The Creation of Juvenile Justice:

A History of New York's Children's Laws

By Merril Sobie

Republished for the 50th
Anniversary of the New York State
Family Court, September 2012

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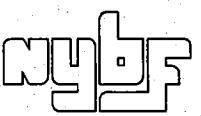

THE NEW YORK BAR FOUNDATION
Albany, New York

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Introduction to the Family Court Fiftieth Anniversary Publication

Silver anniversaries call for celebration – and Family Court has much to celebrate. The founder's goal, an integrated tribunal capable of adjudicating and ameliorating every aspect of familial discord, has been largely achieved. The contributions and achievements of literally hundreds of judges, thousands of non-judicial court officials, and scores of public and private agencies, merit congratulations and applause.

My relationship with the Family Court commenced in 1968, when the then Presiding Justice of the First Department (with the concurrence of the Second Department PJ) asked me to conduct a comprehensive study and evaluation of "the new court" I found much to commend and much to criticize. With the assistance of many individuals and the support of the Appellate Division (in the pre-Office of Court Administration era), I devoted several years to forging a unified New York City court from the multitude of disparate predecessor tribunals. I also found that little was known about the origins of children's laws or the procedures which had evolved over the centuries to adjudicate children's issues. I resolved to someday chronicle the missing history.

That day arrived in the early 1980's, after I had traded court administration for academia. With the generous support of the New York Bar Foundation, several research assistants and I uncovered long buried nineteenth century session laws and many forgotten albeit significant trial and appellate decisions, supplemented by scores of nineteenth and early twentieth century governmental and private child welfare agency reports. The Creation of Juvenile Justice hopefully weaves those threads into a coherent tapestry.

The tale told in "Creation" obviously ends in 1987. But Family Court, like any institution dedicated to human relationships, continues to evolve. To cite but a few examples, in 1987 the word "permanency" was meaningless to family law, domestic violence was a largely hidden issue, and "parenthood" embraced only heterosexual biological or adoptive parents. A new volume would be needed to detail the developments of the past 25 years. In the meantime, I am grateful that the New York State Bar Association has republished "Creation" in commemoration of the Court's 50th anniversary.

We cannot know what the next half century will bring. We understand the rich history and aspirations of this important unique court, and know that today the court rests in capable hands. The proud tradition continues. We have much to celebrate on this grand occasion.

Merril Sobie
September 2012

ACKNOWLEDGMENTS

The idea of writing a historical analysis of children's laws dates from 1981, when I was completing a study of the 1978 New York Juvenile Offender Act. Since Juvenile Offender provisions, such as criminal court jurisdiction and the imposition of a punishment model for adolescent criminality, represented a radical departure from historical traditions, I thought a summary history might prove helpful. But, surprisingly, a historical account had never been published. Further, available fragmentary nineteenth century secondary sources suggested a rich history, one which did not correlate with the contemporary view as initially advanced by twentieth century juvenile court proponents. Scholars, students and practitioners were formulating critical decisions without the benefit of a historical context; the strong jurisprudential underpinnings of children's laws were unknown or misperceived. It became apparent that a critical analysis was both practical and desirable.

I am greatly indebted to The New York Bar Foundation for supporting the study through the several years of research, writing and ultimate publication. Special thanks to Bob Patterson, whose advice was extremely helpful, and to Bob MacCrate, The Bar Foundation President. Bill Carroll, Foundation Secretary, and the Bar Association staff have also unswervingly supported and assisted the project throughout the years.

I am grateful to those who evaluated manuscript drafts and suggested improvements: Jane Knitzer, Flora Rothman, Barbara Flicker, Trude Lash, Betty Schack, Jules Kerness and Eve Brooks. Batya Miller contributed greatly as editor. And special thanks are owed to my research assistants: Lee Elliott, Marilyn Davis and Alice McCarthy.

Last, I am deeply indebted to Charles Schinitsky, the founding director of the New York City Legal Aid Society Juvenile Rights Division. His inspiration, guidance and support has been invaluable. Charlie, the father of children's rights, is in many respects the godfather of *The Creation of Juvenile Justice.*

Merril Sobie
White Plains, New York
April 1987

PREFACE

For the child welfare and juvenile justice system the generation since the 1986 landmark *Gault* decision has been one of self-doubt, controversy and change. As a Family Court judge in New York State during the post-*Gault* generation and as a member of several State advisory committees and commissions dealing with the child welfare and juvenile justice reforms, I became heavily involved in the heated disputes over the perceived failures of the substantive and procedural family law and its administration, and the proposals for legislative change. New York's turmoil over the State's proper response to dysfunctional families, deprived children and violent youth was typical of what nationally became a major public policy controversy.

The existing system, during this era, was under attack from both ends of the ideological spectrum. Both sets of doctrinal critics, however, proceeded from the same factual assumption about the way the present system evolved. It was that, for about a half century, beginning in the early 1900s, the United States embarked and expanded upon a radical experiment to merge traditional legal concepts of substantive law and judicial authority regulating children and families with more contemporary theories and practices of social work, the behavioral sciences and social agencies. The product of this marriage, so the critics asserted, was the infamous "treatment model" of the family or Juvenile court, an unworkable mutation which served neither the interests of its clients for the improvement of their condition nor of society's need for effective social control.

Starting from these common historical presuppositions, the critics from both sides arrived at radically different views as to the basic, inherent defects in the existing approach. On one hand, rights-oriented activists and academicians pointed to the unorthodox, overabundant judicial and administrative discretion in the present system, of broken promises of rehabilitation and the lack of objective standards triggering the exercise of court jurisdiction over, e.g., child neglect and status offenders, all of which permitted excessive State intervention which did more harm than good. On the other hand, public order advocates saw the same features and failed promises as the principal sources of pervasive leniency

and fuzzy-mindedness, crippling the social control function of the law and producing widespread anomie. It is noteworthy that the reforms urged by both of the foregoing schools of thought mirrored each other in looking to a return to what they perceived to be a truer, "punishment" model of determinate sanctions, severely limited judicial and administrative discretion, and the procedural features of the adult criminal justice system. In New York, the criticisms obviously proved quite effective, producing drastic statutory changes which have made this State one of the harshest in the country in its treatment of juvenile crime.

In retrospect, the common historical view, which I have described, of the institutional origins of the juvenile justice and child welfare system was quite significant in eliminating support for the then existing approach and bringing about the far-reaching recent changes that followed. The portrayal of the system as an aberrational parvenu effectively denied the system legitimacy. Moreover, representation of the system as a relatively recent and radical change from the past enabled critics to attribute a causal relationship between it and the empirical evidence on recidivism and increase in youth crime.

Professor Sobie's book, in my view, makes a significant and salutory contribution to the field of juvenile justice by providing a far more realistic and historically valid picture of how the system evolved. He has gathered and integrated prior studies of the various separate components of the system with his own original research on early legislation, judicial decisions and official reports. The book demonstrates, conclusively I think, that the contemporary juvenile and family law, procedures and practices which have been under attack, did not represent a radical departure from the past, but were the product of steady, progressive development over most of our national history. *The Creation of Juvenile Justice: A History of New York's Children's Laws* shows that very early on, society's organized treatment of child misconduct contained many of the features which today are most frequently identified as the defects in the system. In point of fact, diversion from the adult criminal justice system, indeterminancy of sanctions, judicial and administrative discretion and a close working relationship between courts and child care agencies characterized juvenile justice long before the first special court was created in Illinois in 1899 and New York adopted its counterpart in 1922. Indeed, Professor

Sobie's study strongly suggests that the separate juvenile court was a natural, incremental and inevitable outgrowth of earlier developments. However, unbridled judicial discretion and disregard of due process standards (as some of present critics characterize the court) existed only for a brief period, and appropriate procedural safeguards were reintroduced in the 1962 New York legislation creating the Family Court and imposed nationally when the United States Supreme Court decided *In Re Gault.*

The value of Professor Sobie's study is manifold. For those who are or have been practitioners or are otherwise intensely involved in the field of juvenile justice and child welfare law, it gives fresh insight into how the diverse and unique components of the system, such as the role of private non-governmental agencies, came into existence. It demonstrates the ancient origin and durability of rehabilitation as a principal objective of the system, leaving me at least with some confidence that contemporary attacks on rehabilitation as a legitimate public policy goal for family and juvenile law are not likely to prevail. Finally, the historical perspective supplied here will enrich and make more rational the continuing debates and decisionmaking over the future direction of this important area of the law.

Justice Howard A. Levine
Associate Justice
New York State Supreme
Court, Appellate Division,
Third Department

INTRODUCTION

Twentieth century juvenile justice scholarship has focused largely on the juvenile court movement. Established first in Chicago in 1899 and replicated throughout the country within one generation, the juvenile courts have been perceived as a jurisprudential "revolution" which substituted the benevolence of individualized treatment for punitive criminal sanctions. For example, Julian Mack began his landmark 1909 juvenile court study with the following observation:

> The past decade marks a revolution in the attitude of the state toward its offending children, not only in nearly every American commonwealth, but through-out Europe, Australia, and some of the other lands.*

As experimental tribunals, the juvenile courts evaluated, supposedly for the first time in Anglo-American legal history, a youth's environment and background, including possible parental deficiencies. Judges could thereby presumably obtain the insight necessary to formulate measures designed to protect the child against further maltreatment or antisocial behavior. An informal inquiry into the facts and social history supplanted rigid rules of criminal procedure. The juvenile court structure continued unamended, or so the theory goes, until the *Gault* decision mandated procedural

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* Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909). The presumed harshness of the pre-juvenile court principles is underscored in a frequently quoted excerpt from Justice Stewart's dissent in the *Gault* case:

> In that era there were no juvenile proceedings, and a child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was that a twelve-year-old boy named James Guild was tried in New Jersey for killing Katherine Beaks. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional. *In re Gault*, 387 U.S. 1, 79-80 (1967).

In fact, James Guild was only one of two children executed in the United States between the years 1806 and 1882 — both were slave children; see, *infra* page 17.

formality, compromising, for better or for worse, the movement's founding tenets after seventy uninterrupted years.

In fact, however, the juvenile court movement was hardly revolutionary; the modern perception is based on a series of myths. For example, contrary to popular belief, at common law, and prior to the juvenile court era, the child was not subject to the full sweep of the criminal laws, but was protected by several ameliorative doctrines such as the infancy presumption and mitigation. The execution or other violent punishment of a child was an extremely rare occurrence. Of perhaps equal significance, children's laws developed extensively throughout the nineteenth century, particularly following the Civil War. Alternative dispositions for delinquent youth were available from 1824; subsequently, the child protective movement brought great change to the legal system. By the late nineteenth century the legal concepts which govern contemporary delinquency, status offense and child protective proceedings were largely in place — the juvenile courts simply superceded the criminal courts as the arbiters of disputes involving children.

Further, the informality and disregard of procedural rules which supposedly characterized juvenile courts from their inception evolved only slowly. Several early juvenile courts applied due process standards and New York appellate courts did not sanction procedural irregularities until 1932. The practices witnessed immediately prior to the *Gault* decision were just that — practices which may have developed over a long time span, but typified juvenile justice only for the period immediately preceding *Gault* and the public reawakening of the system's problems and potentials.

One reason, perhaps paramount, for the mythical attitudes about the early juvenile court movement has been a lack of research into nineteenth century (and pre-nineteenth century) children's laws. Although summary accounts have been published,* the development of juvenile legal principles has largely escaped both the historian and the lawyer. This study constitutes perhaps the first compendium and analysis of children's legal history. Based in large measure on long dormant session laws, overlooked cases and nine-

* See e.g. Tappan, *Juvenile Delinquency*, McGraw Hill (1949), pages 167-178.

teenth century secondary sources, the study focuses on New York, though the legal evolution cuts across state lines.* In many ways, New York was a pioneer — the first state to establish a house of refuge, one of the leading centers in the development of child care agencies, and the first state to establish societies for the prevention of cruelty to children for the purpose of investigating and prosecuting child maltreatment. Although many other important concepts originated outside New York (for example, the formation of probation services in Massachusetts and the establishment of the first juvenile court in Illinois), New York readily adopted most major innovations. In many respects, New York's history precedes or parallels the national history.

This study is divided into six chronological chapters (though there is considerable overlap). The first chapter briefly traces the origins of legal principles involving children and the second discusses New York's history prior to the Civil War. Chapters three and four are devoted to late nineteenth century developments while chapters five and six analyze the development of the separate children's court system and the early twentieth century refinements of delinquency and child protective legislation. The book concludes with a summary account of developments after 1935, including the enactment of the 1962 Family Court Act and the procedural "revolution" sparked by the 1967 United States Supreme Court *Gault* decision.

* The study is intended as a complete New York legislative history; in addition, relevant caselaw and selective secondary sources have been included.

CHAPTER I

The Origins of Legal Principles Affecting Children

New York's children's laws were originally based upon an adaptation of ancient English principles, such as the infancy presumption and the doctrine of non-intervention in familial affairs. Criminal prosecution of a youngster below the age of fourteen was a rare occurrence and severe punishments were virtually never imposed upon children of any age. Parental authority was supreme, precluding state intervention for child protective purposes.

A. The Common-law Approach to Juvenile Crime

The legal principles governing juvenile criminal behavior developed originally through English common law and, as a part of the common-law heritage, were subsequently integrated into American jurisprudence. Common-law criminal penalties were stringent, entailing at least the possibility of capital punishment upon conviction for most felony offenses. Imprisonment was virtually unknown (except for pre-trial detention), but a convicted defendant could forfeit his entire estate, be fined, pressed into military service, or forced to emigrate.

However, the successful criminal prosecution of a child was a rare event, for a juvenile was protected by two fundamental common-law principles. First, a child under the age of seven was immune from prosecution, i.e. could not be charged with the commission of a crime, while a youth between the ages of seven and fourteen was entitled to the strong presumption of infancy, i.e., was presumed to lack the criminal intent necessary to establish guilt. Second, several of the routine forms of punishment, including forfeiture or fine, could not be levied against a minor (since a person under the age of twenty-one could not possess property). And there was an understandable reluctance to order the more drastic sanction of capital punishment for youths[1] who, despite the presumption of infancy, had been convicted of committing even the most violent crimes.

1. Throughout this book the words "child," "youth," and "juvenile" are used interchangeably. However, the word "minor" always refers to a person under the age of twenty-one, a definition which reflects common legal usage.

The infancy presumption is described in a widely quoted excerpt from Blackstone's Commentaries:

> Under seven years of age indeed an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony. Also, under fourteen, though an infant shall be prima facie adjudged to be doli incapax; yet if it appear to the court and jury, that he was doli capax, and could discern between good and evil he may be convicted and suffer death . . . But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction.[2]

Thus the child was presumed to lack criminal capacity, the ability to understand the consequences of criminal behavior or to differentiate between right and wrong; the presumption could be rebutted only by strong and clear evidence "*beyond all doubt and contradiction.*"[3]

Blackstone did describe four cases in which children were executed, three for the crime of murder and one for arson.[4] These cases, however, spanned two centuries and were reported as exceptions to the general rule. On the other hand, English legal

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2. Sir William Blackstone, *Commentaries on Laws of England, Book IV*, Chapter II, pp. 23-24 (1723-1780). Blackstone presumed that every felony was a capital offense, though apparently a few felonies were punishable only by forfeiture and not by death. As he noted: "the idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if statute makes any new offense felony, the law implies that it shall be punished with death, viz. by hanging, as well as with forfeiture" *Id.* at 98.

3. Emphasis added. The quantum of proof required was greater than the current criminal standard of "beyond a reasonable doubt." Infancy is currently deemed a "defense" rather than a "presumption"; for example, Penal Law §30.00(3) stipulates that "In any prosecution for an offense, lack of criminal responsibility by reason of infancy, as defined in this section, is a defense." A "defense" must be raised by the person charged with the crime and may be waivable (although infancy might constitute an unwaivable jurisdictional infirmity under the Penal Law) — on the other hand a "presumption" need not be interposed by the defendant, but is applied automatically.

4. Blackstone, *supra* note 2 at 24.

historical literature is replete with reports of acquittals based on infancy or of pardons granted to children who were convicted of violent crimes.[5] For the most part, the common-law presumption constituted a formidable impediment to obtaining a felony conviction.[6]

Further, minority was ordinarily considered a mitigating factor in determining the penalty upon conviction. As noted by Wharton, "The law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanors; so as to escape fine, imprisonment, and the like."[7] Children between the ages of fourteen and twenty-one could freely be convicted of felonies or misdemeanors amounting to a breach of peace. But they

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5. Perhaps typical was the 1748 case of William York, a ten-year-old boy convicted of murder. York was originally sentenced to death "But the Chief Justice, out of regard to the tender years of the prisoner, respited execution till he shall have any opportunity of taking the opinion of the rest of judges, whether it were proper to execute him or not upon the special circumstances of the case. Several reprieves took place, till at last, at the Summer Assizes, 1757, he had the benefit of his majesty's pardon, upon condition at his entering immediately into the sea service"; 1 Hale 26, as reported in Wharton, *Treatise on Criminal Law of the United States* (1861) at 47.

6. The infancy presumption also applied to children under the age of fourteen accused of committing misdemeanors amounting to a "notorious breach of peace." In addition, no person under the age of twenty-one could be prosecuted for a misdemeanor which did not involve a breach of peace; see footnote 7, *infra*.

   A person under the age of fourteen was also conclusively presumed to be physically incapable of committing the crime of rape and hence could not be prosecuted; see Wharton, supra note 5 at 48.

7. The full excerpt from Wharton is as follows:

   > The law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanors; so as to escape fine, imprisonment, and the like: and particularly in crimes of omission, as not repairing a bridge, or a highway, and other similar offenses; for, not having the command of his fortune until twenty-one, he wants the capacity to do those things, which the law requires. But where there is any notorious breach of the peace, a riot, battery or the like (which infants when full grown, are at least as liable as others to commit), for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one.

   Wharton, *supra* note 5 at 49.

could not suffer forfeiture and were rarely executed. The common available penalties for that age group was forced emigration, imprisonment or corporal punishment.[8]

The criminal common law thereby effectively divided childhood into three equal multiples of seven. Below the age of seven prosecution was precluded. Between seven and fourteen the infancy presumption was applied while mitigation principles generally softened the penalty in the relatively few cases where the presumption could be rebutted. In the final seven years leading to adulthood the infancy presumption no longer applied, but a youth could not suffer forfeiture and age would be considered as a mitigating factor in determining other appropriate sanctions.

Executions of minors were rare, not only because of the infancy presumption and mitigation factors, but because the imposition of capital punishment was infrequently imposed upon adults as well. Blackstone, for example, describes "the great paucity of capital punishments for the first offense: even the most notorious offenders being allowed to commute it for a fine or wergild or, in default of payment, perpetual bondage"[9] and in the introductory chapter to his volume on Public Wrongs, lists multiple mitigating factors:

8. The most prevalent felony punishment was forfeiture, while misdemeanors were commonly punished by fine. Both were inapplicable to minors — a person under the age of twenty-one could not possess an estate and hence could not forfeit. Less barbaric forms of physical punishment, such as whipping, were available and presumably implemented, at least for minors between the ages of fourteen (when the infancy presumption expired) and twenty-one. Or the minor could, as in the *York* case, be forced into military service or emigration. Long-term imprisonment, however, was not possible until the establishment of the penitentiary system at the end of the eighteenth century. To a large extent youths under the age of twenty-one escaped the most rigorous criminal penalties. And the lack of severe sanctions, other than infrequently imposed execution, coupled with the strong infancy presumption, probably accounts for the paucity of prosecutions involving children under the age of fourteen.

[T]he injured, through compassion, will often forebear to prosecute: juries through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense: and judges, through compassion, will respite one-half of the convicts, and recommend them to the royal mercy.[10]

If the compassions of the injured, jurors, or judges significantly limited capital punishment generally, would they not virtually preclude the execution of children? If there was a "great paucity" of capital punishments for first offenders, would there not be an

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9. Blackstone, *supra* note 2, Book IV, Chapter XXXII, at 406. For an earlier period Maitland reported that:

> In 1256 the justices in Northumberland heard 77 murders; 4 murderers were hanged, 72 were outlawed. They heard of 78 other felonies for which 14 people were hanged and 54 were outlawed. In 1279 their successors in the same county received reports of 68 cases of murder, which resulted in the hanging of 2 murderers and the outlawry of 65, while for 110 burglaries and so forth 20 malefactors went to the gallows and 75 were left "lawless" but at large. Thus, after all, we come back to the point whence we started, for, whatever the law might wish, the malefactor's fate was like to be outlawry rather than any more modern punishment.

Sir Frederick Pollock and Frederick William Maitland, The *History of English Law*, Vol. II (1911) at 557.

10. Blackstone, *supra* note 2, Book IV, Chapter I at 19. He continued with a vivid description of criminal incentives:

> Among so many chances of escaping, the needy or hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to condemn.

Minimal reliance on capital punishment was the norm, but executions increased during period of civil disorder. For example, William J. Bowers, in a recent survey of capital punishment, reports that "Notably, executions appear to have reached their highest level in English history during the period of turmoil and political consolidation that followed Henry VIII's break with the religious domination of the papacy." *Legal Homicide: Death as Punishment in America, 1864-1982*, Northeastern University Press (1984) at 135.

even greater paucity for the first offender child? Although the evidence is far from complete, it would appear that the execution or other severe punishment of a child was indeed a rare occurrence throughout English history.

In Britain, the dual protection of the infancy defense and mitigation continued throughout the nineteenth century.[11] An interesting study of Old Bailey court records revealed that a total of 103 children below the age of fourteen were sentenced to death between the years 1801 and 1836; none, however, were executed.[12] Pardons and lesser punishments such as emigration were common occurrances.[13] Indeed, the protections of the infancy presumption and mitigation continued to be applied until Parliament abolished the death penalty in 1908 for children under the age of sixteen and subsequently substituted delinquency actions for criminal prosecutions.[14]

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11. See Joseph Chitty, *A Practical Treatise on Crime and Misdemeanors*, at 724. Two early nineteenth century English cases in which ten-year-old children were acquitted are *R. v. Owen*, 4 C. & P. 236 (1830) and *R. v. Smith*, 1 Cox 260 (1845).

12. B.E.F. Knell, *Capital Punishment*, 5 British Journal of Delinquency 206 (1965) as reported in Anthony M. Platt, *The Child Savers*, University of Chicago Press (1977), page 197; the fact that 103 children were convicted, an average of three per year, appears to be rather high, given the strength of the infancy presumption and the earlier reported reluctance to even charge youths with the commission of felony offenses.

13. For example, the London Philanthropic Society for the Prevention of Crime, an institution founded in 1780 for juvenile offenders and the children of adult criminals, reported that of 681 boys and 126 girls who were placed with the institution between 1830 and 1834, 428 were placed out in the colonies while 121 were returned to their parents, relations or friends; *The Criminal Responsibility of Juvenile Offender, in Connection with Suitable Houses of Rescue or Reformation*, 27 American Jurist & Law 293, 303 (1842); the Society reported that "As the Society is in correspondence with benevolent families all over the kingdom and in the colonies, it becomes easy for them to obtain places for their young wards"; *Ibid.*

14. In 1908 England formally abolished the death penalty for persons who were under sixteen years of age at the time of conviction; *Royal Commission on Capital Punishment 1949-1953 Report.*

B. The Early American Response to Juvenile Crime

Eighteenth century English common-law principles shaped the rules governing the criminal responsibility of children in the United States during the colonial and early statehood periods. The infancy presumption was applied fully and American courts were apparently as reluctant as their English counterparts to punish children severely.[15]

For example, a study of criminal laws in colonial Massachusetts concluded that: ". . .the courts exhibited a surprising degree of humane and kindly treatment toward the very young. . .Many of the criminal laws set a minimum age limit, usually fourteen or sixteen, excusing from punishment offenders below such limits."[16] So too, "young children were not publicly whipped and, so far as available records reveal the judgments of the courts, probably no child under fifteen was executed."[17] Massachusetts, whose colonial history is well documented, was not alone in establishing a benevolent policy. Other states, including New York, were reluctant to impose stringent criminal penalties for the youthful offender[18] and penal statutes or punishments were frequently in-

15. An interesting theme in early American history was the concept that child discipline is primarily a family responsibility, even when the child had committed public wrongs. In extreme cases the parent could voluntarily apprentice or bind out a troublesome youth; see Robert H. Bremner, *Children and Youth in America*, Vol. 1, page 307 (1970). Children who were orphaned or whose parents were not available to impose discipline were likewise apprenticed or sent to almshouses for community placement.

    The emphasis on parental control led to the enactment of statutes imposing severe punishment, including possible execution, of children who were found guilty of parental disobedience; Id. pages 37-38. In practice, however (and similar to the application of the English common law) the sanction was never practiced — at least prior to 1823 there is no reported execution of a child under the age of sixteen for any crime, including parental disobedience.

16. Edwin Powers, *Crime and Punishment in Early Massachusetts*, Beacon Press (1966) at 529.

17. *Ibid.*

18. See, for example, Bremner, *supra* note 15, Vol. I at 34-39.

applicable to persons below the age of fourteen or sixteen.[19] In effect, for certain crimes the infancy presumption became a substantive rule of law precluding even the initiation of criminal charges.

The abhorrence of levying severe sanctions against children and the presence of penal statutes which exempted youths accounts, at least in part, for a singular lack of prosecutions. There are no reported New York cases involving juvenile defendants under the age of fourteen until the early nineteenth century.[20]

Further, throughout the country youngsters were exempt from capital punishment. For example, an official New York criminal law reporter commented in 1823 that "the lowest period, that judgment of death has been inflicted upon an infant in the United States, has never extended below sixteen years, or at least after a careful search none could be found, and it is presumed none can be found."[21] At a minimum, common-law principles protected eighteenth century children from execution, minimized the application of other punishments, and precluded the prosecution of children for many acts considered criminal when performed by adults.

By the early nineteenth century, however, the prison system had been established in New York — the Legislature authorized construction of the first penitentiary in 1796.[22] Conceived as a

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19. Bremner, for example, observed that "...individual colonies statutorily exempted young children [below age sixteen] from certain punishments," such as public whipping; *Id.* at 307.

20. The earliest reported case involving a child under the age of fourteen is Garret Walker, decided in 1820; 5 New York City Hall Recorder 137.

21. Note following *People v. William Teller and Jason Teller*, 1 Wheeler's Criminal Cases 231, 232 (1823).

22. L. 1796, c. 30. The statute also abolished capital punishment for all offenses except murder or treason, substituting life imprisonment. Judges were authorized to imprison "for any term not more than fourteen years" upon conviction of a lesser felony. The statute also abolished forfeiture and whipping.

    The penitentiary site was New York City. "Located at Greenwich Village, it was opened in 1797 and remained the sole state prison in New York until the opening of the Auburn Institution twenty years later"; Schneider, *infra* note 49 at 146.

substitute for execution or forfeiture, imprisonment constituted a revolution in penal philosophy which directly affected the juvenile offender. For the first time a court could avoid the application of common-law penalties without releasing the child.[23] To an 1800 reformist imprisonment represented a progressive measure; its benefits might well be extended to youths who would otherwise be protected by the infancy presumption or other common-law ameliorative provision. Perhaps for this reason, the first reported New York criminal cases involving juveniles arose shortly after inauguration of the prison system.

The initial reported case involving a child of less than fourteen years of age was *Garret Walker's* case.[24] Walker, a seven-year-old, had been indicted for petty larceny. At the trial, the defense successfully interposed the infancy presumption (as described by Blackstone a century earlier):[25]

> Wilson [the defense attorney] submitted to the court, that as a child of seven was held incapable of crime, and between that age and fourteen it was necessary to show his capacity; and that, in proportion as he approached to seven the inference in his favor was the greater, and as he approached to fourteen the less, that there was not sufficient evidence in this case to support the prosecution, especially as strong evidence of incapacity had been produced on his part. Upon this principle, the Mayor charged the Jury, who immediately acquitted.[26]

23. For the first time also, the youthful offender could be incarcerated for lengthy periods with older, hardened criminals; see pages 25-26.

24. 5 New York City Hall Recorder 137 (1820).

25. See page 6.

26. 5 New York City Hall Recorder at 137 (1820).

The infancy presumption was strong, but, of course, could be rebutted by the prosecution. For example, in the year that *Walker* was decided four New York City youths between the ages of seven and fourteen were indicted for larceny: *George Stage's case*, and *Harris Kellet, Hirem Mills, and Isaac Rubin's case*, 5 New York City Hall Recorder 177 (1820). Stage was charged with grand larceny while Kellet, Mills and Rubin were co-defendants charged with a separate incident of petty larceny. The prosecution introduced evidence proving the concealment of the stolen merchandise and the flight of one defendant to refute the infancy presumption. After the Mayor charged the Jury concerning the presumption, convictions were returned and each youth was sentenced to serve three years in the state prison or penitentiary (*Id.* at 178). Whether the jury would have convicted if imprisonment was not available cannot, of course, be determined.

Judges and jurors also considered youth as a mitigating factor, even when adjudicating offenders who were beyond the age of presumptive infancy. One example is the case of *Eliza Perkins*.[27] Perkins, a youngster who apparently was above the age of fourteen,[28] was indicted for stealing a pocketbook containing $140 (a large sum in 1816). At the conclusion of the trial "the jurors immediately pronounced her guilty, but recommended her to mercy by reason of her youth."[29] The court consequently suspended sentence.

The strength of the infancy presumption in this state is perhaps best illustrated by the case of *People v. William Teller and Jason Teller*, decided in 1823.[30] The evidence of guilt was identical against both defendants, who had been charged with larceny. Each possessed stolen property and each had confessed. However, "Jason was not quite fourteen but William Teller was more than fourteen" and hence not protected by infancy:

> The evidence of Jason's capacity was unsatisfactory; some of the police officers, who knew the boy, thought him active, shrewd, and intelligent while others had a different opinion of his capacity. The Court explained the law to be as charged in the case of Davis and M'Bride, and they returned a verdict of guilty against William Teller, and of acquittal for Jason Teller.

The critical distinction was hence age. The conviction of a person under fourteen was exceedingly difficult to achieve while persons above the age of fourteen could be convicted and imprisoned as adults (though punishment might be mitigated in deference to the defendant's youth).[31]

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27. 1 New York City Hall Recorder 6 (1816).

28. Although her age is not cited in the report, the absence of any discussion of the infancy presumption or any mention of age indicates strongly that she was above fourteen.

29. *Ibid.*

30. 1 Wheeler's Criminal Cases 231; the reporter's notes following this case have already been outlined; see page 12.

31. Whether the elder Teller, like Eliza Perkins, was granted mercy as a result of tender years (a suspended sentence, for example) was not reported.

An interesting examination of the relationship between the criminal and the civil law infancy principles is the somewhat later case of *People v. Kendell*.[32] At common law, a person under the age of twenty-one could not enter into a civil contract.[33] Kendell was older than fourteen but less than twenty-one. He obtained goods by misrepresenting his age, but subsequently refused to pay the agreed price. The merchant commenced a civil contract action, whereupon Kendell successfully pled the civil infancy defense. When he was nevertheless indicted for obtaining goods by false pretenses, i.e. by misrepresenting his age, he asserted that civil infancy precluded his conviction since he could not have legally entered into the contract. The court found that "a very ingenious argument," but nevertheless held that only the criminal presumption applied. Thus, a child over the age of fourteen could be found guilty of the crime of misrepresentation, even though civil liability was barred.[34]

The last important pre-Civil War New York case, *People v. James Randolph*, concerned the common-law irrebuttable presumption that a boy under the age of fourteen lacked the physical capacity to commit rape.[35] Randolph, who was less than fourteen, had been convicted after the judge submitted the question of physical sexual capacity to the jury. On appeal, the Supreme Court (Erie County) held that the common-law irrebuttable rule should no longer apply in New York, but that the defendant was nevertheless entitled to a strong presumption of lack of physical capacity. The presumption could be rebutted only by clear proof. Since the state had failed to clearly prove capacity, the conviction was reversed and a new trial ordered. At the subsequent re-trial Randolph was acquitted of rape, but convicted of assault and battery (an offense to which the presumed lack of physical capacity did not apply).

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32. 25 Wendell 399 (1841).

33. A principle which continued until quite recently.

34. Similarly, an 1829 case held that a twelve-year-old could be civilly sued for the tort of assault and battery, though a criminal conviction based on the same act might be barred by the infancy presumption; *Bullock v. Babcock*, 3 Wendell 391.

35. 2 Parker's New York Criminal Cases 174 (1855).

Randolph represents the first case in which the New York courts altered one of the strong common-law principles protecting children. It did so with extreme caution, modifying the irrebuttable physical capacity presumption to a rebuttable one while maintaining intact the more important infancy presumption of mental incapacity.[36]

Infancy as a bar to conviction continued to be applied throughout the nineteenth and early twentieth centuries, though in 1881 the Legislature lowered the age protected by the presumption from fourteen to twelve.[37] Thus, in 1903, after the passage of extensive juvenile criminal legislation and the establishment of the first juvenile court parts,[38] an eleven-year-old child was acquitted of manslaughter and set free after the trial judge reviewed the applicable caselaw and authority concerning infancy.[39]

Finally, the infancy presumption coupled with the abhorrence of invoking the death penalty against children virtually barred the use of capital punishment against youngsters during the nineteenth

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36. The difference between the two presumptions should perhaps be emphasized. The infancy presumption, which was always rebuttable when the defendant was between the ages of seven and fourteen, concerned mental capacity whereas the irrebuttable physical capacity presumption applied only to rape cases. One could, of course, possess the requisite mental capacity, but lack physical capacity.

37. §19, 1881 Penal Code.

38. See pages 100 through 106.

39. *People v. Squazza*, 40 Misc. 71, 81 N.Y.S. 254 (Court of General Sessions, New York County).

    The principles applied in New York reflected the prevailing national standards. Throughout the nineteenth century children under fourteen years of age were presumed incapable of formulating the requisite criminal capacity, though "in a very few states the age at which presumption of capacity begins has been lowered"; Clark's *Criminal Law*, 2nd Ed., Chap. V at 59 (1902). In scores of reported cases children were acquitted when the presumption could not be overcome; See, for example, *State v. Doherty*, 2 Overton 80 (Tenn. 1806) *State v. Yeargan*, 117 N.C. 706 (1895); *Martin v. State*, 8 So. 858 (Ala. 1891).

    In New York, application of the infancy presumption was discontinued in the juvenile court parts shortly before the First World War; see pages 125-129.

century. Throughout the United States only two children under the age of fourteen were executed from 1806 through 1882.[40] Significantly, both cases involved murders committed by slave children before the Civil War.[41] So too, the execution of older youths has been a rare occurrence. There are no reported cases of children under the age of sixteen receiving capital punishment in New York State.[42] At the national level, from 1800 through 1859 only seventeen persons were executed for crimes committed while they were less than eighteen years of age.[43]

Although the number of adult executions increased substantially toward the end of the nineteenth century (a trend which continued into the twentieth century), the number of youngers receiving capital punishment remained low. For example, 2,755 persons were executed in the last decade of the nineteenth century;[44] of these, only twenty-two had been convicted of crimes committed

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40. Platt, *supra* note 12 at 208-209.

41. *Godfrey v. State*, 31 Ala. 323 (1858) and *State v. Guild*, 10 N.J.L. 163 (1828).

42. Bowers, *supra* note 10, appends a complete list of New York State executions from 1890 to the present (based on the Landmark, Teeters and Zibulka study). The youngest age cited is seventeen and the first person of that age was executed in 1935 (Bowers at page 467). There is no indication that any person under age sixteen has ever been executed in this state.

    One problem in researching capital punishment is that several studies report the age at the time the crime was committed while others cite the age at conviction or the age at execution. Bowers cites the age at execution. Thus, it is likely that the individual was one to two years younger at the time the offense was committed.

43. Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla. L. Rev. 613 at 630 (1983). Streib also indicates that between 1642 and 1899, twenty-two executions in the United States involved youngsters who had been less than sixteen years of age at the time the crime was committed (36 Okla. L. Rev. at 619). While not directly conflicting with earlier studies, which encompassed shorter time periods, Streib's research reveals a somewhat higher rate at executions for that age group. However, twenty-two executions in over 250 years cannot be considered as high. Clearly the use of capital punishment against children, or at least children who committed crimes when below the age of sixteen, was an extraordinary occurrence.

44. Bowers, *supra* note 10 at 54.

when they were below the age of eighteen (less that one percent of the total).[45] In an era when the death penalty was prevalent, youngsters were largely exempted.[46]

Early criminal law research hence does not support the view that children were treated harshly — quite the opposite conclusion can be drawn. For at least two centuries prior to the enactment of the first special laws designed to deal with the delinquent youth, the prosecution of a child was rare; the infancy defense precluded the conviction of most children who were prosecuted and pardons or other forms of mitigation were accepted methods of ameliorating the relatively few convictions which could be obtained. Both in England and in the United States the dominant theme was non-intervention and mitigation (of course, the only other feasible choice would have been the brutal application of common-law punishments, including death). These concepts were to change, for better or for worse, with the increasing pressure of nineteenth century reformers and the substitution of imprisonment for the historic common-law criminal penalties.

C. The Dependent or Poor Child

At common law and throughout early American history the orphaned, destitute or dependent child[47] was subject to the same basic laws and practices as his adult counterpart. Childhood was considered as a separate status for criminal law purposes (hence the infancy presumption), but was not a distinguishing factor when dealing with poverty or neglect. Dating from the English Poor Law

45. Streib, *supra* note 43 at 630. Although the available statistics unfortunately do not include specific age groupings, most, if not all, were probably between the ages of sixteen and eighteen.

46. Ironically, the number of children executed rose during the period immediately following the establishment of juvenile courts. From 1900 to 1930 seventy-seven persons were executed for crimes committed when under the age of eighteen; Streib, *supra* note 43 at 617.

47. An orphaned child is of course one who does not have a parent (through death or abandonment); destitute implies impoverishment, i.e. a child whose parents or guardian cannot afford the basic material necessities. "Dependent" is a more generic term which usually encompasses all children who need extra-familial assistance (including orphaned and destitute children).

of 1601, children were placed in poorhouses or county almshouses[48] together with their parents (or alone, if orphaned) where they received sustenance until boarded-out or apprenticed.[49] Charitable relief was occasionally available. However, during the colonial era destitute families could be banished to other colonies (thereby relieving the "home" county of an economic burden) or to the frontier (where they might find employment); an impoverished older child might also be separated from his family and pressed into maritime employment or other occupation.[50]

By the nineteenth century indenture and apprenticeship had become the predominant method of coping with the destitute or dependent child. Under the governing statutes parents could voluntarily apprentice their offspring and any child who was orphaned or found begging or vagrant could be apprenticed by municipal authorities. In effect, governmental officials assumed parental responsibilities for destitute juveniles, though their motive might well be economic (resulting in child exploitation) instead of educational.[51]

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48. An almshouse was "a house for the publicly or privately supported paupers of a city or county"; *Black's Law Dictionary*, 5th edition, West Publishing Co. (1979) at 71. In the United States the words "almshouse" and "poorhouse" were synonymous (but in England an "almshouse" was privately supported while a "poorhouse" was publicly supported); accordingly, the terms are used interchangeably in this study.

49. See David M. Schneider, *The History of Public Welfare in New York State, 1609-1866*, University of Chicago Press (1938) at 75-77. Schneider's volume constitutes an excellent history of the New York public welfare and educational systems, subjects which are beyond the scope of this book.

50. *Id.* at 47-52; the destitute or vagrant person from outside the locality was particularly subject to banishment.

51. See L. 1788, c. 15 and L. 1796, c. 20; apprenticeship, whereby the youth learned a trade, was a common practice engaged in by persons who were far from destitute. The distinction is that the poor were required by economic reality to apprentice or board out their children while the child who was orphaned or vagrant was indentured by governmental authorities who cared little for the youth's welfare and frequently apprenticed children to exploitive or sadistic employers; see Bremner, *supra* note 15 at 263-270 for a description of the abuses which surrounded the public indenture system.

However, younger children also formed a major part of the almshouse population, where they remained until of sufficient age to be apprenticed.[52] In 1795, for example, the New York City almshouse housed 622 paupers, of whom 259 were children, mostly under the age of nine.[53] The authority to house children at the poorhouses was strengthened by an 1821 statute authorizing magistrates to "send" a youth to an almshouse, provided the child was found begging and his parents were impoverished.[54] By 1856, 1,300 children outside the cities of New York and Brooklyn were confined to almshouses (the census of confined children in the two cities must have been substantial), a number which led a select

52. The age at which children who were public charges were apprenticed apparently increased during the eighteen century, a fact which may account for the concern regarding the almshouse juvenile population. As Bremner, for example, notes:

> For various reasons the age at which the children were bound out tended to rise and consequently the period during which the community continued to be responsible for their care lengthened. Whereas in the seventeenth and early eighteenth century it had been customary to bind the children to masters when they were barely out of infancy, the newer tendency was to maintain them as public charges until they reached the age of eight, ten, or twelve. When it was possible to bind out children at earlier ages it may be assumed that poor law officials took advantage of the opportunity.

Bremner, supra note 15 at 262-263.

53. Schneider, *supra* note 49 at 181.

54. Bremner, *supra* note 15, Vol. I at 639. The entire text, as quoted by Bremner, stipulated that: ...

> If any child or children, shall hereafter be found begging for alms, in any of the cities in this state, and whose Parent or Parents, is or are not a charge to such City, as a pauper or paupers, it shall and may be lawful for any magistrate of such city to take up and send such child or children to the almshouse, or other place for the support of the public poor of such city, there to be detained and supported until such child or children shall become of sufficient age to be bound out or until some fit and proper person or persons shall be found to take such child or children, when it shall be the duty of the overseers of the poor of such city, to bind out such child or children, in the same manner as is prescribed in the Act, entitled "an Act concerning apprentices and servants."

state senate committee to observe that the poorhouse children "... if not properly cared for, [could] some day fill all the houses of refuge and prisons in the state."[55]

Adverse almshouse conditions led directly to the founding of the first orphan asylums in the early nineteenth century. As noted by one historian:

> Although the New York almshouse rules relating to children were surprisingly progressive, the actual condition of the poorhouse children fell far below the standards set by the authorities. Continued overcrowding made impossible a satisfactory separation of children from adult inmates; educational facilities were very limited (as, indeed, they were outside the almshouse); the regime was harsh and often cruel, and there were other unfavorable factors inherent in the very concept of the mixed almshouse. A movement leading toward the establishment of separate institutions for child dependents was inevitable and became manifest at the end of the eighteenth century, culminating in the founding of the first orphan asylum within the state.[56]

Orphan asylums were the first institutions devoted exclusively to the care of children. Separated from the evils of almshouses, the destitute juvenile could receive a modicum of education and subsequently be boarded out or apprenticed by asylum managers instead of by uncaring municipal officials. In 1807 "The Orphan

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55. New York State, *Senate Report of Select Committee Appointed to Visit Charitable Institutions Supported by the State,* reprinted in Bremner, *supra* note 15 at 648. The committee also reported that in 1856, 292 children were born in the almshouses, "...doubtless the offspring of, illicit connections" (*Id.* at 647). Almshouse conditions were described as follows:

> The poor houses throughout the state may be generally described as badly constructed, ill-arranged, ill-warmed, and ill-ventilated. The rooms are crowded with inmates; and the air, particularly in the sleeping apartments, is very noxious, and to casual visitors, almost insufferable. In some cases, as many as forty-five inmates occupy a single dormitory, with low ceilings, and sleeping boxes arranged in three tiers one above another. Good health is incompatible with such arrangements. They make it an impossibility. (*Ibid*).

56. Schneider, *supra* note 49 at 187.

Asylum of the City of New York" was legislatively incorporated.[57] Children without parents received secular and religious education and were later "... bound out to some reputable persons or families for such object and in such manner as the [orphanage] Board shall approve."[58] By 1840 orphanages throughout the state had been established by a multitude of secular and religious organizations.[59]

Orphan relief was limited and, of course, available only to children whose parents were deceased or had abandoned them. The destitute and dependent child frequently turned to the almshouse as a last resort (with or without a parent) or was judicially placed in a poorhouse or a House of Refuge.[60]

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57. L. 1807, c. 179.

58. *Constitution of The Orphan Society in the City of New York*, as quoted in Schneider, *supra* note 49 at 189.

59. *Id.* 189-190; the orphan asylums were funded largely through public grants. Between 1847 and 1866, for example, the Legislature appropriated a total of $617,120 in grants plus extensive per capita assistance to approximately sixty different asylums (*Id.* at 339).

60. Other forms of relief were occasionally employed for the destitute non-orphan child. For example, in 1797 "The Ladies Society for the Relief of Poor Widows with Small Children" was established to assist widows and their young offspring (incorporated by L. 1802, c. 99); but relief was extremely limited and could hardly ameliorate the scope of poverty.

The relationship between poverty, child neglect, delinquency and subsequent adult criminality was recognized at an early date. In 1846 a legislative committee noted:

> that juvenile delinquency was increasing in western New York, particularly in the districts along the canals. It was estimated that about five thousand boys were employed on the canals. Of these, about half were orphans and nearly half were under twelve years of age. Without guardianship or wholesome guidance, they were often "grievously imposed upon" by their employers and thrown out of work without means of support at the close of navigation in winter. Thus set adrift, many homeless boys by their destitution and want of moral culture are compelled (as they suppose) to commit petty thefts at first, in order to obtain their bread, and from the habit and a loss of the dread of jails, are led to greater acts of criminality. It is a fact perhaps noteworthy of remark that a large portion of the inmates of the State prison at Auburn have been canal boys.

Schneider, *supra* note 49 at 326.

Despite the existence of orphan asylums, juveniles continued to be confined in almshouses, together with adults who were frequently alcoholic or deranged. A major reform effort commenced in 1857[61] and finally culminated in an 1875 statute prohibiting the presence of any child in a poorhouse or almshouse.[62]

It should be emphasized that the system of almshouses and orphanages as well as the practice of governmental apprenticeship or indenture applied only to the impoverished or orphaned child. In the absence of either parental poverty, death or abandonment the state would not intervene. Parental control was supreme until the "child saver" era of the late nineteenth century. Child protective laws did not appear until the post-Civil War era[63] and, although the protective system subsequently built upon the earlier relief afforded abandoned, orphaned and dependent children, the abused or neglected child was largely without remedy until the Legislature enacted the comprehensive 1877 "Act for Protecting Children."[64] Early nineteenth century society did not readily supercede parental discretion, regardless of its consequences.

61. As the senate committee report, note 55, indicates.

62. L. 1875, c. 173.

63. See pages 47 through 51.

64. L. 1877, c. 428; see page 47. Extreme physical abuse was nevertheless criminal and after a parent had been convicted and imprisoned for viciously assaulting a child, the youngster might be placed in an orphanage or almshouse; but conviction was extremely rare and, in any event, the criminal laws afforded no protection for the child who suffered parental neglect or anything less than extreme physical abuse.

CHAPTER II

The Juvenile Delinquent and the House of Refuge

1824-1865

With the opening of the New York State penitentiary in 1797[65] the brutal punishments possible at common law were largely superceded by lengthy incarceration. A reform of the age of enlightenment, imprisonment was predicated on the theory that criminals could be rehabilitated through solitude, reflection and religious training. Discipline and lengthy confinement were viewed as keys to the elimination of criminality.[66]

As a progressive measure, imprisonment provided an attractive alternative for the juvenile offender. If the older experienced malefactor could be rehabilitated, as prison proponents believed, surely the younger transgressor would benefit. Incarceration in the state penitentiary however, resulted in the "mixing" of the child

65. See page 12. The first American penitentiary was the Walnut Street prison, which opened in 1790; James A. Inciardi, *Criminal Justice*, Academic Press, Inc. (1983) at 575.

66. See Sir Leon Radzinowcz and Marron E. Wolfgang, *Crime and Justice*, Vol. II at 4-424:

> The first cult of incarceration in this country rested firmly on an ethic of rehabilitation. Prisons were going to eliminate crime; insane asylums, insanity. We were absolutely certain that the institutions were part of a quasi-Utopian movement. We were persuaded that in a well-ordered institution, where rigid, punctual, disciplined routines would take effect, even the most depraved or maniacal criminal would learn to be law-abiding.

offender with the seasoned adult criminal.[67] Imprisonment might help persons of every age, but placing adolescents in close proximity to violent criminals surely violated the rehabilitative ideal. The penitentiary founders viewed commingling with alarm and quickly turned their attention to the founding of separate juvenile institutions.

An early advocate of separate juvenile institutions was Thomas Eddy, a Quaker who was instrumental in establishing the New York penitentiary and had served as its first administrator.[68] Shortly after the War of 1812 Eddy joined John Griscom, a prominent Quaker teacher and reformer, in advocating the separate treatment of juvenile offenders.[69] In 1816 the two reformers established the New York Society for the Prevention of Pauperism as a vehicle for advocating and hopefully implementing juvenile justice reforms.[70]

The pauperism society lobbied intensively for a separate juvenile institution modeled upon the prison system. As part of its campaign, the Society published a report in 1819 describing the New York penitentiary in the following vivid terms:

> Until recently, boys from 10 to 18 years of age were placed in a large apartment with hoary-headed felons, who had grown grey in vice and deprivation, there to listen to their sarcasms on morality, their jests upon religion, or to oaths, imprecations and blasphemies. At present, the young and adult felons and convicts are in some

67. The pre-1797 jails "... were used primarily for the detention of persons awaiting trial and for insolvent debtors, while the workhouses and houses of correction received vagrants and disorderly persons;" Schneider, *supra* note 49 at 142. Children, like adults, could be placed in a jail for brief periods while awaiting trial (a practice which continued after the houses of refuge were established), although application of the infancy presumption undoubtedly minimized the number of cases in which youths were even temporarily detained.

68. Robert S. Pickett, *House of Refuge, Origins of Juvenile Reform in New York State, 1815-1857*, Syracuse University Press (1969) at 23-24.

69. *Ibid.*

70. *Id.* at 26 and 30.

> degree separated, and partial instructions afforded to the former. We are sorry to be informed, by the mayor, that since he has administered our criminal jurisprudence, the unpleasant task has descended on him of sentencing boys from 12 to 15 and 17 years of age several times to the penitentiary...if anything can destroy the ingenuousness and rectitude of youth and open a road to ruin, it is the polluting society of those veterans in guilt and wickedness who hold their reign in our prisons of punishment...[71]

Given that extraordinary description, one might assume that the penitentiary literally overflowed with children. Actually, in the very year of the report the penitentiary census included a total of sixteen boys between the ages of ten and sixteen,[72] while the pauperism society reported that an average of 35 youths were imprisoned.[73] As noted earlier, the common-law infancy presumption was well established,[74] precluding the conviction of most children under the age of fourteen; moreover, the judiciary may have been understandably reluctant to sentence convicted children of any age to severe penal conditions. Either the reformist zeal was directed at a miniscule problem or, more likely, the society envisioned the creation of a separate facility as a necessary prerequisite to incarcerating and treating a far larger number of youths (a situation which in fact occurred). Following a time honored practice, the organizers grossly exaggerated conditions in order to achieve the goal of rehabilitating errant youngsters; and the technique worked.[75]

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71. *The Second Annual Report of the Managers of the Society for the Prevention of Pauperism in the City of New York*, read and accepted, December 29, 1819, as quoted in Paul W. Tappan, *Juvenile Delinquency*, McGraw Hill (1949) at 391.

72. *Boy Offenders in the Bellevue Prison, New York Society for the Detention of Juvenile Delinquents, Memorial to the Legislature of New York*, 1824, at 16-18, as reprinted in Bremner, *supra* note 15, Vol. I at 677.

73. Pickett, *supra* note 68 at 37; the Society's larger figure probably includes youths between the ages of 16 and 18.

74. See page 13.

75. Given the high expectations of rehabilitation in the adult penitentiary, the temptation to rehabilitate difficult youths must have been great, regardless of the presence or absence of a criminal conviction.

In response to society publicity, in 1824 the New York State Legislature incorporated the Society for the Reformation of Juvenile Delinquents as a subsidiary of the New York Society for the Prevention of Pauperism and authorized the construction of a house of refuge for delinquent children.[76] Implementing an apparently prearranged transaction, the Society for the Reformation of Juvenile Delinquents immediately purchased a surplus War of 1812 United States arsenal; the land, owned by New York City, was donated for society use as long as it remained dedicated to "juvenile offenders."[77] Located at Broadway and Twenty-third Street, an area subsequently developed as Madison Park but then located in a semi-rural environment north of the City, the arsenal was rebuilt as a secure residential institution.[78]

Reflecting the perceived need to segregate and treat criminally delinquent youths, the 1824 enabling statute permitted the courts to place with the Refuge, in lieu of imprisonment, any child convicted of committing a criminal offense anywhere in the State:

> [T]he managers of the society mentioned in the act hereby amended, shall receive and take in the house of refuge, established by them in the city of New-York, all such children as shall be convicted of criminal offenses, in any city or county of this state, and as may in the judgment of the court, before whom any such offender shall be tried, be deemed proper objects; and the powers and duties of the said managers in relation to the children which they shall receive in virtue of this act, shall be the same in all things, as are prescribed and provided by the act entitled, an act to incorporate the society for

76. L. 1824, c. 126, amended in 1826. Also see Pickett, *supra* note 68 at 49. Earlier reformers had proposed separate houses of refuge for "criminal" youngsters and neglected or abandoned children (*Id.* at 21).

77. Pickett, *supra* note 68 at 53-54. The Society purchased the structure for $6,000; the down payment was $2,000 with the remainder to be paid at an unspecified future date (in fact, the remaining $4,000 was never paid, *Pickett* at 138). The terms, including free municipal land and a building purchased from the federal government at a "surplus" rate to be partly paid in the future, suggests that the Society was successful in rallying governmental support at every level.

78. *Ibid.*

> the reformation of juvenile delinquents, in the city of New York passed March 29, 1824, in respect to children which the said managers have received, or may receive in virtue of that act.[79]

Placement of children by the courts with the Society was purely discretionary and imprisonment in an adult facility was still permitted. In 1830, however, the Legislature also empowered the Governor to authorize prison administrators to "... convey any convicts who shall be under the age of seventeen years, to the house of refuge in the city of New York; and they shall there be confined according to the rule and regulations of said house of refuge."[80] From 1830 on, most children who had been convicted of crimes were placed with the House of Refuge either directly by judicial decree or through administrative transfer from the adult penitentiary.

Funding for the House and the Society for the Reformation of Juvenile Delinquents was provided primarily through legislative grants. However, direct governmental appropriations were frequently augmented by transfers of surplus state funds and the imposition of special "vice" taxes, earmarked for Society purposes, particularly on shows and "entertainments." The Society's founders thereby wisely linked "vice" with juvenile reformation to establish a secure funding base.[81]

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79. L. 1826, c. 24. In 1825 the Legislature authorized an annual expenditure of $2,000 for the house, an amount greatly augmented by the transfer of surplus funds amounting to $13,000 in 1826; see L. 1826, c. 18.

80. L. 1830, c. 181. In permitting prison administrators to supercede court-ordered imprisonment, the statute appears to constitute a remarkable infringement of judicial discretion.

81. See, for example, L. 1829, c. 302. In 1830 an Assembly committee, after receiving a petition from "Sundry grocers in the city of New York", filed the following report:

> [O]ne of the provisions of the law above referred to, is the imposition of an additional tax of one dollar and fifty cents upon all persons obtaining a license to sell liquors; and the amount thus raised is directed to be paid to the treasurer of the society for the reformation of juvenile delinquents. . . . Viewing this establishment as forming an important part of our penitentiary system of the state, your committee cannot perceive the justice of the law which imposes upon an industrious class of the community, the burden of maintaining it, when ample means should be provided by the state for its support.

Report No. 273, In Assembly, dated March 4, 1830. The next year the Legislature increased the state's annual appropriation to $4,000, but repealed the complained of liquor tax; L. 1831, c. 186. Excise and license "vice" taxes nevertheless continued to provide substantial revenue for the Society, see e.g., L. 1839, c. 13.

As early as 1825, the first year of its existence, the refuge reported a census of 69 children under the age of sixteen.[82] Of these, six had been committed by the court, forty-seven had been brought to the House by the police for stealing and vagrancy and the remaining sixteen had been transferred from almshouses for "stealing, vagrancy and absconding."[83] The authority for court placement was clear[84] and the small number of court commitments consistent with the reported total of sixteen boys confined at the penitentiary several years earlier (as well as the continuing application of the infancy presumption to bar convictions).[85] More surprising was the apparent authority of the police to directly place relatively large numbers of children without court proceedings and the ability of the almshouses, which housed the city's poor of all ages, to transfer difficult children to the refuge.[86]

The lack of any statutory basis for commitments by the police and almshouses is apparent.[87] The Society had suggested that "[t]he design of the proposed institutions is, to furnish, in the first place, an asylum, in which boys under a certain age, who become subject to the notice of our Police, either as vagrants, or houseless, or charged with petty crimes, may be received ...";[88] but enabling legislation was never enacted, nor did the Society propose procedures to bypass the judicial system. Were non-court placements ostensibly voluntary (on the part of parents) or were they extralegal measures to evade criminal due process and the infancy presumption? Unfortunately, there is no reported case in which the authority

82. Pickett, *supra* note 68 at 80.

83. *Ibid.* 84. L. 1826, c. 24.

85. See page 27.

86. See page 21 for a description of the almshouses.

87. As noted, the statutes permitted placement only by a court or a prison administrator following a criminal conviction; research has failed to reveal any other commitment authority.

88. *Proposal for the Creation of the First House of Refuge, New York Society for the Reformation of Juvenile Delinquents, Memorial to the Legislature of New York, 1824*, pages 22-26, as reprinted in Bremner, *supra* note 15, Vol. I at 679.

to place without court order was legally challenged. Similarly, there is no reported criticism of House of Refuge recruitment practices. It nevertheless appears that, irrespective of the statutory limitations, the refuge simply became the dumping ground for unruly youths and, to a lesser extent, destitute children.

Of equal importance, early reports support the view that, despite the apparent benevolent intent of its founders, the House of Refuge quickly assumed a harsh penal attitude toward its juvenile inmates. During the first year "... punishment became the dominant theme of the institution."[89] Corporal punishment was practiced widely and solitary confinement was invoked frequently. The managers further ordered the construction of a six-cell prison and strengthened the exterior walls to prevent and punish escape attempts.[90] Although the House of Refuge spared a small number of children from confinement in the probably even more barbaric adult penitentiary, larger numbers of children were placed, with or without court orders, in a reformist institution which closely resembled the penitentiary.[91]

Whether receiving children through court commitment or through police or almshouse intervention, the House of Refuge served mainly unstable immigrant families. During the pre-Civil War period only approximately one-quarter of the "refuge" children had resided with both parents[92] and an additional seventeen percent had resided with one parent. Approximately fifty-five percent of the children had resided with a non-parent or were already institutionalized (mainly in almshouses) prior to refuge commitment. Similarly, only one-quarter of the House's population were native born Americans;[93] forty-one percent were of Irish birth, the

89. Pickett, *supra* note 68 at 72. Pickett cites several examples of children who were placed in solitary confinement cells, whipped or chained (*Id.* at 69-74).

90. *Id.* at 72-73.

91. But at least were segregated from the older and apparently more hardened adult convicts.

92. Pickett, *supra* note 68 at 190.

93. *Ibid.*

predominant immigrant population of the time. Although fierce immigrant prejudice was apparently not prevalent until mid-century, the delinquent population was clearly immigrant-based.[94]

New York's decision to establish a House of Refuge was followed by the establishment of similar institutions in other Northeastern states. In 1826 the Boston City Council founded the House of Reformation, the first publicly run institution for delinquents.[95] Two years later Philadelphia, reflecting the Pennsylvania Quaker influence, opened a house of refuge.[96] Although the movement did not obtain national scope until the proliferation of juvenile residential programs after the Civil War, the principle of separate children's facilities had taken root.

New York's refuge system was substantially expanded through the founding, in 1846, of the Western House of Refuge in

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94. The Society also reported that "the proportion of delinquent children among the blacks [is] much greater than in our white population," a condition which led, in 1834 to the construction of a separate facility to house 150 to 200 black children; Letter of Nathaniel C. Hart to Steven Allen, December 17, 1834, *Allen Papers, New York Historical Society*, as reprinted in Bremner, *supra* note 15 at 687-688. The letter specifically observed that:

> the board of managers have heretofore called the attention of the legislature and the public to the unprovided state of delinquent colored children, found in great numbers in our city —the proportion of delinquent children among the blacks being much greater than in our white population. This disparity arises in part, from the broad line of separation between the whites and the blacks, being so strikingly drawn, as often to deprive the latter of many employments which are open to the whites. And the number has also been increased by the policy of several of the southern states which forbids [sic] the free blacks from continuing to reside among them.

The fear of black deliquency seems to have been exaggerated; in the quarter century from 1830 to 1855 only eleven percent of the House of Refuge population was black; Picket, *supra* note 68 at 190.

95. Bremner, *supra* note 15 at 680-681.

96. *Id.* at 683.

Rochester.[97] Although the New York City institution, funded by state appropriations, had possessed the authority to accept children from throughout the state,[98] logistic difficulties impeded commitments from outside the New York City area. Accordingly, the Western House of Refuge was specifically established to serve the upstate population.[99] The enabling legislation, however, incorporated provisions mandating that every juvenile convicted of a felony be sentenced to the Western House of Refuge, a sharp departure from the permissive powers possessed by the "downstate" courts:

> ... The courts of criminal jurisdiction of the several counties... shall sentence to said house of refuge every male under the age of eighteen years, and every female under the age of seventeen years, who shall be convicted before such court of any felony.[100]

Moreover, the 1846 Act also permitted the commitment of upstate children who were found to be vagrant, a power which was subsequently extended to the New York City house.[101] For the first

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97. L. 1846, c. 143. Like its New York City counterpart, the Western House of Refuge was managed by a private board of directors; but funding was achieved largely through governmental appropriations.

98. See, for example, the legislative report of 1830, *supra* note 81 which characterized the house as "an institution which is open to the reception of offenders from all quarters of the state..."

99. The geographic division was completed through an 1850 act authorizing courts in the first through third judicial districts to commit juveniles to the New York City house and courts in the fourth through eighth judicial districts to commit children to the Western House (L. 1850, c. 24).

100. L. 1846, c. 134 §16; the Act further provided an appropriation of $22,000 to construct the Western House of Refuge. The male age limitation of eighteen was reduced to sixteen in 1850 (L. 1850, c. 304).

The legislation's puzzling aspect is that children in New York City and the surrounding counties could still be sentenced to the adult penitentiary whereas youths throughout the rest of the state were required to be committed to the Western House in lieu of a criminal sentence. The dichotomy, which raises equal protection as well as moral issues, is nowhere explained.

101. See L. 1860, c. 241; this legislation amended the 1824 Act incorporating the Society for the Reformation of Juvenile Delinquents.

time a juvenile commitment could be statutorily based upon a non-criminal act, though, as has been noted, the New York City society apparently had little difficulty accepting vagrant or homeless youths even in the absence of enabling legislation.[102]

Vagrant children had formerly (i.e. prior to the founding of houses of refuge) been placed with an almshouse or apprenticed;[103] their inclusion with delinquents who had been convicted of criminal activity blurred the distinction between those youths who were violent and those who were merely impoverished.[104] The criminalization of youthful vagrancy (as though a child could be responsible for his vagrancy) was largely completed by enactment of a statute permitting the transfer from the Western House of Refuge to an adult penitentiary, upon court order, of any "refuge" inmate who committed arson or was found to be "... guilty of openly resisting the lawful authority of the officers of the institution, or of attempting, by threats or otherwise, to excite others to do so, or [who] shall, by gross or habitual misconduct, exert a dangerous and pernicious influence over the other delinquents."[105] Thus, a vagrant youth, placed initially in the "civil" House of Refuge, could subsequently be committed to a an adult penitentiary for vaguely defined non-criminal acts such as "habitual misconduct." The system designed to preclude or at least discourage the imprison-

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102. See pages 30 and 31.

103. See page 19.

104. Orphaned children, or at least a sizable percentage of the orphan population, were presumably placed in an orphan asylum; see pages 21-22. The statutory inclusion of "vagrant" children in House of Refuge commitments hence probably applied largely to juveniles whose parents (or one parent) were alive, but improvished.

105. L. 1860, c. 70. The Act required the refuge managers to file written charges with a Supreme Court judge or judge of the Monroe County Court, who would then summarily inquire into the facts of the case and, upon entering the requisite finding, authorize a temporary commitment to the Monroe County penitentiary. The Act, however, did not apply to the New York City House of Refuge.

ment of children who committed crimes had quickly come full circle, permitting the imprisonment of children who were never accused of criminal conduct.[106]

From the earliest days of the refuge movement, commitments, unlike penitentiary sentences, were for periods "during the minority of such children,"[107] i.e. from the date of commitment until age twenty-one. Courts interpreted the commitment acts literally; for example, in 1869 an appellate court held that the magistrates or criminal judges could not commit for a shorter term. If, instead of imprisonment in an adult penitentiary, the child was "... committed to the care and custody of this charitable institution during minority ... no court can increase the term of detention or shorten it."[108] The crime of conviction was hence immaterial; for example, a child found guilty of a misdemeanor could be confined at a house of refuge for several years (until majority) though, in all cases, the refuge managers possessed the authority to release at will. In this respect, the early statutes paralleled modern juvenile justice codes; indeed, the indeterminate nature of juvenile commitments was to continue for over a century.[109]

The New York City and Western houses of refuge continued to expand during the pre-Civil War period. In 1853 the Legislature

106. The interrelationship between the adult prisons and the houses of refuge is an interesting one. Prison authorities could transfer criminally sentenced youths to the refuge (L. 1830, c. 181) and, conversely, refuge administrators could transfer children to the adult penitentiary, at least in the upstate areas (L. 1860, c. 70). Commitments to either were hence interchangeable.

107. See, e.g., L. 1846, c. 143, 13, governing commitments to the Western House of Refuge.

108. *People v. Degnen*, 6 Abb. Rep. New Series 87, 90 (Sup. Ct. First Dist., Gen. Term 1869).

109. However, despite the charitable and rehabilitative nature of the refuge movement, commitment in lieu of imprisonment did not remove the penalties or stigma of a criminal conviction; for example, one court concluded that a child convicted of a felony and committed to a House of Refuge could not testify in a different case because of a statute disqualifying felons from testifying. The court reasoned that commitment does not "... relieve the party of the disabilities which a conviction of the crime inflicted. Had such been the design, the statute no doubt would have so provided." *Park v. People*, 1 Laws 263, 268 (Sup. Ct. Gen. Term, Third Dist. 1869).

appropriated $50,000 to construct a new City House of Refuge on Randall's Island to replace the by then antiquated original building,[110] an amount which was substantially augmented later that decade.[111] The same year both houses were authorized to receive youths sentenced by the United States courts after conviction for a federal offense[112] and in 1855 the New York City society received funds to construct a separate facility for girls.[113] Ten years later the age limitation for placement with a House of Refuge was extended to twenty-one.[114]

The rapid physical growth of the houses was of course related directly to an increase in "refuge" population. In 1840, 239 boys were confined in the New York City House.[115] By 1852, 393 children were confined in the New York City House of Refuge while 128 resided at the Western House of Refuge.[116] Five years later the New York City House alone maintained facilities for 560 children.[117] Large numbers of youths who had committed criminal acts or, more likely, had been found to be vagrant or beggars, were committed to fortress-like secure institutions until attaining the age of twenty-one.[118]

Ironically, the era of extensive growth coincided with the first criticism of the Society since its inception. By the 1840s the theory

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110. L. 1853, c. 391.

111. See L. 1851, c. 290; L. 1855, c. 541; L. 1857, c. 787.

112. L. 1853, c. 608, §1.

113. L. 1857, c. 539.

114. L. 1863, c. 175.

115. Pickett, *supra* note 68 at 111; the Western House had not yet opened.

116. See *State of New York, Messages from the Governors*, Vol IV. at 606 (Albany. 1909).

117. See L. 1857, c. 541.

118. Unfortunately the available statistics do not distinguish between commitments from the criminal courts and placements by other authorities for non-criminal conduct. But the availability of non-criminal placements coupled with the refuge population "explosion" between 1830 and 1857 suggests strongly that most children had not been convicted of criminal acts.

of long-term solitary incarceration as the key to rehabilitation was being questioned.[119] The dehumanizing aspect of prison life was stressed, instead of the earlier condemnation of capital punishment. In 1848 the Assistant Superintendent of the New York City House of Refuge, Elijah Devoe, published a scathing report criticizing refuge practices:

> No treatment, however kind or generous, will serve to make children contented in the Refuge after a certain period has elapsed. A wall is around them. Every moment they are under strict surveillance. The severity of discipline to which every boy, however well disposed, is subjected — the unceasing and unvaried repetition of duties, fare and employment — breed disgust which degenerates into melancholy and despair.
>
> ... nothing short of excessive ignorance can entertain for a moment the idea that the inmates of the Refuge are contented. In summer they are about fourteen hours under orders daily. On parade, at table, at their work, and in school, they are not allowed to converse. They rise at five o'clock in summer — are hurried into the yard — hurried into the diningroom — hurried at their work and at their studies. For every trifling commission or omission which is deemed wrong to do or to omit to do, they are "cut" with rattan. Every day they experience a series of painful excitements. The endurance of the whip, or the loss of a meal — deprivation of play or the solitary cell. On every hand their walk is bounded;while Restriction and Constraint are their most intimate companions. Are they contented?[120]

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119. See Pickett, *supra* note 68 at 155-156. As indicated by Pickett, the 1840s was a period in which the barbaric practices of both adult and juvenile institutions were increasingly questioned.

120. Elijah Devoe, *The Refuge System, or Prison Discipline Applied to Juvenile Delinquents*, New York, 1848, at 24-28, as reprinted in Bremner, *supra* note 15 at 691.

Other reports, however, had praised the education and training provided by the House; see, for example, Pickett, *supra* note 68 at 111-112.

Devoe also attacked, in words which have a distinctively modern ring, the practice of indeterminate sentence (convicted adults were given specific sentences):

> Children are committed to the House of Refuge to be dealt with according to law. They are not sent for any specified term. They are subject to the control and disposition of the managers ... [I]n a conversation with a boy who made one of the most desperate attempts to escape that occurred while I was in the institution, he told me that if he knew how long he had to remain, he could reconcile himself to his punishment; but, that he could not endure to have his mind constantly wracked by uncertainty and suspense. He would rather by far be in state prison, he said, for then he would know how long he should have to remain.[121]

Alternatives to the houses of refuge were slow to develop, but by the 1850s several embryonic organizations had been established. In 1851 the New York Juvenile Asylum was organized to provide residential care for the very young and in 1853 the Children's Aid Society was incorporated.[122] Children's Aid, like many of the later child care agencies, eschewed institutionalization, preferring to apprentice children or board youths in appropriate foster homes. Similar policies could have been adopted by the houses of refuge. In fact, the 1846 Act incorporating the Western House of Refuge had included a provision enabling the managers and superintendents to:

> ... place the said children committed to their care, during the minority of such children, at such employments,

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121. Devoe, *supra* note 120 at 691.

122. See pages 53 through 70 for a full description of the child care agencies. The Juvenile Asylum served a young population largely overlooked by the House of Refuge; as such, they were more the equivalent of orphanages (though parental death was not a prerequisite for placement). Children's Aid, on the other hand, served many older children and thus represented the first viable alternative to the houses. The fact that Children's Aid was established immediately following published criticisms of the houses of refuge suggests an obvious link.

> and cause them to be instructed in such branches of useful knowledge as shall be suitable to their years and capacities; and they shall have the power, in their discretion, to bind out the said children, with their consent, as apprentices or servants, during their minority, to such persons and at such places, to learn such proper trades and employments, as in their judgment would be most for the reformation and amendment and the future benefit and advantage of such children.[123]

However, the Western House and the New York City society apparently made only very sparing use of apprenticeship which, in any event, was overshadowed by their construction of ever larger institutions. Ironically, at the national level the refuge movement, originally patterned on the New York City House, had begun to change. Juvenile institutions emphasized education and training instead of sterile incarceration, coining a new name, the "reform school," to replace the by then criticized term "house of refuge."[124] In many respects, the New York houses were the forerunners of reformatories, but became too entrenched to modify their practices or their names.

The education, apprenticeship or foster care of children as an alternative to harsh long-term incarceration became the hallmark of other programs while the New York houses of refuge, the predominant institutions in this state, continued to practice the more traditional methods. The widespread implementation of relatively benevolent programs for delinquent, disorderly and vagrant youths would await the end of the Civil War and subsequent development of a comprehensive child care network comprised of both private and public agencies.

123. L. 1846, c. 143, §13.

124. See Pickett, *supra* note 68 at 102.

CHAPTER III

Expanded Jurisdiction and the Child Protective Movement

1860-1880

The Civil War marked the conclusion of the first major phase in the development of children's laws. Prior to the war, the legal and social systems designed for the commitment and care of delinquent or vagrant juveniles remained relatively small. From its inception in 1824 until approximately 1860 the New York houses of refuge maintained a virtual monopoly, receiving children through criminal court and magistrate commitments or through placement by administrators of the almshouses and voluntary parental surrenders. Dependent and destitute children remained largely confined to almshouses or were indentured upon reaching an employable age. Alternatives were embryonic — the only major pre-war New York organizations devoted to children's care were the Juvenile Asylum at Dobbs Ferry, established in 1851 to provide services for the very young, the Children's Aid Society, established in 1853 to place homeless and destitute children in foster families, and the orphan asylums, which served only a limited number of parentless youths.[125]

Similarly, the pre-war child care statutory framework remained uncomplicated. Reflecting the original Society for the Reformation of Juvenile Delinquents legislative charter, the statutes provided for the commitment of youths who had been convicted of criminal activity or had been referred by parents, magistrates, prison administrators or the poorhouses to residential institutions whose legislative purpose was rehabilitation in a structured environment

125. Although incorporated in 1853, the Children's Aid Society provided only very limited service until its rapid growth during the post Civil War era; see pages 53 through 56.

separate from the adult penal system. Although criticism of the refuge movement was not unknown[126] and limited alternatives were available in the 1850s, the original legislation had been largely unamended. Authority to control disorderly, unsupervised, or neglected children simply did not exist.

The pattern changed abruptly following the war. In less than twenty years the Legislature enacted comprehensive statutes encompassing conduct which today would be characterized as status offenses or child neglect and the principles which had guided the houses of refuge were applied to the young adult criminal transgressor (i.e. ages sixteen to thirty). In addition, complicated procedural statutes were enacted to govern the commitment and care of delinquent, disorderly, abandoned and neglected children.[127] During the same time a plethora of child care agencies, religious and non-sectarian, were incorporated and funded through legislative acts — the development of the unique New York system of private child care agencies commenced after the war and was completed before the turn of the century. Simultaneously, child protective agencies, most notably the societies for the prevention of cruelty to children, were established throughout the state to investigate and prosecute acts of abuse or mistreatment or simply to intervene for the best interests of the child. The child protective organizations did not provide long-term care as did the child care agencies, but rather attempted to "save" children from dangerous or unwholesome environments — so saved, the child might be placed in the custody of a child care agency. In 1873 the Legislature enacted the first adoption law, and in 1882 codified and expanded a multitude of session laws governing the commitment of children.[128] In little more than one generation the Legislature had fashioned a sophisticated system encompassing delinquent, neglected, destitute and status offender children.

126. See pages 36 through 38.

127. In an almost dizzying spell, statutes were amended, repealed and re-enacted every few years.

128. The expansion of child protective laws also encompassed conduct beyond the scope of this report, such as the child labor laws and compulsory education laws.

The reasons for rapid development are rooted in social and economic upheavals. The Civil War itself caused massive dislocations when fathers, conscripted for lengthy periods, often failed to return home because of desertion or death.[129] The wartime upsurge in the number of homeless and vagrant children caused an expansion of the refuge system;[130] of greater significance, the war's impact upon the family structure contributed to the development of alternative programs. Thereafter, industrialization and increasing urbanization contributed to the large number of unsupervised children roaming the streets. Last, the waves of immigration that accompanied the industrial revolution brought relatively uneducated and "unamericanized" children to the squalor of the urban ghetto.[131] New statutes to govern the conduct of children and to provide standards for parental responsibility were needed to ameliorate social problems; the ensuing legislation redefined the roles of the parent, the state, the courts, and the agencies devoted to child care activities.

A. The Statutory Framework

The first major post-Civil War legislation affecting children introduced the concept of a status offense, i.e. a proscribed noncriminal act which could be committed only by a child. In 1865

129. For example, the Philadelphia Refuge reported in 1864 that "the absence of so many fathers engaged in the defense of their country, has thrown upon our charge a very large number of children"; Mennel, *infra* note 131 at 57.

130. See, e.g., L. 1864, c. 280, which appropriated $30,000 to the Western House of Refuge and $28,000 to the Society for the Reformation of Delinquents (i.e. The New York City House of Refuge), and L. 1863, c. 458, which appropriated $25,000 for the S.R.J.D. building fund. The large number of children provided for by such appropriations is illustrated by the fact that in 1876 the average annual cost to maintain a child in the Catholic Protectory of New York, an institution similar to the houses of refuge, was $115.31; see William T. Letchworth, *Orphan Asylums and Other Institutions for the Care of Children*, in *Ninth Annual Report of the New York State Board of Charities* (Albany, 1876) as quoted in Bremner, *supra* note 15, Vol. II, at 459.

131. For a description of the legislation's social welfare impact see Mennel, *Thorns and Thistles, Juvenile Delinquents in the United States 1825-1940*, University of New Hampshire, 1973, at 58-62.

the Legislature enacted a bill to control the "disorderly child," a term roughly synonymous with the current phrase "person in need of supervision"[132] and defined as follows:

> [A]ll children under the age of sixteen ... deserting their homes without good and sufficient cause, or keeping company with dissolute or vicious persons against the lawful command of their fathers, mothers, guardians or other persons standing in the place of a parent, shall be deemed disorderly children.[133]

The Act provided that, upon complaint of a parent or guardian, a magistrate or justice of the peace "shall issue a warrant for the apprehension of the offender." After finding a child to be disorderly the court was required to commit him to a house of refuge "and the powers and duties of the said managers in relation to the said children shall be the same in all things as are prescribed as to other juvenile delinquents received by them."[134]

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132. See Family Court Act §712.

133. L. 1865, c. 172, §5. The motivation for legislation to bolster parental supervision and, if necessary, apply the strong arm of the state was probably the Civil War. In 1865 large numbers of fathers had been conscripted and were fighting far from home or, worse, had been killed or maimed.

134. L. 1865, c. 172, §7; the full text of the commitment statute read as follows:

> If such magistrate or justice be satisfied by competent testimony that such person is a disorderly child within the description aforesaid, he shall make up and sign a record of conviction thereof, and shall by warrant under his hand commit such person to the House of Refuge established by the managers of the Society for the Reformation of Juvenile Delinquents in the City of New York, and the powers and duties of said managers in relation to the said children shall be the same in all things as are prescribed as to other juvenile delinquents received by them; provided, however, that any person committed under this act shall have the same right of appeal now secured by law to persons convicted of criminal offense; but on any such appeal mere informality in the issuing of any warrant shall not be held to be sufficient cause for granting a discharge.

The provision for appeal underscores the statute's criminal aspects.

Although the houses of refuge had formerly accepted children placed directly by parents and the courts had already obtained jurisdiction to commit "vagrant" children,[135] the "Disorderly Child" Act firmly established the nexus between delinquency and status offenses.[136] For the next century children who were ungovernable or who had run away were for most purposes deemed delinquent and consequently subject to virtually the full sweep of the delinquency laws.[137]

The categories of youngsters committed to institutions similar to the houses of refuge was further broadened by the establishment

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135. L. 1860, c. 241; see page 33. The distinction is that a vagrant child did not necessarily run away or disregard parental commands (many vagrant youths undoubtedly were the loving and obedient offspring of impoverished parents). Further, the Disorderly Child Act permitted, for the first time, a judicial action initiated by a parent against a child.

136. A possible predecessor status offense statute involving truancy was reported by William P. Letchworth in *The History of Child-Saving Work in the State of New York*, published in the *1893 Annual Report of the State Board of Charities* at 110-111. Letchworth reports that "in 1853 the Legislature, by the passage of the Truant Act, sought to enlarge work of this kind by empowering cities to make provision for truants; but the attempt did not prove a success . . . and was subsequently abandoned." The nature of the unsuccessful legislation is not explained and this author has not been able to locate the statute; further, the Legislature apparently did not enact the first compulsory education law until 1874 (L. 1874, c. 421).

137. The one exception was that status offenders could not be initially imprisoned in an adult institution, a right which the delinquent who committed a felony did not achieve until the early twentieth century. However, a disorderly child who had been placed in a house of refuge could be transferred to an adult jail for a brief period under an 1873 statute providing that delinquents and disorderly children could be transferred to a jail or penitentiary for a period not exceeding six months if such child "... [found] in the house of refuge established by said society in the city of New York or under their care, shall have been guilty of attempting willfully to set fire to any building belonging to the institution or any combustible matter for the purpose of setting fire to any such building, or that any delinquent shall have been guilty of violence to any officer or inmate of the institution or of openly resisting the lawful authority of the officers of the institution, or of attempting, by threats or otherwise, to incite others to do so, or shall by gross or habitual misconduct exert a dangerous and pernicious influence over the other delinquents. ..." L. 1873, c.359. The authorized imprisonment of status offenders with adults in a penitentiary for up to six months underscores the penal quality of the nineteenth century juvenile justice system.

of the Elmira Reformatory in 1870. Even before the Civil War, New York refuge officials had proposed a separate institution for the older first-time offender, which would presumably segregate the younger adult from the older recidivist criminal and apply the principles of rigorous work, education and discipline found in the houses of refuge.[138] Elmira was authorized to receive upon court commitment "... male criminals, between the ages of sixteen and thirty, and not known to have been previously sentenced to a state prison in this or any other state or country ..."[139] Similar to statutes governing the placement of delinquent children (children who had been convicted of committing crimes), the Act permitted commitment to Elmira on a purely discretionary basis, i.e. in lieu of incarceration in an adult prison. The institution was operated by an independent board of managers patterned after the refuge administrative system. In effect, Elmira was the house of refuge for the older child and young adult. The only apparent distinction was that commitment was limited to persons who had been convicted of a crime — a child above the age of sixteen could not be found to be disorderly or vagrant.[140]

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138. See Mennel, *supra* note 131 at 70.

139. L. 1870, c. 427; the new facility received its first occupants in 1877. The cutoff age of thirty is surprisingly high. The statute prohibited the use of contract labor, a system which was practiced widely in the houses of refuge (see page 64); the odd result of permitting contract labor for young children while precluding its application to the older transgressor may be explained by the abhorrence of the system voiced by Elmira's founder, Frederick Howard Wines (see Wines, *Historical Introduction to Prison Reform*, Charles R. Henderson, Editor, Russell Sage Foundation, New York, 1910).

140. The practice of committing children under the age of sixteen who were found to be disorderly or vagrant to institutions was subsequently extended to the older juvenile through the "wayward minor" provision, which applied to a person between the ages of sixteen and twenty-one who was "... willfully disobedient to the reasonable and lawful commands of parent, guardian or other custodian and is morally depraved or in danger of becoming morally depraved." See the Code of Criminal Procedure, §913-a (1970); §913-a was held to be unconstitutional in 1971 — *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971); aff'd. without opinion 406 U.S. 913 (1972). Elmira remains in operation today, though it has been merged into the state correctional system and is managed by the Corrections Department instead of by an independent board.

Elmira was subsequently augmented by the incorporation and funding of the House of Refuge for Women at Hudson.[141] Under the enabling legislation women between the ages of fifteen and thirty could be committed to Hudson for a term not exceeding five years upon conviction of petty larceny, habitual drunkenness or "of being common prostitutes."[142] As a house of refuge, the institution was managed by an independent board; the apparent purpose was to afford the older female who had committed a minor crime the benefit of refuge institutionalization as a substitute to state imprisonment.[143]

A second major post-Civil War initiative was the enactment of a comprehensive "Act for Protecting Children" in 1877, a measure which could be characterized as the state's first generalized child neglect law:

> Any child apparently under the age of fourteen years, that comes within any of the following descriptions named:
>
> (a) That is found begging or receiving or gathering alms (whether actually begging or under the pretext of selling or offering for sale any thing), or being in any street, road or public place, for the purpose of so begging, gathering or receiving alms.
>
> (b) That is found wandering and not having any home or settled place of abode, or proper guardianship or visible means of subsistence.
>
> (c) That is found destitute, either being an orphan or having a vicious parent, who is undergoing penal servitude or imprisonment.
>
> (d) That frequents the company of reputed thieves

141. L. 1881, c. 187.

142. *Ibid.*

143. In 1890 the Legislature established a similar institution at Albion; L. 1890, c. 238.

> or prostitutes or houses of assignation or prostitution, or dance-houses, concert saloons, theaters and varieties, or places specified in the second section of this act, without parent or guardian, shall be arrested and brought before a court or magistrate. When, upon examination before a court or magistrate, it shall appear that any such child has been engaged in any of the aforesaid acts, or comes within any of the aforesaid descriptions, such court or magistrate, when it shall deem it expedient for the welfare of the child, may commit such child to an orphan asylum, charitable or other institution, or make such other disposition thereof as now is or hereafter may be provided by law in cases of vagrant, truant, disorderly, pauper or destitute children.[144]

The Act, which was probably drafted or at least advanced by child savers groups, such as the Society for the Prevention of Cruelty to Children,[145] had a remarkable breadth. Apparently aimed at the poor or destitute child, the legislation was predicated, in part, on the 1851 statute permitting commitments to the juvenile asylum, but, unlike the earlier Act, parental malfeasance or non-feasance was not a prerequisite to commitment.[146] On its face, the statute encompassed situations in which a parent did not know of the child's conduct or, if cognizant, employed remedial discipline. Moreover,

144. L. 1877, c. 428.

145. See pages 70 through 76 for a description of the organization and powers of S.P.C.C.

146. The Juvenile Asylum Act (L. 1851, c. 332; see page 57) also incorporated stringent procedural safeguards. Applied initially only to the Juvenile Asylum, the statute was subsequently made applicable to several additional child care agencies. Although the 1851 Act might be characterized as a precursor of the 1877 Statute, its scope was limited and, as such, it fell far short of constituting a child neglect law.

commitment[147] could be predicated upon a single act of, say, attempting to receive alms or "wandering and not having any home or suitable abode," though other provisions ostensibly required a pattern of behavior (for example, children "that frequent ... dance-houses, concert saloons, theaters and varieties ... without parent or guardian").[148] Although many aspects appear to be archaic, even when compared with subsequent nineteenth century legislation (for example, the lack of a parental notice requirement), several provisions remained intact well into the twentieth century. For example, the 1922 Children's Court Act defined a neglected child as, inter alia, one "who wanders about without lawful occupation or restraint" or "who is found in any place the existence of which is a violation of law."[149]

Further, the Act, unlike subsequent child protective legislation, did not encompass parental neglect or even authorize an examination of the child's home environment. Only public activities such as begging were proscribed; the maltreated or malnourished

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147. The word "commitment" as used throughout the nineteenth and early twentieth centuries is equivalent to the current word "placement" (see e.g. Family Court Act §1055, which refers to the "placement" of a neglected child with a public or private child care agency). The term "placement" may be viewed as a part of the substitution of unique juvenile justice terminology for criminal justice terms (such as substitution of the word "finding" for "conviction").

148. L. 1877, c. 428, §3(d); emphasis added.

149. Children's Court Act of the State of New York, §2(4)(d) and §2(4)(f) (1922); for a contemporary version of the 1877 Act see, for example, Alabama Code, Title XIII, Chap. 7, §350, which provides:

> The words "neglected child" shall mean any child, who while under sixteen years of age is abandoned by both parents, or if one parent is dead, by the survivor or by his guardian, or his custodian; or who has no proper parental care or guardianship or whose home, by reason of neglect, cruelty or depravity, on the part of his parent or parents, guardian or other person in whose care he may be is an unfit or improper place for such child; or who is found begging, receiving or gathering alms, or who is found in any street, road or public place for the purpose of so doing, whether actually begging or doing so under the pretext of selling or offering for sale any article or articles, or of singing or playing on any musical instrument, or of giving any public entertainment ... or who for any other cause is in need of the care and protection of the state.

youth remained unprotected. Although wandering, begging or frequenting bars and dance halls might on occasion evidence the possibility of neglectful or uninterested parenting, such conduct might instead evidence the family's economic difficulties. And the proscribed activities could hardly be practiced by an infant or young child, that is by the age group which might require greater protection than the adolescent. Protection of the very young was not possible until the statutes were subsequently broadened and enforced by the child protective agencies.

Jurisdiction to determine cases under the new act was vested in the criminal courts. Indeed, although the statute was not a penal law in the sense that a child could be criminally convicted and imprisoned, the youth was treated as a defendant who "shall be arrested and brought before a court or magistrate"; the evolution of child protective laws had not reached the stage where the parent or guardian was the subject of the action. But perhaps most significant, at least in terms of its effect upon children and the authorities responsible for child care, was the last clause permitting any disposition as "may be provided by law in cases of vagrant, truant, disorderly, pauper or destitute children." Since "disorderly" children, i.e. status offenders, could be committed to institutions for delinquents under the provisions of the 1865 "Disorderly Child" Act, the Child Protection Act indirectly permitted the placement of neglected and destitute children under the age of fourteen in delinquent facilities. In other words, a child who came within the definition of the Child Protection Act could initially be placed in any institution or program for delinquent and disorderly children (including a house of refuge), except the adult penitentiary (an unlikely sentence for any child under the age of fourteen) and, if incorrigible, might be subsequently transferred to an adult prison.[150]

150. Under the provisions of the 1873 Act delinquent or disorderly children (and hence neglected children) could be imprisoned for up to six months; see *supra* note 137, page 51. The 1877 Act also incorporated the following provision: "No child under restraint or conviction apparently under the age of fourteen years, shall be placed in any prison or place of confinement, or in any courtroom, or in any vehicle for transportation to any place in company with adults charged with or convicted of crime, except in the presence of proper official." The section apparently did not preclude imprisonment in the adult penitentiary or other adult facility of any child under fourteen, but merely mandated that proper supervision be provided in such circumstances.

By 1877 the criminal courts possessed full jurisdictional powers over children, including delinquents who had committed a crime, children who today might be characterized as persons in need of supervision and neglected children. Moreover, the court's dispositional powers largely overlapped. It mattered little whether the child had committed a violent crime, was "disorderly" or was found in a theater without a parent.[151] The route to the houses of refuge or child care agencies was open to all who could be classified as disorderly or met the vague definition of the act for protecting children. The courts, at first criminal and later juvenile, could frame a disposition based solely on the child's needs regardless of the conduct which had triggered judicial intervention. Historic policies and legal principles designed to protect family integrity and preclude state involvement, including the infancy presumption, were largely eroded (while the delinquent child might be protected by the infancy presumption, the same youth could be found to be disorderly in a proceeding in which the presumption was inapplicable). Removal of a child from its family through judicial commitment in the name of helping the child, or at least the impoverished youth, was a clear possibility.

The last major post-Civil War act affecting children was the 1873 enactment of the state's first adoption law.[152] Adoption was defined simply as "... the legal act whereby an adult person takes a minor into the relation of child, and thereby acquires rights and incurs the responsibilities of parent in respect to such minor."[153]

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151. The differences between the 1865 Disorderly Children's Act and the 1877 Child Protection Act is an interesting one. The 1865 Act required that a parent request the commitment of a disorderly child whereas the 1877 statute permitted commitment without the consent of the parent, indeed did not even provide for parental notification.

152. L. 1873, c. 830. Adoption was a nineteenth century concept that had no common-law antecedent. A possible origin of the adoption doctrine is alluded to in Letchworth, *supra* note 136 at 102: "in 1873, a law, the principle of which was taken from the French statutes, was passed for the adoption of children, which is growing more and more into favor, and has been attended with very satisfactory results."

153. L. 1873, c. 830, §1. The definition accurately describes the adoption relationship to this day; however, unlike its modern counterpart, the initial adoption law precluded inheritance from the adoptive parent by an adoptive child.

The consent of the natural parent was generally required, but, significantly, consent was not necessary ". . . from a father or mother deprived of civil rights, or adjudged guilty of adultery or cruelty, and who is, for either cause, divorced; or is adjudged to be a ... an habitual drunkard, or is judicially deprived of custody of the child on account of cruelty or neglect."[154] Similarly, parental consent could be dispensed with if the child had been abandoned.[155]

The ease with which parental rights could be terminated (by simply not requiring consent) would shock contemporary adoption agency officials. Curiously, the Act did not define the words "cruelty" or "neglect," nor apparently did any other contemporaneous statute.[156] On the other hand, deprivation of civil rights and divorce were unambiguous concepts. A parent imprisoned for a felony conviction would lose his civil rights and, simultaneously, the right to challenge the adoption of his child. Likewise a parent who was the unsuccessful defendant in a divorce proceeding based on adultery could not veto an adoption (one adulterous act could hence result in the termination of parental rights). The potential use of adoption by the developing child care and child protective agencies was indeed great. Consent of an uneducated and perhaps foreign-speaking parent might be obtained readily or, as an alternative, the courts were increasingly available to determine issues of cruelty and neglect or approve adoptions when parental consent was not statutorily required.[157]

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154. L. 1873, c. 830, §6.

155. L. 1873, c. 830, §11.

156. Since most of the pertinent legislation was in the form of uncodified session laws, it is difficult to state with a substantial degree of certainty that a statute did not exist.

157. There is also an 1874 statute stipulating that the Children's Fold, a child care institution, could place a child for adoption provided the child had been in care for one year if below the age of ten or had been in care for six months if over the age of ten (L. 1874, c. 506). The only manner in which this statute could be interpreted as consistent with the 1873 Adoption Act is to conclude that the statute precluded adoption regardless of parental consent or wrongdoing unless the child had been placed with the agency for a minimum period. The reason for this particular restriction applicable to only one agency is not clear.

Adoption, however, was a tool most readily available to assist children who had been placed with families by the Children's Aid Society or other foster care organizations. For the delinquent, vagrant or disorderly child confined to a house of refuge, adoption was not feasible. Further, the system largely involved the older youth or adolescent, i.e. the least likely "adoptable" age group. The subsequent decline of residential institutions, such as the houses of refuge, and the rise of the religious and non-sectarian child care and adoption agencies increased adoption possibilities, but still excluded a large number of children.

The adoption and child protection acts completed the cycle of child care legislation. Vagrant, disorderly, delinquent and "neglected" children could be committed by the criminal courts to agencies and ultimately might be adopted. A complete, if imperfect, juvenile justice system had been legislated; implementation was assured by the rapidly expanding child care and child protective network.

B. The Child Care Organizations

The first major New York child care agency was the Children's Aid Society.[158] Founded in 1853 by Charles Loring Brace, a noted social reformer, the Society's purpose, highlighted in its initial report, was to "rescue" impoverished immigrant children from the streets and poorhouses through placement in foster homes or farm apprenticeships:

158. Unless one classifies the Society for the Reformation of Juvenile Delinquents as a child care agency.

> During the last twenty years, a tide of population has been setting towards these shores, to which there is no movement parallel in history ... the pauperism and poverty of England and Ireland has been drained into New York ... The children of this class, naturally, have grown up under the concentrated influences of the poverty and vice around them.[159]

The Society's account of an immigration "tide" was accurate (although its view of "the poverty and vice" surrounding the newly arrived population may have been overstated). The Irish potato blight and the 1848 civil disorders in Germany had caused a great migration of malnourished citizens from those countries.[160] Approximately 100,000 immigrants had arrived in 1845; by 1854, the number exceeded 400,000[161] (the numbers thereafter declined until the 1870s). Services were clearly needed to assist New York's immigrant families.

The Society described the children it sought to serve in words which parallel the subsequent disorderly child and children's protective acts:

> Our objects have been, the improvement and elevation of the vagrant and poor children of the street, boys and girls; of those engaged in the petty out-door trades; those who beg, or pilfer, or pick the streets for a living, and those who are driven by homelessness and poverty to the prison, or who are confined there for petty crimes.[162]

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159. *First Annual Report of the Children's Aid Society*, 1854, at 3-4. The Society reported that juvenile crime was rampant with two-thirds of the complaints of higher grade felonies involving persons between the ages of nineteen and twenty-one; of 16,000 criminals lodged in the city prison, 4,000 were under the age of twenty-one and 800 under the age of sixteen (*Id.* at 5). The large number of children below the age of sixteen lodged in the city prison seems odd, given the widespread practice of commitment to homes of refuge in lieu of imprisonment, but the Society's statistic may have included youths who were briefly imprisoned or detained pending trial or disposition.

160. A. Schneider, *supra* note 49, Vol. I at 301.

161. *Ibid.*

162. *Second Annual Report of the Children's Aid Society*, (1855), p. 4; see pages 47 through 50 for a discussion of the 1877 "neglected" children's act which follows closely the Society's earlier description.

The object was to place children in wholesome environments far removed from the ghetto streets, and of equal significance, far removed from the crowded houses of refuge and orphan asylums.[163] During its first year Children's Aid placed 800 children "to the country,"[164] of whom only 143 were American citizens.[165] The Society continued to place relatively small numbers of children throughout the 1850s and '60s.[166] By 1875, however, the number had grown to 4,000,[167] a figure which remained relatively constant until the end of the century.

Children's Aid did not seek court commitments, but relied upon ostensibly voluntary parental placements, although the ability of an impoverished parent, perhaps confined to an almshouse, to resist

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163. "Such children cannot all be shut up in Asylums, and indeed, it may be doubted, whether they are, even in the best Institutions, improved, by the crowding of numbers together"; *Ibid.* at 5.

    Charles Loring Brace, the Society's founder, viewed immigrants as the unfortunate victims of social and economic pressures. For example, he reported that homeless and vagrant children "are often of very good stock; coming of honest European peasantry who, in a foreign land [the United States] have become unfortunate. They are not links of a chain of criminal inheritance. A criminal family in a large city, much sooner than in rural districts, breaks up rapidly"; Brace, *The "Placing Out" Plan for Homeless and Vagrant Children*, pp. 135-136 (1876), as quoted in Platt, *supra* note 12 at 36.

164. *Id.* at page 5.

165. *Id.* at page 16. The Society's bias against the city is perhaps best illustrated by the following passage in its 1858 report: "Our conviction, then, with increasing experience, in regard to the proper measures benefiting this class, is that whatever in charitable operations tends to keep them in the city, effects on the whole, an injury." (*Fifth Annual Report of the Children's Aid Society*, at page 8).

166. For example, 733 were placed in 1858 and 791 in 1863; *Twenty-ninth Annual Report of the Children's Aid Society*, (1881), page 15. Immigration and industrialization probably contributed to the Society's post-Civil War growth; as the only major child welfare agency which pre-dated the war, Children's Aid was in a unique position to expand its services. The large population of "placed" children undoubtedly contributed to the pressures resulting in the 1877 Child Protective Act; see page 47.

167. *Ibid.*

placement is questionable. The consequences of placement were acute; although the child was spared institutionalization, the family was permanently separated and the child transported to a remote farm where he might be exploited, despite the agency's benevolent intentions. Services to assist or rehabilitate the family were non-existent (even visitation was impossible). In short, agrarian foster placement was tantamount to termination of parental rights.

During the period of its rapid growth the Society also established a chain of lodging houses and schools to shelter, feed and educate needy children.[168] In 1881 the Society reported that 200,000 children had been temporarily sheltered, fed and instructed, a total over three times greater than the number of children placed (a total of 63,330 were placed from 1854 through 1881); Children's Aid had become a comprehensive child care agency maintaining both residential and non-residential services. And by 1880 the Society was only one of several child care agencies devoted to assisting or "saving" children through shelter, education and placement in agrarian foster homes.[169]

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168. *Id.* at 8 and 15.

169. The largely western "host" states, as might be expected, did not accept wholeheartedly the transfer of rowdy immigrant youngsters from New York City. The presence of controversy is alluded to in Letchworth, *supra* note 136, at 87-88, though the author staunchly defends the practice; of course, the disadvantages to the agrarian resettlement areas may have been outweighed by the benefits of receiving young workers capable of performing demanding farm and trade labor:

> While some of the western States have legalized the placing of children in families within their borders by eastern societies, thus showing their approval of the practice, complaints have been made from time to time in the meetings of the National Conference of Charities and Correction against the immigration of such children, some of whom, it was asserted, ran away from their guardians and became vagrants and criminals. Conceding this to be so, if we consider the question dispassionately, looking to the interests of the whole country and not to those of any particular State, we must conclude that the work of the Society has been of incalculable benefit. Had the children whom the Society placed in the West been left to roam the streets of New York, the great mass of them would have become vagrants and criminals; and, as such are itinerant, they would have infested the Western States as well as the Eastern, and increased the number of dangerous classes in every State of the Union. By placing these in Western homes the great majority of them had been made good citizens, to the measurable advantage of of the country at large.

A second child care institution organized in the years immediately preceding the Civil War was the New York Juvenile Asylum. Incorporated by legislative act in 1851, the Asylum provided residential care for the very young, i.e. children below the age of fourteen.[170] Unlike the Children's Aid Society, which apparently lacked a legislative charter, the Juvenile Asylum was governed by a comprehensive procedural statute providing for the placement of children through either voluntary parental surrender or court commitment.[171] The Asylum also secured legislation requiring the City of New York to appropriate $50,000 toward the cost of constructing the institution; of greater significance, the municipality was required to reimburse the Asylum $40.00 per year for each child "... entrusted or committed to the said asylum from the city and county of New York."[172] Funding was thereby provided on a open-ended basis; the Asylum could expand as needed without further recourse to the Legislature.

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170. L. 1851, c. 332; the Juvenile Asylum actually predated the Children's Aid Society by two years, but was not fully functional until the end of the decade. Both organizations remained small until the tremendous post-war growth of the child care agencies.

    Establishment of the Juvenile Asylum was preceded by the incorporation of the New York Association for Improving the Conditions of the Poor in 1843. In attempting to alleviate conditions of poverty, Association officials were shocked by the number of homeless and neglected children, estimated at 3,000, who roamed the streets of New York City. In 1850 the Association for Improving the Conditions of the Poor, bolstered by a report by the New York City Police Commissioner concerning the destitute state of immigrant children, drafted legislation to incorporate a Juvenile Asylum. See Schneider, *supra* note 49, Vol. I at 328-329.

171. L. 1851, c. 332, §§1 and 2; the Children's Aid Society apparently lacked and probably did not desire the ability to receive juveniles through court commitment, but presumably relied on voluntary placements.

172. L. 1851, c. 332, §§27 and 28. The statute further provided that "the schools established and maintained by the New York juvenile asylum, shall participate in the distributing of the common school fund in the same manner and degree as the common schools of the city and county of New York," thus assuring adequate educational appropriations (L. 1851, c. 332, §30).

The Act provided that a child between the ages of five and fourteen who was found on the street "or other public place in the circumstances of want and suffering, or abandonment, exposure or neglect, or of beggary" could be temporarily committed by a magistrate to the Juvenile Asylum.[173] An Asylum official or a police officer was thereupon required to serve the parent with notice.[174] The parent could regain custody by convincing the court that the youngster was not neglected.[175] If not, the court, upon finding that the child was in need "by reason of the neglect, habitual drunkenness or other vicious habits of the parents or legal guardian of such child," was required to issue a permanent commitment.[176] However, the Asylum could subsequently discharge for

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173. L. 1851, c. 332, 9. The full text of the provision is as follows:
Whenever any child above the age of five and under the age of fourteen years, shall be brought by any policeman of the city of New York, before the mayor or recorder, or any alderman or other magistrate of the said city, upon the allegation that such child was found in any street, highway or public place in said city, in the circumstances of want and suffering, or abandonment, exposure or neglect, or of beggary, specified and defined in the eighteenth section of the act entitled "an act relative to the powers of the common council of the city of New York, and the police and criminal courts of said city," passed January 23, 1833, and it shall be proved to the satisfaction of such magistrate, by competent testimony that such child is embraced within the said section, and it shall further appear to the satisfaction of such magistrate by competent testimony or by the examination of the child, that by reason of the neglect, habitual drunkenness or other vicious habits of the parents or lawful guardian of such child, it is a proper object for the care and instruction of this corporation, such magistrate instead of committing such child to the almshouse of said city, or to such other place, if any, as may have been provided by the common council thereof, in his discretion by warrant in writing under his hand, may commit such child to this corporation to be and remain under the guardianship of its directors, until therefrom discharged in manner prescribed by law. The Asylum was also authorized to receive children through voluntary parental placement (and voluntary placements may have outnumbered court commitments).

174. Notice was to be served on the father or, if paternal notice was not feasible, upon the mother or guardian; see L. 1851, c. 332, §§11 and 12.

175. L. 1851, c. 332, §13.

176. L. 1851, c. 332, §14.

any reason and was required to release the child in the custody of a parent if the Asylum Board of Directors found that the judicial commitment was based upon "insufficient cause, false or deficient testimony, or [the child was] otherwise wrongfully or improvidently so committed."[177]

Court intervention was thus predicated on the combination of an egregious public act, such as begging, and parental malfeasance. Commitments were governed by rigorous procedural requirements, a strong contrast to the far looser disorderly child and child protective acts which followed.[178]

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177. L. 1851, c. 332, §16; however, if the child was subsequently "arrested" for being in a state of want after an initial discharge, parental notification was not required.

The Asylum and other child care agencies to which the Act was subsequently made applicable hence enjoyed the extraordinary power to reverse a court which had ordered the child committed. For example, the Agency could determine that the judge acted on "false or deficient testimony" and then release the child.

178. See page 58. The Asylum was originally empowered to accept children between the ages of five and fourteen, but that provision was quickly amended to ages seven to fourteen, L. 1851, c. 387. Implementation of the parental notification section was apparently difficult; for in 1856 the Legislature provided for substituted service "to be posted up in a conspicuous place in the police station house nearest the alleged residence of the child" when personal service could not be accomplished "after careful and diligent search and inquiry" (see L. 1856, c. 57, §2).

The retreat from rigorous procedural due process afforded under the 1851 Act to the loose procedures under the 1877 Child Protective Act and 1882 Commitment Code may be explained by the increasing social pressures to treat and rehabilitate needy or neglected youngsters, particularly from immigrant families. To "child savers," parental due process was not a priority.

The procedures prescribed in the 1851 Act remained in effect, in slightly modified form, for several decades and were sequentially made applicable to a growing list of child care agencies as each received legislative incorporation. In other words, the commitment and procedural sections of the Juvenile Asylum Act became the operative commitment statutes for a widening list of child care agencies, an event which transformed the original statute into a more generalized child care procedure code.[179]

The New York Juvenile Asylum incorporation was followed by the Buffalo Juvenile Asylum[180] and the American Female Guardian Society.[181] And in 1860 the first religious-based child care agency, the Hebrew Benevolent Society of New York, was incorporated with the same powers and authority as those conferred upon the Juvenile Asylum.[182] The inclusion of religious institutions as major child care agencies was completed with the sequential incorporation, in a manner similar to that of the Hebrew Benevolent Society and the Juvenile Asylum, of the Society for the Protection of Destitute Roman Catholic Children in the City of New York,[183] the Society for the Protection of Destitute Roman Catholic Children

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179. The statute was repealed by the 1882 Commitment Code; see page 100. But the 1851 Act, limited to commitment procedures for selective agencies, never achieved statewide applicability; the first generalized child neglect statute was the 1877 Act for protecting children; see page 43.

180. L. 1856, c. 123.

181. L. 1857, c. 249. The American Female Guardian Society was authorized to receive girls under the age of fourteen and boys under the age of ten. Both the Buffalo Asylum and the Guardian Society were required to follow the procedures prescribed in the 1851 Juvenile Asylum Act.

182. L. 1860, c. 316. According to Letchworth *supra* note 136 at 77, the Benevolent Society had been founded without legislative charter in 1822. The advantages of legislative incorporation apparently included the authority to accept court commitments and the ability to retain custody over parental objection; legislative incorporation thereby converted the society from one engaged in voluntary charitable work to one which was endowed with child care agency powers.

183. L. 1863, c. 448; the organization subsequently changed its name to the New York Catholic Protectory (L. 1871, c. 83). Like the Hebrew Benevolent Society, the Protectory appears to have evolved from an earlier voluntary charitable organization (see Letchworth, *supra* note 136 at 75).

in the City of Buffalo,[184] the Shepard's Fold of the Protestant Episcopal Church[185] and the Home for Christian Care.[186] By 1874 the Legislature had also incorporated the non-sectarian Home for Friendless in Northern New York plus dozens of smaller child care agencies.[187]

Thus, by the mid-1870s each of the three major religions had received a legislative charter for child care agencies, completing New York's amalgam of sectarian and non-sectarian agencies to receive and care for children through voluntary surrender or judicial commitment. The growth of religious organizations is at least partly explained by the mushrooming need for residential and non-residential programs during the Civil War and subsequent waves of immigration and industrial growth. The religious organizations also concluded that the placement of children by non-sectarian organizations, such as the Children's Aid Society, might result in religious conversion when children removed, particularly from Catholic families in New York, were placed in predominantly Protestant midwest homes.[188] Establishment of sectarian child care organizations surely decreased the likelihood of proselytization; in effect, the church could "take care of our own" by accepting the responsibility for needy and neglected youngsters. That role was secured (and the possibility of conversions minimized) by an 1879 statute stipulating that whenever a vagrant, disorderly or truant child "... is committed to any orphan asylum or reformatory, it

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184. L. 1864, c. 364.

185. L. 1868, c. 775.

186. L. 1874, c. 334.

187. L. 1874, c. 492

188. As one observer noted: "The proponents of placing children and defenders of the reform [or refuge] school system differed over ways to care for delinquents, but philanthropists of both persuasions were staunch Protestants (many were ministers) who on occasion used their position to proselytize the children under their care," Mennel, *supra* note 117 at 63. The Children's Aid Society, for example, placed large numbers of predominately Catholic German and Irish children (those nationalities which comprised the immigrant classes) in Protestant agrarian homes; see, for example, *Twenty-ninth Annual Report of the Children's Aid Society*, *supra* note 166 at 16.

shall, if practicable, be committed to an asylum or reformatory that is governed or controlled by persons of the same religious faith as the parents of such child."[189]

The 1879 law has remained in effect for over one century; the current version, broadened to encompass any court commitment or remand, is virtually identical to the original statute.[190] Although recently challenged as violative of the Federal constitutional proscription against the establishment of religion, the religious "matching" provision has been upheld and sectarian agencies continue to fulfill a paramount child care role.[191]

The authority of all the child care agencies was strengthened, and procedural rights of parents severely compromised, by an 1866 statute providing that a magistrate's commitment "... shall be final and he shall thereafter have no power to discharge such child from the house of reception or from the asylum, or in any manner from the care and custody of said corporation."[192] The law effectively restricted the court's jurisdiction to review and revise commitment orders — placement with a child care agency became a one-way street, except for the very limited judicial review afforded by habeas corpus.[193] Thus, from an early date the courts relinquished con-

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189. L. 1878, c. 404,1. Whether the statute precluded commitment to a sectarian agency is not clear; similarly, its impact on voluntary placements or the commitment of abandoned or neglected children is unclear.

190. "Whenever a child is remanded or committed by the court to any duly authorized association, agency, society or institution, other than an institution supported or controlled by the state or a subdivision thereof, such commitment must be made, when practicable, to a duly authorized association, agency, society or institution under the control of persons of the same religious faith or persuasion as that of the child"; Family Court Act §116(a) (McKinney's, 1986).

191. See *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974).

192. L. 1866, c. 245. Although an amendment to the 1851 New York Juvenile Asylum Act, that act was sequentially made applicable to most child care agencies, religious and non-religious, except the Children's Aid Society.

193. See pages 110 through 112.

trol over the custody of minors as soon as the original commitment was judicially determined. The child care agencies exercised virtual plenary power over children placed in their custody.[194]

One major factor in promoting stringent commitment legislation was the continuing influx of immigrants. It is no coincidence that the child welfare system matured in the 1870s and 1880s; almost three million aliens arrived in the United States in the 1870s and the number almost doubled in the succeeding decade.[195] And approximately three-fourths of all immigrants entered the country through New York.[196] The state became the pioneer in developing child welfare legislation and services largely through necessity.

An increase in the number of youths placed with child care agencies and the concomitant expansion of agency facilities was further assured by an 1875 statute which prohibited the confinement of children in the almshouses.[197] Placement in poorhouses, which existed to provide shelter to destitute persons of all ages, had been prevalent since the colonial era.[198] Faced with growing criticism of almshouses conditions, where children were housed with alcoholics and mentally ill adults, the Legislature ordered the removal of all persons under the age of sixteen.[199] The legislation, which one commentator has deemed "probably the greatest single

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194. But see *Matter of Knowack*, 158 N.Y. 482 (1899), discussed at page 93, in which the Court of Appeals held that courts retained the inherent equitable power to restore parental custody. *Knowack*, decided over thirty years after enactment of the 1866 statute, constituted a limited though important exception to the vast powers exercised by child care agencies.

195. A. Schneider & Deutsch, *infra* note 199, Vol. II at 113.

196. *Ibid.*

197. L. 1875, c. 173.

198. See page 18.

199. L. 1875, c. 173. For a description of poorhouse problems see David M. Schneider and Albert Deutsch, *The History of Public Welfare in New York State, 1867-1940*, University of Chicago Press, (1941), pages 16-18. In 1868 a total of 2,261 children under the age of sixteen were reportedly housed in poorhouses throughout the state (*Id.* at 60).

advancement in child welfare during the period 1867-95 ...,"[200] resulted in an influx of youths to the specialized child care agencies. The Child Protective Act of 1877, with its provisions for the arrest and commitment of "needy" children even in the absence of parental neglect or malfeasance[201] further increased the agencies' residential population. From a base of 11,907 in 1874, the state census of institutionalized children jumped to 23,592 in 1885. In approximately one decade the child care system had doubled.[202]

A further child care reform was the abolition in 1884 of the contract labor system for institutionalized children.[203] Long practiced by the houses of refuge and reform schools, the contract system permitted the binding out of children to private contractors to perform labor, usually menial or rote in nature; in return, the institution or agency received payment from the contractor which was applied toward the child's upkeep.[204] The system was criticized

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200. *Ibid.* As noted earlier, the removal of youths from the almshouses had been advocated for at least twenty years, but was not feasible until the 1870s expansion of the alternative child care system; see page 21.

201. See page 47.

202. Schneider and Deutsch, *supra* note 199 at 65; in addition to the removal of juveniles from the poorhouses and the increasing jurisdiction of the courts, the rise of immigration and economic factors undoubtedly contributed to the increase. It should also be noted that the figure probably does not include children placed by the Children's Aid Society, which was not an incorporated child care agency.

203. L. 1884, c. 470; section one provided that "it shall be unlawful for the trustees or managers of any house of refuge, reformatory or other correctional institution, to contract, hire, or let by the day, week, or month, or any longer period, the services or labor of any child or children now or hereafter committed to or inmates of such institutions."

204. See Mennel, *supra* note 131 at 58-62 for a more complete description of contracting abuses.

severely, particularly for abuses which included long hours and corporal punishment at the hands of the contractor.[205]

Contracting had gained such importance to the houses of refuge that in 1878 the Legislature enacted a statute authorizing the houses to release either to parents or to "the superintendent of the poor in the county whence such child was committed" any crippled, deaf, blind, epileptic or imbecile youth.[206] Incredibly, the houses could thrust onto the streets precisely those children who most required services while maintaining only those who could be worked for profit. The continuation of house of refuge confinement had become more a matter of economic exploitation than of rehabilitation.

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205. See, for example, William Pryor Letchworth, *Labor of Children in Reform Schools*, New York, 1882, as republished in Bremner, *supra* note 15, Vol. II, at 470-471:

> Children under sixteen years of age, when subjected to long hours of labor, in irksome positions, under a task contract system, are likely to be retarded in their development, and fagged out at the end of their long confinement, are too weary to derive due advantage from the teachings imparted in the evening school.
>
> While flogging has long been abolished in the Navy and the use of the "cat" in the State Prisons, it is still thought necessary in order to realize a fair pecuniary return from the children's labor, for the contractor to inflict severe corporal punishment for deficiency in imposed tasks.
>
> ... the tendency of the contract system in reformatory institutions for boys is to retain as long as possible those who are most valuable to the contractor, and as these generally belonged to the most dutiful class and consequently entitled to an early discharge, a great injustice is done, which sometimes drives boys to desperation. On the other hand, the intent of the contractor being to rid himself of the unskillful and careless workers, there is danger of a premature discharge of such before the work of reformation is completed.

206. L. 1878, c. 384. Before the Civil War the houses of refuge had made only minimal use of apprenticeship; see page 39. After the war the use of contracted labor, a method which could result in greater abuse, was practiced widely by the houses (apprenticeship at least ostensibly includes the responsibility to train and educate while contract labor is a purely economic labor arrangement).

Contracting also reflected the strong desire to minimize dependence on governmental funds (and the concomitant possibility of state interference); each dollar gained through private employment sources decreased the need for legislative appropriations. Although the houses of refuge were the primary users of contract labor, the system was employed by several other juvenile institutions. The 1884 Act finally terminated the abusive practice and simultaneously eroded the ability of the houses of refuge to recoup expenses, thereby fostering the growth of alternative child care organizations.[207]

That same year the Legislature required the licensing of unincorporated child care agencies which cared for children under the age of twelve (i.e. those which lacked a Legislative charter). A license could be obtained from the state Board of Charities or from the local Mayor or Board of Health. Of perhaps greater significance to the protection of juveniles housed in the smaller institutions, the Legislature permitted the societies for the prevention of cruelty to children to inspect such facilities.[208] Two years later the

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207. Of course the handicapped child needed greater services at greater expense than the healthy child, a fact which the 1884 Act did not address. The 1878 statute permitting the discharge of a handicapped child without any provision for services also appears to be at cross-purposes with the legislative trend toward more humane child care laws. To replace the contract system the Legislature subsequently funded vocational training at the Society for the Reformation of Juvenile Delinquents in the form of a textile shop, a carpentry shop, a paper box factory, a cooking department and a printing shop (L. 1888, c. 480 and L. 1889, c. 569).

208. L. 1884, c. 46, §288. The zeal of S.P.C.C.s in removing children from abusive organizations is illustrated by the action the New York Society brought against the Shepard's Fold — see page 75. The text of the licensing statute is as follows:

> Any person, other than a duly incorporated institution, who receives, boards or keeps more than two foundlings, abandoned or homeless children under the age of twelve years, not his relatives, apprentices, pupils or wards, without legal commitment, or without having first obtained a license in writing so to do from a member of the state board of charities, or from the mayor or board of health of the city or town wherein such children are received, boarded or kept, is guilty of a misdemeanor. Such license must specify the name and age of the child, and the name and residence of the person so undertaking its care, and shall be revocable at will by the authority granting it. It shall be lawful for the officers of any incorporated society for the prevention of cruelty to children, at all reasonable times to enter and inspect the premises wherein such child is so boarded, received or kept.

Legislature established standards for medical care and housing for all the child care agencies and houses of refuge requiring, inter alia, monthly medical examinations and inspections of both the institutions and their resident children. The Act further prescribed detailed housing specifications and educational requirements.[209] The simultaneous abolition of the contract system, which precluded the care and housing of children outside of agency facilities, and the enactment of stringent standards involving inspection, licensing, medical treatment and decent housing substantially improved the environment in which placed or committed children were maintained and educated.

The child care agencies were understandably self-congratulatory for supporting reforms, such as the removal of juveniles from the almshouses and the abolition of the contract system. Such activities were leading to a more humane care system, albeit one which sanctioned a greater intervention in family affairs and a swelling population of institutionalized children. The agencies were also quick to take credit for an apparent decrease in the crime rate which occurred following the earlier post-Civil War upheavals (although the decrease may be attributed to social and economic factors, such as an improved standard of living, rather than expanded agency involvement). For example, the Children's Aid Society reported a sharp decrease in the number of juveniles arraigned for crimes between 1875 and 1880 and an even sharper

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209. L. 1886, c. 633. The detailed provisions included, for example, the following requirement for children's dormitories:

> The beds in every dormitory in such institution shall be separated by a passageway of not less than two feet horizontally, and all the beds shall be so arranged that under each of them the air shall freely circulate, and there be adequate ventilation. Every dormitory shall be provided with means of ventilation, as the board of health within the locality may prescribe. In the dormitories of such institutions, six hundred cubic feet of air space shall be provided and allowed for each bed or occupant, and no more beds or occupants shall be permitted than those provided in this way, unless free and adequate means of ventilation exist, approved by the local board of health, and a special permit in writing be granted therefor, specifying the number of beds or the cubic air space which shall, under special circumstances be allowed. Such permit shall be conspicuously posted and kept posted in each dormitory. It shall be the duty of the physician attached to any such institution to at once notify in writing the local board of health and the board of managers or directors of such institution, if the provisions of this section are at any time violated.

decrease in the number of delinquents committed by the courts.[210] The Society concluded that "this remarkable decrease of nearly twenty-five percent in all crimes against persons and property during the past six years, is one of the most striking evidences ever offered of the effects of such labors as those of this Society." However, the decrease in juvenile delinquency proceedings must be viewed in light of the increased commitments of children labelled as "disorderly" or "neglected" (pursuant to the 1877 Child Protective Act). A child who might have formerly been charged with a crime could instead be charged under the neglect or disorderly statutes. By increasing the volume of neglect cases and decreasing the volume of delinquency cases (and publicizing the result), the child care organizations might alleviate the public fear of juvenile crime.[211]

Whether the crime rate reduction was attributable to the child care agencies or not, its occurrence during the era of their rapid growth provided the agencies with a potent argument for continued public funding and ever larger legislative grants of power.[212] The growth of the child care agencies continued unabated.

The range of available child care agencies was further broadened in the late nineteenth century by the establishment of the so-called "cottage" institution. Modeled upon a European child care concept, the cottage development substituted a complex of small individual homes where a nuclear family environment could be approximated for the large and often sterile dormitory facilities of the traditional institution.

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210. The number of delinquency commitments decreased from 919 in 1875 to 357 in 1880 and the number of children committed for vagrancy fell from close to 9,000 in 1860 to approximately 4,000 in 1880; see *Twenty-ninth Annual Report of the Children's Aid Society (1881)*, at *supra* note 166 at 8-9.

211. *Id.* at 10.

212. Such as the 1882 Commitment Act; see page 79.

One of the first cottage schools was the Burnham Industrial Farm, later renamed Berkshire Farm. Organized in 1886, the farm developed several innovative child care techniques such as group homes and individualized educational plans [213] Berkshire was subsequently augmented by the incorporation of several additional residential centers practicing modified forms of "cottage" care and principles of self-governance, such as the George Junior Republic.[214]

By 1890 a comprehensive child care system had evolved. Governed by the codified Penal Law and commitment acts of the 1880s,[215] the religious and non-sectarian agencies had gained tremendous powers and responsibilities despite several legal challenges.[216] Delinquent, vagrant, neglected and disorderly

213. See Bremner, *supra* note 15, Vol. II at 476-477 where the author, quoting the papers of Rutherford Hays states:

> The plan [for a cottage school] found most effectual is that practiced for many years with eminent success at Mettray, in France, and at the Rauhe Haus, near Hamburg. Here the boys are distributed in cottage families, not more than fifteen or twenty under one roof, and, under careful personal supervision, are trained in the labor to which their capacities are adapted, with as much as possible of the social and moral influences of home, until they are fitted to be self-supporting citizens. The great majority of those who have been gathered into these institutions, out of the vagabond class, have been permanently saved to society ... Under the charter the [Berkshire Farm] corporation may obtain the custody of boys by surrender on the part of parents or guardians, by the sentence of a committing magistrate for vagrancy, or by transfer from other charitable institutions.

214. See Bremner, *supra* note 15, Vol. II at 480. Bremner, quoting a radio speech by William R. George, the founder of the George Junior Republic, observed:

> The Junior Republic was started July 10, 1895. Its object was to instill in the lives of young people, the virtues of self-support and self-government. This could only be done by direct application. To accomplish that end the customary form of controlling and directing youth by the institution method was renounced. Instead of constructing an institution, a village similar in all essentials to a village of grown-ups was built and put into operation. The young people residing in this village were its voting citizens. They faced the same social, civic, and economic problems that the voting citizens of any other American community confront.

215. See pages 79 through 87.

216. See pages 88 through 96.

youths could be committed under vague statutes or placed directly by parents. A plethora of agencies based upon reformatory, foster care, residential and cottage principles (not to mention non-residential programs) competed for the needy children of New York — the determination of which agency an individual child was placed with was probably more a matter of chance than the product of an examination of suitable alternatives.[217]

The chaotic development of a multitude of child care agencies practicing different philosophies understandably contributed to the movement to rationalize the system through legislative codification, and ultimately led to the establishment of the juvenile courts as well as the development of probation departments to evaluate the child's needs and recommend appropriate placements. Between 1860 and 1890 the child care agencies grew like Topsy, but the juvenile justice system, i.e. the continuum involving investigation, adjudication and disposition, had yet to evolve on a logical basis.

C. The Child Protective Societies

The development of the child welfare agencies during the mid-nineteenth century coupled with the enactment of statutes granting the courts jurisdiction over vagrant, disorderly, delinquent and neglected children established a complex if imperfect system encompassing adjudication, commitment and institutionalization or long-term care. The missing elements were investigation and prosecution.[218] The lack of a preadjudicatory system is evident in the wording of the early statutes which were phrased in terms of criminal activity, complaints by parents[219] or the arrest of children

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217. The agency with which a child was placed or committed probably depended upon who approached the parent or guardian, the views of such child protective agencies such as the societies for the prevention of cruelty to children, or perhaps the philosophy of the criminal court judge charged with the placement decision.

218. As aptly stated by the Society for the Prevention of Cruelty to Children: "Ample laws have been passed by the Legislature of this State for the protection of, and prevention of cruelty to little children. The trouble seems to be that it is nobody's business to enforce them"; *Second Annual Report of the New York Society for the Prevention of Cruelty to Children* (1877), at 6.

219. E.g., the Disorderly Child Act, L. 1865, c. 172, §6.

who were found wandering or begging on streets or other public places.[220] Judicial intervention was triggered by public acts or by parental petition (perhaps at the urging of an agency) rather than an investigation to discover or prove maltreatment.[221]

The deficiency was at least partly remedied by the establishment of the societies for the prevention of cruelty to children in 1875. Formation of the societies was precipitated by a well-publicized episode involving Mary Ellen, a girl severely abused by one Mrs. Connolly (with whom Mary Ellen was living), and Henry Bergh, the president and founder of the Society for the Prevention of Cruelty to Animals. Mary Ellen's plight was apparently brought to Mr. Bergh's attention by neighbors. Bergh thereupon commenced a legal action and, more significantly, publicized the affair.[222] The case resulted in the placement of Mary Ellen, the imprisonment of Mrs. Connolly and legislation authorizing the incorporation of societies for the prevention of cruelty to children.[223]

The enabling act stipulated simply that "any five persons of full age ... who shall desire to associate themselves together, for the purpose of preventing cruelty to children ..." could file a certificate with the Secretary of State and local county provided they received the written consent of a Supreme Court justice.[224] Once established:

> Any society so incorporated may prefer a complaint before any court or magistrate having jurisdiction for the violation of any law relating to or affecting children and may aid in bringing the facts before such court or magistrate in any proceeding taken.[225] [and]

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220. L. 1877, c. 428; see also, L. 1881, c. 332.

221. As noted earlier, one result was the absence of protection for the very young.

222. See *New York Times*, April 10, 1874, as quoted in Bremner, *supra* note 15, Vol. II at 185-187.

223. The scope of publicity surrounding the scandal is illustrated by five *New York Times* articles covering the case's progression through the courts as quoted in Bremner, *supra* note 15 at 185-189.

224. L. 1875, c. 130, §1.

225. L. 1875, c. 130, §3.

> All magistrates, constables, sheriffs, and officers of police shall, as occasion may require, aid the Society so incorporated, its officers, members or agents in the enforcement of all laws which now are or may hereafter be enacted, relating to or affecting children.[226]

The societies' powers were subsequently strengthened when, as part of the children's law codification and consolidation of 1881,[227] S.P.C.C. officers and agents were granted arrest powers.[228] Within a brief period the societies had become full fledged police agencies endowed with the authority to arrest, file charges and present evidence.[229]

The enabling statute was remarkably flexible. Instead of establishing a single agency, the founders innovatively secured the passage of an act which permitted dozens of S.P.C.C.s, one to serve each county in the state.[230] Further, the New York legislation became a model which was duplicated nationally and then internationally. The New York County Society reported that in 1884 there were " ... in active operation in this country 49 societies, and 27 in foreign countries";[231] by the turn of the century 150

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226. L. 1875, c. 130, §4.

227. See page 78.

228. L. 1881, c. 676, §293.

229. It was also held that the societies were immune from state regulation through the State Board of Charities. See *People ex rel State Board of Charities v. The New York Society for the Prevention of Cruelty to Children*, 161 N.Y. 233 (1900).

230. The statute was subsequently broadened to encourage services for counties which did not establish an S.P.C.C. by permitting a society to "...exercise its powers and conduct the like operations in any adjacent county in which no such corporation for such purpose exists" (L. 1909, c. 40, §121).

231. *New York Society for the Prevention of Cruelty to Children, Ninth Annual Report* (1884), at 17.

separate societies devoted to protecting children had been founded.[232]

The societies quickly began to actively investigate and prosecute cases of reported cruelty. In its first year the New York Society for the Prevention of Cruelty to Children, which served only Manhattan, placed sixty-one children.[233] The 1880 annual report lists 1,150 complaints filed, 235 cases prosecuted, 199 "convictions" and 599 children placed in hospitals or with child care agen-

232. Bremner, *supra* note 15 Vol. II at 201. Bremner comments that:

> A quarter century after the founding of the New York Society more than 150 organizations devoted in whole or part to the prevention of cruelty to children were in operation. Most of them, usually called Humane Societies, combined protective work for children and animals. About twenty, patterned after the New York Society, confined their activities to child protection. The societies sought to protect children not only against abuse and neglect but from the moral dangers of certain types of employment.

233. The First Annual Report lists numerous "important cases" ranging from severe abuse to minor transgressions. Examples of each category are as follows:

> Edward Foley was arrested for throwing a pot of boiling coffee over the head and body of his son, Martin, aged twelve, severely scalding face and neck of the child. Tried at Special Session before Justices Smith, Bixby and Murray, found guilty and sentenced to six months penitentiary. The child was allowed to go with elder brother, who promised to care for him.
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> Complaint of Mr. H. Olmstead against Officer Hugh Gatey, Park Police, for cruelly throwing a small boy in basin of fountain in Washington Square, wetting child all over, then sending him home in that condition. Officer tried before Board of Park Commissioners, found guilty and dismissed [by] department July 21st.

First Annual Report of the New York Society for the Prevention of Cruelty to Children at 31 and 44.

cies.[234] Funding was provided by state and municipal sources as well as by private grants. The societies also benefitted from legislation which enabled them to receive fines, penalties and forfeitures which were assessed (and collected) in any case which they had initiated.[235] As a result, prosecutorial activities were at least partially self-funded and were not dependent upon the vagaries of public appropriations (S.P.C.C.s shared the child care agencies' distaste for total reliance on legislative pursestrings).

Activities were directed towards destitute low-income families and the societies shared the child care agencies' bias against immigrants. Thus, the N.Y.S.P.C.C. reported that "the statistics show a very small percentage of Americans as cruelists. And it is not surprising, because very many ignorant foreigners who settle in this country retain their old habits, and fondly clinged to the law practices of their old homes which they imagine they can bring with impunity here."[236] The Americanization of impoverished and allegedly abused immigrant children through placement in residen-

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234. *New York Society for the Prevention of Cruelty to Children Fifth Annual Report* at 90; the list of child care agencies includes most of the predominant religious and non-sectarian organizations. For example, 60 children were placed with the American Female Guardian Society, 72 with the New York Catholic Protectory, 42 with the Juvenile Asylum, 17 with the Society for the Reformation of Juvenile Delinquents, 14 with the Hebrew Guardian Society, and 97 with the Sisters of the Order of Saint Dominick (*Id.* at 91).

    The disparity between the number of prosecutions (235) and the number of children placed (599) is, for the most part, probably the result of "voluntary" placements; faced with the threat of prosecution, many parents would surrender custody. Also, one prosecution might include several sibling children.

235. L. 1888, c. 145, §490. The full text of the statute provided that:

    > All fines, penalties and forfeitures imposed or collected for a violation of this chapter [the Penal Law], or of any act hereafter passed must be paid on demand to the incorporated society for the prevention of cruelty to children in every case where prosecution shall be instituted or conducted by such a society, and any such payment heretofore made to any society may be retained by it.

236. *New York Society for the Prevention of Cruelty to Children Eleventh Annual Report* (1886), at 8.

tial child care or foster programs was an integral feature of the entire system, from investigation and prosecution by a S.P.C.C. through long-term placement or adoption under the auspices of a child care agency.

Societies for the prevention of cruelty to children also viewed themselves as child advocates, lobbying for child labor laws and improved child protection acts. The 1881 codification of the child protective laws and the 1882 Commitment Act were largely the result of the societies' efforts and S.P.C.C.s subsequently advanced the juvenile court movement.[237] Child welfare agencies were also scrutinized. In one celebrated case of institutional abuse the New York County S.P.C.C. successfully prosecuted the Shepard's Fold, a residential agency, and its director for endangering the lives of children placed in his custody.[238] The director was sentenced to serve a term of one year in the penitentiary.[239]

The societies viewed seriously their broad mandate to commence actions "for the violation of any law relating to or affecting children."[240] For example, S.P.C.C.s successfully brought suit to enforce parental child support obligations and initiated actions to enforce the child labor laws.[241] As quickly as they were incorporated, S.P.C.C.s became an established part of the child welfare

237. See pages 78 through 87.

238. The misdemeanor conviction for the crime of endangering the life of a child was upheld by the Court of Appeals; *People v. Crowley*, 83 N.Y. 464 (1881).

239. See *New York Society for the Prevention of Cruelty to Children Sixth Annual Report* (1881), at 20 and 21. As a result of efforts aimed at institutional abuse, S.P.C.C.s gained the authority to inspect all unincorporated child care agencies (L. 1884, c. 463).

240. L. 1875, c. 130, §8.

241. See *People ex rel. Balch v. Strickland*, 13 Abb. N.C. 473 (City Court of Yonkers, 1884).

system and remained so well into the twentieth century.[242] No organization (or, more accurately, organizational network) had a greater influence in the development of children's laws during the late nineteenth and early twentieth centuries and no organization contributed as greatly to the growing population of children placed in long-term residential institutions and programs.

242. Several S.P.C.C.s, including the granddaddy, the New York Society, are still active today. The societies have been designated as child protective agencies (Family Court Act 1012[i]) and may accordingly remove children without court order (Family Court Act §1024) and file child neglect and abuse petitions (Family Court Act §1032); in addition, society officers are "peace officers" (See Criminal Procedure Law §2.10[7]) and may accordingly exercise specific police powers. Thus to this day the societies have maintained a large part of the extraordinary powers first conferred by the 1875 Act.

CHAPTER IV

Code Consolidation and Caselaw Development

1880-1890

Post-Civil War legislation, such as the 1877 Child Neglect Act and the statutes which vested extraordinary powers in societies for the prevention of cruelty to children, added substantial sequential provisions to the the mass of chapter laws governing children's activities.[243] For over 200 years the New York State legislative structure, including laws relating to children, had been comprised wholly of individual session laws. A penal provision might be followed by one governing canal navigation; to determine provisions which might apply to a given case, an attorney or researcher would examine a multitude of chronologically arranged chapter laws, perhaps assisted by an explanatory treatise. In the late nineteenth century the Legislature consolidated most of the chapter laws into topical codes, a system which has continued to this day. Of course, codification also presented individual legislators and interest groups with an opportunity to amend pre-existing statutes. Children's laws were codified, and extensively amended, in the 1880s.

The 1880s were also the nadir of progessive movements to improve children's lives and, not incidentally, to increase state involvement in familial affairs. By then, several philosophies had converged. As noted by Anthony Platt, in his book *The Child Savers: The Invention of Delinquency*:

> The child savers' ideology was an amalgam of convictions and aspirations. From the medical profession, they borrowed the imagery of pathology, infection, immunization, and treatment; from the tenets of social Darwinism, they derived their pessimistic views about the intractability of human nature and the innate moral defects

243. See page 47.

> of the lower classes; finally, their ideas about the biological and environmental origins of crime can be attributed to the positivist tradition in European criminology and anti-urban sentiments associated with the Protestant, rural ethic.[244]

What had formerly been a movement largely motivated by the pressures of immigration[245] and urbanization became far more diffuse. Education, child labor and public health laws proliferated; child savers were convinced that the ills of an underprivileged childhood could be cured through progessive governmental measures. Unfortunately, the specific lobbying and publicity activities of child care leaders during this period are difficult to establish. Agencies, such as societies for the prevention of cruelty to children and the Children's Aid Society, contributed to the maturation of children's laws and applauded the enactment of the new codes; but their activities did not include the publicity and publication campaigns which had characterized earlier legislative efforts.[246] In any event, the child care agencies vigorously defended the new laws against legal attacks challenging their constitutionality and application and engaged in extensive litigation designed to broaden their authority.[247] Code consolidation and child welfare litigation became the decade's twin themes.

A. Code Consolidation

In 1881 New York State enacted a formal Penal Code incorporating and revising the multitude of chapter laws relating to

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244. Platt, *supra* note 12 at 18.

245. See pages 53 through 55.

246. See *infra* note 281. The early nineteenth century activities of the Society for the Reformation of Juvenile Delinquents are discussed at pages 26 through 29. By 1880, the organizations may have gained sufficient political strength to influence public officials directly, without the necessity of educational and publicity campaigns.

247. See pages 87 through 96.

criminal conduct and procedure.[248] Since jurisdiction over children's laws had been vested exclusively in the criminal courts, the act incorporated provisions relating to juvenile delinquency, juvenile vagrancy, truancy, disorderliness and neglect. One year later the Legislature enacted a code entitled "Commitment of Children to Institutions" to replace the piecemeal session laws which had governed child care agency commitments.[249] For the first time most juvenile laws were consolidated in two complementary codes.[250]

Among its provisions, the 1881 Penal Code codified and revised the common-law infancy presumption. The Code provided first that "a child under the age of seven years is not capable of committing a crime,"[251] an exclusion consistent with the common law, but then continued by reducing the maximum age to which the infancy presumption could be applied: "A child of the age of seven years, and under the age of *twelve years* is presumed to be incapable of crime, but that presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him, and to know its wrongfulness."[252] Since criminal activities involved largely older youths, the age reduction from fourteen to twelve affected many, if not most, cases in which conviction had been precluded by presuming infancy.[253] The Legislature had enacted yet another measure to bring additional unruly, vagrant, delinquent or needy children into the expanding juvenile care system.

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248. L. 1881, c. 14; in 1884 the Legislature enacted several major amendments to the 1881 code (see L. 1884, c. 46).

249. L. 1882, c. 19.

250. For the contemporary researcher codification, as an added benefit, minimizes the possibility that a revelant statute will be overlooked or interpreted out of context.

251. L. 1881, c. 14, §18.

252. L. 1881, c. 14, §19; emphasis added.

253. Not only were most juvenile crimes committed by older children, but it is doubtful that many prosecutions were initiated when the alleged criminal was under the age of twelve.

While enlarging the scope of activities deemed criminal through the age reduction, the 1881 Code and its amendment incorporated several ameliorative provisions. An 1884 amendment provided that a child under the age of sixteen convicted of a misdemeanor could not be imprisoned, but had to be "... committed to some reformatory, charitable or other institutions authorized by law to receive and take charge of minors."[254] Thus, the harshest remedy, imprisonment in an adult facility, was for the first time precluded, albeit only when conviction involved a minor crime. In addition, any person under the age of sixteen who was convicted of a felony could in the discretion of the court ". . .be placed in charge of any person or institution willing to receive him"[255] in lieu of imprisonment or fine. Thus, a child who had been convicted of the most violent felony could be placed with a house of refuge or a child care agency. Any delinquent could be placed with a private individual, such as a collateral relative. The option to award custody to an individual adult as a substitute for institutionalizing even the violent juvenile offender constituted a substantial penal reform. And the provision has remained in effect for over a century.[256] On the other hand, by expressly opening the child care agencies to children who had committed serious crimes, the Legislature further blurred the distinction between criminal and non-criminal behavior, a tenet which subsequently became a juvenile court hallmark. Children who were simply destitute or neglected could for that reason alone be placed with children who had committed violent crimes (though in practice violent juveniles probably continued to be committed to houses of refuge while non-violent or neglected youths continued to be placed with residential child care agencies).

The 1881 Act maintained the discretionary authority to commit to a house of refuge or, for the older youth, to the Elmira Reformatory,[257] but further provided that a female of any age "must be

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254. L. 1884, c. 46, §713.

255. L. 1884, c. 46, §713.

256. See Family Court Act §353.3 which stipulates that ". . .the Court may place the [delinquent] respondent in his own home or in the custody of a suitable relative or other suitable person . . ."

257. L. 1881, c. 14, §§700 and 701.

sentenced to imprisonment in a county penitentiary, instead of a State prison."[258] County imprisonment was apparently considered a less punitive sanction than state incarceration; as such, the measure reflected a legislative distaste for imprisoning young women. Similarly, the court could, on a discretionary basis, sentence a boy who was between the ages of sixteen and twenty-one to the county jail instead of the state penitentiary, provided the term of imprisonment was three years or less.[259] Last, a defendant or material witness under the age of sixteen could be detained at any institution authorized by law to receive children upon final commitment[260] in lieu of detention at a jail, a measure designed to discourage even temporary confinement with older criminals.

The 1881 Act further refined the concept of neglect first found in the 1877 "Act for Protecting Children."[261] Most of the 1877 definitions were continued with only slight revision; thus, a neglect complaint could be predicated on public behavior committed by a child, such as begging or frequenting saloons or theaters. However, the 1881 Code added a major new clause encompassing children

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258. L. 1881, c. 14, §698; of course a girl under the age of sixteen could also be committed to a house of refuge. In 1881 the Legislature also established the House of Refuge for Women at Hudson, an institution for females between the ages of fifteen and thirty (L. 1881, c. 187). But Hudson accommodated only women who had been convicted of minor crimes; see page 46.

259. L. 1881, c. 14, §699; unlike females, who could not be sentenced to state prison, male transgressors above the age of sixteen could be imprisoned in state facilities.

260. L. 1884, c. 46, §5(6).

261. See page 47.

"not having any home or other place of abode or *proper guardianship*."[262] The phrase "not having ... proper guardianship" constituted the first provision relating directly to a parental failure to adequately provide for or supervise the child, i.e. represents the initial vague attempt to define that form of parental neglect which constitutes the core of modern child protective statutes. Any child who fit the definition could be committed, i.e. the court could place in a reformatory or child care agency or "... make any disposition of the child such as now or hereafter may be authorized in the cases of vagrants, truants, paupers or disorderly persons." The prescription, based on the 1877 Act for protecting children,[263] was indeed broad and children who were destitute, orphaned or deprived of proper guardianship were thereby placed under the vast judicial umbrella covering delinquency, vagrancy, truancy and disorderly behavior. For example, children who lacked "proper guardianship"

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262. L. 1881, c. 14, §291(2) (emphasis added). The full text of the statute is as follows:

> A male child actually or apparently under the age of sixteen years, or a female child actually or apparently under the age of fourteen years, who is found;
>
> (1) Begging or receiving or soliciting alms, in any manner or under any pretense; or (2) Not having any home or other place of abode or proper guardianship; or (3) Destitute of means of support, and being either an orphan, or living or having lived with or in custody of a parent or guardian, who has been sentenced to imprisonment for a crime, or who has been convicted of a crime against a person of such child, or has been adjuged an habitual criminal; or (4) Frequenting the company of reputed thieves or prostitutes, or a house of prostitution or assignation, or living in such a house either with or without its parent or guardian, or frequenting concert saloons, dance-houses, theaters or other places of entertainment, or places where wines, malt or spirituous liquors are sold, without being in charge of its parent or guardian; or (5) Coming within any of the descriptions of children mentioned in section 292, must be arrested and brought before a proper court or magistrate, as a vagrant, disorderly, or destitute child. Such court or magistrate may commit the child to any charitable reformatory or other institution authorized by law to receive and take charge of minors, or may make any disposition of the child such as now is or hereafter may be authorized in the cases of vagrants, truants, paupers, or disorderly persons.

263. See page 47.

could be placed in delinquent institutions, such as a House of Refuge. Except for possible imprisonment in an adult prison or penitentiary, which was limited to delinquent youths, the complained of conduct of the child (or the parent) was immaterial in determining the possible disposition.[264]

In a related provision the Legislature stipulated that a parent or other person "... having the custody of any child under the age of fourteen years, who shall permit or neglect to restrain such child from begging, gathering, picking or sorting of rags, or from collecting cigar stumps, bones or refuse from markets, shall be guilty of a misdemeanor."[265] Similarly, any person who permitted a child "to play any game of skill or chance" in or adjacent to a place where alcohol was sold was guilty of a misdeameanor.[266] Of perhaps greater importance, the Act provided that "a person who willfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor, is guilty of a misdemeanor."[267] The latter provision, which apparently encompassed the neglect of any child under the age of twenty-one (i.e. "to a minor"), represents the first

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264. Strangely, the "neglect" provisions applied to a "male child actually or apparently under the age of sixteen years, or a female child actually or apparently under the age of fourteen years" (L. 1881, c. 14, §291), i.e. established a gender-based jurisdictional age limitation which excluded the older girl. One would have thought that protection of teenage girls would be a legislative priority; in fact, subsequent statutes defining neglect or status offenses frequently included a higher age jurisdiction for females. For example, the present Family Court Act defines a person in need of supervision as a "male less than sixteen years of age and a female less than eighteen years of age ..."; however, that gender-based distinction has been held to be unconstitutional (see *In re Patricia A.*, 21 N.Y.2d 83, 335 N.Y.S.2d 33 [1972]).

265. L. 1881, c. 496, §2; the impoverished parent who permitted his hungry child to beg or collect market remains thereby committed a crime.

266. The criminalization of parental malfeasance was augmented by an 1895 provision that a "... parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, [who] consents to her taking or detaining by any person for the purpose of prostitution or sexual intercourse" shall be guilty of committing a felony (L. 1895, c. 460).

267. L. 1884, c. 46, §3.

criminal statute establishing direct parental responsibility for the failure to provide an essential need.[268]

The dual Penal Code provisions involving the placement of children who lacked "proper guardianship" and the criminalization of parental malfeasance or non-feasance could have been applied to the same facts.[269] For example, the court could place a juvenile with a child welfare agency (for lack of "proper guardianship") and simultaneously incarcerate the parent (for failure to provide food, clothing, shelter or medical attendance). Comprehensive criminal jurisdiction over children and their parents increased the possibility of judicial intervention and undoubtedly assisted the child protective agencies, including S.P.C.C.s, in their broadening enforcement endeavors.

The Commitment of Children to Institutions Code, enacted in 1882,[270] was almost exclusively a codification of the then existing session laws governing the commitment to the Society for the Reformation of Juvenile Delinquents and to the numerous religious and non-sectarian child care agencies. As discussed earlier, S.R.J.D. commitment procedures had been in effect for over fifty years while the 1851 statute establishing the New York Juvenile

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268. But parental rehabilitative assistance or other services were not possible — the statute was criminal and there was as yet no thought of non-criminal remedies.

269. Assuming the child was a male less than sixteen years of age or a female less than fourteen years of age.

270. L. 1882, c. 19.

Asylum incorporated detailed procedures which had been sequentially applied to at least several major child care agencies.[271] By 1882 the Legislature, which had already codified several areas of law, probably concluded that codification of the disparate commitment laws was desirable, particularly in light of the enormous growth of the child care organizations.

The Act continued earlier provisions governing the commitment of delinquent and vagrant youths to the houses of refuge[272] and provisions of the 1865 Disorderly Children's Act which allowed parents or guardians to seek judicial commitment of their disorderly or "status offender" offspring.[273] The Commitment Code also codified the status offense of truancy, stipulating that "if any child under the age of fourteen years, having sufficient bodily health and mental capacity to attend the public schools, shall be found wandering in the streets or lanes, or in any public place in the city of New York, idle, truant, or without any lawful occupation ..." the juvenile could be arrested.[274] The statute further provided for parental notification and release upon a written agreement to "cause such child to be sent to some school at least four months in each year,

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271. See pages 57 through 60 for a discussion of the 1851 Act. Whether the 1882 Code provisions applied to every agency cannot be established. The Act lists only seven child care organizations (The Juvenile Asylum, The New York Catholic Protectory, The Hebrew Benevolent Society, The Shepard's Fold, the New York Infants Asylum, the American Female Guardian Society and the Home for the Friendly), but other agencies may have been included by separate acts or by agreement. It is also possible that several agencies, like the Children's Aid Society, did not seek court commitments, but obtained custody only through voluntary parental surrenders.

272. L. 1882, c. 14, 1§594.

273. L. 1882, c. 14, §1596; see also L. 1865, c. 172. Although a strict reading of the 1882 Commitment Code would indicate that only a parent could bring an action for disorderliness, the Penal Code permitted a disposition as a "disorderly or destitute child" for any child who was found to be begging or receiving alms, frequenting the company of reputed theives, or "not having any home or other place of abode or proper guardianship" (L. 1881, c. 14, §291). Thus a child found to be "neglected" pursuant to the Penal Law could be committed as a disorderly youth.

274. L. 1882, c. 14, §1612; the statute apparently applied only to New York City. It should be noted that the state's first compulsory education law was enacted in 1874, only eight years prior to codification (L. 1874, c. 421).

until he or she becomes fourteen years old."[275] However, repeated or intentional truancy could result in commitment.[276]

Finally, the 1882 Commitment Code continued, with only minor change, the 1851 provision for the placement of children found in a public place "... in the circumstances of destitution and suffering, or abandonment, exposure, or neglect, or of beggary ... by reason of the neglect, habitual drunkenness or other vicious habits of the parents or lawful guardians of such child."[277] Thus, unlike the Penal Law, the Commitment Code, tracking the earlier Juvenile Asylum Act, required evidence of specific acts amounting to parental malfeasance. The statute also included special provisions for the very young abandoned child, mandating placement with the New York Infants Asylum.[278]

The relationship between the 1881 Penal Code definition[279] and the 1882 Commitment Code is ambiguous. Both provided for judicial intervention when a child was found begging or was abandoned; both incorporated ample jurisdictional provisions. However, the Penal Law definition of child neglect, incorporating situations involving "improper guardianship," was far broader than the Commitment Code stipulation requiring proof of parental wrongdoing as a prerequisite to commitment. The ostensible conflict could be resolved only through extensive litigation.[280]

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275. *Ibid.*

276. *Ibid.*

277. L. 1882, c. 14, §1602 — the provision is repeated at several points in the Code. In a spree of redundancy, which appears to be illogical given the goal of codification, the Act repeats identical placement procedures for each of several child care agencies.

278. L. 1882, c. 14, §1627.

279. See page 77.

280. See pages 87 through 89.

In conclusion, several basic provisions governing delinquency, disorderliness, vagrancy, truancy and neglect had finally been codified.[281] The evolution from separate rehabilitative care for the youngster convicted of committing a criminal offense (despite the infancy presumption) to massive intervention in the name of child protection was virtually complete. A sophisticated statutory scheme was available to convict errant parents and place children found to be delinquent, vagrant, disorderly or neglected pursuant to broadly phrased legal definitions.

B. Caselaw Development

Expanding principles of child neglect and misconduct, as codified in the late nineteenth century, conflicted with the traditional doctrines which presumed parental fitness and accorded the parent an automatic right to custody. As enforcement by societies for the prevention of cruelty to children and related child-saver organizations increased, litigation, particularly in the form of habeas corpus actions, became more prevalent. Caselaw interpreting the earlier delinquency, vagrancy and disorderly persons statutes had been negligible[282] but increased sharply following passage of the 1877 Act for Protecting Children and the subsequent enactment of the penal and commitment codes.

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281. The codifications were applauded by child protective and child care organizations. For example, the New York Society for the Prevention of Cruelty to Children reported that "... at its last session, [the Legislature] carefully revised the Penal Code of this State, which now presents a uniform, compact and harmonious system of law for the protection of children . . ."; *Tenth Annual Report on the New York Society for the Prevention of Cruelty to Children* (1885) at 7.

282. One reason may be that delinquency commitments were based upon a criminal conviction; since the alternative to commitment was imprisonment, there was little motivation on the part of the defendant to appeal the disposition (as opposed to the underlying conviction). And the early "disorderly children" statutes were applied only when a parent petitioned the court; the parent was unlikely to appeal or seek habeas corpus relief while the child lacked the resources to challenge a determination.

Perhaps not surprising, the first reported challenge was to the constitutionality of the 1877 Act. A parent who had been found neglectful and had consequently been deprived of custody contended that the statute deprived him "... of his right to these children, without a trial by jury or due process of law."[283] The court disagreed, invoking, apparently for the first time in New York, the parens patriae doctrine granting the state the inherent right to assume the custody of children:

> the state as *parens patriae*, has the original right to the control and disposition of all minors. It confides a part of its right to a parent *as a trust*. Like every other trust, when abused, it is forfeited and the State reassumes its original powers ... if the courts of the State may, by virtue of their general powers, interfere for the protection and care of children, it is not seen why the Legislature may not prescribe the cases, in which children shall be rescued from their custodians and a mode provided for their summary disposition.[284]

Originally an English equitable principle used by Chancery courts to protect orphans, parens patriae had evolved over several decades into an American substantive doctrine justifying state intervention for child protective purposes.[285] Application in New York was hence neither unique nor surprising. But the invocation of parens patriae to uphold the constitutionality of vaguely worded placement statutes did not settle the more complex issues of statutory interpretation; conceding constitutionality, subsequent decisions focused on the application of the new concepts to specific factual situations.

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283. *Matter of Donohue*, 1 Abb. N.C.1 (Sup. Ct., 1st Dept. 1876); strangely, the date of the case is November 1876 and the court refers to the "1876" Act, though the statute was part of the 1877 session laws and there was apparently no antecedent provision.

284. 1 Abb. N.C.1, 6-8; emphasis in original. Also see *People v. Ewer*, 141 N.Y. 129 (1894).

285. For an earlier application see *Ex Parte Crouse*, 4 Wharton 9 (Sup. Ct. Pa. 1839). The application of parens patriae to procedural due process issues had yet to develop; see page 123.

The thorniest interpretation issue was the apparent conflict between the 1881 Penal Law and 1882 Commitment Code. As has been noted, the Penal Law defined child neglect as including the vague notion of "improper guardianship";[286] child protective agencies could and did obtain summary commitments without any showing of parental fault. On the other hand, the Commitment Code authorized commitment only "by reason of the neglect, habitual drunkenness or other vicious habits of the parents or lawful guardians of such child."[287]

The possible conflict was at least partially resolved by the 1885 case of *People ex rel Van Heck v. The Catholic Protectory.*[288] John Van Heck, a nine-year-old child, was committed to the Protectory when he was found begging, receiving and soliciting alms in violation of Penal Law Section 291 (the "child neglect" section) — there were no allegations or proof of parental neglect. In other words, the conduct met the Penal Law definition, but did not satisfy the Commitment Code requirement of parental malfeasance. For that reason, the appellate court ordered the child's release, concluding that:

> Under these provisions it is not sufficient that it shall appear that the child is found begging or receiving or soliciting alms in the manner forbidden by section 291 of the Penal Code to authorize the commitment of such child to the Catholic Protectory, because the Protectory is only authorized, as will be seen by section 8 of its charter and section 1618 of the Consolidated Act [i.e. the Commitment of Children to Institutions Code] to receive such child in custody where it shall *further appear* "to the satisfaction of such magistrate or court by competent testimony or by examination of the child that by reason of the neglect or vicious habits of the parents or other lawful guardian of such child, it is a proper object for the care of such corporation."[289]

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286. L. 1881, c. 14, §291; see page 107.

287. L. 1882, c. 14, §1602; see pages 110-115.

288. 38 Hun. 126 (Sup. Ct. Gen. Term, First Dept. 1885).

289. 38 Hun. 126, 129-130; emphasis in original.

A similar interpretation was rendered by the Court of Appeals in the 1887 case of *People ex rel Van Riper v. New York City Catholic Protectory.*[290] Mr. Van Riper had been charged with violating the vague 1881 Penal Law provision defining child neglect as, inter alia, the absence of "proper guardianship" or "[the child] frequenting the company of reputed thieves or prostitutes"[291] when his daughter was found wandering in a public park, allegedly without proper guardianship and in the company of a reputed prostitute. The result was a summary magistrate's commitment to the Protectory. As subsequently determined, however, the Van Ripers were a prosperous law-abiding family residing in New Jersey; the youngster, apparently visiting the city, had been lost in the park and innocently asked a woman (who may have been of ill repute) for assistance. The Protectory argued that those facts were sufficient to justify commitment, an interpretation which, in the words of the intermediate appellate court:

> would render the child of the worthiest citizen, who happened to lose her way in the public streets, and sought guidance from the first woman she met, liable to arrest and incarceration, if the person from who she asked information and who accompanied her a block or two to show her the way, chanced to be known to a police officer as a reputed prostitute.[292]

When the court vacated the commitment, the Protectory, in a move which underscores the zealousness of late nineteenth century child welfare reformers, appealed to the state's highest court. But it fared no better, the Court of Appeals holding conclusively that "it must appear that the child was abandoned and neglected, *by the fault of its parents*, to justify taking it from their custody . . ."[293]

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290. 106 N.Y. 604 (1887).

291. L. 1881, c. 14, §291.

292. *People ex rel Elizabeth Van Riper v. The Home of Good Shepard*, 51 Sup. Ct. Reptr. 526, 529 (1887).

293. 106 N.Y. 604, 609 (1887) (Emphasis added).

The courts, faced with the vague generalizations of the "begging" and "improper guardianship" provisions of the 1881 Penal Code, consequently invoked the more stringent definitions of the 1882 Commitment Code to limit placements and protect family integrity.[294] Actual neglect or misconduct had to be proven before parental custody could be superceded by state placement.

Through other decisions, however, neglect was interpreted as encompassing parental nonfeasance as well as malfeasance, i.e. an affirmative wrongful act was not required. For example, a commitment was upheld when the parent kept a child exposed to the weather and alone in a dangerous situation.[295] Similarly, in a criminal action against a parent who had failed to provide "medical attendance," resulting in the child's death, because "... he believed in Divine healing which could be accomplished by prayer," the Court of Appeals held that religious beliefs could not constitute a defense to neglect.[296] In interpreting a different statute permitting the placement of a child who was found begging, the word "begging" was interpreted to include conduct where the youth silently held out his hand (as opposed to accosting persons or asking for alms).[297] Ergo, although proof of parental neglect was required as a prerequisite to placement, acts which might evidence the different statutory forms of neglect were liberally defined to encompass both passive and overt conduct.[298]

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294. Whether the protection extended to child care agencies which were not included in the Commitment Code is unclear.

295. Unreported case of *People ex rel Newby v. New York Society for the Prevention of Cruelty to Children* (1881) cited in Elbridge T. Gerry, *Manual of the New York Society for the Prevention of Cruelty to Children* (1913) at 29.

296. *People v. Pierson*, 176 N.Y. 201 (1903).

297. *Matter of Haller*, 1 Abb. N.C. 65 (Sup. Ct. 1st Dept. 1877); interestingly, the court concluded its opinion with the following suggestion:

> The court thinks proper, however, to suggest that his [the child's] custody be restored by the commissioners (who are clothed with full discretion) to his parents, who seem anxious to receive him, with suitable admonition that if they suffer him to be again found begging in the streets, he will be arrested and permanently placed in a charitable institution (*Id.* at 68).

298. The early decisions are still valid and have been codified in the Family Court Act. For example, §1012(c) provides that an "abused child means a child less than eighteen years of age whose parent ... creates or allows to be created a substantial risk of physical injury to such child ..."

Insofar as they involved a statutory interpretation, the early post-Code decisions appear to be reasonable. But a major procedural impediment to a successful challenge was the summary nature of commitment powers, with jurisdiction vested in the magistrates and lower criminal courts. Those tribunals acted with extreme dispatch. A child was arrested (and child protective agencies were statutorily endowed with arrest powers), the parent notified and a judgment recorded within a few days; the parent was usually unassisted by counsel and unfamiliar with legal procedure. As a practical matter, the only possible subsequent relief was habeas corpus; however, as a cause of action habeas corpus could test jurisdiction but not factual determinations. As stated in one appellate case where commitment to the House of Refuge was contested:

> For that purpose the commitment should be regarded as final judgment under the provisions of the habeas corpus act, and, being prima facie valid, the jurisdiction of the magistrate making the commitment is the only question presented to the justice at special term for review.[299]

The result was that possibly erroneous factual decisions or abuses of judicial discretion could not be challenged, although habeas corpus relief would be granted when the allegations and findings did not amount to a violation (as in the *Van Heck* and *Van Riper* cases)[300] or where there was a procedural jurisdictional defect, such as a lack of statutory parental notification.[301]

299. *Matter of Moses*, 1 Abb N.C. 189, 196 (Sup. Ct. 1st Dept., 1883); see also *People ex rel Perkersoen v. Sisters of the Order of St. Dominick*, 1 Howard 132 (Sup. Ct. 1st Dept., 1885) and *People ex rel Eck v. American Female Guardian Society*, 1 Hun. N.S. 137 (1885).

300. See pages 89 through 90.

301. See, e.g., *Matter of Heery*, 51 Hun. 372 (Sup. Ct. 1st Dept. 1889). The inability to review the facts following summary code commitments created harsh consequences; assuming the jurisdictional prerequisites were met and the allegations and findings by the magistrate or lower court comported with the statutes, commitment was deemed final. (See also L. 1866, c. 245, discussed at page 62.)

Although statistics concerning the volume of habeas corpus petitions are not available, the volume was not insubstantial. A 1913 compendium of child welfare cases lists dozens of unreported cases (and cases unofficially reported in newspapers) in which parents sought a writ; Gerry, *supra* note 295 at 34-37.

The courts' application of the principle of finality resulted in attempts to amend the legislation which gave rise to the doctrine. In 1889 the New York Society for the Prevention of Cruelty to Children, in a statement which cleverly struck the dual chords of child protection and immigrant prejudice, reported that:

> During the past three years a persistent effort has been made in the legislation in this State to overturn the whole legal system of commitments of establishing a right to review the facts in other courts than those held by the committing magistrates. The law remains at the present time precisely as it has always been .... If any illegality has been committed in the commitment it can be reviewed and corrected on habeas corpus and certiorari by the Supreme Court. But this does not suit the foreign element of our population, whose one idea is to regain possession of the child as soon as possible, irrespective of its right to proper education or opportunity to reform. They want the law so amended that the Directors of the Institution shall be deprived of all power in the case, and, whenever they choose, another Court may review, not only the law, but the facts, re-try the case and discharge the child whenever sympathy for the parents may prompt such a course. A more dangerous precedent could not well be established.[302]

The attempt to amend did not succeed. However, one decade later the principle of finality was severely compromised by the Court of Appeals in the case of *Matter of Knowack*.[303] Four children had been placed with the Children's Aid Society in an unchallenged action under the Commitment Code. Two years later the parents brought suit for their return, alleging rehabilitation, i.e. that the conditions of neglect upon which commitment had been predicated

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302. *New York Society for the Prevention of Cruelty to Children Fourteenth Annual Report* (1889) at 7-9.

303. 158 N.Y. 482 (1899).

had been subsequently remedied.[304] The parents did not seek habeas corpus relief, but instead cited the courts' inherent equitable power to restore custody.[305] Their argument was an intriguing one, drawing on the English Chancery Court origins of parens patriae. Since the New York courts had upheld the child protective laws by applying parens patriae, thus permitting the revocation of parental custody, it followed that the court could utilize a companion chancery doctrine to restore parental custody. The Court of Appeals agreed, found that the parents were indeed rehabilitated, and ordered the children released:

> It certainly is a most startling doctrine that a child, who is a public charge and has been committed for such reasons as are disclosed in this case, cannot be restored to parental care and control, where conditions have changed and are such that neither in law or morals the separation of parent and child should be continued . . .
>
> Stripped of all form and technicality we have this situation: Intemporate parents are deemed to be unfit custodians of their children, and the state steps in and cares for and supports them for the time being. It now appears that the parents have reformed, are living honorable lives and are abundantly able to care for their children. It seems self evident that public policy and every consideration of humanity demand the restoration of these children to parental control.[306]

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304. "The petitioners aver that whatever ground might have existed on the fifth day of June, 1895, for the removing of the children from their care and custody, has been fully and absolutely removed; and that since the last named day they have been sober, industrious, and have tried by all means possible to live honorable and respectable lives." (158 N.Y. 482, 485.)

305. "The single question presented by this appeal is whether the Supreme Court of the state of New York, having general jurisdiction in law and equity, and being vested with all the jurisdiction which was possessed and exercised by the court of chancery in England at the time of our separation from the mother country, except as modified by the Constitution and statutory provisions ..., has power to intervene in this case and restore these children to the custody and care of their parents." (158 N.Y. 482, 487.)

306. 158 N.Y. 482, 487-488.

After *Knowack* no placement or commitment decision could be final. Given the court's continuing jurisdiction and ability to modify or restore custody, a parent or guardian could at any time petition for relief based upon changed circumstances evidencing reform or rehabilitation. In a sense, the Court of Appeals had accomplished what the Legislature had refused to do a decade earlier.[307] *Knowack's* emphasis upon change of condition, modification of commitment orders and continuing jurisdiction has a distinct modern tone; these very principles apply to child protective proceedings today, albeit phrased in statutory terms.[308]

The decision also may be viewed as placing significant limits on the state's role as parens patriae; the state (and child care agencies acting on behalf of the state) was no longer automatically entitled to continuing or permanent custody. Instead, a parent held the absolute right to custody upon a showing of fitness. As applied by the courts, parens patriae could justify stringent (even perhaps overbroad) protective laws, but could not justify extreme decisions or be used in specific cases to defeat the child's interest, an approach which continued well into the present century.[309]

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307. Habeas corpus relief, nevertheless, remained limited. A post-*Knowack* parent who was deprived of custody and the child placed pursuant to a factually erroneous summary commitment could not collaterally challenge the decision, but could immediately file a new petition alleging reform and, upon a showing of fitness, regain custody. The distinction is one of form rather than substance.

308. See, e.g., Family Court Act §1061, which permits the court, for good cause shown, to "... set aside, modify or vacate any order issued in the course of a child protective proceeding under this article" and §1062, which permits the parent or other interested person to petition the court to terminate a placement at any time.

309. See, for example, *People v. Fitzgerald*, 244 N.Y. 307 (1927). An extremely interesting decision is *People ex rel O'Connell v. Turner*, 55 Ill. 280 (1870) where the Illinois Supreme Court held that the Illinois summary commitment statute, similar to New York's, was unconstitutional. The court explicitly rejected the *parens patriae* doctrine:

> What is proper parental care? The best and kindest parents would differ, in the attempt to solve the question. No two scarcely agree... What is the standard to be? ... In our solicitude to form youth for the duties of civil life, we should not forget the rights which inhere both in parents and children. The principle of the absorption of the child in, and its complete subjection to the despotism of, the State, is wholly inadmissible in the modern civilized world. (55 Ill. 280, 283).

By the end of the nineteenth century the caselaw as well as the codes had come of age. Increasingly broad delinquency, vagrancy and neglect acts were upheld, thereby permitting widespread state intervention, but were judicially interpreted in a reasonable manner to preclude commitment unless parental mistreatment or neglect was proven. And, although commitments were initially reviewable only through the limited procedure of habeas corpus, parents could regain custody upon a showing of changed conditions which evidenced rehabilitation.[310] The courts thereby attempted to steer a middle course between the stringent child protection laws and the traditional concept of presumed parental fitness and custody.[311]

Prior to the establishment of separate juvenile courts the relevant statutory framework and judicial precedent were substantially complete. The only major distinctions between the late nineteenth century structure and the subsequently established juvenile courts were that most delinquent youths could be theoretically imprisoned (though most were committed in lieu of imprisonment) and, perhaps more significantly, children's laws were administered by the criminal courts. Both distinctions were removed shortly after the turn of the century through the decriminalization of delinquency and the formation of specialized court parts devoted to the implementation of children's laws.

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310. Of course, parental reformation, as per *Knowack*, consisted of self help and the child care agencies were under no obligation to further parental rehabilitation. Also, the principle apparently did not apply when the conduct of the child, rather than the parent, resulted in commitment. For example, an 1899 lower court decision held that a boy, committed to the House of Refuge as "disorderly" upon complaint of his father, could not be released upon proof that his parents deemed him to be sufficiently reformed; *Matter of Cohn*, 28 Misc. 658.

311. Most parents, particularly those who were immigrant, would not be aware of *Knowack* and would not ordinarily enjoy access to legal services. It is hence likely that the decision was not fully applied in the lower courts, though one cannot ascertain the extent of non-compliance.

CHAPTER V

The Children's Court Parts

1891-1920

The establishment of the juvenile courts, first as specialized parts of the criminal courts and later as independent tribunals, was a direct outgrowth of the child protective movement. Conceptually, child protective laws were highly specialized; a unique proceeding had evolved, one which departed significantly from the traditional forms of civil or criminal procedure. Vigilant child protective agencies[312] were filing large number of petitions under the 1881 Penal Code and the 1882 Commitment Code, while child care programs expanded by geometric proportions. Thus, from a pragmatic viewpoint the protective laws had inundated the criminal courts with cases alleging neglect, truancy and disorderly behavior, issues far removed from the core penal jurisdiction encompassing adult criminal behavior.

For example, the New York Society for the Prevention of Cruelty to Children, which limited its activities to Manhattan, reported a total of 1,577 neglect complaints and 855 placements in 1880, the year immediately preceding codification;[313] by 1895 the number of complaints had increased sixfold to 9,642, resulting in 2,964 commitments and 860 criminal convictions for neglect.[314]

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312. School officials, the police and, to a lesser extent, parents also filed petitions.

313. *Sixth Annual Report of the New York Society for the Prevention of Cruelty to Children* (1881) at 107.

314. *Twenty-first Annual Report of the New York Society for the Prevention of Cruelty to Children* (1896) at 54-55; unfortunately, court statistics for the period preceding the establishment of juvenile court parts are not available, nor are statewide figures concerning placements and commitments.

Reducing the age of presumed criminal responsibility to twelve,[315] as prescribed in the 1881 Penal Code, further increased the number of delinquency cases and consequent commitments to houses of refuge and child care institutions.[316]

Moreover, the available dispositional alternatives had increased in number and complexity. How could a criminal judge, particularly during the era when the courts lacked probation or other expert ancillary services, determine the appropriate placement for a particular child? Faced with a multitude of available religious and nonsectarian child care agencies, practicing different and often conflicting philosophies, one may presume that determinations became increasingly frustrating judicial exercises[317] and the placement of a child more a matter of happenstance than an application of individualized justice.[318]

For these reasons the legislative focus understandably shifted from substantive laws to procedure. Although the protective and delinquency laws were refined and modified after 1890, continuing the trends toward decriminalization and a greater degree of state intervention in family affairs, a greater emphasis was placed upon the development of specialized courts and expert services. Viewed in this light, the juvenile courts were needed to implement the

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315. See page 79.

316. The infancy presumption virtually precluded the conviction of persons under the age of twelve. As noted earlier, children between the ages of twelve and sixteen could not be imprisoned unless convicted of a felony (L. 1844, c. 46, 713) and most children of that age bracket who were convicted of felonies were committed to a juvenile institution in lieu of imprisonment. Persons between the ages of sixteen and twenty-one could be committed to Elmira or a similar institution, be placed with a relative or be incarcerated in a state or county prison.

    The age limitation for neglect was sixteen for males and fourteen for females; L. 1881, c. 14, 5291(2).

317. To some extent, however, the courts may have been aided by S.P.C.C.s or child care representatives.

318. See page 70. The agencies, which included those applying the different concepts of congregant institutionalization, cottage care, placing out, foster care and self-governance continued to compete for children.

delinquency and protective laws. A sophisticated substantive body of law had already been established. Given an increased caseload and an increasingly complex statutory scheme, the organization of juvenile courts was a moderate measure designed to rationalize procedures, integrate services and, perhaps, relieve the criminal courts of the child protective burden.[319]

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319. New York's adoption of stringent protective laws in the post-Civil War era, followed by case segregation and the formation of children's courts or court parts was part of a national movement. And the fact that juvenile laws were largely in place and unamended by the juvenile court movement was, of course, known to the juvenile court pioneers. For example, as Judge Ben Lindsey, the first Denver juvenile court judge and a populist promoter of the system, observed in 1904:

> There is very little that is new in principle in what is known as the juvenile court laws. It is rather the surer, more constant, and intelligent application of old principles that deserves to make noteworthy the present agitation for so-called juvenile laws ... There are a number of States having on the statute books ... all the power necessary to conduct as perfect and complete a juvenile court as that of Colorado or Illinois, without the addition of a word or a line of the elaborate statute known as the "juvenile law."
>
> It will be observed, therefore, that even before the juvenile law of Illinois of 1899 became effective, Colorado had upon her statute books every feature of the juvenile court of Illinois, if only availed of and put into actual practice. We have found this condition to exist in several states clamoring for juvenile laws.

Ben B. Lindsey, *The Juvenile Court of Denver, International Prison Commission, Children's Courts in the United States, Their Origin, Development and Results*, U.S. Government Printing Office (1904) at 50 and 51.

In a similar vein Anthony Platt, in his landmark study, *The Child Savers*, concluded that "the juvenile court was not, as some writers have suggested, a 'radical reform', but rather a politically compromised reform which consolidated existing practices"; Platt, *supra* note 12 at 134-135. These views, based on an analysis of contemporaneous literature, conflict with the popular "modernist" belief that the juvenile courts revolutionized the manner in which society dealt with troublesome children and families, reflected in these words of Judge Jerome Frank, written in 1953:

> A revolution occurred late in the nineteenth century, a revolution signalized by the founding, in Chicago, of a specialized court for children. This revolution represented far more than a change in the judicial handling of children. It marked a new social attitude toward the problems of the young. Because it let loose on the world a stirring ideal which can never be wholly actualized, this revolution has not ended — and will never end.

Jerome Frank, preface to Kahn, *A Court For Children*, Columbia University Press (1953), at xi.

A. The Children's Court Parts

The initial tentative step toward juvenile case segregation and specialization was an 1892 statute permitting separate court parts or sessions:

> All cases involving the commitment or trial of children for any violation of the Penal Code, in any police court or court of special sessions, *may* be heard and determined by such court, at suitable times to be designated therefore by it, separate and apart from the trial of other criminal cases, of which session a separate docket and record shall be kept.[320]

Since the courts presumably could segregate case types administratively and could calendar separate sessions at will, the statute curiously appears to permit that which was already permissible. As such, it may evidence a legislative intent to foster separation, i.e. encourage the possibility of separate juvenile parts or sessions.[321] If that was the motive, it at best had only marginal success; there is no indication that separate sessions were held in any county during the ensuing decade.[322] The apparent failure of the 1892 Act led to a mandatory provision in 1903.[323] In the interim, a more far-reaching reform, separate juvenile court parts, had been prescribed for New York City.

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320. L. 1892, c. 217, §2 (emphasis added), amending §291 of the Penal Code. Vagrancy, disorderly behavior and child protective proceedings were a part of the Penal Code; consequently, the statute encompassed every variety of juvenile proceeding.

321. The first reported effort to segregate children's cases was an 1870 Massachusetts statute: "In 1870 Massachusetts extended its rehabilitative efforts by a law requiring separate hearings for children in Suffolk County [Boston]"; Tappan, *supra* note 71 at 172. Segregation, which may have been replicated in states other than New York, can be viewed as the precursor of the juvenile courts.

322. Of course, implementation may have been at least partly accomplished without formal acknowledgment.

323. L. 1903, c. 331, amending §291 of the Penal Code; see page 105.

The Children's Court parts were established through two sequential amendments to the New York City Charter. The first, enacted in 1901, applied to magistrates' courts and stipulated that:

> The board of city magistrates of the first division [Manhattan and the Bronx] shall assign a separate part for the hearing and the disposition of cases now within the jurisdiction of said magistrates involving the trial or commitment of children, which part may for convenience be called the children's court ... Said children's court shall be held by the several magistrates in rotation in such manner as may be determined by said board ...[324]

While mandating the segregation of children's cases in Manhattan and the Bronx, the 1901 statute continued jurisdiction in the magistrates' court, the tribunal which had long exercised commitment powers. By limiting the measure to magistrates, the Act applied only to disorderly children, truants, neglected children and delinquents who were accused of committing petty offenses; children accused of committing felonies, which were heard in the county courts (or the Court of General Sessions), or misdemeanors, which were heard before the Court of Special Sessions, were excluded.

For reasons which are unclear,[325] but may in part be related to the limitations of the magistrates' courts, the 1901 amendment was extremely shortlived. One year later the Legislature again modified the city charter to transfer jurisdiction to the Court of Special Sessions, strengthen specialization, and expand the novel provisions to Brooklyn:

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324. L. 1901, c. 466, adding a new section, 1399, to the Greater New York City Charter of 1897; the amendment was apparently based in part on the pragmatic consideration of holding court near the place where children "arrested" under the neglect provisions of the Penal Code were housed, for it further stipulated that "the said court shall be held, if practical, in the building in which the offices of the Department of Public Charities for the examination of dependent children are located, or if this shall not be practicable, the court shall be held in some other building as near thereto as practicable ..."

325. In a related act all felonies except capital offenses were deemed misdemeanors if committed by a child under the age of sixteen, thereby consolidating all criminal jurisdiction in the Special Sessions children's parts; see page 112.

> The justices of special sessions of the first division shall, as soon as a special court building can be put in readiness, assign a separate part for the hearing and disposition of cases heretofore within the jurisdiction of city magistrates involving the trial or commitment of children, which part shall be called the children's court; and in all such cases the justice or justices holding said court shall have all the powers, duties and jurisdiction now possessed by the city magistrates within said first division . . . Said children's court shall be held by one or more of the justices of Special Sessions of the first division, as the circumstances require in such manner as said justices shall by rule provide . . . The said court shall be held in some building separate and apart from one used for the trial of persons above the age of sixteen charged with any criminal offense, and if practicable in the building which has been appropriated and set aside, by the sinking fund commissioners as a children's court.[326]

The 1902 charter revision accordingly incorporated several unique provisions. First, special sessions, a court of greater stature, superceded the magistrates as the forum designated to entertain all commitment and placement proceedings, including disorderly, vagrant, truant and neglected children. Second, virtually every criminal case in which a child was accused of committing a petty offense, a misdemeanor or a felony was consolidated, for judicial purposes, with cases involving neglect and status offenses. For the first time one court exercised full juvenile jurisdictional powers, an important prerequisite to the development of expert services,

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326. L. 1902, c. 590, amending §§1418 and 1419 of the Greater New York City Charter of 1897. Brooklyn was added by a provision of the same act providing that: "The justices of the special sessions of the second division shall as soon as a special court building can be put in readiness assign a separate part for the hearing and disposition of cases heretofore within the jurisdiction of city magistrates, involving the trial or commitment of children, which part shall be called the children's court, second division, borough of Brooklyn . . ." The boroughs of Queens and Richmond, which were also part of the second division, were excluded.

such as probation supervision, and the subsequently developed concepts of confidentiality and privacy.[327]

Third, the Legislature mandated a separate building, guaranteeing the segregation of children's cases from adult criminal proceedings. Last, the Act, by permitting the assignment of a "justice or justices holding said court," permitted judicial specialization.[328] If implemented, children's cases would no longer be heard by all the judges who comprised the bench; instead, judges could be assigned exclusively to the new parts where they could become familiar with the child care agencies, develop specialized services and become attuned to the unique juvenile case dispositional alternatives.[329]

Establishment of separate parts, limited to Manhattan, the Bronx and Brooklyn, constituted a significant advance toward to formation of juvenile court. Children's Court parts nevertheless remained an integral part of the criminal court system and continued to be governed by the Penal Code. New York thereby elected to maintain the criminal nature of children's proceedings instead of following the lead of Illinois and other states which, at the turn of the century, established independent juvenile tribunals. As a

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327. Magistrates had exercised jurisdiction over petty offenses, special sessions over misdemeanors and the County Court or Court of General Sessions over felonies.

328. The 1901 amendment had, by way of contrast, stipulated that cases be heard "by the several magistrates in rotation," thereby precluding specialization.

329. Ironically, a 1901 statute stipulated that in New York City commitments be finalized within five days; when a child was brought before the court pursuant to the child protective laws the court had to "thereupon fix a day not more than five days distant for the hearing and final disposition of the charges against such child" (L. 1901, c. 466, amending §615 of the Code of Criminal Procedure).

Commitments had always been considered summary in nature (see page 92), but the 1901 statute appears to carry speed to a ludicrous conclusion. Enacted the same year as the initial provision for children's courts parts, one may conclude that the motive may have been to necessitate a judicial rubber stamp, perhaps on commitments already arranged by child protective agencies. The consequences, assuming compliance, are not clear and the subsequent authorization of probation investigation services and emerging concepts of individualized justice surely militated against immediate commitment.

result, children's laws continued to be administered by criminal judges (perhaps specially assigned to the children's parts) and New York continued to apply criminal standards and procedures,[330] emphasizing due process rights as opposed to the informality which frequently characterized separate juvenile courts.[331]

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330. See page 115.

331. The first juvenile court was established in 1899 by the Illinois Legislature to service Chicago. But, although called a "juvenile court" the tribunal was, like New York's children's courts parts, a branch of a larger court of general jurisdiction:

> In counties having over 500,000 population, the judges of the circuit court shall, at such times as they shall determine, designate one or more of their number, whose duty it shall be to hear all cases coming under this act. A special court room to be designated as the juvenile court room, shall be provided for the hearing of such cases, and the findings of the court shall be entered in a book or books to be kept for that purpose, and known as the "Juvenile Record," and the court may for convenience be called the "Juvenile Court." (revised statutes of the state of Illinois, 1899, c. 23.51.)

However, the Illinois Act encompassing twenty-one sections, was far more comprehensive than New York's. Jurisdiction included neglect, truancy, dependency and delinquency, defined as "... any child under the age of sixteen years who violates any law of this state or any county or village ordinance" (§1); Illinois thereby completely decriminalized delinquency, even when the criminal act amounted to murder. It also provided for probation services and concluded with the following statement establishing a presumption against institutionalization:

> This act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child be placed in an improved family home and become a member of the family by legal adoption or otherwise. (§21)

The Illinois Act became the model for establishing juvenile courts nationally. The movement literally swept across the country and the courts soon developed unique characteristics (regardless of whether they nominally remained as a division of a larger court). In some ways New York became an exception by continuing a slower piecemeal progression until enactment of the 1922 Children's Court Act.

The legislative determination to segregate children's cases from adult criminal proceedings was applied statewide in 1903 with the enactment of a statute mandating separate hearings and encouraging separate court parts (revising the 1892 statute which had permitted the convening of separate parts):

> All cases involving the commitment or trial of children, actually or apparently under the age of sixteen years, for any violation of law, in any court shall be heard and determined by such court, at suitable times to be designated therefore by it, separate and apart from the trial of other criminal cases, of which session a separate docket and record shall be kept. All such cases shall, so far as practicable, be heard and determined in a separate courtroom to be known as the children's court . . .[332]

In addition, the Legislature mandated that children's cases "shall have preference over all other cases before all magistrates and in all courts and tribunals in this state both civil and criminal" and prescribed that such cases "shall be brought to trial or otherwise disposed of without delay."[333]

Unlike the provisions for the three large of New York City counties,[334] jurisdiction was not affected; cases continued to be heard before local magistrates and justice courts. Further, these courts were not required to establish separate children's parts, but merely to hold separate hearings "at suitable times" and, if practicable, in a separate courtroom.

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332. L. 1903, c. 331, §7, amending Penal Code §291.

333. *Ibid.*

334. Brooklyn, Manhattan and the Bronx.

The distinction between the heavily populated city counties and the remainder of the state appears to have been based on pragmatic considerations. A rural or even midsized county could not support a full-time court part.[335] And the smaller counties lacked the sizable caseloads necessary to justify the concentration of services (as well as the large child protective agencies which generated cases and demanded specialization). But, however compromised, the essential juvenile court concepts of segregation and a separate records system had been extended statewide by 1903: children were no longer part of the mainstream of criminal court practice.

As the movement grew, additional urban centers were added to the separate children's system. For example, in 1909 Buffalo was authorized to establish separate parts.[336] One year later, the Legislature expanded the New York City Children's Court parts to include Queens and Staten Island.[337] A specialized juvenile structure was evolving to match the unique juvenile laws and codes. Interrupted by the First World War, the system nevertheless reached maturity within one generation with the adoption of the 1922 Children's Court Act.[338]

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335. Even when an independent Children's Court was established, Children's Court judges frequently doubled as criminal judges or surrogates, a practice which continues today.

336. L. 1909, c. 570, §§86 and 87: "There shall always be at least one separate part of the court designated as the children's court for the hearing and disposition of proceedings and cases involving the trial or commitment of children The said court shall be held in some building separate and apart from one used for the trial of adults charged with any criminal offense." The Buffalo children's parts were organized within the City Court of Buffalo.

337. L. 1910, c. 659, §35.

338. See page 130.

B. The Development of Probation

An innovation which paralleled the establishment of juvenile courts, probation services originated in Massachusetts.[339] The concept proved to be popular and at the turn of the century several states organized probation departments to serve criminal cases and, as soon as they were founded, the new juvenile courts.[340] New York enacted a probation statute in 1901, but limited its application to adult criminal cases to the exclusion of juvenile proceedings, a compromise criticized by the Children's Court part proponents.[341] In partial rectification, the state Legislature later that year authorized the Buffalo Police Court to appoint "not more than five discreet persons of good character to serve as probation officers" for the children's parts; the officers (who were unsalaried) were empowered to investigate and supervise children who appeared

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339. As early as 1869 Massachusetts provided for the attendance of a State Board of Charities officer at juvenile trials, where he could recommend dispositions and provide for foster care placements; by 1891 probation was fully established. See Tappan, *supra* note 71 at 171-172.

340. One commentator reported that "a review of other states [as opposed to New York] shows that except in Massachusetts these measures are recent, but there are now juvenile courts with probation also in Chicago (July 1899), in Pennsylvania (June 1901), and in Milwaukee (July 1901), and juvenile probation in New Jersey (1899), St. Louis (1901), and the District of Columbia (1901). I believe there is also juvenile probation in Minnesota"; Frederick Almy, *Juvenile Courts and Juvenile Probation, Second New York State Conference on Charities* (1901) at 285.

341. *Id.* at 288; Almy reported that "A probation law for New York City was passed this year, but in order to secure its passage it was necessary to amend it so that it did not apply to children, at least not to children under sixteen years of age. Consequently, by a curious anomaly a chance is given to adult offenders which is denied to little children."

before the court and were further mandated "to represent the interest of the child."[342]

Two years later the Legislature, in a reversal of prior policy, permitted criminal courts throughout the state to appoint probation officers to assist the judiciary in determining juvenile cases.[343] Interestingly, the legislation provided that "such probation officer may be chosen from among the officers of a Society for the Prevention of Cruelty to Children or any charitable or benevolent institution" (police officers or "reputable private citizens" also qualified for appointment). In deference to the religious-based preferences when dealing with youths, the Act required that "when practicable, any child under the age of sixteen years, placed on probation, shall be placed with a probation officer of the same religious faith as that of the child's parents."[344] As a disposition, probation supervision was limited to the period for which a

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342. L. 1901, c. 627, amending §384(b) of the Buffalo City Charter. The complete text of the statute is as follows:

> The police justice shall have authority to appoint or designate not more than five discreet persons of good character to serve as probation officers during the pleasure of the police justice; said probation officers to receive no compensation from the public treasury. Whenever any child under or apparently under the age of sixteen years shall have been arrested, it shall be the duty of said probation officers to make such investigation as may be required by the court, to be present in court in order to represent the interests of the child; when the case is heard to furnish to the police justice such information and assistance as he may require, and to take charge of any child before and after trial as may be directed by the court.

The probationary period was "for such time not to exceed three months" and the statute further provided that "said probation officers shall have the power to bring the child so convicted before the police justice at any time within three months from the date of conviction for such disposition as may be just."

343. L. 1903, c. 613, amending §11(a) of the Criminal Procedure Law.

344. L. 1903, c. 613, amending §483 of the Code of Criminal Procedure; see also L. 1909, c. 217.

suspended sentence could be ordered, generally one year with provisions for a brief extension. The court retained jurisdiction during the probationary period and could at any time resentence or order a new disposition, including placement or commitment.[345]

The appointment of child protective personnel as court probation officers solidified the agencies' authority and public image. Society for the Prevention of Cruelty to Children representatives, for example, could previously investigate, file complaints and prosecute. Probation officer status added a judicial imprimatur and conferred authority to supervise juveniles under court order; if desirable, the officer could subsequently request commitment of an errant probationer. Further, early probation statutes required the appointment of unsalaried officers. Child welfare representatives, already compensated by their agencies, could readily volunteer. Thus, in 1902 it was reported that:

> of the ten probation officers in Buffalo all are unpaid for this special work, but two are truant officers, two are officers of the Charity Organization Society, and one is the head worker of Welcome Hall, a leading settlement.[346]

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345. See, e.g., L. 1908, c. 50, which established the term of probation for the Buffalo court, stipulating that "said probation officers shall have the power to bring the child so convicted before the police justice at any time during the probation for such disposition as may be just." The authority to order any further "just" disposition during the probation period has continued to modern times (see Family Court Act §360.3[6]), though the 1908 statute did not require any proof of a violation as a prerequsite to ordering a more restrictive disposition.

346. Frederick Almy, *Juvenile Courts in Buffalo*, quoted in Bremner, *supra* note 15 at 527.

Assuming the roles of investigator, prosecutor and supervisor may be viewed as an inherent conflict. To parents and their children in 1900, unrepresented, uncounselled and probably uneducated, the convergence of authority in child welfare cum probation officials must have assumed awesome proportions. And the "role" mixture became ingrained; to a great extent, contemporary county department of social service representatives fulfill identical functions.[347]

It should be stressed that probation supervision was not viewed as a panacea or as a substitute for commitment, but instead as an additional tool for relatively benign intervention. As noted by an early proponent:

> The probation system does not necessarily mean that fewer children will be committed to institutions. It is not a device for keeping children out of institutions, at any cost. It means that many children who now receive no care and are under no one's oversight, who are taking the first step in wrong doing, would be placed under wise, systematic, careful oversight, and, failing to respond to that ... then they will be committed.[348]

As such, the movement's organizers established realistic expectations and assumptions. The goal was to first assist the court in mar-

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347. See, e.g. Social Services Law §424 prescribing investigator powers, Family Court Act §1031, granting the power to originate court proceedings, and Family Court Act §1057 permitting the court to prescribe supervision by a social service official.

348. Homer Folks, *Discussion on Juvenile Courts and Juvenile Probation, Second New York State Conference on Charities*, at 298. Folks perceptively suggested two possible deficiencies of the probation system:

> In the first place, the rapid extension of the system may lead us to think that it is in some part a panacea for all the ills connected with wayward children ... the second mistake to which I think we will be prone in the development of the probation system, is that of doing superficial work.

Id. at page 297. The second danger, superficial probation work, remains a danger common to most current probation systems.

shalling the relevant evidence and then, if necessary, to provide supervision for children who would not ordinarily be placed. Probation thereby afforded at least minimal protection to wayward or neglected youths; or, viewed in a more critical light, probation provided a new method of intervention (however benign) in private family problems, thus continuing the trend toward increased judicial involvement (probation supervision could be effected in large numbers of cases whereas commitment, the only other remedy readily available to the courts, was feasible in only a relatively small number of cases).

The availability of probation supervision coupled with liberal provisions for revocation of probation, rehearing and extension also significantly projected the court's authority, granting the judge continued jurisdiction over troubled youths and their families.[349] In short, the service was a tailor-made appendage of the juvenile courts.[350] The officers also screened cases and acted as the prosecutorial arm of the court. Their value to the Children's Court parts led quickly to its professionalization, to the detriment of the "volunteers." In 1907 the Legislature established a State Probation

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349. In exploring the simultaneous development of both, one is struck by the symbiotic relationship. The juvenile courts were needed to utilize expert probation services while probation was needed to implement the goals of the juvenile courts. The service could investigate background, assist the court in determining the complicated task of selecting a disposition from among the array of possible programs and, ultimately, could supervise children. One commentator noted that the introduction of probation in Buffalo resulted in an upsurge of juvenile arrests for the following reason:

> Much juvenile lawlessness formerly ran riot without arrest because the [police] officers knew that the judge would not send a child away for petty offenses, and mere rebuke meant so little that the child fresh from court would jeer at the officer who had arrested him. With probation an arrest is taken more seriously by the children. (Almy, op. cit. note 340 at page 528).

The perception of juvenile courts as overly lenient tribunals (with or without probation), recognized as such by the community's errant youths, is a constant juvenile justice theme.

350. The range of probation activities for youths was far greater than that for the adult criminal; for example, probation officers frequently acted as prosecutor, a responsibility held by the district attorneys in the adult criminal justice system.

Commission, with statewide policy-making and supervisory responsibilities.[351] When the Commission was organized, the state had but 35 publicly paid officers serving the courts (juvenile and adult); by 1921, 249 officers were employed.[352] A professional probation service had been completely integrated into the court. The function gained further statutory recognition as an essential court component in the 1922 Children's Court Act and continues to employ many of the powers and prerogatives first conferred in 1903.

C. The Decriminalization of Delinquency

The most important substantive children's law amendment during the period when specialized court parts and probation services evolved was the decriminalization of delinquency. In 1905, the New York State Legislature enacted a statute which effectively prohibited state imprisonment (except for murder) and sharply limited the less restrictive local incarceration of persons under the age of sixteen:

> the commission by a child under the age of sixteen years, of a crime, not capital or punishable by life imprisonment, which if committed by an adult would be a felony, renders such child guilty of a misdemeanor only . . .[353]

Since the maximum period of confinement for a misdemeanor was generally one year, the statute, by precluding a felony conviction, drastically reduced the penal sanctions for youthful criminality. As a practical matter, only the crimes of first- and second-degree murder were excepted.[354] Commitment to a house of refuge or a child care agency in lieu of imprisonment had been possible since

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351. L. 1907, c. 430.

352. New York State Probation Commission, *Probation in New York State*, Albany, 1921, p. 10, as cited in Schneider and Deutsch, *supra* note 199 at 194.

353. L. 1905, c. 699, amending §699 of the Penal Code.

354. Under the 1909 Penal Code, adopted shortly after the 1905 measure, death was a penalty only for first-degree murder (§1045) or treason against New York State (§2382), a crime that could hardly be committed by a child under the age of sixteen. Life imprisonment could be imposed for second-degree murder (§1048) or for a fourth felony conviction; the latter was impossible since a child could not legally commit a felony other than murder.

1824 and incarceration in adult institutions had become an increasingly rare event, but the optional sanction of a full criminal sentence had remained,[355] thereby placing all children accused of committing felonies in jeopardy of long-term imprisonment. The 1905 Act prohibited lengthy incarceration, a provision that was to remain in effect until enactment of the 1978 Juvenile Offender Act.[356] From 1905 until 1978, a felony conviction could only result in commitment to a house of refuge or a child care agency, imprisonment in a county or city jail for up to one year, or probation supervision.[357]

Further, preclusion of felony charges effectively removed jurisdiction (except for murder cases) from the adult criminal felony courts. Misdemeanors were heard exclusively before the lower courts, including, at least in New York City, the Court of Special Sessions, i.e. the tribunal which heard and disposed of all other cases involving children through the specialized Children's Court parts. Socially oriented services, including probation, were thereby made available to youths who had committed violent acts and dispositions were determined by the judges who specialized in juvenile proceedings.

The 1905 statute was augmented by several additional ameliorative provisions. First, a companion statute provided that if a child was charged with a misdemeanor or petty offense, the arresting authority "may accept, in lieu of bail, the personal recognizance in writing, without security, of a parent, guardian or other lawful custodian of such child to produce such child before

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355. Unless precluded by the infancy presumption.

356. Under the Juvenile Offender Act fourteen- and fifteen-year-old youths may be incarcerated for lengthy periods upon conviction of a "juvenile offense," a category of crime which includes murder, first- and second-degree robbery and first-degree burglary; see Penal Law §30.00. Additional provisions permit the transfer of a juvenile offender to an adult penal institution; youths may accordingly be imprisoned with adults in state facilities for the first time since 1905.

357. Reducing serious criminal activities to misdemeanor status did not affect commitments, which continued to be for an indeterminate period or until the youth attained majority at age twenty-one. Lengthy imprisonment was precluded, but a lengthy loss of liberty remained a clear possibility.

the proper court or magistrate on the following day."[358] For the first time a promise to appear on the part of a parent could be substituted for bail or detention.[359] Since a child could be charged only with a misdemeanor or a petty offense, the provision permitting personal recognizance applied to all juvenile crimes (except murder), including those which would be felonies if committed by adults.

Second, a 1907 statute mandated that in county jails "minors shall not be put or kept in the same room with adult prisoners."[360] Children under sixteen could not be imprisoned in state institutions[361] under the 1905 Act (state prisons were reserved for persons serving felony sentences) — the alternative, county imprisonment for a brief period upon a misdemeanor conviction, had to be served in segregated facilities.[362] The result was that children could never be imprisoned with adult offenders.

Last, another 1907 statute provided for the removal of civil penalties:

> A conviction of any child under the age of sixteen years of a crime for which, if the child were an adult, the penalty for conviction could be ten years imprisonment or less shall not work any penalty or deprivation of any right or privilege except such as is imposed by the court or magistrate in pursuance with such conviction.[363]

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358. L. 1905, c. 656, amending §554 of the Code of Criminal Procedure.

359. For the contemporary version see Family Court Act §305.2.

360. L. 1907, c. 275, amending County Law §92.

361. Except upon a murder conviction.

362. By using the word "minors" the Legislature also provided for segregated facilities for children between the ages of sixteen and twenty-one when such children were incarcerated in the county jail; if imprisoned for longer periods, the sixteen- to twenty-one-year-old was committed to Elmira, a state facility which housed only older juveniles or young adults.

363. L. 1907, c. 417 amending §699 of the Penal Code. Civil penalties continued to be imposed upon conviction of serious felonies, i.e. where the term of imprisonment could exceed ten years.

The conviction of children had always involved the imposition of civil penalties, such as abrogation of voting rights (when the youth attained majority) and disqualification to subsequently serve as a juror (even when the conviction had resulted in commitment to a juvenile institution).[364] Statutory removal of penalties and impediments, a feature which became a leading juvenile court characteristic, was an added "decriminalization" benefit.[365] In the absence of imprisonment, and without the burden of continuing civil penalties, a child might surmount youthful indiscretions, including criminal activity.[366]

D. The State Board of Charities

Another innovation, legislated at the turn of the century, involved the establishment of the State Board of Charities as the state regulatory agency for child care agencies. The Board was first organized in 1867, but its functions had been limited to advice and publicity.[367] An early Board commissioner was the noted child welfare pioneer, William Pryor Letchworth.[368] Letchworth, who

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364. See *Park v. People*, Laws 263 (Sup. Ct. Gen. Term, Third Dist. 1869) discussed at footnote 109, page 35.

365. The local Children's Court part enabling acts also included ameliorative provisions. For example, the New York City Code provided that "... the justice sitting in the children's court shall so far as is consistent with the interest of the child and of the state consider the child not upon trial for the commission of a crime, but as a child in need of the care and protection of the state" and further provided for the substitution, in appropriate cases, of a disposition as "in the case of a child not having proper guardianship" (in effect a neglect disposition instead of a delinquency disposition); 1910, c. 659, §39.

366. In 1903 the Legislature also revised the truancy law, permitting school attendance officers to arrest truant youngsters, and providing for commitments "in the case of habitual and incorrigible truants"; L. 1903, c. 311 (the prior statute had authorized commitment only for repeat truancy offenders; see pages 85-86). The Act thereby strengthened the ability of school and court officials to intervene and elevated "habitual" or "incorrigible" truancy to a level equal to delinquency.

367. Schneider and Deutsch, *supra* note 199 at 61.

368. *Id.* at 62; Letchworth was appointed to the Board in 1873.

was instrumental in achieving the removal of children from the alsmhouses,[369] persevered in advocating the adoption of statewide standards for the entire child welfare system.

His activities finally succeeded with the enactment of a revised State Constitution in 1895 (Letchworth, after twenty-two years, was still an active member of the Board). Reconstituting the Board of Charities as a constitutional entity, the Constitution also directed that the Legislature authorize board members to "visit and inspect all institutions, whether state, county, municipal, incorporated or not incorporated, which are of a charitable, eleemosynary, correctional or reformatory character."[370] The constitutional grant was indeed a broad one, encompassing houses of refuge, child care agencies, orphan asylums and public juvenile institutions operated by the state or any political subdivision.

Although the constitutional power was limited to inspection and monitoring, the State Board soon acquired comprehensive licensing and supervisory powers. The Board had, in 1883, been granted the power to grant or disapprove the incorporation of all child care agencies and orphanages and, in 1898, achieved licensing powers over the binding out or apprenticeship of children, including the authority to revoke the license of any agency if placed children were improperly treated or neglected.[371] A few years later, the New York City magistrates and justices were required to provide notice to the State Board and to a society for the prevention of cruelty to children whenever an allegedly neglected or destitute child was brought before the court, thus extending the Board's participation to the adjudicatory level. Additional legislation provided for Board

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369. *Ibid.* See page 65.

370. *Id.* at 126; the only organizations exempted from Board oversight were mental and prison institutions.

371. L. 1883, c. 446 and L. 1898, c. 13. Binding out had been considered a major abuse of the child protective system; see page 64. The Legislature further provided that "in every case where practicable any child placed out shall be placed with individuals with like religious faith as the parents of the child."

oversight of the growing number of state-run institutions.[372] In short, the State Board of Charities had evolved into a statewide supervisory agency, a responsibility later assumed by the State Department of Social Services.

E. Children's Court Part Practices

It is difficult to reconstruct with certainty the procedures utilized by the early juvenile court parts. The new tribunals generated little or no appellate activity (in itself a telling fact, though one which has been a persistent theme in juvenile justice), trial level cases were not generally reported and, with minor exception, the participants (such as judges) did not publish accounts. Several guideposts nevertheless exist which suggest that, at least in New York, the courts continued to apply the basic criminal procedure rules, while gradually augmenting traditional practices with such specialized juvenile procedures as confidential hearings and an expanded dispositional process.

First, and perhaps most important, the children's courts remained a part of the criminal court system and, as such, were governed by the Penal Code and criminal procedure laws. Presiding judges were members of the Court of Special Sessions (or a county court) and probably spent the majority of their time hearing adult criminal cases.[373] Second, the substantive laws governing children, including delinquency, disorderly persons, neglect and truancy, were part of the Penal Code until 1922, when they were recodified as the Children's Court Act.[374]

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372. See, e.g., L. 1896, c. 546. Several independently managed houses of refuge had been converted to state schools. For example, in 1898 the Western House of Refuge had become the State Industrial School at Rochester (L. 1898, c. 536) and in 1904 the House of Refuge at Hudson had become the "New York State Training School for Girls" (L. 1904, c. 453), thus apparently becoming the first institution to bear the "training school" appellation.

373. Even with specialization, the judges were undoubtedly rotated from time to time and possessed criminal court experience prior to assignment to the children's parts.

374. The subsequent removal of children's laws from the criminal codes led to litigation concerning applicable procedures; see, for example, *People v. Fitzgerald*, 244 N.Y. 307 (1927), *People v. Lewis*, 260 N.Y. 171 (1932) and *In Re Madik*, 233 A.D. 12 (3rd Dept. 1931), discussed at pages 146 through 152.

Criminal procedure principles such as adequate notice, the right to confrontation, the right to cross examination, trial by jury and the requirement of proof beyond a reasonable doubt were all presumptively applicable, though they may have been somewhat compromised in practice. The lack of controversy concerning procedures, which continued until shortly after enactment of the Children's Court Act, as well as the presence of clearly defined criminal procedure rules, evidence a strong due process orientation. In addition, the infancy presumption, applicable only in delinquency cases and statutorily limited to children under the age of twelve,[375] was held to apply to the Children's Court parts.[376]

A rare glimpse at the early working of the court is revealed by a short extract written by Thomas Murphy, the first police justice of the Buffalo Children's Court part:

> When a case is called the police officer comes forward with the child to the judge's desk. The parents and witnesses follow. The charge is then read. The child is asked to state whether the same is true or untrue, whether he pleads guilty or not guilty. If the plea be "not guilty," witnesses are sworn for the people and on behalf of the defendant, as in adult cases, though the examination is less formal. Lawyers do not practice in this court, and the police court audience is absent.[377]

The basic premise of criminal procedure incorporating notice, pleas and sworn testimony, is clear, though the judge indicates that the "examination is less formal" (whatever that may mean).[378] Of equal interest is the observation that attorneys did not appear, a

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375. See page 79.

376. See *People v. Squazza*, 40 Misc. 71, 81 N.Y.S. 254 (Ct. of Gen. Sessions N.Y. Co. 1903).

377. Thomas Murphy, *History of the Juvenile Court of Buffalo, International Prison Commission, Children's Courts in the United States, Their Origin, Development and Results*, U. S. Government Printing Office (1904) at 13.

378. The presence of pleadings, sworn testimony and confrontation should be contrasted with the landmark 1967 *Gault* decision, where the Arizona juvenile court acted in the absence of notice, testimony or confrontation; 387 U.S. 1.

fact which would indicate less formality and a greater degree of judicial control (though adults charged with criminal activity did not then possess the right to appointed counsel). Last, the absence of an audience suggests that, although the public was not yet excluded from the proceedings, juvenile cases, segregated from adult proceedings, became confidential at an early date through default — the public was simply not interested.

One important characteristic of the Children's Court parts was a concentration of parental neglect and petty offense cases. In the first year, the children's parts in Manhattan and the Bronx reported a total of 7,647 cases, resulting in 4,790 "convictions."[379] Neglect or improper guardianship (at 1,582 cases), charged under §291 of the 1881 Penal Code, predominated. Less than 2,000 cases involved allegations of criminal behavior; the great majority were misdemeanors such as petty larceny (927 cases) or simple assault (149 cases).[380] Of equal significance, the great majority of commitments, which totalled 1,677, were to child care agencies which ordinarily accepted neglected or dependent children, such as the New York Juvenile Asylum (386 commitments), an organization devoted to caring for the very young neglected child, or the Catholic Protectory (576 commitments). By way of contrast, the House of Refuge, which accepted mainly delinquent youths, received only 183 commitments.[381]

The predominance of petty, almost frivolous, matters is underscored in a report by Justice Julius Mayer, a judge of the Court of Special Sessions, concerning the initial year of Children's Court part practices:

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379. Murphy, *supra* note 377 at 190.

380. *Id.* at 191; there was a small number of reported serious cases such as robbery (sixty-four cases), rape (three cases) and arson (five cases).

381. *Ibid.* It is interesting to note that of the 1,667 commitments, 1,654 involved white children while only 13 committed children were black; the report curiously cites "black" children (as opposed to "colored" or "negro"), a word which was not common usage at the time.

> Very many children are arraigned because they engage in playing shinny, football, baseball and other innocent games on public thoroughfares or build bonfires on the asphalt or other pavements. These acts are, of course, innocent in themselves, but are prohibited in the interest of the safety of life, limb, or property on our crowded streets ... a fine or commitment to a reformatory is rarely imposed in such cases, but the judge presiding takes great pains to point out why the game, innocent in itself, must not be played in the streets, and the parent is also instructed, with the result that very few boys offend twice in this particular.[382]

Judicial involvement in ballplaying seems hardly appropriate (and one may wonder whether the details of criminal procedure were complied with), but the extract illustrates the extent to which judicial intervention had been projected into the everyday affairs of parents and their children. Organized to deal exclusively with juvenile matters, virtually any perceived harm, however innocuous, was grist for the courts' mill. Judge Mayer also commented on the large number of disorderly cases initiated by parents against children who are "habitually derelict and who will not yield to parental direction,"[383] though he wryly noted that parents frequently withdrew a petition after receiving an admonishment that, if possessed of sufficient means, the parent was obligated to reimburse the state for the support of a committed child.[384]

Other juvenile justice themes, noted during the court's first year, included the importance of probation services, then in its infancy,[385] and the court's emphasis upon the child's home and background (regardless of the charge), as opposed to the criminal

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382. Julius M. Mayer, *The Child of the Large City, International Prison Commission, Children's Courts in the United States, Their Origin, Development and Results*, U.S. Government Printing Office (1904) at 16 and 17.

383. *Id.* at page 22.

384. *Ibid.*

385. "It may be well to say, however, that the satisfactory experience of the first year of the court is the substantial success of the system of parole or probation, whereby the child is allowed to work out its good behavior." (*Id.* at 23).

court's focus on the crime or wrong committed.[386] Predicating a disposition on environmental factors was not novel, but the availability of expert assistance and the specialization of judges who became attuned to children's cases reinforced the theory that the wrong, committed by either the parent or the child, was a consideration secondary to that of the child's needs as perceived by the specialist. Procedural due process was observed, at least in the main, but the dominant emphasis was protection and rehabilitation, a principle that varied in form from lectures concerning the dangers of ballplaying on the streets to placement in secure institutions, such as the house of refuge.[387]

Juvenile courts throughout the country were experimenting with new techniques. Most, like New York, were offshoots of the criminal courts and preserved at least some elements of criminal procedure. Colorado, for example, which enacted the country's second juvenile code (following Illinois), provided for the right to counsel and trial by jury.[388]

Contrary to popular myth, the new courts did not rush pell-mell into informality which bordered on star chamber practices.[389] Evaluating the juvenile courts in operation as late as 1949 one astute commentator found procedural inconsistencies and wide variations:

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386. "There are, however, numbers of families where both parents are utterly unfit guardians. Parents of this kind are not new, doubtless they are as old as civilization itself. In these cases the proper course is commitment to a reformatory, for parole or probation is rarely of any value where there is no proper home influence." (*Id.* at 20).

387. Framing a disposition for the good of the child was to a large extent a time honored principle which dated from the introduction of indeterminate commitments prior to the Civil War — the distinction between the pre- and post-1902 courts was one of degree.

388. See Lindsey *supra* note 319 at 64; Lindsey maintained criminal procedures only grudgingly — "in order to avoid constitutional difficulties and attacks upon the law, it was considered the better part of prudence to provide for trial by jury in case it is demanded; also the right to counsel, a right that could be claimed in a criminal case."

389. See, for example, the often quoted statement by Dean Roscoe Pound, written in 1937: "The powers of the star chamber were a trifle in comparison with those of our juvenile courts. . .": Foreword to Young, *Social Treatment in Probation and Delinquency* (1937).

> The wide variety of juvenile courts is matched by the diversity in their mechanics of operation. Unfortunately, in the analysis of their procedures, confusion has come from a common inclination to picture them as uniform throughout the country and to idealize them . . . There has been a tendency to exaggerate the contrasts between juvenile court procedures, pictured in most glowing terms, and those of the criminal court system, viewed in a worse possible and quite inaccurate light. The students should realize that the vast majority of children's courts are distinct from the ordinary court system only in having separate hearings; that in fact their judges and other personnel are engaged in criminal, civil, equity, probate, or other ordinary legal business most of the time. Their methods and attitudes quite naturally persevere from one juridical area to another.[390]

If a common theme had not emerged by mid-century, the earlier conflicts and differences must have been staggering.

This is not to suggest that informality was absent or that rigorous procedural rights were always observed. The juvenile judge tended to view his role as patriarchal. He pictured himself as the benevolent judge who placed his arm around a youngster and prevented future criminality through sheer concern and persuasion.[391] Early juvenile court literature is replete with folksy judicial child-saving parables. Increased informality and a disregard of legal procedures became a trend which gradually overshadowed, but never completely supplanted, due process elements. In reality, the juvenile courts started with a criminal procedure mandate. The founding assumptions were subsequently eroded, resulting in a "mix" of due process, patriarchal attitudes and "best interest of the child" informality; the proportions of these ingredients varied substantially.

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390. Tappan, supra note 71 at 179-180.

391. For a charming description of the judicial attitudes see Lindsey *supra* note 319 at 38-39.

The disregard of basic procedural safeguards (such as confrontation, notice or proof) was justified, when they occurred, by invoking the parens patriae doctrine.[392] The courts simply decided that since they were seeking to help and protect the child in their role as surrogate parent, rather than punishing or impugning guilt, procedural due process was irrelevant. As has been previously noted, parens patriae as a jurisdictional doctrine had been applied sporadically throughout the nineteenth century and provided the basis for upholding the New York 1877 Child Protection Act.[393] But extension of the doctrine to justify procedural irregularities is a twentieth century phenomenon. Several decisions interpreting early juvenile codes held that procedural due process could be dispensed with in light of parens patriae,[394] though other courts, including the New York Court of Appeals, rejected the doctrine's application to procedural issues as late as 1927.[395]

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392. See, e.g. *Commonwealth v. Fisher, infra* note 394.

393. *Matter of Donohue*, 1 Abb. N.C. (Sup. Ct. 1st Dept. 1876); see page 88.

394. See, e.g., *Commonwealth v. Fisher*, 213 Penn. 48 (1905) and *Lindsay v. Lindsay*, 257 Ill. 328 (1913). The reasoning of the Pennsylvania Supreme Court in the *Fisher* decision is particularly revealing:

> To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the Legislature surely may provide for the salvation of such a child, 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 natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as parens patriae, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there. (213 Penn. 48, 53.)

395. See *People v. Fitzgerald*, 244 N.Y. 307 (1972), discussed at pages 146 through 148.

The essential fact is that throughout their history the juvenile courts have practiced differing techniques. Where the Children's Court remained a part of a larger criminal court, as in New York, more stringent procedural rules were applied for a longer period of time (though perhaps less stringent than those which governed adult criminal cases);[396] in those states where the juvenile courts gained early independence from the criminal court structure, informality tended to be more pronounced. Ultimately, however, and after several decades, most juvenile courts, relying heavily on the revised parens patriae doctrine, substantially dismantled the procedural safeguards upon which criminal and civil jurisdiction are grounded, a condition which persisted until the 1967 *Gault* decision and the subsequent reintroduction of basic criminal due process standards.[397]

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396. *Ibid.*

397. Tappan made the following observation in analyzing juvenile court practices:

> But actually, juvenile courts are more akin in spirit and method to the contemporary administrative agency than to early equity: their methods and procedures have not been a direct borrowing from chancery, either ancient or modern, nor are the usual remedies of probation and institutional commitment those that chancery has traditionally employed. It appears that these courts have developed as part and reflection of the growth of contemporary administrative and quasi-judicial tribunals, though with considerable rationalization by analogy to ancient chancery. The procedural informalities (particularly in matters of proof), the control over the liberty of the defendant, and the potential influence on his personality through court handling, all these are greatly in excess of the powers ordinarily entrusted to the administrative agency — or to courts of equity. In these respects the juvenile courts resemble more closely the criminal courts, with which they have had a closer historical and functional affiliation than they have had with equity; in the matter of procedures, however, they fail to provide the protections that in the criminal courts are considered basic ingredients of justice. Herein lies the peculiar paradox of juvenile courts: designed to ensure a superior justice through protection of the child, they have to an excessive extent abandoned the fundamentals upon which the methods of promoting justice are based.

Tappan, *supra* note 71 at 169-170.

CHAPTER VI

The Children's Court

1909-1932

From their inception in 1903, the Children's Court parts had applied criminal jurisprudence principles. But through a lengthy progression the laws governing children had deviated significantly from their criminal antecedents. Child neglect, truancy, and disorderly behavior, matters which increasingly dominated juvenile practice, had never been fully compatible with criminal law doctrines.[398] Even delinquent conduct was increasingly viewed as a symptom of family dysfunction instead of as a culpable act warranting severe restriction, if not punishment.

Given the dichotomy between juvenile law and adult penal statutes, a formal break was probably inevitable. In New York the division occurred with the enactment of the 1922 Children's Court Act and the concurrent adoption of a constitutional amendment authorizing the establishment of independent children's courts. Prior to the establishment of separate courts, the Legislature completed the divorce between juvenile and adult criminal laws by totally decriminalizing youthful misbehavior (except for murder) and abrogating the infancy presumption.

A. The 1909 Penal Code and Decriminalization

In 1909 the Legislature recodified the 1881 Penal Code. A product of the first comprehensive criminal law review in almost thirty

398. For example, a child neglect adjudication did not ordinarily result in punishment (though some forms of neglect amounted to a crime) and the disposition greatly affected an innocent party, the child, in addition to the person adjudged guilty of committing the wrongful act.

years, the Code could have substantially revised children's laws. Instead, the act largely continued the earlier provisions, dating from the post-Civil War period, relating to neglected, disorderly and truant children. In a similar vein, the act maintained the requirement of segregated children's proceedings, but did not expand the Children's Court parts or establish new tribunals.[399] The relatively new structure was apparently working well and the Legislature was not yet ready to separate the childrens parts from their parent criminal courts.

The Code nevertheless incorporated one major revision which completed the decriminalization of youthful behavior and introduced the term "juvenile delinquency" into New York's legal lexicon:

> A child of more than seven and less than sixteen years of age, who shall commit any act or omission which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only . . .[400]

The amendment substituted the words "juvenile delinquency only" for the earlier "guilty of a misdemeanor only";[401] henceforth, any act short of murder committed by a youth under the age of sixteen could not be deemed a crime (the former provision had authorized the imposition of misdemeanor penalties).[402] For an

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399. See e.g., §487, 1909 Penal Code.

400. L. 1909, c. 478, amending §2186 of the Penal Code.

401. L. 1905, c. 855; see page 112.

402. It should be noted, however, that other Code sections appeared to conflict with decriminalization. For example, §2194 stipulated that "when a person under the age of sixteen is convicted of a crime, he may, in the discretion of the court, instead of being sentenced to fine or imprisonment . . .," implying at least the possibility of incarceration. However, the sections which provided for the sentence of imprisonment to a state or local facility, sections 2181 through 2184, specifically exempted children under the age of sixteen. The only logical interpretation is that the sporadic references to the conviction and imprisonment of youths constituted only a failure to "clean up" the penal law to conform with the decriminalization statute.

adjudicated delinquent, the possibility of commitment to a private or public institution, such as a house of refuge or a training school, remained, and the child could of course be placed under probation supervision. On the other hand, imprisonment in either a state penitentiary or a county jail (which normally held persons sentenced to serve less than one year of imprisonment) was proscribed. In short, the amendment completed the decriminalization process which had commenced in the early part of the century.[403]

Decriminalization also nullified the infancy presumption. Since the words "juvenile delinquency" were substituted for the word "crime" the courts apparently viewed the presumption as inapplicable.[404] Interpreting the statute in a manner which permitted actions against very young children who had allegedly committed criminal acts may be questioned — at a minimum, the legislative intent was unclear. In fact, the penal overtones of "juvenile delinquent" were underscored in a 1913 Appellate Division opinion:

> Such [criminal] act was made the subject of a new classification, in which it became known as "juvenile delinquency," and this offense, though excluded expressly from the degree of statutory crime, was in its nature *quasi-criminal*, whatever words were used to characterize it.[405]

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403. See pages 112 and 113.

404. The 1881 infancy presumption was continued (Penal Law §§816 and 817), i.e. "A child of the age of seven years, and under the age of twelve years, is presumed to be incapable of crime . . ." But of course the statute did not stipulate that such child was presumed to be incapable of juvenile delinquency.

Since the courts concluded that a child under the age of twelve could be found to be delinquent without the necessity of proving capacity, the infancy presumption's statutory continuation was meaningless. Any criminal conviction was barred by the 1909 amendment (Penal Law §2106); why, then, the need to maintain the presumption? Read together, the two statutes (decriminalization and the infancy presumption) imply that the Legislature intended to apply the presumption to delinquency cases.

405. *People v. Pollack*, 154 A.D. 716, 720 (Second Dept. 1913); emphasis in original. The classification of delinquency as at least analogous to criminality has been ongoing. In 1966, for example, the Court of Appeals again held that delinquency actions "... are at the very least quasi-criminal in nature"; *Matter of Gregory W.*, 19 N.Y.2d 55.

Using similar reasoning, the Court of Appeals subsequently held that the mere substitution of words could not alter the proceeding's criminal nature.[406] Strangely, however, despite the perceived criminal nature of the charges, there is no reported case in which a delinquency petition against a child under the age of twelve was challenged and it is obvious that the courts were permitting such actions shortly after enactment of the 1909 Code.[407]

Ironically, decriminalization greatly increased the possibility that a youngster under the age of twelve would lose his liberty.[408] Although incarceration in an adult penitentiary was precluded for all children, the younger child could be confined to a house of refuge or similar institution based on a criminal finding, a result which was impossible prior to 1909 (or, more accurately, the youth could be confined even when the strong infancy presumption could not be rebutted). Infancy, which had protected children for several centuries, was simply irrelevant.[409] Subsequently, the 1922 state Children's Court Act resolved any ambiguity by providing for delinquency jurisdiction "... of children actually or apparently under the age of sixteen years for any violation of law,"[410] thereby expressly abrogating the presumption and theoretically permitting the prosecution of a new born infant.[411] The policy of state interven-

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406. See *People v. Fitzgerald*, 244 N.Y. 307 (1927), discussed at pages 189 through 195.

407. For example, the 1924 *Annual Report of the Children's Court of the City of New York* reported that a total of 850 children under the age of twelve had been charged with delinquency that year (Table 16, page 26).

408. The infancy presumption age limitation had already been lowered from fourteen to twelve; see page 99.

409. The last New York decision applying the presumption was *People v. Squazza*, decided in 1903; see page 18.

410. §5(l), Children's Court Act of the State of New York (1922).

411. Oddly, the 1924 Children's Court Act of the City of New York stipulated that "the words 'delinquent child' shall mean a child over seven and under sixteen years of age ..." (§52[2]). Thus, a child between birth and age seven could be charged with delinquency outside the city, but not within New York City. The dichotomy raises serious equal protection questions. However, there is no indication that actions were in fact initiated against the very young and the dichotomy may have been the result of poor legislative drafting.

tion had completely supplanted the principle that a child had to know the consequences of an unlawful act and possess the ability to differentiate right from wrong as prerequisites to loss of liberty.[412] Invoking infancy to bar court involvement, presumably for the benefit of the child, was viewed as unnecessary and inconsistent with juvenile court philosophy; the strength of this feeling is emphasized by the fact that the presumption has remained inapplicable throughout the twentieth century.[413]

B. The Children's Courts

With the 1909 amendment criminal court jurisdiction over minors under the age of sixteen had become an historic anachronism. Decriminalization completely stripped the courts of the power to order penal sanctions; even the less drastic civil penalties had been eliminated (such as disqualification from holding office). As a consequence of the 1902 New York City Charter revisions[414] and similar acts affecting other urban areas, separate Children's Court parts held proceedings in separate buildings (and with separate staff) isolated from adult criminal actions. Throughout the state children's records and cases were segregated, although in rural areas local justices and county court judges continued to preside. The next logical step was the formation of the independent tribunals.[415] By 1920 a constitutional amendment authorizing the establishment of a separate Children's Court or Domestic Rela-

412. But the criminal law requirements of specific intent or mens rea presumably applied, at least until the 1932 *Lewis* decision; see page 193.

413. The original interpretation of the 1909 decriminalization statute has remained valid. Infancy, defined as including generally any person under the age of sixteen, is still a defense to a prosecution in a criminal court (Penal Law §30.00), but does not bar prosecution in a family court. The defense was recently amended to permit the criminal indictment of children between the ages of thirteen and sixteen who are charged with the commission of serious felonies (L. 1978, c. 481, 528; the Juvenile Offender Act).

414. See pages 129 through 133.

415. See page 160.

tions Court for each county had been proposed; the amendment was approved in 1921.[416]

Implementation was completed through two separate acts. The first, the 1922 Children's Court Act of the State of New York,[417] applied to those counties which did not maintain separate Children's Court parts while the second, the 1924 New York City Children's Court Act,[418] applied only to New York City; the state Act was subsequently extended to those counties outside New York City which had previously established separate parts.[419] The two Children's Court acts were duplicative, incorporating largely iden-

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416. Article VI, §18. The relevant portion of the constitutional amendment reads as follows:

> The Legislature may establish children's courts, and courts of domestic relations, as separate courts, or as parts of existing courts hereafter to be created, and may confer upon them such jurisdiction as may be necessary for the correction, protection, guardianship and disposition of delinquent, neglected or dependent minors and for the punishment and correction of adults responsible for or contributing to such delinquency, neglect or dependencies, and to compel the support of a wife, child or poor relative by persons legally chargeable therewith who abandon or neglect to support any of them. In conferring such jurisdiction the Legislature shall provide that whenever a child is committed to an institution or is placed in the custody of any person by parole, placing out, adoption or guardianship, it shall be so committed or placed, when practicable, to an institution governed by persons, or in the custody of a person, of the same religious persuasion as the child. In the exercise of such jurisdiction such courts may hear and determine such causes with or without a jury, except those involving a felony.

Note that the constitutional amendment, in addition to authorizing the establishment of new courts to hear cases involving children, broadened the concept of juvenile justice to include criminal activity by adults against children and the failure to support children. This enabled the Legislature to consolidate such proceedings into the new children's courts; see page 172.

417. L. 1922, c. 547.

418. L. 1924, c. 254.

419. See, e.g., L. 1924, c. 436.

tical provisions except for the selection of judges.[420] Why, then, did the Legislature enact two virtually identical codes?[421] The need for parallel acts remains unclear, although the state continued to be governed by the duplicative codes until both were superceded by the 1962 Family Court Act.[422]

In addition to establishing a new tribunal, the state Children's Court Act significantly altered the substantive laws governing youthful behavior. In a major amendment, the Act merged criminal activity, disorderly conduct, truancy and desertion (or "runaway" conduct) into the definition of juvenile delinquency, thereby greatly expanding the original 1909 meaning:

> The words "delinquent child" shall mean a child under sixteen years of age (a) who violates any law or any municipal ordinance or who commits any act which, if committed by an adult, would be a crime not punishable by death or life imprisonment; (b) who is incorrigible, ungovernable or habitually disobedient and beyond the control of his parents, guardian, custodians, or other lawful authority; (c) who is habitually truant; (d) who, without just cause and without the consent of his parent, parents, guardians or other custodian, repeatedly deserts his home or place of abode; (e) who engages in any occupation which is in violation of law, or who associates with immoral or vicious persons; (f) who frequents any place the existence of which is in

420. Children's Court judges outside New York City were elected on a countywide basis (see §4, New York State Children's Court Act) while those in the city were appointed by the mayor (§6 provided that "the court shall consist of six justices who shall be appointed by the mayor of the city of New York"). The dichotomy has continued through the present; see Family Court Act §§124 and 133.

421. Given the fact that New York City already maintained a citywide Children's Part structure, the legislative priority embracing counties outside the city through the 1922 Act is understandable, but one would assume that the Act would have been simply amended to incorporate New York City with whatever special provisions the Legislature deemed desirable (as it was expanded to cover all counties outside the city).

422. The New York City Domestic Relations Court Act, enacted in 1933, largely continued the duplication; see pages 140 through 143.

violation of law; (g) who habitually uses obscene or profane language; (h) who so deports himself as to willfully injure or endanger the morals or health of himself or others.[423]

Until 1922, disorderly behavior, truancy, desertion and delinquency had constituted separated causes of action, but the available dispositions had been similar;[424] for example, each proceeding could result in commitment. In fact, every element of non-criminal behavior incorporated in the 1922 definition of juvenile delinquency, including habitual disobedience and engaging in occupations which violated the law, had antecedent statutes within the Penal Code. But with the decriminalization of delinquency, the only distinct sanction available upon a finding that a crime was committed, imprisonment, had been repealed. Ergo, the rationale for separate proceedings had largely been obviated: the courts were already free to tailor the remedy to the child's needs and environment irrespective of the offending behavior, a reality reflected in the 1922 Act. The incorporation of non-criminal behavior within the definition of delinquency was to continue until the 1962 Family Court Act, which separated non-criminal behavior by establishing a "person in need of supervision" proceeding,[425] and the subsequent limitation on the placement of PINS children in secure facilities.[426]

The 1922 Act's definition of "neglected child" continued, with only minor amendment, the earlier definition incorporating different acts of parental malfeasance and non-feasance, dating from 1881, which included any child "who is without proper guardianship" as well as a child "whose parent, guardian or person with whom the child lives, by reason of cruelty, mental inca-

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423. New York State Children's Court Act, §2 (1922).

424. See page 79.

425. See Family Court Act §712.

426. See Family Court Act §756(a)(iii): even today, the distinction between criminal and non-criminal errant youthful behavior is blurred by the statutory provision enabling the substitution of a "PINS" petition or finding for one alleging delinquent or criminal behavior (See Family Court Act §311.4).

pacity, immorality or depravity is unfit to properly care for such child."[427]

Significantly, the Act incorporated a unified dispositional section, embracing delinquency (including the merged concept of disorderly or status offense behavior) and child neglect:

> The court, if satisfied by competent evidence, may adjudicate the child to be delinquent, neglected or without proper guardianship and render judgment...[428]

Commitment, placement, probation supervision or discharge was available on an equal basis, regardless of the type of proceeding and irrespective of whether the child or a parent had committed the aggrieved act. In practice (and in conformance with the Act's philosophy) the courts treated every juvenile case (delinquency or neglect) as a uniform cause of action from origination through final disposition.[429] The perceived ability of the court to assist the

427. §2, 1922 New York State Children's Court Act. The definition in its entirety read as follows:

> "Neglected child" means a child (a) who is without proper guardianship; (b) whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child; (c) who is under unlawful or improper care, supervision, custody or restraint by any person, corporation, agency, association, institution, society or other organization or who is unlawfully kept out of school; (d) who wanders about without lawful occupation or restraint; (e) whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child; (f) who is found in any place the existence of which is in violation of law; (g) who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals, or health of himself or others.

428. 1922 New York State Children's Court Act, §22.

429. For example, the suggested court forms, prepared by the New York State Association of Judges of the Children's Court, included an omnibus petition for charging delinquency or neglect, i.e. the same petition form was used regardless of the type of proceeding; see Form No. 1, Proposed Forms for County Children's Court, *Gilbert Bliss Civil Practice of New York*. Book 15, page 45 (recompiled 1947).

juvenile was paramount and, although in practice the specific disposition might depend in part upon the type of alleged conduct, all children whose cases were before the court were generally entitled or subject to identical remedies.

The new court was further endowed with criminal jurisdiction over adults who had allegedly committed acts jeopardizing a child's well-being. For example, the code permitted the children's courts to hear and determine misdemeanor violations of the Penal Code which affected children, such as the unlawful employment of a minor.[430] However, criminal jurisdiction was severely limited by a 1924 Appellate Division determination that the Children's Court Act provision was unconstitutional insofar as it related to acts committed by adults which did not contribute to delinquency or neglect.[431] Accordingly, adult criminal jurisdiction was restricted to conduct which was linked directly to delinquency or neglect, such as a parental assault (but excluded non-related crimes such as unlawful employment).

Further, the Legislature, in a move that was to foreshadow the subsequent establishment of the Family Court, granted to the state Children's Court substantial adult civil jurisdiction. For example, the 1922 Code provided that "the court shall have exclusive original jurisdiction in the hearing and determination of bastardy [paternity] cases ... and shall have jurisdiction to issue a warrant and make

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430. See, for example, the 1922 New York State Children's Court Act which provided that "the court shall have original jurisdiction to hear, try and determine all cases less than the grade of felony, which may arise against any parent or other adult responsible for or who contributes to the delinquency of or neglects any child; or who is charged with any act or omission in respect to any child which act or omission is a violation of any state law or municipal ordinance" (§7[2]).

431. *People v. Hopkins*, 208 A.D. 438, 203 N.Y.S. 653 (3rd Dept. 1924). The Constitution had provided that the Legislature could establish children's courts and confer jurisdiction relating, inter alia, to "... the punishment and correction of adults responsible for or contributing to such delinquency, neglect or dependencies ..."; see footnote 416, page 130. Hopkins had been convicted of the crime of "causing the morals of a child to become depraved" by committing an act of sexual abuse against an eleven-year-old girl. Delinquency or neglect was not alleged.

or withhold an order of filiation . . ."[432] Of perhaps greater importance, the Act also provided that "whenever the welfare of a child under the jurisdiction of the court is involved" the court could determine and enforce orders of support for both the child and, if appropriate, the wife (in cases where the husband had willfully failed to provide proper maintenance);[433] the new tribunals were further granted concurrent jurisdiction (with the surrogate courts) over adoption and guardianship actions.[434] Although far short of constituting a "family" court with jurisdiction over all aspects of the family relationship (such as divorce, annulment and child custody), the courts were granted wide civil and criminal jurisdiction to accomplish their mandate of assisting children.[435] Delinquency and neglect jurisdiction, however, ceased at age sixteen, thus continuing the age limitation first enacted in 1824.[436]

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432. §5(3), 1922 New York State Children's Court Act. Oddly, the New York City children's courts and subsequent Domestic Relations Court were never granted paternity jurisdiction.

433. See New York State Children's Court Act, §6(2).

434 New York State Children's Court Act, §6(l); the jurisdiction is similar to that conferred upon the Family Court by the present Family Court Act.

435. The court's broad jurisdictional clauses even resulted in claims that the Children's Court could determine private custody disputes between parents; the issue was not resolved until 1933, when it was held that the Children's Court lacked custody jurisdiction. See *Walsh v. Walsh*, 146 Misc. 604, 263 N.Y.S. 517 (Children's Court, Westchester County, 1933) and *In Re Sisson*, 152 Misc. 806, 274 N.Y.S. 857 (Children's Court, Chenango County, 1934).

436. "The Children's Court in each county shall have within such county exclusive original jurisdiction of all cases or proceedings involving ... children actually or apparently under the age of sixteen years, or who were under sixteen years of age when the act or offense is alleged to have been committed ..."; New York State Children's Court Act, §6. Several early juvenile court acts also established a jurisdictional age limitation of sixteen years, but most, unlike New York's, subsequently expanded the court's jurisdiction to age eighteen; (see e.g. the Illinois Act quoted in footnote 288, page 89). The purpose of maintaining a reduced age limitation in New York, which pioneered in early legislation to ameliorate the consequences of youthful misconduct, is unclear, but may relate, in part, to the adoption of youthful offender acts and the establishment of separate facilities, such as the Elmira Reformatory, for older youth (see pages 45-46); the alternative provisions encompassing older youths may have blunted any effort to expand the Children's Court jurisdictional age limitation.

Children's courts were required to "hear and determine the case in a summary manner,"[437] although time requirements were not prescribed. Borrowed from the predecessor 1881 Penal Code, the clause implies extreme dispatch and it is probable that most cases were determined within days or weeks.[438] As has been noted, dispositions were governed by a single omnibus statute encompassing delinquency, neglect and improper guardianship. The broad dispositional alternatives ranged from suspended judgment to commitment.[439] Continuing the by then traditional approach, commitments were for an indefinite period or until the child at-

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437. New York State Children's Court Act, §22 (1922).

438. Speed may have been essential given the over abundance of petty cases which resulted only in release or warning; see page 145.

439. 1922 New York State Children's Court Act 22. The statute's text provided that:

> The court, if satisfied by competent evidence, may adjudicate the child to be delinquent, neglected or without proper guardianship, and render judgment, complying with the provisions herein as to the religious faith of the child as follows:
>
> (a) Suspend sentence.
> (b) Parole or and place the child on probation to remain in his own home or in the custody of a relative or a duly authorized agency, association, society or an institution, or another fit person, subject to the supervision of the probation officer and the further orders of the court; or
> (c) Commit the child to the care and custody of a suitable institution maintained by the state or any subdivision thereof, or and to the care and custody of a duly authorized association, agency, society or institution; or
> (d) Continue the case and place the child in its own home or in the custody of a relative or a "duly authorized association, agency, society or institution," for a certain designated period under order of the court;
> (e) Discharge the child to the custody of the superintendent of the poor, child welfare board, or to such other officer, board or department as may be authorized to receive children as public charges, who shall provide for such child as in the case of a destitute child or as otherwise authorized by law; or
> (f) Render such other and further judgment or make such other order or commitment as the court may be authorized by law to make.
>
> The cumbersome introductory phrase to subdivision (b), "Parole or and place" was apparently a misdraft; subsequent versions omitted the clause, simply stating that the court could "place the child on probation . . . (See L. 1930, c. 393).

tained majority. Thus, the commitment of a six-year-old neglected child would be valid, without further judicial review, for fifteen years (although the court maintained continuing jurisdiction and could terminate the commitment at any time upon application of the agency or the parent). The contemporary concept of placement for a determined period, which might be extended upon judicial review, originated only with the 1962 Family Court Act.[440]

Curiously, parental sanctions were not prescribed nor could the court order rehabilitative services. The ironic result was that a parent who had committed egregious neglect or abuse could not be placed on probation, but the child who was the victim of neglect could be so supervised. The court's founders were extremely child-oriented and apparently overlooked the possibility of parental control, although the court might invoke its criminal jurisdiction in an effort to discipline parental misconduct.[441]

The juvenile courts' flexibility in maintaining jurisdiction and control over youths who had been before them was enhanced by a provision that "any order or judgment made by the court in the case of any child committed, by virtue of any proceeding other than that of juvenile delinquency [e.g., neglect], may be vacated and set aside or modified at the discretion of the court."[442] Codifying the 1899 *Knowack* decision that a parent could at any time regain custody upon a showing of rehabilitation,[443] the Act further provided that "any parent, guardian, or and a duly authorized agency ... may at any time file with the court a petition ... for the release of the child."[444] Since commitments were for indeterminate duration which could last a decade or longer, the latter pro-

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440. See, e.g., Family Court Act §1055.

441. Several elements of child neglect, such as endangering the life of a child, constituted crimes (though a lack of proper guardianship was not criminal); in such cases the court might convict the parent and consequently order probation supervision. A second possibility might be to place the child on probation, thereby continuing judicial oversight of the entire family.

442. New York State Children's Court Act, §24 (1922).

443. See pages 95 through 96.

444. New York State Children's Court Act, §24 (1922).

vision constituted the only method by which a child could achieve early release from commitment or placement (i.e. prior to age twenty-one).

By 1922 the role and responsibility of probation officers had expanded to encompass every aspect of court procedure, from the filing of a petition to post-disposition supervision. The new Act consequently codified probation's function through the following provision:

> It shall be the duty of a probation officer to make such investigation before, during and after the hearing of any case as the court may direct and to report his findings to the court. He shall visit and keep himself informed as to the conduct and condition of each child under his supervision and shall make reports thereof to the court.[445]

In short, the probation officer had become the alter ego of the judge and could be fully involved in each case from the time of arrest or complaint through investigation and supervision.[446]

Among the more significant features of the Act, at least in terms of divergence from earlier tradition, were the procedural sections. For the first time the public could be excluded, leaving the court to function in a manner isolated from observance or scrutiny:

> In the hearing of any case coming within the provisions of this Act the general public may be excluded and only such persons and the representatives of authorized agencies admitted thereto as have a direct interest in the case.[447]

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445. New York State Children's Court Act, §36.

446. For a description of the wide responsibilities of probation see Tappan, *supra* note 71, at 329 through 335.

447. New York State Children's Court Act, §45.

The possibility of closed courtrooms represented a radical departure from eighteenth and nineteenth century Anglo-American jurisprudential principles. Public presence had been allowed in the Children's Court parts, although there is some evidence that hearings were ill attended.[448] The 1922 Children's Court Act stipulation was tentative; under its terms "... the general public may be excluded," a clause which presumed open hearings unless the court determined that a specific proceeding be closed. However, in 1930 the Legislature amended the original language to read "The general public *shall* be excluded,"[449] thereby mandating closure in every case. Interestingly, the 1962 Family Court Act restored the 1922 version presuming open proceedings.[450] However, in practice the public has remained barred from the courtroom, despite the 1962 amendment, continuing the policy that dates from the mandatory 1930 provision.[451]

Confidentiality of records was prescribed by the vague discretionary language that "all such [court] records may be withheld from indiscriminate public inspection ...,"[452] a statutory provision which, however weak, has persisted.[453] Children's Court and, later, Family Court records accordingly remained largely confidential, as opposed to the public nature of criminal court files.

Of perhaps greater import, the 1922 Act incorporated the following procedural section:

> Where the method of procedure in a case or proceeding in which the court has jurisdiction is not provided in

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448. See page 118 for a description of the de facto privacy of the earlier Children's Court parts.

449. L. 1930, c. 393 (emphasis added)

450. See Family Court Act §341.1, recodifying former §741(b).

451. See §205.04 of *The Uniform Rules For The Family Court.* The rule's validity is questionable in view of the statutory stipulation that the public may be excluded (as opposed to the provision requiring public exclusion, which was in effect from 1930 until 1962.)

452. New York State Children's Court Act, §45.

453. See Family Court Act, §166.

> this Act, such procedure shall be the same as provided by law, or and by rules formally adopted by the court within the scope of their act.[454]

As an integral part of the criminal court structure, the former Children's Court parts (and the segregated proceedings held in counties which did not maintain separate children's parts) had been governed by criminal procedure rules.[455] Divorced from the criminal tribunals in 1922, the children's courts were left in a procedural quagmire. Largely in response to acts' silence concerning prescribed procedures and the national trend toward procedural vagueness and irregularities,[456] the children's courts experimented with new procedures, frequently dispensing with historic protections such as adequate notice, proof and the right of confrontation and cross examination. Evidentiary rules, burden of proof, order of proceedings, motion practice and notice requirements, which had long been established in criminal codes (as well as applicable civil procedure codes), were replaced by the largely meaningless phrase, "such procedure shall be the same as provided by law."[457] Litigation to determine the procedural boundaries resulted, culminating in the 1932 Court of Appeals *Lewis* decision sanctioning rank informality and the disregard of traditional procedural and evidentiary principles.[458] In short, the absence of procedural guidelines stemmed directly from the 1922 Act.

C. The New York City Domestic Relations Court

The New York City Children's Court Act was superceded, after only nine years, by the Domestic Relations Court Act of 1933.[459]

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454. New York State Children's Court Act, §14 (1922).

455. See pages 117 and 118.

456. See pages 121 and 122.

457. Whether the absence of procedural rules was intentional or merely oversight on the part of the Legislature is a matter of conjecture.

458. *People v. Lewis*, 260 N.Y. 171 (1932); see pages 146 through 153.

459. L. 1933, c. 482.

Authority to establish domestic relations courts throughout the state, tribunals designed to determine multiple family issues (adult proceedings, such as support, as well as juvenile matters), had been conferred by the 1921 constitutional amendment.[460] In view of the constitutional authority, the reason for first enacting the 1924 New York City Children's Court Act followed by the passage of a Domestic Relations Court Act is not clear. Moreover, the decision to confine the Domestic Relations Act to New York City is a surprising one; the possible benefits of expanded jurisdiction would seem to be equal throughout the state. However, the Domestic Relations Court Act incorporated only a very limited jurisdictional expansion, far less than would have been permissible under the Constitution; and it was confined to New York City. As such, the Act bears the mark of compromise — a consensus may have been difficult to achieve and the lack of agreement may have precluded adoption of a statewide code.

The Act was divided into two major titles: "The Children's Court" (Title II), which was simply a continuation of the original Children's Court Act shorn of those sections relating to ancillary financial jurisdiction (such as the support of children), and "The Family Court" (Title III), which combined financial and custody jurisdiction.[461] Read together, the titles granted the Domestic Relations Court jurisdiction over only two types of proceedings which the children's courts could not determine — custody, although jurisdiction was limited to temporary orders and ceased when a parent initiated a divorce or separation action in the Supreme

460. See pages 129 and 130.

461. The 1933 Domestic Relations Court Act used, for the first time, the words "Family Court." But the nomenclature is misleading; The "Family Court" was actually only a division of the Domestic Relations Court. The appealing quality of the words, implying comprehensive jurisdiction over familial affairs, was subsequently invoked when in 1962 the earlier tribunals were abolished, to be replaced by the statewide Family Court.

Court,[462] and spousal or dependent adult support in situations which did not involve a minor child.[463] On the other hand, the Domestic Relations Court was not granted paternity jurisdiction, a power which had been conferred upon the children's courts outside New York City.

Given the severe jurisdictional limititations, the title "Domestic Relations Court" was a misnomer — the court was merely the children's court of New York City augmented by a few relatively minor jurisdictional amendments.[464] Further, the court, in implementing the Act, administratively divided itself into a "children's court" and a "family court," with jurisdiction totally compartmentalized within each division. In other words, the court administratively failed to integrate each component into a domestic relations tribunal. As noted by one observer, surveying the court in 1953, twenty years after its establishment:

> When the Domestic Relations Court Act of the City of New York went into effect, it created a unified ad-

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462. The Act permitted the court "to award the custody of the children, during the term of [an] order of protection, to either spouse, or to an appropriate relative within the second degree" §92[8], Domestic Relations Court Act of New York City). An order of protection could be issued in any case "where a child is involved" (§92[7]), including a child support proceeding; since most custody cases also involve support issues, the Act effectively conferred custody jurisdiction in those cases in which a party did not seek a divorce, annulment or separation.

463. The Children's Court Act had permitted support orders to cover both children and spousal maintenance — but in the absence of a minor child who required support, the court lacked jurisdiction to order spousal maintenance. The Domestic Relations Court also possessed the authority to order support for adult dependent relatives (see §92) and could modify and enforce support or alimony decrees issued by the Supreme Court as part of a divorce or separation decree (Domestic Relations Court Act of New York City, 137 [1933]); the Act further incorporated several additional minor provisions which were not found in the New York State Children's Court Act.

464. For example, custody could be determined only in the absence of a proceeding to dissolve a marriage and only for a limited period of time — the more prevalent custody situation involving parents who were divorced or legally separated was determined by the Supreme Court which, in any event, as a court of original jurisdiction held concurrent jurisdiction even in those instances where the Domestic Relations Court could act.

> ministration for the children's and the family courts. Although, under a rotation plan, the same judges preside over both courts, and although each of these courts may refer clients to, and cooperate with, the other, integration between the two courts is actually extremely limited in practice ... thus the court seems to be a domestic relations court in name only.[465]

Ironically, the children's courts outside New York City, possessing jurisdiction to determine spousal maintenance (when coupled with child support), paternity, and criminal actions involving intra-family disputes, functioned more like family courts than the New York City Domestic Relations Court. For example, the children's courts possessed paternity jurisdiction and could thus determine support and custody issues involving out-of-wedlock children.[466] Further, in a case involving child neglect on the part of a father, a children's court judge could prescribe a remedy for the neglect and simultaneously order appropriate support for both the child and the aggrieved spouse. In New York City, the parties would be required, by administrative fiat, to appear before two judges, one sitting in the children's court part and the second in the family court part. Of course, both the upstate and downstate courts possessed only limited jurisdiction to determine complicated family disputes. A more complete integration, although one which fell short of comprehensive family jurisdiction, had to wait until the enactment of the 1962 Family Court Act.

D. Children's Court Practices

Cases involving petty crimes or minor allegations of child neglect continued to dominate children's court practice, as they had the earlier children's parts.[467] For example, in 1924, the year the

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465. Kahn, *supra* note 319 at 32. Kahn referred to the "Children's Court" and the "Family Court" as though they were separate tribunals. However, as noted earlier, the two "courts" were actually divisions of the Domestic Relations Court, despite the misleading statutory language; see note 461.

466. See page 134.

467. See page 119.

New York City Children's Court Act was enacted, the city's Children's Court reported a total of 4,365 cases alleging youthful criminal conduct.[468] Of these, only 362, or eight percent, involved offenses against the person: 58 robberies and 304 assault petitions were filed (most assaults were probably simple, i.e. did not involve a weapon or result in serious injury).[469] Minor property crimes, such as larceny (1,363 cases) and breach of the peace (743 cases) predominated.[470] On the other hand, approximately 5,000 neglect cases were initiated in 1924 and 1,811 children were charged with the commission of a status offense, such as ungovernability or absconding from home.[471]

As might be predicted, given the large number of cases involving petty offenses, the number of commitments was minimal. In 1924, only 179 children, four percent of the total number against whom petitions were filed, were committed after a finding that they had engaged in criminal behavior. In approximately half of the 4,365 cases the child was discharged, warned or acquitted prior to the entry of a finding and almost 2,000 children were placed on probation or received suspended judgments.[472] Similarly, only approximately ten percent of the 5,000 petitions charging neglect resulted in placement or commitment.[473]

Further, at least in New York City, the caseload remained remarkably constant throughout the combined history of the Children's Court parts, the Children's Court and the Domestic Relations Court. For example, in 1916, the period immediately subsequent to the formation of Children's Court parts throughout the ci-

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468. Table I, page 13, *Annual Report of the Children's Court of New York City* (1924).

469. *Id.*, Table III, page 14; strangely, the report indicates a total absence of other crimes against the person, such as sexual offenses.

470. *Ibid.*

471. *Ibid.*; in addition, the court reported a total of 99 truancy cases, a figure that seems surprisingly low.

472. *Id.*, Table VII, page 17 and Table IX, page 19.

473. *Id.*, Table X, page 20.

ty, a total of 12,425 cases were filed.[474] In 1925, the first complete year of the New York City's Children's Court, 11,512 cases were filed and 11,339 were filed in 1934, the first year of the New York City Domestic Relations Court.[475] Almost identical statistics were reported in 1944 (11,650 cases), although by 1952 the caseload had declined slightly (9,417 cases).[476] The quantum caseload jump had occurred in the latter part of the nineteenth century when the Legislature substantially expanded jurisdiction to encompass non-criminal and neglectful behavior while the child-saver agencies assumed a greater prosecution posture.[477] Once the children's parts were established, the caseload stabilized (in fact, since the city's population was increasing rapidly through the early twentieth century, the relative number of cases declined substantially).

The predominance of petty cases is one factor which may have influenced court procedures and contributed to an apparent trend toward informality (a court may be less likely to apply strict due process standards when dealing with a case that will result in dismissal or a warning). Decriminalization, completed in 1909, may have also influenced the courts; the absence of a public record, mandated under the 1922 Code, and the exclusion of the public and press, mandated under a 1930 amendment, were additional factors in contributing to the unique juvenile court characteristics. But perhaps the crucial distinction between the post-1922 Children's Court and the criminal courts (or, for that matter, the civil courts) was the absence of a procedural code. As has been noted, separated from the criminal court structure, the children's courts were statutorily governed only by the vague Children's Court Act phrase "such [Children's Court] procedure shall be the same as prescribed by law,"[478] language which constituted a virtual invitation to diverge from traditional notions of proof, evidence, adequate notice and the other elements of criminal or civil procedural due process.

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474. Kahn, *supra* note 319 at 44. The caseload increased slightly during the First World War (to approximately 14,000), but decreased immediately thereafter. In 1920, for example, 11,582 cases were filed; *Ibid.*

475. *Ibid.*

476. *Ibid.*

477. See page 97.

478. New York State Children's Court Act, §14, see pages 139 and 140.

Prior to the enactment of the Children's Court acts there had been a complete absence of appellate litigation involving procedure. After all, the basic Penal Law provisions applied including the requirements that each element of the crime be proven beyond a reasonable doubt, that the defendant could not be compelled to testify and that confessions or other extra-judicial admissions be corroborated. Shorn from their criminal law foundations, however, the children's courts soon experimented with procedural informality. Litigation challenging the novel practices resulted. Between 1927 and 1932 four major procedural cases were decided by the appellate courts. In all four the intermediate appellate tribunals, the appellate divisions, held either that criminal procedure rules applied to the Children's Court or certified the question to the Court of Appeals.[479] The central issue was hence placed directly before the state's highest court.

The first case challenging the Children's Court's use of informal procedure to reach the Court of Appeals was *People v. Fitzgerald*;[480] interestingly, the case did not involve the 1922 Act, but a predecessor Buffalo Children's Court Act.[481] Fitzgerald, a boy under the age of sixteen, had been charged with delinquency based on alleged burglary and larceny and had been committed to the state school at Industry. The only evidence supporting the finding was the uncorroborated testimony of an accomplice and the defendant's confession, concededly obtained after police threats of physical violence.[482]

The Court of Appeals first distinguished delinquency actions based upon the commission of a crime and those which were based on non-criminal acts, such as ungovernability or truancy, holding

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479. See *People v. Fitzgerald*, 244 N.Y. 307 (1928), which was certified to the Court of Appeals; *In re Madik*, 233 A.D. 12, 251 N.Y.S. 765; and *People v. Lewis*, 235 A.D. 339 (1931).

480. 244 N.Y. 307 (1927).

481. See page 130. The 1922 Act had originally excluded those counties and cities which had established separate Children's Court parts, though the Act was gradually extended to include every county outside New York City — *Fitzgerald* was decided during the interim period.

482. 244 N.Y. 307, 312.

that proceedings involving non-criminal or "status offense" conduct could be adjudicated on an informal basis.[483] In effect, the court decoupled, for procedural due process purposes, the legislative merger of status offenses with delinquency.

The court then equated delinquency predicated on criminal behavior with prosecution for commission of a crime:

> A child, therefore, between those ages [seven and sixteen] who commits an act which would be burglary or larceny in an adult may be tried in the Children's Court and convicted and sent away for not longer than its minority. The Act, however, must be proved, and it must be proved by some kind of evidence. There must be a trial; the charge against the child cannot be sustained upon mere hearsay or surmise; the child must first have committed the act of burglary or of larceny before it can be convicted of being a delinquent child. The act remains the same and the proof of the act is equally necessary whether we call it burglary, larceny or delinquency. The name may change the result; it cannot change the facts.[484]

Concluding that criminal procedure standards had been violated, the court reversed the finding in language which strongly underscored the necessity for strict procedural regularity and implicitly rejected expansion of the parens patriae doctrine to justify informality:

483. "No doubt both under Section 486 of the Penal Law and under Chapter 385 of the Laws of 1925 [the governing Buffalo Children's Court Part Act] there are many occasions for disposing of children under the so-called neglect and delinquency provisions which do not involve any crimes or acts of a criminal nature [cite omitted]. In such cases the formal proceeding of proof according to a trial cannot always be followed. For instance, a neglected child is one under sixteen years of age without proper guardianship, or who has been abandoned, or deserted by both parents, or who is in such a condition of want or suffering as to injure his health ... or one who is habitually a truant from school, or who without consent of his parents deserts his home, may be brought before the judge and submitted to proper control. None of these charges against the child involve a crime or are of a criminal nature, and the proceedings must be and always have been more or less informal." (244 N.Y. 307, 313).

484. 244 N.Y. 303, 313; the court was alluding to the 1909 statute substituting the term "juvenile delinquency" for "conviction" (see L. 1904, c. 478).

> Our activities in behalf of the child may have been awakened, but the fundamental ideas of criminal procedure have not changed. These require a definite charge, a hearing, competent proof and a judgment. Anything less is arbitrary power.[485]

Four years later an appellate division, in the case of *In re Madik*, held that under the Children's Court Act proof of delinquency must be established beyond a reasonable doubt.[486] *Madik*, however, was the last major Children's Court case which applied criminal standards to delinquency proceedings.

In 1932 the Court of Appeals again addressed the procedural aspects of delinquency proceedings. One Arthur Lewis had been found delinquent for committing the crime of burglary.[487] However, the only evidence adduced at the hearing was Lewis' admission made after he had been compelled to testify without being advised of his right against self-incrimination. Finding a violation of constitutional protection, the Appellate Division had reversed the finding.[488]

However *Lewis*, unlike *Fitzgerald*, was governed directly by the Children's Court Act; whereas Fitzgerald had been tried before a Children's Court part which remained a branch of the criminal court structure (the state Children's Court Act had not yet been extended to Buffalo), the *Lewis* proceeding post-dated implementation of the new code, a factor which the Court of Appeals found to be controlling. Distinguishing *Fitzgerald*, the court held that under the Children's Court Act, which lacked procedural sections, the basic criminal due process elements were not longer applicable.

> The decision of this court in *People v. Fitzgerald* [cite omitted] is cited by respondent as conclusive authority. That case arose under the provision (since repealed) of

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485. 244 N.Y. 307, 316.

486. *In re Madik*, 233 A.D. 12, 251 N.Y.S. 765 (Third Dept. 1931).

487. *People v. Lewis*, 260 N.Y. 171 (1932).

488. 235 A.D. 339.

> Chapter 385 of the Laws of 1925, relating to the Children's Court, so-called of Buffalo. As the opinion points out, that act was little, if any, different in substance and effect from Section 486 of the Penal Law. Broadly speaking it did little more than set up a separate local court to administer existing law in cases falling under that section ... the proceeding here is under a widely different statute, which clearly and unmistakably abolishes the distinction referred to above between the two classes of children. The concept of crime and punishment disappears. To the child delinquent through the commission of an act criminal in its nature, the state extends the same aid, care and training which it had long given to the child who was merely incorrigible, neglected, abandoned, destitute, or physically handicapped. All suggestion and taint of criminality was intended to be and has been done away with.[489]

Further, the Court, relying on the then dominant national caselaw, invoked the parens patriae doctrine, albeit indirectly, to sustain the informality and lack of procedural regularity employed by the children's courts:

> So much has been written, judicially and extrajudicially, about the sociological and legal aspects of juvenile delinquency, and about the public policy which underlies such statutes as the one in question, that a detailed discussion here would be trite. For the purposes of this case, the fundamental point is that the proceeding was not a criminal one. The state was not seeking to punish a malefactor. It was seeking to salvage a boy who is in danger of becoming one. In words which have been often quoted "the problem for determination by the judge is not, has this boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career . . ."
>
> The evidence of his specific acts was relevant as an aid in answering those questions. Since the proceeding was

489. 260 N.Y. 171. 174-176.

not a criminal one, there was neither right to nor necessity for the procedural safeguards described by constitution and statute in criminal cases. Many cases in many jurisdictions so hold.[490]

The Court concluded that criminal procedural standards were inappropriate though several basic civil practice rules should be applied, including the necessity of proving the charge by preponderance of the evidence and the exclusion of hearsay evidence.[491]

Lewis was decided by a five-to-two vote and a strong dissent was penned by Judge Crane, who had written the earlier *Fitzgerald* decision.[492] The dissenters concluded that the Children's Court

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490. 260 N.Y. 171, 177.

491. The lengthy passage concerning basic procedural standards reads as follows:

> To serve the social purpose for which the Children's Court was created, provision is made in the statute for wide investigation before, during and after the hearing. But that investigation is clinical in its nature. Its results are not to be used as legal evidence where there is an issue of fact to be tried. When it is said that even in cases of lawbreaking delinquency constitutional safeguards and the technical procedure of the criminal law may be disregarded, there is no implication that a purely socialized trial of a specific issue may properly or legally be had. The contrary is true. There must be a reasonably definite charge. The customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to. The finding of fact must rest on the preponderance of evidence adduced under those rules. Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feeling, the hopes and fears of social workers are all sources of error and have no more place in Children's Court than in any other court. (260 N.Y. 171, 178).

Ironically, many of the standards outlined by the court were obviated by a 1930 amendment to the Children's Court Act (the amendment was enacted too late to apply to *Lewis*); see page 153.

492. *Fitzgerald* was a unanimous decision by five Court of Appeals judges (one judge was absent and the court apparently had one vacancy). *Lewis* was decided by a full court, but only three of the seven judges had heard *Fitzgerald*. Two of the three had changed their position, i.e., joined the majority opinion in both cases.

Act could not be distinguished from the earlier acts establishing children's courts parts — both had decriminalized delinquency, substituting a finding of juvenile delinquency for a conviction, and both had virtually identical dispositional sections.[493] Of greater import, the dissenters found that the Code, though silent concerning specific procedure, could not have abolished the constitutional protection to which all persons, children and adults, are entitled:

> Again, let me put this more concretely, that we may realize just what we are doing. A man charged with burglary or larceny cannot be compelled to be a witness against himself. He cannot be forced to testify and then be convicted on his own statement. This law is as old as our Constitution. Can a child be deprived of his liberty, taken from his home and parent, and incarcerated in an institution for a term of years, by changing the name of the offense from "burglary" or "larceny" to "juvenile delinquency"? If the Legislature can thus wipe out the constitutional protection by changing a name, the substance and reality remaining the same, at what age of an accused does this power begin and end? ... At what age do constitutional safeguards and protection begin? The Constitution of this state and the Federal Constitution, insofar as it is applicable, cannot be nullified by a mere nomenclature, the evil or the thing itself remaining the same ...
>
> We fully realize that all these measures [the Children's Court Act] were adopted in behalf of the infant, and out of so-called charitable considerations for his welfare. The motives behind all our reform movements are probably commendable and beyond criticism. Some are ever on the lookout to improve civic conditions and the morals of the individuals by the force of law, and yet we must be careful that in these endeavors to correct others, we do not exceed well recognized principles of municipal government. Absolute power in the hands of a careful and just man may be a benefit, but most of our con-

493. "We had the same question before us in *People* v. *Fitzgerald* [cite omitted] and while it arose under the children's court act of Buffalo (Laws 1925, c. 385), in essence there is no difference"; 260 N.Y. 171, 179-180.

> stitutions have been adopted out of experience, with human nature as it is, and is apt to be in the future ... to take a young lad filled with a wild dreams of childhood, from his parents and his home and incarcerate him in a public institution until he is twenty-one years of age, is equally as serious [as a criminal conviction], and the consequences are not lessened by the emollient term "juvenile delinquency."[494]

The same year in *People v. Pikunas*, the court reversed a delinquency finding entered against a girl who had allegedly run away or "deserted" her home.[495] The Children's Court Act had defined delinquency as including, inter alia, a child "who without just cause and without the consent of his parent, parents, guardians, or other custodians *repeatedly* deserts his home or place of abode."[496] However, the petition had charged only one act of desertion, a charge which the court found to be insufficient:

> The record in this case is not a satisfactory one on which to deprive a fifteen-year-old child of her liberty, with proper regard for due legal process. Juvenile delinquency is not a crime and the acts charged here do not involve any crime [citation omitted]. The strict rules of criminal procedure for the protection of parties accused of crime are, therefore, inapplicable to the proceedings ... it is, however, reasonable to require that some form or forms of juvenile delinquency be charged in the complaint, established by the evidence and found by the court before the child may be committed to a disciplinary institution, so that it may appear that it is the law which determines the commitment and not the ukase of the magistrate however wise and judicious he may be.[497]

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494. 260 N.Y. 171, 180-182.

495. *People v. Pikunas*, 260 N.Y. 72 (1932).

496. 260 N.Y. 172, 174 (emphasis in original).

497. 260 N.Y. 72, 173.

Read together, *Lewis* and *Pikunas* spelled the end of the era, spanning over one hundred years, in which children's laws had remained rooted in criminal law and procedure. Although the charge and proof had to conform to the statutes (*Pikunas*), constitutional protections and statutory procedural standards were no longer applicable (*Lewis*). In fact, through a 1930 amendment to the Children's Court Act, the proof did not even have to include any competent evidence; for example, a determination could be based solely upon uncorroborated statements or hearsay.[498]

It should be emphasized that *Lewis* represented in many ways the culmination of a long trend. Removal of children's cases from the criminal courts coupled with increasingly liberal dispositional provisions, including decriminalization, had lessened the penal impact and muted the perceived necessity to apply criminal standards. In practice, procedural rights had undoubtedly been compromised at least since the inception of segregated Children's Court parts.[499] And child protective actions had been summary in nature for several decades;[500] even *Fitzgerald* carefully differentiated the statutes applicable to delinquency, where a crime was charged, and child neglect or status offense actions involving non-criminal behavior. The Court of Appeals finally completed the cycle by abrogating the due process rules which had presumptively been applied to juvenile delinquency proceedings, a result encouraged by the 1922 Children's Court Act and its subsequent amendments.

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498. The Children's Court Act had originally specified that an adjudication be based on competent evidence, i.e. "the court, if satisfied by competent evidence, may adjudicate the child to be delinquent, neglected or without proper guardianship. . ." (§22, New York State Children's Court Act [1922]). But in 1930 the Legislature repealed the "competent evidence" phrase, substituting the following vague clause with parents patriae overtones: "the court, if satisfied that the child is in need of the care, discipline and protection of the state, may adjudicate ..." (L. 1930, c. 393). The amendment was crucial, though it was not cited by the Court of Appeals. After 1930, the Children's Court Act, supported by the *Lewis* decision, no longer required that the Court predicate its finding on competent evidence, permitting reliance solely upon incompetent testimony, such as hearsay.

499. See pages 121 through 124.

500. See page 92.

After 1932 the children's courts and New York City Domestic Relations Court were free to utilize whatever procedure, short of caprice, an individual judge found appropriate. As might have been anticipated, the result was inconsistency, a court in which some judges applied basic evidentiary and due process statutes while other judges permitted rank informality. As observed by one commentator in 1953:

> Court rules and procedures do not, in themselves, offer adequate protection to the rights of clients [before the Children's Court]. In some instances procedural provisions are ignored or modified by judges, and hearings are held with too great dispatch. This is a court with few legal safeguards, where an all-powerful judge typically functions in the absence of attorneys or representatives of the press. Under these circumstances, it fails to protect individual rights unless the judge sitting is particularly alert to the inherent dangers. Many of the judges are not.
>
> The judges' activities in the courtroom are so widely varied in patterns and so different from one another in underlying premises that one is left totally perplexed as to what it is that the court means to do. There are judges who are extremely careful about procedure, individual rights, evidence and the separation of adjudication from disposition. But there are also judges who fail to verify the petition with the petitioner, to inform clients of their rights to counsel, to review evidence justifying the assumption of jurisdiction before making plans — in sum to safeguard the rights of all those involved. Some judges conduct hearings with full consideration for the feelings of children and parents and the meanings of the court experience to them. Other judges seem to be insensitive, punishing, unconcerned or too harassed to care.[501]

The age of informality, if one may characterize it as such, therefore commenced in 1932, although the progression from

501. Kahn, *supra* note 319 at 268.

criminal practice to procedural anarchy dated at least from the 1877 provision for the summary commitment of neglected children.[502]

Ironically, the earlier tribunals had not been widely observed or chronicled, leading to the erroneous conclusion that the juvenile courts had always functioned in a manner which frequently disregarded procedural and evidentiary rules.[503] But a perhaps greater irony is that the age of informality lasted only thirty years. The pendulum swung back toward strict practice and procedural rigor with the enactment of the 1962 Family Court Act, the 1967 *Gault* decision and the subsequent reapplication of criminal due process standards to delinquency actions and civil procedural standards to child protective proceedings. In reality, the post-*Gault* "revolution" restored the courts largely to their pre-1932 status, although evolving criminal constitutional standards, such as the right to assigned counsel, eventually brought dramatic changes to both the criminal and the juvenile courts.[504]

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502. Of course, several state courts had earlier determined that procedural standards were not applicable to the juvenile courts; see page 123.

503. See Kahn, *supra* note 319, and Tappan, supra note 71.

504. Between 1932 and 1962 the courts and Legislature largely continued the status quo; See Chapter VII.

CHAPTER VII

The Family Court

1962-1985

The 1932 Court of Appeals *Lewis* decision, upholding the Children's Court departure from procedural due process standards,[505] marked the conclusion of a century of juvenile justice reform. For the next thirty years little changed. Although the children's courts continued to fine-tune the system, by formalizing the authority of probation officers to divert or adjust cases for example,[506] the fundamental tenets of rank informality, secrecy and state intervention in the name of "parens patriae" were never seriously challenged. So too, jurisdictional and dispositional provisions remained largely unamended. The most notable statutory change during this period was the repeal of the "homocide exception," i.e. the Children's Court lack of jurisdiction to hear cases for which the prescribed penalty was death or life imprisonment. Pressure to decriminalize even capital cases apparently increased after the Second World War. The Legislature responded by reduc-

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505. See pages 149 through 153.

506. In 1938 the New York City Children's Court established a probation "adjustment bureau" for that purpose; See Gellhorn, *Children and Families in the Courts of New York City*, Dodd Mead, 1954, at 52-26.

507. In 1946, for example, a district attorney who had prosecuted a fourteen-year-old for murder publicly commented that:

> [T]he job of getting the Legislature to move in that direction [elimination of the capital offense exception] should now be undertaken and assumed, in part at any rate, by those who have been horrified at the sight of the people of the state of New York proceeding against a fourteen-year-old boy in a criminal court (the *New York Times*, May 8, 1946, as reported in Tappan, *supra* note 71 at 174).

ing the age of criminal responsibility to fifteen[508] and subsequently repealing the exception entirely.[509] For the first time, the criminal prosecution of any child below the age of sixteen was barred, regardless of the crime charged. The era of "total decriminalization," however, lasted but one generation; in 1978 the Legislature enacted the Juvenile Offender Act, recriminalizing a large number of offenses committed by adolescents, including homicides.[510]

With the exception of the controversy concerning homocide prosecution, the Children's Court Act remained largely unamended until its repeal in 1962 and there was a complete absence of appellate litigation.[511] The public and the Legislature appeared to be satisfied or, perhaps more accurately, apathetic to the juvenile justice system. The climate changed only in the late 1950s, resulting in the first legislative and judicial changes which forged the present juvenile justice system.

This chapter will summarize the contemporary juvenile justice "revolution." The intent is to complete the history of New York's children's laws in synopsis form (as opposed to the more detailed narration of the pre-1932 history), outlining only the major legislative and judicial initiatives commencing with the establishment of the Family Court in 1962.

A. The Family Court Act

In 1962 New York established a "Family Court" and enacted a Family Court Act as part of a comprehensive court unification program. A 1961 constitutional amendment enabled the state, for the first time, to streamline the judicial system through the merger

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508. L. 1948, c. 555.

509. L. 1956, c. 919.

510. L. 1978, c. 478; see pages 170 through 171.

511. The judicial hiatus lasted thirty-four years; the first post-*Lewis* Court of Appeals decision concerning juvenile justice is *Matter of Gregory W.*, decided in 1966 (19 N.Y.2d 55).

of several disparate and jurisdictionally competing tribunals.[512] Within the context of judicial reorganization, the Family Court represented yet another attempt to consolidate juvenile proceedings, and to fashion a specialized court capable of adjudicating every legal facet of family dysfunction.[513]

Judicial restructuring and code enactment were preceded by a decade of analysis critical of the Children's Court. In 1953, Professor Alfred Kahn published the first analytical survey of the court since its inception thirty years earlier.[514] One year later Professor Walter Gellhorn completed a landmark study under the auspices of the New York City Bar Association entitled "Children and Families in the Courts of New York City."[515] Detailing the statutory and administrative inadequacies of the then existing structure, Gellhorn advocated the formation of a family court where all proceedings pertaining directly to family affairs could be consolidated;[516] jurisdiction would range from divorce to intra-family violence. Published during a period of burgeoning support for extensive court consolidation, the study influenced strongly the development of a jurisdictionally complete court.

Following the Gellhorn report, the City Bar Association underwrote a study of the legal representation, or lack thereof, of children

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512. See, e.g. *State of New York, Joint Legislative Committee on Court Reorganization*, report dated January 30, 1962.

513. As discussed earlier, the initial movement toward the integration of family proceedings was the organization of Children's Court parts at the beginning of the twentieth century. The second attempt was the 1922 Children's Court Act. Each initiative, including the 1962 Act, came slightly closer to the ideal. But political difficulties always precluded the formation of a true family court (for example, neither the Children's Court nor the Family Court were granted divorce jurisdiction).

514. Kahn, *supra* note 319; Kahn was a social work professor at Columbia University. Six years earlier Professor Paul Tappan had published a cogent critique entitled "Juvenile Delinquency"; see Tappan *supra* note 71. Tappan's work, however valuable, was a national survey rather than a specific evaluation of the New York system.

515. Gellhorn, *supra* note 506; Gellhorn is a law professor at Columbia.

516. *Id.* at 382 through 391.

who appeared before the Children's Court. As a part of the study, youths were afforded representation on a experimental basis.[517] Finding that ninety-two percent of the children were unrepresented and that only approximately one in 5,000 adjudicated cases were appealed (i.e. cases in which a child was found to be delinquent or neglected),[518] the report, incorporating examples of injustices which had resulted from the absence of counsel, concluded that attorneys should be assigned throughout the juvenile courts.[519]

The ambition of a unified "family" court, however, was, severely compromised. Rejecting Gellhorn's (and other) recommendations that the new court be vested with matrimonial jurisdiction,[520] the Constitution, as adopted, essentially maintained the former Children's Court jurisdiction with minor augmentation, such as the ability to modify and enforce matrimonial decrees (concurrent with the Supreme Court) and the power to determine intra-family violence disputes.[521] However, the Legislature did abolish the statutory dichotomy between the upstate children's courts and the New York City Domestic Relations Court, a split which had originated with the passage of separate Children's Court part acts for each major city at the beginning of the twentieth century, and

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517. See Schinitsky, the *Role of the Lawyer in Children's Court,* Record of the Association of the Bar of the City of New York, Vol. 17, p. 24 (1962).

518. *Id.* at 25; the lack of appellate activity has been a persistent theme throughout the history of juvenile justice.

519. *Ibid.*

520. See, e.g., Gellhorn, *supra* note 506 pages 382-387.

521. New York State Constitution, Article VI, Section 13. The constitutional authority to determine intra-family criminal disputes was compromised. The Constitution provided that the Legislature could confer on the Family Court jurisdiction over "crimes and offenses by or against minor or between spouses or between parent and child or between members of the same family or household" (Art. VI, 513). However, the appropriate legislative committee limited the new court's jurisdiction to intra-family assaults and disorderly conduct, observing that "... criminal powers and procedures would be inconsistent with the proper development of the Family Court, during its formative period, as a special agency for the care and protection of the young and the preservation of the family"; State of New York, *Joint Legislative Committee on Court Reorganization,* Vol. II, p. 2.

which had continued through the enactment of separate Children's Court and Domestic Relations Court acts.[522] If deficient in terms of broad jurisdiction to adjudicate every aspect of family law, the constitutional reorganization and Family Court Act at least represented the first unified state jurisdictional code. Since 1961, however, the jurisdictional compromise has further shifted. For example, although the Family Court was constitutionally granted exclusive jurisdiction to hear adoption cases, the Surrogate's Court has continued to exercise concurrent jurisdiction by virtue of sequential "temporary" measures, thereby perpetuating the split which existed under the Children's Court Act. Exclusive jurisdiction over intra-family crimes has been repealed, permitting an "election" between family and criminal courts.[523] To cite but one additional example, the 1978 Juvenile Offender Act removed jurisdiction over adolescents who were accused of committing serious felonies.[524] The Family Court, like its antecedent tribunals, has thus experienced difficulties in retaining even limited jurisdiction.

On other fronts, the reformers were more successful. For example, the Family Court Act decoupled status offenses from delinquency, adopting the phrase "person in need of supervision" to cover youthful misbehavior which did not amount to a crime.[525] Thus, the term "delinquency" reverted to its original meaning of criminal conduct by a juvenile.[526] Nevertheless, both proceedings (delinquency and PINS) were incorporated in one code article and

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522. See pages 100 through 106 for a description of Children's Court part organization, and pages 129 through 140 concerning the jurisdictional distinctions between the 1922 Children's Court Act and 1924 Children's Court Act (later re-enacted as the Domestic Relations Court Act).

523. See Family Court Act §812.

524. See page 158.

525. L. 1962, c. 686, §712. The statute defined a "PINS" child as one "...who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority."

526. In adopting the Family Court Act, the Legislature rejected proposals to expand delinquency jurisdiction to age eighteen, thus preserving the provision, dating from 1824, of limiting jurisdiction to age sixteen: see *State of New York: Joint Legislative Committee on Court Reorganization*, Vol. VII, pp.1-3.

most procedures were identical for both; moreover, a PINS petition could be substituted for a delinquency petition. The complete divorce between delinquency and status offenses was not achieved until 1982.[527] The authority to place a neglected, delinquent or PINS child was limited to an initial period of one year,[528] thereby abolishing the tradition, dating from 1824, of long-term indeterminate commitments.[529] The Act also codified the availability of probation officers to divert or "adjust" cases,[530] and thereby preclude the prosecution of inappropriate cases.

The Family Court Act further incorporated substantial child neglect amendments. Instead of treating the child as the respondent, a statutory custom dating from the 1877 "Act for Protecting Children,"[531] the Act designated the parent or guardian as respondent, thereby focusing upon parental responsibility and accountability. As a result, a parent found to have neglected his child could be placed under probation supervision or could for the first time be enjoined from further abusive or neglectful acts through the issuance of a protective order. The court was thereby granted

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527. L. 1982, c. 920; the 1962 demarcation thus represented only the first step of a gradual divergence.

528. L. 1962, c. 686, 355 and 756.

529. The initial placement period has been subsequently extended to eighteen months, with further provision for the "restrictive placement" of up to five years of a delinquent youth found to have committed a serious felony act or repeated felonies.

530. See L. 1962, c. 686, §§333 and 734.

531. See page 47.

substantial flexibility (and contempt powers) in attempting rehabilitation under judicial auspices.[532]

Evidentiary standards were substantially strengthened through the addition of a single word, "competent," to the standard that evidence be "material and relevant," thus restoring the requirement in that the adjudicatory hearing conform to traditional evidentiary rules.[533] Hearsay, rumor, surmise, unsubstantiated reports and similar evidence which is legally incompetent, precisely the form of evidence which had characterized the Children's Court during the preceding generation, were inadmissable.[534] The Act further encouraged the development of procedural standards by stipulating, that "[t]he purpose of this article is to provide a due process of law ... for considering a claim that a person is a juvenile delinquent or a person in need of supervision."[535] Enactment of the dual provisions requiring due process and the introduction of only competent evidence represents the first indication of a trend toward the restoration of procedural standards.

The 1962 Act's greatest contribution was the provision for the appointment of counsel to represent a child involved in a Family

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532. Strangely, the possibility of utilizing probation to supervise parents had never been implemented during the long tenure of the Children's Court parts and Children's Court; see page 137. But in 1956 the Children's Court Act had been amended to permit the issuance of an order of protection (defined as "a written order specifying conduct to be followed by such parent..."); the parent was granted the right of immediate review of such order by the Supreme Court or a county court (perhaps because the parent was not a named respondent in the Children's Court proceeding), a right which was repealed by the 1962 Act. The Family Court Act statute, L. 1962, c. 686, §354, provided that "... the court may place the person to whose custody the [neglected] child is discharged under supervision of the probation service or may enter an order of protection..."

533. The word "competent" had been specifically deleted by a 1930 amendment to the Children's Court Act; see page 153.

534. Specifically, the statutes provided that "only evidence that is competent, material and relevant may be admitted in an adjudicatory hearing"; L. 1962, c. 686, 436 and 744. The requirement of competency did not extend to the dispositional hearing, a distinction which has persisted; see, e.g., Family Court Act §§342.2(1) and 350.3 (1).

535. L. 1962, c. 686, §711.

Court action. Coining the novel term "law guardian," defined by the Act as an attorney,[536] the court was required to appoint counsel "[a]t the request of a minor in a proceeding under articles three [neglect] or seven [delinquency and PINS] or on request of a parent or person legally responsible for the minor's care . . ."[537] Implementing the New York City Bar Association's earlier recommendation,[538] representation speedily altered a court which had been functioning in a highly informal manner.[539] The presence of counsel further reinforced the requirement of competency — an attorney (and only an attorney) could recognize and enforce the crucial distinction between hearsay or surmise and legally competent evidence.

In sum, the Family Court Act established a new court which, while it closely resembled its predecessor, unified the statewide juvenile court system, decoupled status offenses from delinquency and established a new dispositional framework. The Act brought some measure of due process to the court through the introduction of legal representation and the re-introduction of the competency standard. The age of procedural anarchy had concluded, and the system commenced a return to its criminal due process antecedents.

B. Caselaw Development

Contemporary national juvenile justice standards have been shaped primarily by the 1967 United States Supreme Court *In re*

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536. L. 1962, c. 686, §242. The origin of the term is a mystery—the Legislature may have adopted a neutral sounding phrase to assuage possible controversy concerning the introduction of counsel, then defined the term as synonomous with "attorney."

537. L. 1962, c. 686 §249. The "at request" clause has since been amended to require the appointment of a law guardian in virtually all cases; see Family Court Act §§249 and 249-a.

538. See pages 159-160.

539. New York was the first state to provide counsel and only one additional state, California, enacted a similar provision prior to the 1967 *Gault* decision mandating representation in delinquency cases; see Cal. Welf. and Inst. Code §701 (1966).

Gault decision[540] and litigation which flowed directly from the *Gault* opinion.[541] Reviewing the highly informal, albeit typical, procedures applied by the Arizona juvenile courts, the Supreme Court concluded that basic criminal constitutional due process standards were required to sustain a delinquency finding. Ergo, the Court held that a juvenile was entitled to notice of the charges, the right to confront and cross-examine witnesses, and the right against self-incrimination. *Gault* further determined that a child is entitled to counsel in "proceedings to determine delinquency which may result in commitment to an institution."[542]

Continuing the development, the United States Supreme Court held that delinquency conduct must be proven beyond a reasonable doubt[543] and that also a child cannot be subjected to double jeopardy.[544] Federal and state courts have held that a child must be advised of his right to remain silent and the right to have counsel present prior to custodial questioning by police officers.[545] Other decisions, however, have held that criminal due process rights are not applicable in toto; the right to trial by jury, for example, does not extend to delinquency proceedings[546] and a youth may be subject to pretrial detention in circumstances where an adult would

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540. 387 U.S. 1.

541. *Gault* was but the second Supreme Court decision involving juvenile justice. The first, determined only one year earlier, concerned the transfer of cases from the juvenile courts to adult criminal courts; *Kent v. United States*, 383 U.S. 541 (1966).

542. 387 U.S. at 41. Almost all delinquency charges may result in commitment or placement, though excluding the possibility of loss of liberty presumably removes the right to counsel. In any event, New York mandates that counsel be assigned in every juvenile delinquency and status offense case; see Family Court Act §249.

543. *In re Winship* 397 U.S. 358 (1970); *Winship* invalidated the New York statute which required only proof by a preponderence of the evidence.

544. *Breed v. Jones*, 421 U.S. 519 (1975).

545. See, e.g. *In re J.M.A.*, 542 P.2d 170 (Alaska, 1975).

546. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

be entitled to release or bail.[547] In summary, juvenile proceedings must adhere to "the essentials of due process and fair treatment."[548]

The range of caselaw after passage of the Family Court Act in 1962 is beyond the scope of this chapter — the essential fact is that, aided by counsel for both sides (the requirement of defense representation inevitably led to counsel for the petitioner or public prosecution), juvenile courts across the country have been transformed into tribunals which closely resemble their civil and criminal counterparts. Court procedures for delinquency cases which are, by definition, predicated upon criminal conduct, have turned back to its criminal court origins. The paradox is that the application of largely criminal due process standards has been viewed as a novel phenomenon when, in fact, the juvenile courts not only evolved from criminal law, but had applied criminal procedure until well into the twentieth century.[549]

Of course, the revitalization of due process has not escaped the New York courts. One year prior to the *Gault* decision, the New York Court of Appeals, relying on the then new Family Court Act, concluded that delinquency actions are "... at the very least quasi-criminal in nature,"[550] thereby implicitly overruling the 1932 *Lewis* case.[551]

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547. *Schall v. Martin* 104 S. Ct. 2403 (1984).

548. *McKeiver v. Pennsylvania*, 403 U.S. 528 at 541, quoting *Kent v. United States*, 383 U.S. at 562.

549. This is not to suggest that delinquency procedure is now fully equated with criminal. Several unique aspects characterize the juvenile courts, including a strong reliance on divergence from court and a specialized, expansive dispositional process.

550. *Matter of Gregory W.*, 19 N.Y.2d 55, 62, 224 N.E.2d 102 (1966).

551. See pages 149 through 153 for a discussion of the *Lewis* case.

Immediate post-*Gault* decisions dealt with such issues as corroboration of unsworn testimony,[552] suppression[553] and the application of Miranda warnings to delinquency arrests.[554] The appellate process for juvenile cases, which had grown stale during the procedural "anarchy" era, has been utilized increasingly to determine standards and establish judicial policies.

Although focusing on delinquency, the dramatic changes have affected companion juvenile proceedings, including status offenses (PINS) and child neglect. At least in New York, the Legislature and the courts have readily applied several of the newly discovered rights to status offenders. Thus, for example, proof must be beyond a reasonable doubt[555] and the child must be represented by counsel.[556] The application of due process to child neglect proceedings, however, has been more ambiguous process. Protective proceedings, unlike delinquency, are clearly civil in nature, despite their criminal law antecedents. It is hence not surprising that courts have relied upon civil litigation principles in determining procedure, including notice, proof and evidentiary standards. But to a court which totally lacked a procedural framework, the introduction of any standard, whether criminal or civil, represents a significant development.[557] Of perhaps greater significance in adjudicating

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552. *In re Steven B.*, 30 A.D.2d 442, 298 N.Y.S.2d 533 (First Dept. 1968).

553. *Matter of Gary C.*, 42 A.D.2d 704, 346 N.Y.S.2d 276 (Second Dept. 1973).

554. *Matter of Jose R.*, 35 A.D.2d 972, 317 N.Y.S.2d 933 (Second Dept. 1970). *Miranda* required that a criminal defendent be advised of his right to remain silent, to have an attorney present and that statements made could be used against him, as a pre-condition to custodial questioning by police officers.

555. Family Court Act §744(b).

556. Family Court Act §249.

557. The distinction between criminal and civil due process is often narrower than many people assume; basic requirements, such as notice, confrontation and the right to appeal, generally apply to civil cases, albeit in less rigorous form than criminal procedure standards.

child protective proceedings is the requirement that both the child and the parent be represented by separate independent counsel.[558]

As in any complex institution, a modification to one component affects the entire structure. Thus, affording representation in certain proceedings introduces a procedural formalism which ultimately is applied, at least in part, to proceedings which may lack counsel — the judges simply become attuned to evidentiary code rules. Similarly, case decisions involving one cause of action may form precedence for comparable actions (e.g. the application of delinquency standards to status offense cases, despite the lack of a constitutional requirement). To juvenile courts, including the New York Family Court, the result has been the development of proceedings applying virtually the full panoply of procedural and evidentiary legal rules.

C. Statutory Amendments

The post-*Gault* caselaw developments have encouraged, if not mandated, widespread legislative code revisions. Unconstitutional statutes require legislative correction, while judicial procedural rules should be and ordinarily are codified.[559] So too, important cases stimulate public and legislative concern; frequently, the result is statutory changes of a magnitude well beyond constitutional conformance.

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558. See Family Court Act §§249 and 262. The parents' right to counsel was first established by the Court of Appeals; *Matter of Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288 (1972). Interestingly the United States Supreme Court subsequently reached a contrary result; See *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). In the interim the *Ella B.* decision had been codified and the right continues statutorily.

559. Sooner or later, most appellate decisions which affect statutory language (as opposed to interpretation) are codified in the interest of clarity and completion; examples include the 1982 redraft of juvenile delinquency laws (See L. 1982, c. 920, enacting the present Family Court Act Article Three) and the right to assigned counsel (See L. 1970, c. 962, amending Family Court Act 249). Statutes which have been declared unconstitutional are ordinarily amended, although legislative distaste may occasionally preclude statutory conformance; an example of the latter is Family Court Act §712 which still defines a "PINS" child as "a male less than sixteen years of age and a female less than eighteen years of age. . ." despite the fact that the age differential was invalidated in 1972; See *In the Matter of Patricia A.*, 31 N.Y.2d 83, 286 N.E.2d 432.

For these reasons, as well as the increase in juvenile crime recorded during the 1960s and 1970s, New York's delinquency laws have been continuously revised in the past generation. Given the high crime rate and a growing public perception that penalities are overly lenient (for adult and juvenile alike), a legislative response was perhaps inevitable. After several unsuccessful attempts to enact more stringent provisions, the Legislature adopted the 1976 and 1978 juvenile justice reform and juvenile offender acts.

The 1976 Act established a new category of delinquency, the "designated felony,"[560] limited to violent crimes, such as homocide and first-degree robbery. Children above the age of fourteen who are found to have committed designated felonies may be placed for periods of three to five years, (as opposed to the "normal" eighteen-month placement) with a minimum period of up to eighteen months secure confinement.[561] Prosecution was strengthened by granting the District Attorney the optional power of presenting such cases before the Family Court.[562] Perhaps most significantly, the court was directed to consider "the need for protection for the community," a provision that constitutes a sharp philosophical change from the concept of individualized justice based solely on the needs and interests of the child.[563]

The 1976 Act was quickly followed by the 1978 Juvenile Offender Act. The 1978 legislation lowered the age of criminal responsibility from sixteen to fourteen for a wide range of crimes, including first- and second-degree robbery and burglary, first-degree assault and first-degree rape, arson and kidnapping. The age of criminal responsibility for murder was reduced to thirteen. The age reduction automatically precludes Family Court jurisdiction and thereby subjects youths to prosecution in adult criminal courts. The detailed provisions involving preliminary hearings, indictment,

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560. Family Court Act §301.2 (8).

561. Family Court Act §353.5.

562. Family Court Act §254-a; the relevant County Attorney or Corporation Counsel and the County Executive or Mayor (of New York City) must agree to District Attorney prosecution. Other delinquency actions are prosecuted by the Corporation Counsel or County Attorney.

563. Family Court Act §301.1

detention and bail, removal or transfer to the Family Court, and sentencing are beyond the scope of this book. It should be noted, however, that the substantive body of adult criminal law is, with some exception, applied to children below the age of sixteen who are subject to the 1978 Act's provisions.

The result of the Juvenile Offender Act is that, for the first time since 1824, the discretionary power of the court to waive the criminal penalty regardless of the circumstances of the case has been abolished.[564] A youth arrested for the alleged commission of a serious juvenile offense is subjected to adult procedures including bail, indictment, and public hearings.[565] The Juvenile Offender Act thus represents the first important historical break in the juvenile court movement or, more broadly, the movement to treat children separately. As noted earlier, the juvenile justice system itself was not, as commonly assumed, born full blown in the twentieth century, but was the result of an evolutionary development that began almost simultaneously with the establishment of the prison system.[566] Thus, New York's 150-year history of maintaining an age threshold of criminal prosecution (except for murder cases) has been abruptly terminated. The incarceration of youths in adult prisons for criminal activities, a measure permitted without hearing under the Juvenile Offender Act,[567] had been attacked successfully at the inception of the prison system in the early 1800s and gradually abolished by the end of that century.

Interestingly, the nineteenth century "child savers" movement had been motivated, in part, by the increase in the juvenile crime

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564. See page 29.

565. There are however, provisions for "removal" or transfer to the Family Court, and the penalities available upon conviction are less than those that may be imposed upon an adult; See Penal Law §60.10.

566. See page 25 et seq.

567. Under the Juvenile Offender Act, a child "placed" for commission of a serious offense may be transferred, without hearing, to an adult program upon attaining the age of eighteen. Thus, for the first time since 1909 a person may be incarcerated in a penitentiary for a crime committed when under the age of sixteen.

rate which followed the Civil War.[568] At that time, reformers cited the prevalence of youthful criminals to justify rehabilitative measures designed to remove children from the penal system (as well as to remove children from deleterious home environments perceived as crime breeding habitats). Punishment considerations were to be excised from the children's legal system. A century later, a roughly commensurate increase in juvenile crime has been cited as justification to recriminalize, to restore punishment and community protection as legitimate juvenile justice functions.[569] Probably neither approach has registered any appreciable effect on crime rates.[570]

The most recent delinquency statutory innovation has been the 1982 recodification of delinquency statutes.[571] Building upon post-*Gault* caselaw and the introduction of counsel, both defense and prosecution, the current code[572] prescribes detailed procedures ranging from preliminary hearings and motion practice through evidentiary standards and dispositional adjudication. The result is a highly structured procedural framework similiar to criminal and civil practice acts.[573]

With respect to status offenses (or "PINS"), the post-1962 period has been marked by controversy concerning the very existence of this unique cause of action. Reflecting a national debate, several groups have advocated abolition, contending that status offenses should not be judicially actionable. Other groups have advocated a continuation, if not expansion, of the courts' ability to

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568. See page 67.

569. Punishment is a legitimate interest in the adult criminal system to which juvenile offenders are subjected under the 1978 Act. Such punishment is ostensibly still precluded in the family courts, but community protection is a recognized factor under the 1976 Act; See Family Court Act §301.1.

570. Though nineteen century reformers claimed such credit; See page 67.

571. L. 1982, c. 920.

572. Family Court Act Article Three.

573. The 1982 amendments also completed the divorce of delinquency and status offenses through the enactment of a distinct code applicable only to juvenile delinquency proceedings.

prescribe remedies for truancy, runaway behavior and ungovernability. The upshot has been a legislative stalemate. However, the secure detention of a status offender child has been prohibited and PINS children cannot be placed in secure or restrictive settings.[574] For the first time since the pre-Civil War era, non-criminal juvenile activities, however dangerous or dysfunctional, are treated as separate from delinquency.[575]

Last, child protective proceedings, ranging from neglect to permanent termination of parental rights, have emerged as distinct actions. Culminating several generations of legislative development, the 1922 Children's Court Act had virtually merged delinquency, status offenses and child neglect.[576] The triad of major juvenile proceedings was partially split by the 1962 Family Court Act.[577] Subsequently, in 1969 and 1970 the Family Court Act was amended to tighten procedures for neglect and abuse proceedings, particularly relating to children who may have been physically or sexually abused.[578] This was followed by sequential additions to the child protective reporting laws,[579] placing a greater emphasis on investigation and social service involvement in lieu of court proceedings. In recent years, the Legislature has liberalized somewhat the termination of parental rights statutes[580] and has enacted the Child Welfare Reform Act, a broad mandate to provide preventive family services and social service accountability designed to en-

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574. See Executive Law §515-a. The courts have thereby lost the ability to curb serious status offense conduct through loss of liberty, a depravation which some critics criticize as having "removed the teeth" from status offense laws.

575. See pages 43 through 46 for a description of early development of status offense concepts.

576. See page 131.

577. As has been noted, the 1962 Act focused on parental responsibility in neglect situations and provided different remedies for delinquency, PINS and neglect; See pages 161 and 162.

578. See L. 1969, c. 264 and L. 1970, c. 962.

579. See Social Service Law §411 and seq.

580. See Social Service Law §384-a.

courage family rehabilitation or, failing rehabilitation, to facilitate the adoption of children who have been placed in foster care.[581]

Throughout the widespread statutory and caselaw upheavels, the consortium of religious based and non-sectarian private and public child care agencies first developed in the 1870s has remained largely intact, servicing large numbers of children through investigative, prosecution and placement mechanisms.[582]

In many respects, the system has come full circle in the past twenty years, returning to principles which were eroded during the nineteenth century and abolished in the early years of the present century. Procedural irregularity has been supplanted by a return to the traditional notions of due process employed by adjudicatory tribunals, as enhanced by significant new rights — such as the right to counsel — which neither children nor adult defendants enjoyed until recently.[583] In a similar vein (albeit more controversial), delinquency has been partially recriminalized through the Juvenile Offender Act and the concept of public protection as a juvenile justice purpose, excised after a lengthy battle, has reappeared. After 150 years, the infancy presumption age of fourteen has been resurrected in slightly modified form (The Juvenile Offender Act),[584] i.e. the historic protections afforded to youths between the ages of fourteen and sixteen have been abrogated.

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581. See Social Service Law §409 and seq.

582. See pages 60 through 63. Given the changing perceptions regarding child protection and the increasing role of public oversight and financing, the preservation of New York's unique quasi-private child care system constitutes a remarkable achievement.

583. Ironically, the historic procedural protections had been enhanced during the thirty-year period of juvenile court "anarchy." For example, the right to assigned counsel never existed in the criminal system prior to the juvenile court split — the child hence gained back a good deal more than he had earlier surrendered.

584. The Juvenile Offender Act reduces the criminal "infancy" age to twelve in murder cases, thereby subjecting thirteen-year-old youths to automatic criminal prosecution for the first time since at least the sixteenth century.

On the other hand, heavy state intervention in the name of child protection continues. True, wholesale prosecution, as practiced by societies for the prevention of cruelty to children and child welfare agencies in the late nineteenth century, has diminished (and the anti-immigrant bias has been removed, perhaps to be replaced by a socio-economic bias). In addition, parental procedural rights, including legal representation, have been greatly strengthened in the past generation. But the major principle of "saving" children from detrimental environments (as perceived by social welfare officials) remains strong.

Several of the unique juvenile justice concepts, painstakingly built over a century of development, continue in practice. Thus, records are afforded a high degree of confidentiality, hearings are private affairs from which the press and public are barred and the courts attempt to prescribe highly individual remedies drawn from psychological, social and educational models. Juvenile justice has changed significantly in recent years (and many of the changes represent healthy improvements), but remains largely the unique and dedicated albeit imperfect system envisioned by reformers active over the course of many generations.

CONCLUSION

New York's children's laws were originally predicated upon common-law principles. The infancy presumption virtually precluded the criminal prosecution of a youngster below the age of fourteen and severe common-law punishments, such as execution, were rarely imposed upon children of any age. The state would not intervene in familial affairs. Parental authority reigned supreme, precluding governmental child protective measures.

The first deviation from common-law principles was prompted by the substitution of lengthy incarceration for the historic punishments of death or forfeiture. A reform of the age of enlightenment, solitary confinement was perceived as rehabilitative; the human spirit could be redeemed through contemplation, education and religious exercise. Upon completion of the first state penitentiary, the penal law was revised to substitute imprisonment for the more barbaric common-law sanctions. The reform was subsequently extended to children with the 1824 establishment of the House of Refuge. Intended as a rehabilitative center for youths who had been criminally convicted (mostly children beyond the age of criminal law infancy), the refuge houses, extended statewide in 1840, confined a larger number of vagrant and unruly children. State intervention to curb adolescent anti-social behavior had become an accepted policy.

Juvenile justice philosophy was dramatically modified after the Civil War with the passage of the 1865 Disorderly Persons Act and the 1877 Act for Protecting Children. The war, with its concomitant casualties and dislocations, was followed by rapid industrialization and massive immigration. Public intervention was deemed necessary to "save" children from criminal careers, destitution and un-American influences. Enacted in rapid succession, child neglect, truancy, ungovernability and adoption laws constituted remarkable innovations which profoundly altered the legal relationships between children, their parents and the state.

Simultaneously, a multitude of private child care and child protective agencies, religious based and non-sectarian, received legislative charters to provide ameliorative services and rescue children from unwholesome environments. An expanded organizational network, including societies for the prevention of cruelty

to children and the Children's Aid Society, engaged in extensive lobbying and fund-raising activities. By 1885, 23,592 of New York State's children were institutionalized in houses of refuge, asylums and agrarian schools. In one generation a large sophisticated juvenile justice system had evolved. Remaining within the criminal law structure, the new legal principles were codified through the 1881 Penal Code and the 1882 Commitment of Children's Code.

Subsequent refinements continued the thrust toward greater state intervention coupled with a liberal attitude toward the rehabilitative potential of children. Examples include the decriminalization of delinquent conduct and abolition of the infancy presumption. Probation departments were established to provide investigatory and supervisory services under judicial auspices. Development was largely completed with enactment of the 1922 Children's Court Act, which virtually merged delinquency, status offenses and child neglect. Saving the child had become the paramount consideration — the underlying conduct, criminal or noncriminal, performed by the child or the parent, was viewed merely as symptomatic or as one consideration in formulating a rehabilitative prescription.

After the turn of the century, practice and procedure became the dominant themes. Children's Court parts and independent children's courts were sequentially established to administer innovative juvenile laws and relieve the criminal courts of the child protective burden. The courts, perceived as an amalgam of legal and social elements, were largely result rather than procedure-oriented. Procedural informality and experimentation were initially invalidated by the appellate courts. Ultimately, however, the judiciary, citing the 1922 Children's Court Act and the prevalent national caselaw, upheld the juvenile courts' social orientation and the substitution of rank informality for due process. Commencing in 1932, procedural requirements, applied in different form to every criminal and civil proceeding, were for the most part irrelevant and the juvenile courts were free to follow their own path in the apparent interest of the child. The era of procedural "anarchy" continued until enactment of the 1962 Family Court Act and the subsequent restoration of due process standards following the Supreme Court *Gault* decision.

Several themes characterized the century of children's law development (approximately 1824 through 1932). First, the movement was totally child-oriented — parental interests, historically paramount, were frequently ignored. Thus, the early adoption laws did not require parental consent in many circumstances. The 1881 Penal Law permitted the commitment of vagrant or "street" children without a showing of parental neglect. Child care agencies placed children in remote agrarian regions, far removed from possible parental involvement or even visitation. As late as 1930, the applicable statutes did not take cognizance of preventive services, familial rehabilitative techniques or alterntives to placement. Child welfare groups apparently assumed that detrimental environments could not be rectified, regardless of the cause. Parental fault was hence immaterial, an extraneous consideration to child-saving mandates. Only the courts, in the *Van Heck* and *Knowack* decisions,[585] attempted to balance children's interests (as perceived by the child protective agencies and the lower courts) with historic parental rights, concluding that parental neglect must be proven as a prerequisite to child commitment and that a parent always maintains the equitable right to regain custody upon a showing of fitness.

Second, the juvenile justice movement was to a large extent fueled by anti-immigrant prejudice. Child savers were super patriots; if parents could not Americanize their offspring, others would do the job. The reports of child welfare and child protection agencies are replete with descriptions of foreign parental deficiencies and child saving accomplished by placement with wholesome American families or institutions. Witness the Children's Aid Society observation, published in their first report, that "the pauperism and poverty of England and Ireland has been drained into New York. The children of this class, naturally, have grown up under the concentrated influences of the poverty and vice around them"[586] or the Society for the Prevention of Cruelty to Children castigation of the "very many ignorant foreigners who... fondly clinged to the lax practices of their old homes..."[587] A foreign bias permeated

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585. See pages 89 and 94.

586. See page 54.

587. See page 74.

the system, providing the impetus for stringent statutes. The language may have constituted, at least in part, rhetoric designed to enhance public support; but in a state populated by large numbers of immigrants, the repercussions were profound.

Third, the movement reflected an anti-governmental attitude or, conversely, a belief that only private organizations could adequately protect children. Criminal justice might be a governmental function, from prosecution by a district attorney to incarceration in a state penitentiary, but juvenile justice was to become the province of the private agency. Ergo, prosecution was largely by societies for the prevention of cruelty to children and child care was accomplished through institutionalization or foster placement under the auspices of almost countless private agencies. Of course, state and local funding was essential, the courts were cruicial and legislative charters were a necessity. But delivery of services was largely a private organization monopoly. The private approach was subsequently compromised by the development of state training schools (frequently after a private agency, such as the Industry School, had floundered), the emergence of county departments of social services and the increasing state oversight exercised by the State Board of Charities. But the private sector remained strong. Even today, New York's children are frequently assisted by private child welfare agencies.

A corollary to the private eleemosynary approach was the valiant attempt to eliminate a dependence upon annual governmental subsidies. For example, numerous "vice" taxes on such activities as alcohol consumption and theatrical performances were earmarked for child care agency purposes while S.P.C.C.s were partially funded by receiving court fines and penalties levied for violation of children's laws.[588] One advantage of the contract labor system was the fact that it was self-supporting. The houses of refuge even secured the passage of legislation which granted them the authority to release the most economically dependent, retarded and handicapped children. The neediest child hence received the least service. Had the system developed as a purely governmental function, it is possible that such abuses would have been redressed at an earlier date. For all its efforts, the system probably never achieved

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588. See page 74.

anything approaching financial self-sufficiency, although the attempts evidence a strong underlying private charitable philosophy.

Fourth, the movement was largely religious based. Early child welfare organizations, such as the Children's Aid Society, were ostensibly non-sectarian. But their endeavors were, in time, perceived as Protestant attempts to proselytize and convert immigrant Catholic children and, to a lesser extent, youths of Jewish origin. One reaction was the incorporation of religious-based agencies, such as the Shepard's Fold and The Hebrew Benevolent Society, organizations devoted to protecting the faith of needy minors. As juvenile justice system development progressed, legislation was enacted to assure placement in institutions or families which matched the child's religious background — even the probation officer was ordinarily required to be of the same religious faith. The fact that most of the religious agencies have provided uninterrupted services for over a century is a testament to the powerful political constituencies they represent.

Last, the system gradually receded from its criminal origins, forming indigenous concepts. The trend became pronounced with the development of separate Children's Court parts followed by independent tribunals devoted exclusively to children's affairs. Confidentiality, privacy of proceedings, a rejection of judicial trappings, reliance on a social work model (e.g. probation) and an expanded dispositional process were fashioned expressly for the juvenile courts. Gradually, the system even developed its own peculiar nomenclature.[589]

Of greater significance, the children's courts, cast adrift from criminal standards, developed highly irregular procedures. Under the guise of parens patriae, historic procedural protections, found in every judicial and administrative organization, were largely abrogated. Procedural disorientation was a late doctrine, sanctioned only after the 1932 *Lewis* decision.[590] It was also the first to be

589. For example, plaintiffs or complainants were deemed "petitioners" and defendants were deemed "respondents." A trial became an "adjudicatory hearing" and later a "fact-finding" hearing while sentences or final judicial orders were renamed "dispositions."

590. See pages 148 through 153.

discarded (however involuntary on the part of the juvenile courts). The paradox of informality, as noted by Professor Tappan, was that the courts, although "designed to ensure a superior justice through protection of the child...have to an excessive extent abandoned the fundamentals upon which the methods of promoting justice are based."[591] In one respect, the brief era of procedural "anarchy" represented the culmination of a century of juvenile justice development — the end, child protection, justified almost any means.

One interesting footnote to the history of children's laws is the fact that several major legislative innovations appear to have resulted in unintended consequences (though some of the results may have been promoted by child welfare advocates). The House of Refuge, for example, was at first granted authority to receive only children who had been convicted of committing crimes, but quickly became, without legislative authorization, the institution where vagrant and destitute youngsters were transferred by the police and the almshouses. The infancy presumption was deemed to be nullified by the 1909 amendment substituting the words "juvenile delinquency" for "misdemeanor," although it appears doubtful that the Legislature intended to abolish the fundamental principle in such cavalier fashion. And, to cite a third example, the 1922 divorce of the juvenile court parts from their parent criminal courts led to procedural anarchy, a result which the Legislature probably did not envision. The juvenile justice system developed an independent thrust, regardless of legislative intent.

The good faith of the people who developed and expanded the system cannot be faulted. House of Refuge founders believed deeply that long-term rigorous incarceration would rehabilitate youngsters. Child care agency officials were convinced that placement of immigrant children in American rural homes was the key to productive adulthood. Early juvenile court judges believed strongly that the system could work for the benefit of children. Child care agency executives were sincere when they attributed a decline in juvenile crime to child protection and decriminalization legislation (just as contemporary critics are sincere in their belief that re-criminalization will reduce the juvenile crime rate).

Fundamentally, the system's development constituted a logical progression intended to enhance society's ability to protect children

591. See footnote 397, page 124.

from lives of crime, poverty or vagrancy through education and substituted family structures. Each measure could be justified on that basis. When specific abuses occurred, such as the exploitation of children under the contract system, remedial legislation was ultimately enacted. When a weakness was perceived, such as the lack of investigation and prosecution in the late nineteenth century, it was remedied (through establishment of S.P.C.C.s).

On the other hand, the combined consequences of massive legislative and judicial intervention was an unfortunate diminution of parental rights and, more significantly, a quantum increase in the number of children who faced a loss of liberty or who became the subjects of questionable social experiments as a replacement for familial relationships. The legal system, which had long sought to protect children through doctrines of non-intervention, such as the infancy presumption and presumed parental fitness, turned the table by seeking to protect youths through coercive state intervention and restrictions imposed upon parental discretion. At the beginning of the nineteenth century the most egregious parental misconduct, such as violent physical or sexual abuse, was unactionable. By the beginning of the twentieth century, intervention had become so pervasive that innocent children's ballgames formed a basis for court action.[592] Obsessed with the perceived need to rescue and rehabilitate children, the system had lost sight of the countervailing family relationship rules which had guided the legal system for centuries. Ultimately, even the procedural and evidenciary standards underpinning Anglo-American jurisprudence were discarded. The juvenile justice system, as developed in the nineteenth century, thereby created a fundamental imbalance between state power and the family.

Finally, the history of juvenile laws is in large measure a chronicle of the reaction to the forces which forged modern industrial society. Industrialization, immigration and urbanization were realities which affected greatly the family structure. Legislative, judicial and social mandates were consequently required to redefine parental and state authority and to protect children. The errors may have been great, and have been only partially redressed, but the

592. See the 1904 statement of Justice Julius Mayer, a New York Children's Court part judge, quoted on page 120.

motivation was understandable. Societal pressures had overwhelmed the common-law tenets. Creation of the juvenile justice system was a necessity, one vital link in the development of contemporary legal and social institutions.

APPENDIX A

CHRONOLOGICAL TABLE

DATE	EVENT	PAGE
1796 —	First New York Penitentiary authorized (for adults)	12
1807 —	The Orphan Asylum of the City of New York incorporated	21
1816 —	The New York Society for the Prevention of Pauperism founded	26
1824 —	The Society for the Reformation of Juvenile Delinquents legislatively incorporated to construct and operate the New York City House of Refuge	28
1846 —	The Western House of Refuge founded	32
1851 —	New York Juvenile Asylum established	57
1853 —	The Children's Aid Society established	53
1856 —	The Buffalo Juvenile Asylum founded	60
1860 —	The Hebrew Benevolent Society of New York incorporated (the first religious-based child care agency)	60
1863 —	The New York Catholic Protectory incorporated	60
1865 —	The "Disorderly Child" Act (the first statute permitting the judicial placement of children who had not been criminally convicted)	43
1868 —	The Shepard's Fold incorporated (a Protestant religious-based child care agency)	61