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The Legacy of the Stubborn and Rebellious Son

Irene Merker Rosenberg
University of Houston

Yale L. Rosenberg
University of Houston

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*Irene Merker Rosenberg**
*Yale L. Rosenberg***

I. INTRODUCTION

> If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them; then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city: "This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton, and a drunkard." And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.
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> *Deuteronomy* 21:18-21

IN twentieth century America, as in Biblical times, parents[1] unable to subdue their disobedient children are authorized to invoke the coercive power of the state.[2] As recently as 1971, for example, the

* Assistant Professor of Law, University of Houston. B.A. 1961, C.C.N.Y.; LL.B. 1964, New York Univ.—Ed.

** Associate Professor of Law, University of Houston. B.A. 1959, Rice Univ.; LL.B. 1964, New York Univ.—Ed.

1. Although statutes authorizing proceedings against disobedient children generally permit any interested adult to commence such actions, a substantial portion of these cases are initiated by parents. *See* notes 26-27 *infra* and accompanying text.

2. While the punishment of such children has decreased in severity, on a given census day, June 30, 1971, there were 57,239 children in juvenile detention and correctional facilities in this country, of whom 44,140 were boys and 13,099 were girls. Approximately 70 per cent of the girls and 23 per cent of the boys, one third of the total, were held on the basis of noncriminal offenses such as truancy and incorrigibility. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, CHILDREN IN CUSTODY 6-9 (1971). "In fiscal 1971, public juvenile detention and correctional facilities admitted over 600,000 persons . . . ." *Id.* at 8. Moreover, the Law Enforcement Assistance Administration (LEAA) recently estimated that "[b]efore, during and after the adjudication process, one-half of [juvenile noncriminal] status offenders spend time in a detention center. In addition, a large number of status offenders are either detained or sentenced to serve time in city and county jails." LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, PROGRAM ANNOUNCEMENT: DEINSTITUTIONALIZATION OF STATUS OFFENDERS 4 (1975) [hereinafter LEAA ANNOUNCEMENT ON DEINSTITUTIONALIZATION]. "Reports of abuse, rape and suicide do not deter us from placing juveniles in jails under conditions that are more punitive and harmful for them than for adults." M. LEVIN, NATIONAL ASSESSMENT OF JUVENILE CORRECTIONS, UNDER LOCK AND KEY: JUVENILES IN JAILS AND DETENTION 1 (1974).

Supreme Judicial Court of Massachusetts rejected constitutional challenges to the state's "stubborn child" law,[3] which at the time of its original enactment in 1646 was patterned after the above-quoted verse from Deuteronomy.[4] The court upheld an adjudication that an adolescent girl who refused to submit to a medical examination, used vulgar language, slammed doors, and stayed outside the home "probably talking with the boys," was a "stubborn child" within the meaning of the statute.[5]

All fifty states and the District of Columbia have statutes that give their courts jurisdiction over two forms of misconduct by children: criminal law violations and so-called status offenses. The latter are behavior patterns or activities of a noncriminal nature, such as incorrigibility, truancy, and running away from home, that are defined to apply only to minors. Many statutes include both penal law violations and noncriminal status offenses within their definitions of juvenile delinquency.[6] Others limit delinquency to criminal viol-

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The Law Enforcement Assistance Administration's most recent census report does, however, indicate that the total number of children in juvenile detention and correctional facilities, as well as the number of those who have committed noncriminal acts, is decreasing. As of June 30, 1973, the total number incarcerated was 45,694, (a decrease of 11,545 since June 30, 1971) of whom 4551 were guilty of noncriminal offenses. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, CHILDREN IN CUSTODY (Advance Report) 11 (1975). These statistics may be misleading, however, since it appears that the LEAA classifies as "delinquent" any child who is so labeled under state law. *Id.* at 3. As pointed out in notes 6-13 *infra* and accompanying text, many states define delinquency to include status offenses such as disobedience, and, even in some of those jurisdictions establishing a separate category for status offenders, the latter may be subsequently adjudicated delinquent if they persist in being disobedient in violation of a court order. Thus, the actual number of incarcerated status offenders may be substantially larger.

3. Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389 (1971).

4. The 1646 Massachusetts Bay Colony legislation, which also mandated the death penalty, follows the language in Deuteronomy. *See* Katz and Schroeder, *Disobeying a Father's Voice: A Comment on Commonwealth v. Brasher*, 57 MASS. L.Q. 43 (1972). *See also* Sidman, *The Massachusetts Stubborn Child Law: Law and Order in the Home*, 6 FAM. L.Q. 33 (1972). Although the "stubborn child" statute was repealed in 1973, MASS. ANN. LAWS ch. 272, § 53, *as amended*, Nov. 21, 1973, disobedient children in Massachusetts remain within the jurisdiction of the juvenile court and are subject to sanction as "children in need of services." *See* MASS. ANN. LAWS ch. 119, § 39E (1975).

5. Commonwealth v. Brasher, 359 Mass. 550, ___, 270 N.E.2d 389, 395 (1971).

6. *See, e.g.*, DEL. CODE ANN. tit. 10, § 901(7) (1974): " 'Delinquent child' means a child who commits an act which if committed by an adult would constitute a crime, or who is uncontrolled by his custodian or school authorities or who habitually so deports himself as to injure or endanger the morals or health of himself or others."

Ten other jurisdictions have similar statutes classifying status offenders as juvenile delinquents. *See* ALA. CODE tit. 13, § 350(3) (1959); CONN. GEN. STAT. ANN. § 17-53 (Supp. 1975); IND. ANN. STAT. CODE § 31-5-7-4.1 (Burns Cum. Supp. 1975); IOWA CODE ANN. § 232.2(13) (1969); MINN. STAT. ANN. § 260.015(5)

ations and provide a separate category for status offenses.[7] These

(Cum. Supp. 1975); MISS. CODE ANN. § 43-21-5(g) (Cum. Supp. 1975); N.H. REV. STAT. ANN. § 169:2 (Supp. 1973); PA. STAT. ANN. tit. 11, § 50-102(2) (Cum. Supp. 1975); S.C. CODE ANN. § 15-1103(9) (1962); W. VA. CODE ANN. § 49-1-4 (1966).

In addition, in ten states, both children who commit criminal acts and those guilty of status offenses are grouped together, without being labeled "delinquent" or "incorrigible"; instead, they are merely designated as children within the "jurisdiction" of the court. HAWAII REV. STAT. §§ 571-11(1), (2) (Supp. 1974); IDAHO CODE § 16-1803 (Cum. Supp. 1974); KY. REV. STAT. ANN. § 208.020 (Cum. Supp. 1974); ME. REV. STAT. ANN. tit. 15, § 2552 (Supp. 1975); MICH. COMP. LAWS ANN. § 712A.2 (Cum. Supp. 1975); MO. REV. STAT. § 211.031 (1959); NEV. REV. STAT. § 62.040 (1971); ORE. REV. STAT. § 419.476 (1974); UTAH CODE ANN. § 55-10-77 (1953); VA. CODE ANN. § 16.1-158 (1975).

7. One of the first state statutes creating a separate status offender category, N.Y. FAMILY CT. ACT § 712 (McKinney 1962), originally provided:

> (a) "Juvenile Delinquent" means a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime.
> (b) "Person in need of supervision" means a male less than sixteen years of age and a female less than eighteen years of age who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority.

The age differential between boys and girls was held unconstitutional in *In re* Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972). The statute has also been amended to clarify the definition of truancy. N.Y. FAMILY CT. ACT § 712(b) (McKinney 1975).

Twenty-nine other jurisdictions classify status offenders separately from delinquent children. ALAS. STAT. § 47.10.290(7) (1975); ARIZ. REV. STAT. ANN. § 8-201(12) (1974); ARK. STAT. ANN. § 45-403(3) (Supp. 1975); CAL. WELF. & INSTNS. CODE § 601 (West Supp. 1976); COLO. REV. STAT. ANN. § 19-1-103 (1973); D.C. CODE ANN. § 16-2301(8) (Supp. 1973); GA. CODE ANN. § 24A-401(g) (Supp. 1975); ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd 1972); KAN. STAT. ANN. §§ 38-802(c), (d), (e), (f) (1973); LA. REV. STAT. ANN. § 13: 1569(15) (West Supp. 1975); MD. ANN. CODE § 3-801(f) (1974); MASS. ANN. LAWS ch. 119, § 39E (1975); MONT. REV. CODES ANN. § 10-1203(13) (Cum. Supp. 1974); NEB. REV. STAT. § 43-201(5) (1974); N.J. STAT. ANN. § 2A: 4-45 (Cum. Supp. 1975); N.M. STAT. ANN. § 13-14-3(M) (Supp. 1973); N.C. GEN. STAT. § 7A-278(5) (1969); N.D. CENT. CODE § 27-20-02(4) (1974); OHIO REV. CODE ANN. § 2151.022 (Cum. Supp. 1974); OKLA. STAT. ANN. tit. 10, § 1101(c) (Cum. Supp. 1975); R.I. GEN. LAWS ANN. § 14-1-3(G) (1969); S.D. COMP. LAWS ANN. § 26-8-7.1 (Supp. 1974); TENN. CODE ANN. § 37-202 (Cum. Supp. 1974); TEX. FAM. CODE ANN. § 51.03(b) (Supp. 1975); VT. STAT. ANN. tit. 33, § 632(12) (Cum. Supp. 1975); WASH. REV. CODE § 13.04.010 (1962); WIS. STAT. ANN. § 48.12(2) (Cum. Supp. 1975); WYO. STAT. ANN. § 14-115.2(n) (Cum. Supp. 1975). Prior to July 1975, Florida law provided a separate PINS classification, which included truants, runaways and persistently disobedient children. FLA. LAWS c. 26880, § 1 (1951), c. 29615, § 33 (1955). By legislation effective July 1, 1975, the PINS statute was repealed, and truants and runaways have instead been classified as dependent children. FLA. STAT. ANN. § 39.01(10) (Cum. Ann. Supp. 1975). A separate provision states that "an ungovernable child" is one who persistently disobeys parental demands and is beyond parental control, and further specifies that

> The first time a child is adjudicated as ungovernable, he may be defined and treated as a dependent child . . . for the second and subsequent adjudications for ungovernability, the child may be defined and treated as a delinquent child.

FLA. STAT. ANN. § 39.01(10) (Cum. Ann. Supp. 1975). The amended statute eliminates all references to PINS and, notwithstanding the above quoted provision, it does not provide for adjudication as an ungovernable. The section defining "adjudicatory hearing" is limited to adjudications of delinquency or dependency. FLA. STAT. ANN. § 39.01(27) (Cum. Ann. Supp. 1975). *See generally* Gilman, *How To Retain Juris-*

statutes describe offenders within this category in ostensibly less opprobrious terms,[8] such as unruly, wayward, undisciplined or incorrigible children,[9] or as persons, children, minors, youths, or juveniles "in need of supervision,"[10] phrases from which the popular acronyms "PINS," "CHINS," "MINS," "YINS," and "JINS" are derived.[11]

Even in statutes with separate categorizations for status offenses, however, the two forms of misconduct overlap, since some status-offense statutes proscribe not only noncriminal behavior, but also certain forms of criminal conduct, such as violations of city ordinances and minor midemeanors.[12] Similarly, some statutes define delinquency to include both penal law violations and acts that are basically status offenses, such as the breach of a condition of probation by a child previously adjudicated incorrigible.[13] Unless otherwise noted, this article will use the term "delinquency" to denote acts

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diction over Status Offenses—Change Without Reform in Florida, 22 CRIME AND DELINQ. 48 (1976).

8. "[N]ot surprisingly . . . there is indication that a new sort of stigma is attaching to being labeled a person or minor in need of supervision. That result is probably unavoidable as long as any sort of official action is taken. And action by a court—however benign—is likely to be the most severely and permanently labeling of all." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 26 (1967) [hereinafter TASK FORCE REPORT].

9. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-201(12) (1974) (incorrigible); GA. CODE ANN. § 24A-401(g) (Supp. 1975) (unruly); N.C. GEN. STAT. § 7A-278(G) (1969) (undisciplined); R.I. GEN. LAWS ANN. § 14-1-3(G) (1969) (wayward). The Uniform Juvenile Court Act describes status offenders as unruly children. UNIFORM JUVENILE COURT ACT § 2(4).

Kansas has an elaborate statutory labeling process, based on the seriousness of the child's offense and/or the number of times it has been repeated. Thus, a child may be classified as either "truant," "traffic offender," "wayward," "miscreant," or "delinquent." KAN. STAT. ANN. §§ 38-802(b), (c), (d), (e), (f) (1974).

10. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd 1972) (minor); MONT. REV. CODES ANN. § 10-1203(13) (Cum. Supp. 1974) (youth); N.J. STAT. ANN. § 2A: 4-45 (Cum. Supp. 1975) (juvenile); N.M. STAT. ANN. § 13-14-3(M) (Supp. 1973) (child).

11. *See* NEWSWEEK, Sept. 8, 1975, at 66, col. 3; Editorial, N.Y. Times, Nov. 10, 1975, at 34, col. 2 (late city ed.).

12. TEX. FAM. CODE ANN. §§ 51.03(b)(1)(A), (B) (Supp. 1975).

13. N.C. GEN. STAT. § 7A-278(2) (1969) states: " 'Delinquent child' includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or a child who has violated the conditions of his probation under this article." N.C. GEN. STAT. § 7A-278(5) (1969) establishes a separate category dealing with the "undisciplined child," who is defined as "any child who is unlawfully absent from school or who is regularly disobedient to his parents . . . and beyond their disciplinary control, or who is regularly found in places where it is unlawful for a child to be, or who has run away from home." Thus, a child who has been adjudicated undisciplined on the basis of truancy and who subsequently violates a condition of probation by further truancy may be adjudicated a delinquent. *See In re* Dowell, 17 N.C. App. 134, 193 S.E.2d 302 (1972).

that would constitute crimes if committed by an adult, and the acronym "PINS" and variant terms such as "incorrigibility" and "supervision" to refer only to cases involving noncriminal behavior.

The juvenile court also has jurisdiction over actions that pertain to "neglected" or "dependent" children,[14] in which the parent is charged with misconduct or an inability to care properly for the child. In many jurisdictions, the behavior that is a ground for finding neglect or dependency is also proscribed by the PINS law.[15] Thus, depending upon whether fault is assigned to the parent or to the child, truancy can be the basis for either a neglect or a PINS finding.[16] This interrelationship between the PINS and neglect jurisdictions is illustrated inferentially by statutes in a number of states that classify runaways as PINS only when they leave home "without just cause,"[17] and is more directly demonstrated by a New York statute that permits substitution of a neglect charge at any stage of a PINS proceeding[18] and by Arizona legislation that treats as "dependent" a child under eight who commits a delinquent or PINS act.[19]

A disturbing feature of many PINS statutes is the absence of a lower limit on the age of children over whom jurisdiction may be exercised. While a few states do prescribe lower age limits for PINS children,[20] most define "child" simply as a person under the age of eighteen, seventeen, or sixteen.[21] The New York statute, for exam-

14. For example, MINN. STAT. ANN. § 260.015(6)(a) (1971) defines a "dependent child" to include, *inter alia*, one "who is without a parent, guardian or other custodian . . .," while section 260.015(10) defines a "neglected child" as one who, *inter alia*, "is abandoned by his parent, guardian, or other custodian" or "is without proper parental care because of the faults or habits of his parents, guardian, or other custodian."

15. *Compare* WIS. STAT. ANN. § 48.12 (Cum. Supp. 1975), which includes as a child "in need of supervision" one who "habitually so deports himself as to injure or endanger the morals or health of himself or others," *with* WIS. STAT. ANN. § 48.13(1)(f) (1957), which describes a "neglected" child as one whose "occupation, behavior, condition, environment or associations are such as to injure or endanger his welfare or that of others."

16. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-53 (1975) (includes in its definition of "delinquent" child one "who has been habitually truant" and defines a "neglected" child as one who "is being denied proper care and attention, physically, *educationally*, emotionally, or morally . . ." [emphasis added]).

17. *See, e.g.*, GA. CODE ANN. § 24A-401(g)(4) (Supp. 1975).

18. N.Y. FAMILY CT. ACT § 716(b) (McKinney 1975). The same section permits substitution of a neglect petition in a delinquency case.

19. ARIZ. REV. STAT. ANN. § 8-201(10)(c) (1974).

20. *See, e.g.*, TEX. FAM. CODE ANN. § 51.02(1)(A) (1975) (setting lower age limit of ten for PINS and delinquents); S.C. CODE ANN. § 15-1103(9) (1962) (setting lower age limit of seven for "delinquent" children, the definition of which includes status offenders).

21. *See, e.g.*, ALA. CODE tit. 13, § 350(3) (1959) (under 16); HAWAII REV. STAT. § 571-2(5) (Supp. 1974) (less than 18); LA. REV. STAT. ANN. § 13:1569(3) (West

ple, sets no minimum age for PINS, although it requires that a child be over seven before he or she can be adjudicated a delinquent.[22]

Whether categorized separately or included within the definition of delinquency, PINS conduct may be described either with particularity or with vague conclusory terms; some statutes combine specific and vague proscriptions. A relatively precise Texas statute enumerates four types of misconduct that are the exclusive bases for a PINS adjudication: (1) three violations of municipal penal ordinances or of laws defining low-grade misdemeanors; (2) truancy for a specified number of days; (3) leaving home for a substantial length of time or without intent to return; or (4) violation of state laws prohibiting driving while intoxicated.[23] In contrast, the more general Alabama statute defines a "delinquent child" as a criminal law violator, or as one "who is beyond the control of his parent . . ., incorrigible . . . guilty of immoral conduct; . . . [or] leading an idle, dissolute, lewd or immoral life."[24] More typically, Arizona combines somewhat specific prohibitions against habitual truancy and running away from home with vague proscriptions against disobeying reasonable parental orders or habitually deporting oneself so as to injure or endanger one's morals or health.[25]

In most jurisdictions, any person having knowledge of relevant facts can refer a child to court on a PINS charge;[26] typically, the

Supp. 1975) (less than 17). *Cf. In re* Joyner, 358 Mass. 60, 260 N.E.2d 664 (1970) (reversing "stubborn child" adjudication against 18-year-old girl sentenced to ten days in correctional facility for disobeying her parents' orders not to see her intended husband).

22. N.Y. FAMILY CT. ACT § 712(a), (b) (McKinney 1975). The lower age limit of seven in delinquency cases apparently stems from the conclusive common-law presumption that a child under that age was incapable of committing a crime. Between the ages of seven and fourteen, there was a rebuttable presumption of incapacity. *See generally* F. LUDWIG, YOUTH AND THE LAW 17-18 (1955). There is a split in the courts as to whether these presumptions are to be used in juvenile delinquency proceedings. *Compare In re* E.P., 291 S.2d 238 (Fla. App. 1974) (presumption available to 12-year-old child accused of manslaughter), *with* Borders v. United States, 256 F.2d 458, 459 (5th Cir. 1958) (prosecution not required to prove that 12-year-old who derailed freight train was of sufficient maturity to understand the nature and consequences of his conduct). *See In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970) (penal law codification of common-law presumption was applicable in delinquency actions, but suggesting that it would not be available in PINS cases); *accord, In re* Michael B., 44 Cal. App. 3d 443, 118 Cal. Rptr. 685 (1975). In those jurisdictions where the defense of infancy is available to delinquents and where PINS children can be sent to the same state institutions as delinquents, the infancy defense should be available to PINS.

23. TEX. FAM. CODE ANN. § 51.03(b) (Supp. 1975).

24. ALA. CODE tit. 13, § 350(3) (1959).

25. *See* ARIZ. REV. STAT. ANN. § 8-201(12) (1974).

26. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-61 (1975); MO. REV. STAT. § 211.081 (1962). Some states require that the complainant be an adult. *See, e.g.*, KAN. STAT. ANN. § 38-816 (1974).

referring party is either a parent, guardian, or custodian, or a school, police or welfare official.[27] Over half of the states require that before a petition is filed, the complainant and the child must utilize a process known as "informal adjustment" or "probation intake."[28] Its purpose is to assure that formal juvenile court intervention is reserved exclusively for those children considered to be in need of judicial help because of the seriousness of their offenses or the severity of their maladjustment.[29] In general, the options available to an intake department are outright dismissal of the case, dismissal with referral to community agencies, informal supervision of the child, or the filing of a formal PINS petition or complaint.[30]

In some states, the parties may refuse to participate in the established intake procedure;[31] moreover, a number of jurisdictions allow

27. For example, a recent New York survey discloses that parents or parental surrogates initiated 59 per cent of all PINS actions, 25 per cent were brought by school officials, and the remaining 16 per cent were instituted by other parties, such as unrelated individuals and police. *See* ADMIN. BD. OF N.Y. JUDICIAL CONFERENCE, REPORT FOR JUDICIAL YEAR 1972-73, at 331 (1974). Another such study, involving 316 PINS children in New York City who were removed from their homes by court action, found that 65 per cent of the PINS petitions in the survey were filed by the children's mothers. *See* OFFICE OF CHILDREN'S SERVICES OF THE NEW YORK JUDICIAL CONFERENCE, THE PINS CHILD, A PLETHORA OF PROBLEMS 44 (1973) [hereinafter THE PINS CHILD, A PLETHORA OF PROBLEMS]. *See also* LEAA ANNOUNCEMENT ON DEINSTITUTIONALIZATION, *supra* note 2, at 7-8.

28. *See, e.g.*, CAL. WELF. & INSTNS. CODE §§ 653, 654 (West Supp. 1976); PA. STAT. ANN. tit. 11, § 50-304 (Cum. Supp. 1975).

In addition to such juvenile court diversionary processes, "[a]cross the country, it is clear, discretionary action by the police in screening juvenile offenders accounts for the removal of significant numbers from the formal juvenile justice system." TASK FORCE REPORT, *supra* note 8, at 12. The Task Force notes, however, a special data analysis of the Chicago Youth Division, which discloses that in 1965 the police adjusted cases for every juvenile criminal offense category except murder (*e.g.*, armed robbery 30.5 per cent adjusted), but were able to adjust incorrigibility charges in only 19.5 per cent of the cases. *Id.* at 12 n.60.

29. A New York Family Court judge has explained the purpose of the intake procedure as follows: "[P]robation intake is a hallmark of the juvenile justice system. Its purpose is to screen from the Court those youngsters who, because of age, lack of prior record, good adjustment at home and in the community or other factors could derive no benefit from court involvement and, indeed, might be damaged by it." *In re* Charles C., 371 N.Y.S.2d 582, 585 (Fam. Ct. 1975). *See also* TASK FORCE REPORT, *supra* note 8, at 14-18, 21; E. WAKIN, CHILDREN WITHOUT JUSTICE 40-42 (1975).

The statutes themselves often describe the purpose of the intake procedure in vague, general terms. *See, e.g.*, ALAS. STAT. § 47.10.020 (1975) ("to determine whether the interests of the public or of the minor require that further action be taken"); UNIFORM JUVENILE COURT ACT § 10(a)(2).

30. *See, e.g.*, CAL. WELF. & INSTNS. CODE § 654 (West Supp. 1976); MONT. REV. CODES ANN. § 10-1209 (Cum. Supp. 1975); TASK FORCE REPORT, *supra* note 8, at 15. Another form of adjustment, which generally takes place after the filing of a petition, but prior to an adjudication, is the entry of a consent decree. *See* D.C. CODE ANN. § 16-2314 (1973); PA. STAT. ANN. tit. 11, § 50-305 (Cum. Supp. 1975).

31. *See, e.g.*, GA. CODE ANN. § 24A-1001(3) (Supp. 1975); MD. CTS. & JUD. PRO. CODE ANN. § 3-810(e) (Supp. 1975); UNIFORM JUVENILE COURT ACT § 10(a)(3).

the complainant to file a petition against the child even though the probation department recommends that the matter be informally adjusted.[32] The net effect of these provisions is to give the parent or other complaining party access to the court notwithstanding the contrary opinion of probation personnel, as well as power to bypass community resources.[33]

After the petition is filed, the court is usually required to decide whether the child is to be released in the parent's custody or remanded to a facility pending the adjudicatory hearing.[34] Statutory bases for remand generally include a necessity for protection of the child or the public, a likelihood that the child will abscond or fail to appear in court on the return date, an unavailability of proper supervision at home, and, finally, a probability that the child will commit a criminal act before trial.[35] In practice, the determining factor may instead be

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32. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 703-8(3) (Smith-Hurd 1972); N.Y. FAMILY CT. ACT § 734(b) (McKinney 1975) ("The probation service may not prevent any person who wishes to file a petition under this article from having access to the court for that purpose").

In some states, the complainant's access to court is limited by requirements that the judge authorize the filing of each petition. *See, e.g.*, MICH. COMP. LAWS ANN. § 712A.11 (1968); R.I. GEN. LAWS ANN. § 14-1-11 (1969). In the District of Columbia, only designated public officials and representatives of private agencies may file PINS complaints. D.C. CODE ANN. § 16-2305(b) (1973). Under California law, if a probation officer declines to file a petition against a juvenile, the person initiating the complaint against the child may secure review by the court of the officer's decision. CAL. WELF. & INSTNS. CODE § 655 (West 1972).

33. For a discussion of the dynamics of intake adjustment in the New York Family Court, see Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1395 (1974) [hereinafter YALE PINS STUDY].

34. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-63 (1975); ME. REV. STAT. ANN. tit. 15, § 2608 (Supp. 1975). Indeed, children may be held in detention even prior to the filing of a PINS petition. *See, e.g.*, MONT. REV. CODES ANN. §§ 10-1209(4)(c), 10-1212 (Cum. Supp. 1975); TEX. FAM. CODE ANN. § 53.02 (1975).

35. *See, e.g.*, MINN. STAT. ANN. § 260.171 (subd. 1) (1971); N.Y. FAMILY CT. ACT § 739(a) (McKinney 1975); UNIFORM JUVENILE COURT ACT § 14. Some state statutes do not prescribe grounds for remanding the child, and consequently such decisions appear to be left entirely to the discretion of individual judges. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-63 (1975); ME. REV. STAT. ANN. tit. 15, § 2608 (Supp. 1975) (also authorizes jail detention of children provided they are segregated from adult criminal offenders).

The New York statute permits interim detention of both PINS and delinquents if the court finds that there is either a "substantial probability" that the child will not return to court or a "serious risk" that the juvenile may commit a crime. N.Y. FAMILY CT. ACT §§ 739(a), (b) (McKinney 1975). In People *ex rel.* Wayburn v. Schupf, N.Y.L.J., June 8, 1976, at 1, col. 6, the New York Court of Appeals upheld the constitutionality of the above preventive detention provision. *See also* Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1976), holding unconstitutional the Florida juvenile court procedure for pre-trial detention of juvenile delinquents on the ground that it failed to provide for a probable cause hearing. The decision does not appear to apply to PINS cases. 525 F.2d at 1260 n.1.

the parent's willingness to take the child home.[36] In many jurisdictions, PINS and delinquent children who are detained during this interim period are placed in the same facilities, which are likely to be secure.[37] Interim detention may continue until the conclusion of the dispositional hearing; thus, both alleged and adjudicated PINS and

36. A study of the New York Family Court indicates that approximately 50 per cent of the interim PINS detentions are based on parental refusal to take the child home. *See* YALE PINS STUDY, *supra* note 33, at 1396-97. Another survey disclosed that 20 per cent of the parents refused to take their children home. THE PINS CHILD, A PLETHORA OF PROBLEMS, *supra* note 27, at 44. *But see In re* Norman C., 74 Misc. 2d 710, 345 N.Y.S.2d 338 (Fam. Ct. 1973), holding that secure detention for a child accused of delinquency solely on the ground that he had no parent to whom he could be paroled constituted a denial of equal protection. Some jurisdictions have attempted to provide alternatives to interim detention of PINS children in secure facilities. *See, e.g.*, D.C. CODE ANN. § 16-2313(b) (1973) (permitting detention in foster homes, group homes and youth shelters).

Pursuant to section 223(a)(12) of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5633(a)(12) (Supp. IV), the Law Enforcement Assistance Administration has set aside 8.5 million dollars for grants to public and private agencies that have formulated programs to divert PINS children from detention and correctional facilities. *See* News Release accompanying LEAA ANNOUNCEMENT ON DEINSTITUTIONALIZATION, *supra* note 2.

37. *See, e.g.*, ALA. CODE tit. 13, § 379 (1958); ARIZ. REV. STAT. ANN. § 8-226 (A) (Supp. 1975); OHIO REV. CODE ANN. § 2151.34 (Page Supp. 1974); PA. STAT. ANN. tit. 11, § 50-311 (Cum. Supp. 1975). The Alabama statute authorizes interim detention of delinquent children in jail but segregated from adult prisoners, "provided no other arrangement for holding the child can be made." The term "delinquent" is defined so as to include status offenders. ALA. CODE, tit. 13, § 350(3) (1958).

In the District of Columbia, PINS children can be placed in secure detention so long as they are not commingled with adjudicated delinquents. D.C. CODE ANN. § 16-2313(b) (1973). In Georgia, neglected and PINS children may only be detained in shelter care facilities; however, such facilities may also house delinquents. GA. CODE ANN. § 24A-1403(b) (Supp. 1975). Since June 30, 1975, Louisiana has prohibited the holding of PINS children in detention facilities. LA. REV. STAT. § 13:1578.1 (West Supp. 1975).

See Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), 359 F. Supp. 478 (S.D.N.Y. 1973) (determining that PINS children held in secure interim detention facilities for more than 30 days are entitled to treatment, but rejecting claim that secure detention of PINS with delinquents violates equal protection); People *ex rel.* Kaufmann v. Davis, App. Div., 2d Dept., N.Y.L.J., May 19, 1976, at 19, col. 6 (holding that commingling of PINS child with delinquents in secure interim detention facility was not unconstitutional, where PINS child was detained 15 days, had previously run away from nonsecure facility, and was assaultive). *Cf.* Swansey v. Elrod, 386 F. Supp. 1138, 1141-42 (N.D. Ill. 1975) (discussing internal separation of delinquents and PINS remanded to the same juvenile detention center, in connection with determination as to propriety of keeping juveniles waived over to criminal court in the same facility); Cox v. Turley, 506 F.2d 1347 (6th Cir. 1974), reversing trial court's dismissal of a class action to enjoin allegedly unconstitutional arrest and jailing practices by juvenile officials. Plaintiff, a 16-year-old boy, was arrested for violation of a curfew ordinance, taken to the county jail, and kept there incommunicado for five days on the basis of a telephone order by the nonlawyer juvenile court judge. "The willingness of the court to order confinement without having seen or heard from the boy and without having personally observed his conduct or his character, indicates to us that his order was not merely an isolated act, but instead the usual treatment given to all juveniles arrested for being out after curfew." 506 F.2d at 1355. *See also* Anonymous Juvenile v. Collins, 21 Ariz. App. 140, 517 P.2d 98 (1973).

delinquent children may be incarcerated together for extended periods of time.[38]

Most jurisdictions provide for bifurcated trials or hearings, with an adjudicatory or fact-finding hearing to determine innocence or guilt as to the charges, and a dispositional hearing to decide what treatment, if any, the guilty child requires.[39] Many states require that evidence presented at the adjudicatory hearing be material, relevant

38. *See, e.g.,* TEX. FAM. CODE ANN. § 54.01(h) (1975); Martarella v. Kelley, 349 F. Supp. 575, 579, 582-83 (S.D.N.Y. 1972). *But see* D.C. CODE ANN. § 16-2313 (b) (Supp. 1970). As a matter of practice, children may also be kept in detention facilities even after the dispositional hearing pending transfer to a long-term placement facility. *See* State *ex rel.* Harris v. Larson, 64 Wis. 2d 521, 219 N.W.2d 335 (1974).

39. *See, e.g., In re* D.J.B., 18 Cal. App. 3d 782, 785-86, 96 Cal. Rptr. 146, 148-49 (1971), (reversing PINS adjudication because record was unclear as to whether the trial judge considered a probation report prior to making a PINS finding against the child; the court rejected the prosecutor's argument that bifurcated hearings were not required in PINS cases). *See also In re* Arnold, 12 Md. App. 384, 394, 278 A.2d 658, 663 (1971) (remanding delinquency case because, *inter alia,* "the adjudicatory hearing . . . and disposition hearing . . . are interwoven"); *cf. In re* Nawrocki, 15 Md. App. 252, 289 A.2d 846 (1972).

In some states, a mere finding that the child committed the acts alleged in the petition appears sufficient to permit the court to adjudicate the juvenile a PINS and proceed to enter a dispositional order. *See, e.g.,* MASS. ANN. LAWS ch. 119, § 39G (1975); *In re* A.S., 487 S.W.2d 589 (Mo. App. 1972).

In other jurisdictions, in addition to determining that the child engaged in the misconduct alleged in the petition, the court must, either prior to making a PINS adjudication or prior to entering a dispositional order, also find that the minor is in need of rehabilitation or treatment. In some of these states, it is unclear whether adjudication of the child's status as a PINS takes place prior to or after a separate finding that he or she is in need of rehabilitation or treatment. *Compare* CONN. GEN. STAT. ANN. § 17-68(a) (1975) and N.Y. FAMILY CT. ACT §§ 742, 743, 745(b) (McKinney 1975) (PINS adjudication appears to take place only after finding of need for rehabilitation or treatment), *with* LA. REV. STAT. §§ 13:1569(15), (18), (19) (West Supp. 1975) (ambiguous as to when the PINS adjudication occurs). In jurisdictions in which the adjudicatory hearing has been denominated a fact-finding hearing, and the scope of such hearings is limited to determining whether or not the child committed the acts alleged in the petition, it seems reasonable to infer that the PINS adjudication can be entered only after the finding of a need for rehabilitation or treatment has been made. *See* D.C. CODE ANN. §§ 16-2301(8), (16), (17) (1973).

If the finding as to treatment and rehabilitation takes place at the adjudicatory hearing, it should be subject to the rules of evidence and quantum of proof requirements applicable to adjudicatory hearings. If, however, the finding as to care and rehabilitation is made at the dispositional hearing, it may be based on hearsay evidence and a lesser standard of proof. *See* notes 40-42 *infra* and accompanying text. Ambiguities as to the hearing at which the finding of need for care and treatment is made and as to the applicable rules of evidence and quantum of proof are removed in some states by clearly defined tripartite procedures. In the first phase, the court must find, by competent proof beyond a reasonable doubt, that the child committed the acts alleged. In the second phase, it must find, on the basis of clear and convincing competent evidence, that the juvenile is in need of care and rehabilitation, while in the final phase, the judge may use incompetent evidence, provided it is material and relevant, in order to determine the appropriate disposition. *See* N.M. STAT. ANN. §§ 13-14-28(E), (F), (G), 13-14-31(C) (Supp. 1973).

and competent.[40] In addition, some jurisdictions incorporate certain procedural due process rights, such as the standard of proof beyond a reasonable doubt, that are applicable in criminal trials and delinquency hearings.[41]

At the dispositional hearing, the rules of evidence are substantially relaxed, permitting the court to receive probation reports and other forms of hearsay evidence.[42] Most statutes give the judge broad discretion,[43] authorizing such dispositional alternatives as discharge with a warning,[44] imposition of a fine,[45] probation,[46] place-

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

Some state statutes merely provide that hearings shall be conducted in an "informal" or "informal but orderly" manner. *See, e.g.*, MINN. STAT. ANN. § 260.155 (1) (1971); PA. STAT. ANN. tit. 11, § 50-316(a) (Cum. Supp. 1975); UNIFORM JUVENILE COURT ACT §§ 24(a), 29(c). *See also* Gilbert v. Commonwealth, 214 Va. 142, 198 S.E.2d 633 (1973) (reversing incorrigibility adjudication because trial court, over objection, admitted prejudicial hearsay testimony); *In re* Dudley, 310 S.2d 919 (Miss. 1975) (reversing adjudication that appears to have been based on noncriminal conduct, on the ground that the quantum of inadmissible hearsay testimony was such that appellant was effectively denied his right to a fair hearing).

41. *See, e.g.*, COLO. REV. STAT. ANN. § 19-3-106(1) (1973); MASS. ANN. LAWS ch. 119, § 39G (1975). Legislation in some states provides for the exclusion of illegally seized evidence and involuntary confessions in PINS and delinquency cases. *See, e.g.*, N.M. STAT. ANN. § 13-14-25(C) (Supp. 1973); TEX. FAM. CODE ANN. § 54.03(e) (1975). *See also* notes 117-22 *infra* and accompanying text.

42. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 705-1 (Smith-Hurd 1972); ORE. REV. STAT. § 419.500(2) (1974). *See also* Tyler v. State, 512 S.W.2d 46 (Tex. Civ. App. 1974) (rejecting delinquent's claim that statute permitting introduction of hearsay evidence at dispositional hearing violated child's sixth amendment right of confrontation and cross-examination, on the ground that the juvenile's attorney had access to all written reports considered by the court, and that *In re* Gault, 387 U.S. 1 (1967), *discussed at* notes 117-18 *infra* and accompanying text, is inapplicable to post-adjudicative hearings).

43. *See, e.g.*, COLO. REV. STAT. ANN. § 19-3-112 (1973); DEL. CODE ANN. tit. 10, § 937(b)(15) (1974) (the court may "[p]rescribe such other treatment, punishment, or care as in the opinion of the Court would best serve the needs of the child and society"); PA. STAT. ANN. tit. 11, § 50-322 (Cum. Supp. 1975) ("[T]he court may make . . . orders of disposition best suited to . . . [the child's] treatment, supervision, rehabilitation, and welfare: . . ."). Compare N.Y. FAMILY CT. ACT § 745(b) (McKinney 1975), which requires that the disposition be based on a preponderance of the evidence.

See also City & County v. Juvenile Court, 182 Colo. 157, 511 P.2d 898 (1973) (upholding power of juvenile court judge to place child in a specified facility); *In re* Debra A., 48 Cal. App. 3d 327, 330, 121 Cal. Rptr. 757, 759 (1975) (reversing delinquency disposition upon condition that girl spend five consecutive weekends in a detention center facility to be selected by the probation officer, on the ground that the judge had improperly delegated his discretion; the court added that "[w]e need not determine here whether 'punitive' detention (if made reasonably to effect 'rehabilitation') is within the purview of the juvenile court law").

44. *See, e.g.*, N.Y. FAMILY CT. ACT § 754(a) (McKinney 1975).

45. *See, e.g.*, DEL. CODE ANN. tit. 10, § 937(b)(11) (1974).

46. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-241 (A) (2)(b) (1974).

Any technical violation of rules of probation can result in revocation and institutional placement. *See, e.g., In re* Green, 203 S.2d 470 (Miss. 1967), *cert. denied,*

ment in a foster home[47] or nonsecure residential facility,[48] commitment to a secure industrial or training school,[49] or even detention in an adult jail.[50] Whereas some states absolutely prohibit placement of PINS children together with delinquents in training schools,[51] others prohibit only an initial placement, but permit subsequent commingling if the PINS child continues to misbehave.[52] Many jurisdictions, however, have imposed no restrictions on the placement of the two types of children together in the same facilities.[53]

In many states, PINS children may be institutionalized for limited terms, with the possibility of extensions pursuant to court order.[54] In

392 U.S. 945 (1968) (probation revoked on the basis of one day of truancy and creation of disturbance of classes at another school); Echols v. State, 481 S.W.2d 160 (Tex. Civ. App. 1972) (probation revoked for truancy, notwithstanding evidence of parent's and child's reasonable beliefs that the latter was lawfully discharged from school and had a valid work permit, and even though the child was employed). *But see In re* D.E.P., 512 S.W.2d 789 (Tex. Civ. App. 1974) (reversing probation revocation on the grounds that a single curfew violation was supported only by hearsay and that the child's truancy was due to circumstances beyond his control; the court noted that "the slightest technical violation" does not justify revocation and training school commitment, 512 S.W.2d at 791). *See also In re* E.B., 525 S.W.2d 543 (Tex. Civ. App. 1975) (discussing differing statutory rights of PINS and delinquents to trial by jury at probation revocation proceedings).

47. *See, e.g.*, CAL. WELF. & INSTNS. CODE §§ 730 (West 1972), 727(c) (West Supp. 1976).

48. *See, e.g.*, N.C. GEN. STAT. § 7A-286(4) (Cum. Supp. 1975).

49. *See, e.g.*, ARK. STAT. ANN. § 45-221 (1964).

50. *See, e.g.*, N.H. REV. STAT. ANN. § 169:14 (Supp. 1973) (after the child becomes 17, "the court may, under its continuing jurisdiction, commit him either to the industrial school, house of correction, jail, or state prison, for all or any part of the term of his minority"); IDAHO CODE § 16-1814(2) (Cum. Supp. 1975) (permits commitment of a child to jail for up to 30 days if segregated from adult offenders). *Cf.* Long v. Powell, 388 F. Supp. 422 (N.D. Ga. 1975) (three-judge court) (holding unconstitutional as applied a Georgia statute permitting commitment of delinquent and unruly children to adult penal institutions, and further holding that juveniles not amenable to ordinary treatment and rehabilitation at juvenile training schools must be provided appropriate facilities). The judgment in this matter was vacated and remanded by the Supreme Court with directions to dismiss the case as moot. Powell v. Long, 423 U.S. 808 (1975).

51. *See, e.g.*, MASS. ANN. LAWS ch. 119, § 39G (1975); N.M. STAT. ANN. §§ 13-14-31(C), (D) (Supp. 1973).

52. *See, e.g.*, CAL. WELF. & INSTNS. CODE §§ 602 (West Supp. 1976), 730, 777 (West 1972); D.C. CODE ANN. § 16-2320(d) (1973); N.C. GEN. STAT. § 7A-278(2) (1969).

53. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-68 (Supp. 1975); IDAHO CODE § 16-1814 (Cum. Supp. 1975); IND. ANN. STAT. CODE § 31-5-7-15 (Burns Cum. Supp. 1975).

54. *See, e.g.*, COLO. REV. STAT. ANN. § 19-8-105(2) (1973) (initial commitment is indeterminate up to two years, and court after hearing may extend commitment for additional period of not more than two years); CONN. GEN. STAT. ANN. § 17-69 (Supp. 1975) (same); N.Y. FAMILY CT. ACT § 756 (McKinney 1975) (initial placement for 18 months which can be extended after court hearings for successive one-year periods). *See* People *ex rel.* Schinitsky v. Cohen, 34 App. Div. 2d 1020, 312 N.Y.S.2d 1011 (2d Dept. 1970) (per curiam) (holding invalid *nunc pro tunc*

other jurisdictions, a PINS child is formally committed until his or her majority, with early release dependent upon the discretion of the juvenile court or the correctional agency.[55] Thus, depending on the jurisdiction and on the juvenile's age, a child may receive what amounts to a sentence of several years for running away from home.[56]

Although many PINS statutes are characterized by vague proscriptions, drastic sanctions can often be invoked for their violation. These two factors, among others, have combined to allow much misuse and abuse of the PINS jurisdiction. Despite attempts to abolish it, the PINS jurisdiction has displayed remarkable tenacity and longevity. Accordingly, methods should be developed to ensure at least that the court's awesome power is used sparingly and wisely. To that end, this article will, in Part II, outline the abuses and misuses of the PINS jurisdiction, and, in Part III, discuss the challenges that have been raised against it. In Part IV it explores the value of an adjudicatory hearing in combatting PINS abuses. Finally, Part V assesses the potential defenses and affirmative defenses[57]

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extension of a PINS child's placement; due to a clerical error, there was a ten-month delay in requesting the extension); People *ex rel.* Arthur F. v. Hill, 29 N.Y.2d 17, 271 N.E.2d 911, 323 N.Y.S.2d 426 (1971) (holding unconstitutional an extension of placement without notice and a hearing).

55. *See, e.g.*, TEX. FAM. CODE ANN. § 54.05(b) (1975) (until age 18); NEB. REV. STAT. § 43-210.02 (1974) (until age 20); R.I. GEN. LAWS ANN. § 14-1-6 (1969) (until age 21).

Children may be paroled from training schools prior to completion of the term stated in the commitment order. *See, e.g.*, COMMITTEE ON MENTAL HEALTH SERVICES INSIDE AND OUTSIDE THE FAMILY COURT IN THE CITY OF NEW YORK, JUVENILE JUSTICE CONFOUNDED: PRETENSIONS AND REALITIES OF TREATMENT SERVICES 36 (1972) [hereinafter JUVENILE JUSTICE CONFOUNDED]. However, after release they remain subject to parole supervision and may be returned to the training school for parole violations. *See* People *ex rel.* Silbert v. Cohen, 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (1971) (holding that parole of a delinquent may not be revoked without a hearing).

56. *See* E.S.G. v. State, 447 S.W.2d 225, 228 (Tex. Civ. App. 1969) (Cadena, J., dissenting), *cert. denied*, 398 U.S. 956 (1970) ("Under our statute a child of ten may be deprived of his liberty for a period of eleven years. Appellant here faces confinement for almost seven years").

57. In the criminal law context, the ultimate burden of persuasion beyond a reasonable doubt is on the state in the case of a "defense," whereas an "affirmative defense" must generally be proved by the defendant.

In those jurisdictions in which the standard of proof beyond a reasonable doubt is applicable in PINS proceedings, *see* note 122 *infra*, it is arguable that at least some of the defenses outlined in this article constitute material elements of the offense, the proof of which lies with the state. For example, the absence of contributory neglect by the parent, a defense described in the text at notes 256-83 *infra*, can be considered a material element of proof of the child's incorrigibility, the burden of which rests with the prosecution. *Cf.* Mullaney v. Wilbur, 421 U.S. 684 (1975), holding unconstitutional a Maine statute which required the defendant to prove, by a preponderance of the evidence, the mitigating factors which would reduce a murder charge to manslaughter.

that are arguably available, but have been only sporadically asserted in PINS actions.

II. Misuse and Abuse of the PINS Jurisdiction

The potential for misuse of the PINS jurisdiction is illustrated by the following case history.[58] A PINS petition was filed against a fourteen-year-old girl who had allegedly run away from her parents' home. Three months before being brought to court, the child, a product of "an unstable family situation,"[59] had attempted suicide by slashing her wrists. As a result of the PINS petition, she was committed for nine months to a state mental hospital, which delivered a diagnosis of "schizophrenic reaction, schizoaffective type."[60] Upon her release from the hospital, she was found to be a PINS, and custody was transferred from her parents to an aunt and uncle. Within a month, she threatened a fellow student and was sent home from school. After being advised by her aunt that she might be returned to a detention center as a result of this incident, the child attempted suicide by taking an overdose of prescription drugs because, as she later stated, "it would be better to be dead than to be returned to the juvenile hall."[61] Her probation officer filed a petition alleging that she was a delinquent because she attempted to do herself bodily harm, thereby violating the court's earlier PINS order.[62] At a judicial hearing, the child admitted the allegations of the petition, was found to be a delinquent, and was placed at the state training school. The appellate court reversed on the ground that there had been ineffective waivers of the right to counsel and the privilege against self-incrimination. The court further observed that a delinquency finding would be invalid because the suicide attempt was not "an act of disobedience" constituting a violation of a court order, but rather "a repeated manifestation of emotional disturbance."[63]

This case suggests at least two ways in which the PINS jurisdiction lends itself to misuse. First, the lower court classified a possibly

58. *In re* Butterfield, 253 Cal. App. 2d 794, 61 Cal. Rptr. 874 (1967).

59. 253 Cal. App. 2d at 795, 61 Cal. Rptr. at 875.

60. 253 Cal. App. 2d at 796, 61 Cal. Rptr. at 876.

61. 253 Cal. App. 2d at 796, 61 Cal. Rptr. at 876.

62. Under Cal. Welf. & Instns. Code § 602 (West Supp. 1976), a juvenile delinquent is defined as a child who violates the criminal law or an adjudicated PINS who "fails to obey any lawful order of the juvenile court . . . ." Only delinquents and PINS whose dispositions have been modified after violation of a court order may be committed to the state training school. Cal. Welf. & Instns. Code §§ 730, 731, 777 (West 1972). Other states have similar provisions. *See* text at notes 81-84 *infra*.

63. 253 Cal. App. 2d at 800, 61 Cal. Rptr. at 879.

neglected, emotionally disturbed girl as a PINS. Second, it later combined the dubious PINS dispositional order with the renewed manifestation of the same emotional disturbance to convert the child's status to that of a delinquent, and thus to incarcerate her with juveniles who had committed crimes.

In a substantial number of reported cases, children designated as PINS appear to be either neglected or the victims of parental inadequacies. Some opinions merely allude to such factors as prior findings of neglect or dependency,[64] an "unstable home situation,"[65] parental inability or unwillingness to care for the child[66] or "maintain a well-kept home,"[67] and juvenile misconduct that may have resulted from "traumatic situations initiated by the parent."[68] In other cases, the courts have been more explicit, noting, in various instances, that a child had suffered from "poor nutrition and physical care,"[69] that a "home was 'filthy with food, clothing and debris scattered about,' "[70] and that a child's running away had "its genesis in unwholesome and often bizarre home environment and family tensions."[71] Still more graphically, one court described a child "liv-

64. *See In re* Rita P., 12 Cal. App. 3d 1057, 95 Cal. Rptr. 430 (1970); *In re* Elmore, 382 F.2d 125, 128 n.21 (D.C. Cir. 1967). *See also In re* Henderson, 199 N.W.2d 111 (Iowa 1972) (simultaneous findings of PINS and dependency).

65. *In re* M.S., 129 N.J. Super. 61, 64, 322 A.2d 202, 204 (Essex County Ct. 1974). *See also In re* K.E.S., 134 Ga. App. 843, 844, 216 S.E.2d 670, 671 (1975) (delinquency proceeding based on violation of PINS probation order, involving "fifteen-year-old girl, the product of an unstable home environment including tragic family deaths and a mother who has been married six times").

66. *In re* Presley, 47 Ill. 2d 50, 52, 264 N.E.2d 177, 180 (1970) (combined PINS and neglect petition alleging that the child left home and that her parents forced her to do so). *See In re* Potter, 237 N.W.2d 461, 462 (Iowa 1976) ("Parents experienced poor health and were unable to provide adequate supervision and guidance"; child ran away from several foster homes, was subsequently diagnosed as suffering from a " 'manic-depressive reaction' " and was placed at state training school).

67. *In re* Mario, 65 Misc. 2d 708, 714, 317 N.Y.S.2d 659, 665 (Fam. Ct. 1971).

68. *In re* Henry G., 28 Cal. App. 3d 276, 285, 104 Cal. Rptr. 585, 591 (1972).

69. *In re* L.L., 39 Cal. App. 3d 205, 207, 114 Cal. Rptr. 11, 13 (1974). Based on a dependency order entered against the child's parents, the trial judge committed a chronically depressed child to the state mental hospital; his alleged PINS conduct consisted of running away from the hospital and claiming he was not insane. 39 Cal. App. 3d at 208 n.3, 114 Cal. Rptr. at 13 n.3. The appellate court granted the writ of habeas corpus, holding that the juvenile court act did not authorize placement in a state mental hospital and ordering that the child's court record be expunged. *See* note 74 *infra* and accompanying text. *See also In re* Michael E., 123 Cal. Rptr. 103, 107, 538 P.2d 231, 234-35 (1975) (*citing* the *L.L.* case with approval).

70. *In re* Paul H., 47 App. Div. 2d 853, 854, 365 N.Y.S.2d 900, 902 (2d Dept. 1975) (per curiam) (child alleged to be truant; father who was unable to supervise his son adequately accepted most of the blame for son's truancy).

71. *In re* Arlene H., 38 App. Div. 2d 570, 571, 328 N.Y.S.2d 251, 253 (2d Dept. 1971). These "family tensions" included a mother with a history of mental instabil-

ing in rooms . . . reeking with the effluvia of neglect," whose parents were "inebriates" and whose mother "encouraged [him] in truancy."[72]

In some of these cases, the neglected child has been adjudicated a PINS as a result of deficiencies in the state's placement procedures or facilities. For example, one neglected child ran away from a temporary shelter in which he had been kept for over a year, during which time the state could find no suitable foster home or facility.[73] In another case, a dependent child, diagnosed as suffering from a "depressive reaction, chronic," and placed in a state mental hospital, fled the institution because he allegedly had "been tied to his bed . . . for many weeks," and had "been administered . . . anti-psychotic and tranquilizing drugs against his will."[74] Another dependent child was brought to court under a PINS petition for refusing to go to a foster home, the third in which she had been placed in as many years.[75]

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ity and shifting of the child's custody between separated parents for "seven or eight years." 38 App. Div. 2d at 571, 328 N.Y.S.2d at 252.

72. *In re* Lloyd, 33 App. Div. 2d 385, 386, 308 N.Y.S.2d 419, 420 (1st Dept. 1970).

73. *In re* Lloyd, 33 App. Div. 2d 385, 308 N.Y.S.2d 419 (1st Dept. 1970). *Cf. In re* Dennis M., 370 N.Y.S.2d 458, 82 Misc. 2d 802 (Fam. Ct. 1975), describing a retarded schizophrenic child who was adjudicated neglected, removed from his home, and was subsequently held in temporary shelters for four and a half years, because of an inability to find longterm placement for him. "The evidence elicited in this case shows that Dennis is not the only child for whom the Commissioner has been unable to provide longterm care within a reasonable period of time." 370 N.Y.S.2d at 462, 82 Misc. 2d at 806. *See also* Robinson v. Leahy, 401 F. Supp. 1027 (N.D. Ill. 1975) (describing an adolescent child committed to the Department of Corrections on the basis of theft from his father; boy had been in residential centers and mental health facilities almost continuously since the age of three, when he was adjudicated a ward of court); JUVENILE JUSTICE CONFOUNDED, *supra* note 55, at 60-64 (discussion of 95 PINS children placed with the Commissioner of Social Services; after nine months, 41 per cent remained in temporary shelter care and 25 per cent had been returned to court because they could not be maintained in the shelter).

74. *In re* L.L., 39 Cal. App. 3d 205, 208, 209, 114 Cal. Rptr. 11, 13, 14 (1974). *See also* JUVENILE JUSTICE CONFOUNDED, *supra* note 55, at 67-87 (describing the paucity of services available for mentally disturbed children in New York City and in state hospitals); Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974) (three-judge court) (holding as constitutional on their face, New York laws regarding religious matching of children placed with private institutions; plaintiffs claimed these statutory provisions discriminated against children who were Black and Protestant).

75. *In re* Rita P., 12 Cal. App. 3d 1057, 95 Cal. Rptr. 430 (1970). *See In re* Aline D., 14 Cal. 3d 557, 536 P.2d 65, 121 Cal. Rptr. 816 (1975), in which the court reversed the commitment of a delinquent to the state training school, on the ground that there was evidence that such placement would not be beneficial to the child. It is unclear whether the girl was adjudicated a delinquent on the basis of criminal acts or for violation of a court order. She was 16 years old, had an I.Q. of 67, and had been rejected by her mother and previously placed in many treatment facilities without success. The court remanded for reconsideration, stating that if it was determined that the child would not benefit from the training school and "if no appropriate alternative placement exists at that time, then the proceedings should be dismissed." 14 Cal. 3d at 566, 536 P.2d at 70, 121 Cal. Rptr. at 821.

Observations of the juvenile court at the trial level[76] suggest that both tactical and psychological factors may influence juvenile court personnel to proceed against a child as a PINS, rather than against a parent for neglect. There is less hesitancy in prosecuting a neglect case if the child is young and the parent's misconduct overt, because no one in the juvenile court system is apt to attach blame to a small child or to identify with a parent who has evidenced aberrant behavior.[77] Moreover, proving neglect under these circumstances presents minimal difficulty.

However, when older children are involved, judges and other court personnel are more likely to favor PINS proceedings. One possible explanation for this preference is that the individuals who comprise juvenile court systems tend to identify with a parent who has charged a teen-ager with misbehavior, since these individuals may also be struggling with adolescent rebelliousness in their own families. Another factor is the comparative difficulty of proving parental neglect of older adolescents, which is often more subtle and passive than neglect of younger children.[78] If the parents secure attorneys who vigorously defend against the neglect charges, the proceedings will certainly be protracted, and the petition may eventually be dismissed. Juvenile court personnel will thus prefer PINS proceedings, which in all likelihood will be speedily concluded by admissions of "guilt" from the children.[79] As an additional incentive, the PINS finding

76. Studies of juvenile cases at the trial level confirm that the foregoing appellate decisions, notes 64-75 *supra* and accompanying text, involving the adjudication of neglected children as PINS are not isolated instances or aberrations. *See* THE PINS CHILD, A PLETHORA OF PROBLEMS, *supra* note 27, at 30-31, 33-36 (pointing out that a majority of children alleged to be PINS had inadequate or neglectful parents); YALE PINS STUDY, *supra* note 33, at 1392 n.67 (concluding that 50 per cent of the PINS children considered in the study were in fact neglected); E. WAKIN, *supra* note 29, at 12-13, 69 (34-state study by the National Council of Jewish Women produced examples such as the following: a 15-year-old girl kept in detention because her father was charged with raping her; a 14-year-old boy brought to court by mentally disturbed parents for failure to take a bath).

77. *See, e.g., In re* Fred S., 66 Misc. 2d 683, 322 N.Y.S.2d 170 (Fam. Ct. 1971) (involving serious physical injuries to infants).

78. *Cf.* State v. Lance, 23 Utah 2d 407, 413, 464 P.2d 395, 399 (1970) ("Since the species of . . . [the mother's] neglect involved rather subtle psychological factors —interference with the adequate social, educational, and psychological adjustment of her children—justice requires that she be informed of the condition and be advised of appropriate remedial action. There was not a scintilla of evidence that the home itself 'cannot or will not correct the evils which exist' ") (footnote omitted).

79. *See* YALE PINS STUDY, *supra* note 33, at 1393; *cf. In re* Mario, 65 Misc. 2d 708, 317 N.Y.S.2d 659 (Fam. Ct. 1971), involving the placement of a PINS child in the state training school. The court acknowledged generalized passive neglect on the mother's part. A neglect petition originally filed at the judge's direction was subsequently withdrawn because the mother was participating in counseling services.

may permit placement in the state training schools if private facilities are unavailable.[80]

Another misuse of the PINS jurisdiction, which may also stem from a desire to increase placement options, is created by statutes that define delinquency to include the violation of probation or any other court order by a PINS child.[81] In one case, a fifteen-year-old Illinois girl was declared a PINS for "frequently absenting herself from home" and placed on probation. After she breached probation rules by playing truant, she was adjudicated a delinquent pursuant to a statute that forbade violation of "a lawful court [probation] order," and was committed to the state training school.[82] Other courts have reached similar results.[83] In contrast, a Colorado court construed a delinquency statute that forbade violation of a "lawful order of court" so as not to include violation of a term of probation by a PINS child. The court asserted that "it would be contrary to the obvious legislative intent to allow a child to be committed to an institution for juvenile delinquents where the only acts alleged were those which were not, in and of themselves, grounds for an adjudication of delinquency . . . ."[84]

A similar statutory mechanism for adjudicating PINS children as delinquents on the basis of noncriminal behavior is to charge the child

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80. *See* notes 281-83 *infra* and accompanying text.

81. *See, e.g.*, CAL. WELF. & INSTNS. CODE § 602 (West Supp. 1976); GA. CODE ANN. § 24A-401(e)(2) (Supp. 1973); MONT. REV. CODES ANN. § 10-1203(12)(b) (Cum. Supp. 1975).

82. *In re* Sekeres, 48 Ill. 2d 431, 270 N.E.2d 7 (1971), *cert. denied*, 404 U.S. 1008 (1972). *See* ILL. ANN. STAT. ch. 37, § 702-2 (Smith-Hurd 1972). The Illinois statute has since been amended so as to preclude such a result. *See* ILL. ANN. STAT. ch. 37, § 702-3(d) (Smith-Hurd 1972).

83. *See, e.g.*, Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972); *In re* Presley, 47 Ill. 2d 50, 264 N.E.2d 177 (1970); *In re* Dowell, 17 N.C. App. 134, 193 S.E.2d 302 (1972). *See also In re* William S., 10 Cal. App. 3d 944, 89 Cal. Rptr. 685 (1970) (PINS child's threat to violate court order held insufficient to constitute delinquency).

84. *In re* D.R., 29 Colo. App. 525, ___, 487 P.2d 824, 826 (1971). *See In re* Denise C., 45 Cal. App. 3d 761, 119 Cal. Rptr. 735 (1975) (per curiam) (holding that an adjudicated PINS cannot be made a delinquent and committed to the state training school on the basis of running away from a placement facility, unless the order of placement specifically directs the child not to do so, and unless there is a determination that the previous disposition completely failed to rehabilitate the child); *In re* A.L.H., 517 S.W.2d 652 (Tex. Civ. App. 1974) (construing a statutory provision so as to prohibit training school placement of a PINS child who had violated probation by further PINS conduct). The Texas Family Code has since been amended in a manner that permits training school placement of runaway and truant PINS who violate probation orders, provided such facilities do not also house delinquents. *See* TEX. FAM. CODE ANN. §§ 51.03(a)(2), 51.03(b)(4), (Supp. 1975), TEX. CIV. STAT. art. 5143d, § 12(b) (Supp. 1975), *amending* TEX. FAM. CODE ANN. § 51.03 (1975). A similar result was achieved in New York by a process of judicial and administrative action. *Compare In re* Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973), *with In re* Lavette M., 35 N.Y.2d 136, 316 N.E.2d 314, 359 N.Y.S.2d 20 (1974), *discussed in* note 134 *infra*.

who runs away from a state PINS facility with the "crime" of escape. Courts upholding such delinquency adjudications reason that custody is essential for a child's treatment and rehabilitation and that this technique prevents children from flouting the judicial process.[85]

The results reached in these cases presuppose that a troubled, runaway child who is placed in a nonsecure PINS facility will not flee again, or that, in doing so, he or she realizes "the effect that flight will have on the exercise of judicial authority."[86] Besides reflecting unrealistic expectations of child behavior, these statutes and decisions also appear to rest on the theory that the only way to deal effectively with children who repeatedly misbehave is to use force and secure detention.[87]

A third significant abuse of the PINS jurisdiction is its utilization

85. *In re* M.S., 129 N.J. Super. 61, 322 A.2d 202 (Essex County Ct. 1974), *affd.*, 139 N.J. Super. 503, 354 A.2d 646 (1976); *see* L.A.M. v. State, 547 P.2d 827 (Alas. 1976) (Applying variant of the "crime" of escape theory, court held PINS child in contempt and adjudicated her a delinquent on basis of her having repeatedly run away from a nonsecure facility in violation of court order). *Cf.* State v. Williams, 301 S.2d 327, 328 (La. 1974) (holding that juvenile who fled from state training school could not be prosecuted as an adult for the crime of escape since juvenile's commitment is not tantamount to imprisonment and commitment not a sentence); *but see* Le Vier v. State, 214 Kan. 287, 520 P.2d 1325 (1974) (affirming habitual offender sentence where one of the underlying felonies was defendant's escape from the state training school when he was 15 years old; by statute, the legislature had classified such escapes as felonies and as not within the juvenile court's jurisdiction).

86. *In re* M.S., 129 N.J. Super. 61, 69, 322 A.2d 202, 206 (Essex County Ct. 1974), *affd.*, 139 N.J. Super. 503, 354 A.2d 646 (1976). The court in the *M.S.* case reached this result even though the New Jersey statute defining delinquency did not include violation of a court order. *See* N.J. STAT. ANN. § 2A: 4-44 (Cum. Supp. 1975). By treating departure from a juvenile facility as the crime of escape, the court in effect overruled the legislature's determination that disobedience of a court order (in this case an order remanding the child to a shelter) did not constitute delinquency. In coming to this conclusion, the New Jersey court mistakenly relied on Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972), which dealt with the Illinois juvenile statute that, unlike New Jersey's statute, specifically included violation of a lawful court order within the definition of delinquency. 129 N.J. Super. at 75, 322 A.2d at 210 (1974).

87. *See In re* M.S., 129 N.J. Super. 61, 74, 322 A.2d 202, 209, 210 (Essex County Ct. 1974), *affd.*, 139 N.J. Super. 503, 354 A.2d 646 (1976). *Cf.* A Minor Boy v. State, 89 Nev. 564, 566, 517 P.2d 183, 185 (1973) (juvenile arrested for drinking beer, taken to county jail where he was forcibly held down while his long hair was cut; when put in a cell, he destroyed furnishing, for which he was adjudicated a delinquent and placed at training school; appellate court reversed, stating that destruction of furnishing "flowed from [state's] failure to observe the requirements of law"); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.) (three-judge court), *affd. mem.*, 423 U.S. 907 (1975) (upholding state statute permitting corporal punishment of school children without parental consent, provided that it is not used initially to punish misbehavior and that the child is placed on notice as to conduct which will warrant whipping); N.Y. Times, Oct. 24, 1975, at 25, col. 1 (late city ed.) (describing recently discontinued practice in Butte, Montana schools of locking retarded children in a coffin-sized box as punishment for violence).

as a substitute for a charge of delinquency where the alleged criminal act cannot be proved. In cases where there is insufficient proof of drug-related crimes,[88] receipt of stolen goods,[89] vehicular homicide,[90] reckless driving,[91] assault,[92] burglary,[93] criminal mischief,[94] or sex offenses,[95] trial courts have instead made PINS findings.[96] Perhaps

88. *See, e.g., In re* William S., 10 Cal. App. 3d 944, 949, 89 Cal. Rptr. 685, 688-89 (1970) (affirming PINS adjudication even though there was a failure of proof with respect to one of the underlying charges that was criminal in nature; child's presence in a home where marijuana was found was sufficient proof of his bad associations); *In re* Daniel R., 274 Cal. App. 2d 749, 753 n.3, 79 Cal. Rptr. 247, 250 n.3 (1969) (reversing on ground of insufficient corroboration PINS finding based on allegation that child admitted selling marijuana, but suggesting that "[t]he evidence would support findings that the minor had in his possession a substantial sum of money . . . and that he associated with persons engaged in the narcotics traffic, which latter fact, not being an act defined as a felony, might be shown by his admissions"); *In re* Dudley, 310 S.2d 919, 920 (Miss. 1975) (dictum) (in reversing delinquency adjudication on other grounds, court observed that, although "being under the influence" of marijuana was not a crime under Mississippi law, "such conduct, when properly alleged and upon adequate proof," might afford a basis for a PINS adjudication). *See* cases *discussed in* note 215 *infra*, in which PINS findings were affirmed, even though there was insufficient evidence to prove possession of narcotics or narcotics paraphernalia, or there was no criminal statute prohibiting use of particular drug.

89. *See, e.g., In re* Simon, 295 S.2d 473, 477 (La. App. 1974) (trial court dismissed delinquency petition on the basis of determination that child did not know property in question was stolen, but proceeded to make PINS finding, which was reversed on appeal).

90. *See, e.g., In re* Williams, 241 Ore. 207, 405 P.2d 371 (1965) (trial court dismissed delinquency charge based on vehicular homicide because there was no evidence of recklessness, as required by state statute, but made PINS finding based on negligence, which appellate court reversed).

91. *See, e.g., In re* Dahlberg, 184 Neb. 303, 167 N.W.2d 190 (1969) (affirming PINS finding that child deported himself so as to injure or endanger others, on the basis of evidence of malicious damage to a car and of assault).

92. *See, e.g., In re* Mark V., 34 App. Div. 2d 1101, 312 N.Y.S.2d 983 (4th Dept. 1970) (per curiam) (reversing PINS adjudication because there was only an isolated incident of misconduct and the evidence was insufficient to support a finding of delinquency based on a simple assault).

93. *See, e.g., In re* Raymond O., 31 N.Y.2d 730, 290 N.E.2d 145, 338 N.Y.S.2d 105 (1972) (per curiam) (reversing a PINS adjudication based on a single act of criminal trespass, where the trial court had dismissed a delinquency petition alleging burglary. The appellate court stated that it would have been permissible for the trial judge to find respondent guilty of a lesser included offense of burglary, but that dismissal of the petition without such a finding deprived the court of jurisdiction).

94. *Cf. In re* Helman, 230 Pa. Super. 484, 327 A.2d 163 (1974) (children charged with criminal mischief and adjudicated delinquents based on smoking cigars at scene of fire; reversed on the ground that evidence showed that they were at most guilty of criminal trespass, which was a summary offense and not a crime).

95. *See In re* Gladys R., 1 Cal. 3d 855, 865-66, 464 P.2d 127, 135-36, 83 Cal. Rptr. 671, 679-80 (1970) (dictum) (reversing delinquency adjudication against 12-year-old girl for child molesting because, *inter alia*, the trial court failed to consider whether she appreciated the wrongfulness of her act; court suggested, however, that, if there was no such proof, a PINS finding would nonetheless be appropriate); *accord, In re* Michael B., 44 Cal. App. 3d 445, 118 Cal. Rptr. 685 (1975); *cf.* Sorrels v. Steele, 506 P.2d 942, 943-44 (Okla. Crim. App. 1973).

96. *See* THE PINS CHILD, A PLETHORA OF PROBLEMS, *supra* note 27, at 45-47

the most startling example of this abuse of the PINS jurisdiction involved two girls, ages eleven and thirteen, who had allegedly engaged in sexual activities and drug abuse with adult men and women.[97] The adults were arrested and charged with statutory rape and sexual perversion, and the children were identified by the police as victims. Subsequently, the girls were charged not only as delinquents, but also as PINS. The evidence introduced at the adjudicatory hearing in the juvenile court included statements that the girls gave to the police in connection with the investigation of the adults and the testimony of one of the girls, who, over her attorney's objection, had been called by the prosecutor at her own hearing. The trial judge made PINS findings against the children and placed them in the custody of the Department of Juvenile Services.[98] With one judge dissenting, the Court of Appeals of Maryland affirmed the decision and held, on the basis of a strained interpretation of *In re Gault*,[99] that because this was a PINS proceeding in which the children were

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(finding that 16 per cent of the PINS children sampled allegedly used drugs and over one third were alleged to have stolen or to have committed assault); YALE PINS STUDY, *supra* note 33, at 1393-94 n.78, n.81 (indicating that 15-20 per cent of the PINS cases studied alleged criminal behavior and that such cases were processed as PINS to avoid burden of proof and evidentiary standards applicable in delinquency actions).

Indeed, in one case, even though the legislature had mandated that the crime of statutory rape could be committed only by a person over 18, the court found that, while a 16-year-old juvenile could not be adjudicated delinquent on the basis of consensual intercourse with a 15-year-old girl, he came within the statutory definition of "an unruly boy." *In re* J.P., 32 Ohio Misc. 5, 287 N.E.2d 926, 61 Ohio Op. 2d 24 (1972); *accord, In re* M.K., 493 S.W.2d 686 (Mo. App. 1973). In another action, the court made a PINS adjudication that a 14-year-old boy was " 'in danger of leading an idle, dissolute, lewd or immoral life' by reason of the fact that he had committed . . . manslaughter and assault with a deadly weapon." *In re* Donnie H., 5 Cal. App. 3d 781, 791, 85 Cal. Rptr. 359, 365 (1970). This finding was entered after the juvenile court had dismissed a delinquency petition based on the same charges because the only supporting evidence was an illegally obtained confession. The appellate court reversed the PINS finding. 5 Cal. App. 3d at 788-91, 85 Cal. Rptr. at 364-65.

Section 601 of the California Code was amended effective Sept. 30, 1975, to eliminate juvenile court jurisdiction over minors who are "in danger of leading an idle, dissolute, lewd or immoral life." *See* CAL. WELF. & INSTNS. CODE § 601 (West Supp. 1976), *amending* CAL. WELF. & INSTNS. CODE § 601 (West 1972). While the statutory deletion would preclude a court from making a PINS adjudication similar to that of *In re* Donnie H., amended section 601(a) retains the "beyond control of the parent" provision. Accordingly, the prosecutor could argue that any child who commits manslaughter, or any other criminal act, is beyond the control of his or her parent or guardian.

97. *In re* Spalding, 273 Md. 690, 332 A.2d 246 (1975).

98. One of the girls was released after an intermediate appellate decision, and thus did not appeal to the state's highest court. *In re* Carter, 20 Md. App. 633, 318 A.2d 269 (1974).

99. 387 U.S. 1 (1967). The case is discussed in notes 117 and 118 *infra* and accompanying text.

not charged with criminal acts, the privilege against self-incrimination was inapplicable.[100]

Use of the PINS jurisdiction in this manner is a device[101] for stripping the child of constitutional rights guaranteed to delinquents under the *Gault* decision.[102] It permits a PINS finding to be used as a "lesser included offense" of juvenile delinquency when there is a failure of proof in the underlying criminal charges.[103] The effect is to circumvent the constitutional requirement of proof beyond a reasonable doubt in delinquency cases,[104] because some states permit a lesser standard of proof in PINS cases,[105] and because minimal evidence of misbehavior can often satisfy vague PINS definitional statutes. If the child is in fact innocent of the underlying criminal charges, but is nonetheless adjudicated a PINS on the basis of the same allegations, the juvenile is punished for something he or she did not do.[106] If, on the other hand, the juvenile is guilty of a crime, a PINS finding may result in placement of this child with PINS children who have never committed criminal acts.[107]

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100. The court's opinion makes it clear that the acts charged could have supported a delinquency adjudication; the court noted, however, that, since the appellant "was, in fact, a victim, the charge of delinquency in the petition must be regarded as simply an unexplained anomaly." 273 Md. at 708, 332 A.2d at 256. The court went on to observe that, "with the elimination of the delinquency 'charge' . . . the claims of alleged 'criminal' conduct, on which it was premised, vanished with it." 273 Md. at 709, 332 A.2d at 256-57. The dissenting judge pointed out that, "since criminal acts may be the basis for 'CINS' proceedings, and since an adjudication that a child is in need of supervision may lead to confinement in an institution for as long a period as an adjudication that he is delinquent, virtually all juvenile proceedings could be labelled 'CINS' by the authorities without significant consequences. Thus by using the right labels, *i.e.*, 'victim' and 'CINS', the police and juvenile authorities will be able to bypass the requirements laid down by the Supreme Court in Gault." 273 Md. at 716, 332 A.2d at 260.

101. The device is rationalized in terms of the "best interests" doctrine. *See* note 157 *infra* and accompanying text.

102. *See In re* Donnie H., 5 Cal. App. 3d 781, 790, 85 Cal. Rptr. 359, 364-65 (1970); *In re* Spalding, 273 Md. 690, 716, 332 A.2d 246, 259-60 (1975) (dissenting opinion). In *In re* Gault, 387 U.S. 1, 19-29 (1967), and *In re* Winship, 397 U.S. 358, 366-68 (1970), the Supreme Court rejected the "best interests" doctrine as a basis for denying fundamental constitutional rights, in adjudicatory hearings, to juveniles accused of delinquent acts.

103. *See In re* Simon, 295 S.2d 473, 481 (La. App. 1974) (dissenting opinion).

104. *In re* Winship, 397 U.S. 358, 366-68 (1970).

105. *See* note 122 *infra* and accompanying text.

106. *See, e.g., In re* Donnie H., 5 Cal. App. 3d 781, 85 Cal. Rptr. 359 (1970) (serious question as to whether death was brought about by the accused child or by the victim's parents); *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952) (unclear whether respondent was one of the eight or nine boys who assaulted the victim).

107. *See* notes 274-83 *infra* and accompanying text for a discussion of the appropriateness of commingling PINS children with neglected children as contrasted with the appropriateness of commingling those juveniles guilty of criminal offenses with PINS children.

Commingling of PINS and delinquent children also results from delinquency findings based merely on noncriminal violations of a court order or on escapes from PINS facilities. A legislative or judicial conclusion that such mixing is harmful to the PINS children is effectively thwarted by the use of legal fictions, however benevolent their purpose, to interchange PINS and delinquents.[108]

Another abuse is the frequent invocation of the PINS jurisdiction to punish trivial misconduct.[109] At best, these cases are a waste of the court's time and resources. At worst, the prosecution of some of these cases appears to have been racially motivated.[110] Even where the alleged misbehavior is not trivial, the court has been used to enforce parental moral codes; in one such instance a mother sought to compel her daughter to consent to an abortion.[111] Other parents utilize the PINS jurisdiction as a means of divesting themselves of the responsibility of caring for their children.[112]

Perhaps the most alarming characteristic of the PINS jurisdiction is its disproportionate application to the children of the poor,[113] the

108. *Cf. In re* Jeanette P., 34 App. Div. 2d 661, 310 N.Y.S.2d 125, 127 (2d Dept. 1970) (per curiam) ("The creation of the additional [PINS] designation . . . represents enlightened legislative recognition of the difference between youngsters who commit criminal acts and those who merely misbehave. . . . However, the distinction becomes useless where, as here, the treatment accorded the one must be identical to that accorded the other solely because no other adequate alternative has been provided").

109. *See* text at notes 220-23 *infra*, discussing the de minimis defense. *Cf.* People v. Allen, 22 N.Y.2d 465, 470, 239 N.E.2d 879, 881, 293 N.Y.S.2d 280, 282 (1968) (in construing a "Wayward Minor" criminal statute, court notes that "particular care should be taken that the charge has substance based on acts which point to grave danger to youth and is not merely a compliance with form; and that the conduct inquired into is seriously harmful and not merely an exaggerated manifestation of intra-family parent-child conflict").

110. *See* M.S.K. v. State, 131 Ga. App. 1, 205 S.E.2d 59 (1974); Young v. State, 120 Ga. App. 605, 171 S.E.2d 756 (1969); *In re* McMillan, 21 N.C. App. 712, 205 S.E.2d 541 (1974); *see also In re* Green, 203 S.2d 470 (Miss. 1967), *cert. denied*, 392 U.S. 945 (1968); *In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), *affd. sub nom.* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (prosecution of Black children based on participation in civil rights demonstration).

111. *See In re* Smith, 16 Md. App. 209, 295 A.2d 238 (1972) (per curiam) (affirming PINS finding and reversing order compelling abortion). *See also In re* M.K.R., 515 S.W.2d 467 (Mo. 1974) (reversing juvenile court order authorizing sterilization of mentally retarded girl); *cf.* Gesicki v. Oswald, 336 F. Supp. 371, 375 n.5 (S.D.N.Y. 1971) (three-judge court), *affd. mem.*, 406 U.S. 913 (1972) (holding New York's "Wayward Minor" criminal statute unconstitutional; one of the plaintiffs was prosecuted after refusing to permit her out-of-wedlock child to be adopted and another was proceeded against for defying her social worker's instruction to remain in a foster home).

112. *See, e.g., In re* Presley, 47 Ill. 2d 50, 52, 57, 264 N.E.2d 177, 178, 180 (1970).

113. *See* Thomas & Fitch, *An Inquiry into the Association Between Respondents' Personal Characteristics and Juvenile Court Disposition*, 17 WM. & MARY L. REV. 61, 77, 78, 83 (1975), in which the authors generally conclude, on the basis of a

economic class least able to effectuate improvements in the quality of juvenile court services and treatment facilities. Due to the accessibility of alternative options for treatment, such as private schools or private psychiatric care, the affluent parent of a misbehaving child will not likely seek the services of the juvenile court. Any child from a wealthy family brought to court by a third party (*i.e.*, the police or school officials) will probably be screened out by the intake adjustment procedure because of the available parental resources. If the case is not diverted from the judicial process at this stage, affluent parents can offer treatment alternatives far superior to those of the state and thus obtain a favorable judicial disposition.[114]

Because parents are the primary enforcers in PINS cases, and because most PINS statutes describe the condemned conduct in vague terms relating to loss of parental control, a disparate group of individuals has been vested with awesome prosecutorial discretion.[115] Thus, whether a child will be brought to court depends less upon his

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statistical analysis of 1522 Virginia cases, that the harshest juvenile court sanctions are applied to Blacks, school dropouts, children from broken homes, status offenders brought to court by their parents, and juveniles from low socioeconomic backgrounds.

114. For an interesting description of how wealthy parents can, by effective trial and appellate litigation, prevent their child's institutionalization, see *In re* J.F., 17 Ohio Misc. 40, 242 N.E.2d 604, 46 Ohio Op. 2d 49 (1968). As a result of protracted appeals, the child, who was found guilty of arson, outgrew the court's jurisdiction, having spent a total of one hour in detention during the interim.

115. In E.A.S. v. State, 291 S.2d 61 (Fla. App. 1974), the mother of a 15-year-old girl called the police because her child refused to come out of the closet. When the girl declined to leave the closet to talk to two police officers, they dragged her out and, as a result, she allegedly kicked and scratched them. She was charged with resisting arrest and was adjudicated a delinquent. On appeal, with one dissent and one special concurrence, the adjudication was reversed on the grounds that there was no justification for the arrest and that in fact no arrest had been made.

This case illustrates the ease with which the PINS jurisdiction can be abused, for it enabled the mother to summon the police to intervene in what was at most a family squabble. As the concurring judge stated, "I feel that . . . [the police] properly responded to the call by the child's mother and that they were within the bonds [*sic*] of their duties and responsibilities in attempting to induce the child to leave the closet and her room." 291 S.2d at 63. The girl spent almost one year in a juvenile detention center pending appeal. 291 S.2d at 63. *Cf.* Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975) (three-judge district court), *prob. juris. noted*, 44 U.S.L.W. 3531 (U.S. March 22, 1976) (No. 75-1064), in which the descriptions of children "voluntarily" committed by their parents to mental institutions bear a striking resemblance to many PINS children in juvenile court. Examples include commitment of a child who "interfered with the routine of the household and disturbed family members" and commitment to prevent breakup of the parents' marriage. "Class members have also been committed to mental hospitals for running away, robbing a gas station, stealing in general, chasing and striking a girl, arson, delinquent behavior in general, truancy . . . ." 402 F. Supp. at 1044. *See also* J.L. v. Parham, 44 U.S.L.W. 2421, 2422 (M.D. Ga., Feb. 26, 1976) (three-judge district court) (the court noted that, "Unfortunately, the evidence indicates that there are some parents who . . . look upon mental hospitals as a 'dumping ground.' ")

or her conduct than upon the fortuitous circumstance of parental tolerance and maturity.[116]

III. Challenges to the PINS Jurisdiction

In view of the abuses that derive from the vagueness of many PINS statutes and from the extensive discretion granted to parents and courts, it is not surprising that a variety of attacks have been lodged against the PINS jursidiction.

Although Supreme Court decisions during the past decade have established significant due process safeguards for allegedly delinquent children, that tribunal has not yet determined whether PINS have similar rights. *In re Gault*,[117] decided in 1967, held that, during the adjudicatory phase of the proceedings, a youth who was charged with "delinquency" and subject to commitment to a state institution was entitled to notice of the charges, and was possessed of the right to counsel, the right to confrontation and cross-examination, and the privilege against self-incrimination.[118] Three years later, in *In re*

116. Rena Uviller, presently Director of the Juvenile Rights Division of the American Civil Liberties Union and previously a trial and appellate attorney for the Juvenile Rights Division of the New York City Legal Aid Society, has observed that PINS children placed in the state training school remain incarcerated for much longer periods than delinquents who commit serious crimes, because many parents of PINS children oppose their return to the home. Ms. Uviller advocates abolition of the PINS jurisdiction and the use of a graduated sentencing system for delinquents that reflects the gravity of the crime. *See* Letter to the N.Y. Times, Feb. 16, 1975, § 6 (Magazine), at 22, col. 1 (late city ed.). *See also* N.Y. Times, Nov. 1, 1975, at 1, col. 1 (late city ed.), describing a 15-year-old boy adjudicated delinquent for the murder (beating with a golf club) of a young girl; he was committed to a minimum security rehabilitation center for 18 months, but officials said that in all likelihood, he "will serve only six to eight months." The article noted that the boy had no prior criminal record and "lived with parents who cared about him." *Id.* *Compare* Lollis v. New York State Dept. of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970), in which a 14-year-old PINS girl was committed to the state training school, released to her mother after ten months, and within two months, was recommitted on her mother's complaint. A few days later, the girl was implicated in a fight and confined for two weeks in an isolation "strip" room. The child's mother was subsequently charged with neglect of the girl's seven siblings.

117. 387 U.S. 1 (1967).

118. Despite the far-reaching nature of its opinion, the Court did limit the applicability of its holding: "We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." 387 U.S. at 13. Some courts have seized upon this language to support rulings that *Gault* is inapplicable to PINS proceedings, since the latter do not involve criminal law violations. *See, e.g.*, State v. Henderson, 199 N.W.2d 111 (Iowa 1972); *In re* Spalding, 273 Md. 690, 332 A.2d 246 (1975). Such reliance seems misplaced, however, because: (1) although Gerald Gault was adjudicated a "delinquent" on the basis of his having made obscene telephone calls, at the time he was tried, the Arizona Juvenile Code defined a delinquent child to include not only one who committed a criminal-law violation, but also one who habitually deported himself so as to endanger his morals or health,

Winship,[119] the Court held that proof beyond a reasonable doubt was constitutionally required to establish guilt in the adjudicatory stage of delinquency actions, but it specifically deferred decision as to whether that requirement was applicable in PINS cases.[120] Although persuasive arguments can be made in favor of the extension of these rights to PINS proceedings, at least in those jurisdictions in which PINS may be committed to state institutions,[121] there are conflicts among the state court decisions on this question.[122]

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see 387 U.S. at 9 n.6; (2) the Arizona juvenile court judge found Gault guilty under both sections of the above statute, a fact specifically noted by the Supreme Court, 387 U.S. at 8 n.5, 9, 34 n.54; (3) the *Gault* court was aware of the few recently enacted state laws establishing separate classifications for status offenders and knew that many "delinquents" were committed to state institutions for waywardness, 387 U.S. at 24 n.31, 27; and (4) as in the case of Gerald Gault, many PINS actions involve conduct which is also criminal, *see, e.g., In re* Spalding, 273 Md. 690, 332 A.2d 246 (1975). Moreover, in *Gault*, when the Court wished to make its decision applicable only to the adjudicatory phase of juvenile proceedings, it did so by specifically excluding the pre- and post-adjudicatory phases. 387 U.S. at 13, 31 n.48. Finally, the Court's awareness of the distinction between PINS and delinquency proceedings is illustrated by its decision in *In re* Winship, 397 U.S. 358 (1970), in which PINS cases were explicitly excluded from the holding. *See* notes 119-20 *infra* and accompanying text. This exclusion might be considered gratuitous, inasmuch as the New York statute involved established separate PINS and delinquency categories, and Samuel Winship was charged only with delinquency, *i.e.* the criminal act of larceny. 397 U.S. at 359-60; *see* N.Y. FAMILY CT. ACT §§ 712(a), (b) (McKinney 1963), *as amended*, N.Y. FAMILY CT. ACT §§ 712(a), (b) (McKinney 1975).

However, an additional basis for doubting the applicability of *Gault* to PINS cases may have been created by the Supreme Court's recent decision in Middendorf v. Henry, 44 U.S.L.W. 4401 (U.S. March 24, 1976) (Nos. 74-175, 74-5176), which held that there is no constitutional right to counsel in summary courts-martial. The Court cited *Gault* and emphasized the noncriminal nature of the charges against the servicemen, stating that "most of the plaintiffs were charged solely with 'unauthorized absence,' an offense which has no common-law counterpart and which carries little popular opprobrium." 44 U.S.L.W. at 4405. The case is distinguishable though, since the maximum punishment in a summary courtmartial proceeding is much shorter than the usual maximum sanctions applicable in PINS cases.

119. 397 U.S. 358 (1970).

120. 397 U.S. at 359 n.1. *In re* Ivan V., 407 U.S. 203 (1972) (per curiam) held that *Winship* was completely retroactive. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court determined that there was no right to trial by jury in the adjudicatory stage of juvenile delinquency proceedings. Breed v. Jones, 421 U.S. 519 (1975), the Court's most recent decision in the juvenile area, held that the double jeopardy clause applied to delinquency proceedings in juvenile court and prohibited retrial of an adjudicated delinquent in adult criminal court for the same underlying act. The Supreme Court has agreed to review the decision of a three-judge district court in Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), that held unconstitutional state statutory provisions authorizing "voluntary" commitment of children to mental hospitals upon parental application, on the ground that due process safeguards were inadequate. Kremens v. Bartley, 44 U.S.L.W. 3531 (U.S. March 22, 1976) (No. 75-1064).

121. *See* note 118 *supra*. The possibility of confinement was one of the reasons given by the Court for its decisions in both *Gault* and *Winship*. *See In re* Winship, 397 U.S. 358, 367, 368 (1970); *In re* Gault, 387 U.S. 1, 13, 27 (1967).

122. For courts that have declined to apply *Gault* and *Winship* in PINS cases, see State v. Henderson, 199 N.W.2d 111 (Iowa 1972) (in which a majority of the

In contrast to efforts to assure fundamental fairness in delinquency proceedings by means of procedural due process challenges, there have also been broad, frontal attacks on the very power of the state to assert jurisdiction over children on the basis of noncriminal status offenses. Specifically, litigants have argued: (1) that PINS legislation imposes sanctions on the basis of a status rather than any specific acts and thus constitutes cruel and unusual punishment;[123] (2) that

court appears to hold that the standard of proof beyond a reasonable doubt is inapplicable in PINS proceedings, but in which the court appears evenly divided as to the applicability of the privilege against self-incrimination in PINS cases); *In re* Potter, 237 N.W.2d 461 (Iowa 1976) (reasonable doubt standard inapplicable in PINS proceedings); *In re* Spalding, 273 Md. 690, 332 A.2d 246 (1975) (holding fifth amendment privilege against self-incrimination inapplicable to PINS proceedings); *In re* Walker, 282 N.C. 28, 191 S.E.2d 702 (1972) (right to counsel does not apply unless, at the time of the PINS adjudication, incarceration in a state institution is a possible disposition, even though a subsequent violation of the probation order issued pursuant to that original adjudication could, and in fact did, lead to commitment to a state facility). *See also In re* Donnie H., 5 Cal. App. 3d 781, 85 Cal. Rptr. 359 (1970) (holding that an illegally obtained confession of manslaughter which could not be used in a delinquency proceeding was also inadmissible in a PINS proceeding based on the same underlying criminal charge, but declining to rule on whether an illegally obtained confession of a status offense would be admissible in a PINS proceeding); Warner v. State, 254 Ind. 209, 214, 258 N.E.2d 860, 863-64 (1970) (dictum) (reasonable doubt standard inapplicable in PINS cases); *In re* Dahlberg, 184 Neb. 303, 167 N.W.2d 190 (1969) (pre-*Winship* decision declining to determine appropriate standard of proof in PINS case because, on de novo review, court found there was proof beyond a reasonable doubt); *In re* Geiger, 184 Neb. 581, 169 N.W.2d 431 (1969) (on de novo review, divided court found there was proof beyond a reasonable doubt and thus no necessity to determine appropriate standard of proof).

In contrast, the West Virginia Supreme Court of Appeals has held that PINS children have the right to counsel. *See* State *ex rel.* Wilson v. Bambrick, 195 S.E.2d 721 (W. Va. 1973). The New York courts have held that the reasonable doubt standard applies in PINS cases. *See, e.g., In re* Iris R., 33 N.Y.2d 987, 309 N.E.2d 140, 353 N.Y.S.2d 743 (1974) (per curiam); *In re* Richard S., 27 N.Y.2d 802, 264 N.E.2d 353, 315 N.Y.S.2d 861 (1970).

Some statutes require proof beyond a reasonable doubt in PINS cases. *See, e.g.,* COLO. REV. STAT. ANN. §§ 19-1-103(1), 104(1)(b) (1974); MASS. ANN. LAWS ch. 119, § 39(b) (1975); TEX. FAM. CODE ANN. §§ 51.17, 54.03(f) (1975). *But see, e.g.,* D.C. CODE ANN. § 16-2317(c)(2) (Supp. 1973) (preponderance standard of proof); MD. CTS. & JUD. PRO. CODE ANN. § 3-819(d) (Supp. 1975) (preponderance standard of proof); TENN. CODE ANN. § 37-229(c) (Cum. Supp. 1974) (clear and convincing standard of proof).

Some authorities doubt the value of a stricter standard of proof where PINS statutes include vague proscriptions, such as leading an immoral or dissolute life, because virtually any evidence will arguably be sufficient to sustain the burden. *See* Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), at 11-12, *vacated,* 416 U.S. 918 (1974); Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court,* 82 YALE L.J. 745, 756 n.71 (1973).

Many states have held the double jeopardy clause applicable in delinquency proceedings. *See* cases *cited in* District of Columbia v. I.P., 335 A.2d 224, 228 n.7 (D.C. App. 1975). The court in the *I.P.* case stated, however, "We express no opinion on the applicability of the double jeopardy clause to other juvenile adjudications such as 'child in need of supervision' or 'neglected child' cases." 335 A.2d at 229 n.9.

123. *See* Blondheim v. State, 84 Wash. 2d 874, 880, 529 P.2d 1096, 1101 (1975) (eighth amendment argument rejected); Commonwealth v. Brasher, 359 Mass. 550,

PINS statutes deprive children of liberty without due process, since there is no evidence that PINS children will subsequently commit criminal acts (thus placing their conduct beyond the state's police power) or that the welfare of PINS children is being promoted by the state's rehabilitative efforts in its capacity as *parens patriae*;[124] and (3) that, in sanctioning children for acts that would not be penalized if committed by an adult, the PINS statutes violate equal protection.[125] These arguments have been almost uniformly rejected by the courts.[126]

Due process challenges against PINS statutes have also been based on grounds of vagueness and overbreadth. One argument is that amorphous prohibitions such as those against incorrigibility or leading an idle or dissolute life fail to give notice of the proscribed conduct. Another objection is that these statutes constitute an improper delegation of legislative authority to private parties and public officials, who are given virtually unlimited discretion to determine which children will be brought to court and what types of misbehavior will form the basis for PINS charges; moreover, the breadth of the

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—, 270 N.E.2d 389, 394-95 (1971) (argument that "stubbornness in a child 'may be symptomatic of a psychological defect' " rejected); *cf.* Mercado v. Rockefeller, 363 F. Supp. 489, 492 (S.D.N.Y. 1973), *revd. in part*, 502 F.2d 666 (2d Cir. 1974), *cert. denied sub nom.* Mercado v. Carey, 420 U.S. 925 (1975) (district court dismissed complaint for failure to exhaust state remedies, and thus did not pass on plaintiff's eighth amendment argument; appeal to Second Circuit did not contest trial court's exhaustion ruling with respect to this claim; court of appeals decision *discussed in* note 130 *infra*); Gesicki v. Oswald, 336 F. Supp. 371, 376 (S.D.N.Y. 1971) (three-judge district court), *affd. mem.*, 406 U.S. 913 (1972) (holding unconstitutional New York "Wayward Minor" statute, which was part of the state's criminal statutory scheme rather than its juvenile law). *See also* R.R. v. State, 448 S.W.2d 187, 190 (Tex. Civ. App. 1969), *appeal dismissed sub nom.* Rios v. Texas, 400 U.S. 808 (1970) (holding that commitment of delinquent to training school for a period longer than the maximum for adults who committed the same criminal act did not constitute cruel and unusual punishment).

124. *See, e.g.*, S.S. v. State, 299 A.2d 560, 568 (Me. 1973); Commonwealth v. Brasher, 359 Mass. 550, —, 270 N.E.2d 389, 393-94 (1971); *In re* Morin, 95 N.H. 518, 520, 68 A.2d 668, 670 (1949) (rejecting arguments that PINS statutes exceeded the state's police power or its power as *parens patriae*).

125. *See* S.S. v. State, 299 A.2d 560, 570 (Me. 1973) (rejecting equal protection argument). *Cf.* Vann v. Scott, 467 F.2d 1235, 1238-39 (7th Cir. 1972); People v. Sekeres, 48 Ill. 2d 431, 435, 270 N.E.2d 7, 9 (1971), *cert. denied*, 404 U.S. 1008 (1972) (no equal protection violation where state adjudicates as delinquents PINS who have disobeyed court orders). *See also* Smith v. State, 444 S.W.2d 941 (Tex. Civ. App. 1969) (commitment of delinquent to training school for a period longer than the maximum for adults committing the same criminal act did not violate equal protection).

126. *See* cases *cited in* notes 123-25 *supra*. *See also, Ex parte* Crouse, 4 Whart. 9 (Pa. 1838). *But see* People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 8 Am. R. 645 (1870). For an historical discussion of the juvenile court movement in the United States and early case law, see Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

statutory definitions may authorize intrusion upon constitutionally protected behavior.[127] Vagueness also permits arbitrary application of the statute by trial judges, with little opportunity for effective appellate review. Still, although a few courts have accepted such arguments and have struck down portions of PINS statutes,[128] most have rejected challenges based on vagueness and overbreadth,[129] and

127. *See, e.g.*, Note, *supra* note 122, at 746-48; Note, *Juvenile Court Jurisdiction over "Immoral" Youth in California*, 24 STAN. L. REV. 568, 580-81 (1972). *See generally* Todd, *Vagueness Doctrine in the Federal Courts*, 26 STAN. L. REV. 855, 857-58 (1974). Professor Todd's observation that vague statutory proscriptions can effectively undercut procedural due process guarantees seems particularly applicable to PINS cases. For example, if a child is accused of leading an immoral life, the right to notice of the "charges," as a means of preparing a proper defense, is of questionable value, since the finder of fact has virtually unfettered discretion to determine what conduct constitutes violation of the statute. This statutory vagueness may account in part for the overwhelming number of PINS admissions of guilt even in jurisdictions granting PINS the same procedural due process rights as delinquents. *See* note 160 *infra* and accompanying text.

It is difficult for appellate courts to limit the applicability of vague PINS statutes by reversals in individual cases, because the variety of misbehavior arguably falling within the scope of the statute is almost infinite. Indeed, in Gesicki v. Oswald, 336 F. Supp. 371, (S.D.N.Y. 1971) (three-judge court), *affd. mem.*, 406 U.S. 913 (1972), which held New York's criminal "Wayward Minor" statute unconstitutionally vague, the court specifically noted that, since state court reversals "illustrate only a scant number of instances in which the [state] Court of Appeals believed the facts *established* the juveniles were not included in the universe of 'morally depraved' children, they do not appreciably diminish the vagueness of the class of remaining cases that *are* included." (emphasis in original). 336 F. Supp. at 374 n.4.

128. *See* Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) (three-judge court), *vacated*, 416 U.S. 918 (1974); *In re* Brinkley, No. J. 1365-73 (D.C. Super. Ct., June 14, 1973), *revd. sub nom.* District of Columbia v. B.J.R., 332 A.2d 58 (D.C. App.), *cert. denied*, 421 U.S. 1016 (1975); *In re* Doe, 54 Hawaii 647, 513 P.2d 1385 (1973) (curfew ordinance invalidated). *Cf.* State v. Hodges, 254 Ore. 21, 457 P.2d 491 (1969) (criminal statutory prohibition against contributing to the delinquency of a minor unconstitutionally vague as an improper delegation of legislative authority); *In re* Oman, 254 Ore. 59, 457 P.2d 496 (1969) (applying *Hodges* decision in a delinquency proceeding); State v. Flinn, 208 S.E.2d 538, 549 (W. Va. 1974) (portions of PINS statute unconstitutionally vague in the context of a criminal prosecution for contributing to the delinquency of a minor). *See also* Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975) (finding the provisions of an Iowa parent-child termination statute unconstitutional on vagueness, substantive and procedural due process grounds).

129. *See, e.g., In re* Napier, 532 P.2d 423 (Okla. 1975); Blondheim v. State, 84 Wash. 2d 874, 529 P.2d 1096 (1975); *In re* Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972) (dictum); Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389 (1971); E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970); Sheehan v. Scott, 520 F.2d 825 (7th Cir. 1975) (affirming dismissal of action challenging constitutionality of subsection of Illinois PINS statute dealing with habitual truancy; rejecting claims of vagueness, overbreadth, and invasion of privacy, the court concluded that no substantial constitutional question was raised); *cf.* Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975) (holding that, with the exception of a few words and phrases, juvenile curfew ordinance was not unconstitutionally vague; court also rejected first amendment, equal protection, and substantive due process arguments). In response to E.S.G. v. State and the dissenting opinion therein of Justice Cadena, 447 S.W.2d 225, 227 (Tex. Civ. App. 1969), the Texas legislature enacted a highly specific PINS

the Supreme Court has thus far declined to decide the issue.[130]

By far the most successful challenges in the PINS area have been rearguard attacks on institutional placements in individual cases,[131] and federal court class actions to compel adequate treatment and to prohibit inhumane punishments and conditions in the institutions

statute. TEX. FAM. CODE ANN. § 51.03(b) (Supp. 1975), *amending*, TEX. FAM. CODE ANN. § 51.03(b) (1973); *see* Dawson, *Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code*, 5 TEXAS TECH. L. REV. 509, 519 (1974). Thus, even if accepted, arguments based on vagueness and overbreadth would not result in the demise of the PINS jurisdiction, since such statutory infirmities are curable.

130. In *In re* Negron, 409 U.S. 1052 (1972), the Supreme Court dismissed for want of a substantial federal question an appeal that challenged the New York PINS statute on a number of grounds, including vagueness. Thereafter, the Second Circuit held that this summary disposition constituted a decision on the merits of the vagueness issue and that it was binding on lower federal courts. *See* Mercado v. Rockefeller, 502 F.2d 666, 672-73 (2d Cir. 1974), *cert. denied, sub nom.* Mercado v. Carey, 420 U.S. 925 (1975). As noted by the Second Circuit, however, the Supreme Court has acknowledged that summary affirmances, and presumably other summary dispositions, " 'are not of the same precedental value as would be an opinion of this Court treating the question on the merits.' " 502 F.2d at 673, *quoting* Edelman v. Jordan, 415 U.S. 651, 671 (1974). *But see* McCarthy v. Philadelphia Civil Service Commn., 44 U.S.L.W. 3530 (U.S. March 22, 1976) (per curiam) (No. 75-783).

Gonzalez v. Mailliard, No. 50424, (N.D. Cal., Feb. 9, 1971) (three-judge court) held void for vagueness and permanently enjoined enforcement of that portion of the California PINS statute directed at children "who from any cause . . . [are] in danger of leading an idle, dissolute, lewd or immoral life." The suit was a class action brought by nine children who were arrested pursuant to the above provision and against whom charges were dropped prior to the district court's decision. An appeal to the Supreme Court was docketed on April 9, 1971, 39 U.S.L.W. 3500 (U.S.) (No. 70-120). Three years later, in Mailliard v. Gonzalez, 416 U.S. 918 (1974), the Court vacated the judgment below and remanded the case "for reconsideration of the injunction in light of" Steffel v. Thompson, 415 U.S. 452 (1974), and Zwickler v. Koota, 389 U.S. 241 (1967), thus raising the questions of whether injunctive relief was improvidently granted and whether the case was moot.

In State v. Mattiello, 4 Conn. Cir. 55, 225 A.2d 507, *appeal denied*, 154 Conn. 737, 225 A.2d 201 (1966), the Connecticut court rejected a vagueness challenge to that state's PINS statute. After noting probable jurisdiction, 391 U.S. 963 (1968), the Supreme Court subsequently dismissed for want of a properly presented federal question, presumably because there was an unappealed concurrent sentence under an analogous criminal statute, Mattiello v. State, 395 U.S. 209 (1969).

The New York Wayward Minor Act was declared unconstitutional on vagueness and eighth amendment grounds by a three-judge district court in Gesicki v. Oswald, 336 F. Supp. 365 (S.D.N.Y. 1971). The decision was affirmed summarily by the Supreme Court, 406 U.S. 913 (1972). Because the statute was part of the state's criminal law dealing with older adolescents and permitted incarceration in adult correctional facilities, the decision has limited precedental value for PINS cases.

131. *See, e.g.*, People v. Grieve, 131 Ill. App. 2d 1078, 267 N.E.2d 19 (1971); *In re* John H., 48 App. Div. 2d 879, 880, 369 N.Y.S.2d 196, 198 (2d Dept. 1975) (per curiam) (reversing disposition because "placement in a State Training School is a drastic course of action that should, where there are suitable options, only be used as a last resort"); *In re* Jeanette M., 40 App. Div. 2d 977, 338 N.Y.S.2d 177 (2d Dept. 1972) (per curiam); *In re* Stanley M., 39 App. Div. 2d 746, 332 N.Y.S.2d 125 (2d Dept. 1972) (per curiam); *In re* Jeanette P., 34 App. Div. 2d 661, 662, 310 N.Y.S.2d 125, 127 (2d Dept. 1970) (per curiam) (reversing training school placement where "the record contains positive evidence that [such] placement . . . would be harmful").

themselves.[132] Some state legislatures have also initiated reforms in the dispositional area by prohibiting the institutionalization of PINS altogether,[133] or by barring their placement in secure facilities or in facilities that house delinquents.[134]

132. *See* Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (class action brought on behalf of boys aged 12-18 committed to the Indiana training school, one third of whom were PINS; court prohibited unsupervised, routine beating with thick paddles and the intramuscular administration of tranquilizers unless such tranquilizers specifically authorized by a physician; it also ruled that the juveniles had a right to individualized care and rehabilitative treatment); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (E.D. Tex. 1974), *revd. on other grounds*, Civil No. 74-3436 (5th Cir., July 21, 1976) (class action brought on behalf of all juvenile delinquents, including PINS, incarcerated in the Texas training schools; the court found, *inter alia*, that the following practices were in use: persistent and sometimes bizarre physical abuse of juveniles by correctional officers, use of tear gas, extended solitary confinement for trivial offenses, racial segregation, punishment for speaking Spanish, censorship of mail, punishment of children who fell asleep during the day even if they were taking sleep-inducing medication, and severe limitations on family visitation; the judge enjoined or restricted the above practices, ordered the closing of two facilities, and directed that a treatment program for all children be established); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) (class action brought on behalf of boys incarcerated in the Rhode Island training school as a result of "voluntary" commitment by parents, detention pending trial, or adjudication as a delinquent, PINS, dependent or neglected child; court found these children were subjected to prolonged isolation in cold, dark cells, transfers to adult prison, lack of proper medical care, education for only one and a half hours per day, and deprivation of food for a 16-hour period each day); Lollis v. New York State Dept. of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970), 328 F. Supp. 1115 (S.D.N.Y. 1971) (action to enjoin prolonged isolation of children, including PINS, committed to the New York training school).

133. *See* ALAS. STAT. § 47.10.080(j) (1975), *as interpreted in In re* E.M.D., 490 P.2d 658 (Alas. 1971). *But see* L.A.M. v. State, 547 P.2d 827 (Alas. 1976) (PINS child who violates court orders by repeatedly running away may be found guilty of criminal contempt and institutionalized in a secure facility which also houses less violent delinquents).

134. See ILL. ANN. STAT. ch. 37, § 705-2(1)(b) (Smith-Hurd Supp. 1975); MASS. ANN. LAWS ch. 119, § 39G (1975); N.M. STAT. ANN. § 13-14-31(D) (Supp. 1973); S.D. COMP. LAWS § 26-8-40.1 (Supp. 1974).

See In re Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973) (prohibiting commitment of PINS children together with delinquents); *In re* Lavette M., 35 N.Y.2d 136, 316 N.E.2d 314, 359 N.Y.S.2d 20 (1974) (allowing placement of PINS children in state training school in which no delinquents were housed). Following the decision in *In re Lavette M.*, a federal court class action was brought challenging the use of state training schools for PINS, contending that such placements violate the eighth amendment, the equal protection clause, the rights of travel and association, and the right to treatment. *See* McRedmond v. Wilson, 533 F.2d 757 (2d Cir. 1976) (reversing district court's abstention ruling, remanding for determination of the right to treatment issue, and finding plaintiffs' other constitutional claims too insubstantial to warrant convening of three-judge district court).

A recent study indicates that administrative officials have subverted the legislative distinction between PINS and delinquents and that, notwithstanding the establishment of separate training schools for PINS children in New York, there has been no substantial improvement in their care and treatment, which differ little from that given delinquents. "[T]he newly reorganized training schools are separate but equal in all significant respects." INSTITUTE OF JUDICIAL ADMINISTRATION, THE ELLERY C. DECISION: A CASE STUDY OF JUDICIAL REGULATION OF JUVENILE STATUS OFFENDERS 42-47, 52-62 (1975).

Despite these procedural and dispositional reforms, many critics continue to question the wisdom of maintaining juvenile court jurisdiction over PINS cases.[135] In their view, a court's PINS jurisdiction is both a vehicle for parents to coerce their children into adopting rigid codes of behavior and a dumping ground for the children of neglectful or unstable parents who wish to divest themselves of custodial responsibility.[136] Another criticism is that the court offers the illusion of assistance to indigent parents who cannot afford private schooling or psychiatric treatment for their problem children, but in reality provides junior jails and a paucity of other "resources."[137] By stigmatizing these children as being "in need of supervision" and by institutionalizing them, the court reinforces a child's negative self-image and may convert a rebellious adolescent, who could conceivably

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The Texas Family Code, effective September 1, 1973, arguably prohibited absolutely the placement of truant and runaway PINS in state training schools. *See* TEX. FAM. CODE ANN. §§ 51.03(a)(2), 51.03(b)(4), 54.05(g) (1973). *Compare* Dawson, *supra* note 129, at 517-20 (concluding that runaway and truant PINS could be placed at the state training school if such an adjudicated PINS child had violated probation for the third time) *with* Steele, *The Treatment of Juveniles Under the Family Code: An Overview*, 5 TEXAS TECH. L. REV. 589, 590 (1974) (concluding that "[a] child can never be committed because of truancy or runaway").

By amendments effective September 1, 1975, however, Texas law permits placement of truant and runaway PINS who subsequently violate court orders in designated state training schools that may not house delinquents. All other adjudicated PINS children (*i.e.*, those who commit minor misdemeanors or who drive while intoxicated) who subsequently violate probation may be committed to training schools together with delinquents. TEX. FAM. CODE ANN. §§ 51.03(a)(2), 51.03(b)(4) (Supp. 1975), TEX. CIV. STAT. art. 5143d, § 12(b) (Supp. 1975).

135. *See, e.g.*, TASK FORCE REPORT, *supra* note 8, at 25-27; WHITE HOUSE CONFERENCE ON CHILDREN, REPORT TO THE PRESIDENT 381-82 (1970); Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42 (1970); McNulty, *The Right To Be Left Alone*, 11 AM. CRIM. L. REV. 141, 149-50 (1972); Stiller & Elder, *PINS —A Concept in Need of Supervision*, 12 AM. CRIM. L. REV. 33, 59-60 (1974); YALE PINS STUDY, *supra* note 33, at 1405-07; E. WAKIN, *supra* note 29, at 127-29; BOARD OF DIRECTORS, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *Jurisdiction Over Status Offenses Should Be Removed from the Juvenile Court*, 21 CRIME & DELINQ. 97 (1975); N.Y. Times, Nov. 10, 1975, Editorial, at 32, col. 2 (late city ed.).

Most recently, the Juvenile Justice Standards Project, chaired by Chief Judge Irving Kaufman of the United States Court of Appeals for the Second Circuit and cosponsored by the Institute of Judicial Administration and the American Bar Association, has recommended, *inter alia*, that the PINS jurisdiction be abolished. This recommendation will be submitted for adoption at the American Bar Association convention in the summer of 1976. Inasmuch as this proposal is the outgrowth of a comprehensive five-year study of juvenile law by a highly prestigious body, there may be a greater possibility that it will influence state legislatures. *See* Kaufman, *Of Juvenile Justice and Injustice*, 66 A.B.A.J. 730, 731, 733 (1976); N.Y.L.J., Dec. 1, 1975, at 1, col. 3; N.Y. Times, Nov. 30, 1975, at 1, col. 1 (late city ed.).

136. *See* TASK FORCE REPORT, *supra* note 8, at 27; E. WAKIN, *supra* note 29, at 128; Bazelon, *supra* note 135, at 43.

137. *See* YALE PINS STUDY, *supra* note 33, at 1399-1401; BOARD OF DIRECTORS, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 135; cases *cited in* note 132 *supra*.

outgrow the tendency toward misbehavior, into a young criminal.[138] To the extent that PINS children are either delinquent or neglected, they should be so treated by the court; attempting to classify other children as PINS and to provide services for them squanders the court's limited resources, which should be conserved for those who truly require judicial intervention.[139] On the basis of such reasoning, commentators have suggested either partial or complete elimination of juvenile court jurisdiction over status offenses.[140]

In the face of these repeated criticisms, the PINS jurisdiction survives in every state and in the District of Columbia. Although they are not always fully articulated, the reasons given for retention of the PINS jurisdiction are several: PINS behavior is an accurate basis for predicting delinquent conduct, and court jurisdiction allows timely action that may prevent future criminal acts;[141] while many PINS children may in fact be neglected, proof is difficult to secure, and a PINS finding is an alternative means of enabling the court to help the child;[142] at least some PINS children engage in life-threatening behavior, making rapid judicial intervention imperative;[143] the court should be available as a means of reinforcing parental authority and as a last resort when parent-child conflicts become irreconcilable, for even the child's mere awareness of the court's existence may prevent more serious overt misconduct.[144] Finally, even those who acknowledge

138. *See* TASK FORCE REPORT, *supra* note 8, at 26; YALE PINS STUDY, *supra* note 33, at 1401; Bazelon, *supra* note 135, at 43 (1970); Gough, *The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. LOUIS U. L.J. 182, 191 (1971); *cf.* Martarella v. Kelley, 349 F. Supp. 575, 590-93 (S.D.N.Y. 1972).

139. *See* YALE PINS STUDY, *supra* note 33, at 1391-94; Stiller & Elder, *supra* note 135, at 59-60.

140. *Compare* TASK FORCE REPORT, *supra* note 8, at 26-27 (suggesting that, if retained, the PINS jurisdiction be limited to misconduct which "carries a real risk of long-term harm to the child"), *with* YALE PINS STUDY, *supra* note 33, at 1406-07 (advocating elimination of ungovernability jurisdiction, since "the failure to save a few unfortunate youths must be measured against the law's known and unavoidable negative consequences"). *See also* Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L.Q. 499, 508 (1963) (discussing the possibility of substituting a "no-fault" custody proceeding in place of PINS and delinquency actions).

141. *See* S.S. v. State, 299 A.2d 560, 570 (Me. 1973); *cf.* Sheridan, *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?*, 31 FED. PROBATION 26, 30 (1967); *but see* E. SCHUR, RADICAL NON-INTERVENTION 46, 50, 51 (1973).

142. *Cf.* YALE PINS STUDY, *supra* note 33, at 1392-93.

143. TASK FORCE REPORT, *supra* note 8, at 26-27; *cf.* Martin & Snyder, *Jurisdiction over Status Offenses Should Not Be Removed from the Juvenile Court*, 22 CRIME & DELINQ. 44 (1976).

144. *See* District of Columbia v. B.J.R., 332 A.2d 58, 61, 62 (D.C. App. 1975); Commonwealth v. Brasher, 359 Mass. 550, ___, 270 N.E.2d 389, 394 (1971); *but see* Bazelon, *supra* note 135, at 44.

systemic deficiencies claim that they can be remedied by an infusion of resources.[145]

Judicial reluctance to sustain constitutional attacks on PINS statutes and legislative disinclination to repeal such laws may well stem from a lack of awareness of the nature of PINS cases that make up the bulk of juvenile court dockets. The overwhelming number of guilty pleas or admissions to PINS charges and the dearth of appeals based on fully developed records effectively obscure the inherent deficiencies of the PINS jurisdiction.[146] Since so few PINS cases are appealed, appellate courts may consider obvious injustices to be aberrations that can be easily remedied by individual reversals,[147] and may thus believe that drastic institutional reform through constitutional invalidation of PINS statutes is unnecessary.[148] Only by the emergence of an adversary system[149] in which charges are closely scrutinized, facts vigorously contested, all available defenses asserted, and appeals taken in large numbers, can appellate courts and legislatures be fully apprised of the endemic ills of the PINS jurisdiction.[150]

145. *See* S.S. v. State, 299 A.2d 560, 570 (Me. 1973) ("We think no reasonable man would shoot a sound horse because his saddle stirrup needs repairs"); YALE PINS STUDY, *supra* note 33, at 1402 n.117.

146. "By and large, the juvenile court system has operated without appellate surveillance." TASK FORCE REPORT, *supra* note 8, at 40. The paucity of appeals stems from the infrequency of contested PINS cases at the trial level. *See* YALE PINS STUDY, *supra* note 33, at 1394 n.80; Stiller & Elder, *supra* note 135, at 39 n.35.

147. *See, e.g.*, Sorrels v. Steele, 506 P.2d 942 (Okla. 1973). In reversing an adjudication against a 14-year-old girl based on her having stayed out all night and having had unlawful sexual intercourse, the court noted that the trial judge, *inter alia*, refused to give notice of the charges, permitted wholesale introduction of hearsay evidence, and refused to appoint appellate counsel to represent the child. The appellate court observed: "Neither the record, nor the response filed by the [trial] court reflects any logical basis for the orders entered." 506 P.2d at 945.

148. *Cf.* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). In rejecting appellants' argument that jury trials were necessary to prevent prejudgment by juvenile court judges, the court said that such a contention ignored "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." 403 U.S. at 550.

149. *See In re* Henderson, 199 N.W.2d 111, 115 (Iowa 1972) (court noted disapprovingly that the child's attorney had joined in the state's brief instead of filing a separate independent brief on behalf of his client). *See also* Sorrels v. Steele, 506 P.2d 942, 945 (Okla. 1973) (child's attorney prosecuted an appeal although not appointed by the trial court, and the appellate court stated that "[c]ounsel for appellant is to be commended for his effort and persistence in pursuing justice in the best tradition of his profession"). *Cf.* Wagstaff v. Superior Court, 535 P.2d 1220 (Alas. 1975) (in mandamus action by child's attorney, court ruled that where interests of parent and juvenile in PINS case are adverse, child's right to attorney of her own choice rather than lawyer designated by her parents should have been respected).

150. *See generally* A. BLUMBERG, CRIMINAL JUSTICE (1967), discussing the "twilight of the adversary system" in adult criminal courts, *id.* at 26-31, and pointing out the manner in which the "ameliorative-therapeutic" techniques of the "socialized" juvenile courts have been appropriated by the criminal courts to induce guilty pleas,

IV. Value of an Adjudicatory Hearing in PINS Cases

The potential of the adjudicatory hearing for combatting the abuses of the PINS jurisdiction has not yet been fully realized. Although there has been a systematic development of legal defenses for the adjudicatory phase of delinquency cases, there has been no comparable growth in the context of PINS proceedings. There are several related reasons for this disparity.

First, because delinquency actions are based on penal law violations,[151] attorneys naturally perceived delinquency cases as junior criminal trials. Consequently, they readily applied the traditional defenses and procedural protections of adult criminal trials to juvenile court delinquency proceedings.[152] In contrast, the allegations in most PINS cases concern intra-family and school conflicts that have no apparent relationship to the criminal law.[153] Furthermore, there

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id. at 170-79, so that "much of the system's potential danger is hidden by secret negotiations." *Id.* at 179.

151. *See* notes 12-13 *supra* and accompanying text, illustrating how some delinquency statutes include noncriminal acts within their definitions, and some PINS statutory definitions include criminal acts.

152. *See, e.g.*, Thomas v. United States, 370 F.2d 621 (9th Cir. 1967) (corroboration of extrajudicial confession); Smith v. State, 525 P.2d 1251 (Okla. 1974) (corroboration of accomplice testimony); *In re* Roderick P., 7 Cal. 3d 801, 810-11, 500 P.2d 1, 7, 103 Cal. Rptr. 425, 430-31 (1972) (*Miranda* rule); *In re* L.B., 99 N.J. Super. 589, 596, 240 A.2d 709, 713 (Union County Ct. 1968) (search and seizure); *In re* Holley, 107 R.I. 615, 268 A.2d 723 (1970) (Wade-Gilbert lineup rule).

153. Typical PINS charges such as truancy, incorrigibility, and running away from home have no criminal-law counterparts. Thus, it may be contended that traditional defenses and due process guarantees available in criminal cases (*e.g.*, exclusion of illegally obtained evidence or confessions, duress, self-defense) are inapplicable in PINS proceedings. There are, however, situations where such defenses can and should be used. For instance, if a girl runs away from home because she has been raped by her step-father, *see, e.g.*, E. Wakin, *supra* note 29, at 12, even though he is not subject to criminal prosecution or conviction because there is a stringent corroboration requirement for rape in the particular jurisdiction, she should be able to assert self-defense or necessity as defenses to PINS charges. In states which classify runaways as PINS only when they have left home "without just cause," *e.g.*, Conn. Gen. Stat. Ann. § 17-53(b) (Supp. 1975), the defense is statutory; but even in jurisdictions whose PINS statutes contain no such qualification with respect to running away from home, *e.g.*, Miss. Code Ann. § 43-21-5(g) (Cum. Supp. 1975); Nev. Rev. Stat. § 62.040-1(b)(3) (1973), the rape should be available as a traditional criminal-law defense or as a basis for asserting that the child is neglected rather than a PINS. *See, e.g.*, Miss. Code Ann. §§ 43-21-5(h), (i) (Cum. Supp. 1975); Nev. Rev. Stat. §§ 62.040-1(a)(2), (3) (1973). *See* text at notes 256-83 *infra* concerning the defense of "contributory neglect."

Similarly, other situations may call for assertion of criminal law defenses. *See, e.g., In re* Henry G., 28 Cal. App. 3d 276, 281, 285, 104 Cal. Rptr. 585, 588, 591 (1972) (child alleged that he "acted involuntarily in self-defense" when his mother pulled his hair); *In re* D.L.S., 520 S.W.2d 442, 444 (Tex. Civ. App. 1975) (revocation of probation proceeding in which child asserted defense of duress against charge of running away from home; court assumed arguendo that the defense was available, but found it unsupported by the evidence).

is no obvious analogue in matters of civil law that could be easily adapted to provide defenses in ungovernability proceedings.[154]

The criminal law exclusionary rules present special problems in PINS cases. For example, if a boy told his mother that he truanted, this "confession" would presumably be admissible in a PINS action, since there is no custodial interrogation by an agent of the state. *Cf. In re* B.D.A., 524 S.W.2d 550 (Tex. Civ. App. 1975) (rejecting juvenile's claim that confession of car theft to mother was inadmissible in delinquency proceeding). An argument could be made, however, that parental testimony disclosing the child's confidences should be excluded because it contravenes the purpose of the juvenile code, which is "to preserve and strengthen the minor's family ties whenever possible." CAL. WELF. & INSTNS. CODE § 502 (West Supp. 1976).

If the *Gault* decision applies in PINS cases, see note 118 *supra*, a similar admission made to a police officer who has taken the child into custody would be excluded if obtained without the appropriate *Miranda* warnings. *In re* Gault, 387 U.S. 1, 42-57 (1967). Because *Gault* stressed the difficulties involved in obtaining waivers of the privilege against self-incrimination from children and focused on the "presence and competence of parents" as a factor in determining the validity of the waiver, 387 U.S. at 55-56, some states in delinquency cases have required that both parent and child be advised of the child's right and consent to the waiver. *See, e.g., In re* Aaron D., 30 App. Div. 2d 183, 185, 290 N.Y.S.2d 935, 937 (1st Dept. 1968). In the typical PINS case, where the interests of parent and child are adverse, such parental consent is not helpful in determining the validity of the waiver. Therefore, in such cases, the presence of the child's attorney appears to be necessary to assure the voluntariness of the waiver. *See In re* Gault, 387 U.S. 1, 55-56 (1967); *see also In re* F.G., 511 S.W.2d 370 (Tex. Civ. App. 1974) (construing statute, that was also applicable in PINS cases, so as to require concurrence of child's attorney in waiver of privilege against self-incrimination in delinquency proceeding; statute subsequently amended to eliminate this requirement, *see* TEX. FAM. CODE ANN. § 51.09 (Supp. 1975)).

Similar problems arise with respect to exclusion of illegally obtained evidence. *See, e.g.*, Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970) (holding search and seizure in delinquency case by school principal acting *in loco parentis* was not within the protection of the fourth amendment; "[t]he same procedure employed by the principal, if used by the boy's father, would not violate security of appellant under the Fourth Amendment"); *In re* Christopher W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); *In re* J.M.A., 542 P.2d 170 (Alas. 1975) (in delinquency case, foster parent held not agent of the state for fourth amendment purposes).

154. While a superficial analogy may be drawn between PINS cases and custody matters, since each is concerned with placement of the child, the differences between the two are substantial. In the latter case, two or more parties, who are usually relatives of the child, vie for his or her physical custody. In many PINS proceedings, petitioning parents or guardians are seeking to divest themselves of custodial duties, and the end result may be either institutionalization or placement of the child with strangers. Furthermore, in PINS cases jurisdiction is based on misconduct of the child, while in custody actions the focus of inquiry shifts to the relative suitability of opposing adults to care for the child. While parental misconduct may be relevant in both custody and PINS proceedings, it does not always constitute a defense to PINS charges, *see* text at notes 256-83 *infra*, and is only one facet of PINS law, whereas there are many points of congruence between criminal and delinquency law. Moreover, in custody actions, great weight is often given to the preferences of teenage children concerning the party with whom they wish to reside. *See, e.g., In re* Ross, 29 Ill. App. 3d 157, 170, 329 N.E.2d 333, 342-43 (1975). But in PINS cases, most of which involve midadolescents, *see, e.g.*, YALE PINS STUDY, *supra* note 33, at 1386-87, the child's preference not to be placed outside the home is given little weight in the dispositional determination.

Confusion about the similarities between PINS and custody actions may be fostered by the fact that some PINS charges are brought by parents or other relatives as an expeditious means of securing custody of their child or of divesting other per-

A second reason for the failure to develop PINS defenses is that attorneys are relative newcomers to the juvenile court. Only after the *Gault* decision in 1967 was there a massive infusion of attorneys into juvenile courts,[155] which had formerly been the virtually exclusive domain of judges and probation officers.[156] Upon entering this new forum, attorneys were confronted by both customary and statutory decrees that the "best interests of the child" doctrine was to govern the mode of legal representation.[157] As a result, some abdicated their traditional adversarial role and deferred to the recommendations of psychiatrists, social workers and probation officers.[158] Attorneys

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sons of custodial rights; such actions are an obvious perversion of the PINS proceeding. *See In re* Morris W., 79 Misc. 2d 567, 360 N.Y.S.2d 586 (Fam. Ct. 1974) (dismissing PINS petition brought by maternal great-grandmother alleging child left her home to live with his mother); *cf.* People v. Grieve, 131 Ill. App. 2d 1078, 267 N.E.2d 19 (1971).

155. A few jurisdictions provided the right to counsel for children in juvenile court prior to *Gault*. *See In re* Gault, 387 U.S. 1, 37 n.63, 38-41 (1967); N.Y. FAMILY CT. ACT §§ 241, 741(a) (McKinney 1975).

156. *See, e.g.*, L. FORER, "NO ONE WILL LISSEN" 11, 32-35 (1970); TASK FORCE REPORT, *supra* note 8, at 5, 6; Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 796-99 (1966).

In *Gault*, Justice Fortas observed that neither the probation officer nor the judge could act as counsel for or otherwise represent the child. *In re* Gault, 387 U.S. 1, 35-36 (1967). *But cf. In re* Anonymous, 110 Ariz. 98, 515 P.2d 600 (1973), *appeal dismissed*, 417 U.S. 939 (1974), holding that the trial judge's supervision of juvenile court staff did not prevent the judge from being an impartial trier of fact. 110 Ariz. at 100-02, 515 P.2d at 602-04. In dissenting from dismissal of the appeal, Justice Douglas asserted that "appellant was denied the right to jury trial and forced to trial before a judge with the duty of supervising the prosecutorial staff solely because he is a juvenile. . . . I can find no justification for this discrimination . . . ." 417 U.S. at 941. *See also In re* G.K., 497 P.2d 914 (Alas. 1972) (holding that children were entitled to request disqualification of juvenile court judge on the ground of bias).

157. *See, e.g.*, ALA. CODE tit. 13, § 351 (1959) ("The juvenile court shall have power . . . to make and enter such judgment and orders . . . as, in the judgment of the court will properly conserve and protect the welfare and best interests of such child"); CONN. GEN. STAT. ANN. § 17-69(b) (1975); N.C. GEN. STAT. § 7A-286 (Cum. Supp. 1974); UTAH CODE ANN. § 55-10-100(17) (1974); Sorrels v. Steele, 506 P.2d 942, 944 (Okla. 1973) (appellate court in reversing adjudication quoted trial judge's statement that, "In a Juvenile Hearing we are all interested only in the welfare of the child, and the rules of evidence are somewhat relaxed"). *See also In re* Winship, 397 U.S. 358, 367 (1970) (rejecting, as a basis for depriving an alleged delinquent of the standard of proof beyond a reasonable doubt, the New York Court of Appeals' view that "a child's best interest is not necessarily or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court"). *Cf.* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 53-64 (1973), suggesting that, by the time a child's case finally reaches the juvenile court, it is impossible to act in his or her "best interests," and that the most the court can do is provide the least detrimental alternative.

158. *See* A. PLATT, THE CHILD SAVERS 163-75 (1969); FOX, *supra* note 126, at 1237 ("There are, of course, institutional pressures on the lawyer to cooperate with court officials—to follow their views on what sorts of cases need to be tried and what rights to be asserted").

whose concept of advocacy has been shaped by the "best interests" doctrine are unlikely to assert defenses that may result in a disposition contrary to the recommendations of "expert" court staff. Other lawyers, well aware that their clients are minors, substitute their own judgments as to what is best for the children.[159] On yet another level are attorneys who actually identify with the complaining parents and in effect adopt *their* cause. In all these situations, the prospect for the assertion of defenses in a forceful and creative manner is bleak.

A third reason for the dearth of acknowledged defenses in PINS proceedings is that in the vast majority of these cases there is no adjudicatory hearing.[160] Instead, the child pleads guilty, in effect, by admitting the factual allegations of the petition or complaint, thus dispensing with the opportunity to raise legal defenses to the charges.[161] After the child makes an admission, the court proceeds to the dispositional stage, which focuses on the appropriate treatment for the juvenile. Although relevant at the dispositional hearing, evidence relating to a defense such as parental provocation or misconduct will generally affect the minor's placement rather than his or her status as an incorrigible.[162]

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159. *See* A. PLATT, *supra* note 158, at 167.

160. *See* Stiller & Elder, *supra* note 135, at 39 n.35; Comment, *In Re Gault: Children Are People*, 55 CALIF. L. REV. 1204, 1210 (1967); YALE PINS STUDY, *supra* note 33, at 1389 n.50, 1394 n.80 (even in New York, which has provided right to counsel since 1962, a random sampling of PINS cases in two counties showed full or partial admissions to the allegations in 100 per cent of the cases in one county and in 94 per cent of the cases in the other).

161. *See* notes 39, 43-50 *supra* and accompanying text. In those jurisdictions requiring a separate finding that the child is in need of care or treatment as an incorrigible, it is arguable that evidence establishing a defense would be admissible to prove that no such need existed and thus would defeat the juvenile's adjudication or disposition as a PINS. *But see In re* O.H., 512 S.W.2d 424 (Mo. App. 1974), a proceeding alleging both PINS and delinquent conduct, based on the child's escape from the custody of juvenile officers. The court held that the boy's flight was sufficient to establish conduct "injurious to his welfare," and gave the court authority to proceed to disposition, noting that "[a] specific finding that the child is in need of care and treatment is unnecessary if the operative facts of injurious conduct are found." 512 S.W.2d at 427. *Cf.* Dorszynski v. United States, 418 U.S. 424 (1974) (holding that under Federal Youth Corrections Act, in order to treat defendant as an adult, the district court is required to make an explicit finding that the youth will not benefit from treatment afforded under the Act, but is not required to give reasons for its finding).

162. In Oklahoma, for example, there is explicit statutory recognition that a child who is the victim of parental misconduct may nonetheless be adjudicated a PINS. Thus, in entering a dispositional order placing the child in his or her home, "if it appears to the court that the conduct of such parent or guardian has contributed to such delinquency, or need of supervision, or dependency or neglect, the court may issue a written order specifying conduct to be followed by such parent or guardian with respect to such child." OKLA. STAT. ANN. tit. 10, § 1116(a)(1) (Cum. Supp. 1975). *See also In re* S.M.G., 291 S.2d 43 (Fla. App. 1974), in which, as part of an order of disposition against a delinquent girl, the court ordered her mother to par-

There are several explanations for the omission of fact-finding hearings in an overwhelming percentage of PINS cases. One may reasonably infer from the numerous admissions in PINS cases that most of the children involved tell their attorneys that all or part of the charges against them are true.[163] This fact, taken in conjunction with the pervasive influence of the "best interests" doctrine, leads some attorneys to feel ethically foreclosed from pursuing an adjudica-

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ticipate in the daughter's drug rehabilitation program. When the mother refused to do so, she was adjudged in contempt of court. In reversing on the ground that there was no jurisdiction to enter such an order, the appellate court observed, "[T]here are, as all know, hard core cases attended by recalcitrant or unfit parents, and there are those cases unfortunately for which there is no solution. In these latter cases even the possession of the statutory power over such parents would probably be self-defeating and lead only to frustration and increase in the jail population." 291 S.2d at 44. The Florida law has since been amended to authorize court orders directing parents to participate in such family counseling programs. FLA. STAT. ANN. § 39.11 (8) (Cum. Ann. Supp. 1975), *amending* FLA. STAT. ANN. § 39.11 (1961).

It should also be noted that, in a PINS case, entry of a guilty plea or admission of the allegations may arguably be a bar to subsequent assertion of innocence based on affirmative defenses, since, at least in the criminal law context, an otherwise valid guilty plea, accompanied by evidence of the defendant's guilt, permits the court to impose sentence notwithstanding the defendant's claim of innocence. North Carolina v. Alford, 400 U.S. 25 (1970). A guilty plea in a criminal case also waives all antecedent constitutional defects of a nonjurisdictional nature. *Compare* McMann v. Richardson, 397 U.S. 759 (1970) (if otherwise valid guilty plea, defendant waives right to assert that such plea was induced by a coerced confession), *with* Blackledge v. Perry, 417 U.S. 21 (1974) (guilty plea does not waive due process claim that state had no power to charge defendant at all on the particular offense, since defendant had been convicted of misdemeanor assault and when he appealed, the state charged him with felony assault based on the same act). Waiver by guilty plea in a criminal court has likewise been applied so as to bar a claim that a juvenile hearing resulting in transfer to the adult court did not comport with due process. *See* Harris v. Procunier, 498 F.2d 576 (9th Cir.), *cert. denied*, 419 U.S. 970 (1974). Where, however, a state statute permits appellate review of constitutional claims after entry of a guilty plea, the plea is not a waiver of the right to assert such claims in federal habeas corpus proceedings. Lefkowitz v. Newsome, 420 U.S. 283 (1975).

Applying the foregoing principles to the PINS context, one court has held that an admission does not waive the right to assert the unconstitutionality of the PINS statute, since this is a jurisdictional challenge. *See* Mercado v. Rockefeller, 502 F.2d 666, 672 (2d Cir. 1974), *cert. denied sub nom.* Mercado v. Carey, 420 U.S. 925 (1975); *cf.* Gesicki v. Oswald, 336 F. Supp. 371 n.3 (S.D.N.Y. 1971) (three-judge court), *affd. mem.*, 406 U.S. 913 (1972). Moreover, in those jurisdictions that require a finding that the PINS child is in need of care and treatment in addition to the finding that he or she committed the acts alleged in the petition, it is arguable that, even if the juvenile admits the acts, he or she may assert affirmative defenses as a means of rebutting the assertion of a need for care and treatment. *See* note 39 *supra* and accompanying text. *Cf.* Specht v. Patterson, 388 U.S. 605 (1967), holding that where conviction of a criminal act triggers commencement of a separate commitment procedure, whether labelled criminal or civil, which requires a new finding of fact that defendant is either a threat to the community or a habitual offender, such a finding must be made at a due process hearing that includes the rights to counsel and to cross-examination. *But see In re* O.H., 512 S.W.2d 424, 427 (Mo. App. 1974), *discussed in* note 161 *supra.*

163. TASK FORCE REPORT, *supra* note 8, at 33; *cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7), prohibits an attorney from assisting his client "in conduct that the lawyer knows to be illegal or fraudulent."

tory hearing because it may result in a dismissal of the charges, a development that will supposedly foster in the children a belief that they can "beat the rap" and successfully thwart parental discipline.[164] Indeed, a child's lawyer may think that the decision of the office of probation not to adjust the case during the intake procedure indicates that experts have determined the complaint to be meritorious and the child to be in need of the court's help.

Moreover, many PINS children come from low socioeconomic groups and do not relate well to middle-class attorneys.[165] They may also be non-English speaking[166] or inarticulate,[167] reticent about airing family problems with a stranger,[168] or brain-damaged, retarded or mentally disturbed.[169] When dealing with such children, attorneys

164. *See* A. PLATT, *supra* note 158, at 167; Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 389-90 (1971).

165. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 56-57 (1967); TASK FORCE REPORT, *supra* note 8, at 41-42; L. FORER, *supra* note 156, at 25-26; Fox, *supra* note 126, at 1236. *See generally* JUVENILE JUSTICE CONFOUNDED, *supra* note 55, at 23-24.

166. *See* Morales v. Turman, 364 F. Supp. 166, 172-73 (E.D. Tex. 1973), *revd. on other grounds*, Civil No. 74-3436 (5th Cir., July 21, 1976) (challenging the conditions at certain juvenile correctional facilities; the court found that inmates' conversation in Spanish was discouraged or punished, even though almost a quarter of the juveniles were Mexican-American, some of whom could "speak little or no English"). *See also In re* Jose R., 49 App. Div. 2d 869, 376 N.Y.S.2d 906 (1st Dept. 1975), reversing delinquency disposition on the ground, *inter alia*, that no Spanish interpreter was present at the hearing.

167. *See* JUVENILE JUSTICE CONFOUNDED, *supra* note 55, at 24-25; L. FORER, *supra* note 156, at 36.

168. For example, a child may be reluctant to tell the attorney that he or she stays away from home frequently because one or both parents are alcoholics.

169. Many states recognize that mentally disturbed and retarded children are subject to the court's jurisdiction, and have statutory provisions for dealing with them. *See, e.g.*, CAL. WELF. & INSTNS. CODE § 6550 (West 1972); TEX. FAM. CODE ANN. §§ 55.01, 55.02, 55.03 (1975). *See In re* Kevin M., 44 App. Div. 2d 800, 369 N.Y.S.2d 439 (1st Dept. 1975) (reversing a delinquency disposition to the state training school where the trial court refused to authorize neurological examination notwithstanding mental health reports indicating the need therefor). *See also* Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967) (appeal dismissed as moot, but court determined that child held in interim detention who requires psychiatric care is entitled to receive it).

There is a conflict in the courts over the availability of the insanity defense in juvenile proceedings. Courts rejecting this defense have done so on the ground that rehabilitation, rather than punishment, is being provided. *Compare In re* Winburn, 32 Wis. 2d 152, 145 N.W.2d 178 (1966) (accepting insanity defense), *with In re* H.C., 106 N.J. Super. 583, 256 A.2d 322 (Juv. & Dom. Rel. Ct. Morris County 1969) (rejecting insanity defense as a bar to an adjudication, but holding that it will preclude imposition of penal sanctions). *See* Popkin and Lippert, *Is There a Constitutional Right to the Insanity Defense in Juvenile Court?*, 10 J. FAM. L. 421 (1971). Some states have enacted statutes specifically authorizing the insanity defense. *See, e.g.*, TEX. FAM. CODE ANN. § 55.05(g) (1975).

must invest considerable time and patience if they are to elicit factual information sufficient for developing available defenses; unfortunately, some attorneys may be unable to make the requisite investment. Moreover, because they feel that these children will probably be disbelieved by the trier of fact, lawyers may also question the advisability of permitting their clients to testify. Under these circumstances, an attorney is likely to consider a fact-finding hearing valueless.

Certain perceptions of the parental role in the adjudicatory hearing may also discourage attorneys from presenting vigorous defenses. A lawyer may feel that a fact-finding hearing would be futile because the types of allegations that form the basis of most PINS petitions are generally easy to prove with the testimony of parents or school officials.[170] Furthermore, some attorneys wish to avoid a courtroom confrontation between parent and child because it may permanently damage the family relationship.[171] From a practical standpoint, the child's lawyer fears that such a clash may so anger the parents that they will insist upon institutionalization of the minor, a demand that a court may feel itself obliged to honor.[172] If a parent's desire to keep a child away from home will inevitably result in that child's placement, an attorney may be disposed to forgo an adjudicatory hearing and contest only the type of facility to which the juvenile will be sent.

Finally, many attorneys believe that if they bypass a PINS adjudicatory hearing, especially where there appears to be sufficient evidence to sustain a finding against the youth, the judge will be more likely to render a favorable judgment as to disposition, because the child has admitted his or her wrongs and has not wasted the court's time. This belief is, in part, a carryover from experience in criminal courts, where approximately ninety per cent of all cases are disposed of through plea-bargaining.[173]

However persuasive these considerations might appear, they do not justify a passive role for attorneys representing children in PINS proceedings. Thus, an attorney should not forgo a fact-finding hearing on the basis of the "best interests" doctrine. It is often

170. For example, a prima facie case can often be established by use of parental testimony concerning the child's disobedience, or testimony of school officials concerning the child's truancy.

171. *Cf.* Ferster, Courtless & Snethen, *supra* note 164, at 390-91.

172. *See* YALE PINS STUDY, *supra* note 33, at 1396.

173. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 165, at 134-36; D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206-07 n.84, n.85 (1975).

impossible for all concerned parties to agree that a particular course of action is most appropriate to resolve the complex intra-family conflict typically presented in a PINS case.[174] In any event, when the prosecuting attorney, judge, probation officer and other court personnel all purport to act in the "best interests" of the child, defense counsel is rendered virtually superfluous if he or she attempts to perform under the same, ill-defined standard. The defense attorney's role in our legal system is properly that of an advocate, for "an adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."[175] Indeed, the dominance of the "best interests" doctrine may require zealous advocacy to ensure that judicial intervention in a child's life has an adequate basis in law and fact, and that it has not been triggered merely by generalized complaints, unsupported "expert" opinions or vague recommendations.[176]

Other factors lead to the conclusion that attorneys must not abandon their traditional adversarial role. An attorney cannot, for example, assume that the intake procedure has screened out matters that do not belong in court, for there is evidence that the intake process is not fully effective, especially in PINS cases.[177] Furthermore, although zealous advocacy would be appropriate even if states offered optimal care for PINS children, it becomes imperative in light of indications that the facilities to which the children are relegated may be far more destructive than the environments from which they came.[178]

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174. *See, e.g., In re* Lloyd, 33 App. Div. 2d 385, 386, 308 N.Y.S.2d 419, 420 (1st Dept. 1970) (in reversing a training school disposition, court observed: "[T]he learned Family Court Judge was doing the best that he could for the appellant in a well-nigh impossible situation and one with which he never should have been faced. Frankly, we also are at a loss . . .").

175. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-19 (footnote omitted).

176. *See In re* Gault, 387 U.S. 1, 36 (1967); Williamson v. State, 242 Ala. 42, 43, 4 S.2d 734, 735 (1941) (mother charged daughter with using obscene language; court noted mother's "testimony indicates there was no foundation whatever for the charge").

177. *See* notes 231-36 *infra* and accompanying text.

178. *See* the "right to treatment" cases *cited in* note 132 *supra*. There will be instances in which the child requests placement because of intolerable home conditions. Where such a desire is expressed, the attorney should explore the possibility of placement on the basis of a neglect petition, after making sure that the child is not simply expressing a transitory desire or seeking placement in retaliation against the parent. Finally, the attorney is obliged to explain to his or her client the realities of life at a state institution. *See* State *ex rel.* Wilson v. Bambrick, 195 S.E.2d 721 (W. Va. 1973) (runaway girl given choice of returning home with parents or going to state training school, and she chose the latter alternative; subsequent writ of habeas corpus granted because of failure to provide attorney at original proceeding); Wagstaff v. Superior Court, 535 P.2d 1220 (Alas. 1975) (14-year-old girl who left

Finally, the seemingly attractive rationale that a child can secure institutional benefits by making an admission is simply not supported by the facts. Although a defendant in a criminal court may admit guilt in return for a reduced sentence, there is no counterpart to this plea bargaining in the juvenile court system. In making dispositional determinations, the juvenile court judge places primary reliance on parental fitness, parental attitudes toward placement, and the probation recommendations as indicators of the child's best interests. Unlike the district attorney in criminal court, the probation department has no vested interest in rewarding pleas of guilty as a means of reducing the number of trials; its recommendation is generally not influenced by whether a PINS finding is based on an evidentiary hearing or the entry of a plea.[179]

Adherence by defense attorneys to a traditional adversary role can yield several positive benefits for children brought to court under PINS petitions. The most obvious is that vigorous advocacy during the fact-finding hearing may reveal defenses or expose defects in what might have originally seemed an airtight case against the child. But other, more subtle, benefits may also be realized by demands for fact-finding hearings. Among these advantages are an alteration in the parental role in PINS hearings and a change in the kinds of cases that occupy juvenile courts.

The probation intake procedure, with its informality, its pro-parent orientation and its acquiescence to parental pressure that a petition be filed against a child,[180] may lead parents to expect that the judicial proceedings will be similarly informal and deferential to their preferences regarding the imposition of punishment. The absence of a fact-finding hearing reinforces the parents' perception that they are in control of the proceeding and their resulting belief that there can be no serious consequences without their consent. They may be shocked to discover that, once a court has made a finding against a child and has received a probation recommendation, the judge, not the parents, determines whether the child is merely reprimanded or

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home and sought help of police in obtaining foster placement was made a respondent in a PINS action when she refused to remain with her parents); THE PINS CHILD, A PLETHORA OF PROBLEMS, *supra* note 27, at 44 (eight per cent of PINS children in survey refused to return home to parents).

179. In some instances, however, probation officers may consider the child's refusal to admit his or her misconduct to be evidence of the need for a more restrictive disposition. This attitude may be a spillover from statutory provisions conditioning intake adjustment on an admission by the child. *See, e.g.*, PA. STAT. ANN. tit. 11, § 50-304(b)(3) (Cum. Supp. 1975).

180. *See* YALE PINS STUDY, *supra* note 33, at 1395.

instead placed in the state training school.[181] A fact-finding hearing, with its attendant formalities of sworn testimony and cross-examination, immediately puts the parents on notice that the proceedings are weighty, and that they lack control over the outcome. Accordingly, they may choose not to pursue the matter or, if they persist, to temper their accusations. Such circumspect parental behavior may well lead to a more favorable disposition for the child.

Parents may also withdraw PINS charges when faced with the prospects of cross-examination, which can result in the exposure of their own inadequacies, and presentation of their child's perspective of the matters being considered by the court.[182] Even if the parents do not withdraw the petition, the rules of evidence generally applicable at fact-finding hearings will prevent them from heaping generalized abuse on the child. The prevalent relaxation of the rules of evidence at the dispositional hearing, however, encourages the receipt of such testimony.[183] Thus, where there is no fact-finding hearing, a

181. Reyna v. State, 206 S.W.2d 651 (Tex. Civ. App. 1947), is perhaps the ultimate example of a case being taken out of the parent's control. There, a mother who thought she was filing a complaint against her daughter's seducer found herself the petitioner against the daughter, who was adjudicated a delinquent and committed to an institution over the mother's protest; the appellate court reversed. *See also* E. WAKIN, *supra* note 29, at 48 (father decided to teach his curfew-violating daughter a lesson by permitting the police to take her to a detention facility because she was "out of parental control." After attempting suicide as a means of securing release from the detention center, she was transferred to a mental hospital: "It took the girl's father three months to get her out").

182. In New York, a majority of parental PINS cases are withdrawn or dismissed prior to adjudication. YALE PINS STUDY, *supra* note 33, at 1389 n.47. One reason may be that in many instances attorneys for the children are able to persuade parent and child to seek help from community agencies rather than to pursue court action. *Id.* at 1399. Activities of this sort, which sometimes include realistic criticisms of the quality of the court's resources, may account for one family court judge's order prohibiting a child's attorney from interviewing the petitioner in a PINS case. *See* Rapoport v. Berman, N.Y.L.J., July 10, 1975, at 14, col. 8 (temporarily enjoining enforcement of this order). The reason given by the juvenile court judge for his order was that PINS proceedings were civil in nature, and that consequently counsel was ethically prohibited from interviewing an opposing party. The above decision was reversed on the ground that the controversy was "academic," since the family court judge had not issued a formal written order or directed the institution of contempt proceedings; the opinion stated, however, that the child's attorney in a PINS proceeding has the right to interview prospective witnesses, including the petitioner, and that any alleged ethical improprieties should be referred to the appellate court. Rapoport v. Berman, App. Div., 2d Dept., N.Y.L.J., Oct. 22, 1975, at 9, col. 2.

183. *See, e.g.*, D.C. CODE ANN. § 16-2316(b) (Supp. 1973) ("Evidence which is competent, material, and relevant shall be admissible at factfinding hearings. Evidence which is material and relevant shall be admissible at . . . dispositional hearings); ORE REV. STAT. § 419.500(2) (1974) ("For the purpose of determining proper disposition of the child, testimony, reports or other material relating to the child's mental, physical and social history and prognosis may be received by the court without regard to their competency or relevancy under the rules of evidence"). *See also* PA. STAT. ANN. tit. 11, 50-316(d) (Cum. Supp. 1975) (authorizing the court to ex-

judge's perception of a child's behavior may be based largely on the parents' conclusory, exaggerated and self-serving charges.

A vigorously contested adjudicatory hearing will sometimes produce evidence of parental wrongdoing or neglect, which, even if not sufficient for a dismissal of the proceeding, may result in a more favorable interim or final disposition for the child.[184] For example, evidence showing that a child runs away from home because of arguments between parents may induce a judge to arrange for shelter care rather than secure detention, but such evidence is far less likely to come to the court's attention in the absence of formal fact-finding.

A final possibility is that the confrontation between parent and child at an adjudicatory hearing can be a therapeutic rather than an injurious experience, if it is skillfully guided.[185] Where there is a severe communication barrier between parent and child,[186] the hearing may be the first opportunity for a focused dialogue before a neutral arbiter, with parent and child on a more or less equal footing.[187]

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clude a delinquent child, which includes PINS, during the dispositional hearing); MONT. REV. CODES ANN. §§ 10-1221(2), (5) (Cum. Supp. 1975) (permitting the court to receive "social summaries" during a dispositional hearing, and giving the child and parent the right to cross-examine all persons preparing such reports, but allowing the court to exclude child and parent from the dispositional hearing); *In re* Sylvia J., 47 App. Div. 2d 905, 369 N.Y.S.2d 998 (2d Dept. 1975) (per curiam) (affirming 18-month placement of PINS in training school and finding that trial judge did not abuse discretion in denying child's attorney access to probation report and permission to cross-examine probation officer); *but see In re* Cecilia R., 36 N.Y.2d 317, 327 N.E.2d 812, 367 N.Y.S.2d 770 (1975) (reversing placement of 13-year-old PINS girl at training school on the ground that her absence from the dispositional hearing without sufficient cause violated due process).

184. *See, e.g., In re* Henry G., 28 Cal. App. 3d 276, 104 Cal. Rptr. 855 (1972).

185. It is doubtful that the courtroom confrontation between parent and child can cause any more harm to their relationship than the injury that has already occurred by virtue of the parent's bringing the juvenile to court and charging him or her as a PINS. The child plainly knows that but for the parent's charges he or she would not stand accused. Eliminating parental testimony against the child at an adjudicatory hearing or excusing the child from the courtroom during such testimony by the parent may indeed be more detrimental to the child than allowing the juvenile to hear the parental accusations, since the allegations imagined by the child may generate more anger and be more frightening to the youth than the charges that are actually made.

186. *See generally* H. GINOTT, BETWEEN PARENT AND CHILD 20-21 (1965) ("An interested observer who overhears a conversation between a parent and a child will note with surprise how little each listens to the other").

187. It may be argued that such a role is inappropriate and that it is an intolerable demand on the juvenile court judge to combine the functions of psychiatrist, social worker, and judge. Yet, it is this type of multifaceted person who was originally envisioned as appropriate for the position, and who is in effect called for by statutes in some jurisdictions. *See, e.g.*, N.Y. FAMILY CT. ACT § 124 (McKinney 1975). To the extent that such judges are unavailable, the unique quality of the juvenile court is in large part lost, and there is less reason to retain it as a separate entity.

An increase in the number of fact-finding hearings in PINS cases and the introduction of more extensive factual probing at these hearings will necessarily affect the court's workload, which is already considered excessive by a number of observers.[188] Although this increase will initially exacerbate the problem, it may also provide the impetus for long range reform, since bursting court dockets may force legislative action to curtail the PINS jurisdiction of juvenile courts.[189] At the least, more frequent and more probing hearings will compel judges to differentiate between transient, relatively trivial misconduct that is symptomatic of adolescence, such as staying out late, and serious life-threatening behavior, such as narcotics addiction.[190] Thus, instead of scattering their resources over a wide spectrum of cases, juvenile courts would be constrained to dismiss cases of minor misbehavior at the adjudicatory stage, and to focus upon cases involving truly disturbed children. Indeed, it is possible that one reason for the heavy caseload of juvenile courts is the failure to cull out complaints that do not warrant judicial action. As one appellate court has observed, "The very presence of . . . [this] case upon the docket of the Juvenile Court, suggests some answer as to why those courts, nationally, are suffering under almost untriable caseloads . . . . The incident which gave rise to this case was, under any interpretation, a 'schoolboy fight.' "[191]

The court's power to dismiss unwarranted PINS petitions is not curtailed by a parent's adamant refusal to take his or her child home. Such intransigence on the parent's part can, in most jurisdictions, form the basis for a neglect petition.[192] While it is true that some

188. *See, e.g.*, L. FORER, *supra* note 156, at 84-87 (referring to the "five-minute assembly-line hearing"); TASK FORCE REPORT, *supra* note 8, at 7 (citing studies indicating that the average time spent on a juvenile proceeding is 10-15 minutes).

189. "But it is of great importance to emphasize that a simple infusion of resources into juvenile courts and attendant institutions would by no means fulfill the expectations that accompanied the court's birth and development." TASK FORCE REPORT, *supra* note 8, at 8.

190. "[J]uvenile courts retain expansive grounds of jurisdiction authorizing judicial intervention in relatively minor matters of morals and misbehavior, on the ground that subsequent delinquent conduct may be indicated, as if there were . . . reliable ways of redirecting children's lives." TASK FORCE REPORT, *supra* note 8, at 9.

191. *In re* Roberts, 13 Md. App. 644, 645, 284 A.2d 621, 622 (1971). Although this case involved a delinquency adjudication which was affirmed, and although the appellate court remanded only for further dispositional proceedings, the language quoted in the text is apposite to PINS cases, particularly in their adjudicatory phase.

192. *See, e.g.*, MICH. COMP. LAWS ANN. § 712A.2(b)(1) (Cum. Supp. 1975) (statutory definition of neglect includes refusal to provide the care necessary for the child's health, morals or emotional well being); WIS. STAT. ANN. § 48.13(1)(d) (1975) (similar provision).

parents are indifferent to the legal nomenclature and procedure by which custody of their children is transferred to the state, others will object if fault is placed upon them by a finding of neglect and may instead prefer to take their children home. In either case, the children will avoid the stigma of a PINS finding,[193] and those who are unwanted at home will be placed in a shelter facility for neglected children, rather than in a secure institution for PINS and delinquent minors.[194]

Insistence on a fact-finding hearing may instill in the child positive feelings toward the judicial process, whether or not the result is dismissal of the charges. A child's confusion about the legal system may be heightened where the process is truncated by elimination of the adjudicatory hearing. Even where the child's attorney has attempted to explain the effect of entering a plea, the child may not understand the basis for judicial intervention in his or her life. A child may perceive the sanctions that follow an admission of guilt as punishment for honesty rather than for misdeeds.[195] If, however, a finding is made against the child on the basis of extrinsic evidence

193. *See* E.J. v. State, 471 P.2d 367, 370 (Alas. 1970) (holding that "termination" of a PINS adjudication did not moot the child's appeal because of "potential collateral disabilities" such as "availability of juvenile records to school authorities, military service or prospective employers"); Wagstaff v. Superior Court, 535 P.2d 1220, 1226 (Alas. 1975) (holding that, although PINS petition had been dismissed and child had left the state, case was not moot because issue of child's right to attorney of her own choice rather than lawyer designated by her parents was a recurring question of broad public interest). *Contra* Brown v. Yeldell, 487 F.2d 1210 (D.C. Cir. 1973); People v. T.B., 183 Colo. 310, 516 P.2d 642 (1973); *cf. In re* I.B., 287 A.2d 827 (D.C. App. 1972); *In re* Richard S., 32 N.Y.2d 592, 300 N.E.2d 426, 347 N.Y.S.2d 54 (1973) (refusing to expunge police and court records of PINS child whose adjudication was reversed with instructions to dismiss the proceeding; court held that there was no legislative authority to expunge). *See also* TASK FORCE REPORT, *supra* note 8, at 9, 26 (discussing the stigma accompanying a PINS adjudication).

In many jurisdictions, juvenile court records may be considered by adult criminal courts 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); *cf.* Davis v. Alaska, 415 U.S. 308 (1974) (refusal to permit cross-examination of witness in criminal trial concerning witness' delinquency adjudication violated defendant's sixth amendment rights). *Contra*, Lauen v. State, 515 P.2d 578 (Okla. Crim. App. 1973).

194. *See, e.g.*, D.C. CODE ANN. § 16-2313(a) (Supp. 1973); *cf.* Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972). *But see* State *ex rel.* Harris v. Larson, 64 Wis. 2d 521, 219 N.W.2d 335 (1974) (reluctantly approving confinement of adjudicated delinquents, PINS and neglected children in a detention facility for up to five days pending their transfer to placement facilities).

195. *Cf. In re* Gault, 387 U.S. 1, 51-52 (1967) ("[I]t seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished") (footnote omitted).

introduced at a hearing, he or she is more likely to understand that prior misconduct rather than the admission of guilt was the basis for the court's action. Even when juveniles do not agree with the findings, they may appreciate that their side has been presented in court and that the judges have considered the evidence before rendering the verdict. If a child prevails and the petition is dismissed, a belief that the system can be circumvented is not necessarily engendered; the child may instead emerge with positive views of the legal process.

To be sure, there should be no rigid adherence to abstract principles concerning the value of a fact-finding hearing. For a variety of pragmatic considerations, insistence upon an adjudicatory hearing will not always be desirable.[196] But the decision to waive a child's due process right to this hearing should not be made in the vacuum of the "best interests" doctrine. Wholesale waivers have not only injured certain children who have been inappropriately designated as PINS; they may also have helped perpetuate a PINS jurisdiction that is arguably harmful to all children coming before the juvenile court.

V. Defenses in PINS Cases

A. *Statutory Construction: Isolated Incident, De Minimis, Condonation*

In view of the definitional language typically used in PINS statutes, one might reasonably assume that only cases involving serious forms of persistent juvenile misconduct would be brought to court. Terms such as "incorrigible,"[197] "habitually disobedient,"[198] "beyond parental control,"[199] and "in danger of leading an idle, dissolute, lewd or immoral life,"[200] suggest a child who is beyond restraint and on the

196. For example, if insistence on a trial would cause the case to be adjourned and preclude its being heard by a judge known to be particularly understanding, an immediate admission may be preferable. *See In re* D.J.B., 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (1971), where the child admitted to having run away from home on one occasion, but denied that she was beyond parental control within the meaning of the PINS statute. After apparently examining the probation report, the trial judge made a finding against the girl that was reversed on appeal because of the possibility that such an examination had taken place. The appellate court also noted that a single instance of running away was insufficient to sustain a PINS charge. An admission in these circumstances may thus have been based on sound strategic considerations, since a plenary fact-finding hearing might have revealed additional evidence of misconduct sufficient to sustain a PINS finding.

197. *See, e.g.*, N.J. Stat. Ann. § 2A:4-45 (Cum. Supp. 1975).

198. *See, e.g.*, Ind. Ann. Stat. Code § 31-5-7-4.1(b) (Burns Cum. Supp. 1975).

199. *See, e.g.*, Ore. Rev. Stat. § 419.476(1)(b) (1974).

200. *See* Ala. Code tit. 13, § 350(3) (1958). *See also* Mich. Comp. Laws Ann. § 712A.2(a)(3) (Cum. Supp. 1976) (leading an immoral life).

verge of criminality. However, many recent cases illustrate that the PINS jurisdiction is being invoked, at least at the trial level,[201] in response to relatively minor misconduct that does not appear to fall within the intended reach of the statutes. In reversing these findings, appellate courts have insisted upon a narrower interpretation of PINS definitional provisions. They have concluded that where the misconduct involved was either insufficiently serious, or approved by the parents, or not repeated, it did not amount to "habitual disobedience" or "incorrigibility." The decisions of these courts provide authority for defending PINS actions by showing that statutory requirements for the exercise of the PINS jurisdiction have not been satisfied.

The rationale most frequently offered in these cases is that an "isolated incident" of noncriminal misbehavior does not afford a basis for a PINS finding. Utilizing this theory, courts have dismissed charges where, on a single occasion, a child truanted,[202] refused to remain in a foster home,[203] ran away from home,[204] had an altercation with a parent,[205] or wandered the streets at night.[206]

In an analogous line of cases, the isolated incident theory has been used to overturn PINS findings based on allegations of a single criminal act. In these cases, the original petitions filed against the child charged delinquency based on such penal law violations as harassment,[207] assault,[208] and negligent vehicular homicide.[209] At trial, however, a delinquency adjudication was precluded, either because the act alleged did not constitute a crime,[210] or because there was

201. *See, e.g., In re* McMillan, 21 N.C. App. 712, 205 S.E.2d 541 (1974).

202. *See In re* McMillan, 21 N.C. App. 712, 205 S.E.2d 541 (1974). *See also* Sheehan v. Scott, 520 F.2d 825 (7th Cir. 1975), *described in* note 129 *supra*; "Sporadic or occasional absence even though violative of the compulsory requirement of the law does not activate action under the state statute here challenged. That is only triggered by habitual truancy." 520 F.2d at 830.

203. *See In re* Rita P., 12 Cal. App. 3d 1057, 95 Cal. Rptr. 430 (1970).

204. *See In re* D.J.B., 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (1971); Reyna v. State, 206 S.W.2d 651, 653-54 (Tex. Civ. App. 1947).

205. *See In re* Henry G., 28 Cal. App. 3d 276, 104 Cal. Rptr. 585 (1972).

206. *See Ex parte* Yelton, 298 S.W.2d 285 (Tex. Civ. App. 1957).

207. *See In re* David W., 28 N.Y.2d 589, 268 N.E.2d 642, 319 N.Y.S.2d 845 (1971) (per curiam); *In re* Anna A., 36 App. Div. 2d 1001, 321 N.Y.S.2d 59 (3d Dept. 1971) (per curiam); *In re* Richard K., 35 App. Div. 2d 716, 314 N.Y.S.2d 1004 (1st Dept. 1970) (per curiam) (charge of harassment and loitering).

208. *See In re* Mark V., 34 App. Div. 2d 1101, 312 N.Y.S.2d 983 (4th Dept. 1970) (per curiam); *In re* Bordone, 33 App. Div. 2d 890, 307 N.Y.S.2d 527 (4th Dept. 1969) (per curiam) (unclear whether the original delinquency petition charged assault or harassment, although the acts alleged appear to have been sufficiently serious to constitute assault).

209. *See In re* Williams, 241 Ore. 207, 405 P.2d 371 (1965).

210. *See* cases *cited in* note 207 *supra*. In New York, delinquency is defined as "any act which, if done by an adult, would constitute a crime." N.Y. FAMILY CT.

insufficient proof that the child had committed the criminal act.[211] The lower courts attempted to circumvent these evidentiary and legal obstacles by dismissing the delinquency charges and substituting PINS findings based on the original penal law offenses.[212] This subterfuge appears to have influenced appellate court reversals based on the isolated incident theory.[213]

There are, however, limitations on the use of the theory as a defense to PINS charges. One court concluded that the California statute, which is directed against any child who "persistently or habitually refuses to obey [reasonable parental orders] . . . or who is beyond [parental] . . . control,"[214] permits a PINS finding based on

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ACT § 712(a) (McKinney 1975). In the above cases, the original petitions charged the respondents with harassment and loitering, which, under the New York Penal Law, are mere violations rather than crimes. *See* N.Y. PENAL LAW §§ 240.25, 240.35 (McKinney 1967). An isolated act of harassment does not fall within the definition of PINS conduct, since the statute requires habitual disobedience. N.Y. FAMILY CT. ACT § 712(b) (McKinney 1975).

211. *See In re* Williams, 241 Ore. 207, 405 P.2d 371 (1965); *In re* Mark V., 34 App. Div. 2d 1101, 312 N.Y.S.2d 983 (4th Dept. 1970) (per curiam).

In the *Williams* case, the trial court dismissed the delinquency petition alleging negligent vehicular homicide because there was no evidence of reckless driving. The trial judge determined, however, that the child had driven negligently and made a PINS finding on this basis. The appellate court reversed, holding that a single act of negligent driving that violated no law was insufficient to sustain a PINS adjudication where there was no evidence of other driving violations or appearances in juvenile court.

In *Mark V.*, the appellate court reversed a PINS finding based on a single act of assault because there was no evidence of habitual misconduct, and also found that there was insufficient evidence to support a delinquency adjudication. In New York, the crime of assault requires physical injury, N.Y. PENAL LAW § 120.00 (McKinney 1967), whereas harassment, a violation, requires only unauthorized physical contact, N.Y. PENAL LAW § 240.25(1) (McKinney 1967).

See also In re Raymond O., 31 N.Y.2d 730, 338 N.Y.S.2d 105, 290 N.E.2d 145 (1972) (mem.) (reversing PINS finding based on a single act of criminal trespass, after trial court had dismissed a burglary charge against the child).

212. *See also* Kahm v. People, 83 Colo. 300, 304, 264 P. 718, 720 (1928) (one instance of car theft held insufficient to sustain charge of "incorrigibility" or "growing up in idleness or crime").

There is no inconsistency in treating a single act as a sufficient basis for a delinquency finding yet not a sufficient predicate for a PINS adjudication, since the statutes define delinquency as a single criminal-law violation and PINS as habitual misconduct. Moreover, a single criminal act is, in many instances, serious enough to warrant judicial intervention, whereas a single act of noncriminal misbehavior is not. There are, however, certain criminal law offenses such as malicious mischief, *see, e.g.*, TEX. PENAL CODE ANN. §§ 28.03(a), (b)(1), 12.23 (1974), that do not warrant this presumption. *See* TEX. FAM. CODE ANN. (Supp. 1975) §§ 51.03(a), (b), which requires that a delinquency finding be based on the commission of felonies and serious misdemeanors and includes as a basis for a PINS adjudication the commission of three minor misdemeanors.

213. *See* text at notes 58-116 *supra*, discussing the abuse and misuse of the PINS jurisdiction, of which this is one example.

214. CAL. WELF. & INSTNS. CODE § 601 (West Supp. 1976).

a single, sufficiently serious act of misconduct.[215] Rejecting the child's contention that the terms "habitually" and "persistently" modified the parental control clause of the statute, the court held that the legislature's use of the disjunctive "or" meant that "a single act, if sufficiently serious, would indicate that the minor was 'beyond control.' "[216]

Another apparent limitation on the isolated incident theory emerges in those jurisdictions that define as PINS conduct the violation of a "law applicable only to a child,"[217] such as juvenile curfew ordinances. One infraction of such an ordinance constitutes a PINS violation. Thus, even though the Ohio statute required "habitual truancy" to sustain an "unruly child" adjudication,[218] a court upheld a finding that was based upon a single instance of truancy, because the same conduct was violative of a local misdemeanor ordinance prohibiting juveniles from being in the street during school hours.[219]

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215. *See In re* David S., 12 Cal. App. 3d 1124, 91 Cal. Rptr. 261 (1st Dist. 1970), involving a 14-year old who lied to his mother, telling her he was going to spend the weekend with friends at a beach 40 miles from his home, and who thereafter did not return on time, but was instead apprehended 600 miles away at the Mexican border. *See also In re* J.M., 57 N.J. 442, 273 A.2d 355 (1971) (affirming PINS adjudication based on possession of an eyedropper and a hypodermic needle); *In re* A.R., 57 N.J. 71, 269 A.2d 529 (1970) (upholding PINS adjudication based on sniffing carbona); Rusecki v. State, 56 Wis. 2d 299, 201 N.W.2d 832 (1972) (affirming PINS adjudication where child was found "half naked and incoherent"; record indicated that child was a drug abuser).

216. *In re* David S., 12 Cal. App. 3d 1124, 1127-28, 91 Cal. Rptr. 261, 263 (1st Dist. 1970); *but see In re* Henry G., 28 Cal. App. 3d 276, 284, 104 Cal. Rptr. 585, 590 (2d Dist. 1972), *discussed in* notes 263-65 *infra* and accompanying text. In jurisdictions such as New York, where a PINS child is defined as one who is "habitually disobedient and beyond the lawful control of parent," N.Y. FAMILY CT. ACT § 712(b) (McKinney 1975), the use of the conjunctive "and" would appear to preclude the type of statutory interpretation utilized by the court in the *David S.* case. *See In re* Bordone, 33 App. Div. 2d 890, 307 N.Y.S.2d 527 (4th Dept. 1969). *See also In re* Nelly O., ___ App. Div. 2d ___, 381 N.Y.S.2d 66 (1st Dept. 1976) (affirming PINS adjudication where girl struck her mother twice, ran away from home and from a shelter facility; such conduct was held not to be an isolated incident).

217. *See, e.g.*, GA. CODE ANN. § 24A-401(g)(3) (Supp. 1975); OHIO REV. CODE ANN. § 2151.022(G) (Page Supp. 1974); UNIFORM JUVENILE COURT ACT § 2(4)(iii).

218. OHIO REV. CODE ANN. § 2151.022(B) (Page Supp. 1974).

219. *See In re* Carpenter, 31 Ohio App. 2d 184, 287 N.E.2d 399 (1972). The District of Columbia statute also defines PINS conduct so as to include habitual truancy and "an offense commitable only by children," D.C. CODE ANN. §§ 16-2301(8)(A)(i), (ii) (Supp. 1973); it seems unlikely, however, that the District of Columbia courts could reach the same result as the *Carpenter* court. Since the District of Columbia Code requires an additional finding that the child "is in need of care or rehabilitation" before a PINS disposition may be entered, D.C. CODE ANN. §§ 16-2301(8)(B), (17) (Supp. 1973), it is doubtful whether a single day of truancy would afford a basis for such a finding. *See* note 39 *supra*. *But cf. In re* Doe, 87 N.M. 466, 535 P.2d 1092 (1975), reversing a delinquency finding based on the child's violation of a curfew ordinance and his possession of alcoholic beverages, because neither constituted a crime. The court intimated, however, that a PINS petition making

In dismissing charges based on relatively minor misconduct, courts have also interpreted PINS statutes so as to fashion a de minimis defense which, unlike the closely related isolated incident theory, may be applied to either a single act or repeated misbehavior. Thus, because the throwing of a firecracker that resulted in the accidental injury of another child was considered a "boyish prank," a minor was not "without parental control" or "incorrigible."[220] The use of vulgar and abusive language toward taunting schoolmates on several occasions was also deemed insufficient to prove that a child was "in need of supervision" or "in need of correction and training which the parents cannot provide."[221] In reversing PINS findings based upon allegations that two boys had thrown stones at a house during the night, a Virginia court in effect combined the de minimis and isolated incident theories, noting, "There is nothing in the record to suggest that the accused were inherently vicious or incorrigible. To classify an infant as delinquent because of a youthful prank, or for a mere single violation of a misdemeanor statute . . . in this day of numberless laws and ordinances is offensive to our sense of justice. . . ."[222]

The use in the foregoing cases of terms such as "youthful prank"

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such allegations might not be "jurisdictionally defective." 87 N.M. at 468, 535 P.2d at 1094. In addition to requiring proof that the child committed the acts alleged, New Mexico law mandates a finding, supported by clear and convincing, competent evidence, that the child is in need of care and rehabilitation prior to entry of a dispositional order. N.M. STAT. ANN. § 13-14-28(F) (Supp. 1973). In view of these statutory provisions, the court might merely have been saying that a PINS petition alleging such acts would not be subject to dismissal on its face.

220. *In re* Alley, 174 Wis. 85, 182 N.W. 360 (1921). *Cf. In re* D.E.P., 512 S.W.2d 789 (Tex. Civ. App. 1974) (no violation of a probation order in a delinquency case, where the child's truancy stemmed from circumstances beyond his control). *See also* Moore v. State, 111 Tex. Crim. 461, 14 S.W.2d 1041 (1929) (reversing PINS adjudication because, although there was proof that the girl was frequently seen on the streets at night, there was no evidence of an illegitimate purpose on her part).

221. Young v. State, 120 Ga. App. 605, 171 S.E.2d 756 (1969); *accord,* M.S.K. v. State, 131 Ga. App. 1, 205 S.E.2d 59 (1974) (reversing adjudication of delinquency against 11-year-old boy for slight sexual molestation). In both of these cases, there are indications that the trial courts' adjudications were racially motivated. Compare E.S. v. State, 134 Ga. App. 724, 725, 215 S.E.2d 732, 734 (1975) (affirming a delinquency adjudication based on "a long period of harassment . . ., entry on the property of another after strict orders to stay away, destruction of property, and an eloquent use of obscene language," and distinguishing the above Georgia cases on the ground that they involved "competing disciplinary claims" of the public schools). *Cf.* Gonzales v. School Dist., 8 Pa. Commnw. 130, 136-37, 301 A.2d 99, 103 (1973), where the court intimated that school tardiness and absences from class do not afford a basis for a PINS finding of incorrigibility.

222. Jones v. Commonwealth, 185 Va. 335, 343, 38 S.E.2d 444, 447 (1946). The court's opinion makes it clear that, under the Virginia statute in effect at the time of the *Jones* decision, delinquency included PINS activity.

suggests an additional prerequisite for a PINS finding. In committing the acts alleged, the child must be shown to have *mens rea* or some form of evil intent and must have strayed beyond typical juvenile acts of rebelliousness or mischief. As the Virginia court pointed out, a failure to distinguish between mischievous and evil intentions would result in "an inclusion of so many [children] in the [PINS] classification that the word would lose its accepted meaning."[223] Thus, the absence of the requisite state of mind may provide a sufficient defense.

A final defense based upon statutory interpretation has been established by court holdings that a child is not beyond parental control within the meaning of the PINS statute if the parent has approved or condoned the alleged misconduct. One court found that absence from school for fifty-seven days did not establish habitual truancy under the statute, because the absences were not "in defiance of parental authority" and in fact were "consented to by . . . [the child's] father."[224] Another appellate tribunal reversed a finding that a child was beyond parental control because she frequented the headquarters of a radical group, wherein explosives were found, on the ground that she had received her mother's permission and full approval.[225]

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223. 185 Va. at 343, 38 S.E.2d at 448; *see* Ossant v. Millard, 72 Misc. 2d 384, 388, 339 N.Y.S.2d 163, 168 (Fam. Ct. 1972) ("[T]he basic principles of the criminal law are relevant in dealing with 'illegal' absentees. It is therefore, fundamental that the . . . absentee pupil must be found to have a conscious underlying intent . . . to violate the . . . Compulsory Education Law before such [PINS] sanctions may be invoked"); State v. Lefebvre, 91 N.H. 382, 386, 20 A.2d 185, 188 (1941) (children of Jehovah's Witnesses suspended from school for failing to salute flag, adjudicated PINS for failure to attend school, and placed in state training school; in reversing, the court stated, "We find no intent of the legislature to treat as delinquents those who are excluded from attendance because they act in good faith from conscientious motives . . .").

224. *In re* Alley, 174 Wis. 85, 90, 182 N.W. 360, 362 (1921); *see* Ossant v. Millard, 72 Misc. 2d 384, 339 N.Y.S.2d 163 (Fam. Ct. 1972), dismissing a PINS petition founded on truancy, where the parents refused to permit their children to attend school because of a dispute with school authorities concerning the school bus route. *But see* T.A.F. v. Duval County, 273 S.2d 15 (Fla. App. 1973) (per curiam), *cert. denied*, 283 S.2d 564 (Fla. 1975), affirming a PINS finding based on truancy, even though the children were prevented by their parents from attending school because of the latter's view that "race mixing as practiced in the public schools was sinful and contrary to their religious beliefs." 273 S.2d at 16. *Cf. In re* Arnold, 12 Md. App. 384, 278 A.2d 658 (1971) (delinquency adjudication also involving PINS conduct such as minor misbehavior in school; although the court reversed the training school disposition because the trial judge read the probation report during the fact-finding hearing, the record reveals that the parents were never notified about such misconduct, and thus there could be no finding that they failed to exercise appropriate control).

225. *In re* Slawson, 7 Ore. App. 317, 490 P.2d 1022 (1971). *See also In re* McMillan, 21 N.C. App. 712, 205 S.E.2d 541 (1974), in which the North Carolina

The cases discussed in this section illustrate that PINS statutes were not intended to remedy all instances of juvenile disobedience, even those involving repeated acts. PINS legislation should instead be construed to embody three substantive requirements: (1) that the acts of which the child is accused be of sufficient magnitude to cause substantial injury to the child or others; (2) that such acts be the result of intentional malevolence, rather than of mere mischievousness; and (3) that persons in authority have been unable to deter this misconduct with substantial, good-faith efforts.[226]

B. *Exhaustion of Non-Judicial Remedies*

A persuasive argument can be made that a PINS action should be defeated by proof that the petitioning party has failed to utilize non-judicial remedies, such as those available at community welfare agencies, prior to commencement of court proceedings. A defense based upon the existence of non-judicial remedies may be raised regardless of the seriousness or the frequency of the alleged misconduct.

A number of authorities have recognized that the PINS jurisdiction should be exercised only as a last resort to remedy the most serious forms of continuing juvenile misbehavior. Thus, the President's Task Force on Juvenile Delinquency observed, "[E]specially in instances of conduct . . . [that] would not be criminal for an adult, it is of the greatest importance that all alternative measures be employed before recourse is had to court."[227] Similarly, the 1962 committee report that accompanied New York's innovative PINS legislation viewed the juvenile court as "essentially a last resort [whose] . . . energies and processes should be reserved for children requiring official supervision."[228] A Georgia appellate court, in reversing a judgment committing a fourteen-year-old girl to a state agency until her twenty-first birthday for use of obscene language in school, noted:

Court of Appeals reversed a trial court's finding that three siblings, aged nine, twelve and fifteen, were "undisciplined" children because they had, with parental approval, been absent from school one day.

226. *See* Commonwealth v. Brasher, 359 Mass. 550, ___, 270 N.E.2d 389, 393 (1971), construing the state's stubborn child law so as to require proof that a person in authority gave a lawful and reasonable command, that the child's refusal to obey was "wilfull, obstinate and persistent for a period of time," and that there was an actual refusal to obey and not merely a difference of opinion or disagreement.

227. TASK FORCE REPORT, *supra* note 8, at 26. *Cf.* Note, *A Proposal for the More Effective Treatment of the "Unruly" Child in Ohio: The Youth Services Bureau*, 39 U. CIN. L. REV. 275, 282 (1970).

228. REPORT OF JOINT LEGISLATIVE COMM. ON COURT REORGANIZATION, *reprinted in* McKinney's Session Laws of New York 3428, 3436 (1962).

> [S]uch conduct as proved here is usually the subject of disciplinary action by school officials without the necessity of invoking the aid of the courts. . . . To bring all students accused of this or similar deeds of misconduct before the courts would be taking advantage of the real purpose of and necessity for the Juvenile Court Act and would place burdens on the courts which rightfully belong to parents and school officials. It is only when such corrective measures are totally without avail that the courts should be asked to invoke the sometimes awesome consequences of the law.[229]

Despite such conclusions, there are few reported PINS cases in which courts have required the parties to avail themselves of community resources as a prerequisite to judicial action.[230]

In an attempt to limit access to the juvenile court, over half of the states have established intake procedures for the adjustment of cases not requiring judicial intervention and, if necessary, for the referral of the parties to appropriate community agencies.[231] Though some might argue that these intake procedures automatically exhaust non-judicial solutions, the process in fact has serious shortcomings. These include insufficient staffing for conducting investigations,[232] vague criteria for determining which cases warrant diversion,[233] restriction of the adjustment process to cases in which the child admits the misconduct alleged,[234] the tendency of probation personnel to accede to parental demands,[235] and the power of the petitioning party to

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229. Young v. State, 120 Ga. App. 605, 606-07, 171 S.E.2d 756, 757 (1969); *accord*, M.S.K. v. State, 131 Ga. App. 1, 205 S.E.2d 59 (1974), *discussed in* note 221 *supra*. *Cf.* E.S. v. State, 134 Ga. App. 724, 215 S.E.2d 732 (1975), *discussed in* note 221 *supra*. *See also In re* Alley, 174 Wis. 85, 182 N.W. 360 (1921); Ossant v. Millard, 72 Misc. 2d 384, 339 N.Y.S.2d 163 (Fam. Ct. 1972).

230. *See* cases *cited in* note 229 *supra*. *See also* NEWSWEEK, Sept. 8, 1975, at 72, col. 1, *quoting* retired New York juvenile court Judge Justine Wise Polier: " 'parents file status petitions only when they are at their wits end . . . [and] when they are terrified that the children are going to destroy themselves or commit a really serious crime.' " This contention appears to be at odds with the *Yale Law Journal* study of the New York Family Court, which found, *inter alia*, that two thirds of the PINS cases analyzed were withdrawn or dismissed. YALE PINS STUDY, *supra* note 33, at 1399. *See also* E. WAKIN, *supra* note 29, at 12-13.

231. *See* notes 28-33 *supra* and accompanying text.

232. TASK FORCE REPORT, *supra* note 8, at 18; E. WAKIN, *supra* note 29, at 101; *see also* L. FORER, *supra* note 156, at 67-83; Kelley, Schulman, & Lynch, *Decentralized Intake and Diversion: The Juvenile Court's Link to the Youth Service Bureau*, 27 JUV. JUSTICE 3 (1976).

233. TASK FORCE REPORT, *supra* note 8, at 17; E. WAKIN, *supra* note 29, at 42. *See* YALE PINS STUDY, *supra* note 33, at 1399 n.107 ("Probation intake decisions and court dispositional decisions operate at irrational cross-purposes: Those factors at intake which are typically associated with a case sent to court are the same factors that characterize cases which are withdrawn or dismissed").

234. *See, e.g.*, MONT. REV. CODES ANN. § 10-1210(1)(a) (Cum. Supp. 1975); UNIFORM JUVENILE COURT ACT § 10(a)(1); E. WAKIN, *supra* note 29, at 41-42.

235. YALE PINS STUDY, *supra* note 33, at 1395.

maintain a court action despite the intake department's contrary recommendation.[236]

Moreover, if statutory provisions for intake adjustment precluded assertion of the exhaustion defense, the result would be to insulate intake decisions from judicial review and thereby to circumscribe the power of the court to assure the correct application of the intake process in particular cases.[237] The necessity for proper utilization of the intake procedure was recognized by a New York court in a recent case of first impression, *In re Charles C.*.[238] The court held that a juvenile charged with delinquency did not lose the right to intake procedures by his failure to appear at a probation interview. Construing the statutory requirement that a child must be found "in need of supervision, treatment or confinement" before being adjudicated a delinquent, the judge in effect ruled that there could be no such finding or adjudication in this case in the absence of utilization of the intake procedure. The court thus held that, notwithstanding the victim's objection, it was empowered to refer the child to intake for an adjustment decision even after a petition had been filed against him.[239]

The importance of the *Charles C.* case is that, on the basis of a statutory requirement that a child be "in need of supervision," it recognizes judicial power to review intake decisions. Although the court's ruling was in response to an intake determination based on a procedural default, the judge's decision required consideration of the merits of that default (*i.e.*, whether the child's failure to appear for the intake interview was excusable). This power of review could readily be extended to permit courts to pass on whether an intake depart-

236. *See* note 32 *supra*.

237. The argument that intake procedures provide an effective screening mechanism for minor misconduct is controverted by such cases as Young v. State, 120 Ga. App. 605, 171 S.E.2d 756 (1969), and M.S.K. v. State, 131 Ga. App. 1, 205 S.E.2d 59 (1975), *discussed in* note 229 *supra* and accompanying text, inasmuch as Georgia law included intake adjustment provisions. *See* GA. CODE ANN. § 24A-1001 (Supp. 1975). *See also* Doe v. State, 487 P.2d 47, 55 (Alas. 1971) (concluding that delinquents were not entitled to grand jury indictments, the Alaska court noted that the intake adjustment process was more advantageous to the child, but was constrained to observe that there was no evidence it had been utilized in this case: "Our statement here that the [intake] . . . procedures offer a more than adequate substitute for grand jury indictment indicates how important it is that these procedures be followed in every case").

238. 371 N.Y.S.2d 582 (Fam. Ct. 1975).

239. 371 N.Y.S.2d at 587, *construing* N.Y. FAMILY CT. ACT § 734 (McKinney 1962), *as amended* N.Y. FAMILY CT. ACT § 734 (McKinney 1975). For reasons beyond his control, the child did not appear for his original intake interview, which resulted in a petition being filed and an arrest warrant being issued.

ment's refusal on substantive grounds[240] to adjust a case was appropriate. Because intake departments serve as mechanisms for the diversion of juveniles from the court to community agencies, judicial power to review their decisions on the merits would in effect constitute recognition of the exhaustion defense.

Inasmuch as the *Charles C.* decision was based on construction of language commonly found in PINS statutes, even courts that are in jurisdictions without intake procedures could conclude that a child was not "beyond parental control," "incorrigible," or "in need of supervision" within the meaning of the particular state's statute,[241] unless the parent had previously attempted to exercise his or her authority by using community-based facilities for coping with intrafamily conflicts.[242]

The utilization of an exhaustion requirement would accord well with the strong preference, reflected in legislation and case law pertaining to juveniles, for selection of the dispositional alternative that least restricts a child's freedom. Numerous statutes provide that it is preferable for treatment of the child to be "in his own home,"[243]

240. For example, that a court hearing would be in the interests of the public and child. *See* TEX. FAM. CODE ANN. § 53.03(a)(1) (1975). Indeed, the *Charles C.* court did consider such substantive factors as the child's age, prior record, and home and school life. 371 N.Y.S.2d at 587.

241. *See e.g.*, D.C. CODE ANN. § 16-2301(8) (1973) (defining a PINS child as one who is habitually disobedient and in need of care or rehabilitation); NEB. REV. STAT. § 43-201(5)(a) (1974) (including as a PINS child one who is not controlled by his or her parents). The Nebraska statute also includes in its statement of purpose the following: "To provide for the intervention of the juvenile court in the interest of any child who is within the provisions of this act, with due regard to parental rights and capacities and the availability of non-judicial resources." NEB. REV. STAT. § 43-201.01(2) (1974).

242. Legislation in a number of states requires school officials to make reasonable efforts to correct the situation before a PINS application based on truancy can be made to the juvenile court. *See, e.g.*, CAL. WELF. & INSTNS. CODE § 601(b) (West Supp. 1976); LA. REV. STAT. § 17:233 (West Supp. 1975); S.C. LAWS ANN. § 21-766 (1962) (requiring the truant officer to contact parents "with the object in mind of interesting nonattending children in school work, and influencing them by means of persuasion to attend school regularly"). *See also* ILL. ANN. STAT. ch. 122, §§ 26-27, 26-28 (Smith-Hurd 1962); MICH. COMP. LAWS ANN. § 340.739 (1967) (requiring that notice be given to parents of truant children). *Cf.* Goss v. Lopez, 419 U.S. 565 (1975) (requiring notice and hearing prior to suspension of children from school for ten days or less); *In re* John R., 79 Misc. 2d 339, 357 N.Y.S.2d 1001 (Fam. Ct. 1974) (evidence relating to suitability of children's school and extent of psychological counseling offered them before truancy petitions were filed held admissible at dispositional hearing but not at fact-finding hearing).

243. *E.g.*, GA. CODE ANN. § 24A-101 (Supp. 1973); KAN. STAT. ANN. § 38-801 (1973); UTAH CODE ANN. § 55-10-63 (1974) ("It is the purpose of this act to secure for each child coming before the juvenile court such care, guidance, and control, preferably in his own home, as will serve his welfare, and the best interests of the state; to preserve and strengthen family ties whenever possible . . ."). *See also* UNIFORM JUVENILE COURT ACT § 1(3).

while other legislation requires that, before a more restrictive disposition can be entered, there be a finding that "community resources" or "community-level alternatives" have been "exhausted."[244] Similarly, appellate courts have reversed, or directed reconsideration of, training school placements where the trial courts had failed to consider less onerous alternatives.[245] Finally, a concept analogous to an exhaustion requirement is reflected in the practice of allowing the waiver of an alleged delinquent into an adult criminal court only after a finding that the child cannot benefit from the services available to the juvenile court.[246] Thus, requiring the exhausion of non-judicial remedies as a prerequisite for assumption of PINS jurisdiction is, in a sense, a logical extension of current juvenile court practices in selecting dispositional alternatives.

It is also significant that judicial creation of an exhaustion requirement in the absence of explicit legislation is not unprecedented. The doctrine of exhaustion of administrative remedies, for example, "had its origin in a discretionary rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief when he has failed to pursue an available administrative remedy by which he might obtain the same relief."[247] The administrative law requirement of exhaustion has particular force where utilization of agency expertise is important for resolution of the controversy.[248] Another

244. MINN. STAT. ANN. § 260.185 (subd. 1)(c)(4) (Cum. Supp. 1975); N.C. GEN STAT. §§ 7A-286 (4), (5)(d) (Cum. Supp. 1975). *See also* ARIZ. REV. STAT. ANN. §§ 8-261 to 8-265 (1974), establishing "family counseling programs" that the court may order both parents and children to attend, either before or after entry of judgment. ARIZ. REV. STAT. ANN. § 8-263(A) (1974).

245. *See, e.g., In re* William S., 10 Cal. App. 3d 944, 950-51, 89 Cal. Rptr. 685, 689 (1970); *In re* Wooten, 13 Md. App. 521, 284 A.2d 32 (1971); *In re* Jeanette P., 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (2d Dept. 1970) (per curiam); *In re* John H., 48 App. Div. 2d 879, 369 N.Y.S.2d 196 (2d Dept. 1975); Hill v. State, 454 S.W.2d 429 (Tex. Civ. App. 1970).

246. *See, e.g.*, Kent v. United States, 383 U.S. 541 (1966); Atkins v. State, 259 Ind. 596, 290 N.E.2d 441 (1972); J.E.C. v. State, 225 N.W.2d 245 (Minn. 1975). In *Atkins*, the court reversed a waiver to the criminal court that had been entered because the minors were too old for commitment to the state training school, and in so doing observed that the statute, "in addition to creating a presumption in favor of disposing of juvenile matters within the juvenile system, also creates a presumption in favor of using the *least severe* disposition available to the juvenile court which will serve the needs of the case." 259 Ind. at 602, 290 N.E.2d at 445 (emphasis original).

247. Smith v. United Sates, 199 F.2d 377, 381 (1st Cir. 1952); *see* Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41, 50-51 (1938).

248. *See, e.g.*, McGee v. United States, 402 U.S. 479, 485-86 (1971); McKart v. United States, 395 U.S. 185, 197-99 (1969). *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.02 (3d ed. 1972).

A collateral benefit of such an exhaustion requirement is that it "tends to ensure that the agency have additional opportunities 'to discover and correct its own errors,'

judicial creation[249] with a similar rationale is the doctrine of primary jurisdiction, which applies where the court and an administrative agency have concurrent original jurisdiction, and which generally requires the court to defer action where the expertise of the agency is of particular value.[250] Primary jurisdiction has been characterized as "a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to . . . [the] particular circumstances."[251] In a similar fashion, an exhaustion requirement in PINS cases would allow the juvenile courts to defer, whenever possible, to the expertise of community agencies.

In determining whether the exhaustion requirement has been met, courts might consider the following factors at a pre-trial hearing:[252]

1. the amount of time that has elapsed since the child's misbehavior began;
2. the steps taken by the parent to attempt to resolve the problem within the family (*e.g.*, discussions between parent and child, reprimands, sanctions);
3. the agency or agencies from which the parent sought assistance when the foregoing steps were unsuccessful;
4. the length of time spent with the agency, and the procedures it utilized to resolve the problem;
5. the reasons consultation with the agency was terminated; and
6. the relief the parent is requesting from the court.

Consideration of these factors would lead to dismissal in many in-

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and thus may help to obviate all occasion for judicial review." McGee v. United States, 402 U.S. 479, 484. *Cf.* PepsiCo, Inc. v. F.T.C., 472 F.2d 179, 185 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973) (construing section 10(c) of the Administrative Procedure Act that permits judicial review of "final agency action," and suggesting that "[m]any of the considerations supporting the final judgment rule with respect to appeals from decisions of lower courts are equally present in the case of agency action: . . . the case may be settled; the reviewing court, in any event, will be in a better position to assess the matter when all the cards have been played").

249. *See* K. DAVIS, *supra* note 248, at § 19.02.

250. *See, e.g.*, United States v. Western Pacific R.R., 352 U.S. 59, 63-64 (1956) (exhaustion doctrine "applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views") (citations omitted).

251. Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 498-99 (1958).

252. It would appear preferable to present evidence on the exhaustion issue at a pre-trial hearing rather than at the adjudicatory hearing itself, because of the possibility that some of the evidence offered will be hearsay and thus possibly inadmissible at a fact-finding hearing.

stances. For example, if a parent brings a child to court immediately after the alleged misbehavior, or without having talked to the child, or without having gone to any community agency, the petition should be dismissed. Similarly, if, after having sought community assistance, the parent terminates consultation because the agency views the problem as familial or parental and recommends therapy for both parent and child, dismissal would also be warranted.

Adoption of such an exhaustion requirement would, in addition to providing children with a defense to unnecessary PINS actions, clearly improve the operation of the juvenile court system. It can limit access to the juvenile court to mature and responsible parents who have diligently attempted to resolve intra-family conflicts by the use of alternative methods, and will thus screen out parents "who too frequently find . . . [the court] a convenient method both of evading their own responsibilities and of venting their hostility toward their offspring."[253] Thus, the juvenile courts will reinforce the principle that the primary responsibility for rearing a child belongs not to the state, but to the parents.[254] Moreover, if care is taken to assure that the parent does not make only a formal, perfunctory use of the community agency, the juvenile court can limit its caseload to the most serious forms of juvenile misconduct, since minor infractions and normal adolescent rebelliousness will generally be resolved at the agency level.[255] Finally, if the exhaustion requirement is met in all PINS cases, the court will have the views and recommendations of expert community agencies to inform its judgment as to the appropriate interim and final dispositions of every case.

C. *"Contributory Neglect" by Parent*

Legislation and judicial decisions in a number of states suggest that failure of parents or guardians to care properly for their children may constitute a complete or partial defense to PINS charges. Many PINS statutes, by their own terms, incorporate defenses based on parental inadequacies. For example, a number of jurisdictions classify

253. TASK FORCE REPORT, *supra* note 8, at 27. Refusal of a parent to utilize community-based facilities should result in dismissal of the PINS petition. Where, however, the child's behavior is life-threatening and necessitates immediate judicial action, parental refusal to seek treatment in the community could be the basis of a neglect proceeding.

254. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 157, at 7-8. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923).

255. If the parent refuses to be cooperative or makes unreasonable demands upon the child, the agency's report to the court noting that fact should result in dismissal of the PINS case.

runaways as PINS only when they have left home "without just cause."[256] In other states, the PINS statutes proscribe disobedience only if the parental commands in question are "reasonable and lawful"[257] or "reasonable and proper."[258] The Maryland statute is still more emphatic, prohibiting only juvenile disobedience that occurs "without substantial fault" on the part of a child's parents.[259]

Yet many of these same statutes also include a separate provision that classifies *any* juvenile misbehavior, whether precipitated by parental deficiencies or not, as PINS conduct.[260] In the California statute, for example, although one clause prohibits refusal to obey "reasonable and proper [parental] orders," it is followed by a separate clause that permits a child to be adjudged a PINS if he or she is "beyond the control" of the parent.[261] Statutes of this type are internally inconsistent,[262] inasmuch as the "reasonable and proper" provision can be used to exclude from the PINS jurisdiction behavior that is related to parental fault, while the "beyond control" category can be used to condemn the child for the same conduct regardless of parental blameworthiness.

A California court has suggested an appropriate resolution of this apparent statutory inconsistency. The trial court in a PINS case had refused to hear certain evidence tending to show a mother's instability and the propriety of her child's absences from home, although other admitted evidence indicated that the mother may have provoked an assault upon her by the child.[263] The appellate court refused to sustain a PINS finding where "the breakdown in parental control

256. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-53 (Supp. 1975); ME. REV. STAT. ANN. tit. 15, § 2552 (Supp. 1975).

257. *See, e.g.*, GA. CODE ANN. § 24A-401(g)(2) (Supp. 1975); MICH. COMP. LAWS ANN. § 712A.2(2)(a)(2) (Cum. Supp. 1975); UNIFORM JUVENILE COURT ACT § 2(4)(ii).

258. *See* CAL. WELF. & INSTNS. CODE § 601(a) (West Supp. 1976).

259. MD. CTS. & JUD. PRO. CODE ANN. § 3-801(e)(2) (Supp. 1975).

260. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 17-53(b), (c) (Supp. 1976); KAN. STAT. ANN. §§ 38-802(d)(1), (2), (3) (1973); OHIO REV. CODE ANN. §§ 2151.022 (A), (C) (Page Supp. 1974); S.C. CODE ANN. §§ 15-1103(9)(b), (d) (1962); W. VA. CODE ANN. §§ 49-1-4(3), (5) (1966).

261. CAL. WELF. & INSTNS. CODE § 601(a) (West Supp. 1976).

262. Prior to its amendment in 1975, the internal inconsistency of the California statute was even more glaring, because, in addition to the provisions noted in the text, the statute permitted PINS adjudications against children "who *from any cause* . . . [are] in danger of leading an idle, dissolute, lewd, or immoral life." CAL. WELF. & INSTNS. CODE § 601 (West Supp. 1975) (emphasis added), *as amended*, CAL. WELF. & INSTNS. CODE § 601 (West Supp. 1976).

263. *In re* Henry G., 28 Cal. App. 3d 276, 104 Cal. Rptr. 585 (1972); *but see In re* David S., 12 Cal. App. 3d 1124, 1127-28, 91 Cal. Rptr. 261, 263 (1970); *discussed in* notes 214-16 *supra* and accompanying text.

[was] because of failings in the parent rather than in the minor,"[264] and, accordingly, it reversed the decision:

> We do not at all intimate that Henry's mother was the one at fault but his counsel should have been allowed to try to show that fact. Precluding the attempt might well create a situation where the "beyond the control" provisions of . . . [the PINS statute] are used to avoid the more stringent language of that section relating to one who persistently or habitually refuses to obey a parent's reasonable and proper orders or directions.[265]

Courts that are confronted with similar statutory inconsistencies should follow the lead of the California court in disallowing the use of an open-ended provision to justify a PINS finding based upon conduct that is defensible under the terms of the more specific prohibitions.

The neglect or dependency laws of the various states may also afford a defense based on parental inadequacies. In some jurisdictions, the statutory definition of a neglected child embraces those who are also described by the PINS and delinquency provisions, but "whose conduct results in whole or in part from parental neglect."[266] In many states, the same conduct may be the basis for either a PINS or a neglect action. For example, a child's failure to attend school can result in a PINS action,[267] a neglect or dependency proceeding,[268] or

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264. 28 Cal. App. 3d at 285, 104 Cal. Rptr. at 590.

265. 28 Cal. App. 3d at 285, 104 Cal. Rptr. at 590. *See also In re* Elmore, 382 F.2d 125, 128 (D.C. Cir. 1967) (in the context of a PINS right to treatment case, appellate court suggests that, on remand, the juvenile court consider whether its finding that the child was beyond parental control conflicted with its other finding that the child was without adequate supervision; juvenile court had previously denied motion by child's attorney to treat the child as neglected rather than as a PINS).

266. MINN. STAT. ANN. § 260-015(1)(h) (Cum. Supp. 1975); *See* WIS. STAT. ANN. § 48.13(1) (j) (1957). *See also* ARIZ. REV. STAT. ANN. § 8-201.10(c) (1974), treating a child under eight who commits a delinquent or PINS act as a dependent child. Although very few states prescribe lower age limits for PINS children, *see* notes 20-22 *supra* and accompanying text, there are relatively few PINS cases involving extremely young children. *See* YALE PINS STUDY, *supra* note 33, at 1387 n.25. When such cases arise, failure of the parent to exercise appropriate control when the child is so young (*e.g.*, ten years old or less) should afford a strong basis for urging that PINS charges be dismissed and a neglect petition substituted.

267. *See, e.g.*, ARK. STAT. ANN. § 45-403(3)(a) (Supp. 1975); CONN. GEN. STAT. ANN. § 17-53 (Supp. 1976) ("habitually truant"); ILL. ANN. STAT. ch. 37, § 702-03(b) (Smith-Hurd 1972); TEX. FAM. CODE ANN. § 51.03(b)(2) (Supp. 1975). *Compare* Ossant v. Millard, 72 Misc. 2d 384, 339 N.Y.S.2d 163 (Fam. Ct. 1972), *with* T.A.F. v. Duval County, 273 S.2d 15 (Fla. App. 1973) (per curiam), *cert. denied*, 283 S.2d 564 (Fla. 1975), *discussed at* note 224 *supra*.

268. *See, e.g.*, ARK. STAT. ANN. § 45-403(4)(b) (Supp. 1975); CONN. GEN. STAT. ANN. § 17-53 (Supp. 1976) ("being denied proper care and attention, physically, educationally, emotionally, or morally"); ILL. ANN. STAT. ch. 37, § 702-4(1)(a) (Smith-Hurd 1972) ("who is neglected as to . . . education as required by law"); TEX. FAM. CODE ANN. § 51.02(1)(H)(i) (Supp. 1975). *See In re* Pima County Juvenile Action, 18 Ariz. App. 219, 501 P.2d 395 (1972); Cude v. State, 237 Ark. 927, 377

a complaint against the parent under the compulsory education law.[269] A similar overlap is found in states where a juvenile whose "behavior or condition" is injurious to his or her welfare may be adjudicated a PINS, while one whose "environment" produces such injury is deemed neglected.[270] The manner in which courts reconcile these two groups of statutes will determine whether a child may successfully urge parental neglect as a defense to a PINS petition.

The reported decisions in cases where a child could arguably be classified as either a PINS or neglected reflect disparate positions on the proper exercise of juvenile court jurisdiction. Some courts believe that if the juvenile misconduct technically falls within the ambit of the PINS statute, then PINS adjudications are proper, even where parental neglect is causally related to this behavior. A Florida court, for example, affirmed PINS findings of truancy against two children who did not attend school solely because of their parents' religious belief that racial integration of schools was sinful.[271] Similarly, a delinquency finding that was based on the theft of a bag of potato chips and resulted in a training school commitment was affirmed, even though the child had previously been adjudicated dependent and had committed the theft to feed himself. The child's defense based on his parent's neglect was dismissed as a "specious argument which has no basis in law."[272]

S.W.2d 816 (1964); *cf.* Galloway v. State, 249 Ala. 327, 31 S.2d 332 (1947); *In re* Davis, 114 N.H. 242, 318 A.2d 151 (1974) (original charge was both PINS and neglect).

269. *See, e.g.*, ARK. STAT. ANN. § 80-1502 (1960); CONN. GEN. STAT. ANN. §§ 10-184, 10-185 (1958); ILL. ANN. STAT. ch. 122, § 26-1 (Smith-Hurd 1962); TEX. EDUC. CODE § 4.25 (1972). *See also* Commonwealth v. Ross, 17 Pa. Commnw. 105, 330 A.2d 290 (1975); *cf.* Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964) (parents had been fined on three occasions for refusing to vaccinate their children so that they could attend school; their continued refusal resulted in this neglect and guardianship proceeding).

270. *See, e.g.*, KAN. STAT. ANN. §§ 38-802(d)(1), (g)(3) (1973); S.C. CODE ANN. §§ 15-1103(9) (j), (11)(i) (1962); S.D. COMP. LAWS ANN. §§ 26-8-6, 26-8-7.1 (Supp. 1975); WIS. STAT. ANN. §§ 48.12 (Cum. Supp. 1975), 48.13(1)(f) (1957). *See* State *ex rel.* Wiley v. Richards, 253 Iowa 679, 113 N.W.2d 285 (1962) (sisters eight and twelve years old adjudicated dependent and neglected on the basis of conduct that other courts might have classified as PINS—use of vulgar language and roaming the streets at night). *Cf. In re* Chandler, 230 Ore. 452, 370 P.2d 626 (1962) (13-year-old girl's running away from home results in neglect adjudication).

271. *See* T.A.F. v. Duval County, 273 S.2d 15 (Fla. App. 1973) (per curiam), *cert. denied*, 283 S.2d 564 (Fla. 1975). *See also In re* Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961).

272. *In re* Blakes, 41 Ill. App. 3d 567, 572, 281 N.E.2d 454, 457 (1972). *See In re* Henderson, 199 N.W.2d 111 (Iowa 1972); *In re* Garner, 230 Pa. Super. 476, 326 A.2d 581 (1974) (simultaneous adjudication of child as both PINS and neglected). In Commonwealth v. Brasher, 359 Mass. 550, ___, 270 N.E.2d 389, 395 n.2 (1971), the child alleged she was denied equal protection of the law because she was

Other courts, adopting a middle ground, have concluded that, while parental inadequacies do not bar a PINS finding, these deficiencies must be considered in determining the appropriate disposition, at least insofar as the neglect is related to the child's misbehavior. Thus, in a case where a girl had left home because of a "bizarre home environment and family tensions," an order for placement in a training school was reversed, with directions that she be afforded treatment in a more suitable environment.[273]

Finally, some courts reverse PINS findings where parental neglect is present, even though the particular juvenile misconduct technically violates the PINS statute. These courts attempt to determine whether parental neglect is causally related to the juvenile misconduct in question, and, on the basis of this inquiry, make either a PINS finding or a finding of neglect.[274] This approach renders PINS and neglect findings mutually exclusive and precludes PINS findings where parental neglect has directly contributed to the PINS behavior. Thus, a PINS finding based on truancy and disobedience to the child's father was reversed, and a neglect finding substituted, where the probation report indicated that the boy's home was filthy and that, because of ill health, his father was unable to exercise proper supervision.[275] An-

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brought to court as a PINS rather than as a neglected child; the court rejected this argument, holding that there was a reasonable distinction between PINS and neglected juveniles. *Accord, In re* Jackson, 6 Wash. App. 962, 497 P.2d 259 (1972).

273. *In re* Arlene H., 38 App. Div. 2d 570, 328 N.Y.S.2d 251 (2d Dept. 1971). *Cf.* People v. Grieve, 131 Ill. App. 2d 1078, 267 N.E.2d 19 (1971). In *In re* Mario, 65 Misc. 2d 708, 317 N.Y.S.2d 659 (Fam. Ct. 1971), the court indicated that the parent's inadequacies are a defense to PINS charges only where they have a direct causal connection to the juvenile misbehavior, and that generalized passive neglect does not bar either a PINS finding or placement in a state training school if the child's conduct otherwise warrants such a disposition. *Cf. In re* Kenneth S., App. Div., 2d Dept., N.Y.L.J., May 13, 1976, at 11, col. 6 (remanding a case in which the child had been adjudicated both a PINS and a delinquent, with direction that the trial court conduct a supplemental hearing as to whether the child should be placed in a facility for delinquents or one for PINS; by analogy, this case lends support to the dispositional modification approach for "neglected PINS" discussed in text accompanying this note). *See also* OKLA. STAT. ANN. tit. 10, § 1116(a)(1) (Cum. Supp. 1974), *quoted in* note 162 *supra.*

274. If there is insufficient evidence to sustain either a PINS or a neglect finding, the case can simply be dismissed. *See In re* Pima County, 18 Ariz. App. 219, 501 P.2d 395 (1972); *In re* Sippy, 97 A.2d 455 (D.C. App. 1953). *See generally* REVISION COMMITTEE NOTE, 1955 to WIS. STAT. ANN. §§ 48.13(i), (j) (1957).

275. *In re* Paul H., 47 App. Div. 2d 853, 365 N.Y.S.2d 900 (2d Dept. 1975) (per curiam). Under New York law, the court on its own motion may, at any time in the proceedings, substitute a neglect petition for a PINS or delinquency petition, N.Y. FAMILY CT. ACT § 716(b) (McKinney 1975). *See In re* Richard C., 43 App. Div. 2d 862, 352 N.Y.S.2d 15 (2d Dept. 1974) (per curiam), reversing a training school placement of an adjudicated delinquent on the ground, *inter alia*, that it was an abuse of discretion not to substitute a neglect petition when child's mother repeatedly failed to appear at the dispositional hearing.

other appellate court ruled that the habitual absence of a fifteen-year-old boy from a shelter for neglected children did not warrant a finding of ungovernability because the child, who had previously been declared neglected, left only to visit his mother; the court therefore reversed both the PINS finding and the boy's placement at the state training school.[276]

The third approach is preferable,[277] since it avoids attaching the stigma of a PINS finding to a child whose parent is at least partially to

276. *In re* Lloyd, 33 App. Div. 2d 385, 308 N.Y.S.2d 419 (1st Dept. 1970). *See* P.S.M. v. State, 469 S.W.2d 13 (Tex. Civ. App. 1971), reversing a PINS finding on the technical ground that, although the petition alleged that the child left home without permission of her "parents," there was no evidence of lack of consent by the father. The court described in considerable detail the lack of parental supervision, referring to the girl's alcoholic father, mentally disturbed brother, and mother who was away working all day. In remanding, the court noted, "[T]he evidence has not been fully developed. . . . It is obvious that appellant's case requires the attention of the Juvenile Court." 469 S.W.2d at 15.

277. Although this approach may result in the placement of PINS children whose misbehavior was the result of parental inadequacies with neglected children who have engaged in no overt misconduct, there is no inconsistency between this position and the view expressed in the text at note 107 *supra* that PINS and delinquent children should not be commingled. Placement of PINS and neglected children together would seem to create little danger that the neglected juvenile will be led astray or harmed by the PINS child, since the latter's conduct is confined to behavior that is recognized as a child's method of externalizing problems and as a form of juvenile rebelliousness. In contrast, delinquents have by definition crossed the line of criminality, and there probably is a greater likelihood of inciting emulation of this adult form of antisocial conduct, *e.g.*, there is a certain panache about following the lead of a local Bonnie or Clyde that is not present with respect to truancy and staying out late without permission. Commingling of PINS and delinquents, which most often takes place in maximum security facilities, also effectively labels the PINS child as one who is so bad that he or she must be confined with those who have committed crimes. *See generally* LEAA ANNOUNCEMENT ON DEINSTITUTIONALIZATION, *supra* note 2, at 5-8, 10; STONE COMMISSION, AN INQUIRY INTO THE JUVENILE CENTERS OPERATED BY THE DEPARTMENT OF PROBATION OF THE CITY OF NEW YORK 11-14 (1971).

Although it might be argued that some PINS children have in fact perpetrated criminal acts and thus present the same sort of dangerous influence to neglected children as delinquents do to PINS, this danger is diminished because there has been no formal recognition of criminality through a court adjudication to that effect. To the extent that children's perceptions of their peers are influenced by adult labelling, the absence of a delinquency finding increases the likelihood that these children will be viewed merely as braggarts and that they will have little power to sway other juveniles in the direction of criminality. The potential for influence may be heightened, however, where the PINS finding is predicated solely on a criminal act. *See generally* Werthman, *The Function of Social Definitions in the Development of Delinquent Careers*, in TASK FORCE REPORT, *supra* note 8, at 155.

While it is true that neglected, PINS and delinquent children are sometimes placed together in nonsecure, private residential treatment facilities, the labelling process is not nearly as severe in such situations. The fact that placement is not in a maximum security center generates an understanding that the children are there for treatment of juvenile problems rather than for punishment of crimes in a jail-like setting. *Cf.* Martarella v. Kelley, 349 F. Supp. 575, 590-93 (S.D.N.Y. 1972).

blame for the juvenile's misconduct.[278] Furthermore, it requires the trial court to make a broad inquiry into the causes of the child's misconduct, and thus ensures a judgment that is based on an assessment of the blameworthiness of both parent and child.[279] This may be contrasted to the narrow focus of the first approach, which, like a criminal proceeding, restricts the relevant inquiry to the question of whether the accused committed the acts alleged.[280] Moreover, the first two approaches, by reserving the neglect category for children who passively internalize parental abuse, in effect penalize those who manifest their feelings of rejection in overt misbehavior.

The third approach will also inhibit the unwarranted exercise of discretion by which judges, aware of the dearth of residential treatment centers yet assured of the availability of training school facilities, make PINS findings despite the presence of parental neglect.[281] To the extent that a PINS adjudication is predicated on the existence of resources rather than on the child's needs, the courts are allowing fiscal constraints to influence and distort the determination of culpability.[282] By acquiescing in these constraints, the courts reduce pres-

278. *See* notes 8, 193 *supra*, discussing the stigma accompanying a PINS adjudication.

279. *See In re* Lloyd, 33 App. Div. 2d 385, 387, 308 N.Y.S.2d 419, 421 (1st Dept. 1970) (after a lengthy recitation of the facts, the court concluded, "A careful review of this record indicates that this appellant is a 'neglected child' rather than 'a person in need of supervision'. . . . While there is ample support for the finding that appellant habitually absented himself from the Children's Center, this conduct does not warrant a finding that he was habitually disobedient or ungovernable").

280. *See In re* Blakes, 4 Ill. App. 3d 567, 571-72, 281 N.E.2d 454, 457 (1972).

281. *See* LEAA ANNOUNCEMENT ON DEINSTITUTIONALIZATION, *supra* note 2, at 8; JUVENILE JUSTICE CONFOUNDED, *supra* note 55, at 13, 105. State law generally prohibits the placement of neglected children in state training schools. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-241(A) (1974); PA. STAT. ANN. tit. 11, § 50-321(b) (Cum. Supp. 1975). The Pennsylvania statute provides: "Unless a child found to be deprived is also found to be delinquent, he shall not be committed to or confined in an institution or other facility designed or operated for the benefit of delinquent children." In Pennsylvania, PINS are included within the delinquency classification. PA. STAT. ANN. tit. 11, § 50-102(2) (Cum. Supp. 1975). *See also* Galloway v. State, 249 Ala. 327, 31 S.2d 332 (1947); *In re* Slay, 245 Miss. 294, 147 S.2d 299 (1962); *cf.* Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) (right-to-treatment case involving placement of delinquent, PINS and neglected children together in secure detention facilities). For additional reasons prompting judicial preference for treatment of children as PINS rather than as neglected, see notes 76-80 *supra* and accompanying text.

282. *Compare In re* Blakes, 4 Ill. App. 3d 567, 281 N.E.2d 454 (1972) (affirming placement in state training school on the ground, *inter alia*, that the cost of private placement was prohibitive), *with* City & County v. Juvenile Ct., 182 Colo. 157, 161, 511 P.2d 898, 900 (1973) (denying writ of prohibition in action brought by Welfare Department to vacate juvenile court order placing PINS child in a particular private facility; one of the arguments raised by petitioner was that "the City had no money allocated for this particular placement"). *See also In re* L., 24 Ore. App. 257, 546 P.2d 153 (1976) (state contended it had insufficient funds to provide

sure for the creation of sufficient facilities for neglected problem children.[283]

VI. CONCLUSION

The deficiencies of the PINS jurisdiction can be mitigated if, at adjudicatory hearings, there is vigorous assertion of defenses such as contributory neglect and failure to exhaust non-judicial remedies, as well as defenses, based on strict adherence to statutory requirements, that seek exclusion of conduct which is de minimis, condoned or isolated. Utilization of these defenses by zealous advocates may render the PINS jurisdiction nugatory just as analogous defenses developed in the Talmud[284] prevented enforcement of the Biblical sanction against "stubborn and rebellious" sons.[285]

According to the Talmud, the son[286] was subject to prosecution only if he had defied both father and mother, and only if both parents

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proper care for neglected child who repeatedly ran away from placement facility; court ordered termination of state agency's custody if it was unable to provide appropriate treatment). *See generally* JUVENILE JUSTICE CONFOUNDED, *supra* note 55, at 37, pointing out that the median annual cost per child at the New York State Training School during 1970-1971 was $10,008.

283. *Cf. In re* Lloyd, 33 App. Div. 2d 385, 308 N.Y.S.2d 419 (1st Dept. 1970), *discussed in* note 276 *supra* and accompanying text. The court observed that "the provision of proper facilities is the responsibility of the legislature and the legislative failure in that regard does not warrant circumvention of the statute." 33 App. Div. 2d at 387, 308 N.Y.S.2d at 421.

284. The Talmud consists of interpretations and elaborations of the Mishnah, which is in turn a commentary on the Old Testament and a codification of basic Jewish law. The Mishnah was completed *circa* 200 C.E. and the Talmud, *circa* 500 C.E. ENCYCLOPEDIA DICTIONARY OF JUDAICA 419, 585 (Wigoder ed. 1974); *see generally* 15 ENCYCLOPEDIA JUDAICA, TALMUD BABYLONIA 755-71 (1971). While we are not suggesting that resort to the Talmud is necessary to validate any of the defenses discussed in this article, it is instructive to examine the manner in which this ancient counterpart of the PINS statute was restrictively construed, even though framed in mandatory terms. Reference to the Talmud as an aid to interpretation of contemporary law is not unprecedented. *See In re* Juan R., N.Y.L.J., Oct. 28, 1975, at 9, col. 4, where a New York Family Court Judge utilized Talmudic principles of statutory construction to avoid a determination of unconstitutionality with respect to a paternity law.

285. *See generally* F. LUDWIG, *supra* note 22, at 12-13.

286. Daughters appear to have been exempted from the law. BABYLONIAN TALMUD, SANHEDRIN 8:1, at 473 (Soncino ed. 1935) [hereinafter SANHEDRIN]. In contrast, today a majority of girls in the juvenile court are referred on the basis of PINS charges. *See, e.g.*, TEXAS YOUTH COUNCIL, TEXAS JUVENILE COURT STATISTICS FOR 1973, at 10 (1975) (52.6 per cent of girls referred to court for disobedience, 1.8 per cent for immoral conduct); YALE PINS STUDY, *supra* note 33, at 1387 n.26 (62 per cent of PINS cases in New York study were brought against girls). It would appear that statutes providing higher age limits for girls than for boys subject to the court's jurisdiction are unconstitutional. *See, e.g., In re* Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972); *cf.* Stanton v. Stanton, 421 U.S. 7 (1975).

concurred in the prosecution.[287] Through the restrictive interpretation of the word "son," whose meaning was limited to one who was thirteen and thus sufficiently mature to bear criminal responsibility, but not yet old enough to be a "man," the period of indictment was limited to three months following the thirteenth birthday.[288]

The offense consisted of two elements: (1) repeated defiance and reviling of the parents, and (2) gluttony and drunkenness.[289] The latter element could only be satisfied by consumption of specified minimum amounts of food and drink;[290] because these quantities were so large that a child could not afford to purchase them, the law was further interpreted to require that the son have stolen money from his father for that purpose.[291] Thus, while the Talmud recognized that the son's behavior would be predictive of future criminal conduct, that recognition was based on a finding of a criminal act by the son against the father and on a determination that his addictive gluttony could only be appeased by further criminal acts against his parents and others.[292]

Moreover, prosecution was not allowed if the parents possessed certain characteristics. A son was not to be deemed stubborn and rebellious "if his mother [was] not fit for his father," as in the case of violation by the mother of the laws against incest.[293] Thus, it can be inferred that if the parents had set a bad example for their son by themselves acting unlawfully, they were barred from levelling charges

287. SANHEDRIN 8:4, at 482-83. If one parent was dead or refused to join in the charges, the son could not be prosecuted. "Either of them could condone the offense and withdraw the complaint at any time before the conviction." M. ELON, THE PRINCIPLES OF JEWISH LAW 492 (1975). Compare the condonation defense *discussed in* notes 224-25 *supra* and accompanying text.

288. SANHEDRIN 8:1, at 465-68. Under an alternative interpretation, the indictment period was extended to six months after the thirteenth birthday. M. ELON, *supra* note 287, at 491. Compare the mens rea defense *discussed in* note 223 *supra* and accompanying text and the infancy defense *discussed in* notes 22, 266 *supra*.

289. M. ELON, *supra* note 287, at 491-92. Compare the isolated incident defense *discussed in* notes 202-19 *supra* and accompanying text.

290. SANHEDRIN 8:2, at 473-75, 479-81.

291. SANHEDRIN 8:3, at 482. Raschi, who lived in the 11th century and was a leading commentator on the Bible and Talmud, wrote, "A stubborn and rebellious son is not culpable until he has stolen and eaten half a manah of meat and has drunk half a log of wine." THE PENTATEUCH AND RASCHI'S COMMENTARY: DEUTERONOMY 196 (Ben Isaiah & Sharfman ed. 1949).

292. SANHEDRIN 8:5, at 488, states: "Did the Torah [the first five books of the Old Testament] decree that the rebellious son shall be brought before Beth din [the Jewish court of law] and stoned merely because he ate . . . [and drank too much]? But the Torah foresaw his ultimate destiny. For at the end, after dissipating his father's wealth, he would still seek to satisfy his accustomed gluttonous wants but being unable to do so, go forth at the cross roads and rob." (footnote omitted).

293. SANHEDRIN 8:3, at 482-83.

of illegality against him. In addition, a complaint of rebelliousness was precluded if the parents were not "alike in voice" when they admonished their son.[294] This can be interpreted to mean that if the mother and father gave the son inconsistent directions, they were failing to provide him with a cohesive and disciplined home life, and that this parental shortcoming could be a defense to the charge that he was stubborn and rebellious.[295]

Even if the son had committed all the elements of the "crime" and the parents were in no way deficient, he was brought first before a three-judge court where, upon conviction, he was flogged and warned of the consequences if he persisted in such conduct.[296] It was only if he thereafter continued to violate the law that he could be brought before the elders of the city, which was a court of twenty-three persons, and be made subject to the death penalty.[297]

There appears to be no recorded instance of the execution of a stubborn and rebellious son.[298]

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294. *Id.* at 483.

295. Compare the defense of contributory neglect *discussed in* text at notes 256-83 *supra*. Some of the Talmudic interpretations concerning parental traits are rather artificial and appear to have been added to restrict the law's applicability. For example, the son of a parent who had no hands was exempt because of the Biblical requirement that the parents "lay hold on him." SANHEDRIN 8:4, at 484.

296. SANHEDRIN 8:4, at 484-85.

297. *Id.* "He is admonished in the presence of three and flagellated. If he transgresses again after this, he is to be tried by a court of twenty three and cannot be sentenced to stoning unless the first three are present. . . ." Witnesses to the admonition were required, since the son could not be executed on the basis of only his parents' testimony. *Id.* at 484-85. Compare the defense of exhaustion of non-judicial remedies, *discussed in* text at notes 227-55 *supra*.

298. SANHEDRIN 8:3, at 483. "There never has been a 'stubborn and rebellious son,' and never will be. Why then was the law written? That you may study it and receive reward." *Id.* (footnote omitted).