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Juvenile Delinquent and Unruly Proceedings in Ohio: Unconstitutional Adjudications

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NOTE

JUVENILE DELINQUENT AND UNRULY PROCEEDINGS IN OHIO: UNCONSTITUTIONAL ADJUDICATIONS

THE OHIO STATUTES RELATING TO JUVENILES were substantially revised in 1969,[1] purportedly[2] to comply with the Supreme Court's mandate that juveniles be afforded "the essentials of due process and fair treatment."[3] One significant change was the removal of "conduct-illegal-only-for-children"[4] from the definition of "delinquency"[5] and its placement in a new category of "unruly."[6] Juvenile courts thus retained juris-

[1] OHIO REV. CODE ANN. §§ 2151.01-.99 (Page Supp. 1974). For an analysis of the entire revised juvenile court law see Willey, *Ohio's Post-Gault Juvenile Court Law*, 3 AKRON L. REV. 152 (1970).

[2] Whitlatch, *Ohio's Revised Juvenile Court Act*, 42 THE OHIO B. 1389 (1969).

[3] *In re* Gault, 387 U.S. 1, 30 (1967), *quoting* Kent v. United States, 383 U.S. 541, 562 (1966). *Kent* was the first juvenile court case decided in the Supreme Court of the United States. The Court affirmed that when the juvenile court, acting under a District of Columbia statute, "waived" its jurisdiction and transferred children to the criminal court for trial, the waiver hearings "must measure up to the essentials of due process and fair treatment." *Id.* at 562. The *Kent* case can be considered to stand for the proposition that fourteenth amendment due process standards are applicable to juvenile court proceedings. M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 12-13 (1974).

> Technically speaking, *Kent* does not rest on constitutional grounds but upon an interpretation of the statutes of the District of Columbia. This fact does not diminish the constitutional authority of the case. The Court was clearly announcing constitutional principles as it read the applicable legislation "in the context of constitutional principles relating to due process and the assistance of counsel." 383 U.S. at 557. Doubt about the constitutional authority of *Kent* is dispelled by the express approval of its key passages in the *Gault* opinion.

Id. at 14.

[4] One study describes these offenses as

> curfew regulations, school attendance laws, restrictions on use of alcohol and tobacco; and children variously designated as beyond control, ungovernable, incorrigible, runaway, or in need of supervision — according to national juvenile court statistics, the latter two groups account for over 25 percent of the total number of delinquent children appearing before children's courts and between 25 and 30 percent of the population of state institutions for delinquent children.

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 4 (1967) [hereinafter cited as TASK FORCE REPORT].

[5] OHIO REV. CODE ANN. § 2151.02 (Page Supp. 1974), wherein a "delinquent child" is defined as any child:

> (A) Who violates any law of this state, the United States, or any ordinance or regulation of a political subdivision of the state, which would be a crime if committed by an adult (except traffic offenses);
>
> (B) Who violates any lawful order of the court made under this chapter.

[6] OHIO REV. CODE ANN. § 2151.022 (Page Supp. 1974), wherein an "unruly child" is defined as including any child:

> (A) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;
>
> (B) Who is an habitual truant from home or school;

diction over the noncriminal misconduct of children. While the result of some of the revisions was to achieve compliance with certain constitutional due process requirements, the total effect was to create further constitutional infirmities. The analysis and development of these constitutional challenges is the primary concern of this paper.[7]

This article will focus on the constitutional defects of juvenile court adjudications under Ohio juvenile law. The arguments presented, however, are equally applicable in other jurisdictions since every state has some type of legislation granting juvenile court jurisdiction over both criminal[8] and noncriminal[9] misconduct of children.

I. Background and Issues

Under Ohio law the juvenile courts may obtain jurisdiction over a misbehaving youngster by finding him either delinquent or unruly. The first paragraph of the delinquency statute narrowly defines as delinquent those children that commit acts which would be violations of the criminal laws if committed by adults.[10] The second paragraph, however, extends the juvenile court's delinquency jurisdiction to children who merely violate lawful orders of the court.[11] At least nine other states have similar provisions,[12] and they have been aptly described as "open-ended boiler plate clause[s] . . . [extending] jurisdiction as far as any

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(C) Who so deports himself as to injure or endanger the health or morals of himself or others;

(D) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority;

(E) Who is found in a disreputable place, visits or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others;

(G) Who has violated a law applicable only to a child.

[7] For a similar review of the constitutional challenges against noncriminal juvenile statutes in general see Stiller & Elder, *PINS — A Concept In Need of Supervision*, 12 Am. Crim. L. Rev. 33 (1974).

[8] A thorough but somewhat outdated review of juvenile legislation in all fifty states can be found in Comment, *"Delinquent Child": A Legal Term Without Meaning*, 21 Baylor L. Rev. 352 (1969). For examples of delinquency statutes see Ariz. Rev. Stat. Ann. §§ 8-201(7)-(9) (1974); Ark. Stat. Ann. § 45-204 (Supp. 1973); Ill. Ann. Stat. ch. 37, § 702-2 (Smith-Hurd 1972); Tex. Fam. Code Ann. § 51.03 (1975).

[9] The "unruly child" category is variously labeled in other jurisdictions: "Child in Need of Supervision" [CHINS], Colo. Rev. Stat. Ann. § 19-1-103(5) (1975); "Minor Otherwise in Need of Supervision" [MINS], Ill. Ann. Stat. ch. 37, § 702-3 (Smith-Hurd 1972); and "Persons in Need of Supervision" [PINS], N.Y. Fam. Ct. Act § 712 (McKinney Supp. 1974).

[10] Ohio Rev. Code Ann. § 2151.02(A) (Page Supp. 1974). See note 5 *supra*, for text of the statute.

[11] *Id.* § 2151.02(B).

[12] Ariz. Rev. Stat. Ann. §§ 8-201(8), (9) (Supp. 1973); Cal. Welf. & Inst'ns Code § 602 (West Supp. 1975); Colo. Rev. Stat. Ann. § 19-1-103(9)(III) (1973); Conn. Gen. Stat. Ann. § 17-53(f) (1975); Ga. Code Ann. §§ 24A-401(e)(2), (f) (Supp. 1974); Mont. Rev. Codes Ann. § 10-1203(12)(b) (Supp. 1974); Nev. Rev. Stat. § 62.040(1)(c)(2) (1973); N.C. Gen. Stat. § 7A-278(2) (1969); Okla. Stat. Ann. tit. 10, § 1101(b)(1) (Supp. 1974).

court might want."[13] The unruly section[14] contains prohibitions against the usual vague and uncertain child-only crimes of habitual truancy from home or school,[15] disobediance to parents or teachers,[16] "immoral" conduct[17] and associating with "immoral" persons.[18]

The constitutional challenges that can be made against these statutes are several. One of the major defects of the lawful order and unruly sections is that they are invalid based on traditional constitutional grounds of vagueness and overbreadth.[19] Other challenges involve the denial of various procedural due process protections at the trial stage of juvenile proceedings (the adjudicatory hearing). The case of *In re Gault*[20] applied certain procedural due process protections to delinquency adjudications. These essentials of due process include adequate, timely, written notice of the charges in all cases, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses in all cases where the juvenile is in danger of loss of liberty through commitment.[21] The evidentiary standard of proof beyond a reasonable doubt is also applicable to the adjudicatory stage of delinquency proceedings.[22] In *McKeiver v. Pennsylvania*,[23] however, the Supreme Court declined to extend to delinquents the right to trial by jury.[24]

Although the drafters of the Ohio Juvenile Code and the Ohio Rules of Juvenile Procedure are to be commended for extending the rights enumerated in *Gault* equally to delinquency and unruly adjudicatory hearings,[25] there is a distinction under Ohio law between the two classifications as to the required quantum of proof. In compliance with *In re*

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[13] Willey, *supra* note 1, at 163.

[14] OHIO REV. CODE ANN. § 2151.022 (Page Supp. 1974). See note 6 *supra*, for text of the statute.

[15] *Id.* § 2151.022(B).

[16] *Id.* § 2151.022(A).

[17] *Id.* § 2151.022(C), (E), (F).

[18] *Id.* § 2151.022(E).

[19] For similar reviews of constitutional challenges to juvenile statutes based on vagueness and overbreadth, see Stiller & Elder, *supra* note 7, at 45-52; Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745 (1973); Comment, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-For-Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972); Comment, *Statutory Vagueness in Juvenile Law: The Supreme Court and Mattiello v. Connecticut*, 118 U. PA. L. REV. 143 (1969).

[20] 387 U.S. 1 (1967).

[21] *Id.*

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

[23] 403 U.S. 258 (1971).

[24] *Id.* Ohio has not extended the right to trial by jury to juveniles. OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1974); OHIO R. JUV. P. 27.

[25] The juvenile's right to notice of the specific charge brought against him is set out in OHIO REV. CODE ANN. § 2151.27 (Page Supp. 1974) and OHIO R. JUV. P. 15(A). Under Ohio law the juvenile also has the right to retained or appointed counsel. OHIO REV. CODE ANN. § 2151.352 (Page Supp. 1974) and OHIO R. JUV. P. 4(A). Juveniles may exercise the privilege against self-incrimination pursuant to OHIO REV. CODE ANN. § 2151.314 (Page Supp. 1974) and OHIO R. JUV. P. 7(F)(2), 29(B)(5). The juvenile rules also grant the right of confrontation and cross-examination. OHIO R. JUV. P. 29(B)(5).

Winship[26] the Rules provide for proof beyond a reasonable doubt in delinquency proceedings, but permit determinations of unruliness based on mere "clear and convincing evidence."[27] Noncriminal unruly and lawful order delinquency adjudications are open to constitutional attack when the same due process protections are not afforded at every adjudicatory stage leading to commitment. The premise of such challenges is the similarity in treatment by the juvenile court of both delinquent and unruly children.

Even though Ohio law presently differentiates only between unruly and delinquency adjudications with regard to the burden of proof, constitutional challenges based on this distinction are significant and timely since the division of delinquency and unruly jurisdiction into separate categories makes possible additional due process distinctions in the future between the two types of proceedings. Although the Supreme Court has not held that all of the procedural guarantees available in adult criminal trials apply to juvenile delinquency adjudications,[28] commentators continue to argue for the extension of certain fundamental rights.[29] It is reasonable to expect that some of these arguments will prevail in the future.[30] Therefore, the potential broadening of due process protections to delinquent juveniles increases the importance of waging constitutional attacks against findings of unruliness or delinquency where full delinquency due process protections were not afforded at any hearing when the alleged misconduct of the child was in issue.

In addition to the full development of the due process arguments out-

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[26] 397 U.S. 358 (1970).

[27] OHIO R. JUV. P. 29(E)(4). This rule undoubtedly supplants the now unconstitutional code provision which allowed delinquency and unruly issues to be determined by clear and convincing evidence, OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1974).

[28] *See In re* Winship, 397 U.S. 358, 359 (1970); *In re* Gault, 387 U.S. 1, 30 (1967); Kent v. United States, 383 U.S. 541, 556 (1966). *See also* Dorsen & Reznick, *In re Gault and the Future of Juvenile Law*, 1 FAM. L. Q. 1, 3-8 (1967).

[29] For a detailed refutation of the reasoning in McKeiver v. Pennsylvania, 403 U.S. 528 (1971) see 70 MICH. L. REV. 171 (1971). For discussions of the right to a jury trial in juvenile proceedings, see Katz, *Juveniles Committed to Penal Institutions — Do They Have the Right to a Jury Trial?*, 13 J. FAM. L. 675 (1973-74); Note, *Juvenile Right to Jury Trial — Post McKeiver*, 1971 WASH. U. L. Q. 605; Comment, *Juries for Juveniles — A Rehabilitative Tool*, 11 J. FAM. L. 107 (1971-72); Comment, *No Constitutional Right to Trial by Jury for Juveniles in Delinquency Proceedings*, 56 MINN. L. REV. 249 (1971). For discussions of the right to bail in juvenile proceedings see Note, *Right to Bail For Juveniles*, 48 CHI.-KENT L. REV. 99 (1971); Comment, *Juvenile Right to Bail*, 11 J. FAM. L. 81 (1971-72); Comment, *A Juvenile's Right To Bail In Oregon*, 47 ORE. L. REV. 194 (1968). For a discussion of the use of social records (hearsay) in juvenile proceedings see Frey & Bubany, *Pre-Adjudication Review of The Social Record in Juvenile Court: A Low-Visibility Obstacle To A Fair Process*, 12 J. FAM. L. 391 (1972-73); Comment, *Juvenile Delinquency Proceedings In Ohio: Due Process and the Hearsay Dilemma*, 24 CLEVE. ST. L. REV. 356 (1975). For a survey of all of the due process rights available in juvenile court proceedings see Popkin, Lippert & Keiter, *Another Look At The Role of Due Process In Juvenile Court*, 6 FAM. L. Q. 233 (1972).

[30] The Supreme Court in McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971), recommended that each state determine whether a jury trial is desirable in some or all juvenile cases. At least one state has held that under its constitution the right to a trial by jury is available in a delinquency proceeding whenever the child is charged with an act which would be a crime if committed by an adult. R.L.R. v. State, 487 P.2d 27, 32-33 (Alas. 1971). *See also* Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968).

lined above, brief mention will be made of potential but less viable arguments under the equal protection clause.

II. VAGUENESS AND OVERBREADTH

One of the fundamental principles of American criminal law is that no conduct or form of expression may be criminally proscribed unless it is precisely described in a penal law.[31] This principle is commonly expressed as the "rule of law" or the "principle of legality" which imposes a definite limitation on the power of the state to punish conduct without ascertainable rules proscribing such conduct.[32] American courts generally apply the principle of legality by examining statutes on their face for vagueness or overbreadth.[33]

There have been few divergencies from the principle of legality in the Western World in the past several hundred years.[34] Notable exceptions, of course, have been laws regarding juveniles, vagrants and persons described as "without visible means of support."[35] But in the case of vagrants and disorderly persons the Supreme Court has repeatedly demanded statutory specificity by striking down laws attempting to proscribe the vagrancy status or disorderly conduct in imprecise terms.[36]

The historical rationale for ignoring the principle of legality in juve-

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[31] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

[32] *Id.* at 27-28. In Europe the principle of legality is usually called *nulla poena sine lege* which can be expressed as "no person may be punished except in pursuance of a statute which prescribes a penalty." *Id.* at 28. The principle can also be employed narrowly as *nullum crimen sine lege* which means "that no conduct may be held criminal unless it is precisely described in a penal law." *Id.* It is this narrow definition which is applicable to a consideration of the constitutionality of American penal statutes. *Id.* at 41-44.

[33] *Id.* at 42-44.

[34] The only notable divergences from the principle of legality in the Western World within the present century occurred under totalitarian regimes. The Russian Penal Code of 1926 provided:

> A crime is any socially dangerous act or omission which threatens the foundations of the Soviet political structure and that system of law which has been established by the Workers' and Peasants' Government for the period of transition to a Communist structure.

Id. at 48-49.

The German Act of June 28, 1935 provided:

> Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act.

Id. at 48. In Anglo-American history the most recent abandonment of the principle of legality was the English Star Chamber which was abolished in 1641. *Id.* at 52-53.

[35] *Id.* at 54. *See also* Lacy, *Vagrancy and other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Perkins, *The Vagrancy Concept*, 9 HASTINGS L. J. 237 (1958).

[36] For vagrancy statutes invalidated see Papachristou v. Jacksonville, 405 U.S. 156 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971); Palmer v. Euclid, 402 U.S. 544 (1971). For reversals of convictions under disorderly conduct statutes proscribing expression variously described as "opprobrious" or "abusive," see Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971).

nile law[37] was that the objective of such laws was treatment and rehabilitation rather than criminal punishment.[38] The behavioral theory that conduct is caused and can, therefore, be treated[39] provided the impetus for this rehabilitative rationale. The treatment ideal has been used not only to justify vague juvenile statutes[40] but it has been used as the rationale for denying juveniles full criminal due process protections[41] and has provided the underlying theoretical justification for juvenile court jurisdiction over a wide variety of noncriminal forms of juvenile misconduct.[42]

The usual argument made in support of vague and broad juvenile statutes is that they facilitate early intervention, thereby allowing the rehabilitative services of the juvenile court to work their preventive in-

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[37] For discussions of the history and philosophy of the juvenile court movement, see *In re* Gault, 387 U.S. 1, 14-18 (1967); TASK FORCE REPORT, *supra* note 4, at 1-40; Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167.

[38] Kent v. United States, 383 U.S. 541, 554-55 (1966). The rehabilitative rationale has formed the basis for sustaining imprecise statutory grants of juvenile court jurisdiction over noncriminal conduct in several states. *See, e.g.*, E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970); Connecticut v. Mattiello, 4 Conn. Cir. 55, 225 A.2d 507 (App. Div. 1966).

[39] McNulty, *The Right To Be Left Alone*, 12 J. FAM. L. 229, 230 (1972-1973). The behaviorist theory is reflected in a famous quotation from the comments of an early juvenile court judge:

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.

Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-120 (1909). The behaviorist influence was, of course, not limited to juvenile law. The treatment rationale was also responsible for the movement for indeterminate sentences for particular kinds of adult offenses. J. HALL, *supra* note 31, at 56.

[40] McNulty, *supra* note 39, at 230-31. Hall commented on this influence in criminal law as follows:

> In addition, the argument occasionally extends to advocacy of the entire elimination of the requirement that there be any definite criminal conduct, *i.e.* of *nullum crimen* as well as *nulla poena*. "Anti-social" persons would in some sort of proceeding be declared "dangerous" and placed in the hands of experts, to be dealt with as they determined in accordance with their views or knowledge of psychiatry and sociology.

J. HALL, *supra* note 31, at 56.

[41] One of the earliest cases invoking the doctrine of *parens patriae* and the rehabilitative rationale for affirming denial of procedural due process protections to juveniles was Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905):

> To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the Legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. . . .

Id. at 53, 62 A. at 200. This reasoning was repeated fifty years later in the often cited case of *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954). For more recent reiterations, see Bible v. State, 253 Ind. 373, 254 N.E.2d 319 (1970); *In re* Walker, 282 N.C. 28, 191 S.E.2d 702 (1972). A general discussion of this issue may be found in M. PAULSEN & C. WHITEBREAD, *supra* note 3, at 2-6.

[42] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 81 (1967) [hereinafter cited as THE CHALLENGE].

fluences before the crime-prone child becomes established in a life of crime.[43] The validity of this argument, however, depends upon the truth of its underlying premise — that the juvenile court process is and can be rehabilitative.

The Supreme Court has specifically noted that the performance of the juvenile court in effective individualized treatment and rehabilitation has not measured up to its theoretical purpose.[44] The 1967 President's Commission on Law Enforcement and Administration of Justice found not only that the juvenile court had failed to rehabilitate but that it had not succeeded significantly in even stemming the tide of delinquency.[45] The high rate of recidivism reported among delinquents[46] highlights the court's failure to achieve its rehabilitative goals. Furthermore, several analysts have indicated that in some cases the juvenile court process actually reinforces delinquent behavior.[47]

While recognizing that insufficient resources and inadequate facilities are a problem, the President's Commission rejected the argument that an infusion of resources would enable the juvenile courts to fulfill the expectations surrounding their creation.[48] The Commission instead struck a blow to behaviorist theories by noting that we are little able with present knowledge to predict or prevent delinquency:

> What research is making increasingly clear is that delinquency is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the reach of the actions of any judge, probation officer, correctional counselor, or psychiatrist.[49]

The United States Supreme Court explicitly rejected the "seeds of antisocial behavior theory" in a case involving an adult vagrancy statute.[50] Mr. Justice Douglas writing for a unanimous court dismissed the notion that certain forms of noncriminal behavior are conducive of later criminality and therefore must be subject to proscription at an early stage.

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[43] TASK FORCE REPORT, *supra* note 4, at 22-23.

[44] *In re* Gault, 387 U.S. 1, 17-18 (1967); Kent v. United States, 383 U.S. 541, 555-56 (1966).

[45] THE CHALLENGE, *supra* note 42, at 80.

[46] Figures range from one-third of all delinquency cases nationally, TASK FORCE REPORT, *supra* note 4, at 23, to seventy percent of those discharged from parole in one year in California, Gough, *The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. LOUIS L. REV. 182, 191 (1972) *citing* STATE OF CALIFORNIA, YOUTH AND ADULT CORRECTIONS AGENCY, THE ORGANIZATION OF STATE CORRECTIONAL SERVICES IN THE CONTROL AND TREATMENT OF CRIME AND DELINQUENCY 56 (1967).

[47] TASK FORCE REPORT, *supra* note 4, at 23.

[48] THE CHALLENGE, *supra* note 42.

[49] *Id.* As the belief that we can neither prevent nor predict delinquency is increasingly accepted, some observers have advocated alternative methods for dealing with the problem. See Garriott, *The Use of Recreation in Treating Juvenile Delinquency*, 25 JUV. JUST. 56 (1974); Strattan, *Crisis Intervention Counseling & Police Diversion from the Juvenile Justice System: A Review of the Literature*, 25 JUV. JUST. 44 (1974).

[50] Papachristou v. Jacksonville, 405 U.S. 156 (1972). *See* Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745 (1973).

He found that the implicit presumption of the challenged statutes — that crime was being "nipped in the bud" by the arrest of persons who loiter or are suspicious looking to the police — was "too precarious for a rule of law."[51]

It would appear, then, that the underlying premise of vague and broad juvenile statutes is equally invalid. If the juvenile court process is not rehabilitative and if the connection between certain forms of noncriminal youthful misconduct and future criminality is tenuous at best, there is no justification for denying juveniles the due process protection of statutory precision in any laws which subject them to a potential loss of liberty. Indeed, these, as all criminal laws, should be scrutinized under the constitutional doctrines of vagueness and overbreadth.

A. *Void For Vagueness*

In a leading case invalidating a statute on vagueness grounds the Supreme Court held that the terms of the statute were "so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the fourteenth amendment."[52] Therefore, the principle of legality restricting the exercise of the state's power to punish in the absence of specific statutory proscriptions also prohibits vague statutes.[53] The test of statutory vagueness will be met and the first essential of due process is violated when the statute in question

> either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . .[54]

Thus, constitutional challenges based on statutory vagueness generally allege inadequate notice and insufficient guidelines.[55]

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[51] Papachristou v. Jacksonville, 405 U.S. 156, 171 (1972). *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939).

In response to the idea that delinquency can be prevented, a consultant to the President's Commission on Law Enforcement and Administration of Justice has said:

> 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 antecedents of delinquency, and it is unlikely that they will be.

Lemert, *The Juvenile Court — Quest and Realities*, in TASK FORCE REPORT, *supra* note 4, at 91, 93. For an analysis of the validity of the prediction studies of Sheldon and Eleanor Glueck in predicting juvenile delinquency on the basis of social, economic and cultural factors see Weis, *The Glueck Social Prediction Table — An Unfulfilled Promise*, 65 J. CRIM. L. & C. 397 (1974) wherein the author concluded that the Glueck Social Prediction Table is not validated by the empirical data.

[52] Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939).

[53] J. HALL, *supra* note 31, at 42-44.

[54] Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

[55] Musser v. Utah, 333 U.S. 95, 96 (1948). See Stiller & Elder, *supra* note 7, at 47.

1. *Inadequate Notice*

The fourteenth amendment due process requirement that statutes give persons of ordinary intelligence fair notice that their contemplated conduct is forbidden has been reaffirmed recently by the Supreme Court in several cases voiding vagrancy statutes. The challenged statutes used a variety of imprecise terms to describe a forbidden status or conduct such as "without any visible or lawful business,"[56] "conduct annoying to persons passing by,"[57] and "rouges, vagabonds and dissolute persons."[58] The Court held in each case that the particular proscription failed to provide fair notice that the particular conduct was forbidden thereby violating the principle that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[59]

It is clear, then, that adults could never be penalized for violating statutes containing such broad language as that of the lawful order section and much of the unruly section of the Ohio Juvenile Code. A law prohibiting juvenile conduct that may "injure or endanger the health or morals" of the child or others[60] is not unlike the invalid adult statutes penalizing vagrancy.[61] A statute which permits an adjudication of delinquency for violation of "any lawful order of the court"[62] makes the invalid vagrancy statutes seem like models of precision and clarity.

The Supreme Court has not held specifically that the fair warning requirement is applicable to juvenile law. One point of view is that traditional vagueness concepts apply only to criminal statutes and since juvenile proceedings are civil in nature, no challenge for vagueness is appropriate.[63] A recent federal district court decision rejected this argument. In *Gonzalez v. Mailliard*,[64] the court invalidated a California statute which granted juvenile court jurisdiction over children who were "in danger of leading an idle, dissolute, lewd, or immoral life."[65] In

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[56] Palmer v. Euclid, 402 U.S. 544 (1971).

[57] Coates v. Cincinnati, 402 U.S. 611 (1971).

[58] Papachristou v. Jacksonville, 405 U.S. 156 (1972).

[59] Palmer v. Euclid, 402 U.S. 544, 546 (1971).

[60] OHIO REV. CODE ANN. § 2151.022(B) (Page Supp. 1974). See note 6 *supra*, for text of the statute.

[61] The "vagrancy" statute analogy was used by the federal district court in Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974), striking down a California juvenile statute on grounds of vagueness and overbreadth.

[62] OHIO REV. CODE ANN. § 2151.02(B) (Page Supp. 1974).

[63] See the state's argument in Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974). For an opinion in accord with the state's contention see Connecticut v. Mattiello, 4 Conn. Cir. 55, 62, 225 A.2d 507, 511 (Cir. Ct. App. 1966). See the discussion of the "civil" label argument in Kent v. United States, 383 U.S. 541, 555 (1966).

[64] No. 50424 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974).

[65] The entire language of the California code challenged is:

> Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law

rejecting the state's claim that vagueness arguments do not apply to civil statutes, the court noted first that the Supreme Court has held that vagueness may be a constitutional infirmity in civil as well as criminal statutes.[66]

The court further reasoned that a statute cannot escape constitutional scrutiny merely because it is labeled "civil" in nature. What must be considered is the effect of the statute. The tests to determine whether a statute is not truly civil are whether there is the potential for loss of the accused's liberty[67] and whether a stigma attaches when a violation of the statute is found.[68] Although under California law no direct com-

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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.

CAL. WELF. & INST'NS CODE § 601 (West 1972). A 1974 amendment deleted the words "or school authorities" and "who is a habitual truant from school within the meaning of any law of this state." CAL. WELF. & INST'NS CODE § 601 (West Supp. 1975).

[66] *See* Gonzalez v. Mailliard, No. 50424 at 8 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974). The court relied on four cases to support this proposition: Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Jordan v. DeGeorge, 341 U.S. 223 (1951); Small v. American Sugar Refining Co., 267 U.S. 233 (1925); Bonnie v. Gladden, 400 F.2d 547 (9th Cir. 1968). *See also* Baggett v. Bullitt, 377 U.S. 360 (1964).

[67] Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974).

> Whatever label be given the 1860 Act, there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property. Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague.

Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

In *Gault* the Supreme Court rejected the notion that due process could be denied in juvenile proceedings because of the "feeble enticement of the 'civil' label-of-convenience." *In re* Gault, 387 U.S. 1, 50 (1967). *See* Gesicki v. Oswald, 336 F. Supp. 371, 376-77 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972) (the three judge federal district court rejected the notion that New York's "wayward minor" statute which permitted incarceration of juveniles in adult criminal institutions was a nonpenal statute under which the state exercised its power to act as *parens patriae*). For further discussion of the *Gesicki* case and its application to juvenile statutes see Comment, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-For-Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972). *See* E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969) (dissenting opinion), *cert. denied*, 398 U.S. 956 (1970):

> Rather than relying on differences in nomenclature and the civil-criminal dichotomy, it would be a sounder approach to attach significance to the seriousness of the matter which is at stake in determining whether the statute will survive a vagueness attack. Under our statute a child of ten may be deprived of his liberty for a period of eleven years. Appellant here faces confinement for almost seven years. To insist on greater definiteness in a statute imposing a $5.00 fine than in one imposing such confinement as a sanction, and to defend such distinction on the ground that the statute imposing the fine is a criminal enactment while the statute imposing the confinement is civil in nature, is to ignore reality.

Id. at 228 (footnotes omitted).

[68] Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974). There the court noted that the adverse stigma attached to a noncriminal juvenile adjudication is no less than that of an adjudication for commission of a criminal act.

mitment to a state juvenile institution is authorized for children found to be unruly,[69] the potential for deprivation of freedom is similar to that for juveniles who have committed crimes. The potential exists because of an escalator clause identical to Ohio's lawful order section.[70] A child violating any lawful court order can be committed to a maximum security Youth Authority institution and thus commingled with children who have committed criminal acts.[71]

The *Gonzalez* court equated with adult penal institutions not only the Youth Authority institutions, but also the "low security" county juvenile homes and camps, by holding that the loss of liberty in these facilities was the same as that in adult prisons.[72] Therefore, when a statute subjects juveniles to deprivations similar to those imposed upon convicted adults, the statute cannot escape judicial scrutiny merely because the state has labeled it noncriminal and rehabilitative in purpose.

Statutory clarity is particularly essential if the procedural rights mandated by the Supreme Court are to be preserved. The fair warning requirement breathes life into due process guarantees while vagueness makes those guarantees meaningless.[73] The concern for protection of procedural rights underscored the decision in *Giaccio v. Pennsylvania*,[74] which declared unconstitutional a statute assessing costs of prosecution upon a criminal defendant for being "guilty of some misconduct." Mr. Justice Black, speaking for the Court said:

> It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct" or "reprehensible misconduct."[75]

The *Gonzalez* court quoted the above remarks and commented further stressing the danger to juvenile procedural rights from vague statutes:

> It is no easier to defend against charges that one is "in danger of leading an idle, dissolute, lewd or immoral life." 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?[76]

Application of the fair warning requirement to the lawful order section reveals the same difficulties. Of what possible utility is notice of charges to a child that he has violated a lawful order of the court? How

[69] CAL. WELF. & INST'NS CODE § 601 (West Supp. 1975). Children adjudicated within the provisions of section 601 may be committed to county juvenile homes or camps. CAL. WELF. & INST'NS CODE § 730 (West 1972).

[70] CAL. WELF. & INST'NS CODE § 602 (West Supp. 1975).

[71] CAL. WELF. & INST'NS CODE § 731 (West 1972).

[72] Gonzalez v. Mailliard, No. 50424 at 9 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974).

[73] *Id.*

[74] 382 U.S. 399 (1966).

[75] *Id.* at 404.

[76] Gonzalez v. Mailliard, No. 50424 at 11 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974).

is counsel to prepare a defense against such a broad, undefined charge? What type of evidence will be necessary to rebut such a charge? What is a lawful order? The dictionary definition adds little clarity. The word "lawful" is defined as "in conformity with the principles of the law" and as "permitted by law."[77] But what orders are "in conformity with the principles of the law?" What is a violation of a lawful order? If a child has been ordered by a judge to "obey" his parents or to be home at a certain hour, is the child in violation of a lawful order if he stays away from home beyond the appointed hour because his parents are fighting or are intoxicated and he fears abuse? Thus, the lawful order section hardly provides fair warning to children subject to court orders.

Several subsections of the unruly section are also unconstitutionally vague. Sections (C), (E), and (F) contain prohibitions against conduct, associations and occupations that are "dangerous" or "injurious" to the "morals" of the child or others.[78] While "dangerous" and "injurious" are imprecise terms, the principal source of uncertainty arises from the use of the word "morals." Its application requires subjective judgment and questions of degree beyond the comprehension of a child ten or even fourteen years of age.[79] It would seem that these three sections are similar to that challenged in *Gonzalez*, and that they therefore share the same constitutional infirmities of the California statute.[80]

Language identical to that of Section (C) was upheld by the Texas Court of Appeals.[81] There the court reasoned that although the statute was general in its terms the rights of the child were protected because the statute required that specific acts or conduct be alleged in the petition. The requirement of specificity in the complaint, however, does not cure a vague statute. The Supreme Court has stated that:

> If on its face the challenged provision is repugnant to the due process clause, specifications 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.[82]

Further, it must be noted that the Texas case was decided prior to the Supreme Court's application of the void-for-vagueness doctrine to vagrancy statutes.[83] Therefore, the Texas court's assertion that the vagueness doctrine has been limited in use by the Supreme Court to

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[77] WEBSTER'S NEW WORLD DICTIONARY (2d College ed. 1970).

[78] OHIO REV. CODE ANN. § 2151.022 (Page Supp. 1974), see note 6 *supra*, for full text of sections (C), (E), and (F).

[79] E.S.G. v. State, 447 S.W.2d 225, 229-31 (Tex. Civ. App. 1969) (dissenting opinion), *cert. denied*, 398 U.S. 956 (1970).

[80] Gonzalez v. Mailliard, No. 50424 at 1 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974).

[81] E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970). The specific language of the challenged Texas statute defined a delinquent child as one who "habitually so deports himself as to injure or endanger the morals or health of himself or others." *Id.* at 226.

[82] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[83] *See* note 36 *supra* and corresponding text.

first amendment protections of expression[84] is no longer true. The doctrine is now clearly applicable to prohibitions against conduct such as that proscribed by the unruly section.

The absurdity of the use of vague terms such as "morals" is apparent from a closer consideration of Section (E) which prohibits associating with "vagrant, vicious, criminal, notorious, or immoral persons."[85] Does this section imply that a child can be adjudicated unruly for associating with his mother who may be a prostitute or for associating with his mother's friends or business associates?[86] The same question arises from the use of the terms "vicious," "criminal" and "notorious." Can a child be charged with "unruliness" for associating with his father who may be a wanted felon or a notorious racketeer or for associating with his father's friends or business associates? These questions suggest only some degree of the bewilderment experienced by those who must determine the meaning of statutes such as these. One commentator has described them as being "without definable limits understandable to a child, attorney or judge."[87]

2. *Insufficient Guidelines*

Due process also requires that statutes must provide adequate guidelines to prevent arbitrary enforcement and to guide courts in trying those who stand accused under the statutes.[88] This principle was recently reaffirmed by the Supreme Court in *Papachristou v. Jacksonville*,[89] wherein a vagrancy ordinance was held unconstitutional because it encouraged arbitrary and erratic arrests and convictions.[90]

The essence of a constitutional attack under the inadequate guidelines concept is that the excessive discretionary power granted to courts by broad juvenile laws is an unlawful delegation of legislative authority in violation of the separation of powers principle.[91] Broad delegations of discretionary power to nonjudicial agencies are generally approved by leading authorities in administrative law,[92] and the Supreme Court has

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[84] E.S.G. v. State, 447 S.W.2d at 225 n.1 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970).

[85] OHIO REV. CODE ANN. § 2151.022(E) (Page Supp. 1974); see note 8 *supra*, for full text of the statute.

[86] *See* Comment, *Delinquent Child: A Legal Term Without Meaning*, 21 BAYLOR L. REV. 352 (1969).

[87] Willey, *supra* note 1, at 165.

[88] Musser v. Utah, 333 U.S. 95, 97 (1948).

[89] 405 U.S. 156 (1972).

[90] *Id.* at 162. *See* Grayned v. Rockford, 408 U.S. 104 (1972):

> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09 (footnotes omitted). *See also* Giaccio v. Pennsylvania, 383 U.S. 399, 402-03 (1966).

[91] *See* OHIO CONST. art. 2, § 1. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 2.01-.10 (3rd ed. 1972).

[92] K. Davis, *supra* note 91, at § 2.05.

sustained such delegations to federal rule-making agencies even though meaningful standards were not spelled out in the statutes.[93] A compelling need for delegated power without limitation may be shown where the subject requiring regulation presents issues of such complexity as to be beyond the expertise of most legislators.[94]

The defense of broad discretion in juvenile courts rests on a variation of the rehabilitative rationale involving concepts similar to those advanced under administrative law principles. Since early intervention into the lives of misbehaving children is seen by proponents of broad statutes as necessary to prevent future criminal activity,[95] only unrestricted judicial discretion is believed to provide the flexibility thought necessary to effectuate the court's involvement in an unpredictable variety of youthful misconduct.[96] Thus, if statutes are too narrowly defined the child's conduct might not subject him to the court's benevolent jurisdiction. It is thought necessary, then, to draft juvenile legislation that gives courts administrative discretion to apply whatever definition to delinquency they choose.[97]

The sanctioning of broad discretion in juvenile court judges under administrative law principles, however, fails in analogy upon consideration of important distinctions in the nature and operation of juvenile law. First, the very fact of the juvenile court's jurisdiction over noncriminal behavior of children is strongly challenged on the grounds of misuse of the jurisdiction to appease angry parents and the lack of rehabilitative success.[98] The chance of providing meaningful assistance to a few troubled children is seriously outweighed by the harm done to many children by the juvenile court experience itself.[99] Therefore, the need for this type of legislation is not as compelling as that delegating authority to regulatory agencies.

Secondly, legislators are probably as competent as juvenile court judges to determine precisely what specific types of behavior should come within the court's jurisdiction. Although legislators are not trained child psychologists, neither are most juvenile court judges. Furthermore, as noted previously, even sociologists and psychologists have not been able to determine the precise causes of delinquency or the means to prevent it.

Thirdly, the approval of broad administrative delegations is not without strong emphasis on the need for accompanying safeguards to prevent arbitrary action and abuse of discretion, the protection coming not from legislative standards but from procedural safeguards.[100] Juve-

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[93] K. DAVIS, DISCRETIONARY JUSTICE 44-45 (1969).

[94] *Id.* at 38-39.

[95] TASK FORCE REPORT, *supra* note 4, at 22-23.

[96] McNulty, *supra* note 39, at 230-31.

[97] *Id.*

[98] Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1394 (1974).

[99] *Id.* at 1407. *See* TASK FORCE REPORT, *supra* note 4, at 27.

[100] K. DAVIS, *supra* note 91, at § 2.03.

nile court proceedings, however, lack many fundamental procedural due process protections. In Ohio, a child may be adjudicated unruly based on mere clear and convincing evidence.[101] Juveniles are not entitled to trial by jury,[102] and it is reportedly common practice for juvenile court judges to have access to prejudicial hearsay evidence in the form of probation reports and social histories at the adjudication hearing.[103] The important safeguards, therefore, that should accompany broad delegations of administrative authority are not available in most juvenile courts at the present stage of juvenile law development.

In the absence of procedural formality the unbridled discretion permitted by omnibus statutory language, no matter how benevolently motivated, tends to result in arbitrariness.[104] The situation presents the danger of judicial overreach through imposition of the judge's own code of youthful conduct.[105] The power of a prosecutor or judge to put whatever meaning he chooses into terms like "lawful order," "dangerous," "injurious," "morals," or "immoral" and to enforce such determinations against unsuspecting citizens is an arbitrary power that is inconsistent with sound government.[106]

The grant of discretionary power under the lawful order and the unruly sections goes far beyond the broadest recommendations in the field of administrative law. The vague language of these statutes invites arbitrary application and fails to provide fair warning to those subject to the statutes' penalties. There is no reasonable justification for not extending to children the same fundamental fairness to which adults facing criminal charges are entitled under the vagueness doctrine.

B. *Overbreadth*

The first amendment rights of free speech and association are applicable to young people as well as adults.[107] The lawful order section and certain clauses of the unruly section are unconstitutionally overbroad because they fail to specify the nature of the proscribed conduct and thus may be employed to punish constitutionally protected behavior.[108] These sections may be construed to encompass a variety of acts, associations, and expressions that fall within the ambit of first amendment protection. Protective statutes prohibiting immoral and endangering conduct[109] can

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[101] OHIO R. JUV. P. 29(E)(4).

[102] OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1974).

[103] Comment, *Juvenile Delinquency Proceedings in Ohio: Due Process and the Hearsay Dilemma*, 24 CLEVE. ST. L. REV. 356, 362-64 (1975).

[104] *In re* Gault, 387 U.S. 1, 18-19 (1967).

[105] TASK FORCE REPORT, *supra* note 4, at 25; *see* E.S.G. v. State, 447 S.W.2d 225, 231-32 (Tex. Civ. App. 1969) (dissenting opinion), *cert. denied*, 398 U.S. 956 (1970).

[106] *Cf.* K. DAVIS, *supra* note 93, at 78 (criticizing certain regulations issued by public housing agencies restricting tenancy to "desirable" tenants in vague terms).

[107] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[108] *See* Grayned v. Rockford, 408 U.S. 104, 109 (1972); Stiller & Elder, *supra* note 7, at 51-53.

[109] OHIO REV. CODE ANN. § 2151.022(C), (E), (F) (Page Supp. 1974), see note 6 *supra*, for full text of the statute.

be used as a means of enforcing conformity[110] and suppressing youthful involvement in various forms of political and social protest.

The state may have a legitimate interest in preventing certain forms of conduct such as truancy and the excessive use of alcohol or drugs which, although not proscribed for adults, might be detrimental to the welfare of children.[111] The Supreme Court has said, however, that the state may not attempt to achieve legitimate ends through the enactment of unnecessarily broad statutes which invade the area of protected freedoms.[112] Where less drastic means will achieve the same purpose the state may not ignore the demands of personal liberty.[113] Recent legislation in Texas and Illinois demonstrates that juvenile statutes can be drawn more narrowly and with greater specificity. Juvenile court jurisdiction over noncriminal behavior is narrowly confined in Texas to truants and permanent runaways[114] and in Illinois it is limited to truants, drug addicts, and children beyond the control of their parents.[115]

We may not want to abandon all hopes for eventual accomplishment of some of the rehabilitative goals of the juvenile court,[116] but potential achievements do not justify abandonment of fundamental fairness.[117] Although we might applaud workable programs of treatment and crime prevention, the rule of law, as possibly the greatest achievement of Western political experience, cannot be ignored.[118]

III. Procedural Due Process

Adjudications under Ohio's unruly and lawful order sections may be constitutionally deficient under a variety of circumstances involving the denial of full delinquent procedural due process protections. Four basic problems arise. First, children adjudicated unruly based on any type of underlying act, noncriminal or criminal, may be subjected to the same treatment as delinquents who have committed criminal acts without the same due process protections. Second, there is the potential to circumvent the due process rights guaranteed to juveniles charged with violating criminal laws by finding them unruly for such behavior. Third, children adjudicated unruly on the basis of noncriminal conduct can be institutionally commingled with criminally delinquent children. Fourth, the charge of unruliness may be escalated to delinquency on the basis of a mere noncriminal probation violation.

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[110] Task Force Report, *supra* note 4, at 25.

[111] Stiller & Elder, *supra* note 7, at 52.

[112] *See* NAACP v. Alabama, 377 U.S. 288, 307 (1964).

[113] *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[114] Tex. Fam. Code Ann. § 51.03 (1975). See note 183 *infra*, for full text of the statute.

[115] Ill. Ann. Stat. ch. 37, §§ 702-2, -3 (Smith-Hurd 1972). See note 182 *infra*, for full text of the statute.

[116] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

[117] For a discussion of the void-for-vagueness argument in the analytical framework of *McKeiver v. Pennsylvania*, *id.*, see Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 Yale L.J. 745, 758-71 (1973).

[118] Ketcham, *supra* note 31, at 58.

A. *Potential for Subjection of Unruly Child to Same Treatment as Delinquent Child*

The decisions in *Gault* and *Winship* involved delinquency adjudications where the child was charged with committing a criminal act and faced possible incarceration in a state institution.[119] These holdings, however, should also apply to adjudications of unruliness because the unruly child and the delinquent child are equally victimized by the informal process in the juvenile court and also face similar treatment under Ohio law.

1. *Informal Process*

The "benevolent social theory"[120] of juvenile law rests on the premise that since children are to receive care and protection from the juvenile court, procedural due process protections available to adults in criminal trials are not needed nor are they appropriate in juvenile court proceedings.[121] Advocates of informality have argued that the procedures of the adversary system would interfere with the primary task of the juvenile court — rehabilitation.[122]

The validity of the informality rationale can be challenged on several grounds. Not only has the juvenile court process not proved to be rehabilitative in most cases,[123] but in recent years there also has been evidence that the lack of procedural formality may actually impair rehabilitative efforts.[124] The decision in *Gault* was based partly on recognition of the possible adverse effects of a court procedure totally lacking in procedural due process protections upon the child's receptiveness to treat-

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[119] *In re* Winship, 397 U.S. 358, 359 n.1 (1970); *In re* Gault, 387 U.S. 1, 13 (1967).

[120] *See* R.L.R. v. State, 487 P.2d 27 (Alas. 1971) (rejected rehabilitative "benevolent social theory" as justification for denying due process protections in juvenile courts).

[121] Paulsen, *Constitutional Domestication of the Juvenile Courts*, 1967 SUP. CT. REV. 233.

[122] *See* TASK FORCE REPORT, *supra* note 4, at 28; Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 171; M. PAULSEN & C. WHITEBREAD, *supra* note 3, at 2-3 (1974).

[123] Kent v. United States, 383 U.S. 541 (1966):

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

Id. at 556.

See In re Gault, 387 U.S. 1 (1967) wherein the Supreme Court reasserted its refutation of the rehabilitative rationale:

> The constitutional and theoretical basis for this peculiar system is — to say the least — debatable. And, in practice, as we remarked in the *Kent* case, *supra*, the results have not been entirely satisfactory.

Id. at 17-18 (footnote omitted).

[124] TASK FORCE REPORT, *supra* note 4, at 31:

> [T]here has been increasing feeling on the part of sociologists and social welfare people that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent. The feeling is based in part upon the often observed sense of injustice engendered in the child by seemingly all-powerful and challengeless exercise of authority by judges and probation officers, based, in the child's eyes, on inconsistency, hypocrisy, favoritism, and whimsy.

See generally Lipsit, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 B.U.L. REV. 62, 65 (1969); TASK FORCE REPORT, *supra* note 4, at 421.

ment.[125] Also, in the *Winship* case the Supreme Court specifically rejected the argument that formality would destroy any beneficial aspects of the juvenile court system by noting that use of the reasonable doubt standard would not affect a state's policies regarding the criminal and civil effect of delinquency adjudications nor would it affect confidentiality, informality, flexibility, or speed of factfinding hearings. Similarily, procedures distinctive to pre-adjudicatory and dispositional phases of the juvenile process would remain unimpaired.[126]

These same points, then, can be used to extend the full panoply of due process protections afforded in delinquency adjudications to unruly adjudications. The lack of rehabilitative success applies equally to children brought within the juvenile court's jurisdiction for noncriminal behavior.[127] The informal process undoubtedly is as detrimental to rehabilitative efforts directed to the unruly child as to the delinquent child. This may be especially true in unruly adjudications under Ohio law where, because of the clear and convincing standard,[128] there is a greater likelihood of error in determining whether or not the child has misbehaved at all. We can hardly rehabilitate a child who does not need treatment.[129] Furthermore, any distinctive individualized treatment courts wish to afford noncriminal unruly children will not be affected by the requirement of fundamental fairness in trial procedures. The courts can still differentiate between noncriminal unruly and criminally delinquent children in post adjudicatory dispositions and rehabilitative care programs.

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[125] *In re* Gault, 387 U.S. 1, 25-26 (1967). For an analysis of the rejection in *Gault* of the informality doctrine, see Paulsen, *The Constitutional Domestication of the Juvenile Courts*, 1967 SUP. CT. REV. 233.

[126] *In re* Winship, 397 U.S. 358, 366-67 (1970). The Supreme Court also rejected the formality doctrine in *Gault*:

> While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.

In re Gault, 387 U.S. 1, 27 (1967).

[127] Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1397-402 (1974).

[128] OHIO R. JUV. P. 29(E)(4).

[129] The TASK FORCE REPORT vividly stresses that efforts to treat must be based on accurate determinations of facts citing an account of an erroneous commitment of a "sexual psychopath" in a California case:

> Thus, the mistake as to the facts not only resulted in an improper conviction but rendered invalid the psychiatric judgment of the defendant's personality and propensities. However advanced our techniques for determining what an individual is, we have not yet approached the point at which we can safely ignore what he has done. What he has done may often be the most revealing evidence of what he is.

TASK FORCE REPORT, *supra* note 4, at 30 quoting from F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 19 (1964).

2. *Similar Treatment — Commitment and Stigma*

The Supreme Court extended certain due process protections to delinquents based on the similarities between delinquency proceedings and adult criminal trials. The Court found that where there is the possibility of confinement and where a stigma is attached to the adjudication, certain due process rights must be observed.[130] This reasoning should also be used to extend these due process safeguards to children charged with unruliness.

While the creation of classifications such as Ohio's unruly category might have been motivated by a desire to avoid the stigma of delinquency for children brought before the court for noncriminal misconduct there are indications that a stigma also attaches to this new label.[131] This stigma "is probably unavoidable as long as any sort of official action is taken. And action by a court — however benign — is likely to be the most severely and permanently labeling of all."[132]

The child is, first of all, stigmatized in his own eyes. The delinquent or unruly label tends to reinforce the particular misconduct because the child begins to perceive himself as delinquent or unruly and organizes his behavior accordingly.[133] The distinction in reprehensibility intended between the two classifications means little to the unruly child for he still perceives himself as having been accused of doing something bad.[134]

The labeling process also incurs negative reactions from community members, teachers, and friends toward children who have had juvenile court contact.[135] There is evidence that known records of arrest hurt employment chances.[136] This disadvantage extends equally to the un-

[130] *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may *lose his liberty* upon conviction and because of the certainty that he should be *stigmatized* by the conviction.

In re Winship, 397 U.S. 358, 363 (1970).

> [A] proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.

Id. at 366.

See Dorsen & Reznick, *In re Gault and the Future of Juvenile Law*, 1 FAM. L. Q. 1 (1967); Stiller & Elder, *supra* note 7; Willey, *Ohio's Post-Gault Juvenile Court Law*, 3 AKRON L. REV. 152 (1970). For a recent reaffirmance by the Supreme Court that the key factors in *Gault* and *Winship* were loss of liberty and attachment of stigma, *see* Breed v. Jones, 421 U.S. 519 (1975).

[131] TASK FORCE REPORT, *supra* note 4, at 26.

[132] *Id.*

[133] TASK FORCE REPORT, *supra* note 4, at 417; THE CHALLENGE, *supra* note 42, at 80. *See* Gold & Williams, *National Study of the Aftermath of Apprehension*, 3 PROSPECTUS 3 (1969); Grygier, *The Concept of "the State of Delinquency" — An Obituary*, 18 J. LEGAL ED. 131, 138 (1965); Lipsett, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 B.U.L. REV. 62 (1969).

[134] Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974).

[135] Mahoney, *The Effect of Labeling upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 LAW & SOC'Y REV. 583 (1974).

[136] *Id.* The easy access to juvenile court records is well documented. *See In re* Gault, 387 U.S. 1, 24-25 (1967); Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1401-02 n.116 (1974); Comment, *Delinquent Child: A Legal Term without Meaning*, 21 BAYLOR L. REV. 352, 356-57 (1969); TASK FORCE REPORT, *supra* note 4, at 91-93.

ruly child since the public makes little distinction between the delinquent child who has committed a criminal act and the unruly child who has been truant or disobedient — any child who has been subjected to juvenile court intervention is considered to be "delinquent."[137]

The similarity in the stigma attaching to noncriminal and criminal delinquent adjudications was recognized by the federal district court in *Gonzalez v. Maillard.*[138] The Ohio juvenile code also impliedly recognizes that a stigma does attach to adjudications of unruliness for it includes a provision for the expungement of such records.[139] It would appear, then, that the new noncriminal labels used in the juvenile courts are merely substitutions for the term delinquency.[140]

The potential for loss of liberty through incarceration in an institution is the same for unruly children and those violating lawful court orders as it is for children adjudicated delinquent for criminal acts. The Ohio code permits direct commitments to the Ohio Youth Commission for either category.[141] It can be argued, therefore, that since unruly children face the same potential for incarceration and an equally stigmatizing label as do delinquents, they are entitled to full delinquent due process rights during the unruly proceeding, including application of the evidentiary standard of proof beyond a reasonable doubt. Any commitment of an unruly child to the Ohio Youth Commission following a proceeding where due process protections were not fully applied would be unconstitutional.[142]

Unconstitutionality can also be found when a delinquency adjudication is based upon the violation of a lawful court order issued pursuant to an unruly adjudication which lacked full delinquency due process protections. In such a case the child is subjected to the identical potential for incarceration and the identical stigma as the criminally delinquent child.[143]

Furthermore, even where the disposition of an unruly child is commitment to a county home rather than a state institution it can be argued

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[137] Orlando & Black, *Classification in Juvenile Court: The Delinquent Child and the Child in Need of Supervision*, 25 JUV. JUST. 13, 20 (1974).

[138] No. 50424 at 8-9 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974).

> [I]t is dubious whether a criminal charge of public drunkenness or possession of marijuana carries more stigma than a finding of "idle, dissolute, lewd or immoral" behavior.

Note, *Juvenile Court Jurisdiction over "Immoral" Youth in California*, 24 STAN. L. REV. 568, 572 (1972).

[139] OHIO REV. CODE ANN. § 2151.358 (Page Supp. 1974).

[140] *See In re* Gault, 387 U.S. 1, 24 n.31 (1967). In E.J. v. State, 471 P.2d 367 (Alas. 1970), the court indicated that an order finding a child in need of supervision carries with it a moral stigma and legal disadvantages.

[141] OHIO REV. CODE ANN. §§ 2151.354-.355 (Page Supp. 1974).

[142] Direct commitments of unruly children to the Ohio Youth Commission are unconstitutional when full delinquent due process protections are not extended to the unruly proceeding. 1972 OP. ATT'Y GEN. OF OHIO 72-071.

[143] *But see In re* Walker, 282 N.C. 28, 191 S.E.2d 702 (1972) (no right to counsel at "undisciplined child" hearing which could not result in commitment to institution in which freedom is curtailed even though child faces delinquency finding and incarceration for violating probation).

that the unruly child is still entitled to the same due process protections as the delinquent child.[144] The commitment, although to a different type of institution, involves the same loss of liberty. The Supreme Court has recognized the lack of distinction between the two:

> A boy is charged with *misconduct*. A boy is *committed* to an *institution* where he may be *restrained of liberty* for years. 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* in which the child is incarcerated for a greater or lesser time.[145]

The Ohio Supreme Court has also acknowledged that the emphasis of the *Gault* case was commitment and stigma and has drawn an analogy from the juvenile cases to the civil commitment area. In the case of *In Re Fisher*[146] the Ohio court held that in an involuntary civil commitment proceeding due process requires that individuals alleged to require commitment be advised of their right to be represented by retained or appointed counsel. Noting that the key factor in *Gault* for extending due process to delinquents was the "awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21,"[147] the court rejected the notion of any purported distinction between juvenile delinquency proceedings leading to incarceration and involuntary civil commitments.[148] The stigma accompanying commitment to mental institutions was also acknowledged as a determining factor for extension of due process rights.[149] But, it is the Ohio court's recognition of the unfairness of extending fewer due process protections to noncriminal civil commitments than is provided under Ohio law to persons convicted of crimes and referred for psychiatric examination that is particularly appropriate for analogizing to the unruly-delinquent comparison in juvenile law:

> It seems incongruous to protect the constitutional rights of those convicted of crimes and subsequently confined to a mental institution and not provide the same or more extensive protection to noncriminals.[150]

[144] *But see In re* Carter, 20 Md. App. 633, 318 A.2d 269 (1974) (*Gault* not applicable to unruly proceeding, therefore, privilege against self incrimination and Miranda warnings not applicable); *In re* Henderson, 199 N.W.2d 111 (Iowa 1972) (standard of proof beyond a reasonable doubt and privilege against self-incrimination not required where basis of delinquency proceeding was that child was uncontrolled and not that he had committed a public offense); Warner v. State, 254 Ind. 209, 258 N.E.2d 860 (1970) (standard of proof beyond a reasonable doubt adopted only with respect to those cases where the offense, but for the age of the offender, would constitute a crime).

[145] *In re* Gault, 387 U.S. 1, 27 (1967) (emphasis added).

[146] 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974).

[147] *Id.* at 76, 313 N.E.2d at 855, *citing In re* Gault, 387 U.S. 1, 36 (1967).

[148] *Id.*

[149] *Id.*

[150] *Id.* at 81, 313 N.E.2d at 859.

Surely, it is just as incongruous to protect the constitutional rights of juveniles adjudicated delinquent for commission of criminal acts and not provide the same protection to children incarcerated for entirely noncriminal misconduct.

B. *Circumvention of Kent, Gault, and Winship Due Process Protections*

Adjudications under the lawful order and unruly sections can be constitutionally challenged when the facts indicate a possible circumvention of the due process requirements of *Kent*, *Gault*, and *Winship*. An example of such circumvention would be where the authorities wish to charge a child believed to have committed a criminal act with delinquency but are unable to meet the rigorous standard of proof beyond a reasonable doubt required in delinquency proceedings.[151] The lawful order section enables the state to achieve its objective after only a brief delay.

The child can be adjudicated unruly based on the same criminal act or on some noncriminal misconduct.[152] It is a fairly simple matter to find some basis for an adjudication of unruliness under the overbroad and vague unruly section.[153] What child has not skipped school, disobeyed a parent, violated a curfew, or associated with companions thought to be unsavory by his parents or the court? Moreover, the unruly adjudication can be proved by mere clear and convincing evidence whether it be based on a criminal or noncriminal act.[154] With relative ease, then, a child can be adjudicated unruly, thereby providing the court with jurisdiction to issue some "lawful order" regarding his future conduct. In view of the vagueness of the lawful order section and its potential for arbitrary rulings, the

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[151] *In re* Winship, 397 U.S. 358 (1970); OHIO R. JUV. P. 29(E)(4).

[152] This type of abuse of New York's unruly statute was noted in Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974), in a report by the authors of an interview with a juvenile court judge:

> In one typical case a boy's mother filed a petition against him. The boy, it turned out, was an addict and the court mentioned the need for careful handling of this drug "pusher". Under questioning, the judge informed the authors that she was convinced that the child had violated penal statutes for selling heroin, "but if we have to prove this, it requires exact evidence that on such and such a date, at 6:02 p.m., he did such and such," a proof burden easily avoided under ungovernability jurisdiction.

Id. at 1394 n.81.

This type of abuse of the California "immoral conduct" statute which was challenged in *Gonzalez v. Mailliard* was discussed in Note, *Juvenile Court Jurisdiction over "Immoral" Youth in California*, 24 STAN. L. REV. 568, 579 (1972). In fact, the juveniles charged under the "immoral conduct" statute in *Gonzalez* were suspected of robbery and assault.

[153] The invalidation of the California statute in *Gonzalez v. Mailliard* for vagueness was based partly on the potential for total subversion of the *Winship* beyond a reasonable doubt standard. Even if the proof beyond a reasonable doubt standard were applied to § 601, the state would still have an effective route around the requirements of *Winship* because § 601 defines the substance of the offense so broadly that the procedural safeguard of proof beyond a reasonable doubt becomes meaningless.

> 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.

Gonzalez v. Mailliard, No. 50424 at 12 (N.D. Cal., Feb. 9, 1971), *vacated on jurisdictional grounds*, 94 S. Ct. 1915 (1974).

[154] OHIO R. JUV. P. 29(E)(4).

lawful order might be anything within a wide range of admonitions. The order might be as innocuous as "obey your parents" or "don't miss school again." If the child subsequently violates the order the court can then find him to be delinquent under the lawful order section and commit him to the Ohio Youth Commission for incarceration in a state institution.

Thus the state has succeeded in achieving an adjudication of delinquency based on a criminal act without ever having proved that the child committed the crime by the standard of proof required in delinquency proceedings — proof beyond a reasonable doubt. Therefore, even in cases based on underlying criminal acts — the situation which *Kent*, *Gault*, and *Winship* specifically addressed — the state by this circumvention can totally subvert the due process mandates of the Supreme Court. The obvious unconstitutionality of such a gross denial of fundamental fairness prompted California appellate courts to extend various procedural due process protections to proceedings under that state's noncriminal juvenile statute in cases where the complaint alleges an underlying felony.[155] These holdings should be extended in California and followed in other states, including Ohio, in all unruly proceedings where the charge is based on an underlying criminal act regardless of degree.

C. *Commingled Institutionalization*

Even if the same due process protections available to delinquents are applied to noncriminal adjudications under the unruly section, incarceration of unruly children, directly or via the lawful order section, is unconstitutional where it results in their commingling with delinquents who have committed criminal acts. Such commingling is contradictory to the rehabilitative purpose of the juvenile law and, as such, violates the juvenile's constitutional right to treatment.[156]

A thorough analysis of the current status of the right to treatment in constitutional law is beyond the scope of this paper,[157] but brief mention can be made of the theoretical framework that can be used to establish the existence of such a right. The rehabilitative rationale which historically has provided the underlying justification for juvenile court noncriminal jurisdiction implicitly reflects the existence of a constitutional

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[155] *In re* H., 5 Cal. App. 3d 781, 85 Cal. Rptr. 359 (Ct. App. 1970) (privilege against self-incrimination applied to proceeding which declares child a ward upon finding that he is in danger of leading an idle, dissolute, lewd or immoral life where petition alleges a felony, *i.e.*, assault with a deadly weapon and manslaughter); *In re* R., 274 Cal. App. 2d 749, 79 Cal. Rptr. 247 (Ct. App. 1969) (where proof of allegation that minor was in danger of leading dissolute life rested solely upon minor's extrajudicial admissions that he had sold marijuana, minor had right to insist that proof of such allegation be under same standards as if petition had been brought under statute giving juvenile court jurisdiction over minors who violate the law); *In re* Rambeau, 266 Cal. App. 2d 1, 72 Cal. Rptr. 171 (Ct. App. 1963) (privilege against self-incrimination applies to proceeding which declares child a ward upon finding that he is in danger of leading a dissolute life where petition alleges a felony, *i.e.*, purchased, possessed, and smoked marijuana).

[156] *See* Gough, *supra* note 46, at 191.

[157] For a discussion of the development of the concept of a right to treatment and its application to noncriminal juveniles see Note, *Persons in Need of Supervision: Is There a Constitutional Right to Treatment*, 39 BROOKLYN L. REV. 624 (1973).

right to treatment for juvenile's subject to that jurisdiction. If the promise of individualized treatment is the only justification for allowing the state to intervene into the lives of children who have done no worse than commit some noncriminal form of youthful misconduct such as running away, it can be argued that children incarcerated for such conduct are entitled to that rehabilitative care. The treatment objective is specifically affirmed by the Ohio juvenile code as being one of the major purposes to be fulfilled through the juvenile court's jurisdiction.[158]

The civil commitment cases also support the theory that juveniles incarcerated for noncriminal conduct are entitled to more than mere custodial care and have a right to some form of positive treatment,[159] particularly in view of the similarity of the consequences of both procedures such as loss of liberty and stigmatization. It would seem that any right to treatment extended to adults involuntarily committed for mental illness is also, under the Supreme Court's "fundamental fairness" test, a right of juveniles committed for noncriminal conduct.

Commingling destroys the possibility of rehabilitation in several ways. As discussed earlier, individualized treatment has not been provided by the juvenile courts, and there is evidence that institutionalization has little effect in reducing crime.[160] Indeed, it may actually cause

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[158] OHIO REV. CODE ANN. § 2151.01(A) (Page Supp. 1974). This section indicates that one of the purposes of the new juvenile code is:

> (A) to provide for the care, protection, and mental and physical development of children subject to (the juvenile code).

[159] *See* O'Connor v. Donaldson, 422 U.S. 563 (1975). In the *Donaldson* case the Supreme Court held that the state may not confine a nondangerous "mentally ill" person in an institution without providing him with some positive form of treatment. The holding, however, was narrowly confined to the facts of the case and does not establish a right to treatment for all patients who are confined by the state for mental illness. It is limited to those patients who present no danger to themselves or others and are capable of surviving in freedom by themselves or with the help of family members or friends. *Id.* at 576. An analogy can be drawn to juvenile law and it can be argued that the child adjudicated unruly for purely noncriminal conduct such as running away, should not be confined in an institution without some positive form of treatment where it is established that he presents no danger to others or himself. If he is capable of surviving safely on his own or with the help of family members, friends, or social service agency assistance the state should not be permitted to confine him without providing him with meaningful rehabilitative treatment.

Other courts have drawn a "right to treatment" analogy from civil commitment cases to juvenile cases, *see, e.g.*, Morales v. Turman, 383 F. Supp. 53, 71 (E.D.Tex. 1974) (the court closed two juvenile institutions for failing to provide adequate care and treatment); Martarella v. Kelley, 349 F. Supp. 575, 598-99 (S.D.N.Y. 1972) (which held that the eighth amendment's prohibition against cruel and unusual punishment was violated with respect to PINS who were not temporary detainees and who were held in New York detention centers without adequate treatment:

> [t]here can be no doubt that the right to treatment, generally, for those held in noncriminal custody . . . has by now been recognized by the Supreme Court, the lower federal courts and the courts of New York.

Id. at 599.

The Ohio Supreme Court has drawn the analogy in reverse, from the juvenile cases (*Gault*) to the civil commitment area to support the argument for a right to counsel for persons subject to involuntary commitments. *In re* Fisher, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974).

[160] Clarke, *Getting 'Em Out of Circulation: Does Incarceration of Juvenile Offenders Reduce Crime?*, 65 J. CRIM. L. & C. 528 (1974).

more harm than good.[161] There is further evidence that institutionalization may be particularly inappropriate for the noncriminal juvenile because it removes him from his family, which is where the problem must be solved.[162] Further, commingled incarceration subverts rehabilitative goals by exposing the noncriminal juvenile to the negative influences of a criminally oriented subculture.[163] It would appear, therefore, that the noncriminal juvenile's right to appropriate and individual treatment is violated by incarceration in an institution which also houses delinquents who have committed crimes.

Some states have restricted institutionalization to those juveniles who commit criminal acts.[164] Others, such as New York, provide separate institutions. In New York it was held that confinement of an unruly child in a state training school with criminal juveniles did not qualify as supervision and treatment as defined by state law because of the dangers of commingling.[165] Regardless of the current status of a

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[161] In Gesicki v. Oswald, 336 F. Supp. 371 (1971), *aff'd mem.*, 406 U.S. 913 (1972), the court quoted a statement made by the Director of the New York State 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.

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

[162] Additionally, institutionalization of a beyond-control child is likely to be inherently self-defeating because it removes the focus from the family where the problem is based and where it must ultimately be resolved.

Gough, *supra* note 46, at 191.

See *id.*, at 191-92, for a discussion of the results of studies showing the failure of incarceration of PINS in terms of high rates of recidivism. For a duscussion of the inappropriateness of institutionalizing "runaways" see Note, *Runaways: A Non-Judicial Approach*, 49 N.Y.U. L. Rev. 110 (1974). The runaway doesn't view himself as breaking the law:

> [H]e simply views his home situation as intolerable and decides to escape. Yet, as a result of his impulsive course of conduct, he may acquire a juvenile record. Although his parents certainly share responsibility for the family breakdown, the law places the burden on the youth — the least mature party who may now become stigmatized as a delinquent or a PINS.

Id. at 117-18.

[163] [A]nd to commingle youth who are in rebellion against authority, but have manifested no conduct overtly violative of criminal law, with youths who have been adjudicated delinquents simply affords maximum opportunity for tutelage of the former by the latter.

Gough, *supra* note 46, at 191.

> [T]he very fact of incarceration, which by necessarily posing a series of problems of personal deprivation for inmates, generates a more or less antithetical subculture which negates and subverts formal programs of rehabilitation. The logistics of processing delinquents or criminal populations brings large numbers of recidivists to the institutions, where they control informal communication and face-to-face interaction which importantly shapes the course of inmate socialization.

Task Force Report, *supra* note 4, at 96.

[164] Tex. Fam. Code Ann. §§ 51.03(b), 54.04(g) (1975). See note 183 *infra* for text of statute § 51.03. Section 54.04(g) prohibits commitment to the Texas Youth Council for conduct defined in §§ 51.03(b)(2)-(4). The Supreme Court of Alaska through narrow statutory interpretation has held that noncriminal children in need of supervision may not be institutionalized. *In re* E.M.D., 490 P.2d 658, 659-60 (Alas. 1971).

[165] *In re* Ellery C., 32 N.Y.2d 588, 591, 300 N.E.2d 424, 425, 347 N.Y.S.2d 51, 53 (1973), *quoting In re* Ellery C., 40 A.D.2d 862, 864, 337 N.Y.S.2d 936, 940 (1972).

constitutional right to treatment for juveniles under Ohio law or federal constitutional principles, it would appear that at the very least the noncriminal child is constitutionally entitled to be protected from the dangers and abuses of commingled institutionalization.

D. *Escalation of Crime and Punishment*

Adjudications of delinquency based on noncriminal violations of lawful court orders made pursuant to prior noncriminal unruly adjudications violate the due process clause because such adjudications are in effect escalations of crime and punishment on the basis of mere noncriminal probation violations. Assuming that direct commitments to the Ohio Youth Commission from unruly adjudications are unconstitutional,[166] the only proper dispositions of unruly children would be probation or placement in a county home, foster home, or some other noninstitutionalized treatment facility.[167] A later commitment to a state institution pursuant to the lawful order section involves an increase in punishment and the attachment of the criminal delinquency label.

A parole or probation revocation in the adult criminal system puts into effect the original sentence based on the original charge. If the charge was a misdemeanor, the offense cannot be escalated to a felony on the basis of a noncriminal probation violation. The only way the accused can face a more serious charge is if he commits a more serious offense. He then could face a sentence on the felony charge in addition to possible execution of the original misdemeanor sentence.

In the juvenile process under Ohio law, however, a child can face a more serious charge without having committed a more serious offense. The unruly child can be placed on probation or made subject to a lawful order of the court by placement in a home or treatment facility whereby it is implied from such placement that he remain at the facility. Upon violation of the order by some noncriminal act such as disobeying parents, violating a curfew, or leaving the placement facility, the child can be charged with delinquency and incarcerated in the state institution.

If the procedure permitted by the lawful order section were allowed to prevail in the adult criminal system it would occur as follows. A person would be placed on probation for commission of a misdemeanor such as public intoxication. Various rules and regulations of probation would be imposed such as "stop drinking." Upon violation of one of the rules by continued drinking or intoxication the misdemeanor could then be escalated to a felony, the probation revoked, and the individual sent to the Ohio Penitentiary!

Such procedure in an adult court would involve a gross denial of due process rights. An escalation in crime and punishment on the basis of a probation violation involving the same or lesser degree of misconduct as that involved in the original finding is certainly a more serious denial

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[166] 1972 OP. ATT'Y GEN. OF OHIO 72-071.

[167] OHIO REV. CODE ANN. § 2151.354 (Page Supp. 1974). Dispositions permitted for delinquent children are listed in OHIO REV. CODE ANN. § 2151.355 (Page Supp. 1974).

of due process than is the revocation of parole without a full hearing held to be an essential of due process by the Supreme Court in *Morrissey v. Brewer*.[168]

Juveniles are also entitled to due process protections when faced with potential probation or parole revocation.[169] Employing the fundamental fairness test of *Gault*, the New York Court of Appeals concluded that due process requires a fair hearing with the right to counsel prior to revocation of juvenile parole.[170] The court said the proceeding

> involves a deprivation of liberty just as much as did the original criminal action and, by that token, falls within the protective ambit of due process.[171]

The Wisconsin Supreme Court has held that the procedures at a hearing involving possible revocation of a juvenile's "liberty under supervision" must be the same as those afforded adults since there is no constitutional difference between a parole of an adult and such supervised liberty of a juvenile.[172] Therefore, any escalation in crime or punishment via the lawful order section based on a noncriminal violation of an unruly child probation violates the juvenile's due process right to fundamental fairness in probation revocation proceedings.

Recent court decisions and statutory revisions in four states provide excellent support for arguments challenging the validity of noncriminal delinquency adjudications under the lawful order section. Without expressly addressing due process concepts, two state appellate decisions have held that violations of lawful orders under statutes identical to Ohio's lawful order section must be limited to acts which would be crimes if committed by adults.

In the case of *In Re Butterfield*,[173] the court granted a writ of habeas corpus to a juvenile adjudicated delinquent for violation of a lawful court order issued pursuant to California's unruly section.[174] An attempted suicide constituted the violation. The adjudication of delinquency was overturned because the child was not advised of his right to remain silent. But, in dicta, the court expressed the view that the lawful order clause of the delinquency section required a criminal act for implementation:

> The comparatively stringent wardship permissible under section 602 appears to be designed for *delinquent* youngsters. The present subject has violated no *law* and her second suicide at-

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[168] 408 U.S. 471 (1972).

[169] *See generally* 1973 WIS. L. REV. 954.

[170] People *ex rel.* Silbert v. Cohen, 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (1971).

[171] *Id.* at 14, 271 N.E.2d at 910, 323 N.Y.S.2d at 423.

[172] Bernal v. Hershman, 54 Wis. 2d 626, 196 N.W.2d 721 (1972). *See* Gunsolus v. Gagnon, 454 F.2d 416 (7th Cir. 1971).

[173] 252 Cal. App. 2d 977, 61 Cal. Rptr. 874 (1967).

[174] See note 65 *supra*, for text of the statute which is equivalent to Ohio's unruly statute.

tempt, like the first, is the apparent product of psychic imbalance rather than delinquency.[175]

In *People v. E.R.*,[176] the precise question at issue was whether or not a violation of probation in a Colorado unruly adjudication was a violation of a lawful court order within the meaning of the delinquency statute. The child's violative behavior consisted of truancy from school and refusal to return to foster care. In holding that a noncriminal violation of an unruly probation could *not* constitute a violation of a lawful order under the delinquency statute, the Colorado appellate court reasoned that the juvenile code indicated legislative intent to segregate unruly children from criminal delinquents and to provide them with separate treatment and care. As evidence of this intent the court noted that unruly children may not be initially placed in institutions for juvenile delinquents; that the statute dealt with dispositions of unruly children separately from the dispositions of delinquents; and, that the first two categories of the legislative definition of delinquency include only acts which if committed by adults would constitute crimes.

The reasoning of the Colorado court can be applied to Ohio law. The Ohio legislature has provided that unruly children cannot be initially committed to the Ohio Youth Commission.[177] It is possible under the statute to order such commitment after a further hearing,[178] but this type of direct commitment has been ruled unconstitutional by a formal opinion of the Ohio Attorney General.[179] The dispositions for unruly and delinquent children are provided for in separate sections of the Ohio juvenile code.[180] In Ohio's definition of delinquency the first clause includes only criminal acts,[181] and therefore, violations of the second clause (the lawful order section) should also be confined to acts which, if committed by adults, would constitute crimes. Consequently, the lawful order section is superfluous because these acts can form the basis of delinquency adjudications under the first clause of the delinquency section.

A lawful order clause identical to Ohio's was revised and moved to the Illinois unruly section effective January 1, 1974.[182] Now any non-

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[175] *In re* Butterfield, 252 Cal. App. 2d 794, 800, 61 Cal. Rptr. 874, 879 (1967) (emphasis added).

[176] 29 Colo. App. 525, 487 P.2d 824 (1971).

[177] OHIO REV. CODE ANN. § 2151.354 (Page Supp. 1974).

[178] An unruly child may be placed on probation, committed to a county home, foster home, or public or private treatment facility. He cannot be committed to the Ohio Youth Commission for placement in a state institution unless:

> If after making such disposition the court finds, upon further hearing, that the child is not amenable to treatment or rehabilitation under such disposition, the court may make a disposition otherwise authorized under section 2151.355 [delinquency dispositions] of the Revised Code.

Id.

[179] 1972 OP. ATT'Y GEN. OF OHIO 72-071.

[180] OHIO REV. CODE ANN. §§ 2151.354, .355 (Page Supp. 1974).

[181] *Id.* § 2151.02(A). See note 5 *supra*, for text of the statute.

[182] ILL. ANN. STAT. ch. 37, §§ 702-2, -3 (Smith-Hurd 1972):

> § 702-2. Delinquent Minor
>
> Those who are delinquent include any minor who prior to his 17th birthday has

criminal violation of an unruly or delinquency probation in Illinois may only constitute an unruly violation. The child can be adjudicated unruly for the violation but not delinquent.

The new Texas family code contains two lawful order clauses,[183] but their use with regard to delinquency adjudications is limited to children previously adjudicated delinquent or in need of supervision based on underlying criminal acts. A child originally adjudicated in need of supervision on the basis of noncriminal conduct cannot be escalated to delinquency for a second noncriminal offense.

These cases and statutes provide strong support for a revision and limitation of Ohio's lawful order section. They indicate recognition by some courts and legislators of the constitutional infirmity in the lawful order section's application to children brought within the court's jurisdiction for purely noncriminal behavior. There is no justification for escalating the charge to a more serious offense on the basis of a second noncriminal act particularly in view of the notoriously vague and overbroad juvenile statutes which fail to provide the accused with any fair notice of the types of conduct proscribed. Neither is there any justification for failing to provide children with at least the fundamentals of fairness in proceedings which can have such an enormous impact on their lives and on their liberty.

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violated or attempted to violate, regardless of where the act occurred, any federal or state law or municipal ordinance; and (b) prior to January 1, 1974, any minor who has violated a lawful court order made under this Act.

§ 702-3. Minor Otherwise in Need of Supervision

Those otherwise in need of supervision include (a) any minor under 18 years of age who is beyond the control of his parents, guardian or other custodian; (b) any minor subject to compulsory school attendance who is habitually truant from school; and (c) any minor who is an addict, as defined in the "Drug Addiction Act"; and (d) on or after January 1, 1974, any minor who violates a lawful court order made under this Act (footnote omitted).

[183] TEX. FAM. CODE ANN. § 51.03 (1975) provides in pertinent part:

(a) Delinquent conduct is conduct, other than a traffic offense, that violates:

(1) a penal law of this state punishable by imprisonment or by confinement in jail; or

(2) a reasonable and lawful order of a juvenile court entered under Section 54.04 or 54.05 of this code; except that a violation of a reasonable and lawful order of a juvenile court entered pursuant to a determination that the child engaged in conduct indicating a need for supervision as defined in Section 51.03(b)(2) or 51.03(b)(3) of this code does not constitute delinquent conduct.

(b) Conduct indicating a need for supervision is:

(1) conduct, other than a traffic offense, that on three or more occasions violates either of the following:

(A) the penal laws of this state of the grade of misdemeanor that are punishable by fine only; or

(B) the penal ordinances of any political subdivision of this state;

(2) conduct which violates the compulsory school attendance laws;

(3) the voluntary absence of a child from his home without the consent of his parent or guardian for a substantial length of time or without intent to return; or

(4) the violation of an order of a juvenile court entered under Section 54.04 or 54.05 of this code pursuant to a determination that the child engaged in conduct which violates the compulsory school attendance laws or the voluntary absence of the child from his home without the consent of his parent or guardian for a substantial length of time or without intent to return.

IV. Equal Protection

Adjudications under the lawful order and unruly sections can also be challenged on equal protection grounds under the fourteenth amendment.[184] These challenges should be asserted in conjunction with due process attacks as they are less likely to succeed.[185] Courts are likely to uphold disparities in treatment between delinquent and unruly children if they apply the reasonableness test[186] to the statutory classification rather than the strict scrutiny standard[187] applied only to fundamental interests[188] or suspect classifications.[189]

Although a court may apply the less rigorous "reasonableness test," under which the state need only show that the classification or disparity of treatment has some reasonable relationship to a proper state objective,[190] there exists, nevertheless, a basis for attacking adjudications based on violations of court orders and unruly adjudications. The difference in treatment between these and delinquency adjudications vis-à-vis the due process protections afforded each proceeding bears no reasonable relationship to the achievement of the state's purpose to rehabilitate and treat both categories of children. Rehabilitation cannot be effective in either case when there has been an incorrect determination of fact. If the child has not misbehaved, he cannot be treated. Also, the noncriminal child faces the same type of incarceration and the same social and legal disadvantages from the stigma of the unruly label or lawful order section delinquent label as the delinquent convicted of a crime. Therefore, even under a standard of minimum rationality,[191] there appears to be no reasonable basis justifying the different quantum of proof required in unruly and delinquency adjudications.

An additional equal protection challenge against unruly adjudications is that such vague statutes are enforced discriminately on the basis of sex. Girls are punished more often than boys for offenses involving sex-

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[184] *See* Stiller & Elder, *supra* note 7.

[185] *Id.*

[186] *E.g., In re* Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

[187] *See* Reynolds v. Sims, 377 U.S. 533 (1964), wherein the Supreme Court invalidated the existing law and two proposed apportionment plans for electing members to the Alabama Legislature as violative of the equal protection clause of the fourteenth amendment. The laws affecting the right to vote must be subject to careful scrutiny when challenged as discriminatory. *Id.* Therefore, under the strict scrutiny standard the state must make an honest and good faith effort to eliminate the disparity as far as practicable. *Id.* Under the reasonableness test, however, the state need only show that a classification is reasonably related to some proper state objective. *In re* Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

[188] *See, e.g.*, Harper v. Virgina Bd. of Elections, 383 U.S. 663 (1966) (right to vote).

[189] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (race).

[190] *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

[191] *Id.* Under the standard of minimum rationality there is a presumption of constitutionality and the classification will be constitutionally invalidated only if there is *no* relation between it and the achievement of the state's objective. In other words, if *any* set of facts reasonably may be conceived to justify the statutory discrimination it will not be set aside.

ual conduct, promiscuity and staying out late.[192] That such use is made of these statutes was implicitly admitted by the court in *E.S.G. v. State*,[193] which upheld a broad noncriminal juvenile statute:

> The obvious reason for granting such broad and general jurisdiction is seen when one makes even a cursory attempt to define all the types and patterns of behavior and conduct injurious to a child. The need to correct habits and patterns of behavior which are injurious to the health or morals of the child goes to the very heart of our Juvenile Act. The judge in this case observed that most girls who came before said court were charged with violations of this section.[194]

The explanation of this selective enforcement is the fear of pregnancy and unwanted children.[195] The statutes, however, allow judges to express their own prejudices regarding female behavior and to subject girls to incarceration for acts which do not as often result in commitment of boys. This is nothing less than the "double standard," legally sanctioned.[196] It can be argued that even under the less strict reasonableness standard there is no basis for this differentiation in treatment since the same behavior on the part of boys may bring about the same result sought to be prevented by the state — pregnancy and unwanted children.[197]

V. Conclusion

The purpose of this article has been to outline the major arguments that can be used to attack adjudications under Ohio's unruly and lawful order sections. That these statutes lack facial validity is painfully obvious from just a moment's attempt to discern the meaning and application of their language with regard to specific types of conduct.

There is no justification for a broad omnibus statute such as the lawful order section. The court has the inherent power to hold in contempt anyone in violation of a court order in connection with court proceedings. The court also has the inherent power to execute dispositions held in abeyance under delinquency or unruly adjudications. Thus the child violating a condition of probation can be committed according to the dispositions permitted for the type of misconduct constituting the original charge. There is no precedent or comparison in adult criminal law for the grossly unfair procedure permitted under the lawful order section which allows the crime and punishment to be escalated on the basis of a noncriminal probation violation. For these reasons the lawful order section

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[192] Gold, *Equal Protection for Juvenile Girls in Need of Supervision in New York State*, 17 N.Y.L.F. 570 (1971).

[193] 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970).

[194] *Id.* at 226.

[195] Gold, *supra* note 192, at 592.

[196] *Id.* at 593. Comment, *Juvenile Delinquency Laws: Juvenile Women and the Double Standard of Morality*, 19 U.C.L.A. L. Rev. 313 (1971).

[197] Gold, *supra* note 192, at 570.

should be repealed by the state legislature or declared unconstitutional by the courts.

There is no reasonable justification for the distinction between unruly and delinquent children in terms of the due process protections afforded each classification. Unruly children are subjected to the same plight as delinquent children. It is therefore a violation of the Supreme Court's mandate to deny "the essentials of due process and fair treatment" to children subjected to unruly proceedings.

The entire jurisdiction of juvenile courts over children charged with noncriminal conduct has been subjected to mounting criticism in view of the lack of rehabilitative success and the numerous abuses to which the process is exposed. Such abuses include its invocation by angry parents seeking the court's aid to discipline their children whose misbehavior may amount to nothing worse than vulgar language, refusal to perform chores, or association with friends found objectionable by the parents;[198] use of the unruly category where the facts actually indicate that a dependency or neglect proceeding would be most appropriate;[199] and use of noncriminal jurisdiction where the act complained of falls within the statutory definition of delinquency but there is insufficient proof available or there is a conscious determination by court personnel to circumvent the due process requirements of the delinquency proceeding.[200]

Recommendations for total removal of the noncriminal jurisdiction have been increasing.[201] A Presidential commission recommended that serious consideration be given to the complete elimination of jurisdiction over conduct-illegal-only-for-children in view of the little good and possible harm such jurisdiction actually achieves.[202] Most recently, the National Council on Crime and Delinquency issued a policy statement advocating the removal of all status offenses from the jurisdiction of the juvenile court.

> Imprisonment of a status offender serves no humanitarian or rehabilitative purpose. It is, instead, unwarranted punishment, unjust because it is disproportionate to the harm done by the child's noncriminal behavior. It cannot be justified under either a treatment or a punishment rationale.[203]

The abolition of juvenile court noncriminal jurisdiction does not mean that children in need of supervision will be put adrift without a helping hand from the community. The President's commission recommended the establishment of neighborhood youth servicing agencies to provide

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[198] Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1387 n.33, 1394 (1974).

[199] *Id.* at 1391-93.

[200] *Id.* at 1393-94.

[201] McNulty, *supra* note 39; Stiller & Elder, *supra* note 7.

[202] TASK FORCE REPORT, *supra* note 4, at 27.

[203] NATIONAL COUNCIL ON CRIME AND DELINQUENCY, JURISDICTION OVER STATUS OFFENSES SHOULD BE REMOVED FROM THE JUVENILE COURT, POLICY STATEMENT, at 2 (Dec. 1974).

referral services to troubled children and their families.[204] The object of such agencies is to divert noncriminal children from the court system to other agencies that can provide appropriate help and guidance within the context of the home community thereby avoiding the stigma and penal consequences of the juvenile court process.

Elimination of juvenile court jurisdiction over unruly children will not affect the court's jurisdiction over delinquent children or truly neglected and dependent children. Abolition of the unruly jurisdiction would mean only that noncriminal misbehavior would be dealt with in a noncriminal context — through community services designed to provide the help that, in the juvenile court system, has often resulted in mere custodial incarceration.

The argument for retaining noncriminal jurisdiction because alternative community services are unavailable was effectively rebutted by Judge David Bazelon of the United States Court of Appeals for the District of Columbia who pointed out that such services are not available precisely because the juvenile court has maintained its noncriminal jurisdiction.[205] Schools and public agencies will continue to refer cases to the court as long as it holds out its jurisdiction as a solution for troubled children — a promise of help largely unfulfilled.

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[204] THE CHALLENGE, *supra* note 42. *See* 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).

[205] Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. J. 42, 44 (1970).