

RETHINKING THE ROAD TO *GAULT*: LIMITING SOCIAL CONTROL IN THE JUVENILE COURT, 1957–1972

*Daniel A. Ross**

INTRODUCTION

FIFTEEN-year-old Gerald Gault and a friend were at Gault's home in Arizona one afternoon in 1964 when they decided to make a lewd phone call to the woman who lived next door. She reported the boys to the police.¹ Gault was taken into custody, but no one informed his parents, who were both at work at the time. The next day, a petition was filed against Gault, stating no facts, but only that the boy was "in need of protection of this Honorable Court." Gault's parents were not shown that document until they filed a habeas petition. No other notice was provided, and the parents were not informed of their right to counsel for their son.² The hearing took place in the judge's chambers. No transcript was made of the proceedings, which seem to have been minimal, and the probation officer who filed the petition served as the only witness against Gault.³ The judge committed the boy to the State Industrial School for the remainder of his minority—a six-year sentence for an act that, if committed by an adult, could be punished by no more than two months in jail or a \$50 fine.⁴

* M.A. expected, J.D., University of Virginia, A.B., Vassar College. I am deeply grateful to Charles W. McCurdy for his advice, encouragement, and friendship throughout this project. I would also like to thank Risa Goluboff for her critical feedback and support, and the other professors and friends who commented on drafts of this paper. Thanks also to Cecilia Brown in the U.Va. Law Library's special collections department, John Schlegel at SUNY Buffalo, the research staff of the Mudd Manuscript Library at Princeton University for their assistance accessing the ACLU archives, and the members of the *Virginia Law Review* for their exceptional assistance. All errors are my own.

¹ "It will suffice for purposes of this opinion to say that the remarks or questions put to her were of the irritatingly offensive, adolescent, sex variety." In re Gault, 387 U.S. 1, 4 (1967).

² Id. at 5.

³ Id. at 7.

⁴ Id. at 7–9.

The facts, procedure, and outcome in the *Gault* case were not unusual. The juvenile court system had been designed to be an informal rehabilitative alternative to the criminal court during the Progressive Era.⁵ According to the federal Children's Bureau, at least half of minors adjudicated as delinquents in the post-war era were adjudicated on "petty charges" including minor sex offenses, carelessness, truancy, ungovernability, running away, and other minor misconduct or "environmental circumstances."⁶ But because the juvenile court in many states was not subject to appellate review and few records of its proceedings were kept, the system went largely unchallenged for decades.

Growing attention to the juvenile court due to the perceived post-war rise in juvenile delinquency⁷ led many observers to conclude that the juvenile court system needed to be changed. In a series of cases decided in the late 1960s and early 1970s, the Supreme Court considered the constitutionality of aspects of the juvenile court's procedural informalities. Reformers' court victories were dramatic: in *In re Gault*, the first of these cases directly concerning the juvenile court, eight justices voted to overhaul the institution.⁸ In this "constitutional domestication of the juvenile court,"⁹ the Supreme Court required that all states provide certain procedural rights to juveniles and their families as a matter of constitutional right. *Gault* guaranteed to juveniles the right to counsel, the right to be given notice of charges, the right to remain silent, and the right to confront witnesses.¹⁰ Three years later, the Court raised the burden of proof from a preponderance of evidence to beyond a reasonable doubt.¹¹

These procedural reforms have captured nearly all of the scholarly attention given to *Gault* and the juvenile court in that era. Two

⁵ Ellen Ryerson, *The Best-Laid Plans: America's Juvenile Court Experiment* 150, 153 (1978).

⁶ I. Richard Perlman, *Delinquency Prevention: The Size of the Problem*, 322 *Annals Am. Acad. Pol. & Soc. Sci.* 1, 5 (1959).

⁷ James Gilbert, *A Cycle of Outrage: America's Reaction to the Juvenile Delinquent in the 1950s*, at 23–25 (1988).

⁸ *Gault*, 387 U.S. at 78.

⁹ Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 *Sup. Ct. Rev.* 233, 233 (1967).

¹⁰ *Gault*, 387 U.S. at 41, 55–56.

¹¹ *In re Winship*, 397 U.S. 358 (1970).

leading scholars, Professors Ellen Ryerson and Barry C. Feld, contribute to the popular belief that procedural formalization by the Supreme Court embodied the full extent of reform in the 1960s.¹² Ryerson's history of the juvenile court, written only a decade after *Gault*, credits the criminal procedure revolution for *Gault*'s holding, and diminishes the debate about juvenile court reform before the decision.¹³ Feld's later study of race and change in the juvenile court in the decades following *Gault* claims—no doubt correctly—that the criminal procedure revolution was spurred on by the Warren Court's hope that granting additional procedural rights would limit the discretion of racist state courts during the civil rights era. Because he focuses on the Supreme Court, however, Feld—like Ryerson—disassociates *Gault* from the juvenile court reform movement. His brief discussion of that movement mistakenly supposes that the rehabilitative ideal had been abandoned before *Gault*, which would have meant that the Court's decision eliminating procedural informalities destroyed the last vestiges of the Progressives' institution.¹⁴

A broader view of reform beyond procedure, and beyond the Supreme Court, reveals a more extensive agenda. Understanding reformers' vision for a more fair and responsive justice system is increasingly important as growing dissatisfaction with the post-*Gault* juvenile justice system has led to renewed calls for reform.¹⁵ Legislative and judicial reforms to procedure, jurisdiction, and disposition in the 1960s were all intended to keep more juveniles out of any court system, to improve rehabilitative outcomes for misbe-

¹² Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 101–04 (1999); Ryerson, *supra* note 5, at 148–51; see, e.g., Christopher P. Manfredi, *The Supreme Court and Juvenile Justice*, at x (1998); Walter I. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* 126 (1999).

¹³ Ryerson, *supra* note 5, at 146–49.

¹⁴ Feld, *supra* note 12, at 80–81.

¹⁵ See, e.g., New York State Juvenile Justice Advisory Group, *Tough on Crime: Promoting Public Safety by Doing What Works: A Report to the Governor and Legislature* 8 (2010), available at <http://criminaljustice.state.ny.us/ofpa/pdfdocs/toughoncrimereport.pdf> (“[W]hat’s really tough on crime is an approach that focuses on rehabilitation, not punishment. Less, not more, incarceration for low and medium risk children works better to reduce reoffending.”); Editorial, *Court Reform for Teenage Offenders*, *N.Y. Times*, Oct. 12, 2011, at A20; Mosi Secret, *Judge Seeks New System for Juveniles*, *N.Y. Times*, Sept. 21, 2011, at A24.

having youth, and to limit the punitive effects of the court for those whose behavior required the court's attention.

The debate about the juvenile court that raged in the 1960s among court personnel and observers was much broader than the merits of certain procedural rules. Concurrent with the adoption of procedural reforms such as those at issue in *Gault*, the juvenile court's jurisdiction was restricted from the extreme breadth it encompassed at its founding in 1899, and judges' discretion in imposing disposition plans was similarly curtailed. These changes should be understood together because they all stemmed from reformers' concerns about the authority of the state to exercise social control over its most vulnerable citizens. By focusing entirely on legal change in the Supreme Court, scholars and practitioners in the last forty years have ignored these substantive legislative accomplishments and reformers' motivations for pursuing them. Failure to consider these changes as integrated components of a unified theory of reform fosters a misunderstanding of the reformers' view of the juvenile justice system that also misrepresents the purpose of the celebrated procedural changes.

Rehabilitation, which was the goal of the juvenile court from its founding, remained the goal of reformers in the 1960s. Progressives, believing children should be spared from the punitive adult criminal courts, envisioned a separate, informal, non-adversarial system in which juvenile court judges would tailor individualized plans to rehabilitate children in trouble. The "rehabilitative consensus" remained so broad in the 1960s that the merits of rehabilitation were not the focus of the debate between the court's reformers and defenders.¹⁶ Reformers lauded the court's original goals but found that the results of the court's broad jurisdiction, procedural informality, and discretion in formulating disposition plans led to extreme punishments for minor criminal offenses and even for non-criminal conduct. *Gault* and its progeny formalized aspects of that system, but reformers expected formalization to im-

¹⁶ Substantial evidence exists in the published writings and unpublished papers of reformers that explicitly affirms their commitment to juvenile rehabilitation during this period. For more discussion of the "rehabilitative consensus," see Ethan G. Sribnick, *Rehabilitating Child Welfare: Children and Public Policy, 1945–1980*, at iii (May 2007) (unpublished Ph.D. dissertation, University of Virginia) (on file with Alderman Library, University of Virginia).

prove rather than undermine the rehabilitative purpose of the juvenile court. The questions that divided the court's champions and its critics—and divided critics among themselves—were first, who needed rehabilitation, and second, how could rehabilitation be achieved most effectively? Reformers, committed to the rehabilitative ideal, feared that the existing system was poorly designed to meet its purpose. They believed that the nearly limitless jurisdiction of the court, the breadth of discretion given to probation officers and judges, the institutions and policies governing rehabilitation, and the socio-cultural disparities between court personnel and the children they supervised allowed for the imposition of strict social control over a large population of non-conforming children without providing successful rehabilitative services to the subset of criminally-minded children who needed them.

The original juvenile court placed stringent social control at its very core. Its creators and champions were mainly the progressive women leaders of the settlement house movement and their male allies. The juvenile court was one example of the new level of “optimism concerning the capacity of people by bureaucratic and rationalistic means to control a nationally integrated collective experience.”¹⁷ The juvenile court provided a perfect opportunity to create that integrated collective experience. These courts were informal, closed to the public, and administered by judges with enormous discretion to formulate individualized programs of rehabilitation for each juvenile brought before them.¹⁸ Julian Mack, a juvenile court judge in Chicago and a guiding light of the juvenile court movement,¹⁹ explained the new court's purpose:

The problem for determination by the [juvenile court] judge is not, [h]as this boy or girl committed a specific wrong, but [w]hat 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.²⁰

This personalized approach required judges to evaluate not simply behavior but also character. The rehabilitative mission was “a de-

¹⁷ Ryerson, *supra* note 5, at 14.

¹⁸ *Id.* at 39–40.

¹⁹ See In Memoriam: Julian W. Mack, 1866–1943, 17 Soc. Serv. Rev. 506, 507 (1943).

²⁰ Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 119–20 (1909).

sire not simply to improve upon the criminal justice system,” Ryerson explained, “but to retrain the child offender and his family in life patterns that were more acceptable to the middle class.”²¹ Even the courtroom design and informal atmosphere were seen as key to achieving the rehabilitative goal. Mack explained that “[t]he ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit.” Rather, to be most effective, the judge should be “[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him”²² Mack’s paternalistic construction of the juvenile court was thought to be a necessary component of the “rehabilitative ideal” during the Progressive Era. The two could be separated, however, and they were by reformers in the mid-twentieth century.

Academics and legal practitioners in the post-war era, responding to the perceived rise in juvenile crime, proposed reforms of the system in place to deal with the growing delinquency problem. Based in part on these new ideas, California and New York adopted revised statutes governing their juvenile courts within a few months of each other in 1961 and 1962, respectively.²³ While the New York statute went further than the California law, they shared similar provisions. Most obviously, and what therefore has received the great majority of scholarly attention, both states introduced procedural formalities to the hearing process. But very much related to those changes were restrictions imposed on the jurisdiction of the juvenile court. The statutes distinguished between children who had committed criminal conduct and those who had committed less serious offenses. The statutes also restricted judges to certain less coercive rehabilitative schemes in the non-criminal cases. Furthermore, fewer types of non-criminal behavior qualified as judicially reviewable under the new law than had under the Progressive-Era institution.

Rehabilitative services were not abandoned with the introduction of procedural and jurisdictional reforms. Rather, those

²¹ Ryerson, *supra* note 5, at 48.

²² Mack, *supra* note 20, at 120.

²³ Cal. Welf. & Inst. Code (1961); N.Y. Family Court Act (McKinney 1962).

changes were intended to better match such services with the children whose behavior was already criminal or best predicted future criminal involvement. The court's new focus, proponents of reform believed, would finally serve children's best interests by providing social services to children whose criminal future was predictable but avoidable, while reducing the state's authority to intervene in the lives of children and families who merely did not meet the narrow social expectations of the middle class.

Understanding juvenile justice reform in the context of relaxing social controls also aligns the reform movement with broader contemporaneous reforms of the criminal law. While these debates raged between defenders of New York's Children's Court and those who sought change, the landscape of the entire criminal law was under review by the American Law Institute ("ALI"). The ALI's Model Penal Code replaced the common law understanding of general and specific intent, in which criminality was interwoven with notions of "wickedness" and concerned "who you are" rather than "what you did," with a tiered structure of culpabilities for specific acts. Strangely, the similarities in substantive reforms and overlap in personnel between juvenile and criminal reform in the 1950s and 1960s have gone unnoticed in literature about *Gault*, yet they indicate the breadth of possibility of reform in the juvenile court during that period. Changing notions of criminal conduct and the proper exercise of social control, decades into their development, reached their peak before the *Gault* decision and influenced reforms in both juvenile and criminal law.

Although calls for reform predate this paper's starting point of 1957 by several decades, that year marks both the publication of an influential article in the national conversation on juvenile court reform and the creation in California of the Governor's Special Study Commission on Juvenile Justice, which recommended the 1961 revision.²⁴ Proceeding chronologically from discussions of the court prior to legislative reform, to reassessments of the reform acts (primarily in New York), to the spread of reform across the country and the constitutional challenges to extend procedural

²⁴ Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 *Minn. L. Rev.* 547 (1957); Governor's Special Study Comm'n on Juvenile Justice, Part I: Recommendations for Changes in California's Juvenile Court Law (1960) [hereinafter *California Report*].

rights to juveniles in the late sixties, this Note will analyze the relationships between the actors involved, their thoughts and observations of the court's work, and how their views changed over time. Part I will discuss the reformers' early ideas and the resistance they encountered from juvenile court personnel preceding the enactment of the reforms in 1961 and 1962. It will also examine similar concerns and solutions to those problems envisioned by the Model Penal Code. Part II will focus on the observations of juvenile justice reformers and opponents after the new legislation took effect, and will show how other early reform states shaped their juvenile court revisions based on the same types of concerns as had emerged in New York and California. Part III will take a national perspective, showing how the Supreme Court adopted reformers' view of juvenile justice in *Gault* and its progeny and how those decisions fit within the reform movement's continued quest for jurisdictional and other changes to limit the juvenile court's exercise of social control.

I. INITIAL CALLS FOR REFORM

New York's Family Court Act of 1962 was the product of compromise. Reformers won their most pressing procedural and jurisdictional reforms, but their opponents successfully blocked more controversial provisions. Both sides were influenced by concerns about the proper extent of social control that the Children's Court could exert over its charges. The hotly contested provisions of the reform agenda included: (1) the manner by which children would enter the juvenile court system; (2) the types of dispositions that would be available to judges; (3) the proper role of counsel in the juvenile court; and (4) the additional procedural rights children and their parents would be accorded. Each of these had the power to redefine the court's enforcement of social control. Most obviously, limiting the types of behaviors that could result in juvenile court proceedings would drastically affect its ability to maintain certain standards of conduct. Similarly, correlating dispositions to bases for appearance in the juvenile court would reduce a judge's power to impose personal moral requirements on children. Many observers thought that the standardization of procedures and provision of counsel to juveniles and their parents could have a liberating effect, empowering families with a trained advocate who could

both create a more favorable factual record for judges and possibly provide alternative dispositional plans.

A. Problems and Solutions in the Juvenile Court

1. Criticisms of the Court

In 1957, Monrad G. Paulsen, a professor at Columbia Law School, published an influential article about reforming the juvenile court.²⁵ Paulsen had established himself as a specialist in criminal law, but starting with this article, he also became a leader in juvenile justice scholarship.²⁶ Like the Progressive founders of the court, Paulsen was concerned about the stigma that could attach to children accused of criminal behavior. For that reason, he opposed public trials and a child's proposed right to a jury, which some reformers advocated. Paulsen thought the cost of subjecting a child to public scrutiny was too high, but he shared advocates' concern that secrecy and informality could be an invitation for abuse. He proposed a compromise that would require a written record of proceedings and allow the child to be present to hear all testimony against him.²⁷ Paulsen argued that other rights, including the right to remain silent, were unnecessary in a juvenile court proceeding because the non-accusative and "protective" environment made such rights unnecessary.²⁸ He expected judges to protect the rights of juveniles to a large degree. This was perfectly consistent with the views of Judge Mack and the court's later defenders, who thought the non-adversarial nature of the court served the child's best interests.

Paulsen's initial views on reform broke with the Mack ideal regarding what should happen after a petition was filed against a juvenile. He and other reformers were concerned that sociological data about a child, or unattributed comments to the court's social worker, factored into the court's adjudication of delinquency.²⁹ Paulsen was skeptical that a formal bifurcation of proceedings be-

²⁵ Paulsen, *supra* note 24.

²⁶ Sanford H. Kadish, In Memoriam, Monrad G. Paulsen, 3 *Cardozo L. Rev.* 7, 9 (1981).

²⁷ Paulsen, *supra* note 24, at 559–61.

²⁸ *Id.* at 561.

²⁹ *Id.* at 565–66.

tween adjudication and disposition, as some endorsed, would meaningfully improve the juvenile court's operation.³⁰ Instead, he believed witnesses must actually be called to testify and be subjected to cross-examination.³¹ While it sounds basic, even this suggestion was a substantial step to limiting judges' discretion because it required judges to listen to balanced, reliable testimony prior to making determinations, rather than deferring to the conclusions of the court's social workers. To further check that judicial discretion, Paulsen strongly advocated for providing all juveniles with counsel. While most lawyers who were present in the juvenile court played an "unhappy role" as "uninformed pettifoggers," he thought that lawyers properly trained in the procedures and purpose of the juvenile court would be very useful in protecting the child's interests.³²

Paulsen retained some of his early views through the 1970s but changed others soon after his article was published. In 1957, Paulsen believed that police should have a broader power to take juveniles into custody than they had to arrest adults. He thought that a police officer only needed "reasonable grounds to believe that the child [was] delinquent"³³ in order to make an arrest. This was consistent with the broadly defined jurisdiction of the original juvenile court and the 1959 Standard Juvenile Court Act ("Standard Act").³⁴ It was also consistent with his early belief that the juvenile court judge should not be constrained by the minor nature of a child's misconduct in prescribing dispositions that would rehabilitate the child.³⁵ But Paulsen quickly became increasingly concerned about that broad judicial power. Speaking at a conference on Justice for the Child two years after his article appeared, Paulsen explained that "some relationship between conduct and disposition ought to be established."³⁶ He also disavowed his earlier

³⁰ Id. at 566.

³¹ Id. at 565-66.

³² Id. at 570.

³³ Id. at 551.

³⁴ Standard Juvenile Court Act § 19 (Nat'l Prob. & Parole Ass'n, 6th ed. 1959).

³⁵ Id. at 558.

³⁶ The conference papers were later collected in a book. Monrad G. Paulsen, *The Delinquency, Neglect, and Dependency Jurisdiction of the Juvenile Court*, in *Justice for the Child: The Juvenile Court in Transition* 44, 56 (Margaret Keeney Rosenheim ed., 1962).

faith in judges' ability to protect children's rights, believing that the unconfined scope of the judges' power was poorly suited to such a task.³⁷

Another panelist at the Justice for the Child conference, Professor Paul W. Tappan, expanded on Paulsen's observations. An associate reporter of the Model Penal Code and a professor of both law and sociology at New York University,³⁸ Tappan used his expertise in both disciplines to indict the practices of the juvenile court. According to Tappan, the jurisdictional statutes governing the juvenile courts in many states were a combination of "moralism and substantive imprecision that vested in the children's courts broad administrative discretion to define delinquency as they chose." This allowed the courts to treat not only delinquents but also "individuals who were imagined to be potential offenders."³⁹ Tappan thought the juvenile court had wandered too far from its legal role, replacing "juridical" processes with the administrative functions of a social service agency. He thought courts and welfare agencies should cooperate but remain independent institutions.⁴⁰

Tappan criticized the court's domination by psychologists, social workers, and probation officers, which he thought had two negative effects. First, it seemed to him that these professional helpers were "determined to exercise their benignity at any cost to the community or to the individuals who come before them."⁴¹ So taken with their own power to "save" the child from her downward spiral, these caseworkers substituted their values for the interests of both the individual child and her community.⁴² Second, as

³⁷ Id. at 53.

³⁸ Arthur H. Sherry, In Memoriam, Paul Wilbur Tappan, 52 Calif. L. Rev. 457, 457 (1964).

³⁹ Paul W. Tappan, Juridical and Administrative Approaches to Children with Problems, *in* Justice for the Child, supra note 36, at 144, 153.

⁴⁰ Id. at 153-54, 158.

⁴¹ Id. at 151.

⁴² Counselors' recommendations for rehabilitation were, from the founding of the juvenile court, tied up in racist theories of black criminality skeptical of the capacity for rehabilitation. Whereas white immigrant children were expected to need help adjusting to urban life, black children were considered pathologically criminal. Much has been written about the theories of black pathology in the 1960s, but the foundation for these ideas in the juvenile court began at the court's founding. See Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* 122-28, 230-31 (2010).

Paulsen and others had also noted, the social and psychological data these caseworkers championed became the foundation of judges' initial delinquency rulings. Tappan argued that when such data, rather than legal proof, is relied on, juvenile courts "inevitably . . . extend their powers of coercive control beyond a proper scope" ⁴³ The experts' non-legal evidence was permitted because procedural rights, such as confrontation of witnesses and prohibitions against hearsay, were not followed. Proponents of the system argued that such procedural safeguards could be avoided because children were being helped and not punished. Tappan disagreed, arguing that juveniles "paid dearly" for that distinction with "incarceration or supervision disproportionate to the seriousness of [their] misconduct." ⁴⁴

Tappan's recommendations largely agreed with Paulsen's, but he more completely explained the relationship these procedural rights had to the jurisdictional concerns both men shared. "Exercise of legal authority," he argued, "should be predicated upon a scrupulous determination that the child has engaged in delinquent conduct of a character seriously threatening to the community" ⁴⁵ Tappan thought the juvenile court was regulating too much non-criminal, or "predelinquent," conduct. Such conduct fell within the Standard Act's jurisdictional scope and accounted for more than half of juvenile adjudications nationwide. ⁴⁶ He thought that any necessary rehabilitative services for such cases ought to be handled by social service agencies without the interference of courts. ⁴⁷

While exercising unnecessary social control over these petty offenders and non-conformists, the juvenile court also seemed to discount the seriousness of some minors' conduct. Tappan, who authored the Model Penal Code's juvenile sentencing provisions, advocated for firmer authority to be exercised over older, more serious offenders as the only method to maintain "legal and social control over them." ⁴⁸ The role of the juvenile court was to rehabilitate children in the middle—those whose conduct was serious

⁴³ Tappan, *supra* note 39, at 158.

⁴⁴ *Id.* at 158–59.

⁴⁵ *Id.* at 167.

⁴⁶ *Id.* at 156–57.

⁴⁷ *Id.* at 168.

⁴⁸ *Id.* at 148–49.

enough to warrant concern but who also showed a reasonable hope for rehabilitation.

Tappan's views were within the mainstream of juvenile court observers. Sol Rubin, the longtime counsel to the National Probation & Parole Association, had advocated removing predelinquency jurisdiction from the juvenile court for many years. He thought the broad jurisdiction of the court over minor behavior was contrary to the original idea of the court:

When the definition of delinquency includes a variety of conditions and behavior that are not violations of law, [the juvenile court] does not serve to remove children from the criminal court to the juvenile court, but rather to bring children into juvenile court who would not be answerable in the criminal court, or any court, for their behavior.⁴⁹

While Rubin remained counsel to the National Probation and Parole Association during this period, his views were inconsistent with the organization's, which continued to approve of the court's broad jurisdiction in its 1959 Standard Act. While it fell short of his vision, Rubin praised the 1959 Act for making some progress toward narrowing jurisdiction. Under the Standard Act, for example, neglected children were not able to be committed to a training school, as other predelinquents and law violators were.⁵⁰ Juvenile courts, Rubin believed, should concern themselves with cases "in which help is really needed," not simply those "representing growing pains of children and families."⁵¹ Rubin thought that only those juveniles who were truly neglected by their parents or in violation of criminal laws ought to appear before juvenile courts. The other cases, he suggested, should be dealt with by social services beyond the authority of the juvenile court.⁵²

Tappan and Rubin's advocacy of increased social services for predelinquents instead of disposition orders that removed children from their families was in part a reaction against the coercive insti-

⁴⁹ Sol Rubin, *Legal Definition of Offenses by Children and Youths*, 1960 U. Ill. L.F. 512, 512-13.

⁵⁰ Training schools, or industrial schools in some states, were the most restrictive correctional institutions for juveniles. *Id.* at 513.

⁵¹ *Id.* at 516.

⁵² *Id.* at 515.

tutions to which juvenile courts sentenced children. Those institutions usually exercised strict control over juveniles without achieving the rehabilitative purpose of the court's intervention. In their landmark study of juvenile delinquency, sociologists Stanton Wheeler and Leonard S. Cottrell, Jr., explained that while institutions for juveniles usually had more treatment programs than adult facilities did, "the basic fact of coercive confinement remains, and the actual treatment resources available are often far below any reasonable minimum to qualify as meeting the needs of the juvenile court philosophy."⁵³ Reformers, probation officers, and judges all believed in the same rehabilitative mission of the juvenile court, but reformers believed procedural and jurisdictional changes would better align actual outcomes with that goal. Wheeler and Cottrell continued,

If it is necessary to take official actions, efforts should first be made to leave the offenders in the community. The burden of proof, any time official intervention occurs, must be on the side of those who feel that the intervention is clearly necessary for the safety of the community and the welfare of the juvenile.⁵⁴

They placed the burden against control for two reasons. First, echoing many in the reform community, the authors were skeptical that coercive programs, whether treatment programs or the industrial schools, were effective rehabilitative methods. Second, they feared that the professionalization in "the field of delinquency prevention and control services" would bolster practitioners' confidence and "lead toward a broader category of persons being defined as 'in need of service' than in the past."⁵⁵ In essence, Wheeler and Cottrell argued that corrections officers and counselors believed their professional methodology was so effective that they could "fix" all juvenile misbehavior, which would lead them to advocate for broader rather than narrower control over predelinquents.

A group of professors in social work and sociology at the University of Michigan and the University of Chicago found a discon-

⁵³ Stanton Wheeler & Leonard S. Cottrell, Jr. with the assistance of Anne Romasco, *Juvenile Delinquency: Its Prevention and Control* 32 (1966).

⁵⁴ *Id.* at 25.

⁵⁵ *Id.* at 25–26.

nect between these professionals' theoretical commitments and real-world beliefs. Even in the most coercive institution they studied, two-thirds of surveyed employees believed in the potential for rehabilitation, and in the less coercive settings even greater numbers embraced rehabilitation.⁵⁶ Tellingly, however, when asked about the likelihood that boys in their specific facilities would "change for the better," workers were less optimistic. "[D]espite the rehabilitative content of obedience/conformity goals" at the more traditional facilities, the authors found that such facilities "may rather easily slip into pure custodial goals in the sense that the inmates are simply being 'kept,' with little prospect for change."⁵⁷

The crucial difference between the skepticism of corrections personnel and reformers was that reformers blamed ineffective institutional structures for the failure of rehabilitation, whereas corrections personnel blamed the children. The same report on treatment facilities noted that corrections personnel regarded their charges as "intellectually dull, unteachable, or imbued with a delinquent way of life."⁵⁸ In contrast, a reform-oriented group, Mobilization for Youth, diagnosed the cause of delinquency as relating to a dearth of opportunities for inner-city youth, not their inability to improve themselves. It advocated social and psychological services, as well as job training and increased employment opportunities, which would make "conformity" with social norms more viable.⁵⁹

In a later sociological study of delinquency, UCLA sociologist Robert Emerson warned that the juvenile court was being used as a "dumping ground" for non-delinquent children whom the Child Welfare Department and other agencies had found difficult to place in non-institutionalized settings.⁶⁰ Emerson suggested judges were more sympathetic to these children than other reformers had believed, but that their choices were constrained by the profession-

⁵⁶ David Street, Robert D. Vinter & Charles Perrow, *Organization for Treatment: A Comparative Study of Institutions for Delinquents* 147 (1966).

⁵⁷ *Id.* at 146-148.

⁵⁸ *Id.* at 148.

⁵⁹ Mobilization for Youth, Inc., *A Proposal for the Prevention and Control of Delinquency by Expanding Opportunities* 44-46 (2d ed. 1962).

⁶⁰ Robert M. Emerson, *Judging Delinquents: Context and Process in Juvenile Court* 71 (1969).

alization of child services and institutional relationships between the court and the child welfare department:

In surrendering initiative and control over the placement process, the court loses the ability to press energetically for the placement of delinquent clients on whom it is willing to take a chance.

Hence in order to pursue its goal of treating delinquents the juvenile court enters into a system of exchanges on conditions which require a partial abandonment of this goal. Or to state the paradox in another way, the juvenile court, originally founded to prevent and treat delinquency, finds it increasingly difficult to pursue this task because of the limited commitment of associated agencies to "prevention" and "treatment."⁶¹

Each of these critics viewed the situation slightly differently, but none trusted juvenile court judges to exercise judgment on disposition independent from the recommendations of parole officers or representatives of either child welfare or corrections departments.

Of all the reforms advocated, none was considered more important than the right to counsel, because it was a right that could protect other rights. Judge Paul W. Alexander, a one-time president of the National Conference of Juvenile Court Judges, described a good lawyer as "an unqualified blessing" to both children and parents, who would "assist [the] court as well as [the] client in helping devise and carry out the best plan for the child's future."⁶² This cause was bolstered in 1961, when Charles Schinitzky, a senior attorney at the Legal Aid Society, spearheaded a project for the Bar Association of the City of New York to evaluate the usefulness of counsel in the City's Children's Court. Observing more than one thousand juvenile adjudications in 1961, and personally representing more than one hundred respondents, Schinitzky concluded that counsel for juveniles would protect their rights, raise evidentiary standards, assist in the elicitation of facts, avoid unnecessary insti-

⁶¹ Id. at 70-71.

⁶² Paul W. Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A. J. 1206, 1209 (1960).

tutionalizations, and even promote strong relationships between children and the probation department.⁶³

In 1959, the National Probation and Parole Association published a revised version of the Standard Act, which had been revised several times since it was first released in 1926. The 1959 Standard Act adopted some of the reforms critics endorsed. For example, it required that a stenographic or audio recording be kept of all proceedings. Perhaps most importantly, it required that a judge inform parents (and children when appropriate) of their right to counsel, and made provision for counsel to be appointed to indigent parties.⁶⁴ Another reform—removing the terms “delinquent” and “neglected” from the court’s jurisdictional statement—which drafters of the Standard Act had adopted in the 1940s—had made it into the juvenile court statutes in one-third of the states by 1959. The concern was that “in dealing with the child as an individual, classifying or labeling him is always unnecessary, sometimes impracticable, and often harmful.”⁶⁵ Even the 1959 Standard Act drafters who still found the “delinquent” and “neglect[ed]” terms useful were uncomfortable using them to describe “predelinquent” minors.⁶⁶ As these elements indicate, the 1959 Standard Act was a model, rather than a reflection, of the juvenile court as it existed. The provisions for counsel and a record of proceedings also demonstrate that there was broad support for some planks of the reformers’ agenda.

2. *Defenses of the Status Quo*

Despite reformers’ growing concerns about the juvenile court and the Standard Act’s embrace of certain modernizations, the informality and broad judicial discretion Judge Mack envisioned as the cornerstones of the juvenile court’s rehabilitative mission were still lauded in some circles in the late 1950s and early 1960s. Juvenile courts around the country were slow to respond to reformers’ demands, and even the Standard Act’s drafters disagreed with reformers’ positions on many issues. The juvenile court under the

⁶³ Charles Schinitsky, *The Role of the Lawyer in Children’s Court*, 17 *Rec. of N.Y. City B. Ass’n* 10, 22–25 (1962).

⁶⁴ *Standard Juvenile Court Act* § 19 (Nat’l Prob. & Parole Ass’n, 6th ed. 1959).

⁶⁵ *Id.* § 8 cmt. at 25.

⁶⁶ *See id.*

Standard Act retained broad jurisdiction over any child “whose environment is injurious to his welfare, or whose behavior is injurious to his own or others’ welfare.”⁶⁷ In terms of procedure, the Standard Act included no requirement—and not even a suggestion—that families be given notice of the charges against the juvenile. Once in the hearing, judges were given statutory authorization to exclude children from proceedings whenever they thought it was appropriate, denying the reformers’ call for confrontation of witnesses.⁶⁸

In response to criticism that the juvenile court’s broad power sometimes led to abuses, the Association, in an effort to address these shortcomings, published a series of training guides for judges. In 1962, the organization, which had changed its name to the National Council on Crime and Delinquency (NCCD),⁶⁹ published a handbook titled *Procedure and Evidence in the Juvenile Court* that explicitly rejected critics’ harsh evaluations of the court. The NCCD explained that “[t]his book is an attempt to place the legal responsibilities of a juvenile court judge in their proper perspective. It is not a plea to formalize the court”⁷⁰ It went on to note that the court had withstood recent legal challenges “extraordinarily well.”⁷¹

Even in jurisdictions where reforms had begun, judges could frustrate their purpose. Due to an appellate court decision and a local rule of practice, juvenile judges in New York City were supposed to inform children and families of their rights to counsel and to call witnesses even before adoption of the Family Court Act.⁷² Revealing a discrepancy between formal rules and practice, Edward V. Sparer, a researcher for Paulsen who observed proceedings in New York’s Children’s Court in 1961, noted that this was

⁶⁷ Id. § 8(2)(b).

⁶⁸ Id. § 19.

⁶⁹ Rubin, *supra* note 49, at 513 n.3.

⁷⁰ Advisory Council of Judges, National Council on Crime and Delinquency, *Procedure and Evidence in the Juvenile Court: A Guidebook for Judges* 3 (1962).

⁷¹ Id.

⁷² Edward V. Sparer, II—Variations in Advice Concerning the Right to an Adjournment for Counsel or Witnesses, at 2 (on file with Special Collections, University of Virginia Law Library, Papers of Monrad G. Paulsen, Collection Number MSS 85-4 [hereinafter Paulsen Papers], Box 3 Folder 3).

not always done.⁷³ Furthermore, when the rules were followed, it was clear that not all warnings were created equal. “One can advise of the right to counsel and yet by tone and emphasis and general manner convey the notion that this is not a right that one should utilize,” he observed.⁷⁴ Some judges “simply bullied” parents and children who wanted to exercise their rights.⁷⁵

Static procedures were combined with old ideas about substantive matters as well. While reformers worried that the juvenile court exercised unnecessary social control over children, the court’s personnel were worried that reforms would constrain their ability to intervene in children’s reckless behaviors. Several judges in New York expressed concern that the Family Court Act’s changes would render them powerless to treat “singular acts” of fornication, excess drinking, or glue-sniffing.⁷⁶ These judges, and others like them, considered teenage pregnancy to be not simply a social problem, but one requiring judicial intervention and warranting the commitment of adolescent girls to state institutions for a period of months or even years. The limited reach of early reforms demonstrate that the concerns voiced by these judges and others were not simply outdated or fringe views. Rather, they were held by mainstream participants in the juvenile court who were in honest disagreement with reformers.

3. Legislative Changes to the Juvenile Court

Caught between competing visions of the properly designed juvenile court, legislators in California and New York adopted statutes that implemented some, but not all, of the reformers’ suggestions. By mixing social data provided by probation officers with legal evidence of delinquency in an expansive range of cases, juvenile courts in both states had exercised a great deal of coercion

⁷³ Sparer’s report was never published, perhaps, as Sparer’s wife suggested in an interview twenty-five years later, because Paulsen hoped to avoid political fallout from its conclusions. Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973*, at 26 (1993).

⁷⁴ Sparer, *supra* note 72.

⁷⁵ *Id.* at 8.

⁷⁶ Monrad G. Paulsen, Notes on a Lunch with Judges Bernhardt, McClancy, Kaplan, and Ramsgate, at 1–2 (June 13, 1962) (on file with the Paulsen Papers, Box 2 Folder 5).

over juveniles. The California Governor's Commission observed that "juvenile courts do not distinguish between the jurisdictional facts and the social data at the hearing. Consequently, wardship is sometimes decided on issues that evolve from a social investigation even though the jurisdictional facts have not been clearly substantiated."⁷⁷ Judges, in other words, were adjudicating non-delinquent children as delinquent because their character, as revealed through a probation report, diverged too much from mainstream social acceptability even if the children had not actually committed an act warranting court intervention. To prevent this excess of social control, the commission concluded, "a two-stage hearing procedure is essential."⁷⁸ The New York legislature agreed, dividing juvenile proceedings into Part I (adjudication, where facts of the alleged conduct were presented) and Part II (disposition, in which courts were presented with probation reports and other information about the child).⁷⁹ These procedural changes were a direct result of concern about judges' ability to issue disposition orders that were ill-proportioned to a child's behavior.

Other changes further restricted opportunities for judges to exercise social control. New York reformed the court's intake procedures so that, in Rubin's words, "trivial cases"⁸⁰ could be diverted from the juvenile court's authority. Statutes in both New York and California limited the disposition of cases involving non-criminal conduct, as the Standard Act did. The term "delinquent" could only be applied to juveniles who had been found during the adjudication hearing to have participated in criminal conduct.

This change in labels was accompanied by restrictions on dispositions. Before the Family Court Act, an "ungovernable" girl (up to age 21)—frequently one who was sexually promiscuous, associating with older boys, consuming alcohol, and skipping school—would have been brought before either the Children's Court or the Girls' Term, where she would have been adjudicated delinquent or "in need of rehabilitation," respectively, and, in many cases, would have been sent to either the training school or an adult reforma-

⁷⁷ California Report, *supra* note 24, at 28.

⁷⁸ *Id.*

⁷⁹ N.Y. Family Court Act § 746(a) (McKinney 1963) (amended 1976).

⁸⁰ Rubin, *supra* note 49, at 516.

tory.⁸¹ In drafting the Family Court Act, the legislature's Joint Committee on Court Reorganization purposefully drafted the law to end that outcome. Its report stated that the committee did "not believe that girls who have not committed any crime should be sent to [a reformatory]."⁸² The legislature further noted that "[a]ny commitment . . . whether assertively for 'punitive' or 'rehabilitative' purposes—involves a grave interference with personal liberty" and could not be justified for non-delinquents.⁸³ Boys under sixteen and girls under eighteen whose behavior fell within the court's jurisdiction but did not reach the level of delinquency were thus labeled "person[s] in need of supervision" ("PINS") and the Act repealed a judge's ability to send PINS to those institutions.⁸⁴ The predelinquent children who were found to be PINS, therefore, were statutorily protected from the most coercive mechanisms of social control. But neither New York nor California went so far as to remove these predelinquency cases from the court's jurisdiction.

California and New York also embraced the right to counsel. California's statute required that all children be informed of their right to counsel before their adjudication hearing. Although the Governor's Commission recommended that counsel be provided to all indigents who wished to exercise that right,⁸⁵ the statute only required that counsel be provided to indigent children in felony cases.⁸⁶ In New York, the Family Court Act leaned further in favor of the reformers' agenda. All indigent juveniles were given lawyers (called "law guardians") and were informed of their "right to remain silent."⁸⁷

Disagreements between reformers and defenders of the Children's Court were thus not about rehabilitation, but rather about the appropriateness of different methods of limiting the institu-

⁸¹ Second Report of the Joint Legislative Committee on Court Reorganization, *in 2*, 1961 N.Y. Sess. Laws 3428, 3439 (McKinney) [hereinafter Second Report].

⁸² *Id.*

⁸³ *Id.* at 3435.

⁸⁴ Compare N.Y. Family Court Act § 753 (repealed 1983), and *id.* § 758 (repealed 1977) (authorizing the commitment of an adjudicated juvenile delinquent to a state institution), with *id.* § 754 (amended 1976) (omitting this option of commitment for PINS adjudication).

⁸⁵ California Report, *supra* note 24, at 27.

⁸⁶ Cal. Welf. & Inst. Code § 634 (West Supp. 1964) (amended 1967); *id.* § 700 (amended 1967).

⁸⁷ N.Y. Family Court Act § 741 (amended 1975).

tion's social control. Reformers believed in the Progressives' rehabilitative ideal while advocating procedural and jurisdictional changes because they believed that "[t]he rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines."⁸⁸ Many of their most important reforms—the provision of counsel, the redefinition of the court's jurisdiction, the adoption of procedural formalities, the separation of adjudication and disposition hearings, and the limitation on dispositions in PINS cases—were endorsed by New York's legislature in 1962. While judges, probation officers, and the staffs of child welfare institutions were sometimes skeptical, reformers hoped that the reforms embodied in the Family Court Act could close the gap between the court's laudable goals and its actual performance.

B. The Changing Philosophy of Adult Criminal Law

The theory behind the founding of the juvenile court and the concerns of its reformers at mid-century were not unique to the juvenile context. Under a Victorian conception of criminal justice as punishment for evil-doing, "the mental factors necessary for criminality were based upon a mind bent on evil-doing in the sense of moral wrong."⁸⁹ That conception of mens rea ("guilty mind") began to change in the late nineteenth century. "[T]he mental element requisite for criminality," Francis Sayre wrote in 1932, "is coming to mean, not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interests."⁹⁰ This interpretation of criminal law as "a device for management of abnormality in the public interest,"⁹¹ grew in popularity in the early

⁸⁸ Wheeler & Cottrell, *supra* note 53, at 35.

⁸⁹ Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1017 (1932). Students of first-year criminal law will likely remember the case of *Regina v. Faulkner*, 13 Cox C.C. 550 (1877), in which a seaman was convicted of arson after he had lit a match to see the rum he intended to steal but ultimately ignited the rum and burned the ship. The man was convicted of the unintended crime on the theory that his felonious intent to steal rum proved his "wicked, perverse, and incorrigible disposition," satisfying the common law's requisite mens rea for arson. *Id.* at 554.

⁹⁰ Sayre, *supra* note 89, at 1017.

⁹¹ Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 Buff. Crim. L. Rev. 691, 743 (2003). Professor Leonard argues that this public interest purpose of criminal law

twentieth century. Societal forces, rather than an individual's choice to act wickedly, motivated criminal behavior. Judge Mack believed that, with cultivation of a child's personality and social situation, those forces could be reversed and the child could be rehabilitated. Within a few decades, legal scholars and social scientists came to advocate a theory of adult sentencing nearly identical to Judge Mack's juvenile court. "The object of sentencing was . . . therapy. The goal now was reconstruction of the offender's character—what Americans would later call rehabilitation—not through the offender's own acceptance of personal responsibility, but through positive intervention and manipulation of character by the newly scientific, progressive state."⁹² This interest in rehabilitation became a guiding principle of both juvenile justice and adult criminal law. Its influence continued through both the development of the Model Penal Code in the 1950s (culminating in the completed Code's promulgation in 1962) and the revolution in juvenile justice in the 1960s.

The general principle of rehabilitation was not the only bond between juvenile justice reform and adult criminal law reform. Two additional concerns were particularly influential in the thinking of reformers of both systems. First, framers of the Model Penal Code and reformers of the juvenile court both were concerned about the courts' power over certain types of behavior. Second, both were concerned about proportionality of the sentence or disposition to the seriousness of the offense.

Similar concerns led to similar solutions. The Model Penal Code's framers followed the modern understanding that criminality—what determined one's appearance before a criminal court—should be judged by a person's actual state of mind in regard to a particular action. That is, a person could not be subject to the coercive power of the criminal court if he did not have a mens rea sufficient for the particular crime with which he was charged. The

was in fact always dominant, never fully eclipsed by the Victorians' punishment of individuals for making the wrong choice between good and evil conduct. *Id.* at 743–44. New scholarship also reveals that a similar interest in rehabilitating juvenile delinquents was influential in creating more treatment-oriented prisons in the early nineteenth century. Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* 228–29 (2005).

⁹² Leonard, *supra* note 91, at 744.

Model Penal Code's simple requirement that the state prove all elements of a crime, including a specific level of intent for that particular crime, formalized the standard of criminal prosecution and increased the government's burden before a person could be found guilty. Professor Herbert Wechsler, the Chief Reporter of the Model Penal Code, and a colleague of Paulsen's on the Columbia Law School faculty, thought this first phase of a criminal trial—the “guilt phase”—was “an indispensable limitation on state power, subjecting to state coercion only those who had chosen illegal[ity] and thereby abused the predefined scope of freedom guaranteed to them by the liberal state.”⁹³ This reasoning is similar to the California and New York juvenile court laws, which mandated a fact-finding adjudication stage to ensure that the child was found to be delinquent before being subject to the court's coercive dispositional power.

Reformers of juvenile and criminal systems also limited judges' discretion in the sentencing or disposition phase by employing similar means. While both groups of reformers believed in individualized sentences, they wanted to curtail judges' abuse of power that resulted in disparate treatment of similar offenders. In the juvenile context, California and New York imposed limits on the types of institutions to which delinquent and neglected children could be sent, and on the duration of their stay.⁹⁴ The Model Penal Code calibrated particular crimes to sentences of particular ranges in length. Echoing juvenile court reformers' call to reduce incarceration, the commission concluded that “probationary disposition is desirable unless there is a special reason for an institutional commitment.”⁹⁵ It instructed judges to avoid institutionalization unless, “having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant,” the judge believed incarceration was “necessary for the protection of the public.”⁹⁶ Both the juvenile and adult reforms provided the judge with discretion while also limiting the potential for abuse.

⁹³ *Id.* at 815.

⁹⁴ See, e.g. N.Y. Family Court Act § 758(c) (repealed 1977) (limiting a term of commitment of a juvenile to an institution to three years).

⁹⁵ Model Penal Code § 7.01 (Council Draft No. 28, 1961).

⁹⁶ *Id.*

These developments in both the juvenile court reform movement and the American Law Institute's Model Penal Code reflected broader developments in societal understandings of criminality. The juvenile court after *Gault* and its progeny, which reflected procedural formalization and, beginning in the 1970s, a more "tough on crime" attitude, has typically been thought to resemble criminal courts. But examination of the movements to reform the two systems before *Gault* tells a substantially different story. The "criminalization" of the juvenile court after *Gault* was not inevitable. Rather than being abandoned, the rehabilitative ideal was spreading from juvenile courts to adult courts during this period. It was not coincidental that a year after reforming the state's juvenile court, the New York legislature drastically revised its substantive criminal law. With Wechsler's assistance, New York became the first state to reframe its criminal law in a comprehensive and structured code based on (though different from) the Institute's Model Penal Code.

Juvenile court reformers believed that the juvenile court ought to fulfill a special mission, distinct from what had been the criminal court's penal function. They were concerned that the institution was failing in that mission because jurisdictional breadth swamped the court with trivial matters committed by "offenders" who needed no rehabilitation. Procedural informalities compounded the problem, hindering rather than advancing the court's ability to receive and evaluate evidence. Stalwart defenders of the juvenile court system believed jurisdictional breadth and procedural informality were essential to its mission, allowing benevolent judges to intervene whenever children showed signs of deviation from acceptable behavior. After California and New York passed their reform bills in 1961 and 1962, respectively, both the reformers and defenders of the court had an opportunity to reevaluate their beliefs.

II. REEVALUATING REFORM

Rather than ending the debate in 1962, the Family Court Act provided supporters and opponents with new opportunities to observe and reflect upon the law's provisions. Reformers were not content with what they observed, although their concerns varied. Opponents of the Act were also displeased. Their main grievance

was with the law guardians, the lawyers appointed to represent juveniles' interests. Probation officers, in particular, were angry that the law guardians challenged their recommendations for disposition. The phrase "best interests of the child," which had given purpose to the court and its predecessors since 1899, was sharply contested by all parties. Probation officers and some judges considered the phrase to require an exercise of substantial social control, while more liberal reformers understood it to give more respect to individual liberty and the choices of children and families.

A. Lawyers in New York's Family Court

While there was general agreement that lawyers could be valuable additions to the juvenile court process—as evidenced by the right to counsel provision in the Standard Act—there were disagreements among and between probation officers, judges, lawyers, and scholars regarding their role. Because attorneys were completely absent from juvenile courts in most states, but present in every case in New York after the Family Court Act took effect, the Empire State was described as a "controlled experiment" to determine how useful attorneys could be.⁹⁷ Paulsen, assisted by then-recent Columbia Law School alumnus David Bernheim, served in a sense as the experiment's director. The two men observed months' worth of Family Court proceedings, taking notes on everything they saw. This included not only what took place in the courtroom, but also their own personal impressions and questions and those of the law guardians, probation officers, and judges they interviewed. Paulsen and Bernheim's copious notes from 1963 and 1964 have likely not been examined in the last forty-five years, but they provide a window into the operation of the Family Court not available elsewhere.

The state's Family Court judges generally agreed that law guardians were appropriately and successfully protecting their clients' rights in adjudication hearings. By enforcing the rules of evidence, cross-examining witnesses, and explaining the proceedings to the child and his family, law guardians improved the operation

⁹⁷ Nanette Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 *Cornell L.Q.* 499, 512 (1963) (internal quotation marks omitted).

of the juvenile court. Through their advocacy in hearings, they were also able to win judgments favorable to their clients. The lawyers defeated delinquency and PINS petitions that likely would have resulted in dispositions under the former Children's Court. Furthermore, reformed intake procedures prevented many children from ever reaching the adjudication hearing and instead diverted them to social service agencies and government welfare offices for non-judicial assistance. These procedural reforms drastically diminished judges' opportunity to exercise social control over misbehaving youth.

In cases in which children were adjudicated delinquent or in need of supervision, the disposition phase of Family Court proceedings remained controversial. Prior to the Family Court Act, the judge considered the child's alleged conduct, his psychological evaluation, and his social circumstances simultaneously, then ordered a disposition "in the best interests of the child." Probation officers were responsible for the psychological evaluation, the report on social circumstances, and offering a recommendation for disposition. The court's "[u]nofficial treatment" of many cases in this manner had drawn criticism from Paul Tappan, who believed the practice conferred "arbitrary and far-reaching power upon the administrators of probation."⁹⁸

Concerns lingered even after New York separated the adjudication and disposition phases in separate hearings. More than a year after the Act took effect, Charles Schinitsky wanted to "wipe the slate clean" in disposition hearings.⁹⁹ He argued that, because juvenile court judges lacked training in psychology, the probation staff felt little pressure to produce high-quality reports or recommend truly individualized disposition plans. Instead, they relied on a set of standardized disposition plans offered in a booklet produced by the state training school.¹⁰⁰

Probation officers, the staunchest defenders of the Progressive model, thought law guardians had no substantive role in disposition hearings. In oral interviews and written survey responses for

⁹⁸ Tappan, *supra* note 39, at 157.

⁹⁹ Interview by Monrad G. Paulsen with Charles Schinitsky, Chief, Law Guardian Program, Legal Aid Soc'y, in New York, N.Y., at 2 (Nov. 6, 1963) (on file with the Paulsen Papers, Box 2 Folder 5).

¹⁰⁰ *Id.* at 1-2.

Paulsen's study, probation officers were nearly unanimous in their assessment of the law guardians. One officer explained that "we are battling with the Law Guardians for survival."¹⁰¹ Such attitudes were widespread throughout the ranks of the probation department in the city. Because of the broad power they enjoyed before law guardians appeared in the Family Court, probation officers felt personally attacked. Many of them had been in law enforcement for years—even decades—and considered themselves to be professionals trained to determine the child's best interests.¹⁰² William Bailin, who led the juvenile probation department in Brooklyn, told Paulsen that while law guardians should protect children's legal rights in disposition hearings, the attorneys had pushed too far. The law guardians did not seem to care about the best interests of the children. Probation officers had the training, he said, and they should be allowed to work.¹⁰³ The head of juvenile probation in Manhattan agreed. In her view, law guardians had a right to be present for the disposition proceedings, but their role was to protect legal rights regarding procedure; probation officers were there to protect the minors' "social rights" regarding supervision or institutionalization.¹⁰⁴

Still, opinion was not unanimous. Hubert Benjamin, a self-described lone dissenter in the probation officer ranks, confessed that he thought law guardians were "necessary" in both adjudicatory and dispositional hearings. While the law guardians' recommendations were "unrealistic" at times, Benjamin said that in some

¹⁰¹ Interview by Monrad G. Paulsen with Ernestine Welch, New York City Probation Officer, in New York, N.Y., at 1 (Oct. 8, 1963) (on file with the Paulsen Papers, Box 2 Folder 5).

¹⁰² David Bernheim, Observations on a Meeting of the Bar of the City of New York, at 3 (Mar. 14, 1964) (on file with the Paulsen Papers, Box 2 Folder 2) (discussing views of probation officer Ms. Brennan). Additional probation officers' opinions are recorded in the Paulsen Papers, Box 2 Folders 2 & 5.

¹⁰³ Interview by Monrad G. Paulsen with William Bailin, Brooklyn Chief of Juvenile Probation, in New York, N.Y., at 2-3 (Nov. 7, 1963) (on file with the Paulsen Papers, Box 2 Folder 5).

¹⁰⁴ Interview by Monrad G. Paulsen with Mrs. Anthony, Manhattan Chief of Juvenile Probation, New York, N.Y. (Nov. 4, 1963) (on file with the Paulsen Papers, Box 2 Folder 5).

cases their work led to a better result than the probation officer had recommended.¹⁰⁵

While some judges agreed with the vast majority of probation officers, others were more supportive of the law guardians. Echoing probation officers, Judge Philip Thurston believed the law guardians' role was limited to representing the client's interests on legal matters. Thurston argued that law guardians were not social workers and thus should not challenge probation-report findings by "unduly" cross-examining the officers.¹⁰⁶ Similarly, Judge George A. Timone of Manhattan admitted that he had originally opposed law guardians' participation in disposition hearings but by late 1963 had changed his mind after some experience under the new law.¹⁰⁷ He and Judge Emmet Schnep of Rochester thought the law guardians provided valuable services, not only protecting their clients' legal rights, but also offering alternative disposition plans.¹⁰⁸ Judge Timone estimated that law guardians said nothing about disposition in roughly two-thirds of cases, but in half of the cases in which they did offer an alternative disposition, he accepted it.¹⁰⁹ Probation officers were entitled to respect, Judge Timone told a meeting of the New York City Bar, but their reports were not "pronouncements from Olympus."¹¹⁰ In general, these judges thought the law guardians were helpful in making sure children were treated fairly—to ensure, for example, that a child on a PINS petition truly was "in need of supervision"—but were less interested in the lawyers challenging judges' discretion.¹¹¹

¹⁰⁵ Interview by Monrad G. Paulsen with Hubert Benjamin, Bronx Probation Officer, in New York, N.Y. (Oct. 31, 1963) (on file with the Paulsen Papers, Box 2 Folder 5).

¹⁰⁶ Bernheim, *supra* note 102, at 4.

¹⁰⁷ Interview by Monrad G. Paulsen with George A. Timone, New York City Family Court Judge, in New York, N.Y. (Nov. 4, 1963) (on file with the Paulsen Papers, Box 2 Folder 5).

¹⁰⁸ Interview by David Bernheim with Emmet Schnep, Buffalo Family Court Judge, in Rochester, N.Y. (Feb. 20, 1964) (on file with the Paulsen Papers, Box 2 Folder 2); David Bernheim, *Observations from the New York Family Court 17* (Jan. 16, 1964) (on file with the Paulsen Papers, Box 2 Folder 2) [hereinafter Bernheim Jan. 16 Observations].

¹⁰⁹ Bernheim, *supra* note 102, at 5.

¹¹⁰ *Id.* at 4.

¹¹¹ If Judge Timone's numbers can be trusted, the law guardians only changed his mind in roughly sixteen percent of cases.

Judge Justine Wise Polier, who by most accounts was the ideal juvenile judge, had the most developed views about law guardians' roles. Judge Polier—regarded as knowledgeable, dedicated, and empathetic—had earned her place at the forefront of the juvenile court reform movement twenty years before the Family Court Act was adopted.¹¹² She was deeply involved in many professional organizations, including sitting on the national council that wrote the revisions to the 1959 Standard Act.¹¹³ She favored lawyers in juvenile courts then, and continued to do so after the law guardians began their work in 1962. In her own study of the Family Court, Judge Polier reported that the law guardians had “proven to be of great value” in the initial adjudication stage of juvenile proceedings.¹¹⁴ Yet she believed such a level of success had not been reached in the disposition phase. Judge Polier thought the law guardians should provide their own dispositional plans to the court, based on independent analysis from social workers and other consultants on their staff, rather than by cross-examining probation officers.¹¹⁵

While law guardians seemed to have great respect for Judge Polier, they disagreed with her vision of their role in dispositions. Edward V. Sparer, an ally of the Legal Aid Society, rejected the idea that law guardians should serve as a shadow probation department. He told a meeting of the Bar of the City of New York that the law guardians should serve an “intelligent layman’s function of probing” the probation officer and his report to ensure that the best interests of the child were advanced.¹¹⁶ Charles Schinitzky agreed. He dismissed probation officers’ claims that the law guardians made the court adversarial, arguing that it was the probation officers who, faced with the mildest of cross-examinations, typically reacted antagonistically.¹¹⁷ He thought that by disputing the probation reports, law guardians provided the judge with a fuller picture

¹¹² Six years after joining the Family Court bench, Judge Polier published her first of several books about the juvenile court. Justine Wise Polier, *Everyone’s Children, Nobody’s Child: A Judge Looks at Underprivileged Children in the United States* (1941).

¹¹³ Standard Juvenile Court Act, *supra* note 64, at 5.

¹¹⁴ Justine Wise Polier, *A View From the Bench: The Juvenile Court* 67 (1964).

¹¹⁵ *Id.*

¹¹⁶ Bernheim, *supra* note 102, at 7.

¹¹⁷ *Id.* at 5.

of the overall situation. Although he did not think Judge Polier's idea of a second probation staff was necessary, Schinitsky did think law guardians should offer alternative disposition plans in the best interests of the child.¹¹⁸

Those interests usually involved sending the child home to his parents, according to lawyers on Schinitsky's staff. Rena K. Uviller was one of those lawyers. Uviller graduated from Barnard College in 1959 and Columbia Law School three years later.¹¹⁹ As a law guardian for the Legal Aid Society, she was a frequent subject of Paulsen and Bernheim's observations. Uviller admitted that the law guardian's role in dispositional hearings was less clear than in adjudication proceedings, but explained that her goal was to represent the wishes of the child and his parents.¹²⁰ The law guardians saw themselves as making an unfair system more just. Some judges and most probation officers claimed that the lawyers did not understand the "social purpose" of the court, but law guardians responded that they could not take the social purpose of rehabilitation seriously because the institutions to which their clients were sent were simply not rehabilitative.¹²¹ Their experience in the juvenile court had undermined the idea that disposition orders were individualized. Law guardians described the Family Court as "social" in its lack of procedure but "penal" in its sentencing.¹²² Even when Uviller believed that the child could benefit from some state services, she was comfortable with her role as spokesperson for the child, as any private attorney would advocate for her client.¹²³ As long as the court failed its rehabilitative purpose, Uviller's goal was

¹¹⁸ Id. at 2.

¹¹⁹ After graduating from Columbia, Rena Uviller, née Katz, became a model of the 1960s "poverty lawyer." Demographically, Uviller fit the profile for these public-interest-minded lawyers: young, well-educated, and disproportionately Jewish and female. See Joel F. Handler, Ellen Jane Hollingsworth & Howard S. Erlanger, *Lawyers and the Pursuit of Legal Rights* 136–45 (1978). Paulsen described her as having "a great social interest" and being "especially interested in Civil Rights." She told Paulsen that she considered the law guardian work as a "way to serve that end, if in an indirect manner." Interview by Monrad G. Paulsen with Rene [sic] Katz, Law Guardian, Legal Aid Soc'y, in New York, N.Y. (Oct. 28, 1963) (on file with the Paulsen Papers, Box 2 Folder 5).

¹²⁰ Paulsen, *supra* note 119.

¹²¹ Bernheim Jan. 16 Observations, *supra* note 108, at 15.

¹²² Bernheim Jan. 16 Observations, *supra* note 108, at 3.

¹²³ Paulsen, *supra* note 119.

to curtail the exercise of control over children whose condition would not be improved by court intervention.

This stance, equating the child's best interest with the most liberating disposition plan, was enormously controversial in the juvenile court. Probation officers accused Uviller of doing something she knew was wrong.¹²⁴ Judge Polier and the NCCD shared this paternalistic view that court supervision or institutionalization was in children's best interests. Believing in the rehabilitative capacity of the juvenile court and corrections facilities, they thought law guardians should use their independent judgment to determine which placement was in the child's best interests, rather than simply trying to win minimal intervention.¹²⁵

The tension between competing definitions of the child's best interest also arose in the context of the right to remain silent. The NCCD opposed the right, as Paulsen originally had, because it served as a barrier to ascertaining the complete story, which would inform the judge's disposition order.¹²⁶ Law guardians, however, generally believed the child should avoid saying anything that a judge might use to order an institutional disposition that the law guardian believed would hurt, rather than help, the child's development. Debate about a child's Fifth Amendment rights continued without resolution during this period.

Whether law guardians or other provisions of the Family Court Act should be credited, the difference in outcomes of court proceedings between the Children's and Family Courts were more dramatic than Judge Timone and his colleagues seemed to realize. In 1963 alone, the Family Court's intake procedures resulted in 4500 fewer cases being heard by judges in adjudication hearings.¹²⁷ Of the cases that were adjudicated, a greater percentage of those were dismissed than had been in the old Children's Court. Finally, law guardians won more lenient punishments for their clients than had been given to juveniles in the Children's Court. Enrollment at New York's Youth House dropped significantly in the first year af-

¹²⁴ *Id.*

¹²⁵ Polier, *supra* note 114, at 56–57.

¹²⁶ Advisory Council of Judges, National Council on Crime and Delinquency, *supra* note 70, at 42.

¹²⁷ Monrad G. Paulsen, Notes on a Meeting of the Citizens Committee for the Family Court, at 1 (Dec. 12, 1963) (on file with the Paulsen Papers, Box 2 Folder 5).

ter the Act. Between November of 1962 and November of 1963, the number of boys in the Youth House fell from 326 to 289 and the number of girls committed to the home dropped from 193 to 150.¹²⁸

The decrease in commitments to the training school was even more dramatic. Between September 1 and December 6 of 1961, the training school housed 387 juveniles and 165 were waiting to be transferred in. At the same time in 1962—the first few months of operations under the Family Court Act—only 207 juveniles were in the training school and fewer than 30 were awaiting transfer. A year later, 247 juveniles were committed to the facility and only 20 were awaiting transfer.¹²⁹ While these numbers do not reflect all residential facilities for delinquents, they indicate the substantial effect the Family Court Act had. These statistics, showing a precipitous decline in institutional commitments, demonstrate that the procedural formality of counsel was an effective limit on the extent of the court's social control.

B. Judges in Juvenile Courts

Despite their significant impact on the court, law guardians were not perfect substitutes for statutory revision of its jurisdiction or broad discretion. Nanette Dembitz, who worked with the NCCD and the New York Civil Liberties Union, explained:

It is the broad discretion in both phases of the proceeding—both in adjudicating whether the child is within the court's jurisdiction as well as in his disposition—which gives the judge an extraordinary and troubling degree of power over children who are before the court though they have not broken any law.¹³⁰

To add empirical legitimacy to this claim, Louis H. Swartz, a researcher at Columbia who had assisted in preparing sentencing and corrections provisions of the Model Penal Code, worked with Paulsen and Sparer to analyze data from the Children's Court docket.¹³¹ Reviewing more than 13,000 cases tried before twenty-

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Dembitz, *supra* note 97, at 508.

¹³¹ Curriculum Vitae of Louis H. Swartz (2005) (on file with author).

one judge in the five boroughs in 1961, Swartz found that judges' dismissal rates for cases fluctuated widely. In 1964 he concluded that "one of the most powerful factors in explaining adjudication as delinquent, as opposed to dismissal, is the particular judge before whom the case comes."¹³²

Perhaps more concerning, the problem of disparate treatment was not simply between more liberal and more conservative judges. Even among judges with high dismissal rates, the facts of the cases provided no guide for which cases would be dismissed and which would result in a delinquency finding. Instead, "considerable interviewing of judges and probation officers, and a large amount of courtroom observation failed to reveal widely-shared explicit rules, guidelines, or criteria that the judges had developed among themselves with respect to the judgment of delinquency or judgment of dismissal."¹³³ Such arbitrary results ran counter to the idea of justice. Swartz concluded that "even the very best judges operating with the very best auxiliary personnel need as a necessary and essential tool for their work an adequate system of norms to guide and aid them."¹³⁴

Sparer, in particular, was disturbed by the arbitrariness of judges' decisions in the adjudication phase. Few, if any, observers disagreed that adjudication as "delinquent" carried stigma despite the court's stigma-avoiding founding philosophy. A record of delinquency dimmed employment prospects, closed doors to military service and welfare benefits, and could result in harsher punishments if the child were later convicted in a criminal court.¹³⁵ While

¹³² Louis H. Swartz, Overview of the Draft Report (Oct. 12, 1964) (on file with the Paulsen Papers, Box 4 Folder 9). The "docket study" was a tool borrowed from the legal realists in the early twentieth century to determine best practices in substantive and procedural law. See John Henry Schlegel, *American Legal Realism and Empirical Social Science* 76–77 (1995).

¹³³ Louis H. Swartz, Draft Report Part II, Ch. 5 (Oct. 12, 1964) (on file with the Paulsen Papers, Box 4 Folder 9).

¹³⁴ Swartz, *supra* note 132.

¹³⁵ Sparer, *supra* note 72, at 23. After Sparer's research assignment was concluded, Paulsen chose him to be the legal director for Mobilization for Youth, a non-profit agency that worked through social services and legal aid to promote employment opportunities for New York's young people of color. As discussed in Subsection I.A.1, *supra*, Mobilization for Youth had proposed increasing opportunities for juveniles in the inner city as an alternative to allegedly rehabilitative institutionalization. As its legal director in the mid-1960s, Sparer drew attention to the difficulties children faced

criminal records were known to impose great burdens on adults, juvenile records were supposed to be confidential, allowing children to rebuild their lives in conformity with social expectations, including holding a job. In practice, neither court nor police records about juveniles were confidential and their effects were both severe and long lasting.¹³⁶ Therefore, one consequence of retaining predelinquency jurisdiction was that even children who had not committed a crime would be subject to some of the same stigma and employment consequences as adults who had.¹³⁷ Furthermore, that stigma would attach to a child who was arrested but ultimately adjudicated as not a PINS. In this regard, reformers believed the best interests of the child were advanced by limited jurisdictional scope.

While the new law's restrictions on judicial discretion were intended, in part, to limit the consequences Sparer described, Family Court judges frustrated that intent. They had lobbied against the restrictions on the disposition of PINS cases when the legislature considered the Act, and, like probation officers, found it difficult to adjust to the new rules after the Act took effect. The concerns sociologists raised about juvenile institutions and the zeal of probation officers and counselors continued after the reform bill because judges continued to remove non-delinquent children from their family environments and place them in more coercive institutional settings, with little regard for their diminished statutory authority.

In fact, the judges began to eviscerate the limitations through statutory interpretation soon after the Act took effect. Early in October of 1962, over the objection of the Department of Social Welfare, Judge Timone in *In re Doe* interpreted the statute to allow "placement" (as opposed to "commitment") of a PINS in a training school for up to eighteen months with the possibility of annual renewals.¹³⁸ The respondent girl in that case was, according to the

from arrest even without an unfavorable adjudication. Arrest records were being used—sometimes illegally—as a bar to employment and services even if the arrest resulted in a dismissal of a juvenile petition or a not-guilty finding in a criminal court. Edward V. Sparer, *Employability and the Juvenile "Arrest" Record* 4 (1965) (training material prepared for the New York University, Graduate School of Social Work, Center for the Study of Unemployed Youth).

¹³⁶ Sparer, *Employability and the Juvenile "Arrest" Record*, supra note 135, at 8–9.

¹³⁷ *Id.*

¹³⁸ *In re Doe*, 232 N.Y.S.2d 715, 718 (N.Y. Fam. Ct. 1962).

opinion, a sexually promiscuous truant who drank alcohol, associated with older boys, and repeatedly “absconded” from home.¹³⁹ Judge Timone cited a figure that eighty to ninety percent of girls in the training school had not committed an offense qualifying them as delinquents under the 1962 Act, and noted that annexes were being built to the training school to accommodate more juvenile girls.¹⁴⁰ He concluded that “[i]t is unreasonable to suppose that the legislature and the Governor now intend to close or depopulate these facilities by screening out 80 to 90 percent of the children now served, and give the court no alternative but to abandon these children in the open community.”¹⁴¹

Judge Timone’s decision seemed to have little if anything to do with rehabilitating the minor girl, but it was strong advocacy for the court’s exercise of control over non-criminal youth. Rehabilitation by court order requires some amount of social control, and what constitutes an appropriate amount may turn on an individual’s personal views. But cases like *In re Doe* clarify the distinction between reformers and proponents of the status quo. Doe may not have been a model adolescent, but her behavior was not delinquent under the Family Court Act, which was passed with the express desire of the legislature to give more respect to children’s personal liberty. At least some judges agreed with reformers that more rehabilitative options ought to have been created to provide services to PINS. Yet, when offered a choice between more or less coercive dispositions than might have been ideal in their mind, judges preferred the more coercive routes. The child in *Doe* was not released to probation to track her behavior. Rather, Judge Timone used imaginative statutory interpretation to place her in the state’s industrial school.

Under pressure from judges and probation officers, the legislature passed an amendment in 1963 allowing judges to place PINS in training schools temporarily as Timone had done.¹⁴² The 1963 amendment resolved the issue in favor of judges’ discretion, but

¹³⁹ Id. at 716.

¹⁴⁰ Id. at 717, 719.

¹⁴¹ Id. at 719.

¹⁴² Dembitz, *supra* note 97, at 507 n.38. Ten years later, the court of appeals ruled that PINS could never be sent to the state training schools. *Ellery C. v. Redlich*, 32 N.Y.2d 588, 591 (1973).

amendments to the Social Welfare Law that year restricted a training school to accept only girls under sixteen or girls under seventeen whose conduct occurred before they turned sixteen.¹⁴³ Girls who committed conduct creating jurisdiction at the age of sixteen or seventeen could be adjudicated as PINS, but could not be placed in a training school.

Again, faced with an option of a less restrictive environment, such as probation, or a more restrictive environment—in this case, an adult reformatory—Family Court judges sent the girls to the more restrictive environment.¹⁴⁴ In reversing these orders in early 1964, the Supreme Court's Appellate Division reminded judges of the Family Court that the legislature restricted disposition of PINS very purposefully.

[T]he new state-wide Family Court Act is expressive of a purpose and policy to create a new category of a “person in need of supervision” to be distinct and apart, and to be considered in a class less culpable than that of “juvenile delinquent”. The entire structure of the Act reflects a deliberate and calculated plan to place “persons in need of supervision” in authorized agencies for treatment and rehabilitation and not to commit them to penal institutions.¹⁴⁵

The court ended with an admonishment that “[i]f the learned Judges of the Family Court are confronted with a dilemma because of the lack of facilities to handle ‘persons in need of supervision’, their recourse should be with the Legislature to make such facilities available and not through circumvention of the commands of the statute.”¹⁴⁶ Soon thereafter, Judge Polier, “[w]ith concern and reluctance,” but noting her constrained options, paroled a sixteen-year-old PINS girl who otherwise would have been sent to the adult reformatory.¹⁴⁷

As might be expected, reversals were not appreciated among the Family Court's judges. In fact, even after the Family Court Act created a mechanism for appeal, law guardians in New York City

¹⁴³ N.Y. Social Welfare Law § 425 (McKinney Supp. 1964).

¹⁴⁴ *In re Anonymous*, 242 N.Y.S.2d 571, 573 (N.Y. Fam. Ct. 1963).

¹⁴⁵ *Anonymous v. People*, 247 N.Y.S.2d 323, 328–29 (N.Y. App. Div. 1964).

¹⁴⁶ *Id.* at 329.

¹⁴⁷ *In re Anonymous*, 250 N.Y.S.2d 395, 397 (N.Y. Fam. Ct. 1964).

reported that they rarely exercised that right. (Indeed, the respondent in *Doe* did not appeal Judge Timone's ruling despite the strength of her case.) Judges typically responded negatively both to requests for leave to appeal and to habeas filings.¹⁴⁸ In order to avoid angering judges before whom they appeared daily, therefore, law guardians in New York City rarely chose to appeal. Instead, they let unfavorable decisions stand in hopes of maintaining good relations with the judges. By doing so, the law guardians believed that they were improving their ability to represent future clients. This was not a concern statewide, however. After the right to appeal was created by the Family Court Act, private counsel upstate who infrequently appeared before Family Court judges felt no social constraint to appease them and thus "appeal[ed] like mad."¹⁴⁹ Family Court judges reported that Supreme Court judges too frequently overruled their decisions.¹⁵⁰ Jurisdictional, procedural, and dispositional controls changed some outcomes in the juvenile court, but Family Court judges were uncomfortable surrendering their discretion in exercising strict social control over all respondents.

C. Enactments and Findings in Other Early Reform States

While New York's reforms were controversial, they were also seen as a model by other states interested in revision. Along with its modifications to the jurisdiction of the court, California had mandated that courts inform children of their right to counsel, but only required appointment of counsel to indigent children in felony cases.¹⁵¹ A few other jurisdictions also provided representation to indigent children.¹⁵² In 1965, Illinois, which had pioneered the informal juvenile court in 1899, adopted reforms consistent with New York's and California's. Juvenile court hearings were separated

¹⁴⁸ Bernheim Jan. 16 Observations, *supra* note 108.

¹⁴⁹ David Bernheim, Observations from the New York Family Court, at 2 (Jan. 22, 1964) (on file with the Paulsen Papers, Box 2 Folder 2).

¹⁵⁰ David Bernheim, Observations from the New York Family Court, at 2 (Jan. 21, 1964) (on file with the Paulsen Papers, Box 2 Folder 2).

¹⁵¹ Cal. Welf. & Inst. Code §§ 633, 634, 659, 700 (West 1966).

¹⁵² Minn. Stat. Ann. § 260.155(2) (West Supp. 1966) (see Comment of Legislative Commission accompanying this section) (repealed 1999); D.C. Code § 2-2202 (1961) (repealed 1970); Or. Rev. Stat. § 419.498(2) (Supp. 1961) (repealed 1993).

into adjudication and disposition hearings. Distinctions were made between delinquents who violated the law and minors in need of supervision because they were beyond the control of their parents or truant. Procedural formalities were adopted and children were advised of their right to counsel.¹⁵³ The Illinois law required less than New York, however, which actually mandated courts to appoint counsel.

That difference became important: New York's juvenile court lawyers, who had more exposure to the atypical court system, proved more effective than lawyers in states with less demanding statutes. Studying the changes in California, Professor Edwin Lemert concluded that "[t]he evidence is impressive that representation by counsel more often secures a favorable outcome of the case than where there is no counsel. Proportionately, dismissals were ordered nearly three times as frequently in attorney as in non-attorney cases."¹⁵⁴ His conclusion may have been excessively optimistic. Lawyers still were rare in California's juvenile courts, and while their success was relatively strong with neglect cases, the lawyers were less effective in delinquency cases.¹⁵⁵

In Illinois, where the right to counsel was even less robust, lawyers in the juvenile court proved to be the "pettifoggers" Paulsen had described in 1957.¹⁵⁶ A 1968 study of Chicago's juvenile court found that, on the rare occasion in which lawyers were present, they were hired members of the private bar. More than 300 attorneys appeared in fewer than 600 of the city's 17,000 juvenile cases in 1966.¹⁵⁷ Generally, the lawyers were ignorant of the court's operation and saw their role much like how Judge Polier had envisioned it: helping clients to understand the proceedings. Their vision differed from that of many New York law guardians, who believed their role was to advocate for dismissal.¹⁵⁸

Although results were mixed, juvenile justice reform was clearly on the national agenda by the mid-1960s. California, New York,

¹⁵³ Monrad G. Paulsen, *The Role of Juvenile Courts*, 53 *Current Hist.* 70, 73 (1967).

¹⁵⁴ Edwin M. Lemert, *Legislating Change in the Juvenile Court*, 1967 *Wis. L. Rev.* 421, 442.

¹⁵⁵ *Id.* at 442-43.

¹⁵⁶ Paulsen, *supra* note 24, at 570.

¹⁵⁷ Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 *U. Pa. L. Rev.* 1156, 1164, 1166 (1968).

¹⁵⁸ *Id.* at 1174-81.

and Illinois each had adopted some of the reformers' jurisdictional, procedural, and dispositional changes. The Children's Bureau, the National Council on Crime and Delinquency, the National Council of Juvenile Court Judges, and a growing number of state legislatures were increasingly interested in reforming the institution. This law reform was not always unidirectional—as New York's legislative amendments show—but it was real, and it changed how juvenile justice was administered in some of the nation's most populous states. In 1966, the Supreme Court would take notice of the juvenile court for the first time.

III. THE NATIONAL REFORM MOVEMENT

The New York law guardians' characterization of juvenile justice—that it was social in procedure and penal in substance—was repeated by the Supreme Court in its March 1966 decision in *Kent v. United States*. The Court proclaimed that juveniles were receiving “the worst of both worlds” in specialized juvenile courts that lacked procedural safeguards but often imposed substantial constraints on liberty.¹⁵⁹ Three months later, the Court noted probable jurisdiction in *Gault*—the case of the boy who was ordered to six years of institutionalization for a single lewd phone call.¹⁶⁰ The early reform states claimed to have predicted the Supreme Court's juvenile court holdings,¹⁶¹ but the Court's actions in the spring of 1966 in *Kent* and *Gault* inspired a growing number of lawyers across the country to challenge the systems that provided their juvenile clients with harsh penalties and no procedural standards. The cases that followed sought procedural protections for juveniles, not substantive limitations. Lawyers, however, presented the procedural deficiencies in their cases as the cause of dispositions that lacked any proportion to the underlying behavior. The Court cited reformers' research and adopted their positions as constitutional requirements. Its procedural holdings were thus deeply connected to the reform movement and were intended to guard against strict control over juvenile conduct.

¹⁵⁹ *Kent v. United States*, 383 U.S. 541, 556 (1966).

¹⁶⁰ *In re Gault*, 384 U.S. 997 (1966).

¹⁶¹ Platt & Friedman, *supra* note 157, at 1163.

By the mid-1960s, lawyers in states that had not reformed their juvenile justice systems through legislation began to challenge certain practices in court. *Gault* was making its way through Arizona courts in 1965. At the same time, the ACLU was mounting a similar challenge in Florida, seeking the right to counsel for juveniles in that state.¹⁶² Early in 1966, only weeks after the *Kent* decision, the Lawyers Constitutional Defense Committee (LCDC), a civil rights group sponsored by the ACLU and other social justice organizations to protect civil rights activists in the South, won the right to counsel for juveniles in the Supreme Court of Mississippi.¹⁶³ Reveling in the news of his colleagues' success, ACLU Legal Director Melvin Wulf observed, "if Mississippi holds that juveniles are entitled to counsel, I would think that every other state in the Union would be ashamed to do otherwise."¹⁶⁴

The LCDC's interest in juvenile court reform highlights the racial implications of broad jurisdictional and discretionary authority of juvenile courts. As Paulsen explained, the imprecise language of predelinquency jurisdiction statutes "[c]ertainly . . . has formed the basis for adjudications of delinquency in the case of Negro children engaged in civil rights demonstrations."¹⁶⁵ Procedural rights were necessary to protect student activists from racist judges with unfettered power to commit predelinquents to state institutions. Around the same time as the Mississippi decision, the Texas Court of Civil Appeals held that juveniles were entitled to notice of specific charges.¹⁶⁶ The proliferation of these cases throughout state and federal courts in the mid-1960s demonstrates the widespread concern about the state of the court system and revision of that system before *Gault*.

¹⁶² Letter from Tobias Simon to Alan Reitman, ACLU Associate Executive Director (Sept. 17, 1965) (on file with the Seeley G. Mudd Manuscript Library, Princeton University, ACLU Papers [hereinafter ACLU Papers], Box 985 Folder 12); ACLU of Florida News Release, Florida Supreme Court to Review ACLUF Juvenile Rights Case (Oct. 11, 1966) (on file with the ACLU Papers, Box 988 Folder 8).

¹⁶³ *In re Long*, 184 So. 2d 861, 862 (Miss. 1966).

¹⁶⁴ Letter from Melvin Wulf, ACLU Legal Director, to Gertrud Mainzer (Apr. 5, 1966) (on file with the ACLU Papers, Box 1398 Folder 2).

¹⁶⁵ Monrad G. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 Calif. L. Rev. 694, 700 (1966).

¹⁶⁶ *Johnson v. State*, 401 S.W.2d 298 (Tex. Civ. App. 1966) (holding a juvenile court petition insufficient to establish jurisdiction when it did not enumerate the provisions of law that respondent had allegedly violated).

As these cases were multiplying, the ACLU agreed to represent Gerald Gault in an appeal to the Supreme Court. His was the first of these new test cases to reach the High Court, and it immediately sparked national interest. Lawyers and judges from Nebraska, Ohio, Rhode Island, and Texas—states that had yet to reform their juvenile courts—sought copies of the ACLU's brief for use in their own cases.¹⁶⁷

The *Gault* proceedings in the Supreme Court were tipped in reformers' favor. NYU law professor Norman Dorsen argued the case for the ACLU against a young and inexperienced assistant attorney general representing Arizona. Only the Ohio Association of Juvenile Court Judges wrote in support of Arizona's juvenile justice system as amicus curiae.¹⁶⁸ The National Conference of Juvenile Court Judges, in contrast, seriously considered filing an amicus brief on the side of the juvenile.¹⁶⁹ Schinitsky and Dembitz filed a brief for the Legal Aid Society in support of Gault.¹⁷⁰ Leon Polsky, another attorney at the Legal Aid Society, convinced the National Legal Aid and Defender Association to file its own (more ambitious) brief, arguing that the ACLU and the Legal Aid Society were making claims that "should be won without any trouble."¹⁷¹ Informed observers across the country seem to have felt similarly to Professor Joseph W. McKnight at Southern Methodist Univer-

¹⁶⁷ Letter from John A. Childers, Central Ohio Civil Liberties Union Chairman, to Melvin L. Wulf, ACLU Legal Director (Oct. 6, 1966) (on file with the ACLU Papers, Box 1398 Folder 2); Letter from Norman Dorsen, NYU Law Professor and ACLU General Counsel, to Wilfred W. Neurnberger, Lancaster County, Neb., Juvenile Court Judge (Oct. 6, 1966) (on file with the ACLU Papers, Box 1398 Folder 2); Letter from Joseph McKnight to Melvin Wulf (Oct. 19, 1966) (on file with the ACLU Papers, Box 1398 Folder 2); Letter from John J. O'Neil, Court Administrator of the Family Court of Rhode Island in Providence, to Melvin L. Wulf, ACLU Legal Director (Dec. 9, 1966) (on file with the ACLU Papers, Box 1398 Folder 2).

¹⁶⁸ Brief for Ohio Assoc. of Juvenile Court Judges as Amicus Curiae Supporting Appellee, In Re Gault, 387 U.S. 1 (1967) (No. 116), 1966 WL 100788.

¹⁶⁹ Letter from John P. X. Irving to Melvin Wulf (Aug. 29, 1966) (on file with the ACLU Papers, Box 1398 Folder 2).

¹⁷⁰ Brief for Legal Aid Soc'y et al. as Amici Curiae Supporting Appellant, In Re Gault, 387 U.S. 1 (1967) (No. 66-116), 1966 WL 100786.

¹⁷¹ Letter from Leon Polsky to L. Michael Getty (June 30, 1966) (on file with the ACLU Papers, Box 1398 Folder 2).

sity Law School, who wrote to Melvin Wulf that he had “little doubt” that Gerald Gault would win his appeal.¹⁷²

Indeed, Gault did win. Writing for the majority, Justice Abraham Fortas contextualized the Court’s opinion in the history of the juvenile court. He recounted the initial optimism of the Progressives and then catalogued a series of failures of the court, from unqualified judges and ill-equipped auxiliary staffs to breaches of confidentiality of court and police records, to recent sociological research findings that children responded negatively to the combination of “procedural laxness” and “stern disciplining.”¹⁷³ The Court’s decision precisely echoed the objections of reformers such as Paulsen, Tappan, Sparer, Wheeler, and Cottrell.

After adopting the reformers’ criticisms of the juvenile court, Justice Fortas turned to the broad goals of reform that procedural informalities had obstructed: “Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.”¹⁷⁴ The Court went further, explicitly suggesting that the juvenile court judge below should have concluded that Gault’s rehabilitation could have been achieved “at home” instead of ordering years of institutionalization.¹⁷⁵ Announcing that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,”¹⁷⁶ the Court held that children were entitled to appointed counsel, as well as notice of charges, confrontation of witnesses, and the right to remain silent. In support of its holdings, the Court cited “authoritative” standards published by the federal Children’s Bureau as well as the report of the President’s Commission on Law Enforcement and Administration of Justice, which had been published between oral argument and the date of decision.¹⁷⁷ Both documents were consistent with reformers’ objectives. While few states complied

¹⁷² Letter from Joseph W. McKnight to Melvin Wulf (Oct. 19, 1966) (on file with the ACLU Papers, Box 1398 Folder 2).

¹⁷³ *Gault*, 387 U.S. at 16–26.

¹⁷⁴ *Id.* at 19–20.

¹⁷⁵ *Id.* at 28.

¹⁷⁶ *Id.* at 13.

¹⁷⁷ *Id.* at 38–39.

with all of *Gault*'s requirements in 1967, the Court's holdings were well within the sphere of moderate law reform.

After these core reforms became national mandates, reformers' concerns turned from the major areas of agreement to more peripheral questions that enjoyed less consensus. Paulsen renewed his interest in jurisdictional reforms, concluding that procedural safeguards were insufficient to fix the court.¹⁷⁸ Others were concerned about equal protection of girls in the court and advocated jurisdictional reforms to curtail the regulation of adolescent girls' sexual behavior. Still others continued seeking procedural safeguards through appellate litigation. The main procedural issues discussed after *Gault* included contesting the requisite burden of proof and winning rights to a public trial and jury. All of those issues came before the Court in 1969, in a case arising out of Nebraska.

The Nebraska case demonstrates some of the tensions within the reform community. After oral argument, the Supreme Court rejected the claims without reaching the merits,¹⁷⁹ but the *Gault* consensus had already fractured. The National Council of Juvenile Court Judges, which nearly joined the ACLU in *Gault*, filed an amicus brief opposing the criminal burden of proof and the institution of jury trials.¹⁸⁰ Paulsen supported a criminal burden of proof, but continued to oppose jury trials for juveniles.¹⁸¹ When it did reach these questions in subsequent cases, the High Court agreed with Paulsen. In 1970, it required that juveniles be found delinquent beyond a reasonable doubt, replacing the civil burden of

¹⁷⁸ Monrad G. Paulsen, *Children's Court: Gateway or Last Resort?*, in *Gault: What Now for the Juvenile Court?* 39, 49 (Virginia Davis Nordin ed., 1968) (noting that procedural formalization "cannot create new opportunities" for misbehaving youth).

¹⁷⁹ The appellant's lawyer had admitted that enough evidence existed against his client to meet the reasonable doubt burden of proof, and the Supreme Court had not incorporated the right to a jury trial in state criminal proceedings until after the minor was adjudicated delinquent. *DeBacker v. Brainard*, 396 U.S. 28, 30-31 (1969).

¹⁸⁰ Motion of the National Council of Juvenile Court Judges for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of Appellee, *DeBacker v. Brainard*, 396 U.S. 28 (1969) (No. 15), 1969 WL 120083.

¹⁸¹ Monrad G. Paulsen, *The Changing World of Juvenile Law: New Horizons For Juvenile Court Legislation*, 40 Pa. B. Ass'n Q. 26, 31, 35 (1968).

proof in juvenile courts nationwide.¹⁸² The next year, it rejected claims that juveniles were entitled to juries and public trials.¹⁸³

The fracturing of the *Gault* coalition in subsequent cases challenging juvenile court procedure underscored the fact that there was no consensus in favor of extending the criminal procedure revolution to juvenile courts. Instead, the motivations were limiting social control and improving rehabilitative outcomes. Requiring notice of specific charges clearly had a limiting effect on arbitrary jurisdiction. The provision of counsel to indigent juveniles served similar ends. The rights to remain silent and to confront witnesses helped ensure that only juveniles against whom there was proof of wrongdoing became subject to the court's authority. Raising the burden of proof would obviously limit judges' decision making, but rejection of the right to a jury indicated that the Court viewed the juvenile court as reformers in New York had. Procedural informalities that protected the anonymity of juveniles to be rehabilitated without stigma trumped the extension of criminal procedure rights.

It may seem that the series of Supreme Court challenges to juvenile court procedure lend themselves to a teleological understanding of the criminalization of the juvenile court, but such an approach fails scrutiny. The cases were litigated independently and coordination between the lawyers was absent; even their agreement was uncertain.¹⁸⁴ Among the handful of juvenile court cases that reached the Supreme Court in the late 1960s and early 1970s, rarely did the trial lawyers in those cases plan to mount an appeal for the purpose of making new constitutional law. According to Professor Christopher P. Manfredi, only the 1970 burden of proof case, *In re Winship*, could be considered a "true" test case.¹⁸⁵ It began years earlier, after Rena Uviller—who had quickly risen to the Legal Aid Society's appellate department—had decided she want-

¹⁸² *In re Winship*, 397 U.S. 358, 368 (1970) (“[T]he constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* . . .”).

¹⁸³ *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (“[W]e conclude that trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.”).

¹⁸⁴ See Christopher P. Manfredi, *The Supreme Court and Juvenile Justice* 182–83 (1998) (noting that while each case was executed by centralized strategic plans, “the cases emerged on the national scene relatively unsystematically”).

¹⁸⁵ *Id.* at 184.

ed to challenge the Family Court Act's preponderance standard. She instructed law guardians to develop a record for such a case, and waited to litigate the issue until she found the right facts.¹⁸⁶

While litigation challenged procedural rights, other purposes of reform must not be forgotten. The scope of the juvenile court's jurisdiction continued to be of great interest to reformers after legislatures and the Supreme Court began formalizing court proceedings. While Paulsen supported the procedural rights afforded in *Gault*, they did not ease his increasing concern about the general enterprise of the juvenile court. Not only did the broad statutory jurisdiction of the court serve as a weapon against civil rights activists, but, he observed, "[o]ne suspects that it can often be used generally against children of the poor."¹⁸⁷ Paulsen's suspicion was heightened by the fact that cultural differences between socioeconomic classes could be misconstrued by arresting officers as traits of delinquency.¹⁸⁸

For this and other reasons, Paulsen agreed with the recommendation of the President's Commission on Law Enforcement and the Administration of Justice that the juvenile court should be a "last resort."¹⁸⁹ In his 1967 article on *Gault*, Paulsen accepted the Commission's conclusion, although he remained optimistic that the procedural revolution could "provide some badly needed glue" to unite powerful judges and the marginalized youngsters who were brought before them.¹⁹⁰ A year later Paulsen concluded that procedural "[o]rderliness can correct some abuses but surely it cannot create new opportunities."¹⁹¹ Those opportunities would need to be created by a stronger social safety net of schools, housing, employment opportunities, training programs, and family support, made available to poor communities generally, not to individual delinquents after it was too late.¹⁹² The recommendations of Mobilization for Youth in 1962 were still alive after *Gault*. "[W]here the intention was once to get the troubled child into the courts as fast

¹⁸⁶ Id. at 134.

¹⁸⁷ Paulsen, supra note 165, at 700.

¹⁸⁸ Id.

¹⁸⁹ Paulsen, supra note 9, at 245.

¹⁹⁰ Id. at 243, 245.

¹⁹¹ Paulsen, supra note 178, at 49.

¹⁹² Id. at 45, 49.

as possible,” Paulsen reflected, “the aim will now be to keep him out of court altogether, if that is possible.”¹⁹³ Whereas he once believed that police needed only a reasonable belief that a child was a delinquent in order to detain her, by the late 1960s Paulsen believed that juvenile arrests and other police contact should be governed by the same rules that restricted police interactions with adult offenders.¹⁹⁴

While Paulsen outlined a new framework for juvenile courts, other experts renewed calls for eliminating the predelinquency or “in need of supervision” jurisdiction of the court. The belief that certain traits and behaviors were predictive of future delinquency and could be corrected was also questioned. No evidence existed to connect running away, underage drinking, “premature sexual experimentation,” or other predelinquent activities with delinquent activities.¹⁹⁵ An attorney at the NCCD declared that predelinquency jurisdiction was not simply discriminatory against children but also plainly “irrational.” He wondered, “[i]f the criminal law represents the minimum standard of behavior that every person must meet in order to maintain our society, then how can we limit the freedom of children because they in some way misbehave, although they behave at a level acceptable for adults?”¹⁹⁶ The President’s Commission recommended that “serious consideration” be given to the “complete elimination” of the court’s jurisdiction over children engaged in non-criminal conduct.¹⁹⁷ At a minimum, it recommended jurisdiction be “substantially circumscribed,” limited to cases that “entail a real risk of long-range harm.”¹⁹⁸ William H. Sheridan of the Children’s Bureau reported that, by conservative estimates, twenty-six percent of juvenile court cases—roughly

¹⁹³ *Id.* at 49.

¹⁹⁴ Paulsen, *supra* note 181, at 29–30.

¹⁹⁵ A teenage boy committed to a training school in Washington, D.C. offered one connection: “[E]arly in the game he decided you might as well do something for real since many kids get sent up for doing nothing.” Patricia M. Wald, *The Changing World of Juvenile Law: New Vistas for the Nondelinquent Child—Alternatives to Formal Juvenile Court Adjudication*, 40 Pa. B. Ass’n Q. 37, 38 (1968).

¹⁹⁶ Jeffrey E. Glen, *Juvenile Court Reform: Procedural Process and Substantive Stasis*, 1970 Wis. L. Rev. 431, 443.

¹⁹⁷ President’s Commission on Law Enforcement & Administration of Justice, *The Challenge of Crime in a Free Society* 85 (1967).

¹⁹⁸ *Id.*

184,000 per year—were predelinquency petitions.¹⁹⁹ Eliminating or reducing the scope of that jurisdiction would free a substantial number of children from the court's coercive control.

Many calls for narrowing predelinquency jurisdiction framed the court's social control of adolescent girls as a violation of the Equal Protection Clause. Girls were subject to the juvenile court's jurisdiction longer than boys in some states. Under New York's Family Court Act, for example, predelinquent girls were sent to the juvenile court until they were eighteen, whereas predelinquency jurisdiction over boys ended at age sixteen.²⁰⁰ Boys committed more crimes than girls, but girls were overrepresented in predelinquency cases, mostly for incorrigibility, ungovernability, or sex offenses.²⁰¹ More than fifty percent of girls who were brought before the juvenile court were subject to predelinquency jurisdiction, whereas only twenty-one percent of boys were predelinquents. Often, these cases represented a stricter enforcement of girls' "proper" behavior.²⁰²

Observers of the juvenile court had objected to the unequal regulation of girls' sexual behavior since before legislative reform began in 1961. Those calls for change only grew louder in the early 1970s, with the rise of the women's and reproductive rights movements.²⁰³ This loosening of social control in the juvenile court was consistent with Model Penal Code drafters' conclusion that sexual offenses such as adultery and fornication should be decriminalized.²⁰⁴

¹⁹⁹ William H. Sheridan, *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?*, *Fed. Probation*, Mar. 1967, at 26, 27.

²⁰⁰ N.Y. Family Court Act, § 712(b) (McKinney 1962).

²⁰¹ Rubin, *supra* note 49, at 516.

²⁰² Sheridan, *supra* note 199.

²⁰³ See, e.g., Glen, *supra* note 196; Sarah Gold, *Equal Protection for Juvenile Girls in Need of Supervision in New York State*, 17 N.Y. L.F. 570 (1971); Mimi Goldman, *Women's Crime in a Male Society*, 22 *Juv. Ct. Judges J.* 33 (1971); Linda Riback, *Juvenile Delinquency Laws: Juvenile Women and the Double Standard of Morality*, 19 *UCLA L. Rev.* 313 (1971); Rubin, *supra* note 49, at 516; Helen Sumner, *Locking Them Up*, 17 *Crime & Delinq.* 168 (1971); Wald, *supra* note 195. But see Nancy B. Greene & T.C. Esselstyn, *The Beyond Control Girl*, 23 *Juv. Just.* 13 (1972) (defending the regulation of female "sexual delinquency").

²⁰⁴ Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 *Harv. L. Rev.* 635, 643-44 (1966).

Reformers consistently fought for jurisdictional change in combination with procedural rights. After *Gault*, Dorsen and his colleague Daniel A. Rezneck published an article outlining remaining problems in the juvenile courts that could lead to future litigation. The breadth of behavior regulated by the juvenile court was included in their list.

[J]uvenile courts have sought to regulate the behavior and morals of juveniles to a degree far beyond that of criminal codes. While such concern may denote laudable purposes, when it takes the form of a delinquency adjudication accompanied by threat of institutionalization, *Gault* plainly indicates that due process considerations, transcending juvenile court objectives, come into play.²⁰⁵

Citing “much comment” on the subject, Dorsen and Rezneck expected challenges to the statutory provisions on vagueness grounds.²⁰⁶

The vague regulations, critics contended, made it impossible for children to predict what behavior would result in arrest, and gave an unacceptable level of discretion to police. A *Harvard Law Review* note found that sometimes, more often in big cities where court resources were already burdened, or in small towns where personal relationships smoothed reactions, officers accepted minor misconduct as “horseplay.”²⁰⁷ In other situations, however, minor conduct could result in delinquency petitions to “treat” delinquent “traits” before they developed into more serious behavior problems.²⁰⁸ Many of these cases never made it to formal court intake or a hearing before a judge. Rather, they were handled without procedural formality by the police. In both urban and rural patrols, the line between “horseplay” and behavior exhibiting traits likely to lead to delinquency was murky at best. Although officers vehe-

²⁰⁵ Norman Dorsen & Daniel A. Rezneck, *Gault and the Future of Juvenile Law*, *Fam. L.Q.*, Dec. 1967, at 1, 16.

²⁰⁶ *Id.* at 16.

²⁰⁷ Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 *Harv. L. Rev.* 775, 778–79 (1966).

²⁰⁸ *Id.* at 779.

mently denied the accusations, critics charged that the line had less to do with conduct than it had to do with minors' race and class.²⁰⁹

Vagueness challenges to predelinquency statutes came soon after Dorsen and Reznick's article. Some courts rejected the argument, but federal courts in New York and California sided with the plaintiffs bringing the vagueness challenge.²¹⁰ At the same time, lawyers fueled by the same concern about courts' exercise of unnecessary social control successfully challenged adult vagrancy laws, which criminalized the same "idleness" and "immoral" behavior among adults.²¹¹

Vagueness was not the only criticism of predelinquency jurisdiction. After *Gault*, Judge Polier changed her mind about it for other reasons. Three years earlier, Polier had admonished law guardians for trying to win dismissals for children who could benefit from disposition, but in 1967 she thought juvenile courts' jurisdiction should be reduced, reflecting their "actual capacity to secure the services needed for care, treatment, and rehabilitation."²¹² She had not given up on the rehabilitative ideal, but she had come to accept that the juvenile court could not—and perhaps should not—modify all unpleasant behavior.

Gault leads—and deserves to lead—almost all discussions of juvenile justice reform in this period, but the Court's holdings in that case should not be understood in isolation from other reform issues. As one might expect after a far-reaching Supreme Court opinion, scholarship about the juvenile court, discussing its problems, possible solutions, and implementation of new mandates, exploded after 1967.²¹³ Some reformers hoped to incorporate the entire criminal procedure revolution into the juvenile court; others thought the institution's unique purpose weighed against particular

²⁰⁹ *Id.* at 778–79.

²¹⁰ *Gesicki v. Oswald*, 336 F. Supp. 371, 373 (S.D.N.Y. 1971), *aff'd* 406 U.S. 913 (1971). The California decision was reversed by the Supreme Court in *Mailliard v. Gonzalez*, 416 U.S. 918 (1974).

²¹¹ See, e.g., *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1971); *Goldman v. Knecht*, 295 F. Supp. 897, 905 (D. Colo. 1969); *Baker v. Bindner*, 274 F. Supp. 658, 662 (W.D. Ky. 1967); *Fenster v. Leary*, 229 N.E.2d 426, 428 (N.Y. 1967).

²¹² Justine Wise Polier, *The Gault Case: Its Practical Impact on the Philosophy and Objectives of the Juvenile Court*, *Fam. L.Q.*, Dec. 1967, at 47, 50.

²¹³ For a sampling of the thousands of articles on juvenile justice published in the years after *Gault*, see Helena P. von Pfeil, *Juvenile Rights Since 1967: An Annotated, Indexed Bibliography of Selected Articles and Books* (1974).

rights. While reformers debated these questions in the years after *Gault*, they also continued to advocate for a narrowing of the court's jurisdictional scope. Procedural rights and limits on judges' discretion addressed some problems, but only jurisdictional reform could transform the court from its moralistic past.

CONCLUSION

In 1971, impelled by developments in preceding years, the American Bar Association and the Institute for Judicial Administration undertook a project to develop national standards for the juvenile court. The institution envisioned by the twenty-two volume Standards Project, completed in 1982, looked nothing like the Progressive-era institution Paulsen and so many others had critiqued in the 1950s. Nor did it look like the court Paulsen had envisioned in 1957 or even in 1967. As a result, the story that frequently is told about juvenile court reform is one of unintended consequences: Distressed by the injustice of the juvenile court, the *Gault* decision imposed criminal court procedural rights on the juvenile court. Instead of improving that court's service to juveniles, however, the selective extension of procedural rights remade the juvenile court into a junior criminal court that remained the worst of both worlds. The problem with that narrative is not its identification of unintended consequences, but rather its assumptions about the motivations for and purposes of procedural reform in the first place.

Gault was not the beginning of juvenile justice reform, and the Supreme Court was not its instigator. To understand *Gault*, one must understand the trials and tribulations of the lawyers, judges, probation officers, scholars, and legislators concerned with juvenile courts before *Gault* was decided. While examining those individual actors and the changes to the system within which they worked, it is also helpful to understand the broader conceptual innovations of modern law reform, as represented in discussions about the Model Penal Code and vagrancy law. This approach rejects the teleological privileging of adult criminal procedure reform over juvenile procedure reform. It also demonstrates that such formulations of juvenile justice reform are ahistorical, ignoring the fact that procedural reforms were called for and implemented in the juvenile court prior to the Warren Court's procedural revolution.

This reconsideration also allows for the recognition of non-procedural reforms that frequently are overlooked by scholars preoccupied with Supreme Court doctrine. Juvenile justice reformers advocated for a reduction in the juvenile court's jurisdictional scope and an increase in procedural formalities concurrently and consistently throughout the period from 1957 to 1972. By limiting a judge's dispositional options on the institutional commitment end, reformers could prevent the mass incarceration of trivial offenders. The right to counsel and other procedural rights in juvenile hearings would further ensure that only those children who were truly in trouble would be subject to any state coercion. Restriction of the juvenile court's jurisdiction would further prevent abuse of the poor and racial minorities by both courts and police. Underlying each of these goals was reformers' concern about excessive enforcement of middle-class morals on non-conforming marginalized youth. Reformers became increasingly concerned about police officers' and judges' discretion in arresting and institutionalizing law-abiding young people, especially activists involved in the civil rights movement and girls engaging in sexual conduct. This limitation of social control in the juvenile court is consistent with similar limitations imposed on adult criminal courts. Specifically, the two movements shared several goals: (1) the restriction of judges' abuse of power by separating guilt or delinquency from appropriate rehabilitative measures; (2) the relaxation of sexual regulation; and (3) the deregulation of status and vague victimless conduct that deviated from middle-class social norms. Through both revision of substantive law and procedural formalization, reformers sought to transform the juvenile court into an institution that treated young violators of the law with dignity and allowed law-abiding citizens to live their lives free from the social controls of others.

Instead, the reforms in the three decades that followed *Gault* frequently replaced juvenile rehabilitation with adult sentencing. The over emphasis on *Gault's* procedural changes, then, has led to the underappreciation of other important components of reformers' vision and has given undeserved legitimacy to "tough on crime" initiatives that deny Progressives' and reformers' shared belief that children deserve rehabilitative services. Reformers championed procedural changes as safeguards to ensure that other re-

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forms—narrowing the court’s jurisdiction and discretion in disposition—were effectively enforced. They also believed in rehabilitation, but sought that outcome through increased social services and economic opportunities in high-delinquency communities, rather than the Progressive Era’s pseudo-scientific scheme of institutionalization and social retraining.

In *Gault*, the Supreme Court embraced the reformers’ view of juvenile justice; it did not seal the juvenile court’s fate as a junior criminal court. The criminalization of the juvenile court in the decades since *Gault* was not inevitable. The increasingly unsustainable system of incarceration for juveniles and young adults that resulted from the post-*Gault* abandonment of the reformers’ mission has ravaged the already-struggling communities reformers aimed to improve. Like their counterparts fifty years ago, juvenile court observers today seek de-institutionalization of petty offenders and a revival of rehabilitative services. This time, they have fifty more years of data demonstrating the consequences of injustice that Mobilization for Youth warned of in the 1960s. Penal institutionalization continues to widen the inequality of opportunity between rich and poor children. It is time to respond to this growing crisis and to do so with a full understanding of the history behind it.

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