




1979

Wayward Children and the Law, 1820-1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court

Peter D. Garlock
Cleveland State University, p.garlock@csuohio.edu

How does access to this work benefit you? Let us know!

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

 Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Juvenile Law Commons](#), and the [United States History Commons](#)

Original Citation

Peter D. Garlock, "Wayward" Children and the Law, 1820-1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court, 13 *Georgia Law Review* 341 (1979)

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

HEINONLINE

Citation: 13 Ga. L. Rev. 341 1978-1979

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon May 21 15:28:19 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0016-8300](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0016-8300)

GEORGIA LAW REVIEW

VOLUME 13

WINTER 1979

NUMBER 2

“WAYWARD” CHILDREN AND THE LAW, 1820-1900: THE GENESIS OF THE STATUS OFFENSE JURISDICTION OF THE JUVENILE COURT

*Peter D. Garlock**

I. INTRODUCTION

Since the United States Supreme Court's decision in *In re Gault*¹ in 1967, in which due process rights were extended to juvenile delinquency proceedings which might result in commitment of youths to reformatory institutions, numerous courts, legislatures, and private study commissions have been re-examining the rights and obligations of young people in contemporary American society.² In this ongoing debate over juvenile jurisprudence, perhaps no issue has provoked as much controversy as the question of whether juvenile courts should continue to exercise jurisdiction over juvenile “status offenses”—those unique forms of deviant behavior which are illegal only for minors. While terminology and definitions differ from state to state, all jurisdictions today provide for court surveillance of young people who engage in noncriminal misbehavior as distinct from violations of criminal law.³ Generally, such noncriminal mis-

* Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. B.A., Yale, 1960; LL.B., Yale, 1966; Ph.D., Yale, 1972. Research for this Article was supported in part by a grant from the Cleveland-Marshall Fund. I would like to thank Professor Stephen Gard for his helpful comments on an earlier draft of this Article. I would also like to thank Jane Knapp and Marjorie Kornhauser, students at Cleveland-Marshall College of Law, for their invaluable research assistance.

¹ 367 U.S. 1 (1967).

² See, e.g., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967); NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, *JUVENILE JUSTICE AND DELINQUENCY PREVENTION: REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION* (1976); IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT (1977); K. KENISTON & THE CARNEGIE COUNCIL ON CHILDREN, *ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE* (1977).

³ IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, *STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR* 1, 74 app. (Tent. Draft, 1977) [hereinafter cited as *STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR*]. In New York, for example, such children are known as “Person[s] in need of supervision” (PINS), N.Y. FAM. CT. ACT § 712(b) (McKinney 1975); in Colorado they are “Children in Need of Supervision” (CHINS), COLO. REV. STAT. ANN. §§

behavior falls into three broad categories: (1) children who are "unruly," "wayward," "incorrigible," "beyond control of parents," or who otherwise act in a socially unacceptable manner; (2) children who absent themselves from home without parental permission; and (3) children who are habitually truant from school.⁴

Opponents of the present system argue that the status offense jurisdiction unfairly discriminates against youth since it punishes conduct for minors that would not be illegal for adults, that it requires society to devote expensive resources to trivial behavioral problems, that the more serious behavioral problems of young people cannot be solved by compulsory legal intervention, that much youthful "deviant" behavior is transitory and will pass as youths mature, that involving wayward children in the legal process stigmatizes them and actually encourages future criminality, and that, in any case, the status offense jurisdiction is unconstitutional.⁵

19-1-103(5), 19-3-106 (1978); in Illinois they are "Minor[s] Otherwise in Need of Supervision" (MINS), ILL. ANN. STAT. ch. 37 § 702-3 (Smith-Hurd 1972).

Other states do not differentiate between criminal law violators and status offenders, but group both under the general rubric of "delinquent." See, e.g., CONN. GEN. STAT. ANN. § 17-53 (1975):

[A] child may be found "delinquent" (a) who has violated any federal or state law or municipal or local ordinance, or (b) who has without just cause run away from his parental home or other properly authorized and lawful place of abode, or (c) is beyond the control of his parent, parents, guardian or other custodian, or (d) who has engaged in indecent or immoral conduct, or (e) who has been habitually truant or who, while in school has been continuously and overtly defiant of school rules and regulations, or (f) who has violated any lawful order of the juvenile court

⁴ Some statutes include more detailed categories. See, e.g., OHIO REV. CODE ANN. § 2151.022 (Page 1976):

As used in . . . the Revised Code, "unruly child" includes any child:

- (A) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;
- (B) Who is an habitual truant from home or school;
- (C) Who so departs himself as to injure or endanger the health or morals of himself or others;
- (D) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority;
- (E) Who is found in a disreputable place, visits or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons;
- (F) Who engages in an occupation prohibited by law or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others;
- (G) Who has violated a law applicable only to a child.

Until recently, Indiana included violation of detailed curfew regulations as a ground for declaring a child "delinquent." IND. CODE ANN. § 31-5-7-4.1(d) (Burns 1976) (repealed effective Oct. 1, 1979, by IND. CODE ANN. § 31-5-7-4.1(a)(4) (Burns Supp. 1978)).

⁵ These arguments are explored in STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR, *supra* note 3, at 1-13. Recent constitutional attacks have focussed on the vagueness and overbreadth of status offense statutes. See, e.g., Stiller & Elder, *PINS—A Concept in Need of Supervision*, 12 AM. CRIM. L. REV. 33 (1974); Note, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-for-Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972);

Those who would retain juvenile court jurisdiction over status offenders dispute all these points. They claim that noncriminal misbehavior is symptomatic of future criminal conduct and must be caught early, that courts can and do intervene effectively to reform rebellious personalities, and that the primary cause of failure to date is a lack of resources rather than a faulty jurisprudence.⁶

It is not the purpose of this article to rehearse this debate, the contours of which have been explored elsewhere.⁷ Rather, I hope to throw light on the current controversy by examining the historical genesis and expansion of the status offense jurisdiction before the invention of the juvenile court in 1899⁸ and by showing the centrality of concern for wayward⁹ children in nineteenth century juvenile

Note, *Juvenile Court Jurisdiction Over "Immoral" Youth in California*, 24 STAN. L. REV. 563 (1972); Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L. J. 745 (1973). See also Katz & Teitelbaum, *PINS Jurisdiction, The Vagueness Doctrine, and the Rule of Law*, 53 IND. L. J. 1 (1977-78). Status offense statutes have also been criticized on the ground that they deny equal protection of the law to children. See, e.g., Katz & Schroeder, *Disobeying a Father's Voice: A Comment on Commonwealth v. Brasher*, 57 MASS. L. Q. 43 (1972); Rodham, *Children Under the Law*, 43 HARV. ED. REV. 487 (1973); Sidman, *The Massachusetts Stubborn Child Law: Law and Order in the Home*, 6 FAM. L. Q. 33 (1972). For other criticisms of the status offense jurisdiction, see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, ch. 8 (1967); Ketcham, *Why Jurisdiction over Status Offenders Should be Eliminated from Juvenile Courts*, 57 B.U. L. REV. 645 (1977); Rosenberg & Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 MICH. L. REV. 1097 (1976); Note, *California Runaways*, 26 HASTINGS L.J. 1013 (1975); Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974).

⁶ See, e.g., Arthur, *Status Offenders Need Help, Too*, 26 JUV. JUST., February 1975, at 3; Arthur, *Status Offenders Need a Court of Last Resort*, 57 B.U. L. REV. 631 (1977); Gill, *The Status Offender*, 27 JUV. JUST., August 1976, at 3; Gregory, *Juvenile Court Jurisdiction Over Noncriminal Misbehavior: The Argument Against Abolition*, 39 OHIO ST. L.J. 242 (1978); Martin, *Status Offenders and the Juvenile Justice System: Where Do They Belong?*, 28 JUV. JUST., February 1977, at 7.

⁷ See articles cited at notes 5-6 *supra*. Since I believe historians have an obligation to reveal their relevant biases, I should note that I share many of the concerns of present-day critics of the status offense jurisdiction of the juvenile court and am in general agreement with the recommendations of the IJA-ABA Juvenile Justice Standards Project's STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR, *supra* note 3.

I have not attempted complete historical neutrality in this Article, and criticisms of nineteenth-century efforts to regulate the behavior of children appear in the text. I do not believe, however, that an historical inquiry "proves" that the status offense jurisdiction is misguided, if only because these laws have been so widely adopted and have endured for such a long time, despite challenges in legislatures and courts. Rather, the historian's task is to illuminate the reasons why these laws were enacted, the extent of their adoption and implementation, the assumptions about human behavior on which they were based, and alternative options not pursued, and thus to provide a background for more informed policy-making in the present.

⁸ Act of Apr. 21, 1899, 1899 Ill. Laws 131.

⁹ This Article will use the term "wayward" to stand for noncriminal misbehaving children

jurisprudence.

In his provocative book on the juvenile court movement, Anthony Platt contends that juvenile court legislation "brought within the ambit of governmental control a set of youthful activities that had been previously ignored or handled informally. . . . drinking, begging, roaming the streets, frequenting dance-halls and movies, fighting, sexuality, staying out late at night, and incorrigibility" ¹⁰ In his zeal to revise the previously accepted myth of the juvenile court as a purely humanitarian institution, Platt obscures the point that laws punishing children who engaged in these activities had been on the books for decades in many states. While the juvenile court laws passed after 1899 sometimes spelled out prohibited conduct in more detail than previous statutes,¹¹ the general kinds of misbehavior they punished had concerned the child-savers¹² of the 1820's as much as those at the turn of the twentieth century. Indeed, it is not going too far to say that those who dealt with children in the nineteenth century were obsessed with curtailing

unless a more specific category of status offense is indicated. Because the term implies a value judgment about the children in question, it carries implied quotation marks whenever used, as do such similar terms as "incorrigible" and "vicious."

¹⁰ A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 139 (2d ed. 1977).

¹¹ See, e.g., Act of Apr. 23, 1908, § 5, 1908 Ohio Laws 192:

For the purpose of this act, the words "delinquent child" include any child under seventeen years of age who violates any law of this state or any city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill repute; or who knowingly patronizes or visits any policy shop or place where any gambling device is, or shall be, operated; or who patronizes or visits any saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits any public pool or billiard room or bucket shop; or who wanders about the streets in the night time; or who wanders about any railroad yards or tracks, or jumps or catches on to any moving train, traction or street car, or enters any car or engine without lawful authority; or who uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct; or who uses cigarettes; or who visits or frequents any theater, gallery or penny arcade where any lewd, vulgar or indecent pictures are exhibited or displayed.

In some states, such as New York, statutes penalizing children engaging in some of these kinds of conduct antedated the passage of juvenile court legislation. See text accompanying notes 251-57 *infra*. In 1891, Ohio made it a misdemeanor for a minor to enter any saloon, beer-garden, or other place where liquor was sold, without a parent or guardian. Act of Apr. 28, 1891, § 1, 1891 Ohio Laws 409.

¹² While the term "child-saver" might have an ironic flavor today, nineteenth-century reformers themselves used the term to apply to those concerned with the reformation of delinquent children and the care of dependent children, whether managers of children's institutions, elected officials, or private citizens. See, e.g., NATIONAL CONFERENCE OF CHARITIES AND CORRECTION, *REPORT OF THE COMMITTEE ON THE HISTORY OF CHILD-SAVING WORK: HISTORY OF CHILD-SAVING IN THE UNITED STATES* (1893).

juvenile noncriminal misconduct, with increasing fervor as the century progressed, and were less concerned with children who committed serious crimes. The creation of juvenile courts contributed nothing new to juvenile jurisprudence but rather served to provide a more effective means of implementing a wayward child jurisdiction that had been in existence for three-quarters of a century, and which had become the dominant approach to youth by 1900.¹³

Wayward child laws were but one aspect of a larger change in the legal status of children. Increasingly after 1870, states passed laws designed to protect the health, safety, and morals of children: stat-

¹³ The argument that the juvenile court continued a well-established tradition of controlling the behavior of wayward children and that this policy was central to nineteenth-century practice has been previously advanced in a seminal article by Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970). Fox drew largely on data from a few key states. One purpose of this article is to document more fully the extent of nineteenth-century efforts to reform wayward children by investigating statutes and commitment practices in other jurisdictions. For a stimulating essay that seeks to place government regulation of the family from Puritan colonial days through the nineteenth century in a wider social, economic, and legal context, see Teitelbaum & Harris, *Some Historical Perspectives on Governmental Regulation of Children and Parents*, in *BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 1* (L. Teitelbaum & A. Gough eds. 1977).

Two excellent recent studies of the juvenile court movement have not emphasized sufficiently the nineteenth-century movement to reform wayward children, although both mention that before 1900 children could be incarcerated for behavior short of crime. See E. RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 45* (1978); S. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920*, at 8-14, 26-27 (1977). Stressing the juvenile court's "introduction of preventive and diagnostic purposes into judicial proceedings," as does Schlossman, *supra* at 53, clouds the central jurisprudential point: both nineteenth-century reformers and juvenile court proponents sought to prevent adult criminality by coercively reforming wayward children who had not violated the criminal law or who had committed only petty offenses, but whose general character traits or conduct were deemed predictive of future criminality. The techniques used to diagnose and treat juvenile misbehavior, while surely important, are ultimately less significant than the issue of whether the state claims the right coercively to intervene in the lives of children on the basis of predicted criminality, when such intervention would be constitutionally impermissible for adults. That this is still the central mission of juvenile court authorities, as it was for nineteenth-century reformers, is borne out by the following comments of a juvenile court judge:

Status offenses are an indication of some serious trouble. That this is the place where we can help, where we can and should provide compulsory help if the family is not willing to seek help. This is the place where we can reduce the crime rates of the future. Because if we can help a child to unravel incorrigibility, absenting, truancies, drinking, then I think maybe we can do much . . . to make . . . better citizens To deny treatment at such a stage may well lead to mental illness or to crime.

Arthur, *Status Offenders Need Help, Too*, 26 JUV. JUST., February 1975, at 5-6.

Compare the remarks of a mid-nineteenth-century reformer: "I would not wait till the child grows large enough to commit some overt act, to be actually delinquent. I would snatch him as a 'brand from the burning.' I would rescue him from the yearning gulf of poverty, drunkenness and crime, into which he is about to fall." Grimshaw, *An Essay on Juvenile Delinquency*, in *PRIZE ESSAYS ON JUVENILE DELINQUENCY 148* (E. Hale, T. Moore, & A. Grimshaw eds. 1855).

utes required children to attend school part of the year and provided for their incarceration if they did not, prohibited children from working at certain occupations or activities and prescribed the number of hours they could work, and created a roster of places children could not go without an adult.¹⁴ By 1900 their lives had been hemmed in by a host of regulations defining what they could and could not do, and the lines separating children from adults had become sharper than at any time in American history. These developments created the legal framework for a concept of adolescence as a stage of development distinct from adulthood.¹⁵ Whether these laws were protective or repressive of young people is a question that is undergoing continuing examination today.¹⁶

This article will explore these themes through four kinds of evidence: (1) the ideas of the child-savers themselves, as expressed in their writings; (2) statutes passed by certain key jurisdictions to deal with wayward children; (3) statistics from houses of refuge and reform schools illustrating the extent to which wayward children were incarcerated throughout the nineteenth century; and (4) the response of the judiciary when confronted with challenges to the state's right to commit wayward children.

If we are successfully to re-evaluate the utility of wayward child laws today, we must understand why they had such appeal for nineteenth-century reformers. We must discover whether laws formulated in a different era to meet certain perceived social needs and based on certain assumptions about human development are relevant in an age when we are less confident of our ability to predict human deviance, less sure of the reformatory capabilities of our correctional system, and more concerned with insuring justice for previously ignored minority groups, including children.

II. REFORMERS AND "WAYWARD" CHILDREN, 1820-1840

A. *The "Dangerous Classes"*

To discover the roots of modern American concern for wayward children, we must look to the mounting anxiety experienced by elite groups in the 1820's and 1830's over what they perceived as more

¹⁴ See section IV.(A.) *infra*.

¹⁵ On the history of the concept of adolescence in the United States, see J. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA, 1790 TO THE PRESENT (1977).

¹⁶ See, e.g., IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO RIGHTS OF MINORS, pt. 5 (Tent. Draft, 1977); Note, *Child Labor Laws—Time to Grow Up*, 69 MINN. L. REV. 575 (1975).

serious forms and degrees of poverty and criminality than eighteenth-century America had known.¹⁷ As David Rothman has pointed out, colonial Americans had depended on closely knit associations—family, church, a network of social relations—to manage what levels of poverty and criminality existed.¹⁸ Colonists, sharing a fatalistic view of human nature, assumed that because of man's natural depravity some degree of poverty and crime would always be with them. They did not expect to reform individuals or eradicate crime, but they were confident that through the use of severe punishment and close scrutiny of strangers in communities they could control deviance in their midst. Locating the cause of crime in the individual rather than the environment, colonists did not believe it seriously threatened the social order.¹⁹

¹⁷ Laws governing wayward children reach even deeper into the American past. In 1646, Massachusetts Bay Colony imposed the death penalty on "stubborn and rebellious" sons, sixteen years of age and over, who would not obey their parents. Act of 1646, 3 MASS. RECORDS 101 (1854), reprinted in 1 CHILDREN AND YOUTH IN AMERICA 38 (R. Bremner ed. 1970-74) [hereinafter cited as CHILDREN AND YOUTH]. Apparently the death penalty was never inflicted. G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 81 (1960). Another statute, enacted in 1654, provided for the whipping of children who acted "disrespectively [sic], disobediently, and disorderly" towards their parents. Act of 1654, 3 MASS. RECORDS 355 (1854), reprinted in 1 CHILDREN AND YOUTH, supra at 39. (Until 1973 it was still a criminal offense to be a "stubborn child" in Massachusetts. MASS. ANN. LAWS ch. 272, § 53 (West 1963) (amended to exclude "stubborn children" and "runaways" by Act of Nov. 21, 1973, ch. 1073, § 20, 1973 Mass. Laws 1108). Disobedient children in Massachusetts are still subject to juvenile court jurisdiction as "children in need of services." MASS. ANN. LAWS ch. 119, § 39E (West 1975). The Massachusetts "stubborn child" provision previously had been held constitutional in *Commonwealth v. Brasher*, 359 Mass. 550, 270 N.E.2d 389 (1970)).

In 1650, Connecticut permitted selectmen to apprentice "rude, stubborn and unruly" children until the age of majority. CODE OF CONN. GEN. CT., *Children*, 39 (1650). By 1672, the colony had provided that children convicted of "stubborn or rebellious carriage" could be sentenced to the house of correction, "there to remain at hard labour and severe punishment, so long as said authority shall judge meet." 1 CONN. PUB. STAT. LAWS tit. 33, § 7 (1803). As of 1866, both Connecticut provisions were still on the books. CONN. GEN. STAT. tit. 13, ch. 4, §§ 44-45 (1866). New Hampshire and Rhode Island also enacted laws permitting children to be confined in the house of correction if they were stubborn or failed to obey lawful commands of their parents. Act of May 13, 1718, reprinted in N.H. Acts and Laws 73 (1771); An Act for Punishing Criminal Offenses, R.I. Acts and Laws 4 (1719). While these laws provided for official intervention into the lives of children, it would seem that colonial Americans looked primarily to families to discipline misbehaving youths. See generally, E. MORGAN, THE PURITAN FAMILY: RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND 102-08 (rev. ed. 1966); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 16-17 (1971).

¹⁸ D. ROTHMAN, supra note 17, at 16. See generally *id.* at 1-56.

¹⁹ Haskins observes that the Puritans of Massachusetts Bay Colony laid great stress on persuading an offender to acknowledge his or her wrongdoing, a process known as "due conviction." The Puritans believed that logic and reasoning, aided by divine grace, could restore the innate human sense of right and wrong and thus bring the offender back to a

According to Rothman, this consensus broke down between 1790 and 1820, for a number of reasons: an upsurge in population, especially in the cities; a corresponding increase in geographic mobility, accelerating in the 1830's as people began to seek jobs in the new factories; and the broader social mobility that industrialization and commerce precipitated.²⁰ The old sense of loyalty to an insular community broke down, and wider political loyalties—to the state and nation—began to flourish. One no longer knew or trusted one's neighbors, at least in the larger communities, especially when those neighbors were poor immigrants. Further, crime and poverty no longer appeared unimportant: the spectre of a whole class of people pauperized or engaged in crime—the “dangerous classes”²¹—haunted Americans after 1820.

For nineteenth-century Americans, pauperism and crime were inextricably linked. Many attributed the appearance of chronic poverty among the masses to the addiction of poor people to idleness, drinking, and gambling—an addiction that might be caused either by the inherent moral culpability of the poor or the overwhelming nature of the temptations to which they were exposed. Reformers continually commented on the shocking increase of taverns, brothels, and gambling dens and their wicked influence on the poor, especially the immigrant poor. It was widely assumed that anyone who succumbed to these perils would eventually engage in criminal activities as well.²²

respectable place in society. Punishments were often mitigated if a criminal freely acknowledged his or her error. Thus, despite their belief that original sin obscured man's moral faculties, the Puritans were in a sense more optimistic than later colonists that moral persuasion could reform offenders. G. HASKINS, *supra* note 17, at 204-11.

The importance of the settlement provisions of colonial poor laws as a device for excluding potentially disruptive persons and thus controlling the level of crime within a community cannot be overemphasized. See M. CREECH, *THREE CENTURIES OF POOR LAW ADMINISTRATION: A STUDY OF LEGISLATION IN RHODE ISLAND* (1936); D. ROTHMAN, *supra* note 17, at 20-25.

²⁰ D. ROTHMAN, *supra* note 17, at 57-58.

²¹ *Id.* Charles Loring Brace, founder of the New York Children's Aid Society, employed this commonly used term in the title of his memoir, C. BRACE, *THE DANGEROUS CLASSES OF NEW YORK AND TWENTY YEARS' WORK AMONG THEM* (1872).

²² D. ROTHMAN, *supra* note 17, at 62-78, 155-72. Bradford K. Peirce, an influential early nineteenth-century child-saver and the first superintendent of the Massachusetts Industrial School for Girls, summed up the easy equation that linked poverty, immigrants, and crime:

The immense importation of the poorer and lower classes of Europe, the most destitute portion of which lingers in our Eastern cities, greatly increases the statistics of exposed and criminal children. Poor blood, low moral culture, the pinch of poverty, the habit of indulgence, predispose this class to early crime.

B. PEIRCE, *A HALF CENTURY WITH JUVENILE DELINQUENTS* 249-50 (1869). See also *SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 24*, at 11 (1849).

It followed that if adults could not avoid the manifold temptations of poverty-stricken neighborhoods, children must also give in to a life of crime. To prove this was so, managers of institutions for children compiled abundant evidence to show that the parents of their charges had been intemperate, had smoked, had gambled, had not held jobs, or had not sent their children to church.²³ Clearly, in their view, the children's waywardness was the fruit of the parents' vices.

Charles Loring Brace, who founded the New York Children's Aid Society in 1853 with the avowed purpose of "draining the city"²⁴ of vagrant children by sending them to live with farming families in the West, wrote that these children, "if unreclaimed, [will] poison society all around them. They will help to form the great multitude of robbers, thieves, vagrants, and prostitutes who are now such a burden upon the law-respecting community."²⁵ Brace, however, went beyond many of his contemporaries in articulating political fears as well. Commenting on New York City's draft riots of 1863, in which boys fifteen to eighteen years of age assumed positions of leadership, Brace observed:

It should be remembered, that there are no dangers to the value of property or to the permanency of our institutions, so great as those from the existence of such a class of vagabond, ignorant, ungoverned children. This "dangerous class" has not begun to show itself, as it will in eight or ten years, when these boys and girls are matured. . . . They will vote. They will have the same rights as we ourselves, though they have grown up ignorant of moral principle, as any savage or Indian. They will poison society. They will perhaps be embittered at the wealth,

²³ See, e.g., Fourth Annual Report of the Massachusetts State Reform School 24 (1851):

The following facts have been gathered, to throw some light upon the causes of crime, as developed in the commitments to the Reform School.

Whole number received, 440.

169 have lost their father.

108 " " " mother.

138 " fathers who have no steady employment.

194 " " " are intemperate.

57 " mothers who are intemperate.

170 " fathers who use profane language.

45 " mothers " " " " " "

145 " fathers who were Sabbath-breakers.

71 " mothers " " " " " "

72 " fathers, mothers, brothers or sisters, who have been, or are imprisoned.

²⁴ C. BRACE, *supra* note 21, at 92.

²⁵ *Id.*

and the luxuries, they never share. Then let society beware, when the outcast, vicious, reckless multitude of New York boys, swarming now in every foul alley and low street, come to know their power and *use it!*²⁶

Brace here formulated the ultimate agenda of nineteenth-century child-savers. Wayward children must be reformed, not merely because they would engage in individual acts of crime, but because an impoverished and embittered lower class might one day imitate their European counterparts and engage in social revolution, destroying the very system of private property.²⁷

Brace was writing at mid-century, when immigration and industrialization had exacerbated the division between the classes. Yet the men who founded the first houses of refuge for children in the 1820's, with the memory of the French Revolution still in their minds, also shared this fear of class conflict. Descendants of old elite families, prosperous merchants and professionals, although no longer controlling the levers of political power as their families once had, they feared class warfare could erupt at any time. Charity toward the poor and inculcation of proper values in lower-class youth, they believed, were the only ways of avoiding the destruction of the social structure in which they still occupied prominent positions.²⁸

B. "Wayward" Children

Who were these children whom reformers felt compelled to take in hand, or, more to the point, how did reformers perceive them? A picture emerges from their writings of a large and growing population of young children with no homes, sleeping wherever they could find shelter, annoying respectable citizens by begging, stealing small items, or selling apples or newspapers. Reformers often seemed as irritated by young children engaged in "honest" street trades as by those who were shiftless or even stole.²⁹

²⁶ CHILDREN'S AID SOCIETY, ELEVENTH ANNUAL REPORT 4 (1864), reprinted in 1 CHILDREN AND YOUTH, *supra* note 17, at 757.

²⁷ *Harper's Weekly* commented that the New York draft riots "bore a closer resemblance to a European riot than any thing we have ever had here." 1 CHILDREN AND YOUTH, *supra* note 17, at 757.

²⁸ R. MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940, at 4-7 (1973). See also, J. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA 33 (1971); R. PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815-1857, at 26 (1969).

²⁹ See, e.g., SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 17, at 8-9 (1842):

The Society for the Reformation of Juvenile Delinquents in New York, in an 1824 petition urging the New York legislature to create a house of refuge, commented on the "ragged and uncleanly appearance, the vile language, and the idle and miserable habits of great numbers of children, most of whom are of an age suitable for schools, or for some useful employment."³⁰ Josiah Quincy, chairman of the committee which recommended a house of refuge for Boston in 1821, saw its potential inmates as

those idle and vicious children, of both sexes and different ages, which often under the command, and always with the permission of thoughtless and abandoned parents, are found begging in our streets, or haunting our wharves, market places, sometimes under the pretence of employment, at others for the purpose of watching occasions to pilfer small articles, and thus beginning a system of petty stealing³¹

In 1851, a New York diarist singled out gangs of street girls for condemnation:

Many, as soon almost as they are able to run alone, are found hawking the penny papers through our streets, and vending matches and other small wares to the great annoyance of our citizens. By such sauntering employments they are not only deprived of the opportunity of acquiring an education, but are thrown, at this early age when their characters and habits are forming, into dissolute society, and exposed to all manners of temptation and enticements to evil.

³⁰ SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK, REPORT ON THE SUBJECT OF ERECTING A HOUSE OF REFUGE FOR VAGRANT AND DEPRAVED YOUNG PEOPLE, *reprinted in* SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, DOCUMENTS RELATIVE TO THE HOUSE OF REFUGE 13 (N. Hart ed. 1832) [hereinafter cited as DOCUMENTS].

The problem seemed to worsen as the century progressed. The managers of the New York House of Refuge noted in 1842:

We see hundreds of [youth], of all ages . . . congregated on the Sabbath in the suburbs of the city, desecrating that holy day by their unhallowed amusements. They hang round the numerous dram-shops with which our city is cursed, the dock-yards and public squares, mutually contaminating each other—drinking in iniquity, plotting mischief, and by their oaths and filthy badinage, disturbing the quiet of the neighborhood.

SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 17, at 8 (1842).

By mid-century, New York officials believed the situation had reached critical proportions. In a report that received widespread publicity, the New York Chief of Police, George W. Matsell, referred to "the constantly increasing numbers of vagrant, idle and vicious children of both sexes who infest our public thoroughfares, hotels, docks, &c.," who were allowed "to roam day and night wherever their inclination leads them," staying away from their parents' homes for weeks at a time, and engaging in begging, pilfering, "vice, prostitution, and rowdiness." NEW YORK CITY, POLICE DEPARTMENT, SEMI-ANNUAL REPORT, MAY 31-OCTOBER 31, 1849, app. [hereinafter cited as MATSELL REPORT], *reprinted in* 1 CHILDREN AND YOUTH, *supra* note 17, at 755-56.

³¹ REPORT OF THE COMMITTEE ON THE SUBJECT OF PAUPERISM AND A HOUSE OF INDUSTRY IN THE TOWN OF BOSTON 8-9 (1821), *reprinted in* 1 CHILDREN AND YOUTH, *supra* note 17, at 753.

No one can walk the length of Broadway without meeting some hideous troop of ragged girls, from twelve years old down, brutalized already almost beyond redemption by premature vice, clad in the filthy refuse of the ragpicker's collections, obscene of speech, the stamp of childhood gone from their faces, hurrying along with harsh laughter and foulness on their lips that some of them have learned by rote, yet too young to understand it; with thief written in their cunning eyes and whore on their depraved faces³²

Other practices that infuriated child-savers were the "wrangling and fighting" and "reckless oaths and blasphemies" of youngsters gathered on street corners in the evenings and on the Sabbath,³³ and the habit of street boys of racing after fire engines to the scenes of fires, where they would "crowd around the flames, . . . dare danger with the boldness of older spirits," and seek for booty among the ruins.³⁴

While some observers stressed the spirit of camaraderie that characterized these street youths and their gangs, Charles Loring Brace described a lonelier existence:

For the most part, the boys grow up utterly by themselves. No one cares for them, and they care for no one. Some live by begging, by petty pilfering, by bold robbery; some earn an hon-

³² 2 THE DIARY OF GEORGE TEMPLETON STRONG 56 (A. Nevins & M. Thomas eds. 1952), reprinted in 1 CHILDREN AND YOUTH, *supra* note 17, at 756.

³³ MATSELL REPORT, *supra* note 30, reprinted in 1 CHILDREN AND YOUTH, *supra* note 17, at 756.

³⁴ J. LATROBE, ADDRESS ON THE SUBJECT OF A MANUAL LABOUR SCHOOL (1840), reprinted in 1 CHILDREN AND YOUTH, *supra* note 17, at 755. See also SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 15, at 7 (1840):

The first cry of fire, and the first stroke of the bell, sets in motion the whole class of children from 10 to 20 not possessing parents or guardians, or who are not strictly attended to. They are known as volunteers, they are the first at the engine house, they are the moving power to the engine; the strife to get first at the conflagration leads to an exertion disproportioned to their strength, and then comes, not infrequently, additional fatigue, and subsequently the gratuitous distribution of liquor to a company of boys; the free access to valuable merchandise and property scattered about, and the total absence of elder persons and friends to advise and guard them, are circumstances which, when taken together, make the New-York fire establishment, as now conducted, a most prolific source of juvenile delinquency and crime.

Historian Joseph Kett, while admitting that youthful volunteers in fire companies frequently occasioned street brawls, presents a more charitable view of the volunteer companies: "In their heyday . . . the volunteer companies . . . provided an outlet for youthful high spirits, opportunities for display and parades, and a quasi-legitimate form of involvement for youth in civic affairs." J. KETT, *supra* note 15, at 90-92.

est support by peddling matches, or apples, or newspapers; others gather bones and rags in the street to sell. They sleep on steps, in cellars, in old barns, and in markets, or they hire a bed in filthy and low lodging-houses. They cannot read; they do not go to school or attend a church. . . .

The girls, too often, grow up even more pitiable and deserted. . . . They are the cross-walk sweepers, the little apple-peddlers, and candy-sellers of our city; or, by more questionable means, they earn their scanty bread. They traverse the low, vile streets alone, and live without mother or friends, or any share in what we should call a *home*.³⁵

One other trait of wayward youths struck the child-savers: they were older than their years in worldly wisdom, no longer children. For Brace, they were "shrewd and old in vice, when other children are in leading-strings."³⁶ It was the very precociousness of wayward children, their "cunning," that made it all the more necessary to impose on them a properly dependent role. Already Americans were developing the notion of childhood as a prolonged period of dependency, with ever-clearer delineation of what were and what were not proper roles for young people. This development marked a sharp break with the colonial period, when Americans expected children to act as miniature adults and encouraged them to adopt adult functions, including starting a farm and raising a family, in their early teens.³⁷ The exclusion of young people from responsible social and economic roles in society, and the corollary insistence that certain activities and behavior were inappropriate for minors, were to be ever-intensifying features of nineteenth-century culture.

C. *The First Houses of Refuge*

Acting on their fears of social unrest and assumptions about lower-class morality, reformers began to agitate in the 1820's for the construction of special institutions for criminal and wayward children to permit their incarceration separate from adults. In these new "houses of refuge" deviant children would be isolated from the

³⁵ C. BRACE, *supra* note 21, at 91-92.

³⁶ *Id.* at 91. For another writer, their minds had become "sharpened to a degree unnatural to their years" and they had learned "to comprehend the business and the feelings of men, before they have passed the first periods of childhood." J. LATROBE, *supra* note 34, *reprinted in* 1 CHILDREN AND YOUTH, *supra* note 17, at 754.

³⁷ O. & M. HANDLIN, *FACING LIFE: YOUTH AND THE FAMILY IN AMERICAN HISTORY*, chs. 1-2 *passim* (1971). See also J. KETT, *supra* note 15, ch. 1 *passim*.

corrupting influences of family and town and taught the value of hard work, discipline, and obedience. How long they stayed there would depend on how quickly they reformed, although they would be committed for the length of their minority. Given the chance to educate children for a prolonged period in an institutional setting, child-savers were confident they could undo the effects of pernicious environments and instill acceptable behavior in their charges.³⁸

At the very outset of their campaign, the future managers of the New York and Philadelphia Houses of Refuge made clear that the primary purpose of these institutions was the reformation of *wayward* children.³⁹ In their petition to the state legislature urging

³⁸ The movement toward reforming juvenile delinquents and other deviants in large institutions, isolated from such urban temptations as taverns, brothels, and theaters and from the corrupting influence of degenerate families, is developed in D. ROTHMAN, *supra* note 17. After 1820, the colonial idea that children's anti-social tendencies should be restrained within the family was discredited, as parents themselves came to be regarded as dissolute. The reformers who created houses of refuge were frankly contemptuous of families. In its petition to the New York legislature in 1824, the Society for the Reformation of Juvenile Delinquents in New York wrote:

The parents of these [vagrant] children are, in all probability, too poor, or too degenerate, to provide them with clothing fit for them to be seen in at school; and know not where to place them in order that they may find employment, or be better cared for. Accustomed, in many instances, to witness at home nothing in the way of example, but what is degrading; early taught to observe intemperance, and to hear obscene and profane language without disgust; obliged to beg, and even encouraged to acts of dishonesty, to satisfy the wants induced by the indolence of their parents,—what can be expected, but that such children will, in due time, become responsible to the laws for crimes, which have thus, in a manner, been forced upon them?

DOCUMENTS, *supra* note 30, at 13. A Boston reformer called them the "thoughtless and abandoned parents" of "idle and vicious children," while a Philadelphia refuge official inveighed against "the debased and besotted parent." R. MENNEL, *supra* note 28, at 15.

³⁹ DOCUMENTS, *supra* note 30, at 21-23. The New York reformers also hoped the new institution would include neglected children and milder criminal offenders. Since they believed "the gradations of crime [were] almost infinite," *id.* at 22, they were confident they could reform the latter and saw no problem in committing them with merely wayward youths. The impetus to place young criminal offenders in special institutions for children came from the fear that children sentenced to adult jails would listen to adult criminals' stories, "acquire their habits, and by their instruction . . . be made acquainted with the most artful methods of perpetrating crime, and with the surest means of avoiding its detection." SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 2 (1827), reprinted in DOCUMENTS, *supra* note 30, at 74-75. Observers also noted that courts and juries were reluctant to convict young people at all if they had to be sent to adult prisons. DOCUMENTS, *supra* note 30, at 14; SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 1 (1825), reprinted in *id.* at 48; First Annual Report of the Philadelphia House of Refuge 18 (1829).

The New York reformers described neglected children as those "whose parents, either from vice or indolence . . . leave them exposed in rags and filth, to miserable and scanty fare, destitute of education, and liable to become the prey of criminal associates." DOCUMENTS, *supra* note 30, at 22. Their concern was motivated not so much by the suffering of these children as by the fear that they would soon develop "vicious" habits and inevitably turn to

the creation of a house of refuge, the Society for the Reformation of Juvenile Delinquents in New York mentioned as worthy of institutional care "boys under a certain age, who become subject to the notice of our Police, either as vagrants, or houseless, or charged with petty crimes," who would then be classified "according to their degrees of depravity or innocence."⁴⁰ Given the frequency with which children were committed to the New York House of Refuge on charges of vagrancy,⁴¹ this category was probably used as a catch-all to immure those children of "idle and miserable habits" and "vile language" referred to earlier in the same report.⁴² A second group of wayward children whom the reformers wished to include were

delinquent females, who are either too young to have acquired habits of fixed depravity, or those whose lives have in general been virtuous, but who, having yielded to the seductive influ-

crime. See the 1824 petition of the Society for the Reformation of Juvenile Delinquents in New York, quoted in note 38 *supra*. The managers of the Philadelphia House of Refuge published a letter from a citizen which reflected their own assumptions about the linkage between parental neglect and juvenile crime:

Vicious propensities are imbibed at a very early age by children, in the crowded population of a city. Parents, whose extreme poverty, casual calamity, or moral turpitude, induces a neglect of their offspring, expose them at once to be caught up by the profligate and knavish, to be made unsuspected agents in the commission of offences, and to be trained into habits of cunning and predatory vagrancy.

First Annual Report of the Philadelphia House of Refuge 16-17 (1829).

⁴⁰ DOCUMENTS, *supra* note 30, at 21. Vagrancy, of course, was itself a vague concept based on status. Called "disorderly persons" in New York, vagrants were statutorily defined as "all persons wandering abroad and begging, and all idle persons, not having any visible means of livelihood." Act of Feb. 9, 1788, ch. 31, 1785-88 N.Y. Laws 643. In 1822, over 450 youths in New York City under 25 years of age were convicted by police magistrates of being disorderly persons. DOCUMENTS, *supra* note 30, at 14. By 1829, "vagrant" had replaced the term "disorderly person" in an expanded provision:

All idle persons who, not having visible means to maintain themselves, live without employment; all persons wandering abroad and lodging in taverns, groceries, beer-houses, out-houses, market-places, sheds or barns, or in the open air, and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways, passages, or other public places, to beg or receive alms, shall be deemed vagrants.

1 N.Y. REV. STAT. pt. 1, ch. 20, tit. 2, § 1 (1829).

⁴¹ See text accompanying note 166 *infra*.

⁴² DOCUMENTS, *supra* note 30, at 13. That "vagrant" was probably a synonym for "wayward child" in New York is further borne out by the comments of a New York refuge official some years later: "Vagrants will generally be found to be those who have broken away from parental restraint, who have turned their backs upon wholesome instruction, and have followed the inclinations which have sprung up in their youthful minds, disregarding the restraint thrown around them, and resolved upon having their own way." PROCEEDINGS OF THE SECOND CONVENTION OF MANAGERS AND SUPERINTENDENTS OF HOUSES OF REFUGE AND SCHOOLS OF REFORM IN THE UNITED STATES OF AMERICA 14 (1859) [hereinafter cited as PROCEEDINGS].

ence of corrupt associates, have suddenly to endure the bitterness of lost reputation, and are cast forlorn and destitute upon a cold and unfeeling public⁴³

It was simply assumed that a girl no longer chaste stood in need of reformation, whether or not she had turned to prostitution. Throughout the nineteenth century, young women were incarcerated on vague charges of sexual promiscuity.⁴⁴

Philadelphia child-savers also wanted their house of refuge to receive the "idle and deserted" children of Pennsylvania, who "might be received with a chance of reformation when inclined to vice, and with the hope of useful instruction, when they might be merely ignorant but not habitually depraved."⁴⁵ They were convinced that if all wayward children could be incarcerated before they committed crimes, adult criminality would vanish from the city.⁴⁶

When the New York and the Philadelphia Houses of Refuge finally opened, in 1826 and 1829 respectively, they were empowered by statute to receive children convicted of vagrancy or specific criminal offenses, if committing officials considered them "proper objects" of institutional care. In addition, the Pennsylvania law allowed the managers to receive children "taken up . . . upon any

⁴³ DOCUMENTS, *supra* note 30, at 23.

⁴⁴ See text accompanying notes 59-61, 287, 299 *infra*. It is still the case today that one of the principal grounds for status offense allegations against young women is sexually precocious activity. A study done of PINS cases in New York and Rockland counties in New York State showed that while girls accounted for 57% of all PINS petitions filed in one year, they accounted for 100% of the cases involving allegations of prostitution, promiscuity, "cohabiting," and "general sex innuendo." Note, *Ungovernability: The Unjustifiable Jurisdiction*, *supra* note 5, at 1388 n.41. See also Sussman, *Sex-Based Discrimination and PINS Jurisdiction*, in *BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT* 179 (L. Teitelbaum & A. Gough eds. 1977). It has also been argued that because of official concern to curb sexual promiscuity by young women, wayward minor statutes are applied more frequently to females than to males, and such statutes may therefore be suspect constitutionally on equal protection grounds. *Id.* at 179-80, 186-91. See also STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR, *supra* note 3, at 13.

⁴⁵ First Annual Report of the Philadelphia House of Refuge 6, 9 (1829).

⁴⁶ Second Annual Report of the Philadelphia House of Refuge 6 (1830). The managers wrote:

If the vigilance of the magistracy were so exerted, as to leave not one infant beggar in the streets, not one vagrant child, and of consequence not one person, capable of instruction and relief, and unable to receive them elsewhere, who should not be received and instructed here; the darling hope might be realized of an almost total cessation of prison discipline. Let every unprotected child . . . be placed under the parental guardianship of this institution; and where will be the *material* to compose future criminals?

Id. (emphasis in original).

criminal charge," which would seem to indicate that children could be committed even without having been formally convicted of the offense charged.⁴⁷

Refuge officials themselves were indifferent to whether charges of crime against a youth were proved or not. Seeking to rebut criticism that incarceration in a house of refuge was a deprivation of liberty that could only be imposed after trial by jury, the managers of the Philadelphia house argued that "the inquiry which precedes admission here, is not necessarily into the guilt or innocence of the subject, with a view to punishment."⁴⁸ The whole purpose of the institution was to make a trial and criminal conviction unnecessary. A charge of crime merely supplied the occasion for examining a child's entire condition:

[T]he inquiry has been directed mainly to the criminal tendency and manifestations of their condition, to their means of support, to the protection and guidance they receive from their natural friends. If adequate securities against guilt are wanting, and they must in all probability become criminal as well as wretched, they are entitled to a place within these walls, even though they may not have committed specific crimes. . . . Almost every child that steals is a vagrant as well as a thief; for theft is the result of a want of honest occupation and support; and a want of honest means of subsistence is vagrancy. When a commitment, therefore, is made by a magistrate, it is not simply or even necessarily because of crime, but because of want and bereavement, of which crime is both the proof and the consequence. It would be equally cruel and unnecessary to subject to trial and conviction, and thus to lasting

⁴⁷ Act of Mar. 29, 1824, ch. 126, § 4, 1824 N.Y. Laws 110; Act of Mar. 23, 1826, ch. 47, § 6, 1826 Pa. Laws 133. A variety of tribunals, including those presided over by such minor officials as justices of the peace, police magistrates, aldermen, and commissioners of the almshouse or Bridewell, could hear cases against children. Act of Mar. 29, 1824, ch. 126, § 4, 1824 N.Y. Laws 110; Act of Mar. 23, 1826, ch. 47, § 6, 1826 Pa. Laws 133. Procedural protections for children tried in minor city tribunals, especially before administrative officials, were probably minimal. In both New York and Pennsylvania trial by jury was unavailable in vagrancy prosecutions; in petit larceny cases, it could not be claimed in New York, but may have been available in Pennsylvania. Fox, *supra* note 13, at 1191, 1212; Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 945-47, 956 (1926). Since most children being prosecuted were poor, one imagines that they rarely had access to counsel. Coupled with the breadth of the vagrancy jurisdiction and general suspicion of lower-class morals, this must have made it difficult for a child to disprove a vagrancy or petit theft charge. *But see* Joseph v. McKeagy, 1 Ashmead 248 (Phila. C.P. 1831), discussed in text accompanying notes 62-68 *infra*.

⁴⁸ Second Annual Report of the Philadelphia House of Refuge 8 (1830).

infamy, when the requisitions of the law are fulfilled without them, and the child is instructed, cherished, saved, without exposing it to the melancholy satisfaction of knowing, that there are two motives for its restraint when one is sufficient.⁴⁹

To support their contention that proof of crime, accompanied by due process, was not a necessary condition for commitment to the house of refuge, the Philadelphia managers also argued that the purpose of their institution was "education," not punishment. Children's errors, they said, resulted from their parents' failure to educate them properly, and every civilized community had the power to establish a special guardianship over children if the natural parents failed to provide adequately for their needs. Especially since overseers of the poor⁵⁰ could already "coerce [indigent children] to

⁴⁹ *Id.* at 9. The description of the new juvenile court's task offered in 1909 by Judge Julian Mack could have been uttered just as easily by the Philadelphia refuge managers in 1830:

The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.

Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

One of the current criticisms of the status offense jurisdiction is that in cases where a child might be charged with a criminal offense, the prosecution and court can avoid the stricter procedural formalities constitutionally required when the minor is so charged, *In re Winship*, 397 U.S. 358 (1970) (extending the right to proof beyond a reasonable doubt to minor charged with committing a crime); *In re Gault*, 387 U.S. 1 (1967), by filing a wayward minor petition instead, under which the allegation of crime becomes merely evidence of the child's need for supervision. IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ADJUDICATION 59-60 (Tent. Draft, 1977); Note, *Ungovernability: The Unjustifiable Jurisdiction*, *supra* note 5, at 1393-94. Only a few states, such as New York in *In re E.*, 68 Misc. 2d 487, 327 N.Y.S.2d 84 (Fam. Ct. 1971), have determined that the *Winship* requirement of proof beyond a reasonable doubt extends to wayward minor proceedings. Note, *Ungovernability: The Unjustifiable Jurisdiction*, *supra* note 5, at 1390 n.51. Even when the standard of proof beyond a reasonable doubt is applied to wayward minor proceedings, usually very little is required to overcome it. New York has held, for example, that to prove "habitual" disobedience of parental commands there need only be proof that the minor was involved in more than "a single isolated incident." *Id.*, citing *In re W.*, 28 N.Y.2d 589, 590, 268 N.E.2d 642, 643, 319 N.Y.S.2d 845, 846 (1971). Fewer witnesses are usually required in waywardness cases than where the petitioning party must prove that the youth committed a specific criminal act at a specific time. Perhaps as a result, in New York ungovernability cases are tried only seven percent of the time, four or five times less often than are delinquency cases. Note, *Ungovernability: The Unjustifiable Jurisdiction*, *supra* note 5, at 1394 n.80. While these results are now regarded as unfair to youths by critics of the status offense jurisdiction, both nineteenth-century child reformers and twentieth-century juvenile court proponents thought it desirable to treat an allegation of crime merely as evidence of a minor's need for reformation and to minimize the burden of proof required to make such a finding.

⁵⁰ Overseers of the poor were local officials, either appointed or elected, who, under both colonial and nineteenth-century legislation, had responsibility for determining which members of a community were eligible to receive public relief and what form that relief should take. In some cases their duties were assumed by other officials, such as aldermen or church

a course of servitude or apprenticeship," the managers saw "nothing new in the principle" by which the state could coercively "educate" wayward children.⁵¹

Not all institutional officials agreed with these views, however; a few candidly admitted that the main purpose of their institution was punishment. In 1826, the president of the board of managers of the New York House of Refuge lectured the new superintendent of that institution:

My own view of this establishment is, that . . . those who are committed to our care . . . are offenders against the laws of their country, that they are in a place of punishment, and that that punishment is confinement and labor, from which they can only be redeemed by a continuation of good conduct that will give such assurance of reformation, as that they may be trusted to mix with society. I cannot think, therefore, that these children are to be treated exactly as they would be if they were the innocent inmates of a college.⁵²

This description, which accurately forecast the harsh and forbidding worlds that houses of refuge were to become,⁵³ was conveniently ignored by the courts when they came to deal with challenges to the confinement of juveniles. Nor did many child-savers like to advertise such thoughts, for they cut against the argument they wanted the public to accept, namely, that because incarceration was premised on misfortune and lack of education, it involved no more re-

officers. One of their specific powers was to remove children from pauper families and apprentice them to tradesmen to receive an education and learn a trade. On the operation of the poor law system in eighteenth and nineteenth-century America, see M. CREECH, *supra* note 19; A. KENNEDY, *THE OHIO POOR LAW AND ITS ADMINISTRATION* (1934); R. MOHL, *POVERTY IN NEW YORK, 1783-1825* (1971); D. ROTHMAN, *supra* note 17, chs. 1-2, 7-8; W. TRATTNER, *FROM POOR LAW TO WELFARE STATE, A HISTORY OF SOCIAL WELFARE IN AMERICA*, chs. 2-4 (1974).

⁵¹ Second Annual Report of the Philadelphia House of Refuge 9-10 (1830).

⁵² SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, *ANNUAL REPORT No. 2* (1827), reprinted in *DOCUMENTS*, *supra* note 30, at 102. In 1830, the New York managers reaffirmed the primacy of punishment:

[I]t must not be forgotten, that the House of Refuge is in fact a prison for children, and that whilst the greatest tenderness is due to their youth, and the greatest passion should be displayed toward their involuntary errors, no such relaxation of discipline can be permitted, as may tend to call off their minds from the severer duties of life, or encourage the illusory expectation of exemption from wholesome restraint, and from inevitable punishment whenever it is deserved.

SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, *ANNUAL REPORT No. 5* (1830), reprinted in *id.* at 202.

⁵³ For a graphic portrayal of the grim conditions in houses of refuge, see D. ROTHMAN, *supra* note 17, at 221-36. See also R. MENNELL, *supra* note 28, at 19-21.

straint than other social institutions of the time (family, almshouse, boarding school), and therefore neither a finding of criminal guilt nor the procedural guarantees of the criminal process were germane to the commitment of children to houses of refuge.

Information gleaned from the annual reports of the New York and Philadelphia Houses of Refuge in their early years indicates that after their opening these institutions in fact were used primarily for wayward children. In New York, for example, in 1825 ten children were committed by the criminal court for larceny, while sixty-three children were sent by police magistrates or commissioners of almshouses⁵⁴ for stealing, vagrancy, and absconding from the almshouse. The next year, the figures were thirty-six committed by the criminal court for larceny, and 181 by the magistrates or commissioners for stealing, vagrancy, and absconding.⁵⁵

Published case histories of inmates also provided reasons for commitment. Some of the youths were committed for petty theft, some for a combination of theft and vagrancy, while others apparently were institutionalized for "bad habits" alone, or "bad habits" in conjunction with previous thefts.⁵⁶ Typical was the case of a boy who had "played about the streets" for six months after returning from a sailing voyage, had "once" stolen a copper kettle and some old iron from his mother, and, in general, was a "very bad boy, associating with the worst of boys, idling about the streets."⁵⁷ Another youth, found drunk in a public place, had stolen trifling items in the past, visited theaters and circuses frequently, and had disobeyed his mother.⁵⁸

⁵⁴ Commissioners of the almshouse, the central relief agency in New York City, were appointed by the New York city council to manage that institution. In 1785 they took over the functions of overseers of the poor for New York City, replacing an elected board that had exercised largely overlapping duties. R. MOHL, *supra* note 50, at 54.

⁵⁵ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 1 (1825), *reprinted in* DOCUMENTS, *supra* note 30, at 41; SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 2 (1827), *reprinted in id.* at 89. It is impossible to tell if all of the "stealing and vagrancy" cases involved an allegation of theft in addition to vagrancy and, if they did, whether the charge of theft was proved.

⁵⁶ See, e.g., DOCUMENTS, *supra* note 30, at 57-62, 92-96, 157-72.

⁵⁷ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 4 (1829), *reprinted in id.* at 158-59.

⁵⁸ *Id.* at 164. Another boy was committed for "getting with other boys into the cabin of a steamboat." SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 1 (1825), *reprinted in id.* at 58. Yet another was committed "on suspicion" of having stolen a shawl and for playing the tambourine in dancing-houses. SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 2 (1827), *reprinted in id.* at 93.

Similar examples can be found in the reports of the Philadelphia House of Refuge. Typical

The case histories of girls demonstrate even more clearly the emphasis on bad morals, especially sexual precocity, as a sufficient basis for commitment. One child had associated for two and a half years with "lewd and abandoned women," although she was finally committed by her father "for leaving his roof, and frequenting houses of ill fame."⁵⁹ A twelve-year-old girl had been "receiving men's company for more than a year," had been "very active and successful in winning other little girls from the paths of virtue," and had attended theaters and circuses.⁶⁰ Another twelve-year-old was committed for "going out and staying with different boys, about fourteen and fifteen years of age" and "carry[ing] on badly in the streets."⁶¹

D. *Initial Challenges to Wayward Minor Statutes*

The first significant challenge to the use of the vagrancy jurisdiction to incarcerate children who had misbehaved came in Pennsylvania, in the 1831 case of *Joseph v. McKeagy*.⁶² This case, which sharply limited the utility of the vagrancy provision as a tool for reaching predelinquent behavior, may have been important in persuading the Pennsylvania legislature to pass a new wayward minor statute in 1835 that radically extended the grounds for commitment and created a model that other states would soon follow.

The case arose when Abraham Joseph succeeded in committing his fourteen-year-old son, Lewis L. Joseph, to the Philadelphia House of Refuge as an "idle, vagrant, and disorderly boy," then apparently repented of his action and tried to secure the boy's release on a writ of habeas corpus before the Philadelphia Court of Common Pleas. The boy was in the habit of staying away from home one or two days at a time, sometimes prolonging his stays for fear of punishment. His home was a prosperous and comfortable one, his parents intelligent, and the boy had been educated in good private schools. The father seems to have had him committed in a pique of frustration at not being able to find ways to keep his son at home.

was a boy committed because "his mother was unable to manage him, and he spent most of his time in the streets, frequently absenting himself altogether from his mother," and running away from masters to whom he was apprenticed. Second Annual Report of the Philadelphia House of Refuge 25 (1830).

⁵⁹ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 2 (1827), reprinted in DOCUMENTS, *supra* note 30, at 95.

⁶⁰ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT NO. 4 (1829), reprinted in *id.*, at 171.

⁶¹ *Id.*

⁶² 1 Ashmead 248 (Phila. C.P. 1831).

The court rejected two arguments made by counsel for the father. It held, first, that the commitment was not unconstitutional on the ground that the boy had not been accorded trial by jury. Both before and after the adoption of the state constitution in 1790 courts had exercised the power to convict for this kind of "police offense," as the framers of the constitution were aware; had the framers intended to alter that summary jurisdiction, they would have done so explicitly. Second, the court held that the commitment could not be invalidated on the ground that it was for the duration of a child's minority. Commitments of this nature were similar to those ordered by the overseers of the poor to apprentice "poor but virtuous" children during minority. If a child could be placed coercively because of parental poverty, asked the court, "why is it, that . . . the public cannot assume similar guardianship of children whose poverty has degenerated into vagrancy."⁶³

The court would not assume, however, that vagrancy included all kinds of juvenile misbehavior, or that Lewis Joseph met the definition of a vagrant merely because an angry parent and a committing magistrate agreed he needed the discipline of a house of refuge. The offense of vagrancy was "degrading, if not infamous," so much so that the Pennsylvania courts had held that calling someone a vagrant was actionable at civil law.⁶⁴ Thus the term had to be construed strictly, and for the commitment to be valid the boy would have to fit one of the statutory categories defining the offense. The only one of these possibly relevant here, said the court, defined vagrants as "those who are found loitering and having no visible means of subsistence, and who can give no reasonable account of themselves or their business."⁶⁵ The court held, as a matter of law, that this category could not apply to "children of tender years, living with parents of undoubted means, and under their care and protection, even if such children happen to be forward and somewhat ungovernable."⁶⁶ Rather, the child must be found to demonstrate a "malicious capacity for wickedness" and a "wanton and continued indulgence in it," or a "wandering and abandoned course of life."⁶⁷ Lewis Joseph did not meet the definition of a vagrant,

⁶³ *Id.* at 253.

⁶⁴ *Id.* at 256 (citing *Miles v. Oldfield*, 4 Yeates 423 (Pa. 1808)).

⁶⁵ 1 Ashmead at 256-57. The other statutory categories defining vagrants were: (1) "an emigrating pauper from any other poor district"; (2) "a person who has not wherewith to maintain himself and his family, living idle and without employment and refusing to work for the usual and common wages given to other labourers"; and (3) "a wandering beggar."
Id.

⁶⁶ *Id.* at 257.

⁶⁷ *Id.* at 258.

properly construed, for the legislature "never meant to constitute the Refuge a place to correct refractory children."⁶⁸

The *McKeagy* decision was handed down by an intermediate court, but if followed by successive courts it would have meant that the status offense of vagrancy could no longer have been used to commit children guilty of only minor misconduct—the very children reformers felt had to be restrained if they were not to become criminals. Fortunately for Pennsylvania child-savers, and possibly in response to *McKeagy*, four years later the legislature enacted a new statute that explicitly provided for commitment to the Philadelphia House of Refuge of the kinds of children *McKeagy* had held could not be admitted under traditional vagrancy law.⁶⁹ While continuing to allow commitment of children as under prior law, *i.e.*, for vagrancy or crime, the law set out two new grounds of commitment. A parent, guardian, or next friend could bring a complaint against a child on the ground that "by reason of incorrigible or vicious conduct, such infant has rendered his or her control beyond the power of such parent, guardian or next friend."⁷⁰ Further, any person could bring a complaint if there were concurrence of proscribed conduct on the part of parent and child. The court had to find that

such infant is a proper subject for . . . the House of Refuge, in consequence of vagrancy or of incorrigible or vicious conduct, and that from the moral depravity or otherwise of the parent or next friend, in whose custody such infant may be, such parent or next friend is incapable or unwilling to exercise the proper care and discipline over such incorrigible or vicious infant.⁷¹

The law thus introduced two new concepts to juvenile jurisprudence—children who were "incorrigible" or "beyond control" of their parents—which took their place alongside existing vague terms that described children's status, such as "idle," "vicious," and "vagrant."⁷²

⁶⁸ *Id.* at 259.

⁶⁹ Act of Apr. 10, 1835, No. 92, § 1, 1835 Pa. Laws 133.

⁷⁰ *Id.*

⁷¹ *Id.* On its face, this provision required a finding of parental unfitness in addition to filial incorrigibility. There is no way of knowing whether the Pennsylvania courts in fact required an independent showing of parental neglect, or whether they permitted proof of the child's incorrigibility to demonstrate the parents' inability to exercise proper discipline. (The statute required a showing of parental inability to exercise control "from . . . moral depravity or otherwise." *Id.* (emphasis added)).

⁷² The terms "incorrigible child" and "beyond parental control" are still used in statutes

It was not long before the new law was challenged. In 1838, Mary Ann Crouse was committed to the Philadelphia House of Refuge by her mother for being "vicious" and "beyond control"; the complaint merely quoted the language of the statute and provides no clue as to what the girl had really done. Her father apparently disagreed and sought her release from the institution on a writ of habeas corpus, which was denied. On appeal, the Pennsylvania Supreme Court affirmed the commitment,⁷³ in a brief per curiam opinion which became the leading authority nationwide on the powers of juvenile institutions and the constitutionality of incorrigibility laws.

The father argued that commitment to the Philadelphia House of Refuge without jury trial violated the state constitution. He clearly hoped that the Pennsylvania Supreme Court would reject the *McKeagy* court's conclusion that incarceration in a house of refuge for the child's minority did not constitute punishment for a crime, for which a jury trial would be necessary. The court, however, accepted at face value the claims of the refuge managers about the nature of their institution and confidently announced, "The House of Refuge is not a prison, but a school."⁷⁴ By implication, if the child were not being punished there could be no criminal proceeding, and the issue of trial by jury was not germane.

Rebutting the argument that the child had "indefeasible rights" (apparently to liberty) which were being abused, the court maintained that a child had no right to freedom from "restraints which conduce to an infant's welfare," such as those imposed by the "school" here. By a sleight of hand, the state had been awarded the power to "restrain" a misbehaving child that under common law had been exercised by parents alone.⁷⁵ The court, furthermore, fully

governing juvenile misconduct. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 702-3(a) (Smith-Hurd 1972) ("beyond the control of his parents, guardian, or other custodian"); N.Y. FAMILY CT. ACT § 712(b) (McKinney 1975) ("incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority"). *See also* STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR, *supra* note 3, at 74-83 app. In the nineteenth century, "incorrigible" had two meanings: first, as a general term describing wayward children for purposes of court jurisdiction; second, as a term describing children who refused to abide by the rules of an institution to which they were committed. Statutes frequently provided that the latter kind of "incorrigible" child could be transferred from the children's institution to an adult prison. *See, e.g.*, Act of Apr. 9, 1847, ch. 165, § 6, 1847 Mass. Laws 405 (if trustees of state reform school find boy committed to school is incorrigible, he may be committed to jail, house of correction, or state prison).

⁷³ *Id.* at 11.

⁷⁵ Blackstone mentions only the power of a parent to "lawfully correct his child, being under age, in a reasonable manner." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452 (15th ed. London 1809) (1st ed. London 1765-69). He does state that a father

accepted the notion that wayward conduct would lead inevitably to criminality and thus was untroubled by the vagueness of the term "incurable": "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."⁷⁶

The court was aided in its conclusion that the state had the power to discipline wayward children by a doctrine it called *parens patriae*. Apparently in response to an argument that parents had a natural right to custody of their children which the state could not abridge, the court stated that when the natural parents were unequal to or unworthy of the task of educating their children, they could be superseded by "the *parens patriae*, or common guardian of the community."⁷⁷ Without citing authority, the court adumbrated a theory that parental rights derived entirely from the will of the state ("the public") and could be withdrawn by the legislature, subject only to possible constitutional restrictions which the court did not elaborate.⁷⁸

The court's use of the doctrine of *parens patriae* in this case was curious. As Rendleman has observed, the phrase described the power of English chancery courts in the late medieval period, acting on behalf of the Crown, to order feudal relationships, particularly in matters of property and guardianship, and did not constitute a "roving commission to improve parent-child relationships."⁷⁹ In the

may delegate part of his parental authority to restrain and correct a child to a tutor or schoolmaster in order that they may fulfill the purposes for which they are employed, *id.* at 452-53, but such private and temporary delegation of power over a pupil is quite different from the state's assumption of power to confine any misbehaving child.

⁷⁶ 4 Whart. at 11.

⁷⁷ *Id.*

⁷⁸ *Id.* The court argued:

[M]ay 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 entrusted 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 inalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently 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.

Id.

⁷⁹ Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. CAR. L. REV. 205, 208 (1971). See also Cogan, *Juvenile Law, Before and After the Entrance of "Parens*

early nineteenth century, chancery did remove children from parents because of parental unfitness in two famous English cases,⁸⁰ but both cases involved custody battles between wealthy private parties, not proceedings where the state was the complainant against parent or child. The cases also involved either heretical religious ideas or scandalous behavior by an aristocrat, and thus reflected exceptional use of the chancery power rather than settled practice. The Pennsylvania court, however, used the *parens patriae* concept not to justify the inherent powers of the courts to deal with intra-familial property or custody disputes, nor even—a possible extension of the doctrine—to justify legislative assertion of the power to care for pauper or neglected children unable to care for themselves, but to rationalize an assumption of power by the legislature, and its delegation to courts and reformatory institutions, to incarcerate minors who represented a potential threat to community security. Thus the *parens patriae* doctrine entered nineteenth-century jurisprudence as the vehicle by which the legislature, as “common guardian of the community,” could not only remove children from families who were neglecting their elemental physical needs but also confine children whose moral standards did not accord with those of respectable, middle-class society. A doctrine which originally was designed to protect the estates of incompetents became a banner under which courts sanctioned legislatures’ crime-prevention goals, in the name of “educating” children in their own best interests.

Rendleman suggests that the *Crouse* court’s approval of this dramatic extension of state power was facilitated by its familiarity with the long-accepted power of overseers of the poor to take pauper children from their families and apprentice them until majority.⁸¹ Since most of the candidates for houses of refuge came from poor families, and since many children who came under the jurisdiction of poor law authorities probably exhibited some kind of wayward behavior, the court may have felt that a house of refuge was merely an alternative method of handling poor children.⁸²

Patriae,” 22 S. CAR. L. REV. 147 (1970); Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895 (1976).

⁸⁰ *Wellesley v. Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828); *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817).

⁸¹ Rendleman, *supra* note 79, at 216-17, 219. In upholding the power of the state to commit vagrant children the *McKeagy* court had found an analogy in poor law provisions allowing the state forcibly to apprentice children for their minority. 1 Ashmead at 252-53.

⁸² Fox notes that the same children who could be sent to the New York House of Refuge,

Despite the probable influence of the poor law system on the court's endorsement of the incorrigibility law and use of the *parens patriae* concept, it would be wrong to conclude that the house of refuge served "essentially a poor law function" and that juvenile reform was "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."⁸³ To assimilate the house of refuge scheme to traditional American ideas about and techniques of handling poverty is to miss the distinctively new element in early nineteenth-century thought, to which we have previously alluded—the heightened fear that the poor were potential criminals and would provoke social disorder. As Rothman puts it, after 1820 Americans came to believe that "[t]he same vices that caused their poverty would inevitably bring them to lawlessness. . . . Vice, crime, and poverty were stops on the same line, and men shuttled regularly among them."⁸⁴

Thus, the motivation for intervening in the lives of the poor itself had changed, as Americans looked for ways to forestall the anticipated upsurge in criminality among the poor. The *Crouse* court itself recognized that the refuge managers' primary motive was crime prevention, when it declared that the institution sought to reform minors "above all, by separating them from the corrupting influence of improper associates."⁸⁵ Had philanthropists merely wanted to create separate almshouses for poor but "innocent" children to avoid housing them with adult paupers, there would have been no need for statutes authorizing incarceration of children on grounds of proto-criminal behavior.⁸⁶

i.e., vagrants and beggars, could be incarcerated in county poorhouses outside New York City. Fox, *supra* note 13, at 1200-01.

⁸³ Rendleman, *supra* note 79, at 217.

⁸⁴ D. ROTHMAN, *supra* note 17, at 164. See generally *id.* at 30-43.

⁸⁵ 4 Whart. at 11.

⁸⁶ No cases comparable to *McKeagy* or *Crouse* arose in New York, but the managers of the New York House of Refuge noted in 1840 that legal questions had arisen as to whether that institution was a school or a prison and whether children could be removed via habeas corpus. To bolster their legal position, the managers reprinted an 1835 memorandum written by attorney J.R. Ingersoll, one of the leading members of the Philadelphia and federal bars. SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 15, at 45-47 (1840) [hereinafter cited as ANNUAL REPORT No. 15]. On Ingersoll, see C. WARREN, HISTORY OF THE AMERICAN BAR 369, 411 (1966 ed.). (Ingersoll's memorandum reflected the same assumptions as the *Crouse* opinion, handed down three years later, and may well have been the basis for it. His memorandum was concurred in by another eminent Philadelphia attorney, John Sergeant, ANNUAL REPORT No. 15, *supra* at 48, whose brother, Thomas Sergeant,

III. THE EXPANSION OF WAYWARD CHILD LAWS, 1840-1870

A. *New Institutions and the Dilemma of Classification*

Although now firmly sanctioned in law, special institutions for wayward children remained unique to Boston, New York City, and Philadelphia until the late 1840's and 1850's. In those years, authorities in other urban and some rural areas decided they had a "child crisis" in their midst and emulated the eastern cities by constructing houses of refuge or "reform schools"⁸⁷—the latter based

was an Associate Justice of the Pennsylvania Supreme Court when *Crouse* was decided and would undoubtedly have known of Ingersoll's views. See C. WARREN, *supra* at 369, 396, 411; WHO WAS WHO IN AMERICA, HISTORICAL VOLUME 1607-1896, 546 (rev. ed. 1967)).

Ingersoll advanced the position that children had virtually no legal rights of their own at common law and could be restrained in whatever way society saw fit, for their protection and its own. Children, like mental incompetents, lacked "the means to exercise a sound judgment," and it was thus "indispensible . . . that their conduct should be regulated and restrained." If they lacked parents or had inadequate supervision, society must step in to protect them from "the enduring evils of ignorance and idleness." The house of refuge was society's mechanism for providing "a substitute for parental authority and superintendence, which have been either lost by misfortune or forfeited by misconduct." ANNUAL REPORT No. 15, *supra* at 46-47. According to this view, children had a "right" to protection by their parents, which they could "forfeit" through their own waywardness, but had no corresponding right to liberty. Ingersoll also agreed with the child-savers that the legislature had a general power "resid[ing] at all times in the source of all authority" to take control of children who refused to obey parental authority, and that trial by jury was unnecessary when children were committed to houses of refuge since allegations of crime merely demonstrated a wayward condition. *Id.*

Ingersoll's view that the child lacked rights at common law was not entirely accurate. A child could sue by his "next friend," could inherit, acquire, and hold property, and could make and enforce contracts. While the minor could disaffirm his contracts before the age of majority, there was authority holding that he was bound to pay money due on a contract for necessities. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 513-20 (5th ed. London 1942); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 436-41 (1895). According to Blackstone, parents had a duty under natural law to maintain their children, and children had a right to receive such maintenance. 1 W. BLACKSTONE, *supra* note 75, at 446-47. *But cf.* W. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS § 116 (2d ed. 1909) (authorities conflicting over whether or not, at common law and independently of statute, a parent is under legal obligation, or only moral, to support child). Prosser maintains that "there is no good reason to think that the English law would not permit actions for personal torts" by a child against a parent, subject to the parent's privilege to enforce reasonable discipline against the child. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 865 (4th ed. 1971). *But see* C. VERNIER, AMERICAN FAMILY LAW § 267 (1936) (parent not civilly liable at common law for injury to his minor child, whether injury great or small, wilful or negligent).

⁸⁷ Houses of refuge were constructed at New Orleans (1847), Rochester, New York (1849), Cincinnati (1850), Pittsburgh (1854), St. Louis (1854), and Baltimore (1856). State institutions termed reform schools were opened in Massachusetts (1848), Maine (1853), Connecticut (1854), and Ohio (1858). Variations on these institutional themes also appeared: the New York Juvenile Asylum for young neglected and incorrigible children, in New York City (1853), municipal reform schools in Providence, Rhode Island (1850) and Chicago (1855), a

on the supposedly new concept of a "family approach" to treatment. In most cases, the enabling statute or ordinance embodied some version of incorrigibility as a basis for commitment.

The reform schools grew out of a reaction to the increasingly repressive atmosphere of the original houses of refuge. The refuge managers had insisted on the necessity for large, congregate institutions, in which children would all engage in the same activities at the same time, in lockstep fashion. Intent on inculcating proper habits, they saw no need at first to tailor treatment to the needs of the individual child. Children were disciplined harshly, received little formal schooling, and spent most of their time at tiring tasks based on a contract labor system.⁸⁸ One problem that particularly plagued the New York House of Refuge in the 1840's was that the courts were committing boys in their late teens, although the law only permitted the managers to accept children up to the age of sixteen. The older boys frequently had a longer history of criminal violations, were harder to control than the younger inmates, and were thought to exercise a bad influence on the latter.⁸⁹

To meet these problems a number of new approaches were developed. One was to create institutions that would cater only to younger, noncriminal children. The New York Juvenile Asylum, for example, admitted children between seven and fourteen who were either voluntarily entrusted to it by their parents or committed by a magistrate on grounds of neglect, begging, destitution, or abandonment attributable to parental fault.⁹⁰

Another group of reformers felt that the problem lay in the congregate nature of both houses of refuge and juvenile asylums, and

state industrial school for girls in Massachusetts (1856), a local industrial school for boys and girls in Cleveland (1857), and an "Institution for Idle and Truant Children" in Brooklyn, New York (1858). See table in PROCEEDINGS, *supra* note 42, at 119 app. (Dates given here are dates the institutions opened.)

⁸⁸ R. MENNEL, *supra* note 28, at 18-21, 59-62; D. ROTHMAN, *supra* note 17, at 221-36, 257-60. Under the contract labor system, outside contractors paid the refuges 10 to 30 cents a day for the labor of each boy. Youths worked in large workshops within the institution at such tasks as finishing cheap shoes, making brass nails, or caning chairs. At first regarded as a progressive measure for training boys, the system later was criticized severely as economically exploitative and physically brutal. R. MENNEL, *supra* note 28, at 18-25, 59-62. On institutional practices, see also J. HAYES, *supra* note 28, ch. 3; R. PICKETT, *supra* note 28, ch. 8; S. SCHLOSSMAN, *supra* note 13, ch. 3.

⁸⁹ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 19, at 10 (1844); SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 22, at 9-10 (1847); SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 24, at 9-10 (1849). The age limit is given in Act of April 10, 1840, ch. 100, § 1, 1840 N.Y. Laws 73.

⁹⁰ Act of June 30, 1851, ch. 332, §§ 7, 9, 1851 N.Y. Laws 633.

that children needed more individualized attention. After 1850, a fresh generation of child-savers rediscovered the colonial belief that obstreperous children could best be reformed in an intimate family atmosphere. The main body of these reformers did not allow their nostalgia for the family to flower into an all-out attack on institutions, however. They believed that reformatories were still needed to neutralize the baneful influences of a child's environment but thought they should mirror family life, ideally by dividing children among residential cottages, each holding approximately forty children, each presided over by a firm but affectionate adult as surrogate parent.⁹¹ The Massachusetts Industrial School for Girls and the Ohio Reform Farm School were the first institutions to be established according to this so-called "family plan."

A third group of reformers carried the family approach to its logical conclusion and rejected institutions altogether, except for serious criminal law violators. The Children's Aid Society of New York, founded in 1853, argued that children should be plucked from the streets of large cities and placed immediately with families; the arrangement would be informal and subject to termination either by the child or the "foster parent."⁹² Widely imitated in other eastern cities, this policy was pursued with some success until the latter part of the century, when legislation in the western states halted or severely restricted the efforts of the so-called preventive agencies to solve the East's dependent and wayward child problem by exportation.⁹³

The development of these new approaches to child care brought to the forefront an issue that had been latent in the child-saving enterprise since the first houses of refuge were established: was it necessary or desirable, or even possible, to separate children for purposes of treatment according to the reasons for which they were believed to need state care? Should all children—criminal law violators, wayward, neglected, and destitute—be sent to the same institution, should different institutions be created for different categories, or should some be institutionalized and some not? If an institution organized on the cottage plan took in different categories of

⁹¹ REPORT OF THE COMMISSIONERS OF THE OHIO REFORM SCHOOL 4-7 (1856), reprinted in 1 CHILDREN AND YOUTH, *supra* note 17, at 705-07; R. MENNEL, *supra* note 28, at 52. See also sources cited in note 88 *supra*.

⁹² J. HAWES, *supra* note 28, at 100; R. MENNEL, *supra* note 28, at 85.

⁹³ See M. LANGSAM, CHILDREN WEST: A HISTORY OF THE PLACING-OUT SYSTEM OF THE NEW YORK CHILDREN'S AID SOCIETY, 1853-1890, at 17-30, 65 (1964), and sources cited in note 88 *supra*.

children, should each cottage contain a cross-section of children, or should criminal law violators be placed in certain cottages and wayward children in others? The managers of the New York House of Refuge had stated in 1844: "Classification of subjects in a Refuge is not very practicable; the true principle of reformation in such a place, is to make the inmates present as close an imitation as possible of the family life: with this, separation and isolation are inconsistent."⁹⁴ If there were significant differences among children, then perhaps this approach should be rethought. With some thirty years of experience in reforming children, child-savers began to wrestle with a dilemma that has plagued the juvenile justice system ever since.

In 1859, representatives of houses of refuge and reform schools gathered in New York to discuss child care issues, among which was the topic, "The Distinction Which Should be Observed Between Vagrancy and Destitution, on the One Hand, and Crime on the Other." Resolutions were introduced proposing that neither destitution nor vagrancy should be considered criminal, unless vagrancy had become "voluntary" and a "fixed way of life," and that entirely different institutions should be established for the "reform of juvenile offenders" and the "prevention of juvenile crime."⁹⁵ These resolutions sparked a lively debate over whether children should be classified for purposes of treatment, and if so, how.

Roughly three main approaches emerged, corresponding to the policies of New York's two houses of refuge,⁹⁶ the New York Juvenile Asylum, and the Children's Aid Society of New York. Spokesmen for the houses of refuge maintained that criminal law violators and vagrants (probably including incorrigibles)⁹⁷ should be institution-

⁹⁴ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 19, at 10 (1844). Three years later, arguing against the commitment of older boys, the managers wrote: "[Our] space and means are limited, and [we] cannot separate the good from the vicious.—The children must all mingle at their work, in their school and recreation." SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 22, at 10 (1847).

⁹⁵ PROCEEDINGS, *supra* note 42, at 13-59, 82-91, 125-39, 163-75. The resolutions are in *id.* at 34.

⁹⁶ The Western House of Refuge, established in Rochester, New York, in 1849, accepted boys under 16 years of age for vagrancy or criminal convictions. The enabling statute provides an indication of why houses of refuge were coming to be perceived as "tough" places, for courts were *required* to commit youths found guilty of felonies to the house, but had discretion whether to commit those found guilty of petit larceny or vagrancy. Act of May 8, 1846, ch. 143, §§ 13, 16, 1846 N.Y. Laws 150, *as amended* by Act of April 10, 1850, ch. 304, § 1, 1850 N.Y. Laws 670. Under the original New York City House of Refuge act, commitments of both criminal and vagrant youths were discretionary. Act of Mar. 29, 1824, ch. 126, § 4, 1824 N.Y. Laws 110 (criminal and vagrant children to be committed only if "proper objects").

⁹⁷ See text accompanying notes 41-42 *supra*.

alized in reformatory institutions, while merely destitute children should be placed in separate facilities, strictly preventive in nature. A representative of the Rochester House of Refuge contended that if a child voluntarily chose the vagrant's life, he or she should be classified as a criminal. He saw no problem in housing criminals and vagrants together within the same institution, since its purpose was not punishment but reform.⁹⁸ On the other hand, he recognized that some children might be forced into vagrancy because their parents were too poor to feed them; if they were "merely suffering from destitution" and had "not yet entered upon a course of crime," they were not proper subjects for reformatory institutions. Thus the mere street beggar, if he or she had a home, might not be a true vagrant.⁹⁹

Representatives of the New York Juvenile Asylum agreed that houses of refuge should take in children convicted of crime and possibly vagrants and suggested that the Children's Aid Society should provide for merely destitute children—"those who had been measurably well cared for [and] had enjoyed some of the influences of comparatively decent homes; but who, through the misfortune of parents, stood in need of assistance from the benevolent."¹⁰⁰ This left the great bulk of children who needed to be saved for the Juvenile Asylum: wayward children and children physically neglected or morally endangered by their parents.¹⁰¹ Spokesmen for the Asylum

⁹⁸ PROCEEDINGS, *supra* note 42, at 14-15. The Ohio Reform Farm School, which accepted both criminal law violators and incorrigible children, and which utilized a "cottage" system to provide children with more individualized care, also remained orthodox in refusing to use that system to segregate the two classes of inmates. *Id.* at 23. A delegate from the Philadelphia House of Refuge was alone in suggesting that three groups of inmates—older and harder criminal youth, younger criminal offenders, and wayward children (including vagrants, runaways, and truants)—should be prevented from associating with one another when housed in the same institution. *Id.* at 163-65 app.

⁹⁹ *Id.* at 13, 34. Not all delegates accepted the view that there was a clear distinction between wayward children and "merely" destitute children. A representative of the Baltimore House of Refuge advocated that the police "arrest all boys and girls of proper age . . . who [are] found begging in the street, and bring them before the magistrate without distinction"—presumably regardless of whether their begging was motivated by destitution or not. Many beggar children, he thought, were sent out by their parents, "who are abundantly able to support them, and who send them out with instructions not only to beg, but if they cannot beg, to steal . . ." *Id.* at 18.

A delegate from the Ohio Reform Farm School thought that no "clear, well-defined line" could be drawn between "vagrancy, destitution, and crime." Ohio had attempted the distinction but found it impossible. Destitution frequently led to crime, and therefore "each case must be judged for itself, by the committing party" and the laws "must leave much to the discretion of reform school officers, guarding it again by proper revisory power in the courts." *Id.* at 23.

¹⁰⁰ *Id.* at 27, 39-41.

¹⁰¹ *Id.* at 40. Thus, their mandate embraced such wayward children as "beggars, petty pilferers, children who take ash-barrels, fuel, sugar out of hogsheads on the wharves, fruit,

saw no need to distinguish between incorrigible and neglected children for purposes of treatment, for if children had been exposed to parents who were intemperate, sexually immoral, or criminal, they "were in danger of speedily becoming . . . incipient criminals"; left to themselves they "were likely to go to ruin."¹⁰² A delegate from the Northern Home for Friendless Children in Philadelphia summed up the conviction that it was only a matter of time before a young neglected child turned into an incorrigible child, and eventually a criminal: "The . . . child, if neglected and uncared for, unrestrained in its associations or habits, will . . . inevitably grow up to be a person of loose moral character,—indolent and vicious practices, pernicious influences, a useless consumer, and a dangerous depredator upon the society in which he exists."¹⁰³ For this group of reformers, then, both neglected and incorrigible children were morally tainted, potentially dangerous, and in need of restraint. As Fox has summed it up, it was the state's duty "to intervene in the lives

and other trifling things . . . This class also embraced truants . . ." *Id.* In addition, they would house children who were either physically neglected or morally endangered by their parents:

children of degraded women, and of low gamblers, children of poor parents, imprisoned for crimes, and who were supposed to have been tainted by the example of such persons, children of habitual drunkards, and the morally degraded or vicious children who have been subjected to the contaminating influences of such evil associations.

Id.

The Juvenile Asylum, it should be noted, was in active competition for clients with the other major child-saving organizations in New York City, the House of Refuge, and especially the Children's Aid Society. While the Asylum managers agreed that children were best reformed in families, they were appalled at the notion of placing unruly children taken right from the streets in good homes without first attempting to change their ways through a period of institutionalization, which might last from six months to five years. 1 CHILDREN AND YOUTH, *supra* note 17, at 739; R. MENNEL, *supra* note 28, at 44-47.

¹⁰² PROCEEDINGS, *supra* note 42, at 40.

¹⁰³ *Id.* at 125. A further expression of the view that parental neglect led inevitably to crime by children came from a delegate of the Philadelphia House of Refuge:

From a personal knowledge of the parents of those committed to the institution for vagrancy or crime . . . we are warranted in asserting that the causes of their moral delinquencies may generally be justly attributed to improper parental influence, manifesting itself by undue severity or pernicious indulgence, sinful neglect or unhallowed example.

Id. at 164. See also the remarks of Bradford K. Peirce, Superintendent of the State Industrial School for Girls, Lancaster, Massachusetts:

The . . . legitimate subjects of reformatory training . . . are, first, orphans, or motherless children, or worse than orphans, cursed with intemperate or criminal parents; they are untrained save in the vices of the streets, vulgar and profane in speech, impertinent and disobedient, truants from school, indisposed to all labor, their domestic affections numbed, the subjects of ruinous habits, and altogether beyond control of their legal guardians, if they have any.

Id. at 128.

of all children who might become a community crime problem."¹⁰⁴

Having pressed the argument for a quadripartite classification scheme—criminal, wayward, neglected, and destitute—and the claim of the Juvenile Asylum to primacy in treating wayward and neglected children, spokesmen for that agency called on the conference to declare that each agency should “keep within its own peculiar duties,” so that vicious children would not be placed in a family “to pollute its atmosphere,” and “poor unfortunate children of respectable parents” would not be put into a reformatory “amid a hundred corrupted children.”¹⁰⁵ In effect they were proposing an *entente cordiale* among the three New York agencies “by which the several classes of children [might] be divided up, and taken care of properly”;¹⁰⁶ perhaps the Asylum feared that philanthropists were losing credit in the eyes of the public by squabbling over the child-saving pie.

Charles Loring Brace of the Children’s Aid Society would have none of these hair-splitting attempts to classify children. For Brace the only relevant categories were children who had committed crimes—presumably Brace meant serious crimes, not petty larceny or vagrancy—and all others.¹⁰⁷ The former should be placed in houses of refuge, while wayward, neglected, and destitute children should be placed directly in families, without interference by institutions. If a family could be found who would give a home and training even to a “bad” child, he saw no harm in placing the child there.¹⁰⁸ While Brace opposed institutionalization, he did not dis-

¹⁰⁴ Fox, *supra* note 13, at 1193. Indeed, the temptation was strong to argue that the mere fact that a child’s parents were poor or immigrant established a presumption of neglect, and thus a sufficient basis to predict future criminality, as a delegate from the Juvenile Asylum indicated:

[E]ighty-one percent of the children we have to deal with are the children of emigrants born either abroad or in this city. . . . [I]n looking at the cause of juvenile vagrancy and crime . . . we have to look at this parental neglect as it has been spoken of. Now we must remember who these parents are, thus neglecting their children. Only one-sixth of the arrests of children and of parents are of native population. This, then, brings up directly the necessity of reaching the root of the evil in dealing with emigrants.

PROCEEDINGS, *supra* note 42, at 28-29. A delegate from the New York House of Refuge went further, arguing that since many vagrants were the children of poor widows vainly trying to keep large families together, benevolent agencies “should break up the sympathy that exists between these poor parents and their children” and abandon the idea that “they must necessarily keep families together.” *Id.* at 22. In this view, poverty alone became a predictor of criminality and thus an adequate basis for institutionalizing children.

¹⁰⁵ PROCEEDINGS, *supra* note 42, at 44-45.

¹⁰⁶ *Id.* at 44.

¹⁰⁷ *Id.* at 46.

¹⁰⁸ *Id.* at 48.

pute the notion that predelinquent and neglected children should be coercively restrained to protect society. Whether the children were called destitute, poor, friendless, vagrant, or "bad," the Children's Aid Society was determined to send them west for their own and society's good.¹⁰⁹

The deliberations of the 1859 conferees reveal that child-savers were divided over how children should be classified for purposes of treatment, with wayward children at the center of the controversy. All agreed that serious criminal law violators must be confined in houses of refuge, but (1) representatives of the houses of refuge also laid claim to treating vagrants and incorrigible children, (2) spokesmen for the New York Juvenile Asylum felt that incorrigibles should be housed with neglected children in separate institutions, and (3) the Children's Aid Society objected to institutionalization of incorrigibles altogether. These organizations continued to pursue their competing theories of child reform, often clashing angrily in ensuing years.¹¹⁰ On one point they all agreed, however: children who had not committed crimes but had merely disobeyed parents, run away from home, or otherwise manifested disagreeable habits short of crime needed to be coercively restrained and reformed. Most child-savers continued to believe that incarceration in an institution for some period of time was the best way to accomplish this task.

B. *The Statutory Schemes*

Between 1840 and 1870, laws providing for incarceration of wayward children proliferated. Often these statutes were passed in conjunction with the establishment of new institutions for children, but sometimes older states expanded the jurisdiction of existing institutions to include wayward children more explicitly. In particular, the creation of compulsory education in some states after 1850 gave rise to a new status offense—truancy from school—that became a principal ground for committing youths and a key factor in shaping the new legal status of dependency for young people. In this section we will examine some of the major statutory innovations adopted in the 1840-1870 period in order to indicate the increasing diversity of approaches to wayward children and the growing popularity of such laws throughout the United States. While scholarship dealing with juvenile delinquency in the nineteenth century has focused largely

¹⁰⁹ *Id.* at 49-50.

¹¹⁰ M. LANGSAM, *supra* note 93, ch. 5; R. MENNEL, *supra* note 28, at 45-48, 55-57, 113-14. See generally 2 CHILDREN AND YOUTH, pt. 4, *supra* note 17, at 464-73.

on such key states as New York, Pennsylvania, Massachusetts, and Illinois, it will become apparent that by 1870 a truly national consensus was emerging around the proposition that noncriminal youth should be subjected to coercive state intervention to "save" them from future criminality.

As indicated above, one of the new institutions for children created in this period was the New York Juvenile Asylum, which opened in 1853. Technically this institution was set up to receive neglected children¹¹¹ between seven and fourteen years of age, but the directors interpreted their mandate liberally and accepted children more properly deemed wayward or incorrigible, at least where parental failings also could be proved.¹¹² A unique feature of the asylum's scheme was that parents or guardians could voluntarily surrender their children age seven to fourteen to the agency without any intervention by a legal authority.¹¹³ The parent had to consent in writing and could specify the term of years for which the transfer of custody would be valid,¹¹⁴ but otherwise the asylum had full authority over the child and could apprentice him or her for a term of years, as with a child entrusted to it by the courts.¹¹⁵ We shall see that a number of other states adopted this procedure, which clearly permitted parents to incarcerate children without the formality of a court hearing.¹¹⁶

The wayward child jurisdiction received new impetus in New York when the law governing the New York City House of Refuge was amended in 1865 explicitly to permit courts to commit youths, deemed "disorderly children," found guilty of "deserting their homes without good and sufficient cause, or keeping company with dissolute or vicious persons against the lawful commands" of parents or guardians.¹¹⁷ With the passage of this act, New York re-

¹¹¹ Neglected children were defined as those "found in any street, highway or public place . . . in the circumstances of want and suffering or abandonment, exposure or neglect, or of beggary," where the child was proved to be a "proper object" for the agency "by reason of the neglect, habitual drunkenness or other vicious habits of the parents or other lawful guardian of such child." Act of June 30, 1851, ch. 332, §§ 7,9, 1851 N.Y. Laws 633.

¹¹² PROCEEDINGS, *supra* note 42, at 40. See note 101 *supra*.

¹¹³ Act of June 30, 1851, ch. 332, § 7, 1851 N.Y. Laws 633.

¹¹⁴ *Id.* § 8.

¹¹⁵ *Id.* § 11.

¹¹⁶ See text accompanying notes 134 & 146 *infra*. In 1857, a second juvenile asylum opened in Buffalo, New York, with the same jurisdiction as its New York City counterpart. Act of April 17, 1857, ch. 759, §§ 3-4, 1857 N.Y. Laws 622.

¹¹⁷ Act of Mar. 22, 1865, ch. 172, § 5, 1865 N.Y. Laws 293. A complaint could be brought by a parent or guardian before a police magistrate or justice of the peace; if the official was satisfied by "competent testimony" that the complaint was valid, he was *required* to commit

formers no longer were dependent on the courts' continued willingness to interpret "vagrancy" broadly, for they now had statutory authority to commit rebellious children, especially runaways, whether or not they fitted a technical description of vagrancy.

Even more significant for the future of children was the passage in 1853 of New York's first compulsory education and truancy law. Parents were required to send their children to public school at least four months a year until they reached age fourteen. If a child was found "wandering in the streets . . . idle and truant, without any lawful occupation,"¹¹⁸ a court could require the parents to agree in writing that they would ensure the child's attendance at school. If the child then "habitually or intentionally" violated this agreement, the court could commit him or her to "some suitable place" for employment and instruction, to be provided by every city and village. After commitment, jurisdiction over truants passed to the overseers of the poor or commissioners of almshouses, who were empowered to apprentice them for the length of their minority.¹¹⁹ The harshness of the penalty—removal from the custody of one's parents—illustrates how seriously the new status offense was regarded.

Massachusetts also dramatically increased its means of coercive intervention into children's lives during this period. In 1847, it created the first state reform school in the nation, with jurisdiction over male juvenile criminal offenders.¹²⁰ Because it remained a criminal offense in Massachusetts to be a "stubborn child,"¹²¹ the institution was effectively empowered to receive the same kinds of incorrigible children who could be admitted to houses of refuge or juvenile asylums elsewhere.¹²² In 1855, a state reform school for girls was added,

the child to the house of refuge. *Id.* §§ 6-7. (There was no requirement that the official find the youth a "proper object" for the refuge.)

¹¹⁸ Act of Apr. 12, 1853, ch. 185, § 1, 1853 N.Y. Laws 358.

¹¹⁹ *Id.* §§ 1-3.

¹²⁰ Act of Apr. 9, 1847, ch. 165, §§ 1, 4, 1847 Mass. Laws 405.

¹²¹ MASS. REV. STAT. pt. 4, tit. 1, ch. 165, § 28 (1860).

¹²² Examples from the 1851 report of the reform school trustees show that the term "stubborn" was used to cover every conceivable kind of juvenile noncriminal misconduct:

No.—Has spent most of his time idling about the streets in company with other bad boys, and has been addicted to the use of intoxicating liquors and tobacco; has often been intoxicated, has indulged in lying, profanity, pilfering, and sleeping out.

. . . .

No.—Is a notorious truant from school, and home; addicted to the habits of chewing tobacco and profanity. He has associated with the worst class of boys; ran away from home many times, often staying away several days, and even months at a time, sleeping nights in stables, or any place that might afford him shelter. At two different times he was absent three months.

. . . .

with a jurisdiction that explicitly included wayward children ("leading an idle, vagrant, or vicious life"), neglected children ("found . . . in any public place . . . in circumstances of . . . neglect, exposure or abandonment"), and beggars, as well as criminal law violators.¹²³

By 1866, the idea of classifying children more precisely had gained influence in Massachusetts, as legislators established a state primary school for "dependent and neglected" children who had been placed in the state almshouse.¹²⁴ This classification was still not watertight, however, for the statute authorized the state reform school to transfer to the primary school boys committed to the former for "trivial offenses, and [who] do not appear to be depraved in character, or to need the restraints of imprisonment."¹²⁵ Thus officials saw no difficulty in mingling the milder cases of waywardness with children whose only reason for being institutionalized was that their parents were poor.

Both the concern for separate treatment of neglected children and the continued fuzziness of the line between neglect and waywardness were exemplified by a subsequent Massachusetts statute, "An act concerning the care and education of neglected children,"¹²⁶ which authorized judges to commit neglected children under sixteen years of age to institutions established by municipalities for their care. Neglected children were defined as those "who, by reason of the neglect, crime, drunkenness or other vices of parents, or from orphanage, are suffered to be growing up without salutary parental control and education, or in circumstances exposing them to lead idle and dissolute lives."¹²⁷ The language shows that officials still

No.—Was once fined for throwing stones at a market man; is a notorious pilferer, having taken money and small articles too numerous to mention; also addicted to the habits of chewing and smoking tobacco, lying, profanity and Sabbath breaking.

Fifth Annual Report of the Massachusetts State Reform School 18-19 (1851).

In 1859, the trustees offered a "typology" of stubbornness that further revealed the polymorphous nature of the offense. Some of the categories used were: "ungovernable and runaway . . . truant; leaving places of employment, rebellious at home"; "ungovernable and lying . . . characterized by great dishonesty"; "ungovernable and a thief"; "idle, disorderly, arrested . . . for larceny"; "vagabond . . . disorderly, without fixed home, wandering about the country, and arrested for notoriously bad conduct"; "vagabond, simpleton . . . intellect quite low, without decided idiocy"; "trespass and bad conduct: generally disorderly, with some act in particular of decidedly aggravated conduct"; "wanton destruction of property." Thirteenth Annual Report of the Massachusetts State Reform School 5 (1859).

¹²³ Act of May 21, 1855, ch. 442, § 4, 1855 Mass. Laws 837.

¹²⁴ Act of May 3, 1866, ch. 209, § 1, 1866 Mass. Laws 161.

¹²⁵ *Id.* § 6.

¹²⁶ Act of May 29, 1866, ch. 283, 1866 Mass. Laws 266.

¹²⁷ *Id.* §§ 1, 3.

saw no need to separate clearly the concepts of neglect and waywardness. Parental deviance was censured not merely because legislators feared neglected children might suffer physically, but because they believed neglect would produce imminently that "idle and dissolute" behavior that characterized the wayward child.

Like New York, Massachusetts also instituted compulsory education and created the status offense of truancy at this time. In 1850, judges were authorized to commit to houses of refuge or other suitable institutions children between six and fifteen years of age who were "habitual truants" or "not attending school, without any regular and lawful occupation, growing up in ignorance."¹²⁸ Two years later, the legislature required parents to send children between the ages of eight and fourteen to public school at least twelve weeks a year.¹²⁹ In 1865, the state further authorized counties to establish houses of reformation to receive both school truants and criminal law violators.¹³⁰

While one must be cautious of reading too much coherence into this pattern of legislation, it would seem that Massachusetts legislators shared the widely held view that wayward children—at least "stubborn" boys—were most appropriately housed with criminal law violators in the state reform school, while neglected and destitute boys should be housed apart, in the state primary school. On the other hand, because they also viewed neglected and destitute children as having begun the slide toward criminality, legislators also sanctioned the incarceration of less seriously wayward boys

¹²⁸ Act of May 3, 1850, ch. 294, § 1, 1850 Mass. Laws 468. The distinction between the two categories of commitment would appear to be that children "not attending school . . . growing up in ignorance" referred to children not attending school at all, while "habitual truants" referred to those enrolled in school but attending infrequently. Commitments under the act could be for "such periods of time as [the court] may judge expedient," *id.* § 3, later limited to a two-year maximum. Act of Apr. 30, 1862, ch. 207, § 2, 1862 Mass. Laws 179.

¹²⁹ Act of May 18, 1852, ch. 240, § 1, 1852 Mass. Laws 170. In 1862, the legislature provided that children could be committed as truants up to the age of 16. Act of Apr. 30, 1862, ch. 207, §§ 1-2, 1862 Mass. Laws 179. When one juxtaposes the compulsory education and truancy laws, one sees a curious inconsistency: while parents could be fined for not sending their children to school only if the children were under the age of 14, children could be found truant for not attending school until they reached age 16.

Whereas the 1850 statute gave municipalities discretionary authority to deal with truancy, Act of May 3, 1850, ch. 294, § 1, 1850 Mass. Laws 468, under the 1862 law they were required to make such arrangements. Act of Apr. 30, 1862, ch. 207, § 1, 1862 Mass. Laws 179. Several municipalities established special truant schools pursuant to this act. M. KATZ, *THE IRONY OF EARLY SCHOOL REFORM* 167 (1968).

¹³⁰ Act of May 9, 1865, ch. 208, §§ 1, 3, 1865 Mass. Laws 609. In practice, the Boston House of Reformation became almost entirely a school for truants. M. KATZ, *supra* note 129, at 167.

with them.¹³¹ Just as a wayward child in New York City might be housed with criminal offenders in the house of refuge or with neglected children in the Juvenile Asylum depending on how seriously a judge viewed his or her misconduct, whether a Massachusetts predelinquent boy ended up in the state reform school or the state primary school was entirely a matter of official discretion.

Connecticut created a state reform school in 1851 to which courts could send boys under age sixteen who committed criminal offenses, including that of stubbornness.¹³² In 1855, however, the legislature prohibited commitments based on stubbornness, thus departing from contemporaneous Massachusetts practice; the law also forbade commitments to the school based on idleness, vagrancy, begging, or disobedience by apprentices to their masters' lawful commands.¹³³

Paradoxically, a few years later the Connecticut legislature provided that any parent might indenture a son to the reform school for any length of time mutually agreeable to the parent and the school's trustees, as long as the parent paid the costs of the child's upkeep.¹³⁴ No reasons for the commitment had to be given, and one imagines that under this arrangement a certain number of stubborn children found their way to the reform school after all.¹³⁵ Also surprising, in view of the 1855 ban on stubbornness commitments to the state reform school, was the passage of legislation in 1869 that allowed that institution to receive school truants.¹³⁶ Apparently legislators were no longer reluctant to incarcerate at least some status offenders with criminal law violators. The truancy law was vigorously enforced, and commitments on that ground dramatically increased the population of the state reform school after 1870.¹³⁷

Elsewhere in New England and the Middle Atlantic region, statutes authorizing state reform schools to accept wayward children

¹³¹ See text accompanying note 125 *supra*.

¹³² Act of June 27, 1851, ch. 46, § 4, 1851 Conn. Laws 46.

¹³³ Act of June 30, 1855, ch. 104, § 1, 1855 Conn. Laws 123. Curiously, the law allowing justices of the peace to commit "stubborn and rebellious" children to the house of correction or county jail remained on the books. CONN. GEN. STAT. tit. 13, ch. 4, § 45 (Dutton, Waldo, & Booth 1866).

¹³⁴ Act of June 24, 1859, ch. 79, § 1, 1859 Conn. Laws 58.

¹³⁵ In the 1860's, the school housed a few of these "boarders" every year. See text accompanying note 176 *infra*.

¹³⁶ Act of July 9, 1869, ch. 123, § 1, 1869 Conn. Laws 339. Truants were defined as "all minors between the ages of six and seventeen years, habitually wandering or loitering about the streets or public places of [any city], or any where beyond the proper control of parents or guardians, during the school term, and during the hours when school is in session." *Id.* Commitments could last up to three years. *Id.* § 3.

¹³⁷ See text accompanying notes 178 & 289 *infra*.

were enacted in New Hampshire,¹³⁸ Maine,¹³⁹ and New Jersey.¹⁴⁰ Rhode Island created a municipal institution, the Providence Reform School, which could receive juvenile criminal offenders and young persons of "idle, vicious, or vagrant habits" convicted by the courts as "vagrant, disorderly persons."¹⁴¹ Among the southern states, Louisiana,¹⁴² Maryland,¹⁴³ and Kentucky¹⁴⁴ established municipal houses of refuge to restrain wayward children. The Baltimore House of Refuge possessed a jurisdiction copied almost verba-

¹³⁸ Act of July 14, 1855, ch. 1660, §§ 4, 7, 1855 N.H. Laws 1553. The New Hampshire reform school's jurisdiction was limited to criminal offenders under 18 years of age, but stubborn children would have been included therein. In addition, New Hampshire still allowed stubborn children to be sent to the house of correction. N.H. COMP. STAT. tit. 14, ch. 122, § 2 (1853).

New Hampshire also provided for commitment of habitual truants and children not attending school, without regular and lawful occupation, to suitable institutions, including the reform school. Act of Jan. 5, 1853, ch. 1278, §§ 1-4, 1853 N.H. Laws 1215.

Neighboring Vermont had no status offense jurisdiction aimed specifically at children. Its 1797 vagrancy act, listing categories of persons who might be committed to the workhouse, did not include "stubborn children," although "stubborn servants" and "runaways" were included. (The latter term usually referred to runaway servants and apprentices in colonial legislation, rather than children absenting themselves from home.) Act of Mar. 3, 1797, ch. 18, § 13, 1797 Vt. Acts 262. Vermont established a reform school in 1865 but limited its jurisdiction to criminal offenders. Act of Nov. 9, 1865, No. 1, §§ 1, 5, 1865 Vt. Acts 3.

¹³⁹ Act of Mar. 16, 1861, ch. 57, § 3, 1861 Me. Acts 35. The school's jurisdiction included children guilty of Sabbath breaking, vagrancy, truancy, and being a "common runaway, drunkard, pilferer [or] night walker." *Id.*

¹⁴⁰ Act of Apr. 3, 1867, ch. 253, § 12, 1867 N.J. Laws 529. A justice of the supreme court could commit a boy if the youth's parent or guardian complained that he was "habitually vagrant and disorderly or incorrigible." *Id.* While only boys under the age of 16 could be committed for crime, minors of any age could be committed for incorrigibility. Both groups could be confined until age 21. *Id.* §§ 3, 12.

¹⁴¹ Act of Jan. 1850, §§ 1, 4, 1850 R.I. Acts 10. The act also provided that parents could commit their children over five years of age directly to the institution if they agreed to pay for their upkeep. *Id.* § 4. Although the legislature authorized towns to commit school truants to suitable institutions, Act of May 1856, § 1, 1856 R.I. Acts 15, they could not be sent to the reform school. R.I. REV. STAT. tit. 13, ch. 70, § 2 (1857). Apparently special truant schools would handle this category of wayward children.

In 1871, the state, apparently dissatisfied with local efforts to combat truancy, required all towns and cities to enact measures to control the problem. Act of June 2, 1871, ch. 960, § 1, 1871 R.I. Acts 14.

¹⁴² Act of May 4, 1847, No. 245, §§ 1,3, 1847 La. Acts 203 (juvenile criminal offenders and vagrants).

¹⁴³ Act of Mar. 7, 1850, ch. 374, §§ 1-2, 1850 Md. Laws.

¹⁴⁴ Act of Mar. 3, 1860, ch. 1312, § 4, 1860 Ky. Acts 848 (boys under 16, girls under 15, guilty of "vicious or immoral conduct, and idle or mischievous courses"). The age of commitment was raised to 18 years for boys and 16 years for girls in 1866. Act of Jan. 27, 1866, ch. 247, § 3, 1866 Ky. Laws 206.

Elsewhere in the South, Florida included "stubborn children" within the definition of "disorderly persons" and provided that they could be placed in the county jail for six months. Act of Aug. 6, 1868, ch. 1637, subch. 8, No. 13, § 24, 1868 Fla. Laws 96.

tim from Pennsylvania law: boys under twenty-one years of age and girls under eighteen could be incarcerated for criminal offenses, begging, vagrancy, or "incorrigible or vicious conduct," on complaint of parents or others.¹⁴⁵

Perhaps the courts of Baltimore proved reluctant to commit children whose parents brought incorrigibility charges against them, for in 1860 the Maryland legislature provided that the Baltimore House of Refuge could receive "such children as their parents, guardians or friends [might] desire to place them therein for temporary restraint and discipline," if the parent or guardian contracted to pay the child's upkeep.¹⁴⁶ The statute placed no upper limit on the time a parent could keep his or her child in the house, and once again seems deliberately to have been designed to circumvent judicial supervision of parental institutionalization of children. Unlike Massachusetts and Pennsylvania, but like New York, Connecticut, and Rhode Island, Maryland had opted for total parental discretion to incarcerate difficult children.

A further development in Maryland was designed to meet the rising opposition of Catholic groups to child-saving activities traditionally dominated by Protestants. Protests by Catholic parents bridling at what they viewed as attempts by Protestants to proselytize their children had been heard in major urban areas since the 1840's. In response to their concern, homes for neglected and destitute Catholic children had been opened in New York City and Boston, and as far west as Indiana and Michigan.¹⁴⁷ In 1867, Maryland licensed the St. Mary's Industrial School for Boys to receive the full gamut of youths in need of care: destitute or orphaned boys, boys

¹⁴⁵ Act of Mar. 7, 1850, ch. 374, §§ 1-2, 1850 Md. Laws. In 1866, Maryland created a state industrial school for girls to receive girls not accepted by the Baltimore House of Refuge or other child-saving societies. Act of Feb. 8, 1866, ch. 156, §§ 5, 7, 1866 Md. Laws 256. While its statutory jurisdiction was unclear, the legislature appears to have intended that it duplicate that of the house of refuge. In 1872, it was stipulated that the Baltimore House of Refuge should receive only white males, Act of Apr. 1, 1872, ch. 218, § 1, 1872 Md. Laws 324; after that date incorrigible girls undoubtedly were sent to the Maryland Industrial School for Girls.

¹⁴⁶ Act of Mar. 3, 1860, ch. 205, § 2, 1860 Md. Laws.

¹⁴⁷ R. MENNEL, *supra* note 28, at 63-64. See also Twelfth Annual Report of the Massachusetts State Reform School 51 (1858):

Forty per cent. of the boys that have entered this institution for the last sixteen months have Catholic parents, and the percentage would be greatly increased if these parents were as willing to place their children here as Protestant parents usually are. The latter very frequently make complaint against their own children for the sake of placing them under the discipline and influence of the Reform School, while the former, quite as frequently endeavor by various expedients to keep their children away from this discipline and influence when complaint has been made against them by officers of the law.

convicted of criminal offenses, beggars, and vagrants, up to the age of sixteen. The statute stipulated that boys should be sent to the school only at the request of their parents.¹⁴⁸

Incorrigibility laws spread beyond the Alleghenies in this period, as the notion of reforming predelinquent children through institutionalization gained adherents even in less populated areas of the country. In 1852, Ohio authorized cities to construct houses of refuge for youths who violated the criminal law,¹⁴⁹ and five years later permitted the courts to commit the same "incorrigible, beyond control" youths whom Pennsylvania and Maryland had included in their houses of refuge.¹⁵⁰ The state also followed the practice of authorizing commitments without any judicial intervention at all, in Ohio's case by trustees of the town in which a house of refuge was located, or by a child's mother if the father was dead, had abandoned the family, did not provide for their support, or was an habitual drunkard.¹⁵¹

Ohio introduced two further grounds of commitment widely copied by other jurisdictions. If a youth was brought before a grand jury on a criminal charge and the grand jury found evidence sufficient to place the accused on trial, it could authorize commitment to the house of refuge instead of finding an indictment against the youth. Further, if an accused youth consented, a court could arrest his or her criminal trial at any stage of the proceedings and commit the accused directly to the house of refuge.¹⁵² Presumably these procedures were designed to spare youths and their families the pain of a full criminal trial and conviction, but the effect was to permit incarceration on mere suspicion of a criminal offense. In this respect, Ohio was formalizing the earlier practice of the New York and Pennsylvania Houses of Refuge, the managers of which had also assumed that children against whom criminal charges were lodged stood in need of reformation, whether the charges were proved or not.¹⁵³

In 1857, Ohio proudly opened its Reform Farm School, an insti-

¹⁴⁸ Act of Apr. 11, 1874, ch. 288, § 1, 1874 Md. Laws 428; Act of Feb. 28, 1867, ch. 402, § 1, 1867 Md. Laws 840. (The 1874 act defined the school's jurisdiction.)

¹⁴⁹ Act of May 3, 1852, § 78, 1852 Ohio Laws 223.

¹⁵⁰ Act of Apr. 16, 1857, § 6(1)-(2), 1857 Ohio Laws 163.

¹⁵¹ *Id.* § 6(3). Children so committed had to be either "destitute of a suitable home and of adequate means of obtaining an honest living" or "in danger of being brought up to lead an idle and immoral life." *Id.* Houses of refuge could also accept children who had committed criminal offenses, *id.* § 7, indicating Ohio's lack of concern with separate classification of children.

¹⁵² *Id.* §§ 8-9.

¹⁵³ See text accompanying notes 47-51 *supra*.

tution for boys that utilized the new cottage plan for housing youths in small groups under the guidance of cottage "elders." The school was located in a rural area and stressed training in agricultural labor, which was assumed to produce a healthy effect on moral character.¹⁵⁴ Although the institution's penology was new, its jurisdiction was not, for the grounds of commitment were the same as for municipal houses of refuge, including crime and incorrigibility.¹⁵⁵ The division of inmates into cottages opened the possibility of classifying youths on grounds of age, "toughness," or basis of commitment, but the cottage system was not used for this purpose. As the board of commissioners reported in 1869, "In our system no classification, based on character, is admitted. Our families are constituted without any regard to the previous character of the boys or their ages."¹⁵⁶

Elsewhere in the nation, the city of Chicago established a reform school in 1855 to receive children "destitute of proper parental care, wandering about the streets, committing mischief and growing up in mendicancy, ignorance, idleness and vice,"¹⁵⁷ while San Francisco created an industrial school to house "idle and dissolute" children.¹⁵⁸ Other new institutions that could accept wayward children were the Indiana House of Refuge,¹⁵⁹ and the state reform schools of Illinois,¹⁶⁰ Iowa,¹⁶¹ Kansas,¹⁶² and Minnesota.¹⁶³

¹⁵⁴ See R. MENNEL, *supra* note 28, at 52; A. PLATT, *supra* note 10, at 61-67. Mennel notes that the cottage plan, or "family" plan, gained wide popularity in the second half of the nineteenth century. New Jersey and Indiana opened cottage reform schools in 1864 and 1866, respectively. Older states converted existing congregate institutions to the cottage system, sometimes relocating them on farms. The Western Pennsylvania House of Refuge in 1876 and the Philadelphia House of Refuge in 1892 were typical. R. MENNEL, *supra* note 28, at 55.

¹⁵⁵ Act of April 2, 1858, § 10, 1858 Ohio Laws 27.

¹⁵⁶ Fourteenth Annual Report of the Ohio Reform School, *reprinted in* OHIO, GENERAL ASSEMBLY, EXECUTIVE DOCUMENTS 7 (1869) [hereinafter cited as EXECUTIVE DOCUMENTS].

¹⁵⁷ CHARTER AND ORDINANCES OF THE CITY OF CHICAGO, TOGETHER WITH ACTS OF THE GENERAL ASSEMBLY RELATING TO THE CITY, AND OTHER MISCELLANEOUS ACTS, WITH AN APPENDIX 338-39 (G. Thompson & J. Thompson eds. 1856), *cited in* Fox, *supra* note 13, at 1208 n.103.

¹⁵⁸ Act of Apr. 15, 1858, ch. 209, § 10, 1858 Cal. Stats. 166. In addition, the California Reform School briefly allowed parents to commit their sons to the school directly, whether or not they had committed a crime. Act of May 20, 1861, ch. 524, § 3, 1861 Cal. Stats. 591. In 1868, California closed its state reform school and transferred the inmates to the San Francisco Industrial School. Act of Mar. 30, 1868, ch. 515, §§ 1-2, 1868 Cal. Stats. 683.

¹⁵⁹ Act of Mar. 8, 1867, ch. 62, § 10(1)-(2), 1867 Ind. Acts 137. The town trustees or a child's mother could commit a destitute child or one "in danger of being brought up to lead an idle and immoral life." *Id.* § 10(3). A criminal court, with the consent of the accused, could commit a minor to the house of refuge at any stage of a criminal proceeding. *Id.* § 13.

¹⁶⁰ Act of Mar. 5, 1867, § 1, 1867 Ill. Acts 38. The jurisdiction was virtually identical to that of the Chicago Reform School. *Id.* § 17.

¹⁶¹ Act of Mar. 31, 1868, ch. 59, § 17, 1868 Iowa Acts 71. Parents or guardians could bring

In all, by 1870, at least eighteen American jurisdictions had adopted laws authorizing commitment of youths engaging in status offenses to special children's institutions. Although there were semantic variations among the statutes, overall they convey a numbing similarity. Whether the terms used were "incorrigible," "idle," "vicious," "stubborn," or some other colorful moralistic phrase, parents had acquired the power to transfer their child-rearing problems to the state, and the state had assumed the power to remove from families youths whose behavior was socially threatening. The next section will address the problem of the extent to which these new powers were actually wielded.

C. *Implementing the Laws: Institutional Commitments*

The mere fact that many states passed laws proscribing predelinquent conduct by youths does not tell us whether or not these laws were implemented. Fortunately, many of the institutions for children kept statistics on causes of commitment, which reveal that children were incarcerated for wayward behavior in large numbers. Vagrancy, incorrigibility, stubbornness, truancy, and other variations on the predelinquent theme often provided the largest category of inmates, or the second largest after petit larceny.¹⁶⁴ We will summarize here data on status offense commitments from six jurisdictions in the 1840-1870 period. A more detailed breakdown by category of status offense including absolute numbers of those com-

a complaint that their children were "habitually vagrant or disorderly, or incorrigible." *Id.*

¹⁶² Act of Mar. 3, 1869, ch. 93, § 17, 1869 Kan. Sess. Laws 191. Children could be committed if they were "disorderly," *i.e.*, persons under 16 years of age "convicted of vagrancy, or any disorderly practices, or who shall have deserted their homes without good and sufficient cause, or who shall keep company with dissolute or vicious persons, contrary to the lawful commands of their parents, or other persons standing in the place of a parent." *Id.* Children under 16 could also be committed for "residing or staying in any house of ill fame or with vicious persons." *Id.* § 20.

¹⁶³ Act of Mar. 3, 1870, ch. 7, § 3, 1870 Minn. Laws 7 ("incorrigible or vicious conduct," "beyond control" of parents).

¹⁶⁴ The data used in this essay permit only limited conclusions. All we can safely say is that nineteenth-century child-saving institutions received large absolute numbers of children and that high percentages of the inmates were committed on grounds of waywardness. Lacking figures on the total number of children processed by the courts, we cannot say what percentage of all children processed or adjudicated by the courts these incorrigibility commitments represent. Thus, there is no way of comparing the numbers of children sent to reform schools on waywardness charges with wayward or criminal children incarcerated in adult prisons. Lacking adequate data from the nineteenth century we also have no way of knowing whether juvenile courts which committed wayward children to reformatories after 1900 reduced or increased the percentage of youths committed by nineteenth-century courts. See text accompanying notes 391-95 *infra*.

mitted and a comparison with commitments for crimes may be found in the tables in the Appendix.¹⁶⁵

In New York City's House of Refuge, where vagrancy was interpreted broadly to reach various kinds of wayward children, admissions for that offense constituted 35 percent of total commitments in 1863 and 44 percent in 1865.¹⁶⁶ After 1865, the refuge could accept wayward children explicitly (as "disorderly children")¹⁶⁷ and the combined commitments for vagrancy and disorderliness represented 45 percent of total commitments in 1868 and 41 percent in 1870.¹⁶⁸

In the eleven years immediately following the opening of the Massachusetts State Reform School, that state actively utilized its "stubbornness" law to incarcerate boys. Commitments for that all-encompassing offense fluctuated between a low of 34 percent in 1849 and a high of 50 percent in 1854. (Usually the figure was around 45 percent). Additional commitments for vagrancy and being "idle and disorderly" brought total status offense commitments in 1849 to 47 percent and in 1854 to 59 percent.¹⁶⁹

Apparently something of a backlash against sending boys to the reform school developed around 1860, as the next two years saw only a handful of youths committed to the school.¹⁷⁰ The school's trustees

¹⁶⁵ Both here and in section IV.(B.) below, the years for which data are presented have been chosen in order to document the persistently high level of waywardness commitments at representative time intervals. Unless indicated, the percentage of waywardness commitments in any given year are neither atypically high nor low for the particular institution in question. Most of the institutional reports from which these data are drawn are available in the Massachusetts State House Library, Boston, Massachusetts.

¹⁶⁶ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 39, at 26 (1863); SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 41, at 21 (1865).

¹⁶⁷ Act of Mar. 22, 1865, ch. 172, § 5, 1865 N.Y. Laws 293.

¹⁶⁸ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 44, at 23 (1868); SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 46, at 27 (1870).

¹⁶⁹ Third Annual Report of the Massachusetts State Reform School 21 (1850); Eighth Annual Report of the Massachusetts State Reform School 23 (1855). *See generally* Third through Twelfth Annual Reports of the Massachusetts State Reform School (1850-59).

¹⁷⁰ A total of 26 youths were committed for all causes in 1860, and 54 youths in 1861. Fourteenth Annual Report of the Massachusetts State Reform School 23 (1860); Fifteenth Annual Report of the Massachusetts State Reform School 27 (1861).

In 1860, the legislature restricted the power to commit to judges of the superior court and probate courts; previously most of the commitments had come from the court of common pleas, the Boston municipal court, and the various city police courts. Fourteenth Annual Report of the Massachusetts State Reform School 4 (1860). The school's trustees reported that recent legislation had made the process of commitment more complicated, so that now "scarcely any boys are committed at all." *Id.*

previously had intimated that the "stubbornness" jurisdiction was being abused, commenting: "[T]here is a large class convicted of stubbornness, some of them very young, whose coming hither is of, at least, doubtful expediency."¹⁷¹ They admitted that the term was "vague" and could be "used as a cloak for many offences, or for no offence at all."¹⁷² The school's population nevertheless began to climb again, although admissions for stubbornness did not figure as prominently as before, and in 1868 predelinquent children (including stubborn, disobedient, and vagrant children) constituted 37 percent of 115 total new admissions.¹⁷³

The pattern of commitments in Connecticut initially followed that of Massachusetts: in the four years after the Connecticut State Reform School opened in 1851, 42 percent of commitments were for stubbornness and vagrancy.¹⁷⁴ After the legislative ban on stubbornness commitments in 1855, most of the school's population in the 1850's and 1860's were incarcerated for theft, although there were a few vagrancy commitments as well.¹⁷⁵ Furthermore, some parents made use of the law permitting them to place their children in the school without court process, for a group of children labelled "boarders," numbering anywhere from two to thirteen a year, appear in the records after 1862.¹⁷⁶ With the passage of a truancy law in 1869¹⁷⁷ status offenders again comprised a significant part of the school's population: in 1870, 27 percent of total commitments were for truancy.¹⁷⁸

Reformation of predelinquent children remained a preoccupation of Philadelphia officials in this period. While the Philadelphia House of Refuge did not publish statistics on causes of commitment, in 1861 the managers reported on some fifty-one children who had been incarcerated in recent years. Of these, approximately twenty were primarily cases of waywardness—rebelliousness at home, running

¹⁷¹ Fourth Annual Report of the Massachusetts State Reform School 4 (1850).

¹⁷² Thirteenth Annual Report of the Massachusetts State Reform School 5 (1859).

¹⁷³ Twenty-second Annual Report of the Massachusetts State Reform School 29 (1863).

¹⁷⁴ Fifth Annual Report of the Connecticut State Reform School 35 (1857).

¹⁷⁵ There were three commitments for vagrancy in 1860 and five in 1864. By contrast, theft constituted 80% of total commitments in 1860 (44 of 55) and 67% in 1864 (90 of 134). Ninth Annual Report of the Connecticut State Reform School 33 (1861); Thirteenth Annual Report of the Connecticut State Reform School 29 (1865).

¹⁷⁶ In 1862, for example, there were five "boarders"; in 1864, there were 13; and in 1863, two. Eleventh Annual Report of the Connecticut State Reform School 32 (1863); Thirteenth Annual Report of the Connecticut State Reform School 30 (1865); Seventeenth Annual Report of the Connecticut State Reform School 36 (1869).

¹⁷⁷ Act of July 9, 1869, ch. 123, § 1, 1869 Conn. Pub. Acts 339.

¹⁷⁸ Nineteenth Annual Report of the Connecticut State Reform School 36 (1871).

away, associating with "wicked boys," and the like. Perhaps ten more were basically vagrancy cases, twelve youths were committed primarily for theft, seven for a combination of theft and wayward conduct, and two were simply neglected or physically abused by parents.¹⁷⁹

No institution used the wayward child jurisdiction more intensively in the nineteenth century than did the Western Pennsylvania House of Refuge. In each year of the 1860's the great majority of its commitments were for incorrigibility, vagrancy, and vicious conduct. These three status offenses represented 88 percent of total commitments in 1861, 77 percent in 1865, and 84 percent in 1870.¹⁸⁰

It would appear that the extremely high number of waywardness commitments to the Pennsylvania refuge was due in part to an abuse of the statutory wayward child jurisdiction that resulted in incarceration of merely neglected or destitute children whom the institution had no legal authority to receive.¹⁸¹ The superintendent of the refuge noted that the institution housed three principal groups of children: wayward children, confined for reformation; criminal youths, admitted for restraint and discipline; and neglected and destitute children—"good boys and girls" with "strong moral tendencies"—committed to prevent them from falling into vice.¹⁸² Candidly, the superintendent stated that while the destitute and neglected children had been committed by the courts, "the charges [were] vague and indefinite, evidently made for the pur-

¹⁷⁹ Thirty-third Annual Report of the Philadelphia House of Refuge 52-57 (1861). Examples of commitments based on incorrigibility demonstrate that the offense was being used in the same all-inclusive way as "stubbornness" in Massachusetts:

1. Habits were bad; committed on complaint of his father, for incorrigibility and vicious conduct; associated with wicked boys, and refused to engage in any useful employment.

. . . .

3. Incorrigible; father is dead; mother married again; she had him committed to the Refuge for disobedience, and refusing to work, and to go to school.

. . . .

14. Bad boy; mother is dead; father kept tavern; he stole, and was incorrigible, and disobedient; committed on complaint of his father.

15. Rather bad; he was entirely beyond the control of his mother; spent his time upon the streets with vicious boys; visited the circus and theatre.

Id. at 52-53.

¹⁸⁰ See, for all statistics in text, table in Seventeenth Annual Report of the House of Refuge of Western Pennsylvania 15 (1870).

¹⁸¹ Act of Apr. 22, 1850, No. 540, § 15, [1850] Pa. Laws.

¹⁸² Thirteenth Annual Report of the House of Refuge of Western Pennsylvania 22-24 (1866). The refuge also included a fourth group, children suffering from hereditary disease or mental defects, for whom the refuge was an "infirmary and a school." *Id.* at 23.

pose of procuring their admission to the Institution."¹⁸³ He admitted that if the purposes of the refuge were restraint and reformation, at least half of the children committed annually should have been sent elsewhere.¹⁸⁴ In other words, only half of the youths committed under criminal or waywardness charges in fact belonged in those categories, even given their inherent vagueness. Apparently, fictitious charges of waywardness had been lodged against the others, whether by poor or overwhelmed parents, or by authorities intent on separating children from "inadequate" parents. While the practices of the Western Pennsylvania House of Refuge may not have been typical, it is likely that other nineteenth-century reformatories confined merely neglected or destitute children under the waywardness rubric.

Despite his admission that the wayward child jurisdiction was being abused, the superintendent of the Western Pennsylvania House of Refuge did not think neglected and destitute children should be removed from the institution:

[T]his would only circumscribe the usefulness of the Institution, without in any measure remedying the evil. Most of these destitute orphan children, who now find their way to the Refuge as homeless wanderers, would soon be brought here as criminals. Their ultimate ruin is only a question of time. . . . It is better . . . to prevent the necessity of reformation.¹⁸⁵

This official thus accepted the idea of incarcerating children who merely stood in danger of developing bad habits, although the wayward child law had to be stretched to accomplish this purpose. His testimony is further proof that nineteenth-century reformers often saw little point in distinguishing neglected from incorrigible children, since both stood in danger of leading criminal lives.

The Baltimore House of Refuge also incarcerated high numbers of predelinquent children. Commitments for incorrigibility, "vicious conduct," and vagrancy represented 94 percent of total admissions in 1856, 76 percent in 1860, 70 percent in 1865, and 87 percent in 1870.¹⁸⁶ Furthermore, throughout the 1860's, the refuge received a certain number of "boarders" each year, under the law

¹⁸³ *Id.* at 22.

¹⁸⁴ *Id.* at 24.

¹⁸⁵ *Id.*

¹⁸⁶ Sixth Annual Report of the Baltimore House of Refuge 24 (1857); Tenth Annual Report of the Baltimore House of Refuge 18 (1861); Fifteenth Annual Report of the Baltimore House of Refuge 17 (1866); Twentieth Annual Report of the Baltimore House of Refuge 19 (1871).

which made it possible for parents to commit children without court process.¹⁸⁷ Twenty-seven such children were admitted in the war year 1863, for example, comprising 15 percent of new admissions.¹⁸⁸

Commitments for waywardness offenses in Ohio institutions were also numerous. At the Ohio Reform Farm School, admissions for incorrigibility comprised 36 percent of the total in 1861, 39 percent in 1867, and 43 percent in 1870.¹⁸⁹ At the Cincinnati House of Refuge, incorrigibility and vagrancy commitments made up the largest single class throughout the 1860's. In 1863, for example, the two categories accounted for 67 percent of total admissions, while in 1869 they comprised 74 percent of the total.¹⁹⁰

From this survey of six states possessing a wayward child jurisdiction during part or all of the period 1840-1870, it is clear that the laws proscribing "stubbornness," "incorrigibility," "vagrancy," and "truancy" were intensively enforced. Indeed, the statistics show that the incorrigible child, rather than the young criminal offender, was the primary focus of the child-savers' zeal. Descriptions of committed children and comments of refuge officials indicate that the law's vagueness allowed courts to commit virtually any child whose behavior was annoying. Further, use of the wayward child jurisdiction to incarcerate neglected and destitute children provided a convenient tool by which city and state officials could avoid helping families in need of financial assistance. It may have been more convenient to institutionalize poor children as "incorrigible" and separate them from their parents than to search for ways to strengthen those families.

D. *The Response of the Courts*

Challenges to the power of state and municipal institutions to receive children on grounds of incorrigibility were rare in the nineteenth century. For some thirty years after the Pennsylvania court's

¹⁸⁷ See text accompanying note 146 *supra*. See generally Tenth Annual Report of the Baltimore House of Refuge (1861) through Twentieth Annual Report of the Baltimore House of Refuge (1871).

¹⁸⁸ Thirteenth Annual Report of the Baltimore House of Refuge 21 (1864). There were 178 total admissions in 1863.

¹⁸⁹ Sixth Annual Report of the Ohio Reform School, reprinted in EXECUTIVE DOCUMENTS (1861), *supra* note 156, at 133; Twelfth Annual Report of the Ohio Reform School, reprinted in EXECUTIVE DOCUMENTS, *supra* note 156, at 134 (1867); Fifteenth Annual Report of the Ohio Reform School, reprinted in EXECUTIVE DOCUMENTS (1870), *supra* note 156, at 155.

¹⁹⁰ Thirteenth Annual Report of the Cincinnati House of Refuge 9-10 (1863); Nineteenth Annual Report of the Cincinnati House of Refuge 10 (1869).

decision in *Ex Parte Crouse*¹⁹¹ no cases appear to have reached the appellate level in any state. In 1867, however, in *House of Refuge v. Roth*,¹⁹² Martin Roth instituted a habeas corpus action in Baltimore City Court to obtain the release of his son, Frank Roth, from the Baltimore House of Refuge. The senior Roth himself had obtained his son's commitment by a justice of the peace on grounds of incorrigibility but apparently had a change of heart. The city court justice released the boy, finding that he had been tried and convicted of a crime without indictment and trial by jury in violation of the state's declaration of rights, and that a justice of the peace had no constitutional power to convict for a criminal offense. On appeal by the house of refuge to the Supreme Bench of Baltimore City the court reversed the decision and sustained the incorrigibility commitment, relying on the authority of *Ex Parte Crouse*.¹⁹³ The Supreme Court of Maryland affirmed,¹⁹⁴ holding that it did not have jurisdiction to review a decision of the intermediate court in a habeas corpus action. In a brief dictum the court expressed agreement with the intermediate court's reasoning, quoting approvingly the text of *Ex Parte Crouse*.¹⁹⁵

The Supreme Bench of Baltimore City reasoned that the father's position could be sustained only if the framers of the state's bill of rights had intended "to take from a father of a minor . . . the right to subject him to a reformatory restraint, without indicting him by a grand jury and procuring his conviction of crime." This could not have been their intention, for "in all time heretofore, the rights and duty of the parent under the allowance of the State to control his child by any discipline, not barbarous and inhuman, which the incorrigible and vicious conduct of such child may render necessary, has been always admitted and acted upon."¹⁹⁶ The court seemed to be saying that a parent needed no specific statutory authority to commit his child to an institution on grounds of incorrigibility; apparently he had a common law right to discipline the child in any way he saw fit, short of unreasonable cruelty, including incarceration. That a parent had possessed the power to incarcerate a child at common law in the absence of statutory authorization was a

¹⁹¹ 4 Whart. 9 (Pa. 1838).

¹⁹² Sup. Bench Balt. City, Feb. 6, 1868, *reprinted in* Seventeenth Annual Report of the Baltimore House of Refuge 2 (1868) [hereinafter cited as Seventeenth Annual Report].

¹⁹³ *Id.* at 15.

¹⁹⁴ Roth & Boyle v. House of Refuge, 31 Md. 329 (1869).

¹⁹⁵ *Id.* at 334-35.

¹⁹⁶ Seventeenth Annual Report, *supra* note 192, at 12.

dubious proposition, but the Maryland Supreme Court did not disagree.

Rejecting the father's contention that the commitment was void because the justice of the peace had not annexed to the order of commitment a summary of the testimony on which the youth had been found incorrigible, as required by statute, the court suggested that this provision did not apply when a father committed his own son: "the authority and right to control and confine the incorrigible child already exists, by force of law, in the father; and he is entitled to exercise it, for disciplinary purposes, according to his own judgment, of its necessity."¹⁹⁷ The only reason for making application to the court, apparently, was to ensure that the house of refuge would have to accept the committed child and perhaps to prevent abuse of the parental right to commit; otherwise, "his own commitment of the minor, if the institution would receive him, would be as valid as the Justice's."¹⁹⁸ Finally, the court rejected out of hand the notion that an incorrigibility hearing was a criminal prosecution, requiring trial by jury. Invoking *Crouse*, the court held that the proceeding did not deprive a minor of his liberty but merely determined a "transfer of custody."¹⁹⁹

In the companion case of *House of Refuge v. Boyle*,²⁰⁰ the court approved a commitment for incorrigibility of a child charged with stealing \$2.38. It saw no objection to using the waywardness jurisdiction even though the charge was a criminal offense. The only alternative, it thought, was incarceration in a penitentiary after criminal conviction, a rather puzzling proposition since the house of refuge could accept commitments based on criminal convictions, including petit larceny. The court's conclusion indicates that it accepted the child-savers' argument that a youth should be incarcerated because of his general behavior, not because he had violated a specific criminal statute.

The Ohio Supreme Court confronted the issue of whether a child could be committed to a reform school for reasons short of criminal conviction in *Prescott v. State*, in 1869.²⁰¹ Here the issue was the constitutionality of a statutory provision stipulating that if a grand jury found that charges against a youth were supported by sufficient

¹⁹⁷ *Id.* at 13.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 14.

²⁰⁰ *Id.* at 17.

²⁰¹ 19 Ohio St. 184 (1869).

evidence to put the accused on trial, it could make a return to the court that the accused was a suitable person for commitment to the Ohio Reform Farm School instead of finding an indictment; the court was then required to order the commitment. Once again, the petitioner argued that he had been deprived of the right to trial by jury and the right to appear and defend himself in a criminal proceeding, contrary to the Ohio constitution. In what was becoming a ritualistic incantation, the court held that the proceeding in question was not criminal, but a "purely statutory" protective proceeding for the care, discipline, and reformation of minors, not entailing common law guarantees. Admitting that commitment to the institution restrained a youth's liberty, the court nevertheless held that the reform school was not a prison and incarceration in it not punishment for crime,²⁰² even though, in this case, the accused had been brought before the grand jury on charges of arson. Thus the Ohio court also embraced the view that a criminal charge was merely symptomatic of a child's condition of delinquency and provided a sufficient basis for reformatory commitment.²⁰³

Until this point, the view that the state had the right coercively to intervene in the lives of misbehaving children had gone unchallenged by the courts. One may then imagine that toilers in the vineyards of child reform were stunned when in 1870 the Supreme Court of Illinois handed down its decision in *O'Connell v. Turner*.²⁰⁴ Repudiating the cherished assumptions of the child-savers and their judicial allies, the court declared that children, too, had a right to liberty, which could not be infringed without due process of law.

The case arose on the habeas corpus petition of Michael O'Connell, who claimed that his son had been immured in the Chicago Reform School without having been convicted of crime. The court observed that since the warrant of commitment did not indicate that the boy had been arrested for a criminal offense, he must have been committed for "misfortune," *i.e.*, as a child found to be vagrant, "destitute of proper parental care," or "growing up in men-

²⁰² *Id.* at 188.

²⁰³ The court conceded that the *ex parte* nature of the proceeding might lead to children being committed on groundless charges, but held that the statutory appeal procedure and the writ of habeas corpus provided adequate remedies. *Id.* at 188-89. The statute provided that a parent or guardian could apply to the directors of the house of refuge or reform school for release of the committed child. If the application was denied, the party could commence an action in the court of common pleas or superior court to recover custody. Act of April 16, 1857, § 20, 1857 Ohio Laws 163.

²⁰⁴ 55 Ill. 280 (1870).

dicancy, ignorance, idleness, or vice."²⁰⁵ Confronting the issue of whether the state constitutionally could incarcerate a youth for wayward behavior alone, the court held that it could not. It must be noted, however, that neither the precise reach of the court's holding nor the court's reasoning is very clear. Much of the opinion is couched in rhetoric, and no authority is cited. The *O'Connell* opinion reads more like an outraged protest against the reigning interventionist philosophy than a carefully drafted legal argument.

The court began by suggesting that the terms used in the statute were hopelessly relative and vague; without actually formulating a "void for vagueness" argument, the court implied that the terms were so devoid of meaning that no one could tell if a child had or had not violated the statute. "What is proper parental care?" asked the court. "The best and kindest parents would differ, in the attempt to solve the question. . . . There is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition." Ignorance, idleness, and vice were also "relative terms."²⁰⁶ The court's discussion of vagueness was inconclusive, however, apparently intended merely as an introduction and a caution that parents and children had rights that the state could not infringe.

The opinion then turned to a discussion of the rights of parents and children vis-a-vis the state. Parents had a right to custody of and assistance from a child and a correlative duty to maintain and protect him or her, principles derived from natural law. Municipal law, said the court, should not intrude on this relation except for the strongest reasons. Indeed, before the parent's natural right to custody of his child could be infringed, "gross misconduct or almost total unfitness on the part of the parent, should be clearly proved." The court found that the present statute conflicted with that right, because of "the ease with which it may be disrupted . . . the slight evidence required, and the informal mode of procedure."²⁰⁷ The court thus left open the possibility that it would tolerate a statute which created an action for neglect against a parent if the substan-

²⁰⁵ *Id.* at 283. See Act of Mar. 5, 1867, § 4, 1867 3 Ill. Private Laws 31.

²⁰⁶ 55 Ill. at 283-84. The court inquired rhetorically: "What is the standard to be? What extent of enlightenment, what amount of industry, what degree of virtue will save from the threatened imprisonment?" *Id.* at 284. The court even had the temerity to suggest that while some believed "idleness [was] the parent of vice," the former could exist without the latter, an opinion that must have seemed heretical to nineteenth-century experts on child reform. *Id.*

²⁰⁷ *Id.* at 284-85.

tive standards were rigorous and the procedure for intervention demanding, but it did not resolve the problem of what form this abridgment of parental right could take. Might it include commitment of a neglected child to an institution? The court did not say. Whatever the obscurity of the argument, the *O'Connell* court had parted company sharply with child reformers who argued that the state should encourage the dissolution of poor families; implicit in the demand for a standard of "total unfitness" was an assumption that most parents, even poverty-stricken immigrants, were fit to bring up their children.

Addressing the question of the state's power over wayward children, the court rejected the notion that a father's right to discipline a child included the authority to incarcerate him or her in an institution, and suggested that the state could not exercise a power as *parens patriae* that the natural parent did not possess.²⁸³ Unfortunately, the court neither cited authority for these propositions nor offered its own analysis of the *parens patriae* power. The prevailing view, of course, was that parents had the duty to educate their children, to train them in some useful calling, and to restrain them from antisocial behavior; if they failed in these tasks, the state was entitled to step in and assume custody of the children until majority. Merely because a parent did not have a common law right to incarcerate a child for purposes of discipline did not necessarily mean that the state lacked that power. If the state could act as *parens patriae* at all, it had to use whatever means of restraint were available to it, including reform schools. Further, if a parent had the authority to compel a child to attend school, why could not the state compel a child transferred to its custody to attend a reform school?

To challenge these arguments seriously would have meant rejecting the premise that the state did possess a *parens patriae* power to discipline children who misbehaved in ways short of violating the criminal law. The court appeared to adopt this position in the following comments:

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.²⁸⁹

. . . .

²⁸³ *Id.* at 285. The court commented: "If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity." *Id.* (footnote omitted).

²⁸⁹ *Id.* at 284.

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.²¹⁰

And yet, as we shall see below, the court eventually backed away from complete repudiation of *parens patriae*.

The most strikingly modern part of the opinion was the court's insistence that not only adults but children had legal rights, especially the right to liberty. The court detailed the obligations that society imposed on minors—responsibility for crime, liability for torts, obligation to pay taxes and serve in the militia—and suggested it was unjust not to accord them corresponding liberties: "The disability of minors does not make slaves or criminals of them. They are entitled to legal rights, and are under legal liabilities."²¹¹ The right to "life, liberty, and the pursuit of happiness," found in the state's bill of rights and derived from natural law, inhered in "all men," said the court, including children.²¹²

Given a right to liberty, children could be deprived of it only if accorded due process of law. Adults tried for crimes, and even children tried for "grave and heinous offenses," had a right to know the nature of the accusation and to a speedy public trial by jury. Yet "misfortune" offenses, as the court acknowledged, were not considered crimes and thus carried no due process guarantees. The court had no trouble deciding that incarcerated children were deprived of liberty, rejecting the accepted view that confinement in a reform school was not imprisonment: "This boy is deprived of a father's care; bereft of home influences; has no freedom of action; is committed for an uncertain time; is branded as a prisoner; made subject to the will of others, and thus feels that he is a slave."²¹³ Thus the boy had been imprisoned without due process of law, and the statute had to fall.

²¹⁰ *Id.* at 286.

²¹¹ *Id.* Cf. *In re Gault*, 367 U.S. 1, 28 (1967) ("Under our Constitution, the condition of being a boy does not justify a kangaroo court.").

²¹² 55 Ill. at 287.

²¹³ *Id.* Cf. *In re Gault*, 367 U.S. 1 (1967):

The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. . . . Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

Id. at 27 (footnote omitted).

What is not entirely clear from the opinion is whether the due process that was lacking was substantive or procedural. The court appears to have held that *any* attempt by the state to exercise control over misbehaving children for social control purposes was inherently unconstitutional, either because the conduct sought to be regulated could not be described accurately enough or because such control was an unreasonable infringement on family relations. (Presumably the state could act as *parens patriae* to remove a neglected or abused child from a "totally unfit" parent.) One is left to speculate, however, whether the court would have permitted state regulation of wayward children that fell short of incarceration in a reformatory, such as probation. Would that, too, have constituted deprivation of liberty without due process of law? Finally, it is not clear whether extending procedural due process guarantees to wayward minor hearings would not have met the court's objections. The court suggested both of the above possibilities in stating: "Other means of a milder character; other influences of a more kindly nature; other laws less in restraint of liberty, would better accomplish the reformation of the depraved, and infringe less upon inalienable rights."²¹⁴

This passage seems to suggest that the state did not, after all, lack all power to discipline wayward children. Perhaps in suggesting "laws less in restraint of liberty" the court had in mind the new Visiting Agent system, established by the Massachusetts Board of State Charities in 1869, under which an agent of the board appeared on behalf of delinquents in court and frequently obtained their discharge on probation. The court may well have been aware that Massachusetts was attempting to reduce commitments to state institutions under this system.²¹⁵ On the other hand, as Fox has suggested, it may be that the Illinois court was particularly outraged at the harshness of conditions in the particular reform school in question and might have approved incarceration in another institution "of a milder character."²¹⁶

Despite the ambiguities in the court's holding and reasoning, it had at least held that the state could not constitutionally confine

²¹⁴ 55 Ill. at 287.

²¹⁵ See 2 CHILDREN AND YOUTH, pt. 4, *supra* note 17, at 492-94; R. MENNEL, *supra* note 28, at 69. See generally REPORTS OF THE STATE VISITING AGENT, reported in MASSACHUSETTS BOARD OF STATE CHARITIES, ANNUAL REPORTS NOS. 7-10 *passim* (1870-73).

²¹⁶ Fox, *supra* note 13, at 1215-17. In fact the court did just this 12 years later in *In re Ferrier*, 103 Ill. 367 (1882), distinguishing *O'Connell*. See text accompanying notes 327-28 *infra*.

children in the Chicago Reform School for waywardness and had cast doubt on the state's power to incarcerate wayward children at all. In the aftermath of the *O'Connell* decision, the Chicago Reform School was closed and the Illinois legislature repealed the laws establishing jurisdiction over "misfortune" cases.²¹⁷ Illinois thus became the first state since Connecticut in the 1850's to turn its back on an established wayward child jurisdiction and reject the trend toward expansion of state control over children.

At least one commentator believed that the effect of *O'Connell* would be not only to invalidate laws authorizing compulsory moral reform of predelinquents, but laws requiring compulsory education in the common schools as well. Isaac F. Redfield, former Chief Justice of the Vermont Supreme Court, writing in the *American Law Register* one year after the decision,²¹⁸ identified two opposing schools of thought in regard to child training—one which held that government should require compulsory education and moral reform, and another which resisted all government intervention in family affairs and instead looked to family and religion to guarantee moral development.²¹⁹ Expressing his concurrence with the latter school, Justice Redfield concluded: "These two schools are becoming, in our country, year by year, more and more antagonistic."²²⁰

²¹⁷ Act of May 3, 1873, § 17, 1873 Ill. Laws 145. See Fox, *supra* note 13, at 1219-20.

²¹⁸ 10 AM. L. REG., N.S. 372 (1871). The comment was signed by I.F.R., and Justice Isaac F. Redfield was named as the author in *Milwaukee Indus. School v. Supervisor of Milwaukee County*, 40 Wis. 328, 341 (1876).

²¹⁹ 10 AM. L. REG., N.S. 372 (1871). Justice Redfield expressed his sympathy with a "highly cultured and powerful class" who held

that all hopeful and reliable moral reforms must be looked for only in a high degree of religious faith and culture, from earliest infancy; and that this cannot be expected to come from the common schools, or the reform schools, or any other schools; but exclusively or mainly from family training, and from the authoritative teaching of the church and her ministers, in the daily discipline of a devout and holy life.

Id.

²²⁰ *Id.* at 373. Justice Redfield condemned both compulsory education in the common schools and compulsory moral reform in juvenile institutions, and he assumed that his opponents also considered these movements inseparable. In principle, it was possible to support compulsory education and reject state intervention in the lives of wayward children, see text accompanying notes 332-34 *infra*, but contemporary child reformers probably did approve of both policies and believe their fate was intertwined. Schlossman, writing of the period after 1900, suggests that reformers and sympathetic judges considered decisions upholding juvenile court laws crucial victories not merely because of the merits of juvenile courts, but because they "cement[ed] the legal groundwork for sundry other reform measures [e.g., child labor and compulsory education] geared to aid, protect, and establish new means of surveillance over the lower-class family." S. SCHLOSSMAN, *supra* note 13, at 211 n.28. It was no doubt true for the period 1870-1900 as well that those who supported state control over wayward children also espoused compulsory education and child labor reform, and that they viewed court

Yet the great battle between child reformers and their opponents that Justice Redfield anticipated did not emerge. *O'Connell* was not destined to have any influence outside Illinois and would shortly be repudiated in that state. In the last third of the century, the legislative trend was toward even wider restrictions on the activities of children whether for their protection or society's, and dissenting voices were few and ineffectual.

IV. THE GROWING AMBIVALENCE TOWARD CHILDREN, 1870-1900: PROTECTION OR REPRESSION?

Children were in the forefront of national concern during the last thirty years of the nineteenth century. Humanitarians felt they must be protected from the rigors of modern industrial life and successfully lobbied many state legislatures to limit the number of hours children could work and to exclude them from dangerous or taxing occupations.²²¹ Laws were enacted punishing not only those who employed children in such occupations, but parents who permitted them to be so employed or otherwise neglected or physically abused their children.²²²

The growing interest in children, however, was an ambivalent affair, involving both protection of children and severe limitation of their autonomy. More and more states adopted legislation permitting incarceration of children for immoral behavior, and some states which had already legislated in the area expanded their grounds for

decisions approving compulsory reform of misbehaving children as establishing important precedents for reform efforts in other areas.

The linkage between compulsory education and compulsory moral reform was most obvious in the status offense of truancy, but courts recognized that the intersection of the two movements went further. See, e.g., *In re Sharp*, 15 Idaho 120, 133, 96 P. 563, 566 (1903), cited in S. SCHLOSSMAN, *supra* note 13, at 213 n.35:

It would be fatal to the highest and greatest good, both of the individual and of the state, as well as a decided blow at popular education and enlightenment if the state could not enforce compulsory school laws and direct parents and guardians to send their children to school during certain hours, or days, or months, as the case may be. The delinquent children's act is only carrying this principle a step further, and providing for the state assuming the duties of parents or guardians where . . . the parent or guardian has neglected, or fails or refuses to observe and discharge the duties which thus devolve upon him.

²²¹ See J. FELT, *HOSTAGES OF FORTUNE: CHILD LABOR REFORM IN NEW YORK STATE*, chs. 1-2 (1965); W. TRATTNER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA*, ch. 1 (1970).

²²² See Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L. J. 887, 903-10 (1975); Rendleman, *supra* note 79, at 225-29; Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. Rev. 293, 306-22 (1972).

commitment. Compulsory education grew in popularity, and with it the notion that children who did not attend school must be placed in reform or truant schools. Most curiously, under some legislation presumably enacted for child protection, youngsters who engaged in certain forbidden activities or occupations could themselves be punished, by fine or loss of liberty, in addition to those who employed them. While laws that barred children under certain ages from dangerous occupations such as mining or that regulated the hours children could work in industry did not carry penalties for child violators (unless the child also violated school attendance regulations), statutes that forbade children from engaging in morally tainted activities such as circuses, dramatic productions, or street singing, sometimes treated child participants as status offenders.

The effect of this legislation was to press children increasingly into standardized molds, telling them what they could and could not do until they became adults. With various occupations forbidden to them, with certain conduct punishable only for youth, with the role of student increasingly required up to the age of fourteen or sixteen, young people came to assume a status of prolonged legal dependency that had not existed in the colonial period but which had been gaining force since the creation of the first houses of refuge in the 1820's. Historian Joseph Kett has noted that the end of the nineteenth century was the period of the "invention of the adolescent,"²²³ involving the notion that minors have distinctive psychological and behavioral characteristics and should exist in a social and economic world separate from that of adults. Developments in the legal sphere did much to crystallize the concept of adolescence and to create a second-class citizenship for children that still pervades American law.

In the remainder of this essay, we will explore some of the statutory developments that reflect late nineteenth-century ambivalence

²²³ J. KETT, *supra* note 15, at 243. See generally *id.* at 133-44, 162-72, ch. 8 *passim*. Kett observes that "it was . . . from 1890 to 1920, that the institutions which have effectively delayed the achievement of adult status by youth since 1920 were first developed," *id.* at 144, and that "[b]etween 1890 and 1920 a host of psychologists, urban reformers, educators, youth workers, and parent counselors gave shape to the concept of adolescence, leading to the massive reclassification of young people as adolescents." *Id.* at 5-6. Kett devotes considerable analysis to prior nineteenth-century developments that laid the basis for the idea of a special status for youth, observing that "[t]he concept of adolescence did not develop as a mere by-product of the later stages of industrialization but was an expression of distinctive values relating to children and the family that originated in America as early as the 1830's." *Id.* at 7. For the historical development of the concept of adolescence in England, see F. MUSGROVE, *YOUTH AND THE SOCIAL ORDER*, chs. 3-4 (1964).

toward children, the pattern of commitments to reform schools for waywardness and related status offenses, and the response of the courts when challenges to waywardness commitments were mounted.

A. *Statutory Developments*

To understand both the protective and repressive²²⁴ side of legislation toward children in the last thirty years of the nineteenth century, it will be helpful to examine developments in three areas of law: (1) statutes which regulated the ages at which children could be employed in manufacturing or commercial establishments and the hours they could work; (2) laws which forbade children from participating in "immoral" occupations or activities, or which barred them from frequenting undesirable places; and (3) laws which reaffirmed or added to the wayward child jurisdiction, including truancy. For purposes of illustration, particular attention will be paid to legislation from New York, Pennsylvania, Massachusetts, and Ohio, states which frequently set a statutory pattern that other jurisdictions followed.²²⁵

Many states passed laws setting the ages at which children could work and the maximum hours they could be employed. Here the approach toward children was nonpunitive, in the sense that penalties for infraction of the law fell on employers and parents, not children. Pennsylvania pioneered in this regard, providing as early as 1849 that children under thirteen years of age could not work in

²²⁴ I use the term "repressive" to refer specifically to laws which excluded children from occupations, activities, or places that middle-class reformers considered morally offensive, and to laws which provided for incarcerating or fining children who participated in forbidden activities or visited proscribed places. I do not mean to argue that laws which prohibited children from employment in physically dangerous occupations or from working overlong hours were unnecessary. Although poor parents may well have resented such laws since they eliminated needed income, and some children may have objected to the limitation on their freedom of choice, on balance these intrusions into parents' and children's autonomy were justified by the physical dangers posed to children by industrial hazards. On the other hand, Musgrove may well be right in arguing that all protective measures for children necessarily diminished their social status: "Protective measures are a two-edged device: while they may signify concern for the welfare of the young, they also define them as a separate, nonadult population, inhabiting a less than adult world. The need for protection and distinctive treatment underlines their less than adult status." F. MUSGROVE, *supra* note 223, at 28.

²²⁵ To discover if statutes passed by these four major jurisdictions were representative, legislation in eight other states was surveyed in the first two subject areas mentioned in the text. These states were Connecticut, Illinois, Indiana, Maryland, Michigan, Rhode Island, Texas, and Virginia. In addition, the statutes of all American jurisdictions were investigated to see which states passed laws dealing with wayward children before 1900.

certain factories²²⁶ and shortly thereafter that no minor under twenty-one years of age could be employed in factories longer than ten hours a day or sixty hours a week.²²⁷ As of 1885, these laws were still operative in the state.²²⁸ New York followed suit in 1886, declaring that no child under thirteen could be employed in any manufacturing establishment and no minor under the age of eighteen could work longer than sixty hours a week.²²⁹ Massachusetts,²³⁰ Ohio,²³¹ and seven of eight other states surveyed²³² passed substantially similar legislation. More broadly, the Ohio legislature declared that no child under the age of sixteen could be employed in any occupation "whereby its life or limb is endangered, or its health is likely to be injured, or its morals may be depraved";²³³ employers violating the statute were subject to fine or imprisonment. Similarly, Pennsylvania imposed criminal sanctions on those who employed children, or custodians of children who permitted them to be employed, in any vocation "injurious to the health, or dangerous to the life or limb"²³⁴ of a child, regardless of the child's age. Furthermore, to ensure compliance with compulsory education laws, several jurisdictions prohibited employers from hiring children who had not attended school the required number of months.²³⁵

²²⁶ Act of Apr. 21, 1849, No. 415, §§ 2-4, 1849 Pa. Laws 671.

²²⁷ Act of May 7, 1855, No. 501, § 1, 1855 Pa. Laws 472.

²²⁸ 1 PA. DIG. LAWS, *Factories*, §§ 1, 3, 5 (Brightly 1885). For further refinements of the laws pertaining to child labor, see 1 PA. DIG. STAT. LAW, *Factories*, §§ 1-13 (Brightly 1895).

²²⁹ Act of May 18, 1886, ch. 409, §§ 1-2, 1886 N.Y. Laws 629. In 1897, the age below which children could not work in factories was raised to 14 years. Act of May 13, 1897, ch. 415, § 70, 1897 N.Y. Laws 461. In addition, children were forbidden to work more than 10 hours a day or at night. *Id.* § 77.

²³⁰ Act of May 8, 1874, ch. 221, § 1, 1874 Mass. Acts 145; Act of Mar. 16, 1876, ch. 52, § 1, 1876 Mass. Acts 44; Act of June 2, 1898, ch. 494, § 1, 1898 Mass. Act 447.

²³¹ Act of Apr. 27, 1885, § 1, 1885 Ohio Laws 161; Act of Apr. 19, 1898, § 1, 1898 Ohio Laws 123.

²³² These states were Connecticut, Illinois, Indiana, Maryland, Michigan, Rhode Island, and Virginia. See Act of Apr. 13, 1886, ch. 124, § 1, 1886 Conn. Laws 624; Act of Apr. 14, 1887, ch. 62, § 1, 1887 Conn. Laws 692; Act of June 17, 1891, § 1, 1891 Ill. Laws 87; Act of June 17, 1893, § 4, 1893 Ill. Laws 99; Act of June 18, 1883, § 1, 1883 Ill. Laws 116; Act of Apr. 14, 1881, ch. 37, § 215, 1881 Ind. Acts 174; Act of Apr. 13, 1885, ch. 88, §§ 1-2, 1885 Ind. Acts 219; Act of Mar. 8, 1879, ch. 10, § 21, 1879 Ind. Acts 19; Act of Mar. 25, 1876, ch. 125, § 1, 1876 Md. Laws 193; Act of Apr. 10, 1885, No. 39, §§ 1, 4, 1885 Mich. Laws 37; Act of Jan. 1853, §§ 1, 3, 1853 R.I. Laws 245; Act of Apr. 26, 1894, ch. 1278, §§ 1, 6, 1894 R.I. Laws 29; Act of Mar. 4, 1890, ch. 193, § 1, 1890 Va. Laws 150.

²³³ Act of Apr. 8, 1890, § 1, 1890 Ohio Laws 161.

²³⁴ Act of May 24, 1878, No. 150, § 2, 1878 Pa. Laws 119.

²³⁵ See, e.g., Act of Apr. 12, 1882, ch. 80, § 3, 1882 Conn. Laws 162; Act of May 17, 1888, ch. 348, § 2, 1888 Mass. Laws 301; Act of June 2, 1898, ch. 494, § 1, 1898 Mass. Laws 447; Act of Apr. 10, 1885, No. 39, § 2, 1885 Mich. Laws 37; Act of May 11, 1874, ch. 421, § 2, 1874

The second area of legislation—prohibiting children from participating in "immoral" activities or from frequenting undesirable places—embodied both protective and repressive elements. Typical was the New York comprehensive child protection law of 1876,²³⁵ which prohibited anyone from employing children under the age of sixteen, or permitting them to be employed, in such activities as singing, playing musical instruments, rope walking, dancing, begging, peddling, or being a gymnast, contortionist, rider, or acrobat. More generally, employers and custodians of children were forbidden to allow them to engage in any immoral exhibition or practice or any occupation dangerous to life or health. Anyone violating the law was guilty of a misdemeanor.²³⁷

While some of the above activities might have been physically taxing, even dangerous, to young people, the thrust of the legislation seems to have been to prevent their participation in morally repugnant pursuits, especially circuses and theatrical exhibitions. Under this type of legislation some states provided that courts could treat children engaging in the proscribed activity as status offenders. New York decreed that courts could commit such children to an orphan asylum or charitable institution, "or make such other disposition thereof as now is or hereafter may be provided by law in cases of vagrant, truant, disorderly, pauper or destitute children"²³⁸—which of course included commitment to a house of refuge. Ohio placed the same kinds of "immoral" activities off-limits to children and permitted the same dispositions as the New York law allowed.²³⁹ Legislators in these two jurisdictions apparently assumed that children

N.Y. Laws 532; Act of Mar. 20, 1877, § 2, 1877 Ohio Laws 57; Act of Jan. 1854, § 1, 1854 R.I. Laws 262.

²³⁵ Act of Apr. 14, 1876, ch. 122, 1876 N.Y. Laws 95.

²³⁷ *Id.* §§ 1-2.

²³⁸ *Id.* § 3. Permitting the court to dispose of offending children as "paupers" or "disorderly persons" might have opened up the possibility of committing them to almshouses or jails. See N.Y. CODE CRIM. PRO. § 903 (1882) (disorderly persons may be sentenced to six months imprisonment at hard labor if they refuse to enter an engagement to remain on good behavior). In 1879, however, New York prohibited justices of the peace, boards of charities, police justices, and other magistrates from committing any child under 16 years of age as vagrant, truant, or disorderly to any jail, county poorhouse, or almshouse. Act of Apr. 30, 1879, ch. 240, § 1, 1879 N.Y. Laws 321. New York also mandated the removal of all children between the ages of three and 16 years from county poorhouses and their placement with families, orphan asylums, or other appropriate institutions. Act of May 15, 1876, ch. 266, § 2, 1876 N.Y. Laws 264.

²³⁹ Act of Apr. 11, 1876, §§ 1, 5, 1876 Ohio Laws 219. Ohio still includes within its definition of "unruly child" one who "engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others." OHIO REV. CODE ANN. § 2151.022(F) (Page 1976).

might have to be incarcerated to eradicate the moral taint acquired from association with the world of the circus or theater.

Massachusetts,²⁴⁰ Pennsylvania,²⁴¹ and six of the other states surveyed²⁴² also passed laws barring children from employment in the activities described above, sometimes varying the list with such additions as acting or dancing in a saloon or theater.²⁴³ Of these jurisdictions, only Maryland treated offending children as status offenders; they were deemed vagrants and committed to the custody of the "poor or almshouse authorities."²⁴⁴ Pennsylvania provided that upon conviction of an adult under the act, the county orphan's court could appoint a guardian for the child or commit the child to an "asylum or home for children," which would assume powers of guardianship.²⁴⁵ This procedure in effect treated the child as destitute rather than wayward and does not appear to have contemplated commitment to houses of refuge or reform schools. Still, however mild the place to which children might be sent, their liberty could be curtailed merely because they had engaged in occupations which adults considered dangerous or immoral. Massachusetts, on

²⁴⁰ Act of Apr. 28, 1877, ch. 172, § 1, 1877 Mass. Laws 554.

²⁴¹ Act of June 11, 1879, No. 151, §§ 3-4, 1879 Pa. Laws 142.

²⁴² These states were Connecticut, Illinois, Indiana, Maryland, Michigan, and Rhode Island. See Act of Apr. 4, 1884, ch. 99, 1884 Conn. Pub. Acts 378; Act of May 18, 1877, § 1, 1877 Ill. Laws 90; Act of Mar. 9, 1889, ch. 201, §§ 2-4, 1889 Ind. Acts 363; Act of Apr. 8, 1876, ch. 392, § 1, 1876 Md. Laws 640; Act of June 10, 1881, No. 260, § 1, 1881 Mich. Pub. Acts 357; Act of Apr. 12, 1878, ch. 683, § 1, 1877-1878 R.I. Pub. Laws 111.

²⁴³ See, e.g., Act of June 11, 1879, No. 151, § 4, 1879 Pa. Laws 142.

²⁴⁴ Act of Apr. 8, 1876, ch. 392, § 2, 1876 Md. Laws 640. Several other states enacted legislation prohibiting children from engaging in specific immoral activities and occupations or generally barring them from participating in "obscene, indecent, or immoral" exhibitions or practices. Four of these states provided that the court could commit such children to orphan asylums or other charitable institutions, or "make such other disposition thereof as . . . may be provided by law in cases of vagrant, truant, disorderly, pauper, or destitute children." See Act of Mar. 30, 1878, ch. 521, §§ 1-3, 1878 Cal. Stats. 813; Act of Oct. 20, 1879, No. 342, §§ 1-2, 1879 Ga. Laws 162; Act of Mar. 20, 1889, ch. 104, § 1, 1889 Kan. Sess. Laws 138; Act of Feb. 18, 1879, ch. 75, §§ 1-3, 1879 Minn. Laws 75. New Jersey specifically provided that such children could be sent to a reform or industrial school. Act of Mar. 9, 1885, ch. 57, §§ 1-2, 1885 N.J. Laws 65.

Another group of states passed legislation prohibiting children from the same types of activities and made infraction of the law a misdemeanor for an employer, parent, or guardian, but provided no disposition for the offending child. See ARIZ. REV. STAT. tit. 9, ch. 2, § 444 (1887); Act of Apr. 1, 1885, §§ 1-2, 4, 1885 Col. Sess. Laws 124; Act of Mar. 18, 1879, ch. 150, §§ 2-4, 1879 Del. Laws 218; Act of Feb. 24, 1894, ch. 19, § 2, 1894 Ky. Acts 28; Act of July 6, 1892, No. 59, §§ 1-2, 1892 La. Acts 81; Act of Apr. 11, 1895, §§ 1-3, 1895 Mo. Laws 205; MONT. REV. CODES ANN. pt. 1, tit. 9, ch. 2, § 472 (1895); Act of July 19, 1877, ch. 53, § 2, 1877 N.H. Laws 38; Act of Mar. 15, 1880, ch. 239, § 1, 1880 Wis. Laws 276; Act of Feb. 15, 1895, ch. 46, §§ 1-2, 1895 Wyo. Sess. Laws 94.

²⁴⁵ Act of May 24, 1878, No. 150, § 5, 1878 Pa. Laws 119.

the other hand, did not provide for institutionalization or other sanctions against a child participating in a forbidden activity.²⁴⁶ The omission was significant, for it demonstrated that some late nineteenth-century legislators could conceive of protecting children from physical harm without feeling compelled to correct the "immoral" tendencies they might have developed while appearing in circuses or theaters.

States also sought to prevent children from frequenting morally offensive establishments. New York, for example, penalized proprietors of saloons, dancehouses, or other places of entertainment where liquor was sold if they allowed minors under the age of fourteen to remain on the premises unaccompanied by parent or guardian.²⁴⁷ At the same time, children could be institutionalized as "vagrant, truant, disorderly, pauper or destitute" if they frequented "the company of reputed thieves or prostitutes or houses of assignation or prostitution, or dancehouses, concert saloons, theaters and varieties . . . without parent or guardian."²⁴⁸ Ohio prohibited minors from entering saloons, beer-gardens, or other places where liquor was sold unless accompanied by a parent or guardian, and fined not only the offending proprietor but the child as well.²⁴⁹ Proprietors there were also forbidden to allow youths under eighteen years of age to play pool or billiards.²⁵⁰

The variety of activities against which New York legislators felt the need to protect children was endless. Minors could be fined for climbing on the platform or steps of steam railway cars or horse-drawn street cars²⁵¹ and for smoking tobacco in a public place.²⁵² "Picking rags, or collecting cigar stumps, bones or refuse from markets" were added to the list of prohibited activities,²⁵³ and children were forbidden to enter "museums or other places of entertainment" without a parent or guardian²⁵⁴ and to play "any game of chance or

²⁴⁶ Act of Apr. 28, 1877, ch. 172, § 1, 1877 Mass. Laws 554.

²⁴⁷ Act of June 6, 1877, ch. 428, § 1, 1877 N.Y. Laws 486.

²⁴⁸ *Id.* § 3.

²⁴⁹ Act of Apr. 28, 1891, §§ 1-2, 1891 Ohio Laws 409.

²⁵⁰ Act of May 18, 1886, § 1, 1886 Ohio Laws 202. Several other states prohibited children from being on the premises of such morally dubious places as dance houses, concert saloons, roller skating rinks, vaudeville theaters, museums, pool or gambling halls, policy shops, and bowling alleys. *See, e.g.*, Act of June 22, 1895, ch. 216, 1895 Conn. Laws 565; Act of Apr. 14, 1881, ch. 37, § 182, 1881 Ind. Laws 174; Act of June 10, 1881, ch. 260, § 2, 1881 Mich. Pub. Acts 357.

²⁵¹ Act of June 25, 1880, ch. 585, §§ 2-3, 1880 N.Y. Laws 876.

²⁵² Act of May 24, 1890, ch. 417, § 1, 1890 N.Y. Laws 776.

²⁵³ N.Y. PENAL CODE § 292(2)-(3) (1887).

²⁵⁴ *Id.* § 291(4).

skill in any place wherein or adjacent to which any beer, ale, wine or liquor is sold or given away."²⁵⁵ The law was tightened to forbid merely *being* in the company of reputed thieves or prostitutes or *being* in a reputed house of prostitution (in addition to *frequenting* the same, as under former law), whether with or without a parent or guardian.²⁵⁶ Children who engaged in any of the above activities (except those where a fine was specifically provided) were subject to commitment to a child-saving institution.²⁵⁷

The third area of law contributing to the new legal definition of childhood was the wayward child jurisdiction itself. In particular, laws mandating compulsory education and incarceration of school truants proliferated during this period. New York²⁵⁸ and Massachusetts²⁵⁹ reaffirmed their commitment to compulsory education, and Ohio²⁶⁰ joined the movement in 1871. The length of schooling required varied from state to state, tending to increase as the century progressed. Massachusetts, for example, required parents to send children to school, up to the age of fourteen, for twenty weeks a year as of 1874, for thirty weeks as of 1890, and, after 1898, for the entire time the public schools were in session.²⁶¹ In all three states parents could be fined for failing to meet their obligations.²⁶²

Along with the passage of compulsory education laws—and in some states even in the absence of laws requiring *parents* to send children to school—came enactment of truancy laws providing for reformation of *children* who would not attend school. In New York, if parents were unable to induce their children to attend school for

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* § 291(5). Ohio forbade proprietors to sell not only guns but "toy pistols" to minors under 14 years of age, Act of Mar. 25, 1880, § 1, 1880 Ohio Laws 79, and to sell tobacco to minors under 15 years of age, Act of Apr. 10, 1888, § 1, 1888 Ohio Laws 169. In Pennsylvania, minors who claimed to be over 21 years of age for the purpose of obtaining liquor could be fined or jailed for 30 days, 1 PA. DIG. STAT. LAW, *Liquors*, § 10(29) (Brightly 1895), and proprietors of bowling-saloons, billiard-rooms, or ten-pin alleys could be fined for admitting minors, 1 PA. DIG. LAWS, *Gaming*, § 18 (Brightly 1885).

²⁵⁸ Act of May 11, 1874, ch. 421, § 1, 1874 N.Y. Laws 532.

²⁵⁹ See, e.g., MASS. PUB. STAT. ch. 47, § 1 (1882).

²⁶⁰ Act of Mar. 20, 1877, § 1, 1877 Ohio Laws 57. Pennsylvania required compulsory attendance in 1901. Parents were required to send their children between the ages of eight and 16 to school during the entire time the public schools were in session. Act of July 11, 1901, No. 335, § 1, 1901 Pa. Laws 658.

²⁶¹ Act of May 11, 1874, ch. 233, § 1, 1874 Mass. Acts 155; Act of June 4, 1890, ch. 384, 1890 Mass. Acts 343; Act of June 2, 1898, ch. 496, § 12, 1898 Mass. Acts 451. See also Act of May 12, 1894, ch. 671, §§ 2-3, 1894 N.Y. Laws 1682, for later developments in New York.

²⁶² Act of May 11, 1874, ch. 233, § 1, 1874 Mass. Acts 155; Act of May 11, 1874, ch. 421, § 5, 1874 N.Y. Laws 532; Act of Apr. 15, 1889, § 8, 1889 Ohio Laws 333.

the requisite number of weeks, they could have them declared "habitual truants" and committed to whatever "suitable places for [their] discipline and instruction and confinement" the city or town might provide.²⁶³ Pennsylvania, as of 1871, provided for twenty-four-hour detention of a child for each case of "habitual absence" from school. If because of parental neglect a child totally failed to attend school or attended irregularly, he or she could be removed from the family and placed in a home for friendless children or house of refuge.²⁶⁴ In Ohio, children who were either occasional or chronic truants from school, along with children who were "incorrigible, vicious, or immoral" while in school, could be committed as "juvenile disorderly persons" to a county children's home or a juvenile reformatory until age sixteen.²⁶⁵ Legislatures frequently authorized counties to establish special truant schools to service this special category of status offender.²⁶⁶

Some states seemed to have difficulty deciding just how serious a status offense truancy was. In a move that demonstrated the continuing uncertainty of the distinction between neglected and wayward children, Massachusetts provided in 1894 that courts could commit neglected children to truant schools,²⁶⁷ in contrast with that state's legislation of the 1860's that had authorized placing truants with criminal law violators in county houses of reformation.²⁶⁸ This was not the legislature's final word, however. In 1898 they decided that there were different degrees of fault among truants themselves, deserving treatment by different institutions. "Habitual truants," defined as children who "willfully and habitually" absented themselves from school in violation of mandatory attendance laws, could

²⁶³ Act of May 11, 1874, ch. 421, §§ 7-8, 1874 N.Y. Laws 532.

²⁶⁴ PA. REV. STAT. § 60(5)-(6) (Derickson & Hall 1871).

²⁶⁵ Act of Apr. 15, 1889, §§ 5, 8, 1889 Ohio Laws 333.

²⁶⁶ See, e.g., Act of May 21, 1890, ch. 309, § 1, 1890 Mass. Acts 261; Act of May 12, 1894, ch. 671, § 9, 1894 N.Y. Laws 1682; Act of July 11, 1901, No. 335, § 3, 1901 Pa. Laws 658. States also created the position of truant officer. In New York, truant officers could arrest truant children without a warrant and return them to parents or teachers, or, in the case of "habitual and incorrigible truants," bring them before a police magistrate. Act of May 12, 1894, ch. 671, § 8, 1894 N.Y. Laws 1682. In Massachusetts, truant officers could visit factories and commercial establishments to find children employed in violation of the law. Act of May 17, 1888, ch. 348, § 8, 1888 Mass. Acts 301.

²⁶⁷ Act of June 21, 1894, ch. 498, § 28, 1894 Mass. Acts 607. A neglected child was defined as one under 16 years of age who "by reason of orphanage or of the neglect, crime, drunkenness or other vice of parents, is growing up without salutary parental control and education, or in circumstances exposing such child to lead an idle and dissolute life . . ." *Id.* Although the statute does not specifically call such children "neglected children," that term is used in MASS. PUB. STAT. ch. 48, § 18 (1882), to categorize children described in identical language.

²⁶⁸ See text accompanying note 130 *supra*.

be committed to a county truant school for not more than two years if a boy, or, if a girl, to the state industrial school for girls.²⁶⁹ "Habitual absentees," defined as children "found wandering about in the streets or public places of any city or town, having no lawful occupation, habitually not attending school, and growing up in idleness and ignorance"²⁷⁰ — the traditional vagrant who permanently did not attend school — could be committed to a county truant school or to the state reform school (renamed the Lyman School for Boys) or the industrial school for girls. Children who persistently violated school regulations or otherwise misbehaved while attending school, designated "habitual school offenders," could be treated as "habitual absentees."²⁷¹ Thus, the more serious cases of chronic truancy and misbehaving school attenders were now seen as needing the tougher discipline of the reform school.

The four principal states under discussion here all maintained their other grounds for incarcerating wayward children substantially unchanged through the latter part of the nineteenth century, with one notable exception. Ohio, while continuing to allow "incorrigible" and "vicious" children to be committed to houses of refuge,²⁷² determined in 1881 that incorrigible boys should no longer be sent to the state reform school. The legislature limited that school's jurisdiction to boys who had committed criminal acts,²⁷³ although subsequent legislation allowed admission of school truants and youths who had engaged in occupations illegal for minors.²⁷⁴ Exactly why the legislature decided to eliminate the incorrigibility jurisdiction of the state reform school is not clear,²⁷⁵ but this deci-

²⁶⁹ Act of June 2, 1898, ch. 496, § 24, 1898 Mass. Acts 451.

²⁷⁰ *Id.* § 25.

²⁷¹ *Id.* § 26.

²⁷² Act of Apr. 15, 1880, § 1, 1880 Ohio Laws 217.

²⁷³ Act of Apr. 18, 1881, § 1, 1881 Ohio Laws 167.

²⁷⁴ Act of Apr. 15, 1889, § 8, 1889 Ohio Laws 336.

²⁷⁵ There was no Ohio judicial decision comparable to *O'Connell v. Turner* questioning the constitutionality of state power over incorrigible children, and the legislature had just reaffirmed the authority of houses of refuge to accept such youths. See note 272 and accompanying text *supra*. Two possible reasons present themselves. In their annual report for 1880, the trustees of the reform school indicated that public opinion opposed that institution's practice of mixing the "less and more criminal inmates" in the same cottages. Twenty-fifth Annual Report of the Ohio Reform School, reprinted in EXECUTIVE DOCUMENTS (1880), *supra* note 156, at 487. Perhaps the legislature decided, contrary to the trustees' wishes, that incorrigible youths should not be committed to the institution at all, to avoid their mixing with more "hardened" offenders. If so, the subsequent decision to admit school truants and youths who had engaged in forbidden employments was strangely inconsistent.

Another possible explanation is a financial one: the trustees informed the legislature in 1880 that the reform school was practically overflowing with inmates and requested funds for the

sion, along with the similar limitation constitutionally compelled by *O'Connell* in Illinois, stands as the only example of retrenchment in the power of the state to incarcerate wayward minors that this author has found in the late nineteenth century.²⁷⁶ The trend elsewhere was toward expansion or consolidation of the jurisdiction.

Indeed, in the last thirty years of the century twelve jurisdictions provided for incarceration of incorrigible children for the first time, in newly constructed special institutions for minors.²⁷⁷ All except one of these, the Ferris Reform School in Delaware, were state-owned institutions. Wyoming, although not erecting an institution for children, provided that its incorrigible, vicious, and vagrant children could be sent to reform schools in other states.²⁷⁸ Of the juris-

construction of another building to house some of the smaller and less criminal boys. Twenty-fifth Annual Report of the Ohio Reform School, *reprinted in EXECUTIVE DOCUMENTS* (1880), *supra* note 156, at 487. The legislature may well have decided that rather than spend the additional funds, a simpler solution to the overpopulation problem would be not to admit "beyond control" youths any longer.

²⁷⁶ The Ohio legislature did not experience similar qualms about incarcerating incorrigible girls. In 1873, it empowered counties to establish "homes for the friendless," which could receive girls between the ages of seven and 16 who had committed criminal offenses, were "leading an idle, vagrant, or vicious life," were homeless, or had been found "in a state of want, suffering, abandonment, or beggary." Act of May 5, 1873, §§ 1, 8, 1873 Ohio Laws 277. Five years later, a state industrial home for girls was created, authorized to receive girls between the ages of nine and 15 who had committed criminal offenses, or were "evil-disposed, incorrigible, [or] vicious." Act of May 10, 1878, §§ 1, 9, 1878 Ohio Laws 144.

²⁷⁷ These jurisdictions were Alabama, Colorado, Dakota Territory, Delaware, Missouri, Nebraska, Oregon, Tennessee, Utah, Washington, West Virginia, and Wisconsin. See Act of Feb. 23, 1899, No. 817, § 6, 1899 Ala. Acts 158 (Reformatory and Industrial School: "by their course of conduct or surroundings are likely to become base or criminal"); Act of Apr. 4, 1887, § 7, 1887 Colo. Sess. Laws 279 (Industrial School for Girls: "habitually wandering about the streets" beyond proper control of parents "at unseemly or improper hours"; "growing up in habits of vice and immorality"); Act of Mar. 9, 1883, ch. 25, § 16, 1883 Dak. Terr. Laws 332 (Reform School: "habitually vagrant or disorderly, or incorrigible"); Act of Mar. 10, 1885, ch. 495, § 5, 1885 Del. Laws 713 ("incorrigible or vicious conduct," parent cannot control); Act of Apr. 10, 1885, § 14, 1885 Mo. Laws 221 (reform schools to be established in counties with cities having over 50,000 population: "vagrancy or any disorderly practices," deserting home without good cause, keeping company with "dissolute or vicious persons contrary to the lawful commands" of parents); Act of Mar. 31, 1887, ch. 74, § 5, 1887 Neb. Laws 589 (Industrial School for Juvenile Offenders: "growing up in mendicancy and vagrancy"; "incorrigible"); Act of Feb. 20, 1893, § 16, 1893 Or. Laws 70 (Reform School: "incorrigible and vicious conduct," beyond control of parent; "incorrigibly turbulent and immoral, vicious, or of extreme depravity"); Act of Mar. 26, 1891, ch. 195, § 1, 1891 Tenn. Pub. Acts 396 (Industrial School for Orphan, Helpless, Wayward and Abandoned Children: "begging"; "wandering" without home or means of support; frequents company of "lewd, wanton or lascivious persons" or "notorious resorts of bad character"; parents unable to control child); Act of Mar. 13, 1890, ch. 66, § 2, 1890 Utah Laws 97 (Reform School: "incorrigible or vicious conduct," beyond control of parent; "incorrigibly vicious"); Act of Mar. 7, 1891, ch. 103, § 1, 1891 Wash. Laws 195 (Reform School: "growing up in mendicancy or vagrancy, or is incorrigible"); Act of Feb. 11, 1889, ch. 3, § 6, 1889 W. Va. Acts 12 (Reform School: "incorrigible or vicious

dictions that had already legislated on the subject, six created new institutions empowered to receive incorrigible children.²⁷⁹ Furthermore, Connecticut once again provided that incorrigible children could be committed to its reform school,²⁸⁰ while Illinois authorized private groups to form industrial schools for girls²⁸¹ and training schools for boys²⁸² that could receive wayward children. Finally, thirteen states, in addition to the four principal states discussed above, passed laws permitting incarceration of children on grounds of truancy.²⁸³

All in all, by 1900 some thirty American jurisdictions provided for institutionalization of children under some variation of the incorrigibility jurisdiction, and another twenty-one authorized confinement of school truants. Coercive state intervention in the lives of predelinquent children was clearly a familiar part of the American legal landscape by the time the juvenile court was invented.

conduct," beyond control of parent); Act of Mar. 15, 1870, ch. 66, § 10, 1870 Wis. Laws 119 (State Reform School: "incorrigible or vicious conduct," beyond control of parent).

²⁷⁸ Act of Mar. 8, 1888, ch. 57, § 2, 1888 Wyo. Sess. Laws 130.

²⁷⁹ These jurisdictions were California, Kentucky, Maine, Maryland, New Jersey, and Rhode Island. *See* Act of Mar. 11, 1889, ch. 108, § 20, 1889 Cal. Stats. 111 (School of Reform: "incorrigible and vicious conduct," beyond control of parents); Act of Mar. 21, 1896, ch. 33, § 13, 1896 Ky. Acts 55 (Houses of Reform: "incorrigible and vicious conduct," not subject to control of parent; "habitually disobeys" parent; "resorts to immoral places and practices"); Act of Feb. 11, 1879, ch. 87, § 1, 1879 Me. Acts 109 (Industrial School for Girls: "leading an idle or vicious life," "manifest danger of falling into habits of vice or immorality"); Act of May 3, 1882, ch. 291, § 7, 1882 Md. Laws 445 (Industrial Home for Colored Girls: "incorrigible or vicious conduct," beyond control of parents); Act of Apr. 4, 1871, ch. 428, § 15, 1871 N.J. Laws 78 (Industrial School for Girls: "vagrant, disorderly, or incorrigible"); Act of Apr. 16, 1880, ch. 817, 1880 R.I. Pub. Laws 126 (State Reform School: "idle, vicious or vagrant habits," "vagrants or disorderly persons").

²⁸⁰ Act of Mar. 28, 1879, ch. 125, § 1, 1879 Conn. Pub. Acts 478 ("brought up to lead an idle or vicious life"; "incorrigible, or habitually disregards the commands" of parent; "resorts to immoral places or practices").

²⁸¹ Act of May 28, 1879, § 3, 1879 Ill. Laws 309 ("begs," "a wanderer through streets," "frequents the company of . . . reputed thieves or other vicious persons"; "found in a house of ill-fame").

²⁸² Act of June 18, 1883, § 3, 1883 Ill. Laws 168 (for jurisdiction, *see* note 281 *supra*).

²⁸³ These jurisdictions were Colorado, Illinois, Indiana, Michigan, Minnesota, Montana, New Jersey, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See* Act of Apr. 12, 1899, ch. 136, § 4, 1899 Colo. Sess. Laws 340; Act of Apr. 24, 1899, § 1, 1899 Ill. Laws 346; Act of Mar. 8, 1897, ch. 165, § 8, 1897 Ind. Acts 248; Act of May 21, 1885, No. 108, §§ 3-6, 1885 Mich. Laws 108; Act of Apr. 14, 1899, ch. 226, §§ 4-5, 1899 Minn. Laws 248; MONT. STAT. pt. 3, tit. 3, ch. 6, art. 14, § 1924 (1895); Act of Apr. 20, 1885, ch. 217, §§ 5-7, 1885 N.J. Laws 280; Act of Mar. 10, 1897, ch. 57, § 2, 1897 S. D. Sess. Laws 110; Act of Mar. 8, 1894, ch. 69, § 18, 1894 Utah Laws 101; Act of Nov. 20, 1894, No. 26, § 4, 1894 Vt. Acts 22; Act of Nov. 23, 1870, No. 13, § 1, 1870 Vt. Acts 48; Act of Mar. 14, 1899, ch. 140, § 11, 1899 Wash. Laws 280; Act of Apr. 18, 1889, ch. 519, § 8, 1889 Wis. Laws 729; Act of Dec. 15, 1877, § 1, 1877 Wyo. Sess. Laws 115.

B. *Institutional Commitments, 1870-1900*

Given the range of legislation passed to monitor the development of children, it is not surprising that institutional commitment of wayward youths continued at a high level through the last three decades of the nineteenth century. The precise pattern varied with the institution and the state, some places taking in much higher proportions of status offenders than others. Truancy became a major new source of commitment for certain institutions, but did not figure prominently elsewhere. One also notes a perception dawning on a few institutional managers that parents were using wayward child laws to shift the burden of rearing children to the state, and an occasional statement that unwanted and wayward children did not deserve to be placed in the same institutions as criminal offenders—institutions, some managers admitted, that were really prisons. Such views remained the province of a small minority, however. In this section we will examine data on commitments from eight states, at approximately ten year intervals for comparison purposes.

In the New York House of Refuge, the pre-1870 pattern of a rising level of waywardness admissions continued. Indeed, whereas before 1876 the combined commitments for vagrancy, truancy, and being a "disorderly child" at no time exceeded 50 percent of total commitments, between 1876 and 1900 the combined total for these three status offenses was above 50 percent in all but five years.²⁸⁴ Admissions for vagrancy and disorderliness accounted for 55 percent of total new commitments in 1880, 52 percent in 1890, and 46 percent in 1900.²⁸⁵

Massachusetts continued its policy of incarcerating wayward children in its state reform school under the "stubbornness" rubric, although these cases never constituted a majority of the school's population. Stubbornness convictions represented 31 percent of total admissions in 1880, 18 percent in 1893, and 30 percent in 1900. Admissions for vagrancy brought status offenses in each of these

²⁸⁴ See SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 54, at 23 app., table 5 (1878); SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 76, at 31, table 5 (1900). A "disorderly child" was one who deserted his or her home without good cause, or kept company with dissolute or vicious persons against parental command. Act of Mar. 22, 1865, ch. 172, § 5, 1865 N.Y. Laws 293.

²⁸⁵ SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 56, at 16 app. (1880); SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 66, at 19 (1890); SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, ANNUAL REPORT No. 76, at 31 (1900).

three years to 33 percent, 24 percent, and 32 percent, respectively.²⁸⁶

Although in general there were fewer absolute commitments of young women than of young men to reformatory institutions in the nineteenth century, the number of convictions for waywardness was often proportionately higher for women. At the Massachusetts State Industrial School for Girls, for example, in 1880 stubbornness accounted for 57 percent of total commitments, and the combined offenses of lewdness, vagrancy, and being idle and disorderly comprised another 27 percent. In 1890, stubbornness represented 59 percent of the total, and lewdness, vagrancy, and being idle and disorderly, 14 percent. In 1900, stubbornness commitments were 66 percent of the total, with lewdness, vagrancy, truancy, and being idle and disorderly accounting for 8 percent. In addition, the absolute number of commitments rose from thirty in 1880 to 101 in 1900.²⁸⁷

Connecticut, as we have seen, first permitted commitments to its state reform school on grounds of stubbornness and then rescinded that jurisdiction. In 1879, however, the legislature adopted a full-fledged incorrigibility jurisdiction permitting commitment of a boy under 16 years of age who was

in danger of being brought up, or is brought up, to lead an idle or vicious life . . . [or] who is incorrigible or habitually disregards the commands of his father or mother or guardian, who leads a vagrant life, or resorts to immoral places or practices, or neglects or refuses to perform labor suitable to his years and condition, or to attend school.²⁸⁸

In 1881, those sentenced for incorrigibility represented 37 percent of total admissions, with school truants adding another 15 percent. For the twelve month reporting period 1890-1891, the figure for incorrigibility was 43 percent and for truancy, 3 percent. By 1900, incorrigibility commitments had risen to 47 percent of the total, and truancy accounted for 12 percent.²⁸⁹

²⁸⁶ Second Annual Report of the Massachusetts Primary and Reform Schools 86 (1880); Fifteenth Annual Report of the Massachusetts Primary and Reform Schools 70 (1893); Sixth Annual Report of the Lyman and Industrial Schools 45 (1900). (In 1885, the state reform school for boys was reorganized on the cottage plan and renamed the Lyman School for Boys; between 1882 and 1893 the trustees published no statistics on causes of commitment for boys.)

²⁸⁷ Second Annual Report of the Massachusetts Primary and Reform Schools 138 (1880); Twelfth Annual Report of the Massachusetts Primary and Reform Schools 95 (1890); Sixth Annual Report of the Lyman and Industrial Schools 108 (1900).

²⁸⁸ Act of Mar. 28, 1879, ch. 125, § 1, 1879 Conn. Pub. Acts 478.

²⁸⁹ Thirtieth Annual Report of the Connecticut State Reform School 21-22 (1882); Fortieth

The Pennsylvania Reform School (formerly the House of Refuge for Western Pennsylvania) continued to admit more children for incorrigibility than any other facility in the late nineteenth century. In the two years 1881-1882, admissions for incorrigibility, "vicious conduct," and vagrancy accounted for 85 percent of total commitments. These three offenses represented 90 percent of total admissions in 1895-1896 and 91 percent in 1901-1902.²²⁰ The Pennsylvania Reform School thus remained an institution specializing in the discipline of wayward children, virtually to the exclusion of criminal offenders.

The Baltimore House of Refuge also pursued its pre-1870 practice of committing large numbers of children for incorrigibility, vicious conduct, and vagrancy. Commitments for these three offenses represented 85 percent of total admissions in 1878, 85 percent in 1889, and 77 percent in 1900.²²¹

The Ohio Reform Farm School's population also was becoming dominated by incorrigibility commitments before the state legislature eliminated that category from its jurisdiction in 1881. In 1874, boys admitted for incorrigibility represented 32 percent of total admissions, while in 1878, commitments for incorrigibility comprised 50 percent of new admissions. By 1880, the last full year of incorrigibility admissions before the legislative ban, commitments for incorrigibility amounted to 77 percent of total admissions.²²²

Annual Report of the Connecticut State Reform School 16 (1891); Annual Report of the Connecticut School for Boys 22 (1900).

²²⁰ Biennial Report of the Pennsylvania Reform School 26 (1882); Biennial Report of the Pennsylvania Reform School 25 (1896); Biennial Report of the Pennsylvania Reform School 28 (1902). (The name of the school was changed to the Pennsylvania Reform School in 1872. Between 1882 and 1895 the school's reports provide no data on causes of commitment.) Vagrancy commitments represented only 1% of the total in 1895-1896 and less than 1% in 1901-1902.

The years 1901-1902 represented a high-water mark for incorrigibility commitments. In 1903-1904, the figure for incorrigibility and vicious conduct was down to 64% (263 of 419 total admissions), and in 1907-1908, 41% (169 of 411 total admissions). A new category, "delinquency," accounted for 7% (28 of 419 cases) in the former biennium, and 22% (92 of 411 cases) in the latter. Biennial Report of the Pennsylvania Reform School 26 (1904); Biennial Report of the Pennsylvania Reform School 29 (1908). The Pennsylvania Juvenile Court Act of 1903 created the category of "delinquency," which included both incorrigible children and criminal law violators. Act of Apr. 23, 1903, No. 205, § 1, 1903 Pa. Laws 274. It is not possible to say what portion of those committed for delinquency after 1903 were committed for general misbehavior or for specific offenses.

²²¹ Twenty-eighth Annual Report of the Baltimore House of Refuge 16 (1879); Thirty-ninth Annual Report of the Baltimore House of Refuge 17 (1890); Fiftieth Annual Report of the Baltimore House of Refuge 14 (1901).

²²² Nineteenth Annual Report of the Ohio Reform School, *reprinted in EXECUTIVE DOCUMENTS* (1874), *supra* note 156, at 403; Twenty-third Annual Report of the Ohio Reform

For some time after 1881 the Ohio Reform Farm School received only those committed for criminal offenses, plus an occasional vagrant. The school also obtained authority to receive "juvenile disorderly" children, a term of art for school truants and chronic nonattenders. Surprisingly, by the turn of the century judges were again committing boys to the school (now called the Ohio Boys' Industrial School) on grounds of incorrigibility despite the absence of statutory authority. In 1900, 32 boys were committed to the school for incorrigibility, 6 percent of total admissions.²⁹³ Judges may have been utilizing the incorrigibility label as a way of prodding the legislature to act, for the superintendent of the industrial school reported in 1900 that most state judges "clamor for the restoration to our courts of the power to send incorrigibles to the institution, and thus safeguard society against bad boys who are unquestionably destined to lives of criminality, and whose criminal operations—even though anticipated—cannot be prevented by police officers."²⁹⁴

Of course Ohio did not dispense completely with incarcerating wayward children during this period, since local institutions, such as the Cleveland and Cincinnati Houses of Refuge, could still receive them. In 1880, incorrigibility commitments accounted for 50 percent of new admissions to the Cleveland institution; the comparable figure for 1889-1890 (a sixteen-month period) was 45 percent.²⁹⁵ Incorrigibility commitments figured less prominently in the profile of the Cincinnati House of Refuge before 1900, but sizeable numbers were incarcerated for the offense nonetheless. Incorrigible children accounted for 4 percent of admissions in 1881, 23 percent in 1885, and 32 percent in 1890; in absolute terms, while only 12 children were incarcerated for incorrigibility in 1881, the number rose to 66 in 1885 and 92 in 1890.²⁹⁶

School, reprinted in EXECUTIVE DOCUMENTS (1878), *supra* note 156, at 737; Twenty-fifth Annual Report of the Ohio Reform School, reprinted in EXECUTIVE DOCUMENTS (1880), *supra* note 156, at 498.

²⁹³ Forty-fifth Annual Report of the Ohio Boys' Industrial School 16-17 (1900).

²⁹⁴ *Id.* at 11-12.

²⁹⁵ Tenth Annual Report of the Cleveland Workhouse and House of Refuge 50 (1880); Report of the Workhouse 84 (1890). (The institution was closed in 1891.)

²⁹⁶ Thirty-first Annual Report of the Cincinnati House of Refuge 25 (1881); Thirty-fifth Annual Report of the Cincinnati House of Refuge 21-22 (1885); Fortieth Annual Report of the Cincinnati House of Refuge 21 (1890).

The Cincinnati refuge also admitted a large category of children characterized as "homeless" or "without suitable homes"—32% of admissions in 1881, 31% in 1885, and 27% in 1890. It is difficult to know if these children represented the same vagrant children who would have been admitted to houses of refuge elsewhere, or merely neglected and destitute

Two other midwestern states, Indiana and Michigan, also vigorously enforced laws against status offenders. At the Indiana House of Refuge, commitments for incorrigibility accounted for 29 percent of new admissions in 1879, 56 percent in 1890, and 49 percent in 1901.²⁹⁷ The Michigan Reform School originally admitted only criminal violators, but in the early 1880's it began to accept children committed for truancy. In 1885-1886, 25 percent of new commitments were for truancy, a figure that rose to 37 percent in 1890-1891, and 42 percent in 1900-1901.²⁹⁸

Michigan also used its status offense laws against young women. Most were committed to the State Industrial Home for Girls on "disorderly conduct" charges but a variety of special categories for children were employed as well. In 1892, for example, while disorderly conduct commitments accounted for 34 percent of new admissions, children committed for being "wayward and unmanageable" comprised 8 percent, and for truancy, 19 percent. In the two-year period 1898-1900, disorderly conduct commitments represented 35 percent of new admissions, "wayward and unmanageable," 5 percent, and truancy, 16 percent. In this latter period there were also eleven commitments for such miscellaneous waywardness offenses as "frequenting saloons" and "lounging on streets."²⁹⁹

In the last third of the nineteenth century some individuals began

children, who generally were not placed in houses of refuge. (*But cf.* remarks of the superintendent of the Western Pennsylvania House of Refuge, at text accompanying notes 181-84 *supra*, indicating that that institution's waywardness commitments masked cases of neglect or destitution.)

After 1900, incorrigibility apparently was used less as a ground for commitment to this institution. In 1904, only 6% (26 of 422 total admissions) were committed on this ground, and in 1910, none. Fifty-fourth Annual Report of the Cincinnati House of Refuge 11 (1904); Sixtieth Annual Report of the Cincinnati House of Refuge 14 (1910). In the latter year, however, 52% were committed as "delinquents" (130 of 250 total cases), the new catch-all category for incorrigibles and criminal offenders.

²⁹⁷ Thirteenth Annual Report of the Indiana House of Refuge 25 (1879); Twenty-fourth Annual Report of the Indiana Reform School for Boys 37-38 (1890); Thirty-fifth Annual Report of the Indiana Reform School for Boys 31-32 (1901).

²⁹⁸ Biennial Report of the Michigan Reform School 21 (1886); Biennial Report of the Michigan Reform School 234 (1892); Biennial Report of the Michigan Industrial School for Boys 18 (1902).

In 1885 Michigan provided for compulsory reformatory education of "juvenile disorderly persons." Included in that category were: (1) habitual truants from school; (2) children who, while attending school, were "incorrigibly turbulent, disobedient, or insubordinate," or were "vicious or immoral in conduct"; and (3) children not attending any school who habitually frequented the streets and had no lawful employment. Act of May 21, 1885, No. 103, § 3, 1885 Mich. Pub. Acts 103.

²⁹⁹ Seventh Biennial Report of the Michigan State Industrial Home for Girls 15 (1892); Eleventh Biennial Report of the Michigan Industrial Home for Girls 48 (1900).

to express doubts that wayward children ought to be committed to institutions, or at least that they ought to be committed to the same institutions as minors found guilty of crimes. We have already observed that after 1850 some child-savers thought children should be placed in families rather than institutions. As the century wore on, officials connected with the juvenile justice system occasionally observed that vague statutory definitions of waywardness could lead to abuses at the hands of parents, police, and prosecutors. In Massachusetts, where the office of the Visiting Agent was created in 1869 to represent children at court hearings and to find suitable family placements for them, that officer observed in his first annual report: "The charge of 'stubbornness' is made to include disobedience, truancy and little offences generally. Since the punishment for these has been made easy to the parents by commitment of the children to Reformatories, the parental duty of correction is too frequently and readily transferred to the state."³⁰⁰

Occasionally, refuge managers themselves commented on the injustices to which the wayward child jurisdiction could lead. The superintendent of the Connecticut School for Boys noted in 1899:

A marked disregard for the letter and spirit of the Statutes regulating commitments to the School for Boys is sometimes apparent. To commit a boy to the School as incorrigible for a frivolous cause, like hiding behind a door to avoid going to school . . . is to do that boy an injustice he will long remember. . . . The motive in such cases is usually the unworthy one of throwing the care and support of the boy upon the State.³⁰¹

The directors of the Cleveland House of Refuge, observing in 1883 that their population had increased dramatically over the previous year and now included many very young children, commented:

This increase is largely due to our courts committing to the House of Refuge children for no other cause than running away from school or home. This condition of things should not exist, and instead of the courts committing this class of children to

³⁰⁰ ANNUAL REPORT OF THE STATE VISITING AGENT, reported in MASSACHUSETTS BOARD OF STATE CHARITIES, ANNUAL REPORT No. 6, at 175 (1869). The Visiting Agent pursued this theme the following year: "The charge of stubbornness can be easily sustained against almost any child; therefore under it usually appear the cases in which the blame attaches to the parents rather than the child, and those in which an ulterior purpose prompts complaint and not the avowed one—the child's good." ANNUAL REPORT OF THE STATE VISITING AGENT, reported in MASSACHUSETTS BOARD OF STATE CHARITIES, ANNUAL REPORT No. 7, at 276 (1870).

³⁰¹ Annual Report of the Connecticut School for Boys 13 (1899).

the House of Refuge, they should compel their parents to take these children home and give them better care.³⁰²

A strong protest against abuse of incorrigibility laws came in 1890 from the directors of the Indiana Reform School for Boys, an institution which by then had a population composed over half of children committed for incorrigibility. The directors did not believe that wayward youths should be committed to the reform school at all and recommended to the legislature that they be excluded. They were frank in referring to the school as a "criminal institution"³⁰³ and noted that the state constitution had originally intended it to be used for the "correction and reformation of juvenile offenders."³⁰⁴ They disputed the wisdom of subsequent legislation that provided for commitment of incorrigible children, particularly a law of 1879 that allowed depravity of a parent or drunkenness of a father to be included in charges against a boy. This law, they argued, "left the doors open for many unfortunate boys to be punished for the sins of the parent."³⁰⁵ Under its loose provisions, many boys had been committed by poor, drunken, or "inhuman" parents, "who had them committed to get them out of the way."³⁰⁶

Even when that law was changed to permit a boy to be committed only because of his own incorrigible or vicious conduct, it was defective, for "there might be as many different judicial interpretations of [incorrigibility] as there are circuit judges in the State,"³⁰⁷—a point the *O'Connell* court had made in Illinois twenty years before. Unlike refuge managers in most institutions, the Indiana directors in 1890 considered incorrigible children more innocent than criminal law violators and thought the former would only be stigmatized and corrupted by associating with the latter in the same school. Although the institution was operated on the cottage plan, which provided an opportunity to separate "good" from "bad" boys for residential purposes, they thought it impossible to prevent the boys from getting to know each other and resuming their friendships once

³⁰² Thirteenth Annual Report of the Cleveland Workhouse and House of Refuge 10 (1883).

³⁰³ Twenty-fourth Annual Report of the Indiana Reform School for Boys 11 (1890).

³⁰⁴ *Id.* at 9.

³⁰⁵ *Id.* at 12.

³⁰⁶ *Id.* at 11.

³⁰⁷ *Id.* at 13. In recommending to the legislature that incorrigible children no longer be sent to the reform school, the directors concluded with a startling libertarian flourish: "Better that ninety-nine incorrigible boys should be left to take the chances of their becoming better boys in the communities in which they live than that one innocent and helpless boy should in after life have the bitter memory that he was unjustly sent to the Reform School." *Id.* at 14.

discharged. While the directors did not argue that incorrigible children should never be institutionalized, their remarks on the vagueness and abuses of the incorrigibility law pointed in that direction.

The views expressed above, like those of the *O'Connell* court, were maverick. The Indiana legislature did not abolish the reform school's incorrigibility jurisdiction, and that institution continued to receive incorrigible children into the twentieth century.³⁰⁸ More typical were the views of the trustees of the Ohio Industrial School for Boys, where the incorrigibility jurisdiction had been abolished in 1881. Noting that guardians and parents subsequently had children arrested and committed for trivial offenses—even encouraging some to commit theft—to be rid of their care, the trustees called for the restoration of the incorrigibility law in order that the criminal law not be used as a subterfuge to reach noncriminal children who needed to be saved.³⁰⁹ Despite occasional misgivings, as the twentieth century approached, most legislators and institutional managers still believed that incarceration and reformation of wayward children were necessary to protect society from the “dangerous classes.”

C. *Wayward Child Laws in the Courts, 1871-1905*

Where legislators and institutional officials led, courts willingly followed. No state supreme court after Illinois in *O'Connell v. Turner* struck down a wayward child law in the period we are studying.³¹⁰ Indeed, comparatively few appeals were brought challenging

³⁰⁸ See, e.g., Fifty-first Annual Report of the Indiana Boys' School 45 (1917). In 1917, 34% of admissions (100 of 290) were for incorrigibility, as against 66% (190 of 290) for “felony.” The superintendent of the school still felt the incorrigibility jurisdiction was being abused:

The tendency each year seems to be smaller boys committed here. It seems to us that boys are sent here too young. Eight, nine and ten year old boys should not be given up as incorrigible and committed here if parents and courts would exercise proper supervision. At these tender ages we are of the opinion it is more a desire of parents to be relieved from responsibility of proper bringing up of the boys, and that courts should be more rigid in the cause of commitment . . . We have reason to feel that boys have been sent to us more because of broken home ties than misdemeanors. This should not be.

Id. at 15.

³⁰⁹ Thirty-first Annual Report of the Ohio Boys' Industrial School 19 (1886); Thirty-third Annual Report of the Ohio Boys' Industrial School 21 (1888). The trustees agreed that boys should not be admitted, whether as misdemeanants or incorrigibles, simply because their parents wanted to avoid the responsibility of rearing them. Thirty-first Annual Report of the Ohio Boys' Industrial School 19 (1886).

³¹⁰ Indeed, no state supreme court has yet done so. Where constitutional challenges have been mounted against status offense laws in recent years they have been turned back with virtual unanimity by the courts. See, e.g., *Commonwealth v. Brasher*, 359 Mass. 550, 270

commitments for waywardness. Most of the reported cases involved very young children taken from their parents on grounds of neglect or destitution.³¹¹ Since the line between neglect and waywardness was so uncertain, however, courts used the same arguments to justify state intervention in both kinds of cases, freely citing cases upholding commitments by reason of parental unfitness to support commitment of wayward children, and vice-versa. In both situations, the courts assumed the state had power as *parens patriae* to take control of children whose behavior, or whose parents' behavior, was inadequate to prepare them for roles as good citizens.

The reaction to *O'Connell* was not long in coming. A Wisconsin court disapproved of its language in dictum, in the 1876 case of *Milwaukee Industrial School v. Supervisors of Milwaukee County*.³¹² That case upheld the power of a municipal court to transfer to the Milwaukee Industrial School children who were inmates of a poor house. The relevant statute authorized the school to receive inmates of poor houses, and begging, vagrant, and orphaned children. The statute also allowed commitment of children who "frequent[ed] the company of reputed thieves, or of lewd, wanton or lascivious persons in speech or behavior, or notorious resorts of bad characters,"³¹³ thus introducing a waywardness element. The court said that it was only concerned with the provision permitting commitment of inmates of poor houses; other grounds of commitment were

N.E.2d 389 (1971); *A. v. City of New York*, 21 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972); *In re Napier*, 532 P.2d 423 (Okla. 1975); *E.S.G. v. State*, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970); *Blondheim v. State*, 84 Wash. 2d 874, 529 P.2d 1096 (1975). *But cf. In re Doe*, 54 Hawaii 647, 513 P.2d 1385 (1973) (curfew ordinance unconstitutional due to vagueness of term "loitering").

Two lower court decisions striking down incorrigibility statutes on vagueness grounds have not withstood appeals. See *Gonzalez v. Mailliard*, No. 50424 (N.D. Cal. Feb. 9, 1971) (three-judge court) (invalidating statute extending juvenile court jurisdiction over children "who from any cause . . . [are] in danger of leading an idle, dissolute, lewd or immoral life"), *vacated and remanded mem.*, 416 U.S. 918 (1974) (vacating and remanding for reconsideration of lower court's grant of injunctive relief; no discussion of constitutional issues); *In re Brinkley*, No. J 1365-73 (D.C. Super. Ct., June 14, 1973) (striking down District of Columbia statute directed at "habitually disobedient" and "ungovernable" children), *rev'd sub nom. District of Columbia v. B.J.R.*, 332 A.2d 58 (D.C. App. 1975), *cert. denied*, 421 U.S. 1016 (1975). *Cf. Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971) (three-judge court), *aff'd mem.*, 406 U.S. 913 (1972) (invalidating New York's "Wayward Minor" statute authorizing court jurisdiction over minors ages 16 through 21 who are "morally depraved or . . . in danger of becoming morally depraved"; stresses penal character of statute).

³¹¹ See cases cited in Areen, *supra* note 222, at 900-09, and Rendleman, *supra* note 79, at 230-33, 241-47.

³¹² 40 Wis. 328 (1876).

³¹³ Act of Mar. 17, 1875, ch. 325, § 5, 1875 Wis. Laws 632.

independent and might stand or fall on their own.³¹⁴ *O'Connell* was held not to be applicable because it dealt with the question of "compulsory education" and with a statute involving "some nice fault-finding with the course of the parent with the child,"³¹⁵ unlike the total failure of parental support here.

Nevertheless, the court felt compelled to observe that "there is much said in the [*O'Connell*] opinion inconsistent with some of the views which we have expressed, to which we could not assent"³¹⁶ The notion that commitment to the industrial school could be considered imprisonment (probably argued by counsel on the strength of *O'Connell*) was flatly rejected. The state, as *parens patriae*, had power to assume parental authority over children in circumstances of misfortune; such parental authority "implied restraint, not imprisonment." In language that would frequently be quoted by courts sustaining commitments to reformatory institutions on grounds of destitution, neglect, vagrancy, or waywardness, the court added: "And, in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child, no more than the tenderest parents exercising like power of restraint over children."³¹⁷

Given the long history of state placement of children in poorhouses when parents were unable to support them, it was perhaps not difficult to sanction their removal to a special institution for children that was perceived as being milder than adult poorhouses.³¹⁸ No one disputed that the state owed a duty of support to children who were completely destitute, and since outdoor relief³¹⁹ of the poor had long been discredited the only real question was what kind of institutional placement was appropriate. Institutionalization of predelinquent children was a different matter, however, and the question still remained whether the state had the right, much less the duty, to intervene at all in the lives of those who

³¹⁴ 40 Wis. at 335.

³¹⁵ *Id.* at 338, 340.

³¹⁶ *Id.* at 340.

³¹⁷ *Id.* at 338.

³¹⁸ Indeed, in 1876 Wisconsin required poor law authorities to place pauper children in families, orphan asylums, or other appropriate institutions, rather than in poor houses. Act of Mar. 18, 1876, ch. 142, § 1, 1876 Wis. Laws 409.

³¹⁹ The term "outdoor relief" referred to the poor law practice of aiding those in need of public assistance in their own homes, through financial subsidies or donations in kind, or by apprenticeship in the case of children. The practice was contrasted with "indoor relief," which referred to aiding the poor within institutions, *i.e.*, almshouses. *See*, in addition to sources cited in note 50 *supra*, J. LEIBY, CHARITY AND CORRECTION IN NEW JERSEY, ch. 1 (1967).

misbehaved short of criminal misconduct. Some courts were willing to admit that waywardness proceedings were "quasi-criminal" in nature,³²⁰ thus raising the possibility that incarceration of predelinquents, unlike paupers, could be considered imprisonment without due process of law. Despite these differences, the *Milwaukee Industrial School* case became one of the precedents frequently cited to justify state *parens patriae* power over any "misfortune" case, including wayward children.³²¹

Milwaukee Industrial School indicated that the doctrine of *O'Connell* faced an uncertain future. The Illinois Supreme Court itself virtually repudiated *O'Connell* in the 1882 case of *In re Ferrier*.³²² *Ferrier* arose under an 1879 "Act to aid industrial schools for girls,"³²³ by which the state once again devolved power to accept neglected, vagrant, and wayward children on reformatory institutions, limited now to private schools. Avoiding some of the vaguer grounds of commitment that the *O'Connell* court had found repugnant in the Chicago Reform School legislation (the phrase "growing up in . . . ignorance, idleness, and vice" was excised, for instance), the new statute provided for incarcerating girls deemed "dependent," including

[e]very female infant who begs or receives alms while actually selling or pretending to sell any article in public, or who frequents any street, alley or other place for the purpose of begging or receiving alms, or who, having no permanent place of abode, proper parental care or guardianship, or sufficient means of subsistence, or who for other cause is a wanderer through streets and alleys, and in other public places, or who lives with or frequents the company of, or consorts with, reputed thieves or other vicious persons, or who is found in a house of ill-fame, or in a poor house.³²⁴

This law, similar to the Wisconsin law involved in *Milwaukee Industrial School*, thus included elements of begging, vagrancy,

³²⁰ See, e.g., *Van Riper v. New York Catholic Protectory*, 106 N.Y. 604, 610, 13 N.E. 435, 437 (1887); *In re Knowack*, 158 N.Y. 482, 487, 53 N.E. 676, 677 (1899).

³²¹ See, e.g., *Olson v. Brown*, 50 Minn. 353, 358, 52 N.W. 935, 936 (1892).

³²² 103 Ill. 367 (1882). The *Ferrier* court attempted to distinguish *O'Connell*, but other jurisdictions regarded that case as having been overruled. See, e.g., *Wisconsin Indus. School for Girls v. Clark County*, 103 Wis. 651, 664, 79 N.W. 422, 426 (1899) ("That case [*O'Connell v. Turner*] was in effect overruled by later cases and is not now considered as authority. *Petition of Ferrier*, 103 Ill. 367 . . .").

³²³ Act of May 28, 1879, 1879 Ill. Laws 309.

³²⁴ *Id.* § 3.

waywardness ("frequents the company of . . . reputed thieves or other vicious persons"), and perhaps moral neglect ("found in a house of ill-fame").

The child, a girl of nine years, was brought before the court on a petition that made out a case of waywardness: she had frequently been picked up by the police while wandering the streets at night, she was a truant from school, and was "in imminent danger of ruin and harm." Witness testimony added that she lied and stole, ran away from home, was beyond the control of her invalid step-father, and kept bad company. Her mother was "weak-minded, and at times insane," and had even tried to hang the girl once, but the case did not turn on child abuse.³²⁵ A jury found the child "dependent" and she was committed to the Industrial School for Girls of Cook County. The girl appealed, claiming that she had been deprived of liberty without due process of law.

The court dealt with this argument in three ways. First, it distinguished *O'Connell* by noting that the new statute provided much greater procedural due process than that permitting commitment to the Chicago Reform School. Whereas under the earlier law the judge decided all issues of fact, the industrial school act provided for a jury of six. In addition, notice to the parent or guardian was required, defense counsel was permitted, and a showing of parental unfitness was necessary for conviction.³²⁶

The court also distinguished the schools in question. The Chicago Reform School had been regarded as "a place of confinement, and for punishment, and the commitment to it was regarded as imprisonment."³²⁷ Unlike the new Industrial School for Girls, the Chicago Reform School had accepted children who committed criminal offenses (a fact, it should be noted, which had not led the *Crouse* court to declare the Philadelphia House of Refuge a prison!). The industrial school was different: exercising that magical power of definition which eliminated any need for informed investigation, the court declared:

This institution is not a prison, but it is a school, and the sending of a young female child to be taken care of, who is uncared for . . . we do not regard imprisonment. We perceive hardly any more restraint of liberty than is found in any well regulated school. Such a degree of restraint is essential in the

³²⁵ 103 Ill. at 368.

³²⁶ *Id.* at 371.

³²⁷ *Id.*

proper education of a child, and it is in no just sense an infringement of the inherent and inalienable right to personal liberty so much dwelt upon in the argument.³²⁸

O'Connell thus was distinguished simply on the ground that the industrial school was somehow less restrictive than the defunct reform school, although the court presented no facts about either institution that might have justified that conclusion.

The third, and principal, ground of decision in *Ferrier* effectively undercut *O'Connell*. The broad rationale of the opinion was that it was not unconstitutional for the state to incarcerate a wayward child, or a child suffering only from "misfortune," as the *O'Connell* court had put it. The court rehearsed the by-now familiar litany that the county court had inherited the power of English chancery courts to deprive a parent of custody of a child if the parent was "grossly unfit"³²⁹ and had failed to take care of the child properly or provide him or her with a proper education. Assuming that the state's right to control children was superior to the parents', the court said that while parents were usually permitted to exercise this right, the state could withdraw it if parents proved unsuitable. The court interpreted the industrial school statute as requiring a finding that the parent was "not a fit person" to have custody,³³⁰ which might seem to indicate its approval of state intervention only in neglect cases. In the factual context of this case, however, it seems clear that the court assumed that the child's own wayward conduct could establish that the parents' care had been inadequate. Thus, while *Ferrier* can be read narrowly as supporting the *parens patriae* power of the state only in parental neglect cases, the court's ready acceptance of the notion that a child's conduct evidenced parental failure indicates that the court meant to approve the exercise of state power over wayward children as well. As was so often the case in the nineteenth century, the court simply did not see a legally relevant difference between wayward and neglected children.

The court's repudiation of *O'Connell* is made even clearer by its severe qualification, if not rejection, of the doctrine that a child had a right to liberty:

The right to liberty which is guaranteed is not that of entire unrestrainedness of action. . . . There are restrictions imposed

³²⁸ *Id.*

³²⁹ *Id.* at 372.

³³⁰ *Id.*

upon personal liberty which spring from the helpless or dependent condition of individuals in the various relations of life, among them being those of parent and child, guardian and ward, teacher and scholar. . . . These are legal and just restraints upon personal liberty which the welfare of society demands, and which, where there is no abuse, entirely consist with the constitutional guaranty of liberty.³³¹

A child's liberty, therefore, did not extend to being free of the restraints of the educational process. As long as courts continued to accept the child-savers' argument that reformatories were "schools," they would continue to hold that the restraint of liberty involved was no more than that required by any school and therefore constitutional. The *Ferrier* court, like the *Crouse* court before it, failed to distinguish compulsory education in the public schools, which operated equally on all children, did not involve total isolation in institutions or transfer of parental custody to the school, and provided a minimal level of intellectual competence to all children, from incarceration in a reformatory, which depended on a court's subjective evaluation of children's deviant conduct, cut children off from parents and friends, and subjected them to a stultifying routine and harsh discipline.³³²

The *Ferrier* court missed an opportunity to fashion a doctrine that would have been fairer to children and parents while supporting a limited right of state intervention in family autonomy. It could have found that the state possessed authority to protect the health and safety of children from parents who physically abused them or failed to provide them with basic necessities of life, while denying the state the right to supervise the moral upbringing of children.³³³ By allow-

³³¹ *Id.* at 372-73.

³³² See text accompanying notes 303-07 *supra*. See also 2 CHILDREN AND YOUTH, *supra* note 17, at 460-64, 469-71; R. MENNELL, *supra* note 28, at 102-13; S. SCHLOSSMAN, *supra* note 13, at 110-11, 118-23, 129-30. The Illinois court reiterated its views later the same year:

It would be difficult to conceive of a class of persons that more imperatively demands the interposition of the state in their behalf than those we have just enumerated [in the industrial school act], and for whose benefit the act under consideration was adopted, and it would be a sad commentary on our State government, if it is true, as is contended, there is no constitutional power in the legislature to provide, by suitable legislation, for their education, control and protection.

County of McLean v. Humphreys, 104 Ill. 378, 383 (1882).

³³³ For contemporary analyses of this position, see IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT (Tent. Draft 1977); STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR, *supra* note 3; Areen, *supra* note 222, at 920-37; Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

ing the state to exercise the role of moral censor, the court rejected the doctrine that in a pluralistic society parents should be free to bring up children and children free to act in different ways, and imposed instead the subjective views of judges and reform school managers. Granting the state that power also meant accepting the shibboleth that reformatory institutions exercised discipline no harsher than "the tenderest parents exercising like power of restraint over children."³³⁴ Individual parents might sometimes treat their children harshly, but in an institution children were part of a faceless mass, their conduct regulated to meet the needs of institutional efficiency. The notion that the state could and should replace the natural parents must be understood as the reflex of a society that felt profoundly threatened by youthful deviance; the argument that a large institution could step into the shoes of a parent and provide the attention and love a child needed to mature was hollow and cruel.

In the wake of *Ferrier*, several courts upheld wayward child and neglect statutes against arguments that they infringed on liberty and imprisoned youths without due process of law. Only a few need be discussed here, since these decisions produced little fresh analysis of the *parens patriae* power.

Two years after *Ferrier*, the Connecticut Supreme Court of Errors upheld an incorrigibility statute in *Reynolds v. Howe*.³³⁵ The statute in question permitted justices of the peace to commit to the reform school boys under sixteen years of age who were "in danger of being brought up, or [were] brought up, to lead an idle or vicious life."³³⁶ Counsel put forward a variety of arguments: the term "vicious" was too vague to pass constitutional muster; "idle" meant unemployed, and no parent could compel a child under sixteen years of age to labor; the statute provided no chance for the parent to be heard, and a father could only lose custody after a finding of parental misconduct; the statute required no hearing for the minor, constitutionally required since the youth was being prosecuted as a criminal; and justices of the peace had no power to sentence a minor to imprisonment.³³⁷

Without citing authority, the court rejected the notion that the proceeding in question was criminal or the reform school a prison. Since the proceeding was not criminal, no formal hearing was neces-

³³⁴ *Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328, 338 (1876).

³³⁵ 51 Conn. 472 (1884).

³³⁶ *Id.* at 476.

³³⁷ *Id.* at 475.

sary; since confinement in a reform school did not constitute imprisonment, delegation of authority to commit to justices of the peace did not violate the constitution.³³⁸ Nor could the boy's father complain that he had lost custody of his son without a finding of parental unfitness or the right to be heard. He had a duty, opined the court, to rear his children to be industrious and virtuous, and if he "[brought] them up to vice" instead, he had no cause to complain.³³⁹ While the court did not impose on the statute a requirement that parental unfitness be found in waywardness cases, it clearly felt that the boy's vicious conduct proved that unworthiness in any case.

The court took little notice of counsel's definition of "idleness" or his complaint about the vagueness of "viciousness." For the Connecticut court, these were palpable concepts that needed no specification. Idleness and intemperance were responsible for filling almshouses and jails with paupers and criminals, a "worthless class of humanity." The government had a duty to save future citizens from "ignorance and lawlessness and crime."³⁴⁰ The court simply was not troubled by the doubts that had troubled the *O'Connell* court: like their Puritan forebears, the judges knew idleness when they saw it, and they knew its evil consequences. The court needed no elaborate rationale to support incarcerating idle and vicious youths, and it never even mentioned *parens patriae*. The only justification needed was "the social necessity of saving boys from impending ruin and the community from the prevalence of crime."³⁴¹

Finally, like almost all courts of the period, the Connecticut court saw no difference between the wayward child law and other laws by which society managed the affairs of dependent individuals—compulsory education, apprenticeship of minors, appointment of conservators of the estates of incompetents, and the confinement of insane persons.³⁴² Rather than viewing incorrigibility laws as quasi-criminal in nature, as did the New York court, the Connecticut court saw them merely as part of the state's educational system, and thus as requiring neither precise substantive standards nor procedural niceties.

Courts in Minnesota³⁴³ and Indiana³⁴⁴ also sustained wayward

³³⁸ *Id.* at 477-78.

³³⁹ *Id.* at 478.

³⁴⁰ *Id.* at 477.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Olson v. Brown*, 50 Minn. 353, 52 N.W. 935 (1892).

³⁴⁴ *Jarrard v. State*, 116 Ind. 98, 17 N.E. 912 (1888).

child laws. The Minnesota court upheld a statute prescribing "incorrigibility and vicious conduct" as grounds for commitment to the state reform school. Against the claim that the statute was unconstitutional because it authorized a justice of the peace to imprison a criminal for over three months, the court said simply that incarceration in the school was neither punishment nor imprisonment. While acknowledging the *O'Connell* court's views, it stressed that almost all northern states had adopted, and many courts had sustained, incorrigibility statutes; the court was content to cite the relevant cases and quote at length from the Wisconsin court's *Milwaukee Industrial School* opinion.³⁴⁵ The Indiana court was even more succinct. Upholding the commitment of a boy for being vicious and beyond the control of his guardian, and for associating with "immoral, drunken, and dissolute persons," the court held it was "settled" that the legislature could commit to a reformatory "boys who are entering upon a career of wickedness" when their parents could not prevent them from becoming "evil member[s] of society."³⁴⁶

Affirmance of wayward child laws on some more or less explicit version of the *parens patriae* doctrine thus became routine. A few courts, while unwilling to upset the laws, did demonstrate concern over possible abuse by construing them narrowly. The highest court of New York was faced with a habeas corpus action brought by a girl of fourteen, who had been committed by a police justice to the New York Catholic Protectory in part on a charge that she was "improperly exposed and neglected, and wandering in the public park . . . without any proper guardianship . . ." ³⁴⁷ The only section of the Penal Code that was relevant, said the court, involved a minor "not having any home or other place of abode or proper guardianship, or who has been abandoned or improperly exposed or neglected by its parents . . ." ³⁴⁸ The court read this section as requiring an allegation that the child had been abandoned and neglected by the fault of her parents or custodians, which had not been made here:

³⁴⁵ 50 Minn. at 358, 52 N.W. at 936 (citing *Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328 (1876)).

³⁴⁶ 116 Ind. at 99-100, 17 N.E. at 913. For other cases upholding laws authorizing commitment of children to reformatory institutions for incorrigibility, see *Pugh v. Bowden*, 54 Fla. 302, 45 So. 499 (1907); *Dinson v. Drosta*, 39 Ind. App. 432, 80 N.E. 32 (1907); *Scott v. Flowers*, 60 Neb. 675, 84 N.W. 81 (1900); *In re Mason*, 3 Wash. 609, 28 P. 1025 (1892) (dictum).

³⁴⁷ *Van Ripper v. New York Catholic Protectory*, 106 N.Y. 604, 13 N.E. 435 (1887).

³⁴⁸ *Id.* at 609, 13 N.E. at 436.

The information in these cases of summary conviction ought to be precise, and show a case clearly within the statute. . . . 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.³⁴⁹

Thus a conviction obtained on the basis of the charge in question would have to be overturned.³⁵⁰

Another New York court adopted a similarly strict attitude in a habeas corpus case involving commitment of a child to the Mt. Magdalen School of Industry on a charge of "being a disorderly child."³⁵¹ The court found that while prior to 1886 the Penal Code permitted commitment of a child to any institution as a "vagrant, disorderly, or destitute child," an amendment of that year had omitted these words. Thus, being a "disorderly child" was no longer a proper ground for commitment and the child must be released.³⁵² Nor would the court permit the child to be committed under a new warrant of commitment, signed by another magistrate some two years after the writ of habeas corpus had been served, which sought to bring the girl's activities within the statute. Although the statute permitted a magistrate to draw up a new warrant of commitment if a previous one had been found defective, this provision applied only to the magistrate who made the original commitment, in order to cure a technical defect.³⁵³

³⁴⁹ *Id.* at 609-10, 13 N.E. at 436.

³⁵⁰ The court found, however, that the second charge in the complaint, "that the said child was found in the company of Mary Ryan, who is a reputed prostitute," stated a valid charge under the statute. *Id.* at 610, 13 N.E. at 437. While the constitutionality of this provision was not contested, the relator argued that the evidence was insufficient to support the conviction because the child had been in the park on a lawful purpose, to visit parents. The court held that the issue of the sufficiency of evidence in a summary conviction could not be attacked collaterally by habeas corpus. *Id.* at 611-12, 13 N.E. at 437-38.

³⁵¹ *Day v. Mt. Magdalen School of Industry*, 7 N.Y.S. 737 (Sup. Ct. 1889).

³⁵² *Id.* at 738. It should be noted that the 1886 amendment did not omit any of the activities prohibited for children on which an allegation of disorderly behavior could have been based under the 1882 Penal Code. The 1886 amendment omitted the previous requirement that a child engaging in the prohibited conduct be brought before the court as a "vagrant, disorderly, or destitute child"; by extension, the mere allegation that a child was disorderly no longer stated an offense. Compare N.Y. PENAL CODE §§ 291(5)-292 (1882) with N.Y. PENAL CODE §§ 291(5)-292 (1887).

³⁵³ 7 N.Y.S. at 738.

Concern for the liberty of children could also take the form of demanding that procedural requirements be strictly observed. A Minnesota statute required that charges of incorrigibility heard by municipal courts be proved by at least two witnesses, that witness testimony be reduced to writing, and that the evidence be transmitted to the district court, which must approve or disapprove the conviction.³⁵⁴ The Minnesota Supreme Court threw out the incorrigibility conviction of a fourteen-year-old boy when the record did not affirmatively show that testimony of witnesses had been put in writing and transferred to the district court, stating: "[W]hen we reflect upon the opportunity for wrong and injustice in these cases, the reason why the law-makers have thrown safeguards about and attempted to protect infants charged with incorrigible and vicious habits, or with crime, is obvious."³⁵⁵

A court might also insist on adequate notice to the parties involved. In *Van Riper v. New York Catholic Protectory*,³⁵⁶ a child was charged under the New York Penal Code with being "improperly exposed and neglected, and wandering in the public park" and with being found in the company of a reputed prostitute.³⁵⁷ The statute required that the child's parent either must be present at the hearing or be given sufficient notice. Although Mrs. Van Riper was at the hearing, the child's father was not; nor had he been given notice.

³⁵⁴ Act of Mar. 2, 1883, ch. 37, § 2, 1883 Minn. Laws 35.

³⁵⁵ *Connolly v. Brown*, 47 Minn. 472, 474, 50 N.W. 920, 921 (1891). To like effect is *People v. Giles*, 152 N.Y. 136, 46 N.E. 326 (1897), where children who had been found improperly exposed and neglected by their parents and in a reputed house of prostitution appealed their conviction on grounds that the testimony taken by the magistrate had not been reduced to writing, and thus was not available to a reviewing court assessing the sufficiency of the evidence. The New York court held that magistrates must keep minutes of testimony taken in hearings and insert such evidence in the record, observing:

Our magistrates are invested with important powers. Many offenses of a criminal nature may be summarily tried and disposed of by them. . . . To permit them to exercise these important powers, without keeping any minutes or records of the testimony upon which their determinations can be reviewed, would be contrary to public policy, and would be investing them with autocratic powers greater than those possessed by any other officer of the government.

Id. at 140, 46 N.E. at 328. Unfortunately for the children in this case, the court found¹ that their affidavit of appeal had been framed defectively, ruled that the lower court therefore was not required to return the evidence in response, and sustained the commitments. *Id.* at 141-42, 46 N.E. at 328.

³⁵⁶ 106 N.Y. 604, 13 N.E. 435 (1887).

³⁵⁷ *Id.* The charge was brought under § 291 of the New York Penal Code, which also authorized commitment of children who begged; picked rags or refuse; were homeless, orphaned or otherwise abandoned; or were found in houses of prostitution, concert saloons, dancehouses, theaters, museums, or places where liquor was sold. N.Y. PENAL CODE § 291 (1887). It thus combined elements of parental neglect and filial waywardness.

The court agreed with the father's contention that a father, if living, must be given notice, because he was the child's natural guardian and would best be able to provide for the child's defense. The court also did not overlook the child's right to liberty: "The rights of the child are primarily in question, and every step which the statute requires to be taken in the exercise of this summary jurisdiction must be observed."³⁵⁸

Apart from the cases requiring that incorrigibility statutes be interpreted narrowly or procedural niceties be observed, the other major departure from the majority viewpoint on state power over children came from the New Hampshire Supreme Court, in *State v. Ray*.³⁵⁹ Significantly, the case did not involve incorrigibility, but a complaint against two minor boys for burglary. The statute permitted a justice of the peace, empowered to order minor defendants to post surety for their appearance in court, to send them instead to the state industrial school for such term up to majority as the judge should think appropriate if he found it in their best interest. Rejecting a contrary Ohio precedent,³⁶⁰ the court held the law unconstitutional. Breaking with the national consensus, it refused to hold that an industrial school was simply part of the state's school system or that the state, acting as *parens patriae*, could detain any youth who needed its discipline. Said the court:

We cannot ignore the fact that in the public estimation the school has always been regarded as a quasi penal institution, and the detention of its inmates or scholars as involuntary and constrained. . . . [T]he fact cannot be overlooked, that the

³⁵⁸ 106 N.Y. at 614, 13 N.E. at 439. Cf. *Reynolds v. Howe*, 51 Conn. 427 (1884) (statute not constitutionally defective for failure to provide father opportunity to be heard in incorrigibility proceeding against son); *Cincinnati House of Refuge v. Ryan*, 37 Ohio 197 (1881) (same, as to hearing involving charge that child is incorrigible, neglected, or homeless, at least where review may be had by habeas corpus).

The courts could be even more stringent in requiring notice to the parents in cases of destitution or parental neglect of young children, where the central issue was parental unfitness. See, e.g., *Van Heck v. New York Catholic Protectory*, 101 N.Y. 195, 4 N.E. 177 (1886) (statutory notice must be given to father that child has been committed to institution on charge of begging, according father opportunity to contest commitment; commitment of child for begging apparently requires finding of parental responsibility, or at least knowledge child is begging); *In re Heery*, 58 N.Y. Sup. Ct. 372 (1889) (notice of hearing must be given to father where four-year-old child is charged with having no home or proper guardianship; legislative intent was not to intervene where parents are temporarily unable to furnish necessaries, but only where they are totally unfit to retain children). But see *Cincinnati House of Refuge v. Ryan*, 37 Ohio 197 (1881).

³⁵⁹ 63 N.H. 406 (1885).

³⁶⁰ *Prescott v. State*, 19 Ohio 184 (1869).

detention of the inmates is regarded to some extent in the nature of a punishment, with more or less of disgrace attached on that account.³⁶¹

The court held that the justice did not have the power to commit youths charged with criminal offenses to the school and that the minor defendants had to be accorded trial by jury.

Since the issue was not before it, the New Hampshire court did not rule on whether the legislature could constitutionally incarcerate incorrigible children in reformatory institutions. Perhaps an institution for wayward children might not be regarded as penal if criminal offenders were not sent there? In dictum, the court hinted at this possibility:

So children of profligate parents, or with vicious surroundings, may be taken from the custody of their natural guardians and committed to the guardianship of those who will properly care for their moral, intellectual, and physical welfare. . . . But this is a power exercised by the state as *parens patriae* in the welfare and interest of its citizens.³⁶²

It may be, then, that New Hampshire would have lined up with other American jurisdictions had the issue of the state's *parens patriae* power over wayward children been squarely presented to it.

Other appellate courts did not raise nagging questions about the constitutionality of laws that authorized incarceration of misbehaving children in the closing years of the nineteenth century. Further, *parens patriae* rationale was frequently invoked to justify removal

³⁶¹ 63 N.H. at 409. To like effect is *Ex Parte Becknell*, 119 Cal. 496, 51 P. 692 (1897), where the California court invalidated a statute under which a grand jury, instead of finding an indictment against a minor accused of a crime, could recommend to the superior court that the accused be committed to the Whittier State School; the court could then order the commitment if convinced the minor was a suitable person for reformatory care. The court discharged the minor, declaring:

As a judgment of imprisonment, the order of the superior court is void. The boy cannot be imprisoned as a criminal without a trial by jury. As an award of guardianship it is equally void, for his parents—his natural guardians—cannot be deprived of their right to his care, custody, society, and services except by a proceeding to which they are made parties, and in which it is shown that they are unfit or unwilling or unable to perform their parental duties.

Id. at 497-98, 51 P. at 693. *Becknell* was disapproved, without being explicitly overruled, in *In re Daedler*, 194 Cal. 320, 327-28, 228 P. 467, 470 (1924), as being out of line with other holdings of the court as to the nature and purpose of reformatory legislation.

³⁶² 63 N.H. at 412. The court may have been referring, however, to the judicial power of intervention in custody disputes rather than to the legislative power of *parens patriae*, as it cited a custody case, *Prime v. Foote*, 63 N.H. 52 (1884), for this proposition.

of young children from parents declared "unfit" by the courts.³⁶³ *O'Connell* was relegated to the dustbin of history, a legal curiosity to be resurrected by twentieth-century critics of the juvenile court's incorrigibility jurisdiction.

Against this tradition of approval of incorrigibility laws, it is not surprising that state courts ratified that jurisdiction when it was incorporated in the new juvenile court laws passed after 1899. The leading case upholding the new juvenile court acts was *Commonwealth v. Fisher*,³⁶⁴ sustaining the Pennsylvania statute.³⁶⁵ That law authorized the new juvenile court to commit "delinquent" children, including criminal law violators and incorrigible children, to reformatory institutions. While the case involved a commitment to the Philadelphia House of Refuge on a felony charge, the court's sweeping opinion justified the state's power to incarcerate incorrigible children as well. Incorporating seventy years of judicial approbation of the *parens patriae* doctrine in child misbehavior cases, the *Fisher* court extended its ambit even further. Although the opinion contributed nothing to an understanding of why the legislature had such total control over the lives of children, other American jurisdictions reviewing juvenile court acts accepted *Fisher* as dogma until *In re Gault* in 1967.³⁶⁶

The *Fisher* court rejected the argument that the state must observe due process in the procedure by which it initiated court proceedings against minors:

To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the Legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state *without any process at all*, for the purpose of subjecting it to the state's guardianship and protection.³⁶⁷

³⁶³ See, e.g., *Kennedy v. Meara*, 127 Ga. 68, 56 S.E. 243 (1906); *Van Walters v. Board of Children's Guardians*, 132 Ind. 567, 32 N.E. 568 (1892); *Farnham v. Pierce*, 141 Mass. 203, 6 N.E. 830 (1886); *Kol v. North Dakota Children's Home Soc'y*, 10 N.D. 493, 88 N.W. 273 (1901).

³⁶⁴ 213 Pa. 48, 62 A. 198 (1905).

³⁶⁵ Act of Apr. 23, 1903, No. 205, § 1, 1903 Pa. Laws 274.

³⁶⁶ 367 U.S. 1 (1967). For cases approving juvenile court acts, citing *Fisher* as authority, see, e.g., *In re Daedler*, 194 Cal. 320, 228 P. 467 (1924); *Matacia v. Buckner*, 300 Mo. 359, 254 S.W. 179 (1923); *In re Turner*, 94 Kan. 115, 145 P. 871 (1915); *Lindsay v. Lindsay*, 257 Ill. 323, 100 N.E. 892 (1913); *In re Sharp*, 15 Idaho 120, 96 P. 563 (1908); *Mill v. Brown*, 31 Utah 473, 88 P. 609 (1907).

³⁶⁷ 213 Pa. at 53, 62 A. at 200 (emphasis added).

The state stepped into the shoes of a child's natural parents, via *parens patriae*, to "shield [a child] from the consequences of persistence in a career of waywardness";³⁶⁸ since a parent need follow no due process temporarily to confine a child in his or her home, the state need not either to take a child into custody.

In response to the argument that the Fisher boy was being denied trial by jury on a criminal charge, the court reiterated the by-then standard argument that the juvenile proceeding involved no trial; it was instead a merciful procedure to save a child from a trial when the child's best interests demanded that he or she not be tried in an adult court. A jury had no role in such a proceeding: "Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it."³⁶⁹ Accepting the child-savers' consistent position since the 1820's, the court agreed that whether a child had committed a particular criminal act or not was irrelevant, if his or her general pattern of behavior demonstrated to the judge that the youth was a potential threat to society.

Similarly, the proposition that placement in a reformatory institution constituted punishment was rejected, whatever the cause of commitment. The court quoted at length from an 1899 Wisconsin case upholding a statute authorizing commitment of "vicious, abandoned, incorrigible, and vagrant children" to the Wisconsin Industrial School for Girls.³⁷⁰ Placement of children in industrial schools, the Wisconsin court had said, involved no restraint on their natural liberty, but only the exercise of the parental restraint and protection to which they were entitled.³⁷¹ In effect, a child had a right to custody, but not to liberty.³⁷²

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 54, 62 A. at 200. *Cf. In re Ferrier*, 103 Ill. 367, 371 (1882), where the court gave as one of its reasons for sustaining the Illinois "Act to aid industrial schools for girls" the fact that the industrial school statute incorporated due process safeguards, including a jury of six, unlike the reform school statute found unconstitutional in *O'Connell v. Turner*. See text accompanying notes 323-26 *supra*.

³⁷⁰ *Wisconsin Indus. School for Girls v. Clark County*, 103 Wis. 651, 79 N.W. 422 (1899).

³⁷¹ *Id.* at 664, 79 N.W. at 427.

³⁷² *Cf.* the resolution passed by the National Council of Juvenile Court Judges at their 1967 annual meeting:

Be it resolved, that the National Council of Juvenile Court Judges understands, and will maintain in courts whenever and wherever it is permitted to do so, the following points of juvenile court law and philosophy:

-
5. Immaturity is the natural and normal condition of childhood. Immaturity is not bad, and it is unreasonable to endeavor to turn children into adults prematurely;

Finally, in a passage with breath-taking implications, the court stated that the juvenile court's decision to commit a child as a "worthy subject for an effort of salvation" was

but an exercise by the state of its supreme power over the welfare of its children, a power under which it can take a child from its father and let it go where it will, without committing it to any guardianship or any institution, if the welfare of the child, taking its age into consideration, can be thus best promoted.³⁷³

The court seemed to imply that there were neither limitations on the substantive grounds by which a child could be deprived of liberty nor restraints on the dispositions the state could invoke once it had decided to "save" the child.

With the *Fisher* decision the early child-savers' hopes had been realized. State power to control the lives of misbehaving children had been sanctioned in the broadest possible terms and had been invested with a missionary quality. In the new juvenile court, child-savers possessed an agency to effect the reformation of predelinquent children more thoroughly and efficiently than the police and magistrate courts of the nineteenth century had been able to do. As the Progressive era dawned, reformers were optimistic that the juvenile court would instill proper moral values in youth, eliminate the scourge of juvenile urban crime, and help banish the spectre of lower-class political dissidence that had haunted Charles Loring Brace.

V. CONCLUSION: TOWARDS THE JUVENILE COURT

Our main purpose has been to demonstrate that well before the invention of the juvenile court, statutes authorizing the state to intervene coercively in the lives of wayward children, whether on grounds of general misbehavior such as "incurability" or specific offenses for youth such as truancy, were prevalent in the United States. Further, courts aggressively implemented these laws, committing sizeable numbers of children who had misbehaved short of violating the criminal law to reformatory institutions, where child reformers sought to erase the effects of corrupt environments and

6. The fundamental right of a child is not to unrestrained liberty, but to custody

18 Juv. Ct. JUDGES J. 107 (1967).

³⁷³ 213 Pa. at 54, 63 A. at 200.

instill acceptable middle-class behavior.

The wayward child laws embodied the reformers' assumption, readily embraced by state appellate courts, that children who engaged in troublesome behavior would inevitably graduate to a life of crime if not restrained, and that to meet this threat the state had a duty to take in hand young people who manifested the warning signs of predicted criminality.³⁷⁴ For the most part, child reformers believed criminality was fostered by the temptations of the cities—taverns, brothels, theaters—and that it bred most prolifically among immigrants and the poor. Hence they stressed isolating children in institutions or, in the case of the New York Children's Aid Society, sending them to live with farming families in the West.

The most difficult problem that reformers faced, one they never really resolved, was whether distinctions should be made among wayward, neglected, and criminal youth for purposes of treatment. All youth, except perhaps the most "depraved" criminal offenders, were regarded as in some sense innocent and capable of being reformed, but some were seen as further along the road to a life of crime than others. The tension centered around wayward children: sometimes it was thought the petty nature of their conduct warranted their placement with neglected children (who themselves were seen as having begun the slide toward crime); sometimes they were regarded as difficult enough to justify placement with young criminal law violators.³⁷⁵ As the nineteenth century progressed, a consensus seemed to emerge that neglected children should be housed in institutions by themselves, although some states felt it would do no harm to place school truants with them.³⁷⁶ Incurrigible children thus found their way to reform schools with criminal law violators, with only an occasional voice arguing that they should be institutionalized separately, or not at all.³⁷⁷ With the notable excep-

³⁷⁴ In 1900, the belief that wayward behavior accurately predicted future criminality was still vigorously held, as the Nebraska Supreme Court demonstrated:

[T]he complaint charged this girl with incorrigibility. Who is more likely to eventually become a criminal than a youth who is so far advanced in following his own will as to have become incorrigible, incapable of being corrected or amended, bad beyond correction, irreclaimable, by those on whom society and the laws place the duty of training him in proper conduct as a member of society?

Scott v. Flowers, 60 Neb. 675, 682, 84 N.W. 81, 82 (1900).

³⁷⁵ See text accompanying notes 95-110 *supra*.

³⁷⁶ See text accompanying notes 124 & 267 *supra*.

³⁷⁷ See text accompanying notes 300-07 *supra*. The debate about mixing criminal law violators and status offenders continues. The New York Court of Appeals has held that PINS children may not be committed to the same institution as delinquents. *C. v. Redlich*, 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973). For the response of New York authorities

tion of the *O'Connell* court and Justice Redfield of Vermont, there was scant opposition to the dominant view that the state must reform misbehaving youth to protect society from their anticipated adult criminality. Since preventive detention of this sort would likely have been pronounced unconstitutional if exercised towards adults,³⁷⁸ the wayward child laws emerge as a crucial factor in the formation of a deep gap between young people and adults in terms of the rights and privileges they exercise in American society, a formal separation that was by no means implicit in pre-1820 America.

Against this background, it is plain that whatever innovations juvenile court laws may have introduced in court procedures, diag-

to this ruling, see INSTITUTE OF JUDICIAL ADMINISTRATION, *THE ELLERY C. DECISION: A CASE STUDY OF JUDICIAL REGULATION OF JUVENILE STATUS OFFENDERS* (1975).

³⁷⁸ It might be argued that vagrancy laws performed the same function vis-a-vis adults that wayward child laws did towards children, since both punished a status and provided for "preventive detention" of those thought likely to commit crime, and that therefore wayward child laws did not discriminate against children. It is true, as Herbert Packer has noted, that the main purpose of vagrancy laws was to incarcerate those considered likely to commit offenses unless restrained, H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 98-99 (1968), and vagrancy laws were not finally invalidated until the United States Supreme Court's decision in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). We have argued above that the purpose of wayward child laws was to prevent misbehaving children from developing into full-fledged criminals.

While the purposes of the vagrancy and wayward child laws overlapped to some extent, there were also fundamental distinctions that rendered the wayward child laws intrusive of personal liberty in ways that would not have been tolerated for adults. First, vagrancy, a criminal offense, usually carried a penalty of no more than six months confinement. See, e.g., 1 N.Y. REV. STAT. pt. 1, ch. 20, tit. 2, § 1 (1829); Frankfurter & Corcoran, *supra* note 47, at 983-1019 app. By contrast, wayward minor offenses, not regarded as criminal, could lead to loss of a child's liberty for his or her minority.

More basically, whereas vagrancy laws punished those whom it was feared would commit crimes imminently, wayward child laws operated on the assumption that the child *might* commit a crime *some day* if his character were not reformed and thus punished behavior even further removed from the commission of crime. Further, under wayward child laws more undesirable personality traits rather than conduct might be penalized, or alternatively conduct so trivial that it would not have been cognizable under vagrancy categories. The *McKeagy* court in Pennsylvania recognized the latter distinction, 1 Ashmead 248 (Phila. C.P. 1831), when it overturned the vagrancy conviction of a boy the court considered merely "refractory." See text accompanying notes 62-71 *supra*. Finally, as broad and indefinite as the concept of vagrancy might be, terms like "incorrigible," "vicious," and "ungovernable" were even vaguer, allowing a court to incarcerate a child who in any significant way failed to meet adult expectations. (Of course, a child might be declared wayward *because* he was a vagrant, and some states, such as New York, conceivably stretched the concept of vagrancy to sweep in the kinds of trivial misconduct that other states punished under incorrigibility laws.) In requiring children to conform to the shifting and arbitrary requirements of another class of the population, i.e., adults, the wayward child laws imposed a more sweeping regulation of behavior than did the vagrancy laws, which in all probability would not have been countenanced had it been directed towards adults under the criminal law.

nostic techniques, and dispositional alternatives,³⁷⁹ these laws did not originate the status offense jurisdiction, although they may have expanded it. While the theory and practice of the juvenile court are beyond the scope of this essay,³⁸⁰ it may be helpful to identify several ways in which the court followed past tradition.

First, and most obviously, juvenile court statutes maintained the status offense jurisdiction itself. By 1925 there were juvenile courts of varying descriptions in all but two states, and most of these had jurisdiction over wayward children.³⁸¹ While the laws sometimes spelled out in great detail activities that could lead to an adjudication of delinquency,³⁸² youths could have been punished for the same kinds of conduct before 1900 under general incorrigibility laws or under statutes proscribing particular immoral activities.³⁸³ The continuing existence of status offense statutes has meant that much of the juvenile court's clientele to the present day has consisted of children petitioned on waywardness charges.³⁸⁴

Second, the judges who took charge of the early juvenile courts fully accepted the nineteenth-century doctrine that wayward behavior predicted future criminality. As Judge Ben Lindsey of the Denver Juvenile Court put it,

³⁷⁹ The extent to which juvenile court theory and practice were innovative has been questioned. Massachusetts introduced official probation in 1869, several states had experimented with separate, informal court hearings in the latter part of the 19th century, and the notion of family treatment of offending children had been a leitmotif of child reform since the 1850's. See A. PLATT, *supra* note 10, at 98; Fox, *supra* note 13, at 1229. Other writers, while acknowledging that the juvenile court consolidated past practices, stress its distinctive contributions: its emphasis on probation as the treatment of choice, its preference for separate detention facilities for children, and its insistence—at least in theory—that each child's case be given individualized attention to determine the causes of delinquency and the appropriate remedy. See S. SCHLOSSMAN, *supra* note 13, at 58-62; Schultz, *The Cycle of Juvenile Court History*, 19 CRIME & DEL. 457, 463-67 (1973).

³⁸⁰ For detailed discussions of the juvenile court in practice, see E. RYERSON, *supra* note 13, ch. 4; S. SCHLOSSMAN, *supra* note 13, chs. 8-9.

³⁸¹ For a summary of juvenile court laws existing as of 1910, see RUSSELL SAGE FOUNDATION, *JUVENILE COURT LAWS IN THE UNITED STATES* (H. Hart ed. 1910).

³⁸² See note 11 *supra*. See also Act of May 11, 1901, § 2, 1901 Ill. Laws 141.

³⁸³ See text accompanying notes 236-57 *supra*.

³⁸⁴ Platt records that in the earliest years of the Cook County Juvenile Court, over 50% of the delinquency cases involved charges of "disorderly behavior," "immorality," "vagrancy," "truancy," and "incorrigibility." A. PLATT, *supra* note 10, at 140. More recently, a national study estimated that approximately 25% of the delinquency cases heard by juvenile courts in America involved status offenders. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 4* (1967) [hereinafter cited as *TASK FORCE REPORT*]. It has also been estimated that cases of children engaging in noncriminal misbehavior represent from one-third to one-half of the workload of juvenile courts today. *STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR*, *supra* note 3, at 1.

[The juvenile court's] purpose is . . . to prevent crime before crime is actually committed . . . [The court] believes in what the statistics show, that the inception of crime is in the waywardness of misdirected children. It would take care of these children in adolescence, when character is plastic and can be molded as clay in the potter's hands. It would help to form character and not postpone the evil day in a bungling attempt to reform it.³⁸⁵

Probably few juvenile court judges today would dissent from these views.³⁸⁶

The juvenile court did witness some movement away from the rigid condemnation of the poor, including the view held by nineteenth-century reformers that the poor were inevitably condemned to become criminals.³⁸⁷ Further, while most Progressive reformers continued to emphasize environmental causes of delinquency, there was a growing tendency to stress psychological maladjustment of the child, caused by his or her own mental deficiencies.³⁸⁸ The clinic, even the hospital, became the favored metaphor of the court,³⁸⁹ and the new discipline of psychology was harnessed to

³⁸⁵ Lindsey, *The Juvenile Court of Denver*, in INTERNATIONAL PRISON COMMISSION, CHILDREN'S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS 30-31 (1904) [hereinafter cited as CHILDREN'S COURTS].

³⁸⁶ See sources cited in note 6 *supra*. See also the vigorous defense of the status offense jurisdiction by Judge Robert L. Drake, in which he argues, *inter alia*, that

[t]he proposal to eliminate status offenses misinterprets the fundamental reason for increasing crime, and, rather than decreasing it, will result in a further increase. It limits society's response to treatment of crime as a symptom, while accentuating its true cause: The widespread disease in contemporary society of liberation without responsibility and family breakdown. Its end result is unlimited permissivism.

Drake, *Elimination of Status Offenses: The Myth, Fallacies, and More Juvenile Crime*, 26 JUV. JUST. 33, 34 (1978).

At its July 17, 1975, meeting, the National Council of Juvenile Court Judges voted to retain juvenile court jurisdiction over status offenses, on the grounds that "[antisocial and self-destructive adolescent] conduct is contrary to the Welfare of the child, hinders his development to responsible adulthood, impairs the parent's ability to guide and regulate the child's behavior, and may also violate the rights of the community . . ." Arthur, *Should Status Offenders Go to Court?*, in BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 245 (L. Teitelbaum & A. Gough eds. 1977). Judge Arthur also reports that in a recent poll 89% of juvenile court judges surveyed (he does not give the number of respondents) felt status offenses should not be removed from the court's jurisdiction. *Id.* at 244.

Social scientists have expressed doubt, however, that we possess the diagnostic techniques to make reliable predictions about delinquency or criminality in juveniles. See E. SCHUR, RADICAL NON-INTERVENTION: RETHINKING THE DELINQUENCY PROBLEM 46-51 (1977).

³⁸⁷ See S. SCHLOSSMAN, *supra* note 13, at 191.

³⁸⁸ See E. RYERSON, *supra* note 13, ch. 5; S. SCHLOSSMAN, *supra* note 10, at 66-69.

³⁸⁹ See A. PLATT, *supra* note 10, at 140-42. See also the remarks of Judge Richard S. Tuthill,

diagnose and treat the child.³⁹⁰ Though the perceived causes of youthful deviance might change, the consensus remained firm that the legal system must attempt to change noncriminal misbehavior, whether a youth wanted help or not.

Finally—although here we must be cautious—some juvenile courts continued the nineteenth-century practice of committing sizeable numbers of wayward children to reformatory institutions.³⁹¹ While we do not yet know much about the commitment practices of juvenile courts in their early years and more research needs to be done, there is evidence that the courts varied widely in their resort to institutionalization as a disposition for status offenders. For example, juvenile courts in Ohio³⁹² and New York City³⁹³ sent large

first judge of the Cook County, Illinois, Juvenile Court:

Facilities in the way of schools . . . are needed . . . a permanent home and school in the country where children can live under the guidance of a good "house mother" and "house father". . . These children are suffering from disease, contagious diseases, incorrigibility, disobedience, and defiance of authority, and criminal misconduct. For such a hospital—such a school as I have spoken of—is needed as much as are hospitals for curing physical diseases. These delinquent children should be placed in such hospitals where they can be carefully watched, treated, and trained, not for a period of months but for a year, or two, or three years, if need be, until permanent reclamation is accomplished and they are adjusted to a better life.

Tuthill, *History of the Children's Court in Chicago*, in *CHILDREN'S COURTS*, *supra* note 385, at 5.

³⁹⁰ See R. MENNEL, *supra* note 28, ch. 6; E. RYERSON, *supra* note 13, chs. 4-5.

³⁹¹ Platt contends that "the child savers . . . recommended increased imprisonment as a means of removing delinquents from corrupting influences." A. PLATT, *supra* note 10, at 135. Schlossman disagrees, arguing that Progressive reformers sought to rehabilitate children in their own homes and citing Milwaukee Juvenile Court statistics as evidence. S. SCHLOSSMAN, *supra* note 13, at 60, 203 app., & 232 n.30. It should be noted that Judge Ben Lindsey, perhaps the most influential of the early juvenile court judges, did not disdain reform schools. He wrote:

The industrial school is doing splendid work. It is no longer looked upon as a reform school. It no longer has about it the odor of degradation. . . There should be no hesitation to send a boy or girl to an institution when it is a proper case. I rather fear the danger of not sending them there when I ought. These schools are doing work as important to the State as your universities.

Lindsey, *supra* note 385, at 30. See also the remarks of Judge Tuthill, *supra* note 389.

³⁹² In 1907, by which time all commitments to the Ohio Boys' Industrial School were coming through the juvenile courts (except for a few committed by United States courts for violation of federal laws), according to the superintendent of the institution, Fifty-first Annual Report of the Ohio Boys' Industrial School 4 (1906), there were 120 boys committed for readily identifiable status offenses (16% of 741 total admissions). The number may well have been higher, since the school's statistics include vague categories (such as 74 boys committed for "delinquency" or "juvenile-delinquent") which could well have included status offenders. Fifty-second Annual Report of the Ohio Boys' Industrial School 18-20 (1907). The superintendent reported that there had been a steady increase in the school's population, due in part to "the thorough manner in which the delinquent youth of the state are being looked after by the Juvenile Courts." Fifty-first Annual Report of the Ohio Boys' Industrial School 4

numbers of wayward children to reform schools before World War I, while the juvenile courts of Milwaukee³⁹⁴ and Boston³⁹⁵ did not. Thus, while probation within the child's own family may have been "the essential condition of juvenile justice reform,"³⁹⁶ this new dispositional ideal did not prevent some juvenile court judges from incarcerating incorrigible children as their nineteenth-century predecessors had done.³⁹⁷

Our present-day system of state control over misbehaving children thus has a long lineage, extending back unchanged in its fundamental aspects to the Jacksonian period of American history. It is a system based primarily on an assumed progression from youthful misbehavior to criminal activity that requires and justifies court

(1906). In 1914, of 870 total commitments to the school, 213 were for incorrigibility (24%), 87 for being a "juvenile disorderly" person (10%), and 56 for truancy (6%). Fifty-ninth Annual Report of the Ohio Boys' Industrial School 23 (1915).

³⁹³ In 1915, the Children's Court of the City of New York committed 2012 children to institutions: 145 were committed as "ungovernable" (7%), 152 as "disorderly" (8%), 43 as "in danger of becoming morally depraved" (2%, all girls), and 165 as truants (8%). By contrast, 2754 children were placed on probation: 226 were "ungovernable" (8%), 236 were "disorderly" (9%), 65 were "in danger of becoming morally depraved" (2%, all girls), and 133 were truants (5%). Annual Report of the Children's Court of the City of New York 19 (1915).

³⁹⁴ See S. SCHLOSSMAN, *supra* note 13, at 203 app., table 3. In 1910, for example, of 731 new male delinquency cases heard by the Milwaukee Juvenile Court, only 22 boys were committed to the Wisconsin state reform school. *Id.* The figures are not broken down by causes of commitment, but in the same year, 13% of the children brought before the Milwaukee Juvenile Court were charged with incorrigibility, 21% were charged with being disorderly persons, and 4% with truancy. *Id.* at 205 app., table 5. Between 1905 and 1916 the average number of youths committed each year was 30, while as many as 1,000 children were put on probation each year beginning in 1910. *Id.* at 154-55.

³⁹⁵ One reason that the Boston Juvenile Court did not commit wayward children to reform schools is that its enabling statute did not authorize it to do so. A "wayward child" was defined in the statute as one "growing up in circumstances exposing him to lead an immoral, vicious or criminal life." Act of May 24, 1906, ch. 413, § 1, 1906 Mass. Acts 426. Wayward children could be put on probation or dealt with as neglected children. *Id.* § 8. "Delinquent" children, on the other hand, defined as criminal law violators, could be sent to a reformatory institution. *Id.* In 1915, the Boston Juvenile Court did commit eight boys to the Lyman Industrial School as "stubborn" and one as a "runaway" out of a total of 43 boys it committed to the school. MASSACHUSETTS STATE BOARD OF PRISON COMMISSIONERS, ANNUAL REPORT No. 15, at 148-49 (1915). (Stubbornness and running away from home were still technically crimes under Massachusetts law and thus were offenses for which one could be committed.)

³⁹⁶ Schultz, *supra* note 379, at 465.

³⁹⁷ Institutionalization of wayward children continues in many states today, although estimates differ as to numbers. The President's Commission on Law Enforcement and the Administration of Justice estimated in 1967 that status offenders accounted for between 25 and 30% of the population of state institutions for delinquent children. TASK FORCE REPORT, *supra* note 384, at 4. The National Council on Crime and Delinquency has estimated that there are more than 66,000 young people in state training schools or other institutions, and that between 45 and 55% of them are status offenders. M. RECTOR, PINS: AN AMERICAN SCANDAL (1974).

supervision of wayward young people, although our legal system would not tolerate such "preventive reformation" of adults. The system further assumes that court personnel can identify the symptoms that warrant imposition of legal controls—and screen out the cases that do not—and that there are effective treatment programs that can modify a youth's behavior to accord with desired social norms, although such programs are compulsorily imposed. The system assumes, finally, that it is the youth's "deviant" behavior that needs to be changed, and not some external factor such as his or her family situation, school, poverty, or general sense of powerlessness. Whether any of these assumptions are valid today, if they ever were, is an urgent question for policy-makers.

APPENDIX

Number of Children Committed to Houses of Refuge and Reform Schools
for Selected Years of the Nineteenth Century

Table I

New York House of Refuge

	1863	1865	1868	1870	1880	1890	1900
Vagrancy	190	320	222	66	128	50	36
Disorderly	— ^a	—	50	101	175	94	162
Other Wayward	—	—	—	—	12	3	18
Petit Larceny	278	363	281	192	189	99	150
Serious Felony ^b	58	33	43	40	23	16	37
Other Crime	12	14	7	7	20	13	30
Total	538	730	603	406	547	275	433

^aIndicates no cases in this category.

^bIn this and subsequent tables, "serious felony" includes grand larceny, burglary, rape, arson, robbery, and homicide, including attempted crimes.

Source: Annual Reports of the Society for the Reformation of Juvenile Delinquents.

Table II

Massachusetts State Reform School (Lyman School for Boys)

	1849	1854	1868	1880	1893	1900
Stubbornness	106	171	35 ^a	29	26	52
Idle & Disorderly	17	10	—	—	—	—
Vagrancy	23	22	7	2	9	4
Other Wayward	3	1	10	2	1	7
Larceny	109	108	21	42	45	72
Serious Felony	3	9	1	2	2	3
Other Crime	50	22	41	18	63	35
Total	311	343	115	95	146	173

^aIncludes two children committed for "disobedience."

Source: Annual Reports of the Massachusetts State Reform School, Annual Reports of the Massachusetts Primary and Reform Schools, Annual Reports of the Lyman and Industrial Schools.

Table IIIMassachusetts State Industrial School for Girls

	1880	1890	1900
Stubbornness	17	33	67
Vagrancy	1	2	1
Lewdness	5	5	3
Other Wayward	2	1	4
Larceny	5	11	19
Other Crime	—	4	7
Total	30	56	101

Source: Annual Reports of the Massachusetts Primary and Reform Schools.

Table IVConnecticut State Reform School

	1851-55 (4 yrs.)	1870	1881	1890-91 (12 mos.)	1900
Stubbornness	36	—	—	—	—
Vagrancy	41	3	14	6	1
Truancy	—	40	28	5	23
Incorrigibility	—	—	70	65	89
Other Wayward	—	—	6	7	—
Theft	81	89	49	44	51
Serious Felony	7	1	6	12	20
Other Crime	19	11	13	11	6
Boarders	—	3	3	1	—
Total	184	147	189	151	190

Source: Annual Reports of the Connecticut State Reform School; Annual Reports of the Connecticut School for Boys.

Table VHouse of Refuge of Western Pennsylvania
(Pennsylvania Reform School)

	1861	1865	1870	1881-82 (2 yrs.)	1895-96 (2 yrs.)	1901-02 (2 yrs.)
Incorrigibility	59	56	80	182	497	506
Vicious Conduct	20	26	10	42	—	—
Vagrancy	10	31	17	36	6	5
Larceny	11	30	19	36	45	33
Serious Felony	—	2	1	3	2	9
Other Crime	1	1	1	8	12	8
Total	101	146	128	307	562	561

Source: Annual Reports of the House of Refuge of Western Pennsylvania;
Biennial Reports of the Pennsylvania Reform School.

Table VIBaltimore House of Refuge

	1856	1860	1865	1870	1878	1889	1900
Incorrigible Conduct	79	56	77	79	51	64	61
Vicious Conduct	37	8	17	26	2	3	4
Vagrancy	58	46 ^a	25	9	4	19	14
Stealing (Larceny)	11	25	31	1	7	8	9
Other Crime	—	5	1	—	1	—	—
Boarders	—	5	20	16	2	2	1
Miscellaneous	—	—	—	—	—	5	13
Total	185	145	171	131	67	101	102

^aIncludes eleven commitments for "street begging."

Source: Annual Reports of the Baltimore House of Refuge.

Table VII

Ohio Reform Farm School

	1861	1867	1870	1874	1878	1880	1900
Incorrigibility	39	44	58	57	140	210	32
Vagrancy	24	2	5	6	12	8	13
Truancy	—	—	—	—	—	—	87
Juvenile Disorderly	—	—	—	—	—	—	52
Petit Larceny	25	40	41	81	63	23	164
Serious Felony	8	24	26	23	29	23	28
Other Crime	4	2	4	12	19	8	72
Miscellaneous	9	—	—	—	19	—	59
Total	109	112	134	179	282	272	507

Source: Annual Reports of the Ohio Reform School.

Table VIII

Cincinnati House of Refuge

	1863	1869	1881 ^a	1885	1890
Incorrigibility	54	57	12	66	92
Vagrancy	34	47	6	4	2
Other Wayward	—	—	4	9	9
Homeless	—	—	15	61	55
Without Suitable Home	—	—	71	30	23
Petit Larceny	31	24	50	46	51
Serious Felony	—	3	—	8	11
Other Crime	8	2	21	66	40
Miscellaneous	4	7	20	—	—
Total	131	140	269^a	290	284

^aThe 1881 Annual Report of the Cincinnati House of Refuge evidently contains a misprint in the statistics for categories of offenses, as they do not add up to the total of 269, a figure for total commitments confirmed elsewhere in the Report.

Source: Annual Reports of the Cincinnati House of Refuge.

Table IX
Cleveland House of Refuge

	1880 ^a	1884	1889-90 (16 mos.)
Incorrigibility	54	30	22
Vagrancy	11	15	3
Other Wayward	6	2	2
Petit Larceny	22	20	13
Other Crime	8	9	9
Homeless	5	—	—
Total	107^a	76	49

^aThe 1880 Annual Report of the Cleveland Workhouse and House of Refuge evidently contains a misprint in the statistics for categories of offenses, as they do not add up to 107, a figure for total commitments confirmed elsewhere in the Report.

Source: Annual Reports of the Cleveland Workhouse and House of Refuge.

Table X
Indiana House of Refuge

	1879	1890	1901
Incorrigibility	31	130	111
Vagrancy	5	1	4
Truancy	—	—	4
Petit Larceny	13	52	74
Serious Felony	13	41	25
Other Crime	7	9	8
Miscellaneous	38	—	—
Total	107	233	226

Source: Annual Reports of the Indiana House of Refuge.

Table XIMichigan Reform School (Industrial Home for Boys)

	1885-86	1890-91	1900-01
Truancy	58	99	140
Vagrancy	31	1	1
Other Wayward	—	3	14
Larceny	87	119	124
Serious Felony	4	3	4
Other Crime	15	16	10
Miscellaneous	35	27	37
Total	230	268	330

Source: Biennial Reports of the Michigan Reform School; Biennial Reports of the Industrial Home for Boys.

Table XIIMichigan Industrial Home for Girls

	1892	1894-96	1898-1900
Wayward & Unmanageable	7	14	10
Truancy	16	37	32
Disorderly Conduct	29	68	69
Other Wayward	4	9	14
Larceny	19	28	28
Serious Felony	—	1	4
Prostitution	9	24	38
Other Crime	2	—	4
Total	86	181	199

Source: Biennial Reports of the Michigan Industrial Home for Girls.

