 153 L. Ed. 2d 604 (2002). In the Zelman case, the Ohio state government established a voucher program through which parents could select a parochial school or a nearby public school for their child's education, then sign over the voucher to that school. Nearly 96% of the schools for which parents applied vouchers were parochial. The Supreme Court considered whether it is constitutional for tax revenues to be used to pay for parochial education. For the U.S. Supreme Court, the crucial fact was that the voucher was made available to a parent, who made the decision whether to apply the tuition to a parochial, another private, or another public school. Because the Ohio state government was not directly supporting a parochial school, the Supreme Court concluded it was not supporting religion. The Zelman case indicates that at least some state governments have opted to collaborate

with private schools to provide education rather than repair what is perceived as failed public educational systems. An open question is what happens to a child whose parents do not use a voucher to transfer the child out of a failing school?

The U.S. health-insurance system is a quilt of public-private collaborations. As described above, the U.S. health-insurance system is a collaboration of public and private insurers. More than 60% of Americans receive coverage through tax-subsidized, employer-sponsored health insurance. Of this large group, for the year 2002, approximately 31% of adults and 69% of children are insured through their relationship with the employee (Boushey and Wright 2004). Employer-sponsored health-insurance receives public support through tax benefits. About 25% of Americans enjoy publicly-provided health-insurance coverage. Approximately 41 million Americans are covered through Medicaid, through Medicaid nearly 6 million children are enrolled in CHIP programs, and 40 million through Medicare Part A (CMS 2004).

Concerns Arising from Public-Private Partnerships

In her book, *Partners, Not Rivals: Privatization and the Public Good*, Minow (2002) raises concerns for when public and private sectors collaborate to provide social services. When we study social policy, a benefit we usually ascribe to private provision is freedom from government control. The private sector is where government coercion can be avoided in providing social-policy benefits. Private health insurance allows an employer and employees to contract as to what kinds of health care and problems they agree to insure. Minow emphasizes that avoiding government coercion has encouraged great diversity in private activities, both in form and in kind of services that are privately provided. While government regulation already is extensive, a concern for public-private collaboration is that regulation will increase. This regulation will weaken the ability of an employer and its employees to agree contractually what their health-insurance plan will cover and at what cost. By reducing diversity, government regulation may reduce innovation. Minow also is concerned with whether public-private collaborations will mean the public sector can enter into what were private arenas of

responsibility and decision making. Requirements attached to federal funds may change behaviors and goals of private actors and institutions. Faith-based organizations, for example, have expressed concerns over whether receiving federal funds will hamper their ability to proselytize. Federal funds may have an indirect impact, affecting individual's decisions on how to educate their children, insure their health, and save for their retirement.

Public-private collaborations raise concerns for the public sector as well (Minow 2000: 1081-1082). Minow (2000: 1081) highlights commitments to "equality, freedom, and fairness. Translated in our legal system as antidiscrimination, freedoms of association and religious exercise, and due process, these public commitments traditionally helped to under gird the public/private distinction itself, ensuring private freedoms by restricting public incursions." Public provision of social services, for example, is supposed to be equally available to all Americans. All Americans, regardless of opinions, backgrounds, or other factors, have access to public health services.

Another Concern: Public-Private Gaps

When taking a closer look, another important concern arises for relying on public-private collaborations to provide social programs and services. This concern is that often times a gap is discovered between public and private providers. Some individuals do not qualify or in fact do not receive social services or program benefits from either public or private providers or public-private collaborations.

An important example is health insurance in the United States. As described above, in the United States, the health-insurance system is a collaboration of public and private providers. Many Americans receive health insurance coverage from employers, but private insurance receives public support through tax benefits and it is regulated by federal and state laws. After Americans reach age 65 and fulfilling Social Security requirements, they become entitled to Medicare coverage. Medicaid and CHIP programs provide health insurance to people who have low incomes.

Political debates revolving around the U.S. health-insurance system often focus on the large number of individuals without health-insurance coverage. Among OECD countries, the United States has the highest proportion of taxpayers without health-insurance coverage. Over 15% of Americans are without health-insurance coverage. For many OECD countries, including Australia, Canada, France, Japan, New Zealand, and the United Kingdom, all individuals are entitled to health insurance. Despite spending the most money, whether measured in total dollars or as a percentage of gross domestic product, compared to other rich countries, Americans fail to insure the most of their population.

Law and Public-Private Gaps

One question this article seeks to start to answer is how "law" influences responses to public-private gaps. For this article, law is a set of formal and informal rules that influence behavior (Turler 1995). Law, according to this definition, includes formal and informal rules that influence behavior. Law can order the different worlds in which we live (DeFlem 1996). Legislation often is produced when public-private gaps receive widespread attention. These pieces of legislation are devised to respond, or sometimes appear to respond, to these public-private gaps. Legislation can compel actors and institutions to fill in public-private gaps.

As described above, over 15% of Americans are without health insurance. They fall into a gap between public and private health-insurance coverage. They are not entitled to Medicare, Medicaid, or CHIP. Their employers do not provide health-insurance coverage and they do not purchase health-insurance coverage on their own. Some experts contend that this public-private gap, although raising important concerns, is not as terrible as it seems. Rather, individuals falling into this public-private insurance gap are still entitled to medical care from the best health-care system in the world. Through the Emergency Medical Treatment and Active Labor Act (EMTALA), emergency rooms must screen all individuals who enter their doors, then treat a patient until his or her condition is stable or they can transfer the patient to another facility

(Section 1867(a) of the Social Security Act). Another hospital must accept a transferred patient if it can provide specialized treatment the patient needs. EMTALA only applies to hospitals that accept Medicare payments. According to , nearly all hospitals accept Medicare, so nearly every U.S. hospital is subject to EMTALA.

EMTALA is an example of how law is used to fill a public-private gap. EMTALA is an attempt to mend a public-private gap in the U.S. health-insurance system by assuring individuals who are not covered by public or private health insurance have access to health care. The EMTALA's success in filling the public-private gap, however, is ambiguous. It is not clear that individuals receiving health care by way of EMTALA enjoy similar kinds and levels of quality of health care as other individuals who do not fall into the public-private gap in the U.S. health-insurance system. Evidence on the quality of care and relationships of patients and providers suggests that individuals who obtain health care through emergency rooms do not enjoy consistency in care, do not form relationships with physicians that promote long-term health, and are less likely to follow-up on physicians' recommendations, including medical tests and filling prescriptions.

Public-Private Gaps and Law: Children's Interests and Rights

Rather than focus on a policy area, this article presents a group that is vulnerable to falling into public-private gaps in social policies. Children are often vulnerable to falling into public-private gaps. Most American children possess some rights and are often entitled to benefits provided by public social programs and services, with the right to education most prominent. A child's rights are usually enforced by his or her parents or caretakers, but when parents or caretakers fail to enforce the child's rights, who is responsible? Many people would answer the public sector, but in the United States and many other countries, this answer is incorrect.

This failure to enforce rights has unfortunately become a social and political issue in cases of child abuse. An important example from the United States is the legal case, Deshaney v. Winnebago, 489 U.S. 189 (1989). In Deshaney, the U.S. Supreme Court found that the Due

Process Clause generally does not confer an affirmative right to governmental assistance, despite the situation where aid is necessary to secure life, liberty, or property interests that the government may not deprive the individual. The State of Wisconsin recognized and made a record that the Deshaney boy was suffering deadly beatings from his father. Despite the record and recognition that the boy needed assistance, the State of Wisconsin failed to intervene. The U.S. Supreme Court held that the State of Wisconsin was not liable for failing to intervene. The Deshaney case and similar cases raised the issue of children's rights and whom children rely on to enforce their rights.

Similar cases have arisen in other countries. The Victoria Climbié inquiry has received significant attention in England and elsewhere. Another heart-wrenching situation, the Climbié child was abused by family members, apparently a great aunt and a man with whom her family lived. Despite suspicions of abuse by hospital personnel, who reported non-accidental injuries, the Climbié child was returned to her great aunt. After three hospital visits over a seven-month period, the Climbié child died in February 2000 with 128 injuries (The Victoria Climbié Inquiry, www.victoria-climbié-inquiry.org.uk).

According to data from the U.S. Administration on Children and Families, in 1998 there were an estimated 2,806,000 referrals of child abuse or neglect to relevant U.S. state or local agencies (U.S. Department of Health and Human Services, Administration on Children, Youth and Families 2001). Douglas Besharov (1998) has pointed out that "unfounded" reports account for a large number of child-abuse reports (65% of reports of child abuse in 1995). Nevertheless, these referrals resulted in an estimated 903,000 confirmed victims of maltreatment, a rate of 12.90 per 1,000 children nationwide. (For comparison's sake, 1 person per 1,000 U.S. residents age 12 and older was raped in the United States in 1998 (Bureau of Justice Statistics 2002). The kinds of abuse these victims suffer are also disturbing. Of the 903,000 victims in 1998, 11.5% suffered sexual abuse, 22.7% suffered physical abuse, and 53.5% suffered neglect. Of these victims, 25% were victims of more than one type of maltreatment. Frequently abused children are

at risk for abuse in the future. Of course, child abuse can be fatal: approximately 1,100 children died of abuse or neglect in 1998, a rate of 1.6 deaths per 100,000 children. Of all forms of abuse, about 75% of the perpetrators were parents. In England, for the year March 31, 2001 to March 31, 2002, approximately 59,700 children were "looked after" by the government (United Kingdom Department of Health 2001), a rate of 5.34 per 1,000 children in the United Kingdom. Nearly 22,000 were subject of substantiated abuse reports in Australia for the year 1999 (Australian Institute of Health and Welfare 2001), a rate of 5.51 per 1,000 Australian children.

In 1989, the same year the Deshaney case was handed down, the United Nations General Assembly approved the Convention on the Rights of the Child. Despite the widespread ratification of the Convention, it has become clear that in most countries children fall through the cracks of citizenship rights. As suggested, often children per se possess civil rights, but must rely on their parents to enforce those rights. Typically children are not entitled to political rights. If they qualify for a social right, often a parent mediates and obtains the benefit on the child's behalf.

Despite its widespread ratification, it is clear that children all over the world fall into public-private gaps. Bryan Turner (1993) contends that human rights are useful when nation-states are unwilling or incapable of enforcing citizenship rights. Romany (1993) argues that contemporary notions of human rights are useful in the public "sphere," but so far have limited utility in the private "sphere." Human rights, according to Romany, have not broken into the private sphere. If Romany's contention is accurate, the UN Convention on the Rights of the Child will have a limited impact on children's rights and welfare. Romany's analysis may describe the situation of children in most nation-states. A child depends on his or her parents or caretakers to pursue their interests and enforce their rights. As data on child abuse suggest, many children cannot rely on their parents and caretakers to pursue their interests and enforce their rights. Since governments in the end are not responsible for enforcing children's rights and pursuing their interests, children live in Romany's private sphere. In this private sphere it appears difficult to

enforce citizenship or human rights if a parent forbids it and a government is unwilling to assume responsibility for a child's rights.

Mending Public-Private Gaps: Introducing the Children's Ombudsperson

Into this gap between the public and private sectors has arisen the office of children's ombudsperson. The office of children's ombudsperson is a social policy innovation established for purposes of advocating for children and enforcing their rights (Verhellen 1989). Little research on the office of children's ombudsperson has been undertaken. An important exception is an edited volume by Verhellen and Spiesschaert (1989), but contributions are primarily focused on individual countries rather than comparisons across countries or over time. It is therefore important to investigate offices of children's ombudspersons from a comparative perspective to identify and evaluate differences among the offices and powers they hold. It is believed that this article presents the first cross-national analysis of legislated powers held by children's ombudspersons and their potential impacts on children's rights.

The first office of children's ombudsperson was established in Norway in 1981. The individual holding this office can advocate on behalf of children, mediate disputes between children and others, and raise awareness of children's rights and needs. To fulfill these expectations, the Norwegian ombudsperson has access to many public and private institutions that affect children. Malfrid Grude Flekkøy (1989: 122), Norway's first children ombudsperson, emphasized that the ombudsperson

[H]as the right and the obligation to criticize any administrative level, any group, organization, or person disregarding the interests of children, regardless of political or other considerations. This means that we can raise issues which may be difficult or impossible for others, e.g., employees of the municipal or governmental establishment, who are often bound to loyalty (sic) in relation to the political leadership.

Legislative Powers of Children's Ombudspersons and the Public-Private Dichotomy

Therborn (1993: 243) emphasizes that “law...is a major determinant of childhood.” Little comparative research has been conducted on children and laws and policies affecting their childhood (Therborn 1993: 241-242), with even less on children’s ombudspersons and their powers to shape children’s life chances. As described above, children are vulnerable to falling into public-private gaps. This section reviews eight legislated powers children’s ombudspersons typically possess. These powers are divided into two sets. One set is designed to be applied to a child. Another set is designed to be applied to actors and institutions that affect children. Each power is examined according to which it could enable a children’s ombudsperson to affect different conceptual components of the public-private dichotomy. Following this examination, four empirical cases of children’s ombudspersons are assessed to determine the degree to which a children’s ombudspersons can represent a child’s interests in these different components of public and private worlds.

Before describing the legislated powers that a children's ombudsperson can employ to mend a public-private gap for a child, it is important to emphasize that children's ombudspersons are usually described as independent of both public and private sectors. Although typically sponsored by government, children's ombudspersons are often expected to monitor and influence government. In turn, children's ombudspersons are anticipated to monitor and influence private actors and institutions. The children's ombudsperson is expected be a "children's champion" in all parts of a child's life. Another important variable affecting the powers of a children’s ombudsperson is whether the children’s ombudsperson can work on behalf of an individual child. Because an individual child is entitled to a right, usually not a group, to enforce a right the children's ombudsperson must have the power to work on behalf of an individual child.

A children’s ombudsperson may use four powers to mend a public-private gap as well as affect a child’s position in public and private spaces: the powers to investigate, collect evidence, provide legal assistance, and remove. The power to investigate could enable the children’s ombudsperson to determine whether a child’s well being is at stake and if a child’s rights are

enforced. A children's ombudsperson can use this power to investigate all spheres in which a child lives. This power would allow the children's ombudsperson to investigate whether parents or other caretakers are harming a child, determining whether a father is royally ruling over his child in the eyes of Aristotle, or endangering the child as Gobetti has expressed concern. The power to investigate can be focused on the state. For children in detention facilities, a children's ombudsperson can investigate whether the state is harming an individual child. The children's ombudsperson can investigate Fraser's social sphere where a child may be subject to decisions made by social experts.

A children's ombudsperson can use the power to require another actor to provide evidence about a child. While the children's ombudsperson is conceived as the children's champion, the person holding this office is typically expected to work with extant public, private, and social organizations and actors, including police departments, social-service agencies, and health-care providers. The children's ombudsperson is not expected to arrest an individual harming a child, enforce laws that remove a child from a dangerous situation, or care for physical, psychological, or other injuries. The children's ombudsperson may, however, have the power to collect evidence to demonstrate to police that an individual has harmed a child, that a child should be removed from a caretaking situation for his own safety, and that a child has suffered injuries. By conducting an investigation and collecting evidence, these powers can help promote justice in a household as described by Gobetti. It can enable the child to present evidence that his or her parents are not ruling royally over him or her, thereby enabling members of Aristotle's public sphere to intervene.

The power to engage a legal system on a child's behalf can enable a children's ombudsperson to hold public and private actors and institutions accountable to a child. In some situations, a child may need to turn to the legal system to overcome a public-private gap. A child may not have the resources or the ability to hire legal representation to enforce legal rights. This power enables the children's ombudsperson to deploy part of the state against other parts of

Habermas' state as well as his market and private sectors. The children's ombudsperson can use the legal system to bring justice into the private sphere as Gobetti and Benhabib suggest.

A children's ombudsperson may use four powers to change how actors and organizations treat children: the powers to monitor, lobby, research, and publish. Because many children are prevented from or are incapable of participating in the public sphere, children's ombudspersons often possess powers could enable them to participate on behalf of children. These powers can, in turn, create lasting change to public-private gaps, benefiting interests of all children. An example of this kind of power is the ability to monitor. Independent of government, many children's ombudspersons hold the power to monitor legislation and policy government establishes. Using this power, the children's ombudsperson may be able to represent children in the public sphere, reaching at least some objectives of participation in the public sphere envisioned by Habermas. This monitoring power can effectively monitor the power of government as it pertains to interests of many children. Many children's ombudspersons possess the power to monitor private authorities as well. The power to monitor can be used to observe the work of actors in Fraser's social sphere, for instance, ensuring social service agencies effectively promote children's interests.

A similar power is the ability to lobby on behalf of children, advocating children's interests in circumstances where decisions are made affecting children. Many children's ombudspersons can lobby government actors and institutions as well as private authorities. Using this power, the children's ombudsperson can attempt to influence public and private actors and institutions, modifying their approaches to children and their interests. Legislated powers that enable children's ombudsperson to make these modifications are shaping legislation and opinion. Like the power to monitor, this power enables the children's ombudsperson to represent children's participatory interests in the public sphere as he or she seeks to control state, market, and social authorities, and their impact on households and other caretaking situations.

Conducting research and then publishing research findings can influence debates over children's interests and rights. Because children have limited abilities to do research on their own circumstances, a children's ombudsperson using his power may have a substantial impact on many children's situations. As a children's champion, the power to conduct research and publish findings can permit the children's ombudsperson to overcome walls to participation children face in the public sphere and encourage overall integration of children and their interests in the public sphere. It can, in turn, be used to control state, market, and social authorities from a child's perspective. This power can help children leave Aristotle's household and participate in the affairs of their community and state.

Case Selection and Data Sources

This article presents analyses of the children's ombudspersons of the four countries of the United Kingdom. It focuses on the United Kingdom for three reasons. The first reason is that the children's ombudsperson offices in the four United Kingdom countries are among the most recently established in the world. The second reason is that a great deal of change is taking place for children's rights in the United Kingdom. A variety of social forces have compelled government leaders to evaluate statuses of children's rights. Debates over children's rights in the United Kingdom perhaps raise most salient issues surrounding children and their rights and interests. The third reason is that, although each government has different degrees of independence of each other, the events affecting children and their responses in each country has influenced the other countries. At the time of writing, three of the four countries making up the United Kingdom have established offices of children's ombudspersons. The first was Wales, which established the office in 2001. The second was Northern Ireland, which established the office in 2002. The third was Scotland, which established the office in 2003. The English government has recently passed The Children Bill, which includes the establishment of an office of children's ombudsperson for England.

Data for this article are from legislation establishing offices of children's ombudspersons and legislation designating powers the children's ombudspersons possess. In addition, data are from interviews the author conducted during the 2003 summer in the United Kingdom.

Analyses

This project analyzes the legislated powers of the children's ombudsperson offices of Northern Ireland, Scotland, and Wales, as well as the legislated powers described in the Children Bill of England, from the perspective of an individual child.

[Table 1 about here]

The children's ombudspersons of all four UK countries enjoy varying degrees of independence. All four are financed and appointed by government officials, and all four can be removed for cause by government officials (Wales: clauses 3 and 7; Northern Ireland: Regulation number 5; Scotland: Act numbers 2 and 3; England: Schedule 1(1)). Beyond these requirements, except for England, legislation indicates that the children's ombudspersons are not in the service of the crown (Wales: clause 3; Northern Ireland: Schedule 2(1); Scotland: 1(1)). In the case of England's children's ombudsperson, the HL Bill (number 4) states that the Secretary of State may direct the children's commissioner to hold an inquiry. An amendment (Amendment 57) has been made to this bill, which appears to enable the children's ombudsperson to hold an inquiry at his or her discretion. Of course, appearances matter. Although governments established these offices of children's ombudspersons, appoint and financially support the children's ombudspersons, many powers the children's ombudspersons hold can be employed to affect the behavior of government and private actors and institutions. It is unclear whether children and others perceive the children's ombudspersons as independent of the government. It is hard to anticipate how governments will respond if children's ombudspersons are openly critical of their governments.

The children's ombudspersons of Wales (clauses 3 and 4) and Northern Ireland (clause 8) can act on behalf of an individual child. The Scottish children's ombudsperson cannot and the English children's ombudsperson generally cannot unless the Secretary of State directs the

children's ombudsperson to act in a specific case (HL Bill number 4). An amendment (66) to this bill indicates that the children's ombudsperson can investigate a matter affecting an individual child in exceptional circumstances. Consideration of the children's ombudsperson's power to work on an individual child's behalf indicates the Scottish children's ombudsperson, and perhaps the English, is severely limited, at least in immediate circumstances, in mending public-private gaps for children.

All four children's ombudspersons have the power to conduct an investigation, but this power is strongly limited in each case. The Welsh children's ombudsperson has the strongest power. The Welsh children's ombudsperson has the power to investigate the well-being of an individual child, but not a child living in a family home (that is, in other kinds of residences such as what Americans call a foster home). The children's ombudsperson of Northern Ireland has the power to investigate the well-being of children (Regulation 8(2) and 9(1)), as does the Scottish children's ombudsperson (Act number 7). The English bill does not explicitly authorize a children's ombudsperson to conduct an investigation, but an amendment (66) gives this power concerning an individual child to the ombudsperson.

The Welsh (Explanatory Note 5) and Northern Ireland (Regulation 21(8)) children's ombudsperson has the power to remove a child from a residence, but not a family home. The Scottish children's ombudsperson cannot. In fact, the Scottish children's ombudsperson cannot affect the parent-child relationship (Explanatory Note 24). Neither the bill nor any amendments at the time of this article's writing enable the English children's ombudsperson to enter any residence, a parental home or another kind of residence, and prevent a child from falling into a public-private gap.

Another important power is the ability to require another party to give evidence. The power to compel provision of evidence can benefit children by making available information to police and other authorities. To prevent an individual child from falling into a public-private gap, this power may be essential to enabling both government and private authorities to act on an

individual child's behalf. An important limitation on this power faces the Welsh children's ombudsperson, who can require evidence from individuals who have relationships with providers of children's services, but not parents (Regulations 3, 9, and 14). The children's ombudspersons of Northern Ireland (Regulation 20) and Scotland (Act number 9) do not face this limitation. The current bill does not authorize the English children's ombudsperson to possess this power.

The Welsh and Northern Ireland (Regulation 11) children's ombudspersons can provide legal assistance to children, but not the Scottish or English children's ombudspersons. An amendment (number 38) has been made to the English bill that enables the children's ombudsperson to provide legal representation, but only "to establish a point in law."

Three of the U.K. children's ombudspersons have the power to monitor legislation affecting children. The children's ombudspersons of Wales (clause 3), Northern Ireland (Regulation 7), and Scotland (clause 4) can monitor the making of legislation as well as legislation already in force. It is not clear whether the English children's ombudsperson is expected to monitor government actors, but Explanatory Note 22 indicates the children's ombudsperson is expected to advise the Secretary of State as to children's interests.

Although children are not entitled to vote, the Welsh, Northern Ireland, and Scottish children's ombudspersons can lobby their governments on behalf of children. The Welsh children's ombudsperson (Explanatory Note 12) and the Northern Ireland children's ombudsperson (Regulation 8(6)) have and the English children's ombudsperson will have the clear authority to lobby the government to promote and protect children's interests. Reading between the lines, the Scottish children's ombudsperson can lobby the government.

Two powers can shape opinions about children in public-private gaps. The power to conduct and sponsor research can document public-private gaps and other factors shaping children's interests and well-being. All four children's ombudspersons can conduct and sponsor research Wales (clause 4); Northern Ireland (Regulation 8(1)); Scotland (Act number 4); and England (HL Bill 2)).

Conducting research may only result in obtaining knowledge. Perhaps equally important is the power to publish research findings. The children's ombudspersons of Wales (Regulations 13 and 14), Northern Ireland (Regulation 8(5)), and Scotland (Act numbers 4 and 14) can publish findings from their research. It is not clear whether the English children's ombudsperson is permitted to research findings.

Discussion and Conclusion

An examination of legislated powers indicates children's ombudspersons possess extraordinary powers to enforce children's rights and promote children's interests. These powers enable a children's ombudsperson to champion children's interests in public and private arenas, as well as gaps arising between them.

This examination reveals, however, an important pattern among these powers. Children's ombudspersons of Wales, Northern Ireland, and Scotland have strong powers to influence behaviors of public and private organizations. With the exception of England, where establishment of an office of a children's ombudsperson is on going, the children's ombudspersons of Wales, Northern Ireland, and Scotland all possess powers to monitor, lobby, conduct and publish research. These children's ombudspersons can use these powers to watch, document, and persuade public and private actors and organizations to change their behaviors toward children.

When directly affecting a child's circumstances, however, children's ombudspersons are noticeably less powerful. Not one of the children's ombudspersons possesses all four powers that can move a child out of a public-private gap. Not one has the unmitigated power to remove a child from a dangerous situation arising from a gap between household, government, and the public sphere. With the exception of the English legislation, these three children's ombudspersons can investigate children's circumstances, with only the Welsh children's ombudsperson possessing the power to investigate an individual child's situation. The children's ombudspersons of Northern Ireland and Scotland have the ability to collect evidence about a child falling into a

public-private gap. Only the Welsh and Northern Ireland children's ombudspersons can provide legal assistance so that a child can employ the legal system to mend a public-private gap.

These differences suggest that children's ombudspersons have powers to affect different components of public and private sectors. These four children's ombudspersons have powers to affect Habermas' public and market spheres, and Fraser's social sector. Because they rely on government support and because, to varying degrees, they are susceptible to government influence, these four children's ombudspersons seem more restricted when influencing government. The legislated powers of all four children's ombudspersons, however, are limited when trying to influence Aristotle's household. Compared to the public sphere, market sphere, social sector, and government, these children's ombudspersons have weak powers to affect household governance. If Aristotle's view on household governance portrays contemporary home life, children can expect royal governance and little interference from outside the home. Consequently, we cannot expect these four children's ombudspersons to mend gaps between the household and the public sphere, market sphere, social sector, and government. These four children's ombudspersons have limited abilities to mend public-private gaps for children.

Future research must go beyond legislated powers to evaluate whether a children's ombudsperson will use the powers in practice. The children's ombudsperson may possess extraordinary powers, but a variety of factors may drive a children's ombudsperson's decision to use those powers. Possessing the power does not necessarily mean the children's ombudsperson will use the power. Given limitations on powers possessed by children's ombudspersons, researchers need to identify what powers children's ombudspersons will and will not employ to mend public-private gaps facing children.

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Table 1: Legislated powers possessed by children’s ombudspersons in the United Kingdom

	Individual child?	Investigate	Collect evidence	Provide legal assistance	Remove	Monitor	Lobby	Research	Publish
England	No	Unclear	No	No	No	Unclear	Yes	Yes	Unclear
Northern Ireland	Yes	Limitation: Children	Yes	Yes	Not family home	Yes	Yes	Yes	Yes
Scotland	No	Limitation: Children	Yes	No	No	Yes	Yes	Yes	Yes
Wales	Yes	Yes	Unclear	Yes	Not family home	Yes	Yes	Yes	Yes