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Penal Incarceration of the Incorrigible Juvenile

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NOTES

THE PENAL INCARCERATION OF THE INCORRIGIBLE JUVENILE

I. Introduction

Until a century ago our system of criminal justice did not differentiate between the adult and the minor who had reached the age of criminal responsibility. The state demanded vindication for infractions of the law from both alike with the focus not on reformation but on punishment of the offender. The juvenile convicted of committing criminal acts was to be treated as that which he was, a criminal.[1]

Eventually states began to enlighten their attitude toward the juvenile offender. Legislation established juvenile courts as special tribunals to carry a more humanitarian concept into effect.[2] Under such legislation, states no longer would act as the prosecutor of a crime but as legal guardian and protector of the delinquent child.[3] This transition in attitude has presented a serious question: may the state in brandishing this philanthropic banner continue to authorize the commitment of juvenile offenders to institutions primarily designed for the adult criminal offender?

Juvenile courts have generally refrained from commitments to adult penal institutions. In most instances the court may order probation or placement at an institution specifically designed for the care and education of the juvenile. Nevertheless, many states directly or indirectly authorize the penal incarceration of the juvenile, and juvenile courts have at times exercised such authority. Hence, the constitutional validity of such penal commitment under the unique procedures of the juvenile court demands scrutiny.

Legislation authorizing penal commitment of the juvenile has been motivated primarily by the need to remove problem children from the juvenile facilities where their presence might prove harmful to other juveniles.[4] It is contended that this ill-suited juvenile must be placed at an institution more capable of handling his extreme incorrigibility. The protection of society demands that control and the maintenance of order be the primary consideration.

Those opposing penal commitment argue that while placement at a more secure penal institution is indeed a practical manipulation of certain benefit, such practicality fails to withstand the constitutional challenges of the juvenile's right to due process. A penally incarcerated adult has been convicted in a criminal proceeding with its attendant procedural protections. The juvenile hearing, however, lacks much of the formality of the criminal proceeding along

1 *See* Mack, *The Juvenile Court,* 23 HARV. L. REV. 104 (1909). This article is a classic in the field of juvenile law. Judge Mack provides an excellent insight into the objectives hoped to be realized in light of past frustrations in the treatment of juvenile offenders.

2 The first juvenile court system was legislatively created by Illinois in 1899, with the first juvenile court being established in Cook County, Illinois.

3 The states uniformly agreed upon the purpose of the juvenile court, with this or similar language being used in just about all the cases sustaining juvenile court legislation.

4 Shone v. State, 237 A.2d 412, 415 (Me. 1968). Pirsig, *The Constitutional Validity of Confining Disruptive Delinquents in Penal Institutions,* 54 MINN. L. REV. 101, 124-25 (1969).

with many of its procedural safeguards. To treat the offender as a juvenile for purposes of the judicial hearing and to then sentence the offender as an adult is arguably a violation of the juvenile's right to judicial fair treatment.[5]

II. General Framework of the Juvenile Court

The accepted purpose of juvenile court legislation is to insure the protection, education, and reformation of juvenile offenders. States have recognized the imperative duty of every enlightened government to secure the well-being of her ungovernable youth and have traced the basis of this sovereign power of guardianship to the sweeping concept of *parens patriae*.[6]

The historical origin of the *parens patriae* concept is clouded. It has been conjectured that the concept derives from an ancient prerogative of the English kings. The king as protector of all children within his realm had the duty to defend all persons who because of their minority were unable to fend for themselves. It is further conjectured that the Court of Chancery thereafter inherited this executive duty in its role of Keeper of the Great Seal.[7] Eventually, this power did in fact become firmly established as a judicial function of the English Chancery Court.[8]

In the United States the adopted power of *parens patriae* belongs exclusively to the legislature and is possessed by the judiciary only to the extent conferred by statute.[9] Under the doctrine the state is authorized to legislate for the protection, care, and maintenance of the children within its borders.[10]

State intrusion upon the natural authority of the parents will occur only upon default of the parents in their duty toward their dependant.[11] The right of the parents to possess and to control their child is not inalienable, and where the state in its parental role finds that official intervention is demanded as the best means of securing the juvenile's present and future well-being, it is authorized under the *parens patriae* concept to interfere.[12] Logical or not, a juvenile's involvement in a criminal offense is usually strong evidence that parents have been delinquent in their duty and that state intrusion is required.

In its parental role the state has statutorily initiated unique juvenile offender proceedings that are philosophically as well as procedurally distinct from criminal proceedings. The juvenile hearing is formally designated as a noncriminal determination of status.[13] Major technicalities and formalities are done away

5 White v. Reid, 125 F. Supp. 647, 650 (D.D.C. 1954).

6 Mack, *supra* note 1, at 108-109. With the emphasis not on punishment for an act but on learning why the juvenile acted in this way and to gauge treatment accordingly, the court will naturally possess a greater degree of discretion under the *parens patriae* doctrine than under the orientation of the criminal court.

7 4 J. POMEROY, EQUITY JURISPRUDENCE § 1304 (5th ed. 1941). In actuality, the King did not act as defender of *all* children, but as guardian of only a select few. This parental power was exercised by the king only in regard to heirs who lacked the capacity to manage their own affairs and in regard to children as an incident of direct feudal tenure.

8 *Id.*

9 *Id.* at § 1340 n.14.

10 White v. Reid, 125 F. Supp. 647, 649 (D.D.C. 1954); State v. Gronna, 79 N.D. 673, 703, 59 N.W.2d 514, 539 (1953).

11 Ex parte Crouse, 4 Whart. 9 (1838).

12 *Id.*

13 Kautter v. Reid, 183 F. Supp. 352, 353 (D.D.C. 1960); White v. Reid, 125 F. Supp. 647, 649 (D.D.C. 1954).

with in the judicial attempt to better focus on the infirmity of the youth and to best prescribe the necessary treatment.[14] Theoretically, therefore, a juvenile comes before the court not as a suspected criminal but as a youth who is possibly in need of proper parental care and guidance.

The unique orientation and substitution of much of the criminal procedure do not exempt the state from the requirement of judicial fair treatment of the juvenile offender. It has been ordered on various occasions by the United States Supreme Court that such proceedings must meet the due process requirement of fundamental fairness.[15]

The inquiry into the fairness of the proceeding is important despite the noncriminal label since in the majority of instances the hearing centers on whether or not the juvenile requires some form of official supervision and detention. While a determination of delinquency will theoretically only render the juvenile susceptible to the imposition of protection and guidance by the state, the juvenile has the right to decline to surrender any aspect of his liberty and to continue his life without judicial interference until such time as the state can justify an infringement of that liberty.

To what extent does the requirement of fundamental fairness undercut the theoretical basis of the juvenile court and make it essentially synonymous with the criminal trial? It has been held by the Supreme Court that the criterion of fundamental fairness necessitates the incorporation of certain criminal procedural safeguards. *In re Gault*[16] established minimal standards that must be met to comply with the juvenile's due process rights: (1) Notice of the scheduled proceeding must be given sufficiently in advance in order that a "reasonable opportunity to prepare will be afforded" and the notice "must set forth the alleged misconduct with particularity."[17] (2) The juvenile must be afforded the right to have counsel represent him.[18] (3) The juvenile must be afforded the privilege against self-incrimination.[19] (4) A determination of delinquency cannot be sustained in the absence of "sworn testimony subjected to the opportunity for cross-examination. . . ."[20]

Gault specifically did not hold that fundamental fairness grants the juvenile the right to insist upon appellate review, to have a transcript or recording of the hearing, or to have the judge specifically state the grounds upon which his conclusion is based.[21] The Supreme Court later decided that a juvenile has no absolute right to trial by jury.[22] Furthermore, it has never been uniformly held that a juvenile has a right to a speedy[23] or public trial,[24] to be placed only once

14 United States ex rel. Murray v. Owens, 341 F. Supp. 722, 724 (S.D. N.Y. 1972); White v. Reid, 125 F. Supp. 647, 649 (D.D.C. 1954); In re Dargo, 81 Cal. App. 2d 205, 208, 183 P.2d 282, 284 (1947).

15 McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); In re Gault, 387 U.S. 1, 12 (1967); Kent v. United States, 383 U.S. 541, 562 (1966); Haley v. Ohio, 332 U.S. 596, 601 (1948).

16 387 U.S. 1 (1967).

17 *Id.* at 33.

18 *Id.* at 41.

19 *Id.* at 55.

20 *Id.* at 57.

21 *Id.* at 58.

22 McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

23 McCloskey v. Director of Patuxent Institution, 230 Md. 635, 187 A.2d 833 (1963),

in jeopardy,[25] or to presentment only by indictment or information.[26] Although it is an uncontested requisite that evidence to establish delinquency must be sufficient beyond a reasonable doubt,[27] the extent to which the generally accepted rules of evidence are applied in juvenile court varies greatly among the states.[28]

While it is apparent that not all of the criminal procedural safeguards have been incorporated within the juvenile offender proceedings, it is equally apparent that to a substantial degree the juvenile hearing has taken on the tenor of an adversary proceeding. Is such a proceeding in all practicality to be therefore labelled "criminal"?

The Supreme Court in its process of selective incorporation has made it clear that such procedural incorporation has *not* been undertaken for purposes of transforming the juvenile hearing into a juvenile criminal court. The imposition of certain aspects of criminal procedure was initiated to provide safeguards which would insure fair treatment of the juvenile.[29] Since of necessity the juvenile offender proceeding has similarities to the criminal trial, the transposition of certain criminal safeguards to insure fair treatment is only natural. To infer that this incorporation necessarily results in an alienation from the basic juvenile court philosophy of *parens patriae* would be erroneous. Safeguards to insure fair treatment and to protect against arbitrariness need not, in any sense, affect the state in its assertion of parental power, but should reinforce it.

That the juvenile court system is able to remain aligned with its treatment orientation is reflected in the juvenile court's dispositional power which appears to be the crux of the entire system. Unlike the criminal court that must set the sentence within statutorily set limits provided for each criminal offense, the juvenile court is vested with broad dispositional power. No one set penalty is specified for a delinquent act, but under the *parens patriae* concept, it is left to the discretion of the court as to what disposition will best serve the interests and welfare of the child.[30] Broad dispositional power is both justified and necessitated in a system whose prime interest is the welfare of the minor.

The degree of discretion varies among the states; most legislatures impose certain limitations on the court's dispositional power. A Missouri statute specifically limits commitment of a delinquent to an institution authorized or licensed by the state *to care for children,*[31] statutorily ruling out penal commitment. Other state statutes ostensibly import similar limitations yet careful scrutiny of the statutory language and references results in different dispositional powers. In Nebraska upon adjudication of delinquency, one possible alternative is to commit the child to the care and custody of the Department of Public Institutions.[32]

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cert. denied, 374 U.S. 851 (1963).

24 Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

25 Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958); State v. R.E.F., 251 So.2d 672 (Fla. App. 1971). *Contra,* M. v. Superior Court of Shasta County, 4 Cal. 3d 370, 482 P.2d 664 (1971).

26 State v. Fisher, 17 Ohio App. 2d 183, 245 N.E.2d 358 (1969).

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

28 *See generally,* Annot., 43 A.L.R.2d 1128 (1955).

29 McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).

30 *See, e.g.,* Mo. Rev. Stat. § 211.181 (1959).

31 *Id.* at §§ 211.181(2)(a), (2)(b).

32 Neb. Rev. Stat. § 43-210(2) (1968).

One of the facilities that is statutorily included within the Department of Public Institutions is the Nebraska Penal and Correctional Complex.[33] Hence, the youth may be indirectly committed to a penal institution through the agency of the Department of Public Institutions. New Jersey's statute is similarly vague. That statute allows commitment to a public institution established for the care, custody, instruction, and reform of the juvenile offender, or "to any like institution" to which commitment is authorized by law.[34] "Any like institution" must necessarily encompass all facilities other than those designed specifically for the juvenile offender, and consequently, must include penal facilities in that no statute specifically disallows the penal incarceration of the juvenile. A few states have specifically removed practically all limits to the dispositional discretion of the juvenile court. Maine, for example, statutorily authorizes a full span of dispositional alternatives including direct commitment to the men's or women's correctional facility.[35]

This is indeed the problem whether the recognition of flexibility validly implies the need to extend this dispositional discretion to the extreme bounds of penal incarceration.

III. Litigation

A. *Cases Invalidating Penal Commitment*

Decisions that refuse to sustain the commitment of juvenile offenders to penal institutions have generally placed emphasis both on the unique purpose of the juvenile court and on the distinct difference in modes of confinement between juvenile and penal facilities.

A number of state courts have held that by penally incarcerating juvenile offenders, juvenile courts have overstepped the scope of their authority by failing to meet their responsibility to protect the interests of the juvenile. *State v. Fisher,*[36] decided by an Ohio appellate court, invalidated the penal incarceration of a juvenile offender less upon basic juvenile court philosophy than straight deductive logic. Acknowledging that a denial of liberty without due process of law is dependent upon the type of restraint imposed,[37] the court invalidated the penal commitment because the juvenile court is statutorily authorized only to adjudicate the status of a child in a civil proceeding, not to convict the juvenile

33 *Id.* at § 83-107.01 (1971).
34 N.J. STAT. ANN. § 2A: 4-37(b) (Supp. 1972).
35 ME. REV. STAT. ANN., tit. 15, § 2611-4(A-1) (Supp. 1972). *See,* State v. Huard, 296 A.2d 141 (Me. 1972), where the Supreme Court of Maine refused to rule on the constitutionality of this statutory provision.
36 17 Ohio App. 2d 183, 245 N.E.2d 358 (1969). *But see also,* In re Baker, 18 Ohio App. 2d 183, 248 N.E.2d 620 (1969), which involved an appeal from an adjudication of delinquency and the subsequent penal incarceration of an 18-year-old, who under Ohio law *could have* been proceeded against as an adult. The court sustained the commitment, asserting that by statute an 18-year-old could not have been committed to any other institution, and it was not for the court to prescribe the place of treatment in light of this statutory provision. The court did not feel that petitioner's constitutional rights had been infringed since the juvenile proceeding had afforded him a fair forum in which to defend himself.
37 *Id.* at 191, 245 N.E.2d at 363.

offender.[38] By inference, the court's conclusion is based on the assumption that a valid distinction exists between confinement in an adult offender facility and a juvenile offender facility and that this distinction is sufficient to indicate a denial of due process.[39]

A similar assumption was made by the Vermont Supreme Court in *In re Rich*.[40] Reemphasizing that a juvenile hearing is a noncriminal custody proceeding, the court asserted that confinement in a penal institution is not by nature protective but is in fact punitive, and punitive commitment will necessarily convert the proceedings from informal to criminal.[41]

The court in *White v. Reid*[42] refused to merely assume substance to the "protective-penal" labels relied on by *Fisher* and *Rich*, preferring to explore the distinction between juvenile and penal facilities within a more objective context. In order to insure fair treatment in the absence of the criminal procedural framework, the court in *White* recognized the judicial duty to initially inquire whether "the state is presently exercising a reasonable restraint as guardian *in loco parentis*, or whether petitioner is being confined as punishment for an offense."[43] Placing this inquiry in proper perspective, the court further emphasized that although modern penal institutions may often resemble juvenile facilities, the two are objectively distinct:

> It is true that in both juvenile court and criminal proceedings a person may be deprived of his liberty. It is likewise true in the modern administration of penal institutions increasing emphasis has wisely been placed upon the rehabilitation and training of prisoners as essential elements in a program for crime prevention and correction. Therefore some of the features of penal institutions resemble those of educational, industrial and training schools for juvenile delinquents. The basic function and purpose of penal institutions, however, is punishment as a deterrent to crime. However broad the different methods of discipline, care and treatment that are appropriate for individual prisoners according to age, character, mental condition, and the like, there is a fundamental legal and practical difference in purpose and technique. Unless the institution is one whose primary concern is the individual's moral and physical well-being, unless its facilities are intended for and adapted to guidance, care, education and training rather than punishment, unless its supervision is that of guardian, not that of a prison guard or jailor, it seems clear a commitment to such institution is by reason of conviction of crime. . . .[44]

This distinction between juvenile and penal institutions is as relevant today as when it was made twenty years ago. A major distinction in purpose must be

38 *Id.* at 189, 245 N.E.2d at 362, where the court noted that "[p]roceedings in the Juvenile Court are civil in nature and not criminal. Section 2151.35, Revised Code, implies protection for the minor and not punishment."

39 In the face of such logical statutory deduction, it seems difficult to conceptualize any opposing argument. Yet many courts are intent upon allowing penal commitment and attempt to circumvent logic with various arguments.

40 125 Vt. 373, 216 A.2d 266 (1966). *See also*, State v. Adams, 143 W.Va. 325, 102 S.E.2d 145 (1958), where the West Virginia Supreme Court invalidated penal commitment of its juvenile offenders using almost identical reasoning.

41 125 Vt. at 378, 216 A.2d at 269.

42 125 F. Supp. 647 (D.D.C. 1954).

43 *Id.*

44 *Id.* at 650.

recognized in light of the fact that the convicted adult offender is at the correctional facility because he is "deemed to be in possession of his normal mental faculties and is held morally and criminally responsible for the conduct which brought him there. . . ."[45] The juvenile offender is the subject of a commitment under a completely different focus. His commitment is "directed at a condition, disability, or 'status' of the person . . . and assumes an absence, or at least a more limited degree, of free choice and hence of moral and criminal responsibility."[46] A commitment under this focus must therefore be distinct from a criminal sanction.

If juvenile courts cannot penally incarcerate the more incorrigible juvenile offender, what alternatives are left for those charged with the problem of rehabilitation? *United States v. Hegstrom*[47] specifically met this practical issue. It was the court's opinion that if the juvenile is ill-suited for the existing juvenile facility then he is also ill-suited for the juvenile court system. This determination should be made at the outset and the ill-suited juvenile should be waived to adult criminal court. To try and sentence the youth as a criminal offender from the start would at least afford the juvenile the entire array of constitutional safeguards.[48]

Probably the better alternative, and one that meets both the humanitarian needs and the constitutional issues, was offered by the court in *Kautter v. Reid*.[49] With regard to the juvenile who presumably would not fit the mold of the existing juvenile institution, new and more suitable institutions provide the ultimate answer.[50]

Under either alternative an option is present to treat the minor as a juvenile offender or to initiate criminal proceedings. Once that option is exercised and the state decides to bring the youth under the jurisdiction of the juvenile court, no penal commitment can be sustained. If the state decides to hold the minor criminally responsible, as evidenced by a subsequent penal incarceration, the juvenile is entitled to all the constitutional safeguards afforded a defendant at a criminal proceeding.

B. *Cases Sustaining Penal Commitment*

There have been a variety of arguments validating the penal incarceration of juvenile offenders. Often these arguments are outrageously transparent and reflect little analytical reasoning. In *Ex parte Buchfield*,[51] for example, the penal incarceration of a fifteen-year-old girl was upheld on the grounds that commitment to an adult penal institution could not be deemed "punitive" since any commitment by a juvenile court is statutorily designated as protection and treatment, not punishment.[52] Obviously, labels are being manipulated in order to

45 Pirsig, *supra* note 3, at 133.
46 *Id.*
47 178 F. Supp. 17 (D. Conn. 1959).
48 *Id.* at 18.
49 183 F. Supp. 352 (D.D.C. 1960).
50 *Id.* at 355.
51 90 Okla. Crim. App. 197, 212 P.2d 145 (1949).
52 *Id.* at 199, 212 P.2d at 147.

produce the desired result. For the most part, however, the cases upholding the penal incarceration of juvenile offenders have attempted to qualify this disposition by more substantial justification, most of which seems to emphasize the urgency of the circumstances.

1. Practical Necessity

It takes neither a legal scholar nor a penologist to recognize that certain juvenile offenders are inappropriate for the type of environment offered at presently existing juvenile facilities. Penal incarceration of a juvenile offender was sustained in *Stone v. State*[53] because in the specific circumstances more stringent discipline was needed than that available in juvenile facilities. The stricter environment of the penal institution was prompted and justified by the unruliness of the juvenile. Similarly the court in *Wilson v. Coughlin*[54] concluded that "the severity of the restraint is governed entirely by the actions of the child resisting parental authority."[55] The juvenile offender himself forced the hand of the authorities and had to suffer the consequences.

The practical need for dispositional flexibility formed the basis upon which a series of cases arising under the Federal Juvenile Delinquency Act[56] sought to justify penal incarceration. Under the Delinquency Act federal jurisdiction commences upon consent by the juvenile, and if adjudged delinquent, the juvenile is committed to the custody of the Attorney General.[57] The Attorney General has broad discretion as to the institution of custodial confinement and at times commitment has been to penal facilities. A federal district court in *Suarez v. Wilkinson*[58] recognized that under the Act juveniles should *normally* be saved from the stigma of criminality in that "persons under the age of eighteen do not have mature judgment and may not fully realize the nature or consequences of their acts."[59] The court emphatically noted, however, that the right to this protective treatment was not absolute but was always subject to the discretionary power of the Attorney General.[60] The court in *Arkadiele v. Markley*[61] refused to inquire into the extent of this discretionary power because the nature of the custody must be left to those in charge of the problem of rehabilitation.[62] And in *Sonneburg v. Markley*[63] it was noted that even federal penitentiaries are equipped with facilities to meet the rehabilitative goals of the juvenile court system.[64]

Suarez, Arkadiele, and *Sonneburg* validly recognize the need for flexibility in regard to mode of treatment. What these and other cases have failed to note,

53 237 A.2d 412 (Me. 1968).
54 259 Iowa 1163, 147 N.W.2d 175 (1966).
55 *Id.* at 179-80.
56 18 U.S.C. §§ 5031 *et seq.* (1970).
57 18 U.S.C. § 5034 (1970).
58 133 F. Supp. 38 (M.D. Pa. 1955).
59 *Id.* at 39.
60 *Id.* at 39-40.
61 186 F. Supp. 586 (S.D. Ind. 1960).
62 *Id.* at 587.
63 289 F.2d 126 (7th Cir. 1961).
64 *Id.* at 129.

however, is that despite its beneficial effect, discretion is often abused. When the authorities opt to bring the offender through the juvenile proceeding, the juvenile acquires a right to receive its fruits, and the inadequacy of sufficient juvenile facilities to treat the more troubled youth cannot operate to justify punitive measures against this juvenile.

2. The *Murray* Case—Misinterpreting the Scope of *McKeiver*

By far the most influential decision supporting the penal incarceration of juvenile offenders is the recently decided second circuit case *United States ex rel. Murray v. Owens*.[65] The fifteen-year-old petitioner was found delinquent by a New York family court and was subsequently committed to a penal institution. Petitioner argued a denial of due process and equal protection in that he received a criminal sentence upon the termination of an informal, noncriminal proceeding. Judge Gurfein of the district court[66] sustained the argument holding this combination of procedure and disposition unconstitutional as a violation of due process.

On appeal the second circuit reversed the decision by the district court and reinstated petitioner's commitment. Their decision was based on the United States Supreme Court's analysis in *McKeiver v. Pennsylvania*.[67] Pertaining to the need for jury trials at juvenile hearings, *McKeiver* once again established that the juvenile court must meet the due process standard of fundamental fairness. Using this standard it was concluded that jury trials would enhance rather than alleviate the shortcomings of the juvenile court system. This burdensome procedure would not substantially aid the fact-finding function of the court and might well jeopardize the juvenile court's emphasis on informality and rehabilitation by its tendency toward formality and adversariness.

The second circuit apparently saw petitioner's argument as essentially identical with the issue decided by *McKeiver*—whether as a result of the distinct possibility of penal incarceration the juvenile is constitutionally entitled to a jury trial at the juvenile hearing. The court reiterated the negative response given by *McKeiver*, holding that:

> [T]he conclusion is inescapable that the Supreme Court in no way implied that jury trials were constitutionally required if the ultimate disposition following an adjudication of delinquency was the same as for older offenders. The Court's determination that trial by jury would not effectively improve the fact-finding process during the adjudicatory stage is not altered by whether the juvenile once adjudged a delinquent is committed to a juvenile or adult facility. The advantages sought by the juvenile system do not begin and end with the treatment considered appropriate once an adjudication of delinquency has been reached: they include "the idealistic prospect of an intimate, informal protective proceeding" . . . , one which disposes of the issues promptly and without all the time-consuming procedures. . . .[68]

65 465 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973).
66 341 F. Supp. 722 (S.D.N.Y. 1972).
67 403 U.S. 528 (1971).
68 465 F.2d at 292.

In so framing the argument the court cleverly manages to evade the issue hit so hard at the district court level: is this *combination* of juvenile procedure and criminal disposition violative of due process? The second circuit is probably correct when it says that *McKeiver* in no way intimated that jury trials were constitutionally required even when the ultimate disposition was penal incarceration. The entire focus of *McKeiver* was on retaining the goals of the juvenile system, and jury trials would add a further unwarranted aspect of criminality. *McKeiver*'s reference to the penal incarceration of juvenile offenders was for the sole purpose of pointing up shortcomings of the juvenile system, none of which would be relieved by jury trials. The *Murray* court is wrong in thinking that these references were meant to add to the scope of the decision, and by failing to meet the issue head-on, the *Murray* court stumbled past the opportunity to add a note of finality to this continuing controversy.

IV. Conclusion

The cases that have considered the issue of penal incarceration of juvenile offenders seem to fit into one of two categories. The first group, those invalidating penal commitment, follow the theoretical justifications found in the juvenile court legislation. In examining the issue in light of the legislative and philosophical framework, the invalidation of penal commitment is but a logical deduction. The entire emphasis of juvenile court legislation is on treatment rather than punishment. A juvenile court has no authority to deal with the juvenile as a criminal, and thus, penal commitment under the procedures of the juvenile court can never be sustained.

The second group of cases, those allowing penal commitment, have attempted to overcome the theoretical framework in light of the practical needs of society. Juvenile crime is upon us in epidemic proportions, with the public constantly crying for vindication. The inclination to look upon the juvenile offender as distinct from the criminal offender, requiring sympathetic treatment, becomes increasingly difficult to maintain. When faced with a particularly problem juvenile, the juvenile court ultimately finds penal incarceration as the only viable alternative.

That the lofty ideals sought to be achieved by the juvenile courts have met only limited success is all too apparent. However, the decision to discard this unique orientation does not rest with the courts. Until the various legislatures decide to shelve the traditional juvenile court approach, the system will remain with us. Clearly an examination of the juvenile court system reveals that the juvenile court is designed to focus on the juvenile as a person who, because of age, lacks the capacity and responsibility of an adult criminal offender. It is incumbent upon the system, therefore, to maintain this focus beyond the adjudicatory stage. To first treat the juvenile as lacking adult criminal capacity and to thereafter incarcerate him in an adult penal institution is a blatant violation of the juvenile's right to due process of law.

Warren J. Casey