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# Deinstitutionalization Of Status Offenders: In Perspective

Robert W. Sweet, Jr.\*

## I. INTRODUCTION

This paper traces the historical development of the deinstitutionalization of status offenders, culminating in the federal Juvenile Justice and Delinquency Prevention Act of 1974,<sup>1</sup> its amendments, and its implementation by the Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice. The paper shows how this change in juvenile justice law, policy and practice is part of a larger reform movement in the administration of juvenile justice.

## II. TOWARDS A JUVENILE JUSTICE SYSTEM

When the first American juvenile court was established at the close of the nineteenth century, laws penalizing youth for delinquent behavior had been on the books for more than two centuries.<sup>2</sup> In John Winthrop's "City upon a Hill," the Massachusetts Bay Colony, where "the most important source of Puritan legal thinking was the Bible,"<sup>3</sup> a 1654 statute provided for public flogging of children dem-

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\* President Bush named Mr. Sweet Administrator of the Office of Juvenile Justice and Delinquency Prevention (OJJDP), United States Department of Justice, on April 5, 1990. Mr. Sweet's current responsibilities include the development and implementation of approximately 50 major discretionary programs covering broad areas, including gang violence, drug abuse, privatization, school dropouts, and missing and exploited children. Mr. Sweet received his B.A. in English from the University of Maine and has continued post-graduate studies at the University of New Hampshire and Brandeis University.

1. 42 U.S.C. §§ 5601-5778 (1988).

2. The earliest known law in America relating to delinquent children was passed in 1641 by the Massachusetts Bay Colony. See W. SANDERS, *JUVENILE OFFENDERS FOR A THOUSAND YEARS: READINGS FROM ANGLO-SAXON TIMES TO 1900*, at 317 n.1 (1970). As early as the fifth century B.C., the Twelve Tables provided for lesser penalties for children by reason of their immaturity. For a discussion of early concepts of child crime, see B. GRIFFIN & C. GRIFFIN, *JUVENILE DELINQUENCY IN PERSPECTIVE* 5-9 (1978).

3. K.T. ERIKSON, *WAYWARD PURITANS* 56 (1986).

onstrating disrespect for their parents.<sup>4</sup> Common law principles had long established that a child below the age of seven lacked the ability to form criminal intent (*mens rea*) and, hence, to commit a culpable criminal act.<sup>5</sup>

### III. FROM HOUSE OF REFUGE TO REFORM SCHOOL

Specialized institutions for delinquent youth preceded the juvenile court by nearly seventy-five years. "Houses of Refuge" were founded in New York (1825),<sup>6</sup> Boston (1826),<sup>7</sup> and Philadelphia (1829)<sup>8</sup> for the rehabilitation of "wayward" youth who had yet to commit a serious crime, but whose "life circumstances" were believed to portend such a path.<sup>9</sup> They were followed by state reform, industrial, and

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4. L. EMPEY, *AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION* 76 (1978). "In actual practice, however, courts and juries were often lenient towards the young. Children were often acquitted after a nominal trial or pardoned if found guilty." *Id.* The first law against contributing to the delinquency of a minor was enacted by the General Court of Massachusetts in 1672. The law made it a criminal offense to "lure children away from work or studies." For a review of colonial treatment of juvenile crime, see B. GRIFFIN & C. GRIFFIN, *supra* note 2, at 9-11. For a contemporaneous account, see SANDERS, *supra* note 1, at 317-20.

5. See R. PERKINS, *CRIMINAL LAW* 729-32 (1957). "Between the ages of eight, and fourteen, they might be presumed innocent unless proven otherwise. . . . Anyone over the age of fourteen, presumably, was judged as an adult, although some colonies made exceptions." L. EMPEY, *supra* note 4, at 75.

6. Kinds of Punishment that May be used in the House of Refuge:

- (1.) Privation of play and exercise.
- (2.) Sent to bed supperless at sunset.
- (3.) Bread and Water, for breakfast, dinner, and supper.
- (4.) Gruel without salt for breakfast, dinner, and supper.
- (5.) Camomile, boneset, or bitter herb tea for breakfast, dinner and supper.
- (6.) Confinement in solitary cells.
- (7.) Corporal punishment, if absolutely necessary, or if awarded by a jury of the boys, and approved.
- (8.) Fetters and handcuffs, only in *extreme cases*.

Hart, *Documents Relative to the House of Refuge Instituted by the Society for the Reformation of Juvenile Delinquents in the City of New-York, in 1824* (1832), in W. SANDERS, *supra* note 2, at 348.

7. "A boy shall not be deprived of his food more than one meal for the same fault, nor in ordinary cases shall he be kept on bread and water for more than three or four days." City of Boston, *Report of the Standing Committee of the Common Council on the Subject of the House of Reformation for Juvenile Offenders* (1832), in W. SANDERS, *supra* note 2, at 362.

8. Some have supposed the restraints imposed in this establishment, were inconsistent with the liberty of the citizen, and especially with that clause of the Constitution, which secures to every one a trial by jury. . . .

The House of Refuge is intended to obviate not merely the sentence of infamy and pain, which follows a trial and conviction, but to prevent the trial and conviction itself.

Committee of the Board of Managers of the Philadelphia House of Refuge, *The Design and Advantages of the House of Refuge* (1835), in W. SANDERS, *supra* note 2, at 366 (emphasis in original).

9. By 1860, sixteen such institutions had been founded in the United States. For a contemporaneous account of the Houses of Refuge and their rationale, see G. DE BEAUMONT AND A. DE TOCQUEVILLE, *DU SYSTÈME PÉNITENTIAIRE AUX ÉTATS UNIS* (1883). See also W. SANDERS, *supra* note 2, at 341-72, 388-91.

training schools<sup>10</sup> designed to inculcate discipline and the work skills and habits for "an honest trade" in Massachusetts (1847),<sup>11</sup> New York (1849), and Maine (1853).

The reformatory plan embodied the following principles [among others]: (1) Young offenders must be segregated from the corrupting influences of adult criminals. (2) "Delinquents" need to be removed from their environment and imprisoned for their own good and protection.<sup>12</sup> Reformatories should be guarded sanctuaries . . . . (3) "Delinquents" should be assigned to reformatories without trial and with minimal legal requirements. Due process is not required because reformatories are intended to reform and not to punish. (4) Sentences should be indeterminate, so that inmates are encouraged to cooperate in their own reform and recalcitrant "delinquents" are not allowed to resume their criminal careers. (5) Reformation should not be confused with sentimentality . . . .<sup>13</sup>

The ideal of the new "Age of Treatment" was expressed most succinctly by Zebulon Brockway, Superintendent of New York's Elmira Reformatory, who wrote, "[r]eformation is socialization of the anti-social by scientific training while under completest governmental control."<sup>14</sup>

Reform schools, like prisons before them, were hailed as humane, progressive innovations. However, many were, "in reality, juvenile prisons, with prison bars, prison cells, prison garb, prison labor,

10. These three types of schools were very similar in practice; it was the terminology that evolved. "The industrial schools can be considered to have been somewhat successful, since reform schools began to call themselves industrial schools and, when that name became suspect, training schools. These institutions nevertheless remained under criticism for their harsh custodial treatment of children." B. GRIFFIN & C. GRIFFIN, *supra* note 2, at 17.

11. One rationale was economical.

It can hardly be considered as admitting of a query which will be the most economical for the State—to place herself at once *in loco parentis*, assume the burden; support and train them for useful stations when they shall reach their majority, or leave them in their present neglect and viciousness, to become inevitably the prodigals of her court house, and the population of her jails.

*First Annual Report of the Trustees of the State Industrial Training School for Girls, at Lancaster* (Boston 1857), in W. SANDERS, *supra* note 2, at 388. The first reform or training school was the Lyman School for Boys, which opened in Westboro, Massachusetts in 1846.

12. "There is no conflict between the state and the child. The state accepts the child into its protection and seeks to help the child to grow into a useful citizen." Schramm, *Philosophy of the Juvenile Court*, in *THE PROBLEM OF DELINQUENCY* 272 (S. Glueck ed. 1959) See also Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 10 ("[The delinquent] is society's child, and therefore the interests of the state and the child do not conflict but coincide.").

13. A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 54 (1969).

14. A. PLATT, *supra* note 13, at 67 (quoting Z. BROCKWAY, *FIFTY YEARS OF PRISON SERVICE* 308-09, 393 (1912)). For biographical information regarding Brockway, see *id.* at 47-48.

prison punishments and prison discipline."<sup>15</sup>

Reform schools, however, differed from prisons in their practice of indeterminate sentences. As Enoch Wines,<sup>16</sup> Secretary of the New York Prison Association, and Theodore Dwight, the first Dean of Columbia Law School, leading proponents of the reformatory plan, advised the New York state legislature in 1867:

The ultimate aim of penal policy was reformation of the criminal, which could only be achieved "by placing the prisoner's fate, as far as possible, in his own hand, by enabling him, through industry and good conduct to raise himself, step by step, to a position of less restraint . . ."<sup>17</sup>

#### IV. OF LAWS AND COURTS

As juvenile detention centers permeated America, new laws were enacted. By 1870, eighteen states institutionalized youths for "wayward behavior" either by constituting it as a criminal offense (*e.g.*, Massachusetts, New Hampshire, Ohio) or by broadening the committal grounds for noncriminal conduct (*e.g.*, Connecticut, Kentucky, Louisiana, New York).<sup>18</sup>

As the numbers of juvenile institutions and their involuntary inhabitants proliferated, challenges to state authority over unruly children were rare and largely procedural in nature. They generally fell on deaf judicial ears.<sup>19</sup>

An exception to the rule was the 1870 Illinois Supreme Court decision in *People ex rel. O'Connell v. Turner*,<sup>20</sup> which found that a child's right to liberty could not be infringed for any reason without

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15. H. HART, PREVENTATIVE TREATMENT OF NEGLECTED CHILDREN 11 (1910).

In our old buildings we had cells wherein each boy was locked up for the night. I confess that with all my endeavors to make myself believe that these boys were not prisoners, that the building was not a prison, that I was not a jailer, were utterly unavailing. In vain did I tell the boys that after I had locked them in, I should go and lock myself in. But, oh, says one of the discerning ones, "Mr. Nichols, you hold the keys."

Rev. D.B. Nichols, Superintendent, *Second Annual Report of the Officers of the Chicago Reform School . . . for the Year Ending November 30, 1857* (Chicago: 1857), in W. SANDERS, *supra* note 2, at 393 (emphasis in original).

16. For biographical data on "the foremost American authority on reformatories and institutions for children prior to the twentieth century," see A. PLATT, *supra* note 13, at 48-50. Enoch Wines' son Frederick was a significant penologist in his own right.

17. M. GRUNHUT, PENAL REFORM 90 (1948).

18. Zatz, *Problems and Issues in Deinstitutionalization: Laws, Concepts, and Goals*, in NEITHER ANGELS NOR THIEVES: STUDIES IN DEINSTITUTIONALIZATION OF STATUS OFFENDERS 19 (J. Handler & J. Zatz eds., 1982).

19. For a typical response, see *Ex parte Crouse*, 4 Whart. 2 (1838)

Where reformation, and not punishment, is the end, . . . may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by *parens patriae*, or common guardian of the community? . . . [W]here they [parents] are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable one.

*Id.*

20. 55 Ill. 280 (1870).

due process of law. Heretofore, when accused of committing children without proof of crime or due process, those incarcerating children customarily claimed that their professed rehabilitative goals did not require such measures because restraint of liberty was required for treatment. The Illinois Supreme Court, however, questioned the beneficent mission of such coercive state intervention and held that the wayward child's liberty was as precious as that of the adult criminal's.<sup>21</sup>

While subsequent decisions reaffirmed the judicial norm,<sup>22</sup> the *Turner* court's "exception" was limited in scope. It did not abrogate the doctrine of *parens patriae*,<sup>23</sup> "the best known source of the idea of the juvenile court."<sup>24</sup>

## V. THE JUVENILE COURT

Indeed, it was the Illinois state legislature that launched "the most

21. Executive clemency can not open the prison doors, for no offense has been committed. The writ of *habeas corpus*, a writ for the security of liberty, can afford no relief, for the sovereign power of the State, as *parens patriae* has determined the imprisonment beyond recall. Such a restraint upon natural liberty is tyranny and oppression. If, without crime, without 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. . . . Even criminals can not be convicted and imprisoned without due process of law . . . .

*Id.* at 286-87.

22. It is insisted that the law under which the proceeding was had is unconstitutional . . . in violation of the Bill of Rights . . . provision that no person shall be deprived of life, liberty, or property without due process of law, and *The People v. Turner*, 55 Ill. 280, is relied upon . . . in this respect. . . .

It is not natural but civil liberty of which a person may not be deprived without due process of law. . . .

We find here no more than such proper restraint which the child's welfare and the good of the community manifestly require. . . .

*In re Ferrier*, 103 Ill. 367, 370, 373 (1882) See also *Ex parte Ah Peen*, 51 Cal. 280 (1876); *Angello v. People*, 96 Ill. 209 (1880); *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905).

23. As *parens patriae*, the state, substituting for the king, invested the juvenile court with the power to act as a parent of the child. The judge was to assume a fatherly role, protecting the juvenile in order to cure and save him. The juvenile court withheld from the child the procedural safeguards granted to adults because it viewed him as having the right to custody rather than the right to liberty, and juvenile proceedings were civil, not criminal.

Reasons, *Gault: Procedural Change and Substantive Effect*, 16 CRIME & DELINQ. 163, 164 (1970). The principle of *parens patriae* evolved from the English courts of chancery or equity in *Eyre v. Shaftsbury* (1772). *Id.* at 164 n.3.

24. TASK FORCE ON JUVENILE DELINQUENCY, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME; REPORT ON JUVENILE JUSTICE AND CONSULTATION PAPERS 2 (1967).

significant advance in the administration of justice since the Magna Charta<sup>25</sup> when it passed the Juvenile Court Act in 1899.<sup>26</sup> The Act and its amendments brought cases of neglect, dependency, and delinquency under a single jurisdiction.

It defined a "delinquent child" broadly as a male under seventeen or female under eighteen who

violates any law of this State; or is incorrigible, or knowingly associates with thieves; vicious or immoral persons; or without just cause and . . . consent of its parents . . . or custodian absents itself from its home . . . , or is growing up in idleness and crime; or knowingly frequents a house of ill repute; or . . . any policy shop or place where any gambling device is operated; . . . saloon . . . ; or . . . public pool room . . . ; or wanders about the streets in the night time without being on any lawful business . . . ; or habitually wanders about any railroad yards . . . ; or enters any car . . . without lawful authority; or uses vile, obscene, vulgar, or indecent language in any public place . . . ; or is guilty of indecent and lascivious conduct.<sup>27</sup>

While the founding fathers of the juvenile court claimed ancestors in the mother country's courts of equity or chancery, less partial observers deemed such relations "dubious exercises at best, and in the words of a wry English judge, little more than spurious justifications for the sometimes 'highhanded methods of American judges'. . . [since] equity procedure clearly requires evidentiary findings within specific able limits conspicuously lacking in our early juvenile court statutes."<sup>28</sup>

The paternity of the juvenile court, however, could scarcely be con-

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25. The accolade was accorded by Roscoe Pound, Dean of the Harvard Law School. R. Pound, *The Juvenile Court and the Law*, in NATIONAL PROBATION AND PAROLE YEARBOOK, 1944, at 13 (1945). For a review of the Illinois juvenile court from 1899 to 1927, see H. LOU, JUVENILE COURTS IN THE UNITED STATES (1927).

26. The first revision in court procedure for American youth occurred in 1870 in Boston when separate hearings were required to try juvenile offenders. Special provisions for the trials of juveniles were made in Indiana (1891), New York (1892), and Rhode Island (1898). For forerunners to the juvenile court, see S. ROBISON, JUVENILE DELINQUENCY: ITS NATURE AND CONTROL 227-28 (1960).

27. Illinois Juvenile Court Act, 1899, § 1. See also A. PLATT, *supra* note 13, at 138. Nor did the situation change significantly over the next half century: "The statutes defining juvenile delinquency . . . embrace a bewildering variety of kinds of conduct . . . [V]arious statutes include within the purview of 'delinquency' certain noncriminal acts: for example, smoking cigarettes . . ." Paulsen, *The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court*, in JUSTICE FOR THE CHILD: THE JUVENILE COURT IN TRANSITION 44, 49-51 (M. Rosenheim ed. 1962) (quoted in O. KETCHAM & M. PAULSEN, CASES AND MATERIALS RELATING TO JUVENILE COURTS 151 (1967)). See also, S. RUBIN, CRIME AND JUVENILE DELINQUENCY—A RATIONAL APPROACH TO PENAL PROBLEMS 49 (1961).

28. Lemert, *The Juvenile Court—Quests and Realities*, in TASK FORCE ON JUVENILE JUSTICE, *supra* note 24 at 91-92. See also E. LEMERT, SOCIAL ACTION AND LEGAL CHANGE: REVOLUTION IN THE JUVENILE COURT 24-26 (1970) [hereinafter SOCIAL ACTION].

Dean Pound, an enthusiast of the juvenile court, concedes it was invented by "a few socially minded judges" who tried to reconcile their creation with "historical legal dogmas." R. POUND, INTERPRETATIONS OF LEGAL HISTORY 135 (1923). For arguments that the juvenile court is primarily of chancery origin, see H. LOU, *supra* note 25 at 2-7.

tested. The court was the offspring of the child welfare reform movement and it was not eager to cut the umbilical cord.<sup>29</sup> Its first probation officers were members of one of the movement's principal lobbies, the Juvenile Protective Association. Although the child advocates failed in their attempts to prevent public employees from staffing the juvenile court, they succeeded in cementing the court's ties with the social service and mental health professions.<sup>30</sup>

## VI. THE COURT CASTS ITS NET

Within a dozen years, twenty-two states had followed Illinois' example, and by 1917, all but three states had established juvenile court systems.<sup>31</sup> As the number of juvenile courts grew (to some 600 by 1932),<sup>32</sup> so did their judicial domain. It soon encompassed all children who violated local or state laws or who were physically or morally neglected or endangered in conformance with "the critical philosophical position of the reform movement. . . that no formal, legal distinctions should be made between the delinquent and the dependent and the neglected."<sup>33</sup>

Persisting in the belief that waywardness was a harbinger of criminality, the juvenile court cast its net of *parens patriae* far and wide.<sup>34</sup> More than half the delinquency cases brought before the Cook County juvenile court in its early years involved such charges as "in-corrigibility," "truancy," "vagrancy," "immorality," and "disorderly behavior."<sup>35</sup>

29. Rapid growth in urban density also played a role in the creation of the juvenile court. In 1800, no American city had a population of 100,000. By 1900, thirty seven did. See Dunham, *The Juvenile Court: Contradictory Orientations in Processing Offenders*, 23 LAW & CONTEMP. PROBS. 508, 510 (1958).

30. J. HANDLER & J. ZATZ, *supra* note 18, at 21.

31. The last state to enact juvenile court legislation was Montana in 1945. For dates of other laws, see G. COSULICH, *JUVENILE COURT LAWS OF THE UNITED STATES: TOPICAL AND STATE BY STATE SUMMARIES OF THEIR MAIN PROVISIONS 9-12* (1939).

32. Today there are more than 2000 courts handling juvenile delinquency matters, encompassing every American jurisdiction, including the District of Columbia.

33. J. HANDLER & J. ZATZ, *supra* note 18, at 9.

34. [I]t is proposed that the court be given jurisdiction over all children's cases, not merely serious defectives and delinquents. . . . [E]ducational agents could turn to the court for backing against recalcitrant parents in securing remedial measures early in the process of aberration. Eliot, *The Juvenile Court and the Educational System*, J. AM. INST. CRIM. L. CRIMINOLOGY 25 (1923-24), quoted in O. KETCHAM & M. PAULSEN, *supra* note 27, at 13.

35. T. HURLEY, *FIRST ANNUAL REPORT OF THE COOK COUNTY JUVENILE COURT 3* (1900). See also, T. HURLEY, *SECOND ANNUAL REPORT OF THE COOK COUNTY JUVENILE COURT 2* (1901).



As Judge Julian Mack of the Chicago juvenile court proclaimed:

Why is it not just and proper to treat these juvenile offenders . . . as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is . . . and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform . . .<sup>36</sup>

## VII. THE COURT'S CRITICS

Through the "socializing" of court procedure, the juvenile court, like the reformatory, came to specialize in "treatment without trial."<sup>37</sup> A candid observer noted that "the Juvenile Court is conceived in the spirit of the clinic; it is a kind of laboratory of human behavior."<sup>38</sup> One of the twentieth century's outstanding authorities on the law of evidence, John Wigmore, charged that the promoters of the juvenile court had "gone to the borderline of prudence in their iconoclasm" and that "the orthodox rules of trial evidence have been riddled as with a reformatory machine-gun."<sup>39</sup>

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36. Mack, *The Juvenile Court*, 23 HARV. L. REV., 104, 107 (1909). Judge Mack's views were shared by many, including Cook County Assistant State Attorney Albert Barnes, who advised the State Attorneys Association:

The State must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime. To that end, it must not wait as now to deal with him in jails, bridewells, and reformatories after he has become criminal in habit and tastes, but must seize upon the first indications of the propensity as they may be evidenced in his conditions of neglect or delinquency.

*Report of the Chicago Bar Association Juvenile Court Committee*, October 28, 1889. The answer to Judge Mack's inquiry was supplied nearly three quarters of a century later by the National Council on Crime and Delinquency: "(1). The law favors the liberty of the individual. (2). When government has available a variety of equally effective means to a given end, it must choose the one which interferes least with individual liberty." National Council on Crime and Delinquency, *The Nondangerous Offender Should Not Be Imprisoned: A Policy Statement*, 19 CRIME & DELINQ. 449, 449 (1973).

37. "These various methods of applying court treatment without a full and fair judicial trial of the issue of guilt of a particular offense, despite their seductive rationale, appear . . . to be peculiarly hazardous and . . . resemble too closely in some respects the philosophy of the Star Chamber." Tappan, *Treatment Without Trial*, in *THE PROBLEM OF DELINQUENCY*, *supra* note 12, at 293. See also Tappan, *Unofficial Delinquency*, 2 NEB. L. REV. 547 (1950). Dunham cites the following factors as developing the juvenile court's "social-agency image":

- (1) the aggressive social-work orientation of the United States Children's Bureau;
- (2) the broadening jurisdiction of the juvenile court to include . . . all matters of a legal nature involving children;
- (3) the gradual professionalization of social work;
- (4) various court decisions involving delinquency; and
- (5) the growing prospect of treatment through . . . psychoanalysis . . .

Dunham, *supra* note 29, at 513.

38. Waters, *The Socialization of Juvenile Court Procedure*, in E. HOAG & E. WILLIAMS, *CRIME, ABNORMAL MINDS AND THE LAW* 158 (1923).

39. 5 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* 145 (3d ed. 1940). The following excerpt from a juvenile court report gives evidence of Wigmore's charge: "[T]he justices have been enabled to

In a study of the reform movement that inspired America's juvenile justice system, Anthony Platt concluded that criticism of the juvenile court system in the first half of the twentieth century arose primarily from two perspectives, that of the "legal moralists" and that of the "constitutionalists."<sup>40</sup>

Legal moralists subscribe to the philosophy of "retributive" justice which upholds society's moral right and duty to punish those who willfully commit crimes. A crime that we do not punish is a contradiction in terms. As A.L. Goodhart has observed, "a community which is too ready to forgive the wrongdoer may end by condoning the crime."<sup>41</sup> Regarding the criminal law as the symbol of the societal values violated by the criminal, the legal moralists believe that "the punishment must fit the crime."<sup>42</sup>

Constitutionalists, on the other hand, question ideals more often professed than practiced by the juvenile court, which frequently violate personal rights under the guise of "rehabilitation." As Edward Lindsey, an early constitutionalist proponent, observed, "[T]here is often a very real deprivation of liberty, nor is that fact changed by refusing to call it punishment or because the good of the child is stated to be the object."<sup>43</sup> The juvenile court's use or abuse of the judicial robes of *parens patriae* as a cloak for the denial of constitutional protections has come under particular criticism by the constitutionalists.<sup>44</sup>

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scrap once and for all the old legal trial of children with its absurd and obsolete limitations of testimony and to inquire into the causes of the children's neglect or delinquency untrammelled by narrow rules of evidence." Children's Court of the City of New York, ANNUAL REPORT 16 (1925).

40. For further analysis, see A. PLATT, *supra* note 13 at 152-63.

41. A.L. GOODHART, ENGLISH LAW AND THE MORAL LAW 92-93 (1953).

42. [T]he social workers and the psychologists and the psychiatrists know nothing of crime and wrong. They refer to "reactions" and "maladjustments" and "complexes." . . . The people need to have the moral law dinned into their consciences every day in the year. The juvenile court does not do that. And to segregate a large share of daily crime into the juvenile court is to take a long step toward undermining the whole criminal law.

Note, *Juvenile Court vs. Criminal Court*, 21 NW. U.L. REV. 375, 376-77 (1926).

43. Lindsey, *The Juvenile Court Movement from a Lawyer's Standpoint*, in ANALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 145 (1924).

44. [T]he supporters of the unrestricted social processes in a court of law for children and their parents have embraced the catchwords *parens patriae* and *chancery* as something equivalent to little or no legal restraint so that they may cast the beneficent safeguards of due process of law into the limbo of forgotten things. Nothing could be more fallacious.

Address by Chief Justice W. Bruce Cobb, New York City Court of Domestic Relations,

## VIII. JUVENILE JUSTICE REFORM: THE 1960S

A number of developments during the 1960s stimulated reform in the juvenile justice system. They arose, in particular, from (1) the President's Commission on Law Enforcement and the Administration of Justice, (2) the National Council on Crime and Delinquency, and (3) the Supreme Court. These and subsequent reforms in the early 1970s would provide the impetus for the Juvenile Justice and Delinquency Prevention Act of 1974.

### A. *The President's Commission*

Established in 1965, the President's Commission on Law Enforcement and the Administration of Justice (the Commission) made significant contributions to juvenile justice reform.

Seeing police apprehension and court referral as signs of civic failure and finding little likelihood of therapeutic rehabilitation, the Commission focused public attention on delinquency prevention. The Commission believed that juvenile courts unnecessarily stigmatized youth by labeling them "delinquent," thus diminishing their chances of rehabilitation.<sup>45</sup> It concluded that both juvenile and adult courts had failed to achieve their goals.

Rejecting the contention that "the time has come to jettison the experiment," the Commission stated that: "[w]hat is required is rather a revised philosophy of the juvenile court, based on recognition that in the past our reach exceeded our grasp."<sup>46</sup>

Accordingly, the Commission counseled several steps to improve the administration of juvenile justice.

- (1) The formal system should be used only as a last resort. Rather, dispositional alternatives must be developed.<sup>47</sup>
- (2) Efforts to narrow the juvenile court's jurisdiction should be

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Joint Meeting of the Committees of the Court of Domestic Relations, the Association of the Bar, and the County Lawyers Association (Feb. 6, 1945).

Dr. Paul Tappan has described *parens patriae* as "an *ex post facto* fiction" designed to reconcile the juvenile court, more akin to contemporary administrative bureaucracies than to early equity, with orthodox legal doctrine. See P. TAPPAN, *JUVENILE DELINQUENCY* 169 (1949).

45. Ironically, the term "delinquent" was coined to avoid the stigma attached to the label "criminal."

To get away from the notion that the child is to be dealt with as a *criminal*; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma,—this is the work which is now being accomplished . . . even with the most of the *delinquent* children through the court that represents the *parens patriae* power of the state. . . .

Mack, *supra* note 36, at 109 (emphasis added).

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

47. *Id.*

continued. "Serious consideration . . . should be given to complete elimination of the court's power over children for noncriminal conduct."<sup>48</sup>

(3) Procedural justice for the child should be instituted. "The major rationale for the withdrawal of procedural safeguards ceases to exist."<sup>49</sup>

(4) As alternatives to formal juvenile justice system processing, the President's Commission recommended expanded use of non-judicial community agencies.<sup>50</sup>

The Commission also made specific recommendations regarding use of detention and incarceration:

[1] For children for whom detention is made necessary only by the unavailability of adequate parental supervision, there should be low-security community residential centers and similar shelters.

[2] Legislation should be enacted restricting both authority to detain and the circumstances under which detention is permitted.

[3] Correctional authorities should develop more extensive community programs providing special, intensive treatment as an alternative to institutionalization for both juvenile and adult offenders.<sup>51</sup>

### *B. The National Council on Crime and Delinquency*

At the request of the President's Commission on Law Enforcement and the Administration of Justice, the National Council on Crime and Delinquency (NCCD) surveyed state and local correctional agencies and institutions across the United States in 1966. The survey documented extensive use of detention facilities to house juveniles accused of noncriminal conduct. While such detention was permitted under broadly written state juvenile court statutes, it often occurred without the benefit of court petitions. Wide variations in detention rates and lengths of stay compounded the problem. NCCD concluded that "[c]onfusion and misuse pervade detention. It has come to be used by police and probation officers as a disposition; judges use it for punishment, protection, [and] storage. . . ."<sup>52</sup>

As a result of its survey, NCCD recommended that:

No child should be placed in any detention facility unless he is a delinquent or alleged delinquent and there is a substantial probability that he will commit an offense dangerous to himself or the community or will run away pending

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48. *Id.* at 85.

49. *Id.*

50. *Id.* at 83.

51. *Id.* at 87, 171.

52. National Council on Crime and Delinquency, *Correction in the United States*, in TASK FORCE ON CORRECTIONS, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 115, 129 (1967).

court disposition. He should not be detained for punishment or for someone's convenience.<sup>53</sup>

The NCCD survey also documented problems in the use of juvenile training schools, concluding that: "[i]n theory, training schools are specialized facilities for changing children relatively hardened in delinquency. In practice, . . . they house a nonselective population and are primarily used in ways which make the serving of their theoretical best purpose . . . beside the point."<sup>54</sup>

### C. Supreme Court Decisions

Well into the latter half of the twentieth century, the courts continued to uphold the juvenile court's restrictions of traditional due process protections. As the Supreme Court held in *In re Holmes*, "[s]ince juvenile courts are not criminal courts, the constitutional rights granted to persons accused of crime are not applicable to children brought before them."<sup>55</sup>

The 1960s witnessed increased challenges to the doctrine of *parens patriae*. Critics questioned whether youth were receiving the individual treatment the juvenile courts were created to provide. And, if not, why were they denied the due process protections even adult criminals enjoy?<sup>56</sup>

Four Supreme Court decisions in the late 1960s and early 1970s brought important changes to the administration of juvenile justice.

In 1966, in *Kent v. United States*,<sup>57</sup> the Court began to extend due process rights to juveniles, finding evidence, in Justice Abe Fortas' words, "that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>58</sup>

That same year *Miranda v. Arizona*<sup>59</sup> required police to advise

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53. *Id.* at 211. A study nearly a decade later found status offenders were incarcerated as long or longer than juvenile delinquents who committed rape, aggravated assault, and other felonies classified as "FBI index crimes." See Ohio Youth Commission, *A STATISTICAL INQUIRY INTO LENGTH OF STAY AND THE REVOLVING DOOR*, 1974.

54. TASK FORCE REPORT: CORRECTIONS, *supra* note 52, at 143. "The typical state training school does not always have provisions for the special care and treatment . . . In some places, habitual truants and neglected and dependent children are placed in the same institution as offenders. . . . There is also a tendency for the more hardened youngsters to set the pace." COUNCIL OF STATE GOVERNMENTS, *JUVENILE DELINQUENCY, A REPORT ON STATE ACTION AND RESPONSIBILITY* 29 (1962).

55. *In Re Holmes*, 379 Pa. 599 (1954). For a discussion of this case, see P. TAPPAN, *CRIME, JUSTICE AND CORRECTION* 390-92 (1960). See also M. HASKELL AND LEWIS YABLONSKY, *CRIME AND DELINQUENCY* 395-96 (1974).

56. See Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 *CRIME & DELINQ.* 97, 100-07 (1961).

57. 383 U.S. 541 (1966).

58. *Kent v. United States*, 383 U.S. 541, 556 (1966).

59. 384 U.S. 436 (1966).

juveniles taken into custody for a felony offense, or an offense that could result in adjudication of delinquency and commitment to a secured facility, of certain constitutional rights, including the right to remain silent and the right to consult an attorney before questioning.<sup>60</sup>

The following year the Supreme Court's *In re Gault*<sup>61</sup> ruling granted additional due process rights to juveniles facing incarceration, including notice of the charges, right to counsel, right to confrontation and cross-examination, and the privilege against self-incrimination.<sup>62</sup> Justice Fortas reflected the Court's sentiments when he wrote, "neither the Fourteenth Amendment nor the Bill of Rights is for adults only. Under our constitution, the condition of being a boy does not justify a kangaroo court."<sup>63</sup>

Prior to 1970 the standard for determining guilt in delinquency proceedings was a "preponderance" of available evidence. *In re Winship*,<sup>64</sup> decided by the Supreme Court in 1970, held that due process required that the state prove "beyond a reasonable doubt" facts establishing a juvenile's delinquency.<sup>65</sup>

At the same time, *In re Gault* and subsequent Supreme Court decisions<sup>66</sup> made clear that the juvenile court was not to be equated with the criminal proceedings of adult courts. In *McKeiver v. Pennsylvania*,<sup>67</sup> the Court even expressed its hope for the juvenile court system as a separate process.

60. *Miranda v. Arizona*, 384 U.S. 436 (1966). For a description of such "Miranda rights," see R. KOBETZ, *THE POLICE ROLE AND JUVENILE DELINQUENCY* 108-109 (1971). See also Holtz, *Miranda in a Juvenile Setting: A Child's Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534 (1987). For discussion of waiver, see Grisso, *Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134 (1980).

61. 387 U.S. 1 (1967).

62. The effects of such reforms are not always clear. Lemert's California study suggests that use of counsel in juvenile cases has increased dismissals and decreased the removal of children from their homes. However, the Duffee and Siegal report shows more severe court dispositions for youth represented by attorneys. See E. LEMERT, *SOCIAL ACTION*, *supra* note 28, at 192; Duffee & Siegal, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL., 544, 552 (1971).

63. *In re Gault*, 387 U.S. 1, 1328 (1967).

64. 397 U.S. 358 (1970).

65. *In re Winship*, 397 U.S. 358, 368 (1970).

66. See e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). For a review of constitutional issues, see Gilman, *The Constitutionality of Juvenile Court Administration of Court Services*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 465-74 (1981).

67. 403 U.S. 528 (1971).

## IX. JUVENILE JUSTICE REFORM: THE 1970S

In addition to the changes wrought by the Supreme Court, further juvenile justice reform arose in the early 1970s from: (1) the National Advisory Commission on Criminal Justice Standards and Goals, (2) radical changes in the juvenile correctional system in Massachusetts, and (3) the labeling theory.

### A. *The National Advisory Commission*

The National Advisory Commission on Criminal Justice Standards and Goals (the Advisory Commission) identified its own concerns regarding detention problems.<sup>68</sup> Observing that "many agencies have advocated that detention be limited to allegedly delinquent offenders who require secure custody for the protection of others," the Advisory Commission determined that "persons in need of supervision" (PINS),<sup>69</sup> or "minors in need of supervision" (MINS)<sup>70</sup>—who later came to be called "status offenders"—comprised at least fifty percent of most detention populations.<sup>71</sup>

This ratio and the deplorable conditions the Advisory Commission found in detention centers and jails<sup>72</sup> prompted it to propose that the delinquency jurisdiction of the court should be limited to those juveniles who commit acts that if committed by an adult would be criminal, and that juveniles accused of delinquent conduct would not under any circumstances be detained in facilities for housing adults accused or convicted of crime. . . .

.....  
Detention should be considered as a last resort where no other reasonable alternative is available.

.....  
Detention should be used only where the juvenile has no parent, guardian, custodian, or other person able to provide supervision and care for him and to assure his presence at subsequent judicial hearings.

.....  
Juveniles should not be detained in jails, lockups, or other facilities used for adults.<sup>73</sup>

### Sharing the Supreme Court's hope in the promise of the juvenile

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68. The Commission, appointed by the Law Enforcement Administration in 1971, formulated the first national criminal justice standards and goals for crime reduction and prevention. See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME (1974); NATIONAL ADVISORY COMMISSION REPORT(S) ON CRIMINAL JUSTICE SYSTEM, POLICE, COURTS, CORRECTIONS (1974) [hereinafter REPORT ON CORRECTIONS]; NATIONAL ADVISORY COMMISSION COMMUNITY CRIME PREVENTION, (1974).

69. New York Family Court Act § 712 (1963). See *In re Winship*, 397 U.S. at 374 n.6.

70. Illinois Family Court Act, ILL. ANN. STAT. ch. 23, para 2001-2036 (Smith-Hurd 1990) (1966). Synonymous acronyms include CHINS and JINS for children and juveniles in need of supervision, respectively.

71. REPORT ON CORRECTIONS, *supra* note 68, 257.

72. For an expose on America's incarcerated children, see K. WOODEN, *WEeping IN THE PLAYTIME OF OTHERS* (1976). See also H. JAMES, *CHILDREN IN TROUBLE* (1970).

73. REPORT ON CORRECTIONS, *supra* note 68, at 259.

court, the Advisory Commission urged reform "to improve the effectiveness of the court process as part of a rehabilitative juvenile justice system"<sup>74</sup> To this end, the Commission recommended that the juvenile courts should only be authorized to institutionalize delinquents whose offenses would be crimes if committed by adults.<sup>75</sup>

### *B. Revolutionary Reform in Massachusetts*

The warehousing of juveniles in large training schools had been under attack since its creation. Critics charged that they were "schools of crime," produced high recidivism rates, were custodial rather than therapeutic, and denied their inmates due process.

In 1969, the Massachusetts Director of Youth Services resigned following a series of crises in the state's training schools. His successor, Dr. Jerome Miller, took office with a mandate to develop new programs. Over the next two years, Miller established "therapeutic communities" within the state's existing training schools, but adherents of the old custodial philosophy resisted his reforms. By 1971, Miller concluded that therapeutic communities could not be run successfully within the traditional training schools and closed them. They were replaced by a network of decentralized community-based services (and a few, small secure-care units for violent juvenile offenders).<sup>76</sup>

The Massachusetts revolution constituted the most sweeping reforms in youth corrections in the United States since the establishment of juvenile training schools and juvenile courts in the nineteenth century. It demonstrated that juvenile corrections need not be centered around large training schools.<sup>77</sup> Twenty years later, the community-based system Miller initiated in Massachusetts is still in place.<sup>78</sup>

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74. *Id.* at 291.

75. National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts*, 293.

76. A. MILLER, L. OHLIN & R. LOATES, *A THEORY OF SOCIAL REFORM: CORRECTIONAL CHARGE PROCESSES IN TWO STATES* 14-15 (1977).

77. *Id.* at 16-19.

78. Loughran, *Refocusing on Prevention of Delinquency*, *Educ. Week*, Mar. 21, 1990, at 32. For an analysis of the JJDP Act's impact in Massachusetts, see Arnaud & Mack, *The Deinstitutionalization of Status Offenders in Massachusetts: The Role of the Private Sector*, in *NEITHER ANGELS NOR THIEVES: STUDIES IN DEINSTITUTIONALIZATION OF STATUS OFFENDERS* 335-371 (J. Handler & J. Zatz eds. 1982).

Most of Massachusetts' 1700 committed youth are involved in community-based residential and non-residential programs, while the minority of violent offenders (15%) are in small secure facilities. A 1989 study by the National Council on Crime and De-



### C. *The Labeling Theory*

"Labeling" became a popular, if not formal, theory in the United States during the 1960s. Proponents argued that most juveniles would mature out of delinquency if left alone. They charged that agents of control exacerbate delinquency by setting into motion a self-fulfilling prophecy by officially labeling youths as "bad" or "delinquent" as a result of overly dramatizing initial wayward acts.

Labeling theorists contend that youths repeatedly labeled "delinquent" by police, judges and probation officers, come to see themselves as such officials do. They live up, or rather down, to their image. Hence, the likelihood of subsequent delinquent behavior is increased.<sup>79</sup>

Dr. LaMar Empey has succinctly stated the policy implications of labeling. According to Empey, American society has tended to react by viewing juvenile courts as an agency of last resort reserved for only the most serious juvenile offenders.<sup>80</sup> Consequently, three reforms have been pursued:

- (1) decriminalization—narrowing the jurisdiction of the juvenile court, particularly over status offenders;
- (2) diversion—turning juveniles away from the juvenile justice system and into other social agencies for help;
- (3) due process—requiring the juvenile court to become a court by insuring that alleged delinquents are provided with the constitutional protections afforded adults.<sup>81</sup>

Empey paused to reflect: "Since this is what the juvenile court set out to do in the first place, only the passage of time will tell whether our fervent 'reforms' are more humane and helpful than were those of the 19th century child savers."<sup>82</sup>

### X. THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT

In August 1974, Congress passed the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974. President Gerald Ford signed it into law on September 7, 1974.

Three years of Congressional hearings had preceded enactment of the JJDP Act.<sup>83</sup> The implications for juvenile justice reform found

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linquency shows that the Massachusetts system has a lower rate of recidivism than California's training schools (23% versus 62%) and that placing only violent offenders in secure care is more cost-effective. *Massachusetts Has Lowest Rate of Recidivism*, 18 JUV. JUST. DIG. (1990).

79. L. EMPEY, *supra* note 3, at 341-68. See also H. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963); E. LEMERT, *SOCIAL PATHOLOGY: A SYSTEMATIC APPROACH TO THE THEORY OF SOCIOPATHIC BEHAVIOR* (1951); and F. TANNENBAUM, *CRIME AND THE COMMUNITY* (1938).

80. See L. EMPEY, *supra* note 4.

81. *Id.* at 364-65.

82. *Id.* at 365.

83. See especially, THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT,

through this process were expressed succinctly by the Senate Judiciary Committee in its report accompanying the proposed JJDP Act. The report noted:

First, most children and youth mature and develop into positive and productive members of society. . . .

Second, it is well documented that youths whose behavior is noncriminal. . . have inordinately preoccupied the attention and resources of the juvenile justice system. Nearly 40 percent (one-half million per year) of the children brought to the attention of the juvenile justice system have committed no criminal act, in adult terms, and are involved simply because they are juveniles. . . . These [are] status offenders. . . .

Third, if the status offender were diverted into the social service delivery network, the remaining juveniles would be those who have committed acts which, under any circumstances, would be considered criminal.<sup>84</sup>

#### A. *Deinstitutionalization of Status Offenders (DSO)*

The JJDP Act initially required that states wishing to receive formula grant funds<sup>85</sup> submit a plan that would "provide within two years after submission of the plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, shall not be placed in juvenile detention or correctional facilities, but must be placed in shelter facilities. . . ."<sup>86</sup> This provision became known as the "deinstitutionalization of status offenders" (DSO) requirement.<sup>87</sup> The JJDP Act further directed

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HEARINGS ON S. 3148 AND S. 821 BEFORE THE SUBCOMM. TO INVESTIGATE JUVENILE DELINQUENCY, 92d Cong., 2d Sess. (1972); THE DETENTION AND JAILING OF JUVENILES, HEARINGS BEFORE THE SUBCOMM. TO INVESTIGATE JUVENILE DELINQUENCY, 93d Cong., 1st Sess. (1973).

84. S. REP. NO. 1011, 93d Cong. 2d Sess. 22-24, *reprinted in*, 1974 U.S. CODE CONG. & ADMIN. NEWS 5283, 5287-89.

85. Formula grants are dispersed to states who meet the JJDP Act's mandates regarding commitment to deinstitutionalize status offenders and other requirements. The funds, based on a formula derived from the size of a state's population under age 18, do not have to be spent on deinstitutionalization. For the JJDP Act's original provisions, see The Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 1974 U.S. CODE CONG. & ADMIN. NEWS (88 Stat. 1109) Title II, Part B, support I (codified at 42 U.S.C. § 5601) [hereinafter JJDP].

86. JJDP at § 223(a)(12).

87. Considerations favoring a DSO policy included:

- (1) Incarceration in closed facilities is harmful to the positive development of youth.
- (2) Institutions are not effective in rehabilitating residents.
- (3) Institutional corrections is not cost effective.
- (4) Incarceration with criminally involved individuals contaminates the non-criminal youth, providing an environment where criminal activity is glamorized and the techniques and methods are learned by the noncriminal child (schools of crime notion).
- (5) Deprivation of liberty for persons who have not violated the criminal code is unjust, and possibly unconstitutional, because such limitations of free-

that participating states "provide for an adequate system of monitoring jails, detention facilities, and correctional facilities to insure that the [DSO]. . . requirements are met, and for annual reporting of the results of such monitoring to the Administrator."<sup>88</sup>

In 1975, the Office of Juvenile Justice and Delinquency Prevention (OJJDP), newly established by the JJDP Act, translated its provisions into federal guidelines<sup>89</sup> requiring state plans to describe "in detail the State's specific plan, procedure, and timetable for assuring that within two years of submission of its plan, status offenders<sup>90</sup>, if placed outside the home, would be placed in shelter facilities, group homes, or other community-based alternatives rather than juvenile detention or correctional facilities."<sup>91</sup>

Subsequent amendments to the JJDP Act and regulations promulgated by OJJDP adjusted the DSO requirements, particularly, in the following areas: (1) substantial compliance, (2) the valid court order, and (3) *de minimis* exceptions.

### 1. Substantial Compliance

On October 3, 1977, President Jimmy Carter signed the Juvenile Justice Amendments of 1977 into law. The new law substantially revised the timetable for DSO and codified the concept of "substantial compliance" introduced by OJJDP in its guidelines.<sup>92</sup> As the Chairman of the Senate Subcommittee to Investigate Juvenile Delinquency, Senator Birch Bayh advised his colleagues that

some additional flexibility must be provided to the States in their efforts to meet the deinstitutionalization requirement. Otherwise, many currently participating States—States that have acted in good faith to meet the 2-year dead-

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dom neither reflect the status offender's dangerousness to the community nor principles of due process and equal protection.

(6) Juveniles develop a fixed self image as a delinquent primarily in response to being treated as a delinquent by persons in authority (labeling theory).

J. Howell, *Deinstitutionalization of Status Offenders: Briefing Paper*, 1 Sept. 18, 1990 (on file at the office of Juvenile Justice and Delinquency Prevention).

88. JJPD at § 223(a)(14).

89. Law Enforcement Assistance Administration, *GUIDELINE MANUAL M 4100.1D*, (July 10, 1975).

90. The JJDP Act defined "status offenders" as "juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult." JJDP at § 223(a)(12). For a further definition of "status offender" as it pertains to monitoring and reporting, see Council of State Governments, *Status Offenders: A Working Definition*, (unpublished document on file at the Office of Juvenile Justice and Delinquency Prevention) (1976).

91. Law Enforcement Assistance Administration, *supra* note 89.

In 1977, the National Council on Crime and Delinquency reported that "Approximately 70 percent of the girls and 23 percent of the boys committed to detention centers and correctional institutions are status offenders, according to National Criminal Justice Information and Statistics Service reports." 1 *YOUTH FORUM* 6 (1977).

92. Law Enforcement Assistance Administration, *GUIDELINE MANUAL M. 4100, 12(a)(3)*.

line may be forced to withdraw, or have their eligibility terminated . . . under the formula grant program. The children of those States would be the losers. . . . The incentive to continue the deinstitutionalization . . . would be severely affected.<sup>93</sup>

The 1977 JJDP Act Amendments defined "substantial compliance" as "achievement of deinstitutionalization of not less than 75 per centum of such juveniles."<sup>94</sup> It further stipulated that the "unequivocal commitment" required "appropriate executive or legislative action"<sup>95</sup> and defined a "reasonable time" to achieve compliance as "not exceeding two additional years."<sup>96</sup> The "two additional years," however, were not added to the original two-year limit, for it had been extended to "within three years after submission of the initial plan."<sup>97</sup> The expanded grace period led critics, like Representative John Conyers, to complain that "in effect States have 5 years for full compliance . . . [and] five years . . . is too long to jail and imprison youth who have committed no criminal offense."<sup>98</sup>

In its 1980 Amendments to the JJDP Act, Congress provided an additional method for establishing substantial compliance with the JJDP Act's DSO requirements:

[I]f a state had totally removed status offenders and other nonoffenders from correction facilities within the three year period, as opposed to a 75 percent reduction of both detention and correctional placements, the maximum time allowed for full compliance would remain the same—five years.<sup>99</sup>

The report of the House Committee on Education and Labor on provided the committee's rationale:

Current law recognizes no differences between status offenders held in secure detention and those placed for long periods of time in correction facilities. . . . The committee is concerned about children who have committed no criminal

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93. 123, *Cong. Rec.*, 32,251 (1977) (statement of Sen. Bayh).

94. Pub. L. No. 95-115, 91 Stat. 1054 (1977).

95. *Id.*

96. The 1977 JJDP Act Amendments expanded the Act's DSO requirements to include "such nonoffenders as dependent or neglected children." JJPD at § 223(a)(12)(A).

A new subpart (B) to § 223(a)(12) of the JJDP Act required that states report annually to OJJDP regarding their progress towards deinstitutionalization. It directed OJJDP to review the degree to which states insured that status offenders and nonoffenders, when placed in facilities, were placed "in the least restrictive alternatives appropriate . . . in reasonable proximity to the [juvenile's family] . . . and should provide appropriate services." *Id.* at 1054.

Law Enforcement Assistance Administration, Formula Grant Provisions of the Juvenile Justice and Delinquency Prevention Act of 1974, *amended by*, 43 Fed. Reg. 36402, 36403 (1978).

97. *Id.* at 1053.

98. 123 CONG. REC. 15,505 (1977) (statement of Rep. Conyers).

99. H.R. REP. NO. 946, 96th Cong., 1st Sess. 27, *reprinted in* 1980 U.S. CONG. & ADMIN. NEWS 6098, 6114.

offense being locked away in secure correctional placements for long periods of time. Secure detention, while still harmful to status offenders and nonoffenders, is of shorter duration. The committee believes that States who have totally ended the practice of placing status offenders and nonoffenders in secure correctional placements within the allowable three year period should also be judged to have made a good faith effort.<sup>100</sup>

## 2. Valid Court Order

Not all opposition to the five-year timetable for DSO has come from those who find it too lenient. In the report's Supplemental Views, minority members of the committee, led by ranking minority member, Representative John Ashbrook, expressed their view that the current provision "excessively limits the court's ability to respond to status offenders who chronically and habitually refuse to accept voluntary treatment recommended by the court."<sup>101</sup>

On November 19, 1980, Representative Ashbrook, describing the current law as "a cure worse than the disease," offered an amendment to H.R. 6704 that amended section 223(a)(12)(A) of the JJDP Act to authorize the detention or confinement of status offenders who had violated a valid court order.<sup>102</sup> The amendment was adopted on a vote of 239 to 123.

On December 8, 1980, President Carter signed the Juvenile Justice Amendments of 1980 into law. The new law contained the revisions regarding substantial compliance and valid court orders described in the preceding paragraphs.<sup>103</sup>

## 3. De Minimis Exceptions

Legal Opinion 76-7 of the Law Enforcement Assistance Administration's<sup>104</sup> Office of General Counsel, issued on October 7, 1975, held that a state's failure to fully comply with the JJDP Act's DSO stipulations within the time frame established by statute would render the state ineligible for formula grants "unless such failure was *de*

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100. *Id.* at, 26-27, reprinted in 1980 U.S. CONG. & ADMIN. NEWS at 6113-14.

101. *Id.* at 76. Such criticism was not confined to members of Congress. Judge John Milligan of Ohio asked the House Human Resources Subcommittee: Does Congress intend that every child have the ultimate right, at any age, to decide for himself whether he will (1) continue to run away from home, (2) go to school; (3) consume alcohol; or (4) violate legitimate court orders? *Id.*

102. This act has made it virtually impossible for juvenile courts to deal with chronic status offenders by denying the court its traditional discretionary power to enforce valid court orders involving these youth. For the debate and vote on the Ashbrook amendment see 126 CONG. REC. 30, 214-38 (1980).

103. The United States General Accounting Office is conducting a study of the implementation and impact of the 1980 JJDP Act's valid court order amendment. It is expected to shed light on state DSO practices.

104. By statute, the Office of Juvenile Justice and Delinquency Prevention was located within the Law Enforcement Assistance Administration of the United States Department of Justice cite.

*minimis.*" The opinion further stated that exceptions would be determined on a case-by-case basis.

On January 9, 1981, OJJDP published its final policy and criteria for *de minimis* exceptions to full compliance in the *Federal Register*. While noting the matter "cannot be determined by an inflexible formula," the policy provided criteria OJJDP would employ in reviewing each case "on its merits."<sup>105</sup>

### B. DSO Implementation

Strict enforcement of the JJDP Act's DSO requirement encountered resistance during the 1970's.<sup>106</sup> Police, probation officers, juvenile court judges, and others raised issues ranging from how to properly handle status offenders who are not securely confined to questions about the federal government's involvement in local affairs.

Nevertheless, efforts to deinstitutionalize status offenders begun in the late 1960s were accelerated in most jurisdictions following passage of the JJDP Act and its establishment of OJJDP. Federal funds available under the JJDP Act became an incentive that encouraged states and local jurisdictions to deinstitutionalize status offenders and to establish alternative programs for such youth.

In 1976, OJJDP funded thirteen projects designed to deinstitutionalize status offenders by prohibiting through statute and regulation, their placement in detention centers and training schools and by creating a variety of alternatives to detention for such juveniles, includ-

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105. The broad categories cited were: Criterion A "The extent of non-compliance is insignificant or of slight consequence in terms of the total juvenile population in the State." Criterion B "The extent to which the instances of non-compliance were in apparent violation of State law or established executive or judicial policy." Criterion C "The extent to which an acceptable plan has been developed which is designed to eliminate the non-compliant incidents within a reasonable time." For a comprehensive delineation of these criteria, see 46 Fed. Reg. 2566-69 (1981).

106. Testifying before the House Subcommittee on Economic Opportunity in 1978, Flora Rothman, Chair of the Justice for Children Task Force of the National Council of Jewish Women, suggested that growing opposition to OJJDP's enforcement of the JJDP Act's DSO mandate has evidence of the effectiveness of the effort. *Oversight Hearing on the Juvenile Justice and Delinquency Prevention Act: Hearings on Pub. L. No. 93-415. Before the Subcomm. on Economic opportunity, 95th Cong., 2d Sess. 174 (1978) (statement of Flora Rothman).*

You may have had some feeling that objections to it have grown stronger, but I would say not in number as perhaps decibel level, and we feel it is attributable to the success it has had. We think it is quite remarkable how many youngsters around this country are no longer in training schools, are no longer in detention centers because of the Juvenile Justice and Delinquency Prevention Act.

*Id.*

ing foster homes, shelter-care, and home detention.<sup>107</sup>

In 1979, Malcolm Klein conducted a systematic review of deinstitutionalization efforts nationwide. He concluded that DSO programs had not been implemented effectively in accordance with their premises. "They have not been meaningfully evaluated and their effectiveness cannot be shown."<sup>108</sup>

Klein identified five impediments to DSO and diversion: (1) insufficiently developed program rationales, (2) inappropriately selected client groups, (3) development of insufficient and narrowly conceived social services and treatment strategies, (4) professional resistance to reform attempts, and (5) placement of programs in inappropriate settings.<sup>109</sup>

The National Academy of Sciences (NAS) conducted a comprehensive study of the federal DSO effort during the period of 1979-1982 to assess what happened to youth who committed status offenses. The NAS examined in detail the DSO experience in seven representative states and drew five conclusions that pertained to all seven:

- [1] The placement of status offenders in secure public facilities has been virtually eliminated. . . .

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107. An independent evaluation of the program concluded:

Fewer than 10% of status offenders served through the projects were deemed in need of any kind of alternative residential placement; home placement was feasible in most cases.

In the most cost-effective circumstances, community-based services for status offenders were provided at about 20% less than the cost of juvenile justice system processing.

Foster homes worked best in cases of younger children, primarily dependent and neglected.

Short-term shelter-care was identified as the most effective alternative for those youth requiring residential placements (primarily chronic status offenders).

Comparisons of DSO and "non-DSO" youths generally showed no differences in recidivism.

Both of the major strategies for reducing or eliminating the secure confinement of status offenders (developing alternative programs or issuing absolute prohibitions against confinement) produced unintended side effects.

— Many jurisdictions that developed alternatives without prohibiting confinement experienced "net widening" effects in which the alternative programs were used mainly for juveniles who previously had been handled on an informal basis.

— The absolute prohibitions against confinement resulted in adjudicating as "delinquent" many of the cases that were previously treated as status offenses. Also, some youths in need of services were not receiving them.

J. Howell, *supra* note 87, at 3-4.

108. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145 (1979) ("They have not been meaningfully evaluated and their effectiveness cannot be shown."). Klein combined diversion with DSO for purposes of his review given the interrelationship of the two processes; that is, in juvenile justice system practices, deinstitutionalization procedures often involve diverting youths from the formal juvenile justice system to agencies and organizations outside the system.

109. *Id.* at 157-81.

[2] There has been a substantial reduction in the use of detention for preadjudicated status offenders. . . .

[3] There has been a decline in the number of youth who commit status offenses and who then enter the juvenile justice system. . . .

[4] For those status offenders who are diverted to some other service system, the predominant forms of out-of-home care are group homes or foster care arrangements. . . .

[5] It is unclear what is happening to youth who commit status offenses but do not enter the juvenile justice system or its closely related diversion programs. . . .<sup>110</sup>

## XI. THE DEBATE CONTINUES

While most observers recognize the desirability of handling most status offenders outside the formal juvenile justice system thereby conserving scarce resources for serious offenders, the public discourse on DSO continues. Today's debate centers on such issues as: (1) whether status offenders receive needed services without the intervention of the juvenile justice system; (2) whether "chronic" status offenders should be removed from the juvenile justice system;<sup>111</sup> and (3) the appropriateness of the placement of status offenders in mental health facilities.

In its 1987 *Report*, the President's Child Safety Partnership (the Partnership) cited the crises created by "chronic runaways" who "account for a disproportionate share of legal, social, psychological, and medical problems."<sup>112</sup> The Partnership found these problems were compounded by local misunderstanding of federal laws and regulations.<sup>113</sup>

Many cities and towns have expressed exasperation . . . that Federal guidelines regulating their actions concerning runaways are too restrictive and do not provide the flexibility needed . . . . Unfortunately, there seems to be broad misunderstanding . . . of the provisions of Federal runaway legislation . . . . Regulations implementing the Juvenile Justice and Delinquency Prevention Act do allow law enforcement officers temporarily to detain runaways while

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110. J. Handler, *Deinstitutionalization in Seven States: Principal Findings*, in *NEITHER ANGELS NOR THIEVES: STUDIES IN DEINSTITUTIONALIZATION OF STATUS OFFENDERS*, *supra* note 18 at 88-89.

111. It seems highly probable that those . . . who have argued that the rehabilitative goals of the [juvenile] court have not been attained are correct; similarly, that this failure . . . provides little or no support for any suggestion that the court be allowed to retain extremely broad discretionary decision-making power; and, finally, that status offenses are inherently discriminatory in application as well as typically unconstitutionally vague in their construction.

Thomas, *Are Status Offenders Really So Different? A Comparative and Longitudinal Assessment*, 22 *CRIME & DELINQ.* 438, 441 (1976).

112. *A Report to the President—President's Child Safety Partnership* at 123 (1987).

113. *Id.*



various alternatives are considered.<sup>114</sup>

OJJDP's National Incidence Studies of Missing, Abducted, Runaway and Thrownaway Children (NIS-MART) has shed important light on troublesome runaway status offenders. According to NIS-MART, in 1988 some 450,000 runaways left or stayed away from home at least overnight or ran away from juvenile facilities (primarily, group foster homes, residential treatment centers, mental health facilities, boarding schools, and juvenile detention centers). Of the 12,800 youth who ran away from a juvenile facility, about 40 percent had run from the same facility within the prior twelve months. Approximately a third of those who ran away from home had run away at least once during the previous year at least once.<sup>115</sup>

The National Coalition of State Juvenile Justice Advisory Groups' May 1989 Report to the President contends that many youth who would have been brought into the juvenile justice system as status offenders in the past are now labeled as suffering mental health problems. This relabeling facilitates their diversion into the mental health system and their confinement in psychiatric, in lieu of correctional, institutions.

The National Coalition warned:

[I]n some jurisdictions a lucrative industry has developed to provide alternative services, specifically mental health services, for noncriminal "acting out" teenagers. Status offenders often relabeled as mentally ill, are increasingly being institutionalized in secure mental health settings where conditions parallel those found in juvenile correctional facilities, but without the attendant rights to due process.<sup>116</sup>

## XII. A "SUBSTANTIAL" SUCCESS STORY

Despite such on-going debates and difficulties, most juvenile justice professionals would agree that the JJDP Act's goal of state compliance with its DSO mandate has been substantially accomplished. National juvenile court data confirm that the JJDP Act had a significant impact on DSO between 1975 and 1978 when the propor-

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114. *Id.*

115. D. FINKELHOR, G. HOTALING & A. SEDLAK, MISSING, ABDUCTED, RUNAWAY, AND THROWNWAY CHILDREN IN AMERICA 97-134 (1990). Copies of the report and its executive summary may be ordered from the Juvenile Justice Clearinghouse, Box 6000, Rockville, MD 20850 (800-638-8736). For an overview of NIS-MART, see Sweet, "Missing Children": *Found Facts*, Nov./Dec. 1990 NIJ REP., at 15 (1990).

About 3 out of 10 [of the 450,000 runaways] . . . were without a safe place to stay at some time during the course of the runaway episode. Parents or caretakers contacted the police for 4 out of 10 runaways [and 8 percent of the total were placed in a detention center]. Roughly 3 out of 10 of these runaways were gone at least a week, and one out of 10 had not returned home at the time of the interview with the parent . . .

*Id.* at 116-118.

116. NATIONAL COALITION OF STATE JUVENILE JUSTICE ADVISORY GROUPS, PROMISES TO KEEP XXX (1989).

tion of status offenders detained relative to all juveniles in detention dropped from forty to fifteen percent. Since 1978, the proportion of juvenile detainees that are status offenders has continued a steady, if more gradual, decline.<sup>117</sup>

As previously noted, the JJDP Act requires participating states to submit an annual monitoring report to OJJDP.<sup>118</sup> The first such report was required by the end of 1976 from the forty-two states and territories participating in the formula grant program at that time. Only twenty-five states had forwarded such reports by the following March. Among these, eight states had not established monitoring systems, only nine states provided what could be considered complete data, and only two states appeared to demonstrate at least a seventy-five percent reduction in the number of status offenders placed in detention and correctional facilities.<sup>119</sup> By 1979, fifty-one states and territories were participating in the JJDP Act program, all of which had established monitoring systems. Among these, thirty-three states had demonstrated substantial DSO compliance. Another thirteen had shown significant progress toward substantial compliance.<sup>120</sup>

By 1988, fifty-six states (and territories) were participating in the JJDP Act program. Among these, fifty-one were in full compliance, or in full compliance with de minimis exceptions, with the DSO requirements.<sup>121</sup>

State monitoring reports submitted to OJJDP by the fifty-six participating states and territories demonstrate a ninety-five percent overall reduction in DSO violations nationally from 1979 to 1988.<sup>122</sup>

The following have been identified by OJJDP to be the most important ingredients in participating states' success in achieving DSO:

- (1) state legislation prohibiting or severely limiting detention or incarceration-

117. National Center for Juvenile Justice, Response to an Official Request from OJJDP for Statistical Information Regarding Deinstitutionalization of Status Offenders and Jail Removal 3 (1990) (unpublished document). For additional data on detention of status offenders see DEPARTMENT OF JUSTICE, CHILDREN IN CUSTODY, 1975-85: CENSUS OF PUBLIC AND PRIVATE DETENTION, CORRECTIONAL, AND SHELTER FACILITIES, 1975, 1977, 1979, 1983, and 1985 (1989).

118. JJDP at § 223 (a)(15).

119. GENERAL ACCOUNTING OFFICE, REMOVING STATUS OFFENDERS FROM SECURE FACILITIES: FEDERAL LEADERSHIP AND GUIDANCE ARE NEEDED 31 (1978).

120. Office of Juvenile Justice and Delinquency Prevention, 1979 Summary of State Compliance (March, 1980) (unpublished document).

121. Office of Juvenile Justice and Delinquency Prevention, 1988 Summary of State Compliance (October 1990) (unpublished document).

122. DSO violations were reduced from 188,007 to 9741. Personal Communication, Office of Juvenile Justice and Delinquency Prevention (October 16, 1990).

tion of status offenders,<sup>123</sup>

(2) 24-hour court intake,

(3) objective detention criteria that mirrors or are more restrictive than state laws,

(4) local commitment and involvement in DSO efforts,

(5) availability and use of nonsecure community-based alternatives—both residential and non-residential.<sup>124</sup>

OJJDP is sponsoring a study, currently underway, assessing the effects of DSO on involved youths, youth-serving agencies, and the juvenile justice system. The research will examine DSO programs in three categories of state approaches: (1) the “treatment” model—in which status offending behavior is seen as a symptom of a larger problem for which remediation is needed; (2) the “normalization” model—which views status offending behavior as a normal process of growing up; and (3) a deterrence approach favoring intensive treatment through judicial control and/or secure detention.<sup>125</sup>

### XIII. CONCLUSION

DSO must be viewed within the larger context of juvenile justice reform. Since its enactment in 1974, the JJDP Act has stimulated numerous improvements, including adoption of standards for the administration of juvenile justice, juvenile code revisions, improved conditions of confinement, improved police investigation techniques, selective and vertical prosecution of habitual offenders, more effective treatment of serious and violent offenders, development of such system alternatives as restitution and intensive probation, expanded volunteer programs, increased public awareness and involvement in juvenile justice issues and development of statewide programs and infrastructures for coordination of youth services.

The success of the DSO movement cannot be measured solely in terms of the removal of nonoffenders and status offenders from secure detention centers and training schools. Until DSO's impact on the juvenile system's response to status offenders, particularly run-aways and chronic noncriminal offenders, is adequately assessed and found acceptable, only the first phase of this important mandate for reform will have been achieved.

Removing noncriminal juveniles from secure confinement may

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123. As of February 1988, 19 states had statutes that prohibited secure detention or incarceration of status offenders personal communication. National Center for Juvenile Justice (October 16, 1990). Others have enacted laws limiting such practices. Still others have executive or judicial policies that prohibit or limit them.

124. Widely used residential alternatives include shelter-care, emergency foster care and group homes. Home detention, after-school report centers and counseling programs are popular non-residential alternatives.

125. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, ASSESSING THE EFFECTS OF DEINSTITUTIONALIZATION OF STATUS OFFENDERS: A JUVENILE JUSTICE BULLETIN 2-3 (1989).

well prove to be the easiest part of the process. Ensuring effective programs and services that reduce recidivism and deter future status offenses or delinquent acts is the far more complex challenge facing those not simply pursuing compliance with the JJDP Act, but seeking to build a juvenile justice system that helps our troubled youth, strengthens our families, and protects our citizens.<sup>126</sup>

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126. "The interest of the public is served not only by rehabilitating juveniles when that is possible, but the interest of the public is also served by removing some juveniles from environments where they are likely to harm their fellow citizens." *In re Winburn*, 32 Wis. 2d 152, 161, 145 N.W.2d 178, 182 (1966).

