

1974

## Book Reviews

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### Recommended Citation

Thomas J. McDermott, Michael E. Libonati & Lawrence Schlam, *Book Reviews*, 12 Duq. L. Rev. 1025 (1974).

Available at: <https://dsc.duq.edu/dlr/vol12/iss4/17>

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HOW ARBITRATION WORKS (3rd Edition). By *Frank Elkouri*† and *Edna Asper Elkouri*††. Washington: Bureau of National Affairs, 1973. Pp. 797. \$17.50.

Outside of the services containing published arbitration decisions, the Elkouris' book, *How Arbitration Works*, long has been the reference source most frequently cited by practitioners in labor arbitration and on occasions by arbitrators themselves. The second edition was published in 1960, so that in recent years it had become outdated. Many new issues, not present in the 1950's, have been going to arbitration. For other issues, like subcontracting, the principles governing such cases have become more firmly established, while with still others, as the arbitrator's right to direct a trial period in promotion cases, the position of many arbitrators has changed.

Thus, practitioners and many arbitrators will be welcoming this 1973 edition of *How Arbitration Works*. The work reflects the enormous increase in both the volume of labor arbitration cases and the increasing variety of issues arising therein. Besides treating topics like the legal status of arbitration, procedures and techniques, its scope, and the variety of arbitration tribunals, the authors have referenced hundreds of arbitration decisions, from which they have set forth the general consensus of principles and qualifications thereto for most of the issues that have been treated in arbitration.

The book has been expanded from 486 pages to 797, and the revision represents almost a complete rewriting. With the exception of chapters like "Arbitration and Its Setting," "Scope of Labor Arbitration," and "Standards for Interpreting Contract Language," where the subject matter has not changed greatly since 1960, the other chapters have been completely rewritten to reflect the many changes in issues and problems connected with the use of labor arbitration since 1960.

Two new chapters have been added. One, titled "Safety and Health," chapter sixteen, reflects the increasing occurrence of safety and health as a factor in the arbitration of grievances. Of particular value in this

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chapter is the analysis of cases dealing with refusal to obey orders, where such refusal is based on an alleged safety hazard.

The other new chapter, titled "Employee Rights and Benefits," chapter seventeen, sets forth the analysis of arbitration decisions for many issues, which in the 1940's and 50's rarely arose or were non-existent, but which in the changing 60's appeared with increasing frequency. Among these are such issues as leaves of absence for maternity, jury duty and funerals, moonlighting and outside business activities; personal appearance cases involving hair, beards and clothing; surveillance of employees, and possession and use of dangerous weapons, to cite a few.

Other chapters, although following the same basic outline as was presented in the 1960 edition, have been expanded to treat the many developments in both law and arbitration that took place since that volume. Chapter five, which treats grievances and grievance procedures, discusses such current topics as abuse and misuse of grievance procedures, remedies for distressed grievance procedures, and the rights of individual employees to fair representation in the processing of grievances as affected by the Supreme Court in *Republic Steel Corp. v. Maddox*.<sup>1</sup> Also, chapter six, "Determining Arbitrability," reflects the substantial changes in the relationship of arbitration to the courts, as was wrought by the Supreme Court's determination of substantive law for arbitration set forth in the now famous *Trilogy* and subsequent decisions.<sup>2</sup>

This new edition discusses some of the old arbitration controversies that have continued, and it analyzes several of the newer ones that have arisen. In chapter four, the authors touch on the age-old question, "Who makes better arbitrators, those with or without legal training?" As would be expected the lawyer-authors resolve the question in favor of the legal training by stating: "Legal training alone is not enough to make an able arbitrator, but if a person possesses the other qualifications, legal training will make him even better."<sup>3</sup> From the point of view of a non-lawyer, this conclusion could be stated somewhat differently as, "a thorough knowledge of collective bargaining and industrial

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1. 379 U.S. 650 (1965).

2. *United Steelworkers v. Enterprise Wheel & Car Corp.* 363 U.S. 593 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior Gulf Navigation Co.*, 363 U.S. 524 (1960).

3. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 95 (1973) [hereinafter cited as *ELKOURI & ELKOURI*].

relations alone may not be enough, but if a person has acquired some knowledge of law, that along with his basic background in collective bargaining will make him even better."

The chapter eight treatment of the use of evidence in arbitration discusses the conflict between strict and liberal admission of evidence. This controversy has not changed much since the 1950's. There are still many practitioners who feel that arbitrators are too free and easy in admitting evidence, while at the other end of the spectrum there are those who claim that arbitrators have become too legalistic with respect to what should be accepted as evidence.

As long as arbitration remains a creation of the parties to collective bargaining this controversy is likely to continue. Most arbitrators will tend to try to please both sides in the admission of evidence, so that a more liberal approach tends to be followed. They will hold the viewpoint that in the final analysis they will be capable of weighing properly the evidential value of everything accepted into the record, and that they are competent enough not to make any important findings based upon inadequate or tainted evidence.

One of the newer points of controversy is whether arbitrators should use the full scope of their remedy power as defined in *United Steelworkers v. Enterprise Wheel & Car Corp.*<sup>4</sup> in order to achieve equity or should they follow strictly contractual restraints?<sup>5</sup> As is pointed out in chapter seven, most arbitrators accept the premise that they have the power to provide a remedy where a contractual violation has taken place, even though the contract is silent with respect to the remedy.<sup>6</sup> However, most are relatively cautious with respect to the devising of new remedies. An example is the payment of interest on back pay awards,<sup>7</sup> which has had little support among most arbitrators.

Also in this same chapter is a discussion of another topic that has developed out of the increasing caseload in arbitration. It is a discussion of the problems created when the parties go to arbitration before they have completed their grievance negotiations, schedule a date for the hearing with a selected arbitrator, and then later cancel the case with relatively short notice to the arbitrator.<sup>8</sup>

This is a serious problem for a busy arbitrator, for he is placed in the

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4. 363 U.S. 593 (1960).

5. ELKOURI & ELKOURI, *supra* note 3, at 241-46.

6. *Id.* at 351.

7. *Id.* at 357.

8. *Id.* at 208-10.

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position of having to predict his rate of cancellations. If he underpredicts the number he finds himself with an inadequate caseload, even though he had previously turned away other requests for his services. If he overpredicts the number, he finds himself overcommitted with resulting delays in getting out his decisions.

Still another new topic of controversy among arbitrators is the extent to which arbitrators should consider statutory or administrative law when resolving disputes over contract language which may be in violation of the law.<sup>9</sup> This is clearly a controversy of the 1960's, which has resulted from the various forms of equal rights legislation adopted at the federal and state levels. It also grew out of the increasing number of grievances filed that represent overlapping jurisdiction between the National Labor Relations Board and arbitration.

Throughout this book the various topics are presented clearly and the positions and principles are generally set forth with clarity and specificity. There are, however, a few exceptions. One is found in chapter nine. In this chapter, which deals with standards for interpreting contract language, the analysis in some sections becomes extremely technical, and it will leave the average non-lawyer layman with some confusion. A case in point is where the authors refer to use by courts and arbitrators of "accepted standards of interpretation of general application" when interpreting collective agreements.<sup>10</sup> However, nowhere are these "standards of interpretation" specifically set forth or explained.

Another is the authors' discussion of the residual rights doctrine in chapter thirteen, "Management Rights." The chapter begins with a number of strong statements supporting the residual rights doctrine, and the analysis leaves the reader with the impression that other than with some minor exceptions, arbitrators universally endorse the residual rights doctrine of management authority. In earlier years of arbitration this doctrine was accepted with little or no reservations, and even currently some arbitrators continue to uphold it. However, the acceptance of the concept of enforceable past practices and the idea that management has certain implied obligations in a collective bargaining agreement has gained wide acceptance. The latter concept of implied obligations has been commonly applied in subcontracting and certain

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9. *Id.* at 225-28.

10. *Id.* at 298.

safety cases, while the former has been frequently applied to various situations where contract language is silent.

With reference to past practice the discussion of the use of custom and past practice set forth in chapter twelve is itself relatively weak. Again this reader was left with the impression that the application of past practice to situations not treated by contract language is a no-man's land with substantial disagreement among arbitrators as to whether such practices become enforceable. While some disagreement does exist it is mainly in certain fringe-type issues, as for example whether a certain benefit constitutes a gratuity or an enforceable condition of employment. Arbitrators tend generally to agree on the conditions or tests to apply in order to determine what constitutes a validly enforceable past practice, and generally they seek to be careful in their application of those conditions to given situations.

Despite these qualifications there is no question that the Elkouris have come up with an outstanding publication. Advocates and arbitrators will find it to be of inestimable value in establishing the generally held principles relating to issues arising in arbitration. In terms of the savings in research time alone the returns will be substantially more than the price of the book.

*Thomas J. McDermott\**

**DEVIANCE IN SOVIET SOCIETY—CRIME, DELINQUENCY AND ALCOHOLISM.** By *Walter D. Connor*.† New York: Columbia University Press. 1972. Pp. 327. \$12.50.

Sober, well-researched books on aspects of the legal and social systems of other countries always make profitable reading. This seems especially true of books about the Soviet Union<sup>1</sup> which functions for many of us as a negative example. Soviet studies seem to yield information about how not to go about organizing a society, how not to think about social problems, much as do studies of the Nazi state. Professor Connor however, as is the present fashion, does not adopt an adversary stance.

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1. See, e.g., H. BERMAN, *JUSTICE IN THE U.S.S.R.* (1963).

Nor does he attempt to view the system of social control of alcoholism, delinquency and crime in the U.S.S.R. from an internal point of view, *e.g.*, by adopting the standpoint of the embattled functionary attempting to impose order on a recalcitrant populace. Instead, he dons the mask of the detached observer, specifically that of the trained academic sociologist. This strategy meets the requirements of the content of the book which is devoted in the main to a thorough marshaling of the information available about crime and corrections in the U.S.S.R. Connor's refusal to make value judgments about the state of the Soviet reality which he attempts to describe is made easier by his exclusion of "political" deviance from the book.<sup>2</sup> Although this strategy fits neatly into the pure science paradigm on the appropriate role of the scholar,<sup>3</sup> it evades what seems to some observers an age-old question—the relationship between scholars and rulers.<sup>4</sup> The debate has taken on a particular edge and poignancy in our era as the result of the emergence of two ideologies born of contempt for man and his God-given dignity—Nazism and the Leninist<sup>5</sup> brand of Marxism. Those of us who are lawyers and as such constantly engaged in the appraisal of our own and other social systems for their conformity with the dictates of our legal and Constitutional tradition (much of which is embodied in the Universal Declaration of Human Rights, a document constantly invoked by current Soviet dissidents) may be forgiven by the aspirants to value-free monographic work for what must seem an obsession.<sup>6</sup>

Sociologists concerned with crime and delinquency have been cynically defined as persons who keep their eyes down and their palms up.

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2. W. CONNOR, *DEVIANCE IN SOVIET SOCIETY* 1-2 (1972) [hereafter cited as *DEVIANCE*]. *But see* Connor, *The Manufacture of Deviance: The Case of the Soviet Purge, 1936-1938*, 37 *AM. SOCIOLOGICAL REV.* 403 (1972), for a valuable discussion of the Stalinist purges of political deviants.

3. *See* Black, *The Boundaries of Legal Sociology*, 81 *YALE L.J.* 1086 (1972).

4. *See generally* L. STRAUSS, *ON TYRANNY* (rev. ed. 1963).

5. The thesis that Soviet practice is rooted in Leninism and not an innovation by Stalin is advanced by the Nobel Prize winning author Alexander Solzhenitsyn in his recently published work on the Soviet penal system. *N.Y. Times*, Dec. 29, 1972, at 1, cols. 1-3. *See generally* A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO 1918-1956* (forthcoming, 1974).

6. There are, of course, legal scholars who share Professor Connor's orientation—that it is enough to describe the processor or instrumentalities of legal and social control without undertaking a clarification of the ends which are served by these processes. This approach in law has been associated with the names of Professors Hart and Sacks of the Harvard Law School. For an interesting critique of the legal process school, *see* P. ACKERMAN, *LAW AND THE MODERN MIND: A PERSPECTIVE ON TWENTIETH CENTURY AMERICA* (forthcoming, 1974).

In all fairness, it must be remarked that Professor Connor's standpoint (and that of Professor Black) is adopted by him strictly in his capacity as a scholar whereas the Legal Process School recommends the adoption of neutrality as a recommendation to both scholars and decision-makers.

The tendency of social researchers to focus on the failures of individuals at the bottom of the social scale without scrutinizing the actions of agents of social structure or the causative impact of the social structure on crime has been severely questioned by Western sociologists. The interactionist school, for example, has identified rules of law as "causes of crime."<sup>7</sup> This reasoning is persuasive when applied to crimes without victims such as gambling and other forms of consensual crime but proves too much when stretched to fit violent crime.<sup>8</sup> The fact that such theories emerge and have a widespread impact both on theory and practice in this country makes a startling contrast with Soviet theoretical development, as Professor Connor points out. Theorizing about the causes of crime has been a personally dangerous activity in the Soviet Union,<sup>9</sup> indeed academic research was terminated in 1935 and was only relegitimated under the Khrushchev thaw in 1963. There is still a widespread demand to justify all theorizing in terms strictly grounded in the prevailing variety of Marxist orthodoxy. Much of Soviet criminological writing seems to be devoted to explaining away the existence of a phenomenon which ought not to exist in a socialist society, or, as lawyers say, confession and avoidance. The theories of crime resulting from this basic assumption are reminiscent of nothing so much as this remark concerning philosophical fallacies: "The philosopher first invents a false theory as to the nature of things, and then deduces that wicked actions are those which show his theory is false."<sup>10</sup> Professor Connor's discussion of these Soviet viewpoints reveals more concern with the state of the criminological discipline than the fate of the deviant in a social structure which produces and channels such theorists into positions of academic responsibility. It is probable that

7. See generally E. RUBINGTON & M. WEINBERG, *DEVIANCE: AN INTERACTIONIST PERSPECTIVE* (1968).

8. Peculiarly enough, forms of white collar crime like antitrust violations, securities fraud, sale of adulterated or misbranded drugs, which are offensive to sociologists who adopt the underdog's point of view in interactionist theory, are also "caused" by the more extensive view of social protection taken by the modern welfare state. White collar crime too, is an example of culture conflict—the profit maximizing entrepreneur versus the benevolent paternalism of the state.

A fascinating view of the rise of the "humanitarian police state" is presented in O. HANDLIN & M. HANDLIN, *COMMONWEALTH* 229-44 (rev. ed. 1969).

9. As has theorizing about the nature of law and the state, witness the liquidation of Y. Pashukanis for lack of orthodoxy during the Stalin purges. R. CONQUEST, *THE GREAT TERROR* 276 (1968).

10. B. RUSSELL, *SCEPTICAL ESSAYS* 91 (1927). A similar fallacy is found among the ideologues of what I call Supreme Courtism in our own society. A typical remark of the Supreme Courtists is "that can't happen, it's unconstitutional." *THE RIGHTS OF AMERICANS* (N. Dorsen ed. 1972), provides a fine specimen of an ideology which is both socially useful and scientifically useless.



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we shall learn more from Solzhenitsyn's methodologically unsound, impressionistic revelations about the Soviet system in action than from the statistics, organization charts, and disputations of the learned which constitute Connor's primary source material. This is not to say that Connor has not made the best of the admittedly sketchy and formalistic data available to him, he has. It is only that the study of the social control of any form of deviant behavior, as Radzinowicz' great treatise on English criminal law shows so clearly, cannot be achieved without detailed investigation of the mundane activities of the agents of social control.<sup>11</sup> This information is not made available to detached inquirers in a totalitarian society.<sup>12</sup>

Professor Connor has done a first-rate job of describing a less charged area in which the Soviet state has mobilized its resources to define and control a social problem—the problem of drunkenness. The drunk is not defined as a medical problem (the disease of alcoholism) or as a problem in the maintenance of public order.<sup>13</sup> He is a voluntary sinner against the ideal of productive, other-regarding Socialist Man, and he must be ferretted out, redeemed and reintegrated into society and the world of socially productive work. To achieve this task a panoply of means are employed by the Soviet state, including: propaganda in school, enlistment of members of the Communist youth movement in apprehending or reporting on drunks, public shaming of the drunk by neighbors and co-workers, reprimands and suspension of privileges by comrade's courts, compulsory "treatment" in a treatment correctional center, and finally, conviction of social parasitism with confinement in a penal correctional institution.<sup>14</sup> It will be noted that the stress is on preventive and informal sanctioning mechanisms lodged in the family, residential area or place of work, but guided by the omnipresent Party

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11. Radzinowicz' work is, unlike that of his predecessor Stephen, primarily a study of criminal law administration rather than of doctrine. See generally L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION* (1948-1956).

12. Study of the Nazi archives which fell into Allied hands made possible the masterful and gruesome chronicle of Hitler's process of destruction. Cf. R. HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (1961).

13. This is the basic rationale offered in *Powell v. Texas*, 392 U.S. 514 (1968), for the constitutionality of imprisoning chronic alcoholics for public drunkenness. Strangely enough, twenty years of study by the Yale and Rutgers Centers on Alcoholism have provided massive evidence of the physiological and criminogenic effects of drinking undreamed of by the most fervent Prohibitionist during the era of the Noble Experiment. The nexus between drunkenness and crimes of violence is so great that one might be tempted to justify drunkenness arrests as a preventive measure even in certain private contexts into which police are constantly being thrust, e.g., the family quarrel.

14. *DEVIANCE*, *supra* note 2, at 59-79.

apparatus. As in Puritan Massachusetts,<sup>15</sup> official and quasi-official intrusion completely permeates the fabric of day-to-day life in the Soviet Union—all other groupings are harnessed to the achievement of the common ends of the State and Party, at least in theory.

A patchwork net of voluntary and informal social control linked ultimately to Party discipline and the formal agencies of procuracy and court is also found in the area of juvenile delinquency.<sup>16</sup> A bureaucracy of specialists in social work among juveniles with job descriptions and certification procedures has not emerged in the Soviet Union. Considering the stereotyped picture of totalitarian society as replete with bureaucrats having cradle to grave jurisdiction, this lack is both surprising and puzzling. Surely the Soviets have not anticipated that the institutionalization of a specialized juvenile authority will blossom, as it has among certain avant-garde social workers in this country, into the development of paid adversaries of the social structure they are charged with maintaining. One explanation might be that the Soviets refuse to treat the phenomenon of juvenile delinquency as a complex one involving the clash of conflicting cultures, aspirations and life styles.<sup>17</sup> They may believe that there is a common interest between juvenile offenders and the rest of us to which ordinary adults armed with little more than common sense can appeal in order to induce conforming behavior. Given the miserable record of failure and nonfeasance by America's professional altruists in this area, as in so many others, such an approach is not absurd on its face. It seems highly unlikely however, that social integration of juvenile offenders can be achieved by methods involving an endless parade of ideological abstractions whether derived from the official culture in the Soviet Union, or the counter culture or revolutionary nationalism that animates so many in our country.

Connor's chapter on crime prevention and criminal correction deals with topics that may be of some interest to a wide audience of lawyers and correctional officials.<sup>18</sup> There are, as in most European countries,<sup>19</sup>

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15. See G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 76 (1960). The analogy between Puritan and Soviet ideology and practice is an underlying theme in many studies. Cf. P. MILLER, *THE NEW ENGLAND MIND* (1939). The Puritans did not, however, share the Marxist belief in the innate perfectability of man.

16. *DEVIANCE*, *supra* note 2, at 114-46. There are also no professional parole or probation officers for either adult or juvenile offenders.

17. There is some indication that juvenile delinquency may be more widespread in the non-Russian areas of the Soviet Union.

18. *DEVIANCE*, *supra* note 2, at 190-235.

19. For a concise description of the most highly developed system of measures of security

a wide range of preventive sanctions at the disposal of police and procuratorial authorities, short of arrest and imprisonment. Many of these measures are the functional equivalent of our civil remedy of injunction—to order the guilty person to perform certain positive duties, *e.g.*, undergo medical treatment, or to avoid certain locations or associations. We are more familiar with this kind of flexibility in sanctions for traffic violations wherein an offender may be ordered to refrain from driving for a certain fixed period (suspension of license) or may be ordered to attend traffic safety classes for a given period (conditional revocation of license). Other measures involve referring criminal complaints to more informal agencies of social control such as neighborhood meetings (KOLLEKTIV).<sup>20</sup> The measures for averting crime which authorize widespread investigative work by police to facilitate halting crimes in the preparatory phase do not differ in kind from the increasing prominence given in American police work to electronic surveillance, the use of undercover agents and informers, and the considerable expansion of the arrest powers under the law of attempted crime,<sup>21</sup> although they most certainly differ in degree. There is no question that we are pursuing under other labels many of the practices which have long been associated on the continent with theories stressing the protection of society by nipping potential offenders in the bud.<sup>22</sup>

The bulk of this chapter is devoted to a detailed description of the formal organization of Soviet correctional institutions. There is little

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on the continent (the Italian *misure di sicurezza*), see H. SILVING, I CRIMINAL JUSTICE 32-48 (1971).

20. A proposal along these lines for referral of certain victimless crimes to neighborhood adjudicating bodies was made in New York City and is described in Danzig, *Toward Completion of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973).

21. The Pennsylvania Penal Code, based on the American Law Institute's Model Penal Code, adopts the "social dangerousness" rationale as a justification for this definition of criminal attempt: "A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." CONSOL. PA. STAT. ANN. tit. 18 § 901(a) (1973). What constitutes a substantial step is left undefined in the Pennsylvania Penal Code. The Model Penal Code enumerates certain fact situations which justify the submission of an attempt count to the jury where there is no evidence that the accused engaged in "lying in wait, searching for or following the contemplated victim of the crime." MODEL PENAL CODE § 5.01(2)(a) (Prop. Offic. Draft 1962). This might justify a result like *McQuirter v. State*, 36 Ala. App. 707, 63 So. 2d 388 (1953). Compare *Lewis v. State*, 35 Ala. 380 (1860), discussed in O. HOLMES, THE COMMON LAW 56 (M. Howe ed. 1963).

22. See generally Ancel, *Social Defense*, 72 L.Q. REV. 491 (1962). There is a strong empirical basis now for the proposition that recidivist offenders for relatively severe crimes can be identified at an early stage in their criminal careers. M. WOLFGANG, T. SELLIN & F. FIGLIO, *DELINQUENCY IN A BIRTH COHORT* (1972). It is but a short step from identification to the adoption of preventive measures.

here to shock or surprise—Connor's material was gathered from official sources exclusively.<sup>23</sup> Thus Connor does not deviate from his decision to exclude "political" deviance from his focus of attention by making reference to the rather extensive literature on the treatment of politicals in Soviet correctional institutions.<sup>24</sup> It would seem to this reviewer that this type of evidence should have been sifted for what it was worth in shedding light on "normal" Soviet penal practice. But one supposes that reliance on literary works like *One Day in the Life of Ivan Denisovich* or accounts smuggled out of Russia concerning the treatment of Amalrik and other Soviet dissenters, or on testimony by defectors like Kravchenko would not have satisfied canons of contemporary scholarship.

In the final chapter,<sup>25</sup> Connor provides an outspokenly critical discussion of Soviet theories about deviance which may be summed up as follows:

1. Omnipresence of ideological blinders in the Soviet literature.
2. Espousal of an epidemiological view of deviance—which is pictured as a virus spread by contact of the contaminated with the clean.
3. All crime is viewed as socially determined yet all individuals are capable of acting other than in conflict with the norms of a socialist society.
4. Absence of theories that find deviance may be beneficial as well as costly to society.
5. Adoption of congruence with Soviet ideology and practical utility for appraising theories.
6. Perniciousness of linkage between criminology and law.

It is submitted that propositions one through six restate, at varying levels of abstraction, a basic analytical failure by Soviet criminological thinkers to adopt an appropriate observational standpoint. As to proposition seven, Connor attributes much causal importance in accounting for the conservative bias in Soviet thinking to its subordination to laws

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23. Connor does gather some useful evidence concerning patterns of disposition of offenders. Of those criminals detected, roughly one-quarter escape formal criminal responsibility, another quarter are sentenced to corrective works (which may involve forced change in location), and roughly one-half receive deprivation of freedom (of which some sentences are suspended).

On corrective works, compare DEVIANCE, *supra* note 2, at 204-06 with ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.4 (partial confinement) 15-16, 74-79 (1967).

24. DEVIANCE, *supra* note 2, at 1-2.

25. *Id.* at 236-51.

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or legal science.<sup>26</sup> Connor treats this subordination as if it were a part of some assumed unilineal pattern describing the evolution of criminology as a science—the necessity for emancipation from the tutelage of a normative discipline such as law so that an autonomous value-free science may emerge. I fail to see what is either liberating or theoretically compelled in elevating a peculiarity of academic compartmentalization in this country into some sort of universal. However, this is part and parcel of my major criticism of the book, for scientism is every bit as constricting and biased a perspective from which to account for human affairs as legalism.<sup>27</sup> The truth is that criminology can no more be separated from the study of power processes than can criminal law. It too must grapple with the fundamental problems of the appropriate relationship between the individual and the state.<sup>28</sup> It seems to me that recent efforts by lawyers in constitutional litigation involving every aspect of the criminal process from arrest through probation as well as efforts by the American Bar Association<sup>29</sup> have gone far toward defining and clarifying these fundamental problems. From the lawyer's point of view, Connor's book is flawed by its effort to sidestep these issues. Soviet society is detestable in direct proportion to the unquestioning subordination of the claims of the individual to the state, its legal science in proportion to the failure of its legal profession to develop an adversary, client-centered approach toward human rights questions, its social science in proportion to its adherence to the dictates of that society and that legal science.

Even when all possible scientific questions about the structure and operation of the deviance processing machinery in the Soviet Union have been answered, the problems of life there, the riddles that are both unanswerable and of ultimate concern to a human-centered discipline like law, remain completely untouched.<sup>30</sup>

*Michael E. Libonati\**

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26. *Id.* at 250-51.

27. For a brilliant polemical account of the biases of American legal science, see Horwitz, *Book Review*, 17 *AM. J. LEGAL HIST.* 275 (1973).

28. Allen, *Legal Values and the Rehabilitative Ideal*, 50 *J. CRIM. L.C. & P.S.* 226 (1959).

29. See note 23 *supra*.

30. Cf. L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 148-49 (D.F. Pears & B.F. McGuinness transls. 1961).

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LEGAL RIGHTS OF CHILDREN: STATUS, PROGRESS AND PROPOSALS. A Symposium of the Columbia Human Rights Law Review. Fairlawn: R. E. Burdick, Inc., 1973. Pp. 212. \$9.00.

Did we win or lose?

We won.

Yeah? What did we win?

A decision that you didn't do it!

But I *didn't* do it!<sup>1</sup>

The Columbia Human Rights Law Review has produced a significant symposium and valuable resource volume; the collected papers contain much information with which most general practitioners are probably unfamiliar but which should be reviewed if they are at all concerned with juvenile courts.

Although of great value to the bar or jurists newly involved in family or youth law, this volume will still require those with much background in youth law to refer elsewhere for debate on other pragmatic, current and pointed issues, *e.g.*, the "right to treatment" for wards of juvenile courts,<sup>2</sup> the oppressive, *continuing* problems with voluntary transfers of temporarily dependent minors to social welfare agencies,<sup>3</sup> the specialized "exclusionary rules" recently developed for interrogation of children,<sup>4</sup> and difficult legal issues concerning "runaways" could have

1. Conversation between a child and the attorney-author of chapter 5 in LEGAL RIGHTS OF CHILDREN: STATUS, PROGRESS AND PROPOSALS (1973) [hereinafter cited as SYMPOSIUM].

2. *See, e.g., Symposium—Observations on the Right to Treatment*, 10 DUQ. L. REV. 553 (1972); *see also* (preferably in the following order of study) *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967); *In re Elmore*, 382 F.2d 125 (D.C. Cir. 1967); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971); *Robinson v. California*, 370 U.S. 660 (1962); *In re Harris*, 2 Crim. L. Rptr. 2412 (Cook County Cir. Ct., Ill. 1967); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974). All these cases help to conceptualize and define a growing constitutional right to rehabilitative treatment, tailored to the needs of the individual child where liberty is deprived for reasons relating to the doctrine of *parens patriae*.

3. The poor and uneducated are often not made aware of the meanings of clauses that qualify the parental right to "demand" return with agencies options to file court petitions. Also, no provisions exist for rights to consult counsel prior to signing such forms or to compel explanation of all the ramifications from the point of view of proof in court, *e.g.*, social investigations occurring during "temporary" family separations will certainly be devoid of information concerning how well integrated is that family unit!

4. I am here referring to the "line" of decisions commencing with *People v. Burton*, 6 Cal. 2d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971), distinguished in *Commonwealth v. Porter*, 449 Pa. 153, 295 A.2d 311 (1972), and synthesized and resolved in and by *Lewis v. State*, 288 N.E.2d 138 (Ind. 1972) and *In re K.W.B.*, No. KCD26307 (Mo. Ct. App., Oct. 1973). *See also* Schlam, *Police Interrogation and 'Self-Incrimination of Children by Parents: A Problem Not Yet Solved*, 6 CLEARINGHOUSE REV. 618 (1973).

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received more treatment.<sup>5</sup> And several chapters are of only passing value to the legal practitioner.<sup>6</sup>

The child desperately requires means to oppose the oppression of *parens patriae* and tools to demand that its theoretical rhetoric be exercised for his or her personal development. This volume, of course, only points the way.<sup>7</sup>

William O. Flannery's piece is excellent and, ideally, the general practitioner ought to begin this volume with his chapter. It discusses the probability of United States Supreme Court inclusion of the fourth amendment exclusionary rule to juvenile court delinquency proceedings<sup>8</sup>—after a discussion of the history, concepts and major decisions affecting the juvenile courts.

State courts, however, have already taken the initiative and incorporated "exclusionary" rules into juvenile court procedures as a matter

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5. Senator Bayh's article is basically little more than a compilation of widely known statistics and previously presented speeches, e.g., excerpts from the Congressional Record containing testimony before the Senate on the "runaway" problem. There is some discussion of proposed legislative solutions but no discussion of legal and political problems still inherent in this and similar legislation as well as in state law. See McNulty, *The Right to be Left Alone*, 11 A.B.A. CRIM. L. REV. 141 (1972); Schlam, *Runaways, An International Problem*, ADIT: APPROACHES TO DRUG ABUSE AND YOUTH 7 (1973).

6. Berns' misplaced and confused compassion in his chapter on children in detention relates experiences of general applicability to any helping profession but it is poorly reasoned concerning the issues of the proper requirements of service and treatment, e.g., "bound-over" boys, who "stay longer" are not "disruptive of the humane treatment program [they] are trying to administer" but should somehow be the objects of some form of treatment. SYMPOSIUM, *supra* note 1, at 20.

7. The general practitioner benefits from a survey of the problems, the youth specialist will need to be part of the solution. For example, in addition to the other substantive issues not to concern in SYMPOSIUM, *supra* note 1, the specialist would benefit from notes on the unsettled area of juvenile court discovery e.g., do we use civil, criminal or both standards? Are the standards the same for neglect "prosecution"? See *Joe Z. v. Superior Court*, 3 Cal. 2d 797, 478 P.2d 26, 91 Cal. Rptr. 594 (1970) (delinquency); *People ex rel. Hanrahan v. Felt*, 48 Ill. 2d 171, 269 N.E.2d 1 (1971); *In re Edgar L.*, 66 Misc. 2d 142, 320 N.Y.S.2d 570 (Fam. Ct. 1971); *In re W.*, 62 Misc. 2d 585, 309 N.Y.S.2d 280 (Fam. Ct. 1970) (neglect, no right to discover); *In re Curtis B.*, 52 Misc. 2d 420, 275 N.Y.S.2d 997 (Sup. Ct. 1966) (neglect, civil rules). And what of truancy, thought not the province of juvenile courts by myself, among others, as well as the currently convoluted procedures used in many states regarding non-educatable or disciplinary problem students, who are deprived of liberty as "minors otherwise in need of supervision." See D.C. CODE ANN. § 11-1551(1)(b) (1973); ILL. REV. STAT. ch. 37 § 702-3 (1972). Also, the nationwide controversy over transfer or waiver of allegedly "untreatable" children from a juvenile division to a criminal division cries out for extensive examination by the legal community. See *Kent v. United States*, 383 U.S. 541 (1966); *Missouri ex rel. T.J.H. v. Bills*, S.W.2d (Mo. Sup. Ct., January 14, 1974) (clear and definite standards, juvenile judge's factual opinion required, burden on state to show no rehabilitation possible); and the recently amended Illinois statute, ILL. REV. STAT. ch. 37 § 702-7 (1972), as compared to *In re Templeton*, 302 Kan. 89, 447 P.2d 158 (1968) (no proof of delinquency allegation necessary); *People v. Fields*, 30 Mich. App. 390, 186 N.W.2d 15 (1971) (no criteria need be provided judge by juvenile waiver statute); *Lavis v. State*, 86 Nev. 889, 478 P.2d 168 (1970) (no reasons need be given by judge).

8. SYMPOSIUM, *supra* note 1, at 129.

of due process and equal protection of the law,<sup>9</sup> leaving us with the question (unanswered in the essay): what difference does this advocacy and scholarship make (or harm might it do) to our practice? Recent Supreme Court pronouncements in this area are unsatisfactory; more harm than good may result were Flannery afforded the opportunity to argue his thesis before the Court as rejection now seems probable.<sup>10</sup>

Even assuming that a Supreme Court decision on juvenile court exclusionary rules is advisable or necessary, Flannery's use, by analogy, of both *Elkins v. United States*<sup>11</sup> (both federal and state prosecutors must, supposedly, be similarly prohibited, under the fourth amendment from the use of either's illegally seized evidence) and the extension of fourth amendment exclusionary rules to state courts by *Mapp v. Ohio*,<sup>12</sup> is an inadequate basis for hope. In *United States v. Ramsey*,<sup>13</sup> a Missouri federal district court allowed the introduction of statements at trial that would have been inadmissible under state exclusionary rules. The federal judiciary, thus, seems unprepared to accept or expand exclusionary rules to the same extent as have the states—to benefit children or otherwise.

The use of *Camera v. Municipal Court*<sup>14</sup> and *See v. Seattle*,<sup>15</sup> as argument for extending exclusion to juveniles was valuable to the extent that federal courts accept federal precedent, e.g., *In re Gault*<sup>16</sup>

9. See note 4 *supra*; motions to suppress may presently be made in most juvenile courts. *In re L.B.*, 99 N.J. Super. 589, 240 A.2d 709 (Juv. & Dom. Rel. Ct. 1968). Even where civil rules are still proper in delinquency cases, authority for suppression motions exists. *Reasoner v. State*, 463 S.W.2d 55 (Tex. Ct. Civ. App., 1971). See also *In re Marsh*, 40 Ill. 2d 53, 237 N.E.2d 529 (1968); *In re Williams*, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (Fam. Ct. 1966).

10. State high courts continue to uniformly reject attacks on exclusionary rules at trial, e.g., *Gibbs v. State*, 14 Crim. L. Rptr. 2450 (Ark. 1974); and even extend such rules to additional procedural areas, e.g., *State v. Wilson*, 14 Crim. L. Rptr. 2452 (Hawaii 1974) (preliminary hearing) even though they will not extend the rule to all areas of procedure, e.g., *State v. Simms*, 14 Crim. L. Rptr. 2324 (Wash. 1974) (not available at probation or parole hearings), and *Everhart v. State*, 14 Crim. L. Rptr. 2481 (Md. 1974) (probable cause for search warrants). The United States Supreme Court, however, has severely limited such rules, *Harris v. New York*, 401 U.S. 222 (1971), and is strongly disinclined to extend it further (certainly a problem for Flannery). See *United States v. Calandra*, 94 S. Ct. 613 (1974) 14 Crim. L. 3061 (January 8, 1974). In *Calandra*, Justice Brennan expresses the fear, justifiably, that the Court is moving toward abandoning the rule (*Id.* at 624). Certainly Chief Justice Burger and Justice Blackmun are on record in support of abandonment. See *Collidge v. New Hampshire*, 403 U.S. 443 (1971); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (dissent). The majority of the Justices are in accord. See *Gustafson v. Florida*, 94 S. Ct. 488 (1973); *United States v. Robinson*, 94 S. Ct. 467 (1973).

11. 364 U.S. 206 (1960).

12. 367 U.S. 643 (1961), discussed as an analogy at SYMPOSIUM, *supra* note 1, at 135.

13. 367 F. Supp. 1307 (W.D. Mo. 1973).

14. 387 U.S. 523 (1967).

15. 387 U.S. 541 (1967).

16. 387 U.S. 1 (1967).



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and *Miranda v. Arizona*,<sup>17</sup> not state law.<sup>18</sup> But I did not follow Flannery's argument here. Additional procedural rights for delinquency hearings are improperly demanded by use of an implicit characterization (for purposes of his "argument") of delinquency proceedings as "civil." Evidence obtained from warrantless or unjustified administrative searches must be excluded from criminal prosecutions. But how does it follow that questionable evidence obtained from a child must, therefore, be subject to exclusion *in the juvenile courts*? Can the *interrogation* somehow be characterized as administrative or "civil"? The nature of the search, not the hearing, was the focus of *Camera* and *See*.

Flannery argues that incorporation of "exclusion" is consistent with the "Rule" of *McKeiver v. Pennsylvania*.<sup>19</sup> Part of that rule is that, prior to incorporating a new procedural due process right, it must be shown that "problems" of juvenile process will more than likely be solved rather than expanded. I found it hard to understand why Flannery argues that exclusion meets the criteria of *McKeiver* without bothering to *question* obvious inconsistencies; how did the "proof beyond a reasonable doubt" or the *In re Winship* standard<sup>20</sup> solve any "problems" of the juvenile process? And he suggests the compromise that "excluded" evidence be introduced for sentencing, treatment or disposition? Since *Gault* and *Winship* did not discuss disposition, should the rights to counsel and cross-examination be held not to apply to disposition? Flannery does not adequately demonstrate that the exclusionary rule meets whatever "due process" standard for children now exists or will exist in the future.<sup>21</sup>

"The Case for Repeal of Section 383 of the New York Social Service Law,"<sup>22</sup> by Oscar Chase and Jonathan Weiss (an early advocate of juvenile rights responsible for many of the early successes—especially concerning the right to treatment) as well as the book review by James Woller of "When Parents Fail: The Law's Response to Family Breakdown" by Sanford N. Katz,<sup>23</sup> together, explain the discriminatory aspects of neglect proceedings and the problems inherent in this aspect of juvenile court jurisdiction. Woller's review should be read first; it gives a concise review of the "system" of neglect process after which

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17. 384 U.S. 436 (1966).

18. 367 F. Supp. 1307 (W.D. Mo. 1973).

19. 402 U.S. 528 (1971).

20. 397 U.S. 358 (1970).

21. SYMPOSIUM, *supra* note 1, at 153.

22. *Id.* at 7.

23. *Id.* at 209.

one can more easily see the significance of the litigation described by Weiss and Chase.

Vague neglect statutes provide a judge with "a vehicle for imposing on others his [sic] own preferences for certain child-rearing practices and his own ideas of adult behavior and parental morality."<sup>24</sup> The law provides little guidance for resolution of the basic conflicts in this field: protecting the integrity of an individual family unit, furnishing a conducive environment for the proper physical and emotional well-being of the child, and meeting the legitimately expressed needs and desires of each child. Guaranteed full participation by the child's counsel is rare.<sup>25</sup> In most states, decisions on criteria for finding neglect, *i.e.*, non-compliance with proper child-rearing norms which should legitimately allow state intervention, are also rare.<sup>26</sup> "Relevant" reading materials on child development theories<sup>27</sup> should not be used to circumvent real issues and the genuinely relevant needs, desires, and evidence adduced by the *child* and his or her counsel.

Weiss and Chase, on the New York law concerning temporary surrender of children to the state by persons who are temporarily unable to render proper care, point out that parents sign surrender "agreements" under duress and unaware of the nature of the document. Parents unknowingly relinquish the ability to determine their children's future. A constitutional problem arises concerning the manner in which the right to demand immediate return of custody is lost. The deprivation of such a vital interest as control over one's own child can not be accomplished, consistent with due process, unless preceded by a full evidentiary hearing. The signing of voluntary agreements is often unaccompanied by the aid of counsel, the extent of custodial rights

24. *Id.* at 210.

25. See, *e.g.*, ILL. REV. STAT. ch. 37 § 702-4 (1972).

Those who are neglected include any minor under 18 years of age

(a) who is neglected as to proper or necessary support, education as required by law, or as to medical or other remedial care recognized under State law or other care necessary for his wellbeing, or who is abandoned by his parents, guardian or custodian; or

(b) whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.

*Id.* (emphasis added).

26. Recently, in Illinois, the simple rendering of an appellate decision on standards of neglect even though that decision did little more than reassert the assumed fact that the accoutrements of poverty such as filth and disarray were inadequate reasons for removal from the home for neglect was widely noted and hailed. *In re Stacey*, 305 N.E.2d 634 (Ill. App. 1973). Prior to *Stacey*, only two decisions provided guidance and then only as a source of factual comparisons. *E.g.*, *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952); *In the Interest of Garmon*, 4 Ill. App. 3d 391, 280 N.E.2d 19 (1972).

27. See, *e.g.*, J. BOWLBY, *SEPARATION* (1974); J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

surrendered are not understood and, when parents later demand return, they may be flatly refused on the ground that the agency now has accumulated evidence of unfitness and the parent must "sue" for his or her children (the former situation in New York) or, suddenly find himself or herself the respondent in a court proceeding. At this point of demand for return, maintain these authors, the agency is revealed to have *unilaterally* cut off the right of parental control on the basis of its own judgment, having afforded the parent no *prior* opportunity to be heard.

*Boone v. Wyman*,<sup>28</sup> discussed in this chapter, expressed displeasure with the heavy burden of "going forward" placed on parents in matters such as these. The court in *Boone* placed that burden on the state, holding, as a matter of due process of law, that the fact that deprivation was conceivably only temporary did not obviate due process requirements of notice and filing of proceedings by the state where a child is being held. Indeed, in most cases, judicial proceedings for recovery are never initiated by parents. Parents should not be obliged to affirmatively prove their fitness in order to have a chance of regaining custody.

But what of the deleterious consequences of even temporary separation? The parent still has insufficient opportunity, prior to even a required hearing, to demonstrate fitness, for social report purposes, as the parent has lost the company of the child and already stands at a disadvantage. Parental custody prior to the hearing might provide the parent with valuable evidence in rebuttal to agency allegations. Thus, since the legitimate interest of the state in safeguarding children would not be defeated by allowing the natural parent to regain custody *on demand* as the state would retain an effective alternative, a closely proscribed "probable cause" emergency removal process (warrant), return on demand should not be defeated by simple notice of the filing of a petition but only the emergency circumstance of imminent harm sworn to be a reliable informant.

Accordingly, "notice" that court proceedings can be instituted, even after demand for return, can and is still being used to circumvent due process of law for natural parents. We need to re-examine the current practices by which acceptance of a child for care by a state agency is accomplished without legal counsel and with less than total comprehension of the legal ramifications.

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28. 295 F. Supp. 1143 (S.D.N.Y.), *aff'd*, 412 F.2d 857 (2d Cir. 1969), *cert. denied*, 396 U.S. 1024 (1970).

*In re Ella B.*,<sup>29</sup> completes this volume's "trilogy" (with Weiss and Chase and the Katz book review) on the field of child neglect. *Ella B.*, focused on the right of indigent parents to counsel in child neglect proceedings. Because civil commitment, or criminal proceedings directed at parents, could result from these proceedings—in addition to the serious threat of loss of the child's society—parents in neglect proceedings are entitled to counsel, and to notice of that right, as a matter of equal protection and due process of law. This case developed the "state adversary test," a presumption that, where the state is an adversary in any court proceeding, (a) some fundamental right will generally be involved and (b) the citizen will generally be disadvantaged in terms of resources of all kinds; accordingly, even though nominally a "civil" proceeding, a court must weigh this presumption before denying any specific incorporation of a given procedural protection of the "due process" clause into neglect proceedings.

Wizner, in his excellent contribution,<sup>30</sup> maintains, as he has constantly and persistently over the years,<sup>31</sup> that what is at stake in juvenile court is a child's basic human right to liberty and to continue in the custody of persons of the child's choice. This right is always being clearly and directly challenged by the state's assumed power to control crime and enforce morality; the state and the child are adversaries in every sense of the word.

The equitable and historical doctrine of *parens patriae*, derived improperly, say Wizner, from early practices of the English chancery courts, now amounts to state interference with and assumption of the parental function of child-rearing and obscures the adversary relationship between court and child—the doctrine's irrelevancy to the present and danger to liberty.<sup>32</sup> The purpose of the interference is to accomplish those therapeutic and social goals *primarily* placed in but unmet by natural parents. Unfortunately, the state decides the criteria to be met as well as whether they are in fact being met.

In England, historically, misbehaving children were prosecuted, if at

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29. 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

30. SYMPOSIUM, *supra* note 1, at 101.

31. Based on personal conversations, in various places throughout the country occurring intermittently since 1969 and from works of this author found elsewhere.

32. The common concern of the Supreme Court, in examining the issue of whether specific procedures are to be incorporated into the juvenile court as a matter of due process of law, is that the procedure not add to the "adversary" climate of what they assume should properly be a protective or rehabilitative proceeding. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); SYMPOSIUM, *supra* note 1, at 104. Wizner cites Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971).

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all, under the criminal laws. Equitable power, invoked as *parens patriae*, occurred only in the resolution of disputes between private parties over guardianship and property matters affecting infants and idiots deemed incapable of caring for themselves. Wizner quotes from Morris and Hawkins:

Historical idiosyncracies gave us a doubtful power over children. With the quasi-legal concept of *parens patriae* to brace it, this assumption of power blended well with the earlier humanitarian traditions in the churches and other charitable organizations regarding child care and child-saving. The juvenile court is thus the product of paternal error and maternal generosity which is a not unusual genesis of illegitimacy.<sup>33</sup>

The basis of Wizner's argument is that ". . . there must be clearer role separation in the juvenile courts, a sceptical approach to benevolent pretensions, and vigorous and scrupulous deference by counsel to the wishes of his client, the child."

Wizner prophetically maintains that:

Easy analogies of the state to the parent will not and should not serve to legitimize the state's power over children. If such a rationale is relied on, it seems reasonable to expect those affected by that power, frequently the nation's newly militant poor, to confront it in open court and demand that the state's performance be as parental as advertised. Perhaps we will see an increase in the number of cases using a writ of habeas corpus to free juveniles from confinements in institutions demonstrably not rehabilitative or parental.<sup>34</sup>

Judge Forer contributes an extensive introduction, explanation and exposition of a model Youth Court Act which is obviously the product of a long process of integrating practical experience with extensive theory. "A Children and Youth Court: A Modest Proposal"<sup>35</sup> expresses the conviction that reform of the juvenile justice system through litigation alone is time-consuming, wasteful and inefficient. Judge Forer suggests that state legislatures enact a new law; both criminal and civil divisions would be unified in one court.

The civil division would allow affirmative actions wherein children

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33. SYMPOSIUM, *supra* note 1, at 104-05, quoting N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 157 (1970).

34. SYMPOSIUM, *supra* note 1, at 107. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974); *Martarella v. Kelley*, 549 F. Supp. 575 (S.D.N.Y. 1972); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

35. SYMPOSIUM, *supra* note 1, at ch. 4.

could assert their claims against those who are allegedly infringing upon their rights. Many problems which federal courts are now dismissing as insignificant would now be capable of resolution in a more understanding and appropriate forum. In addition to the traditional juvenile or family court matters of adoption, custody, mental health, and termination of parental rights, this civil division would entertain broad actions "brought by or on behalf of a child to obtain redress for abuse, denial of rights or entitlements."

The criminal division would provide as a matter of law all the substantive due process safeguards of adult criminal courts, the minimum rights of a fair and equitable juvenile hearing already established, as well as further essential safeguards. Some significant proposals are: jury trials for children charged with serious crimes and the right to public trials unless the child objects for good cause.

The "Act" would also provide a "Bill of Rights," insuring for juveniles proper care, treatment and education. Several *exclusive* personal rights for children would be added: the right to bodily safety and integrity and freedom from physical and mental abuse; the right to medical, psychiatric and dental care; the right to education; the right to a home which provides food, shelter, clothing, care and recreation. The right to treatment is explicitly established for children in custody.

Although, on the whole, Judge Forer's outlined legislation is excellent and progressive, one might have hoped for some additional help in certain areas. For example, where "runaway" as a delinquent act is alleged, the affirmative defense of *justification* (by reason of bad home or school) exists. However, where truancy (habitually refusing to attend school) is the "delinquency" alleged, this same affirmative defense is apparently not thought advisable. This inconsistency is conspicuous and appears unjustifiable. Another conspicuous lack of depth concerns "contributing to the delinquency of a minor." It would have been useful to have some more careful and extensive drafting of this form of statute. Statutes of this kind have caused great difficulty due to their vagueness and, often, to their unconstitutional application.<sup>86</sup>

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36. See, e.g., *Vachon v. New Hampshire*, 94 S. Ct. 664 (1974); *Hanby v. State*, 479 P.2d 486 (Alaska 1970); *State v. Carey*, 284 A.2d 88 (Me. 1971); *People v. Owens*, 13 Mich. App. 469, 164 N.W.2d 712 (1969) (good intention to help runaway, no defense); *State v. Vachon*, 306 A.2d 781 (N.H. 1973); *State v. Blount*, 113 N.J. Super. 211, 275 A.2d 754 (App. Div. 1971); *Matter of Oman*, 254 Ore. 59, 457 P.2d 496 (1969); *State v. Bryant*, 3 Wash. App. 15, 472 P.2d 408 (1970) (good intention of helping runaway, no defense). Although the foregoing decisions speak to overbroad applications, held unacceptable, the statutes, themselves, have mostly been sustained against vagueness challenges. See *Brockmueller v. State*, 86 Ariz. 82, 340 P.2d 992 (1959); *State v. Barone*, 124 So. 2d 490 (Fla. 1960); *McDonald*

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My only other wish would have been that the provision concerning transfer to the adult criminal division, provided for certain cases in most jurisdictions, would have been drafted so as to speak to waiver standards, double jeopardy problems; proper rules of evidence or discovery upon hearing, appealability of a transfer, and other unsettled problems concerning waiver of juvenile court jurisdiction.<sup>37</sup>

The "Bill of Rights" creates guarantees that are bold, justified, and, in several particulars, contrary to current practice in most states, *e.g.*, no statements given by children who are arrested can be admitted unless made in the presence of counsel or of a representative; while in detention, rights to communication with parents, friends and counsel are guaranteed, solitary confinement of any kind is clearly prohibited; if the court finds the child innocent, records of arrest are expunged upon release (self-executing expungment is a much needed advance; this area of law is now causing some controversy);<sup>38</sup> no investigation or testing of children shall be made prior to a finding of guilt; no order upon a finding of guilt shall exceed the maximum period for which an adult could be incarcerated for the same offense; and the penalty for a delinquent act, in any event, shall not exceed six months commitment, probation or order requiring service.

Of noteworthy significance is the created cause of action for emancipation.<sup>39</sup> And as to termination of parental rights: it can be immediate and complete, the voice and preference of the child is guaranteed, priority is given to non-institutional care if separation from the natural family is warranted, and the child is declared *explicitly* incapable of being deprived of any rights of inheritance or other benefits to which he is legally entitled from his *natural* parents.

The most innovative ideas and intriguing papers is William P. Statsky's "The Training of Community Judges: Rehabilitative Adjudication." Statsky demonstrates the community youth might beneficially be taught "self-adjudication." A wide variety of valuable techniques

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v. Commonwealth, 331 S.W.2d 716 (Ky. 1960); State v. Hodges, 254 Ore. 21, 457 P.2d 491 (1969).

37. ILL. REV. STAT. ch. 37, § 702-7 (1972), is a recent attempt at a "model" set of standards for judicial discretion where the state maintains that a child is not deserving of the benefits of the state's juvenile code.

38. See, *e.g.*, SYMPOSIUM, *supra* note 1, at 173. See Spalty, Ferster & Courtless, *The Beginning of Juvenile Justice, Police Practices and the Juvenile Offender*, 22 VAND. L. REV. 567, 602-08 (1969).

39. As to the current interest in and need for such a remedy, see *Youth: Transition to Adulthood*, REPORT OF THE PANEL ON YOUTH OF THE PRESIDENT'S SCIENCE ADVISORY COMMITTEE (1973).

were used to acclimate young people to conflict resolution in the demonstration project described.

"Community forum judges," neighborhood volunteers with no legal training or judicial experience, learned to run and participate in the Forum (a community "court"). These citizens successfully adjudicated matters that would have otherwise found their way to the juvenile justice system. As an alternative to police "adjustments," overloaded courts, and poorly trained probation officers, community conflict resolution appeared quite satisfactory and generates much hope for the future. Recidivism was reduced and increasing community consciousness of their ability to manage delinquency prevention was accomplished.

Edward R. Spalty's essay "Juvenile Police Record Keeping" is a fine analysis and survey of a complex and major problem.<sup>40</sup> Juvenile police records are given improper treatment and attention and, as a result of the inconspicuous nature of the record-keeping process, statutory assurances of confidentiality are illusory.

The general practitioner, reading Spalty, will quickly glean the prime "civil liberties" problem in this field: although police records are often "unofficial," frequently result from unsubstantiated reports, and often are no more than accusations of guilt with no rebuttal by the accused, their uncorroborated use generates "negative labelling" problems for the child and their presumptively adverse use at detention, custody or disposition hearings violates standards of due process of law that would not be permissible for adults, *e.g.*, "evidence" of police contacts short of arrest could not be considered probative or be used to determine bail or sentencing for adults. Spalty narrows in on this:

An argument can be made that there is an obvious relationship between [incident or adjustment reports] and arrest and disposition. If enough reports are filed their cumulative effect could lead to the juvenile's eventual arrest and, if used by the court or probation officer or in making out a pre-sentence report, they could affect the disposition of the case.<sup>41</sup>

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40. The reader would be well-advised if interested in this specialized problem area to also refer to the articles in his footnotes. See generally Coffee, *Privacy v. Parens Patriae: The Role of Police Records in the Sentencing and Surveillance of Juveniles*, 57 CORNELL L. REV. 571 (1972). See also *In re Smith*, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (Fam. Ct. 1970).

41. SYMPOSIUM, *supra* note 1, at 190. The problem with the article, however, is a weak analysis of Cuevas v. Leary, 70 Civ. 2017 (S.D.N.Y. 1970), and the value it has for children; I am not convinced, at this time, that the stipulation obtained was adequate (see SYMPOSIUM, *supra* note 1, at 190-91). Also, readers interested in litigation such as this should refer to *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir. 1973); *Doe v. Scott*, No. 74C231 (N.D. Cal., Feb. 11, 1974).



## Book Reviews

In "Appellate Review for Juveniles: A 'Right' to a Transcript" by Jonathan I. Mark, we find an "equal protection" based "brief" for access to verbatim transcription of trial records for appellate review of delinquency findings analogous to the argument, previously accepted by the Supreme Court, that poor persons must be afforded appellate review where state statute affords this right to the wealthy. His essay is scholarly but not convincing.

Neither Mr. Mark, nor *In re Brown*,<sup>42</sup> a case upon which he relies (Virgin Islands appeals statute was declared unconstitutional because it unfairly discriminated against juveniles attempting to appeal), effectively deflects the reasonableness of different age classifications for purposes of provision of certain state "services." The "right" of appeal of children, that might follow from *Brown* is not here adequately shown to (1) include within a specific method of providing an appeal record (*verbatim* transcription) or (2) to surpass in importance probable legitimate state interests, *e.g.*, enormous juvenile "crime" causing enormous expense justifying cheaper alternatives for juvenile court where feasible.

Mark, himself, points out the problems inherent in his argument:

*In re Gault* refused to disturb the holding in *Griffin* and refrained from saying that due process requires a transcript of juvenile hearings. These two cases, then, preclude our asserting that the right to a transcript is a fundamental due process right, even for adults.<sup>43</sup>

Traditional "equal protection" arguments still do not allow courts to make the legislative choice of competing legitimate state options.<sup>44</sup>

On the whole this volume is of great value to the general practitioner with a growing interest in youth law; it will encourage in him or her greater study and effort in the field. Those familiar with the field will receive a useful review of where we have been and insight into the struggle that remains.

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42. 439 F.2d 47 (3d Cir. 1971).

43. SYMPOSIUM, *supra* note 1, at 202.

44. Legislative lobbying would seem advisable; Mark does not discuss this.

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