JUVENILE STATUTES AND NONCRIMINAL DELINQUENTS: APPLYING THE VOID-FOR-VAGUENESS DOCTRINE

Juvenile court jurisdiction, in virtually all states, extends not only to those children who violate criminal laws and to neglected or dependent children, but also to juveniles whose conduct is of a noncriminal nature.[1] Forty-one states have omnibus clauses in their juvenile statutes covering behavior or circumstances which endanger the child's welfare.[2] Most of these clauses contain references to idle or immoral conduct which are broad, all-encompassing, and incapable of precise definition.[3] Such broadly drawn clauses vest the juvenile court with virtually absolute discretion to adjudicate a child delinquent on the basis of noncriminal conduct.[4] According to national juvenile court records, delinquency adjudications based on behavior illegal only for juveniles, such as curfew regulations and conduct variously designated as "beyond control," "ungovernable," "incorrigible," "runaway," or "in need of supervision" accounts for over twenty-five per cent of the total number of delinquency adjudications, and from twenty-five to thirty per cent of the delinquent children in state institutions.[5] Analysis of the juvenile court's expansive jurisdiction based on regulation and control of noncriminal behavior through broadly drawn statutes must begin with a review of the historical rationale and development of the juvenile court system.

At the end of the last century, an increasing social awareness prompted reformers, who were incensed with the subjection of juveniles

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1 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3-4, 25 (1967) [hereinafter cited as TASK FORCE REPORT]. *See generally* Paulsen, *The Delinquency, Neglect, and Dependency Jurisdiction of the Juvenile Court*, in JUSTICE FOR THE CHILD 44 (M. Rosenheim ed. 1962).

2 Comment, *"Delinquent Child": A Legal Term Without Meaning*, 21 BAYLOR L REV. 352, 358-60 (1969). A table indicating the results of a comparative study of the various types of conduct which constitute delinquency according to the juvenile codes of the fifty states may be found at 369-71.

3 TASK FORCE REPORT, *supra* note 1, at 25. *See* Note, *Juvenile Court Jurisdiction over "Immoral" Youth in California*, 24 STAN. L. REV. 568, 568 n.5 (1972). An up-to-date list of statutory citations to juvenile court acts is found at 568 n.1. In fifteen states a child is delinquent if he is judged to be "incorrigible." In thirty three states he may be adjudged delinquent if he is "ungovernable." *See* Comment, *supra* note 2, at 358.

4 TASK FORCE REPORT, *supra* note 1, at 25.

5 *Id.* at 4. Estimates indicate the probability that "beyond-control" referrals comprise more than one-third of the nation's juvenile court cases. Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42, 42 (1970).

to the same procedures and penalties accorded adults, to agitate for the establishment of a separate system of courts uniquely for juveniles.[6] On July 1, 1899, the Illinois state legislature established the first juvenile court, and by 1925 only two states lacked a juvenile court system; today every state has a juvenile court act.[7] The state's authority to legislate in the area of the protection, care, custody, and maintenance of juveniles was a manifestation of the doctrine of *parens patriae*.[8]

> The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." . . . If his parents default in effectively performing their custodial functions—that is, if the child is "delinquent" —the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.[9]

The role of the juvenile court was not to determine the guilt or innocence of the child, as in an adversary system, but rather to reform and treat the delinquent through a rehabilitative system.[10] Thus,

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6 FOX, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187 (1970). For a brief discussion of the history and theory of the juvenile court movement see Ketcham, *The Unfilled Promise of the American Juvenile Court*, in JUSTICE FOR THE CHILD 22, 22-25 (M. Rosenheim ed. 1962) and Welch, *Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653 (1966).

7 TASK FORCE REPORT, *supra* note 1, at 3.

8 *See* Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 894 (1966). Justice Fortas, writing for the Court in *In re* Gault, 387 U.S. 1 (1967), expressed doubts regarding the theory's validity:

> The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.

Id. at 16.

9 *In re* Gault, 387 U.S. 1, 17 (1967) (footnote omitted).

10 S. Glueck & E. Glueck, *The Juvenile Court: Historical Background*, in THE PROBLEM OF DELINQUENCY 257 (S. Glueck ed. 1959).

New Jersey's own supreme court has regarded the philosophy of the juvenile court system as directed towards "rehabilitation through reformation and education;" its goal is "to restore a delinquent youth to a position of responsible citizenship." State v. L.N., 109 N.J. Super. 278, 286, 263 A.2d 150, 154-55 (App. Div.), *aff'd per curiam*, 57 N.J. 165, 270 A.2d 409 (1970), *cert. denied*, 402 U.S. 1009 (1971). Thus, the state's authority, exercised as *parens patriae*, was directed at the rehabilitation of the youthful offender rather than his punishment. TASK FORCE REPORT, *supra* note 1, at 22-23.

See generally Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957). Dean Paulsen's view expressed in this article, as he later explained, was based on the assumption that the treatment offered by the juvenile court was in fact rehabilitative. For his current position, see Paulsen, *supra* note 1, at 53. Dean Paulsen notes that retribution has remained an influential factor in juvenile delinquency proceedings.

understanding, guidance, and protection were emphasized,[11] while guilt, punishment, and criminal responsibility were deemphasized or abandoned.[12]

The highest motives and most enlightened impulses had led to the creation of the juvenile court system.[13] However, the original hope that the system had the capacity of fulfilling its goals was cast into doubt in the face of the high rates of juvenile crime and recidivism.[14] The juvenile system, which had functioned from its inception largely free of constitutional protections, appeared to be ineffective either in reducing crime or in rehabilitating offenders.[15]

The President's Commission on Law Enforcement and Administration of Justice emphasized the failure of the juvenile court to measure up to—or even approach—the high hopes with which it was initiated.[16] Theoretically, juveniles received "benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process."[17] However, the

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11 *In re* Gault, 387 U.S. 1, 15-16 (1967).

12 S. Glueck & E. Glueck, *supra* note 10, at 257.

13 *See* TASK FORCE REPORT, *supra* note 1, at 22-23:

> The rationale for this comprehensive array of jurisdictional pegs generally emphasized the growth of social as opposed to legalistic justice and the new efforts to bring the law out of isolation and into partnership with the ascending social and behavioral sciences. It was strengthened by precepts of optimism and paternalism. Children, assumed to be malleable, seem eminently salvageable; as the rehabilitative theme crept into the criminal law, it naturally appeared most applicable to children. Thus the juvenile court was to arrest the development of full-fledged criminals by catching them early and uncovering and ameliorating the causes of their disaffection. . . . The practicality of a stitch in time combined with an idealistic faith in the social sciences and treatment to give them a zealous desire to extend the juvenile court's helping hand as far as it could reach and a somewhat uncritical conviction that whatever the court did, as long as it meant well, was in the child's best interest.

A further rationale for the state's jurisdiction over noncriminal conduct has been the idea that delinquency can or will be thereby prevented. A consultant to the President's Commission on Law Enforcement and Administration of Justice has argued that:

> This belief rests upon uncritical conceptions that there are substantive behaviors, isometric in nature, which precede delinquency, much like prodromal signs of the onset of disease. . . .
>
> Social science research and current theory in social psychology refute the idea that there are fixed, inevitable sequences in delinquent or criminal careers. As yet no behavior patterns or personality tendencies have been isolated and shown to be the antecedents of delinquency, and it is unlikely that they will be.

Lemert, *The Juvenile Court—Quest and Realities*, in TASK FORCE REPORT, *supra* note 1, at 91, 93.

14 *In re* Gault, 387 U.S. 1, 20 n.26, 22 (1967). Much of the recent literature critical of the juvenile court system is collected in this case. *Id.* at 18-30 nn.7-48.

15 *Id.* at 20 n.26, 22.

16 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 85 (1967).

17 387 U.S. at 21.

failure to observe the requirements of due process had resulted, all too often, in depriving juveniles of their fundamental constitutional rights.[18]

The President's Commission on Law Enforcement and Administration of Justice recommended that noncriminal conduct be removed from juvenile court jurisdiction.[19] To those opposed to the relinquishment of jurisdiction, the Commission suggested that

> we must bluntly ask what our present power achieves and must acknowledge in answer that at the most we do not really know, and in at least some cases we suspect it may do as much harm as good.[20]

However, as the Commission realistically recognized, the necessity for an undefined jurisdiction was and continues to be a real consideration.[21] The state must be able, in some authoritative way, to "protect them from themselves and, often, from their environments."[22] The Supreme Court, cognizant of the mounting criticism of the juvenile court system, began in the late 1960's to take a closer look at the constitutional rights denied the juvenile under the doctrine of *parens patriae*.

In *Kent v. United States*,[23] the Court held that a waiver order by which jurisdiction over a serious offense committed by a juvenile was transferred to an adult criminal court, when there had been no hearing, no effective assistance of counsel, nor statement of reasons, was invalid as a denial of the essentials of due process and fair treatment.[24] *Kent* was the first case to afford any due process guarantees to juveniles, and set the tone for the Court's landmark decision in *In re Gault*.[25]

Gault revolutionized state juvenile court systems[26] by holding that in proceedings where commitment to a state institution was possible, the following due process guarantees were required: (1) notice to parent and child adequate to afford reasonable opportunity to prepare a defense, including a statement of the charge alleged with particularity; (2) right to counsel, and if indigent, provision for the appointment of counsel; (3) privilege against self-incrimination; and

18 *In re* Gault, 387 U.S. 1, 27-28 (1967). "Under our Constitution the condition of being a boy does not justify a kangaroo court." *Id.* at 28.

19 TASK FORCE REPORT, *supra* note 1, at 27. It reached this position after concluding that even the "most earnest efforts to narrow broad jurisdictional bases, in language or practice, will not altogether remove the possibility of over extension." *Id.* See also Bazelon, *supra* note 5, at 43.

20 *Id.*

21 *Id.* at 25.

22 *Id.*

23 383 U.S. 541 (1966).

24 *Id.* at 554, 562.

25 387 U.S. 1 (1967).

26 Comment, *Statutory Vagueness in Juvenile Law: The Supreme Court and Mattiello v. Connecticut*, 118 U. PA. L. REV. 143, 143 (1969).

(4) right to confrontation and cross-examination of witnesses.[27] *Gault* recognized the fact that unlimited judicial discretion, no matter how benevolently implemented, was no substitute for procedural safeguards.[28]

The Supreme Court further expanded due process guarantees in juvenile proceedings in *In re Winship*,[29] when the quantum of proof for conviction for an alleged violation of criminal laws was raised from a preponderance of the evidence to proof beyond a reasonable doubt.[30] But the Court in *McKeiver v. Pennsylvania*[31] declined to extend the due process right to a jury trial to delinquency proceedings, concluding that not all of the constitutional safeguards afforded adults in criminal trials apply to juvenile proceedings.[32] Despite the limitation of *McKeiver*, the standard of fundamental fairness as developed by *Gault* and *Winship*[33] has resulted in both judicial and legislative reevaluation of broadly drawn juvenile statutes[34] which deprive juveniles of procedural due process at the adjudicatory stage.

> If the statute under which a juvenile is charged is so uncertain and all-encompassing that the state need prove no specific crime or course of harmful conduct, defense counsel has little idea of what he must defend against, and thus minimal opportunity to be effective.[35]

The continued application of these broadly drawn statutes renders meaningless the rights accorded juveniles in *Gault*.[36]

Thus, the failure to provide for different classifications of juvenile offenders based upon the nature of the acts committed has meant that juveniles adjudicated delinquent on the basis of noncriminal behavior are treated, in most jurisdictions, almost identically with juveniles found to have broken criminal laws.[37] As one commentator has stated:

> [T]hese children should not be taken from one bad situation and put into another. They should not be taken from unfit homes and committed to a state training school where murderers, rapists, etc., are their fellow students.[38]

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27 387 U.S. at 31-57.

28 *See id.* at 18.

29 397 U.S. 358 (1970).

30 *Id.* at 368.

31 403 U.S. 528 (1971).

32 *Id.* at 545.

33 *Id.* at 543.

34 Note, *supra* note 3, at 569.

35 Comment, *supra* note 26, at 148 (footnote omitted).

36 Note, *supra* note 3, at 580.

37 *See id.* at 576-77.

38 Comment, *supra* note 2, at 361.

Nevertheless, detaining noncriminal minors in the same facilities as criminal

Two recent federal court decisions have considered the constitutionality of juvenile noncriminal conduct statutes whose terms were typically vague and all-encompassing in their substantive definitions of proscribed behavior. In *Gesicki v. Oswald*,[39] a three-judge federal district court held that that part of New York's Wayward Minor Statute, which granted adult criminal court jurisdiction over juveniles who were "morally depraved" or "in danger of becoming morally depraved"[40] was void for vagueness.

Similarly, in *Gonzalez v. Mailliard*,[41] another three-judge federal district court declared that that part of a California juvenile statute which granted juvenile court jurisdiction over children who were "in danger of leading an idle, dissolute, lewd, or immoral life"[42] was void for vagueness.

In *Gesicki*, a girl of nineteen, whose father had died and whose mother had been committed to a state mental hospital,[43] was expelled from school for alleged "sexual promiscuity."[44] Shortly thereafter, the state charged her with violation of the Wayward Minor Statute[45] for

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children and often treating them similarly can have serious results. The process begun by labeling children delinquents and detaining them in juvenile halls has been shown to affect their self-conceptions significantly enough to shape their future behavior along more delinquent lines. In addition, the same logic which prohibits the association of juvenile with adult criminals in jails—preventing a "training ground" atmosphere for teaching illegal behavior—would appear to cast doubt on the benefits of current methods of placing criminal and noncriminal youths together.

Note, *supra* note 3, at 578 (footnotes omitted). Current New Jersey procedures permit the institutional mingling of criminal youth, indeed, noncriminal youth over the age of fifteen may be incarcerated with adults in such institutions as the Youth Reception and Correctional Center, Yardville. N.J. STAT. ANN. § 30:4-146 (Supp. 1972), *amending* N.J. STAT. ANN. § 30:4-146 (1964); N.J. STAT. ANN. § 30:4-147 (Supp. 1972), *amending* N.J. STAT. ANN. § 30:4-147 (1964).

39 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972).

40 336 F. Supp. 371, 374.

41 Civil No. 50424 (N.D. Cal., Feb. 9, 1971), *appeal docketed*, 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 1565, 1970-71 Term; renumbered No. 70-120, 1971-72 Term). Defendant Mailliard held the position of President of the Police Commission of the City and County of San Francisco.

42 *Id.* slip opinion at 12.

43 Brief for Plaintiff at 5, Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971).

44 336 F. Supp. 371, 375 n.5.

45 336 F. Supp. 365, 369 n.4 (S.D.N.Y. 1971). N.Y. CODE CRIM. PRO. § 913-a (McKinney 1958) provides that

> Any person between the ages of sixteen and twenty-one who either . . . (5) is willfully disobedient to the reasonable and lawful commands of parent, guardian or other custodian and is morally depraved or is in danger of becoming morally depraved or (6) who without just cause and without the consent of parents, guardians or other custodians, deserts his or her home or place of abode, and is morally depraved or is in danger of becoming morally depraved . . . (7) . . . may be deemed a wayward minor.

336 F. Supp. 365, 368.

alleged conduct that was morally depraved or was capable of leading to moral depravity.[46] She was adjudicated a "wayward minor," put on probation, and placed in a foster home.[47]

Upon her mother's release from the state hospital, Esther Gesicki sought to return home and, when her social worker refused to allow it, she ran away.[48] Having violated probation,[49] she was sent to Western Reformatory in Albion, and was later transferred to Bedford Hills Correctional Facility, both adult penal institutions.[50]

Gesicki and two other girls who had been committed under the same provisions of the Wayward Minor Statute sought relief in federal court,[51] naming the State Commissioner of Correctional Services as defendant.[52] Plaintiffs sought injunctive relief to enjoin further enforcement of the statute and to set aside their convictions, and a declaratory judgment that the statute was unconstitutional[53] under the due process clause of the fourteenth amendment.[54] The district court held that the imprecise language set forth in subsections (5) and (6) of section 913-a raised "a substantial question as to whether that portion of the statute is not unconstitutionally vague,"[55] and a three-judge district court was convened.[56] That court recognized that the case presented an

> issue of fundamental importance concerning the power of a state to enforce against juveniles a purportedly non-criminal statute which permits commitment of defendants to adult criminal correctional programs and facilities, but is impermissibly vague if judged by the standards applicable to penal laws. We hold that the

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Section 913-a was permitted to expire by the legislature on August 31, 1971, but persons found to have violated the statute prior to that date remained subject to its provisions until the expiration of their terms in custody, parole or probation. 336 F. Supp. 365, 366 n.2. *See generally Hearings pursuant to S. Res. 32 Section 12 Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 92d Cong., 1st Sess. 579-95 (1972).

46 The state alleged that Miss Gesicki had had sexual relations with fourteen men. 336 F. Supp. 365, 369 n.4.

47 336 F. Supp. 371, 375 n.5.

48 *Id.*

49 Brief for Plaintiff at 6, Gesicki v. Oswald, 336 F. Supp. 371.

50 336 F. Supp. 371, 375 n.5.

51 *See id.* for histories of the other two girls.

52 336 F. Supp. 365, 365.

53 *Id.* at 366. Jurisdiction was predicated on 28 U.S.C. § 1343(3) & (4) (1970) and 28 U.S.C. § 2254(a) (1970).

54 336 F. Supp. 365, 366. Plaintiffs sought to have the case determined a class action and moved for an order convening a three-judge district court. *Id.* at 366-67.

55 336 F. Supp. 365, 371.

56 *Id.* (pursuant to 28 U.S.C. § 2284 (1970)).

> particular provisions at issue, on their face, violate due process of law.[57]

The court concluded that the terms "morally depraved" and "in danger of becoming morally depraved" were impermissibly vague in their definition of criminal conduct.[58]

The court, however, believed it necessary to distinguish the Wayward Minor Statute from New York's general statutory scheme for treating juvenile offenders.[59] While statutory jurisdiction over juvenile offenders is contained in the Family Court Act (and while juvenile offenders may not be incarcerated in an adult prison pursuant to that act), the Wayward Minor Statute was included in the Criminal Code, trials were conducted in courts of general criminal jurisdiction, and incarceration was permitted in any adult correctional facility.[60]

While the statute attacked in *Gesicki* could itself be a reason to limit the holding, several aspects of the court's reasoning offer a broader base from which to interpret the case. The court explicitly rejected the traditional arguments that statutes dealing with juveniles are a legitimate exercise of its power as *parens patriae*, and that the statute was nonpenal in nature since it failed to provide for criminal punishment.[61] Juveniles brought under the scope of the word "wayward" were deprived of the due process guarantee of fair notice of proscribed conduct at the beginning of the procedure, and then faced an adjudication that not only punished them like criminals, but confined them alongside criminals in penal institutions. Under such a scheme, the *parens patriae* rationale which relieves the need for full due process guarantees because of the rehabilitory end, amounts to nothing more than adjudicating juveniles as criminals without giving them those constitutional protections afforded adult criminals.

> Specifically, *there is no assurance that wayward minors will be given special treatment substantially distinguishable from that*

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57 336 F. Supp. 371, 373.

58 *Id.* at 374.

59 *Id.* at 377 n.7. The court noted that its decision was not concerned with state procedures which lead to special supervision of juveniles. The court limited its holding to those procedures which led to the incarceration of juveniles with adult criminals. Moreover, the court recognized

> the justification and wisdom of identifying and affording bona fide treatment to juveniles who exhibit behavioral deviations requiring treatment and intervention without which they might, in time, become adult criminals.

Id.

60 *Compare* N.Y. FAMILY CT. ACT §§ 731 *et seq.* (McKinney 1962) *with* N.Y. CODE CRIM. PRO. § 913-a (McKinney 1958).

61 336 F. Supp. 371, 376-77.

> *accorded to criminals and reasonably related to the condition upon which the adjudication of waywardness is based.*[62]

The court took judicial notice of the realities of institutional life.[63] In this regard, not only were adult institutions singled out for criticism, but the court also noted that juvenile institutions were inadequate and in need of attention.[64] In perhaps the strongest indictment of the juvenile justice system appearing in a judicial opinion, the court quoted the Director of the State's Division for Youth:

> "With the exception of a relatively few youths, it would probably be better for all concerned if young delinquents were not detected, apprehended or institutionalized. Too many of them get worse in our care."[65]

The notion that there exists, for those held in involuntary non-criminal custody, a right to effective treatment to remedy the condition which brought about their confinement, was first articulated slightly over a decade ago.[66] It was argued that substantive due process requires that the deprivation of liberty involved in a civil commitment be justified by a provision for proper treatment.[67] The right to treatment initially achieved judicial recognition in cases involving persons acquitted of crime on the basis of mental defect or insanity who were then involuntarily committed.[68] In *Wyatt v. Stickney*,[69] a federal district court recently held that patients involuntarily committed through civil proceedings to a state mental hospital were denied substantive due process when they received inadequate treatment:

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[62] *Id.* at 379 (footnote omitted). Implicit in this statement is a recognition of the "right to treatment" doctrine.

> This concept is founded upon a recognition of the concurrency between the state's exercise of sanctioning powers and its assumption of the duties of social responsibility. Its implication is that effective treatment must be the *quid pro quo* for society's right to exercise its *parens patriae* controls. Whether specifically recognized by statutory enactment or implicitly derived from the constitutional requirements of due process, the right to treatment exists.

Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 870 (1969) (footnote omitted).

[63] 336 F. Supp. 371, 378.

[64] *Id.* at 378 n.9. See authorities cited therein.

[65] *Id.* at 378 (quoting from Samuels, *When Children Collide with the Law*, N.Y. Times, Dec. 5, 1971, § 44 (Magazine), at 146).

[66] *See* Birnbaum, *The Right To Treatment*, 46 A.B.A.J. 499 (1960). *See also* Gough, *The Beyond-Control Child And the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. LOUIS L.J. 182 (1971).

[67] *Id.* at 503.

[68] Tribby v. Cameron, 379 F.2d 104, 105 (D.C. Cir. 1967); Rouse v. Cameron, 373 F.2d 451, 452 (D.C. Cir. 1966).

[69] 325 F. Supp. 781, *enforced in* 334 F. Supp. 1341 (M.D. Ala. 1971). For further developments in this case see N.Y. Times, Dec. 18, 1972, at 11, col. 1.

> When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. . . . Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense." . . . The purpose of involuntary hospitalization for treatment is *treatment* and not mere custodial care or punishment.[70]

The court rejected the contention that the failure to provide suitable and adequate treatment could be justified by lack of operating funds to provide for staff and facilities[71] when the immediate forfeiture of a person's liberty was involved.[72]

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.[73]

While the right to treatment has been recognized by statute in nearly a dozen jurisdictions,[74] no court has specifically applied the *Wyatt* substantive due process rationale to extend the constitutional right of treatment to include juveniles.[75] However, the doctrine has had recent application in a variety of state jurisdictions involving commitments from juvenile courts, often without specific mention.[76] In *Lollis v. New York State Department of Social Services*,[77] a New York federal district court held that the treatment received by a nondelinquent fourteen-year-old in custody as a "person in need of supervision" violated the eighth amendment's prohibition of cruel and unusual punishment.[78]

The *Gesicki* court recognized that a central infirmity of noncriminal conduct statutes is that there is no actual reference to conduct, but only to a condition or status of being.[79] The court held that the

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70 325 F. Supp. at 784 (citations omitted).

71 *Id.*

72 *Id.* at 785.

73 *Id.*

74 Note, *An Important Step Towards Recognition of the Constitutional Right to Treatment*, 16 ST. LOUIS U.L.J. 340, 344 (1971).

75 Pyfer, *The Juvenile's Right to Receive Treatment*, 6 FAM. L.Q. 279, 296 (1972).

76 *See, e.g., In re* Arnold, 12 Md. App. 384, 396, 278 A.2d 658, 664 (1971); *In re* Hamill, 10 Md. App. 586, 591-93, 271 A.2d 762, 765-66 (1970); *In re* I, 64 Misc. 2d 878, 879, 316 N.Y.S.2d 356, 357 (Fam. Ct. 1970); *In re* Braun, 145 N.W.2d 482, 486-87 (N.D. 1966).

77 322 F. Supp. 473 (1970), *modified*, 328 F. Supp. 1115 (S.D.N.Y. 1971).

78 322 F. Supp. at 482-83.

79 336 F. Supp. 371, 376.

Wayward Minor Statute acted impermissibly to punish a status,[80] permitting the "unconstitutional punishment of a minor's condition, rather than of any specific actions, as did the statute penalizing narcotics addiction condemned in Robinson v. California . . . ."[81]

In *Robinson*, the Supreme Court held that a California statute which made the "status" of narcotics addiction a criminal offense and which provided for imprisonment was violative of constitutional safeguards.[82] The Court concluded that the statute inflicted a cruel and unusual punishment in violation of the fourteenth amendment,[83] and stated that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[84]

The *Gesicki* court agreed with plaintiffs' contention that any punishment for the condition of being a "morally depraved" minor is cruel and unusual.[85] The court rejected the state's assertion that wayward minors were treated on the basis of their individual needs and not punished[86] because the statute failed to require any specific course of treatment.[87] Thus, the court recognized that the status situation inherent in the proscription of noncriminal conduct requires provision for the effective treatment of that condition in order to constitutionally justify the juvenile's loss of liberty.

Gesicki can be interpreted as a strong statement for greater procedural safeguards for juveniles. If punishment rather than treatment results, then juveniles should at least be made aware of specifically defined acts that constitute wrongful conduct. In conclusion, the court held that the Wayward Minor Statute was the substantial equivalent of a criminal provision, and that it failed to define the proscribed conduct which could bring a juvenile within its jurisdiction.[88] This being so, the statute was violative of due process since it failed to comport with the standard of fundamental fairness applicable to all juvenile proceedings.[89]

The Supreme Court, in May, 1972, affirmed without opinion the

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80 *Id.* at 373.

81 *Id.* at 376 (footnote omitted).

82 Robinson v. California, 370 U.S. 660, 666 (1962).

83 *Id.* at 667.

84 *Id.*

85 336 F. Supp. 371, 376.

86 *Id.*

87 *Id.* at 379.

88 *Id.*

89 *Id. See* 403 U.S. at 543: "[T]he applicable due process standard in juvenile proceeding . . . is fundamental fairness."

district court's decision.[90] For the first time the void for vagueness doctrine was successfully employed in striking down as unconstitutional a broad jurisdictional statute concerned with noncriminal juvenile conduct.

Recently, in *Gonzalez v. Mailliard*,[91] a California juvenile statute which extended juvenile court jurisdiction to juveniles who exhibit certain types of noncriminal behavior was attacked in federal court. Section 601 of the Welfare and Institutions Code permitted any person under the age of twenty-one to be adjudged a ward of the juvenile court "who from any cause is in danger of leading an idle, dissolute, lewd or immoral life."[92] As in New York, earlier challenges of the statute's language in state courts as unconstitutionally vague and indefinite were unsuccessful.

Gonzalez was a member of the "24th Street Gang," a group of youths who were arrested by two police officers dispatched to investigate a report that an individual had been robbed by gang members.[93] The victim named the gang and three individual members as her attackers. The police took ten members of the gang into custody on the grounds that they were in "danger of leading a lewd or dangerous life," in violation of section 601, the state's noncriminal delinquency statute.[94] All ten were then arrested on charges of suspicion of robbery and for criminal violations of the juvenile delinquency statute, section 602. Later, all charges against them were dropped and they were released from custody.[95]

A class action was brought seeking a declaratory judgment that the vagueness of section 601's words "in danger of leading an idle, dissolute, lewd, or immoral life," rendered the statute unconstitutional.

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90 406 U.S. 913 (1972).

91 No. 50424 (N.D. Cal. Feb. 9, 1971), *appeal docketed*, 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 1565, 1970-71 Term; renumbered No. 70-120, 1971-72 Term).

92 CAL. WELF. & INST'NS CODE § 601 (West 1966):

> Any person under the age of 21 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law of this state, or who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

A 1971 amendment lowered the jurisdictional age from twenty-one to eighteen. CAL. WELF. & INST'NS CODE § 601 (West Supp. 1971).

93 No. 50424 (N.D. Cal., Feb. 9, 1971), slip opinion at 2.

94 *Id.* slip opinion at 2.

95 *Id.* CAL. PENAL CODE § 211 (West 1970); CAL. WELF. & INST'NS CODE § 601 (West 1966).

They sought a permanent injunction against arrests under the statute, and an order expunging their records for noncriminal conduct arrests under section 601.[96] A three-judge district court found the challenged clause of section 601 unconstitutional and granted all the relief sought.[97] Taking notice of the many recent federal court decisions holding adult vagrancy statutes unconstitutionally vague,[98] the court rejected the state's attempt to distinguish these cases by affixing a civil label to the delinquency statute.[99]

Like the *Gesicki* court, the *Gonzalez* court looked to the nature and consequences of juvenile incarceration. The court recognized that "[t]he more extensive the deprivation, the greater the due process requirement for certainty of statutory language."[100] In *Gesicki*, the court distinguished juvenile proceedings under the aegis of the family court from the Wayward Minor Statute (which was within the jurisdiction of the criminal court)[101] and took exception to the practice of incarcerating juveniles in adult institutions without specific provision for treatment and rehabilitation.[102] In contrast, the California statute established a *juvenile court proceeding* and additional provisions provided for commitment in one of two *juvenile* homes or camps under county control.[103] Indeed, a minor adjudged a ward of the court for noncriminal behavior under section 601 could not be committed to the separately operated state juvenile facilities under California Youth Authority control; a juvenile can be committed to the latter only when the commission of a crime can be proved under section 602.[104]

Nevertheless, the court concluded that, despite the fact that "[j]uvenile homes or camps are admittedly 'low-security' institutions that attempt to maintain a rehabilitative, home-like atmosphere," their rehabilitative ideal failed to distinguish them "from the Youth Authority institutions, nor indeed from modern adult penal institutions."[105]

Having equated the seriousness of the deprivation of freedom in juvenile facilities with that of adult prisons, the court concluded that the statute's "immoral" clause was too vague to serve as a constitu-

96 No. 50424 (N.D. Cal., Feb. 9, 1971), slip opinion at 2.
97 *Id.* slip opinion at 12.
98 *Id.* slip opinion at 7. *See* notes 126 and 130 *infra.*
99 *Id.* slip opinion at 8.
100 *Id.* See notes 113 and 114 *infra.*
101 336 F. Supp. 371, 377 and 377 n.7.
102 *Id.* at 377-78.
103 CAL. WELF. & INST'NS CODE § 730 (West 1972).
104 CAL. WELF. & INST'NS CODE § 731 (West 1972).
105 Civil No. 50424 (N.D. Cal., Feb. 9, 1971), slip opinion at 9.

tionally permissible standard and that it was therefore violative of the due process clause of the fourteenth amendment.[106]

The court recognized that a "central infirmity of a vague statute is that its vagueness makes other due process guarantees meaningless."[107] It then analyzed the failure of procedural due process guarantees that had been applied to juvenile proceedings in *Gault* that had resulted from the lack of substantive definition in the statute.

> Of what possible utility is notice of charges when the charge is merely that one is "dissolute"? What use is counsel when it is impossible to know what type of evidence is relevant to rebuttal of the prosecution case?
>
> . . . Standards of proof depend on standards of relevance and probativeness, and these are precluded when the substantive offense covers the entire moral dimension of one's life.[108]

A majority of American jurisdictions have broadly drawn juvenile statutes proscribing a wide range of noncriminal conduct and providing for incarceration in a variety of institutions under the guise of rehabilitation and reformation. As *Gesicki* and *Gonzalez* have observed, these vaguely drawn, all-encompassing provisions are based on subjective and arbitrary determinations of conduct made without reasonable standards of specificity. Their continued application results in a denial of constitutional rights and exposes noncriminal juveniles to criminal influences during commitment. Before surveying how state courts have adjudged attacks for vagueness on their juvenile statutes, the applicable standards for an attack on a vague statute should be explored.

The successful application of the void for vagueness doctrine as a mode of constitutional challenge of the statutes in *Gesicki* and *Gonzalez* would appear to cast doubt on the constitutional validity of most of this nation's juvenile statutes which proscribe noncriminal conduct. It is a basic principle of constitutional law that a statute which lacks specificity and certainty is void under the due process clause of the fourteenth amendment.[109] The direct application of the doctrine to juvenile proceedings has been impeded by arguments that the juvenile system

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106 *Id.* slip opinion at 12.

107 *Id.* slip opinion at 10.

108 *Id.* slip opinion at 11-12.

109 *See* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). *See also* Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Freund, *Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948); Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272 (1948).

is protective rather than penal[110] and civil rather than criminal.[111] The Supreme Court has, however, explicitly refused to limit the application of the void for vagueness doctrine to criminal statutes. The Court held constitutional standards of specificity applicable in a civil contract dispute in *A.B. Small Co. v. American Sugar Refining Co.*[112]

In the interpretation of nonpenal statutes, the Court has looked to the severity of the penalty imposed by the statute in reaching a determination of whether a statute will survive an attack on vagueness grounds.[113] In *Jordan v. De George*,[114] the Court stated:

> Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that "deportation is a drastic measure . . . ." We shall, therefore, test this statute under the established criteria of the "void for vagueness" doctrine.[115]

In *Giaccio v. Pennsylvania*,[116] the Court struck down a statute which permitted the jury to assess prosecution costs against a defendant acquitted of criminal charges if it found him guilty of "some misconduct."[117] The Court dismissed the state's assertion that the statute, which was guided by no standards whatever, was merely a civil sanction and hence not subject to the vagueness test,[118] and reasoned that the due process protection afforded by the fourteenth amendment "is not to be avoided by the simple label a state chooses to fasten upon its conduct or its statute."[119] The Supreme Court, moreover, has raised grave doubts that a decision in a juvenile court case can be defended by a simple pronouncement that the proceedings are civil in nature.[120]

The seminal case prescribing the test for determining whether a statute contains sufficient specificity to pass constitutional muster is *Connally v. General Construction Co.*,[121] where the Court stated that

> a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily

110 *See, e.g* Commonwealth v. Fisher, 213 Pa. 48, 50, 62 A. 198, 199 (1905).

111 C. VEDDER, THE JUVENILE OFFENDER 235 (1954).

112 267 U.S. 233, 239 (1925).

113 Note (U. PA. L. REV.), *supra* note 109, at 69-70 n.16.

114 341 U.S. 223 (1951).

115 *Id.* at 231. The test was applied in upholding a statute permitting deportation upon conviction of a "crime involving moral turpitude."

116 382 U.S. 399 (1966).

117 *Id.* at 404-05.

118 *Id.* at 402.

119 *Id.*

120 387 U.S. at 49-50.

121 269 U.S. 385 (1926).

> guess at its meaning and differ as to its application, violates the first essential of due process of law.[122]

Applying the *Connally* test, the Court in *Musser v. Utah*[123] vacated petitioner's conviction for conspiracy to commit acts injurious to public morals.[124] The statute was defectively imprecise since it failed

> to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.[125]

The judge and jury were thus allowed an inordinate amount of discretion in determining the criminality of the condemned conduct.

The same vague and subjective standards for determining civil or quasi-criminal conduct has been incorporated into the broadly drawn and severely criticized adult vagrancy statutes.[126] In *Goldman v. Knecht*,[127] a three-judge federal court struck down a Colorado statute defining a vagrant as a person "leading an idle, immoral, or profligate course of life" as unconstitutionally vague.[128] *Goldman* was soon followed by the Supreme Court decision of *Coates v. Cincinnati*,[129] where a vagrancy ordinance prohibiting an assembly of three or more people on a public sidewalk conducting themselves in a manner annoying to persons passing by was held unconstitutional:

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a

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122 *Id.* at 391. *See, e.g.*, United States v. National Dairy Prod. Corp., 372 U.S. 29, 32-33 (1963), which stated:

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.

See also Lanzetta v. New Jersey, 306 U.S. 451 (1939).

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.

Id. at 453 (citations omitted).

123 333 U.S. 95 (1948).

124 *Id.* at 96.

125 *Id.* at 97.

126 Goldman v. Knecht, 295 F. Supp. 897, 904 n.21 (D. Colo. 1969). Broad vagrancy statutes, like broad delinquency statutes, are defended on the ground that since vagrancy is a preliminary stage of serious criminality, early intervention is vital to community interests. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972). However there is no statistical correlation between vagrancy and criminality to warrant such intervention. *See* Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 627 (1956).

127 295 F. Supp. 897 (D. Colo. 1969).

128 *Id.* at 905.

129 402 U.S. 611 (1971).

> person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.[130]

The language proscribing noncriminal conduct in juvenile statutes is similar in breadth to the adult vagrancy statutes. Language regulating conduct and behavior rather than criminal acts is by its very nature and necessity broadly drawn. When the vagueness standard is applied to juvenile statutes, whether labeled as civil or criminal, a serious doubt may be raised concerning their compliance with due process requirements.

The void for vagueness doctrine gives vitality to all the other due process guarantees. The right to counsel, the right to fair notice, the right to confrontation of witnesses are all vacuous without precise statutory construction. As the failure of the rehabilitative aspect of juvenile incarceration continues to be attacked and its penal nature becomes more obvious, the *Gault* procedural due process guarantees are frustrated by vague statutes which are incapable of definition. While the *Gault* Court did not rely on differences in nomenclature and the civil-criminal dichotomy, it attached greater significance to the consequences of juvenile statutes with their provisions for commitment and deprivation of liberty.[131]

> It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement . . . . His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ." [P]eopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[132]

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130 *Id.* at 614. *See, e.g.*, Palmer v. City of Euclid, 402 U.S. 544, 544 (1971) ("suspicious person"); Ricks v. District of Columbia, 414 F.2d 1097, 1106-07 (D.C. Cir. 1968) ("leading an immoral and profligate life"); Original Fayette County Civic & Welf. League v. Ellington, 309 F. Supp. 89, 92 (W.D. Tenn. 1970) ("the use of rude, boisterous, offensive, obscene or blasphemous language . . . or to conduct oneself in a disorderly manner"). *See generally* Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Watts, *Disorderly Conduct Statutes in Our Changing Society*, 9 WM. & MARY L. REV. 349 (1967).

131 387 U.S. at 50.

132 *Id.* at 27 (footnotes omitted). The same point has been made by numerous commentators. *See, e.g.*, Allen, *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, 1958 SOC. SERV. REV. 107, 116; Lerman, *Beyond Gault: Injustice and the Child*, in DELINQUENCY AND SOCIAL POLICY 236, 241 (P. Lerman ed. 1970); Malmquist, *Dilemmas of the Juvenile Court*, 6 J. AM. ACAD. CHILD. PSYCH. 723, 735-36 (1967); Paulsen, *supra* note 1, at 48. For an account of the harm inflicted on juveniles committed to correctional institutions, see Sheridan, *Delinquents Without Crime*, in DELINQUENCY AND SOCIAL POLICY 69, 69-72 (P. Lerman ed. 1970).

It would appear reasonable to conclude that *Gault* requires the application of a stringent standard of substantive, as well as procedural due process to vaguely drawn noncriminal conduct clauses since in practice, juveniles, like adults, are faced with the possibility of incarceration and loss of liberty.

Under the broad umbrella of authority furnished by *Gault*, an attack was mounted in the late 1960's on broadly drawn juvenile statutes using the vagueness doctrine as a basis. Initial attempts through the state courts were not successful.

In *E.S.G. v. State*,[133] a Texas civil court of appeals upheld language in an omnibus clause which defined a delinquent child as one "who habitually so deports himself as to injure or endanger the morals or health of himself or others . . . ."[134] The statute had been challenged as unconstitutionally vague.[135] While the court conceded that the clause in question defined the conduct of a delinquent child in general terms, it held that the rights of the child were protected insofar as the statute required that prohibited acts or conduct be specifically alleged.[136] Additionally the court stated that, while the word "morals" conveys precise impressions to an adult,[137] it would be an impossible task to define with specificity all types of conduct which could conceivably impair a child's morals.[138] A strongly worded dissent emphasized the lack of notice of proscribed conduct:

> Here, a directive addressed to children is couched in terms which have been the source of controversy among theologians, philosophers and judges for centuries. . . . It is another thing to expect a child of ten or, as in this case, of fourteen, to understand the meaning of words which judges are unable to define while assuring us that the language is "perfectly clear."[139]

The majority emphasized traditional juvenile court philosophy, noting that the statute was protective and rehabilitative in nature and sought

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133 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970).

134 TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3(f) (1971).

135 447 S.W.2d at 227. *See* Note, *An Aspect of the Texas Juvenile Delinquency Law—"Morals,"* 24 SW. L.J. 698 (1970); Note, [Texas Statute] *Defining Delinquent Child as One Who "Habitually So Deports Himself As To Injure or Endanger the Morals or Health of Himself or Others," Is Not Unconstitutionally Vague*, 2 ST. MARY'S L.J. 126 (1970).

136 447 S.W.2d at 227. *But see* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939): "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

137 447 S.W.2d at 226.

138 Note (SW. L.J.), *supra* note 135, at 702-03.

139 447 S.W.2d at 231 (Cadena, J., dissenting).

"to correct habits and patterns of behavior which are injurious to the health or morals of the child. . . ."[140]

In *State v. Mattiello*,[141] a seventeen-year-old girl was convicted under a Connecticut statute granting circuit court jurisdiction over one "in manifest danger of falling into habits of vice, or who is leading a vicious life."[142] A demurrer was filed to the charge, alleging the terms "habits of vice" and "vicious life" violated the due process clause since they purported to define a crime in language too vague and uncertain in its meaning to give adequate warning of the conduct proscribed or to guide the courts in its fair administration.[143] The court overruled the demurrer and on appeal the conviction was affirmed.[144] The appellate division held that the statute was a valid exercise of the state's power as *parens patriae*, that the proceeding was civil rather than criminal in nature, and that its end was not to punish, but rather to rehabilitate the child through guardianship and protection.[145]

The Supreme Judicial Court of Massachusetts, in the case of *Commonwealth v. Brasher*,[146] upheld the constitutionality of that state's 325-year-old "stubborn child" law which was attacked as being so vague and indefinite as to violate the due process clause of the fourteenth amendment.[147] Specifically the defendant argued that the statute left judges

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140 *Id.* at 226.

141 4 Conn. Cir. 55, 225 A.2d 507 (App. Div.), *cert. denied*, 154 Conn. 737, 225 A.2d 201 (1966), *prob. juris. noted*, 391 U.S. 963 (1968), *appeal dismissed for want of a properly presented federal question*, 395 U.S. 209 (1969). *See* Comment, *supra* note 26, at 145.

142 CONN. GEN. STAT. ANN. § 17-379 (1960). The full text reads:

> Any unmarried female between the ages of sixteen and twenty-one years who is in manifest danger of falling into habits of vice, or who is leading a vicious life, or who has committed any crime, may, upon the complaint of the prosecuting attorney of the circuit court, be brought before said court for the circuit within whose jurisdiction she resides or is found, and, upon conviction thereof, may be committed, until she has arrived at the age of twenty-one years, to the custody of any institution, except Long Lane School, chartered by the general assembly or incorporated under the general laws for the purpose of receiving and caring for females who have fallen into or are in danger of falling into vicious habits.

143 4 Conn. Cir. at 57, 225 A.2d at 509.

144 *Id.* at 62, 225 A.2d at 511. Miss Mattiello was also charged with violations of CONN. GEN. STAT. ANN. § 53-219 (1960) (forbidding walking with a lascivious carriage) and CONN. GEN. STAT. ANN. § 53-175 (1960) (disorderly conduct). She was acquitted of the disorderly conduct charge but found guilty of lascivious carriage. Her appeal, however, was based solely on the conviction under CONN. GEN. STAT. ANN. § 17-379 (1960).

145 4 Conn. Cir. at 61-62, 225 A.2d at 511.

146 — Mass. —, 270 N.E.2d 389 (1971).

147 *Id.* at —, 270 N.E.2d at 392. The statute attacked was MASS. GEN. LAWS ANN. ch. 272, § 53 (1968). The full text reads:

> Stubborn children, runaways, common night walkers, both male and female, common railers and brawlers, persons who with offensive and disorderly act or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious

and jurors free to determine on a case-by-case basis what is permissible juvenile conduct without any legally-fixed standards.[148]

The court reasoned that the statute proscribed conduct that had long been recognized by the state as amounting to criminal behavior:

> The fact that a child is under a moral obligation to obey his parents does not preclude the Legislature, in the exercise of its police power, from making that same obligation a legal one, with criminal penalties for its breach.[149]

The court determined that the elements of the crime identified by the use of the words "stubborn children" were the refusal of a child in a willful, obstinate, and persistent way to obey the lawful and reasonable commands of a person in authority.[150] The court concluded that there was evidence beyond a reasonable doubt to indicate defendant was a stubborn child.[151]

A California court of appeals, in *In re Daniel R.*,[152] held that the statute's "words 'dissolute and immoral' met constitutional standards of certainty and definiteness" on the authority of earlier decisions construing those terms in the context of adult crimes.[153] The court believed it

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> persons in speech or behavior, idle and disorderly persons, prostitutes, disturbers of the peace, keepers of noisy and disorderly houses and persons guilty of indecent exposure may be punished by imprisonment in a jail or house of correction for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

See Katz & Schroeder, *Disobeying a Father's Voice: A Comment on Commonwealth v. Brasher*, 57 MASS. L.Q. 43 (1972); Sidman, *The Massachusetts Stubborn Child Law: Law and Order in the Home*, 6 FAM. L.Q. 33 (1972).

148 — Mass. at —, 270 N.E.2d at 392.

149 *Id.* at —, 270 N.E.2d at 393.

150 *Id.* at —, 270 N.E.2d at 393.

151 *Id.* at —, 270 N.E.2d at 395. The court rejected as irrelevant to the issues

> [a] substantial portion of the defendant's brief [which] is devoted to the statement of facts and arguments of a sociological nature . . . criticizing the physical facilities available for the detention of such offenders . . . .

Id. at —, 270 N.E.2d at 394.

152 274 Cal. App. 2d 749, 79 Cal. Rptr. 247 (Dist. Ct. App. 1969).

153 *Id.* at 752-53, 79 Cal. Rptr. at 249.

In attempting to define the language in juvenile noncriminal statutes, courts faced with the paucity of juvenile case law have looked to adult criminal statutes employing similar language for guidance. *See, e.g.*, E.S.G. v. State, 447 S.W.2d 225, 226-27 (Tex. Civ. App. 1969). Most states have statutes making it a criminal act to contribute to the delinquency of a minor. Delinquency is usually defined as any act which tends to injure the morals, health or welfare of the child. Typically, crimes against juveniles are in the area of sexual abuses or the serving of alcoholic beverages. These statutes, until recently, had been almost universally held constitutional as against attack for vagueness. *See, e.g.*, Brockmueller v. State, 86 Ariz. 82, 340 P.2d 992 (1959); People v. Deibert, 117 Cal. App. 2d 410, 256 P.2d 355 (Dist. Ct. App. 1953). The analogy may be questioned since the meaning of such terms as "morals" in these instances was derived from statutory language directed at adults. Where similar language is directed towards children, it would appear unreason-

reasonable that there should be some method by which a juvenile could be made a ward of the court other than in a dependency situation or when the commission of a crime was involved.[154] The standard applied in construing the statute was to be " '[r]easonable certainty, in view of the conditions,' " and that " 'liberal effect . . . be given to the legislative intent when possible.' "[155]

New York's Wayward Minor Statute, declared unconstitutional in *Gesicki*, followed a similar judicial history as that demonstrated by the preceding cases. The state's highest court, just prior to *Gault*, sustained without analysis the constitutionality of the statute against the proposition that it was unconstitutionally vague in *People v. Salisbury*.[156]

In *People v. Allen*,[157] the court of appeals reversed the convictions of three juveniles who had been individually adjudicated wayward minors on the allegation that they were "morally depraved or in danger of becoming so."[158] Faced by a definition of conduct that was so broadly drawn as to render precise analysis impossible, the court of appeals lamented:

> It is not easy to define this for all kinds of situations and, of course, the draftsmen of the statute in 1923 . . . had difficulties intrinsic to the objective sought. Part of the trouble in the resolution of the draft is "morally depraved", a term which probably changes in meaning for each generation. The term is one not readily visualized. Even less easily palpable is "danger of becoming" morally depraved.[159]

The *Allen* court read *Gault* as imposing on juvenile courts all the

able to expect them to understand the meaning of words which the courts themselves are unable to define with any specificity. *See* Judge Cadena's dissent in E.S.G. v. State, 447 S.W.2d at 230-31, for a well-reasoned attack on this practice.

Recent decisions have questioned the measure of due process afforded adults charged with contributing to the delinquency of a minor. In State v. Hodges, 254 Ore. 21, 457 P.2d 491 (1969), an Oregon statute was held to be unconstitutional under the void for vagueness test. Following this decision the Oregon Supreme Court set aside the adjudication of delinquency of a sixteen-year-old boy who had been charged with contributing to the delinquency of a fourteen-year-old girl. The court reasoned that the juvenile had the same right as an adult defendant to challenge the constitutionality of the statute for vagueness. State v. Oman, 254 Ore. 59, 457 P.2d 496 (1969).

154 274 Cal. App. 2d at 753, 79 Cal. Rptr. at 249.

155 *Id.* (quoting from People v. Kennedy, 21 Cal. App. 2d 185, 193, 69 P.2d 224, 229 (Dist. Ct. App. 1937)).

156 18 N.Y.2d 899, 900, 223 N.E.2d 43, 43, 276 N.Y.S.2d 634, 635 (1966), *remittitur granted*, 19 N.Y.2d 703, 225 N.E.2d 576, 577, 278 N.Y.S.2d 892, 893 (1967).

157 22 N.Y.2d 465, 239 N.E.2d 879, 293 N.Y.S.2d 280 (1968).

158 *Id.* at 473, 239 N.E.2d at 882-83, 293 N.Y.S.2d at 284. The statute alleged to be violated was N.Y. CODE CRIM. PRO. § 913-a(5) and (6) (McKinney 1958).

159 22 N.Y.2d at 471, 239 N.E.2d at 881, 293 N.Y.S.2d at 283 (citation omitted).

constitutional restraints applicable to adversary criminal trials, just as Justice Stewart had feared in his *Gault* dissent.[160] To be in accord with *Gault*, the *Allen* court reasoned that the substantive definition of conduct which subjects the juvenile to penal or corrective discipline should be a procedural requirement.[161] The court, however, was able to avoid overruling *Salisbury* on the constitutional issue of vagueness by simply holding that the adjudications of waywardness were not sustained by the record.[162] The court followed the same tact in refusing to reconsider *Salisbury* in *People v. Duke*[163] and *People v. Gregory E.*[164]

New Jersey's Juvenile Delinquency Statute[165] perhaps is the least helpful of all definitions, tautologically defining delinquency as "incorrigibility," "immorality" or "growing up in idleness or delinquency."[166] Other noncriminal acts which will support an adjudication of delinquency in New Jersey include "habitual vagrancy," "knowingly associating with thieves or vicious or immoral persons," and "idly roaming the streets at night."[167] The statute's omnibus clause defines delinquency as "deportment endangering the morals, health or general welfare of said child."[168]

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160 *Id.* at 469, 239 N.E.2d at 880, 293 N.Y.S.2d at 281.

161 *Id.* at 469-70, 239 N.E.2d at 880, 293 N.Y.S.2d at 282.

162 *Id.* at 471-73, 239 N.E.2d at 881-82, 293 N.Y.S.2d at 283-84.

163 23 N.Y.2d 780, 244 N.E.2d 711, 297 N.Y.S.2d 144 (1968).

164 26 N.Y.2d 622, 255 N.E.2d 721, 307 N.Y.S.2d 465 (1970).

165 N.J. STAT. ANN. § 2A:4-14 (1952). That portion of the statute extending the jurisdiction of the juvenile court over noncriminal conduct reads as follows:

> . . . .
>
> Juvenile delinquency is hereby defined as the commission by a child under 18 years of age . . . [of any]
>
> (2) of the following acts:
>
> e. Habitual vagrancy, or
>
> f. Incorrigibility, or
>
> g. Immorality, or
>
> h. Knowingly associating with thieves or vicious or immoral persons, or
>
> i. Growing up in idleness or delinquency, or
>
> j. Knowingly visiting gambling places, or patronizing other places or establishments, his admission to which constitutes a violation of law, or
>
> k. Idly roaming the streets at night, or
>
> l. Habitual truancy from school, or
>
> m. Deportment endangering the morals, health or general welfare of said child.

166 Comment, *supra* note 26, at 152. *See* N.J. STAT. ANN. § 2A:4-14(f), (g), and (i) (1952).

167 N.J. STAT. ANN. § 2A:4-14(e), (h), (k) (1952).

168 N.J. STAT ANN. § 2A:4-14(m) (1952). *See generally* Note, *Problems Arising Under the New Jersey Juvenile Court Law*, 11 RUTGERS L. REV. 641 (1957) which states:

> Provision *m* . . . seems to be so vague that it could encompass almost any act and makes definition almost impossible.

Id. at 645 (footnote omitted). The author, however, found justification for the statute in the benefits to be derived from this flexible approach to juvenile offenders given to

Recently the New Jersey Supreme Court affirmed without opinion the appellate division's decision in *State v. L.N.*,[169] which upheld the constitutionality of subsections (i) and (m) against an attack for vagueness. These subsections provide for an adjudication of delinquency for "growing up in idleness or delinquency" and "deportment endangering the morals, health or general welfare of said child."[170] The court found no merit in the defendant's contention that the failure to give him adequate notice of the charge amounted to a denial of due process. Rather, the court held that for a juvenile, the specificity of a criminal complaint was not necessary.[171] The court could find no authority for the proposition that juvenile statutes proscribing noncriminal conduct had been held unconstitutionally violative of due process because of vagueness.[172] The court rejected defendant's contention that *Gault* had exposed broadly drawn juvenile statutes to constitutional scrutiny. The court, unlike the *Allen* court, did not feel constrained to afford juveniles broader due process rights than those enunciated in *Gault*.[173]

The *L.N.* court continued with a description of the state's philosophy of the juvenile court system:

> The juvenile court proceeding is not the trial of a child charged with a crime but is mercifully designed to save him from such an ordeal in the future. . . . It has been said to be designed to make men out of errant boys. . . . The State as *parens patriae* has a duty to see to it that a minor does not live a life of delinquency. . . .
>
> . . . .
>
> The philosophy of our juvenile court system is aimed at rehabilitation through reformation and education in order to restore a delinquent youth to a position of responsible citizenship.[174]

The court found nothing in *Gault* which denied the state the authority to discipline noncriminal conduct which threatened either the child's or society's welfare.[175] The court read *Gault* to require the procedural due process safeguards in juvenile proceedings,[176] and concluded that the defendant was fully aware of the specific nature of his actions

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> the courts so as to accomplish their desired end of individual care and rehabilitation.

Id. at 646.

169 109 N.J. Super. 278, 286-87, 263 A.2d 150, 155 (App. Div.), *aff'd per curiam*, 57 N.J. 165, 270 A.2d 409 (1970), *cert. denied*, 402 U.S. 1009 (1971).

170 N.J. STAT. ANN. § 2A:4-14(i) and (m) (1952).

171 109 N.J. Super. at 284, 263 A.2d at 153.

172 *Id. L.N.* was decided in 1970 before *Gesicki* and *Gonzalez*.

173 *Id.* at 286, 263 A.2d at 154.

174 *Id.* at 285-86, 263 A.2d at 154-55 (citations omitted).

175 *Id.* at 286, 263 A.2d at 154.

176 *Id.*

that constituted the basis for the alleged violation.[177] Notwithstanding the *L.N.* court's opinion, a juvenile is entitled to prior notice of what act or omission constituted unacceptable behavior under the statute.[178]

As a result of the criticism and the failure of the present juvenile correction system, new legislation has been enacted to ameliorate some of the present defects.

As a possible alternative, the President's Commission has proposed non-coercive community aid facilities for noncriminal juveniles. Based on this proposal, Youth Service Bureaus have been instituted in several states to provide individual and family counseling to troubled youngsters and their families.[179]

The more probable alternative, since the juvenile court retains jurisdiction over the conduct in question, provides for different classifications of juvenile offenders based upon the nature of the acts committed and permits the treatment of these classes in different ways.[180] The Illinois Juvenile Court Act of 1966 created the category of "minor otherwise in need of supervision" for a juvenile charged with violations of noncriminal conduct.[181] New York's Family Court Act of 1963 has labeled a juvenile involved in noncriminal conduct as a "person in need of supervision," commonly referred to as a "PINS."[182] The statute, however, has defined a PINS in traditionally broad language, including such categories as "incorrigible," "ungovernable," and "beyond lawful control."[183]

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177 *Id.* at 287, 263 A.2d at 155.

178 Comment, *supra* note 26, at 152. *Cf.* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Gesicki v. Oswald, 336 F. Supp. 365, 369.

179 TASK FORCE REPORT, *supra* note 1, at 19-21. Note, *supra* note 3, at 578. *See generally* Note, *A Proposal for the More Effective Treatment of the "Unruly" Child in Ohio: The Youth Services Bureau*, 39 U. CIN. L. REV. 275 (1970). Similar programs are also under consideration in Great Britain. *See* Her Majesty's Stationery Office, *Great Britain Home Office, the Child, the Family, and the Young Offender*, in JUVENILE COURTS 440, 440-42 (O. Ketcham & M. Paulsen eds. 1967).

180 TASK FORCE REPORT, *supra* note 1, at 26. Comment, *supra* note 2, at 363.

181 ILL. ANN. STAT. ch. 37, §§ 702-2 to 702-4 (Smith-Hurd Supp. 1972).

182 N.Y. FAMILY CT. ACT § 712 (McKinney Supp. 1972).

However, the failure or inability of New York's legislature to sufficiently fund adequate alternative treatment programs for its PINS has, it is argued, reduced the statutory differentiation between delinquents and noncriminal youth to a "legal distinction without a social difference." Comment, *Nondelinquent Children in New York: The Need for Alternatives to Institutional Treatment*, 8 COLUM. J.L. & SOC. PROB. 251, 284 (1972).

183 N.Y. FAMILY CT. ACT § 712(b) (McKinney Supp. 1972).

The statute has recently been attacked on the grounds that it is violative of due process by reason of vagueness, and also that it offended the equal protection clause of the fourteenth amendment on the grounds that it discriminated against sixteen and seventeen-year-old girls. The court of appeals rejected the first claim, distinguishing the Wayward Minor Statute in the *Gesicki* case, from the PINS statute. (See note 59 *supra* for

Legislation recently proposed by the New Jersey State Bar Association's Committee on Juvenile Delinquency would bring much needed revision to this state's juvenile court system. Draft legislation would establish dual categories for conduct labeled either "delinquency" or "person in need of supervision." The text of the proposals read in part as follows:

> N.J. STAT. ANN. § 2A:4-44 DEFINITION OF "DELINQUENCY"
>
> (a) As used in this Article, "delinquency" means the commission of an act by a juvenile which if committed by an adult would constitute:
>
> 1. A high misdemeanor or misdemeanor,
> 2. A disorderly persons offense, or
> 3. A violation of municipal penal ordinance.
>
> N.J. STAT. ANN. § 2A:4:45 DEFINITION OF "PERSON IN NEED OF SUPERVISION"
>
> (a) As used in this Article, "person in need of supervision" means:
>
> 1. A juvenile who is habitually disobedient to the lawful commands of his parent or guardian when such disobedience makes him ungovernable or incorrigible.
> 2. A juvenile who is habitually and voluntarily truant, or
> 3. A juvenile who has committed an offense applicable only to juveniles.
>
> (b) No juvenile shall be adjudged to be a person in need of supervision unless he is in need of treatment or rehabilitation.[184]

These proposals are an improvement over the current statutory scheme in that the distinction is clearly drawn between what is labeled criminal and what is labeled noncriminal behavior. At present both types of be-

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court's reasoning.). The court held there was no justification for the age-sex distinction in section 712(b), and so struck down that portion of the statute as violative of the equal protection clause. *In re* Patricia A., No. — (N.Y. Ct. App. July 7, 1972). *See, e.g.*, Comment, *Juvenile Delinquency Laws: Juvenile Women And The Double Standard of Morality*, 19 U.C.L.A.L. REV. 313 (1971).

The equal protection argument may figure prominently in future challenges of juvenile statutes. *See, e.g.*, Lamb v. Brown, 456 F.2d 18, 20 (10th Cir. 1972), in which an Oklahoma statute permitting females under the age of eighteen benefits of a juvenile court proceeding, while limiting the same benefits to males under the age of sixteen, was held to be violative of the equal protection clause.

184 Legislation proposed by the N.J. Bar Ass'n, Committee on Juvenile Delinquency.

The proposed section 2A:4-45(a)(3) does not attempt to expand the court's jurisdiction over PINS.

> [I]t was the clear agreement of all members of the committee involved in drafting the proposal that 2A:4-45(a)3 . . . includes only those juveniles who have committed some specific statutory offense, which by its terms applies only to juveniles.
>
> Examples of this sort of offense are curfew violations and certain alcoholic-beverage infractions. It was certainly not the intent to create a whole expanded common law of judge-created offenses applicable only to juveniles.

Letter from John M. Cannel, Reporter, New Jersey Bar Association, Committee on Juvenile Delinquency, to author, October 20, 1972, on file in the *Seton Hall Law Review*.

havior are considered delinquency under section 2A:4-14. Moreover, under the proposed sections 2A:4-61 and 62, a child labeled a PINS will no longer suffer under the delinquent label; the child will be given the type of treatment and supervision required for rehabilitation while he is separated from serious offenders. Section 2A:4-62(b) specifically provides for the penal preclusion of PINS:

> No juvenile shall be committed to or placed in any institution or facility established for the care of deliquent children nor in any facility other than a mental hospital which physically restricts children committed to or placed in it as part of a disposition under this section.[185]

Revision of the state's juvenile statutes in this manner would accord with such model laws as the Uniform Juvenile Court Act and that proposed by the *Legislative Guide*, as well as legislation already enacted by such jurisdictions as New York, California, and Illinois.[186]

The successful application of the void for vagueness doctrine to noncriminal conduct statutes is a further affirmation by the federal courts that the constitutional domestication of the juvenile court system is still in progress. The *Gesicki* and *Gonzalez* opinions throw considerable doubt on the constitutional validity of most of this nation's juvenile court statutes. Due process, as formulated in these cases, requires a substantive definition of the conduct sought to be proscribed, in order that fair notice be given to the potential juvenile offender. This definition should be based on objective, ascertainable standards of application to preclude arbitrary and discriminatory enforcement. Upon commitment, the noncriminal juvenile should be afforded the right to treatment which has a rational relationship to the nature of his condition. Juvenile legislation should be brought into harmony with these constitutional requirements.

The Supreme Court set in motion a revolution throughout the juvenile justice system as a result of its decision in *Gault*. Dean Paulsen wrote in 1967 that the language of *Gault* "reads like a warning shot, fired to gain the attention of state court judges and lawmakers."[187] It is time that New Jersey heed that admonition.

Robert G. Rose

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185 Legislation proposed by the N.J. Bar Ass'n, Committee on Juvenile Delinquency.

186 *See* UNIFORM JUVENILE COURT ACT §§ 2(2) and (3) (1969); UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATIVE SERVICE, LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS (Children's Bureau Pub. No. 472, 1969). *See, e.g.*, Sheridan, *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?*, 31 FED. PROB. 26 (1967).

187 Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 237.