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Austin Owen Lecture: Reassessment Should Not Lead to Wholesale Rejection of the Juvenile Justice System

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AUSTIN OWEN LECTURE

REASSESSMENT SHOULD NOT LEAD TO WHOLESALE REJECTION OF THE JUVENILE JUSTICE SYSTEM

*The Honorable Lawrence L. Koontz, Jr.**

The Honorable Lawrence L. Koontz, Jr., presented this address as The Fifth Annual Austin Owen Lecture on September 26, 1996.

The Honorable Austin E. Owen attended Richmond College from 1946-47 and received his law degree from The T.C. Williams School of Law in 1950. During his distinguished career, Judge Owen served as an Assistant U.S. Attorney for the Eastern District of Virginia; a partner in Owen, Guy, Rhodes, Betz, Smith and Dickerson; and was appointed Judge of the Second Judicial Circuit of Virginia where he served until his retirement in 1990. The Law School community grieved the loss of this distinguished alumnus upon his death in March, 1995. In 1991, Judge Owen's daughter, Dr. Judith O. Hopkins, W'74, and son-in-law, Dr. Marbry B. Hopkins, R'74, established the Austin Owen Lecture which is held each fall at the Law School.

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For those of you who knew and respected him as I did, you will understand when I say it is a great honor to have had this opportunity to deliver the Fifth Annual Austin Owen Lecture.

I. INTRODUCTION

While coming into the twenty-first century will be a new experience for all of us, we should be conscious of the intersections of the past, present, and future as we near the year 2000.

Reassessment in many areas of our society seems not only appropriate, but to be expected at such a time. Change becomes inevitable, but I submit not all change is positive or justified. In "taking stock" there seems to be an overwhelming desire on the part of many to dissect and discard every social movement, every technological advance, and every political theorem which this century has produced. The pundits would have you believe that every societal evil is not the fault of current policy, but rather the inevitable result of some long chain of events begun twenty, fifty, or one hundred years ago.

I take, as an example, the present movement to reform, and in some instances relegate to the scrap heap, the single most significant innovation in the American system of justice in this century, the creation and universal implementation of a juvenile justice system. A system having separate courts, separate procedures, and most significantly, separate goals for the corrective measures it imposed upon the existing criminal justice system.

In very general terms these "reforms" are aimed at treating juvenile offenders more like adult offenders. For example, some of the more common proposals are: (1) the elimination of confidentiality of juvenile records; (2) the imposition of equal sentences for adults and juveniles charged with the same kind of crime; (3) the elimination of juvenile court jurisdiction for specific offenses; (4) the lowering of the maximum age for juvenile court jurisdiction; (5) the raising of the maximum age for which a juvenile may be kept in a juvenile institution and the use of adult institutions for sentencing; and (6) the transfer of authority to waive jurisdiction from the juvenile court judges to the State's attorney.

Some have suggested that these reforms represent no more than a swing in the pendulum of public opinion undoubtedly fostered by the mass media's exposure of the whole topic of juvenile delinquency and sensational reporting of particularly

violent crimes involving juveniles. To some extent this may well be true. History reveals that in this area the pendulum of public opinion is an apt analogy, but the danger in periodic assessment is that rejection can be an all too appealing "quick fix." I submit that the quick fix is all the more appealing because it permits one to ignore the inherent difficulty in the reassessment process of a judicial system, not really understood by many, nor lending itself well to statistical analysis.

In these brief comments, allow me to paint with an admittedly broad brush. What began as a social experiment imposed within a court system, evolved into a delicate and complicated menu of cause and effect. I will begin by framing the term "juvenile delinquency" and then discuss the historical judicial response to it.

II. CONCEPTUALIZING "JUVENILE DELINQUENCY"

Consider this quote:

> The young are in character prone to desire and ready to carry any desire they may have formed into action. Their wishes are keen without being permanent; like a sick man's fits of hunger and thirst. They are passionate, irascible and apt to be carried away by their impulses. If the young commit a fault, it is always on the side of excess for they carry everything too far whether it be their love or hatred or anything else.[1]

Thoughts of a modern sociologist or behavioral scientist? No, the thoughts of Aristotle who suggests youthful conduct or misbehaviors appear to be causally connected to their stage of development. We know from the common law that children under seven years of age were assumed to be incapable of criminal intent and, thus, unable to commit actions regarded as crimes.[2] From age seven to age fourteen, children were also

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1. WILLIAM F. THORNTON, JR. & LYDIA VOIGHT, DELINQUENCY AND INJUSTICE 4 (3d ed. 1992) (quoting G.S. HALL, ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONSHIP TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION (1905)).

2. *See* Godfrey v. State, 31 Ala. 323 (1858); Clay v. State, 196 So. 462 (Fla. 1940); 4 WILLIAM BLACKSTONE, COMMENTARIES *23-24; Frederick Woodbridge, *Physical*

presumed innocent of criminal intent unless it could be proved that they possessed the knowledge of right and wrong.[3] Thereafter, children fourteen and older were held accountable for their crimes and receive adult punishment.[4]

Over the years, while recognizing that age was a significant factor in youthful behavior, our search for causation has added many other factors. Poverty, dysfunctional families, learning disabilities, maternal smoking, toxic metal exposure, poor nutrition and mutant genes are but a few. The truth is that since Aristotle's time we do not know why some juveniles become delinquent and others do not. Thus, there is no universal agreement on a comprehensive definition of the term "juvenile delinquency."

With this unsettling state of affairs, enters the judicial response. Over several hundred years the judiciary attempted to respond to a problem it could not define nor understand.

III. JUDICIAL RESPONSE TO DELINQUENCY

A. *Early Treatment of Juvenile "Offenders"*

Imagine that you are an orphaned or abandoned child in colonial Virginia. Under the Poor Laws enacted in the colony in 1646,[5] your only recourse as a ward of the state is indenture in an apprenticeship selected for you. Owing absolute obedience to your master, you run the risk of swift and severe corporal punishment imposed by a local tribunal for any slight infraction of that duty. That same tribunal is charged with overseeing the actions of masters and punishing abuse of apprentices, but in all likelihood the tribunal consists of other masters and wealthy landowners whose sympathies are not likely to rest with you.

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and Mental Infancy in the Criminal Law, 87 U. PA. L. REV. 426, 426-35 (1939).

3. *See* McCormack v. State, 15 So. 438, 440 (Ala. 1894); Martin v. State, 8 So. 858, 860-61 (Ala. 1891); WAYNE LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.11 (1972).

4. *See Godfrey*, 31 Ala. at 327-28; 4 WILLIAM BLACKSTONE, COMMENTARIES * 23-24.

5. 1 WILLIAM WALLER HENING, STATUTES AT LARGE, Act XXVII (1646).

Imagine that you are a child living in an immigrant tenement of an East Coast city in the mid-nineteenth century. To society at-large, you are a part of "the dangerous classes;"[6] and while the efforts of many, who call themselves "child savers,"[7] are well-meant, the realty of the House of Refuge they founded for your benefit is far from beneficial. These institutions were little more than workhouses where the residents, some would say inmates, performed piecework for local factories.[8]

B. *Developing the Doctrine of* Parens Patriae

It was to the Philadelphia House of Refuge that a twelve-year-old girl was taken in the 1830s on a charge of vagrancy. Crouse was her surname, but her given name is lost in time. Her father, by writ of habeas corpus, sought her release. The superior court rejected his effort, finding that where natural parents are "unequal to the task, or unworthy of it, [they should] be superseded by the *parens patriae*" to safeguard the community.[9] The Supreme Court of Pennsylvania agreed, and with those two words, *parens patriae*, it gave to the state the power to take a twelve-year-old girl from her parents, without due process of law, for the crime of being poor.[10]

It would be thirty-two years before the Illinois Supreme Court would render a contrary opinion.[11] We may presume that Daniel O'Connell of the city of Chicago was not a model citizen. Indeed, it is likely that he committed a few petty crimes in the slum near the slaughterhouses where he lived, but his arrest and incarceration in the Chicago Reform School was not predicated on any crime of property or violence. Rath-

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6. *See* J. Herbie DiFonzo, *Deprived of "Fatal Liberty": The Rhetoric of Child Saving and the Reality of Juvenile Incarceration*, 26 U. TOL. L. REV. 855, 855 n.1 (1995).

7. *See* Murray Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y. L. SCH. J. HUM. RTS. 711, 715 (1993); Brian R. Suffredini, Note, *Juvenile Gunslingers: A Place for Punitive Philosophy in Rehabilitative Juvenile Justice*, 35 B.C. L. REV. 885, 889 (1994).

8. *See* ANTHONY M. PRATT, THE CHILD SAVERS 69 (1977) (stating that at the Illinois State Reformatory, "inmates were forced to work ten hours a day manufacturing shoes, brushes, and chairs."); DiFonzo, *supra* note 6, at 882-83.

9. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839) (per curiam).

10. *See id.*

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

er, it was on a determination that he was a destitute youth without proper supervision. Daniel's parents challenged their son's arrest, and the Illinois Supreme Court returned him to their custody, finding that Daniel's arrest for simple "misfortune," rather than a criminal act, was violative of due process.[12]

It is uncommon for a single decision of an appellate court to have immediate effect beyond the parties at issue, but *O'Connell* was an uncommon case. Within two years the Chicago Reform School was forced to close. Every Illinois statute which allowed misfortune, rather than criminal acts, to result in the confining of children to an institution was challenged and defeated. While many states continued to adhere to a strict interpretation of *parens patriae*,[13] others followed Illinois' lead, and that left a vacuum.[14]

C. *Legislative Reaction to the Void*

Reform of an unjust system does not always result in a just one. By recognizing the inequity of a system that tore families apart and treated children as less than full citizens, the Illinois Supreme Court helped to overcome a great injustice, but in so doing, it also removed an effective tool for controlling delinquency and criminal activity. Many who had clamored for reform in the treatment of children in our justice system, were appalled when that reform led to treatment of youthful offenders as adults. If due process was to be afforded, the only process that was available was the criminal court.

Illinois again led the way, perhaps because it had the greatest need, having started the ball rolling, when in 1899 it enacted the Juvenile Court Act.[15] This landmark legislation repre-

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12. *See id.* at 287-88.

13. *See, e.g.*, Farnham v. Pierce, 141 Mass. 203 (1886); Cincinnati House of Refuge v. Ryan, 37 Ohio St. 197 (1881); Commonwealth v. Fisher, 213 Pa. 48 (1905).

14. *See, e.g.*, State *ex rel.* Cunningham v. Ray, 63 N.H. 406 (1885) (holding that a statute which authorized a justice of the peace to commit a minor under the age of seventeen without a trial, on a criminal charge of which the justice of the peace had no jurisdiction, was unconstitutional as it violated due process).

15. Act of Apr. 21, 1899, §§ 1-21, 1899 Ill. Laws 131. For a thorough discussion of the Act, see also Birt E. Waite, The Origin and Development of the Juvenile Court, 109-12 (1974) (unpublished Ph.D. dissertation, University of Tennessee).

sents the first real innovation in the treatment of children by the American justice system. All prior actions, both by the state and private institutions, merely expedited existing policies, admittedly with benevolent intent, but nonetheless sought merely to control a segment of society viewed as dangerous and unworthy of better treatment. By contrast, the Juvenile Court Act had as its paramount goal the best interests of the child.[16] Justice Fortas, recounting the history of juvenile justice in the 1967 case *In re Gault*,[17] viewed the reform this way:

> The child—essentially good, as [the reformer] saw it—was to be made "to feel that he was the object of [the state's] care and solicitude," not that he was under arrest or under trial . . . . The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.[18]

This may not seem particularly innovative. Indeed it must seem to us as second nature, but it was a radical idea at the beginning of this century. It was an idea whose time had apparently come, however, for by 1919 every state but two had enacted similar legislation.[19]

Remarkably, the Juvenile Court Act is not uncharacteristic of our modern understanding of juvenile justice. The drafters made careful distinctions between status offenses, criminal acts, and children neglected or in need of supervision.[20] Separate courts, separate procedures, and separate institutional programs were all hallmarks of the Act, just as they are today in our juvenile courts.

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16. *See* Act of Apr. 21, 1899, § 21, 1899 Ill. Laws 131, 137 ("This act shall be liberally construed to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents."); *see also*, Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

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

18. *Id.* at 15-16.

19. Only Maine and Wyoming remained without reform.

20. *See, e.g.*, Act of Apr. 21, 1899, § 7 (defining dependent and neglected children); § 9 (regarding the disposition of delinquent children and distinguishing between status offenses and criminal acts).

The justification for these reforms was again *parens patriae*, but it was a paternalism of the state tempered by lessons of the past. If the procedures afforded the children did not reach the full panoply of constitutional protections, nonetheless there were procedures, defined and required to be followed, which afforded basic protection.

Until the conclusion of the Second World War, there was little further innovation in the juvenile justice system. It must be conceded that many of the ideals first put forth in 1899 remained unrealized. In many instances, the warehousing of youths from the lower classes continued much as it had been in the days of the Houses of Refuge.

In the 1950s, many began to reject the rehabilitation model and question whether a paternalistic system could effectively address the problems of delinquency and neglect, judging the whole concept a failure. It would be fairer to say that the philosophy underlying *parens patriae* did not fail, but that it accomplished only what it could.

D. *Extending Constitutional Protections*

At the same time, the juvenile justice system was under attack by public opinion. For its alleged lack of results, both the juvenile and adult criminal justice systems came under reassessment in the United States Supreme Court. As a result, the Court made sweeping changes in both systems.

With regard to adults, the Court decided in *Mapp v. Ohio*[21] that the familiar exclusionary rule applied to state court proceedings through the Fourteenth Amendment. The Court further held in *Escobedo v. Illinois*[22] that the Sixth Amendment's right to an attorney, and in *Miranda v. Arizona*,[23] that the Fifth Amendment's right not to self-incriminate were also applicable to state court proceedings. In this same period of sweeping change, the Court reassessed and restructured the informal procedural requirements of the juvenile justice system that, for

21. 367 U.S. 643 (1961).
22. 378 U.S. 478 (1964).
23. 384 U.S. 436 (1966).

approximately sixty years, had been hidden from public and appellate judicial scrutiny.

As had been the case with David O'Connell in Chicago almost one-hundred years before, Morris Kent, a sixteen-year-old in Washington, D.C., in 1966, was not a model citizen. The charges against him of statutory burglary, robbery and rape were entirely inconsistent with even the benevolent view Aristotle suggested about youthful conduct. Under the circumstances it should not be surprising to us that Kent was transferred to the adult system for trial without a transfer hearing and in spite of Kent's assertions that only the juvenile system could adequately treat his physiological problems.[24] It is equally not surprising that, in response, the Supreme Court struck down the transfer as lacking in constitutional due process, long understood as applicable to adults.[25] Certainly, following *Kent* the legal and academic communities began to reassess the juvenile justice system.

In 1967, the Court considered the case of Gerald Gault, a fifteen-year-old from Arizona, who was sent to reform school for making an obscene phone call to a woman neighbor.[26] Gault had been in trouble before and the judge knew it. Consequently, the judge sent Gault to a reform school without a hearing.[27] As a result, the Supreme Court imposed upon the juvenile justice system the right to notice of the charges, right to an attorney, right to confrontation and cross-examination of witnesses and right to a fair trial.[28]

Three years later with Samuel Winship, a twelve-year-old New York purse snatcher, the Court imposed proof beyond a reasonable doubt, the adult standard, as the standard of proof required in the juvenile court for conviction of criminal acts.[29]

A year later, a sixteen-year-old from Pennsylvania charged with robbery, failed in his attempt to insist upon the right to a jury trial in the juvenile court.[30] Perhaps with the *McKeiver*[31]

24. *See* Kent v. United States, 383 U.S. 541, 545-52 (1966).
25. *See id.* at 560-64.
26. *See In re* Gault, 387 U.S. 1, 4 (1967).
27. *See id.* at 6-10.
28. *See id.* at 31-57.
29. *See In re* Winship, 397 U.S. 358 (1970).
30. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

the pendulum ceased its swing toward the elimination of essential procedural distinctions between the juvenile and adult criminal justice systems. How should these differences in the definition and treatment of juvenile offenders affect our present discussion?

IV. JUVENILE OFFENDERS: NOT A YOUTHFUL VERSION OF THE ADULT CRIMINAL

No one denies the wisdom of the reasoning of the Supreme Court in extending constitutional protections to youthful offenders. No one desires a return to the House of Refuge mentality. But, it is impossible to deny that the extension of adult process to the juvenile system has contributed further to the perception, at least, that it is merely a mirror image of the adult criminal justice system affording lesser punishment for criminal acts merely because of the age of the offender.

That perception, born of fear and understandable frustration, has steadily eroded support for the nobler aspirations of the juvenile justice system. The danger is that as support erodes, those fears become self-fulfilling prophecies, and those frustrations become political ideology.

Today, we are at a crossroads in the administration of juvenile justice. Reassessment of that system is the order of the day from almost every corner of our society. There are those who would urge us to take the path that would discard in its totality one hundred years of progress. They would treat juvenile criminals as adult criminals; trying them in adult court and placing them in adult prisons. Status offenses would be criminalized too, though not for the offenders. Rather, the parents would now be judged guilty and punished for failing to meet the expectations of society. In short, the arguments suggest that we could eliminate juvenile delinquency by simply redefining it. This, despite the fact that juvenile delinquency has for hundreds of years defied definition.

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31. *See* Belloti v. Baird, 443 U.S. 622, 634; *see also* John D. Goetz, Note, *Children's Rights Under the Burger Court: Concern for the Child but Deference to Authority*, 60 NOTRE DAME L. REV. 1214, 1215-16 (1985).

It is not my intention to chastise. I recognize that the single issue of juvenile justice cannot be viewed outside the context of other social problems. Poverty, absentee parents, drug abuse, and a host of other social ills are part of the challenge that faces our judicial system and our society as a whole. I also recognize that severe youthful offenders may require punishment for serious offenses similar to the adult system. My point simply is this: the inability of the juvenile justice system, or of the criminal justice system, to be a panacea for the evils it sets out to address is not a justification for abandoning or even lessening the effort.

Sam, as I will call him, did not like school, but made good grades. Aristotle would have described him as impulsive and prone to carry anything too far. At age seventeen, in the eleventh grade of high school, he took without permission, (stole if you will) his neighbor's car and drove from Roanoke to Florida where he was arrested. Under all of the circumstances, and I will spare you the details, the juvenile court at the time decided to retain him within the juvenile system rather than to transfer him to the adult system.

Today, when I see Sam busily running his independent insurance agency I wonder what would have been his future if the law at the time had mandated his waiver from the juvenile court to the adult court. What impact would the "reforms" I mentioned earlier, have had if applied to his case? Sam is an example that the juvenile justice system can accomplish its goals.

V. CONCLUSION

Why do some juveniles become delinquent and others do not? Where is the line to be drawn between youthful impulse and criminal acts? The answers remain elusive. But, as we enter a new century, we need not surrender our ideals to our fears. Nor should we let our ideals blind us to the reality that spawns those fears, but let constructive reassessment, rather than rejection, be our watchword. As informed members of the legal and academic community, I trust that you will actively guard against uninformed rejection of a system that promotes juvenile justice.