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Deprived of "Fatal Liberty": The Rhetoric of Child Saving and the Reality of Juvenile Incarceration

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ARTICLES

DEPRIVED OF "FATAL LIBERTY": THE RHETORIC OF CHILD SAVING AND THE REALITY OF JUVENILE INCARCERATION

*J. Herbie DiFonzo**

As to abridgement of indefeasible rights by confinement of the person, it is no more than what is borne . . . in every school.¹

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1. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

INTRODUCTION: OF RHETORIC AND REALITY

“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.”² The modern reader who scans this sentence can only grope for its meaning. Toward what “confirmed depravity” was the child headed? Why would it constitute “extreme cruelty” to release her from her captors? The gothic tone of the language is reminiscent of Edgar Allan Poe, but in fact the quoted words comprise the end of the one-page opinion in *Ex parte Crouse*, handed down by the Pennsylvania Supreme Court in 1839.³ *Crouse* upheld the incarceration of a girl in the Philadelphia House of Refuge without even the suggestion of criminal culpability, and the decision served as the compelling model for dozens of subsequent judgments throughout the country.⁴ Indeed, the text of this minuscule yet landmark opinion can operate as a template to measure the “child-saving”⁵ rhetoric by which state supreme courts and Protestant reformers rationalized special treatment for the children of the poor, primarily Roman Catholics and immigrants, from the Jacksonian age until the end of the Progressive era. Child-saving rhetoric, in the courts as well as in society at large, justified state control over “vicious”⁶ or “dangerous”⁷

2. *Id.*

3. *Id.* The reporter's notes and summary of briefs occupy slightly more than two pages of the report. The actual per curiam opinion takes less than a full page.

4. *Id.*

5. “Child-saving” was the unselfconscious term applied by Victorian reformers to their work of attempting to rescue both dependent and delinquent children from destitution. See, e.g., COMMITTEE ON THE HISTORY OF CHILD SAVING WORK TO THE TWENTIETH NATIONAL CONFERENCE OF CHARITIES AND CORRECTION, HISTORY OF CHILD SAVING IN THE UNITED STATES (1893); John G. Shortall, *Child-Saving Work of the Humane Societies*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS (1897) (excerpted in CARE OF DEPENDENT CHILDREN IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES (1974)).

6. See, e.g., BRADFORD K. PEIRCE, A HALF CENTURY WITH JUVENILE DELINQUENTS: THE NEW YORK HOUSE OF REFUGE AND ITS TIMES 275 (reprint ed. 1969) (1869) (“The two great necessities in our country at this hour in the matter of juvenile reform are, first, some thorough, effectual measure for clearing the streets of our cities and large towns of vagrant, begging, and vicious children.”). Mary Ann Crouse, the young girl whose incarceration was upheld in *Ex parte Crouse*, had been committed to the Philadelphia House of Refuge on her mother's petition which referred to her “vicious conduct.” *Ex parte Crouse*, 4 Whart. at 9.

7. See, e.g., CHARLES L. BRACE, THE DANGEROUS CLASSES OF NEW YORK AND TWENTY YEARS' WORK AMONG THEM, at i (1872). Brace, the preeminent Victorian child saver, founded and managed the New York Children's Aid Society, which conducted the “orphan trains” transporting many thousands of impoverished urban children to Western farm families. On Brace's career, see MIRIAM Z. LANGSAM, CHILDREN WEST: A HISTORY OF THE PLACING-OUT SYSTEM OF THE NEW YORK CHILDREN'S AID SOCIETY, 1853-1890 (1964); HENRY W. THURSTON, THE DEPENDENT CHILD 92-112 (reprint ed. 1974) (1930); FRANCIS E. LANE, AMERICAN CHARITIES AND THE CHILD OF THE IMMIGRANT 75-83 (reprint ed. 1974) (1932). English penal reformer Mary Carpenter defined the “dangerous classes” as “those who have already received the prison brand,

children by claiming that incarceration restricted children's freedom of action no more than a common school would.⁸

Closely examining the fit between rhetoric and reality in judicial opinions and penal reforms is always a useful exercise, for it may uncover the hidden agendas which make a trumpeted advance often a lateral move and sometimes a retreat. In the nineteenth century, correctional discourse almost never identified the religious and anti-immigrant agendas of many child-saving efforts. In America, in this last decade of the twentieth century, we again face increasing calls to transform the juvenile justice system, this time in an effort to treat child offenders more like adult outlaws.⁹ But the rhetoric that permeates this discourse rarely discloses that the juvenile court docket today handles far more African-Americans and Hispanics than their proportion in the general population.¹⁰ It is these two groups who will bear the brunt of the more punitive measures being proposed.¹¹ Although we are unlikely to encounter gothic diction in current reformist rhetoric, we may confront a similar tale of misdirected aims and not-fully-articulated goals. This article documents an earlier episode in our tortuous history of dealing with deviant norms and different children to illustrate the role played by judicial rhetoric in concealing correctional prejudice and following a dominant cultural blueprint. Using a term familiar to our child-saving predecessors, it is a tale of "incurability."¹²

The first section of this article introduces the problem and glances at the historiographical treatment of child saving. The second section limns a picture of childhood in early nineteenth-century America, and argues that the idea of family autonomy was largely a myth. Particularly in the lives of lower-class youth, primarily from Roman Catholic immigrant families, the legal culture supported a preference for state intervention. The common schools and the reform schools were both designed to hold poor children long enough to instill

or, if the mark has not been yet visibly set upon them, are notoriously living by plunder, —who unblushingly acknowledge that they can gain more for the support of themselves and their parents by stealing than working, —whose hand is against every man, for they know not that any man is their brother." GORDON ROSE, *SCHOOLS FOR YOUNG OFFENDERS* 3 (1967) (quoting MARY CARPENTER, *REFORMATORY SCHOOLS FOR THE CHILDREN OF THE PERISHING AND DANGEROUS CLASSES AND FOR JUVENILE OFFENDERS* 2-3 (1851)). Carpenter founded the Working and Visiting Society in Bristol, opened several reformatory schools, and was influential in securing passage of legislation for wayward children. See generally JOSEPH M. HAWES, *CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA* 63-77 (1971) (chronicling Mary Carpenter's career in juvenile reformation).

8. See *infra* text accompanying notes 108-137.

9. See, e.g., James Dao, *Pataki Proposes Legislative Plan to Curb Violent Crime by Youths*, N.Y. TIMES, Dec. 10, 1995, at 1 (stating that New York Governor George Pataki's approach effectively "prod[s] the state's prosecutors and courts to treat more teen-agers like adult criminals").

10. Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1367, 1424-25 (1995).

11. *Id.*

12. The statute under which Mary Ann Crouse was sentenced to the Philadelphia House of Refuge provided for the commitment of children as a "consequence of vagrancy, or of incorrigible or vicious conduct." *Ex parte Crouse*, 4 Whart. at 11.

Protestant and nativist values. The third section considers the spread of the "supplemental schools," institutions—like the houses of refuge—designed to educate and reform wayward youth in a carceral environment. Particular attention is paid to the Philadelphia House of Refuge, which served as both a characteristic juvenile institution and the subject of a state supreme court decision which helped shape the contours of child saving for a century.¹³ The fourth section turns to the struggle in the state courts, and analyzes the quick ebb and early flow of constitutional protections of childhood liberties. The rationale that juvenile refuges were schools and not prisons proved a compelling metaphor for the shelving of early constitutional concerns. The fifth section explores the rhetoric of child saving in a century of court decisions which represented the triumph of metaphor over reality.

I. THE CYCLE OF CHILD-SAVING HISTORY

The metaphor of infant salvation was coined by the child savers themselves. An 1823 report by New York's Society for the Prevention of Pauperism pointedly depicted the foul environment in which poor children were raised:

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 indulged 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? . . . Is it possible that a Christian community, can lend its sanction to such a process without any effort to rescue and save?¹⁴

In 1880, renowned penologist Enoch Wines wrote of the same class of children:

Their destitution, their vagrant life, their depraved habits, their ragged and filthy condition forbid their reception into the ordinary schools of the people. It is from this class that the ranks of crime are continually recruited, and will be so long as it is permitted to exist. They are born to crime, brought up for it. They must be saved.¹⁵

By "saved," the reformers did not intend a religious conversion ensuring the child's well-being in the afterlife, but rather a secular deliverance, permitting

13. *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839).

14. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189 (1970) (quoting 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 (1823)).

15. ENOCH C. WINES, THE STATE OF PRISONS AND OF CHILD-SAVING INSTITUTIONS IN THE CIVILIZED WORLD 607 (reprint ed. 1968) (1880).

society to call upon the productive toil of the child.¹⁶ In the words of the California Supreme Court, the task at hand aimed not at "punishment for offenses done, but [at] reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society."¹⁷ Exercising control was the key to this human reclamation project. As child saver Thomas Eddy phrased the point early in the nineteenth century, troublesome children could "by proper discipline be subdued and reclaimed."¹⁸

Enoch Wines' precis of the problem and the solution highlighted the three elements which focused the rhetoric of the child savers: (1) the model of the public school as the proper locus for socialization; (2) the view of dependent and neglected children as "pre-delinquent," thus treatable with matching medicine;¹⁹ and (3) the unquenchable confidence that this major extension of state and societal control over the lives of these children constituted a social duty whose effects were entirely beneficial, what the Wisconsin Supreme Court referred to, in 1876, as "the political necessity of public charity."²⁰

Pointedly missing from Wines' list, and, as this article will argue, from the fulcrum of child saving, was any mention of reforming the family itself. Indeed, one of the contrapuntal themes to the development of American domesticity and, later, the Victorian ideal of the home, was the prolixity of home substitutes designed for those whose natural hearths did not pass muster in the scale of the dominant culture.²¹ As social historian David J. Rothman pointed out, "deviancy began with the family."²² It is no coincidence that the common school movement arose at the same time as the drive to establish houses of refuge.²³ Both aimed at restricting the freedom of youth and channeling its energies into traditional labor at a time of social uncertainty. In the minds of the reformers, and in the language of nearly every appellate court which approved the increased incarceration of wayward children, the refuges and reformatories were not prisons, but schools.²⁴

The decidedly benign self-image of the reformers held sway throughout the nineteenth century, and was converted into lapidary tribute upon the spread of the

16. *Ex parte Ah Peen*, 51 Cal. 280, 281 (1876).

17. *Id.*

18. See Fox, *supra* note 14, at 1193.

19. In his visit to the United States, Charles Dickens remarked on Boston's Boylston "school," which he described as "an asylum for neglected and indigent boys who have committed no crime, but who in the ordinary course of things would very soon be purged of that distinction if they were not taken from the hungry streets and sent here." 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 685 (Robert H. Bremner ed., 1970) (quoting 1 CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 58-59 (1842)) [hereinafter CHILDREN AND YOUTH DOCUMENTARY].

20. *Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328, 332 (1876).

21. See *infra* text accompanying notes 72-76.

22. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 66 (1971).

23. See *infra* text accompanying notes 201-283.

24. *Id.*

juvenile court legislation in the early years of the twentieth century.²⁵ The first major reconsideration of the work of the child savers did not appear until 1969, when criminologist Anthony Platt published *The Child Savers: The Invention of Delinquency*.²⁶ Platt's work came on the heels of the U.S. Supreme Court's own significant alteration of the cardinal premises of juvenile justice, through two important decisions in the 1960s.²⁷ Platt lampooned the reformers' pretensions and pierced through their noble sentiments to uncover a "crusade" to inculcate middle-class, Protestant, and nativist values upon an immigrant-laden lower class which was both feared and despised.²⁸ Platt focused on the events in the era immediately before and after the passage of the first juvenile court act, in the last year of the nineteenth century, and slighted the work of the child refuges and reformatories—as well as the ideological justification for these new institutional arrangements articulated by the state courts who decided on their constitutionality—which had developed over the previous three-quarters of a century.²⁹

Law professor Sanford J. Fox followed Platt's exposé with an historical study emphasizing the continuity of the reformers' ideals and methods throughout the nineteenth, and much of the twentieth century.³⁰ Fox also argued that the modern classification of children on the juvenile court dockets as either neglected or delinquent is anachronistic. The child savers were focused on "crime prediction,"³¹ Fox maintained, and they placed in the "reclamation pile" all deviant children, without regard to their status as victims or agents of misfortune.³² As English penal reformer Mary Carpenter bluntly stated in 1875, all children under fourteen "may be classed together . . . for there is no distinction between pauper, vagrant, and criminal children, which would require a different system of treatment."³³

Platt and Fox have been substantively critiqued. J. Lawrence Shultz argued that both authors overstated the evidence that the creation of the juvenile court represented the imposition of middle-class values upon the poor, immigrants, and racial minorities, and that both understated the importance of probation as a tool

25. See, e.g., TIMOTHY D. HURLEY, *ORIGIN OF THE ILLINOIS JUVENILE COURT LAW: JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED* (reprinted 1977) (3d ed. 1907); HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* (1972); PREVENTIVE TREATMENT OF NEGLECTED CHILDREN (Hastings H. Hart ed., 1910).

26. ANTHONY N. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (2d ed. 1977)

27. *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

28. PLATT, *supra* note 26, at 98.

29. Platt acknowledged some of this oversight in the introduction to the second edition of his text. *Id.* at xi.

30. Fox, *supra* note 14, at 1191-92, 1207.

31. *Id.* at 1192.

32. *Id.* at 1191.

33. *Id.* at 1193 (quoting Mary Carpenter, *What Should Be Done for the Neglected and Criminal Children of the United States*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES 70 (1875)).

that markedly changed and extended the power of the child-saving courts.³⁴ Douglas Rendleman criticized Fox for locating the core of child saving in crime prediction.³⁵ According to Rendleman, the extension of *parens patriae* to the refuge movement and the juvenile court was based on medieval English poor laws, and represented concern about paupers, not inchoate criminals.³⁶ Lawrence Friedman argued that Platt overstated his thesis of a campaign of oppression against lower-class youth.³⁷ That many children were brought into the correctional arms of the state by their own parents suggested to Friedman that Platt's portrait of class-based repression was unidimensional.³⁸ In 1988, sociologist John Sutton joined the debate with *Stubborn Children: Controlling Delinquency in the United States, 1640-1981*.³⁹ Sutton chronicled the various juvenile reforms as a "turn from punitive justice to an avowedly therapeutic style of social control."⁴⁰ He argued that the rather harsh custodial institutions generated by the refuge movement of the 1820s were a product of the philosophical and political clashes inherent in Jacksonian society, and that, far from a radical innovation, the juvenile court was "primarily a ceremonial institution through which the ideology of the broader charity organization movement was enacted and within which the routine practices of child saving established in the nineteenth century could be continued in a more legitimate form."⁴¹

In 1995, two authors have taken a postmodern look at some of these issues. Jonathan Simon located the instability of the juvenile court and its institutional predecessors in the doctrinal premises of *parens patriae*, and he connected the failures of juvenile reform to the need to "exercis[e] paternal power in settings that look like neither the traditional family nor the modern welfare state."⁴² In

34. J. Lawrence Schultz, *The Cycle of Juvenile Court History*, 19 CRIME & DELINQ. 457, 462-67 (1973). Schultz was, in turn, critiqued by Ellen Ryerson. ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 76-77 (1978). Alexander Pisciotto provided another review of the literature. Alexander W. Pisciotto, *Theoretical Perspective for Historical Analyses: A Selective Review of the Juvenile Justice Literature*, 19 CRIMINOLOGY 115, 122-27 (1981).

35. Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 215, 217 n.65 (1971).

36. *Id.*

37. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 413-15 (1993).

38. *Id.* See Alexander W. Pisciotto, *Saving the Children: The Promise and Practice of Parens Patriae, 1838-98*, 28 CRIME & DELINQ. 410, 411 (1982); RYERSON, *supra* note 34, at 76-77; STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920 (1977); ROBERT M. MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940 (1973).

39. JOHN R. SUTTON, *STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981*, at 2 (1988).

40. *Id.*

41. *Id.* at 122.

42. Simon, *supra* note 10, at 1425. Simon insists on the term "paternal" rather than "parental," to emphasize that gender domination has always characterized the use of such power

Birth of the Prison Retold, George Fisher situated the carceral reforms which encompassed a much younger birth cohort within the "juvenilization of punishment"⁴³ in the late eighteenth and early nineteenth centuries. Fisher argued that the prison-builders focused on youth crime in an effort to take up the challenge of what they believed to be a "reformable" class of miscreants.⁴⁴ Fisher reversed the traditional picture of adult penal institutions modified for use by children, claiming instead that the corrective and custodial institutions were designed for younger miscreants and ill-adapted for adult prisoners.⁴⁵

While other authors have examined the child-saving rhetoric of state appellate courts,⁴⁶ this article links the courts' rationales to the child savers' development of barracks for the young as merely alternative educational institutions, constitutionally appropriate for the children of the "vicious and dangerous" classes. In order to appreciate the legal culture in which prisons would pass constitutional muster as schools, the next section explores the social background to the era of building both types of school systems.

II. DEVIANT CHILDREN IN THE NEW REPUBLIC

Although the early American theocratic settlements viewed departure from divinely approved norms as sin, colonists anticipated poverty and crime as normal concomitants of a precarious existence. Deviance was not disturbing to the colonial mind because it could be controlled through the strong sense of family order, an institutional force which was synonymous with the public good. The social structure of the family was expected to accommodate both the impoverished and the reprobate. When meager resources failed, the colonial community often extended rehabilitative aid to reinforce—not to displace—the family.⁴⁷

This system of "outdoor relief"⁴⁸ afforded financial succor to worthy, but temporarily dependent, neighbors, thereby enabling them to retain both family dignity and community standing. Colonists who could not be supported by their

in our culture. *Id.* at 1373 (discussing the development of *parens patriae* in relation to juvenile law in American courts). See *id.* at 1367-1368, 1384-1392; Alexander W. Pisciotta, *Parens Patriae, Treatment and Reform: The Case of the Western House of Refuge, 1849-1907*, 10 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 65 (1984); Pisciotta, *supra* note 38; Rendleman, *supra* note 35. Neil Cogan presented an overview of the medieval roots of the doctrine. Neil H. Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147 (1970).

43. George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1314 (1995).

44. *Id.* at 1243.

45. *Id.*

46. See, e.g., RYERSON, *supra* note 34, at 64-76; SCHLOSSMAN, *supra* note 38, at 8-17, 137-38; MENNEL, *supra* note 38, at 13-14, 125-128, 144-45.

47. See generally WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 15-18 (1974); ROTHMAN, *supra* note 22, at 3-20.

48. "Outdoor relief" represented public assistance to the impoverished provided in their own homes, as contrasted with "indoor relief," supplied within the confines of a residential institution. THURSTON, *supra* note 7, at 7 n.4; ROTHMAN, *supra* note 22, at 30-35.

immediate families were usually assured that relatives or neighbors would spare them from the almshouse. Colonial criminal law swiftly and publicly punished miscreants, old and young, but neither custom nor the public coffers countenanced a policy of general incarceration. Workhouses were even rarer than almshouses in the colonies. Before 1750, jails served as pre-trial detention facilities for adults, or as punishment for selected deviant classes, such as debtors and political or religious offenders.⁴⁹ In Massachusetts, for instance, magistrates often remitted delinquent children to their homes for a court-observed, but family-enforced, whipping.⁵⁰ When urban migration in the eighteenth century was accompanied by a degree of family breakdown, public authorities turned to apprenticeship as a way of restoring order.⁵¹ The guiding principle, however, was still familial. If a child's family had been corrupted, it was better to attach the child to a good home. In this context, apprenticeship or binding-out satisfied the need to ensure social control, whether or not the apprentices learned useful trades.⁵²

The concept of the self-policing community, distrusting outsiders but sustaining its own through the family ideal, remained an ideological fixture throughout the eighteenth century. However, when post-Revolutionary urbanization spawned new waves of delinquents, colonial law enforcement agencies demonstrated that their suitability for homogenous village life left them woefully inadequate to confront this unfamiliar menace. The resulting disorder precipitated a change in the ideation of poverty and delinquency; no longer was poverty perceived as an exigency befalling a worthy neighbor. As a result, the premises underlying the community's trust in outdoor relief began to crumble. While the colonists had viewed youthful transgressions with relative equanimity, by the end of the Revolutionary era the social lens was focused on the misdeeds of the new class of poor children. As notions of dependency and delinquency altered, the victims of misfortune blended into the unfortunates who victimized others. The category of "worthy poor" nearly disappeared.⁵³

Colonial penal codes and law enforcement had relied on the link between religious failings and extremely harsh penalties for both adult and juvenile offenders. Underdeveloped state and municipal governments could not have administered a complex system of punishments. Murder, arson, horse-stealing, and a child's disrespect for his parents all merited the death penalty, which was unevenly enforced. In the 1790s, however, Americans responded to changes in the social milieu by enacting a secular system of corrections which would mitigate the excesses of the gallows while providing for more rational, widely-

49. Fisher, *supra* note 43, at 1239.

50. MENNEL, *supra* note 38, at xx.

51. See Fisher, *supra* note 43, at 1242-43 (discussing a similar phenomena in England).

52. See MENNEL, *supra* note 38, at xix-xxiv; ROTHMAN, *supra* note 22, at 30-56. See also HAWES, *supra* note 7, at 13-20 (discussing the colonists' view of deviant children).

53. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 37-40 (1975). See also Louis P. Masur, *The Revision of the Criminal Law in Post-Revolutionary America*, 8 CRIM. JUST. HIST. 21 (1987); ROTHMAN, *supra* note 22, at 58, 164; MENNEL, *supra* note 38, at xxvi.

enforced, and thus more republican, punishments.⁵⁴ Incarceration for offenses lies at the heart of this reform.

A. *The Sequestration of Childhood*

With the dawn of the nineteenth century came a new focus on childhood. Wordsworth's maxim that the "child is father of the man,"⁵⁵ reflected the Romantic idea that childhood is not merely a stage to be outgrown, but also a critical developmental period in human life.⁵⁶ Post-Calvinist theology fostered the notion of the child as an independent moral actor, and thus a fit subject for efforts aimed at spiritual salvation.⁵⁷ In the words of historian Mary P. Ryan: "However cloudy the concept and insubstantial the logic, the notion of the moral agency of childhood opened a wedge into Calvinism, through which parents could actively enter into the salvation of their children."⁵⁸ It was but a short step from these theological ideas to their secular counterparts: childhood should be preserved as long as possible from the snares of adulthood, and children who wander from the true can be taught to return. As Dorus Clarke vigorously phrased the point in his 1836 *Lectures to Young People in Manufacturing Villages*, "next to the conservative power of the gospel, we must look to education to give perpetuity to our republican institutions, and to preserve our cities and villages from riots, incendiarism and blood."⁵⁹

This increased generational segregation was accompanied, paradoxically, by "not only a recognition of the organic character of human growth, but also [by] a tendency toward preserving juvenile innocence rather than stimulating children to imitate adults."⁶⁰ These tendencies coalesced in two major reforms of the middle third of the nineteenth century: the common school and the house of refuge. Both educational institutions aimed at preserving the newly-found special condition of childhood, and in particular at keeping it quarantined from the corruption of adult influences.⁶¹ Education was thus intended as a *confining*

54. See Douglas S. Greenberg, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, 19 AMER. J. LEGAL HIST. 173, 175-207 (1975); Douglas S. Greenberg, *Patterns of Criminal Prosecution in Eighteenth-Century New York*, 56 NEW YORK HIST. 132, 132-53 (1975). These two articles were expanded into DOUGLAS S. GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 (1976).

55. JOHN BARTLETT, FAMILIAR QUOTATIONS 374 (Justin Kaplan ed., 16th ed. 1992) (quoting WILLIAM WORDSWORTH, MY HEART LEAPS UP (1807)).

56. See SUTTON, *supra* note 39, at 56-57 (discussing the Romantic influence upon American education and the refuge movement).

57. MARY P. RYAN, CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865, at 69 (1981).

58. *Id.*

59. THOMAS BENDER, TOWARD AN URBAN VISION: IDEAS AND INSTITUTIONS IN NINETEENTH-CENTURY AMERICA 121 (1975) (quoting DORUS CLARKE, LECTURES TO YOUNG PEOPLE IN MANUFACTURING VILLAGES (1836)).

60. Joseph F. Kett, *Adolescence and Youth in Nineteenth-Century America*, in EDUCATION IN AMERICAN HISTORY: READINGS ON THE SOCIAL ISSUES 53 (Michael B. Katz ed., 1973).

61. *Id.*

experience for all children. Puritans viewed childhood as a regrettable prelude to adult life, but their nineteenth-century successors celebrated the juvenile years and viewed educational institutions as "asylum[s] for the preservation and culture of childhood."⁶²

The image of an asylum encompassed both the common school and its corrective correlate, the refuge.⁶³ Not only were children increasingly viewed as different enough to warrant their own institutions, but the offspring of immigrants stood out as perfect candidates for these new socialization methods. "The Age of the Common School"⁶⁴ coincided with growth spurts in urbanization and industrialization throughout the American north, as well as the first substantial wave of immigrants.⁶⁵ Both the common school movement and the development of juvenile incarceration facilities represented efforts by voluntary associations and state governments to undertake functions previously thought to reside exclusively within the family. But the families of the poor could no longer be trusted to bring up dutiful citizens for the nation's burgeoning

62. *Id.* See JOSEPH F. KETT, *rites of passage: adolescence in America, 1790 to the present* (1977) (presenting a fuller statement of Professor Kett's views).

63. In nineteenth-century usage, the terms "asylum" and "refuge" were largely interchangeable, although asylum eventually became primarily associated with facilities for the insane. Both words incorporated notions of sanctuary and tranquil respite. HOWARD W. HOPKIRK, *institutions serving children* 10 (1944). A child became an "orphan" (sometimes called a "half-orphan") upon losing only one parent, and "orphanages" (sometimes referred to as "orphan asylums") housed a broad array of unfortunate children, some of whom had been institutionalized by their parents. Social investigator Henry Thurston estimated that up to 90% of the children in orphanages during this period had one or both parents living. THURSTON, *supra* note 7, at 39 n.1; HOPKIRK, *supra* at 12. Terms such as asylum and orphanage may have fallen into disuse after the Victorian era because they emphasized the helpless state and dependent nature of the residents, a vision of youth at odds with twentieth-century notions of individual responsibility. "Little Orphant Annie," for example, began life as a character drawn by Victorian poet James Whitcomb Riley. She was reinvented as "Little Orphan Annie" by Harold Gray in the 1920s. When she made her Broadway debut in the 1970s, however, she jettisoned her pity-evoking modifiers and emerged simply as "Annie." See RUSSEL NYE, *the unembarrassed muse: the popular arts in America* 117-18, 221-22 (1970). As an illustration of the unpredictable contingency of history, orphanages may be making a comeback. See JAMES J. CLOSE, *no one to call me home: America's new orphans* (1990) (an account of the work of the Mercy Home for Boys and Girls with Chicago's abused and abandoned children); Elizabeth Kolbert, *The Vocabulary of Votes*, N.Y. TIMES, March 26, 1995, § 4, at 46 (noting survey results suggesting that 62% favor sending the children of abusive welfare mothers to orphanages); *Time for Orphanages in Illinois*, CHI. TRIB., Dec. 3, 1995, at C18 (supporting the revival of orphanages editorially); Karen Zantyk, *Orphan Trains Offer a Lesson*, N.Y. DAILY NEWS, Dec. 4, 1995, at 25 (same). Contemplating the restoration of orphanages is part of a larger cultural reconsideration of Victorian ideals and institutions suggested by, among others, Newt Gingrich, Speaker of the House of Representatives. See Michiko Kakutani, *If Gingrich Knew About Victoria's Secret*, N.Y. TIMES, March 19, 1995, § 4, at 5 (criticizing Gingrich's call for a restoration of Victorian values and institutions). But see GERTRUDE HIMMELFARB, *the de-moralization of society: from Victorian virtues to modern values* (1995) (calling for a revival of Victorian moralism).

64. FREDERICK M. BINDER, *the age of the common school, 1830-1865* (1974).

65. *Id.* at 3-4, 62.

cities and factories. Accordingly, central roles of socialization were removed from the family's control.⁶⁶

B. The Myth of Autonomy: From the Family as Refuge to the Refuge as Family

Traditional separate spheres historiography saw the nineteenth-century family as a calm and clean retreat from the din and dust of urbanization and industrialization.⁶⁷ Social roles divided along gender lines. "The two sexes have been destined by the Creator," Francis Lieber wrote in 1833, "for different spheres of activity and have received different powers to fulfil their destiny."⁶⁸ To the man was given the world at large, with a particular focus on the evolving workday universe of factory or office. His wife emerged as the matron of the home. This cult of domesticity simultaneously chained women to concerns of the hearth and freed them to expand the range of domestic activities. For a man, the home—as now managed by his wife—was transformed into a refuge from the storms of the workplace. As a contemporary essayist grandiloquently stated:

O! what a hallowed place home is when lit by the smile of [a woman]; and enviably happy the man who is the lord of such a paradise . . . [W]hen his proud heart would resent the language of petty tyrants . . . from whom he receives the scanty remuneration for his daily labors, the thought that she perhaps may suffer thereby, will calm the tumult of his passions, and bid him struggle on, and find his reward in her sweet tones, and soothing kindness, and that the bliss of home is thereby made more apparent.⁶⁹

Recent explorations, however, have tried to account for the paradox of twin cultural constructs: one viewing the family as an enclave for domestic tranquility, and the other justifying increased governmental involvement in intimate family activities such as child-rearing.⁷⁰ The portraits in this family gallery could not differ more starkly. On one wall we can view historian John Demos' etching of

66. See Barry W. Poulson, *Education and the Family During the Industrial Revolution*, in *THE AMERICAN FAMILY AND THE STATE* 145, 152-58 (Joseph R. Peden & Fred R. Glahe eds., 1986). For other interpretations of the common school movement, see DAVID TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820-1980*, at 3-104 (1982); LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783-1876*, at 133-85 (1980); SAMUEL BOWLES & HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE* 151-79 (1976); GERALD GUTEK, *AN HISTORICAL INTRODUCTION TO AMERICAN EDUCATION* 49-61 (1970).

67. See Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1144-47. Much of the discussion in this section is drawn from Teitelbaum's heuristic analysis.

68. Francis Lieber, *Preface and Introduction*, in GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES*, at xv (Francis Lieber trans., 1833).

69. NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 69-70 (1977).

70. Teitelbaum, *supra* note 67, at 1137.

a nineteenth-century home as "a bastion of peace, of repose, of orderliness, of unwavering devotion to people and principles beyond the self."⁷¹ Across from this tableau, however, we see an altogether different drawing, limned by Edward Everett Hale in 1855, stating: "Whenever there are parents, incompetent to make their homes fit training places for their children, the State should be glad, should be eager, to undertake their care."⁷²

Why is the juxtaposition of these portraits so jarring? Perhaps the source of the modern discomfort with these clashing canvasses lies in the assumption of a monolithic family, whose uniform cultural construction can be recovered by the craft of history, a type of 'one zeitgeist fits all' American family. But the truth has many painters. Family history is particularly difficult because the notion of a smooth continuum is undercut by the variegated realities discovered just underneath. Only a few slices of American families can be presented in this article, but they are at least suggestive of the iconoclasm necessary to undo tunnel vision.

Education historian Lawrence A. Cremin argued that the significance of the new custodial institutions for children lies in the "extent to which they were explicitly seen, on the one hand, as surrogates for families and schools—the metaphors of household and schooling abound in the literature of custodial institutions—and, on the other hand, as complements to families and schools in the building and maintenance of the virtuous society."⁷³ While Cremin is correct about the parallel to schools, he is mistaken about the link to the family. The child savers largely abandoned the family metaphor when referring to deviant lower-class children. These unfortunate youths were perceived as needing rescuing *from their own* families, and the state and voluntary associations aimed not to stand in for the lower-class family, but rather to displace it altogether. No other conclusion can be drawn but that the child savers wished the school to replace the lower-class home. In 1851, Mary Carpenter made the point sharply when, in referring to dependent and delinquent youth, she wrote:

Look at them in the streets, where, to the eye of the worldly man, they all appear the scum of the populace, fit only to be swept as vermin from the face of the earth; see them in their home, if such they have, squalid, filthy, vicious, or pining and wretched with none to help, destined only, it would seem, to be carried off by some beneficent pestilence; —and you have no hesitation in acknowledging that these are indeed dangerous and perishing classes. Behold them when the hand of wisdom and of love has shown them a better way, and purified and softened their outward demeanor and their inner spirit, in schools well adapted to themselves, and you hardly believe them to be separated by any distinct boundary from the children who frequent the National and British Schools.⁷⁴

71. John Demos, *Images of the American Family, Then and Now*, in *CHANGING IMAGES OF THE FAMILY* 51 (Virginia Tufts & Barbara M. Myerhoff eds., 1979).

72. LARRY COLE, *OUR CHILDREN'S KEEPERS: INSIDE AMERICA'S KID PRISONS*, at xx (1972) (quoting EDWARD E. HALE ET AL., *PRIZE ESSAYS ON JUVENILE DELINQUENCY* (1855)).

73. LAWRENCE A. CREMIN, *TRADITIONS OF AMERICAN EDUCATION* 47 (1977).

74. ROSE, *supra* note 7, at 3. Toward the end of the century, a Minnesota district judge

The middle-class reformers who devised the Philadelphia House of Refuge for neglected and dependent youth emphasized, at some length, that their institution was not intended for society's protection through either the incapacitation or the infliction of retributive punishments upon juvenile offenders:

[The House of Refuge] presents no vindictive or reproachful aspect; it threatens no humiliating recollections of the past; it holds out no degrading denunciations for the future—but, in the accents of kindness and compassion, invites the children of poverty and ignorance, whose wandering and unguided steps are leading them to swift destruction, to come to a home where they will be sheltered from temptation, and led into the ways of usefulness and virtue.⁷⁵

This rhetoric contains no evocation of the cult of domesticity exalting the middle-class hearth. The "home" lionized in the passage above is clearly the reformatory institution, and the contrast is sharply drawn between the children's "unguided" life in their previous family homes, and their new careers of "usefulness and virtue" in the new "school of discipline and instruction."⁷⁶

perfectly captured the by then well-developed rationale for state intervention in unworthy families, stating:

It is the duty of the state in cases where evil courses have been entered upon, to stretch forth its hand and rescue children from their evil surroundings, and place them in institutions where they will receive such mental, moral and physical training as will induce them to turn from the wrong and pursue the right, and become men and women, the pride, rather than the shame, of the republic. In the exercise of such rights and the performance of such duties, the state has the right to break in upon the family circle and remove children therefrom and place them where they will be surrounded by better influences. When the family becomes a training school of vice, the state has the right to interfere; if not, then it has not the right of self-preservation.

For the purpose of enabling the state the better to perform its duty to those of its youths who have entered upon a vicious life, and become incorrigible, it erected and maintains an institution known as the State Reform School, in which it places, educates and trains that class. In committing a youth to that institution, the justice of the peace does not appoint a guardian for him, but acts as the agent of the state, and by its express authority takes the child from his evil associates and places him where he will be subject to better influences. This school is not a prison, but is what it[s] name implies, a school The child there receives that parental care and control which should have been exercised toward him by those whom he and the state had the right to assume would perform that duty.

State v. Brown, 50 Minn. 353, 354-55 (1892). The metaphors of education reveal the institutional and psychological prejudices of the nineteenth-century mind: if the family has become a "training school for vice," the remedy lies in commitment to the state reform school.

75. *JUVENILE OFFENDERS FOR A THOUSAND YEARS: SELECTED READINGS FROM ANGLO-SAXON TIMES TO 1900*, at 365 (Wiley B. Sanders ed., 1970) (excerpting COMMITTEE OF THE BOARD OF MANAGERS OF THE PHILADELPHIA HOUSE OF REFUGE, *THE DESIGN AND ADVANTAGES OF THE HOUSE OF REFUGE* (1835)) [hereinafter *JUVENILE OFFENDERS*].

76. *Id.* at 364-65. Since, as David Rothman noted, "Refuge managers located in parental neglect the primary cause of deviant behavior," they acted consistently in keeping the lower-class families at bay as much as possible:

C. Campaigns Against Catholics and Immigrants

It should come as no surprise that the refugees were populated largely by lower-class youths. The ascription of deference to the domestic sanctum was a product of middle-class consciousness. Lower-class families, particularly immigrants, were victimized by the opposite presumption. As Lee Teitelbaum noted:

The relationship of immigration to social and family disorganization was supported by environmentalist views and associationist psychology which commanded wide acceptance by the 1820s Americans were accordingly concerned by the poverty of the newcomers, but even more by the different values and goals that immigrants were believed to carry with them and the resulting difficulty of adjusting to the "open" society of America.⁷⁷

The Philadelphia House of Refuge incarcerated the children of laborers, sailors, tailors, and blacksmiths far more often than the offspring of lawyers or merchants.⁷⁸ Foreign-born and second-generation immigrants pervaded adult as well as juvenile penal institutions, provoking some measure of nativist wrath. For example, poet Lydia Sigourney, discovering the large proportion of immigrants upon a visit to the New York's Auburn Penitentiary, complained, writing that: "To furnish a poor-house for the decrepit of other realms might be accomplished in our broad land of plenty; but to be a Botany Bay [the convict colony of Australia] for their criminals, is a more revolting and perilous office."⁷⁹ Miscegenation proved an even greater horror. In 1837, Horace Bushnell called upon Americans to protect their majestic Anglo-Saxon blood against infusions from the tide of immigration.⁸⁰ Anti-Catholicism also dotted a great deal of the social thought and agitation throughout the remainder of the century.⁸¹

The Philadelphia refuge, reminiscent of many penitentiaries, provided separately for various types of visitors. Reversing the natural order of things, [the managers] established regulations whereby the closer a person was to an inmate, the less he was permitted to come. Foreign tourists had no trouble gaining admission; they could inspect the premises anytime with a ticket from the managers, the mayor, the ladies' committee, or a local judge. Interested citizens were slightly more restricted, entitled to admission on the first and third Wednesday of the month. But parents, guardians, and friends of the inmates, could visit only once in every three months. As a further safeguard, no one was permitted to converse with the children without special permission. Having rescued their charges from a foul environment, officials had no intention of bringing corruption to them.

ROTHMAN, *supra* note 22, at 77, 224.

77. Teitelbaum, *supra* note 67, at 1149.

78. See ROTHMAN, *supra* note 22, at 261.

79. J.C. FURNAS, *THE AMERICANS: A SOCIAL HISTORY OF THE UNITED STATES, 1587-1914*, at 524 (1969) (quoting LYDIA H. SIGOURNEY, *SCENES IN MY NATIVE LAND* 125 (1845)).

80. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925*, at 10 (1975).

81. *Id.*

Forty-two percent of the inmates in Philadelphia were Irish by 1855,⁸² as were forty-one percent of the children confined in the State Reform School for Boys in Westborough, Massachusetts in 1850.⁸³ In the New York Refuge, Irish parentage accounted for over forty-one percent of a sample taken of all residents between 1830 and 1855.⁸⁴ The New York Juvenile Asylum was founded in 1853; within three years, a majority of its residents were Catholics.⁸⁵ As several authors have pointed out, the reformers were almost entirely composed of active Protestants, and they regularly imposed their religion upon the large numbers of Roman Catholic children whom they housed.⁸⁶ As Fox noted, the Bible readings and mandatory chapel services at the heart of this "involuntary Protestantism" constituted "coerced heresy" for Catholic children.⁸⁷

By 1830, the large wave of Irish Catholic immigration had begun to flood Philadelphia, New York, and Boston. The campaign for the common school movement hit full stride in that decade, prefaced by the American Lyceum movement, which commenced in 1826, and punctuated by the 1837 creation of the nation's first state board of education in Massachusetts, an action providing a bully pulpit for that redoubtable educational trumpeter, Horace Mann.⁸⁸ Proponents of the common school packaged nativism and religious prejudice into their "vision of a redeemer nation."⁸⁹ Deeply suspicious of the Catholicism of many of the immigrants, the school reformers presented their ideal institutions as key legions in the battle for America's soul, whose central tenets involved Protestant links to individual freedom and republicanism.⁹⁰ In the words of

82. *Id.* at 262.

83. PETER C. HOLLORAN, BOSTON'S WAYWARD CHILDREN: SOCIAL SERVICES FOR HOMELESS CHILDREN, 1830-1930, at 46 (1989).

84. ROBERT S. PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815-1857, at 189-90 (1969).

85. GEORGE P. JACOBY, CATHOLIC CHILD CARE IN NINETEENTH CENTURY NEW YORK 65-68 (reprint ed. 1974) (1941).

86. See, e.g., Fox, *supra* note 14, at 1195; ROTHMAN, *supra* note 22, at 261-62; HAROLD FINESTONE, VICTIMS OF CHANGE: JUVENILE DELINQUENTS IN AMERICAN SOCIETY 31-32 (1976).

87. Fox, *supra* note 14, at 1195. The Bible chosen for school reading was, of course, the Protestant *King James* version, not the Catholic *Douay* edition, which was effectively banned. See BINDER, *supra* note 64, at 67-68. A furor ensued when, in 1842, Philadelphia's Catholic Bishop lobbied for permission for Catholic students to use the *Douay* Bible and be exempt from religious instruction in the public schools. Amid cries that Catholics were attempting "to kick the Bible out of the schools," nativist agitation culminated in a riot two years later in which Catholic schools were attacked and two Catholic churches were burned. See ALICE F. TYLER, FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY FROM THE COLONIAL PERIOD TO THE OUTBREAK OF THE CIVIL WAR 380-81 (1944).

88. See GUTEK, *supra* note 66, at 52-54; S. ALEXANDER RIPPA, EDUCATION IN A FREE SOCIETY: AN AMERICAN HISTORY 103-117 (1967).

89. TYACK & HANSOT, *supra* note 66, at 20.

90. *Id.* at 20-22. See ERNEST L. TUVESON, REDEEMER NATION: THE IDEA OF AMERICA'S MILLENNIAL ROLE (1968); Timothy Smith, *Protestant Schooling and American Nationality, 1800-1850*, 53 J. AMER. HIST. 679 (1967); David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening in the West*, 36 HARV. EDUC. R. 447 (1966).

historian Frederick Binder, "many Protestants continued to view the pope as an agent of Satan, determined to strike down every vestige of Protestantism and all republican institutions."⁹¹ The Pope's army, of course, marched in the guise of the many thousands of "Romanists" flocking to America. A virulent strain of Protestant nativism arose in response to this perceived threat to American culture. In 1830, a northern newspaper stated that the Catholic Church was working as an agent of the European nations to overthrow the American government.⁹² This widely-circulated tale of a treasonous plot lay behind much of the Protestant animosity in the antebellum period.⁹³

The roster of American luminaries who were bellicose anti-Catholic nativists ranges from Samuel Adams to Harriet Beecher Stowe. High on this list is painter and inventor Samuel F.B. Morse, whose numerous xenophobic diatribes include two texts published in the 1830s, *The Imminent Dangers to the Free Institutions of the United States through Foreign Immigration*⁹⁴ and *Foreign Conspiracy Against the Liberties of the United States*,⁹⁵ both of which attacked the Jesuits and served as manuals for anti-Catholicism.⁹⁶ Fulminations against "Catholics and infidels" streamed from famed preacher Lyman Beecher's pulpit in Boston in the late 1820s, and Beecher's move to Cincinnati was prompted in part by his desire to ward off an invasion of Papal influence in that region. In 1835, Beecher published *Plea for the West*,⁹⁷ an appeal for funds to counteract Catholic religious and political subversion in the Midwest. He accentuated the menace of the "dread confessional" as a vehicle for the predominantly Catholic powers of Europe to "inflamm[e] and divide the nation, break the bond of our union, and throw down our free institutions."⁹⁸ Despite his inflammatory rhetoric, Beecher did not advocate violence in repelling the Catholic invasion. On the contrary, he trusted the "full action of our common schools and republican institutions" to effect the cultural metamorphosis needed to transform Catholics into "Americans."⁹⁹

91. BINDER, *supra* note 64, at 63. See HIGHAM, *supra* note 80, at 6 ("Nativists, charged with the Protestant evangelical fervor of the day, considered the immigrants minions of the Roman despot, dispatched here to subvert American institutions . . . Surely such creatures were unfit for citizenship."); FURNAS, *supra* note 79, at 524 (asserting that the Pope was "scheming to turn America into a medieval Spain, Inquisition and all").

92. See TYLER, *supra* note 87, at 365.

93. *Id.*

94. SAMUEL F.B. MORSE, *THE IMMINENT DANGERS TO THE FREE INSTITUTIONS OF THE UNITED STATES THROUGH FOREIGN IMMIGRATION* (reprint 1969) (1835).

95. SAMUEL F.B. MORSE, *FOREIGN CONSPIRACY AGAINST THE LIBERTIES OF THE UNITED STATES* (reprint 1977) (1835).

96. *Id.* at 366-67; FURNAS, *supra* note 79, at 524-527; BINDER, *supra* note 64, at 63.

97. LYMAN BEECHER, *A PLEA FOR THE WEST* (reprint 1977) (1835).

98. TYLER, *supra* note 87, at 366. See FURNAS, *supra* note 79, at 525-26. Catholic immigrants, both Germans and Irish, did make their way to southern Ohio. In 1852, more than half the inmates at the Cincinnati House of Refuge came from German and Irish families. See ROTHMAN, *supra* note 22, at 262.

99. TYLER, *supra* note 87, at 366.

Former New York City mayor Philip Hone expressed his revulsion at German and Irish immigrants, describing them as "filthy, intemperate, unused to the comforts of life and regardless of its proprieties."¹⁰⁰ The full story of antebellum nativist organizations and incendiary publications, accompanied by mob violence against Catholic convents and churches, has been told elsewhere.¹⁰¹ First-person, if unwitting, testimony to the strong anti-Catholic bias displayed by the child savers is provided in the cardinal text by one of the century's leading reformers, Charles Loring Brace. In his *The Dangerous Classes of New York and Twenty Years' Work Among Them*, Brace described his missionary work in rescuing "abandoned and destitute" youth by the influence of "education and discipline and religion."¹⁰² His sentiments are captured in this passage:

Among all the hundreds of families I knew and visited I never met but two that were Protestants. To all words of spiritual warning or help there came the chilling formalism of the ignorant Roman Catholic in reply, implying that certain outward acts made the soul right with its Creator. The very inner ideas of our spiritual life of free love towards God, true repentance and trust in a Divine Redeemer, seemed wanting in their minds. I never had the least ambition to be a proselytizer and never tried to convert them, and I certainly had no prejudice against the Romanists; on the contrary, it has been my fortune in Europe to enjoy the intercourse of some most spiritual-minded Catholics. But these poor people seemed stamped with the spiritual lifelessness of Romanism. At how many a lonely death-bed or sick-bed, where even the priest had forgotten to come, have I longed and tried to say some comforting word of religion to the dull ear, closing to all earthly sounds; but even if heard and the sympathy gratefully felt, it made scarcely more religious impression than would the chants of the Buddhists have done. One sprinkle of holy water were worth a volume of such words.¹⁰³

Brace followed up this summary of his well-intentioned bigotry with an understated coup de grace: "A Protestant has great difficulty in coming into connection with the Romanist poor."¹⁰⁴ The "orphan trains" run by Brace's New York Children's Aid Society and by the Boston Children's Mission placed predominantly Catholic children with Protestant western farm families who were willing to accept them. The reformers thus carried out their desire both to salvage children from urban squalor and to facilitate their conversion to "patriotic

100. FURNAS, *supra* note 79, at 524.

101. See TYLER, *supra* note 87, at 358-95 (reciting the best account of nativism in relation to Catholicism and immigration). See also RUSSEL B. NYE, *SOCIETY AND CULTURE IN AMERICA, 1830-1860*, at 206-208, 308-10, 377 (1974); WHITNEY R. CROSS, *THE BURNED-OVER DISTRICT: THE SOCIAL AND INTELLECTUAL HISTORY OF ENTHUSIASTIC RELIGION IN WESTERN NEW YORK, 1800-1850*, at 83-84, 231-33 (1950); FURNAS, *supra* note 79, at 526-28.

102. BRACE, *supra* note 7, at ii. On Brace's career and influence, see MENNEL, *supra* note 38, at 32-41; ROTHMAN, *supra* note 22, at 258-60.

103. BRACE, *supra* note 7, at 154-55.

104. *Id.* at 155.

Protestantism."¹⁰⁵ In response to the stridently Protestant tone of all public welfare efforts, the Catholic community began piecing together its own versions of child-saving reforms. For example, New York's Roman Catholic Orphan Asylum Society launched its own placing-out program in the 1850s, with efforts made "to encourage reluctant Catholic farmers to receive these children."¹⁰⁶

As historian John Higham observed: "Catholic traditions continued to look dangerously un-American partly because they did not harmonize easily with the concept of individual freedom imbedded in the national culture."¹⁰⁷ Ironically, "individual freedom" was precisely what the Protestant reformers denied the immigrant and mostly-Catholic youth who were committed to the refuges and their successor institutions. This understanding of anti-immigrant and anti-Catholic bias serves to contextualize the large-scale effort, through the common schools no less than through the refuges and reform schools, to educate and convert the children whom it confined.

III. BUILDING THE "SUPPLEMENTARY SCHOOLS"

Nineteenth-century attorney and educational reformer Henry Barnard defined refuges and reformatories as "supplementary schools" that remedied "deficiencies" in the education of children whose school attendance had been "prematurely abridged, or from any cause interfered with."¹⁰⁸ In this category, Barnard lumped all children who were adjudged to need separate schools: the handicapped, blacks and Native Americans, and the incorrigible and delinquents.¹⁰⁹ Our carapace of modernism causes us to express surprise at the linkage between what we today view as distinct institutional tasks: education for ordinary students and punishment for extraordinary youth, whom we no longer even consider students. But our forbearers, a century ago, emphasized the need to "subdue the child early and at almost any cost,"¹¹⁰ and put a premium upon

105. HOLLORAN, *supra* note 83, at 46.

106. LANE, *supra* note 7, at 107. Peter Holloran argued that Catholic child-saving efforts, largely ignored by historians' focus on the elite Protestant reformers, "reflected a vital and distinctive working-class subculture . . . which regarded the family as sacred and inviolate, to be restored not superseded." HOLLORAN, *supra* note 83, at 63, 65. Yet Catholic dioceses preferred to restore the child's broken family in the context of "massive asylums . . . [which] were intended to mitigate misery, not . . . to reform the poor." *Id.* at 66. See JACOBY, *supra* note 85, at 89-244 (describing Catholic juvenile institutions); LANE, *supra* note 7, at 98-134 (same). More research needs to be done on the different philosophies and policies of Protestant, Catholic, Jewish and other groups engaged in juvenile reformation. See, e.g., HOLLORAN, *supra* note 83, at 137-96 (discussing child-saving efforts in Boston by African-Americans, Jews, and Italians).

107. HIGHAM, *supra* note 80, at 6.

108. CREMIN, *supra* note 66, at 390 (quoting Henry Barnard, 1 J. OF THE R.I. INST. OF INSTRUCTION 60 (1845)).

109. *Id.* See CREMIN, *supra* note 66, ch. 7 (entitled *Outcasts*).

110. CARL DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 87 (1980).

the "subordination of young people," to be accomplished in part by the "widespread use of humiliation and disgrace in schools."¹¹¹

A. "*Vice in its Embryo State*"¹¹²

Notions of quaint one-room schoolhouses in which compliant youth patiently absorbed their McGuffey readers¹¹³ are nostalgic claptrap. The truth about early schools was far more brutal. Even the normally equable Ralph Waldo Emerson complained that:

[S]omething must be done, and done speedily, and in their distress the wisest are tempted to adopt violent means, to proclaim martial law, corporal punishment, mechanical arrangements, bribes, spies, wrath, main strength and ignorance, in place of that wise and genial providential influence they had hoped, and yet hope in some future day to adopt.¹¹⁴

Dealing with refractory children posed a dilemma for a court system equipped with only two dispositional alternatives. Offenders could be returned to the streets, the same environment which engendered their delinquency, or they could

111. KETT, *supra* note 62, at 45-46. See MICHAEL B. KATZ, *THE IRONY OF EARLY SCHOOL REFORM: EDUCATIONAL INNOVATION IN MID-NINETEENTH CENTURY MASSACHUSETTS* 163-211 (1968) (discussing the symbiosis between compulsory education and reform schools).

112. JUVENILE OFFENDERS, *supra* note 75, at 368 (quoting Governor De Witt Clinton speaking to the New York legislature about juvenile institutional reform).

113. See CHILDREN AND YOUTH DOCUMENTARY, *supra* note 19, at 488-91 (excerpting the McGuffey readers).

114. KETT, *supra* note 62, at 46 (quoting Ralph Waldo Emerson, *Education*, in 10 COMPLETE WORKS 152-53 (1929)). The line between school and jail was constantly blurred. In 1832, for example, the New York Public School Society called for a compulsory school attendance law, similar to one in place in Boston:

Truants [in Boston] is deemed a criminal offense in children, and those who cannot be reclaimed, are taken from their parents by the Police, and placed in an institution called the 'School of Reformation' corresponding in many respects with our House of Refuge Every Political compact supposes a surrender of some individual rights for the general good. In a government like ours, 'founded on the principle that the only true sovereignty is the will of the people,' universal education is acknowledged by all, to be, not only of the first importance, but necessary to the permanency of our free institutions. If then persons are found so reckless of the best interests of their children, and so indifferent to the public good, as to withhold from them that instruction, without which they cannot beneficially discharge those civil and political duties which devolve on them in after life, it becomes a serious and important question, whether so much of the natural right of controlling their children may not be alienated as is necessary to qualify them for usefulness, and render them safe and consistent members of the political body.

CHILDREN AND YOUTH DOCUMENTARY, *supra* note 19, at 260 (excerpting TRUSTEES OF THE PUBLIC SCHOOL SOCIETY OF NEW YORK, TWENTY-SEVENTH ANNUAL REPORT 14-16 (1832)). In the literature of the common school movement, it often appeared that *all* schools were intended as reform schools. See Teitelbaum, *supra* note 67, at 1150-51.

be committed to the penitentiary, then as now the most effective school of crime.¹¹⁵ In the Jacksonian era, the idea arose that the disturbing numbers of deviant children could be reformed, once removed from the ill confines of their corrupted families. Environmentalist doctrines which began to dominate intellectual thought dictated a new approach to deviancy, one focused on family and community disorganization.¹¹⁶ The decade of the 1820s witnessed a major attack on the theory of outdoor relief.¹¹⁷ Would-be reformers believed that the needy had become vicious and shiftless though the unorganized benevolence of the dole. In some respects, institutional reformers in the Jacksonian era looked at their world through eighteenth-century spectacles. They perceived the new social fluidity as corrupt. To straighten and stiffen the moral character of the dependent and delinquent classes, it was necessary to remove them from their homes, which provided nothing but the illicit temptations of the world. Separating children from their home environment was all the more essential, as the young had no mechanisms to avoid the near occasions of social sin. Segregating untutored delinquents from their hardened criminal elders was important for the same reason.

Understanding the reformers' dualistic view of the family is essential to an assessment of their successes and failures in juvenile reformation. Charles Brace proclaimed the child savers' gospel: "The family is God's Reformatory."¹¹⁸ But which families were deemed fit to serve this purpose? The reformers generally believed that the destitute child's own home was beyond salvage. Elijah Devoe, a former assistant superintendent of the New York House of Refuge, attested to the importance of separating children from their family and home in order to achieve reformation:

[T]he paternity of the inmates is assumed by the managers of the Society [for the Reformation of Juvenile Delinquents]. They bind the children to farmers and mechanics; and, as a general thing, parents are not allowed to know where their children are sent. Many mothers have I seen leaving the House [of Refuge] with streaming eyes, because this information has been withheld from them. In this way there is no doubt that some children are separated from their parents and friends for

115. PEIRCE, *supra* note 6, at 43. On the origins of the penitentiary, see Fisher, *supra* note 43; ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY* (1992); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977). In his sermon upon the opening of the New York House of Refuge, Rev. John Stanford referred to the penitentiaries as awarding a Bachelor in the Art of Crime. PEIRCE, *supra* note 6, at 371-72. Cf. Peter King & Joan Noel, *The Origins of 'The Problem of Juvenile Delinquency': The Growth of Juvenile Prosecutions in London in the Late Eighteenth and Early Nineteenth Centuries*, 14 CRIM. JUST. HIST. 17 (1993) (discussing the English approach to juvenile corrections).

116. See ROTHMAN, *supra* note 22, at 57-78.

117. See TRATTNER, *supra* note 47, at 52-56.

118. 2 *THE CHILD AND THE STATE* 364 (Grace Abbott ed., 1938) (quoting CHARLES L. BRACE, *THE BEST METHOD OF DISPOSING OF OUR PAUPER AND VAGRANT CHILDREN* 12 (1859)).

life; for not infrequently children are sent to a distance of several hundred miles from the City.¹¹⁹

Brace's instructions to agents of the New York Children's Aid Society also leave no doubt about the intention to carry out urban child removal:

To the parents of these poor children, representations should be made of the great advantages which a good western home offers over the poverty and ignorance, and temptation, to which they are exposed in the city. The strongest assurances can be given to them that the future welfare of the children will be watched over by the Society You should appeal to the conscience of the mother, as to her giving the best education she is able, to her child. You can mention the inducements held out in the [Industrial] School by the meals, the clothes and shoes, and the assistance given Most parents can be made to understand that the dangers before their children, in the street and uneducated, are very great.¹²⁰

The reformers who established the houses of refuge, first in Manhattan in 1825, and within three years in Boston and Philadelphia, were a conservative elite who viewed themselves as heirs to the legacy of colonial theocracy and Federalist cultural custodianship.¹²¹ Philanthropic work formed part of their moral and cultural stewardship. Because they saw the poor as a threat to social stability, they felt that policing the city was as much their personal responsibility as it was of the official constabulary. They perceived all pauper children as voyagers on the road to moral demise, and did not distinguish among disobedient, dependent, or delinquent children. All were equally tarred with the brush of dangerousness. The conservative reformers staked their authority on the ability to control and remake the offspring of the "vicious" classes.

Institutionalization was to benefit all needy children. In 1822, New York's Society for the Prevention of Pauperism issued a report calling for the erection of a new institution for juvenile deviants.¹²² Their terminology confirms the subcutaneous mixture of concepts of incarceration and education: "These prisons," the Society advised, "should be rather schools for instruction, than places of punishment."¹²³ Two years later, the Society, whose nomenclature now announced it as the New York Society for the Reformation of Juvenile Delinquents, issued a memorial to the state legislature. The term the Society

119. JACOBY, *supra* note 85, at 41 (quoting ELIJAH DEVOE, *THE REFUGE SYSTEM* 25 (1848)).

120. THURSTON, *supra* note 7, at 111-12 (quoting NEW YORK CHILDREN'S AID SOCIETY, *ELEVENTH ANNUAL REPORT* 43-44 (1864)).

121. See SCHLOSSMAN, *supra* note 38, at 22-36; Finestone, *supra* note 86, at 25-33; MENNEL, *supra* note 38, at 3-31; HAWES, *supra* note 7, at 27-60; ROTHMAN, *supra* note 22, at 207-16; Fox, *supra* note 14, at 1188-1204; PICKETT, *supra* note 84 *passim*.

122. NEW YORK SOCIETY FOR THE PREVENTION OF PAUPERISM, *REPORT ON THE PENITENTIARY SYSTEM IN THE UNITED STATES* (1822).

123. MENNEL, *supra* note 38, at 11 (quoting NEW YORK SOCIETY FOR THE PREVENTION OF PAUPERISM, *REPORT ON THE PENITENTIARY SYSTEM IN THE UNITED STATES* 59-60 (1822)).

chose for the institution, a "refuge,"¹²⁴ conveyed the notion of a hapless waif enveloped by warm, protective arms.¹²⁵ This attribution was intentional. They intended to furnish "asylum"¹²⁶ for children whose evil environment proved too strong. For the reformers, parental neglect had framed the child's abject circumstances, and the dependent condition of both parent and child provided no occasion for respecting any legal rights either might have in the disposition of the child's fate. As historian Robert Pickett noted: "If a youngster or an adult was regarded by his betters as depraved or unable to care for himself, he seemingly deserved no rights One group of people, possessing a more enlightened sense of parenthood, stood ready to step in and wrestle the child away from the original parents."¹²⁷ In this refuge, Pickett noted:

[The rescued children] work at such employments as will tend to encourage industry and ingenuity, [and are] taught reading, writing, and arithmetic, and [are] most carefully instructed in the nature of their moral and religious obligations, while at the same time, they are subjected to a course of treatment, that will afford a prompt and energetic corrective of their vicious propensities, and hold out every possible inducement to reformation and good conduct.¹²⁸

In a culture where children of the poor were rarely educated, the aims of the Society truly furthered the mission of the advocates of common schooling. Moreover, the lack of discrimination between dependency and delinquency is apparent not only from the Society's own name change without alteration of goals or methods, but also from its express aims. All children had "vicious propensities,"¹²⁹ and so it made no sense to treat them differently. Similarly, the 1826 charter of the Boston House of Reformation provided for reception of "juvenile offenders," which it described as including "all such children who shall be convicted of criminal offenses," as well as "rogues, vagabonds, common beggars, and other idle, disorderly and lewd persons."¹³⁰ In their famous report on American patterns of imprisonment, de Beaumont and de Tocqueville rationalized this lack of distinction by noting that:

[The children incarcerated in the houses of refuge] by way of precaution . . . without having been convicted of some offence, are boys and girls who are in a position dangerous to society and to themselves: orphans, who have been led by misery to vagrancy; children, abandoned by their parents and who lead a disordered life; all those, in one word, who, by their own fault or that of their parents, have

124. CHILDREN AND YOUTH DOCUMENTARY, *supra* note 19, at 679.

125. De Beaumont and de Tocqueville observed that, to avoid any suggestion of criminality, the refuges were given a name "which reminds us of misfortune only." DE BEAUMONT & DE TOCQUEVILLE, *supra* note 68, at 112.

126. *Id.*

127. PICKETT, *supra* note 84, at 58-59.

128. *Id.* at 55.

129. *Id.*

130. CHILDREN AND YOUTH DOCUMENTARY, *supra* note 19, at 681.

fallen into a state so bordering on crime, that they would become infallibly guilty were they to retain their liberty.¹³¹

As education was to guide the tender sprout into proper shape, so child saving could not wait until the branch had bent in the wrong direction. The New York Society spoke for all nineteenth-century reformers in espousing the uses to which Lockean tabula rasa theory was put in juvenile corrections: "[T]he minds of children, naturally pliant, can, by early instruction, be formed and moulded to our wishes. An inclination can there be given to them, as readily to virtuous as to vicious pursuits."¹³² The essayist Grimshaw captured the essence and urgency of this preventive work, writing: "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."¹³³

Under this viewpoint, the extension of the reforms to include non-delinquent children was an act of kindness.¹³⁴ Thus, one aspect of the Pennsylvania Supreme Court's conclusion in *Ex parte Crouse*, discussed in this article's introduction, becomes clearer: we can see why the court believed that to release Mary Ann Crouse from the protective embrace of the refuge would be "an act of extreme cruelty."¹³⁵ These children, de Beaumont and de Tocqueville declared, "were not the victims of persecution, but merely deprived of a fatal liberty."¹³⁶ In the grip of an embryonic statist welfare ideology, which transferred the fate of the poor and unruly from family to state, the courts would continue to pronounce as "extreme cruelty" the return of an institutionalized child to parental custody.¹³⁷

131. DE BEAUMONT & DE TOCQUEVILLE, *supra* note 68, at 111. As this passage suggests, many wayward children were homeless, or effectively so, even if they were technically not orphans. The child savers' preference for providing destitute children with a familial environment takes on a different coloration when there is no available original family. This article focuses, however, on the reformers' propensity to formally and legally separate impoverished children from their parents, whether by constabulary arrest or by providing inducements to the parents to transfer custody.

132. HAWES, *supra* note 7, at 46 (quoting NEW YORK SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, SECOND ANNUAL REPORT (1826)). See SUTTON, *supra* note 39, at 58-62 (discussing the acceptance of Lockean psychological principles in America); Teitelbaum, *supra* note 67, at 1148-49 (same).

133. MENNEL, *supra* note 38, at 12 (quoting A.H. Grimshaw, *An Essay on Juvenile Delinquency*, in EDWARD E. HALE ET AL., PRIZE ESSAYS ON JUVENILE DELINQUENCY 148 (1855)).

134. HAWES, *supra* note 7, at 45 (quoting NEW YORK SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, SECOND ANNUAL REPORT (1826)) ("The young offender should, if possible, be subdued with kindness.").

135. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839). As David Rothman characterized the Jacksonian mindset, to abandon destitute children "to the influences at loose in the community was to condemn them to a life of depravity and crime." ROTHMAN, *supra* note 22, at 170.

136. DE BEAUMONT & DE TOCQUEVILLE, *supra* note 68, at 113.

137. See *infra* text accompanying notes 202-283.

B. *The Philadelphia Experiment*

The Philadelphia House of Refuge was typical of nineteenth-century juvenile institutions, and the two most significant appellate court affirmations of child saving emanated from Pennsylvania.¹³⁸ Accordingly, this article takes a close look at the reforms in Philadelphia, as a representative study of the larger child-saving movement.¹³⁹ The establishment of the Philadelphia House of Refuge was presaged by a public meeting called by the mayor in 1821 to discuss the increase in youthful criminality.¹⁴⁰ A committee was appointed, which reported later that year on the need to establish an "asylum where useful mechanical arts should be taught to male children."¹⁴¹ In 1826, the state legislature responded with an act authorizing a Board of Managers to find a suitable building and promulgate regulations for the "religious and moral education, training, employment, discipline and safekeeping of the inhabitants."¹⁴² The legislature further authorized the courts to commit those children "deemed proper objects,"¹⁴³ who were vagrants, or were charged with or convicted of crime. The managers were empowered to bind out children as apprentices during their minority, with their consent, to learn trades which would be "most conducive to their reformation."¹⁴⁴

What was the character of the Philadelphia House of Refuge? In 1835, a committee of the institution's Board of Managers published a report discussing the corrective and non-punitive functions of the refuge, and setting out the philosophy which undergirded all future child-saving reforms. The report rejected the idea that children were entitled to freedom unless and until they committed a crime "repugnant to every dictate of social prudence and justice."¹⁴⁵ The parents of Refuge children had either neglected them, or worse, introduced them to vice, and to return the children to the source from which they had derived their vile habits would compound the evil.¹⁴⁶

138. *Crouse*, 4 Whart. at 11; *Commonwealth v. Fisher*, 213 Pa. 48, 50 (1905).

139. Philadelphia is atypical in one key sense: the influence of the Quakers and their thirst for penal reforms made Pennsylvania a model for correctional experimentation from the colonial era. DE BEAUMONT & DE TOCQUEVILLE, *supra* note 68, at 1-2. See HUGH BARBOUR & J. WILLIAM FROST, *THE QUAKERS* 164-66 (1988) (discussing Quaker involvement in philanthropy and prison issues in Philadelphia); MARGARET H. BACON, *THE QUIET REBELS: THE STORY OF THE QUAKERS IN AMERICA*, 122-45 (1985) (same).

140. *JUVENILE OFFENDERS*, *supra* note 75, at 334.

141. *Id.*

142. Act of March 23, 1826, §§ 5-7, 1825 Pa. Laws 133, 135-36.

143. *Id.*

144. *Id.* The legislature broadened the jurisdiction of the refuge in 1827 by directing the managers to receive children who had been convicted in courts outside Philadelphia of offenses which would be punishable by imprisonment in the penitentiary. Children so received were to be maintained and instructed at the expense of the home county. Act of March 2, 1827, § 4, 1826 Pa. Laws 76, 78.

145. *JUVENILE OFFENDERS*, *supra* note 75, at 364.

146. *Id.* ("If by the irresistible impulse of humanity, [the child] is restored to liberty, he returns

Moreover, the managers considered the refuge a "school of discipline and instruction, . . . not a place of punishment."¹⁴⁷ This "school for reformation" imposed restraint "merely [to] interdict[] a fellowship with the vicious."¹⁴⁸ Humanitarian overtones typified the rhetoric of child saving throughout the century. The establishment of a system of juvenile reformation which rendered irrelevant both the constraints and the safeguards of the formal criminal law formed the core of the juvenile court idea. Indeed, even more radically than the juvenile court, developed three-quarters of a century later, the refuge "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."¹⁴⁹ A society which only recently had adopted incarceration as a punishment for crime, and in which the penitentiary was still a relatively new institution, accepted without much difficulty the argument that sequestration in a refuge was not a criminal sanction.

Nonetheless, the managers anticipated the terms of the debate in the courts, and presented their rebuttal to accusations of illegal imprisonment. They began by acknowledging the core republican view of what must precede imposition of punishment and the consequent deprivation of rights: "If a trial is to take place, the legitimate form is by jury. No substitute can be adopted, which our republican institutions would tolerate. By no other means can guilt be satisfactorily ascertained."¹⁵⁰ But conviction was only one means of entry into the refuge. The much larger group of children were committed for social deficiencies, and for these the presumption of innocence was reversed: "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."¹⁵¹ In fact, the commission of a crime was viewed by the managers as merely an indicia of the "absence and necessity of proper guardianship,"¹⁵² the true ticket of admission to the refuge.

What *really* was the character of the Philadelphia House of Refuge? One clue about the reason why the managers de-emphasized any connection to the criminal process was provided in their 1835 report.¹⁵³ Alternative commitments for children were needed because criminal prosecutions against children were

to his former haunts and habits, emboldened by impunity.").

147. *Id.* at 364-65.

148. *Id.* at 365.

149. *Id.* at 366.

150. *Id.*

151. *Id.* at 367. That the child would be committed unless the proceedings uncovered "adequate securities against guilt" precisely reverses the presumption of innocence. Of course, the refuge managers would have deemed this argument irrelevant, as their commitment procedures focused on rescuing "vicious" children from their lairs of iniquity. But even modern-day civil commitment procedures impose the burden of proof upon the proponent of the deprivation of individual freedom. See generally William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995) (offering a new analysis of the meaning of the presumption of innocence).

152. JUVENILE OFFENDERS, *supra* note 75, at 367.

153. *Id.*

notoriously unsuccessful.¹⁵⁴ The managers buried this admission amid an avalanche of rhetoric discrediting the criminal process itself and elevating their environmental alternative:

To seize upon the first dawn of the faculty of discerning between right and wrong, when childhood is manifest in the language, the deportment, and in the very person of the culprit, and subject the offending child to the same punishment, and condemn him to the same association, with the ripe and hardened offender, has in it something so revolting to humanity, that the spectacle never fails to enlist the feelings against the law; and judges and juries are often tempted to strain their consciences in order to produce an acquittal. Either alternative is dangerous to the future welfare of the unfortunate accused. If by the irresistible impulse of humanity, he is restored to liberty, he returns to his former haunts and habits, emboldened by impunity. If he be condemned, disgrace and infamy attend him¹⁵⁵

Managers of the New York House of Refuge bemoaned the pattern of nullification in criminal courts, in language strikingly similar to that employed by their Philadelphia counterparts:

Even when [the children were] guilty, jurors have strained their consciences to find some ground for their acquittal. Their youth, their helpless situation, and a heartfelt repugnance to consign them over to the common herd of malefactors, has often pleaded powerfully in their behalf, when truth and justice exacted their convictions.¹⁵⁶

De Beaumont and de Tocqueville observed that prison reformers were "[t]ouched by the shocking fate of young delinquents, who were indiscriminately confounded in the prison with inveterate criminals."¹⁵⁷ Consistent with the educational psychology of the era, these leaders strongly believed that, so long as youthful offenders were incarcerated side-by-side with adult criminals, confining the former in the penitentiary would "tend to harden them in vice."¹⁵⁸ The results of this

154. *Id.*

155. *Id.* at 364. See Cecile P. Remick, *The House of Refuge of Philadelphia 168* (1975) (unpublished Ed.D. dissertation, University of Pennsylvania) (quoting John Sergeant, *Address to the Citizens at the Opening of the House of Refuge* (1828)).

156. SCHLOSSMAN, *supra* note 38, at 24 (quoting NATHANIEL HART, *DOCUMENTS RELATIVE TO THE HOUSE OF REFUGE* 48 (1832)). The local District Attorney, Hugh Maxwell, protested that many New Yorkers acted out of misplaced charity in declining to press criminal charges against juveniles. Maxwell expressed relief at the opening of the refuge, which "removed all objections to convictions in cases of guilt." *Id.* The prosecutor noted that in cases of petty theft: "It was hardly ever that a jury would convict. They would rather that the culprit acknowledged to be guilty should be discharged altogether, than be confined in the prisons of the state and county." Fox, *supra* note 14, at 1194.

157. DE BEAUMONT & DE TOCQUEVILLE, *supra* note 68, at 110.

158. 2 *THE CHILD AND THE STATE*, *supra* note 118, at 344 (quoting Cadwallader D. Colden &

improper intergenerational mixing were generally perceived as so toxic that "magistrates hesitate to pursue young delinquents, and the jury to condemn them."¹⁵⁹ This leniency had a severe social cost, however. "Encouraged by impunity, [the delinquents] give themselves up to new disorders, which a punishment proportionate to their offence would perhaps have prevented them from committing."¹⁶⁰

The reformers who maintained the beneficial effects of enforcing no distinctions *among* children, relating to their dependency or delinquency, insisted on a high wall *between* children and adults. They thus excoriated the lack of generational segregation in both jails and almshouses.¹⁶¹ In this way, early nineteenth-century penal reformers—no less than the school advocates—affirmed the new-found sense of the uniqueness of childhood.¹⁶²

But the reformers' end-around the criminal system strikes a chord of utilitarian endeavor, rather than convinced theoretical imperative. The numerous accounts of the reluctance of magistrates and juries to convict children in criminal proceedings speaks to the reformers' sense of a lost opportunity in their quest to extend control over an increasing range of deviant children. Not that this desire made the reformers bloodthirsty; to the contrary, their actions exhibited a mixture of intentions: genuine humanitarian concern for the welfare of destitute children, fear of the "vicious" and "dangerous" classes, a revulsion at the perceived indolence of the parents of impoverished and delinquent youths, and a grasping effort to reassert domination in an increasingly fluid society. As sociologist John Sutton concluded, the refuges "typified the Jacksonian era trend toward the physical confinement of deviants as a means of imposing moral order on society as a whole."¹⁶³

The reformers did not limit their corrective efforts to mere confinement. Rather, they displayed a "curious mixture of puritanical zeal and progressive education"¹⁶⁴ in pursuing the rectification of their subjects' character. Because they maintained that incarceration did not constitute punishment for their wards, the operators of the refuges had to resort to corporal punishments to correct "vicious" habits.¹⁶⁵ Despite protestations that the asylums were organized on principles of kindness,¹⁶⁶ the inmates' daily regimen at the New York House of Refuge included four hours of schooling and eight hours of labor, with order enforced by regular whippings, iron fetters, solitary confinement, reduced diet,

Peter A. Jay, *The Condition of Children in the Penitentiary and Bridewell, New York, 1819*, in 10 MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK, 1784-1831, at 467-68).

159. DE BEAUMONT & DE TOCQUEVILLE, *supra* note 68, at 111.

160. *Id.*

161. See MENNEL, *supra* note 38, at 8-10.

162. See *supra* text accompanying notes 55-62.

163. SUTTON, *supra* note 39, at 44.

164. *Id.* at 46 (quoting Negley G. Teeters, *The Early Days of the Philadelphia House of Refuge*, 27 PA. HIST. 166 (1960)).

165. *Id.*

166. See *supra* note 132 and accompanying text.

and periods of enforced silence.¹⁶⁷ Surprisingly, one of the most bleak indictments of refuge routine came from the pen of a former assistant superintendent who wrote:

[N]othing short of excessive ignorance can entertain for a moment the idea that the inmates of the Refuge are contented. In summer, they are about fourteen hours under orders daily. On parade, at table, at their work, and in school, they are not allowed to converse. They rise at five o'clock in summer—are hurried into the yard—hurried into the dining-room—hurried at their work and at their studies. For every trifling commission or omission which it is deemed wrong to do or to omit to do, they are "cut" with ratan. Every day they experience a series of painful excitements. The endurance of the whip, or the loss of a meal—deprivation of play or the solitary cell. On every hand their walk is bounded; while Restriction and Constraint are their most intimate companions. Are they contented?¹⁶⁸

Discipline and education were thus rather imperfectly blended in the early juvenile institutions. Next, we turn to the connection between educational reform and the legal protection afforded the refuges and their successors.

IV. DEFENDING THE INSTITUTIONS: PRISONS ARE SCHOOLS FOR THE POOR

In a recent and fascinating account of antebellum Philadelphia courts' resolution of child custody issues, legal historian Michael Grossberg identified "arenas of conflict" as ways of "conceptualizing legal institutions and rules as public sites for contests over the meaning and application of the law."¹⁶⁹ Grossberg described Philadelphia courts in this period as arenas of conflict involving clashing legal ideologies as to the changing norms of child custody. He pointed to "[n]ewly-constructed visions of the family" and a "new sense of children as plastic, malleable beings vital to the fate of the American republican experiment" as essential elements in this transitional period for child custody, one in which the colonial patriarchal standard had not quite ebbed, and the maternal 'tender years' doctrine had not fully jelled.¹⁷⁰ As Grossberg suggested, Pennsylvania provided an alluring forum for threshing out the legal issues of

167. HAWES, *supra* note 7, at 47-49; Fox, *supra* note 14, at 1195; SCHLOSSMAN, *supra* note 38, at 30. As Schlossman noted, the fact that the New York Refuge's first superintendent was fired for leniency and inability to control the juveniles casts doubt upon the assertion that the refuge employed a regime of benevolence. *Id.* at 218 n.45.

168. CHILDREN AND YOUTH DOCUMENTARY, *supra* note 19, at 691 (quoting ELIJAH DEVOE, THE REFUGE SYSTEM, OR PRISON DISCIPLINE APPLIED TO JUVENILE DELINQUENTS 27-28 (1848)).

169. Michael Grossberg, *Battling Over Motherhood in Philadelphia: A Study of Antebellum American Trial Courts as Arenas of Conflict*, in CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE 153-54 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994).

170. *Id.* at 154-57. See Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth Century America*, 9 FEMINIST STUD. 235 (1983) (discussing the rotation in child custody standards from a paternal to a maternal preference); Teitelbaum, *supra* note 67, at 1154-55.

children's identity, capacity, and custody.¹⁷¹ While Grossberg focused on a child custody dispute which pitted wife against husband in an 1840 Philadelphia forum, similar considerations imbued the determination of Mary Ann Crouse's custodial fate, two years earlier, in the same city's courts.¹⁷² The cases challenging juvenile confinement illustrate the rhetorical war between the pull of constitutional ideology and the push of a popular social reform which successfully sidestepped the requirements of due process and trial by jury.

A. The Early Peak of Constitutional Ideology in Juvenile Confinement Cases

The first reported test of a refuge commitment occurred in 1831.¹⁷³ In resolving a habeas corpus petition,¹⁷⁴ in *Commonwealth v. M'Keagy*,¹⁷⁵ the Philadelphia Court of Common Pleas examined the validity of the commitment of Lewis L. Joseph, who had been placed in the refuge at the request of his father. The court acknowledged that the original refuge legislation permitted the commitment of a child for vagrancy.¹⁷⁶ But it struck a note of caution in stating that "great power is given to the managers of this institution, a power which could only be justified under the most pressing public exigencies, and whose continuance should depend only on the most prudent and guarded exercise

171. Grossberg, *supra* note 169, at 159.

172. *Id.*

173. See Remick, *supra* note 155, at 171 (discussing two unreported cases which arose in 1829-30, involving girls whose mothers had given their children to the Refuge, and later demanded them back).

174. Grossberg suggested that, by the 1840s, habeas corpus had become the "primary vehicle for defining the new best interests of the child doctrine." Grossberg, *supra* note 169, at 159. The evidence suggests an even earlier provenance. The child custody actions in *Commonwealth v. Addicks* (Addicks I), 5 Binn. 520 (Pa. 1813) and *Commonwealth v. Addicks* (Addicks II), 2 Serg. & Rawle 174 (Pa. 1816), both discussed by Grossberg, had been brought by habeas corpus. Grossberg, *supra* note 169, at 161. An even earlier case, *Commonwealth v. Murray*, 4 Binn. 486 (Pa. 1812), involved a habeas challenge to the continued service of a minor in the United States Navy. In 1835, the Managers of the Philadelphia House of Refuge admitted that in the "extreme improbability" of an improper commitment, redress would lie through the "glorious remedy" of habeas corpus. Allen R. Steinberg, *The Criminal Courts and the Transformation of Criminal Justice in Philadelphia, 1815-1874*, at 66 (1983) (unpublished Ph.D. dissertation, Columbia University) (quoting THE DESIGN AND ADVANTAGES OF THE HOUSE OF REFUGE 17-18 (1835)). See DE BEAUMONT & DE TOCQUEVILLE, *supra* note 68, at 112 n.2 (noting habeas corpus is available to test "the legality of the commitment or detention of any child" in a refuge). Indeed, the first two reported legal challenges to refuge commitments, *Commonwealth v. M'Keagy*, 1 Ashmead 248 (Pa. Commw. Ct. 1831), and *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839), were brought as habeas actions. Counsel for the petitioner seeking release of the confined child in *Crouse* relied on *Addicks I* and *Addicks II*, as well as on *Commonwealth v. Murray*. *Crouse*, 4 Whart. at 10-11. In all these cases, the courts readily perceived habeas corpus as the appropriate method to challenge child guardianship. At least in the area of juvenile confinement, it was clear from the outset that the Great Writ would be the acceptable method for court challenges to juvenile custody and confinement.

175. *Commonwealth v. M'Keagy*, 1 Ashmead 248 (Pa. Commw. Ct. 1831).

176. *Id.*

of it."¹⁷⁷ The court expressed a particular concern that the law gave the lower magistracy the authority, "on a charge of vagrancy or crime . . . to take a child from its parent and consign it to the control of any human being, no matter how elevated or pure."¹⁷⁸ But given the traditional power of the overseers of the poor to provide for and apprentice out dependent and destitute children, the court asked why "the public cannot assume similar guardianship of children whose poverty had degenerated into vagrancy?"¹⁷⁹ The court held that vagrant children, within the age limits, who exhibited the knowledge and capacity to commit a crime might lawfully be committed to the care and custody of the refuge managers.¹⁸⁰ But the authority to receive and detain children was restricted to the precise manner prescribed by the statute. The court forbade the managers from accepting a father's transfer of custody to the institution unless his child was lawfully adjudged a proper subject for refuge care.

When the law is applied to admit those not specified in the statute, the Court of Common Pleas warned, and when "preservation becomes mixed with a punitive character . . . doubts are started and difficulties arise, which often and necessarily involve the most solemn questions of individual and constitutional rights."¹⁸¹ The court released young Mr. Joseph upon finding that the youth was not a vagrant.¹⁸² His father was not a pauper, and while the son had misbehaved, the court found that the boy's actions rendered him neither a vagrant nor a criminal.¹⁸³ The court rejected the custodial claims of the refuge, declaring that the institution was not a "place to correct refractory children."¹⁸⁴

By contrast with the *M'Keagy* court's nuanced consideration of the statutory and constitutional issues, the refuge's next annual report found the managers again advertising that the refuge was not a prison, and that no one should recoil against sending a child there for fear of the taint of imprisonment: "against the refuge, no such repugnance is felt, because the character is entirely different . . . and therefore, there is no hesitation in taking measures against youthful delinquents."¹⁸⁵ But the hortatory effect of *M'Keagy* appeared in 1835, when the lower house of the Pennsylvania legislature conducted an inquiry into the Philadelphia Refuge. The members of the investigating committee were instructed to determine, *inter alia*, "how far the imprisonment of persons in that institution, without the verdict of a jury, is conformable to the letter and spirit of the constitution."¹⁸⁶

177. *Id.* at 250.

178. *Id.* at 251.

179. *Id.* at 253.

180. *Id.*

181. *Id.* at 257.

182. *Id.*

183. *Id.*

184. *Id.*

185. Remick, *supra* note 155, at 174 (quoting FIFTH ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE HOUSE OF REFUGE 11 (1832)).

186. Remick, *supra* note 155, at 175 (quoting XV HAZARD'S REGISTER OF PENNSYLVANIA, DEVOTED TO THE PRESERVATION OF FACTS AND DOCUMENTS, AND EVERY KIND OF USEFUL

The legislative committee came away very impressed with the Philadelphia Refuge, particularly with its educational program of which they wrote: "[T]he ordinary branches of an English education are better acquired in the House of Refuge than in many of our country schools."¹⁸⁷ However, the committee worried that some unconstitutional commitments might have been effected in an excess of "laudable zeal."¹⁸⁸ Accordingly, the committee drafted a bill designed to "restrain the institution within the 'spirit of the constitution' and laws, and . . . at the same time throw no obstacle in the accomplishment of this laudable end."¹⁸⁹

The ensuing 1835 legislation regulated admission procedures to the refuge and judicial review of those commitments.¹⁹⁰ In addition to the procedures set out in the original 1826 legislation, providing for commitment upon conviction of a criminal offense, an alderman or justice of the peace could now commit a child when its parent or guardian made and proved a complaint that, because of "incorrigible" or "vicious" conduct, the child was uncontrollable and needed to be placed under the guardianship of the refuge to safeguard the child's morals and future welfare.¹⁹¹ A child could also be committed when the "moral depravity" or neglect of his or her guardian denied the child proper care and discipline.¹⁹²

This statute also set forth layers of protective legal process with which Pennsylvania enveloped the institutionalized child. The legislation specified the duties of aldermen or justices of the peace when adjudicating a complaint.¹⁹³ The officials were to attach to their order of commitment the names and addresses of the witnesses they examined, and the substance of the relevant testimony of each.¹⁹⁴ A final section of the act mandated, and regulated, visiting procedures for judges at the refuge. Certain members of the Philadelphia bench were to visit every two weeks and carefully examine all commitments not previously adjudicated by a judge.¹⁹⁵ For each examination, the managers were to produce the child in question and the testimony based upon which he or she had been adjudged a fit subject for the refuge. If the judge decided that the transfer of custody from the child's parents to the managers was justified, he would indorse an order continuing the guardianship. But if the judge deemed the commitment improper, he was to order the child discharged. Failure of the managers to obey such an order would expose them to liability for wrongful imprisonment.¹⁹⁶

INFORMATION RESPECTING THE STATE OF PENNSYLVANIA 15 (Samuel Hazard ed., 1835)).

187. *Id.*

188. *Id.* at 175-76.

189. *Id.* at 176.

190. Act of April 10, 1835, 1834 Pa. Laws 133, 133-35.

191. *Id.* See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880*, at 37-55 (1989) (providing a fascinating study of aldermanic justice in nineteenth-century Philadelphia).

192. Act of April 10, 1835, 1834 Pa. Laws 133, 133-35.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

The law also allowed the child, or someone acting on his or her behalf, to demand that the hearing be transferred to the courthouse, so that the child may have benefit of counsel and exercise compulsory process to obtain witnesses.¹⁹⁷

Given the respect for the application of the writ of habeas corpus to cases of child custody shown by Pennsylvania courts in *Murray*,¹⁹⁸ *Addicks I*¹⁹⁹ and *Addicks II*,²⁰⁰ and *M'Keagy*,²⁰¹ and with the procedural protections written into the 1835 statute, a confident view might have been taken that constitutional protections were safeguarded in juvenile confinement cases. Such confidence would have been mistaken.

B. "Not a Prison, but a School": The Education of Ex parte Crouse

The 1835 legislative committee's praise for the Philadelphia Refuge as an educational institution turned out to have more predictive punch than its constitutional concerns about the absence of due process in the confinement of juveniles. Three years later, Mary Ann Crouse was committed to the House of Refuge upon a warrant signed by a Philadelphia justice of the peace.²⁰² Mary Crouse, the girl's mother, had made "complaint and due proof" that her daughter "by reason of vicious conduct, has rendered her control beyond the power of the said complainant, and made it manifestly requisite that from regard to the moral and future welfare of the said infant she should be placed under the guardianship of the managers of the House of Refuge."²⁰³ Continuing to track the language of the 1835 statute, the alderman certified that Mary Ann was "a proper subject" for the refuge, and he appended to his warrant the names and addresses of the witnesses examined, and the substance of their testimony upon which the adjudication was founded.²⁰⁴

Mary Ann's father filed a writ of habeas corpus, seeking custody of his daughter. In the Pennsylvania Supreme Court, his counsel, W.L. Hirst, contended that the denial of a trial by jury rendered the statutory provisions unconstitutional. He relied on the sixth and ninth sections of the Pennsylvania Bill of Rights, *Murray*,²⁰⁵ and *Addicks I*²⁰⁶ and *Addicks II*.²⁰⁷ These citations suggested

197. *Id.*

198. *Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812).

199. *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813) (*Addicks I*).

200. *Commonwealth v. Addicks*, 2 Serg. & Rawle 174 (Pa. 1816) (*Addicks II*).

201. *Commonwealth v. M'Keagy*, 1 Ashmead 248 (Pa. Commw. Ct. 1831).

202. *Ex parte Crouse*, 4 Whart. 9, 9-10 (Pa. 1839).

203. *Id.*

204. *Crouse*, 4 Whart. at 10. The Reporter's Notes, which prefaced the opinion of the Pennsylvania Supreme Court, supplied a summary of the 1826 and 1835 legislation which provided for the refuge's legal existence. *Id.* Though the point is not made explicitly, the lower court which considered the application for the writ must have declined to issue it, thus leading to Mary Ann Crouse's appeal in the state supreme court.

205. In *Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812), John Lewis Connor, a seventeen-year-old boy without a father, master, or other male guardian, had enlisted in the United States Navy against his mother's consent on the eve of the War of 1812. She (or perhaps the overseers of the poor) filed a habeas action against Alexander Murray, the local gunboat commander who had

Hirst's two-fold strategy. He hoped to persuade the Pennsylvania Supreme Court that—if considered a criminal case—Mary Ann's commitment violated the constitutional requirement that punishment be preceded by jury verdict; and

detained Connor pursuant to the youth's engagement for naval service. Petitioner's attorney argued that the common law rendered voidable all contracts by minors, and that, in the absence of a father, the mother had custody of the son and was entitled to his services until his majority. The Pennsylvania Supreme Court rejected these contentions in seriatim opinions by Chief Justice Tilghman and Justices Yeates and Brackenridge which enforced the contract signed by the minor. With regard to the boy's mother, the Chief Justice noted that the young man "owed her reverence and respect, yet she had no legal authority over him," *Commonwealth v. Murray*, 4 Binn. 487, 492 (Pa. 1812), and Justice Yeates allowed that, while a father has an entitlement to the services of his son, "however strange it may appear, the mother has no such right." *Id.* at 494. Justice Brackenridge observed that the common law permitted contracts such as Connor's, which afforded him subsistence, and that "[c]ourts have a superintending control over such cases, and can relieve where the contract is injurious and not beneficial; and this is a sufficient security for the infant." *Id.* at 495.

206. In *Addicks I*, a father, Joseph Lee, brought a habeas corpus action against his former wife, Barbara Addicks, demanding custody of their two daughters. *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813). Joseph had obtained a divorce from Barbara on the grounds of her adultery with John Addicks, proven by her bearing John's child while still married to Joseph. Barbara had compounded her moral error, according to Joseph, by marrying John despite Pennsylvania's prohibition against adulterers' marriage to their paramours during the lifetime of their original spouses. Responding to the father's contention that "as the natural guardian of the children, [he] had a right to their custody," *Addicks I*, 5 Binn. at 520, counsel for the mother pointed to the father's failure to provide for his wife or their children for four years, and to the fact that the girls, ages seven and ten, had always lived with their mother. Moreover, the mother claimed that the children, given their "sex as well as age, particularly required the care of a mother." *Id.* at 520-21. In ruling for the mother, the Pennsylvania Supreme Court acknowledged that it was "bound to free the person from all illegal restraints," but that it had discretion to act equitably in guardianship cases. *Id.* at 521. In contrast to the curt dismissal of a mother's legal rights the previous year in *Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812), the *Addicks I* court expressed considerable regard for a mother's custodial rights. Although the court disapproved of Barbara's adulterous conduct, it stressed that its "anxiety [was] principally directed" toward the children, and "considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother." *Id.* at 522. Accordingly, to use—anachronistically—the terms of modern family law, the court awarded custody to the mother and visitation to the father, along with an admonition to the father that he not "carry [the girls] abroad." *Id.*

207. *Addicks II* was a surprising reprise of *Addicks I*. *Commonwealth v. Addicks*, 2 Serg. & Rawle 174 (Pa. 1816). Two and one-half years had passed since the Supreme Court's first ruling, and the father once again sought custody of his two daughters through the writ of habeas corpus. The girls were now aged 9 and 13, and the court believed that their ages (particularly the older daughter's) warranted a change of custody. The court feared that the girls would soon learn of their mother's "fatal error[]" on a fundamental point of morals—the obligation of the marriage contract." *Addicks*, 2 Serg. & Rawle at 177. Accordingly, the court found itself compelled "to guard the children against the consequences of this pernicious mistake, and to fortify their minds, by inspiring them with fixed principles on this essential article." *Id.* Recognizing the human agony involved in the court's decision, Chief Justice Tilghman recommended to the father that he "not . . . be abrupt in their removal, but . . . conduct the matter so as to avoid a violent shock either to them or [to] their mother." *Id.*

that—if considered a guardianship issue—her father had a superior claim to custody than the managers of the House of Refuge.

Mary Ann's father lost on both fronts. The supreme court's first words revealed an entirely different way to analyze children's cases, stating: "The House of Refuge is not a prison, but a school."²⁰⁸ With this opening gambit, the court disclosed an ideological mutation in the debate over child custody and confinement. By adopting the rhetoric of the common school advocates and the refuge managers' attempt to bring their institution within the umbrella of public education, the Pennsylvania court effectively announced a paradigm shift in the legal control of children. The Pennsylvania court did not, of course, single-handedly achieve a transformation of the legal culture relating to juveniles.²⁰⁹ But its opinion crystallized the developing cultural strains which were moving the nation into greater intrusiveness into the realm of the lower-class, often immigrant, family, and it crafted an articulate justification and resonant siren for the apotheosis of legal control by the Protestant middle class.

The court began by distinguishing the situations in which children had been sentenced to the refuge upon conviction of a crime. To reform these youthful malefactors, the refuge "may indeed be used as a prison for juvenile convicts who would else be committed to a common goal."²¹⁰ The constitutionality of this procedure "stands clear of controversy," although even in these cases "reformation, and not punishment, is the end."²¹¹ At the heart of the matter before the court, however, were children admitted to the refuge as dependents, vagrants, or because of their "incorrigible or vicious conduct."²¹² Did not the parents' assertion of custody take precedence over the refuge's? The court answered that the "right of parental control is a natural, but not an unalienable one," and it indicated that the parents' rights may be usurped by the state, "when [the parents are] unequal to the task of education, or unworthy of it."²¹³

The "business of education"²¹⁴ thus moved to center stage in juvenile adjudications. In this newly-critical arena of American life, moreover, the roles of parents and the state were reversed, with the parents serving as agents of the state. The court emphasized the state's role, stating:

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?²¹⁵

208. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

209. *See supra* text accompanying notes 76, 123, and 128.

210. *Crouse*, 4 Whart. at 11.

211. *Id.*

212. *Id.* at 10.

213. *Id.* at 11.

214. *Id.*

215. *Id.* As Horace Mann was later to phrase the point: "[T]he true business of the schoolroom

The court penned these words in the aftermath of the loudest and most influential legislative struggle over the fate of the common schools in nineteenth-century America. The Pennsylvania Free School Act of 1834,²¹⁶ passed after a vigorous and lengthy campaign by educational reformers, had finally overturned the tradition of pauper schools in favor of a state-wide system of public schools.²¹⁷ However, the controversy boiled again the following year, and a move to repeal the legislation was successful in the Pennsylvania Senate. The House stayed its hand, however, largely due to the efforts of Representative Thaddeus Stevens, whose effulgent discourse on the public responsibility for universal schooling has been called "one of the great orations of American history."²¹⁸ Led by Stevens, the Pennsylvania House of Representatives not only beat back the repeal effort, but the legislature passed a stronger common school act.²¹⁹

In his 1835 address, Stevens stunningly recapitulated the identity of interests between the republican ideal and the goals of the common school, stating:

If an elective republic is to endure for any great length of time, *every* elector must have sufficient information, not only to accumulate wealth, and take care of his pecuniary concerns, but to direct wisely the legislatures, the ambassadors, and the executive of the nation—for *some* part of all these things, *some* agency in approving or disapproving of them, falls to every freeman. If then, the permanency of our government depends upon such knowledge, it is the duty of government to see that the means of information be diffused to every citizen. This is a sufficient answer to those who deem education a private and not a public duty—who argue that they are willing to educate their *own* children, but not their *neighbor's* children.²²⁰

In short, Stevens argued that "education [is] a duty which every government owes its people."²²¹ The Pennsylvania Supreme Court used the *Crouse* case to write a coda to Stevens' address, lending its imprimatur to government regulation of the "business of education"²²² as applied to dependent and delinquent youths.

connects itself, and becomes identical, with the great interests of society As the 'child is father to the man,' so may the training of the schoolroom expand into the institutions and fortunes of the State." 1 PROBLEMS IN AMERICAN HISTORY 345 (Richard W. Leopold et al. eds., 4th ed. 1972) (excerpting MASSACHUSETTS BOARD OF EDUCATION, TWELFTH ANNUAL REPORT 42-43 (1849)).

216. Act of April 1, 1834, 1833 Pa. Laws 170.

217. See RPPA, *supra* note 88, at 120-24 (discussing the Pennsylvania Free School Act controversy).

218. RPPA, *supra* note 88, at 129 (quoting CARL R. FISH, THE RISE OF THE COMMON MAN, 1830-1850, at 217 (1941)).

219. *Id.*

220. RPPA, *supra* note 88, at 129-30 (quoting XV HAZARD'S REGISTER OF PENNSYLVANIA (Samuel Hazard ed., 1835)).

221. *Id.* at 130.

222. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

The Pennsylvania Supreme Court deemed the Philadelphia House of Refuge a comprehensive educational institution, attuned to the needs of its student body and to its mission, which it achieved "by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates."²²³ The cost of this beneficial separation, of course, was the students' freedom. Yet the court considered this loss of liberty not only a small price for the young scholars to pay, but one equivalent to the sacrifice required of school children everywhere, holding: "As to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school"²²⁴

In contrast to its practice, as evidenced in *Murray*²²⁵ and *Addicks I*²²⁶ and *Addicks II*,²²⁷ the Pennsylvania Supreme Court dismissed the father's custody challenge in *Crouse* without reference to the underlying facts. Nothing is said of Mary Ann's allegedly "incurable" actions, as labelled by her mother, nor of her father's presumably different interpretation.²²⁸ Instead, the decision is primarily the court's conclusion, a rhetorical fusillade that established the tone of child saving for a century: "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."²²⁹

Two further points about *Crouse* require discussion. First, despite its holding, the court's treatment of habeas corpus was consistent with its precedents in child custody cases. As the court had noted in *Addicks II*: "[The] great object of the *habeas corpus* is to free the person from illegal restraint. That being done, the Court may proceed farther or not, as circumstances require."²³⁰ Having determined in *Crouse* that the refuge offered no more restraint than an ordinary school, the court believed it was unfettered and could act equitably, exactly as it had in *Addicks I* and *Addicks II*.²³¹

223. *Id.* The court thus echoed the managers' insistence that they operated the refuge as a "school for reformation" which imposed restraint "merely [to] interdict[] a fellowship with the vicious." JUVENILE OFFENDERS, *supra* note 75, at 365.

224. *Ex parte Crouse*, 4 Whart. at 11.

225. *Commonwealth v. Murray*, 4 Binn. 486 (Pa. 1812).

226. *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813) (*Addicks I*).

227. *Commonwealth v. Addicks*, 2 Serg. & Rawle 174 (Pa. 1816) (*Addicks II*).

228. The formalistic presentation rendered the case even more opaque. Since the mother's characterization of her daughter's actions tracked the statutory language, the reader actually learns almost nothing about Mary Ann's behavior which led to her incarceration (or if Mary Ann's behavior actually triggered her commitment). Nor does the formulaic rhetoric inform the reader about the facts underlying the antagonistic positions taken by the parents. A complete record of the *Crouse* litigation would provide the materials for a quite interesting study, viewing the case as a child custody struggle between two parents, mediated by the state through the auspices of the refuge and the courts.

229. *Crouse*, 4 Whart. at 11.

230. *Addicks II*, 2 Serg. & Rawle at 176.

231. See *supra* notes 206-207. In *Murray*, moreover, Justice Brackenridge had referred to the

A second and related point is that when the *Crouse* court determined that there was "no natural right to exemption from restraints which conduce to an infant's welfare,"²³² the road was clear for the court to exercise its discretion in vouchsafing the interests of both the community and the child involved. The court referred to the "*parens patriae*, or common guardian of the community" as superseding negligent or dissolute parents.²³³ This phrase has its origins in a medieval concept used to describe various powers of the Chancellor relating to infants, normally where property or guardianship issues between private parties were disputed.²³⁴

But the Pennsylvania Supreme Court's single reference to *parens patriae* is almost casual, particularly compared to its repeated stress on the refuge's essential character as a school. Its assertion that "parental control is a natural, but not an unalienable"²³⁵ right, is hardly radical. Under the circumstances of the *Crouse* case, it seems unlikely that the court intended a major expansion of traditional equity power. A more probable explanation, arguably, is that the court's reference to *parens patriae* was metaphorical.²³⁶ Given the rhetoric of the burgeoning common school movement, it seems likely that the "common guardian of the community"²³⁷ was another manifestation of the state itself, to whom the critical task of education was increasingly being transferred.

This conclusion of the relative unimportance of the doctrine of *parens patriae* to the *Crouse* holding is buttressed by an examination of the next two state supreme court resolutions of challenges to refuge or reform school commitments. Not until 1869 did juvenile commitment challenges reach the highest courts of Maryland and Ohio. Both *Roth v. House of Refuge*²³⁸ and *Prescott v. Ohio*²³⁹ specifically relied on *Crouse* as dispositive in affirming the juvenile commitment in each case.²⁴⁰ But neither the Maryland Supreme Court nor the Ohio Supreme Court even mentioned *parens patriae*.²⁴¹

V. ILLUSIONS OF CHILD SAVING: A HUNDRED YEARS OF SOLICITUDE

Thirty years elapsed after *Ex parte Crouse* before another state supreme court considered the issue of juvenile confinement. The institutional makeup of

courts' "superintending control" over cases involving minors' contracts, although the power was not invoked in the case. *Murray*, 4 Binn. 486, 495 (Pa. 1812).

232. *Crouse*, 4 Whart. at 11.

233. *Id.*

234. See generally Cogan, *supra* note 42, at 148; Rendleman, *supra* note 35, at 205. See also Simon, *supra* note 10, at 1385-86 (discussing the problematic application of *parens patriae* in *Crouse*).

235. *Crouse*, 4 Whart. at 11.

236. See Rendleman, *supra* note 35, at 259 (suggesting the assertion of *parens patriae* simply begs the question of the rationale for the application of state power).

237. *Crouse*, 4 Whart. at 11.

238. *Roth v. House of Refuge*, 31 Md. 329 (1869).

239. *Prescott v. Ohio*, 19 Ohio St. 184 (1869).

240. *Roth*, 31 Md. at 334-35; *Prescott*, 19 Ohio St. at 188.

241. Beginning with *People ex rel. O'Connell v. Turner*, 55 Ill. 280 (1870), appellate courts began citing to the *parens patriae* doctrine more regularly.

juvenile institutions had considerably changed after mid-century.²⁴² But for legal doctrine, time stood still. In 1869, the Maryland Supreme Court reviewed two cases involving issues of discharge, upon habeas corpus, of youths from the Baltimore House of Refuge.²⁴³ The Baltimore City Court had discharged both children, but its decision in each case had been reversed by the Supreme Bench of Baltimore City. The Maryland Supreme Court dismissed the subsequent appeals as improperly brought, but in view of the "grave constitutional questions" involving refuge commitments, the court expressed its opinion that the refuge statutes and procedures complied with constitutional requirements. On this point, the Maryland Supreme court found the *Crouse* opinion so compelling that, in lieu of supplying its own reasoning, the Court reprinted *Crouse* as an appendix to its decision in *Roth v. House of Refuge*.²⁴⁴

That same year the Supreme Court of Ohio examined a procedure employed by a grand jury in finding a fourteen-year-old boy "vicious and incorrigible" and recommending commitment to a house of refuge or to the State Reform Farm in lieu of returning an indictment.²⁴⁵ The trial court followed the grand jury's direction and committed the youth to the State Reform Farm "until he became of age, or was reformed."²⁴⁶ In the Ohio Supreme Court, the prosecutor relied on *Crouse*, contending that the juvenile institution properly rendered a "system of benevolent education or apprenticeship for young boys of evil habits or bad surroundings."²⁴⁷ The statutory procedure constituted no circumvention of the constitutional right to jury trial, the prosecutor maintained, because the young man had been committed without an indictment, and the State Reform Farm meted out no punishment. The prosecutor concluded his brief by summoning the rhetoric of state intervention in the lives of deviant families, writing: "The State may thus protect itself and promote the public weal."²⁴⁸ The Ohio Supreme Court readily agreed. Relying on *Crouse*, the court affirmed the child's commitment, declaring that the State Reform Farm "is a school, not a prison."²⁴⁹

The unanimity of state supreme court affirmations was dissolved in Illinois in 1870. In *People ex rel. O'Connell v. Turner*,²⁵⁰ the Illinois Supreme Court filed a vigorous protest against the dominant paradigm of state intervention.²⁵¹

242. See ROTHMAN, *supra* note 22, at 237-95; Fox, *supra* note 14, at 1208.

243. *Roth*, 31 Md. 329 (1869).

244. *Id.* at 335-36.

245. *Prescott v. Ohio*, 19 Ohio St. 184, 185 (1869).

246. *Id.*

247. *Id.* at 186.

248. *Id.* The prosecutor followed this assertion with a citation to *Crouse*. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

249. *Prescott*, 19 Ohio St. at 188. The court considered the possibility that a child might be committed "upon a false and groundless charge," but found that the remedy of habeas corpus sufficiently protected the child's rights. *Id.* at 188-89.

250. *People ex rel. O'Connell v. Turner*, 55 Ill. 280 (1870).

251. *Id.* at 283.

Lambasting the statutory "grant of power[] to arrest and confine for misfortune,"²⁵² the court mockingly questioned both the capacity of the reformers and the scope of the ameliorative programs, writing:

What is proper parental care? The best and kindest parents would differ, in the attempt to solve the question. No two scarcely agree; and when we consider the watchful supervision, which is so unremitting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition.²⁵³

With another touch of hyperbole, the court lampooned the "principle of the absorption of the child in, and its complete subjection to the despotism of, the State."²⁵⁴ Asserting the rule of law against the prevailing paradigm of social reform, the court declared that "[d]estitution of proper parental care, ignorance, idleness and vice, are misfortunes, not crimes."²⁵⁵ Asserting a fundamental due process chasm between dependency and delinquency, the Illinois court characterized a juvenile confinement not predicated upon a criminal conviction as a "restraint upon natural liberty" constituting "tyranny and oppression."²⁵⁶

Far from evaluating the merits of the Chicago Reform School as an educational institution, the court launched a jeremiad against the philosophy of child saving, writing:

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. Nothing could more contribute to paralyze the youthful energies, crush all noble aspirations, and unfit him for the duties of manhood.²⁵⁷

Although the Illinois Supreme Court employed the rhetoric of rights against the language of social reform, the class and immigrant character of the juvenile institutions lay just beneath the surface. Noted jurist Isaac F. Redfield, former Chief Justice of the Vermont Supreme Court, declared that a "Reform school [is] but another name for the Penitentiary,"²⁵⁸ and praised *Turner* for "striking at the very root and life of . . . legislative moral reform and compulsory popular education."²⁵⁹ In an article in the *American Law Register* following the report of the *Turner* decision, Redfield attacked upper-class social reformers who were

252. *Id.*

253. *Id.* at 283-84.

254. *Id.* at 284.

255. *Id.* at 287.

256. *Id.* at 286.

257. *Id.* at 287.

258. Isaac F. Redfield, Annotation, 19 AM. L. REG. 372, 373 (1871).

259. *Id.*

planning to "erect an empire" based on government backing of their moral and educational schemes.²⁶⁰

Redfield forthrightly detailed the anti-immigrant and anti-Catholic bias inherent in the reforms, applauding the Illinois Supreme Court for leading the revolt against state compulsion of minorities. No longer would a Roman Catholic child, Redfield wrote, be "driven into a Protestant school, and made to read the Protestant version of the Holy Scriptures."²⁶¹ Nor would such a child now be "torn from home and immured in a Protestant prison, for ten or more years, and trained in what he regards a heretical and deadly faith, to the destruction of his own soul."²⁶² Redfield expressed no doubt about the identity of the subject population for these social and legal reforms, writing:

We do not indeed suppose that the persons mainly instrumental in getting up these [reforms] in the country really intend them for their own children, or indeed in the present case for the children of Protestant parents, to any large extent. We cannot disguise to ourselves that these things do have an ominous squint towards the children of Roman Catholic parents, and of the multitudes of poor emigrants yearly coming to our shores, most of whom are of that faith.²⁶³

Redfield's analysis referred to the protective cover provided by the reformers, which sounded in class-neutral terms such as "ignorance, idleness and vice."²⁶⁴ But their ostensibly dispassionate proposals harbored a very specific religious animus, namely: "Reform schools or common schools [exist] for the leading purpose of training Roman Catholic children in the fundamental principles of Protestantism by compulsion."²⁶⁵

Despite the example of *Turner*, and the exhortations of Chief Justice Redfield, the progress of the reformers and the rationale expressed in *Ex parte Crouse* proved unstoppable. Only two other state supreme court decisions were

260. *Id.*

261. *Id.* at 373.

262. *Id.* at 373-74. Redfield exaggerates to a certain extent. Just as parochial schools served, in places, as an alternative to public schools, so too some Catholic reform schools were built. See, e.g., *People v. New York Catholic Protectory*, 101 N.Y. 195 (1886).

263. Redfield, *supra* note 258, at 374.

264. *Id.* at 375.

265. *Id.* See BARBARA M. SOLOMON, *ANCESTORS AND IMMIGRANTS: A CHANGING NEW ENGLAND TRADITION* (1972) (discussing the anti-Catholic bias in New England from the 1850s to the 1920s). Redfield's piercing the rhetorical shield of neutral-sounding legislation helps the modern reader understand the barely-disguised contempt many reformers felt for the social class made the object of the reforms. Consider the words of Connecticut's Chief Justice Park in support of child saving: "To bring up a boy to lead an idle life is, as a general rule, to educate him to a vicious life. Next to intemperance, and generally accompanying it, a habit of idleness helps to fill our alms houses with paupers and our jails with criminals. By means of these two causes the burden is imposed on the public of maintaining a worthless class of humanity as well as the great expense of our criminal courts." *Reynolds v. Howe*, 51 Conn. 472, 477 (1884).

consistent with *Turner* in the nineteenth century.²⁶⁶ In *State v. Ray*,²⁶⁷ the New Hampshire Supreme Court rejected the contention that the industrial school merely formed the part of the state's school system in which the state may detain "such scholars as may need its discipline."²⁶⁸ Because the children in question had been charged with burglary, and committed to the industrial school without conviction for the crime, the court affirmed their discharge by the lower court.²⁶⁹ Despite this bow to the anti-reformist rhetoric of *Turner*, New Hampshire, in fact, lined up in the *Crouse* column, as the court expressed no objection to almshouse dispositions for poor, or to reform school commitments for "children of profligate parents, or with vicious surroundings."²⁷⁰ A similar burglary prosecution turned reform school commitment prompted the California Supreme Court to discharge a youth from custody.²⁷¹

But most state supreme courts flowed along the stream cut by *Crouse*. In 1876, the Wisconsin Supreme Court responded directly to Chief Justice Redfield's objections, professing that the grand scheme of the social reform "reflects honor upon the legislative bodies which passed them."²⁷² Detention at a reform school, the court declared, entailed no more punishment than a stay at an almshouse, or a term in any boarding school. In these various school situations, the court held, "[p]arental authority implies restraint, not imprisonment."²⁷³ The court believed that the state's actions in removing destitute children to reform schools "is mercy, not punishment."²⁷⁴ A myriad of appellate courts adhered to that catechism, whose principal tenets were recapitulated in a District of Columbia opinion early in the new century, which cited *Crouse* as its first authority, holding:

[T]he Reform School for Girls is not a prison or penitentiary. It is what it purports to be—a school wherein girls of tender years, who may be exposed by conditions of misfortune, or who may perversely expose themselves to immoral surroundings and influences, may be kept under reasonable restraint during their minority, not as a punishment for crime, but for their moral and physical well being. It is a beneficent public charity made necessary by the conditions of modern life, especially where population is crowded in narrow limits.²⁷⁵

266. *State v. Ray*, 63 N.H. 406 (1885); *Ex parte Becknell*, 51 P. 692 (Cal. 1897).

267. 63 N.H. 406 (1885).

268. *Id.* at 408.

269. *Id.* at 412.

270. *Id.*

271. *Ex parte Becknell*, 51 P. 692 (Cal. 1897).

272. *Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328, 332-33 (1876).

273. *Id.* at 338.

274. *Id.* at 337. Although the argument of the court is redolent of *Crouse's* school analogy, the Pennsylvania opinion was cited only in the brief for counsel for the Milwaukee Industrial School. *Id.* at 331.

275. *Rule v. Geddes*, 23 App. D.C. 31 (1904). See *Ex parte Ah Peen*, 51 Cal. 280 (1876); *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197 (1881); *Reynolds v. Howe*, 51 Conn. 472

The *Turner* decision, on which Chief Justice Redfield pinned his hopes for the end of child saving, did not survive long even in its native soil. In 1882, the Illinois Supreme Court upheld a commitment to an industrial school, distinguishing *Turner* on the palpably evasive ground that the 1870 court had regarded the reform school there at issue as a place for confinement and punishment, while the present court regarded the industrial school in a more propitious light.²⁷⁶ The court's rhetoric clearly marked a change of direction in Illinois to the *Crouse* approach to juvenile commitments:

This institution is not a prison, but it is a school, and the sending of a young female child there to be taken care of, who is uncared for, and with no one to care for her, we do not regard imprisonment. We perceive hardly any more restraint of liberty than is found in any well regulated school.²⁷⁷

Turner's fame had indeed been fleeting. Early in the twentieth century, the Michigan Supreme Court described *Turner* as "chiefly notable as an example of the vigor with which that which is not the law may be stated."²⁷⁸

Nor did the passage of the Juvenile Court Acts, beginning in Illinois in 1899, alter the child-saving rationale.²⁷⁹ Once again, a Pennsylvania court provided the bellwether judicial pronouncement. In *Commonwealth v. Fisher*,²⁸⁰ the Pennsylvania Supreme Court affirmed the state's entry into the juvenile court era by relying on *Ex parte Crouse* and quoting virtually the whole text of the earlier opinion.²⁸¹ The *Fisher* opinion is, of course, saturated with child-saving rhetoric, but the reasoning adds nothing to the *Crouse* line of precedents.²⁸² Following *Fisher*, other state supreme courts viewed juvenile court acts in much the same fashion, even if, for technical reasons, the statutes were at times invalidated.²⁸³

(1884); *People v. New York Catholic Protectory*, 101 N.Y. 195 (1886); *Farnham v. Pierce*, 141 Mass. 203 (1886); *Jarrard v. Indiana*, 17 N.E. 912 (Ind. 1888); *State v. Brown*, 50 Minn. 353 (1892); *Tennessee v. Kilvington*, 45 S.W. 433 (Tenn. 1898); *Wisconsin Indus. School for Girls v. Clark County*, 103 Wis. 651 (1899); *Ex parte Watson*, 72 S.E. 1049 (N.C. 1911). A note appended to the report of the *Farnham* case in the American Reports identifies *Crouse* as the "leading case" in this field, and reprints virtually the whole *Crouse* opinion. Annotation, 55 Am. Rep. 456 (1886).

276. *In re Ferrier*, 103 Ill. 367, 371 (1882).

277. *Id.* The court expressed some small impatience with claims based on constitutional liberties, stating: "Such a degree of restraint is essential in the 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." *Id.* See *County of McLean v. Humphreys*, 104 Ill. 378 (1882).

278. *Robison v. Wayne Circuit Judges*, 151 Mich. 315, 324 (1908). The court immediately followed its disparagement of *Turner* by a listing of properly decided cases on the subject, beginning of course with *Crouse*. *Id.* at 324-25.

279. Act of April 21, 1899, 1899 Ill. Laws 131.

280. 213 Pa. 48 (1905).

281. *Id.* at 55-56.

282. *E.g.*, cases cited *supra* notes 238, 239 and 275.

283. See, *e.g.*, *Mill v. Brown*, 88 P. 609, 613 (Utah 1907) ("Such laws are most salutary . . . To effect this purpose some restraint is essential. Such or similar restraint is, however, necessary in any institution of learning, however humble . . . and it is this discipline which is denominated

CONCLUSION: OF RHETORIC AND THE LEGAL CULTURE

Stanley Fish once observed that the "legal process is always the same, an open, though bounded, forum where forensic battles are contingently and temporarily won."²⁸⁴ On one level, Fish is certainly correct. *Crouse* and its successors well into this century hunkered down behind the fortified pillboxes of child-saving rhetoric, keeping a wary eye on the feared incursion of constitutional arguments about due process rights. Under the shadow of this judicial Maginot line, the expulsion of poor immigrant children from the shelter of fundamental liberties could be rationalized as "no more than what is borne . . . in every school."²⁸⁵ But the nose of the constitution remained in the tent of the juvenile process. Eventually, most of the camel, though not all of it, was let in: at a minimum, *Kent v. United States*²⁸⁶ and *In re Gault*²⁸⁷ teach a lesson about the contingency of history.

And rhetoric surely matters. The way we picture the world helps define the boundaries within which we act. In 1850, New York's chief of police, George W. Matsell, described the city streets as "schools of vice."²⁸⁸ Matsell's choice of metaphor was surely an ordinary one, but it both reflected and advanced the cultural norm that the remedy for the ills of urban child mendicancy and delinquency could be found in better educational institutions. Any doubt on that score should be resolved by Matsell's assertion, in his next sentence, that the "offspring of always careless, generally intemperate, and oftentimes immoral and dishonest parents . . . never see the inside of a school-room, and so far as our excellent system of public education (which may be truly said to be the foundation stone of our free institutions) [is concerned], it is to them an entire nullity."²⁸⁹

Matsell's text contains the elementary principle of child saving: to avoid the sidewalk schools of indolence and depravity, children at risk must be enrolled in either the common or the reform schools of a civilizing society.²⁹⁰ Furthermore, to justify the transfer of custody into the salvific institutions of the state, the parents must be condemned as grossly negligent or even evil. On this latter point, the chief of police supplied ample rhetorical proof, stating:

restraint in schools such as are provided for juvenile offenders."); *Robison v. Wayne Circuit Judges*, 151 Mich. 315, 325 (1908) ("Such legislation as that under consideration is but a transfer of the jurisdiction which formerly reposed in the court of chancery . . ."); *Ex parte Sharp*, 96 P. 563, 564 (Idaho 1908) ("Under this law the state, for the time being, assumes to discharge the parental duty and to direct his custody and assume his restraint.").

284. THE RHETORIC OF LAW 1 (Austin Sarat & Thomas R. Kearns eds., 1994).

285. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

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

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

288. 1 WHO BUILT AMERICA?: WORKING PEOPLE & THE NATION'S ECONOMY, POLITICS, CULTURE & SOCIETY 283 (Bruce Levine et al. eds., 1989).

289. *Id.*

290. *Id.*

Astounding as it may seem, these are many hundreds of parents in this City who absolutely drive their offspring forth to practices of theft and semi-bestiality, that they themselves may live daily on the means thus secured,—selling the very bodies and souls of those in whom their own blood circulates, for the means of dissipation and debauchery.²⁹¹

Parents so characterized could bank on only rarely countering either the legal formulations or the cultural caricatures which delivered their children to the child savers.

Rhetoric may thus be seen, in James Boyd White's words, as "the central art by which community and culture are established, maintained, and transformed."²⁹² As applied to the child savers, however, this proposition is not quite satisfactory. A rhetorical artist still needs a canvas supplied by society. No rhetorician can do more than catalyze elements already present in the audience. The reason why the "school" rhetoric of *Ex parte Crouse* bested the "freedom" discourse of *People ex rel. O'Connell v. Turner*²⁹³ lies more in the dominant cultural paradigms of the time than in the particular language deployed by each court.²⁹⁴ No one could seriously argue that American child saving would have taken a markedly different path had Mary Crouse never taken her daughter Mary Ann to the Philadelphia House of Refuge.

Yet this alternative proposition is equally insufficient, in the opposite direction. Our culture's constitutive elements are many and varied, but law's discourse is surely a critical ingredient. "Legal interpretation," Robert Cover has reminded us, "takes place in a field of pain and death."²⁹⁵ This article has explored the work and words of nineteenth-century state supreme courts on issues of juvenile commitments, and located them in the context of school and prison reform. The thrust of child saving in the courts cannot be understood without a sense of the broad array of forces which coalesced to produce social change. But the rhetoric of the law determined the configuration of the child-saving institutions.

The conflict between state control and individual freedom continues, of course, to permeate juvenile cases. While we no longer—at least in official pronouncements—malign children as "vicious," we still denigrate lower class parents, and, of course, we still use the power of the state to separate the unworthy from the unwatched. Nearly a century after the first juvenile court convened in Cook County, Illinois, a descendant assigned to preside over a difficult juvenile case in the same county remarked that: "It's hard to believe the way people treat [their] children. The most frustrating part is when the parents

291. *Id.*

292. James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

293. *People ex rel. O'Connell v. Turner*, 55 Ill. 280 (1870).

294. It is important not to overstate this point. Both "school" and "freedom" arguments were made in both cases. Most of the petitioners who attacked reform school commitments in the *Crouse* line of cases did so with weapons from the armory of constitutional due process.

295. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

don't even know they've done anything wrong."²⁹⁶ These disparaging comments about parents were followed by the judge's acknowledgment of the significant burden the state bears in separating children from their parents: "'Clear and convincing' is a very high standard and it should be. Taking away someone's child, well, there's very little that's more serious."²⁹⁷

If the judge's first observation bespoke the rhetoric of parental insufficiency warranting state intervention, the second clearly addressed the tradition of constitutional freedom. How may these two aspects of legal culture be reconciled? Our contemporary juvenile judge synthesized the concerns this way:

[I]f the state has proved its case through "clear and convincing evidence," then I don't lose sleep enforcing it. You're dealing with children who have been in the system a long time—they're wards of the court which I interpret to mean they're my kids, my responsibility—and if they're getting a chance at a better life, then by God, I smile and say, "Finally!"²⁹⁸

At least in this judge's eyes, the twin rhetorical traditions of disciplinary restraint and constitutional liberty are blended within the personal responsibility he assumes over the children's welfare. Finally. But for how long?

296. Cheryl Lavin, *In Whose Interest?: Two Families' 4-Year Trek Through the System Finally Ends in Juvenile Court*, CHI. TRIB., June 9, 1995, § 5, at 3.

297. *Id.*

298. *Id.*