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Court Control over Treatment of Juvenile Offenders

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The thesis of this paper can be stated simply: to the extent that courts permit procedural (or substantive)[1] treatment of juveniles which varies from and falls below the constitutional protections which adults may command, and that variance is predicated upon the power of the State to substitute rehabilitation for punishment in dealing with the young, then, and to the same extent, the courts have the duty of seeing to it that the treatment afforded is in fact rehabilitative and not punitive in nature and effect. Otherwise, the courts must face the criticism that:

> It is not only illogical but blatantly inconsistent with the fair treatment of the child to argue, on the one hand, that the safeguards of criminal procedure are unnecessary in non criminal cases and then, on the other hand, to apply criminal sanctions in such cases.[2]

Before coming to what the writer sees as a basic conflict between the pretext of rehabilitation and the fact of penalty which has been largely concealed by the rhetoric surrounding the juvenile courts,[3] it will be well to locate and to limit the area of discussion planned.

It is not intended to review again the impact of *Kent*[4] and *Gault*[5] or *Winship*.[6] One is tempted to accept the view that more has already been said about them than there was to say.[7] At least the first two have engendered a literature so prolific and profound as to make temerarious

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1. Children are quite generally forbidden activities open to adults. Among these appear truancy, resistance to parental control, frequenting places of adult entertainment and a heterogeneous list of habits which have at one time or another appealed to legislatures as being bad for the young or, concomitantly, calling for rehabilitation. A detailed, and sometime incongruous, outline of such provisions is compactly set out in SUSSMAN, JUVENILE DELINQUENCY (1959). Portions, but by no means all, of this outline have been eliminated in the legislative revisions of the years since its publication.

2. *Delinquent Children in Penal Institutions* U.S. Dept. of Health, Education and Welfare, CHILDREN'S BUREAU PUBLICATION #415 at 10 (1964).

3. *See* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?* 57 GEO. L.J. 848 (1968).

4. Kent v. United States, 383 U.S. 541 (1966).

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

6. *In re* Winship, 397 U.S. 358 (1970). *See*, Cohill article *supra* at 577.

7. See *e.g.*, Lenon *On Re-examining Gault—Again and Again*, 4 FAMILY L.Q. 387 (1970).

any effort to expand or improve on it.[8] Nevertheless, present-day consideration of any part of the juvenile law field cannot proceed without taking bearings on the landmarks the United States Supreme Court has provided.

The flat assumption is made throughout these remarks that accused juveniles are entitled to the protection of those basic rules of fairness which underlie the criminal due process safeguards afforded adults. This assumption rests not only on what the Supreme Court has expressly made authoritative but also on a consideration which, if it has been at all influential, has remained largely unexpressed.[9] That is the conviction that if the purpose of dealing with juveniles is wholly, or even partly, to effect their rehabilitation, it is absolutely essential that they be, and that they realize they are, fairly treated in the process of determining whether the accusations against them are proven true.

A considerable degree of sophistication on the part of today's youth must be taken for granted. If they know or suspect that they are handled and "convicted"[10] in ways which would nullify a similar proceding against their elders,[11] it seems beyond question that their empathy or cooperation with subsequent rehabilitative programs and efforts will be minimal—as will beneficial results.[12]

It would be disingenuous to pretend that this assumption commands, even today, uniform concurrence. Since its inception at the turn of the century the juvenile court movement has based its very existence on the benign proposition that something more and different must be accorded juvenile offenders than subjecting them to the sordid and degrading atmosphere of our criminal courts and penal institutions. They were to be helped and rehabilitated, not convicted and punished; and in seeking this goal the State was acting as *parens patriae*, not prosecutor. In the latter distinction was found the constitutional justification

8. Even a partial listing of this literature would extend greatly beyond present needs, and a partial list will unjustly slight some excellent efforts. Broad coverage can be found, however, in Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law*, 1 FAMILY L.Q. 1 (1967); Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527 (1968); George, *Gault and the Juvenile Court Revolution*, Inst. of Continuing Legal Education, Ann Arbor (1968). This writer owes much to the student effort which foresaw many of the basic issues later dealt with in *Gault*: Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

9. But see, *In re* Gault, 387 U.S. at 27 (1967).

10. It is doubtful that youngsters are mollified by the use of such euphemisms as "found involved."

11. Who knows what they learn—rightly and wrongly—from the press, the movies, Perry Mason and other television depictions of the goings-on in adult courts?

12. *See, Juvenile Delinquency, Its Prevention and Control*, Russel Sage Foundation at 33 (1966); NATIONAL CRIME COMMISSION REPORT at 85 (1967).

for relaxing or omitting altogether many formal safeguards which Anglo-American criminal law had evolved.[13] And it came to be accepted that there was somehow a congruence between eliminating legal "technicalities" in juvenile proceedings and achieving rehabilitation. *Kent, Gault* and now *Winship* are emphatic in saying that benefits are not conferred on juveniles by skimping the rules that have been evolved to sift out the truth of accusations. Read at large, they are equally clear in disclaiming any purpose to limit juvenile courts in the search for dispositional methods which will aid in the rehabilitation of children properly found deliquent.[14]

Nevertheless, a natural tendency to dwell on the Supreme Court's evocations of the great principles of due process has tended to obscure the fact that returning juveniles to parity with others who are entitled to constitutional protection at a trial or hearing is only a beginning. Once it is determined by meticulously correct procedure that a youth has been involved in proscribed conduct,[15] what is to be done? How "rehabilitate"?

It is not proposed here to explore, or even touch upon the enormous problems of correction which have baffled sociologists, social workers, criminologists and others over most of recorded time.[16] But it is submitted that each juvenile court has an unavoidable responsibility to enquire whether there are, in its jurisdiction, facilities which reasonably purport to carry out the functions which justify its own existence. Juvenile courts were created and set apart principally to provide a means of ameliorating the problems of delinquency—of smoothing the path to rehabilitation of delinquents. If they make no effort to see that their determinations have at least a prospect of doing so, one may question the legitimacy of their function.[17]

13. Almost every state has at least one case devoted to a painstaking exposition of this theory. *Gault* itself refers to the seminal article on the subject by Judge Mack, *The Juvenile Court* 27 HARV. L. REV. 104 (1909), and to a major compilation of the state authorities, Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REVIEW 167. Two frequently quoted examples are Mill v. Brown, 31 Utah 473, 88 P. 609 (1907), and, from a more recent era, *Holmes' Appeal* 379 Pa. 599, 109 A.2d 523 (1954), *cert. den.* 348 U.S. 973 (1955). The latter case evoked a telling dissent which urged a distinction between the process of determining the fact of delinquent behaviour and that of prescribing treatment, pointing out the grave consequences of finding delinquency by the use of loose procedures.

14. *See e.g.*, ". . . nothing will require that the conception of the kindly juvenile judge be replaced by its opposite . . ." In *re* Gault, 387 U.S. at 27 (1967).

15. There are, or should be, limits to what may be proscribed, although these remain largely unexplored.

16. *See*, Symposium, *The Right to Treatment*, 57 GEO. L.J. 673 (1969); Hart, *The Aims of the Criminal Law*, 23 LAW AND CONTEMP. PROB. 401 (1958); Twerski, *Treating the Untreatable*, 9 DUQ. L. REV. 218 (1971).

17. Of course, the burden of ensuring that efforts are made and facilities provided

That question has been stated in stark terms: "it would be better for all concerned if young delinquents were not detected, apprehended or institutionalized. Too many of them get worse in our care."[18] It has also been obliquely referred to by many courts in the process of discussing more familiar legal issues. Thus Mr. Chief Justice Burger, joined by Mr. Justice Stewart, in dissent to *Winship* said:

> Much of the judicial attitude manifested by the Court's opinion today and earlier holdings in this field is really a protest against inadequate court staffs and facilities; we "burn down the stable to get rid of the mice."[19]

This may be read to imply that over-concern with constitutional niceties in the determination of delinquency may inhibit the effectuation of rehabilitatory effort.[20] The same dissent says later:

> My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile-court era. I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing. We can only hope the legislative response will not reflect our own by having these courts abolished.[21]

The response against which the Chief Justice's final hope is expressed is not wholly imaginary. At least one publicist has come forward with

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cannot be left to the courts alone. Judge Ketcham of the Juvenile Court in the District of Columbia has eloquently pointed out that all persons "interested in justice for children as well as concerned with their social welfare" [and what responsible citizen can fail to be?] must insist on improvement in the juvenile courts and on the provision of facilities suitable to the effectuation of their purposes. *The Unfulfilled Promise of the Juvenile Court* 7 CRIME AND DELINQUENCY 97 (1961).

18. Milton Luger, quoted in THE NEW REPUBLIC, Dec. 26, 1970, at 17.

19. In *re* Winship, 397 U.S. 358, 376 (1970).

20. A somewhat similar thought was expressed by Justice Weintraub concurring in *In re State in Interest of Carlo*, 48 N.J. 224, 225 A.2d 110, 121 (1966) where he said,

> With respect to crime, we suppress the truth even if it means the release of one who is plainly guilty, and this in the belief that the support thereby given a constitutional value outweighs the price tomorrow's victims may pay. I would suggest that it need not follow that the same course should be pursued with respect to juvenile delinquency, since as to it there is another value to be weighed, to wit, the rehabilitation of the infant. To deny an infant the attention he needs because the police erred in obtaining evidence of that need may not be the parental thing to do. *Id.* at 122.

This plainly should not be read as suggesting either that rehabilitation of "criminals" is not a value to be weighed, or that juveniles should be rehabilitated even if there is no acceptable evidence of need to do so. But the former proposition often seems to underlie discussions of juvenile law; and too many juvenile court determinations seem to embody the latter.

21. In *re* Winship, 397 U.S. at 376 (1970).

the thought that the logical path initiated by *Gault* would lead to returning truly criminal juveniles to the criminal courts—"A return to old time justice."[22] It cannot be assumed that this idea would be devoid of appeal to at least some legislators; but it can be suggested, with respect, that "rigors and trauma" may inhere more in determinations of delinquency based on constitutionally unacceptable procedures than in subjecting the juvenile to processing in a court limited by some, if not all,[23] of the traditional constitutional protections. This will be the more true if the effect of the determination is to send the delinquent to a "rehabilitative" facility which differs in no substantial respect from a jail.

Here we return to the issue dealt with in this paper: The concern (*vel non*) of the juvenile courts with the rehabilitative facilities to which their determinations relegate the young. It must be conceded at the outset that the authorities on this question are at best sparse and equivocal. Their sparsity may, perhaps, be attributed to the undoubted fact that, at least until very recently, juveniles have seldom had the advice of counsel; but the equivocality probably indicates that the thesis of this paper, as states above, has not appealed strongly to even those courts before which it has come.

An early case raised—and disposed of—the issue with rare clarity. *State v. Ragan*[24] held in 1910 that no adequate challenge to the juvenile court's jurisdiction was presented by the claim that Louisiana had no facilities appropriate to the treatment of juveniles. *State ex rel. Sowders v. Superior Ct.*,[25] in similar vein simply denied judicial control over the allegedly unacceptable character of the available detention facility (jail) in Washington. Two more recent cases avoid bringing the courts face to face with the question of suitability of facilities. *Carter v. Montoya*[26] vacated a citation of contempt issued by a juvenile judge against the superintendent of a hospital and training school who had refused to take in a committed juvenile; and the Oklahoma Supreme Court in *In re Wiggins*[27] satisfied itself by calling

22. Parker, *Instant Maturation for the Post Gault "Hood"*, 4 FAMILY L.Q. 113, 127 (1970).
23. The Supreme Court has so far been explicit in denying that it has imposed on the juvenile courts all of the limitations affecting criminal courts. In *re* Winship, 397 U.S. at 359 (1970); In *re* Gault, 387 U.S. at 51 (1967); Kent v. United States, 383 U.S. at 562 (1966).
24. 125 La. 121, 51 So. 89 (1910).
25. 105 Wash. 684, 179 P. 79 (1919).
26. 75 N.M. 730, 410 P.2d 951 (1966).
27. 425 P.2d 1004 (Okl. 1967).

the inadequacy of challenged facilites to the attention of administrative authorities and hoping for the best. It may be surmised that the inadequacy of available facilities was of some effect in persuading the North Dakota Supreme Court to extricate a delinquent girl from an otherwise apparently hopeless tangle of bureaucratic "rehabilitation."[28] Nevertheless, no one of these cases suggests that the inadequacy of facilities might abrogate the power of the court to send children to them for rehabilitation.

A group of cases decided by the United States Court of Appeals for the District of Columbia may point in a different direction. Following an initial decision in which juvenile law was not involved,[29] that court proceeded to construe the District of Columbia Juvenile Court Act as requiring, in effect, that detention facilities be appropriate to their stated purpose.[30] The first case was admittedly an elaborate dictum, giving warning as to proposed future holdings.[31] This was followed soon by *In re Elmore*[32] which required the juvenile court to look into the claim that the detention facility lacked means to give needed psychiatric care to a detained child. It thus applied the dictum of the previous case that the District of Columbia statute confers "a legal right to custody that is not inconsistent with the *parens patriae* premise of the law."[33] Since, moreover, the "*parens patriae* premise" has so frequently been made the foundation for the constitutionality of the whole juvenile process, it does not require a great stretch of the imagination to believe that this court might have found a constitu-

28. *In re* Braun 145 N.W.2d 482 (N.D. 1966). A brief summary of the facts is the following: Jeanette Braun, aged sixteen, was found delinquent for rather minor misconduct in school and was remanded to her parents on probation, a condition of which was that she continue in school. She failed of admission and was brought back to the court, at which time it developed that she was pregnant and planned to marry. She was forthwith committed to an "industrial school" which had no facilities to care for pregnant girls and which sent her to a Florence Crittenden Home. While at the latter she married the father of the unborn child (a ceremony which her own father attended) and left the Florence Crittenden Home, which would not keep married women. Jeanette's marriage was annulled because she had not obtained the statutorily required approval to marry from the industrial school or the Juvenile Court; and her commitment to the industrial school was continued by the juvenile court's refusal of a motion for new trial or rehearing which motion set out the urgent desire of herself, her parents and the father of her child to get her married and settled down in circumstances which, as alleged, seemed eminently satisfactory. The Supreme Court reversed the denial of her motion, directed termination of her commitment and the granting of permission to marry.

29. Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) released an elderly woman from confinement where there were no facilities to treat the mental illness upon which the confinement was predicated. Compare, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

30. See, Kittrie, *supra* note 3, and Cohen, *Right of the Civil and Criminally Incarcerated*, 4 CLEARING HOUSE REVIEW 399 (1971).

31. Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967).

32. App. D.C. 382 F.2d 125 (D.C. Cir. 1967).

33. Creek v. Stone, 379 F.2d 106, 111 (1967).

tional basis for the declared right had the statute not provided it; but no subsequent case has had occasion to speak to that proposition.[34] It is difficult to say what the precise effect was of the denouement[35] of the protracted litigation over Kent. It was finally held that the (retroactive) waiver and transfer of an insane juvenile for trial as an adult criminal was an improper dispositive order, the outcome being that Kent was held pending proceedings for civil commitment.[36]

New York has also produced a number of cases which may be attributed to its unique statutory scheme. *In re Ronny*[37] holds that a child may not be institutionalized for a delinquent act unless there appears need for his rehabilitation by such means. *In re Anonymous*[38] involved a situation in which the training school to which the child had been sent had concluded no rehabilitation could be effected by available facilities. The court was impelled to release her from further detention.[39]

Another group of cases may be thought to have no relevance to the instant discussion, but the fact that the Supreme Court has referred specifically to the problem they present may make them significant. In discussing Gault's disadvantages as a juvenile, the court pointed out:

> If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings. For the particular offense immediately involved, the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years.[40]

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34. *Cf.* Fulwood v. Stone, 394 F.2d 939 (D.C. Cir. 1967). Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968).

35. Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968), Burger, J., dissenting; Compare, Rouse v. Cameron, 387 F.2d 241 (D.C. Cir. 1967).

36. Somewhat similar in effect are Interest of Winburn 32 Wisc. 2d 152, 145 N.W.2d 178 (1966) directing discharge of an insane juvenile and Harryford v. Parker 396 F.2d 393 (10th Cir. 1968), disapproving commitment of a feeble-minded epileptic. Compare Pelletier v. Langlois, 94 R.I. 262, 179 A.2d 856 (1962), which refuses to sanction the jailing of a "defective delinquent."

37. 40 Misc. 2d 194, 242 N.Y.S.2d 844 (1963).

38. 43 Misc. 2d 213, 250 N.Y.S.2d 395 (1964). Compare the excellent discussion, *In re* Mario, 317 N.Y.S.2d 659 (1971).

39. There are, of course, numerous cases in which an appellate court reverses on the ground that the lower court's invocation of the power to commit is simply an error of law. State v. Pulakis, 14 Wash. 2d 507, 128 P.2d 649 (1942) and State ex rel. Marcum v. Ferrell, 140 W. Va. 202, 83 S.E.2d 648 (1954) are two rather striking examples. In *Pulakis* a juvenile was sent to training school because it would do him good although he was not shown to have been delinquent. In *Marcum*, a girl was sent to a juvenile facility because she was a somewhat recalcitrant witness in a rape case. Both appellate courts reversed. *See also*, Matter of Hamill, 271 A.2d 762 (Md. 1970).

40. *In re* Gault, *supra* note 5 at 29.

This language plainly does not import approval of Gerald's situation, yet it is difficult accurately to characterize the unfavorable inference. The indeterminate sentence was eagerly sought by the criminal reform movement of the nineteenth century. This is not an appropriate place to trace its history or review its recommendations;[41] but it can be noted that a basic virtue attributed to it was its flexibility. This made it adaptable to rehabilitative programs since a sentence need last only so long as it took to accomplish their purpose. Generally, such sentences cannot last longer than the maximum terms applicable to the crime. However this may have worked out in the development of adult criminal law, there is no doubt that it was seized on by the architects of the juvenile court system where it very frequently serves to lengthen the period (if any) which would be applied as a criminal sentence for the act in question. This device became almost as closely identified with the rehabilitative pretensions of this system as the notion of *parens patriae* itself.

Indeed, it has been held in some jurisductions that definite term sentences are impermissible.[42] From early times challenges to the results of the device have failed. In 1911, North Carolina saw no infirmity in a sentence which could keep a juvenile incarcerated for as long as six years for an offence (vagrancy) which could hold an adult for no more than 30 days.[43] South Carolina was equally unimpressed by the argument against a sentence with a potential of holding juveniles eight and ten years of age until their respective majorities for what would impose a maximum of ten days on an adult. It saw no deprivation of rights of the juveniles involved, or of those of their parents.[44] Missouri has held similarly,[45] and no state appellate court has been found which has held to the contrary.[46]

Two recent cases may augur change, however. *Commonwealth v. Daniels*[47] held unconstitutional as denying equal protection a statute authorizing the imposition of indeterminate sentences on women for

41. See, Tappan, *Sentencing Under the Model Penal Code*, 23 LAW AND CONTEMP. PROB. 528 (1958).
42. Cohen v. Clark, 107 Neb. 849, 187 N.W. 120 (1922), followed in *In re* Roth 158 Neb. 789, 64 N.W.2d 799 (1954). It has also been held that once a juvenile is committed to the rehabilitative system provided by statute, the juvenile court loses power to intervene. State v. Shrode, 119 Ind. App. 57, 83 N.E.2d 900 (1949).
43. *Ex parte* Watson, 157 N.C. 340, 72 S.E. 1049 (1911).
44. State v. Cagle, 111 S.C. 548, 96 S.E. 291 (1918).
45. *Ex Parte* Naccarat, 328 Mo. 722, 41 S.W.2d 176 (1931).
46. *Cf.*, Interest of K.V.N., 112 N.J. Super. 544, 271 A.2d 921 (1970); Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964).
47. 430 Pa. 642, 243 A.2d 400 (1968); accord, U.S. ex rel. Robinson v. York, 281 F. Supp. 8 (D.C.D. Conn. 1968).

an offense which authorized a sentence on males which could be fixed within definite limits (less than the maximum to which the indeterminate one might run). Of course, it is still possible to argue that, while there is no reasonable ground for classifying women as differing from men in this context, the rehabilitation of youth is a wholly different matter from the sentencing of adults[48]—male or female. This position appears less than satisfying.

One other case may bear mention here, although it is apparently *sui generis*. In *Workman v. Commonwealth*[49] two fourteen year old boys were convicted, after waiver and transfer to criminal court, of a particularly unpleasant, forcible rape. They were sentenced to life imprisonment without possibility of parole under a statute authorizing that sentence for the crime charged. It was held on appeal that the denial of possible parole was unconstitutional, the court regarding this part of the sentence as "cruel and unusual" under the Federal, and "cruel" under the State, constitution. The majority of the court felt that the youth of the defendants was incompatible with the implied judgment that they could never be rehabilitated. It made clear its belief that the statutory sentence could constitutionally have been applied to an adult. This case on its facts obviously has no direct bearing on the imposition by juvenile courts of indeterminate sentences which may extend beyond a period reasonably appropriate for rehabilitation,[50] but it finds a specific constitutional prohibition against imposing on youth a detention which presupposes—and creates—impossibility of rehabilitation.[51] Another specific constitutional right juveniles have been accorded is not to be incarcerated in racially segregated facilities.[52]

The District of Columbia has again taken the lead in a series of cases which strikes closest to the heart of the issue here examined. In *White v. Reid*[53] the District Court had before it a challenge by a juvenile delinquent to his commitment to an institution established by Federal law for the rehabilitation of "youthful offenders" who were

48. But see, *In re* Wilson, 246 A.2d 614 (Pa. 1971).
49. 429 S.W.2d 374 (Ky. 1968). Compare, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).
50. Compare, *In re* Smigelski 185 F. Supp. 283 (D.C.N.J. 1960) with *Appl. of Johnson* 178 F. Supp. 155 (D.C.N.J. 1957), the former disagreeing with the latter's holding that detaining a delinquent, who had been first committed as a juvenile, until well beyond adulthood was improper because all possibility of rehabilitation had expired.
51. Compare, Interest of Steenback 34 N.J. 89, 167 A.2d 397 (1961).
52. Singleton v. Board 356 F.2d 771 (5th Cir. 1966); Crum v. State Training School for Girls 413 F.2d 1348 (C.A. 5, Ala., 1969).
53. 126 F. Supp. 867 (D.D.C. 1954).

regularly convicted of crime but thought to be amenable to rehabilitation. The Court examined into the character of the facilities and compared them, not unfavorably, with those assigned to juveniles committed under the separate Federal statute establishing the District of Columbia Juvenile Court. It nevertheless said after discussing the relevant statutes:

> The Court, accordingly, concludes that both Constitution and statute forbid the transfer of a youth committed under the Juvenile Court Act to any institution designed for custody of persons convicted of crimes . . . and the commingling of such juveniles with criminals.[54]

This decision was followed in *United States v. Hegstrom*;[55] and *Kautter v. Reid*[56] extended it slightly to forbid even the temporary detention of a juvenile parole violator in the District of Columbia jail. Later Judge Ketcham reviewed a closely similar case of transfer from a juvenile facility to the one dealt with in *Reid*.[57] He observed:

> If, after such a juvenile proceeding, the juvenile can, by the discretionary act of an executive officer, be transferred to a place of penal servitude, the entire claim of *parens patriae* becomes a hypocritical mockery. In such circumstances, those interested in the welfare of children might better urge the abolition of the Juvenile Court than seek its improvement.[58]

Some State cases are similarly oriented. *In re Rich*[59] directed the release of a recalcitrant juvenile from the penal institution to which he had been sent and his re-transfer to the juvenile facility. It stated:

> The validity of the whole juvenile system is dependent upon its adherence to its protective rather than its penal aspects. *In re Gomez, supra*, 113 Vt. 224, 225, 32 A.2d 138.

State e.r. Londeholm v. Owens,[60] held unconstitutional a statute specifically authorizing the use of a reformatory for the commitment of boys over sixteen despite a vigorous dissent which asserted that the only other available facilities were, and the legislature must have

54. *Id.* at 871.
55. 178 F. Supp. 17 (D.C. Conn. 1959).
56. 183 F. Supp. 352 (D.D.C. 1960).
57. Matter of Eleven D.C. Youths, 91 Wash. Law Reporter 3009 (Juvenile Court, District of Columbia, 1963).
58. *Id.* at 3010; see Pirsig, *The Constitutional Validity of Confining Disruptive Delinquents in Penal Institutions*, 54 MINN. L. REV. 101 (1969).
59. 125 Vt. 373, 216 A.2d 266 (1965).
60. 197 Kan. 212, 416 P.2d 259 (1966).

known them to be, wholly inadequate in size for the predictable population of delinquents. New York, under its unique system, forbids the sending of its category, "persons in need of supervision," a milder group than delinquents, to a reformatory.[61]

Two other State cases reaching the opposite conclusion evoked vigorous dissents. It is interesting to note the contrasting viewpoints. The majority of the Iowa Supreme Court justifies the incarceration:

> In making this transfer the board is presumed to be performing a duty imposed upon it, that of restraint, education and reformation. It is not restraining the natural liberty of the child, but is placing him under a natural restraint, a restraint so far as is practicable as should be exercised by a parent . . . . While we may not feel restraint in a place generally used and occupied by convicted felons is quite proper for a child of 16 years, yet this seems to be a policy question for the legislature, not the courts.[62]

And the dissent:

> No one would contend that the juvenile court could, under our present law, find a juvenile delinquent and commit him to the Anamosa Reformatory without offering opportunity for a jury trial. Can the state, in the name of administrative efficiency do indirectly what it cannot, in the name of law enforcement, do directly?[63]

People ex rel. Rodello v. Denver District Court[64] shows the Colorado court rather differently divided. The dissent in that case seems to say that juvenile detention facilities are in fact jails and therefore, a seventeen year old should be tried criminally without reference to the juvenile court for transfer.

Shone v. State,[65] however, simply regards inter-institutional transfers of recalcitrant juveniles as an administrative matter not raising a serious constitutional issue; and *Shone v. Maine*[66] agrees on the basis of the weight of state and lower federal authority.[67] Rhode

61. *In re* Anonymous, 20 App. Div. 395, 247 N.Y.S.2d 323 (1964); Fish v. Horn, 14 N.Y.2d 905, 200 N.E.2d 857, 252 N.Y.S.2d 313 (1964). *But cf., In re* Mario, 317 N.Y.S.2d 659 (1971).
62. Wilson v. Coughlin, 259 Iowa 1163, 147 N.W.2d 175, 179-80 (1966).
63. *Id.* at 183.
64. 164 Colo. 530, 436 P.2d 672 (1968).
65. 237 A.2d 412 (Me. 1968).
66. 286 F. Supp. 511 (D.C. Me. 1968).
67. The statement as to weight of authority is substantially correct although much of that cited precedes cases cited above which might well have influenced it, and some seems, with respect, not wholly apposite.

Island[68] and Pennsylvania[69] appear to agree with Maine, while the latest decision in Connecticut is neutral in effect.[70]

Conclusion

Suppose there is taken as a text the composite quotation[71] found in *In re Urbasek*[72]

> A minor found guilty of the requisite conduct to be adjudged a delinquent "is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence —and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional laws . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians [and] state employees." When we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home "juvenile quarters" in a jail, or a state institution . . . we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics.

Urbasek used this depressing assessment to support its adding another dollop of due process to juvenile delinquency hearings.[73] It may equally well, however, serve here as the basis for our inquiry: can the courts control the character of the facilities to which they are committing youngsters? They can if they choose, of course, say that this is a matter for legislative policy makers and not a concern of the courts. They can in many jurisdictions point to specific legislation which places the responsibility for such matters in other hands. But if these

68. The only direct holding appears to be Long v. Langlois 93 R.I. 23, 170 A.2d 618 (1961). The later case where the issue was raised dismissed the matter as moot. Cochrane v. Langlois, 247 A.2d 91 (R.I. 1968). A different view may result from In re Brown 4 Cr. L. Rep. 2203 (1968).

69. Matter of John Williams, 210 Pa. Super 388, 234 A.2d 37 (1917): In re Jones, 432 Pa. 44, 246 A.2d 346 (1968).

70. Appeal of Bailey, 158 Conn. 439, 262 A.2d 177 (1969) simply found a failure of proof as to the criminal character of the challenged institution.

71. The contributors are *Gault*, dissent in *Holmes' Appeal* and the Illinois Court itself.

72. 38 Ill. 2d 535, 232 N.E.2d 716 at 719 (1967).

73. It was an early case in the *Winship* category, requiring proof beyond a reasonable doubt.

easy evasions do not appeal, could they find authority for the position that their specially conferred jurisdiction does not permit them to abuse children by sending them for rehabilitation to institutions which can only, and do consistently, corrupt? It is submitted that they could —and should.

The District of Columbia courts inquire into—and, presumably, assert the right to take remedial action respecting—absence of facilities for needed psychiatric care in the local juvenile detention quarters. New York releases juveniles where institutionalizing them promises no rehabilitation. The courts may annul dispositions on specific constitutional grounds stemming from the fact that they do not meet a need for rehabilitation or that the facility itself imposes forbidden racial segregation. Finally, the courts may reverse orders to incarcerate juveniles in facilities that are proven to be "criminal" or "penal" in character.

Concededly, none of these powers has attracted unanimous support. Such support as is shown for them above, however, surely suggests that their existence cannot be flatly denied. An analysis of them would seem ample to warrant a juvenile court's insistence that the effectuation of its dispositions be made to comport with the basis upon which their constitutional validity rests, the alternative being the refusal to exercise its special jurisdiction. The near unanimity attracted by the view that the promise of the juvenile court system is not being realized should be challenge enough to lead the courts to seek and impose such a solution.

Envoi

> [I]t is hard to explain away the experience in California where a judge closed a juvenile institution because he was disgusted with the absence of sound treatment. The children had been neglected and abused in the institution. Most were simply sent home by the judge, some were placed in foster homes. The police predicted a crime wave; it never came. Six months later, out of 140 children taken out of the institution, only ten were in trouble again.[74]

74. Sol Rubin, Crime and Juvenile Delinquency at 40, (3d ed. 1970).