Chapter 1

The Vision of Missouri's Nineteenth Century Child Savers

The pedigree of America's juvenile courts begins in the nineteenth century with the sustained efforts of the "child savers." These reformers were dedicated women and men who fought to extricate delinquent children from harsh adult prisons, and to improve the lives of dependent children. The child savers' foundation was the common law *parens patriae* ("parent of the country") doctrine, which had long given the English Crown the responsibility to protect persons legally incapable of caring for themselves, including children.[1]

The Crown's *parens patriae* authority, exercisable in the chancery court, passed to this side of the Atlantic after the Revolution, when the newly independent states received the English common law unless and until changed by statute. The Missouri Territory enacted a "reception statute" even before Missouri joined the Union as the twenty-fourth state in 1821, and the statute remains in effect today. *Parens patriae* has always been part of Missouri law.[2]

The early English common law doctrine described by William Blackstone in the 1760s was quite narrow in both design and application. Royal child protection normally extended only to the landed gentry, with an eye toward securing financial reward for the Crown itself. Children rarely received royal protection unless their father had died leaving a sizeable estate for administration.[3]

Once the Revolution ended direct English influence on the new nation, American law quickly began to extend *parens patriae* protection beyond children of well-to-do parents. Justice Joseph Story's influential 1836 master-

piece, *Commentaries on Equity Jurisprudence,* spoke of children generally, without regard to their parents' station in life: "[P]arents are intrusted with the custody of the persons, and the education, of their children; yet this is done upon the natural presumption, that the children will be properly taken care of . . .; and that they will be treated with kindness and affection. But, whenever . . . a father . . . acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere."[4]

Justice Story's extension received strong support in 1839, when the Pennsylvania Supreme Court handed down *Ex parte Crouse,* a decision widely cited in later years. The local justice of the peace found young Mary Ann Crouse "vicious" and beyond the mother's control, and committed the child to an institution. The state supreme court called the institution "not a prison, but a school." The court refused to release the girl into her father's custody because "natural parents, when unequal to the task of education, or unworthy of it, [may] be superseded by the *parens patriae,* or common guardian of the community." The state's "paramount interest in the virtue and knowledge of its members" meant that parental rights are "natural, but not . . . unalienable." The supreme court said nothing about estate administration or the Crouse family's financial position.[5]

In Missouri, *parens patriae* authority landed quickly in the circuit courts. The state's first constitution, adopted in 1820, vested judicial power in the supreme court, a chancellor, the circuit courts and any inferior courts the General Assembly created. The chancery court had jurisdiction "in all matters of equity, and a general control over executors, administrators, guardians, and minors." This framework lasted only until 1822, when the General Assembly ratified a constitutional amendment abolishing the chancellor's office and vesting chancery jurisdiction in the supreme court and circuit courts.[6]

To achieve their child protective goals, the nation's child savers spent much of the nineteenth century fighting to expand *parens patriae* beyond Justice Story's exposition. For one thing, the doctrine's broadest English formulation protected only dependent children and not delinquents. Without running afoul of the doctrine, English common law imposed harsh criminal punishment on children as young as seven, sometimes even execution for relatively petty offenses. To keep child offenders out of adult prisons, American reformers needed to justify state protection for children accused of violating the state's own laws.

The reformers faced a second, equally daunting battle. Justice Story described only state authority to protect dependent children from their own parents or guardians, cases that today would fall into the categories of abuse

and neglect. In England and the United States alike, the early nineteenth century *parens patriae* doctrine did not conceive of child protection programs created by the state legislature and administered by executive agencies. Federal child protection programs were beyond the wildest imaginings of the most ardent reformers. Only after sustained efforts by child advocates did affirmative government programs appear by the turn of the twentieth century, reach Washington during and after the New Deal, and achieve permanence after World War II.

The child savers won both these battles. When the United States Supreme Court reaffirmed in 1890 that *parens patriae* was "inherent in the supreme power of every state . . . for the prevention of injury to those who cannot protect themselves," the doctrine already meant much more than even the most prescient observers could have imagined when Justice Story wrote more than a half century earlier. The doctrine would come to mean even more once states created juvenile courts in the early twentieth century.[7]

The Child Savers

Historians have engaged in a spirited debate lately about the impulses that energized the nation's nineteenth century child savers. The prevailing view, embraced by most historians and the Supreme Court, is that juvenile court legislation climaxed an essentially humanitarian movement. Individual child savers may have been parochial or just plain wrong in some of the positions they took, but they were sincere when they argued that the law should help delinquent and dependent children achieve better lives.[8]

This prevailing view, stressing humanitarian impulse, dissatisfies some revisionist historians. These writers have asserted that while many nineteenth century reformers undeniably perceived the juvenile court as a moral imperative, others perceived it as a heavy-handed vehicle for imposing traditional agrarian values on an increasingly urban nation, and particularly on poor immigrant children. "It was not by accident," writes Berkeley criminologist Anthony M. Platt, "that the behavior selected for penalizing by the child savers—drinking, begging, roaming the streets, frequenting dance-halls and movies, fighting, sexuality, staying out late at night, and incorrigibility—was primarily attributable to the children of lower-class migrant and immigrant families."[9]

The revisionists, in turn, have faced stern rebuke. Ellen Ryerson maintains that the child savers defined delinquency broadly, not to place blameless children in the clutches of the law, but to assure juvenile court treatment for children whose behavior might otherwise have exposed them to criminal

court conviction for disorderly conduct, vagrancy or some similar offense. Lawrence M. Friedman, America's preeminent legal historian, criticizes the revisionists for minimizing the reformers' child-protective aims, and for exaggerating their class-based impulses. "No doubt there was a good deal of middle-class snobbery and condescension" in the child savers' attitudes, Friedman writes, but "children were not, by and large, dragged into court by social workers, policemen, upper-class snoops and hegemonists. More often than not they were brought in by their very own parents."[10]

Friedman's point is well taken. The nation's child savers may indeed have been drawn largely from social classes with little personal experience with poverty in their own lives, but they also held no monopoly on what Friedman calls snobbery and condescension. With sweatshops, tenements and factory smokestacks beginning to dominate the urban landscape during the nineteenth century, rural life held a revered place in the popular imagination. America's agrarian ideal—admiration for the independent hard working, simple and honest farmer—dated at least from Thomas Jefferson, and its place in national folklore resisted the rise of major metropolitan areas. Child savers were not the only contemporary social critics who recoiled against congested industrial cities and romanticized rural and small town America.[11]

Nor were some child savers the only Americans to blame poverty on weak character and personal fault, unaffected by greater social and economic forces beyond individual control. Herbert Spencer and the Social Darwinists attracted an adoring American audience in the late 1800s when they argued that only the fittest would survive in the emerging industrial economy, and that dog-eat-dog economic competition was the natural order of things. Horatio Alger's immensely popular "rags to riches" novels captivated Americans with the message that anyone could succeed through hard work, perseverance and rugged individualism. The inevitable corollary encouraged little patience with poverty.

Justine Wise Polier, a prominent twentieth century juvenile court judge after her appointment by New York City Mayor Fiorello LaGuardia, correctly praised the child savers for helping sustain a reform impulse that flourished during the Progressive era. The child savers, she wrote, were "a comparatively small group who opposed exploitation of adults and children [and] . . . were among the first to support legislation to protect women and children in industry."[12]

Many of the nation's leading child savers were middle and upper class urban women, including legendary social worker Jane Addams, founder of Chicago's Hull House. Nineteenth century women were not expected to participate in public affairs, and they had no place in government. Women were denied much opportunity for formal education, and they were virtually

excluded from business and the professions. Society accepted child saving as an appropriate public extension of women's domestic childrearing and homemaking roles, and these talented women saw volunteer child advocacy in alliance with male officeholders as a way to overcome imposing barriers and devote their energies to the public good.

For many Missouri women engaged in law reform, child saving accompanied other public service to improve children's lives, including active roles in founding and operating orphanages, kindergartens, children's hospitals and similar charitable endeavors. In the 1850s, for example, Rebecca Naylor Hazard of Kirkwood (1826-1912) became director of the St. Louis Industrial Home, which provided temporary care for neglected girls between two and twelve before they were released for adoption or other placement. Hazard strengthened the home before leaving to help organize the St. Louis Union Aid Society for sick and injured soldiers during the Civil War. She also organized the Woman Suffrage Association of Missouri and attended the National Woman Suffrage Convention in St. Louis in 1869. She became president of the American Woman Suffrage Association in 1878, served for more than twenty years as vice president of the Association For the Advancement of Women, and took an active role in the Women's Christian Temperance Union.[13]

Another Missouri child saver, Susan Elizabeth Blow of St. Louis (1843-1916), is sometimes called the founder of the American public kindergarten movement because she opened the state's first public kindergarten for poor city children in the Des Peres School at Carondelet in 1873. She went on to train other kindergarten teachers as her St. Louis experiment spread statewide, and she assumed a visible national role until her death. The daughter of a prominent St. Louis business and political family, Blow chose public service because her privileged upbringing and international education produced, as she put it, "an irresistible impulse to action, and a hunger for something which might seem worthwhile doing."[14]

At the beginning, the kindergarten movement's central aim was to shield poor urban children from harmful street influences by teaching them social skills before they began formal education. In 1892, Jacob Riis praised kindergartens as "one of the longest steps forward that has yet been taken in the race with poverty [by] conquering . . . the street with its power for mischief." By the end of her career, Blow had fashioned an early model of the federal Head Start program created in the 1960s. Today the Governor's office at the Capitol is graced with a portrait of her standing in front of a classroom blackboard featuring the apt message, "Let us live for the Children."[15]

When the St. Louis Children's Hospital opened in 1879, it was one of the nation's first pediatric hospitals. All eight incorporators named in the certificate of incorporation issued by the St. Louis City circuit court were women,

including some active child savers. One was Appoline A. Blair, the first president of the hospital's board of managers, the wife of Senator Frank P. Blair, and a mother who had lost children of her own to disease. The efforts of these Missouri women came at a time when infant mortality rates were high and hospitals ministered primarily to the poor because the affluent could afford private treatment at home for childbirth and illness.[16]

Missouri's nineteenth century child savers, women and men alike, had their work cut out for them. They would not win their battles overnight. Even before the child savers began sustained advocacy for a specialized juvenile court in the 1880s, they struggled to improve the lot of delinquents, abused children, neglected poor children, and children needing permanent adoptive homes. Cases involving such vulnerable children were destined to dominate juvenile court dockets.

Delinquent Children

In the earliest years of statehood, Missouri took tentative steps toward recognizing that children sometimes needed greater legal protection than adults. An 1834 law, for example, made it a crime for licensed billiards halls to permit children or apprentices under twenty-one to play without the permission of their father, master or guardian. Legislation the following year made it a crime for licensed inns or taverns to knowingly provide alcoholic beverages to minors, apprentices, servants or slaves without written permission from the parent, guardian or master. If a child or apprentice lost money gambling or wagering in a store or tavern, the parent or master could sue to recover the losses. Children could not sue or be sued in the civil courts without appointment of an adult to represent their interests.[17]

Missouri even had an early, short-lived experiment with specialized children's courts. A July 4, 1807 territorial law created orphans' courts with authority to appoint guardians for minors, to order apprenticeship of poor children, and to hear disputes between masters and apprentices. The territorial legislature abolished the orphans' courts in 1815, and specialized children's courts would not reappear in Missouri until the General Assembly created the St. Louis City juvenile court in 1903.[18]

The criminal law remained virtually untouched by Missouri's early protective legislation. The state applied the common law infancy defense, which exposed children, except for the very youngest, to the full force of prosecution and punishment. The defense held that children below seven were incapable of committing a crime no matter how heinous. The defense presumed that children between seven and fourteen were incapable of committing a crime,

but the presumption could be (and often was) rebutted by "evidence strong and clear beyond all doubt and contradiction" that the child could distinguish between right and wrong. The common law defense deemed children over fourteen as capable as adults of criminality, and thus as equally subject to conviction and incarceration.[19]

For most of the nineteenth century, American children and adults were arrested under the same laws, tried in the same courts, and incarcerated in many of the same forbidding prisons. During Missouri's earliest years, exposing children to the adult criminal process was no small matter because prisoners on the frontier and in cities alike might be sentenced to whipping with the lash or standing in the pillory. An 1813 territorial law, for example, provided that a person convicted of larceny "shall be whipped on his or her bare back, not exceeding thirty-nine stripes, at the discretion of the court."[20]

At least for free whites, whipping and the pillory ended shortly before the state penitentiary opened in Jefferson City in 1836. Slave children, like their parents, were at the lowest rung of Missouri's criminal justice ladder throughout the antebellum period. Slaves were subject to death, whipping and other physical punishment for misconduct, with little or no effective recourse to legal process that might protect others.

By the late 1830s, imprisonment in Missouri usually meant confinement in the penitentiary or the county jail, or in military prisons in counties that maintained no jails of their own. The penitentiary's 1836 opening began what Bob Priddy has described as "a long and generally unflattering history" for the institution, which was sometimes called "the worst in the nation" and a "loathesome stone purgatory." By 1854, according to Priddy, the state penitentiary was "in pitiful condition. The buildings were run down. Living conditions were atrocious. Bedding was filthy. The cells were little more than kennels." Throughout the nineteenth century, the penitentiary housed some children and remained a cold institution driven by an unrelenting policy of incarcerating convicts at the lowest possible cost. The state paid little attention to persistent maltreatment by poorly trained, underpaid guards who included, according to one researcher, "all manners of men from sadists to drunkards."[21]

For their part, Missouri's early county jails were "fortresses . . . erected simply and solely to house bad men—and light and sanitation were not even secondary considerations." An 1835 law required counties to maintain jails "in good and sufficient condition and repair," but serious efforts to improve prison conditions were defeated because Americans saw austere confinement as a deterrent to crime.[22]

An 1840 St. Louis grand jury investigation of the county jail found that a room for petty offenders contained "prisoners in a space of about fifteen by

thirty feet, when not more than four or five prisoners should be placed in" the room. Because the jail lacked hospital facilities, several prisoners sick with fever and dysentery remained confined with the healthy prisoners.The grand jury finding did not lead to improved conditions because Missouri, like the rest of the nation, did not yet perceive rehabilitation as a central goal of criminal punishment, except insofar as prisoners might change their ways by the deterrent force of confinement itself.[23]

The state penitentiary, the St. Louis Workhouse that opened in 1843, and most county prisons were barely habitable places for adults, but they were no places for children. Disease and filth were only part of the story. Within county jails, state law required separation of debtors and other civil prisoners from criminals, and female prisoners from males, but said nothing about separating children from adult criminals.[24] Child savers decried prison conditions, which saw incarcerated children learn criminal ways from adult convicts and frequently leave confinement less capable than before of coping in the greater society.[25]

The General Assembly took early steps to spare younger convicted children time in the state penitentiary but explicitly left them subject to incarceration in county jails. An 1835 law permitted, but did not require, courts to confine convicted felons under sixteen for one year in a county jail rather than in the state penitentiary that would be opened the following year. By 1866, confinement of children under sixteen in the county jail, and the one-year maximum sentence, had become mandatory rather than permissive. The General Assembly raised the age to eighteen in 1879, but returned it to sixteen in 1887. Reports of younger children confined in the penitentiary nonetheless persisted.[26]

The 1866 statute did not spare the life of William Barton, a 15-year-old African American convicted of murdering a white man in 1879. He was hanged the following year before 3000 witnesses in St. Charles after the state Supreme Court held that the statute only substituted the county jail for the penitentiary, and thus did not apply to felonies punishable by death. Barton and the other three Missouri juveniles known to have been executed in the nineteenth century were between twelve and sixteen when they committed their homicides.[27]

Without affirmative state programs to aid the poor, many Missouri children not reached by private charity found themselves imprisoned in county jails with hardened adult criminals for little more than their parents' poverty. Because begging and vagrancy were crimes, and because homeless children sometimes resorted to petty theft and other antisocial conduct, only a hazy line sometimes separated dependent and delinquent children. A law on the

books since territorial days also authorized imprisonment of disobedient children until they "shall humble themselves." The line between disobedience and dependency was also hazy, so dependent children guilty of no misconduct by today's standards also suffered incarceration.[28]

Missouri was not alone in imprisoning dependent and delinquent children. When Alexis de Tocqueville described America's orphans and abandoned children in 1833, he called them children who, "by their own fault or that of their parents, have fallen into a state so bordering on crime, that they would become infallibly guilty were they to retain their liberty."[29] In 1851, New York still had 4,000 inmates under twenty one in its prisons, including 800 who were fourteen or younger and 175 under ten.[30] Many of these children were simply poor, homeless or charged with vagrancy by authorities who could find little else to do with them.

By the second half of the nineteenth century, Missouri began informally removing many children from county prisons. Faced with an all-or-nothing proposition, judges and juries sometimes set children free rather than expose them to imprisonment. (In the eastern states, and perhaps also in Missouri, this informal nullification of the criminal law may have begun even sooner. In 1833, de Tocqueville observed that judges "hesitate to pursue young delinquents, and the jury to condemn them" because of the prospect of imprisonment with hardened adult criminals.)[31]

Convicted Missouri children also sometimes received lighter sentences than adults and were more often pardoned. Probation statutes were still decades away, but children were more likely than adults to be placed on informal probation through a common law device sometimes called "binding to good behavior," which evolved from the practice of conditionally suspending a sentence. Before serving any part of a sentence, the child would be released to a responsible third party who would provide supervision and periodic reports to the court. Children's aid societies, societies for the prevention of cruelty to children and similar private benevolent organizations cooperated with the courts to assume responsibility for children released without imprisonment or institutionalization. The criminal justice system thus inched toward special treatment of children, a process that would culminate with creation of the juvenile courts early in the twentieth century.

Private charity inspired by the child savers also protected delinquent and dependent children, particularly in Missouri's larger cities. At the beginning of the nineteenth century, no reformatory for children existed anywhere in the United States.[32] The first St. Louis private institution for dependent children was probably the Mullanphy Orphan Asylum, opened under Catholic auspices in 1827. In 1851, the privately operated St. Louis Reform School was

organized for delinquent and dependent boys under eighteen and girls under sixteen. Seven other private institutions, which admitted whites but not free African Americans, also housed St. Louis area dependent children.[33]

By 1850, St. Louis had grown from a frontier community to the nation's eighth largest city in just a decade. The explosive growth had produced a population of 78,000 and a desperate class of urban poor, including hordes of rootless children roaming the streets. Before the St. Louis Reform School opened, wayward children so overwhelmed city authorities that delinquents were usually committed to the workhouse or prison. The reform school's charter envisioned an institution with work, recreation and study as benign alternatives to incarceration.[34]

With the St. Louis Reform School filled to capacity by 1853, the city's Common Council authorized establishment of Missouri's first public institution for children, the St. Louis House of Refuge. The House admitted both white and free African American children who were delinquent, dependent or neglected. Slave children, like their parents, were still entitled only to bondage, with minimal protection from want or maltreatment.[35]

The first children placed in the St. Louis House of Refuge lived in temporary quarters at the city's work house because the General Assembly did not authorize the city council to construct a permanent building until 1855. The permanent building was finally completed in 1860 and quickly held 250 children. The building burned down later that year, but was rebuilt with a bond issue.[36]

The races were segregated in the St. Louis House of Refuge, as they were in most of the nation's fifteen or so other houses of refuge, including ones in New York, Boston and other northern cities. Dependent children confined in the St. Louis house outnumbered delinquents in the first few years, and accounted for nearly half the house's population for the rest of the century. The house made little effort to separate, or otherwise protect, dependent children from the more dangerous delinquents.[37]

In 1859, the General Assembly provided that boys under sixteen and girls under fourteen charged with crimes punishable by imprisonment in the House of Refuge would have "a private examination and trial," unless the parent or guardian demanded a public trial. St. Louis Circuit Attorney Charles P. Johnson said the public was excluded "out of consideration for the feelings of all parties," a factor juvenile court reformers would summon in favor of confidentiality later on.[38]

In 1866, the House of Refuge's board of managers sharply criticized institutionalization of children and recommended adoption of the so-called cottage or family plan. The plan called for construction of small buildings, each