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Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age

DAVID S. TANENHAUS

The disability of minors does not make slaves or criminals of them.
They are entitled to legal rights, and are under legal liabilities.

—Justice Anthony Thornton, Illinois Supreme Court, 1870

The Civil War, by abolishing chattel slavery, launched a revolutionary era in American constitutionalism during which lawmakers debated what liberty, dependency, and good governance would mean in the new nation.¹

1. Robert J. Kaczorowski, "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War," *The American Historical Review* 92 (Feb. 1987): 45–68; Eric Foner, *Reconstruction: America's Unfinished Revolution* (New York: Harper and Row, 1988);

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Although historians have made a convincing case for the significance of legal developments in the 1870s and 1880s, they have not focused much attention on the problem of children's rights in the age of slave emancipation.² This is largely due to the assumption that the history of children's rights did not begin until the U.S. Supreme Court's landmark decisions in *Brown v. the Board of Education* (1954) and *In re Gault* (1967).³ This article, however, builds on the work of scholars, such as Joseph Hawes and Mary Ann Mason, who have demonstrated that the ideas and practices central to the modern children's rights movement of the late twentieth century have deep roots in American history.⁴ I argue that a sophisticated conception of children's rights existed in the late nineteenth century and investigate how lawmakers in Illinois articulated it through their attempts to define the "rights" of "dependent children." These were children who had been abused or neglected or were considered to be at risk of becoming juvenile delinquents, but who had not been charged with or convicted of committing a criminal offense. How to handle their cases raised fundamental questions about whether children were autonomous beings or the property of either their parents and/or the state. And, if the latter, what

William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Akhil Reed Amar, *The Bill of Rights: Construction and Reconstruction* (New Haven: Yale University Press, 1998); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998); and Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (New York: Cambridge University Press, 2001).

2. There is a vast literature about children's rights as a legal and philosophical concept. For a good overview of this literature see Martha Minow, "Interpreting Rights: An Essay for Robert Cover," *Yale Law Journal* 96 (July 1987): 1860–1915. In this essay, I work from Minow's idea that "rights represent articulations—public or private, formal or informal—of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted" (1867).

3. Scholars generally cite *Brown v. the Board of Education*, 347 U.S. 483 (1954), as the first decision to recognize a substantive right for children and *In Re Gault*, 387 U.S. 1 (1967), as the first decision to recognize a child's right to due process protection. See, for example, Theresa Glennon and Robert G. Schwartz, "Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights," *Temple Law Review* 68 (Winter 1995): 1557–72. Barbara Bennett Woodhouse, however, contends that the first children's rights cases were actually brought by African Americans at the turn of the twentieth century to challenge the constitutionality of school segregation laws. Woodhouse, "Who Owns the Child? *Meyer* and *Pierce* and Children as Property," *William and Mary Law Review* 33 (Summer 1992): 1058–59.

4. Joseph M. Hawes, *The Children's Rights Movement: A History of Advocacy and Protection* (Boston: Twayne Publishers, 1991) and Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* (New York: Columbia University Press, 1994).

were the limits of parental authority and/or the power of the state acting as a parent? These fundamental questions, which the Civil War re-exposed, have remained enduring issues in American law.⁵

By investigating how the Illinois Supreme Court confronted the conundrum of children's rights in the Gilded Age, we can reconstruct how lawmakers established a viable system for guaranteeing at-risk children due process protections as well as the positive rights of social citizenship (i.e., shelter, clothing, nourishment, education, and medical care).⁶ Significantly, this creative moment for thinking about children as persons with both negative and positive liberty occurred at a transitional moment in American legal history, when lawmakers began developing liberal constitutionalism. As the legal historian William Novak has argued, "Liberal constitutionalism thrived on (and reinforced) the separation of public from private, state power from individual right. Indeed, its identity and strength hinged on its role as the principal guardian of the sacrosanct boundaries between power and liberty. The invention of this constitutional law entailed fundamentally new rationalities of regulation, social governance, and public order."⁷ As part of the development of liberal constitutionalism, the U.S. Supreme Court in the 1920s established the parental rights doctrine that granted parents via the Fourteenth Amendment a property right in their offspring.⁸ This development helped to solidify the family as a supposedly private realm secure from state action and privileged the rights of parents to raise their children as they saw fit.⁹ Yet, as Barbara Bennett Woodhouse

5. See, for example, Martha Minow, "Children's Rights: Where We've Been, and Where We're Going," *Temple Law Review* 68 (Winter 1995): 1573–84 and Woodhouse, "Who Owns the Child?" For excellent analyses of how conceptions of children have shaped American child welfare policy, juvenile justice, and immigration law, see Michael Grossberg, "Changing Conceptions of Child Welfare in the United States, 1820–1935," in *A Century for Juvenile Justice*, ed. Margaret K. Rosenheim et al. (Chicago: University of Chicago Press, 2002), 3–41; Elizabeth S. Scott, "The Legal Construction of Childhood," in *A Century for Juvenile Justice*, 113–41; and David B. Thronson, "Kids Will Be Kids? Reconsidering the Conceptions of Children's Rights Underlying Immigration Law," *Ohio State Law Journal* 63 (2002): 979–1016.

6. On the concept of social citizenship in the context of American history, see Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare* (Cambridge: Harvard University Press, 1994) and Michael B. Katz, *The Price of Citizenship: Redefining the American Welfare State* (New York: Metropolitan, 2001).

7. Novak, *The People's Welfare*, 245–46.

8. *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

9. This doctrine was partly a response to growing concerns among lawmakers in the 1920s about the socialization of the law during the Progressive Era. For an analysis of socialized law in theory and practice, see Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge, U.K.: Cambridge University Press, 2003).

has pointed out, the parental rights doctrine often left children without individual rights or a voice in legal proceedings. Moreover, as she has forcefully argued, this doctrine has remained the constitutional foundation for modern American family law.¹⁰

Given the difficulties that liberal constitutionalism has had in protecting children's due process rights, providing for their basic needs, and giving them a voice in the legal process, it is worth examining how late nineteenth-century lawmakers constructed and incorporated a broad conception of children's rights into the legal process. This historical investigation does not argue that the Gilded Age was a Golden Age for American children (it certainly was not) but rather suggests that the social and political climate was conducive for considering the rights of the child in a new light.¹¹

Part I analyzes *The People v. Turner* (1870), the first modern children's rights case.¹² In this decision, the Illinois Supreme Court declared that the state's new constitution guaranteed due process protections to minors. This controversial decision generated debates between lawmakers and reviewers over the relationships among children, their parents, the public, and the state. Part II examines how subsequent dependency cases heard by the Illinois Supreme Court in the 1880s—*Petition of Ferrier* (1882), and *County of McLean v. Laura B. Humphreys* (1882)—forced the justices to develop more fully their conception of children's rights.¹³ As a result, they

10. Woodhouse, "Who Owns the Child?" Also see Annette Ruth Appell, "Virtual Mothers and the Meaning of Parenthood," *University of Michigan Journal of Law Reform* 34 (Summer 2001): 683–790.

11. See, for example, the following studies of family law and life in the nineteenth century: Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1995); Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston, 1880–1960* (New York: Viking, 1988); Viviana A. Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* (New York: Basic Books, 1985); and Steven Mintz and Susan Kellog, *Domestic Revolutions: A Social History of American Family Life* (New York: Free Press, 1988). For a remarkable social and cultural history of a child's troubled life and death in the Gilded Age, see Joan Jacobs Brumberg, *Kansas Charley: The Story of a Nineteenth-Century Boy Murderer* (New York: Viking, 2003).

12. *The People v. Turner*, 55 Ill. 280 (1870). Scholars have had a difficult time fitting this seemingly anomalous decision into the history of American juvenile justice. See Sanford J. Fox, "Juvenile Justice Reform: An Historical Perspective," *Stanford Law Review* 22 (June 1970): 1216–22; Anthony M. Platt, *The Child Savers: The Invention of Delinquency*, 2d ed. (Chicago: University of Chicago Press, 1977); Steven L. Schlossman, *Love and the American Delinquent: The Theory and Practice of "Progressive" Juvenile Justice, 1825–1920* (Chicago: University of Chicago Press, 1977), 11–14; and Joan Gittens, *Poor Relations: The Children of the State in Illinois, 1818–1990* (Urbana: University of Illinois Press, 1994), 97–104.

13. *Petition of Ferrier*, 103 Ill. 367 (1882) and *County of McLean v. Laura B. Humphreys*, 104 Ill. 379 (1882).

emphasized the importance of children's needs as well as their rights. The conclusion notes that the progressive founders of the juvenile court included procedural protections in its early administration of dependency cases, but that their commitment to due process soon faded. Instead, they used the juvenile court to promote a narrower conception of children's rights that focused almost exclusively on social citizenship claims. Children's rights advocates in the late twentieth century challenged this narrow definition. In focusing so intently on the shortcomings of progressive child welfare governance, they overlooked an earlier history of children's rights that could have served them well.

Part I. Are Children Persons?

In September 1870, Daniel O'Connell, a fourteen-year-old Irish-Catholic boy of working age, was imprisoned in the Chicago Reform School. This set the stage for the Illinois Supreme Court to address the legal status of children in the state. The origins of the case are murky, for it is not clear why on September 9, Daniel was arrested under a broadly worded section of the city charter for being "destitute of proper parental care, and growing up in mendicancy, ignorance, idleness or vice."¹⁴ He was then brought before Judge Porter of the Cook County Superior Court. After a brief examination, the judge found the boy "to be a proper subject for commitment to the Reform School."¹⁵ The Chicago Common Council had established the school fifteen years earlier to combat the city's growing delinquency problem through the incarceration of children at risk of becoming delinquent as well as for the punishment and reclamation of juvenile offenders. Boys between the ages of six and sixteen could be committed to the school to "be kept, disciplined, instructed, employed and governed,"

14. Reform School, Section 1, in *Laws and Ordinances Governing the City of Chicago, January 1, 1866, With An Appendix, Containing the Former Legislation Relating to the City, And Notes of Decisions of the Supreme Court of Illinois, Relating to Corporations*, ed. Joseph E. Gary (Chicago: E. B. Myers and Chandler, 1866), 130. Also see the brief and argument of the relator, William T. Butler, filed November 23, 1870, n.p. Case file 16742, Supreme Court Archives, Springfield, Illinois [hereafter cited as Butler's brief]. The attorneys in the O'Connell case, Butler and Stiles, both argued that the laws in question were a combination of the reform school section of the city charter and "An Act in Reference to the Reform School of the City of Chicago," passed by the Illinois General Assembly on March 5, 1867.

15. Brief by I. N. Stiles, the City Attorney and counsel for the Chicago Reform School, filed November 23, 1870, 1. Case file 16742 [hereafter cited as Stiles's brief].

and the school's board of guardians had custody and control over them until they turned twenty-one.¹⁶

The commitment procedure to the reform school diverted many boys from going through the criminal justice system and spared them from a potentially lengthy and harrowing process. In the criminal justice system, any child over ten—the minimum age at which children in Illinois could be held criminally responsible for misdemeanors and felonies—might spend weeks or months in jail awaiting his or her trial.¹⁷ Moreover, children were housed with adults during this period. The commitment process, on the other hand, which involved only a brief hearing before a superior court judge, sent children directly to the reform school.

Removing children from adult institutions and placing them in schools was part of a transitional stage in the history of American childhood. Increasing numbers of Americans supported the idea that children should be in school, not at work in the factories, mills, and mines of the industrializing nation. But before 1870 few states had passed compulsory school attendance laws or restricted child labor, and the laws that did exist generally applied to children under twelve or fourteen years of age.¹⁸ In urban America, almost one out of every three children between the ages of ten and fifteen worked to help support their families.¹⁹ It is thus not surprising that the Chicago Reform School recorded the "occupations" of the children it received, or that "attending school" was listed as the occupation for only 178 out of the 1,121 boys committed to the institution between 1856 and 1869.²⁰ In fact Daniel O'Connell had worked in a tobacco factory for eighteen months prior to his arrest.²¹

16. *Laws and Ordinances Governing the City of Chicago*, 135. For a discussion of the school's educational philosophy, see Fox, "Juvenile Justice Reform," 1207–12.

17. In 1827 Illinois had raised the age of criminal responsibility from seven (the age set by English common law) to ten. Platt, *The Child Savers*, 101–2. For discussions of how the criminal justice system handled children's cases, see John P. Altgeld, *Live Questions Including Our Penal Machinery* (Chicago: Humboldt Publishing Co., 1890) and "Report of the Members of the Cook County Grand Jury," November 16, 1898, Chicago Historical Society, Chicago.

18. Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830–1900* (New Haven: Yale University Press, 1995), chap. 7. On the limited number of compulsory attendance and child labor laws in this period, see Grace Abbott, *The Child and the State* (Chicago: University of Chicago Press, 1938), 1:260.

19. Children also worked on farms in rural American, but early child labor laws generally applied only to mining and industrial workplaces. For a good overview of child labor in the late nineteenth century, see Priscilla Ferguson Clement, *Growing Pains: Children in the Industrial Age, 1850–1890* (New York: Twayne, 1997), chap. 5.

20. *Thirteenth Annual Report* (1869), 42–43. In 1870 the United States Census recorded the occupations of child laborers for the first time. Clement, *Growing Pains*, 133.

21. "Petition for *Habeas Corpus*," issued November 12, 1870, n.p. Case No. 16472, Supreme Court Archives, Springfield, Illinois.

At the school Daniel lived with approximately thirty boys as a family under the supervision of a housemother and father. Daniel's new family members were a mix of dependent and delinquent children. The majority had confessed to petty larceny, vagrancy, grand larceny, burglary, running away from home, or incorrigibility.²² His day now began with a drumbeat awakening him every morning at 5:30. Religious services, six hours of work, four hours of school, meals, singing, general exercises, and a bedtime prayer at 7:30 completed his day.

Since the children were disciplined by a system of rewards and punishments that affected when they would be released, Daniel was serving an indeterminate sentence. Through good behavior, he could work his way up a ladder of seven categories of boys, each one sporting a different color uniform to designate its members. Once he reached the top, he would be given a ticket of leave and allowed, if he chose, to find work elsewhere. According to the superintendent of the school Robert Turner, a boy could "grade out in six months," but the average stay at the school was closer to eighteen months.²³ Some boys, however, stayed on for years. Thus, Daniel would have to spend at least six months at the school and could possibly remain imprisoned for seven years.

By 1870 the reform school was a controversial institution. Catholic leaders and parents were angered that the school provided Protestant religious instruction to all its wards, even though more than one-third were Irish Catholics like Daniel O'Connell.²⁴ Historian Joan Gittens has pointed out that the publicly funded school "was ostensibly nonsectarian; but in reality, it was Christian and Protestant in its moral instruction. The bible used was the Protestant bible; the 'Our Father' in the school's devotional prayer book ended with the Protestant 'For thine is the kingdom and the power and the glory.' The superintendent, assisted by visiting Protestant ministers, conducted the school's Sunday services, which had "no provision for Catholic children to hear mass or receive the sacraments that their church told them were the true means to salvation." Chicago's Roman Catholic Bishop McMullen had publicly criticized the school for providing only Protestant instruction, but the school had denied his offers to provide

22. Seventy-eight children were committed to the school in 1870. The children "confessed to" the following offenses: petit larceny (30), vagrancy (12), grand larceny (10), burglary (7), running away from home (7), incorrigibility (6), truancy (4), assault (1), and burning hay (1). *Chicago Reform School Annual Reports, 1866-1872* (Chicago, 1872), 14. [Hereafter all cites will be to a specific annual report.]

23. *Twelfth Annual Report* (1868), 51.

24. According to the school's records, 581 of out the 1,284 children committed to the school between 1856 and 1872 had Irish parents. A separate table listed the "nativity" of the children themselves. It recorded that 161 out of the 1,284 children were Irish, presumably this meant that they had been born in Ireland. *Sixteenth Annual Report* (1872), 15-16.

religious services for Catholic children on Sundays. Although Catholic leaders established an industrial school for boys of their faith in 1864, judges continued to commit Catholics to the Chicago Reform School.²⁵

Some parents did apply for the writ of habeas corpus to challenge the imprisonment of their children in the reform school.²⁶ In the year prior to Daniel's arrest and commitment, the Illinois Supreme Court, which had original jurisdiction in habeas corpus cases, had freed sixteen boys from the reform school. On November 12, 1870, Michael O'Connell filed for this writ to free his son. Six days later, the high court commanded Superintendent Turner to produce "the body of Daniel O'Connell," so that it could "then and there consider of him."²⁷

Parental use of this writ outraged Superintendent Turner. "It is a notorious fact, that most of those [sixteen boys recently freed by the court], before being committed here," he reported, "were allowed to roam the streets without parental care or sympathy from any source, and preying upon the public at every opportunity; but immediately they are taken under the care and supervision of a benevolent institution, established for their benefit, parents and parties who never gave them a thought before, now indignantly demand their release by Writ of Habeas Corpus." In addition, "time and money are freely spent to gain the desired object, and (past experience tells us) gained only to drop the boy back in the same downward path from which we received him." How, he questioned, "can there be anything illegal in depriving an incompetent parent of the power of educating his son in crime, and placing that son, even against his own will, where he will be educated, cared for, and made a useful member of society? No law, either human or divine can be so construed."²⁸

Why the Illinois Supreme Court chose to use the O'Connell case, and not one of the previous cases, to review the constitutionality of the reform school laws is a mystery. It may have been that the boy's name inspired the judges. Daniel O'Connell had been the name of the leader of the Irish liberation movement of the 1820s and 1830s, popularly known as "the Great Emancipator." In any case, the court's decision to issue an opinion would at least address the growing disagreement among Chicago judges about the constitutionality of imprisoning children who had not been convicted of committing crimes.²⁹

25. Gittens, *Poor Relations*, 95–97.

26. Article II, Section 7 of the Illinois Constitution of 1870 guaranteed "the privilege or writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

27. "Writ of Habeas Corpus," filed November 18, 1870, n.p. Case File 16742, Supreme Court Archives, Springfield, Illinois.

28. *Fourteenth Annual Report* (1870), 22–23.

29. "Justice and the Reform School," *The Chicago Times*, December 2, 1870, p. 4.

The timing of the boy's case, like his name, was highly symbolic. His father had filed for the writ of habeas corpus right after election day, when black men in Chicago had voted for the first time in a general election since the ratification of the Fifteenth Amendment to the United States Constitution. "Nothing in all history," the abolitionist William Lloyd Garrison said of the amendment, equaled "this wonderful, quiet, sudden transformation of four millions of human beings from . . . the auction-block to the ballot-box."³⁰ The *Chicago Times* reported, "from early morn 'till dewy eve' [black voters] hugged the polls. . . . The denizens of Fifth avenue and Sherman street arose early yesterday, jumped into their sleekest harnesses, and rushed to the polls to deposit their ballots. Many brought their wives and sweethearts to see them vote."³¹ This celebration of black male suffrage captured the excitement of a truly revolutionary era for American constitutionalism that promised to erase the vestiges of slavery. After the ratification of the Fifteenth Amendment, for instance, the members of the American Anti-Slavery Society, which had been established almost forty years earlier, considered their work completed and disbanded.³²

William T. Butler, the attorney who represented the O'Connell family, contrasted the newfound freedom of the "colored people" with Daniel's imprisonment. Butler declared that it was as if Daniel were trapped in a prison because the school knew "no intermission! No rejoining of the family circle at noon or night! No Saturdays of Emancipation! No Sunday without Enthralment!"³³ Even more disturbing was the fact that Daniel, who had not been charged with or convicted of a crime, was "confined" and "*employed indefinitely*."³⁴ The children in the school labored in its various "work departments," where most wove baskets or built chairs.³⁵ Thus, Daniel was in a state of "involuntary servitude," which violated the recently adopted Thirteenth Amendment and denied him the "privileges and immunities" of American citizenship guaranteed by the even newer Fourteenth Amendment.³⁶ Butler added that if the State of Illinois were

30. Quoted in Foner, *Reconstruction*, 448

31. "Elections," *The Chicago Times*, November 9, 1870, p. 1.

32. Foner, *Reconstruction*, 448.

33. Butler's brief, n.p.

34. "Argument for relator," November 26, 1870, Case No. 16742, Supreme Court Archives, Springfield, Illinois, n.p. (emphasis in original). After reading his opposing counsel's brief, Butler filed a second brief. He had filed his first brief on November 23.

35. *Sixteenth Annual Report* (1872), 19.

36. In its first section, the Thirteenth Amendment banned involuntary servitude: "Neither Slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." In its first section, the Fourteenth Amendment declared: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

to deprive "the children of the Africans and the Chinese" of their liberty, then we could "expect to hear the alarms of the 14th Amendment to the Federal Constitution resound about our ears."³⁷ Why, he questioned, were these same bells not ringing for Daniel O'Connell?

Butler's invocation of race suggested how problematic it would be during this period of heightened rights consciousness to suggest that "white" children did not have civil rights. By contrasting Daniel's legal status with those of non-white children, Butler emphasized the boy's "whiteness" while simultaneously eliding his "foreignness."³⁸ In the late nineteenth century, Americans used "race" not only to distinguish between "white" and "non-white" races, but also to classify and rank the various "white" races, including Anglo-Saxons, Celts, Hebrews, Mediterraneans, Slavs, and Teutons among others. These national discussions, which had been triggered by concerns over immigration, especially the influx of the Irish at mid-century, often focused on which of these white races were "fit for self-government" in the American republic.³⁹ In its coverage of the election day, *The Chicago Times*, for example, questioned the fitness of the Irish to be citizens when it noted that "a curious commentary on the times was to see a healthy specimen of the newly-franchised [i.e., a black man] explain to a Celtic voter his duty as a citizen."⁴⁰ In this climate of mistrust of the Irish, Butler did not mention Daniel's heritage or raise the issue of the religious persecution of Catholic children at the school. Instead Butler argued that the Reconstruction Amendments should be broadly construed to protect not only "colored people," but also "white" children.

The timing of Daniel's case was also fortuitous. The Illinois Supreme Court was meeting in Chicago to open its first session since the Illinois Constitution of 1870 had been adopted.⁴¹ Daniel had been arrested a month after the constitution had gone into effect and Butler was able to use the boy's case to test whether it afforded due process protections to children. Butler contended that Daniel's arrest and commitment had violated four "old and sacred guarantees," which the state constitution had "newly re-enacted" in its Bill of Rights.⁴² Among these guarantees were:

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

37. Butler's brief, n.p.

38. For a good introduction to the legal privileges of "whiteness," see Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106 (June 1993):1710-91.

39. Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigration and the Alchemy of Race* (Cambridge, Mass.: Harvard University Press, 1998).

40. "Elections," p. 1.

41. "The Bench and Bar," *The Chicago Times*, November 10, 1870, p. 3.

42. Butler's brief, n.p.

- No person shall be deprived of life, liberty or property without due process of law.⁴³
- The right of trial by jury, as heretofore enjoyed, shall remain inviolate.⁴⁴
- All penalties shall be proportioned to the nature of the offense.⁴⁵
- Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation.⁴⁶

These protections—due process, trial by jury, proportionality, and a means for redress—were all designed to protect the rights of individuals, especially in criminal prosecutions.

Due process of law, Butler explained, required “*a regular trial* according to the course and usage of the Common Law.”⁴⁷ The commitment process to the reform school, in his opinion, clearly violated these ancient norms. No cause for the boy’s arrest was entered in a docket book, no pleadings were made, no judgment of the court was entered, and no record of the proceedings was preserved. The “private” nature of the hearing was also deeply troubling. The judge’s examination of the boy to determine whether he was a “proper subject for commitment” could occur at any time, in anyplace, and without the public playing a role in the process. Historically, juries had assumed this populist role of monitoring judicial proceedings, but there was no provision in the reform school laws for a jury trial.⁴⁸ Thus, the process was “simply an *inquisition*,” in which “the judge does not sit as a Court, but is a mere Commissioner or ministerial officer.” This hearing was not, according to Butler, “*a trial of any kind*.”⁴⁹

It was questionable, however, whether the guarantees of due process found in either the recently amended United States Constitution or the nascent Illinois Constitution applied to cases involving the commitment of dependent children to reform schools. In *Ex Parte Crouse* (1838), the

43. Article II, Section 2.

44. The remainder of the section read: “but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law” Article II, Section 5.

45. The remainder of the section read: “and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the same.” Article II, Section 11.

46. The remainder of the section read: “he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.” Article II, Section 19.

47. Butler’s brief, n.p.

48. On the significance of juries for American governance in the nineteenth century, see Amar, *The Bill of Rights*, esp. chap 5.

49. Butler’s brief (emphasis in original).

leading case in this area of the law, the Pennsylvania Supreme Court had denied a petition for a writ of habeas corpus by a father seeking to free his daughter, Mary Ann Crouse, from the Philadelphia House of Refuge.⁵⁰ This antebellum decision belonged to what William Novak has characterized as “the common law vision of a well-regulated society” that emphasized the social nature of human beings and their connections to local communities. For the first three-quarters of the nineteenth century, American courts generally followed the first maxim of the common law, *salus populi suprema lex est* (“the welfare of the people is the supreme law”) and granted vast power to local officials to police individual behavior for the sake of the common good.⁵¹

The *Crouse* decision epitomized this philosophy of governance that placed the common good above individual rights. The Pennsylvania court asked, “[M]ay not the natural parents when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?” Answering in the affirmative, the court declared, “the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it.” According to *Crouse*, the responsibility and accompanying power of the state to act as a parent toward its children (i.e., *parens patriae*) trumped the rights of natural parents and guardians. Ultimately the court, determining that the House of Refuge was “not a prison, but a school” where “reformation, and not punishment” was the goal, had rejected the father’s claim that the commitment and detention of his daughter without a trial by jury had violated the state’s constitution.⁵²

I. N. Stiles, the city’s attorney who represented the Chicago Reform School, based his defense of the institution almost entirely on *Crouse*, which he transcribed in full and attached to his brief. Although he noted that the opposing counsel would “cite other authorities,” Stiles informed the justices: “I shall call the attention of the court to one decision only. I refer to *ex parte Crouse*.”⁵³ If the Illinois Supreme Court followed the reasoning of *Crouse* it could be expected to uphold the constitutionality of the reform school laws and to find that Daniel’s confinement was indeed lawful. However, if the court determined that the principles espoused in this antebellum decision were no longer sound, then it might reach a far different conclusion.

50. *Ex Parte Crouse*, 4 Wharton 9 (Pa., 1838). For an excellent discussion of the case see Michael Grossberg, *A Judgment for Solomon: The D’Hauteville Case and Legal Experience in Antebellum America* (New York: Cambridge University Press, 1996), 74–75.

51. Novak, *The People’s Welfare*.

52. *Crouse*, 11.

53. Stiles’s brief, 2.

Stiles argued that *Crouse* remained good law. Minors, he noted, did not possess liberty and thus they could not be deprived of it. Whether “in or out of the Reform School,” Stiles explained, Daniel as a minor could make “no valid legal contract” or represent himself in court.⁵⁴ This equation of the freedom to contract with the possession of liberty was telling. As the legal historian Amy Dru Stanley has noted, “in the age of slave emancipation contract became a dominant metaphor for social relations and the very symbol of freedom.”⁵⁵ The expansion of the wage economy (the economic system in which individuals sell their labor for wages in the marketplace) had made “wage labor,” as the Massachusetts Bureau of Statistics and Labor reported in 1873, into a universal “system more widely diffused than any form of religion, or of government, or indeed, of any language.”⁵⁶ In the aftermath of the Civil War, liberty was becoming the freedom to contract.

Children did not have the freedom to contract. Even though they might work for wages, they could not as a general rule enter into contracts by themselves. In most instances, a parent or guardian had to contract for them. The law prevented minors from making their own contracts for two reasons. First, this prohibition shielded them from the consequences of immature decisions with potentially long-term consequences. Second, the legal disability of minors protected the right of fathers to serve as patriarchs who were entrusted with the custody, care, and education of their offspring. In return, fathers were entitled to the wages that their children earned. There were, however, limits to patriarchal authority. Through its power of *parens patriae*, Stiles pointed out, the state could “change that custody whenever and as often as the interests of the minor or the good society may require.”⁵⁷ Thus children, since they were not capable of making their own contracts or representing themselves in court, did not possess “the liberty which the framers of the constitutions were so desirous of protecting, even against the encroachment of legislators.”⁵⁸

Stiles’s defense of the school incorporated populist ideals from the vision of a well-regulated society into the rising liberal faith in the sanctity of individual rights. If his argument was successful, it appeared that the liberal state, much like the well-regulated society before it, would not recognize children as autonomous individuals and they would remain as dependents.⁵⁹

54. *Ibid.*, 1.

55. Stanley, *From Bondage to Contract*, x.

56. Quoted in Stanley, *From Bondage to Contract*, 62.

57. Stiles’s brief, 2.

58. *Ibid.*, 1.

59. For analysis of the creation of the liberal order, see Novak, *The People’s Welfare*, 235–48.

Butler strenuously objected to the assertion that children lacked liberty. He explained:

Ten years ago we were told by some people that American liberty was not the right of all persons; but was the exclusive right of those of a certain color, or rather those of no color. And now the learned Counsel for the respondent [Stiles] in their cases argues that the liberty of to-day is not the right of "all persons," notwithstanding the very words of the Constitution; but is the exclusive right of persons over and above a certain age.

On behalf of children, Butler declared that it was time to reconsider *Crouse* because "this Pennsylvania decision" was "rife with principles dangerous to liberty." It would, he concluded, be "better [to] banish the boy at once and give him his liberty elsewhere if the good of society will not permit him to enjoy it here."⁶⁰ Butler asked the Illinois Supreme Court to view the re-constitution of the nation after the Civil War as the beginning of a new era in American history in which children, like the freed people, possessed civil rights.

Justice Anthony Thornton, who had just joined the court, authored its unanimous opinion in *Turner*. Thornton, who had served as a Republican representative for Illinois in the 39th Congress that had passed the Fourteenth Amendment, agreed with Butler's argument about the liberty of children and adopted many of his rhetorical moves, such as distinguishing children from slaves.⁶¹ Instead of making a constitutional argument about the significance of the Reconstruction Amendments, Thornton relied on natural law to explain the source of parental duty as well as children's rights. This emphasis on higher law reflected the religious imagery on the ceiling and walls of the elegant Chicago courtroom in which the justices decided the case, including a fresco depicting "Moses giving the Ten Commandments to the children of Israel" and another displaying the "Rabbinical legend of King Solomon deciding the ownership of a child between two women."⁶² Against this backdrop, Thornton cautioned, "In our solicitude to form youth for the duties of civil life, we should not forget the rights, which inhere both in parents and children." He explained, "The parent has the right to the care, custody, and assistance of his child," and in order to provide for his children the father required power over them, "which is an emanation from God." The state should not disturb this power, he stressed, "except for the strongest reasons."⁶³

60. Butler's brief, n.p.

61. "Thornton, Anthony," in *Historical Encyclopedia of Illinois*, ed. Newton Bateman et al. (Chicago: Munsell Publishing, 1906), 1:522. Thornton only served on the Illinois Supreme Court for three years and resigned in 1873.

62. "The Supreme Court," *The Chicago Times*, November 28, 1870, p. 3.

63. *Turner*, 284.

Thornton criticized the reform school laws for not explaining precisely why the state severed these natural bonds between parents and their children. He found the terms enumerated in the legislation—vagrancy, destitution of proper parental care, mendicancy, ignorance, idleness, or vice—too vague. “What is proper parental care? The best and kindest parents would differ, in the attempt to solve the question,” he observed. He observed, “there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition.”⁶⁴ This vagueness of language in the legislation could lead to the wanton destruction of families.

The public benefited from preserving family ties, Thornton argued, because they not only bound the father to his family but also to his workplace. Proponents of wage labor assumed that fathers as breadwinners earned enough money to support their families, which allowed their wives and children to remain at home.⁶⁵ Now that slavery had been abolished, all men were supposed to find work in the marketplace so that their dependents could remain at home, in a realm supposedly safe from the corrupting influences of commerce.

The high rate of child labor in the late nineteenth century showed that this ideal did not match social reality. Moreover, in the very case before the court, the son worked to support his father, a self-described “poor man.”⁶⁶ Yet Thornton noted, “in this country, the hope of the child, in respect to education and the future advancement, is mainly dependent upon the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift.”⁶⁷ He added, “The violent abruption of this relation would not only tend to wither these motives to action, but necessarily, in time, alienate the father’s natural affections.”⁶⁸ Thus, the emotional ties between a father and his family helped to bind society together by encouraging men to labor productively.

Thornton did not limit his discussion to parental rights. He also pointed out that children actively participated in American society as legal actors and that “the welfare and the rights of the child are also to be considered.” He noted that children were bound by an “implied contract for necessities,”

64. *Ibid.*, 283–84.

65. Stanley, *From Bondage to Contract*, 138.

66. “Petition for Habeas Corpus,” n.p. According to his petition, Michael O’Connell was “a poor man, of the age of 50 years; [and] that the said Daniel O’Connell, his said son, for the eighteen month previous to his commitment to said Reform School had been engaged and employed in a Tobacco factory in said City of Chicago; and was receiving as wages for his labor in said Tobacco factory, the sum of Four Dollars per week at the time of his commitment to said Reform School.”

67. *Turner*, 285.

68. *Ibid.* Thornton quoted this passage, but did not name its author.

were “liable for torts,” “punishable for crime,” paid taxes, constituted “a part of the militia,” and endured “the hardships and privations of a soldier’s life in defence [sic] of the constitution and the laws.”⁶⁹ This list of legal acts undertaken by children, including fighting in the Civil War, contradicted Stiles’s simple depiction of minors as lacking liberty since they could not make valid contracts or represent themselves in court.⁷⁰

By drawing the reader’s eye first to implied contracts for necessities, Thornton provided an important lens for viewing minors as legal actors. Necessaries were the basic needs of dependents such as wives, children, and, prior to emancipation, slaves. A father, for example, had to provide clothing, food, and medical services for his children appropriate to their station in life.⁷¹ If a third party provided necessary services or supplies to a child and the husband refused to pay, then the third party could sue the father who could be held liable for the debt, even though he had made no express promise to the provider.⁷² This rule protected third parties such as merchants, doctors, dentists, and educators who dealt with married women and minors.

Minors could also be held liable for contracting for necessities. At first blush, this seemed contradictory because such laws were usually used to protect dependents and third parties, not pit them against one another in court. However, there were situations in which a minor, like an “idiot” or “lunatic,” had to be able to act with the legal agency of an adult. Otherwise he or she “might not be able to obtain food, shelter, or raiment.”⁷³ Thus, when his or her survival depended upon being able to make a contract, a child could do so.

Since children had played such an active role in the United States, including fighting to preserve the Union, Justice Thornton did not see how the Illinois’ Bill of Rights declaration that “all men are by nature free and independent, and have certain inherent and inalienable rights,” could be read to exclude children. Instead, he interpreted “all men” to mean that “all people everywhere, have the inherent and inalienable right to liberty.”

69. Turner, 286.

70. About forty percent of the soldiers who served in the Civil War were minors. Clement, *Growing Pains*, 12.

71. Ransom H. Tyler, *Commentaries on the Law of Infancy, including Guardianship and Custody of Infants, and the Law of Coverture, embracing Dower Marriages and Divorce, and the Statutory Policy of the Several States in Respect to Husband and Wife* (Albany: W. Gould and Son, 1868), 112–13.

72. James Schouler, *A Treatise on the Law of Domestic Relations Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant* (Boston: Little, Brown, 1870), 76–100.

73. Tyler, *Commentaries on the Law of Infancy*, 99.

He added that the principle that children had liberty “was declared in the [Illinois] constitution, is higher than constitution and law, and should be held forever sacred.”⁷⁴ “Even criminals,” he noted, “cannot be convicted and imprisoned without due process of law.”⁷⁵ Yet, Daniel had been stripped of his sacred liberty without the due process of law. He was “deprived of a father’s care, bereft of home influences, has no freedom of action, is committed for an uncertain time, is branded a prisoner, made subject to the will of others, and thus feels that he is a slave.”⁷⁶ This condition, Thornton concluded, would “paralyze the [boy’s] youthful energies, crush all noble aspirations, and unfit him for the duties of manhood.”⁷⁷ Thus, Daniel, who had not been afforded the due process protections that even criminals were entitled to, had been enslaved and emasculated.

Declaring that “if, without crime, without the conviction of any offence, the children of the state are to be thus confined, for the ‘good of society,’ then society had better be reduced to its original elements, and free government acknowledged a failure,” the Illinois Supreme Court freed Daniel and struck down the provisions of the reform school laws that had allowed for the imprisonment of children without the due process of law. The court did leave open the possibility that a “milder” approach to these cases of children of misfortune, which would “infringe less upon inalienable rights” would pass constitutional muster.⁷⁸ The court, however, did not specify what such an approach might entail. As a result of *Turner*, the Chicago Reform School could only accept children who had been tried and convicted in the criminal justice system. Superintendent Turner complained that this process hardened children and undermined the school’s subsequent efforts to reform them.⁷⁹

The following year the Great Fire of 1871 that destroyed much of Chicago also burned down its reform school. The board of guardians decided not to rebuild the institution; instead the children were transferred to the recently opened State Reformatory at Pontiac, which the nation’s foremost penologist E. C. Wines described as “a *prison* for juvenile offenders.”⁸⁰ In the aftermath of *Turner*, the state of Illinois tried children over the age of ten in the criminal justice system and incarcerated them in a juvenile prison.

74. *Turner*, 287.

75. *Ibid.*

76. *Ibid.*

77. *Ibid.*

78. *Ibid.*, 286.

79. Gittens, *Poor Relations*, 99.

80. E. C. Wines, *The State of Prisons and of Child-Saving Institutions in the Civilized World* (New York: Cambridge University Press, 1880), 173.

The significance of *Turner* did not end with the school's demise. The court's broad interpretation of "all men" to include children demonstrated that it was indeed possible to imagine children possessing liberty in the liberal state. Children in Illinois now had the right to due process, but the processing of their cases had also become more harrowing. Moreover, reformers in Illinois who wished to make the state into a caring parent for its dependent and delinquent children could no longer rely solely upon antebellum precedents like *Crouse* to justify state paternalism. They would have to find newer foundations upon which to build a separate justice system for juveniles.

The Illinois Supreme Court's decision elicited angry responses from state officials. Newton Bateman, the state's superintendent of public instruction, denounced the decision because it threatened to undermine the state's long regulatory heritage that had placed the public good above "the personal liberty of the individual citizen."⁸¹ The decision also threatened the very idea of public education and would leave children unprepared to exercise their inalienable rights. Without education, he argued, "the *pursuit of happiness*" may become the blind search for sensual pleasures, impelled by the spur of unregulated passions and unhallowed desires—*liberty* may be misconceived and abused, or lapse into unrestrained and lawless license—and *life* is dwarfed, circumscribed, impoverished, shorn of many of its richest enjoyments and blessings, powers and possibilities."⁸² Due to their lack of experience, children were dependents who required moral guidance to develop into responsible and independent citizens. Accordingly, the state had an obligation to provide common schooling for children as well as to compel their attendance. The court's decision, he feared, might prevent the state from enacting a compulsory education law.

Turner also reached a nationwide audience. In 1871 the *American Law Register* reprinted the decision with favorable commentary by Isaac Redfield, the eminent former Chief Justice of the Vermont Supreme Court. Redfield explained that *Turner* was such a portentous decision because it struck "at the very root and life of one of the most favorite schemes of reform known to the present age; what is called in popular language, legislative moral reform and compulsory popular education." Decisions like *Turner*, he argued, would prevent reformers from "being able to mould so vast an empire as this [i.e., the United States], composed of such diverse nationalities, and such discordant religions and political opinions, into one homogeneous compound of purity and perfection, which these men greatly

81. *Ninth Biennial Report of the Superintendent of Public Instruction of the State of Illinois, 1871–1872* (Springfield, 1872), 202 [hereafter cited as Bateman, *Report*].

82. Bateman, *Report*, 224 (emphasis in original).

desire.” Redfield predicted that the decision would protect the liberty of Catholic children and “must certainly be a great comfort to a devout Roman Catholic father or mother to reflect that now his child cannot be driven into a Protestant school, and made to read the Protestant version of the Holy Scriptures. And what is more, his or her child cannot be torn from home and immured in a Protestant prison, for ten or more years, and trained in what he regards a heretical and deadly faith, to the destruction of his own soul.”⁸³ *Turner* would protect American diversity and literally save Catholic children from a fate far worse than death.

Redfield noted that the lack of due process protections in the commitment procedure under the reform school laws had made *Turner* an easy case for the justices to decide. He pointed out, however, that harder cases were sure to follow since “there is a wide field of debatable ground between the dominion of punishment for crime and that of mere improved culture.”⁸⁴ Future decisions, he prophesied, would fall into this uncertain territory. The Illinois Supreme Court had left open the possibility that milder laws for the treatment of children of misfortune would be acceptable. Redfield suggested that this might indeed be the case.

Although a number of state courts handed down decisions similar to *Turner* that led to children being released from institutions, the child-saving movement of the late nineteenth century helped to change the tenor of the debate over the legal status of dependent children.⁸⁵ By exploiting fears of children as well as emphasizing that children were developmentally different from adults, reformers championed the idea that the state had a responsibility to ensure that all children had a childhood. This responsibility entailed expanding the state’s police powers to regulate the lives of more children and their families. As the legal historian Michael Grossberg has noted, “the scope and direction of child welfare change in the era was evident in the fact that in the United States, as in Britain, the phrase *the children of the state*, once used to refer exclusively to children in the direct care of public authorities, began to be used to refer to all children by advocates of a wider state role.”⁸⁶ By the early twentieth century, the child-saving movement had legitimated an enhanced role for the state in child protection that paved the way for expanded compulsory education

83. Isaac Redfield, “Comment,” *American Law Register* 19 (1871): 372–74.

84. *Ibid.*, 375.

85. *Turner*-like decisions that led to the release of children from houses of refuge and reform schools included *Commonwealth v. Horregan*, 127 Mass. 450 (1879); *State (ex rel. Cunningham) v. Ray*, 63 N.H. 406 (1885); and *Ex Parte Jonie Becknell*, 119 Cal. 496 (1897).

86. Grossberg, “Changing Conceptions of Child Welfare,” 24.

laws, juvenile courts, child labor laws, and public health measures.⁸⁷ Turner thus served as only the beginning of the postbellum debate over the legal status of dependent children, not the final word.

Part II. The Responsibility of the State to Protect and Provide

The tenor of the debate over the legal status of dependent children was changing in the late nineteenth century. But reformers still had to make the case for increasing state responsibility for the care of these children. Although private associations, through the founding of orphan asylums, played the major role in caring for dependent children from the Civil War to the Great Depression, child savers were concerned about children who were growing up in almshouses or poorhouses.⁸⁸ They argued that these institutions, like jails, surrounded children with adults who were “degrading and vicious influences.”⁸⁹ Not only did this experience of being confined with these adults harm young people, but due to the spread of contagious diseases in poorhouses children also died in these institutions at an alarming rate.⁹⁰ In their efforts to develop state-sponsored programs to provide more school and home-like care for these dependent children, child savers in Illinois established the rudiments of a child welfare system as well as the ideological foundations of the nation’s first juvenile court.

Among the many public and private approaches designed to remove children from poorhouses and place them in school and home-like settings, child savers developed two competing state-sponsored solutions. These approaches—the Michigan Plan and the subsidy system—shared a common faith in diverting children from adult institutions, but also reflected an ideological divide over the proper role of public involvement in child welfare.⁹¹ The Michigan Plan (also known as the state system) involved the creation of a central school for all of a state’s dependent children. In Michigan the passage of an 1871 law required counties to transfer children from local almshouses to a new State Public School in Coldwater, where the children lived in congregate housing and were groomed for placement

87. Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* (New York: Basic Books, 1986), 113–45.

88. Timothy A. Hacsí, *Second Home: Orphan Asylums and Poor Families in America* (Cambridge, Mass.: Harvard University Press, 1997).

89. Katz, *In the Shadow of the Poorhouse*, 104.

90. Susan Tiffin, *In Whose Best Interest? Child Welfare Reform in the Progressive Era* (Westport, Conn.: Greenwood Press, 1982), 190–91.

91. Homer Folks, *The Care of Destitute, Neglected, and Delinquent Children* (New York: Macmillan, 1902; reprint Washington, D.C.: NAWS Classic Series); Abbott, *The Child and the State*, 2:8–21.

in private homes.⁹² This centralized approach separated children from adults and made child dependency into a state concern. It also allowed for a state to keep records on its population of dependent children and develop a more sophisticated understanding of this social problem.⁹³

Some children's advocates, as the era's leading authority on child welfare Homer Folks explained, objected to this state-centered approach. They feared that it would bring partisan politics and the spoils system into the administration of child welfare, which would lead to political hacks, not specialists, running these systems. This argument was based partly upon the perception that machine politicians, by swapping alms for votes, had already corrupted poor relief in eastern cities.⁹⁴

Such mistrust of public administration contributed at least partly to the development of the subsidy system as an alternative to the Michigan Plan. This privatized approach encouraged individuals to establish industrial schools under a state's incorporation laws. The state would then pay a per-child subsidy to these tax-exempt institutions. The advantages of this system were that it allowed for a more decentralized and flexible approach to child welfare. Industrial schools could be established throughout the state, not just in one central location. Moreover, it potentially gave ethnic and religious groups more control over their own dependent children.

The main disadvantage of the subsidy system was that it did not require that all children be removed from almshouses. It also led to uneven levels of care and made it difficult for the state to ensure the safety of children in institutions spread across its expanses. This decentralized system, by definition, was not as uniform as the Michigan Plan and often evolved in a much more haphazard manner. According to Folks, "It is doubtful whether any State deliberately and intentionally adopted this plan as a general State system. Usually it has been undertaken in various localities as a temporary expedient, and then gradually extended, until, by permission of the State, rather than by its direction, it has become the prevailing system."⁹⁵

92. "An Act to Establish a State Public School for Dependent and Neglected Children," reprinted in Abbott, *The Child and the State*, 2:54–57; G. A. Merrill, "State Public Schools for Dependent and Neglected Children," *History of Child Saving in the United States* (1893; reprint Montclair, N.J.: Patterson Smith, 1971), 204–46.

93. By the turn of the twentieth century, Colorado, Kansas, Minnesota, Montana, Nebraska, Nevada, Wisconsin, and Texas had all adopted the Michigan plan. Folks, *The Care of Destitute, Neglected, and Delinquent Children*, 82.

94. *Ibid.*, 97–98. Although Folks listed concerns about partisan politics as a leading objection to the state system, he argued that these charges were generally exaggerated.

95. By the end of the nineteenth century, California, Delaware, the District of Columbia, New York, Maryland, North Carolina, New Hampshire, Oregon, Pennsylvania, and Tennessee all made appropriations to some child welfare institutions within their borders. Folks, *Care of Destitute, Neglected, and Delinquent Children*, 116.

After the Illinois Supreme Court had condemned the Chicago Reform School as a form of state despotism, it would have been difficult for the state's lawmakers to adopt the Michigan Plan. Instead in 1879, when the general assembly passed the Industrial School Act for Girls, Illinois put the rudiments of a subsidy system into place.⁹⁶ This legislation was based upon a Wisconsin statute that the neighboring state's high court had declared constitutional in 1876.⁹⁷ Any seven or more residents, as long as the majority were women, could, with the approval of the governor, establish a tax-exempt industrial school for girls under the state's incorporation laws.⁹⁸ This requirement that the majority of the board be women reflected a growing maternalist assumption that women by nature were better suited than men to be the primary caretakers of children. In addition, the Illinois Board of State Commissioners of Public Charities, which had been established in 1869 to oversee social welfare in the state, including charitable and penal institutions, had the power to visit, inspect and supervise these industrial schools.⁹⁹

Significantly, this legislation, unlike the state's earlier reform school laws, included many procedural safeguards as part of the commitment process. Any "responsible person," who had lived in the county for a year, could petition to have a county court "inquire into the dependency of any female infant then within the county."¹⁰⁰ The petitioner, however, was required to provide the names of the child's parents or guardian, show why they were not fit to have custody, and take an oath to verify these claims.¹⁰¹ Once the petition was filed, the clerk of the court would issue a writ to the sheriff to bring the girl before the court. Notice of the hearing had to be given to the parents or guardian of the child.¹⁰²

The statute also required that an attorney represent the girl during the hearing. The statute declared that if the girl did not have counsel it was then "duty of the court to assign counsel for her." Thus, in the hearing that would take place in open court before a six-member jury, the counsel presumably represented the girl's interest, not her parents or guardians.¹⁰³

96. "An Act for Industrial Schools for Girls," *Laws of Illinois* (Springfield: Weber and Co., 1879), 309-13.

97. *Milwaukee Industrial School v. Supervisor of Milwaukee County*, 40 Wis. 328 (1876).

98. "An Act for Industrial Schools for Girls," 309.

99. *Ibid.*, 313.

100. *Ibid.*, 309.

101. *Ibid.*

102. This notice requirement only applied if the parents or guardians were in the county at the time.

103. As Martha Minow has noted, "The problem of insuring that advocates work towards the best interests of the client is inherent in any system which uses counsel to represent

Moreover, the jury had to find a girl that the girl was “dependent” and that “the other material facts set forth in the petition are true” before a judge could commit her to an industrial school.¹⁰⁴

Once a judge committed a girl to an industrial school its officers and trustees assumed “exclusive custody, care and guardianship” over her until she turned eighteen, the age of majority for girls in Illinois. The school could discharge a girl at any time for either her sake or the school’s. The governor also had the power to discharge girls. The school provided for a girl’s “comfort and support” and educational, moral, and religious training. It also taught her the “domestic avocations, such as sewing, knitting, and housekeeping.”¹⁰⁵

Although these schools were privately managed, the state helped to support them with supplies and subsidies. The county courts were required to see that every girl they sent to a school was furnished with “three chemises, three pairs of woolen stockings, one pair of shoes, two woolen petticoats or skirts, three good dresses, a cloak or shawl, and a suitable bonnet.”¹⁰⁶ These items would be paid for out of the county treasury, unless the parents or guardians could afford to provide them. In addition, the county paid the school \$10 per month for each child it committed to a school, except for those that a school apprenticed or placed in private homes as domestics.¹⁰⁷

Unlike the vague language used in the reform school laws, the industrial schools legislation included specific acts or conditions that could make a “female infant” into a “dependent girl.” To be considered dependent a girl had to fall within the following description:

Every female infant who begs or receives alms while selling, or pretending to sell any article in public; or who frequents any street, alley or other places, for the purpose of begging or receiving alms; or who having no permanent place of abode, proper parental care, or guardianship, or sufficient means of subsistence, or who for other cause is a wanderer through streets and alleys, and in other public places; or, who lives with, or frequents the company of,

clients. Where one party is given the authority to put forward another’s interests, there is always the danger that the agent will not be faithful to the interests of his client. The agent may have misperceived what the client wanted. The agent may believe something to be in the client’s interests when it actually is not. Finally, wherever power is delegated, there is always the potential and incentive for the agent to put his own interests ahead of those of his client. These problems infect almost every human relationship.” Minow, *Interpreting Rights*, 1889–90.

104. “An Act for Industrial Schools for Girls,” 310

105. *Ibid.*, 312.

106. *Ibid.*

107. *Ibid.*

or consorts with reputed thieves, or other vicious persons; or who is found in a house of ill-fame, or in a poor house.¹⁰⁸

Although there were still ambiguous phrases in the legislation, such as “proper parental care,” these terms were surrounded by specific examples that could be used by juries to determine their application in individual cases.

The industrial school law excluded certain girls from being considered dependent. It promulgated that “no imbecile, or idiotic girl, or one incapacitated for labor, nor any girl having any infectious, contagious, or incurable disease, shall be committed or received into any Industrial School.”¹⁰⁹ The exclusion of some girls, especially ones unable to labor, shed light on the mission of these *industrial* schools. They were intended to train girls for future employment and respectable marriage. Those who could not learn these skills belonged elsewhere. Girls who posed a health risk to the other inmates were also banned in order to prevent the outbreak of epidemics.¹¹⁰

The 1882 cases of Winifred Breen, a nine-year-old Chicago girl, and Mary Stoner, a seven-year-old McLean County orphan, presented the Illinois Supreme Court with the opportunity to determine whether the Industrial Schools Act was constitutional. The girls’ cases revisited the major question decided twelve years earlier in *Turner*: Could the state imprison children without following the due process of law? This time the children in question, unlike Daniel O’Connell, might have been poster children for dependency. Winifred and Mary were not old enough to work, to be convicted of a crime, or to consent to sex.¹¹¹ They also did not have families that could care for them. Unless they were sent to an industrial school, these young girls would likely end up in an almshouse or on the streets where they might be sexually exploited or possibly starve. Their cases questioned whether very young children, especially girls, could be considered autonomous individuals and forced the Illinois Supreme Court to reconsider what liberty for children meant.

On November 10, 1881, Alexander Ferrier, an American-born butcher of Scottish descent who lived with his family in a tenement on West Madison

108. *Ibid.*, 310.

109. *Ibid.*, 313.

110. On health concerns in children’s institutions in the 1870s and 1880s, see Kenneth Cmiel, *A Home of Another Kind: One Chicago Orphanage and the Tangle of Child Welfare* (Chicago: University of Chicago Press, 1995), 25–26.

111. Illinois’ age of consent (i.e., the age at which girls could legally consent to sex) was set as ten years of age, which was the norm in the 1880s. For an analysis of the campaign to raise the age of consent law in the late nineteenth century, see Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920* (Chapel Hill: The University of North Carolina Press, 1995), chap. 1.

Street, filed a petition alleging that his neighbor's daughter Winifred Breen was "a dependent person."¹¹² The petition stated that the nine-year-old was a "wanderer upon the streets," "has been picked up by the Police and others while wandering the streets at nights," "is a truant at school," "has not proper parental care," and "is in imminent danger of ruin and harm." Her father, a convicted felon, was presumed to be dead and her mother was in such poor mental health that she was not capable of restraining the girl and was no longer a "fit person to have the custody of the child."¹¹³ By filing the petition, Ferrier made Winifred and her home life into the subject of a public trial before the County Court of Cook County to determine whether she was a "dependent girl" who should be committed to the Illinois Industrial School for Girls in South Evanston.

Unlike the murkiness surrounding Daniel O'Connell's arrest, Winifred's trial shed light on why she had been brought to court and also provided a record for the Illinois Supreme Court to review. Her stepfather James Suedden, a Scottish janitor and partial invalid, testified that his wife Millie Addie Suedden had "tried to hang" her daughter, but he had "caught her at it, and let the child down, and saved her life." Millie had then tried to commit suicide by hanging herself. According to James Suedden, his wife was "insane two or three times every week, and is not a fit person to have the care and custody of the child." He declared that he loved Winifred as if she were his own daughter, but he could not take care of her because he was "away at work during the day." "I would like to keep her if I could take care of her properly, but it is impossible; I am afraid she will go to the bad if she stays where she is, and be the means of driving her mother crazy; I think the best place for her is the Industrial School for Girls."¹¹⁴

Perhaps due to a period of insanity Millie Addie Suedden did not attend her daughter's trial, but a neighborhood physician D. P. Hanson confirmed that she was "at times insane" and "is not a fit person to take care of the child." Dr. Hanson knew the Suedden family and testified that Winifred was "difficult to manage; won't go to school, and gets into the hands of the police." He diagnosed that her behavior "grows out of the condition of the mother" and that unless Winifred was removed from her home she "will be ruined."¹¹⁵

Both the doctor and the petitioner Ferrier testified that that the girl had

112. "Petition of Alexander M. Ferrier," November 10, 1881, Case No. 20610, Supreme Court Archives, Springfield, Illinois, n.p. The information about Ferrier's family comes from the 1880 Census track for Illinois, Cook County, Registration District, 123, p. 22.

113. "Petition of Alexander M. Ferrier," n.p.

114. "Abstract, In the Matter of the Petition of Alexander M. Ferrier To Have Winifred Breem [sic] Declared A Dependent Girl," Case No. 20610, Supreme Court Archives, Springfield, Illinois, p. 3.

115. *Ibid.*

come to their respective homes well after dark and then asked to spend the night. They appeared worried that Winifred was becoming a bad influence on their own children.¹¹⁶ Ferrier stated: "I have known of her being arrested and being confined in the police station; she runs all over the city and keeps bad company; I believe she will be ruined unless she is taken away from her present home and made to change her life." Under cross-examination, he explained what he meant by the term "ruined": "you know what that means; on the account of the bad company she keeps; she will lie and steal, and I am afraid she will finally become a loose woman."¹¹⁷ All the men who testified feared that Winifred was in grave danger of becoming a prostitute and called upon the state to make this "female infant" into a "dependent girl" before she became a "loose woman."

Winifred Breen testified on her own behalf, although it is impossible to know whether she had been coached or even how much of the trial's proceedings or significance the nine-year-old could have understood.¹¹⁸ In a response to a series of questions posed by her lawyer, Winifred stated: "I love papa; I don't know whether I love mamma; I have tried to do as they wanted; I am not a bad girl; I try to be good; I do sometimes run away; my mother tried to hang me and then tried to hang herself; I am afraid of her; I know of this industrial school and want to go there."¹¹⁹ Winifred at least had had a say in her case.

In stark contrast to Winifred's sad home life, the jury heard glowing testimony about the South Evanston Industrial School from its president Helen Beveridge, the wife of the former governor of Illinois. Beveridge stressed that the school was not a prison. As she explained, the school was located in South Evanston on the shore of Lake Michigan and had "five acres of undulating, beautiful grounds, well shaded, and over which the inmates have free range as a playground."¹²⁰ "The only barrier to freedom from these grounds," she pointed out, "is a low fence of four parallel boards, over which any child over four years can easily climb, the gate to which is never locked, and any of them can easily open it." Inside the school building "the only thing to prevent the children from going outside at

116. According to the 1880 census track, Ferrier and his wife had four daughters (Agnes, age 11; Anna, age 9; Helen, age 8; and Gracie, age 6). Dr. Hanson testified that he had several children.

117. "Abstract," p. 3.

118. On the competency of children and adolescents to understand the legal process, see *Youth on Trial: A Developmental Perspective on Juvenile Justice*, ed. Thomas Grisso and Robert G. Schwartz (Chicago: University of Chicago Press, 2000).

119. "Abstract," p. 4.

120. This paragraph is drawn from Beveridge's testimony, which is printed on an insert, located between pages three and four of the "Abstract."

pleasure is a command not to go without permission; and there is no more restraint upon their liberty than that imposed upon children in an ordinary family or institution of learning.” And, she emphasized, “the sole object and aim of the institution is to make a pleasant home for the homeless ones committed to their charge.” They were “taught ordinary household duties, sewing, and the ordinary branches of English education, and receive moral and religious (but not *sectarian*) instruction. Their parents and friends are allowed to visit them freely, and children are provided with homes in good families as often as opportunity offers; but not without their and their parents’ consent.”¹²¹ The school, as described by Beveridge, certainly did not sound like a juvenile prison.

At the conclusion of the trial, the jury determined that Winifred was a dependent girl and Judge Mason Loomis ordered that she be “surrendered to the care and custody” of the South Evanston Industrial School.

Surprisingly, Winifred’s court-appointed attorney Consider Willett appealed his client’s case to the Illinois Supreme Court. Willett appeared to be putting the finances of Cook County ahead of Winifred’s interests, as he played to common fears in this period about creating dependency through state charity and used the language of children’s rights from *Turner* to protect the taxpayers from a potentially costly precedent.¹²² If the Sueddens who had only one child could claim that they were not capable of raising her, then he argued families with multiple children could easily assert that they could not care for their more numerous offspring. In addition, he contended that the state was treating Cook County like a dependent by forcing it to pay subsidies to private institutions that might not even be located within its bounds. This practice, he declared, was “*taxation without representation*” and had always been “*odious*.”¹²³

Willett also used rhetorical techniques borrowed from the abolitionist critiques of chattel slavery. He stated that the law, which had no residency requirement for the girls that might be declared dependent, would make Chicago into a center for child stealing. “Immigrant agents on behalf of

121. Ibid. (emphasis in original).

122. An attorney for the Industrial School charged that Willett was only “acting in the name of the respondent [Winifred], but in reality” represented Cook County. “Brief for Appellees,” Case No. 20610, Supreme Court Archives, Springfield, Illinois. Determining how attorneys should represent children raises a host of ethical questions. For more discussion of these issues as well as a proposed model, see Martin Guggenheim, “A Paradigm for Determining the Role of Counsel for Children,” *Fordham Law Review* 64 (March 1996): 1399–1433. For an excellent discussion of these fears about creating dependency in this age of ascendant liberalism, see Karen Sawislak, *Smoldering City: Chicagoans and the Great Fire, 1871–1874* (Chicago: The University of Chicago Press, 1995).

123. “Appellant’s Brief,” Case No. 20610, Supreme Court Archives, Springfield, Illinois, p. 7 (emphasis in original) [hereafter Willett’s Brief].

these institutions, called Industrial Schools, may like hotel runners meet incoming trains to Chicago and snatch into their care and confidence all girls under 18 years of age." Even "a baby at the mother's breast," he added, "may be taken."¹²⁴ Moreover, parents were only allowed to "appear and resist" the commitment of their daughter if they were actually in the county at the time of the trial.¹²⁵ As a result, "county lines may become as famous as the Mason Dixon line, because, if a child is found in the county a petition may be filed without notice to her parents, although they are known to be in an adjacent county."¹²⁶ This possibility of a parent losing his or her daughter undermined parental rights and, in his opinion, clearly violated the Illinois Constitution.

While Winifred Breen's case was on appeal, the future of Mary Stoner also hung in the balance. In October of 1880 a six-man McLean County jury had found the seven-year-old African-American orphan to be a dependent girl. McLean County, however, did not have an industrial school and the judge had to locate one that would accept her. There were only two industrial schools for girls in the state, the one in South Evanston and another in Springfield. The judge made arrangements with the former and issued a warrant for Laura Humphreys, a manager of the school, to pick up and bring the girl to South Evanston. After delivering Mary to the school on April 1, 1881, Humphreys presented her bill for \$34 (136 miles traveled at 25 cents per mile) to the Board of Supervisors for McLean County, but the board refused to reimburse her.¹²⁷ Humphreys sued the board, won at trial, but the board appealed the trial court's decision to the Illinois Supreme Court.

Robert Porter, the state's attorney, and Frank Henderson, the county attorney, who represented McLean County in Mary Stoner's case took a different tack from Willett in challenging the constitutionality of the Indus-

124. "Willett's Brief," p. 4. The opposing counsel, N. M. Jones, mocked Willett for this argument: "He is afraid lest Cook county shall be a refuge for dependent girls from all parts of the world! He seems as greatly agitated in regard to their irruption as the Californians are in regard to the Chinese. This school, however, has, been established four years, and yet Cook county, with its 600,000 inhabitants, has now committed to said school less than forty girls, although thousands of boys and girls are annually arrested in said county and punished for crime." "Appellee's Brief," Case No. 20610, Supreme Court Archives, Springfield, Illinois, p. 8 [hereafter Jones's Brief].

125. "Willett's Brief," p. 5

126. *Ibid.*

127. According to section 8 of the Industrial School Act, "The fees for conveying a dependent girl to an Industrial School for Girls, shall be the same as conveying a juvenile offender to the Reform School for Juvenile Offenders, at Pontiac, in this State, and they shall be paid by the counties from which such dependent girls are sent, unless they are paid by the parent or guardian." "An Act for Industrial Schools for Girls," 311.

trial Schools Act. They focused more attention on the explosive question of church-state relations. The act, as they pointed out, required that the girls must be given moral and religious training, although this training should avoid “as far as practicable, sectarianism.”¹²⁸ This requirement violated the Illinois Constitution because it forced counties to pay subsidies to private schools that provided religious instruction.¹²⁹ They argued that this was an extremely dangerous delegation of discretion to a private corporation, which could “practically chose their own inmates . . . and inculcate Catholic, Methodist, Presbyterian, or any other dogma.”¹³⁰

They also argued that based on *Turner* the legislation was clearly unconstitutional because it deprived children of their liberty. “What may be the best for Mary Stoner is not the question in this case, but we are to ask, has she by this record had a constitutional trial?”¹³¹ They declared that she had been stripped of her liberty because she had not received a fair trial before a twelve-member jury—the standard number of jurors in a criminal prosecution—and the use of a six-man jury had violated her right to due process of law. As a result of this violation of her right to due process of law, they argued that she must be freed.

They also spelled out what would happen if the court did not invalidate the Industrial Schools Act. “If this statute is constitutional, one providing for the like confinement of boys or men would also be valid and there would be no end to which the innovation might be carried. It is carrying the doctrine of paternalism entirely too far. The doctrine is dangerous and subversive of liberty.”¹³² This slippery-slope argument attempted to shift the focus away from a seven-year-old girl, one of the people least likely to be considered an autonomous citizen in the late nineteenth century. The lawyers wanted the justices to think about the liberty of an adult male, not a “colored girl” who was under the state’s minimum age for criminal responsibility as well as consent.

The lawyers who represented the South Evanston Industrial School in

128. *Ibid.*, 313.

129. Article 8, Section 3 of the Illinois Constitution of 1870 declared: “Neither the General Assembly, nor any city, town, township, school district or other public corporation shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.”

130. “Appellant’s Brief,” Case No. 6293, Supreme Court Archives, Springfield, Illinois, p. 6.

131. *Ibid.*, 9.

132. *Ibid.*, 12.

both cases focused on the dependency of the girls and questioned whether it was possible for either one to benefit from the negative liberty guaranteed by the due process of law. In Mary's case, the school counsel A. E. Magne declared that McLean County "would have her retain her *personal* liberty though in the enjoyment of it she will starve."¹³³ She did not need protection from the state; instead she desperately needed its assistance. This was a demand for the positive rights of social citizenship.

N. M. Jones, who represented the school in Winifred's case, also asserted that dependent girls required "control and care," the "necessities of life," and "moral training and all that is meant by home, and home influences."¹³⁴ The needs of children, Jones argued, took precedence over any notion of personal liberty. He declared, "We believe in liberty, in the ancient *magna charta*, in the more modern bill of rights: We think the personal freedom of individuals should never be infringed lightly and carelessly, or without just cause. But we believe that honesty, sobriety and morality are of more value than personal freedom, and that virtue is more to be desired than liberty."¹³⁵ Much like the argument of the state's superintendent of public instruction, that children required education before they could exercise liberty, the attorneys for the school in both cases emphasized that children had more pressing needs than personal freedom, and that virtue must come before liberty.

In deciding *Ferrier* and *Humphreys*, the Illinois Supreme Court weighed the arguments for unfettered personal liberty against the calls for disciplined social citizenship. How the court decided these cases would determine whether Illinois could build a subsidy system to handle the cases of its dependent children. On June 21, 1882, the court announced its decision in the first case. It declared that the procedures for hearing dependency cases established by the Industrial Schools Act did not violate the state constitution.¹³⁶ Justice Benjamin Sheldon, a member of the court since 1870 and its former chief justice, wrote the majority opinion that applauded the "anxious provision" that the legislation "made for the due protection of all just rights."¹³⁷ The extensive due process protections in this legislation had distinguished it from the earlier reform school laws that had made *Turner* such a straightforward case to decide.

Sheldon also explained that the South Evanston Industrial School was truly a school, not a prison. This critical distinction allowed the court to

133. "Appellee's Brief," Case No. 6293, Supreme Court Archives, Springfield, Illinois, p. 6.

134. "Jones' Brief," 15.

135. *Ibid.*, 18.

136. *Petition of Ferrier*, 103 Ill. 367 (1882).

137. *Ibid.*, 371.

conceptualize the Industrial Schools Act not as a part of the state's *criminal* law, but rather as one belonging to "the same character of jurisdiction exercised by the court of chancery over the persons and property of infants, having foundation in the prerogative of the Crown, flowing from its general power and duty, as *parens patriae*, to protect those who have no other lawful protector."¹³⁸ Not only had the court resuscitated the doctrine of *parens patriae*, but it declared that since the commitment hearing was a chancery procedure it did not have to follow criminal procedure. Thus it was acceptable to have only six jurors instead of the twelve required in criminal cases.¹³⁹

Significantly, Sheldon also drew a distinction between "natural" and "civil" rights that implied that *all* children's cases might in fact be handled as chancery matters. He explained that children did not have absolute liberty. Instead they should be classified as "dependent" or "helpless" individuals who needed to be in controlled, hierarchical relationships such as "parent and child, guardian and ward, [or] teacher and scholar."¹⁴⁰ This discussion, which drew primarily from Blackstone's *Commentaries on the Laws of England*, described children as social beings who had limited civil rights.¹⁴¹ This understanding of the social nature of human existence and limited individual rights was, of course, not new. It has served as the foundation for American governance since the revolution.

Although the emerging liberal order had begun to replace this vision of a well-regulated society, Justice Sheldon retained the older notion of civil rights because he could not conceive of young girls as autonomous individuals with constitutional rights that needed to be protected at all costs.¹⁴² He believed that it was the public's responsibility to ensure that these girls were in safe, structured settings, such as respectable families or industrial schools. Since the court found that South Evanston Industrial School exercised "no more than such proper restraint which the child's welfare and the good of the community manifestly require," the court declared that "the decision in 55 Ill. [*Turner*] as to the reform school" should not "be applied to this industrial school."¹⁴³ Sheldon's opinion thus marked a retreat from the court's earlier extreme libertarian position and the only dissenter, Justice Pinkney Walker, did not explain why he objected. Yet, it

138. *Ibid.*, 372.

139. *Ibid.*, 374.

140. *Ibid.*, 373.

141. Justice Sheldon was relying upon William Blackstone, *Commentaries of the Laws of England*, vol. 1, 125. It is not clear which edition he used.

142. For an overview of Sheldon's life and career, see *Historical Encyclopedia of Illinois*, 477.

143. *Ferrier*, 373.

is important to note that the court had emphasized the “anxious provisions” in the legislation that provided procedural protection for “just rights.” Thus, the justices were still concerned about process, but were satisfied with the procedural safeguards established in the statute.

The court did not address the constitutionality of requiring counties to pay subsidies to industrial schools that provided religious instruction.¹⁴⁴ It decided this important question three months later in *Humphreys*. Judge John Mulkey, who delivered the high court’s opinion, rejected the characterization of the South Evanston Industrial School as either being “organized or conducted in the interest of any particular church or religious organization.”¹⁴⁵ The fact that the members of the school’s board belonged to different Protestant denominations was enough proof. More important than this judgment about this particular school was the precedent that the decision set. It cleared the way for the subsidy system to take root in Illinois, although there would be future suits filed against specific industrial schools for being sectarian.¹⁴⁶

The most striking feature of Mulkey’s opinion was his response to the McLean County attorneys’ slippery-slope argument, which had cautioned that the Industrial Schools Act would eventually erode the foundations of liberty for boys and then adult men. Mulkey quoted the definition of dependency from the act in its entirety and then declared, “It would be difficult to conceive of a class of persons that more imperatively demands the interposition of the State in their behalf.” He added:

It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason, of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise.

This powerful statement granted the state both the power as well as the responsibility to act as a parent for all its citizens who could not take care of themselves. Justice Mulkey concluded that the legislature had the right “to provide the necessary instrumentalities or agencies for the accomplishment of these objects.”¹⁴⁷

144. *Ibid.*, 374.

145. *Humphreys*, 383.

146. Six years later, for example, the court did declare that the Chicago Industrial School for Girls, a Catholic school, was a sectarian institution. *County of Cook v. The Chicago Industrial School for Girls*, 125 Ill. 540 (1888).

147. *Humphreys*, 383–84.

With these decisions, the Illinois Supreme Court had cleared the path for Illinois to construct a statewide system for caring for its dependent children. The next year the Illinois General Assembly passed legislation to establish a system of subsidized training schools for dependent boys.¹⁴⁸ The language of this act was almost identical to the Industrial Schools for Girls Act, including its description of the commitment procedure and definition of dependency. The framework for a system for policing dependent children was now legally in place in Illinois, although children charged with committing crimes were still tried as adults.

III. Conclusion

In the 1880s, the Illinois Supreme Court had moved beyond the libertarianism of its *Turner* decision, much like the nation had abandoned the radicalism of Reconstruction, but the ideas in Justice Thornton's opinion about parental and children's rights did not simply vanish. His concerns about the due process of law were, for example, incorporated into the procedural guarantees of the industrial and training schools acts. In addition, much like African Americans worked to keep the spirit of the Civil War and Reconstruction alive, critics of state paternalism continued to use Thornton's powerful arguments about children's rights as well as parental rights.¹⁴⁹ Yet, *Ferrier* and *Humphreys* did serve as countervailing forces that helped to lay the foundations for the juvenile court. In the 1890s, when reformers searched the case law for ways to allow the establishment of

148. "An Act to Provide For and Aid Training Schools for Boys," *Laws of Illinois* (Springfield: H. W. Broker's Printing House, 1883). Due to the different ages of majority for boys and girls in Illinois, the length of commitments differed. Training schools retained custody over boys until they turned twenty-one, whereas industrial schools had custody over girls only until they turned eighteen. Training schools received smaller subsidies than industrial schools. They were paid from between \$7 to \$9 per boy, considerably less than the \$10 per-child subsidy paid to industrial schools.

149. See, for example, David S. Tanenhaus, *Juvenile Justice in the Making* (New York: Oxford University Press, 2004). For analysis of African Americans keeping the spirit of the Civil War and Reconstruction alive, see David W. Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge: Belknap Press of Harvard University Press, 2001). For the status of civil rights law in Illinois in the 1880s, see Elizabeth Dale, "Social Equality Does Not Exist among Them or Us: *Baylies vs. Curry* and Civil Rights in Chicago, 1888," *American Historical Review* 102 (April 1997): 311–39. In his influential brief for *Pierce v. Oregon* (1925), the Columbia Law professor William D. Guthrie, for example, cited *Turner* as a precedent that supported the liberty of parents. Mr. William D. Guthrie, with whom Mr. Bernard Hershhoff was on the brief, for appellee in No. 583, *Pierce v. Society of Sisters*, 268 U.S. 510, 519 (1925). For discussion of Guthrie's role in the parental rights cases of the 1920s, see Woodhouse, "Who Owns the Child?" 1070–80.

a separate juvenile justice system, they seized upon the interpretation of *parens patriae* in these child dependency decisions.

Although the Cook County Juvenile Court—the nation's first such court—did initially convene six-men juries to hear dependency cases, the progressive supporters of the court in Illinois and elsewhere were more committed to a narrower conception of children's right than the Gilded Age lawmakers who had built the state's subsidy system. In *Commonwealth v. Fisher* (1905), in upholding the constitutionality of the state's juvenile court law, the Pennsylvania Supreme Court best articulated the progressive understanding of children's rights as the need for salvation, not process. As the court explained:

The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as *parens patriae*, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there.¹⁵⁰

Instead of focusing on the due process rights of the child, the progressives emphasized children's rights to social citizenship and used the juvenile court as an instrument with which to build the welfare state through the administration of family preservation programs, such as mothers' pensions.¹⁵¹

The progressive success in constructing the welfare state upon the concept of needs, especially those of dependent children, helped to elide the Gilded Age's broad conception of children's rights. Moreover, children's rights advocates in the 1960s and 1970s focused their attention on incorporating due process protections into the institutions that the progressive child savers had championed, such as juvenile courts and public schools.¹⁵² This late twentieth-century critique of progressive state building largely ignored the Gilded Age. As a consequence, in their efforts to establish a children's rights movement, these advocates missed a history that they might have drawn upon to further their cause. And scholars, by focusing

150. *Commonwealth v. Fisher*, 213 Pa. 48, 53 (1905).

151. David S. Tanenhaus, "Growing Up Dependent: Family Preservation in Early Twentieth-Century Chicago," *Law and History Review* 19 (Fall 2001): 547–82.

152. For characterizations of 1960s child savers attacking the accomplishments of the Progressive Era child savers, see David J. Rothman, "The State as a Parent: Social Policy in the Progressive Era," in *Doing Good: The Limits of Benevolence*, ed. Willard Gaylin et al. (New York: Pantheon Books, 1978), 67–96, and Minow, "Children's Rights," 1575–76.

on children's rights as a late twentieth-century development, have ignored earlier historical moments that may illuminate conditions under which lawmakers are likely to reconsider the rights of the child.

As this article has demonstrated, the concept of children's rights has a history that predates *Brown v. the Board of Education* and *In re Gault* by almost a century. Much like the civil rights movement of the 1950s helped to launch the children's rights movement of the 1960s and 1970s, the abolition of slavery a century earlier had helped lawmakers to conceive of children as persons under the law. Moreover, even though the Illinois Supreme Court moved away from the libertarianism of its *Turner* decision during the 1880s, the justices did not abandon their concern for due process. Instead, they were pleased to see that the legislation in question focused on both the rights and needs of children. Incorporating this broad conception of children's rights into the legal process proved challenging, as the cases of Winifred Breen and Mary Stoner revealed. The lawyers for both sides in these cases, for example, appeared to have a hard time conceptualizing children's rights as a combination of rights and needs. And, as today's proponents for including a capacious conception of children's rights in the administration of American law remind us, it remains the central challenge for securing justice for children.