

5-15-1979

## Take My Child, Please - A Plea For Radical Nonintervention

William M. Marticorena

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Courts Commons](#), and the [Juvenile Law Commons](#)

### Recommended Citation

William M. Marticorena *Take My Child, Please - A Plea For Radical Nonintervention*, 6 Pepp. L. Rev. Iss. 3 (1979)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol6/iss3/3>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Take My Child, Please—A Plea For Radical Nonintervention

WILLIAM M. MARTICORENA\*

## INTRODUCTION

It is often said that children are our nation's most valuable asset. In order to protect those "assets," various levels of government have created a juvenile justice system, separate from the criminal justice system, to care for the needs of youthful offenders. It was envisioned that such a system could best serve our nation's youth by providing them with treatment as opposed to punishment in an attempt to rehabilitate them. Its creators hoped that this system could be utilized to combat our children's most serious enemies: crime, poverty and neglect. Unfortunately, despite good intentions, the juvenile justice system has been transformed into one of our children's most vicious enemies.

A commonly-stated goal of the juvenile justice system is to care for and rehabilitate juveniles. State intervention is justified on a *parens patriae* theory in place of one based upon moral blameworthiness. Because of this theory, the juvenile justice system in-

---

\* B.A., Loyola University of Los Angeles, 1974; J.D. Harvard University, 1977; Professor of Law, Western State University College of Law, 1978 to date; Associate with Rutan and Tucker, Santa Ana, California, 1977 to date. The author wishes to acknowledge Raymond Karch, Loyola of Los Angeles Law School, class of 1978, for his invaluable assistance during the early stages of the preparation of this article.

trudes in a child's life where the criminal justice system would dare not or could not go for due process reasons. The most significant aspect of this intrusion is the juvenile court's jurisdiction over "status offenders."

Status offenders are children who have committed an act that if committed by an adult would not constitute a crime. However, they have engaged in conduct which is disfavored by society, such as misbehavior, truancy, or sexual promiscuity and, thus, they fall under this special jurisdiction of the juvenile court. Juvenile court jurisdiction, at least as to these children, is clearly based upon rehabilitative, protective, and supervisory principles.<sup>1</sup>

Some commentators have advanced the notion that the juvenile justice system has dual goals: care and punishment. The punishment feature (which most probably includes an element of deterrence) is clearly applicable to non-status offender juveniles since they have engaged in criminal conduct. Even those who most vigorously defend the status offender jurisdiction of the juvenile court, however, concede that one cannot justify its existence on a punishment or deterrent theory.<sup>2</sup>

The specific structure and operation of the juvenile justice theory varies from jurisdiction to jurisdiction and state to state. Their differences are relatively unimportant to the major thrust of this paper for generally, they possess a common, overriding characteristic: all allow judges discretion to intervene in the lives of juvenile status offenders. It is this aspect of the system which most needs criticism.

Generally, children coming under the jurisdiction of juvenile courts because of delinquent conduct may be classified into two

---

1. See, e.g., *In re Henderson*, 119 N.W. 2d 111, 119 (1972); *In re Walker*, 282 N.C. 28, 39-40, 191 S.E.2d 702, 709-10 (1972).

We have already observed the purpose of juvenile proceedings is to help and assist the child, not to punish. The constitutional safeguard of 'fundamental fairness' must be preserved in that setting. However, where there is no public offense charges, we believe the requirement of advising the juvenile and his parents of his right to remain silent would frustrate the very purpose of the juvenile proceeding. . . .  
*Henderson, supra* at 119.

The purpose of the Juvenile Court Act is not for the punishment of offenders but for the salvation of children. The Act treats delinquent children not as criminals, but as wards, and undertakes. . . to give them the control and environment that may lead to their reformation, and enable them to become law-abiding and useful citizens, a support and not a hindrance to the commonwealth (citation omitted). The state must exercise its power as *parens patriae* to protect and provide for the comfort and well-being of such of its citizens as by reason of infancy. . . are unable to take care of themselves (citation omitted). Thus juveniles are in need of supervision and control due to their inability to protect themselves.

*Walker, supra*, at 709-10.

2. See 19 CRIME AND DELINQUENCY, 477, 483 (1973).

categories. First, there are those who have committed acts which would be crimes if committed by adults, and second, there are those who have not been convicted of such offenses.<sup>3</sup> The second group may be further divided into two categories, consisting of children who have violated specific ordinances that only apply to children, such as truancy, curfew, alcohol and tobacco ordinances, and those who have broken no law but who are designated as "beyond control," "incorrigible," "runaway," "persons in need of supervision (PINS)," or "minors in need of supervision (MINS)," depending upon the jurisdiction.<sup>4</sup>

The omnibus clauses indicated above represent attempts by the legislature to reach children who are likely to become delinquent because they are presently leading lives of idleness or are in danger of becoming "morally depraved."<sup>5</sup> Of the approximately 600,000 children held each year in secure detention pending a court hearing, more than one-third are status offenders.<sup>6</sup> The Law Enforcement Assistance Administration (LEAA) recently estimated that "before, during, and after the adjudication process, one-half of juvenile noncriminal status offenders spend time in a detention center. In addition, a large number of status offenders are either detained or sentenced to serve time in city or county jails."<sup>7</sup> Reports of abuse, rape, and suicide do not deter juvenile court judges from placing juveniles in jails that are more punitive and harmful for them comparatively than for adults.<sup>8</sup>

Of the 85,000 children committed to correctional institutions each year, twenty-three percent of the boys and seventy percent

3. See *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correction System?* 31 FED. PROBATION 26 (1967) [hereinafter cited as *Why Treat?*].

4. *Id.* In all but a few jurisdictions, the same dispositions are permitted in the case of these status offenders as for children who have committed adult crimes. In other words, in the name of "parental care," children who are not guilty of any crime are processed through basically a "criminal" system.

5. Orlando & Black, *Classification of the Juvenile Court*, 25 JUV. JUS. 13 (May 1974) [hereinafter cited as ORLANDO & BLACK].

6. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, CHILDREN IN CUSTODY—A REPORT ON THE JUVENILE DETENTION AND CORRECTIONAL FACILITY CENSUS OF 1971 (Washington, D.C., U.S. Government Printing Office, 1971) [hereinafter cited as CENSUS OF 1971].

7. See LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA), U.S. DEPT. OF JUSTICE, PROGRAM ANNOUNCEMENT: DEINSTITUTIONALIZATION OF STATUS OFFENDERS, 4 (1977) [hereinafter cited as LEAA ANNOUNCEMENT ON DEINSTITUTIONALIZATION].

8. M. Levin, *Under Lock and Key: Juveniles in Jails and Detention*, NATIONAL ASSESSMENT OF JUVENILE CORRECTIONS 1 (1974).

of the girls were adjudicated status offenders.<sup>9</sup> This situation can be partially explained by the common practice of filing a petition for "incurability" or "beyond control" for girls, when, in fact, their conduct would fall into the "criminal" category if committed by adults. This practice probably results from either a tendency to protect girls or the inability to prove a criminal act. It may also reflect the fact that we, as a society, permit freer conduct for boys than for girls.<sup>10</sup>

Despite the fact that some girls might continue to be convicted under a system that denies the court jurisdiction for noncriminal acts, it is still significant that, nationwide, over one-fourth of all those confined to institutions have committed no criminal act. Several studies have put the figure as high as forty to fifty percent.<sup>11</sup> The net result of the juvenile court's jurisdiction over status offenders is that youths are being funneled into the juvenile court system and are stigmatized by the process in the same manner as are children who have committed crimes.<sup>12</sup>

The actual impact of the court's jurisdiction over status offenders is alarming, and its potential impact is even more frightening. Recent studies report that perhaps ninety percent of all young people have, at one time or another, performed an act for which they could have been subjected to the jurisdiction of the court under current juvenile statutes. Many of these children have committed only relatively trivial PINS-type offenses.<sup>13</sup> This statistic implies that almost everyone who reads this paper, including its author, has acted in a manner which could have resulted in incarceration if we had been caught and that disposition served the

---

9. CENSUS OF 1971 *supra* note 6.

10. *Why Treat?* *supra* note 3, at 27.

11. See Comment, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974) [hereinafter cited YALE PINS STUDY]. See also Klapmick, *Children's Rights: The Legal Rights of Minors in Conflict with Law of Social Custom*, 4 CRIME AND DELINQ. LIT. 449, 470 (1972); cf. Downey, *Why Children Are in Jail*, 17 CHILDREN 21 (1970).

12. ORLANDO & BLACK *supra* note 5.

13. See Comment, *Persons in Need of Supervision: Is There a Constitutional Right to Treatment?* 39 BROOKLYN L. REV. 624, 628 (1973) [hereinafter cited as *Constitutional Right to Treatment*]. The PINS classification

was developed to cover forms of deviant juvenile behavior which are considered disturbed, although not criminal, by adult standards. The New York State Legislature, in creating this new status recognized that the non-criminal conduct requisite for a PINS adjudication, in contrast to the criminal conduct required for a juvenile delinquency adjudication also necessitated facilities commensurate with the required treatment methods for these two distinct classes of children. It was intended that this new classification would provide the courts with more flexibility, that PINS would be treated separately from juvenile delinquents, and that any stigma would be eliminated (footnotes omitted).

*Id.*

fancy of some juvenile court judge. Probably, all that stood between us and those heavy iron doors were caring parents and blind luck. There are a multitude of children each and every year who are not that lucky.

In the name of *parens patriae*, our American system of justice has yearly denied thousands of children due process rights declared essential to preserve the liberty of adults and then confined them to institutions where conditions are intolerable. The only "crime" many of these children committed was the crime of being unwanted, unloved, or unmotivated. In many ways, they were the victims of the adverse conditions of our society. Yet, since we cannot lock up society, we lock up its children instead. Recognizing this, Justice Fortas stated in *Kent v. United States*:

There is evidence, in fact, that there may be grounds for concern that the child received the worst of both worlds; that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

The juvenile does in fact receive the worst of both worlds. Although the system has failed in its goal of rehabilitation as to both status and criminal offenders, the continuation of the present system cannot be justified as to status offenders. In the case of children who have performed criminal acts, their continued detention can be justified, and persuasively, by the theories of punishment and deterrence. However, once society admits that the high ideals of rehabilitation and treatment have become words without substance, then there can be no justification for depriving children of their constitutional right to liberty without due process of law. This right entails full procedural safeguards and the substantive right not to be incarcerated unless convicted of a crime.<sup>14</sup>

The purpose of this article is to argue for a significant change in the way juvenile status offenders are currently treated. In the first section of the article, one legislative approach to this problem will be examined, that being the philosophy of radical nonintervention. In discussing this alternative, the focus will be on the structural failings of the juvenile justice system and will consider modifications.

---

14. As it currently exists, the juvenile justice system results in the status offender being subjected to the worst of two approaches to deviant behavior by being viewed as both "sick" and "bad." See Malmquist, *Juvenile Detention: Right and Adequacy of Treatment Issues*, 7 L. AND SOC'Y. REV. 159, 160 (1972) [hereinafter cited as MALMQUIST].

The second portion of this article will evaluate legal solutions that can be utilized by lawyers and judges to improve the plight of the status offender. The main discussion will concern the "right to treatment" as applied in the juvenile context; but other legal avenues to the system's improvement will also be considered. Finally, combined legislative and legal solutions previously proposed necessitates the making of some policy judgements as to which courses merit the greatest attention.

It should be noted that this article is exclusively concerned with the juvenile status offender. Thus, many of the solutions evaluated will not directly improve the situation of the juvenile who has been convicted of a criminal act, although this may be the indirect result.

## I. THE LEGISLATIVE SOLUTION: RADICAL NONINTERVENTION

### A. *Operation of the Juvenile Justice System As It Applies to Status Offenders.*

As noted in the Introduction, the number of status offenders who are deprived of their liberty by being restricted in a juvenile institution is numerically significant. These statistics do not include those who were exposed to the torments of state intervention but escaped confinement. Many of these children are extremely young and face spending a significant developmental period of their lives behind closed doors. A shocking aspect of a great many PINS statutes is the absence of a minimum age limit restricting the number of those over whom jurisdiction may be exercised. While a few states do designate a minimum age limit for status offenders, most define "child" simply as a person under the age of eighteen, seventeen, or sixteen.<sup>15</sup>

#### 1. Jurisdiction Over Status Offenders By Referral.

There exist a plethora of avenues through which a child can become an adjudicated status offender. The most common method involves referral of a child to the juvenile court on a PINS charge. Usually the referring party is either a parent, guardian, or custodian, or a school, police, or welfare official.<sup>16</sup> The parent consti-

---

15. Rosenberg & Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 MICH. L. REV. 1097, 1101 (1976) [hereinafter cited as *Rebellious Son*]. See, e.g., ALA. CODE tit. 13 § 350 (3) (1959) (under 16); HAWAII REV. STAT. § 571-2(5) (Supp. 1974) (less than 18); LA. REV. STAT. ANN. § 13:1569(3) (West Supp. 1975) (less than 17). *Id.* at n.21.

16. *Id.* at 1103. For example, a recent New York survey discloses that parents or parental surrogates initiated fifty-nine percent of all PINS actions, twenty-five percent were instituted by other parties, such as unrelated individuals and police. See ADMIN. BD. OF N.Y. JUDICIAL CONFERENCE, REPORT FOR JUDICIAL YEAR 1972-73,

tutes the most significant referring party, accounting for roughly fifty-nine percent, for example, of referrals in New York.<sup>17</sup>

Subsequent to referral, a petition is filed with the appropriate juvenile court. The court is generally required to decide whether the child is to be released into the parent's custody or whether he will be confined to some sort of institution to await adjudication. Statutory bases for confinement vary from state to state, but generally include the necessity for protection of the public and the child, the probability that the child will return for his hearing, the availability of proper supervision at home or in some other place of disposition and the likelihood that the child will commit a criminal act before trial.<sup>18</sup>

Although most juvenile statutes prescribe the standards upon which commitment decisions are to be made, studies indicate that in many jurisdictions, the determining factor is the willingness of the parent(s) to take the child home.<sup>19</sup> A major study in New York disclosed that in about half of all interim detentions, the commitment decision was based upon parental refusal to return the youth to the family home.<sup>20</sup> Although one court has held that this type of decision constitutes denial of equal protection,<sup>21</sup> it continues to be the prevailing practice. Thus, to a great extent, a child is doubly-punished by being unwanted and by being subjected to the potential horror of a juvenile institution or, perhaps, an adult jail. Whether a child is brought to court and whether he is incarcerated often depends less on his own conduct but on the

---

331 (1974). Another such study, involving 316 PINS children in New York City who were removed from their homes by court action, found that sixty-five percent of the PINS petitions in the survey were filed by the children's mothers. See OFFICE OF CHILDREN'S SERVICES OF THE NEW YORK JUDICIAL CONFERENCE, *THE PINS CHILD, A PLETHORA OF PROBLEMS* 44 (1973). See also LEAA ANNOUNCEMENT ON DEINSTITUTIONALIZATION, *supra* note 7, at 7-8.

17. See ADMIN. BOARD OF NEW YORK JUDICIAL CONFERENCE, REPORT FOR JUDICIAL YEAR 1972-73, at 331 (1974).

18. *Rebellious Son*, *supra* note 15, at 1104. See, e.g., MINN. STAT. ANN. § 260.171 (subd. 1) (1971); N.Y. FAMILY CT. ACT. § 739 (a) (McKinney 1975); UNIFORM JUVENILE COURT ACT § 14.

19. *Rebellious Son*, *supra* note 15, at 1105.

20. See YALE PINS STUDY, *supra* note 11, at 1396-97. "Moreover, when such a punitive detention occurs, in two out of three cases the youth is placed in a prison-like secure facility; a rate of secure detention as high as that for juveniles who the court fears will commit a criminal act." *Id.*

21. See *In re Norman C.* 74 Misc. 2d. 710, 345 N.Y.S.2d. 338 (Fam. Ct. 1973) (holding that secure detention for a child accused of delinquency for the sole grounds that he had no parent to whom he could be paroled constituted a denial of equal protection of the law.)



fortuitous consequences of parental tolerance and compassion, an area over which he has little or no control.

Interestingly, older status offenders are more apt to be declared guilty of the status offense than are younger children. Generally, there are two major reasons for this result, neither of which is very appealing on its face. First, as juvenile court judges are often parents themselves, they may identify with parents facing problems with their teenage child and thus be more inclined to accede to the parents' wishes. This seems to be a suspect reason to deprive a person of his liberty. Second, the petition for a PINS-adjudication may be the welfare department's substitute for a "neglect proceeding" in the case of older children, where it feels that it cannot adequately make the case for parental "neglect" or "dependency." Juvenile court personnel generally prefer PINS proceedings which, in all probability, will be concluded quickly with some "confession of guilt" by the child.<sup>22</sup> The higher burden on the state in neglect proceedings reflects a policy judgement by the legislature that state intervention is not justified absent a certain threshold level of demonstrated improper parental care. Below that point, there is a fundamental core of family privacy into which the state should not intrude. When the status offense is so used as to circumvent this zone, it is a clear abuse of the discretion of the juvenile court.

Often, the complaining party has the option to utilize community resources, such as voluntary services or the court's probation department, before he turns to the juvenile court for relief. However, not all states require that the petitioner investigate alternatives to a PINS adjudication prior to commencing his action. Some states sanction direct refusal on the part of the parents to avail themselves of the intake procedure.<sup>23</sup> In fact, a number of jurisdictions permit a petitioner to file a PINS petition against a child even if the probation department has investigated the case and recommended informal disposition.<sup>24</sup> The impact of these types of provisions is that parents or other complaining parties generally have unfettered access to the juvenile court despite the availability and superiority of other dispositional alternatives less offensive to the child.

---

22. See YALE PINS STUDY, *supra* note 11, at 1393-97.

23. See, *Rebellious Son*, *supra* note 15, at 1103. See, e.g., GA. CODE ANN. § 24 A-1001(3) (Supp. 1975); MD. CTS. & JUD. PRO. CODE ANN. § 3-810(e) (Supp. 1975); UNIFORM JUVENILE COURT ACT § 10(a)(3).

24. *Id.* at 1103-4. See, e.g., ILL. ANN. STAT. ch. 37, § 703-8(3) (Smith-Hurd 1972); N.Y. FAMILY CT. ACT § 734(b) (McKinney 1975).

## 2. Improper Use of the Status Offense.

It is very difficult to specify what acts justify adjudication as status offenses. Basically, any criminal act for which there is an adult counterpart is usually a sufficient grounds for determining that a child is a status offender. Additionally, most any noncriminal act which in any way offends the sensibilities of the presiding juvenile judge is also sufficient. In many cases, what is punished are instances of trivial misconduct. In many ways the juvenile justice process has shifted from correcting criminal behavior in children to enforcing parental dictates via the *parens patriae* power of the state.

Related to the occasional triviality aspect of PINS offenses is parental utilization of the juvenile court in order to divest themselves of the responsibility of caring for their children. Through the creation of the juvenile justice system, society has indirectly communicated to parents that should they find the burdens of raising their children unpleasant, society will relieve them of that burden through its juvenile justice system. The unloving, uncaring, irresponsible parent is then rewarded by the status offense system since he is given the option of shifting his responsibility to the state. It is time that society change this aspect of the system and place the ultimate responsibility for rearing children back on the family where it belongs.

The vagueness of the standards for commitment as a "status offender" has bred one further abuse. Status jurisdiction is often utilized as a substitute for a charge of delinquency where the criminal act cannot be proved.<sup>25</sup> This practice constitutes a *de facto* denial of the procedural and substantive rights guaranteed a juvenile under *In re Gault*.<sup>26</sup> By allowing a PINS finding to be included in a more serious criminal charge as a "lesser included offense," the juvenile justice system makes a mockery of the due

---

25. *Id.* at 1115-16. "In cases where there is insufficient proof of drug-related crimes, receipt of stolen goods, vehicular homicide, reckless driving, assault, burglary, criminal mischief, or sex offenses, trial courts have instead made PINS findings." *Id.* at 1116 (footnotes omitted).

26. *In re Gault*, 387 U.S. 1, 19-29 (1967).

Under our constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected?"

*Id.* at 28 (footnote omitted).

process model. The impact is to circumvent the constitutional requirement of "proof beyond a reasonable doubt,"<sup>27</sup> because some states allow a lesser standard of proof in PINS cases. The vagueness inherent in the definition of status offenses allows the introduction of minimal evidence to sustain a conviction. The use of status offense proceedings has eroded many of the constitutional rights guaranteed to children by the Supreme Court.

Perhaps the most blatant example of the dishonest use of a "parental control" statutes occurred in Berkeley, California. A study performed in that city<sup>28</sup> indicated that the local police were utilizing the "beyond parental control" statute to arrest and remove from the area out-of-town juveniles who had come to spend the summer in the city. The imposition of the statute was justified on the theory that since the parents were not accompanying their children, the children were "beyond parental control" and thus subject to arrest and disposition under the statute. These children were arrested, booked and fingerprinted despite the fact that most of them were there with the permission of their parents. Later, when this practice was publicized, children coming to Berkeley produced notarized letters from their parents indicating that the parents knew of their whereabouts and approved of their activities. Despite these letters, many of these children were arrested, booked and sent home. It was clear that the Berkeley Police Department suspected that many of these children were involved in minor street crime, although they had no proof of such. The authorities also felt that those children who were not involved in crime were a "nuisance" to the community, and that their exodus would improve living conditions for the tax-paying residents. Thus, the police and the courts utilized this ordinance to remove these children from the city, despite the fact that they had committed no provable wrong. This episode is a clear case of extension of a vague statute to control behavior of which a law enforcement agency disapproves, but which is not prohibited by law.

---

27. *In re Winship*, 397 U.S. 358, 366-68 (1970).

28. Comment, *California Predelinquency Statute: A Case Study and Suggested Alternatives*, 60 CAL. L. REV. 1163 (1972). Berkeley was a haven for large numbers of young people during the days of the free speech movement and student activism.

The summer of 1970, like previous summers, witnessed an influx of young people. In response to this situation, the Berkeley Police Department employed a "runaway net" and detained and returned over 1,000 children to their parents. Anyone who appeared to be a nonresident of the city under the age of 18 and was unaccompanied by a responsible adult was subject to detention by the police.

*Id.* at 1169 (footnotes omitted).

The President's Commission on Law Enforcement and Administration of Justice surveyed practices such as these and noted:

In addition to behavior that would be criminal on the part of an adult, delinquency includes behavior illegal only for a child: conduct uniquely children's—truancy, incorrigibility—and conduct tolerated for adults but objectionable for children—smoking, drinking, using vulgar language, violating curfew laws, hanging around in bars or with felons or gamblers. The provisions on which intervention in the category of cases is based are typically vague and all-encompassing: Growing up in idleness and crime, engaging in immoral conduct, in danger of leading an immoral life. Especially when administered with the informality characteristic of the court's procedures, they establish the judge as arbiter not only of the behavior but also of the morals of every child (and to an extent the parents of every child) appearing before him.<sup>29</sup>

When you reach the bottom line, all that can be said definitely about the juvenile court intake process is that little can be said definitely about it. The system is characterized with endless discretion on the part of parents, the police and judges.<sup>30</sup> The result is that intake decisions are often made on factors other than the seriousness of the offense and the needs of the child.

The seriousness of the allegation often bears little relation to whether a case is settled informally or taken to court. At the initial police contact point, the disposition often fails to reflect the gravity of the offense. A study conducted by Piliavin and Briar concerning police encounters with juveniles reported that the *demeanor* of the child was one of the most important factors influencing police decisions. Approximately ninety percent of the cases studied by these researchers were decided on the basis of the child's demeanor rather than the nature and gravity of the offense. Also, police decisions were influenced by the child's age, race, and style of dress.<sup>31</sup>

---

29. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *Task Force Report: Juvenile Delinquency and Youth Crime* 25 (Washington, D.C., U.S. Government Printing Office, 1967) [hereinafter cited as TASK FORCE REPORT].

30. See Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975) [hereinafter cited as WALD].

31. It is not surprising to find abuse in such a system of uncontrolled policy discretion. One of the hallmarks of the criminal justice system viewed as essential to protect individual liberties is some check on police practices. In the case of small children, such checks are virtually nonexistent. Instead of relying on the Constitution to protect the rights of juveniles, we defer that responsibility to their tailor and speech teacher. Piliavin & Briar, *Policy Encounters With Juveniles*, AMERICAN JOURNAL OF SOCIOLOGY 206-14 (Sept. 1964).

Even at the formal adjudication stage, the seriousness of the offense often has only peripheral importance. Sexual misbehavior<sup>32</sup> is treated with greater severity than many criminal acts.<sup>33</sup> A case that reaches this point in the process is automatically adjudicated.<sup>34</sup> This makes the child the victim of chance and the persistence of the court as much as of his own criminal activity. Adjudication is more likely if the parents do not tire of court proceedings, the youth does not age beyond the court's jurisdiction, and no one in the system convinces the parent and the child to agree to an alternative disposition.<sup>35</sup>

The single thread running through both the preadjudication and formal adjudication stages is that the child's needs are frequently lost in the shuffle. Detention is more probable in the case of minor allegations of ungovernable activity than in cases involving serious runaways and persons accused of assault.<sup>36</sup> The vast majority of those confined are sent to secure institutions that closely resemble adult penal institutions, irrespective of the offense charged. An inspection of these dispositions indicate that financial or other non-treatment related reasons govern the court's placement decision rather than some notion of what would be in the best interests of the child.

### 3. Discharge of the Child

The only thing in the juvenile justice system that appears to be more discretionary and arbitrary than the intake decision is the decision regulating the outflow from the juvenile institution.

---

32. Often this means any sexual activity at all, especially if the accused child is female.

33. YALE PINS STUDY, *supra* note 11, at 1398-99. "Fifty percent of the cases in which there are allegations of sexual misbehavior are adjudicated; in contrast, only 36 percent of cases in which there are criminal allegations are adjudicated." *Id.* at 1399 n.102.

34. *Id.* at 1399. "In 60 percent of cases, the youth admits the allegations against him in full; in 24 percent the youth admits the allegations against him in part. Thus, in only 7 percent of cases is there a denial of the allegations." *Id.* at 199 n.103.

35. *Id.* at 1399. "When the court eventually decides upon an 'appropriate' disposition (footnote omitted), the degree to regulation and service it mandates for the youth often seems an incongruously small return on the court's investment of time (footnote omitted) and labor, especially in light of the imposition upon the youth and his family." *Id.* at 199.

36. *Id.* at 1398.

For example, in cases involving such minor allegations as verbal abuse and undesirable companions the detention rates are 57 percent and 55 percent respectively. In cases involving more serious charges like assault, malicious mischief, and robbery, the detention rates are 14 percent, 25 percent, and zero percent, respectively.

*Id.* at 1398 n.98.

Again, immense discretion is allowed and the decision is seldom reviewed. The length of stay in juvenile facilities has little, if any, rational relation to the seriousness of the offense or the effectiveness of treatment. The result is that status offenders are often confined for longer periods than serious offenders.<sup>37</sup> Rena Uviller, presently Director of the Juvenile Rights Division of the American Civil Liberties Union has observed that PINS children placed in state training schools remain incarcerated for much longer periods than delinquents who commit serious crimes because many parents of PINS children oppose their return to the family home.<sup>38</sup> Another similar study reveals the same conclusion:

Length of stay is more likely to be determined by the adjustments to institutional rules and routines, the receptivity of parents or guardians to receiving children back home, available bed space in cottages and other treatment facilities, and the current treatment ideology. Juvenile status offenders tend to have more family trouble and may actually have greater difficulty in meeting the criteria for release than their delinquent peers. The result is that the delinquents without crimes probably spend more time in institutions designed for delinquent youth than "real" delinquents.<sup>39</sup>

### *B. Arguments for Radical Nonintervention*

As has been demonstrated, the juvenile justice system is in need of a major overhaul. The change advocated is the adoption of a philosophy of "radical nonintervention" as applied to status offenders. Radical nonintervention involves withdrawal of the juvenile court's jurisdiction over acts which would not constitute a crime in the case of an adult. Additionally, all aspects of state intervention should be prohibited unless specifically mandated by some other statute such as the Health and Safety Code. There are several reasons for advancing this position.

---

37. See Stone, *Mental Health and Law: A System in Transition*, CRIME AND DELINQUENCY ISSUES (U.S. Dept. of Health, Education and Welfare, Public Health Service: Alcohol, Drug Abuse, and Mental Health Administration, Washington D.C., U.S. Government Printing Office, 1975) [hereinafter cited as STONE].

38. See Letter to the N.Y. Times, Feb. 16, 1975, § 6 (Magazine), at 22, col. 1.

39. See Note, *Nondelinquent Children in New York*, 1972 COL. J. LAW AND SOC. PROBS. 249, 267.

*Id.*

## 1. Ineffectiveness of Intervention

First, state intervention in the case of status offenders is in many cases ineffective. It must be noted that the stated goals of state intervention in the case of status offenders are rehabilitation and treatment. It is by this standard that the juvenile justice system must be judged as it applies to status offenders.

The goal of juvenile rehabilitation has been unrealized. The humanitarian concern for the welfare and rehabilitation of PINS has rarely been implemented by the juvenile courts.<sup>40</sup>

Despite the . . . rhetoric which has accompanied the juvenile court movement, it has been amply demonstrated that the country's juvenile courts have simply lacked the resources to live up to their pretensions. In the main, the dispositional alternatives available in the case of minors alleged to be beyond the control of his parents or custodian are precisely the same as those available in the case of a minor charged with the violation of a penal law . . .<sup>41</sup>

The effect of the broad jurisdiction of the juvenile court is to subject millions of young, frightened children to what is, in reality, a criminal justice system. In this system they are called criminals so often that, eventually, they begin to believe it. The system causes them to identify with a criminal peer group and deprives them of their precious freedom as punishment for acts of youthful disobedience. As a means of deterring criminal actions, coercive treatment as exercised by the juvenile justice system has been a massive failure.

It should be noted that the existence of status offense jurisdiction is a major factor contributing to the breakdown of the juvenile justice system. The mistaken legislative ideas revealed in juvenile law statutes, that the state can better raise children than can the children's parents, has led society to escape careful evaluation of the system and to overburden the system to such an extent that it is unlikely to be effective.<sup>42</sup>

The net effect of this system collapse is that few children are receiving any form of real treatment. Many major investigations of state training schools and significant appellate division case law demonstrate that these schools totally fail to provide status offenders with appropriate rehabilitative treatment.<sup>43</sup> Several major investigative studies of shelters and training schools have

---

40. See Note, *Treatment for Misbehaving Minors*, 20 CATH. LAW 106-07 (Spring 1974) [hereinafter cited as *Misbehaving Minors*].

41. See Gough, *Beyond Control Child*, 16 ST. LOUIS L.J. 182, 190 (1971) [hereinafter cited as *Beyond Control*].

42. See ORLANDO & BLACK, *supra* note 3, at 19.

43. *Beyond Control*, *supra* note 41, at 107-08. See note 45 *infra*; see, e.g., *In re Jeanette P.* 34 App. Div. 2d 661, 310 N.Y.S. 2d 125 (2d Dep't 1970); *In re Lloyd*, 33 App. Div. 2d 419, 308 N.Y.S. 2d 419 (1st Dep't 1970).

been conducted in New York. Doctor Stone of Harvard outlines the results of one of those inquiries:

As for conditions at the shelters, New York State Attorney General Lefowitz has termed them "disgraceful," "dreadful," and "inadequate". . . . Overcrowding has converted virtually all potentially therapeutic space—classrooms, craft rooms, lounges, etc.—into dormitories . . . . Psychiatric care and drug abuse help is said to be virtually nonexistent . . . . Staffing is chronically thin; one shelter with an average population of 121 girls was budgeted in 1970 for 21 psychiatric manhours per week, including diagnosis and consultations . . . . Despite an occasional rash of election time promises for reform and new appropriations . . . conditions in the shelter show no hope of improvement in the foreseeable future.<sup>44</sup>

There are some who argue that one need not be concerned with the conditions in the shelter facilities since they provide mainly transitional care and that treatment within the state's training schools and institutions is a far higher level. Unfortunately, facts do not support such a conclusion. In December of 1973, Arthur Levitt, State Comptroller of New York, disseminated a report on the conditions and treatment programs in state training schools.<sup>45</sup> The general conclusion of this report was to the effect that insufficient funding and inadequate staffing mandated treatment levels below acceptable standards.

Rehabilitative treatment can have little chance of success unless there is a sufficient number of qualified personnel providing that treatment.<sup>46</sup> The Levitt study found both insufficient pre-employment preparation and a lack of in-staff training provided by the schools.<sup>47</sup> The study indicated that there was an absence of a standard civil service requirement for a beginning child care worker and that senior, principal, and head child-care workers need only have a minimum of two years experience in institutional care for delinquents in addition to a high school diploma.<sup>48</sup> Given the poor working conditions in most state institutions and the paucity of employment qualifications, it is no wonder that even a full ward of staff-workers cannot effectively cope with the problems of the delinquent child.

---

44. STONE, *supra* note 37, at 153 (footnotes omitted).

45. See OFFICE OF THE COMPTROLLER, DIVISION OF AUDITS AND ACCOUNTS, REP. NO. A1-15-74, AUDIT REPORT ON REHABILITATION OF ADOLESCENTS AT STATE RESIDENTIAL FACILITIES, EXECUTIVE DEPT., DIVISION OF YOUTH (1973) [hereinafter cited as AUDIT REPORT].

46. *Id.* at 44.

47. *Id.* at 44-47.

48. *Id.* at 44.



The professional members of the staff include the psychiatrists, psychologist and social workers, who theoretically are responsible for providing the child's treatment and his physical and emotional needs. In 1972 the Committee on Mental Health Services, headed by Justice Polier, reported on the quality of professional services in New York's training schools:

The fragmented, fractional, and inadequate psychiatric, psychological, and casework services made available by the state for training schools cannot possibly provide even a modicum of the treatment services that the children require. It is doubtful that the part-time psychiatrists . . . can adequately screen all new admissions and advise on medication, special programs, transfers and discharges.<sup>49</sup>

State training schools are, at least in theory, educational institutions. However, the Levitt report also concluded that the educational services provided in these facilities are far below minimum standards. The report found "inconsistent patterns" of educational services, with classroom time varying from three and one-half to ten hours per week per pupil. Some schools were without remedial reading programs and high absentee rates were discovered among both students and teachers.<sup>50</sup>

In many of these schools, drug tranquilization is substituted for effective treatment programs. The drug tranquilization practice is used for custodial and control reasons without any treatment justification.<sup>51</sup> This practice is indicative of the philosophy of many training schools in New York. With regard to the educational and mental health care at these schools, the findings of the Levitt and Polier reports demonstrate the irrelevance of these institutions to the actual needs of ungovernable children. As Judge Beatrice S. Bursten of the Family Court of Nassau County concluded: "There is not a single training institution that can really boast of being a residential treatment center."<sup>52</sup> In light of the results of these and numerous studies, it is not surprising that many have called for the virtual shut-down of nearly all of these institutions.<sup>53</sup>

Clearly, this is not a situation unique to New York.<sup>54</sup> These menacing institutions have been spawned throughout the land. In Illinois, a study recently disclosed that eighty percent of the children committed to state juvenile facilities are placed in custo-

---

49. See COMMITTEE ON MENTAL HEALTH SERVICES, *INSIDE AND OUTSIDE THE FAMILY COURT IN THE CITY OF NEW YORK. JUSTICE CONFOUNDED: Pretensions and Realities of Treatment Services* 52 (1972) [hereinafter cited as CONFOUNDED].

50. AUDIT REPORT, *supra* note 45, at 3-5, 11-35.

51. STONE, *supra* note 37, at 154.

52. AUDIT REPORT, *supra* note 45, at 5.

53. Citizens Committee for Children of New York, *The New York Training School System* 5 (1967).

54. Janowitz, *forward* to STREET, WINTER, & PERROW, *ORGANIZATION FOR TREATMENT* at xi (he estimates that a least one-half of all juvenile institutions are basically custodial).

dial institutions similar to adult penal institutions rather than in rehabilitative centers designed to provide child care.<sup>55</sup>

The crisis generated by the inexcusable conditions in juvenile facilities is compounded by the general paucity of resources allocated to the juvenile justice system. The impact of inadequate funding is lack of alternative dispositions. The juvenile courts have never been given the personnel, facilities, auxiliary services, and operating funds essential to meeting the idealistic goal of rehabilitation.<sup>56</sup> The President's Commission of Law Enforcement and the Administration of Justice reported that the juvenile courts have consistently failed to attract qualified judges. The tremendous case overloads force the system to spend far too little time considering the merits of each individual case. Additionally, there is a severe shortage of professionals who are able to deal with children outside of juvenile institutions. Even when these specialists are available to evaluate the child and his emotional problems, the lack of appropriate services and facilities often reduces their work to mere "paper recommendations" to be filed and forgotten. The net impact is that individual treatment has become a goal in search of a reality.

Numerous advocates of the rehabilitative model assert that probation can be an effective alternative to institutionalization. Even if the premise of effectiveness is accepted, the scarcity of resources has blocked any contribution that large-scale probation programs could have made. A recent study of juvenile courts has revealed that on a nationwide basis, one-third of juvenile courts have no probation officers or social workers.<sup>57</sup>

Even when probation services are provided, they are usually cumbersome and inefficiently organized. The President's Com-

55. See Renn, *The Right to Treatment and the Juvenile*, 19 CRIME AND DELINQUENCY 477, 477 (1975).

56. MIDONICK, CHILDREN, PARENTS AND THE COURTS: JUVENILE DELINQUENCY UNGOVERNABILITY AND NEGLECT 163 (1972).

57. TASK FORCE REPORT, *supra* note 29, at 8.

The dispositioned alternatives available even to the better endowed juvenile courts fall short of the richness and the relevance to individual needs envisioned by the court's founders. In most places, indeed, the only alternatives are release outright, probation, and institutionalization. Probation means minimal supervision at best. A large percentage of juvenile courts have no probation services at all, and in those that do, caseloads are typically so high that counseling and supervision take the form of occasional phone calls and perfunctory visits instead of the careful, individualized service that was intended.

*Id.*

mission on Law Enforcement and the Administration of Justice viewed the impact of inadequate resources on the probation system and concluded: "Probation means minimal supervision at best. Counselling and supervision take the form of occasional phone calls and perfunctory visits instead of the careful, individualized service that was intended."<sup>58</sup>

It is curious that a society known to so greatly value its children that it created a special system to treat and help them has not found it within its heart to provide the resources necessary to effectively operate this system. This is especially appalling when one considers status offenders since the *only* justification for their entry into the system was the notion that the state could help them.

There are a multitude of evidentiary facts that indicate the failure of the juvenile system. Courts and critics alike cite the high rates of recidivism and crime among juveniles as evidence of its lack of effectiveness. In 1973 twenty-three percent of all persons arrested for violent crime and fifty-one percent of those arrested for property related offenses were under the age of eighteen.<sup>59</sup> The recidivism rate among juveniles is even more shocking. A study conducted for the President's Commission revealed that sixty-one percent of juveniles referred to the court in the District of Columbia in 1965 had been referred to the court at least once before, and forty-two percent had been referred at least twice before.<sup>60</sup> In a study conducted in Philadelphia it was found that eight-four percent of offenses were committed by recidivists who comprised fifty-four percent of the sample. Offenders with five or more arrests comprising eighteen percent of the sample was responsible for fifty-one percent of delinquent acts.<sup>61</sup>

Even steadfast advocates of continued state intervention in the lives of status offenders can cite little persuasive evidence as to the effectiveness of the rehabilitative model. At best, these optimists can argue that further research is imperative and that not all the results are in. However, the juvenile justice system, as we presently know it, arose over seventy-seven years ago, and every year the juvenile justice process steals, and perhaps ruins, the lives of hundreds of thousands of children.

---

58. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, (Washington, D.C., U.S. Government Printing Office, 1967) [hereinafter cited as CHALLENGE].

59. FEDERAL BUREAU OF INVESTIGATION, 1974 FBI UNIFORM CRIME REPORTS 187 (1974).

60. REPORT ON THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 773 (1966).

61. See Simpson, *Rehabilitation of Juveniles*, 64 CALIF. L. REV. 984, 987 (1976) [hereinafter cited as SIMPSON].

The President's Commission on Law Enforcement and the Administration of Justice, one of the most prestigious panels ever assembled, surveyed the seventy-seven year history of the juvenile court and concluded that: "(the juvenile justice system) has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of juvenile criminality, or in bringing justice and compassion to the child offender."<sup>62</sup> Not all advocates of continued juvenile court jurisdiction over nondelinquent children are blind to the facts described above. However, they maintain that the philosophy behind the system is sound and that effectiveness can be guaranteed with some increased funding and fine-tuning. The standard bureaucratic response that increased funding is the panacea to all woes is easily applied to the juvenile court.

While additional expenditures may improve institutional conditions for actual delinquents, increased funding levels for status offenders would be fruitless. Additional spending will not solve the problems that surround status offenders because the underlying *philosophies* behind the juvenile justice system renders it *inherently* ineffective in this area.

To a great extent, the juvenile justice system's treatment of status offenders is predicated upon the "medical model" of delinquency. Vaguely, juvenile delinquency is deemed an illness with medical cures. However, the medical model is inherently inapplicable to the juvenile status offender. It fails because of several factors.

First, the medical model is inappropriate for diagnosis and treatment. For many years social scientists, psychiatrists, probation officers, and juvenile court judges have accepted the medical model in the area of juvenile delinquency prevention and treatment at a high cost and with little success. This model has not only proved to be misleading when applied to the causes and cures of juvenile misbehavior but has, in fact, hindered potentially successful corrective efforts.<sup>63</sup> In April, 1975, Robert W. Balch, Assistant Professor of Sociology at the University of Montana, wrote a comprehensive article rejecting the imposition of the medical model in the area of juvenile delinquency. He noted:

The disease analogy has a basic weakness: it obscures the nature of devi-

---

62. TASK FORCE REPORT, *supra* note 29, at 7.

63. See Balch, *The Medical Model of Delinquency*, 21 CRIME AND DELINQUENCY 116 (1975) [hereinafter cited as BALCH].

ance. Unlike physical illness, juvenile delinquency has no existence apart from the social judgements we make about behavior. If a person is physically ill—if he has a fever, for example—we can trace his symptoms to objective physiological conditions, an infection perhaps. But apart from societal standards and moral judgements, there is no independent criterion for the “sickness” we call delinquency.<sup>64</sup>

The social deviance theory is even more applicable to status offenders, for often their conduct consists merely of offending the values of some older individuals. In short, there is no “qualitative” difference between the status offender and the “normal” child that appears when one compares a mentally ill patient to a “normal” child. Delinquency is not a “disease.” The principles that guide our decisions about the causes and cures of physical, and even mental ailments have little bearing on social deviants. The effects of psychotherapy on these individuals varies to extremes ranging from significant improvement to horrendous deterioration. Some studies which have recently appeared suggest that other forms of treatment are equally hopeless. The lack of treatment is no guarantee of further harm and the presence of treatment does not promise the patient’s improvement.<sup>65</sup> Although some delinquent children may in fact be mentally ill, the illness exists apart from their delinquency and is not an inherent part of such behavior.

Second, the fact that delinquency tends to decline with age also suggest the inappropriateness of the medical model. Most delinquents never become adult offenders whether or not they receive treatment and regardless of the quality of treatment. Delinquency appears to be a passing stage that most children outgrow. The reform through maturation is difficult to explain if we accept the premises of the medical model.<sup>66</sup>

---

64. *Id.* at 117.

Consider the case of venereal disease. VD is more than a physical illness—there is a powerful social stigma attached to it. But remove the social stigma, even make VD a prestigious thing to have, and the physical disorder remains. Venereal diseases exist independently of the judgements we make about them. Juvenile delinquency is fundamentally different—the social judgment is everything. Remove the condemnation of all those things we call juvenile misbehavior and delinquency would cease to exist.

*Id.*

65. *Id.* at 124.

What holds for physical illness does not necessarily hold for social deviance. There is some evidence that patients undergoing psychotherapy are no more likely to improve than comparable persons who experience no treatment whatsoever. Furthermore, the condition of those *not* undergoing psychiatric treatment does not necessarily deteriorate; it may even improve. The effects of psychotherapy are extremely variable, ranging from marked improvement to severe deterioration.

*Id.* (footnote omitted).

66. MATZA, *DELINQUENCY AND DRIFT* (New York, John Wiley, 1964), chapters 4 and 5 [hereinafter cited as MATZA].

Criticism of the medical model's place in juvenile delinquency has not been confined to lawyers and social scientists. Several members of the medical community have called for the abolition of the medical model in this area. Dr. Alan Stone succinctly lists the most important objections to viewing the juvenile crime problem as a medical matter:

In my view . . . the solution to this dilemma cannot be found within the medical model of the mental health profession because: (a) Inpatient psychiatric facilities for children with rare exceptions have been horrendous. (b) Whatever the value of traditional diagnostic criteria may be, they are not readily applicable to child illness. (c) Psychotherapeutic methods that do exist are geared to the intact family, and this is rarely the target group of the juvenile courts. (d) Finally, as Justine Wise Polier points out, the dollar and resource cost of the medical model approach is totally unrealistic.<sup>67</sup> (Footnotes omitted.)

The medical model was the direct stimulus for the development of juvenile institutions from which horror stories of inhuman conditions have recently emerged. These institutions have been a dismal failure for studies indicate that these juvenile institutions have no measurable beneficial effect on children committed to them.<sup>68</sup> Despite this fact, many continue to be confined to these dungeons each and every year in the name of "treatment."

The medical model of juvenile delinquency has been a significant impetus to the intervention in the lives of status offenders.<sup>69</sup> Under the guise of helping the child, the concept of predelinquency has been seriously abused. In an important study, Lerman learned that children adjudicated status offenders often receive more severe dispositions than do hardened criminals.<sup>70</sup> These children are usually confined with more serious offenders who often pass on their criminal skills. This is all done in the name of the medical model. The critical moral question is posed by Professor Balch and remains one for all to answer: "is it fair to

---

67. STONE, *supra* note 37, at 145.

68. GIBBONS, *DELINQUENT BEHAVIOR*, 1970, chapter 10 [hereinafter cited as GIBBONS].

69. BALCH, *supra* note 63, at 127.

For example, Dr. Arnold Hutschnecker, a New York physician, has proposed a nation-wide delinquency prevention program. According to his plan, every six- or seven-year-old child in the country would be given a battery of psychological tests to determine whether he has delinquent inclinations. Hutschnecker's pre-delinquents would be assigned to various treatment programs, including interment camps for children with such an unfavorable prognosis that they would probably never be able to adjust to conventional social institutions without intensive care.

*Id.*

70. Lerman, *Child Convicts*, TRANSACTION 37 (July-August 1971).

subject a person to any form of treatment *before* he has committed a criminal offense? The dubious morality of treatment without guilt is made all the more questionable by the absence of any reliable method of identifying predelinquent children.”<sup>71</sup>

If a child who happens to be a status offender is truly mentally ill, then the medical model might have some application and commitment, in the name of treatment, if that treatment is provided, might be justified. However, as to the general status offender, the medical model gives him the worst of two worlds. To most of society, although he may be confined in the name of medicine, he is just another “punk” to them. Not only must he contend with this, but he is also constantly reminded that he has been labeled “sick.” Now he is not only legally deviant, but he is psychologically ill as well.

The labeling process which so fascinates the medical community may have a harmful effect on the juvenile. Proponents of this model cite studies indicating that delinquent juveniles are immature, suspicious, hostile, distrustful, and irresponsible when compared to nondelinquent children.<sup>72</sup> The flaw in these studies is that they were conducted solely upon institutional children. It is no surprise that children forced to live in the dehumanizing conditions of the typical juvenile institution would show these personality traits. According to one study, suspicion, hostility and cynicism are natural products of the juvenile system itself.<sup>73</sup>

Treatment itself, where none is actually needed, may be harmful. The stigma associated with the treatment may do more harm to the child than any improvement he may experience as a result of the treatment.<sup>74</sup> Although most of the children subjected to the juvenile system are not “sick,” they are vulnerable and impressionable. There is a significant chance that the stigma of “delinquency” will become a self-fulfilling prophecy.<sup>75</sup>

The final reason that the medical model should be rejected in the juvenile framework is that it provides a convenient excuse for horrendous institutions and ineffective treatment. If delinquency, truancy, and underachievement can be explained on the basis of the individual emotion and intellectual patterns of the child, then the schools and juvenile institutions are relieved from blame for the misbehavior of their children. The medical model focuses attention away from the institution and on the individual. Also, the

---

71. BALCH, *supra* note 63, at 127.

72. GIBBONS, *supra* note 68, at 76-89.

73. MATZA, *supra* note 66.

74. Toby, *An Evaluation of Early Identification Treatment Programs for Predelinquents*, SOCIAL PROBLEMS 175 (1967) [hereinafter cited as TOBY].

75. BALCH, *supra* note 63, at 124.

protected position provided by the medical model, in that the medical community possesses privileges as to communications with its juvenile patients, is used to shield treatment decisions from public scrutiny, even when the decision is to deny any treatment whatsoever. Thus, the medical community is called upon to enforce the discretion of the police and the courts without its "medical" reasons ever being disclosed, other than by labeling the juvenile's behavior as "deviant" or "incorrigible." These medically imposed labels insulate the court from the real world justifications for the removal of individual liberties, and excuses the court's dispositions based upon these incomprehensible labels. The claim of the medical community to privacy is used to shield treatment decisions from public scrutiny, despite the fact that the decision is to deny any treatment whatsoever. It enforces the discretion of the police and the courts to a frightening level. It insulates the court from the real world where individual liberty is a treasured commodity not to be taken lightly.

One basic premise of the medical model is that children are more susceptible to treatment than adults. The facts have simply not justified that conclusion.<sup>76</sup> However, even if we accept that thesis, we lack sufficient knowledge to transform that notion into effective treatment.<sup>77</sup> Our current knowledge of rehabilitating delinquents is so meager that we are utilizing techniques on a trial and error basis. This implies that our nation's children have become laboratory rats in a very costly experiment.<sup>78</sup>

In concluding this discussion on the underlying premises of the juvenile justice system, I advance the polemic that we simply can-

76. SIMPSON, *supra* note 61, at 1012. "Maturational reform is not evidence of a greater amenability to rehabilitative programs; the reform associated with age appears to occur whether or not the offender is apprehended." *Id.* (footnote omitted).

77. MALMQUIST, *supra* note 14, at 189. See also ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 13 (1964).

Although various theories regarding etiology and treatment exist for mental illness, there is more consensus on what should be done as treatment even if it may not be available. With delinquents, no treatment approaches show any consistent degree of effectiveness-beyond the process of aging. Although some challenge the position that treatment is the *quid pro quo* for detaining a juvenile, this appears increasingly difficult to defend. This is in view of recent court cases spelling out details, such as the number of staff and need for an individualized treatment plan for each patient, in the civil commitment area (*Wyatt v. Stickney*, 1971).

*Id.*

78. MALMQUIST, *supra* note 14, at 160.



not improve the conditions of a child, especially a status offender, with state intervention. There is a substantial body of psychological and psychoanalytical evidence that, in general, children develop best through close contact with a mother and father and that substitutes for that framework act as a barrier to normal development.<sup>79</sup> Also, substantial evidence exists indicating that, except in the case of seriously harmed children such as those physically abused, we cannot improve a child's situation with coercive state intervention. Usually a child is harmed more by the intervention than he is helped. This is true whether the intervention takes the form of actual removal of the youth from his home or probation.<sup>80</sup> The parents will often resent the outside meddling of the court and blame the child for this situation. Thus, improvement is also hopeless if the family resists the in-home therapy.<sup>81</sup> The only remaining step is removal but no evidence indicates that children are always helped through compulsory placement.<sup>82</sup>

Professor Wald of Stanford best sums up this position: "In an ideal world, children would not be brought up in "inadequate" homes. However, our less than ideal society lacks the ability to provide better alternatives for these children. The best we can do is expand our social services for families on a voluntary basis."<sup>83</sup>

Given the fact that the philosophies underlying the juvenile justice system are inappropriate, it is no surprise that its major *weapons* render it *inherently* ineffective.

Institutionalization is the major, and most offensive, tool of the juvenile court. Major studies have proven that a uniformly positive rehabilitative effect can be discounted since there is little evidence of a reduction in recidivism resulting from the incarceration.<sup>84</sup> The California Assembly Interim Committee of

---

79. GOLDSTEIN, FREUD & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 32-34 (1973) [hereinafter cited as *BEYOND*]. This thesis contends that disruptions of continuity have different consequences for different ages: infancy, young children, school-age children, adolescents, and adults. *Id.*

80. WALD, *supra* note 30, at 993.

81. *Id.* at 1023. "Few communities have sufficient personnel and programs to permit meaningful intervention, even in cases involving physical abuse or severe emotional damage. It is highly questionable whether limited resources ought to be expended on families with less severe problems, unless the families request services or accept them voluntarily." *Id.*

82. *Id.* at 1023.

83. *Id.* at 1024.

84. Clarke, *Getting 'Em Out of Circulation: Does Incarceration of Juvenile Offenders Reduce Crime?*, 65 *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY* 528, 528 (1974) [hereinafter cited as *CLARKE*]. This study was concerned only with the rehabilitative effect of commitment. The removal effect and the natural decline in recidivism due to maturation were thus factored out in this portion of the study but later considered.

Procedure concluded that there was "not a single shred of evidence . . . to indicate that any significant number (of beyond control children) have benefited from juvenile institutionalization."<sup>85</sup> It reviewed the operation of the entire juvenile system (although its main focus in the treatment stage was on institutionalization) and concluded:

There is no significant evidence that the court's beyond control jurisdiction has been effective in turning runaways, truants, promiscuous girls, and other incorrigibles into the kind of children whose behavior patterns satisfy adult expectations. There is even less evidence that Section 601<sup>86</sup> has produced happier, healthier children who go on to become better adults because of their court, probation, or institutional experience.<sup>87</sup>

The resounding conclusion is that compulsory institutionalization is inherently ineffective.<sup>88</sup> The major reasons are three-fold. First, the element of compulsion often renders the subject so hostile that any treatment is impossible. Second, institutionalization of the status offender is likely to be self-defeating because it shifts the focus away from the family where the problem is based and must be resolved. Even an adequately funded and staffed institution presents a subculture that is antithetical to family integration and subverts the regenerative process.<sup>89</sup> Third, the nature of institutional living itself produces a delinquent subculture which quickly assimilates status offender. This subculture militates against traditional treatment approaches and, in effect, becomes the antithesis of treatment.<sup>90</sup>

These facts usually produce outcries from interventionists for

85. REPORT OF THE CALIFORNIA ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, JUVENILE JUSTICE PROCESSES 7 (1971) [hereinafter cited as CAL. ASSEMBLY].

86. California's beyond control statute, CAL. WELF. & INST. CODE § 601 (West 1971).

Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law of this state, or who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

*Id.*; see also, § 602.1, "Referral of habitually disobedient or truant minors to school attendance," and § 601.2, "Failure of parent, guardian, or person in charge of minor to respond to directives of school attendance review board; disposition of minor."

*Id.*

87. CAL. ASSEMBLY, *supra* note 85, at 30-31.

88. MALMQUIST, *supra* note 14, at 173.

89. BEYOND CONTROL, *supra* note 41, at 191.

90. SCOTT & HISSONG, CHANGING THE DELINQUENT SUBCULTURE: A SOCIOLOGICAL APPROACH 509 (1970).

increased funding. However, given the inherent defects in institutionalization, higher spending levels cannot be expected to improve results significantly. Greater funding could allow improvement of conditions in these institutions, but the improvement in conditions cannot be correlated to increased rehabilitation.<sup>91</sup> Even with unlimited financial resources, there is a great possibility that we would not be able to obtain the manpower necessary to implement a treatment mandate.<sup>92</sup> In fact, psychiatric and psychological experts now suggest that even with an ideal placement (which includes institutionalization), separation from the family is itself sufficiently traumatic to be justified only under the most extreme conditions.<sup>93</sup> The basic problem was best explained in a report issued by the President's Commission after its review of situations where funding levels were increased:

The failure of the juvenile court to fulfill its rehabilitative and preventive promise stem in important measure from a grossly overoptimistic view of what is known about the phenomenon of juvenile criminality and of what even a *fully equipped* juvenile court could do about it . . . . Study and research tend increasingly to support the view that delinquency is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the reach of the actions of any judge, probation officer, correctional counselor, or psychiatrist.<sup>94</sup>

The ultimate conclusion of the Task Force was that "[i]t seems the better part of both wisdom and justice to use institutional confinement only for those who would be dangerous to the community without it."

Another major tool utilized in the juvenile justice system is probation. Probation is often a failure for all parties involved. Probation departments are notoriously understaffed, underfunded, and overworked.<sup>95</sup> However, increased staffing and funding to reduce the caseload does not appear to be the answer. Studies suggest that mere reduction in the size of caseloads does not, in itself, lower the recidivism rate of the supervised group.<sup>96</sup>

---

91. YALE PINS STUDY, *supra* note 11, at 1402.

92. See Note, *Treatment for Juveniles*, 1973 WASH. L.Q. 157 [hereinafter cited as *Juveniles*].

93. Thomas, *Child Neglect Proceeding—A New Focus*, 50 IND. L.J. 60, 72 (1974) [hereinafter cited as THOMAS]. See, e.g., *In re Barron*, 268 Minn. 48, 53-54, 127 N.W.2d 702, 706 (1964).

94. TASK FORCE REPORT, *supra* note 29, at 8 (emphasis added).

95. Kittrie, *The Juvenile Process*, 57 GEORGIA L.J. 848 (1969) [hereinafter cited as Kittrie]. A 1966 survey showed that about 75% of the juvenile courts reported no inservice training for their probation officers and a maximum annual salary of less than \$5,000. Sheridan, *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?*, 31 FED. PROBATION 26, 30 n.15 (Mar. 1967). See also Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME AND DELINQUENCY 97, 104 (1961).

96. See *Constitutional Right to Treatment*, *supra* note 13, at 639.

A "shining star" in an oases of despair is the status often claimed by private "voluntary" agencies. They are usually voluntary only in relation to the parent, since the child usually has no choice as to his disposition. Several authorities argue that the public-private distinction is meaningless to the child because the element of compulsion is present in both treatment programs.<sup>97</sup> However, even if we assume that the quality of care and treatment is better in voluntary agencies, the inquiry cannot stop there. The admissions policies of these voluntary institutions are often discriminatory and cause the juvenile great emotional stress. The usual practice is to make only one referral at a time so that the child is forced to stay in a temporary shelter or a public institution while the agency makes its decision. Some probation officers are convinced that a child's emotional problems are compounded when he is rejected by the agency on a "preplacement visit." In the final analysis, few status offenders are accepted by the voluntary agencies. Doctor Stone, describing the practices of voluntary agencies, states:

Ironically, little is known about the quality of care provided by any of the voluntary agencies . . . . However, since the agencies are funded at a higher level than other programs such as training centers and usually provide care to smaller numbers in smaller units, it is assumed that they provide somewhat better care. Unfortunately, however, just 26 percent of the children placed with the agencies (in New York) go to residential centers (5 percent) or special treatment-oriented units (21 percent) which provide the best therapy. The remainder receive less good care. In sum, the agencies . . . for the most part ceased to serve those children with the fewest resources in their homes, schools, and communities and those with the more severe problems<sup>98</sup> (Footnotes omitted).

In New York, only five institutions operated by two voluntary agencies accepted a significant number of juveniles in 1973. This is a deplorable situation given the massive influx of public funds into these private agencies. During 1970, the "residential treatment centers," which have a capacity of serving 929 children, accepted only seven delinquent boys and sixty-three male and female status offenders. This was a mere "drop in the bucket" when compared to total commitment that year.<sup>99</sup>

The final major dispositional alternative available to the juvenile court is commitment to a foster home. The foster care model

---

97. Ferdinand, *Some Inherent Limitations in Rehabilitating Juvenile Delinquents in Training Schools*, 31 *FED. PROBATION* 30, 36 (Dec. 1967).

98. STONE, *supra* note 37, at 152 (footnotes omitted).

99. *Const. Right to Treatment*, *supra* note 13, at 643.

is subject to a number of intrinsic defeats. Initially, it is extremely difficult to find a sufficient number of qualified foster parents who are willing to care for the kind of children who would be placed there through the juvenile justice process.<sup>100</sup> Consequently, many youths earmarked for foster homes end up spending more time in institutions awaiting placement than they do in the foster homes.<sup>101</sup> Even after a child is placed, he will probably not stay with the same foster parents for a long period of time and will be subject to a number of moves. Each placement can have a devastating impact on the child's emotional development.<sup>102</sup>

Even for children fortunate enough to have continuity of care, the act of placement in a strange environment in the emotionally formative years can create significant psychological problems. Children often see foster care placement as punishment for blameworthy conduct on their part. They also suffer identity problems and extreme conflicts of loyalty, since they are exposed to at least three sets of authoritarian adults, the natural parents, the foster parents, and the social worker. Two experts examined these problems and concluded: "It is our conviction that no child can grow emotionally while in limbo . . . . He cannot invest except in a minimal way . . . if tomorrow the relationship may be severed."<sup>103</sup>

Courts, like those in Pennsylvania, are beginning to realize that although a natural home may be less than ideal for a child, intervention by foster care agencies may well be worse.<sup>104</sup> Their wisdom appears to be justified since one study shows that between forty and fifty percent of children in foster homes in every community studies showed symptoms of maladjustment.<sup>105</sup>

After reviewing the evidence concerning the rehabilitative effectiveness of the major tools of the juvenile justice system, the conclusion is inevitable that none of their promises have come true for the status offender. Of course, some children may appear to improve after state intervention. However, the overwhelming preponderance of evidence suggests that improved child would have done so without intervention through maturation and for every child we genuinely help, we commit hundreds to a life of crime and emotional instability.

---

100. FANSHEL, FOSTER PARENTHOOD 163-67 (1966).

101. COLE, OUR CHILDREN'S KEEPERS 63-99 (1972).

102. CALIFORNIA LEGISLATIVE AUDIT COMMITTEE, REPORT ON THE STATE'S ROLE IN FOSTER CARE IN CALIFORNIA (No. 148.2) 748 (1974).

103. Bryce & Ehlert, 144 *Foster Children*, 50 *CHILD WELFARE* 499, 503 (1971).

104. See Note, 35 *PTT. L. REV.* 732, 822 (Fall 1973).

105. See 38 *CHILD WELFARE* 5, 16 (1969).

## 2. Counterproductive

Perhaps we could tolerate a system that only squandered money because of its inherent ineffectiveness. But we cannot afford to tolerate a system that squanders the lives of our children because of some unrealistic ideals. The juvenile justice system results in a tremendous waste of human potential. Thus, a second major contention is that the juvenile justice system is counterproductive. We intervene in the name of helping the child. However, the net result is that the child is often far worse off after the intervention. This is largely because institutionalization, the major tool of state intervention, is counterproductive.

As previously indicated, we institutionalize status offenders to save them from a life of crime and immoral conduct. The result of institutionalization is often to lead the child down that path.<sup>106</sup>

There are three primary reasons that explain the inherent counter-productivity of institutionalization. First, the status offender, who is not a criminal, assumes the mores and customs of the institutional society. The impact is the internalization of the criminal self-concept. One major study dealing with this subject concluded that commitment commences a negative labeling process and the result is that the children committed develop depreciated self-images.<sup>107</sup> Although the results are not conclusive, it is believed that this change in self-concept has a direct impact on the delinquency rate. If you continually tell a child that he is a criminal, and lock him up because of it, then eventually he will begin to believe it.

The second major factor underlying the counterproductive nature of institutionalization is the integration of status offenders with harder delinquent offenders. Although some states absolutely prohibit placing status offenders together with actual delinquents in state institutions, others prohibit only an initial placement, but allow integration if the status offenders misbe-

---

106. *Why Treat?*, *supra* note 3, at 27.

Placing of such children in correctional institutions exposes them to association with more sophisticated delinquents who have committed serious offenses and developed a pattern of delinquent conduct. Even more to be condemned is the hardened adult criminals in jail detention and in adult penal institutions to which some are committed or transferred as being incorrigible.

*Id.* at 27-28.

107. Culbertson, *The Effect of Institutionalization on the Delinquent Inmates' Self-Concept*, 66 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 88, 93 (1975).

have. Many jurisdictions have absolutely no restrictions that would prohibit the placement of PINS and delinquents in the same facility.<sup>108</sup>

The legislature of New York should be applauded for its initial stroke of wisdom in prohibiting the placement of PINS in state training schools. However, the legislators' sense of idealism was not matched by their sense of fiscal generosity. Lack of available alternative dispositions for PINS prompted the temporary use of state institutions to house status offenders. However, after three years, the authorities abandoned the quest for alternative placements due to insufficient allocation of funds by the state legislature and it was again legal to incarcerate status offenders and delinquents in the same overcrowded institutions.<sup>109</sup>

The result of this placement structure is that today an overwhelming proportion of the children confined by the juvenile courts are those who have committed no criminal act. Yet, some ninety-three percent of the nation's juvenile court jurisdictions, which serve forty-four percent of the population, have no place to send these children other than the county jail.<sup>110</sup> There, not only are they confined with delinquent juveniles, but they are also placed with hardcore adult offenders. It is now commonly accepted that contact with adult offenders, even on a casual basis during mealtime or recreational periods, can undo any beneficial effect that rehabilitative efforts directed toward the child may have.<sup>111</sup> The impact of the child from constant association with hardcore delinquent offenders is not surprising. Basically, we are taking a rowdy, ill-mannered child and putting him in an institution where he can become versed in criminal skills from experts. It is no wonder that many people closely involved in the operation of juvenile centers refer to them as "institutions of Higher Education in the Criminal Arts."

The third reason for institutional counterproductivity is the

---

108. *Rebellious Son*, *supra* note 15, at 1108. See, e.g., CONN. GEN. STAT. ANN. § 17-68 (Supp. 1975); IDAHO CODE § 16-1814 (Cum. Supp. 1975); IND. ANN. STAT. CODE § 31-5-7-15 (Burns Cum. Supp. 1975).

109. *Constitutional Right to Treatment*, *supra* note 13, at 633-634. "Finally in 1968 the Legislature permanently amended the Family Court Act to allow placement of PINS children in secure detention facilities, thereby invalidating the original reform. L. 1968, ch. 874". *Id.* at 634 n.52.

110. Kalkin, Kramer & Human, *Three Models of Juvenile Justice*, 112 CRIM. L. BULL. 165, 186 (March-April 1976). See JUVENILE DELINQUENCY IN A FREE SOCIETY 158 (1973).

111. Chase, *Questioning the Juvenile Commitment: Some Notes on Method and Consequence*, 8 IND. L. REV. 373, 383 (1974). "[T]he treatment contingencies are in danger of being frustrated, on a daily basis, by the child's association with offenders for whom different treatment modalities or, more likely, none at all are being provided." *Id.* at 383-84. See also TASK FORCE REPORT, *supra* note 29, at 23.

stigma associated with incarceration that attaches to the child. This is due, in part, to the way the child views himself and the manner in which society views him.

On the personal level, by labeling the child as "beyond control," or "in need of supervision," and by putting him behind locked doors because of this, the court reinforces the child's negative self-image and, in many cases, changes a rebellious youth, who if only left alone would outgrow his tendency toward mischievous conduct, into a full-fledged criminal.<sup>112</sup> This is inexcusable when the child has committed no crime in the first place.

Society also lends a hand in this stigmatizing process, especially in the case of status offenders. The public fails to make the distinction between a child convicted of a criminal act and those committed because of certain noncriminal acts they have performed. On the contrary, it views them all as "juvenile delinquents" once they have been committed to an institution.<sup>113</sup> There is nothing that even the best-intentioned rehabilitationalist can do about it. The child is "punished" for the rest of his life despite wishes to the contrary.

This stigma of delinquency is not something to be taken lightly. In 1944, the Virginia Supreme Court warned that:

The stigma of conviction will reflect on him for life . . . It may, at some inopportune, unfortunate moment, raise its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to esteem and respect of his fellow man.<sup>114</sup>

The specific effects of this stigma are twofold. First, the stigma of delinquency often precludes any potential rehabilitation and, in fact, may encourage future delinquency.<sup>115</sup> Second, it may prove to be an onerous burden to the child in later life. It has been demonstrated that an adjudication of delinquency (regardless of the charge) can make it difficult or impossible to find employment,<sup>116</sup> obtain occupational licenses,<sup>117</sup> enlist in the armed forces,<sup>118</sup> and obtain public benefits.<sup>119</sup> In many respects, conviction of a status offense can be just as damaging in later years as a

112. *Rebellious Son*, *supra* note 15, at 1128-29. See TASK FORCE REPORT, *supra* note 29, at 26; YALE PINS STUDY, *supra* note 11, at 1401.

113. ORLANDO & BLACK, *supra* note 5, at 19.

114. *Id.* at 20.

115. *Id.* at 20-21.

116. *Id.* at 22.

117. *Id.* at 22.

118. *Why Treat?*, *supra* note 3, at 28.

119. *Id.* at 28.



conviction for murder or rape.<sup>120</sup> It is no wonder that a number of these children are forced to lead a life of crime after release from the institution. To quote the California Interim Committee on Criminal Procedure: "If any of these "beyond control" children were ever on the verge of committing a criminal act, they have been brought to the right place for a final push."<sup>121</sup>

The obvious response to this counterproductivity argument is that institutionalization is not the only alternative of the juvenile judge. Clearly, the counterproductivity is strongest when the child is committed. However, close examination of the evidence leads this author to the conclusion that state intervention itself in any compulsory manner is counterproductive. No matter where a judge decided to send the child, the mere contact between the child and the juvenile justice system has already produced immense harm.

The degrading process of arrest and booking can be severely traumatic for the young child, especially one who has committed no criminal act. Any type of court adjudication, no matter how informal, implies to the youth that he has been labeled as "undesirable" by society. Of course, the risks are at their peak when the child is separated from his family, regardless of where he is placed. Psychiatrists now recognize that "so far as the child's emotional responses are concerned, interference with parental ties, whether the psychological parent is "fit" or "unfit," is extremely harmful."<sup>122</sup> Removal of the child from the family environment can result in serious psychological damage. Mere interference with the home environment can produce the same result. This damage is often more serious than the harm intervention was supposed to prevent.<sup>123</sup>

The final unbearable stress that often ruptures the family may be the act of state intervention by the juvenile court, even in cases where the parents requested intervention. When a child is swept from his home in a socially degrading fashion and kept away from it against his will, the home is likely to close over him like the formation of scar tissue. The child needs his own place in his own home, however underprivileged and undesirable to others that home may be. The state cannot supply the love that even a woefully inadequate parents feels for his own child.<sup>124</sup>

Empirical research verifies this conclusion. A study conducted

---

120. ORLANDO & BLACK, *supra* note 5, at 20.

121. CAL. ASSEMBLY, *supra* note 85, at 14.

122. BEYOND, *supra* note 79, at 31-34.

123. See BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* 13-20 (2d ed. 1965).

124. See Dobson, *The Juvenile Court and Parental Rights*, 4 *FAM. L.Q.* 393, 407 (1970).

by Gold and Williams concluded that even apprehension encourages rather than discourages delinquency.<sup>125</sup> The study revealed that the recidivism rate was higher when there was *any* form of state intervention, from apprehension to institutionalization, than if nothing had been done at all. The conclusion is that the imprisonment of the status offender can serve no humanitarian purpose. Rather, it is nothing more than punishment no matter what you call it. The following facts concerning juvenile status offenders makes this clear:

Juvenile status offenders are incarcerated as long as or longer than children who are committed for rape, aggravated assault, and other felonies classified as FBI "index crimes". The younger the offender, the longer is the period of institutionalization. The classification for rehabilitation lengthens the period of institutionalization and does not reduce the rate of recidivism. Children with the longest institutionalization have the highest rates of parole revocation.<sup>126</sup>

**A recent California Legislative Committee reports:**

No one can prove that truants which become wards of the court end up better educated than those who do not. No one can show that promiscuous teenagers who are institutionalized have fewer illegitimate children than those who do not. No one can show that runaways who become wards of the court end up leading better, adjusted lives than those who do not. Finally, no one can prove that unruly, disobedient minors who come under court supervision end up in prison less often than those who do not.<sup>127</sup>

The disenchantment with the current system was best conveyed by Mr. Milton Luger, Commissioner of the New York Division of Youth, which was later quoted in a judicial opinion: "With the exception of a relatively few youths, it would probably be better for all concerned if young delinquents were not detected, apprehended or institutionalized. Too many of them get worse in our care."<sup>128</sup>

### 3. Unnecessary

The third argument for the abolition of status offense jurisdiction is that state intervention into the lives of status offenders is unnecessary for the protection of the child.

125. ORLANDO & BLACK, *supra* note 5, at 21.

126. See OHIO YOUTH COMMISSION, *A STATISTICAL INQUIRY INTO LENGTH OF STAY AND THE REVOLVING DOOR*, COLUMBUS, 1974.

127. See Board of Directors, National Council on Crime and Delinquency, *Jurisdiction Over Status Offenders Should Be Removed From the Juvenile Court, A Policy Statement*, 21 CRIME AND DELINQUENCY 97, 98 (April 1975) [hereinafter cited as *Jurisdiction Removed*].

128. *Gesicki v. Oswald*, 336 F. Supp. 371, 378 (S.D.N.Y. 1971).

It is not difficult to observe that the juvenile justice system constitutes a serious threat to the personal liberty of status offenders. Cases such as *Gault*<sup>129</sup> and *Kent*<sup>130</sup> make it clear that the value of such liberty does not vary with age. Surely the right to walk among the trees, take a drive in the country, or just do as one pleases is no less precious to a seventeen-year-old than one of the age of nineteen. It is also clear that children interjected into the juvenile justice system have that liberty restricted. Regardless of the label whether, punishment or rehabilitation, the loss of liberty is basically a punitive measure to the child.<sup>131</sup> No amount of flowery descriptives can change the reality:

The fact of the matter is that, however euphemistic the title, an ... industrial school for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a 'building with whitewashed walls, regimented routines ... Instead of a mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and delinquents confined with him for anything from waywardness to rape and homicide.'<sup>132</sup>

Regardless of the motivation and objectives, involuntary separation from family, compulsory commitment to an institution, even supervision of the child's activities by a probation officer, all smack of punishment. Good intentions and a flexible vocabulary cannot change this.

These involuntary restrictions on personal liberty are unnecessary for the protection of the child. Once the responsibility for child-rearing is placed back in the family, they can do a far better job than the state in raising their children. The shifting of responsibility will also spur the development of voluntary community programs to assist the child. The retention of jurisdiction by the juvenile courts blocks these efforts. Judge David Bazelon, of the United States District Court of Appeals for the District of Columbia, has said:

The argument for retaining beyond control and truancy jurisdiction is that juvenile courts have to act in such cases because 'if we don't act, no one else will.' I submit that precisely the opposite is the case; because you act, no one else does...If the juvenile court had no jurisdiction to commit children in such situations, the community would have to come up with a solution. Neither the parents nor the community need to look for solutions while the juvenile court is available.<sup>133</sup>

Also, as has already been demonstrated, the child is better off if there is no intervention at all. Thus, since the state can do the

---

129. *In re Gault*, *supra* note 26.

130. *Kent v. U.S.*, 383 U.S. 541 (1966).

131. JOINT LEGISLATIVE COMM. ON THE PROTECTION OF CHILDREN AND YOUTH AND DRUG ABUSE; LEG. DOC. NO. 19, WHAT CHANCES FOR CHILDREN? A REPORT ON WHAT HAPPENS IN NEW YORK STATE TO THE YOUNG IN TROUBLE, 27 (1970).

132. *In re Gault*, *supra* note 26, at 27.

133. Bagelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42, 43-44 (Summer, 1970) [hereinafter cited as *Beyond the Court*].

child no good and only harm him in the long run, the protection of the child cannot justify further state intervention.

Second, status offense jurisdiction is unnecessary for the protection of society. Juvenile status offenders present no great danger to society.<sup>134</sup> Certainly institutionalization of these children is not mandated in the name of societal protection. It is a common belief now that delinquency will naturally decline with age without state intervention and that state interference in the early years of a child's life is not necessary to deter him from becoming an adult criminal. A famous study of the Gluecks of Harvard Law School indicated that the number of delinquencies decreased with age and this decrease could be attributed to greater maturity and a greater sense of responsibility on the part of the child rather than to treatment.<sup>135</sup> In regard to status offenders, a Committee of the California Assembly reported:

Ambiguity in standards also leads many juvenile courts into handling trivia. Well-adjusted youths who need no help whatever from the courts typically at sometime or other while growing up get drunk, stay out late, have sex, cut school or rebel against parental authority. If left alone, most survive and become normal adults.<sup>136</sup>

Even if we assume that a smaller number of status offenders are potentially dangerous to society, the present state of the art holds little promise for an effective prediction of dangerousness model.<sup>137</sup> A major study of the effectiveness of prediction of delinquency conducted in Cambridge and Sommerville, Massachusetts, indicated an inability to predict accurately. In fact, the predictions studied were wrong in more than fifty percent of the cases.<sup>138</sup> The prediction usually erred in favor of false positives which meant unnecessary confinement for thousands of children.<sup>139</sup> Even if prediction is effective, there is still some concern about detention on the basis of criminal potential. To many, the concept itself is revolting. Where do we draw the lines? For what potential acts do we confine and what degree of probability must exist before incarceration is justified? These are all unanswered

---

134. *Misbehaving Minors*, *supra* note 40, at 191.

135. GLUECK & GLUECK, *JUVENILE DELINQUENTS GROWN UP* (1940). *See also* SIMPSON, *supra* note 61, at 1005.

136. CAL. ASSEMBLY *supra* note 85, at 7.

137. TOBY, *supra* note 74, at 101.

138. POWERS & WITMER, *AN EXPERIMENT IN THE PREDICTION OF DELINQUENCY* (1951).

139. Wenk, Robinson & Smith, *Can Violence Be Protected?*, 18 *CRIME AND DELINQUENCY* 393, 402 (Oct. 1972).

questions. The criminal justice system admits that preventive detention is a monstrous evil. Why should it be any less so for children?

Finally, the costs of incarceration are not justified by the results if the goal is societal protection. Steven H. Clarke conducted an extensive study on the crime-suppressing effects of removal of the juvenile offender from society.<sup>140</sup> This study only considered the "removal effect" of incarceration, which is the effect of getting the delinquent off the street by incarcerating him. (It should be noted that it has already been shown that the preventive and rehabilitative effect of juvenile incarceration is nugatory, thus the removal effect would seem to be the only remaining justification for imprisonment if the system really does not exist to punish.) This study also included a population group of all committed juveniles. Thus, the results are based on the total release of hard and status offenders, something not advocated by this paper.

The study concluded that the cost of preventing one index crime through institutionalization is conservatively set at \$1100.<sup>141</sup> Even more surprising was the conclusion that if all incarceration of juveniles was completely eliminated, serious offenses committed by those under eighteen would increase by only five to fifteen percent.<sup>142</sup> This translates into a one to four percent increase in all index crimes.<sup>143</sup> The study goes on to state that even if you could double the number of juvenile offenders incarcerated, the resulting decrease in nationwide FBI index offenses would be only one to four percent. Considering the problems involved, the benefits are not worth the cost.<sup>144</sup> If releasing all juvenile offenders, including the rapists and murders, from institutions has such a small effect on the crime rate, then surely barring the imprisonment of status offenders, the least dangerous group of juveniles, would reconcile the goals of individual liberty and allow society to sleep safely at night.

#### 4. Discriminatory

Fourth, the juvenile justice system operates in a highly discriminatory manner. Few middle or upper-class children come into contact with the juvenile court because of voluntary diversions to

---

140. CLARKE, *supra* note 84, at 527.

141. "It is assumed that the marginal cost of a nine-month incarceration is about \$1100. This figure includes four dollars per day for food, medicine, laundry, and other variable costs, but does not include correctional personnel costs and costs of law enforcement and juvenile courts." *Id.* at 531.

142. *Id.* at 532.

143. *Id.* at 532.

144. *Id.* at 535.

private agencies.<sup>145</sup> At the disposition stage, the voluntary institutions are filled with middle and upper-class clients and the overwhelming majority of poor and minority children are sent off to state institutions. Also, children with the most severe emotional problems and thus the greatest treatment needs are customarily rejected by voluntary agencies. Children from minority and poverty backgrounds generally cannot meet the rigid standards set by voluntary agencies. The Committee on Mental Health Services, in the current report, substantiated the existence of this discriminatory policy. It concluded that the voluntary agencies prefer the younger, female, white children from a "cooperative family." The persistent runaway, fire-setter, or the child from a broken home, will not be accepted in most cases. In 1971, over seventy-five percent of white, female PINS were placed with voluntary agencies, while ninety-one percent of black, male juvenile delinquents were placed in training schools.<sup>146</sup> The same study found that twenty percent of white delinquent boys were sentenced to state institutions, while eighty-four percent of Puerto Rican delinquents found their way into these dreaded places.<sup>147</sup>

Those that witnessed the television production of "*Roots*" and were appalled at the treatment of blacks in this country, merely need to visit a state juvenile institution to witness another enslavement of minority groups. A nation built on equality and justice cannot allow such a system to stand.

### C. *Radical Nonintervention Provides the Superior Policy Option.*

Adoption of a policy of radical nonintervention, which restricts the coercive sanction of the juvenile court to conduct where there is a specific violation of criminal statutes, would have significant advantages. Such a policy has been advocated by such acclaimed groups and individuals as the President's Commission on Law Enforcement and the Administration of Justice,<sup>148</sup> the National Council on Crime and Delinquency,<sup>149</sup> the Institute of Judicial

---

145. SCHUR, *RADICAL NONINTERVENTION, RETHINKING AND THE DELINQUENCY PROBLEM*, 56-57 (1973) [hereinafter cited as *NONINTERVENTION*].

146. *CONFOUNDED*, *supra* note 49, at 23-25, 54-55.

147. *Id.* at 24.

148. *TASK FORCE REPORT*, *supra* note 29.

149. "Subjecting a child to judicial sanction for a status offense—a juvenile victimless crime—helps neither the child nor society; it often does considerable harm to both." *Jurisdiction Removed*, *supra* note 128, at 97.

Administration, in conjunction of the American Bar Association,<sup>150</sup> and Judge David Bazelon.<sup>151</sup>

This policy, like all other legislative policies, must be evaluated on a cost-benefit analysis model. Clearly, a few status offenders have reaped benefits from state intervention, however, such is not the ground upon which policymakers decide the issue. It is necessary to know the number of children harmed in the name of helping those few and the extent of these benefits and harms in order to make a proper decision. There are two compelling cost-benefit arguments in favor of radical nonintervention.

First, on balance, radical intervention is better for the individual. We have already concluded that under the current system, the child is better off if he is never apprehended since his chances of leading a normal life decline as he becomes increasingly involved with the juvenile justice system. Under a policy of restraint, emphasis would have to be placed on voluntary family-based treatment programs since the option of intervention would be nonexistent for the status offender.

Voluntary programs have traditionally been more effective in deterring criminal activity than institutionalization because of the noncoercive nature of the program itself.<sup>152</sup> Parents and children who are in conflict with each other, or with society, should certainly have community resources available to them, but the choice to utilize these programs should rest with the family. The primary responsibility must lie with the family unit. However, even if family-based voluntary treatment programs are no more effective than state intervention, their adoption is still suggested because of the counterproductive impact of state interference. Thus, even a system that totally abolished status offenses and substituted nothing for them would be a superior alternative.

A second policy justification is that, on balance, radical nonintervention is better for society. The gains of state intervention into the lives of juvenile status offenders are clearly outweighed by the cost. The National Council on Crime and Delinquency concludes:

The benefits derived from such (status offense) classification for either the child or society appear to be nonexistent. "It is unsettling ... to realize that the number of recidivists is not only larger than one would reasonably expect, but also larger than if nothing had been done—larger than if no delinquents had been incarcerated, had appeared before the court, or, indeed, had been caught at all." Weighing the costs of the status offender's involvement in the juvenile court process persuades us that the jurisdiction should be eliminated. In essence, the possible gains are not worth

---

150. See *New Juvenile Justice Standards Proposed*, 12 TRIAL 38 (Feb. 1976).

151. *Beyond the Court*, *supra* note 133.

152. Nonintervention, *supra* note 145, at 23.

the risks.<sup>153</sup>

What is frustrating is that most of the monetary costs are devoted to custodial aspects of the system, as opposed to those of treatment. The state has become one of the biggest operators of hotels and restaurants in the country (not that you would ever *choose* to stay or eat in any of them). It now costs the state more per year to incarcerate a juvenile (\$5700) than to send him to college. About three-fourths of these costs are for non-rehabilitative requirements such as shelter, food, clothing, etc.<sup>154</sup> The result of granting jurisdiction over noncriminal behavior to the juvenile courts is that a disproportionate share of available resources is applied to youth who pose no criminal danger to society. With the continued acceleration of juvenile crime, we can ill afford to waste these meager resources.<sup>155</sup> We cannot allow that money to be spent on feeding and housing ill-behaved but harmless children who should be cared for by their parents. Even if we must subsidize the parents through our welfare system, that is arguably a cheaper and more humane alternative.

If we feel compelled to retain the money in the juvenile system, we could allocate it to improve the rehabilitative conditions in institutions to which we send delinquents or to enhance voluntary community-based programs for disturbed children. Abolishing rehabilitation as a basis for state intervention will not necessarily eliminate all rehabilitative programs. This author's thesis is that rehabilitation is objectionable as a *justification* for state intervention. However, once a child is convicted of a criminal act, there is nothing objectionable about entering him into a rehabilitation program. Of course, one would not necessarily evaluate the program against the standards of effective rehabilitation only. Rather, the programs should be judged in terms of their "fairness" and "humaneness" as well as their "rehabilitative" value.

Schur suggests that money spent on improving the quality of life in the areas where the juvenile lives is likely to have a greater effect on the delinquency rate than increased institutionalization.<sup>156</sup> The President's Commission agrees, noting:

The underlying problems are ones that the criminal justice system can do little about .... Unless society does take concerted action to change the

---

153. Jurisdiction Removed, *supra* note 128, at 99.

154. Ketcham, *The Changing Philosophy of the Juvenile Justice System*, 20 JUV. CT. JUDGES J., 63 (Summer 1969) [hereinafter cited as *Changing Philosophy*].

155. *Jurisdiction Removed*, *supra* note 128, at 99.

156. *Nonintervention*, *supra* note 145, at 104.



general conditions and attitudes that are associated with crime, no improvement in law enforcement and administration of justice . . . will be of much avail.<sup>157</sup> Few could argue against the wisdom of eliminating delapidated housing, ghettos, of building new and more effective schools to prevent the growth of delinquency. Money spent on such significant changes in the environment produce greater rehabilitation benefits than an equal dollar amount of individual psychotherapy, institutionalization, and probation counseling.<sup>158</sup>

It should be noted that only a complete abolition of status offense jurisdiction can deter resource squandering. If you allow the court the option of a case-by-case determination of the suitability of the child to status offense jurisdiction, then the option will be widely utilized. Thus, the presence of an option to intervene in "special cases" squanders legal resources in itself since the result will require litigation of a great number of cases in order to decide what circumstances are "special." Also, inevitably, some status offenders will be committed and that result is unjustifiable.

#### *D. Practical Model.*

Unlike status offenders, actual delinquents, especially those committing serious crimes against persons and property, present a serious and increasing danger to society.<sup>159</sup> New York has experienced more than its share of this frightening increase.<sup>160</sup> It is clear that the oppressive treatment of PINS and the lax disposition of hardened offenders has caused a breakdown of the juvenile system in New York and has unleashed public outcry.<sup>161</sup> The legislature has attempted to deal with the serious juvenile offender by enacting the New York Juvenile Justice Reform Act of 1976.<sup>162</sup>

The Act basically provides for less judge-discretion in the adjudication of juveniles accused of serious crimes. The important changes introduced into the system through the Act consist of a detailed record-keeping procedure at each stage of the proceeding; the possibility of substituting a criminal prosecutor for the county attorney as counsel for the petitioner; the introduction of "the need for protection of the community" into the placement decision; the curtailment of the wide discretion which the Proba-

---

157. *Challenge*, *supra* note 58, at 1.

158. *Changing Philosophy*, *supra* note 154, at 62.

159. Note, *The New York Juvenile Justice Reform Act of 1976: Restrictive Placement—An Answer to the Problem of the Seriously Violent Youth?*, 45 *FORD. L. REV.* 408, 408 (1976) [hereinafter cited as *Violent Youth*].

160. In Nassau County, for example, 83% of all those arrested for major crimes were youths. *Id.* at 408.

161. *Id.* at 408-09.

162. Law of July 26, 1976, *N.Y. LAWS.*; see also *Violent Youth*, *supra* note 159 (for an excellent discussion of the operation of the Act and an analysis of its impact).

tion and Division for Youth currently possess over the processing and disposition of juveniles accused of serious violent crimes; and the imposition of continuity in judicial supervision.<sup>163</sup>

Statutory schemes such as the one suggested by the New York Juvenile Justice Reform Act of 1976 would have an excellent interface with a policy of radical nonintervention. The elimination of status offense jurisdiction allows the juvenile court to concentrate its efforts and resources on juveniles who commit serious offenses. A system such as this responds, to some extent, to the demands for reform from advocates of mishandled youth and the demands of a frightened and outraged community.

There is a general consensus among interventionalists and noninterventionalists regarding the need for changes in the way we deal with serious juvenile offenders.<sup>164</sup> Most radical non-interventionalists have little quarrel with a juvenile system that is based upon deterrence and punishment. Even those who feel that there is some potential for rehabilitation can be accommodated. Once a child commits a criminal act and is convicted by a system that grants him all due process safeguards, he has forfeited his unrestricted right to liberty. Once he is in the system, it is permissible to attempt to rehabilitate him. All that is argued is that it is impermissible to deprive a child of freedom *solely* on the basis of rehabilitation.

It is not clear whether harsher treatment of the juvenile criminal will have any appreciable impact on the crime rate. However, it is not subject to attack on the same grounds as status offense imprisonment.

Therefore, the juvenile court's jurisdiction should be limited to those offenses which have counterparts in adult criminal law. The juvenile would have all due process procedural rights extended to him. Additionally, there should be an increase in the number of community-based treatment programs which would be offered on a voluntary basis.

Physically abused children should be handled through neglect proceedings, coupled with criminal prosecutions of the parents. Standards for state intervention in neglect cases would be delineated and strictly enforced.<sup>165</sup> The main purpose of this provision

---

163. *Violent Youth*, *supra* note 159, at 419-20.

164. *Id.* at 425-26.

165. See WALD, *supra* note 30 (for an example of a set of standards for state intervention in neglect cases and an analysis of their justification and operation).

would be to prevent the juvenile court from utilizing its neglect jurisdiction to retrieve its status offense jurisdiction. (There would also be a strictly enforced rule against institutionalization for neglected children.) The philosophy of radical nonintervention would also be introduced into the "neglect" proceedings through a strong statutory presumption against removal from the home.

Obviously, there are a multitude of objections to a policy of radical nonintervention. Many of those rest on the ground that potential rehabilitation is a justification for confinement. These will be summarily dismissed on the basis of the previous discussion and others will be dealt with briefly.

First, it is suggested that radical nonintervention prevents the court from removing a child from a "undesirable" home environment. However, as previously noted, the state cannot improve this situation and, most probably, will worsen it. Even though a few isolated cases might benefit, the employment of an "on-balance" criteria demands rejection of the option.

Second, some are concerned with physically abused children. The battered child is indeed a serious problem and one that shocks the conscience. However, this is an ideal case for the invocation of the court's neglect jurisdiction along with utilization of the court to prosecute the parents. Finally, the beatings in state institutions are often far worse than those at home and thus make commitment undesirable.

Third, there is a notion that unification of the criminal and juvenile systems will expose many young soft-offenders to hard-core adult criminals. That is often the situation now. However, children could be segregated under the system suggested here. By reducing congestion in these facilities, that goal becomes obtainable.

Fourth, critics assert that the elimination of status jurisdiction will preclude the enforcement of truancy laws. Initially, institutionalization seems an inappropriate remedy since it almost guarantees that the child will become educated in the criminal sciences. Further, the enforcement of truancy laws deters few children from missing school. If necessary, an attempt could be made to utilize voluntary programs to motivate the child into attending class. But even if these programs do not succeed, the child is probably in a better position without an education than being a product of the juvenile justice system.

Fifth, a fear is expressed by some that radical nonintervention will prevent the enforcement of anti-liquor and tobacco laws. Some speculate a society of alcoholic, chain-smoking minors.

Their fears are unjustified. It is illegal in most states for adults to sell those items to children. Thus, the adult sellers can be prosecuted if the problem is serious. Also, the most serious concern about alcohol is that the minor will drive under the influence. That will remain a criminal act both for adults and children. Additionally, this seems to be a parental matter which requires parental discipline, not state coercion. Finally, it is questionable that the law deters those children who occasionally want alcohol from procuring it.

### *E. Conclusions.*

The steadfast support of status offense jurisdiction presents a classic case of "don't bother me with the facts" syndrome. It now appears that state intervention in the lives of juvenile status offenders is inherently ineffective, counterproductive, unnecessary, and discriminatory. Any one of these indictments should be sufficient to warrant its abolition. The price we pay in terms of wasted lives and squandered resources is just too high.

The juvenile system is one plagued with discretion. Public policy would not allow a case-by-case determination of when intervention is permissible in the case of a status offender, even if meaningful standards could be formulated. It would be too easy for the minority of bad judges to carelessly ruin the lives of our children. However bad judges are not the problem. This author is convinced that juvenile court judges are extremely well-intentioned people. Those intentions are the root of the problem. If one cultivates a system that repeatedly communicates to judges that they possess this mystical power through which they can, with a wave of the hand, save a child from a life of crime, they eventually come to believe it. What is needed is a total revamping of this attitude and the structures of the juvenile justice system.

If society questioned a status offender upon release from one of those "dungeons of despair" known as a state juvenile institution, it is unlikely that he would thank society for its efforts. Perhaps, after seventy-seven years, we can come to realize that enough lives have been destroyed and enough money wasted. We cannot make it up to those children, but we can help those who are yet to come.

## II. THE LEGAL AVENUE

### A. *The Role of the Lawyer.*

The lawyer in the juvenile court system is torn between two goals. On one hand, as he is accustomed to operating as an advocate in an adversary system, he feels compelled to protect the liberty of his client. On the other hand, however, he is told that the juvenile system is based on the notion that state intervention is in the "best interests of the child." As such, his role is to work with the courts to find the best disposition for his client. Given these conflicting philosophies, it is no wonder that the juvenile justice process often has difficulty in attracting high-grade legal talent and even those lawyers who enter the system are not sure what to do once in it. To say that the role of the lawyer in the juvenile system is unclear is a paramount understatement.

Given the fact that contact with the system cannot help the status offender and will most probably scar him for life, the role of the attorney defending this subgroup of the juvenile population should be clear. His function should be to argue strenuously to keep the child from the possessive clutches of the juvenile process. As long as the court maintains status offense jurisdiction, it is often only the child's lawyer that can stand between him and those cold gray walls of some juvenile institution. In some cases this will necessitate separate counsel for the child and the parents since their interests are often conflicting in a PINS adjudication.

Any discussion of the utilization of lawyerly skills to keep a client out of confinement normally begins with procedural protections. Many of the procedural safeguards applied to adults have been extended to children.<sup>166</sup> However, the list is not complete. The extension of all due process rights to children seems a sensible course of action, given the fact that children, in many cases, are deprived of their liberty after disposition for longer periods than adults. However, full due process guarantees are not a complete solution. The accomplishment of legal safeguards for juveniles at the trial level will still leave a significant number committed to institutions.<sup>167</sup> This is especially true for status offenders, given the vagueness of the statutes.

Perhaps a promising avenue for the lawyer defending an ac-

---

166. See *In re Gault*, *supra* note 26 (right to counsel, privilege against self-incrimination, cross-examination of witnesses); see also, *In re Winship*, *supra* note 27 (determinations of delinquency require proof beyond a reasonable doubt); see also, *Kent v. United States*, *supra* note 131 (due process applies to juvenile proceedings).

167. MALMQUIST, *supra* note 14, at 160.

cused status offender would be the development of PINS defenses resembling, but not identical to, standard criminal defenses. Most lawyers are more than willing to apply these defenses in cases of accused delinquency since they are often viewed as junior criminal trials. In status cases, however, lawyers tend to be less willing to assert them since the charge usually involves intrafamily and school conflicts.<sup>168</sup> A lawyer trained in standard criminal law may find it difficult to find a relationship between these offenses and any form of traditional legal defense. The result is that few defenses to PINS charges have been developed and asserted.

The second reason for the deficiency of PINS defenses is that attorneys, as a group, are not familiar with the functions and operations of the juvenile court. Lawyers, for all practical purposes, did not enter the field at all until 1967.<sup>169</sup> Many of those that did enter were engulfed in the ideals of rehabilitation and refused to assert defenses vigorously. Other lawyers, particularly the older ones, actually sided with the parents against the child. Another group disregarded the wishes and desires of their client and the juvenile system and substituted their own judgement. The result was that few status offenders had any form of meaningful legal defense.

Third, even though some lawyers may be qualified to defend PINS, usually the status offender will not be able to relate to the lawyer and thus be of little assistance in preparing his defense. The lawyer typically comes from a middle-class background. The status offender more often than not comes from both a minority and low socioeconomic background and, generally, is distrustful of a stranger in a three-piece suit.<sup>170</sup> PINS often do not speak English or are inarticulate, fearful of discussing family matters with a stranger, or can even be emotionally disturbed or retarded.<sup>171</sup> The result is that a lawyer must invest an inordinate amount of time to elicit facts necessary to assert a defense in a process closely akin to "teeth pulling." Even if he manages to find out the relevant information, he often feels that the child would make such a poor witness that his own testimony, despite its

---

168. *Rebellious Son*, *supra* note 15, at 1131-32.

169. There were a few jurisdictions that guaranteed the juvenile legal counsel before *Gault*. See *In re Gault*, *supra* note 26 at 37 n.36, 38-41.

170. *Challenge*, *supra* note 58, at 56-57.

171. *Rebellious Son*, *supra* note 15, at 1136.

evidentiary importance, would only work against him. It is not surprising that most PINS defense attorneys waive the fact-finding hearing.<sup>172</sup>

A fourth reason behind the scarcity of PINS defenses is the lack of any formal adjudication hearing in most cases.<sup>173</sup> In the common case, the child admits the act and then is quickly hustled off to the disposition stage where the court is only concerned with the best possible treatment. Although there is a hearing at this stage, defenses such as parental misconduct or provocation will not go to the issue of incorrigibility, as it has already been decided, but only to placement.<sup>174</sup> The raising of such issues can work against the child at this stage, since in some cases it will virtually guarantee his removal from the family.

Finally, the refusal to develop and advance defenses for PINS is sometimes a tactical decision, although probably based on a faulty assumption. Some lawyers are convinced that if they bypass the adjudication hearing, especially in cases where the child has committed the act of which he is accused, the judge will treat the child more favorably at the disposition stage. This is based on the premise that the admission of wrong is the child's first step to rehabilitation and that the juvenile judge will consider this fact. This is also largely because most attorneys in the juvenile court have acquired their experience in the adult criminal court process where in some jurisdictions up to ninety percent of all cases never go to trial but are disposed of through a plea-bargain agreement.<sup>175</sup>

Several changes in the process could be initiated to make it more difficult to subject status offenders to the juvenile justice system. The first would be the guarantee of a full and formal adjudicatory hearing in the case of all PINS. Coupled with this provision would be a prohibition against waiver, so that the child will not be pressured into quickly admitting his "guilt." The major objection to this introduction of formality is that it could impede the rehabilitative effect. Since we have seen little rehabilitation accompany the present informality, it is questionable that anything will be lost with added formality. On the contrary, the confrontation between the parent and the child at the adjudicatory hearing can in fact be therapeutic if properly handled.

---

172. *Id.* at 1136-37.

173. Stiller & Elder, *PINS- A Concept in Need of Supervision*, 12 AM. CRIM. L. REV. 33, 39 n.35 (1974).

174. For example, in Oklahoma it is recognized by statute that a child may be adjudicated a PINS even though he is the victim of parental misconduct. OKLA. STAT. ANN. tit. 10 § 1116(a)(1). (Cum. Supp. 1975).

175. *Challenge*, *supra* note 58, at 134-35.

It is doubtful that the courtroom confrontation between parent and child can cause any more harm to their relationship than the injury that has already occurred by virtue of the parent's bringing the juvenile to court and charging him or her as a PINS. The child plainly knows that but for the parent's charges, he or she would not stand accused. Eliminating parental testimony against the child at an adjudicatory hearing or excusing the child from the courtroom during such testimony by the parent may indeed be more detrimental to the child than allowing the juvenile to hear the parental accusations, since the allegations imagined by the child may generate more anger and be more frightening to the youth than the charges that are actually made.<sup>176</sup>

The hearing may provide the first meaningful opportunity for dialogue between the parent and child in a neutral environment with an impartial arbiter.<sup>177</sup>

Increased formality, in itself, may deter parents from filing "beyond control" petitions against their child. The informality of the probation intake procedure leads parents to believe that it can mold the court disposition to fit their desires as they can normally do with the probation intake process.<sup>178</sup> Because of this, parents sometimes feel that they have nothing to lose by filing a incorrigibility petition, since they will be able to dictate the outcome in a "wrist-slapping" manner. The parents are often shocked to learn that once the child is adjudged a status offender, the parents' wishes are often ignored and the judge now decides the fate of the child.<sup>179</sup> A formal adjudicatory hearing, with sworn testimony and cross-examination, will put the parents on notice early that they will not be able to reverse an unwanted disposition once the process begins and may deter them from filing or at least cause them to tone down their accusations.<sup>180</sup>

The requirement of cross-examination may also deter parents from filing a beyond control petition, especially in marginal cases. Such cross-examination will often expose parental inadequacies and misbehavior which the parents would rather not have revealed in court. Even if the parents do file, cross-examination will generally impede the making of general and vague accusations

---

176. *Rebellious Son*, *supra* note 15, at 1141 n.185.

177. It may be argued that asking a juvenile court judge to act as a neutral arbiter in such a situation is too demanding because it forces him to act as a psychiatrist and a social worker, as well as a judge. The observation is often made, however, that such a role is not to be avoided by the judge, since it strengthens the unique quality of the juvenile court in our justice system. *See Rebellious Son*, *supra* note 15, at 1141 n.187.

178. YALE PINS STUDY, *supra* note 11, at 1395.

179. *Rebellious Son*, *supra* note 15, at 1139-40.

180. *Id.* at 1140.



that lack factual support.<sup>181</sup>

Finally, the hearing may bring out facts regarding parental indiscretions or misbehavior that could either warrant dismissal of the charges, or a more favorable disposition for the child. Of course, it could also work against the child. Only the trial lawyer can decide if the introduction of these facts can help the child's cause.

Once we have a formal adjudicatory hearing in PINS cases, lawyers representing accused status offenders should vigorously assert defenses such as failure to exhaust non-judicial remedies, contributory neglect, as well as defenses based on strict adherence to statutory requirements. Perhaps some of the standard criminal defenses could prove helpful in some incorrigibility defenses as well as a form of the *de minimis* defense for trivial conduct. Stocking the arsenal of legal weapons for the juvenile defense attorney may serve to keep some children out of state juvenile institutions.

The cost of such a system will be a massive drain on legal manpower, including both lawyers and judges. Every child accused of a status offense will have to be represented by counsel to make these changes meaningful. Since few of these children can afford legal services, the state will most likely be forced to underwrite the cost. In most cases, the parent's attorney cannot adequately represent the parents and child since their interests do not normally coincide in PINS proceedings. There might be an ethical problem even if the parents offered to pay for the child's lawyer.

The child would be no worse off under a more formal system that emphasized the adversarial role of the lawyer. A review of the evidence indicates that the child does not receive a more favorable disposition if he pleads guilty.<sup>182</sup> In many cases, the child receives a harsher placement. A formal fact-finding procedure will, at least prevent the child from feeling that he was "railroaded" into the juvenile institution. Irene and Yale Rosenberg of the University of Houston School of Law state that "Insistence on a fact-finding hearing may instill in the child positive feelings toward the judicial process, whether or not the result is dismissal of the charges."<sup>183</sup>

When the child is confined on the basis of a pressured admis-

---

181. *Id.* at 1140-41.

182. "[T]he seemingly attractive rationale that a child can insure institutional benefits by making an admission is simply not supported by the facts. Although a defendant in a criminal court may admit guilt in return for a reduced sentence, there is no counterpart to this plea bargaining in the juvenile court system." *Id.* at 1139.

183. *Id.* at 1143.

sion, he feels that the state has unjustifiably intruded into his life in an arbitrary fashion. This is true even if the lawyer attempts to explain to him the effect of his plea.<sup>184</sup> He views the process as punishment for his honesty. If, however, his conviction is sustained after a full formal hearing where his attorney has asserted defenses in his behalf, the child is more likely to understand that it is his conduct that the state disapproves of, not his honesty. Juveniles generally appreciate the presentation of their side of the story even if they disagree with the finding of the court.<sup>185</sup> The introduction of increased procedural formality will probably not advance rehabilitation in itself, but it could reduce some of the alienation that young status offenders are bound to feel toward the judicial system and toward society.

Another avenue of attack available to the juvenile defense attorney is to argue that placement of the child is improper on grounds of fairness and statutory compliance. Several appellate courts have held that the commitment of status offenders to state institutions, absent a strong showing of cause, amounted to an abuse of the trial court's discretion.<sup>186</sup> Some of the commitments of PINS to state institutions appear to be outside of the statutory framework and are susceptible to attack on those grounds.

An evaluation of these proposals involving formality in the adjudication and disposition stage of PINS proceedings is difficult. The result will most probably be reduction in the number of status offenders committed to juvenile institutions. But the price, in

---

184. *Id.*

185. *Id.* at 1143-44.

186. See *In re M*, 332 N.Y.S. 2d 125 (1972) (where the New York Supreme Court, Appellate Division, modified a Family Court disposition in which a person in need of supervision who violated his probation was committed to a state training school, rather than being placed in a suitable drug rehabilitation program). See also, *In re M*, 338 N.Y.S. 2d 177 (1972) (where the same court held that a PINS, who is not charged with any delinquent conduct, should not be placed in a state training school "unless all other reasonable means of placement have been fully investigated and exhausted"). *In re C*, 337 N.Y.S. 2d 936 (1972); (reversed), *C v. Redlich*, 347 N.Y.S. 2d 51 (1973) (The New York Supreme Court, Appellate Division, affirmed a court disposition of a 15 year old youth, adjudged to be a person in need of supervision, after all efforts to place him in alternative settings had failed. The court decided that "unfortunately" the state training school was the only suitable environment for the child. The New York Court of Appeals reversed and held that "proper facilities must be made available to provide adequate supervision and treatment for children found to be persons in need of supervision..."); *In re Peters*, 188 S.E. 2d 619 (1972). (The Court of Appeals of North Carolina held that committing a status offender to a state school is inappropriate where the evidence disclosed that he disliked school and had absented himself from school.)

terms of legal resources, may be high. Any plan which will keep our children free from the influences of the juvenile justice system is probably worthwhile, although a legislative policy of radical nonintervention would be a superior course of action. Hopefully, increasing the difficulty of institutionalization proceedings through procedural safeguards and more vigorous assertion of defenses will deter utilization of the system by parents.

### *B. The Right to Treatment.*

Presently, it is commonly accepted that juveniles deprived of their freedom, especially status offenders, enjoy a constitutional right to treatment.<sup>187</sup> To provide a blow-by-blow description of the history of this right appears unnecessary. Generally, the analytical basis for the right is found in one of two theoretical justifications. The first is the eighth amendment concept that confinement without treatment constitutes cruel and unusual punishment.<sup>188</sup> The second justification involves a higher standard based on due process and equal protection.<sup>189</sup> The treatment is *quid pro quo* for confinement and, absent treatment, confinement becomes philosophically and practically untenable. It would seem better to base future right to treatment contentions on due process grounds since an eighth amendment theory only guarantees improvement in physical conditions up to some unspecified minimum. Due process attacks are best suited to insure meaningful treatment to juveniles.

Clearly, advocates can utilize the right to treatment theory to improve the conditions in institutions that status offenders are committed to. However, it is not readily apparent that such an approach is desirable. The right to treatment up to this point has not been successfully invoked to keep status offenders out of institutions completely. The issue is whether the theory can be used to keep a significant distance between juveniles and juvenile institutions.

In Part I, evidence was presented to the effect that the most effective treatment programs center on family participation.<sup>190</sup> In line with this contention, several commentators have suggested that, as to status offenders, the right to treatment includes the

---

187. For an excellent and up-to-date analysis of the case law formulating this right in both the areas of juvenile delinquency and civil commitment, see, Brown, *The Right to Treatment Under Civil Commitment*, NATIONAL COUNCIL OF JUVENILE COURT JUDGES (1975); See also, Note, 49 NOTRE DAME LAW. 1051, 1054-57 (1975).

188. STONE, *supra* note 37, at 87.

189. *Id.* at 88.

190. THOMAS, *supra* note 93, at 78.

right not to be removed from the home environment. Professor Gough of the University of Santa Clara Law School explains:

[A] child is affected—and there “treated”—from the moment of his induction into the juvenile court system and his categorization as a person over whom the system has jurisdiction. I have attempted to suggest that the right to treatment, in the case of one whose behavior presents no community danger and does not contravene the criminal law, subsumes a paradox—namely, a right not to be treated unless there is a positive likelihood of that treatment yielding beneficial results; and I would here argue for its extension to include a right not to be improperly categorized. Among other things, this would preclude the adjudication of a child as incorrigible or beyond the control of his parents without an affirmative showing that his parents have attempted to exert controls in a reasonable and proper way . . . . Second, the right to treatment posits the making by the court of a dispositional choice best suited to the amelioration of the presenting conditions. In some cases, if not in many, the right to treatment will require that the court decline to assume jurisdiction when its jurisdiction will not be adjuvant to the child or when its intervention will exacerbate parental dysfunction. More specifically, since incorrigibility cases by definition reflect family disruption, and since a growing body of clinical evidence points to the conclusion that therapy directed to correction of that unruly behavior must be oriented to the family as a whole, the right to treatment for the beyond control child will most frequently mean a right not to be removed from that setting in which the corrective therapy must be carried out—the family.<sup>191</sup>

Henry Foster and Doris Freed stated that: “A child has a moral right and should have a legal right . . . to receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables them to develop into a mature and responsible adult. . . .”<sup>192</sup>

Thus, implicit in the concept of the right to treatment should be a strong presumption in favor of parental autonomy.

The formulation and implementation of stringent standards for judicial intervention will further the child's right not to be removed from his family environment. Vague status offense statutes increase the likelihood that the court will intervene in instances where a child will be damaged by the intervention. The lack of clear statutory standards allow the decisionmaking to be deferred to the *ad hoc* analysis of judges and social workers. Often on the basis of their own personal biases, they remove a child from a home where, if left alone, he would have developed normally. Short of radical nonintervention, we should at least demand that these individuals make their decisions on the basis of specific harms that will result to the child if left alone. Another

---

191. *Beyond Control*, *supra* note 41, at 194-95.

192. Foster & Freed, *A Bill of Rights for Children*, 6 *FAM. L.Q.* 343, 347 (1972).

possible approach would be through a statutory presumption that commitment to a state institution is inherently more damaging than total nonintervention in the absence of special circumstances. It would then be incumbent on the state to justify its actions.

Despite the emergence of the "right to nonintervention" theory as early as 1971, no state has fully adopted its principles. A few have suggested that the youth has a right to family-based programs,<sup>193</sup> but no court has gone as far as saying that commitment is void in the absence of exhaustion of all possible alternatives (including nonintervention). The theory, while its net result is appealing, contains certain analytical flaws. In theory, its claim that it is an extension of the judicially created "right to treatment" after commitment, as such, is unsound. The eighth amendment justification for the right to treatment cannot be advanced here, since we can only improve institutional conditions under this notion. It is unlikely that any court would hold that state intervention itself constitutes "cruel and unusual punishment."<sup>194</sup> The due process claim is also weak. The standard application of due process to the juvenile treatment case is that treatment is the *quid pro quo* for incarceration under the *parens patriae* theory. Before one can demand treatment, there must be some form of coercive incarceration. It would thus be difficult to utilize the right to void the incarceration from its inception since treatment is dependent on the confinement.

There are two possible theories that could sustain the "right to nonintervention." First, the right to treatment cases could be read as mandating the best treatment for the child, something which the courts have explicitly refrained from doing. Since home-treatment is best suited for the status offender, then it is mandatory, or so one argues under the right to treatment cases. Second, one could also maintain that the right to treatment is the threshold *quid pro quo* for any form of state intervention, whether it involves confinement or not. As such, it comes into play at the moment of initial contact between the child and the system. As a result, by the time this status offender arrives before the judge, he has already earned his release since that would be the best treatment possible. No due process "right to treatment" case has extended the right this far. The development

---

193. "Failure to allow and encourage full participation of family and interested friends in the program of a youthful offender constitutes a violation of the juvenile's state and federal right to treatment." *Morales v. Turman*, 364 F. Supp. 116 (E.D. Tex. 1973).

194. *See Robinson v. California*, 370 U.S. 660 (1962) (for a discussion of the criteria for "cruel and unusual punishment").

and implementation of such a theory seems absurd in that it creates a perpetual "revolving door" of arrest and release. However, it is one possible avenue to pursue if one is committed to a "right to treatment" approach.

### C. *Criticism of the Right to Treatment.*

The conditions in most juvenile institutions are horrendous and thus this author would support any program that minimizes youth contact with it, or at least improves existing conditions. However, the real question is what is the most effective and efficient system to accomplish that goal. In the absence of reasonable alternatives, a right to treatment approach to improve the treatment facilities in our juvenile institutions should be implemented. I would also advocate it as a short-term solution as we make the transition to radical nonintervention. However, this author is convinced that, in the long run, it is not desirable to restructure the present juvenile justice system. Lawyers tend to look for legal solutions, viewing due process as some doctors view penicillin. However, often legal solutions are not the best, and could even compound this problem. The full-scale implementation of the right to treatment, in the sense that the courts have interpreted it in cases from *Martarella v. Kelley*<sup>195</sup> through *Nelson v. Heyne*,<sup>196</sup> would be plagued with severe problems and would clearly be inferior to a policy of radical nonintervention.

An initial objection to the reliance of the right to treatment in the juvenile area is that it fortifies the medical model, which, as already indicated, is inappropriate to juvenile delinquency. The focus of the entire system becomes even more misdirected. Basically, the status offender, with a few exceptions, is not "sick." The word "treatment" itself implies some sort of medical solution. Of course, an undesirable effect of this terminology is that although the juvenile may not need treatment, the child may come to believe that he is "sick" and become mentally ill because of the prescription of the institution where he is sent.<sup>197</sup> Another problem is that although the child receives treatment, since the child is

---

195. *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), *ordered* 359 F. Supp. 478 (S.D.N.Y., 1973).

196. *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1973); *aff'd*, 491 F.2d 352 (7th Cir. 1974); *cert. denied* 417 U.S. 976 (1974).

197. Note, *Treatment for Juveniles*, 1973 WASH. L.Q., 157, 191 (1974).

suffering from no known "disease,"<sup>198</sup> there is no existing treatment for the status offender, except confinement itself. Incarceration becomes the "cure."<sup>199</sup> The courts will be hesitant to order nonexistent treatment since the order would be difficult to phrase.<sup>200</sup> No case can be found where the court demanded more than the presently available treatment.<sup>201</sup> As a result, the right to treatment will, in reality, only be applied in a few situations where some treatment is clearly identifiable. In other cases, comprised mostly of status offenders, the courts will probably look to the conditions of confinement and if they are reasonable, confinement will continue. At best, the status offenders are placed in cleaner institutions under this approach. A few may even be released by judges disgusted with the juvenile system. Of course, the label carried by those released under this theory will not be pleasant, since society and the child may feel that he was only set free because he was too "sick" to be helped by medical science.

Second, the right to treatment is a piecemeal solution. At best, a few children are set free or improvements are made in the quality of a few institutions. Given the vast burden on the legal process, it is unrealistic to expect a wholesale restructuring of the juvenile justice system through this approach. This is largely because individualistic solutions mandate failure. Theoretically, the treatment of juveniles is to be applied on an individual basis and the right to treatment will probably be applied in a similar manner. Unless we are able to utilize the right to exclude a large group of children from the juvenile process at a single time, we are forced into an ad hoc system which is tremendously inefficient and probably ineffective. Unless the mandate can be carried out in terms of probability of groups, it is doomed to failure. The "right to nonintervention" seems plagued by this objection since it seems to make blanket evaluations of commitment, which is something the courts, under the present philosophy, will do on only an individual basis.<sup>202</sup>

Third, to the extent that the right to treatment improves the quality of life in juvenile institutions, unless some stringent admission limitations are enacted, there will be an exaggeration of

---

198. Other than perhaps being children, which is a fairly common "ailment" in children.

199. MALMQUIST, *supra* note 14, at 179.

200. See *Rouse v. Cameron*, 373 F.2d 451, 456-57 (U.S. App. D.C., 1966) (where the court expressly limited the 'right to treatment' to treatment that is "adequate in light of present knowledge").

201. "At no point does it appear that the courts have given effectuation to a claim for optimum treatment, nor for treatment which is curative in fact." *Beyond Control*, *supra* note 41, at 185.

202. *Id.* at 199.

demand. As parents see the conditions in state training schools approaching those of private agencies or even of the family home, they will have a greater incentive to file a "beyond control" petition. The result may be that more children are committed to less horrendous places.<sup>203</sup> Of course, as the institution population increases, conditions will again degenerate, perhaps to lower levels than those currently existing.

The fourth problem with the right to treatment approach is that the vast bulk of status offenders are not represented by counsel or are defended by inexperienced attorneys.<sup>204</sup> To make the right meaningful would require the appointment of qualified lawyers for all status offenders at public expense. Not only would this amount to a squandering of lawyer-time that might be better utilized in another area, it would also involve massive allocations of judges away from delinquency cases where they are vitally needed. Judges would also have to continuously supervise juvenile institutions to insure compliance with their treatment orders. It is questionable whether society would be willing to bear such costs, and even more dubious if they should. Radical nonintervention would produce equal or better results without the immense costs.

Not only would a right to treatment approach waste legal resources, it would also squander societal resources. The improvement of juvenile facilities is an expensive proposition. With radical nonintervention, we could reduce overcrowding and spend the resources on children who have been adjudged delinquent. It would also be possible, and perhaps wiser, to fund projects that will renovate the ghettos, improve education, or provide voluntary community services to troubled families. One thing is certain: we could not do worse with the money.

A sixth objection to the right to treatment theory is that it only guarantees a minimum level of care. All that the courts have required is a "good-faith" effort.<sup>205</sup> There is really no assurance that status offenders will be given treatment distinguishable from that accorded hardened criminals. Coupled with this problem is the reality that the formulation and enforcement of meaningful stand-

---

203. See generally, Manella, *The Case for Residential Treatment of Delinquent Children*, 25 JUV. JUST. 2 (May 1974).

204. Couch, *Diverting the Status Offender From the Juvenile Court*, 25 JUV. JUST. 18 (November 1974).

205. *Rouse v. Cameron*, *supra* note 200, at 456.



ards presents a difficult task. An objective standard seems hopeless given the complexities of the subject matter.<sup>206</sup> A subjective standard will force the court to deal with very complex medical, psychiatric, psychological, and sociological theories. Although the courts could probably perform this task, it would require the expenditure of a great deal of judicial time. If the courts only require "some sort" of treatment, then the constitutional right to treatment is rendered a nullity since almost any institutional program could be defended as a form of treatment.<sup>207</sup> In short, once we confine the child to a juvenile institution, he is forced to play a dangerous game of russian roulette, where some win, but most lose.

With a policy of radical nonintervention, we are not forced to premise incarceration on rehabilitation. As such, we only have to apply eight amendment criteria to juvenile institutions which are far easier to formulate and enforce.

Seventh, the right to treatment without adequate funds is an attempt to cut through the substance in order to reach the procedure. It is unclear that legislatures will be willing to allocate the funds necessary to upgrade treatment programs to acceptable levels. Even if they do, the monies will most likely come from other social programs which are urgently needed.

The expenditure of public funds on improving juvenile institutions without limiting their admissions may also be undesirable because it will entrench the state in the "hotel and cafe" business. The state should get out of the business of providing custodial care to juveniles, which involves the majority of the cost of institutionalization, and place that burden on the parents where it belongs. In many cases, the right to treatment merely forces the state to upgrade their "Motel 6" into a "Holiday Inn."

The ninth objection to the full-scale adoption of the right to treatment is that it could lock-in current levels and methods of treatment and impede the development of community programs. Once an institution meets judicial levels of care, it may become inflexible and fail to adopt new treatment procedures, especially if the institution is forced to obtain prior court approval of each new method. Also, since the courts would be defining institutional treatment in constitutional language, this would tend to perpetuate institutional treatment. This could have the undesirable effect of discouraging experimentation in community and family-based rehabilitation programs<sup>208</sup> and could also deter pre-

---

206. *Juveniles*, *supra* note 92, at 187.

207. *Id.* at 188.

208. *Juveniles*, *supra* note 92, at 190-91.

vention through improvement in social condition programs since the institutions would siphon most of the funds. The right to treatment could guarantee that juvenile institutions are here to stay.

Finally, the costs of improving the system through the legal avenue of the right to treatment outweigh the gains by a considerable degree. As discussed in Part I, treatment is inherently ineffective and counterproductive. Spending more money provides cleaner institutions with volleyball and shuffleboard courts but, no matter what name is given them, they are still jails that deprive children of one of their most fundamental rights, the right to be free. A policy of radical nonintervention that insures a child's liberty until he commits a criminal act is clearly superior to one that merely provides him with a more attractive room once committed.<sup>209</sup>

### III. CONCLUSIONS

One thing *is* clear. A purely legal solution to the problem of status offender jurisdiction will prove ineffective.<sup>210</sup> What is needed is the eradication of the rehabilitative model as a justification for incarceration. Once we rid ourselves of *parens patriae*, it is not necessary to utilize the right to treatment philosophy. We can attempt to "treat" delinquents if we feel it wise or humane, but we should be under no moral obligation. Although this approach may seem harsh, it is anything but that. Under this system, no child would be subjected to the evils of the juvenile justice system until he has been accused and proven guilty of criminal conduct beyond a reasonable doubt and has been afforded full due process safeguards.

It is time to refrain from using our legal system to enforce parental normative judgements on our children at the price of their liberty. Edwin Schur, one of the foremost advocates of radical nonintervention, states this proposition as follows:

Policies should be adopted, therefore, that accept a greater diversity in youth behavior; special delinquency laws should be exceedingly narrow in scope or else abolished completely, along with preventive efforts that single out specific individuals and programs that employ "compulsory treat-

---

209. A solution of radical nonintervention is responsive to individual needs while "a purely legal solution. . . would nullify the rehabilitative nature of the juvenile process by imposing social sanctions upon one who does not require them, or withholding treatment from one who needs it." KITTRE, *supra* note 95, at 860-61.

210. See generally, *Beyond the Court*, *supra* note 133.

ment." For those serious offenses that cannot simply be denied away through a greater tolerance of diversity, this reaction pattern may paradoxically increase "criminalization"— Uniformly applied punishment not disguised as treatment; increased formalization of whatever juvenile court procedures remain in order to limit sanctioning to cases where actual anti-social acts have been committed and to provide constitutional safeguards for those proceeded against.<sup>211</sup>

A discretionary system that allows the option of confining status offenders invites abuse and wastes legal and societal resources in trying to combat the abuse. The costs of a legal solution to this problem outweighs the gains and is far greater than the price of a policy of radical nonintervention.

Let the next parent's cries that the state take his child fall upon deaf ears. Next year, over 20,000 children who have committed no crime will be scarred for life as a result of sentencing to juvenile institutions.

---

211. *Nonintervention*, *supra* note 148, at 23.