

POWER WITHOUT PARENTS: JUVENILE JUSTICE IN A POSTMODERN SOCIETY

Jonathan Simon*

It is tempting at times to speak of a general crisis of childhood in America. We hear and read of record numbers of children living in poverty and unprecedented levels of violence against children and adolescents.¹ With astounding frequency, stories emerge of child abuse in the nation's churches, schools, and day-care centers.² But this characterization of a general crisis leaps over the specific contexts in which these disturbing images are arising and mistakes the democracy of the daily news for a common fate in America. Such a discussion also risks ignoring the specific technologies of power that are in play, and their genealogies.

Here, I examine the juvenile court, an institution formed during the Progressive Era, through which the state has channeled its exercise of power to punish and protect children and young adults for most of the twentieth century.³ The idea of separating youthful offenders from older ones was established in the early nineteenth

* Jonathan Simon received his J.D. from the University of California, Berkeley, School of Law (Boalt Hall) in 1987 and his Ph.D. in the Jurisprudence and Social Policy program at Berkeley in 1990. Following law school, Professor Simon clerked for the Honorable William Canby, Jr. of the Ninth Circuit Court of Appeals. From 1990 to 1992, Simon was an Assistant Professor of Political Science at the University of Michigan. Since 1992, Simon has been an Associate Professor of Law at the University of Miami Law School where he teaches criminal and constitutional law. Simon's first book, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990*, was published by the University of Chicago Press in 1993. He is currently writing a book on the legal and political transformations associated with the rise of risk management technologies in American institutions.

¹ Throughout 1993, the major newspapers and networks produced scores of stories on youth, violence, and crime. A particularly powerful example is Colin McMahon & Steve Johnson, *Killing Our Children: Portrait of a City's Tragedy*, CHI. TRIB., July 9, 1993, at N1.

² Whether true or false, these stories reflect what is already widely believed; namely, someone must be perverse to choose to spend their time taking care of children. See, e.g., Andrea Gross, *Who's Telling the Truth?*, LADIES HOME J., June 1994, at 72; A.S. Ross, *Blame It on the Devil*, REDBOOK, June 1994, at 86; Laura Shapiro et al., *Rush to Judgment*, NEWSWEEK, Apr. 19, 1993, at 54.

³ See generally ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (2d ed. 1977); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980); STEVEN L. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920* (1977); JOHN R. SUTTON, *STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981* (1988); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Alexander W. Pisciotto, *Saving the Children: The Promise and Practice of Parens Patriae, 1838-98*, 28 CRIME & DELINQ. 410 (1982).

century through the same revolutionary sentiments that ushered in the prison and asylum as the hallmarks of republican institutional values.⁴ The first wave of juvenile reforms came in the 1820s and 1830s with the establishment of special institutions for youth.⁵ The second wave, which brought the juvenile court, began to emerge after the Civil War and achieved wide success in the United States during the first decades of the twentieth century.⁶ The juvenile court idea broadened judicial discretion to set the terms of treatment for young people. This expansion of power was justified and regulated (in theory) by the court's access to the greatest possible array of evidence about the subject, including not only legal evidence, but also social and psychological facts culled through the investigatory powers of probation officers and special clinics.⁷ The first court of this kind to be fully established under a statute was in Chicago in 1899;⁸ by 1920, all but three states had a juvenile court of some sort.⁹

Today, many people find the workings of the juvenile court a little embarrassing. But few institutions have so embodied the hopes of modernism in legal policy. It was a court that was also a clinic. It was a nexus where psychology and philanthropy were to combine and place a rational and loving hand on wayward youth.¹⁰ Although early hopes for the court failed to be realized, the court remains an institutional monument to an enlightened society's will to foreswear the ancient urge to hurt and humiliate the criminal and instead to suffocate the roots of crime.

The juvenile court currently finds itself under sustained attack. Since the mid-1970s, at least ten states have modified their juvenile court statutes to express a new punitive intention,¹¹ and many others have made it easier for juveniles to be removed to courts of adult jurisdiction.¹² Even where the traditional statutes remain relatively intact, the official premise of rehabilitation is openly ridi-

⁴ See THOMAS L. DUMM, *DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES* (1987); Fox, *supra* note 3, at 1188.

⁵ DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971); Fox, *supra* note 3.

⁶ ROTHMAN, *supra* note 3, at 35; Fox, *supra* note 3, at 1207.

⁷ PLATT, *supra* note 3, at 139; ROTHMAN, *supra* note 3, at 213.

⁸ Fox, *supra* note 3, at 1187.

⁹ ROTHMAN, *supra* note 3, at 215.

¹⁰ PLATT, *supra* note 3, at 75-83; ROTHMAN, *supra* note 3, at 49.

¹¹ BARRY C. FELD, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 842-47 (1988) [hereinafter Feld, *Juvenile Court*]; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 701 (1991) [hereinafter Feld, *The Transformation*].

¹² Feld, *The Transformation*, *supra* note 11, at 703-08.

culed in the media and in the discourse of professional politicians.¹³ The court's methods, once viewed as the cutting edge after which adult corrections would eventually model themselves, are now dismissed as frauds. While the juvenile offender was once presumed to be the most easily redeemable and rehabilitatable, there is now an emerging consensus that these youths are dangerous predators who must be locked away.¹⁴

The transformation of the juvenile court into a punitive instrument, to address an increasingly marked and isolated population, has been ongoing for some decades.¹⁵ As is frequently the case with the history of institutions, change has not been brought about either in a single stroke or at the behest of a coherent coalition of forces with an agreed-upon agenda.¹⁶ Rather, a variety of factors have acted to bring about revisions. For example, during the 1950s, both popular culture and sociology operated to suggest the adoption of a less pathological view of juvenile delinquency. The discourse did not deny the need for intervention, but rather was willing to see the delinquent as a marker of a deformed social order.¹⁷

During the 1960s, the Supreme Court "domesticated" the juvenile court by providing many adult procedural rights for juveniles.¹⁸ The Court disclaimed any intent to disestablish the juvenile court model, but, in dicta, blatantly called into question the plausibility of many of the juvenile court's intellectual underpinnings.¹⁹ As usual, it is hard to say whether these opinions moti-

¹³ See, e.g., Dexter Filkins, *Kids' Place Is in the Home?*, MIAMI HERALD, Dec. 11, 1993, at 1A; Larry Hawkins, *Put Local Spotlight on Solving Crime Problems*, MIAMI HERALD, Dec. 14, 1993, at 17A; Oscar Musibay, *Metro Proposes Youth Boot Camp*, MIAMI HERALD, Dec. 22, 1993, at 2B; Terry Neal, *Chiles Signs Juvenile Crime Bill*, MIAMI HERALD, Nov. 30, 1993, at 5B; Don Van Natta, Jr., *Leaders Confer on Juvenile Crime*, MIAMI HERALD, Nov. 13, 1993, at 2B.

¹⁴ See, e.g., PLATT, *supra* note 3; ROTHMAN, *supra* note 3; IRA M. SCHWARTZ, (IN) JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD (1989); Feld, *The Transformation*, *supra* note 11. For a discussion of opposition to the juvenile court today, see generally CHARLES H. SHIREMAN & FREDERIC G. REAMER, REHABILITATING JUVENILE JUSTICE (1986); H. Ted Rubin, *Retain the Juvenile Court? Legislative Developments, Reform Directions, and the Call for Abolition*, 25 CRIME & DELINQ. 281 (1979).

¹⁵ Feld, *The Transformation*, *supra* note 11.

¹⁶ For a general point about agency and historical change, see ROTHMAN, *supra* note 3.

¹⁷ See, e.g., HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963); THE WILD ONE (Columbia Pictures 1953) (in which Marlon Brando plays the leader of a motorcycle gang).

¹⁸ See *Breed v. Jones*, 421 U.S. 519 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *infra* notes 165-93 and accompanying text.

¹⁹ *Gault*, 387 U.S. at 15-31.

vated or simply articulated an emerging cultural consensus against the modernist clinical model of punishment.

Starting in the 1970s, legislative and judicial decisions limited the jurisdiction of the juvenile courts to actions analogous to adult crimes and made it easier to try juveniles in adult court.²⁰ In the 1980s, many states subjected juvenile judges to rigid punishment schedules similar to those used in the regular criminal process.²¹ This punitive drift has been reinforced by a portentous rise in violent crime, by and against youth, which began in the mid-1980s and has become progressively worse.²²

The travails of the juvenile court in recent decades have stemmed in large part from external factors that have influenced other aspects of public life. The institution has been buffeted by structural economic change. Not surprisingly, the most violent crimes committed by inner-city minority teenage men, both against each other and against others, are taking place in communities that have lost much of their labor market and working-class culture²³ (toward which the juvenile court once aimed at steering troubled youth). Fiscal cutbacks in state government, and the priority given to imprisoning adult offenders during the 1980s, drained away much of the funding for more therapeutic programs for juvenile offenders.²⁴

The court's ability to function effectively has also been undermined by changes in the social construction of childhood. Though many grow up in what might be called "child-centered" households, children today are experiencing net reductions in the amount of time and income parents are willing or able to spend on them.²⁵ More broadly, some speculate that the cultural model of

²⁰ Feld, *The Transformation*, *supra* note 11, at 697-98.

²¹ The history of sentencing law is bound up with that of juvenile justice. The indeterminate sentencing strategy, which predominated in the United States from the 1910s to the 1970s, was modeled on approaches used in nineteenth-century juvenile reformatories. See ROTHMAN, *supra* note 3. The shift to determinate sentencing in the 1970s, reflected the increasingly punitive approach to adult crime that has been moving into the juvenile process. See Barry C. Feld, *Criminalizing the American Juvenile Court*, in 17 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 197 (Michael Tonry ed., 1993).

²² The rate per 100,000 people, aged 14-17 years, who committed murder or nonnegligent manslaughter increased from 8.4 in 1986 to 15.7 in 1991. U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1992, at 394 (Kathleen Maguire et al. eds., 1993).

²³ Troy Duster, *Crime, Youth Unemployment, and the Black Urban Underclass*, 33 *CRIME & DELINQ.* 300 (1987).

²⁴ See BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* (1993).

²⁵ See generally MARIAN W. EDELMAN, *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE* (1987).

childhood as a unique and preparatory stage for a life of orderly stages (think of Erik Erikson)²⁶ is rapidly dissipating for populations that are constantly changing and insecure.²⁷

If such a cultural shift is dimming sympathy for young people who do destructive things, it is exacerbated by the enduring racial coding of sympathy. African American and Hispanic youth now make up a proportion of the juvenile court's docket far out of proportion to their distribution in the general population.²⁸ The juvenile justice system is increasingly a racially identified institution.²⁹ This may help explain why a White majority society finds it easier to get tough with juveniles in the system.

This Article argues that the legal theory of the juvenile court provides significant clues to its current destabilization and the stakes involved. The doctrinal foundation of the juvenile court, reaffirmed as recently as the mid-1980s by the Supreme Court, is "*parens patriae*," which means that the court acts with the power of the sovereign to function as "the father of the nation."³⁰ Examples of English sovereigns acting as a guardian for minors and other dependents have been traced back to the thirteenth century.³¹ The

²⁶ Erikson analyzed the life cycle as a series of stages with unique existential challenges and determinate modes of resolution. See ERIC H. ERIKSON, *CHILDHOOD AND SOCIETY* (1950).

²⁷ NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* (1982); Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991).

²⁸ Of 42 states reporting on the existence of minority overrepresentation in the juvenile justice system under a congressional mandate to discover discrimination, 41 reported that an overrepresentation of minorities existed in juvenile custody facilities. See Carl E. Pope, *Racial Disparities in Juvenile Justice System*, 5 *OVERCROWDED TIMES* (No. 6) 1, 5-6 (1994). The juvenile court has White clients as well, but as one outspoken judge has recently noted, the public perception of the court has shifted from *Boys' Town* (Metro-Goldwyn-Mayer 1938) to *Boyz 'n the Hood* (Columbia Pictures 1991). Thomas Petersen, *Juvenile Justice and Captain Scott's Children: Searching for a Solution to an Urban Dilemma* (1993) (unpublished paper, on file with author).

²⁹ In the sense used by the desegregation cases to mean the enduring association of an institution with a particular race despite an end to *de jure* segregation. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968).

³⁰ *Schall v. Martin*, 467 U.S. 253, 263-65 (1984); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972); see also BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). See generally Gilbert T. Verable, Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894 (1966). Some of the more recent publications have substituted "parent" for "father." For reasons discussed below, see *infra* notes 59-62 and accompanying text, I retain the original phrasing.

³¹ See GORDON J. SCHOCHET, *PATRIARCHALISM IN POLITICAL THOUGHT: THE AUTHORITARIAN FAMILY AND POLITICAL SPECULATION AND ATTITUDES ESPECIALLY IN SEVENTEENTH-CENTURY ENGLAND* (1975); Melissa A. Butler, *Early Liberal Roots of Feminism: John Locke and the Attack on Patriarchy*, in *FEMINIST INTERPRETATIONS AND POLITICAL THEORY* 74 (Mary L. Shanley & Carole Pateman eds., 1991); Peter Laslett,

phrase *parens patriae* appears in the political debates of the seventeenth century where it is used by those defending the monarchy.³²

In perhaps the most central tract in liberal political theory, John Locke's *Second Treatise of Government*, this picture of sovereignty as a form of paternity is openly ridiculed.³³ Yet, nineteenth-century courts, as successors to the powers of the King's Bench in avowedly "liberal" societies, borrowed the hoary expression to claim special jurisdiction over the affairs of youths and others.³⁴

This strange clipping from His Majesty's gardens has sent out many and diverse shoots. It supports a broad set of state authorities. As *parens patriae*, state governments have authority to confine and regulate those who, but for some claim of dependency, could not lose their "liberty" to the government, e.g., the insane, children, and the elderly;³⁵ to regulate private charities; to manage populations of wild animals and other natural resources;³⁶ and to protect or repair "quasi-sovereign" interests on behalf of its people as a whole, against parties that endanger their economic or physical well-being.³⁷ The United States's fiduciary role toward Native American tribes has been analogized to *parens patriae*.³⁸ The juvenile court is the largest and perhaps strangest of the fruits on this vine.

The idea of *parens patriae* together with the surrounding political imagery, evokes deep ambivalence within liberal societies. This ambivalence is about much more than political theory narrowly construed. It raises the question of what forms of subjectivity are available in society that are compatible with dominant modes of exercising power.³⁹ Indeed, for Locke and his generation, with distant but no doubt compelling memories of a King's execution by his political children, the problem of how to solve the relationship between sovereignty and paternity was far from ab-

Introduction to SIR ROBERT FILMER, *PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER* 1 (Peter Laslett ed., 1949).

³² JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon ed., 1952) (n.p. 1690).

³³ *Id.* at 30-34.

³⁴ Pisciotta, *supra* note 3; Verable, *supra* note 30.

³⁵ *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).

³⁶ *United States v. Nevada*, 412 U.S. 534, 539 (1973).

³⁷ *Hawaii*, 405 U.S. at 258.

³⁸ *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960).

³⁹ See *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* (Graham Burchell et al. eds., 1991); see also Colin Gordon, *Governmental Rationality: An Introduction*, in *THE FOUCAULT EFFECT*, *supra*, at 1; Niklas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 *BRIT. J. SOC.* 173 (Paul Rock ed., 1992).

tract.⁴⁰ Ever since then, Western political and legal theory has viewed any effort to exercise political power that invokes the idea of the father with intense suspicion.⁴¹

Over the centuries, a variety of institutional strategies have been created to address this ambivalence and to channel the dynamic energy generated toward the construction of the state and other institutions. The figure of the king himself is perhaps the single most influential of these strategies and, as we shall see, is frequently invoked in an accusatory manner against those who would create modernist forms of paternalism.⁴²

This Article examines the juvenile court in the context of this historic problem.⁴³ The juvenile court is one of the most developed efforts in our political culture to affirm the relationship between paternity and sovereignty in a manner consistent with modernism and democracy. Whether or not it is soon cast into the junkyard of public policy history, the juvenile court will remain relevant to all those *bricoleurs*⁴⁴ called to restructure political institutions capable of governing postmodern society.

Part I of this Article briefly reviews the general treatment of *parens patriae* and paternalism as legal theory. For a long time, legal scholars and philosophers have debated about paternalism as if it posed a choice between the risks of independence and the degradations of being dependent on supposedly benevolent institutions. But it has become painfully obvious that for many people much of the time, the real choices, when they exist at all, are between dependence on institutions that justify their power on the best interests of the dependent subject, and institutions that do not

⁴⁰ Locke, it should be recalled, had lived through the English civil war and the scaffold execution of Charles I, King of England. Don Herzog argues that the execution of Charles I and the larger popular campaign of resistance to authority at all levels of English society, form the necessary historical background for making sense of the language of liberal theory, especially that of consent. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989); see also REGICIDE AND REVOLUTION: SPEECHES AT THE TRIAL OF LOUIS XVI (Michael Walzer ed. & Marian Rothstein trans., 1992).

⁴¹ Yet, as Michel Foucault noted, "[i]n political thought and analysis, we still have not cut off the head of the king." 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 88-89 (Robert Hurley trans., Vintage Books 1978) (1976).

⁴² See *infra* notes 66-69 and accompanying text.

⁴³ For analytic purposes, this Article will separate this aspect from other obviously important questions, like whether or not the juvenile court has achieved its stated goals, or to what extent its institutional formation lives up to the advantageous assumptions made in legal theory.

⁴⁴ The term denotes one who builds culture out of the scraps saved from dismantled cultural forms, as used by Claude Lévi-Strauss in his classic essay *The Science of the Concrete*, CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* 16-33 (George Weidenfeld trans., Univ. of Chicago Press 1966) (1962).

bother trying to justify their power with reference to the dependent subject at all. From this perspective, those legal doctrines—including the *parens patriae* theory of the juvenile court, in which paternal power has been accepted, cultivated, and regulated—provide a critical reserve of experience from which to derive new ways of dealing with the realities of power and dependence.⁴⁵

Part II revisits the most influential early account of how paternal power can be reconciled with the liberal model of politics—John Locke's critique of Sir Robert Filmer's political theory. I explore this critique of paternalism in Locke's *Second Treatise of Government*,⁴⁶ and his efforts to delineate the enduring role of paternal power within liberalism in *Some Thoughts Concerning Education*.⁴⁷ Locke's views are canvassed less for their theoretic value than as evidence that liberal ideology, so often characterized as decisive for our political culture, was initially quite open in confronting the problem of paternalism.

Part III examines the common understanding of the *parens patriae* theory of the juvenile court during its period of rapid assimilation in the early decades of the twentieth century. The juvenile court was equipped with legal powers, reminiscent of absolutist regimes, to carry out the modernist mission of rehabilitating the most damaged products of poor parenting and desperate communities. There is little need to add another chapter to the already extensive and well-covered history of the juvenile court.⁴⁸ However, this section seeks to foreground those features of the court that represent a serious effort within modernism to recapture the use of paternal power consistent with democratic ideals of government.

Part IV examines the due process revolution which swept the juvenile court between 1966 and 1975. This jurisprudential episode reproduced the most basic moves in liberal antipaternalism, but within the context of childhood and adolescence that Locke associated with the legitimate exercise of paternal power. While the right to counsel invokes little real objection today,⁴⁹ it is abundantly clear that due process did not address the practical contra-

⁴⁵ So does the historic significance accorded to motherhood in our culture. See MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

⁴⁶ LOCKE, *supra* note 32.

⁴⁷ JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION*, reprinted in *THE EDUCATIONAL WRITINGS OF JOHN LOCKE* 111 (James L. Axtell ed., 1968).

⁴⁸ See *supra* note 3.

⁴⁹ But, for the view that legal formalization also entails significant costs for those ostensibly protected, see William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

dictions surrounding the juvenile court. More ominously, constitutional doctrine has severed the connection between the considerable powers of the juvenile court and the political technologies which the Progressive Era reformers deployed to contain, channel, and exercise the historic strategies of paternalism. Increasingly, the juvenile court exercises what might be called "power without parents."

Part V turns to psychoanalytic and feminist theory to situate the vicissitudes of the juvenile court within the larger crisis of paternal power in contemporary society. Freud's theories, especially his conception of the Oedipus complex, provide a modern reformulation of the dispute between Locke and Filmer⁵⁰ by explaining the origins of self-government in the internalization of the king/father. Jacques Lacan's reading of Freud, which emphasizes the Oedipus complex as primarily a cultural and linguistic event, makes the political implications of the process even more evident.⁵¹

In the 1950s and 1960s, a number of social theorists, including Herbert Marcuse and Norman O. Brown, began suggesting that the displacement of paternal power in modern societies was fundamentally altering the Oedipus complex with potentially revolutionary political consequences.⁵² More recently, feminist theorists have reconsidered the virtues of the Oedipus complex. They have suggested new possibilities for viewing the relationship between paternal power and political power which are at once less catastrophic and less utopian.⁵³

These critical discourses suggest that the problems of governing the young in a postmodern society cannot be resolved by simply repudiating the paternalistic impetus of the modern juvenile court. To do so ignores more than a century of efforts to create

⁵⁰ Norman O. Brown made this connection in *Love's Body*. NORMAN O. BROWN, *LOVE'S BODY* (1966).

⁵¹ JACQUES LACAN, *ÉCRITS: A SELECTION* (Alan Sheridan trans., W.W. Norton & Co. 1977) (1966).

⁵² See NORMAN O. BROWN, *LIFE AGAINST DEATH: THE PSYCHOANALYTICAL MEANING OF HISTORY* (2d ed. 1985); BROWN, *supra* note 50; HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* (1966) [hereinafter MARCUSE, *EROS AND CIVILIZATION*]; HERBERT MARCUSE, *The Obsolescence of the Freudian Concept of Man, in FIVE LECTURES: PSYCHOANALYSIS, POLITICS, AND UTOPIA* (Jeremy J. Shapiro & Shierry M. Weber trans., 1970) [hereinafter MARCUSE, *Obsolescence*].

⁵³ See, e.g., JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION* (1988); NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

forms of government responsive to the fundamental problem faced by all liberal societies—how to produce citizens who can govern themselves.

Young people committing violent crimes, who grab our attention from the front pages of newspapers, are the shock troops of postmodern culture. Many of their parents, often teenagers when they became parents, have disappeared into drugs, crime, or the criminal justice system.⁵⁴ The larger institutional structure of education and employment, which should connect them to the normative order of society, has largely disintegrated. The irony is that the juvenile court, which was often fairly criticized for a class-biased paternalism that mistook working-class families for dysfunctional families,⁵⁵ is increasingly confronted with a juvenile population that is suffering a crisis of parenting and government.⁵⁶ The radical needs being expressed in both youth crime and the public demand for punitive responses to it in contemporary America, require us to revisit the genealogy of these forms and their continuing implications.

I. IN THE NAME-OF-THE-FATHER: PATERNALISM AS A RATIONALE FOR POWER

Paternalism is often defined as an exercise of control over an individual that purports to be implemented in the interests of that individual, either overriding or filling in for unreliable or nonexistent individual choices.⁵⁷ Here, I use the term in a sense which is both broader and narrower. On one level, it is useful to think of paternalism whenever we draw on the concept of the family, and its internal dynamics, as a model for the exercise of power by the state and other controlling institutions. In this sense, although their historical specificity remains crucial, paternalism, patrimonialism, and patriarchy may all be seen as parts of a larger constellation of means of exercising power that borrow explicitly from the family ideal. At another level, paternalism describes the logic of

⁵⁴ ELLIOTT CURRIE, *RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE* (1993); ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (1991).

⁵⁵ The classic statement remains PLATT, *supra* note 3.

⁵⁶ In Lacan's reading of the Oedipus complex, it is less the personal father than the "name of the father" that links the subject, through language, to the normative order of society. David S. Caudill, "*Name-of-the-Father*" and the *Logic of Psychosis: Lacan's Law and Ours*, 16 *LEGAL STUD. F.* 421 (1993).

⁵⁷ See, e.g., DONALD VANDEVEER, *PATERNALISTIC INTERVENTION: THE MORAL BOUNDS ON BENEVOLENCE* 12 (1986); Gerald Dworkin, *Paternalism, in PHILOSOPHY, POLITICS AND SOCIETY* 78 (Peter Laslett & James Fishkin eds., 1979).

particular social practices that have as their primary target the subjectivity of subjects.⁵⁸ What connects institutions like schools, mental hospitals, prisons, and welfare, is that their exercise of power over the subject is explicitly aimed at transforming the subject. We may be tempted to dismiss the claim of such places to transform in the interest of that subject (whatever that might mean), but we should not as easily ignore that it is the subjectivity of the subject that is worked on.

The first objection one might have to paternalism, as used here, is that it reproduces a highly gendered picture of power.⁵⁹ It is possible, of course, to speak of *parentalism* rather than *paternalism*. Indeed, Locke himself suggests just such a formulation.⁶⁰ The model of power suggested by the relation of parents and children is manifestly one to which women are clearly equal (if not stronger) claimants. Locke concludes that the naming of the father is primarily ideological (not Locke's words, of course).⁶¹ But the phrase "paternalism" helps remind us that parental power in our culture has always been marked by gender domination.

Thus, one flaw in the worthwhile efforts of recent thinkers to develop more active and positive visions of political power, for example in community practices or in the republican virtues, is their linguistic disregard for the paternity in paternalism.⁶² This problem cannot be resolved linguistically by appointing the community or the fraternity of citizens as the repository of all those capacities

⁵⁸ The genealogy of these particular practices in the West was the elusive goal of Michel Foucault's final works. See FOUCAULT, *supra* note 41; 3 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE CARE OF THE SELF* (Robert Hurley trans., Pantheon Books 1986) (1984); 2 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE USE OF PLEASURE* (Robert Hurley trans., Vintage Books 1985) (1984).

⁵⁹ Lacan has taught us that the father is only a metaphor for the more general normalizing power which he describes as the "Phallus." See JACQUES LACAN, *On a Question Preliminary to Any Possible Treatment of Psychosis*, in *ÉCRITS: A SELECTION*, *supra* note 51, at 179; Caudill, *supra* note 56, at 427-28. Of course, the relationship between the normalizing power and its representation in society is historically contingent. See Drucilla L. Cornell, *Gender, Sex, and Equivalent Rights*, in *FEMINISTS THEORIZE THE POLITICAL* 280, 285 (Judith Butler & Joan W. Scott eds., 1992).

⁶⁰ LOCKE, *supra* note 32.

⁶¹ In the *Second Treatise of Government*, Locke turns this into one of many repetitions of the theme that the monarchist (Filmerian) account of political relations, as one of royal father to subject children, is comically absurd. *Id.* at 31.

⁶² The literature in both these fields is considerable. For examples of the communitarian perspective see, for example, ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). For republican perspectives see, for example, Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988).

that have been bound up in our culture with the name-of-the-father. The ideal of the father is a problem of power, as well as of language. Indeed, the fact that only feminism and psychoanalysis take this problem seriously makes these disciplines indispensable to any progress on the issues discussed in this Article.

If we take paternalism away from its usual analytic moorings and view it in light of the historical genealogy of our political and legal institutions, it is easy to see why the stakes have always been so high. As a consequence of its peculiar history in the West, paternalism links problems like the legitimacy of centralized state authorities, with the problem of shaping the subjectivities of subjects. The consequences of the historic coupling of king and father, and its violent suppression, have been more than philosophic. Or, to put the matter in the way it has been cast since the emergence of republican governments, paternalism links the politics of self-government with the practices of governing the self.

The emergence of liberalism corresponded to a crisis of paternalism as a general model of power in European and colonial North American societies. Over the next three centuries, a broad cultural struggle against the government of the father at all levels unfolded.⁶³ Indeed, to our own day, the emergence of any subordinated group or knowledge into an overt struggle for political recognition is bedecked in the rhetoric of antipaternalism and regicide; feminism and deconstruction are two of the most significant contemporary formations that continue to carry this banner.⁶⁴

Antipaternalism has also been the hallmark of conservative reactions to demands for justice. Locke, although famous for distinguishing political power from paternal power, recognized the centrality of paternal power to the maintenance of social order.⁶⁵ During the late nineteenth and early twentieth centuries, business leaders and their lawyers spoke out vigorously against legislative

⁶³ See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

⁶⁴ For examples of: abolitionism, see DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* (1975); organized labor, see DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862-1872* (1981); DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* (1993); feminism, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); DRUCILLA CORNELL, *BEYOND ACCOMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* (1991); CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); deconstruction, see JACQUES DERRIDA, *SPURS: NIETZSCHE'S STYLES* (Barbara Harlow trans., Univ. of Chicago Press 1979) (1978); JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., Univ. of Chicago 1978) (1967).

⁶⁵ See *THE EDUCATIONAL WRITINGS OF JOHN LOCKE*, *supra* note 47.

intervention in employment and sales relationships as paternalism. For most of the nineteenth and twentieth centuries, legal scholars have treated paternalism with utmost contempt and suspicion. Christopher Tiedeman, a nineteenth-century legal treatise writer, inveighed against the demands of the working classes for legal protection in terms that explicitly linked paternalism to monarchy:

Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.⁶⁶

In the same vein, conservative bar association maven, John Randolph Tucker of Virginia, rallied lawyers to combat this unruly restoration in terms that themselves recall a distinctly monarchical mentality.

Brother lawyers of America! In all ages, our profession has furnished the trained and skilled champions of right and justice, of liberty and law. Don your armor. Set knightly lance in rest. Demagogues deride and would discard you. The schemes of Paternalism allow you only disinheritance. Be it so. On our burnished shield is the motto: No favorites, no victims, the equal rights of each man to achieve his unhelped and unhindered destiny by brave and self-reliant manhood! Though a disinherited knight, the American Bar enters the lists as the champion of Institutional liberty under Constitutional guaranty.⁶⁷

In the twentieth century, liberals and conservatives, formalists and realists have shared the idea that the paternal model of power was a dangerous and degenerate feature to be exposed and eradicated from the legal system.⁶⁸ They disagreed, of course, on which policies, practices, and ideas were corrupt in this way. Even today, as Duncan Kennedy points out, “[t]he rhetoric of paternalism . . .

⁶⁶ CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES*, at vi-viii (1886), *quoted in* ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* 17 (1960).

⁶⁷ John R. Tucker, *British Institutions and American Constitutions*, in *REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION* 213-44 (1892), *quoted in*, PAUL, *supra* note 66, at 77. The images of disinheritance here bring up the ambiguity of these conservatives' views about the place of the father. Paternalism itself is the disinheritor, but “disinherited” is the necessary state of the bar and its denizens. Only so can the knight's lance move freely to stab away at its own destiny.

⁶⁸ For conservatives and formalists, see PAUL, *supra* note 66; for realists see, for example, JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

smacks . . . of communism as well as of feudalism.”⁶⁹ According to Kennedy, this demonization is sustained by a set of assumptions about the nature of values and human knowledge. Paternalism is presumed to be inefficient and oppressive because, like preferences in classical economics, the true interests of beneficiaries are treated as unknowable.⁷⁰ When the state or other governing institution constrains the choices of a subject in the name of that subject’s interests, they run a great risk of filling the gaps in knowledge about the subject’s preferences with the institution’s own interests. In fact, Kennedy suggests, there are numerous places in the law where we expect various decision makers to act in the best interests of others.⁷¹

The more interesting issue is not whether we will tolerate persons acting in the best interests of others, but what kinds of relationships sustain the most acceptable exercises of paternalism. The pluralist assumption, that we cannot know each other’s best interests, rests on a rather thorough segregation in American society which helps assure that we have little knowledge of each other.

Acceptable paternalism, on Kennedy’s account, requires empathy and identification that comes from “intersubjective unity.”⁷² Whether or not that happens, depends on our politics and social relations rather than any strong legal principles. Kennedy suggests that the private law fiduciary duty doctrines provide a host of juridical devices for exercising paternalistic power more broadly if our politics permit.⁷³

Frances Olsen argues that paternalism and liberal autonomy present a false dichotomy.⁷⁴ For women, Olsen finds protective claims almost always carry the heavy price of reinforcing patriarchal conceptions, but they also offer the most promising areas for mobilizing power and attention.⁷⁵ When we look closely at the political and social context of decisions, it becomes apparent that any choices between them are strategic at best and, sometimes, even tactical. From Olsen’s perspective, we can only make realistic

⁶⁹ Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 590 (1982).

⁷⁰ *Id.* at 636.

⁷¹ *Id.*

⁷² *Id.* at 647.

⁷³ *Id.* at 631-38. This Article suggests that the juvenile court is, similarly, a repository of political technologies to cope with the problem of paternalism.

⁷⁴ Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois, 1869-1895*, 84 MICH. L. REV. 1518 (1986).

⁷⁵ *Id.* at 1519.

choices about paternalist institutions from a close examination of both the social practices in which they operate and the stakes for disempowered groups within those settings.⁷⁶

Aviam Soifer suggests that courts have strategically deployed the ambiguous status of paternalism.⁷⁷ Conservative nineteenth-century judges righteously denounced the dangers of monarchical regression in protective "special interest" legislation.⁷⁸ Simultaneously, they arrogated to themselves the role of "father of the nation" with the power and duty to prevent democratic majorities from doing what the majorities thought was in their best interests.⁷⁹ Soifer views this ambiguity as functional to conservative judges largely interested in constitutionalizing their own political and economic preferences,⁸⁰ but he also sees it as a genuine legacy of the earlier revolutionary generations of 1789 and 1865.⁸¹

As an abstract principle, a vigorous antipaternalism is well established in American ideology and law.⁸² To the extent that academic writing about paternalism has been dominated by economists and analytic moral philosophers, the logic of this abstraction has been refined to a high degree. Left in the background are the institutions and modalities of power through which pater-

⁷⁶ *Id.* at 1539.

⁷⁷ Soifer has written a series of essays that raise the problem of paternalism in a number of legal contexts, including contracts, the Thirteenth Amendment, and due process. See Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989) [hereinafter Soifer, *Moral Ambition*]; Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987) [hereinafter Soifer, *Status*]; Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 255 (1987) [hereinafter Soifer, *Paradox*].

⁷⁸ *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting); see Soifer, *Paradox*, *supra* note 77, at 260.

⁷⁹ Soifer, *Status*, *supra* note 77. This helps explain why, as we shall see, relatively conservative Supreme Courts upheld the presumably radical juvenile court when it was first litigated in the early twentieth century. See, e.g., *In re Ferrier*, 103 Ill. 367, 371-72 (1882).

⁸⁰ Soifer, *Paradox*, *supra* note 77, at 255.

⁸¹ This ambiguity was particularly acute for the Reconstruction framers who sought to establish both a governmental commitment to protect the freed slaves, and the legal status of "independent freeman" for them. In the hands of the ultra conservative Waite and Taft Courts, which were busy crafting a highly privative concept of freedom of contract, the protective side of this legacy was largely wiped out. See Soifer, *Status*, *supra* note 77, at 1916. Pathetically, contract law became an instrument of control to replace the legal authority of slavery in the immediate post-Bellum period. *Id.* at 1943.

⁸² A good example of the antipaternalist principle in law is the due process protections provided to mentally ill persons. See, e.g., Bruce T. Winick, *The Right to Refuse Mental Health Treatment: A Therapeutic Jurisprudence Analysis*, 17 INT'L J.L. & PSYCHIATRY 99 (1994).

nalism is exercised, and the histories and identities through which antipaternalism is remembered and reproduced in our culture.⁸³

II. THE KING IS THE FATHER OF THE NATION

This title phrase is most famously linked in the anglophone world with the seventeenth-century political theorist Sir Robert Filmer.⁸⁴ In fact, the idea behind the phrase was widely shared and constituted an enduring and productive formation in the history of political thought.⁸⁵ Filmer's texts, which sounded shrill and silly even a century later, are but the tip of a great formation of political discourses that viewed the organization of the family as critical to the political order of society.⁸⁶ For a long time this vision was buried beneath conceptions of kingship which emphasized the King as the agent of Christ.⁸⁷ Only as the idea of the nation began to take shape in the fourteenth century could a kingship, which took its legitimacy from its direct relationship with the nation, begin to prevail over a divine emissary picture modelled on the church.⁸⁸ Filmer's effort to utilize the model of family to justify a particular and an extremist picture of royal power rendered his account of paternalism quite inflexible (and hence our account if we treat him as its chief spokesman).

Paternalism was, in fact, a robust set of discourses which made sense of numerous social and political practices of medieval and early modern societies.⁸⁹ In the seventeenth century, for example,

⁸³ Earlier legal scholarship, despite remaining within this analytic framework, succeeded in surfacing some of the same aspects of paternalism. See, e.g., Ronald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107 (Richard A. Wasserstrom ed., 1971).

⁸⁴ SCHOCHET, *supra* note 31.

⁸⁵ A parallel view of kingship prevailed throughout Europe at this time. See ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1957). For the French case, see ROGER CHARTIER, *THE CULTURAL ORIGINS OF THE FRENCH REVOLUTION* 111-35 (Lydia G. Cochrane trans., 1991).

⁸⁶ Paternalism was prevalent as more than simply a political theory. "The religious, moral and economic welfare of the subject became the concern of rulers from the Christian princes of the sixteenth century to their rationalist successors the enlightened despots of the eighteenth." Geraint Parry, *Individuality, Politics and the Critique of Paternalism in John Locke*, 12 *POL. STUD.* 163, 172 (Peter Campbell ed., 1964).

⁸⁷ See KANTOROWICZ, *supra* note 85, at 42-45.

⁸⁸ The idea of the nation and its relationship to a sovereign had reached a high development in Roman law, but had been largely absent from public discourse for a millennium. *Id.* at 232-51.

⁸⁹ The family, as a model for political power, also made sense in societies where childhood and adulthood were far from universal dichotomies. As John Boswell notes: "[D]uring most of Western history only a minority of grown-ups ever achieved . . . independence: the rest of the population remained throughout their lives in a juridical status more comparable to 'childhood,' in the sense that they remained under someone else's control—

it was a persuasive ground on which to argue about the prevailing issues of the day: the execution of Charles I, the forms of obedience that Stuart supporters owed the Puritan government, and the role of Parliament in governing.⁹⁰ Patriarchal arguments were also used by antimonarchical forces; indeed, they were used even by some of the most populist forces such as the Diggers.⁹¹

We might not even remember Sir Robert Filmer today were it not for his starring role as the foil in the fundamental primer of liberal thought, John Locke's two *Treatises of Government*.⁹² While this classic has been the subject of profound critiques over the decades,⁹³ Locke's at times laborious, but devastating analysis of Filmer's views has remained remarkably fresh. In the two treatises, Locke systematically sets about attacking both the textual foundations (mainly in the Bible) and the internal logic of Filmer's argument.

Locke's choice of a target is understandable. Filmer had died in 1653, but his manuscripts, which had circulated in unprinted editions, were published in 1680 as part of the loyalist response to the emerging crisis of the restored Stuart regime.⁹⁴ Understandably, loyalists were interested in repudiating any political arguments that could have justified the trial and execution of the King. They were especially concerned with the growing tradition of contractarian arguments which implied that the King's rule was bound up in an agreement with his subjects. Filmer's baroque picture of a nation that owed its King the filial obedience owed to a father was a blunt rejection of any notion that government relied on the consent of the governed.⁹⁵ Filmer's family drama of power also raised uncom-

a father, a lord, a master, a husband, etc." JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* 27 (1988).

⁹⁰ HERZOG, *supra* note 40, at 60-63; SCHOCHET, *supra* note 31, at 126-27.

⁹¹ SCHOCHET, *supra* note 31, at 161-62. The range of interpretations of paternal power is shown in the republican version offered by James Harrington who ridiculed the idea that kings were in any important sense the fathers of the country, but asserted in his Utopian treatise *Oceana* that it was only through fatherhood that citizens of Oceana come into their status as governing subjects capable of forming a part of government. *Id.* at 170.

⁹² In what follows, I will focus exclusively on Locke's *Second Treatise of Government*. See *supra* note 32.

⁹³ For the main lines of the leftist critique of Locke, see SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* (1960); C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

⁹⁴ Laslett, *supra* note 31, at 33.

⁹⁵ SCHOCHET, *supra* note 31, at 117.

fortable questions for contractarians.⁹⁶ How could a population give its consent to a ruler when it was changing its composition through birth and death at every moment? What did the natural equality of persons mean when it was evident that children and lunatics, among others, were incapable of guiding their own affairs?⁹⁷

Filmer argued that the power of fathers over their children, established both in nature and by Christianity, was the sole and sufficient basis for political life in society.⁹⁸ In lengthy quotations from the Old and New Testaments, Filmer argued that present monarchs were the direct successors, through a genealogy of both forceful usurpation and natural succession, of the actual paternity of the peoples whom they ruled.⁹⁹ On the basis of this assertion, which took him back to Adam and Eve, Filmer argued for a broad and practically unmediated authority for kings.¹⁰⁰

In *The First Treatise*, Locke challenges Filmer's biblical interpretations. In *The Second Treatise*, Locke counters Filmer's theory with an alternative view of both sovereigns and parents, according to each a significant but separate domain.

[T]hese two powers, political and paternal, are so perfectly distinct and separate, are built upon so different foundations, and given to so much different ends, that every subject that is a father has as much a paternal power over his children as the prince has over his, and every prince that has parents owes them as much filial duty and obedience as the meanest of his subjects to theirs, and cannot therefore contain any part or degree of that kind of dominion which a prince or magistrate has over his subjects.¹⁰¹

Locke, and readers ever since, have found this distinction between the government of parents and the government of kings, wholly persuasive.

⁹⁶ HERZOG, *supra* note 40, at 201.

⁹⁷ While such literal arguments would be avoided by contemporary critics of liberalism, there is an obvious continuity with current arguments by feminists and communitarians that consent theory does not provide an adequate account of the formation of the subject. Indeed, a recent reconstruction of liberal political theory addresses precisely these problems and begins with Filmer. *See id.*

⁹⁸ *See* SCHOCHET, *supra* note 31, at 115-36.

⁹⁹ *Id.* at 139-43.

¹⁰⁰ *See* FILMER, *supra* note 31; Butler, *supra* note 31, at 76.

¹⁰¹ LOCKE, *supra* note 32, at 40. Speaking directly of Filmer, Locke noted that "the most blinded contenders for monarchy by 'right of fatherhood' cannot miss this difference." *Id.* at 35.

It is likely that Locke would have characterized himself as reformulating, rather than replacing, the power of fathers.¹⁰² Filmer had effectively accused liberals of denying the distinction between parent and child, conjuring, at least by implication, a picture of household order run amuck.¹⁰³ In *The Second Treatise*, Locke distances himself from any such implication by arguing that the obligations of children to obey their parents are appropriate and important, but of a different nature than the obligations an adult has to the rulers of society: "It is one thing to owe honor, respect, gratitude, and assistance; another to require an absolute obedience and submission. The honor due to parents, a monarch in his throne owes his mother, and yet this lessens not his authority, nor subjects him to her government."¹⁰⁴

While the split between family and state, private and public realms, is a supposedly canonical supposition of liberalism, its attribution to Locke is partly misleading.¹⁰⁵ Locke's great advance in *The Second Treatise* was to see that a functional social system survived diversity of principle even, perhaps, required it. All power did not need to be derived from one source. The power of the state, derived from the consent of the governed, stood subject to this aim. The power of the parent, mobilized to accomplish the socialization of a new self, stood accountable to its own vital, but distinct rationales.

The importance of the "government of the family," noted in passing in *The Second Treatise*, emerges fully in Locke's writings on child rearing published in 1693 as *Some Thoughts Concerning Education*.¹⁰⁶ The book was widely read in England and especially the

¹⁰² "Like Hobbes, [Locke] was bound to deal with husbands, fathers and conquerors because they were an accepted and therefore necessary part of political debate" R.W.K. Hinton, *Husbands, Fathers and Conquerors*, 16 POL. STUD. 55, 60 (1968).

¹⁰³ He would have felt right at home during the disastrous 1992 Republican convention in Houston.

¹⁰⁴ LOCKE, *supra* note 32, at 38. Interestingly, Locke acknowledges that there might indeed be a historical link between the two realms of power. In "the first ages of the world, and in places still where the thinness of people gives families leave to separate into unpossessed quarters," a basic continuity between king and father, i.e., the king as first among fathers, exists. *See id.* at 42. Note that Locke, in the same quote, evokes the image of "the mother" as governor of the family.

¹⁰⁵ Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

¹⁰⁶ Locke originally wrote the texts in THE EDUCATIONAL WRITINGS OF JOHN LOCKE, *supra* note 47, as a series of letters to a gentry relative, but they were published and celebrated even in his own lifetime. Locke was a physician by training and practice, and he provided detailed discussions of the most practical questions in raising young gentlemen and ladies. In unstinting detail he surveys issues such as regulating bowel movements and keeping the servants from offering the children liquor.

North American colonies, and became to eighteenth-century gentry what Benjamin Spock's treatises on the subject were to those of the mid-twentieth century.¹⁰⁷ Indeed, even as Filmer's ideas about the paternal origin of political power were being abandoned as indefensible, partly due to Locke's influence, a new "liberal paternalism" was developing around Locke's concern with the construction of citizen subjects through parenting.¹⁰⁸

Locke's *Epistle Dedicatory*, with which he prefaces *Some Thoughts Concerning Education*, provides a glimpse of Locke's own understanding of the place held by these thoughts in the public life to which they were addressed.¹⁰⁹ Locke believes that the education of children is a public question of the first order.¹¹⁰ He begins by noting, in a gesture that is frighteningly familiar to the denizen of the late twentieth century, that "the early Corruption of Youth is now become so general a Complaint, that he cannot be thought wholly impertinent, who brings the Consideration of this Matter on the Stage."¹¹¹

Locke points out that flaws that emerge in childhood "carry their afterwards-incorrigible Taint with them, through all the Parts and Stations of Life."¹¹² He acknowledges that this makes it a public problem of the first order, even unto "Welfare and Prosperity of the Nation" itself.¹¹³ Locke had not abandoned his view that the government of the state was a different matter than this government of the family, and he was not calling for the family to become a matter of direct regulation by the state. He addressed himself to a class that had its own means to govern.

Interestingly, while Locke takes them to be distinct modes of power, his criticism of both politics and paternal power share a common emphasis on the potential for arbitrary and irrational cruelty in the exercise of power. Locke describes a regime of paternal power whose exercise should always be subject to its end in fostering the capacity of the child for self-government.¹¹⁴ He therefore repeatedly criticizes whipping and other strong punishments for

¹⁰⁷ BENJAMIN SPOCK, *A BABY'S FIRST YEAR* (1955); BENJAMIN SPOCK, *PROBLEMS OF PARENTS* (1962).

¹⁰⁸ WOOD, *supra* note 63, at 156.

¹⁰⁹ LOCKE, *supra* note 47, at 111-13.

¹¹⁰ Indeed, the basic picture of the problems faced by the governance of the young shares much with the account of social workers and education progressives that would come to dominance only in the twentieth century.

¹¹¹ LOCKE, *supra* note 47, at 111.

¹¹² *Id.* at 112.

¹¹³ *Id.*

¹¹⁴ *Id.* at 112-113.

children. Locke inveighs against corporal punishment of children almost as much as the criminal law theorist Cesare Beccaria did against scaffold punishment for adults and in much the same terms:¹¹⁵ “[I]t is mere Cruelty, and not Correction to put their Bodies in Pain, without doing their Minds any good.”¹¹⁶ Locke urges that parents permit their children to be as “perfectly free and unrestrained” as is compatible with “the Respect due to those that are present,”¹¹⁷ and to avoid “a great deal of mis-applied and useless Correction.”¹¹⁸

While Locke’s work marks the end of family as a general model for political government, it also marks the beginning of the family as a problem of government.¹¹⁹ Indeed, when read against Filmer’s criticisms of liberalism as being unable to account for the status of dependent people in the population, Locke’s analysis of the government of children is crucial to expounding liberal politics. Without a picture of power that could be both authoritarian and enabling of self-government, Locke’s theory of political power would be weakened.

Locke’s model of the family was compelling to a gentry class undergoing a cultural revolution against monarchy. In his recent study of the American Revolution, Gordon Wood argues that the struggle against the King was also a struggle against the broad authority of fathers in the hierarchies within civil society.¹²⁰ If parents did not enjoy a kind of absolute right to the obedience of their children, but had to earn it through the excellence of their governance, even more attention and effort had to be deployed in understanding and regulating the child.¹²¹ Locke’s discourses on child rearing helped fill the demand for guidance in this field of endeavor whose essential link to the well-being of the Republic his theories had implied.

¹¹⁵ *Id.* at 185; CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963) (n.p. 1764).

¹¹⁶ LOCKE, *supra* note 47, at 216.

¹¹⁷ *Id.* at 156.

¹¹⁸ *Id.* at 157.

¹¹⁹ It is true that this argument omits Locke’s concern for the division between public and private. It does not argue that he would have approved paternalistic actions by the state even to protect children. But once it is acknowledged that paternalism is integral to liberal politics, our attention shifts to questions like how is paternal power exercised, and away from the public/private split. The latter indeed may be an ideological formation motivated in part by the desire to maintain an illusion of separation between sovereign and father, lest their rejoinder become a restoration.

¹²⁰ WOOD, *supra* note 63.

¹²¹ *Id.* at 163.

Wood suggests that struggles at all levels of hierarchy pushed this dialectic of independence and regulation.¹²² The revolution itself was marked by a great assault on the manifest signs of paternal authority.¹²³ The new state legislatures set about ridding their civil laws of paternalistic doctrines like primogeniture and entail. The revolutionary generation latched onto an almost obsessive affection for the idea of independence, not just from Great Britain, but from all the bonds of personal influence that crisscrossed society; their rhetoric would ultimately have profound consequences.¹²⁴

III. THE CLINIC AND THE KING: THE JUVENILE COURT AS A MODERNIST TECHNOLOGY OF POWER

The rise of the juvenile court is one of the most studied episodes in the history of modern law.¹²⁵ Historians have debated how innovative the juvenile court was. There is no doubt that it benefitted from almost a century of ideological and legal reform around the institutions of social control. Indeed, Locke's psychology must be counted among the discourses that flowed into the first great flowering of institutional efforts to restore deviant children.¹²⁶

The court itself, and the set of special laws and procedures designed to enable it, were part of a larger archipelago of practices, including reformatories for juvenile incarceration, private charity and settlement house social work, informal police, and prosecutorial and judicial tactics to deal with youth within the regular criminal process.¹²⁷ Ultimately, the court must be seen as well in the context of twentieth-century measures aimed at the lives of children.¹²⁸

¹²² Wood goes so far as to suggest that the success of Locke's educational ideas resulted in reversing his effort in the two *Treatises of Government* by reinvigorating the analogy between power in the family and power in the political system. Both, in Lockean terms, might be seen as involving "a trusting relationship between caring parents and respectful children." *Id.* at 157.

¹²³ In the end, the cultural ferment of the prerevolutionary years helped prepare the revolutionary generation for the political break with Great Britain. *Id.* at 183-84.

¹²⁴ The strong picture of independence, which developed out of the revolutionary struggle, helped to pitch slavery in new and more problematic terms. *Id.* at 178.

¹²⁵ See *supra* note 3.

¹²⁶ SUTTON, *supra* note 3, at 60-62.

¹²⁷ ROTHMAN, *supra* note 5; SUTTON, *supra* note 3.

¹²⁸ According to Francis Allen,

[The juvenile court was part of] a broader effort to advance the welfare of children, evidenced both in the United States and western Europe, which included the rise of public education, the development of protective services for dependent and neglected children, and agitation against child labor and other abuses

The connection between *parens patriae* doctrine and the penal confinement of youth first came before the courts in the 1830s. In *Ex parte Crouse*,¹²⁹ the high court of Pennsylvania upheld (against a writ brought by a father) the confinement of a young girl, in a place in Philadelphia known as the House of Refuge, for charges that amounted to neglect in today's terms.¹³⁰

The House of Refuge is not a prison, but a school. . . . The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?¹³¹

The key component of this argument remains consonant with the main theme in Locke's pedagogy: the discipline involved in parenting is distinct from the power of the sovereign to punish. The resulting substitution of the state for parental authority, however, potentially would have been disquieting for Locke who, in *The Second Treatise*, is anxious to establish the difference between these two dimensions of power.¹³² Indeed, the doctrinal syllogism seems to require a blurring of the two powers. Since liberty of children is already subordinate to the custodial power of their parents, the exercise of state jurisdiction over that custody is no loss of liberty for the child. Since original authority for custody over children is based on the duty of parents to see to the maintenance and moral development of their children, when parents default on this

of children in industry. All these activities were in some degree influenced by new theories of human behavior which sometimes challenged the validity of such basic concepts of the legal order as the concept of criminal responsibility and resulted, among other things, in the formation of the schools of positivist criminology.

FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY* 46 (1964).

¹²⁹ 4 Whart. 2 (Pa. 1839).

¹³⁰ This is purportedly the first case in the United States that explicitly adopted the language of *parens patriae* to legitimize confinement in a juvenile reformatory. See Fox, *supra* note 3, at 1206.

¹³¹ *Crouse*, 4 Whart. at 11.

¹³² LOCKE, *supra* note 32. This does not necessarily pose an unsolvable logical problem. Theorists from T.H. Green to Ronald Dworkin have demonstrated that as an analytic proposition, basic tenets of liberalism can be consistent with, or even require, state intervention. See RONALD DWORIN, *A MATTER OF PRINCIPLE* 181-204 (1985); T.H. GREEN, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION: AND OTHER WRITINGS* 194-212 (Paul Harris & John Morrow eds., 1986).

duty as manifested in the deviance of the child, the state has a right and a duty to take their place to the extent necessary to restore the child.¹³³

The major precedent cited for this model of the court is that of nineteenth-century chancery court powers of equity. In certain fields, like bankruptcy, such courts exercised great discretion over how to distribute assets.¹³⁴ British courts exercised these powers as delegates of the King. Courts in the United States continued to claim this jurisdiction despite the significant legal and ideological problem of defining of what sovereignty they were delegates.

A new wave of penal innovations began to gather momentum at midcentury.¹³⁵ Among the reforms proposed was a distinct court for juveniles. While the reformatory promised an alternative sanction for juveniles, it left the basic judicial mechanism and jurisdictions of the common law criminal court intact. Judges drew on the *parens patriae* doctrine to justify the reformation, but the ideal of the family did little to organize the actual regimen of the reformation, which was based on the same mix of religion and discipline that influenced the contemporary penitentiary movement for adults.¹³⁶ The juvenile court model, developed by Progressive reformers from the 1880s on, dispensed with the formalities of criminal conviction and the law of evidence. As described by its supporters, the juvenile court relaxed those features of criminal law that limited the usefulness of the emerging social sciences, particularly psychology and social work. Furthermore, the juvenile court movement added two significant substantive innovations. First, they took the language of *parens patriae* seriously and imagined their task as one of literally replacing the father.¹³⁷ Second, they celebrated the uniqueness of the individual delinquent whose specific truth must be the object of judicial knowledge.¹³⁸

The wave of reform statutes which created the juvenile courts in the early 1900s were never reviewed by the United States Supreme Court; however, they received universal support from those state supreme courts that considered them. For instance, the Illinois Supreme Court stated:

¹³³ At least one early nineteenth-century decision balked at this theory of *parens patriae*. Illinois *ex rel. O'Connell v. Turner*, 55 Ill. 280 (1870).

¹³⁴ Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1910).

¹³⁵ Fox, *supra* note 3, at 1208.

¹³⁶ *Id.* at 1206-07.

¹³⁷ *Id.* at 1208.

¹³⁸ ROTHMAN, *supra* note 3, at 43.

There are restrictions imposed upon personal liberty which spring from the helpless or dependent condition of individuals in the various relations of life, among them being those of parent and child, guardian and ward, teacher and scholar. There are well recognized powers of control in each of these relations over the actions of the child, ward or scholar, which may be exercised. These are legal and just restraints upon personal liberty which the welfare of society demands, and which, where there is no abuse, entirely consist with the constitutional guaranty of liberty.¹³⁹

The Supreme Court of Pennsylvania, approving that state's first modern juvenile court law, stressed its paternalistic features unapologetically.

Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it. . . . Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority, and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails.¹⁴⁰

The early American critics of the juvenile court had no trouble evoking the images of monarchical absolutism against it.

It originated in the feudal relation of lord and vassal and was first exercised principally to secure to the king his feudal dues. The extension of it in this country was purely individualistic and to supply the want of natural guardianship and to vindicate the rights of the minor as against the state as well as individuals. It appears, however, that this erroneous theory has had considerable influence over courts in sustaining statutes framed on entirely different and opposing theories.¹⁴¹

¹³⁹ *In re Ferrier*, 103 Ill. 367, 373 (1882). The statute in *Ferrier* was far less radical in moving away from traditional criminal procedure. Juveniles prosecuted under the statute received the same rights as adults, including the right to notice, the right to a jury trial on the issue of dependency, and the right to counsel. *Id.* at 371.

¹⁴⁰ *Commonwealth v. Fisher*, 62 A. 198 (Pa. 1905).

¹⁴¹ Edward Lindsey, *The Juvenile Court Movement from a Lawyer's Standpoint*, 52 REFORM IN ADMINISTRATION OF JUSTICE: THE ANNALS 140, 143 (Emory R. Johnson ed., 1914). The United States Supreme Court took the same view when it finally passed on the constitutionality of the juvenile court more than 50 years later:

The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders.

In re Gault, 387 U.S. 1, 16 (1967) (footnotes omitted).

Monarchism, was, of course, a charge that the Progressives would face in many of their reform efforts. Indeed, they were paternalists and the most articulate among them recognized the need to address the historic residue of the overthrow of kings as fathers.¹⁴² From this perspective the juvenile court stood out because it was both the model Progressive institution, and conceptually the easiest place to acknowledge and confront the paternalistic aspects of their institutional designs.

A noteworthy example is Roscoe Pound's widely cited quip that the juvenile court compared favorably in its powers to the infamous Star Chamber.¹⁴³ The article as a whole is less frequently described, but it provides a window into the effort to structure a modernist vision of paternal power. For most of the article, Pound hammers at the idea that the law of the United States was hobbled by an outdated fear of Royal usurpation and must be reformed to make it an effective instrument of social control in the modern city.

[O]ur common-law polity postulates an American farming community of the first half of the nineteenth century; a situation as far apart as the poles from what our legal system has had to meet in the endeavor to administer justice to great urban communities at the end of the nineteenth and in the twentieth century.¹⁴⁴

When Pound addresses the juvenile court at the end of his article, it is not to decry the shadow of the monarch but to insist that strategy of such risk and consequence demands the utmost investment of legal talent and political capital. "If those [juvenile] courts chose to act arbitrarily and oppressively they could cause a revolution quite as easily as did the former [Star Chamber]."¹⁴⁵

The heart of Pound's article is a list of the eight most important problems of the American city today. Laid out with Poundian economy and arrogance, this list makes interesting reading at the end of the twentieth century. All are variations of the theme sketched above: how to govern the modern city. At the top of the list is the question of how to set up a

system of legal administration of justice which will secure the social interest in the moral and social life of every individual under the circumstances of the modern city, upon the basis of rules and principles devised primarily to protect the interest in

¹⁴² ROTHMAN, *supra* note 3, at 49-50.

¹⁴³ Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 322 (1913).

¹⁴⁴ *Id.* at 310.

¹⁴⁵ *Id.* at 322.

general security, in the security of acquisitions and the security of transactions, at a time when these were best protected by securing individual interests of substance.¹⁴⁶

Besides the ideological problem of founding a powerful government on such enfeebling constitutional principles, the modern city, according to Pound, poses special problems that raise the stakes of government. Pound argues that government must deal with class divisions, including revolutionary formations, as well as a population laden with "the defective, the degenerate of decadent stocks, and the ignorant or enfeebled victim" exposed to the peculiar dangers and provocations of the industrial metropolis.¹⁴⁷ The greatest task of his generation was "[t]o unshackle administration from the bonds imposed when men who had little experience of popular government and much experience of royal government, in their desire to have a government of laws and not of men, sought to make law do the work of administration."¹⁴⁸

For Pound, the task of governing the modern city is not just one of collective organization. "[T]he social interest in the moral and social life of every individual" is also a problem for government.¹⁴⁹ It is not idealism that requires a government of individuals, but the peculiar circumstances of the modern city that make the individual problems of its huge population a mortal threat to its collective well-being. It is in the microphysics of the modern city that the administration of justice faces the greatest need for innovation, and Pound's solution is to modify the adversary system of lawyers with an increasingly managerial role for the judge.¹⁵⁰ In Pound's version, the government of the modern city requires institutions that can link the moral and social life of the individual through the expertise of the social sciences to the paternalist powers of the king.

The juvenile court sought to embody each of these features. Perhaps the most famous programmatic statement of this vision was that of Judge Julian Mack. "Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally"¹⁵¹ The relationship which the law mandated between judicial

¹⁴⁶ *Id.* at 310.

¹⁴⁷ *Id.* at 311.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 310.

¹⁵⁰ *Id.* at 319.

¹⁵¹ Mack, *supra* note 134, at 107. Mack was the first judge of the nation's first official, and most famous, juvenile court in Chicago. See ROTHMAN, *supra* note 3, at 215. The

judgment and juvenile subjectivity required a diagnostic mechanism that turned up the kinds of truth suited to the individual. Thus, the first major amendment to Chicago's pioneering juvenile court model was the addition of a diagnostic clinic mandated to provide "diagnosis before treatment."¹⁵²

The first director of the Juvenile Psychopathic Institute was William Healy, a psychiatrist and student of William James. Healy believed that determinable truth lay behind all juvenile deviance, but a truth unique to each individual's particular situation.¹⁵³ To be sure, common factors and causes existed: poverty, biological degeneration, and poor upbringing. However, no discrete set of such factors could identify troubled youth or the appropriate "treatment" for them.¹⁵⁴

This idea of judgment shaped by individualized diagnosis virtually required truth produced by the individual. One ready-to-hand technique for garnering such truth was the confession. The delinquent as a subject of modern penal concern has been the subject of a seemingly endless history of confessions to chaplains, later to judges, and later still to sociologists.¹⁵⁵ All of these authorities used confessional techniques, not only for their evidentiary value, but as an essential method of treatment in its own right. Some, like Healy, had been influenced by Freudian and Jamesian conceptions of the deep interiority of the subject.¹⁵⁶ For others, like Denver's famous Judge Ben Lindsey, the idea that troubled youth reflected some problem well below the surface of individual choice, required no explicit theoretical foundation.¹⁵⁷ Lindsey would gather his young charges in his chambers for the informal production of delinquent truth in a process he dubbed a "snitching bee."¹⁵⁸ James Bennett argues:

power of his characterization is evidenced by the fact that it was one of the most widely cited law review articles written before World War II and remains one of the most cited of all times. See Ainsworth, *supra* note 27, at 1097 n.93.

¹⁵² JAMES BENNETT, ORAL HISTORY AND DELINQUENCY: THE RHETORIC OF CRIMINOLOGY 113-14 (1981).

¹⁵³ See WILLIAM HEALY, THE INDIVIDUAL DELINQUENT: A TEXT-BOOK OF DIAGNOSIS AND PROGNOSIS FOR ALL CONCERNED IN UNDERSTANDING OFFENDERS (1915).

¹⁵⁴ This causal pluralism might have made good scientific sense, but, unfortunately, it proved difficult to render in effective administrative tools. Jorge DeGregorio's contribution to this symposium suggests that efforts to imagine how such a judicial method might develop still live. Jorge DeGregorio, *The Unconscious and the Law The Law in the Unconscious*, 16 CARDOZO L. REV 1023 (1995).

¹⁵⁵ BENNETT, *supra* note 152.

¹⁵⁶ *Id.* at 114-17.

¹⁵⁷ *Id.* at 104.

¹⁵⁸ *Id.* at 105-06.

Lindsey's snitching bees were . . . a form of group therapy, and the main point of action and change was not in communicating the boy's story to a public but in the very act of the boy's speaking—speaking intimately in front of a representative of the law and thus encouraging a less fearful attitude toward authority.¹⁵⁹

The critical juncture in the juvenile court, the place where the gap between scientific aspirations and techniques threatened to open up and reveal a despot behind the bench, was the introduction of the juvenile judge. It is not an accident that the early judges of the court took on the aura of healers, a mythopoetic image that has deep roots in monarchism.¹⁶⁰ European monarchs were widely believed to have the power to cure certain diseases by the laying-on of hands.¹⁶¹ This residue of the religious construction of kingship lasted well into the eighteenth century.¹⁶² Perhaps unconsciously, proponents of the juvenile court freely reproduced this monarchical badge. Juvenile judges were often described in the Progressive Era as physically touching the delinquent:

The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.¹⁶³

According to David Rothman, a photograph of a Boston courtroom included an X where the child was to stand next to the judge, where the latter could look over the youth and "if necessary [place] a friendly hand on the shoulder."¹⁶⁴

¹⁵⁹ *Id.* at 107.

¹⁶⁰ David Rothman usefully writes of "[t]he [c]ult of [j]udicial [p]ersonality." ROTHMAN, *supra* note 3, at 236.

¹⁶¹ The most common such belief was in reference to "scrofula," then known as "the King's Evil." This painful, but usually not fatal, form of tuberculosis of the lymph nodes was very common until the early twentieth century. The first sovereign recorded as using his hands to cure scrofula was Philip I of France, who reigned from 1060 until 1108. The practice entered England with Edward the Confessor. The Stuarts made particular use of the practice. Charles II (during whose reign Locke lived and wrote) was said to have touched 92,107 people. In France, Louis XVI practiced it at his coronation in 1775. Charles X attempted to revive the practice at his coronation in 1824. 13 *ENCYCLOPÆDIA BRITANNICA* 366 (1966) (under the heading "King's Evil"); 20 *ENCYCLOPÆDIA BRITANNICA* 96 (1966) (under the heading "Scrofula").

¹⁶² See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 21 (rev. ed. 1991); SIGMUND FREUD, *TOTEM AND TABOO: SOME POINTS OF AGREEMENT BETWEEN THE MENTAL LIVES OF SAVAGES AND NEUROTIKS* 140-46 (James Strachey trans., W.W. Norton & Co. 1950) (1913).

¹⁶³ Mack, *supra* note 134, at 120.

¹⁶⁴ ROTHMAN, *supra* note 3, at 217.

The rapid acceptance of the juvenile court in the United States marked the successful stabilization of a new technology of power that linked the sovereign and the father in a matrix supposedly dominated by a clinical science of the individual. From the start, the practice of these institutions rapidly outstripped their administrative innovations and more traditional forms of judgment came to predominate. Nonetheless, the broad plausibility of the juvenile court program helped it endure as the obvious vehicle for improving itself for a good half century.

IV. REGICIDAL REPRISAL: DUE PROCESS AND THE TRANSFORMATION OF THE JUVENILE COURT

When the Supreme Court finally accepted an appeal challenging a juvenile court action in the 1966 case of *Kent v. United States*,¹⁶⁵ the opinion reversed almost all the assumptions of the Progressive Era reviews by state courts. The Court held, five to four, that a sixteen-year-old accused of burglary and rape in Washington, D.C. should have been accorded a hearing before juvenile court jurisdiction was waived. *Kent's* thunder is mostly in dicta as the case was explicitly decided on statutory grounds. However, Justice Fortas's opinion strongly suggests that the constitutional grounds of the classic *parens patriae* juvenile court are suspect.¹⁶⁶ That Term, the Court also granted certiorari in a case that posed the constitutional question squarely. In *In re Gault*,¹⁶⁷ the Court held that the Due Process Clause of the Fourteenth and Fifth Amendments give juveniles the right to a hearing with notice, representation by counsel, the privilege against compelled self-incrimination, and an adversary procedure when faced with formal adjudication that could lead to incarceration.¹⁶⁸ The case remains one of the most famous of the entire Warren Court jurisprudence.

In the decade following *Gault*, the Court also held that due process requires proof of guilt beyond a reasonable doubt,¹⁶⁹ and freedom from being placed in double jeopardy.¹⁷⁰ In 1971, the Court placed its first limitation on the rights of juveniles to adult protections: the right to a jury trial.¹⁷¹ This series of opinions is almost as much of a case study in doctrinal change as the original

¹⁶⁵ 383 U.S. 541 (1966).

¹⁶⁶ *Id.* at 551-52.

¹⁶⁷ 387 U.S. 1 (1967).

¹⁶⁸ *Id.* at 28-31.

¹⁶⁹ *In re Winship*, 397 U.S. 358 (1970).

¹⁷⁰ *Breed v. Jones*, 421 U.S. 519 (1975).

¹⁷¹ *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

adoption of the juvenile court, and has received extensive commentary.¹⁷² They combine an enthusiastic exercise in realist disclosure of the foibles of law in practice, with the application of doctrines recently decided in adult criminal procedure. The sense that these cases represent the application of a settled constitutional vision, rather than its innovation, is reflected in *Gault* by Justice Fortas's memorable reference to the "domestication" of the juvenile court.¹⁷³

A. *The Domestication of the Juvenile Court*

Gerald Gault was a fifteen-year-old from Gila County, Arizona when he allegedly made a "crank" telephone call to a neighbor, Mrs. Cook, which contained "lewd or indecent remarks."¹⁷⁴ As Monrad Paulsen summarized: "Gault's case involved a long catalogue of procedures carelessly executed and actions taken with little regard for legal norms."¹⁷⁵ No attempt was made to notify his parents of his incarceration, who learned of it through the inquiries of Gerald's older brother. The petition filed against Gerald had no specific information from which he or his parents could understand what actually was alleged to have occurred. At the conclusion of two rather informal hearings in which Gerald was represented only by his mother, and was not allowed to call his accuser to testify, the court followed the recommendation of the probation report and sentenced Gerald to the State Industrial School (juvenile prison) for the remainder of his minority (six years until age twenty-one), unless discharged earlier.¹⁷⁶ Arizona provided no appeal from a juvenile delinquency finding in those days, so the Gaults brought a state habeas corpus action to challenge the finding and the disposition.¹⁷⁷ The petition was denied and the denial was affirmed by the Arizona Supreme Court.¹⁷⁸

¹⁷² See, e.g., Orman W. Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U. L. REV. 585 (1966); Edwin M. Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421; Monrad G. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CAL. L. REV. 694 (1966) [hereinafter Paulsen, *Juvenile Courts*]; Monrad G. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167 [hereinafter Paulsen, *Constitutional Context*]; Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233 [hereinafter Paulsen, *Constitutional Domestication*].

¹⁷³ *In re Gault*, 387 U.S. 1, 22 (1967).

¹⁷⁴ *Id.* at 4.

¹⁷⁵ Paulsen, *Constitutional Domestication*, *supra* note 172, at 234.

¹⁷⁶ *Gault*, 387 U.S. at 7-8.

¹⁷⁷ Paulsen, *Constitutional Domestication*, *supra* note 172, at 235.

¹⁷⁸ *In re Gault*, 407 P.2d 760 (Ariz. 1965) (en banc).

While acknowledging the noble aims of those who designed the juvenile court, Justice Fortas describes it as an institution largely unprecedented in its accumulation of discretion.¹⁷⁹ As the Court itself went to some pains to point out, they had no desire to dismantle the special institutions and procedures of juvenile justice. The Supreme Court, it seemed, was going to rehabilitate (or at least discipline) the deviant institution of the judiciary in the United States.¹⁸⁰ "But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication."¹⁸¹ From this perspective, the treatment accorded Gerald Gault was patently irrational even by the internal standards of the juvenile court.

Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions. Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and his "wanting to go to . . . Grand Canyon with his father," the points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute.¹⁸²

Procedural protections required by the Due Process Clause for adults could have corrected some of the absurdities of the *Gault* case.

[T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. "Procedure is to law what 'scientific method' is to science."¹⁸³

Justice Fortas offers a withering critique of *parens patriae*: The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional

¹⁷⁹ *Gault*, 387 U.S. at 17-18.

¹⁸⁰ *Id.* at 18-21. The Court, of course, never drew such a parallel explicitly, but it is implicit in the promise of "domestication" of the juvenile court.

¹⁸¹ *Id.* at 22.

¹⁸² *Id.* at 28-29 (footnotes omitted).

¹⁸³ *Id.* at 21 (citation omitted).

scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders.¹⁸⁴

Justice Fortas continues by examining the assumptions behind the traditional justifications for denying full constitutional rights to juvenile defendants. First, in holding that juveniles have a right to a meaningful adversary hearing prior to being confined, the Court rejects, out of hand, any effort to discount the effect of juvenile court control on the subject's liberty interests.

It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a “receiving home” or an “industrial school” for [a] juvenile is an institution of confinement in which the child is incarcerated for a greater or lesser time.¹⁸⁵

Second, in holding that juveniles have a right to counsel, the Court repudiates the claim of the clinical knowledge of the individual, wielded by the juvenile court and its officers, to protect the interests of the juvenile.

The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved.¹⁸⁶

Third, in holding that juveniles have a constitutional right to silence, the Court qualifies the importance of confession as a means of producing the truth of the individual delinquent. Justice Fortas's argument strips the modernist clinical aspects of confession to reveal its monarchical elements. “One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investiga-

¹⁸⁴ *Id.* at 16 (footnotes omitted).

¹⁸⁵ *Id.* at 27.

¹⁸⁶ *Id.* at 36.

tion and depriving him of the freedom to decide whether to assist the state in securing his conviction."¹⁸⁷

Without the promise of clinical expertise and personal care, the juvenile judge, unrestrained by procedure or lawyers, necessarily became a paradigmatic example of the kind of uncontrolled discretion that the Warren Court was generally attacking in the 1960s. Indeed, this sense of a reform whose time had clearly come is to be found in all the literature greeting *Gault*. As the leading academic lawyer writing on juvenile justice at that time, Monrad Paulsen pointed out, shortly before the *Gault* decision, in an analysis of *Kent v. United States* that¹⁸⁸

[L]ittle in the present day of racial crises and of the discontented poor argues for the extension of discretionary power. Legal norms and forums in which a man can state his point of view, argue his case, and hear the reasons for his fate have an attractive look in 1966.¹⁸⁹

B. *The Juvenile Court Survives: Power Without Parents*

While *Gault* and *In re Winship*¹⁹⁰ could be read to place an almost insurmountable burden on any attempt to limit the procedures of adult criminal court from being used by the defense in juvenile court, a more conservative Supreme Court in the 1970s signalled a limited reaffirmation of the juvenile court as a *parens patriae* institution. In *McKeiver v. Pennsylvania*,¹⁹¹ petitioners (in two consolidated cases) challenged state procedures that denied juveniles the right to a jury trial.¹⁹² The Court upheld state author-

¹⁸⁷ *Id.* at 47. Justice Fortas also argued that confessions might not be very good therapy in any case. *Id.* at 51-52.

¹⁸⁸ 383 U.S. 541 (1966).

¹⁸⁹ Paulsen, *Constitutional Context*, *supra* note 172, at 183. One of the reasons discretion looked so unattractive was its potential for political abuse. In his later article, Paulsen noted the use, by a number of Southern and border states, of juvenile court jurisdiction to reach young civil rights fighters. Paulsen, *Juvenile Courts*, *supra* note 172, at 707-09.

¹⁹⁰ 397 U.S. 358 (1970).

¹⁹¹ 403 U.S. 528 (1971).

¹⁹² In state courts, the right of an adult faced with anything more than a six-month term of incarceration to have a jury trial was established in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

In many respects, the facts in *McKeiver* made it a perfect case for viewing the dangers hidden behind the ideals of *parens patriae*. In one of the North Carolina appeals, the petitioners were African American teenagers called into juvenile court following protest actions at their schools. They were sentenced to custody, suspended pending supervision by the court over various activities, including where they attended school. *McKeiver*, 403 U.S. at 536-38. Justice Brennan described the North Carolina facts as "a paradigm of the circumstances in which there may be a substantial 'temptation to use the courts for political ends.'" *Id.* at 556 (Brennan, J., concurring in part & dissenting in part).

ity to limit juveniles to judicial adjudication of guilt. Justice Blackmun, for the majority, worried that requiring a right to jury trial “[would] remake the juvenile proceeding into a fully adversary process and [would] put an effective end to what [had] been the idealistic prospect of an intimate, informal protective proceeding.”¹⁹³

There was little in *Gault* to suggest much faith in the existence of “an intimate, informal protective proceeding.” The case may rightly be seen as reflective of the larger backlash against expanding rights of any kind for criminal defendants. Still, as argued above, a powerful juvenile court judge, who could unite fact-finding and disposition in one expert center, was critical to almost all that was innovative about the *parens patriae* juvenile court. The right to a jury trial would also have displaced the official role of paternalism with the goal of legitimated condemnation which the jury has historically guaranteed.¹⁹⁴

After *McKeiver*, juvenile court judges occupied a peculiar legal position. They retained much of their personal power to adjudicate cases, but this power had been visibly wrested from its original moorings by the assumptions of special paternalistic capacities and responsibilities. A new logic for *parens patriae* began to show up in two 1980s decisions, *Schall v. Martin*¹⁹⁵ and *Deshaney v. Winnebago County Department of Social Services*.¹⁹⁶

In *Schall*, the Court upheld a New York statute permitting judges to hold accused juvenile delinquents in preventive detention on the basis of a finding that “there is a ‘serious risk’ that [the juvenile] ‘may before the return date commit an act which if committed by an adult would constitute a crime.’”¹⁹⁷ Writing for the Court, Justice Rehnquist speaks in terms that could have been taken from one of the original state supreme court cases affirming juvenile court powers in the early 1900s: “The juvenile’s countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody.”¹⁹⁸

Much of the opinion is highly formalistic, skimming the surface of juridical categories with no sustained interrogation of the

¹⁹³ *Id.* at 545.

¹⁹⁴ *Id.* at 551 (White, J., concurring).

¹⁹⁵ 467 U.S. 253 (1984).

¹⁹⁶ 489 U.S. 189 (1989).

¹⁹⁷ *Schall*, 467 U.S. at 255.

¹⁹⁸ *Id.* at 265.

actual practices. As is often the case, however, its formalism reflects an undeveloped but substantive picture of the situation. This portrays youth as a dangerous population in need, not so much of care, but of control. Justice Rehnquist warms up to a paternalistic picture of the state, largely because he finds it easy to see juveniles as a dangerous class.¹⁹⁹

Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child.²⁰⁰

The further development of preventive detention law suggests that the linkage between welfare and control was just a way station on the road to a more general affirmation of the exercise of risk management for its own sake. A few years later, the Court ignored the *parens patriae* basis used in *Schall* and upheld the preventive detention of adults on the ground that it did not violate the Eighth Amendment right to be free of excessive bail.²⁰¹ As a juvenile justice due process case, *Schall* articulates a new rationale for the *parens patriae* powers of the juvenile court, i.e., controlling dangerous youth offenders.

Deshaney takes us out of the context of dangerous juveniles and into that of endangered juveniles—contexts which the old *parens patriae* logic insisted on keeping together.²⁰² In Justice Rehnquist's logic these territories are far apart. The custodial nature of childhood, which rendered *Schall* an easy case for Justice Rehnquist, all but disappears in the child-welfare context presented by *Deshaney*.²⁰³

¹⁹⁹ Justice Rehnquist quotes with approval a New York opinion discussing the special developmental features of juvenile offenders which make them even more prone to commit crimes if released. *Id.* at 266 n.15 (quoting *People ex rel. Wayburn v. Schupf*, 350 N.E.2d 906 (N.Y. 1976)).

²⁰⁰ *Id.* at 266. This was more than rhetoric as the practice of the New York procedure documented. As Judge Winter pointed out, in his Court of Appeals opinion invalidating the law, the vast majority of juveniles detained under the preventive detention measure were subsequently released rather than receiving custodial juvenile commitments. This suggests that the detention decision reflected not simply an earlier, but also a substantively different, evaluation of the juveniles' risk. *Martin v. Strasburg*, 689 F.2d 365, 369 (2d Cir. 1982).

²⁰¹ *United States v. Salerno*, 481 U.S. 739 (1987).

²⁰² Fox, *supra* note 3, at 1192-93.

²⁰³ Here I draw heavily on Aviam Soifer's forceful and moving jeremiad against the result and majority opinion in *Deshaney*. See generally Soifer, *Moral Ambition*, *supra* note 77.

The defendant, Department of Social Services (“DSS”), monitored signs that four-year-old Joshua Deshaney was being violently abused by his father, with whom a divorce court had earlier ruled that Joshua should live.²⁰⁴ When a particularly violent beating left Joshua permanently brain damaged, he and his mother sued, seeking to have the DSS pay for the lifetime of care he would need. The Court held that there is no general Fourteenth Amendment right to have the state protect a subject from private acts of violence and that no special right is created by the actions of the DSS in Joshua Deshaney’s case.²⁰⁵ Justice Rehnquist rejects the parallel with the juvenile incarceration cases, stressing that the state’s relationship to Joshua must be analyzed in the context of the “free world.”²⁰⁶

In *Schall*, it was the juvenile court’s role as manager of criminal risks that gave it power to take custody over the juvenile petitioners. In *Deshaney*, risk shows up as a set of dangers that people, including Joshua, have to face on their own in the free world. According to Justice Rehnquist, there is not even a constitutional obligation to manage those risks in a prudent manner.²⁰⁷ In ringing terms, he reminds us that the purpose of the Fourteenth Amendment Due Process Clause is “to protect people from the State, not to ensure that the State protect[s] them from each other.”²⁰⁸

Yet, as Justice Brennan argues in his dissenting opinion, *Deshaney* is not really a case about whether there are positive rights in the Constitution,²⁰⁹ but rather is about what it means for the state to act as *parens patriae*. While the majority characterizes the state as a bystander, the dissent suggests that the facts point to an extensive regime of intervention.²¹⁰ When evidence of Joshua being beaten by his father came to the state’s attention, a “Child Protection Team” consisting of representatives of all the major sectors of epistemological and legal authority²¹¹ decided on a vast set of changes in the lives of Joshua and his father. “The Team did, however, decide to recommend several measures to protect Joshua, including enrolling him in a preschool program, providing his fa-

²⁰⁴ *Deshaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 191-93 (1989).

²⁰⁵ *Id.* at 201-02.

²⁰⁶ *Id.* at 201. Soifer questions the aptness of this description. See Soifer, *Moral Ambition*, *supra* note 77, at 1522-23.

²⁰⁷ *Deshaney*, 489 U.S. at 195-97.

²⁰⁸ *Id.* at 196.

²⁰⁹ *Id.* at 204 (Brennan, J., dissenting).

²¹⁰ *Id.* at 213 (Brennan, J., dissenting).

²¹¹ The committee included “a pediatrician, a psychologist, a police detective, the county’s lawyer, several DSS caseworkers, and various hospital personnel.” *Id.* at 192.

ther with certain counselling services, and encouraging his father's girlfriend to move out of the home."²¹²

As Justice Brennan points out, the state's own statutory efforts had become the sole vehicle through which a wide range of professionals with independent fiduciary relations to Joshua could invest their concern.²¹³ The dissent would have permitted the plaintiffs the opportunity to show that this failure arose, "not out of the sound exercise of professional judgment . . . but from the kind of arbitrariness that we have in the past condemned."²¹⁴ Wisconsin had created a substantive legal structure founded on *parens patriae* (although this is not discussed in the opinion).²¹⁵ For the dissent, this structure of affirmative state action, and not Joshua's general liberty claims, provided a significant foundation for Fourteenth Amendment Due Process Clause issues to be joined.

Justice Rehnquist, virtually inverting Locke's assumptions,²¹⁶ premises the special prerogatives of the state's *parens patriae* power over youths on its criminal punishment and social defense powers.²¹⁷ The implicit argument that lies between *Schall* and *Deshaney* is that the state, as *parens patriae*, "father of the nation," has a special relationship with children that allows it to control those risks that are peculiarly acute, due to their youthfulness. In other words, it is because children are dangerous that they deserve the consideration of the state. As sources of risk, children have fewer liberty interests (than adults) that require respecting against the state's social control functions. But as *Deshaney* teaches, children, as victims of risk, have no claim on the state's social control apparatus. Joshua Deshaney would have had to survive his father's

²¹² *Id.*

²¹³ *Id.* at 209-10 (Brennan, J., dissenting).

²¹⁴ *Id.* at 211 (Brennan, J., dissenting).

²¹⁵ Just the kind of structure a majority of the Court recognized two years later in *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. 549 (1990). There, the Court held that a mother could not invoke the Fifth Amendment privilege against self-incrimination to refuse a juvenile court's order to produce her son in court. "By accepting care of Maurice subject to the custodial order's conditions . . . Bouknight submitted to the routine operation of the regulatory system and agreed to hold Maurice in a manner consonant with the State's regulatory interests . . ." *Id.* at 559.

²¹⁶ Locke views punishment fit for adult criminals as wholly inappropriate for the exercise of paternal power over children: "This kind of Punishment, contributes not at all to the Mastery of our Natural Propensity to indulge Corporal and present Pleasure, and to avoid Pain . . . which is the Root from whence spring all Vicious Actions . . ." *THE EDUCATIONAL WRITINGS OF JOHN LOCKE*, *supra* note 47, at 149.

²¹⁷ *Deshaney*, 489 U.S. at 200.

brutality, and become a threatening person himself, to become a special interest of the state.²¹⁸

C. *The Consequences of Gault*

While *Gault* imposed many of the panoply of rights sought by the 1960s critics of the juvenile court, the effects of these rights are difficult to fathom, and certainly cannot be mapped exclusively in the terms that due process reformers set for them. A recent study suggests that the implementation of the rights celebrated in *Gault* has been mixed at best.²¹⁹ The results of the implementation of perhaps the most important of all, the right to counsel, vary widely from state to state. Barry Feld found that the percentage of juveniles charged with the equivalent of felony property crimes who were represented by counsel, varied greatly: ninety-eight percent in New York, fifty-nine percent in Nebraska, and only thirty-eight percent in North Dakota.²²⁰ Where counsel was present, the effects on outcomes are decidedly mixed. Feld also found that where representation rates were high, due process procedures were generally more highly honored, but pretrial detention rates and sentences were also higher.²²¹

While *Gault* did not directly order any fundamental changes in substantive policies of juvenile courts, the procedural shift arguably set in motion federal and state legislative efforts that did produce significant practical change.²²² It would take a much more detailed analysis to tease out the effects of the interaction between legal discourse and the rightward shift in political sentiment, especially regarding crime over the last two decades. At the very least, the due process revolution helped cement an emerging national consensus that juvenile court jurisdiction was largely destructive and should be reserved for punitive purposes. This idea was picked up and amplified by the economic force of the Federal Juvenile Justice

²¹⁸ Aviam Soifer makes this point with great force and eloquence. See Soifer, *Moral Ambition*, *supra* note 77, at 1520-21.

²¹⁹ BARRY C. FELD, *JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS* 4 (1993).

²²⁰ *Id.* at 55.

²²¹ *Id.* at 142. Feld acknowledges that this is not simply a result of lawyers. The predominantly more urban areas that tend to have higher representation rates also have more serious crime problems. In a series of regression equations which examine different decision points, however, Feld found that representation itself was positively related to more severe sanction even when crime and record seriousness factors were controlled. *Id.* at 138.

²²² SUTTON, *supra* note 3, at 215; Feld, *supra* note 21.

and Delinquency Prevention Act of 1974,²²³ which provides direct financial incentives for the reform agenda and caused states to modify their systems to benefit from the generous federal appropriations.²²⁴

Due to such prodding, states have made two significant moves. First, many have narrowed the scope of formal juvenile court actions with the possibility of detention to juveniles charged with a crime. This has resulted in the exclusion of those juveniles charged with acts that are deemed to be deviant, but are not criminal, as well as dependency cases.²²⁵ Second, an increasing tendency to waive the most serious juvenile offenders into adult court has stripped away the juvenile court's protection against the increasingly severe penalties for adult felons.²²⁶

Removal of many status offenders has reduced the number of females and nonunderclass males in the system.²²⁷ As a consequence, the system today is even more concentrated with young males of minority ethnic and racial backgrounds (although this trend was there from the start).²²⁸ Between 1985 and 1989, the number of White juveniles taken into custody dropped by twenty-six percent,²²⁹ while the number of African American²³⁰ and Hispanic juveniles jumped by thirty and thirty-two percent respectively.²³¹ This makes it easier for the system to take on an explicitly punitive visage.²³²

Increasingly, states are also altering the substance of juvenile law. In place of Progressive Era promises to protect children, new

²²³ 42 U.S.C. §§ 5601-5785 (1988 & Supp. V 1994).

²²⁴ By 1982, 46 states had legislatively or judicially redefined delinquency to exclude all those but criminal offenders. SUTTON, *supra* note 3, at 216.

²²⁵ SUTTON, *supra* note 3, at 206-07; Feld, *The Transformation*, *supra* note 11, at 698-700.

²²⁶ KRISBERG & AUSTIN, *supra* note 24, at 50. States are moving aggressively to permit not only waiver, which at least requires a hearing, but also direct filing by the prosecution in adult court with no judicial review.

²²⁷ SUTTON, *supra* note 3, at 200-01; Feld, *The Transformation*, *supra* note 11, at 699.

²²⁸ This is not altogether new. As early as 1939, observers noted the disproportionate numbers of minority youth in urban juvenile justice systems. See Fox, *supra* note 3, at 1232.

²²⁹ KRISBERG & AUSTIN, *supra* note 24, at 116.

²³⁰ There is significant evidence of institutionalized racism against African Americans in the juvenile justice system. See *id.* at 129. But even if eliminated, it is likely that the proportion of African American youths in the system will continue to grow beyond its already unacceptable numbers.

²³¹ *Id.* at 116. The number of Asian youths, partially because of recent surges in their immigration, jumped by more than 100% in the same period. *Id.*

²³² This remains less true of suburban and rural juvenile justice agencies. See Feld, *supra* note 21, at 236-37.

statutes are explicitly writing into law a priority for punishment and community security.²³³ Many states are also shifting their juvenile sentencing systems to remove discretion from judges to individualize dispositions.²³⁴ Like many adult schemes, the new juvenile sentencing structures are increasingly driven by offense rather than offender.²³⁵

D. *The Juvenile Court and the Crisis of Paternal Power*

Why was the *parens patriae* model so severely destabilized during the 1960s? We must reject the assumption that accumulating evidence had finally undermined the optimistic claims that courts had originally accepted. A reading of the very earliest critics reveals that virtually every criticism that was to be made of the juvenile court during the 1960s had already been articulated.²³⁶ Nor were these critics silenced. Their articles appeared in prestigious journals like the *Journal of Criminal Law & Criminology*.²³⁷ Furthermore, most of the sociologists whose evidence and criticisms of the juvenile justice system were discussed in law review articles and court opinions during the 1960s, believed ultimately in the same vision of juveniles that the Progressives had advanced: blameless victims of external forces over which they had no control.²³⁸ They doubted that the clinical techniques offered by the Progressives could accomplish the task and called for broader efforts at social reform, but not for abandoning the project of rehabilitating juvenile lawbreakers.²³⁹ The changes put in motion by the critics, both judicial and scholarly, have pushed the system in unexpected and likely unwelcome ways to them.

One factor which may have rendered the juvenile court more vulnerable to attack is the changing social understanding of the life

²³³ Feld, *Juvenile Court*, *supra* note 11; Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323 (1991).

²³⁴ Feld, *Juvenile Court*, *supra* note 11, at 850-79 (reviewing determinate sentencing tendencies in statutes); Feld, *The Transformation*, *supra* note 11, at 708-10.

²³⁵ Feld, *Juvenile Court*, *supra* note 11, at 851; Forst & Blomquist, *supra* note 233, at 346.

²³⁶ See generally Lindsey, *supra* note 141; Pound, *supra* note 143.

²³⁷ Then known as the *Journal of the American Criminal Law Society*, of which it was the official organ. The society was a major promoter of juvenile justice.

²³⁸ See, e.g., STANTON WHEELER & LEONARD S. COTTRELL, JR., *JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL* (1966).

²³⁹ See, e.g., *id.* at 14-21.

cycle.²⁴⁰ Janet Ainsworth argues that the intuitive appeal of the juvenile court program has been diminished because

Americans in the last half of the twentieth century have limned a new refiguration of the human life cycle in which childhood and adolescence have been re-imagined. As a result, the Progressives' view of childhood now seems so foreign to our current assumptions that it may be difficult for us to credit that they seriously believe in it.²⁴¹

The juvenile court was shaped to fit a vision of adolescence as a distinct stage of life with its own psychological and social unities. Ainsworth suggests that continuing to invest meaning in the categories juridified by the Progressives is counterproductive, and that the interests of juvenile offenders could be better served by abolition of the present juvenile justice structure.²⁴²

This broad cultural redefinition of juveniles has been compounded by the social changes in the demographic composition of the juvenile offender population discussed above.²⁴³ Judge Thomas Petersen, a juvenile judge in Dade County, Florida, active in the system for more than a quarter century,²⁴⁴ argues that the public perception of the juvenile delinquent has gone from the empathy of *Boys' Town*, to fear and loathing of the youth depicted in the recent *Boyz 'n the Hood*.²⁴⁵ This reflects both movement in the range of criminal behavior among youth toward serious crime, and the increasing disproportionality of minority youth in the juvenile justice system. The fact that it is easier for legislatures to pass "get tough" laws for juveniles, reflects both public frustration with crime and a largely White voting public's lack of identification with young African American and Hispanic men.

Both the general transformation of the life cycle, discussed by Ainsworth, and the class-specific perception of youth crime, discussed by Petersen, doubtless make it difficult for the juvenile

²⁴⁰ The history of mentalities gives us a different view of institutions by reconstructing the experience of life within them. See NORBERT ELIAS, *THE CIVILIZING PROCESS: THE DEVELOPMENT OF MANNERS* (Edmund Jephcott trans., Urizon Books 1978) (1939); PIETER SPIERENBURG, *THE PRISON EXPERIENCE: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE* (1991); PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION* (1984).

²⁴¹ Ainsworth, *supra* note 27, at 1101.

²⁴² *Id.* at 1101-04.

²⁴³ See *supra* notes 229-32 and accompanying text.

²⁴⁴ Judge Petersen moved to Miami in 1968 as a Vista volunteer to set up a juvenile division of the public defenders office after *Gault*.

²⁴⁵ See Petersen, *supra* note 28.

court to sustain a coherent and satisfying strategy.²⁴⁶ But the current situation of juvenile justice also reflects the increasing failure of Progressive Era institutions to operate as an effective circuitry for paternal power in our culture. This is true not only of the juvenile court, but also of many other paternalistic institutions, from mental hospitals to schools, that sought to institutionalize the relationship between the state and what Roscoe Pound called the "moral and social life of the individual."²⁴⁷ While this failure may be traced in part to sins of implementation, it also points to a transformation in the status of parental power.

The rapid adoption of the juvenile court by state legislatures, and its embrace by conservative state supreme courts, suggests that it drew on a broad cultural consensus about the legitimacy of parental power. Today, as historian David J. Rothman frames it: "We no longer share a belief in the possibility of the state acting as a parent to decide in the best interests of the child. We no longer even trust to the biological parent to act in the best interests of the child."²⁴⁸

Taken in its narrowest form, the idea of the state as parent is difficult to take seriously (as President Clinton noted in his 1994 State of the Union speech).²⁴⁹ No doubt, the current crisis of all institutions that seek to act paternalistically is deepened by the conflation of the contemporary practical critique of the implementation failures, with the older antimonarchical traditions which are deeply suspicious of any such effort. Yet, if these peculiar and often embarrassing *parens patriae* institutions are markers for the far broader and more subtle role institutions play in shaping the subjectivities of their subjects, the stakes for our experiment in self-government are more serious. This is particularly true in light of the fact that the diminution of paternalistically deployed power is not a diminution of power per se. In the place of *parens patriae* institutions, new regimes of regulation have come; often ones more

²⁴⁶ Until very recently it has been impossible to know, with any real accuracy, how effective any criminal process has been in suppressing crime. This means that the satisfactoriness of a criminal justice institution is driven in large part by its ideological fit between predominant cultural narratives concerning crime and criminals. For a fuller explanation, see JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS* 9, 103-06 (1993).

²⁴⁷ Pound, *supra* note 143, at 315.

²⁴⁸ David J. Rothman, *The Progressive Legacy: Development of American Attitudes Toward Juvenile Delinquency*, in *JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS* 34, 67 (LaMar T. Empey ed., 1979).

²⁴⁹ President Bill Clinton, State of the Union Address (Jan. 25, 1994), *excerpts in State of the Union*, N.Y. TIMES, Jan. 26, 1994, at A16.

effective at actually controlling choices and behaviors, while generally avoiding any claim to addressing the subjectivities of the subject. The Court in *In re Gault* noted with concern that almost two percent of all youth in America had contact with the juvenile court in 1965 (although the majority of these youths were not confined).²⁵⁰ In 1987, more than two percent of all youth in America were actually confined in juvenile facilities.²⁵¹

V. PATERNAL POWER IN A POST-OEDIPAL SOCIETY

At one level, Locke and Filmer were engaged in a debate over the implications for politics of the clearly authoritarian features of family government. To Filmer, the power of the father was both a necessary and sufficient model to account for the power of sovereigns.²⁵² From his perspective, the claims of contractarian theorists were undermined by the empirical fact of widespread relations of dependence, which constituted much of the experience of some adults in seventeenth-century English society, and the childhood experience of all adults.²⁵³ To Locke, the necessity of child development held its own problems for the appropriate government of the family, but in no way determined the structure of political power.²⁵⁴

Psychoanalysis reconfigured this debate in its own terms.²⁵⁵ Sigmund Freud's most important structural theory, that of the Oedipus complex, is Filmerian in its insistence that the father is a necessary fixture of the political life of society. Yet, Freud's clinical theory is Lockean in its aspirations to open up the space of rational self-government through the ego, by diminishing the power of the internalized father. In short, psychoanalysis is a highly modernist effort to reconcile the classical dilemmas of liberal political theory.

A. *Oedipus and the Limits of Self-Government*

Freud's most self-conscious statements of political theory are expressed in his admittedly speculative construction of the origins of political society in the primal horde ruled by a single dominant male.²⁵⁶ All women in the band were his sexual property and all

²⁵⁰ 387 U.S. 1, 14 n.14 (1967).

²⁵¹ See Forst & Blomquist, *supra* note 233, at 357.

²⁵² FILMER, *supra* note 31, at 58.

²⁵³ See *supra* notes 89-93 and accompanying text.

²⁵⁴ LOCKE, *supra* note 32, at 33.

²⁵⁵ See BROWN, *supra* note 50.

²⁵⁶ FREUD, *supra* note 162, at 140-46.

children his offspring. Males, when they got old enough to pose a threat to the father's sexual and political monopoly, were either killed or driven out of the clan. From a political perspective, the primal father embodied a horrible and violent personal domination of the sons, while operating as the progenitor of work discipline and rational administration.²⁵⁷

Freud theorized that a coalition of vulnerable males, brothers in a literal sense, united and overthrew the father (who was perhaps literally eaten to signify both his utter destruction and internalization in the brothers). In the course of cultural evolution, this internalized father became progressively abstracted into religion, law, and respect for political authority. Despite this abstraction, fraternal government remained profoundly close to the place of the father and, in particular, "the law" which the brothers had erected as a father substitute and an assurance that the father, in his full despotism, could never return.²⁵⁸

Freud's account of the rise of civilization from the horde reads almost like an extension of, and gloss on, the Locke/Filmer debate, but with primal paternity being passed on to a larger circle of lesser fathers who must increasingly internalize the repression they stand for.²⁵⁹ The eventual triumph of civilization is the return of the father into a permanent, but distant sovereignty. At its best, this residue of the father survives mostly as the force of prohibition and law, forever covering the unconscious memory of the deeply erotic and personalized domination of the father. Freud believed that this unconscious deposit constituted an ever present locus for cultural regression.²⁶⁰

According to Freud, this cultural evolution is recapitulated, in large part, in individual psychosexual development.²⁶¹ Freud's theory of the Oedipus complex is perhaps his most central concept.²⁶²

²⁵⁷ SIGMUND FREUD, *MOSES AND MONOTHEISM* 129 (Katherine Jones trans., Vintage Books 1955) (1939); MARCUSE, *EROS AND CIVILIZATION*, *supra* note 52, at 64.

²⁵⁸ Marcuse offers a reading of Freud's ethnographic myth of the primal horde for its "symbolic value," a concentrated synchronic picture of a genuine, if far more complicated dialectic. MARCUSE, *EROS AND CIVILIZATION*, *supra* note 52, at 60.

²⁵⁹ BROWN, *supra* note 50, at 4.

²⁶⁰ FREUD, *supra* note 257, at 129-30.

²⁶¹ FREUD, *supra* note 162, at 143. It might seem as though Freud's anthropological thesis should have the greatest relevance to our inquiry into the vicissitudes of paternal power in social life. In fact, as Christopher Lasch points out, the cultural significance of Freud's thought often emerges the clearest when apart from his own efforts at cultural theory, in his more clinical analyses. CHRISTOPHER LASCH, *THE MINIMAL SELF: PSYCHIC SURVIVAL IN TROUBLED TIMES* 231-32 (1984).

²⁶² In a late footnote added to his programmatic 1905 publication, *Three Essays on the Theory of Sexuality*, Freud described the Oedipus complex as "the shibboleth that distin-

Freud theorized that young children experience both a desire for their respective parents as sexual objects, and a violent jealousy of them as rivals. In his most programmatic analysis of how the complex is resolved in the male, Freud described a crisis in which, faced with what appears to be an overwhelming threat of castration, the male child undertakes a great loan of power from the father to control his own desires which threaten to occasion a fatal confrontation with that same father. The transaction assures the submission of children in the family, but also underwrites the child's eventual succession into self-government.²⁶³

*The broad general outcome of the sexual phase dominated by the Oedipus complex may, therefore, be taken to be the forming of a precipitate in the ego, consisting of these two identifications [father identification and mother identification] in some way united with each other. This modification of the ego retains its special position; it confronts the other contents of the ego as an ego ideal or super-ego.*²⁶⁴

Like Locke, Freud ultimately sees paternalism as a prerequisite for the formation of political power. The formation of an autonomous subject capable of governing itself and participating in collective self-governance is a product of paternal power, which is inevitably dealt a blow within the life-world of the individual by the emergence from youth into true independence. As Hans Loewald puts it: "Without the guilty deed of parricide there is no autonomous self."²⁶⁵

guishes the adherents of psycho-analysis from its opponents." See 7 SIGMUND FREUD, *Three Essays on the Theory of Sexuality* (1905), in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 125, 226 n.1 (James Strachey ed. & trans., W.W. Norton & Co. 1953).

²⁶³ Freud's attempt to delineate the course of the complex and its repression in females is notoriously tortured, but it involves the same elements and results in a similar structural formation in the ego, albeit with a significant disabling of the female's capacity for real independence. See 22 SIGMUND FREUD, *New Introductory Lectures on Psycho-Analysis: Lecture 33, Femininity* (1933), in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3, 112-35 (James Strachey ed. & trans., W.W. Norton & Co. 1964).

²⁶⁴ See 19 SIGMUND FREUD, *The Ego and the Id* (1923), in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3, 34 (James Strachey ed. & trans., W.W. Norton & Co. 1961).

²⁶⁵ HANS W. LOEWALD, PAPERS ON PSYCHOANALYSIS 393 (1980). Loewald describes the oedipal-self as "an atonement structure" in which the sense of guilt and obligation toward the law is dependent on the symbolic consecration of the most basic crimes of rebellion. *Id.* at 394.

B. *Governing the Fatherless Society*

While Freud wrote of the “waning of the Oedipus complex” in the context of individual psychosexual development, others have cognized its waning as a cultural and historical process.²⁶⁶ If paternal power, and its victorious confrontation with the infantile subject is a necessary moment in the creation of self-governing adult subjects, any sign that paternal power was weakening, or even collapsing, would be cause for considerable concern. It is precisely this theme which the mid-twentieth century Frankfurt school theorists,²⁶⁷ especially Herbert Marcuse, seized upon. Marcuse argues that the transformation of Western societies into the advanced stage of capitalism fundamentally altered the social conditions that fostered the autonomous subjectivity associated with liberal democratic modernity.²⁶⁸ Marcuse links the liberal subject and the psychoanalytic description of the personality, speaking of the “obsolescence of the Freudian concept of man.”²⁶⁹

Marcuse believed that as social control came to be more and more a function of bureaucratic “administered systems,” the oedipal circuitry of father/law/autonomy would be decoupled from the circulation of power.²⁷⁰ The result on the level of the individual would be a collapse of subjective depth, a reduction toward one dimensional man to coincide with a monotheism of instrumental rationality on the collective level. At the societal level, Marcuse feared a collapse of the dialectical tension of history into a kind of velvet Stalinism, in which a pursuit of profit demanded surplus repression and an increasingly obstructionist machinery of social coordination.²⁷¹

For Marcuse, the disappearance of a distinctly paternal power contained hints of both danger and possibility. The danger lay in the undermining of the autonomous subjectivity, which Marcuse associates with the progressive moment of the Bourgeois experi-

²⁶⁶ Loewald stakes out an interesting intermediate position by suggesting the interest of psychoanalytic research in the oedipus complex is waning in favor of a concern with pre-oedipal processes which pose for individuals (and for theorists) the starkest questions of the relationship between subjects and objects. *Id.* at 399-401. Loewald suggests that this represents a shift from a focus on individuation as the culmination of human development toward an appreciation of another striving in humans, i.e., toward unity. *Id.* at 401-02.

²⁶⁷ For a discussion of the full history of this idea, see LASCH, *supra* note 261, at 228-29.

²⁶⁸ MARCUSE, *EROS AND CIVILIZATION*, *supra* note 52, at 96-97.

²⁶⁹ MARCUSE, *Obsolescence*, *supra* note 52, at 44-45.

²⁷⁰ *Id.* at 46-47.

²⁷¹ MARCUSE, *EROS AND CIVILIZATION*, *supra* note 52, at 100. This was, needless to say, a far grimmer picture than the “end of history” scenarios circulated in the late 1980s. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

ence.²⁷² Its disappearance suggests the risk of collective regression to a pre-oedipal subjectivity of boundariless desires and threats of overwhelming destruction.²⁷³ From Marcuse's perspective (following the broader Frankfurt school), fascism was merely the most disturbing manifestation of this.²⁷⁴ It is also dangerous because the potent drive to recreate the father makes any revolutionary process suspect.

The waning of paternal power in the organization of social life also holds its promise according to Marcuse.²⁷⁵ The successes of late capitalism in achieving technological and organizational gains in productivity have created the conditions for the formation of a new mode of subjectivity, which is no longer coupled by necessity to the disciplining of the body as a source of labor power and social control. Marcuse is less forthcoming in describing this new subjectivity except to hint that the Greek legend of Narcissus might serve as the sign for this new subject, much as Oedipus did for the autonomous ego of the Bourgeois experience.²⁷⁶

Marcuse's reading of Freud and his interpretation of the dangers and opportunities created by a crisis of paternal power in modern society, share a great deal with the contemporaneous work of Norman O. Brown. Brown, a classicist, published *Life Against Death* in 1959, which helped establish him as the leading American humanist of his generation to draw on and interpret Freud.²⁷⁷ His sixties' sequel, *Love's Body*,²⁷⁸ offered another way of imagining beyond the horizon of oedipal subjectivity. Brown views the ontogenetically pre-oedipal phase as a critical basis for such imagining.²⁷⁹ The loss of subject boundaries is a fundamentally healthy step for humans, albeit akin to both madness and nirvana.²⁸⁰ Brown reads Freud's primal clan story as a direct displacement, and interpretation, of the political ruptures that formed liberalism.²⁸¹

²⁷² MARCUSE, *Obsolescence*, *supra* note 52, at 57-58.

²⁷³ MARCUSE, *EROS AND CIVILIZATION*, *supra* note 52, at 101.

²⁷⁴ See MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950* (1973).

²⁷⁵ MARCUSE, *EROS AND CIVILIZATION*, *supra* note 52, at 47-48.

²⁷⁶ *Id.* at 161-62.

²⁷⁷ BROWN, *supra* note 52.

²⁷⁸ BROWN, *supra* note 50.

²⁷⁹ *Id.* at 98.

²⁸⁰ See JONATHAN DOLLIMORE, *SEXUAL DISSIDENCE: AUGUSTINE TO WILDE, FREUD TO FOUCAULT* 206 (1991); PHILIP POMPER, *THE STRUCTURE OF MIND IN HISTORY: FIVE MAJOR FIGURES IN PSYCHOHISTORY* 161 (1985).

²⁸¹ Intriguingly, Brown suggested that Locke's trashing of Filmer enacted as a "battle of books . . . Freud's primal crime." BROWN, *supra* note 50, at 4.

Freud seems to project into prehistoric times the constitutional crisis of seventeenth-century England. The primal father is *absolute monarch* of the horde; the females are his *property*. The sons form a *conspiracy* to *overthrow* the despot, and in the end substitute a *social contract* with *equal rights* for all.²⁸²

Brown suggests that liberalism had already fundamentally transformed paternal power by projecting the real paternity to God in heaven.²⁸³ Locke had already denied parental property rights in children, describing parents as guardians. The survival of the father as governor of the self (superego) in the psychology of the individual, is akin to the survival of kingship inside the political structure of liberalism.²⁸⁴ From Brown's perspective, what remains for a postliberal society is to give up the remnant of the father in the construction of the autonomous ego.²⁸⁵

C. *Beyond Oedipus*

Marcuse and Brown paid little attention to the emerging feminist discourses gathering force in the 1960s. However, by the mid-1970s, it was clear that feminism would provide a new way of thinking about the collapse of the oedipal system and its paternal rulers. While Marcuse and Brown painted the situation as catastrophic and revolutionary, feminists have tended to view the possibility, and the unravelling of its gender logic, more sanguinely.²⁸⁶ While Marcuse pointed to fascism as an example of the kind of regression made possible by the collapse of the king/father/law structure, some feminists insisted that long suppressed possibilities for human relations based on nurturance, rather than autonomy and competition, had been made possible.²⁸⁷

Without Freud and Marcuse's masculine vision of the autonomous subject, it is possible to provide a less despairing or utopian view of modern social controls. According to Jessica Benjamin, this vision masks two vital components of a critical theory of subjectivity: the violent role of the father as seen from the child's perspective before the resolution of the Oedipus complex; and, the

²⁸² *Id.* at 3.

²⁸³ *Id.* at 77.

²⁸⁴ *Id.* at 6.

²⁸⁵ This provides the basis for Brown's Buddhist version of Christianity.

²⁸⁶ See, e.g., BENJAMIN, *supra* note 53; CHODOROW, *supra* note 53; DINNERSTEIN, *supra* note 53; GILLIGAN, *supra* note 53.

²⁸⁷ BENJAMIN, *supra* note 53; DINNERSTEIN, *supra* note 53. Brown's view anticipated some of the feminist response, taking an optimistic view of the death of the Western ego. Brown's work, however, also had a decidedly mystical bent with less salience outside of the "hot-tub belt" of Northern California.

nonregressive influence of the mother, as the source of a sustaining cycle of nurturance and confidence.²⁸⁸

Paternal authority, then, is a far more complex emotional web than its defenders admit: it is not merely rooted in the rational law that forbids incest and patricide, but also in the erotics of ideal love, the guilty identification with power that undermines the son's desire for freedom. The need to sustain the bond with the father makes it impossible for the sons to acknowledge the murderous side of authority; instead they create the "paternal law" in his name.²⁸⁹

According to Benjamin, a less dualistic perspective would rehabilitate the meaning of dependence and nurturing.

Benjamin criticizes Marcuse for buying into Freud's (and Western civilization's) conception of the father as the force of rationality and law, in contrast to the mother's role as the presence of infantile regression toward the undifferentiated.²⁹⁰ In viewing the father as the liberator who frees humankind (one child at a time) from the dangerous maternal compulsions of regression into oneness and the attendant fantasies of self-annihilation and self-aggrandizement, critical theorists reveal that, for them, the real universal subject is masculine.²⁹¹

Benjamin believes that the broad cultural and political movement associated with feminism can alter the condition.

What makes helplessness more difficult to bear is the feeling that one does not have the source of goodness inside, that one can neither soothe oneself nor find a way to communicate one's needs to someone who can help. It seems to me that the confidence that this other will help, like the confidence created by the early attunement, is what mitigates feelings of helplessness. Such confidence is enhanced by a cultural life in which nurturance, responsiveness, and physical closeness are valued and generalized, so that the child can find them everywhere and adopt them himself.²⁹²

²⁸⁸ BENJAMIN, *supra* note 53, at 173.

²⁸⁹ *Id.* at 143.

²⁹⁰ *Id.* at 145.

²⁹¹ A feminist genealogy of the subject does not have to presume a Pollyanna view of the world. Human beings do face a deep challenge to their sense of self in the realization that dependence cannot be wholly controlled. That dilemma is present whether dependence is carried out in the patriarchal household or in a state-run day-care center. A more interesting question is whether the challenge of dependence can be met with strategies other than denial and repudiation.

²⁹² BENJAMIN, *supra* note 53, at 173.

For Benjamin it is not primarily a search for individual or even family solutions. From her perspective, the Freudian tradition turns into fantasy what must actually be accomplished in reality: confrontation with the father's aggression.²⁹³

Working from a different reading of psychoanalysis, Drucilla Cornell sees in present cultural politics the possibility of reinterpreting "the standardized gender divide itself."²⁹⁴ Following Lacan, Cornell sees the Oedipus complex as primarily about the imposition of linguistic skills and, with them, the symbolic system of a particular cultural order.²⁹⁵ In this sense, the father's penis is only a more or less successful metaphor for the Phallus. From a Lacanian perspective, the social and economic decentering of paternal power does not necessarily drive a regression toward the prelinguistic. Indeed, it may help create the conditions in which the reproduction of culturally specific categories can be contested.²⁹⁶

Donna Haraway uses the term "cyborg" to describe this kind of interruption in the categories of cultural reproduction.²⁹⁷ Cyborgs, entities along the machine/human intersection, represent what she calls "promising monsters."²⁹⁸ Haraway shares with Marcuse a sense that subjectivity is endangered by the transformation of paternal power.²⁹⁹ "'Advanced capitalism' and postmodernism release heterogeneity without a norm, and we are flattened, without subjectivity, which requires depth, even unfriendly and drowning depths."³⁰⁰ However, whereas Marcuse saw the new scientific administration as a dead end to history and subjectivity, Haraway takes seriously its productive capacities to produce new subjectivi-

²⁹³ "Freud's reading of Oedipus exclusively as a story of unconscious desire and not of real transgression shows how difficult it is to know—and face—external reality, how difficult it is to confront not only one's own aggression and desire, but that of the father as well." *Id.* at 180.

²⁹⁴ Cornell, *supra* note 59, at 287.

²⁹⁵ CORNELL, *supra* 64, at 36.

²⁹⁶ Cornell, *supra* note 59, at 293.

²⁹⁷ DONNA J. HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 9 (1991).

²⁹⁸ DONNA HARAWAY, *The Promises of Monsters: A Regenerative Politics for Inappropriate/d Others*, in CULTURAL STUDIES 295 (Lawrence Grossberg et al. eds., 1992).

²⁹⁹ Haraway criticizes Brown for following Freud's reduction of the body politic to sex. According to Haraway, Brown's view of the domination of human nature as an inevitable concomitant of civilization led him to take up a utopian approach to its overcoming in fantasy and ecstasy. Haraway criticized Brown for reifying civilization and human nature as two independent phenomenon, rather than as interacting in complex ways which generate opportunities for both domination and liberation. See HARAWAY, *supra* note 298, at 9.

³⁰⁰ *Id.* at 245 n.4.

ties.³⁰¹ Criticizing the commitment to a naturalism of the body espoused by critical theory and much of radical feminism, Haraway envisions a world where many of the surveillance technologies that power Marcuse's sinister bureaucracies have been harnessed to the production of wholly new ways of practicing human being.³⁰²

D. *The Juvenile Court in a Post-Oedipal Society*

There is a kind of complementariness between the logic of *In re Gault*,³⁰³ and the 1960s' "fatherless society" critique associated with Marcuse and Brown. *Kent v. United States*³⁰⁴ was decided in 1966, the same year that Brown published *Love's Body* and Marcuse's *Eros and Civilization* was reissued as a widely read paperback with a new "political preface." For Brown, Marcuse, and Justice Fortas, the modernist project to exercise paternal power in a manner compatible with democracy was in deep crisis. All three ultimately sought to leap out of the Lockean/Freudian assumption that the authoritarian government of the self is a necessary bridge to mature self-government.³⁰⁵

The due process revolution and the new punitive regime of juvenile justice is, from a feminist perspective, a predictable oscillation between the good post-oedipal father who provides law and meaning, and the bad pre-oedipal father who strikes with destructive violence.³⁰⁶ From this angle, it becomes apparent that attacking the figure of the father in the juvenile court cannot succeed in breaking the cycle of good and bad fathers, unless it addresses the real issues of how to exercise power over those who need its control and support. It is ironic that *Kent*, which we now view as only a prolegomenon to *Gault*, has facts that are so suggestive of the current crisis in juvenile justice.

As in so many other areas of public life, to move forward we must rethink choices made in the 1960s and uncover trailheads of

³⁰¹ *Id.*

³⁰² *Id.* at 154.

³⁰³ 387 U.S. 1 (1967).

³⁰⁴ 383 U.S. 541 (1966).

³⁰⁵ In this sense they both partake of a utopian vision that individuals might become their own fathers, or found themselves. Pierre Legendre has described this as the major delusion of contemporary society. See Alain Pottage, *Crime and Culture: The Relevance of the Psychoanalytical*, 55 *MOD. L. REV.* 421, 433 (1992).

³⁰⁶ The practical stakes for feminism in the reconstruction of a *parens patriae* juvenile court are also significant. While women as a class are rarely foregrounded in the juvenile justice enigma, the kinds of threats posed by Randy Deshaney, and the largely male youth culture of violence in *Schall*, are particularly salient for women. Indeed, *Kent* and *Gault* also involve women as victims.

alternative paths not chosen. Here, the feminist rereading of the dangers and opportunities created by the crisis of paternal power in society may provide a sense of direction, while taking us back to the institutional experiment of the juvenile court. It is not surprising that *Gault*, and not *Kent*, is remembered as the great Warren-era juvenile justice case. The former established as constitutional principle what the latter only gestured at in statutory construction.

Between them, Morris Kent and Gerald Gault mark out the past and the future of the juvenile justice system. Gault, a small-town maker of lewd "crank" telephone calls, presents a picture of the kind of adolescent crimes we are all too nostalgic for these days, combined with a hint of potentially totalitarian abuses of power consistent with other representations of institutional power popular in the 1960s, like Ken Kesey's *One Flew Over the Cuckoo's Nest*.³⁰⁷ Seen through the libertarian values of the Warren Court, the romance of the father-like juvenile reformer, whether Ben Lindsey³⁰⁸ or Spencer Tracey's Father Flanagan,³⁰⁹ is replaced by something more akin to Big Nurse.

Morris Kent, a sixteen-year-old from Washington, D.C., was charged with numerous violent felonies.³¹⁰ He is a dramatic example of the new archetype of juvenile crime in both the media and popular culture, i.e., the explosive violence of young African American men in the inner cities. If Gerald Gault needed to be rescued from the smothering embrace of an overreaching Nanny State, Morris Kent came to the Supreme Court to save himself from a lifetime of punishment in prison. His legal task was not about getting out of the juvenile justice system, but about staying in it. Kent challenged the authority of the juvenile court to waive jurisdiction without providing him a hearing.³¹¹ An adult criminal court, which provided him with full due process rights, sentenced him to thirty to ninety years imprisonment for a series of rapes and burglaries.³¹² As a juvenile delinquent, Kent could have received a maximum sentence of only five years.³¹³

Interestingly, Justice Fortas's opinion in *Kent* has hints of a more substantive demand for rationality in the juvenile justice system than is to be found in *Gault*. Holding that the District of Co-

³⁰⁷ KEN KESSEY, *ONE FLEW OVER THE CUCKOO'S NEST* 127-30 (1962).

³⁰⁸ See *supra* notes 146-54 and accompanying text.

³⁰⁹ *BOYS' TOWN* (Metro-Goldwyn-Mayer 1938).

³¹⁰ *Kent v. United States*, 383 U.S. 541, 548 (1966).

³¹¹ *Id.* at 550-51.

³¹² *Id.*

³¹³ *Id.* at 554.

lumbia statute provided discretion to the judge to determine whether waiver to adult court was appropriate in certain cases involving more serious crimes (which Kent certainly fit formally), Justice Fortas noted: “[T]his latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a ‘full investigation.’”³¹⁴ With respect to the latter, Justice Fortas quoted approvingly from a lower court opinion construing the investigation requirement:

It prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on “an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.”³¹⁵

Justice Fortas’s opinion in *Kent* also looks to administrative models of procedure that require more procedural rigor and public accountability than was accorded Kent, while stopping short of full criminal due process rights.³¹⁶

CONCLUSION: THE DEATH OF THE CLINIC

The old dominations of white capitalist patriarchy seem nostalgically innocent now: they normalized heterogeneity, into man and

³¹⁴ *Id.* at 553.

³¹⁵ *Id.* at 553 n.15 (quoting *Green v. United States*, 308 F.2d 303, 305 (D.C. Cir. 1962)).

³¹⁶ Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. REV. 44, must be considered one of the most influential attempts to combine social scientific with legal perspectives on the juvenile court. The article was cited by the Supreme Court in both *Kent*, 383 U.S. at 555 n.20, and *Gault*, 387 U.S. at 66 n.2. Handler was one of the only legal critics insisting that a resolution of the due process issues must also address the substantive purposes of the juvenile court. Handler, *supra*. He pointed toward an administrative form of due process that was very different from both the discretionary *parens patriae* regime and the criminal process model that the Supreme Court ultimately chose. Handler argued that representation for juveniles from the start of the process was essential, but he doubted that a move toward universal representation by defense counsel was either affordable or fully desirable. He foresaw that representation by lawyers would almost surely undermine the welfare function of the court and hasten its reduction to a purely punitive institution. Moreover, the chance that the system could pay for enough lawyers to get involved was low and thus, the pressure to encourage waiver high. His proposed solution was an administrative structure with built-in nonlawyer adversary processes, in which probation officers fill three distinct roles: investigator (prosecution), defense, and hearing (judicial). *Id.* at 41. An appeal to a real court would be possible. *Id.* at 44. Such a system would promote more serious development of the facts of the case while permitting informality, cooperation, and a focus on child welfare. *Id.* at 42-43.

woman, white and black, for example. 'Advanced capitalism' and postmodernism release heterogeneity without a norm, and we are flattened, without subjectivity, which requires depth, even unfriendly and drowning depths. It is time to write *The Death of the Clinic*.³¹⁷

A. *Haunted House*

A legal version of the "undead," the *parens patriae* juvenile court haunts us from its incomplete burial in the 1960s. Its bloated body moves forward in the name of control with little of its original identity intact. Its interned vision of clinical justice endures only as a kind of monument pointing us toward a cluster of strategies for exercising power in our culture that are increasingly inaccessible to our political life. Like all ghosts, it has left its established channels and yet remains, underground, threatening to emerge in forms that we cannot easily predict or control.

There have been increasing calls to abolish or fundamentally reform the juvenile court from both those who view the court as muddling the deterrent signal being sent to dangerous young offenders, and others, who view the weak adherence to due process values in juvenile justice as evidence that the experiment in "domestication" is over.³¹⁸ The debate over abolition of the juvenile court is increasingly moving into the policy realm.³¹⁹

In what remains of this Article, I present the question of how to re-imagine the conditions under which paternal power might be exercised in whatever institutional vehicles are ultimately shaped to conduct it. We must also attend to the ways we exercise power in institutions that manage people without claiming the status or burdens of parents. These are proliferating in postmodern society. They do not seem like a coherent formation, in part because they are bifurcated along class lines. On the one hand, for the poor, we have coercive institutions, like our criminal justice system which has grown to a size and jurisdiction that its Progressive Era builders never dreamed of. On the other hand, for the middle classes,

³¹⁷ HARAWAY, *supra* note 298, at 245 n.4.

³¹⁸ Ainsworth, *supra* note 27, at 1097; Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Barry C. Feld, *Juvenile (In)Justice and the Criminal Court Alternative*, 39 CRIME & DELINQ. 403 (1993). For opposing views, see Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136 (1990); Forst & Blomquist, *supra* note 233, at 323; Irene M. Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163.

³¹⁹ See Rosenberg, *supra* note 318, at 164.

we have facilitative institutions that provide personal management structures that sustain individual autonomy while producing the fantasy that people can be their own parents.³²⁰

B. *Governing in the Name-of-the-Father*

Liberal society has preserved in its legal system significant fragments of monarchical power. *Parens patriae* is one of these. In *Johnson v. State*,³²¹ the New Jersey Supreme Court defined *parens patriae* as the "duty on the sovereignty to protect the public interest and to protect such persons with disabilities who have no rightful protector."³²² Likewise, early twentieth-century cases upholding the juvenile court seized upon the idea of the state's duty to protect youth to explain why it posed no danger of a restoration of tyrannous sovereign prerogative.³²³ Even today, many statutes enabling the juvenile justice process retain the state's discursive commitment to a parental government of its troubled youth.³²⁴

Held in check from any broad dispersion by the ideologies of liberal revolution, these fragments have provided a useful resource for reformers seeking to create institutions within liberal society capable of responding to the new forms of dependency created by modern society. We are doubly separated from this logic today, on the one hand by a broad political retreat from governing during the 1980s—a retreat sanctified by the Supreme Court in cases like *Deshaney*. On the other hand, where the logic of *parens patriae* remains, as in *Schall*, the touch of the king's hand no longer cures, but rather leaves behind marks of disability and dangerousness that invoke the most punitive and controlling responses of the state.

This is a genealogical crisis; it is a separation from both historical deposits of power and the political problem of lineage (i.e., of establishing the conditions and the limits of self). Pierre Legendre's recent work has focused on describing the stakes of this gene-

³²⁰ Today, we have the spectacle of the suburban middle class, which has absorbed the lion's share of public spending for infrastructural improvements over the last 50 years, angrily demanding the dismantling of those few programs that aim at the poor in the name of eliminating dependency.

³²¹ 114 A.2d 1 (N.J. 1955).

³²² *Id.* at 5.

³²³ See, e.g., *In re Ferrier*, 103 Ill. 367, 373 (1882).

³²⁴ For example, in the face of increasing pressure to punish juveniles as adults, the Florida Supreme Court has recently insisted that the statute creates for children "the right to be treated differently from adults." *Troutman v. State*, 630 So. 2d 528, 531 (Fla. 1993) (quoting *State v. Rhoden*, 448 So. 2d 1013, 1016 (Fla. 1984)).

alogical crisis in law and politics.³²⁵ In Legendre's account, the increasing difficulty of confronting the constitutive role of government under late modern discursive conditions has created the illusion that human beings can and must do what is impossible: parent themselves.³²⁶

This problem of genealogy and politics (of king and father) was captured for Legendre by a striking act of political parricide in Quebec in 1984. Denis Lortie, a soldier, attacked the Assemblée Nationale in a self-described effort to "kill the government of Québec."³²⁷ Legendre views Lortie as the product of the increasing denial of a parental status for the limits built into the culture and embodied in government and laws.³²⁸ The limits remain however, policed by a power without parents that regulates people, while making no claim on their subjectivity (and taking no responsibility for it).³²⁹

How many Lorties are there among the youths collecting in our prisons and juvenile detention centers today? Many have in a real sense been deprived of fathers and even the name-of-the-father.³³⁰ Their personal fathers are unavailable for large portions of their youth, swept away into the channels of economic marginality, crime, and the prison system. Their links to the discursive formations of political authority, economic opportunity, and normative integration have been stripped by economic restructuring.³³¹

³²⁵ See, e.g., PIERRE LEGENDRE, *LEÇONS VIII: LE CRIME DU CAPORAL LORTIE: TRAITÉ SUR LE PÈRE* (1989); see also Pottage, *supra* note 305.

³²⁶ Pottage, *supra* note 305, at 433.

³²⁷ *Id.* at 422.

³²⁸ *Id.* at 431.

³²⁹ While some products of this crisis will experience it as a tremendously liberating opportunity for narcissistic self-invention; others, like Lortie, may be expected to act out their own search for identity and limits.

³³⁰ This is obviously a much different kind of fatherless society than Marcuse described. For one thing, Marcuse viewed the major problem as the production of surplus sublimation as an exploitive economic system disciplined individuals in the name of profits well beyond what was rationally necessary to reproduce the social order. The inner-city communities ravaged by gang violence have experienced catastrophic decreases in their employment base. Part of what is defining this population as an underclass is that there is little demand for their labor. Marcuse worried about a loss of ego autonomy as individuals submerged into the soft social control of a consumer society. That may be a danger in some sectors of postmodern society, but not, apparently, in communities like South Central Los Angeles where social control is present in its bad-father visage as the police and the prison system. Indeed, from Marcuse's perspective these forms of control suggest the most archaic forms of sovereign power and might be expected to generate the most radical forms of resistance. See MARCUSE, *EROS AND CIVILIZATION*, *supra* note 52.

³³¹ See WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

The youth in these communities have become key players in the violent war against all that has turned our inner cities into literal embodiments of Hobbes's mythical state of nature.³³² The situation is all the more troubling in terms of our own national genealogy because these youths are the actual successors in interest to those "freedmen" who for the reconstruction legislation and amendments remain promises unkept in Aviam Soifer's eloquent phrase.³³³

C. *Notes on a Promising Monster*

Donna Haraway writes that "the most promising monsters in cyborg worlds are embodied in non-oedipal narratives."³³⁴ The wonderful ambiguity of that phrase, "promising monsters," is appropriate to the situation of today's juvenile offenders whose recently prodigious capacity for violence is fueling new demands for their repression. Monsters combine the horrible, in the sense of repugnant, with the awesome, the supernatural. They terrify us because of their powers and their inhumanity. Their strength, their ability to transcend various kinds of barriers, makes them creatures we admire beneath our fear and loathing. For Haraway, postmodern conditions are producing fundamentally new ways of constructing subjectivities that we have trouble recognizing, so long as we cling to the modernist assumptions about the subject, of which Freud's Oedipus theory is the exemplary expression.

This ambiguity has lately become a conscious strategic formation among creators of the musical subgenre known as "Gangsta Rap."³³⁵ Gangsta rappers speak directly of the violence and fatherlessness that pervade the communities from which many of them come and for which they claim to speak. Rap artists evoke the image of the "monster" to express the way they believe White society views young African American men.³³⁶ Yet, it also expresses an affirmation of the monster figure. Being scary is part of the response. The scariness is supported in part by the real life violence of young inner-city "gang bangers" whose own self-expressiveness blurs, at times completely, the line between performers and gangsters (not for the first time in our history).

³³² THOMAS HOBBS, *LEVIATHAN* 186 (C.B. Macpherson ed., 1951).

³³³ Soifer, *Status*, *supra* note 77.

³³⁴ HARAWAY, *supra* note 298, at 150.

³³⁵ Robin D.G. Kelley, *Straight from Underground: How Rap Music Portrays the Police*, 254 *NATION* 793 (1992).

³³⁶ A particularly political example is the album *PUBLIC ENEMY, FEAR OF A BLACK PLANET* (Def Jam/Columbia Records 1990).

One of these figures has recently published an autobiography with the appropriate title *Monster*.³³⁷ The author, Sanyika Shakur, is a twenty-eight-year-old veteran of the vicious youth gang wars in Los Angeles, and is currently a prisoner in California's maximum security Pelican Bay prison. Shakur, whose birth name is Kody Scott, and whose *nom de guerre* is Monster, describes the world of youths and adults in the poverty zones of Los Angeles.³³⁸ Here, what may seem to be the homogeneity of minority status and economic marginality has been replaced by the warfare of hostile tribes marked in primary colors, sports teams, television commercials, and the like.³³⁹

Monster Kody is in some ways a perfect example of what Haraway calls a cyborg. His self-description³⁴⁰ captures the strong sense in which his subjectivity became fused with a variety of machine systems, such as his weapons³⁴¹ and his bodybuilding equipment. Shakur describes his transformation into a killing machine who would fly upon his ten-speed, holding deadly firearms to visit revenge on his enemies blocks away.³⁴² At sixteen, Kody had been wounded by gunshots on two separate occasions (the first time almost fatally), and had killed several gang enemies.³⁴³ He earned the name, Monster, by pounding a robbery victim into an unrecognizable shape.³⁴⁴

³³⁷ SANYIKA SHAKUR, AKA MONSTER KODY SCOTT, *MONSTER: THE AUTOBIOGRAPHY OF AN L.A. GANG MEMBER* (1993).

³³⁸ Los Angeles-based urban scholar, Mike Davis, estimates that there are over 100,000 gang members in the Los Angeles region. Mike Davis, *Bringing Home the Hate*, N.Y. TIMES, Aug. 11, 1991, § 7 (Book Review), at 6.

³³⁹ We take odd comfort that it presumably took the Serbs, Croats, and Muslims centuries of living with and hurting each other in the Balkans to create violent hatred. The Crip and Blood wars Shakur describes in Los Angeles during the 1980s suggest hatred does not require even the semirationality of old feuds.

³⁴⁰ Biography and autobiography have become one of the most successful publishing genres today. Shakur's book creates an interesting point of connection between our current literary formations and the disciplinary tradition of chronicling individual lives. The practice of the juvenile court/clinic gave rise to its own form of this in the delinquents "own-story." See BENNETT, *supra* note 152, at 112-20; see also Jonathan Simon, *Ghost in the Disciplinary Machine: Lee Harvey Oswald Like History and the Truth of Crime* (1994) (unpublished manuscript, on file with author). For a recent effort to revive this tradition within criminology, see ELLIOTT CURRIE, *DOPE AND TROUBLE: PORTRAITS OF DELINQUENT YOUTH* (1991).

³⁴¹ As poet Wanda Coleman writes in a review of *Monster*: "[H]e treats guns as if they function without human agency . . . Eerily, there are more . . . detailed and loving descriptions of weapons than there are of friends and relatives." Wanda Coleman, *The Making of a 'Monster'*, L.A. TIMES, July 4, 1993, Book Review, at 3.

³⁴² SHAKUR, *supra* note 337, at 16.

³⁴³ *Id.* at xiii.

³⁴⁴ *Id.* at 13.

Indeed, the image of human/machine synthesis is taken as almost an ideal by gang members, as reflected in the chant that Monster and his comrades composed and performed nightly in their cell block in state prison:

“Monsta Kody!” Big Rebo from Compton would holler every night.

“Yeah?” I’d say.

“MONSTA KODY!” he’d holler again, just to make sure everyone knew what was going on.

“YEAH?” I’d reply again.

“MACHINE IN MOTION!” which came out with a rhythm like
“MAH-SHEEN-IN-MOE-SHUUN!”

And I’d answer “MACHINE IN MOTION!”

Then, from my left, Elimu would yell, “Handle that shit!”

And I’d begin.

C-R-I-P, C-R-I-P

Crip! Crip!

Minds of steel, hearts of stone,

*Crip machine is movin’ on.*³⁴⁵

Shakur is doubtless proud of his accomplishments as warrior and warrior leader, but his account powerfully indicates just how costly monsters can be to their communities. The toll amongst dead young gangbangers and hapless “civilians” is sobering. Some limit is achieved by the violence itself and by the eventual imposition of lengthy prison terms. Indeed, Monster’s transformation into Shakur (a Kiswahili name that reflects the Afro-centric philosophy to which he now adheres) was achieved only after more senior figures in the gang world made clear that they were willing to kill him to limit his predatory powers.³⁴⁶

It is easy to see only the control problem posed by the deadly human/machine synthesis of a Monster. A community that generates large numbers of “Monsters” or fails to find ways to transform them cannot survive long—Haraway reminds us, however, that the cyborg is more than dangerous. “The cyborg is a contested and heterogeneous construct. It is capable of sustaining oppositional and liberatory projects at the levels of research practice, cultural productions, and political intervention.”³⁴⁷ Some clues lie in the ability of gang life itself to produce “Monsters.” Like them, or not, gangs are clearly one way to address the absence of both personal

³⁴⁵ *Id.* at 306. The chant evokes comparison with the high school athletic cheers of less menacing youths, rap performances, and collegiate fraternity rituals.

³⁴⁶ *Id.* at 312.

³⁴⁷ HARAWAY, *supra* note 298, at 212.

parenting and the linguistic/cultural normalization accomplished through the imposition of the name-of-the-father. As Crazy De, Shakur's friend who is currently serving a life prison sentence for murder, relates to him during a jail visit described in *Monster*: "[Y]ou gotta understand that I'm still in this to the fullest. This is all I know. It's Gangsta for life, homie."³⁴⁸

In the absence of the personal father, gangs provide love, discipline, prestige, productivity, and the elusive hint of connection to a larger, more meaningful transhistoric community. "It's like being in a family, like being in a house—a secure house. A place where you get the praise and love of people who are appreciative of you and your achievements—albeit they may be criminal. But these people are appreciative of you."³⁴⁹ In the absence of the name-of-the-father, the gang becomes an amazingly prolific creator of names and signatures of authority. It creates signification in bodies, wall paint, and stories. Where the name-of-the-father once connected oedipal subjects to law and work, the gang connects Monster Kody to his own kind of law and work: "Work does not always constitute shooting someone, though this is the ultimate. Anything from wallbanging' (writing your set name on a wall, advertising) to spitting on someone to fighting—it's all work. And I was a hard worker."³⁵⁰ The gang achieves this with few of the anchors that support solidarity in traditional or modernist settings, i.e., religion, kinship, the labor market, political parties. Indeed, their reference points are all "virtual," coming from popular culture, television commercials, sports, and most importantly, movie representations of White ethnic gangsters.

D. *The King Never Dies*

It is not easy to imagine the institutions that could make a difference to troubled youths in South Central Los Angeles and similar places. The remnants of earlier *parens patriae* institutions are increasingly irrelevant.³⁵¹ The authoritarian power of the

³⁴⁸ SHAKUR, *supra* note 337, at 375.

³⁴⁹ Léon Bing & Greg Spring, *Voices from the Hood: Gang Members Talk About Life and Death on the Mean Streets of L.A.*, PLAYBOY, Nov. 1992, at 171.

³⁵⁰ SHAKUR, *supra* note 337, at 52.

³⁵¹ This is true not only of the juvenile court, but perhaps more importantly the school. "Knowing George Washington and Abraham Lincoln isn't going to help you survive in South Central. People are wise to that. The schools could be mowed down in South Central today and nobody would miss them . . ." Bing & Spring, *supra* note 349, at 175. Indeed, despite his explicit repudiation of the "gangsta" life, Shakur affirms that these features remain integral to his own new roles as self-described "revolutionary" and father to his own children. *Id.*

father, of the king, is not gone. South Central Los Angeles experiences the hand of law and authority but only in the most archaic ways, as the beating of Rodney King and the resultant waves of counterviolence testified.

Critics of the juvenile court rightly ask how anyone can imagine that an institution designed to normalize mildly wayward youth can handle the ruthless violence of a Monster Kody. The question is perplexing. The Progressive Era notion that delinquents cannot appreciate the significance of their criminal actions simply does not fit the eleven-year-old Kody Scott who understands exactly what it means when he empties five rounds from a shotgun into a gathering of rival gang members as part of his own gang initiation.³⁵² On the other hand, Shakur's own attempts at explanation for his transformation into Monster emphasize precisely the absence of his father and a profound uncertainty as to his relationship to the name-of-the-father.³⁵³

There are many juveniles in the system who respond to the same problems in far less explosive ways. For example, for young men growing up in inner-city housing projects in Dade County, Florida, contact with the juvenile justice system is the normal experience in the neighborhood.³⁵⁴ Most of them bear little resemblance to Monster Kody (but being African American and male are too often assimilated to a monolithic stereotype). There is a real danger that current fears of "Monsters" will generate successful demands for an increasingly punitive juvenile crime policy.

In the short term, the juvenile court must be defended as a check on the drive to mark youth offenders as subjects for punishment and criminalization.³⁵⁵ A phenomenal number of young African American men in America are already under the custody of the penal system. Recent studies of Washington, D.C. and Baltimore, Maryland, found that around one-half of all the African

³⁵² SHAKUR, *supra* note 337, at 8-13.

³⁵³ This actually involves a fairly complicated set of things in Kody's life. His biological father was never married to his mother and disappeared. His two brothers and a sister were the progeny of his mother's relationship with another man who, according to Shakur, ignored him. His mother, however, was well connected to successful people including the blues singer Ray Charles, who is Shakur's godfather. Brent Staples, *When Only Monsters Are Real*, N.Y. TIMES, Nov. 21, 1993, at E16.

³⁵⁴ Petersen, *supra* note 28, at 8.

³⁵⁵ Franklin Zimring's notion that adolescence ought to be a "learner's permit" for adulthood, promoting experimentation in self-government while preventing irrevocable harms, might serve as a relevant ideal even for the kids caught in the violent inner-city situation. See FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 89-90 (1982).

American men in these cities, between the ages of fifteen and twenty-nine, were either in custody or wanted fugitives.³⁵⁶ While efforts must be made to slow this juggernaut and attack discrimination in charging, sentencing, and punishment, it is not acceptable to write off the huge numbers already caught up in the system. The juvenile court continues to offer shorter and more therapeutically oriented sentences that promise to do at least less damage.

In the medium term, we must strive to protect and expand the right to affirmative treatment which lies in many remaining juvenile justice statutes. The States' highest courts continue to honor the rehabilitative commitments of these laws, although they have been abandoned by legislative majorities. Where they remain unamended they must be mined for legally enforceable checks on criminalization and punishment. The alternatives are frightening. The current tendency is to invest huge sums of scarce capital in an archipelago of juvenile prisons to hold large portions of our minority male population, for the early stages of what will probably be a lifetime of interactions with the criminal justice system. What happens if a poorer and meaner society regrets the massive costs of this strategy? Consider Brazil, where police death squads eliminate troublesome juveniles at night in the large cities.³⁵⁷

In the longer term, we need to explore new institutional strategies for exercising paternal power in settings that look like neither the traditional family nor the modern welfare state. We must look

³⁵⁶ A study conducted by the National Center on Institutions and Alternatives reported that 56% of the African American males in Baltimore, between the ages of 18 and 35, were either in the criminal justice system or wanted on warrants. Don Terry, *More Familiar, Life in a Cell Seems Less Terrible*, N.Y. TIMES, Sept. 13, 1992, § 1, at 1, 40. A study of Washington, D.C. found 42% of young African American males were under some form of criminal justice custody. William Raspberry, *The Making of Certified Criminals*, WASH. POST, Dec. 30, 1992, at A19. A 1990 study of national data, commissioned by the Sentencing Project, estimated that 23% of all African American males in the United States between the ages of 20 and 29 were under the control of the criminal justice system. Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* (Sentencing Project, Washington, D.C.), Feb. 1990, at 3; see also Terry, *supra*, at 40.

³⁵⁷ Persistent stories have suggested that death squads, made up at least partially by police in disguise, carry out summary executions of suspected juvenile offenders who live on the streets in the slums of Rio de Janeiro and other large cities. See, e.g., James Brooke, *Big Outcry Doesn't Slow Killing of Youths in Rio*, N.Y. TIMES, Jan. 3, 1994, at A9; *Killing of Brazil Youths Reported*, N.Y. TIMES, Sept. 6, 1990, at A8; *Stop the Slaughter of Children in Brazil*, N.Y. TIMES, Dec. 4, 1990, at A30 (editorial). Similar horrors among the slum youths of Mexico City were depicted in Luis Bunuel's brilliant 1950 movie, *LOS OLVIDADOS* [The Young and the Damned] (Tepeyac 1950). In the horrifying last moments of the film, the camera follows the falling bodies of the two protagonist "delinquents" as they roll over in death amidst garbage and construction wastes, while an old blind man, a victim of youth violence, prays "kill them all, kill them all, before dawn." *Id.*

at our legal and political culture for the deposits that might capitalize a renewed effort to construct democratic forms in which the power of parents might be exercised as government. What is at stake is not only the moral claim to "save" these youths, but the promise they offer for transformation of our culture.³⁵⁸ In any such survey, the juvenile court is likely to remain among the most promising precedents.

³⁵⁸ These inner-city youths have an intelligence appropriate to the postmodern condition that rivals any other sector of the culture. See GREG TATE, *FLYBOY IN THE BUTTERMILK: ESSAYS ON CONTEMPORARY AMERICA* (1992); Kelley, *supra* note 335, at 793.