STATE OF VERMONT
HOUSE OF REPRESENTATIVES
MONTPELIER
05602

February 27, 1976

Phyllis N. Shycon
New England Children's
Mental Health Task Force
Suite 300
25 Huntington Avenue
Boston, Massachusetts 02116

Dear Ms. Shycon:

Enclosed herewith is my paper for presentation to the Children's Advocacy Conference.

I appreciate the opportunity to participate and am looking forward to April 23 and 24.

Very truly yours,

Judy P. Rosenstreich

JPR/mmc

(enclosure)

ABSTRACT

This paper dealing with the subject of "Children's Rights, Parent's Rights and Society's Rights", rests upon the law itself in attempting to define the rights in question, and to trace their derivation.

It contends that both society and parents, as fully participating members of society, have rights that are well defined and closely observed. In contrast, the rights of children are derived obtusely, and are in a sense "non-functional" in that responsibility for recognizing them is transferable, and the resources, upon which recognition of them is predicated, never developed or never produced.

Ultimately, the determination that establishes inalienable rights for children will be made by society through its legislatures since the courts are close to the limit of what they can effect within the framework of the law. Until that framework is less confining, children will continue to have "interests", not rights.

WORKSHOP E
CHILDREN'S RIGHTS, PARENTS" RIGHTS & SOCIETY'S RIGHTS
JUDITH ROSENTREICH
Second Annual Children's Advocacy Conference
April 23 & 24, 1976

CHILDREN'S RIGHTS, PARENT'S RIGHTS AND SOCIETY'S RIGHTS

A Paper by Judy P. Rosenstreich
prepared for presentation to the
Second Annual Children's Advocacy Conference
Durham, New Hampshire - April 23 and 24, 1976

PREFACE

Papers are best understood when the reader has the full benefit of knowing from whence comes the writer.

My participation in the Second Annual Children's Advocacy Conference results from my position in the Vermont General Assembly as a member of the House. My focus then is directed toward laws as they are and as they should be, all within the framework of the legislative process in the State of Vermont.

I am, however, a member of the Supervisory Board of the Governor's Commission on the Administration of Justice, Vermont's manifestation of the federal Law Enforcement Assistance Administration. In that capacity I am supplied with information regarding the "doers" - those children adjudicated because of some offense they themselves committed. My knowledge extends less to the "done unto" children who are processed by the system as a result of abandonment or abuse. Because with the passage of time and "treatment" the latter often become the former, there are areas in which these populations overlap and with which I am acquainted.

JUDY P. ROSENSTREICH
Waterbury Center, Vermont
February 27, 1976

Discussion of everyone's rights, society's, parent's and children's must be predicated upon some agreement concerning the definition of "society". Parents and children are words which conjure in most minds the same general meaning. If the thoughts that follow can be accepted as this paper's working definition of society, then the subject of the rights of society, parents and children in the context of their inter-relationships becomes less complicated than one might assume at first consideration.

Society in this country is most of the people most of the time, the collective, the body politic. It was and still is that whole realm of human interactions that vested two hundred years ago in the American Sovereign the latter's power to govern. Since then, it has expanded that power in some areas, has contracted it in others, but in the process, society's rights have remained absolute. Society can determine absolutely, what those rights will be. Under this government "by the people" society has reserved for itself the right to define its rights and has insured constitutionally that it will have the authority to do so. Society has insured at least that government will not develop the absolute power to define society's rights.

Society has indicated through the way it exercises its own power and by the nature of the power it vested in the government which it created and to which it still remains

subject, that peace, both personal and public, is its right. It has further indicated that protection is implicit in peace.

Law is the means this society has applied to obtain that peace and protection. Law describes to all the actors in the play when peace exists and how to maintain it; when it does not and how to restore it all in the terms that society has decided apply at the moment. Society then has established clearly its right and means to protect itself and more importantly, has retained for itself, by means of representative government, the power to define just what it cares to protect itself against, whether it be abuse of children by their parents or the delinquent act of a child.

In a real sense then, society's right to protection is the ultimate right and supercedes those of any other party to the proceeding because society has the means to insure that its right is respected. To some this is a sad commentary. It is, however, a realistic one. In this context might does make right regardless of how right or wrong the right may be.

Society seems to have agreed that parents have rights. Society's laws have set forth quite carefully, although indirectly, just what they are. The laws' circuitousness comes from specifying what rights may be removed from parents by order of the Court and what rights still remain after others are removed. Although the law does not vest these rights in parents, it seems fair to assume that if rights may be removed, they were vested in the first place.

Vermont's Juvenile Code is a composit adopted by the State's General Assembly in 1967 and 1973. The 1967 legislature expressed the following to be among its purposes:

> to remove from the children committing delinquent acts the taint of criminality and the consequences of criminal behaviour and to provide a program of treatment, training, and rehabilitation consistent with the protection of the public interest.
>
> to achieve the foregoing purposes whenever possible in a family environment, separating the child from his parents only when necessary for his welfare or in the interests of public safety.

In 1973, the following was added:

> It is the purpose of this act to include children who have formerly been defined as "neglected" or "unmanageable" in one category and to define the children in this one category as "children in need of care or supervision". In so doing, the general assembly takes the position that children whose outward behaviour is socially unacceptable share basic problems with children who have been deprived of certain essentials of care and supervision, and that without the implication of fault or blame, the State of Vermont is better able to carry out its commitment to assist these children in achieving their highest potential.

Measured by the standards of the label, separate and treat philosophy which has pervaded the child saving movement since its inception in Victorian America and the Juvenile Justice movement since the passage of the Illinois Juvenile Court Law in 1899, Vermont's Juvenile Code is an enlightened one. It directs itself to those vague, good things society has agreed all its children theoretically ought to have. It promulgates the epidemy of ex parens patriae in directing as one observer describes the principle:

> that ... the state, acting through the Juvenile Court, exercises that tender solicitude and care

> over its neglected dependent wards, that a wise and loving parent would exercise with reference to his own children under the same circumstances.[1]

In Vermont the Code recognizes that the Court, in its "tender solicitude" may see fit under certain circumstances to remove from parents some prerogatives that are presumed to be implicit in parenthood. Under the authority of 33 U.S.A. Section 632(10), the Court in transferring legal custody of a child vests in a guardian the following rights:

> to have physical possession of a minor;
> to determine where and with whom he shall live;
> to consent to major medical, psychiatric and surgical treatment.

And, in creating a custodial situation the Court transfers from the parent to the guardian:

> the right and duty to protect, train, and discipline the child involved in the proceedings and the right and duty to provide the child with food, shelter, education and ordinary medical care.

Also attached (33 U.S.A. Sec. 632(6)) as rights of guardianship are:

> authority to consent to the child's marriage or enlistment in the armed services; authority to represent the child in legal actions and to make concerning the minor other decisions of substantial legal significance; and the authority to consent to adoption of the minor if specifically ordered by the Court.

Unless the Court deals in detail with the adoption authority, it remains with the parents. Even if it does so deal, after

---

1. Joel Handler, "The Juvenile Court and the Adversary System: Problems of Function and Form," 1965 Wisconsin Law Review, p. 9.

all these rights have been transferred, the parent retains residually the right to reasonable visitation and in some instances the duty to support the child.

Parents then do have rights in regard to their children. The strength of society's conviction that rights are attached to parenthood and the magnitude of those rights are distilled by the law's presumption that parents have the right to physical possession of a child. That is as descriptive of the situation as one can be, and if it rings a bit of the Dark Ages, it was not meant to do so. It simply does, and so does its application.

Although listing the rights parents have in their relationship with their children might lead one to conclude that little is left that can be categorized as children's rights, one reacts to this conclusion with disbelief. This after all is not the Dark Ages but 20th Century America, a society in which the general conception is that every citizen enjoys rights to an extent not exceeded by any other civilized society in the world's recorded history. Children are citizens. Do they not have rights?

If children do have rights, they are endowed with those rights even more indirectly than parents are vested with their prerogatives. Parents, it has been established, are presumed to have in regard to their children those rights that may be transferred from them by action of the court. In allowing such a transfer of rights, the law also permits the removal of certain parental duties such as providing a child with food, shelter, education and ordinary medical care, along with protection and

discipline. The parent is required to fulfill these obligations for the benefit of the child or risk losing "possession" of the child. The parental duties must be a child's rights. Children would seem to have then the rights to be fed, sheltered, educated, provided with medical care, protected and even disciplined. But do they? What is characteristic of a functional right? Can there be a right that is non-functional?

Rights, functional or not, imply a negative in that they are limits upon the powers of someone or something else. They establish that a person or the state may not in its dealing with the individual proceed beyond certain defined boundaries. In the case of parents and children, a child's right directs that a parent will not starve the child, neglect his education, abandon or abuse him.

On the positive side, a right presumes that it will be recognized. Rights are functional only when the negative aspect of limitation and the positive characteristic of recognition combine to form a thing of substance.

If a parent chooses to exceed the limits set upon his activities and ultimately not to recognize the rights of his child, society has developed no viable means to insure that recognition. Instead society has determined that it, through the state and specifically by means of the Juvenile Court, will assume the responsibility for recognizing the child's rights.

The attempt by the state to assume this responsibility may not be successful. Parents' rights, especially that of physical

possession of a child, are so well established and observed that infringing upon them by establishing that a child's rights have been abridged is a cumbersome process. The child's right is rather easily subordinated to the right of the parent and in many instances is recognized ultimately by no one. In those cases where the state is successful in proving that it, rather than the parent, must recognize the child's rights, during the period of litigation no one observes the rights in question.

One observes at this point that children's rights, if they have them at all, are lowest on the list of priorities. Society's are ultimate, parents' prerogatives come next and are reinforced by parents' status as full fledged members of society. Children's rights are decidedly last largely because society has never chosen to treat children as real persons complete unto themselves and whole in the eyes of the law.

It is telling to compare the difference in method society applies to deal on the one hand with an infringement of an adult's rights and, on the other, with that of the rights of a child. If the rights of Adult X are abridged by Y, Y is subject to a number of sanctions that are designed to coerce Y into observing rights and to force Y to make restitution if X incurred damages as a result of Y's action. If a child's right is infringed by his parent, little sanction in the form of coercion and restitution applies. The parent may lose possession of the child. In cases of neglect where the parent's actions demonstrate that he cares little for the child, one has to

question whether losing the child is any sanction at all. Society's attitude expresses that since the parent did not observe a child's right, the State will. Can a right be functional when the requirement for recognition of it may be transferred from one to another? Is a right functional when no real sanction applies for non-recognition? Can a right be a right when it is not functional? Do children, then, have rights? The answer to all these questions is "of course not", and affirms emphatically that children under the most "enlightened" of our Juvenile Codes do not have rights.

The law does not say that children have rights. It establishes that they have "interests" and it is in the best of those interests that the Juvenile Court is directed to act. A criminal court operates on the basis of respecting the defined rights of the most incorrigible of adult criminals, and those rights have become specific, detailed and obvious. A Juvenile Court is required to observe interests, interests which the Court itself must determine, and in cases involving allegations of abuse or neglect, the Court may determine those interests without giving so much as a nod to concepts of due process. A child in need of care for example, "in his best interest" may be excluded from portions of his hearing.

There are those who assert that a child subject to a delinquency petition has attained a unique and desirable position. For the first time in his life real, functional rights attach to his status, all in the name of Gerald Gault. Gault established that a child subject to a delinquency petition,

because the latter may result in substantial limitation upon the child's freedom, is entitled to such fundamentals of due process as counsel, notice of charges, confrontation of his accusers, and privilege against self-incrimination.

The Gault decision was heralded as a fantastic landmark which would result in massive change in society's treatment of its juveniles. It was so heralded by dreamers. Other than in Arizona, where concepts of justice seem to lack general acceptance (both Miranda and Gault appealed from the Arizona Supreme Court), the decision was not a surprise to most juvenile court administrators. The light had dawned around the time of Miranda.

Gault did not consider the matter of substantive due process. It did not change that a child, in his best interest, may be sentenced for an indeterminate period of time to a situation which amounts to incarceration. It did not prohibit the use of the indeterminate sentence for minor crimes, or, in the case of the status offender, for no crime at all. It did not limit the Juvenile Justice system's ability to label and stigmatize a child, to "treat" him during his whole adolescence, to fail to "cure" him, and to make him unfit to function in this society, all in his "best interest". Halt - In the Name of Gault!,[1] is little more than a mild application of the brakes. It is understandable, however, that its implications were misconstrued. Attaching some rights where none at all existed is a step of exceptional magnitude.

1. A phrase borrowed from Lisa A. Richette, The Throaway Children, New York, J.B. Lippencott Company, 1969, p. 298.

Rights to due process in a system that is a failure are no rights at all, and the system is a failure, a dark and dismal one. Three quarters of a century of observing the Juvenile Court substantiates that it has not achieved results "in the best interest" of anyone involved. It has not created for children the atmosphere in which they may experience that one element which is essential to childhood, the opportunity for growth. Nor has it provided for society fair treatment for its children and protection from behaviour society has labeled deviant.

And why have the system's failures been many and its successes few? Two rather obvious reasons explain that, the first of which is the inextricable entwinement in the operation of the Juvenile Court of a method which frustrates the results the Court was designed to achieve. Minimizing legal formalism and maximizing the impact of extra legal determinants violates every concept of liberty inherent in the development and application of law in the western world. If growth is the purpose, can the environment for growth be achieved by a process not concerned with rights and liberty either during its operations or at its termination? Is there any way to avoid that "Formalism is the twin born sister of liberty"?[1]

The second reason for the system's failure stems not from the operational aspects of the Court itself, but from the un-

1. Sir Frederick Pollock and Frederick William Maitland, The History of English Law, 2nd. ed., Cambridge at the University Press, 1968.

mitigated optimism of the philosophy upon which the Court is predicated. The little Victorian ladies of Illinois who put the whole thing together back in the 1890's really did believe that all the resources necessary to meet each child's needs would be developed. Every Juvenile Court Act on the books of the nation reflects that belief.

In seventy-five years those resources have not developed. There were not at the beginning nor are there now enough loving foster parents, group homes, residential treatment facilities or even decent institutions. There were not, there are not, nor, for the foreseeable future, will there be for these are the hardest of times. What didn't develop when dollars were valuable and plentiful certainly is not forthcoming now. The practical limits of liberalism were reached in the Sixties, and today one is confronted with a despicable sounding phenomenon by the name of "economic jurisprudence".

It is not as bad as it sounds and may prove when and if the fiscal holocaust subsides, to have been a productive influence. Economic jurisprudence causes one to look intensely at whether the present allocation of resources is producing desired results. He is forced to consider what he has, along with what he wants to have, and how best to achieve the latter by inventive application of the former.

More specifically, economic jurisprudence has subjected the Juvenile Court to close scrutiny. From lofty, prestigious places recommendations have been forthcoming that may move this

society, if only for economic reasons, to recognize that children must have rights.

A case in point is demonstrated by recommendations of Irving R. Kaufman, Chief Judge of the Second Circuit Court of Appeals and Chairman of the Juvenile Justice Standards Project recently sponsored by the American Bar Association and the Institute of Judicial Administration.[1] Judge Kaufman suggests that increased visibility of juvenile proceedings would contribute to greater judicial accountability and thus "duer" process for the child. He suggests the lifting of the secrecy that hides the juvenile process and would allow either the youth or the judge to request admission of certain persons to hearings, including the press. "In the best interest of the child", considerations have shrouded his adjudication in a cloak of secrecy.

The Kaufman project report would require that a juvenile have contentious counsel at every stage of the proceeding, and recommends the elimination of the "indeterminate sentence", i.e. that provision in juvenile law which allows the court to retain jurisdiction of the child, until he attains his majority. Instead, a specific sentence would be imposed. The Project's conclusion is that:

---

1. The Juvenile Justice Standards Project results are forthcoming for presentation to the 1976 convention of the A.B.A. Thirteen of twenty-five volumes are completed. The remaining twelve, along with a summary volume will be available this coming summer.

> The intent of the indeterminate sentence - to treat each juvenile individually, according to his needs and release him when ready - has been carried out rarely. Often youngsters have been forced to stay in juvenile centers for the sake of rehabilitation that is never provided.[1]

The Kaufman report would abolish the concept of the court's "acting in the best interest of the child" and would substitute new criteria which include consideration of the gravity of the crime, the degree of the juvenile's guilt, his age and his prior criminal record. In this regard, Judge Kaufman asserts:

> The rehabilitative ideal has proved a failure, frequently causing needless suffering in the name of treatment. Sentencing geared to the gravity of the offense on the other hand reduces arbitrary sentencing disparities and prevents harsh, vindictive sanctions from being imposed in the guise of benevolence.[2]

In terms of increasing fairness both in the adjudication process and in placement, much of what Judge Kaufman recommends makes sense. Caution, however, is advised because the "maximum" sentence is also a "minimum" in that no corrections administrator would have the power to release a juvenile and abort a placement without petitioning the Court for review. One must reserve comment on that portion of the report until the full argument is available for deeper study.

Serious consideration of the juvenile court has led many to conclude both nationally and in this state, that the juris-

---

1. Marcia Chambers, "Radical Changes Urged in Dealing with Youth Crime", New York Times, November 30, 1974, Sec. 1, p. 1.

2. Ibid.

diction of the juvenile court must be narrowed to exclude status offenses - those that would not be criminal if committed by an adult including truancy from home or school, consuming alcohol and being, in the language of Vermont's Juvenile Code, "without and beyond the control" of one's parent.

Simple concepts of general fairness and due process bring many to this conclusion. They assert there can be no justification for allowing the mighty arm of the law to descend upon a child for doing something that is "all right" if undertaken by an adult.

Less altruistically but very realistically, an understanding of "economic jurisprudence" brings others to the same conclusion. In the face of dwindling funds and rising costs, society, through the State is forced to ask just how much it can commit to protecting itself and reorienting "deviant" behaviour. Can the net of intervention be thrown over an ever increasing number of non-criminal "offenders" when the cost of treating those who have committed serious criminal acts creates hardship? Is there any purpose to be accomplished by intervening in the name of protecting society, with those who have not, in any real sense, committed crimes? Economic jurisprudence answers a firm "no" to both questions and asserts that prohibiting simple "moralistic meddling" on the part of the State will make placement situations available to children who can make better use of them.

And economic jurisprudence causes one to reflect not only on adjudication and placement resources, but on all those resources

expended "in the best interest" of children. The reflection process then focuses immediately and emphatically on that consumer of society's greatest expenditure of funds allocated to children, the public school.

Do the funds expended on behalf of educating children produce individuals who can function both economically and socially in this society? They do not, and in admitting that society is forced to consider that the school itself is a great deal more "delinquent" than the children it produces. Predicating a program upon some undefined concept of the "average child" and systematizing the stigmatization as "failure" of all other children is not only delinquent, but downright criminal. Reorganizing of the vast resources expended in the public school toward programs that create alternative roles in which children can achieve success would represent functional recognition of what should be a child's most fundamental right, the right not to be made a failure.

So it would seem that society has come to consider that it cannot continue to predicate if only for economic reasons, the recognition of its children's rights upon resources that never developed and those that never produced. But it will be society, through its legislatures that will make the ultimate determination that establishes rights for children. The courts are close to the limit of what they can effect within the framework of the law. Until that framework is less confining children will continue to have interests, not rights.