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THE JUVENILE COURT MOVEMENT

The juvenile court: A paradoxical institution

An objective observer would not look upon the juvenile court as a major social innovation of the twentieth century. Yet it has received disproportionate attention from researchers, reformers, and commentators. Until recently, critics and defenders have been equally represented.

Famous social reformers, with varying degrees of dedication, have had at least a transitory interest in the court for children and the problem of delinquency, before moving on to more urgent or more topical social causes. The fact that the court concerns itself with children has always assured it some sympathetic, if ineffective, intermeddling.

This concentration on the juvenile court has been compounded and complicated by the many disciplines involved. The court has always been a hybrid – a legal creation but a social administrative institution, a bridge between law and the social sciences. The tribunal was not strictly controlled by legal procedures which always seemed daunting or incomprehensible to the layman or social scientist. Yet this procedural flexibility was the very basis for the serious attacks on the court by civil libertarians in the last decade.

Criminological and social experiments, which would not be countenanced in an adult criminal court, were encouraged in the juvenile court from its inception at the end of the nineteenth century. At that time, a century of penal reform had run its exhausted and disillusioned course. The penal reformer found new hope in the child and the court which would serve as a social laboratory for ideas which would later be translated to the adult jurisdiction.

The whole concept of the juvenile court and its philosophy were paradoxical. The delinquent child was officially viewed as an object of pity and social concern and was to be treated by a 'parental' judge as misguided rather than wicked or vicious. Yet, the general public, in this century at least, and perhaps in many preceding ones,[1] has often shown retributive attitudes toward the juvenile delinquent.

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1 See Sanders (ed) *Juvenile Offenders for a Thousand Years*, (1970), Bremner (ed) *Children and Youth in America: A Documentary History* (1970) 3 vols; for a more light-hearted approach, Donovan *Wild Kids* (1967).

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The court was established by a group of reformers most of whom neither liked nor trusted legal procedures. The court emerged at a time when the classical school of criminology, preoccupied with the principle of legality, procedural justice, and the diminution of judicial discretion, was giving way to the positivists' concentration on the study and treatment of the individual offender. Its founders, of course, did not think in these theoretical terms but their writings, prior to 1899, would suggest an appropriate ambivalence.

The founders were partly motivated by a reaction against the craze for institutions, particularly reformatories which had been relative failures. Yet they seem to have created a far greater institutional structure.

The child-savers were often earnest Christians who believed in voluntary and private charity and the power of free will as an agent for good. They were soon assailed by deterministic notions and by the rapidly expanding profession of social work and the appeal of psychiatry as a cure for child and family problems.

The court was founded before massive governmental interference in the lives of citizens was commonplace. The informal children's tribunal was meant to take the child out of the destructive adult criminal process and yet it was also an attempt to make the state a benevolent surrogate parent which would minimize the exploitation of the child while offering maximum assistance. Very soon, a new brand of social reformer in the progressive era was talking of society as an organism which had to be controlled for the good of all the people. Interference could no longer remain minimal or benevolent.

The Victorians were constantly debating the treatment of the poor. Were they unfortunates who should be helped or were they degenerates who were sapping the strength of society? The Victorians felt that the control of the dependent child should be taken from parents who were deviant, dissolute, or vicious. The new reformers at the end of the nineteenth century believed that governments had a duty to change the social conditions which produced these children and their parents.

The juvenile court was unfortunate in its timing, because it emerged at a time when ideas about social reform were undergoing drastic change. The court might never have been established except for the simplistic child-saving ideas and the exaggerated optimism of the Evangelicals and other moral reformers and yet these ideas were already losing their force. The new reformers were more pragmatic. Most of them abhorred the old concepts of charity. Instead, they demanded government support and finance. The social institutions in this new era would be benevolent rather than coercive. The elitist notion of 'less eligibility' would be replaced by a democratic striving toward equality of social opportunity.

The court also suffered because so many social concerns dissipated the energies of some of its more creative supporters. And, of course, world events, particularly wars and an economic depression, did not help the court to succeed, even if success were, in fact, possible.

The court was never able to decide whether it was a co-operative enterprise or a forum of conflict. The writings of lawyers, including justices of the United States Supreme Court, clearly show this dichotomy. Perhaps that, too, is a reflection of the twentieth-century dilemma.

The court was a social laboratory in which the research methods were suspect or non-existent and the research results more confused than illuminating. This was a function of the state of sociological (and, in particular, criminological) knowledge. If the court were established for the first time today, would any of the questions raised earlier be more easily solved?

An historical sketch of some child-saving influences

THE CHILD IN THE ADULT WORLD

While the *philosophes* of the Enlightenment, particularly Rousseau,[2] emphasized kindness toward children, the Puritans, with their unequivocal belief in original sin, felt a responsibility for moulding the potentially evil child in God's image.

The views of the Puritans and other religionists won the day. Their child-rearing methods strongly influenced the reformers of the nineteenth century. An instructional manual for parents of the period could have served equally well as a handbook of prison reform. *A Practical View of Christian Education* advised parents to avoid whipping children because it tended to brutalise them and suggested that, instead, the child should be locked in his room as a stimulus to thought. At a time when pain and suffering were commonplace in society, cruelty was relative. The conditions in the schools for the children of the privileged were not very different from those suffered by children kept in poor-houses or reformatories. Childhood was looked upon as a 'biologically necessary prelude to the sociologically all-important business of the adult world.'[3] The child should be kept in the background until maturity when reason would have been acquired by some osmotic process.

The Puritan notions of original sin and innate wickedness were eventually replaced by an equally strong belief in the fragility and innocence of the child who must be protected against 'pollution by life.'[4] This anti-contamination theory provided the rationale for juvenile institutions such as reformatories, houses of refuge, and juvenile courts. Frequently adults, whose attitudes toward children had been so cruel and functional, became cloyingly sentimental, as the writings of both Kingsley and Dickens illustrate.[5] Sometimes, of course, the adult world was quite capable of both cruelty and sentimentality.

2 Eg, *Emile: An Education*
3 1 Pinchbeck and Hewitt *Children in English Society* (1969), at 8
4 Aries *Centuries of Childhood* (1962), at 119
5 See generally, Coveney *The Image of Childhood* (1967).

THE TREATMENT OF DEVIANT CHILDREN: TWO CENTURIES OF INACTION

When Dickens – novelist and social reformer – was becoming firmly established, ragged schools and reformatories were starting and the Juvenile Offenders Act of 1847[6] was passed. Dickens believed strongly in the innocence of children. In 1850, after he had seen small 'criminal' children hunted, flogged, and imprisoned for stealing a loaf of bread, he exclaimed 'Woe, woe, can the State devise no better sentence for its little children. Will it never sentence them to be taught?'[7]

Dickens was an effective reformer because of his prominence and persuasive powers but there were many other child savers. Jonas Hanway founded the Marine Society charged with the Christian and patriotic duty to rescue the young from the 'jaws of perdition' so as to 'breed them up to social and religious duties to prevent their being disturbers of the quiet enjoyment of their fellow subjects.'[8] Hanway and John Fielding wished to clear the streets of London of delinquent children who would be sent to the Virginia plantations or in service on the high seas.[9]

Tudor ideas on child-saving had remained in force for more than two centuries. By a law of 1536,[10] parochial authorities were empowered to apprentice idle, begging children. Their parents were often forced to forfeit all their rights to the children.[11] Frequently, little distinction was made between delinquent and vagrant children; too often juvenile delinquents were regarded as simply miniature criminals.

Important changes only came when John Fielding campaigned against cruel laws and Howard exposed inhumane prison conditions and demanded the removal or segregation of children. Fielding criticized laws which allowed children of vagrants to be sentenced to peonage on overseas plantations or in apprenticeships until their majority. The children's treatment was not much better than they would have received, as adults, under the Transportation Act of 1717. A House of Commons Committee of 1778 deplored the number of boys found in prisons and hulks and recommended that any youth under 15 charged with a misdemeanour or petty larceny be released on condition that he serve three years in the navy or the colonies (as already practised by Fielding and the Marine Society). No legislation was ever drafted.

Private charity continued to carry the burden of child welfare. Hanway also founded the College of Infants but it failed because the parishes refused

6 An Act for the More Speedy Trial and Punishment of Juvenile Offenders, 10 & 11 Vict., c 82

7 Collins *Dickens and Crime* (1965), at 86

8 Pinchbeck and Hewitt, supra note 3, at 112

9 See 4 Geo. I, c 11. The Marine Society in 1828 was catering for more than 400 boys annually but rejected between two and three thousand every year as undesirable. Certainly, no boy with a known criminal record was accepted. Pinchbeck & Hewitt, supra note 6, at 116.

10 27 Hen. VIII, c 25

11 I Edw. VI, c 3; 3 & 4 Edw. VI, c 16

to support it and magistrates complained of a lack of coercive power to order children committed to the college. The poor were looked upon as burdens to be borne by respectable citizens at minimum cost and inconvenience. The honest poor were subjugated. The 'deviant' poor were to be warehoused and forgotten.

These attitudes only changed when the philanthropists were victorious over the laissez faire philosophy. Only then did society realise that the past treatment of children, the most valuable of natural resources, was wasteful and wrong. Yet the new philanthropy did not avoid a paternalistic stance; instead of inattention or cruelty, we find too much interference in the lives of the poor and their children, in the name of benevolence.

PENAL REFORM AND PENAL THOUGHT

In the final quarter of the eighteenth century, Eden, Romilly, and Howard campaigned for basic penal reform rather than mild amelioration of conditions. On his fourth, and penultimate attempt, in 1816, to stop hanging for theft, Romilly told the House that a boy of ten years was then awaiting execution for shop-lifting.[12]

In his *State of the Prisons*, Howard described disease, cruelty and degradation. He deplored the lack of classification of prisoners and particularly the indiscriminate congregation of 'young beginner and old offender.'[13] The prisons were 'seats and seminaries ... of idleness and every vice'[14] and instead of reforming offenders, prison 'notoriously promotes and increases the very vices it was designed to suppress.'

Elizabeth Fry performed constructive reforms in Newgate prison, starting a school in the women's section. The Fry family founded the Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders. The society stressed the need for stringent classification which was almost unknown in British prisons at the start of the nineteenth century.

Howard and Fry were penal reformers rather than penal philosophers. Both were directly or indirectly influenced by Beccaria's *Crimes and Punishment*. His ideas were praised and adopted by many other philosophers and reformers who took a peculiar interest in prisons and penal reform. In a period when the penal law was harsh and political persecution common, Beccaria wanted judicial discretion severely curtailed.[15] He believed that the savagery of the laws had inhibited their execution. Instead, a 'fixed proportion' between punishment and offence would be more likely to prevent crime. Beccaria, along with Hutcheson[16] and Risi[17] argued that education

12 But see the reservations of Knell, 'Capital Punishment,' (1965), 5 *British J. Criminology* 200, where he disputes the stories of executions of children.

13 John Howard *The State of the Prisons in England and Wales* (1777), at 15–16

14 Ibid, at 20–1

15 Beccaria *On Crimes and Punishments* (trans. Paolucci, 1963), at 14, 93

16 Hutcheson *System of Moral Philosophy* (1746), quoted in Health, *Eighteenth-Century Penal Thought* (1963), at 85

17 Risi *Observations on Matters of Criminal Jurisprudence*, translated by Heath, in ibid, at 161.

and discipline were more effective than severity. Much crime, particularly when committed by the young, reflected human frailty rather than wickedness and should attract judicial clemency.

Montesquieu and Beccaria wanted these principles written into a rigid code of penal laws because vague notions, such as considering the spirit of the law only led to a 'torrent of opinions.'[18] When the juvenile court was established, the spirit of the court was based on the vague concept of the 'best interests of the child.'

Beccaria's treatise led to a liberal approach to criminal law. In the US context, his views are important because of the Constitution's concentration on procedural fairness and specific guarantees against arbitrary state action. Similarly, Edward Livingstone's penal code stressed the need for a social contract between the state and the citizen which would ensure rational punitive measures. The state, however, had an obligation to 'father the fatherless' and to 'snatch the innocent child from the hands of depraved parents'[19] with few, if any procedural guarantees and rather imprecise justification for state intervention.

Beccaria and his followers believed in benevolent retribution; severe, prompt, and certain punishment should be inflicted for serious crime. There was no thought of punishment for merely potential harm; the *philosophes* would have deplored the state's interference in a child's life because he was pre-delinquent. Beccaria would suggest that prevention of crime in young offenders should be achieved by better education and a system of rewarding virtue. Beccaria wanted to promote good legislation which would lead men 'to the greatest possible happiness or to the least possible unhappiness.'[20] Bentham refined these ideas in his felicific calculus. He had little interest in children because his uncompromising determinism presumed that they would be deterred before they became criminals or even delinquents – a view shared by the founders of the English reformatories.

THEORIES OF CRIMINOLOGY

The rise of the reformatory in the first half of the last century coincided with the emergence of positive criminological thought which negated the free will and reason of the Enlightenment and, instead, concentrated on the individual offender rather than the offence. Crime was seen as the product of society itself and the dangerous classes which inhabited it. The 'bad' must be segregated and the causes of the badness must be isolated. Lombroso's theories of biological determinism were enthusiastically welcomed because the 'good' citizens hoped he would identify the stigmata of criminality. Soon these ideas were bolstered by Social Darwinism inspired by Spencer's organic and evolutionary theories of society. The deviant segments of society

18 Beccaria, supra note 15, at 15

19 Quoted by Sanborn *The Public Charities of Massachusetts during the Century ending January 1, 1876* (1876), at clxxvii

20 Beccaria, supra note 33, at 93

must be kept under strict control to protect the 'fittest' who were using the *laissez faire* system to 'survive.'[21]

Criminologists moved away from the primitive Lombrosian ideas but the positivists, such as William Healy, continued to search for the cause of delinquency in birth, IQ, etc. They did not concern themselves with legal definitions of responsibility but saw the offender as a specimen to be studied. Ferri considered that guarantees of human rights 'led to a sacrifice of the most obvious social necessities.'[22] The juvenile court frequently succumbed to positivist ideology, only 'treating' the child for its own good.

Allen regrets that criminological theory has disregarded political and ethical values.[23] Matza finds fault with its insistence on 'hard' determinism – that there is a discoverable difference between the deviant and the law-abiding.[24] The researchers have managed to multiply the causative factors of delinquency without offering the juvenile court judge much assistance.

The idea of a sub-culture of delinquency is now as embedded in modern attitudes toward the control of deviancy as the equally set views of the child-savers of the last century with their reform schools as instruments of social hygiene to protect the law-abiding from vice or as a haven for the young who would otherwise be contaminated. The juvenile court is simply an extension of these attitudes.

Matza argues that the child derives a distinct sense of injustice from the juvenile court. Yet the ideology of the court shared by all its personnel is that of *parens patriae* – the child is under the parental care of the state because he is below a specified age and therefore irresponsible. This confuses the analytical concept of cause, whatever its basis, with the moral concept of fault.

THE RISE OF THE REFORMATORY

So long as the poor (and other deviants and dependents) were not a threat to the social fabric, they could be cared for in the community. When they became numerous, expensive, and therefore troublesome, the general welfare required that they be removed from the prosperous and serene environment of the godly and the comfortable. Until the beginning of the nineteenth century, large institutions were rare, but soon thereafter England had 400 workhouses with 100,000 inmates. The 'institution craze' had started. This was partly due to an accelerated rate of agrarian desertion, industrialization, and accompanying misery, poverty, depravity and vice. These problems arose later in the United States.

21 See Dugdale *The Jukes*, for the life of a criminal family.

22 Ferri *Sociologia Criminale* (5 ed, by Sautoro, 1930) quoted by Radzinowicz *Ideology and Crime* (1966), at 142

23 Allen *The Borderland of Criminal Justice* (1964), at 126

24 Matza *Delinquency and Drift* (1964), at 4, 18. Cf Wootton *Social Science and Social Pathology* (1959), at 306

The US measures against crime were community-based and placed little reliance on prisons as we know them today. The stocks, the whipping-post (and banishment as the last resort) were the usual punishments. The town-meeting flavour was lost with the rise of the large city in the mid-nineteenth century. Americans had been convinced by Beccaria's argument that the draconian penal laws of England and Europe perpetuated and reproduced cruelty. Penn's peaceable kingdom created the penitentiary as a humane alternative to the widespread use of the death penalty. If any citizen deviated from the ideal of brotherly love, he would soon be brought to his senses in the solitude of a penitentiary cell. The Auburn silent system soon followed and the endless debate about the relative merits of the silent, congregated system and the Pennsylvania solitary regime was a meaningless contest. Both sides were confident of success. Both believed in the contagion theory and the need for the criminal to learn industrious habits. The Auburn advocates collected data on the antecedents of inmates and it was no coincidence that New York philanthropists such as Griscom and Eddy soon started a refuge for juveniles whose parents did not provide guidance, discipline, temperance, and stability.

In essence, the penitentiary and the reformatory would fulfil the same function: '... join practicality to humanitarianism, reform the criminal, stabilize American society, and demonstrate how to improve the condition of mankind.'[25] The contagion theory failed at the penitentiary level and therefore it was necessary to isolate the juvenile delinquent at the earliest possible stage.

Joseph Tuckerman was an opponent of this institutional solution. He did not believe that all the poor were undeserving or that poverty was a self-inflicted wound. He blamed the prevailing social conditions. Although he and Mary Carpenter pioneered street missions and educational experiments, the reformatory movement was stronger than advocacy of better social conditions and community welfare. Indeed the English woman became a leader in the reformatory movement.

Within thirty years of the opening of the children's New York House of Refuge, more than 20,000 children were in institutions which would provide 'a healthy moral constitution, capable of resisting the assaults of temptations.'[26]

Very soon the utopian aims of rehabilitation were replaced by a merely custodial function: the asylum and the reformatory were considered the only way to avoid more dependency and deviance. Rothman, however, feels that the reformatory was still the least destructive of the institutions;[27] it did not keep the youths for long periods and the community was prepared to take back the former delinquents who were now 'rehabilitated.'

25 Rothman *The Discovery of the Asylum; Social Order and Disorder in the New Republic* (1971), at 79
26 Ibid, at 212
27 Ibid, at 264

A CLOSER LOOK AT THE JUVENILE REFORMATORY

Griscom of New York had been influenced by his visit, in 1818, to Elizabeth Fry's juvenile institution. The English reformatories had been started by the Philanthropic Society[28] in 1788 when Robert Young opened four houses for juvenile offenders and the children of convicts. The Prison Discipline Society was founded in 1815 for the purpose of improving prison conditions and preventing the prisons' 'corrupting association and consequent evil effects upon the youthful offender.'[29]

Parliamentary committees were reporting that young persons were being adversely influenced by hardened criminals; they recommended a penitentiary for the young.[30] More than twenty years later, in 1838, Parkhurst was opened as a juvenile prison.[31] The enabling act provided for a pardon for those who put themselves under the care of a charitable institution (such as one of the new private reformatories).

The New Yorkers were also active. Eddy was one of the first Americans to advocate state guardianship so that it could withdraw 'from the custody of weak and criminal parents, children who were vagabonds in the streets and in peril of a criminal life, although no overt act had been committed.'[32]

The penitentiary was a 'fruitful source of pauperism' and a nursery of vice. An 1823 committee planned a house of refuge to care for delinquents *after* their discharge from prison. Later, the reformers had decided to save all children from prison, not only those who were ragged, unclean, begging, intemperate, using vile language or of idle and miserable habits, but even those guilty of actual crime. The community should be 'guardians of virtue' and 'political fathers of the unprotected.'[33]

The House of Refuge would meticulously classify children to distinguish between 'minute shades of guilt' and 'infinite gradations of crime.'[34] The

28 Hinde *The British Penal System, 1773–1950* (1951), at 96

29 The Prison Discipline Society was founded by Elizabeth Fry and her brother-in-law Sir Thomas Fowell Buxton. The latter said in appealing for funds for the Society after it had set up a refuge for young offenders released from jail: 'They are trained up to habits of industry, educated in moral and religious principles, and after remaining a reasonable time, are apprenticed and placed in suitable situations. Thus many have been saved whose days would otherwise have been spent in misery and crime.' Quoted in Adshead *On Juvenile Criminals* (1856), at 27

30 Quoted in ibid, at 12. At this stage, according to Adshead, at 9, juveniles were responsible for most of the crime and when this fact was known, it spurred reform. This statistic is a little more significant than it would be today when we have a preponderance of youth. In 1845, juveniles between 15 and 20 years formed one-tenth of the total population but were guilty of one-quarter of its crime.

31 1 & 2 Vict., c 82

32 Edward Livingstone, in his 1821 Penal Code, advocated a school of reform almost identical with the plan of the New York House of Refuge: 'Introductory report to the code of reform and prison discipline,' in 1 Livingstone *Complete Works on Criminal Jurisprudence* (1873) at 570–80, and 'A Code of reform and prison discipline,' in 2 ibid, at 557–90

33 Pierce *A Half-Century with Juvenile Delinquents or the New York House of Refuge and Its Times* (1869), at 55–6

34 Ibid, at 57–8

reformers of this period had great difficulty in deciding whether 'criminal' children were salvageable. Sometimes, they treated all children as merely victims. At other times, children who had degenerated into vice beyond petty theft were not viewed as fit, or hopeful, subjects for reform. The House of Refuge took all children who were released to them at the discretion of the magistrates. After a year of operation there were optimistic reports of 'paternal affection' bringing forth 'the strongest filial returns' which had been aided by the 'delightful scientific addresses' which had 'beguiled' the young guests at mealtimes. Very soon Boston and Philadelphia opened similar institutions.[35] The French judge Demetz visited these places and on returning home started the Mettray *colonie* which became a model for many other reformatories.

Only twenty years after New York's House of Refuge had opened, the hope of reforming older children had seriously diminished. The House managers also complained that the New York streets were being flooded with migrants who produced young beggars, paupers, and vagabonds. Some critics suggested that the Michigan cottage-style reformatory would be more effective than the large congregate refuge. They were answered with the argument that there were too few reformatory geniuses to be squandered on small groups and, in any event, the large institution more closely resembled the society in which the inmates would be required to live on release.[36]

FURTHER REFORMATORY DEVELOPMENTS: MASSACHUSETTS

Boston had founded a humane society in 1785 and two orphan asylums were opened in the following thirty years. In both Boston and Philadelphia, institutions were established, in the 1820s, for juvenile delinquents who, instead of the corruption of prison, would be decontaminated by industry and education. Their rationalia were Christian duty, economy, preserving community peace, and 'guarding the fruits of industry.'[37] These institutions, and the Lyman School in Massachusetts, became too popular; in a fourteen-year period, 3000 children were sent to Lyman.

Massachusetts, a progressive state in many respects, became addicted to the institution craze. The Nautical Reform School, launched in 1860 took

35 DeTocqueville and Beaumont *On the Penitentiary System in the United States* (trans Lieber, 1833), at 123

36 The House of Refuge withstood a legal challenge to its right to 'reform' children. In the case of Thomas Tobans, the boy's counsel argued that the institution was given power to detain the boy but not to send him out of the state. The court held that 'so long as the well-being of the child' was considered, the Refuge should have such authority. Cited, ibid, at 336.

37 *Third Annual Report of the Board of Managers of the Prison Discipline Society* (1828). The First Annual Report of that body (1827) had found many children under 12 in the prisons. The Managers made much of the contamination theory. Ibid, at 28–9.

From August 1826, when it opened, until January 1829, 192 children were received. 47 were committed for stealing; 29 were vagabonds; 49 for 'being stubborn and disobedient'; 11 for 'leading an idle life and being neglected by parents, on account of drunkenness and other causes,' and 4 for 'wanton and lascivious conduct.' 4th Annual Report (1829), at 11

the 'bad' boys but was soon complaining of the corrupting influence of the 'worst' boys on the less hardened offenders. At the Monson State Primary School, on the other hand, only ten per cent of the children were referred by the courts and the rest were dependency cases. The state was taking seriously Livingstone's plea to father the fatherless, and his opinion that vice was more contagious than disease.[38] Furthermore, it was considered cheaper, and good economics and good morals was a most attractive mixture. The courts continued to send children. Some of them were so young that they were better fitted for the nursery. The magistrates frustrated the child-savers by sentencing children to fixed terms which were contrary to the reformers' aims. Yet the statistics of the Lyman Reform School show that less than one per cent of the 'vicious' inmates, who were all 'graduates' of the Primary School, had committed what would be an adult criminal offence.[39]

Yet the administrators of these institutions kept complaining of contamination, lack of segregation and classification, and the baneful influence of the court child on the 'comparatively innocent.' They still believed, not merely hoped, that the child-saving system could be perfected.

REFORMATORIES: THE ENGLISH EXPERIENCE

The English reformers T.B.L. Baker, Matthew Davenport Hill, and Mary Carpenter were strongly influenced by Crofton and Maconochie,[40] the most innovative penologists of the first half of the nineteenth century. They also admired Demetz of Mettray and Wichern's Rauhe Haus.[41]

The English pattern of reform had shown less concern with court procedures, and had tended to avoid the huge reform institutions of the United States. The English reform schools also had closer connections with the communities in which they were located. Carpenter opened a ragged school in 1843 to reach 'the outcast and destitute,'[42] not to break the will but to train the child to govern itself. Sydney Turner, chaplain to the Philanthropic Society, and Captain Brenton started schools to reform rather than to punish. These institutions were always short of funds and also lacked legal authority to detain children. Hill, as Recorder of Birmingham, had developed a system of unofficial probation for young offenders 'not hardened in crime.'[43] He released these young persons to their employers who would

38 Quoted by Sanborn, supra note 19, at clxxvii

39 13th Annual Report of Reform School (1859), at 5

40 See Crofton *The Criminal Classes and Their Control* (1868); Maconochie *Norfolk Island* (1848). Also see Barry *Alexander Maconochie of Norfolk Island* (1958).

41 Wichern's work is described in Wines *The State of Prisons and of Child-Saving Institutions in The Civilized World* (1880), at 693–699.

42 Carpenter *Reformatory Schools, for the Children of the Perishing and Dangerous Classes, and for Juvenile Offenders* (1851), at 79.

43 Davenport Hill *The Recorder of Birmingham, A Memoir of Matthew Davenport Hill with Selections from his Correspondence* (1878), at 155. See also Hill *Draft Report on the Principles of Punishment* (1847), where his informal probation is described and assessed.

guarantee their good behaviour. His system was tried in London but it failed because, Hill stated, of the 'appalling fact that scarcely one ... possessed either employer, parents or friends.'[44] Therefore institutional care continued; in 1844, there were more than 11,000 youths aged between ten and twenty in prison.

The reformers kept making demands for change.[45] In 1851, Carpenter's book, *Reformatory Schools*, appeared; she wanted three classes of schools to reflect the different grades of destitution, vagrancy, and criminality; free day schools, feeding industrial schools (where attendance was compulsory), and reformatory schools (in place of prison).[46] She had four reformatory principles. First, all children, however 'apparently vicious and degraded' could be made useful members of society with proper training. Second, the present system made children permanent members of the criminal class and neither deterred nor reformed. Third, reformatory schools, conducted on Christian principles and with a 'wise union of kindness and restraint,' could make the most degraded and corrupt useful members of society if there were financial support and legal authority to impose sufficient restraint. Fourth, every parent should be chargeable for 'the maintenance of a child thrown on the care of the State' and 'made in some way to suffer for the non-discharge of this duty.'[47]

Hill and Carpenter emphasized education; they did not want reformatories to be a 'multiplication of Parkhursts instead of Mettrais,' which would simply be prisons in disguise. Conferences on Carpenter's principles were held in 1851 and 1853 and Hill appeared before a parliamentary committee.[48] They emphasized trade training – to make the children 'useful,' an important word to the Victorians. Such training would reduce indolence, drunkenness, and vice. Carpenter argued that the state had a duty to educate its children. Ragged schools were merely a stop-gap. Industrial schools would teach trades and the habits of hard work; they were not really meant for criminal children, but for neglected, destitute or orphaned children who could not be boarded-out and who had not otherwise been disposed of (for example, sent to the colonies).

44 Ibid, at 156

45 Eg, in 1846 a meeting was held in London proposing the establishment of special asylums for criminal and destitute children in place of the ordinary prison. Further meetings were held in 1848 and 1851 and Parliamentary committees investigated in 1847 and 1853.

46 See Carpenter, supra note 42, at 18, where she describes the work of Sheriff Watson in Aberdeen, in establishing industrial feeding schools and generally inveighs against contramination which leaves the 'perishing child to die and driving the dangerous to crime.'

47 Ibid, at 119–20. The Conference resolves three classes of schools: free day schools, industrial feeding schools, and correctional and reformatory schools. See Hill, supra note 43, at 125

48 A 1847 House of Lords Committee recommended that 'reformatory asylums' be established. The Committee stressed the need for 'sound moral and religious' and trade training. The rulers had a duty to prevent punishment 'as far as may be possible ... and where they do inflict punishment to attempt reformation.' This led to the act of 1847, 10 &

Finally, there were the reformatories. Thomas Barwick Baker's private institution on his estate in Gloucestershire was remarkable because it was the first where the directors did not delude themselves that they were catering for children who had merely had an unfortunate upbringing. Baker looked upon his charges as potential criminals, but he was prepared to give them every chance if they had committed only petty offences. Baker also believed that police were unnecessarily arresting and charging children who indulged in mischievous acts when they should have been only reprimanded. Secondly, as an avowed Benthamite, Baker argued that first offenders (who committed criminal acts, not apple poaching) might properly be deterred by the infliction of the sharp shock of a short prison term or a whipping. If these measures were successful, then the boy was in need of correction and should be enrolled as an involuntary guest at Baker's Hardwicke Reformatory where he would learn to be good, industrious, honest, clean, and obedient. If he failed in the reformatory, then he was a true criminal in need of punishment. Baker saw a social duty to help the less fortunate. He was also a keen student of penology. Many of his views were derived from Beccaria; he believed, for instance, that the sentencing of adults should depend more on recidivism than on the particular crime committed. The 'external system' was too often stressed when we should try to 'ascertain what actually are the feelings and thoughts of that class whom we most desire to affect.'[49] The criminal justice system showed no discrimination, according to Baker, sending merely mischievous children to reformatory. This exacerbated the contamination problem. Baker's experience showed him that boys 'who had any education in crime have learned it from boys under sixteen.' When a few ring-leaders were committed to Hardwicke Reformatory, crime was considerably diminished in Gloucestershire.

Baker was enlightened but of cast-iron convictions. If he certified a boy as 'reformed,' then the community should accept it. Yet he was very realistic about his chances of success. Some boys only needed a month at Hardwicke

11 Vict., c 82, which limited the imprisonment of children under 14 and allowed JP's to suspend sentence on good behaviour.

In 1853, a House of Commons recommended that 1/ separate penal reformatories be established, at public expense, for children convicted of serious criminal offences; 2/ reformatory schools should be established, financed by local rates and state contributions, for children convicted of minor offences; and 3/ parents should contribute toward their upkeep. See Hinde, supra note 28, at 99–100.

In 1854, the Youthful Offenders Act, 17 & 18 Vict., c 86, was passed. See discussion, infra. Industrial schools were established by 20 & 21 Vict. (1857), c 48; vagrant children were sent there for a week and then to their parents on good behaviour for one year. Further provisions were made by an act of 1861, 24 & 25 Vict., c 118, 29 & 30 Vict., c 118, and 33 & 34 Vict., c 75.

Reformatories were provided for by 20 & 21 Vict. 1857, c 55. Parents were obliged to contribute toward their children's maintenance. Offenders could be discharged on licence. See further provisions in 29 & 30 Vict. (1886), c 117.

49 Baker, 'Is it desirable to establish reformatories for adult criminals?' unidentified manuscript found in a collection at the New York Public Library.

to be improved while others could be there for ten years and he still 'could not insure ... future good conduct.'[50] Some boys had a clear knowledge of right and wrong and were merely victims of bad education while some twelve-year-olds could be as stubborn as grown men. Baker described his philosophy and aim in the following:

> I am no believer in reformatories in the light which some consider them, namely as a sort of moral mill, into which whoever is put is, by a specified number of turns of the wheel, ground out an honest man. I only consider them as places, where a man, if he wish to do well, may have opportunity and aid; where at any rate, his character is likely to become better known than in close confinement, and where he may become by degrees more fitted to withstand the temptations which a sudden change from perfect seclusion and almost irresponsibility to perfect freedom is likely to bring, and still more, by giving him a more trustworthy character, to be more likely to find him employment.[51]

Juvenile delinquency did not abate. By 1860, the problem of 'juvenile depravity' was still being examined in the context of the contamination theory but, with the help of those seeking reform of the child labour laws, the reformers were starting to realise that they had been examining symptoms but had not really discovered the seat of the disease. The degrading conditions of the poor, and particularly those in workhouses, were examined. Pauper children were described as 'remarkable for their extreme ignorance, viciousness, stupidity, stubbornness, and want of animation when they were not brutified morally and intellectually.'[52]

Schooling was inadequate. Even when it was available, neither parents nor children waited to worry about trade training when the children could find factory work. Instead of demanding the reform of factory laws, there were demands for three solutions: the children should be sent to the colonies or into the merchant navy; the parents should be forced to support them – a forlorn hope; or the children should be detained in an institution. The truth was that the education system was inadequate, urban conditions were unbearable, and the reformatory system was not working because the large number of children placed there had caused overcrowding and rendered the reform programs ineffective. The privileged classes were still satisfied with a little polite charity rather than social justice.

Turner, a reformatory pioneer, clearly saw the problem. He thought there was a clear distinction between the pauper and the criminal child and blamed the wretched conditions of the city for the latter. 'The wonder is,' he

50 Baker *War with Crime, Being a Collection of Reprinted Papers on Crime, Reformatories, etc* (1889), at 166

51 Manuscript in New York Public Library.

52 Day *Juvenile Crime, its Causes, Character and Cure* (1858), at 222–3. The same sentiments and social description are given in *Prize Essays on Juvenile Delinquency* (published under the Directions of the Board of Managers of the House of Refuge, Philadelphia, (1855), at 6.

said, '*not* that we have so many young thieves and vagabonds to infest our streets and pilfer our shops and houses but that we have not *many many* more.'[53]

All the reformatory founders believed that children were not criminals – at least not before reformatory discipline failed to save, reform, or educate them. That these views were still current in the twentieth century is shown in the remarks of the eminent penologist, Ruggles-Brise, who called for a 'Preventive Science' which would 'in early age before it is too late' by 'diagnosis and therapeutics' and other 'suitable preventive means' be applied to the offender properly classified according to sex, age, and offence.[54]

The forerunners of the juvenile court

The positivistic philosophy which preoccupied the reformatory movement in the latter part of the nineteenth century gave little thought to the legal status of the juvenile. Sometimes reformatory managers complained that the law allowed magistrates only discretionary power to send a child to a reformatory. In most instances, however, there was merely an informal compact between the courts and reformers.

Perhaps it is fitting that the first indications of a 'legal' approach to an alternative system for dealing with juveniles should arise in the United States where the subsequent history of the juvenile court has seen a struggle between civil libertarians who want 'justice' for the child on a due process model and behavioural scientists who, allegedly, have been prepared to manipulate the child, in his alleged 'best interests,' with little regard to legal notions of guilt, responsibility, and accountability.

Ironically, the legal approach to child-saving was introduced by those organizations which tried to keep children out of institutions. In New York, the Children's Aid Society and the SPCC were very active in placing out. In Massachusetts, there were the first instances of boarding-out and the appointment of county agents to supervise children in foster-homes.

THE STATE AGENT IN MASSACHUSETTS

When Monson Primary School and the Lyman School were started in Massachusetts, their by-laws obliged officers of those institutions to supervise children who were placed out – 'advise and counsel as a parent would.'[55] This duty was not satisfactorily carried out because the schools' officers were overburdened with work. As a result, many children were ill-treated in indentures and foster homes. A state agent was appointed in 1866 to remedy this deficiency. He very soon discovered numerous abuses in the placing-out

53 Symons (ed), *On The Reformation of Young Offenders. A Collection of Papers, Pamphlets and Speeches on Reformatories, and the Various Views Held on the Subject of Juvenile Crime and Its Treatment* (1855), at 18; emphasis in original.

54 Ruggles-Brise *The English Penal System* (1921), at xvii

55 *First Annual Report of State Board of Charities* (1865), at xxii; emphasis added

system; of 977 indentured in 13 years, only 218 were satisfactorily accounted for. The rest of the children were spread out across the eastern states, following their masters from town to town and being transferred, without authority, from family to family. The 'common neglects' included insufficient schooling, non-attendance at church, inadequate clothing, overwork, and maltreatment.[56]

The ladies of Boston founded the Newsboys' Club[57] and were shocked to find large numbers of children, aged ten to fifteen, in the city jail. This led to the start of the Children's Aid Society which established a home and provided, by its constitution, legal guardianship of children even after they were bound out to families. The city chaplain, as paid agent of the society, attended all sessions of the police court and Supreme Court and took 'on probation' the children awaiting trial.[58] In the first year, 123 boys had come under the agent's supervision and only seven had been returned to court.

In 1869, the state agent's work was extended to include supervision of children placed out from industrial schools and reformatories. At the same time, the state agency received legislative recognition as a friend of the child in court and no complaint against a child under seventeen could be heard in court without prior notice to the state agent who acted as 'watcher, counsel, advocate or prosecutor, ... as the circumstances require.'[59] A trivial offence would result in an admonition or a suspended sentence. In more serious cases, the child was sent home but on probation to the state agent. If the home was unsatisfactory, the court authorized the removal of the child who was placed under the guardianship of the state board.

Gardner Tufts, who administered the state agency, viewed a court appearance by a child as a 'grave act' which might seriously affect an impressionable child. The law was exact, just, and technical but it also condemned and this may have been appropriate for adults but was not for juvenile offenders. Tufts wanted the judge who heard juvenile cases to be 'open-eyed, flexible and warm; holding the scales so freely that he may feel, and then be moved by the weight of circumstances or mercy's plea.'[60]

Tallack, of the English Howard Association, praised the state agency as an antidote to the institution craze. He wanted special magistrates for all juvenile cases who would nominate policemen and volunteers to supervise children and their children. If this failed, then boarding out, emigration, or reformatory should be used, with imprisonment as an absolute last resort.[61]

56 *3rd Annual Report* (1867), at 153

57 From a pamphlet, 'Children's Aid Society, its origins and objects' (1864). John Augustus had started unofficial probation in 1841. See Augustus *A Report of the Labors of John Augustus* ... (1852).

58 *2nd Annual Report, Boston C.A.S.* (1866), at 7

59 As described by Tallack *Penological and Preventive Principles* (1896), at 364. Michigan had an agent system soon after. *The Second Bienniel Report of the Board of State Commissioners for the General Supervision of Charitable, Penal and Pauper and Reformatory Institutions* (1875), at 56.

60 *1880 Report*, at 200

61 Tallack, supra note 59, at 366

The state agency idea led to separate hearings in Boston in 1870 and in all Massachusetts two years later. In 1877, the law referred to 'sessions' for juvenile offenders with a separate record and docket (although this practice was obviously not adhered to).[62] In the following year, an adult probation officer was appointed.[63]

CHARLES LORING BRACE AND THE NEW YORK CHILDREN'S AID SOCIETY

New York followed a different route, one more appropriate for a city which in 1849 had 10,000 vagrant children. One quarter of the city prison population were minors; half of the known thieves in New York were under twenty-one years.

The Children's Aid Society was founded by Brace (who was later to write a book under the significant title of *The Dangerous Classes*). The society, which, in its first year, boarded out more than 200 children on farms, wanted to save the United States from 'an ignorant debased, permanently poor class in the great cities.' Brace saw an acute problem in the migrant poor with the 'lowest passions' and 'thriftless habits' who could corrupt the honest poor and if 'played upon by demagogues,' might sway an election. So long as these classes existed, 'rapine' could burst forth and 'neither liberty nor property would be safe.'[64] The CAS believed in social hygiene, at least in the vicinity of New York City. The rural areas where the children were placed out felt that Brace was performing a service for New York City but creating fresh problems; he was saving the city but not the children.

In the second year of the society's existence, the eight CAS officers made 11,000 calls on children of whom 863 were sent to the country. Fourteen of these children had been in prison, one was found at a police station, and 45 were from juvenile institutions. This means that almost 800 were simply homeless, neglected, or dependent. The society had a duty to the United States but a 'wider and nobler duty to humanity' to raise up the poorest and most hopeless 'to what we enjoy.'[65] As early as 1853, the CAS had obtained some legal authority for its work; children between five and fourteen years found wandering idle or truant could be brought before a justice of the peace who could order the parents to control the child. If the child was orphaned, there could be committal to an institution.

Brace was a sincere Victorian child-saver who was also saving the New York public purse by removing the dependent and dangerous classes. He made little attempt to change the social conditions which produced them. After 30 years, the CAS child-export scheme was under heavy attack from

62 See Lou *Juvenile Courts in the United States* (1927) for the dates of other separate hearing legislation.

63 Mass Laws 1878, c 198

64 *2nd Annual Report of New York C.A.S.* (1855), at 3

65 By 1859, the Society was very short of funds and was pleading for help, urging the economic argument that children are cheaper than prisoners: ibid, at 18. The year before, the Society had started sending children to Michigan and Indiana.

such constructive reformers as Josephine Shaw Lowell,[66] who thought Brace's placements were made too hastily and with insufficient investigation. Brace was also criticized because of a lack of concern for the rights of children who were separated from families without regard to due process of law.[67]

Lowell wanted to preserve the institution of the family and saw the remedy in improved social conditions. The poor, she said, wanted 'fair wages and not little doles of food'[68] Lowell and Letchworth were responsible for introducing, in New York, the county agent who appeared at trial 'to protect the interests of the child.'

THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN

This organization (founded in 1864 soon after the Society for the Prevention of Cruelty to Animals) had similar views to the CAS; the child's interests were paramount and neglectful or cruel parents received little sympathy from the SPCC. The society had a strong legal bias with a strong prosecutorial stance. Its autocratic president, Gerry, who believed that 'a godless child is simply an undeveloped criminal,'[69] resisted any attempt to allow rights of appeal from magistrates committing children to institutions.[70]

As early as 1888, New York's magistrates, at SPCC's prompting, were regarding child offenders as irresponsible at law. The parents were, in effect, on trial and if they showed 'utter indifference' to the child's welfare or connived at the offence, their parental rights could be terminated. The SPCC was the only private agency with authority to file and prosecute complaints.[71] The society played an important role in creating a special legal status for children. This child-saving body saw the law as its chief weapon. The society provided counsel in *habeas corpus* applications by parents trying to have children released from institutions. It helped enforce legislation concerning child labour and the president announced that 'every child, however hopeless, has rights which the law enforces and which even the vicious are compelled to respect at their peril.'[72] The society made a contribution to the

66 See *The Philanthropic Work of Josephine Shaw Lowell* (1904).

67 *21st Annual Convention* (1891), at 78

68 *2nd Annual Report* (1855), at 3. In the *C.A.S. Third Report* (1856), at 8, the Society reports '... if [the visitor] finds any positively neglected, or employed for evil purposes by their parents, he puts them into the hands of the police, to be committed to the Juvenile Asylum.' (Although they usually found homes in the country.)

69 *14th Annual Report* (1888), at 5

70 See examples, cited *28th Annual Report* (1902), at 20

71 Henry Bergh, founder of the SPCC advocated a presumption of criminal incapacity for children between seven and fourteen years 'by proof of conscious moral obliquity': *30th Annual Report* (1904), at 6.

72 *27th Annual Report* (1901), at 10. In the first ten years, the Society had received 16,823 complaints involving 50,469 children. 5563 cases were prosecuted resulting in 5309 convictions. In 1884 alone, 1569 cases had been investigated at the request of police justices, involving the commitment of 2378 children. Justices had directed parents to pay $5921 for the support of their children in institutions.' *10th Annual Report* (1884), at 20.

juvenile court movement when it helped secure the passage of a new law allowing children committed for trial for alleged violations of the penal code to have their cases heard in the police court at suitable designated times and separate and apart from adult criminal cases. (Apparently, this discretionary provision was not fully exercised.)[73]

The state of the law immediately prior to the establishment of the juvenile court

MASSACHUSETTS

We have already seen in examinations of other jurisdictions that improvements had been effected in institutional care, in the increased use of placing-out, the partial enforcement of orders against neglectful parents, the segregation of children first from adults in jails, then classification of the children themselves according to viciousness and criminality. State agents had been appointed in a few jurisdictions.

The law of Massachusetts in 1895 is fairly representative of the liberal position.[74] By a law of 1882,[75] no child under twelve could be committed to a jail or house of correction, to the Boston House of Industry, or to the State Workhouse. No boy over fifteen years could be sent to the Lyman School[76] (and very few boys under twelve were sent there). Boys under sixteen could not be sent to the state prison,[77] but could be sent to the House of Reformation for Juvenile Offenders. Older boys and young men were sent to the Massachusetts Reformatory; this institution only received those who had been convicted less than three times.[78] The average age of those in the reformatory was twenty-one years.[79] No intermediate institution existed for boys between fifteen and eighteen, an anomalous situation as the juvenile offender was usually defined as being between seven and seventeen.[80]

Surprisingly, children over twelve years could also be sent to the House of Industry, the county jail or the House of Correction. These institutions were not thought by Balch to be 'promising places for reforming young men and

73 *30th Annual Report* (1904), at 46

74 Some of the following data is taken from Balch *Manual for Use in Cases of Juvenile Offenders and Other Minors in Massachusetts*, a pamphlet published by the Conference of Child-Helping Societies, Publication No 2, 1895. See Randall *Improper Bostonian: Emily Greene Balch* (1964), at 81.

75 Statutes 1882, c 127. The only limitation was a case where the offence was punishable by life imprisonment.

76 Statutes 1884, c 323, s 3. A boy could be kept in the institution until majority, but usually spent no more than 2 years in the Lyman School.

77 P.S. 215, s 17 provided that no boy under 16 years sentenced to solitary imprisonment and confinement at hard labour for a term of less than 3 years was to serve such term in the jail and not the state prison.

78 P.S. 215, ss 2, 5. No person over forty years could be sent there. Statutes 1888, c 49, s 1.

79 Balch, supra note 74, at 36

80 Statutes 1893, c 396, s 35

fitting them to become good citizens.'[81] The House of Industry was for those committed for non-payment of fines and drunkenness and larceny. Massachusetts, a supposed paragon of penal virtue, had instances of young persons in adult prisons in 1895. Perhaps this was a result of the growing disenchantment with attempts to reform boys over fifteen.

In 1895, the inferior courts could hear all juvenile cases, except those in which life imprisonment was a possible penalty, and could send juveniles to any institution other than the state prison.[82] These courts also had jurisdiction over neglected children under fourteen and truants.[83] The juveniles were not arrested but summonsed. A summons also had to issue to the parent or guardian to appear and show cause why the child should not be committed to an institution.[84]

THE ENGLISH LAWS

In 1847, English legislation[85] allowed courts of summary jurisdiction to hear felony cases against children under fourteen. The maximum sentence to be imposed was three months, with or without hard labour or a fine of three pounds or, if male, whipping (but privately). The legislation also provided for suspended sentence. This law also tried to inject some informality into the proceedings.[86]

The Summary Jurisdiction Act 1879 repealed the 1847 Act and enabled justices to mitigate punishment by allowing the young offender to be released on his own recognizance rather than imprisoned or fined. Any child under twelve could be tried summarily (with parental consent) on any charge other than homicide. Penal servitude was prohibited and imprisonment was limited to a month. Fines could be no greater than two pounds and whipping was limited to six strokes. A 'young person' (twelve to sixteen) could be tried summarily for property offences but no other indictable offences. Such youths could be leniently dealt with if the court thought it 'expedient' after considering the character and antecedents of the offender and the nature and circumstances of the offence. After favourable consideration, the offender could be fined a maximum of ten pounds or imprisoned with or without hard labour for up to 3 months. If the young person were male and under fourteen years he could, instead of or in addition to either of the above, be privately whipped with up to 12 strokes. The managers of reformatories and industrial schools did not like the law being couched in permissive terms.

81 Statutes 1882, c 181; 1886, c 330; 1888, c 248; 1894, c 498, s 15
82 Statutes 1882, c 127, s 3
83 An Act for the more speedy Trial and Punishment of Juvenile Offenders, 10 & 11 Vict. 1847, c 82
84 Both these provisions come from ibid, s 10.
85 42 & 43 Vict. 1879, c 49
86 Ibid, s 11(1)

No further changes in the trial of juveniles were made until the English juvenile court was established by 1908 legislation.[87]

ENGLISH THOUGHTS ON THE JUVENILE COURT MOVEMENT

The history of the juvenile court is not a history of law or a history of courts. Basically, it is a history of improving the conditions of child-life and, of more importance to the Victorians, the 'saving' or reform of children.

The Industrial Revolution created urban masses and social problems of entirely different magnitude. The child savers (and other social reformers) were not strictly philanthropic. They hoped to return the poor, dissolute, and criminal to godly ways but also to preserve private property and ensure a work force which was honest, hard-working, and decent.

The wealthy Evangelicals saw as their holy mission in life the abolition of this misery. Their remarkable efforts in law reform were badly tainted by their ambivalence toward *laissez-faire* and by their fervid adherence to 'less eligibility.' When these influential reformers had created a legislative framework, the religious contribution was transformed by the Social Gospel movement[88] with its down-to-earth attacks on the social conditions of the poor.

These powerful forces were able to harness the energies of the increasingly numerous and strong middle class. Ironically, the economic and political power of the newly rich industrial and merchant class arose from the same forces which had created the evils the middle class tried to cure.

The middle class wished to protect its values and realised that it could only do so by upgrading the situation of the poor. There were deeper philosophical reasons. Until the early nineteenth century, humanitarianism was based on a superior feeling of pity, mercy, or charity (in the worst sense). No one had asked whether it was wrong to have misery in the midst of plenty. These potential and actual injustices became accentuated and more obvious as an affluent middle class developed. Of course, the common man also came to realize that he had a social role to play partly because he was a crucial economic factor and partly because socialists, trade unions, and reformers told him so.

In tracing the origins of the juvenile reform movement through its English roots, many gaps must be left. For instance, the field of child welfare has not been discussed. The English child welfare reformers[89] were not as intimately connected with juvenile delinquency as were their US counterparts. As a broad generalization, we could say that the history of the juvenile court movement in the US was the history of social welfare reform which

87 Children Act, 1908, 8 Edw. VII, c 67

88 See Hopkins, *The Rise of the Social Gospel in American Protestantism, 1865–1915* (1940), and Rauschenbusch *Christianity and the Social Crisis* (1907).

89 Florence Davenport Hill *Children of the State* (1889) gives a history of child-saving in England.

developed legal connotations through the juvenile court whereas the English experience was more a history of penal reform. The early US courts emerged as social welfare tribunals while the English courts were not very different from the magistrates' and justices' courts for adults.[90] This distinction had cultural, legal, and social bases.

The years 1845 to 1855 saw an intensive concern with juvenile delinquency. There were several essay competitions on the problem of juvenile delinquency.[91] Many of these essays were merely temperance tracts written by clergymen who were writing for competition judges who wanted to hear of the evils of liquor. With some justification, the Industrial Revolution was blamed for the increased drunkenness. While at one time the country yokel drank his pint in the friendly atmosphere of his local tavern under the friendly eye of his farmer employer or squire, this yokel and his children had now become city dwellers who were tempted by the penny show and the gin palace. In one district in London, which housed 400 families, there were one butcher's shop, two baker's shops, and seventeen beerhouses. On one single street near the London docks, there were 67 gin palaces, public houses, and beer shops.[92] Worsley, one of the essayists, saw great harm in the worldly nature of the times; of 833 youths under twenty years of age who were interviewed, only 70 had any knowledge of religion.[93]

In 1842 in London, 12,625 were arrested for disorderly conduct; 206 were between ten and fifteen years, 1,271 were between fifteen and twenty years, and another 1,565 were under twenty-five. 2,500 were arrested for prostitution; 10 were between ten and fifteen years, 545 between fifteen and twenty, and another 570 were under twenty-five. 12,338 were arrested for drunkenness, of whom 228 were between fifteen and twenty and one was under fifteen.

The contagion theory was also obvious in the statistics which Worsley cited from the 1844 population of Parkhurst Prison. 187 were between eight and eighteen, 65 were without fathers, 48 were motherless, 18 were orphans, 34 had been cruelly treated by parents, and 79 were described rather ambigu-

90 Eg, see *Report of the Committee on Children and Young Persons* (1960), Cmdn 1191, and *Report of the Governor's Special Study Commission on Juvenile Justice* (1960). For comments on these two reports, see Geis: 'Juvenile justice: Great Britain and California,' (1961), 7 *Crime and Delinquency* 111.

91 Worsley *Juvenile Depravity* (1849), was the best of these. The Rev Mr Worsley won a one hundred pound prize which had been advertised because of the public's 'fearful and growing prevalence of Juvenile Depravity and the inadequacy of means hitherto employed to meet the evil': ibid, at v. See also, Day *Juvenile Crime, Its Causes, Character and Cure* (1858); Rushton *Juvenile Delinquency* (Reprint from the *Christian Teacher*, July 1842); Waugh *The Gaol Cradle: Who Rocks It?* (1875) (of which more, infra); *Prize Essays on Juvenile Delinquency*, published under the Direction of the Board of Managers of the House of Refuge, Philadelphia, (1855); Symons *The Reformation of Young Offenders* (1855).

92 See the novels of Mrs Henry Wood, and particularly *Danesbury House*, for highly emotional attacks on the drink problem.

93 Worsley, supra note 91, at 167

ously as 'led away by vicious companions, parents or relations.'[94] The following quotation could be duplicated from several pamphlets, tracts, sermons, and books published in the mid-nineteenth century to describe the state of child-life. Worsley's statement is relatively free of much of the sermonizing on materialism and irreligion which were common themes but he could not resist reference to the evils of drink.

> The child of the drunkard, besides the temptation of pernicious example at home, and the fatal contagion of profligate companions, is thus urged on in the path of sin by the piercing goad of necessity; he is almost forced to steal through the destitution and want in which his family is plunged; he is, perhaps, even solicited to thieve by his parents, that his dishonest gains may be converted into drink. The influence which should incite him to virtuous industry, and which no other can altogether supply, is turned to his ruin – everything is against him – all the motives which must be supposed to actuate his mind, conspire to lead him astray: instructed only in vice, he proceeds from one iniquity to another, hardened in sin by early and constant habituation, till at length, he is summoned untimely through his own excesses, or by the just hand of the law, from a world which had been to him, from infancy, a scene of almost unmixed depravity.[95]

T.B.L. BAKER AND OTHER COMMENTATORS

Did Baker, Hill, and Carpenter give any thought to an institution of the future, the juvenile court? They were not concerned with changes in the law or with the law itself (unless it interfered with their own plans). They complained that some magistrates refused to recognize the industrial schools and did not send children there. They wanted parents to be bound over for the behaviour of their children and forced to pay for part of the support of their children in the government industrial schools or other institutions.

Carpenter emulated Michigan and Massachusetts and had a children's agent appointed but he was more of an inspector of schools than a supervisor of children released on recognizances by the courts. Baker had little patience with the law. Once he referred to the 'legal rubbish' involved in differentiating between misdemeanours and felonies.[96] He had sufficient respect for the law to insist that children go before a magistrate before being sent to industrial school because some had 'done something wrong' and were not 'merely unfortunate.'[97] On the occasion when he came closest to considering

94 Ibid, at 161

95 Ibid, at 150–1. Letter to the *Leeds Mercury*, 3 November 1863. On another occasion, he said: 'It is, indeed, a matter of grave doubt to many, whether the determining the length of sentences is most wisely entrusted to those whose lives have been spent chiefly in the study of civil law ... the very fact of their having spent their lives in the abstruse study of law, must prevent them having been able to mix much with the lower classes, so as to enter into their feelings, and to know how to produce the desired effect on their minds.'

96 'Rough thoughts on an important matter by one who feels its importance,' *Stroud News* (nd: a reprint found in New York Public Library collection)

97 'Reformatories and prisons,' Letter to Editor, *Aberdeen Journal*, 15 January 1878.

juvenile justice, he reinforced legal authority: 'You object to [children] being tried in a Criminal Court. Yet a Reformatory is a Government Institution, supported chiefly by the State for the purpose of receiving and reforming boys who have committed offences against the law. It never was intended as a charity to receive all children whose parents were unable or unwilling to support them, nor could the government have undertaken such a work. If you will establish "a refuge" by voluntary charity you may receive any poor you please ... But a reformatory implies a need of reform proved in a court of authority.'[98]

One of the most intelligent critics of English penology in the late nineteenth century was William Tallack, of the Howard Association. He did not like the 'institution craze' in the United States and felt that it had spread to England. Parents were shirking their responsibilities and were sending children to institutions to avoid supporting them. Courts were not enforcing the payment of upkeep of the children in reformatories. Baker's worst fears seemed to have been realized; the reformatories at the turn of the century were over-crowded and 'evil associations' were as rife there as they had been in the prisons. There had been insufficient classification – a topic on which Baker and Carpenter were adamant – and the program had suffered through poor admission systems and too many children in the wrong kinds of institutions. The training ships (modelled after Mettray and some in the United States) were simply floating prisons.[99] Finally, too many of the children who had been expensively 'trained' in reformatories were then sent back to their parents who had not been improved. 'By a perversity of sentimental folly,' said Tallack, the 'imaginary, so-called "rights" of such parents had been allowed to sacrifice the *real rights of their children*.'[100]

Tallack also pointed out that the Home Office had 'persistently disregarded' the call for 'special Magistrates to deal with School Board cases and in other places than Police Courts.'[101]

98 'The Prison and the reformatory,' Letter dated 17 December 1877: No other identification given, New York Public Library Collection

99 Tallack, supra note 59, at 344–5. Cf, Rylands *Crime, Its Causes and Remedy* (1889), at 86, for a more favourable view of reformatories.

100 Tallack, ibid, at 346. Emphasis in original. He added, at 347: 'Where parental responsibility can be enforced, the training of children at home is incomparably better than the pauperising system of throwing the burden of them wholly or mainly on the State. Many a vicious or idle parent, who now complacently permits his offspring to be thus maintained at the expense of his hard-working neighbours, and even eagerly endeavours that such shall be the case, would promptly bestir himself, if obliged to perform a certain amount of labour for the State, or to undergo a term of cellular confinement for the neglect of his natural duties.' Rylands, ibid, at 96, agreed: 'With respect to all those children who are quite neglected by their natural guardians, or who may have lost them by death, the State may not improperly consider itself to stand in *loco parentis*; and, so far from such a course being any infringement of individual liberty, the disregard of its responsibilities and orphans and neglected children must be held to be culpable carelessness on the part of the State.' See also ibid, at 104, 116 for his views on enforcing payment by parents.

101 Tallack, supra note 59, at 350. He referred to the special courts and special magistrates for children which had been established in Massachusetts and Australia. Rylands, supra note

The Reverend W.D. Morrison believed that juvenile crime had not been reduced; the children were simply distributed differently:[102] they were perhaps in industrial schools rather than reformatories and their 'offences' were now sometimes classed as non-criminal, such as 'intractability,' truancy, or wandering.[103]

Morrison was much more sophisticated than Carpenter who often thought in purely philanthropic terms. Morrison did not talk of vice and saving children through Christian understanding; instead he saw the *facts* of juvenile 'crime' as a question of non-discernment or lack of responsibility: that children did not distinguish between acts and criminal acts. They did not realize the significance of imprisonment. Children might know right from wrong but they had no moral restraint; therefore legal tests of criminal responsibility based on right and wrong were inappropriate.[104] Pessimism pervaded Morrison's view of crime in 1896. He described the modern problems of 'economic vicissitudes' of the working people and the evils of the big cities and believed that 'these conditions may be working more powerfully for evil than child-saving institutions are working for good.' Consequently crime would increase 'in spite of the best juvenile institutions imaginable.'[105]

Morrison, in short, did not offer much hope for reformatories. He thought the situation was aggravated by the lack of classification inside those institutions where children from ten to eighteen were intermixed. The reformatories were also too big; for good work to be possible at all, the institutions had to be small and the child had to be individualized according to mind and temperament. Baker's advice seemed to have gone unheeded. Morrison wanted 'definite and intelligible principles' applied to children who should be given preliminary mental and physical examinations.[106]

Morrison did not devote much attention to probation but he gave a prophetic warning. The first results of probation seemed favourable but, he reminded his readers, the same had been true of the first years of the reformatory movement. The originators of reformatory methods had

99, at 10, would solve the problem of truant children by appointing agents who would keep a watchful eye on children in the community and report back to the courts. He suggests this would be better than using police as the children were only neglected and the industrial school (where they might be sent) was not part of a criminal process.

102 Morrison *Juvenile Offenders* (1896). See Robin, 'William Douglas Morrison, 1852–1943,' in Mannheim (ed) *Pioneers in Criminology* (2d ed 1973), at 341.

103 Morrison, ibid, at 65. Tobias *Crime and Industrial Society in the Nineteenth Century* (1967), at 128, discusses and substantially agrees with Baker's optimistic statistics.

104 Morrison, supra note 102, at 248–9. He also argued strenuously, at 272–3, that imprisonment had no discernible effect on any of the criminal population, adult or juvenile. He claimed, at 295–6, that the juvenile institutions were failing with children between 16 and 21 because no institution for that age group was of an educational character. He favourably regarded the Concord, Massachusetts, institution for those in the young adult age group.

105 Ibid, at 284

106 Ibid, at 312

'based too high expectations on their prospective efficiency.' Consequently the hopes for probation 'may have to be somewhat modified by the lessons of a fuller experience.'[107]

Children were still being sent to prison as late as 1898. Very soon after his release from Reading Gaol, Oscar Wilde wrote to the London *Daily Chronicle* complaining of the 'incredible' treatment of children in prison. (Warden Martin of the Reading Gaol had been dismissed by the Prison Commissioners because he had given biscuits to a small child who was hungry). Wilde believed that: 'The present treatment of children is terrible, primarily from people not understanding the peculiar psychology of a child's nature. A child can understand a punishment inflicted by an individual, such as a parent or guardian, and bear it with a certain amount of acquiescence. What it cannot understand is a punishment inflicted by Society. It cannot realise what Society is.[108]

Wilde thought magistrates were quite wrong in thinking that they were deterring or reforming a child by remanding the child's case for a week and giving the child a taste of jail during the remand. Children did not understand a remand as being any different from a conviction; it was a subtlety which the child could not comprehend.

Benjamin Waugh should be remembered as something of a prophet because he described a juvenile court system years before its founding. In the light of the strong court-orientation of the New York SPCC, perhaps it is not surprising to discover that Waugh was secretary of the London SPCC. To Waugh, sending children to prison was absurd because it simply perpetuated the prison population by turning innocent children into criminals. He criticized the legal names we have applied to the urchin and asserted that 'legal names excite false opinions, evoke feelings of horror out of all proportions to the facts of the case, mystify and muddle ...'[109] This of course is exactly what has happened to the word 'delinquent' which has taken on a pejorative quality prompting some jurisdictions to seek a substitute.[110] Waugh also argued that 'juvenile delinquency' was a relative term; to say that stealing a tart was a felony was absurd. A child might sin but he was not a

107 Ibid, at 194

108 Oscar Wilde *Children in Prison and Other Cruelties of Prison Life* (1898), at 6: a pamphlet which originally appeared as a letter to the Editor of the *Daily Chronicle*, 27 May 1897

109 Waugh, supra note 91, at 10. There are three other harbingers of the juvenile court which should be mentioned: Littleton *Juvenile Trials for Robbing Orchards, Telling Fibs, and Other Heinous Offences* (1771); Eardley-Wilmot *A Letter to the Magistrates of England on the Increase of Crime; and an Efficient Remedy Suggested for their Consideration* (1827); Scott, 'What changes are desirable in the mode of dealing with juvenile delinquency?' *Transactions of the National Association for the Promotion of Social Science* (1880), at 361–6. See also *Juvenile Offenders: Reports to the Secretary of State for the Home Department on the State of the Law Relating to the Treatment and Punishment of Juvenile Offenders* (1881).

110 Eg, *Juvenile Delinquency in Canada; The Report of the Department of Justice Committee on Juvenile Delinquency* (1965), which wanted to use 'young offender' or some similar term for those who breach the Juvenile Delinquents Act. This has now been superceded by the phrase 'Young person in conflict with the law' in a 1975 draft bill.

criminal. A child who became angry or boisterous and damaged something has done a natural act for a person of his age. The only problem was that the poor child did it in a public place while the middle-class child had his tantrums at home. In explanation of this, Waugh said: 'Charley, the impulsive lad, of whose very failings you are secretly proud, would, instead of simply being whipped and sent to bed, be conveyed to prison or to a reformatory, to be fed, and lodged at public charge, in five years to swell the reports of "turned out well."'[111] 'But,' asked Waugh, 'can that which would be injustice – absurd, atrocious injustice – to your Charley cease to be absurd, atrocious injustice, when applied to the Charley of your charwoman?'[112]

If the state pretended to be *in loco parentis* to the delinquent, asked Waugh, why should it use means of correction against the child which not even the 'most fiendish parent under heaven' would adopt?[113] He saw the problem in the same light as Wilde: the 'child of nine hears the bolt lock him in the same station cell, is bewildered by the same, "so help me God," is handled by the same gigantic officials, and stands, or surely is held up, in the same dock, and looks upon the same solemn deputy of the Crown as a murderer.'[114]

He wanted youth to be a criminal defence or mitigation. Lack of responsibility should decide whether it was expedient to punish although under no circumstances would Waugh tolerate imprisonment for children. In other words, Waugh wanted to find a new approach to juvenile justice. He would not want a stipendiary magistrate to preside over his new form of justice for children because the magistrate had no sense of fair play and could be a 'crotchety bachelor.' An alternative might be an 'auxiliary jury' with powers similar to those of a grand jury. If the charge proved to be due to 'childish folly, sheer want or simply stupidity,'[115] then, of course, the case would never go to court. Waugh preferred, however, a 'New and Distinct Tribunal.' He described its personnel: 'A tribunal of citizens – men and women – superintendents of Sunday Schools, teachers of day schools if you will – why not? Citizens whose functions should be magisterial, whose legal qualifications should be their ability to read the living literature of English children, whose Act of Parliament should be their own moral instincts, with the discretionary powers of a domestic *habeas corpus ad satisfaciendum* – above all, who had committed and had not forgotten the appetitive and pugnacious follies of youth.'[116] Waugh wanted individualized justice so that someone would 're-

111 Waugh, supra note 97, at 12

112 Waugh continued the argument about the class quality of the difference between juvenile crime and youthful mischief: 'To what extent is His Worship on the bench there indebted for his present grade in society, to the fact that *his* young virtue failed him at the door of mamma's sideboard, not at a baker's window and to what extent does that thievish-looking fellow just sent to Newgate owe his grade in society, to the fact that *his* young virtue failed at the counter of a confectioner's shop, he being fatherless! In what differing moods must these two think of their Auld Lang Syne?'

113 Ibid, at 15; emphasis in original

114 Ibid, at 61

115 Ibid, at 65

116 Ibid, at 80

gard a child as the father of a man, see him in wider, deeper, higher, more lasting relationship than his relationship to some pitiless, pettifogging pastry cook, recklessly indifferent to everything in heaven, earth, and under the earth, but the loss of a two penny pie.'[117]

Finally, in terms which were many years ahead of their time, Waugh added:

> Is it not time to let the ridiculously big name, 'Juvenile Crime' drop from our language, and the consequent hideous impersonation, a Juvenile Criminal, vanish from our fancy – time to relieve the stealing of apples of the tremendous word which law thrusts upon it, – to drop the humbug of the legislative distinctions 'Felonious Intent', 'Misdemeanour', 'Depredation', 'Assault with intent to do grievous bodily harm' and all the rest of it? – to talk and act towards a young ragamuffin sensibly, at least as sensibly as we talk and act towards the more fortunate child of our homes? Might we not try a reasonable economy in hateful and degrading names, economise the robbery of juvenile chances, in soured spirits, in perverted powers, in ghastly destinies? Is it not possible that by nicer names on the tongue might be achieved ends more just to the child, more loyal to the State?
> Does it not occur to you that a hard and fast law against children's deeds, which we have thought proper to call crimes, is horribly ridiculous?[118]

After reiterating that he did not want children imprisoned and that compulsory labour schools were needed and that such schools should not in any sense be penal (as he thought industrial schools to be), Waugh said: 'We are beginning at the beginning of a parliament for children. Long has the children's turn waited, at last it has come.'[119]

Probation

By the end of the nineteenth century, there was serious disillusionment with the institution. Instead of being crowded into slums and city streets, children were now congregated in institutions. The reformers were claiming again that contamination was taking place – this time in juvenile institutions. Even reformatories and training schools with good classification and treatment programs did not seem to be reforming or saving children.

Surely there was a better way. Frederic Almy, a pioneer social reformer in Buffalo was prepared to spend more money to achieve this, even if it cost ten times as much as would be spent on adults. If one generation of children were given sufficient attention, 'we should have reformed the world.'[120]

A more sophisticated commentator, and one of the best known social workers in the United States, Edward Devine believed that state policy endangered 'the integrity of the family' and urged that children should be

117 Ibid, at 81
118 Ibid
119 Ibid, at 82
120 Ibid, at 220

allowed to remain with their parents so long as they were fit to have charge of them.

Another delegate to the State Conference of Charities and Correction agreed with Devine that there were too many committals to institutions. He blamed the diffusion of child care policy, with many different police justices committing children without a concerted plan. He argued that a uniform policy would minimize committals, particularly if social workers advised the courts.[121]

Almy also made a plea for leaving the child at home and trusting 'to the church, the school, the tenement house law and the settlements as antiseptics against contamination.'[122] If additional help were needed, he wanted a probation system which was 'economical as well as moral.'

To a great extent, the history of child-saving in the twentieth century is not the history of improving the general conditions of child-life (because most of the battles had been won), or the history of juvenile institutions (which changed very little after the initial efforts of the founders of the House of Refuge and their imitators). It is not even the history of the juvenile court itself because it provided, as legal institutions tend to do, a purely symbolic quality to child work. The real history of the period is a history of probation. Homer Folks[123] thought probation was the 'most striking fact in the history of child-saving.' Probation created the bridge between legality and the informality of friendly visiting, the rather rigid social hygiene of the SPCC and the CAS. Probation was basically a penal idea which emerged as institutional commitments proved inhumane and useless.

Probation had been started on an informal basis in 1841 by John Augustus of Boston who took boys from the court on his own oral guarantee of their good behaviour. These practices existed in many courts and institutions on an *ad hoc* basis and were very much subject to official discretion which often erred on the side of unnecessary leniency, according to advocates of official probation. Many judges in the police courts had simply taken pity on very young offenders and therefore had contributed to the manufacture of adult criminals.

Probation first received official recognition in Massachusetts in 1878 and a year later enabling legislation was passed in England. Even before the start of the juvenile court, it was an attempt to keep offenders out of prison and so has the same ideological ancestry as the court for children. At first this new penal device was used for first offenders who had been convicted for trivial criminal acts. No doubt most of these probationers were children and youths.

The essence of probation, as was the case with the juvenile court idea, was

121 By 7& 8 Vict., c 101. *Proceedings of the New York State Conference of Charities and Corrections*, First Annual Session, Albany, November 1900 (1901), at 163

122 *2nd Annual Conference*, at 283–4

123 Ibid, at 296

informally practised for decades before obtaining formal recognition and the validity of enforcement by law.

The county agent system (particularly as practised in Michigan after 1875) was, in many respects, one of informal probation. The agent was interested in both the placed-out children of unfit parents and 'bad' children (so long as they did not have to be sent to institutions). C.D. Randall of Michigan had expressed concern for 'these little defenseless children' who belong to society 'which becomes, by reason of their dependence, their rightful guardian.'[124] The county or state agent was an adoption and placing-out officer. He also appeared in court and advised on dispositions. He visited the children at least once annually after placement, ensuring that they were not neglected or abused and had power to cancel the contract of indenture or placing-out.

Similarly, the boys released to T.B.L. Baker by the Warwickshire magistrates were in effect placed in his care on a probationary basis. In 1840, Matthew Davenport Hill, then Recorder of Birmingham, instituted a 'register of supervisors' to oversee cases in which he wanted to be lenient but over whom some controls should be maintained.

Massachusetts had the most advanced system of probation. The number of children under the direct care of the State Board of Lunacy and Charity as 'minor wards of the State' had increased from 2065 in 1866 to 3004 in 1897. In the former year, 626 had been self-supporting and by 1897 this figure had increased to 1645. In 1866, none had been boarded-out and thirty years later 922 were so treated. The numbers in institutions had been reduced from fourteen hundred in 1866 to about four hundred in 1897. The Massachusetts Board was notified of every criminal case against a child and had the power to investigate these cases. In 1891, probation officers had been appointed to replace the county visitors. They appeared before the court on the boys' behalf and supervised and visited them in their homes.

In 1902, Almy thought it was too early to evaluate probation. He had 32 cases in his care; 11 were still pending, 12 had successfully completed the probationary period and 9 had been sent to reformatory. He added, however, that even if probation did not work, there were few places suitable for a twelve-year-old boy.[125]

The State Conference discussed the pros and cons of probation. Probation was valuable because the child was given 'one more chance' after seeing what punishment meant. This seems of doubtful validity because of the idea of keeping the young away from the adult prisoners, jails, and courtrooms meant that any deterrent value in showing children the taste of punishment and officialdom was missing. The second supposed advantage of probation

124 *3rd Biennial Report of Michigan Board* (1879), at 118

125 *2nd Annual Conference*, supra note 230, at 293. Rochester was not available except for felonies. George Junior Republic and Berkshire Industrial Farm were small and in great demand.

was the 'continuing possibility of punishment for the deed already done.' If deterrence meant anything, this factor should have had some merit. Third (and one of the reasons which has worn least well) was that a probation officer was 'simply a friendly visitor.'

What were the dangers of probation as seen in 1901? First, the delegates were warned that they must not 'think of its rapid expansion as the panacea of all ills.'[126] Not all offenders would necessarily be on probation. Second, probation supervision must not be superficial. One agent was reported as 'solemnly asserting' that he 'exercised an entirely adequate and suitable visitation and oversight over 1900 children.'[127] Instead, there should be a 'high standard of accounting' for each probationer with proper follow-up on the results of probation.[128] Probation was not meant to be a means of keeping children out of institutions at all costs. While very short commitments, for example, ten days, should now be avoided, it did not necessarily mean that all children were suitable for probationary treatment.

Probation was a new penal idea which was being applied first to juveniles as if it were a trial run for the whole system. It was an attempt 'to preserve the self-respect for first offenders' particularly when they had only committed trivial offences. This new system gave an opportunity for reformation 'free from the institutional stigma.' The success of probation was dependent on the 'character and fitness' of the probation officers selected – another constant theme in the twentieth century.

In Buffalo, one of the first jurisdictions to have a well-developed system of juvenile probation, the probationer stayed on probation up to three months and was discharged on the recommendation of the probation officer. He was required to report regularly and had to bring progress reports from his school teacher. His parents were reminded of their duties. If the child did not maintain good conduct, he was brought before the court and could be sent to an institution. Judge Murphy of the Buffalo court aptly described the function of probation:

> Some offenses may be of such a shocking nature that the child should be sent direct to some reformatory as an example to others. Some may be so trivial that nothing more than a reprimand is required. The great majority of cases require an intermediate form of treatment. Incarceration may be too severe, and a reprimand may be too lenient to command respect for the law. Probation is the solution. It aims to restrain and reform without confinement or separation from home and friends, under the refining and elevating influence of the probation officer. When a child is placed on probation he is given to understand that he has an opportunity to redeem himself ...[129]

126 Ibid, at 297
127 Ibid
128 Ibid
129 Ibid, at 137

The juvenile court itself

The actual founding of the juvenile court at the end of the nineteenth century was really anti-climactic. A separate tribunal for dependent and delinquent children had been mooted for some time and in some jurisdictions it had already existed, either sporadically, as in South Australia since 1886, or on a more or less permissive basis, in New York and Massachusetts and probably other places. The 'official' start of the court in some place, such as Cook County, Illinois, was merely a definitional exercise – a separate docket, a separate court, full jurisdiction over all cases relating to children, a distinct court-room, a judge particularly designated for children's cases, a totally segregated detention home, independent probation officers, a court staff chosen on a non-partisan basis, a court for children with a psychiatric-clinic attached. No court had all of these virtues at the start although Illinois was the closest.

This does not mean that Illinois was the 'best' court which clearly reflected, and practised, the philosophy of the juvenile court by treating each child, not as a criminal, but as a misguided child in need of care and protection rather than punishment. If that honour could be awarded to anyone, it would go to Judge Ben Lindsey of the Denver court.

By the time the juvenile court became a legal entity authorized by legislation, perhaps the best work and the best thoughts on childcare had already been achieved. The mere fact of establishing an entity called the juvenile court was the start of a benevolent bureaucracy which was fated to become rigid, overburdened with meaningless paperwork, and the receptacle of forlorn hopes. This essay started out by saying that the juvenile court was an unlucky institution because it emerged, officially recognized, to paraphrase Charles Dickens, in the worst of times and in the best of times.

We have heard much of classical theories of penology and criminology, of the high hopes held out for the positivist school's search for the aetiology of delinquency by the proper study of the individual offender, of 'less eligibility,' of contamination theories, of the high hopes held out by a whole cast of reformers who were sure they could prevent crime, achieve the greatest happiness of the greatest number, reform children inside the walls of some institution, and restore the integrity of the family by friendly visiting.

Yet do any of these ideas and programs really explain why the juvenile court was brought into existence? They may convince an historian of ideas but they do not persuade anyone who has studied an individual court.

If we study the Chicago court, we could soon become convinced that Jane Addams was the real founding genius of that court because she created a 'social idea' at the Hull House Settlement and yet the contemporary records would show that she had very little to do with actual formation of the court. In New York, we find that the 'social idea' was much weaker and that the SPCC and CAS created a legalistic climate which made a court for children a

convenient political plan for a city even then faced with peculiar problems. Those organizations helped create a court which was 'traditionalist' before it even started – the rationalization of *parens patriae* and the 'best interests of the child,' custody of children, negation of parental rights, and little evidence of due process. In Denver, the charismatic leadership and inspiration of Judge Ben Lindsey created a court in his own image. In many important respects, he *was* the juvenile court – he loved and understood children, he had a close rapport with them, he abhorred cant and corruption, and the children trusted him even when he decided that he could no longer help them by means of his very personalized form of probation and they had to be sent to the industrial school. Lindsey applied his considerable muckraking and political talents to becoming the 'kids' judge' and fighting for their rights. Walter Lippman thought he was the nation's most effective muckraker because he did not make vague statements about the need for government intervention to protect the less fortunate elements of society. He found a cause in children and was prepared to fight the sources of their misfortune; indeed this fight led to his difficulties with a corrupt municipal regime and his eventual downfall. When he left the Denver court, there was little left of the children's tribunal.

There was never one juvenile court. There were many. Their foundations were different because they served different purposes. If we are able to gather these threads together, we might be able to find a common theme. Success is highly unlikely, however, because the much-quoted philosophy of the court was interpreted with as many shades of meaning as there were courts.