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CHILDREN'S RIGHTS

The Legal Rights of Minors
in Conflict with Law or Social Custom

by Nora Klapmuts

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National Council
on Crime and Delinquency

Children's Rights

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NORA KLAPMUTS

CHILDREN'S RIGHTS is an enormously broad subject because it encompasses not only procedural rights in juvenile court and the applicability of constitutional rights to juveniles, but also the complex issue of the political, economic, and social position of minors in our culture. The subject is further complicated by the rapidly changing status of young people today and the resulting confusion reflected in adult attitudes toward children and youth.

Current developments are not wholly unprecedented. The definition of the "child" has been in evolution for centuries. But today, perhaps for the first time, young people are beginning to take an active role in their own "liberation." When a 12-year-old child participates responsibly in a court action to prohibit compulsory prayers in public school, when 14-year-olds write and produce their own "consciousness-raising" newspapers to inform their peers of their rights as persons, and when a million American children leave home each year seeking actual if not legal emancipation, adults must abandon previous conceptions of children and their needs and consider anew the possible injustices in the way this politically, economically, and socially disadvantaged group of citizens is treated.

As other movements strive to establish legal rights and equal treatment for disadvantaged groups (ethnic minorities, women, criminal suspects, institutional inmates), the beginnings of a serious reevaluation of the status of minority and the rights and responsibilities that ought to go with it can be discerned. Following a period during which children's rights were viewed primarily in terms of custody, care, and protection (a view still propounded by many), some of the current literature—as well as certain legislative, judicial, and administrative developments—reflects a shift toward a delineation of rights that more closely resemble those accorded adults. Earlier laws and conventions designed to protect the weak, the immature, and the otherwise disadvantaged are increasingly viewed as constraining and sometimes oppressive. In its 1971 report, the White House Conference on Children states this issue plainly:

> Although adult rights have been specifically delineated in the law and Bill of Rights, children are still considered objects to be protected—indeed, almost possessions. We must recognize their inherent rights which, although not exclusively those established by

law and enforced by courts, are nonetheless closely related to the law.[1]

Unfortunately, the "inherent" rights of children are not self-evident, nor have they ever been fully identified and described. Relatively little case or statutory law exists in which the rights of juveniles are set forth, although this is beginning to change. Until recently, as Lois Forer points out, the rights of children have been represented by a legal vacuum.[2] With a few prominent exceptions intended to apply universally (such as in juvenile court procedure), enforceable legal rights of juveniles will probably continue to be defended case by case—a costly and time-consuming process.

Outside of the courts, perspectives on the child and the nature of juvenile rights are changing. The status of the child as *person* is receiving some recognition. It has been suggested, for instance, that the child, like the adult, has a right to privacy (including the right to personal style)[3] and a right to be left alone except where this right clearly conflicts with a compelling interest of the state or its institutions.[4] It has been stated that the child is an individual with his own full right to life and development and that there should be no legal presumption that in case of conflict the parent, the school, or the state is right.[5] And it is frequently held that deviance and delinquency, especially those behaviors and conditions that are illegal or invite censure only for juveniles, are basically political, with the implication that powerlessness and dependency are essential to the violation of the rights of those subjected to control. The publication of numerous legal-rights handbooks for youth in general,[6] and for students in particular,[7] the creation of child advocacy roles and children's lobbies, and the reworking of school disciplinary procedures to insure greater

[1] White House Conference on Children, *Report to the President* (Washington, D.C.: U.S. Government Printing Office, 1971), p. 347.

[2] Lois G. Forer, "The Rights of Children: The Legal Vacuum," *American Bar Association Journal*, (55):1151-1156, 1969.

[3] Mark J. Green, "The Law of the Young," in *With Justice for Some*, Bruce Wasserstein and Mark J. Green, eds., (Boston: Beacon Press, 1970), p. 11.

[4] *Ibid.* See also Roderick L. Ireland and Paul R. Dimond, "Drugs and Hyperactivity: Process is Due," *Inequality in Education* (No. 8):19-24, 1971.

[5] Sol Rubin, "Children as Victims of Institutionalization," *Child Welfare*, 51(1):6-18, 1972.

[6] E.g., Michael Dorman, *Under 21: A Young People's Guide to Legal Rights* (New York: Dell, 1970); Joseph S. Lobenthal, Jr., *Growing up Clean in America: A Guide to the Legal Complexities of Being a Young American* (New York: World, 1970); Jean Strouse, *Up Against the Law: The Legal Rights of People under 21* (New York: Signet, 1970).

[7] See, for example, National Juvenile Law Center, *Student Rights Handbook for Dayton, Ohio* (St. Louis, Mo.: St. Louis University, 1971). The message on the back cover of this handbook is: "Knowledge is power. . . ." See also New York Civil Liberties Union, Student Rights Project, *Student Rights Handbook for New York City*, New York, 1971.

protection for students represent some recent efforts to correct the imbalance of power which discriminates against youth.

The future of the law concerning children and youth may be determined more by changes in public and professional attitudes than by the development of narrow legal remedies. Still, as minors' rights become better defined, they will have to be defended repeatedly, one case at a time, until they become standardized in legislative codification and judicial rulings. Young people have always been relatively powerless, and legal change is an important means of redressing the imbalance. The question of what are or should be the rights of children remains unanswered and controversial; a solution can come only from a combination of case law and legislation to delineate specific rights and a general re-examination of the concept of the child and his emancipation.

What Is a "Child"?

What are the rights of children and youth? It depends. The legal rights of a 16-year-old may differ from those of a 14-year-old or an 18-year-old, although all are under the age of majority. The rights of the same 16-year-old may also differ from those of a 16-year-old in a different state or county. It depends on what is meant by "child" or "youth."

Laws define "child" in terms of age limits; and age limits for the status of "juvenile" vary from state to state as well as from one situation to another. With the exception of a few states in which the age of majority has recently been lowered to 18 across the board,[8] "infant"—a concept derived from common law—is still the technical term for anyone under 21. Further subdivisions within this category of infancy are based on degree of responsibility and are defined by upper age limits. Below a certain age a young person is considered helpless or lacking legal responsibility for his own actions. Beyond a certain age the child may be considered a "youth," a stage of semi-responsibility which may last until he is 21 (but can become practically full responsibility if the youth qualifies as an independent, self-supporting "emancipated minor"[9]). But even age is not an absolute determinant of legal dependence or responsibility: for example, a pregnant female of any age is considered "emancipated" for purposes of obtaining medical treatment in California.[10]

Dissatisfaction with the manner in which minors are dealt with by the law is expressed in the literature in three different ways. Some writers

[8] The Wisconsin legislature lowered the age of majority to 18 this year. Nine other states have enacted similar laws since 1969, although six of them retain the 21-year limit for the purchase of liquor.

[9] For a general discussion of age limits and graduated legal responsibility, see Lobenthal, *op. cit. supra* note 6, pp. 64-80.

[10] *Id.*, p. 67.

emphasize the need for added protections and compensatory rights to offset the legal disabilities imposed on juveniles. Others maintain that present age limits are too high and should be lowered to reflect the increasing maturity of contemporary youth. These two views are already finding expression in legal changes extending due process rights to juveniles in court and lowering age limits for voting, for obtaining medical treatment without parental consent, and for entering into legal contract. A third approach argues that the rights and responsibilities of the young should be determined individually, taking into account a child's maturity rather than his chronological age. This is perhaps an unattainable goal. While it is true that distinctions between "child" and "youth," or between "juvenile" and "adult" are artificial and arbitrary, and that rights and responsibilities *should* be fixed on an individual determination of maturity, it is unlikely that this will be put into practice. If children are not to be considered adults (there are few in our culture who would consider them so) and if it is believed that the young should be treated differently *in any way*, then some reference to chronological age categories may be the only practicable means of apportioning differing rights and responsibilities.

The fact remains that many people believe that rights and responsibilities have not been apportioned appropriately. A thought voiced by Frank Musgrove in his article on the "adolescent ghetto" is representative of this view. "The young," he says, "are older than we think."[11] The protected status of minority and all the legal disabilities that go with it are justified by the alleged immaturity of the young. The *parens patriae* doctrine, the philosophy of the juvenile court, the laws supporting compulsory education and restricting child and youth employment, and the status of legal irresponsibility are all based on the belief, deeply entrenched in our socio-legal tradition, that "children" (minors) have needs to be met, not rights to be respected; that their only right is to custody and protective care—to life, but not to liberty.

It seems that we have gone too far. Our elaborate "protection schemes," as Musgrove calls the efforts made to exclude the young from adult society, are at least as protective of adult hegemony and the status quo as they are of juvenile immaturity and innocence. The young *are* older than we think. After many years of expanding control over children in more and more areas of their lives, the real competence and maturity of most young people 16, 17, and 18 years of age and the personal integrity of children of all ages are being rediscovered.

What is a child? A child, under the law, is not an adult. But a child *is* a person,[12] despite the occasional claim that he is not.[13] The Constitution

[11] Frank Musgrove, "Why Youths Riot: The Adolescent Ghetto," in *Work, Youth and Unemployment*, Melvin Herman, Stanley Sadofsky, and Bernard Rosenberg, eds. (New York: Thomas Y. Crowell, 1968), p. 427.

guarantees all persons who are also citizens certain inalienable rights, but some of these rights become effective only when an individual reaches a certain age. The process of determining which rights apply to whom and how they apply is continuous and dynamic. As social definitions of the child and his needs and capabilities are modified, and as interpretations of such terms as "due process" or "fundamental fairness" (both highly elusive concepts) are further delimited, the functional rights of children can be expected to change.

While definitions of the child vary and the question "What is a child?" could be debated indefinitely, for practical purposes a child may be defined as anyone whose rights are restricted because of his age. "Children's rights," then, are those that either inhere in any individual regardless of age or compensate for disabilities that accompany the status of minority. Because the rights of minors are in flux, no comprehensive listing of children's rights can be made. Legal developments and trends in thinking on the subject can be traced by imposing a sometimes overlapping distinction, borrowed from the law, between *procedural* rights and *substantive* rights—rights to due process and fairness in procedure and rights of content or substance.

Procedural Rights of Minors

In the wake of the post-World War II "due process revolution," as Paul Nejelski calls this period of heightened interest in fair legal treatment of individuals under adult criminal law and within the juvenile justice system,[14] the procedural rights of minors have advanced far more rapidly than have their substantive rights. Concern for the fair treatment of juveniles in conflict with the law or of children subjected to state intervention for other reasons is not new with 1950's and 1960's: it is not even unique to the twentieth century. In 1870, a judge in an Illinois court pierced the rhetoric of *parens patriae* and the reform school movement to comment, in *People v. Turner*, that the reform school boy was "a prisoner made subject to the will of others" and thus ought to have the same legal rights as an adult offender.[15] But the voices of protest at that time were

[12] In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969), the Supreme Court stated specifically that students in school as well as out of school are "persons" under the Constitution.

[13] One example of this line of thought is expressed by Ned O'Gorman in his review of *Children's Rights* by Paul Adams and others (New York: Praeger, 1971), appearing in *Saturday Review*, Oct. 23, 1971, pp. 27-29, 84. He states plainly (p. 84): "Children simply are not persons. . . ."

[14] Paul Nejelski, "The Missing Links," *Trial*, 7(5):17, 19, 1971.

[15] *People v. Turner*, 55 Ill. 280 (1870), quoted in Robert H. Bremner, ed., *Children and Youth in America—A Documentary History*, Vol. II, *1866-1932*, Parts 1-6, (Cambridge, Mass.: Harvard University Press, 1971), p. 487.

barely heard amid the commotion that accompanied the "child-saving" movement and the creation of the juvenile court.[16] Even the early attacks on the juvenile court, on the grounds that it deprived children of basic constitutional rights of due process, failed.[17] The development of legal rights for juveniles had to be postponed until the fascination with the paternal benevolence of the state and its courts toward the young had run its course.

The literature on the history of juvenile justice reform puts into perspective some current beliefs, not only about the creation of the juvenile court, but also about the import of procedural changes since *Kent* and *Gault* and the present status of juvenile rights in and out of court. In a review of the history of juvenile justice reform since the mid-nineteenth century, Sanford Fox attacks the myth, created by the Court in the *Gault* decision, that children were being brought back to a Golden Age of constitutional rights that they had lost at the turn of the century with the establishment of the juvenile court. There is little reason to suppose that such a Golden Age ever existed, says Fox, and much reason to suppose it did not.[18] Commentary by the judge in *People v. Turner* supports this idea: Despite the many liabilities imposed on children of the time, ". . . it is assumed, that to them, liberty is a mere chimera. It is something of which they may have dreamed, but have never enjoyed the fruition."[19] It seems more accurate to view the juvenile court not as having taken away the constitutional rights of children but as having delayed their recognition.

Due process rights of children have received growing acknowledgement since the 1940's, as evidenced by court decisions and requirements, legislative changes in state juvenile codes, and additions to the ranks of the critics in the literature. However, there are some who maintain that the "procedural revolution" itself is a myth—that the impact of Supreme Court decisions on juvenile courts has been slight; that the participation of lawyers in juvenile court has not significantly altered juvenile procedure; and that police, school officials, social agencies, and other representatives of adult culture have not recognized any substantial change in the position of minors. There is probably no way of determining with any certainty the *practical* rights of children—those that are operative regardless of their status under law. "On the books," at least, the procedural rights of juveniles are expanding. But the doubts expressed by observers

[16] The quality and strength of the movement that the constitutionalists found themselves up against is documented by Anthony M. Platt in *The Child-Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1969).

[17] For a brief historical overview of the juvenile court, see Jeffrey E. Glen and J. Robert Weber, *The Juvenile Court: A Status Report* (Washington, D.C.: National Institute of Mental Health, 1971).

[18] Sanford J. Fox, "Juvenile Justice Reform: An Historical Perspective," *Stanford Law Review*, 22(6):1187-1239, 1970.

[19] *People v. Turner*, *supra* note 15.

of juvenile justice in operation suggest that the Golden Age of children's rights is yet to come.

Procedural Rights In Juvenile Court

The subject of juvenile rights in court is important to any discussion of children's rights. As the juvenile court increasingly handles problems which were dealt with in the past by the family or other social institutions, conflict between the juvenile and his parents, between the student and the school, and between the minor and society frequently end up in court as delinquency (or "incorrigibility") cases. Also, while the authoritarian/paternalistic approach to the young pervades our culture, it is perhaps best articulated in juvenile court philosophy and practice. Efforts to define the scope and operation of the juvenile court have quite properly reflected larger social norms and purposes. In his book on the relationship of social action to legal change in the juvenile court in California, Edwin M. Lemert describes the changing perspectives on the juvenile court in the 1940's as "portents of challenges to the rising level of authority imposed on youth in American society."[20] Today the delineation of juvenile rights in court also suggests an increasing willingness (1) to extend to the young the legal remedies believed necessary to protect any person against arbitrary action by the state, and (2) to reevaluate the requirements of due process for juveniles in light of contemporary social definitions of fundamental fairness and the changing status of youth.

Even a cursory review of the literature on juveniles' rights in court reveals the same confusion that characterizes the entire field of children's rights. The *Gault* decision, made by the U.S. Supreme Court in May 1967, gave form to the upheaval that was already occurring in juvenile court procedures throughout the country and set off a new wave of procedural chaos as state courts, legislatures, and other governmental agencies struggled to implement its requirements and to determine its implications. What the *Gault* decision makes clear is that in state proceedings which could result in incarceration, the child has a right to adequate notice of charges against him, a right to counsel and to have counsel provided if he is indigent, a right to confrontation and cross-examination of witnesses, and a privilege against self-incrimination.[21] What is not made clear, and has since been the subject of much debate, is whether the application of the due process clause of the Fourteenth Amendment to juveniles in this limited case has implications for a wide range of other situations. Similar confusion has resulted from Supreme Court decisions in other cases: in the *Kent* decision, which established a right to a judicial

[20] Edwin M. Lemert, *Social Action and Legal Change: Revolution within the Juvenile Court* (Chicago: Aldine, 1970), p. 29.

[21] *In re Gault*, 387 U.S. 1 (1967).

hearing, with counsel, before transfer of a juvenile to adult court[22]; in *Winship*, which applied to juveniles the standard of proof beyond a reasonable doubt[23]; and in *McKeiver*, which declared that the concept of due process in juvenile court proceedings does not include a right to trial by jury.[24] In applying to juveniles *some* of the Bill of Rights protections of adult criminal law, but not others, the Court generated further controversy over the implications of other decisions, such as *Miranda*, which did not consider the case of juveniles at all.

In a series of articles on developments in juvenile law, Jeffrey Glen provides a running commentary on the changing postures of state courts and legislatures in response to, and in anticipation of, federal court decisions on juvenile procedure.[25] The picture emerging from his review is that of tremendous variety at the state level—the level at which the practical rights of juveniles are actually determined. For example, a juvenile in Nevada has the right to a speedy trial; in New York a child has the right not to be placed twice in jeopardy in juvenile court and the right to counsel at the dispositional stage of the court hearing; and, despite the Supreme Court ruling against such a right, in several states a child has been found entitled to a jury trial.

This diversity at the local level in both law and practice is confirmed by other writers. Many issues are still debated: for instance, procedural rights (especially the right to counsel) at the dispositional stage of a delinquency hearing or at other crucial decision points such as the probation revocation hearing[26]; the right to appeal and to a transcript of proceedings for judicial review; the retroactivity of rights outlined in *Gault*; and rights in dependency, neglect, or other custody proceedings.[27] A major issue is whether the juvenile court can survive the imposition of procedures developed in criminal law or whether guarantees of individual rights are not in irresolvable conflict with the rehabilitative nature of the juvenile court. While some writers see no essential conflict between the purposes of the juvenile court and due process of law, others decry the increasing formalism of the court, stressing the "supraconstitutional rights" (to custody, protection, and regenerative care) that it was designed to protect.

[22] *Kent v. United States*, 383 U.S. 541 (1966).

[23] *In re Winship*, 397 U.S. 358 (1970).

[24] *McKeiver v. Pennsylvania*, 91 S. Ct. 1976 (1971).

[25] Jeffrey E. Glen, "Developments in Juvenile and Family Court Law," *Crime and Delinquency*, 15(2):295-305, 1969; 16(2):198-208, 1970; 17(2):224-232, 1971; and "Juvenile Court Reform: Procedural Process and Substantive Stasis," *Wisconsin Law Review*, (2):431-449, 1970.

[26] For example, see James D. Ishmael, "Juvenile Right to Counsel at a Probation Revocation Hearing," *Journal of Family Law*, 11(4):745-752, 1972.

[27] On the rights of children in neglect proceedings, see American Humane Association, Children's Division, *Due Process and Child Protective Proceedings: State Intervention in Family Relations on Behalf of Neglected Children*, Denver, undated.

Alfred Noyes claims that "a child is entitled to more than the bare legal rights afforded to adults."[28] Judge Lindsay G. Arthur maintains that children "should not have equal liberty: they should have less. Neither should they have equal protection: they should have more."[29] And Don Young states that the most important rights that a child has before the juvenile court are the right to the special privileges and immunities conferred by juvenile court law and the right to solicitous care and regenerative treatment.[30]

Whatever the merits of their arguments, these writers seem to be in the minority today. The trend is toward the granting of constitutional rights and protections, possibly with the ultimate effect of eliminating distinctions between criminal and juvenile courts—despite the Supreme Court's "disinclination" (in *Gault*) "to give impetus" to such a development. This trend originated with adjudicatory hearings in delinquency cases, extended to pre- and post-court stages of juvenile justice, and has even spread into other (non-court) areas of juvenile life.

Procedural Rights at Other Stages of Juvenile Justice

The rights of juveniles are important in such pre- and post-hearing processes as contact with police, juvenile court intake, informal disposition, and incarceration or treatment. It is becoming increasingly clear that throughout the juvenile justice system, children have rights, similar to those of alleged or convicted adult offenders, which must be respected if juvenile justice is to be a reality.

While the Supreme Court has not yet considered the question of whether the constitutional rights of individuals contacted by police apply to juveniles, many courts, legislatures, and police departments have assumed that they do. Ferster and Courtless report a trend in the amendment of juvenile court acts to extend laws of arrest to juveniles[31] and the Uniform Juvenile Court Act includes a specific provision on search and seizure.[32] Several courts have taken the position that a statement by a juvenile during pre-judicial investigation (interrogation by police or probation officers)[33] is not admissible in court unless he was previously

[28] Alfred D. Noyes, "Has *Gault* Changed the Juvenile Court Concept?" *Crime and Delinquency*, 16(2):158-162, 1970, p. 160.

[29] Lindsay G. Arthur, "Should Children Be Equal as People?" *North Dakota Law Review*, 45(2):204-221, 1969, p. 221.

[30] Don J. Young, "Due Process and the Rights of Children," *Juvenile Court Judges Journal*, 18(3):102-105, 1967, p. 104.

[31] Elyce Zenoff Ferster and Thomas F. Courtless, "The Beginning of Juvenile Justice: Police Practices and the Juvenile Offender," *Vanderbilt Law Review*, 22(3):567-608, 1969.

[32] Commissioners on Uniform State Laws, *Uniform Juvenile Court Act*, Section 27B, 1968.

[33] The adjustments made by one court to comply with constitutional requirements at intake are described in William H. Ralston, Jr., "Intake: Informal Dis-

notified of his rights to counsel and to remain silent. This quite clearly implies that the requirements of *Miranda v. Arizona* bind the police in dealing with youthful law violators. Richard Kobetz presents the following as a policy guide for police:

> When gathering evidence of an offense, there must be no differences in procedural operations within a police agency if a juvenile is involved instead of an adult suspect. . . . Every care must be exercised to assure the rights of the child; he is guaranteed the same rights as an adult.[34]

Several problems are associated with court rulings on the rights of juvenile suspects. First, where protections apply to juveniles taken into custody for an alleged offense, police remain relatively free in dealing with "noncriminal" juveniles unless they are restricted by local guidelines (such as those set down by the Berkeley City Council for police handling of underage "street people" and runaways[35]). Second, even where Fourth Amendment rights are extended specifically to juveniles, the manner of application may deny their effectiveness: the broad definition of behaviors justifying the arrest of juveniles and the way in which the "reasonableness" of a search is interpreted in the case of a juvenile may make these rights meaningless in practice.[36] Third, such "handcuffing" of police may encourage them to expand their use of informal "station adjustment" and unofficial dispositions without court referral. A number of authors have discussed the abuse of children's rights by police in informal disposition and by court workers at intake.

Ferster, Courtless, and Snethen provide an excellent summary of procedures and problems associated with informal probation and the consent decree. Noting that informal dispositions at intake may include (without adjudication) long periods of probation supervision, ranging from months to years, in which the child's hours, associates, and activities are prescribed, limited, and scrutinized, these writers conclude that existing practices are too informal and do not sufficiently protect the juvenile's rights.[37] Sometimes the police themselves engage in unofficial supervision and their methods may be quite severe.[38]

position or Adversary Proceeding?" *Crime and Delinquency*, 17(2):160-167, 1971.

[34] Richard W. Kobetz, *The Police Role and Juvenile Delinquency* (Gaithersburg, Md.: International Association of Chiefs of Police, 1971), p. 132.

[35] Berkeley City Council, *Resolution No. 44,548 N.S.: Stating the policy of the Council of the City of Berkeley with regard to certain provisions of the juvenile court law*, June 8, 1971 (circulated to police June 25, 1971).

[36] Allan M. Dabrow and Daniel M. Migliore, "Juvenile Rights under the Fourth Amendment," *Journal of Family Law*, 11(4):753-764, 1972.

[37] Elyce Zenoff Ferster, Thomas F. Courtless, and Edith Nash Snethen, "Separating Official and Unofficial Delinquency: Juvenile Court Intake," *Iowa Law Review*, 55(4):864-893, 1970, pp. 882, 887.

[38] A description of the police practice of "grounding" youths in Kansas City

Unfortunately for the juvenile who finds himself subjected to such restriction by police or probation officers, informal disposition has received wide acceptance as a means of "diversion from the juvenile justice system," as a way of achieving a much-needed saving of court time, and even as a method of reducing the "disadvantages" imposed by the due process requirements of *Gault*.[39] While even advocates of informal probation have recommended that it be conditioned on the juvenile's admission of guilt or involvement or on the voluntary consent of parent and child,[40] the utility of unofficial handling is such that opponents are unlikely to achieve its prohibition. The Children's Bureau, in its legislative guide, claims to eliminate informal probation by substituting the consent decree,[41] a more formalized order for supervision or treatment approved by the judge (but without a fact-finding hearing) after consent by the parents and the child. Participation of the judge may lend a measure of official sanction to an otherwise wholly informal procedure, but the extent to which important rights of the child are jeopardized is still in doubt.

Some of the issues pertaining to children's rights which are connected with informal supervision are: the need to recognize a child's right to counsel at the point of entry into the juvenile justice system (at the police station, detention center, or court intake interview); the need for separate counsel and other protections for the child whose interests conflict with those of his parents; and the need for investigation of the possibility of double jeopardy when court proceedings against a child on the original complaint are permitted after informal supervision has begun.[42] A newly emerging issue (really a question of substantive rights) concerns the limits of state intervention in cases where the individual has not been accused of an offense. Currently under examination in terms of the "right of privacy" or the "right to be left alone," this issue is of vital importance to the noncriminal juvenile subjected to informal or unofficial disposition.

Children's rights often are flagrantly denied in the common practice of pre-adjudication detention. The National Crime Commission found that many state statutes do not set standards to restrict the use of detention, that detention is frequently used when it is unnecessary, and that,

is included in the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* (Washington, D.C.: U.S. Government Printing Office, 1967), pp. 12-13.

[39] Aidan R. Gough, "Consent Decrees and Informal Service in the Juvenile Court: Excursions toward Balance," *University of Kansas Law Review*, 19(4): 733-746, 1971, p. 736.

[40] For example, see Uniform Juvenile Court Act, Section 10.

[41] William H. Sheridan, *Legislative Guide for Drafting Family and Juvenile Court Acts*, (Washington, D.C.: U.S. Children's Bureau, 1969), Section 33.

[42] All of the foregoing are provided for in Council of Judges, National Council on Crime and Delinquency, *Model Rules for Juvenile Courts*, New York, 1968.

despite the possible unconstitutionality of punishing one who has yet to be tried,[43] children are placed in detention for punishment or for reformation through exposure to the "consequences" of misbehavior.[44] Standards for the use of detention stress that it should be limited to those cases in which the child is likely to run away or commit new offenses and that it should never be used to punish the child or to teach him a lesson.[45] An alternative to the imposition of standards for detention decisions is the enunciation of a legal right to bail for juveniles. Opponents of such a right maintain that it is unnecessary since "standard practice" in dealing with juveniles is release to the parent unless this is impracticable. Standard practice, however, seems remarkably varied. The juvenile's right to avoid detention would appear to be better protected if release were expressed as an entitlement, perhaps as a right to bail. As of this time the Supreme Court has not found that the right to bail extends to juveniles, and state statutes differ in their provisions for bail or release on recognizance for juveniles.[46] The number of children in jails and other detention facilities across the nation suggests that the juvenile's right to remain at liberty unless he poses a serious threat to himself or others is not adequately protected.

A final issue involves the rights of incarcerated juveniles, whether already committed or awaiting court action in detention. Concern for the rights of juveniles in institutions derives from two sources, both originating with incarcerated adults: (1) a growing concern with prisoners' rights and a new willingness of courts to become involved in defining and protecting these rights; and (2) the development of the idea that persons involuntarily committed for rehabilitation (notably the mentally ill) have a right to treatment. Because rehabilitation is the primary justification for the incarceration of children, the right to treatment has been applied more easily to juveniles. Courts have held that an institutionalized child must receive the indicated treatment or be released, and cases have been brought to require juvenile correction systems to improve institutional services and to release children when services are inadequate[47] or in violation of their right to an "acceptable home substitute" as their place of detention.[48]

[43] Supreme Bench of Baltimore City, *Memorandum Opinion: Juvenile Detention Center, Baltimore City Jail*, Baltimore, August 1971, pp. 9-12.

[44] President's Commission, *op. cit. supra* note 38.

[45] National Council on Crime and Delinquency, *Standards and Guides for the Detention of Children and Youth*, New York, 1961, pp. 15-17.

[46] Six statutes appear to establish a right to bail; in twelve admission to bail is discretionary. Most statutes provide for release on recognizance or on written promise of parent or child, almost always at the discretion of the court or probation officer. Seven statutes say nothing about release procedures and two explicitly prohibit bail. National Council of Juvenile Court Judges, *Juvenile Court Judges Directory and Manual*, Reno, 1970.

[47] Glen and Weber, *op. cit. supra* note 17, p. 16. See also Supreme Bench of Baltimore City, *supra* note 43.

The application to juveniles of the concept of prisoners' rights is likely to meet with greater resistance, although it would seem to be a logical extension of the admission that training schools are prisons and confinement punitive regardless of the terminology. The Model Act for the Protection of Rights of Prisoners, which does not specifically mention juvenile inmates, recommends the prohibition of inhumane treatment and suggests standards for solitary confinement, disciplinary procedures, grievance procedures, judicial relief, and visiting.[49] Courts have also upheld (adult) prisoners' basic constitutional rights, such as freedom of religion, and have ruled that prison authorities "possess no power of censorship" regarding the receipt of newspapers or mail from attorneys and public officials and the reading of outgoing mail.

Court action to protect the juvenile inmate is likely to be restricted to the prohibition of inhumane conditions in institutions, emphasizing the right to treatment and a rehabilitative environment. The conditions of solitary confinement in one case were held to violate the constitutional ban on cruel and unusual punishment; the court indicated that the cruelty consisted in part in the procedure's counterproductivity.[50] An explanation of the difference in emphasis between prisoners' rights and the rights of incarcerated juveniles is found in the central principle underlying the modern interpretation of the rights of prisoners. This principle derives from a federal case in which the court declared that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[51] The rights of an "ordinary (minor) citizen" are not extensive even on the outside, where what he can read, see, do, think, and be is restricted and institutionally controlled and his rights are defined primarily by environmental conditions.

Procedural Rights outside the Justice System

Juveniles' rights outside the justice system include their rights under laws governing employment, driving, contracts and legal agreements, voting, drugs, drinking, marriage, sex, the draft, abortion, and running a business.[52] Only two areas are considered here: the rights of students in

[48] Juvenile Court of the District of Columbia, *In the matter of: Joseph Franklin Savoy and Tony Hazel*, p. 16.

[49] National Council on Crime and Delinquency, A Model Act for the Protection of Rights of Prisoners, Paramus, N.J., 1972.

[50] *Lollis v. New York State Department of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970).

[51] *Coffin v. Reichard*, 143 F. 2d 443, 155 A.L.R. 143 (C.C.A. Ky. 1944).

[52] These topics are dealt with in recently published juvenile rights handbooks, *supra* note 6. Also see Irving J. Sloan, *Youth and the Law* (Dobbs Ferry, N.Y.: Oceana Publications, 1970).

school and the rights of children with regard to parents and the home. These are selected because the family and the school are primary institutions to which almost all children are exposed and which are capable of exerting nearly complete control over a child's life. The child has little legal recourse against school or family and conflict with either can land him in juvenile court, under present definitions of court jurisdiction. Together the parents and the school have the power and the means to deny the child the degree of liberty and independence (commensurate with his capabilities and level of maturity) that is necessary for his growth and development. As long as parents can turn their children over to the courts or institutions[53] as "incorrigible," and as long as schools can suspend, expel, or otherwise discipline students arbitrarily and without challenge, the rights of children are in serious danger.

Because both parents and schools are responsible for controlling and disciplining minors to some extent, finding a proper balance is not a simple matter. Between the extreme positions of those who argue for complete self-government by children and those who advocate a return to old-fashioned authoritarian discipline, another view is gaining acceptance in the literature and in the courts: that due process and fair procedure, which permits the child to make himself heard, is required in decisions that importantly affect a child's life and future development.

Courts and legislatures have been understandably reluctant to intervene in the child's relationship with parents and the home except in cases of neglect or physical abuse. The right of parents to deal with their children as they see fit has only recently been questioned. This new emphasis on a child's right to protection from exploitation, even by those who act as his guardians, is summed up in a draft charter of children's rights published by the Advisory Centre for Education in England. One of several provisions which distinguish this charter from earlier efforts[54] states that "children have the right to protection from any excessive claims made on them by their parents or others in authority over them . . . no one shall have the power to infringe a child's rights."[55]

In addition to recommendations that the child be entitled to separate counsel when his interests conflict with those of his parents, recent efforts to protect the child from his protectors have included (1) claims that

[53] Court proceedings, of course, can be initiated by parents as well as by schools, social agencies, or the court itself. In Kentucky, a child under 18 may be committed directly to the Department of Child Welfare (which runs the training schools) on the consent of his parents, without court action. See Glen, *supra* note 25 (1969), p. 300.

[54] *Cf.*, the 1924, 1948, and 1959 versions of League of Nations and United Nations charters, described in "Declaration of the Rights of the Child," *International Child Welfare Review*, 22:4-8, 1968.

[55] Advisory Centre for Education, *A Draft Charter of Children's Rights*, Cambridge, England, 1971.

counsel for the child must defend the child's stated interests rather than his own or others' opinions about what is best for him[56]; (2) measures to insure the child's right to be heard in custody litigation, to have independent counsel, and, if he is old enough, to choose where and how he will live[57]; and (3) some statutory changes to define the juvenile as "emancipated" for limited purposes, such as to obtain medical treatment without parental consent or knowledge. The legal status of emancipation, whether applied to all juveniles for a specific purpose or broadly conferred on individuals who qualify as emancipated minors,[58] is one means of achieving some balance of rights and responsibilities and protection from the inappropriate exercise of parental authority.

The rights of the child as student are somewhat better defined. While the law is still undeveloped and court decisions have not been consistent, a significant body of court rulings favoring student rights is forming as litigation by students against schools increases. An overview of the pertinent decisions in the context of recent developments in juvenile court is provided in a handbook for school personnel, published by the National Juvenile Law Center.[59] Decisions have dealt with constitutional rights of students in substantive questions such as dress codes and hair length, picketing and demonstrations, censorship of school newspapers, and marriage and pregnancy, but the emphasis has been on due process requirements that restrict the schools in disciplining students who violate school rules and regulations. Recognizing the severe consequences of denial of an education through expulsion from school, courts have established the general rule that a child may not be expelled or given lengthy suspension for misconduct unless he has been notified of the charges against him and given a hearing.[60] Although the full protections of a court hearing as outlined in *Gault* are not usually required, some schools have set up procedures that approximate court review.[61]

Other writers have considered the constitutionality of corporal punishment in schools[62]; the student's right to counsel in disciplinary hearings[63];

[56] Stephen Wizner, "The Defense Counsel: Neither Father, Judge, Probation Officer, or Social Worker," *Trial*, 7(5):30-31, 1971.

[57] Milwaukee, Wisc., has instituted a child advocate system to guard the interests of children in divorce proceedings.

[58] An emancipated minor is generally above a certain age (16 to 18), living apart from his family, and adequately supporting himself. Texas is the only state that statutorily permits minors at age 18 to petition for emancipated status.

[59] National Juvenile Law Center, *The Legal Rights of Secondary School Children Charged with an Act of Delinquency or Violation of School Rules* (St. Louis, Mo.: St. Louis University, 1971).

[60] *Id.*, p. 18-19. See also Robert A. Butler, "The Public High School Student's Constitutional Right to a Hearing," *Clearinghouse Review*, 5(8):431, 454-464, 1971.

[61] *Ibid.* Procedures developed in response to a lawsuit against the Albany Unified School District, N.Y., for hearings on disciplinary transfers are described.

the range of constitutional protections available to a child excluded from school for refusing to take drugs for alleged hyperactivity[64]; and the rights of students during crime investigation in the school.[65] On the latter issue, the consensus among legal writers is that police must abide by the same rules of procedure that apply elsewhere. William Buss examines the legal claims that a student might make in alleging that crime-prevention methods used in public schools violate his rights as a citizen or as a student.[66] After reviewing court cases involving the Fourth Amendment, the rights of students in school, and the rights of youth, Buss concludes that Fourth Amendment requirements governing search and seizure extend to the search of school lockers.

Crime, violence, and protest in schools and colleges across the nation have elicited two disparate responses similar to those brought on by disruptions in prisons: an increased concern with security (evidenced by the presence of police in public schools and the tendency to expel or transfer "troublemakers"), and a concomitant concern for the protection of the rights of students and for the need to involve those directly affected in the processes of decision-making.[67] Interpretation of students' rights are conditioned in each case by court decisions such as *Tinker*,[68] which held that under the Constitution students are "persons" to whom the usual protections apply, and *Dixon v. Alabama*[69] which declared that due process requirements extend to the school and implied that the process of education in a democracy must be democratic. In applying the principles of constitutional due process to the school, the courts have extended the concept of restriction on liberty to include much more than the possibility of incarceration as defined in *Gault*. As the court commented in *Dixon:* "whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."

[62] Alan Reitman, Judith Follman, and Edward T. Ladd, *Corporal Punishment in the Public Schools* (New York: American Civil Liberties Union, 1972).

[63] Martin A. Frey, "The Right of Counsel in Student Disciplinary Hearings," *Valparaiso University Law Review*, 5(1):48-70, 1970.

[64] Ireland, *supra* note 4.

[65] William G. Buss, *Legal Aspects of Crime Investigation in the Public Schools* (Topeka, Kans.: National Organization on Legal Problems of Education, 1971).

[66] *Ibid.*

[67] The New York Board of Education, for example, has recognized the right of students to be involved in the process of developing disciplinary and other school policies. See New York Civil Liberties Union, *op. cit. supra* note 7.

[68] *Tinker, supra* note 12.

[69] *Dixon v. Alabama State Board of Education*, 249 F.2d 150 (5 Cir., 1960), cert. denied 368 U.S. 930 (1961).

Substantive Rights of Minors

While the existence or impact of the "procedural revolution" is at least debatable, it is obvious that a corresponding revolution in children's substantive rights has not yet begun. The landmark decisions on juvenile court procedure considered only the fairness of the fact-finding process. Later decisions and legislative changes have concentrated on the constitutional requirements of due process in the manner in which children are subjected to treatment or control. None of these developments has challenged the propriety of intervention in noncriminal matters or defined the outer limits of the right of any person in a democratic society to freedom from unnecessary interference. The rumblings of change can be heard, especially in the widespread criticism of the broad jurisdiction of the juvenile court. But the statement, made in 1870, that the complete subjection of the child to the state "is wholly inadmissible in the modern civilized world"[70] is no less applicable today.

In attacking the control of juveniles who present no real threat to society, most writers have directed their criticism at the juvenile court. The real problem, however, is found in the entire philosophy underlying our approach to crime and correction: the medical model and the accompanying doctrine of individualized treatment to "cure" the deviant through preventive and corrective measures. The juvenile court is a natural outgrowth of a treatment ideology that has been at least a century in the making and retains its respectability today in the concept of intervention to fit the offender and not the offense.

The history of the treatment model, rooted in the nineteenth-century school of criminological positivism, is well documented,[71] as is the growth, within this model, of the juvenile justice system and its specialized courts.[72] The following conclusions can be drawn from this historical overview:

1. The positivist view of delinquency and crime as a product or symptom of an underlying pathology, in directing attention away from the criminal act, tended to reduce the significance of the adjudicative process

[70] *People v. Turner, supra* note 15.

[71] E.g., Nicholas N. Kittrie, *The Right to Be Different: Deviance and Enforced Therapy* (Baltimore: John Hopkins Press, 1971); *Struggle for Justice: A Report on Crime and Punishment in America*, prepared for the American Friends Service Committee (New York: Hill and Wang, 1971); Sanford H. Kadish, "The Crisis of Overcriminalization," *Annals*, 374 (November):157-170, 1967.

[72] For example, see M. K. Rosenheim, ed., *Justice for the Child: The Juvenile Court in Transition* (New York: Free Press of Glencoe, 1962); Platt, *op. cit. supra* note 16; Kadish, *ibid.;* Michael H. Langley, H. Ray Graves, and Betty Norris, "The Juvenile Court and Individualized Treatment," *Crime and Delinquency*, 18(1):79-92, 1972.

and to permit a wide range of behavior to be viewed as requiring social intervention (overcriminalization).[73]

2. The medical model was applied most easily to the young through the logic that the older a criminal the less amenable he would be to treatment.

3. Although the treatment philosophy is ostensibly the rationale for the social control of adults and juveniles, it has received little more than lip service for adults. The juvenile court was developed as but a means of achieving a much broader social objective for children than could be accepted for adults: social control of the normative behavior of youth—their attitudes toward authority, their personal morality, and their use of leisure time. There is no reason to suppose that removing these areas from the jurisdiction of the court would eliminate the function of control over aspects of young persons' lives which, from a contemporary perspective, may merit no intervention at all.

Criticism of the concept of individualized treatment as a response to youthful deviance is becoming more common. The authors of a recent article on the juvenile court and the treatment philosophy state, "The time has come to strip of its legitimacy the mental health model of juvenile delinquency . . . the concept [of individualized treatment] is outdated and at variance with the findings of the social sciences over the past four decades. We propose that delinquency be viewed as a community-enacted, legally based political procedure for controlling and altering youthful behavior that is disruptive to an orderly adult way of life."[74] This view of delinquency control as a *political* process represents a new school of thought in criminology, in contrast to which supporters of the treatment ideology today appear conservative. The newer, radical alternatives in criminal policy derive from a sociological view of crime control as a conflict situation in which crime is the visible expression of a balance among pressures of different social elements. It is within the latter perspective that the present state of children's rights can be seen most realistically.

If the political dimension of the enactment of legal procedures to restrict the social behavior of the young is difficult to accept, consider the reactions that would accompany decisions to treat as "incorrigible" any adult whose attitudes, associates, or pastimes were viewed as unhealthful or antisocial. Lacking an adequately powerful or persistent interest group, the young have borne the brunt of the efforts to cure and prevent the disease of crime, often at the expense of their rights as citizens.

The substantive rights of minors in conflict with law or social custom are not represented as succinctly in the literature, nor are the issues as clear, as in the case of juveniles' procedural rights. The relevant material

[73] Kadish, *supra* note 71.

[74] Langley, *supra* note 72, p. 81, 82.

must be drawn from the literature on juvenile court jurisdiction over noncriminal children, on the goals of crime control and criminal policy in general, and on the limits of provision of involuntary services even under civil or nonpenal arrangements. Some of the issues appear slightly different when children's rights are considered. For example, where court processing of noncriminal children as delinquents is the problem, reclassification of these children or their diversion to social agencies may no longer be an appropriate response. What may instead be required is a general rethinking of the justification for intervention or control of any kind.

Substantive rights in earlier years were expressed primarily in terms of protection and welfare: the right to food, clothing, and shelter, a healthful environment and family life, an education, and protection from material exploitation. The "new" substantive rights inject a decidedly new element: the right to *refuse* unwanted services, the right to make or participate in choices that affect one's life, and the right to be free from unnecessary restrictions on individual development. Underlying all efforts to define these new rights is the question of whether children, as well as adults, have a fundamental interest in privacy that might be expressed as the "right to be left alone."

The Right to Be Left Alone

When Justice Brandeis described the "right to be let alone" by the government as the right "most valued by civilized men,"[75] he was concerned with the right of *adult* citizens to at least some freedom from public intrusion. Since then, the right to privacy has received some attention, but its scope, even for adults, remains untested. This right, based on a combination of the Fourth and Fifth Amendments and related to the First and Third, has been invoked in a number of cases to invalidate laws governing the private behavior of adults. While the right of the child to be left alone has not been tested in court, the concept has been used to measure the extent of undue interference in the lives of children whose behavior does not conflict with a compelling interest of the state.

Ireland and Dimond review court decisions on state interference with family or personal autonomy, and conclude that there are legally cognizable interests in the child's right to be left alone except as necessary for the survival of the state.[76] On the child's right to refuse to take drugs for hyperactivity, these writers observe that the child's and the family's interest in privacy and autonomy must be weighed against the school's interest in compelling children to consume drugs as a condition of school attendance. Whether these "rights" belong to the child, the parent, or the

[75] *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

[76] Ireland, *supra* note 4.

family, they note, is an unresolved issue, especially where the interests or wishes of the parents differ from those of the child.

William Buss concludes from a review of court cases involving the rights of children and of students in particular that the student has a strong interest in privacy by reason of the conditions of compulsory school attendance.[77] Others have suggested that compulsory attendance necessitates a guarantee of privacy with respect to personal style (student dress, etc.) and dissemination of personal data from school files. Mark Green subjects runaway statutes to constitutional analysis, and concludes that such laws violate several of our basic notions of civil liberty, including the right to be left alone.[78] The U.S. House of Representatives' right-to-privacy inquiry considered in this light the use of behavior modification drugs with school children, a proposal to test 6-year-olds for criminal tendencies, the development of computerized data banks on public school children, and the dangers implicit in the combination of compulsory education with behavior modification techniques and the concept of preventive mental health.[79]

Should the courts come out strongly in favor of the child's right to be left alone, this right would undoubtedly be invoked to test the constitutionality of a wide range of laws and official actions that currently limit the freedom of minors. The right to privacy and free choice in decisions to behave in a manner which, though socially disapproved, is not demonstrably harmful is already implicit in recommendations to decriminalize victimless behavior (including that of juveniles)[80] and in court decisions holding that the behavior and appearance of students can be restricted only upon proof by the school that the learning process is thereby disrupted. It might be used to test the extent and nature of the state's interest in compulsory education (already dealt with by courts in the case of the Amish), or to determine the legality of a host of involuntary measures now officially imposed on "predelinquent" or otherwise troublesome juveniles. The right to be left alone most obviously underlies the dissatisfaction that many have expressed with the broad and vague jurisdiction of the juvenile court and justice system.

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[77] Buss, *op. cit. supra* note 65.

[78] Mark J. Green, "The Law of the Young," in *With Justice for Some*, Bruce Wasserstein and Mark J. Green, eds. (Boston: Beacon Press, 1970), pp. 1-37.

[79] U.S. House of Representatives, Government Operations Committee, *Federal Involvement in the Use of Behavior Modification Drugs on Grammar School Children of the Right to Privacy Inquiry*, Ninety-first Congress, Second Session, September 1971.

[80] Board of Trustees, National Council on Crime and Delinquency, *Crimes without Victims: A Policy Statement*, Paramus, N.J., 1971.

Juvenile Court Jurisdiction: Noncriminal Children

The proper role of the juvenile court, the extent of its jurisdiction, and the definition of delinquency have been problematical since the creation of specialized procedures for juveniles in the late nineteenth century. From that time on, the central question has been whether children whose behavior or condition would not be considered criminal for an adult should be dealt with by the court. In most states the question of jurisdiction was eventually resolved in favor of a broad definition of delinquency, justified by the "preventive" nature of early intervention. The argument that children's (supraconstitutional) rights were actually being expanded bolstered support for the broadest possible expansion of court jurisdiction to include all minors judged to need services. Because broad jurisdiction implied a potentially overwhelming workload, early critics concentrated on the need to limit the role of the court and to assign some of its duties to other agencies. The court's inability to handle the full range of juvenile misbehavior and the evidence that court processing tends to aggravate the conditions and behaviors it attempts to prevent remain strong motivations for redefining court jurisdiction. But concern is also expressed over the injustice of subjecting to punishment *or to treatment* those who pose no serious threat either to themselves or to others.

In support of due process requirements in the fact-finding procedure of delinquency hearings, Glen notes that "whatever one's view of the rehabilitative capacities of the juvenile justice system, it is surely unfair to rehabilitate a child who has done nothing wrong."[81] The same argument can be brought against the broad jurisdiction of the court, and many have attacked the incarceration of troublesome but hardly dangerous children on these grounds. Justice for these children, however, has been impeded by years of debate over two difficult questions: first, the definition of delinquency—what is to be considered "wrong" for a child; and second, what, if anything, should be done with those children who, though troublesome, cannot be labeled "delinquent"? Both questions importantly affect the rights of all children who come in contact with the juvenile justice system.

Under most state statutes, behavior sufficiently "wrong" to invite court action has been defined so broadly[82] that one writer has described delinquency as "behavior on the part of the younger age groups of the population such that the senior groups object to it."[83] The catch-all cate-

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[81] Glen, *supra* note 25 (1971), p. 229.

[82] A list of delinquency definitions has been compiled by F. B. Sussman and F. S. Baum in *The Law of Juvenile Delinquency* (Dobbs Ferry, N.Y.: Oceana, 1968).

[83] Leslie T. Wilkins, "Juvenile Delinquency: A Critical Review of Research and Theory," *Educational Research*, 5(2):104-119, 1962, p. 107.

gory of children who are "incorrigible" or "beyond the control of parent or guardian" has received the most strident criticism as not only permitting but encouraging the improper application of state power and authority. The *utility* of such vague definitions is clear. In a handbook for police in California, for example, officers are instructed that a runaway juvenile whose parents have filed a missing-persons report must be classified as an incorrigible "since there is no other specific section of the juvenile court law that provides for this type of conduct."[84]

The runaway perhaps best exemplifies the problem of the noncriminal juvenile up against the law: Running away from home appears to be popular among the young; it is decidedly noncriminal behavior that apparently is not associated with real delinquency[85]; and it results in apprehension even in states where it is not proscribed by law. Asked whether, given its apparent legality, running away from home was a *right* of juveniles, a federal judge commented that "an adolescent has the right to run away as far and as fast as his feet will carry him—until his parents catch up with him."[86] More accurately, it is the law that will catch up with him. Even when his parents do not want him home or have given him permission to travel, a minor may be incarcerated in juvenile hall as a dependent or neglected child.[87]

The plight of runaways and other noncriminal juveniles in institutions today underscores the failure of efforts to solve the problem by simply redefining the delinquency jurisdiction. In response to recommendations that noncriminal children not be dealt with as delinquents, some states (such as California and New York) rewrote their juvenile codes early in the 1960's to create a new category, distinct from the delinquency jurisdiction, of "persons in need of supervision" (PINS). This precedent has since been followed by other states. The findings of a recent study of nineteen major cities substantiate the claim that the alleged trend toward separating delinquents from nondelinquents is "a hoax."[88] The study revealed that 40 to 50 per cent of the residents of correctional institutions nation-wide are PINS cases and these are mixed indiscriminately with delinquents in most institutions.[89] Unless it is held that nondelinquents

[84] Ernest Kamm and others, *Juvenile Law and Procedure in California* (Beverly Hills, Calif.: Glencoe Press, 1968), p. 40.

[85] Research conducted by the National Institute of Mental Health found that the great majority of runaways did not get into trouble at all either before or after running away. See Mark J. Green, "Runaways on the Legal Leash," *Trial*, 7(5): 20-29, 1971.

[86] Quoted in Dorman, *op. cit. supra* note 6, p. 114.

[87] E.g., California Welfare and Institutions Code, Section 600a or 600b.

[88] Glen, *op. cit. supra* note 17, p. 6.

[89] Delaware Agency to Reduce Crime, *Proposed Juvenile Delinquency Prevention Legislation*, Wilmington, 1971, memorandum to members of the National Governor's Conference Committee on Crime Reduction and Public Safety Task Force.

should receive "more intensive" treatment, the findings of this study are a further indictment of the present arrangement: PINS are more likely to receive harsher dispositions and to be sent to correctional institutions; they are more likely to be detained (54 per cent) than serious delinquents (31 per cent) and twice as likely to be held for more than thirty days; and the median length of institutional stay for PINS is thirteen months, compared with nine months for serious delinquents. It appears that noninstitutional dispositions are following suit. Statistics compiled by the San Diego County Probation Department indicate that the "601" offenses, for which there is no equivalent adult law, are comprising more and more of the total probation caseload.[90]

The constitutionality of incarcerating nondelinquents is under attack[91] and the injustice of court processing and correctional handling of such children, even without labeling them "delinquent," is becoming evident. Attention has now turned to the possibility of diverting this category of juveniles from the justice system entirely. Since the late 1960's, recommendations have stressed the limitation of juvenile court jurisdiction to exclude children whose alleged behavior does not constitute a violation of law for adults. In 1967 the National Crime Commission's Task Force on Juvenile Delinquency and Youth Crime cautiously endorsed this position, recommending that it be given "serious consideration."[92] Individual authors have continued to press for removal of the noncriminal jurisdiction,[93] perhaps setting the stage for the 1970 White House Conference on Children to recommend that "as a first step [in overhauling juvenile justice], children's offenses that would not be crimes if committed by adults—runaway, truancy, curfew violation, incorrigibility—should not be processed through the court system, but diverted to community resources. . . ."[94] Support for this new approach, even among judges, is such that a committee of NCCD's Council of Judges, in preparing a new edition of the Standard Juvenile Court Act, is considering a significant revision of the court's jurisdiction over noncriminal children, although apparently not its elimination.[95]

[90] R. M. Ariessohn and F. I. Clossen, "Alternatives to Juvenile Detention," *California Youth Authority Quarterly*, 24(4):17-26, 1971.

[91] Malcolm V. McKay, *Juvenile Court Jurisdiction over Non-Criminal Children*, unpublished legal survey, 1969.

[92] President's Commission, *op. cit. supra* note 38, p. 27.

[93] See, for example, William H. Sheridan, "Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?" *Federal Probation*, 31(1): 26-30, 1967. See also Glen, *supra* note 25.

[94] White House Conference, *op. cit. supra* note 1, p. 382.

[95] The preliminary report of the Committee, not yet officially adopted policy, is described by Sol Rubin in a paper presented to the New York State Probation Management Institute VII, "Children's Rights and Juvenile Court Law," NCCD, Paramus, N. J., 1972.

This seems to be the direction in which juvenile justice reform is moving. Alternatives to juvenile court processing almost always emphasize "diversion to community agencies and resources," a solution that will surely enhance the rights of the noncriminal minor . . . or will it? "Diversion" is the latest fashion in correction and its advocates are many. It is a good cause—presumably it will get truants and runaways out of the training schools and eliminate official labeling of merely difficult youth. Relatively few observers have noted the possibility of its representing yet another means of achieving the nineteenth-century child-savers' goal of retaining control over the normative behavior of youth.

Diversion or Diversionary Tactic?

The nature and the rationale of the movement to divert noncriminal but troublesome juveniles from the justice system are reflected in the report of the White House Conference on Children:

> We recommend the development of systems for the early detection and treatment of children headed for trouble. It is important to prevent labeling the child on the basis of behavior and to treat him on the basis of what he needs, rather than what he is or does.[96]

Some of the alternate systems that are being tried or have been suggested are the expanded use of unofficial supervision; referral to existing social agencies or clinics; the upgrading of school programs or creation of alternatives to public school (street academies, etc.) to appeal to truancy-prone youths; the establishment of officially sanctioned facilities for runaways; and—the most popular alternative—the creation of a Youth Service Bureau or similar agency to perform "service brokerage" and to mobilize community resources to solve youth problems. Whether each new approach is truly a diversion from the official system of control or is merely a tactic to draw attention from the crucial issues will depend on how it is conceived and operated.

Since those diverted are meeting the minimum requirements for behavior in society (as defined by the criminal law), the central issue concerns the methods that may legitimately be used to meet the needs of these children without violating their rights to privacy and personal liberty. It is a difficult question and has not been satisfactorily decided even in the case of adult "status offenders" such as addicts, alcoholics, and vagrants. Civil commitment is the diversionary tactic for "misbehaving" adults. Are alternatives to court processing the same for children?

Frederick Howlett believes that they may be. In a paper presented to the National Conference on Social Welfare, Howlett suggests that "diversion, as presently conceived, is not based upon consideration of the

[96] White House Conference, *op. cit. supra* note 1, p. 384.

fundamental rights of individuals, but is rather another in a series of responses to the economic needs of a justice system so inadequately formulated that it has become inoperable."[97] Referring to the Youth Service Bureau concept, he maintains that diversion from the courts to social agencies is not an adequate response to the denial of the individual's basic rights to associate with those of his choice and to engage voluntarily in acts which harm no one but himself. Howlett's alarm is understandable: the idea of an extrajudicial agency empowered to deal with "problem" youth without court interference, perhaps to deal with an even wider range of behaviors than currently comes to the attention of the courts, might appeal to many communities. A multipurpose social agency, mandated to treat individual troublemakers, could relieve the community of the responsibility for social problems and blind it to its own inability to tolerate and absorb minor deviance. Worst of all, the creation of a "nonpenal" social agency with unlimited jurisdiction to "meet the needs" of all difficult juveniles might seriously infringe on the rights of many more children than are now affected by official intervention.[98]

The problem, however, lies not with the concept of the Youth Service Bureau but with the way it is interpreted and applied in a community. If referral by the agency or Bureau for services or treatment in the community is backed by the threat of referral to court, then the allegedly nonpenal agency is really an adjunct of the justice system and "diversion" a verbal fiction. On the other hand, if the agency's powers are based on nothing more than the ability of personnel to *persuade* a youth to accept services, then the Youth Service Bureau would seem to be an excellent means of insuring both the right of the individual to receive treatment and his right to refuse services he does not view as helpful or necessary. As conceived by Sherwood Norman and the National Council on Crime and Delinquency, the Youth Service Bureau properly follows the model of the voluntary, noncoercive agency. In *The Youth Service Bureau,* Norman stresses that once a child is referred to the Bureau he should not be subject to court action unless he subsequently commits an offense that warrants court referral. He also emphasizes the position of NCCD that the Bureau should be an advocate of the child, even if the child's wishes differ from those of his parents, and should not be required to refer a child to court on the parents' request.[99] If fully incorporated into a community's

[97] Frederick W. Howlett, *The Youth Services Bureau: Diversion for Children or Babelistic Escape?,* paper presented to the National Conference on Social Welfare, Dallas, 1971.

[98] A citizens' "children's panel" approach, recently adopted in Scotland to handle problem children of all ages up to 18 years, has resulted in the informal supervision of many more children than under the old system. See A. J. B. Rowe, "Children's Hearings," *New Society,* 19(492):444-446, 1972.

[99] Sherwood Norman, *The Youth Service Bureau: A Key to Delinquency*

agency approach, the principles of voluntariness and advocacy for the child should insure adequate protection of the child's rights. Further, the position of minors in society could be vastly improved if the function of systems modification and institutional change, as outlined by Norman, were taken seriously. The Youth Service Bureau, he states, "seeks to modify, in established institutions, those attitudes and practices that discriminate against troublesome children and youth. . . . It is the bureau's job to educate, to consult, to demonstrate, and to resort when necessary to political pressure to see that resources and institutions are responsive to needs."[100]

The principles of voluntariness and advocacy can also be used to test the validity of other alternatives to court processing and to compare different approaches to a given problem. The case of alternate solutions to the runaway problem is instructive: Contrast the bill introduced by a group of congressmen providing for federal grants to establish locally controlled "runaway houses" (and, not incidentally, to strengthen a national computerized communications network to help families find their children, with grants to law enforcement agencies) with privately run facilities, such as Runaway House in Washington, D.C., and Huckleberry House in San Francisco, which provide essential services *on request* and help young runaways achieve satisfactory adjustments in the absence of unwanted interference from adults.[101]

The essence of an approach to diversion which not only guarantees but advances the rights of noncriminal minors is the development of opportunities for growth—not the creation of involuntary benefits or a "tyranny of services":

> The state is obligated to establish, maintain, and safeguard equal access to such opportunities while ensuring that children are not forced to utilize a given service merely because it is available.[102]

Advancement of Children's Rights—How?

Obviously, it is not enough to simply list the legal or natural rights of minors. For at least a century the statement that "children, too, have rights" has had little effect on the actual position of individual children.

Prevention (Paramus, N.J.: National Council on Crime and Delinquency, 1972), pp. 16-17.

[100] *Id.*, p. 13.

[101] Runaway House is described in the *Delinquency Prevention Reporter*, February 1972 (U.S. Youth Development and Delinquency Prevention Administration); Huckleberry House, in Youth Development and Delinquency Prevention Administration, *Volunteers Help Youth*, Washington, D.C., 1971, pp. 14-15.

[102] White House Conference, *op. cit. supra* note 1, p. 346.

The gradual extension of official control to protect children from physical abuse and exploitation has led not to greater freedom and respect for the child but to a "partial exchange of masters."[103] Protected from unreasonable demands by parents or guardians, the child is now required to conform closely to social norms and official expectations. The treatment he receives at the hands of the state, while officially "correct," may still ignore his rights and his individuality. Today, even in the juvenile court, where a revolution in children's rights is supposed to have occurred, a "rather deep disrespect among judges for the integrity of adolescents" is reported,[104] as is a tendency, even among lawyers, to regard juvenile clients as subordinates and "nonpersons."[105] While an official goal of modern societies is "justice for the child," in practice, children are continually dealt with throughout society in ways that would be unacceptable for adults—sometimes in violation of constitutional rights and commonly without regard for privacy, integrity, and human dignity.

Significant efforts are being made to change the legal and social position of minors. The forces behind these efforts include not only the courts, but also lawyers and legal associations, private individuals and agencies, legislatures, university institutes, educational groups, and juveniles themselves. The efforts of different change-agents sometimes converge; while alternatives to public school education and new methods of teaching are tried in attempts to reduce truancy without recourse to punitive methods, one state legislature (Virginia) has enacted a law authorizing school boards, at the request of the juvenile court, to excuse from school any pupil who cannot benefit from attendance. If this law is not used to perpetuate the tendency of schools to exclude troublemakers, it could modify the effect of compulsory education statutes on juveniles who are truant simply because school has nothing to offer them.

Efforts have been made to shift to the schools the burden of dealing more equitably with truancy and minor misbehavior. There has been much talk of making schools (and other social institutions and agencies) accountable in some way to the child and his parents. Some action has been taken to develop new school codes that conform more closely to the constitutional requirements of due process and redefine the scope of students' rights to protect individual privacy in personal affairs.[106] A number of legal rights handbooks have been published to guide the minor in asserting his own rights in the context of accompanying responsibili-

[103] Bremner, *op. cit. supra* note 15, p. 117.

[104] Martin T. Silver, "The New York City Family Court: A Law Guardian's Overview," *Crime and Delinquency*, 18(1):93-98, 1972, p. 98.

[105] Platt, *op. cit. supra* note 16, p. 175.

[106] The National Juvenile Law Center at St. Louis University in Missouri is developing a model high school disciplinary procedure. On school codes, see Patricia M. Lines, "Codes for High School Students," *Inequality in Education*, *op. cit. supra* note 4, pp. 24-35.

ties and a students' rights litigation packet has been prepared to assist attorneys in handling students' cases.[107]

Legislative and administrative measures have attempted to bring police, courts, and correction into line with newly recognized constitutional requirements. Steps have been taken to bring legal assistance to juveniles through legal aid bureaus, and to aid lawyers in defending juvenile cases.[108] Standards and guides are being developed to insure fair treatment for minors in court and in the correctional system.[109] There have also been attempts to establish uniformity in state juvenile codes and, currently, modification of juvenile court law is being considered to permit a child to invoke the court's jurisdiction in defense of his own rights.[110] Litigation by privately retained lawyers or by organizations such as the National Legal Aid and Defender Association, the American Civil Liberties Union, or Office of Economic Opportunity legal offices is becoming increasingly important in advancing basic substantive rights as well as insuring procedural fairness.

The juvenile's ability to exercise his right to take voluntary, informed action for his own benefit is enhanced by the development of hot-lines, free clinics, legal aid drop-in centers, information and referral services, and voluntary facilities for temporary stays. The National Center for Child Advocacy was recently established at the federal level to deal primarily with the welfare-type needs of children. It could also serve as a vehicle for achieving significant legislative change in much the same way as the state-level Children's Lobby is already working in California.

Meanwhile, however, thousands of children remain incarcerated in custodial institutions throughout the country, many of them "for their own protection," all of them allegedly for rehabilitative purposes. Noncriminal minors are still placed in detention "to teach them a lesson"; young people are still harassed for unconventional dress or appearance and denied the means of self-help because of their age; parents still take their children to court to enforce demands for obedience; and young people still have little recourse to the law in defense of their interests as they perceive them.

The success of the children's rights movement thus remains to be seen. Some writers still maintain that "children simply are not persons" and good arguments are advanced in support of their need for control and

[107] Harvard University Center for Law and Education, *Student Rights Litigation Packet*, Cambridge, Mass., 1972.

[108] The National Juvenile Law Center has put out a manual for attorneys entitled *Law and Tactics in Juvenile Cases*, St. Louis, Mo., 1971.

[109] The Juvenile Justice Standards Project of the New York University School of Law is working on standards for nonjudicial and pretrial procedures as well as court procedure and correctional administration.

[110] See Rubin, *op. cit. supra* note 95, p. 9.

guidance, especially at younger ages. But it is frequently argued that present methods of control—by the state and official institutions if not also by parents—are too heavy-handed. It is coming to be accepted that justice sometimes requires a "hands-off policy"[111] and that abrogation of rights to force compliance with social expectations is often self-defeating: Excessive intervention applied too quickly does nothing to teach self-reliance or responsibility, nor does arbitrary and unjust action prepare the individual to participate in a democratic society. To demand that a child respect the law and a system that show him no respect is asking too much. Young people are quick to see the hypocrisy in a society that claims to value individual freedom and privacy and yet comes down hard on minor expressions of nonconformity, especially among the young.

Historically, the concept of individual rights is relatively new and for any category of disadvantaged individuals the development of legal rights and mechanisms to enforce them is gradual and often painfully slow. The experience of other legal rights movements suggests that efforts to change the structure and operation of legal and social institutions to insure justice for the child must be accompanied by a general change in public and private attitudes. If officially recognized rights are not to be violated repeatedly in practice, adult attitudes will have to be modified to allow for greater tolerance of individual difference, to permit experimentation and testing of alternate lifestyles by trial and error, and to restrain from bringing against the occasional mistake the full force of either legal or social measures of control.

[111] Silver, *supra* note 104, p. 98.

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