
Chapter 3

The Emergence of the “Least Restrictive Alternative”

With the creation of juvenile courts from coast to coast, change was in the air. Private philanthropy spurred by the child savers was growing, at least in many of the nation's larger cities. States were taking more active roles in child protection, and the newest social science learning about children's physical, emotional and cognitive needs made it appear more unseemly than ever to dismiss delinquent and dependent children as mere miniature adults unentitled to special public concern.

The very presence of the new juvenile courts highlighted a striking anomaly that had grown disturbing to many reformers. States had few effective public programs for treating delinquent or dependent children whose families wished to raise them in their own homes. But once children were removed from their homes, states paid to support many of them in prisons, asylums and other cold, often forbidding institutions. The anomaly persisted despite evidence that in-home care, even when supervised by salaried public authorities, was less expensive and often more successful than institutional care.

In delinquency and dependency cases alike, early twentieth century reformers encouraged states to treat children in their own homes or in substitute home-like settings whenever possible, and to institutionalize children only when no alternative would satisfy the interests of the child and the community. Strengthening families was seen as a way to overcome poverty and prevent or remedy delinquency, while the humiliation and distress of institutionalization were seen as sure ways to hurt children who needed help.

The immediate catalyst for the growing disaffection with institutional placement was the 1909 White House Conference on Dependent Children, convened by President Theodore Roosevelt only six weeks before he left office. After convening conferences on business practices and natural resource issues during his administration, the President had grown comfortable with the conference approach to problem solving. Now he turned to children's issues, which had not previously been a federal concern.

President Roosevelt was no newcomer to child welfare. In the 1850s, his father, Theodore Roosevelt, Sr., helped Charles Loring Brace found the New York Children's Aid Society and then enlisted wealthy friends to support the orphan trains and other CAS programs to remove homeless and abandoned children from institutions. While the future President was growing up, the elder Roosevelt worked tirelessly to find foster homes for needy children and remained active in efforts to remove children from institutions. As vice president of the New York Charities Aid Association in 1877, the elder Roosevelt argued against institutionalizing children except as a last resort, and urged that institutionalized children be "transferred to families as fast as possible." He told the American Social Science Association's general meeting that "children educated in an institution are more likely to fall back into the dependent classes than children brought up outside in families not because they are not pure on leaving the institution but because they have not been accustomed to taking care of themselves." The future President was just nineteen and about to embark on his own career.¹

The paternal influence was so strong that when his father died in 1878, young Theodore called him "the best man I ever knew." In the waning days of his administration thirty years later, President Roosevelt took the opportunity to translate the non-institutionalization impulse into action. "Surely nothing ought to interest our people more than the care of the children who are destitute and neglected but not delinquent," the President wrote to C.C. Stahmann, superintendent of the Missouri Children's Home Society on December 25, 1908. "I very earnestly believe that the best way to care for dependent children is the family home."²

The two-day White House Conference kindled a lasting federal role in child welfare. The Conference unanimously approved a resolution whose stress on maintaining the integrity of families and home life would reverberate in juvenile court circles in the coming decades. Quite unforeseen by the two hundred prominent social workers who attended, the resolution later helped produce a strong federal presence in child welfare law during the New Deal crafted by the President's fifth cousin.

“Home life is the highest and finest product of civilization,” the Conference’s final resolution began. “It is the great molding force of mind and character. Children should not be deprived of it except for urgent and compelling reasons”:

Children of parents of worthy character suffering from temporary misfortune, and children of reasonably efficient and deserving mothers who are without the support of the normal breadwinner, should as a rule be kept with their parents, such aid being given as may be necessary to maintain suitable homes for the rearing of the children. . . . Except in unusual circumstances, the home should not be broken up for reasons of poverty, but only for considerations of inefficiency or immorality. . . .

As to the children who for sufficient reasons must be removed from their own homes, or who have no homes, it is desirable that, if normal in mind and body and not requiring special training, they should be cared for in families whenever practicable. The carefully selected foster home is for the normal child the best substitute for the natural home.³

Citing the prison-like conditions prevalent in many nineteenth century children’s institutions, the White House Conference recommended that where institutionalization was necessary, placement should be as family-like as possible, on the cottage plan with small units housing no more than twenty-five children in each. Each dependent child should receive “care and treatment which his individual needs require, and which should be as nearly as possible like the life of the other children of the community.”⁴

Five years after Congress unanimously created Mother’s Day, the 1919 White House Conference on Child Welfare, summoned by President Woodrow Wilson, extended the Roosevelt conference’s conclusions to delinquency cases: (1) “No child should be permanently removed from his home unless it is impossible so to reconstruct family conditions or build and supplement family resources as to make the home safe for the child, *or so to supervise the child as to make his continuance in the home safe for the community*,” (2) removals from the home should be as brief as possible, and the removed child should have “home life as nearly normal as possible, to safeguard his health, and to insure for him the fundamental rights of childhood,” and (3) institutional placement should be “as brief as possible” and should “approximate as nearly as possible . . . normal family life.”⁵

“However good an institution may be, however kindly its spirit, however genial its atmosphere, home-like its cottages, however fatherly and motherly its officers, and admirable its training,” a social worker explained, “institu-

tional life is, at best, artificial and unnatural, and . . . the child ought to be returned at the earliest practicable moment to the more natural environment of the family home – his own home, if it is a suitable one, and, if not, then to some other family home.”⁶

Or as New York’s Fiorello LaGuardia would later say, with his characteristic exuberance, “[t]he worst mother is better than the best institution.”⁷

Juvenile court legislation quickly extended the non-institutionalization impulse to delinquent children. Missouri instructed its juvenile courts, in fashioning delinquency and dependency dispositions alike, to insure that “the care, custody and discipline of the child shall approximate as nearly as may be that which should be given by its parents.” This mandate commanded juvenile courts to order what later became known as the “least restrictive alternative,” that is, the disposition that would best advance rehabilitation, treatment and community interests while placing the least restraint on the liberty and freedom of choice enjoyed by the child or family.⁸

In the typical dependency case, the range of dispositions (from least restrictive to most restrictive) would include dismissing the case, returning the child home while placing the family under probation or other court supervision, placing the child in foster care with relatives or non-relatives pending return to the family or adoptive placement, or committing the child to a public or private institution. From the least restrictive to the most restrictive, the range of delinquency dispositions would include outright dismissal, dismissal after payment of restitution or reparation to the victim, probation with or without restitution or reparation, placement in foster care or public or private agency custody, and commitment to a public or private institution. Institutionalization was a last resort when less restrictive alternatives failed or were inappropriate because of the child’s physical or emotional condition, a record of prior offending, failure of prior efforts to strengthen the family, or community safety concerns.

Probation

Unless a delinquency or dependency case was dismissed outright, the least restrictive alternative normally involved placing the child or family under the supervision of the probation department, which one observer called the “most valuable and powerful instrument at the service of the juvenile court.” The juvenile court’s mandate to keep children out of congregate institutions, and to maintain children in their own homes whenever appropriate, depended on maintaining an efficient, professional probation department that

would provide the court information needed to decide the case and would supervise assigned children afterwards.⁹

In 1897, six years before creating the state's first juvenile court, Missouri became the second state to create a statutory probation system in the criminal courts. (Massachusetts was the first in 1878.) The General Assembly acted after the state's circuit judges, at a convention, presented lawmakers a bill authorizing judicial discretion to ameliorate the criminal law's harshness in appropriate cases. The circuit judges reportedly acted after a man was sentenced to two years in the penitentiary for stealing twenty-five cents worth of tobacco.¹⁰

With children still subject to trial and sentencing in criminal court, Missouri's 1897 probation law covered all criminals, except felons over twenty-five and anyone convicted of murder, rape, arson or robbery. Even before the offender began serving any part of the sentence, the circuit court could release him on conditions imposed by the court, though the bill did not provide for supervision.

In 1901, Missouri became one of the first states to create a juvenile probation department when the legislature authorized appointment of juvenile probation officers in St. Louis City. Once again, the leader was the St. Louis Humanity Club, which enlisted James L. Blair, Edward C. Eliot and other leading members of the St. Louis bar to draft the legislation. The State Board of Charities and Corrections lauded probation's aim to "keep young boys and girls from the stigma and contamination of jail sentence and give them intelligent supervision." Other states quickly followed Missouri, and forty-seven had juvenile probation systems by 1929.¹¹

Most St. Louis courts began ordering probation of child offenders when circumstances warranted. From July through September of 1901, thirty-eight of the 184 boys and four girls arrested in the city were released on probation, and only one was later returned to court for sentencing.¹²

In 1909, Missouri became one of only three states to provide for appointment of juvenile court probation officers, chiefs as well as deputies, by competitive civil service examinations. The legislation applied only to St. Louis, where the competitive probation officer examination consisted of a written test (counting 50%), a private oral examination (counting 25%), and an estimate of experience and personality (counting 25%).¹³

Civil service merit selection paid rich dividends in St. Louis. A 1914 study concluded that merit selection "work[ed] admirably," and found "no reason why any court should not use this method" of selecting juvenile probation officers. The study called the St. Louis juvenile probation department one of the best in the nation, and the National Probation Association found the city's juvenile probation officers well qualified with esprit de corps ten years later.¹⁴

Missouri did not yet have a general civil service system, and patronage appointments to probation and other juvenile justice positions were not unknown elsewhere in the state. For example, positions from top to bottom at the Boonville, Chillicothe and Tipton reformatories depended on patronage, a state of affairs that hurt efforts to recruit quality personnel seeking stability. In 1915, an exasperated member of the State Conference For Social Welfare called it "wrong to bring our institutions to a standstill every four years because of the happenings of election day." In 1938, the Osborne Association's national survey of juvenile reformatories chastised the state for entrusting the welfare of boys at Boonville to appointees "whose vision does not extend beyond the fortunes of a political machine."¹⁵

Missouri's early juvenile court acts created probation departments throughout the state. Juvenile courts began ordering probation so often that by 1911, the population of delinquents in the St. Louis Industrial School had fallen considerably because "many more children were left with their parents at home." In 1916, the first state Children's Code Commission nonetheless found that more than 5000 Missouri boys and girls, including 3000 in St. Louis alone, were still confined in private institutions. Between 1925 and 1929 in St. Louis, probation was the most frequent disposition in neglect cases and accounted for about half the dispositions in delinquency cases.¹⁶

Roger N. Baldwin

In these early years, the St. Louis City juvenile court was blessed with talented chief juvenile probation officers, including Roger N. Baldwin, who went on to organize the American Civil Liberties Union in 1920 and achieve a national, and indeed international, reputation for the next six decades.

Baldwin was born to a wealthy Boston family in 1884. He entered social work after earning bachelors and masters degrees from Harvard, and he went west to teach sociology at Washington University in 1906 at the urging of his father's lawyer, Louis D. Brandeis, who had practiced law in St. Louis for a few months in early 1879. Baldwin became the city's second chief juvenile probation officer in 1907 and served in the position until 1910.

In 1909, Baldwin helped defeat efforts to authorize the St. Louis circuit court clerk to hire deputy probation officers, a likely invitation to patronage appointments. Baldwin's scrap with the politicians about civil service reform almost cost him his job by spurring the clerk and his allies to urge the General Assembly to fix the minimum age for chief and deputy probation officers at thirty, which would have disqualified the twenty-five-year-old Baldwin. As passed, the bill spared him by setting the age at twenty-five, and

he remained chief until he became secretary of the St. Louis Civic League, a position that enabled him to play a leading role in drafting the legislation that extended the juvenile courts statewide in 1917.¹⁷

Baldwin helped create the National Probation Association in 1908. He served on the influential St. Louis Municipal Commission on Delinquent, Dependent and Defective Children, appointed by Mayor Frederick H. Kreismann in 1910 at the behest of the St. Louis Civic League, perhaps in response to the White House Conference's ringing endorsement of in-home care a year earlier. The three commission members visited facilities in Missouri and other states, studied treatment methods in other cities and presented a thorough report criticizing existing St. Louis methods and recommending fundamental reforms. The 1911 report, mentioned frequently in the next several pages, produced important reforms in St. Louis and statewide in the months and years ahead.

Later in 1911, Baldwin founded the St. Louis Central Council of Social Agencies, an effective clearinghouse that arranged private treatment for children and families. In 1912, he founded the St. Louis Board of Children's Guardians, the city's public child protective agency. He also remained active in the Missouri Association For Social Welfare. In 1914, Baldwin's St. Louis experiences led him to co-author *Juvenile Courts and Probation*, the first comprehensive text on the courts and the leading national authority on juvenile justice for many years. Among other things, the text argued that due process constraints hurt the juvenile court's rehabilitative mission, a position tinged with irony because the ACLU led the successful argument against it a half century later before the United States Supreme Court in *Gault*.¹⁸

In 1915, Baldwin was named one of the ten most influential people in St. Louis. After he founded the ACLU in 1920, that organization and other social causes consumed his considerable energies until he died in 1981 at the age of 97, a few months after President Jimmy Carter awarded him the Medal of Freedom, the nation's highest civilian honor.¹⁹

The Workings of Probation

"Probation" derives from the Latin "probare," to prove, and thus was designed to give offenders the chance to prove themselves worthy of release into the greater society without more restrictive sanctions. Baldwin offered this description of probation's role in juvenile justice:

The probation process is in essence a process of education by constructive friendship. It presupposes an intense personal interest; it presupposes a perception of a child's needs in such a way that the child may be more securely

set upon its feet by throwing about him every constructive force which the community has to offer. It means introducing him by one way or another to those activities which will enable him to spend his entire time rightly. The process does not require theories; it does not require book knowledge. It must never be in any degree sentimental, patronizing, or amateurish. It requires sympathy, tact, good humor, patience, and above all a thorough knowledge of the needs of child-life and the manifold ways in which to meet them.²⁰

Juvenile probation officers shouldered heavy burdens indeed. The juvenile court acts permitted "any reputable person" to refer delinquent or neglected children to the court. Most delinquency referrals were made by police (as they are today), and most dependent children were referred by other social agencies. The probation department often played a gatekeeper role, investigating referrals to determine whether the case required formal processing or whether it could be resolved informally without a court hearing. This was the beginning of the process known as "intake," which remains steeped in official discretion today.

Then as now, most delinquency and dependency cases were diverted out of the system or resolved informally, without a filed petition or a court hearing. In St. Louis city, for example, the juvenile court had an excellent working relationship with the police. St. Louis police ceased arresting children for petty offenses in 1907, choosing instead to issue summonses to parents to bring them to court. The change let the city transport the children in street cars rather than patrol wagons, kept most children out of the house of detention, and left investigation to the probation office, which would determine whether to file a complaint or merely call in parents and children for consultation and warning. Generally resolved informally were cases concerning neighborhood disputes, complaints of coal stealing and jumping on street cars, and complaints of petty theft involving not more than \$5 or \$10. Informally processed cases were sometimes referred to a private agency for follow-up, unless the child was placed under supervision of the probation department itself.²¹

On the other hand, children arrested for violating St. Louis city ordinances were processed formally. Police would take them to the district station house, where they would remain in the matron's room or the captain's office until their parents were notified. Children likely to appear in court were often released on bond, which was usually nothing more than their parent's written agreement to appear, without monetary guarantee. Other children would be taken by street car to the house of detention to await further proceedings.²²

In St. Louis as in other parts of the state, a probation officer would typically investigate formally processed cases and perhaps supervise the child or

family before trial while examining the home, family conditions, friends and school and employment records. Pending trial, the court could release the child on bond, on his own recognizance or to the custody of his parents or other suitable person.

The probation officer would then represent the child or family in court, except in the rare instances when a lawyer appeared. Because the juvenile court was seen as the child's protector rather than as a decisionmaker in an adversary process, states remained untroubled by the prospect that probation officers were officers of the court often akin to prosecutors, with interests often inconsistent with those of the juveniles and their families. Unbound by constraints resembling the attorney-client privilege, the probation officer could learn facts from the child or family confidentially and then turn around and use the facts against the child. The United States Supreme Court itself did not distinguish between probation officers and defense counsel until *Gault* in 1967.²³

To help the court determine the appropriate disposition, the probation department (sometimes assisted by a special investigator) would prepare a pre-disposition social investigation on the child and family. Emphasis on the least restrictive alternative made probation a prominent dispositional option. In delinquency cases, probation was particularly suited for first-time offenders, youths charged with less serious offenses, and youths whose parents or other relatives could be counted on to assume care. Where parents appeared amenable to treatment in dependency cases, the child might be sent home under the supervision of a probation officer assigned to the family.

Following imposition of probation on the child or parent, the probation officer would supervise fulfillment of the conditions. The officer would also help plan individual treatment, receive regular reports from the child or family, visit the family home and monitor the child's health needs, which might range from dental care to treatment for venereal disease. If all these roles were not enough, the officer would also coordinate with the child's school to monitor attendance and conduct, and sometimes even advise the child concerning employment and supervise that employment.

Effective probation meant continuous contact with the child or family during the probationary period. Contact was often difficult to maintain in rural areas where travel distances were great. In St. Louis city, delinquent boys would report to their male probation officer at the office on designated evenings, while delinquent girls would be visited at home by female probation officers and were rarely required to report to the office. The officer would also make periodic home visits and consider written reports prepared by parents and teachers. The average period of supervised probation in St.

Louis was ten to twelve months, though some children and families remained on probation for years.²⁴

Missouri probation departments occasionally received private help. In 1922, the St. Louis chief juvenile probation officer reported that his office used volunteer probation officers rarely, and only to assist paid officers who retained ultimate responsibility for the children assigned to them. The probation office did depend on supervisory assistance from school attendance officers, religious organizations and voluntary groups such as Big Brothers and Big Sisters. At the other end of the state, the Women's Club of Kansas City provided volunteers for office and clerical duties, and sometimes even for case work with children. The Club also purchased clothes, lunches, books and other items necessary to enable the supervised children to attend school. In many smaller counties, volunteers played a larger role because probation officers themselves were often not full-time employees.²⁵

Two chronic problems—high caseloads and low salaries—plagued nationwide efforts to create effective, professional juvenile probation staffs. Reliance on probation quickly overwhelmed Missouri's newly created juvenile probation departments. In the smaller counties, caseloads were relatively low but still high enough often to swamp the small staff, who might be part-time employees forced to travel long distances over poor roads to carry out their supervisory functions. Caseloads were particularly high in the cities. The 1911 St. Louis Municipal Commission report found the city's department already "handicapped by too few officers to look after the large number of children." The eight St. Louis probation officers supervised an average of 167 children each, well above the recommended maximum of fifty to seventy-five (which, to be fair, was exceeded in most of the nation's juvenile probation departments). Two years later, the average caseload per St. Louis officer exceeded two hundred.²⁶

The average probation caseload in St. Louis City had fallen only slightly to 156 per officer by 1919, when the juvenile probation department consisted of the chief and sixteen deputies (eight men and eight women). In 1927, the Child Welfare League of America found the the city's probation department understaffed and urged more hirings to help reduce the average caseload.²⁷

In St. Louis and Kansas City, caseload pressures were sometimes worsened because assignments depended heavily on race, gender, ethnicity and religion. Assignment of cases by these factors was recommended by juvenile court proponents nationwide and was practiced in most departments with sufficiently large staffs until the 1970s. Missouri juvenile probation departments accommodated prevailing attitudes about segregation. In their influential 1914 text, Baldwin and Flexner justified race-based probation assignments because of "the differences between the social life of colored and white people and the pecu-