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THE JUVENILE'S RIGHT TO TREATMENT:
PANACEA OR PANDORA'S BOX?

Jill K. McNulty* and Hon. William S. White**

I. EARLY HISTORY

Since its inception in the mid-19th century, the so-called juvenile justice system has avowed concern about the treatment of children. Although we are now entering the last quarter of the 20th century, the nature and objects of this concern still reflect, to some extent, the social attitudes characteristic of the earlier era.

The opening of the New York House of Refuge in 1825 is considered by many as the beginning of the separate system for dealing with juvenile deviants.1 The House was established for all such children as shall be taken up or committed as vagrants, or convicted of criminal offenses . . . as may in the judgment of the Court of General Sessions of the Peace, or of the Court of Oyer and Terminer, . . . or of the jury before whom any such offender shall be tried, or of the Police Magistrates, or of the Commissioners of the Alms-House and Bridewell . . . be proper objects . . . .2

The House was not for all juvenile offenders, but only for “proper objects,” those who could be rescued from a life of crime.3 Responsibility for identifying such children was vested in persons both in the poor relief and the justice systems.4

Whether a child’s deviant behavior was viewed as a product of his own perversity or of his poverty and resulting dependence on public charity made little difference to the mid-19th century reformers. Poverty was considered a catalyst to future

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2. Id. at 1190, citing Act of March 29, 1824, ch. 126, § 4, [1824] N.Y. Laws III.
3. See Fox, supra note 1, at 1190.
4. Id. at 1190-91.
criminality such as vagrancy, begging and theft.\textsuperscript{5} As Professor Sanford Fox concluded: “Protection of society against crime and vicious pauperism by means of a more severe and more efficient institutionalization, provided the rationale for the county poorhouse system and for the House of Refuge.”\textsuperscript{6}

In 1838 the Refuge system was challenged in \textit{Ex parte Crouse.}\textsuperscript{7} Mary Ann Crouse had been committed to the Philadelphia House of Refuge by a justice of the peace on her mother’s allegation that her vicious conduct had rendered her beyond the mother’s control. Her father brought a writ of habeas corpus, alleging that her confinement had been obtained without due process because she had been denied the right to jury trial guaranteed to criminal defendants by the state constitution. The court in \textit{Crouse} rejected that argument, and adopted a “hands off” attitude towards internal administration of the institution. As long as the declared purpose of the Philadelphia House was socially and morally proper, its legal validity was thereby established, and the court would make no further effort to inquire into the actual treatment of Mary Ann or to determine whether the administration of the House was punitive or oppressive.\textsuperscript{8}

The \textit{Crouse} case was the leading authority for the right of the state as \textit{parens patriae} to apply coercive sanctions to children it predicted might go astray in the future.\textsuperscript{9} Implicit in the theory was the assumption that with proper treatment for such children—that is, stern discipline—a life of crime could be averted. House rules were rigidly enforced, infractions punished severely.\textsuperscript{10} It was the nature of this coercion that led reformers in the middle and latter part of the 19th century to bewail the fate of the children caught up in the criminal system.\textsuperscript{11} The focus of concern was not the lack of fairness in the commitment process, but rather the nature of the confinement to which children were subjected. Emphasis on institutional reform characterized the child welfare movement of this era.\textsuperscript{12}

The 19th century reform movement culminated in the en-

\textsuperscript{5} \textit{Id.} at 1201.
\textsuperscript{6} \textit{Id.}
\textsuperscript{7} 4 Whart. 9 (Pa. 1838).
\textsuperscript{8} Fox, \textit{supra} note 1, at 1206.
\textsuperscript{9} 4 Whart. at 11.
\textsuperscript{10} See Fox, \textit{supra} note 1, at 1195 n.43.
\textsuperscript{11} \textit{Id.} at 1222-29.
\textsuperscript{12} \textit{Id.}
The actment in 1899 of the Illinois Juvenile Court Act, the first in the nation. The Illinois Act provided that:

the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child [shall be] placed in an improved family home and become a member of the family by legal adoption or otherwise.

This was a new standard for the treatment of juveniles. The Act also reflected much of the old approach, however, restating the belief prevalent at the time (and still enjoying much vitality today) that future criminality is predictable by present deviant behavior. Further, there were few provisions imposing procedural formality in hearings for children subject to the court’s jurisdiction. Institutional care facilities available to children did not improve. A provision of the Act prohibited placing children under 12 in jails but, ironically, appropriations necessary to finance special detention care were deleted from the final bill. The legislature offered no financial aid to provide the promised improved care and custody for children.

There was one advance: the Act provided for probation officers to assist the court. They were, however, to serve without remuneration. The first annual report of the Juvenile Court of Cook County showed that the court borrowed personnel from other agencies and commissioned them as probation officers—21 truant officers from the Board of Education, 16 police officers, 11 agents from associations handling cases of dependent children, and 36 other persons engaged in child welfare work, a total of 94.

Four days after the Act became law, the first case was filed and set for hearing. The petitioner, the child’s own father, alleged simply, “I am unable to keep at home, associates with bad boys, steals newspapers, etc.” A jury of six impaneled to hear the case found the boy to be dependent and he was com-

13. Id.
15. COMMITTEE ON JUVENILE COURTS, REPORT TO THE CHICAGO BAR ASSOCIATION 4 (1899).
16. JUVENILE COURT OF COOK COUNTY, FIFTIETH ANNIVERSARY REPORT 19 (1949) [hereinafter cited as COOK COUNTY REPORT].
17. Id. at 20.
18. Id.
mitted to the Illinois Manual Training School. He was 11 years old.\textsuperscript{19} During the first year of the court's existence, delinquents were detained in a remodeled cottage.\textsuperscript{20} The following year the detention home was moved to a three-story building which was referred to by the people who worked there as "the barn" because a barn at the rear of the premises formed an important part of the home.\textsuperscript{21} Dependent children were kept at the detention hospital, where, in the words of the report, "the unfortunate insane are awaiting trial."\textsuperscript{22}

Thus America's first juvenile court, an institution soon to be established in every state,\textsuperscript{23} coupled nobility of purpose with very modest beginnings indeed.

There were periodic cries for reform. In 1911 a Chicago newspaper began a campaign with stories of cases allegedly mishandled; probation officers were pictured as "child snatchers" rather than "child savers."\textsuperscript{24} The Cook County Board responded by dismissing the chief probation officer.\textsuperscript{25} He was later restored to his position by the Illinois Supreme Court on the ground that the County Board, as a part of the legislative branch of government, could not dismiss an assistant of the judicial branch.\textsuperscript{26} Except for a few such skirmishes, the practices and procedures of the juvenile justice system remained for the most part unscrutinized by the judiciary for over 60 years after its inception.

Although juvenile court statutes throughout the country contain much social welfare rhetoric about treatment and rehabilitation, the jurisdictional emphasis of such statutes relating to delinquent minors is largely based upon penal law. Problems of applying in the juvenile court a social welfare philosophy, with its deterministic underpinnings, come sharply into focus when one recognizes that the primary law for juvenile courts in delinquency matters is the criminal law, replete as it is with

\begin{itemize}
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id. at 21.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at 20.
\item \textsuperscript{23} In California the Juvenile Court was established in 1904. Cal. Stats. (1903), ch. 43, at 44-48. Note, A Look at the California Juvenile Court Past, Present and Future, 1 LINCOLN L. REV. 166 (1966).
\item \textsuperscript{24} COOK COUNTY REPORT, supra note 16, at 21-22.
\item \textsuperscript{25} Id. at 21.
\item \textsuperscript{26} Witter v. County Comm'rs, 256 Ill. 616, 100 N.E. 148 (1912).
\end{itemize}
notions of moral blameworthiness and condemnation. While it is true that juvenile-offender legislation has traditionally provided that a juvenile delinquency adjudication shall not constitute a conviction of crime nor result in loss of certain civil rights, these official policy pronouncements have had little influence upon basic social attitudes.

II. Procedural Reform

The disparity between the benevolent rhetoric and the reality of the juvenile justice system began to attract national attention in the mid-1960's. The report issued in 1967 by the President's Commission on Law Enforcement and Administration of Justice was sharply critical of the system and recommended a number of changes. In addition, the United States Supreme Court in a series of decisions beginning at this time expressed grave doubt that the juvenile justice system ever had, or indeed, ever could operate in the benevolent manner postulated by its founders. The Court found in these cases that since the consequences of a juvenile court adjudication of delinquency resembled closely the consequences of a finding of guilt in a criminal trial, some of the same procedural protections mandated by the due process clause of the fourteenth amendment for the latter are also applicable to the former. Expansion of the application of the procedural rights in criminal trials to delinquency proceedings, however, came to a temporary halt with McKeiver v. Pennsylvania, which held that fundamental fairness, the basic due process imperative, does not require states to afford jury trials in juvenile delinquency proceedings even though they are required in criminal proceedings of a "serious" nature.

One of the results of imposing some of the procedural safe-

30. Kent v. United States, 383 U.S. 541 (1966). See also, In re Winship, 397 U.S. 358 (1970) ("beyond a reasonable doubt" burden of proof applicable to criminal proceedings is also applicable to a juvenile court adjudication of a minor for delinquency); In re Gault, 387 U.S. 1 (1967) (notice, hearing, right to counsel, and privilege against self-incrimination must be afforded a minor in a juvenile court adjudication for delinquency).
31. 403 U.S. 528, 545 (1971).
guards of the criminal trial process was to make the juvenile delinquency adjudication hearing more adversary in nature. In juvenile courtrooms of large metropolitan areas today, one sees the full panoply of trial personnel—judge, court reporter, clerk, bailiffs and, of course, prosecutor and defense counsel.\(^{32}\) Although the Supreme Court deplored the lack of rehabilitative resources available to juvenile courts, its decisions brought only more procedural formality to the court, in no way alleviating the paucity of resources.

This alteration of the juvenile delinquency adjudication process was not welcomed by many social workers, who had been and still are the principal treatment agents of the juvenile court. Their role in the process was attenuated and that of the lawyer enhanced.\(^{33}\) Prior to the Supreme Court decision in *In re Gault*, it was not uncommon for the juvenile court probation officer (ordinarily a social worker) to be the pre-trial investigator, the prosecutor, counsel for the child and court supervisor of the child after adjudication.\(^{34}\) The role conflicts are obvious, and after *Gault*, attorneys represented the state and the child before the court.

It is important to note, however, that the focus of the Supreme Court's attention on the juvenile court process has been the adjudication or trial phase. The dispositional phase, at which the judicial decision of what to do to or for the child is made, has to date been left unexamined. In addition, the Supreme Court has declined to address the constitutional questions posed by the dearth of dispositional resources available to the juvenile court, a problem which in part prevents the system from working in the manner intended by its originators.

If it is fair to say that *McKeiver* represents a reflective pause by the Supreme Court to consider the wisdom of further imposing procedural protections of the criminal judicial process upon the juvenile justice system,\(^{35}\) then perhaps it is time


\(^{33}\) For a discussion of the role of the attorney in juvenile court proceedings see Symposium, *Some Theoretical and Practical Problems in Formalizing the Juvenile Court Procedure*, 47 N. Dakota L. Rev. 287 (1971).

\(^{34}\) *In re Gault*, 387 U.S. 1 (1967).

\(^{35}\) *But see* Breed v. Jones, 421 U.S. 519 (1975), wherein the Court held that the constitutional right of a person not to be placed twice in jeopardy was violated when the state subjected a minor to a juvenile delinquency adjudication hearing and then subsequently subjected him to a criminal trial as an adult for the same conduct.
to re-examine the role of the juvenile court in delinquency prevention and in the rehabilitation and reformation of deviant youth.

III. THE RIGHT TO TREATMENT: WHAT DOES IT MEAN?
A. The State’s Right to Subject a Minor to Compulsory Treatment

Juvenile court statutes reveal that one meaning of the term “treatment” is the judicial process itself, whereby the state in its role as parens patriae applies coercive power against the minor primarily, and his parents secondarily, to alter behavior that is deemed deviant. Once a minor is found a fit subject for juvenile court intervention, the severity of the coercion can range from supervision of the minor in his home, to removal from the home and, in delinquency cases, to incarceration. What is the extent of the state’s right to compel a child, in the name of “treatment,” to accept intervention designed to correct behavior that does not conform to societal norms? From this perspective, there are essentially two questions to be examined. First, what kind of behavior ought to subject a minor to compulsory treatment by the state? Second, if there are children whose behavior warrants the application of coercion by the state, either for the purpose of treating the child or of protecting society, what treatment must be provided under such circumstances and what are the limitations, if any, upon the state’s right to subject the minor to treatment against his or her will?

1. Who should be subject to compulsory treatment?
Many think that one of the unfortunate side effects of the parens patriae or treatment philosophy has been the jurisdictional overreach of juvenile courts. Court-ordered treatment

is compulsory from the child’s standpoint. Refusal to cooperate in a program of treatment usually leads to further intervention in the minor’s life, so the child may view such offers of “treatment” as punishment rather than therapy no matter how others may perceive it. As one commentator has acknowledged, “When in an authoritative setting we attempt to do something for a child because of what he is and needs, we are also doing something to him.”

This fact necessarily raises the question of the kind of deviant behavior that justifies juvenile court intervention for the purpose of “treatment.” The “status offender” jurisdiction of the juvenile court is an excellent example of the problem of determining who merits compulsory treatment. Certain kinds of non-criminal conduct such as truancy, ungovernability, and endangering one’s morals—the so-called status offenses—subject a minor in almost every state to juvenile court intervention. This reflects the juvenile court movement’s original focus on the child who engaged in minor misconduct. A traditional reason advanced in support of intervention by the juvenile court in non-criminal misconduct is that minors who behave in this way are incipient serious offenders and the court, in exercise of its delinquency prevention function, has the right to intervene in the lives of such minors to save them from a further downward course. Thus, from its very beginning the juvenile court has been involved in predictive guesswork about the potential danger to society of a minor who commits non-criminal but irritating acts offensive to the community or the family.

A recent series of studies clearly indicate that behavioral science is extremely poor at predicting which persons, including those with past histories of violent acts, will commit future


42. See, e.g., CAL. WELF. & INST’NS CODE § 601 (West Supp. 1976) (beyond parental control); MICH. COMP. LAW ANN. § 712 A.2 (Supp. 1976) (habitual idleness); see also Gough, Commentary, supra note 40.


44. See authorities cited in note 43 supra.
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acts of violence. The temptation to overpredict a tendency to violence is great. It is the "safe" decision. Cases of underprediction are apt to generate publicity. But the result of overprediction is to confine involuntarily for "treatment" many persons who present little potential danger to the community. It is highly unlikely that a juvenile court can either predict with any accuracy which "status offenders" are apt to become serious offenders or demonstrate that court intervention was a significant factor in restraining such minors from committing criminal acts.

Despite the weakness of the rationale, status offenses exist, and they give the juvenile court an extraordinarily broad jurisdictional sweep. In some states status offenses are included in the statutory definition of delinquency. In others, they are a separate category of juvenile court jurisdiction, and statutes designate such minors as "persons in need of supervision," or the like. Often procedural protections afforded a child accused of a status offense are less than those afforded to a child charged with delinquency. In Illinois, for example, the state need prove a status charge only by a preponderance of the evidence rather than beyond a reasonable doubt. Thus, the opportunity exists for subjecting a child to compulsory treatment through exercise of the juvenile court's status-offender jurisdiction in cases in which delinquent conduct is suspected, but the state is unable to meet the "beyond a reasonable doubt" burden of proof required to obtain a delinquency adjudication.

In the Juvenile Court of Cook County all petitions charg-

45. See, e.g., E. SCHUR, RADICAL NONINTERVENTION 46-51 (1973) [hereinafter cited as E. SCHUR]; Kozol, Boucher & Garafalo, The Diagnosis and Treatment of Dangerousness, 18 CRIME & DELINQ. 371 (1972); Wenk, Robison & Smith, Can Violence Be Predicted?, 18 CRIME & DELINQ. 393 (1972); see also the comments of Dr. Alan A. Stone, Professor of Law and Psychiatry, Harvard University, and Dr. John Speigel of Brandeis University reported in the Chicago Sun-Times, Sept. 28, 1975, at 80.

46. INSTITUTE FOR JUVENILE RESEARCH, ILLINOIS DEPARTMENT OF MENTAL HEALTH, YOUTH AND SOCIETY IN ILLINOIS, SUMMARY AND POLICY IMPLICATIONS (1975).


ing status offenses and alleging that a child is a "minor otherwise in need of supervision" (MINS) are heard by one judge who specializes in dealing with the problems such cases present. Often a MINS petition is filed at the request of a parent whose motive, revealed at the court hearing, is the apparent desire to be rid of responsibility for a child whose adolescent problems have become a source of aggravation.\textsuperscript{50} The court is often viewed by the parent as the vehicle to accomplish this purpose. The court has little in the way of local placement resources for such children and no state child welfare agency has a statutory duty to accept such a child for placement or treatment unless a court order has been violated.\textsuperscript{51} Therefore, a great deal of judicial energy is spent in attempting to persuade the parent to forgive the child’s "transgressions" and to take him or her home; or alternatively, to persuade the reluctant state child welfare agency to provide suitable placement for the child outside the home. The child derives little if any benefit from contact with the court and it is painfully obvious that the court is ill-equipped to deal effectively with what is essentially a family squabble.\textsuperscript{52}

In many jurisdictions, status offenders eventually are sent by juvenile courts to the same institutions as delinquent offenders who have committed serious criminal acts. Indeed, in the case of \textit{Nelson v. Heyne},\textsuperscript{53} discussed in greater detail later, it was noted that one third of the population of the Indiana Boys School were non-criminal offenders. Consequently, the "treatment" many status offenders receive is incarceration with serious offenders in a juvenile prison.

There is a considerable body of opinion that the status offense jurisdiction of the juvenile court is the product of statutes that are overbroad and unconstitutionally vague.\textsuperscript{54} Al-

\textsuperscript{50} It is interesting to note that in the Juvenile Court of Cook County, the "minor in need of supervision" (MINS) calendar, as compared to the delinquency calendar, is disproportionately female. Statistics indicate that for the period of January 1, 1975—December 31, 1975, 14,594 delinquency charges were filed against males as compared to 1223 against females. During that same period, 1579 MINS petitions were filed against males as compared to 1928 against females.


\textsuperscript{52} In New York, a large portion of the "persons in need of supervision" (PINS) caseload of the New York Family Court involved family malfunctioning. Note, \textit{Ungovernability}, supra note 40.


\textsuperscript{54} In recent years there have been increasing attacks on the status offense jurisdiction with respect to its vagueness and overbreadth. See, e.g., Wald, \textit{Making
though constitutional attack on MINS statutes has met with little success,\(^5\) some changes are occurring. New York permits status offenders to be confined in state training schools,\(^6\) but prohibits mingling them with delinquents incarcerated in the same institution.\(^7\) In Illinois the juvenile court may commit to the state correctional authority only minors aged 13 or older who have committed an act which, if committed by an adult, would be punishable by a term of incarceration or imprisonment. This disposition, therefore, is not available to the court for the status offender.\(^8\)

In addition, it may be contended that the recent Supreme

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\(^7\) In re Lavette M., 35 N.Y.2d 136, 316 N.E.2d 314, 317, 359 N.Y.S.2d 20, 23 (1974). In this case the court held that it was lawful to place PINS in a training school for PINS only, regardless of the state trial court’s earlier decision in In re Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973). The court’s essential point was that PINS could not be mixed with delinquents. The court stated inter alia: absent a clear showing that the treatment provided at a training school is significantly inadequate for the task, the current experiment with training school placement . . . , as authorized by statute (FAMILY COURT ACT, § 756), should be permitted . . .

We are frank to acknowledge the practical limitations upon the power of the courts to determine the adequacy and effectiveness of treatment afforded PINS children. . . . Surely the role of formulating criteria to measure the effectiveness of treatment facilities is not and should not be an exclusively judicial function. It should not be our province to determine what is the best possible treatment or to espouse an ideal but perhaps unattainable standard. Rather, our role should be to assure the presence of a bona fide treatment program.


In effect, the court stated that the parameters of the “right to treatment” consist in there being bona fide efforts to treat the child adequately within the scope of present knowledge.\(^5\) In re Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973).

Court decision in *O'Connor v. Donaldson* casts further doubt upon the constitutionality of the practice in many states of incarcerating the "status offender." The *O'Connor* case involved a civil rights action in which the plaintiff alleged that he had been incarcerated for more than 15 years in a state institution in violation of his constitutional rights. The jury found that Mr. Donaldson was dangerous neither to himself nor to others, that he was capable of self sufficiency, and that, if mentally ill, he had received no treatment. However, the Supreme Court viewed *O'Connor* as a "right to release" and not a "right to treatment" case. The Court thus avoided deciding the questions of whether a dangerous mentally ill person has a constitutional right to treatment upon compulsory confinement by the state, or whether the state may compulsorily confine a nondangerous mentally ill individual for the purpose of treatment. On the confinement issue alone, however, there may be a significant parallel between the holding in *O'Connor* and juvenile court status offender jurisdiction.

The Supreme Court held that compulsory confinement of a nondangerous mentally ill person capable of self sufficiency under circumstances where no treatment was provided constituted a violation of the individual's constitutional right to liberty. It is certainly arguable that truancy, running away from home, and disobedience to parents are not acts which, standing alone, indicate that an adolescent minor is dangerous to himself or to others. When such acts lead to incarceration in a juvenile correctional institution, with the minor merely locked up and no effort made to address and alleviate the underlying causes of such behavior, it may be contended that this, too, is a violation of the child's constitutional right to liberty. In the words of Mr. Justice Stewart, writing for the majority in *O'Connor*:

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

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60. Id. at 573.
61. Id. at 585.
62. Id. at 575.
In addition, Chief Justice Burger in his concurring opinion expressed grave reservation about compulsory confinement for "treatment."

To the extent that this theory may be read to permit a State to confine an individual simply because it is willing to provide treatment, regardless of the subject's ability to function in society, it raises the gravest of constitutional problems. . . .

If one takes the position that minority alone renders a person incapable of self sufficiency, then the Supreme Court's decision offers little encouragement for the argument that the state has no right to involuntarily confine a misbehaving minor when it has no treatment to offer.

In O'Connor the Supreme Court specifically eschewed endorsement of the Fifth Circuit Court of Appeals' finding that a person involuntarily committed for mental illness has a constitutional right to treatment. Chief Justice Burger in his concurring opinion underscores his reservations about such a right. He rejected the Fifth Circuit's premise that "at least with respect to persons who are not physically dangerous, a State has no power to confine the mentally ill except for the purpose of providing them with treatment."

That proposition is surely not descriptive of the power traditionally exercised by the States in this area. Historically, and for a considerable period of time, subsidized custodial care in private foster homes or boarding houses was the most benign form of care provided incompetent or mentally ill persons for whom the States assumed responsibility. Until well into the 19th century the vast majority of such persons were simply restrained in poorhouses, almshouses, or jails.

One of the goals of the reform movement of the late 19th and early 20th centuries, Justice Burger noted, was to provide appropriate medical care for the mentally ill; but since many could not be cured by any known treatment, providing custodial care for the "dependent insane" remained a major concern of the state.

In short, the idea that States may not confine the mentally ill except for the purpose of providing them with treatment

63. Id. at 585.
64. Id. at 581.
65. Id. at 581-82.
is of very recent origin, and there is no historical basis for imposing such a limitation on state power. . . . There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease. . . . Additionally, the States are vested with the historic *parens patriae* power, including the duty to protect "persons under legal disabilities to act for themselves." . . . The classic example of this role is when a state undertakes to act as "the general guardian of all infants, idiots, and lunatics." 66

Consider the foregoing with respect to a similarly situated person whose disability is his youth rather than his mental state. Even if one supports the argument that the state may exert some measure of control over the status offender and the non-dangerous delinquent, is there not a duty to protect such persons from harm that would preclude confinement in institutions with dangerous delinquents? Might not such confinement violate the eighth amendment prohibition against cruel and unusual punishment?

Perhaps truancy is a matter for schools to deal with. 67 Maybe intra-family disputes should be addressed by community social agencies if the families experiencing such difficulties are willing to accept help. If families are unwilling, should not the community develop a higher tolerance level for such problems rather than expect the juvenile court to remove a child involuntarily from the community for annoying but minor misconduct? 68 Assuming even that juvenile court intervention may be appropriate in some "status offender" cases, few would dispute that incarceration of the minor is a totally inappropriate response to such behavior.

2. **Parameters of the state's right to apply compulsory sanctions to alter a minor's deviant behavior.** Children who commit criminal acts should be the primary target group for compulsory "treatment" by juvenile courts. State intervention can and should include incarceration in appropriate cases. Involuntary confinement, however, may raise constitutional is-

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66. *Id.* at 582-83 (citations omitted).
67. See, e.g., CAL. WELF. & INST'NS CODE § 601.1 (West Supp. 1976), which requires that habitual truants be referred to a school attendance review board referral to the juvenile court.
sues. Although the United States Supreme Court has not reviewed the dispositional phase of juvenile court proceedings, a growing number of lower federal courts are examining the dispositional process and concluding that a minor subjected to incarceration has a right to treatment that is both fundamental and of constitutional dimension.

The state's right to punish. Two cases, *Nelson v. Heyne* and *Morales v. Turman*, illustrate a current trend in some federal courts concerning punishment of incarcerated minors. *Nelson v. Heyne* involved a class action brought in the United States District Court for the Northern District of Indiana for declaratory and injunctive relief with respect to the operation of the Indiana Boys School, a medium security correctional institution for boys 12 to 18 years of age. The court subjected to constitutional scrutiny several disciplinary practices employed at the school, and its treatment program. The court found that infliction of corporal punishment severe enough to cause serious injury and indiscriminate use of protracted periods of solitary confinement were excessive measures, unnecessary to attain the correctional goal, and thus violative of the eighth amendment prohibition against cruel and unusual punishment. The court's ruling, however, was not limited to prohibiting abusive disciplinary practices. The court found that minors in custody have a constitutional right to treatment, and consequently a correctional institution must have affirmative programs of rehabilitation which meet minimal constitutional standards of acceptability. In requesting the parties to submit proposals on programs which would meet such standards, the district court recognized the difficulties inherent in judicial intrusion into the treatment process:

The Court is not unmindful of the very great burden it confronts in fashioning a specific remedy pursuant to these general findings . . . . The Court sees its present function as steering a middle course between the indefensible extreme of abstinence and the impossible extreme of superintending the system.

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71. 355 F. Supp. at 461.
72. *Id.* For an extensive discussion of the implications of the court's holding on this aspect of the right to treatment, see text accompanying notes 99-107 *infra.*
In contrast, a federal district court in Texas faced with a similar class action suit, *Morales v. Turman,* was not at all hesitant to "superintend the system." Plaintiffs sought relief from conditions existing at Mountain View State School for Boys, the maximum security correctional facility then operated by the Texas Youth Council. The court ordered that any inmate in solitary confinement be visited by his caseworker for a period of 10 minutes each hour until his release from solitary confinement, except for the hours between 10:00 p.m. and 7:00 a.m. If an inmate was so confined for longer than three consecutive days, a written report prepared by his caseworker justifying the continued confinement was required to be forwarded to the Executive Director of the Texas Youth Council, to all counsel in the civil action, and to the court. Further, if the confinement exceeded 10 consecutive days, the burden of preparing and filing the reports was shifted to the Executive Director of the Texas Youth Council.

In addition, the court limited commitment or transfer to the school to those youths who had committed acts which would be serious felonies of violence if committed by adults. It also appointed an ombudsman to hear grievances from inmates and staff. The ombudsman was to have access to all school records, attend all staff meetings, and make recommendations concerning the operation of the school and its compliance with the court's order. Finally, the court ordered that all persons subsequently applying for a position at the school be required to submit to psychological testing and psychiatric interviews; persons whose test results cast doubt upon their fitness to work with children were not to be employed.

*The state's right to use drugs for institutional control.* Treatment in correctional institutions increasingly involves use of tranquilizing drugs and aversion therapy for the purpose of behavior control. The federal appellate court in *Nelson v. Heyne* suggested that there are constitutional limitations as to their use on minors who are involuntarily incarcerated. The

74. Id. at 177.
75. Id. at 178.
76. Id.
77. Id. at 178-79.
78. Id. at 179.
79. Id. at 180.
80. 491 F.2d 352 (7th Cir. 1974).
**Nelson** court stated that forcible injection of tranquilizing drugs is violative of the eighth amendment prohibition against cruel and unusual punishment if such medication is used for behavior control rather than as part of a program of individualized therapy, and if it is introduced into the body in an unnecessarily intrusive way: for example, by injection rather than orally.

Federal courts with increasing frequency are declaring that fundamental rights such as personal privacy and freedom to communicate, although necessarily attenuated by institutionalization, are not extinguished by it. Treatment measures such as forced drug injection may, in addition, raise first and fourth amendment problems. If the first amendment guarantee of free expression prohibits systematic manipulation of one's very capacity to think and respond, then behavior modification devices which dull the senses may be violative of this guarantee. Also, if the right to privacy protected under the fourth amendment encompasses not only security of the person, but sanctity of the body as well, it may proscribe use of behavioral control therapy which results in significant physical intrusion of the body to accomplish the desired therapeutic goal.

The legal theories upon which both the **Nelson** and **Morales** decisions are based have analytical weaknesses. The decisions rely upon three premises; first, the eighth amendment prohibition against cruel and unusual punishment; second, the right to communicate protected by the first amendment; and third, the fourteenth amendment due process argument that treatment is the *quid pro quo* that an incarcerated minor must receive in exchange for denial, at the trial stage of juvenile delinquency proceedings, of all the procedural rights afforded adults accused of crime. The **Nelson** and **Morales** courts broke new ground when they intervened in the correctional process to force development of affirmative treatment programs; intervention to prevent use of certain punitive sanc-

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tions in the name of treatment, however, rests on much firmer
foundation.

Duration of compulsory treatment. As the many prisoner
mistreatment cases demonstrate, the fourteenth amendment
requires that some procedural safeguards be afforded before
punishment may be imposed, and limits the severity and dura-
tion of punishment only to that necessary to attain the correc-
tional goal. That these constitutional limitations are equally
applicable to protect the incarcerated minor when the "treat-
ment" he receives is, in reality, punishment cannot seriously
be doubted.

At this point the question must be asked whether the con-
stitutional theories outlined above are helpful in determining
to what extent, if any, the state may require an incarcerated
minor to participate in rehabilitation programs, and apply
coercion for refusal to cooperate. To what extent may the minor
refuse treatment? Cases involving the right to refuse treatment
are sparse indeed. No case has been found which prohibits a
state from compelling an incarcerated minor to participate in
educational, vocational or recreational programs designed to
assist his eventual reintegration into the community, although
some experts believe that such programs must be voluntary to
have rehabilitative value.

In most jurisdictions a delinquent minor is subject to institu-
tional commitment or supervision during his entire minority,

84. See cases cited in note 81 supra.

85. See, e.g., Melville v. Sabbatino, 30 Conn. Sup. 320, 313 A.2d 886 (1973)
(seventeen-year old, voluntarily admitted to private mental health hospital by his
parents, has the right to sign himself out, despite parental opposition); In re Lee, No.
68-JD-1362 (Ill. Cook County Cir. Ct. Juv. Div. 1968), abstracted in 6 CLEARINGHOUSE
REV. 284 (1972), 6 CLEARINGHOUSE REV. 575 (1973), 9 CLEARINGHOUSE REV. 58 (1975)
(minors over 13, admitted to a mental hospital as voluntary patients on the application
of a third party, can request their own discharge, must be so informed of this right on
admission, and must be permitted to leave within five days of such request); In re
Smith, 16 Md. App. 209, 295 A.2d 238 (1972) (minors over the age of 16 cannot be
compelled by their parents to have an abortion); In re Slayton, No. 183756 (Mich.
Wayne County P. Ct. 1972) (fifteen-year old’s consent required for admission to a
mental hospital; father’s consent alone is insufficient); In re Anonymous, 42 Misc.
2d 572, 248 N.Y.S.2d 608 (Nassau County Ct. 1964) (parents could not place their ten-
year old child in a mental hospital when hospitalization was not shown to be neces-
noted, 96 S. Ct. 1457 (1976) (minors entitled to a hearing within 72 hours after being
committed to a mental institution by their parents).

The Illinois Juvenile Court Act does not require a MINS to accept treatment or
to participate in a treatment program.

86. See, e.g., D. FOGEL, THE JUSTICE MODEL FOR CORRECTIONS (1975); Morris, The
whether his transgression was a serious felony or a trivial misdemeanor or status offense. In the latter cases, problems of proportionality arise. The "catch-22" inherent in the right to treatment theory is that if one mode of therapy fails, the minor may be kept in custody while one treatment method after another is tried; or worse, the ineffective therapy may simply continue indefinitely, despite lack of response. Examples of a minor's "unresponsiveness to treatment" in a correctional institution may include swearing at those in authority, refusing to work, smoking, drinking, and the like.

Most delinquents are not "ill" in any medically definable way. Many suffer from the general malaise of poverty, with its attendant dislocation of families, and inadequate education and vocational opportunities. These ills are not cured by treating the minor. Thus, when commission of a criminal offense justifies incarceration, but the minor proves unresponsive to treatment, the duration of the intervention should be limited by statute, in proportion to the severity of the offense committed. Sanford Fox calls it the "child's right to punishment"—a minor confined for treatment who cannot benefit from what the state has to offer has a right to take his punishment and be done with ineffectual interference.

Involuntary confinement without treatment. Justice Fortas in Kent v. United States and In re Gault made note of the fact that a minor gives up procedural protections in the juvenile justice system in exchange for "treatment." The United States Court of Appeals for the Seventh Circuit endorsed this theory in Nelson v. Heyne, finding that a minor involuntarily confined because of deviant behavior had a constitutional right to treatment.

Turning now to the right to treatment principle as it applies to minors who have committed violations of the criminal law, consider the fact that notwithstanding the parens patriae rhetoric contained in the preambles of most juvenile court acts, state intervention in most cases of criminality by minors is

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87. See, e.g., ILL. REV. STAT. ch. 37, § 705-11 (1972) which provides that the juvenile court has jurisdiction over the minor until his or her twenty-first birthday.
88. See generally E. SCHUR, supra note 45.
91. 387 U.S. 1 (1967).
92. 491 F.2d 352 (7th Cir. 1974).
based more on society’s need for protection than the minor’s need for treatment. The juvenile court in delinquency cases, while it has a rehabilitative focus, is nonetheless serving societal ends similar to those served by the criminal court: condemnation, deterrence and incapacitation of those whose behavior is threatening to society.\textsuperscript{93} If we decline to acknowledge this function of the juvenile court, then those offenders whose problems are beyond the capability of behavioral scientists to diagnose or treat would be entitled to release from institutions lacking programs to meet their treatment needs. The attractiveness of the right to treatment doctrine viewed in this context is inversely proportional to the dangerousness of the offender.\textsuperscript{94}

In \textit{O’Connor v. Donaldson},\textsuperscript{95} Justice Burger was sharply critical of the \textit{quid pro quo} theory (adopted by the Fifth Circuit Court of Appeals) as it applies to the mentally ill. He wrote:

It is too well established to require extended discussion that due process is not an inflexible concept. . . . Where claims that the State is acting in the best interests of an individual are said to justify reduced procedural and substantive safeguards, this Court’s decisions require that they be “candidly appraised.” . . .

The \textit{quid pro quo} theory is a sharp departure from, and cannot coexist with, these due process principles. As an initial matter, the theory presupposes that essentially the same interests are involved in every situation where a State seeks to confine an individual; that assumption, however, is incorrect . . . .

A more troublesome feature of the \textit{quid pro quo} theory is that it elevates a concern for essentially procedural safeguards into a new substantive constitutional right. . . .

In sum, I cannot accept the reasoning of the Court of Appeals and can discern no basis for equating an involuntarily committed mental patient’s questioned unconstitutional right not to be confined without due process of law with a constitutional right to \textit{treatment}. Given the present state of medical knowledge regarding abnormal human behavior and its treatment, few things would be more fraught with peril than to irrevocably condition a State’s power to protect the mentally ill upon the providing of “such treatment as will give [them] a realistic opportunity to be cured.”\textsuperscript{96}

\textsuperscript{93} \textit{See}, e.g., F. Allen, supra note 27, at 49-60.
\textsuperscript{94} \textit{Id}.
\textsuperscript{95} 422 U.S. 563 (1975).
\textsuperscript{96} \textit{Id.} at 584-89 (citations omitted).
Nor could Justice Burger accept the theory that a state may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. As he said, "Our concepts of due process would not tolerate such a 'trade-off.'" 97

Conclusion. The parens patriae philosophy of the juvenile court system has resulted in theoretical and practical problems which still plague it. Minors whose conduct may not justify the application of coercive intervention by the state are often caught up in the system and subjected to treatment that is either unnecessary or ineffective. The meager resources of the juvenile court are thus squandered in attempting to treat problems for which the judicial system is ill-equipped. 98 On the other hand, this philosophy has served to mask the hard reality that juvenile court intervention in the case of the minor offender whose conduct is a threat to the community is in truth based not upon the court's ability to rehabilitate the offender but rather on society's need to control such behavior. A frank acknowledgement of these facts indicates that societal expectations of what the court can do effectively in areas of delinquency prevention and control have been overbroad. If so, the juvenile justice system "failures" in such areas may be due more to society's unrealistic expectations than to internal defects in the court system itself.

B. The Minor's Right to Treatment: The Right to Necessary Social, Educational and Other Services

The second dimension of the right to treatment involves obtaining services for minors in need of them, as contrasted with the state's right, through the juvenile court, to do something to a child for the purpose of treatment. Will the child's right to treatment support the juvenile court's application of coercive power to public agencies to secure better services for court wards? The court's coercive power traditionally has been directed against the child, not the agencies required to provide care and service. When one recalls the origins of the juvenile court, this fact is not surprising. Many state agencies have statutory obligations to provide care and service to children. 99

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97. Id. at 589.
98. See McCarty, Juvenile Justice: The Economics of Ineptitude, 10 SAN DIEGO L. REV. 250 (1975).
99. See note 105 infra.
If the child has a "right to treatment," may the juvenile court become the child's advocate and enforce this right by using its power to demand and secure adequate services from such agencies?\textsuperscript{100}

Notwithstanding the theoretical and practical limitations of the right to treatment as it applies to juveniles who are not ill or who are untreatable, juvenile court laws throughout the country require courts to attempt to secure for the minor who has been removed from his home custody, care and discipline as nearly as possible equivalent to that which should be given by his parents.\textsuperscript{101} The Illinois Juvenile Court Act, as recently amended, states: "Every child has a right to services necessary to his proper development, including health, education and social services."\textsuperscript{102} If state and federal courts become more willing to find that the legislative intent behind statutes containing such language was to mandate treatment, and if courts accept Justice Black's theory that to deprive a person of a statutory right, once granted, is a due process violation,\textsuperscript{103} more decisions will emerge holding that a juvenile has a constitutional right to treatment; nor would the right be limited to those juveniles who are institutionalized. All children subject to juvenile court intervention, whether for a delinquent offense, a status offense, or because they are neglected or dependent, would enjoy such a right.\textsuperscript{104}

If the right to treatment gains recognition and acceptance, the burden of implementing it will rest largely upon the federal and state courts. However, the emergence of a right to treatment, whether based upon the federal constitution or upon state statute, may provide juvenile courts with a tool to force state and local governmental agencies charged with the responsibility of supplying care to children to treat such children on an individual basis. Juvenile courts may begin to assume an advocate's role on behalf of court wards in obtaining and monitoring services from such agencies.

Laws have been passed establishing or protecting chil-

\textsuperscript{100} See, e.g., N.Y. Family Court Act § 255 (McKinney 1975).
\textsuperscript{103} Griffin v. Illinois, 351 U.S. 12 (1956).
dren's rights in areas such as education and health. Numerous public agencies have become involved in the socialization of our children, and have statutory obligations to provide service. Related to this is the growing belief that certain services are essential for a child's welfare, and therefore must be made available to all as a matter of right. Child advocacy programs have adopted the position that not only the family, but schools, hospitals, courts and other institutions affecting children are crucial determinants in child development. Consequently, those entrusted with the responsibility of dealing with juvenile problems must turn their attention from the family—traditionally the focus of intervention—to the operation of other institutions that play a major role in a child's life. It can be persuasively argued that this shift in focus, first articulated by the child advocacy movement, is one that juvenile courts must also make if the validity of their existence as separate courts is to be defended as we enter the last quarter of the 20th century. Because it not only provides services but makes the services of other institutions available, the juvenile court is potentially both a target for and an instrument of advocacy. The court is one of the most highly visible of the institutions serving youth, playing a major role in the lives of children in trouble, affecting essential rights, in varying degrees, in all of its processes. Understandably, with increased public sensitivity about rights, the shortcomings and failures of the court, if not the most grievous, have certainly been the most conspicuous. They have been the objects of analysis, criticism, pressure, confrontation, legislation and litigation—and each of these activities has at times been called advocacy. A recent study (called the "baseline study") correctly states that "these courts have been the targets of reformers who want to redefine their jurisdiction or procedures by reforming state laws." The Juvenile Justice Standards Project of the American Bar Association and Institute of Judicial Administration is a notable example of such an effort.


Also, minors may obtain certain kinds of medical treatment in Illinois without parental consent. ILL. REV. STAT. ch. 91, §§ 18.4, 18.7 (Supp. 1976).


107. Id. at 100.
1. **Class advocacy.** The "baseline study" notes that family and juvenile courts have been the focus of major class actions in recent decades. For examples of advocacy litigation directed against juvenile courts, the experience in Cook County, Illinois, is fairly typical. A spate of class actions against judges and officers of the court sought and obtained a variety of institutional changes. Placing neglected and dependent children in the Detention Center was prohibited by one decision. Other litigation resulted in limiting the use of detention for minors in need of supervision; systematic notice to juveniles of their right to appeal, with transcript and court appointed counsel provided without cost to indigents; and an end to the practice of detaining in the county jail, pending trial, minors waived to criminal court for trial as adults.

Conversely, there are relatively few reported cases where juvenile courts themselves have been vehicles of advocacy, ordering institutions and agencies to provide or improve services to children. In 1973, the Juvenile Court of Cook County entered an order attempting to change certain practices of the Illinois Department of Corrections, Juvenile Division, with respect to treatment of delinquent wards of the court committed to that agency. Plaintiff Douglas Owen was confined in the Industrial School for Boys, a correctional facility, pursuant to an order of the Juvenile Division of the Cook County Circuit Court. He had been adjudged delinquent and under Illinois law continued to be a ward of the court. He and other named defendants petitioned on behalf of themselves and others similarly situated, alleging that children at the school were subjected to cruel and unusual punishment and were denied due process of law. After a hearing, the juvenile court found that injections of a tranquilizing drug, thorazine, were forcibly administered to the children as a behavior control device, and that solitary confinement was imposed as punishment without any procedural protections. Upon these findings, the juvenile court entered an order enjoining both nontherapeutic use of the drug

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108. *Id.*
and the imposition of punishment without notice and hearing.\textsuperscript{114} The court ordered that the injections be given only pursuant to written rules as part of a therapeutic program, and that the Department of Corrections establish procedural guidelines for disciplinary proceedings.\textsuperscript{115} The court specified in some detail what these rules and guidelines should contain.\textsuperscript{116} The order was based upon the court's statutory powers to require custodians to report to the court concerning care of court wards, not upon constitutional grounds. However, the order was designed to curb many of the procedures and practices that concerned the federal courts in *Nelson v. Heyne*\textsuperscript{117} and *Morales v. Turman*,\textsuperscript{118} two decisions that did involve the constitution. The Illinois Supreme Court reversed the trial court, stating that if each juvenile court of the state's 102 counties entered similar orders specifying the manner in which its wards should be treated, it would become administratively impossible to operate a state institution.\textsuperscript{119} The court expressly refused to consider to what extent judicial intervention could appropriately have been used to relieve the abuses, but said it was not aware of any case where the postdisposition authority granted a juvenile court has been construed to authorize the court to establish detailed procedures for the care and discipline of wards committed to an institution operated by the executive branch of state government.\textsuperscript{120}

It should be recalled, however, that in several cases, of which *Nelson v. Heyne*\textsuperscript{121} and *Morales v. Turman*\textsuperscript{122} are examples, courts have adopted an advocate's role by entering federal orders in class action suits requiring creation of treatment programs, staff additions and procedural changes, all of which necessarily affect state budgetary priorities.\textsuperscript{123}

2. *Case advocacy.* The Illinois Juvenile Court Act, in which the Illinois Supreme Court failed to find authority for active judicial intervention in correctional facility programs, is typical of statutes throughout the country. A minor's wardship

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\item[114.] \textit{Id.} at 106, 295 N.E.2d at 456.
\item[115.] \textit{Id.} at 106-07, 295 N.E.2d at 457-58.
\item[116.] \textit{Id.}
\item[117.] 491 F.2d 352 (7th Cir. 1974).
\item[120.] \textit{Id.} at 110, 295 N.E.2d at 458.
\item[121.] 491 F.2d 352 (7th Cir. 1974).
\item[123.] See also cases cited in note 83 supra.
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endures until age 21 unless earlier terminated by court order. During this period of wardship the court has power over the minor, but has no express power to deal with agencies whose activities affect the minor's life. Generally, efforts to strengthen the hand of juvenile courts in ordering treatment and monitoring service rendered by public child welfare agencies have followed one of three approaches.

The first approach: legislation. The State of New York has resorted to legislation to resolve the issue of the extent of the juvenile court's power to intervene and redirect the policies and programs of other state and local agencies to secure better service for wards of the court. In 1972, the New York Family Court Act was amended to give the family court, or a judge thereof, the power to order "any state, county and municipal officer and employee to render such assistance and cooperation as shall be within his legal authority, as may be required to further the objects of this act." The amendment further gave the family court judge the power and duty to order "any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act."

An interesting account of the genesis of section 255 of the New York Family Law Act is found in the family court opinion in the case of In re Edward M. The impetus for the amendment had come from the 1972 Report of the Assembly Select Committee on Child Abuse, and it was to that report that the Edward M. court turned for guidance on legislative intent. The Committee, concerned primarily with prevention of child abuse, had noted that the family court "is . . . the lynchpin upon which the entire out-of-court system depends," and is "in many ways, a unique court, dependent upon numerous outside agencies to make its processes effective." The court quoted at length from the Committee Report language which was itself a quotation from an earlier New York Senate study:

126. Id.
128. Id. at 783, 351 N.Y.S.2d at 605.
Compounding the difficulties confronting the Family Court judge is the absence of adequate supporting services. From adjudication to disposition, the Family Court judge is "dependent upon the cooperation and assistance of other municipal agencies and private social agencies, so often understaffed and ill equipped to meet even the minimum needs and demands of this court, contributing heavily to its inability to become the social forum it was designed to be." 129

The Committee continued:

The fragmented patchwork of child welfare agencies is responsible for lack of communication, inefficiency and inadequate service. The list of agencies in itself reveals the splintering of services. A family in trouble too often gets lost in the maze of agencies. Repeating their problems over and over again to social worker after social worker becomes frustrating, annoying, and destructive to any helping relationship. 130

The amendment to the New York Family Court Act has been utilized a number of times to secure services for children from state and local agencies which were required to provide such services, but either had failed to do so, or were providing inappropriate service to the child. The court is also empowered by this amendment to fix ultimate responsibility for specific services on certain state or local agencies when those agencies cannot agree which of them is responsible for attending to the child's needs. 131

Procedurally, before the family court can enter an order directing the assistance and cooperation of a state, county or municipal officer, a hearing must be held to establish the following: (1) the specific services needed; (2) that it is within the legal authority of the public agency before the court to provide those services; (3) that it is reasonable for the court to expect the agency to provide the services to a court ward; and (4) the reasonable time limit within which to expect the agency to begin delivery of service. 132

An examination of some recent New York family court decisions in individual cases is illuminating. It offers a glimpse

129. Id.
130. Id.; 35 N.Y.S.2d at 605-06.
of how a court armed with such statutory authority can become an advocate for children.

Efforts to secure better mental health services for children in need of them have produced a series of useful decisions. *In re Leopoldo Z.*\(^{133}\) presented the court with the difficult problem of fixing responsibility for appropriate placement of a mentally retarded delinquent child. Leopoldo had been placed on probation as a person in need of supervision in January, 1973. In February, 1974, he was adjudicated delinquent for a fatal shooting. The psychiatric, psychological and social service reports all recommended a structured setting where he could receive educational rehabilitation and vocational training. The probation officer had a list of such agencies that had been contacted, but reported that all had rejected the boy because of his retardation. A division of the State Department of Mental Hygiene was recommended. An administrator of that division appeared before the court and said that although Leopoldo was within the spectrum of the agency's services, the agency was not prepared to deal with children with behavioral problems such as his.\(^{134}\) Yet the psychologist for the Department reported that under no circumstances should the boy be returned home.\(^{135}\) The family court judge felt he could no longer in good conscience hold the boy in the Detention Center; neither could he, merely "for want of a better alternative," place Leopoldo in a training school. Consequently, the court ordered the Department of Mental Hygiene to find or create a suitable facility in which Leopoldo could be placed.\(^{136}\)

*In re David M.*\(^{137}\) illustrates the manner in which a family court judge armed with appropriate power can intervene on behalf of a child to prevent his being bounced back and forth between mental health and corrections authorities, each of which disclaims responsibility for custodial care. David's institutional history began at the age of seven when he was sent to the psychiatric division of the city hospital. He had been referred by his school because of his restless, aggressive and destructive behavior. A diagnosis of childhood schizophrenia was made, and after four months he was released. Between the time of his release and his appearance in the family court, David had

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133. 78 Misc. 2d 866, 358 N.Y.S.2d 811 (Fam. Ct. 1974).
134. Id. at 867, 358 N.Y.S.2d at 813.
135. Id. at 868, 358 N.Y.S.2d at 813.
136. Id.
137. 77 Misc. 2d 491, 354 N.Y.S.2d 80 (Fam. Ct. 1974).
been in one hospital six times and in another hospital twice. Indeed, in the previous six years, the longest period he had been able to remain outside an institution had been less than one month. He came before the family court charged with attempted murder, assault and robbery. The alleged acts occurred during an escape from the hospital, a feat which David had managed before, because the hospital was not a secure institution. The judge noted that the juvenile was a patient at a mental hospital and returned him to that institution. David stayed there for a short time, then was discharged and returned to court, which remanded him to the Detention Center to await hearing.138 However, before a hearing could be held the Center psychiatrist advised the court that David was unmanageable, assaultive, and urgently needed hospitalization, since the Detention Center had no treatment programs for mentally ill children.139 The court sent David back to the hospital. Twenty-two days later the hospital discharged him, and he was again sent to the Detention Center. Within five days, the psychiatrist asked that David be removed as a danger to himself and others.140 David was returned to the hospital but was promptly discharged and was back in court in a month.141 In an emergency report, the court psychiatrist wrote, "We again for the third time, respectfully urge the court not to return this youngster to Juvenile Center."142 An exasperated judge sent David back to the hospital, and ordered a hearing to resolve the issue of the youngster's care.

Finding that David was an appropriate subject neither for treatment in an ordinary mental hospital nor for placement in a typical juvenile correctional facility, the court determined that the Commissioner of Mental Hygiene had statutory authority to provide or contract for proper custodial care; that he should have done so; and that he should not have discharged a mentally ill child to the family court.143 The court therefore ordered

pursuant to the powers granted under Section 255 of the Family Court Act that the State Commissioner of Mental Hygiene provide or contract for a proper facility for the

138. Id. at 492, 354 N.Y.S.2d at 82.
139. Id. at 493, 354 N.Y.S.2d at 82.
140. Id., 354 N.Y.S.2d at 82-83.
141. Id., 354 N.Y.S.2d at 83.
142. Id.
143. Id. at 495-96, 354 N.Y.S.2d at 84.
care and treatment of this mentally ill child by implementing the recommendations of the psychiatrists for a structured, closed residential setting. 144

A similar ruling was made by the court in In re Graham S. 145 In each case the Commissioner of Mental Hygiene was ordered to submit to the court within a specified period of time a plan for the placement and treatment of a dangerous, mentally ill child. 146

State and local school authorities have also been ordered to provide appropriate services (or pay the cost of such services if provided by others) under the authority given the family court by section 255. In a 1973 case, In re Anthony W., 147 the family court ordered the New York Commissioner of Education to approve state reimbursement of half the cost of special education services for a physically handicapped child. A similar case, In re John M., 148 involved a child with a serious speech defect. He was before the court for truancy, which began when he was enrolled in a new school. It appeared that his schoolmates at the second school teased him because of his speech defect, whereas his friends at the previous school had accepted him. The Board of Education refused to readmit him to his old school because he no longer resided in the district it served. The court ordered the Board of Education to readmit John to his former school. 149

Complete commitment to the concept of child advocacy is perhaps best illustrated by a quotation from the opinion of Judge Stanley Gartensen in another school case, In re Carlos P. 150 A local school board had refused to admit Carlos to a vocational high school near his home because he had applied for admission after the deadline for enrollment had passed. The school offered programs suited to his particular talents, but he had been unable to meet the admission deadline because at that time he was in the custody of the family court. After ordering the board to admit the child to the school, Judge Gartensen wrote:

144. Id. at 496, 354 N.Y.S.2d at 84.
146. Id. at 355, 356 N.Y.S.2d at 772.
149. Id. at 676, 347 N.Y.S.2d at 870.
150. 78 Misc. 2d 851, 358 N.Y.S.2d 608 (Fam. Ct. 1974).
Perhaps a history of our time will someday define the function of the law and its courts as the intervenor between an individual struggling to be recognized as human and the vast bureaucracy which tends to dehumanize him.

Bureaucracy and red tape have a way of feeding on themselves. When they trap a human being, he is categorized; placed on the assembly line; labeled, packaged and delivered at the end of this treadmill wholly anesthetized as a neat stack of reports, each of which has picked up its requisite complement of marginal initials on the way. When the frustration becomes intolerable, this human being is often impelled to perform some act affirming that he is in fact alive and unique. In his rage, the delinquent youth who is promised but receives no treatment might well become the misfit of tomorrow. It is tragic enough that Society’s insoluble problems contribute to this process. But it is criminal when we are given a chance to intervene and let it pass us by. The court is here given this opportunity, indeed, the positive statutory duty to do so. In the light of the unsatisfactory choice of dispositional alternatives which Society at large has made available to this court, a condition for which Society has the temerity to blame the court itself, it will not allow this opportunity to slip through its fingers.151

County social service departments have also been targets of the New York family court’s intervention to secure additional or more appropriate services for juveniles. In re Norman C.152 involved a motion that the juvenile be remanded to the Department of Social Services rather than kept in the Family Court Detention Center pending his next court hearing. The family court granted the motion. Emphasizing that Norman had merely been accused, not adjudicated delinquent, the court pointed out that under similar circumstances a child with parents would have been returned home on parole until the hearing. Holding a destitute child in the detention facility merely because he did not have “the good fortune to have parents” to look after him, the court concluded, was a denial of equal protection.

The court feels that the Department of Social Services must stand now in the place of a parent to this boy and he must be accommodated by them . . . in some other

151. Id. at 852, 358 N.Y.S.2d at 609.
152. 74 Misc. 2d 710, 345 N.Y.S.2d 338 (Fam. Ct. 1973).
facility. The Department of Social Services, if it does not have facilities for such a youngster must find facilities so that the Family Court Act can be complied with. This boy... should be presumed innocent until proven guilty. He should not be denied the same rights as every other youngster who has... parents to insure his protection.153

The family court of St. Lawrence County, New York, utilizing the amendment in another case, In re Edward M.,154 ordered the County Department of Social Services to develop a program to meet every readily foreseeable contingency involved in the placing of juvenile delinquents or persons in need of supervision in foster care. The plan was to include ongoing training programs for foster parents, and a means of assuring that no child would be permitted to remain indefinitely in the uncertainty of the detention home nor returned to his own home if needed care and supervision were lacking. In addition to highlighting effective judicial intervention, this case also illustrates the dilemma of the district attorney. As attorney for county departments he is required to defend a county agency charged with failure to provide services. Yet as the prosecutor of a juvenile, he has the duty to see that the child whose adjudication he has sought and obtained receives appropriate services upon disposition. In this case the district attorney found himself in the position of arguing that the family court had no power to direct the Commissioner of Social Services to take specific action. The court responded:

I am mindful of the rule... that the Court should not substitute its judgment for the judgment of those whose duty is to administer agencies and institutions. However, under § 255 that rule may be superseded in a particular case where the nature and urgency of the need presented and the consequences of the failure to provide services require court action. This is particularly true when the root cause of the difficulty is administrative inaction as distinguished from a dispute over the appropriateness of a particular action. Thus, in a given case, the officer may not hide behind a shield of insufficient time, inadequate staff, insufficient funds, or mere rhetoric. Under § 255 the Court is given the authority to order the officer into action so that the needs of people before the Court can be met.155

153. Id. at 712, 345 N.Y.S.2d at 340.
155. Id. at 787, 351 N.Y.S.2d at 608.
Upon appeal the trial court’s holding was sustained.\textsuperscript{156}

Section 255 has also been used by the New York family court to expunge a juvenile’s record with a police department after the court had dismissed the delinquency petition filed against the child. In response to the argument that the family court had no jurisdiction over police department records, the court found in \textit{In re Terrance J.}\textsuperscript{157} that the amendment to the Family Court Act did confer such jurisdiction.

\textit{The second approach: "inherent powers."} Courts in jurisdictions lacking the specific statutory authority conferred by the New York Family Court Act have relied on other theories to justify court supervision of public agencies that are failing in their responsibility to provide services to court wards. In a recent Minnesota case, \textit{J.E. C. v. State},\textsuperscript{158} the Hennepin County District Court, Juvenile Division, ruled that the judicial branch may insist that agencies of the executive branch respond to the needs of wards of the juvenile court. It specifically required the Department of Corrections to create a program for the rehabilitation of children accused of major offenses which would also provide adequate protection to the public, thereby making it unnecessary for the juvenile court to transfer all youths accused of major offenses to adult court. On appeal this


\textsuperscript{157} 78 Misc. 2d 437, 353 N.Y.S.2d 695 (Fam. Ct. 1974). Subsequent cases illustrate that the juvenile courts are still exercising their powers given to them under the New York Family Court Act to review the treatment of juveniles. \textit{See, e.g., In re Raymond M.}, 81 Misc. 2d 70, 364 N.Y.S.2d 321 (Fam. Ct. 1975) (the Department of Social Services did not use statutorily required diligent efforts to strengthen the parent-child relationship); \textit{In re John H.}, 48 App. Div. 2d 879, 369 N.Y.S.2d 196 (1975) (PINS defendant should not have been committed to the state training school unless other, less restrictive alternatives had been explored and found wanting); \textit{In re Paul H.}, 47 App. Div. 2d 853, 365 N.Y.S.2d 900 (1975) (child should not have been committed where parent had admitted his own fault in supervision of the child, and the child himself was not at fault).

There may be limits, however, on the power of the New York Family Courts to review the treatment of juveniles pursuant to § 255. \textit{See note 56 supra.}


A Florida appellate court has recently upheld the authority of the juvenile court to regulate the placement of children after giving custody of them to the state department of family services. Division of Family Servs. v. State, 319 So. 2d 72 (Fla. App. 1975).

Also, in \textit{In re A.D.}, \textit{abstracted in 7 Juvenile Ct. Digest 164 (1976)}, the Juvenile Court of Harris County, Texas, ordered a government agency to pay for a juvenile’s treatment in a private facility and enjoined the agency from removing the child from the private facility.
order was reversed, further indication that appellate courts are most reluctant to find that juvenile courts have power to demand specific programs from public child welfare agencies, absent express statutory authority.\textsuperscript{159}

The third approach: contempt power. In Pennsylvania, the juvenile court of Allegheny County, in \textit{Janet v. Carro},\textsuperscript{160} used the contempt power to impose a personal fine of 100 dollars upon the local Commissioner of Social Service, who had repeatedly failed to provide the court with an individual plan adequate to the needs of a difficult-to-place ward of the juvenile court.

\section*{IV. Conclusion}

The court orders issued in many of the cases discussed above must necessarily have a substantial impact on the state budget. State legislatures will have to appropriate funds to enable agencies of the executive branch of government to provide the services to children mandated by state mental health and juvenile codes, and by courts acting under the authority expressly or impliedly conferred by such statutes. It is obvious that separation of powers problems arise when the judicial branch of government assumes an advocacy role to secure adequate treatment. What power does a court have to enforce its order if the legislature refuses? May courts order agencies to alter their program priorities when there aren’t enough funds to provide programs to meet the needs of all the individual children who come to the court’s attention? Again, some federal courts are answering this question affirmatively.\textsuperscript{161} May a court order specific treatment programs or dictate the terms and conditions governing a child’s commitment to an agency or, even more importantly, of his release to the community? Such actions may intrude upon areas of discretion usually reserved by the legislature to particular agencies. In response to the argument that juvenile court intervention into agency deci-

\begin{footnotesize}
\begin{enumerate}
\item 225 N.W.2d at 254.
\item The United States Supreme Court has ruled that the federal judiciary can compel governmental agencies of the state to spend public monies to meet constitutional requirements. \textit{See, e.g.}, \textit{Griffin v. School Bd.}, 377 U.S. 218 (1964); \textit{Griffin v. Illinois}, 351 U.S. 12 (1956). \textit{But see} \textit{Edelman v. Jordan}, 415 U.S. 651 (1974) (11th amendment prohibits award of retroactive welfare payments by a federal court).
\end{enumerate}
\end{footnotesize}
sions is a violation of the separation of powers doctrine, one can assert that juvenile court statutes speak generally about securing for each minor such care and services as best serve the interests of the minor and the community.\(^{162}\)

In Illinois, the trend in recent years has been away from involving the court in direct placement of wards needing long-term care outside the home. The placement function has been taken over primarily by state public welfare agencies, and primary responsibility for securing care and services for such children has devolved upon them.\(^{163}\) This limits the role of the court, for the most part, to determination of which children are proper candidates for removal from their homes and commitment to such agencies.\(^{164}\) Disillusionment with the quantity

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\(^{163}\) See, e.g., Ill. Rev. Stat. ch. 23, § 5005 et seq. (Supp. 1976) which established the State Department of Children and Family Services.


Generally, without a specific mandate, such as that provided in New York, courts have been unwilling to interfere with social service agencies in the executive branch regarding the question of treatment. See, e.g., Ridgeway v. Superior Court, 74 Ariz. 117, 245 P.2d 628 (1952) (after commitment, a minor is under the exclusive control of state institutions); Jones v. State, 134 Ga. App. 611, 215 S.E.2d 483 (1975) (the State Department of Human Resources alone has the authority and responsibility to establish policies and standards governing youth development centers); In re Jones, 432 Pa. 44, 246 A.2d 356 (1968) (question of inadequate treatment in a state facility for delinquents must be dealt with by the legislature, not by the courts).

The courts have been more willing to intervene in situations where a minor has been improperly or unlawfully committed to a state or federal treatment facility. These decisions touch on the treatment issue only insofar as they review whether a minor should have been committed for treatment in the first place. See, e.g., People v. Grieve, 131 Ill. App. 2d 1078, 267 N.E.2d 19 (1971); In re Johnson, 30 Ill. App. 2d 439, 174 N.E.2d 907 (1961); In re Hammill, 210 Md. App. 586, 271 A.2d 762 (1970); In re Walter, 172 N.W.2d 603 (N.D. 1969); Hill v. State, 454 S.W.2d 429 (Tex. Ct. Civ. App. 1970); Cantu v. State, 207 S.W.2d 901 (Tex. Ct. Civ. App. 1948).

Some courts have held commitment to a residential treatment facility improper where it was shown that the minor would not receive adequate treatment at the facility or where other, less restrictive alternatives had not been explored. See, e.g., Wilson v. Coughlin, 259 Iowa 1163, 147 N.W.2d 175 (1966); In re Roberts, 13 Md. App. 644, 284 A.2d 621 (1971); In re Wilson, 138 Pa. 425, 264 A.2d 614 (1970); In re Haas, 234 Pa. Super. 422, 339 A.2d 98 (1975). One of the more interesting decisions along this line was that in Long v. Powell, 388 F. Supp. 422 (D.C. Ga. 1975). A state statute had provided that delinquent or unruly children who were not amenable to treatment could be committed to the State Department of Corrections. The court held that the statute was constitutional on its face but unconstitutional as applied because, in practice, children were being committed to institutions which were inadequate to provide them with the treatment they required. The court stated that commitment of minors to inadequate institutions was "fundamentally unfair." Id. at 429.

It should be noted that approximately half of the juvenile court statutes offer no indication of what powers the juvenile court may have to order other officials or agen-
and quality of services rendered by such agencies to juvenile court wards, as the foregoing cases illustrate, is a present indication that the court may have attenuated its role too greatly with respect to monitoring the services received by these wards.

A persuasive argument can be made that governmental institutions—whether they be state child welfare agencies, courts or legislative bodies—perform best when monitored from outside their own administrative framework. Agencies are more responsive to the needs of children committed to their care if the quality and quantity of services are subject to scrutiny by a court. The juvenile courts are well equipped to perform this function; indeed, it would appear they have a statutory, if not a constitutional mandate to do so. Unfortunately, until recently this duty has been largely ignored.

It is understandable that professional social workers might view the suggestion that the court monitor closely the activities of social service agencies as unwarranted judicial intrusion into day-to-day treatment decisionmaking. But this is a misconception. Agency decisions would not be scrutinized from the standpoint of success or failure in a particular case. Judicial review would be limited to an examination of the criteria used by the agency in decisionmaking. For example, the juvenile court would and should inquire as to whether agency decisions reflect conscientious efforts to respond to children’s individual needs, and whether due regard is given to the fact that as children grow, they change and their needs change also. This is similar to the function of appellate courts reviewing factual and discretionary decisions of trial courts: they ask not so much whether they would have reached the same decision the trial court did, but whether the decisionmaking process was proper.

If a social agency should disagree with the court as to what

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165. See, e.g., Ill. Rev. Stat. ch. 37, § 705-8 (Supp. 1976) which was recently amended to strengthen the court’s authority to monitor activities of public agencies to which guardianship or custody of juvenile court wards has been given.
distinctions may be made with respect to children and what restrictions may legitimately be imposed upon them, the fact remains that traditionally our society has entrusted ultimate responsibility for preservation of statutory and constitutional rights to the judicial system. Issues involving the relationship of government to persons are decided ultimately by courts of law, not administrative bodies, no matter how benevolent or well-intentioned the latter may be.

The juvenile court in many communities is the most highly visible and influential institution dealing with children on a day-to-day basis. Until now the focus of the juvenile court has been on delinquency as a characteristic of the child's behavior or attitudes. Rehabilitation programs have sought to alter these characteristics in the minor, to enable him to avoid trouble while living in the existing social environment. It is not enough, however, to focus only upon the child's problems; those may be the result of community institutions which are failing to respond adequately to the particular needs of the child. Often, inadequacy in community institutions serving children, or lack of community social service resources necessary to assist particular groups of children, comes first to the attention of the juvenile court. The traditional response has been an attempt to manipulate the child. Changing children is politically safer than altering social institutions and conditions, because it is less disruptive of organized adult society. However, if the juvenile court is to meet the needs of our urban society in the last quarter of this century, it must not only develop rehabilitative programs for court wards but supplement them with dispositions which cause institutional change in necessary and appropriate cases. Assuming the constitutional problems can be overcome, the effectiveness of the juvenile court as an advocate to obtain more and better services for children in need of them still remains to be seen. Reported cases in which the court has assumed an advocacy role on behalf of its wards are too few at this point to provide a clear prognosis.\textsuperscript{166}

Whether an amendment to existing juvenile court acts similar to that passed in New York, or reliance by the juvenile court upon its inherent powers or its contempt power will transform juvenile courts into more effective instruments of child

\textsuperscript{166}. See cases cited in note 83 supra.
advocacy, time and the appellate courts will tell. However, there are many indications that the juvenile court is at a cross-roads, and is seeking new directions and roles in response to the growing criticism of its procedures and its traditional focus upon the trivial offender.

In the words of Judge Gartensen of the New York family court, there appears to be a growing recognition that the court charged with the responsibility of intervention in people's lives, [has been] consistently denied facilities giving it any meaningful alternatives. At a time when the law mandated treatment, society provided none. The very reason for the existence of this court as a separate entity—that of providing services—[has been] too often illusory. . . . The U.S. Supreme Court has warned that failing some unique service to be made available in this court, the noble social experiment which was its genesis might very well be discontinued.167

Will the juvenile court as a vehicle of child advocacy be that unique service?

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