THE VICIOUS REFORM:

JUVENILE INCARCERATION IN AMERICA, 1825-1925

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To Mamá and Papá,

con cariños

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INTRODUCTION

This essay explores the rise and fall of delinquent incarceration in America, with special reference to the legal history of Pennsylvania. Nineteenth century juvenile delinquents witnessed the pendulum of social control carry them from outdoor to indoor relief and back again. This transition was accompanied in the post-Civil War decades by the emergence of government intervention in and supervision of the juvenile corrective process. These legislative initiatives were upheld in the courts on the basis of the remarkably adaptive parens patriae doctrine.

The traditional methods of controlling juvenile delinquency were radically transformed during the nineteenth century. As the model family order of colonial life yielded to an urbanizing society with far less secure norms, notions of at-home relief for dependents and delinquents became suspect. The House of Refuge, the first institution for delinquent children outside the family, was invented in the 1820's. A succeeding generation was to replace the prison structure of the refuges with the cottage plan of the reform schools, but the coercive elements of institutionalization were the same. In the early twentieth century, the juvenile probation-court system represented society's reversal of the trend toward indoor relief. Incarceration was not forgotten, however; it remained as the alternative for children who failed probation.

Juvenile incarceration began as a reform. Each institutional adaptation attempted unsuccessfully to mollify the coercive elements of its predecessor. The widespread use of juvenile probation indicated a partial return to the colonial concept of the family as the only institution for the child. But it remained for courts in recent years to reject the unhampered power of the juvenile probation-court system by insisting upon due process prior to incarceration. Nineteenth century institutionalization was praised as the best medicine for the offspring of the "vicious" classes. The history of its adoption and decline stands that epithet on its head.

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ONE: THE REFUGE MOVEMENT AND THE TRANSITION FROM OUTDOOR TO INDOOR RELIEF

Although the early American theocratic settlements viewed departure from divinely approved norms as sin, colonists anticipated poverty and crime as normal concomitants of a precarious existence. Deviance was not disturbing to the colonial mind because it could be controlled through the strong sense of family order, an institutional force which had grown to be regarded as synonymous with the public good. The social structure of the family was expected to accommodate both its impoverished and its delinquent members. When meager resources failed, the colonial community extended rehabilitative aid to reinforce the family.[1]

This system of "outdoor" relief gave financial succor to worthy but temporarily dependent neighbors, thereby enabling them to retain both their family dignity and community standing. A colonist who could not be supported by his immediate family was usually assured that relatives or neighbors would spare him from the almshouse. Colonial criminal law swiftly and publicly punished miscreants, young and old, but

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[1]David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic (Boston, 1971), 3-20, 155-156; Walter I. Trattner, From Poor Law to Welfare State: A History of Social Welfare in America (New York, 1974) 15-18.

neither custom nor the public coffers countenanced a policy of general incarceration. Workhouses were even rarer than almshouses in the colonies. Before 1750, jails were used as pre-trial detention facilities for adults, or as punishment for selected deviant classes, debtors, and political or religious offenders.

In Massachusetts, for instance, magistrates often remitted delinquent children to their homes for a court-observed but family-enforced whipping. When urban migration in the eighteenth century was accompanied by a degree of family breakdown, public authorities turned to apprenticeship as a way of restoring order. The guiding principle, however, was still familial. If a child's family had been corrupted, it was better to attach him to a good home. In this context, apprenticeship or binding-out was aimed at securing social control, not at teaching children useful trades.[2]

The concept of the self-policing community, distrusting outsiders but sustaining its own through the family ideal, remained an ideological fixture throughout the eighteenth century. However, when post-Revolutionary urbanization spawned new waves of delinquents, colonial law enforcement agencies,

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[2]Robert M. Mennel, Thorns & Thistles: Juvenile Delinquents in the United States, 1825-1940 (Hanover, N.H., 1973), xix-xxiv; Rothman, Discovery of the Asylum, 30-56.

suitable for homogeneous village life, proved woefully inadequate. The resulting disorder precipitated a change in the ideation of poverty and delinquency; no longer was poverty perceived as an exigency befalling a worthy neighbor. As a result, the premises underlying the community's trust in outdoor relief began to crumble. While the colonists had viewed youthful transgressions with relative equanimity, by the end of the eighteenth century delinquency had become a catchword for the crimes and activities of the new class of poor children. As notions of dependency and delinquency altered, the "victims" of one blended in with the "culprits" of the other. The colonial category of worthy poor almost disappeared.[3]

Colonial penal codes and enforcement had relied on the link between religious failings and extremely harsh penalties for both adult and juvenile offenders. Underdeveloped state and municipal governments could not have administered a complex system of punishments. Murder, arson, horse-stealing, and children's disrespect for parents all merited the death

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[3]Rothman, Discovery of the Asylum, 58, 164; Mennel, Thorns & Thistles, xxvi; William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (Cambridge, Mass., 1975), 37-40. Nelson describes the purposes of criminal law in pre-Revolutionary Massachusetts in terms of religious sanctions: "to give legal effect to the community's sense of sin and to punish those who breached the community's taboos." Ibid., 37.

penalty.[4] In the 1790's, however, Americans responded to changes in the social milieu by enacting a secular system of corrections which would mitigate the excesses of the gallows while providing for more widely-dispersed, and thus more republican, punishments. Incarceration for offenses lay at the heart of this reform.[5]

Birth of the Refuge

Prosecuting the new republic's children posed a dilemma for a court system equipped with only two dispositional alternatives. The offender could be returned to the streets, the same environment which engendered his delinquency, or he could be committed to the penitentiary, then as now the most effective school of crime.[6] In the Jacksonian era, the idea arose that the disturbing numbers of deviant children could be reformed, once removed from the ill confines of both penitentiary and street. Environmentalist doctrines which began to

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[4]Rothman, Discovery of the Asylum, 15. See Douglas S. Greenberg, "The Effectiveness of Law Enforcement in Eighteenth-Century New York," American Journal of Legal History, 19 (1975), 173-207. Greenberg, "Patterns of Criminal Prosecution in Eighteenth-Century New York," New York History, 56 (1975), 132-153.

[5]Rothman, Discovery of the Asylum, 57-64.

[6]Bradford Kinney Peirce, A Half Century with Juvenile Delinquents: The New York House of Refuge and Its Times (Appleton, N.Y., 1869, reprinted Montclair, N.J., 1969), 43. In his sermon upon the opening of the New York House of Refuge, Rev. John Stanford referred to the penitentiaries as awarding a Bachelor in the Art of Crime. Ibid., 371-372.

dominate intellectual thought dictated a new approach to deviancy, focusing on family disorganization and community corruption.

The decade of the 1820's saw a major attack upon the theory of outdoor relief. Would-be reformers believed that the needy had become vicious and shiftless through the unorganized benevolence of the dole. Jacksonian penal thinkers looked at their world with eighteenth-century spectacles. Consequently, they perceived the new social fluidity as corrupt. To straighten and stiffen the moral character of the dependent and delinquent classes, it was necessary to remove them from the temptations of the world. Separating children from their environment was all the more essential, as they were even less capable than their elders of avoiding occasions of sin. Segregating untutored delinquent waifs from their hardened criminal elders was also important.

The reformers who established the House of Refuge, first in Manhattan in 1825, and within three years in Boston and Philadelphia, were a conservative elite who viewed themselves as the heirs to the legacy of colonial theocracy and Federalist cultural custodianship. Philanthropic work was part of their moral and cultural stewardship. Because they saw the poor as a threat to social stability, they felt that policing the city was as much their personal responsibility as it was that of the official constabulary. Since most pauper children were on the road to social demise, it did not appear sensible

to distinguish among disobedient, dependent, or delinquent children. The conservative reformers staked their authority on their ability to control and remake the offspring of the vicious classes.

Institutionalism was to benefit all needy children. In 1822, New York's Society for the Prevention of Pauperism issued a report calling for the erection of a new institution for juvenile offenders. "These prisons," the report said, "should be . . . schools for instruction." The jarring mental image of a prison-school was to define the debate and eventual disillusionment among proponents of reformatory institutions for children.[7]

Pennsylvania, The Vanguard of "Parens Patriae"

The establishment of the Philadelphia House of Refuge was presaged by a public meeting called by the mayor in 1821 to discuss the increase in youthful criminality. A committee was appointed, which reported later that year on the need to establish an "asylum where useful mechanical arts should be taught to male children." In 1826, the state legislature responded with a simple act authorizing a Board of Managers to

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[7]Society for the Prevention of Pauperism, Report on the Penitentiary System in the United States (New York, 1822), 59-60; Mennel, Thorns & Thistles, 11. For an excellent analysis of the genesis of the refuge movement, see Robert S. Pickett, House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857 (Syracuse, N.Y., 1969).

find a suitable building and promulgate regulations for the "religious and moral education, training, employment, discipline and safekeeping of the inhabitants." The legislation further authorized the courts to commit those children "deemed proper objects," who were vagrants, were charged with crime, or had been convicted of crime. The managers were empowered to bind out children as apprentices during their minority, with their consent, to learn trades which would be "most conducive to their reformation." The legislature broadened the jurisdiction of the refuge in 1827 by directing the managers to receive children who had been convicted in courts outside Philadelphia of offenses which would be punishable by imprisonment in the penitentiary. Children so received were to be maintained and instructed at the expense of the home county.[8]

What was the character of the Philadelphia House of Refuge? In 1835, a committee of the institution's Board of Managers published a report discussing the reformatory and non-punitive function of the refuge, and setting out the philosophy which was to undergird all the child-saving reforms of the nineteenth century, including the juvenile probation-court system. The report rejected the idea that a child was entitled to freedom unless and until he committed a crime, as "repugnant to every dictate of social prudence and justice." On the other

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[8]Wiley B. Sanders (ed.), Juvenile Offenders for a Thousand Years (Chapel Hill, N.C., 1970), 331-334; Pennsylvania, Laws, 1826, Secs. 5-7, pp. 135-136; 1827, Sec. 4, pp. 78-79.

hand, imprisonment with adult criminals was also dismissed because judges and juries concerned with the deleterious effects of such an association tended to acquit young offenders rather than condemn them to the state prison.

The committee concluded that the refuge was to be neither prison nor almshouse, but "a school of discipline and instruction." Its humanitarian overtones typify the rhetoric of child-saving, and the establishment of a system of juvenile reformation to which both the constraints and the safeguards of the formal criminal law were irrelevant, contain the essence of juvenile court philosophy. The refuge was "intended to obviate not merely the sentence of infamy and pain, which follows a trial and conviction, but to prevent the trial and conviction itself." The focus of the refuge, and of its successor child-saving reforms, was not on criminal conduct, but on unregenerate character and "deficiencies of education." The refuge claimed to have its back to the retributive state, "threaten(ing) no humiliating recollections of the past (, and) hold(ing) out no degrading denunciations for the future." The managers foreswore the criminal law precisely because it would have an inhibiting effect on refuge admissions, with the result that the numbers of vicious and unreformed children would swell on the city streets.

The reforming process within the institution was not expected to take longer than one year. If a child had by that

time shown "satisfactory evidence of reformation," and could read and write, he or she was bound out to serve as an apprentice during their minority, ideally to a rural location beyond a twenty-mile radius of Philadelphia.[9]

The Pennsylvania legislature of 1835 passed a comprehensive bill regulating admission procedures to the refuge and judicial review of those commitments. The beginnings of due process provided for juvenile commitments by an alderman or a justice of the peace when the parent or guardian made and proved a complaint that because of incorrigible or vicious conduct, the child was uncontrollable and needed to be placed under the guardianship of the refuge in order to safeguard his morals and future welfare. A child could also be committed when the malevolence or neglect of his guardian denied him proper care and discipline. Another provision of the bill allowed the courts to continue to commit children as they had under the 1826 act.

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[9]Committee of the Board of Managers of the Philadelphia House of Refuge (Peter Hay, Chairman), The Design and Advantages of the House of Refuge (Philadelphia, 1835), quoted in Sanders, Juvenile Offenders, 363-372. Among the managers of the Philadelphia House of Refuge were Robert Vaux (1786-1836), a Quaker and leader of the Philadelphia Society for Alleviating the Miseries of the Public Prisons; Alexander Henry (1766-1847), first President of the American Sunday School Union; and Paul Beck, Jr., Thomas P. Cope, and Robert Ralston, all of whom were active in the American Sunday School Union. John Sergeant (1779-1852), congressman and advocate of the United States Bank, was the first president of the refuge, while abolitionist and feminist Sarah Grimké (1792-1873) served on the Ladies Committee. Mennel, Thorns & Thistles, 4-5.

The 1835 legislation also specified the duties of aldermen or justices when adjudicating a complaint. The officials were to attach to their order of commitment the names and addresses of the witnesses they examined, and the substance of the testimony each rendered, on which the adjudication was founded. A final section of the act mandated and regulated visiting procedures for judges at the refuge. Certain members of the Philadelphia bench were to visit every two weeks, and carefully to examine all commitments not previously adjudicated by a judge. For each examination, the managers were to produce the child in question and the testimony upon which he or she was adjudged a fit subject for the refuge. If the judge decided that the transfer of custody from the child's parents to the managers was justified, he would indorse an order continuing the guardianship. But if the commitment was deemed improper, the judge would order the child discharged. Failure of the managers to obey such an order would expose them to liability for wrongful imprisonment. An important procedural provision allowed the child, or someone acting on his behalf, to demand that the hearing be transferred to the courthouse, in order that the child may have benefit of counsel and of compulsory process to obtain witnesses in his behalf.[10]

These three acts, comprising all the refuge legislation

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[10]Pennsylvania, Laws, 1835, Secs. 1-3, pp. 133-135.

in Pennsylvania for the first half of the nineteenth century, survived quite well in the courts. In the two most important decisions concerning delinquency prior to the Civil War, Pennsylvania courts not only confirmed the legitimacy of commitments to the refuge, but sanctioned a broad transformation of the state's role in child welfare. The Philadelphia Court of Common Pleas held in 1831 that the original refuge legislation justifiably permitted the commitment of a child for vagrancy.[11] In deciding the habeas corpus petition presented in Commonwealth v. M'Keagy, the court held that if a vagrant child was within the age limits and exhibited the knowledge and capacity to commit a crime, he or she might be lawfully committed to the care and custody of the refuge managers. The court limited the managers' authority to receiving and detaining children only in the manner prescribed by law, when the commitment was for vagrancy or crime. The managers could not accept a father's transfer of custody of his child from himself to the refuge, unless the child were lawfully adjudged a proper subject for refuge care. This dictum may have been an attempt to thwart parents who took advantage of the ease with which a child could be committed in order to shift the burden of raising their children to the state without publicity.[12]

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[11] Commonwealth v. M'Keagy, 1 Ashmead 248 (Pa. Court of Common Pleas, 1831).

[12] See Hannah Kent Schoff, "Pennsylvania: A Campaign for Childhood," in Children's Courts In The United States, ed. Samuel J. Barrows (Washington, D.C., 1904, reprinted New York, 1973), 134-135.

M'Keagy affirmed the right of judicial review in the commitment process by holding that habeas corpus was a proper remedy by which to obtain the discharge of institutionalized children. The court also ruled that the adjudication of commitment by an alderman or justice of the peace was not conclusive of the truth of its contents. The validity of the commitment was open on the hearing of a writ of habeas corpus, when the managers must show, through affirmative evidence, that the child detained in their custody was a proper subject for the refuge, within the meaning of their charter. The Common Pleas court analogized the refuge act to the traditional poor law power over orphans and dependent children, and found no reason why "the public cannot assume similar guardianship of children whose poverty has degenerated into vagrancy." The court released the child in M'Keagy, because the finding of vagrancy was in error, but judicial sanction for this type of statutory alteration of the common law was to remain constant throughout the century.

In 1839, the Pennsylvania Supreme Court decided another habeas corpus petition in Ex parte Crouse. In an opinion that would be cited for generations, the court assessed the essential character of the refuge as a school, not a prison, and the goal of the institution as reformation rather than punishment. However, the refuge could be considered a prison for juvenile convicts, since in their case it served merely as an alternative to jail. Thus the supreme court held the acts of

1826 and 1835 to be constitutional.[13] Crouse indicated legal recognition of the breakdown of the traditional family. The court stated that although parents are normally their children's guardians, they might be replaced by the parens patriae or "common guardian of the community" when they fail in some socially significant way.

In justifying this expansive and totally novel power of the state to regulate the lives of its unwanted minors, the court expropriated the parens patriae doctrine from the equity or chancery jurisdiction, which had traditionally protected the interests of neglected or dependent children only as an incident to a property determination. In equity, parens patriae represented the interests of the chancellor in juvenile matters, such as a child's estate, education, and marriage. But the chancellor's reach had extended no further than these matters allowed. The court was now using parens patriae as a wedge to separate deviant children from unsuccessful parents.[14] Crouse shifted the burden of proof in a case in which the refuge had shown that a minor was a proper inmate, to those persons who wished to disturb the sanctioned reformation.

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[13] Ex parte Crouse, 4 Wharton 9 (Pa. 1839).

[14] Neil Howard Cogan, "Juvenile Law, Before and After the Entrance of 'Parens Patriae,'" South Carolina Law Review, 22 (1970), 147-181; Douglas R. Rendleman, "Parens Patriae: From Chancery to the Juvenile Court," South Carolina Law Review, 23 (1971), 205-259.

"The infant has been snatched," the court reasoned, "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."[15]

In 1842, the legislature incorporated the "Institute for Colored Youth," which opened as the refuge for Pennsylvania's unfortunate black children in 1849. Black juvenile delinquents probably suffered imprisonment for the first half of the century, as is indicated by an 1850 statute which authorized prison inspectors to transfer any black juvenile convict who consented to the "colored house of refuge" in Philadelphia.[16]

The Western House of Refuge was established in Pittsburgh under a law of 1850 which provided for the identical educational and reformatory aims, requisites for admission commitment procedures, and duties and provisions for child management, as the Philadelphia refuge legislation of the 1820's and 1830's.[17] The operating principle that all children received by the refuge would be clothed, maintained and instructed at the expense of their county of residence was

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[15] Ex parte Crouse, 4 Wharton 9 (Pa. 1839).

[16] Pennsylvania, Laws, 1842, Sec. 1, pp. 299-301; Mennel, Thorns & Thistles, 17; Pennsylvania, Laws, 1850, Sec. 6, p. 570.

[17] Ibid., 1850, Secs. 14-18, pp. 540-542.

codified through a series of laws in the 1850's.[18] An 1855 statute set the fees to be awarded during the process of committing a child to the refuge. The arresting officer was paid fifty cents, as was the committing magistrate or alderman. The officer delivering the child to the refuge received one dollar, plus certain mileage expenses.[19] White and black refuge inmates alike could be indentured, during their minority and with their consent, to citizens of other states, under laws of 1857 and 1858.[20] Juvenile residents of the Western District of Pennsylvania who were convicted of a federal crime in that district, could be admitted to the Western House of Refuge after 1862.[21]

An 1854 revision of the refuge commitment procedures directed the judge to examine the complaint in the presence of both the complainant and the juvenile. The use of judicial process was authorized to insure the presence of the parents and the witnesses in court. Testimony upon which the child's commitment was based had to be taken under oath, in

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[18] Ibid., 1850, Secs. 19, p. 542; 1855, Sec. 1, pp. 6-7; 1857, Sec. 1, p. 219.

[19] Ibid., 1855, Sec. 1, p. 283.

[20] Ibid., 1857, Sec. 1, pp. 454-455; 1858, Sec. 1, p. 452. Black refuge inmates could not be bound out to persons "residing within slave states." Ibid.

[21] Ibid., 1862, Sec. 1, p. 425. After 1899, all Pennsylvania children convicted of federal offenses could be committed to any House of Refuge or Reform School within the state. Laws, 1899, Sec. 1, pp. 15-16.

the presence of the party complained of, and transmitted to the refuge managers together with the judge's adjudication.[22]

Pennsylvania courts in the mid and late nineteenth century generally supported the radical extension of the state's power over the child announced in M'Keagy and Crouse. In 1842, Commonwealth v. Armstrong announced that parental authority was only limited by the law to the extent that the parent could not endanger the child's safety or morals.[23] Courts in the 1870's reiterated the judicial power in habeas corpus to determine the present and future welfare of the child.[24] The Philadelphia Court of Quarter Sessions insisted in 1876 that after a commitment to the refuge had been judicially reviewed and approved, pursuant to the 1835 Act, the court had no discretionary power to discharge the minor on

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[22] Ibid., 1854, Sec. 2, p. 13.

[23] Commonwealth v. Armstrong, 1 Pennsylvania Law Journal 146 (Pa. undetermined court 1842). But see Case of Kelly, Purdon's Digest (13th ed. 1854) II, Sec. 12 (Pa. Court of Quarter Sessions 1854), in which the court held that a juvenile felon committed to the refuge was entitled to a discharge on giving bail to answer for his appearance and demanding a jury trial.

[24] Commonwealth v. Barney, 29 Legal Intelligencer 317, 1 Luzerne Law Register 449, 4 Brewster 408, 3 Legal Gazette 209 (Pa. Court of Common Pleas 1871); Deringer v. Deringer, 30 Legal Intelligencer 336, 5 Legal Gazette 329 (Pa. Court of Quarter Sessions 1873).

habeas corpus. The court held that the release of a girl committed for the duration of her minority was at the discretion of the refuge managers.[25] The court in Commonwealth v. Patterson, in terms paralleling those in Crouse, noted that a commitment to the refuge was not a sentence. The object of the law in such a case, the court explained, was reformation, not punishment.[26] The Crouse principle extending chancery jurisdiction was upheld in 1879 and again in the 1890's, as courts on different levels stated that at any time during a child's minority, a court might make whatever disposition would promote the child's "entire well-being."[27]

Habeas Corpus for Children

A Pennsylvania Common Pleas court summarized in 1881 the legal considerations involved in children's custody cases. On habeas corpus, the court was free to ignore the common law rules in deciding who was entitled to a child's custody, and was to exercise "a sound legal discretion" in determining guardianship. On all questions touching the custody of children,

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[25] Commonwealth ex rel. Davenport v. Superintendent of House of Refuge, 33 Legal Intelligencer 272, 2 Weekly Notes of Cases 691, 11 Philadelphia Reports 458 (Pa. Court of Quarter Sessions 1876).

[26] Commonwealth v. Patterson, 1 Susquehanna Legal Chronicle 73, 5 Luzerne Legal Register Reports 307 (Pa. Court of Quarter Sessions 1878).

[27] In re Darmody's Estate, 36 Legal Intelligencer 96, 6 Weekly Notes of Cases 487, 13 Philadelphia Reports 207, 10 Lancaster Bar 163 (Pa. Orphan's Court 1879); In re Brown's

the concerns of the parent, as well as those of the state, were inferior to the child's interest, as judicially determined.[28]

The writ of habeas corpus was originally understood to apply solely to cases of restraint under color of law. The nineteenth century witnessed an extension of the writ to child welfare cases, in which equity notions prevailed over formal legal interpretations. The writ in these cases came to rest on the assumption of a right in the state, superior to any parental or other claim, to dispose of children in their best interests. The legal rights of parents, although important, were never enforced to the child's detriment. The proceeding could be regarded under two aspects. In form, the writ permitted the court only to inquire whether a child was unlawfully deprived of his liberty. In fact, habeas corpus provided the means for investigating and deciding which party was better suited to take custody of the child.[29]

While some states were satisfied with the common law expansion of habeas corpus, other jurisdictions made specific

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Estate, 166 Pennsylvania State Reports 249, 30 Atlantic Reporter 1122 (1895); Commonwealth v. Keisel, 13 Montgomery County Law Reporter 172 (Pa. Court of Common Pleas 1897).

[28]Commonwealth v. Kenny, 1 Chester County Reports 322 (Pa. Court of Common Pleas 1881).

[29]This discussion of the application of the writ of habeas corpus to child custody cases is drawn from "Habeas Corpus," Corpus Juris (New York, 1922) XXIX, 108-115.

statutory provision for the use of the writ in child custody cases. A peculiar wrinkle developed when the writ was brought in cases involving children detained from their parents or guardians. Under these circumstances, the writ issued on the ground that absence from legal custody constituted illegal restraint. While the court was bound to free the child from unlawful deprivation of liberty, it was not bound to award custody to any particular person, although it had the discretion to do so. If the child were of sufficient age, the court would merely make an order setting him at liberty to go where he chose. The court's jurisdiction ended with the execution of the order either freeing the child from illegal restraint or awarding his custody to the proper party. Jurisdiction of the court could not be reasserted unless another writ of habeas corpus were issued.[30]

The court's perception of the nature of detention at a particular type of institution was crucial to the exercise of its review powers. Thus a child committed to a training school would not be discharged on habeas corpus because of irregularities in the commitment procedures. Similarly, a court would not release a minor informally committed to a

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[30]Where the proceedings in the trial of a delinquent were invalid, or where the judgment committing the juvenile to an institution was void or materially defective, or was based upon a petition insufficient to confer jurisdiction on the court, the minor would be released on habeas corpus. An order made in an ex parte proceeding giving an institution custody of a child would not bar a writ by the child's parents, where notice and a hearing were required by statute. "Habeas Corpus," 114-115.

state charitable institution unless the court decided that the welfare of the state or of the juvenile required it. The commitment of a child to a refuge or, later, to a reform school, upon the application of the child's father, was seen as not in the nature of prosecution, conviction, and punishment for crime. Because the character of the detention was reformatory, the court reasoned, it would not release a child on a writ filed by its next friend, although the youth might have been committed without notice and opportunity for a judicial hearing.

The Meaning of the Refuge

The New York, Boston, and Philadelphia Refuges sparked a movement which built thirteen more houses of refuge throughout the north-eastern and mid-western states by 1860.[31] In

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[31] In 1857, Henry Barnard published a study of reformatory education. The sixteen institutions for children ranged in capacity from 90 children at Lancaster, Massachusetts, to 1,000 at the New York House of Refuge, with a median of 210. Only four were filled to or above capacity. Seven admitted only boys. One was a girls' Refuge, while the rest served both sexes. The total population of the 16 institutions was 3,067 boys and 468 girls. The average age of admission ranged from 11 to 14 years, and the average period of detention extended from less than six weeks in St. Louis to 24 months in New Orleans, Rochester, and Providence. No school allowed more than two hours a day for recreation, and only two required less than six hours of work. Only the Farm School and House of Reformation in Boston allowed as much time for school as for work. Staff-to-inmate ratios were also reported. The highest ratio was one-in-eight in the Colored House of Refuge in Philadelphia. Ten institutions had fewer than 15 children per staff member. Henry Barnard, Reformatory Education, or Papers on Preventive, Correctional and Reformatory Institutions

terms of the legal history of juvenile justice reforms, the most significant aspects of the refuge were its function as a dispositional alternative that was neither street nor prison, its use of binding-out, and the power of the indeterminate sentence. As a dispositional alternative, the refuge signalled the complete breakdown in society's faith in the ability of parents to exercise unconstrained control over their children. Robert M. Mennel has suggested that "the word 'house' identifies a milestone in the shift from family-centered discipline to institutional treatment administered by society."[32] But the shift to indoor relief was to affect only a select class of families. As crime, pauperism, and intemperance threatened to plunge more and more members of society into a cultural chasm, urban conservative elites built up refuges to capture the children of the poor and bind them out "in the most distant parts of the country."[33]

The ability to apprentice undesirable youths away from the city would have been largely undercut, however, had the

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in Different Countries (Hartford, Conn., 1857), 354. See Rachel B. Marks, "Institutions for Dependent and Delinquent Children: Histories, Nineteenth-Century Statistics, and Recurrent Goals," in Child Caring: Social Policy and The Institution, eds. Donnell M. Pappenfort, Dee Morgan Kilpatrick, Robert W. Roberts (Chicago, 1973), 9-67.

[32]Mennel, Thorns & Thistles, 3.

[33]Design and Advantages of the House of Refuge, quoted in Sanders, Juvenile Offenders, 372.

reformers not been granted the power of the indeterminate sentence. Refuge managers were well aware of the uses of their unlimited commitment power during a child's minority. They decried the commitment of children to prisons because, among other reasons, the power of those institutions over their charges ended with the expiration of the sentence. Indeterminate sentencing gave the refuge managers long-arm control over their child prisoners after release from the institution. The reformers felt that this extended surveillance was essential to juvenile reformation. Thus the typical statutory provision authorizing refuge managers to bind out children until they reached their majority was crucial in asserting the primacy of institutional over parental control.

TWO: THE REFORM SCHOOL AND THE FAILURE OF INDOOR RELIEF

Although the house of refuge implanted indoor relief as the paradigm of philanthropic and penological thought in the decades before the Civil War, its binding-out program symbolized a reluctance to abandon all aspects of the ideal of outdoor relief. The refuge, a product of the first flush of institutionalization in the Jacksonian era, represented the reforming elite's conclusions as to the worth and reliability of America's poor families. But the child savers were unwilling to renounce the myth of the colonial home. Their conviction that the best reformation took place in a good home was shown in the initial efforts to simulate the firm home and school discipline which, in their opinion, the refuge children's upbringing had failed to provide.[34]

However, the refuge's binding-out system was even more significant evidence of the reformers' orientation because its influence was more enduring. After the managers had made the children behaviorally presentable, they sought to attach them to rural western families. While their motivation was partially a parochial attempt to export social defects, another factor may have been a residual belief that the family was a natural reformatory. When a child's biological family had

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[34]Rothman, Discovery of the Asylum, 76-78, 206-216.

failed in the task of socializing responsible citizens, the child savers felt that another family, more attuned to the reformers' own rural ancestry, might succeed.

The refuges, begun so optimistically, were in decline by mid-century, victims of their own growth. Overcrowding and the entropy of protracted idleness wreaked their predictable results, and the refuges' domestic arrangements yielded to a military regimen.[35] The 1860's also witnessed fresh skepticism on the efficacy of penitentiary reform, and the refuge was often linked with its adult counterpart. The Massachusetts Board of State Charities charged in 1864 that many reformatories had become prisons, and the "pupils were in all essential respects prisoners."[36] The refuge had sacrificed its reforming mission in order to maintain a custodial character.

The placing-out societies and reform schools which developed in the wake of refuge criticism were founded by a second generation of reformers far less convinced of the value

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[35]Pickett, House of Refuge, 181-182; Rothman, Discovery of the Asylum, 237-240. In 1863, Massachusetts prison inspectors described the Boston House of Refuge in terms which epitomized the fate of the refuge, calling it "too much of a prison, too little an institution of instruction, too much the residence of law and punishment, too little the home of grace and culture." Boston Common Council, Report of Committee Appointed to Investigate Alleged Abuses at the House of Reformation and House of Correction (Boston, 1864), pp. 22-23, quoted in Mennel, Thorns & Thistles, 29.

[36]Quoted in Rothman, Discovery of the Asylum, 258.

of incarcerating destitute children for any period of time. These new reformers believed strongly in environmental origins of deviancy, and some rejected the premise that the short sharp shock of refuge existence would reform any child. Philanthropists of this persuasion founded charitable organizations and preventive agencies opposed to a rigid program of training or education.

A leader among these critics was Charles Loring Brace, one of the founders of the New York Children's Aid Society. Brace's critique was significant for it asserted that the prison character of the refuges was inevitable under any system of institutionalization. Influenced by Horace Bushnell's Doctrine of Christian Nurture, Brace believed that the family, as "God's reformatory," was the only institution capable of reforming its members. He therefore advocated eradicating juvenile delinquency through a vigorous program of placing-out pre-delinquent and neglected children to farm families on the developing middle border. In order to encourage a natural relationship, receiving families were not required to sign an apprenticeship agreement.

However, not all reforming minds were willing to accept the full force of Brace's logic.[37] The country cottage plan

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[37] Ibid., 259; Mennel, Thorns & Thistles, 35-48. See Charles Loring Brace, The Dangerous Classes of New York and Twenty Years Work Among Them (New York, 1872); Sanders, Juvenile Offenders, 388-392; Joseph M. Hawes, Children in Urban Society: Juvenile Delinquency in Nineteenth Century America (New York, 1971), 87-111.

appealed to those intent on recapturing the familial ideal lost inside the massive city refuges on the congregate system. Cottage institutions utilized family-style living arrangements, and emphasized labor, religion, and manual training as a better schedule for reform than military discipline.[38]

The Civil War era was also marked by an upsurge in state and local government involvement in the founding and administration of institutions for delinquents. State reformatories and reform schools often resembled the refuges in their mass congregate organization, prison design, and rigid workshop routine, but they laid a greater emphasis on formal schooling.[39] The resultant cacophony of institutional arrangements was raised to a din by the variations and degenerations within each form. Intended to provide "organized persuasion" rather than "coercive restraint," reformatories and reform schools turned to brutal and exploitative contract labor in times when they fell short in the stiff competition for state funds.[40] Furthermore, the line between cottage and congregate

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[38]Mennel, Thorns & Thistles, 55; Platt, Child Savers, 55; S. A. Martha Canfield, U.S. Bureau of Education, Circulars of Information, Number 6 (Washington, D.C., 1875), pp. 42-45, quoted in Robert H. Bremner et al. (eds.), Children and Youth in America: A Documentary History (3 vols.) (Cambridge, Mass., 1971), II, 464-468.

[39]Rothman, Discovery of the Asylum, 262; Mennel, Thorns & Thistles, 51-52.

[40]Platt, Child Savers, 47; Bremner, Children and Youth, II, 439, 469-471.

planning was not always distinct: the Ohio Reform Farm at Lancaster was constructed in 1856 on the cottage family model, but each unit was designed for 50 children.[41]

Various preventive agencies divided over the question of whether children should be placed out immediately, or after a training period. Brace's New York Children's Aid Society opted for immediate placement, as did Robert M. Hartley, organizer and secretary of the New York Association for Improving the Condition of the Poor. Some dissenters within Hartley's organization, however, split off to form the New York Juvenile Asylum, which attempted to alter children's behavior before indenturing them. Boston's Children's Aid Society also maintained an institution to discipline children for about six months before placing them out.[42]

Beginning in the 1870's, state governments began incorporating reformatories for young men (aged 16 to 25 or 30) who were first-offenders. This juvenile reformatory movement

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[41]Henry W. Thurston, Concerning Juvenile Delinquency: Progressive Changes in Our Perspectives (New York, 1942), 170.

[42]Mennel, Thorns & Thistles, 44-46. Hartley was apparently a consistent advocate of the emigration of social problems. Bremner described Hartley's advice to the poor as "Go somewhere else." Robert H. Bremner, From the Depths: The Discovery of Poverty in the United States (New York, 1956), pp. 35-38.

displaced some of the reform schools' older and more inveterate malefactors. The development of these institutions had not been unforeseen. Stephen Allen of the New York House of Refuge had called in the 1840's for older delinquents to be cared for separately. In 1851, The Pennsylvania Journal of Prison Discipline had recommended the establishment of an institution for "a large class of grown-up boys, and the very worst in the community."[43]

The multitude of economic, religious, and disciplinary problems experienced by juvenile institutions prompted state governments to seek a way to supervise and regulate the disposition of these public children. State boards of charity were established to inspect, report on, and recommend changes in institutional practices. In 1885, William Pryor Letchworth, president of the New York State Board of Charities, was successful in making the Western House of Refuge in Rochester the first juvenile institution to repudiate contract labor and install a comprehensive vocational educational program.[44]

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[43]Mennel, Thorns & Thistles, 70,72. Pennsylvania did not construct a juvenile reformatory until the 1880's; see text at notes 60-61, infra.

[44]Mennel, Thorns & Thistles, 65-70, 110. Massachusetts established the first state board of charity. Within 20 years, eight other northern states and North Carolina had set up similar supervisory agencies.

The Uncertain Story of Due Process

The late nineteenth century also witnessed procedural reforms in children's criminal court cases. In general, the reforms gave formal sanction to practices which mitigated the harsher consequences of the confrontation between the juvenile offender and the common law. Like the refuges and reform schools, these procedural developments should be seen as attempts by elites to extend their control over the impoverished classes. Both kinds of reform spared children from confinement with adults in the penitentiary by effectively raising the age of common law liability. But all nineteenth century juvenile law reforms provided the custodians of America's urban culture with the opportunity to collect and reshape far more children than the common law would have allowed. Because the institutional arrangements posed dispositional alternatives heralded as reforms, they were successful in increasing the number of incarcerated children.[45]

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[45]The opinion of Hugh Maxwell, New York City's District Attorney in 1825, the refuge's first year, is illustrative: "Before the establishment of the House of Refuge, a lad of fourteen or fifteen years of age might have been arrested and tried four or five times for petty thefts, and 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 or county. . .

"The consideration, however, that there is a charity (the Refuge) which provides for objects of this character, has removed all objections to convictions in cases of guilt.

"Formerly too many citizens were reluctant in bringing to the police-office, young persons who were detected in

Criminal trial reforms in children's cases were scattered throughout the northern and mid-western states in the last half of the nineteenth century. In 1861, the mayor of Chicago received the authority to appoint a commissioner for the purpose of hearing petty cases of boys aged six to sixteen. The commissioner had the option of placing convicted children in reform schools or under probationary supervision. Within the decade, the regular Cook County courts acquired these functions. Illinois statutory provisions for jails and jailers were amended in 1874 to direct that minors be "kept separate from notorious offenders and those convicted of a felony or other infamous crime."[46]

An 1869 Massachusetts statute required the Board of State Charities to have a visiting agent present at the trial of each juvenile case. The law provided for notice of pending

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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 know no punishment would follow." First Annual Report of the Managers of the Society for the Reformation of Juvenile Delinquents, in the City of New York (New York, 1825), p. 19, quoted in Sanders, Juvenile Offenders, 346-347.

[46]Illinois, Private Laws, 1861, p. 149; Private Laws, 1867, III, Secs. 1-4, pp. 31-32; Revised Statutes, 1874, Sec. 11, p. 617. Platt argues that this latter provision was "a tokenistic and ineffectual remedy which could not be implemented in overcrowded and poorly constructed institutions." Platt, Child Savers, 120.

criminal actions to be given to the Board, as well as an opportunity to investigate children's cases, protect their interests, and make recommendations to the trial judge. The following year brought provisions for separate hearings in juvenile cases tried in Boston. In 1872, separate hearings were incorporated into the procedures of district, municipal, and police courts throughout the commonwealth. The governor was authorized to appoint as many justices of the peace to try these cases as the public interest required. The legislature instituted a "session for juvenile offenders" in 1877, and ordered that a separate record and docket be kept for these cases.[47]

New York legislation of 1877 prohibited the securing of any children below the age of fourteen with adult convicts or criminal defendants in any prison or "place of confinement," or in any courtroom or vehicle, unless "proper officers" were present. In 1892, New York followed the lead of Massachusetts in prescribing separate trials, dockets and records for adjudicating children younger than sixteen. In Indiana, the Board of Children's Guardians was empowered by an 1891 law, amended in 1893, to file a circuit court petition if it had probable cause to believe that a child below the age of fifteen was dependent, neglected, truant, incorrigible, or delinquent. If the court concurred with the Board, it was to

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[47]Massachusetts, Laws, 1869, Secs. 1-5, chap. 453; 1870, Sec. 7, p. 262; 1877, Sec. 5, p. 595.

remand the child to the Board's custody until the child came of age. An Ohio statute of 1892 provided for the Board of County Visitors to receive notice whenever proceedings were begun to commit a child to an industrial school. The Board was required to send an agent to attend the trial and protect the interests of the child. In 1898, Rhode Island mandated separate hearings in children's cases, the presence of state and private agencies at these trials, and separate pretrial detention for children.[48]

Distrust of refomatory institutions which prompted several states to establish supervisory boards also led to litigation focused on the nature of the restraint imposed by reform schools. In 1870, the Illinois Supreme Court struck out at the informal commitment procedures of the Chicago Reform School. In People v. Turner, the court labelled the school an "infant penitentiary," and held that a child could only be sentenced to it by a jury's verdict. The Supreme Court of New Hampshire in 1885 mocked the efforts to characterize reform school restraint as non-punitive: "If the order committing a minor to the school is not a sentence but the substitute for a sentence . . . what is a substitute for a sentence but a sentence in and of itself?" In 1897, California's highest court reversed the commitment of a delin-

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[48]New York, Laws, 1877, Sec. 4, p. 486; 1892, I, Sec. 2, pp. 459-460; Indiana, Laws, 1891, Secs. 1-4, pp. 365-367; 1893, Secs. 1-2, pp. 282-283; Ohio, Laws, 1892, Sec. 1, pp. 160-161; Rhode Island, Laws, 1898, Secs. 1-8, pp. 40-41.

quent to a reformatory by a grand jury. The court demanded that such imprisonment be imposed only after a jury trial.[49]

However, the attempt by these courts to infuse a measure of due process into juvenile adjudication was far outweighed by the number of decisions holding that the procedural safeguards of the adult criminal law should not be applied to reform school commitments because their detention was non-penal in nature. In fact, a dozen years after People v. Turner, the Illinois Supreme Court overruled it in all but name in holding that the industrial school for girls was not a prison and so commitment to it did not trigger the personal liberty safeguards of the Bill of Rights.[50]

Pennsylvania: A Child Welfare State

Many of the state court decisions supportive of the reform school's mission cited the parens patriae doctrine of Ex parte Crouse as their principal authority. As we have already seen, Pennsylvania courts in the nineteenth century had no trouble upholding the expansive Crouse formulation.

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[49] People v. Turner, 55 Illinois Reports 280 (1870). For the child-savers' reaction to the Illinois decision, see Platt, Child Savers, 104. State v. Ray, 63 New Hampshire Reports 406 (1885); Ex parte Becknell, 119 California Reports 496, 51 Pacific Reporter 692 (1897).

[50] In re Ferrier, 103 Illinois Reports 367 (1882). For similar cases see Prescott v. State, 19 Ohio State Reports 184 (1870); Ex parte Ah Peen, 51 California Reports 280 (1876); Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisconsin Reports 328 (1876); Reynolds v. Howe, 51 Connecticut Reports 472 (1884); and Rule v. Geddes, 23 Appeal Cases District of Columbia 31 (1904).

The legal history of Pennsylvania thus positions the state as the trail-blazer of American child-saving thought.[51]

In 1871, the Pennsylvania legislature provided that truant, disobedient, idle and disorderly youths over the age of sixteen could be arrested and committed for the duration of their minority to the Philadelphia House of Correction, Employment and Reformation. The managers were empowered to train, employ and bind out the children. The legislature additionally specified rights to appeal a commitment and to habeas corpus. Binding out provisions were also included in an 1878 law which authorized corporations organized to provide homes for the friendless or destitute, to receive children from the guardians of the poor. If the parents did not provide for the children's maintenance, the benevolent societies could bind out the children. Refuge and reform school directors were allowed to reclaim their less successful placements under an 1879 law. These children would be returned to the institution if agreements made on their behalf had been violated, or if they had been neglected or improperly treated by the persons entrusted with their care.[52]

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[51] Ex parte Crouse, 4 Wharton 9 (Pa. 1839). See text at notes 13-15, supra.

[52] Pennsylvania, Laws, 1871, Secs. 2-6,13, pp. 1301-1303, 1305; 1878, Sec. 1, p. 152; 1879, Sec. 1, p. 84. An 1899 law solidified the position of the benevolent societies vis-a-vis the child's original guardians. Whenever such an organization cared for a minor for one year at its own expense, the courts were authorized to permit the child to be indentured to any suitable person during his or her minority. The rights of the parents or guardians were thus extinguished. Laws, 1899, Sec. 1, pp. 46-47.

The statute providing for the return of ill-treated apprentices was part of a broad-scale effort to extend governmental protection and control over the health and morals of all children. The movement was to culminate with the Progressive era dictum that the legislature has the power to enact regulations to protect children's health and morals, and to make punishable any act that contributed to the destruction of their welfare.[53] The fountainhead of this modern doctrine is clearly the 1839 adaptation of parens patriae. In the ensuing years, Pennsylvania's courts and legislatures plotted the course toward the child welfare state with unwavering accuracy.

In 1879, the legislature made the wilful neglect of a juvenile by his guardian a misdemeanor. Another provision stated that in cases in which a guardian is convicted of an assault upon his child, or of any violation of the Health and Morals Act, the child could be committed to a humane society which protected children from cruelty.[54] If there was any doubt as to the quality of the care required of a parent to remain above the wilful neglect standard, the Pittsburgh Court

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[53] Commonwealth v. Wormser, 260 Pennsylvania State Reports 44, 103 Atlantic Reporter 500 (1918).

[54] Pennsylvania, Laws, 1879, Secs. I, 7-9, pp. 142-145. The provisions of this statute were radically enlarged by Laws, 1885, Secs. 1-5, pp. 27-28; see Commonwealth v. Bowser, 61 Pennsylvania Superior Court Reports 107, 114, 214 (Pa. Superior Court 1915).

of Quarter Sessions resolved it in 1892 by elaborating on the statutory requirements. Wilful neglect was defined as "a failure to see that the child has sufficient food, properly prepared, clothing suitable for the occasion, kept in reasonably good condition, and that the child avails itself of the things provided." Evidence of the law's solicitousness may be found in an 1894 state supreme court decision upholding the conviction, on a common law misdemeanor, of a director of the poor who knowingly bound out a pauper to a "cruel and parsimonious master." The court also stated that if a director had reason to know that the master's treatment imperiled the child's health, but took no step to rescue the child, he would be guilty of a misdemeanor at common law.[55]

Legislation of 1883 prohibited guardians of the poor from maintaining healthy children aged two to sixteen in an almshouse for longer than 60 days. The guardians were permitted to place out the children, but were required to visit them at least twice a year and report on their condition. A final section of the act established "industrial homes" for the care and training of poor children, and provided for the

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[55] Commonwealth v. Stewart, 12 Pennsylvania County Court Reports 151, 2 Pennsylvania District Reports 43, 23 Pittsburgh Legal Journal (N.S.) 59 (Pa. Court of Quarter Sessions 1892); Commonwealth v. Coyle, 160 Pennsylvania State Reports 36, 28 Atlantic Reporter 576,634 (1894). Contributing to the delinquency of a minor was made a misdemeanor by Laws, 1909, Sec. 1, p. 434.

homes to be entirely unconnected and remote from the poor-house.[56]

The commitment and placement procedures of certain charitable organizations were revised in 1893. The legislature commanded that a judicial commitment be preceded by a finding that the child was uncontrollable, had been convicted of crime, or was a neglected vagrant. Children of parents who themselves were vagrant, vicious, incorrigible, criminal, morally depraved or cruel, so as to render them unfit to raise their children, were entitled to have the state take over those functions. The committing magistrate was required, as his earlier refuge counterpart had been, to amend his order with the names and addresses of the witnesses, and the substance of the testimony which formed the basis of his adjudication.

While earlier legislatures had been content to provide for judicial visitation of institutional commitments as the only check on their validity, the 1893 lawmakers felt that the commitment order itself should trigger an executive and judicial review process. Accordingly, they required that the committing magistrate release all the papers to the district attorney, who would in turn present them to a judge of the Court of Quarter Sessions. After examining the documents, the judge would either indorse the minor's detention by the charitable

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[56]Pennsylvania, Laws, 1883, Secs. 1-3, p. 111.

society, or order his discharge. Final provisions of the 1893 act required the receiving society to place children in families of the same religious denomination as their parents, and noted the duty of Common Pleas judges to appoint visitors to call upon the children committed under this act at least once every six months. The official visitors were to report on the children's condition.[57]

Parents could commit their vicious or incorrigible male children to the Philadelphia Protectory for Boys under regulations set out in 1901. Since these admissions were voluntary (from the parents' point of view), the legislature did not see fit to prescribe any particular procedures for administrative or judicial review of the child's detention.[58]

Legislation of 1903 established and extended the jurisdiction of the State Board of Charities and the county boards of visitors to include both public and private charitable institutions. The various boards and courts were expected to coordinate their child-saving efforts. Every institution was required to file an annual report with the state Board giving a statistical and financial breakdown of its activities. Each county's board of visitors was to pay an annual call on all institutions caring for neglected, dependent and delinquent children within its jurisdiction. The statute

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[57] Ibid., 1893, Secs. 1-6, pp. 399-400.

[58] Ibid., 1901, Secs. 1-2, pp. 187-188.

provided that no child was to be placed with a non-complying institution.[59]

Pennsylvania joined the movement to establish juvenile prisons for first-time older offenders in the 1880's. The aim of the Huntingdon Reformatory was to prevent male criminals aged 15-25 from becoming hardened careerists in the penitentiary. The "remedial preventive treatment" included an inmate classification system, rudimentary education, vocational training, and disciplinary credit and demerit "marks." The inmates were confined for an indeterminate period that could not exceed the maximum statutory penalty for their crime. In 1893, the legislature added a provision for returning paroled inmates who had violated their terms of release.[60]

The sole policy behind the Pennsylvania juvenile reformatory was to alter totally the adolescent's normative behavior. The anticipatory portrait of a submissive caste lay beneath the designs of reform. Thus the primary object of the Huntingdon Reformatory was to drive beyond conformity

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[59] Ibid., 1903, Sec. 1, p. 8; 1903, Sec. 1, pp. 11-12.

[60] Ibid., 1881, Secs. 1-9, pp. 63-65; 1887, Secs. 1-17, pp. 63-72; 1893, Secs. 1-5, pp. 326-327. The institution opened in 1889. See generally, Isaac J. Wistar, "The Pennsylvania Industrial Reformatory," in The Reformatory System in the United States, ed. Samuel J. Barrows (Washington, D.C., 1900), 134.

of conduct,

> to surround (the youth) immediately by a system of firm but humane discipline, where the dullest can not fail to observe that the quickest road to liberty lies in fitting himself for the duties of citizenship by learning respect for and obedience to authority. To him honest obedience means early liberty, while disobedience means longer imprisonment. Such mere "good behavior" as the habitual criminal soon learns to simulate for his own ease will not avail, for the tests of improvement here in use are so numerous and continuous that the ordinary hypocrisy of hardened criminals is tolerably sure of detection.[61]

Late in the century the Keystone State became convinced of the wisdom of locating cottage institutions in a wholesome and secluded agricultural setting. Under an 1889 law and with the assistance of moneyed altruists, the Philadelphia House of Refuge abandoned its congregate city housing two years later for a cottage arrangement at Glen Mills. The Girls' Department of the refuge moved from Philadelphia to Sleighton Farms in 1910. Both institutions are still in operation.[62]

Procedural reforms were enacted in 1893 which had the effect of segregating minors and adults surrounding the trial of criminal cases. Children under sixteen were no longer confined with their elders, or placed in a courtroom during an adult trial, or transported in a vehicle along with adults

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[61] Wistar, "Pennsylvania Industrial Reformatory," 135.

[62] Pennsylvania, Laws, 1889, Sec. 1, p. 209.

criminally charged or convicted. Children's felony or misdemeanor cases were tried separately, and a distinct docket and record were kept. These trial reforms, paralleling those of other states, were extremely short-lived, however. The same year they were enacted they were held to contravene the Pennsylvania constitutional provision that all courts be open and that all laws relating to the courts be general and uniform.[63]

The Institutional Epitaph

The late nineteenth century was characterized by a growing distrust of the efficacy of reforming delinquents through reform schools and other vehicles of indoor relief. This institutional skepticism was matched by a burgeoning confidence that the boon of government supervision should be extended over all the children of the state. These two themes would snowball into the twentieth century, preparing the stage for the modern debate over juvenile justice.

One of the most articulate critics of the reform school was Homer Folks, secretary of the Children's Aid Society of Pennsylvania. At the 1891 National Conference of Charities and Correction, Folks elaborated on five failures of the reformatory system:

> 1. The temptation it offers to parents and guardians to throw off their most sacred respon-

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[63] Ibid., 1893, Secs. 1-2, p. 459; In re Courts for Trial of Infants, 14 Pennsylvania County Court Reports 254, 3 Pennsylvania District Reports 753, 11 Lancaster Law Review 174 (Pa. Court of Oyer and Terminer 1893). See text at note 48, supra.

> sibilities . . . in proportion as the educational and industrial features of these institutions are perfected this temptation is increased . . .
>
> 2. The contaminating influence of association. It is certainly unjust to crowd into one building the good and the bad, the innocent and depraved, the homeless boy and the juvenile criminal . . .
>
> 3. The enduring stigma which the fact of having been committed to such an institution fastens upon the child. The reformatory is, first and foremost, a place to which criminal children are sent to be reformed; and the implication is, in the case of every child thus committed, that the community was obliged in self-defence to place it behind bars.
>
> 4. Such a system renders impossible the study and treatment of each child as an individual.
>
> 5. The great dissimilarity between life in an institution and life outside . . . (Release makes) new and large demands for individuality and self-control and a knowledge of the affairs of ordinary life. Of the ninety-five children readmitted to the (Philadelphia) House of Refuge in 1890, 43 or 45 per cent had been discharged less than three months.[64]

Folks' opposition to reform institutionalization was symbolic of an age forced to the realization that the grand experiment in indoor relief had failed to eradicate pauperism

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[64]Homer Folks, "The Care of Delinquent Children," in Proceedings of the National Conference of Charities and Correction (Indianapolis, 1891), 137-139, quoted in Bremner, Children and Youth, II, 472-473.

or crime. Folks himself would become a Progressive Era spokesman for non-institutional family reforms such as widows' pensions, mothers' aid, and juvenile court and probation legislation. He continued to attack reform schools as the bane of the emerging probation movement.[65]

Although the child savers were intimately involved in the development of reform school procedures, their greatest influence was felt in broadening the net of government control cast over previously immune juvenile activities. Engaged in what Anthony M. Platt has called "the successful reification of youth," the child savers redefined the meaning of adolescence in order to reinforce and regulate the dependent status of lower class children. Since the reformers acted in the best interests of their wards, the legal safeguards which customarily preceded the imposition of punishment were seen as particularly inappropriate and counterproductive. Declaring due process -- that "morbid sensibility on the subject of personal liberty" -- to be irrelevant, had the intended effect of perpetuating the dependency of certain classes of children. Submission of the will and alteration of the personality were the aim, not merely the by-products, of reform school discipline. Reformatory education was expected to produce a

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[65]Mennel, Thorns & Thistles, 111-112, 123, 150; Platt, Child Savers, 62. Folks' major work was The Care of Destitute, Neglected, and Delinquent Children (Albany, N.Y., 1900, reprinted New York, 1970).

quiescent and obedient hybrid child with middle-class values and lower-class skills.[66]

The placing-out programs of charitable societies represented the only alternative to juvenile incarceration until the burgeoning of probation with the first juvenile courts. The emergence of probation as the dominant mode of outdoor relief signalled the culmination of both the anti-institution and the pro-government trends in society's handling of juvenile delinquents. Child reformation in the Progressive era was the business of a court and probation officer, but the treatment was administered within the recipient child's own home.

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[66]Platt, Child Savers, 67, 99, 106. Platt argues that "(r)estraint and discipline were an integral part of the 'treatment' program and not merely expedient approximations. Military drill, 'training of the will,' and long hours of tedious labor were the essence of the reformatory plan. Correctional workers combined the functions of a public health doctor and insurance company agent: their job was to treat clients, but their primary obligation was to report recalcitrant and troublesome clients to the 'company.'" Child Savers, 73.

THREE: THE JUVENILE PROBATION-COURT SYSTEM AND THE REVIVAL OF OUTDOOR RELIEF

In the first session of the Chicago Juvenile Court, Judge Richard Tuthill called probation "the keystone which supports the arch of the juvenile law."[67] The widespread use of probation enabled the child savers to perfect the transition from institutional to outdoor relief. Emphasis on the probation function was the only significant difference between the juvenile courts and their criminal law predecessors, which were already equipped in places with separate trials, dispositional alternatives, and nascent probationary initiatives.[68]

Although probation had roots steeped in the common law, it was only energized as a method of juvenile reformation late in the nineteenth century. So long as the prospectus for child saving was devoted to institutional ventures, probation received little attention or implementation. English

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[67] Quoted in Timothy D. Hurley, "Juvenile Probation," in Proceedings of the National Conference of Charities and Correction (Indianapolis, 1907), 15-16.

[68] See Henry W. Thurston, "The Juvenile Court as a Probationary Institution," in Preventive Treatment of Neglected Children, ed. Hastings H. Hart (New York, 1910, reprinted 1971). "The ultimate value of the work of the juvenile court will be determined by the effect of probation upon the child . . . the efficient court must have intimately interwoven into its machinery a closely knit and well organized probation officer, competent to make the investigation in such a way as to enable the judge to determine

courts had quite often bound over misdemeanants to sureties or released them on their own recognizance. Judges on both sides of the Atlantic devised methods of suspending sentence, and modern probation probably evolved from these.[69]

The use of probation for juvenile offenders had its American genesis in Massachusetts. By 1831, Boston municipal court justice Peter Oxenbridge Thacher had begun an unofficial probation practice by entrusting sheriffs, constables, and others with the supervision of young offenders. Under Massachusetts practice at that time -- and until probation legislation in the latter part of the century -- probation preceded sentencing. If the offender kept the peace during the probationary period, he would return to court so that the judge could declare a suspended sentence or dismiss the case. A

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whether or not the child shall be placed on probation, and of carrying out in a consistent way the judgment of the court." Bernard Flexner, "The Juvenile Court as a Social Institution," in Hart, Preventive Treatment, 265. See also Homer Folks, "Juvenile Probation," Proceedings of the National Conference of Charities and Correction (1906), 121.

[69]On the history and legal origins of probation, see Charles L. Chute and Marjorie Bell, Crime, Courts and Probation (New York, 1956), 1-88; N. S. Timasheff, One Hundred Years of Probation (New York, 1941), 1-88; Barbara A. Kay and Clyde B. Veddar (eds.), Probation and Parole (Springfield, Ill., 1963), 3-27; Alexander B. Smith and Louis Berlin, Introduction to Probation and Parole (St. Paul, Minn., 1976), 72-82. See also John Augustus, A Report of the Labors of John Augustus, for the Last Ten Years, in Aid of the Unfortunate (Boston, 1852).

Massachusetts law of 1836 officially sanctioned the release of petty offenders to sureties.[70] But the real work of probation began five years later through the renowned efforts of John Augustus, cordwainer, bootmaker, and member of the Washington Total Abstinence Society, an organization formed in Boston in 1841 to promote temperance and reclaim drunkards. By 1858, this self-appointed probation officer had bailed almost two thousand persons. Augustus' practice was to support criminal offenders of any age whom he considered good risks. Upon his promise to help the probationer obtain schooling or employment, the court would hold the case pending. If Augustus' subsequent report on the probationer's status was satisfactory, the court would fine the offender one cent and spare him from the House of Correction. After Augustus' death, Rufus R. Cook, chaplain of the Suffolk County Jail and agent of the newly-founded (1864) Boston Children's Aid Society, took up the work of probation and rehabilitation.[71]

Pioneer probation legislation was enacted in Massachusetts in 1869, through which the Board of State Charities was

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[70]Massachusetts, Revised Statutes, 1836, Sec. 9, p. 780. Timasheff argues that this provision was not a true forerunner of statutory probation because it merely gave statutory sanction to the common law practice of replacing punishment by accounting for good behavior. One Hundred Years of Probation, 16n. (emphasis included).

[71]Chute and Bell, Crime, Courts and Probation, 32-55.

directed to attend all hearings in children's cases which might result in commitment to a reformatory. The Board's visiting agents appeared on the child's behalf and often recommended probation of the juvenile in order to place him with a foster family. After a decade of such efforts, the Board, the first agency to work almost entirely with children outside institutions, had attended over 17,000 hearings, and had succeeded in placing almost 4,400 children on probation. An act of 1891 provided for the appointment of probation officers by Massachusetts lower court judges, and for monthly reports to the State Commissioners of Prisons. The Superior Court of Massachusetts also appointed probation officers after 1898.[72]

No official probation work developed outside Massachusetts until 1873, when Michigan established an agency for the care of child offenders. The governor was empowered to appoint an agent for the State Board of Charities in each county, to take custody of delinquents paroled by the courts. The Board's agent could place delinquents with foster families or supervise them in their own homes. He was also made responsible for dependent children in his county who were committed to institutions or who received foster placements. The New York Society for the Prevention of Cruelty to Children, founded in 1875, also worked with dependent and neglected children, ultimately achieving a status of quasi-probation officer in

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[72]Massachusetts, Laws, 1869, Secs. 1-4, chap. 453; 1878, Secs. 1-2, pp. 146-147; 1891, Secs. 1-4, 7, 9, pp. 920-921;

some courts. New York legislation of 1884 furnished courts with an alternative to fining or imprisoning child offenders not yet eighteen years old. Such children could be placed, in the court's discretion, under the custodial care of any suitable and willing person or institution. An Ohio statute of 1892 pronounced the duty of probate courts to give notice to the boards of county visitors whenever proceedings were instituted to commit a child under sixteen to an industrial school, so that the board could attend the hearing and "protect the interests of such child." The Prisoner's Aid Society in Baltimore was permitted to conduct probation work under Maryland legislation of 1894. Three years later, Missouri commenced an official probation system. In 1898-1899, Vermont, Rhode Island, and Minnesota adopted probation measures; the Rhode Island legislature was the first to enact a state-subsidized and state-controlled probation administration. In 1899, probation was incorporated into the new juvenile courts in Denver and Chicago.[73]

Probation and the freedom from legal process written into most juvenile court laws represented a victory for the

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1898, Sec. 1, pp. 474-475; Paul W. Tappan, Juvenile Delinquency (New York, 1949), 313-314; Chute and Bell, Crime, Courts and Probation, 56-66.

[73]Michigan, Laws, 1873, Secs. 1-6, pp. 229-232; New York, Laws, 1884, Sec. 9, p. 47; Ohio, Laws, 1892, Sec. 1, pp. 160-161; Maryland, Laws, 1894, Sec. 1, pp. 583-584; Missouri, Laws, 1897, Secs. 1-2, p. 71; Vermont, Laws, 1898, Secs. 1-7, pp. 98-99; Rhode Island, Laws, 1899, Secs. 1-8, pp. 74-76; Minnesota, Laws, 1899, Secs. 1-7, pp. 157-159; Colorado, Laws, 1899, Sec. 4, p. 342; Illinois, Laws, 1899, Secs. 1-21, pp. 131-137.

child savers' position that youthful deviance cut across lines of delinquency and dependency. In order to extend community control over a wide range of children's normative behaviors, it became essential to develop a "socialized" court procedure[74] to further the "therapeutic competency" of the juvenile court itself.[75] Despite the demonstrated flexibility of the criminal courts, their reliance on due process hindered their effectiveness as child welfare organizations.

Late nineteenth century courts dealt with juvenile delinquency through an amalgam of pliant criminal procedure and fortified parens patriae. Common law courts were, however, intrinsically reactive: colorable legal violation was needed to precipitate judicial action. Since the child savers desired preventive medicine, they envisioned the juvenile probation-court as an unfettered super-agency, free to direct and deflect the lives of troublesome children.[76]

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[74]Miriam Van Waters, "The Socialization of Juvenile Court Procedure," Journal of Criminal Law and Criminology 13 (May, 1922), 61-69.

[75]William Healy, "The Psychology of the Situation: A Fundamental for Understanding and Treatment of Delinquency and Crime," in Jane Addams, et al., The Child, The Clinic and The Court (New York, 1925), 48.

[76]Platt, Child Savers, 123, 135-145. Mennel suggests that fear of judicial decisions extending constitutional protections for children may have prompted the designers of the Illinois juvenile court act to opt for a noncriminal equity procedure which could ignore legal rights of children. Thorns & Thistles, 131. Timothy D. Hurley, President of the Chicago Visitation and Aid Society, described the juvenile court as "to be perfectly plain, a return to paternalism." Timothy D. Hurley, The Origin of the Juvenile Court Law (Chicago, 1907), 56.

Like the refuges and reform schools, however, this new institution-without-walls was not intended to rescue society's most dangerous malefactors. From the beginning, juvenile court laws provided for the transfer of serious offenders to the adult criminal system. During the Chicago court's first year, for example, Judge Tuthill remanded 37 children for grand jury consideration, excluding them from the operation of the new law. This transfer function was consistent with Progressive notions of efficient child-saving, insisting that precious community resources should not be expended unless juvenile reclamation was foreseeable. Thus the juvenile probation-court system bypassed those delinquents most seriously in trouble.[77]

Early juvenile court legislation reflected a compromise among reform theorists and various institutional proponents. The 1899 Illinois statute was consistent with the state's industrial school legislation and with the policy of reformatory commitment for appropriate youngsters. The Illinois Board of Public Charities was pleased with the promise of

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[77]Platt, Child Savers, 135. Sanford J. Fox suggests that this selective approach was endemic to all child reform movements, which never encompassed all children, but only those "proper objects" who could yet be remolded into the life of virtue. Sanford J. Fox, "Juvenile Justice Reform -- An Historical Perspective," Stanford Law Review, 22 (June 1970), 1187-1239.

comprehensive governmental control over delinquents and predelinquents. Lastly, sectarian support was obtained by requiring the juvenile court to respect the parents' religious preferences in committing a child to individual or associational care.[78] In its construction, the Illinois law codified a century's growth in procedural adaptation, institutional variation, and the all-enveloping evolution of parens patriae. The provisions for probation, separate detention, and special trial sessions were borrowed from leading developments in Massachusetts and New York. Thus the juvenile court act is best understood not as an "almost revolutionary awakening,"[79] but as a transitional step in the development of government-dominated non-institutional delinquent care.

Pennsylvania: The System of Government Benevolence

Juvenile institutions in Pennsylvania at the turn of the century consisted of two houses of refuge, organized on a

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[78] Platt, Child Savers, 134-135. See also Helen Rankin Jeter, The Chicago Juvenile Court (Washington, D.C., 1922, reprinted in The Juvenile Court, New York, 1974), 1-10; Julia C. Lathrop, "The Background of the Juvenile Court in Illinois," in The Child, The Clinic and The Court, 290-297; Timothy D. Hurley, "Origin of the Illinois Juvenile Court Law," The Child, The Clinic and The Court, 320-330.

[79] As some of the reformers themselves saw it, Charles Coleman Wall, Jr., "The Juvenile Court Movement, 1899-1925" (Unpublished Master's Thesis, University of Virginia, 1969), 1.

mammoth cottage plan, and one reformatory for adolescent offenders. Private charities, including the Children's Aid Society, received and placed many children, but many others were stored in almshouses and city and county prisons. With this situation in mind, the New Century Club, under the leadership of Hannah Kent Schoff, drafted a juvenile court and probation statute modelled on that of Illinois.[80]

The resultant Act of 1901 was an ungainly structure which attempted to regulate the treatment and control of dependent, neglected, and delinquent children below the age of sixteen; establish juvenile courts and regulate their practice; provide for the appointment of probation officers, agents of juvenile reformatories, and a board of visitors; impose certain duties on the Board of Public Charities; and regulate the incorporation of associations for the care of dependent, neglected, and delinquent children. The statute also attempted to prohibit the commitment of children under fourteen years of age to jails or police stations, and to determine the conditions under which out-of-state associations could place children for adoption or indenture within Pennsylvania.[81] For various reasons, this first effort to establish

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[80]Hannah Kent Schoff, "Pennsylvania: A Campaign for Childhood," in Children's Courts in the United States, ed. Samuel J. Barrows (Washington, D.C., 1904, reprinted New York, 1973), 133-143.

[81]Pennsylvania, Laws, 1901, Secs. 1-20, pp. 279-286. The strict regulation of the importation of dependent, delinquent or defective children was revised in stronger form in

a juvenile probation-court system was declared unconstitutional in 1903.[82]

However, that same year the Pennsylvania legislature passed an act limited to the jurisdictions and powers of courts of quarter sessions deciding cases involving dependent, neglected, incorrigible, and delinquent children.[83] The 1903 law provided for unpaid court-appointed probation officers, and declared it their duty:

> (t)o make such investigations as may be required by the court, to be present in court when the case is heard, and to furnish to the court such information and assistance as the judge may require, and to take such charge of any child, before and after trial, as may be directed by the court.[84]

1917 and 1919. Laws, 1917, Sec. 1, pp. 769-770; 1919, Sec. 2, pp. 1028-1029.

[82]The act was overturned in Mansfield's Case, 22 Pennsylvania Superior Court Reports 224 (Pa. Superior Court, 1903). The court held that the 1901 act was insufficient in title, because it gave no intimation that the prupose of the act was to treat and control all children, and because it failed to indicate that the legislature was changing the "whole course of judicial procedure" for delinquent children. In its age classification scheme, the juvenile court act was held to be in violation of the state constitutional provision forbidding the passage of any special law regulating practice and jurisdiction in judicial proceedings, or granting to any individual any exclusive privilege or immunity. The Superior Court also held the act to contravene the state bill of rights provisions regarding criminal indictments and speedy public jury trials. As the coup de grace, the court expressed serious doubts that the legislation could survive a challenge under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

[83]Pennsylvania, Laws, 1903, Secs. 1-12, pp. 274-278.

[84]Ibid., 1903, Sec. 3, p. 276. In 1909, the juvenile court act was amended to allow 100 dollars monthly pay for

The legislation clearly intended the juvenile judge and the probation officer to operate an organic juvenile treatment system. The probation officer was to assist the judge at the child's hearing, which would determine whether the youth would be placed in custody under the aegis of the state. If the child were adjudged delinquent, the court could commit him to the care and guardianship of the probation officer. The child might remain at home, subject to visitations from the officer, and would be required to report periodically to the officer. Should conditions warrant it, the child would be returned to the court for further proceedings. Alternative dispositions included commitment to the probation officer, with directions to place the child in some suitable family home, under the officer's supervision. The court could also commit the delinquent to a reform school, or to the care of a charitable society. The power of the court to try a delinquent upon an indictment was not affected by the statute;[85] however, the court was forbidden to sentence a

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probation officers. Ten years later, probation officers outside Philadelphia were allotted 150 dollars monthly. Laws, 1909, Sec. 1, pp. 89-90; 1919, Sec. 1, pp. 885-886.

[85]Under this provision, courts upheld murder indictments for children in Commonwealth v. Rispo, 30 Pennsylvania District Reports 459 (Pa. Court of Oyer and Terminer 1921) and Commonwealth v. Cavalier, 284 Pennsylvania State Reports 311, 131 Atlantic Reporter 229 (1925). In Rispo, the court determined that a child indicted for murder who was discharged after a hearing by the juvenile court could subsequently be tried for the same offense in the Court of Oyer and Terminer. In Cavalier, the Supreme Court held that a first degree murder conviction was not invalid because the testimony included the confession of the defendant, who was fourteen and one-half years old.

delinquent child less than twelve years old to prison or to a reformatory institution until the probationary system had been tried and had failed. Furthermore, children were not to be subjected to pre-trial detention in any jail or police station, or in any institution to which adult offenders were sentenced. The juvenile court was admonished to respect the religious preferences of the child's parents in its commitment orders. In its institutional dispositions, the court was to segregate delinquents from neglected and dependent children. In no case was a commitment order to extend beyond the juvenile's minority.

The powers of the court were to be exercised upon the petition of any citizen, or at any stage during which criminal process was directed at a child, by certification of the magistrate, district attorney, or trial judge, that neither the interests of the child nor those of the state required the criminal process to continue. At that point the court of quarter sessions would transfer its jurisdiction to its juvenile court branch, which would make the necessary orders respecting the production and temporary custody of the child, and the attendance of the child's guardians. While conducting proceedings under the 1903 act, the court of quarter sessions was to hold separate sessions from its general criminal or other business, and records of its hearings as a juvenile court were to be kept in a separate docket.[86]

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[86]Another 1903 statute prohibited magistrates and jus-

Preliminary hearings were dispensed with in 1913 in cases involving dependent, delinquent, or neglected children under the age of sixteen. A statute provided that these children immediately be brought to the juvenile court judge, who would hear and determine each case separately, "at a place and hours most conducive to the child's welfare." A system of rehearings and appeals was established in 1915. Procedures provided that within 21 days after a commitment order was issued, a child's guardian could petition for a rehearing as a matter of right. At the rehearing, the testimony was to be recorded and transcribed by the official court stenographer (at the guardian's cost) and it became part of the record. Appeals could be taken as of right from the juvenile court's final order to the Superior Court. The appellate court's regulations were the same as applied "to appeals from any definitive sentence." If the guardian felt that a change of circumstances warranted the revocation or

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tices of the peace from committing children under the age of sixteen to any institution for purposes of reform or correction. All applications for such commitment were to be brought before the city's Court of Quarter Sessions. Laws, 1903, Sec. 1, p. 66. This statute effectively overturned a 1902 decision holding that the magistrates' power to commit incorrigible children to the House of Refuge was not affected by the 1901 juvenile court law. In re Shelton, 11 Pennsylvania District Reports 155, 26 Pennsylvania County Court Reports 583, 59 Legal Intelligencer 106 (Pa. Court of Quarter Sessions 1902). In 1911, the legislature fleshed out their commitment to probation by authorizing the Courts of Quarter Sessions to appoint probation clerks, stenographers, and office assistants. Laws, 1911, Secs. 1-2, p. 268.

modification of the final order, he had the right to a "full and proper hearing" on his petition.[87]

In 1901, the legislature had provided for a house of detention for untried juvenile offenders and dependent children, pending final determination of their cases. The lawmakers decided that it was not essential to commit a child to the house of detention if a probation officer favored another disposition, but under no circumstances were more than 25 youths to be housed together. Two years later the county commissioners were directed to provide and maintain a building for the separate pre-hearing or pre-trial confinement of juveniles under the age of sixteen.[88]

Operating procedures for the probation-court system soon developed. In Philadelphia, one magistrate came to hear all the children's cases, sitting not as a criminal judge, but as an extraordinary chancellor under the juvenile court law. Although the law permitted juveniles to be proceeded against criminally, the district attorney initiated few prosecutions of children under sixteen years of age. A woman probation officer under the direction of the National Congress of Mothers attended the child's preliminary hearing before a central magistrate. At this hearing the child was customarily released on his parents' bail to appear at the juvenile court. A strong preference was expressed for home detention rather

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[87] Ibid., 1913, Sec. 9, p. 714; 1915, Secs. 1-2, pp. 652-653.

[88] Ibid., 1901, Secs. 1, 6, 8, pp. 601-602; 1903,

than incarceration pending trial. Juvenile court was held once a week, and judges alternated every month. After the probation officer investigated each case, he presented a "comprehensive statement of conditions and previous history" to the judge to aid in his deliberation. The probation officer also testified in every case. If the home was "not criminal," the child was returned to it under probationary supervision. Placement with another family was the next priority. Only if the first two dispositions were entirely unfeasible would the child be institutionally committed. In its first 17 months, the Philadelphia Juvenile Court heard 1100 delinquent and 700 dependent cases, and returned 1000 children home on probation.[89]

The Pennsylvania Supreme Court upheld the juvenile court's informal trial and commitment process in the landmark case of Commonwealth v. Fisher in 1905. Nearly 70 years after Ex parte Crouse had settled the propriety of commitments to the house of refuge through a parens patriae rationale, Pennsylvania's highest court sanctioned another refuge commitment under a statute which codified the extraordinary adaptation of parens patriae in erecting the juvenile probation-court system.[90] Fisher reaffirmed both the anti-legal and

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Sec. 1, p. 137.

[89]Schoff, "Campaign for Childhood," 140-143.

[90]Commonwealth v. Fisher, 213 Pennsylvania State Reports 48, 62 Atlantic Reporter 198 (1905).

government-interventionist trends of juvenile reformation, holding that the legislature had the power to "provide for the salvation" of a delinquent or pre-delinquent, "if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. . . . The act simply provides how children who ought to be saved may reach the court to be saved." The Supreme Court also determined that the constitutional right to a jury trial was not denied by the 1903 act, since the juvenile court neither imposed punishment nor even conducted a trial at all. Finally, the court noted that the act did not establish a new court, but merely granted additional powers to the ancient and quite diversified Court of Quarter Sessions.

Pennsylvania's juvenile probation-court system achieved great success in the courts in its first quarter century. Cases following Fisher upheld the non-criminal jurisdiction of the juvenile court, and justified its reliance on the parens patriae power.[91] Lower courts repeated that the parents'

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[91] In re Juvenile Court, No. 7943, 21 Pennsylvania District Reports 535 (Pa. Court of Quarter Sessions 1912); Commonwealth v. Carnes, 82 Pennsylvania Superior Court Reports 335 (Pa. Superior Court 1923); Commonwealth v. Mountain, 82 Pennsylvania Superior Court Reports 523 (Pa. Superior Court 1924); United States v. Briggs 266 Federal Reporter 434 (United States District Court, Western District of Pennsylvania 1920).

primary right to custody must yield to a judge's better determination of what the child's welfare required.[92] The 1903 Act's definitions of dependent, neglected, and delinquent children were approved,[93] as were the probation-court system's right to make custody orders for all juveniles pending final disposition,[94] and to commit delinquent children for periods which extended beyond their sixteenth birthday up until their twenty-first.[95]

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[92]Brennan v. Gauntlett, 47 Pennsylvania County Court Reports 272, 14 Schuylkill Legal Record 255 (Pa. Court of Common Pleas 1918); Commonwealth v. Bloomfield, 84 Pennsylvania Superior Court Reports 243 (Pa. Superior Court 1924). In 1917, a court construed a 1911 law to authorize a teacher to suspend temporarily, and a school board to suspend or expel an incorrigible pupil. The court also acknowledged the power of a juvenile court, after a hearing, to determine that the continued presence of the student was detrimental to the welfare of his school, and to commit him to the House of Refuge. Laws, 1911, Sec. 1411, p. 382; Mayberry School Board v. Starr, 27 Pennsylvania District Reports 856, 45 Pennsylvania County Court Reports 610 (Pa. undetermined court 1917).

[93]In re Juvenile Court, No. 2725, 18 Pennsylvania District Reports 79, 36 Pennsylvania County Court Reports 49 (Pa. Court of Quarter Sessions 1908) (dependent child); Commonwealth v. Murray, 26 Pennsylvania District Reports 489 (Pa. Court of Quarter Sessions 1917) (dependent child); Commonwealth v. Bickel, 78 Pennsylvania Superior Court Reports 348 (Pa. Superior Court 1922) (neglected child); Commonwealth v. Carnes, 82 Pennsylvania Superior Court Reports 335 (Pa. Superior Court 1923) (delinquent child).

[94]"Administration of the Juvenile Court," Pennsylvania District Reports, 17 (1908), 207-212.

[95]Commonwealth v. Briggs, 68 Pittsburgh Legal Journal 618 (Pa. Court of Common Pleas 1920).

Steps toward increasing the availability of outdoor relief and expanding the range of government supervision were taken by the legislature in 1909 and 1917. The former statute gave reformatory managers the discretion to release minors "on parol" when it would be in their best interests, and authorized the managers to pay the board at a family home for children whose mental or physical defects prevented them from being indentured or placed out in the customary way. The 1917 legislation conferred on the Board of Public Charities a general supervisory and management power over all matters within the juvenile probation-court act.[96] An eight-year legislative effort resulted in the establishment of county schools in 1917 for all children committed by the juvenile court. Supplementary to the state school system, these schools were to operate year-round on the cottage plan. The legislature set out guidelines for the construction and design of the school buildings, decreed they should be built on farms, and provided for instruction in the "common branches, and manual and moral training."[97]

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[96]Pennsylvania, Laws, 1909, Sec. 1, p. 113; 1917, Sec. 3, p. 771.

[97]Ibid., 1909, Secs. 1-9, pp. 302-305; 1911, Secs. 1-3, pp. 262-264; 1913, Sec. 1, pp. 263-264; 1915, Secs. 1-10, pp. 244-246; 1917, Secs. 1-15, pp. 693-697; 1917, Sec. 1, p. 802.

Promise and Threat: Probation and the Institution

In its first quarter century, the juvenile probation-court system tried with relative success to eliminate the idea of criminality as a prelude to the prevention and treatment of juvenile delinquency.[98] Probation provided, in the words of Homer Folks, "a new kind of reformatory," but it was clear from the outset that the coercive taint of the traditional reformatory was not meant to disappear. The probation discipline at the turn of the century merely intended for institutional commitments to recede from the foreground of child-saving methodologies.[99]

That probation itself was a coercive methodology was evident from its structure and early practice. The probation

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[98]Joel Handler has proposed that "the critical philosophical position of the reform movement was that no formal, legal distinctions should be made between the delinquent and the dependent or neglected." Joel Handler, "The Juvenile Court and the Adversary System: Problems of Function and Form," 1965 Wisconsin Law Review (1965), 9. Platt pointed out that statutory definitions of delinquency included not only criminal law violations but also a broad spectrum of adolescent conduct categorized as "vicious or immoral behavior," "incorrigibility," "truancy," "profane or indecent language," "growing up in idleness," "living with any vicious or disreputable person," etc. Child Savers, 138.

[99]Homer Folks, "Juvenile Probation," Proceedings of the National Conference of Charities and Correction (1906), 122; Mennel, Thorns & Thistles, 143-144. Early juvenile court records from Cook County, Illinois indicate that incarceration may not have receded very far at all. One-third of all accused delinquents were committed to reform schools or transferred to the criminal courts. Institutionalization was the prescribed remedy for nearly two-thirds of all girls found to be delinquent. See Platt, Child Savers, 140-141. Timothy

officer was portrayed as standing "between the family and the law," but the significance of his conflicting loyalties was never recognized. As the representative of government benevolence, the probation officer's influence staved off a reform school commitment. But as an officer of the court, the specter of the institution underlined his every contact. Because juvenile court children were not subject to the criminal law, probation officers dismissed due process safeguards as irrelevant. This attitude "often obscured or eliminated the proof of facts essential in establishing the court's authority to intervene in the circumstances."[100] The probation officer was encouraged to "utilize to the fullest degree whatever advantages there are in the shock caused by apprehension of the child, by the court proceedings and the judge's counsel."[101]

Hurley measured the success of the juvenile court's first year in terms of intensive government intervention: "(The juvenile court) has saved hundreds from lives of shame and crime; taken hundreds from homeless life or from so-called homes that were utterly unfit, and placed them in good institutions or in the care of societies to find them suitable homes." First Annual Report of the Cook County Juvenile Court (1900), p. 3.

[100] Mennel, Thorns & Thistles, 139-140.

[101] Homer Folks, "Juvenile Probation," 117-122. See Timothy D. Hurley, "Juvenile Probation," 225-232; Henry W. Thurston, "Some Phases of the Probation Work of the Juvenile Court," Proceedings of the National Conference of Charities and Correction (Portland, Ore., 1905), 184-185. Hastings L. Hart casually noted that it was "interesting to see . . . the surprising improvement which takes place in many families under the influence of the probation officer, strengthened by

Since the purpose of the juvenile probation-court was not to determine legal guilt but to alter delinquent norms, the criteria for inclusion into the treatment process were consequently vague. But the incarceration that awaited the system's failures was an unmistakable reminder that society had not totally abjured indoor relief for its child offenders. The informality and personalization of the court and probation techniques could, in the absence of due process safeguards, result in the untrammeled institutionalization of juveniles seen as not amenable to probationary supervision. In 1914, Judge Edward L. Lindsey of Pennsylvania described his state's juvenile court act as "clearly in conflict with constitutional provisions and this conclusion can only be escaped by evasions." Lindsey added, "Every child accused of crime should be tried and subject to neither punishment nor restraint of liberty unless convicted. No child should be restrained simply because he has been accused of crime, whether he is guilty or not."[102] In 1927, Judge Charles W.

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the fear of having the child taken away from his home by the court." Hastings L. Hart, "The Juvenile Court as a Non-Criminal Institution," in Preventive Treatment of Neglected Children, 255. Wall has noted that in juvenile court procedure, the "prosecutor was noticeably absent; in his place a probation officer equipped with the facts of a social investigation of the child presented evidence in his behalf." Wall, "Juvenile Court Movement," 12. Mennel has crisply summed up the role conflict and its resolution: "Probation officers, whatever their sympathies for delinquent children, considered themselves servants of the judge of the juvenile court, not defenders of the rights of children." Mennel, Thorns & Thistles, 139.

[102]Quoted in Mennel, Thorns & Thistles, 146-147.

Hoffman surveyed Pennsylvania's juvenile court system and found many children confined in detention homes and jails, despite state laws forbidding the incarceration of children. "What has the advanced legal status accomplished?" he asked. "Is it not clear that the juvenile courts are not functioning?"[103]

The juvenile courts were indeed not functioning, for various reasons, but the inability to perceive the relationship between treatment mode and legal process was a significant contributory factor. For two generations the juvenile court failed to separate the promise of probation from the threat of incarceration. Although the transition from indoor to outdoor juvenile reform began in the late nineteenth century, it remained largely unrealized until the United States Supreme Court injected a modicum of due process into juvenile court procedure in the 1960's.[104] The spiral of delinquency has wound from the colonial home through the house of refuge, the juvenile court and probation. Institutionalization has taken and failed every historical test.

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[103] Ibid., 146.

[104] The lessons of Kent v. United States, 383 U.S. 541 (1966), In re Gault, 387 U.S. 1 (1967), and In re Winship, 397 U.S. 358 (1970), can be understood to extend to juveniles certain procedural rights previously applied only within the adult criminal system. But in another sense, in raising obstacles to the imposition of juvenile incarceration, they narrow the scope of indoor relief. These cases can thus be read to fulfill the cycle of reform, from outdoor to indoor, and once again to outdoor relief.