

Book Reviews

Peace in the Balance: The Future of American Foreign Policy. By Eugene V. Rostow, *Simon and Schuster*, 1972. Pp. 352. \$8.95.

Reviewed by Philip C. Jessup[†]

As these lines are published, it is the 50th anniversary of my third year at the Yale Law School. There I studied international law with Professor Edwin Borchard who, like Professor Eugene Rostow, was a thorough analyst of the literature of foreign affairs; and who, again like Professor Rostow, was a skilled advocate with experience in government service and the practicalities of international law and politics. I began my first stint in the State Department when Professor Rostow, at whose feet I now gladly sit, was eleven years old: With the valor of youth, I was soon crossing swords with Professor Borchard, particularly with regard to the law and policy of neutrality. Now, with the obstinacy of age, I find myself again having to disagree with a Yale Law Professor, and a good friend, whose official participation in conduct of United States foreign policy is much more recent than my own. I do not feel competent to judge Professor Rostow's comments on the views of Kolko, Alperowitz and Chomsky; I feel somewhat more confident discussing certain of his interpretations of history.

I

First, I must outline the structure of this impressive book. Professor Rostow posits the urgent need for a "genuine debate about the ends and means of foreign policy."¹ He hopes his book will stir up such debate, stating as its theme:

the relationship of ideas and events affecting the possibility of peace. In method it is both an analysis and a memoir.²

His memories of the Johnson Administration, where he was Undersecretary of State for Political Affairs, enrich and enliven his

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1. E. ROSTOW, *PEACE IN THE BALANCE: THE FUTURE OF AMERICAN FOREIGN POLICY* 12 (1972) [hereinafter cited to page number only].

2. *Id.*

analysis of eight schools of thought found in recent literature on foreign policy.³ Although his own opinions shine through in all the chapters, it is in the last three that he seeks to state the criteria he finds lacking in many of the books and articles he discusses:

Few of those who write about foreign policy make their major premises explicit and fewer still give reasons for their choice.⁴

Naturally, Professor Rostow defends the policies of the Johnson Administration in which he served with distinction, and inevitably, Vietnam emerges at almost every step. I understand his approach, for as I attempt to write about the Truman Administration in which I served, I find myself justifying its policies because I know what our motives and objectives were at the time and am satisfied that many of our critics are misinformed or misguided. But Professor Rostow does not escape from the dilemma posed by the impetuous chronology of international events: No one writing about contemporary foreign affairs can avoid the inevitability that the reader will challenge his statements with events which occurred after the book went to press.⁵ Moreover, as I shall suggest, generalizations about men or nations valid in the context of one decade, may be quite inappropriate to another, though the interval between them be very short.

I have rather basic disagreements with two aspects of Professor Rostow's thesis. First, he speaks of foreign "policy" in the singular, while for me it is always inevitably pluralistic—probably hydra-headed or at least Janus-faced in the sense of contrasting aspects. Second, when he writes about "power" (as he does throughout) or "the balance of power," it does not seem to me that he takes into account the many elements which constitute national power in this day and age. I cannot agree that power should be conceived of as purely military force; economic and moral strength may be equally important. Thus Japan and India have exercised power which has not rested on armaments. I am not sure that Professor Rostow would disagree with this point if the question were put to him directly, because he does refer to such other elements. Still, the basic refrain is always "*Arma virumque cano.*" And when he writes of the Presi-

3. See pp. 79-238.

4. P. 79.

5. Rostow takes Senator Fulbright to task for not discussing "the effect of withdrawal [from Vietnam] now on the policies of Japan and the nations of Southeast Asia or on China and the Soviet Union." P. 186. But Rostow's conclusions will also be judged by hindsight.

dent, I keep feeling that he concentrates too much on the man and his influence.

I for one would not identify the foreign policies of the Eisenhower Administration with the President as much as with Secretary Dulles. Rostow seems to underestimate Dulles' role in advancing the notion of "liberating" Eastern Europe; yet I remember Dulles ranting about Stalin in the corridors of the State Department before he was Secretary, like a John Knox berating a Mary Queen of Scots. Thus, Rostow dismisses Senator Fulbright's charge of a "global anticommunist crusade"⁶ but he marshals the evidence of the 1940's; he stops short of the Dulles era. He tends to speak of SEATO as an Eisenhower agreement,⁷ yet it was clearly Dullesian. To be sure, it was not "global," yet a directive from Secretary Acheson to me as Ambassador-at-Large in 1949 (in line with a National Security Council paper) stated:

[I]t is a fundamental decision of American policy that the United States does not intend to permit further extension of Communist domination on the continent of Asia or in the southeast Asia area.

Still, the use of American troops on the Asian mainland or against the Soviet Union was at that time clearly excluded.

I would also differ strongly with one of Rostow's historical assessments: He contends that Truman's decision not to run again in 1952 may be equated with Johnson's in 1968, because the reason for both was identification with an unpopular war. I do not agree that Truman was forced out by Korea as Johnson was forced out by Vietnam. Nor do I believe, as does Rostow, that that "[f]oreign policy wrecked [Truman's] . . . career."⁸

II

I would agree with Rostow's praise of the era following Vienna (1815),⁹ save that he disregards such aberrations as the Crimean, Franco-Prussian and colonial wars and the utter contempt of the major powers for the independence of the smaller states. Despite this disregard, he replies affirmatively to the question "Does the

6. Pp. 180-81. *See also* p. 37.

7. Pp. 16-17.

8. P. 15. I am inclined to prefer the explanation suggested by Dean Acheson, that President Truman decided to withdraw for personal reasons unrelated to foreign policy. D. ACHESON, *PRESENT AT THE CREATION* 632-33 (1969).

9. Pp. 31-34.

Third World Matter?"¹⁰ which entitles one of his chapters. Similarly, I believe that Professor Rostow overstates American aloofness from the League of Nations. While this aloofness was indeed stupid during the Harding and Coolidge administrations, there was a difference in the Hoover Administration once Secretary Stimson was forced to realize that Japanese aggression against China had to be challenged through or with the League (though the United States might insist that the rules to be invoked were those of the Briand-Kellogg Pact and not those of the Covenant). I think Rostow and I do share convictions on the value of the United Nations, although when he says—correctly enough—that it “was not intended to function as a peace-keeping agency when great powers are seriously divided,”¹¹ I would recall the resort to the Security Council during the Berlin blockade in 1948 and the central role of the United Nations in Korea.¹²

This brings me to a rather fundamental disagreement. Professor Rostow maintains that in Germany, Korea, and Vietnam it was understood that the divisions created separate states and not merely temporary demarcations within a single state.¹³ As for Germany, this was simply not true, at least during the decade after the war when we insisted that there was one Germany, part of which was occupied by the Russians. It was not until Willy Brandt's *Ostpolitik* took the fore that the idea of admitting the existence of two separate states was accepted by the West. Today the “two Germanies” have reached agreement, and they will apply for separate membership in the United Nations.

Korea was divided at the 38th parallel as a war-time agreement connected with the surrender of the Japanese forces when the Russian armies were close at hand and our available forces were off in Formosa and the Philippines. Speaking for the United States in the Interim Committee of the U.N. General Assembly on February 24, 1948, advocating elections in the South even if the U.N. Committee were excluded from the North by the Russians, I emphasized our concept of a single state of Korea; Canada, Australia, and others opposed the elections out of fear they would hinder eventual union. Through the war years, we never agreed that there were two separate Korean states; and today the authorities in the North and South are affirm-

10. P. 239.

11. P. 48.

12. Rostow's explanation of Soviet action in ending the Berlin Blockade is inadequately made by a passing reference at p. 213; cf. Jessup, *Park Avenue Diplomacy—Ending the Berlin Blockade*, 87 *Pol. Sci. Q.* 377 (1972).

13. Pp. 187-88.

ing their desire for unity on the same pattern we stressed in 1948. But we did not promise either Germany or Korea "unity through elections."¹⁴

In December, 1951, we supported a resolution of the United Nations General Assembly "to secure the aid of the United Nations in taking a necessary step toward the unification of Germany" with the aid of a U.N. Commission to supervise elections, but the Soviets again denied access to the territory they controlled, and we made no "promises."

In Vietnam while the French were there, the West never recognized that the northern areas controlled by Ho Chi Minh constituted a separate state. The Geneva arrangements of 1954, in drawing a line, did not propose to create two separate states. All of this is of real importance to Professor Rostow's analysis, since he, of course, defends our policy in Vietnam, something I cannot do. According to his theory of two separate states, Hanoi is clearly the "invader" of the South and therefore the aggressor; thus, there is no basis for calling the struggle a "civil war." I disagree and therefore cannot accept his assertions on the rules of international law applicable during civil strife.¹⁵ The pros and cons of this argument have been developed elsewhere at such length that I do not intend to discuss them further here. But I do wish to disagree with Rostow's reference (in the Middle Eastern context) to the inadmissibility of territorial acquisition by war "as a murky principle" of international law;¹⁶ it is, in fact, as clear as crystal and basic to international law in this era.

Another troubling aspect of the Vietnamese war from a hard-boiled view of the interests of the United States, is that we are daily revealing the relative impotence of the mightiest war machine in the world. General George Marshall warned the Dutch, apropos Indonesia, that a European army could never defeat a fervent nationalist movement in the Asian jungles. The British proved the truth of that judgment in Malaysia, where it was only Gurkha auxiliaries that finally brought relative victory. Morals aside, what have we to show for the thousands of tons of bombs which were supposed to prevent the North Vietnamese from coming south on the Ho Chi Minh Trail? This futility, coupled with what one may fairly call a global abhorrence of the

14. P. 187.

15. My own views are much closer to the thesis of Professor Richard Falk, although I do not accept all of his argument. *See, e.g., R. FALK, LEGAL ORDER IN A VIOLENT WORLD* (1968), especially ch. 4.

16. P. 270; cf. p. 272.

brutality of the war—Mylai, Lavelle, and all—surely teaches a lesson which, it seems to me, Professor Rostow does not include in his course. As Hamilton Fish Armstrong has said,

The methods we have used in fighting this war have scandalized and disgusted public opinion in almost all foreign countries.

Not since we withdrew into comfortable isolation in 1920 has the prestige of the United States stood so low.¹⁷

Reluctantly, I must also disagree with some aspects of Rostow's analysis of the Middle Eastern strife between the Arabs and the Jews. Unpopular as the conclusion is, I cannot escape the conviction that our support of Israel has been much more a product of domestic political considerations than a dispassionate, objective appraisal of our strategic interests. It was this domestic element which led President Truman to grant precipitate recognition to the State of Israel over the objections of Secretary Marshall and Undersecretary Lovett—a move which was not even communicated to those of us carrying out our instructions in the General Assembly, ignorant of what was being told the rest of the world by the news ticker-tape. And I cannot agree with Rostow's statement that,

Nominally, it [Israel] was established by a decision of the United Nations, acting with regard to trust territories administered under its authority.¹⁸

Palestine was not, *inter alia*, a "trust territory" and the United Nations had no power of administration before the declaration of the establishment of the Israeli state. The traditional bugaboo of the loss of Near Eastern oil has been unmasked by the newly exploited resources of Libya, the North Sea, Nigeria, Alaska, and other off-shore drillings; but the possibility of such a loss clearly was a major fear in the minds of those responsible and conscientious officials who, in 1948, warned against estranging the Arab world. As for the situation in 1967, U Thant's action, which Rostow criticizes,¹⁹ was inescapable in view of the ultimata of the governments who supplied the forces which were withdrawn.²⁰

Of course, the Soviet Union has steadily sought to increase its

17. Armstrong, *Isolated America*, 51 FOREIGN AFFAIRS 1-2 (1972).

18. P. 248.

19. P. 256.

20. I believe that this view was shared by Ralph Bunche, whose name, curiously enough, appears nowhere in the book.

power in the Middle East and the Mediterranean. In 1945, at a meeting of the Council of Foreign Ministers, Molotov did say the Soviet Union wished to be trustee for Tripolitania,²¹ one of the three districts of Libya, but the claim was abandoned. The three Western Allies succeeded in maintaining their grip on the former Italian colonies until their future was decided by the General Assembly in accordance with the provisions of the Italian Peace Treaty.

III

It seems I have satisfied Professor Rostow's hope that this book would stir up a debate, and since he has used both analysis and "memoir" I have been led to do the same. But we have not yet reached the point which is "the ends and means of foreign policy," a theme to which Rostow returns in his last two chapters.²²

As noted above, Rostow first disposes of seven of his eight "schools"—the pacifist, the Strangelovites, the communists, the isolationists, the Wilsonian moralists, the *realpolitikers*, the devotees of world government. He himself wears the old school tie of the eighth, which seeks a system of peace in the world on the foundation of "an *accepted* balance of power."²³

I agree with Professor Rostow that "The vision of safety under siege in Fortress America is a terrible illusion."²⁴ And I heartily concur that "international peace, and its correlative principle of not interfering in the internal affairs of other states—the two basic principles of the United Nations Charter"²⁵ are worthy goals for our foreign policy, satisfying the requirements of morality and idealism as well as our essential material interests. As I understand his conclusions, we need to find a new "accepted" balance of power. He argues that:

Under the circumstances of modern life, the path of wisdom and prudence is that of stalemate, detente, and peaceful coexistence under the rules of the United Nations Charter.²⁶

This is true especially since the nuclear weapon can be neither ignored nor used.

21. Cf. p. 252.

22. Pp. 283-342.

23. P. 95 (emphasis added).

24. P. 322.

25. P. 323.

26. P. 330.

While I agree, I am still puzzled as to how we attain a mutually acceptable balance of power. Rostow properly points to the Soviet policies of imperialist expansion which alarm us and which we seek to counter; but our insistence on predominance must equally alarm the Russians. In the early fifties we in the State Department, following Dean Acheson, were insisting that we would not negotiate except from a position of strength. I never could persuade the Secretary or the Policy Planning Staff that we ought to draw up what we would consider an acceptable program once that position of strength was assured, though I do recollect that George Kennan had a similar view.

Rostow agrees that the policy of "spheres of interest" has not worked. It makes sense to say, as he does, that we need to transform our alliances and,

become in fact the junior partner in regional coalitions to assure stability and development in areas of the Free World now threatened with conquest or chaos.²⁷

This does not seem to me to be our present policy in Vietnam. I think the *New York Times* was correct in saying that when President Nixon compared himself to Disraeli pursuing a "strong foreign policy,"

Mr. Nixon forgets that the European ruling classes in the nineteenth century shared a common world view which made balance-of-power diplomacy workable. There was an intellectual community of interest then that simply does not exist today between Western statesmen and Chou En-Lai or Brezhnev and Kosygin.²⁸

This is why Kissinger is out of date—a diplomatic Rip Van Winkle. And I think Rostow agrees with the further point made by the *Times* that today one must consider the wider community which works day by day through the United Nations and its many agencies.

Rostow, in my opinion, underemphasizes the potentialities of a United Europe.²⁹ I am inclined toward a policy of admitted parity between America and Europe, Russia, China, Japan and the Third World. With the emergence to full statehood of the two Germanies and—as I anticipate—a single Korea and Vietnam, the policy of accommodation and detente could become a reality and the national interest of the United States would be served.

27. E. ROSTOW, *LAW, POWER, AND THE PURSUIT OF PEACE* 116 (1968), quoted pp. 334-35.

28. Editorial, *The Nixon Interview*, *New York Times*, Nov. 12, 1972, § 4, at 10, col. 1.

29. Cf. pp. 233, 235.

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Professor Ronald Syme of Oxford, writing of Ulpian, a Roman jurist who attained high rank in government only to be slain, concludes:

Such was the tragedy of Ulpian, scholar and minister of state [A] philosophical mind . . . will evoke with complacency the gentler manners of present times In the United States, he is permitted to revert to a law school or to the charge of some opulent foundation.³⁰

I view the restoration of Eugene Rostow to the legal realm of Academe, not just with complacency, but with unmitigated delight and with the assurance that when we have a wiser national administration he will be available for further public service in the national interest.

30. Syme, *Lawyers in Government: The Case of Ulpian*, 116 *PROC. AM. PHIL. Soc'y* 409 (1972).

The Assault on Privacy. By Arthur R. Miller. *Ann Arbor: University of Michigan Press*, 1971. Pp. xi, 333. \$7.95

Databanks in a Free Society. By Alan F. Westin and Michael A. Baker. *New York: Quadrangle Books*, 1972. Pp. xxi, 522. \$12.50.

Reviewed by Charles Lister†

There are fashions in the law, and no doctrine is now more fashionable than the right of privacy. Virtually any issue of political or personal liberty may, after sufficiently eager scrutiny, be styled a problem of individual privacy. Abortion,¹ motorcycle helmets,² homosexuality,³

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1. See, e.g., *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970); *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969).

2. See, e.g., *People v. Fries*, 42 Ill. 2d 446, 250 N.E.2d 149 (1969); *American Motorcycle Ass'n v. Davids*, 11 Mich. Ct. App. 351, 158 N.W.2d 72 (1968).

3. See, e.g., REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (WOLFENDEN REPORT), CMND. No. 247 (1957); Note, *Homosexuality and the Law*, 17 N.Y.L.F. 273, 295-96 (1971).

hair styles,⁴ marijuana,⁵ psychological testing,⁶ and sodomy:⁷ All have, with greater or lesser success, been brought beneath privacy's convenient banner. Traces of the doctrine now have been fortuitously unearthed in the First,⁸ Fourth,⁹ Fifth,¹⁰ and even Ninth¹¹ Amendments. Only seven years after *Griswold*,¹² privacy threatens to become a code word for all freedom from governmental interference.

Given the doctrine's obscurity, it should hardly be surprising that the literature of privacy is characteristically ephemeral. With isolated exceptions, that literature adds little to our understanding of either privacy or the situations in which it is thought to be endangered. From the law journals, we have jejune philosophizing and tedious explorations of the ambivalent opinions in *Griswold*. Monographs and non-legal periodicals have typically proved no better. They have done little more than fervently lament the wholesale destruction of privacy.

Although numerous villains have been identified, it is customary to point with particular dismay to the development of the computer. If privacy is fashionable, it is *haute couture* to bewail the iniquities of computerization. Professor Miller's book¹³ is among the most recent of these lamentations. With a single exception,¹⁴ it is undoubtedly the best of a bad lot. Its most important strength is that Professor Miller has had the good sense to avoid the more extravagant applications of the privacy doctrine, and to limit his inquiry to information-gathering and record-keeping about individuals. Moreover, he parades the usual horrors with more than ordinary *elan*. Computers and those who employ them are flayed with a remarkable collection of anecdotes, snippets of poetry, and technological lore. Most of the book is highly readable, and all of it is written with obvious conviction. Not

4. See, e.g., *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969); Comment, *A Student's Right to Govern His Personal Appearance*, 17 J. OF PUB. L. 151 (1968).

5. See, e.g., Comment, *The California Marijuana Possession Statute: An Infringement of the Right of Privacy or Other Peripheral Constitutional Rights?*, 19 HASTINGS L.J. 758 (1968).

6. See, e.g., A. WESTIN, *PRIVACY AND FREEDOM* 242-78 (1967).

7. See, e.g., *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated and remanded*, 401 U.S. 989 (1971).

8. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969); *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

9. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

10. See, e.g., *Marchetti v. United States*, 390 U.S. 39, 56-57 (1968); *Griswold, The Right to be Let Alone*, 55 N.W.U.L. REV. 216 (1960).

11. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

12. *Id.*

13. A. MILLER, *THE ASSAULT ON PRIVACY* (1971) [hereinafter cited as A. MILLER, *PRIVACY*].

14. A. WESTIN, *supra* note 6.

surprisingly, disciples in large numbers are apparently gathering round him.¹⁵

Professor Miller's thesis is simple and familiar. He argues that new information technologies—the principal features of what he styles the “Age of Cybernetics”—are now dramatically altering “basic patterns in our daily life.”¹⁶ Miller assures us that as a result of computerization more information is now being accumulated from and about more individuals, is being more extensively manipulated and analyzed, is more often centrally collated and more rapidly and widely disseminated than ever before. He perceives a “profound change” in public attitudes toward information and the purposes for which it is used, and believes that these changes involve “a potential or actual threat to personal privacy.”¹⁷

Despite the enthusiasm with which it has been greeted elsewhere,¹⁸ the book is largely disappointing. I share Professor Miller's conviction that record-keeping and information-gathering about individuals warrant prompt and careful study, and had expected that his book would make an important contribution. It has not. Many of the issues in the book were treated with greater balance and perception by Alan Westin five years ago.¹⁹ Popular books and magazines, congressional hearings, and even presidential messages have already sounded any necessary alarms.²⁰ Professor Miller might have drawn together the suggestions and proposals that have been made, assessed them rigorously in light of information gathered during the past several years, and formulated a sensible program of research and legislation. Such a book is very much needed, and Professor Miller is one of the few men prepared to write it.

Unfortunately, he has done little more than rehearse the usual warnings about computerization and sundry other misfortunes, and although he surveys the law of privacy, offering various proposals and recommendations, *aficionados* of the literature will find little that is

15. See, e.g., Christie, *The Right to Privacy and the Freedom to Know: A Comment on Professor Miller's The Assault on Privacy*, 119 U. PA. L. REV. 970 (1971).

16. A. MILLER, *PRIVACY* at 1-2.

17. *Id.* at 5.

18. Christie, *supra* note 15.

19. A. WESTIN, *supra* note 6.

20. See, e.g., M. BRENTON, *THE PRIVACY INVADERS* (1964); E. LONG, *THE INTRUDERS* (1967); J. ROSENBERG, *THE DEATH OF PRIVACY* (1969); HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, *THE FEDERAL PAPERWORK JUNGLE*, H.R. REP. NO. 52, 89th Cong., 1st Sess. (1965); *Hearings on Invasions of Privacy Before the Subcomm. on Admin. Prac. and Proc., Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); *Hearings on the Computer and Invasion of Privacy Before a Subcomm. of House Comm. on Gov't Operations*, 89th Cong., 2d Sess. (1966).

new. The distressing fact is that the book does little to clarify, and much to obscure, debate on the already muddled issue of computerization.

I

The book's principal defect is its failure to describe accurately the relative significance of computerization. A reader could pardonably conclude that record-keeping about individuals was conducted in so gentlemanly a manner before the computer as to avoid all of the dangers noted in the book. Implicit through much of it is the notion that if we only come to grips with computerization, we shall have solved the problems of record-keeping. The truth is quite different, as Professor Miller is no doubt aware.²¹ The computer is, and doubtless will remain, only tangentially responsible for the critical issues of individual record-keeping. Although they have until recently been largely ignored by the law,²² the important issues—what information should various institutions collect, under what conditions should collection be permitted, how long should information be retained, with what other information should it be combined, and to whom should it be disseminated—are assuredly not problems peculiar to the "Age of Cybernetics."

Public school records are an excellent illustration. Professor Miller devotes some sixteen pages to experimentation in computer-assisted instruction and the possible consequences of computerization for student record-keeping.²³ With characteristic elegance, he announces that "computer-assisted instruction is becoming the 'in' thing in the Ed Biz."²⁴ It is, Miller assures us, a matter of the "Little Red Schoolhouse" going "Electronic."²⁵ The book argues that such instructional methods may result in the creation of "dossiers containing information on all aspects of a student's educational life."²⁶ Miller informs us that computer-based record-keeping "is replacing manila folders,"²⁷ asserting that this may destroy something akin to a "confidential relationship" that "pres-

21. Professor Miller served as a member of the advisory committee of the data bank study of the National Academy of Sciences, described below, in which the relative significance of the computer was investigated. Traces of the report's more balanced position now and again emerge in *Assault on Privacy*.

22. A careful summary of the lamentably inadequate law may be found in Goldstein, *Legal Control of the Dossier*, in *ON RECORD: FILES AND DOSSIERS IN AMERICAN SOCIETY* 415 (S. Wheeler ed. 1969); and Karst, "The Files": *Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 *LAW & CONTEMP. PROB.* 342 (1966).

23. A. MILLER, *PRIVACY* at 105-22.

24. *Id.* at 110.

25. *Id.* at 105.

26. *Id.* at 111.

27. *Id.* at 108.

ently exists" between "a student and his mentors."²⁸ With uncharacteristic caution, he concedes that the existing threat to privacy may be "remote," and that the "long-term ramifications of the computer" are not "really perceptible."²⁹ He then speculates on the dangers that might follow if comprehensive student records were circulated freely.³⁰

It would be difficult to imagine a less helpful summary. First, it is simply not true that public school records have been computerized in significant numbers. Given the severe limitations on school finances and the caution with which computerization has proceeded elsewhere, there is every reason to expect that this situation will not change rapidly. When it does change, the available evidence suggests that the information computerized is likely to be the most objective and least intrusive.³¹ More important, Professor Miller evidently does not recognize the deficiencies of *manual* record-keeping as it now exists. The record-keeping policies of the public schools have until recently been typically haphazard, with wide variations in the character, quantity, and intrusiveness of the information collected.³² It seems clear that these differences have generally reflected, not reasoned distinctions based on the particular activities and goals of different school systems, but rather the ad hoc and even ad hominem judgments of thousands of individual record-keepers. It seems equally clear that many public schools already maintain relatively comprehensive records on the progress, difficulties, and aptitudes of their students. Professor Miller's manila folders often contain remarkably intrusive information.³³ They may include psychological and psychiatric reports, unsubstantiated or false allegations concerning a student's behavior or capabilities, or extensive information about the student's family or economic background. If improperly disseminated, such records may have severely prejudicial consequences for a student's later academic career, as well as for his relationships with the police, the military, potential employers, and others.

Nor are these records generally maintained in confidence. The best available survey indicates that student records are widely available

28. *Id.* at 112.

29. *Id.* at 111.

30. *Id.* at 111-13.

31. A. WESTIN & M. BAKER, *DATABANKS IN A FREE SOCIETY* 243-51 (1972).

32. See generally Goslin & Bordier, *Recordkeeping in Elementary and Secondary Schools*, in S. Wheeler, *supra* note 22, at 29.

33. See generally *id.*; C. ERICKSON, *A PRACTICAL HANDBOOK FOR SCHOOL COUNSELORS* (1949).

without prior consent to the police, the FBI, military investigators, and many others.³⁴ A congressional committee recently had not the slightest qualms about printing for public dissemination extracts from the records of identifiable students without student or parental consent.³⁵ Many school systems have cheerfully acknowledged that they disclose student records to third parties more often and more readily than to students or their parents.³⁶ In most states, the situation is complicated still further by uncertainty as to whether student records are "public records," available to anyone. More restrictive rules are now being adopted in some districts,³⁷ but the assumption from which Professor Miller apparently began—that manual record-keeping in the schools is relatively limited, harmless, and confidential—was and generally remains false.

Criminal records provide another illustration. Such records are often incomplete and sometimes inaccurate. Despite numerous statutory and administrative restrictions, such records are widely available to employers, private investigators, and newsmen. By contrast, individuals about whom records are maintained are generally not provided an opportunity to examine them or challenge their accuracy. Moreover, few jurisdictions require the destruction of criminal records, even if the individual arrested was not convicted.³⁸ One misstep, or even the valid exercise of constitutional rights, may thus leave a severe and permanent stain upon an individual's past. Although computers and high speed transmission facilities³⁹ undoubtedly make these problems more urgent and widespread, they did not arrive with the "Age of Cybernetics." Indeed, the threat of increasing computerization has, in at least one respect, proved helpful: It has drawn attention to existing inequities and stimulated more careful thought about the social policies that have produced them. For example, at least until the FBI was awarded control of the forthcoming system for the national exchange of crimi-

34. Goslin & Bordier, *supra* note 32, at 56.

35. *Doe v. McMillan*, 459 F.2d 1304 (D.C. Cir. 1972), *cert. granted*, 40 U.S.L.W. 3617 (June 26, 1972) (No. 71-6356).

36. Goslin & Bordier, *supra* note 32, at 56.

37. See, e.g., 14 Del. Laws § 4114 (1970 Supp.); MICH. COMP. LAWS § 600.2165; WIS. STAT. ANN. § 885.205 (1969 Supp.); CAL. EDUC. CODE § 10751 (West 1972 Supp.). Many of the recent efforts to devise more systematic rules for handling student records are the consequence of Russell Sage Foundation, *Guidelines for the Collection, Maintenance and Dissemination of Pupil Records* (1970).

38. See, e.g., *Irani v. District of Columbia*, 292 A.2d 804 (D.C. App. 1972); *Spock v. District of Columbia*, 283 A.2d 14 (D.C. App. 1971). Compare *Anderson v. Sills*, 56 N.J. 210, 265 A.2d 678 (1970). But see *Davidson v. Dill*, 41 U.S.L.W. 2284 (Colo. Sup. Ct. Nov. 13, 1972).

39. The use of such facilities for the exchange of criminal history information was successfully demonstrated in 1971 by Project SEARCH (System for the Electronic Analysis and Retrieval of Criminal Histories).

nal records, there had been a genuine prospect of more rational and humane rules for the collection and dissemination of such records.⁴⁰

I do not completely blame Professor Miller for not writing a lengthy, perhaps painful, study of such specialized record-keeping problems. Although progress toward the solution of such problems is likely to be made only by such discrete studies, there is little interest in such tedious minutiae. My point is rather that Professor Miller's emphasis on computerization has caused him to obscure many of the most important issues surrounding record-keeping. Limitations upon computerization, whether federal or local, comprehensive or particularized, are likely to prove helpful only if those limitations address the various social policies implicit in each record-keeping system. Professor Miller's preoccupation with the gadgetry and excitement of computerization merely diverts attention from the dreary, unromantic questions of what kinds of information various organizations should collect, whether the consent of the individuals involved should be required, how the information should be used, and to whom it should be disclosed.

II

Professor Miller's emphasis on the computer might be pardonable, if nevertheless misleading, if his assessments of the extent and present consequences of computerization were accurate. There is, however, important new evidence, based on sources quite different from those examined by Professor Miller, that now suggests that he has seriously misjudged those questions. In 1969, the National Academy of Sciences, with the assistance of the Russell Sage Foundation, began an elaborate study of computerized data banks.⁴¹ The project, under the direction of Alan Westin, was designed to obtain empirical evidence on the extent to which various organizations and agencies, both public and private, have computerized their files and the consequences for their record-keeping practices.

40. Until the assignment of the proposed SEARCH system to the FBI, the Security and Privacy Committee of Project SEARCH had made significant progress toward the formulation of new standards for the collection, maintenance and dissemination of criminal history records. In three reports, the Project described elaborate new standards and offered a model state statute and administrative regulations to implement those standards. The willingness of the FBI to adhere to such standards has yet to be demonstrated. A vivid interpretation of these events is provided by Sorkin, *The FBI's Big Brother Computer*, 4 WASHINGTON MONTHLY 24 (1972). I should note that I served as consultant to the Security and Privacy Committee.

41. A. WESTIN & M. BAKER, *supra* note 31. I served as a member of the study's staff during the project's latter stages.

The study began by accumulating what is undoubtedly the largest single collection of the literature on computerization. The second and most important stage of the study was a series of elaborate site visits. Some fifty-five organizations, twenty-nine of them agencies at various levels of government, were visited by teams of investigators for periods of one to three days. Banks, insurance companies, an airline, credit-reporting firms, law enforcement agencies, universities, federal agencies, and religious organizations were all included. Each organization visited was selected after being judged to be particularly innovative in computerization or data processing. Almost all of the visits involved extensive discussions at various levels of the organization, from high management to the programmers in the computer room. Each visit was preceded by a careful study of the published materials on the organization and its activities. The goal in each situation was to obtain a full and accurate picture of the organization's record-keeping practices prior to computerization, the extent to which it had computerized, the changes that had occurred because of computerization, and the respects in which other changes were expected to occur over the next several years. The final stage of the study involved a survey of a much larger number of organizations, designed to gather data against which to compare the visit results.

The Westin report is too elaborate and detailed to permit a full summary in a few paragraphs. It is enough for present purposes to sketch some of the report's principal findings. First, the report demonstrates that, contrary to the assertions of Professor Miller and others,⁴² computerization has not caused most organizations to collect more information, or more intrusive information, about individuals. Although new data bases have developed in some areas—elaborate credit card systems are an excellent illustration—computerization has generally served merely to provide more expeditious handling of data that were previously collected. Indeed, since the costs of computerized data handling are considerable, some organizations have reevaluated their information requirements and now collect less, not more, than they did with manual systems.⁴³

Second, the study found that highly sensitive personal data are not being computerized. Instead, the most objective information—which usually means the least sensitive and intrusive—has commonly been computerized.⁴⁴ This is, of course, generally not the result of the fas-

42. A. MILLER, *PRIVACY* at 20-23.

43. A. WESTIN & M. BAKER, *supra* note 31, at 420-24.

44. *Id.* at 424-27.

tidiousness of data processing managers. It reflects the significance of processing and conversion costs, and the fact that the computer can most economically perform high volume, routine processing tasks which generally involve relatively objective data.

Finally, the report found no evidence to support the usual claim that computerization, because of coding and increased possibilities of error, has rendered decision-making more arbitrary and less accurate. Although computer errors are often spectacular and well-publicized, the study found that computerization generally reduces the frequency of error and increases the likelihood of correction.⁴⁵

As a general matter, the evidence collected by the Westin study strongly suggests that computerization has not yet significantly altered the extent or character of record-keeping, or the rules by which records are maintained and used. Despite their flashier dress, data processing managers are evidently file clerks at heart. I do not mean, and I do not understand the Westin report to suggest, that computerization does not demand prompt and careful regulation. The deliberate pace of computerization, and the relatively modest changes it has produced thus far, provide time for careful thought, not an excuse for inactivity. The essential point is rather that computerization must be regulated merely as a part—and at the moment only a small part—of the wider problems of record-keeping and information-gathering. It is simply frivolous to address the means by which record-keeping policies are implemented, as Professor Miller would evidently have us do, without first reevaluating those policies themselves.

III

Professor Miller's preoccupation with the computer also muddles his remedial suggestions. Although he pauses now and again to endorse specific suggestions for specific problems, he is characteristically impatient with "particularistic" devices. His affection instead is reserved for a new federal agency, which he would have develop an "administrative privacy scheme for information systems operated by the federal government, and perhaps those maintained by other organizations."⁴⁶ He quite properly recognizes that such a unit would suffer the usual debilities of administrative agencies, and is sensibly modest about its immediate potentialities.

45. *Id.* at 433-36.

46. A. MILLER, *PRIVACY* at 230.

But Professor Miller is predictably blind to another and more fundamental problem. The notion that record-keeping systems are sufficiently similar to permit extensive regulation by a single agency is plausible only after it has been decided that the problems created by those systems derive from a single cause—computerization. Once it is recognized that the computer is responsible for only a small part of the problem, it becomes plain that Professor Miller is assigning his agency an impossible hodgepodge of problems. Record-keeping systems are the embodiment and reflection of the significant activities of our institutions, both public and private. With few exceptions, the problems created by record-keeping systems are as disparate as the activities from which they arise.⁴⁷ Any agency given authority to regulate all collections of information from and about individuals would have been given, in essence, the authority to control each of those activities. Whether this is otherwise desirable or not, it should certainly be obvious that any such agency would immediately encounter extraordinarily formidable difficulties. At best, Professor Miller's new *apparatchiki* would be reduced to the solemn promulgation of meaningless generalities.⁴⁸ More probably, the result would be chaos on stilts. In either event, there is no reason to anticipate prompt or effective regulation.

The lamentable truth is that we cannot effectively escape the difficulties of record-keeping either by denunciations of the computer or by the appointment of a new czar of personal information. Record-keeping is not one problem but many, and those problems are susceptible to meaningful solution only by the tedious process of separately analyzing many disparate issues and circumstances. Professor Miller's oversimplification both of those problems and of the methods demanded for their solution has unfortunately obscured an already muddled public debate.

47. Certain minimal due process rights may be applied broadly to systems that collect and manipulate information about individuals. In particular, there is unquestionably an immediate need for appropriate guarantees of individual rights of notice, access, and challenge. But even as to such rights, adequate protection will be provided only after careful analyses of the specific circumstances and problems of each information-gathering area have first been conducted.

48. The meaningless rules likely to be promulgated by such an agency are illustrated by those laboriously formulated by the PRESIDENT'S COMMISSION ON FEDERAL STATISTICS, 1 FEDERAL STATISTICS 9 & 195-218 (1971).

The Child Savers: The Invention of Delinquency. By Anthony Platt. Chicago: University of Chicago Press, 1969. Pp. ix, 230. \$8.50.

Reviewed by J. Lawrence Schultz†

Two authors have recently challenged some long-held assumptions about the origins of juvenile courts. In complementary publications sociologist Anthony Platt¹ and law professor Sanford Fox² attempt to debunk conventional historical wisdom and to show that middle-class interests motivated reformers who wrote the first juvenile court act in 1899. Their analysis bears importantly on current efforts to reform our juvenile justice system.

I

The focus of both Platt and Fox is the Illinois "Juvenile Court Act" of 1899.³ The Act included provisions for protecting children other than those involved in court proceedings,⁴ but the features that gained national attention were those governing the adjudication and disposition of children under sixteen who were either "dependent and neglected" or "delinquent."⁵ The innovative characteristics included: the designation of one circuit judge in Cook County to hear all cases under the Act⁶ in a special, separate courtroom⁷ in a summary proceeding;⁸ the separation of children from adult convicts confined in the same institution;⁹ and the prohibition against confining a child under twelve

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

2. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *STAN. L. REV.* 1187 (1970).

3. Law of April 21, 1899, [1899] Ill. Laws 131.

4. The Act provided for inspection of and annual reporting by foster homes, institutions, and private associations to whom children would be referred under the Act. *Id.* §§ 12-14, 18 at 135. It also regulated the placement of dependent, neglected, and delinquent children from other states to private agencies in Illinois. *Id.* § 16 at 136.

5. Delinquents more than ten years of age, unlike dependent and neglected children, could be committed to the state reformatory or Home for Juvenile Female Offenders, or could be placed in a foster home, a state training school, or some accredited private institution. *Id.* §§ 7, 9.

6. *Id.* § 3, at 132 (the statute by its terms applied to all counties having a population over 500,000; in 1899 and for some time thereafter, only Cook County was in this category).

7. *Id.*

8. *Id.* § 5. Other procedural aspects of the Act are worth noting. "Any reputable person" who in a petition alleged facts sufficient to invoke the court's jurisdiction could initiate a proceeding. *Id.* § 4. This typical provision, repeated in the acts of other states, has contributed to the image of all juvenile proceedings—including those alleging the commission of a crime—as "civil" in nature. Section 2 of the Act permitted "any person interested" to demand trial of any case brought under the Act by a "jury of six."

9. *Id.* § 11, at 135.

in a jail or police station.¹⁰ The new court was authorized to appoint probation officers to investigate cases, represent the interests of the child during his hearing, and supervise children placed on probation.¹¹

As important as any of these specific provisions was the general purpose clause:

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.¹²

Significant amendments in 1901,¹³ 1905,¹⁴ and 1907¹⁵ expanded the definition of juvenile delinquency,¹⁶ regulated more closely the quality of treatment accorded juveniles,¹⁷ and increased public funding for the probation system.¹⁸

Earlier writers extolled the central philosophy of the Illinois legislation as "revolutionary"¹⁹ or "radically new."²⁰ Professors Platt and Fox disagree. Although their interpretations differ, each concludes that the 1899 legislation served primarily middle-class interests and produced no important innovations in either concept or detail.²¹

Platt analyzes intellectual trends which dominated criminal and

10. *Id.*

11. *Id.* §§ 6, 9, at 133.

12. *Id.* § 21, at 137.

13. Act of May 11, 1901, [1901] Ill. Laws 141.

14. Act of May 11, 1905, [1905] Ill. Laws 151.

15. Act of June 4, 1907, [1907] Ill. Laws 70.

16. The 1901 law broadened "delinquency" to include both peculiarly juvenile offenses (*e.g.*, frequenting saloons) and the apparently all-encompassing "status" offenses of incorrigibility and "growing up in idleness or crime." Act of May 11, 1901, § 2, [1901] Ill. Laws 142. The 1907 law expanded "juvenile" offenses to include, *inter alia*, running away from home, loitering, and using profanity. Act of June 4, 1907, § 2 [1], [1907] Ill. Laws 76.

17. The 1901 law established a procedure requiring the Board of State Commissioners of Public Charities to certify annually the "fitness" of institutions receiving juveniles under the Act, and prohibited commitment of children to institutions not approved by the agency. Act of May 11, 1901, § 13 [1901], Ill. Laws 143. In 1907, legislation gave the court authority to inquire into the treatment accorded any adjudicated juvenile, and to remove children from unsatisfactory institutions. Act of June 4, 1907, § 9c, [1907] Ill. Laws 77. It also permitted the court to return a committed juvenile to his home, if it were found unsuitable. *Id.* § 9d.

18. The 1905 amendment provided public compensation from county funds for probation officers in Cook County. *See* note 6 *supra*. Act of May 13, 1905, § 6, [1905] Ill. Laws 151. The 1907 amendment provided for compensation for all probation officers, regardless of county population. Act of April 19, 1907, § 6, [1907] Ill. Laws 69.

19. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. REV. 7.

20. Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967). However, Judge Julian Mack of the Chicago Juvenile Court saw "nothing radically new" in probation or any other feature of the Act. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 116 (1909). *See* note 29 *infra*.

21. *See* Platt, *supra* note 1, at 134-36; Fox, *supra* note 2, at 1229-30.

penal reform in the nineteenth century and which were reflected in the act.²² Paramount among the middle-class biases he finds embodied in the legislation was hostility to the cities, to the new waves of immigrants, and even to their children, whom the reformers professedly wished to save from criminality and immorality.²³

In his recent *Stanford Law Review* article, Fox concentrates on two themes: First, he contends that two important provisions of the Act—summary proceedings and a bias in favor of treatment modeled on family life—reflected conservative attitudes common in the nineteenth century.²⁴ Second, he contends, as does Platt, that in important respects the 1899 Act represented a failure for the reformers, who were defeated in efforts they themselves held important: improving conditions of incarceration²⁵ and severing public treatment of children from the influence of sectarian organizations.²⁶

II

Generally, although their effort to correct exaggerated claims made for the 1899 Act is valid and valuable, Platt and Fox seem to overstate the claims made by the reformers themselves. Both authors trace the antecedents of the important features of the Illinois Act,²⁷ including separate confinement of children for minor offenses and the use of probation,²⁸ to other states. But most responsible commentators and reformers did not contend that such provisions were unique or original.²⁹ Their claim, rather, was that these elements had been combined for the first time in a single act which explicitly committed the state to the approach of treating children who broke the law as children

22. Platt, *supra* note 1, at 15-100.

23. *Id.* at 36-43 & 135-36.

24. Fox, *supra* note 1, at 1207-15.

25. *Id.* at 1222-24.

26. *Id.* at 1228-29.

27. Platt, *supra* note 1, at 15-100; Fox, *supra* note 2, at 1188-1222. For a concise survey of the legal history, see TASK FORCE ON JUVENILE DELINQUENCY, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2-4 (1967) [hereinafter cited as TASK FORCE REPORT]. See also 4 W. BLACKSTONE, COMMENTARIES *21-22.

28. Platt, *supra* note 1, at 108-09; Fox, *supra* note 2, at 1189. For a description of probation in late nineteenth century Massachusetts, see J. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA 174-77 (1971).

29. See BARTOWS, *Introduction to International Prison Commission, Children's Courts in the United States: Their Origin, Development, and Results*, H.R. Doc. No. 701, 58th Cong., 2d Sess. x-xi (1904) [hereinafter cited as CHILDREN'S COURTS]. Bartows stressed the continuity of development of institutions and laws as did other contributors. See Eliot, *The Change Wrought by the Juvenile Probation System in St. Louis*, *id.* at 10-11; Mack, *supra* note 20, at 116; Murphy, *History of the Juvenile Court of Buffalo*, in CHILDREN'S COURTS 10-11.

with problems rather than as criminals.³⁰ Some of the authors' specific interpretations are also vulnerable.

Coercion and Middle-Class Values. Platt and Fox are correct in their central contention that the Act continued the older system of "coercive" treatment for dependent and delinquent children³¹: that is, the juvenile court could assess fines, impose probation, and forcibly remove children from their homes. Platt is open to challenge, however, in his further assertion that the Act expanded the scope of government interference in children's lives because it authorized punishment for status and other vaguely defined offenses which were offenses only for children.³² Platt's own findings indicate that punishment for such crimes pre-dated the Act. Thus in 1867, children could be committed to indeterminate sentences in the State Reform School for being "destitute of proper parental care, or growing up in mendicancy, ignorance, idleness or vice."³³ Before the Act's adoption children were also systematically committed to adult jails for "disorderly conduct," a charge that could apparently encompass any act that might later have served as a basis for juvenile court jurisdiction.³⁴ Rather than expand state power the Act may have only consolidated authority previously held by other state and local agencies.

The Act's consolidation of existing power had an impact on all aspects of child care. One of its effects may have been some reduction in the number of children in penal institutions.³⁵ On the other hand,

30. Law of April 21, 1899, § 11, [1899] Ill. Laws 135.

31. Platt, *supra* note 1, at 134-35; Fox, *supra* note 2, at 1229.

32. Platt, *supra* note 1, at 3-4, 6 & 137.

33. *Id.* at 103.

34. From the first of January, 1899, when the legislature met which enacted the measure popularly known as the Juvenile Court law, until the first of July, 1899, when that law went into effect, 322 boys between the ages of nine and sixteen years were sent to the city prison. Three hundred and twenty of them were sent up on the blanket charge of disorderly conduct, which covered offenses from burglary and assault with a deadly weapon to picking up coal in the railway tracks, building bonfires, playing ball in the street, or "flipping trains," that is, jumping on and off moving trains.

Lathrop, *Introduction* to S. BRECKENRIDGE & E. ABBOTT, *THE DELINQUENT CHILD AND THE HOME* 2 (1912).

35. Of 1,301 alleged delinquents brought before Judge Tuthill in Chicago between February 1 and November 1, 1903, more than half (715) were placed on probation; 505 were sentenced to the John Worthy School, 58 cases were dismissed, 17 were sentenced to other courts, and 6 were placed in institution for dependents. Of the 505 children placed in the School, 467 were children who had previously been before the court at least once and 141 had been there at least twice. Thus, only about 38 children were placed in the School as a result of their delinquency petition. Tuthill, *History of the Children's Court in Chicago*, in *CHILDREN'S COURTS*, *supra* note 29, at 6.

Similarly, the first two years under the original juvenile court act in Denver, of 554 children placed on probation, 5.5 per cent were subsequently committed to a training school. Of those brought to juvenile court on delinquency petitions, only ten per cent were initially sentenced to the schools, as compared to seventy-five per cent of those children who had appeared in criminal court prior to the 1903 law. Lindsey, *The Juvenile Courts of Denver*, *id.* at 33.

various reforms such as probation may also have permitted states to assume some control over more children and for longer periods of time.³⁶ Empirical evidence of what actually happened to children before and after the passage of juvenile court acts is essential to answering these questions; the authors provide none and there may in fact be none.

Both Platt and Fox also fail to support their argument that the juvenile court system, because it was coercive, served only middle-class interests and values.³⁷ There is evidence to suggest, on the contrary, that immigrants, racial minorities and poor parents may have welcomed an expansion of state police power as a means of controlling ungovernable children, relieving the burdens of under-financed child-rearing and restoring order to turbulent neighborhoods.³⁸ In fact, parents often availed themselves of the courts' broad jurisdiction to discipline or rid themselves of their own children.³⁹

Detention. The authors contend that the reformers failed to segregate children from adults pending final court action—a goal they considered crucial to juvenile justice—because the legislature did not provide funds for a new juvenile detention home.⁴⁰ But they ignore the supplementary role of private charitable organizations.⁴¹ Where public money fell short, private funds traditionally made up the difference; although no publicly supported facility was built under the 1899 law, children were separately housed in a building provided by a prisoner's aid society, and others were lodged in a county hospital.⁴²

Probation. Both authors' analysis is further weakened by an unjustifiable failure to discuss the significance of probation.⁴³ Reformers, judges, and early probation officers in Illinois and throughout the country considered probation the most important element of the first juvenile court acts.⁴⁴ Following the 1899 Act, probation spread to every

36. See, e.g., Tuthill, *supra* note 35, at 4; he states that it was his practice to place every child charged with delinquency "under the care of a probation officer" and to allow him to return home.

37. Platt, *supra* note 1, at 134-36; Fox, *supra* note 2, at 1193-95.

38. For discussion of views of immigrant parents, see N. GLAZER & D. MOYNIHAN, *BEYOND THE MELTING POT* 124-25, 195; O. HANDLIN, *THE UPROOTED* 234 (1951).

39. Wilkin, *History of the Children's Court, Borough of Brooklyn, City of New York*, in *CHILDREN'S COURTS*, *supra* note 29, at 26.

40. Platt, *supra* note 1, at 146-47; Fox, *supra* note 2, at 1224.

41. Although both Platt and Fox emphasize the vital role of private organizations in securing passage of the Act, they underestimate their importance in effecting its provisions. See Platt, *supra* note 1, at 134-36, 175; Fox, *supra* note 2, at 1229-31.

42. See Kelsey, *The Juvenile Court of Chicago and Its Work*, 17 *ANNALS* 293, 301 (1901).

43. Fox, *supra* note 2, at 1229, dismisses probation as a "token" and "of little assistance."

44. See, e.g., Murphy, *supra* note 29, at 13, describing probation as "the keystone of the system." Another reformer stated: "The success of the system would depend principally on the character of the probation work that was provided . . ." Schoff, *A Campaign for Childhood*, *id.* at 138. See also Eliot, *id.* at 162.

state which enacted juvenile court legislation.⁴⁵ Probation proved critical for juvenile justice reform because it permitted judges to extend their knowledge and dispositional authority beyond the courthouse. It gave the judge an attractive middle road between incarceration and release by permitting supervision of children in their homes.

The 1899 Act did not provide funds for probation officers,⁴⁶ but in fact officers were employed soon after passage of the Act, and paid by private organizations.⁴⁷ By 1905, probation officers in Cook County⁴⁸—and by 1907,⁴⁹ all Illinois probation officers—were paid by the state.

Procedures. Second in importance only to probation were the “summary” procedures mandated by the 1899 Act and its progeny. Fox suggests that procedural informality was not innovative because children had been dealt with “informally” before—namely, in lower municipal courts.⁵⁰ He justifiably surmises that before 1899 children tried for crimes were routinely processed with little respect for civil liberties.⁵¹

But the informality of court procedures under the Act was far different from that in Chicago municipal court.⁵² Children in juvenile court had probation officers charged to represent their interests;⁵³ they also enjoyed a statutory right to a jury trial in every case,⁵⁴ and the benefit of apparently well qualified judges.⁵⁵ Indeed, there is evidence that a major impetus to reform was a desire to make procedures *less* informal—less hurried and more individualized—by giving the court time and manpower to conduct a full investigation of each case and thus to spare children from the sloppy, assembly-line procedures of lower courts.⁵⁶ Providing a non-adversarial forum, moreover, was at most

45. H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 24-25 (1927).

46. See Law of April 21, 1899, [1899] Ill. Laws 131.

47. By the end of its first year of operation, the Chicago court had six probation officers supported by the Juvenile Court Committee of the Chicago Women's Club, Platt, *supra* note 1, at 139-40. By 1904, fifteen policemen served as probation officers; ten to fifteen women officers were supported by the Women's Club; and several others were furnished by private philanthropists. See Tuthill, *supra* note 35, at 4.

48. See Act of May 13, 1905, [1905] Ill. Laws 151.

49. See Act of April 19, 1907, [1907] Ill. Laws 69.

50. Fox, *supra* note 2, at 1222.

51. *Id.* at 1212-13.

52. See Tuthill, *supra* note 35, at 3-4; Kelsey, *supra* note 42, at 302-04.

53. Act of April 21, 1899, § 6, [1899] Ill. Laws 133.

54. *Id.*, § 2, pt. 132; nonetheless this provision was probably seldom used.

55. Richard S. Tuthill had fifteen years' experience on the bench before becoming the first juvenile court judge in Chicago. Platt, *supra* note 1, at 141. He was succeeded by Julian W. Mack. Hawes, *supra* note 45, at 183.

56. A probation officer complained of children having been treated in the “flippant manner that usually characterizes proceedings in the police courts of our large cities.” Hall, *History of the Juvenile Court of Milwaukee*, in *CHILDREN'S COURTS*, *supra* note 29, at 144. A reformer stated that before reform:

Any magistrate could commit a child to a reformatory on the parent's statement

a subsidiary aim. Most reformers were far more impressed with the need to improve corrections and treatment programs.⁵⁷

III

Of what present significance is the history of the juvenile justice system? The history of juvenile court procedure bears directly on the current debate about whether more stringent rules of due process ought to be applied to juvenile courts. Those who argue for greater informality of procedure often rely on the contention that this was the reformers' original objective, and that informality is therefore in the reformist tradition.⁵⁸ Such is the interpretation of history presented by Platt.⁵⁹ But, as shown above, few reformers considered procedural informality important to the juvenile courts, and many intended to increase procedural formality.⁶⁰

One argument for procedural informality has been that the juvenile court process may itself be therapeutic if restrictive due process safeguards are not imposed; for example, the juvenile may be coaxed into admission and repentance of wrongdoing.⁶¹ This argument, however, tends to confuse correction and treatment, on the one hand, with procedures leading to these dispositions, on the other. Misuse of the argument is illustrated by a recent decision of the Second Circuit relying on the idea that juvenile court procedures may be therapeutic in order to deny a juvenile the right to jury trial (although he could be committed, and was in fact committed, to an adult prison).⁶²

of incorrigibility, and no effort was ever made to prove the parent's statement. The child's side of the case was never heard.

Schoff, *supra* note 44, at 134-35.

57. Judge Lindsey expressed faith in the efficacy of reform schools and industrial schools. Lindsey, *supra* note 35, at 29-30.

58. The early reformers were appalled by adult criminal procedures and penalties The child—essentially good, as they saw it—was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable (footnote omitted).

In re Gault, 387 U.S. 1 at 15 (1966).

59. Platt, *supra* note 1, at 141-45.

60. See p. 634; but see Fox, *supra* note 2, at 1221-22.

61. See, e.g., Lindsey, *supra* note 57, at 108-09; Mack, *supra* note 20, at 120.

62. As indicated above, we believe that the Supreme Court in *McKeiver* countenanced the juvenile court system for the benefits it confers on juveniles apart from those arising after disposition. An informal proceeding informed by sympathy and concern was *itself considered sufficiently desirable and still attainable* to outweigh the argument in favor of jury trials (emphasis added). *United States ex rel. Murray v. Owens*, Nos. 72-1474, 72-1514 at 4346-47 (2d Cir. August 10, 1972). The view that less procedural "formality" leaves courts more flexible in treating children was voiced in *McKeiver v. Pennsylvania*, 403 U.S. 528, 550-51 (1971), holding that there is no Fourteenth Amendment right to a jury trial in juvenile delinquency cases.

Informal procedures have recently been defended by others as a *quid pro quo* for the government's promise to help the child (*e.g.*, the child will not be stigmatized; the family will be strengthened; children who must be removed from their homes will be placed in other homes or in family-like institutions).⁶³ But if, according to this view, such benefits are not forthcoming, and the "contract" in effect is breached, then the procedural safeguards must be restored.⁶⁴ A full assessment of this theory is not possible here, except to note an important objection: it makes the granting of procedural rights contingent upon a judge's ad hoc decision that a particular disposition is bad for a child.⁶⁵

Both Platt and Fox share the skeptical view of present juvenile courts expounded by advocates of a current liberal agenda, exemplified by the final recommendations of the President's Crime Commission in 1967.⁶⁶ This agenda continues to assign the state a major role in solving the problems of delinquents. Its essential features include (1) encouraging reliance by social service workers, police, teachers and parents on youth service programs before resort to juvenile courts (without restricting the juvenile courts' jurisdiction)⁶⁷ and (2) transferring children from big, coercive institutions into smaller, "community-based" facilities.⁶⁸

As an alternative to this liberal agenda, another program for reform stresses minimum interference in children's lives as a goal. This program advocates: (1) Repealing laws defining crimes in terms of children's status ("incorrigible" and the like) or in terms of behavior which would be illegal only for children (truancy);⁶⁹ and (2) committing juveniles to brief, determinate terms of confinement.⁷⁰ Supporters of this program thus resist many of the impulses toward "child-saving"

63. See *In re Gault*, 387 U.S. 1, 14-21 (1966).

64. *Id.*

65. Fox questions whether granting procedural rights on this basis may not lead to rescinding child welfare programs without providing adequate funds for counsel. Fox, *supra* note 2, at 1238-39.

66. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 79-87 (1967).

67. See Gough, *Consent Decrees and Informal Service in the Juvenile Court: Excursions Toward Balance*, 19 U. KAN. L. REV. 733-38 (1971).

68. See O. KELLER & B. ALPER, *HALFWAY HOUSES: COMMUNITY-CENTERED CORRECTION AND TREATMENT* 106-17 (1970); Kovach, *Massachusetts Reforms to Doom Youth Prisons*, N.Y. Times, Jan. 31, 1972, at 37, col. 3.

69. See *Gesicki v. Oswald*, 336 F. Supp. 371 (1971), *aff'd mem.*, 406 U.S. 913 (1972), holding the New York "Wayward Minor" Act unconstitutional; TASK FORCE REPORT, *supra* note 27, at 27; Glen, *Juvenile Court Reform: Procedural Process and Substantive Stasis*, 1970 Wis. L. REV. 431, 441-47.

70. See AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* 40-47, 83-99 (1970). But see TASK FORCE REPORT, *supra* note 69, at 5.

that led to the 1899 law⁷¹ and sustain juvenile courts today. The program's danger is that behavior left unpunished by the state, but socially disapproved, may be punished by teachers, police, or parents as arbitrarily and destructively as by the worst juvenile courts. In the prevailing atmosphere of skepticism about juvenile courts, the most impressive justifications for new approaches emphasizing voluntariness are that they are cheaper and preserve children's autonomy.

Why is it important as the reformers claimed, that the state handle children who violate laws as children with problems rather than as criminals? Three final observations of the impact of juvenile reform, past and potential, can be made: First, children seem better off in juvenile courts than in adult criminal courts. This is because children's prisons are generally not as bad as adult prisons; because fewer children than adults are incarcerated, for shorter periods of time; and because a juvenile court faces less resistance in placing even serious offenders in foster homes, drug programs, or probation.⁷²

Second, the existence of a system committed to treatment rather than punishment has encouraged innovation. For example, probation was adapted from juvenile courts to the adult system.⁷³ More recently, Massachusetts' energetic Commissioner of Youth Services, Dr. Jerome Miller, in closing that state's largest institutions for delinquents, may have paved the ground for adult penal reform.⁷⁴

Finally, the general purpose clause authorizing juvenile courts to use family treatment has provided a rationale for implementing a "right to treatment," which otherwise must be pegged to more cumbersome constitutional doctrines.⁷⁵ To the extent that courts are willing to impose spending obligations on legislatures to implement this right, general purpose clauses may yet provide a way to realize some of

71. A Philadelphia reformer expressed an attitude typical of many reformers:

In the light of true values no cases coming into the courts equal in importance to the community and the State these children's cases. The treatment given at this time will decide whether he shall become a good citizen or a criminal. . . .

Should not the State safeguard the interests of its helpless citizens and provide adequately and wisely for their development physically, morally, and intellectually? Schoff, *supra* note 44, at 136.

72. As trying as are the problems of the juvenile courts, the problems of the criminal courts, particularly those of the lower courts that would fall heir to much of the juvenile court jurisdiction, are even graver

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 81 (1967).

73. *See* p. 634.

74. Kovach, *supra* note 68; Kovach, *N.Y. Times*, Nov. 18, 1972, at 21, col. 3.

75. *See* *United States v. Alsbrook*, 336 F. Supp. 973 (D.C.D.C. 1971); Gough, *The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 *St. Louis U.L.J.* 182 (1971); 16 *St. Louis U.L.J.* 340 (1971).

the promise of the original acts.⁷⁶ That the advocates of reform aspired to more is doubtful; that they secured this much, at least, must moderate present-day cynicism.

76. See, e.g., *Wyatt v. Stickney*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), supplementing 344 F. Supp. 1341 (M.D. Ala. 1971). The court, per Johnson, C. J., held that failure to comply with a court order to provide patients at three state mental institutions with the minimum medical and constitutional requisites of treatment could not be justified by lack of funds. The court said:

In the event . . . that the Legislature fails to satisfy its well-defined constitutional obligation, and the Mental Health Board, because of lack of funding or any other legally insufficient reason, fails to implement fully the standards herein ordered, it will be necessary for the Court to take affirmative steps, including appointing a master, to ensure that proper funding is realized and that adequate treatment is available for the mentally ill of Alabama [footnote omitted].
344 F. Supp. at 378.