1972


Clara Ann Bowler

Staff Attorney with the Juvenile Div. of the Legal Aid Bureau of Chicago

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Family Law Commons, and the Social Welfare Law Commons

Recommended Citation

Available at: http://lawecommons.luc.edu/luclj/vol3/iss1/5

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Clara Ann Bowler*

The problem of providing for children without families has been with us as long as family living has been the recognized means of preparing young human beings for adulthood. Church, State and secular charities have all attempted to intercede on behalf of children and their problems with varying success. Although twentieth century charity has become a “social” science practiced by experts in “welfare,” the problem still remains.

Presently, children without families or with inadequate families are cared for by a network of private, quasi-private and governmental agencies. Because the courts have long had the final responsibility for determining the relationship or lack thereof between family members and the custody of minors, they have become a necessary partner of these child welfare agencies. However, since the science of child welfare has become more professionalized, the courts are less aware of what happens to the child after he enters the child welfare network. This lack of expertise, as well as crowded dockets, has made urban juvenile courts a rubber stamp for welfare agencies, much like “delinquency correctional” agencies. In Illinois, this ignorance has grown with recent legislative attempts to re-organize the child welfare network under the Department of Children and Family Services and to effect reform measures.

This article will survey the origin and effect of the new Department of Children and Family Services in the Illinois child welfare system. It will attempt to isolate certain problem areas in this new administrative

* A member of the Illinois Bar, Mrs. Bowler served as Staff Attorney with the Juvenile Division of the Legal Aid Bureau of Chicago from 1969-1971.
system and suggest reasons why it has not been successful in reforming the child welfare network in Illinois. Finally, it will discuss the relationship of the Department to the juvenile court and analyze various methods in which the juvenile court could be used to promote the reforms which the Department has been unable to effect. Presently, the juvenile court reform movement begun by In re Gault has not been applied to child welfare in Illinois as it has in New York and California. Therefore, Illinois case law in this field is still limited. This discussion is limited to child welfare problems covered by the Department of Children and Family Services. No attempt will be made to discuss problems arising under the federal/state aid to dependent children plans.

I. HISTORY

The Illinois Department of Children and Family Services was created in 1964 in response to the recommendation of the Illinois Report for the 1960 White House Conference on Children and Youth. Prior to this time, the State of Illinois did not fully recognize a public duty to provide for dependent and neglected children. The 1960 Report described the situation as follows:

Since 1950 there has been little change in the general pattern of child welfare services. Illinois is still primarily a private agency state, with 130 agencies and institutions under religious, non-sectarian, fraternal auspices, by chance located in selected sections of the State. Public child welfare services are not only far overshadowed; they are held to a minimum. But the private agencies are not totally private. Under the present pattern, many private agencies could not exist without public tax funds, roughly 4.5 million dollars a year . . . . This kind of quasi-private agency is the primary child care resources in Illinois, second only to the Court, which has over the years assumed a child-placement function, either through its own probation staff or through use of the existing voluntary agency. . . . Public Service augments that structure to the extent that the State Division of Child Welfare can legally serve veteran's children, and Cook County Division of Child Welfare can legally serve only the children not accepted by private agencies.4

1. 387 U.S. 1 (1967).
4. 1960 ILLINOIS REPORT at 16. See also Illinois Governor's Commission on Mid-Century White House Conference for Children & Youth, CHILDREN AND YOUTH IN ILLINOIS (1950) [hereinafter cited as 1950 ILLINOIS REPORT].

50
The view that neglected and dependent children are the responsibility of private charities was so predominant in Illinois that the *Cook County Report for the 1960 White House Conference on Children and Youth* suggested that child welfare in Illinois was, in a sense, dependent upon the success of the Community Fund money-raising activities.

The problem of voluntary agencies is highlighted by the failure of the Community Fund of Chicago to reach its goal in each successive year between 1945 and 1958. Voluntary agencies have been under serious financial strain and have responded in this period of rising costs by reducing staff, deferring needed maintenance of buildings, and, in some cases, discontinuing service entirely.⁵

Although the 1960 Illinois Report recommendations were aimed at downstate areas where private agency facilities were inadequate or non-existent, the 1960 Cook County Report documented the inability of private agencies to cope with the sociological changes in the Chicago area which had developed in the 1940’s and ’50’s.⁶ The concept of a State-administered and centralized child welfare program was advanced to solve two very diverse and, perhaps, contradictory problems: 1) lack of child welfare facilities and programs in low population areas downstate, and 2) the breakdown of existing private child welfare facilities due to the disproportionate increase in numbers among low-income and migrant populations in the inner city and metropolitan area around Chicago. A uniform program was formulated to solve both problems and was advanced in the *Report of a Commission for a Comprehensive Family and Child Welfare Program in Illinois* issued in October of 1962.⁷

The Committee Report recommended a major judicial reorganization which would consolidate all legal actions regarding children under the jurisdiction of a single Juvenile or Family Court. This Juvenile Court was to have exclusive jurisdiction in all of the following matters relating to children: adoptions, legal guardianship of the person, divorce and separate maintenance actions involving children, alleged dependency of children, alleged neglect of children, alleged delinquency of

---


⁶. *Id.* at 2-8.

children, alleged mental illness or deficiency of children and of adults who are parents and/or legal guardians of children, alleged contribution to the neglect or delinquency of children by their parents, guardians, or legal custodians, and criminal non-support by parents of children.\(^8\)

The social service work of the Juvenile Court Probation Department was to be continued by the new Family Court and was to include the following responsibilities:

In matters of Petitions to establish legal guardianship for children: To make such preliminary investigation and inquiry as need be required, and,

To make recommendations to the judge as to the adequacy and fitness of the nominated guardian.

In matters of alleged dependency of children:

To make preliminary investigation and to attempt to effect adjustment without formal court action, and,

To refer to licensed public or voluntary child welfare agencies, cases of adjudicated dependent children . . . .

In matters of alleged neglected children:

To make preliminary investigation and referral . . . and to effect adjustment of such cases without formal court action if possible,

To provide emergency/temporary shelter care, pending court hearing and disposition of case . . .

To provide family/child welfare services to adjudicated neglected children, until such time as they will be otherwise available, and,

To review periodically the cases of adjudicated neglected children . . . . \(^9\)

The Committee Report also recommended that the term dependent child

concern[s] a child in need of court action through no fault of his parents, including a child (a) without a parent or legal custodian and in need of same, (b) in need of special services, whose parents, although willing, are unable to provide for such services, and (c) whose parents, with good cause, wish to be relieved of guardianship and custody of that child.\(^10\)

Such a definition would enable a poor parent to obtain government funds for children who required special treatment outside the home without submitting to a finding of neglect.

\(^8\). Committee Report, at 7.

\(^9\). Committee Report, at 31.

\(^10\). Committee Report, at 32.
Further recommendations called for the creation of a statewide Department of Family and Children Services which would include an expansion of the services “previously provided” by the Children’s Division of the Department of Mental Health, the public assistance programs of the Illinois Public Aid Commission and local General Assistance, the services of the Division of Vocational Rehabilitation and the Illinois Youth Commission. However, due to the fact that there was no basic Family and Child Welfare Program in existence, the Committee recommended that the proposed new Department initially include only a casework division, a licensing division, an institutions division and research. Services for crippled children, eye and ear infirmary research and educational hospitals were to be left under the Higher Education Board. Public Assistance, the Division of Vocational Rehabilitation and the Illinois Youth Commission were to be added at a future time.\(^\text{11}\)

In 1963 the General Assembly passed the Department of Children and Family Services Act which created a State agency to “provide direct child welfare services when not available through other public or private child care facilities.”\(^\text{12}\) Although the Illinois Juvenile Court Act was amended in 1965, there was no attempt to expand its jurisdiction to include the recommended category of children “in need of special services whose parents, although willing, are unable to provide for such services.”\(^\text{13}\) Dependency was limited to children whose parents were dead, physically or mentally disabled or wished to put the child up for adoption.\(^\text{14}\) A child needing special services whose parents could not provide them had to be classified as neglected. Thus Ill. Rev. Stat., ch. 37, § 702-4(2) which prohibits actions brought “... solely for the purpose of qualifying for financial assistance ...” has been used by parents who falsely admit to neglecting their child in order to qualify for funds for special services.\(^\text{15}\)

Thus, the Department of Children and Family Services was left with the responsibility of creating a comprehensive program for Illinois children under the traditional court system with its divided jurisdiction over

\(^{11}\) Committee Report.
\(^{12}\) ILL. REV. STAT., Ch. 23, § 5005 (1965).
\(^{13}\) ILL. REV. STAT., Ch. 37, § 701-08 (1965). See also, note 10, supra.
\(^{14}\) ILL. REV. STAT., Ch. 37, § 702-05 (1969).
\(^{15}\) Since 1970, the Chicago offices of the Department of Children and Family Services have been mitigating the effect of this inconsistency by encouraging parents in need of funds for special services for their children to enter into a “voluntary” placement agreement with the Department under ILL. REV. STAT., Ch. 23, § 5005 and 5005.1 (1969). However, the “voluntary” agreement has not been available to parents receiving Public Assistance in Cook County who are still forced to receive the Department’s services by means of a neglect proceeding in the Juvenile Division of the Circuit Court of Cook County.
The Department was charged with the responsibility for 1) establishing and maintaining tax-supported child welfare services, 2) regulating adoption, foster care, family counselling, protective service, service to unwed mothers, homemaker service, return of runaway children, and "interstate services," 3) children committed by the Juvenile Court for placement and 4) administering funds used for child placement. The Department was also to operate six institutions including an old people's home, provide services for the visually handicapped, operate an eye and ear infirmary, license child care facilities under the Child Care Act\footnote{17} and investigate child abuse cases.\footnote{18}

The Department was also charged with providing counselling for mentally retarded children "when not otherwise available."\footnote{19} However, the Department has limited its service to short-term situations rather than long-term service.\footnote{20} This means that families with retarded children are without long-term public welfare services unless the child is committed to the Department of Mental Health and institutionalized.

A similar gap remained in regard to pre- and post-institutionalization services for mentally ill children. The Department does not accept guardianship over children committed to the Department of Mental Health by their parents, nor does it actively supervise its own wards once they are "placed" in a Mental Health institution. If the child becomes eligible for discharge from a state hospital and the parents refuse to accept the child back in the home, there is no public agency which will take responsibility for providing placement or foster care.\footnote{21}

The result is that the child remains in the Department of Mental Health until the parent decides to release him or he obtains the age of majority.

In August, 1969, the Cook County Department of Public Aid, Children's Division, surrendered its guardianship over "nearly 6,000 children" to the Department.\footnote{22} At the same time, the establishment and
maintenance of day-care facilities was added to the Department's responsibilities as well as a plan to subsidize adoptions of "hard-to-place" children.²³

This gigantic task was designed to provide a gradual transition from a quasi-private system of child welfare to a State supported and operated system. The transition was, however, to be implemented by "purchase of care" agreements entered into by the Department with private institutions and agencies. The expected effect in a state historically devoted to private responsibility for child welfare, was a parallel growth and revitalization of both State and private child welfare programs. Since the State had neither the facilities nor the personnel to take on the entire task of providing child welfare services, Illinois could not afford to admit that this parallel development of State and private facilities might prove to be contradictory.

II. PRIVATE V. PUBLIC CHILD WELFARE

The regressive history of Illinois in the development of public child welfare services has created a seemingly insoluble situation. Unfortunately, present attempts to remedy this situation ultimately will lead to exacerbation of the problem.

Illinois has developed a quasi-private market for child welfare services. Private agencies, religious and otherwise, have long provided casework and placement services, foster homes and institutions. None of these agencies are self-sufficient. They depend, in part, on direct financial aid from the government in the form of purchase of care orders.

The inadequacies of this system of private agencies have long been recognized.²⁴ The modern complaint is not the quality of services rendered, but the lack of religious, racial and, especially, geographic equality in the distribution of services.²⁵

What is not articulated is the deleterious effect these often excellent private agencies continue to have on the development of public child welfare services. A recent theory claims that the Juvenile Court Act of 1899 was the result of the lobbying pressure of the private agencies to promote the funneling of larger numbers of children through public courts into private institutions at the County's expense.²⁶ In effect,

²³. ILL. REV. STAT., Ch. 23, § 5005 (1969).
²⁶. One legal historian has gone so far as to blame the failure of Illinois to provide adequate institutional facilities for children to a deliberate and successful lobbying cam-
the Juvenile Court was a device to promote government subsidies to private charitable foundations. If this theory has any validity, the remainder of the vicious circle is inevitable.\footnote{27}

The existence of private agencies blocked the creation of facilities to implement the plans and jurisdiction of the Juvenile Court so that the Juvenile Court would be driven to use their facilities. After the Court became dependent upon the private facilities, and the public became accustomed to extensive Juvenile Court jurisdiction without public facilities, it became more difficult to develop tax-supported facilities. Those public facilities which were developed were financially starved and plagued with bureaucratic and political incompetence.\footnote{28} The more inadequate the public facilities became, the less willing the public was to increase their financial support. Further, the private agencies justified their continued existence by pointing to the inadequacy of public facilities at the same time they were diverting public moneys away from these public facilities into their own facilities. This depleted the resources of public facilities still further and led to renewed support for private agencies based on the inadequacy of public alternatives.

Eventually, the public facilities were so hopelessly inadequate and the need so great\footnote{29} that the private agencies could not fill the need. At this point, the private agency bloc was willing to support a public system of co-ordinating, supporting and delivering child welfare services. This reform may have been encouraged by the tendency of child welfare services to fractionalize in the same fashion as the private services. It was becoming difficult to secure governmental subsidies in any organized fashion at a time when both the need and cost of child welfare services were increasing.\footnote{30}

When the Department of Children and Family Services was finally organized in 1964 to provide child welfare services for all children in Illinois, the only practical way to implement its plans was through the purchase of child care from existing private facilities. The capital investment necessary for any other approach would have been more than

\footnote{27. Catholic agencies, in particular, were concerned that Catholic children could only receive proper religious instruction in Catholic institutions. Fox, \textit{Juvenile Justice Reform: An Historical Perspective}, 22 STAN. L. REV. 1187, 1225-1231 (1970).}

\footnote{28. \textit{See} 1950 ILLINOIS REPORT at 27-30; 1960 ILLINOIS REPORT at 16, 18, 20.}

\footnote{29. \textit{Id.}}

\footnote{30. 1960 ILLINOIS REPORT.}
the taxpayers would have accepted. However, this purchase of care approach, if enough money is allocated to make it successful, must lead to a revitalization of private facilities. The funneling of State money into private facilities will further inhibit the development of public facilities and the vicious circle will again begin.

This new approach, however, has the added danger, which is already becoming apparent, that the Department will attempt to control the development of private facilities by imposing tighter restrictions. These restrictions will eventually result in imposing the same bureaucratic and political problems on the private facilities as are prevalent in public institutions. Such a development could ultimately lead to a deterioration of private facilities to the same level of incompetence as public facilities.

The optimist might argue that the intelligent use of the Department's mandate to regulate private facilities will prevent such a development from occurring. It is true that the present regulations published by the Department are intelligent and practical. However, child welfare being essentially a service commodity, regulations can be no better than the personnel which enforce them. Unfortunately, personnel inadequacy has been a perennial problem for all public welfare agencies.

The same factors which have led to the inadequacy of public child care facilities in Illinois also permit the private agencies to recruit and maintain better staffs than public facilities. In the area of public child welfare services, a qualified staff is the exception rather than the rule due to the absence of civil service and the stifling effect of the political patronage system as it presently exists in Illinois. The inefficiency of public staff, in turn, drives qualified young workers to seek employment out of state or in private services. This, of course, is a drain on the already inadequate supply of child welfare workers available in Illinois.

In order to exercise intelligent control over private agencies, the Department must attract and keep high-quality staff. However, it cannot retain such staff when the present supervisory staff is below the standards of private agencies. The better quality young workers gravi-

31. Most Illinois taxpayers are not aware of how inadequate public child care facilities in Illinois are. Despite many publicity drives, this lack of State responsibility seems to be a "professional secret." However, the type of compromise solution put into effect in 1964 was thoroughly discredited as early as 1938. G. ABBOTT, supra note 24.


tate to private or out-of-state agencies, perpetuating the problem. Thus, the inability of the Department to exercise control over child welfare in Illinois leads to further abuses which make it more difficult to attract the kind of staff which would perform more efficiently and competently.

The Department of Children and Family Services has an insoluble problem. On the one hand, the State has insufficient financial and personnel resources to take immediate and exclusive control over all child welfare services in Illinois. On the other hand, the present attempt to compromise with the private agency approach to child welfare has the effect of strengthening the same forces which make it impossible for the State to ever take exclusive control. Thus, as the Department of Children and Family Services succeeds in perpetuating its present mixture of public and private services, it is reducing its opportunity to fully provide the services it is mandated to provide, and to achieve adequate child care in Illinois.

III. PROBLEMS OF THE 1970'S

After six years of attempting to create a comprehensive child welfare program in Illinois, the Illinois Commission on Children stated that the first major problem in child welfare in the 1970's is "delivery of services." The 1970 Illinois Report predicts that:

The plight of the many thousands of children whose personalities are severely damaged through poverty, racism and neglect will shortly become a national scandal.

This break-down in "delivery of services" is traced to several trends in agency practice as it presently exists in Illinois. The first is a horizontal limitation of the type of service provided by any single agency for a particular child.

Many agencies delivering service tend to become (agency) service oriented rather than being oriented to the child and his family. Each of the services to children is viewed as serving only that part of the child's needs which conforms to the specialty of the agency. The users of services are rarely consulted as to individual or community needs.

34. Federal programs such as the controversial child development program in S. 2007, 92nd Cong., 1st Sess. (1971) (vetoed by the President on Dec. 9, 1971) could add both financial support and federal regulation to the Illinois scene. However, they do not seem to be imminently forthcoming.


36. Id. at 12.

37. Id. at 13.
Complementing the horizontal limitations on agency services are the present financing systems which limit the vertical expansion of both private and public agencies.

A predominant philosophy exists in Illinois that financing of services should be made by a voluntary or governmental unit which is at the nearest level to the people who are users of the service. In the past it has been possible for this philosophy to govern the development of needed programs and priorities. However, the present governmental units of townships, counties, municipalities, etc., provide too small a population base or tax structure to adequately fund or operate quality services to meet the needs. Therefore, there has been a decided trend in the last ten years to looking to a larger governmental or private unit to which responsibility for programs would be assigned and funding required. ... 38

After an analysis of “co-ordination” problems created by present methods of federal funding, 39 the 1970 Report finds that there are serious problems in “co-ordination” among private agencies.

Voluntary [private] agencies share many of the same problems in co-ordination seen in public agencies. In some communities, there are too many small private agencies providing very similar services. Besides the competition for staff among these agencies, there is a gross waste of financial resources which could be remedied by realignment of services, consolidation of programs or mergers of agencies. 40

Finally, the Report finds a serious lack of co-ordination and co-operation between private and public welfare agencies.

All of these problems are understandable in light of Illinois’ history of child welfare and the compromise solution put into effect in 1964. The long partnership between the Juvenile Court and private agencies which began in 189941 has resulted in public acceptance of the need for private agency intervention on behalf of neglected and orphaned children. The private and often sectarian origin and financing of these child care agencies results in an emphasis on the interests of potential donors rather than on the needs of the users of services. Citizens tend to contribute to special projects which they believe will benefit the unfortunate (i.e., a cure for cancer, blindness, etc.). Every voluntary donor to charity is his own expert on what services are needed, and any service-providing agency which is dependent on a continuous supply of voluntary donors must be limited by their peculiar notions and prejudices

38. Id. at 14.
39. Id. at 15-16.
40. Id. at 17.
41. Fox, supra note 26, at 1229.
if it is to survive. The problem is not so much an "(agency) service orientation," but a potential donor orientation.42

This orientation to the prejudice of the donor rather than the needs of the recipient of welfare services can be as much a problem to public welfare projects as it is to private projects.43 The government, however, has the advantage of being able to draw on a larger and more continuous pool of financial resources in order to maintain welfare programs already in operation. A public welfare agency is not dependent on a continuous supply of individual voluntary contributions, but rather on a single act of the legislature. Once enacted, a legislative program becomes, to a great extent, protected from the more transitory shifts in public opinion.44

The "philosophy" of financing at the lowest level is a direct result of the pre-1964 practice of reimbursing private child-care facilities at the county level,45 as well as the localized and complex distribution of public assistance in Illinois. A complete overhaul of the federal Social Security Act and the Illinois public assistance program is a prerequisite to any comprehensive plan for public child welfare. Competition between private agencies and the resulting waste of financial resources is inevitable under any state purchase of care program.46 Finally, the "lack of cooperation" between private and public welfare agencies is a predictable result of the private agencies' peculiar role as both the essential support and chief competitor of public agencies.47

To solve these problems, the 1970 Illinois Report recommended a co-ordinated system of local and regional units for planning and

42. The authors of the 1970 Illinois Report, apparently do not feel that Department of Children and Family Services' purchase of care arrangements have done much to re-orient private facilities to the actual needs of children rather than the peculiar specialties of the institution. Two factors may be responsible for this: (1) the department has been noticeably conservative about suggesting new approaches, and (2) the shortage of child care facilities has created a permanent seller's market in Illinois where the Department has difficulty finding any placement for many of its wards.

43. Political pressure can be the strongest donor influence of all. The President, in his veto of S. 2007, 92nd Cong., 1st Sess. (1971), appealed to two contradictory taxpayer prejudices about the basic employability of welfare mothers and the immorality of middle-class mothers who want to be employed. On the other side of the political fence, the National Welfare Rights Organization has actively campaigned against a guaranteed annual income because H.R. 1, 92nd Cong., 1st Sess. (1971) could result in a decrease of dollar benefits to Organization members in large cities.

44. An example of this inertia is the federal social security program which somehow has survived much popular criticism and several major shifts in political power.

45. County reimbursement of private agencies directly through the Juvenile Court was the prevalent practice in DuPage County as late as January, 1970. Interview with Richard George, Deputy Chief Probation Officer, October, 1970.

46. See discussion in part II at p. 55, supra.

47. Id.
community development which are representative of the various interests and concerns for children's services.\textsuperscript{48}

The Report also recommended that the legislature designate a single State Agency (Department of Children and Family Services?) to provide funding and staff for this planning system. There was no discussion of how this planning system is to be effectuated or enforced. Nor was anything said about the relationship between the regulating State Agency and the private agencies upon which the State depends to provide most of the actual services. And, of course, nothing was said about the ultimate causes of the “delivery of services” problem and what can be done to counteract them.

The other significant problem of the 1970’s involving the Department of Children and Family Services is its relationship to the Juvenile Court. The author has yet to speak with a judge, probation officer or lawyer in the Juvenile Division of the Circuit Court of Cook County who does not acknowledge this relationship as a major source of confusion and frustration. There are signs that other counties in Illinois are beginning to experience similar problems with the Department.

The 1970 Illinois Report attacks the problem directly. The Report recommends that the Juvenile Court retreat and leave the disposition of dependent and neglected children to the sole discretion of the Department of Children and Family Services.

The sole responsibility of Juvenile Courts on dependency and neglect cases should be that of providing legal protection through acting on recommendations for changes in the legal relationship of a child to his parents, guardian or other parties. This would mean that the Department of Children and Family Services would have the responsibility for such non-judicial functions as receiving and studying complaints in dependency and neglect situations and determining whether a petition shall be filed to secure Court action when a child needs removal from his family, providing or financing temporary or long-term foster family, adoptive or institutional placement, determining the type of care a child needs, study and supervision of foster care facilities and procuring of child care services. \textit{These are child welfare functions and should be performed by child welfare specialists}.\textsuperscript{49}

The Report rationale is that the present Juvenile Court role in dependency and neglect cases was primarily an attempt to fill the gap caused by the lack of local services and resources. Since the Department of Children and Family Services had been in existence for six

\textsuperscript{48} 1970 \textit{ILLINOIS REPORT}, at 19.
\textsuperscript{49} \textit{Id.} at 81.
years, the Report believed that the time was ripe for the Juvenile Court to turn over its child-placing functions to the Department which should be better qualified to do the job. The Report apparently resented the constant interference of the Department's placement and supervision of neglected children by lawyers, judges and probation personnel in the Juvenile Court.

In theory, there is much to support the Report's position. Neither probation officers nor judges are trained social workers. Nor is court action an effective device to solve social and emotional problems. In the past, court orders (which can be enforced by delinquency proceedings and sentencing to the Department of Corrections) have placed children in impossible or inappropriate situations. The author has witnessed instances where probation officers insisted on bringing children before judges to be ordered incarcerated instead of providing obviously-needed medical or psychological treatment. Such court orders are grossly inappropriate as well as emotionally harmful to the child. There is also the vindicative parent who, after a finding of neglect, will bring legal action to stop placement plan after placement plan on the theory that "if I can't have the child, no one will."

However, the greatest dilemma facing juvenile judges, conscientious defense lawyers and prosecutors is the total lack of any adequate remedy for children mistreated by the Department of Children and Family Services itself. The lawyer and judge in the Juvenile Court expect, as a matter of course, the Department to provide good care for all the neglected and dependent children brought into court. Instead, cases such as the following occur:

1. A sixteen-year-old neglected girl with serious emotional problems is held in the juvenile detention home for over a year and in solitary confinement continuously for two months because there is no placement available. Eventually, she is placed in a foster home, returned to the detention home and sent to a mental hospital, all without notifying the Juvenile Court.

2. A nine-year-old deaf and dumb girl is held in the detention home for nine months. She is rejected by the Illinois School for the Deaf because of an old Board of Education I. Q. test which shows an I. Q. of 45. Despite indications from caseworkers and employees at the detention home that she is considerably brighter than the test score indicates, she is never retested nor is the affect of her handicap on her

50. Id. at 66-67.
I. O. score evaluated. She is finally placed at a private institution for mentally retarded children in Oregon.

3. An eight-year-old neglected "burglar" is held in the detention home five months and placed in a foster home despite the recommendations of the psychological and psychiatric reports which indicate institutional placement. The boy is arrested for another burglary and the Department substitutes the Public Defender for the boy's lawyer of record. The Public Defender pleads him guilty to the burglary charge, he is committed to the Department of Corrections (at age nine) and the Department is relieved of guardianship.51

Although understandable in light of the impossible task confronting the Department of Children and Family Services, such abuses are intolerable on an individual basis. And despite the abstract "due process" rhetoric of the Supreme Court,52 it is practical administrative bungling that has provided the real impetus of the Juvenile Court reform movement.

IV. CHILD WELFARE AND JUVENILE COURT REFORM

Despite disagreement as to the underlying problems, it is clear that the neglect and dependency branch of the Juvenile Court, like the delinquency branch, is not meeting its obligations to its wards. In delinquency actions, the last six years have brought a procedural "revolution" to American juvenile courts. Beginning with the Supreme Court decision In re Gault53 the appellate courts on the state and federal levels have been limiting juvenile courts' broad jurisdiction over delinquent children by means of distinctions adopted from modern criminal procedure. The theory of these decisions has been that juvenile courts do not provide the rehabilitative "treatment," which they claim to provide, and that the "treatment" provided, in fact amounts to little more than incarceration and punishment. Since the result of being adjudicated a "ward of the court" may also be incarceration and punishment, the courts' jurisdiction should be limited by the due process considerations developed in adult criminal or penal proceedings. The Supreme Court has reasoned that because these due process rights would be available to delinquent children if they were charged in an adult court, they

---

51. Cases from the legal files of Patrick T. Murphy and the Legal Aid Bureau, Chicago, Illinois.
52. In re Gault, 387 U.S. 1 (1967). For a discussion of whether children actually had due process rights before the development of the modern Juvenile Court see Fox, supra note 26, at 1238.
should be made available to children in a delinquency proceeding in the juvenile court where the sanctions, in terms of the possible duration of incarceration, can be even more drastic.\footnote{Id., but see Fox, supra note 26, at 1238.}

In Illinois, the Probation Department of the Juvenile Court has rightly objected that the goal of these recent developments is to "get the kid off" and block attempts to work with the child before he becomes a full-fledged "criminal." The Juvenile Court is faced with an illusive choice of dispositions in juvenile cases which sounds impressive in the statute,\footnote{ILL. REV. STAT., Ch. 37, § 705-7 (1969).} but in practice amounts to outright dismissal, probation in the home or commitment to the Department of Corrections. Defense attorneys (and the United States Supreme Court) have operated on the assumption that the Department of Corrections is an evil, probation is arbitrary and ultimately leads to incarceration by the Department of Corrections and that the job of the defense attorney is to keep the court from adjudicating the child a delinquent in the first place. Modern juvenile law practice has become an essentially negative effort where unsupervised parental custody of the child is equated with liberty and the greatest effort is expended to keep the child out of the clutches of the juvenile court.

Such negative reform movements are encouraged by the persistent tendency of modern juvenile courts to evade the effects of constitutional due process requirements through the creation of arbitrary and unlimited "children's offenses" such as the "Minor in Need of Supervision."\footnote{IN re Anonymous, 43 Misc. 2d 213, 250 N.Y.S.2d 395 (Fam. Ct., 1964); In re Lloyd, 33 App. Div. 2d 585, 308 N.Y.S.2d 419 (1970); In re P., 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (1970).} The child "in Need of Supervision" has been clearly recognized by the New York courts as an attempt to compensate for the lack of facilities for neglected children by funneling the more difficult to place children into correctional facilities.\footnote{Bordonne v. F., 33 App. Div. 2d 890, 307 N.Y.S.2d 527 (1969); In re W., 34 App. Div. 2d 1100, 312 N.Y.S.2d 544 (1970), aff'd 28 N.Y.2d 589, 319 N.Y.S.2d 845 (1971); In re A.A., 36 App. Div. 2d 1001, 321 N.Y.S.2d 59 (1971); In re P., 12 Cal. App. 3d 1057, 95 Cal. Rptr. 430 (1970); In re D.J.B., 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (1971).} Both New York and California courts have made substantial judicial attempts to limit the number and quality of children falling into this category.\footnote{In re P., 12 Cal. App. 3d 1057, 95 Cal. Rptr. 430 (1970); In re D.J.B., 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (1971).}

Although Illinois does not permit the placement of Minors in Need of Supervision directly into the Department of Corrections, the Illinois Supreme Court has sanctioned the practice of issuing a "court order"
to a misbehaving child and then making a finding of delinquency and commitment to the Department of Corrections when the child violates the "court order" by misbehaving a second time.\textsuperscript{59} The theory seems to be that two acts of noncriminal "disobedience" constitute a criminal offense. The actual explanation is that Minor in Need of Supervision is almost always, by definition, a child whose parents are actively seeking the assistance of the juvenile court in asserting their authority over the will of the child,\textsuperscript{60} supposedly for the child’s own good. Philosophically, this is a more difficult situation for both defense attorneys and judges to acknowledge than either the delinquent child and his adult parent versus a citizen complainant, or the adult parent charged with child neglect versus a social agency.

Therefore, although reform lawyers have not been able to resist the Minor in Need of Supervision abuses in Illinois, they have been able to carry on the reform movement into the area of child welfare by contesting neglect charges. The defense lawyer in a child neglect case has always been a trusted agent of wealthy parents, and the expansion of the Public Defender program, as well as federal legal services programs, has made him available to poor and indigent parents as well.

The long term failure of the State to recognize an obligation to provide for neglected and dependent children and the inability of the new Department of Children and Family Services to solve the child welfare problems of Illinois have encouraged these activities. Lawyers and judges who recognize that the State is unable to provide for dependent and neglected children are becoming increasingly reluctant to remove the child from the custody of his parents. More effort is expended in getting the child out of court by contesting the neglect charge than in finding an appropriate disposition for him after he is in court.

The first philosophical problem a defense attorney faces in child welfare litigation is the issue of parental rights. The attorney, with some support from Illinois case law, believes in a "natural" or "inherent right" of a parent to the custody of his children.\textsuperscript{61} Whether this "inherent right" is based upon the biological relationship between parent and child or some traditional "sanctity" of the family is unclear.\textsuperscript{62} However, the

\textsuperscript{59} In re Presley, 47 Ill. 2d 50, 264 N.E.2d 177 (1970); In re Sekeres, 48 Ill. 2d 431, 270 N.E.2d 7 (1971).
\textsuperscript{60} Bazelon, Beyond Control of the Juvenile Court, 21 Juv. CT. JUDGES J. 42 (1970).
\textsuperscript{62} An interesting theory of the origin of parental rights over a child was ad-
constitutional and criminal law orientation of most defense attorneys in Juvenile Court, together with case law insistence on "inherent parental rights," leads them to equate unsupervised parental custody of a child with the child's liberty. An adult offender can be logically classified as "incarcerated" by the State or "at liberty." But it becomes mere semantics to state that a child is "at liberty" when his natural parents may take lawful actions more restrictive of his "liberty" than any State institution.

The child welfare agencies, on the other hand, recognize a duty of someone in society to defend the child against possible abuse by his own parent, and intervene between the parent and child if necessary. They feel that children have certain "passive rights" such as rights to be fed, sheltered, educated and not physically abused. Viewed in this light, a neglect proceeding is not depriving the child of his liberty, but asserting his rights against his parent's wrongdoing. At the trial, the issue becomes whether or not the parent did abuse the child's passive rights to receive proper care and, often, what constitutes "proper care." At this point, the same attorney who so passionately defended his juvenile client's right not to be adjudicated a delinquent minor, will just as passionately defend the parent's right to do whatever he wants to the child. The welfare worker now views the child's attorney, the great defender of the child's liberty against interference by the State in a delinquency action, as the defender of the absolute power of a parent over his child.64

vanced by the New York Supreme Court in Mercein v. People ex. rel. Barry, 25 Wend. (N.Y.) 64, 102-03 (1840). "By the law of nature, the father has no paramount right to the custody of his child. . . . On the establishment of civil societies, the power of the chief of a family as sovereign, passes to the chief or government of the nation. And the chief or magistrate of the nation not possessing the requisite knowledge necessary to a judicious discharge of the duties of guardianship and education of children, such portion of the sovereign power as relates to the discharge of these duties, is transferred to the parents, subject to such restrictions and limitations as sovereign power of the nation think proper to prescribe. There is no parental authority independent of the Supreme power of the State. But the former is derived altogether from the later. . . . The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated by its duty of protection, to consult the welfare, comfort and interests of such child in regulating its custody during the period of its minority." For further historical material, see G. ABBOT, supra note 24, at vols. 1 & 2. See also 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Ch. 16 (3rd ed. 1768).

63. For a discussion of these "passive rights" see Kleinfeld, supra note 7.

64. Roman law recognized the absolute power of a father over the life and death of his children on the theory that one who gave life could take it away. Blackstone, however, states that a father's power over his children is given him by the State so that he can exercise certain duties toward his children. W. BLACKSTONE, supra note 62, at § 1 and 2. Most modern juvenile defense lawyers will agree that the State can intervene in clear instances of attempted infanticide. However, their insistence on the "natural" rights of biological parents often sounds more like Roman law theories than common law.
The second great problem for the attorney in dependency and neglect proceedings is the reticence and perhaps inability of the court to demand and enforce affirmative actions on the part of State welfare agencies. The problem is compounded when all existing child shelters are filled to capacity, or when no facility exists that can handle the child's problems. The court must then decide between the only two places which it can order a child to be taken—the county detention home (or jail) or the Department of Corrections.

An appellate court in New York faced this problem in *In re Lloyd*. The Family Court attempted to dispose of a neglected child by reclassifying him as a "person in need of supervision" and committing him to a state "training" or correctional school for delinquents. The appellate court reclassified him as a neglected child because the provision of proper facilities is the responsibility of the legislature and the legislative failure in that regard does not warrant circumvention of the statute.

The court then went on to outline the inadequacy of its own order:

Is this child then to be relegated to the custody of his mother under conditions that the record shows have actually deteriorated since the original, and justified, finding of neglect? It is easy to say, as it is undoubtedly true, that it is not our problem. The court obviously cannot provide a facility where none exists. We do not give up, however, without a final gesture . . . . We direct a new adjudicatory and dispositional hearing in the hope that with the lapse of time a place in some authorized agency may be found or that the Children's Center may be able to make a viable adjustment.

The Illinois Juvenile Court exercises its supervisory power over its dependent and neglected wards, and the courts may demand periodic reports of guardians and custodians including the Department of Children and Family Services. However, the only remedy against abuse is removal of the guardian. Before 1964, when private agencies took direct guardianship of their dependent and neglected children, the power to change the child's guardian may have had a real effect. However, as the Department obtains a virtual monopoly of agency guardianship over court wards, the threat to remove the Department as guardian becomes meaningless. The same difficulty arises in a possible neglect action against the Department itself. If the Department is unfit to take

66. Id. at 421.
67. Id.
care of the child, who can? The guardian’s report and supplementary hearing then is an adequate remedy only for parents who are seeking return of a child previously taken away. When the issue is the proper disposition of a child who can not be returned to its parents, an attorney or judge is reduced to harassing the Department’s court representative.

An aggressive and independent attorney or judge can, by persistent pressure, attack those abuses which originate in the negligence of the Department itself, such as uncovered cases, incomplete social investigations and psychiatric evaluations, and lack of adequate medical treatment. However, when a genuinely “difficult-to-place” child is before the court, pressure on the Department simply results in an attempt to place the child in the Department of Corrections or some other inappropriate setting. The author has witnessed numerous attempts to have a difficult-to-place child of borderline intelligence adjudicated “mentally retarded” so that he can be turned over to the Department of Mental Health for institutionalization rather than “placed.” The defense attorney then finds that he has succeeded in pushing his client out of the detention home into a “state school” of the Department of Mental Health which may be even more inappropriate.

The same criticism can be made of the “right to treatment” cases in the District of Columbia which evolved from analogous litigation over inmates in mental institutions. The usual remedy to inadequate institutional care is release from the institution. In the case of neglected children this remedy merely brings the court back to the original problem of placement of the child.

Some attempts have been made by the courts to control conditions within state child correctional facilities through the judicial review of institutional rules and regulations and injunctions. However, actions such as the Lollis v. New York State Department of Social Services case are usually based upon the unconstitutionality of specific treatment such as solitary confinement which has been held not to constitute cruel and unusual punishment as proscribed by the United States Constitution.

69. In re Ilone I., 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Fam. Ct., 1970) the court released a child on probation because the training school to which she had been committed refused to submit a progress report to the court and provide psychiatric treatment as ordered.
71. Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); In re Elmore, 382 F.2d 125 (D.C. Cir. 1967).
73. Id.
74. Sostre v. McGinnes, 442 F.2d 178 (2nd Cir. 1971).
There is, of course, the classical remedy of a suit for damages.\textsuperscript{75} However, this remedy seems only to be applicable in instances of recklessly negligent mistreatment by a few specific individuals after the child has already sustained substantial injuries.

The only effective legal remedy in placement cases seems to be for the court to place the child directly with the appropriate child care facility or foster home itself. This, of course, is exactly the situation which the Department of Children and Family Services was created to avoid because it has worked so poorly in the past.

One helpful approach to the disposition of neglected and dependent children is a hearing procedure within the Department itself with a provision for administrative review in the Juvenile Court. Such a scheme would require the appointment of a guardian \textit{ad litem} for each ward of the Department who would be charged with interceding on behalf of the child with the Department to correct abuses and object to inappropriate placements both within child care facilities and outside the Department; i.e., to the Department of Mental Health or Corrections.\textsuperscript{76} The guardian \textit{ad litem} could deal directly with caseworkers and placement personnel informally and at administrative hearings rather than as the "court representative."

In Illinois, there is presently no appeal from dispositional decisions of the Department of Children and Family Services except through the "report of guardian" hearings in the Juvenile Court.\textsuperscript{77} Certain final administrative decisions of the Department are, by statute, subject to judicial review under the Administrative Review Act.\textsuperscript{78} Whether or not the Administrative Review Act applies to the Department's exercise of power under Ill. Rev. Stat., ch. 23 § 5005 is unclear, but of no significance since review can only be had from decisions which both "effect the legal rights, duties or privileges of parties and which terminate the proceedings before the administrative agency."\textsuperscript{79} Obviously, placement proceedings can not be terminated by the Department until the child reaches majority or the Department is relieved of guardianship.

\textsuperscript{75} Roberts v. Williams, Civil No. 28829 (5th Cir., Apr. 1, 1971), CCH Pov. L. Rep. 13,017 (1971). Prison farm superintendent was liable for injuries to juvenile inmates from shotgun blast fired by prison farm trustee.

\textsuperscript{76} The value of aggressive guardians \textit{ad litem} in bringing child welfare abuses to the attention of the courts has been clearly demonstrated by the actions on behalf of neglected children raised by New York law guardians appointed under N.Y. Family Court Act, § 243, 249 (McKinney 1966). In re Lloyd, 33 App. Div. 2d 385, 308 N.Y.S.2d 419 (1970); In re P., 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (1970); In re Ilone I., 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Fam. Ct. 1970).

\textsuperscript{77} ILL. REV. STAT., Ch. 37, § 705-708 (1969).

\textsuperscript{78} ILL. REV. STAT., Ch. 110, § 264 et seq. (1969).

\textsuperscript{79} ILL. REV. STAT., Ch. 110, § 264 (1969) (emphasis added).
An effective administrative review would require legislation enabling the Juvenile Court to formally order the Department to change a placement plan when it was satisfied that such plan was inappropriate to the extent of being an abuse of the Department's discretion. Under the present Juvenile Court Act, it is questionable that the court has the power to order the Department to make a new placement without removing the Department as guardian. Further, an army of independent guardians ad litem with legal assistance would be necessary to preserve their independence from the Department. Perhaps this is totally unrealistic in a State which has yet to fully commit itself to providing for its neglected and dependent children. Yet lawyers have been traditionally more successful than social workers in gaining the support of the powers of government. Their interest, as a force in itself, may do more for child welfare than any elaborate plans or theoretical considerations.
