

OUR KINDLY PARENT—THE STATE: THE JUVENILE JUSTICE SYSTEM AND HOW IT WORKS. By Patrick T. Murphy. The Viking Press, Inc., New York, N.Y., 1974. Pp. x, 180. \$8.95.

Working on juvenile cases was like picking up a damp, flat rock and finding thousands of slimy, crawling things under it.¹

In June of 1970, a young Chicago lawyer, Patrick Murphy, became Chief Counsel of the Juvenile Office of Chicago's Legal Aid Society. For the next 3 years, he and his small staff wrote a new chapter in the story of "the rise and fall of the juvenile court."² They brought a series of lawsuits exposing, and often putting an end to, the harsh treatment of children and adolescents confined to reform schools, detention centers, receiving homes, mental hospitals, facilities for the mentally retarded, and other institutions of incarceration for Chicago's economically deprived, "disturbed and disturbing"³ youngsters.

Their victories were impressive: the closing of a juvenile prison; a halt to the banishment of children to out-of-state institutions; reduction in the incidence of incarceration of runaway children; and a decision granting hearings to children, who had been taken from their parents, before the state could commit them to institutions for the mentally ill or retarded or transfer them from mental health facilities to maximum security institutions. Court rulings were obtained prohibiting the placement of juveniles in the state's "security hospital," a maximum security facility for dangerous, mentally ill adults, and limiting the use of drugs, physical restraints, solitary confinement, and other excessive forms of discipline. Private agencies receiving public funds were forced to accept minority group youngsters from overcrowded, understaffed state facilities; there was a challenge to the state welfare department's policy of coercing parents in need of social services into confessing that they had "neglected" their children and giving custody of the children to the state. Finally, there was a decision from the United States Supreme Court permitting unwed fathers to contest the removal and commitment to state custody of their children.⁴

1. P. MURPHY, *OUR KINDLY PARENT—THE STATE: THE JUVENILE JUSTICE SYSTEM AND HOW IT WORKS* 15 (1974).

2. The expression is taken from E. Ryerson, *Between Justice and Compassion: The Rise and Fall of the Juvenile Court*, 1970 (unpublished dissertation in the Yale Law School Library).

3. This characterization of the children primarily affected by the juvenile justice system was used by Chief Judge David Bazelon of the District of Columbia Circuit Court of Appeals in an address at the Yale Law School on November 1, 1974.

4. *Stanley v. Illinois*, 405 U.S. 645 (1972).

Murphy has described his work in a thoughtful and compelling book, *Our Kindly Parent—The State: The Juvenile Justice System and How It Works*. The book is an excellent introduction to the juvenile justice system for those unfamiliar with its history and practice. It is also a dramatic account of the efforts of a small group of legal aid lawyers to reform that system and to rescue children from brutal treatment.

The book should appeal to a wide audience—lawyers, judges, probation officers, correctional personnel, social workers, behavioral scientists, and, happily, the general reader. Moreover, it is a particularly good book for law students, describing the day-to-day working life of practicing lawyers attempting to work within the legal system to achieve reform and justice. The book is laced with excellent descriptions of case development and preparation: how issues are presented and disputes resolved in an adversary system, how tactical and strategic decisions are made, and how ethical questions arise and are resolved.

Murphy's tone is ironic and bitter,⁵ yet the story of the efforts of these lawyers to redress injustice and to relieve suffering both challenges and inspires. Murphy writes:

Since the inception of the juvenile courts almost a century ago, a veil of secrecy has surrounded them and their activities. The alleged reasons for this secrecy is to protect the names and lives of the children and families who are "aided" by the juvenile justice system. But . . . the secrecy is perpetuated more to protect those who work within the state bureaucracies than to maintain the anonymity of those who are compelled to endure being "saved" by the system of juvenile justice. This book was written in an attempt to pierce that veil of secrecy and privacy, and to enlighten the public about how in fact our nation "saves" children and their parents.⁶

The Historical Basis of Juvenile Justice

As Murphy states, the events described in his book must be placed in historical context. The story actually began in Chicago more than a century ago. In 1870, 14-year-old Daniel O'Connell was brought before a superior court judge and charged with being "destitute of proper parental care, and growing up in mendicancy, ignorance, idleness or vice."⁷ Although the boy had committed no crime, the judge found that he was

5. Some of the chapter titles are indicative of the author's approach: "Care, Custody, and Maximum Security: Our Battle in the Federal Courts"; "The Demise of Maximum Security"; "How to Dump Homeless Children in Out-of-the-way-Places"; "The Family-Saving Quagmire."

6. P. MURPHY, *supra* note 1, at vii-viii.

7. *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 282 (1870).

"a proper subject for commitment in [the] reform school [and that his] moral welfare and the good of society require that he should be sent to said school for instruction, employment and reformation"⁸ Daniel was sentenced to the Chicago Reform School pursuant to a statute which provided that children so described were to be "'kept, disciplined, instructed, employed and governed,' until they shall be reformed and discharged, or shall have arrived at the age of twenty-one years."⁹

Daniel's father obtained the assistance of counsel and brought a habeas corpus proceeding in the Illinois supreme court seeking Daniel's release. The court held that the laws under which the boy had been confined were unconstitutional and ordered him set free. "Why," the court asked, "should children, only guilty of misfortune, be deprived of liberty without 'due process of law?'"¹⁰

If, without crime, without the conviction of any offense, 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.¹¹

While conceding that benevolent and rehabilitative purposes had motivated the statute, the court characterized rehabilitative incarceration as imprisonment, recognized the social stigma attached to such confinement, and demanded less restrictive alternatives.¹² This position would one day receive general acceptance in our jurisprudence,¹³ but contemporaneous response to *O'Connell* was to criticize or ignore it. As Murphy observes:

This decision was considered quite illiberal by the child- and family-rescuers of the day. It obviously hindered them from saving from their undeserving parents the children growing up in the immigrant ghettos that were so much a part of the nineteenth-century American city. What was even worse, the Illinois Supreme Court had looked behind the statute and into the realities of the

8. *Id.* at 281.

9. *Id.* at 283.

10. *Id.* at 287.

11. *Id.* at 268.

12. It cannot be said, that in this case, there is no imprisonment. Nothing could more contribute to paralyze the youthful energies, crush all noble aspirations, and unfit him for the duties of manhood. Other means of a milder character; other influences of a more kindly nature; other laws less in restraint of liberty, would better accomplish the reformation of the depraved and infringe less upon inalienable rights.

Id. at 287.

13. Even the notion that impoverished children and their parents would one day have access to free legal counsel in such cases saw its seed planted in 19th-century Chicago. The first true legal aid society, open to individuals of any nationality, sex, or age—The Bureau of Justice—was established in Chicago in 1888. JOHNSON, JUSTICE AND REFORM 5 (1974); R. SMITH, JUSTICE AND THE POOR 136 (1919).

institutional life and in effect was saying that the discipline meted out to O'Connell was, in fact, imprisonment.¹⁴

By the turn of the century, *O'Connell* had been overturned by statute. The first juvenile court in the United States was established in Chicago in 1899,¹⁵ as a result of the efforts of "child savers" of that time such as Jane Addams, Julia Lathrop, Louise deKoven Bowen, Judge Richard Tuthill, and Judge Julian Mack.¹⁶ As the Supreme Court noted in its landmark decision, *In re Gault*:¹⁷

The early reformers were appalled by adult procedures The child . . . was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in . . . procedural criminal law were therefore to be discarded.¹⁸

Not only were procedural safeguards relaxed, but the jurisdiction of the juvenile court was far broader than that of adult criminal courts. Children who, like Daniel O'Connell, had committed no crimes, but were alleged to be truant, beyond the control of their parents, or otherwise "in need of supervision," were to join those children who were charged with adult criminal offenses, in receiving the care, discipline, and treatment which, the child savers claimed, they had been denied by their parents.¹⁹

Flaws in both the theory and implementation of the reformers' plans appeared early. Critics such as Wigmore, then teaching in Chicago, charged that the system neither rehabilitated offenders nor protected the community and disregarded the fundamental purposes of the criminal law.²⁰ It was not simply that society failed to provide the treatment resources necessary to fulfill the child savers' promise to reform, edu-

14. P. MURPHY, *supra* note 1, at 4.

15. See Illinois Juvenile Court Act, Act of Apr. 21, 1899, [1899] Ill. Laws 131.

16. See generally A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Schultz, *The Cycle of Juvenile Court History*, 19 CRIME & DELIN. 457 (1973).

17. 387 U.S. 1 (1967).

18. *Id.* at 15. See generally *THE CHILD, THE CLINIC AND THE COURT* (J. Addams ed. 1925); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

19. [The reformers] were convinced that youth crime was not a problem of law enforcement but a social-psychological problem of children and their families requiring interventions of a therapeutic nature, involving state interference with and assumption of the parental function of child rearing The lack of formal legal procedures and protections for the children was justified on the ground that nothing "bad" was being done to the children, but rather something "good" was being provided for them.

Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUMAN RIGHTS L. REV. 389, 390 (1972).

20. Wigmore, *Juvenile Courts vs. Criminal Courts*, 21 ILL. L. REV. 375 (1926).

cate, and rehabilitate the errant and neglected children of the poor, although that was certainly the case. More fundamentally, the theory was based upon simplistic, sentimental, and authoritarian notions about child development, which have been challenged by professionals in numerous fields.

Shaw and McKay, in their famous Chicago Area Project and other delinquency studies,²¹ have shown the extent to which delinquency is a function of the poverty, overpopulation, and social disorganization of urban slums. Providing a special court and institutions cannot cure delinquency; they can only protect the community from delinquent children during the period of their confinement. Psychological theory—particularly psychoanalysis—has also contradicted the approach of the child savers. Psychologists have argued that the causes of youthful anti-social behavior are deeply rooted within the personality and, therefore, cannot be treated effectively except through extended individual psychotherapy.²² If the sociologists and psychologists are correct, the superficial efforts of friendly probation officers, kindly judges, and humane correctional personnel are doomed to failure from the outset. Similarly, legal theorists and criminologists have joined in criticizing the theoretical assumptions of the child savers. Professor Francis Allen, formerly of the University of Chicago Law School, has correctly pointed out the inherent conflict in the juvenile justice system between legal values and rehabilitative ideal.

We shall escape much confusion here if we are willing to give candid recognition to the fact that the business of the juvenile court inevitably consists, to a considerable degree, in dispensing punishment. . . . [W]e can no more avoid the problem of unjust punishment in the juvenile court than in the criminal court. . . . A child brought before a tribunal . . . has . . . a right to receive not only the benevolent concern of the tribunal but justice. One may question with reason the value of therapy purchased at the expense of justice.²³

Revisionist historians of the child-saving movement have begun to question even the motivations of the reformers who had devised and promoted the special juvenile justice system. Platt²⁴ and Fox²⁵ have con-

21. C. SHAW, *THE JACK-ROLLER, A DELINQUENT BOY'S OWN STORY* (1930); C. SHAW, *THE NATURAL HISTORY OF A DELINQUENT CAREER* (1931); C. SHAW & H. MCKAY, *DELINQUENCY AND URBAN AREAS* (1942, 1969); C. SHAW & H. MCKAY, *DELINQUENCY AREAS* (1929); C. SHAW, H. MCKAY, B. HANSON, E. BURGESS & J. McDONALD, *BROTHERS IN CRIME* (1938).

22. See Ryerson, *supra* note 2, at 128-68.

23. F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 18-19 (1964).

24. A. PLATT, *supra* note 16.

25. Fox, *supra* note 16.

tended that middle-class and conservative interests dominated the child-saving movement, and that the movement was in fact a paternalistic and class-motivated effort to control the lives of urban lower-class adolescents by imposing sanctions upon premature independence and behavior deemed unbecoming to youth. The leaders of the movement, particularly those involved with settlement houses serving immigrant populations, were prominent, often wealthy, women who advocated therapeutic strategies to achieve social control and sought to impose middle class values on the children of the poor, while creating a respectable professional identity for themselves. These reformers promoted correctional programs requiring longer terms of imprisonment for children than for adults, frequently for reasons which would not justify the incarceration of an adult, consisting of long hours of physical labor, militaristic discipline, and "the inculcation of middle-class values and lower-class skills."²⁶

Thus, by exposing the abuses perpetrated by the juvenile justice system in Chicago and challenging its theoretical basis, Patrick Murphy has joined the ranks of a distinguished group of social scientists, criminologists, lawyers, and historians who represent a Chicago-centered tradition of child advocacy and juvenile justice criticism.

The Lawyer's Role in Juvenile Justice Reform

Most importantly, the Murphy book raises the question of the proper role of the lawyer in the juvenile justice system.²⁷ Murphy reports that when he and his associates began to bring lawsuits challenging some of the practices of state agencies and juvenile justice officials, "the shock waves in and around the juvenile bureaucracies were unbelievable. Everybody—from lawyers in the public defender's and state's attorney's offices, to the social workers in the juvenile agency—looked upon us as ogres for challenging such a benign system."²⁸

This response is difficult to comprehend when one reads Murphy's descriptions of children tied, spread-eagled, to beds in mental hospitals for weeks at a time, thrown into solitary confinement "strip cells" for long periods, and kept close to unconsciousness by large doses of powerful tranquilizing drugs; of mentally competent children committed to mental hospitals or dumped in institutions for the retarded;

26. A. PLATT, *supra* note 16, at 26.

27. See generally W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972); Weiss, *Defense of a Juvenile Court Case*, in 3 CRIMINAL DEFENSE TECHNIQUES 60.01[1] (S. Bernstein ed. 1974); Wizner, *supra* note 19. See also J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, ch. 5 (1973).

28. P. MURPHY, *supra* note 1, at 12.

of runaway children incarcerated in jails; of a 13-year-old child receiving an unconsented to and unnecessary hysterectomy; of thousands of children neglected and mistreated by the state in the name of child saving. As Murphy wrote: "In our work, we had been in many jails, hospitals, and detention centers I could never walk away without a feeling of severe depression at the thought of what some humans would do to others in the name of 'help.'"²⁹

Ordinary bureaucratic defensiveness may account, to some degree, for the reactions of public officials to the legal challenges brought by Murphy's office, but a more complex explanation is required for the systematic retreat from reality by those public officials responsible for maintaining children in such unconscionable circumstances. This explanation may be that the juvenile justice system is a world where euphemistic labels and unrealistic pretensions substitute for reality. It is a world where an indictment is a petition; a prosecutor is a court advocate; a guilty verdict is a finding; a sentence is a disposition; a jail is a detention center; a prison is a training school; a cell is a room; and a strip cell used for solitary confinement is a reintegration or intensive treatment unit. It is a fantastic world where labels are applied to children virtually interchangeably in order to conform the children to whatever programs or placements are in fact available at a given time. When a lawyer, from outside the system, like Murphy, questions such manipulation of labels and looks behind the terminology of the juvenile justice professionals, he is threatening the world to which they have become accustomed. Rather than join with him to alleviate suffering and redress injustice, they fight back.

When Murphy brought a successful suit seeking the release of "neglected" children from the detention center (jail), the number of "neglected" children incarcerated fell dramatically. Strangely, however, the number of "minors in need of supervision" confined in the same detention center increased substantially, as did the number of "mentally ill" and "retarded" children confined to mental hospitals and institutions for the retarded.³⁰ They were the same children; only their labels had been changed. "The fact was, whenever we put pressure on one juncture in the dumping process, the population in the other juncture would increase."³¹

29. P. MURPHY, *supra* note 1, at 139.

30. In most states children who are not in need of psychiatric care can be confined to mental hospitals as "voluntary" patients by their parents or legal guardians, whether or not the child agrees to be so committed and without a hearing or any other form of judicial scrutiny. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840 (1974).

31. P. MURPHY, *supra* note 1, at 119.

In view of the inadequate resources available to the state, the resulting dumping and neglect of children in state custody, and the substantial deprivations of liberty involved, the juvenile justice system must become an adversary one. In every realistic respect, it is an adversary system, and any effort to deny that fact is simply another attempt to camouflage reality by manipulating labels.

By exposing the adversary quality of the juvenile justice system, Murphy demonstrates that the proper role for the child's lawyer is the same as the role of a lawyer representing any other client in any adversary process.³² Even if children are subject to parental or state control, even if they are not fully competent to make intelligent decisions concerning their own best interests, and even if children are more amenable to treatment and rehabilitation than adults,³³ this hardly justifies a conclusion that they are not entitled to due process of law. Those adults seeking their institutionalization must be required to demonstrate that it is in fact necessary, proper, and the best program for them, involving the least restriction of their liberty.

Nevertheless, Murphy has no illusions that lawyers can "save" children any better than social workers or bureaucrats: "The litigation helped some of our clients and gave them hope for a brighter future. But for others, although the cases we brought on their behalf may have wrought major changes in the law, they themselves were unaffected and continued on their downward slide to poverty and crime."³⁴ Nor does Murphy believe that juvenile courts should be abolished:

We do need a juvenile court to prosecute youngsters charged with serious criminal offenses, to assist in resolving the problems of adolescents who can no longer live at home, and to review charges of serious physical or emotional child-abuse. But cases in which the courts are merely used as a club to enforce the views of middle-class social workers and inept regulations should be no part of a judicial system The juvenile court too often acts

32. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*." *Anders v. California*, 386 U.S. 738, 744 (1967). I have benefited greatly from conversations with and written work by Steven Goode, Yale Law School class of 1975, concerning the role of counsel in civil commitment proceedings. Mr. Goode's views, and my own, appear to be somewhat inconsistent with the ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-11, 7-12 (1971). However, as Mr. Goode has demonstrated in a Note in the *Yale Law Journal*, these provisions are so ambiguous that they could be construed to be consistent with these views. Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540 (1975).

33. This is a doubtful proposition. Martinson, "What Works?—Questions and Answers About Prison Reform," PUBLIC INTEREST, Spring 1974, at 22, 25-27.

34. P. MURPHY *supra* note 1, at 164.

as a rubber stamp, giving its imprimatur to the switching of children and families from agency to agency.³⁵

Rather, Murphy argues for the development of what the Cahns have called a "civilian perspective"³⁶ as a means of reforming the public child welfare system:

Citizens who are supposed to be assisted by the state must have some form of power over it. Many of the inequities caused to our clients were the result of irrational decisions made by lower-level state bureaucrats and stupidly upheld by their superiors. Of course, we had many of these decisions reversed, but only after expensive and time-consuming litigation. And we only represented a few of the people who had been kicked around [W]e seem to have reached a stage now where the bureaucracies run themselves without regard to political or public pressure of any sort.³⁷

An essential component of the civilian perspective is the provision of competent legal counsel in sufficient numbers to challenge the decisions of the child-saving bureaucrats. But even more important is legislative reform reducing the power of the bureaucracies and of the juvenile court over citizens. One can only hope that the work of legislative reformers will be guided by the words of the Illinois supreme court, more than a century ago, in the *O'Connell* case:

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. The principle of the absorption of the child in, and its complete subjection to the despotism of, the State, is wholly inadmissible in the modern civilized world.³⁸

Stephen Wizner*

35. *Id.* at 174.

36. Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966).

37. P. MURPHY, *supra* note 1, at 177.

38. *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 284 (1870).

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