

12-15-1973

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Edward R. Roybal *Void for Vagueness: State Statutes Proscribing Conduct Only For a Juvenile*, 1 Pepp. L. Rev. 1 (1974)

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Void for Vagueness: State Statutes Proscribing Conduct Only For a Juvenile

EDWARD R. ROYBAL*

Mark Twain, himself no admirer of the law process,¹ once wrote: "A man should not be without morals; it is better to have bad morals than none at all."² Probably, had he the opportunity, Twain would not have penned a current California statute relating to juvenile court jurisdiction in that state, to wit:

Any person under the age of 21 years . . . who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.³

Neither, perhaps, would he have cared to commit juveniles in Con-

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1. "To succeed in the other trades, a capacity must be shown; in the law, concealment of it will do." PUDDENHEAD WILSON'S NEW CALENDER. S. CLEMENS, FOLLOWING THE EQUATOR, 331 (1971).

2. S. CLEMENS, MARK TWAIN'S NOTEBOOK, 237 (A. Paine ed. 1935).

3. CAL. WELF. & INST. CODE sec. 601 (West 1966), *as amended*, (West 1972). Section 601 was amended from "21 years" to "18 years." *See also* WASH. REV. CODE sec. 13.04.010 (1962).

necticut⁴ and Indiana⁵ to the juvenile court for engaging "in indecent or immoral conduct."⁶ Similar language is employed by practically every state to define that conduct on the part of minors which invokes juvenile court jurisdiction: "habitually so deporting himself as to injure or endanger the morals or health of himself or others";⁷ "associates with vagrant, vicious or immoral persons";⁸ "growing up in idleness and crime";⁹ "whose occupation, behavior, age, condition, environment, or associations are such as to injure or endanger his health, morals and general welfare or that of others";¹⁰ "is incorrigible, ungovernable";¹¹ "behaving in an incorrigible or indecent and lascivious manner . . . living in circumstances of manifest danger of falling into habits of vice or immorality";¹² "who is growing up in circumstances exposing him to lead an immoral, vicious or criminal life";¹³ "who is leading an immoral life . . . who habitually idles away his or her time";¹⁴ "who,

4. CONN. GEN. STAT. ANN. sec. 17-53 (Supp. 1972).

5. IND. ANN. STAT. sec. 93204 (Supp. 1972).

6. *Id.* CONN. GEN. STAT. ANN. sec. 17-53 (Supp. 1972).

7. ARIZ. REV. STAT. ANN. sec. 8-201 (Supp. Pamph. 1972); DEL. CODE ANN. tit. 10, sec. 901 (1953); D.C. CODE sec. 11-1551 (1967); IOWA CODE ANN. sec. 232.2 (1969); MD. ANN. CODE art. 26, sec. 70-1 (Supp. 1971); MINN. STAT. ANN. sec. 260.015 (1971); MISS. CODE ANN. sec. 7185-02 (Supp. 1971); MONT. REV. CODE ANN. sec. 10-602 (1968); N.H. REV. STAT. ANN. sec. 169:2 (Supp. 1970); N.M. STAT. ANN. sec. 13-8-26 (1968); PA. STAT. ANN. tit. 11, sec. 243 (1965); S.C. CODE ANN. sec. 15-1103 (1962); TEX. REV. CIV. STAT. art. 2338-1, sec. 3 (1971); W. VA. CODE ANN. sec. 49-1-4 (1966); WIS. STAT. sec. 48.12 (Supp. 1972).

8. ALASKA STAT. sec. 47.10.010 (1971); DEL. CODE ANN. tit. 10, sec. 901 (1953); D.C. CODE ANN. sec. 11-1551 (1967); FLA. STAT. ANN. sec. 39.01 (Supp. 1972); GA. CODE ANN. sec. 24-2401 (1971); IND. ANN. STAT. sec. 9-3204 (Supp. 1972); MASS. GEN. LAWS ANN. ch. 119, sec. 52, (1969); MICH. COMP. LAWS sec. 712A.2 (1968); N.J. REV. STAT. sec. 2A:4-14 (Supp. 1972); OHIO REV. CODE ANN. sec. 2151.022 (Page Supp. 1971); PA. STAT. tit. 11, sec. 243 (1965); R.I. GEN. LAWS ANN. sec. 14-1-3 (1970); S.C. CODE ANN. sec. 15-1103 (1962); TEX. REV. CIV. STAT. art. 2338-1, sec. 3 (1971); W. VA. CODE ANN. sec. 49-1-4 (1966).

9. FLA. STAT. ANN. sec. 39.01 (Supp. 1972); N.J. REV. STAT. sec. 2A:4-14 (Supp. 1972).

10. GA. CODE ANN. sec. 24-2408 (1971); ALASKA STAT. sec. 47.10.010 (1971); HAWAII REV. STAT. sec. 571-11 (1968) *as amended* Act 81, sec. 1 (1970) Hawaii Acts 146; LA. REV. STAT. sec. 13:1570 (1968); MISS. CODE ANN. sec. 7185-02 (Supp. 1971); MO. REV. STAT. sec. 211.031 (1962); NEV. REV. STAT. sec. 62.040 (1971); ORE. REV. STAT. sec. 419.476 (1971); UTAH CODE ANN. sec. 55-10-77 (Supp. 1971); VA. CODE ANN. sec. 16.1-158 (Supp. 1972).

11. IND. ANN. STAT. sec. 9-3204 (Supp. 1972); N.J. REV. STAT. sec. 2A:4-14 (Supp. 1972); N.Y. FAMILY CT. ACT sec. 712 (Supp. 1972); S.C. CODE ANN. sec. 15-1103 (1962); VA. CODE ANN. sec. 16.1-158 (Supp. 1972); WASH. REV. CODE sec. 13.04.010 (1962); W. VA. CODE ANN. sec. 49-1-4 (1966).

12. ME. REV. STAT. ANN. tit. 15, sec. 2552 (1965).

13. MASS. GEN. LAWS ANN. ch. 119, sec. 52 (1969).

14. MICH. COMP. LAWS sec. 712A.2 (1968).

by reason of being habitually wayward or habitually disobedient, becomes an incorrigible or uncontrollable child."¹⁵

To invoke Twain is not, of course, to suggest that he should have authored this country's juvenile laws. Neither, of hopefully equal obviousness, is it to imply a virtue in immoral behavior, however it be defined. Rather, Twain's observation aids the introduction of an issue of constitutional import: the questionable validity of current state statutes which proscribe behavior which is illegal only for juveniles; behavior, often couched in vague and all-encompassing moral terms, which, if engaged in by an adult, would not be prohibited.

The U.S. Supreme Court has addressed the problem of vaguely written statutes on numerous occasions.¹⁶ The general rule is that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.¹⁷ Inasmuch as the U.S. Supreme Court decision in *In re Gault*¹⁸ has largely vitiated the notion that juvenile proceedings are beyond the application of due process guarantees, it is wholly reasonable to expect that due process now requires that juveniles not be forced to defend against vaguely written laws.

Such statutes as those mentioned above, while the subject of both recent judicial rejection on vagueness grounds¹⁹ as well as serious

15. MISS. CODE ANN. sec. 7185-02 (Supp. 1971).

16. See generally Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

17. *Connally v. Gen. Construction Co.*, 269 U.S. 385, 391 (1926).

18. 387 U.S. 1 (1967). Historically, juvenile courts have been classified as civil courts. As such, they often did away with many of the procedures of ordinary criminal cases. In *Gault*, however, the Supreme Court ruled that a child alleged to be a juvenile delinquent had at least the following rights: (1) right to notice of the charges in time to prepare for trial; (2) right to counsel; (3) right to confrontation and cross examination; and (4) privilege against self incrimination, at least in court. See M. MIDONICK, *CHILDREN, PARENTS AND THE COURTS: JUVENILE DELINQUENCY, UNGOVERNABILITY AND NEGLECT* 13 (1972). See also 387 U.S. at 17.

19. *Gonzalez v. Mailliard*, No. 50424 SAW (N.D. Cal. Feb. 9, 1971); appeal docketed, No. 70-120; Apr. 9, 1971; *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd* 406 U.S. 913 (1972). The New York Times has reported a federal suit challenging as "hopelessly vague" a New York statute, N.Y. FAMILY COURT ACT sec. 712(b), (McKinney, 1963), which defines

inquiry for the purpose of reform,²⁰ have traditionally been upheld by the courts.²¹ State courts in Alaska,²² New Jersey,²³ Texas,²⁴ Connecticut,²⁵ Massachusetts²⁶ and most recently, New York²⁷ have upheld them against vagueness attacks. The Texas case²⁸ is illustrative of the typical response to claims that many juvenile behavior laws are phrased in such vague moral terms as to be meaningless and constitutionally infirm:

The relatively comprehensive word 'morals' is one which conveys concrete impressions to the ordinary person. Such word is in constant use in popular parlance, and this word or words of similar import are used in the statutes of most states to define behavior illegal for a child.²⁹

a person in need of supervision as a boy under 16 or a girl under 18 "who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." The suit was filed by the Children's Rights Project of the New York Civil Liberties Union, the Legal Aid Society and the American Civil Liberties Union Foundation. See N.Y. Times, Feb. 2, 1973, at 14, col. 1.

20. The NEW YORK LAW JOURNAL recently reported the formation of a national commission to develop the first comprehensive proposed standards of juvenile justice in the country. "The aim of the commission will be to improve the 'deplorable and deteriorating' system of dealing with youth in criminal and non-criminal behavior . . ." See N.Y.L. JOURNAL, Feb. 13, 1973, at 1, col. 6.

21. "Although no court decision has yet struck down a juvenile court act for vagueness, a number of courts have considered such a challenge." Midonick, *supra* note 18 at 13. *But see* State v. Gallegos, 384 P.2d 967 (Sup. Ct. Wyo. 1963).

22. United States v. Meyers, 143 F. Supp. 1 (D. Alaska 1956) upholding "contributing to the delinquency of a child" where the court noted that the second paragraph of the statute in question made "perfectly clear" what was intended to be prohibited by the statute. The second paragraph read as follows: "For the purposes of this Act any child under the age of eighteen years . . . who is in danger of becoming or remaining a person who leads an idle, dissolute, lewd or immoral life . . . or who is guilty of or takes part in or submits to any immoral act or conduct . . . shall be deemed a delinquent child." 143 F. Supp. at 3.

23. State v. L.N., 109 N.J. Super. 278, 263 A.2d 150 (1970), *aff'd*, 57 N.J. 165, 270 A.2d 409 (1970), *cert. denied*, 402 U.S. 1009 (1971) upholding "growing up in idleness or delinquency" and "deportment endangering the morals, health or general welfare of said child."

24. E.S.G. v. State, 447 S.W.2d 225 (Tex. Ct. Civ. App. 1969) *cert. denied*, 398 U.S. 956 (1970) upholding "habitually so deports himself as to injure or endanger the morals or health of himself or others."

25. State v. Mattiello, 4 Conn. Cir. 55, 225 A.2d 507 (App. Div. 1966), *cert. denied*, 154 Conn. 737, 225 A.2d 201 (1966) *prob. juris. noted*, 391 U.S. 963 (1968), *appeal dismissed*, 395 U.S. 209 (1969), upholding "habits of vice" and "vicious life."

26. Commonwealth v. Brasher, 270 N.E. 389 (Sup. Jud. Ct. Mass. 1971), upholding "stubborn child."

27. A. v. City of New York, 31 N.Y.2d 83, 286 N.E.2d 432 (1972), upholding "habitual truant," "incorrigible," "ungovernable," "habitually disobedient and beyond . . . lawful control."

28. E.S.G. v. State, *supra* note 24.

29. *Id.* at 226. With all due respect, "concrete impressions," "constant

Legislative justification for such broad statutes most often rests on the premise that early intervention, allowing the reformatory influence of juvenile courts and training schools to reach the delinquent before he commits more serious crimes, is a desirable end,³⁰ an understandable conclusion in light of the polestar which the States have followed since juvenile court acts were begun: the doctrine of *parens patriae*.³¹

Notwithstanding the "highest motives and most enlightened impulses"³² of those who author the juvenile laws of the several states, it is submitted that contemporary juvenile behavioral laws are impermissibly vague and violative of due process. Similarly written laws, when applicable to adults, have been struck down.³³ It must necessarily follow that if we are going to endow juveniles with due process rights to hearing, counsel, notice, confrontation and freedom from self-incrimination,³⁴ their meaningful applica-

use in popular parlance" and the fact that sister states employ equally vague statutes are subjective justifications of an already subjective law. It is of no utility to use imprecision to justify an imprecise law.

30. See Rosenheim, *Perennial Problems in the Juvenile Court*, in JUSTICE FOR THE CHILD 12 (M. Rosenheim ed. 1962).

31. The Latin phrase, *parens patriae*, has for many years been used to epitomize the legal and social philosophy underlying the juvenile court. *Parens patriae* describes a doctrine of the English court of chancery by which the King, through his chancellors assumed the general protection of all infants in the realm. The theory was that the sovereign, as *pater patriae*, possessed an obligation to oversee the welfare of the children in his kingdom who, because of the frailties intrinsic to their minority, might be abused, neglected, or abandoned by their parents or other guardians. The King, through his court of chancery, could thereby step in and provide the requisite parental protection and care. Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, in JUSTICE FOR THE CHILD 22 (M. Rosenheim ed. 1962).

32. Speaking of the juvenile process in this country, some of whose constitutional deficiencies it was the Court's intent to correct, the Supreme Court in *Gault* noted: "Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context." 387 U.S. at 17.

33. See, e.g., *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969), striking down vagrancy statute proscribing an "idle, immoral or profligate life." *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969), striking down vagrancy statute proscribing an "idle, immoral or profligate course of life." *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968), striking down vagrancy statute proscribing "leading an immoral and profligate life." Cf. *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Palmer v. City of Euclid*, 402 U.S. 544 (1971).

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

tion demands that a juvenile not be made to defend against vague laws.

In *Gonzalez v. Mailliard*³⁵ a federal district court judge struck down a California statute which permitted the juvenile court to adjudge certain persons under 21 as wards of the court, to wit those:

. . . who from any cause is in danger of leading an idle, dissolute, lewd or immoral life.³⁶

The *Gonzalez* decision came about as a result of a suit seeking a declaratory judgment that the California statute was unconstitutionally vague. The plaintiffs, nine juveniles, of whom all, on a prior occasion, had been arrested pursuant to the statute, sought, additionally, an injunction barring further enforcement of the Act.

The court appearing to emphasize the impermissibly broad scope of conduct to which the statute apparently applied, quoted from prior California cases describing conduct which justifies making a juvenile a ward of the state: conduct which is hostile to the welfare of the general public and contrary to good morals; conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; willful, flagrant or shameless conduct showing moral indifference to the opinions of the respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare; showing that he or she is indifferent to moral restraint, given over to dissipation or vicious courses; not occupied or employed; to loaf or dissipate ones time; loose in morals and conduct; wanton, lewd, debauched; inimical to good order and *contra bonos mores*; any practice, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it; loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched.³⁷

The court was impressed with the fact that adult vagrancy statutes, employing language similar to the California law, had been struck down on a number of occasions. The court was equally impressed with what it saw as "the seriousness of the deprivation of freedom" which was possible under the statute.³⁸

35. No. 504 24 SAW (N.D. Cal. Feb. 9, 1971), *appeal docketed*, No. 70-120; Apr. 9, 1971. The decision is unreported and is reproduced as an appendix to this article.

36. CAL. WELF. & INST. CODE sec. 601 (West 1966). See Appendix i-ii.

37. Case citations are collected in decision footnotes at Appendix vii.

38. Notwithstanding defendants' claim that the California statute was "civil" in nature, the court chose to view it as a "penal" provision "since it sanctions misconduct against the public order with deprivation of liberty." Appendix viii, at n.9.

Beyond these considerations, however, the court addressed the damaging effect which a vague statute would work on the *Gault*-given due process rights³⁹ to which a juvenile is entitled. Noting that "a central infirmity of a vague statute is that its vagueness makes other due process guarantees meaningless"⁴⁰ the court quoted from Justice Black's opinion in *Giaccio v. Pennsylvania*,⁴¹ where the Supreme Court found a statute unconstitutionally vague which imposed costs of prosecution upon a criminal defendant guilty of "some misconduct".⁴²

It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct' or 'reprehensible conduct'.⁴³

The Court in *Gonzalez* believed that a sufficient analogy between the case before it and that in *Giaccio* existed. Certainly, the court believed, it is no easier to defend against "leading an idle, dissolute, lewd or immoral life" than "misconduct" or "reprehensible misconduct" which was at issue in *Giaccio*. And what legal utility is there in allowing certain due process rights to juveniles if they are all for naught in light of a charge under a vague statute?:

Of what possible utility is notice of charges when the charge is merely that one is 'dissolute'? What use is counsel when it is impossible to know what type of evidence is relevant to rebuttal of the prosecution case?⁴⁴

In light of the Supreme Court decision in *In re Winship*,⁴⁵ holding that a juvenile is entitled to the "proof beyond a reasonable doubt" standard, at least when he is charged with conduct amounting to an adult crime, the *Gonzalez* court took cognizance of possible mischief on the part of juvenile authorities when enforcing their juvenile laws. It is not wholly beyond possibility, the court implied, that if the police or probation officers do not have sufficient evidence to prove the commission of a crime by a juvenile beyond a reasonable doubt, they can change the charge "and prove a potentially immoral conduct of life."⁴⁶ Thus it is obvious, though

39. See note 18 *supra*.

40. See Appendix xi.

41. 382 U.S. 399 (1966).

42. See Appendix xii.

43. *Id.*

44. See Appendix xii-xiii.

45. 397 U.S. 358 (1970).

46. See Appendix xiii.

the court did not state the conclusion, that using such open-ended statutes, authorities may effect "criminal" convictions by use of a "civil" (as at least it was traditionally known) process. Even if the "proof beyond a reasonable doubt" standard were applied to the noncriminal charge of "leading an immoral life," the court surmised, the substance of the offense is so broadly defined that the procedural safeguard of such a standard of proof becomes meaningless. The court:

Standards of proof depend on standards of relevance and probativeness, and these are precluded when the substantive offense covers the entire moral dimension of one's life.⁴⁷

A three-judge federal court in New York, in striking down portions of that state's Wayward Minor statute⁴⁸ found the terms "morally depraved" and "in danger of becoming morally depraved" "far beyond the bounds of permissible ambiguity."⁴⁹ In doing so the court articulated a conclusion that even common sense would seem to dictate:

The concept of morality has occupied men of extraordinary intelligence for centuries, without notable progress (among even philosophers and theologians) toward a common understanding.⁵⁰

47. See Appendix xiv. *Gonzales* is now before the Supreme Court where, possibly, the question will be decided. It must be remembered, however, that the court abruptly terminated review of an earlier case raising similar issues. See *State v. Mattiello*, *supra* at note 25. For a discussion of *Mattiello* see comment, *Statutory Vagueness in Juvenile Law: The Supreme Court and Mattiello v. Commissioner*, 118 U. PA. L. REV. 143 (1969).

48. Former N.Y. CODE CRIM. PROC. §§ 913-a(5) (6). Now see N.Y. FAMILY COURT ACT § 712 (b) (McKinney, Supp. 1972) which withstood an attack on vagueness grounds in *A. v. City of New York*, 31 N.Y.2d 83, 286 N.E.2d 432 (1972). See note 27, *supra*. While upholding the statute on vagueness grounds, the court struck that portion of the statute down as a violation of equal protection which differentiated between males under 16 and females under 18.

49. *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971) *aff'd* 406 U.S. 913 (1972).

50. 336 F. Supp. at 374. With this articulation, the issue herein reaches its zenith of visibility. Of course we must all agree that we should live a "good" life and be "moral" and avoid "evil." But to legislate these notions in the abstract is beyond constitutional sanction. To simply regulate juvenile behavior in such vague terms leads to the following confusing description of expected behavior on the part of juveniles in Kansas. The description appears intended to assist juveniles in gauging their conduct so as to avoid conflict with Kansas' law concerning juvenile behavior:

Acting in any way that goes against what most of the lawabiding people in your community think is right and proper is usually considered indecent or immoral conduct and is against the law. The court (judge), who is elected by your parents, decides what is indecent or immoral because he understands the thinking of most of the people in your community.

Anyone who conducts himself according to the moral standards of society usually leads a much happier, more meaningful, and

The court went beyond consideration of the constitutional infirmity of vagueness to what it believed to be the impermissible punishment of a condition or status of immorality which the New York statute worked on those subject to its enforcement. Referring to the U.S. Supreme Court decision in *Robinson v. California*,⁵¹ the New York Court appeared to view the statute before it as penalizing a minor's condition, rather than any specific actions, similar to the fated California statute in *Robinson* which punished the status of narcotic addiction "whether or not he [the offender] has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there."⁵²

It may be advanced that the statute in *Gesicki* is distinguishable from the one in *Gonzalez*⁵³ and those discussed earlier⁵⁴ for the fact that the statute before the court was found to be "substantially equivalent to a criminal statute."⁵⁵ Those convicted pursuant to the statute were possibly subject to being incarcerated with adult criminals; the statute was in the Criminal Code of the state; trials thereunder were conducted in courts of general criminal jurisdiction; those juveniles convicted were not assured of treatment substantially distinguished from that accorded to criminals. However, such a distinction only perpetuates a fallacious notion: that if we *really* treat juveniles pursuant to civil (or at least not otherwise identified as criminal) proceedings and incarcerate them in "farms", "reformatories" or whatever surroundings (again, in facilities that are, at least, not otherwise identified as criminal) then such treatment assumes a more acceptable air, one that does not require strict constitutional sanction. The fact is that however we care to characterize our treatment of juveniles, they *are* being deprived of their liberty,⁵⁶ a process which we must insure is done

more rewarding life.

Kansas State University, *What is the Law for Juveniles?* 4 (1971). One certainly need not be a reform zealot to recognize the impossibility of measuring conduct that falls within the scope of such standards.

51. 370 U.S. 660 (1962).

52. *Id.* at 666.

53. See Appendix i-ii.

54. See notes 3-5, 7-15 *supra*.

55. 336 F. Supp. at 379.

56. The Supreme Court in *Gault*, 387 U.S. 1, (1967), noted the fallacy of the "civil-criminal" distinction: "For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" *Id.* at 50.

only pursuant to the requirements of the Constitution. "Fundamental fairness"⁵⁷ demands that one of those requirements be that juvenile statutes be written so as to comport with criteria of specificity as handed down by the Supreme Court⁵⁸—not to conflict with them.

Another danger is that of overreaching by authorities who assume jurisdiction over juveniles by vaguely written statutes. It is not difficult to agree with Task Force on Juvenile Delinquency⁵⁹ that such statutes

. . . establish the judge as arbiter not only of the behavior but also of the morals of every child (and to a certain extent the parents of every child) appearing before him [citation omitted]. The situation is ripe for overreaching, for imposition of the judge's own code of youthful conduct.⁶⁰

The Task Force went so far as to recommend, in view of the "serious stigma and the uncertain gain accompanying official action"⁶¹ that "serious consideration" be given to "complete elimination from the courts jurisdiction of conduct illegal only for a child."⁶² But there is at least a nugget of propriety and purpose, perhaps, in maintaining an approach that seeks to assist and redirect children before more serious traits develop; an approach that may very well be facilitated by a juvenile court equipped with useful educational, medical, psychiatric or social services.⁶³ There are sufficient statutory models that may prove workable.⁶⁴ But

57. The applicable due process standard in juvenile proceedings is fundamental fairness. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

58. See text to notes 16 & 17 *supra*.

59. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967) [hereinafter cited as *Task Force Report*].

60. *Id.* at 25. It has been noted that "[t]he zealous court can in fact intervene in any case in which the condition of the child, his parents, or his neighborhood attracts the saolitude of its personel." Tappan, *Juridical and Administrative Approaches to Children with Problems*, in *JUSTICE FOR THE CHILD* 157 (M. Rosenheim ed. 1962).

61. *Task Force Report*, *supra* note 59, at 27.

62. *Id.* Mr. Justice Fortas notion that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," *In re Gault*, 387 U.S. 1, 13 (1967), raises the question of whether punishing a juvenile for conduct for which an adult is not punishable violates a juvenile's equal protection rights. However, *Gault* is not without its limitations. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). No constitutional right to jury trial in juvenile delinquency proceedings.

63. Midonick, *supra* note 18, at 14.

64. See Standard Juvenile Court Act in Eldefonso, *Law Enforcement and the Youthful Offender* 451-481 (2d ed. 1973); Sheridan, U.S. Dep't HEW, Childrens Bureau, Pub. No. 472, *Legislative Guide for Drafting Family and Juvenile Court Acts* (1969); NATIONAL CONFERENCE OF COMMITTEE ON UNIFORM STATE LAWS, *Uniform Juvenile Court Act* (1968).

in any event, state legislators and the courts must insure, at the very minimum, that juvenile behavioral statutes are written with constitutional precision. It can and should be done. After all, as noted by the court in *Gonzalez*, states have had "over 50 years of experience with the juvenile court system and should by now be able to give fair warning of the conduct which it wishes to single out for treatment in confining state institutions."⁶⁵

65. See Appendix xi, at n.10.

Appendix A

In the United States District Court for
the Northern District of California

No. 50424 SAW

Frank Gonzalez, through Maria Alvarez,
his Guardian ad Litem; et al., Plaintiffs,

vs.

J. W. Mailliard, III, President of the Police Commission of the
City and County of San Francisco, et al., Defendants.

MEMORANDUM OF DECISION AND ORDER

WEIGEL, J.

Plaintiffs seek declaratory judgment that a California juvenile delinquency statute is unconstitutionally vague. The statute provides that "Any person under the age of 21 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law of this State, or *who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life*, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court." CAL. WELF. & INST. CODE, § 601 (West 1966) (emphasis added).

The facts giving rise to this lawsuit are as follows.

On October 9, 1968, two San Francisco policemen were dispatched to investigate a report that a girl had been assaulted. The victim told the officers that she had been assaulted by about fifteen persons, a mixed group of whites and Latins who were members of the "24th Street Gang" that frequented the corner of Folsom and 24th Street. She knew the names of only three of her attackers. The officers then proceeded to 2400 Folsom Street where they saw eight boys they believed to be part of the "24th Street Gang". They arrested all eight on the grounds that they were in "danger of leading

a lewd and dangerous life." While the officers were making the arrests, two suspects named by the victim approached and were also placed in custody. All ten persons were then booked for violating the juvenile delinquency statute and on suspicion of robbery. CAL. WELF. & INST. CODE § 602 (West 1966); CAL. PENAL CODE § 211 (West 1970). All charges against the ten youths were later dropped.

Nine of these ten persons filed this complaint on their own behalf and on behalf of all persons threatened by continued enforcement of the statute. They named as defendants the arresting officers, members of the city's Police Commission, and the then Chief of Police. They sought as relief a declaratory judgment that § 601 is unconstitutional, a permanent injunction against arrests under § 601, damages from the individual police officers, and an order expunging their records of arrests under § 601. Because of the constitutional challenge to a state statute, a three-judge court was convened. 28 U.S.C. § 2284 (1964).

Defendants filed a motion to dismiss or, alternatively, for summary judgment. They argued that there was probable cause for the arrests on suspicion of robbery and that therefore the Court need not consider the arrests under § 601. In an order dated April 10, 1970, this three-judge court granted the defendants' motion with respect to the two plaintiffs named by the victim, but denied it with respect to the other plaintiffs. Plaintiffs then filed a motion for partial summary judgment on the issue of the constitutionality of the statute. There are no relevant facts in dispute on the issues raised. Plaintiffs' motion for partial summary judgment and the unresolved issues in defendants' motion to dismiss are now ripe for decision.

MOTION TO DISMISS

Defendants' remaining preliminary arguments are that the controversy between plaintiffs and defendants is moot, and that even if it is not moot, this federal court should abstain from ruling on the constitutionality of the state statute.

Mootness

Defendants rest their mootness argument on the fact that all charges against plaintiffs under § 601 had been dismissed before this lawsuit was filed. But plaintiffs request relief to which they still may be entitled and which depends on a decision as to the constitutionality of § 601. A declaration that this statute is unconstitutional should entitle plaintiffs to have the arrest record expunged. "An unconstitutional act is not a law; . . . it imposes no duties; . . . it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Co.*, 118 U.S. 425, 442 (1886).

If this statute is unconstitutional on the grounds suggested by plaintiffs, it would be inappropriate to allow the stigma to remain. *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D. No. Car. 1969) (3 Judge Court), *app. pend.*, Docket No. 102, 39 U.S.L.W. 3020 (U.S.S.C., Filed 3/3/70). *Cf. Ex parte Siebold*, 100 U.S. 371, 376 (1879).

Plaintiffs also charge two of the defendants with "wilfully, knowingly and purposely and with the specific intent to deprive plaintiffs" of first amendment rights, engaging in a systematic pattern of "intimidation and humiliation." Complaint, paragraph XIX. Their claim, simply stated, is that defendants were aware of the vague nature of the statute, and used its breadth to intentionally infringe on plaintiffs' right of association and assembly. Such an argument is an extension of *Pierson v. Ray*, 386 U.S. 547 (1967), but it is nonetheless tenable, and depends on a prior determination of unconstitutionality. If plaintiffs succeed, they will be entitled to money damages. See *Pierson v. Ray*, *supra*; *Monroe v. Pape*, 365 U.S. 167 (1961). There is, therefore, a present controversy on this issue.

The Court also notes, in denying the defense of mootness, that the named plaintiffs and the plaintiff class face continued use of the statute against them. Plaintiffs and their class should not be required to violate the statute in order to raise its constitutionality, especially since they are threatened with its use on a daily basis. Compare *Evers v. Dwyer*, 358 U.S. 202 (1958), with *Golden v. Zwickler*, 394 U.S. 103 (1969).

Abstention

The defendants also urge this Court to escape from the task of deciding this case by applying the doctrine of federal abstention. With respect to the claim for declaratory relief, as contrasted to injunctive relief, "[t]he judge-made doctrine of abstention, first fashioned in 1941 in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, sanctions such escape only in narrowly limited 'special circumstances.'" *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). Compare *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (injunctive relief). This Court has not been presented any "special circumstance" which would justify abstention. It is true that one "special circumstance" justifying abstention is the "susceptibility of a state statute to a construction by the state courts that would avoid or modify the constitutional question." *Zwickler* at 249, citing *Harrison v. NAACP*, 360 U.S. 167 (1959). However California courts have repeatedly interpreted § 601 and given the terms under consideration here a broad reading. See *infra*. In light of these decisions and the long period of time for which the juvenile delinquency statute has been in existence, the Court does not believe that justice would be served by sending plaintiffs back to the state courts for yet another state interpretation. See generally, *Klim v. Jones*, No. 52332 GSL (N.D. Cal. July 17, 1970); *Goldman v. Knecht*, 295 F. Supp. 897, 900-02 (D. Colo. 1969) (three-judge court).

PARTIAL SUMMARY JUDGMENT

The argument of the plaintiffs centers upon the vagueness of the words, "in danger of leading an idle, dissolute, lewd or immoral life." CAL. WELF. & INST. CODE § 601 (West, 1966). This Court must, of course, consider the statute as interpreted by the state courts. The state courts have constructed "idle, lewd, dissolute or immoral" by reference to California decisions construing those terms in the context of adult crimes. *In re Daniel R.*, 275 Cal. App. 2d 749, 79 Cal. Rptr. 247 (4th Dist. Ct. App. 1969). These cases make it clear that the words are not used restrictively, but rather used in their ordinary sense. In a jury trial for having contributed to the delinquency of a minor (an adult crime incorporating the § 601 language by reference), no definition of the terms, nor limiting instruction need be given to the jury. *People v. Lowell*, 77 Cal. App. 2d 341, 347-48, 175 P.2d 846 (2d Dist. Ct. App. 1946). See *People v. Deibert*, 117 Cal. App. 2d 410, 256 P.2d 355 (2d Dist. Ct. App. 1953). Judicial definitions of the terms indicate the breadth of the conduct that might be covered. According to California cases set out in the margin, a juvenile may be declared a ward of the court if he or she commits conduct which is: "hostile to the welfare of the general public and contrary to good morals";¹ or "inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare";² or showing that he or she is "indifferent to moral restraint, given over to dissipation or vicious courses";³ or "not occupied or employed; to loaf or dissipate one's time";⁴ or "loose in morals and conduct; wanton; lewd, debauched";⁵ or "inimical to good order and *contra bonos mores*";⁶ or "any practice the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it";⁷ or "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched".⁸ The terms are not confined to sexual misconduct. *Orloff v. Los*

1. *Orloff v. Los Angeles Turf Club*, 36 Cal. 2d 734, 740, 227 P.2d 449 (1951).

2. *Id.*

3. *People v. Jaurequi*, 142 Cal. App. 2d 555, 560, 298 P.2d 896 (2d Dist. Ct. App., 1956).

4. *People v. Diebert*, 117 Cal. App. 2d 410, 417, 256 P.2d 355 (2d Dist. Ct. App. 1953).

5. *Id.*, 117 Cal. App. 2d at 419.

6. *Id.*

7. *People v. Scott*, 113 Cal. App. 778, 780, 296 P. 601 (App. Dept., Super. Ct., L.A. Co. 1931).

8. *Id.*, 113 Cal. App. at 783. See also *People v. Babb*, 103 Cal. App. 2d 326, 330, 229 P.2d 843 (2d Dist. Ct. App. 1951).

Angeles Turf Club, 36 Cal. 2d 734, 746, 227 P.2d 449 (1951); *In re Daniel R*, *supra*.

Many federal courts have recently held that similar language in adult vagrancy statutes is unconstitutionally vague. *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D. No. Car. 1969) (3 Judge Court), *app. pend.*, Docket No. 102, 39 U.S.L.W. 3020 (U.S.S.C., Filed 3/3/70), held unconstitutional as vague a statute that proscribed "leading an idle, immoral or profligate life". *Baker v. Binder*, 274 F. Supp. 658, 662 (W.D. Ky. 1967) (three-judge court), held unconstitutionally vague a Kentucky statute that specified conduct with considerably more precision that is found in § 601. *See also Goldman v. Knecht*, 295 F. Supp. 897, 905 (D. Colo. 1969) (three-judge court) ("idle, immoral or profligate course of life" vague); *Ricks v. United States*, 414 F.2d 1097, 1106-07 (D.C. Cir. 1968) ("leading an immoral and profligate life" vague).

Defendants would attempt to distinguish these cases by affixing the label "civil" to § 601. But even if such a label was justified,⁹ it would not dispose of the vagueness problem. It is clear from several decisions that vagueness may be a constitutional infirmity in either criminal or civil statutes. In *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925), the Supreme Court expressly rejected the criminal-civil distinction in holding void for vagueness a statute which gave a defense to a contract action, 267 U.S. at 239. This holding was recently reaffirmed in *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966), which struck down a "civil" statute which imposed costs on criminal defendants guilty of "some misconduct". In *Bonnie v. Gladden*, 400 F.2d 547, 548 (1968), the Ninth Circuit cited *Giaccio* as relevant to a district court's consideration on remand of a juvenile statute. *See also Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951).

It is important, however, to note the seriousness of the deprivation of freedom possible under § 601. The more extensive the deprivation, the greater the due process requirement for certainty of statutory language. *See Jordan v. DeGeorge, supra; Winters v. New York*, 333 U.S. 507, 515 (1948). A child within the provisions of § 601 may be adjudicated a "ward" of the juvenile court and be committed to one of the juvenile homes or camps established by the various counties. CAL. WELF. & INST. CODE § 730 (West 1966).

The first effect of an adjudication under § 601 is the attachment of social stigma. The § 601 child is denominated a ward, the same term describing youths who violate criminal standards of conduct. CAL. WELF. & INST. CODE § 602 (West 1966). The juvenile court may maintain for at least five years a record that the child has been adjudged a ward of the court. CAL. WELF. & INST. CODE § 781 (West 1966). Efforts to make such adjudications non-stigmatizing have been generally recognized as unavailing. *In re Gault*, 387 U.S. 1, 23-24 (1967).

9. The better view would seem to characterize the statute as "penal" since it sanctions misconduct against the public order with deprivation of liberty. Cf. *In re Gault*, 387 U.S. 1, 13 (1967).

An adjudication of wardship under § 601 may also lead to deprivation of freedom. Juvenile homes or camps are admittedly "low-security" institutions that attempt to maintain a rehabilitative, home-like atmosphere. However, an escape from such an institution can lead to a commitment to one of the medium-security institutions of the Youth Authority. See CAL. WELF. & INST. CODE §§ 602, 731 (West 1966). Nor does the rehabilitative ideal distinguish the juvenile homes and camps from the Youth Authority institutions, nor indeed from modern adult penal institutions. See *id.* at § 1251. Wards under § 601 may be placed in direct contact with wards committed for conduct amounting to a crime under § 602. See *id.* §§ 506, 508, 730, 731. Wards may be required to do physical labor on grounds maintenance and fire prevention, and may even be required to participate in fire fighting, activity of such obvious danger that the state has a special statute extending workmen's compensation benefits for injury or death arising therefrom. CAL. WELF. & INST. CODE § 883 (as amended 1967) (West Supp. 1970). Compensation for such labor is completely within the discretion of county boards of supervisors. *Id.* § 884. Commitment to such homes and camps may extend until the ward becomes 21 or for two years after adjudication (whichever is longer).

Defendants cannot adequately distinguish the cases, noted above, which struck down adult vagrancy statutes. The language in § 601 is equally vague as that considered unconstitutional in those cases. Indeed, in several of those statutes, the same terms appear as are found in § 601. Nor, as we have indicated, are the cases distinguishable by the "civil" label, nor by the level of deprivation of liberty.¹⁰ But in addition to this lack of adequate distinctions, this Court has positive reasons for following these cases.¹¹ It is recognized that

10. Nor does the fact that the persons regulated here are minors sufficiently distinguish those cases dealing with adult crime. Some subject matters of regulation are less amenable to precision than others. See *Winters v. New York*, 333 U.S. 507, 520, 524-25 (1948) (Frankfurter, J. dissenting). But we do not see why the state cannot specify the conduct which it wishes to take as a ground for initiating its rehabilitative efforts. The state has had over 50 years of experience with the juvenile court system and should by now be able to give fair warning of the conduct which it wishes to single out for treatment in confining state institutions.

11. This Court is aware that the decision of *Mattiello v. Connecticut*, 395 U.S. 209 (1969), dismissing appeal for want of a properly presented federal question, 4 Conn. Cir. 55, 225 A.2d 507 (App. Div. 1966), was an adjudication on the merits. We cannot determine, however, from the short per curiam opinion whether the holding was dictated by vagueness doctrine or whether the appeal was dismissed because the sentence under the challenged statute ran concurrently with a conviction not challenged. See Brief of Appellee 4-6, *Mattiello v. Connecticut*, *supra*, citing *United States v. Romano*, 382 U.S. 136, 138 (1965). Even if the Court reached the

a central infirmity of a vague statute is that its vagueness makes other due process guarantees meaningless. See generally, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Since the Supreme Court has in recent years defined certain due process guarantees attaching to juvenile proceedings, the question of vagueness may be analyzed in light of those guarantees.¹²

A juvenile facing a § 601 adjudication is guaranteed rights to hearing, to counsel, to notice, to confrontation and to freedom from self-incrimination. *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966); CAL. WELF. & INST. CODE §§ 625, 634, 679 (as amended 1967) (West Supp. 1970). The effect of a vague statute on such rights was the crucial point in the decision of *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). In holding unconstitutional a statute imposing costs of prosecution upon a criminal defendant guilty of "some misconduct", Mr. Justice Black spoke for the Court:

It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct" or "reprehensible misconduct".

382 U.S. at 404. It is no easier to defend against charges that one is "in danger of leading an idle, dissolute, lewd or immoral life". Of what possible utility is notice of charges when the charge is merely that one is "dissolute"? What use is counsel when it is impossible to know what type of evidence is relevant to rebuttal of the prosecution case?

It is also important to consider that the Supreme Court held in *In re Winship*, 397 U.S. 358 (March 31, 1970), that a juvenile is entitled to the "proof beyond a reasonable doubt" standard, at least when charged with conduct amounting to an adult crime. Without holding that the *Winship* standard is applicable to § 601 adjudications, we note that the vagueness of § 601 gives the state an easy escape from its requirements. According to a statement by Defendant Cahill, then Chief of Police, San Francisco Police Department, the police ordinarily act with respect to a minor only where there is a report or observation of a crime. See Answers to Inter-

vagueness question, it is difficult without opinion to determine whether the Court accepted Connecticut's assertion that the statute was limited to continuing courses of conduct, which, of course, would make the statute less open to challenge. Note also that *Mattiello* preceded *Winship*, which plays a part in our decision here.

12. Plaintiffs argue that the breadth of the statute creates a danger that the exercise of free speech would lead to a § 601 adjudication on the basis that such speech might show an "inconsiderate attitude toward good order". Compare *Orloff v. Los Angeles Turf Club*, 36 Cal. 2d 734, 746, 227 P.2d 449 (1951), with *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). But absent any indication that the state courts would consider such protected speech as constituting a violation of § 601, or in upholding an arrest under that section, we prefer to rest our holding on the grounds that the indeterminateness of this statutory language would negate the important procedural rights attaching to an adjudication under § 601.

rogatories, No. 50 (filed April 14, 1969). Assuming this to be the general practice, the possibilities for abuse are manifest. If the police or probation officers do not have sufficient proof to show commission of a crime beyond a reasonable doubt, they can change the charge to § 601 and prove a potentially immoral conduct of life. A similar practice was condemned in *Ricks v. District of Columbia*, 414 F.2d 1097, 1107-09 (D.C. Cir. 1968). With the § 601 charge, the state can impose the same sanctions as on the "criminal" § 602, with the single exception that the places of initial incarceration are under the control of the county rather than the Youth Authority. Even if the "proof beyond a reasonable doubt" standard were applied to § 601, the state would still have an effective route around the requirements of *Winship* because § 601 defines the substance of the offense so broadly that the procedural safeguard of proof beyond a reasonable doubt becomes meaningless. Standards of proof depend on standards of relevance and probativeness, and these are precluded when the substantive offense covers the entire moral dimension of one's life.

On the basis of the preceding analysis, the Court holds that the portion of CAL. WELF. & INST. CODE § 601 (West 1966) which reads "or who from any cause is in danger of leading an idle, dissolute, lewd or immoral life" is too vague to serve as a constitutionally permissible standard on which to base an arrest or an adjudication of a juvenile as a ward of a court. We believe that this portion of the statute is such that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). It is violative of the due process clause of the Fourteenth Amendment.¹³

13. There are three other bases, stated in the alternative, by which a juvenile may be adjudged a ward under § 601. At least the first two alternatives of § 601 present serious vagueness problems in themselves. The first would sanction habitual disobedience of the "reasonable and proper" orders of parents and school authorities. The second covers children who are "beyond the control of" their parents and school authorities. The first section presents problems in its "reasonable and proper" language; the second because its failure to specify a *persistent* lack of control might lead it to the same potential abuses that we have found possible under the "idle, dissolute, lewd, or immoral life" portion of § 601 by reason of its application to the same type of single acts. But the parties have not squarely presented the issues raised by these other portions of § 601, and their own factual situation does not present an adequate case for consideration of these other portions, and we do not make a holding on them today. Nor do we find the statute so "indivisible" that the whole must fall with the part. See *Decker v. Fillis*, 306 F. Supp. 613, 617 (D. Utah 1969).

In so holding, we neither decide nor imply that the legislature is impotent to provide for some form of protective custody for delinquent or

It Is Therefore Declared And Ordered:

1. That the portion of CAL. WELF. & INST. CODE § 601 (West 1966) which reads "or who from any cause is in danger of leading an idle, dissolute, lewd or immoral life" is unconstitutional; and

2. That enforcement, by arrest, adjudication or otherwise, of the portion of CAL. WELF. & INST. CODE § 601 referred to in paragraph one, against the named plaintiffs, members of their class, or against any other person, is hereby permanently enjoined.

Dated: February , 1971.

/s/ M. Oliver Koelsch, Circuit Judge

/s/ William T. Sweigert, District Judge

/s/ Stanley A. Weigel, District Judge

Original filed feb. 9, 1971,
Clerk, U.S. Dist. Court, San Francisco.

neglected juveniles, upon reasonably clear and definite standards, when it may be necessary for their own protection or that of society or of both.