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# Juvenile Justice Reform: An Historical Perspective

Sanford J. Fox\*

Three years ago the Supreme Court delivered its famous decision, *In re Gault*,<sup>1</sup> requiring due process in juvenile courts. The *Gault* decision has led to a reexamination of the entire juvenile justice system in America.<sup>2</sup> The eventual result will very likely be drastic changes in the design and function of juvenile courts. Mr. Justice Fortas, writing for the Court in *Gault*, described the change as a matter of the "constitutional domestication" of the juvenile courts.<sup>3</sup> We find ourselves in the midst of a period of juvenile law reform that is being nourished and supported by the Supreme Court<sup>4</sup> and enthusiastically embraced by a widening circle of lower courts.<sup>5</sup>

Twice before there have been claims of major reform in the means for dealing with juvenile deviants.<sup>6</sup> The opening of the New York House of Refuge in 1825<sup>7</sup> has been denominated "the first great event in child welfare" in the period before the Civil War.<sup>8</sup> The second reform, probably the better known of the two, was the institution of the juvenile court by the Illinois legislature in 1899.<sup>9</sup> *Gault* appears to mark a third great humanitarian effort. In assessing the potential impact of *Gault*, it is useful to consider the social and judicial evolution of these earlier reforms. An

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1. 387 U.S. 1 (1967).

2. See, e.g., UNIFORM JUVENILE COURT ACT; Symposium—Juvenile Problems, 43 IND. L.J. 523 (1968); Dorsen & Reznick, *In re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1 (1967).

3. 387 U.S. at 22.

4. See *In re Winship*, 397 U.S. 358 (1970) (delinquency comprised of criminal conduct must be proved beyond a reasonable doubt).

5. See, e.g., *Cooley v. Stone*, 414 F.2d 1213 (D.C. Cir. 1969) (right to probable cause inquiry as part of detention hearing); *Baldwin v. Lewis*, 300 F. Supp. 1220, 1232 (E.D. Wis. 1969) (same); *Piland v. Juvenile Court*, 457 P.2d 523 (Nev. 1969) (constitutional right to a speedy trial extended to a juvenile); *In re Lang*, 60 Misc. 2d 155, 301 N.Y.S.2d 136 (Fam. Ct. 1969) (accomplice testimony must be corroborated); *In re Rindell*, 2 BNA CRIM. L. REP. 3121 (R.I. Fam. Ct. 1968) (delinquency proceedings must be held before a jury).

6. In this Article the term "deviant" refers to children whose antisocial conduct (begging, robbery) or family status (lacking fit parents) authorizes state intervention in their lives. The deviance is defined in statutes that specify the sorts of children who may be committed to reform schools or who may be brought before a juvenile court. This approach implicitly adopts the view that "[d]eviance is not a property inherent in any particular kind of behavior; it is a property conferred upon that behavior by the people who come into contact with it. The only way an observer can tell whether or not a given style of behavior is deviant, then, is to learn something about the standards of the audience which responds to it." K. ERIKSON, *WAYWARD PURITANS* 6 (1966) (emphasis in original).

7. R. PICKETT, *HOUSE OF REFUGE* 67 (1969). The enabling legislation for the House of Refuge was the Act of Mar. 29, 1824, ch. 126, [1824] N.Y. LAWS 110.

8. I D. SCHNEIDER, *THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609-1866*, at 317 (1938).

9. Act of Apr. 21, 1899, [1899] Ill. LAWS 131.

analysis of both the House of Refuge development and enactment of the Illinois Juvenile Court Act suggests that juvenile justice reform is a complex and highly ambivalent affair in which the goal of child welfare has been but one of many motivational elements.

Recently published works of Robert S. Pickett<sup>10</sup> and Anthony M. Platt<sup>11</sup> shed new light on these earlier reforms and provide evidence that casts serious doubt on texts that have heretofore been taken as authoritative.<sup>12</sup> This Article traces the important previous juvenile justice reforms during the periods cumulatively covered by Platt and Pickett, differs interpretatively from these revisionists on some major issues, and suggests possible limitations on reforms in the post-*Gault* period.

### I. THE HOUSE OF REFUGE AS A MANIFESTATION OF AMERICAN OPTIMISM

The colonization of America was itself a reform movement, undertaken with a firm belief in man's ability to bring about earthly progress. Daniel Boorstin has noted, "in America one needed to be neither historian nor prophet: progress seemed confirmed by daily experience."<sup>13</sup> Expansion and prosperity provided evidence of man's power over social and economic forces; the success of the spirit of constitutionalism in 1789 promised that fundamental political progress was also within his grasp. Human resistance to change and to the unknown gave way to the desire to convert dreams of the American Enlightenment to reality. Many of the most enthusiastic reformers were Quakers. The movement to establish the House of Refuge, and its management after it opened, was guided by Quaker reformers who had gained prominence through earlier works of charity and reform.<sup>14</sup> They had achieved penal law revisions greatly diminishing the scope of capital punishment by replacing death and corporal penalties with sentences to newly erected prisons;<sup>15</sup> they had created schools for the poorer classes,<sup>16</sup> and engaged in widespread efforts to alleviate the suffering of the poor in their communities.<sup>17</sup> Eventually

10. R. PICKETT, *supra* note 7.

11. A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969).

12. *E.g.*, H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 2-23 (1927).

13. D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 155 (1958).

14. *See* S. JAMES, *A PEOPLE AMONG PEOPLE: QUAKER BENEVOLENCE IN EIGHTEENTH-CENTURY AMERICA* (1963).

15. W.D. LEWIS, *FROM NEWGATE TO DANNEMORA* 1-2 (1965); D. SCHNEIDER, *supra* note 8, at 145-46. The reform legislation of 1796 greatly reduced the number of capital offenses originally established by the 1788 legislature. *Compare* Act of Mar. 26, 1796, ch. 30, [1796] N.Y. Laws 291, *with* Act of Feb. 21, 1788, ch. 37, § 2, [1788] N.Y. Laws 73-74.

16. The first of these was run by the New York Free School Society, established in 1805. *See* D. SCHNEIDER, *supra* note 8, at 183-85. Documents relating to the founding of the Society may be found in J. LANCASTER, *IMPROVEMENTS IN EDUCATION* iii-xl (3d ed. 1807).

17. The Society for the Relief of Distressed Debtors, organized in New York in 1787, was one of the earliest of the private charities dedicated to alleviating the suffering of the poor. Renamed the Humane Society in 1803, the organization contributed much to the relief of the poor. D. SCHNEIDER, *supra* note 8, at 143-48.

the reformers focused on the plight of children. The House of Refuge, by offering food, shelter, and education to the homeless and destitute youth of New York, and by removing juvenile offenders from the prison company of adult convicts, partook of the same dynamic humanitarian fervor that had characterized their earlier projects.

#### A. *The Campaign to Save Predelinquents*

An 1823 report by the Society for the Prevention of Pauperism in the City of New York called for the rescue of children from a future of crime and degradation:

Every person that frequents the out-streets of this city, must be forcibly struck with the ragged and uncleanly appearance, the vile language, and the idle and miserable habits of great numbers of children, most of whom are of an age suitable for schools, or for some useful employment. The parents of these children, are, in all probability, too poor, or too degenerate, to provide them with clothing fit for them to be seen in at School; and know not where to place them in order that they may find employment, or be better cared for. Accustomed, in many instances, to witness at home nothing in the way of example, but what is degrading; early taught to observe intemperance, and to hear obscene and profane language without disgust; obliged to beg, and even encouraged to acts of dishonesty, to satisfy the wants induced by the indolence of their parents—what can be expected, but that such children will, in due time, become responsible to the laws for crimes, which have thus, in a manner, been forced upon them? Can it be consistent with real justice, that delinquents of this character, should be consigned to the infamy and severity of punishments, which must inevitably tend to perfect the work of degradation, to sink them still deeper in corruption, to deprive them of their remaining sensibility to the shame of exposure, and establish them in all hardihood of daring and desperate villainy? Is it possible that a Christian community, can lend its sanction to such a process without any effort to rescue and to save?<sup>18</sup>

The 1822 *Report on the Penitentiary System in the United States*, submitted by the same group of reformers, called public attention to the corruptive results of locking up children with mature criminals, citing this contamination of innocence as one of the major evils that had resulted from the prison reform.<sup>19</sup> In 1824 the New York legislature responded

18. SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK, REPORT ON THE SUBJECT OF ERECTING A HOUSE OF REFUGE FOR VAGRANT AND DEPRAVED YOUNG PEOPLE, *reprinted in* SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, DOCUMENTS RELATIVE TO THE HOUSE OF REFUGE 13 (N. Hart ed. 1832) [*hereinafter cited as DOCUMENTS*]. The activities of the society that led up to this report are summarized in R. PICKETT, *supra* note 7, at 35-49.

19. This report decried the lack of classification among convicts generally: "A State Prison must necessarily be filled with every description of offenders, from him who is the least obnoxious to the laws, to him who is the most flagrant aggressor. Felons, according to the ordinary principles of our nature, will assimilate in moral character by intercourse; and the standard which will be approached and adopted, will not be the lowest, but the highest degree of turpitude. The hardened convict will maintain his abandoned principles, and the novice in guilt will become his pupil and convert. The greater offender will not go to the lesser; the tendency is the reverse. It requires no reflection to perceive, that without classification, our Penitentiaries, instead of preventing crimes, and reforming convicts, directly promote crimes, and augment the moral baseness of convicts. They are

by granting a charter and authority to erect a House of Refuge to the successor to the Society for the Prevention of Pauperism, the Society for the Reformation of Juvenile Delinquents.<sup>20</sup> The central provision of the act of incorporation granted to the Managers of the Society

power in their discretion to receive and take into the House of Refuge to be established by them, all such children as shall be taken up or committed as vagrants, or convicted of criminal offences . . . as may in the judgment of the Court of General Sessions of the Peace, or of the Court of Oyer and Terminer, . . . or of the Jury before whom any such offender shall be tried, or of the Police Magistrates, or of the Commissioners of the Alms-House and Bridewell . . . be proper objects . . . .<sup>21</sup>

It is important to note the discriminating nature of the reform; only "proper objects" were to be sent to the House, not every vagrant and criminal child. This limitation was conceived as a mandate to the courts that they commit to the House only those who could still be rescued. Those who could not be rescued were to be prevented from contaminating the saving process. The reformers were convinced that it was necessary to close their House to prematurely corrupted and corrupting young persons. The 1823 report observed that "[b]oys imitate each other, both in virtue and vice, more naturally and more rapidly than they do those who are much their superiors in age."<sup>22</sup> This concern for segregating the still "innocent" juveniles from their too precocious peers was meant to save the charges of the House from future criminal conduct.<sup>23</sup> The objects of House reform thus were seen as children who were not yet truly criminal; the undertaking was a matter of crime and delinquency prevention, aimed

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so many schools of vice—they are so many seminaries to impart lessons and maxims calculated to banish legal restraints, moral considerations, pride of character, and self-regard." SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK, REPORT ON THE PENITENTIARY SYSTEM IN THE U.S. (1822) [hereinafter cited as REPORT ON THE PENITENTIARY SYSTEM].

The need for classification was deemed especially important for juvenile offenders: "The policy of keeping this description of convicts completely separate from old felons, is too obvious to require any arguments. Nor does it seem wise to place young felons, who have been guilty of but one offense, and who can be reclaimed and rendered useful, in the severe state of punishment that attends solitary confinement. In most instances, they have no inveterate habits to extirpate. Their characters are not formed. No moral standard of conduct has been placed before their eyes. No faithful parent has watched over them and restrained their vicious propensities. Their lives exhibit a series of aberrations from regularity—a chain of accidents that has rendered them the victims of temptation, and the sport of adversity. They have been sent from place to place, subsisted by precarious means, or been left to combat with poverty, want, and the inclemency of the seasons, by the exercise of their own ingenuity. Every thing about them has been various and unsettled; and in the unfortunate hour of temptation, while under the pressure of want, or when seduced into the giddy vortex of depraved passions, they have offended against the laws, and been sentenced to the State Prison." *Id.* at 59–60.

20. Act of Mar. 29, 1824, ch. 126, [1824] N.Y. Laws 110. The decision to change the reformers' interest from poverty in general to the more specific problem of juvenile delinquency is discussed in R. PICKETT, *supra* note 7, at 49.

21. Act of Mar. 29, 1824, ch. 126, § 4, [1824] N.Y. Laws 111.

22. DOCUMENTS, *supra* note 18, at 16. The 1822 prison report similarly observed: "There will be shades of guilt, among young, as well as among old criminals—and the evils of contagious vice appear in both cases." REPORT ON THE PENITENTIARY SYSTEM, *supra* note 19, at 62.

23. DOCUMENTS, *supra* note 18, at 16.

at saving predelinquent youth.<sup>24</sup> This concept of predelinquency was one of the central concepts of juvenile justice for well over a century following its emergence in New York reform thought in the early nineteenth century. A major corollary was the view that deviant children were victims rather than offenders, even though they might already have been convicted in a court.<sup>25</sup>

Many children had, in fact, been convicted as disorderly persons, an offense that included "all persons wandering abroad and begging, and all idle persons, not having visible means of livelihood."<sup>26</sup> But the reformers fully understood that these children were guilty of little more than being poor and neglected. The House reform was designed to deal with those who were still novices in antisocial conduct. As Thomas Eddy, one of the leaders of the movement, noted, the House was intended "solely for the confinement of boys sixteen years of age, considered as vagrants, or guilty of petty thefts or other minor offenses."<sup>27</sup> There was no right to indictment or jury trial. In 1816 Chancellor Kent upheld summary conviction of disorderly persons and their imprisonment for up to 60 days.<sup>28</sup> An emphasis on minor offenses, belief in the innocence of the children despite their wrongs, and summary commitment procedures were all central features of the predelinquency campaign that characterized the House of Refuge reform. Subsequent developments in juvenile treatment, including the appearance of a juvenile court in Chicago in 1899, were similarly concentrated on petty offenses and salvageable offenders. Major offenders were, from the beginning, left in the adult criminal system.<sup>29</sup> A similar segregation of the reformables from the nonreformables came

24. B. PEIRCE, *A HALF CENTURY WITH JUVENILE DELINQUENTS* 34 (1869).

25. This discrepancy between the strictly legal status of these children and their plight as innocents was illustrated in the 1823 report: "Many of these are young people on whom the charge of crime cannot be fastened, and whose only fault is, that they have no one on earth to take care of them, and that they are incapable of providing for themselves. Hundreds, it is believed, thus circumstanced, eventually have recourse to petty thefts; or, if females, they descend to practices of infamy, in order to save themselves from the pinching assaults of cold and hunger." *DOCUMENTS, supra* note 18, at 13-14.

26. Act of Feb. 9, 1788, ch. 31, § 1, [1788] N.Y. Laws 52.

27. S. KNAPP, *THE LIFE OF THOMAS EDDY* 84 (1834).

28. *In re Goodhue*, 1 N.Y. City Hall Recorder 153 (1816). Chapter 767 of the 1744 Acts of the New York Provincial Assembly authorized summary trial, and corporal punishment upon conviction, of any person who "Commit[s] any Misdemeanor, Breach of the Peace, or other criminal Offence, under the Degree of Grand Larceny, within the City and County of New York." In 1769 the New York Attorney General, in response to what he considered improper uses of this act in bypassing jury trials, suggested it was intended only for vagrants and other disorderly persons. *See* J. GOEBEL, JR. & T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 606-07 (1944). The absence of a right to a jury trial in these cases was confirmed by the New York Constitution of 1777 which provided for jury trials "in all cases in which it hath heretofore been used in the colony of New York . . ." N.Y. CONST., art. 41 (1877). The 1821 constitutional revision continued the policy.

29. The arrival of the juvenile courts did not change this pattern; in his first year of presiding at the Chicago Juvenile Court, Judge Richard S. Tuthill sent 37 juvenile offenders to the Grand Jury. Hurley, *Juvenile Court Report*, in *PROCEEDINGS OF THE ILLINOIS CONFERENCE OF CHARITIES* (1900), reported in *BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, SIXTEENTH BIENNIAL REPORT* 353, 354 (1900).

to occupy a prominent place in the later juvenile court acts.<sup>30</sup> This central concern for morally untarnished minor offenders has been a characteristic of American juvenile justice from the outset.

A final aspect of the New York undertaking to be noted is the extent to which the reformers were engaged in crime prediction. The conditions of misery, the minor law breaking, and the habits of ignorance and vice were seen as prodromal signs of future antisocial conduct, and these predictive factors were commonly spelled out in legislation. Like other elements of the House reform, the use of statutory terms to describe conditions leading to crime is a thread that runs through more than a century of juvenile justice.<sup>31</sup>

The early focus thus was on children who were not guilty of what was considered real crime. They were the class of youth that predominated in the population of the House. The first annual report of the Managers of the House, submitted to the Society and the public in 1825, reveals that, of the 73 children received during the first year of operation, only one had been convicted of a serious offense (grand larceny), nine had been sent for petty larceny, and the remaining 63 (88 percent) were in the House for vagrancy, stealing, and absconding from the Almshouse.<sup>32</sup> In the following year, the percentage committed for "vagrancy, stealing, and absconding" was approximately the same.<sup>33</sup>

### B. *The Emergence of Parens Patriae*

The theoretical justification for subjecting predelinquent children to a coercive court commitment was furnished by the *parens patriae* doctrine. The role of this doctrine in American juvenile justice has been misunderstood due to a failure to recognize that the distinction between neglected children and delinquent children, which is of great importance in the twentieth century, had virtually no meaning in the nineteenth-century predelinquency system.<sup>34</sup> In 1875 Mary Carpenter, the noted English

30. See, e.g., Del. Code Ann. tit. 11, § 2711 (Supp. 1968); Ind. Ann. Stat., § 9-3214 (Supp. 1970).

31. By 1899 the conception of what sort of juvenile behavior justified fear of future criminality had changed little from what it had been seven decades earlier. The Illinois Juvenile Court Act brought under the reforming power of the law any child who "is destitute or homeless or abandoned; or dependent upon the public for support, or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child; and any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the streets or giving any public entertainment." Act. of Apr. 21, 1899, § 1, [1899] Ill. Laws 131-32.

32. SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 1 (1825), reprinted in DOCUMENTS, *supra* note 18, at 41.

33. DOCUMENTS, *supra* note 18, at 89.

34. For an example of an attempt to make such a distinction see H. LOU, *supra* note 12, at 2-7.

penal reformer, spoke for all the reformers of the 1800's when she declared that, as to children under 14: "All may be classed together under this age, for there is no distinction between pauper, vagrant, and criminal children, which would require a different system of treatment."<sup>35</sup> In 1898 Illinois reformers reaffirmed the unitary nature of predelinquency by reporting: "If the child is the material out of which men and women are made, the neglected child is the material out of which paupers and criminals are made."<sup>36</sup> Thus, when the nineteenth-century reformers spoke of *parens patriae*, they were dealing with neglected and criminal children; they were articulating the duty of the government to intervene in the lives of *all* children who might become a community crime problem.

This idea of the guardianship of juvenile deviants in order to prevent their punishment was soon picked up by the courts, and applied with almost uniform consistency during a long period in which the prediction-oriented predelinquency system of justice prevailed. The view espoused in *Gault* that "there is no trace of the [*parens patriae*] doctrine in the history of criminal jurisprudence,"<sup>37</sup> misses the crucial point that juvenile justice in America had no separate *criminal* jurisprudence, a fact not to be obscured by the administration of juvenile justice in the criminal courts. In those courts *parens patriae* was a cornerstone justification for state intervention in the jurisprudence that did exist regarding deviant, crime-prone children.

## II. THE REGRESSIVE FACE OF REFORM

Support for the House was replete with a solicitous regard for saving victimized children from downward careers that would inevitably invoke harsh official punishments. Paradoxically these same children were the objects of open hostility emanating from the very reformers who supported the House. The terms these reformers employed could have been used to describe a system of criminal corrections. Thomas Eddy, for example, opined that the boys could "by proper discipline be subdued and reclaimed."<sup>38</sup> The Managers of the House neatly combined attitudes of both benevolent care and undisguised hostility:

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35. Carpenter, *What Should Be Done for the Neglected and Criminal Children of the United States*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES 70 (1875).

36. BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, FIFTEENTH BIENNIAL REPORT 62 (1898).

37. 387 U.S. at 16.

38. Quoted in KNAPP, *supra* note 27, at 84.

In installing the second superintendent of the House in 1826, the President of the Society did not shrink from describing the purpose of the use of punishment: "I know from your character that the children now to be placed under your protection, will meet with every indulgence that they can claim. If any caution on this head were necessary, it would be that they should be so treated as that they may not forget that they are placed here for their misdeeds. My own view of this establishment is, that it should be kept in the remembrance of those who are committed to our care, that they are offenders



These little vagrants, whose depredations provoke and call down upon them our indignation are yet but children who have gone astray for want of that very care and vigilance we exercise towards our own. They deserve our censure, and a reward for our property, and the good of society, requires that they should be stopped, reprov'd, and punished.<sup>39</sup>

This insistence on atonement and punishment is a common attitude toward deviance and perhaps is only surprising when seen as a part of a reform program for the granting of shelter, nourishment, education, and removal from adult prisons.

### A. Nullification

For many of the boys who had committed punishable offenses, the reform meant the change from freedom to incarceration, rather than a transfer from prison to House. One of the features that characterized the prereform era was the outright acquittal of what officials and reformers considered an inordinately large number of boys brought up on minor charges of one sort or another. The District Attorney, for example, reported in 1823 that "[m]any . . . have been discharged, from an unwillingness to imprison, in hope of reformation, or under peculiar circumstances."<sup>40</sup> In speaking of cases of petty theft in the pre-House period, he later stated: "It was hardly ever that a jury would convict. They would rather that the culprit acknowledged to be guilty should be discharged altogether, than be confined in the prisons of the state and county."<sup>41</sup>

In addition, cases were brought to the attention of the judicial agencies that would earlier have gone unreported. The District Attorney noted that "[f]ormerly, too many citizens were reluctant in bringing to the police office, young persons who were detected in the commission of crimes. This operated as an encouragement to depraved parents to send very young children to depredate on the community—if detected they knew no punishment would follow."<sup>42</sup> Law enforcement officers must have seen as one of the great reform needs a more efficient system of juvenile justice that would close the gaps through which children were escaping apprehension and conviction.

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against the laws of their country, that they are in a place of punishment, and that that punishment is confinement and labor, from which they can only be redeemed by a continuation of good conduct that will give such assurance of reformation, as they may be trusted to mix with society. I cannot think, therefore, that these children are to be treated exactly as they would be if they were the innocent inmates of a college. Were they to be treated as those deserve who are pure and innocent, they might be led to think, that vice was not odious to mankind, and that the stain of crime was too easily obliterated. SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 2 (1826), reprinted in DOCUMENTS, *supra* note 18, at 41.

39. DOCUMENTS, *supra* note 18, at 81.

40. *Id.* at 14.

41. *Id.* at 48.

42. *Id.*

### B. Corporal Punishments

Once at the House, the boys found that the Society's President had made no idle promise when he declared that the program should be no school picnic. Punishment for infraction of the rules was severe.<sup>43</sup>

### C. Coerced Heresy

A substantial portion of the House population also experienced religious repression. The reformers were all Protestants, many of them actively so.<sup>44</sup> The rehabilitation program, therefore, included Bible reading and chapel services that the inmates were required to attend.<sup>45</sup> For the sizeable number of Catholics in the House<sup>46</sup> this involuntary Protestantism was pure heresy. Not until near the close of the century did the Managers permit a priest to minister to the religious needs of the Catholic inmates.<sup>47</sup> Until then commitment of a Catholic to the House of Refuge jeopardized his spiritual well-being for eternity. The practice of coerced heresy continued during the nineteenth century as a common element in the administration of juvenile justice.<sup>48</sup>

## III. SOURCES OF REFORM

All of this suggests that the House of Refuge was not simply a manifestation of humanitarian concern for children needing help. It was, in fact, the following: (1) a retrenchment in correctional practices, (2) a regression in poor-law policy, (3) a reaction to the phenomenon of immigration, (4) a reflection of the repressive side of Quaker education. Old values were reaffirmed in the search for new forms.

43. Inmates who betrayed a trust, for example, faced the following consequences: "This punishment consists in flagellation with a whip of strings, in solitary confinement to their cells, either with or without the accompaniment of a low diet; in forbidding anyone to hold communication with the offender without permission, and in extraordinary cases of flagitious conduct, in wearing an iron on one side, fastened to the waist at one end and to the ankle at the other." SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 3 (1828), *reprinted in DOCUMENTS, supra* note 18, at 138. See also R. PICKETT, *supra* note 7, at 24.

44. Eddy, for example, was a founder of the American Bible Society. B. PEIRCE, *supra* note 24, at 33.

45. DOCUMENTS, *supra* note 18, at 86. The reformers saw compulsory religious services to be of central importance from the outset. See DOCUMENTS, *supra* note 18, at 24.

46. Information concerning the religious affiliations of the children can be obtained only indirectly. Until 1830, when the nationality of committed children was reported, the parentage of the children received in the House each year was reported only as "foreign" or "American." Beginning in 1830, when the parentage of children received in the House was reported by country of origin, Ireland was by far the leading country mentioned, and the Irish children were probably Catholic. The 1830 report noted that of the 85 children of alien parents, 47 (55%) were from Ireland. SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 5 (1829), *reprinted in DOCUMENTS, supra* note 18, at 206-07.

47. In a footnote in the 1892 report, the Managers noted that "a special chapel service has been held each Sunday for the benefit of children of Roman Catholic parents." SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 68, at 14 (1892).

48. See text accompanying notes 206-16 *infra*.

## A. *Salvaging the Prison Experiment*

### 1. *Penal theory in the 1820's.*

The penal character of the House of Refuge might have been expected since the House was one of several approaches to reform of the general penal system as it existed in the early 1820's. As far as the reformers were concerned, the entire criminal justice system of New York had turned away from a philosophy of retribution some 30 years before the House was proposed. In 1796 Thomas Eddy was instrumental in securing humanitarian revisions of the penal code that reduced the number of capital offenses from 13 to three. At the same time, the legislature authorized the erection of the first prison in New York, an institution that was to allow incarceration rather than death and various forms of corporal punishment then common.<sup>49</sup> Thus, the committee that expounded on the need for a House of Refuge in 1823 introduced its recommendation with a description of the laudable state of penal theory due to the principles of the European reformers Cesare Bonesona Beccaria and Jeremy Bentham.<sup>50</sup>

The reformers had not reached agreement on whether deterrence or reformation was to displace the older retributive theory. It is clear that both these utilitarian goals were preferable to what was deemed to be the inhumane retribution that had characterized the earlier period. The inmates of the new prisons, however, may not have seen the change in quite the same light as did the reformers. Certainly, for those who would have been executed under the law as it existed prior to 1796, the substitution of imprisonment had obvious advantages. However, the new prison facility was soon filled to capacity; many who would otherwise have been subjected to some short period of corporal punishment were incarcerated for relatively long periods of time.<sup>51</sup> To these prisoners, loss of their liberty under the conditions that prevailed at the prison was likely viewed as a regression in their condition. It is no surprise, therefore, that periodic riots broke out at Newgate, requiring the calling in of military force and,

49. See note 15 *supra* and accompanying text.

50. "But the most important step in the enactment and administration of penal laws, is the full admission of the principle, that it is not revenge which stimulates society to the infliction of punishment, and arms the law with its severest denunciations;—that neither in the prescriptions of the Legislature, nor in the progress of juridical investigation and decision, are the vindictive passions to be allowed to operate:—but that the *great ends of punishment* are, to *deter* others from crime, to prevent the aggressor from the repetition of his offenses, and, if possible, to effect the moral reformation of all those who become amenable to the laws. It cannot but afford the highest gratification to every humane individual, to witness the solicitude which now prevails in relation to this subject. . . . It is creditable to this country, young as it was in experience, to have given to the world one of the first effective impulses in this new sphere of wise and charitable regulation—the Penitentiary System of Prison Discipline." DOCUMENTS, *supra* note 18, at 11–12 (emphasis in original).

51. The committee that investigated the prisons called attention to the fact that "[t]here is at least one advantage in our Penitentiaries; while villains are shut up, society are [*sic*] relieved from their depredations and outrages. Not so, if the space of fifteen minutes finishes their punishment." REPORT ON THE PENITENTIARY SYSTEM, *supra* note 19, at 82.

on occasion, the shooting of convicts.<sup>52</sup> Even though many inmates objected strongly to confinement for their own good, the idea that prevention, not retribution, was the goal of punishment and that it was best accomplished through deterrence and reformation had been adopted by the beginning of the 1830's.

## 2. *Failure of the penal system.*

The disorders at the new prison and other problems,<sup>53</sup> indicated that the new system was in deep trouble. In 1801, Eddy had already been obliged to defend the reform against the charge that it promoted crime.<sup>54</sup> In 1816, the judges, believing the new humanitarianism was adversely affecting public safety, declared that prisons were a lark to real criminals.<sup>55</sup> By the early 1820's, it was widely recognized—even by Eddy who then admitted that he knew of only two cases of reformation<sup>56</sup>—that the penitentiary system had failed. This acknowledgement of failure was the thrust of the detailed report issued in 1822 by a special committee of the Society for the Prevention of Pauperism.<sup>57</sup> The report concluded that the most

52. The problems that plagued Newgate are detailed in W.D. LEWIS, *supra* note 15, at 33-52.

53. Positions at the Newgate prison became part of the system of political patronage, *id.* at 37, with the result that "[t]he council of appointment changed the whole board, and brought into office those who were wholly ignorant of the least of their duties. The funds they were entrusted with were badly spent and all the land-marks of economy and system swept away." S. KNAPP, *supra* note 27, at 75. The Auburn prison, which had been constructed in 1817 in order to remedy the defects at Newgate, was itself falling into the same infamous state. See W.D. LEWIS, *supra* note 15, at 54-65.

54. "That the number of convicts has increased since the erection of the State Prison, is evident. But to infer from that fact, that the new and milder scheme of punishment has been less efficacious in preventing crimes than the old and sanguinary system, would be a most partial and erroneous conclusion. The *true causes* of this increase of crimes are the rapid growth of our population and wealth; the consequent luxury and corruption of manners, particularly in the capital of the state; and the great number of indigent and vicious emigrants from Europe and the West Indies, driven hither by the disordered and distressful condition of their native countries, or to escape the vengeance of the laws." S. KNAPP, *supra* note 27, at 48-49 (emphasis in original).

55. See, e.g., Armstead's & Maxwell's Cases, 1 N.Y. City Hall Recorder 174-75 (1816): "To deprive a man of feeling or sentiment of his liberty and immure him within the walls of a prison, is dreadful in the extreme; and to such men the state prison, it must be admitted, has terrors nearly equal to the gallows; but we rarely find men of this description subjects of punishments. And we would now emphatically inquire, whether the hardened, abandoned wretch, who laughs from the box at the impressive sentence of the law, who is determined never to reform, and to whom the world itself is a prison, can be punished by imprisonment?"

"Legislators, it is true, may pass laws for building state prisons, in every section of the state; they may even proceed to change robbery and grand larceny into petit larceny merely; they may resort to this or that expedient to support a false theory; the gangrene is merely healed at the surface, and remains, in the body politic, to corrupt and destroy.—Lenity is despised, the list of crimes increased, the prisons surcharged, and at the end of twenty years, it becomes absolutely necessary rapidly to disgorge the prisons, by pardon, or otherwise, of wretches, to return to their old business of prowling on the community, for the purpose of making room for others. Besides, the punishment by state prison has the effect, in the progress of revolving time, of producing a regular revolution of crime and concentrating villainy. In various instances, the term of imprisonment of a great number expires at the same time; they associate together, resort to their former haunts of vice, and form combinations to prey again on society. This city, in particular, has sufficient reason to deprecate a system, which has the effect, year after year, of disgorging among her inhabitants, villains, high and low, of every description, from every part of the state."

56. S. KNAPP, *supra* note 27, at 78.

57. "It was the offspring of this country, and established on the broad principles of humanity. It was believed by its founders, that sanguinary punishments were not the most subservient to the ends of criminal justice, and that a system of laws that would tend to give a moral dominion over the

direct and promising approach to the prevention of pauperism lay in the House of Refuge. The report further insisted that reformation could be achieved only if the prisoners were segregated in a way that would preclude intramural corruption. Finally, the report found that imprisonment had become an unduly pleasant experience for inmates of the state prison, adult and juvenile alike.<sup>58</sup>

The solution was to call for greater severity in convict life. Solitary confinement, strict discipline, and a coarse diet were encouraged, and penitentiaries were proposed for juvenile offenders.<sup>59</sup> Despite the criticisms the report constituted a rededication to the reformatory doctrine. The same commitment was evident in the report's proposal that the House of Refuge be established.<sup>60</sup> The founding of the House should be seen as the embodiment of the idea that children should be treated instead of punished; this was no more than a specific application of common penological doctrine.<sup>61</sup> The emphasis on discipline and submissiveness, however, pervades the report's discussion of the juvenile as well as the adult regime.<sup>62</sup> The Report on the Penitentiary System concluded that "it is absolutely essential to anything like success in the Penitentiary System, that criminals should sleep in solitary cells, even when they are not kept in solitude dur-

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mind and bring it to a sense of its errors and turpitude, would prove more efficacious in preventing offences, than severe corporal inflictions: that a system of laws which should prescribe confinement, hard labour, and moral discipline and instruction, would accomplish this purpose, and send forth convicts at the termination of their confinement, as useful members of society." *REPORT ON THE PENITENTIARY SYSTEM*, *supra* note 19, at 12-13. "The grand question which now arises, is, has the system answered the expectations of its founders and advocates? To this inquiry but one answer can be given.—It has not." *Id.* at 18.

The report, however, advocated continued faith in the possibility of success: "We shall contend that the Penitentiary System is a practical System, and that its present defects are separable from it and can be eradicated. We must still cherish the firm and unshaken conviction, that it is not beyond the bounds of human effort to devise a system of punishment, that will combine in its tendency, the prevention of crimes, and the reform of convicts. We do not believe that civilization has yet effected all the moral changes and improvements, that can be wrought in the constitution of human society, or that laws and government have been carried to the utmost limits of perfection. Nor do we admit, that even in the Penitentiary System, there has been that total failure which some have been pleased to assign, although from the perversion of its principles, it has disappointed the hopes of its early friends." *Id.*

58. "The members of these little communities are comfortably clothed, comfortably fed, condemned to moderate labour, and easy tasks, permitted to have their hours of ease and recreation, indulged in talking over their exploits in the paths of guilt, suffered to form new schemes for future execution, and to wear away their term of service, under circumstances calculated to deprive it of every salutary effect. . . . Large numbers of convicts are promiscuously crowded together; a sentence to the State Prison is not viewed with terror that tends to prevent crimes; the allurements and pleasures of social intercourse, are kept up; the ignominy of punishment is forgotten; and with many hundreds of criminals, the State Prison is viewed like the transportation to Botany Bay, by felons in Great Britain, as a welcome asylum." *Id.* at 23-24.

59. *Id.* at 49.

60. *Id.* at 59-61.

61. "Reformation is, or ought to be, an object dear to every man who votes for a penal statute. In the case of the young it is almost everything; for who can deny that juvenile offences proceed almost entirely from the influence of bad example." *DOCUMENTS*, *supra* note 18 at 33. See also *REPORT ON THE PENITENTIARY SYSTEM*, *supra* note 19, at 13; S. KNAPP, *supra* note 27, at 64.

62. See, e.g., *REPORT ON THE PENITENTIARY SYSTEM*, *supra* note 19, at 60: "The youth confined [in the juvenile facility] should be placed under a course of discipline, severe and unchanging, but alike calculated to subdue and conciliate."

ing the day.”<sup>63</sup> Compare this with the statement in the same report that “[a]s to the construction of these prisons for juvenile offenders, it is believed that they should sleep in separate and solitary cells, and that during the day, they should be divided into classes.”<sup>64</sup> Nightly solitary confinement came to be one hallmark of New York’s famous Auburn system of imprisonment<sup>65</sup> and a feature of the New York House of Refuge.

### B. Repressive Treatment for Pauper Children

So far this Article has suggested that the House of Refuge movement was part of an increasingly repressive emphasis in the penal system. The reform was invested with an equally stern and repressive attitude toward the problem of poverty. From the time private charity in eighteenth-century New York had become concerned with the plight of imprisoned debtors, issues of penology began to intrude on the attention of the reformers.<sup>66</sup> These two social ills had come to be virtually synonymous. The Society for the Prevention of Pauperism reorganized to become the Society for the Reformation of Juvenile Delinquents. Unattended pauperism was thought to ripen into criminality, and uncontrolled criminality—particularly vagrancy, beggary and minor thefts—swelled the ranks of paupers who had to be supported in public institutions. Both problems were conceived in moral terms. The 1822 Report on the Penitentiary System declared that the system of morality control had failed. The *Report of the Secretary of State in 1824 on the Relief and Settlement of the Poor* confirmed that the poor-law system, too, was a near total failure in its inability to improve the morals, and, therefore, the prosperity of the poor.<sup>67</sup>

Private philanthropic organizations in particular believed that the reason for poverty in the city was the immorality of the poor. In 1810, Thomas Eddy, chairman of a committee of the Humane Society on this subject, reported that “[b]y a just and inflexible law of Providence, misery is ordained to be the companion and the punishment of vice.”<sup>68</sup> Since intemperance was seen as the major vice of the time, it was nominated by Eddy as the leading cause of pauperism.<sup>69</sup> The fact that the committee investigation was made in the midst of a depression produced by the Embargo Act changed none of the emphasis on moral degeneracy; economic

63. *Id.* at 58.

64. *Id.* at 62.

65. W. D. LEWIS, *supra* note 15, at 81.

66. D. SCHNEIDER, *supra* note 8, at 142–48.

67. J. YATES, REPORT OF THE SECRETARY OF STATE IN 1824 ON THE RELIEF AND SETTLEMENT OF THE POOR, reprinted in 1 NEW YORK STATE BOARD OF CHARITIES, ANNUAL REPORT NO. 34, at 937, 951–55 (1901) [hereinafter cited as YATES REPORT].

68. HUMANE SOCIETY OF NEW YORK, A REPORT OF A COMMITTEE OF THE HUMANE SOCIETY, APPOINTED TO INQUIRE INTO THE NUMBER OF TAVERN LICENSES AND OTHER SOURCES OF VICE AND MISERY IN THIS CITY 3 (1810), quoted in D. SCHNEIDER, *supra* note 8, at 212.

69. D. SCHNEIDER, *supra* note 8, at 212.

conditions were nowhere alluded to in the report. The view espoused by Eddy on behalf of the Humane Society was shared by public officials. In 1819 a joint committee of the New York legislature declared that government had no responsibility for the poor who were "[t]he idle, the vicious and the intemperate . . . ." The report added: "Better leave them to the exercise of individual charity, which is more discriminating; the dispensers of which will feel strong inducements to impress on the mind of the receiver the necessity of reformation."<sup>70</sup>

With the belief in the need for moral change went a fear of the threat to law and order posed by the poor. In proposing formation of the new antipoverty society in 1817, John Griscom, a prominent Quaker reformer, observed that unless some radical changes were made, "the present system must fall under its own irresistible pressure, prostrating perhaps in ruin some of the pillars of social order."<sup>71</sup> In 1824, it was reported that there were nearly 9000 children under 14 living in poverty in the state, and it was feared, "that this mass of pauperism, will at no distant day form a fruitful nursery for crime, unless prevented by the watchful superintendence of the legislature."<sup>72</sup>

In order to motivate the poor out of their poverty it was suggested that public charity should be made less attractive. Thus New York's Mayor Allen opined that conditions in the institutions in which the poor were housed had become too comfortable.<sup>73</sup> The almshouse, Yates recommended, should furnish a clearly punitive experience for vagrants and beggars:

Every *alms-house* should be connected with a *work-house*, to which the sturdy beggar and vagrant might be sent, by way of punishment. This course would soon put an end to *street beggary*, if rigidly enforced; and to this end the magistrates should be required to be strict and persevering, on pain of indictment, &c.; and grand juries should be charged to enquire and present such offences. Pauperism would *decrease* more than one half, by adopting these measures.<sup>74</sup>

70. N.Y. STATE ASSEMBLY JOURNAL 607, 42d Sess. (Albany 1819), *quoted in* D. SCHNEIDER, *supra* note 8, at 217.

71. J. GRISCOM, REPORT ON THE SUBJECT OF PAUPERISM (1818), *reprinted in* DOCUMENTS, *supra* note 18, at 12.

72. YATES REPORT, *supra* note 67, at 942. In 1822 it was estimated that three-fourths of the children on public relief were children of immigrants. *Id.* at 1011-12 (App. B).

73. "[A]nd, what adds to the evil [of intemperance], is the ample provision for the needy in our establishment of alms-houses, and benevolent institutions. It is these that eradicate from the human mind, every fear of want, and encourage a reliance upon others, instead of inducing the poor to rely on their own industry and economy for support; thus blunting those feelings of independence and fear of want, which ought to be encouraged instead of repressed." YATES REPORT, *supra* note 67, at 1017 (App. B).

In a report to the Society for the Prevention of Pauperism, Griscom rhetorically asked whether even the prevention of death by charitable intervention was worth accomplishing if it meant destroying the pauper's motivation to help themselves. DOCUMENTS, *supra* note 18, at 16.

74. YATES REPORT, *supra* note 67, at 1061 (App. B) (emphasis in original). The Yates Report was submitted to the legislature in 1824. Accompanying it was a model bill embodying Secretary of State Yates' principal recommendations. *See id.* at 956-58. This bill became the basis for the legislation establishing the county poorhouse system in New York. Act of Nov. 27, 1824, ch. 331, [1824] N.Y. Laws 382. *See also* D. SCHNEIDER, *supra* note 8, at 235-46.

The interchangeable nature of the pauper and criminal concepts, as applied to children, became clearly evident in two landmark statutes adopted by the New York legislature in 1824. Under the County Poorhouse Act, the result of the Yates report, children outside of the City of New York who were vagrants or were begging in the streets were to be confined in the county poorhouse.<sup>75</sup> The law incorporating the Society for the Reformation of Juvenile Delinquents authorized children of this sort in New York City to be sent to the House of Refuge.<sup>76</sup> Whether a child's deviant conduct was seen primarily as offensive to legal rules or as an improper demand on the charity of the wealthier classes made little difference. Protection of society against crime and vicious pauperism by means of a more severe and more efficient institutionalization provided the rationale for the county poorhouse system and for the House of Refuge.

### C. *Immigrant Pauper-Delinquent*

It has already been mentioned that a large proportion of the children on poor relief were the offspring of immigrants.<sup>77</sup> So, too, were there large numbers of such children in the House, the proportion going from 41 percent in the first year to 58 percent in 1829.<sup>78</sup> Undoubtedly many immigrant youth were vagrants and petty thieves. But their immigrant status made them especially useful as a lesson to the rest of the community. As Durkheim and Erikson have pointed out, a society's deviants often play an essential role in their community.<sup>79</sup> Starting with the earliest tides of post-Revolution immigration, the isolation of immigrants contributed to the construction of essential definitions of what was American.

Perhaps every society experiences periodic needs to redefine itself. For America in the early part of the nineteenth century, the need for definition was obvious and pressing. Even at the most fundamental level of geography, no one could be quite sure just where America left off and something else began. The Louisiana Purchase had illustrated, furthermore, that even when some familiarity with physical borders had been acquired, it was subject to sudden and dramatic redefinition. There was no great certainty about the political contours of the new nation either. The Virginia and Kentucky Resolutions in 1792 and the talk of formation of a Northern Confederacy in New England in 1803 left unclarified the

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75. Act of Nov. 27, 1824, ch. 331, § 4, [1824] N.Y. Laws 384. The 1824 Act vested this power in the overseers of the poor.

76. Act of Mar. 29, 1824, ch. 126, § 4, [1824] N.Y. Laws 111.

77. See text accompanying note 72 *supra*.

78. ANNUAL REPORT NO. 1, *supra* note 32, at 41; SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 4 (1829), *reprinted in* DOCUMENTS, *supra* note 18, at 149.

79. E. DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 67-69 (8th ed. 1964); K. ERIKSON, *supra* note 6, at 5-13, 19-23.



nature of the union represented by the federal government.<sup>80</sup> The beginnings of Jacksonian democracy raised further doubts. Periodic depressions and panics injected the serious question of whether America could become economically independent. Since Great Britain and most of Europe had experienced 40 years of virtually continuous external and internal instability, it was unclear whether the new nation that had adopted so much of European, and especially British, culture could itself maintain a high level of security and peace.

The immigrant was a valuable national asset in working out some of these problems in the sense that his deviance could be seen as being beyond the borders of America. Intemperance, poverty, criminality, and immorality could be segregated as characteristics of aliens. Insofar as native Americans also transgressed on the values of morality, private property, or religion they, too, did not completely belong, and sooner or later the nation would formally evolve the concept of the un-American American. It was the immigrant, however, who, when singled out for not being what America aspired to be, bore witness to and infused life into those aspirations. Each arrest and confinement in the House of an immigrant child was, in effect, an assertion that American children were moral, well-behaved, and paragons of middle-class Protestant virtue. Snaring immigrants in the law enforcement process was a reaffirmation of traditional values.<sup>81</sup>

#### D. *The Quaker Influence*

Perhaps a key element in understanding the House of Refuge Reform lies in comprehending the early nineteenth-century Quaker influence. Quakers were active participants and leaders in virtually every humanitarian scheme undertaken in New York in the decades following the Revolution. An important factor accounting for the judgment of traditional history that the House of Refuge was a great achievement in child welfare and a benevolent reform in juvenile penology was the reputation acquired by the Society of Friends for corporate charitable activity, the international renown attained by individual Quaker reformers such as Thomas Eddy and John Griscom, and the universal statements of endearment and

80. J. ADAMS, *NEW ENGLAND IN THE REPUBLIC 1776-1850*, at 236 (1926); J. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 169-81* (1951).

81. The hostility generated by the immigrants was manifest even before the waves of immigration in the 1830's. In 1819 the Society for the Prevention of Pauperism reported that immigration was the foremost cause of pauperism in New York: "This inlet of pauperism threatens us with the most overwhelming consequences. . . . Many of them arrive here destitute of everything. When they do arrive, instead of seeking the interior, they cluster in our cities . . . depending on the incidents of time, charity, or depredation, for subsistence. . . . They are frequently found destitute in our streets; they seek employment at our doors; they are found in our alms-house, and in our hospitals. . . .

"New York is the resting place and is liable to be devoured by swarms of people. . . . Where is this evil to stop, and who can compass its magnitude?" *DOCUMENTS*, *supra* note 18, at 18, *quoted in* D. SCHNEIDER, *supra* note 8, at 127.

warmth for the pauper-criminal youth of the city. Sponsored and guided by the most prominent corporate and individual exponents of enlightened humanitarianism, how could it have been anything else? But, as preceding sections have suggested, it was. And, paradoxically, many of its repressive and punitive features are traceable to the influence of Quakerism.

The House of Refuge program showed the strong influence of Quaker educational policies. Within the Society education was of central concern, for it was the primary means of transmitting Quakerism from one generation to the next.<sup>82</sup> Soon after the Revolution, Quaker day schools were set up, many of which admitted children of nonmembers including Negro and poor-white children.<sup>83</sup> This mixing, however, produced great anxiety over dangerous associations and the corruption of Quaker youth by outsiders.<sup>84</sup> Consequently, special boarding schools were opened, such as the Nine Partners Boarding School in 1796 in New York and the Westtown School in 1799 in Pennsylvania, where a religiously guarded education could be offered exclusively to young Quakers.<sup>85</sup> The course of penological thought followed the same pattern; prisons too, had started out with a heterogeneous population, but the need for segregation and classification to prevent corruption and to facilitate moral progress was soon recognized. The House program of setting the young apart in order to promote moral growth was thus no novel experiment.

Some of the internal features of Quaker education also serve to illumine policies in the House. Corporal punishment was not uncommon in the Friends' schools.<sup>86</sup> Solitary confinement, although not an invention of the Quakers,<sup>87</sup> followed naturally from fundamental Quaker doctrine. Their belief in an "Inner Light," whereby each Friend through silent meditation experienced God and moral regeneration, was basic to their educa-

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82. H. BRINTON, *QUAKER EDUCATION IN THEORY AND PRACTICE* 20 (1949).

83. S. JAMES, *supra* note 14, at 272-74.

84. *Id.* at 275.

85. *Id.* at 275-76. The phrase "religiously guarded education" had special meaning for the Quakers: "This phrase, with such variants as a 'pious guarded education,' occurs so often in the minutes and pronouncements of Quaker bodies dealing with education that it might almost stand as a definition of their educational policy. It did not mean a 'guarded religious education' for Friends have held that religion cannot be taught except by the Divine Teacher who works either directly within the soul or through some prophetic individual acting under a sense of direct guidance. A 'religiously guarded education' means that the Quaker school must, under a sense of religious concern, shield the children from contrary influences, particularly such influences as emanate from the wrong teacher or the wrong text book." H. BRINTON, *supra* note 82, at 57-58.

86. B. LEEDOM, *WESTTOWN UNDER THE OLD AND NEW REGIME* 32 (1883). Leedom's evaluation of disciplinary practices is summed up: "This was Westtown under the old regime. Friends had not yet seen through the Mosaic veil that covered the mercy-seat; the law of love had not as yet superseded the law of force; the old Hebrew law, 'an eye for an eye and a tooth for a tooth,' still reigned triumphant, and moral suasion was a thing unknown." *Id.* at 28.

87. One of the earliest supporters of separate confinement of prisoners was the English philanthropist Jonas Hanway. W.D. LEWIS, *supra* note 15, at 25-26. Hanway was also active in reform movements to better the conditions of young children. See E. CAULFIELD, *THE INFANT WELFARE MOVEMENT IN THE EIGHTEENTH CENTURY* 129-41 (1931).

tional programs for Quaker children.<sup>88</sup> One of the major reasons for resorting to boarding schools was that this "special training in silent waiting" could best be carried out in an institutional setting.<sup>89</sup> The 1822 Report on the Penitentiary System recognized the value of solitary confinement as a means of forcing confrontation with mystical forces of a chastening character,<sup>90</sup> and the Managers of the House held similar expectations for the practice of meditation:

The moral faculties are awakened, the thoughts of the young offender are turned, often with regret, upon his past life, and he is led to resolve on a better course. In many instances, the child not only thinks of his future condition in this world, but his mind is filled with a concern for his eternal, as well as his temporal welfare. . . .<sup>91</sup>

#### IV. ENDORSEMENT BY THE COURTS AND COERCIVE PREDICTIONS

The philosophy of the House of Refuge movement illustrates the well-known historical truth that the decade of the 1820's was a period of reaction and conservatism. In spite of the punitive and conservative aspects of the reform, however, the American judiciary interpreted the establishment of institutions patterned on the New York House of Refuge wholly as a matter of humanitarian progress. With but two short-lived exceptions,<sup>92</sup> when commitments to these institutions were challenged as infringements of liberty, judicial opinions denied that disadvantage, forfeiture, and punishment existed in such houses at all. The unqualified adoption by the courts of the philanthropic protestations of the reformers and their disregard of any punitive purpose were major factors contributing to the creation of the myth that the New York House of Refuge marked a noble triumph in child welfare rather than the complex and ambivalent development that it was.

The Managers of the New York House faced a number of habeas corpus petitions asserting that children were being imprisoned in violation of

88. H. BRINTON, *supra* note 82, at 23, 54, 65. "The policy of solitary confinement to keep prisoners from encouraging each other in wickedness and to isolate them with their consciences met a ready response from Quakers, who had long believed that detachment from terrestrial things would lead to attention to the spiritual stirrings within." S. JAMES, *supra* note 14, at 290.

89. *Id.* at 275.

90. "It would leave human beings in solitude and darkness, to turn their thoughts on the causes that placed them in their narrow and gloomy mansions, and carry back their memories to that early dereliction from duty, which placed them at the bar of a criminal court, and incurred the heavy sentence of the law. It would lead them to contrast innocence with guilt, and to appreciate the worth and blessings of moral rectitude. It would tend to suggest amendment, and transport the mind to a future period in the prisoner's life, when better days and happier nights would again pass over him. . . . The worst of men will think at times, and the hour of midnight, is, of all hours, the most horrid to a guilty conscience, when the mind is left to that retrospect, that brings agony and remorse." REPORT ON THE PENITENTIARY SYSTEM, *supra* note 19, at 59.

91. DOCUMENTS, *supra* note 18, at 150.

92. *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 8 Am. R. 645 (1870); *Ex parte Becknell*, 119 Cal. 496, 51 P. 692 (1897).

their rights,<sup>93</sup> but there are no decisions reported in these cases. Philadelphia reformers were the litigants in *Ex parte Crouse*,<sup>94</sup> the first reported case upholding the Refuge scheme.

That 1838 case was decided under a statute more broadly drawn than the 1824 New York Act in that it included authority for the Managers to receive children against whom parents had charged and proved incorrigibility.<sup>95</sup> Mary Ann Crouse had been committed by a justice of the peace on her mother's allegation, in statutory terms,

that the said infant by reason of vicious conduct, has rendered her control beyond the power of the said complainant, and made it manifestly requisite that from regard to the moral and future welfare of the said infant she should be placed under the guardianship of the managers of the House of Refuge.<sup>96</sup>

The girl's father sought a writ of habeas corpus to obtain her release from the House on the grounds that she had been deprived of the right to trial by jury guaranteed by the state constitution to criminal defendants. Counsel for the Philadelphia House of Refuge had argued three years before:

It is mainly objected, as I understand, to the law in question, that punishment is inflicted without the ordinary preliminaries of trial and conviction. Into this the principal difficulties resolve themselves, which have forced their way into the minds of persons of high intelligence. The error on which the objection is founded is twofold. First in supposing that the mere commission of crimes is the reason for admission to the house; and secondly, in imputing to the consequences of that admission the character and name of punishment. An individual who is certified to be a proper subject for the discipline of the house, is only brought into view on the particular occasion, because he has done something wrong. His condition was such independently of his fault as to require the discipline and care of the establishment. The crime he has committed is satisfactory proof of his condition and requirements. It manifests his unfitness for self government and absence or abuse of domestic authority and influence. . . . On principles of mere municipal and constitutional law, there is a clear right to provide for the education and improvement of the young; and in the attainment of these great objects all the assistance

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93. SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 15, at 5-6 (1840) [hereinafter cited as ANNUAL REPORT NO. 15].

94. 4 Whart. 9 (Pa. 1838).

95. Act of Mar. 23, 1826, ch. 47, [1826] Pa. Laws 133. The original 1826 Act authorized commitment to the Philadelphia House of Refuge of "such children who shall be taken up or committed as vagrants, or upon any criminal charge, or duly convicted of criminal offenses, as may be in the judgement of [various parties] deemed proper objects." *Id.* § 6, at 135. In 1835 this was changed to permit the managers to receive from judicial agencies: (1) children described in the 1826 statute; (2) any child proved to be a proper subject for the House "in consequence of vagrancy, or of incorrigible or vicious conduct," and whose parent "is incapable or unwilling to exercise the proper care and discipline over such incorrigible or vicious infant"; and (3) a child complained against by his parent, guardian or friend that "by reason of incorrigible or vicious conduct, such infant has rendered his or her control beyond the power of such parent, guardian, or next friend, and made it manifestly requisite, that from regard for the morals and future welfare of such infant, he or she should be placed under the guardianship of the managers of the House of Refuge." Act of Apr. 10, 1835, No. 92, § 1, [1835] Pa. Laws 133-34.

96. 4 Whart. at 9.

that can be derived from discipline and restraint in due and wholesome exercise of them is within the limits of that authority conferred by the constitution on the legislature. . . . Instead of being subject to, they are saved from punishment.<sup>97</sup>

In a *per curiam* opinion, the court in *Crouse* used much the same argument and readily resolved any doubt concerning summary commitments. The holding was justified by endorsement of the charitable purposes of confinement and by the first explicit judicial resort to *parens patriae* as justification for seeking to instill virtue in children who would otherwise be doomed to a life of depravity. There was an implicit endorsement of the New York reformers' view that deviance was a prediction of future misconduct:

The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. . . . As to abridgement of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare. Nor is there a doubt of the propriety of their application in the particular instance. The infant has been snatched from a course which must have ended in confirmed depravity; and not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it.<sup>98</sup>

So long as the declared purposes of the Philadelphia House were morally and socially acceptable, the court made no effort to inquire into what was actually happening to Mary Ann or to determine whether, as was true in New York, the design and operation of the House were heavily laden with punitive and suppressive elements barely distinguishable from those of an adult prison. Counsel for the House had remarked on another occasion: "[I]f [such laws] are imperfect in application, it is only because their execution and details do not conform to the theory and intention which it is their object to effectuate."<sup>99</sup> In proposing that "imperfect[ions] in application" are immaterial, he and other Pennsylvania jurists who took up this view charted a jurisprudence that dealt with the constitutional problems of delinquency control in dogmatic terms. The judicial process became estranged from the correctional process.

The New York reformers must have been overjoyed to have this judi-

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97. ANNUAL REPORT NO. 15, *supra* note 93, at 45-47 (App.) (remarks of J.R. Ingersoll).

98. 4 Whart. at 11.

99. ANNUAL REPORT NO. 15, *supra* note 93, at 46 (App.) (remarks of J.R. Ingersoll).

cial endorsement of their philosophy. Through the remainder of the nineteenth century and well into the twentieth *Crouse* was the leading authority for the right of the state, under the *parens patriae* banner, to make coercive predictions about deviant children.<sup>100</sup>

From the beginnings of a separate juvenile system in the early 1820's through the enactment of juvenile court acts at the turn of the twentieth century, these same basic predictive factors appeared in the legislation dealing with juvenile deviants. Thus the same law violations, idleness, and parental unfitness defined "juvenile offender" in Massachusetts in 1826<sup>101</sup> and the jurisdictional reach of the Illinois Juvenile Court Act in 1899.<sup>102</sup> The presumption remained that this was all a means to the end of crime prevention. Rather than a significant reform, the Illinois Juvenile Court Act of 1899 was essentially a continuation of both the major goals and the means of the predelinquency program initiated in New York more than 70 years earlier.

## V. THE CHICAGO REFORM SCHOOL, 1855-1872

### A. *The Emphasis on Family*

The 1899 Illinois Juvenile Court Act can best be understood by outlining the course of that state's prior predelinquency efforts, especially those entailed in the life of the Chicago Reform School. The Chicago School was established to treat the same broad class of "crime prone" children as did its predecessors elsewhere. Its charter authorized commit-

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100. See, e.g., *Prescott v. State*, 19 Ohio St. 184, 2 Am. R. 388 (1869) (arson). The leading case upholding the juvenile court scheme as a means of carrying on the 19th-century system, *Commonwealth v. Fisher*, 213 Pa. 48, 55-56, 62 A. 198, 200-01 (1905), found ample authority for its view in *Crouse* and its progeny. That these cases sometimes dealt with criminal deviance signified no expansion of the *parens patriae* doctrine, because the jurisprudence did not differentiate youthful deviance that was criminal from that which was not. How little concerned the 19th-century system of juvenile justice was in erecting a firm line between criminal and noncriminal deviance appears in the opinion of Wisconsin's Chief Justice Ryan sustaining that state's institutional provisions for juvenile deviants: "It was strongly objected to the statute, that it authorizes the same disposition of children destitute by misfortune, and of children convicted of crime; committing them alike to these schools, during minority, there to associate together. It must be remembered, however, that this evil, if evil it be, is subject to judicial discretion, and that in sentencing criminal children courts will not overlook the discretion to confine them in ordinary prisons or in these schools, or the degree of depravity of convicted children, or the liability of destitute children in these schools to be demoralized by association. Children guilty of crime are not always, perhaps not often, so depraved as to make their presence in such schools dangerous to their associates. The state, providing for children dependent upon it, whether from indigence or crime, has an essential discretion in the manner of doing so. And it appears to have been in the mind of the legislature, that children guilty of accidental offenses might be more sure to gain than children destitute by misfortune would be to lose by the association, under the careful discipline provided by the act, subject to the supervision of the state board of charities and reform." *Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328, 336 (1876).

101. The statute authorized commitment to the Boston House of Employment and Reformation of "all children who lead an idle or dissolute life, whose parents are dead, or if living, from drunkenness, or other vices, neglect to provide any suitable employment or exercise any salutary control over said children." Act of Mar. 4, 1826, ch. 182, § 3, [1826] Mass. Laws 327.

102. Act of Apr. 21, 1899, § 1, [1899] Ill. Laws 131-32.

ments to the reform school of those children who committed misdemeanors and of those "who are destitute of proper parental care, wandering about the streets, committing mischief, and growing up in mendicancy, ignorance, idleness and vice."<sup>103</sup>

By the 1850's a new outlook for juvenile corrections had developed. The emphasis of the Chicago Reform School was on creating a family life for children rather than on education and religion as in the House of Refuge. In his first annual report, the Reverend Nichols, superintendent of the school, announced:

Our government of the school has been parental. We have labored to introduce as much of the family as possibly [sic] into our management of the school. We have made it our chief aim to fill a father's place to these unfortunate youth, many of whom have been deprived of both father and mother. . . . The law of kindness has been our rule in regulating its discipline.<sup>104</sup>

This family plan had developed in competition with what was called the congregate system, the archetype of which was the New York House of Refuge's imposing collection of massive buildings on Randall's Island in New York's East River.<sup>105</sup> Nichols considered reformation impossible in the regimented atmosphere of the traditional institutions:

Remove a boy from his old haunts of vice, shut him out from the world, shut him up by himself, let him march with locked step, wheel him to the right, wheel him to the left with the most precise military discipline, yet know that when your manoeuvres are through, you are ignorant of the mind and soul of this tractable machine.<sup>106</sup>

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103. CHARTER AND ORDINANCES OF THE CITY OF CHICAGO, TOGETHER WITH ACTS OF THE GENERAL ASSEMBLY RELATING TO THE CITY, AND OTHER MISCELLANEOUS ACTS, WITH AN APPENDIX 338-39 (G. Thompson & J. Thompson eds. 1856) [hereinafter cited as CHARTER AND ORDINANCES]. This ordinance was an exercise of authority in the city's charter that empowered the Common Council "[t]o authorize the taking up, and provide for the safe keeping and education, for such periods of time as may be deemed expedient, of all children who are destitute of proper parental care, wandering about the streets, committing mischief and growing up in mendicancy, ignorance, idleness, and vice, [and] to restrain and punish vagrants, mendicants, street beggars and prostitutes." LAWS AND ORDINANCES GOVERNING THE CITY OF CHICAGO 568, 570 (J. Gary ed. 1866).

104. First Annual Report of the Officers of the Chicago Reform School to the Board of Guardians 14-15 (1856).

105. The crisis in New York concerning predelinquent children became clear with the 1848-49 Report of the Police Chief, revealing that there were nearly 10,000 vagrant children in the city. In 1852 the City Prison noted that it was holding 800 offenders between the ages of nine and fifteen. Almost 8000 minors were arrested in the following year, and over half of them were committed. See CHILDREN'S AID SOCIETY, FIRST ANNUAL REPORT 4 (1854). Statistics such as these persuaded the Society for the Reformation of Juvenile Delinquents to abandon its quarters at 23d Street and the East River for a complex of buildings on Randall's Island that would accommodate 1000 children. See SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 28, at 33, 39 (1853) [hereinafter cited as ANNUAL REPORT No. 28]. The House of Refuge remained there until its demise in 1935. R. PICKETT, *supra* note 7, at 183-84.

106. Fourth Annual Report of the Officers of the Chicago Reform School to the Board of Guardians 57 (1859) [hereinafter cited as Fourth Annual Report]. The congregate system was not without its ardent defenders. In 1869 Reverend Bradford K. Peirce wrote in his history of the New York House of Refuge: "It is not possible for the boys, in such divisions as those arranged in the New York House, working, studying, playing, in the company of mature and observing persons, constantly brought in contact with the strongest moral forces, to have such an influence for evil upon one another as the

The family plan was accorded international sponsorship in a paper by the English prison reformer, Mary Carpenter, read at the annual meeting of the National Conference of Charities held in Detroit in 1875. She declared:

[I]n all cases, I object to large institutions for children, where individuality is destroyed, and where there cannot be any home influence. The family system should be represented as completely as circumstances will permit, the parental control and authority being delegated by the State to the managers of the institutions, and the loving spirit of a family being infused by the resident officials and by voluntary benevolent effort. The surroundings of the young persons thus brought into an artificial atmosphere should correspond with their natural mode of life, as far as is compatible with sanitary conditions, order and propriety; while the educational and industrial learning should be such as to prepare them to discharge well the duties of the condition of life which they may be expected to fill.<sup>107</sup>

By using small living groups and attempting to duplicate for the boys the conditions of manufacturing and agricultural employment the Chicago Reform School achieved a substantial amount of success in implementing the new approach.<sup>108</sup>

But if institutions sought to replicate families, would it not have been

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children of decent families, spending their days between the school and the street; for how powerless for good, in most instances, are the average homes in which city children live!

"The positive advantages of a large reformatory in a dense community may be thus set forth:

"I. It is in a condition, from its extensive resources—sanitary, educational, industrial, and moral—to receive a large number, at any given time, within its halls, so that a great diminution of juvenile crime and evil influence may be secured in the vicinity.

" . . . .

"II. It was well remarked, in the very able report of the Massachusetts State Board of Charities for 1865, that few persons have the reformatory power—that strong, magnetic, spiritual power of awakening, with the Divine blessing, the latent manhood and the latent conscience in a boy's heart. When such a person is found, it is therefore the more desirable to give him a wide field. . . .

"III. But the great advantage of the congregate system is the opportunity it offers for systematic labor. Almost without exception, the best boys, so called, and the worst that are sent to the Refuge, are lazy. They have lived truant, vagrant, and vicious lives. They hate work . . . Farm-work is not sharp enough as a counter-irritant in the majority of these cases. It is not sufficiently electric. It does not wake the boys up. But the shop, with its carefully-adjusted stints, with its delicate labors, requiring constant and absorbing attention, with its daily recurring duties always demanding faithfulness, has an amazing power over their minds. . . .

" . . . .

"It will, from these suggestions, be seen that a large institution, with all its liabilities, having its subjects for a year or more under perfect discipline, day and night, having regular hours of labor, having daily moral lessons, with prayers and the Word of God, having the Sabbath sanctified with appropriate services, and the most affecting and wholesome addresses from the wisest and best of Christian men and women, must make a salutary and lasting impression upon the minds of its inmates.

"The institution is less like home, but more like the society into which the boy is to enter. He has learned the sanctity of law, the necessity and beauty of obedience, and the consequences of disobedience. He goes forth into a greater institution, where law constantly meets him, and will impress him as it never did before. Both habit and conscience will be his keepers, and there is great reason to hope that he will become 'a law unto himself.' " B. PEIRCE, *supra* note 24, at 257-64.

107. Carpenter, *supra* note 35, at 68.

108. Superintendent Nichols recommended that new construction be undertaken to provide buildings accommodating no more than 40 boys. Fourth Annual Report, *supra* note 106, at 55. By 1863 the School was operating with boys separated into classes lodged in quarters that would accommodate 30 boys. Seventh Annual Report of the Board of Guardians of the Chicago Reform School to the Mayor and Common Council of the City of Chicago 20 (1863) [hereinafter cited as Seventh Annual Report]. Four years later it was reported that "[o]ur Reform School village is now in successful operation, so far as the complete separation of departments is concerned. Each thirty boys have their own play ground and living apartments, without any connection with the other branches of the Institution."



better to place the predelinquents directly in real families? Such a use of foster homes had roots in colonial apprenticeship practices, but as a means of clearing city streets of pauper-criminal predelinquents, its beginnings may be marked in the establishment of the New York Children's Society in 1853.<sup>109</sup> This group operated schools in the city, held religious meetings, and maintained a lodging house for New York children,<sup>110</sup> but its major energies were invested in conveying juvenile paupers out of the city to homes in other parts of the country, mainly in the western states.<sup>111</sup> The young clients of the Society were those who would otherwise have been candidates for the House of Refuge; they included "many without homes or parents, some from prisons and station houses, some . . . whom their parents could not support, and others [who] were just falling into bad ways."<sup>112</sup> In 1879 it was reported that 48,000 children had already been sent out of New York by the Children's Aid Society.<sup>113</sup>

Other organizations were doing the same thing. The House of Refuge, the New York Juvenile Asylum, established in 1851,<sup>114</sup> and the Five Points Mission placed children in rural homes in the west.<sup>115</sup> Soon there was Catholic sponsorship of the westward movement. In 1863 a charter was granted to the Society for the Protection of Destitute Roman Catholic Children in the City of New York,<sup>116</sup> which operated its local institution

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Eleventh Annual Report of the Board of Guardians of the Chicago Reform School to the Mayor and Common Council of the City of Chicago 24-25 (1867). The next year there were six "families" containing from 30 to 40 boys each. Twelfth Annual Report of the Board of Guardians of the Chicago Reform School to the Mayor and Common Council of the City of Chicago 47 (1868) [hereinafter cited as Twelfth Annual Report]. The following year the Superintendent complained that the number to be housed should be kept down to 25, "thereby rendering the children still more comfortable and contented and mak[ing] this Institution more of a home than it ever was before." Thirteenth Annual Report of the Board of Guardians of the Chicago Reform School to the Mayor and Common Council of the City of Chicago 27 (1869).

The School prided itself on the replication of life outside: "Our Institution daily epitomizes the workings of the outside life. It is a little world revolving within itself. Our store rooms, often placed in the care of some of our older boys, represent the mercantile life, in the debit and credit system. Nothing goes out except by order of the Superintendent, and is charged to the department that receives it. Our Shoe, Chair, Willow, and Tailor Shops represent the manufacturing interest. Our Farm and Green House the agricultural." Twelfth Annual Report, *supra* at 48.

109. CHILDREN'S AID SOCIETY, *supra* note 105, at 7. For a history of the Society see H. THURSTON, *THE DEPENDENT CHILD* 92-140 (1930).

110. CHILDREN'S AID SOCIETY, *SECOND ANNUAL REPORT* 7-15 (1855).

111. *Id.* at 16.

112. *Id.* (statement by C.L. Brace, first Secretary of the Children's Aid Society).

113. PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE OF CHARITIES 158 (1870) (statement by J.W. Skinner, Superintendent of Industrial Schools in New York).

114. B. PEIRCE, *supra* note 24, at 218-19. According to the President of the Society for the Reformation of Juvenile Delinquents, the New York Juvenile Asylum was "designed to diminish the sources of supply to the House of Refuge by taking children at an earlier age and a less advanced stage of vagrancy or delinquency. . . . A course of instruction and discipline is provided for children requiring the same, who will remain in the institution a shorter period than would be proper in the House of Refuge, and then be indentured. In addition to the management of the Asylum the Society is engaged in the same service as the Children's Aid Society, the procuring of places for children in the country." SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, *ANNUAL REPORT* No. 13, at 66-67 (1855) [hereinafter cited as *ANNUAL REPORT* No. 13]. The institution was primarily for the benefit of Protestant children. *People ex rel. Van Heck v. New York Catholic Protectory*, 101 N.Y. 195, 197-98, 4 N.E. 177, 178 (1886).

115. B. PEIRCE, *supra* note 24, at 211.

116. Act of May 5, 1863, ch. 448, [1863] N.Y. Laws 767.

and sent Catholic children west as well.<sup>117</sup> Resident agents were installed in Chicago by Children's Aid<sup>118</sup> and the Juvenile Asylum in order to locate suitable homes for New York's pauper children.<sup>119</sup> Inevitably, the receiving states complained that New York was exporting its young criminals to western communities<sup>120</sup> and that foster homes for local children were being taken up by the many easterners.<sup>121</sup> Finally, in 1899, the Juvenile Court Act adopted a protectionist policy and placed restrictions on the importation of children into Illinois for purposes of family placement.<sup>122</sup>

The great value to be placed on family life for deviant and crime-prone children was later explicitly set forth in the Juvenile Court Act. In an oft-cited provision, the act declared that "care, custody and discipline" were to be of a parental sort. The "treatment of choice" was removal of the child from his own home and placement in a better family. This was made clear in the description of the statutory goal:

This act shall be liberally construed, to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can

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117. B. PEIRCE, *supra* note 24, at 301, 304. The use of foster homes as a means of dealing with predelinquents posed a special problem for immigrant Catholics. What they had to contend with in this context was described in 1879 by Mrs. Clara T. Leonard of Massachusetts: "A strong opposition has arisen in the Roman Catholic Church to placing Catholic children in Protestant families. The fear is that it will lead to the conversion of children to Protestantism. It will be very difficult, therefore, to provide for some of those children who most need to be separated from the life they are now living. Comparatively few Catholic families in New England are yet sufficiently intelligent and prosperous to adopt or to train the children who need homes; and, as they usually have large families of their own, it is difficult to find among them homes to be compared with those freely offered by Americans and Protestants. . . . The foreign Catholic population is very large. It furnishes a real proportion of our dependent and criminal class. It also furnishes us with voters and tax-payers in great numbers, and embraces many excellent and conscientious citizens. The opposition by Catholics to Protestant influence is based on real religious scruples, and must be met in a spirit of tolerance, and not by blind opposition. That which is real and enduring in the Catholic faith should be respected; and Protestants should remember how much they hold in common with Catholics, in the great doctrines of Christianity and its requirements of pure and upright life. The true way to deal with Catholic children in Protestant families, would be to permit them to practice their own form of worship, to be silent in regard to their peculiar doctrines, and to inculcate a life of piety and good works. . . . I believe that if our people could be led to deal fairly with Catholics, many poor children might receive the benefit of a good family training, who are shut out from it by the fear of proselytism which their parents and clergy feel." Leonard, *Family Homes for Pauper and Dependent Children*, in PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE OF CHARITIES 170, 176 (1879).

118. See H. THURSTON, *supra* note 109, at 124.

119. See B. PEIRCE, *supra* note 24, at 220.

120. See H. THURSTON, *supra* note 109, at 123. "Dr. Byers thought Mr. Brace dumped car-loads of children in the West, where the people took them in as a matter of humanity, but without that solicitude for their real welfare that ought to be provided. The reduction of juvenile crime in New York might be attended by an increase of juvenile crime in the West." *Debate Concerning Children*, in PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE OF CHARITIES 158 (1879). In answer: "Mr. Skinner said Mr. Brace sent Mr. Fry to all the penal institutions of the West, and he found in them only a very few of the boys sent from New York. New York papers were complaining that the best boys were being picked out, and sent West." *Id.* at 160.

121. "Mrs. Louisa Rockwood Wardner said, that in a part of the poorhouses of this State, outside of Chicago, there were over 700 children. In Chicago there were 1200 children needing immediate attention. She thought the people of the West should find homes for their own poor children before they furnished homes for the 10,000 children sent from New York City to the State of Illinois. She was satisfied that these children did not stay long in the homes where they were first placed. Many of them became tramps." *Id.* at 158.

122. Act of Apr. 21, 1899, § 16, [1899] Ill. Laws 136-37.

properly be done the child be placed in an improved family home and become a member of the family by legal adoption or otherwise.<sup>123</sup>

Traditional juvenile court history has interpreted this section as declaring that children were to be protected and not punished for their misdeeds, as if that were a major philosophical innovation.<sup>124</sup> There was no express statement of such a principle, and there was no need for such a statement, since a welfare philosophy had arisen to replace a retributive view of earlier generations. The House of Refuge was as clothed in protection philosophy as was the Illinois Act. The section does make historical sense, though, when seen in the light of the increased emphasis that was being placed on family life in both institutions and in foster home placements. It codified the shift from congregate to family penology; it did not shift the underlying rehabilitative aim of all juvenile penology. Chicago's first juvenile court judge, Richard S. Tuthill, adopted the philosophy of the act when he instructed his probation officers: "The law makes it the duty of the Court, as far as possible, to locate its young wards, both dependents and delinquents, in family homes."<sup>125</sup>

### B. *Judicial Procedures, 1855-1872*

The judicial process by which the children were delivered to the school is important in establishing a background from which to analyze what was lost and what was gained by the Juvenile Court Act of 1899. The 1855 Chicago municipal ordinance that established the school made children who had been "convicted before any justice of the peace or police magistrate" of a misdemeanor or noncriminal deviance liable for commitment.<sup>126</sup> The focus on these minor tribunals in the judicial hierarchy underscores the continuing central concern of juvenile justice with the petty offender. As to procedural formalities and rights, it seems reasonable to infer that, as is true today,<sup>127</sup> they were rarely observed in the courts hearing minor offenses.

123. *Id.* § 21, at 137.

124. In spite of nearly a century of reformation philosophy prior to 1899, the second juvenile court judge in Chicago, Julian Mack, wrote concerning early 19th-century juvenile law: "What we did not have was the conception that a child that broke the law was to be dealt with by the State, as a wise parent would deal with a wayward child." Mack, *The Chancery Procedure in the Juvenile Court*, in *THE CHILD, THE CLINIC AND THE COURT* 310 (1925). Unfortunately Mack's views on the background of juvenile law have been accepted uncritically. He figures prominently, for example, in the Supreme Court's views on juvenile-court history. See *In re Gault*, 387 U.S. 1, 15-16 (1967). See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) [hereinafter cited as TASK FORCE REPORT: JUVENILE DELINQUENCY].

125. Tuthill, *The Juvenile Court Law in Cook County*, in PROCEEDINGS OF THE ILLINOIS CONFERENCE OF CHARITIES (1900), reported in BOARD OF THE STATE COMMISSIONERS OF PUBLIC CHARITIES, SIXTEENTH BIENNIAL REPORT 333, 336 (1900).

126. CHARTER AND ORDINANCES, *supra* note 103, § 4.

127. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 29-32 (1967).

In 1857 state legislation replaced the ordinances as the fundamental law governing the reform school and its referral sources.<sup>128</sup> This act made three changes regarding predelinquents charged with violation of the penal law. First, instead of being restricted to misdemeanants, the Chicago Reform School became eligible to receive boys convicted of any non-capital offense.<sup>129</sup> Second, the minimum age for offenders was lowered to seven years.<sup>130</sup> Finally, referral to the school could be by "each and all courts having criminal jurisdiction in the County of Cook and each and all police magistrates in the city of Chicago."<sup>131</sup> Juvenile felons who had been tried and convicted in courts of general criminal jurisdiction were now eligible for reform school education. Whether there was greater procedural formality for juveniles in the criminal courts is unclear.

The Supreme Court of Illinois noted in 1870 that "[i]n all criminal prosecutions against minors, for grave and heinous offenses, they have the right to demand the nature and cause of the accusation, and a speedy public trial by an impartial jury."<sup>132</sup> But there were relatively few commitments for offenses that would have been classed as "grave and heinous" and, therefore, triable by the formalities suggested by the Illinois court. During the 1856-1872 period there were 1284 commitments to the school; of these, only 160 were for crimes such as robbery, burglary, manslaughter, grand larceny, or arson that would merit the "grave and heinous" characterization.<sup>133</sup> It would appear, therefore, that only slightly more than one out of ten of the school's inmates had arrived via the major criminal courts where the full panoply of procedural rights would ordinarily have been available.

Even in the criminal courts the procedural formalities may not have been observed for juveniles. There was a statutory duty imposed on the courts to commit to the school only boys who, "in the opinion of the court, would be a fit and proper subject for commitment to said reform school."<sup>134</sup> Such a distinction would have been made more easily by informal interrogation of the boy and his parents than by calling witnesses under oath in an adversary proceeding. A major question is whether this judicial inquiry

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128. Law of Feb. 14, 1857, [1857] Ill. Private Laws 650.

129. *Id.* § 3.

130. *Id.*

131. *Id.*

132. People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 287, 8 Am. R. 645, 651 (1870).

133. Sixteenth Annual Report of the Board of Guardians of the Chicago Reform School to the Mayor and Common Council of the City of Chicago 14 (1872) [hereinafter cited as Sixteenth Annual Report].

134. Law of Feb. 14, 1857, § 3, [1857] Ill. Private Laws 651. When it reenacted this statute in 1863, the Illinois legislature added: "Provided, however, that such boys only shall be committed to such reform school as, in the opinion of the court, are in need of and will be benefited by the reformatory influence of said school, the said school being intended as an educational and reformatory institution, rather than as a prison or place of punishment." Law of Feb. 13, 1863, § 9, [1863] Ill. Private Laws 136.

was conducted following a formal criminal conviction, as are present-day sentencing proceedings, or was incorporated in a proceeding dealing simultaneously with guilt and amenability to reform school training. According to the Chicago Reform School's last Superintendent, Robert Turner, the courts were almost entirely unconcerned with the guilt or innocence issue:

Previous to December, 1870, when a boy was arrested for an offense, he was first examined by the Police Magistrates, then remanded to the Superior Court, there to be examined immediately by one of the Judges as to whether he was a suitable subject or not. *If on the examination of him and his parents* (for the law required the presence of his parents or guardian) *it was considered best for the welfare of the boy that he should come to the Institution, an order or mittimus was made out to that effect, charging him with no crime, recording no criminal proceedings against him, blotting out all previous charges, and consigning him as it were to a Boarding School, regardless of the enormity of the offense for which he was arrested.*<sup>135</sup>

Turner is writing of the boys who ended up under his charge. What of the others, those who were screened out of the specialized program for children? It seems reasonable to assume that these were the precociously criminal children who had either already completed, unsuccessfully, the program for juvenile offenders at the reform school or who had committed offenses of such enormity or notoriety that the courts could not avoid dealing with the offense rather than the offender. There was, it should be recalled, nothing novel in the nineteenth century's idea that children such as these should be treated precisely as if they were adult offenders.

The informality of Illinois procedures further appears in 1861 legislation relating to the commitment of boys who had not violated the penal law.<sup>136</sup> The law provided for a commissioner who heard the cases of boys within the ages of six and seventeen charged with being "a vagrant or destitute of proper parental care, wandering about the streets, or committing mischief or growing up in mendicancy, ignorance, idleness and vice."<sup>137</sup> This official was authorized to summon and question the boy and his parents to determine whether the boy was "a suitable subject for the reform school, and [whether] his moral welfare and the good of society require that he should be sent to said school, for instruction, employment and reformation."<sup>138</sup> There was no jury trial and no privilege against self-in-

135. Fifteenth Annual Report of the Board of Guardians of the Chicago Reform School to the Mayor and Common Council of the City of Chicago 24 (1871) [hereinafter cited as Fifteenth Annual Report] (emphasis added). See Twelfth Annual Report, *supra* note 108, at 45: "That these boys are not sent here as criminals, appears from the fact that when they appear before the Police Court charged with crime, instead of passing sentence on them as in adult cases, the matter is considered, if their youth will render them susceptible of improvement, and if so, they are sent to the Superior Court, that the offense may be overlooked, and the city take them under its protection." (Emphasis in original.)

136. Act of Feb. 22, 1861, [1861] Ill. Private Laws 149.

137. *Id.*

138. *Id.* In 1867 the commissioner's function was transferred to the judges of the superior and circuit courts. Law of Mar. 5, 1867, ch. 14, § 8, 3 Ill. Private Laws 134.

crimination; the notice required by the statute appears limited to an order to appear before the commissioner and "to show cause, if any there be, why the said boy shall not be committed to the reform school."<sup>139</sup> There was no reference to appointed defense counsel, and, since the boys were likely to be from indigent families, there was probably no counsel at all in most cases. The whole tenor of the statutory provisions is that this was not to be an adversary proceeding; it was rather an inquisitorial hearing to assess the character of the boy and his family. The act required that, when cases were referred to the commissioner, the transmittal was to include "the list of witnesses which may be necessary to establish the situation and condition" of the boy,<sup>140</sup> indicating that it was status and need, not behavior, that was the central issue. It is only the reference to competent testimony that may indicate the use of certain rules of evidence. The commissioner was not required to be a lawyer, and he probably made his own commonsense estimate of what was and was not competent testimony.

There is little basis for thinking that the commissioner's process of dealing with predelinquents in this period was inhibited by any of the law's formalisms, or that such inhibitions came into play when his functions were taken over by the judges<sup>141</sup> who were also hearing children's criminal cases.<sup>142</sup>

### C. O'Connell and Its Aftermath

By the end of the 1860's the Chicago school was falling on bad times. The courts seemed to be turning against the institution. They were developing the practice of committing boys to the school as a last resort, using sentences to the jail and bridewell to deal with boys when they first got in trouble with the law.<sup>143</sup> Assuming the judges who were responsible for this

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139. *Id.*

140. *Id.*

141. See note 137 *supra*.

142. The fact that the 1861 legislation placed noncriminal deviant youth before the commissioner and juvenile criminals before judges may seem to contradict the thesis that these two groups were not distinguished for judicial purposes in the nineteenth century. Although there is no direct evidence of what moved the legislature to bring the commissioner into the picture, there are indications that it was a response to parental complaints that children were being taken from their homes without cause. When an offense had been committed, there was probably an expectation that the punishment might entail an institutional commitment of some sort, but when the behavior declared to be deviant was seen as a fairly normal pattern of living—intemperance, idleness, and so on—the commitment might have been a good deal more difficult to accept. The commissioner helped to persuade the parents that commitment was at least reasonable, if not right. See Seventh Annual Report, *supra* note 108, at 21. The assertion that the 1861 law was primarily intended to deal with the complaints of parents is supported by the fact that, along with establishing the commissioner, it made the procedure for obtaining a writ of habeas corpus to release a child from the school more difficult and more expensive. Act of Feb. 22, 1861, §§ 1-4, [1861] Ill. Private Laws 149. The commissioner appears, therefore, to have been a short-term concession to parental objections, rather than a jurisprudential innovation intended to alter the process by which coercive predictions were made about noncriminal delinquents.

143. Fourteenth Annual Report of the Board of Guardians of the Chicago Reform School to the Mayor and Common Council of the City of Chicago 5-6 (1870) [hereinafter cited as Fourteenth Annual Report].

pattern were employing the dominant sentencing theory that the least harsh measure is to be applied first, it must have appeared to them that life at the Chicago Reform School, in spite of its family plan, was not as advertised.<sup>144</sup> This attitude was seen by those who ran the school to undermine their efforts. The President of the school's Board of Guardians complained:

. . . the interests of reformation have great reason to complain of the repeated fining and imprisoning of young boys by the different Courts before being sent to our School. The familiarity thus gained by being arrested, fined and imprisoned so often has a tendency to confirm them in their downward course, and is pernicious to the interests of reformation and humanity.<sup>145</sup>

At the same time the Illinois supreme court, by virtue of its original jurisdiction in habeas corpus cases, was releasing children from the school regardless of what progress they might be making toward reformation. The pressure was coming from parents who were, perhaps, also prevailing on the trial courts to avoid commitments to the school in the first place.<sup>146</sup>

The supreme court in 1870 published an opinion in a habeas corpus case, *People ex rel. O'Connell v. Turner*,<sup>147</sup> which further demonstrated judicial hostility to the school. By the time the *O'Connell* case arose, the 1861 legislation governing commitments to the school had been amended so as to eliminate the office of commissioner.<sup>148</sup> His jurisdiction and duties were assigned to judges of the superior or circuit courts; they were

to proceed in the same manner and give the same notice that said commissioner is . . . required to give; and if, upon such examination, such judge shall be of opinion that the said boy or girl is a proper subject for commitment to the reform school, and that his or her moral welfare, and the good of society require that he or she should be sent to said school for instruction, employment and reformation, he shall so decide . . .<sup>149</sup>

144. The length of stay in the Chicago school may also have been an important factor. While sentences to jail and the bridewell must have been relatively short, in 1868 the school revealed that although it was theoretically possible for a boy to be out in 6 months, "[t]he average time of staying is a year and a half, some staying with us years." Twelfth Annual Report, *supra* note 108, at 50.

145. Fourteenth Annual Report, *supra* note 143, at 5.

146. In the year ending March 31, 1870, 16 boys had been discharged by the writ. Superintendent Turner commented bitterly of these 16: "It is a notorious fact, that most of those, before being committed here, were allowed to roam the streets without parental care or sympathy from any source, and preying upon the public at every opportunity; but immediately they are taken under the care and supervision of a benevolent institution, established for their benefit, parents and parties who never gave them a thought before, now indignantly demand their release by Writ of Habeas Corpus; time and money are freely spent to gain the desired object, (and past experience tells us) gained only to drop the boy back in the same downward path from which we received him. I am aware this is no place for argument, but we who are so closely connected with this class of children, know the incalculable harm and immense injustice done, not only to those unfortunate boys, but also to the community in which they live, by such a proceeding. Can there be anything illegal in depriving an incompetent parent of the power of educating his son in crime, and placing that son, even against his own will, where he will be educated, cared for, and made a useful member of society? No law, either human or divine, can be so construed." *Id.* at 22-23.

147. 55 Ill. 280, 8 Am. Rep. 645 (1870).

148. Law of Mar. 5, 1867, § 4, 3 Ill. Private Laws 31-32.

149. *Id.* at 32.

The 1867 amendments did not affect the screening duty of criminal court judges concerning boys convicted of any criminal offense. Daniel O'Connell had been committed to the school by the Superior Court of Cook County; the court did not specify whether he had been convicted of a criminal offense and was sentenced under the 1863 legislation<sup>150</sup> or was "destitute of proper parental care, and . . . growing up in mendicancy, ignorance, idleness and vice," and was committed pursuant to the 1867 amendments. His father's petition for the writ alleged that there had been no conviction of crime,<sup>151</sup> and Mr. Justice Thornton noted:

The warrant of commitment does not indicate that the arrest was made for a criminal offense. Hence, we conclude that it was issued under the general grant of power, to arrest and confine for misfortune.<sup>152</sup>

The terms of the warrant support this view since they contain verbatim repetitions of phrases from the 1867 statute.<sup>153</sup>

The fact that the court found it necessary to distinguish between crime and "misfortune" is of utmost significance, for it suggests that, unlike all earlier cases dealing with the legality of commitments to juvenile institutions, the court proposed to deal with the *O'Connell* claims as if misfortune was to be viewed as one of life's cruelties visited upon children, not a sign of incipient social threat.

As a further preliminary matter, the court noted that its attention had been called to the institution's humanitarian purposes. Its reaction to this argument was also novel:

It is claimed, that the law is administered for the moral welfare and intellectual improvement of the minor, and the good of society. From the record before us, we know nothing of the management. We are only informed that a father desires the custody of his child; and that he is restrained of his liberty. Therefore, we can only look at the language of the law, and the power granted.<sup>154</sup>

No protestations of kindness and benevolence would be given weight. From the allusion to the barren record, it seems that the court might have considered evidence, had it been submitted, bearing on life at the reform school. Perhaps the reason why the school offered no proof on this question was the fear that a realistic appraisal of the Chicago Reform School would only have confirmed what the courts had already begun to believe—that children were better off in the jail or the bridewell.

The writ was granted, and young O'Connell was ordered discharged from custody. The opinion does not come to grips with the line of argu-

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150. Law of Feb. 13, 1863, § 9, [1863] Ill. Private Laws 136.

151. *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 281, 8 Am. R. 645, 646 (1870).

152. *Id.* at 283, 8 Am. R. at 647-48.

153. *Id.* at 281, 8 Am. R. at 646.

154. *Id.* at 283, 8 Am. R. at 648.



ment advanced in *Crouse*<sup>155</sup> and the cases that followed it; in fact, no cases were cited. Crime prevention was not mentioned at all; crime prediction was impliedly rejected. *Parens patriae* found its way into the opinion solely in a rhetorical question posed after the court had pointed out that there were distinct limits to the authority of the natural parent to discipline his child: "Can the State, as *parens patriae*, exceed the power of the natural parent, except in punishing crime?"<sup>156</sup> The *parens patriae* duty to safeguard the present and future welfare of children did not enter the discussion. Possibly it was because the Illinois court did so little to refute the prevailing arguments and assumptions of nineteenth-century juvenile justice that they ultimately prevailed. The *O'Connell* decision was widely criticized and was substantially eroded twelve years later in the same court.<sup>157</sup>

The *O'Connell* court found that the jurisdictional definitions in the statute were too broad and vague. The court thus rejected the assumption that middle-class reformers could always recognize the deviance of lower classes merely because the former were different from the latter. The antebellum view that intemperate parents were "unfit" was replaced in the opinion with a social and moral relativity that was quite novel.

What is proper parental care? The best and kindest parents would differ, in the attempt to solve the question. No two scarcely agree; and when we consider the watchful supervision, which is so unrelenting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition. Ignorance, idleness, vice, are relative terms. Ignorance is always preferable to error, but, at most, is only venial. . . . Though it is sometimes said, that "idleness is the parent of vice," yet the former may exist without the latter. It is strictly an abstinence from labor or employment. If the child perform all its duties to parents and to society, the State has no right to compel it to labor. Vice is a very comprehensive term. Acts, wholly innocent in the estimation of many good men, would, according to the code of ethics of others, show fearful depravity. What is the standard to be? What extent of enlightenment, what amount of industry, what degree of virtue, will save from the threatened imprisonment? In our solicitude to form youth for the duties of civil life, we should not forget the rights which inhere both in parents and children. The principle of the absorption of the child in, and its complete subjection to the despotism of, the State, is wholly inadmissible in the modern civilized world.<sup>158</sup>

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155. See notes 94-100 *supra* and accompanying text.

156. 55 Ill. at 285, 8 Am. R. at 650.

157. *In re Ferrier*, 103 Ill. 367, 42 Am. R. 10 (1882). *Ferrier* only distinguished *O'Connell* and did not overrule it; but the unanimous view of later courts was that *O'Connell* was a dead letter and can be treated as overruled. See *Wisconsin Indus. School for Girls v. Clark County*, 103 Wis. 651, 664, 79 N.W. 422, 426-27 (1899). *Accord, In re Daedler*, 194 Cal. 320, 331, 228 P. 467, 471 (1924) (noting that *O'Connell* was "contrary to the main current of authority"); *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905); *State ex rel. Olson v. Brown*, 50 Minn. 353, 357, 52 N.W. 935, 936 (1892).

158. 55 Ill. at 283-84, 8 Am. R. at 648.

Tucked away in this statement is a denial of the predictive system. It is explicitly made only in reference to the significance of "idleness" but is at the heart of the judgment as a whole.

The *laissez-faire* theme implicit in the above passage emerges more fully in the discussion of the parent's rights. The parent had a natural right to the custody of his child that the state could abrogate only in extreme circumstances:

The ease with which it may be disrupted under the law in question; the slight evidence required, and the informal mode of procedure, make them conflict with the natural right of the parent. Before any abridgment of the right, gross misconduct or almost total unfitness on the part of the parent, should be clearly proved. This power is an emanation from God, and every attempt to infringe upon it, except from dire necessity, should be resisted in all well governed States.<sup>159</sup>

The court also dealt with the manner in which the legislation infringed both constitutional and natural law rights of the child. The confinement and control of the child were seen as matters of such unbridled administrative discretion that "[s]uch a restraint upon natural liberty is tyranny and oppression."<sup>160</sup> The court suggested strongly that no authority existed at all to provide for the welfare of children deemed destitute and neglected—if the welfare were to be provided behind locked doors and high walls.<sup>161</sup> The declaration of an inalienable right to liberty in the state's bill of rights was merely declarative of the natural law, which extended to children equally as to adults.

In the closing portion of the opinion, the court accepted the cornerstone doctrine that it had earlier thrust aside; it might be a permissible legislative judgment that misfortune was equivalent to depravity. If the lawmakers and administrators were only a bit more mild and kindly, if the confinement were somehow less onerous, and if inalienable rights were respected, then the whole enterprise might receive the approbation of the judges.<sup>162</sup>

Although *O'Connell* changed the course of events only in Illinois, its impact there was considerable for a short time. The illogic, confusion, and technical incompetence in failing to deal with relevant cases and doctrine prevented the opinion from having any broader, lasting influence on the course of law. That decision, the Chicago Fire of 1871, and the requirement that the grounds be vacated and returned to Cook County combined to

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159. *Id.* at 284–85, 8 Am. R. at 649.

160. *Id.* at 286, 8 Am. R. at 650.

161. "If, without crime, without the conviction of any offense, the children of the State are to be thus confined for the 'good of society,' then society had better be reduced to its original elements, and free government acknowledged a failure." *Id.*

162. "Other means of a milder character; other influences of a more kindly nature; other laws less in restraint of liberty, would better accomplish the reformation of the depraved, and infringe less upon inalienable rights." *Id.*, 8 Am. R. at 651.

force the closing of the school.<sup>163</sup> In 1872 the Chicago school closed its doors forever. The legislature repealed all jurisdiction over "misfortune" cases—those directly affected by the *O'Connell* decision.<sup>164</sup> The jurisdiction of the reformatory at Pontiac was extended to the boys who committed criminal offenses and who might, before 1872, have been sent to the Chicago school.<sup>165</sup> Illinois was out of the institutionalized predelinquency business.

Superintendent Turner tells us that thereafter children were exposed to a purely criminal process:

At present when a boy is arrested for a petty offense, the Police Magistrate imposes a fine, which if not paid, the delinquent goes to the Bridewell to stay until liquidated, at the rate of 50 cents per day. If arrested for a higher offense, he is remanded to jail (should he not be able to procure sufficient bail), there to stay in close companionship with the most hardened criminals until his trial, which may not come on for 4, 6, or 8 weeks, and when it does come, two-thirds of them are discharged or get their sentence suspended, but whether innocent or guilty, just as sure as they have been in jail once, just so sure, if they live, will they return to it before many weeks. This awaiting trial; idle both mentally and physically; in company; on equal footing; sleeping in the same cell; almost eating out of the same dish, with adult confirmed criminals, will prove their ruin, as it has thousands before them. Yet they are blamed and must suffer the penalty. Society wants them punished for something they cannot avoid under the present laws, for the boy that can serve such an apprenticeship, under such tutorage however short, and not come out three times more of a criminal than before he entered must be a saint indeed.<sup>166</sup>

Note that the practice of dividing the boys into those who commit petty offenses and those engaging in "higher" offenses continued. The former were tried before the police magistrate, and there is no reason to believe that these trials conformed to modern notions of due process any more than they had before *O'Connell*. Since petty offenders were then, and still are, the central concern of the juvenile justice system, *O'Connell* did nothing to criminalize the judicial process for the great majority of deviant youth.

Turner was unmoved by anything resembling a procedural matter. It was the nature of the confinement that children were required to undergo that led him to bewail their fate; the evil was not in the court but in the prisons. For the ensuing 30 years this emphasis on institutional reform characterized the reform movement in Illinois. The idea that the reform movement leading to the 1899 Act was aimed at substituting an informal judicial process for criminal trials has no basis in historical fact. Like

163. Sixteenth Annual Report, *supra* note 133, at 33-34.

164. Act of May 3, 1873, §§ 12, 17, [1873] Ill. Laws 147-48. Section 17 specifically repeals the 1867 Act that established jurisdiction over "misfortune" cases, and Section 12 establishes jurisdiction in adult court over only such cases as are punishable by imprisonment.

165. *Id.* § 1, at 145.

166. Fifteenth Annual Report, *supra* note 135, at 24-25.

Turner, child welfare advocates wanted a better place for the child to live when he was in state custody.

## VI. THE ILLINOIS JUVENILE COURT ACT

### A. *The Myth of Procedural Reform*

Section 5 of the Illinois Juvenile Court Act is primarily devoted to problems of notice and process. The section also contains, however, the sentence: "On there turn [*sic*] of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner."<sup>167</sup> Since no other part of the legislation purports to deal with how the court is to approach juvenile cases, it is this sentence that the *Gault* opinion credits with bringing about a monumental change in juvenile law:

The early reformers were appalled by adult procedures. . . . The child . . . was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were, therefore, altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in . . . procedural criminal law were therefore to be discarded.<sup>168</sup>

The period between the *O'Connell* decision and the 1899 Juvenile Court Act saw no new legislation dealing with procedure. Appearances before the lower criminal tribunals were probably carried on much as they had been before *O'Connell*.<sup>169</sup> Thus, in the first year of the Chicago Juvenile Court, when more than nine out of ten of the delinquents brought before it were minor offenders, the hearing of cases "in a summary manner" was no greater an informality or absence of procedural rights than had been the case in the inferior courts prior to the Juvenile Court Act.

But what of the remaining ten percent, those who had committed major offenses?<sup>170</sup> It is not even clear that, prior to 1899, all youthful offenders charged with major crime were accorded an adult trial. Platt reports that in the first half of 1899 the Chicago police courts convicted boys of disorderly conduct on the basis of such serious behavior as burglary.<sup>171</sup> The inferior courts seem to have accepted jurisdiction over offenses that were, technically, beyond their authority in order to keep children from the risk of stiff penalties in the higher courts. Assuming this also occurred before 1899, at least some of the serious offenders were not receiving adult trials.

I have not, of course, established by satisfactory proof that informality

167. Illinois Juvenile Court Act § 5, [1899] Ill. Laws 133.

168. 387 U.S. at 15.

169. See text accompanying notes 132-34 *supra*.

170. These might include breaking and entering, assault, and arson. Hurley, *supra* note 29, at 354.

171. A. PLATT, *supra* note 11, at 127.

did mark the trial of children accused of major offenses before 1899. This discussion merely suggests that the burial of *O'Connell* provides some reason to believe that this might have been so, and that there may have been little actual use of oppressive criminal procedures in juvenile cases that could have appalled the turn-of-the-century juvenile court reformers. That there was little procedural rigor that was harming children might help to explain why the reformers were in fact *not* appalled. One looks in vain for evidence of a reform movement devoted in whole, or in part, to ending the application of adult criminal procedures to children.<sup>172</sup> Whatever else the 1899 legislation reflected, it was not a movement to change procedures.

### B. *The Reform Movement and the 1899 Juvenile Court Act*

It has been proposed thus far that the 1899 legislation served to continue the process of coercive predictions as a program of crime prevention; that it was designed to continue, as well, the emphasis on family life; and that it was not the aim of the reformers to change the procedures whereby the courts participated in child-saving. There were, in addition, other reform goals influencing the 1899 legislation that should be noted.

#### 1. *Improving institutions.*

In 1871 Superintendent Turner of the Chicago Reform School echoed the concern expressed by reformers fifty years earlier—children ought not to be incarcerated with adults, and when set off by themselves they should be under a system of strict classification.<sup>173</sup> The last quarter of the nineteenth century in Illinois proved to be much less fruitful for reformers, however, than was the first quarter in New York. Legislation made the Pontiac institution a place for more mature and experienced criminals.<sup>174</sup> Reformers lamented that Pontiac had become incapable of caring for pre-delinquents.<sup>175</sup> The alternative institutions to which children were sentenced were as bad.<sup>176</sup>

172. At a national level, too, it appears that no one was appalled long enough or deeply enough to have placed his views into the Proceedings of the National Conferences of Charities and Corrections. An exception is the declaration of the Secretary of the Michigan Board of Charities in 1878: "It is a bad thing to have a criminal record against a boy, if it can be avoided. . . . Why cannot a law be devised by which magistrates may send boys to . . . a school for discipline, protection, and education, and not for penalty, on criminal warrant?" Lord, *Dependent and Delinquent Children with Special Reference to Girls*, in PROCEEDINGS OF THE FIFTH ANNUAL CONFERENCE OF CHARITIES 168, 178 (1878). There is, therefore, little support for Platt's assertion that "there was a general consensus of opinion among state welfare experts and private child-saving organizations that children should not be processed through the criminal courts . . . ." A. PLATT, *supra* note 11, at 123.

173. Fifteenth Annual Report, *supra* note 135, at 24.

174. In 1891 courts were authorized to commit to Pontiac male offenders as old as 21 years. Law of June 18, 1891, § 12, [1891] Ill. Laws 55.

175. See, e.g., BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, NINTH BIENNIAL REPORT 52 (1886).

176. In 1876, for example, Frederick Wines wrote concerning the county jail: "We have long felt, and every year has given new strength to our conviction, that the county jail system of Illinois is

Predelinquent children were also kept in poorhouses. In 1870 the Board of State Commissioners of Public Charities had warned: "[T]he children in the almshouse have little or no hope of ever being lifted, by any agency whatever, out of the pauper class. They are, almost without exception, uninstructed and untrained."<sup>177</sup> There is some reason to believe that it was the problem of almshouse children about which the Illinois reformers marshaled in 1898 to do battle with the legislature. Hastings H. Hart, one of the prominent reformers, declared to a statewide reform meeting:

This is one of the most important States in the Union, and yet it has no law on its statute-books forbidding the keeping of children in poorhouses. . . . Now if we can all get together and agree upon what shall be the future policy of the State, we shall accomplish something. If there is no understanding as to what is required, the Legislature will become confused, and we shall not get anything. We need to see to it that what we do is done in the right direction. In the first place we want a law that shall forbid the keeping of any child of sound body and mind in a poor-house.<sup>178</sup>

The female crusaders similarly declared that the main problem was the deficiency in institutional facilities. They pressed to get children out of the jails and into new facilities. At this same 1898 state conference, Mrs. Lucy Flower informed the delegates:

We are struggling very hard to get a juvenile reformatory in Chicago. At the present we have no such school. The difficulty with the industrial schools is that they do not cover the ground. They are full and have not the necessary accommodations. . . . We feel that our great need is a parental school. . . . We want to establish in Chicago, under the board of education, a truant school which will accommodate the children who are running the streets and take charge of them.<sup>179</sup>

Julia Lathrop joined this view, noting that "the truant or parental school is the last word on this subject in all great cities."<sup>180</sup> The Chicago Bar Association joined the crusade, citing as the primary reason for its concern the deficiencies in institutional facilities.<sup>181</sup>

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a failure, and a disgrace to the intelligence and the humanity of the state. We know of no evil which so loudly calls for a remedy." BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, FOURTH BIENNIAL REPORT 81 (1876), *quoted in* A. PLATT, *supra* note 11, at 118-21.

Despairing of having any effect on the jails, the reformers changed their focus: "During the 1880's, penal reformers in Illinois shifted their interest from the general physical condition of jails to the effect that these conditions had on particular groups, especially children. . . . The Board of Public Charities slowly gave up the idea of 'overthrowing the system,' and instead concentrated on improving jail conditions for children who needed special care and attention." *Id.* at 121.

177. BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, FIRST BIENNIAL REPORT 192 (1870).

178. PROCEEDINGS OF THE ILLINOIS CONFERENCE OF CHARITIES (1898), *reported in* BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, FIFTEENTH BIENNIAL REPORT 320-21 (1898).

179. *Id.* at 327.

180. *Id.* at 323.

181. "WHEREAS, the State of Illinois and the City of Chicago, are lamentably deficient in proper care for delinquent children, accused or convicted of violation of law, lacking many of those reformatory institutions which exist in other progressive states of the union; and WHEREAS, children accused of crime are kept in the common jails and police stations, and children convicted of misdemeanors are

There is consistent evidence from the most relevant sources for believing that the reform crusade was massing for a change in institutional conditions. If this is correct—if these urban crusaders were seeking reform of the institutions when they went to Springfield—then the legislation that resulted was a colossal failure. Institutional conditions were barely changed. Nothing was done about the children in the poorhouse; a provision to remove them was deleted from the final bill.<sup>182</sup> Local jails remained as they were. The only change was the provision that forbade placing children under twelve in a jail or police station.<sup>183</sup> They were to be confined in a "suitable place," although no money was provided to lease, build, or otherwise find such a place. A provision to pay for such special detention was deleted by the legislature.<sup>184</sup> In a sense, this is merely another refusal of a rural legislature to appropriate funds to solve urban problems. The excisions are also part of a long history of financial starvation of correctional systems. Current interactionist sociological theory would have it that the legislature acted so as to ensure an adequate supply of deviant youth.<sup>185</sup> But whatever the complex of reasons, the statute that emerged represented the failure of a drive to reform the reformatories, detention facilities, and other institutions for predelinquent youth.

Significantly, although the Bar Association committee came back virtually empty-handed, it styled itself, for the first time, as a Juvenile Court Committee, and announced victory.<sup>186</sup> Its elation may be understood partly as a result of the infectious enthusiasm of colleagues with other goals who had assisted in formulating the bill,<sup>187</sup> and for whom the bill was a success. This success represented the triumph of private enterprise and sectarianism.

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sentenced to the bridewell, where they are kept in immediate association with drunkards, vagabonds and thieves; and WHEREAS, the Judges having charge of the trial of children in our courts are so overburdened with other work as to make it difficult to give due attention to the cases of children, particularly those of the dependant and neglected classes; and WHEREAS, the State of Illinois makes no provision for the care of most of the children dependent upon the public for support, other than the public almshouse—unlike many neighboring states which have long ago passed laws prohibiting the keeping of children in public almshouses: RESOLVED, that the president of this association appoint a committee . . . to investigate existing conditions relative to delinquent and dependant children, and to cooperate with committees of other organizations in formulating and securing such legislation as may be necessary to cure existing evils and bring the State of Illinois and the City of Chicago up to the standard of the leading states and cities of the Union." *Quoted in A. PLATT, supra note 11, at 131.*

182. REPORT OF THE COMMITTEE ON JUVENILE COURTS TO THE CHICAGO BAR ASSOCIATION 4 (1899) [hereinafter cited as CHICAGO BAR REPORT].

183. Illinois Juvenile Court Act § 11, [1899] Ill. Laws 135.

184. CHICAGO BAR REPORT, *supra* note 182, at 3-4. Hastings Hart reported in 1900 that the bill "was amended by the legislature in its closing hours by eliminating every item of expense in carrying it out." PROCEEDINGS OF THE BOARD OF PUBLIC CHARITIES (1900), *reported in STATE COMMISSIONERS OF THE BOARD OF PUBLIC CHARITIES, SIXTEENTH BIENNIAL REPORT* 252 (1900).

185. *See, e.g., K. ERIKSON, supra note 6, at 13-18.*

186. At the end of its report, the committee approvingly quoted from Prosecutor Barnes' speech prophesying that the act "will prove the dawn of a new era in our criminal history, and of a brighter day for the people of Illinois." CHICAGO BAR REPORT, *supra* note 182, at 6.

187. The first draft of the act was written by Hastings H. Hart. H. H. HART, PREVENTIVE TREATMENT OF NEGLECTED CHILDREN 251 (vol. 4 of CORRECTION AND PREVENTION, C. HENDERSON ed. 1910). Judge Harvey B. Hurd then took over and produced a second draft.

## 2. *Private enterprise.*

During the whole period of reform activity in Illinois, local jails and state reformatories took charge only of the criminal children. The dependent, ignorant, idle, and other noncriminal predelinquents became clients of private child welfare organizations.<sup>188</sup> Four of these received subsidies from county government, and ran their own institutions—industrial and training schools.<sup>189</sup> Other private groups such as the Visitation and Aid Society functioned largely as family placement agencies, holding children only long enough to find foster homes for them.<sup>190</sup>

The state charities commissioners were opposed to the practice of having private parties care for these children and called for the state to assume this responsibility. In 1886 they reviewed the practices in other jurisdictions and found general agreement on certain matters:

The state should retain the control of the entire system in all its branches, and not intrust it to private persons, or to private institutions acting otherwise than under the authority of the state, and subject in all respects to whatever regulations the state may ordain for their government.<sup>191</sup>

In their next biennial report, in 1888, the commissioners complained even more strongly about county money going to the privately run industrial schools:

Governments which shirk their obligations are sure to forfeit the respect and confidence of the people sooner or later. . . . The states which put the care of their unfortunate and criminal classes off upon the counties display a similar weakness. And it is an evasion of responsibility for our own state to encourage or even to permit the formation of private institutions which can live only by the receipt of a subsidy from the state or county treasury. . . . But the government should never go into partnership with any individual or corporation in the transaction of busi-

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188. A. PLATT, *supra* note 11, at 109–10.

189. The Industrial School for Girls at South Evanston and the Chicago Industrial School for Girls were authorized in 1879 by An Act to Aid Industrial Schools for Girls. Act of May 28, 1879, [1879] Ill. Laws 309. The Act provided public funds and jurisdiction to house and reform "[e]very female infant who begs or receives alms while actually selling or pretending to sell any article in public, or who frequents any street, alley or other place for the purpose of begging or receiving alms, or who, having no permanent place of abode, proper parental care or guardianship, or sufficient means of subsistence, or who for other cause is a wanderer through streets and alleys, and in other public places, or who lives with or frequents the company of, or consorts with reputed thieves or other vicious persons, or who is found in a house of ill-fame, or in a poor house." *Id.* § 3, at 309–10.

The boys' schools were organized under an Act to Provide for and Aid Training Schools for Boys. Act of June 18, 1883, [1883] Ill. Laws 168. The St. Mary's Training School was established in 1882 and legitimated by the 1883 legislation. BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, EIGHTH BIENNIAL REPORT 147 (1884). The fourth institution was the Illinois Industrial Training School for Boys, established in 1887. Dudley, *The Illinois Industrial Training School for Boys*, in PROCEEDINGS OF THE EIGHTEENTH NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS 145–46 (1891).

190. From 1888 to 1903 the Visitation and Aid Society had placed 942 children in homes. T. HURLEY, *THE JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED* (2d ed. 1904) (the number of children placed in homes appears inside the front cover on an unnumbered page).

191. BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, NINTH BIENNIAL REPORT 75 (1886).



ness which properly belongs to the government. If the government finds it necessary or expedient to establish and maintain a charitable or penal institution, let it do so wholly at its own charge and expense, and receive no form of aid from private parties. . . . If private persons undertake some form of charitable work, let them find the money with which to carry it on, without calling on the government for an appropriation to enable them to dispense with the effort required for success in their undertaking, and at the same time evade responsibility for the expenditure of public funds. If a private charity can not be sustained without a governmental subsidy, it is usually either because the demand for it does not impress the public, or else the public has not confidence in its management.<sup>192</sup>

The objection was not entirely a matter of private use of public funds. These reformers were also opposed to the courts' practice of committing destitute children to private corporations that ran no schools themselves but forwarded the children to what purported to be industrial schools under the industrial school Act.<sup>193</sup> This "middle-man" commitment practice had developed in Judge Richard Tuthill's Cook County court. The commissioners felt that if Judge Tuthill were correct in interpreting the industrial school Act so as to authorize this practice, then the Act should be repealed.<sup>194</sup> In an 1888 decision, *County of Cook v. The Chicago Industrial School for Girls*,<sup>195</sup> the Supreme Court of Illinois reviewed the 1879 statute and found no legislative intent to authorize commitments to agencies that did not, themselves, operate industrial schools.

Timothy D. Hurley of the Visitation and Aid Society, one of the family placement agencies, saw the foundations of his child-saving work threatened by the *County of Cook* decision.<sup>196</sup> His agency had even less standing to take court-committed children than did the litigant in that case; there was no law purporting to authorize commitments to a private agency that did not even pretend to be an industrial school. In 1891 Hurley's society drafted the First Juvenile Court bill, which would have legalized their work.<sup>197</sup> If enacted it would have reversed *County of Cook* by authorizing the court to commit

192. BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, TENTH BIENNIAL REPORT 85-86 (1888).

193. An Act to Aid Industrial Schools for Girls, Act of May 28, 1879, [1879] Ill. Laws 309. This Act was passed in an attempt to reinstate the power to "save" juveniles that had been taken away by *O'Connell*. It provided public funds and jurisdiction to "industrial schools for girls" to save delinquent girls.

194. BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, NINTH BIENNIAL REPORT 79, 80 (1886).

195. 125 Ill. 540, 18 N.E. 183 (1888). The county had objected to supporting the industrial school. The school was a corporate entity, but it had no school facilities of its own. Girls committed to it were sent to Catholic institutions—the House of the Good Shepherd or the St. Joseph's Orphan Asylum. *Id.* at 554, 18 N.E. at 189. The court noted that the county's paying the bills was inconsistent with the state constitutional provision forbidding public funds to be used for any sectarian purpose. *Id.* at 558, 567-70, 18 N.E. at 191, 195-97.

196. He worried that the work of his Visitation and Aid Society, "as well as the work being done along the same lines by other societies, while not actually illegal, was authorized by no legislation giving them power to do what they realized it was necessary to do in order to save the child." T. HURLEY, *supra* note 190, at 17-18.

197. *Id.* at 18.

any such child to any corporation, not for pecuniary profit, organized under the laws of this state, the objects of whose organization may embrace the purpose of caring for any such child, and which corporation may, in the judgment of such court, be competent and disposed to properly care and provide for such child.<sup>198</sup>

The Hurley interests felt the juvenile court movement was a matter of reinstating the role of private charities in juvenile work.<sup>199</sup>

The 1899 legislation definitively settled the issue of private enterprise versus government monopoly. Its provisions were a resounding victory for the Hurley group and, as with the institutional reform issue, a crushing defeat for the charities commissioners and others who had similarly viewed the problem of predelinquency as an exclusive concern of government. The industrial schools came away from the 1899 legislative session with more business than ever before. The Juvenile Court Act authorized commitment to them of law violators as well as the predelinquents they had been receiving before.<sup>200</sup> The family placement agencies too had their roles confirmed and enlarged by the new law. The substance of Hurley's 1891 bill was included,<sup>201</sup> as well as authority for the juvenile court—in the person of Judge Tuthill—to commit criminal predelinquents to family placement agencies.<sup>202</sup> The industrial schools and the placement agencies were also empowered to give up for adoption children committed to them without obtaining the consent of the natural parents.<sup>203</sup> When the bill was enacted, Hurley reported:

At last the long strain was over, the work of years was about to bear fruit—Chicago was to have a Juvenile Court, and the agencies interested in child-saving work had the strong arm of the law back of them in any action it might be necessary for them to take in order to save a child and make a man.<sup>204</sup>

The institutional issue and the private enterprise question were related. The predelinquency business that the industrial and training schools received under the Juvenile Court Act could not have been given to them if government facilities had been expanded to serve the same needs.<sup>205</sup> Taking children out of the poorhouses would have required some institutional alternatives that would inevitably have competed with the privately main-

198. *Quoted in id.* at 71.

199. Hurley's conception, for instance, of the role of the Chicago Bar Association in the reform was "to inquire into the needs and outline such legislation as would appear, in the minds of the [bar association] committee to cover the necessities of the societies engaged in charitable and sociological work." T. HURLEY, *supra* note 190, at 20.

200. Illinois Juvenile Court Act § 9, [1899] Ill. Laws 134.

201. See text accompanying notes 197–98 *supra*.

202. Illinois Juvenile Court Act § 9, [1899] Ill. Laws 134.

203. *Id.* § 8, at 133.

204. T. HURLEY, *supra* note 190, at 22.

205. Girls who were already inmates of the House of the Good Shepherd and the St. Joseph's Orphan Asylum were sometimes taken to the Cook County Court to be adjudged dependent so that the county could be billed for their care. *County of Cook v. Chicago Indus. School for Girls*, 125 Ill. 540, 557, 18 N.E. 183, 190–91 (1888). There was nothing in the Juvenile Court Act designed to end this exploitation of the county treasury.

tained schools. Many of those who pressed vigorously for the industrial school interests could not have been very enthusiastic in their support for improvement in public institutions.

### 3. *Religious segregation.*

The third major issue on which the charities commissioners and others aligned with them—including this time the state supreme court—were administered a resounding defeat by Hurley and the legislature was the matter of religious segregation of predelinquent youth. In 1863 the Society for the Protection of Destitute Roman Catholic Children in the City of New York received its official state charter. It required that “whenever the parent, guardian, or next of kin of any Catholic child about to be finally committed, shall request the magistrate to commit the child to the Catholic institution, the magistrate shall grant the request.”<sup>206</sup> In Illinois there was no such explicit approval of religious segregation of this sort, but it existed nonetheless. By 1887 the four industrial schools that had been chartered and were operating were evenly divided between Catholic and Protestant managements; each religious group had a school for girls and one for boys.<sup>207</sup>

The charities commissioners objected to the industrial schools not only on the grounds that they were encroaching on what was properly a government monopoly,<sup>208</sup> but also because their sectarian nature did not allow the counties to provide subsidies without violating the church-state provision of the Illinois constitution.<sup>209</sup> In 1886 the report of the commissioners disclosed that the court assigned children to institutions of their own religion, a practice that was alleged to be part of the unconstitutional operation of the industrial school Acts.<sup>210</sup> Individual religious preferences were probably also observed in commitments to a family placement agency. Hurley’s anxiety after *County of Cook* may not only have been provoked by the question of the legality of agencies such as his receiving children from the court, but also by the fear that the whole segregation system might be in constitutional jeopardy. *County of Cook* had not only supported the “no middle-man” commitment interpretation of the industrial school law,

206. Act of May 5, 1863, ch. 448, § 1, [1863] Laws of N.Y. 767–68.

207. BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, TENTH BIENNIAL REPORT 81 (1888).

208. See text accompanying notes 191–92 *supra*.

209. “[T]he rules that protestant children shall be sent to protestant institutions, and catholic children to catholic [*sic*] institutions, is evidence that the county . . . intends to guard and preserve intact the sectarian beliefs and relations of such children, or of their parents. This . . . purpose may originate in the personal beliefs of the officers intrusted with the administration of the affairs of the county, or it may be a concession to such beliefs on the part of others; but in either case it is inconsistent with the letter and spirit not only of the constitution, but of the industrial school act itself, which provides, in the fourteenth section, that ‘avoiding as far as practicable sectarianism, provision shall be made for the moral and religious instruction of the inmates of the industrial school for girls in this state.’” BOARD OF STATE COMMISSIONERS OF PUBLIC CHARITIES, NINTH BIENNIAL REPORT 81 (1886).

210. *Id.* at 79.

but also had toyed with the view that county subsidies to Catholic schools were unconstitutional.<sup>211</sup> It could have been argued that the constitutional part of that decision was dictum, since the court found that the legislature did not authorize commitments to a "middle-man" corporation, and, therefore, need not have decided the constitutional issue. But, in theory, the whole industrial school system had received a blow similar to that which had fallen on the Chicago Reform School in *O'Connell*.

The legislature in 1899 must have ignored the constitutional problems, for the Juvenile Court Act declared: "The court in committing children shall place them as far as practicable in the care and custody of some individual holding the same religious beliefs as the parents of said child, or with some association which is controlled by persons of like religious faith of the parents of said child."<sup>212</sup> The Act must have been welcomed by Hurley and other Catholic interests who believed that the only way to break out of the enforced heresy of the nineteenth century's juvenile justice system was to keep Catholic children out of the hands of Protestant reformers.

In summary, the 1899 Illinois Act (1) restated the belief in the value of coercive predictions, (2) continued nineteenth-century summary trials for children about whom the predictions were to be made, (3) made no improvements in the long-condemned institutional care furnished these same children, (4) codified the view that institutions should, even without badly needed financial help from the legislature, replicate family life, and that foster homes should be found for predelinquents, and (5) reinforced the private sectarian interests, whose role long had been decried by leading child welfare reformers in the area of juvenile care.

### C. *The Rise of the Juvenile Court*

The establishment of the court was hailed as a new era in our criminal history, and it was widely imitated in other states. Why this new myth developed<sup>213</sup>—that society had indeed turned a corner in its dealings with children—is an intriguing historical question that can only be treated briefly here. At the outset, it seems clear that a large number of interests benefited from the legislation. There is every reason why men like Hurley should have been overjoyed. He and Judge Tuthill followed their ideological triumph with a career partnership as they became, respectively, Chief Probation Officer and Judge of Chicago's new juvenile court. There were tokens, of little substance, for many of the other reformers as well. Illinois law spoke of probation for the first time; a rule against keeping young

211. 125 Ill. 540, 558, 567-70, 8 N.E. 183, 191, 195-97 (1888).

212. Illinois Juvenile Court Act § 17, [1899] Ill. Laws 137.

213. The myth lives on: Professor Joel Handler describes it as a "revolutionary experiment." Handler, *The Juvenile Court and the Adversary System*, 1965 Wis. L. Rev. 7.

children in jails had been accepted. The Act was a reaffirmation of state concern for predelinquents and for prevention. Perhaps exaggeration to the point of announcing a novel idea in American jurisprudence served to mask the magnitude of the defeat suffered by opponents of industrial schools, private interests, and sectarianism.

In reality the law's policies could hardly be described as a milestone of progress. No one could applaud "An act to promote private sectarian agencies and to defeat institutional reform." A more appealing title was needed. It was a phrase, buried in one section that said the tribunal was to carry on the prevailing system, that was used to characterize the accomplishment. The phrase was "[the court] may, for convenience, be called the 'Juvenile Court.'"<sup>214</sup> Although the legislation was actually titled "An Act to regulate the treatment and control of dependent, neglected and delinquent children," it came to be known as the Juvenile Court Law. A massive propaganda campaign was then mounted on behalf of this juvenile court. Judge Benjamin B. Lindsey from Denver, Colorado, reported:

I have been privileged to talk personally to considerably over a million people in this country and to reach practically every one of the state legislatures, as well as committees in the United States Congress and in the parliaments of Great Britain and other foreign countries. In addition, thousands of pamphlets were issued on the subject.<sup>215</sup>

One can guess at reasons for the friendly reception given the new law. The same climate of welfare enthusiasm that produced child labor legislation and compulsory-school laws would have been fertile ground for acceptance of a juvenile court law. An era of progressivism helped to generate receptivity for any strongly supported welfare proposal, especially one that cost no money. Furthermore, it is quite possible that in other states, as in Illinois, the issue of private sectarian power was ready for political resolution. A widespread sense of failure in the century-long effort to provide for "the best interests" of lower-class children and a realization that reform schools—family as well as congregate—had struck out dismally could have led to a discomforting awareness that the American social and economic system needed reform as much as did deviant parents and their offspring. Along with a growing sense of *mea culpa* seared into the conscience of the ruling classes by Upton Sinclair, Lincoln Steffens, and the cadre of muck-raking revivalists, such factors would have created a profound need for the dawn of *some* new era. Enthusiasm was easier than recognition that the juvenile court law changed nothing of substance.

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214. Illinois Juvenile Court Act § 3, [1899] Ill. Laws 132.

215. Lindsey, *Colorado's Contribution to the Juvenile Court*, in *THE CHILD, THE CLINIC, AND THE COURT* 274, 287 (1925).

## VII. THE THIRD ROUND OF REFORM

It was almost seventy years before the Supreme Court of the United States rendered a critical appraisal of juvenile courts in America.<sup>216</sup> It would be a great mistake to believe that the *Gault* decision represented an appraisal of the juvenile court as it was created at the turn of the century. Much of the nineteenth-century system that the juvenile court served to perpetuate had died out before the Supreme Court took on a major part of the responsibility for the nature of juvenile justice in the 1960's.

The juvenile court eventually became irrelevant as an institution to funnel law-violating children to private schools or agencies; the Illinois state government acquired a virtual monopoly in the care and treatment of these children.<sup>217</sup> Similarly, the responsibility of the juvenile court to provide family placements for predelinquent children was nullified by the process of industrialization and urbanization that, early in this century, rendered the practice of exporting children from city streets to rural homes an anachronism. In theory, at least, the loss of country placements might have been compensated for by the development of foster homes within the city. But this has not happened; "juvenile delinquent" today does not mean an unfortunate child not completely responsible for his misbehavior. A juvenile delinquent is viewed as a junior criminal hardly less threatening to peace and order than his more mature counterpart. Just as the opprobrium attached to reform schools long ago identified them as the dead end of juvenile justice, so the connotations of "juvenile delinquency" have made the delinquents highly unattractive as members of another's household. The demands delinquents appear to make on potential foster parents have effectively ruled out home placement as a dispositional choice for the juvenile court.<sup>218</sup>

216. The first such case arose in the District of Columbia. *Kent v. United States*, 383 U.S. 541 (1966). *Kent*, however, contained omens for the application of due process in state juvenile courts. See Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUPREME COURT REV. 167, 184.

217. In writing of the dispositions made by juvenile courts, the President's Task Force on Juvenile Delinquency notes: "In most places, indeed, the only alternatives are release outright, probation, and institutionalization." TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 124, at 8. The basic reason, as the Report points out elsewhere, is that "[p]rivate social agencies deem [delinquents] too difficult to work with and regulate their intake accordingly." *Id.* at 23. Thus, although child guidance clinics were founded in order to aid juvenile courts (see Healy & Bronner, *The Work of the Judge Baker Foundation*, in HARVEY HUMPHREY BAKER: UPBUILDER OF THE JUVENILE COURT 123-31 (1920)), recent studies find that "[t]he problems of delinquent children do not appear to be a central concern of child guidance agencies." J. TEELE & S. LEVINE, THE ACCEPTANCE OF EMOTIONALLY DISTURBED CHILDREN BY PSYCHIATRIC AGENCIES IN CONTROLLING DELINQUENTS 103 (S. Wheeler, ed. 1968); H. WITMER & E. TUFTS, THE EFFECTIVENESS OF DELINQUENCY PREVENTION PROGRAMS 34-36 (1954); Gordon, *A Psychotherapeutic Approach to Adolescents with Character Disorders*, 30 AM. J. ORTHOPSYCHIATRY 757, 759-60 (1960).

218. Consider the rhetorical question put by the President of the American Orthopsychiatric Association in 1962: "When did you last try to find a placement for a 15- or 16-year-old, severely disturbed 'acting-out' type of kid—even with a lot of money behind him?" Redl, *Crisis in the Children's Field*, 32 AM. J. ORTHOPSYCHIATRY 761 (1962). In a recent survey of 233 probation departments, only

An additional factor contributing to the loss of foster homes has been the change in the racial composition of the children brought to the courts. In 1939 it was noted that

the percentage of Negro cases in the Manhattan Children's Court is twice what might be expected from the Negro population of that borough, but in Brooklyn the percentage is three times as high as the population warrants, and in the Bronx and Queens approximately four times as high. The problem of Negro juvenile delinquency in the courts of New York City has grown rapidly. . . . From 1925 to 1937 the percentage of Negro juvenile delinquency increased from 7.8 to 25.8 percent of the total number of cases. (In 1920 the percentage of Negro cases was only 2.7 percent). The proportion of Negroes in the population of the city in 1930 was 4.7 percent of the total.<sup>219</sup>

For reasons likely akin to those that have caused racial segregation elsewhere in the community, foster home placements seldom cross racial lines. In 1967, for example, it was pointed out:

The grim story of minority children in need of placement has been chronicled in numerous studies in the past two decades. Consider the events in New York City which may well be typical of other large cities with a growing proportion of non-white children. In 1964 the Welfare Council's Committee on Foster Care for Children in New York City discovered that "Protestant agencies receiving public funds has [*sic*] 184 vacancies in which to place a capacity of 349 children." In 1955 the Deputy Mayor's report on *Children Need Families* reported that "between 1946 and 1955 the number of Negro children awaiting long-term placement had risen from 140 to 610, while the number of whites in the same predicament had fallen from 390 to 370." A 1961 report from the Department of Welfare on *Children in Temporary Care Over One Month*, reports that the largest single group of children waiting in temporary care for more than six months were Negro Protestant children, ages two to six. To these studies can be added a more recent report by the Department of Public Welfare on *Children in Shelter Care for Over One Month*, during the first six months of 1964. A comparison of the children who are rejected for long-term foster care by one or more agencies with those who are more readily placed, indicates that 40 percent of the Negro children were hard to place, by this definition, as compared with only 18 percent of white children.<sup>220</sup>

These are the problems of children who have not violated the law. Finding foster homes for juvenile delinquents is even more difficult.

At the same time, there has been a lack of significant change in juvenile reformatories and training schools. Most hold to the nineteenth-century expectation that family-style institutional organization can produce long-term changes in character. In 1950 Albert Deutsch revealed that the prob-

42 percent reported that they used foster homes. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 40 (1967).

219. N.Y. JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE CHILDREN'S COURT JURISDICTION AND JUVENILE DELINQUENCY, REPORT 171 (1939).

220. M. Rein, Issues in the Delivery of Social Services and Implications for Foster Care 57-58, Nov. 1, 1967 (paper prepared for the Conference on Foster Care of Children). But see Witherspoon, *Foster Home Placements for Juvenile Delinquents*, 30 FED. PROBATION 48 (1966).

lems of political appointments, financial starvation, overcrowding, and untrained custodians that had haunted the first juvenile reformatories had persisted. He only found some new words in use:

The disciplinary or punishment barracks—sometimes these veritable cell blocks were more forbidding than adult prisons—were known officially as “adjustment cottages,” or “lost privileges cottages.” Guards were “supervisors.” Employees who were often little more than caretakers and custodians were called “cottage parents.” Whips, paddles, blackjacks and straps were “tools of control.” Isolation cells were “meditation rooms.” . . . Catch-words of the trade—“individualization of treatment,” “rehabilitating the maladjusted”—rolled easily off the tongues of many institutional officials who not only didn’t put these principles into practice but didn’t even understand their meaning.<sup>221</sup>

The call for family relations within institutions was nothing more than wishful thinking. Without ready access to family life for the children coming before it, the juvenile court lost much of its *raison d’être*.

The greatest functional loss the juvenile court has suffered in the twentieth century, however, is its role in the predelinquency system of crime prevention. The predelinquency concept rested on the belief that society could recognize, and the law could describe, the conditions of childhood that would give rise to adult criminals, and that techniques were available—institutions, foster homes, probation, psychiatry—that could arrest the conditions and prevent the crime. Loss of any of the elements of this belief would undermine the fundamental function of the juvenile court; the twentieth century has eroded all of them.

The metamorphosis of the relationship between poverty and crime exemplifies the erosion of nineteenth-century crime prevention techniques. In contrast to the zeal of earlier reformers for rehabilitating idle and ignorant children, today it is widely acknowledged that the roots of delinquency go deeper. Both the incipient political power of the poor and the conscience of the liberals make such antipauper action unfeasible. But denial of the predictive relationship between the conditions of poverty and the phenomenon of crime is more fundamental. It is based upon the recognition that poverty is not always a matter of the moral deficiencies of the poor, and that, absent the assumption that immorality is inherent in poverty, the leap to the immorality of crime fails. When American society finally rejected the older view cannot be specified. It must have occurred, or been greatly reinforced, during the Great Depression when impersonal economic forces reduced to poverty great numbers of Americans whose moral credentials were not open to question.<sup>222</sup>

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221. A. DEUTSCH, *OUR REJECTED CHILDREN* 15 (1950).

222. The observation made by Judge Boyle of the New York Domestic Relations Court in his 1933 report would hardly have been made by a magistrate asked to commit a juvenile pauper to the New York House of Refuge one hundred years earlier: “Boys arrested for peddling and similar money



Related to the evolution of this attitude toward the poor was a new conception of the problem of child neglect, one that served to remove neglected children from the class of predelinquents. Parental immoralities that used to be seen as warnings of oncoming criminality in children have become acceptable, albeit not ideal, factors in a child's home life. Thus, the parent is free to drink, to fail to provide a Christian education, or to refuse to keep his child busy with useful labor. Parents may still incur informal social sanctions for behaving in this manner, and if they go so far as to prevent an early education the sanctions may be formal and penal. But when the adult deviance no longer is an irresistible lesson in immorality, the need to educate the immorality out of the children disappears.

In addition, it had become clear that the new institutions for predelinquents were heavily punitive and functioned much like the adult prisons. It was only the myth of the New York House of Refuge—the belief that it was not designedly punitive and prison-like from the outset—that sustained the conception that substantive penal law, too, could be bent to humanitarian purposes. In reality, however, children charged with criminal offenses had to contend with the popular view—expressed in the law by the *mens rea* concept—that crime is the result of a choice to behave wickedly. For child or adult, crime and punishment were two sides of the same coin; juvenile crime could never be solely a sign of some future wickedness.

The role of juvenile crime as a predictor was weakened by the growing belief that society, as well as the child, was at fault;<sup>223</sup> the more each act of criminal behavior symbolized the failures of the community, the less sense it made to be preoccupied with crime as an incipient failure of character. As a 1939 report to the New York legislature concluded,

A thorough going plan of crime prevention must be based on a social program aiming at the improvement of conditions in the neighborhood, the school, and the home. Delinquency is an unmistakable symptom of social maladjustment, and can be removed only by the elimination of the causes of such maladjustment.<sup>224</sup>

Changing the focus of treatment from the individual to the community at large became increasingly attractive, moreover, as evidence increasingly indicated that the reformation of individual children was more fantasy than fact.<sup>225</sup> The idea that crime could be prevented by individual treat-

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making activities are far from being of the stuff of which real delinquents are made. They are enterprising youngsters, many of them helping to eke out the income of their own needy family; boys who would scorn to commit a dishonest act. Some way other than arrest and arraignment—certainly in the case of first offenders—should be found to enforce the law or ordinances in this class of cases." *Quoted in* JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE JURISDICTION OF THE CHILDREN'S COURTS, REPORT 137 (1939).

223. See C. SHAW & H. MCKAY, *SOCIAL FACTORS IN DELINQUENCY* (1931).

224. JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE CHILDREN'S COURT JURISDICTION AND JUVENILE DELINQUENCY, REPORT 249 (1939).

225. S. GLUECK & E. GLUECK, *ONE THOUSAND JUVENILE DELINQUENTS* 234 (1934). See also Healy & Bronner, *The Close of Another Chapter in Criminology*, 19 MENTAL HYGIENE 208 (1935).

ment of those who showed its early symptoms lost its claim to credibility. With the illusions gone, it became clear that the juvenile courts were really deciding criminal responsibility. One court observed: "While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed a conviction of crime, nevertheless, for all practical purposes this is a legal fiction, presenting a challenge to credulity and doing violence to reason."<sup>226</sup>

In 1955 the Municipal Court of Appeals of the District of Columbia repeated the litany: "The purpose of the proceedings is not to determine the question of guilt or innocence, but to promote the welfare of the child and the best interests of the state."<sup>227</sup> The court was promptly reversed by an appellate opinion emphasizing that a trial to adjudicate criminal responsibility was what the juvenile court action was all about.<sup>228</sup> Crime was crime, the juvenile court acts of the nineteenth century notwithstanding.

In some states, notably New York and California, legislation finally placed procedural concerns ahead of the long-dead judicial system of coercive predictions,<sup>229</sup> but the passage of over a century produced little change. The juvenile court system had taken on a life of its own, and, though it lost its social relevance, neither the motive to change nor the institutional means for effecting change appeared.

It was upon this scene that the Supreme Court arrived to announce a "revolution in the procedural aspects of juvenile courts."<sup>230</sup> Or did it? Procedural revolution in the juvenile courts may well be the most recent myth of juvenile justice reform. There seem to be several reasons to doubt that any such revolution has taken place, or is likely to in the near future.

It is one thing for the Supreme Court or a legislature to command that procedural rights be guaranteed but quite another for them to be enforced in the juvenile courts. The *Gault* opinion did little to provide the juvenile courts with the motivation to comply by dubbing them "kangaroo courts" and by calling for their "domestication" as if they were some beasts run amuck.<sup>231</sup> But even if the Court had consciously attempted to motivate the country's juvenile courts to apply a system of procedural formalities and rights and to recognize that the nineteenth century had come and gone, it

226. *In re Contreras*, 109 Cal. App. 2d 787, 789, 241 P.2d 631, 633 (2d Dist. 1952).

227. *Shioutakon v. District of Columbia*, 114 A.2d 896, 898-99 (D.C. Mun. Ct. App. 1955), *rev'd*, 236 F.2d 666 (D.C. Cir. 1956).

228. *Shioutakon v. District of Columbia*, 236 F.2d 666 (D.C. Cir. 1956).

229. Before *Gault*, counsel was appointed for indigent juveniles in California in proceedings where the crime charged would constitute a felony for an adult, CAL. WELF. & INST'NS CODE § 634 (West 1966), and in New York in all proceedings for neglect or delinquency, N.Y. FAMILY CT. ACT § 249 (McKinney 1963).

230. *Kent v. United States*, 401 F.2d 408, 409 (D.C. Cir. 1968).

231. "Under our Constitution, the condition of being a boy does not justify a kangaroo court." 387 U.S. at 28. "But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication." 387 U.S. at 22.

would be naive to assume that these courts would enthusiastically adopt the mandated system.

Central among the reasons for the failure of the revolution is the role of counsel. The granting of procedural rights can hardly become a reality for children without lawyers to assert them on their behalf. As a practical matter, there are indications that defense lawyers do not defend. Platt has already noted that the role of defense counsel in the juvenile court appears to be less defending his client than accommodating himself to the system of personal relationships, the philosophy, and the organizational needs of the juvenile court.<sup>232</sup> He points out, for example:

The views of lawyers about the rights of children differ quite fundamentally from those expressed by the Supreme Court and academics. Lawyers apply different standards to juvenile clients because they are children, not necessarily because lawyers have been constrained by the court's welfare orientation. A lawyer typically has conscientious reservations about helping a juvenile to "beat a case" and, if a case is won on a technicality, he feels obliged to personally warn his client against the dangers of future misconduct.<sup>233</sup>

This attitude is more than a matter of "conscientious reservations." Experience in the Boston College Juvenile Court program<sup>234</sup> suggests that for the large proportion of cases where there are racial, social, and economic differences between lawyer and juvenile client, there is often a significant emotional component involved. Not only does the child identify the lawyer as part of the organization that is after him, but the recognition is fused with elements of hostility and resentment based on perceptions of a more broadly based attempt to impose one culture on another. With the uninhibited candor of childhood, the client manages to communicate his alienation and hostility—he fails to keep appointments, he lies, in a hundred different ways he shows that he does not believe the lawyer is on his side.<sup>235</sup> But what of the lawyer's end of such a relationship? It is difficult to be despised and not to do a little despising back, or to be rejected and not to reject back. There is much, in short, that gives the lawyer cause to be angry, although he rarely recognizes himself to be in that state. Suppressed anger against the one to be helped necessarily detracts from the effectiveness of the helper.

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232. A. PLATT, *supra* note 11, at 163-75.

233. *Id.* at 167.

234. For the past 5 years the author has been teaching a seminar on juvenile-court practice in collaboration with a social psychologist and a practicing attorney. Students have been assigned to defend and prosecute juvenile-delinquency cases in the Boston Juvenile Court, as well as to represent children, parents or the Commonwealth in neglect cases.

235. Some Boston College clients have, for example, (1) hidden under the bed when the student-lawyer has come to see them; (2) turned up the television during a home interview; (3) called counsel "Fatso"; or (4) brandished a knife at counsel. At the same time these children try, often with success, to get the counsel to believe and act as the children desire. See also Platt's quotation from a bitter young black concerning his experiences with a public defender. A. PLATT, *supra* note 11, at 174-75.

All too often those who appear on behalf of children are not highly skilled advocates.<sup>236</sup> A conscientious and experienced judge will sometimes raise questions concerning possible defenses when the child is not represented by counsel. But when the child is represented, the judge commonly adopts the passive judicial role, and leaves the matter of defense strategy, including waivers, to the discretion of defense counsel. The less experienced and skillful counsel is, the more the child may lose by counsel's presence in the case. If the lawyer does not see that there is a defense available, the judge will not tell him about it nor will the defense be raised from the bench as it might have been in the case of an unrepresented child.<sup>237</sup> The right to counsel is not an unmixed blessing.

There are, of course, institutional pressures on the lawyer to cooperate with court officials—to follow their views on what sorts of cases need to be tried and what rights to be asserted. "Bad" children are to be helped into the training schools; the "good" ones are to be saved from them.<sup>238</sup> There are undoubtedly skillful and zealous lawyers who put the state to its proof and advocate all available defenses in every case. It appears unlikely, however, that this is representative of the quality of defense provided the run-of-the-mill pauper delinquents in juvenile courts. The psychological and social limitations on ideal juvenile court advocacy, briefly sketched above, often prevent lawyers from being the professional champions of liberty that their popular image suggests. Nonetheless, the lawyers are the heroes of the current round of reform; procedural revolution could nominate no one for this role but he who is trained and skilled in the tactics of the revolt. Like the heroes of earlier juvenile justice reform movements, they are deemed capable of nothing but heroic action on behalf of children in trouble. Little is known or heard of the severities and repressions of the House of Refuge; masked, too, is the essential vacuousness of the 1899 Juve-

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236. "Generally, the lawyers who do this work in New York City are young; most of them come from the less well-known law schools. In generally [*sic*] they were not near the top of their class at school; over half of them are women. Without question they are zealous, dedicated lawyers, although the skill they now possess is largely the product of on-the-job training. Few of them had much experience of any sort before being taken on for this employment. Those who had experience generally had it in another field." Paulsen, *Expanding Legal Services—II*, 67 W. VA. L. REV. 267, 274 (1965).

237. Concerning objections to incompetent evidence, a Harvard survey reported: "Juvenile Court judges indicated that although they would raise these objections themselves in a trial without an attorney, they would probably not intervene if the juvenile was represented by counsel, and appropriate objections would thus be lost if the attorney did not raise them." Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 798 (1966).

238. In deciding how strenuous a defense to raise, the lawyer "relies primarily upon the demeanor of his client and secondarily upon the demeanor of his client's parents. . . . He is concerned . . . with how his client speaks, the amount of respect he is shown, the way the client dresses, and how such highly subjective factors as 'charm,' 'personality,' and how 'cute' or 'pretty' or 'handsome' the client might be. If the client is a 'clean kid,' said a former juvenile court public defender, 'you go out of your way to help him.' Whether the client is in school or has a job, as opposed to being a 'drop-out' or unemployed, are meaningful criteria of worthiness." A. PLATT, *supra* note 11, at 169. "[T]he public defender does not waste his time or credit on 'bad kids' because a serious effort on their behalf would only jeopardize his chances with more 'worthy' defendants." *Id.* at 168.

nile Court Act and its capitulation to special interests. There is a real danger that contemporary society generally, and the bar in particular, will ignore the darker, less respectable, and less generous side of reform and reformer.

Can there be a procedural revolution? The *Gault* decision accepted the standard propaganda—the “history” according to Julian Mack and Timothy Hurley—and gave its sponsorship to their myth that the original juvenile court was a matter trading constitutional rights for promises of rehabilitation and humane treatment.<sup>239</sup> The Court also created its own myth—that children were being brought back to a Golden Age of constitutional rights that they lost at the turn of the century. If procedural formalities once were the order of the day, then it is quite likely that they can be made so again; there is no pioneering involved, only restoration. But if the historical interpretation made here is sound, then there is little reason to suppose that such a Golden Age ever existed and much reason to suspect that it did not.

There is also the disquieting thought that historical continuities in the judicial administration of juvenile justice may extend to the resource-starvation that has characterized both juvenile and adult justice.<sup>240</sup> Giving children procedural rights is a somewhat distorted way of formulating the prospective reform. The rights must be bought and paid for by the community. Skillful and experienced lawyers must be obtained. Court staff size must be vastly expanded to relieve the pressure to compromise that results when too many cases must be processed by too few people. Courtrooms need to be constructed so that cases can go forward without encountering a bottleneck of physical facilities. Training programs, especially those that would permit lawyers to acquire an understanding of the social and psychological setting in which they work, need to be figured in the cost. But if the community has been unwilling to pay for nineteenth-century institutions and twentieth-century courts, can it be assumed that it will suddenly become generous when asked to pay for a procedural system designed largely to serve the same deprived population that has traditionally been the “beneficiary” of the juvenile justice system?

The Supreme Court's endorsement of the view that children are now being returned what they once gave up serves to compound the already enormously difficult task of reversing public attitudes toward the deviant poor. The Court interprets the 1899 events as creating a quid pro quo relationship between the delinquents and the state. For their constitutional rights, so tradition tells it, the children were promised treatment and

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239. 387 U.S. at 14-18.

240. “One reason for the failure of the juvenile courts has been the community's continuing unwillingness to provide the resources—the people and facilities and concern—necessary to permit them to realize their potential and prevent them from acquiring some of the undesirable features typical of lower criminal courts in this country.” PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 80 (1967).

humane kindness. Will all of this now be rescinded as the rights are re-conveyed? Will child welfare responsibilities assumed in 1899 be terminated and the state relieved of its obligations to allocate resources? With no call on the public purse, the youthful clients of the juvenile court may find their procedural rights as chimerical as the so-called benefits that were proposed for the juvenile offenders of earlier days.

In spite of all this, there is one foundation on which faith in the achievement of procedural reform might rest. Unlike the earlier reforms, the present one can be viewed as being made by lawyers for lawyers. It is a deeper and broader involvement than was undertaken by the Chicago lawyers in 1899. The procedural reforms now being pursued require, in addition to resources and reorganization, the development and application of lawyer's law—the technical rules derived from constitutional theory and the needs of an orderly litigation process. Perhaps if the bar seriously devotes itself to satisfying what might be seen as its own professional needs, the public can be persuaded to allocate the necessary resources. Skillful and zealous advocacy in legislative halls might accomplish what has thus far eluded the bar's humanitarian predecessors. A commitment of the bar's abilities and prestige to the cause of procedural justice for juveniles may also provide opportunities to correct other glaring deficiencies in the methods by which juvenile justice is presently administered; the relevant underlying public attitudes are, after all, the same. The first step is the recognition that history has frowned on similar efforts, and that the path of reform is a matter of complex social and psychological problems that must be confronted before procedural change can be truly accomplished.