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TREATMENT FOR MISBEHAVING MINORS*

The New York Family Court Act (FCA) mandates that children found to be "persons in need of supervision" (PINS)¹ must be provided with "appropriate supervision or treatment."² In distinguishing PINS from juvenile delinquents,³ the Legislature attempted "to reduce the instances of stigma and at the same time to permit the Court to use appropriate resources in dealing with persons in need of supervision."⁴ Unfortunately, the humanitarian concern for the welfare and rehabilitation of PINS, evidenced by such legislative pronouncements,⁵ has rarely been implemented

* This article is a student work prepared by Barbara P. Gertel, a member of the ST. JOHN'S LAW REVIEW and the St. Thomas More Institute for Legal Research.

¹ N.Y. FAMILY CT. ACT § 712(b) (McKinney Supp. 1973) provides:

"Persons in need of supervision" means a male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of parent or other lawful authority.

This provision's validity has been subjected to attack on several occasions. See *In re Patricia A.*, 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972), wherein the New York Court of Appeals held section 712(b) as applied to females aged 16-18 unconstitutional. In *Mercado v. Rockefeller*, 363 F. Supp. 489 (S.D.N.Y. 1973), *appeal docketed*, No. 73-2120, 2d Cir., Oct. 10, 1973, three parolees from state training institutions claimed that section 712(b) was unconstitutional due to its vagueness and overbreadth, its punishment of a status in derogation of the eighth amendment, and its violation of due process "in that it restrain[ed] their liberty without serving any legitimate state purpose." *Id.* at 490. The court, however, dismissed the complaint for failure to exhaust available state remedies.

² N.Y. FAMILY CT. ACT § 711 (McKinney 1963) provides, in part, that "[t]he purpose of this article is to provide a *due process of law* . . . for devising an *appropriate order of disposition* for any person adjudged . . . in need of supervision." (emphasis added). Section 743 states that "[i]n the case of a petition to determine need for supervision, 'dispositional hearing' means a hearing to determine whether the respondent requires supervision or treatment." Section 756 provides for the placement of a PINS child in his own home or in the custody of a suitable relative or other suitable person or an authorized agency, or a youth opportunity center. *Id.* § 756 (McKinney Supp. 1973).

When read in conjunction, these three sections reflect a "deliberate . . . plan to place . . . [PINS] in authorized agencies for treatment and rehabilitation and not to commit them to penal institutions." *In re Anonymous*, 20 App. Div. 2d 395, 400, 247 N.Y.S.2d 323, 328-29 (1st Dep't), *aff'd mem.*, 14 N.Y.2d 905, 200 N.E.2d 857, 252 N.Y.S.2d 314 (1964).

³ Juvenile delinquents are persons over seven and less than sixteen years of age who do acts which, if done by adults, would constitute a crime. N.Y. FAMILY CT. ACT § 712(a) (McKinney Supp. 1973).

⁴ SECOND REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON COURT REORGANIZATION, McKinney's Sess. Laws 3435 (1962) [hereinafter cited as SECOND REPORT].

⁵ The draftsmen of the FCA noted that the underlying humanitarian philosophy of the act is to "guide and supervise, rather than punish children in trouble." *Id.* at 3437.

by the family court.⁶

Prompted by its benevolent attitude, the Legislature was initially loath to place PINS in New York State training schools housing juvenile delinquents.⁷ Shortly after the law's enactment, however, family court judges found that a "gap" existed between the statutory mandate to provide PINS with appropriate supervision or treatment and the pragmatic consideration of the limited availability of proper facilities for their placement.⁸ The Legislature, therefore, amended the FCA on a yearly basis to permit the placement of PINS in state training schools.⁹ In 1968, this provision was made permanent due to a continuing shortage of private facilities.¹⁰ Legislative authorization of such placement, however, was intended solely to eliminate the "gap" and to secure a facility in which PINS would obtain the necessary treatment and supervision mandated by the FCA. In actuality, all major investigative studies of state training schools¹¹

⁶ JOINT LEGISLATIVE COMM. ON THE PROTECTION OF CHILDREN AND YOUTH AND DRUG ABUSE, Leg. Doc. No. 19, 1 WHAT CHANCE FOR CHILDREN? A REPORT ON WHAT HAPPENS IN NEW YORK STATE TO THE YOUNG IN TROUBLE 27 (1970) [hereinafter cited as JOINT LEGISLATIVE COMMITTEE].

⁷ The Joint Legislative Committee commented:

The decision not to authorize a commitment in the case of a person in need of supervision is an important element of the statutory pattern. Any commitment — whether "civil" or "criminal", whether assertedly for "punitive" or "rehabilitative" purposes — involves a grave interference with personal liberty and is justified only by urgent reason. There is a second reason for this decision. The Committee has been advised by many persons that existing facilities for children are not wholly satisfactory.

SECOND REPORT, *supra* note 4, at 3435-36.

⁸ See, e.g., *In re Anonymous*, 40 Misc. 2d 1058, 1060, 245 N.Y.S.2d 264, 266-67 (Family Ct. Bronx County 1963). See also *Anonymous v. People*, 20 App. Div. 2d 395, 400, 247 N.Y.S.2d 323, 329 (1st Dep't 1964).

Those agencies, private and voluntary, already in existence did not provide the services needed for the large number of PINS requiring placement. See JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, OFFICE OF CHILDREN'S SERVICES, THE PINS CHILD: A PLETHORA OF PROBLEMS 7 (1973) [hereinafter cited as JUDICIAL CONFERENCE REPORT].

⁹ Ch. 518, [1964] N.Y. LAWS 1472-73; ch. 126, [1965] N.Y. LAWS 746; ch. 705, [1966] N.Y. LAWS 1501-02 (expired 1968).

¹⁰ Ch. 874, [1968] N.Y. LAWS 2654-55.

¹¹ See OFFICE OF THE STATE COMPTROLLER, DIVISION OF AUDITS AND ACCOUNTS, REP. NO. A1-St-15-74, AUDIT REPORT ON REHABILITATION OF ADOLESCENTS AT STATE RESIDENTIAL FACILITIES, EXECUTIVE DEPARTMENT, DIVISION FOR YOUTH (1973) [hereinafter cited as No. 15 LEVITT REPORT]; OFFICE OF THE STATE COMPTROLLER, DIVISION OF AUDIT AND ACCOUNTS, REP. NO. A1-St-16-74, AUDIT REPORT ON SELECTED OPERATING AND FINANCIAL PRACTICES, EXECUTIVE DEPARTMENT, DIVISION FOR YOUTH, March 1, 1971 to February 28, 1973 (1973) [hereinafter cited as No. 16 LEVITT REPORT]; COMMITTEE ON MENTAL HEALTH SERVICES INSIDE AND OUTSIDE THE FAMILY COURT IN THE CITY OF NEW YORK, JUVENILE JUSTICE CONFOUNDED: PRETENSIONS AND REALITIES OF TREATMENT SERVICES (1972) [hereinafter cited as POLIER REPORT]; JOINT LEGISLATIVE COMMITTEE *supra* note 6; CITIZENS' COMMITTEE FOR CHILDREN OF NEW YORK, INC., THE NEW YORK STATE TRAINING SCHOOL SYSTEM: FINDINGS AND RECOMMENDATIONS (1969) [hereinafter cited as CITIZENS' COMMITTEE]; COMMUNITY SERVICE SOCIETY OF NEW YORK, DEPARTMENT OF PUBLIC AFFAIRS, COMMITTEE ON YOUTH AND CORRECTION, OUT OF SIGHT — OUT OF MIND: A REPORT OF AN EXAMINATION OF THE NEW YORK STATE TRAINING SCHOOLS IN THE DOWN-STATE COMPLEX (1968).

and significant appellate division case law¹² have shown that these schools totally fail to provide PINS with appropriate rehabilitative treatment.

Within this context, the recent landmark decision of the New York Court of Appeals, *In re Ellery C.*,¹³ was formulated. The case originated in the family court upon a petition filed by Ellery C.'s mother alleging that her son "refused to go to school, kept late hours, fought with his siblings, stole from home and refused to obey her just commands."¹⁴ A probation report further revealed that the boy used drugs and had an I.Q. of 69. After attempts to reform the boy proved futile,¹⁵ a PINS dispositional hearing was convened, which resulted in Ellery C.'s commitment to the New York State Training School at Otisville.¹⁶ On appeal, the Appellate Division, Second Department, by a closely divided vote, affirmed the order¹⁷ noting that "[w]here . . . every effort to place the infant . . . in a nonstructured facility meets with failure, the only suitable environment, unfortunately, is the confinement of a State Training Center."¹⁸

The Court of Appeals reversed,¹⁹ holding that "persons in need of supervision may not validly be placed in a state training school."²⁰ The proceeding was remitted to the family court for the purpose of placing the appellant in a suitable environment. In reaching this decision, Chief Judge Fuld, writing for a unanimous court, stated:

The conclusion is clear. Proper facilities must be made available to provide adequate supervision and treatment for children found to be persons in need of supervision [T]herefore, . . . the appellant's confinement in the training school, along with juveniles convicted of committing criminal acts,

¹² See, e.g., *In re Jeanette P.*, 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (2d Dep't 1970); *In re Lloyd*, 33 App. Div. 2d 419, 308 N.Y.S.2d 419 (1st Dep't 1970).

¹³ 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973).

¹⁴ See Brief for Appellant at 3, *In re Ellery C.*, 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973).

¹⁵ Between March 2 and March 9, Ellery C. was remanded to a juvenile center because his mother refused to take him home. *Id.* On March 9, he was paroled to his mother until April 15, at which time he was placed on a 12-month probation period on condition that his school attendance improve. On August 18, however, Mrs. C. filed another petition alleging that her son had violated the terms of probation. A finding of such violation was made and Ellery C. was instructed to attend a mental health clinic. The court soon paroled the boy to an uncle in Alabama, but Ellery returned home after two weeks. Three months later, Mrs. C. reported her son's failure to cooperate with the mental health clinic, and on February 2, 1972, he was referred to the Federal Addiction Services. Although his progress there was reported as favorable, the boy left the program two months later. *Id.* at 3-5.

¹⁶ Ellery C.'s law guardian excepted to the court's disposition stating that such placement was "inappropriate and not in the best interest of the child." *Id.* at 9. He further argued that no correlation existed between Ellery C.'s need for treatment and his incarceration in a state training school. *Id.* at 8-9.

¹⁷ 40 App. Div. 2d 862, 337 N.Y.S.2d 936 (2d Dep't 1972) (mem.).

¹⁸ *Id.*

¹⁹ 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973).

²⁰ *Id.* at 592, 300 N.E.2d at 425, 347 N.Y.S.2d at 54.

"can hardly, in any realistic sense, serve as 'supervision' and 'treatment' for him."²¹

This holding has given rise to conflicting interpretations as to its true import. The State Division for Youth (DFY),²² the agency that operates the training schools, adopted the view that *Ellery C.* merely condemned the "co-mingling" of PINS and juvenile delinquents. Therefore, Milton Luger, Director of DFY, notified the family court judges and probation directors of his plan to implement DFY's interpretation of *Ellery C.* Phase I of the agency's program,²³ effective September 19, 1973, retained the use of the training schools but designated separate schools for juvenile delinquents and PINS.²⁴

An alternative interpretation of *Ellery C.* is that it requires an absolute prohibition against the placement of PINS in state training schools, irrespective of the presence of juvenile delinquents therein. This position, which appears consistent with the views espoused by state legislators,²⁵ has been endorsed by the Juvenile Rights Division of the Legal Aid Society.²⁶ Legal Aid maintains that the opinion on its face evidences the fact that PINS have a statutory right to treatment which the New York State training schools have failed to provide.²⁷

²¹ *Id.* at 591, 300 N.E.2d at 425, 347 N.Y.S.2d at 53, quoting *In re Ellery C.*, 40 App. Div. 2d 862, 864, 337 N.Y.S.2d 936, 940 (2d Dep't 1972) (mem.) (dissenting opinion).

²² The Division for Youth, a part of the Executive Department, was established in 1960 to continue the functions of the Youth Commission. In 1971, the state training schools were transferred to the Division "to consolidate youth-related activities in a single agency in order to improve the coordination of Youth programs within the State." No. 15 LEVITT REPORT, *supra* note 11, at 1.

²³ Phase II of this program involves the development of co-educational programs at nearly all the facilities and is to be "implemented as necessary changes are completed at each of the newly designated co-educational facilities." Letter from Milton Luger, Director of Division for Youth, New York State Executive Department, Sept. 17, 1973.

²⁴ See *id.*, which designates four schools for delinquents and four others for PINS. It should be noted, however, that on Sept. 19, 1973, one adjudicated female juvenile delinquent was assigned to Hudson, a New York State training school designated for PINS girls only. Furthermore, in late September, 19 of the 64 girls at Hudson were juvenile delinquents. It appears that those juvenile delinquents already in residence at PINS designated schools in September, 1973, were asked to sign waivers of transfer to institutions reserved for juvenile delinquents. Apparently, DFY is not abiding by its own interpretation of *Ellery C.* Interviews with Steven M. Schluskel, Associate Appellate Counsel, the Legal Aid Society, Juvenile Rights Division, New York, Dec., 1973, Jan., Feb., 1974 [hereinafter cited as Interview with Schluskel]. Mr. Schluskel is the attorney who represented *Ellery C.* in the Appellate Division, Second Department, and the Court of Appeals.

²⁵ See text accompanying notes 1 & 2 *supra*.

²⁶ PINS children are represented by Legal Aid at all stages of the judicial proceedings. Although the FCA authorizes the use of private counsel, in practice, the Legal Aid attorneys are assigned to virtually every child brought before the court. The right to counsel "is particularly important for PINS children since in so many cases the parent is proceeding against the child." JUDICIAL CONFERENCE REPORT, *supra* note 8, at 16.

²⁷ Interview with Schluskel, *supra* note 24. See also Memorandum from Mara Thorpe to Staff

Having defined the issue created by *Ellery C.*, Legal Aid and DFY recently afforded the Court of Appeals, in *In re Maurice C.*,²⁸ an opportunity for its resolution. The court, therein, recognized PINS' right to proper treatment, yet sanctioned DFY's interpretation of *Ellery C.*²⁹ Thus, placement of these children in New York State training schools solely housing PINS is currently permissible.

Nevertheless, Legal Aid's viewpoint appears superior to that of DFY and consistent with the Court of Appeals' holding in *Ellery C.* This position can be substantiated by a consideration of several factors: (1) an analysis of the general PINS profile; (2) their statutory and, arguably, constitutional right to adequate rehabilitative treatment; (3) the current unsatisfactory condition of state training schools; and (4) the subsequent judicial interpretation of *Ellery C.* Discussion of these points will lend credence to the assertion that the current placement of PINS in state training schools constitutes a denial of the child's right to treatment and, as such, must be prohibited.

THE PINS PROFILE

The legislative creation of the PINS classification in 1962 represented

enlightened . . . recognition of the difference between youngsters who committed criminal acts and those who merely misbehave in ways which, frequently, would not be objectionable save for the fact that the actor is a minor

. . . .³⁰

Although PINS and juvenile delinquents both require rehabilitation, treatment of delinquents should be designed to eliminate the motivation behind specific and oftentimes isolated criminal conduct; rehabilitative techniques appropriate in dealing with PINS, however, must alleviate broader behavioral problems as difficult to deal with, yet less objectionable than criminality.³¹

Attorneys of the Legal Aid Society, Juvenile Rights Division, New York, Aug. 21, 1973; Letter from Steven Schlusell to State Senator James H. Donovan, July 17, 1973. With regard to the failure of the state training schools to provide adequate rehabilitative programs for PINS, see reports cited note 11 *supra*.

²⁸ No. 361B (Ct. App., July 15, 1974), *rev'g* 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974). The Court of Appeals decided this case in conjunction with *In re Lavette M.*, No. 361A (Ct. App., July 15, 1974). In *Lavette M.* a 13 year-old adjudicated PINS was committed to a state training school after unsuccessful attempts were made at private placement. The Appellate Division, First Department affirmed the order and was in turn affirmed by the Court of Appeals.

²⁹ *Id.* at 3. The opinion in *Maurice C.* was written by Judge Jasen and concurred in by all except Judges Rabin and Stevens who took no part. Chief Judge Fuld, who wrote the opinion in *Ellery C.*, retired from the bench prior to the appeal in *Maurice C.*

³⁰ *In re Jeanette P.*, 34 App. Div. 2d 661, 662, 310 N.Y.S.2d 125, 127 (2d Dep't 1970).

³¹ See *Martarella v. Kelley*, 349 F. Supp. 575, 591 (S.D.N.Y. 1972), quoting Judge Florence Kelley, Administrative Judge of the Family Court.

In November, 1973, the Office of Children's Services (OCS) released the results of a study dealing with PINS.³² One stated purpose of this report was to disclose the genesis of PINS' behavioral problems.³³ The study provided information based upon a sample of 316 PINS placed outside their homes by the family court between June, 1971 and May, 1972. Approximately half of these children were black; the remainder were evenly divided between whites and Puerto Ricans.³⁴ On the basis of the information acquired, it was OCS's hope that appropriate resources for the rehabilitation of PINS would be developed.³⁵

The mass of statistics gathered in this report clearly indicated the urgent need for proper care and treatment of PINS. For example, 80 percent of the sample reportedly came from the most deprived areas in New York City where few community services were available. The children resided in apartments described as small, dirty and deteriorated. Sixty-one percent were classified as living in severe poverty.³⁶

In addition to their dismal physical surroundings, PINS were generally shown to suffer from unstable home environments. Seventy-three percent of the 316 PINS came from single-parent families or broken homes. Forty-three percent of the total sample were born out of wedlock. Among 37 percent of the children, the parents were either separated, divorced, or the father of the family deceased. In 55 percent of the cases in which the father had left home, the departure occurred prior to the child's fifth birthday. As OCS aptly noted, these figures "underscore the lack of continuity and cohesion among these poverty families and the consequent lack, at times, of care and adequate supervision for many of their children."³⁷

Inasmuch as the family court's assertion of jurisdiction over juveniles is based on the *parens patriae* theory, *i.e.*, the state adopts the role of parent when the natural parent has failed to do so, a brief description of PINS' actual parents and their relationship to the children is useful. Of

³² JUDICIAL CONFERENCE REPORT, *supra* note 8. The Office of Children's Services was established in June, 1972 "to serve as an advocate within the judicial system for improved services for court-related children in New York City." *Id.* at preface.

³³ *Id.* at 12.

³⁴ Twenty percent of the entire sample were placed with the training school system. Twenty-four percent of the black and 24% of the Puerto Rican children were placed in such schools, whereas only 12% of the white children were so placed. *Id.* at 76. These disproportionate figures can be explained in part by the discriminatory admissions policies of the voluntary and private agencies. One report reveals that in 1970-71, as a result of this discrimination, the family court was forced to place 76% of the black and 66% of the Puerto Rican children in training schools and public shelters. On the other hand, 78% of the white children were provided care by private, publicly funded agencies. POLIER REPORT, *supra* note 11, at 22. See also 15 LEVITT REPORT, *supra* note 11, at 106.

³⁵ JUDICIAL CONFERENCE REPORT, *supra* note 8, at 12.

³⁶ *Id.* at 23-24, 28.

³⁷ *Id.* at 25. These figures also indicate a major barrier to PINS' access to care in voluntary agencies which prefer, if not demand, an intact and cooperative family with which to work for the return of the child to the community. *Id.* at 26.

the 316 cases, 52 percent of the parents were classified as inadequate or unable to cope with their children's behavior or their own personal problems; 49 percent were "rejecting" the children and, in some cases, desirous of being rid of them; 36 percent were categorized as strict in discipline and in their expectations of the children; and 35 percent were reportedly neglectful in providing material benefits or sufficient supervision, love, or understanding.³⁸ Mental illness among the parents was discovered in 61 percent of the sample cases. Fifty-eight of the fathers and 30 of the mothers were reportedly alcoholics or abusers of alcohol.³⁹

The fact that 104 of the 316 PINS had lived away from their families prior to placement in state training facilities provided an additional source of insecurity for the children.⁴⁰ Forty-six of the children had been separated from their parents prior to reaching the age of six. Twenty-five percent of the 104 PINS living away from home had been placed in child care institutions, 18 percent with foster parents, and 42 percent with relatives. Another 14 percent of the 104 children had received treatment in state hospitals for the mentally ill.⁴¹

Additionally, evidence of school-related problems indicates the PINS child's need for special treatment. Of the 316 children surveyed, 224 were reportedly truant and 79 had been medically suspended, placed on home instruction, assigned to a "school for socially maladjusted children," or put in special classes. Forty-five children were awaiting assignment to special class, school, or home instruction when placed by the family court.⁴²

Among those PINS who attended regular public school classes,⁴³ the median grade level was the eighth; however, the median reading level hovered between the fifth and sixth.⁴⁴ It should be noted that the median I.Q. score of 78 percent of the sample was between 81 and 90.⁴⁵ According

³⁸ *Id.* at 30-31.

³⁹ *Id.* at 34-35.

⁴⁰ *Id.* at 39.

⁴¹ *Id.* at 37-38. A study of the petitions filed in the family court against the sample PINS and the psychiatric evaluations ordered by the judges further reveals the extent of PINS domestic problems: 65% of the 316 petitions were filed by the children's mothers. Once court action had commenced, 21% of the families refused to take their children home, and 8% of the PINS refused to return home. *Id.*

Among the allegations in the petitions, a large number included charges of sexual promiscuity or association with undesirable companions, drug abuse, and excessive drinking. Over one-third of the sample were alleged to have committed thefts or assaults. *Id.* at 45. Psychiatric evaluations of the PINS children most frequently diagnose the problems as "personality disorder," "adjustment reaction to adolescence," and "passive aggressive personality." In fact, 16% of the 316 sample cases had a history of psychiatric hospitalization. *Id.* at 47.

⁴² *Id.* at 40.

⁴³ Seventy-five percent of the 316 children were in regular public school classes. *Id.* at 43.

⁴⁴ The national and New York City reading level for eighth grade students ranges between 8.1 and 8.9 depending upon the month in which the reading tests are administered. Interview with J. Colligan, Coordinator of City-Wide Testing for New York City Public Schools, Board of Education, April 18, 1974 [hereinafter cited as Interview with Colligan].

⁴⁵ The children's I.Q. scores ranged from 51 to 100 plus. JUDICIAL CONFERENCE REPORT, *supra*

to OCS, these figures not only reflect the serious problems of PINS, but also indicate why many of the PINS are placed in state training schools rather than private facilities. Most of the voluntary agencies and DFY homes and work camps⁴⁶ have admissions standards which include minimum grade and I.Q. levels.⁴⁷ PINS not meeting these requirements are placed in the state training schools.⁴⁸

The survey further disclosed that only 198 of the 316 PINS studied were admitted to the highly selective voluntary agencies and DFY homes. With respect to those PINS who were not accepted by these agencies, OCS noted: "Generally, several reasons are given for rejecting a child — and the reasons describe the PINS child."⁴⁹ The report further observed:

The children with serious emotional problems, . . . drug users, children with a history of mental illness, children who lack an intact family — these are the children who will be denied admission to those elite programs.⁵⁰

These are the PINS who are placed in state training schools⁵¹ and who find themselves most in need of either a statutorily or judicially enunciated right to treatment.

THE RIGHT TO TREATMENT

Based upon OCS's accurate, yet disheartening, portrayal of PINS, it is evident that significant rehabilitative treatment must be afforded these children. The responsibility for ensuring that such treatment is forthcoming has fallen upon the government. As noted, justification for the estab-

note 8, at 50. On the national level 95 plus is considered normal. Interview with Colligan, *supra* note 44. Forty-eight percent of the PINS tested fell within the 90-100 plus range. A majority of this group were placed with voluntary agencies. Another 48% of the children had I.Q. scores between 70 and 90. These are the PINS that are placed in training schools or shelters. Almost 13% of these had scores of 75 or below; 4% had scores of 70 or under. JUDICIAL CONFERENCE REPORT, *supra* note 8, at 52. See also Sussman, *Psychological Testing: Is It a Valid Judicial Function?* 70 N.Y.L.J., July 31, 1973, at 1, col. 6, which criticizes the use of I.Q. test results in the family courts' dispositional hearings.

⁴⁶ In addition to state training schools, DFY operates a wide range of urban homes, group homes, foster homes, and work camps, referred to as "Title II facilities." JUDICIAL CONFERENCE REPORT, *supra* note 8, at 7. See N.Y. EXEC. LAW §§ 502-509 (McKinney 1972).

⁴⁷ JUDICIAL CONFERENCE REPORT, *supra* note 8, at 44.

⁴⁸ *Id.*

⁴⁹ *Id.* at 55.

⁵⁰ *Id.* at 9.

⁵¹ As a result of a number of pre-*Ellery C.* intermediate appellate decisions in which the placement of PINS in training schools were reversed, the number of such placements dropped sharply. *Id.* at 8. See, e.g., *In re Arlene H.*, 38 App. Div. 2d 570, 328 N.Y.S.2d 551 (2d Dep't 1971); *In re Edwards*, 37 App. Div. 2d 977, 328 N.Y.S.2d 235 (2d Dep't 1971); *In re Jeanette P.*, 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (2d Dep't 1970); *In re Ilone I.*, 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Family Ct. Queens County 1970). When *Ellery C.* was decided there were 128 PINS from New York City in training schools. JUDICIAL CONFERENCE REPORT, *supra* note 8, at 9.

lishment of the PINS category emanates from the *parens patriae* power of the state.⁵² This power embodies the right of the state, where necessary, to substitute itself for the natural parent — to protect, care for, treat and rehabilitate the child in order to save him from harm and make him a useful citizen.⁵³

In asserting its role under the *parens patriae* theory, the family court's placement of PINS in state training schools must meet the statutory and, arguably, constitutional requirement⁵⁴ of furnishing adequate therapeutic treatment for these children.⁵⁵ With respect to the relatively recent notion of a right to treatment,⁵⁶ it has been observed:

[A] new concept of substantive due process is evolving in the therapeutic realm. This concept is founded upon a recognition of the concurrency between the state's exercise of sanctioning powers and its assumption of the duties of social responsibility. Its implication is that effective treatment must

⁵² See Donahue, *New York Family Court Act: Article 7 — Its Philosophy and its Aim*, 15 SYRACUSE L. REV. 679 (1964).

⁵³ See *In re Gault*, 387 U.S. 1, 15-17 (1967). See also SECOND REPORT, *supra* note 4, at 3433-34; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2-4 (1967); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1238-39 (1970); Kettie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 851-53 (1969); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

⁵⁴ Although the United States Supreme Court has not as yet held that there exists a constitutional right to treatment for juveniles, the author agrees with Adrian R. Gough who has remarked:

[T]here is no little thought, and I am persuaded, that it [the right to treatment] can be constitutionally based. To impose custody because of a need for care and treatment and then fail to provide that treatment offends against due process and equal protection, and constitutes cruel and unusual punishment.

Gough, *The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. LOUIS U.L.J. 182, 183 (1971) [hereinafter cited as *Beyond-Control Child*]. But see Note, *A Right to Treatment for Juveniles?*, 1973 WASH. U.L.Q. 157 (1973), which attempts to persuade the reader that there should be no constitutional right to treatment for juveniles committed to institutions.

⁵⁵ See *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972), wherein the court observed:

Where the State, as *parens patriae*, imposes such detention, it can meet the Constitution's requirement of due process and prohibition of cruel and unusual punishment if, and only if, it furnishes adequate treatment to the detainee.

⁵⁶ It has generally been accepted that the right to treatment doctrine was first promulgated by Dr. Morton Birnbaum in 1960. See note 71 and accompanying text *infra*. But see *White v. Reid*, 125 F. Supp. 647 (D.D.C. 1954). Although the *White* decision was based on statutory grounds, the court, in ordering the juvenile petitioner's release from jail, noted:

Unless the institution is one whose primary concern is the individual's moral and physical well-being, unless its facilities are intended for and adopted to guidance, care, education and training rather than punishment, unless its supervision is that of a guardian, not that of a prison guard or jailor, it seems clear a commitment to such institution cannot withstand an assault for violation of fundamental Constitutional safeguards.

Id. at 650.

be the *quid pro quo* for society's right to exercise its *parens patriae* controls. Whether specifically recognized by statutory enactment or implicitly derived from the constitutional requirements of due process, the right to treatment exists.⁵⁷

The Statutory Right to Treatment

By virtue of the FCA, a solid statutory foundation exists for the proposition that PINS are entitled to proper treatment. Section 732 of the Act mandates, *inter alia*, that a PINS petition allege the child's need for "supervision or treatment."⁵⁸ Before a PINS adjudication can be made, such need must be established by a preponderance of the evidence at a dispositional hearing.⁵⁹ For example, if Corporation Counsel, which prosecutes PINS cases in New York City, fails to satisfy this burden, the family court must dismiss the petition.⁶⁰

Once the need for "supervision or treatment" is established, the Act imposes a duty upon the family court to make a dispositional order in accordance with section 711. This section provides:

The purpose of this article is to provide a *due process of law* . . . for devising an *appropriate order of disposition* for any person adjudged . . . in need of supervision.⁶¹

Consequently, "[i]n regard to persons found to be in need of supervision, the deprivation of freedom is authorized only if placement provides treatment."⁶² To comply with this statutory mandate, section 255 of the FCA authorizes the family court to order state and local officials and agencies to render all necessary cooperation so these children may receive "such care, protection and assistance as will best enhance their welfare."⁶³

Furthermore, in recognition of the behavioral differences existing between juvenile delinquents and PINS, the Legislature drew a distinction between the facilities in which each could be appropriately placed.⁶⁴ Thus, the FCA directs that the need for "confinement" may provide the basis for an adjudication and placement of a juvenile delinquent in a state training school.⁶⁵ However, the Act withholds from the family court the right to

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

⁵⁸ N.Y. FAMILY CT. ACT § 732 (McKinney 1963).

⁵⁹ *Id.* §§ 743, 745, 752.

⁶⁰ *Id.* § 751.

⁶¹ *Id.* § 711 (emphasis added).

⁶² POLIER REPORT, *supra* note 11, at 2.

⁶³ N.Y. FAMILY CT. ACT § 255 (McKinney Supp. 1973). Section 255, as amended, gives the family court greater power than existed under the old law. Previously, the FCA only enabled the family court judge to "seek" cooperation, whereas section 255 presently authorizes the court to "order" cooperation. This significant change reflects the legislature's profound interest in, and growing concern with, the necessity of securing dispositions appropriate to the needs of children within the family court's jurisdiction. *See id.*

⁶⁴ *See* SECOND REPORT, *supra* note 4, at 3435-36.

⁶⁵ N.Y. FAMILY CT. ACT § 743 (McKinney 1963).

place PINS in such confinement.⁶⁶ PINS may be placed in facilities that treat or supervise, but never confine. Accordingly, the Appellate Division, First Department, in *Anonymous v. People*⁶⁷ stated:

The entire structure of the act reflects a deliberate and calculated plan to place . . . PINS . . . in authorized agencies for treatment and rehabilitation⁶⁸

More recently, upon examination of the FCA, the Family Court, Bronx County, in *In re Neil M.*⁶⁹ noted that:

[the court] must . . . be prepared to hold that . . . [the Act]. . . create[s] a vested right . . . [in the infant] . . . to treatment rather than a liability to be subject to it.⁷⁰

Constitutional Arguments For a Right to Treatment

In 1960, the constitutional right to treatment doctrine was introduced by Dr. Morton Birnbaum in the field of mental health. He proposed that the involuntary confinement of the mentally ill to institutions lacking adequate treatment facilities constituted commitment to a mental prison and that substantive due process prohibited such deprivation of a mentally ill person's liberty.⁷¹ The right to treatment in the mental health field has since won recognition in both state and federal courts.⁷² The principle governing these cases is theoretically applicable to the juvenile justice system — that is, in exercising its *parens patriae* power to restrain the child's freedom, the juvenile court must provide adequate rehabilitative treatment.⁷³

Various state and federal courts have voiced their approval of a consti-

⁶⁶ *Id.*

⁶⁷ 20 App. Div. 2d 395, 247 N.Y.S.2d 323 (1st Dep't 1964).

⁶⁸ *Id.* at 400, 247 N.Y.S.2d at 328-29.

⁶⁹ 71 Misc. 2d 396, 336 N.Y.S.2d 304 (Family Ct. Bronx County 1972).

⁷⁰ *Id.* at 399, 336 N.Y.S.2d at 307.

⁷¹ Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 503 (1960).

⁷² See, e.g., *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971); *Nason v. Superintendent of Bridgewater State Hosp.*, 353 Mass. 604, 233 N.E.2d 908 (1968); cf. *Lake v. Cameron*, 364 F.2d 415 (D.C. Cir. 1953); *Commonwealth v. Page*, 339 Mass. 313, 159 N.E.2d 82 (1959).

⁷³ If adults suffering from mental illness are entitled to the right to treatment, then surely PINS children, plagued by behavioral and educational problems, must be afforded similar treatment all the more so because the State has promised these children, through the exercise of its *parens patriae* power, that it will guide, supervise and treat them. See generally Birnbaum, *Some Comments on the Right to Treatment*, 13 ARCHIVES OF GENERAL PSYCHIATRY 34 (1966); Symposium, *The Right to Treatment*, 57 GEO. L.J. 673 *et seq.* (1969); Symposium, *The Mentally Ill and the Right to Treatment*, 36 U. CHI. L. REV. 742 *et seq.* (1969); Note, *Persons in Need of Supervision: Is there a Constitutional Right to Treatment?*, 39 BROOKLYN L. REV. 624, 645-57 (1973); Note, *Adequate Psychiatric Treatment — A Constitutional Right?*, 19 CATH. LAW. 322 (1973); Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87 (1967).

tutional right to treatment where juveniles are concerned. In *State v. Owens*,⁷⁴ the Kansas Supreme Court held unconstitutional the juvenile court's commitment of boys 16 years of age or over to the state industrial reformatory. The court described the institution as penal rather than rehabilitative in nature. In outlining the constitutional requirements, the court remarked that "[t]he rehabilitative caretaking offered in exchange for constitutional protections must be substantive and real, not mere verbiage."⁷⁵

The Pennsylvania Supreme Court, in *In re Wilson*,⁷⁶ arrived at a similar decision. There, a 16-year-old adjudicated delinquent had been committed to a state correctional institution for an indefinite term which, due to his age, could extend up to five years. A criminal conviction would have resulted in confinement in the same institution, but for a shorter period of time. In holding this distinction constitutionally invalid, the court noted that the longer commitment could be upheld only if it was clear that it would "result in the juvenile's receiving appropriate rehabilitative care and not just in his being deprived of his liberty for a longer time."⁷⁷

On the federal level, in *Inmates of Boys' Training School v. Affect*,⁷⁸ a class action was brought alleging, *inter alia*, that the training school inmates' right to rehabilitative treatment, in the form of vocational training, drug programs, and psychiatric counseling had been denied. In ruling that the plaintiffs were entitled to a psychiatric counseling program, the court commented that "due process in the juvenile justice system requires that the post-adjudicative stage of institutionalization further . . . [the] goal of rehabilitation."⁷⁹ Similarly, in *Nelson v. Heyne*,⁸⁰ the court held that children placed in the Indiana Boys School were "entitled to a right to treatment under . . . the Federal Constitution."⁸¹

A recent and significant decision concerning the juvenile's right to treatment is *Martarella v. Kelley*.⁸² In *Martarella*, the federal District Court for the Southern District of New York answered the question whether PINS may constitutionally be confined in secure detention centers

⁷⁴ 197 Kan. 212, 416 P.2d 259 (1966).

⁷⁵ 416 P.2d at 269-70. The court also commented: "If after a juvenile proceeding, the juvenile can be committed to a place of penal servitude, the entire claim of *parens patriae* becomes a hypocritical mockery." 416 P.2d at 269. At the hearing in this action, the director of penal institutions testified that the state industrial reformatory, to which boys 16 years of age and over were being committed, was a maximum security facility with iron bars, cell houses, and guard towers. The director also explained that the reformatory had no trained professional social workers. *Id.*

⁷⁶ 438 Pa. 425, 264 A.2d 614 (1970).

⁷⁷ 264 A.2d at 618 (1970).

⁷⁸ 346 F. Supp. 1354 (D.R.I. 1972).

⁷⁹ *Id.* at 1364.

⁸⁰ 355 F. Supp. 451 (N.D. Ind. 1972).

⁸¹ *Id.* at 459.

⁸² 349 F. Supp. 575 (S.D.N.Y. 1972).

without treatment. The court held that the long-term detention of PINS in a facility which suffered from insufficient counselors and staff, inadequate psychiatric assistance, a lack of coordination and communication among the staff and physical conditions resembling a jail, constituted a denial of their constitutional right to treatment. In dicta, the court went so far as to note:

There can be no doubt that the right to treatment, generally, for those held in non-criminal custody (whether based on due process, equal protection or the Eighth Amendment, or a combination of them) has by now been recognized by the Supreme Court, the lower federal courts and the courts of New York.⁸³

Consideration of the foregoing statutory and decisional law signifies that persons adjudicated PINS are entitled to meaningful rehabilitation.⁸⁴ If the state is going to deprive children of their liberty by invoking the *parens patriae* doctrine, it must meet its responsibility of ensuring that care and treatment are provided. Unfortunately, the current status of state training schools indicates that government has been negligent in meeting its responsibilities.

TREATMENT FOR PINS AT STATE TRAINING SCHOOLS

In recognition of the state's affirmative duty to provide appropriate treatment for PINS, the New York courts in recent years have increasingly examined the internal management of state training schools housing these children.⁸⁵ *In re Jeanette P.*⁸⁶ illustrates the movement in this direction. Noting the unsatisfactory conditions at state training schools, the Appellate Division, Second Department, reversed the placement of Jeanette, an adjudicated PINS, in such an institution. The court held that petitioner's record contained positive evidence that such a disposition would result in harmful effects upon her.⁸⁷ Similarly, in *In re Ilone I.*,⁸⁸ the family court set aside the placement of an adjudicated PINS in a training school which had failed to provide the child with court-ordered psychiatric care.

In *In re Mario*,⁸⁹ however, the family court held that the placement of

⁸³ *Id.* at 599. The only Supreme Court decision cited in this regard was *Robinson v. California*, 370 U.S. 660 (1962), which held that drug addiction could not be a crime in the absence of treatment. 349 F. Supp. at 599. For a detailed account of the constitutional argument for the right to treatment in the juvenile justice system, see Brief for Appellant at 18-20, *In re Ellery C.*, 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973); Brief for Appellant at 4-30, *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972); Brief for Nat'l Juvenile Law Center as Amicus Curiae at 6-25, *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972).

⁸⁴ See note 53 *supra*.

⁸⁵ See *In re Mario*, 65 Misc. 2d 708, 713, 317 N.Y.S.2d 659, 664 (Family Ct. New York County 1971); *Beyond-Control Child*, *supra* note 54, at 184.

⁸⁶ 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (2d Dep't 1970).

⁸⁷ *Id.* at 661-62, 310 N.Y.S.2d at 127.

⁸⁸ 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Family Ct. Queens County 1970).

⁸⁹ 65 Misc. 2d 708, 317 N.Y.S.2d 659 (Family Ct. New York County 1971).

a 13-year-old PINS in a state training school was "reasonably rehabilitative" and, therefore, constitutional, provided the petitioner was not subjected to any physical force or solitary confinement. The *Mario* court acknowledged that PINS placements in these institutions previously had been held invalid, but concluded that each case had to be decided on its own merits.⁹⁰

Prior to *Ellery C.*, therefore, the determination as to the adequacy of treatment provided for PINS placed in state training schools was based upon a subjective consideration of the therapy received by the individual.⁹¹ The *Ellery C.* court, however, premised its determination of the inadequacy of treatment in such facilities by considering the institution as a whole.⁹² In so doing, the court refused to limit itself to a mere consideration of the individual PINS' particular situation.⁹³

In light of the Court of Appeals' recent holding in *In re Maurice C.*,⁹⁴ the status of *Ellery C.*'s standard is unclear. The court now holds that ". . . it is the adequacy of the supervision and treatment . . . provided, not the characterization of the facility as a Training School, that is determinative"⁹⁵ of the suitability of PINS' placement. This formulation may represent a retreat to the pre-*Ellery C.* subjective approach. Alternatively, it may be interpreted as the court's use of the *Ellery C.* standard to find, as it did, that treatment provided at PINS designated training schools, viewed as a whole, is adequate.

⁹⁰ *Id.* at 714, 317 N.Y.S.2d at 665.

⁹¹ *Accord, In re Arlene H.*, 38 App. Div. 2d 570, 328 N.Y.S.2d 551 (2d Dep't 1971); *In re Edward S.*, 37 App. Div. 2d 977, 328 N.Y.S.2d 235 (2d Dep't 1971).

⁹² Dr. Birnbaum concludes that once a right to treatment is established, a determination as to standards of the adequacy of treatment received should be "objectively based upon a consideration of the institution as a whole and not subjectively premised upon the individual therapy received." Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 752, 753 (1969); *But see Note, The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1156 (1967). *See also Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972) (court determined the inadequacy of treatment provided for PINS at a secure detention center).

⁹³ There are no established standards used in determining whether proper treatment is provided for PINS in state training schools. Few courts have made any attempt to establish such standards. *But see Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966), where the court, in determining whether petitioner, who was involuntarily committed to a mental hospital, was receiving adequate treatment, observed that: (1) the institution need not demonstrate that its treatment program will cure or improve, but only that there is "a bona fide effort to do so"; (2) the effort should be to provide treatment which is adequate in light of present knowledge; (3) the fact that science has not reached a final determination as to the most effective therapy cannot "relieve the court of its duty to render an informed decision"; and (4) continued failure to provide suitable adequate treatment cannot be justified by lack of staff or facilities. *Id.* at 456-57. *See also Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), where the court pointed out that factors such as (1) personnel qualifications and training, (2) the ratio of children to professional personnel, and (3) the availability of information about the child must be considered when determining the adequacy of treatment given PINS in secure detention centers. *Id.* at 586.

⁹⁴ No. 361B (Ct. App., July 15, 1974).

⁹⁵ *Id.* at 3.

Current Status of State Training Schools

Just two months prior to *Ellery C.*, Milton Luger, DFY Director, commented that "[t]oo many of our facilities are irrelevant as far as kids' needs are concerned."⁹⁶ The propriety of this statement, as well as of the conclusion expressed in *Ellery C.*, is sustained by a review of the training schools' facilities. The comment is further supported by a 1970 study of the New York training school system, conducted by the State Joint Committee on Protection of Children and Youth and Drug Abuse, which recommended that no PINS be placed in these institutions.⁹⁷ Consistent with these sentiments, all other major, independent investigations have reported the failure of the training schools to provide adequate rehabilitative treatment.⁹⁸

In *Ellery C.*, the Court of Appeals judicially sanctioned the notion that PINS did not receive proper treatment in the state training schools. Shortly thereafter, Mr. Luger controverted the court's view. He noted that a number of beneficial changes had been instituted to alleviate the treatment problem since DFY took charge of the training schools in 1971.⁹⁹ However, in December, 1973, State Comptroller Arthur Levitt released a report on the rehabilitative programs at the training schools.¹⁰⁰ Consistent with the earlier studies, although milder in tone, the Levitt report scored the educational and mental health care facilities at these institutions as below acceptable standards.¹⁰¹

⁹⁶ Oelsner, *Juvenile Justice: Helpless Frustration*, N.Y. Times, April 3, 1973, at 32, col. 5. This is the second of a four article series which reports the shortcomings of New York City's juvenile justice system.

⁹⁷ JOINT LEGISLATIVE COMMITTEE, *supra* note 6, at 32. *Accord*, CITIZENS' COMMITTEE, *supra* note 11, at 7.

⁹⁸ See reports cited note 11 *supra*.

⁹⁹ N.Y. Times, July 6, 1973, at 1, col. 1. Mr. Luger noted that the use of ombudsmen is an example of such beneficial changes. Beyond that, the Director indicated that only two of the schools could be described as closed in the sense of a prison, whereas the remaining eight institutions were "open." *Id.*

¹⁰⁰ No. 15 LEVITT REPORT, *supra* note 11; No. 16 LEVITT REPORT, *supra* note 11. These reports cover a 12 month period of study ending in April, 1973.

¹⁰¹ Immediately following the release of this report, Mr. Luger, Director of DFY, commented that although some of Mr. Levitt's criticism was justified, much of it was out of date because of the prior implementation by DFY of some improvements suggested in the report. N.Y. Times, Dec. 2, 1973, § 1, at 49, col. 1. See Memorandum from Elizabeth Schack, Director, Office of Children's Services, to Thomas McCoy, Dec. 11, 1973; Brief for Respondent, app. B, *In re Maurice C.*, 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974). See also No. 15 LEVITT REPORT, *supra* note 11, wherein the Comptroller's office noted:

Any criticism of the operations of the State training schools must be tempered by the recognition that they must accept children rejected by voluntary agencies and that they have never been the recipients of funds equivalent to those provided through public and private support to the voluntary agencies [In addition], the training schools have had to accept an ever-growing number of children coming from the most troubled home and community situations.

Id. at 48.

The Levitt report's finding as to the inadequacy of staff personnel at state training schools is indicative of the institutions' failure to provide appropriate treatment for PINS. For example, child care workers who by the nature of their job have the closest relationship with PINS are usually deficient in professional training.¹⁰²

Clearly, the unique role played by child care workers in the lives of PINS¹⁰³ warrants that such workers be adequately qualified. However, the report disclosed both insufficient pre-employment preparation and a failure on the part of the schools to provide needed in-staff training.¹⁰⁴

The professionally trained members of the staff include the psychiatrists, psychologists and social workers, all of whom are responsible for the inmate child's behavioral and emotional therapy. Regarding this aspect of the training schools' treatment services, the Committee on Mental Health Services, chaired by the Honorable Justice Polier, reported in 1972:

The fragmented, fractionalized, and inadequate psychiatric, psychological, and casework services made available by the state for the training schools cannot possibly provide even a modicum of the treatment services that the children require. It is doubtful that the part-time psychiatrists . . . can even adequately screen all new admissions and advise on medication, special programs, transfers and discharges.¹⁰⁵

In making a similar observation concerning the work of psychiatrists and psychologists, the Levitt report stated: "We question whether as little as four hours a week of care for 200 children is sufficient to carry out this phase of the treatment program."¹⁰⁶

The social workers, unlike the psychiatrists and psychologists, are required to provide day-to-day, individualized treatment for the children. To help the inmates "understand their problems and . . . adopt socially acceptable behavior,"¹⁰⁷ these employees are required to maintain case records from which treatment can be planned. According to Levitt's auditors, however, 20.2 percent of 436 required reports were either missing or had not been prepared and 17.7 percent of those found were prepared

¹⁰² No. 16 LEVITT REPORT, *supra* note 11, Managerial Summary at 4. Presently, there is no standard civil service requirement for a beginning child care worker; senior, principal, and head child care workers need have only a high school or equivalency diploma and at least two years experience in institutional care for delinquent children. *Id.* at 44. Furthermore, the child care workers, most of whom are white and residents of nearby rural communities, have little in common with the black and Puerto Rican children from New York City. POLIER REPORT, *supra* note 11, at 38.

¹⁰³ Child care workers are responsible for the supervision of the children in the living areas. They must teach the children cleanliness, personal hygiene, etiquette and how to cope with their peers. In addition, these employees apply individual counseling and guidance when necessary. No. 16 LEVITT REPORT, *supra* note 11, at 44.

¹⁰⁴ *Id.* at 44-47.

¹⁰⁵ POLIER REPORT, *supra* note 11, at 52.

¹⁰⁶ No. 15 LEVITT REPORT, *supra* note 11, Managerial Summary at 6.

¹⁰⁷ *Id.* at 53.

late.¹⁰⁸ Those records examined exhibited broadly stated treatment plans with little recorded evidence of actual treatment.¹⁰⁹ Moreover, the report indicated that little personal consultation existed among the social workers, psychiatrists, and psychologists.¹¹⁰

In addition to the need for proper mental health care, the OCS survey noted the PINS' desperate need for the best educational services obtainable.¹¹¹ Nevertheless, Mr. Levitt's auditors found "inconsistent patterns" of educational services, with classroom time for pupils ranging from approximately 3½ to 10 hours per week. Remedial reading instruction was unavailable at some schools, and high absenteeism rates were noted among the teachers as well as the students.¹¹²

In regard to the educational and mental health care at state training schools, the findings of the Levitt and Polier reports accentuate the irrelevancy of training school facilities to the urgent needs of PINS for adequate treatment. As Judge Beatrice S. Burstein of the Family Court, Nassau County, commented: "There is not a single state training institution that can really boast of being a residential *treatment center*."¹¹³

DFY's Proposed Solution

It would be unfair to assert the inadequacy of the current treatment being provided PINS without acknowledging DFY's efforts to improve the conditions at state training schools. The most promising feature of the Division's action subsequent to *Ellery C.* is embodied in the agency's Model Staffing Program.¹¹⁴ The objective of this plan is "[t]o implement a decentralized program operation, utilizing the semi-autonomous concept, . . . [by]. . . establish[ing] an effective staffing organization."¹¹⁵ In promulgating its program, DFY sanctioned the maintenance of comprehensive case records to be used by staff in planning appropriate treatment, psychiatric care for the youths, in-staff training, and constant communication between staff members.

¹⁰⁸ *Id.* at 54. These figures are based on randomly selected case folders of 76 children who were released from all but one of the state training schools between April and July, 1972. Of these 76 case folders, 436 reports should have been prepared.

¹⁰⁹ *Id.* at 58.

¹¹⁰ *Id.* at 53.

¹¹¹ See text accompanying notes 42-47 *supra*.

¹¹² No. 15 LEVITT REPORT, *supra* note 11, Managerial Summary at 3-5, 11-35. Additionally, the OCS survey indicates that 42% of the children were said to be involved with drug use or experimentation. JUDICIAL CONFERENCE REPORT, *supra* note 8, at 75. However, only one school has "what appears to be an effective drug abuse program. None have specialists in this field on staff." POLIER REPORT, *supra* note 11, at 38. *Accord*, CITIZENS' COMMITTEE, *supra* note 11, at 4.

¹¹³ No. 15 LEVITT REPORT, *supra* note 11, at 5 (emphasis added).

¹¹⁴ Brief for Respondent at app. C, *In re Maurice C.*, 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974).

¹¹⁵ *Id.* at app. C.

Additionally, and probably of more significance, DFY noted:

[T]he basic treatment unit in each school will be the cottages . . . [with] . . . a treatment team . . . established in each of them. The rationale for this approach is that the problems of each youngster take precedence over other considerations.¹¹⁶

Each cottage, housing 20 residents, is to be administered by a team responsible for the development and implementation of rehabilitative treatment. The team is to consist of several tiers of professional and nonprofessional workers, each of whom must meet the skill and experience requirements mandated by DFY for his particular function in the treatment plan. Generally, the job of these team members is oriented toward counseling, providing a home environment for the youth, and developing interpersonal relations with the child.

DFY's Model Staffing Program with its accompanying team concept is apparently devoted to the rehabilitation of the resident youths. However, the implementation of this program is progressing at a slow rate.¹¹⁷ Regrettably, the few DFY model programs which have been instituted in New York State training schools in the past have been short-lived.¹¹⁸ Consequently, the effectiveness of the DFY plan cannot be properly assessed until it is implemented on a long-term basis.

Until the Model Staffing Program may be fully implemented, DFY has merely provided for the placement of PINS and juvenile delinquents in separate facilities in purported compliance with *Ellery C.*¹¹⁹ As evi-

¹¹⁶ *Id.*

¹¹⁷ As of August, 1974, only one cottage had been instituted in each training school and recruitment for the program's staff had just begun. Full implementation of the Model Staffing Program will take approximately one to three years. Interview with Peter Winfield, Director of Personnel, Division for Youth, Albany, New York, Aug. 8, 1974.

¹¹⁸ Interview with Schluskel, *supra* note 24. Mr. Schluskel noted that previously DFY proposed in writing many model programs, based on the cottage unit, which were never implemented. For example, such a program was proposed for Otisville, a New York State training school. Yet, no new staff members were hired; in fact, the program was never instituted. In Warwick, another New York State training school, a proposed mental health cottage was set up in the summer of 1973 to help those children with more serious mental health problems. However, the program lasted only three to four weeks.

¹¹⁹ See text accompanying notes 22-24 *supra*. See also *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), wherein the court held constitutional the co-mingling of PINS and juvenile delinquents in secure detention centers. The court noted:

While even defense witnesses agreed that it would be "desirable" to establish separate facilities for PINS and [juvenile delinquents], the conflict among experts as to whether joint custody is damaging to PINS is too sharp to sustain a finding of unconstitutionality Of course, there is considerable debate within the child care profession as to whether PINS should be held in secure detention under *any* circumstances, and clearly they may not be so detained unless treatment is provided, but those questions are separate.

Id. at 595-96.

DFY's segregation plan presents two major questions: (1) will there be an increase in the

denced by the findings of the Levitt report, the present condition of state training schools clearly establishes the inadequacy of this approach. Thus, as noted earlier, Legal Aid properly views the segregation solution as an assault on the *Ellery C.* endorsement of the PINS's right to treatment in truly rehabilitative facilities.¹²⁰

INTERPRETING THE MANDATE OF *Ellery C.*

Conflicting Interpretations

In *Ellery C.*, the New York Court of Appeals had taken a bold step toward ensuring that effective PINS rehabilitation would be forthcoming. Chief Judge Fuld noted that PINS must be placed in a suitable environment, *viz.*, facilities that "provide adequate supervision and treatment."¹²¹ The Chief Judge further observed the Legislature's deliberate failure to mandate confinement of PINS children, concluding that "appellant's confinement . . . with adjudicated juvenile delinquents in a *prison environment*" was unjustified.¹²² He unequivocally stated that "persons in need of supervision may not validly be placed in a state training school."¹²³

Such language evinced a recognition by the Court of Appeals of the PINS's right to treatment and the training schools' failure to provide it. *Ellery C.* arguably provided a strong precedent for affirmative remedial action. Moreover, the court's reasoning was more satisfying than that of earlier appellate division cases in which it was simply held that family courts had "abused their discretion" in placing PINS in state training schools.¹²⁴

number of PINS committed to training schools? and (2) what type of programs will DFY develop at PINS training schools to distinguish them from those schools designated for juvenile delinquents?

¹²⁰ See text accompanying notes 26-27 *supra*.

¹²¹ 32 N.Y.2d at 591, 300 N.E.2d at 425, 347 N.Y.S.2d at 53.

¹²² *Id.* at 592, 300 N.E.2d at 425, 347 N.Y.S.2d at 54 (emphasis added). Furthermore, it is important to note Chief Judge Fuld's reference to N.Y. FAMILY CT. ACT § 255 (McKinney 1963) which empowers the family court to seek the assistance needed to provide that care which best enhances the child's welfare. The confinement of PINS in state training schools, the Chief Judge concluded, is inconsistent with the purposes of this section. There appears to be no explanation for Chief Judge Fuld's reference to the original section 255 which was amended in 1972. See note 63 *supra*.

¹²³ 32 N.Y.2d at 592, 300 N.E.2d at 425, 347 N.Y.S.2d at 54.

¹²⁴ See, e.g., *In re Arlene H.*, 38 App. Div. 2d 570, 328 N.Y.S.2d 551 (2d Dep't 1972); *In re Edward S.*, 37 App. Div. 2d 977, 328 N.Y.S.2d 235 (2d Dep't 1971); *In re Ilone I.*, 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Family Ct. Queens County 1970). But see *In re Jeanette P.*, 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (2d Dep't 1970) in which the court quoted the Supreme Court as saying:

The fact of the matter is that, however euphemistic the title, an . . . 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours Instead of a mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, cus-

Nevertheless, DFY, as well as the Corporation Counsel's office,¹²⁵ contended that Legal Aid's interpretation of *Ellery C.* as prescribing an absolute prohibition on placement of PINS in state training schools as they are presently constituted was untenable.¹²⁶ DFY's reasoning was based on the Court of Appeals' failure to declare the legislative authorization for such placement unconstitutional. This position, however, fails to appreciate the fact that the amendment to FCA section 756(a),¹²⁷ which authorized the use of state training schools to house PINS, was intended merely to eliminate the family court's dilemma of being responsible "for placement of children . . . [yet being] . . . without authority to secure placement, except in those cases where private agencies would accept them."¹²⁸ Although the amendment authorizes the placement of PINS in state training schools, it does not negate the original Act's provision for their treatment. Therefore, since state training schools fail to provide statutorily required "supervision or treatment," the Act has been violated, and no further PINS placements in these schools can be tolerated until the schools are reformed.¹²⁹

Judicially Narrowing the Scope of Ellery C.

Faced with the conflicting interpretations of *Ellery C.*, courts deciding subsequent cases have had available three alternative positions: (1) DFY's "segregation view"; (2) Legal Aid's "per se prohibition" approach; or (3) the pre-*Ellery C.* case-by-case inquiry which determined whether a family court judge "abused his discretion" in failing to secure the most appropriate facility for treatment and rehabilitation of PINS.¹³⁰

todians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.

Id., 310 N.Y.S.2d at 126, quoting *In re Gault*, 387 U.S. 1, 27 (1967).

An abuse of discretion includes the family court's failure to exhaust its investigation into the availability of proper facilities for the PINS child involved, the failure of Corporation Counsel to present sufficient proof that state training schools provide treatment, and the failure of the court to provide a full and fair hearing (e.g., the failure to grant an adjournment as requested by the law guardian). See interview with Schlüssel, *supra* note 24.

¹²⁵ Corporation Counsel represents New York City in family court proceedings dealing with PINS.

¹²⁶ See Brief for Respondent at 9-10, *In re Maurice C.*, 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974).

¹²⁷ N.Y. FAMILY CT. ACT § 756(a) (McKinney Supp. 1973).

¹²⁸ *In re Anonymous*, 40 Misc. 2d 1058, 1060, 245 N.Y.S.2d 264, 266 (Family Ct. Bronx County 1963).

¹²⁹ The amendment on its face is constitutional. However, the means by which it has been put into practice offend the FCA's mandate for proper treatment.

¹³⁰ See note 124 *supra*. The *Ellery C.* decision has been considered in subsequent cases. See *In re Evelyn M.*, 43 App. Div. 2d 563, 349 N.Y.S.2d 400 (2d Dep't 1973) (mem.), wherein the court held that PINS, currently confined in state training schools pursuant to orders made prior to *Ellery C.*, are "entitled to remission of their cases to the Family Court for placement in suitable treatment programs." *Id.*, 349 N.Y.S.2d at 401.

The interpretation question was squarely presented to¹³¹ and resolved by the Court of Appeals in the recent decision in *In re Maurice C.*¹³² There, the appellant was alleged to be "suffering from childhood schizophrenia, poor judgment and lack of insight"¹³³ He had a long history of placement in and elopement from foster homes and other facilities. However, the boy had never committed acts which would characterize him as a juvenile delinquent.¹³⁴ The Family Court, Kings County, subsequent to *Ellery C.*, ordered the appellant placed in a state training school.¹³⁵

On appeal, Maurice C.'s law guardian¹³⁶ argued that *Ellery C.* prohibited the placement of PINS in state training schools, thereby rendering the family court's disposition illegal.¹³⁷ Corporation Counsel and DFY, on the other hand, contended that the "segregation" policy complied with *Ellery C.*¹³⁸

The Appellate Division, Second Department, refused to rely on DFY's "mere protestations of conformity"¹³⁹ with *Ellery C.* Instead, the court examined OCS's report and concluded:

[T]oo little has been done, . . . the quality of care and treatment in the training schools must be improved, . . . [and] . . . adequate fiscal resources must be provided to acquire competent staff and facilities. It is conceded that such staff and facilities have not yet been provided and, more-

The appellant in *In re Maurice C.*, 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974) argued that although the opinion in *In re Evelyn M.* did not discuss DFY's segregation tactic, the segregation argument was raised and "obviously rejected" by the court. Brief for Appellant at 10. The respondent, however, disagreed with this interpretation of the case. Brief for Respondent at 10-11.

Furthermore, the appellant in *Maurice C.* argued that Legal Aid's interpretation of *Ellery C.* was confirmed in *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973) (civilly committed mental patient, though dangerously mentally ill, cannot be transferred to prison hospital). Brief for Appellant at 8-9. In that case, the Court of Appeals cited *Ellery C.* not only for the co-mingling problem but for the proposition that non-criminals who are deprived of their liberty must be provided with suitable and adequate treatment, the absence of which cannot be justified by the lack of funds or staff.

¹³¹ See Brief for Appellant at 6-13; Brief for Respondent at 9-14, *In re Maurice C.*, 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974) wherein the issue was set forth before the Appellate Division, Second Department.

¹³² No. 361B (Ct. App., July 15, 1974), *rev'g* 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974).

¹³³ *In re Maurice C.*, 44 App. Div. 2d 114, 116, 354 N.Y.S.2d 18, 20 (2d Dep't 1974).

¹³⁴ *Id.* at 115, 354 N.Y.S.2d at 19. See Brief for Respondent at 2-7 for the history of *Maurice C.* in the Family Court.

¹³⁵ 44 App. Div. 2d at 115, 354 N.Y.S.2d at 19.

¹³⁶ The law guardian is the attorney who represents PINS in Family Court.

¹³⁷ See Brief for Appellant at 6-8, *In re Maurice C.*, 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974).

¹³⁸ DFY filed a brief as *amicus curiae*.

¹³⁹ 44 App. Div. 2d at 116, 354 N.Y.S.2d at 20. See Brief for Respondent at 10-12, *In re Maurice C.*, 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (2d Dep't 1974).

over, that in the instant case the training school had but one half-time psychiatrist for one hundred children.¹⁴⁰

The court did not merely denounce the conditions at the New York State training schools, but further noted the distinction drawn in *Ellery C.* between the confinement of a juvenile delinquent in the quasi-criminal institutional setting of a training school and the treatment and supervision necessary to rehabilitate a PINS child. The court unanimously held:

The record . . . does not demonstrate that the institution in which this infant has been confined meets the standards set in *Ellery C.* . . . , for the care and treatment of PINS children [W]e cannot permit this unfortunate child to be confined in the training school at this time. He needs care and psychiatric treatment in a more therapeutic setting than has thus far been achieved in the training school program.¹⁴¹

Accordingly, the court reversed the order appealed from and remitted the proceeding to the family court for the placement of the appellant in a "suitable environment." In applying the *Ellery C.* recognition of a right to treatment, the court rejected DFY's segregation solution, implicitly accepting the Legal Aid viewpoint. This judicial pronouncement increased the probability that urgently needed care and treatment facilities for PINS would soon be operative.¹⁴²

However, the Court of Appeals reversed the Second Department's decision.¹⁴³ In so doing, it held that absent "a clear showing" that the treatment afforded PINS children at state training schools is "significantly inadequate," DFY's current segregation policy is statutorily and constitutionally permissible.¹⁴⁴

In adopting DFY's interpretation of *Ellery C.*, the *Maurice C.* court relied heavily upon the agency's presentation of the Model Staffing Program. Recognizing DFY's efforts to upgrade the training schools, its current employment therein of one part-time psychiatrist and one psychologist, and its future plans pursuant to the Model Staffing Program, the court held:

¹⁴⁰ 44 App. Div. 2d at 116, 354 N.Y.S.2d at 20. In addressing itself to DFY's claimed conformity to the *Ellery C.* standard, the Second Department also noted that the Model Staffing Program has yet to be implemented. *Id.* at 115, 354 N.Y.S.2d at 20.

¹⁴¹ *Id.* at 116, 354 N.Y.S.2d at 20.

¹⁴² Clearly, if the state training school system were completely revamped to provide proper rehabilitative treatment facilities and personnel, the placement of PINS in these institutions would be legal.

¹⁴³ No. 361B (Ct. App., July 15, 1974).

¹⁴⁴ The court's recognition of a constitutional right to treatment is implicit in its opinion which provides:

Whatever the altruistic theory for depriving the child of his liberty, if proper and necessary treatment is not forthcoming, a serious question of due process is raised. *Id.* at 5, citing *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966). See also text accompanying notes 73-83 *supra*.

On the total record before us, we cannot assume that the necessary initiatives to establish a fully adequate program of supervision and treatment for PINS children at the Training Schools, already begun, will not be carried to fruition A different question will be presented if at a later time it appears that it has not. But for the present, we note that the Division for Youth has made a commendable start toward . . . implementing the PINS child's right to necessary care and treatment.¹⁴⁵

CONCLUSION

In *Ellery C.* the Court of Appeals meritoriously determined that the rights of PINS were violated in the training school system. Regrettably, however, the court in *Maurice C.* rejected Legal Aid's interpretation of *Ellery C.* and sanctioned PINS' placement in these schools on a modified basis. Clearly, PINS should not be committed to these institutions until proper facilities and well-trained personnel are provided to effectuate rehabilitative care to which these children are entitled.

The current lack of proper treatment in the training schools is substantiated by reference to the OCS and Levitt reports. The OCS profile of PINS indicated that these children have behavioral problems of a non-criminal nature. Accordingly, proper care must be provided, and "quasi-criminal" institutions, as are currently in operation, are unfit for the task. The Levitt report, in describing the facilities at these institutions, confirmed that placements therein deprived PINS of their statutory and constitutional right to treatment. Unfortunately, DFY's Model Staffing Program has not, as yet, served to alleviate these deplorable conditions.¹⁴⁶

Ellery C. offered a clear judicial statement of the need for reform in the field of juvenile care as administered under state supervision. Its immediate effect would have been an improvement of the present training school system. Moreover, the Court of Appeals' decision, reinforced by the Appellate Division in *Maurice C.*, narrowed the gap between the humanitarian philosophy underlying the creation of the PINS classification and the approach of the family court to date. These decisions would have compelled the family court, Legislature, and institutional administrators to "seek and adopt [more] effective, rational, and constantly improving treatment programs" for PINS.¹⁴⁷

¹⁴⁵ No. 361B (Ct. App., July 15, 1974) at 4. In *Maurice C.* the Court of Appeals attempts to define the right to treatment. According to the court, the concept embraces a "bona fide effort to adequately treat . . . [PINS] in light of present knowledge" and "a requirement of initial diagnosis and of periodic assesment of the PINS child's needs in order that individualized treatment may be revised as the diagnosis develops." *Id.* at 5.

¹⁴⁶ See note 117 and accompanying text *supra*.

¹⁴⁷ Dr. Nicholas Kittrie, a leading advocate of the right to treatment doctrine, noted: The time is short. Unless necessary precautions are taken to guarantee that the recognition of the right to treatment, the establishment of its criteria, and the machinery for its enforcement are carefully formulated, public dissension and interagency bicker-

The Court of Appeals in *Maurice C.*, however, insists that it is not in its "province to determine what is the best possible treatment or to espouse an ideal but perhaps unattainable standard."¹⁴⁸ The court somehow clings to the hope that by placing its confidence in DFY and threatening future sanction if DFY should fail, the PINS children's dilemma in state training schools will be resolved. In light of DFY's past record,¹⁴⁹ it would seem more appropriate to expect that the Model Staffing Program will not satisfactorily provide PINS with rehabilitative treatment in the New York State training institutions.

Maurice C. represents a significant step in derogation of the inroads made by *Ellery C.* in the field of juvenile care.¹⁵⁰ The retrenchment evidenced therein signifies that the only current hope for adequate rehabilitative treatment for PINS rests with DFY's Model Staffing Program. Should it prove unsuccessful, the costly and time-consuming process of seeking judicial or legislative change must once more be undertaken.

ing may ensue, and one more opportunity for the law's constructive contribution to social engineering will fail to materialize.

Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 885 (1969). Cf. YOUTH DEVELOPMENT AND DELINQUENCY, PREVENTION ADMINISTRATION, SOCIAL AND REHABILITATION SERVICE, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE; Bazelon, *Beyond Control of the Juvenile Court* 4 (Pub. No. SRS 72 1970).

Two states have recently taken major steps in seeking alternatives to placing children in institutions and have emphasized the use of community resources. California, for example, subsidizes those counties which reduce their commitments to state institutions. These subsidies, however, must be used in community-based probation supervision programs. In Massachusetts, all the state schools were closed by the summer of 1972 and children were placed in community rehabilitation programs. No. 15 LEVITT REPORT, *supra* note 11, at 6-7.

It is interesting to note that within a short period after *Ellery C.* was decided, the development of two trends was discovered in the family court procedure: (1) judges became unwilling to continue reducing delinquency charges to PINS charges since they believed the training schools could not be utilized even if no other facilities were found for the children, and (2) some probation officers became hesitant to recommend that petitioners file a PINS rather than a delinquency petition. JUDICIAL CONFERENCE REPORT, *supra* note 8, at 17-18.

¹⁴⁸ No. 361B (Ct. App., July 15, 1974) at 5.

¹⁴⁹ See note 118 *supra*.

¹⁵⁰ It is noteworthy that one week after *Maurice C.* was decided, the Appellate Division, Second Department, reversed the placement of a 15 year-old adjudicated PINS child in a state training school based on the lack of testimony at the family court hearing as to whether the training school satisfied the *Ellery C.* requirements. See *In re Shirley G.*, No. 973E (2d Dep't, July 22, 1974). It is unclear, however, whether the Second Department was aware of the Court of Appeals' ruling in *Maurice C.* when it so decided.