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# Truancy, School Phobia and Minimal Brain Dysfunction

Irene Merker Rosenberg\* and  
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## I. INTRODUCTION

Truancy in the United States is a problem of vast proportions.<sup>1</sup> Legal efforts to effect a solution have produced three intersecting sets of laws dealing with unexcused school absence. First, compulsory education statutes permit an action, generally resulting in imposition of a fine, against the parents of a non-attending minor.<sup>2</sup> Second, based on their failure to assure the juvenile's regular school attendance, the parents may also be

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1. See, e.g., CHILDREN'S DEFENSE FUND, CHILDREN OUT OF SCHOOL IN AMERICA 1-3, 33-45 (1974) [hereinafter cited as CHILDREN OUT OF SCHOOL IN AMERICA] (survey found 5.4 percent of children aged 6-17 out of school 45 days or more per year; this figure was deemed to be a highly conservative estimate); N.Y. Times, June 7, 1976, at 34, col. 2 (approximately 200,000 of New York City's 1,500,000 pupils not in school each day); Washington Post, May 16, 1975, § C, at 1, col. 7 (estimating 20 percent of District of Columbia high school students absent each day). Compare National Association of Secondary School Principals, *Student Attendance and Absenteeism*, 1 The Practitioner 1 (1975) (in both 1973 and 1974, association members rated truancy "their 'most perplexing student problem' by a ratio of two to one over discipline") with E. ABBOTT & S. BRECKINRIDGE, TRUANCY AND NON-ATTENDANCE IN THE CHICAGO SCHOOLS 91 (1917) (during the period 1904-1908, "there have been each year about 60,000 cases [in Chicago] of absent children referred to the truant officers for investigation").

2. See, e.g., CAL. EDUC. CODE §§ 12451 *et seq.* (West 1975) (violation constitutes a misdemeanor punishable, upon first conviction, by a \$25 fine or jail confinement up to five days); ILL. ANN. STAT. ch. 122, § 26-10 (Smith-Hurd Supp. 1976); N.J. STAT. ANN. § 18A: 38-31 (West 1968). See also note 9 *infra*. Every state other than Mississippi has a compulsory education law. See CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 56-58, 224-28. Mississippi does, however, have a compulsory education statute directed against children in the form of its juvenile delinquency law, which defines delinquency to include willful absence from school, Miss. CODE ANN. § 43-21-5(g) (Cum. Supp. 1975), authorizes interim detention of delinquent children in jail under certain circumstances, *id.* § 43-21-13 (1972), and permits their placement at the state training school until age 20. *Id.* § 43-21-19.

subject to a civil suit under the state's neglect or dependency law; the most drastic disposition in such litigation is loss of custody of the child.<sup>3</sup>

Finally, all juvenile courts, in addition to their authority to hear neglect or dependency cases, have quasi-criminal jurisdiction over two kinds of misbehavior by children:<sup>4</sup> criminal law violations and juvenile status offenses, such as running away from home, being beyond parental control, and truancy.<sup>5</sup> In some states, the definition of delinquency includes both criminal

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3. See, e.g., CAL. WELF. & INST. CODE §§ 600, 726 (West 1972), 601.2, 727 (West Supp. 1976); ILL. ANN. STAT. ch. 37, §§ 702-4(1) (a), 705-7 (Smith-Hurd 1972), 705-2(1) (c) (Supp. 1976); N.Y. FAM. CT. ACT §§ 1011, 1012(f) (i) (A), (h), 1052 (McKinney 1975); TEX. FAM. CODE ANN. §§ 15.02(1) (J) (Vernon Supp. 1976), 15.05 (1975).

4. Most codes state that the proceeding against the juvenile is civil. See, e.g., N.Y. FAM. CT. ACT §§ 164, 165 (McKinney 1975); TEX. FAM. CODE ANN. § 51.17 (Vernon 1975). Before the Supreme Court, in *In re Gault*, 387 U.S. 1, 50 (1967), rejected the constitutional efficacy of the "civil" label-of-convenience," in juvenile delinquency proceedings, states had used the "civil" designation to preclude application of traditional due process rights available in criminal prosecutions.

5. Over two-thirds of the states have specifically enumerated truancy as a basis for juvenile court jurisdiction over children. See, e.g., ILL. ANN. STAT. ch. 37, § 702-3(b) (Smith-Hurd 1972) ("any minor subject to compulsory school attendance who is habitually truant from school"); N.Y. FAM. CT. ACT § 712(b) (McKinney 1975); OHIO REV. CODE ANN. § 2151.022(B) (Page 1976); TEX. FAM. CODE ANN. § 51.03(b) (2), (d) (Vernon Supp. 1976). In those states whose juvenile codes do not explicitly refer to truancy, the courts nonetheless appear to have jurisdiction over the child who is unlawfully absent from school because such statutes prohibit disobedience to parental orders, incorrigibility, or conduct endangering the child's welfare. See, e.g., ALA. CODE tit. 13, § 350 (3) (1959); ORE. REV. STAT. §§ 419.476(1) (b), (c) (1975). But see *In re Garner*, 230 Pa. Super. Ct. 476, 326 A.2d 581 (1974) (Under Pennsylvania law, children who are incorrigible and those who violate criminal laws are grouped together as delinquents; truants, however, are classified as deprived children. In this case, the child was found to be both a truant and incorrigible, and adjudicated both delinquent and deprived; the appellate court approved this dual adjudication.); cf. *Gonzalez v. School Dist.*, 8 Pa. Commw. Ct. 130, 135, 301 A.2d 99, 102 (1973) (holding that truancy and lateness may constitute "disobedience or misconduct" on the basis of which the child may be suspended or expelled; court is unclear as to whether such conduct may afford a basis for a delinquency proceeding).

By a recent amendment, California gives its juvenile courts jurisdiction over truants only after a determination that available non-judicial facilities and services cannot correct the minor's habitual refusal to attend school. In addition, the court's dispositional power with respect to truants is restricted, inasmuch as the child, whose only adjudicated misbehavior is truancy, cannot be removed from parental custody except during school hours. CAL. WELF. & INST. CODE § 601(b) (West Supp. 1976).

law infractions and status offenses.<sup>6</sup> In others, the latter are placed in a separate category, and the children are called ungovernables, incorrigibles, or "persons in need of supervision" ("PINS").<sup>7</sup> In this Article, truants will be referred to by the acronym PINS notwithstanding their classification as delinquents in some jurisdictions.

In many states, the ultimate penalty that can be imposed against PINS truants is incarceration in the state training school, which may also house juveniles who have committed criminal acts.<sup>8</sup> Thus, if liberty is deemed to be of transcending value, the most severe sanctions in the network of laws designed to assure school attendance are those to which the truant child may be subject.<sup>9</sup>

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6. See, e.g., MINN. STAT. § 260.015(5) (1976); PA. STAT. ANN. tit. 11, § 50-102(2) (Purdon Supp. 1976); S.C. CODE § 15-1103(9) (1962).

7. See, e.g., COLO. REV. STAT. § 19-1-103(5) (1974); ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd 1972); N.Y. FAM. CT. ACT § 712(b) (McKinney 1975).

Recent amendments to the Florida juvenile code purport to eliminate the PINS classification and to treat truants as dependent children. Another section of the amendments, however, describes an "ungovernable" child as one who is beyond parental control, and provides that, upon the first adjudication of ungovernability, the child may be treated as dependent, but that, in the case of subsequent ungovernability adjudications, the child may be treated as a delinquent. It is unclear whether truancy alone may constitute ungovernability. See FLA. STAT. ANN. §§ 39.01(10), (11) (West Supp. 1976).

Under Washington law, truants and other status offenders are treated as dependent children, WASH. REV. CODE ANN. § 13.04.010 (1962). The dispositional section of the statute provides that delinquents and incorrigibles, one sub-category of juvenile status offenders, may be incarcerated in the state training school, and thus purports to exempt truants and other types of status offenders from placement in the training school, WASH. REV. CODE ANN. § 13.04.095(6) (Supp. 1975). A prosecutor might, however, argue that a child is incorrigible by virtue of his or her truancy. Cf. *In re Garner*, 230 Pa. Super. Ct. 476, 326 A.2d 581 (1974), discussed in note 5 *supra*.

8. See, e.g., CONN. GEN. STAT. ANN. §§ 17-53(e), 17-68(a), (b) (West Supp. 1976), 17-69(a), (b) (West 1975) (indeterminate commitment up to two years, subject to extension for up to two additional years); IND. CODE ANN. §§ 31-5-7-4.1(c) (Burns Supp. 1976), 31-5-7-17 (Burns 1973) (indeterminate commitment to age 21); W. VA. CODE §§ 49-1-4(4), 49-2-2, 49-5-2, 49-5-11 (1976) (indeterminate commitment to age 18). In some jurisdictions, truants may be placed in training schools, but must be segregated from juveniles who have committed crimes. See, e.g., N.M. STAT. ANN. §§ 13-14-3(M) (1), 13-14-31(C), (D) (Supp. 1976); TEX. FAM. CODE ANN. §§ 51.03(b) (2), (3) (Vernon Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 5143d, § 12(b) (Vernon Supp. 1976).

9. Although some compulsory education statutes permit incarceration of the parent upon conviction, see note 2 *supra*, the maximum confinement is of short duration, and, even where authorized, it is doubtful

Many juvenile court PINS petitions are based on failure to attend school.<sup>10</sup> Moreover, the effect of unlawful absence may

that such sanctions are often invoked. See, e.g., *Commonwealth v. Ross*, 17 Pa. Commw. Ct. 105, 330 A.2d 290 (1975) (\$2 fine plus court costs); *State v. Pilkinton*, 310 S.W.2d 304 (Mo. 1958) (\$10 fine assessed against each parent).

In some states, juvenile courts are authorized to issue orders directed to the parents of children who are within the court's jurisdiction. See ILL. ANN. STAT. ch. 37, § 705-5(1) (Smith-Hurd 1972); N.Y. FAM. CT. ACT §§ 740, 759 (McKinney 1975); OKLA. STAT. tit. 10, § 1116(a)(1) (West Supp. 1976). The parent's violation of such an order may result in a contempt proceeding. See *In re Burr*, 119 Ill. App. 2d 134, 255 N.E.2d 57 (1970) (child alleged to be in need of supervision on the basis of truancy; mother directed to assure juvenile's daily school attendance, found in contempt for failure to comply with this order, and sentenced to five days in jail; finding and sentence sustained on appeal).

Finally, although a neglect or dependency action against the parent may result in a loss of custody and placement of the child in a neglect shelter or foster home, and although such a parental loss is not to be denigrated, a similar deprivation of custodial rights occurs where a PINS truancy proceeding against the child ends in institutionalization. The difference, however, aside from the assessment of culpability involved, is that the PINS truant may be committed to a considerably less pleasant facility. See, e.g., *CHILDREN OUT OF SCHOOL IN AMERICA*, *supra* note 1, at 65 (1974) ("In Pickens County, South Carolina, it apparently is common practice in the school system to refer truants to court for prosecution . . . [and to place] them in county jail. Two of our clients . . . , after an adjudication of truancy, were held in the same cellblock with adult prisoners . . . [and] were brutally raped and beaten.") (footnote omitted); *In re Kroll*, 43 A.2d 706 (D.C. Mun. Ct. App. 1945) (child placed in training school on the basis of truancy subsequently alleged that he had run away from the facility because his legs were burned by lighted cigarettes and he was struck in the stomach, resulting in appendicitis attack). For greater detail with respect to the training schools to which truants may be committed, see, e.g., *Nelson v. Heyne*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976).

In a recent survey of children incarcerated in adult jails, the authors reported that "17.9 percent of jailed children we found had committed 'status offenses' . . . such as running away or truancy." *CHILDREN'S DEFENSE FUND, CHILDREN IN ADULT JAILS* 4, 20 (1976).

10. See, e.g., ADMIN. BD. OF N.Y. JUDICIAL CONFERENCE, REPORT FOR JUDICIAL YEAR 1972-73, at 330 (1974) (disclosing that during the 1972-73 judicial year, 3,274 PINS proceedings, or 25 percent of the total number of such actions, were brought in New York on the basis of habitual truancy charges); TEXAS YOUTH COUNCIL, TEXAS JUVENILE COURT STATISTICS FOR 1973, at 10-11 (1975) (in 1973, school authorities referred 1,683 cases or 2.9 percent of the total number of delinquency and PINS cases, to the juvenile courts). See also OFFICE OF CHILDREN'S SERVICES OF THE N.Y. JUDICIAL CONFERENCE, THE PINS CHILD, A PLETHORA OF PROBLEMS 39, 44 (1973) [hereinafter cited as PINS PLETHORA] (in a survey of 316 New York City PINS children removed from their homes by court action, "[t]ruancy featured in the allegations against 71 percent of the children;" moreover, "[s]chool related problems are . . . seen as a major

be considerably more significant than statistics relating to truancy petitions indicate; regardless of the misconduct for which a juvenile is brought to court, his or her truancy is an influential factor in determining whether the child remains at home or is institutionalized.<sup>11</sup>

Although the constitutionality as well as the wisdom of legislation punishing children for non-criminal conduct such as truancy has been attacked,<sup>12</sup> both vested interests in the nation's

factor in the lives of PINS children and as causal to their appearance in the Court").

The above statistics may not fully reflect the number of children brought to juvenile court on truancy charges, inasmuch as a number of states permit actions against children as delinquents if they have been previously adjudicated PINS and thereafter violate a probation order by engaging in further PINS conduct including truancy. *See, e.g.*, GA. CODE ANN. § 24A-401(e) (2) (1976); MONT. REV. CODES ANN. § 10-1203(12) (b) (Cum. Supp. 1975); N.C. GEN. STAT. § 7A-278(2) (1969); TEX. FAM. CODE ANN. § 51.03(a) (2) (Vernon Supp. 1976). Such children may be classified as delinquents rather than truants. *See, e.g., In re Dowell*, 17 N.C. App. 134, 193 S.E.2d 302 (1972) (child adjudicated a PINS on the basis of truancy and placed on probation; she subsequently violated probation by further truancy, was adjudicated delinquent and committed to Board of Youth Development).

11. *See* Thomas & Fitch, *An Inquiry into the Association Between Respondents' Personal Characteristics and Juvenile Court Dispositions*, 17 WM. & MARY L. REV. 61, 68, 72-74, 77, 80, 82-83 (1975) (more severe dispositions are imposed if, *inter alia*, the child is a truant).

If a child is adjudicated either a PINS or a delinquent and is placed on probation, his or her subsequent truancy may result in a probation revocation hearing, which may culminate in institutionalization. *See, e.g.*, N.Y. FAM. CT. ACT § 779 (McKinney 1975); *Echols v. State*, 481 S.W. 2d 160 (Tex. Civ. App. 1972).

Furthermore, a child who is placed in a training school and thereafter paroled may subsequently be returned to the training school on the basis of various types of misconduct, including truancy. *See* J. Lobenthal, *An Introduction to the Law and Conduct of Administrative Hearings To Revoke a Child's Parole* 24, 26-27 (unpublished manuscript on file at the New York State Division for Youth, New York, New York) (the author is a practicing attorney who was appointed to be the first juvenile parole revocation hearing officer in New York).

12. *See, e.g.*, *Sheehan v. Scott*, 520 F.2d 825 (7th Cir. 1975) (affirming dismissal of action challenging constitutionality of subsection of Illinois PINS statute prohibiting habitual truancy; rejecting claims of vagueness, overbreadth, and invasion of privacy, the court concluded that no substantial constitutional question was raised); *In re Napier*, 532 P.2d 423, 425 (Okla. 1975) (rejecting vagueness challenge to PINS statute); *Blondheim v. State*, 84 Wash. 2d 874, 529 P.2d 1096 (1975) (rejecting various constitutional challenges to PINS statute); *Commonwealth v. Brasher*, 359 Mass. 550, 270 N.E.2d 389 (1971) (rejecting, *inter alia*, vagueness challenge to PINS statute).

For authorities questioning the wisdom of PINS legislation, *see, e.g.*, Kaufman, *Of Juvenile Justice and Injustice*, 66 A.B.A.J. 730, 731, 733 (1976); Bazelon, *Beyond Control of the Juvenile Court*, 21 Juv. Ct.

school system<sup>13</sup> and the overriding state interest in assuring an enlightened, or at least literate, citizenry<sup>14</sup> militate in favor of some form of juvenile court control over truancy for the foreseeable future. Indeed, inasmuch as education appears to offer the best opportunity for upward mobility, parents, especially among the poor, have expressed support for vigorous enforcement of such truancy legislation.<sup>15</sup>

For a variety of reasons, juvenile court personnel and police officials are also in favor of maintaining jurisdiction over truancy. Truancy is viewed as a precursor of juvenile crime, and early intervention on the basis of the child's refusal to attend school is seen as a way to deter future criminality.<sup>16</sup> Because it is asserted that there is a correlation between school absence and commission of crimes by children, strict enforcement of the truancy laws is also regarded as a means of ensuring juvenile court jurisdiction without the necessity of alleging and proving particular penal code violations.<sup>17</sup> Finally, statutes prohibiting truancy enable the police, during school hours, to take a child

JUDGES J. 42 (1970); Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974) [hereinafter cited as Yale PINS Study].

13. See J. HOLT, *INSTEAD OF EDUCATION* 8, 152-57, 222 (1976). Mr. Holt, a radical educator, advocates the abolition of compulsory education requirements. *Id.* at 20-21. Cf. *Geduldig v. Board of Educ.*, 43 App. Div. 2d 840, 351 N.Y.S.2d 167 (1974) (mem.) (mandamus action to annul community school district's dismissal of all attendance teachers assigned thereto; court held plaintiffs entitled to relief, finding such dismissal contrary to compulsory attendance statutes).

14. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972); *In re John R.*, 79 Misc. 2d 339, 340-42, 357 N.Y.S.2d 1001, 1003-04 (Fam. Ct. 1974); *In re Mario*, 65 Misc. 2d 708, 715-18, 317 N.Y.S.2d 659, 666-68 (Fam. Ct. 1971); cf. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973).

15. See CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 55, 62 (in a survey conducted by the Children's Defense Fund, 93.6 percent of those who responded supported compulsory attendance laws).

16. See S. GLUECK & E. GLUECK, *DELINQUENTS AND NONDELINQUENTS IN PERSPECTIVE* 32, 189-93 (1968) (in a study comparing delinquent and nondelinquent boys, 94.8 percent of the delinquents had histories of truancy; school problems, including truancy at an early age, are among the factors which the authors believe may be predictive of delinquency). See also S. GLUECK & E. GLUECK, *TOWARD A TYPOLOGY OF JUVENILE OFFENDERS* 67-70 (1970).

17. See, e.g., *Washington Post*, Oct. 4, 1975, § 1, at 7, col. 1 (Alexandria, Virginia police officials initiated enforcement program against school truancy because "56 per cent of the people arrested for burglaries in 1974 were juveniles of school age and 'most of them are truants'"). According to law enforcement officials, the foregoing anti-truancy campaign resulted in a decrease of the number of juveniles involved in burglaries and a decrease in shoplifting. *Washington Post*, Nov. 29, 1975, § B, at 2, col. 3. See also Yale PINS Study, *supra* note 12, at 1393-94.

into custody without showing probable cause that a crime has been committed.<sup>18</sup>

The PINS truancy proceeding itself is usually bifurcated;<sup>19</sup> the first stage, the fact-finding or adjudicatory hearing, is to determine guilt or innocence of the charges;<sup>20</sup> the second phase, the dispositional hearing, is to determine the appropriate care, treatment, or supervision of the child.<sup>21</sup>

The vast majority of PINS cases are not contested at the fact-finding stage. Instead, the child "pleads guilty" by admitting the allegations of the petition.<sup>22</sup> Such a result is particularly likely in truancy cases; the proof against the juvenile, school attendance records, is ostensibly clearcut<sup>23</sup> and the child may readily admit that he or she has not attended school.<sup>24</sup>

Notwithstanding the prevalence of admissions in truancy cases, there are defenses that are arguably available and that should be asserted at the fact-finding hearing.<sup>25</sup> Unfortunately,

18. See, e.g., CAL. EDUC. CODE § 12405 (West 1975); MO. ANN. STAT. § 167.071(2) (Vernon 1965); N.J. STAT. ANN. § 18A: 38-29 (West 1968); TEX. FAM. CODE ANN. § 52.01(a) (3) (Vernon 1975); *In re Carpenter*, 31 Ohio App. 2d 184, 287 N.E.2d 399 (1972) (child arrested by police officer for being on a public street during school hours in violation of municipal ordinance; on this basis, he was adjudicated a PINS); Washington Post, Oct. 4, 1975, § 1, at 7, col. 1 ("Police officers have now been instructed to patrol . . . 'teen-age hangouts' . . . and will ask to see a student's school identification card if they are suspected truants . . ."). But see N.Y. FAM. CT. ACT § 721 (McKinney 1975), and Committee Comments thereto; cf. *State v. Smithers*, 256 Ind. 512, 269 N.E.2d 874 (1971) (police officers unsuccessfully attempted to establish probable cause to search automobile for drugs by alleging that defendants were juveniles violating a curfew ordinance).

19. See Rosenberg & Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 MICH. L. REV. 1097, 1106 & n.39 (1976).

20. See, e.g., ILL. ANN. STAT. ch. 37, §§ 704-1 (Smith-Hurd 1972), 704-2, 704-8 (Smith-Hurd Supp. 1976); N.Y. FAM. CT. ACT §§ 742, 744(a) (McKinney 1975); TEX. FAM. CODE ANN. § 54.03 (Vernon 1975).

21. See, e.g., ILL. ANN. STAT. ch. 37, § 705-1 (Smith-Hurd 1972); N.Y. FAM. CT. ACT §§ 743, 745, 746 (McKinney 1975); TEX. FAM. CODE ANN. § 54.04 (Vernon 1975).

22. See, e.g., Yale PINS Study, *supra* note 12, at 1389 n.50; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 33 (1967) [hereinafter cited as TASK FORCE REPORT].

23. See *In re John R.*, 79 Misc. 2d 339, 342-43, 357 N.Y.S.2d 1001, 1004-07 (Fam. Ct. 1974) (ruling certified transcript of child's attendance record admissible at the fact-finding hearing).

24. TASK FORCE REPORT, *supra* note 22, at 33; cf. CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 18.

25. For a general discussion on the value of an adjudicatory hearing in PINS cases, see Rosenberg & Rosenberg, *supra* note 19, at 1131-44. The same article discusses various defenses which may be raised



the child may be of little assistance in the preparation of a defense, for, when asked why he or she is a truant, the juvenile's reply is apt to be, "I don't like school."<sup>26</sup> This response will not avoid an adjudication of truancy.<sup>27</sup> The underlying reasons for the child's dislike of school and resulting nonattendance that may afford a basis for defense are likely to be beyond the child's ken or ability to articulate.<sup>28</sup> Indeed, without the help of experts, the attorney may also be unable to ascertain the legal relevance of the facts that may constitute a defense against truancy charges. Thus, the need for interdisciplinary assistance at the fact-finding stage of truancy cases is compelling, for the use of medical, psychiatric and/or psychological experts may be the only way to determine the availability of certain defenses.

This Article will explore two such defenses: school phobia and minimal brain dysfunction. It will describe the characteristics of school phobics and children with minimal brain dysfunction, and explain why the disabilities of such children may preclude school attendance and afford a defense to truancy charges.

## II. SCHOOL PHOBIA

Scholars in medicine and psychology generally separate children who absent themselves from school into two distinct

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in truancy and other types of PINS proceedings; these defenses include parental neglect, failure of the petitioning party to exhaust non-judicial remedies, and assertion that the conduct involved is either an isolated incident, *de minimis*, or parentally condoned. *Id.* at 1144-63.

26. See CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 18 (in a survey of reasons for nonattendance, "[t]he most frequently reported response was that the children 'did not like school'").

27. See *In re Mario*, 65 Misc. 2d 708, 717, 317 N.Y.S.2d 659, 667-68 (Fam. Ct. 1971) (while the state may not compel an adult to work notwithstanding the possible correlation between vagrancy and crime, under the doctrine of *parens patriae*, the state may require a child to attend school regardless of the juvenile's disinclination to do so).

28. See CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 18 (response that children "'did not like school' . . . masks many of the real reasons underlying nonattendance," including poor reading skills, inappropriate instruction, and misclassification by the school system). Parents are also "ignorant of the possible disabilities their children may have, ways of assessing them, educational services that would be beneficial, or what exactly they are entitled to." *Id.* at 96. Furthermore, "[w]hen a child first shows signs of not understanding or keeping up with classwork, a complete diagnostic session is in order. . . . But such comprehensive diagnoses rarely are made. . . . Few of the districts we visited had anywhere near adequate diagnostic facilities or support personnel." *Id.* at 104.

groups, truants and school phobics.<sup>29</sup> Truancy is described as a conduct or behavior disorder and is thus eliminated from studies of school phobia,<sup>30</sup> which is usually classified as a psychoneurotic or even more severe emotional disorder.<sup>31</sup> The symptomatology of truancy includes absence from both school and home without parental permission, dislike of school, and poor school performance; some truants may also engage in antisocial behavior.<sup>32</sup> In contrast, school phobics remain at home during schooltime with parental knowledge and perhaps encourage-

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29. See, e.g., Bakwin, *Learning Problems and School Phobia*, 12 PEDIATR. CLIN. NORTH AM. 995, 1010 (1965); Eisenberg, *School Phobia: A Study in the Communication of Anxiety*, 114 AM. J. PSYCH. 712 (1958); Hersov, *School Refusal*, 3 BRIT. MED. J. 102, 104 (1972); Lassers, Nordan, & Bladholm, *Steps in the Return to School of Children with School Phobia*, 130 AM. J. PSYCH. 265 (1973); Schmitt, *School Phobia—The Great Imitator: A Pediatrician's Viewpoint*, 48 PEDIATRICS 433 (1971); Tyrer & Tyrer, *School Refusal, Truancy, and Adult Neurotic Illness*, 4 PSYCHOL. MED. 416, 417 (1974). Dr. Hersov notes that school phobia "should be distinguished from truancy, which is possible in most cases but more difficult when there is an overlap in the pattern of non-attendance and associated behaviour." Hersov, *supra* at 104. He also points out that in 80 to 90 percent of the cases, non-attendance is attributable to physical illness, while other children "are unlawfully withheld from school by their parents to help at home, to keep a parent company, or to do the shopping for a phobic, house-bound mother." *Id.* at 102. See also CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 19, 65-68 (1.9 percent of children in survey who were out of school for 45 days or more gave as their reason: "Had to help at home").

30. See, e.g., Eisenberg, *supra* note 29, at 712; Lassers, Nordan, & Bladholm, *supra* note 29, at 265; Skynner, *School Phobia: A Reappraisal*, 47 BRIT. J. MED. PSYCHOL. 1, 14 (1974) (describing one of the treatment failures in a study of school phobics, the author explained that the child "was really a truant from a family with delinquent attitudes in which our advice regarding management was not followed").

One expert has, however, conducted a comparative study of truants and school phobics. See Hersov, *Persistent Non-Attendance at School*, 1 CHILD PSYCHOL. & PSYCH. 130 (1960) (comparing a group of school phobics with a group of truants and a control group, each having fifty members).

31. See, e.g., Berg, Nichols, & Pritchard, *School Phobia—Its Classification and Relationship to Dependency*, 10 J. CHILD PSYCHOL. & PSYCH. 123, 131 (1969); Hersov, *supra* note 30, at 135; Milman, *School Phobia: Clinical Experience*, 66 N.Y. STATE J. MED. 1887, 1890-91 (1966).

Generally speaking, conduct disorders involve antisocial "acting out" behavior, whereas neuroses involve internalization of anxieties. See Kessler, *Neurosis in Childhood*, in MANUAL OF CHILD PSYCHOPATHOLOGY 387-88 (B. Wolman ed. 1972). See also Anthony, *Neurotic Disorders*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/II 2149-50 (2d ed. A. Freedman, H. Kaplan, & B. Sadock 1975).

32. See Berg, Nichols, & Pritchard, *supra* note 31, at 133; Eisenberg, *supra* note 29, at 712; Tyrer & Tyrer, *supra* note 29, at 417.

ment, often exhibit somatic conditions such as nausea, headaches, and abdominal pain, usually do not display delinquent behavior, and, before onset of the symptoms, generally enjoy school and perform well there.<sup>33</sup>

School phobia, which may occur at any time from early childhood to late adolescence,<sup>34</sup> is often divided into two basic subgroupings.<sup>35</sup> In the case of "type 1" school phobics, who are primarily of elementary school age, there is generally an acute and dramatic onset of the phobia, accompanied by changes in the child's personality.<sup>36</sup> The juveniles falling within this classification are considered neurotic and usually respond favorably to treatment.<sup>37</sup> The older, "type 2" school phobics are ordinarily

33. See, e.g., Nader, Bullock, & Caldwell, *School Phobia*, 22 PEDIATR. CLIN. NORTH AM. 605, 606 (1975); Schmitt, *supra* note 29, at 433; Waldfogel, Coolidge, & Hahn, *The Development, Meaning and Management of School Phobia*, 27 AM. J. ORTHOPSYCH. 754 (1957). But see Berg, Nichols, & Pritchard, *supra* note 31, at 126 (statistical analysis of 29 school phobics included a few "who missed some schooling without their parents' knowing"); Coolidge, Willer, Tessman, & Waldfogel, *School Phobia in Adolescence: A Manifestation of Severe Character Disturbance*, 30 AM. J. ORTHOPSYCH. 599, 602-04 (1960) (discussing case of 13½ year old school phobic boy who engaged in delinquent behavior); Waldron, Shrier, Stone, & Tobin, *School Phobia and Other Childhood Neuroses: A Systematic Study of the Children and Their Families*, 132 AM. J. PSYCH. 802, 804 (1975) (in study of 35 pre-adolescent school phobics, 62 percent showed at least mild maladjustment in school prior to onset of phobia).

34. See Johnson, *School Phobia*, 27 AM. J. ORTHOPSYCH. 307 (1957); Milman, *supra* note 31, at 1888; Sperling, *School Phobias: Classification, Dynamics, and Treatment*, 22 PSYCHOANAL. STUDY CHILD 375, 378 (1967).

35. See, e.g., Coolidge, Hahn, & Peck, *School Phobia: Neurotic Crisis or Way of Life*, 27 AM. J. ORTHOPSYCH. 296, 297 (1957) (two classifications, "neurotic" and "characterological"); Kennedy, *School Phobia: Rapid Treatment of Fifty Cases*, 70 J. ABNORM. PSYCHOL. 285 (1965); cf. Rodriguez, Rodriguez, & Eisenberg, *The Outcome of School Phobia: A Follow-Up Study Based on 41 Cases*, 116 AM. J. PSYCH. 540, 542-43 (1959) (treatment of children younger than 11 significantly more successful than of older children). Because age is a factor in classification, some authorities recognize that they may be dealing with a continuum rather than two sharply divisible sub-groups. See Coolidge, Hahn, & Peck, *supra* at 298; Johnson, *supra* note 34, at 308; Waldfogel, Coolidge, & Hahn, *supra* note 33, at 755. Others provide still more refined classification of school phobics for purposes of diagnosis and treatment. See Sperling, *supra* note 34, at 375, 377; Waldron, Shrier, Stone, & Tobin, *supra* note 33, at 803.

36. See Coolidge, Hahn, & Peck, *supra* note 35, at 296-97; Hersov, *supra* note 29, at 103; Kennedy, *supra* note 35, at 285-86.

37. Success in treatment is generally determined on the basis of the child's return to school. See Eisenberg, *supra* note 29, at 717; Kennedy, *supra* note 35, at 289; Lassers, Nordan, & Bladholm, *supra* note 29, at 267-68; Rodriguez, Rodriguez, & Eisenberg, *supra* note 35, at 542. There

more seriously disturbed and may be psychotic; success rates in treatment are considerably lower. The symptoms of "type 2" school phobia, which may be chronic, appear more gradually, and less radical personality modifications occur than in the case of "type 1" children.<sup>38</sup>

Some school phobias appear to be triggered by particular events at home or in school, such as illness or death in the family, promotion to junior high school, difficulties with a new teacher, or intimidation by fellow students.<sup>39</sup> The absence of any recent traumatic experience does not, however, preclude a diagnosis of school phobia,<sup>40</sup> inasmuch as the phobia is often induced or learned as a result of a pathological parent-child relationship.<sup>41</sup> Moreover, school phobia does not necessarily

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is a scholarly debate concerning the advisability of forced early return to school. One group suggests that insistence on speedy resumption of attendance may result in symptom displacement that then provides an excuse for discontinuation of therapy, and may ultimately cause more severe mental illness. See Powers, McMahan, & Owens, *Severe School Phobia*, 97 VA. MED. MON. 760, 762-63 (1970); Sperling, *supra* note 34, at 377, 390-91. Others submit that there is no evidence of symptom displacement and that failure to effect a rapid return exacerbates the problem. See Lassers, Nordan, & Bladholm, *supra* note 29, at 265; Rodriguez, Rodriguez, & Eisenberg, *supra* note 35, at 540-41. One set of co-authors believes that the child should be kept out of school until the underlying neurosis has been eliminated because the early return to school may appear to obviate the need for continued therapy; they suggest, however, that this precaution may be unnecessary in upper-class families, since they would probably be more aware of the need for continued treatments, whereas "[t]he lower-middle-class and lower-class families cannot appreciate these factors to the same extent." Waldfogel, Coolidge, & Hahn, *supra* note 33, at 779 (discussion by Hyman S. Lippman).

38. See Coolidge, Hahn, & Peck, *supra* note 35, at 297-99; Eisenberg, *supra* note 29, at 716-17; Hersov, *supra* note 29, at 103; Kennedy, *supra* note 35, at 285-86, 289. *But see* Berg, Nichols, & Pritchard, *supra* note 31, at 124-25, 138 (group of acute school phobics had higher mean age than chronic group; the latter were, however, significantly more neurotic and maladjusted).

39. See Hersov, *supra* note 29, at 103; Powers, McMahan, & Owens, *supra* note 37, at 761; Radin, *Psychodynamic Aspects of School Phobia*, 8 COMR. PSYCH. 119 (1967). Cf. "The 90,000 'Ghosts' Who Haunt the Schools," N.Y. Times, Nov. 14, 1976, § 12, at 1, col. 1 (The "ghosts" referred to in the title are children who have stopped attending school; "the greatest number of children out of school are lost in the transition between junior high school and high school. Children who are afraid of being moved up simply move out.').

40. See Hersov, *Refusal To Go To School*, 1 J. CHILD PSYCHOL. & PSYCH. 137, 140 (1960) (in a study of fifty school phobics, "[n]o clear precipitating factor could be found in 17 cases"); Waldron, Shrier, Stone, & Tobin, *supra* note 33, at 805-06 (no precipitating school or family factor present with respect to 42 percent of the school phobics studied).

41. See Miller, *School Phobia: Diagnosis, Emotional Genesis, and Management*, 72 N.Y. STATE J. MED. 1160, 1161 (1972); Sperling, *supra*

mean an absolute refusal to attend school; instead, it may be characterized by irregular or spotty attendance.<sup>42</sup>

While not nearly as prevalent as truancy, school phobia appears to affect a substantial number of children and to be on the increase.<sup>43</sup> Moreover, the actual number of school phobics may be greater than indicated in the psychiatric literature. Many parents and school authorities may be unaware that they are dealing with a mental illness, and thus it may be that only the most dramatic cases are referred to clinics and psychiatrists.<sup>44</sup>

The problem of undetected school phobia may be particularly acute in the case of children from lower socioeconomic backgrounds, that is, the children who are most often brought to juvenile court and charged as PINS.<sup>45</sup> Although scholars have

note 34, at 379-80. Some authorities refer to school phobia as a manifestation of "separation anxiety, by which is meant a pathologic emotional state in which the child and parent, usually the mother, are involved in a mutually hostile, dependent relationship, the outstanding characteristic of which is an intense need to be close together." Bakwin, *supra* note 29, at 1011; Johnson, *supra* note 34, at 307. Two writers have noted, however, that

if the separation theory is correct, . . . these children should have difficulties separating from mother in all or many areas of their life rather than just in going to school. Empirically, this is not always the case and, in older children, from about 12 on, this is rarely the case. There are many examples in the published case reports of children maintaining outside social activities.

Leventhal & Sills, *Self-Image in School Phobia*, 34 *AM. J. ORTHOPSYCH.* 685, 686 (1964).

42. See Berg, Nichols, & Pritchard, *supra* note 31, at 123; Nader, Bullock, & Caldwell, *supra* note 33, at 606; Powers, McMahan, & Owens, *supra* note 37, at 761; Schmitt, *supra* note 29, at 433, 440.

43. See Eisenberg, *supra* note 29, at 712 (as of 1958, "the incidence [of school phobia in clinic admissions] was noted to have risen from 3 cases per 1,000 to 17 cases per 1,000 over the last 8 years"); Kennedy, *supra* note 35, at 285; Milman, *supra* note 31, at 1887; Waldron, Shrier, Stone, & Tobin, *supra* note 33, at 802 ("[There is] a high number of young children affected by a reluctance to go to school. . . . Furthermore, a substantial proportion of adolescent dropouts have been found to have a history of school phobia.") (footnotes omitted).

44. See Waldfogel, Coolidge, & Hahn, *supra* note 33, at 771, 773 ("[M]any cases of school phobia persist undetected by ordinary referral methods and untreated over long periods. The bulk of these seem to be chronically crippled children operating with marginal adjustments, who need to be reached more urgently than those youngsters whose disturbances are more dramatic . . ."); Tyrer & Tyrer, *supra* note 29, at 419. See also Schmitt, *supra* note 29, at 433 (school phobia "often remains undiagnosed because it is such a frequent imitator of physical disorders").

45. See generally Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *STAN. L. REV.* 1187, 1236 (1970); PRESIDENT'S COMMISSION ON

described school phobia as an illness which cuts across socioeconomic class lines,<sup>46</sup> the school phobics dealt with in many studies appear to be from middle and upper-middle class backgrounds.<sup>47</sup> Some authors merely refer to truants in passing as children who "usually [stem] from the lower socioeconomic strata of the community."<sup>48</sup> Indeed, one writer has noted that "in underprivileged groups, genuine school phobia is rare and when encountered is usually labeled truancy and handled in an authoritarian rather than a sympathetic fashion."<sup>49</sup> To the extent that such stereotyping is prevalent, the child's diagnosis as a "conduct disorder" truant rather than a "neurotic" school phobic may be based at least in part on socioeconomic status.

The label given a child who does not attend school regularly is of critical importance.<sup>50</sup> If he or she is diagnosed a school phobic, a psychiatric treatment program, involving medication, therapy, interim medical exemption from school, and comprehensive team efforts to bring about the child's return to the classroom is initiated.<sup>51</sup> The truancy label, however, prompts

LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 56-57 (1967).

46. See, e.g., Bakwin, *supra* note 29, at 1010; Miller, *supra* note 41, at 1162; Nader, Bullock, & Caldwell, *supra* note 33, at 605.

47. See, e.g., Milman, *supra* note 31, at 1890; Robison, Dalgleish, & Egan, *The Treatment of School Phobic Children and their Families*, 5 PERSPECT. IN PSYCH. CARE 219, 220 (1967); Talbot, *Panic in School Phobia*, 27 AM. J. ORTHOPSYCH. 286, 287 (1957); Waldfogel, Coolidge & Hahn, *supra* note 33, at 769 n.1. But see Waldron, Shrier, Stone, & Tobin, *supra* note 33, at 803 (in which most of the children studied were from lower-middle class backgrounds).

48. Eisenberg, *supra* note 29, at 712. See generally Meeks, *Behavior Disorders of Childhood and Adolescence and Group Delinquent Reaction*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY III 2127, 2133-35, 2136-41 (2d ed. A. Freedman, H. Kaplan, & B. Sadock 1975).

49. Milman, *supra* note 31, at 1890. Dr. Milman notes, however, that "[t]he symptom of school phobia is determined both by the diagnostic category and by the cultural values of the society. School achievement and excellence are prized as prerequisites for success, hence their focus as a center for neurotic anxiety." *Id.*

50. The decision to select a treatment or a correctional agency appears to depend upon whether anxiety is involved as a motivation for the child's behavior. When anxiety is not involved in school refusal, we ordinarily speak of *truancy*. When anxiety is a motivation, we refer to *school phobia*. . . .

Truants are seldom referred for psychotherapy. . . .

Levitt, *Research on Psychotherapy with Children*, in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE: AN EMPIRICAL ANALYSIS 474, 486 (A. Bergin & S. Garfield ed. 1971) (footnote omitted).

51. See, e.g., Bakwin, *supra* note 29, at 1012-13; Leavitt, *Treatment of an Adolescent with School Phobia*, 4 J. AM. ACAD. CHILD PSYCH. 655, 656, 666-67 (1965) (13-year-old, middle class school phobic in

neither medical intervention nor kid glove treatment;<sup>52</sup> instead, its application sets in motion the procedures for bringing the child to juvenile court on truancy charges, which may in turn result in the juvenile's incarceration in a state training school.<sup>53</sup>

In order to ascertain whether a defense based on school phobia is available, an attorney representing a child on a PINS truancy petition must necessarily go beyond eliciting information concerning the juvenile's school attendance. From discussions with both parent and child, the lawyer should attempt to determine whether any symptoms of school phobia are present, for example, whether the child claims physical illness as a reason for nonattendance;<sup>54</sup> whether there is parental preoccupation with the juvenile's illness;<sup>55</sup> whether the child stays at home with a

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therapy for one year; elaborate arrangements for his return made with school officials); Robison, Dalglish, & Egan, *supra* note 47, at 222-26 (program included social worker treating parents, visits to home and school by psychiatric nurse, testing and evaluation by child psychologist, treatment of child by psychiatrist, therapist walking child to school, and school counselor spending lunch hour with the child); Schmitt, *supra* note 29, at 437-39; Waldfogel, Coolidge, & Hahn, *supra* note 33, at 770-71 ("Little Renee, who was afraid of the toilets, was permitted to use the private toilets in the teacher's room until her fears could be worked out in therapy; Nanette's teacher met her at the bus in the morning and saw her back to the bus in the afternoon; Hope's teacher permitted her to sit by her side when the room was darkened for movies."). There are, however, experts who "have not hesitated to invoke the legal authority of the school to compel attendance when no real movement toward return to school was evident on the part of the family." Rodriguez, Rodriguez, & Eisenberg, *supra* note 35, at 540.

52. See note 50 *supra*; Hersov, *supra* note 30, at 134 (in comparative study, 37 of 50 truants had appeared in juvenile court, while only one of 50 school phobics had made such an appearance; it is unclear, however, whether the referrals to juvenile court were on the basis of truancy or of other misbehavior); Skynner, *supra* note 30, at 11 (suggesting that the appropriate treatment for "truants referred as school phobics" was "normal disciplinary measures," and that such children were referred to psychotherapists by school authorities who "prefer to avoid a disciplinary challenge by using a diagnosis which will transfer the child to medical responsibility;" the author emphasizes that "attempts to re-refer [the truant] as a medical problem were resisted").

53. See, e.g., ARIZ. REV. STAT. ANN. §§ 8-201(12), 8-241(A)(2) (e) (West 1974); CONN. GEN. STAT. ANN. §§ 17-53, 17-68(b), 17-69(a), (b) (West Supp. 1975); *In re Kroll*, 43 A.2d 706, 707 (D.C. Mun. Ct. App. 1945) (reversing training school commitment of child who was originally referred to juvenile court because of habitual truancy, and whose father testified "that his [son's] unwillingness to attend school was due to a nervous condition and that he had been advised by a physician to permit him to remain at home"); *In re Dowell*, 17 N.C. App. 134, 193 S.E.2d 302 (1972).

54. See, e.g., Nader, Bullock, & Caldwell, *supra* note 33, at 605-06; Schmitt, *supra* note 29, at 433-36.

55. See Nader, Bullock, & Caldwell, *supra* note 33, at 607-09; Wald-

parent during school hours;<sup>56</sup> whether the juvenile has other phobias;<sup>57</sup> whether the youth's nonattendance coincides with a precipitating school factor such as transfer from one school to another or promotion to a higher grade;<sup>58</sup> whether the child's absences occur more frequently on Mondays, after school vacations or holidays, or in the fall.<sup>59</sup>

If there are affirmative responses to one or more of these inquiries,<sup>60</sup> a psychiatric and psychological evaluation of the

fogel, Coolidge, & Hahn, *supra* note 33, at 757-58. See also Schmitt, *supra* note 29, at 434-36; Coolidge & Brodie, *Observations of Mothers of 49 School Phobic Children*, 13 J. AM. ACAD. CHILD PSYCH. 275, 276 (1974) (mothers "would run the gamut from mildly neurotic to ambulatory schizophrenic").

56. See, e.g., Berg, Nichols, & Pritchard, *supra* note 31, at 123; Eisenberg, *supra* note 29, at 712-13; Miller, *supra* note 41, at 1160-61. Some school phobics stay at home because they fear that their parents will die in their absence; such fears may stem from real or imagined family illnesses, unconscious death wishes of the child toward the parent, or from recent deaths in the family. See Sperling, *supra* note 34, at 378-79; Lassers, Nordan, & Bladholm, *supra* note 29, at 265; Waldfogel, Coolidge, & Hahn, *supra* note 33, at 767.

57. See Bakwin, *supra* note 29, at 1010; Sperling, *supra* note 34, at 395, 398.

58. See, e.g., Hersov, *supra* note 40, at 140; Miller, *supra* note 41, at 1161.

59. See Kennedy, *supra* note 35, at 286; Miller, *supra* note 41, at 1160; Nader, Bullock, & Caldwell, *supra* note 33, at 606; Powers, McMahan, & Owens, *supra* note 37, at 761; Schmitt, *supra* note 29, at 433, 436. The textual list of characteristics of school phobia is not exhaustive. See Hersov, *supra* note 30, at 134-35. For instance, other possible symptoms of the phobia include eating and sleeping disturbances. Moreover, there is overlap in symptomatology between truants and school phobics, since, for example, some truants, albeit a small number, also exhibit eating and sleeping difficulties; similarly, while enuresis is a characteristic possessed by some truants, a small number of school phobics also have this problem. According to Dr. Hersov's study, the only statistically significant symptom found in truants but not in school phobics was wandering from home. *Id.*

It should also be noted that there are apparently some school phobics who do not readily fit into any of the diagnostic categories established by the authors, no matter how refined such classifications are made. See Waldron, Shrier, Stone, & Tobin, *supra* note 33, at 806 ("Only 14 percent of the school phobic children did not appear to fit any of the 4 types very well").

60. In the course of ascertaining whether such symptoms are present, the child's attorney should also attempt to determine the validity of "reality factors," that is, that the child's illnesses do have a physical basis or that his or her complaints about school bullies or hostile teachers are realistic. The true school phobic will continue refusing to attend even after a medical examination eliminates any possibility of physical illness or after a change of teachers or schools has been effectuated. See Bakwin, *supra* note 29, at 1010; Hersov, *supra* note 29, at 103; Nader,



juvenile before the adjudicatory hearing is appropriate.<sup>61</sup> Such an examination may confirm that the child suffers from school phobia, which should then be asserted as a complete defense to the PINS truancy charges.<sup>62</sup> Even if school phobia is ruled out, the resulting medical report may provide information helpful in securing an appropriate disposition,<sup>63</sup> or it may afford a suffi-

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Bullock, & Caldwell, *supra* note 33, at 606-07, 610; Rodriguez, Rodriguez, & Eisenberg, *supra* note 35, at 540; Schmitt, *supra* note 29, at 437-39.

A substantiated physical ailment should constitute a defense to truancy charges. See, e.g., N.J. STAT. ANN. § 18A:38-26 (West 1968) (compulsory education required unless "the bodily condition of the child is such as to prevent his attendance at school"); OHIO REV. CODE ANN. § 3321.04(A) (1) (Page 1972). If the juvenile's complaints about intimidating teachers or schoolmates have some validity, they should likewise be asserted as defenses, although it is less certain that such defenses would be accepted by the courts. Cf. *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C.) (three judge court), *aff'd mem.*, 423 U.S. 907 (1975) (upholding state statute permitting corporal punishment of children by school authorities); *Commonwealth v. Ross*, 17 Pa. Commw. Ct. 105, 107, 330 A.2d 290, 291 (1975) (in suit against parents for violation of the compulsory school attendance laws, court affirmed holding that claims of physical abuse by other students, even though uncorrected by school authorities, "were not such threats to the health and safety of the Ross children as to justify the action of their parents in withholding them from school. . ."). It may be that judicial reluctance to accept the defense of necessity or duress in this context is attributable to increasing violence in the nation's public schools. See, e.g., *Terror in Schools*, U.S. NEWS & WORLD REPORT, Jan. 26, 1976, at 52; *An 'A' in Violence*, National Observer, March 22, 1975, at 1, col. 1; Washington Post, April 10, 1975, § A, at 1, col. 2; London Times, April 21, 1976, at 4, col. 1 ("In some schools truants were absent because they were afraid of bullyboys."). Analogous attempts to interpose homosexual attacks as a justification for escapes from prisons have generally been rejected. See, e.g., *State v. Green*, 470 S.W.2d 565 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972) (rejecting the defense). *But see* *People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975) (accepting the defense).

61. Indeed, it would appear to be advisable, in the case of every child brought to court and charged with truancy, to have a complete medical and psychological examination performed as a matter of course. In addition to school phobia, such examinations may reveal other emotional problems, brain damage, retardation, or learning disabilities. See *Bakwin*, *supra* note 29, at 995; 1966 LANCET 919, 920; *Robison, Dalglish, & Egan*, *supra* note 47, at 222; cf. *In re Kevin M.*, 48 App. Div. 2d 800, 369 N.Y.S.2d 439 (1975) (*per curiam*) (reversing delinquency disposition placing child in training school where trial court had refused to authorize neurological examination even though mental health reports indicated need therefor).

62. See notes 96-111 *infra* and accompanying text for a discussion of the theoretical bases for a school phobia defense.

63. See *In re Kevin M.*, 48 App. Div. 2d 800, 369 N.Y.S.2d 439 (1975) (*per curiam*), discussed at note 61 *supra*. In some cases, appellate courts have reversed training school dispositions in PINS cases where psychiatric or psychological reports indicated the inappropriateness of such a commitment. See, e.g., *In re Esther W.*, 44 App. Div. 2d 603, 353 N.Y.S.2d

cient basis for other defenses, such as those based on minimal brain dysfunction or specific learning disabilities.

### III. MINIMAL BRAIN DYSFUNCTION

A child who does poorly in school and is unable to understand much of what occurs there will neither enjoy the experience nor have a strong incentive to continue attending. Many truants are academic failures in one or more subjects.<sup>64</sup> A possible reason for such failure is that the child suffers "minimal brain dysfunction," which, according to recent estimates, affects anywhere from one to twenty percent of the student population.<sup>65</sup>

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524, 525 (1974) ("The psychiatric report indicated a rejecting environment . . ."); *In re Jeanette M.*, 40 App. Div. 2d 977, 978, 338 N.Y.S.2d 177, 178 (1972) ("[A]ccording to the psychiatrist's report, [this thirteen-year-old girl] is 'deprived, frustrated, angry and depressed, with fragile self-esteem and little control.'").

64. See, e.g., CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 18; CITIZENS COMMITTEE ON CHILDREN OF NEW YORK CITY, CHILDREN ABSENT FROM SCHOOL 18-20 (1949) [hereinafter cited as CHILDREN ABSENT FROM SCHOOL].

65. See, e.g., W. CRUICKSHANK, THE BRAIN-INJURED CHILD IN HOME, SCHOOL, AND COMMUNITY 21 (1967) ("Percentages [of the general childhood population] varying from 1 to 7 are occasionally heard, but the fact stands that as of now no accurate count is available."); OFFICE OF CHILD DEVELOPMENT, U.S. DEP'T OF H.E.W., REPORT OF THE CONFERENCE ON THE USE OF STIMULANT DRUGS IN THE TREATMENT OF BEHAVIORALLY DISTURBED YOUNG CHILDREN 2 (1971) (conservatively estimating that three percent of elementary school children have hyperkinetic disorders) [hereinafter cited as OFFICE OF CHILD DEVELOPMENT]; P. WENDER, MINIMAL BRAIN DYSFUNCTION IN CHILDREN 60-61 (1971) (surveys indicate that five to 10 percent of school age children have symptoms of minimal brain dysfunction); Ambrosino, *MBD: Its Diagnosis and Treatment*, 103 MED. TIMES No. 9, at 70, 71 (1975) ("The incidence of MBD in children from ages 4 to 14 years is 5% to 20%"). Cf. Laybourne, *Psychiatric Response to the Minimal Brain Dysfunction Child*, in LEARNING DISABILITY/MINIMAL BRAIN DYSFUNCTION SYNDROME 126, 129 (R. Anderson & C. Halcomb ed. 1976) [hereinafter cited as MBD SYNDROME] (noting that reports of incidence of minimal brain dysfunction in up to 41 percent of school children are of questionable accuracy, because of the lack of clear criteria for classification); Gallagher, *New Educational Treatment Models for Children with Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 383, 385, 387 (1973) ("Using the most conservative figure available for incidence [of minimal brain dysfunction], 1%, we arrive at 600,000 children, ages 5-19, who need service"); Silverman & Metz, *Numbers of Pupils with Specific Learning Disabilities in Local Public Schools in the United States: Spring 1970*, 205 ANNALS N.Y. ACAD. SCI. 146 (1973) (finding, on the basis of a nationwide survey, that 1,160,000 pupils were reported to have specific learning disabilities; the relationship between minimal brain dysfunction and specific learning disability is discussed in note 67 *infra*).

Minimal brain dysfunction refers to children of approximately average intelligence or better who have certain behavioral and learning disabilities that are associated with deviant functioning of the central nervous system. These deviations may manifest themselves in various combinations of impairment in perception, conceptualization, language, and memory and control of attention, impulse, or motor function.<sup>66</sup>

As this definition suggests, minimal brain dysfunction ("MBD")<sup>67</sup> is an umbrella term covering a wide variety of impairments that can lead to both academic failure and behavioral disorders.<sup>68</sup> The general characteristics of the MBD child in-

66. Denhoff, *The Natural Life History of Children with Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 188 n. (1973).

67. "MBD" is the shorthand term most frequently used in scholarly literature. Central nervous system ("CNS") dysfunction is also commonly used, see, e.g., Haller & Axelrod, *Minimal Brain Dysfunction Syndrome*, 129 AM. J. DIS. CHILD. 1319 (1975). Specific learning disability, or "SLD," is an overlapping term generally used by educators to describe the types of learning impairments which many MBD children have. See, e.g., Clements & Peters, *Psychoeducational Programming for Children with Minimal Brain Dysfunctions*, 205 ANNALS N.Y. ACAD. SCI. 46, 47 (1973); Douglas, *Differences Between Normal and Hyperkinetic Children*, in CLINICAL USE OF STIMULANT DRUGS IN CHILDREN 12 (C. Conners ed. 1974) [hereinafter cited as STIMULANT DRUGS IN CHILDREN] (as diagnostic categories, MBD and learning disability "are exceedingly poorly defined," and there is considerable overlap); Peters, Dykman, Ackerman, & Romine, *The Special Neurological Examination*, in STIMULANT DRUGS IN CHILDREN, *supra* at 53, 63 ("The term MBD is useful to physicians and the terms SLD or LD are useful to educators. They are roughly overlapping terms.").

Because of the large number of symptoms encompassed within the syndrome, the imprecise descriptive terminology, and the attendant diagnostic difficulties, some authorities view the MBD classification with concern. See, e.g., Schmitt, *The Minimal Brain Dysfunction Myth*, 129 AM. J. DIS. CHILD. 1313 (1975) ("The current problem with the MBD syndrome is that it has become an all-encompassing wastebasket diagnosis for any child who does not quite conform to society's stereotype of normal children"). Others have suggested that the term MBD is stigmatizing, that it is an "invented disease," and that medication is overused as a means of behavior control of nonconforming children labelled as MBD. See P. SCHRAG & D. DIVOKY, *THE MYTH OF THE HYPERACTIVE CHILD* (1975). Mr. Schrag and Ms. Divoky are especially concerned that many MBD children are being designated pre-delinquent and are ultimately being swept into the juvenile justice system. *Id.* at 132-74. While sharing some of these concerns, we are dealing in this Article with children who have already become enmeshed in the judicial process, and are suggesting means by which such juveniles may use a defense based on MBD to extricate themselves from the courts' PINS jurisdiction. See also Note, *Coercive Behavior Control in the Schools: Reconciling "Individually Appropriate" Education with Damaging Changes in Educational Status*, 29 STAN. L. REV. 93 (1976).

68. See, e.g., Clements & Peters, *supra* note 67, at 46; Reitan & Boll, *Neuropsychological Correlates of Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 65 (1973); Wender, *The Minimal Brain Dys-*

clude hyperactivity, impulsivity, awkwardness, irritability, tantrums and destructiveness, short attention span, and specific learning problems related to hearing, speaking, reading, calculating, and writing.<sup>69</sup> For example, MBD may prevent the child from ignoring irrelevant stimuli; as a result, he or she is distracted by every sound, color, and movement in the classroom, making concentration on an assigned task impossible.<sup>70</sup> Others may be unable to see letters or words as a totality<sup>71</sup> or incapable of stopping one activity and starting another.<sup>72</sup> The hyperactive child is fidgety and may run about the classroom, exhibiting impulsive and aggressive behavior.<sup>73</sup> It should be emphasized,

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*function Syndrome*, 26 ANN. REV. MED. 45, 47 (1975) ("Together with academic underachievement . . . , lack of impulse control probably constitutes the most common referring complaint.").

69. See, e.g., CRUICKSHANK, *supra* note 65, at 30-65; Huessy, Marshall, & Gendron, *Five Hundred Children Followed from Grade 2 Through Grade 5 for the Prevalence of Behavior Disorder*, in STIMULANT DRUGS IN CHILDREN, *supra* note 67, at 79, 80-81; Hewett, *Conceptual Models for Viewing Minimal Brain Dysfunction: Developmental Psychology and Behavioral Modification*, 205 ANNALS N.Y. ACAD. SCI. 38 (1973); WENDER, *supra* note 65, at 12-26. The learning problems of the MBD child may include dyslexia, a reading disorder; dysgraphia, a writing disorder; auditory verbal imperception, a difficulty in understanding spoken words; dyscalculia, a difficulty with calculation; and speech disorders. See Bakwin, *supra* note 29, at 997-1006; de Hirsch, *Early Language Development and Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 158 (1973); WENDER, *supra* note 65, at 16-17, 40-41. Dr. Wender notes that when hyperactivity is included in the MBD symptomatology, the ratio of boys to girls ranges from three to one to nine to one. *Id.* at 60.

70. See CRUICKSHANK, *supra* note 65, at 30-36, 55-57.

71. *Id.* at 36. This defect is referred to as dissociation; it causes extreme difficulties in learning to read and to write, since both letters and words cannot be seen or reproduced as a whole, but only in their individual parts. For example, children suffering from dissociation are unable to reproduce accurately a picture of two interlocking squares. *Id.* at 37-42. Another trait is referred to as "figure background reversal," an inability to distinguish figures in the foreground from those in the background, thus preventing the child from reading individual words on a page. *Id.* at 42-49.

72. *Id.* at 49-51. This characteristic is called perseveration; the child suffering therefrom will, for example, continue to write the same letter over and over again.

73. See, e.g., OFFICE OF CHILD DEVELOPMENT, *supra* note 65, at 2-3; WENDER, *supra* note 65, at 12-14. There are, however, some MBD children who are hypoactive, withdrawn, passive, and listless. See Anthony, *A Psychodynamic Model of Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 52, 58-59 (1973); WENDER, *supra* note 65, at 13. "It is probably the case that MBD children are not universally excessively active but that their activity is inappropriate . . . [Moreover,] hyperactivity is not a *sine qua non* of minimal brain dysfunction. Some children with all the other signs and symptoms of MBD are normally active or hypoactive." Wender, *supra* note 68, at 46-47.

however, that an MBD child does not necessarily possess all of the foregoing characteristics; instead, he or she may have only one or a few of these traits, and they may appear in varying degrees of severity.<sup>74</sup>

Identification of MBD is complicated by the broad spectrum of characteristics and varying degrees of disability possessed by these children.<sup>75</sup> Diagnosis is also difficult because the child does not display gross motor defects and may indeed have a superficial appearance of normality.<sup>76</sup> Moreover, he or she usually has an average or above average IQ and may perform adequately in some subjects but not others, or may perform erratically.<sup>77</sup> Medical diagnosis is similarly difficult, because neither discernible brain lesions, structural damage, nor concrete evidence of neurological impairment can always be found.<sup>78</sup> An

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74. See, e.g., CRUICKSHANK, *supra* note 65, at 35-36, 55; WENDER, *supra* note 65, at 3-4, 15-16, 62-64; Bateman, *Educational Implications of Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 245, 246 (1973); de Hirsch, *supra* note 69, at 158; Klein & Gittelman-Klein, *Diagnosis of Minimal Brain Dysfunction and Hyperkinetic Syndrome*, in STIMULANT DRUGS IN CHILDREN, *supra* note 67, at 1, 4.

75. See, e.g., Gallagher, *supra* note 65, at 383, 384, 386; McCarthy, *Education: The Base of the Triangle*, 205 ANNALS N.Y. ACAD. SCI. 362, 363 (1973).

76. It is important to emphasize that the behavior of children with this disorder is, in general, not qualitatively different from that of the normal child. The differences between the affected child and the normal child are in the intensity, persistence, and clustering of his signs and symptoms. Further complicating the picture is the fact that some of the salient characteristics tend to change as the child matures.

Wender, *supra* note 68, at 46. See also CRUICKSHANK, *supra* note 65, at 6, 22, 48 ("These children, often handsome and appealing, are only rarely characterized by visible physical stigmata." *Id.* at 22.).

77. See, e.g., CRUICKSHANK, *supra* note 65, at 55; Clements & Peters, *supra* note 67, at 46; Denhoff, *supra* note 66, at 188; Reitan & Boll, *supra* note 68, at 66. MBD symptoms may also be found in mentally retarded children. See CRUICKSHANK, *supra* note 65, at 29; WENDER, *supra* note 65, at 53.

78. See CRUICKSHANK, *supra* note 65, at 3-4; Anthony, *supra* note 73, at 52; Dubey, *Organic Factors in Hyperkinesia: A Critical Evaluation*, 46 AM. J. ORTHOPSYCH. 353 (1976); Eisenberg, *General Discussion*, 205 ANNALS N.Y. ACAD. SCI. 61 (1973); Reitan & Boll, *supra* note 68, at 65, 66. There are a variety of theories of MBD causation, including organic brain damage, genetic transmission, biochemical imbalance, maturational lag, psychological stress, and food allergies. See, e.g., WENDER, *supra* note 65, at 37-58; Palmer, Rapoport, & Quinn, *Food Additives and Hyperactivity*, 14 CLINICAL PEDIATRICS 956 (1975). One authority has suggested that "reading retardation may be an artifact of the alphabetic nature of our written language," noted that dyslexia is rare in Japan, and cited a study disclosing that American children with reading deficiencies could be taught to read Chinese logographs. Willerman,

additional obstacle to identification of MBD children is the necessity of using a sophisticated interdisciplinary team, which may include a pediatrician, neurologist, speech and hearing specialists, psychiatrist, psychologist, ophthalmologist, and an expert in special education.<sup>79</sup> Even with such a team, if there are no signs of neurological damage, such as an abnormal EEG, diagnosis can often be achieved only by comparing the behavior or characteristics of children suspected of having MBD with

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*Social Aspects of Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 164 (1973).

For the following reasons, brain damage is suspected even though many MBD children do not display definitive signs of neurological damage: (1) There is similarity in the behavior and characteristics of children with known brain damage and suspected MBD children. See CRUICKSHANK, *supra* note 65, at 4; Knights, *Problems of Criteria in Diagnosis: A Profile Similarity Approach*, 205 ANNALS N.Y. ACAD. SCI. 124, 130-31 (1973); Reitan & Boll, *supra* note 68, at 79. (2) About half of MBD children display "soft" signs, that is, intermittent and age-dependent signs of neurological impairment, and others have abnormal electroencephalograph ("EEG") readings. See Wender, *supra* note 68, at 51; Satterfield, Lesser, Saul, & Cantwell, *EEG Aspects in the Diagnosis and Treatment of Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 274, 278-81 (1973); Peters, Romine, & Dykman, *A Special Neurological Examination of Children with Learning Disabilities*, 17 DEV. MED. & CHILD NEUROL. 63, 73 (1975).

Some studies have noted a correlation between pregnancy and birth complications and premature births, on the one hand, and MBD on the other. See Bernstein, Page, & Janicki, *Some Characteristics of Children with Minimal Brain Dysfunction*, in STIMULANT DRUGS IN CHILDREN, *supra* note 67, at 24, 30-32. Because such problems are encountered more often in lower socioeconomic classes, "one . . . would expect a much higher incidence of behavioral disorders in slum schools. Some workers feel that they find as many as 40% of the elementary school students in slum schools meeting the criteria of the behavior constellation under discussion." See Huessy, Marshall, & Gendron, *supra* note 69, at 81.

79. See, e.g., CRUICKSHANK, *supra* note 65, at 69; Clements & Peters, *supra* note 67, at 47; Connors, *Psychological Assessment of Children with Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 283, 284-85 (1973); Hewett, *supra* note 69, at 40. But see WENDER, *supra* note 65, at 72 n.11, who takes the position that psychological, psychiatric, and neurological tests are of limited diagnostic value since they can suggest the diagnosis but cannot definitively confirm or exclude MBD; and that case histories are instead the most important diagnostic tool. Dr. Wender believes that "an important and unifying feature of the MBD syndrome is its response to treatment with the amphetamines," *id.* at 64, and implies that successful drug treatment is consequently an important means of diagnosis. *Id.* at 72-73, 76, 100, 130. Because MBD has numerous subgroups, with a variety of possible combinations of handicaps, and because there is a plethora of available drugs, however, "[t]he necessity for careful neuro-physiological, academic, psychometric, and behavioral evaluation prior to selection of a particular drug cannot be over-emphasized." Zike, *Drugs in Maladaptive School Behavior*, in STIMULANT DRUGS IN CHILDREN, *supra* note 67, at 214, 219.

those of children known to have structural brain damage.<sup>80</sup> Because the data for such comparisons must often be obtained from parents and teachers of suspected MBD children, whose memories and norm expectations may vary considerably, there is a danger that the information thus provided will be unreliable.<sup>81</sup>

Because of these diagnostic difficulties, MBD often goes undetected.<sup>82</sup> Suspicion that something is wrong with the child who cannot sit still, behaves aggressively, or is unable to learn may focus solely on possibilities such as emotional disturbance, conduct disorder, or retardation.<sup>83</sup> The MBD child may consequently be placed in classes for the mentally retarded or schools for aggressive and disruptive children, either of whose teaching methods and facilities may be inappropriate for his or her learning or behavioral disabilities.<sup>84</sup> On the other hand, the juvenile may be left in a normal classroom and promoted, because the gravity of the impairment is unrealized or because school policy requires promotion.<sup>85</sup>

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80. See note 78 *supra*. For example, only patients with frontal lobe lesions who are asked how they feel when doing something improper will respond: "I know exactly how to do that, but I cannot help myself." This discrepancy between knowing and doing is also noted in MBD children. See Eisenberg, *supra* note 78, at 62. See also Dykman & Ackerman, *supra* note 78, at 41.

81. See WENDER, *supra* note 65, at 32-34, 65-67; Klein & Gittelman-Klein, *supra* note 74, at 5. See also Clements, *The Clinical Psychological Assessment of Minimal Brain Dysfunctions*, in *STIMULANT DRUGS IN CHILDREN*, *supra* note 67, at 36, 41 (Clements notes that teacher-parent information is critical to appropriate diagnosis by the physician, because the MBD child may not display impulsivity or hyperactivity "when in a one-to-one situation such as the examining room. Whereas, in the one-to-thirty classroom environment his behavior may become extremely disorganized and unproductive because of the presence of a multitude of stimuli.").

82. See WENDER, *supra* note 65, at 1. Dr. Wender also observes that, although hyperactivity of MBD children may decrease at puberty, more serious features of the syndrome may remain. *Id.* at 14, 16, 79-84. Accord, Weiss & Minde, *Follow-Up Studies of Children Who Present with Symptoms of Hyperactivities*, in *STIMULANT DRUGS IN CHILDREN*, *supra* note 67, at 67-68, 75-76. In the foregoing five-year follow-up study, "poor school performance was the feature which most clearly characterized the group as a whole." *Id.* at 71.

83. See WENDER, *supra* note 65, at 19, 53, 195 ("In MBD children in whom 'antisocial' behavior is prominent, this behavior usually begins to attract increasing social and professional attention so that the other MBD abnormalities are ignored . . ." *Id.* at 19). Many MBD children do, however, also present psychiatric problems. See *id.* at 53.

84. See *In re Mecca*, 82 Misc. 2d 497, 369 N.Y.S.2d 282 (Fam. Ct. 1975); *CHILDREN OUT OF SCHOOL IN AMERICA*, *supra* note 1, at 101, 104-07; Clements & Peters, *supra* note 67, at 46.

85. See Clements & Peters, *supra* note 67, at 46; Denhoff, *supra* note 66, at 199-201.

Failure to detect MBD precludes treatment, which could include medication, therapy for the child and family, and special teaching techniques and materials.<sup>86</sup> Without appropriate educational facilities and treatment, the child's school life will be marked by constant failure, frustration, and humiliation.<sup>87</sup> These circumstances often produce emotional disturbances<sup>88</sup> which, coupled with lack of impulse control, may result in aggressive behavior.<sup>89</sup> If such behavior is perceived as willful misconduct, the child may be suspended or expelled.<sup>90</sup> Alternatively, the

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86. See WENDER, *supra* note 65, at 87-130; Millichap, *Drugs in Management of Minimal Brain Dysfunction*, 205 ANNALS N.Y. ACAD. SCI. 321 (1973). Indeed, some experts believe that MBD children require classrooms with cocoon-like carrels of uniform color and texture, which will alleviate distractions. See CRUICKSHANK, *supra* note 65, at 104-08.

Although drug therapy is advocated as a means of controlling MBD symptoms, experts acknowledge that without educational assistance and counselling services medication is of limited value. See Weiss & Minde, *supra* note 82, at 75. Dr. Wender, a vigorous proponent of drug therapy, notes that it may not be helpful for children whose problems are in the perceptual-cognitive area and are not behavioral; he suggests that such children require special educational programs. Wender, *supra* note 68, at 59. See also Laybourne, *supra* note 65, at 126, 130 ("It has been our experience that those children who do not respond to drug therapy and structured schooling experiences have severe emotional disturbances in the family which must be dealt with in a traditional psychotherapeutic manner.").

87. See, e.g., WENDER, *supra* note 65, at 17, 51-52; Clements & Peters, *supra* note 67, at 50; Hewett, *supra* note 69, at 41.

88. See WENDER, *supra* note 65, at 60-61 (estimating that 50 percent or more of the children referred to clinics for psychiatric problems display symptoms of MBD); Rourke, *Brain-Behavior Relationships in Children with Learning Disabilities*, 30 AM. PSYCHOL. 911, 912 (1975) (study concluded that cerebral dysfunction was a crucial factor in some learning disabilities; in the study, author attempted to exclude the possibilities of other causative factors such as mental retardation, cultural deprivation, and emotional disturbance; with respect to ruling out emotional disturbance, the author encountered difficulty, because MBD children "usually will develop some form of at least mild socioemotional disturbance if their deficits in learning go unattended during the early school years").

89. See CRUICKSHANK, *supra* note 65, at 235; WENDER, *supra* note 65, at 17-20, 21-24. See also Paternite, Loney, & Langhorne, *Relationships Between Symptomatology and SES-Related Factors in Hyperkinetic/MBD Boys*, 46 AM. J. ORTHOPSYCH. 291 (1976) (in a study to determine the relationship of socioeconomic status and parenting styles to MBD symptoms, the authors noted that primary symptoms, such as hyperactivity, fidgetiness, and inattention, were unaffected by these variables, but that socioeconomic status and parenting styles did affect secondary symptoms, which included aggressive behavior and impulse control). *Id.* at 299-300.

90. See, e.g., ARIZ. REV. STAT. ANN. § 15-305 (West 1975); N.Y. EDUC. LAW §§ 3214(3)(a)(1), (2) (McKinney Supp. 1975); CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 136-37.



juvenile's repeated failures may result in refusal to attend school.<sup>91</sup> In either case, the next step may well be a PINS petition against the child, alleging either incorrigibility or truancy.<sup>92</sup>

The attorney representing any juvenile charged with truancy or school misbehavior should, at the very least, secure a psychological examination of the child before the adjudicatory hearing.<sup>93</sup> This evaluation is critically important, since the

91. See WENDER, *supra* note 65, at 78-79; de Hirsch, *supra* note 69, at 161.

92. See, e.g., N.Y. EDUC. LAW § 3214(3) (e) (McKinney Supp. 1975) (child suspended for being "insubordinate or disorderly" may be referred to juvenile court). The MBD child's incorrigibility may result in a delinquency petition, since the juvenile's aggressive behavior may technically constitute an assault. Some authorities believe that when MBD children reach pre-adolescence or adolescence, their antisocial conduct may take the form of delinquent acts. See WENDER, *supra* note 65, at 26; de Hirsch, *supra* note 69, at 101; Eisenberg, *supra* note 78, at 62-63 ("if untreated, MBD results in increased risk for psychopathology in later life, all the way from poor social adjustment, under-achievement and scholastic failure, to juvenile delinquency and, in some cases, even psychosis"). Satterfield, Lesser, Saul, & Cantwell, *supra* note 78, at 281; WENDER, *supra* note 65, at 75-85.

93. Statutes in a number of jurisdictions specifically provide that the court may authorize medical, psychiatric or psychological examinations of any child against whom a petition has been filed. See, e.g., FLA. STAT. ANN. § 39.08 (West Supp. 1976); MICH. COMP. LAWS ANN. § 712A.12 (West 1968); N.Y. FAM. CT. ACT § 251 (McKinney 1975).

In some instances, school authorities will have already administered various tests when the child's maladjustment or truancy began, in order to determine eligibility for special education programs or for special counselling services. See, e.g., ARIZ. REV. STAT. § 15-1013 (1975); FLA. STAT. ANN. §§ 230.2313(b), (c) (West Supp. 1976); ILL. ANN. STAT. ch. 122, § 14-8.01 (Smith-Hurd Supp. 1976); N.Y. EDUC. LAW § 4408 (McKinney Supp. 1975). If such tests have been conducted, the attorney should attempt to secure copies for examination and transmission to the court-appointed expert. The availability of these tests should not, however, deter the child's attorney from seeking new examinations, since the school tests may be outdated or inadequate for purposes of defending the PINS action. In particular, group-administered IQ tests may be unsuitable for the MBD child. See Douglas, *supra* note 67, at 19. See also CRUICKSHANK, *supra* note 65, at 97-98, stating that a full psychological evaluation should be made every six months during the first three or four years following an MBD diagnosis.

If the PINS proceeding is instituted by school authorities who have not conducted diagnostic tests, the child's attorney should seek dismissal of the action on the ground that petitioners have failed to exhaust non-judicial remedies. See Rosenberg & Rosenberg, *supra* note 19, at 1150-56; cf. *In re Mecca*, 82 Misc. 2d 497, 499, 369 N.Y.S.2d 282, 284 (Fam. Ct. 1975) (boy placed in a school for "seriously disruptive" children without testing by any qualified specialist to determine if the placement was proper; court noted that "[i]t may well be that thousands upon

psychological tests and sub-tests administered may reveal abnormalities frequently associated with MBD and indicate the necessity for further examination by other specialists.<sup>94</sup> For example, variations in verbal and performance scores on the Wechsler Intelligence Scale for Children ("WISC") or variations in sub-tests may suggest the need for neurological testing.<sup>95</sup> If psychological testing discloses a possibility of MBD, the attorney should seek an adjournment of the adjudicatory hearing pending completion of all examinations by other experts. If the conclusion reached by the interdisciplinary team is that the child suffers from MBD, then this diagnosis should be interposed as a complete defense to the truancy or school disciplinary charges.

#### IV. SCHOOL PHOBIA AND MBD AS DEFENSES TO TRUANCY

The child's counsel may rely on a number of arguments to support the contention that school phobia and MBD afford defenses to PINS truancy findings.<sup>96</sup> In jurisdictions whose PINS statutes make truancy actionable only if committed "with-

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thousands of children who are placed in the '600' schools are in receipt of a treatment and educational program inadequate for their needs").

In school expulsion cases, complaining children and parents have been required to exhaust their administrative remedies within the school system prior to seeking judicial relief, in order to give school authorities an opportunity to resolve the matter before litigation is commenced. See, e.g., *Griffin v. DeFelice*, 325 F. Supp. 143 (E.D. La. 1971). Similarly, school officials should be compelled to make efforts to obviate continued truancy and school behavioral problems before they are allowed to resort to the courts.

94. Because an interdisciplinary appraisal is required, an examination by a psychologist may be insufficient to determine either the presence or absence of MBD. See note 79 *supra* and accompanying text. Individual psychological testing does, however, appear to be the best preliminary diagnostic method available. See Clements, *supra* note 81, at 41 (the Wechsler Intelligence Scale for Children "if thought of as something other than an IQ test, is one of the most powerful of all tools available for the diagnostic appraisal of MBD/SLD children"). In addition, an initial request for psychological testing is reasonable and is more likely to be granted than a motion for examination of the child by an interdisciplinary team.

95. See, e.g., Douglas, *supra* note 67, at 14, 17; Kaspar & Schulman, *Organic Mental Disorders: Brain Damages*, in *MANUAL OF CHILD PSYCHOPATHOLOGY* 207, 212-15 (B. Wolman ed. 1972). Cf. Bakwin, *supra* note 29, at 1005, stating that a disparity of ten points or less between verbal and performance scores is in the normal range.

96. Defenses analogous to those suggested with respect to truancy can also be made concerning school incorrigibility charges against MBD children. See notes 108-10 *infra* and accompanying text.

out justification"<sup>97</sup> or "willfully,"<sup>98</sup> it may be urged that the MBD or school phobic child's absences from school do not fall within the statutory proscription. Because an MBD child may be unable to learn in the traditional classroom setting, his or her avoidance of school is at least arguably justifiable or unintentional.<sup>99</sup> Similarly, the school phobic child's neurosis is a ground for asserting that nonattendance is justified.<sup>100</sup>

PINS truancy statutes that include no excuse or justification clause sometimes refer explicitly to the state's compulsory education statutes;<sup>101</sup> the latter in turn may contain exemptions from

97. ARK. STAT. ANN. § 45-403(3)(a) (Supp. 1975); D.C. CODE § 16-2301(8)(A)(i) (1973); GA. CODE ANN. § 24A-401(g)(1) (1976); N.D. CENT. CODE § 27-20-02(4)(a) (1974); TENN. CODE ANN. § 37-202(5)(i) (Supp. 1976); see ME. REV. STAT. tit. 15, § 2502(2) (1964) ("habitual and willful absence from school without sufficient excuse"); TEX. FAM. CODE ANN. § 51.03(d)(6) (Vernon Supp. 1976) (absence excused if resulting from "circumstances found reasonable and proper").

98. MASS. ANN. LAWS ch. 119, § 39E (Michie/Law Co-op 1976); MICH. COMP. LAWS ANN. § 712A.2(a)(4) (West Supp. 1976); R.I. GEN. LAWS § 14-1-3(G)(5) (1969); VA. CODE § 16.1-158(1)(h) (Supp. 1976); see N.J. STAT. ANN. § 2A:4-45(c) (West Supp. 1976) ("voluntarily").

99. See Eisenberg, *supra* note 78, at 63 ("The MBD child is believed to be 'naughty' and 'willful' and is often blamed for this when he really lacks control"); cf. CHILDREN ABSENT FROM SCHOOL, *supra* note 64, at 24-25 ("There are . . . school situations so bad that truancy may represent the protest of a psychologically healthy aggression. From a mental health point of view, the latter child may fare better than the readily intimidated child who may attend through compliance but react with other symptomatic behavior."); Sullivan v. Houston Ind. Sch. Dist. 333 F. Supp. 1149 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973) ("A school system that causes a large number of students to fail in their academic work, in their style of life, in athletics and in social acceptance, will cause these failures to be pushed into the streets with other failures, from whence it is often only a short step to a juvenile court."). 333 F. Supp. at 1173 n.23.

100. See, e.g., Hersov, *supra* note 29, at 103 (school phobia is "a special form of fear out of proportion to the real demands of the school situation, which is beyond voluntary control and cannot be reasoned or explained away").

In the typical school phobia case, where the child remains at home with the consent and knowledge of the parent, a defense based on parental condonation is also available. See *In re McMillan*, 21 N.C. App. 712, 714, 205 S.E.2d 541, 543 (1974); *In re Alley*, 174 Wis. 85, 87, 182 N.W. 360, 362 (1921). Cf. *In re Kroll*, 43 A.2d 706, 707 (D.C. Mun. Ct. App. 1945).

Where the parent takes no action to secure psychiatric care for the school phobic child, a defense of parental neglect may also be asserted. See note 136 *infra* and accompanying text.

101. E.g., COLO. REV. STAT. § 19-1-103(5)(a) (1973); ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd 1972); LA. REV. STAT. § 13:1569(15)(a) (West Supp. 1977); N.Y. FAM. CT. ACT § 712(b) (McKinney 1975) (PINS de-

attendance where the juvenile is "physically or mentally unable to attend."<sup>102</sup> Reading these PINS and compulsory school attendance statutes together, one may argue that a child is not a PINS truant because school phobia or MBD syndrome constitutes a medical exemption under the attendance statute.<sup>103</sup>

Even if, in prohibiting truancy, the PINS law contains no justification clause and makes no reference to the compulsory education statute,<sup>104</sup> it may be urged that the exemptive provisions of the latter must be construed so as to apply to the PINS statute. While it is true that the compulsory school laws are generally intended as a sanction against parents rather than their children,<sup>105</sup> failure to apply the exemptions to PINS truants would create an anomalous situation in which the child's medical condition constituted a defense available to the parents in prosecutions under the compulsory education law, but unavailable to the child in actions under the PINS truancy law.<sup>106</sup>

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fined to include child "who does not attend school in accord with the provisions" of the compulsory education statute).

102. *E.g.*, CAL. EDUC. CODE § 12152 (West 1975) ("Children whose physical or mental condition is such as to prevent, or render inadvisable attendance at school or application to study shall be exempted . . ."); COLO. REV. STAT. § 22-33-104(2)(c) (1973); ILL. ANN. STAT. ch. 122, § 26-1(2) (Smith-Hurd Supp. 1976); LA. REV. STAT. ANN. § 17:226(1) (West Supp. 1977); N.Y. EDUC. LAW §§ 3208(1), (2) (McKinney Supp. 1976).

103. The medical exemptions provided in compulsory education statutes generally require certification as to the disability by a physician, psychiatrist, or psychologist. *E.g.*, ILL. ANN. STAT. ch. 122, § 26-1(2) (Smith-Hurd Supp. 1976); LA. REV. STAT. ANN. § 17:226(1) (West Supp. 1977); N.Y. EDUC. LAW § 3208(5) (McKinney Supp. 1975). Thus, if a child suffers MBD and no special educational program is available, the report of the interdisciplinary medical team should provide a sufficient basis for exemption. A psychiatric report that the child is a school phobic should likewise afford a basis for exemption.

104. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-53(e) (West Supp. 1977); IND. CODE ANN. § 31-5-7-4.1(c) (Burns Supp. 1976); OHIO REV. CODE ANN. § 2151.022(B) (Page 1976).

105. *See, e.g.*, OHIO REV. CODE ANN. § 3321.38 (Page 1972); PA. STAT. ANN. tit. 24, § 13-1333 (Purdon Supp. 1976).

106. In some jurisdictions, the parent's inability to compel the child's attendance is a defense to charges under the compulsory education statute; if such a defense is proved, the compulsory attendance law may authorize the institution of PINS proceedings against the child. *See, e.g.*, OHIO REV. CODE ANN. § 3321.22 (Page 1972); PA. STAT. ANN. tit. 24, § 13-1338 (Purdon Supp. 1976). Compulsory education statutes that authorize initiation of PINS actions against habitual truants often contain requirements that school authorities take appropriate steps to attempt to eliminate the truancy prior to commencement of the juvenile court proceeding. *See, e.g.*, LA. REV. STAT. ANN. § 17:233 (West Supp. 1975) (requires written notice to parent and "all reasonable efforts by the prin-

Finally, where the PINS truancy law contains no justification provision and exemptions in the compulsory education statute are deemed inapplicable,<sup>107</sup> the MBD syndrome and school phobia may still, by analogy to traditional criminal law defenses such as lack of *actus reus* or *mens rea*, insanity, or necessity,<sup>108</sup>

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cipal and the teacher . . . to correct the condition"); S.C. CODE §§ 21-757.4, 21-757.6 (Cum. Supp. 1975), 21-766 (1962) (requiring the attendance officer to contact parents, to interest "nonattending children in school work," and to persuade them "to attend school regularly"). In jurisdictions whose statutes contain such prerequisites, noncompliance therewith should be asserted as a defense in the PINS proceeding. Such prerequisites can also reasonably be inferred from provisions of compulsory education statutes specifying the duties of attendance officers and school officials. See, e.g., MD. ANN. CODE art. 77, § 94 (1975) (names of nonattending or maladjusted students must be reported to superintendent "so that the causes may be studied and solutions worked out").

107. See CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 56 n.7 ("The student's ability to invoke an exemption [under the compulsory education statute] is less clear" than the parent's or school's authority to do so). *But cf. In re John R.*, 79 Misc. 2d 339, 342-43, 357 N.Y.S.2d 1001, 1004-05 (Fam. Ct. 1974) (in PINS truancy action, child's attorney objected to admissibility of certified transcript of attendance records on ground that it was contrary to juvenile code provision requiring competent evidence at fact-finding hearings; the use of certified transcripts to prove nonattendance was only authorized pursuant to the compulsory education law; court held transcript admissible, finding that the juvenile code requirement of "competent evidence . . . must be construed to include the evidence specified in [section] 3211" of the compulsory education statute); *In re Franz*, 84 Misc. 2d 914, 378 N.Y.S.2d 317 (Fam. Ct. 1976) (in neglect action against parent based on failure to send child to school, court incorporated by reference provisions of the compulsory education law into the juvenile code); *In re Thomas H.*, 78 Misc. 2d 412, 357 N.Y.S.2d 384 (Fam. Ct. 1974). In this jurisdiction, however, both the PINS and neglect statutes contain explicit references to the compulsory education law. See N.Y. FAM. CT. ACT §§ 712(b), 1012(f) (i) (A) (McKinney 1975).

108. See *Ossant v. Millard*, 72 Misc. 2d 384, 389, 339 N.Y.S.2d 163, 168 (Fam. Ct. 1972) (dismissing PINS action based on truancy because children had not "consciously intended to violate . . . the Compulsory Education Law"); MODEL PENAL CODE §§ 2.01, 2.02, 3.02, 4.01 (Proposed Official Draft, 1962). *But see T.A.F. v. Duval County*, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973) (per curiam), *cert. denied*, 283 So. 2d 564 (Fla. 1973) (PINS truancy finding affirmed even though parents prevented children from attending school because of religious beliefs opposing racial integration).

Similarly, these analogous criminal law defenses should be recognized where an MBD child is charged with incorrigibility because he or she defies traditional regulations governing department in school. Indeed, the MBD child's inability to function in a regular classroom setting is explicitly recognized by many state laws requiring special education programs for such children. See notes 138-46 *infra* and accompanying text.

See also Lobenthal, *supra* note 11, at 20-22, 27, describing a juvenile parole revocation proceeding in which the defense asserted that the youth, who showed evidence of

be asserted as defenses to PINS truancy charges. Acceptance of these defenses in adult criminal cases indicates societal recognition that, in prescribed circumstances, an assessment of moral culpability is inappropriate.<sup>109</sup> By the same reasoning, it is inappropriate to hold a child who suffers from learning disabilities, distractibility, hyperactivity and/or other symptoms associated with MBD responsible for failure to attend regular classes, which may be virtually incomprehensible or structured in such a manner that he or she cannot function.<sup>110</sup> The school phobic

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possible brain damage and was also severely emotionally disturbed, was virtually programmed to fail in the community because of: (a) inappropriate medical and psychiatric treatment, (b) insensitivity of the [state training school] Division's after-care team in setting up behavioral goals that were not realistic, and (c) an error on the part of the Board of Education which resulted in placing him in a class for the mentally retarded. The gravamen of the defense was that, under these circumstances, it could not be proven that the releasee had been responsible for his own conduct—for example, running away from his foster home and not attending school. . . . The lawyer argued that, in an extreme case of this sort, . . . it was anomalous to hold him accountable for having 'knowingly' violated the conditions of his release.

*Id.* at 21-22. The author, who was the hearing officer at the proceeding, explains that, before he rendered his decision, the parties settled the case by agreeing to "an acceptable and appropriate alternative placement." *Id.* at 22.

109. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), in which the court adopted the Model Penal Code provision for insanity. Judge Bazelon, however, asserted that the test did not make sufficiently clear the jury's role in determining insanity, namely "the evaluation of the defendant's impairment in light of community standards of blameworthiness." *Id.* at 1030 (Bazelon, J., concurring in part, dissenting in part).

110. In the same way, children with minimal knowledge of the English language cannot realistically be expected to sit in classrooms day after day, comprehending little or nothing and being blamed for their failure to keep pace with English-speaking classmates. It has been estimated that some 4,000,000 children in this country have English language handicaps, and that only a fraction of them are enrolled in bilingual education programs. CHILDREN OUT OF SCHOOL IN AMERICA, *supra* note 1, at 72.

If such children are charged with truancy, a defense may be based on *Lau v. Nichols*, 414 U.S. 563 (1974), in which the Court held that, if a school district with a substantial number of non-English speaking students receives federal funds, its failure to provide any form of comprehensible education for such children violates section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970). Although the Court declined to pass on the Chinese-speaking students' equal protection argument, it observed that, in view of state laws requiring compulsory attendance, specifying English as the basic language of instruction, and making proficiency in English a prerequisite for graduation, "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum, for students who do not under-

child's mental illness is similarly a basis for asserting that he or she "lacks substantial capacity . . . to conform his [or her] conduct to the requirements of law."<sup>111</sup>

The availability of the suggested defenses notwithstanding, it may be argued that since the child was in fact absent from school, an admission should be made at the adjudicatory hearing and the results of psychological and psychiatric tests should be used only to determine the appropriate disposition. Indeed, one court has held that "consideration of attempts to overcome a child's truancy is inappropriate in the fact-finding hearing . . . . However, all circumstances relevant to the cause and cure of respondent's truancy should be considered in the dispositional phase."<sup>112</sup> Such an approach, however, may result in serious adverse consequences to the MBD or school phobic child.

stand English are effectively foreclosed from any meaningful education." *Id.* at 566. The Court's reference to this lurking equal protection problem, combined with its citation to compulsory attendance statutes and its observation that "those who do not understand English are certain to find their classroom experiences wholly incomprehensible," *id.*, provide a reasonable basis for inferring a defense to truancy based on a state's failure to provide meaningful education to non-English-speaking children.

Where state law provides for bilingual education, *see, e.g.*, CAL. EDUC. CODE §§ 5761 *et seq.* (West 1975); COLO. REV. STAT. §§ 22-24-101 *et seq.* (Cum. Supp. 1976); N.Y. EDUC. LAW § 3204 (McKinney 1970 & Supp. 1976), an argument can be made that compulsory attendance of non-English-speaking children is conditioned upon implementation of such statutes. *Cf. Aspira of New York, Inc. v. Board of Educ.*, 58 F.R.D. 62 (S.D. N.Y. 1973) (class action on behalf of 182,000 Spanish-speaking children, seeking special programs and bilingual instruction); *Serna v. Portales Mun. Schools*, 499 F.2d 1147 (10th Cir. 1974) (class action on behalf of Spanish-speaking children, seeking special programs in bilingual instruction).

111. *See* MODEL PENAL CODE § 4.01(1) (Proposed Official Draft, 1962). *Cf. United States v. Brawner*, 471 F.2d 969, 1026-27 (D.C. Cir. 1972) (Bazelon, J., concurring in part, dissenting in part) ("if kleptomania is an abnormal condition of the mind, then for purposes of the ALI test a kleptomaniac . . . may lack capacity to appreciate the wrongfulness of theft or to conform his conduct to the requirements of the law prohibiting theft"); *Harris v. State*, 18 Tex. Crim. 287 (1885) (accepting defense of kleptomania to charge of horse theft).

112. *In re John R.*, 79 Misc. 2d 339, 346, 357 N.Y.S.2d 1001, 1008 (Fam. Ct. 1974). In *John R.*, the children's attorney attempted on cross-examination of the attendance officer to elicit information regarding the extent of counselling offered the children before the PINS truancy petitions were filed and the suitability of the schools which they attended. The trial court sustained objections to these questions, stating:

Review of factors bearing on the truancy is . . . unfeasible in the fact-finding hearing, in which only "competent" evidence is admissible; for a wide range of inadmissible hearsay testimony usually is relevant to an appraisal of available classes, schools,

Limiting the inquiry at the adjudicatory hearing to whether the youth committed the acts alleged creates a far too narrow focus.<sup>113</sup> Indeed, even in criminal prosecutions, an accused is

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and treatment and their advantages and disadvantages for a child of respondent's aptitudes.

To the extent that such evidence is hearsay (a fact which the child's attorney would be in the best position to determine before trial), any problem relating to its admissibility could be obviated by conducting a pre-trial hearing on the issues in question. Moreover, a blanket a priori determination that all such testimony in all truancy fact-finding hearings is inadmissible seems inappropriate. Instead, the nature of the adversary system would appear to require opposing counsel to make individual objections to each question as it is asked. Furthermore, the issues to be decided do not necessarily call for hearsay testimony. Such determinations (for instance, whether a child has been placed in an unsuitable class or school; whether a juvenile is retarded, has MBD, or is emotionally disturbed; whether he or she would benefit from special education programs) can be made by calling as witnesses the child's parents and teachers, as well as experts such as psychologists, psychiatrists, neurologists, and pediatricians, whose testimony can clearly be competent. Indeed, these issues are no more complex than a determination whether a defendant is insane, a fact that is established by competent expert opinion testimony at the guilt stage of a criminal trial.

In addition, in *John R.* the trial judge pointed out that, if the evidence at the dispositional hearing disclosed that the child would attend school if his class were changed or he received counselling, then the PINS petition would be dismissed. *Id.* at 346, 357 N.Y.S.2d at 1008. Thus, deferring such a determination until the dispositional hearing would appear to lengthen the proceeding unnecessarily and to be at odds with both the court's own stated preference that "voluntary remedies should be attempted prior to Court intervention," *id.*, and with its observation that some children would attend school voluntarily if placed in appropriate classes and given special counseling. *Id.* at 341, 357 N.Y.S.2d at 1004. There may be little incentive for school authorities to attempt to cure truancy on their own if the court will entertain a PINS petition without making a threshold determination on this issue.

Finally, the court intimated that its exclusion of evidence showing that the truancy was justifiable was based on trial counsel's failure to make an explicit offer of proof. *Id.* at 345 n.6, 357 N.Y.S.2d at 1008 n.6. This ruling should serve as a warning to attorneys representing children in truancy cases that extensive pre-trial investigation and advice from potential expert witnesses are essential.

113. See *In re Gregory B.*, 387 N.Y.S.2d 380 (Fam. Ct. 1976), denying a discovery motion by children charged with truancy in a PINS action. The children were seeking extensive information from school authorities for the purpose of proving that they were receiving such inadequate education that required school attendance amounted to confinement in violation of due process, and that, in such circumstances, a PINS adjudication based on truancy would also be contrary to due process. The juveniles sought to discover, *inter alia*, attendance statistics at their school, statistics concerning PINS truancy petitions filed against children enrolled there, reading and mathematics scores of children at the school, data concerning the race, sex and educational background of school personnel, and data concerning crime in the school. Although finding that the children had not made a sufficiently particularized showing to warrant such



permitted to insist upon strict statutory construction and to assert defenses such as lack of mens rea, insanity or necessity, all of which presume that the proscribed act took place.<sup>114</sup> A possible response to this analogy is that, although such defenses are appropriate in criminal cases in which punishment will be imposed upon a culpable defendant, they are counterproductive in juvenile court proceedings, whose purpose is the treatment and rehabilitation of troubled children.<sup>115</sup> This argument is unpersuasive, since the above-mentioned defenses are permitted in criminal trials even though modern theories of sentencing also emphasize the importance of rehabilitation in the criminal justice process.<sup>116</sup> Moreover, juvenile proceedings are themselves quasi-criminal in nature,<sup>117</sup> and the child adjudicated a PINS is stigmatized in many of the same ways as a convicted criminal defendant.<sup>118</sup>

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extensive discovery, the court, in dictum, rejected the arguments of school officials that inadequate education was not a defense to PINS truancy charges and that the children were required to resort to a different forum for declaratory and injunctive relief with respect to unsuitable educational facilities and programs. Noting that new defenses were part of "a dynamic development of the law," the trial judge stated:

There is nothing in [the juvenile code] . . . which limits Respondents to the single and exclusive defense which asserts a denial to Petitioner's claim that they were absent a certain number of days without recognized school excuse. Nor can the respondents be deprived of their right to interpose a defense involving constitutional rights. If the Board may assert its powers to enforce the compulsory nature of the Education Law, as it must, it cannot thereby limit the Court's powers to consider a defense of noneducation, assuming the bona fides thereof.

387 N.Y.S.2d at 382-83 (citation omitted).

114. See note 108 *supra* and accompanying text. Since truancy can be considered a public welfare law rather than a common law crime, the state may be free to impose strict liability. See *Morissette v. United States*, 342 U.S. 246 (1952).

115. See, e.g., N.J. STAT. ANN. § 2A:4-42 (West Supp. 1976); TENN. CODE ANN. § 37-201 (Cum. Supp. 1975). Some courts have refused to accept the insanity defense as a bar to a delinquency adjudication, on the theory that rehabilitation rather than punishment is being provided. Compare *In re H.C.*, 106 N.J. Super. 583, 256 A.2d 322 (1969) (rejecting insanity defense, but holding that it bars imposition of punishment) with *In re Winburn*, 32 Wis. 2d 152, 145 N.W.2d 178 (1966) (accepting insanity defense). A number of modern juvenile codes specifically incorporate the insanity defense. E.g., TEX. FAM. CODE ANN. § 55.05 (1976).

116. See, e.g., N.Y. PENAL LAW § 1.05(5) (McKinney 1975); N. MORRIS, *THE FUTURE OF IMPRISONMENT* 13-20 (1974).

117. See *In re Gault*, 387 U.S. 1 (1967); Rosenberg & Rosenberg, *supra* note 19, at 1121-22 n.118.

118. See, e.g., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9, 26 (1967). Notwithstanding juvenile code provisions that an adjudication results in no civil disabilities, see, e.g., TEX.

Furthermore, once a PINS finding has been made and the court empowered to supervise the child, evidence concerning MBD and school phobia may not preclude an improper disposition. Although there may be no appropriate state facilities for children with emotional, learning, and behavioral disabilities,<sup>119</sup> where jurisdiction has attached, juvenile courts may be loathe to release a child even if they are unable to provide adequate treatment.<sup>120</sup> While sometimes admitting that appropriate facilities are nonexistent, courts will nonetheless consign the child to whatever facility is available, on the theory that "we must do the best we can with what we have." That facility is too often the state training school.<sup>121</sup> Moreover, because juvenile court

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FAM. CODE ANN. § 51.13(a) (Vernon 1976), juvenile court records are made available to school authorities, prospective employers, and the military. See *E.J. v. State*, 471 P.2d 367, 370 (Alaska 1970). See also Sussman, *The Confidentiality of Family Court Records*, 45 Soc. SERV. REV. 455 (1971). Moreover, many jurisdictions permit adult criminal courts to consider juvenile court records for purposes of sentencing. See, e.g., *People v. McFarlin*, 389 Mich. 557, 208 N.W.2d 504 (1973); *Taylor v. Howard*, 111 R.I. 527, 304 A.2d 891 (1973).

119. See PINS PLETHORA, *supra* note 10, at 44, noting that most private agencies and public group shelter programs "require that the child be able to fit into their school programs and have established minimum grade levels, IQ levels, and the like. Only the training schools have been available for the non-reader or seriously backward students." Of the 316 PINS children in the survey, "the median grade level was the eighth and the median reading level was 5-6. . . . Twenty-seven of the children were reading at the 1-2 level and another 64 at the 3-4 level." *Id.* at 43. Cf. *Mills v. Board of Educ.*, 348 F. Supp. 866, 868 (D.D.C. 1972) (granting relief in class action brought on behalf of seven children "labeled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive, and denied admission to the public schools. . . ."); *Usen v. Sipprell*, 41 App. Div. 2d 251, 342 N.Y.S.2d 599 (1973) (mandamus proceeding to compel adequate education and treatment, brought on behalf of indigent, emotionally and mentally handicapped children with "acting out" behavior; plaintiff was a 15-year-old retarded girl with history of belligerent conduct and emotional instability who had been adjudicated neglected, PINS, and delinquent in that order; at time of suit, child had been held in "short-term" detention facility longer than any other juvenile, with state conceding absence of appropriate facility for her care; case remanded for family court hearing to determine if any adequate facility was available).

120. See *In re Aline D.*, 14 Cal. 3d 566, 536 P.2d 65, 121 Cal. Rptr. 817 (1975) (reversing and remanding for reconsideration training school commitment of 16-year-old girl with a 67 IQ, where trial judge had expressed doubts that child would benefit from the placement, but ordered it because no alternatives were available); *In re Susan B.*, 45 App. Div. 2d 920, 921, 357 N.Y.S.2d 313, 315 (1974) ("No decision can be made in the placement of a child with Susan's problems with the assurance that one has found the best or even an adequate solution. We concur, however, . . . that the [state training school] . . . is the best available resource.").

121. See *Usen v. Sipprell*, 41 App. Div. 2d 251, 253, 342 N.Y.S.2d 599,

judges are given broad discretion in dispositional determinations, the scope of appellate review of dispositional orders may be limited, and the likelihood of overturning an improper disposition correspondingly decreased.<sup>122</sup>

Inappropriate dispositions may also result because the trial court bases its decision on written reports filed by the various medical specialists rather than on their oral testimony. These hearsay reports, which are admissible at dispositional hearings,<sup>123</sup>

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602 (1973) (discussed in note 119 *supra*; plaintiff alleged that "placement of children with [emotional and mental] handicaps has been a chronic problem for institutional social workers employed by Family Court; and such children are released and receive no treatment, or they are incarcerated in state training school for juvenile delinquents, or they are referred to an institution with an inadequate program. . . ."); *In re Mario*, 65 Misc. 2d 708, 710 n.2, 712-14, 317 N.Y.S.2d 659, 662 n.2, 663-65 (Fam. Ct. 1971) (13-year-old truant committed to training school; placement order prohibiting use of force to return child to facility if he escaped and barred housing the boy in a locked building for a prolonged period; court psychiatrist had recommended a treatment oriented facility); PINS PLETHORA, *supra* note 10, at 9 (noting that PINS children with serious emotional problems and histories of mental illness, as well as those with "acting out" behavior, are denied admission to private facilities and group residences and are instead placed in temporary shelters or state training schools).

122. See, e.g., ALA. CODE tit. 13, § 361 (1958); DEL. CODE tit. 10, § 937 (b) (15) (1974); MISS. CODE ANN. § 43-21-19 (1972); PA. STAT. ANN. tit. 11, § 50-322 (Purdon Supp. 1976). Cf. *Echols v. State*, 481 S.W.2d 160, 162 (Tex. Civ. App. 1972) (appeal from probation revocation based on truancy; evidence showed that child and parents believed that the child was excused from attending because of his employment; court stated, "[N]o abuse of discretion is shown. We must affirm the judgment whether we agree with it or not."); *In re P.A.O.*, 530 S.W.2d 902, 903 (Tex. Civ. App. 1975) ("The juvenile courts are granted broad powers and discretion in determining suitable disposition of children who have been adjudicated to have engaged in delinquent conduct or in conduct indicating a need for supervision."). *But see* N.Y. FAM. CT. ACT § 745 (b) (McKinney 1975); *In re T.R.W.*, 533 S.W.2d 139 (Tex. Civ. App. 1976) (reversing disposition, because trial court did not give specific statement of reasons for committing delinquent to state training school).

In contrast, a fact-finding determination must be supported by evidence sufficient to meet the standard of proof required in the particular jurisdiction; thus, there is a more substantial possibility that an improper fact-finding determination in a contested proceeding will be reversed on appeal. See, e.g., COLO. REV. STAT. §§ 19-1-103(1), 104(1)(b) (1974) (requiring proof beyond a reasonable doubt at the PINS adjudicatory hearing); D.C. CODE § 16-2317(c)(2) (Supp. 1973) (preponderance standard of proof); TENN. CODE ANN. § 37-229(c) (Cum. Supp. 1974) (clear and convincing standard of proof).

123. See, e.g., ILL. ANN. STAT. ch. 37, § 705-1 (Smith-Hurd 1972); N.Y. FAM. CT. ACT § 745 (McKinney 1975); TEX. FAM. CODE ANN. § 54.04 (b) (Vernon 1975); *Tyler v. State*, 512 S.W.2d 46 (Tex. Civ. App. 1974) (rejecting argument that admission of psychologist's hearsay report at dispositional hearing violated sixth amendment rights of confrontation and cross-examination).

necessarily have less impact than oral testimony and may, in any case, be so technical that the judge cannot properly evaluate their meaning.<sup>124</sup> If, however, evidence concerning MBD or school phobia is presented at the adjudicatory hearing, it must generally be competent.<sup>125</sup> Where the specialist testifies personally, the judge will be able to question him or her at length, and will thus be in a better position to comprehend the child's inability to conform his or her behavior to the requirements of the law.<sup>126</sup> Even if the court makes a finding against the child, the expert testimony previously received in evidence may help to assure a more favorable disposition.<sup>127</sup>

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124. In *In re Kevin M.*, 48 App. Div. 2d 800, 369 N.Y.S.2d 439 (1975) (per curiam), the court reversed the training school placement of an adjudicated 12-year-old delinquent, where the trial judge had refused to postpone disposition pending receipt of a neurological examination. As noted in appellant's brief, the mental health reports that were submitted to the trial court "revealed findings of perceptual difficulties, . . . poor impulse control, and a hyperkinetic tendency." Brief for Appellant at 5, *In re Kevin M.*, *supra*. Although the child had a full-scale I.Q. of 72, the reports included the examiner's opinion that the boy's potential for average intelligence "had not been achieved because of the interference of a central nervous system dysfunction." The reports also disclosed a "marked variance between verbal and performance scores," included recommendations for neurological and EEG examinations, and advised placement in a treatment-oriented residential facility.

Notwithstanding these written reports, the recommended examinations were never conducted, and the trial judge proceeded to place the child in the state training school on the basis of the probation officer's recommendation, which was made after a fifteen minute interview with the boy and his parent on the day of the hearing. See *id.* at 4-7. At the dispositional hearing, the child's attorney brought the foregoing mental health reports to the court's attention, stating: "[I]t is essential to tailor the disposition to meet the therapeutic needs of the individual respondent." The trial judge replied, "That doesn't mean a . . . thing to me. Get down to earth. We have a boy here . . . [who has] gotten into trouble repeatedly." *Id.* at 4.

125. See, e.g., N.Y. FAM. CT. ACT § 744(a) (McKinney 1975); TEX. FAM. CODE ANN. § 54.03(d) (Vernon 1975).

126. In discussing the hypothesis that frontal lobe damage or neurochemical factors may be involved in the MBD syndrome, one authority has observed, "The MBD child is believed to be 'naughty' and 'willful' and is often blamed for this when he really lacks control. Unjustified reproach in turn increases the child's already impaired control of behavior . . ." Eisenberg, *supra* note 78, at 62-63.

127. If a defense based on MBD is interposed at the adjudicatory hearing, the judge will be able to examine the expert witnesses extensively and thus gain a firmer understanding of the syndrome. See text accompanying notes 125-26 *supra*. In addition, inasmuch as most PINS adjudications are based on admissions; assertion of the defense at the fact-finding hearing puts a judge on notice that the parties consider the case significant and the defense substantial. See notes 22-24 *supra* and accompanying text. Thus, if the judge makes a finding, he or she knows

Although a nonrestrictive disposition such as probation may result from a vigorously contested adjudicatory and dispositional hearing,<sup>128</sup> the attorney should nevertheless give serious consideration to an appeal from the truancy adjudication and disposition. Because courts have not been very successful in curing truancy,<sup>129</sup> and because there is a paucity of educational and psychiatric resources for troubled children who do not attend school,<sup>130</sup> there is the likelihood that an adjudicated truant

that, at the very least, unless the disposition is nonrestrictive there is a distinct possibility of an appeal based on a fully developed record. Even though a judge professes a lack of concern about appeals, he or she will have learned from the expert testimony the type of facility which can provide the needed services for the MBD child. The judge who discovers at the dispositional hearing that no such state facility exists may, when faced with the alternatives of letting the child remain at home or committing the juvenile to the state training school, decide that if the court cannot help the child, it will at least not subject the youth to the harsh, inappropriate conditions of a correctional facility. Although a contested dispositional hearing may also result in reversal of an inappropriate placement, *see, e.g., In re Aline D.*, 14 Cal. 3d 566, 536 P.2d 65, 121 Cal. Rptr. 817 (1975), discussed at notes 120 *supra* & 209 *infra*, the finding of fact against the child will remain. Moreover, because of the less stringent rules of evidence and burden of proof at the dispositional hearing, *see note 122 supra*, the possibility of reversal of the dispositional order is diminished.

Finally, if a child is diagnosed as an MBD child, he or she may begin drug therapy immediately. Stimulant drug therapy appears to be effective in 44 to 70 percent of MBD cases, *see WENDER, supra note 65*, at 95, and, "when effective, the drug has a profound influence on the activity level, impulsivity, social behavior and cognition of MBD children." *Id.* at 89. Moreover, the response is, in many cases, "prompt and dramatic." *Id.* at 100. Thus, by the time the dispositional hearing occurs, the school and home reports submitted to the court may persuade the judge that the treatment has been successful and that institutional placement is unnecessary.

128. Indeed, on the first occasion that the child is brought to court on truancy charges, probation may be a likely disposition whether or not a defense is asserted at the fact-finding hearing. *See In re Mario*, 65 Misc. 2d 708, 715, 317 N.Y.S.2d 659, 666 (Fam. Ct. 1971) ("the established procedure of the Family Court in truancy cases is first to place the child on parole or probation in the community, imposing specific requirements as to regular school attendance . . . ; placement is effected only if such specific conditions are disobeyed"); *cf. PINS PLETHORA, supra note 10*, at 70-71, 78 (one-third of the PINS children in the survey were on probation prior to being placed outside their homes).

129. *See, e.g., In re Mario*, 65 Misc. 2d 708, 710, 317 N.Y.S.2d 659, 661 (Fam. Ct. 1971) ("[E]fforts by this court and its probation officers over the past 8 months to induce the 13-year-old respondent, a long-time school truant, to resume school, have completely failed."); *In re John R.*, 79 Misc. 2d 339, 341-42, 357 N.Y.S.2d 1001, 1004 (Fam. Ct. 1974) ("[T]he Court's efforts are frequently ineffective with PINS-truant children . . ." The judge noted, however, that some truants have participated successfully in the court's "special school with small classes and daily counselling.").

130. *See CHILDREN OUT OF SCHOOL IN AMERICA, supra note 1*, at 92-

placed on probation will persist in refusal to go to school, and that a probation revocation proceeding will be instituted.<sup>131</sup> At this stage, the probability of a more restrictive disposition, such as training school commitment, increases because the court has already "given the child a chance" to be rehabilitated in the community.<sup>132</sup> Evidence of MBD or school phobia as a justification for truancy may be inadmissible in the more narrow confines of a probation revocation hearing.<sup>133</sup> Moreover, if the revocation proceeding results in an unfavorable disposition and an appeal is taken therefrom, the appellate court may be unwilling or unable to review the evidence presented at the original adjudication and disposition.<sup>134</sup> Thus, failure to appeal from

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94, 104. See also *Reid v. Board of Educ.*, 453 F.2d 238, 239-40 (2d Cir. 1971) (class action on behalf of brain-injured children "to provide special public school classes with adequate staff and resources . . . and to provide proper screening within a reasonable time . . .;" one of the plaintiffs was medically discharged from regular public school classes because he was receiving no benefit and was allegedly being "severely injured;" thereafter, during a 28-month period spent waiting for placement in a special education program, the child was receiving only a few hours of home instruction per week); NATIONAL ADVISORY COMM. ON THE HANDICAPPED, 1976 ANNUAL REPORT, THE UNFINISHED REVOLUTION: EDUCATION FOR THE HANDICAPPED 1-2, 29 (1976) (estimating that there are 1,966,000 children in the United States, ages 0-19, with specific learning disabilities, of whom 1,706,000, or 87 percent, are "unserved," receiving either inappropriate education or no education at all).

131. See, e.g., N.Y. FAM. CT. ACT § 779 (McKinney 1975); TEX. FAM. CODE ANN. § 54.05 (1975); *In re Dowell*, 17 N.C. App. 134, 193 S.E.2d 302 (1972).

132. See *In re Mario*, 65 Misc. 2d 708, 715, 317 N.Y.S.2d 659, 666 (Fam. Ct. 1971), discussed at note 128 *supra*.

133. Cf. *In re E.B.*, 525 S.W.2d 543, 546 (Tex. Civ. App. 1975) (probation revocation proceeding resulting in commitment to state training school; in affirming, the court intimates that statute permits assertion of insanity defense only at the original adjudicatory hearing); *In re D.L.S.*, 520 S.W.2d 442 (Tex. Civ. App. 1975) ("Assuming that 'duress' is a defense to the allegation that appellant violated the terms of her probation, we cannot say that the juvenile court abused its discretion in refusing to find that appellant was acting under duress."). *Id.* at 444 (footnote omitted).

134. Cf. *In re D.E.P.*, 512 S.W.2d 789, 791 (Tex. Civ. App. 1974) (on appeal from decision revoking probation, child attempted to attack original adjudication of delinquency which had not been appealed; although acknowledging that state law did not permit a minor to waive service of process, the court refused to consider this error because "no appeal was perfected from the adjudication hearing . . ."); *In re Stanley M.*, 39 App. Div. 2d 746, 747, 332 N.Y.S.2d 125, 126 (1972) (mem.) (On appeal from revocation of probation, court found "the constitutional arguments without merit. Appellant did not appeal from the original PINS adjudication and disposition."); *In re R.A.B.*, 525 S.W.2d 892 (Tex. Civ. App. 1975) (on appeal from order revoking probation, child at-

the original orders may waive the right to challenge their legal sufficiency and may seriously prejudice the child.

If a defense based on school phobia or MBD leads to dismissal of the PINS action, the child's parents and attorney should, in order to ensure that the child's handicap does not bring him or her within the juvenile justice system again, secure appropriate education and treatment. On the strength of evidence proving that the child suffers from school phobia, parents should be able to obtain home instruction until the phobia has been successfully treated through psychiatric care.<sup>135</sup> Failure of the parent to secure therapy at community agencies can be the basis for a neglect or dependency proceeding.<sup>136</sup> If the phobic child is in need of residential treatment, statutory provisions for assistance to mentally, emotionally, and physically handicapped children may be a means of securing such relief.<sup>137</sup>

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tempted to attack unappealed original adjudication of delinquency; court refused to consider this challenge notwithstanding claim that child and parent had not been advised of right to appeal from original order of adjudication).

135. See, e.g., Milman, *supra* note 31, at 1887 ("It is estimated that, of approximately 360 high school-age children in Brooklyn currently on home instruction, about 25 percent are homebound for emotional reasons.") (footnote omitted); PINS PLETHORA, *supra* note 10, at 42, 43 (referring to a New York State report which found that, in the 1969-1970 school year, 44 percent of children receiving home instruction were emotionally disturbed; noting that a prerequisite for home instruction is that an adult be present, and that, preferably, counselling be provided for child and family; and giving case history of 11-year-old child who was denied home instruction because his mother refused to accept counselling).

136. See, e.g., CONN. GEN. STAT. ANN. § 17-53 (West Supp. 1976) (defining a neglected child as one who "is being denied proper care and attention, physically, educationally, emotionally or morally"); ILL. ANN. STAT. ch. 37, § 702-4(1) (a) (Smith-Hurd 1972). Neglect or dependency proceedings may result in removal of the child from the home. See note 9 *supra*. Where therapy is prescribed for both child and parent, see, e.g., Sperling, *supra* note 34, at 380, 386; Waldfogel, Coolidge, & Hahn, *supra* note 33, at 778, and the latter refuses to accept treatment, see Coolidge & Brodie, *Observations of Mothers of 49 School Phobic Children*, 13 J. AM. ACAD. CHILD PSYCH. 275, 281-82 (1974); Sperling, *supra* note 34, at 386-89, a defense of parental neglect should also be asserted. Furthermore, if the court has directed the parent to secure therapy for the child or to participate in a treatment program with the juvenile, the parent's disobedience of the order may constitute contempt. Cf. *In re Burr*, 119 Ill. App. 2d 134, 255 N.E.2d 57 (1970) (court order directing mother to act to ensure her daughter's school attendance unless ill, and that such must be supported by a physician's certificate, held reasonable; evidence supported holding mother in contempt for violation of order of protective supervision; five day jail sentence imposed).

137. See notes 139-53 *infra* and accompanying text.

Where the school has mistakenly failed to designate a child as MBD or to provide an appropriate classroom setting, the evidence presented at the PINS adjudicatory hearing may persuade school authorities to take corrective action. If they are unwilling either to accept the MBD diagnosis,<sup>138</sup> or to provide such special facilities, or are unable to do so because of fiscal constraints, a separate action can be instituted on behalf of the child to secure this relief.<sup>139</sup> Statutory provisions in many jurisdictions, for example, require the state to establish appropriate educational facilities and services and/or to provide financial assistance to "exceptional" or "handicapped" children, thus enabling them to attend appropriate private schools.<sup>140</sup> The terms "handicapped" and "exceptional" are defined so as to include MBD children either explicitly or by implication.<sup>141</sup> Some state laws refer explicitly to children with "minimal brain dysfunc-

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138. See Denhoff, *supra* note 66, at 200 (in discussing the history of an MBD child whose hyperkinetic behavior improved as a result of medication, the author notes, "special education was recommended, but the school authorities resisted, since they felt that his problem was behavioral rather than academic").

139. See, e.g., *Nickerson v. Thomson*, 504 F.2d 813, 815 (7th Cir. 1974) (action on behalf of "maladjusted children, children with specific learning disabilities . . . mentally handicapped children, speech defective children, and multiply handicapped children" to compel adequate special education; trial court's abstention order reversed); *Reid v. Board of Educ.*, 453 F.2d 238 (2d Cir. 1971) (suit by brain injured and other handicapped children seeking special education services; abstention order affirmed with direction that district court retain jurisdiction instead of dismissing action); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), discussed in note 119 *supra*; *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972) (three-judge court) (action on behalf of retarded children to compel appropriate educational services; consent agreement approved).

140. Recent federal legislation authorizes increased funding to states which provide free special education programs and services for all handicapped children, including those with minimal brain dysfunction and specific learning disabilities. See 20 U.S.C. §§ 1401(15) *et seq.* (Supp. V 1975).

141. For instance, the Alaska legislation dealing with "exceptional children" requires the provision of special services for such children by each school district and further specifies that if educational programs within the state are inappropriate for the needs of an exceptional child, he or she may be enrolled in an out-of-state institution, with the cost to be borne by the Department of Education. ALASKA STAT. §§ 14.30.186, 14.30.285 (1975). The term "exceptional children" is defined to cover physically and emotionally handicapped children as well as those with learning disabilities, which "includes those who exhibit disorders in one or more of the basic learning processes involved in comprehending or using expressive or receptive language and who may require special facilities, equipment or methods to make their educational program effective." *Id.* § 14.30.350(1).



tion,"<sup>142</sup> "special" or "specific learning disabilities,"<sup>143</sup> or "identifiable perceptual or communicative disorders,"<sup>144</sup> whereas others refer more generally to juveniles who suffer "physical and or mental disability"<sup>145</sup> or who "deviate from the so-called normal person in physical, mental, social or emotional characteristics or abilities to such an extent that specialized training, techniques, and equipment are required. . . ."<sup>146</sup>

Litigation under New York's ambiguous statutory provisions for assistance to handicapped children<sup>147</sup> demonstrates the extent to which special education laws may be applied to secure treatment for juveniles with a wide variety of physical, mental and emotional handicaps, including MBD children. Courts have ordered assistance to children with mental retardation,<sup>148</sup> schizophrenia,<sup>149</sup> brain injury,<sup>150</sup> and learning disabilities such as

142. *E.g.*, ARIZ. REV. STAT. §15-1011(3) (g) (1975); DEL. CODE tit. 14, § 3101(6) (1974). *See also* MASS. GEN. LAWS ANN. ch. 71B, § 1 (West Supp. 1976) ("child who, because of . . . attributes arising from intellectual, sensory, emotional or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning disabilities or any combination thereof, is unable to progress effectively in a regular school program").

143. *See, e.g.*, ALA. CODE tit. 52, § 534(24) (Cum. Supp. 1973); FLA. STAT. ANN. § 228.041(19) (West Supp. 1965); ILL. ANN. STAT. ch. 122, § 14-1.03a (Smith-Hurd Supp. 1976); MINN. STAT. § 120.03(3) (1976).

144. COLO. REV. STAT. § 22-20-103(4) (1974). *See also* GA. CODE ANN. § 32-605a(a) (1975) (children "who have emotional, physical, communicative or intellectual deviations or a combination thereof, to the degree that there is interference with school achievements or adjustments").

145. *See, e.g.*, IND. CODE ANN. § 20-1-6-1(A) (Burns 1975); MO. ANN. STAT. § 162.675(2) (Vernon Supp. 1976).

146. *E.g.*, HAWAII REV. STAT. § 301-21(1) (1968); KAN. STAT. § 72-962(g) (2) (Supp. 1975).

147. *See In re Leitner*, 40 App. Div. 2d 38, 42, 337 N.Y.S.2d 267, 272 (1972) ("the statutory scheme for the ordering of special educational services for a handicapped child through the Family Court and the allocation of the costs of those services is, at best, cumbersome, and at worst, unclear and unnecessarily complex").

148. *See In re Sharkey*, 84 Misc. 2d 655, 379 N.Y.S.2d 284 (Fam. Ct. 1975); *In re Jetty*, 79 Misc. 2d 198, 359 N.Y.S.2d 406 (Fam. Ct. 1974).

149. *See In re Warren A.*, 385 N.Y.S.2d 590 (App. Div. 1976); *In re McDonald*, 76 Misc. 2d 532, 351 N.Y.S.2d 120 (Fam. Ct. 1974); *In re James B.*, 75 Misc. 2d 1012, 349 N.Y.S.2d 492 (Fam. Ct. 1973); *In re David H.*, 72 Misc. 2d 59, 337 N.Y.S.2d 969 (Fam. Ct. 1972) (schizophrenia coupled with MBD symptoms such as hyperactivity and distractibility). *See also In re Jessup*, 85 Misc. 2d 575, 576, 379 N.Y.S.2d 626, 629 (Fam. Ct. 1975) ("[o]veranxious reaction of childhood, severe, with borderline features;" opinion also contains analysis of the New York statutory framework and of the case law thereunder). Compare *In re Lavette M.*, 35 N.Y.2d 136, 316 N.E.2d 314, 359 N.Y.S.2d 20 (1974), discussed at notes 170-78 *infra* and accompanying text.

150. *See In re Diana L.*, 70 Misc. 2d 660, 335 N.Y.S.2d 3 (Fam. Ct. 1972); *In re Hilary M.*, 73 Misc. 2d 513, 342 N.Y.S.2d 12 (Fam. Ct. 1972).

dyslexia and dysgraphia.<sup>151</sup> Even where the handicap is not denominated as MBD, the characteristics referred to in the cases include typical MBD symptoms.<sup>152</sup> Indeed, in some of these cases, assistance was given to children whose underlying disorders were coupled with serious behavioral problems and delinquent acts.<sup>153</sup>

Attempts to obtain special education or therapy may be countered with the argument that such services are financially infeasible. In fact, however, provision of such special treatment may be the most efficient means to prevent children from being consigned to inappropriate and vastly more expensive juvenile correctional facilities.<sup>154</sup> In *In re Richard C.*,<sup>155</sup> for example,

151. See *In re Kirkpatrick*, 77 Misc. 2d 646, 354 N.Y.S.2d 499 (Fam. Ct. 1972); cf. *In re Serotte*, 63 Misc. 2d 999, 314 N.Y.S.2d 114 (Sup. Ct. 1970) (child with "cerebral dysfunction and learning disabilities, as well as problems of an emotional nature;" court found public facilities were adequate to meet the child's needs).

152. See *In re Kaye*, 84 Misc. 2d 569, 570, 379 N.Y.S.2d 261, 262 (Fam. Ct. 1975) ("neuro physiological maturational lags"); *In re James B.*, 75 Misc. 2d 1012, 349 N.Y.S.2d 492 (Fam. Ct. 1973) ("hyperactivity, . . . inability to cooperate and communicate"); *In re David H.*, 72 Misc. 2d 59, 337 N.Y.S.2d 969 (Fam. Ct. 1972) (schizophrenia coupled with MBD symptoms such as hyperactivity and distractibility).

153. See *In re Jetty*, 79 Misc. 2d 198, 199, 359 N.Y.S.2d 406, 407 (Fam. Ct. 1974) ("serious behavior disturbance"); *In re James B.*, 75 Misc. 2d 1012, 349 N.Y.S.2d 492 (Fam. Ct. 1973) ("occasional destructiveness"); *In re Kirkpatrick*, 77 Misc. 2d 646, 648, 354 N.Y.S.2d 499, 501 (Fam. Ct. 1972) ("emotional problems and an antiauthoritarian attitude manifesting themselves in drug use and other delinquencies . . . disruptive anti-social behavior"). But see *In re Mecca*, 82 Misc. 2d 497, 499, 369 N.Y.S.2d 282, 284 (Fam. Ct. 1975) ("[T]here does not appear to be a basis for recognizing Robert Mecca as other than a serious discipline problem to his parents and teachers. To find otherwise would be to equate 'handicapped' with any serious adolescent emotional or disciplinary problem."). To the extent that the *Mecca* decision was predicated on the requirement that the handicap be physical, *id.* at 499, 369 N.Y.S.2d at 284, it has been overruled by *In re Warren A.*, 385 N.Y.S.2d 590 (App. Div. 1976).

154. Compare N.Y. Times, March 2, 1976, at 1, col. 7, ("what amounts to custodial care [at Goshen training school], is costing the taxpayers of New York \$28,000 a year for each juvenile delinquent") with *In re Jetty*, 79 Misc. 2d 198, 359 N.Y.S.2d 406 (Fam. Ct. 1974) (\$10,200 for residential care, education and treatment of handicapped child), and *In re James B.*, 75 Misc. 2d 1012, 349 N.Y.S.2d 492 (Fam. Ct. 1973) (\$3,500 tuition for non-residential special educational facility). In a letter to one of the authors dated August 31, 1976, Karen Pope, Assistant to the Director of Communications of the New York State Division for Youth, advised that, for the fiscal year ending March 31, 1976, the cost per child at state training schools, halfway houses, and special centers was \$24,794.45.

Moreover, the private facilities which handicapped children receive assistance to attend appear to offer far superior education and treatment

the court ordered assistance for a handicapped child who had previously been adjudicated delinquent several times, notwithstanding the city's argument that "every juvenile delinquent would qualify for Phillips Exeter Academy or The Choate School" if the petition for assistance were granted.<sup>156</sup> The court's eloquent response was:

If it is not enough to reject the equation which would balance the welfare of children against dollars, I would add that if the sum of \$2,425 which is being sought by the petitioner will benefit this child and enable him to live in the community and be self-supporting rather than in a prison or in a mental institution at an infinitely greater annual economic cost, the public fisc will be more than adequately rewarded.<sup>157</sup>

Finally, the possibility of federal court right-to-treatment litigation should be seriously considered.<sup>158</sup> In the recent case of *Frederick L. v. Thomas*,<sup>159</sup> a class action was brought on behalf of all Philadelphia public school children from the fifth to the twelfth grades having specific learning disabilities. Asserting both federal constitutional and pendent state law claims, plaintiffs sought implementation of the state's special education laws so as to assure appropriate education for SLD children. In a wide-ranging opinion, the trial judge found that there were "thousands of unidentified" children with specific learning disa-

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than that afforded by the state training schools. *Compare In re Hilary M.*, 73 Misc. 2d 513, 342 N.Y.S.2d 12 (Fam. Ct. 1972) (describing private school program which enabled a defective child with severe brain damage and emotional problems to learn to read and write and to gain emotional stability) *with* INSTITUTE OF JUDICIAL ADMINISTRATION, *THE Ellery C. DECISION: A CASE STUDY OF JUDICIAL REGULATION OF JUVENILE STATUS OFFENDERS* 53 (1975) (finding that New York training schools for PINS children did not differ markedly from those provided for delinquents) *and* *Lollis v. New York State Dep't of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970), 328 F. Supp. 1015 (S.D.N.Y. 1971) (action to enjoin prolonged "strip room" isolation of PINS and delinquent children committed to state training schools). *But see* note 172 *infra*, describing legislation effective January 1, 1977, which prohibits training school placement of PINS children.

155. 75 Misc. 2d 517, 348 N.Y.S.2d 42 (Fam. Ct. 1973).

156. *Id.* at 521, 348 N.Y.S.2d at 46. The petitioning child was mentally defective and had been previously committed to the Wassaic State School.

157. *Id.*

158. To be sure, federal court right-to-treatment litigation may require expenditures of time and resources far beyond the capacity of individual attorneys in private practice. Institutional advocates in the fields of juvenile and education law will undoubtedly be the primary advocates in cases of this nature.

159. 408 F. Supp. 832 (E.D. Pa. 1976), 419 F. Supp. 960 (E.D. Pa. 1976).

bilities in the school district,<sup>160</sup> and that the latter had failed to implement state law provisions for their education. The court directed further proceedings to determine an appropriate remedial order.<sup>161</sup>

In sum, the advocate for a truant child whose nonattendance stems from physical, mental, or emotional disabilities may advance substantial arguments in opposition to a PINS adjudication. On the basis of expert psychological, psychiatric, and medical testimony presented at a contested adjudicatory hearing at which it is urged that strict statutory construction precludes the applicability of truancy laws to such disabled children, the attorney may be able to secure dismissal of the PINS petition. Judicial acceptance of these defenses to truancy actions may, however, be predicated on assurance that the child will receive appropriate treatment outside the juvenile court system.<sup>162</sup> Thus, the attorney who has secured psychiatric care, home instruction, or a special education program suited to the child's needs is most likely to succeed in defeating the PINS action. Where school authorities have refused to afford such services, the child's counsel may achieve the same result by instituting state or federal court action to secure the needed educational program. All of these efforts will further the attorney's prime goal: to keep the child who cannot, for physical and/or emotional reasons, comply with school attendance laws out of a juvenile court system which cannot hope to ease the child's ills.

#### V. EXAMPLES OF JUDICIAL HOCUS-POCUS WITH DISTURBED CHILDREN IN NEW YORK

Children who have emotional problems and who appear in court as PINS or delinquents rather than as plaintiffs in handicap petitions, usually have not fared as well as Richard C.<sup>163</sup> A

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160. 419 F. Supp. at 974.

161. *Id.* at 979.

162. The child's attorney may be able to secure dismissal merely by contesting the charges, without assuring that appropriate psychiatric or educational services will be provided for his or her client. While the value of such a dismissal is not to be denigrated, it seems likely that, in the absence of affirmative action by the attorney to secure the necessary services for the child, the latter will continue to be truant or misbehave and will again be brought to court.

163. See notes 155-57 *supra* and accompanying text. The case histories of disturbed children discussed in this section do not appear to be aberrations. See generally PINS PLETHORA, *supra* note 10. In this study involving New York City PINS children, the authors found that 16 percent had a history of psychiatric hospitalization, that 22 percent

close examination of the factual circumstances of four children against whom juvenile court charges were brought demonstrates that the label given a proceeding seems to influence significantly the quality of care and treatment that a child will receive.<sup>164</sup>

It is true that before 1973 New York's intermediate appellate courts reversed a number of training school placements of PINS children.<sup>165</sup> Some of these reversals appear to have been motivated, at least in part, by the fact that PINS and delinquents were commingled at the state training schools.<sup>166</sup> In 1973, however, the New York Court of Appeals held that such commingling violated state law.<sup>167</sup> Although the court's opinion

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"had attended a mental health clinic or been treated at a psychiatric hospital," that 15 percent of their mothers and 4 percent of their fathers had a history of mental illness, and that 9 percent of the mothers and 18 percent of the fathers were alcoholics. *Id.* at 34-35, 36, 46-47. "[M]ost of the children in the sample were either disturbed themselves or came from families with serious emotional problems." *Id.* at 26.

Nor is the practice of placing disturbed children in training schools limited to New York. See *In re Toporzycki*, 14 Md. App. 298, 300 & n.1, 287 A.2d 66, 67, 68 & n.1 (1972) (in reversing a determination authorizing the trial of a juvenile offender as an adult, the opinion describes the boy's involvement with the juvenile court; he was brought to court at age nine for failure to conform with school regulations and placed at the state training school; at about that time, he was diagnosed as having brain damage, being a borderline defective, and suffering from minimal neurological dysfunction).

164. A similar disparity in care and treatment occurs depending upon whether the child is labeled neglected or PINS. In many jurisdictions, the same conduct on the part of the child, including truancy, may be the basis for either a PINS or a neglect proceeding. See, e.g., CONN. GEN. STAT. ANN. § 17-53 (West Supp. 1976); N.Y. FAM. CT. ACT. §§ 712(b), 1012(f), (h) (McKinney 1975); S.C. CODE §§ 15-1103(9)(j), (11)(i) (1962). Whether the child will be adjudicated a PINS or neglected ostensibly turns on whether the court considers the parent or child culpable. Children found to be neglected, but not delinquent, generally may not be placed in training schools. See, e.g., ARIZ. REV. STAT. § 8-241(A) (1974); PA. STAT. ANN. tit. 11, § 50-321(b) (Purdon Supp. 1976).

165. See, e.g., *In re Jeanette M.*, 40 App. Div. 2d 977, 338 N.Y.S.2d 177 (1972) (mem.); *In re Arlene H.*, 38 App. Div. 2d 570, 328 N.Y.S.2d 251 (1971) (mem.); *In re Jeanette P.*, 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (1970) (mem.); *In re Lloyd*, 33 App. Div. 2d 385, 308 N.Y.S.2d 419 (1970).

166. See, e.g., *In re Jeanette M.* 40 App. Div. 2d 977, 978, 338 N.Y.S.2d 177, 179 (1972) (mem.); *In re Arlene H.*, 38 App. Div. 2d 570, 571, 328 N.Y.S.2d 251, 253 (1971) (mem.); *In re Jeanette P.*, 34 App. Div. 2d 661, 662, 310 N.Y.S.2d 125, 127 (1970) (mem.). In some of these cases, the courts were also motivated by recommendations in psychiatric reports concerning the needs of the particular children.

167. *In re Ellery C.*, 32 N.Y.2d 588, 591, 300 N.E.2d 424, 425, 347 N.Y.S.2d 51, 53 (1973) (ruling that confinement of PINS with delinquents in training schools did not comply with statutory requirement that PINS receive supervision and treatment).

was ambiguous with respect to whether PINS children could be committed to segregated training schools housing no delinquents,<sup>168</sup> the state proceeded administratively to establish such facilities.<sup>169</sup> The uncertainty was resolved a year later when, in *In re Lavette M.*,<sup>170</sup> the court ruled that PINS children could be placed in training schools separate from those housing delinquent children.

In *In re Maurice C.*,<sup>171</sup> a companion case decided together with *Lavette M.*, New York's highest court signalled its acquiescence to training school placements even in the case of seriously disturbed PINS children.<sup>172</sup> Maurice was a thirteen-

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168. The ambiguity of the *Ellery C.* decision was reflected in differing intermediate appellate court interpretations. Compare *In re Shirley G.*, 45 App. Div. 2d 876, 358 N.Y.S.2d 9, 10 (1974) (mem.) (reversing a training school commitment, the court stated, "At the hearing there was no testimony as to whether the training school satisfied the *Ellery C.* requirements") with *In re Susan B.*, 45 App. Div. 2d 920, 921, 357 N.Y.S. 2d 313, 315 (1974) (in affirming training school placement, court took note of the segregation of PINS from delinquents pursuant to the *Ellery C.* decision).

169. See INSTITUTE OF JUDICIAL ADMINISTRATION, *THE Ellery C. DECISION: A CASE STUDY OF JUDICIAL REGULATION OF JUVENILE STATUS OFFENDERS* 10-18, 25-35, 56-58 (1975) [hereinafter cited as IJA STUDY].

170. 35 N.Y.2d 136, 316 N.E.2d 314, 359 N.Y.S.2d 20 (1974). A recent study of the separate PINS training schools in New York indicated that there has been no significant improvement in the care of PINS children as a result of the newly segregated facilities. See IJA STUDY, *supra* note 169, at 42-47. Following the *Lavette M.* decision, a federal court class action was brought challenging the use of state training schools for PINS children. See *McRedmond v. Wilson*, 533 F.2d 757 (2d Cir. 1976) (reversing district court's abstention order and remanding for trial on right to treatment issue).

171. 35 N.Y.2d 136, 316 N.E.2d 314, 359 N.Y.S.2d 20 (1974).

172. The New York legislature recently passed amendments, effective January 1, 1977, prohibiting the placement of PINS children in the state training schools. N.Y. Sess. Laws ch. 515 (McKinney Aug. 10, 1976). See also *id.* at A-357 (governor's memorandum describing placement alternatives, namely "urban homes, group homes, family foster care placements, youth development centers, day services and rural based services"). This legislation does not, however, render superfluous the discussion of case histories contained in this section, for the following reasons: (1) the recently enacted statute does not apply to delinquent children, some of whom are emotionally disturbed and some of whom have MBD symptoms, see *In re Samuel P.*, 52 App. Div. 2d 552, 382 N.Y.S. 2d 94 (1976) (per curiam), discussed at text accompanying notes 179-86 *infra*; *In re Frederick N.*, Nos. D14281/74, D14052/74, D13531/74 (N.Y. App. Div. Aug. 15, 1975), discussed at text accompanying notes 187-95 *infra*; and (2) in many other jurisdictions, both PINS and delinquents, some of whom may be emotionally disturbed and/or suffering from MBD, are still committed to state training schools.

year-old boy whom the trial judge had adjudicated a PINS and placed at a training school for PINS children because he had run away from various foster homes. The whereabouts of his parents was unknown. An intermediate appellate court reversed the commitment and remanded the case, stating:

[W]e cannot permit this unfortunate child, whom a Family Court psychiatrist found suffering from childhood schizophrenia, poor judgment and lack of insight, 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.<sup>173</sup>

The intermediate court rejected the state's "self-serving declarations" that the quality of the training schools was sufficiently improved, stating that it could not "rely upon mere protestations . . . unsupported by the record."<sup>174</sup> The court also noted that, at the time, the training school at which Maurice was placed had one half-time psychiatrist for one hundred children.<sup>175</sup>

The New York Court of Appeals reversed and reinstated the training school placement, noting that Maurice had absconded from various shelters and travelled to other parts of the country.<sup>176</sup> The court referred to the psychiatrist's report in order to emphasize the boy's "poor judgment," but, significantly, omitted any reference to the diagnosis of schizophrenia.<sup>177</sup> With respect to the quality of the training schools, the court in effect shifted the burden of proof, stating:

[A]bsent a clear showing that the treatment provided at a training school is significantly inadequate to the task, the current experiment with training school placement for PINS children . . . should be permitted. . . .

We are frank to acknowledge the practical limitations upon the power of the courts to determine the adequacy and effectiveness of treatment afforded PINS children.<sup>178</sup>

173. *In re Maurice C.*, 44 App. Div. 2d 114, 116, 354 N.Y.S.2d 18, 20 (1974).

174. *Id.* at 116, 354 N.Y.S.2d at 19-20.

175. *Id.*

176. *In re Lavette M.*, 35 N.Y.2d 136, 140, 316 N.E.2d 314, 316, 359 N.Y.S.2d 20, 22 (1974), *rev'g In re Maurice C.*, 44 App. Div. 2d 114, 354 N.Y.S.2d 18 (1974).

177. 35 N.Y.2d at 140, 316 N.E.2d at 316, 359 N.Y.S.2d at 22.

178. *Id.* at 141-42, 316 N.E.2d at 317, 359 N.Y.S.2d at 23-24. The intermediate appellate courts in New York have, however, reversed training school placements in PINS cases since the *Lavette M.* decision. See, e.g., *In re Theodore F.*, 47 App. Div. 2d 945, 367 N.Y.S.2d 103 (1975) (mem.); *In re Paul H.*, 47 App. Div. 2d 853, 365 N.Y.S.2d 900 (1975) (mem.); cf. *In re John H.*, 48 App. Div. 2d 879, 369 N.Y.S.2d 196 (1975) (mem.).

One way courts may spare themselves the onerous task of making these difficult determinations about the adequacy of treatment, of course, is to have no information regarding the child's needs. Absent psychiatric and/or psychological examinations, there is virtually no way to ascertain whether a child is suffering from mental illness or MBD. Yet in *In re Samuel P.*,<sup>179</sup> an intermediate appellate court affirmed a training school commitment, albeit of a delinquent child, stating, "We find that the order placing appellant in a training school without information regarding his emotional, psychological and educational needs was not violative of due process nor was it a violation of the Family Court Act or an abuse of discretion."<sup>180</sup>

The court attempted to distinguish its decision a year earlier in *In re Kevin M.*,<sup>181</sup> in which it had reversed the training

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179. 52 App. Div. 2d 552, 382 N.Y.S.2d 94 (1976) (per curiam).

180. *Id.* at 552, 382 N.Y.S.2d at 94. The decision appears to apply only to delinquents. Samuel, who was fifteen, had been found guilty on two charges of robbery in the second degree. A burglary petition was pending, but was subsequently dismissed for lack of prosecution. Both robbery petitions alleged that the juvenile had been acting in concert with adults who were before the criminal court. One of the petitions asserted that, in the course of the particular robbery, Samuel, either alone or together with his adult companions, removed all the victim's clothing and urinated on him. See Brief for Appellant at 2-3, 5, Brief for Respondent at 2-3, *In re Samuel P.*, 52 App. Div. 2d 552, 382 N.Y.S.2d 94 (1976) (per curiam).

After the above delinquency findings were made, Samuel was remanded to a secure detention facility and kept there for more than twenty days. The training school disposition was apparently precipitated when the child's attorney objected to a continued remand pending the completion of the probation department's investigation; the basis for the objection was N.Y. FAM. Ct. ACT § 749 (McKinney 1975), which prohibits adjournments of dispositional hearings for more than twenty days, absent special circumstances, if the child is in detention. Special circumstances could conceivably have been shown, since the youth's family had recently moved from Manhattan to the Bronx, and, as a result, the Bronx probation office had received the case only a week prior to disposition. At the dispositional hearing, a supervising probation officer, who had apparently never met Samuel or his mother, testified that it would take six or seven weeks to obtain mental health reports and stated that, if continued remand was impossible, then training school placement was appropriate. The boy's own probation officer was also present at the hearing and recommended exploration of less restrictive placement alternatives which, however, required a mental health report. Brief for Appellant at 5-6, Brief for Respondent at 4, *In re Samuel P.*, *supra*. Thus, what the intermediate appellate court may have been implying in its *Samuel P.* decision was that if assertion of statutory rights prohibiting lengthy interim detention results in training school placement of a delinquent, such a disposition will be affirmed.

181. 48 App. Div. 2d 800, 369 N.Y.S.2d 439 (1975) (per curiam), discussed in detail at note 124 *supra*.



school placement of a delinquent because of the trial court's failure to order neurological and EEG examinations, despite earlier mental health reports indicating the need for such tests. The *Samuel P.* court said that, unlike the case of *Kevin M.*, there was no "evidence that a mental examination would be helpful and appropriate."<sup>182</sup> It is impossible, however, to detect MBD without, at the very least, psychological testing.<sup>183</sup> Thus, the very "evidence" that the *Samuel P.* court said is necessary in order to disclose the need for testing<sup>184</sup> consists of the examinations that the court deemed unnecessary.

In seeking leave to appeal from the intermediate court's decision in *Samuel P.*, the boy's attorney alleged that the opinion "contained numerous factual inaccuracies," including the statement that no facility other than the training school was available for Samuel. The prosecutor's affirmation in opposition, although denying any other inaccuracies, conceded that the record did not support the intermediate court's finding that other facilities were unavailable, but contended that this error did not affect the validity of the affirmance. The appellant also alleged that the dispositional record showed the probation department had only begun its investigation and had indeed requested an adjournment to gather further information.<sup>185</sup> The state's highest court nevertheless denied leave to appeal.<sup>186</sup>

A child's symptomatology may also be masked if the appellate courts affirm dispositions in decisions without opinions or in

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182. 52 App. Div. 2d at 552, 382 N.Y.S.2d at 94.

183. See notes 78-85 & 93-95 *supra* and accompanying texts.

184. The *Samuel P.* court also attempted to distinguish *In re Melvin W.*, 45 App. Div. 2d 842, 358 N.Y.S.2d 451 (1974) (mem.), in which the training school placement of a delinquent was reversed because the boy had been committed notwithstanding the absence of a psychiatric report requested by the probation department. *Melvin W.* was distinguished on the basis of this probation recommendation. To the extent that the *Samuel P.* decision is predicated on reliance on the probation department's expertise and diligence, it fails to take into account that particular probation officers may lack such qualities. See discussion of the *Kevin M.* case at note 124 *supra*. See also *In re John H.*, 48 App. Div. 2d 879, 369 N.Y.S.2d 196, 197 (1975) (mem.) ("The record indicates that the Office of Probation for the Courts of New York City failed to make any effort to follow the primary recommendation" of the Family Court Psychiatrist).

185. See Appellant's Affirmation at 2, 4-5 (appended to notice of motion for leave to appeal), Respondent's Affirmation at 2, *In re Samuel P.*, 52 App. Div. 2d 552, 82 N.Y.S.2d 94 (1976) (per curiam).

186. 39 N.Y.2d 708 (1976). It should be noted that private agencies will not accept referral of a child for placement without a psychological and psychiatric test accompanying the probation investigation and report. See PINS PLETHORA, *supra* note 10, at 16.

one-sentence opinions giving none of the facts of the case. In *In re Frederick N.*,<sup>187</sup> for example, an unreported decision, an intermediate New York appellate court affirmed without opinion the training school placement of a child adjudicated delinquent. The boy's court involvement began in 1972 with a PINS petition, that resulted in private school placement for eighteen months.<sup>188</sup> Frederick showed progress there, notwithstanding brain damage manifested by hyperkinesis, compulsive behavior, visual motor perception impairment, and below normal psychomotor coordination. During this period, he received Ritalin (an amphetamine), which controlled his hyperactivity.<sup>189</sup>

The boy was discharged, with a guarded prognosis, to an unstable family, including an alcoholic father, an elder brother who was home from the training school and was neither working nor attending school, a younger brother on probation, and an

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187. Nos. D14281/74, D14052/74, D13531/74 (N.Y. App. Div. Aug. 15, 1975) (unanimously affirming an order of the Family Court, Kings County, New York, dated December 23, 1974).

Decisions without opinion and those accompanied by very brief, conclusory opinions may be equally cryptic when training school placements are reversed. For example, in *In re Theodore F.*, 47 App. Div. 2d 945, 367 N.Y.S.2d 103 (1975) (mem.), the court reversed both the training school placement and the fact-finding determination with respect to a PINS child. The basis of the fact-finding reversal was clear; the boy had not made an intelligent waiver of his right to remain silent when an admission was made on his behalf by his attorney. The court went on to note that the disposition "was not supported by a preponderance of the evidence." *Id.*, 367 N.Y.S. at 104. Theodore's mother had brought him to court on a PINS petition approximately two months after he had completed an eleven-month drug rehabilitation program. The boy resisted placement in private facilities, and ultimately spent three months in a secure interim detention center. The court psychiatrist and the probation officer recommended commitment in a secure facility, and the boy's mother also requested placement. The trial judge stated that, although Theodore was charged as a PINS, he had all the earmarks of a delinquent. A delinquency petition for assault on a police officer was pending against the boy, but no fact-finding hearing had been held. Brief for Appellant, 2-11, *In re Theodore F.*, *supra*. Theodore testified that he did not think he should go to any facility, stating, "I am not here for nothing serious, burglaries or nothing like that, and I am not crazy . . . . A training school is a juvenile prison." *Id.* at 10. The prosecutor confessed error with respect to the fact-finding hearing, but claimed that "there was overwhelming evidence to support the dispositional order." Brief for Respondent, at 1, 5, *In re Theodore F.*, *supra*. Compare the facts of this case with those in *In re Jose A.*, discussed at notes 196-204 *infra* and accompanying text, in which the training school placement was affirmed.

188. Brief for Appellant at 4, *In re Frederick N.*, Nos. D14281/74, D14052/74, D13531/74 (N.Y. App. Div. Aug. 15, 1975).

189. Brief for Appellant at 4, Brief for Respondent at 6-7, *In re Frederick N.*, *supra*.

"overwhelmed" mother.<sup>190</sup> Soon after returning home, he was found guilty of committing delinquent acts.<sup>191</sup> Frederick was subsequently rejected by several residential centers, one of which, a public facility, based its refusal on his "need for medication, the extent of his emotional problems and the indication of an organic basis for much of his behavior."<sup>192</sup> The private school at which he had been placed as a result of the previous PINS proceeding also refused to accept Frederick, but recommended a special school for him as well as continuation of drug therapy.<sup>193</sup> The trial judge "conceded that 'through no fault of his own' appellant was a problem, and that there was parental conflict in the home which was 'nonproductive.'"<sup>194</sup> Although children who commit criminal acts may be less deserving of sympathy than juvenile status offenders, the court's placement of a delinquent with MBD symptoms of such severity in the training school system that had already failed his brother casts doubt on the ability of the juvenile court to provide appropriate rehabilitation and treatment.<sup>195</sup>

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190. Brief for Appellant at 4, Brief for Respondent at 7, *In re Frederick N., supra*.

191. Brief for Appellant at 5-6, Brief for Respondent at 2, *In re Frederick N., supra*. The charges of which Frederick was found guilty were robbery in the second degree, grand larceny in the third degree, petit larceny, and criminal possession of stolen property. A fourth petition had been filed, but no fact-finding hearing was held. Respondent's Brief at 2, *In re Frederick N., supra*.

192. Brief for Appellant at 9, Brief for Respondent at 8, *In re Frederick N., supra*.

193. Brief for Respondent at 7, *In re Frederick N., supra*. Frederick was apparently accepted for residential placement in a public facility in Bedford-Stuyvesant, but the trial judge refused to place him in a non-secure facility in his own neighborhood. Brief for Appellant at 6, Brief for Respondent at 2-3, *In re Frederick N., supra*.

194. Brief for Appellant at 9, Brief for Respondent at 8, *In re Frederick N., supra*.

195. In the case of delinquent children, the N.Y. FAM. CT. ACT § 743 (McKinney 1975) authorizes a dispositional hearing to determine if the juvenile needs supervision, treatment, or confinement, whereas, in the case of PINS children, only supervision or treatment is authorized.

It is conceivable that the appellate court's affirmance without opinion in *Frederick N.* was benignly motivated, that is, that the appellate court did not wish to give a clear signal to the trial courts that children with such severe symptoms could be routinely placed in training schools. Reported decisions with opinions may create the possibility of such expansive interpretations. Aside from the fact that such possible good intentions will not help Frederick, the foregoing hypothesis ignores the communication network that exists among trial judges and within probation departments.

In any event, whatever value this benevolent appellate silence may have had was diminished by the opinion of another intermediate appel-

PINS children with emotional problems do not necessarily meet better fates. In *In re Jose A.*,<sup>196</sup> an intermediate appellate court affirmed the training school placement of a PINS child. When he was thirteen years old, the boy's mother filed a PINS petition charging him with various acts of incorrigibility. The court made a finding based solely on truancy.<sup>197</sup> For the next fifteen months, pending disposition, the child was institutionalized in various temporary facilities including a hospital. At all times during this interim, Jose's parents refused to take him home; in addition, the parents failed to keep family therapy appointments, and the court made no attempt to order family counseling or to compel the parents to allow Jose to return home. The boy's behavior deteriorated during this period; he ran away from one facility and engaged in assaultive conduct. He expressed fears, which ultimately proved to be well founded, that he would never be allowed to return home.<sup>198</sup>

Psychological and psychiatric testing of the child disclosed a full scale IQ of 102 and a performance score of 126. He was found to be excessively hyperactive and emotionally disturbed, and to have an explosive temper. Treatment in a residential setting was recommended.<sup>199</sup> Three residential facilities rejected Jose, and at age fifteen, he was placed at the state training school for eighteen months.<sup>200</sup>

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late court in *In re Samuel P.*, 52 App. Div. 2d 552, 382 N.Y.S.2d 94 (1976) (per curiam), discussed at notes 179-86 *supra* and accompanying text. If, as the court stated in *Samuel P.*, "[m]ental tests are not required in every juvenile delinquency case," 52 App. Div. 2d at 552, 382 N.Y.S.2d at 95, it becomes possible to commit an adjudicated delinquent like Frederick N. to the training school without ever conducting the tests necessary to discover whether he is emotionally disturbed and/or brain damaged.

196. 51 App. Div. 2d 726, 378 N.Y.S.2d 1022 (1976) (mem.).

197. Brief for Appellant at 3, Brief for Respondent at 1-2, *In re Jose A.*, 51 App. Div. 2d 726, 378 N.Y.S.2d 1022 (1976) (mem.). The charges included running away from home. Brief for Respondent at 1-2, *In re Jose A.*, *supra*.

198. Brief for Appellant at 3-10, Brief for Respondent at 1-4, *In re Jose A.*, *supra*. One week before the dispositional hearing, Jose was taken home on parole by his 30-year-old brother who decided, however, that he could not keep Jose because the boy was beyond his control. The older brother was himself an alumnus of the New York State Training School. Brief for Appellant at 9-10, *In re Jose A.*, *supra*. Other than this one-week stay immediately prior to commitment at the training school, Jose was institutionalized during the entire fifteen month period, including his fourteenth and fifteenth birthdays. Brief for Appellant at 3, 6, *In re Jose A.*, *supra*.

199. Brief for Appellant at 4, *In re Jose A.*, *supra*.

200. Brief for Appellant at 6-9, Brief for Respondent at 3-4, *In re Jose A.*, *supra*. One of the residential facilities rejected Jose because

Defending the disposition on appeal, the Corporation Counsel of the City of New York stated that whether the mother refused to take Jose home because she recognized her inability to control him or because "she merely wished to rid herself of a troublesome child is unknown and unknowable. Moreover, it is fundamentally irrelevant . . . The court was left with little recourse but the state training school. While this placement may be far from ideal, it is, we submit, appropriate in this case."<sup>201</sup>

The intermediate appellate court agreed with the trial judge's disposition, rendering an opinion which, after a one sentence summary of the proceedings below, concluded: "In our view, the Family Court made the correct determination."<sup>202</sup>

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of his "homicidal tendencies." Brief for Respondent at 3, *In re Jose A., supra*. Apparently one of his psychological reports stated that the boy had expressed homicidal thoughts about his mother. This psychological examination was performed after Jose had been institutionalized for over four months as a result of parental refusal to take him home. The boy reported to the psychologist that he felt his mother did not like him and that she frequently told him, "The Devil is after you." Brief for Appellant at 7-8, *In re Jose A., supra*.

201. Brief for Respondent at 5-6, *In re Jose A., supra*.

202. 51 App. Div. 2d 726, 378 N.Y.S.2d 1022 (1976) (mem.). In *In re Linda T.*, No. S-8989/73 (N.Y. App. Div. May 22, 1975), the same court, in an unreported decision without opinion, upheld the training school commitment of a PINS who was brought to court at age thirteen by her mother for truancy and placed on probation. When she continued to be truant and failed to keep clinic appointments, Linda's probation was revoked; she was kept in various temporary shelters for four months pending disposition, at which time she was placed in the training school. At the dispositional hearing, there was hearsay evidence that the girl had repeatedly absconded from a nonsecure facility and that she was verbally and physically abusive and seductive toward males. Some of her mental health reports indicated that Linda needed therapy, that her IQ, which fluctuated between 62 and 70, was due to "extreme educational and cultural neglect," and that she "had not had a chance to develop and/or use her possibly higher intellectual potential due to the very hectic and impoverished home." In affirming the placement, the court rejected arguments that the trial judge's refusal to permit the child's attorney to inspect the probation report or cross-examine the probation officer violated due process or constituted an abuse of discretion. See Brief for Appellant at 2-8, Brief for Respondent at 2-6, *In re Linda T., supra*.

Similar legal issues regarding the right to see the probation report and to cross-examine the probation officer had been decided by the same court one month earlier in *In re Sylvia J.*, 47 App. Div. 2d 905, 369 N.Y.S. 2d 998 (1975) (mem.). Although charged with other forms of misconduct, Sylvia, who was brought to court at age twelve, made an admission solely with respect to truancy. On appeal, the child's attorney also argued that the psychiatric examination relied on by the court was two years old. The prosecutor claimed that other reports had been made in the interim. In affirming, the court did not discuss this issue at all. See

Thereafter, New York's highest court, *sua sponte*, dismissed the appeal,<sup>203</sup> rejecting the argument that where the choice was between placement in the state training school or at home, failure to provide the boy an opportunity to receive the treatment least restrictive of his liberty, supervision and rehabilitation in his own home, was a denial of due process.<sup>204</sup>

One year earlier, in *In re Cecilia R.*,<sup>205</sup> the same court had reversed, as a denial of due process, the training school disposition of a PINS child who was absent from her dispositional hearing. Noting that the girl had been rejected by twenty-three private agencies, the three dissenting judges contended that a new dispositional hearing would be "an exercise of utter futility."<sup>206</sup> The majority stated, however, that the unavailability of facilities created "pressures for dispositions dehors the merits" and that thus "the dispositional hearing can become an even more crucial factor in salvaging a young life."<sup>207</sup> The case of *Jose A.* belies this benevolent view of due process for children.

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Brief for Appellant at 2-7, Brief for Respondent at 2-7, *In re Sylvia J.*, *supra*.

203. 39 N.Y.2d 743 (1976) (mem.). Compare *Jose A.*, 51 App. Div. 2d 726, 378 N.Y.S.2d 1022 (1976) (mem.) with *In re Jose D.*, 50 App. Div. 2d 520, 374 N.Y.S.2d 658 (1975) (per curiam). Jose D.'s mother filed a petition alleging that her 13-year-old son had run away from home and did not attend school. On consent, the boy was placed in a private residential facility from which he absconded, returning to his mother. The private school requested Jose D.'s transfer to another agency. By the time the transfer hearing took place in juvenile court, the boy was 16 and no longer subject to the compulsory education law. The trial judge nonetheless placed him in the state training school.

On appeal, the disposition was reversed. The appellate court noted that, although the boy's school absence persisted, there had been some improvement and that he was in any event already sixteen. It added, "Not only did the mother indicate that she now wanted appellant to remain with her, but there was also testimony to the effect that during the eight-month period he resided with her, appellant made attempts at rehabilitation." It would thus appear that, at least in some cases, whether a child will be consigned to the training school turns less on truancy than on parental willingness to take the juvenile home. See *In re Gregory V.*, 47 App. Div. 2d 647, 364 N.Y.S.2d 19 (1975) (mem.), which involved a factual context quite similar to that of the *Jose D.* case. The boy was sixteen at the time of the dispositional hearing, and his mother wished to keep him; the appellate court also reversed the training school commitment. See Brief of Appellant, *In re Gregory V.*, *supra*, at 2-6. See also *In re Terry UU.*, 52 App. Div. 2d 683, 382 N.Y.S.2d 373 (1976).

204. Appellant's Memorandum of Law, *In re Jose A.*, No. M-265 (N.Y. March 30, 1976).

205. 36 N.Y.2d 317, 327 N.E.2d 812, 367 N.Y.S.2d 770 (1975).

206. *Id.* at 321, 327 N.E.2d at 816, 367 N.Y.S.2d at 776.

207. *Id.* at 321 n.4, 327 N.E.2d at 814 n.4, 367 N.Y.S.2d at 774 n.4.

Despite failure to use the dispositional hearing as a means of making available the most important nonsecure dispositional facility of all, namely the child's home,<sup>208</sup> the court found "that no substantial constitutional question is directly involved."<sup>209</sup>

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208. There are several reasons why even in a case such as *Jose A.* the home must be considered the preferred dispositional alternative.

In view of the palpable deficiencies of PINS placement facilities and the dearth of therapeutic services for PINS children, life in the home, although far from ideal, appears preferable to the restrictive environment of the state training school. Indeed, Jose himself, having been given the opportunity to compare life in several interim public facilities with that in his home, opted unequivocally for the latter. In the sense that the child's home is where he or she ultimately must learn to live, Jose's placement there, in conjunction with supportive services for the child and family, would constitute the most effective treatment. On the other hand, if Jose's institutionalization was based on a determination that his home environment was beyond repair, then he should have been treated as a neglected child rather than as a PINS. Although placement in a neglect shelter may not result in optimum care, it is surely superior to the state training school. If there were no PINS jurisdiction, Jose's mother would only have been able to divest herself of custodial responsibility through a neglect proceeding in which she was charged by the state as the guilty party. The quid pro quo for permitting parental invocation of the PINS jurisdiction should be a good faith effort by the parents to resolve difficulties with the child while he or she is at home. It is the duty of the juvenile court to require parents to do so, either by dismissing the PINS action, instituting a neglect proceeding, or holding the parents in contempt. Otherwise, the juvenile court PINS jurisdiction may be utilized as a child dumping ground available to parents who are themselves immature or disturbed.

209. *In re Jose A.*, No. M-265 (N.Y. March 30, 1976). *But cf. In re Aline D.*, 14 Cal. 3d 557, 562, 566, 536 P.2d 65, 67, 69, 121 Cal. Rptr. 816, 819, 821 (1975) (reversing, on statutory grounds, training school commitment of a 16-year-old girl with a 67 IQ and a history of assaultive conduct, even though all other facilities had rejected the juvenile; court found that a training school commitment "may not be made for the sole reason that suitable alternatives do not exist;" the trial court referee had expressed doubts as to whether Aline would benefit from the training school; in remanding, the court stated that "if no appropriate alternative placement exists . . . , then the proceedings should be dismissed").

To be sure, the procedural due process issue involved in *Cecilia R.* makes that case distinguishable from *Jose A.* We suggest, however, that the concerns professed by the Court of Appeals majority in *Cecilia R.*, as well as the compelling facts and the novel constitutional issue presented in *Jose A.*, made it inappropriate for the court to dismiss the *Jose A.* appeal.

We recognize that summary dispositions are attributable at least in part to overwhelming appellate dockets, that reasonable persons may differ as to the substantiality or importance of particular issues before a state's highest court, and that New York criminal cases are frequently summarily affirmed. To the extent, however, that juvenile courts exist for the purpose of "salvaging young lives" and preventing future adult criminality, failure to exercise appropriate appellate review would appear to be penny wise and pound foolish.

These cases illustrate the extent to which the promise of individualized treatment and rehabilitation within the juvenile court system has not been fulfilled. Instead, children are incarcerated without physical or mental examinations to determine the extent of their impairments or the treatment they require. Severely disturbed children, as well as juveniles with obvious MBD symptoms, are placed in training schools because dispositional alternatives are lacking. Finally, both trial and appellate courts have acquiesced in the demands of parents seeking to avoid the responsibility of caring for their children, without requiring such parents to attempt to resolve their family problems in the home. The courts appear instead to have opted for the path of least resistance: consignment of troubled children to the state training school.

## VI. CONCLUSION

Notwithstanding the potentially dire sanctions facing a child who refuses to attend school and the child's awareness of the existence of such penalties and of the likelihood that they will be imposed, many children continue to be absent from school.<sup>210</sup> One may wonder what is so terrible about the schools that a child would risk confinement in a state institution for months or years, with a total loss of liberty, rather than sitting in class six or seven hours per day for approximately 180 days each year.<sup>211</sup> One radical educational reformer has suggested that schools in this country are themselves jails,<sup>212</sup> and that children live "a large part of their school lives in constant anxiety, fear, and shame."<sup>213</sup> Another critic of the public school system has stated that:

It is not possible to spend any prolonged period visiting public school classrooms without being appalled by the mutilation vis-

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210. See *In re Mario*, 65 Misc. 2d 708, 715, 317 N.Y.S.2d 659, 666 (Fam. Ct. 1971) ("respondent had adequate notice and warning of specific directions to be obeyed to avoid placement"). When this thirteen-year-old boy refused to return to school notwithstanding court efforts for eight months, he was placed at the state training school.

211. See, e.g., COLO. REV. STAT. § 22-33-104(1) (1974) (172 days); LA. REV. STAT. ANN. § 17:225 (West Supp. 1976) (180 days); N.Y. EDUC. LAW § 3204(4) (a) (McKinney Supp. 1975) (190 days).

To be sure, a child's ability to balance the prospect of possible future consequences against actual present discomfort may be limited. However, the juvenile grapevine, both in the court and in the child's neighborhood, may be sufficiently effective for the youth to know that threats of incarceration are not always empty.

212. J. HOLT, *INSTEAD OF EDUCATION* 190 (1976).

213. *Id.* at 145.



ible everywhere—mutilation of spontaneity, of joy in learning, of pleasure in creating, of sense of self . . . . Because adults take the schools so much for granted, they fail to appreciate what grim, joyless places most American schools are, how oppressive and petty are the rules by which they are governed . . . , what an appalling lack of civility obtains on the part of teachers and principals, what contempt they unconsciously display for children as children.<sup>214</sup>

Regardless of whether truancy is the fault of the schools themselves or is attributable to other causes such as poverty, parental indifference and neglect, a breakdown in traditional adherence to authority, or is a combination of many factors,<sup>215</sup> it seems likely that unlawful school absence will continue to be prosecuted and punished.<sup>216</sup>

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214. C. SILBERMAN, *CRISIS IN THE CLASSROOM* 10 (1970); cf. *In re Arnold*, 12 Md. App. 384, 387, 278 A.2d 658, 660 (1971) (during a dispositional hearing concerning a delinquent boy, his school principal testified that he was disruptive in school and gave as examples of such misbehavior that the child wore a hat to class and that he refused to "keep his shirt-tail in").

215. See generally *CHILDREN OUT OF SCHOOL IN AMERICA*, *supra* note 1, at 18-20. Poverty and parental neglect were also thought to be causes of truancy a half century ago. See E. ABBOTT & S. BRECKKNRIDGE, *TRUANCY AND NON-ATTENDANCE IN THE CHICAGO SCHOOLS* 136, 189-210 (1917).

216. At the same time the courts are being used to compel truant children to decide either to resume attendance or to risk incarceration, the school system is denying admission to children who desire to attend. Some juveniles are excluded because they are deemed uneducable or because they have special educational needs for which the state's resources are allegedly insufficient. See, e.g., *Nickerson v. Thomson*, 504 F.2d 813 (7th Cir. 1974); *Reid v. Board of Educ.*, 453 F.2d 238 (2d Cir. 1971); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972). Others are suspended or expelled because of alleged incorrigibility, sometimes for reasons as frivolous as violations of hair length regulations. See, e.g., *Hatch v. Goerke*, 502 F.2d 1189, 1190-92 (10th Cir. 1974) (rejecting claims by parents of expelled fifth grader that "the local rules for student appearance, . . . [which required] the cutting of their son's Indian braided hair" were unconstitutional); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970) (upholding claim of high school student suspended for wearing long hair; *Kriska v. State*, 501 P.2d 159 (Alaska 1972) (invalidating school regulation relating to hair length; junior high school boy had been suspended and expelled for its violation); *Pendley v. Mingus Union High School Dist.*, 109 Ariz. 18, 504 P.2d 919 (1972) (upholding high school dress code regulating hair length).

Publication of an underground newspaper can be grounds for suspension. Such newspapers make interesting reading; they generally criticize the school administration, sometimes using profanity. See, e.g., *Scoville v. Board of Educ.*, 425 F.2d 10, 15-17 (7th Cir. 1970); *Sullivan v. Houston Ind. School Dist.*, 333 F. Supp. 1149, 1163 n.16 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973); *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517, 528-33 (C.D. Cal. 1969).

Children denied permission to attend school are forced to invoke judicial authority in an effort to secure their admission or readmission. Al-

Ironically, use of juvenile courts as bludgeons to compel unwilling children to attend school is at odds with the avowed purpose of compulsory attendance statutes. It is doubtful whether coerced education will "prepare citizens to participate effectively and intelligently in our open political system" so as to "preserve freedom and independence."<sup>217</sup> At best, a court order can only assure the physical presence of the child in the classroom; compliance with such a judicial directive can be achieved without any intellectual involvement. The lessons learned, that form wins over substance and that force ultimately prevails,<sup>218</sup> may not be consonant with the democratic principles

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though school regulations governing suspension of incorrigible students are extremely vague and give school officials almost unfettered discretion to determine what constitutes undesirable behavior, attacks based on the vagueness and overbreadth of such statutes have generally been rejected. See, e.g., *Hatch v. Goerke*, 502 F.2d 1189, 1193 (10th Cir. 1974); *Murray v. West Baton Rouge Parish School Bd.*, 472 F.2d 438, 441-42 (5th Cir. 1973). But see *Mitchell v. King*, 363 A.2d 68 (Conn. 1975).

Such regulations are sometimes employed to suspend students against whom juvenile court charges are pending, even though the alleged misconduct occurred off school grounds. See, e.g., *Charles S. v. Board of Educ.*, 20 Cal. App. 3d 83, 86-87, 97 Cal. Rptr. 422, 424 (1971), *appeal dismissed sub nom. Strickland v. Board of Educ.*, 405 U.S. 1005 (1972); *R.R. v. Board of Educ.*, 109 N.J. Super. 337, 263 A.2d 180 (1970); *Howard v. Clark*, 59 Misc. 2d 327, 299 N.Y.S.2d 65 (Sup. Ct. 1969). Such suspensions generate a vicious cycle, inasmuch as the child's disposition in juvenile court is likely to be more restrictive if he or she is not attending school. See note 11 *supra* and accompanying text. See also *Sullivan v. Houston Ind. School Dist.*, 333 F. Supp. 1149, 1173 n.23 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973).

217. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

218. Cf. *Ingraham v. Wright*, 525 F.2d 909 (5th Cir.), *aff'd*, 45 U.S.L.W. 4364 (U.S. April 19, 1977), rejecting substantive and procedural due process and eighth amendment claims of children whose paddlings by school authorities required medical and hospital treatment. The opinion states: "While whipping an adult prisoner is sufficiently degrading to offend 'contemporary concepts of decency,' we cannot believe paddling a child, a long-accepted means of disciplining and inculcating concepts of obedience and responsibility, offends current notions of decency and human dignity." 525 F.2d at 915 n.5. Three dissenting judges viewed the situation differently:

In the present posture of this case, the undisputed evidence discloses much more than a de minimis deprivation of property rights. It shows deprivations of liberty, probability of severe psychological and physical injury, punishment of persons who were protesting their innocence, punishment for no offense whatever, punishment far more severe than warranted by the gravity of the offense, and all without the slightest notice or opportunity for any kind of hearing.

*Id.* at 926.

Adopting an ostensibly intermediate position, another group of dissenters stated that the particular punishments were not so severe as to violate due process, but added the following: "I doubt that the majority

we appear so anxious to instill.<sup>219</sup> When the coercive power of the courts is brought to bear against children who are either emotionally or physically incapable of functioning in a normal classroom, and when little effort is made to condition the use of judicial power upon the provision of appropriate care and treatment, the court's assertion of jurisdiction should not be facilitated by unwarranted admissions of guilt. Instead, where the facts of a child's condition support a defense based on MBD or school phobia, the available histories of disturbed children enmeshed in the juvenile justice system illustrate vividly the need for counsel to use all the resources of law and medicine to prevent the child from entering that system.

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really means what it says, and I suspect that if in a future case the punishment inflicted has broken the victim's leg, we will face the issue and hold that substantive due process has been violated." *Id.* at 920-21.

The Supreme Court affirmed the Fifth Circuit's holding on the procedural due process and eighth amendment claims, but denied review of the substantive due process question.

219. See, e.g., N.Y. EDUC. LAW §§ 3204(3a) (2), (3) (McKinney 1970) (requiring instruction in "the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States," and permitting the study of "'communism and its methods and its destructive effects'"). *But see* N.Y. Times, Jan. 2, 1977, at 1, col. 2, giving the results of a survey conducted by the National Assessment of Educational Progress concerning the knowledge of 13- and 17-year olds about the fundamentals of government. The survey disclosed alarming gaps in knowledge. For instance, 47 percent of the 17-year olds did not know that each state has two United States Senators, half the 13-year olds thought it against the law to start a new political party, one of every eight of the 17-year olds believed that the President was not required to obey the law. The report noted, however, that both groups of children were quite knowledgeable with respect to the constitutional rights of arrested persons.