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Razing & Rebuilding Delinquency Courts: Demolishing the Flawed Philosophical Foundation of *Parens Patriae*

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Since its inception, the delinquency court has failed to live up to its purported mission of caring for the state's children as a wise parent would care for their own. While poor implementation and a lack of resources has undoubtedly contributed to this failure, the main fault lies with the court's fundamentally flawed foundational philosophy of parens patriae. *This Article explores how* parens patriae *became the philosophical underpinning of the modern delinquency court. The Article deconstructs the doctrine's history, its essential components, and the manner in which it has been applied to children through the delinquency court. Based on this analysis, the Article argues that* parens patriae *is chiefly responsible for the delinquency court's perpetual prioritization of controlling youth over meaningfully caring for them. The Article concludes by calling for abandoning* parens patriae *as the philosophical underpinning of the modern delinquency court and removing its influence on the overall design of the delinquency court. Overall, this Article seeks to lay the foundation for abolishing the delinquency system as designed and replacing it with a system that is smaller, better, and more just.*

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INTRODUCTION

While the uprisings over the police killing of George Floyd elevated the need to decenter police and reimagine public safety, the coronavirus pandemic further exposed the fallacies upon which the juvenile legal system[1] operates. The global pandemic threw a wrench into the machinery by which youth are adjudicated, more sharply exposed the system's historical overuse of detention, and called into question the value-add of the system's approach to community supervision.[2] Calls to reform the system's response to the misbehavior of youth have been around since even before the founding of the juvenile court—calls for deinstitutionalization, for recognizing and enforcing due process rights, developmentally appropriate services, and racial equity in the application of all of the aforementioned.[3] Moreover, we have learned a great deal since the founding of the juvenile court in 1899—about adolescence,

1. I use the terms "juvenile legal system" and "delinquency court" to refer to the parts of the juvenile court and related agencies tasked with directly policing youth behavior. These terms include both delinquency cases and cases involving persons or children in need of supervision (i.e., status offenders) given their shared history in the development of the juvenile legal system. Additionally, while the term "juvenile court" is often broader and includes dependency cases, my focus is on how the juvenile court was designed to respond to allegations of delinquency as opposed to allegations that a child is being maltreated or neglected by their caregivers. For a critique of the dependency side of the juvenile court, *see* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022).

2. *See* Subini Ancy Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L. & SOC. CHANGE 471, 482–83 (2022) (discussing the perils of incarcerating medically vulnerable youth during a pandemic); Patricia Soung, *Is Juvenile Probation Obsolete? Reexamining and Reimagining Youth Probation Law, Policy, and Practice*, 112 J. CRIM. L. & CRIMINOLOGY 549, 552–53 (2022) (arguing that the pandemic and racial justice uprisings called into question the efficacy of juvenile probation); *see generally* JUSTICE POLICY INST. ET. AL., YOUTH JUSTICE IN THE COVID-19 PANDEMIC: LESSONS FROM FIVE SITES (2023), https://justicepolicy.org/wp-content/uploads/2023/02/JJ-COVID-Lessons-from-Five-Sites.pdf [https://perma.cc/3PB5-QEQT].

3. *See* Joel Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 16–21, 29-31 (1965) (critiquing the delinquency system's lack of a formal, adversarial process); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1207–29 (1970) (discussing nineteenth century critiques of juvenile reformatories and various efforts at reform as well as critiques); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY, 61–74 (3rd ed. 2009) (discussing late nineteenth century critiques of juvenile reformatories) [hereinafter THE CHILD SAVERS]; GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE 159–61, 195–98, 229–32, 256–63 (2012) (summarizing efforts to promote racial equity and justice throughout the history of the juvenile court); NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 274–84 (2014) (calling for the adoption of effective developmentally responsive, community-based alternatives to incarceration as the "national norm, not boutique exceptions").

what helps youth thrive, and what holds youth back. Yet, here we sit, nearly a century-and-a-quarter after the founding of the first juvenile court in the United States, with an ineffective, harmful system still grounded in its original principles that requires dramatic transformation. To be clear, the juvenile legal system has not failed primarily due to issues with execution or implementation; the modern delinquency court works as designed, if not as intended.[4] And while constructive changes have occurred throughout the juvenile court's evolution, the flaws in the delinquency court's foundation continue.[5] Now is the time to stop tinkering with incremental reforms to the existing system. A system whose very foundation is the problem cannot be fixed. Instead, now is the time to raze and rebuild our response to the transgressions of youth.[6]

While the juvenile court has often been touted as a revolutionary triumph of progressive democracy,[7] it is better understood as an example of America's long history of supposedly benevolent colonization and coerced assimilation.[8] The cornerstone of the juvenile court—the notion that the state should treat youth who commit crimes in a markedly different manner than adults—was not a particularly novel idea at the turn

4. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 331 (1999) ("The juvenile court's fundamental flaw is not simply a century-long failure of implementation, but a failure of conception. The juvenile court's effort to combine social welfare and criminal social control in one agency simply ensures that it pursues both missions badly.").

5. *See* Washington v. S.J.C., 352 P.3d 749, 751 (Wash. 2015) ("This discussion reveals a centuries-old effort to balance the competing concerns where a juvenile is viewed as needing reformation and rehabilitation, but is not appropriately subjected to adult criminal proceedings and punishments. To balance these unique concerns, the law has constructed a constitutional wall around juveniles, maintaining its integrity through a continuous process of refining its contours and repairing its cracks.").

6. This Article is an attack on the juvenile legal system's foundational philosophy. This Article is not an attack on the many hard-working, caring judges, prosecutors, probation officers, social workers, and defense attorneys who are doing their best within the confines of the design of the existing system to improve the lives of individual youth. However, despite the efforts of well-meaning stakeholders who have sought to reform the juvenile legal system since its inception, many of the same abuses and failures remain today. As such, it is time to reevaluate the foundation of the system itself.

7. *See* Leo J. Yehle, *The Role of the Juvenile Court in Our Legal System*, 41 MARQ L. REV. 284 (1958) (alteration in original) (citing Dean Roscoe Pound referring to the juvenile court as ". . . the greatest step forward in the administration of Anglo-Saxon justice since the signing of the Magna Charta.").

8. *See* Sanford J. Fox, *supra* note 3, at 1188 (1970) ("The colonization of America was itself a reform movement . . . ."); HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 365 (2005) (discussing American imperialism and highlighting President Jackson's justification of political authority over Native Americans centered on "comparing them to children who lacked reason" and President Taft's role as secretary of war in justifying American rule over the Phillipines by comparing Filipinos to "women and children" that lack "sufficient reason or fitness to choose their own government").

of the twentieth century when the first juvenile courts were founded in the United States.[9] Indeed, the launch of the first juvenile courts reflected more a triumph of politics than a triumph of policy.[10] During the latter half of the nineteenth century, progressives promoted adolescence as a distinct period of development as a way to protect youth from the host of ills they believed resulted from industrialization and immigration.[11] Institutionalizing this new vision of adolescence became a key goal of the progressive agenda across a host of areas of law and society[12] and drove much of the foundational philosophical underpinning of the juvenile court. Believing that "delinquent" youth were more a product of their circumstances rather than natural born criminals, the founders of the juvenile court sought to divert youth away from the adult criminal system (and its jails and prisons) to a system that would build them into productive, democratic citizens.[13]

However, while the founders' stated intent appeared altruistic on its face, the philosophical foundation of *parens patriae*[14]—upon which the founders built the juvenile court—baked the biases and self-interest of the founders into the very essence of the court. By grounding the juvenile court in *parens patriae*, the court was designed to embody the proposition that the state could deny its "parental" responsibility to care for a child until the state has chosen to exercise its "parental" right to control the

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9. For instance, at common law, youth were often judged through the lens of infancy and whether they had the ability to form the required criminal *mens rea* for the offense. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 23 (London: A. Strahan & W. Woodfall, 1795); *see also* Application of Gault, 387 U.S. 1, 15–17 (1967) (discussing the history of the reformatory movement that predated the creation of the juvenile court).

10. *See* Robert M. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELINQ. 68, 69–70 (1972) ("The widespread establishment of juvenile courts in the early years of this century represented one of the proudest achievements of progressive reformers.").

11. KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 8–10 (2021) (discussing the invention of adolescence as a social construct); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 549 (2000) ("On my view, however, both the romanticized vision of youth offered by the early Progressive reformers and the harsh account of modem conservatives are distortions—and both have been the basis of unsatisfactory policies.").

12. *See* Scott, *supra* note 11, at 552 (citing child labor laws and compulsory education as other examples).

13. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1457–61 (2003) ("Because Progressive reformers attributed criminal behavior to external and deterministic forces, they de-emphasized individual moral responsibility for crime, employed medical analogies to 'treat' offenders, and focused on efforts to reform rather than to punish them.").

14. *Parens patriae* is a Latin term that translates to "parent of his or her country." BLACK'S LAW DICTIONARY (11th ed. 2019). For further discussion of the origin of *parens patriae*, see *infra* notes 22–36 and accompanying text.

child.[15] This prerogative formed the essence of *parens patriae* when the principle was originally formulated in England during the thirteenth century; and it remains at the heart of our approach to children in the United States today.[16]

Given that the court's foundation underpins a control approach that masquerades as care for the child, it is no wonder that the juvenile court developed into a tool of social control rather than a meaningful social safety net.[17] At the systemic level, the foundation of the juvenile legal system preferences the interests and welfare of the state above the child, demonstrating that the real purpose of the system is to intervene in the lives of specific children in order to define, control, and colonize "the other" while preserving the political and social status quo. Put more bluntly, the system was not designed to "save" the children, but rather to save the "child savers."[18] This elevation of the interests of the state above the interests of the youth explains why the delinquency court was designed in a manner that prioritized control above care, criminalized adolescence, and ultimately failed in its mission to "rehabilitate" youth. Moreover, this foundation of control permeates the system's core architecture,[19] destabilizing its entire construction. As a result, the court

15. *See* BERNSTEIN, *supra* note 3, at 48 ("Understood in the context of the era, as well as the subsequent reality of its exercise, the doctrine of parens patriae had less to do with enforcing the state's obligation to children than with legitimatizing its authority over them—an authority greater than that of the natural parent.").

16. *See infra* Part I.

17. *See* BERNSTEIN, *supra* note 3, at 46 ("The tension between care and control—reflected to this day in the tug-of-war between rehabilitation and punishment—is not, as is sometimes assumed, of recent origin. It was woven into the fabric of the juvenile control from its very inception.").

18. Anthony Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, 381 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 21 (1969). Platt describes the child saving movement as "a conservative and romantic movement, designed to impose sanctions on conduct unbecoming youth and to disqualify youth from enjoying adult privileges." *Id.* The movement was "heavily influenced by middle-class women who extended their housewifely roles into public service and emphasized the dependence of the social order on the proper socialization of children." *Id.*; PLATT, THE CHILD SAVERS, *supra* note 3, at xlviii ("The child-saving movement tried to do for the criminal justice system what industrialists and corporate leaders were trying to do for the economy—that is, achieve order, stability, and control, while preserving the existing class system and distribution of wealth").

19. The philosophical grounding in *parens patriae* shaped key facets of the design of the juvenile court, including the legal definition of delinquency and the penological aim of rehabilitation. For instance, the broad legal definition of delinquency allows the state to intervene in the life of any young person it wants given the near-universal experience of delinquency during adolescence. *See* BERNSTEIN, *supra* note 15, at 58–60. However, in practice, the state limits its intervention to select cases that reflect the state's interest in the child, not necessarily the child's behavior. *Id.* Additionally, while rehabilitation is often associated with the idea of reducing recidivism, over the history of juvenile court, rehabilitation is better understood in relation to the broader concept and goal of "citizen-building"—and particularly white democratic-citizen-building. *See* WARD, *supra*

as designed is ill-suited to meet even the founders' own purported diversionary and citizen-building goals. Thus, until this control orientation is unwound from the underpinnings and architecture of the juvenile legal system, efforts at meaningful reform will continue with limited results.

This Article critiques the juvenile legal system's philosophical grounding in *parens patriae* and explains why *parens patriae* must be abandoned as the foundation of the delinquency system. Part I explains the doctrine of *parens patriae* and how it came to provide the philosophical justification for the juvenile court's power. Part II explains how the philosophy of *parens patriae* is chiefly responsible for instilling the delinquency court with an approach that perpetually prioritizes control over care. The Article concludes by previewing the steps necessary to excise *parens patriae*'s influence over the design of the delinquency court and build a new approach to responding to the transgressions of youth.

I. THE PHILOSOPHY OF *PARENS PATRIAE*: THE FOUNDATION OF THE MODERN DELINQUENCY COURT

The modern delinquency court is best understood as the result of a series of major and minor political, policy, and practical shifts that sought to divert children away from the punishments applied in criminal court while increasing state intervention in their lives.[20] Broadly speaking, the major movements can be organized into three diversionary stages: (1) the political and legal accommodation of childhood during the seventeenth and eighteenth centuries that sought to divert youth from adult culpability; (2) the creation and implementation of juvenile reformatories during the nineteenth century that sought to divert youth from adult punishment; and (3) the launch and evolution of the juvenile court during the twentieth century that sought to, in part, divert delinquent youth from the adult criminal legal system.[21] Taken together, these movements

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note 3, at 26–28, 38, 72–76, 101. As such, the legal definition of delinquency and the goal of rehabilitation together helped effectuate the *parens patriae*'s goals of coercively assimilating—not affirming—the disproportionately poor, immigrant, BIPOC, and LGBTQ+ populations whom the state has historically sought to control.

20. While not necessarily specifically pincited throughout the paper in favor of citing original source material to the greatest extent possible, my understanding of the history of the juvenile court generally is informed by the research and analysis conducted by Neil Bernstein, Holly Brewer, Lawrence Custer, Barry Feld, Sanford Fox, Kristin Henning, Wallace Mlyniec, Robert Pickett, Anthony Platt, Doug Rendleman, Robert Pickett, Dorothy Roberts, David Tanenhaus, and Geoff Ward, among others.

21. *See* BREWER, *supra* note 8, at 184 ("Attention to what is now defined as juvenile crime has

represent a slow march to a massive increase in the reach of the legal doctrine of *parens patriae* that has minimized the rights of children and elevated the government's right to control children over any concomitant duty to care for them.

A. Laying the Cornerstone: Children Are Different Than Adults

The genesis of the juvenile court and our modern-day approach to "juvenile delinquency" can be traced back to the post-Reformation political and legal debates of the seventeenth and eighteenth centuries. While these debates affirmed childhood as a distinct period of increased dependence, diminished capacity, and deferential subservience relative to adulthood, the varying implications drawn from this reality revealed a tension between status, reason, and threat that still fundamentally undergirds society's approach to intervening in youth misbehavior. On the one hand, the model of childhood as submissive and dependent was used to justify autocratic government power and state intervention on the premise that the state was the parent of all its citizenry and thus was owed the same duty of obedience from its citizens that children owe their parents. This philosophy of *parens patriae* provided the legal justification for state intervention in dependency cases. On the other hand, the increased adoption of "reasoned consent" as the basis for political power also led to the idea that youth were less criminally culpable than adults on account of their "lack" of reason.[22] This republican philosophy provided the legal justification for the first major diversionary stage—diverting children from adult culpability. Unfortunately, fear of the threat that children allegedly posed to society compromised this foundation of diversion from the start, creating cracks in which patriarchal philosophies would take root. This time period ultimately laid the groundwork for the prioritization of control over care that sits at the core of the failures of the modern juvenile legal system today.[23]

1. The Origin of *Parens Patriae*: A Philosophy of Political Power

Recognized officially by the *Prerogative Regis* in 1324, the principle of *parens patriae* established the power of the English monarchy over its

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focused on the last century and a half. Only by telling the story of the previous three centuries do the connections between children's liability for crime and what we would not call democratic political theory, or more broadly speaking, between crime and enlightenment, become clear."); Fox, *supra* note 3, at 1187–88 (discussing the reformatory movement and founding of the juvenile court as the two major pre-Gault reforms "in the means for dealing with juvenile deviants").

22. BREWER, *supra* note 8, at 103, 182–83, 216–29.

23. *Id.* at 183 ("In practice, the eighteenth and early nineteenth centuries witnessed a struggle between intent and threat, between sparing the child and seeking to make the child an example.").

subjects and endorsed the right and responsibility of the English monarchy to act *in loco parentis*—in the place of the parent—to protect persons who are legally unable to act on their own behalf.[24] According to Blackstone, this royal prerogative included "such positive, substantial parts of the royal character and authority, as are rooted in and spring from the king's political person . . . ."[25] The royal prerogative established the king's preeminence over all of his subjects and affirmed that he could do no wrong.[26] By divine right, the king inherited unquestioned authority.[27]

This power of wardship—which was originally exercised on behalf of the crown by feudal lords—was eventually assigned to the Court of Wards and Liveries in the mid-sixteenth century. The Court exercised the power primarily over three types of wards: (1) "idiots"; (2) "lunatics"; and (3) minor heirs.[28] While the court's exercise of jurisdiction over the former two categories was grounded primarily in the more humanitarian, "protective interests" of the king, the exercise of jurisdiction over minor heirs was grounded more in the "financial interests" of the king.[29] Given that the crown had the right to the revenue generated by the land of the minor heir but no meaningful reciprocal duty to care for the heir,[30] the king's wardship over minor heirs was "the most profitable for the crown and therefore most notorious for its financial abuses."[31] While the abuses of the Court of Wards and Liveries led to its abolishment in 1660,[32] the principle of the sovereign's wardship powers over its minor subjects not only survived but expanded.

Relying on the natural right and the "king's power as *pater patriae*" to "defend his [s]ubjects" and protect those "who cannot defend or govern [themselves]," the English Chancery Court subsequently assumed the

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24. Prerogativa Regis, 17 Edw. 2, c. 1, (1324) (Eng.), *translated in* 1 STATUTES AT LARGE 376–84 (Pickering ed. 1792), *see also* Application of Gault, 387 U.S. 1, 16 (1967) (discussing the state's right to deny a child procedural rights); *see generally* Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978); Ralph A. Weisheit & Diane M. Alexander, *Juvenile Justice Philosophy and the Demise of* Parens Patriae, 52 FED. PROB. 56 (1988); Jonathan Simon, *Power without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1367 (1995).

25. George B. Curtis, *The Checkered Career of* Parens Patriae*: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 896 (1976).

26. *Id.*

27. *Id*.

28. Custer, *supra* note 24, at 195–96. Jurisdiction over "idiots" and "lunatics" was also grounded in the *Prerogative Regis*. 1 STATUTES AT LARGE 380 (defining "idiots" as "natural fools" and lunatics as those individuals whose "Wit" had failed him).

29. Custer*, supra* note 24, at 196–99.

30. *Id.* at 199.

31. *Id.* at 196.

32. *Id.* at 199, 201.

power of wardship.[33] While initially the chancery court's wardship power appeared to apply primarily by precedent to "idiots" and "lunatics,"[34] the court's jurisdiction was soon extended, in part likely by historical accident, to cover infants as well.[35] Over time, the English Chancery Court further broadened the principle of *parens patriae* to include jurisdiction over "the moral welfare of children, regardless of the wealth or position of their parents."[36] However, the extent to which that jurisdiction should apply was later called into question given the state's inability to actually care for all youth in the realm.[37] Irrespective of the scope of the exact power, the doctrine as applied to minors was limited to what today we would consider custody and dependency cases.[38]

2. The Political Debate: Status vs. Reasoned Consent

While the doctrine of *parens patriae* thus became the manifestation of the royal prerogative as applied in the courts of chancery,[39] the broader philosophy was also used by the English crown and its loyalists to justify, solidify, and expand the power of the king over *all* its subjects. For instance, Sir Robert Filmer—a staunch monarchist—"argued that the power of fathers over their children, established both in nature and by Christianity, was the sole and sufficient basis for political life in society."[40] Filmer situated the king as the "father of the nation" (anointed by nature and Christ) and, thus, as the source of all power in society, thereby bestowing the king with "broad and practically unmediated authority . . . ."[41]

Filmer exemplified a movement to defend the legitimacy of the monarchy and the feudal system in a broader post-Reformation power struggle in England between those who believed that political authority

33. *Id.* at 200–01 (discussing *Falkland v. Bertie* and Fitzherbert's *Natura Brevium*); *Id.* at 205 ("The result was all the more exceptional since there had been no case involving *parens patriae* before 1697, except for the error in *Beverley's Case*, which had in any event been decided by the King's Bench and not the Chancellor.").

34. *See supra* note 28 and accompanying text.

35. Custer, *supra* note 24, at 202–06; Curtis, *supra* note 25, at 897–98.

36. Custer, *supra* note 24, at 206 (discussing *De Manneville v. De Manneville*).

37. Wellesley v. Beaufort, 38 Eng. Rep. 236 (Ch. 1827) (refocusing jurisdiction on cases with youth involving property).

38. Weisheit, *supra* note 24, at 56 (highlighting that the principle, which was borrowed from English practice dating back to the thirteenth century, was initially developed specifically to allow the sovereign to intervene on behalf of dependent children); Curtis, *supra* note 25, at 897–98.

39. Curtis, *supra* note 25, at 896; *see also* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 590, 600 (1982) ("The *parens patriae* action has its roots in the common-law concept of the 'royal prerogative.'").

40. Simon, *supra* note 24, at 1380.

41. *Id.* at 1378, 1380.

was based on inherited right (patriarchal political theory) and those who argued it should depend on the consent of the people (democratic-republican theory).[42] As defined by historian Holly Brewer, patriarchal political theory consisted of three main related concepts: "the equation of the king's authority with paternal power, the transference of that right via inheritance (primogeniture), and the appointment by God's will (so that the king should be accountable to God alone)."[43] While the theory was grounded in the notion of familial—and specifically fatherly—authority, the theory "was really about lordship. It gave the king or lord primary authority over lesser men's children."[44] Patriarchal political ideology centered status (and identity)—not merit—as the source of authority over others.[45] Ultimately, patriarchal theory's primary goal was to reaffirm the status quo.[46]

In contrast, inspired by the Reformation's religious debates regarding the role of reason in choosing church membership, democratic-republican political theory rejected the centering of status as the locus of authority, and instead, argued that the authority to govern others should be grounded in reasoned consent.[47] John Locke, a seventeenth century philosopher who promoted this ideology, sought to divorce political authority from parental authority and primogeniture, as well as to dispel the notion that power and obligation could or should be passed down from one generation to the next.[48] Locke used the fact that children do not consent to parental authority as both the basis for arguing why political authority should not follow the model of patriarchalism and why parents did not have the power to bind their children to obligations beyond their reaching the age of maturity.[49] For Locke, consent must be both freely given and based on reason.[50] Democratic-republican ideology thus presented a seismic challenge not only to the existing basis for political authority at the time, but also to the hierarchical organization of the existing feudal system.

Children found themselves in the middle of this battle between

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42. *See* BREWER, *supra* note 8, at 13–16.

43. *Id.* at 21–22 (explaining that patriarchalism was the dominant political ideology at the time of the founding of the English colonies in America).

44. *Id.* at 22.

45. *See id.* at 24, 29 ("[T]he purpose of this ideology was to reify status relationships.").

46. *See id.* at 29 ("[P]atriarchal theory was a sixteenth- and seventeenth-century patchwork, put together in response to the challenge of the reformation in order to rationalize an earlier system.").

47. *See id.* at 13–14 (explaining that while folks in this camp did not necessarily agree on the form that government should take, they agreed that consent had to be the basis for its power).

48. *See generally id.* at 91–93.

49. *Id.* at 91.

50. *Id.*

competing political ideologies.[51] Both patriarchal political theorists and democratic-republican theorists started with a similar view of children as needing to be submissive and obedient to their parents given their dependence and relative lack of intellectual capacity.[52] However, each approach drew different conclusions from this common view of children.

Patriarchal political theorists focused on the power dynamic between children and their parents, lifting up children as "a metaphor for submission and obedience to the church and kingdom, wherein subjects were commanded to obey their religious and social superiors just as children should obey their parents."[53] In accord, patriarchal political theorists argued that a child's obedience to their parents did not end when they became adults; rather parents could pass their obligations, debts, and status to their children.[54] As a result, most adults "also had the status of perpetual children, at least in their relations with those above them in the [social] hierarchy."[55] In other words, the requirement of one's obedience to their king, their lord, and their social superiors continued despite reaching the age of adulthood. Additionally, given that submission was something owed based on status or identity alone, irrespective of age or capacity, children were not inherently disadvantaged politically under patriarchalism; rather children could and did wield a level of political or social power if born into it.[56]

Democratic-republican political theorists focused on a different aspect of childhood—the relative "lack" of intellectual capacity of children.[57] In building an argument for governance by *reasoned* consent, the political position of children had to be confronted and resolved. Locke, starting from the premise that all persons were created free and equal, reconciled a lack of political power of children by concluding that, while born into equality, children do not achieve a full state of equality until adulthood when mentally independent and able to reason.[58] Until that point, given their mental and physical dependence on their parents, a child's

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51. *Id.* at 44.

52. *Id.* at 91 (quoting Locke describing children as "weak and helpless, without Knowledge or Understanding").

53. *Id.* at 2 ("In this vision of the world, children should revere and obey not only their parents but all social superiors, as a duty enjoined by God.").

54. *Id.* at 19.

55. *Id.* at 2.

56. *Id.* at 103 ("While they had an important niche within patriarchal theory, children were not uniquely disadvantaged. They owed their obedience and allegiance to their social superiors and to their father because of natural filial bonds. Authority descended by the rules of primogeniture, which frequently bestowed great power on the very young.").

57. *See, e.g.*, *id.* at 103, 127–28 (explaining that intellect was required to provide consent).

58. *Id.* at 91–93.

entitlement to eventual equality derived from their "Father's Understanding"[59] and justified the authority of their parents over them.[60] As a result, under a consent-based ideology, children were excluded from direct political participation and, instead, forced to rely on the political power of their parents.[61]

3. The Legal Debate: Diminished Culpability vs. Threat Posed

The Reformation's religious debates over church members also influenced the manner in which children were to be treated politically and under criminal law.[62] At the turn of the seventeenth century, criminal law was harsh and mostly inflexible. Punishments for adults and children alike were severe and "meant to inspire terror and blind obedience."[63] Children were branded, beaten, whipped, and put to death.[64] Culpability was determined by whether the act was done, with little regard for intent or capacity for understanding.[65] Any measure of leniency was dispensed primarily based upon status and privilege.[66] Age appeared mostly irrelevant to the application of criminal law during this time.[67]

However, the increasing focus on the role of reason as fundamental to meaningful choice led to a reexamination of criminal culpability, particularly with respect to children.[68] Proponents of democratic-republican political theory struggled to square the application of criminal law to children who were presumed unable to either understand or consent to the laws they would be accused of breaking.[69] As a result, affirming that children are different from adults in ways that should be legally relevant, common law reformers sought to establish a minimum age of criminal culpability of fourteen.[70] Importantly, early common law reformers did not offer some alternative version of criminal liability, process, and punishment for children under fourteen. Instead, the early common law reformers believed that children thirteen and under should

59. *Id.* at 91 (quoting John Locke, *Second Treatise of Government*, chap. 6, sect. 61) (describing Locke's argument that a child exercises their right to freedom despite their lack of reason through the reason of their father).
60. *Id.* at 91–93.
61. *Id.* at 91, 103.
62. *Id.*. at 182 ("These debates were part of a larger struggle over intent that related to the struggle over consent and over equality.").
63. *Id.*
64. *Id.* at 185–201.
65. *Id.* at 182, 204.
66. *Id.* at 185–86, 193, 197–98, 204.
67. *See generally id.* at 181–229.
68. *Id.* at 184.
69. *Id.* at 182–83.
70. *Id.* at 206–12.

be diverted away from the criminal court entirely and should be excluded from criminal liability as a matter of law, just as they were excluded from political participation.

Given the relationship the early reformers saw between the right to vote and criminal liability, the minimum age of criminal liability proposed could have been set higher but for fear—reformers were concerned about the threat that children posed to individuals on a micro level and society on a macro level.[71] Hale, for instance, considered proposing a minimum age of criminal liability of twenty-one to be consistent with the voting age, but ultimately worried that such a high minimum age of criminal liability would lead to great societal unrest.[72] Blackstone would later take this concern a step further. While generally believing that the minimum age of criminal culpability should be fourteen, Blackstone suggested the addition of an individualized test for children between ages seven and thirteen where criminal liability was measured not by their age *per se* but by their individual capacity to understand and reason.[73] Thus, while these common law reformers further affirmed that children are different from adults in legally relevant ways and sought to accommodate those differences in their conceptions of criminal culpability, the threat they believed children posed led reformers to limit the extent to which criminal law was responsive to these differences.[74] This compromise opened the door for an affirmation of patriarchal political philosophy in not only the application of criminal law to childhood but also the state's power to intervene in the "pre-crime" behavior of youth.[75] Ultimately, this compromise paved the way for *parens patriae* to take hold as the philosophical, political, and legal justification for the state's power to intervene with "wayward" youth.

B. Pouring the Foundational Philosophy: Placement Pursuant to Parens Patriae

This exposure of children to the possibility of criminal liability and punishment led not only to tension between philosophical approaches to state power, but also to concerns over the harm to children resulting from such an approach. In particular, social reformers in the nineteenth century became chiefly concerned with "the juvenile delinquent" and the corruptive influence of their environment—be it the poor slums of cities

71. *Id.* at 183, 207–08, 224–25.
72. *Id.* at 207–208.
73. *See generally* BLACKSTONE, *supra* note 9, ch. 2.
74. *See* BREWER, *supra* note 8, at 183 ("The issue of threat had the potential to trump the concerns about understanding and intent that tended to moderate punishment.").
75. *Id.*

in which they lived, the theaters and gambling halls which they visited, or the jails and prisons to which those found criminally liable were sent.[76] To that end, social reformers focused their attention on trying to prevent delinquency in the first place and on diverting youth found criminally liable from adult punishment. The solution they constructed—the juvenile reformatory—was devised to address both goals. In doing so, the second diversionary stage began to formally and practically blend the state's approach to dependency, status offenses, and delinquency. It also laid the foundation for extending *parens patriae* from dependency cases to delinquency cases, thereby setting the stage for the construction of the juvenile court at the turn of the twentieth century.

1. The Creation of Juvenile Reformatories: Developing a Social Safety Net for Children

While there has been debate with respect to whether the juvenile court is better understood as an outgrowth of the chancery courts or as an extension of the Elizabethan "poor" laws,[77] the juvenile court is best understood as directly descending from the convergence of these two streams of law in one predecessor institution—the juvenile reformatory. At the turn of the nineteenth century, progressive social reformers faced two chief concerns that mirrored the tensions of common law reformers in the seventeenth and eighteenth centuries. On the one hand, these reformers continued to push for a more developmentally responsive criminal legal system, particularly with respect to punishment.[78] On the other hand, distressed by the emerging trends of industrialization and immigration, reformers continued to fear children, especially "other people's" children.[79] These first "child savers" believed that the juvenile

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76. *See* ROBERT PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815–1857, at 25 (1969) ("They believed in the paramount influence of environment upon man. Instead of fastening blame for sin upon man's innate weakness, they chose to attach evil to external objects.").

77. *Compare* Doug Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. C. L. REV. 205, 207–29 (1971) ("[T]he institution which came to be the juvenile court was, in large part, a descendant of mechanisms, definitions and dispositions feudal England to deal with poverty.") *with* Fox, *supra* note 3, 1195 ("[T]hat the House of Refuge was not simply a manifestation of humanitarian concern for children needing help. It was, in fact, the following: (i) a retrenchment in correctional practices, (2) a regression in poor-law policy, (3) a reaction to the phenomenon of immigration, (4) a reflection of the repressive side of Quaker education.").

78. *See, e.g.*, PICKETT, *supra* note 76, at 21, 37–40 ("[They] had found the penal system of the country in appalling condition. They singled out for particular notice the inadequate handling of juvenile criminals. To their minds, efficient and humane juvenile penitentiaries ought to be established at the earliest possible moment.").

79. *See id.* at 2–20; PLATT, THE CHILD SAVERS, *supra* note 3, at 123–45.

reformatory model could address both concerns.[80]

Though perhaps odd to think of prison as diversion given today's context, the expansion of prisons during the eighteenth century served to divert individuals from what previously would have been a death sentence. Compared with the state of affairs at the time, the increased use of prisons represented movement toward a more rational, humane criminal justice system.[81] However, while prisons spared those convicted of felonies from a disproportionate and ultimate punishment, the conditions of prisons were often almost as barbaric. Those imprisoned were subjected to all forms of abuse and maltreatment, including torture, forced labor, solitary confinement, and malnourishment.[82]

Children convicted of a crime were often placed alongside adults in penitentiaries to suffer the same abuse and trauma.[83] However, social reformers quickly came to view this diversionary practice as a cruel and ineffective failure and began to search for an alternative to reforming youth convicted of crimes.[84]

Progressive social reformers were concerned not just with diverting youth from adult prisons. Driven by the combination of a fear of and desire to assist some of the children of parents exploited or left behind by the rapid social and economic changes of the era,[85] reformers sought to save poor youth from a life of "ignorance, idleness, and intemperance" in the first instance.[86] Initially, the child savers' efforts began as an attempt to understand and address the root causes of poverty and crime. Over time, they narrowed their focus specifically on the prevention and

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80. *See* Fox, *supra* note 8, at 1188–92 (footnotes omitted) ("The objects of House reform thus were seen as children who were not yet truly criminal; the undertaking was a matter of crime and delinquency prevention, aimed at saving predelinquent youth.").

81. *Id.* at 1196.

82. BREWER, *supra* note 8, at 219, 228–29.

83. Fox, *supra* note 3, at 1196–98 ("imprisonment had become an unduly pleasant experience for inmates of the state prison, adult and juvenile alike.").

84. *See* PICKETT, *supra* note 76, at 21, 37–38, 47 (outlining social reformers' early thoughts and proposals regarding the removal of children from adult penitentiaries); THE DESIGN AND ADVANTAGES OF THE HOUSE OF REFUGE 8 (1840) ("The common prisons of our country, then, are obviously unsuitable places for juvenile delinquents."). Unfortunately, despite the early recognition of the harms that adult jails and prisons pose to youth, youth are still placed in such facilities today. *See* MARCY MISTRETT & MARIANA ESPINOZA, SENT'G PROJECT, YOUTH IN ADULT COURTS, JAILS, AND PRISONS (2021), https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf [https://perma.cc/3WLN-2EDK] (discussing the continued incarceration of children in adult jails and prisons in the United States despite the dangers posed by adult facilities).

85. PICKETT, *supra* note 76, at 15, 20, 26.

86. *Id.* at 30.

reformation of juvenile delinquency.[87]

Much of the debate among reformers in the early nineteenth century centered on whether to extend aid to the poor in the form of direct cash payments that would support individuals in their homes (i.e., outdoor aid) or to rely on institutional relief (i.e., indoor aid).[88] Reformers chose institutional relief, in part, because their belief of the corruptive influence of the environment favored removal from such environment[89] and, in part, because they believed that direct payments made the poor more idle and dependent on the government aid.[90] Initially, this institutional relief took the form of the almshouse, the poorhouse, and the workhouse.[91] However, just as reformers came to believe that children were corrupted by adult prisons, reformers during this time also came to believe that children did not belong in institutions housing poor adults.[92]

Juvenile reformatories developed with the hope of serving as a singular institution that could address the dual strands of concerns of progressive reformers. First, juvenile reformatories were created to provide another diversionary step away from the forms of punishment meted out to adults in favor of focusing on the reformation of the child.[93] Second, juvenile reformatories were created to serve as a safety net to provide for poor children physically, educationally, spiritually, socially, and financially.[94] This dual purpose is evident in the statutory authorization provided to the first juvenile reformatory—New York's House of Refuge—to take in children who were convicted of crimes or considered "vagrant."[95] As a

87. *Id.* at 40, 49.

88. Rendleman, *supra* note 77, at 213.

89. Fox, *supra* note 3*,* at 1193.

90. Rendleman, *supra* note 77, at 213; Fox, *supra* note 3*,* at 1199–1200.

91. Rendleman, *supra* note 77, at 213.

92. *Id.*

93. *See* PICKETT, *supra* note 76, at 37–49 (describing the development of the House of Refuge for reforming predeliquent children); *see also* BREWER, *supra* note 8, at 228–29 ("The reasoning behind the penitentiary movement was that almost all criminals could be reformed and turned into better human beings. Children became the model and the main beneficiaries of these reforms."); PLATT, THE CHILD SAVERS, *supra* note 3, at 123 (noting the potential positive impact of reform schools). Reformers were also concerned about the high number of children alleged to have committed a crime that were being diverted entirely from the criminal legal system—either through jury nullification or failure to report—as a result of public hesitancy to convict youth lest they get placed in an adult jail. *See* THE DESIGN AND ADVANTAGES OF THE HOUSE OF REFUGE, *supra* note 84, at 4–9 (discussing the hesitancy to prosecute and convict children to keep them from adult penitentiaries); J. Herbie DiFonzo, *Deprived of "Fatal Liberty": The Rhetoric of Child Saving and the Reality of Juvenile Incarceration*, 26 U. TOL. L. REV. 855, 881–82 (1995); PLATT, THE CHILD SAVERS, *supra* note 3, at 119–23; Fox, *supra* note 3*,* at 1194.

94. Rendleman, *supra* note 77, at 216.

95. Laws of New York, 47th Session, ch. CXXVI 110 (1824); Rendleman, *supra* note 77, at 216

result, the reformatory was established, at least in principle, to be a more developmentally responsive alternative to both the penitentiary and the poorhouse.[96]

The dual mission of the House of Refuge—to remediate poverty and reform juvenile "delinquents"—is also evident in its design. To carry out this dual mission, the creators of the reformatory blended the available technology used by existing institutions focused on the issues of penance and poverty. From both the prisons and the poorhouses, the proponents of the reformatory approach borrowed the model of compelled confined congregate care. From the prisons, the reformatory model borrowed means of discipline and punishment, including forced labor, beatings, whippings, and solitary confinement.[97] From the poorhouses, the reformatory model borrowed the use of apprenticeships, which contracted the youth out to a master who provided the youth with food, clothes, housing, religious instruction, and a nominal payment at the end of the contract in exchange for the youth's labor throughout the term of the contract.[98] The reformatory model also introduced indeterminate sentences as well as academic, vocational, and spiritual instruction as the basis for reformation.[99] This blended, dual purpose design of the House of Refuge inspired the juvenile reformatory movement which took root in the middle of the nineteenth century and provided a host of principles from which the first juvenile court would later draw inspiration.[100] Additionally, given the absence of robust direct assistance programs at the time, this blended, dual purpose design also positioned juvenile reformatories, and later the juvenile court, as the de facto social

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(noting that in its first year in operation, out of seventy-three youth admitted to the House of Refuge, only one was admitted after being convicted of a serious offense); Fox, *supra* note 3*,* at 1192 (describing how nine were admitted for petty larceny, and another sixty-three for "vagrancy, stealing, and absconding from the Almshouse").

96. *See e.g.*, Milwaukee Indus. Sch. v. Supervisors of Milwaukee Cnty., 40 Wis. 328, 332–33 (1876) (noting the different impact on children's development by reformatories, poorhouses, and penitentiaries); *see also* PLATT, THE CHILD SAVERS, *supra* note 3, at 108–23 (outlining reformers' efforts to establish reform schools).

97. *See generally* Alexander W. Pisciotta, *Saving the Children: The Promise and Practice of* Parens Patriae*, 1838–98*, 28 CRIME & DELINQ. 410, 413–17 (1982).

98. *Id.* at 420–22 (noting that these indentures, ostensibly pursued so that the youth could learn a trade and the value of hard work, also conveniently helped defray the costs of the institution); BERNSTEIN, *supra* note 3, at 41 (describing how these forced apprenticeships do not appear to have been a success); Pisciotta, *supra* note 97, at 420–22; *see also* Rendleman, *supra* note 77, at 217 (comparing the House of Refuge apprentice program to almhouses and workhouses).

99. *See* PLATT, THE CHILD SAVERS, *supra* note 3, at 46–55 (summarizing the reformatory plan championed by reformers).

100. *See* Fox, *supra* note 3*,* at 1207 ("Rather than a significant reform, the Illinois Juvenile Court Act of 1899 was essentially a continuation of both the major goals and the means of the predelinquency program initiated in New York more than 70 years earlier.").

safety net for children in the United States.

2. The Extension of *Parens Patriae* in the United States

Importantly, while the reformatory model was grounded in the notion of the reformatories acting *in loco parentis*,[101] the doctrine of *parens patriae* itself was not explicitly used as the legal basis for the placement of youth in reformatories in the United States until the case of *Ex parte Crouse*.[102] In 1839, nearly fifteen years after the Pennsylvania legislature established its House of Refuge,[103] the Supreme Court of Pennsylvania considered a petition for a writ of habeas corpus in the case of Mary Ann Crouse, a child committed to Philadelphia's House of Refuge.[104] Mary Ann was not committed to the House of Refuge by the courts after being criminally convicted.[105] Instead, Mary Ann was committed after her mother—Mary Crouse—filed a complaint alleging that Mary Ann was engaging in "vicious conduct" that rendered her beyond her mother's control and required commitment to the House of Refuge for her "moral and future welfare."[106] A magistrate committed Mary Ann after reviewing a warrant signed by a justice of the peace certifying "that complaint and due proof had been made before him by Mary Crouse" and that an alderman had determined that Mary Ann was "a proper subject for the said House of Refuge."[107] The warrant also included the names, addresses, and testimony of the "witnesses examined."[108] Mary Ann's father, through counsel, subsequently filed a habeas corpus petition seeking her release arguing that Mary Ann's continued detention "without a trial by jury" violated Sections 6 and 9 of the Bill of Rights

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101. *See* PICKETT, *supra* note 76, at 47 (illustrating that there are important differences between the concepts of *in loco parentis* and *parens patriae*). *In loco parentis*—which means acting in the place of the parent—is the legal power conferred upon an individual or non-governmental entity empowering them to wield some level of parental power over a specific individual, often a child. Rendleman, *supra* note 77, at 218. In contrast, *parens patriae* is the postulated inherent power of the state itself to act as the common parent or guardian over all its citizens. *Id.*

102. *See generally Ex parte* Crouse, 4 Whart. 9 (Pa. 1939); *see also* Fox, *supra* note 3, at 1206 ("The [Crouse] holding was justified by . . . the first explicit judicial resort to *parens patriae* as justification for seeking to instill virtue in children who would otherwise be doomed to a life of depravity."); Pisciotta, *supra* note 97, at 411 ("[P]arens patriae was not directly employed as a rationale for the founding of the houses of refuge . . . .").

103. *Crouse*, 4 Whart. at 9.

102. *Id.* at 9.

103. *Id.* at 10.

106. *Id.*

107. *Id*.

108. *Id.* at 9 (explaining that the opinion does not give more detail as to the specific facts alleged or proven. The opinion makes no mention of Mary Ann or her father having an opportunity to contest the allegations or the testimony of the witnesses).

and common law.[109] The Supreme Court of Pennsylvania affirmed and held Mary Ann's continued detention without a trial by jury was constitutional.[110] In doing so, the Pennsylvania court confronted two separate due process issues—one substantive and one procedural—albeit not through the modern-day due process analytical frameworks.[111]

Before directly addressing these two due process issues, the *Crouse* court opened its opinion with the pronouncement that "[t]he House of Refuge is not a prison, but a school."[112] This factual finding would form the foundation upon which the entirety of the court's reasoning is based. In support of this declaration, the court highlighted that the House of Refuge's stated goal was the reformation of wayward youth through vocational training, civic education, religious formation, employment opportunities, and separation from corrupting influences.[113] While perhaps true on paper, the court's characterization of the Philadelphia House of Refuge ignored the realities of life in the reformatory—the loss of liberty, physical and emotional abuse rampant at the institution, the frequency of abscondences, and the lack of success with reformation.[114]

The Pennsylvania Supreme Court next confronted whether the statute authorizing Mary Ann's placement in the reformatory violated her father's right to control his children.[115] It bears emphasizing that Mary

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107. *Id.* at 9, 11.

108. *Id.* at 10–11.

111. *Compare id.*, *with* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (evaluating the requirements of procedural due process pursuant to a balancing test that considers the private interest affected by the government action; the risk of incorrectly depriving the individual of such interest under the procedures used as well as the potential value of any additional process; and the government's interest in using the challenged procedure); Santosky v. Kramer, 455 U.S. 745, 753, 761–70 (1982) (recognizing the well-established fundamental liberty interest of parents "in the care, custody, and management of their child" and applying the *Mathews* test to find that a "clear and convincing evidence" standard of proof was required to terminate parental rights); Reno v. Flores, 507 U.S. 292, 301–02 (1993) ("[O]ur line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

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

113. *Id.* at 11. ("The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates.").

114. *See* Negley K. Teeters, *The Early Days of the Philadelphia House of Refuge*, 27 PA. HIST.: J. OF MID-ATLANTIC STUD. 165, 173–75, 183–87 (1960) (describing the rebellion by institutionalized youth against the strict schedule and rules of the House of Refuge that resulted in frequent discipline, including flogging with the cat, isolation in dark cells, and eating standing up).

115. *Compare Crouse*, 4 Whart. at 11, *with* Troxel v. Granville, 530 U.S. 57 (2000) (holding the Due Process Clause protects parents' fundamental right to make decisions concerning care,

Ann's case was not a case involving alleged parental abuse, nor a case involving a child convicted of a crime—it was a case that pitted a father's desire to have his daughter home with him against the state's asserted interests in protecting the public and sparing a child from a life course that the court believed "must have ended in confirmed depravity."[116] Without explicitly finding that Mary Ann's father was unfit or unable to control Mary Ann, the Pennsylvania Supreme Court found not only that "the restraint of her person [was] lawful, but [also that] it would be an act of extreme cruelty to release her from it."[117] The court's full analysis on this issue is worth highlighting:

> To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily entrusted with it, is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted.[118]

Second, the court confronted whether the state's commitment of Mary Ann to the House of Refuge without a jury trial—or presumably an adversarial hearing of any type—violated her constitutional rights. The court dismissed the procedural due process rights of Mary Ann stating simply: "[a]s to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from

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custody, and control of their children); Santosky v. Kramer, 455 U.S. 745 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); Prince v. Massachusetts, 321 U.S. 158, 164 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . ."); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (concluding that parents and guardians have the liberty to direct the upbringing and education of their childrent without unreasonable interference by the state); Meyer v. Nebraska, 262 U.S. 390 (1923) (finding that the Due Process Clause guarantees several rights, including the right to marry and "establish a home and bring up children").

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

117. *Id.* at 12.

118. *Id.* at 11 (emphasis added).

restraints which conduce to an infant's welfare."[119]

In sum, without citing a single case, the Pennsylvania Supreme Court held that the state had the power under the extra-constitutional, extra-statutory doctrine of *parens patriae* to remove a child—accused not of a crime but of "incorrigible or vicious conduct"—from their home without first providing the child with due process.[120] While *Ex parte Crouse* is perhaps best known for introducing *parens patriae* into American jurisprudence and paving the way for the doctrine's adoption as the philosophical and legal foundation of the juvenile court, the implications of the court's rationale for its holding were similarly influential.[121]

First, in asserting that the House of Refuge was a school and not a prison—despite evidence to the contrary—the court elevated form over substance. In doing so, the court prioritized intent over execution and sanctioned the state's usurping the natural rights of a parent based on the state's claims about the nature of the facilities rather than the readily apparent failures of the facilities themselves.[122] Moreover, by overlooking the realities of the Philadelphia House of Refuge in favor of the aspirations of its creators, the court both gave undeserved legitimacy to the notion that the state could effectively care for youth *in loco parentis* and demonstrated that it was uninterested in meaningfully evaluating the actual care the state was providing to children.

Second, in limiting the question considered to whether "a court, a magistrate, or the managers of the Alms-house" could legally commit a child to the House of Refuge for non-criminal behavior,[123] the court framed the issue as a clash between the rights of the parent and the rights of the state over the "education" of the child. In doing so, the court dismissed that Mary Ann's right to liberty was implicated at all, leaving the inference that the individual due process rights of children accused of

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119. *Id.*

120. *Id*. at 10–12.

121. *See e.g.*, Schall v. Martin, 467 U.S. 253 (1984) (holding pre-trial detention does not violate juveniles' right of Due Process); Milwaukee Indus. Sch. V. Supervisors of Milwaukee Cnty., 40 Wis. 328 (1876) (upholding a statute establishing industrial schools and the process for committing minors); Roth v. House of Refuge, 31 Md. 329 (1869) (concluding the power of a justice of the peace to commit a minor and the power of the managers of the House of Refuge to detain a minor to be constitutional); Prescott v. Ohio, 19 Ohio St. 184 (1869) (finding a statute establishing houses of refuge and subsequent statutes authorizing the commitment of minors to the "State Reform Farm" in any county to be constitutional).

122. Fox, *supra* note 3*,* at 1206 ("So long as the declared purposes of the Philadelphia House were morally and socially acceptable, the court made no effort to inquire into what was actually happening to Mary Ann or to determine, as was true in New York, the design and operation of the House were heavily laden with punitive and suppressive elements barely distinguishable from those of an adult prison.").

123. *Crouse*, 4 Whart. at 9, 11.

allegedly "pre-crime" behavior could be ignored if the denial of liberty was framed in terms of formation or reformation rather than punishment. As a result, in forty-five words, the court foreclosed a child-centric, rights-based analysis of the outplacement of not just Mary Ann, but generations of children to come. Indeed, to the *Crouse* court, Mary Ann's interests were hardly relevant; only the rights of the state and her parents mattered to the legal analysis.

Third, the court's rationale reveals that it believed Mary Ann—and children like her—were a threat from which the state was entitled to defend itself. In grounding the state's right to educate in the public's "paramount interest" in a virtuous, informed citizenry while grounding the state's power to place children as the "common guardian of the community,"[124] the court implied that youth at risk of becoming immoral, uneducated citizens posed a threat to the republic. Moreover, the court believed that this risk was so great that it justified authorizing the state to remove a child from their home when the state decided that the parent was not able to control their child. Thus, while the court later postured that it was trying to protect Mary Ann from the threat that she posed to herself,[125] the court's rationale and language reveal that it was at least, if not more, concerned with the threat that Mary Ann posed to the perpetuation of the self-governed state itself.

Finally, the dicta of *Crouse* also likely impacted the evolution of *parens patriae* as the philosophical and legal foundation for the juvenile court. While not essential to its decision, the court found, without explanation, that the House of Refuge could be used as a prison for youth convicted of a crime who would otherwise be sent to prison.[126] In doing so, the *Crouse* court was careful to make clear that its analysis as to Mary Ann did not apply to youth committed to the reformatory after a criminal conviction.[127] To the contrary, youth charged with a criminal offense were still entitled to due process. As such, in modern terms, the *Crouse* decision established the doctrine of *parens patriae* as the legal

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124. *Id.*; *see* BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 24 (Franklin E. Zimring & David S. Tanehaus eds., 2019) ("One goal of the parental-state was citizen building to prepare young people for self-governance and participation in civil affairs.").

125. *Crouse*, 4 Whart. at 11–12 ("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.").

126. *Id.* at 11 ("Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who would else be committed to a common 907oal [sic]; and in respect to these, the constitutionality of the act which incorporated it, stands clear of controversy.").

127. *Id.* at 11–12 (stating that youth in the criminal legal system were only committed to the House of Refuge at sentencing and, thus, after receiving due process consistent with a loss of liberty).

justification for outplacing status offenders—but not delinquent youth—without the due process of law required in criminal matters.[128] Sixty years later, however, the doctrine of *parens patriae* would be used to justify the extension of the same approach to delinquent youth as part of the design of the juvenile court.[129]

3. Practical and Legal Critiques of the Juvenile Reformatory Movement

Despite the increased adoption of the juvenile reformatory model throughout the nineteenth century, calls to reform the reformatories began almost immediately[130] given the exploitative, unsafe, and abusive conditions often associated with the facilities.[131] In addition to using youth as cheap labor for the profit of the administrators of the institutions,[132] youth were victimized physically by their peers and the administrators of the facilities.[133] For example, mid-nineteenth century investigations into the practices of reformatories revealed that the administrators often used harsh physical punishment that, in essence, amounted to state-sanctioned and imposed child abuse.[134] Such abuse included "flogging with the 'cat,'" whipping, simulated drowning, choking, prolonged use of a sweatbox, hanging youth by their thumbs, being hosed down with ice cold water, placement in a straightjacket, and

128. The Pennsylvania statute also provided for the placement of dependent youth in the House of Refuge. While the court makes no mention of this provision, presumably it would similarly have found that issue well settled using the same rationale it applied to Mary Ann. *See In re* Knowack, 158 N.Y. 482, 487 (1899) (describing status offenses as quasi criminal and finding that youth can be outplaced in dependency matters).

129. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909) ("[T]his is the work which is now being accomplished by dealing even with most of the delinquent children through the court that represents the *parens patriae* power of the state, the court of chancery."); *see also* Weber v. Doust, 84 Wash. 330, 333–34, 337 (Wash. 1915) (noting that the state, in the exercise of its prerogative or sovereign right, may take a child from a parent due to a parent's untrustworthiness or if it appears to be in the child's best interest); *Ex parte* Sharpe, 15 Idaho 120 (1908) (affirming the use of an "Industrial Training School" for "delinquent children"); Hunt v. Wayne Cir. Judges, 105 N.W. 531, 539 (Mich. 1905) ("[T]he state itself must in some cases be parent to children of the state."); Commonwealth v. Fisher, 62 A. 198 (Pa. 1905) (citing *Crouse* and affirming the legislation at issue).

130. *See e.g.*, PICKETT, *supra* note 76, at 82 (explaining the first superintendent of the New York House of Refuge was either fired or resigned as a result of the high number of escapes and the punitive nature of the institution); *see also* PLATT, THE CHILD SAVERS, *supra* note 379, at 50, 61–74 (discussing the reformers proposal of a new approach—the Cottage plan—as a way to remedy the existing failures of the juvenile reformatory model).

131. *See* Pisciotta, *supra* note 97, at 413–24 (noting the 908xploitation of children in contracting labor); BERNSTEIN, *supra* note 3, at 38–45 (discussing the history of juvenile justice in the United States).

132. Pisciotta, *supra* note 97, at 416–17; BERNSTEIN, *supra* note 3, at 41.

133. Pisciotta, *supra* note 97, at 413–16, 422–24.

134. *Id.* at 413 ("[T]he techniques of subjection applied in many reformatories could not, by any reasonable standard, be described as 'parental' in nature.").

physical beatings, among other things[135] that would not have been tolerated if committed by the biological parent of the youth. An 1876 Pennsylvania House of Delegates investigation into the conditions at the Philadelphia House of Refuge found that the managers punished children with whippings, withholding food, and solitary confinement while forcing youth to work six days a week without pay for the profit of the board.[136] Shortly thereafter, an 1881 investigation into the New York House of Refuge found that "corporal punishment is, and always has been, a conspicuous feature of the discipline of the House; and it is manifest that a main reliance is placed upon it for the accomplishment of the reformatory work proposed."[137] These investigations revealed that physical, psychological, and emotional abuse was not only common, it was considered integral to the reformatory model by the end of the century.[138]

Additionally, while reformatory managers claimed success in their efforts,[139] the realities of the reformatories call into question whether they were in fact accomplishing their rehabilitative mission.[140] For example, one key metric used by reformatory leaders to measure the success of their efforts was the successful reentry of youth through the completion of community-based apprenticeships.[141] However, despite their rosy public representations, a review of a random sample of 210 youth between 1857 and 1862 demonstrated that the vast majority (approximately 72 percent of the sample) failed to complete their apprenticeship, either because they "ran away, voluntarily returned to the refuge because they were not pleased with their placement, were returned to the refuge by their master, or committed an offense and were

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135. *Id.* at 413–15.

136. James Kopaczewski, *House of Refuge*, ENCYCLOPEDIA OF GREATER PHILADELPHIA (2016), https://philadelphiaencyclopedia.org/archive/house-of-refuge/ [https://perma.cc/UUM2-ZUFY].

137. Pisciotta, *supra* note 97, at 415. Specific examples of documented abuse date back to Joseph Curtis, the first superintendent of the New York House of Refuge. PICKETT, *supra* note at 76, at 68–74. The abuse he administered included, among other things, solitary confinement, being forced to eat alone, being stripped and beaten or whipped, and being forced to walk for miles on the stepping mill. *Id.*

138. PLATT, THE CHILD SAVERS, *supra* note 3, at 73 ("Restraint and discipline were an integral part of the 'treatment' program and not merely expedient approximations.").

139. *Id.* at 53 (noting that reformatory administrators claimed success rates ranging from 60–80 percent).

140. BERNSTEIN, *supra* note 3, at 47 ("From the very beginning . . . the implementation and practice of juvenile justice fell far short of its lofty ideals. The courts relied heavily on 'reformatories,' later known as training schools, where conditions were often more severe and discipline far harsher than their rehabilitative mission implied."); FELD, *supra* note 124, at 36 ("Despite Progressives' rehabilitative rhetoric, juvenile institutions and reformatories were essentially custodial, punitive, and ineffective.").

141. Pisciotta, *supra* note 97, at 420–22.

incarcerated in another institution."[142] Additionally, escapes and attempted escapes from the facilities were frequent.[143] In the span of fifty years, there were nearly two hundred documented examples of youth successfully escaping from the New York House of Refuge while hundreds of other youth tried but failed.[144] The Rochester refuge experienced a mass exodus when an open gate resulted in approximately one hundred youth escaping at one time.[145]

While courts did not explicitly reference the failures of the reformatories, it is likely that the reality of reformatory life informed the opinions of the minority of courts that rejected the states' legal justifications for outplacing youth in such facilities. For example, in two key cases, the Illinois and New Hampshire Supreme Courts rejected *Crouse*'s lynchpin characterization that the reformatory is a school not a prison and, thus, that placement at such facility was not punishment.[146] In *O'Connell*, the Illinois Supreme Court rejected the claim by examining the substance of the reformatory model, rather than uncritically accepting its stated intentions.[147] Recognizing that youth committed to reformatories were separated from their parents, had their freedom of movement constrained, and had to follow the commands of others, the *O'Connell* court found that "[i]t can not [sic] be said, that in this case, there is no imprisonment."[148] In *Cunningham*, the New Hampshire Supreme Court looked to the purpose, public perception, and punitiveness of the reformatories in rejecting the state's claim that the industrial school was not a prison.[149]

Having pierced the veil of the claim that reformatories were nothing more than a school, both *O'Connell* and *Cunningham* concluded that

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142. *Id.* at 420–21.

143. *Id.* at 423; *see also* PICKETT, *supra* note at 76, at 68–74.

144. Pisciotta, *supra* note 97, at 423; *see also* PICKETT, *supra* note 76, at 81 ("Because of the large number of escapes and [the superintendent's] preoccupation with punishment, the internal affairs of the institution presented quite a different picture to the managers than that which they had publicly extolled.").

145. Pisciotta, *supra* note 97, at 423.

146. People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 287 (Ill. 1870); State *ex rel.* Cunningham v. Ray, 63 N.H. 406, 408–09 (N.H. 1885).

145. *O'Connell*, 55 Ill. At 287.

148. *Id.* ("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."); *see also id.* at 285 ("If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity.").

149. *Cunningham*, 63 N.H. at 408–09. The court also pointed out that "[a]t no time since its institution in 1855 have its doors been open to the admission of any other class of scholars." *Id.* at 408.

placement in a reformatory constituted a restraint on the child's right to liberty protected by the Constitution and natural law.[150] *Cunningham* was a more obvious case in this respect given that the magistrate placed the youth in a reformatory after the youth was charged with, but not yet convicted of, a crime.[151] As a result, *Cunningham* arguably merely blocked the use of reformatories as a way to evade the due process rights to which children accused of a crime were at that time both constitutionally and statutorily entitled.[152] In contrast, *O'Connell* explicitly recognized the right of the child to liberty independent of the rights of the father in non-criminal contexts, finding that:

> In cases of writs of *habeas corpus* to bring up infants, there are other rights besides the rights of the father. If improperly or illegally restrained, it is our duty, *ex debito justitiæ*, to liberate. The welfare and rights of the child are also to be considered. The disability of minors does not make slaves or criminals of them. They are entitled to legal rights, and are under legal liabilities.[153]

Having found that children have a liberty interest separate and apart from that of their parents, the court concluded that a child "only guilty of misfortune" could not be deprived of liberty without first being provided the same due process owed to children accused of crimes.[154] As such, *O'Connell* and *Cunningham* rejected the centering of the alleged *parens patriae* powers of the state in favor of an individual rights—and specifically child rights—framework.

This pushback from courts to the reasoning of *Crouse* and the aims of the reformatory movement was short-lived.[155] While the *O'Connell* decision resulted in statutory changes in Illinois that required the provision of notice, appointment of counsel, and a jury trial prior to the placement of a child in an "industrial school" for non-criminal behavior,[156] the Illinois Supreme Court again soon endorsed the notion

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150. *Id.* at 411–12; *O'Connell*, 55 Ill. At 286–88.

151. *Cunningham*, 63 N.H. at 406–07, 410 ("No one of [*Ex Parte Crouse* and its progeny] is an authority for the commitment of a minor charged with the commission of a crime to such an institution, without some kind of a trial and conviction.").

152. *Id.* at 412.

153. *O'Connell*, 55 Ill. At 286. The Court noted "[t]he constitution is the highest law; it commands and protects all." *Id.* at 288.

154. *Id.* at 287 ("In all criminal prosecutions against minors, for grave and heinous offenses, they have the right to demand the nature and cause of the accusation, and a speedy public trial by an impartial jury.").

155. Rendleman, *supra* note 77, at 239 ("The *O'Connell* case points to one of the paths not taken in American history.").

156. *See In re* Ferrier, 103 Ill. 367, 370–73 (Ill. 1882) (distinguishing the due process provided in the statute at issue in the instant case from the lack of due process guaranteed under the statute

that the "industrial school" was not a prison but a school, thereby dismissing the child's liberty interest.[157] In its rationale for upholding the statute, the court again centered the role of the state as *parens patriae* over the "care and person of the infant, so far as is necessary for his protection and education," using language and reasoning closely resembling that in *Crouse*.[158] Thus, although the *O'Connell* court was successful in promoting the due process rights of children for a time, the decision proved unable to domesticate the doctrine of *parens patriae*. Instead, *parens patriae* became not only the philosophical and legal foundation of the soon-to-launch juvenile court, but also the basis for eradicating the gains made in recognizing the due process rights of children in Illinois and elsewhere for the following seventy years.

C. Designing the Juvenile Court: Building on the Foundation of Parens Patriae

The creation of the juvenile court at the turn of the twentieth century marked the third major diversionary movement in the evolution of the American response to youth non-prosocial behavior—purported diversion from the criminal legal system. Building upon the work done by proponents of the reformatory movement, child savers continued to expand the doctrine of *parens patriae*. By diverting youth charged with crimes to a separate court designed to also have jurisdiction over dependent and allegedly "pre-criminal" youth, child savers were able to do away with the due process protections previously considered constitutionally due to youth charged with criminal offenses under the guise of the court acting as a benevolent parent.

However, just as reformatories proved themselves unfit to play the role, the juvenile court quickly proved itself ill-suited for the task. After decades of failing to live up to its mission to care for youth, the Supreme Court finally rejected the notion that the purported benevolent intentions of the state functioned as an adequate substitute for due process.[159] Nevertheless, despite its concerns, the Court left *parens patriae* intact as the foundation of the juvenile court.[160]

This small crack in the foundation of *parens patriae* did little to curtail

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challenged in *O'Connell*); *see also* PLATT, THE CHILD SAVERS, *supra* note 3, at 104 ("Despite the protests of the child savers, the State Reform School act was revised in 1873 to incorporate the *O'Connell* decision and make it consistent with constitutional guarantees.").

157. *Ferrier*, 103 Ill. At 371.

158. *Compare id.* at 372 *with Ex Parte* Crouse, 4 Whart. 9 (Pa. 1939).

159. Application of Gault, 387. U.S. 1, 17–18 (1967).

160. Simon, *supra* note 24, at 1396–1401, 1417 ("A legal version of the 'undead,' the *parens patriae* juvenile court haunts us from its incomplete burial in the 1960s.").

its power. Indeed, within a generation of the Warren Court's efforts to restrain the virtually unfettered power of the juvenile court, the Rehnquist Court recentered *parens patriae* in its delinquency court jurisprudence and used it to limit the due process rights and minimize the liberty interests of youth.[161] As a result, despite the many criticisms and failures, *parens patriae* remains the philosophical foundation of the delinquency court to this day.

1. The Launch of the Juvenile Court: A New Hope?

Dissatisfied with the inefficacy of the criminal courts, juvenile reformatories, and almshouses, child savers in Illinois proposed the development of a separate "system of jurisprudence" for dependent children and children accused of criminal offenses.[162] However, despite claims that the creation of the first juvenile court was a "unique experiment" that "started with new thoughts and ideas,"[163] the first juvenile court represented more evolution than revolution.[164] More specifically, the launch of the juvenile court is best understood as the beginning of the third major diversionary stage in the development of our societal response to youth non-prosocial behavior. This stage combined various strands of existing philosophy and practice in a manner that both expanded and solidified the state's purported *parens patriae* power over its children, while supposedly removing children from the harms associated with criminal court.

Importantly though, the juvenile court was not just diversionary, but interventionist.[165] The juvenile court drew inspiration from the reformatory movement's philosophical and practical approaches to crime reduction to significantly expand the scope of youth that fell under the *parens patriae* power of the state.[166] In its report to the Chicago Bar Association justifying the creation of the first juvenile court, the Special Committee on Juvenile Courts argued, as supporters of the reformatory movement had previously, that the state not only had the right to

161. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Schall v. Martin, 467 U.S. 253 (1984).

162. TIMOTHY DAVID HURLEY, ORIGIN OF THE ILLINOIS JUVENILE COURT LAW: JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED 5–6, 9–48 (3d ed. 1907); *see also* PLATT, THE CHILD SAVERS, *supra* note 3, at 123–45 (discussing the fate of the juvenile court); DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 3–22 (2004) (describing the development of the children's court).

163. HURLEY, *supra* note 162, at 5, 9.

164. Fox, *supra* note 3, at 1207; PLATT, THE CHILD SAVERS, *supra* note 3, at 134–35 ("The juvenile court was not, as some writers have suggested, a 'radical reform,' but rather a politically compromised reform which consolidated existing practices.") (citation omitted).

165. FELD, *supra* note 124, at 3.

166. *Id.*

intervene under the doctrine of *parens patriae* to reduce youth crime, but had a duty to intervene.[167] The Special Committee report laid out its vision for the new juvenile court:

> [The juvenile court's] fundamental idea is that the state must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime. To that end, it must not wait as now to deal with him in jails, bridewells and reformatories after he has become a criminal in habit and tastes, but must seize upon the first indications of the propensity, as they may be evinced in his conditions of neglect or delinquency . . . .[168]

To further this mission, the founders envisioned that "the state, acting through the Juvenile Court, [would exercise] that tender solicitude and care over its neglected, dependent and delinquent wards that a wise and loving parent would exercise with reference to his own children under similar circumstances."[169] Timothy Hurley, a member of the Special Committee and the Cook County Juvenile Court's first chief probation officer, explained that the "inquiry [of the court] was with reference to the condition of the child" with its goal being "formation" rather than "punishment and reformation."[170] The work of the juvenile court then would be "to inquire into the causes of the dependency or delinquency, to find why the child went wrong in the first place, to remove the cause of the fall from grace, and to start the little one on the right road."[171] Because the founders viewed the focus of the court as the condition of the child rather than their behavior,[172] the juvenile court moved allegedly delinquent youth out from under the jurisdiction of the criminal court and instead grouped them with allegedly dependent and allegedly pre-

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167. HURLEY, *supra* note 162, at 45 ("Recognizing these evils and the duty of the state to assume its responsibilities as parens patriae, this association at its last annual meeting directed the appointment of a committee of five to investigate existing conditions relative to neglected, dependent, and delinquent children . . . ."); *see also id.* at 58 ("Remembering that the state has after all, the right, in the absence of proper care from the natural parents, to step in and take it upon itself the work which the natural parents had proved themselves unable to do . . . .").

168. *Id.* at 47; *see also id.* at 56 ("The fundamental idea of the Juvenile Court is so simple it seems anyone ought to understand it. It is, to be perfectly plain, a return to paternalism. It is the acknowledgement by the State of its relationship as the parent to every child within its borders.").

169. *Id.* at 47; *see also* Mack, *supra* note 129, at 107 ("Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?").

170. HURLEY, *supra* note 162, at 24; *see also* PLATT, THE CHILD SAVERS, *supra* note 3, at 45 (noting that children cannot be seen as entirely devoid of moral significance).

171. HURLEY, *supra* note 162, at 63.

172. *See id.* at 24 ("When the child was brought into court, the inquiry was with reference to the condition of the child.").

delinquent youth under the *parens patriae* powers of the state.[173]

The founders of the juvenile court used this change in jurisdiction to justify stripping children accused of violating criminal statutes of the due process protections to which they had been previously entitled despite facing similar or worse consequences in delinquency court.[174] Given the mission of the new juvenile court and its grounding in the state's *parens patriae* powers, the founders believed the due process protections granted in criminal court to be an impediment to the effective execution of the juvenile court's goals.[175] They believed this to be especially true given their view that the goal of the juvenile court was not to adjudicate guilt or innocence but to "save and redeem th[e] child."[176] As a result, the founders took "great care [] to eliminate in every way the idea of a criminal procedure."[177] Instead, the new juvenile court was reframed as a chancery court with informal proceedings.[178] Juvenile court cases were initiated by petition rather than an indictment, and juvenile courts issued a summons for youth to appear rather than an arrest warrant. The rules of evidence were relaxed, and there were no prosecutors or defense attorneys. Children were assigned probation officers, who were tasked with investigating the condition of the child, presenting evidence, representing the child's interests, counseling the child, and "protect[ing] the child before court and after court the same as a good, patient, kind,

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173. *See generally* Ill. Juv. Ct. Act of 1899; *see also* HURLEY, *supra* note 162, at 107 ("[I]t is but a substitution of the parental power of the state for that of the criminal branch."); *accord* Judge Julian Mack, Address to the Nat'l Conf. of Charities and Correction, XXXIII Session: The Juvenile Court, (May 1906), at 3–4; Fox, *supra* note 3*,* at 1193 ("[W]hen the nineteenth-century reformers spoke of *parens patriae*, they were dealing with neglected and criminal children; they were articulating the duty of the government to intervene in the lives of *all* children who might become a community crime problem.").

174. Importantly, not all children accused of criminal conduct had their cases heard in the new juvenile court. *See* TANENHAUS, *supra* note 162, at 43–44 (explaining the approach of Chicago Juvenile Court judges who did not always assert their original and exclusive jurisdiction in cases). Rather, pursuant to an informal agreement with the state's attorney's office created in hopes of avoiding a challenge to the constitutionality of the juvenile court, the Chicago Juvenile Court exercised a concurrent jurisdiction with the criminal justice system. *Id.* (describing the concurrent jurisdiction that retained the state's attorney's right to file charges directly against a child in criminal court). Additionally, the Juvenile Court sometimes declined to exercise jurisdiction over certain children and other times affirmatively transferred children to criminal court. *Id.*

175. *See* Mack, *supra* note 129, at 108–12 (citing to several cases and perspectives from judges in various jurisdictions and states such as Idaho, Utah, and Michigan); *see also* Joel Handler, *supra* note 3, at 10 (1965) ("This foundational concept of *parens patriae* is the theoretical underpinning for the rejection of the criminal law adversary procedures."); *accord* PLATT, THE CHILD SAVERS, *supra* note 3, at 137–45 (discussing the juvenile court's adoption of informal procedures); FELD, *supra* note 124, at 33–38 (discussing the procedures of the early juvenile courts).

176. Judge Julian Mack, *supra* note 173, at 4.

177. HURLEY, *supra* note 162, at 23.

178. *Id.* at 23–25, 145–50; HELEN RANKIN JETER, THE CHICAGO JUVENILE COURT 5 (Dep't of Labor, Bureau Publication No. 104. 1922) (describing the new legislation).

intelligent father or mother would their own child."[179] Juries, if used at all in juvenile court, consisted of six jurors rather than twelve.[180] Children were found dependent or delinquent rather than convicted, and they were "committed" to a probation officer or institution rather than sentenced.[181]

Yet, while the founders of the court may have rejected the terminology and procedural protections of the criminal courts, the design of the juvenile court adopted much of the existing and emerging technology of the criminal court.[182] The legal definition of delinquency was derivative of the existing criminal code.[183] Probation and outplacement were tools already in use by the criminal courts.[184] Moreover, given the lack of jury nullification and practice of indeterminate sentencing in juvenile court, youth often faced terms of probation or incarceration that were longer than if in criminal court.[185] Thus, in juvenile court, youth accused of crimes faced many of the same consequences as they had previously with fewer procedural and practical protections.

The new juvenile court quickly proved to be a significant expansion of state's *parens patriae* power—both because of the dramatic number of children brought under the jurisdiction of the court[186] and because of the

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179. Ill. Juv. Ct. Act of 1899 § 6; HURLEY, *supra* note 162, at 23–25, 108–15, 181–83 (presenting the *Juvenile Court Blank No. 12 Instructions to Probation Officers by the Juvenile Court*). As Chief Probation Officer Hurley described the role, "[t]he probation officer . . . is not only judge, but must also in many cases become doctor, nurse, peace-maker, even missionary. He must be all things to all men." *Id.* at 115.

180. HURLEY, *supra* note 162, at 23; Lindsay v. Lindsay, 257 Ill. 328 (1913) (upholding the constitutionality of using six rather than twelve jurors in a dependency matter); *accord* KATHARINE F. LENROOT & EMMA O. LUNDBERG, CHILDREN'S BUREAU & U.S. DEP'T OF LABOR, JUVENILE COURTS AT WORK: A STUDY OF THE ORGANIZATION AND METHODS OF TEN COURTS 132–33 (1925) (describing the lack of jury trials in the ten jurisdictions studied as a result of either prohibition or practice).

181. HURLEY, *supra* note 162, at 24.

182. The key features of this separate approach included (1) a separate court with "chancery rather than criminal jurisdiction," (2) "the detention of children apart from" adults, and (3) the use of probation. JETER, *supra* note 178, at 5.

183. Ill. Juv. Ct. Act of 1899 § 1 ("The words delinquent child shall include any child under the age of 16 years who violates any law of this State or any city or village ordinance.").

184. *See* Mack, *supra* note 129, at 116 ("Probation is, in fact, the keynote of juvenile-court legislation. But even in this there is nothing radically new.").

185. *See* Fox, *supra* note 3 (Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197, 244-45 (1993) ("Moreover, juveniles currently may serve longer sentences than their adult counterparts convicted of the same offense because they purportedly receive treatment rather than punishment."); *see, e.g.*, *Gault*, 387 U.S. at 29 (recognizing that the delinquency court judge committed Gerald Gault to state custody for a maximum of six years for an offense that, if committed by an adult, would have been punishable by a fine of $5 to $50 or up to two months imprisonment.)

186. In his first three years as the judge of the Chicago Juvenile Court, Judge Mack heard over fourteen thousand cases. TANENHAUS, *supra* note 162, at 47.

virtually unfettered discretion the court had to intervene in these cases in whatever way it saw fit.[187] The state, through the juvenile court, maintained this unchecked power for over a half-century.

2. The Due Process Evolution: The Warren Court Strikes Back

While critiques of and efforts to reform the juvenile court began shortly after its founding,[188] by the 1960s it had become abundantly clear that the juvenile court's exercise of its *parens patriae* powers had resulted in a deeply dysfunctional system that represented "the worst of both worlds" for system-involved youth.[189] The juvenile court not only subjected youth accused of delinquency to the unchecked power of the state, but also failed to meaningfully provide the care that the court claimed justified such broad power and discretion.[190] In *Kent* and *In re Gault*, the Supreme Court, under Chief Justice Warren, attempted to address these failures by remedying the power imbalance present in the juvenile court without invalidating the overall diversionary goal of the court. In *Kent*, the Warren Court held that the judge could not summarily transfer a child to adult court "without [a] hearing, without effective assistance of counsel, [and] without a statement of reasons."[191] In *Gault*, the Court considered more precisely what due process protections were required in delinquency proceedings, finding that children were entitled to notice of the charges, appointment of counsel, the right to confront witnesses, and the right to remain silent.[192] The reasoning of *Kent* and *Gault* calls back to the attempts to curtail the unbridled power of the courts to commit youth to juvenile reformatories found decades earlier in the *O'Connell*

187. *See* Mack, *supra* note 129, at 119 (recognizing the "almost autocratic power" of early juvenile court judges).

188. *See, e.g.*, Judge Julian Mack, *supra* note 173, at 1 ("In our Juvenile Court work in Chicago we are still far behind realizing our ideals."); TANENHAUS, *supra* note 162, at 54 ("Juvenile Courts . . . were not immaculate constructions; they were built over time. It took more than a generation to pour form and substance into the idea of a juvenile court.").

189. *See* Kent v. United States, 383 U.S. 541, 555–56 (1966) ("There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."); Gault, 387 U.S. at 17–18 (1967) (citation omitted) ("And in practice, as we remarked in the *Kent* case, the results have not been entirely satisfactory.").

190. *See Kent*, 383 U.S. at 555–56 (lacking, for example, the necessary resources to perform adequately as *parens patriae*); *Gault*, 387 U.S. at 21–22 ("[T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.").

191. *Kent*, 383 U.S. at 554.

192. *Gault*, 387 U.S. at 1, 10, 29; *see also* Breed v. Jones, 421 U.S. 519, 537, 541 (1975) (finding youth are entitled to double jeopardy protections); *In re* Winship, 397 U.S. 358, 368 (1970) (finding that proof beyond a reasonable doubt was also required during the adjudication of a youth alleged to be delinquent).

and *Cunningham* opinions.

First, like in *O'Connell* and *Cunningham*, the Warren Court in *Kent* and *Gault* rejected the elevation of form over substance, instead examining more closely the realities of how the delinquency system actually functioned rather than merely deferring to the juvenile court's "original laudable purpose."[193] In *Kent*, for instance, the Court focused on evidence demonstrating that some juvenile courts lacked the necessary resources, personnel, facilities, and techniques to adequately fulfill its role as parent.[194] The Court in *Gault* extensively explored a number of ways in which the reality of the juvenile court failed to live up to its promises, citing the failure to "reduce crime or rehabilitate offenders," the stigma associated with the label "delinquent," the lack of meaningful confidentiality, and the lack of procedural justice as examples.[195]

Second, the Court reclaimed the constitutional rights of the child, rejecting the notion that the state's role as *parens patriae* justified *unfettered* control over children. For instance, in *Kent*, the Warren Court recognized that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."[196] The Court was even more direct in *Gault*, recognizing that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" and famously announcing that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court."[197] Moreover, the *Kent* Court found that safeguarding the rights of the child was necessary to, rather than incompatible with, intervening with the child in an effective manner.[198] As such, the Court not only made clear that youth did in fact have individual rights enforceable vis-a-vis the parent-state, but also that fundamental fairness was not a zero-sum game where procedural rights must be sacrificed for increased substantive protections. To the contrary, procedural rights were necessary to protect the increased substantive

193. *Kent*, 383 U.S. at 554–55 ("The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."); *Gault*, 387 U.S. at 21 ("[I]t is important, we think, that the claimed benefits of the juvenile process should be candidly appraised.").

194. *Kent*, 387 U.S. at 556.

195. *Gault*, 387 U.S. at 21–27.

196. *Kent*, 383 U.S. at 555.

197. *Gault*, 387 U.S. at 13, 28.

198. *See, e.g.*, *Kent*, 383 U.S. at 563.

> If a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge—which is protected by the statute only against "indiscriminate" inspection—be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation.

Id.

protections afforded to youth under delinquency court statutes.

Third, while the Warren Court questioned the soundness of the doctrine of *parens patriae* as the foundation of the juvenile court,[199] the Court sought to domesticate it, not dismantle it.[200] Despite being critical of the methods and efficacy of the juvenile court, the Court also recognized the tangible importance of its diversionary role.[201] Realizing perhaps that dismantling the system as a whole might do more harm than good and that the Court likely had little ability to hold each juvenile court accountable for providing meaningful rehabilitation, the Court relied on increased procedural protections in its attempt to remedy the previous power imbalance between state and child and to improve both the decision-making and outcomes of the juvenile court.[202]

3. The Modern Delinquency Court: Return of the *Parens Patriae* Power

Unfortunately, the Warren Court's recognition that children were entitled to certain due process rights did not "domesticate" the juvenile court nor unmoor it from its philosophical foundation in *parens patriae* as some have claimed or hoped.[203] To the contrary, repeating the pendulum-swinging dynamic seen in Illinois with respect to the reformatory movement,[204] the Supreme Courts recentered *parens patriae* as the philosophical and legal foundation upon which the juvenile court's power is still based and exercised today.

Shortly after Chief Justice Warren's retirement in 1969, the Supreme Court in *McKeiver v. Pennsylvania* rejected an expansion of the legal recognition of the rights of the child and reaffirmed the prerogative of the state and the "promise" of the juvenile court.[205] In *McKeiver*, the Court

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199. *See Gault*, 387 U.S. at 16 ("The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.").

200. *See id.* at 22 ("But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication.").

201. *See Kent*, 383 U.S. at 557 ("[The Juvenile Court] considering . . . that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence . . . .").

202. *See Gault*, 387 U.S. at 18 ("Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").

203. *See* State v. S.J.C., 183 Wash. 2d 408, 444 (2015) (Stephens, J., dissenting) (citation omitted) ("The juvenile justice system has emerged out of the shadows in light of *Gault* and passage of the Juvenile Justice Act of 1977, shifting doctrinally away from the parens patriae doctrine of 'benevolent coercion, and closer to a more classical emphasis on justice.'").

204. *See generally In re* Ferrier, 103 Ill. 367 (1882).

205. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

refused to recognize that the due process protections announced in *Gault* and its progeny encompassed the right to a jury trial during a delinquency adjudication. The Court expressed four reasons in support of its conclusion. First, it found that a jury trial was not "a necessary component of accurate factfinding," and, as such, was distinguishable from those rights recognized in *Gault*.[206] Second, the Court attempted to rehabilitate the juvenile court, asserting "praise" for the juvenile court as well as its "high promise" while couching its deficiencies as a failure of implementation, not intent or design.[207] Third, without evidence, the Court expressed its concern that requiring trial by jury would mean the end of the juvenile court itself.[208] And finally, though the Court did not explicitly mention *parens patriae*, the Court elevated the right of the state to continue its experiment as parent-state over the right of the child to the full panoply of constitutionally-delineated procedural protections.[209]

Nearly fifteen years later, in *Schall v. Martin,* the Court explicitly reaffirmed *parens patriae* as the foundational philosophical and legal justification for the power of the state acting through the juvenile court. In *Schall*, the Court considered the constitutionality of New York's preventive detention statute that empowered the juvenile court to detain a youth if: (1) the child posed a risk of reoffending prior to the next court hearing if released; or (2) the child posed a risk of not appearing at the next court hearing if released.[210] Importantly, the challenge to the New York statute involved both a facial and as-applied challenge. Both the trial level and appellate courts invalidated the statute because "the statute [was] administered in such a way that 'the detention period serve[d] as punishment imposed without proof of guilt established according to the requisite constitutional standard.'"[211] Had the challenge been merely a

206. *Id.* at 543 ("[W]e have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. But one cannot say that in our legal system the jury is a necessary component of accurate factfinding.").

207. *Id.* at 547 ("The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania appellants here, that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure.").

208. *Id.* at 551 ("If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.").

209. *Id.* at 547 ("We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.").

210. Schall v. Martin, 467 U.S. 253, 255 n.1 (1984).

211. *Id.* at 256 (quoting Martin v. Strasburg, 689 F.2d 365, 373–74 (1982)).

facial challenge, the analysis likely would have more closely mirrored the more limited strict scrutiny-like analysis in *United States v. Salerno*. There, the Court relied primarily upon finding that the government's "legitimate and compelling" interest in preventing crime by arrestees outweighed the "individual's strong interest in liberty" when the government can show that the individual poses an "identifiable and articulable threat to an individual or the community."[212] However, given the extensive record and the lower courts' findings that the statute was being used "not for preventative purposes, but to impose punishment for unadjudicated criminal acts,"[213] the Court needed more to surmount the as-applied challenge in *Schall*. As a result, in a decision that closely mirrors *Ex parte Crouse*, the Court turned to *parens patriae* to justify the broad power of the state to control children.

First and foremost, like in *Crouse*, the *Schall* Court grounded the legal power of the state to apply the Constitution differently to children in the extra-constitutional doctrine of *parens patriae*. While the Court recognized that youth were entitled to certain constitutional protections, the Court found that the State's "*parens patriae* interest in preserving and promoting the welfare of the child . . . makes a juvenile proceeding fundamentally different from an adult criminal trial" and, thus, justified not extending all constitutional protections to youth.[214]

Second, and again like in *Crouse*, the *Schall* Court minimized the liberty interests of youth while reaffirming the *parens patriae* interests of the state. Despite recognizing that youth did in fact have a substantial liberty interest, the Court asserted that the liberty interest of youth "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody" given that they are "subject to the control of their parents and if parental control falters, the State must play its part as parens patriae."[215] Thus, the Court concluded that "the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the 'State's 'parens patriae interest in preserving and promoting the welfare of the child.'"[216]

Third, further paralleling *Crouse*, the *Schall* Court elevated form over

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212. *See* United States v. Salerno, 481 U.S. 739, 749–52 (1987) (upholding a statute allowing for the pretrial detention of individuals when the government demonstrates by clear and convincing evidence after an adversarial hearing that no release conditions can reasonably assure the safety of a specific individual or the community generally).

213. *Schall*, 467 U.S. at 262.

214. *Id.* at 263.

215. *Id.* at 265.

216. *Id.* (citing Santosky v. Kramer, 455 U.S. 745, 766 (1982)). Additionally, while diluting the liberty interests of youth, the Court found that crime prevention was a legitimate state interest that "persist[ed] undiluted in the juvenile context." *Id.* at 264–65.

substance and intent over implementation in its analysis.[217] While youth can be assumed to be in some form of custody, the Court used the concept of the state-as-parent to create a false equivalence between being in the custody of one's parent and being in the custody of the state.[218] Indeed, as the dissent points out, "[s]urely there is a qualitative difference between imprisonment and the condition of being subject to the supervision and control of an adult who has one's best interests at heart."[219]

Finally, despite over a century of evidence indicating the harms of juvenile jails and the record itself regarding the treatment of youth in the juvenile jail, the *Schall* Court revived the paternalistic argument that the restriction of the youth's liberty was being done for the youth's own benefit—to "protect[] the juvenile from [their] own folly."[220] This basis for detention remains an explicit stand-alone statutory basis for detention in many juvenile court schemes around the country to this day.[221] That youth still can be securely detained in a jail for "their own good" in 2023 is one example of how *parens patriae* still exerts over the delinquency system.[222]

In sum, the reality that children are not miniature adults posed a quandary for proponents of the idea that state power derived from reasoned consent of the governed, not the inherited status of the

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217. *See* Simon, *supra* note 24, at 1397–98 ("Much of the opinion is highly formalistic, skimming the surface of juridical categories with no sustained interrogation of the actual practices.").

218. *Schall*, 467 U.S. at 289–90 (Marshall, J., dissenting).

219. *Id.* The dissent highlights the trial court's findings that youth were securely detained pretrial "in a facility closely resembling a jail," were subjected to strip searches, forced to wear institutional clothing, forced to follow the institutional regime, and often commingled with youth who had been adjudicated delinquent. *Id.* at 287–90.

220. *Id.* at 265–66 (quoting People *ex rel.* Wayburn v. Schupf, 385 N.Y.2d 682, 688–89 (1976)).

221. *See, e.g.*, MD CTS. & JUD. PRO. CODE § 3-8A-15 (holding that a child may be placed in detention prior to a hearing if "[s]uch action is required to protect the child"); VA. CODE ANN. § 16.1-248.1(1)(b) (justifying juvenile detention where "[t]he liberty of the juvenile would present a clear and substantial threat of serious harm to such juvenile's life or health"); TEX. FAM. CODE ANN. § 54.01(e) (stating that a child may not be released from detention if they they lack "protection" or would be "dangerous" to themselves or the public); W. VA. CODE § 49-4-706(a)(2) (explaining a child may be detained where there is a "threat of serious bodily harm" or "[n]o responsible adult can be found"); 42 PA. CONS. STAT. § 6325 (holding that a child shall not be detained prior to a hearing unless "his detention or care is required to protect the person or property of others or the child"); *see also* Margaret Beyer PhD., *Juvenile Detention to "Protect" Children From Neglect*, 3 U.D.C. L. REV. 373 (1995) ("The court detains the juvenile who appears to receive inadequate adult guidance and who may be at risk of becoming more involved in delinquency.").

222. Eight states still have *parens patriae* as the stated purpose of their juvenile legal system. OFF. OF JUV. JUST. & DELINQ. PREVENTION, STATISTICAL BRIEFING BOOK: PURPOSE CLAUSES FOR JUVENILE JUSTICE SYSTEMS, 2019 (Apr. 18, 2022), https://www.ojjdp.gov/ojstatbb/structure_process/qa04205.asp?qaDate=2019 [https://perma.cc/VBE7-XHH9].

governors. This tension between treating kids as kids and including them in the social contract was especially acute with respect to the application of criminal law and procedure. On the one hand, youth were perceived to have insufficient reason to create, understand, or consent to the application of such laws. On the other hand, certain youth were perceived to pose a threat to society. Over time, the tension was addressed by promoting the belief that the state acting in *parens patriae* could best minimize the threat children posed by "protecting" children from themselves and their circumstances. As such, a doctrine—once rejected as antithetical to the notion of self-government—was adopted as the foundation of a new juvenile court with a purported mission of building democratic citizens. And while the juvenile court itself has changed in various ways over the course of the last 120 years, the doctrine of *parens patriae* has remained the philosophical and legal foundation of the court.[223] The doctrine continues to pervade all aspects of the juvenile court—from the role of judges and probation officers, to the standards for detention and disposition, to the services offered youth, and the conditions imposed on them.[224] And, as will be explained in the next Part, it is precisely because *parens patriae* forms the philosophical foundation of the juvenile court that the delinquency system continues to prioritize control over care in its approach to the non-prosocial behavior of youth.

II. THE FUNDAMENTALLY FLAWED FOUNDATION: *PARENS PATRIAE*'S PERPETUAL PRIORITIZATION OF CONTROL OVER CARE

Since its inception, *parens patriae* has been a philosophy that couches the state's power to control in the language of care. At its core, *parens patriae* is a doctrine designed to uphold the status quo and to protect the interests of those already in power. It is a philosophy that seeks to justify unquestioned deference to the dominant caste with the promise that the dominant caste will use its power and privilege to protect and care for those expected to subjugate themselves. It is a philosophy that seeks to paint those with power as faultless and benevolent while casting those without power as a constant threat to the established social hierarchy. This dichotomy reveals the central paradox of *parens patriae*—the false belief that those who are seeking to remain in power will meaningfully care for those they perceive to be a direct threat to their power. This paradox reveals the fallacy of conflating the state and parent and explains

223. *See* Simon, *supra* note 24, at 1367 (noting the Supreme Court's reaffirmation of the doctrine as recently as the mid-1980s).

224. *See generally*, Weisheit & Alexander, *supra* note 24, at 56.

why the juvenile legal system will perpetually prioritize control over care so long as the system has *parens patriae* as its foundation.

A. The State as Parent: Exerting Control

Parens patriae—both in theory and in practice—has always had control at its core. The doctrine was originally constructed and promoted to protect and perpetuate monarchical power and feudalistic social hierarchy in the face of challenges to the status quo from those who believed in more democratic forms of government and a more "merit-based" social hierarchy. The three essential elements of *parens patriae*—the king as father of the nation (i.e., paternalism), primogeniture (i.e., inherited power), and divine right (i.e., unquestioned authority)—were used together to justify the king's control over his subjects.

First, *parens patriae* equated the authority of the king with paternal power. Likening the king to the "father of the nation" was an attempt to cast the perception of the monarchy as something familiar and benevolent. At first glance, particularly when the concept of parent is viewed through a modern lens, *parens patriae* can be associated with the image of a loving parent caring for the child. However, *parens patriae*, as originally conceived, emphasized the obedience owed from child to parent rather than a duty of care owed from parent to child.[225] Practically speaking, given this positioning of the king as parent, *parens patriae* elevated the interests of the king over those of his subjects.[226] In doing so, it made clear that the king did not owe a duty to his subjects to meet their needs. Rather, the subjects owed a duty to the king to further his desires and goals. As such, *parens patriae* was not a philosophy that promoted the self-actualization of the citizen, but instead supported the subservience of subject to state.[227]

The treatment of orphans by the king's courts during the Middle Ages and Renaissance exemplified *parens patriae*'s elevation of the interests of the state over those of the child. In contrast to courts today, the old English courts intervened primarily, if not exclusively, in the cases of

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225. *See* ROBERT FILMER, PATRIARCHA; OR THE NATURAL POWER OF KINGS, ch. 3 (1680) ("Whether it be a Sin for a Subject to disobey the King, if he Command anything contrary to his Laws? For satisfaction in this point, we must resolve that not only in Humane Laws, but even in Divine, a thing may be commanded contrary to Law, and yet Obedience to such a Command is necessary.")

226. *See* ROBERT FILMER, THE NECESSITY OF THE ABSOLUTE POWER OF ALL KINGS; AND IN PARTICULAR, OF THE KING OF ENGLAND 11–12 (1648) (arguing that the monarch was above the law).

227. *See* ROBERT FILMER, OBSERVATION UPON ARISTOTLE'S POLITIQUES 1 (1652) ("Adam was the father, king and lord over his family: a son, a subject, and a servant or a slave were one and the same thing at first.").

wealthy orphans under its *parens patriae* powers.[228] Intervention by the crown in these cases was both protectionist and profitable. Given that the king was entitled to the revenue from the lord-child's land, the king needed to intervene to safeguard not just his revenue stream, but the continuation of the feudal social order.[229] Additionally, because the king did not have a responsibility to provide a certain level of care for the child, profits to the crown (and to the appointed caretaker) could be maximized through court intervention appointing a caretaker whose interests aligned with the king.[230] Poor orphans, however, were not the subject of court intervention in this same manner. Rather, poor children were often left to fend for themselves or forced into mandatory apprenticeships to survive.[231] While over time the chancery court purportedly broadened *parens patriae* to include jurisdiction over the moral welfare of children regardless of social class, the court recognized its limited capacity to intervene in the cases of all poor orphans.[232] Thus, *parens patriae*, as practically applied, prioritized the interests of the king and the maintenance of the feudal social order over care for the individual child.[233]

Second, *parens patriae* argued that the king's authority could only be transferred through inheritance (i.e., primogeniture).[234] The rule of primogeniture applied not just to royal succession but throughout feudal society, ensuring that titles, land, and money would pass from father to child and safeguard the continued high (or low) social status of the family.[235] Broadly speaking, *parens patriae* reinforced the notion that power and privilege derived primarily from one's status, not one's

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228. *See* Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S. C. L. REV. 147, 148–150 (1970) (describing the king's wardships in the heirs of wealthy tenants as "profitable"); Curtis, *supra* note 25, at 896–98 ("Wardship of his tenants' infant heirs assured the king income; sale of the wardship could produce needed revenues.").

229. *See* FELD, *supra* note 124, at 24 ("[*P*]*arens patriae* doctrine originated in medieval English law to assure property interests and feudal succession . . . .").

230. Custer, *supra* note 24, at 196, 199; Cogan, *supra* note 228, at 148.

231. ROBERTS, *supra* note 1, at 108–09; Rendleman, *supra* note 77, at 208–10.

232. *See* Custer, *supra* note 24, at 206 (citing De Manneville v. De Manneville, 32 Eng. Rep. 762 (Ch. 1804)) (discussing a case in which the lower courts were criticized for declining to interfere into a particularly unstable family).

233. Cogan, *supra* note 228, at 147 ("'[P]arens patriae' became a helpful synonym for various state interests that the chancellor desired to further: among them, the preservation of juvenile estates; the furtherance of juvenile education; and the protection of juveniles from improper marriages.").

234. FILMER, *supra* note 225, at 47–48 ("For unless we will openly proclaim Defiance unto all Law, Equity and Reason, we must (for there is no other Remedy) acknowledg [sic], that in Kingdoms Hereditary, Birth-right giveth Right unto Sovereign Dominion, and the Death oft he Predecessor, putteth the Successor by Blood in Seisin.").

235. BREWER, *supra* note 8, at 22–24.

ability.[236]

Importantly, because authority was the product of status rather than ability, children of high status wielded political power and privilege under the feudal system. For instance, the children of lords were owed duties of loyalty and obedience from their subjects regardless of the child's age or capacity.[237] The privilege their status afforded also allowed them the ability to escape criminal liability by claiming the benefit of the clergy—a defense practically afforded only to boys with education and money.[238] As such, *parens patriae* reaffirmed the privilege and authority of those already in power in an effort to maintain the status quo.

Third, *parens patriae* justified this inherited allocation of power using the notion of "divine right"—the idea that those in power have been pre-ordained by God. Given that those in power are thus conduits of God on earth, neither their decisions nor the system by which they came to power should be questioned.[239] Grounding *parens patriae* in the concept of divine right functioned as a way to rationalize an individual having power despite their lack of capacity or ability to exercise their authority well. Thus, the doctrine of *parens patriae* not only sought to perpetuate the allocation of power through status, but also to make clear that such authority should not be questioned.[240]

In sum, at its core, *parens patriae* is a philosophy designed to justify and maintain existing caste structures and the distribution of power that accompanies such societal stratification under the auspices of "paternal" care. Despite this nature (or perhaps because of it),[241] the architects of the first juvenile court built the court upon this doctrinal foundation. The

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236. *See id.* at 23.

237. *See* FILMER, *supra* note 225, at 20 ("[M]any a Child, by succeeding a King, hath the Right of a Father over many a Gray headed Multitude . . . .").

238. To receive the benefit of the clergy, an accused had to demonstrate that they were preparing to become clergy and could read a passage from the Bible. BREWER, *supra* note 8, at 185–86, 193, 197–98, 204.

239. *Id.* at 21–22.

240. *See* Simon, *supra* note 24, at 1380.

> Filmer argued that present monarchs were the direct successors, through a genealogy of both forceful usurpation and natural succession, of the actual paternity of the peoples whom they ruled. On the basis of this assertion, which took him back to Adam and Eve, Filmer argued for a broad and practically unmediated authority for kings.

Id. (footnote omitted).

241. Both Probation Officer Hurley and Judge Mack were aware of the dubious basis for the expansion of *parens patriae*. *See* HURLEY, *supra* note 162, at 107 (recognizing that the *parens patriae* powers of the state were historically only used in the self-interest of the state to intervene with youth with property or estates); Mack, *supra* note 129, at 104–05 (pointing out that the doctrine of *parens patriae* has been around for so long that many believe it should not be questioned).

result was the creation of a court with unbridled power to intervene in the lives of youth and their families in a manner that affirms the political, societal, religious, and economic status quo of the time. Thus, as long as *parens patriae* remains the philosophical foundation, the juvenile court will always have control as its primary objective.[242]

1. The Court-as-Parent: Prioritizing the Interests of the State over the Interests of the Child

As had been the case historically, *parens patriae*, as applied through the juvenile court, has functioned to prioritize the interests of the dominant political and economic castes of the time over the interests of the youth that the status quo perceived to be a threat.[243] While often conflated, *parens patriae* and the penological goal of rehabilitation are two distinct principles.[244] *Parens patriae* represents the power of the state. The penological goal of rehabilitation allegedly protects and benefits system-involved children.[245] However, "[t]here is nothing inherent in the idea of *parens patriae*, however, which requires that it be tied directly to rehabilitation or which precludes punishment."[246] As such, the goal of rehabilitation can exist and be implemented separate and apart from a system grounded in *parens patriae*. The doctrine of *parens patriae* is instead better "equated with the idea of *paternalism*,"[247] which "is often defined as an exercise of control over an individual that purports to be implemented in the interests of that individual, either overriding or filling in for unreliable or nonexistent individual choices."[248] Paternalism thus "implies broad discretion for the courts to deal with the juvenile offender as the court deems best, with kindness being shown to the deserving (i.e., compliant) and harsh treatment for the recalcitrant."[249]

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242. *See* BERNSTEIN, *supra* note 3, at 48 ("Understood in the context of the era, as well as the subsequent reality of its exercise, the doctrine of parens patriae had less to do with enforcing the state's obligation to children than with legitimizing its authority over them—an authority greater than that of the natural parent.").

243. *See id.* ("The overriding values involved protecting the social order from the potential threat posed by a growing army of impoverished youth."); *see also* ROBERTS, *supra* note 1, at 24 ("Far from promoting the well-being of children, the state [through the child welfare system] weaponizes children as a way to threaten families, to scapegoat parents for societal harms to their children, and to buttress the racist, patriarchal, and capitalist status quo.").

244. Weisheit & Alexander, *supra* note 24, at 56.

245. *See* FELD, *supra* note 124, at 29–33 (describing the "rehabilitative ideal").

246. Weisheit & Alexander, *supra* note 24, at 56.

247. *Id.* at 57; *see also* HURLEY, *supra* note 162, at 56 (characterizing the notion of the Juvenile Court as a return to classic paternalism); PICKETT, *supra* note at 76, at 20 (describing the motives of the founders of the juvenile reformatory movement as being "often misguided by a warped and pious paternalism").

248. Simon, *supra* note 24, at 1372.

249. Weisheit & Alexander, *supra* note 24, at 57; Simon, *supra* note 24, at 1369.

Paternalism also denotes "a willingness to intervene in the lives of juveniles to prevent more serious misbehaviors in the future."[250] This approach provides the juvenile legal system with the power and justification to elevate the state's interests above those of the child. This is evident not just by the nature of the philosophy itself, but also by the manner in which the state's *parens patriae* interests have been specifically articulated and implemented through the juvenile court.

Throughout the history of the juvenile court, when articulating how the court protected children using its *parens patriae* powers, the interests of the state were deemed more important than the interests of the child or framed as one and the same. For instance, while Hurley—a key architect of the Chicago Juvenile Court and its first probation officer—described the task of the juvenile court as "the formation" of the child, he described the juvenile court statute as "the solution [to] the entire economic problem—the problem of ignorance, poverty, and crime" and as "securing . . . the greatest possible good for the greatest number of people . . . ."[251] The instructions provided to probation officers by the Cook County Juvenile Court described the "welfare and interest of the child" as saving the child from neglect, cruelty, and the danger of becoming delinquent or dependent; in contrast, the court described the "welfare of the community" as "lessening the burdens of taxation and the loss of property" resulting from poverty and crime.[252] The Illinois Supreme Court found that:

> [t]he purpose of this statute [was] to extend a protecting hand to unfortunate boys and girls . . . have proven that the best interests of society, the welfare of the State and their own good demand that the guardianship of the State be substituted for that of natural parents.[253]

While Judge Mack—the second judge to preside over the Cook County Juvenile Court—proclaimed his belief that "[t]he state is thus helping itself as well as the child, for the good of the child is the good of the state," in reality, the good of the state was deemed to be the good of the child.[254] Thus, in the eyes of the founders, the formation of the child was a means to an end, not the end itself.

Moreover, in his seminal defense of the juvenile court, Judge Mack noted that a number of early twentieth century courts used the state's interest in preventing crime and building strong citizens to justify diminishing and overriding the due process and liberty interests of

250. Weisheit & Alexander, *supra* note 24, at 57; Simon, *supra* note 24, at 1369.
251. HURLEY, *supra* note 162, at 55.
252. *Id.* at 181.
253. Lindsay v. Lindsay, 257 Ill. 328, 340 (1913).
254. Mack, *supra* note 129, at 122.

allegedly delinquent children.[255] For instance, the Pennsylvania Supreme Court found that the state may bring a child "into one of the courts of the state without any process at all, for the purposes of subjecting it to the state's guardianship and protection" in order "[t]o save a child from becoming a criminal, or from continuing in a career of crime . . . ."[256] Similarly, the Idaho Supreme Court upheld the constitutionality of its juvenile court statute given that its object was not punishment but rather "to confer a benefit both upon the child and the community . . . and thereby saving him to society and adding a good and useful citizen to the community."[257] As Judge Mack highlighted, these opinions all echoed the rationale of *Ex parte Crouse*, which similarly elevated the state's "paramount interest in the virtue and knowledge of its members" over the interests of children (and their parents) to justify the state's exercise of its alleged *parens patriae* power.[258]

Throughout the twentieth century, the U.S. Supreme Court has continued to prioritize the broad interest of the state in self-perpetuation when justifying the state's exercise of its *parens patriae* power over children. For instance, in upholding the legality of child labor laws, the Supreme Court in *Prince v. Massachusetts* found that

> [t]he state's authority over children's activities is broader than over like actions of adults . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.[259]

In *Santosky v. Kramer*, the Supreme Court built upon *Prince*, further

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255. *See id.* at 109–11*; see generally* State *ex rel.* Caillouet v. Marmouget, 111 La. 225 (1903); *In re* Kol, 10 N.D. 493 (1901); *In re* Knowack, 158 N.Y. 482 (1899); State *ex rel.* Bethell v. Kilvington, 45 S.W. 433 (1898); State *ex rel.* Schulman v. Phillips, 73 Minn. 77 (1898); *Ex parte* Nichols, 110 Cal. 651 (1896); *Ex parte* Liddell, 93 Cal. 633 (1892); *In re* Mason, 3 Wash. 609 (1892); State *ex rel.* Olson v. Brown, 50 Minn. 353 (1892); *In re* Kelley, 152 Mass. 432 (1890); Jarrard v. State, 116 Ind. 98 (1888); Farnham v. Pierce, 141 Mass. 203 (1886); Reynolds v. Howe, 51 Conn. 472 (1884); Milwaukee Indust. Sch. v. Milwaukee Cnty. Sup'rs, 40 Wis. 328 (1876); Prescott v. State, 19 Ohio St. 184 (1869).

256. Mack, *supra* note 129, at 109–10 (citing Commonwealth v. Fischer, 213 Pa. 48 (1905)).

257. *Id.* (citing *Ex parte* Sharpe, 15 Idaho 120 (1908)); *see also* Mill v. Brown, 31 Utah 473, 481 (1907) ("The whole and only object of such laws is to provide the child with an environment such as will save him to the state and society as a useful and law-abiding citizen, and to give him the educational requirements necessary to attain that end.").

258. Mack, *supra* note 129, at 111, 119–20 (quoting *Ex parte* Crouse, 4 Whart. 9, 11 (1838)).

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

Id.

259. Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (upholding a child labor law as justified by the state's interests in promoting citizenship).

elaborating that "[f]ew could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance."[260] Importantly, when the Supreme Court in *Schall* upheld the constitutionality of the pretrial detention of children for their own good, the Court cited the *Prince*/*Santosky* articulation of the state's *parens patriae* interest in support of its conclusion.[261] As such, the juvenile court, given its grounding in *parens patriae*, was designed and has been implemented in a manner that furthers the interests of the state over the interests of the child.

In practical terms, the state's elevation of its crime prevention interests is reflected in the juvenile legal system's adoption of a law enforcement-centered, compliance-driven approach over a social work approach. This tension between control and care—and its resolution in favor of control—is the direct result of the juvenile court's grounding in the philosophy of *parens patriae* itself. Pursuant to *parens patriae*, the relationship between the court and the child is supposed to mirror the parent-child relationship.[262] As such, the expectation was that the child owed a duty of obedience to the parent-state,[263] and the state would protect and care for the child.[264] However, the parent-state often conceptualized care as control and restraint over the child.[265]

This "parent-child" dynamic is purportedly best represented by the probation officer's "lynchpin" role in delinquency court and relationship with the child.[266] Since its inception, the probation officer has been

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260. Santosky v. Kramer, 455 U.S. 745, 790 (1982) (remarking on the state's urgent interest in the welfare of the child).

261. Schall v. Martin, 467 U.S. 253, 263 (1984) (quoting *Santosky*, 455 U.S. at 766).

262. *See* Mack, *supra* note 129, at 107 ("Why is it not just and proper to treat these juvenile offenders . . . as a wise and merciful father handles his own child whose errors are not discovered by the authorities?").

263. *See* HURLEY, *supra* note 162, at 88–99 ("As a whole, the attitude of the court towards the child is such that, perhaps for the first time in his life, the child realizes his responsibility towards the public around and about him."); *see also Ex parte* Sharpe, 15 Idaho 120, 127 (1908) ("This, too, is done for the minor at a time when he is not entitled . . . to his absolute freedom, but rather at a time when he is subject to the restraint and custody of either a natural guardian or a legally constituted and appointed guardian to whom he owes obedience and subjection.").

264. *See* FILMER, *supra* note 225, at ch. 2.

265. *See Hunt*, 142 Mich. at 113–14 ("Infancy imports wardship. It implies control, direction, restraint, supervision."); *see also* Mill v. Brown, 31 Utah 473, 481 (1907) ("The whole and only object of such laws is to provide the child with an environment such as will save him to the state and society as a useful and law-abiding citizen, and to give him the educational requirements necessary to attain that end. To effect this purpose some restraint is essential."); *see also Sharpe*, 15 Idaho at 127 ("Under this law the state, for the time being, assumes to discharge the parental duty and to direct his custody and assume his restraint.").

266. Mack, *supra* note 129, at 116.

expected to be all things to all people.[267] The first chief probation officer of the Cook County Juvenile Court described the role of the probation officer as investigator, judge, prosecutor, quasi-defense counsel, adviser, "doctor, nurse, peace-maker, even missionary."[268] As a result, the tension between control and care was embedded in this multi-faceted, all-encompassing role, "generat[ing] uncertainty for probation officers about which strategy to employ."[269] While many probation officers deploy a "hybrid" control/care approach, researchers have found that a "preponderance of states specifically focused on enforcement-oriented tasks such as investigating cases, enforcing the law, supervision, and monitoring rather than implementing a treatment model" and that probation officers are "often more than twice as likely to exercise enforcement-oriented tasks than to exercise rehabilitation-oriented tasks."[270] The result is that the juvenile court acting through probation has primarily functioned as a system of monitoring and control rather than care.[271]

Additionally, the state's elevation of its self-perpetuation interests and protection of the status quo is reflected by the design of the juvenile court itself. During the drafting of the Illinois juvenile court statute, there were serious concerns about the manner in which juvenile institutions were run and the power the private associations behind them held.[272] For example, the keynote speaker at the conference held to garner support for the new juvenile court referred to institutions as a necessary evil that the public believed should be replaced.[273] Concerned that an anti-institutional approach might put industrial schools out of business, the industrial school lobby "fought to amend the proposed children's court bill."[274] The final proposed juvenile court bill contained a number of concessions

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267. HURLEY, *supra* note 162, at 115 ("He must be all things to all men."). Hurley also noted that "[s]uch a person is rare indeed." *Id.*

268. *See id*. at 23–25, 62–63, 108–15, 181–83.

269. Adam D. Fine et. al., *Juveniles' Beliefs About and Perceptions of Probation Predict Technical Violations and Delinquency*, 25 PSYCH., PUB. POL'Y & L. 116, 117 (2019).

270. *Id.* at 119–20 (citations omitted); *see generally* Soung, *supra* note 2, at 581–87 (discussing the research regarding the orientations and practices of juvenile probation officers).

271. *See* Fine, *supra* note 269, at 117 (citing Schwartz, *A 21st Century Developmentally Appropriate Juvenile Probation Approach*, 69 JUV. & FAM. CT. J. 41 (2018)); *see also* ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBABION: A VISION FOR GETTING IT RIGHT 5–11 (2018) (stating that, at best, this approach gives youths the chance to stay in their community, but also becomes a gateway to unnessessary confinement).

272. TANENHAUS, *supra* note 162, at 14–22; Robert Mennel, *supra* note 10, at 74–75 (referencing a New York investigation into a private contract revealing instances of exploitation and brutality in a boys' instution).

273. *See* TANENHAUS, *supra* note 162, at 15 (quoting Address, Fifteenth Biennial Report, Bd. of State Comm'rs of Pub. Charities (Springfield, Ill. 1899)).

274. *See id.* at 14–22.

to the industrial school lobby that "ensured . . . private institutions would continue to play the leading role in caring for dependent children in Illinois."[275] Thus, the prioritization of the interests of the child savers over the child was baked directly into the enacting statute of the juvenile court itself.

In modern terms, the elevation of the interests of the state and the status quo over the child is reflected by the costly preservation of the delinquency-industrial complex despite significant decreases in the number of youth under its jurisdiction.[276] For example, between 2009 and 2021, the number of youth referred annually to delinquency court in the District of Columbia was cut by two-thirds. More specifically, arrests of youth fell nearly 66 percent[277] and delinquency petitions fell nearly 69 percent.[278] And yet, the probation and commitment agencies that supervise youth in D.C.'s delinquency system saw revenue per youth increase significantly and youth to staffing ratios decrease significantly during this same time period.

For instance, in 2009, when the probation department supervised 1,621 youth per day on average, the department had a budget just over $16 million and approximately 140 full-time-equivalent employees.[279] In 2021, while supervising approximately 380 youth per day,[280] the department had a budget of $22.4 million and 140 FTEs.[281] As a result,

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275. *Id.* at 21.

276. *See generally* Daniel Hatcher, *Purpose vs. Power:* Parens Patriae *and Agency Self-Interest,* 42 N.M. L. Rev. 159 (2012).

> Agencies that exist to serve also seek to exist. The purpose of state human service agencies to serve vulnerable populations such as abused and neglected children derives from the commonlaw doctrine of *parens patriae*. . . . The doctrine provides the foundation for the very existence of agencies that serve vulnerable children and underlies the core purpose of the agencies to promote and protect children's welfare and best interests.

Id. at 159 (footnotes omitted). For a discussion of the parallel phenomenon in the child welfare side of the juvenile court, *see* ROBERTS, *supra* note 1, at 141–58 (discussing the foster-industrial complex).

277. Youth arrests fell from over four thousand annual arrests to approximately 1,400. *Compare* METRO. POLICE DEPT., ANNUAL REPORT: 2009 (2010) (reporting 4,086 youth arrests) *with* METRO. POLICE DEPT., ANNUAL REPORT: 2021 (2022) (reporting 1m406 youth arrests).

278. Delinquency petitions fell from over two thousand annually to under 650. *Compare* D.C. CTS., FAMILY COURT 2009 ANNUAL REPORT (2010) (reporting 2,076 delinquency petitions) *with* D.C. CTS., FAMILY COURT 2021 ANNUAL REPORT (2022) (reporting 644 delinquency petitions).

279. *See* D.C. CTS., FY 2011 BUDGET JUSTIFICATION 83, 87 (2010) (estimating a youth-to-probation officer ratio of thirty to one). In 2021 dollars, this would be approximately $20.3 million assuming an average inflation rate of 2.52 percent.

280. *See* D.C. CTS., FAMILY COURT 2021 ANNUAL REPORT, *supra* note 278, at 77.

281. *See* D.C. CTS., FY 2023 BUDGET JUSTIFICATION 100 (2022). Note that the numbers of FTEs for the probation department have fluctuated some in recent years, increased to 151 in 2017 before

revenue increased over $45,000 per youth in 2021 dollars (a greater than 300 percent increase) while the ratio of youth to staff decreased from 11.6 to 1 to 2.7 to 1.[282]

Similar trends have taken place at DC's commitment agency[283] even though the agency's overall budget has decreased over time. In 2009, when the agency supervised an average daily population of 811 committed youth[284] and housed over one hundred pre-trial youth in its secure and non-secure facilities,[285] the agency had a budget of $94 million and 511 full-time-equivalent employees.[286] As of January 31, 2022, when the agency supervised approximately 112 committed youth and approximately 190 detained and post-commitment youth, the agency had an approved budget of approximately $89 million and 585 full-time-equivalent employees.[287] As a result, revenue increased over $166,000 per youth (a greater than 130 percent increase) while the ratio of youth to staff decreased from 1.8 to 1 to 0.52 to 1.[288]

There is evidence that these trends of significantly increasing revenue per child is happening across the country as well—at least with respect to incarceration. According to data collected and published by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), the number of youth in residential placement fell over 32 percent, from over 54,000

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decreasing to 128 in 2018 prior to increasing again to 141 in 2020. *See* D.C. CTS., FY 2018 BUDGET JUSTIFICATION 65 (2017); D.C. CTS., FY 2020 BUDGET JUSTIFICATION 89 (2019); D.C. CTS., FY 2021 BUDGET JUSTIFICATION 92 (2020).

282. In 2009, the average revenue per youth was approximately $12,523 in 2021 dollars. In 2021, the average revenue per youth was $58,947.

283. The District's commitment agency oversees the pre-trial detention of youth, youth committed to the agency at disposition, and a limited number of youth whose commitment has ended but are still engaged in services through the agency.

284. DEP'T YOUTH REHAB. SERV., 2011 ANNUAL PERFORMANCE REPORT 28 (2012) (reporting that the average daily population of committed youth was 811 in FY 2009, 969 in FY 2010, and 1003 in FY 2011).

285. DEP'T YOUTH REHAB. SERV., FY09 PERFORMANCE ACCOUNTABILITY REPORT (on file with author) (reporting that the average daily population at the Youth Services was 97 youth).

286. GOV'T OF D.C., 3 FY 2011 PROPOSED BUDGET AND FINANCIAL PLAN, AGENCY BUDGET CHAPTERS PART II E-149 (2010). In 2021 dollars, this would be approximately $119.2 million assuming an average inflation rate of 2.52%.

287. DEP'T YOUTH REHAB. SERV., PERFORMANCE OVERSIGHT HEARING, PRE-HEARING QUESTIONS AND ANSWERS, RESPONSE TO QUESTION 1 (2022); GOV'T OF THE D.C., 2 FY 2023 PROPOSED BUDGET AND FINANCIAL PLAN, AGENCY BUDGET CHAPTERS PART I C-39 (2022). Note that the agency had nearly 550 FTEs in 2020, was approved for 574 FTEs in 2022. *Id.*

288. In 2009, the average revenue per youth was approximately $128,172 in 2021 dollars. In 2022, the average revenue per youth was approximately $294,702. NB: This youth to staff ratio does not include the staff at the community-based organizations with which the agency contracts that provides non-secure placement and other services to pre-trial and committed youth.

youth in 2013 to under 36,500 youth in 2019.[289] During approximately this same time period, the average cost per year to incarcerate a young person increased 44 percent to $214,620.[290]

While the increase in revenue and decrease in youth to staff ratios can be explained in part by the fact that there is likely not a linear relationship in terms of an agency's budget and the number of youth the agency serves,[291] that cannot fully explain the staggering increases and resulting inefficiencies.[292] Moreover, even in states where reduced incarceration and closing facilities have reduced the cost of placement, the savings are often reinvested in programs in the shallower-end of the delinquency system, rather than directly in supporting youth and families prior to any system-involvement.[293] As a result, these trends reflect a prioritization of agency self-preservation and growth over the interests of the child.[294] In the end, juvenile legal system "agencies are using their power to take resources from the vulnerable populations they exist to serve, under the rationale of increasing the agencies' capacity to serve the same vulnerable

289. *Easy Access to the Census of Juveniles in Residential Placement: 1997-2019*, NAT'L CTR. FOR JUV. JUST. (2022), https://www.ojjdp.gov/ojstatbb/ezacjrp/ [https://perma.cc/556R-ECKJ].

290. JUST. POL'Y INST., STICKER SHOCK 2020: THE COST OF YOUTH INCARCERATION 2 (2020), https://justicepolicy.org/wp-content/uploads/2022/02/Sticker_Shock_2020.pdf [https://perma.cc/F37Q-KHJR].

291. *Id.* at 6 ("There is not a 1:1 relationship between a facility budget and the confined population.").

292. *See, e.g.*, Soung, *supra* note 2, at 558 (footnote omitted) ("Despite [] significant population decreases [between 2016 and 2020], overall juvenile probation institution expenditures [in Los Angeles] increased primarily due to inflation, as staff levels remained nearly level to resist layoffs and preserve positions into the future").

293. *See* Jake Horowitz, *States Take the Lead on Juvenile Justice Reform*, PEW CHARITABLE TRS. (2017), https://www.pewtrusts.org/en/research-and-analysis/articles/2017/05/11/states-take-the-lead-on-juvenile-justice-reform [https://perma.cc/SDV7-BZE4] (discussing efforts in Georgia and Utah to reinvest cost-savings from reducing incarceration to probation departments and community-based programming); RENEE MENART & BRIAN GOLDSTEIN, AN OPPORTUNITY FOR REINVESTMENT: CALIFORNIA STATE JUVENILE JUSTICE FUNDING IN FIVE BAY AREA COUNTIES, CTR. ON JUV. & CRIM. JUST. 7–8 (2018), https://www.cjcj.org/media/import/documents/california_state_juvenile_justice_funding_in_five_bay_area_counties.pdf [https://perma.cc/ER9R-2W4H] ("California's counties often default to the probation department as the primary providers for JJCPA- and YOBG-funded services, and counties spent 79 percent of all YOBG expenditures in FY2015-16 on probation and country department salaries and benefits."); *see also* SAMANTHA HARVELL, PROMOTING A NEW DIRECTION FOR YOUTH JUSTICE: STRATEGIES TO FUND A COMMUNITY-BASED CONTINUUM OF CARE AND OPPORTUNITY, URB. INST. (2019), https://www.urban.org/sites/default/files/publication/100013/innovative_strategies_for_investing_in_youth_justice_1.pdf [https://perma.cc/7S33-HHQG] (discussing reinvestment efforts in California, D.C., Kansas, New York, North Carolina, Texas, and Virginia).

294. *See* Hatcher, *supra* note 276, at 160–61 ("[R]evenue maximization strategies have led to conflicts between the obligation to serve the interests of the children and the fiscal interests of agency self-preservation and growth.").

populations."[295] Thus, the delinquency system, acting in *parens patriae*, functions practically in a way that prioritizes its continued power, expansion, and existence over the interests of the youth it serves.

2. Coerced Assimilation and Purposeful Exclusion: Controlling Other People's Children to Perpetuate the Status Quo

The juvenile court also functions to reinforce the political and social hierarchy of the time, effectively perpetuating the principle of primogeniture—the idea that power and privilege derive from status—central to the philosophy of *parens patriae*. Historically, the doctrine of *parens patriae* was applied through the chancery courts to "protect" the in-group and preserve the social hierarchy.[296] While controlling the assets of landed orphans was profitable to the king, managing the land of the orphaned child also ensured that the child would retain his family's status.[297] *Parens patriae*, as applied through the juvenile court, similarly functions to "protect" the in-group and preserve the social hierarchy. However, rather than controlling the in-group as was the case originally, the juvenile court was designed primarily to control the out-group.

The child savers as a group tended to be middle class, politically progressive, morally conservative, and culturally ethnocentric.[298] On an intellectual level, child savers tended to reject the notion that children were born bad.[299] Instead, the founders of the juvenile court (and the juvenile reformatories preceding the court) believed that children were malleable and that the context in which children found themselves was corrupting.[300] The founders viewed the problems of crime and poverty as being intertwined and framed them "as environmental problems that required thorough investigation in order to discover and eradicate their

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295. *Id.* at 161.

296. FELD, *supra* note 124, at 24.

297. *Id.* (noting that *parens patriae* "originated in medieval English law to assure property interests and feudal succession"); *see also supra* notes 225–230 and accompanying text.

298. Rendleman, *supra* note 77, at 217; FELD, *supra* note 124, at 23. This Article does not take a position on the motives or intent of the child savers. Ideologically, their approach appears to be a reflection of a type of progressive conservatism insofar as the child savers were progressive in their beliefs about the root causes of crime and the government's ability to address them, but conservative in their design of how government should address those root causes. FELD, *supra* note 124, at 30; *see generally* Preston Elrod & Daryl Kelley, *The Ideological Context of Changing Juvenile Justice*, 22 J. SOCIO. & SOC. WELFARE 57 (1995) (explaining the tensions between conservative and liberal approaches to juvenile delinquency in the latter half of the twentieth century).

299. PLATT, THE CHILD SAVERS, *supra* note at 3, at 43.

300. PICKETT, *supra* note at 76, at 25 (recognizing that the founders of the juvenile court "believed in the paramount influence of environment upon man"); FELD, supra note 124, at 23 ("[Progressives] believed that children were more malleable than adults and would internalize their norms and expectations.").

root causes."[301] As a result, chief among the presumed root causes of delinquency was "the city" itself—or rather the structural inequality and violence "the city" came to represent.[302] For many child savers, newly industrialized cities epitomized the mix of grief, segregated slums, labor exploitation, lack of employment opportunity, and easy access to "vices" perceived to be at the root of poverty and crime.[303] Child savers also blamed parents and disorganized families for poverty and crime.[304] However, child savers did not meaningfully connect the structural inequities of city-life to the struggles of families.[305] Instead, they often ascribed the brokenness of families to a lack of character or inability to parent[306]—an attribution made easier by the primarily immigrant background of the families perceived to be disorganized.[307] Furthermore, on an emotional level, child savers perceived poor immigrants—particularly Irish immigrants—not merely as lesser-than but as a threat to the political and social order.[308] To combat that perceived threat, child savers created the juvenile court as a tool "to acculturate and Americanize the recent European immigrants to become middle-class Americans like themselves."[309] The design of the juvenile court reinforced the function of the court as a tool to control "other people's children" and reaffirm the social hierarchy in two primary ways—(1) through *how* it was designed to intervene and (2) with *whom* it was designed to intervene.

First, by creating a government institution focused on changing youth and families on the individual level rather than addressing the structural issues at the root of their concerns with respect to poverty and crime, the

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301. TANENHAUS, *supra* note 162, at 5.

302. For instance, the Herald proclaimed that "these boys were really more sinned against than sinning." *Id.* at 10; *see* FELD, *supra* note 124, at 28 ("Progressives believed that social disorganization associated with urban growth caused delinquency and required interventions to reform rather than to punish errant youth.").

303. PICKETT, *supra* note at 76, at 1–20; PLATT, THE CHILD SAVERS, *supra* note 3, at 36–43.

304. TANENHAUS, *supra* note 162, at 29–30; DiFonzo, *supra* note 93, at 898–900.

305. PICKETT, *supra* note at 76, at 4, 20; PLATT, THE CHILD SAVERS, *supra* note 3, at 97 ("Although Jane Addams wrote perceptively of the numerous ways children were being objectified by modern industrialism, she always avoided unconventional political solutions and resisted the logical consequences of her arguments which pointed to an indictment of capitalism.").

306. TANENHAUS, *supra* note 162, at 58; HURLEY, *supra* note 162, at 55–59.

307. BERNSTEIN, *supra* note 3, at 48 (citing legal scholar Barry Krisberg for his observation that *Crouse* "was heavily influenced by the antagonism toward Irish parents who were regarded as corrupt and ineffectual by more established Americans").

308. PICKETT, *supra* note at 76, at xvi, 6–7, 15–16; FELD, *supra* note 124, at 19.

309. FELD, *supra* note 124, at 23, 36 ("Progressives created juvenile courts to Americanize and acculturate poor and immigrant children who made up the vast majority of those who appeared before it."); PLATT, THE CHILD SAVERS, *supra* note 3, at 60 ("From the new education, penal reformers took the assumption that the essential purpose of education is to indoctrinate children with the values of the middle-class, adult world.").

child savers created an institution that reinforces rather than challenges the political, economic, and social status quo of the time. Rather than directly investing in improving youth's environments prior to system-involvement or changing the structural inequities creating those environments,[310] the child savers developed reactive interventions focused on changing individual youth and families.[311] Initially, their approach was centered on removing youth from their homes entirely and placing them in reformatories, purportedly for their own good.[312] Even when probation was added to the approach with the founding of the juvenile court, the court has focused on forming or changing the individual youth and their family, often through coercive means.[313] Indeed, the penological goal of rehabilitation itself provided a benevolent-sounding platform through which to force conformation with the values of the dominant social caste.

Judge Mack himself recognized the juvenile court's reactive focus on the individual or individual family unit, repeatedly characterizing the work of the court as "at the best, palliative, curative" and emphasizing the need to "prevent the children from reaching the condition in which they have to be dealt with in any court."[314] In a 1906 speech to the Proceedings of the National Conference of Charities and Correction, Judge Mack implored the attendees to work together toward a vision of

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310. PICKETT, *supra* note 76, at 3–20 (concluding that the founders of the New York House of Refuge "did not realize the degree to which they themselves were responsible for human suffering"); *id.* at 40 (noting the "move away from total efforts to abolish poverty and crime and toward an attempt to eliminate juvenile delinquency"); *see infra* notes 311–317 and accompanying text.

311. FELD, *supra* note 124, at 39.

> Although social structural features—urbanization, economic inequality, and political processes—create criminogenic conditions, Progressives focused on individual deficiencies rather than those structural factors. Although family, economic, and social influences contributed to delinquency, Progressives opted to minister to affected individuals rather than to alter the conditions that caused their behavior. Changing individuals and reforming their character was a less radical agenda than understanding crime as a consequence of social inequality and reducing it.

Id. (footnotes omitted); *see also* PLATT, THE CHILD SAVERS, *supra* note 3, at 100 ("The child savers defined delinquency as a problem of social rather than political policy, calling for 'therapeutic' remedies rather than a redistribution of power.").

312. PLATT, THE CHILD SAVERS, *supra* note 3, at 53.

313. HURLEY, *supra* note 162, at 62–63; PLATT, THE CHILD SAVERS, *supra* note 3, at 99 ("The child savers were prohibitionists in a general sense who believed that social progress depended on efficient law enforcement, strict supervision of children's leisure and recreation, and the regulation of illicit pleasures.").

314. Mack, *supra* note 129, at 122; *see also* Judge Julian Mack, Address to the National Conference of Charities and Correction, XXXIII Session: The Juvenile Court 8 (May 1906) ("All of this work in the end is only palliative . . . . [The work] means nothing unless we get down to the underlying social problems.").

positive youth development and make available the recreational, educational, and employment opportunities necessary to avoid court involvement in the first place.[315]

Professor Barry Feld summarizes how the child savers designed the juvenile court to reinforce the status quo as follows:

> Confident in their social order, they emphasized changing individuals and improving their morals and character rather than addressing the structural causes of crime like urbanization, poverty, inequality, and limited social mobility. Although Progressives recognized that social factors contributed to delinquency, they designed their programs to care for damaged individuals rather than to change the structural root causes. They blended a liberal humanitarian inclination to use state power to help the less fortunate with a conservative impulse to control and repress those who differed or posed a threat to the social order.[316]

Importantly, the juvenile court's myopic focus on controlling the individual was not the result of historical accident or lack of imagination, but of intentional choice and design. For instance, prior to the passage of the Illinois Juvenile Court Act, the governor of New York vetoed a bill passed by the legislature that would have provided direct cash assistance to widowed mothers equivalent to the cost of placing their children in reformatories.[317] The first statewide "mother's aid" program in the United States—and the predecessor to the federal Temporary Assistance for Needy Families program—would not pass until 1911.[318] Perhaps ironically, the Illinois state legislature adopted the first mother's pension program in recognition of the juvenile court's failure to adequately serve the significant number of poor, fatherless youth entering the juvenile court and being removed from their homes.[319] However, given that the legislature tasked the juvenile court itself with administering the aid, the intervention marked both a reinforcement and an expansion of the court's

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315. Mack, *supra* note 314, at 8.

316. FELD, *supra* note 124, at 30.

317. Private charity organizations allegedly convinced the governor to veto the bill. Mark H. Leff, *Consensus for Reform: The Mothers'-Pension Movement in the Progressive Era*, 47 SOC. SERV. REV. 397, 399 (1973).

318. By 1913, eighteen states had adopted similar mothers' pensions approaches; and, by 1919, thirty-nine states had passed similar laws. Abe Bortz, *Mother's Aid*, VCU LIBR., https://socialwelfare.library.vcu.edu/programs/mothers-aid/ [https://perma.cc/6SXM-YYD8] (last visited May 1, 2022); Theda Skocpol et al., *Women's Associations and the Enactment of Mothers' Pensions in the United States*, 87 AM. POL. SCI. REV. 686–701, 686 (1993).

319. TANENHAUS, *supra* note 162, at 56–59; *see also* Leff, *supra* note 317, at 400–01 (noting that Judge Pinckney of the Chicago Juvenile Court supported the mothers' aid program as a better alternative to separating youth from their families); Frank T. Flynn, *Judge Merritt W. Pinckney and the Early Days of the Juvenile Court in Chicago*, 28 SOC. SERV. REV., 20, 26–27 ("Mother's pension legislation was the outgrowth of a great deal of real concern about the problem of children removed from their own homes because of poverty.").

reactive and coercive approach.[320]

Second, the broad discretion granted to the juvenile legal system enabled the delinquency court to intervene selectively with particular youth the state determined to be a threat and in need of assimilation.[321] Given the broad definition of delinquency and the nature of adolescence, virtually all adolescents could be swept up into the net of the delinquency court. However, the juvenile court did not intervene equally or equitably. Initially, the juvenile court focused on controlling white European immigrant youth and families—individuals whom the child savers deemed in need of *and* "worthy" of assimilation.[322] Judge Mack noticed this disparity matter-of-factly in his article defending the court, noting that "[m]ost of the children who come before the court are, naturally, the children of the poor" with parents who "are foreigners, frequently unable to speak English, and without an understanding of American methods and views."[323]

In contrast, privileged white youth, by virtue of their power and resources, were excluded by-and-large from the delinquency court.[324] Given the court's primary focus on whether the youth needed "help" rather than on whether the youth committed a particular act, the delinquency court could decline to intervene or choose to intervene minimally when the youth came from relative wealth or had parents the

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320. The vast majority of the states who passed mothers' pension laws assigned the administration of the program to the juvenile court. Charles Kettleborough, *Administration of Mothers' Pension Laws*, 9 AM. POL. SCI. REV. 555, 555–58 (1915). Acceptance of a pension administered through the juvenile court typically meant that the mother "had to structure her life according to the standards set by the juvenile court" and accept regular, if not frequent, home visits and advice from court officials, including probation officers and court dieticians. TANENHAUS, *supra* note 162, at 73–76. In 1921, Julia Lathrop, then chief of the United States Children's Bureau and former resident of the Hull House, opined that expert opinion had coalesced around the fact that an agency separate from the juvenile court should administer the program so as to minimize stigmatization of the poor. *Id.* at 80. Over the course of the next two decades, states and localities moved the administration of mothers' pensions program out of the juvenile court to child welfare agencies. *Id.* at 80–81.

321. Barry Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative Backlash*, 87 MINN. L. REV. 1447, 1460–61 (2003) ("Despite their benevolent rhetoric, Progressive reformers intended the court to discriminate. They deliberately designed it to control the poor and immigrant children and to distinguish between 'our children' and 'other people's children.'").

322. *See* FELD, *supra* note 124, at 29–39 ("White philanthropy was the primary source of crime prevention funding and immigrant children and native-born whites were the primary receipients, even though African American children's needs were greater."); SOPHONISBA BRECKENRIDGE & EDITH ABBOTT, THE DELINQUENT CHILD AND THE HOME 56–60 (1912) (reporting that over 70 percent of the children brought before Chicago's delinquency court between 1899 and 1909 had foreign-born parents).

323. Mack, *supra* note 129, at 116–17.

324. *See* PLATT, THE CHILD SAVERS, *supra* note 3, at 135 ("In effect, only lower-class families were evaluated as to their competence, whereas the propriety of middle-class families was exempt from investigation and recrimination.").

court deemed capable of imparting the values of the dominant social caste.[325]

Black youth were also initially excluded from the delinquency system. Given the belief that Black youth were not worthy of assimilation and not capable of becoming full citizens, rather than declining state intervention as with privileged white youth, the state often charged Black youth in criminal court and placed them in adult jails and prisons or declined to provide Black youth with supportive services.[326] Thus, the discretion baked into the design of the juvenile court empowered the court to use state power to preserve the existing social hierarchy by coercively assimilating poor immigrant youth, protecting privileged white youth from state intervention, and excluding Black youth from the diversionary protections and "citizen-building" supports provided to white children.[327]

The coercive assimilation and exclusion of non-dominant caste youth still pervades the modern-day delinquency system. When European immigrants assimilated and were no longer seen as the out-group, Black youth became the target of control. Black youth are now disproportionately represented at all stages of the delinquency system and are disproportionately stripped of the protections of the delinquency court through the adult transfer process.[328] For instance, in 2018, Black youth were arrested at a rate 2.6 times higher than that of white youth,[329] and nearly two-thirds of Black youth's cases were then formally petitioned, compared to just over one-half for white youth.[330] In 2019, Black youth were also 6.3 times more likely than white youth to be detained,[331] 4.4

325. FELD, *supra* note 124, at 37 ("The individualized justice of juvenile courts legitimated differing responses based on who youths and their family were, rather than what they did.").

326. *See generally* WARD, *supra* note 3, at 47–124 (2012); *see also* FELD, *supra* note 124, at 27; TANENHAUS, *supra* note 162, at 36–39; Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1352, 1384 (2013).

327. WARD, *supra* note 3, at 47 ("Ultimately, this new institution of racialized social control, the white-dominated parental state, was organized to underdevelop black citizens deemed delinquent and black civil society generally, and, thus, to maintain the boundaries of a white democracy.").

328. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, JUVENILE COURT STATISTICS 2018, NAT'L CTR. FOR JUV. JUST. 58–59 (2020), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juvenile-court-statistics-2018.pdf [https://perma.cc/M8M2-BLF7].

329. OFF. OF JUV. JUST. & DELINQ. PREVENTION, STATISTICAL BRIEFING BOOK: JUVENILE ARREST RATES BY RACE, 1980–2020, https://www.ojjdp.gov/ojstatbb/special_topics/qa11502.asp?qaDate=2020 [https://perma.cc/QUN3-NU5F] (last visited Aug. 17, 2022).

330. HOCKENBERRY & PUZZANCHERA, *supra* note 328, at 58.

331. OFF. OF JUV. JUST. & DELINQ. PREVENTION, STATISTICAL BRIEFING BOOK: JUVENILE DETENTION RATES BY RACE/ETHNICITY, 1997–2019, https://www.ojjdp.gov/ojstatbb/special_topics/qa11802.asp?qaDate=2019 [https://perma.cc/2NCE-A4ZD] (last visited Aug. 17, 2022).

times more likely to be placed in a residential placement,[332] 3.6 times more likely to be committed,[333] and 1.5 times as likely to be waived to adult court.[334] Indeed, throughout the history of the reformatory and juvenile court movement, Black youth have experienced the worst of both worlds. As children, they have been "adultified" and stripped of the protections of childhood.[335] However, when Black youth become adults, they have been infantilized in order to justify denying them full citizenship.[336] The doctrine of *parens patriae* has never served to protect Black adolescence, but rather to reinforce the racial hierarchy with which the child savers were most comfortable.

Ultimately, the juvenile court is simply about controlling youth to perpetuate the status quo. The goal was to colonize those deemed potential citizens and exclude those deemed not worthy or eligible for democracy. Thus, rather than provide direct support to the family or work to address the root causes that resulted in juvenile court involvement, the child savers designed the juvenile court as a reactive and coercive de facto social safety net that effectively criminalized childhood poverty and otherness while reinforcing social hierarchy and structural inequalities.

3. The Rejection of Due Process: Control without Constraint

Parens patriae, as applied through the juvenile court, also functioned to give the state virtually unchecked power over children.[337] The principle of divine right—which was used to justify the unquestioned power of the king—was effectively institutionalized in the juvenile court by casting the court as a benevolent and infallible father. This characterization was then used to strip youth of their procedural due process protections and reinforce the control orientation of the juvenile legal system.

Just as the patriarchists argued that the king's will should go

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332. *Id.*

333. *Id.*

334. OFF. OF JUV. JUST. & DELINQ. PREVENTION, STATISTICAL BRIEFING BOOK: CASE PROCESSING CHARACTERISTICS OF DELINQUENCY OFFENSES BY RACE, 2019, https://www.ojjdp.gov/ojstatbb/special_topics/qa11601.asp?qaDate=2019 [https://perma.cc/W7GG-5TC3] (last visited Aug. 17, 2022) (detailing data that indicates disparities among minority youth at the court referral, detention, placement, and waiver to criminal court stages).

335. *See generally* HENNING, *supra* note 11.

336. BREWER, *supra* note 8, at 113, 224–25.

337. *See* Handler, *supra* note 3, at 19 ("According to the critics, then, the present administration of juvenile justice represents, for all practical purposes, unfettered official discretion."); Curtis, *supra* note 25, at 895–96 ("Because it is uninhibited by a strict conceptual or precedential definition, this theory imparts an extensive discretionary power to the court, agency, or government which is able to justify its usage.").

unquestioned given his divine anointment by God,[338] the child savers cast the juvenile court in the same light.[339] Time and time again, the founders of the juvenile court described the role of the judge as a "wise father" who treats the children before him with the same kindness and approach that he would his own children.[340] However, like the patriarchists before them, the child savers went further, framing the juvenile court judge as wise *and* infallible. As Hurley explained when describing Judge Tuthill, the first judge of the Cook County Juvenile Court:

> Judge Tuthill seldom fails correctly to read the character of the miniature men and women that come before him; he knows from ripe experience how to distinguish crocodile tears from genuine sorrow for the wrong actions, and his decision in a case is never questioned, for every person who has heard the evidence in the case feels instinctively that the judge has done exactly right in his decision.[341]

Moreover, the child savers viewed the juvenile court's sanctions against the child not as something that was being done to the child, but as something that was being done *for* the child.[342] In actuality, the founders of the juvenile court sought to shift the whole question of the delinquency court from whether the child committed an offense in the first place to how to best save the child.[343] Thus, given the benevolence and infallibility of the state acting through the juvenile court, the founders believed that children did not need any protection from the state.[344]

However, as the Supreme Court noted, the design of the juvenile court resulted in the "worst of both worlds" for youth with their receiving "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[345] A pre-*Gault* review of the procedures used in delinquency court revealed how informal the juvenile legal system had become and how little process youth

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338. *See, e.g.*, *supra* note 237.

339. Fox, *supra* note 3, at 1235 ("The purpose of the proceedings is not to determine guilt or innocence, but to promote the welfare of the child and the best interests of the state.").

340. *See* Mack, *supra* note 129, at 107 ("Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?").

341. *See* HURLEY, *supra* note 162, at 88. Hurley also held the juvenile court's probation officers in similar high regard. *Id.* at 115 (describing probation officers as "certainly doing not only God's work, but the state's work and society's work").

342. *See, e.g.*, Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905) ("[T]he act is not for the trial of child charged with a crime, but it is mercifully to save it from such an ordeal . . . . Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it.").

343. Mack, *supra* note 129, at 119–20.

344. *See* FELD, *supra* note 124, at 23 ("Progressives viewed individual and societal welfare as co-extensive and saw no need to protect individuals from state benevolence.").

345. Kent v. United States, 383 U.S. 541, 556 (1996).

received.[346] In some jurisdictions, youth were outright denied key procedural protections—such as notice, the appointment of counsel, and the ability to confront witnesses. In other jurisdictions, youth nominally had such rights but were discouraged from exercising them by juvenile system stakeholders.[347] Even the little process that did take place was often cursory and merely involved the judge "rubberstamping" the findings and recommendations of the probation officer or police.[348] This was particularly troubling given that Judge Mack, who recognized the "autocratic" design of the juvenile court,[349] believed that the way to keep the court's broad power in check was to exercise care in choosing judges specially educated and trained for the task.[350]

While the Supreme Court in *Gault* and its progeny did constrain the power of the juvenile court to a degree by recognizing that a child is entitled to a suite of due process protection in delinquency court, key procedural protections still have not been realized. For instance, fifty years after *Gault*, the National Juvenile Defender Center (NJDC) found that access to counsel was still elusive for many youth in the juvenile legal system.[351] In particular, NJDC found that youth often appeared without counsel because they did not qualify for free counsel, were appointed counsel late, were allowed to waive counsel without first

346. *See* Handler, *supra* note 3, at 16–19 (1965) (footnote omitted) ("Summarizing the charge, we find very broad statutes, an extremely informal procedure where there is no defense counsel to challenge the findings of the social investigation or to insist on other procedural safeguards, and the possibility of very serious consequences. Whatever protection the adolescent might receive from the hazards of the arbitrary, the vicious, the incompetent or even the tired, rests solely with the judge. He alone must take it upon himself to challenge the facts and to insist on competent and relevant evidence.").

347. *See id.* at 16 (stating that procedural protections were even less existent in the shadow delinquency system, then referred to as "station adjustment or unofficial delinquency); *id.* at 18 (citing Goldman, The Differential Selection of Juvenile Offenders for Court Appearance, 1950 (unpublished thesis)).

348. *Id.* at 16–17 (describing that critics of the juvenile court also believed that judges chosen for the juvenile court were often under-qualified and under-trained for the position).

349. Mack, *supra* note 129, at 119 ("The public at large, sympathetic to the work, and even the probation officers who are not lawyers, regard [the juvenile court judge] as one having almost autocratic power."); *see also* Roscoe Pound, *Foreword to* Pauline V. Young, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY (1937), at xxvii ("The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . .").

350. *See, e.g.*, Mack, *supra* note 129, at 118–19 (containing a number of qualifications that Mack believed essential for someone serving as a juvenile court judge, including: 1) "trained lawyer;" 2) "thoroughly imbued with the doctrine that our is a 'government of laws and not of men;'" 3) a student of philanthropy and child development; 4) "a lover of children;" 5) empathetic; 6) patient; 7) thoughtful; and 8) collaborative).

351. *See generally* NAT'L JUV. DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL (2017), http://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf [https://perma.cc/2PSN-XWL8]. NB: The National Juvenile Defender Center is now The Gault Center.

consulting with counsel, were made to pay for "free" counsel, or lost access to counsel prior to the conclusion of delinquency court jurisdiction.[352]

Additionally, while *Gault* and its progeny had returned particular due process protections to youth, the Supreme Court in *McKeiver* reaffirmed the notion that youth did not enjoy the same constitutional protections as adults and that the state still had discretion in determining the procedural formality and protections granted to youth in delinquency court.[353] Moreover, the explicit reaffirmation of *parens patriae* in *Schall* reasserted that courts still maintain wide discretion to control youth for their supposed own good or protection.[354] Today, this broad power manifests itself in, among other things, the use of secure placement for technical violations or status offense-like behavior;[355] and the imposition of pre-adjudication conditions with no nexus to the alleged offense, risk to the community, or risk of non-appearance under the auspices of rehabilitation. This broad power to control is still too often wielded by delinquency court judges who do not have the specialized background, training, or support that even delinquency court judges themselves believe is necessary to perform the position well.[356] Thus, the court's paternalistic philosophy coupled with the lack of constraint provided by due process protections created a court with unprecedented discretion that still prioritizes control over care.

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352. *See id.*

350. McKeiver v. Pennsylvania, 403 U.S. 528, 542–44 (1971).

351. *See* Schall v. Martin, 467 U.S. 253, 265–68 (1984) (citations omitted) ("In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's 'parens patriae interest in preserving and promoting the welfare of the child.' Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child.").

355. *See* Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html [https://perma.cc/XA2F-MJT7] (finding that nearly one in five youth in juvenile facilities nationally were placed for technical violations or status offenses, which are behaviors that unlawful only because they are committed by youth); Mae C. Quinn, Tierra Copeland, Tatyana Hopkins & Mary Brody, *A More Grown-Up Response to Ordinary Adolescent Behaviors: Repealing PINS Laws to Protect and Empower D.C. Youth,* 25 UDC. L. REV. 66, 66–67 (2022) (providing examples of status offenses to include truancy, running away from home, and not listening to your parents).

356. *See generally*, JOHN WEBER, COURTING JUDICIAL EXCELLENCE IN JUVENILE JUSTICE: A 50-STATE STUDY, CSG JUSTICE CENTER (2022), https://csgjusticecenter.org/wp-content/uploads/2022/04/Courting-Judicial-Excellence-in-Juvenile-Justice-A-50-State-Study-2.pdf [https://perma.cc/G9MU-HSV8].

B. The State as Parent: Failing to Care

Much of the high-level rhetoric regarding the juvenile court emphasized the manner in which the state—acting as *parens patriae* through the juvenile court—would protect and care for the youth under its jurisdiction. However, in theory and in practice, to the extent the parent-state even recognizes that it has a responsibility to its child, the parent-state has repeatedly failed to care for the children under the jurisdiction of the juvenile legal system.

1. The Absentee Parent-State: No Care without Control

Under the doctrine of *parens patriae*, the state claims the right to control the child, but not the responsibility to care for the child. More specifically, the state rejects any duty to care for the child until the state has decided it is in the state's interests to control the child. Historically, this reality was reflected by the manner in which *parens patriae* was applied in the English chancery courts to affirm that the state did not have the responsibility to care for youth that did not have resources but had the right to intervene and control the estates of children who did have resources.[357] Today, this reality still exists in the juxtaposition of the Supreme Court's decisions in *Schall* and *Deshaney*, which similarly make clear that the state's *parens patriae* power is a prerogative to be exercised by the state with no concomitant responsibilities to care.[358]

Five years after finding in *Schall* that the state does not violate the rights of a child when it securely detains a child prior to trial for his own protection, the Supreme Court in *Deshaney* faced the question whether the state violated the rights of a child by failing to protect a child from a significant risk of serious violence of which the state was aware.[359] Joshua Deshaney was two years old when the state first heard that Joshua's father might be physically abusing him.[360] Over the next two-and-a-quarter years, Joshua was admitted to the hospital multiple times with injuries indicative of abuse, prompting an investigation by the Department of Social Services (DSS).[361] Despite these repeated injuries and the father's failure to comply with the services and conditions recommended by DSS, Joshua remained in his father's home. When Joshua was four years old, his father beat him so severely that he fell into a life-threatening coma and suffered serious, permanent brain damage.[362]

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357. *E.g.*, Wellesley v. Beaufort, 38 Eng. Rep. 236, 243 (Ch. 1827).
358. Simon, *supra* note 24, at 1397–401.
359. Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191–94 (1989).
357. *Id.* at 192.
358. *Id.*
359. *Id.* at 193.

Joshua and his mother sued the state, alleging that the state had violated his due process rights under the Fourteenth Amendment by failing to protect Joshua from his father.[363]

Chief Justice Rehnquist, the author of the *Schall* decision, now writing for the majority in *Deshaney*, interpreted the Due Process Clause to be a constraint on the state's power to act, not a guarantee of any minimum level of safety and security.[364] The Court further found that the Due Process Clause generally confers no affirmative right to governmental aid, unless the state by the affirmative exercise of its power restrains an individual's liberty in a manner that renders them unable to care for themselves.[365] As a result, while the state may have been aware of the serious danger Joshua faced, the Court held that the state bore no constitutional responsibility to protect the child from the danger it supposedly played no role in creating.[366] In sum, the state's failure to protect a child against private violence does not violate due process even though the government was aware of or contributed to such risk. Chief Justice Rehnquist did not mention *parens patriae* once in his opinion.[367]

The legal reasoning in *Deshaney* stands in stark contrast to the reasoning in *Schall*, which relied heavily on the extra-constitutional doctrine of *parens patriae* to elevate the state's interest in the welfare of the child over the child's constitutionally protected liberty interest. In *Schall*, Judge Rehnquist grounded his analysis in the fact that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves" and found, as a result, that "if parental control falters, the State must play its part as parens patriae."[368] To Justice Rehnquist and the majority, the state playing "its part as parens patriae" meant protecting the child and the community from the harms associated with further criminal behavior.[369]

Read together, *Schall* and *Deshaney* reveal the true essence of *parens patriae* as a philosophy of state control that masquerades as a philosophy of care for the state's children. When justifying unwanted state control over the life of a child, the state points to its duty as the parent of the country and its related interests in crime prevention and citizen-building. However, when it comes time for the state to protect the child, its duty as *parens patriae* is not just ignored, it is rejected. This differential response

363. *Id.* at 191–94.
364. *Id.* at 194–97.
362. *Id.* at 198–99.
363. *Id.* at 202.
367. *See generally id.*
368. Schall v. Martin, 467 U.S. 253, 265 (1984).
369. *Id.* at 265–66.

is attributable to whom the state perceives to be the target of a threat. In *Schall*, the state is protecting itself from the child, whereas in *Deshaney,* only the child is perceived to be at risk.[370] This is the crux of the nature of *parens patriae*—application of the doctrine will always prioritize control over care because *parens patriae* is and has always been about protecting the interests of the state above the interests of the child.[371] Thus, *parens patriae* ultimately represents the prerogative of the state to selectively control children, not a duty of the state to actually care for its children.

2. The Neglectful and Abusive Parent-State: The Lack of Care after Control

Even when the state concedes that it has a duty to care for youth under its control through the juvenile legal system,[372] the state too often neglects and outright abuses the youth under the control of the juvenile legal system.

Since its inception, the juvenile court experiment has struggled—by design and by choice—to devote the time, attention, and resources necessary to care adequately for youth under its jurisdiction. For instance, despite the fact that probation was the "keynote of the juvenile-court legislation,"[373] the first juvenile court legislation passed in the United States explicitly prohibited the public funding of probation officers—the arm of the court that was supposed to provide community-based "care" to the child.[374] While local charities provided some funding to support the hiring of probation officers, probation officers struggled with high caseloads and little time to provide the type of support envisioned by the child savers.[375] A similar lack of investment, coupled with the rapid growth of the juvenile court, impacted the juvenile court bench by reducing judges to the role of bureaucrat rather than the "wise

370. Simon, *supra* note 24, at 1400–01.

371. Indeed, the juxtaposition of *Schall* and *Deshaney* mirrors the same approach developed by the Courts of Wards and Liveries and later the chancery court to intervene in the lives of landed children when profitable to the crown and necessary to maintain the feudal system.

372. *See* Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 194 (1989) (finding that an affirmative constitutional duty to protect exists when the state knows a particular child is in danger *and* actually tries to protect him from that danger); Reno v. Flores, 507 U.S. 292, 304–05 (1993) (conceding that the state must meet minimum standards of care when incarcerating unaccompanied minors in immigration detention facilities).

373. Mack, *supra* note 129, at 116.

374. Ill. Juv. Ct. Act of 1899 § 6; *see also* TANENHAUS, *supra* note 162, at 30–40 (describing the history of funding of probation officers and detention centers).

375. *Id.*

father" originally anticipated.[376] Perhaps most importantly, however, has been the lack of resources historically devoted to the system-involved youth themselves or to the community-based programs that would actually provide care and support to system-involved youth.[377]

The state's neglect also facilitated the state's abuses, which have been well-documented and publicized. Early examples of such abuse include justices of the peace trolling poor neighborhoods for youth to submit to the court's jurisdiction,[378] the over-incarceration of youth,[379] and the corporal punishment commonly found in juvenile "reformatories."[380] Modern day manifestations include the over-policing of youth, particularly youth of color,[381] the Kids for Cash scandal in Pennsylvania,[382] and the continued physical, sexual, and psychological abuses that take place in juvenile facilities to this very day.[383]

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376. *See* Handler, *supra* note 3, at 16 (stating that the judge solely is responsible for the protection the child will receive); *see also* Kent v. United States, 383 U.S. 541, 546 n. 5 (1966) ("Congressional hearings and reports attest the impossibility of the burden which [the Juvenile Court judge] was supposed to carry.").

377. *See* LENROOT & LUNDBERG, *supra* note 180, at 159–60 (1925) ("In general the resources at the disposal of the court seemed to have been developed in a haphazard manner and did not fit together to form a complete community program for the care of delinquent and dependent children.").

378. PLATT, THE CHILD SAVERS, *supra* note 3, at 139–41 (detailing the policing of lower-class, migrant, and immigrant children in Chicago).

379. *Id.* at 140, 148–52; Handler, *supra* note 3, at 12–13; TANENHAUS, *supra* note 162, at 33–34 (discussing the early overcrowding of the first detention home in Chicago).

380. BERNSTEIN, *supra* note 3, 43–45; Handler, *supra* note 175, at 12–13.

381. *See* HENNING, *supra* note 11 (discussing the criminalization of Black adolescents in America).

382. *See generally* WILLIAM ECENBARGER, KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A $2.8 MILLION KICKBACK SCHEME (2012).

383. *See e.g.*, Jacqueline DeRobertis, *How Decades of Broken Promises Led to Louisiana's Deepening Youth Prison Crisis*, ADVOCATE (Aug. 4, 2022, 8:00 AM), https://www.theadvocate.com/baton_rouge/news/crime_police/article_fe47e568-f6f4-11ec-95a2-e7a4538d7064.html [https://perma.cc/2P3V-PV2C] (explaining the harsh conditions in Louisiana juvenile prisons); Jolie McCullough, *Almost 600 Texas Youths Are Trapped in a Juvenile Prison System on the Brink of Collapse*, TEXAS TRIBUNE (Aug. 2, 2022, 5 AM), https://www.texastribune.org/2022/08/02/texas-juvenile-prisons-crisis/ [https://perma.cc/8Y8M-4BSV] (describing isolating and disturbing conditions in Texas's juvenile prison system); 19 News Investigative Team, *Advocates Say Juvenile Justice Center Is One of the Most Dangerous Places in Cleveland*, CBS19 NEWS (Jun. 7, 2022, 7:28 PM), https://www.cleveland19.com/2022/06/07/advocates-say-juvenile-justice-center-is-one-most-dangerous-places-cleveland/ [https://perma.cc/TP29-XLQ6] (noting the inhumane treatment of juvenile's at Cuyahoga County Juvenile Justice Center and its severe understaffing); Curtis Gilbert, *Under Scrutiny, Company That Claimed to Help Troubled Youth Closes Many Operations and Sells Others*, APMREPORTS (Apr. 26, 2022), https://www.apmreports.org/story/2022/04/26/sequel-closes-sells-youth-treatment-centers [https://perma.cc/8QEW-8TWF] (detailing behavioral health

Critically, the neglectful and abusive nature of the juvenile legal system did not develop because its nature was hidden from the public eye. Rather, the whole history of "child-saving" jurisprudence emanating from the doctrine of *parens patriae* enabled and reinforced the parent-state's ability to neglect and abuse its children.

First, a key feature of *parens patriae* jurisprudence dating back to *Ex parte Crouse* has been the elevation of form over substance. Rather than meaningfully examine the care the state was providing to youth, courts routinely deferred to the state's intent behind its care and often ignored evidence that contradicted the spirit of the state's claims. Thus, the manner in which courts have applied *parens patriae* in cases like *Ex parte Crouse* and *Schall* demonstrates a reluctance on the part of the courts to pierce the veil of the state's rhetoric and analyze the reality of the juvenile legal system more critically, thereby allowing the state to hide its abuse and neglect behind its own aspirational portrayal of its actions. Even *Gault*, which explicitly raised the question of "whether fact and pretention, with respect to the separate handling of children, coincide," did not go so far as to take a definitive stance as to whether the juvenile court lived up to its own purported purpose and design.[384]

Second, even when courts do dig deeper, the standard of care to which they hold the state when acting as *parens patriae* is low. For example, in *Reno v. Flores*, the Supreme Court considered a lawsuit brought by unaccompanied minors against the Immigration and Naturalization Service (INS) challenging the INS's restrictive policy limiting the release of unaccompanied minors to a parent or guardian except in "unusual and extraordinary cases."[385] The unaccompanied minors also challenged the conditions under which they were detained.[386] While the issues with respect to detention conditions were settled pursuant to a consent decree, the Court considered whether the unaccompanied minors had a right to be released to the care of an available private custodian rather than remain

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treatment centers that are sold or closed after abuse allegations); Timothy Bella, *A Black Teen Died in Custody While Being Restrained Facedown. Now the Prone Position Is Again under Fire*, WASH. POST (Dec. 29, 2021, 5:16 PM), https://www.washingtonpost.com/nation/2021/12/29/kansas-cedric-lofton-prone-restraint/ [https://perma.cc/4PP2-KLPN] (explaining that a teen was killed by police while in custody); Jim Saunders, *Florida to Face Class Action on Juvenile Solitary Confinement*, ORLANDO SENTINEL (Oct. 27, 2021, 1:05 PM), https://www.orlandosentinel.com/news/crime/os-ne-florida-class-action-solitary-confinement-20211027-kjxiwp2qmbfopci3fm5nwzoxgi-story.html [https://perma.cc/5PLB-XK7G] (detailing a class action lawsuit in Florida on behalf of thousands of minors regarding the use of solitary confinement).

384. Application of Gault, 387 U.S. 1, 22 n. 30 (1967).

385. Reno v. Flores, 507 U.S. 292, 294–99 (1993).

386. *Id.*

detained in a government institution.[387] In analyzing the issue, the Court followed the trend of elevating form over substance ever present in its *parens patriae* jurisprudence—characterizing the immigration detention centers as a "decent and humane custodial institution[s]" and emphasizing that the government's intent was not to punish the child.[388] The Court then considered the nature of the care due when the state is acting in *parens patriae*. In doing so, the Court again elevated form over substance, finding that because parents are not required by the force of law to act in the best interests of the child, the parent-state is not legally bound to pursue the best interests of children either.[389] As a result, the Court concluded that:

> [C]hild-care institutions operated by the State in the exercise of its parens patriae authority, see *Schall*, *supra*, at 265, are not constitutionally required to be funded at such a level as to provide the *best* schooling or the *best* health care available; nor does the Constitution require them to substitute, wherever possible, private nonadoptive custody for institutional care.[390]

Instead, the state must merely provide adequate care that meets "minimum standards."[391] Moreover, the state can freely prioritize other state interests over the children under its control so long as these minimum standards are met and fundamental rights are not infringed.[392] Thus, while acting in *parens patriae*, the state is not required to provide good care, only care that is "good enough."[393]

Third, when youth have tried to hold the state accountable for its neglect and abuse, the parent-state pushes back against being held accountable. Among the most "notorious" examples is the District of Columbia.[394] In 1985, youth in D.C.'s delinquency system sued the District, alleging that the manner in which they were treated in its correctional facilities violated their rights under the Constitution and D.C. law.[395] At the time of the filing, youth detained and incarcerated in the

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387. *Id.* at 296.
388. *Id.* at 303.
389. *Id.* at 304.
390. *Id.*
391. *Id.*
392. *Id.* at 304–05.
393. *Id.*; *see also* Paul Holland & Wallace Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for Historical Promise*, 68 TEMP. L. REV. 1791, 1808–11 (1995) (discussing the demise of the right to treatment).
394. *See generally* LIZ RYAN & MARC SCHINDLER, NOTORIOUS TO NOTABLE: THE CRUCIAL ROLE OF THE PHILANTHROPIC COMMUNITY IN TRANSFORMING THE JUVENILE JUSTICE SYSTEM IN WASHINGTON, D.C. 6–13 (2011).
395. *See* Will Singer, *Judicial Intervention and Juvenile Corrections Reform: A Case Study of*

District were placed in unsafe drug-, vermin-, and cockroach-infested facilities with violent staff and insufficient educational, medical, and treatment services.[396] Despite agreeing to an extensive consent decree in 1986, the District refused to comply with its terms.[397] For years, the Court attempted to force compliance through millions of dollars of fines, findings of civil contempt, and the appointment of special masters and court monitors, among other things.[398] It would not be until the passage of a series of bills in 2004 calling for the creation of a cabinet-level agency and the closure of the Oak Hill facility that the District would begin to implement meaningful reforms.[399] Even then, it would not be until December 2020 that the District would make enough progress to exit the consent decree.[400] Thus, even when children fight for meaningful care or fight to shed light on abuse, the state fights back in order to maintain its power and prerogative to be inadequate and abusive.

The neglectful and abusive nature of the delinquency system demonstrates that the state does not exercise its *parens patriae* power over youth accused of delinquent acts—despite all of the juvenile court's rhetoric—in the best interest of the child as a wise and loving parent would. Rather, on a systemic level, the parent-state does not care to care about the child; ultimately, the state only cares about its own interests and maintaining the status quo. Given this orientation, the juvenile legal system is designed to prioritize control over care. Until the Court's grounding in *parens patriae* is razed, the court will be driven to bring children into the net of the juvenile legal system without providing meaningful resources for them before or once they are ensnared.

CONCLUSION

The philosophy of *parens patriae* itself prioritizes the state's right to control its citizens over its responsibility to care for them. This is especially true with regard to those citizens whom the state deems to be a threat. This is the way *parens patriae* was designed; the way it has been applied for seven hundred years; and the way it has manifested

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Jerry M. v. District of Columbia, 102 J. CRIM. L. & CRIMINOLOGY 901, 904–13 (2012) (discussing the District's historical "insincere and ineffectual" attempts to comply with the negotiated consent decree).

396. RYAN & SCHINDLER, *supra* note 394, at 6–13; Singer, *supra* note 395, at 904–13.

397. Singer, *supra* note 395, at 904–13.

398. *Id.* at 909–11.

399. *Id.* at 911–12.

400. The consent decree was finally vacated by the court in December 2020. Dep't of Youth Rehab. Serv., *Consent Decree*, https://dyrs.dc.gov/page/consent-decree [https://perma.cc/S68Q-4L4X] (last visited Mar. 16, 2023) (recognizing that "on December 20, 2020, DYRS vacated all Work Plan goals and was free from court oversight and monitoring.").

operationally through the juvenile legal system. At its core, *parens patriae* is a philosophy devised to justify the state's unconstrained power to defend itself from those who it has determined pose a threat to the political, social, and economic status quo. As the foundation of the delinquency system, this *parens patriae* power was deployed to coercively assimilate those youth deemed worthy of democratic participation while excluding those considered unworthy or ineligible. And while cracks in this foundation of the juvenile court have formed, the juvenile court's underpinnings and architecture remain grounded in a philosophy that cannot be rehabilitated or renovated. As a result, *parens patriae* must be abandoned as the foundation of our approach to responding to the non-prosocial behavior of youth and its influence excised from the overall design of juvenile court.[401]

In order to accomplish these goals, the delinquency court as originally designed must be razed and rebuilt.[402] Practically, abolishing the delinquency court as we know it requires not just razing its philosophical foundation, but also constructing new first principles unconstrained by the philosophical foundation of *parens patriae* to govern our societal approach to the misbehavior of youth. For example, razing and rebuilding delinquency courts requires the creation of a new legal definition of delinquency—one that is developmentally responsive and reaffirms the limited role the delinquency court should play in the larger positive youth development ecosystem. Moreover, razing and rebuilding delinquency courts requires replacing the penological goal of rehabilitation with resilience—a shift that would prioritize the self-actualization of the child over those of the state. Finally, razing and rebuilding delinquency courts demands a new framework that prioritizes preventive justice, procedural justice, and reparative justice to guide our approach. It is by abandoning *parens patriae* and adopting a new foundation and first principles that we can make the juvenile legal system the smallest, best, and most just system it can be.

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401. Given the influence that *parens patriae* had on the overall design of the juvenile court as its foundation, merely declaring new or additional philosophies, purposes, or goals to guide the juvenile legal system, without more, has proven insufficient. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 222 (highlighting how each state defines the purpose of their juvenile justice system).

402. In doing so, we need to move beyond reform that serves merely as yet another diversionary shift with harm mitigation at its core, and instead design a new overall approach to non-prosocial youth behavior that equally incorporates, if not prioritizes, harm prevention and reparation. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (conceptualizing abolition as "a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation is recognized as morally unsustainable" that involves, among other things, "meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare [and] decriminalizing serious infractions").