MAINE COMMISSION TO REVISE STATUTES RELATING TO JUVENILES

PRELIMINARY REPORT

OF

RECOMMENDATIONS AND ANALYSIS

VOLUME 1

This is a two volume report. Volume 1 contains the text of the report and Volume 2 contains the report's appendices.

October, 1976

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The Commission is grateful to Justices McCarthy and Roberts, of the Superior Court and to Judges Batherson, Briggs, Clark, Devine, Henry, MacDonald, Ross, Smith and Spill of the District Court.

These jurists graciously shared their experience and expertise with the Commission.

The Commission is also grateful to Mr. Kevin W. Concannon, Mr. Thomas V. Kane, Mr. Barry W. Nelson, Mr. N. Warren Bartlett and Mr. William M. Reid of the Children & Youth Services Planning Project for their assistance.

The views expressed herein, however, are those of the Commission and not of any person or organization it consulted in the course of its work.

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INTRODUCTION

INTRODUCTION

A. Establishment of the Commission

The Commission to Revise Statutes Relating to Juveniles was established on July 1, 1975 by an act of the Maine Legislature.[1] It is charged with responsibility for preparing a proposed juvenile code for Maine,[2] with particular emphasis on the areas of education, community-based corrections, institutional corrections, policing agencies and the court system.[3]

B. Chronological History of the Commission's Work to Date

Governor Longley convened the first Commission meeting on October 2, 1975. Subsequently, the Commission has met at least once a month.[4] Additionally, the

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1 H.P. 1271-L.D. 1752, See Appendix I

2 Ibid.

3 Ibid., Section 1

4 October 2, 1975; October 21, 1975; October 30, 1975; November 6, 1975; December 19, 1975; January 8, 1976; March 5-6, 1976; April 22, 1976; June 10, 1976; July 1, 1976; August 5, 1976; September 10, 1976; September 24-25, 1976; October 15, 1976

Commission has already completed one series of public hearings[5] and has scheduled another.[6]

In response to its enabling legislation;[7] opinions expressed at the public hearings held last May and June;[8] activities of other committees and projects currently working in Maine;[9] the experience and concerns of individual Commission members; and the parameters of time and budget, the Commission decided to narrow the scope of its inquiry to four areas: prevention, non-criminal behavior, criminal behavior, and juvenile courts.[10]

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5 On May 25, 26 and 27 in Portland, Bangor and Augusta and on June 1, 2, and 3 in Saco, Lewiston and Presque Isle.

6 On November 4, 5, 6 and 8 in Portland, Presque Isle, Bangor and Augusta.

7 See supra., note 1.

8 Supra., note 5.

9 Criminal Law Advisory Committee; Project on Standards and Goals of the Maine Criminal Justice System; Correctional Economics Project; Child Abuse and Neglect Task Force, Maine Human Services Council; Criminal Code Impact Project; Substitute Care Task Force, Greater Portland United Way; and Community Justice Project.

10 For an extended discussion of the procedure by which these four areas were selected see, FitzGerald, et al, "Goals of Maine's Juvenile Justice System: Report on Task 1," February, 1976.

C. Procedures Employed To Reach the Recommendations Outlined in This Report

After meeting with the Commission as a whole, staff extensively interviewed each Commissioner individually. The results of this process, of interviews with members of the Children & Youth Services Planning Project, and of interviews with the Commission's advisors are outlined in "Goals of Maine's Juvenile Justice System: Report on Task 1" which staff prepared for the Commission in February, 1976. On March 5 and 6, 1976, the Commission, after extended discussion, voted to concentrate on the areas of prevention, non-criminal misbehavior, criminal behavior and juvenile courts.

A series of Commission meetings were then held, each of which focused on one of these four areas. Before each session, Commissioners received a packet of materials, prepared by staff, to read as background material. Each meeting began with a staff presentation based on available demographic information;[11] relevant sections of Maine's existing statutes[12] and regulations[13] and available model

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11 See Appendix II.

12 See, "Statutes of Maine's Juvenile Justice System: Report on Task 3," prepared in March, 1976.

13 See, "Regulations of Maine's Juvenile Justice System: Report on Task 4," prepared in July, 1976.

legislation where appropriate.[14] The goal of each of these work sessions was to provide Commissioners with the information necessary to make tentative decisions about recommendations for change in Maine's juvenile justice system and to achieve a concensus among Commissioners about preliminary recommendations in the four areas.

This document is the result of that process. It contains preliminary recommendations in each of the four areas on which the Commission has concentrated.[15] A synopsis of this report has also been prepared and will be mailed to all interested citizens. The second, and final scheduled series of public hearings[16] will focus on this report.

Based on public reaction to this report, gathered during the November public hearings, the Commission will make final decisions about its analysis and recommendations, and will prepare a draft of proposed statutory amendments that reflect these decisions.

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14 For background material on each of the four topic areas see, "PREVENTION" prepared for the Commission meeting held on August 5, 1976; "CRIMINAL BEHAVIOR" prepared for the Commission meeting held on September 10, 1976; "NON-CRIMINAL MISBEHAVIOR" prepared for the Commission meeting held on September 24, 1976; and "JUVENILE COURTS" prepared for the Commission meeting held on September 25, 1976.

15 On July 1, 1976, the Commission voted unanimously that if four or more Commissioners disagreed with any resolution, they could submit a minority report of their findings and such report would be included in this document. In fact, no recommendation included here was opposed by four members.

16 See, infra., note 6 and accompanying text.

GUIDING PRINCIPLES
AND
SUMMARY OF RECOMMENDATIONS

GUIDING PRINCIPLES

The Commission's recommendations are based on the following philosophical principles:

I. Children and youth at risk should be provided with whatever supportive and rehabilitative services are necessary to ensure their healthy development.

II. Children and youth services must be provided in a way that recognizes the individual differences among people and the essential differences between young people and adults.

III. The liberty of individual children and youth is no less important than that of adults and is therefore to be protected so long as it is consistent with the liberty of others.

IV. Children and youth who are accused of criminal behavior should be treated by the justice system in a manner that clearly acknowledges the seriousness of the crime and adequately protects the constitutional rights of the accused.

V. The state is obligated to observe strict parsimony in intervening in the lives of children and youth. The state has the burden of justifying why any given instrusion--and not a lesser one--is called for.[17]

[17] Morris, The Future of Imprisonment (Chicago: University of Chicago Press, 1974).

SUMMARY OF RECOMMENDATIONS[18]

A. Prevention

1. The Commission agrees that children and youth should receive whatever services are necessary to prevent them from coming into contact with the juvenile court system and to aid in accomplishing this result, the Commission recommends that a single state agency, not necessarily a new one, be charged with responsibility for:

a. ensuring the provision of all services necessary to--

- prevent children and youth from coming into contact with the juvenile court system; and
- support and rehabilitate those children and youth who do come into contact with the juvenile court;

b. gathering standardized information on the present and past services needs of children who have come into contact with the juvenile court;

c. gathering standardized information on the extent to which such services needs are being met;

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[18] Each of these recommendations is made by unanimous resolution of the Commission unless otherwise noted.

d. making proposals for meeting the services needs which are not being addressed; and

e. coordinating with all other existing agencies that gather data on the services needs of Maine's children and youth.

2. The Commission agrees that:

a. there should be mandated responsibility on the part of schools and parents to adequately and appropriately meet the educational needs of Maine's children through age 17 years;

b. it is not appropriate to detain or commit students who truant or drop out from school in the Maine Youth Center or any other correctional facility for that reason only;

c. the present truancy statutes should be repealed and replaced with a mandate that

- students participate to the maximum extent that their ability permits with parents and school personnel in the prccess of achieving an education for themselves; and
- a decision not to so participate by any of the three parties will be reviewed by a community-based committee composed of parents, teachers, probation department personnel and/or other appropriate professionals and students; and

d. If, after reasonable efforts to maintain the child in an educational program which is responsive to his needs, the child does not participate in an educational process, that child will be permitted to withdraw from school without penalty to himself or others.

B. Non-Criminal Behavior

1. The Commission recommends that terms such as "behavior which might indicate a tendency to lead an idle, dissolute, lewd, or immoral life" or any other similarly vague terms should not be used to define non-criminal juvenile behavior and statutes employing such language should be repealed.

2. The Commission recommends that the "beyond-control-of-parents" child, where the child performs any criminal act, should be treated as a delinquent child, and where the child has not committed a criminal offense, he, and his family, will be offered and encouraged to accept voluntary social services which the state shall make available to them.

3. The Commission recommends that runaway children, for that behavior alone, should not be detained or incarcerated in any correctional facility.*

4. The Commission recommends that the jurisdictional basis for judicial intervention in cases of runaway children and youth should be altered so as to treat them essentially as neglect cases. (10-1)

5. The Commission recommends that Maine's statutes be amended to include the following custody standard and procedure (which refers to runaway youth only):

> A child may be taken into custody--
>
> a. pursuant to an order of a court; or
>
> b. by a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child has deserted his parent, guardian or custodian without just cause.
>
> A child taken into custody shall be referred forthwith to the Department of Human Services for appropriate disposition. (8-1)

C. Criminal Behavior[19]

1. The Commission agrees that non-residential community-based programs are the most desirable means for addressing juveniles' problems related to drug or alcohol abuse or prostitution. And,

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19 Other recommendations concerning criminal behavior by juveniles will be found under Section D: Juvenile Courts, infra. at page 122.

therefore, the Commission recommends that Maine's statutes be amended to require that a juvenile who has been adjudicated a delinquent because of drug or alcohol abuse or prostitution may not be committed to the Maine Youth Center or any other residential program until he has been placed in at least one non-residential program appropriate to his needs and has not been rehabilitated by that program; and that such residential commitment may be made only if there is evidence that such placement will provide the juvenile with appropriate programming.

The Commission further recommends that courts be provided with sufficient intake assistance to adequately carry out the intent of this requirement.

2. The Commission recognizes that it is most inappropriate and undesirable to detain juveniles in facilities which are also used to detain adult offenders. And, therefore, the Commission recommends:

a. that the detention of juveniles in facilities which are also used to detain adults be strictly forbidden by law; and

b. that the state establish a network of regional juvenile detention and evaluation facilities which will insure that juveniles will never have to be detained in adult jails.

3. The Commission recommends that the state criminal code provisions relating to arrest be adopted for juveniles arrested for delinquent behavior.

4. The Commission recommends that Maine statutes be amended to include the following additional standard for juvenile arrest:

A police officer may without a warrant take a minor under the age of 18 into temporary custody whenever the officer has reasonable cause to believe that the minor has committed a juvenile offense related to alcohol or drugs or has engaged in prostitution.

D. Juvenile Courts

1. The Commission recommends that the juvenile court be retained as a division of the district court and that continuing legal education be provided to judges and attorneys to ensure the highest possible quality of legal practice in juvenile matters.

2. The Commission recommends that delinquency hearings be conducted in all procedural respects, except jury trials, as are adult criminal hearings.

3. The Commission recommends that all court hearings involving juveniles accused of class A, B, or C offenses be open to the public. (7-2)

4. The Commission recommends that no child under age 14 shall be questioned about alleged delinquent behavior unless a lawyer acting on his behalf is present.

5. The Commission recommends that, in order to provide for more effective administration of justice with regard to juveniles who have committed serious offenses, the existing criteria for bind-over of juveniles to superior court be repealed and replaced by the following criteria:

> The juvenile court concludes and so states in its probable cause findings, that having considered--
>
> a. the record and previous history of the child,
>
> b. whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner, greater weight being given to offenses against person than property, and
>
> c. whether there is a reasonable likelihood that like future conduct will not be deterred by continuing the child under the juvenile justice system,

the court finds that--

a. the maturity of the child as determined by considerations of his home, environment, emotional attitude, and pattern of living, indicates that the child would be more appropriately prosecuted under the general law; and

b. the nature and seriousness of the offense indicate that the protection of the community requires detention of the child in facilities which are more secure than those provided in the juvenile justice system.

6. The Commission recommends that the salary of district court judges be increased and fees for court appointed attorneys in juvenile matters be determined on a case-by-case basis, according to the complexity of the case and length of the adjudicatory process. (8-0-1)

RECOMMENDATIONS AND ANALYSIS

RECOMMENDATIONS AND ANALYSIS

A. Prevention

RECOMMENDATION #1

The Commission agrees that children and youth should receive whatever services are necessary to prevent them from coming into contact with the juvenile court system and to aid in accomplishing this result the Commission recommends that a single state agency, not necessarily a new one, be charged with responsibility for:

a. ensuring the provision of all services necessary to--

- prevent children and youth from coming into contact with the juvenile court system; and
- support and rehabilitate those children and youth who do come into contact with the juvenile court;

b. gathering standardized information on the present and past services needs of children who have come into contact with the juvenile court;

c. gathering standardized information on the extent to which such services needs are being met;
d. making proposals for meeting the services needs which are not being addressed; and
e. coordinating all other existing agencies that gather data on the services needs of Maine's children and youth.

Vote By Which Resolved: Unanimous

Current Statutory Provisions: None

Current Regulatory Provisions: None

Discussion:

Of all the recommendations made by the President's Crime Commission in 1967, perhaps none generated more hope or received more widespread theoretical support than the concept of diverting large numbers of youthful offenders outside of the formal juvenile justice system to community-based youth-serving agencies[20] designed to delivery delinquency prevention

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20 There is definitional confusion in the formal titles which have been attached to the concept of providing community-based services to youthful law violators. For example, in 1967, the President's Commission on Law Enforcement and the Administration of Justice recommended an establishment of "Youth Services Bureaus" (Crime Commission Report at 83); in 1969 the Joint Commission on Mental Health of Children proposed "Neighborhood Child Development Systems" (Joint Commission on Mental Health of Children, Crisis in Child Mental Health: Challenge for the 1970's, 11 (1969)); in 1971, the White House Conference on Youth endorsed "Child Advocacy Councils" (White House Conference on Children, Report to the President, 391 (1971)); in 1973, the International Association of Chiefs of Police called for "Multi-Service Center for Youth" (Kobetz, R. and Bosarge, B., Juvenile Justice Administration, 487 (1973)); and in 1974 the Youth Development and Delinquency Prevention Administration of the U.S. Department of Health, Education and Welfare funded a pilot project on "Comprehensive Youth Service Delivery System" (ABA Commission on Correctional Facilities and Services, Source Book in Pretrial Criminal Justice Intervention Techniques and Action Programs, 124 (1974)).

and rehabilitation resources more effectively than juvenile courts.[21] Yet, in 1972, a national study was able to identify fewer than 170 programs which appeared to be "significantly related" to the Commission's concept.[22] An Institute of Judicial Administration/American Bar Association survey suggested even that number is over optimistic.[23] One can only conclude that what was heralded as one of the most innovative recommendations of the President's Commission has not, as yet, become a national alternative to the established juvenile justice process.[24]

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21 President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society, 83 (1967) (hereinafter Crime Commission Report).

22 Department of California Youth Authority, National Study of Youth Service Bureaus, 34 (1972) (hereinafter National Study).

23 Juvenile Justice Standards Project, Youth Service Agencies (unpublished draft, October, 1974). This section of our paper relies heavily on this study.

24 In part, this may be due to the fact that we do not know what causes or cures juvenile delinquency. For an excellent summary of the deficiencies of the existing evidence, see Lundman, R., MacFarline, P., and Scarpitte, R., "Delinquency Prevention: A Description and Assessment of Projects Reported in the Professional Literature," CRIME AND DEL. 297 (1976). This survey found that of 6,500 attempts to prevent delinquency since 1965, only 3% of the projects had produced an easily available public report. Moreover, only 25 reports contained usable information on the nature and results of the prevention effort. Nine of these reports involved such flawed research design that their results were not conclusive. Seven more were conducted without the use of a control group. The small number of reports with reliable research design reported no difference in the delinquency rate of the experimental and control group.

What are the 'character and purpose' which signal a "youth service agency"? Several fundamental elements can be identified, although they in turn raise new definitional questions. For example, as to character, most agree a youth service agency should be community-based and outside of the formal juvenile justice system. But the term "community" has been used loosely to describe anything ranging from a large urban area to a small neighborhood. Moreover, determining whether a program is "inside or "outside" of the formal system can be very difficult, particularly if, as is true in many jurisdictions, the program is staffed by a combination of personnel loaned by formal institutions.[25] Still, the identification of these two essential characteristics does serve to create some meaningful parameters. For example, a program in which intake workers refer juveniles directly to a probation department is clearly "within" the existing system and not community-based.

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25 Cressy, D., and McDermott, R., Diversion from the Juvenile Justice System, 5-8 (National Assessment of Juvenile Corrections, University of Michigan, 1973).

As to the fundamental elements of purpose, similar definitional problems arise. It seems clear that a youth service agency must mesh the principles of delinquency prevention and diversion. But diversion is itself a rather ambiguous term which has been used to describe various ideas that have little more in common than that they propose to alter current criminal justices practices. Sometimes the term is used in reference to procedures which avoid the formal criminal process altogether. In this context, attempts to decriminalize certain activities and thereby narrow the jurisdiction of the juvenile court may properly be termed diversion, as may the decisions of officers not to formally arrest. A juvenile court system is itself one manifestation of yet another concept of diversion in that it was established to divert juvenile offenders from the adult criminal justice system. In this context, diversion entails not a bypassing of the formal criminal process altogether, but rather a re-routing from one formal system to another.

Finally, the term diversion is sometimes used in reference to <u>any</u> disposition of a juvenile offender which avoids confinement in a formal correctional institution.

In this context, diversion represents an early exit from the existing systems by either formal or informal procedure. It may be accomplished by the police through release or stationhouse adjustment, by the prosecutor, through a refusal to press charges, or through a juvenile judge's decision to dismiss the case, acquit the juvenile, find an alternative to institutionalization or suspend the sentence.

With such a panoply of practices called diversion, it is apparent that we must carefully define our understanding of the term if the conception of the youth service agency as a diversion alternative is to have any meaning. One suggested operational definition is that found in the Report of the Corrections Task Force of the National Commission on Criminal Justice Standards and Goals:

> [D]iversion refers to formally acknowledged. . . efforts to utilize alternatives to. . . the justice system. To qualify as diversion, such efforts must be undertaken prior to adjudication and after a legally proscribed action has occurred. . . . Diversion implies halting or suspending formal criminal or juvenile justice proceedings against a person who has violated a statute in favor of processing through a non-criminal disposition.[26]

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[26] National Commission on Criminal Justice Standards and Goals, Corrections Task Force Report, 50 (1973).

It follows that a youth agency must receive direct and formally acknowledged referrals from the police and from the juvenile court.

As to delinquency prevention, it must be acknowledged that this goal is shared by a broad spectrum of youth-oriented programs. For this reason, reliance upon the strategy of prevention does not serve to distinguish a youth service agency from those other organizations. But by identifying the approach to prevention which is taken, a meaningful distinction may be drawn. As outlined by the President's Commission Report:

> These [youth] service agencies would act as central co-ordinators of all community services for young people and would also provide services lacking in the community or neighborhood. . .[27]

It is then the combination of the provision of direct services and the co-ordination of existing services which serves to identify a youth service agency. This fundamental approach, when coupled with the requirement of providing diversion for some juveniles from the formal juvenile justice system, serves to exclude a great number of community youth oriented programs (YMCA, Boy Scouts, Teen Centers) which are not youth service agencies as the term is used here.

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[27] Crime Commission Report, 1 at 83.

In summary, a youth service agency is an agency which exists independently of the formal juvenile justice system or the traditional child welfare system and which is designed to deliver appropriate beneficial services to diverted and non-diverted youths both by co-ordinating existing resources and by developing resources which are lacking.

While this conception explains the focus of this discussion, it is important to note that it does not dispel all the definitional confusion. For one thing, the goals of prevention and diversion need not necessarily conflict. Even if one believes the primary goal of a youth services bureau should be to serve as a diversion program, for example, the best way to achieve that goal may be to involve non-diverted youth in the program. For one thing, such a mix may be the only way to avoid the stigma associated with the formal juvenile justice system, for without the mix, the youth services bureau may well develop the reputation of being a program for delinquents. Similarly, a mix may be the best "treatment" a youth service bureau can provide to offenders.[28] But on the other hand, such a mix

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28 Especially if one subscribes to the theory that delinquency is largely a product of peer group influence.

means that youth service bureau money and resources are reallocated in part from diverted youth to members of the generally large group of community youth who have not been charged with delinquent acts. Thus a prevention focus may help a diversion strategy in some respects, yet conflict sharply with it in others--particularly financial.

A second area of potential conflict exists between the goals of co-ordination and direct service provision. There is the very real danger that without a focus on co-ordination, the youth service movement will result merely in the creation of "just one more agency following popular or fashionable trends in youth work, muddying the waters a little more and falling into obscurity."[29] Yet, designing youth service agencies primarily to co-ordinate services will similarly achieve little where--as is the case in Maine--existing services for youth are inadequate.

The confusion surrounding the definition of a youth service agency is merely one reflection of a more basic confusion about what such agencies

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29 Lemert, E., Instead of Court, NIMH Studies of Crime and Delinquency, (1971).

should do. Diversion, in theory, is based on the analysis that juvenile justice processing is frequently detrimental to some youth, and such youth, who otherwise would receive such processing, should be "diverted" to youth services programs. Under such an analysis, the concept of diversion is intended to represent the probability that a youth entering the juvenile justice system will be discharged from the system prior to some particular event: commonly, court adjudication. Such diversion is seen as beneficial because it permits the state to provide service through a youth services program without labeling the youth a delinquent or tainting the youth's identity with a stigmatizing judicial experience.[30] This ideal

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30 It must be pointed out here that the labeling theory has come under increasing attack. Few studies have found any correlation between labeling and subsequent acts of delinquent behavior. See, Gibbons, D., and Jones, D., The Study of Deviance (New Jersey, 1975); Williams and Gold, "From Delinquent Behavior to Official Delinquency" 20 SOC. PROB. 209 (1972); Mahoney, A., "The Effects of Labelling Upon Youths in the Juvenile Justice System: A Review of the Evidence" 8 LAW AND SOC. REV. 583 (1974).

The Williams and Gold study, supra., may provide slight support for the labelling theory, but it is methodologically weak. It involved a comparison of the offenses committed by youths who had previously been apprehended to those youths who had committed four previous unapprehended offenses. However, no attempt was made to control for the seriousness of the offenses.

Despite a lack of evidence, the labelling theory does present certain problems. For example, if it were taken to its extremes, it would imply that the best treatment for all youths is no treatment. Yet most labeling theorists hesitate to go this far. (See Mahoney, supra.) Certainly there are some children with specific problems who have been helped by programs offered within juvenile justice systems. Presumably almost everyone knows delinquent children who become productive citizens, and who credit this change to diversionary or treatment programs.

has been termed "true" diversion.

> If 'true' diversion occurs, the juvenile is safely out of the official realm of the juvenile justice system and he is immune from incurring the delinquent label or any of its variations--pre-delinquent, delinquent tendencies, bad guy, hard core, unreachable, Further, when he walks out the door from the person diverting him, he is technically free to tell the diverter to go to hell. We found very little 'true' diversion in the communities studied.[31]

Several critiques have been leveled at diversion. Questions have been raised about fairness and the absence of due process protections in the administrative discretion upon which diversion rests.[32] There is concern that focusing on diversion is a reactive process which diverts energy from primary delinquency prevention:

> If...diversion becomes merely a bureaucratic means of diverting attention from needed changes in the environment of youth, it will do great injustices.[33]

Popular criticism of diversion revolves around crimes committed by diverted youth, mismanagement of funds and the problems generated in trying to mesh new clients into traditional social services.[34]

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31 Cressy, D., and McDermott, R., Diversion from the Juvenile Justice System, National Assessment of Juvenile Corrections, University of Michigan, June, 1973.

32 Justine Wise Polier, "Myths and Realities in the Search for Juvenile Justice" HARV. ED. REV. Vol. 44, No. 1 (Feb. 1974).

33 Cressy and McDermott, supra. note 31 at 62.

34 Becker, A., "Problems of Broad Diversion Program Implementation," unpub. paper prepared for the Center for Criminal Justice, Harv. Law School, Cambridge, Massachusetts, 1974, pg. 30.

Finally, there is the concern that diversion is becoming a mechanism for increasing unwarranted state intervention into more and more young lives. Some scholars argue that diversion does not so much "save" youth from the consequences of court processing as "increase" the rate of service intervention into their lives. It has been suggested that diversion statistics may be bloated by thousands of youth "scooped up" into the juvenile justice system who previously were dismissed. Such figures may serve to mask the fact that those youth who traditionally were processed through to correctional institutions are still processed through without any benefit from all the diversion efforts. Up to this time there has been no systematic analysis of diversion which has truly factored out such issues as who and how many really benefit. While data is compiled on police and court referrals to youth service programs, very little is actually known about the degree to which diversion is actually practiced in the juvenile justice system.

The Commission has found that there is a need for more and varied diversion programs for children in Maine;

and that there is a need for well-trained family workers, street workers and counselors to work with a child in his community before he becomes involved with the juvenile court in any way. We suggest that diversion services should be provided by already existing human services agencies and that the ability of such agencies to provide necessary services to both delinquent and non-delinquent youth be expanded.[35]

The informational basis for these Commission recommendations was the national and state literature discussed in this section of the report, the testimony of a variety of experienced and knowledgeable people at Commission hearings, and the comments of Commission members. Although this information has been helpful in focusing the Commission's work, it is the unanimous opinion of Commissioners that planning, administration, and provision of prevention services would be far more effective in Maine if a single state agency were given the responsibility and capability to gather and analyze standardized information on the services needs of children and youth who come into contact with the juvenile court.

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35 These conclusions were also reached by the Substitute Care Task Force of United Way, Inc. See: Children and Families at Risk In Cumberland County, United Way Substitute Care Task Force, (September, 1976).

This information along with data on the extent to which these needs were being met would provide a sound foundation for decision making about resource allocation and new services development. The agency could therefore also be responsible for making proposals for meeting needs which present services are not adequately addressing.

Such an agency need not be a new, additional one. Ideally these functions should be performed by a unified children and youth services agency which combined functions presently provided by elements of the Departments of Mental Health and Corrections and Human Services. The agency should be located in one of the two Departments and would perform the following general functions:

Provision of direct services for children and their families--

- administering, supervising and ensuring the provision of public child protective and welfare services;
- administering, supervising and ensuring the provision of correctional programs for delinquent offenders;
- assisting communities to establish and provide necessary local services through technical assistance and additional financial resources in establishing the necessary range of comprehensive evaluation and treatment services;

- using to best advantage the available resources of both the income maintenance and social service programs in appropriate titles of the Social Security Act and other federal statutes;
- using other public and voluntary agencies as resources for the purchase of care and services;
- stimulating the creation of voluntary services; and
- intervening if local agencies fail to provide adequate services for which they are responsible.

Leadership in statewide program planning--

- collecting and reporting all pertinent data on services recipients, programs, and unmet needs;
- analyzing needs of children and families;
- promoting the development of comprehensive child welfare services systems based on needs;
- ensuring effective utilization not only of social services, but of all existing services and resources for children and their families, under both public and private auspices, and, when necessary, encouraging their development and expansion;
- promoting a teamwork approach and bringing together the various fields interested in developing services for children and their families;

- providing planning grants for local communities; and
- seeing that state planning is implemented and that comprehensive services are available in all communities.

Regulation of agencies--

- setting standards and minimum requirements;
- licensing voluntary agencies and others in the private sector;
- approving program agencies as meeting the minimum requirements of the licensing authority; and
- supervising public agencies and providing consultation to assist voluntary agencies and others in the private sector to improve services.

Evaluation and accountability--

- ensuring compliance with the regulations for use of public funds;
- evaluating quality and cost effectiveness of services; and
- monitoring and assisting local agencies and service contractors, including proprietary agencies, to assure that they are carrying out their service responsibilities appropriately and effectively.

Provision for appeals, fair hearings and grievances--

- protecting the rights of individuals to appeal against denials of or exclusion from the services to which they are entitled, actions that negate the individual's right of choice to specific programs, or actions that force involuntary participation in a service program.

Staff development and training--

- meeting the need for professional personnel for public child welfare services, through inservice training, institutes, conferences, and educational leave grants;
- upgrading education and competence of professional and subprofessional personnel and volunteers; and
- making staff and training facilities available for training of staff and volunteers in contractor agencies or facilities to assure effective provision of purchased services.

Research and demonstration--

- engaging in research; and
- entering into contracts with other agencies and making grants for research, including basic research into the causes of social problems of children and their parents, evaluation of methods in use, and development of new approaches.

In regard to individual children for whom such agency has accepted responsibility, it should:

- make appropriate services available to them, either directly or by purchase of or payments for such services provided by by another agency;
- assume responsibility, to the extent that parents are unable to do so, for payment for services;
- assume legal custody of children or legal guardianship, vested by the court, when parental rights are temporarily abrogated or terminated (as, for example, when the agency is authorized to place the child for adoption);
- take necessary action for the appointment of a guardian of the person of children who do not have a parent to exercise effective guardianship;
- carry continuing responsibility for seeing that the children and parents are receiving appropriate services in accordance with their needs.

Such a unified agency could pull together most of Maine's children and youth serving resources and employ them most efficiently and effectively in the meeting of many unmet needs. It could also bring order to the efforts of various unrelated programs and agencies which are now working in Maine.

RECOMMENDATION #2:

The Commission agrees that:

a. there should be mandated responsibility on the part of schools and parents to adequately and appropriately meet the educational needs of Maine's children through age 17 years;

b. it is not appropriate to detain or commit students who truant or drop out from school in the Maine Youth Center or any other correctional facility for that reason only;

c. the present truancy statutes should be repealed and replaced with a mandate that--

- students participate to the maximum extent that their ability permits with parents and school personnel in the process of achieving an educational for themselves; and

- a decision not to so participate by any of the three parties will be reviewed by a community-based committee composed of parents, teachers, probation department personnel and/or other appropriate professionals and students; and

d. If, after reasonable efforts to maintain the child in an educational program which is responsive to his needs, the child does not participate in an educational process, that child will be permitted to withdraw from school without penalty to himself or others.

Vote By Which Resolved: Unanimous

Current Statutory and Regulatory Provisions:

Part a. - There is mandatory responsibility on the part of schools to prepare all children to become useful citizens. (Maine Constitution, Article VIII). And, by law,

all children between the ages of 5 and 20 have the right to a free education in a public school subject to certain limitations and conditions. (20 M.R.S.A. Section 859-Supp. 1975).

Parents are obligated to insure that their children attend school. (20 M.R.S.A. Section 911-Supp. 1975; 20 M.R.S.A. Section 220-Supp., 1975).

For a thorough discussion of Maine's statutes relating to the right to education, see Appendix III and Appendix IV.

For a thorough discussion of Maine's regulations relating to the right to education see Appendix V.

Part b. - Although a child may be adjudicated an offender because of habitual truancy

(15 M.R.S.A. Section 2552-Supp. 1975), he may not be incarcerated for that offense alone.

Part c.- Maine is moving toward this concept through its Positive Action Committees(20 M.R.S.A. Section 917-Supp. 1975).

For a thorough discussion of Maine's statutes relating to truancy, exclusion and expulsion see Appendix IV. For a thorough discussion of Maine's regulations relating to truancy, exclusion and expulsion see Appendix VI.

Discussion:

Laws penalizing children and their parents for truancy have existed for over a hundred years.[36]

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36 Bremner et al.(eds.) Children and Youth in America (Cambridge: Harvard University Press, 1971) pg. 1421

For generations, the thrust of truancy laws has been the same. There are still laws which threaten recalcitrant children and parents with stiff punishment if a child is truant.[37] This is so despite the fact that very little is known about the causes and effects of truancy and dropping out of school.[38] Whether there is a positive correlation between children who have trouble in school and children who commit delinquent acts is a disputed question.[39] If the correlation between truancy or dropping out and delinquency has not yet been established, the mere fact that a child does not attend school

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37 See Appendix VII.

38 President's Science Advisory Committee, Youth: Transition to Adulthood, 66 (1973).

39 See Judicial Conference of the State of New York, "The PINS Child: A Plethora of Problems" (1973); Polk, Frease and Richmond, "Social Class, School Experience and Delinquency" 12 CRIM. 84 (1974); Senna, Rathus and Siegel, "Delinquent Behavior and Academic Investment among Suburban Youths" 9 ADOLESCENCE 481 (1974).

may not be sufficient cause to justify state intervention to compel attendance.[40]

But in most states, a truant child is categorized as being in need of supervision, being unruly, incorrigible or wayward.[41] After a court so adjudicates a child, he may then be released to his parents, placed on probation or placed with a suitable individual or public agency or institution.

A few states also allow courts to revoke the child's driver's license,[42] place the child in a "camp"[43] or fine the child.[44]

40 It is argued that failure to attend school may be a symptom of greater problems of the child and that the state should intervene in truancy situations to avoid greater disruption in a child's life. Children's Defense Fund, Children Out of School in America, 19 (1974).

And it has been argued that the child himself has the right to an education that will prepare him adequately for adult life. See Brown v. Board of Education, 347 U.S. 483 (1954) which raised at least aspects of this right to a constitutional level. But this right may extend only to that education which is required for the child to function as an adult in a particular society. Thus, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court held that Amish parents could be compelled only to send their children to school through the eighth grade.

41 For example, in Arizona, Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Massachusetts, New York, Ohio, Pennsylvania, Virginia.

42 Florida and Ohio, for example.

43 Georgia and Ohio.

44 Ohio

Other states provide that truants shall be considered delinquent children, either for the first offense or for the second offense, or for refusal to obey a court order and attend school.[45] As such, truants may be sent to institutions which care for other delinquent children.

Two states have adopted innovative programs for truant children. New York provides special day schools for truants.[46]

California deals with its truancy problem by providing for action by a school attendance review board before truancy matters reach the juvenile courts. All children who habitually refuse to obey the reasonable and proper orders of the school authorities or who are habitually truant from school are first referred to this attendance board.[47] Juvenile courts have jurisdiction only after this attendance board determines that the available public or private services are inappropriate to correct a child's behavior or habitual truancy

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45 Alabama, Connecticut, Georgia, Indiana, Michigan, Pennsylvania.

46 N.Y. Educ. Code Section 3214(2) (1974). Connecticut also allows truant children to be placed in a vocational education program, but only if they are mentally or emotionally disabled to the extent that they cannot benefit from regular school attendance. Conn. Rev. Stat. Sections 17-53, Sections 17-68(c) (1969).

47 Cal. Welf. & Inst'ns Code, Section 601.1(a) (1974).

or that a child has failed to respond to services provided.[48]

A truant is defined in California as a pupil who is absent from school "without valid excuse" more than three days or who is tardy by more than 30 minutes on each of more than three days.[49] Such a pupil is reported to the attendance supervisor of the school district.[50]

If a pupil is reported truant three or more times, he is considered a habitual truant.[51] A habitual truant is referred to the school attendance board review.

The school attendance board is designed to provide:

> intensive guidance and coordinated community services...to meet the special needs of pupils with school attendance problems or school behavior problems.[52]

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48 Cal. Welf. & Inst'ns Code, Section 601.1(b) (1974).

49 Cal. Educ. Code, Section 12401 (1969).

50 Id.

51 Cal. Educ. Code Section 12403 (1969).

52 Cal. Educ. Code Section 12500(a) (1974).

Thus, the board is given authority to determine whether available services are sufficient to meet and correct the needs of a truant youth.[53] If the board finds that available services are inadequate to deal with such child's needs, it may propose and promote alternative solutions which attempt to provide for the maximum utilization of community resources prior to the involvement of the judicial system.[54]

Provisions are made for the establishment of such attendance review boards in each county.[55] These boards include representatives of parents, the county probation department, the county welfare department and the superintendent of schools.[56]

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53 Cal. Educ. Code Section 12500(b) (1974).

54 Id.

55 Cal. Educ. Code Section 12501(a) (1974).

56 Id.

They may compel action by parents. Thus, if a parent fails to respond to the directives of an attendance board, his child may be referred to the probation department or the county welfare department as a neglected child.[57] Furthermore, the board may file a criminal complaint against a parent for failure to send his child to school.[58]

Courts may also order parents to deliver their child at the beginning of the school day to the school.[59] However, the parents may, within three days after the judgment, post a bond for $200 guaranteeing that the child will go to school.[60]

The California model, outlined above, envisions court intervention as a last resort.[61] However, this

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57 Cal. Welf. & Inst'ns Code, Section 601.2 (1974).

58 Id. Any parent who fails to make his child attend school is guilty of a misdemeanor and may be fined $25 or five days imprisonment for the first offense and $25 to $250 and/or 5 to 25 days for subsequent offenses. Cal. Educ. Code, Section 12454 (1969).

59 Cal. Educ. Code, Section 12410 (1969).

60 Cal. Educ. Code, Section 12411 (1959). Of course, if the conditions of the bond are violated, then the bond is forfeited. Cal. Educ. Code, Section 12412 (1959).

61 Supra. at note 57.

Commission recommends the elimination of such judicial intervention because: (1) there is no evidence that such intervention, however benign, prevents truancy;[62] and (2) there is some evidence that judicial intervention, rather than working as intended, sometimes harms both parents and children.[63]

The Commission, therefore, supports the philosophy Maine has already espoused in forbidding the detention of incarceration of children for truancy alone. We suggest that a further refinement of that philosophy is to completely remove jurisdiction over truancy matters from judicial tribunals and to place it where it belongs—in the hands of educators, parents and representatives of social

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62 Supra. note 38. We were unable, after an extensive search, to develop accurate and complete data about truancy in Maine. In fact, the Commission was told that the Department of Education in Maine does not keep such data on a state-wide basis. (Testimony of Mr. Omar Norton before the Commission at a public hearing held in Augusta, Maine on May 27, 1976.)

Neither does there appear to be any state-wide program designed to alleviate truancy which has been monitored in a way that would make extrapolation of generated data useful for our purposes. We are therefore unable to formulate any evidence that intervention, of whatever sort, affects truant behavior in any way.

63 Wald, "State Intervention on Behalf of 'Neglected Children'" 28 STAN. L. REV. 625 (April, 1976).

service agencies, more equipped than are courts to deal with the problems of a truant child.[64]

We believe that only when the barriers separating teachers from parents and administrators from teachers are removed will be begin to address the problems of truancy. Implicit in our recommendations is the belief that:

1. Suspension of students from school should be curtailed. State and local school officials should immediately examine their school discipline policies and practices in light of the interests

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64 We recognize that the problems of children out of school, or those who do poorly in school or act out in school reflect their and their families' broader needs. Reforms inside the educational system must be viewed in tandem with reforms outside schools. But while school officials cannot solve all the problems of the children they serve, they can alleviate many, particularly those that are a direct outgrowth of their own policies or the lack of them.

Some may view these comments as a wholesale indictment of schooling and school officials in Maine. It is not. We do not mean to imply that all school districts, administrators and teachers are falling down on their jobs. Many are struggling daily with genuine concern and commitment to educate Maine's children. But many are not. It is clear to this Commission that drastic changes in attitudes and programs must occur if schools are to serve all children, including troublesome ones, effectively.

of children and of good educational sense. The use of expulsion, suspension and other disciplinary exclusions should be curtailed except where serious danger of harm to person or property exists. Fair hearings in these latter emergency cases should be held prior to or within 24 hours of the exclusion. Exclusion should last only as long as the danger persists. In-school alternatives should be devised to keep children with discipline problems in school. Alternative educational approaches should also be more fully explored and implemented to avoid many of the behavior problems that now result in exclusion.[65]

2. State educational officials should provide (1) model discipline codes and (2) technical assistance to aid local districts revising discipline policies. To ensure enforcement, states should adopt

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65 See Appendix VIII. It may also be advisable to use Pupil Evaluation Teams to assess a disruptive or truanting student's needs. Special programs for such students could be developed on the same basis as other Special Education programs, utilizing the 90%-100% state cost sharing support.

regular local district reporting requirements whose results are used in furtherance of an established state goal for school attendance by all children.[66]

3. School officials should undertake specific and continuing outreach efforts to involve parents in important school decisions affecting their children. These include disciplinary and other

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66 National Commission on the Reform of Secondary Education, The Reform of Secondary Education (1973). This Task Force adopted the following criteria for school rules:

- The rules must be known to students. If the act for which the student is to be punished is obviously destructive or disruptive, no rule is necessary.
- The rules must have a proper educational purpose connected to learning itself. (When schools enforce rules relating to societal norms of hair styles, lengths of skirts or other clothing standards, problems arise.)
- The rules must be reasonably clear in meaning.
- The rules must be narrow to avoid trespassing on some protected right. (If a rule states that literature shall be distributed only before school, at noon, and after school, the rule is constitutionally sound. If the rule forbids distribution of literature produced off campus, it is unconstitutional.

exclusions and special education testing and placement.[67]

The final implication of our recommendations is that Maine's ages for compulsory education should remain unchanged - i.e., five to seventeen years. We recognize that definitions of when individual children have matured are difficult to establish. Currently, as a national matter, sixteen is viewed as the first acceptable age to leave school.[68]

Obviously, the state can establish, within reason, any maximum age for compulsory education.[69]

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67 A common argument used to discourage educational innovation these days is that "there is no money". It's true that some of the problems of children who are not in school will require more money before they are solved. But many will not.

A change in attitudes may be the most crucial factor to the many children who are pushed out because of school hostility, condescension, and indifference. It does not cost much money to design and implement fair discipline policies and procedures, to establish periodic teacher-parent-child conferences or to inform parents of special education placement procedures.

Many changes that are required are matters of data collection. Knowing the extent of the problem will help officials design good outreach programs. That is the first step. Others involve enforcement of existing policies, taking the time to ask the right questions, to insist that reporting requirements be met, to relate what is reported to policy implementation. These steps would go a long way to identify some of the problems that cause children to be excluded from school.

68 Skolnick, A., "The Limits of Childhood: Concepts of Child Development and Social Context" 39 LAW AND CONT. PROBLEMS 38, 74 (1975).

69 Stanton v. Stanton, 421 U.S. 7 (1975).

Some argue that the age should be drastically lowered.[70] Others favor allowing a child more alternatives for combining education with work.[71] Still others believe that children have a fair opportunity to become productive adults only if schooling is required for a large portion of adolescence.[72]

Since persons between the ages of 14 and 24 may be characterized by great diversities in their physical and psychological development and academic achievement,[73] the age for compulsory

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70 National Commission on the Reform of Secondary Education, supra. note 66.

71 President's Science Advisory Committee, supra. note 38.

72 For example, Gallup polls indicate that 61% of a surveyed sample of people want schooling required even beyond the age of seventeen and only 28% thought that age sixteen would suffice. The Gallup Polls of Attitudes Toward Education, 1969-1973 (S. Elam, ed, 1973).

73 President's Science Advisory Committee, supra. note 38.

school attendance should not be lowered.[74] We believe that lowering the age for compulsory school attendance will only mask a critical problem in Maine's educational system - that most of Maine's youths who are not attending school are between fourteen and seventeen years of age. While recognizing that any upper limit on compulsory education is necessarily arbitrary, we believe that Maine should err on the side of more public education rather than less.

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74 In 1974 the highest percentage of children not enrolled in school in Maine were older than 14.

U. S. Census Data
Children Not Enrolled by State (Maine)

Ages	School-Age Population	Enrolled	Not Enrolled	Institutional Population Not Enrolled	Not Enrolled (Adjusted)	Percent Not Enrolled
6*	20,458	18,733	1,725	22	1,703	8.3
7-15	183,485	176,357	7,128	215	6,913	3.8
16&17	38,977	35,108	3,869	162	3,707	9.5
TOTAL*	222,462	211,465	10,997	377	10,620	4.8

*Data on 6-year-olds is shown but not counted in state total.

Sources: Children's Defense Funds, Children Out of School in America (Cambridge, 1974) and U.S. Bureau of the Census, Census Population: 1970, Detailed Characteristics, Final Report PC(1)-D Series, Tables 146 and 154.

B. Non-Criminal Behavior

RECOMMENDATION #1: The Commission recommends that such terms as "behavior which might indicate a tendency to lead an idle, dissolute, lewd or immoral life" or any other similarly vague terms should not be used to define non-criminal juvenile misbehavior and statutes employing such language should be repealed.

Vote By Which Resolved: Unanimous

Current Statutory Provisions: Maine's statutes currently include such language. (15 M.R.S.A. Section 2552-Supp. 1975). By statute Maine's district courts have jurisdiction over the following acts committed by children:[75]

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[75] 15 M.R.S.A. Section 2552 (Supp. 1975).

- habitual truancy;[76]
- behaving in an incorrigible[77] or indecent and lascivious manner;[78]
- knowingly and willfully associating with vicious, criminal or grossly immoral people;[79]

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76 Note that since the problem of truancy was discussed in the materials on PREVENTION therefore truancy will not be discussed here.

77 Other states that still have an incorrigibility provision in their juvenile statutes include: Alabama, Florida, Georgia, Indiana, Mississippi, New Jersey, Ohio, South Carolina, Washington, West Virginia and Wyoming.

78 Other states with similar statutory language include Alabama, Michigan, Nevada, New Jersey and Washington. Many states have a "wayward" child category in their statutes - for example: Alaska, Delaware, Iowa, Kentucky, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, Ohio and Wyoming.

79 Some states have an "unruly" child category, for example: Georgia, North Dakota, Ohio, and Tennessee. Others use language such as "ungovernable," for example: Alaska, Delaware, Indiana, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

- repeatedly deserting one's home without just cause;[80]
- living in circumstances of manifest danger of falling into habits of vice or immorality.[81]

Current Regulatory Provisions: None

RECOMMENDATION #2: The Commission recommends that the "beyond-control-of-parents" child, where the child performs any criminal act, should be treated as a delinquent child, and where the child has not committed a criminal offense, he, and his family, will be offered and encouraged to accept voluntary social services which the state shall make available to them.

Vote By Which Resolved: 8-1

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80 Almost all states have some provision about "runaway" children in their statutes. Maine has signed the Uniform Interstate Compact on Juveniles which provides for the return of runaway children to their own state. 34 M.R.S.A. Section 181 (1957 as amended through 1972).

81 Many states have statutory language prohibiting children from leading "idle, dissolute lives," for example, Alabama, Michigan, Nevada, New Jersey and Washington. Also note that in 1973, a Maine court upheld the adjudication of a juvenile for living in circumstances of manifest danger of falling into habits of vice or immorality against a claim that it violated the Due Process Clause of the U.S. Constitution because it was vague and overbroad. The court stated that the language merely requires a person to conform to an "imprecise but comprehensive normative standard" of conduct. S*** v. State, 229 A.2d 560, 568 (Me. 1973).

Current Statutory Provisions: Maine provides that such children may be found to be offenders. (15 M.R.S.A. Section 2552-Supp. 1975)

Current Regulatory Provisions: None

Discussion:

The juvenile court's jurisdiction over children's non-criminal misbehavior has long been seen as a keystone of its "child-saving mission." It is both widespread and widely invoked: Every state has some ground of jurisdiction extending the juvenile court's power to cases involving anti-social but non-criminal behavior.[82] Sound data are not available, but it is estimated that beyond-parental control and truancy cases may comprise half the cases heard in U.S. juvenile courts. In one county which undertook a thorough study, it was found that such cases accounted for forty percent of all minors detained and seventy-two percent of court-ordered out-of-home placements and commitments.[83]

For better than a decade, there has been increasing criticism of jurisdiction over non-criminal behavior of

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82 See Appendix IX.

83 County of Sacramento, CA, Provation Dept., The Sacramento 601 Diversion Project: A Preliminary Report (1971).

children.[84] Recent years have seen sharply mounting challenges, both in legislatures and in the courts.[85]

The following appear to be the chief arguments propounded for abolition of jurisdiction over non-criminal behavior of children.[86]

> 1. The unruly child jurisdiction fails to provide effective rehabilitation; it simply doesn't work. No evidence supports its central theses that the behavior encompassed in its ambit are evidence of probable future law violation or that official intervention will prevent future crimes. In fact, such evidence as there is indicates that quite the reverse may be the case. Rates of recidivation are in some places appallingly high, in one

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84 For an early attack on the vagueness and overbreadth of the empowering statutes, see Rubin, S., "Legal Definition of Offenses by Children and Youths", (1960) Illinois Law Forum, 512, 1960.

85 See: Report of the Cal. Assembly Interim Committee on Criminal Procedure: Juvenile Justice Processes, 1971, recommending abolition of the juvenile court's beyond-control child statute.

86 The following material is not organized in a hierarchical sequence.

California county, a study undertaken before a "diversion" project was commenced revealed that half of the "beyond-control" offenders were charged with a subsequent offense within 7 months from the date of first court contact.[87] But note that there seems to be some regional variation: In two studies undertaken in the summer of 1973, in New York City and nearby Rockland county, investigators found children referred to the court as PINS reoffended in only 36.36 percent and 25 percent of the cases respectively.[88]

2. The handling of non-criminal behavior requires a diversion of effort, time and resources of the juvenile justice system that is vastly disproportionate to any good achieved. If the unruly child jurisdiction were abolished, resources and personnel -- including lawyers for children -- could better attend and serve

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87 Sacramento Co. Probation Dept., Preventing Delinquency Through Diversion: The Sacramento County Probation Department 601 Diversion Project - A First Year Report, 1972

88 Andres, R.H., and Cohn, A.H., Unruly Children: The Juvenile Non-Criminal Offender, 117, 167 unpub. manuscript prepared for the IJA/ABA Juvenile Justice Standards Project, October 1973.

those cases involving conduct which more seriously endangers the community. Non-criminal cases appear to involve institutionalization with alarming frequency. For example, in one jurisdiction about which data is available, such cases accounted for more than 32 percent of the cases referred, more than 40 percent of the detention petitions filed, and more than 72 percent of all out-of-home placements (not counting neglected child placements).[89]

3. Cases involving "unruly" children who have violated no penal law present issues for resolution which are peculiarly ill-fitted for, and unbenefited by, legal analyses and judicial fact-finding. The judicial system can decide quite well whether a person did a given act or not; it cannot properly decide what a person is. And that is what we demand that it do in cases of "incorrigible" children. The law is simply inept as a corrective of the kinds of family dysfunction these cases most frequently involve. Legal compulsion cannot restore (or provide) parent-child understanding and tolerance nor can it build up mechanisms for conflict resolution within any given family.

89 Sacramento Co. Probation Dept., The Sacramento 601 Diversion Project: A Preliminary Report 10, 1971.

4. The non-criminal jurisdiction of juvenile courts affronts what has been termed the "Fairness Principle": Adult runaways and dropouts often do not face court-imposed sanctions. Though there is considered contrariety of thought on the matter, it has been suggested that maintenance of the "incorrigible" child jurisdiction offends constitutional guarantees of due process and equal protection.[90] In short, the non-criminal jurisdiction of juvenile courts seeks to demand of children a greater and more exact adherence to desired norms than we are willing to impose on adults.

5. Many, if not virtually all, statutes conferring on the juvenile court jurisdiction over the unruly child are arguably void for vagueness; language extending such jurisdiction to a minor who is "leading or is in danger of leading an idle, dissolute, lewd or immoral life" falls far short of such specificity as would allow the actor to determine what conduct fell within the prohibitions of the statute, so that he or she

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90 See Sidman, "The Massachusetts Stubborn Child Law: Law and Order in the Home" 6 FAM. L. Q. 33, 49-56, 1972.

could gauge behavior accordingly. Given the typical overbreadth of these statutes, every child in the country could be made out to be the proper subject of juvenile court jurisdiction, if there were a sufficiently detailed chronical of their behavior.

6. The unruly child and person-in-need-of-supervision statutes essentially impose sanctions upon a status, not upon a specific act.[91]

7. The exercise of the juvenile court's non-criminal jurisdiction works a stigmatization on the minor involved which affects both his or her conception of self and the conception of the minor held by others. To make non-criminal behavior a separate jurisdictional basis for intervention from that of delinquency - i.e., law violation - in no way abates the stigma, any more than saying that delinquency proceedings are not criminal removes their taint.[92]

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[91] See Robinson v. California, 370 U.S. 660 (1962), overturning a California statute making the status of narcotic addiction a criminal offense. The decision rested on the constitutional prohibition against cruel and unusual punishment, which the court found was violated when a person was jailed for a status that amounted to a medical problem.

[92] There is presently some thought that "labeling theories" and processes of stigmatization may have a lot less impact and effective consequence on juvenile behavior than the proponents of labeling theory have suggested. See, e.g., Mahoney, A.R., "Youths in the Juvenile Justice System: Some Questions About the Empirical Support for Labeling Theory," unpub. paper prepared for J.J.S.P., 1973. See infra. at note 30 and accompanying text.

8. Allowing formal intervention in non-criminal cases isolates the child from the family, undermines familial autonomy and authority and cuts against the development of mechanisms within the family to establish controls and resolve disputes. It thus impedes the child's maturation into an adult who possesses effective ways of handling and adjusting to problems of inter-personal relationships. Moreover, it encourages parents to abdicate their functions and roles to the court: Court appearance with an incorrigible child bespeaks parental failure, and having been thus marked as failures, the parents may be all too willing to give over their child to a system that is all too willing to take him or her. It seems probable that many families are deflected from trying to work matters out in their own (and likely more effective) way simply because the court is there.

9. Similarly, the existence of non-criminal jurisdiction weakens the responsibility of community agencies and dulls their ability to respond to problems that are essentially theirs.

10. The non-criminal jurisdiction serves to further racial and economic discrimination, though the degree will vary greatly with locale and size of jurisdiction.[93]

11. There are no good data on the point, but the non-criminal jurisdiction is thought to afford an unfortunate and convenient haven for the lodging of cases which properly belong under the rubrics of neglect or delinquency. In the case of an older child, the probation officer may be reticent to file and the court equally reticent to sustain a neglect petition, since that would mean (in many if not most jurisdictions) housing the child in a non-secure shelter facility geared to the handling of much younger children. This may be particularly true of runaways; the system seeks to creak along on the assumption (usually unvoiced) that a youth who has once run away from home is always a flight-risk. In delinquency cases, such matters as drug possession and prostitution are frequently brought as beyond-control cases. It is often said that this is done to shield the child from the stigma of delinquent adjudication.

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93 Thornberry, "Race, Socio-Economic Status and Sentencing in the Juvenile Justice System", 64 CRIM. L. 90 (1970); Cohn, "Criteria for the Probation Officer's Recommendations to the Juvenile Court Judge", 9 CRIME & DEL. 262 (1963).

> The observation of British juvenile courts made better than a decade ago seems to apply to our system with at least equal force: The juvenile court often appears to be trying a case on one particular ground and then to be dealing with the child on some quite different ground.[94]

> 12. Finally, the non-criminal jurisdiction is posited on the assumption that beyond-control behavior is predictive of future criminality, and that coercive intervention in such cases is preventive of future law violations. There is no evidence that the assumption is correct, and indeed much more indication that it isn't.[95]

The Commission recognizes that non-criminal behavior may indicate that a child and his family need assistance. But we believe that services designed to respond to such behavior should be voluntary and completely removed from judicial intervention.

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94 H. M. Home Office, Report of the Committee on Children and Young Persons, Ingleby Committee, and Comd. 1191 at 26, 1960.

95 Glen, J., "Juvenile Court Reform" Procedural Process and Substantive Statute", 1970 WIS. L. REV. 431, 444; and Rosenheim, M.K., Notes on "Helping Juvenile Nuisances 2, unpub. ms., 1973. (Available from the University of Chicago, School of Social Work.); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Delinquency and Youth Crime (1969); Report of the California Assembly Interim Committee on Criminal Procedure, Juvenile Justice Processes (1971).

We suggest that such a comprehensive system of child welfare services should include:

Diagnostic services and case finding --

- outreach services for children and their families in their homes and communities; and
- comprehensive evaluation.

Services to support and reinforce parental care --

- social work or other professional support services for children in their own homes;
- child protective services for neglected, abused and exploited children; and
- services to unmarried parents.

Services to supplement parental care or compensate for its inadequacies --

- homemaker service for children; and
- day care service, both group and family day care, including services for children with special needs (such as emotionally disturbed and physically handicapped children).

Services to substitute in part or in whole for parental care --

- foster family care service, including foster homes capable of handling emotionally disturbed juveniles;
- group home care service;
- institutional care service;
- residential treatment service;
- adoption service; and

- professional consultants to foster home and services staff.

Preventive services --

- social action to improve and ensure conditions and services that will promote wholesome child development, strengthen family life and preserve the child's own home; and to reduce the incidence of circumstances that deprive children of the requirements for their optimal development; and
- early case finding and intervention to protect children at risk and to avert unnecessary separation from their parents.

Regulation of agencies and facilities --

- standard setting, licensing, certification, approval of agencies and facilities providing care and services for children (outside and in their own homes).

Community planning of services for children and parents --

- developing the full range of child welfare services and coordinating these services with one another and with the other social services and community resources serving children and families (income maintenance, family services, health services, mental health services, education, housing, legal and court services, vocational counselling and training, recreation).[96]

Follow-up --

- continuing case management services including periodic reevaluation and placement reassessment.

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96 Child Welfare League of America, A National Program for Comprehensive Child Welfare Services (New York, 1971).

RECOMMENDATION #3	The Commission recommends that runaway children, for that behavior alone, should not be detained or incarcerated in any correctional facility.
Vote By Which Resolved:	Unanimous
Current Statutory Provisions:	"Repeatedly deserting one's home without just cause" is an offense. (15 M.R.S.A. Section 2552-Supp. 1975) Maine has signed the Interstate Compact on Juveniles which provides for the return of runaway children to their own state. (34 M.R.S.A. Section 181 - 1957 as amended through 1972). A child may also come under the district court's jurisdiction if he repeatedly deserts his home without just cause.[97]

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97 15 M.R.S.A. Section 2552 (Supp. 1975).

Again, there have been no cases interpreting this section.

This section presents two problems of interpretation. First, it requires the child to "repeatedly" run away from home. Thus, the child who only runs away once technically does not fall within this provision although the state's interest in protecting him may be as strong as its interest in the repeater.

The statute also requires that the child act "without just cause." However, this language is not defined. Obviously, a child might desert his home for one of numerous reasons.[98] Thus,

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98 For example, a child may run away because he is sexually abused, or lacks adequate nutrition. See Brunswick v. LaPrise, 262 A.2d 366 (Me. 1970) in which the court held that the parent was liable for the support of the child even if the child left home involuntarily. The court in that case did not decide whether a pregnant daughter who refused to abide by her father's requirement that she relinquish the child had left voluntarily or involuntarily.

	the circumstances which may bring a child under a juvenile court's jurisdiction are unclear.
Current Regulatory Provisions:	None
RECOMMENDATION #4	The Commission recommends that the jurisdictional basis for judicial intervention in cases of runaway children and youth should be altered so as to treat them essentially as neglect cases.
Vote By Which Resolved:	10-1
Current Statutory Provisions:	See Appendix X
Current Regulatory Provisions:	Approved Policy Statement #52, Bureau of Social Welfare, Department of Human Services (November 1, 1973),[99] which defines "child protective services" as "a set of specialized social services, based on law and supported by

[99] Reproduced as Appendix B in Maine Human Services Council, "Report and Recommendations on Child Abuse and Neglect" June, 1976.

> community standards which carry a delegated responsibility to intervene in behalf of any child considered, or found to be, neglected, abused, exploited, or delinquent. It is a service to children directed mainly to parents for the benefit of children. It is a service available to any child in the State of Maine, dependent on community referrals, including self-referrals and may necessarily be offered on a non-voluntary basis to a child's family."[100]
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> See also Appendix XI.

Discussion:

These recommendations reflect two assumptions--

- Even the act of running away - which is probably the most common act of non-criminal misbehavior - will not provide a ground for juvenile court jurisdiction, because the act

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100 Id.

of running away is likely reflective of developing independence on the part of the youth on the one hand and family conflict on the other. Neither of these actors is aided by formal induction into the juvenile justice system and adjudication as an unruly child.[101]

- There will remain a need for police and other enforcement agencies to take into temporary custody some youths who are runaways.[102]

The Commission believes that there is a substantial difference between allowing law enforcement officers to take temporary custody of a runaway child and the present practice of institutional detention and possible court adjudication.[103]

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101 Gough, A., "Non-Criminal Behavior" unpublished paper prepared for the IJA/ABA Juvenile Justice Standards Project, 1973. Available from the School of Law, University of Santa Clara.

102 See infra. at page 9 for the Commission's recommendation about such custody.

103 Andrews and Cohn, "Ungovernability, Runaways and Truancy: An Analysis of Juvenile Court Jurisdiction" at page 30, unpublished paper prepared for IJA/ABA Juvenile Justice Standards Project, tentative draft, dated November, 1973

At least one well known study concluded that runaways are no more prone to become law violators than are children who do not run away.[104]

The principle of these recommendations is that a minor's absence from home without the consent of his parent, guardian or custodian shall not constitute a ground for asserting juvenile court jurisdiction over that minor. We intend that such recommendation apply whether or not the minor is found in a state other than the state of residence of his parents, guardian or custodian. In short, we recommend that Maine withdraw from participation in the Interstate Impact as it pertains in the return of runaways who have committed no criminal offense. Experience with the Interstate Compact has shown that its processes are lengthy and expensive,[105] necessarily involving the assumption of juvenile court jurisdiction in each case, followed by commitment to the Compact Administrator of the sending state who arranges with his counterpart in the receiving state for the minor's return. In the interim, the minor is most often housed with delinquent

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104 Shellow, et al, Suburban Runaways of the 1960's, Monographs of the Society for the Research in Child Development, No. 3, 1967.

105 Gough, supra. at note 101.

youth. Since the state youth authority or youth commission is usually the Interstate Compact Administrator, use of the Compact may mean that the runaway minor will be housed with delinquent youth committed to state custody.

Notice that these recommendations are inapplicable if the minor is the subject of a petition alleging violation of the criminal law, even though the minor is absent from home without parental consent.

We make these recommendations in part because available research indicates that no generalizations can be articulated about whether children are helped by any one particular complex of services.[106] For example, the literature indicates that the provision of services to children appears to have little effect on the rate of recidivism. Thus, in the "Cambridge-Somerville" project, one of the best known and most comprehensive experiements in controlling deviant behavior, the subjects were assigned an adult counselor who sought to provide the juvenile with friendship, understanding and a good example. This study found there was no significant difference between the delin-

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106 National Assessment of Juvenile Corrections, "Juvenile Corrections in the States: A Preliminary Report," November, 1975 (unpublished paper available from the University of Michigan).

quent behavior of juveniles who received this "treatment" and a control group who did not.[107]

The results of the study were supported in part by another experiment conducted thirteen years later. An educational experiment in Columbus, Ohio, shows that there was no significant difference in self-perception between juveniles placed in an experimental school program designed to increase their self-concept and juveniles placed in a control group who received no special attention.[108]

In light of the absence of any evidence that judicial intervention in the lives of runaway children aides those children, or diverts them from future criminal activity, we are unwilling to sanction continued judicial intervention into their lives. We simply do not see a state interest compelling enough to support such intervention.

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107 McCord, W., and McCord, J., Origins of Crime: A New Evaluation of the Cambridge-Somerville Youth Study (Montclair, N.J., 1959); Powers, E. and Witmer, H., An Experiement in The Prevention of Delinquency, (New York, 1951).

108 Reckless, W. and Dinitz, S., The Prevention of Juvenile Delinquency (Columbis, Ohio, 1972).

Where, however, a minor desires to return home and his parents, guardian, or custodian unreasonably refuses to allow the minor to return to the family home, child neglect proceedings may be initiated in the juvenile court by the Department of Human Services. Where a minor is of the age of sixteen years or over and wishes to continue in placement against the wishes of his or her parent, guardian or custodian, the minor may file with the juvenile court a Petition for Emancipation. Briefly, the system we recommend would function as follows:

- If the minor and the parents, guardian or custodian agree to the minor's return home, the minor shall be transported as soon as practicable to the county of residence of the parent, guardian or custodian at the latter's expense, unless indigent.
- If the minor refuses to return home and is under the age of sixteen years, and if no other living arrangements agreeable to the minor and to the parent, guardian or custodian can be made, the minor shall be offered shelter in a licensed temporary residential care facility in the county of residence of the parent, guardian or custodian.

- If the parent, guardian or custodian refuses to allow the minor to return home, and no other living arrangements agreeable to the minor and the parent, guardian or custodian can be made, legal counsel shall be appointed for the minor and a neglect petition shall be filed in a court. The court shall schedule a hearing date and notify the minor's parent, guardian or custodian of the date of the hearing, the allegations of the petition, the legal consequences of an adjudication of neglect, and their rights to be represented by legal counsel and to present evidence at the hearing.
- If the minor is sixteen years of age or older, and either the minor refuses to return home or the parents refuse to permit the minor to remain away from home, legal counsel shall be appointed for the minor and the minor may file with the court a Petition for Emancipation. The court shall schedule a hearing date and shall notify the parent, guardian or custodian of the date of the hearing, the legal consequences of an order of emancipation, and their rights to be represented by legal counsel and to present evidence at the hearing. The court shall grant an order of emancipation if it finds either

(i) that the refusal of the parent, guardian or custodian to permit the minor to remain away from home is unreasonable, or

(ii) that the minor is sufficiently mature to assume responsibility for his or her own care.

It shall be the responsibility of the juvenile and his counsel to identify available community resources to help in the juvenile's emancipated life to any extent necessary, to develop a plan for the provision of such services, and to demonstrate that these social service agencies have agreed to provide such support. Before the court grants a Petition for Emancipation, it shall review and approve this services plan.

If the court denies the Petition for Emancipation, it shall offer the minor shelter in a licensed temporary residential care facility in the county of the parent, guardian or custodian. The cost of such return shall be borne by the transferring jurisdiction.

RECOMMENDATION #5

The Commission recommends that Maine's statutes be amended to include the following custody standard and procedure:[109]

A child may be taken into custody--

a. pursuant to an order of a court; or

b. by a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child has deserted his parent, guardian or custodian without just cause.

A child taken into custody shall be referred forthwith to the Department of Human Services for appropriate disposition.

Vote By Which Resolved: 8-1

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109 Recall that this standard applies to runaway children only. For a discussion of the Commission's recommendation with regard to the arrest of juveniles accused or suspected of delinquent behavior see Criminal Behavior, Recommendation #3.

Current Statutory Provisions: A child may be arrested either because his conduct attracts the attention of police officers or because he fails to obey a citation. (15 M.R.S.A. Section 2604-1964)

Current Regulatory Provisions: None

Discussion:

The purpose of this recommendation is to fix responsibility for the care of runaway children where we believe it belongs-- with the Department of Human Services,[110] not the judiciary--and to distinguish between taking a runaway into protective custody

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110 We note with concern the allegation that the Department of Human Services "through policy and practice, tends to narrowly interpret its role as the state's designated agency responsible for safeguarding the health and welfare of all children at risk. Rather than broadly extending its protective mantle to cover all children in jeopardy, it has instead allowed the evolvement of restrictive eligibility criteria to govern the availability of its resources. Often, these services are limited exclusively to children already in its custody." United Way Substitute Care Task Force, "Children and Families at Risk in Cumberland County" September, 1976.

This well-documented analysis of foster care services for children in Cumberland County was of enormous help to the Commission's staff in the preparation of this Preliminary Report. We wholeheartedly support its recommendation #3 - "The Department of Human Services Must Improve And Expand Its Capability To More Effectively Serve Children At Risk."

and arresting a juvenile suspected of delinquent activity. Implicit in this recommendation is the belief that a runaway child should be given maximum opportunity to return home or to other living arrangements voluntarily. We recognize that the place for most children is with their families. And therefore, if the parents and child agree to the child's return home, the child should be allowed to return home immediately. If an agreement to return the child to his home cannot be reached immediately, the child should be taken to a temporary shelter program designated by the Department of Human Services, regardless of the time of day.

We also recognize, however, that a frequent fault in social services is the failure to sustain casework and other services to reintegrate a family once an out-of-home placement has been made. It is the intent of our recommendations that in most cases, substitute residential care should be used only as an interim measure while services are provided to abate the problem and enable a minor to return to his family. The spectrum of services provided should include both crisis intervention and continuing service components.

Crisis intervention services should consist of an interview or series of interviews with the minor or his or her family, as needed, conducted within a brief period of time by qualified professional persons,

and designed to alleviate personal or family situations which present a serious and imminent threat to the health or stability of the minor or the family. Crisis intervention services should include the arrangement of temporary residential care, if required, which shall not be in a secure detention facility or in an institution used for the detention or treatment of minors charged with or adjudged guilty of violation of the criminal law. Insofar as practicable, temporary residential care should be provided in a family or small group setting through the use of relative's homes, foster homes, runaway shelters, group homes and similar services.

Other crisis intervention services appropriate to the needs of the minor and the family include: the provision of or referral to services for suicide prevention, psychiatric or other medical care, psychological, welfare, legal, educational or other social services.

Continuing services include, as appropriate to the needs of the minor and the family: psychiatric or other medical care, psychological, welfare, legal, educational or other social services, and the arrangement of substitute residential placement.

We recommend that the sources of assistive services be convenient, decentralized and flexibly managed, so that function does not become submerged in form. The services offered and the staffs that provide them should be aligned with the needs of the people served. A center serving an area with a significant proportion of non-English speaking families, for example, can hardly be responsive if its staff speaks only English and must rely on outside interpreters.

In appropriate cases, such service centers should make maximum use of hot-line and other serivces offered elsewhere, including national or regional hot-lines for the reuniting of runaway minors with their families.[111]

Services should be well-publicized and stickers with telephone numbers and locations should be affixed to each public telephone.

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[111] Two national toll-free runaway hot-lines are presently in operation. They are intended to act as clearing centers which runaway youth anywhere in the country can use to get in touch with their families through the use of a neutral intermediary. One number is 1-800-231-6946 and the other number is 1-800-621-4000, which is the National Runaway Switchboard funded by HEW.

C. Criminal Behavior[112]

RECOMMENDATION #1: The Commission agrees that non-residential community-based programs are the most desirable means for addressing juveniles' problems related to drug or alcohol abuse or prostitution. And, therefore, the Commission recommends that Maine's statutes be amended to require that a juvenile who has been adjudicated a delinquent because of drug or alcohol abuse or prostitution may not be committed to the Maine Youth Center or any other residential program until he has been placed in at least one non-residential program appropriate to his

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112 Note that serious and/or violent crimes by juveniles are dealt with under the section on "Juvenile Courts" which follows this section.

needs and has not been rehabilitated by that program; and that such residential commitment may be made only if there is evidence that such placement will provide the juvenile with appropriate programming.

The Commission further recommends that courts be provided with sufficient intake assistance to adequately carry out this requirement.

Vote By Which Resolved: Unanimous

Current Statutory Provisions: Alcohol or drug abuse or prostitution are juvenile offenses. The juvenile court's dispositional alternatives for offenders includes release, probation, "bind-over" for indictment by a grand jury, commitment to Maine Youth Center, commitment to the custody of the Department of Human Services, and dismissed of the action. (15 M.R.S.A Section 2611)

Current Regulatory Provisions: See Appendix XII

Discussion:

Many commentators[113] recommend that juvenile misconduct that is not intended to cause, and does not cause or risk, injury to the person or property of another should not be criminally punished.

Accordingly, they suggest that juvenile criminal liability should not be based upon:

1. acquisition, possession, use, gratuitous transfer of or being under the influence of narcotics, marijuana, alcohol or other drugs;
2. acquisition, possession or gratuitous transfer of obscene or pornographic materials;
3. engaging in consensual sexual behavior, including prostitution;
4. gambling.

The aim of such recommendations is to "decriminalize" in juvenile proceedings behavior that harms or threatens harm, if at all, only to the interests of the person engaging in such behavior. While the juvenile court may rationally provide aid or treatment for young persons who engage in self-damaging behavior, criminal punishment does not promote, and may retard or defeat, such rehabilitative measures.

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113 For example, Kadish, "The Crisis of Overcriminalization" 34 ANNALS 157 (1967), Packer, H., The Limits of Criminal Sanction (1968).

The decriminalization of so-called "victimless" crimes has been increasingly urged by legal scholars and others on a variety of grounds which are to some extent also applicable to juvenile criminal liability.[114]

Because such behavior rarely if ever generates a complaint to initiate the enforcement process, the auto-offenses outlined above share the feature of being widely underenforced. Efforts to suppress such behavior must, therefore, be directed to the public and reasonably provable private manifestations of this private, often secret, behavior. While pervasive underenforcement may not alone provide a sufficient ground for decriminalization, many commentators have urged that the negative attitudes toward law and the legal system engendered by necessarily random or discriminatory enforcement patterns, and the subversion of law enforcement efforts occasioned thereby, warrant the elimination of at least some systematically underenforced offenses.

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114 See, generally, Kadish, supra; Morris and Hawkins, The Honest Politician's Guide to Crime Control (1970); Kolnick, S., "Coercion to Virtue: The Enforcement of Morals," 41 S. CAL. L. REV. 588 (1968); cf. Junker, "Criminalization and Criminogenesis" 19 U.C.L.A. L. REV. 697 (1972).

Although it is unlikely that the other consequences of underenforcement commonly urged as reasons for decriminalization--extortion and official corruption--apply with the same force to the juvenile justice system, there is potential for such abuses in that system as well.

A final and related ground for removing juvenile criminal liability from the described behavior derives from the operation of what Professor Herbert Packer has termed the "crime tariff."[115] Because the official prohibition of commercial transfers of certain goods and services, narcotics or prostitution, for example, does not automatically extinguish the demand for such goods and services, attempts at suppression of such transfers will cause not a decrease in the prohibited behavior but an increase in the cost of the goods and services. This increase in cost - the "crime tariff" - will tend to cause users of prohibited substances and services to engage in other criminal behavior (secondary deviance) in order to continue their use. Of course, not all consumers of forbidden goods will turn to crime to meet the inflated cost of contraband: offenders as well as officials perceive the difference between harming

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115 See supra. note 113.

oneself and harming another. Nor can decriminalization of consensual transfers of proscribed commodities only in juvenile proceedings be expected discernibly to reduce the crime tariff, since the risks to the seller, to compensate for which the tariff is imposed, will be undiminished.

In this context, therefore, economic analysis serves primarily to describe the law's relative inability to stem the flow of illicit goods and services and to suggest the potential for increased criminality that more rigorous enforcement efforts may entail.

Although the reasons asserted for general decriminalization may have only limited applicability to criminal proceedings in juvenile court, features unique to the juvenile justice system nonetheless warrant consideration of these recommendations:

1. As already noted, the recommendation does not preclude every juvenile court response to the behavior described; it merely bars the response of imposing juvenile criminal liability.
2. Random or discriminatory enforcement, inherent in underenforcement, ought per se to be avoided in a system that seeks, as does the juvenile court, to encourage

conformity to law by inculcating law-abiding attitudes in young persons. Surely systematically underenforced offenses do nothing to promote such attitudes and, because juveniles prosecuted for such offenses can plausibly interpret their plight as the consequences of bad luck or bad law, or both, the juvenile court's rehabilitative efforts and resources may be substantially nullified.

3. The attribution to individuals by society of labels such as "criminal" or "delinquent" is widely believed to create or confirm in the individual so labeled a self-concept and way of life consistent with his or her official label.[116] Because young persons commonly have not yet developed stable self-concepts, and because the initial application of a negative label is the most potent, juveniles are particularly vulnerable to the labeling phenomenon. This latent consequence of criminal processing cannot be avoided by substituting clean labels for tainted ones, as the history of juvenile delinquency clearly demonstrates.

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116 See generally, Schur, E., Radical Non-Intervention, 118-126 (1973).

It follows that the juvenile justice system should, whenever possible, avoid characterizing "private offenses" as criminal or delinquent.[117]

This Commission has decided that the abolition of juvenile court jurisdiction over "private offenses" of juveniles, while attractive is at present unworkable. This recommendation, therefore, envisions continuing jurisdiction over such behavior by minors. However, the question of what to do with juveniles after they have been adjudicated delinquent because of drug or alcohol abuse or prostitution remains.

The need for an answer to this question has been made apparent by recent disclosures about detention centers. Such centers have been the mainstay of America's juvenile correctional systems since the 1820's,[118] but in the last three decades they, and other places of confinement, have been subjected to closer scrutiny. Sociologists and psychologists have documented their social life,[119]

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117 Recall that the recommendations relate to conduct that neither harms nor risks harm to the legitimate interest of others.

118 See Rothman, David J., The Discovery of the Asylum, (Boston: Little, Brown, 1971) for a history of the development of prisons and other institutions of confinement in the United States.

119 See Clemmer, Donald, The Prison Community (New York: Holt, Rinehart & Winston, 1940); Goffman, Erving, Asylums (Garden City, N.Y.: Anchor Books, 1961); Sykes, Gresham, The Society of Captives (Princeton: Princeton University Press, 1958)

courts have inquired into institutional conditions,[120] and inmates have made their grievances heard.[121] Incarceration, it became apparent, is a far harsher measure than was once supposed. Not surprisingly, there has been much recent interest in drastically reducing the use of detention centers, and developing alternatives to incarceration. The aim seems clear, and it has been adopted by the Commissioners in their statement of this goal--to rehabilitate the offender. But researchers, who have monitored rehabilitative programs, both inside and outside detention centers, have been disappointed.[122]

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120 A number of federal district courts have found that confinement of juvenile delinquents in anti-rehabilitative environments, or failure to provide rehabilitation, constitutes a violation of due process. See, e.g. Morales v. Turman, 364 F. Supp. 166, 175 (E.D. Tex. 1973); Nelson v. Heyne, 355 F. Supp. 431, 458-59 (N.D. Ind., 1972) (supplemental opinion) (by implication); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1367 (D.R.I., 1972) (also based on equal protection rationale); cf. In re Elmore, 382 F.2d 125, 127 (D.C. Cir., 1967) (allegation that psychiatric treatment was not provided was a substantial complaint under D.C. statute); Creek v. Stone, 379 F.2d 106, 1-1 (D.C. Cir., 1967) (juveniles have a "legal right to a custody that is not inconsistent with the parens patriae premise of the law:); In re Gault, 387 U.S. 1, 22-23, n.30 (1967) (noting that juvenile detainees are not always properly treated).

121 Rothman, David J., "Decarcerating Prisoners and Patients" 1 CIVIL LIBERTIES REV. 8 (1973).

122 Ibid.

It has also become apparent that the ideal of treatment is not without its own dangers; it legitimizes more state intervention with fewer legal constraints.[123]

The conventional viewpoint about rehabilitating delinquents consists of three main assumptions:

1. The disposition should rehabilitate. The offender should receive the correctional treatment best suited to inculcate law-abiding habits in him. Rehabilitation should influence the choice of sentence as well as the manner in which the sentence is carried out.

2. Predictive restraint is a second theme. The disposition, supposedly, should be based on a forecast of the offender's likelihood of returning to crime. If he is considered a potential recidivist, he should be confined until he becomes safe.

3. Individualized decision-making is the third. The disposition is to be tailored to the offender's need for treatment and the risk

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123 Allen, Francis, The Borderland of Criminal Justice, (Chicago: University of Chicago Press, 1974); American Friends Service Committee, Struggle for Justice (New York: Hill and Wang, 1971).

he poses to the public. To allow decisions to be individualized, sentencing courts and correctional officials are to be given wide discretionary powers of disposition, with as few legal constraints as possible. During the first half of this century, these ideas had almost unchallenged ascendancy. While less fashionable notions (such as deterrence and retribution) did retain a measure of influence on the practical decisions of legislatures and judges, the dominant trio of assumptions was thought to represent the enlightened viewpoint. In the last two decades, skepticism about these notions has been growing, but the conventional assumptions retain considerable influence. In crime commission reports, judicial opinions, and editorials, the familiar themes are still reiterated: sentence for treatment, incarcerate the dangerous, individualize the disposition.[124]

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124 See, e.g. Model Sentencing Act; National Advisory Commission on Criminal Justice Standards and Goals, Corrections Washington, D. C. Government Printing Office, 1973 (hereinafter cited as Corrections).

A wide variety of rehabilitation programs have now been studied. A few successes have been reported, but the overall results are disappointing.[125] For example:

1. The character of the institution seems to have little or no influence on recidivism. It was hoped that children in smaller and less regimented institutions would return to delinquent behavior less often on releases, but that hope has not been borne out.[126]

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125 See Greenberg, David, "Much Ado About Little: The Correctional Effects of Corrections" Department of Sociology, New York University, June, 1974 (unpublished paper prepared for the Field Foundation, N.Y.City); and Lipton, Martinson and Weeks, Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (New York: Praegur, 1975).
Note: Available long-term follow-up studies generally pertain to adult criminal populations. Hence, much of this material is derived from those studies. Therefore, the even more complex developmental questions presented by juvenile offenders are not addressed here.
We do know that there is no conclusive evidence that juveniles are helped by any one particular complex of services. For an excellent summary of the deficiencies of existing evidence about juveniles, see Lundman, McFarline and Scarpitte, "Delinquency Prevention: A Description and Assessment of Projects Reported in the Professional Literature" CRIME AND DELINQUENCY 297 (1976).

126 Ibid.

2. Although probation has long been acclaimed for its rehabilitative usefulness, the recidivism rate among otherwise like offenders fails to show a clear difference whether they are placed on probation or confined. While those on probation perform no worse, the claim that they perform better has not been sustained.[127]

3. More intensive supervision on the streets, a recurring theme in rehabilitation literature, has not been shown to curb recidivism. Probationers or parolees assigned to small caseloads with intense supervision appear to return to crime about as often as those assigned to large caseloads with minimal supervision.[128]

4. Vocational training has been widely advocated, on the theory that people turn to crime because they lack the skills enabling them to earn a lawful living. The quality of many programs has been poor. But where well staffed and well equipped programs of vocational training for marketable

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127 Ibid.

128 Ibid.

skills have been tried in institutions, studies fail to show a lower rate of return to crime.[129]

5. Education and literacy training[130] and psychiatrically oriented counseling programs[131] have also not had any appreciable success.

6. Behavior control is another technique that has recently been tried. While there have been claims for its effectiveness in controlling disruptive behavior within a detention center,[132] its long-term rehabilitative usefulness has yet to be demonstrated.[133]

It would be an exaggeration to say that no treatment methods work, for some positive results.

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129 In California, where this technique has most extensively been used, a 1971 evaluation of vocational training concluded: "Profiling from the experience of history, the Department of Corrections does not claim that vocational training has any particular capability of reducing recidivism." See Dickover, Maynard and Painter, "A Study of Vocational Training in the California Department of Corrections" California Department of Corrections, Research Report No. 40, 1971, p. 10.

130 Supra. at note 125.

131 Supra. at note 125.

132 Note, "Condition and Other Technologies Used to Treat? Rehabilitate? Demolish? Prisoners and Mental Patients" 45 S.CAL. L.REV. 616 (1973); Note, "Aversion Therapy: Its Limited Potential for Use in the Correctional Setting" 26 STANFORD L.REV. 1327 (1974).

133 Schwitzgebel, "Development and Legal Regulation of Coercive Behavior Modification Techniques with Offenders" (Maryland: National Institute of Mental Health, 1971).

have been reported.[134] But it is uncertain to what extent even the successes would survive replication.

This analysis rests on two premises:

1. We assume that the liberty of each individual is to be protected so long as it is consistent with the liberty of others.

2. We also assume that the state is obligated to observe strict parsimony in intervening in adjudicated delinquents' lives.[135] Even after adjudication, the state should have the burden of justifying why any given intrusion -- and not a lesser one -- is called for.

Therefore, until the success of a particular type of state intrustion can be justified, the Commission recommends limiting intrusion. We do not find this a basis for ignoring responsibility to continue attempts to develop successful programs; and since no one specific approach can be seen as a complete solution, a comprehensive range of services must be developed and monitored.

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134 For example, the model probation department project conducted by the California Youth Authority in Sacramento County between 1968 and 1969. (Unpublished material available from the Sacramento County Division, California Youth Authority.) See also, Lloyd Ohlin's analysis of Jerry Miller's attempted reform of the Massachusetts Youth Correctional System. (Some materials as yet unpublished; some results reported in HARVARD EDUCATIONAL REVIEW, Vol. 44, No. 1, p. 74 and in TIME Magazine, August 30, 1976 edition, p. 63

135 Morris, Norval, The Future of Imprisonment (Chicago: University of Chicago Press, 1974) pp. 60-61.

RECOMMENDATION # 2:	The Commission recommends that it is most inappropriate and undesirable to detain juveniles in facilities which are also used to detain adult offenders. And, therefore, the Commission recommends: a. that the detention of juveniles in facilities which are also used to detain adults be strictly forbidden by law; and b. that the state establish a network of regional juvenile detention and education facilities which will insure that juveniles will never have to be detained in adult jails.
Vote By Which Resolved:	Unanimous
Current Statutory Provisions:	A juvenile may be detained in a "designated" jail if he is separated from criminal offenders. (15 M.R.S.A. Section 2608-Supp. 1975)

Current Regulatory Provisions: None

Discussion:[136]

We were unable, in an extensive literature search, to find a single study about the psychological effects on a child of being jailed. That's not surprising. "One of the problems with jails and their inmates is that they have gotten the reputation of being unimportant. That unimportance rubs off on everything associated with a jail. The people who are in jails, whether they are inmates or staff, are therefore very easy to neglect."[137]

> For these kids, being smart is not getting arrested. So they say 'I hate myself for having gotten into this. I hate myself for not having been smarter. I hate myself for being small. I hate myself for being weak.' That means I'm going to hate myself until I stop being small and weak. If you're ten years old, that's a long time.[138]

"Generally speaking, a jail is not a pleasant place to be. One feels a strain, obviously, and one feels that one has been delivered into the hands of strangers...."[139]

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136 This discussion is a commentary on the psychological effects on a child of being detained in an adult jail. We know that such detention occurs in Maine. (Meeting with the Maine Sheriff's Association, March 18, 1976)

137 Interview with Hans Mattick, Professor and Director, Center for Research in Criminal Justice, University of Illinois at Chicago Circle, 4/14/75 (hereinafter "Prof. Mattick").

138 Interview with Philip Zimbardo, Ph.D., Professor of Psychology, Stanford Univ., in San Francisco, Ca., 4/18/75 (hereinafter "Dr. Zimbardo").

139 Interview with Prof. Mattick, 4/14/75.

Probably the first, and one of the most critical, reactions of an adolescent to being jailed a sense of abandonment.[140] To some extent, many adolescents define themselves in terms of their situation--physically, with a certain environment and emotionally, with certain people.[141] Cutting children off from everything--all the people they know and all the physical, environmental and situational experiences they know--is devastating.[142] To do so suddenly, as when a child is arrested and jailed, without any psychological preparation for the transition from freedom to imprisonment and from the familiar to the unfamiliar intensifies the sense of abandonment.[143]

Why do jailed children feel so abandoned? First, there is the shock of arrest. The child is put in the position of being dangerous--of being a criminal--and his freedom is snatched from him by strangers. He may begin to feel guilty, even if he is innocent.[144]

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140 Interview with Dr. Zimbardo, 4/18/75; Prof. Mattick, 4/14/75; and George Tarjan, M.D., Department of Psychiatry, University of California at Los Angeles, 4/25/75 (hereinafter "Dr. Tarjan").

141 Interview with Dr. Zimbardo, 4/18/75.

142 Ibid.; interview with Dr. Tarjan, 4/25/75; and interview with Margaret Rosenheim, Ph.D., School of Social Work, University of Chicago, 4/15/75 (hereinafter "Dr. Rosenheim").

143 Interview with Dr. Zimbardo, 4/18/75.

144 Interview with Dr. Zimbardo, 4/22/75.

Then, at the sheriff's office, station house or jail, a child may be forced to empty his pockets.[145] All the things he has on him, which are probably familiar and therefore comforting, may be taken from him.[146] He may be asked to remove his clothes and take a shower.[147] His clothes may be fumigated.[148] If so, he will be issued an institutional outfit.[149] At this point, the images of normal existence, upon which an adolescent depends for his definition of self, have been collapsed.[150] The child has lost all sense of continuity or sameness.[151] He is alone in what must appear to him a bizarre environment.[152] When a child compares a jail to the environment with which he is familiar, the extraordinary differences may be

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145 Interview with Prof. Mattick, 4/14/75. Obviously, not all of these admission procedures will affect every jailed child. However, they are standard procedures recommended by the United States Bureau of Prisons. See Instructors Guide to the Jail: It's Operation and Management (Washington, D.C.: U.S. Government Printing Office #2700-00208). It is therefore likely that some, if not all, jailed children will experience some, if not all, of them.

146 Interview with Prof. Mattick, 4/14/75.

147 Ibid.

148 Ibid.

149 Ibid.

150 Interview with Dr. Zimbardo, 4/22/75. See also, Ruff, et al., "Factors Influencing Reactions to Reduced Sensory Input," pp. 72-90, at 87-88 in Solomon, et al. (Eds.) Sensory Deprivation (Cambridge, Mass.: Harvard Univ. Press, 1961 (hereinafter "Ruff").

151 Ibid.

152 Interview with Dr. Zimbardo, 4/22/75.

sufficient to distort his perception of reality.[153] Behavior he normally employes to defend himself in stressful or novel[154] situations, he finds less effective. His responses may become increasingly primitive and violent.[155] His behavior may be, in other words, the opposite of that which would reduce his anxiety.[156] The child is torn between a need to understand the situation and a desire to deny it--to ward it off.[157] He is confused.

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153 Redl and Wineman, Children Who Hate (New York: Free Press, 1951), pp. 117-121 (hereinafter "Redl and Wineman").

154 A "novel situation" means two things. The first is an experience that has not been encountered before (initial). The second is an event which differs from a customary pattern and style of life (strange). A jail is a novel environment for children. To jail a child is to remove him from his usual surroundings, to alter the pattern and quality of known stimuli, to deprive him of known reassurance and to place him in a situation where characteristic modes of adaptation will probably be ineffective. Even if a child has been previously jailed, therefore, each incarceration is novel.

155 Ruff, supra, note 150, at 85.

156 Redl and Wineman, supra, note 153, at 121.

157 Ibid.

Next, the child may be photographed and fingerprinted.[158] He will then be locked, either in a holding tank, or, if the jail is not overcrowded, into a separate cell.[159] Since his arrest two hours, five hours, or half-a-day ago, the child has been surrounded by potentially hostile strangers who have treated him as a dangerous and guilty prisoner.[160] It is likely that by the time he reaches a cell, the child himself is not sure that his behavior is predictable or controllable.[161]

Change from one environment to another is a stress-filled situation for any child. Change from a situation that the child basically considers better, being at home, to a worse situation, being in jail, is very stressful.[162] If there is any time when youngsters need increased support, it's when their environment is altered.[163] But jailed

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158 Interview with Prof. Mattick, 4/14/75.

159 Ibid.

160 Interview with Dr. Zimbardo, 4/22/75.

161 Ibid.

162 Interview with Dr. Tarjan, 4/25/75.

163 Ibid.

children rarely, if ever, receive any individual attention.[164] Often, they are left completely alone.[165] Even if they are not isolated, they are surrounded by unfamiliar people and are in an alien place. The natural result of this unfamiliarity is that the child often will not seek reassurance despite available help.[166] And even if a child could express his feelings about being jailed, it is unlikely that he would find someone able to calm his anxious or hostile behavior.[167] So the sense of abandonment experienced

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164 "Generally, people processed into jails are kind of abstractions. They are simply cases and dispositions--people who have to be processed." Interview with Prof. Mattick, 4/14/75.

165 Interview with Prof. Mattick, 4/14/75. Children are often placed alone in a separate cell to protect them from other inmates. It has been suggested that such isolation, particularly when imposed on severely troubled youngsters, may lead to suicide. Interview with Rosemary Sarri, Ph.D., Co-director, National Assessment of Juvenile Corrections Project, School of Social Work, University of Michigan at Ann Arbor, 4/16/75 (hereinafter "Dr. Sarri"). We don't have any national picture of the number of children per year who seriously injury themselves in jails. Interview with Dr. Rosenheim, 4/15/75.

166 Interview with Margarite Warren, Ph.D., School of Criminal Justice, State University at Albany, 3/20/75 (hereinafter "Dr Warren"); and interview with Dr. Sarri, 4/16/75.

167 ...the range of behavior when confronting someone is very limited and it may simply go from gruff words to a cuffing on the side of the head." Interview with Prof. Mattick, 4/14/75; and interview with Dr. Zimbardo, 4/22/75.

by jailed children is compounded by the fact that the child either has no one with whom he can talk or he is unable to talk at all. "Such abandonment is enormously stressful and some children become terrified."[168]

A child's terror on being jailed springs in large part from a fact of childhood. Children do not have the spectrum of experience that adults do.[169] They are therefore more likely to experience situations as first impressions. If a child has had no previous similar experience, he will be unable, when placed in a new situation, to project the future and so reassure himself.[170] Jailed children often don't know whether their incarceration is temporary or long-term;[171] whether or not their parents know they've been arrested;[172] whether they will be abused

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168 Interview with Dr. Tarjan, 4/25/75.

169 "The data suggests that in social-perceptual terms, that is, how complex is the world, can a person make any sense out of what is happening to him and be able to deal with that sense in some way that involves any kind of behavior alternatives or choices, you would be wrong one heck of a lot of the time, in talking about fifteen and sixteen year olds as though they were able to function as normal adults in society." Interview with Dr. Warren, 3/20/75.

170 Interview with Dr. Tarjan, 4/25/75; and with Dr. Sarri, 4/16/75.

171 Ibid.

172 Interview with Dr. Zimbardo, 4/18/75.

or molested.[173] Such uncertainty of future, and of present, situation is psychologically traumatizing.[174]

In any environment that is novel,[175] people are less assertive and more dependent.[176] Jailed children, then, in addition to feeling abandoned, experience a sense of loss of control.[177] They are now in an environment where they can control nothing and where they are totally controlled by strangers. For the adolescent, who is trying to achieve the delicate balance between learning from adult behavior and not being totally dependent upon adults,[178] the utter dependence of confinement is greatly disturbing.[179]

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173 Interview with Dr. Sarri, 4/16/75.

174 Interview with Dr. Tarjan, 4/25/75.

175 See supra, note 153.

176 Interview with Dr. Zimbardo, 4/18/75.

177 Ibid. and interview with Prof. Mattick, 4/14/75.

178 Erikson, E.H., "Growth and Crises of the 'Healthy Personality'" in Symposium on the Healthy Personality (New York: Josiah Macy, Jr. Found., 1950).

179 Interview with Dr. Rosenheim, 4/15/75.

One result of this feeling of dependence may be an increased susceptibility to external influence.[180] Such malleability is hazardous for jailed children because, generally speaking, jails, in their procedures and staffing and facilities, encourage inmates to be uncomplicated and to keep quiet.[181] There is a preference, in other words, for custodial convenience.[182] This preference is communicated to jail inmates.[183] When coupled with a child's increased impressionability, this institutional preference leads to a troublesome result. The child may cease his usual pattern of behavior. In response to pressure whether overt or implied, the child may incorporate behavior appropriate to a "good prisoner."[184] He will become unusually quiet

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180 Peter Suedfeld, "Changes in Intellectual Performance and in Susceptibility to Influece," pp. 126-166, at 166 in Zubek (ed.) Sensory Deprivation: Fifteen Years of Research (New York: Century Psychology Series, Meredith Corp., 1969).

181 Interview with Prof. Mattick, 4/14/75.

182 Ibid.

183 Ibid.

184 Generally, children, in a given situation, understand less about contributing elements, and so have fewer choices about what to do. In that sense, they are more vulnerable than adults. Things can more easily happen to them that they don't understand and they have fewer ways of dealing with experiences. Interview with Dr. Warren, 3/20/75.

Obviously, since jailed children may well be susceptible to suggestion about their behavior from other inmates as well as from jailors, they probably will also learn behavioral patterns that are socially aberrant. Interview with Dr. Tarjan, 4/25/75.

and pass through the jail as anonymously as possible. In doing so, he may effectively block access to his normal behavior and emotions.[185] Obviously such a blockage is deleterious, in some cases seriously, to a child's emotional well being.[186] Since the adaptive behavior a child learns in jail will be inappropriate to his need for self-expresion in other situations,[187] he may be uncomfortable and confused not only while he is in jail but after his release. In masking the child's usual behavior, learned attitudes may impede normal development and later attempts to provide corrective therapy.[188] And if a child is repeatedly exposed to enforced adaptive behavior in jails, he may become totally unresponsive to later rehabilitative efforts.[189]

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185 Dr. Zimbardo suggested that there are only two ways of surviving as a prisoner. Both involve constructing a buffer to insure emotional insulation. One is to be angry all the time. The other is to turn off all emotion. "I think that to survive in a prison-to be a good prisoner-you have to control, limit, contain and in extreme, deny any emotional expression. My own feeling is that if you don't express emotion overtly you begin to lose the capacity to feel it internally...I think we need practice in expressing emotion. If you never do it publicly, you begin to not do it personally. You then can't allow the danger of experiencing it too much because you will express it." Interview with Dr. Zimbardo, 4/22/75.

186 Ibid.

187 Interview with Dr. Zimbardo, 4/2//75.

188 The only permissible purpose for state intervention is, of course, to "treat" or "rehabilitate" children. Such behaviroal adaptation makes diagnosis, the first step in any treatment process, more difficult.

189 See supra, footnote 185.

In fact, a jailed child may become inaccessible to all adults. These children experience a loss of trust in adults which is extreme. Such a loss influences the way they relate to their parents:

> If you have parents and you're in jail one day and they don't release you, there is a sense that your parents are powerless. If your parents are powerless, you are even more powerless. You don't know whether they are trying to get you out and can't...or they're not trying, which means they're either indifferent or want you to be in jail. For most adolescent kids, especially kids for whom this is a first experience, being in jail more than a day would start them thinking this way. The outcome of either decision--my parents are trying and are helpless or my parents are not trying--either way you feel helpless. You lose trust. More generally, you begin to resent parents and the authority they represent, which means resentment against society.[190]

Normal development occurs for adolescents, as well as younger children,[191] only when they feel secure.[192] A child feels secure when he realizes that he is loved and wanted by his parents,[193] when he is certain that

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190 Interview with Dr. Zimbardo, 4/18/75.

191 Gardner, "Adjustment Difficulties During Adolescence," pp. 329-339, at 330 in Stuart and Prugh (Eds.), The Healthy Child (Cambridge, Mass.: Harvard University Press, 1966).

192 Ibid.

193 We are referring to psychological as well as biological parents. See: Goldstein, Freud and Solnet, Beyond the Best Interest of the Child (New York: Free Press, 1973).

he is not to be deserted by them; and when they protect him from external attacks or physical injury.[194] The way a child perceives himself, then, he is largely a reflection of the way his family, and other adults whom he considered important, react to him.[195] When a child feels rejected by his parents, as when he is jailed,[196] he develops a distorted and devaluated self-image.[197] If a child thinks that his parents do not approve of him, he finds it difficult to think positively of himself. Generally, children who are, or perceive themselves rejected, may become insecure, attention-seeking, jealous, aggressive, or hostile.[198] Many

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194 Ibid. at 330. Of course, there are additional elements necessary in good parental-child relationships, such as the child's confidence that his parents treat him as an individual. These three, however, are basic to the feeling of security necessary for normal development.

195 White House Conference on Children, Report to the President (Washington, D.C., U.S. Government Printing Office, 1970), p. 242; and Joint Commission on Mental Health of Children, Inc., Crisis in Child Mental Health: Challenge for the 1970's (New York: Harper and Row, 1969).

196 Interview with Dr. Zimbardo, 4/18/75.

197 Pepitone, A. and Wilpigeski, C., "Some Consequences of Experimental Rejection," J. ABNORM. SOC. PSYCHOL., 1960, vol. 60, pp. 359-364.

198 Sears, et al., Patterns of Child-Rearing (Evanston, Ill.: Row, Peterson, 1957); Bandura, A. and Walters, R.H., Adolescent Aggression (New York: Ronald, 1959). Of course, there is considerable variation in the effects of parental rejection. The severity of a child's reaction depends on many things including the way the rejection is expressed, whether both parents are involved and other aspects of the child's total life situation. Ibid.

have difficulty expressing and responding to affection.[199] Jailing a child discourages belief in the security of his relationship with his parents. Instead, it fosters cynicism and bitterness about them.

It may also affect relations with other adults[200] who adolescents have been led to believe look out for, and care for, the rights of children.[201]

Jailed children learn not that adults care for them but that a jail is a totally closed environment where the primary value is that of power.[202] Children, naturally smaller and weaker than other inmates, fare poorly. They may be abused physically; certainly they are abused emotionally. In any situation where a child

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199 Ibid.

200 Interview with Dr. Zimbardo, 4/18/75.

201 They are products of a society that doesn't encourage them to be all that grown up at 16 or 17... It seems to me that there is an essential acceptance by kids of the authority of adults in their lives and that this authority rests on legitimate grounds... The average expectation is that one can trust adults and that one should have some confidence in their judgment and in their doing things for you that will make sense. If we are talking about the jail risk population, it may be that we're talking about kids who just don't have that trust in adults. I'm not so sure about that. Even if they think that certain figures like the police are always going to have it in for them, I don't think that would be their general view about all adults, and I think they would probably like to be proved wrong... They really want to be helped by someone who is interested in helping then." Interview with Dr. Rosenheim, 4/15/75.

202 Interview with Dr. Zimbardo, 4/22/75.

is abused, he feels powerless.[203] He learns that power depends on two things--physical might and cunning.[204] "They learn not to be tolerant, not to be understanding. They learn that you have to become powerful in any way."[205] When abused, a child will not only experience repulsion, but may also see the convenience, or even pleasure, that his discomfort affords the abusor. In a paradoxical sense, the child learns that it is more pleasurable--certainly easier-- to be powerful than powerless.[206] Once a child develops a sense that he is powerless, he will either repeatedly create situations that will prove him weak,[207] or he will have to prove himself powerful.[208] He may become aggressive.[209]

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203 Coleman, J., Abnormal Psychology and Modern Life (Chicago: Scott Foresman and Co., 3d Ed.), p. 271.

204 Interview with Dr. Zimbardo, 4/18/75.

205 Ibid.

206 Ibid.

207 Perhaps, in part, juvenile-criminal careers so begin.

208 Interview with Dr. Zimbardo, 4/18/75.

209 Ibid.; and Whiting and Child, Child Training and Personality (New Haven: Yale University Press, 1953), pp. 273-275.

> The analogy I think of is a kid building a sand castle at a beach and somebody walking over and in one second demolishing it. Who's more powerful--the kid who built it or the kid who tore it down? What you create in jails are kids who are never going to build sand castles.[210]

The final disillusionment about adults come for children who are physically mistreated in jails. If they have a basic faith that some adults, at least, can help them, to be physically assaulted while in the custody of adults who are symbols of authority is a shattering emotional experience.[211]

A child in jail, then, is very much alone. His physical surroundings are strange and fearsome;[212] his trust in his family and other adults is undermined; and his own stability is shaken.[213] In addition to enduring the anxiety of abandonment to, and dependence on, potentially hostile strangers and the sadness that accompanies a loss of trust in adults, jailed children also feel stigmatized.[214] Their self-image is altered.[215]

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210 Ibid.

211 Interview with Dr. Rosenheim, 4/15/75 and interview with Dr. Zimbardo, 4/22/75.

212 Interview with Dr. Sarri, 4/16/75.

213 Ibid., and interview with Dr. Zimbardo, 4/22/75.

214 Interview with Dr. Zimbardo, 4/22/75.

215 Interview with Dr. Rosenheim, 4/15/75.

Confinement represents deliberate social rejection. A child's social depravity is assumed in order to legitimize custody.[216] Jailed children feel like outcasts.[217] They feel rejected, not only by their families, but by everyone.

Then, there is the physical way people are handled in a jail.[218] Whether because of overcrowding, understaffing or disinterest, prisoners are treated as cases to be processed.[219] Little attention is paid to individual needs.[220] A jailed child cannot exercise any choice, not even about diet, physical exercise, or hygiene.[221] At a time when children are developing a sense of themselves as unique individuals, they find such curtailment of personal expression very disturbing.[222]

In most jails, there is absolutely nothing for children to do.[223] They experience an overwhelming sense of boredom.[224] Such enforced idleness is very

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216 American Friends Service Committee, Struggle for Justice (New York: Hill and Wang, 1971), pp. 86-88.

217 Interview with Dr. Sarri, 4/16/75; Erving Goffman, Asylums (New York: Doubleday, 1961).

218 Interview with Prof. Mattick, 4/14/75.

219 Ibid.

220 Interview with Dr. Zimbardo, 4/18/75.

221 Interview wtih Dr. Rosenheim, 4/15/75.

222 Ibid.

223 Interview with Prof. Mattick, 4/14/75.

224 Interview with Dr. Sarri, 4/16/75.

painful for adolescents.[225] They become restless and irritable.[226] They may feel confused and disoriented.[227] They may be unable to concentrate, unable to think clearly.[228] If so, they will be frightened.[229] They are also frustrated.[230] Generally, children do not view themselves as lawbreakers in a significant sense.[231] Neither do they see themselves as dangerous.[232] "They must think that there is no earthy need to lock them up this way."[233] They see the police as overreacting to their behavior. One result of this perception is that the entire criminal justice system becomes questionable.[234] To a child, it appears unable to appropriately respond to his behavior.[235]

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225 Ibid.; and interview with Dr. Zimbardo, 4/18/75.

226 Kubzansky, P., and Leiderman, P., "Sensory Deprivation: An Overview," pp. 221-238 at 239 in Solomon, et al., (Eds.) Sensory Deprivation (Cambridge, Mass., Harvard University Press, 1961)(hereinafter "Solomon et al.").

227 Ibid.

228 Heron, "Cognitive and Physiological Effects of Perceptual Isolution," pp. 6-33, at 17, in Solomon et a., supra, note 226.

229 Interview with Dr. Sarri, 4/16/75.

230 Ibid.

231 Interview with Dr. Rosenheim, 4/15/75. Although, of course, some children realize that what they do is wrong.

232 Interview with Dr. Sarri, 4/16/75.

233 Ibid.

234 Ibid; and interview with Dr. Zimbardo, 4/18/75.

235 Ibid.

Minority children suffer more in jails than do white children.[236] If a child is not white, does not speak English or speaks it with an accent, dresses unusually--in sum, is different--he is treated differently in jails as elsewhere.[237] In addition to the reactions outlined above, non-white children experience an increased sense of self-devaluation.[238] Minority children are made to feel even more ashamed of themselves than are white children.[239] The ridicule, silent or overt, which they feel from jailers and other inmates makes minority children question the value of what they are. The small hints that no one expected them to be "good" children leaves them worn down and self-doubting.

We don't know the permanent effects on children of the experience of being jailed. At age forty, are they more prone to depression? To suicide? To homicide? We don't know. But we do know that it is immedately and

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236 See: American Friends Service Committee, Struggle for Justice, supra, note 216 at 107.

237 Ibid.

238 Lief, H.T. and Stevenson, I.P., "Psychological Aspects of Prejudice with Special Reference to Desegregation," AMER. J. PSYCHIAT., 1958, 816-823.

239 Ibid.

substantially harmful for fifteen and sixteen year olds. Jailing children makes them frightened, sad, lonely and angry. Some children are resiliant. Some of them will be all right. But by treating children so, we make it more likely that some will grow up rebellious, hostile, aggressive and violent.[240]

The Commission therefore recommends that, in order to ensure that children and youth are never detained in adult jails, the state establish a group of regionalized small detention facilities which are physically separate and distinct from adult jails. These centers should also provide staff and services which are sensitive to the needs of the young people they detain.

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240 Interviews with Dr. Zimbardo, 4/22/75; and with Dr. Sarri, 4/16/75.

RECOMMENDATION #3

The Commission recommends that the state criminal code provisions relating to arrest be adopted for juveniles arrested for delinquent behavior.

The Commission recommends that Maine statutes be amended to include the following additional standard for juvenile arrest:

A police officer may without a warrant take a minor under the age of 18 into temporary custody--

a. whenever the officer has reasonable cause to believe that the minor has committed a juvenile offense related to alcohol or drugs or has engaged in prostitution.

Vote By Which Resolved: Unanimous

Current Statutory Provisions: When a juvenile is arrested, the arresting officer shall notify his parents, guardian, or legal custodian. (15 M.R.S.A. Section 2607)
If a juvenile fails to obey a citation or if the juvenile court feels that its citation will not be obeyed, it may issue an arrest warrant for the juvenile. (15 M.R.S.A. Section 2604)

Current Regulatory Provisions: None

Discussion:

There has been considerable and understandable confusion over the issues of whether Fourth Amendment standards and common law and statutory requirements relating to arrest apply when the police take

custody of juveniles and what the effect is, regardless of whether the answer to this question is yes or no. This confusion stems from the fact that there are broader purposes for bringing juveniles within the custody of the juvenile justice system than for arresting for criminal or delinquent acts.

It is interesting to note that all the model acts recognize these broader purposes and give the police broad authority to take juveniles into custody (although narrower than many of the existing state statutes). For example, Section 13 of the Uniform Juvenile Court Act provides:[241]

> "(a) A child may be taken into custody:
>
> (1) pursuant to an order of the court under this Act;
> (2) pursuant to the laws of arrest;
> (3) by a law enforcement officer (or duly authorized officer of the court) if there are reasonable grounds to believe that the child is suffering from illness or injury or is in immediate danger from his surroundings;

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241 For comparable provisions, see Legislative Guide, Section 18 and Standard Act and Model Rules, Section 16.

> (4) by a law enforcement officer (or duly authorized officer of the court) if there are reasonable grounds to believe that the child has run away from his parents, guardian, or other custodian.
>
> (b) The taking of a child into custody is not an arrest, except for the purposes of determining its validity under the Constitution of the United States."

But, combining the authority to take custody for delinquency purposes with the authority to take custody for welfare or other purposes can result in circumventing a juvenile's constitutional rights:

> "Courts have sometimes greatly abused this parens patraie doctrine, however, by finding, for example, that when the police were investigating a complaint of use of obscene language and interference with use of playground equipment, 'the minor herein was found in such surroundings as to endanger his welfare,' upon his refusal to identify himself to the police." In re James., Jr.[242] Arrests cannot be justified by such semantic manipulations.[243]

Thus, by allowing the police to take juveniles into custody under the same statute both when they have committed acts which justify their arrest and prosecution and when they have committed no such acts but require assistance or protection, the application of Fourth Amendment standards to such a statute becomes blurred

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242 Case is reported in 194 N.E.2d 797 (Juv. Ct. Cuyahoga Cty., Ohio, 1963).

243 Id. at 95.

and confused. What should happen, for example, when a juvenile makes incriminating statements after he has been taken into custody to "remove him from surroundings which endanger his welfare?" Should probable cause and warrant requirements apply in situations where police intervene not because of criminal acts but because of such matters as being neglected, being a truant, or being a runaway.

It is difficult to argue that the police should be precluded from taking a juvenile into custody when his health or life is endangered unless they have the basis for a constitutional arrest.[244] The needs in this area obviously require more than simply reducing police authority to intervene to criminal-type situations. Standards must be developed which deal comprehensively with police authority and restrictions both in: (1) criminal-type situations; and, (2) situations where intervention is for other essential reasons and arrest and prosecution are not contemplated.[245]

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244 Ferster and Courtless, The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender, 22 VAND. L.REV. 567, 589 (1969).

245 See infra at pages 117 for a discussion of taking a runaway child into custody.

In criminal-type situations, standards should undoubtedly reflect the same strict constitutional requirements and common law distinctions that relate to arrest of adults.[246] In nonarrest situations, police authority to take juveniles into custody or otherwise intervene in their lives should be carefully circumscribed and limitations should be placed on the use of nonarrest custody to obtain evidence or otherwise assist in the investigation of potential criminal or delinquency cases. The suggestion of this Commission that statutes clearly distinguish between police intervention in arrest and non-arrest

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246 See, e.g., California's statute on arrest of juveniles which became effective on March 4, 1972: "625.1. A police officer may, without a warrant, take a minor under the age of 18 into temporary custody as a person described in Section 602: (a) Whenever the officer has reasonable cause to believe that the minor has committed a public offense in his presence. (b) When the minor has committed a felony, although not in the officer's presence. (c) Whenever the officer has reasonble cause to believe that the minor has committed a felony, whether or not a felony has in fact been committed. (d) Whenever the minor has been involved in a traffic accident and the officer has reasonable cause to believe that the minor had been driving while under the influence of intoxicating liquor and any drug."

situations has support in the American Bar Association's "Standards Relating to the Police Function."[247]

In summary, in drafting standards in the "arrest" area, distinctions must be made between taking juveniles into custody for criminal vs. noncriminal reasons and between the nature and limits of the authority to act in both situations. As the ABA Standards Relating to the Police Function note in considering the issues in an adult context, this difficult task should not be handled simply by drafting omnibus arrest procedures:

> "Neither should legislatures, under an omnibus arrest procedure, confer authority upon police to help drunks, settle family disputes, or maintain order. The task of conferring specific and appropriately limited authority is likely to be a difficult one, but it is necessary if police are to be given the authority and guidance needed to deal with a variety of increasingly complex problems."[248]

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[247] ABA "Standards Relating to Police Function" at pp. 94-113. These Standards recommend that police have authority to use methods other than arrest and prosecution in certain instances to deal with the variety of behavioral and social problems which they confront. The suggestion is, for example, that recognized and properly-limited authority be considered in areas such as interferences with the democratic process, self-destructive conduct, resolution of conflict, and prevention of disorder, but that this authority to intervene without having to invoke the arrest power is not to be used to circumvent Fourth Amendment requirements and is subjected to checks and balances of its own. Id. at 99.

[248] Id.

D. Juvenile Courts

RECOMMENDATION #1: The Commission recommends that the juvenile court be retained as a division of the district court and that continuing legal education be provided to judges and attorneys to insure the highest possible quality of legal practice in juvenile matters.

Vote By Which Resolved: Unanimous

Current Statutory Provisions: The district court currently acts as juvenile court in juvenile matters.

Current Regulatory Provisions: None

Discussion:

The Commission believes that--

- The organizational structure of the juvenile court as a specialized division of the District Court permits the unique features of today's juvenile courts to be retained, while foregoing the usual isolation of this forum which has turned out to be a major weakness of juvenile courts. As a specialized division, rather than

as a separate court, the juvenile division of the District Court is an organic part of a general trial court and its judges are drawn from the bank of general trial judges, rather than being elected or appointed to an exclusive tenure on a juvenile bench.

- Equal status for the juvenile court cannot come other than as part of a court of general trial jurisdiction.[249] Equal status cannot come even when there is a separate state-wide juvenile court operating under its own statewide rules and administration.[250]

- A rotation system, coupled with specialized and continuing training in handling juvenile cases and in the developments in the law as it relates to juveniles is the most effective means of achieving a uniform system of juvenile justice for Maine.

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249 Schultz, "The Cycle of Juvenile Court History", CRIME & DELINQUENCY, October, 1973, p. 457.

250 Elizabeth D. and Richard B. Dyson, "Family Courts in the United States", 8 J.F.L. 4 (Winter, 1968) and 9 J.F.L. 1 (1969). Because such a system has not been successful in removing the vestiges of the juvenile court as an inferior institution. See, Rubin, Ted, Institute for Court Management, unpublished paper on Juvenile Courts prepared for the IJA/ABA Juvenile Justice Standards Project, September 24, 1973.

RECOMMENDATION #2: The Commission recommends that delinquency hearings be conducted in all procedural respects, except jury trials, as are adult criminal hearings.

Vote By Which Resolved: Unanimous

Current Statutory Provisions: Juvenile hearings are informal, and require no formal arraignment or plea. (15 M.R.S.A. Section 2610).

Current Regulatory Provisions: None

Discussion:

We believe that in adopting this standard, Maine is merely adhering to constitutional standards for juvenile proceedings already articulated by the Supreme Court.

During the early 1960's the Supreme Court had begun a major reevaluation and liberalization of due process rights for criminal defendants. A number of cases in nearly all areas of criminal law, including the right to counsel[251] and the rights of the accused while in police custody[252] were decided. It was not surprising, therefore, that when

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251 Gideon v. Wainwright, 372 U.S. 335 (1963).

252 Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966).

confronted with questions concerning the rights of juvenile offenders, the Court adopted the view that due process safeguards have a role to play in juvenile proceedings.

Kent v. United States[253] was the first major step taken by the Court to protect juvenile offenders.[254] The significance of Kent lay in the Court's attempt to strike a balance between the discretionary power of the juvenile courts inherent in the "parens patriae" philosophy, and the recognition that such authority was not an "invitation to procedural arbitrariness".[255] While some latitude was desirable when they were in the early, experimental stage, the Court found juvenile courts were not achieving their theoretical promise.[256] Citing such facts as lack of sufficient personnel and facilities, the Court said that there was evidence that the juvenile, while denied his constitutional rights, was not being accorded the "solicitous care and regenerative treatment" originally envisioned by the early reformers as

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253 383 U.S. 541 (1966).

254 The court, in two earlier cases, Haley v. Ohio, _U.S._;, and Gallegos v. Colorado, _U.S._ had reversed convictions of youths based on coerced confessions.

255 383 U.S. 541 at 553.

256 "While there can be no doubt of the original laudible purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults". Id. at 555.

justifying abridgement of these protections. Consequently, the child received the "worst of both worlds".[257]

In 1967, after the Kent case had been decided, two reports became public which served as a devastating indictment of juvenile courts and their failure to stem the tide of delinquency.[258] Soon afterwards, the Supreme Court decided, in In re Gault,[259] that since the "promise" of the juvenile court system was clearly unfilled,[260] it could no longer be regarded as sufficient grounds for denying certain essential due process protections. In Gault the Supreme Court concluded that "constitutional domestication" of juvenile proceedings was required.

First, the Court questioned the constitutional basis of juvenile courts. There had been no trace of the doctrine

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257 Id. at 556. See also, Handler, "Juvenile Court and the Adversary System: Problems of Function and Form", 165 WIS. L. REV. 7 (1965).

258 One was the President's Commission's report on juvenile delinquency referred to in footnote 66, supra. The other was the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Challenge of Crime in a Free Society (1967).

259 387 U.S. 1 (1967).

260 The Court cited a report by the Stanford Research Institute, Crime in the District of Columbia. In 1966, 66% of the 16-17 year olds referred to the Juvenile Court had been before it previously. In 1965, 56% of the juveniles were repeaters, with 42% of this group having been before the court at least twice. 387 U.S. at 21.

of "parens patriae" in the history of criminal jurisprudence.[261] Then the benefits of the juvenile process were appraised. The claim that hearings and their results were kept secret so as to prevent the child from future stigma was dismissed as "more rhetoric than reality".[262] Informality in the proceedings was condemned as being an invitation to arbitrariness which resulted in highly negative effects.[263]

However, the Court's attention was primarily focused on the consequences of juvenile proceedings. Often, juveniles faced long periods of confinement.[264] Regardless of whether the hearing was labeled "civil" or "criminal", the

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261 "...the highest and most enlightened impulses led to a particular system for juveniles unknown in our law in any comparable context. The constitutional and theoretical basis for this peculiar system is -- to say the least -- debatable". Id. at 17.

262 Id. at 24. Disclosure of juvenile records was discretionary with the judge in most instances. Courts often routinely furnished information concerning juveniles to the F.B.I., the armed services, governmental agencies and private employers when youths sought employment. Moreover, police often maintained files on juveniles with whom they came into contact, and had discretion to reveal juvenile records to prospective employers. See also, Note, "Juvenile Delinquents: The Police, State Courts and Individualized Justice", 79 HARV. L. REV. 775, 802 (1966).

263 Id. at 58. In fact, it had been suggested by some studies that a juvenile would respond to rehabilitation more favorably if his hearing was conducted with complete fairness, impartiality and orderliness. See Wheeler and Cottrel, Juvenile Delinquency: Its Prevention and Control (Russell Sage Foundation, 1965), 33.

264 For example, the act committed by Gerald Gault, a fifteen year old Arizona youth, was considered a misdemeanor under the Arizona penal code. He had allegedly made a lewd phone call. If committed by an adult, this offense was punishable by a fine of $5 - $50, or a maximum period of imprisonment of two months. Gault was confined to the State's Industrial School as a juvenile delinquent for the "period of his minority" (approximately six years). 387 U.S. at 29.

practical outcome of these proceedings was often incarceration.[265] Recognizing the potentially serious consequences of juvenile court proceedings, the Court in Gault held that the child must be accorded notice of charges, right to counsel, privilege against self-incrimination and the right to confront and cross-examine witnesses in all delinquency hearings.

Although the Court failed to rule on whether a juvenile was also to be guaranteed a right to appellate review, it strongly suggested that some record of the proceedings should be maintained. If no record of the case were preserved, a reviewing court would be obligated to reconstruct the record. This would impose on the juvenile judge the "unseemly duty" of testifying under cross-examination as to events that had transpired in hearings conducted before him.[266]

Gault left several questions pertaining to due process for juveniles unanswered. According to Mr. Justice Harlan's opinion, the majority failed to provide any discernable standards for due process in juvenile proceedings.[267] It

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265 "His world becomes a building with whitewashed walls, regimented routine and institutional hours. Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees and 'delinquents' confined with him for anything from waywardness to rape and homicide". Id. at 27.

266 Id. at 58.

267 Id. at 67.

could be argued that whatever rights constitute the "essentials of due process and fair treatment"[268] must be incorporated into the juvenile court system. However, this analysis is problematic. Should all due process protections accorded to adult hearings be provided for juveniles?

The Court was clearly dissatisfied with the performance of the juvenile court system. Yet, there was no suggestion that it be scrapped, despite the strong inference that many delinquency hearings were indistinguishable from criminal proceedings. Mr. Justice Harlan suggested that the Court should guarantee fundamental fairness, yet permit the States to possess sufficient leeway to experiment so as to develop an effective response to the problem of juvenile crime.[269]

In re Winship[270] served to confuse the issue rather than clarify it. Winship held that proof beyond a reasonable doubt was among the "essentials of due process and fair treatment" that had to be accorded to a juvenile offender at his hearing. On its face, the decision seemed to support those who argued that Gault intended to extend all adult criminal protections to delinquency proceedings. However, a close reading of the opinion suggests a movement toward the

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268 383 U.S. at 562.

269 387 U.S. at 72.

270 397 U.S. 358 (1970).

Harlan viewpoint. Mr. Justice Brennan's opinion emphasized that incorporating the "reasonable doubt" test would not destroy the "beneficial aspects" of the juvenile process. Juvenile proceedings would still be confidential. Informality and flexibility would remain the cornerstone of the juvenile justice system. Opportunity would be made during the hearing for wide-range review of the child's social history. Individualized treatment was still to be keynoted. Moreover, the Court reaffirmed the axiom that a finding of delinquency did not constitute a criminal conviction.[271] It was evident that the original purpose of juvenile courts was to remain an important consideration where the question of incorporation of due process for juveniles was concerned.[272]

In 1971, the Supreme Court held that the right to trial by jury was not applicable in juvenile proceedings.[273] Writing for the majority, Mr. Justice Blackmun noted that no case had expressly held that all rights constitutionally

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271 Id. at 366, 367.

272 See Mr. Justice Harlan's concurring opinion. Id. at 374-375. He noted that the "reasonable doubt" standard did not interfere with the worthy goal of rehabilitating the juvenile; increase the extent to which a youth is stigmatized as a "criminal"; or burden the juvenile courts with a procedural requirement that will make juvenile hearings significantly more time-consuming or rigid.

273 403 U.S. 528 (1971).

accorded to adults in criminal cases were also to be enforced in juvenile proceedings.[274a] Justice Blackmun went on to suggest that while the "fond and idealistic hopes" of juvenile court proponents have not been realized, the addition of a jury would emasculate the unique process, making it "fully adversary" and "put an end to what has been an idealistic prospect of an intimate and informal protective procedure".[274b]

The Court said that despite its many shortcomings, "we are particularly reluctant to say...that the (juvenile) court system cannot accomplish its rehabilitative goals".[274c] States should remain free to experiment in dealing with problems of youthful offenders. The "abuses" of the system were not of "constitutional dimension". They relate to lack of resources and dedication, rather than inherent unfairness.[274d] To date, a majority of the states have not sanctioned jury trials for juveniles.

274a
Id. at 533.

274b
Id. at 545.

274c
Id. at 547.

274d
Id. at 548.

RECOMMENDATION #3:	The Commission recommends that all court proceedings involving juveniles accused of class A, B, or C offenses be open to the public.
Vote By Which Resolved:	7-2
Current Statutory Provisions:	Juvenile hearings are not public hearings. In fact, any person who divulges or publishes the name of any juvenile brought before a district court or any of the matters which occurred at the hearing without the consent of the juvenile court may be found guilty of criminal contempt. (15 M.R.S.A. Section 2609-1965) And records of juvenile proceedings may not be inspected by the public. (15 M.R.S.A. Section 2606-Supp. 1975).
Current Regulatory Provisions:	None

RECOMMENDATION #4: The Commission recommends that, in order to provide for more effective administration of justice with regard to juveniles who have committed serious offenses, the existing criteria for bind-over of juveniles to superior court be repealed and replaced by the following criteria:

The juvenile court concludes and so states in its probable cause finding, that having considered--

a. the record and previous history of the child,

b. whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner, greater weight being given to offenses against person than property, and

c. whether there is a reasonable likelihood that like future conduct will not be deterred by continuing the child under the juvenile justice system,

	the court finds that-- 1. the maturity of the child as determined by considerations of his home, environment, emotional attitude, and pattern of living, indicates that the child would be more appropriately prosecuted under the general law; and 2. the nature and seriousness of the offense indicate that the protection of the community requires detention of the child in facilities which are more secure than those provided in the juvenile justice system.
Vote By Which Resolved:	Unanimous
Current Statutory Provisions:	In order to bind a juvenile over to the Superior Court for a grand jury hearing, a district court must find from the totality of the juvenile's circumstances that:

- the juvenile's age, maturity, experience and development require prosecution under the general law;
- the nature and seriousness of the juvenile's conduct represents a threat to the community;
- the juvenile's conduct was committed in a violent manner; and
- there is reasonable likelihood that like future conduct will not be deterred by continuing the juvenile under the juvenile justice system.

Current Regulatory Provisions: None

Discussion:

While we are unwilling to abandon the original curative concept of the juvenile court entirely, we recognize that some juveniles do commit serious

crimes, are repetitive offenders and are unreached by the juvenile justice system.

Traditionally, juvenile courts have had jurisdiction over all offenders under a certain age. When a juvenile commits a serious crime, however, juvenile courts can waive their jurisdiction and transfer the case to the criminal courts.[275]

Because of concern over the increase in violent crimes committed by children, there has been a movement in other states to make the provisions for waiver easier.[276] The forerunner of this movement was the controversial provision in the District of Columbia's juvenile statutes which eliminated the need for a waiver hearing by allowing a prosecutor discretion to arraign

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275 Note "Juvenile Justice", 53 B.U.L. REV. 212, 223 (1973).

276 Note, "Waiver of Juvenile Jurisdiction and the 'Hard Core' Youth," 51 N.D.L. REV. 655, 657 (1975).

juveniles for certain crimes in the criminal court. In the District of Columbia, a "child" is defined as any individual less than 18 years old, except any individual sixteen years or older who has been:

> (A) charged by the United States attorney with (i) murder, forcible rape, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense, or (ii) an offense listed in clause (i) and any other offense properly joinable with such an offense;
> (B) charged with an offense referred to in subparagraph (A)(i) and convicted by plea or verdict of a lesser included offense; or
> (C) charged with a traffic offense.
> D.C.Code §16-2301(3) (1970).

This law has been heavily criticized. It's been suggested that there is no possibility that a case brought in the criminal courts will be transferred to the juvenile courts.[277] Furthermore, since it is a prosecutor and not a judge who determines where charges will be brought, some commentators feel there is an increased danger of administrative abuse and arbitrariness.[278]

However, the statute has been sustained as constitutional. The District of Columbia Court of Appeals, reviewing the statute, first stated that it was

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[277] Note, "Juvenile Justice", supra. at 216.

[278] Id. at 224.

reasonable for Congress to improve the operation of the juvenile justice system by removing from the system individuals between 16 and 18 who were beyond rehabilitation and whose presence might serve as a negative influence on the other juveniles.[279] Further, the court found no violation of due process in the provisions which allowed the prosecutor to exercise discretion in determining whom to prosecute.[280] The court stated that in the absence of evidence that a prosecutor used suspect factors[281] in exercising his discretion, the law always permitted him to determine whom to prosecute.[282]

Another state which has recently made waiver easier is Colorado. Previously, Colorado had required a full investigation and hearing before waiver.[283] However, Colorado now allows district attorneys discretion to file suit in the criminal courts in certain specific cases.

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279 United States v. Bland, 472 F.2d 1329,1332 (D.C., 1972) cert. den.

280 Id. at 1335.

281 Such as race.

282 Id. at 1337.

283 Colo. Rev. Stat. Ann. Section 22-1-4 (4)(a)(Supp.1967).

In Colorado, a delinquent child is defined as an individual between the ages of 10 and 18 who has violated any federal, state or local law or any order of the court.[284] However, this definition does not apply to children 14 years or older who have committed crimes of violence defined as class 1 felonies (those punishable by death or life imprisonment), those children who have been adjudicated delinquent within the last two years, provided the act for which they were adjudicated would have been a felony if committed by an adult, and who are now 16 years or older and commit either a class 2 or 3 felony (punishable by five to fifty years) or a nonclassifiable felony punishable by death.[285] Those children 14 or older who commit a felony subsequent to having committed any other felony for which the juvenile court had previously waived jurisdiction are also not considered delinquents but are considered adult criminals.[286]

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[284] Colo. Rev. Stat. Ann. Section 19-1-103 (9)(a)(1975).

[285] Colo. Rev. Stat. Ann. Section 19-1-103 (9)(b)(I) and (II) (1975).

[286] Colo. Rev. Stat. Ann. Sections 10-19-1-103 (9)(b)(III)(1975).

Colorado also allows waiver at the request of a district attorney whenever a child 14 years or older commits an act which would have been a felony if committed by an adult.[287] After such a request, a juvenile court holds a transfer hearing. At the transfer hearing, the court decides:

> (a) Whether there is probable cause to believe that the child has committed an act for which waiver...may be sought...; and
> (b) Whether the interests of the child or of the community would be better served by the juvenile court waiving its jurisdiction...[288]

A few states require that juvenile courts hold a hearing on the waiver issue before hearing other evidence in the case.[289] Thus, Illinois states that the transfer hearing must be held before the adjudicatory hearing and that taking evidence in the adjudicatory hearing first will bar criminal prosecution on the matter.[290]

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287 Colo. Rev. Stat. Ann. Sections 19-31; 19-3-106 (4)(1975).

288 Colo. Rev. Stat. Ann. Section 19-3-108 (1)(1975). Four other states which deny juvenile courts jurisdiction of certain offenses are Delaware (capital felony), Louisiana (any capital crime plus aggravated rape), Mississippi (any crime punishable by death or life imprisonment) and Pennsylvania (murder). Virginia repealed a provision similar to that of Mississippi in 1973.

289 Georgia, Illinois, Maryland, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas and Wyoming.

290 see Rev. Stat. Ch.37, Section 707-7(3) (Smith-Hurd, 1974).

Other states currently provide for a transfer hearing to be held after the adjudicatory hearing on the matter. For example, California provides for a waiver hearing "at any time during the hearing".[291] Massachusetts provides that a juvenile court may dismiss the complaint and waive jurisdiction of the child after a hearing if the court determines that the complaint alleges an offense against the law, the child who committed the act was between the ages of 14 and 17, and the "interests of the public" require that the child be tried as a criminal.[292]

Florida now requires prosecutors to petition a juvenile court to stay its proceedings for two weeks while a grand jury indictment is sought.[293] Although this requirement avoids the imposition of double jeopardy, it does impose a substantial delay in the proceedings.[294]

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291 Cal. Welf. and Inst'ns Code, Section 707 (West, 1972 as amended through West Supplement, 1973).

292 Mass. Gen. Laws Ann. c.119 Section 61 (1964).

293 Fla. Stat. Ann. Section 39.02 (5)(c)(1974).

294 Whitebread and Bates, "Juvenile Double Jeopardy", 63 GEORGETOWN L.J. 857,868 (1975).

However, the Supreme Court has recently held that a juvenile is guaranteed the same constitutional rights against double jeopardy as an adult, and therefore the waiver hearing must be held before any adjudicatory hearing of the case.[295] The Court indicated that the nature of the evidence presented at the waiver hearing may require a different judge preside at the hearing on the merits.[296] However, the Court indicated that a juvenile should be given the opportunity to waive this requirement since the judge who presided at the waiver hearing may have shown that he is sympathetic to the juvenile and rapport and rehabilitation may already have begun.[297]

Standards for waiver differ greatly among jurisdictions. In Kent v. United States,[298] the Supreme Court suggested eight areas for a judge to consider in waiver hearings. Some states basically adopted

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295 Breed v. Jones, ___U.S.___, 44 L.E. 2d 346 (1975).

296 Id. at 360. This already occurs in Florida, Tennessee and Wyoming.

297 Id. at 361, n.21.

298 383 U.S. 541,566-67 (1965).

the Court's suggestions. For example, Colorado's statute provides that a judge must consider:

> (I) The seriousness of the offense and whether the protection of the community requires isolation of the child beyond that afforded by juvenile facilities;
> (II) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
> (III) Whether the alleged offense was against persons or property, greater weight being given to offenses against person;
> (IV) The maturity of the child as determined by considerations of his home, environment, emotional attitude, and pattern of living;
> (V) The record and previous history of the child; and
> (VI) The likelihood of rehabilitation of the child by use of facilities available to the juvenile court.[299]

The only factors suggested for consideration in the Kent decision which Colorado omits are the desirability of trying the juvenile in the same court as adult criminals and the prospects for adequately protecting the public if the youth is tried in juvenile court.[300]

A few statutes only delineate general standards.

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[299] Colo. Rev. Stat. Ann. Section 19-3-108 (2)(b)(1973).

[300] Kent. supra., at 566-67.

Massachusetts, for example, merely states that a transfer should occur:

> if the court is of the opinion that the interests of the public require that he should be tried for said offense or violation.[301]

It has been held in Massachusetts that the term "public interest" is sufficiently definite to allow a judge to properly carry out the judicial function of declining jurisdiction.[302] The court held that a consideration of both the individual juvenile's needs and the treatment available to him were inherent in a consideration of the "public interest".[303]

Many states' statutes specifically refer to some of the considerations which Kent suggested. In Ohio, for example, juvenile courts may transfer a case only if the juvenile was 15 years or older at the time he allegedly committed an offense and the court finds probable cause to believe that he did the act.[304] Furthermore, the juvenile court must conduct an investigation of the child including both mental and physical examinations to determine whether there are

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301 Mass. Gen. Laws Ann. c,199 Section 61 (1964).

302 In re a Juvenile, 74 Mass. Adv. Sh. 61,67,306 N.E. 2d 22 (1974).

303 Id. at 68.

304 Ohio Rev. Code Ann. Section 2151.26 (A)(1)(2)(Page Supplement 1973).

reasonable grounds to believe that the child is not amenable to rehabilitation and that the safety of the community requires that he be placed under legal restraint which will extend beyond when he attains his majority.[305]

In determining whether a child is amenable to rehabilitation, the juvenile court must consider:

> (1) The child's age and his mental and physical health;
> (2) The child's prior juvenile record;
> (3) Efforts previously made to treat or rehabilitate the child;
> (4) The child's family environment; and
> (5) The child's school record.[306]

These considerations are clearly derived from Kent, but do not include all of the factors mentioned in that case. Furthermore, juvenile courts are given considerable latitude in determining whether to transfer jurisdiction.[307]

Illinois does not limit the factors which a judge may use but does list areas which must be

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[305] Ohio Rev. Code Ann. Section 2151.26 (A)(3)(Page Supp. 1973).

[306] Ohio R. Juv. P. 30(3).

[307] Note, "Juvenile Court and Direct Appeal from Waiver of Jurisdiction in Ohio", 8 AKR. L.R. 499,513 (1975).

considered "among other matters":

> (1) Whether there is sufficient evidence for a grand jury to return an indictment;
> (2) Whether the offense was committed in an aggressive and premeditated manner;
> (3) The age of the minor;
> (4) The previous history of the minor;
> (5) The facilities available to the juvenile court for the treatment and rehabilitation of the minor; and
> (6) Whether the best interests of the minor and the security of the public may require custody of the minor beyond his minority.[308]

Provisions for determining whether a juvenile will benefit from the rehabilitative facilities available to him through the juvenile system are common. However, such provisions have come under attack. It has been suggested that they provide a convenient subterfuge for those states which seek to provide only the most meager facilities for their juvenile systems.[309]

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[308] Ill. Ann. Stat. c.37, Section 702-7(3)(a)(Smith-Hurd Supp. 1974).

[309] See, Note, "Waiver of Juvenile Jurisdiction" supra. at 674.

We feel that the proposed recommendation about waiver, which is reflective of the standards outlined by the Supreme Court in Kent v. United States[310] is a workable solution to the problems presented to juvenile courts by mature juveniles who commit serious offenses.

In the same view, we recommend that juveniles who are charged with aggravated crimes[311] should not be permitted to escape public scrutiny. In such cases, we feel that the public's right to know overrides the juvenile's right to secrecy. It has also been suggested that open juvenile proceedings conducted, as we recommend, in all procedural aspects except jury trials as are adult criminal proceedings may be beneficial to juvenile defendants since public scrutiny may insure consistent judicial adherence to procedural propriety.

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310 383 U.S. 5211 (1965).

311 Class A, B, or C crimes.

RECOMMENDATION #5: The Commission recommends that no child under age 14 shall be questioned about alleged delinquent behavior unless a lawyer acting on his behalf is present.

Vote By Which Resolved: Unanimous

Current Statutory Provisions: At a hearing, a juvenile defendant has the right to be represented by any interested person or by counsel.[312]

Current Regulatory Provision: None

Discussion:

Although the Supreme Court has not yet ruled on the precise question, it is likely that the Court will rule that custodial interrogation of juveniles must comply with Miranda standards, and several state courts have already so held.[313] In addition, at least two states have made Miranda warnings applicable to juveniles by statute.[314]

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312 15 M.R.S.A. Section 2609 (1964).

313 See, e.g., In re Creek, 243 A.2d 49 (DC Ct. App. 1968); Leach v. State, 428 S.W.2d 817 (Tex. Civ. App. 1968); In re Forest, 76 Wash. Dec. 2nd 84, 455 P.2d 368 (1969); In re Rust, 53 Misc.2d 51, 278 N.Y.S.2d 333 (1967).

314 Calif. Welf. and Inst. Code Section 625; (1968); Okla. Stat. Ann. Tit. 10, Section 1109 (1968).

As one commentator has pointed out, the more basic question than does Miranda apply is whether the Miranda requirements must be applied even more strictly and supplemented for juveniles.[315] It has been argued that the answer to this question should be yes for the following two reasons:

> "There are special reasons for the use of special safeguards. The first is the basic premise, underlying the whole juvenile justice system, that juveniles who commit unlawful acts are not criminals and should not be treated as criminals.... The second reason is that juveniles are not mature enough to understand their rights and are not competent to exercise them."[316]

To enforce this attitude, numerous recommendations and some special procedures have been made relating to the questionning process. For example, some jurisdictions have required that juveniles be turned over to probation officers before questionning or have required that they be interrogated only if parents or counsel are present.[317] The Legislative Guide for Drafting Family and Juvenile Court Acts excludes in the adjudication process use of any statement made without counsel.[318]

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315 Rezneck, "The Rights of Juveniles" in The Rights of Americans, 479 (N. Dorsen, ed., 1971).

316 Ferster and Courtless, "The Beginning of Juvenile Justice, Police Practices, and The Juvenile Offender," 22 VAND. L. REV. 567 (1969).

317 Id. at page 596.

318 Section 26.

RECOMMENDATION #6: The Commission recommends that in recognition of the significant role that district court judges and court appointed attorneys play in the adjudication of juvenile matters, the salary of district court judges be increased and fees for court appointed attorneys in juvenile matters be determined on a case-by-case basis, according to the complexity of the case and length of the adjudicatory process.

Vote By Which Resolved: Unanimous

Current Statutory Provisions: None

Current Regulatory Provisions: None

Discussion:

Provision of satisfactory legal representation and judicial expertise in juvenile court cases is the proper concern of all segments of the legal community. It is, accordingly, the responsibility of courts, defender agencies, legal professional groups

individual practitioners, and educational institutions to insure that competent counsel, jurists and adequate supporting services are available to all juveniles in hearings before district courts.

We therefore further recommend that:

- suitable under-graduate and post-graduate educational curricula relevant to representation in juvenile courts should be regularly available;
- careful and candid evaluation of representation in cases involving juveniles should be undertaken by judicial and professional agencies;
- careful and candid evaluation of judicial behavior in cases involving juveniles should be undertaken by judicial and professional agencies; and
- lawyers active in general trial practice should be encouraged to qualify themselves for participation in juvenile court cases, and to this end, law firms should encourage members to represent parties involved in such matters.

We recognize that competent lawyers and jurists cannot be assured unless adequate compensation for

counsel and judges is available. Therefore, we recommend that lawyers and judges participating in juvenile matters should be reasonably compensated for time and services performed according to prevailing professional standards.

In the case of assigned counsel, compensation and awards of fees should reflect all appropriate services performed for the client and should fairly approximate the reasonable locally prevailing compensation for court appointed counsel performing comparable services for adults.