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Parens Patriae: From Chancery to the Juvenille Court

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PARENS PATRIAE: FROM CHANCERY TO THE JUVENILE COURT

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INTRODUCTION

In this article I will trace through the nineteenth century the progress and manners of what came to be the juvenile court. My inquiry has been aided immensely by recent scholarship and the subject matter has become of current interest because of recent constitutional decisions. By knowing the origin and original scope of legal institutions, we can appraise their present worth in terms of those origins and the current understanding and expectation of society.

I take the position herein that the institution which came to be the juvenile court was, in large part, a descendant of mechanisms, definitions and dispositions developed in feudal England to deal with poverty. It is currently fashionable to attack reformers and liberals and I indulge in that pastime but, at the risk of seeming sentimental and evolutionary, it seems to me that those liberals and reformers pruned much of the bad and repaired much of the good. They did so, however, within the frame of reference of their time; and although they were additions and improvements, the outline, to me, is clear. Our society because of cultural ethnocentrism and an unwillingness to admit that poor people were entitled to full citizenship, continued to derogate children's right to liberty and parent's right to custody. By calling the statutes "protective" and by borrowing the idea of *parens patriae* the reformers were able to state their task elegantly and to dazzle many observers, in their time and ours. However, those terms, used as they were, prevented the development of true protection and *parens patriae.* Thus, there is more than a little irony in my use of the words "protective" and *parens patriae.*

The issues raised herein are by no means solved. For almost one hundred years it has been argued that social welfare policy tended to break up families.[1] A disturbing phrase in a disturbing case[2] is

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1. Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 330 (1876).

2. *See generally* Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication,* 58 CAL. L. REV. 555 (1970).

persuasive evidence that the makers of dominant ideology are still unwilling to admit that family solidarity is important to poor people. In response to the argument that maximum welfare grants tended to break up families because children were worth more in welfare benefits out of their parent's home than they were in it, the Supreme Court justified the maximum grants by stating that "the kinship tie may be attenuated but it cannot be destroyed."[3] As the dissents point out, this result may indeed attenuate the family tie because the children, difficult to support at any rate, are, in fact, worth more in another relative's home.[4] Moreover, such an attitude may conceivably lead to the complete destruction of family ties.[5] In any event, the idea that poor people are less entitled to family solidarity than the rest of society is a slur on every impoverished family in the nation.[5.1]

Before I begin the body of the paper, some discussion of methodology is in order. Sources are hard to come by, especially those dealing with "the short and simple annals of the poor." Rostovtzeff, discussing the social and economic history of the Roman Empire observed, "of the life led by the lower classes at this time we know nothing; but it is unlikely that it was specially attractive."[6] We know very little about the life of the impoverished classes in our recent history. We can study the legislation,[7] but while it tells us something about the ambiance of the times, legislation in the absence of data about its administration and effect, is sterile and lifeless.[8] Institutional and organizational records, reports and proceedings are a form of

3. Dandridge v. Williams, 90 S. Ct. 1153, 1159 (1970); *compare* Dews v. Henry, 297 F. Supp. 587, 592 (D. Ariz. 1969); *see* Dienes, *supra* note 2 at 578-80.

4. 90 S. Ct. at 1170 (Douglas, J., dissenting); 90 S. Ct. at 1176 (Marshall, J., dissenting).

5. *Cf.* 42 U.S.C. § 608 (1969); *In re* Cager, 251 Md. 473, 248 A.2d 384 (1968).

5.1. *See* the comments of Mr. Justice Marshall in Wyman v. James arguing against the majority position that welfare could be cut off because the recipient refused to allow a government agent to enter her home: "Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy." Wyman v. James, 91 S. Ct. 381, 399 (dissenting opinion) (1971).

6. M. ROSTOVTZEFF, ROME, Ch. XIIV 160 (Galexy ed., 1960).

7. *See, e.g.*, GILLIAN, POOR RELIEF LEGISLATION IN IOWA (1914) [hereinafter cited as GILLIAN].

8. *Cf.* M. JERIGAN, THE LABORING AND DEPENDENT CLASSES IN COLONIAL AMERICA 157 (1960) [hereinafter cited as JERIGAN].

access to the past which can profitably be explored,[9] but this approach reflects the thoughts and aspirations of a certain segment of the middle class. While such study may be a legitimate aspect of social and intellectual history, the review of the records hardly holds "a mirror up to nature" because it is one or more steps removed from the poor themselves.

I have chosen to use statutes and decisions, in short "the law", less for analysis than to show the situations of people and the response of society through the legislatures and courts.[10] My generalizations, to the empiricist, are based on isolated and particular instances but in the absence of empirical contradiction, I stand by them.[11] The cynic may well compare my data and conclusions to the data and conclusions of others and agree with Henry Burlingame that: "History, in short, is like those waterholes I have heard of in the wilds of Africa: the various beasts may drink there side by side with equal nourishment."[12]

EARLY ENGLISH DEVELOPMENTS

A. Chancery Courts

Previously, it was held by some, on what was thought to be good authority, that the extension of the *parens patriae* doctrine to children came about when, because of a printer's error in an early case, the word "enfant" was substituted for "ideot".[13] Later and more thorough research, however, seems to have dispelled the idea that the goof was committed by such a minor figure.

The doctrine of *parens patriae* as it developed in medieval and late

9. *See* R. PICKETT, HOUSE OF REFUGE: ORIGIN OF JUVENILE REFORM IN NEW YORK STATE 1815-1857 (1969) (hereinafter cited as PICKETT).

10. Weyrauch, *Dual Systems of Family Law*, 457, 460 LAW OF THE POOR (J. tenBroek ed., 1966).

11. There should be no reason to apologize. Statutes and lawsuits are the record of historical fact. The statement of fact in opinions are facts found by an efficient system of truthseeking and recorded, as reliable, for the use and enlightenment of posterity. The decisions in the reported cases show how society solved that particular conflict and, we assume from the operation of the rules of precedent, future conflicts. *See* D. FISCHER, HISTORIAN'S FALLACIES 99-100 (1970). Nevertheless, there are questions: did the legislation affect any people or did it repose innocuously on the books; did the litigation concern a common problem or was it a single instance, an outrage or a freak; was the decision followed or did the administrators ignore it? *Id.* at 104-05.

12. J. BARTH, THE SOT WEED FACTOR 515 (1966).

13. FOOTE, LEVY AND SANDER, CASES AND MATERIALS ON FAMILY LAW 394, n.13 (1966).

medieval English chancery courts is traced in an excellent recent article.[14] The state's interest in the welfare of children developed slowly and in response to litigation. The litigation concerned feudal relationships and the thrust of chancery power seems to have been a series of attempts to assure the orderly transfer of feudal duties from one generation to another and to insure that there would be someone to perform these duties.[15] Later, and perhaps subordinate to this role, the courts of chancery began to prevent the victimization of vulnerable parties by prohibiting litigation by anyone outside of the formal feudal hierarchy.[16] The major issues in the medieval cases concerned property, guardianship and the arrangement of people, property, and power, in relation to the monarchy. Rather than a roving commission to improve parent-child relationships, chancery, as an agent of the monarchy, had a duty to harmonize testimentary and guardianship problems in the interest of order and hierarchy.

The cases of the poet Percy Shelley and Long Wellesley in the early nineteenth century will complete our brief summary of the English chancery law. Following the death of his wife Harriet and his marriage to Mary, Shelley attempted to obtain the custody of his and Harriet's children from Harriet's family, the Westbrooks. The Westbrooks adduced the poem *Queen Mab* as evidence that Shelley was an atheist. Other evidence introduced was Shelley's political tracts, letters from Shelley to Harriet, and some of Shelley's less than impeccable behavior with Harriet and Mary. Lord Chancellor Eldon held that, because of the poet's behavior and expressed ideas, he could not have custody of the children and the controversy was remanded to a master for final resolution.[17]

On the other hand, Long Wellesley was an outspoken and free swinging aristocrat; and the scandalous behavior which was difficult to

14. Cogan, *Juvenile Law Before and After the Entrance of "Parens Patriae"*, 22 S.C.L. REV. 147 (1970) [hereinafter cited as Cogan].

15. *Id.* Cogan states "*Parens patriae* was never used to legitimate an interest of the king. Rather it was used to legitimate interests of the needy." *Id.* at 165. The feudal hierarchy, I presume, would not work unless someone of competence occupied intermediate positions and it was in the interest of the governing class for the positions to be occupied. Thus, by aiding the "needy" or incompetent members of the hierarchy, the ruling classes secured the competent performance of intermediate duties. My analysis does not cover the chancery protection of charities which do not fit the pattern. (*Id.* at 161-63).

16. *Id.* at 151, 153.

17. Shelley v. Westbrook, 37 Eng. Rep. 850 (Ch. 1817).

find in Shelley's case was open and palpable in Wellesley's. He was a deadbeat, lived in open adultery, and was outspoken about his views. In a lawsuit for custody between Wellesley and his deceased wife's relatives, the courts, shocked at such conduct, refused to allow him to resume custody.[18]

These cases are frequently cited,[19] but their relevance to a study of American law is far from clear. First, the idea of protective jurisdiction through *parens patriae* was a part of the crown's power[20] and, as I have argued above, was used to maintain the structure of feudalism.[21] The American revolution was a repudiation of the idea of monarchy and feudalism; and the federal and state constitutions stand for the idea of limited and popularly elected government. Chancery, in particular, was held to be objectionable; and several of the new states refused to adopt chancery jurisdiction because of its monarchial connotations.[22] Second, these decisions were not precedent in the common law sense of the term. After the revolution the new states "received" the English common law in general terms,[23] but with qualification. In some jurisdictions the reception was only up to a certain date and the latest date given in 1776, forty years before the decision in *Shelley's* case.[24] In other jurisdictions the reception was only to the extent that English law was consistent with and applicable to local conditions.[25] Third, both cases deal with the expression of unpopular ideas. In *Shelley v. Westbrook*[26] the publication of *Queen Mab*, an anti-religious poem, is one of the grounds for the decision. To deprive a parent of his children because he

18. Wellesley v. The Duke of Beaufort, 38 Eng. Rep. 236 (Ch. 1827); Wellesley v. Wellesley, 4 Eng. Rep. 1078 (H.L. 1828).

19. *See, e.g.*, Foster and Freed, *Child Custody*, 39 N.Y.U.L. REV. 423, 424 (1964); Simpson, *The Unfit Parent*, 39 U. DET. L.J. 347, 382 (1962).

20. *See, e.g.*, Butler v. Freeman, 27 Eng. Rep. 204 (Ch. 1786).

21. *Supra* notes 15, 16.

22. P. CARRINGTON, CIVIL PROCEDURE: CASES & COMMENTS ON THE PROCESS OF ADJUCIATION 29 (1969); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 56-58 (1835); Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 21-24 (1923).

23. Kocourek, *Sources of Law in the United States of North American and Their Relation to Each Other*, 18 A.B.A.J. 676, 677-78 (1932) [hereinafter cited as Kocourek].

24. *Id.*; Shelley v. Westbrook, 37 Eng. Rep. 850 (Ch. 1817); Bielsky v. Schulz, 16 Wis. 2d 1, 114 N.W.2d 105, 109-10 (1962). Limitations on the tort liability of governmental bodies and manufacturers are additional doctrines developed in England after the American Revolution which did a great deal of damage in the United States. Fortunately, both are almost gone.

25. Kocourek, *supra* note 23, *see also* CODE OF ALABAMA, Title 1 § 3 (Recomp. 1958).

26. 37 Eng. Rep. 850 (Ch. 1817).

expresses unpopular and anti-religious ideas seems contrary to the first amendment of the Federal Constitution and to the Bill of Rights in most state constitutions.[27] A decisive factor in *Wellesley* seems to have been Wellesley's petulant declaration of family sovereignty: "there are certain things which ought to be left alone, a man and his children ought to be allowed to go the devil their own way, if he pleases."[28] In effect this meant "no one can stop me." The House of Lords replied, "We can." If Long Wellesley had kept his ideas to himself, I speculate that the custody issue might have been decided differently. Fourth, and I will extend this at length below, the English chancery cases which deal with the aristocracy are not directly relevant to the development of the juvenile court because, to a large extent, the juvenile court grew out of the law of pauper control. The desultory effort of the courts of chancery to socialize the wayward rich are important, but only because the cases were cited as supporting state interference in intra-family affairs.[29] The ideas, the mechanism, and the means are to be found elsewhere.

B. Statutory Law

While chancery was struggling along case by case with the property and custody problems of the rich, a statutory scheme which dealt with the child custody of the poor had been developing. As a response to the social and economic changes of the declining feudal age, Parliament in 1562 passed the Statutes of Artificers[30] which provided, among other things, that the children of pauper parents were to be involuntarily separated from their parents and to be apprenticed to others. The Poor Law Act of 1601[31] added to the system. Children could be taken from pauper parents at the discretion of the overseers of the poor; and the child was bound out to a local resident as an apprentice until he reached full age.[32] In addition the statute established

27. *Cf.* 79 HARV. L. REV. 1710, 1715 (1966).

28. Wellesley v. Wellesley, 4 Eng. Rep. 1078, 1080, 1083 (H.L. 1828). Hal Painter said, "I have decided Mark and myself would be better off if I went ahead with what I've started and the hell with the rest, sink, swim or starve." The result is history. Painter v. Bannister, 258 Iowa 1390, 1392, 140 N.W.2d 152, 155 (1966).

29. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

30. 5 ELIZ. c. 4 (1562).

31. 43 ELIZ. c. 2 (1601).

32. *See generally* tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257, 274, 279-82 (1964). This three part article, I. 16 STAN. L. REV. 257; II. 16 STAN. L. REV. 900 (1964); III. 17 STAN. L. REV. 614 (1965) [hereinafter cited as tenBroek, *Family Law* followed by volume and page.]

forced labor for the able bodied and cash relief for those unable to work.[33] Blackstone, writing in the last half of the eighteenth century, commented on these statutes and the duty of a parent to educate:

> Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children (w); and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth.[34]

Blackstone did not mention the crown as a parent to all because there was evidently no need to justify legislation which controlled the labor of the lower classes, even at the expense of their family solidarity. Blackstone continued: "The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family,"[35] evidently unaware of the developing doctrine of *parens patriae*.[36]

ENGLISH POOR LAW IN AMERICA

The transplantation of English poor law to the colonies has been traced in a thorough article[37] and colonial poor law legislation and practice has been discussed in some detail.[38] Involuntary apprenticeship of the children of undeserving parents was an integral part of the poor law in colonial North America.[39] Jernigan concluded from an examination of the colonial sources that these provisions were in frequent and customary use.[40] Some of the statutes cast a wide

33. 43 ELIZ. c. 2 (1601).

34. BLACKSTONE, 1 COMMENTARON THE LAWS OF ENGLAND 451, 513-14 (18th ed. 1821).

35. *Id.* at 514.

36. Mr. Wellesley inadvertently paraphrased Blackstone in a letter which later found its way into evidence, "there are certain things which ought to be let alone, a man and his children ought to be allowed to go to the devil their own way, if he pleases." *See* Wellesley v. Wellesley, 4 Eng. Rep. 1078, 1080, 1083 (1828).

37. Risenfield, *The Formative Era of American Public Assistance Law,* 43 CAL. L. REV. 175 (1955) [hereinafter cited as Risenfield].

38. JERIGAN, *supra* note 8; *see also* the documents from the colonial period collected, 1 G. ABBOTT, THE CHILD AND THE STATE 195-213 (1938) [hereinafter cited as G. ABBOTT].

39. *See* Risenfield, *supra* note 37 at 214, n.232; 218; and 223, n.296.

40. JERIGAN, *supra* note 8, at 166, 182, 187.

moralistic and theocratic net. We can see the emphasis begin to shift from "poor" to "poor plus" and the beginnings of the idea that children should be protected from both poverty and from other putatively dangerous environmental hazards. In eighteenth century Virginia the local officials could bind out as apprentices the children of parents who were poor, not providing "good breeding," neglecting their formal education, not teaching a trade, or were idle, dissolute, unchristian or "uncapable".[41] Apprenticeship, because the child's labor paid for his care and education, kept relief costs down in an age of government parsimony, and theoretically trained skilled workers, and thereby reduced idleness and unemployment.[42] Even so, the quality of the care seems questionable, and undoubtedly it was often a business proposition for the master, and the child frequently was little more than a slave for a term.[43] Thus, independently of any Latin rubric, the American colonies, and later states, developed a system of separating children from their undeserving parents. The doctrine once established proved worthy of emulation; and the states and territories in the West copied their legislation from the experiences of the earlier states.[44]

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41. *Id.* at 104, 151, 149, 161.

42. *Id.* at 146-47.

43. Chapters III, IV, V, VI of *Oliver Twist* by *C. Dickens*, discuss some of the abuses of apprenticeship in nineteenth century England.

> "A 'pprentice, sir!" said Mr. Bumble. "The kind and blessed gentlemen which is so many parents to you, Oliver, when you have none of your own, are agoing to 'pprentice you, and to set you up in life, and make a man of you, although the expense to the parish is three pound ten!—three pound ten, Oliver!—seventy shillins—one hundred and forty sixpenses!—and all for a naughty orphan which nobody can't live."

Id. Ch. 3 at 42-43 (Signet ed.). The protection seems pretty meagre. In Pennsylvania as late as 1894, an overseer of the poor was prosecuted for indenturing a seven year old pauper child for fouteen years to a cruel farmer. The overseer was warned before and after the indenture and visited the farmer but reported that the boy was not maltreated. The boy died of starvation and overwork after a few months. Commonwealth v. Coyle, 160 Pa. 36, 28 A. 576, 28 A. 634 (1894). Although the problem must not have been a new one, the case is said to have been one of first impression (24 L.R.A. 522). Note the close relationship between apprenticeship and slavery. *See* Clark's Case, 1 Blackford (Ind.) 122, 12 Am. Dec. 213 (1821); *see also* Bailey v. Alabama, 219 U.S. 219 (1911); Toney v. State, 141 Ala. 120, 37 So. 332 (1904). I consider chattel slavery to be a related but distinct problem and do not discuss it. The practice of breaking up families by sale was one of the most egregious components of the institution but the state was neither a buyer nor a seller and not an integral party to the transaction. *See* J. LESTER, TO BE A SLAVE, THE AUCTION BLOCK 48-49 (1968). A society which treated slaves as breeding stock would not likely be brimming with commiseration for paupers.

44. *See, e.g.*, J. GILLIAN, POOR RELIEF LEGISLATION IN IOWA (1914); KELSO, HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS 1620-1920 (1922); I. BRUCE AND

POOR LAWS IN NINETEENTH CENTURY AMERICA

A major social welfare issue of the early nineteenth century was whether to extend indoor or outdoor aid to paupers. Outdoor relief was cash paid to support the recipients in their homes; and because it was thought to "pauperize" the poor by creating habits of idleness and dependency, outdoor relief was thought to be inferior to indoor or institutional relief. A study of New York relief in 1824 by Secretary of State Yates concluded:

> The education and morals of the children of paupers (except in almshouses), are almost wholly neglected. They grow up in filth, idleness, ignorance and disease, and many become early candidates for the prison or grave.

and recommended,

> The establishment of one or more houses of employment, (poorhouses or workhouses) upon proper regulations in each of the counties of the state . . . ; the pauper there to be maintained and employed at the expense of the respective counties, in some healthful labor, chiefly agricultural; their children to be carefully instructed, and at suitable ages to be put out to some useful business or trade.[45]

The almshouse, workhouse or poor house became the center of poor relief; and the doors of this venerable institution became the channel through which all the poor passed.[46]

Even though the children of the poor were apprenticed as soon as they reached suitable age, reformers began to feel that the poorhouse was not, under any circumstances, a proper place for children. For one thing, they were pauperized:

> Experience has shown that children brought up and indentured from almshouses often feel toward it a filial regard, and having been accustomed to see grown persons supported there

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E. EICKHOFF, THE MICHIGAN POOR LAW (1936); tenBroek discusses the legislation in New York; tenBroek *Family Law, supra* note 32, I at 295-96, and California, *supra* note 32, II at 961-66. Apprenticeship was not used much in California, tenBroek, *Family Law, supra* note 32, II at 965; *see generally* Riesenfield, *Lawmaking and Legislation Precedent in American Legal History,* 33 MINN. L. REV. 103 (1949).

45. The quotations are from H. THURSTON, THE DEPENDENT CHILD 24 (1930) [hereinafter cited as THURSTON]; the Yates report is summarized. *Id.* at 19-24.

46. LAWS OF NEW YORK, 47th Session, Ch. CCXXXI at 383 (1924) (unless ill, § 111); GILLIAN, *supra* note 7, at 89; *see also* C. DICKENS, OLIVER TWIST, Ch. I, II, III for life in an English workhouse.

> for no other reason than that they were addicted to idleness and intemperance, again resort to it themselves rather than encounter the common difficulties of life.[47]

In addition, the children were vulnerable to epidemic disease[48] and moral pollution from indiscriminate contact with adult paupers, vagrants, and criminals.[49] Thus, the potential abuses of the apprenticeship system were preferable to life in the poorhouse;[50] therefore, the government continued to break up families and to separate children from their parents.

The poorhouse or almshouse was always present and the development of alternatives was ragged, irrational and incomplete yet constant. The poor law itself changed very little.[51] Instead subordinate alternatives were created which eventually superseded the original. The original arrangement in turn became subordinate but continued to exist

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47. H. FOLKS, DESTITUTES, NEGLECTED AND DELINQUENT CHILDREN 22 (1900) [hereinafter cited as FOLKS].

48. *Id.* at 21.

49. *Id.* The poorhouse contained:

> [R]ogues, vagabonds, and idlers . . . common pipers, fiddlers, runaways, stubborn servants or children, common drunkards, common night walkers, piferers, wanton and lascivious persons either in speech or behavior, common railers, or brawlers such as neglect their callings, misspend what they earn, and do not provide for themselves or the support of their families.

JERIGAN, *supra* note 8, at 202-03, or in Gillian's words was:

> [T]he refuge of the hopeless, the deathhouse of the pauper sick, the winter home of the diseased vagrant, the last refuge of the broken down prostitute, the asylum for the insane, the lying-in hospital both for the feebleminded members and also for the poor unfortunate girl, the victim partly of ignorance and partly of lust, and perhaps saddest of all, the home of some independent, high-spirited persons whom misfortune or filial irreverence in his declining days left with only such a place in which to close his eyes in the last long sleep.

GILLIAN, *supra* note 7 at 90; F. Allen notes:

> Lawyers and social workers, for example, may well be reminded that the distinction between penal treatment and the administration of welfare services is one that has sometimes been far from clear, even in theory. This is especially likely to be true in a culture that tends to conceive of poverty, unemployment, and even physical handicaps as evidence of a lack of moral fiber in those who suffer such misfortunes.

F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 2 (1964).

50. GILLIAN, *supra* note 7 at 220.

51. tenBroek, *Family Law, supra* note 32, I at 297, 316; II at 941; *compare* 18 ELIZ. c. 3 (1576) *with* IOWA CODE § 252.26 (1966); *compre* 43 ELIZ. c. 2 § (1601) *with* IOWA CODE § 252.6 (1966).

in the shadow of the innovation. Thus, today along with aid to families with dependent children and the juvenile court we still find county farms and general relief. Much of the confusion in the study of these trends comes from a failure to observe the central position of the poor laws, pauper control and the poorhouse. Fox,[52] for example, views development of residential institutions for children in the nineteenth century through the juvenile court with an emphasis on what came to be the juvenile court's delinquency jurisdiction. His analysis is unhistorical because it emphasizes what the juvenile court became, not the way that it was conceived at the time.[53] This confusion is easy to understand for the nineteenth century viewed poverty almost as a crime[54] and many of the terms were used synonymously. Thus, vagrant, wayward, delinquent, depraved, dependent, vicious, neglected and perhaps other adjectives were used to describe basically the same children. Fox compounds his misunderstanding by lumping together all children who were subject to state control as "deviants"[55] and failing to distinguish between those who were threatened by their environment and those who were objective threats to the environment. He then extrapolates from the idea of deviance and assumes that the extirpation of predelinquency and the prediction of future delinquency and crime were the sole goals of the reform movements.[56] Fox assumes that all state intervention in family life was designed to prevent crime and thereby ignores the central nature of the poor laws, the nascent social welfare, the rleationships of these efforts to the law of pauper control, and the idea that poverty, aside from possible future criminal activity, was seen as a threat to society. These defects, coupled with a heavy reliance on institutional sources, press Fox's analysis into a focus on developments in New York and Illinois and a concomitant de-emphasis of the halting and complex growth of alternatives to Elizabethan pauper relief and the growth of moralistic social welfare.[57]

52. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) [hereinafter cited as Fox].

53. D. FISCHER, HISTORIAN'S FALLACIES 135-40, 160-63 (1970) [hereinafter cited as FISCHER].

54. Fox, *supra* note 52, at 1191; *see* the quotations *supra* note 49.

55. Fox, *supra* note 52, at 1187; FISCHER, *supra* note 53, at 265-67.

56. See Fox, *supra* note 52 at 1193.

57. FISCHER, *supra* note 53, at 142-44. The textual statements are, in a way, unfair to Fox. I am in substantial agreement with many of the revisionist ideas in the article (1193-1204, 1224, 1230) and the use of institutional sources provides valuable background material for many of the important developments.

The New York House of Refuge,[58] established in 1824, combined with the poor laws the movement toward humanitarian treatment of juvenile criminal offenders. The legislation[59] allowed the Society for the Reformation of Juvenile Delinquents to incorporate, to build and manage an institution, and to dispose of the children under its custody. The children were to come from two sources: children convicted of crimes and children "taken up or committed as vagrants."[60] Thus, the house was to be an alternative available to the "commissioners of the almshouse or bridewell"[61] for pauper children. As was customary the rights of the pauper parents to the custody of their children were ignored. Pickett says "[i]f a youngster or an adult was regarded by his betters as depraved or unable to care for himself, he seemingly deserved no rights. . . . One group of people, possessing a more enlightened sense of parenthood, stood ready to step in and wrest the child away from the original parents."[62] Once in the house the children were presumably to be educated and socialized. The managers were allowed to bind the children out as apprentices, which was the common poor law policy, but in what seems to be an improvement over the poor laws, only with the children's consent.[63] The legislation did not stray too far from the poor law; and the indenture of apprenticeship was to contain the same "protections" as those made for pauper children by the overseers of the poor in the counties which lacked a House of Refuge.[64] Once the House was in operation it became clear that most of the subjects of its favor were vagrants, absconders from the almshouse, or petty thieves, for in the first year only one admittee had been convicted

58. R. PICKETT, HOUSE OF REFUGE: ORIGIN OF JUVENILE REFORM IN NEW YORK STATE 1815-1857 (1969) [hereinafter cited as R. PICKETT] is a valuable source for this period. The author de-emphasized secondary and legal material and based his research on institutional sources. *See* Book Review, 75 AM. HIS. REV. 925 (1970); *see also* FOLKS, *supra* note 47, at 97; Fox, *supra* note 52, at 1188-1207.

59. LAWS OF NEW YORK, 47th Session, Ch. CXXVI at 110 (1824).

60. *Id.* § IV.

61. *Id.*

62. R. PICKETT, *supra* note 58, at 58-59.

63. LAWS OF NEW YORK, 47th Session, Ch. CXXVI at 110 (1824). The statute says that the managers of the house;

> [S]hall have 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 will be most for the reformation and amendment, and the future benefit and advantage of such children.

64. *Id.* § V.

of a serious offense.[65] Thus, it is a permissible inference that the House of Refuge served essentially a poor law function despite the intention of its founders and managers.[66] What is called juvenile reform seems to me to be a modification of the practice of committing paupers to almshouses or workhouses because both operated on the lower classes; both sent the presumed beneficiaries to a residential institution; and both apprenticed the children. The House of Refuge reformers were humanitarians and the legislation widened the scope of permissible state intercession.

We can see in the House of Refuge, the seeds of what came to be called the juvenile court. Both were founded by "reformers" who were middle class, conservative and culturally ethnocentric.[67] The legislation is similar to the Elizabethan poor laws because it allows the state to interpose on "behalf" of children in cases of "poverty" and "poverty plus".[68] The dispositional alternative of apprenticeship for the children is the thread which ties the Elizabethan poor laws[69] to the House of Refuge[70] and to the Illinois juvenile court.[71] The New York reform was

65. Fox, *supra* note 52, at 1192, cites the institutional sources:

> The first annual report of the Managers of the House, submitted to the Society and the public in 1825, reveals that, of the 73 children received during the first year of operation, only one had been convicted of a serious offense (grand larceny), nine had been sent for petty larceny, and the remaining 63 (88 per cent) were in the House for vagrancy, stealing, and absconding from the Almshouse. In the following year, the percentage committed for "vagrancy, stealing, and absconding" was approximately the same.

However, Fox's emphasis on delinquency and crime prediction prevents him from apprehending the import of the data. He assumes that the statutes described potential future criminals while the descriptions were taken over from the poor laws, embroidered with opprobrious adjectives and used to describe poverty, an existing fact. Rather than crime prediction the legislature, it seems to me, was describing a way of life or status. Thus, the dependency and neglect definitions in the Illinois Juvenile Court Act [LAWS OF ILLINOIS, 41 G.A. Juvenile Courts at 131-137 (1899)] and the alternatives for disposition such as apprenticeship (*Id.* § 8) were in many respects descendents of the feudal Statute of Artificers [5 ELIZ. I ch. 4 (1562)] and later poor law legislation.

66. R. PICKETT, *supra* note 58, at 55, 57, 58, 89, 102.

67. *Compare* R. PICKETT, *supra* note 58, *with* A. PLATT, THE CHILD SAVERS (1969); *see also* J. GUSFIELD, SYMBOLIC CRUSADE (1963).

68. *Compare* LAWS OF NEW YORK, 47th Sess. Ch. CXXVI, § IV (1824) *with* LAWS OF ILLINOIS, 41 G.A. Juvenile Courts, § 1, at 131 (1899); also *compare* LAWS OF NEW YORK, 47th Sess. Ch. CCXXXI *with* ILLINOIS REVISED STATUTES, Ch. 107 (1912) (poor laws).

69. 43 ELIZ. c. 2 (1601).

70. LAWS OF NEW YORK, 47 Sess., Ch. CXXVI, § IV (1824).

71. LAWS OF ILLINOIS, 41 G.A. Juvenile Courts, § 8 at 131-37 (1899).

evidently completed without use of the phrase *parens patriae.* There was, however, a Latin phrase, *in loco parentis,*[72] which would seem to express the power of the state to control the child once it had obtained custody rather than a state interest which is over and above the interest of a parent. It is the latter which has come to be called *parens patriae.*

Parens patriae was first used by the Pennsylvania Supreme Court to justify statutory commitments to a residential institution for juveniles in *Ex parte Crouse.*[73] The reported opinion is apparently an appeal from a denial of habeas corpus. Mary Ann Crouse, upon her mother's petition, had been committed by a justice of the peace to the House of Refuge as unmanageable. Her father sought her release and argued that commitment without a trial by jury was unconstitutional. The court, in a one page *per curiam* opinion, without citing any authority, held that the purpose of the House of Refuge was improvement, reformation, wholseome restraint, and protection from depraved parents or environment; and that if the statutory procedure was followed, a jury trial was not necessary.

The court's discussion of the right to a jury trial before the child was detained is only three sentences long.[74] The balance of the short opinion is dicta and devoted to the rights of parents and the state in

72. R. PICKETT, *supra* note 58, at 47.

73. 4 Whart. 9, 11 (Penn. 1839).

74. *Id.*

> As to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare. Nor is there a doubt of the propriety of their application in the particular instance. The infant has been snatched from a course which must have ended in confirmed depravity; and, not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it.

The court, when it says, "The infant has been snatched from a course which must have ended in confirmed depravity," is allowing prediction and it assumes that, given the talisman, the prediction was accurate. The presumed accuracy of the prediction justifies the extreme measure. The prediction is "confirmed depravity" which may be either pauperism or crime. The child, after all, was only refractory. Recent emperical scholarship concludes that such predictions are inaccurate generally because they overpredict. *See* STANFIELD AND MAHER, CLINICAL AND ACTUARIAL PREDICTIONS OF JUVENILE DELINQUENCY IN CONTROLLING DELINQUENCY 245 (1968); for the difficulties inherent in accurate emperical research, *see* D. WEST, PRESENT CONDUCT AND FUTURE DELINQUENCY (1969); Ketcham, Book Review, 83 HARV. L. REV. 1464, 1467 (1970).

children. The court took the position that the state has almost plenary authority to intervene in parent-child relations:

> To this end (reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and above all, by separating them from the corrupting influence of improper associates) may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it conseqnently remains subject to the ordinary legislative power which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted.[74.1]

There we have it. The Latin phrase *parens patriae* had acquired meaning over a long period of time and was sensibly applied.[75] But it was an equitable concept applied by the chancellors between private parties and usually where property or guardianship was in issue.[76] The *Crouse* case took this phrase and transplanted it into a branch of the poor law where it was used to justify the state statutory schemes to part poor or incompetent parents from their children.[77]

74.1. *Ex parte* Crouse, 4 Whart. 9, (Penn. 1839).

75. Cogan, *supra* note 14.

76. *See* text at notes 14-16. *See also* N. MORRIS AND HAWKINS, THE HONEST POLITICAN'S GUIDE TO CRIME CONTROL 157 (1970):

> The juvenile court emerged from what was a legal misinterpretation of the *parens patriae* concept. This concept was developed for quite different purposes—property and wardship—and had nothing to do with what juvenile courts do now. Though we keep on prating *parens patriae*, we might as well burn incense. Historical idiosyncrasies gave us a doubtful assumption of power over children. With the quasi-legal concept of *parens patriae* to brace it, this assumption of power blended well with the earlier huminitarian traditions in the churches and other charitable organizations regarding child care and childsaving. The juvenile court is thus the product of paternal error and maternal generosity, which is not unusual genesis of illegitimacy.

77. The doctrine later came to stand for the proposition that because of the peculiar

In early American law there were two theories which allowed the state to displace a parents' custody of his children. Both may be observed in Joseph Story's work.[78] The first was the chancery power of *parens patriae*. Story's discussion of this branch of equitable jurisdiction in his treatise on equity is primarily a redaction of the English law.[79] For example, on the question of parental custody, Story lays out the reasoning of the *Shelley* and *Wellesley* cases:

> For although, in general, parents are intrusted with the custody of the persons, and the education, of their children; yet this is done upon the natural presumption, that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever (for example) it is found, that a father is guilty of gross ill treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such, as tend to the corruption and contamination of his children; in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education.[80]

On the other hand there was the power of the legislature to alter by

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state interest a juvenile could be deprived of his liberty without observing the procedural requirements which are necessary before an adult is confined. *In re* Gault, 387 U.S. 1, 16 (1967). The child's right to be at liberty and not confined to an institution is an issue but so also is the parent's right to the custody of their children. The two can easily be confused. The court in *Gault* talks, in the essay part of the opinion, of the child's interest in his liberty (387 U.S. at 13, 17, 27-28), but holds that the parent must receive notice of the hearing because of his interest in the custody of the child, (387 U.S. at 33-34) and that the parent must be notified of the right to counsel (387 U.S. at 41-42). Perhaps the Court assumed that the parent can assist the child in regaining his liberty. Or perhaps the parent has an interest in the custody of his children, which is independent of the child's interest in liberty. Fox ignores the parental right to custody completely (*cf.* Fox, *supra* note 52, at 1215, n. 142); this, I believe, is due to his focus on delinquency which involves the child's liberty. Pickett realizes the existence of the issue but does not develop it. R. PICKETT, *supra* note 58, at 58-59.

78. *See generally* J. STORY, DICTIONARY OF AMERICAN BIOGRAPHY 102-08 (1936); Kent adds nothing to the inquiry, *see* II KENT, KENTS COMMENTARIES, Lecture XXX(1), 217-21 (1836) *Cf.* Insurance Company v. Bangs, 103 U.S. 435, 438-39 (1880).

79. 2 STORY, EQUITY JURISPRUDENCE, Ch. XXXV, §§ 1327-61 (4th ed. 1846). Story included some American decisions, *e.g., Id.* at 777, n. 3, but they followed the English cases.

80. *Id.* at 775-76. *See* cases *supra,* notes 17-18. *See* my objections, *supra* notes 19-29.

statute the relationships between the child, the parents and the state. Story had occasion to deal with that power in a case on circuit.[81] Robert Treadwell a minor had joined the navy but later found it not to his liking and deserted. He was apprehended, pleaded guilty, and was sentenced to two years service without pay. His father sued out a habeas corpus against Commodore Bainbridge alleging that Robert had enlisted without his consent and asking custody.[82] Story ordered the minor remanded to his commanding officer[83] but, in the process, wrote extensively on the issue of the government's role in intra-family matters. Story's reasoning was as follows. The first rule was the parents' right to the custody and control of his infant children, but this right was qualified at three points: first by the doctrine that a parent's contract for a child should be of some benefit to the child, second by the criminal law and, third by the general police power. On the latter point Story says:

> Be the right of parents, in relation to the custody and services of their children, whatever they may, they are rights depending upon the mere municipal rules of the state, and may be enlarged, restrained, and limited as the wisdom or policy of the times may dictate, unless the legislative power be controlled by some constitutional prohibition. . . . Can there be a doubt, that the state legislature can, by a new statute, declare a minor to be of full age, and capable of acting for himself at fourteen, instead at twenty-one years of age? Can it not emancipate the child altogether from the control of its parents? It has already, in the case of paupers, taken the custody from the parents, and enabled the overseers of the poor to bind out the children as apprentices, or servants, during their minority, without consulting the wishes of the parents.[84]

Story then noted that Congress may and had abrogated the necessity for parental consent to a minor's enlistment. Congress was constitutionally delegated the power to make war as well as the power "to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers."[85] The intent of Congress, Story felt, must prevail. Parental consent was not mentioned in the legislation, which said "boys", but neither was it required. Thus, prior

81. United States v. Bainbridge, 24 F. Cas. 946 (No. 14,497) (D. Mass. 1816).
82. *Id.* at 947.
83. *Id.* at 952.
84. *Id.* at 949-50.
85. *Id.* at 949, *quoting from* U.S. CONST. art. I, § 8.

legislation,[86] federal supremacy[87] and the necessities of war and naval service, as opposed to land duty,[88] combined to mean that the parents' consent to a naval enlistment was unnecessary.

Although Story cited some of the English chancery cases for the proposition that a parent has a right to the custody of his children,[89] it is clear that there are some differences between the doctrines. The statutory power is limited by the Constitution[90] while it seems that the chancery power of *parens patriae* is only limited by the predilections of the chancellor.[91] The parties to a chancery suit, however, were private litigants while in the statutory cases the state was the moving party and the private litigant was forced to act or respond in the face of the awesome power of the government.

However, Story's reasoning may be too fine spun and attenuated. In *Ex Parte Crouse*[91.1] when the Pennsylvania Supreme Court used the chancery phrase *parens patriae* in a statutory case, it seems to have defined the Latin phrase as coexistent with the general legislative power

86. "Whenever the rights of parents were intended to be saved, a special proviso was uniformly introduced for that purpose." 24 F. Cas. at 952.

87. *Id.*

88. Story's patriotism is very evident here.

> It is certain, that the services of minors may be extremely useful and important to the country, both in the army and navy. How many of our most brilliant victories have been won, on land and sea, by persons, who had scarcely passed the age of minority? In the navy, in particular, the employment of minors is almost indispensable. Nautical skill cannot be acquired, but by constant discipline and practice for years in the sea service; and unless this be obtained in the ardor and flexibility of youth, it is rarely, at a later period, the distinguishing characteristic of a seaman. It is notorious that the officers of the navy generally enter the service as midshipment as early as the age of puberty; and that they can never receive promotion to a higher rank, until they have learned, by a long continuance in this station, the duties and the labors of naval welfare. And to this early discipline and experience, as much as to their gallantry and enterprise, we may proudly attribute their superiority in the contests on the ocean during the late war.

Id. at 949-50.

89. *Id.* at 949.

90. *Id.*

91. *See supra* note 80. Pomeroy observed: "There is one fundamental rule viz., that the exercise of the jurisdiction depends upon the sound and enlightened discretion of the court, and has for its sole object the highest well-being of the infant." III POMEROY, EQUITY JURISPRUDENCE § 1308 at n. 1 (1883).

91.1. 4 Whart. 9 (Penn. 1839).

to regulate.[92] It seems sensible to assume that the Pennsylvania court was stating the general policy power of the legislature in Latin. This may be what Pomeroy meant in 1883 when he wrote: "In this country, according to our system of government, the power of *parens patriae* belongs exclusively to the legislature of each state, and is not possessed by the courts."[93]

We have seen how, in the first half of the nineteenth century, the chancery phrase *parens patriae* came to be used to justify the state in sundering children from parents. I have argued that the state separation of children from their parents was a lineal descedent of poor law mechanisms for parting pauper children and their parents and placing the children out as apprentices and that *parens patriae* was no more than a phrase added, after the fact, as a reason for the regulation. There were some additions. The movement to almost exclusive indoor relief, and the humanitarian desire to save children from the bad influences of jails and poorhouses joined in the House of Refuge and in similar urban residential juvenile institutions. Categories of families potentially subject to the intercession widened from "poor" to "poor plus" and the statutes came to include "idle or dessolute" children and those whose parents were drunken or neglectful.[94] Present or potential breaches of the criminal law gave the state protective jurisdiction.[95]

PROTECTIVE JURISDICTION

From this point onward I concentrate my study on what I refer to as protective jurisdiction or the power to intercalate where the child is considered to be in danger from his environment as opposed to delinquency jurisdiction over the child who is dangerous to others. Merely locating the decisions where certain words are used is a

92. "The *parens patriae* or common guardian of the community," *Id.* at 11; *see also* People *ex rel.* Splain v. New York Juvenile Asylum, 2 T&C 475, 478-79 (N.Y.S. Ct. 1874); tenBroek, *Family Law, Supra* note 32, III at 680-81.

93. III POMEROY, EQUITY JURISPRUDENCE § 1304 at n. 2 (1883). Pomeroy's treatment of child custody is, in general, more skeptical and less inclined to intervention than was Story's two generations earlier; (*see, e.g.*, §§ 1303, 1304, 1310) and this, I believe, is because Pomeroy was aware of the monarchial origins and feudal implications of the chancery power of *parens patriae.* He did not take up the statutory regulation of family affairs, (§ 1303 at n. 1) but discussed only the general powers of the court of equity.

94. MASSACHUSETTS LAWS OF 1826, Ch. 182 § 3.

95. *See* Fox, *supra* note 52.

historical trap; and the proper inquiry must be to filter the available evidence and to discern what the ideas came to mean in the statutory regulation of the lives of poor parents and their children. If, as I assume, *parens patriae* in the nineteenth century was a statement of the general power to regulate, then how was that power exercised by the legislature and administered by the executive and limited by the courts. These are the matters to which I will now direct my attention.

My assumption, is that, before the Civil War, the great majority of pauper children were relegated to the poorhouse and summarily apprenticed. The historical slate is not completely void but the evidence is subdued. The overseers of the poor and almshouse stewards did not leave the same kind of records as the reformers who founded the House of Refuge. The Houses in the large eastern cities were an alternative or model for future change, but they were formally chartered to handle dangerous rather than endangered children and did not have enough space for the volume.

The House of Refuge did not catch on before the Civil War but remained a minor alternative in the spectrum of state response to parental poverty and mistreatment. In 1856 in New York State, with the exception of Kings and New York counties, there were fifty-five almshouses containing 4,936 people—837 lunatics, 273 idiots, and 1,307 children of all ages;[96] and between 500 and 600 children were apprenticed out of New York poorhouses each year.[97] The reformers felt that anything was better than the almshouses and worked for legislation forbidding the commitment of children to almshouses. Following New York's example,[98] Ohio, Massachusetts, Michigan, Wisconsin, Pennsylvania, Connecticut, Rhode Island, Maryland, New Hampshire, Indiana and New Jersey passed legislation regulating children in poorhouses.[99]

The problem, of course, was what to do with the children. Public home relief was against the prevailing ideology because it "pauperized" the poor.[100] Private charity was inadequate.[101]

96. THURSTON, *supra* note 45, at 28.

97. 2 G. ABBOTT, *supra* note 28 at 67.

98. LAWS OF THE STATE OF NEW YORK, Ch. 173 (1875).

99. FOLKS, *supra* note 47, at 47-51.

100. 2 G. ABBOTT, *supra* note 38, at 5-6; E. ABBOTT, FROM RELIEF TO SOCIAL SECURITY 517-18 (1941), [hereinafter cited as E. ABBOTT].

101. G. ABBOTT, *supra* note 38, at 5-6; E. ABBOTT, *supra* note 100, at 517-18.

Apprenticeship was too slow and there weren't enough masters. In addition, craft skills learned during several years of close contact with an older craftsman were becoming obsolete in the new age of division of labor. If the practice of separating poor children from their parents was to continue, the placement dilemma had to be resolved.

In the years between 1875 and 1900 a variety of public alternatives to poorhouse care were developed. A pattern is discernable but there is no consistency; therefore, examples will suffice. Even so, the catalogue may seem dreary and redundant and the reader may wonder whether the statutory language had any application to reality. The writer assumes, in the absence of evidence to the contrary, that it did.[102] In Iowa, where poorhouse commitment and retention of children has not been forbidden as of 1970, an orphanage for orphans of civil war veterans had been established during the war to spare these blue ribbon poor from the ravages of the poorhouse. When there were not enough soldier's orphans to fill the institution, it was opened to destitute children generally.[103] Gillian noted that this was due less to commiseration for the poor than to community desire to retain a state payroll.[104] However, the county of settlement was charged for the care of children of non-veterans and most children without a veteran parent stayed in the county poorhouse where they cost the county less to maintain, or were later sent to reform schools where the state paid all the bill.[105]

Michigan forbade children in poorhouses and established an institution at Coldwater for the poor, the neglected, and the ill-treated who, upon commitment by probate judges, became wards of the state to be placed out at the first opportunity.[106] Other states had county children's homes, paid subsidies to private institutions, or boarded out their wards in private homes.[107]

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102. I presume, in other words, that statutes have some effect on the society at large.

103. ACTS OF THE 16TH G.A., Ch. 94 (Iowa 1876). Leyendecker calls this "preferential assistance". LEYENDECKER, PROBLEMS AND POLICY IN PUBLIC ASSISTANCE 52-57 (1955).

104. GILLIAN, *supra* note 7 at 201; at 368, n. 258.

105. *Id.* at 206-14. This, I take it, is another example of the idea that poverty and crime were almost interchangeable or so similar as to be indistinguishable in light of the desire to save the public fisc.

106. FOLKS, *supra* note 47, at 53-55.

107. *Id.* at 52-53.

State public institutions called juvenile asylums or orphanages were developed elsewhere to deal with the destitute and neglected.[108] The word orphanage was a euphemism because ninety percent of the inhabitants were not true orphans.[109] These institutions received children committed by the courts or relinquished by their parents.[110] Commitment because a child was "without proper guardianship" seems to have been heavy-handed and indiscriminate.[111] Following poorhouse practice the children in the institutions were often indentured out when they reached a suitable age.[112]

The criteria of state intervention and the classes of potentially subject children began to expand. Before 1800 the state normally intervened only in cases of poverty[113] but as the century rolled on, children who, by legislative definition, were suffering, abandoned, neglected, improperly exposed, in the custody of a notoriously immoral mother, were candidates for public favor.[114] Private child saving societies were formed to investigate abuse and neglect, to observe courtroom proceedings where children were involved, to procure legislation, and to control the disposition of children.[115]

Child saving or child rescue schemes became more comprehensive and the idea spread.[116] The New York legislature in 1877 passed an omnibus child protection statute.[117] In order to protect children from bad influences they were forbidden from entering saloons and "dance houses" and if under "restraint or conviction" from being in the same "prison or place of confinement . . . courtroom . . . or vehicle . . .

108. THURSTON, *supra* note 45, at 39-91, FOLKS, *supra* note 47, at 25.

109. THURSTON, *supra* note 45, at 39 n.1.

110. FOLKS, *supra* note 47, at 41-42. See also, tenBroek, *California's Welfare Law,* 45 CAL. L. REV. 241, 297 (1957).

111. 2 G. ABBOTT, *supra* note 38, at 11. In California most of the commitments were for "leading an idle and dissolute life." tenBroek, *California's Welfare Law,* 45 CAL. L. REV. 241, 297 (1957).

112. 1 G. ABBOTT, *supra* note 38, at 192-93, 223-34.

113. FOLKS, *supra* note 47, at 96.

114. *Id.* at 97. In Massachusetts the state had power over children under sixteen "whom by reason of the neglect, crime, drunkenness or other vices of parents, or from orphanage, are suffered to be growing up without statary parental control and education, or in circumstances exposing, lead idle and dissolute lives." MASS. ACTS AND RESOLVES OF 1866, Ch. 283, §§ 1, 3.

115. FOLKS, *supra* note 47, at 99-102.

116. *See* Riesenfield, *Lawmaking and Legislative Precedent in American Legal History,* 33 MINN. L. REV. 103 (1949).

117. LAWS OF NEW YORK, Ch. 428 (1877).

with adults charged with or convicted of crime, except in the presence of a proper official." Children under the age of fourteen who were "found begging", or "wandering and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence," or "destitute", or in the "company of reputed thieves or prostitutes," could be arrested and if the case were proved to the satisfaction of a judge, be commited to "an orphan asylum, charitable or other institution" or treated similarly to the "vagrant, truant, disorderly, pauper, or destitute." The act was coupled, as was customary, with criminal penalties against the offending custodian.[118]

Indiana created a network of crimes against children, such as: ill treatment, overwork, unnecessarily cruel punishment or neglect, apprenticing or permitting the child, among other things, to be an acrobat or contortionist, engage in an "obscene, indecent or illegal exhibition or vocation", or "prostitution or begging."[119] The court could appoint a guardian for the person of the wronged child or place the child in an asylum. The asylum authorities had power to indenture the child and if the parent resumed custody he was required to post bond and took his child "subject, nevertheless, to the obligations of any indentures or legal engagements already entered into on behalf of said minor." As part of a criminal statute, and except for certain of the forbidden occupations, neither ingenious nor creative, the act does show the influence of the child saving societies. The members of "any duly organized or incorporated humane society having for one of its objects the protection of children from cruelty" were allowed to become guardians of the child. The societies were not given the power to indenture but were allowed to petition for commitment of the child to an instituion which did have the power to indenture.[120]

In cities of population over 75,000[121] (for example, Indianapolis), a more formal system was established. The Board of Children's Guardians, a public body, was given jurisdiction over the "neglected and dependent" children who were "abandoned, neglected, or cruelly treated;" beggars; "children of habitually drunken or vicious and unfit parents" or in "vicious or immoral association; children known by

118. *See* also PUBLIC ACTS OF CONNECTICUT, Ch. 20 (1885).

119. INDIANA LAWS, Ch. 101 at 353 (1889).

120. Private organizations have been significant throughout. *See, e.g.*, tenBroek, *Family Law*, supra note 32, I at 257, 267, 281-82.

121. Indiana Laws, Ch. 85 at 261-63 (1889).

their language and life to be vicious or incorrigible; juvenile delinquents and truants". The Board was permitted to establish a home and consign children to the orphan's asylums, the House of Refuge or the Reformatory for Women and Girls. The Board with permission of the court could indenture the child as an apprentice.

Michigan began child protection in 1881 with a statute punishing the use of children as gymnasts and contortionists, forbidding the presence of children in saloons and dance houses, and the practice of not allowing children access to corrupting printed materials. Moreover, children were not to be jailed with adult criminals nor kept in poorhouses.[122] In 1889 removal of an "ill-treated child was one who, among other things, was a contortionist or gymnast or frequented saloons or dance houses, was "habitually exposed or in want", engaged "in any occupation . . . likely to endanger his health, or life, or deprave his morals," whose parent was "an habitual drunkard, or a person of notorious and scandalous conduct or a reputed thief." The case was to be tried by a jury, presided over by a probate judge and upon a positive verdict the child could be placed under guardianship, sent to the state public school, indentured or remitted to the superintendent of the poor to be furnished care "as for other poor persons."[123]

State power to control people expanded. As the statutory definitions became broader more people were covered. The statutory categories were vague, pregnant with moral connotation and peculiarly tailored to poverty. Perhaps all the terms were synonyms for poverty. In addition to an administrative framework for seeking out and processing cases; institutions for the disposition of children further increased the states' potential for control.

Not only were more families potentially subject to interference, but the effect of the intervention became potentially more permanent. Under the law of apprenticeship and institutional commitment, the child remained in the legal family of his biological parents.[124] Adoption,

122. Michigan Public Acts of 1881, No. 260, at 357.

123. Michigan Public Acts of 1889, No. 187, at 219; *see also* the criminal statutes passed four years later Michigan Public Acts of 1893, No. 156 at 255.

124. This legal right was often more theoretical than actual. Whalen v. Olmstead, 61 Conn. 263, 23 A. 964 (1891). In Dumain v. Gwynne, 92 Mass. (10 Allen) 270, 275 (1865), the court said:

> In some of our public institutions it has been deemed expedient to keep parents in ignorance of the place where homes have been found for

which was unknown to the common law and not available at all in any of the states until 1851,[125] imposed a complete and permanent severance of the adopted child's legal relation to his biological parents and assumption of those rights and duties by the adoptive parents.[126] The legislatures added to child protection statutes the idea that a parent, because of his status or behavior, could lose his child completely and permanently.[127] This addition has far reaching implications for the public law of parent and child.

CHILD SAVING LEGISLATION

Next I will examine the child saving legislation in the courts. No attempt will be made to draw general legal conclusions. The progress of the legislation, although of a certain pattern, was ragged and spotty. The legislatures had created exceptions to poor law treatment for certain designated classes of children. In many places, poor law alternatives remained and in some the new legislation was treated as a part of the poor law. The beneficiaries of these government services could not have been inveterate litigators, but the reports do contain quite a few cases.

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their children, on account of the disposition often manifested to visit them and excite uneasiness and discontent in their minds.

See also In re Diss Debar, 3 N.Y.S. 667 (S. Ct. 1889). The New York Children's Aid Society placed 24,000 New York City children "in various parts of the country". 2 G. ABBOTT, *supra* note 38, at 140; *see generally Id.* at 133-53; *see* People *ex rel.* Splain v. New York Juvenile Asylum, 2 T&C 475 (N.Y.S.C. 1874), (placement in Illinois).

125. Massachusetts was first [Acts and Resolves Ch. 324 (1851)]. Other states followed. *See generally* 1 G. ABBOTT, *supra* note 38, at 189-224.

126. Like most absolute statements, the sentence in the text can be qualified. Dumain v. Gwynne, 92 Mass. (10 Allen) 270 (1865); *see, e.g.,* MICH. CODE ANN. §§ 702.80, 710.6, 710.9 (1948). *See also* 12 WAYNE L. REV. 893 (1966).

127. CALIFORNIA CIVIL CODE OF 1872 § 224; INDIANA LAWS OF 1889, Ch. 85, § 2; LAWS OF NEW YORK, Ch. 438 (1884). *See also In re* Souris, 521 N.Y.S. 738 (Sur. 1930) which traces the history of the doctrine; tenBroek, *Family Law, supra* note 32, II at 900, 954, n.587. The Georgia court recoiled from this idea and wrote adoption out of the statute. Kennedy v. Meara, 127 Ga. 68, 56 S.E. 243 (1906); *see also In re* Kol. 10 N.D. 493, 88 N.W. 273 (1901). Fox deals with adoption as a dispositional alternative under the protective statutes and concludes that within the preexisting rehabilitative spirit of the statutes the provision for adoption of children who were within the jurisdiction of the Chicago Juvenile Court "codified the shift from congregate to family penology." Fox, *supra* note 52, at 112. This assumption, growing as it does out of Fox's focus on crime and penology, ignores the breaches of parental prerogatives. Fox, by looking at the process rather than the result, misses the real issue which is not a minor point of institutional organization, but is the growth of the state as a super parent. *See also* Fox, *supra* note 52, at 1215, n.142.

A. Apprenticeships

Apprenticeship was the oldest alternative for the children of the poor, and an accepted mechanism to teach a trade to children of other classes. The rules were different for the pauper or "parish apprentice" who was bound without the consent of his parents or himself.[128] Statutes which allowed overseers of the poor or other minor officials to bind out the children of poor relief recipients were common in the nineteenth century,[129] and it appears to have been a fairly regular practice to detach children from their pauper parents and to attach them to new masters.[130]

The agreement in *Bardwell v. Purrington*[131] seems to have been standard. It was:

> [A]n indenture made by and between him and the selectmen of Shelburne on April 5, 1861, which set forth "that the said overseers of the poor have bound and do hereby bind George W., a minor son of Samuel Hayden, a poor person lawfully settled in said Shelburne and actually chargeable thereto, unto the said Bardwell, to follow the business of farming or agriculture, and with him to serve from the day of this indenture until the eighth day of September in the year eighteen hundred and seventy-three, when the said George W. the said Bardwell will arrive at the age of twenty-one years, during which time the said George W. the said Bardwell shall faithfully serve;" and wherein the plaintiff covenanted to faithfully instruct the said George in the business of farming, and during all said term to provide for his comfortable support in sickness and health, and cause him to be taught in reading, writing, ciphering, and "such other branches as are ordinarily taught in common schools," and to pay him $100 upon his coming of age. It was admitted that a duplicate of this indenture was duly filed with the town clerk of Shelburne.[131.1]

Nor was the judicial attitude surprising. The court stated:

> It has been well said that the authority given to overseers of

128. Musgrove v. Kornegay, 52 N.C. (7 Jones) 56, 58 (1859) (a good review of the private law of indenture). *See also,* Owen v. State, 48 Ala. 328 (1872); Day v. Everett, 7 Mass. 144 (1810); II KENT, KENTS COMMENTARIES, Lecture XXXII, part III, at 261-66 (1836). *See generally* 1 G. ABBOTT, *supra* note 38, at 164-203.

129. *See, e.g.,* the Massachusetts statutes quoted in Bardwell v. Purrington, 107 Mass. 419, 422 (1871). "A minor child who is, or either of whose parents is, chargeable to a town as having a lawful settlement therein, or supported there at the expense of the state, may be bound as an apprentice or servant by the overseers of the poor." *Id.*

130. *In re* Kelley, 152 Mass. 432, 438, 25 N.E. 615, 616-17 (1890) (dissent).

131. 107 Mass. 419 (1871).

131.1. *Id.* at 420.

> the poor to interfere in the domestic relations of families, and to take children from their parents to be bound out as servants to strangers, is a high and arbitrary, if not dangerous, power, in favor of which nothing should be presumed, and everything required for its lawful exercise must be shown affirmatively.[132]

Apprenticeship cases, once in court, were subject to close scrutiny, and strict adherence to proper procedure was required. In Mississippi, for example, the court read into the statute the requirement of notice to the parent.[133] A few of the courts were no longer willing to accede in the parish practices of the seventeenth century England.

Some of the reported cases are read like pages from Charles Dickens. The 1899 Connecticut case of *Harrison v. Gilbert*[134] is bound up in the law of settlement and removal and thus somewhat recondite,[135] but the facts show the use and abuse of state power. The case concerns two towns and a pauper family. The Hull family lived within the poor law jurisdiction of Wallingford but were the responsibility of Farmington. They had six children but the father, born in an almshouse and formerly a poor law apprentice, was a chronic public charge. The family lived on a farm which was half paid for but they came on hard times and required public aid for medicine. Five of the children were taken and placed in a county home and almshouse. The family went to Massachusetts but returned. Finally Farmington, the jurisdiction with the primary responsibility, sent officials to Wallingford "without any written process" and the officials "forcibly removed Mr. and Mrs. Hull to the Farmington almshouse." The unstated reason for this impressment seems to have been that Farmington was responsible for aid to the Hulls and that it was less costly in the Farmington almshouse than on the family farm in Wallingford. The lawsuit was a habeas corpus to gain freedom for Mr. and Mrs. Hull. It is not clear who the petitioner was, but the issue was whether the Hulls could be released. The court held that, under the statutory provisions, the Farmington officials acted properly and that the Hulls could be kept in the Farmington almshouse against their will.

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132. *Id.* at 425.

133. Howry v. Calloway, 48 Miss. 587 (1873); *see also* Goodchild v. Foster, 51 Mich. 599, 17 N.W. 74 (1883).

134. 71 Conn. 724, 43 A. 190 (1899).

135. *See generally* Mandelker, *The Settlement Requirement in General Assistance,* WASH. U.L.Q. 21 (1956); Mandelker, *Exclusion and Removal Legislation,* WISC. L. REV. 57 (1956).

The court stated: "No constitutional right was violated by the proceedings in controversy. Town paupers belong to a dependent class. The law assigns them a certain status. This entitles them to public aid, and subjects them, in a corresponding degree, to public control."[136] So much for the families' home, their children, and their freedom to come and go as they pleased.

The Kansas case of *Ackley v. Tinker*[137] is similar. Mr. and Mrs. Ackley lived on a small farm in Kansas and until the winter and spring of 1879 made a passable living. In 1879 both Mr. and Mrs. Ackley were ill and their crops failed. The parents and a small son went to the county poorfarm and when Mr. Ackley recovered his health he left wife and son at the poorfarm and found employment, intending to reunite his family as soon as his fortunes were repaired. In April of 1879, the son, age eight, without the knowledge or consent of either of his parents, and without his consent, was apprenticed to Tinker for ten years. Procedurally, an unverified petition was presented to the probate judge by the superintendent of the poorfarm, alleging the son to be a county charge and that Tinker was "willing to take him as an apprentice."[138]

The lawsuit was an appeal from the lower court's denial of the parents' petition of habeas corpus against Tinker. In an opinion written by Justice Brewer, later of the United States Supreme Court, the Kansas court held the apprenticeship immune. The reasoning was as follows: If the county is expending funds for relief whether long term or temporary, the child is a county charge and the superintendent of the poorfarm may apprentice the child summarily without his consent or the knowledge or consent of his parents.[139] The decision did not preclude the resumption of parental custody; and suggested either a suit by the parent for custody, which seems futile if habeas corpus would not lie, or a suit in probate grounded upon changed circumstances to set aside the apprenticeship.[140] Even so, when the case was decided, Tinker had already used the boy's services and supplied his needs for some twenty-nine months. As was said of another of Justice Brewer's poor law cases: "even mighty minds are circumscribed by the spirit of

136. 71 Conn. at 729, 43 A. at 191.
137. 26 Kan. 485 (1881).
138. *Id.* at 486.
139. *Id.* at 487, 489.
140. *Id.* at 487, 489-90.

their time,"[141] and the spirit of the time was firmly fixed. Apprenticeship was a standard method of relieving the poor of the burdens and benefits of their children and if the statutory criteria existed and the minimal procedural niceties followed, the child was bound for his minority.

I have argued above that the statutory power to sever children from their pauper parents began in the poor laws. I have further contended that orphanages and perhaps the houses of refuge were established as alternatives to the poorhouse. The principle that poor people were unfit to raise their children and the mechanism of placing those children out as apprentices continued. The addition of the phrase *parens patriae,* stripped as it was of analysis and true concern, did not change anything for the people and their children;[142] it did perhaps make the process more palatable to the enforcers.[143] The phrase *parens patriae* and the idea that children were being rescued from a downward course combined to detract the attention of the upper classes from inequalities in income and the need for adequate cash assistance for those in need.

B. Reform Schools

The development of these trends was, of course, halting and uneven. Nor did it proceed without some setbacks. In 1870 in Chicago, Michael O'Connell[144] was immured in the state reform school under a statute which allowed the state to arrest and take custody of any youth between six and sixteen who "is a vagrant, or is destitute of proper parental care, or is growing up in mendicancy, ignorance, idleness or

141. Comment on Justice Brewer's opinion in a drought relief case [State *ex rel.* Griffith v. Osaweeke Twp, 14 Kan. 418 (1875)] by the Montana court in a similar case. State *ex rel.* Cryderman v. Weinrich, 54 Mont. 390, 392, 170 P. 942, 945 (1918).

142. Fox, *supra* note 52, at 1207.

143. *See* George Orwell's essay *Politics and the English Language,* IV G. ORWELL, THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 135-37 (1968).

144. People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870). Fox has some valuable background material on the Illinois experience Fox, *supra* note 52, at 1207-21. However, his commitment to delinquency and crime prediction leads him to misunderstand the implications of some of the data. (*See, e.g.,* Fox, *supra* note 52, at 1213 n.133). Fox accuses the Court of "illogic, confusion, and technical incompetence in failing to deal with relevant cases and doctrine." Fox, *supra* note 52, at 1219. I disagree. In addition to my usual demurrer (*supra* notes 52-57), I would like to add that Fox's emphasis at this point on the procedural and technical detracts from the substantive rights of parents and children.

vice."[145] In the parents' collateral attack by habeas corpus the Illinois Supreme Court assumed that because the mittimus did not indicate a crime, young O'Connell had been apprehended and was being held "under the general grant of power, to arrest and confine for misfortune."[146] The issue was whether, in the absence of "gross misconduct or almost total unfitness on the part of the parent,"[147] the child could be committed to a reform school. Justice Thornton summarized the power of a parent to raise and educate his child and concluded that this power and the accompanying duties were of divine origin, "an emanation from God."[148] The Justice also analyzed the legal capacities and incapacities of children and concluded that children were protected by the constitution.[149] Scrutinizing the vague and morally connotative terms of the statute, he noted that "proper parental care" could be subject to varying interpretations: "When we consider the watchful supervision, which is so unremitting over the domestic affairs of others . . . there is not a child in the land who could not be proved . . . to be in this said condition."[150] Ignorance and idleness were not grounds for imprisonment and "vice is a very comprehensive term. Acts, wholly innocent in the estimation of many good men, would according to the code of ethics of others, show frightful depravity."[151]

If the statutory definitions were infirm, the lack of procedural safeguards was hopeless,[152] and arguing that the process was ameliorative and for the child's benefit did not make the reform school any less a prison.[153] The law was held to be unconstitutional and the officials were ordered to discharge Daniel O'Connell.[154]

The court declined to redact the rubric of *parens patriae* stating:

> Such a restraint upon natural liberty is tyranny and oppression. If, without crime, without the conviction of any

145. People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 282 (1870).
146. *Id.* at 283.
147. *Id.* at 284.
148. *Id.* at 285.
149. *Id.* at 286-87. This idea was rediscovered in *In re* Gault, 387 U.S. 1, 27-31 (1967).
150. 55 Ill. at 283-84.
151. *Id.* at 284.
152. *Id.* at 284-87.
153. *Id.* at 287.
154. *Id.* at 286.

> offense, the children of the state are to be thus confined for the "good of society", then society had better be reduced to its original elements, and free government acknowledged a failure.[155]

The O'Connell opinion, after the nineteenth century fashion, overstates its points but it does face the crucial issue of the role of the state in parent-child relationships. Justice Thornton recognized the sham and rhetoric which imbued the process, trimmed out the imposture, and stated the case for freedom and family sovereignty. The opinion could not last in the statist climate of the time. It was not that the reformers loved the family less; it was that they loved their ethnocentric view of family life and the aggrandizement of governmental power more.

However, the O'Connell opinion did not go without praise. Chief Justice Issac Redfield wrote a comment on the *O'Connell* case in the American Law Register.[156] He was as interested as anyone in the extirpation of ignorance, idleness, and vice but was skeptical about the purity of the child saver's motives and the social class bias and religious implications of the statutes. Justice Redfield observed: "[W]e believe the reformers of all ages have been mainly well-intentioned men, who had the highest good of the greatest number deeply at heart." He also stated:

> We have no evil will towards reformers of any class. The love of reform comes always from the best of purposes; from a desire to have others participate in the beauty and excellence which we have found for ourselves. But we cannot disguise the fact, as we look back, across the dark tract of the ages, that reformers, in all times and in all countries, invoke the aid of force and compulsion, in some form. They sincerely believe themselves entitled to exercise the strong arm of the law, in order to bring about some greater

155. *Id.* at 286. Justice Thornton did not cite the *Crouse* case (*supra* note 73), but he rejects its major points. The idea that there is no protection for the family tie is explicitly rejected:

> In our solicitude to form youth for the duties of civil life we should not forget the rights which inher 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. at 284; as is the idea that the state may establish predictive talismens for protective intervention. "Though it is sometimes said, that 'idleness is the parent of vice,' yet the former may exist without the latter." *Id.*

156. 19 AM. L. REG. 372 (1871). The comment is signed I.F.R. and Judge Redfield, an editor, is named author in Milwaukee Industrial School v. Supervisor of Milwaukee County, 40 Wisc. 328, 341 (1876).

> good, or in some shorter period, than could otherwise be accomplished. The time for the resort to the fagot or the gibbet, or the rack or the wheel, has indeed passed away; at which all rejoice. But in doing so, we are in danger of forgetting, that those who invented and exercised these engines of reform were animated by the same spirit as ourselves—the doing of good to those who were too ignorant or too perverse willingly to accept their highest good at our hands. And in all times the subjects of such compulsory reforms are prone to regard the reformers in too offensive a light, and to give them the undeserved name of priests or puritans, or some other offensive epithet.[157]

The reformers, he noted, did not intend for the legislation to be applied to people of the middle and upper classes but in "natural operation", if not design, the statutes "have an ominous squint towards the children of Roman Catholic parents, and of the multitudes of poor emigrants yearly coming to our shores," and the child could be forced into a Protestant institution and "trained in what he regards a heretical and deadly faith."[158]

Even pretermitting the potentially invidious and discriminatory applications of legislation of this type, Justice Redfield was doubtful of the propriety of compulsory uplift. Especially significant was the tender and shifting area between crime and welfare:

> There is a wide field of debatable ground between the dominion of punishment for crime and that of mere improved culture, in which it will be a long time before any very exact definitions of jurisdiction or of the distribution of service between the voluntary and compulsory fields can be satisfactorily fixed.[159]

Justice Redfield was not, in modern terms, a liberal; it would probably be safer to call him a reactionary. His position led to opposition to compulsory education and child labor laws. He might be what is sometimes called a nineteenth century liberal because he wished to reduce or eliminate government power to meddle in the private lives of the citizens. In that respect his views sit comfortably with many people 100 years after the time he wrote.

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157. 19 AM. L. REG. at 374.

158. *Id. See* notes 252-64 *infra.*

159. 19 AM. L. REG. at 357. See on these points F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964).

C. General Statutory Requirements

The protective statutes which allowed the state to sever children from their parents spread, despite the articulate protests of Justice Thornton and Chief Justice Redfield. The legal conclusion in the statute was normally something like dependent and neglected but I am inclined to assume that the statutory term was more often than not synonymous with poor and different. It is significant that there were lawsuits and appeals. Next to nothing appears in the judicial record in the prior 200 years but, between 1875 and 1900, a fairly large body of case law dealing with the protective statutes developed. Some of the decisions were salutary, some were regressive, but there was litigation. Perhaps, on the other hand, the broadening categories were reaching into other social classes. In addition, there had been some progress. The children were undoubtedly better off in reform schools, industrial schools, houses of refuge and orphanages than they would have been in poorhouses or as apprentices.

The Illinois Supreme Court, in one of the first developments, articulated the idea of statutory *parens patriae*. In *Ex Parte Crouse*[160] the Pennsylvania Supreme Court merely dropped the phrase and did not expatiate upon either the origin or extent of the power. After the Illinois Supreme Court voided the earlier effort in *O'Connell v. Turner*,[161] the Illinois legislature created a new scheme to sequester "dependent" girls[162] which required a detailed petition, notice to the parents, and permitted a jury of six, and appointed counsel. The definition, although more precise than the statute at issue in the *O'Connell* case, was vague, moralistic and particularly tailored to poverty.[163] The facts in the first appealed case, *In Re Ferrier*,[164]

160. 4 Whart. 9 (Penn. 1839).

161. 55 Ill. 280 (1870).

162. LAWS OF ILLINOIS, at 379 (1879).

163. *Id.* at 3.

> Every female infant who comes within the following descriptions shall be considered a dependent girl, viz: Every female infant who begs or receives alms while actually selling or pretending to sell any article in public, or who frequents any street, alley or other place for the purpose of begging or receiving alms, or who, having no permanent place of abode, proper parental care or guardianship, or sufficient means of subsistence, or who for other cause is a wanderer through streets and alleys, and in other public places, or who lives with or frequents the company of or consorts with, reputed thieves or other vicious persons, or who is found in a house of ill-fame, or in a poor house.

164. 103 Ill. 367 (1882).

presented circumstances ripe for intercession;[165] an impoverished family, an invalid stepfather, a brutal and perhaps deranged mother and a nine year old girl who was a truant, a runaway and a thief. On appeal from a denial of habeas corpus, following commitment, the court distinguished *O'Connell*,[166] upheld the statute, and affirmed the commitment.[167] The court justified state intervention under the statute by analogy to Story's view of the chancery power, through *parens patriae*, to remove a child from the custody of parents who fail to meet the proper standards, and to appoint a guardian. The power exercised under statute by the county court was of the same nature as the chancery power. The statute contained a procedural mechanism for carrying out the state's interest and there was an institutional repository for the children.[168] The court then discussed the child's right to liberty and decided that the restraints were moderate rather than excessive and, therefore, permissible.[169]

Except for approving the statutory requirement that the parent be served with notice,[170] the court did not discuss the right of the parent to the custody of his children. In the *O'Connell* case by way of contrast the same court had stated:

> 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.
>
> The parent has the right to the care, custody, and assistance of his child. The duty to maintain and protect it, is a principle of a natural law.[171]

Nor was there in *Ferrier* any discussion of the vagueness of the statutory definition. In the *O'Connell* case twelve years earlier, the same court had taken sharp issue with the subjective, moralistic and

165. *Id.* at 368-69.

166. *Id.* at 370-73. *O'Connell* turned on a quasi-criminal statute with less procedural protection and resulting in penal treatment. The composition of the court was the same. [*Compare* 55 Ill. ii (1870) with 103 Ill. iii (1882)]. Justice Thornton who wrote *O'Connell* did not dissent in *Ferrier* but Justice Walker who sat on *O'Connell* dissented in *Ferrier*, 103 Ill. at 374.

167. 103 Ill. at 374.

168. *Id.* at 371-72.

169. *Id.* at 371, 372-73.

170. *Id.* at 373.

171. 55 Ill. at 284.

imprecise terms of that statute.[172] Thus, did the Illinois Supreme Court sound its retreat from the individualistic position it had taken twelve years earlier?

The *Ferrier* case held that the state may interpose in family life when there are constitutional statutes which allow the intervention. *Parens patriae* was used as an analogy to show previous judicial activity and thus to justify present legislative activity. *Ferrier*, thus, did not hold that *parens patriae* provided an independent basis for the government to interpose itself in family life. In subsequent judicial opinions *parens patriae* became a slogan or a cliche to be chanted instead of a guide to the Constitution, the statute, and the facts. In most poverty or dependency-neglect cases the facts were ripe for intercession of some kind. The judges had neither the power to order, not the inclination to suggest an income maintenance system; and, therefore, the state was allowed to proceed in established channels without considering alternatives. The *O'Connell* case points to one of the paths not taken in American history. The Illinois Supreme Court, by striking down the legislature's idea that poor children could be taken from their parents, gave the onus to the legislature to develop an alternative. The legislature came back with more of the same and the court receded. The time for adequate in-home relief had not yet arrived. Thus the state continued, under a new guise, and with judicial approval, the Elizabethan policy of severing poor parents from their children.

The cases which ended with a reported opinion, and I believe these were a minute percentage, are distressingly similar. Except in a few cases[173] the protective statutes were upheld. The *parens patriae*

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172. *Id.* at 283-84.

> Vice is a very comprehensive term. Acts, wholly innocent in the estimation of many good men, would, according to the code of ethics of others, show fearful depravity. What is the standard to be? What extent of enlightenment, what amount of industry, what degree of virtue, will save from the threatened imprisonment?

The *Ferrier* result is still the law: if there is a minimum of procedural fairness, the law does not inquire into the substantive standard. *See* State v. Mattiello, 4 Conn. Cir. 55, 225 A.2d 507 (App. Div. 1966), *cert denied*, 154 Conn. 737, 225 A.2d 201 (1966). *Prob. juris. noted*, 391 U.S. 963 (1968), *cert denied* (for want of a properly presented federal question), 395 U.S. 209 (1969), (vagueness attack on juvenile delinquency statute rejected). *See generally*, Comment, *Statutory Vagueness in Juvenile Law: The Supreme Court and Matiello v. Connecticut*, 118 U. PA. L. REV. 143 (1969).

173. People *ex rel.* O'Connell v. Turner, 55 Ill. 280; State *ex rel.* Cunningham v. Ray, 63 N.H. 406 (1885).

approach appealed to the judicial and social conservatism of the age. In a time of limited government the idea of state interference in family life was viewed with skepticism. A parent, the state courts held, had some sort of variously stated right to the custody of his children[174] and the child had some right to liberty.[175] However, the state had a protective power either by analogy to the chancery power of *parens patriae*[176] or inherent in its sovereignty[177] or by a simple recitation that the state was *parens patriae*.[178] Statutes which carried out this state interest were valid; and because the institutions were schools and not prisons, no more liberty than necessary was taken when the children were placed there.[179] Nor could the parent complain: "when a parent is unable or unwilling to provide for his child, and leaves the child dependent on the charity of the state, we are at a loss to comprehend the right of the parent to object to the form which the state gives to its charity, with intelligent regard for the welfare of the child."[180] Even so, the courts, at

174. Kennedy v. Meara, 127 Ga. 68, 78, 56 S.E. 243 (1906) (property right); Van Walters v. Board of Children's Guardians, 132 Ind. 567, 569, 32 N.E. 568 (natural right) (1892); Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 341 (natural and sacred relations) (1876). The observer will note that the vocabulary of the law could only with difficulty be made to cover this relationship and even then the concepts are lacking in form and substance. Analogies such as agent and trustee were borrowed from other legal relationships; but when examined it appears that the similarities are few and the analogy becomes a tenuous one at best. Frequently an analogy or simile is redacted without examination and applied without thought. Thus, the quality of understanding and conceptualization is destroyed for such usage distorts the object it is supposed to describe. Platitudes and catch phrases, for example, "natural right", sound pompous but are no help in deciding concrete cases. Because there are no tools for analysis the reasoning is frequently conclusory and subjective; and the underlying interests of all the parties are ignored. The clearest thinking on these issues I have seen is in a Children's Bureau pamphlet. W. SHELLDON, STANDARDS FOR JUVENILE AND FAMILY COURTS (1966).

175. *In re* Ferrier, 103 Ill. 367, 372-73 (1882).

176. *Id.* at 371-73.

177. "It has been for many centuries theoretically true that the State, through its appropriate organs, is the guardian of the children within its borders. The constitution of a State is always presumed to be framed by organized society governed by settled principles." Van Walters v. Board of Children's Guardians, 132 Ind. 567, 569, 32 N.E. 568 (1892).

178. Whalen v. Olmstead, 61 Conn. 263, 23 A. 964 (1891); *In re* Knowack, 158 N.Y. 482, 486, 53 N.E. 676 (1899); Cincinnati House of Refuge v. Ryan, 37 Ohio 197, 204 (1881); Miwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 338 (1876).

179. *In re* Ferrier, 103 Ill. 367, 371 (1882); Cincinnati House of Refuge v. Ryan, 37 Ohio 197, 203 (1881); Prescott v. State, 19 Ohio 184, 188 (1869), *cf.* Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 337 (1876).

180. Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 337 (1876).

the peril of reversal, required the government to follow the statute with care.[181]

The courts realized that they were dealing with statutes which descended from the poor laws. The judges, however, were not sure whether the legislation was criminal or civil.[182] Statutes depriving pauper parents of their children were old and familiar,[183] but these statutes which allowed the state to intercalate on behalf of endangered children and to place the children in an institution were new: the schemes were protective of the child and humane in application.[184] In

181. Hibbard v. Bridges, 76 Maine 324 (1884); Goodchild v. Foster, 51 Mich. 599, 17 N.W. 74 (1883); People *ex rel.* Van Riper v. New York Catholic Protectory, 106 N.Y. 604, 13 N.E. 435 (1887). In the *Van Riper* case Andrews states the case for liberty and revealed his distrust of functionaries.

> The information in these cases of summary conviction ought to be precise and show a case clearly within the statute. It is the foundation of the jurisdiction of the justice, and when it omits an essential ingredient or circumstance to bring the case under the statute, and the defect is not supplied by the evidence, the conviction is bad. It is not consistent with the proper security of personal liberty to indulge, in cases of summary convictions, in latitude or liberality of intendment to support the proceedings. They are conducted contrary to the course of the common law, without the intervention of a jury, usually before magistrates of limited experience, and are often attended with the gravest consequences.

106 N.Y. at 609-10.

182. In Reynolds v. Howe, 51 Conn. 472, 477 (1884) the court said: "The proceeding under the statute, for commitals by a justice of the peace to the State Reform School, is not a criminal one, since the matter presented by the complaint is not a criminal one; and clearly it is not a civil one." *See also* People *ex rel.* Van Riper v. New York Catholic Protectory, 106 N.Y. 604, 13 N.E. 435 (1887) (quasi-criminal); *In re* Knowack, 158 N.Y. 482, 486 (1889) (noncriminal) although the statutes were part of the penal code.

183. Reynolds v. Howe, 51 Conn. 472, 478 (1884); "Statutes like this have been in existence for the past two hundred years, and it is very late to call their constitutionality in question." In *In re* Kelley, 152 Mass. 432, 25 N.E. 615 (1890) the dissent stated:

> This right of the authorities to retain control of an apprenticed child until he arrives at the age of twenty-one years is not affected by the possibility that his father may soon become of ample ability to support him. Similar provisions of law have been in existence from the earliest times. They have often been approved by the courts, and, so far as we are aware, have never been questioned.

Id. at 438, 25 N.E. at 617.

184. *In re* Knowack, 158 N.Y. 482, 486-87, 53 N.E. 676 (1899); Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328 (1876), "Such a statute, so framed and so guarded, is not an arbitrary assumption of meddlesome authority, outside of the scope of the proper function of legislation; but is evidence that public charity is here losing the offensive and oppressing character sometimes attributed to it." 40 Wisc. at 340. The North Dakota court catches this idea and the transitional nature of the residential institutions when it answers the involuntary servitude objection

addition, child saving work was an outlet for the better instincts of the weaker sex. The Wisconsin court commented on the legislation before it:

> [N]o industrial school can be without the sex which is by nature best qualified for the nurture of the children. Such charities are best committed to women, in whole or in part. And in such lies the truest and noblest scope for the public activities of women, in the time which they can spare from their primary domestic duties.[185]

The late nineteenth century transition from pauper control to something resembling social welfare can be traced chronologically in the Massachusetts cases.[186] Massachusetts care of children began with the overseer of the poor, changed to a pleasantly named institution, and finally we find the chance of new parents in a presumably better home. The terminology at least became more modern and humane and the children were probably better treated. The first case,[187] in 1886, involved a "neglected" (pauper) child who had been remanded to the custody of the overseers of the poor. Four years later in the second case, neglected children were placed in the custody of the State Board of Lunacy and Charity.[188] The third case,[189] in 1893, was against the

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by saying: "We cannot understand that the detention of the child at one of these schools should be considered as imprisonment, any more than its detention in the poorhouse." *In re* Kol., 10 N.D. 493, 88 N.W. 273, 277 (1901). Once the legitimacy of the poorhouse is granted, who could argue to the contrary?

185. Milwaukee Industrial School v. Superviors of Milwaukee County, 40 Wisc. 328, 340 (1876). *See* J. ADAMS, THE SUBJECTIVE NECESSITY OF SETTLEMENTS, CH. 6 OF TWENTY YEARS AT HULL HOUSE (1915); C. LASCH, THE NEW RADICALISM IN AMERICA, 3-37 (1965); A. PLATT, THE CHILD SAVERS, 75-100 (1969) [hereinafter cited as PLATT]. For an example of the "child savers" in action, *see* Cincinnati House of Refuge v. Ryan, 37 Ohio, 197, 197-198 (1881). On women's rights in the midwest *see In re* Bradwell, 55 Ill. 535, 542 (1869).

186. The Massachusetts experience, if somewhat of a model, was not repeated elsewhere. In Iowa for example, as late as 1909, we find overseers of the poor controlling neglect and dependency matters. *See In re* East, 143 Iowa 370, 122 N.W. 153 (1909). In Iowa, in fact, the official who controls county relief is still called the overseer of the poor. IOWA CODE § 252.26 (1966). In Pennsylvania, as late as the 1890's the overseers of the poor were apprenticing children directly to masters. *See* Commonwealth v. Coyle, 160 Pa. 36, 28 A. 576, 28 A. 634 (1894), a grisly case, where a seven year old pauper child was bound, despite a warning, to a cruel master who killed him of starvation and overwork in a few months. The case is a criminal prosecution of the overseer who indentured the child and who later visited the "home" and reported that the boy was not maltreated.

187. Farnham v. Pierce, 141 Mass. 203 (1886).

188. *In re* Kelley, 152 Mass. 432, 25 N.E. 615 (1890).

189. *In re* Wares, 161 Mass. 70, 36 N.E. 586 (1894).

Commissioners of Public Institutions of Boston. The last case in the series was a contest between the pauper mother of an illegitimate child and a couple who desired to adopt a child.[190] Thus, the legislature had at the very minimum euphemized the vocabulary, established new administrators, and changed the disposition, presumably all for the better.[191] But along with amelioration came the aggrandizement of state power. In the first two cases the parent was allowed to contest the commitment by habeas corpus;[192] in the third it was held that the cases could not be reopened after full hearing because of the need for certainty of relationships and discretion in placement.[193] Finally, in *Purinton v. Jamrock,* the discretion of the state officials was protected against both the original parents and potential adoptive parents.[194] Thus, as the system became theoretically more humane, state power over people's lives burgeoned.[195]

There were, among the appealed cases, only a few crimes.[196] Most of the litigated commitments seem to have been for a status and because the reported cases are by and large appeals from procedural

190. Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 902 (edited) (1907).

191. The skeptic might say with Juliet "What's in a name; That which we call a rose by any other name would smell as sweet." See ACTS OF THE 33 G.A. Ch. 29 § 9 (Iowa 1909) changing the name of the poorhouse of the county home.

192. Farnham v. Pierce, 141 Mass. 203 (1886); *In re* Kelley, 152 Mass. 432, 25 N.E. 615 (1890). In the latter case three judges, including Holmes, dissented. *(Id.* at 436-40).

193. *In re* Wares, 161 Mass. 70, 72, 75, 36 N.E. 586 (1894).

194. Purington v. Jamrock, 195 Mass. 187, 201-02, 80 N.E. 802 (edited) (1907). The case is a miscarriage of justice. The mother acceded in poor relief for her child and was held to have forfeited her right to prevent adoption or control the child's religious education. 195 Mass. at 198-200. This was contrary to statute, MASS. ACTS AND RESOLVES, Ch. 464 (1905). The foster parent's petition for adoption was granted but subject to the uncontrolled discretionary custody of the State Board 195 Mass. at 197, 202. Thus, there is no real protection for anyone but the government and the result makes a mockery of rhetorical adherence to the best interest rule and the idea that established relationships should be maintained. *Compare* Dumain v. Gwynne, 92 Mass. 270 (1865). Perhaps the state is "the ultimate parent" as Judge Mack said. Mack, *The Juvenile Court,* 23 HARV. L. REV. 104 (1909).

195. *See also In re* Knowack, 158 N.Y. 482 (1899); *In re* Kol., 10 N.D. 493, 88 N.W. 273 (1901); Commonwealth v. St. Johns Orphan Asylum, 9 Phil. 571, (Pa. Dist. 1872); McFall v. Simmons, 12 S.D. 562, 81 N.W. 898 (1900); For the tenacious habits of the institutions. As is often the case, the idea of administrative discretion was used to smooth over a potential for arbitrary acts and to avoid facing the real issue. Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 339 (1876); Whalen v. Olmstead, 61 Conn. 263, 23 A. 964 (1891); *cf.* K. DAVIS, DISCRETIONARY JUSTICE 142-61 (1969); *In re* Gault, 387 U.S. 1, 15 (1967).

196. *See* State v. Ray, 63 N.H. 406 (1885) (burglary); Prescott v. State, 19 Ohio 184 (1869) (arson).

points and collateral attacks, the facts are subsumed into allegations framed from statutory categories. Nevertheless, some tentative conclusions about what society was doing can be garnered from allegations like "exposed and neglected", and "in a reputed house of assignation and prostitution",[197] and "in the company of Mary Ryan who is a reputed prostitute."[198] Others are not so clear. For example, it is impossible to tell for sure what was wrong from "in danger of being brought up, and was being brought up, to lead an idle and vicious life, against the peace, of evil example and contrary to the statute."[199] In North Dakota "the mother, Ida Cole, by reason of her violent temper, immoral habits, language, and associations, is an unfit and improper person to have the care and custody of said minor children,"[200] was enough of an allegation to remove the children. In Georgia an impoverished mother with "vicious habits and guilt of habitual drunkenness"[201] also lost her children. Many, if not most of the institutional commitments under the protective statutes were for simple poverty.[202] Others were for "poverty plus" such as begging,[203] poverty destitution and neglect,[204] and dependency.[205] And in some cases it is impossible to tell from the decision why the child was separated from his parents.[206] Even so, it is evident from the decisions that small children were being taken from their parents not because there was any breach of the criminal law by either the parents or the children and not because of any intentional failing of the parents, but simply because the parents were poor and behaved as poor people always have. In addition

197. People v. Giles, 152 N.Y. 136 (1897); People *ex rel.* Van Riper v. New York Catholic Protectory, 106 N.Y. 604, 610 (1887).

198. People *ex rel.* Van Riper v. New York Catholic Protectory, 106 N.Y. 604, 13 N.E. 435 (1887). *See also* Nunn v. State, 55 Ind. App. 37, 103 N.E. 439 (1913).

199. Reynolds v. Howe, 51 Conn. 472, 472-73 (1884).

200. *In re* Kol., 10 N.D. 493, 88 N.W. 273 (1901) (note the discrepancy in names.)

201. Kennedy v. Meara, 127 Ga. 68, 75, 56 S.E. 243 (Habeas corpus for release denying the evident allegation that led to commitment).

202. Whalen v. Olmstead, 61 Conn. 263, 23 A. 964 (1891); Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 329 (1876).

203. People *ex rel.* Van Heck v. New York Catholic Protectory, 101 N.Y. 195, 196, 4 N.E. 177 (1886).

204. *In re* Knowack, 158 N.Y. 482, 484, 53 N.E.676 (1899).

205. County of McClean v. Humphries, 104 Ill. 378, 381 (1882). Dependent seems to have meant dependent upon the public for support.

206. *See, e.g.*, People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 283 (1870) (Misfortune); *In re* Ferrier, 103 Ill. 367, 368-69 (1882) is one of the few cases where the facts upon which the separation was based are set out. *See also* People v. Giles, 152 N.Y. 136, 46 N.E. 326 (1897).

it is also evident that, once made, the institutional commitments were potentially almost permanent, and difficult to attack.[207]

D. Procedural Rights

The procedural rights of the parents and children varied widely. Apprenticeships were frequently established summarily by a lower level administrative officer directly connected with pauper relief.[208] The questions were whether the power to commit to an institution was judicial;[209] whether notice to the parents was necessary;[210] and what kind of a hearing was required.[211] Normally a commitment was affirmed if it followed the statute.[212] A related issue was the power of a parent to attack an existing commitment by habeas corpus or other means.[213]

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207. Some of this was due to the tenaciousness of the institutions. See cases cited *supra* note 195; the effect of an intervening adoption or apprenticeship was also considered. *Cf. In re* Knowack, 158 N.Y. 482, 488, 53 N.E. 676 (1899); Kennedy v. Meara, 127 Ga. 68, 78-79, 56 S.E. 243 (1906) (discussion of adoption); People *ex rel.* Splain v. New York Juvenile Asylum, 2 T&C 475 (N.Y.S.C. 1874); *In re* Kelley, 152 Mass. 432, 36 N.E. 586 (1894), dissent at 438 (apprenticeship). The case of Ackley v. Tinker, 26 Kan. 485 (1881), where a temporarily poor child was apprenticed out of the poorhouse by the superintendent is also in point here although the poorhouse is not, in name, one of the institutions we are here considering. Perhaps the courts reasoned that if it was easy to get the children out of the institutions, then many parents would put their children in and thereby escape the obligations of parenthood. See County of Cook v. Industrial School for Girls, 125 Ill. 540, 572 (1888); *In re* Knowack, 158 N.Y. 482, 492-93, 53 N.E. 676 (1899).

208. Ackley v. Tinker, 26 Kan. 485 (1881); Farnam v. Pierce, 141 Mass. 203 (1886).

209. Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 334 (1876).

210. Goodchild v. Foster, 51 Mich. 599, 17 N.W. 74 (1883); Cincinnati House of Refuge v. Ryan, 37 Ohio 197, 202 (1881); Farnham v. Pierce, 141 Mass. 203, 205-06 (1886); Reynolds v. Howe, 51 Conn. 472, 477 (1884); People *ex rel.* Van Heck v. New York Catholic Protectory, 101 N.Y. 195 4 N.E. 177 (1886).

211. Wilkinson's Board of Children's Guardians, 158 Ind. 1, 8-9 (1902); Cincinnati House of Refuge v. Ryan, 37 Ohio 197, 198 (1881); People v. Giles, 152 N.Y. 136, 139-40, 46 N.E. 326 (1897).

212. There was of course some creative interaction between the courts and the legislatures. After the *O'Connell* case the next Illinois venture required a petition, notice to the parents, appointed counsel and a jury trial in a court of record before an effective commitment could be adjudicated. *In re* Ferrier, 103 Ill. 367 (1882). The New York cases also demonstrate a dialogue between the courts and the legislature. The courts followed the statutes carefully but could strain them. *See* (in reverse chronological order) People *ex rel.* Van Riper v. New York Catholic Protectory, 106 N.Y. 604 (1887) (form of complaint); Carpenter v. People *ex rel.* Brown 123 N.Y. 640, 25 N.E. 1044 (1890) (notice); People v. Giles, 152 N.Y. 136, 46 N.E. 326 (1897) (record of proceedings).

213. Kennedy v. Meara, 127 Ga. 68, 80-81, 56 S.E. 243 (1906); Hibbard v. Bridges, 76 Maine 324 (1884); Roth and Boyle v. House of Refuge, 31 Md. 329 (1869); *In re*

The safest generalizations concerning the procedural decisions are that the result depended on the statutes and the cases are sometimes wildly divergent.[214]

The parents' interest was, in some measure, recognized everywhere; and a child could not be taken from his parent's home and institutionalized, apprenticed or adopted without some opportunity to contest the proceeding by notice, hearing or collateral attack. These protections may have been more theoretical than actual. Procedural guarantees are of no use if the substantive standard is open ended, and as may be assumed, the parents by definition lacked the intellectual and economic resources necessary to contest the issue. The lack of an intelligible substantive standard and the existence of only the flimsiest procedural protections reveals an unspoken assumption that the state had an equal if not superior interest in the children and the burden was on the parents to show to the contrary. The procedural laxity allowed the state to assume its conclusion. The legal rubric was that the parent had violated his duty to the child and, therefore, had no rights to his custody.[215] In any event, the absence of notice to the parent[216] or the parents' absence from the hearing[217] guaranteed the result. What

Wares, 161 Mass. 70, 36 N.E. 586 (1894); *In re* Knowack, 158 N.Y. 482, 53 N.E. 676 (1899); Cincinnati House of Refuge v. Ryan, 37 Ohio 197 (1881). Aside from parental rights, government economy was a factor in allowing release.

> The duty of the state is discharged when it affords necessary relief to those whose support is cast upon the public, and it is plain that it should be given for such a length of time only as necessity demands. There is nothing more to be deprecated than encouragement to pauperism, or the extension of public aid to those who are able to support themselves, or the keeping of inmates in charitable institutions, whether children or adults, beyond the time that they can be self-supporting, or when they could be safely allowed to shift for themselves. Nor are institutions of charity subserving their proper function when they relieve friends or relatives of indigent persons, able and bound to maintain them, from the burden of their support.

In re Knowack, 158 N.Y. at 492-93.

214. *See, e.g.*, Kennedy v. Meara, 127 Ga. 68, 56 S.E. 243 (1906); McFall v. Simmons, 12 S.D. 562, 81 N.W. 898 (1900); *In re* Knowack, 158 N.Y. 482, 53 N.E. 676 (1899) as progressive. Contrast the wooden and unreconstructed decision in State *ex rel.* Bethell v. Kilvington, 100 Tenn. 227, 45 S.W. 433 (1898).

215. Reynolds v. Howe, 51 Conn. 422, 478 (1884); People *ex rel.* Splain v. New York Juvenile Asylum, 2 T&C 475 (N.Y. S. Ct. 1874); Home of Refuge v. Ryan, 37 Ohio 197 (1881).

216. In the *Ryan* case the three children were notified of the pendency of the proceeding. However they were all under six. 37 Ohio at 198. *See also* Reynolds v. Howe, 51 Conn. at 477.

217. 37 Ohio at 198.

interest could the parent have in his children if he did not have an opportunity to contest their institutilization?[218] The unspoken assumption may have been that the state was all seeing, all knowing, and of ultimate benevolence and would protect any legally cognizable interest. That assumption is far from true; and skinflinted economy and meanness, rather than disinterested benevolence, seem to have activated poor law administration.[219] Rights are concrete only when there are procedures to protect them, and when there are no procedural protections, it is not far from wrong to say that there are no rights.[220]

PUBLIC VS. PRIVATE CHILD CUSTODY LAW

It is useful at this point to compare the public and the private law of child custody. First of all there were not many cases on the issue of child custody. Divorces were few and the fault concept was in full force.[221] There was some appellate law concerning the issue of child custody between a parent and a relative who was not a parent.[222] The rules are easily stated. A parent had some sort of presumptive right,[223] but an unfit natural parent might lose custody of his child,[224] and in all cases even where the parent was "fit" the "paramount consideration is, what will promote the welfare of the child?"[225]

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218. In Ohio the parent was not precluded from collateral attack. *Id.*

219. *See* the removal cases. Harrison v. Gilbert, 71 Conn. 724, 43 A. 190 (1899). *See* Wood v. Boone County, 153 Iowa 92, 133 N.W. 377 (1911); Cerro Gordo County v. Boone County, 152 Iowa 692, 133 N.W. 132 (1911); Cass County v. Audubon County, 221 Iowa 1037, 266 N.W. 293 (1936); Thiede v. Town of Scandin Valley, 217 Minn. 218, 14 N.W.2d 400 (1944); Settlement of Cegan, 212 Minn. 75, 2 N.W.2d 433 (1941). *See* note 135 *supra*. *See* Aug. 1969 CIVIL LIBERTIES at 6, for a report of the continuing vitality of the idea that the poor may be sent back where they came from.

220. "The history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943).

221. *See, e.g.*, W. ____ v. W ____, 141 Mass. 495 (1886) (Holmes J).

222. Chapsky v. Wood, 26 Kan. 650 (1881); Prime v. Foote, 63 N.H. 52 (1884). Charles Doe was Chief Justice and sat on both this case and State v. Ray, 63 N.H. 604 (1885).

223. Stapleton v. Poynter, 111 Ky. 264, 62 S.W. 730 (1901); *see* tenBroek, *Family Law, supra* note 32, I. at 299-300, 313-16; II at 915-27 (1964).

224. Prime v. Foote, 63 N.H. 52 (1884) (the court cited the English chancery cases for this proposition).

225. Chapsky v. Wood, 26 Kans. 650, 654, 656 (1881). Justice Brewer cited no cases in his opinion, not even for the proposition that a drunken or immoral parent will lose the custody of his child. *Id.* at 653. The *Chapsky* case is the subject of extended discussion in SAYRE, AWARDING CUSTODY OF CHILDREN, SELECTED ESSAYS ON FAMILY LAW, 588, 592-601 (1950).

Pomeroy discussed the private law of child custody in his treatise on equity,[226] and the differences between the public and private law are immediately apparent. First, almost all the private law cases concerned the wealthy and involved property.[227]

The question was; when may the parent be displaced in custody? As Pomeroy propounded the law, the similarity to the boiler plate in a public law case is noticeable:

> The court of equity will also exercise its jurisdiction, in a proper case and to promote the highest welfare of the infant, where there is already a guardian, natural or legal, by controlling the person of the infant, and by removing it personally from the custody of its natural or legal guardian, even from the custody of its own parents. By the common law, as well as by the law of nature, the father is the natural guardian of his infant children. It is not only the father's right but his imperative *duty* to have custody of the persons of his infant children and to educate and train them so as to promote their future well-being as members of society. The equitable jurisdiction over the persons of infants is based upon this parental duty, and is an indirect means of enforcing it by furnishing a remedy for its violation. The jurisdiction is a delicate one; it rests in the highest degree upon the enlightened discretion of the court; and will only be exercised when plainly demanded as the means of securing the infant's present and future well-being. It is well settled, therefore, that a court of equity may interfere on behalf of infants and remove them from the custody and control of their father, or mother, whenever the habits, practices, instruction, or example of the parent, exerting a personal influence on the infants, tend to corrupt their morals and undermine their principles; or when the parent is neglecting their education suitable for their condition in life; or is endangering their property; or is guilty of ill-treatment or cruelty towards them.[228]

Pomeroy disclaimed an intention to denote the fact situations which would allow the court to take a child from the parent and cited the rule "that the exercise of the jurisdiction depends on the sound and enlightened discretion of the court, and has for its sole object the highest well being of the infant."[229] The "best interest" rule cannot be

226. POMEROY, III POMEROY, EQUITY JURISPRUDENCE §§ 1303-1310 (1883). *See also* notes 91, 93 *supra.*

227. *Id.* § 1305 at 328.

228. *Id.* § 1307. The chancery cases are cited in support of this statement.

229. *Id.* at 330 n.1.

commended for precision and predictability, but when one gets down to cases the difference between private and public child custody cases is immediately apparent.

"Mere insolvency of the father" Pomeroy stated, "is not sufficient ground for interference" with the custody of the parent.[230] The Nebraska court went further:

> The court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, —so long as the latter discharge their duties to the best of their ability,—and give them to strangers, because such strangers may be better able to provide what is already well provided. If that were the law it would be soon changed,—by revolution, if necessary.[231]

It is impossible to reconcile these statements about the private law of child custody with the statutes which allowed children to be taken from their parents because of poverty,[232] and the fact that during the nineteenth century children, in wholesale lots, were separated from their parents because of their parents' poverty.[233] There had been only a

230. *Id.*

231. Norval v. Zinsmaster, 57 Neb. 158, 161-62, 77 N.W. 373, 374 (1898). *See also* Stapleton v. Poynter, 111 Ky. 264, 62 S.W. 730 (1901).

232. *See, e.g.*, The language of the first Illinois juvenile court statute "any child who for any reason is destitute or homeless or abandoned; or dependent on the public for support" could be committed for his minority to an institution which could indenture the child as an apprentice or agree to formal adoption. LAWS OF ILLINOIS, 41 G.A. JUVENILE COURTS, §§ 1, 7-8 at 131 (1899).

233. Figures are hard to come by, but I submit that the textual statement is confirmed by the following sources. 2 G. ABBOTT, THE CHILD AND THE STATE 11, 133-63, 347-49, 374 (1938); H. FOLKS, DESTITUTE, NEGLECTED AND DELINQUENT CHILDREN, 72 (31,799 children in New York City controlled by private organizations) (1900); M. JERIGAN, THE LABORING AND DEPENDENT CLASSES IN COLONIAL AMERICA, 166 (1960); R. PICKETT, HOUSE OF REFUGE (entire) (1969); H. THURSTON, THE DEPENDENT CHILD, 92-160 (1930); tenBroek, *Family Law, supra* note 32, I. at 958, 972 n.695 (1964). The institutions and officials were local, the procedures were informal and evidently few records were kept. The first systematic attempt to gather data seems to be H. JETER, THE CHICAGO JUVENILE COURT (1920 Children's Bureau #104). Between 1913 and 1917 about 200 children were indentured each year in Wisconsin. E. LUNDBERG, CHILDREN INDENTURED BY THE WISCONSIN STATE PULBIC SCHOOL (1918 CB #150); 1 G. ABBOTT, THE CHILD AND THE STATE, 232-34 (1938). In 1938 Grace Abbott stated "the practice of taking children from their parents solely on the ground of poverty is rapidly

few protests. In the *O'Connell* case the Illinois Supreme Court had said "such a restraint upon natural liberty is tyranny and oppression. If, without crime, without the conviction of any offense, the children of the State are to be thus confined for the 'good of society', then society had better be reduced to its original elements, and free government acknowledged a failure."[234] But by and large the dual system of family law was accepted without question and even with alacrity. In 1898, the Charter of the Michigan Children's Aid Society proclaimed the mission of the organization to "seek homeless, neglected and destitute children and to become their friend and protector, to find homes for them in well to do families and to place them there wisely with the least possible delay."[235]

Poor people were excluded from the idea that parents should be allowed to raise their own children. I believe the result can be explained as a deduction from the prevailing ideology. As Handler and Goodstein point out,[236] the biological determinism and Social Darwinism which typified dominant iedology in this period, compelled a distinction between the merely poor and paupers. The latter group was composed of moral degenerates who, like the diseased, should be isolated for the

disappearing," because of the availability of home aid. 2 THE CHILD AND THE STATE 167 (1938). But in the 1950's, *see* Savery v. Eddy, 242 Iowa 822, 45 N.W.2d 872 (1951), rehearing, 48 N.W. 2d 230 (1951); in the 1960's large numbers of children were separated from impoverished parents. *See* JACKSON, FACELESS FAMILIES AND FORLORN CHILDREN (Study of institutional placements in the District of Columbia, in 1962) at 94, 121-231 of *Hearing on § 1817 before the Public Health Education, Welfare and Safety Subcommittee of the Senate Committee on the District of Columbia,* 87th Cong. 1st Sess. (1965). The Michigan statute which allows the state to take custody of impoverished and illegitimate children was recently construed. MICHIGAN COMPILED LAWS ANN. § 712A.2(b)(2) *construed in* Franzel v. Michigan State Dept. of Social Welfare, 180 N.W.2d 375, 377 (Ct. App. 1970).

234. People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 286 (1870); *see also* Verser v. Ford, 31 Ark. 27, 29-30 (1881) (private custody case), where it is stated:

> It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone.

235. *Quoted* W. DOWNS, MICHIGAN JUVENILE COURT LAW AND PRACTICE § 5.85 (1963).

236. Handler and Goodstein, *The Legislative Development of Public Assistance,* 1968 WIS. L. REV. 414, 416-20.

protection of the rest;[237] and no usage was too bad for the paupers. As the Connecticut court said in 1883:

> Next to intemperance, and generally accompanying it, a habit of idleness helps to fill our almshouses with paupers and our jails with criminals. By means of these two causes the burden is imposed on the public of maintaining a worthless class of humanity as well as the great expense of our criminal courts.[238]

The reformers did feel, however, that the children could be salvaged; and if they were removed from corruption and temptation and placed in a salutary environment, there was a good chance of rehabilitation.[239] Thus, based on the distinction between poverty and pauperism, official thought acceded in the proposition, carried over from the Elizabethan poor laws, that paupers had no cognizable rights appertaining to the custody of their children, and the dual system of law endured.[240] If a normal person was merely insolvent, he was only poor and unfortunate; there was no cause to interrupt his relationship with his children. But a pauper was, perforce, a degenerate and could not be heard to protest against the government forbidding him to infect the rising generation.

In addition the protective statutes were available to protect and vindicate conventional middle class views; that is, people who were different could be deprived of their children. Demon Rum was thought by the dominant classes to be a major cause of the problems of the lower classes.[241] The use of spirits by parents contributed, in the eyes of the reformers, to neglect, delinquency, and pauperism;[242] and it should not be too much of a surprise to find that children who frequented saloons could be institutionalized.[243]

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237. *Cf.* New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837) (pauperism is "moral pestilence" subject to quarantine).

238. Reynolds v. Howe, 51 Conn. 472, 477 (1883).

239. *Supra,* note 236 at 422-27.

240. The Wisconsin court said "it is difficult to comprehend the right of a parent to complain, that the discharge by the state of his own duty to his child, which he has wholly failed to perform, is an imprisonment of the child as against his parental right in it." Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wisc. 328, 338 (1876). *Compare* Wisconsin Industrial School for Girls v. Clark County, 103 Wisc. 651, 79 N.W. 422 (1899).

241. *See generally* J. GUSFIELD, SYMBOLIC CRUSADE (1963).

242. R. PICKETT, *supra* note 58 at 103-04. This is one of many interesting parallels between the temperance movement and juvenile reform or child saving movement. *Compare* J. GUSFIELD, SYMBOLIC CRUSADE (1963) with R. PICKETT, *supra* note 58.

243. *See, e.g.,* MICHIGAN PUBLIC ACTS OF 1889, No. 189 P. 219, ILL-TREATED CHILDREN §§ 12 First, 14.

The morality of the dominant classes was also a part of the child protection package. Most of the statutes were, and are, omnibus compendiums of opprobrius epithets.[244] In several cases majority definitions of morality were used to institutionalize children. In New York a girl who was allegedly "found in the company of Mary Ryan, who is a reputed prostitute" was immured, for a time, in the Protectory;[245] and two small children who were allegedly "found improperly exposed and neglected by their parents, and in a reputed house of assignation and prostitution and without proper guardianship" were committed to a missionary order.[246] Immoral parents not only lost custody of their children, but they were also denied the chance to "rehabilitate" themselves. Thus, an adultress and petty thief lost her children, was forbidden from visiting them, and evidently was not even told where they were.[247] The child savers were interested in rescuing the children, not in redeeming parents; and neither sparing the public pocketbook nor improving the parents was deemed of such importance.[248] The state's role as guardian of endangered children thus came to encompass the idea that the state

244. *See* the collection of current definitions, Simpson, *The Unfit Parent*, 39 U. DET. L.J. 347, 366-67 (1962):

> Typical provisions are: abandonment; lack of proper parental care through the fault of the parent; neglect or refusal to provide proper or necessary subsistence, education, or medical care; refusal or neglect to provide special care necessary for a particular mental or physical condition of the child; disreputable lodging, especially a house of prostitution; association of the child with vagrant, vicious, and immoral persons; permission for the child to engage in an occupation dangerous to life and limb or one that is illegal or injurious to health or morals of the child or others; home unfit because of neglect, cruelty, or depravity of the parents; violation of child labor laws; violation of school attendance laws; subjection of the child to cruel and inhuman treatment; dependency of the child on the public for support; custody in controversy; habitual begging and receiving alms; giving entertainments, playing musical instruments on the streets or in public places for pay; home unsuitable for reasons other than poverty; parents habitually drunken; parents generally unfit; and neglect.

245. People *ex rel.* Van Riper v. New York Catholic Protectory, 106 N.Y. 604, 610 13 N.E. 435, 437 (1887).

246. People v. Giles, 152 N.Y. 136, 138, 46 N.E. 326 (1897); *see also* Nunn v. State, 55 Ind. App. 37, 103 N.E. 439 (1913) (crime of contributing to neglect on similar facts).

247. *In re* Diss Debar, 3 N.Y.S. 667 (1889); *see also* the quotation from Dunmain v. Gwynne, *supra* note 124.

248. FOLKS, *supra* note 47, at 101-102. The private institutions received a per capita maintenance from the state and volume was necessary to hold down unit costs. *Id.* at 187-88.

could assume custody of the children of a parent who was unconventional by dominant standards.[249]

Poverty, the use of alcohol, and "immoral" behavior were all reference points which the controlling groups in the nineteenth century selected to define others as abnormal and themselves as normal. The remedy was to inculcate conventional mores by parting the malleable children from their unregenerate parents and raising the children by dominant standards.[250] Thus, the reformers anticipated Shaw's comments: "You can exterminate any human class not only by summary violence but by bringing up its children to be different" and "[t]here is nothing that can be changed more completely than human nature when the job is taken in hand early enough."[251] The reformers were unable to extirpate pauperism and abnormality because of the parsimoniousness of the legislatures; instead of being moulded and improved, the children of the state were regularly abused, mistreated and warped.

Perhaps the religious issue is the best example of the conventional reaction to people who were different. In commenting on the *O'Connell* case, Justice Redfield said of the protective statutes:

> We do not indeed suppose that the persons mainly instrumental in getting up these things in the country really intend them for their children, or indeed in the present case for the

249. *Cf.* Smith v. Wilson, 269 S.W.2d 255 (Ky. Ct. App. 1954).

250. The Chicago Juvenile Court Act proclaimed as its purpose:

> 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.

LAWS OF ILLINOIS, 41 G.A. JUVENILE COURTS 131, § 21 at 137 (1899). This may have, as Fox asserts, "codified the shift from congregate to family penology." Fox, *supra* note 52, at 1212. First someone must explain to me what "family penology" is. The true significance of the act is, I believe, that it shows the growth of governmental power, the proclivity of reformers to social control and the domineering attitude of the upper classes towards the lower classes and those with different life styles. It is interesting to note that the first reported Illinois juvenile court case [Lindsey v. Lindsey, 257 Ill. 328, 100 N.E. 892 (1913)] did not concern a potential criminal. The child was held by the lower court to be endangered simply because his mother was a votary of a screwball religion; and there seems to have been no objective danger of harm. The Illinois Supreme Court reversed on the facts while upholding the statute. PAULSEN, *Juvenile Courts Family Courts and the Poor Man,* LAW OF THE POOR, 370, 383-85 (J. tenBroek ed. 1966).

251. *See* H. JAMES, CHILDREN IN TROUBLE: A NATIONAL SCANDAL, 33, 35, 268, see especially the ironic twist of the *parens patriae* doctrine at 65 (1969-1970); see the study of Junior Village, *supra* note 233.

> children of Protestant parents, to any large extent. We cannot disguise to ourselves that these things do have an ominous squint towards the children of Roman Catholic parents, and of the multitudes of poor emigrants yearly coming to our shores, most of whom are of that faith. We cannot but feel that the real animus of these enactments is but poorly disguised under the general terms adopted. . . .
>
> We all very properly look to the natural operation of such provisions, and the persons they will naturally reach, in order to determine the motive of those who introduce them.[252]

The good judge was both right and wrong. He correctly observed that reform was initially impelled, at least in part, by a fear of immigrants.[253] Fear of Catholicism and irreligion activated the reformers; evidenced by the fact that Protestant instruction was a part of the religion at the House of Refuge.[254] Justice Redfield commented after *O'Connell* that a Catholic "child cannot be torn from home and immured in a Protestant prison, for ten or more years, and trained in what he regards a heretical and deadly faith, to the destruction of his own soul."[255] The *O'Connell* decision did not stop this practice.

This problem is a part of the American reaction to immigration in the nineteenth century, middle class fear of the working classes, rural fear of urbanization and Protestant fear of Catholicism. It is not an unfair generalization to say that the child savers were middle class, Protestant and infatuated with rural as opposed to urban virtues.[256] Frequently, they did their good deeds through private organizations.[257] The absence of adequate in-home assistance and the prevailing attitude toward the lower class homes precluded modern income support, and required the removal of wayward, neglected and destitute children from their parents' home.[258] The legislatures in many cases did not appropriate capital funds for building and the child saving work was frequently carried on by per capita subsidies to private institutions[259] with varying public control over commitment, institutional

252. 19 AM. L. REG. 372, 374-75 (1870).

253. R. PICKETT, *supra* note 58, at 36.

254. *Id.* at 112, 122, 143; *see also* Fox, *supra* note 52, at 1195.

255. 19 AM. L. REG. 372, 373-74 (1870).

256. *See, e.g.*, the rhetoric of Charles Loring Brace and his group found in 1 G. ABBOTT, *supra* note 38, at 133-63, and THURSTON, *supra* note 45, at 92-160.

257. FOLKS, *supra* note 47, at 30-36, 69, 71-72, 98-103. For a sanguine analysis of their possible motives see PLATT, *supra* note 185, at 75-152.

258. FOLKS, *supra* note 47, at 101-02.

259. *Id.* at 83-86 (9 states). *See also* 2 G. ABBOTT, *supra* note 38, at 73-111.

housekeeping and release.[260] State control of religious education[261] and statements to religious bodies can be observed.[262] In addition parents lost control over the religious education of their children.[263] So strong was the commitment to child saving that the courts ignored everything else. Child saving was a good thing, and as reformers often have, the child savers ignored Shaw's dictim: "there is no more dangerous mistake than the mistake of supposing that we cannot have too much of a good thing."[264]

SUMMARY

Earlier, the juvenile court was hailed as revolutionary.[265] However, closer and more thorough studies have concluded that the Chicago juvenile court of 1899 was the product of conservative political groups and a consolidation of legislative precedent from Illinois and elsewhere.[266] The legislation[267] allowed the State upon complaint by

260. FOLKS, *supra* note 49, at 75-78. Public officials were not even allowed to visit the "Chicago Industrial School for Girls" without permission of the presiding Bishop. Cook County v. Chicago Industrial School, 125, Ill. 540, 550-51, 558, 18 N.E. 183 (1888).

261. FOX, *supra* note 52, at 1195.

262. *See* State *ex rel.* Nev. Orphan's Asylum v. Hallock, 16 Nev. 373 (1882) declaring this practice illegal under the state constitution. In Illinois, the subsidies were declared to be illegal, Cook County v. Chicago Industrial School, 125 Ill. 540, 18 N.E. 183 (1888), but government institutions were not forthcoming and the use of sectarian institutions did not cease. PLATT, *supra* note 185, at 116. The Illinois Supreme Court recanted its earlier position. *See* Dunn v. Chicago Industrial School, 280 Ill. 613, 117 N.E. 735 (1917); Dunn v. Addision School, 281 Ill. 352, 117 N.E. 993 (1917); Trost v. Ketteler Training School, 282 Ill. 504, 118 N.E. 743 (1918). It is interesting to contrast the sedulous protection from sectarian influences extended to non-pauper children in public schools. *See* People v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910). In New York the problem was not handled much better but with a more eager sophistry. *See* Sargeant v. Rochester Board of Education, 177 N.Y. 317, 69 N.E. 722 (1904); People *ex rel.* Roman Catholic Orphan Asylum Society v. Board of Education, 13 Barb. 400 (1851). Subsidies are permissible under prevailing interpretation. Cases collected ANNOT., 81 A.L.R.2d 1309 (1962) and later case services.

263. Whalen v. Olmstead, 61 Conn. 263, 23 A. 964 (1881). *See* the interesting twists in Puinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907) where a declaration that a child was to be raised in her parent's faith resulted in tragedy to all concerned except the state. For the use of the protective statutes to harass people with unconventional life styles and religion, see the facts in Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913) which has a happy ending but disturbing implications. *See also In re* Black, 3 Utah 2d 315, 283, P.2d 887, *cert. denied,* 350 U.S. 923 (1955) (religious polygamy).

264. GEORGE BERNARD SHAW, PREFACE TO GETTING MARRIED, 317 at 333; 4 COMPLETE PLAYS WITH PREFACES (1963).

265. Jerome Frank, *Preface to,* A. KAHN, A COURT FOR CHILDREN, XI (1953).

266. *A. Platt, supra* note 185, at 135, Fox, *supra* note 52, at 1229-30.

267. LAWS OF ILLINOIS, 41 G.A., Juvenile Courts at 131-37 (1889)

"any reputable person" to institutionalize and possibly apprentice or consent to the adoption of any dependent, neglected or delinquent child. There was nothing new in any of these ideas, and there was no sharp break from tradition.[268] The statutory definitions of dependency and neglect were from the poor law; the population at risk was poor; commitment to institutions was an improvement over, but a descendent from, commitment to poorhouses; apprenticeship was the expedient available to overseers of the poor from the earliest times; and adoption, a nineteenth century addition, reveals the growth of state power as much as the development of state benevolence.

The authorized version of the juvenile courts' history is somewhat as follows. The juvenile court was a successor to chancery. From the earliest times, equity has protected infants who were dependent or neglected under *parens patriae.*

> Under the English common law it was recognized that "the care of all infants is lodged in the king as *parens patriae* and by the kind this care is delegated to the Court of Chancery." In protecting neglected and dependent children chancery courts used what are called "equitable powers" the essential ideas of which are flexibility, guardianship, and a balancing of interests in the general welfare, with a view to getting a fairer result than could be obtained by applying the older, more rigid rules.[269]

The juvenile court was a statutory expression of these impulses. This interpretation contains several errors. First, the courts of equity protected the feudal arrangements and property rather than the "dependent and neglected;" and there is no evidence that chancery ever protected the dependent and neglected as they were statutorily defined.[270] Second, if the analysis suggested herein is accurate, the juvenile courts' protective jurisdiction was a direct descendent of the poor laws, more particularly those which allowed the state to apprentice a pauper's children without the parents' consent. Those

268. *See* the legislative scheme in *ex parte* Crouse, 4 Whart. 9, 10 (Pa. 1838); House of Refuge v. Ryan, 37 Ohio 197, 201-02 (1881); *In re* Knowack, 158 N.Y. 482, 486-87, 53 N.E. 676 (1899); all operating to "protect" the impoverished the wayward and the endangered. In Michigan before the turn of the century a child who was dependent, (MICHIGAN COMPILED LAWS of 1897 § 2023), delinquent (*Id.* § 2261), or ill-treated (*Id.* § 5563) could be taken from his parents and placed in a public institution (*Id.* §§ 2025, 2261, 5563 § 14 Second) and was available for apprenticeship or adoption (*Id.* §§ 2034, 2263, 2264).

269. F. SUSSMAN AND BAUM, THE LAW OF JUVENILE DELINQUENCY 5-6 (1968).

270. *See* Cogan, *supra* note 14; and the Illinois legislation, *supra* note 267.

statutes came to require more rigorous procedure as commitments were gradully taken from the poor law officials and given to judicial officers, but at the same time the definitions were broadened and the effect of intervention became more serious. The rubric should not be allowed to conceal the facts. Acting under the police power to regulate and camouflaging its action by chanting *parens patriae,* the state assumed the power to dissolve for a time, and later permanently, the ties between impoverished parents and their children. And third, it is wrong to say that there was any flexibility or balancing of interests in making these decisions. The statutes exacerbated the vulnerability of a class of people; and because of the pourous and opaque definitions and the flimsy procedures the state was allowed to interpose pretty much its will. The power of equity over the estates and sometimes the custody of children, rather than a precedent, was used as a legal argument, after the fact, to make palatable the poor law practice of separating children from their parents.[271] Some of the proponents of the juvenile court were merely sappy and wrong headed;[272] others were dangerous;[273] all were, in a sense, wrong.

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271. *Cf.* Tappen, *Approaches to Children With Problems,* JUSTICE FOR THE CHILD, 146-50 (M. Rosenheim ed. 1961).

272. *See* THE CHILD, THE CLINIC, AND THE COURT (J. Addams ed. 1925) (collection of lyrical encomiums); H. LOU, JUVENILE COURTS IN THE UNITED STATES (1927); 2 G. ABBOTT, *supra* note 38, at 138-51, 362-51, 362-65 (Charles Loring Brace). The reform impulse of many is summarized by this quotation from Dickens:

> "But even if he has been wicked," pursued Rose, "think how young he is; think that he may never have known a mother's love or the comfort of a home, that ill usage and blows, or the want of bread, may have driven him to herd with men who have forced him to guilt. Aunt, dear aunt, for mercy's sake, think of this before you let them drag this sick child to a prison, which in any case must be the grave of all his chances of amendment. Oh! as you love me, and know that I have never felt the want of parents in your goodness and affection, but that I might have done so, and might have been equally helpless and unprotected with this poor child, have pity upon him before it is too late!"

C. DICKENS, OLIVER TWIST, Ch. XXX at 264 (Signet ed.)

273. Mack, THE JUVENILE COURT, 23 HARV. L. REV. 104 (1909) "We are familiar with the conception that the state is the higher or the ultimate parent of all of the dependents within its borders." *Id.* at 104. "Most of the children who came before the court are, naturally, the children of the poor. In many cases the parents are foreigners, frequently unable to speak English, and without understanding of American methods and views." *Id.* at 116-17. "Seated at a desk with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectivenss of his work." *Id.* at 20.

It would be foolish to argue that the juvenile court, once established, brought no useful changes. New and salutary ideas about the causes of crime, penology, probation, parole and child welfare services have played a large part in its development.[274] Apprenticeship has died out as a dispositional alternative, and no one could seriously argue that the modern juvenile court is using its neglect and dependency jurisdiction to take babies from poor familes and then in turn to give them up for adoption to the rich.[275] In addition, the mother's pension, the beginning of modern income maintenance, originated in the Chicago Juvenile Court, due to the efforts of a judge who disliked committing "dependent children" to institutions because of the poverty of their parents.[276]

Even so, the temporal juvenile court and *parens patriae* in practice are not all they have been said to be; the story is mostly one of missed opportunities. The concept of *parens patriae* was borrowed from equity

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I wonder how Justice Redfield would have reacted to that statement. See 19 AM. L. REG. 372 (1871). In Meyer v. Nebraska the Supreme Court said:

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child nor any child his parent . . . . The proper officers will take the offspring of the good parents to the penn or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

262 U.S. 390, 301-02 (1922). Holmes dissented without mentioning the parent-child relationship. *Id.* at 412-13. Compare the dissent in *In re* Kelly, 152 Mass. 432-40, 25 N.E. 615, 616 (1890) in which Holmes dissented. *See also* Tinker v. Des Moines Independent School District, 393 U.S. 503, 511-15 (1969).

274. F. ALLEN, THE BORDERLINE OF CRIMINAL JUSTICE, THE JUVENILE COURT AND THE LIMITS OF JUVENILE JUSTICE, 43-61 (1964); A KADUSHIN, CHILD WELFARE (1967).

275. tenBroek, *Family Law, supra* note 32, III at 679 (1964). Johnson v. Horace Mann Mut. Ins. Co., 241 S.2d 588, 591 (La. Ct. App. 1971) (dicta); *but see* Savery v. Eddy, 242 Iowa 822, 45 N.W.2d 72, *rehearing* 48 N.W.2d 230 (1951).

276. 2 G. ABBOTT, THE CHILD AND THE STATE, 230 (1938); LAWS OF ILLINOIS 1911 at 126-27.

and misapplied in statutory poverty and protective proceedings. In the process, it took on a new meaning which was nearly synonymous with the general power of government to regulate. Thus, in analyzing state power over minors and inter-family relationships today, *parens patriae* adds nothing, except that in the twentieth century it is a nice way to beg a question.[277]

History is important, for, in Holmes' words, "the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules," is knowledge of the origin and original scope of terms and institutions. But knowledge without action is otiose: "When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal."[278] The juvenile court is now on the plain.[279]

277. Cogan, *supra* note 14, at 147, n.139 at 173.
278. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
279. LAW OF THE POOR, 370 (J. tenBroek ed. 1966).