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Jurisdiction Over Misbehaving Children and Their Parents Under the New Indiana Juvenile Law

LEE E. TEITELBAUM*

If one wished to find a pure example of traditional juvenile court jurisdiction, Indiana law until 1976 would have served well. The jurisdictional definitions of that statute, essentially unchanged since creation of the court itself in 1905, read as follows:

"Delinquent Child" defined . . .

The words "delinquent child" shall include any boy under the full age of sixteen [16] years and any girl under the full age of eighteen [18] years:
- Who shall violate any law of this state or any ordinance of a city;
- Or who is incorrigible;
- Or who knowingly associates with thieves or other vicious or immoral persons;
- Or who is growing up in idleness or crime;
- Or who knowingly visits or patronizes any policy shop or place where any gaming device is or shall be operated;
- Or who patronizes, visits, or enters any saloon or wine-room where intoxicating liquors are sold;
- Or who knowingly patronizes, visits or enters any public pool-room or bucket-shop;
- Or who wanders about the streets of any city in the nighttime without being on any lawful business or occupation;
- Or who wanders about in any railroad yards or upon railroad tracks;
- Or who jumps upon any moving train or enters any car or engine without lawful authority;
- Or who uses vile, obscene, vulgar, profane or indecent language;
- Or who smokes cigarettes;
- Or who loiters about any school building or school yard;
- Or who is guilty of indecent or immoral conduct . . . .1

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1IND. CODE ANN. § 31-5-4-1 (Burns 1973)(repealed 1975) was directly descended from the original 1905 statute, 1905 Acts ch. 145, § 1. The language of this statute was substan-
Such a provision incorporates every strategy for extending jurisdictional control over children except abandonment of the rule of law itself. It reaches behavior which would be criminal if done by an adult and that which would not; misconduct directed at strangers and intrafamily conflict; acts that are listed with great particularity and, in the event the list is not quite exhaustive, conditions (such as “growing up in idleness or crime”) which are designedly vague and comprehensive.

If it seems that this statute would reach every child about whom concern might for any reason be entertained, that was its intent. And if it seems as well that a vast array of misbehavior was subject to identical sanction, that also was intended. Traditional juvenile court theory was almost entirely concerned with the condition of the children with whom it dealt rather than with either their specific acts or the relationship of those acts to rules of law. Judge Julian Mack expressed this positivist view of juvenile law with unmatched clarity when he suggested that “[t]he problem for determination by the [juvenile court] judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.”

Judge Mack’s view, which was widely shared by proponents of the juvenile court movement, logically calls for abandonment of specific rules defining the occasion for intervention and for substitution of a statute which simply authorizes intervention upon a showing of need for treatment. This would have been a revolutionary step in our system of law, but would accurately have reflected the goals of the “child-savers” who called forth the juvenile court. Ultimately this step was not taken.

Initially modified in 1976, IND. CODE § 31-5-7-4.1 (Cum. Supp. 1979)(repealed 1979), but, except for the elimination of murder from juvenile court jurisdiction, its reach remained essentially the same. While the listing of specific acts of misconduct was removed, most of them remain within the court’s purview either through separate statutes making the behavior wrongful or as a basis for a finding of incorrigibility.

In this, the juvenile court falls squarely within the current of positivist criminology. Classical criminology primarily concerned itself with the relationship of rules governing behavior to social institutions. Thus, for Montesquieu, “[p]olitical liberty consists of security, or at least the belief that one is secure. This security is never more threatened than by public or private accusations of crime. It is, thus, on the excellence of criminal laws that the liberty of the citizen principally depends.” MONTESQUIEU, De L’Esprit des Lois, L. XII, ch. 2, in OEUVRRES DE MONTESQUIEU 280 (1843) (author’s trans.). For a positivist, in contrast, attention is devoted to the condition or needs of the actor rather than to the relationship of his act to legal institutions. See D. MATZA, DELINQUENCY AND DRIFT 3-4 (1964).


Traditional juvenile court theory, taken whole, would have replaced our accustomed system of justice by prescriptive rules with instrumental rules not specified in advance and defined only by reference to some general social goal (such as prevention of crime). Such a statute might read, for example, “the Juvenile Court shall have jurisdiction over any child for whom intervention is necessary to assure his sound development.” This would mean, at base, abandonment of what is ordinarily described as the rule of law. See Katz & Teitelbaum, PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law, 53 IND. L.J. 1 (1977-78).
However, juvenile court legislation, as the original Indiana statute reveals, came as close to that ideal as reliance on prescriptive rules allowed. By incorporating extensive jurisdictional grants, these statutes sought to reach any child in need of help, however unimportant his or her behavior might seem by itself. Moreover, traditional statutes treated all the children it reached in much the same way. Criminal conduct, non-criminal misbehavior, and parental neglect—were each principally important not as discrete forms of misconduct but as symptoms of maladjustment. In each instance, intervention was thought necessary because of the apprehension that, without assistance, the child would engage in future wrongdoing; in each, the necessity for intervention was attributed to parental failure of some kind; for each, the same remedy—rehabilitation through governmental services—was the same.

Given these premises, there was no reason to differentiate among degrees of criminal conduct for adults nor to distinguish criminal from noncriminal misconduct. And, indeed, no formal differentiation existed under traditional law and practice. Statutes such as that formerly gov-

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6Neglect statutes were an integral part of juvenile court jurisdiction, and shared much the same characteristics as provisions addressed to delinquency. The original Indiana law, which again could stand for many others in its reach, defined as neglected any child of appropriate age who has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame, or with any vicious or disreputable persons; or who is employed in any saloon; or whose home, by reason of neglect, cruelty or depravity on the part of its parent or parents, guardian or other person in whose care it may be, is an unfit place for such child; or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship.

IND. CODE ANN. § 31-5-5-2 (Burns 1973)(repealed 1974), which was drawn from 1907 Acts ch. 41, § 2, at 59. Section 31-5-5-1 reached "dependent" children who are defined as youths "dependent upon the public for support, or... destitute, homeless, or abandoned."

7In true delinquency cases, where the child has violated some generally applicable law, the prediction of dangerousness involved is the same as that relied upon in the case of adults. See generally Katz, Dangerousness: A Theoretical Reconstruction of the Criminal Law (pt. I) 19 BUFFALO L. REV. 1 (1970), (pt. II) 21 BUFFALO L. REV. 603 (1972). For evidence that incorrigibility and neglect jurisdiction were also founded on an apprehension that the child who was disobedient or neglected would develop into a law violator, see Teitelbaum & Harris, Some Historical Perspectives on Governmental Regulation of Children and Parents, in BEYOND CONTROL 1 (1977); Fox, Juvenile Justice Reform: An Historical Perspective, 22 STAN. L. REV. 1187 (1970).

8See notes 85-86 & accompanying text infra.

9See, e.g., Mack, supra note 3, at 107:

Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?

... (I) is this thought—the thought that the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state... because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities [that characterizes the juvenile court].
erning Indiana practice authorized use of the entire range of dispositional alternatives, from probation to confinement in an industrial school, for any child found "delinquent," regardless of the underlying charge. Moreover, empirical evidence indicates that, in many jurisdictions, no particular relationship existed in fact between the "offense" committed and the dispositional order entered. Incorrigible children were virtually as likely to find themselves in an industrial school as those who committed crimes.

Over the last two decades, however, a considerable body of revisionist legislation and literature has appeared. According to this school, children who are "incorrigible" or engage in other conduct wrongful only for minors (such as truancy or curfew violation) ought not be treated the same as children who commit seriously antisocial (i.e., criminal) acts. Several grounds for differentiation are typically urged. The first is that, despite all hopes to the contrary, the term "delinquency" has become a highly stigmatizing label, connoting "junior criminality." In view of this development, it is inappropriate to apply such a label to children who have not in fact committed any crime. Moreover, the argument continues, it cannot safely be assumed that children who are disobedient or run away are "bad," or even that their acts are "bad," whereas the wrongfulness of criminal misconduct is axiomatic. Finally, those who argue for change in jurisdictional standards suggest that the kinds of treatment appropriate for children who commit crimes may not be appropriate for children whose problem is conflict within the family.

10Under the prior Indiana Code, a court, upon a finding of delinquency (which included all forms of criminal and noncriminal misbehavior) could make any order allowed by the statute. Its discretion was governed not by the specific conduct involved but presumably by its view of the child's best interests. IND. CODE ANN. § 31-5-7-15 (Burns 1973)(repealed 1979). This was also true under the 1976 revision. IND. CODE § 31-5-7-15 (1976)(repealed 1979).


12See, e.g., M. Rector, PINS: AN AMERICAN SCANDAL (1974) (estimating that between 45 and 55 percent of the 66,000 youths confined in training schools are status offenders); Klapmuts, Children's Rights: The Legal Right of Minors in Conflict with Law or Social Custom, 4 CRIME AND DELINQUENCY LIT. 449, 470-71 (1972).

deed, in an echo of the original juvenile court theory, which sought to separate erring children from “hardened” adult offenders, the point is made that commitment of children who have not committed crimes with those who have may lead to the corruption of the former and, thereby, to more serious behavior on their part.16

Adoption of these views has resulted in division of what was traditionally “delinquency” jurisdiction into two distinct categories, one of which is still denominated “delinquency” but reserved for criminal misconduct, and the other one bearing some new title (such as “Persons in Need of Supervision” (PINS) or the like) which reaches behavior wrongful only for children.17 The strength of this development is conveyed by the fact that, while no state limited the definition of “delinquency” to criminal acts in 1950,18 approximately half of all current juvenile codes now do so.

The new Indiana Juvenile Law, effective in October of 1979,19 represents a compromise between the traditional approach that has obtained since 1905 and the revisionist school. Certainly it follows the traditional view in its definition of delinquent acts, which includes not only commission of crime but departure from home without reasonable cause or permission, truancy, habitual disobedience to the reasonable and lawful commands of his parent, guardian, or custodian, and curfew violation.20 It is equally certain, however, that the new code departs from the traditional approach in a number of respects. In connection with assertion of jurisdiction itself, it differentiates the wrongfulness or seriousness of criminal and noncriminal misbehavior in much the same way that a revisionist would. The jurisdiction of the court is based upon a finding that the respondent is a “delinquent child.”21 Whereas any child who commits a crime is, for that reason alone, a “delinquent child” and therefore subject to the court’s dispositional power, a youth who is charged with any other kind of “delinquent act” can only be found a “delinquent child” upon two separate findings: first, that he did such an act and, second, that he “needs care, treatment or rehabilitation that he is not receiving, that he is unlikely to accept voluntarily, and that is unlikely to be provided or accepted without the coercive intervention of the court.”22 Moreover, even if such a showing is made, incorrigible or ungovernable children cannot be committed to either the state industrial school or a secure private facility. They may only be placed on probation,

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16See, e.g., Gough, Beyond-Control Youth in the Juvenile Court—The Climate for Change, in BEYOND CONTROL 271, 273 (1977).
17For a review of current treatment of noncriminal misbehavior, see id. app., at 297.
20Id. § 31-6-4-1(a) (Cum. Supp. 1979).
21Id. § 31-6-4-1(b).
22Id. § 31-6-4-1(b)(2).
ordered to participate in out-patient treatment, or placed in a foster home or nonsecure shelter care facility.\textsuperscript{23} And, under certain circumstances, the child whose conflict is with his parents may be emancipated rather than brought back into line.\textsuperscript{24}

In quite another direction, however, the new Juvenile Law reaches even further than either its predecessors or most jurisdictions now providing differential treatment for criminal and noncriminal misconduct. While traditional theory frankly held parental failure responsible for youthful misconduct,\textsuperscript{25} it never pursued this assumption to its logical conclusion by making parents as well as children directly subject to the court's power.\textsuperscript{26} And, though a revisionist may also see the parents as equally blameworthy or even more so,\textsuperscript{27} the child usually remains the sole party to proceedings based on his incorrigibility. The new Indiana law expressly provides, however, that the parents of a child charged with delinquency may be made parties for dispositional purposes and, therefore, may be required to participate in some therapeutic regimen together with the child who is the initial respondent in the case.\textsuperscript{28}

The purpose of the following discussion is to examine this compromise. Part I addresses the accommodation between traditional and revisionist positions concerning the treatment of juvenile offenders. Part II considers the Code's extension of jurisdiction to the parents of delinquents together with the issues that enterprise presents. The last part raises a number of questions concerning the premises behind and effectiveness of continued court jurisdiction over children who engage solely in noncriminal misbehavior.

**The Old and the New in Treatment of Juvenile Offenders**

**The Definition of Delinquency**

Commission of Crime

The Indiana law defines delinquency, as we have seen, in a traditional sense, including both criminal and noncriminal misbehavior. Ordinarily, the first of these provisions, defining delinquency in terms of "an act that would be a crime if committed by an adult," would occasion no comment.

\textsuperscript{23}Id. § 31-6-4-16(e), -16(g).

\textsuperscript{24}Id. § 31-6-4-16(e)(5).

\textsuperscript{25}See note 8 & accompanying text supra.

\textsuperscript{26}Curiously, a number of jurisdictions hold the parents responsible in tort for damage done by their children in connection with delinquent behavior, but do not make them parties to juvenile court proceedings and therefore cannot directly require their participation in a treatment program. On the tort liability of parents, see IND. CODE § 31-5-10-1 (Cum. Supp. 1979)(repealed 1979); Note, A Constitutional Caveat on the Vicarious Liability of Parents, 47 Notre Dame Law. 1321 (1972).

\textsuperscript{27}See Rubin, supra note 14, at 514.

\textsuperscript{28}IND. CODE § 31-6-4-16(i) (Cum. Supp. 1979).
However, the scope of this conventional provision is expanded by definition of the apparently innocuous term “crime” to mean “an offense for which an adult might be imprisoned under the law of the jurisdiction in which it is committed.”

The latter definition, it has been observed, clarifies the law by authorizing an Indiana court to assert jurisdiction over a child who commits an offense in, say, Ohio, or violates a federal statute.

This clarification raises interesting and difficult questions as to crimes committed in other states. It certainly rejects the ancient learning of The Antelope, in which Chief Justice Marshall reiterated the general proposition that “[t]he Courts of no country execute the penal laws of another . . .” While this doctrine has been qualified with respect to civil laws having some punitive aspect and even as to criminal violations which have some connection with the forum state, the Indiana statute draws none of these lines. Its terms reach criminal acts planned, begun, and concluded outside the forum state and with no effect upon that state.

Perhaps the extraterritoriality provision can be seen as an effort to provide rehabilitation in the jurisdiction where the offender will probably live. In this, it follows the general tradition of juvenile court theory. If, as that theory would have it, the principal concern of the juvenile court is to rehabilitate the child rather than to allow an injured community opportunity to express its outrage or to republish the bounds of its laws, it is sensible to allocate jurisdiction to the court where rehabilitation can best be carried out (ordinarily, where the child resides) rather than to the court where the injury occurred.

Whether such a justification can withstand

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29 Id. § 31-6-1-2 (emphasis added).
30 Kerr, Foreward: Indiana’s New Juvenile Code, 12 IND. L. REV. 1, 4 (1979). The Illinois definition of delinquency is equally broad, reaching any crime, “regardless of where the act occurred.” ILL. REV. STAT. ch. 37, § 702-2 (1978). However, no reported cases deal with this provision, and its validity remains open.
31 Jurisdiction over acts that would constitute federal crimes, such as robbery of a federally-insured bank, presents no issues that do not obtain with respect to state criminal court jurisdiction over the same acts.
33 Id. at 123.
34 Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 HARV. L. REV. 193, 204-05 (1932).
35 As, for example, where the crime committed elsewhere produces an effect in the home state, or a resident of the home state is an accessory to a crime carried out elsewhere. See George, Extraterritorial Application of Penal Legislation, 64 MICH. L. REV. 609, 622-23 (1966); Rotenberg, Extraterritorial Legislative Jurisdiction and the State Criminal Law, 38 TEX. L. REV. 763, 770-80 (1960); Berge, Criminal Jurisdiction and the Territorial Principle, 30 MICH. L. REV. 238 (1931).
36 This notion may be reflected, although imperfectly, in the venue provision allowing proceedings to be brought in the county where the delinquent act occurred or where the child resides. IND. CODE § 31-6-7-7(a) (Cum. Supp. 1979). One wonders whether this theory, if it indeed exists, would not better be served, however, by requiring that at least dispositional hearings be held in the county of residence, wherever the wrongful act occurred.
37 It may appear that the provision seeks to assure that some state will be able to assert jurisdiction over the child, since extradition does not ordinarily reach juvenile offenders and the Interstate Compact on Juveniles only requires return of children already ad-
the constitutional and policy issues created by extraterritorial jurisdiction is not, however, so apparent as its rationale.

In point of law and policy, a provision of this kind creates significant questions. There are sound reasons, some of which may reach constitutional proportions, for generally requiring that prosecution for crime occur in the place where it was committed.38 One class of concerns is attributable to notions of sovereignty. It is true that the Indiana law does not seek to apply its own definition of crime to acts committed elsewhere, thereby avoiding a traditional objection to extraterritorial statutes.39 However, the statute does present the question of whether the legislative jurisdiction of a state is not confined to the geographical location of acts or omissions and their effects.40 The only basis upon which jurisdiction would seem to be based is the citizenship of the respondent, and even this is not expressly required by the juvenile code.41

A variety of reasons might be presented as justifying refusal to enforce in one state obligations, either civil or criminal in nature, which have arisen under the laws of another state. Some of these reasons have already been mentioned in previous paragraphs; others have not. They may be very briefly summarized as (1) historical reasons based on the intensely local character of early legal systems, including the fact of collective responsibility of the community for acts done within its borders and the notion of the trial body as a jury of neighbors personally acquainted with the facts in the case; (2) respect for the sovereign rights and pretensions of foreign states and nations, coupled with the idea that the diplomatic processes of extradition and interstate rendition would give adequate relief against absconding parties; (3) procedural difficulties, such as the non-availability at the forum of a remedy by which reasonably equivalent relief could be assured, and the traditional procedure in criminal cases of action brought by the injured state as a plaintiff; (4) local public policy opposing the type of claim presented for enforcement; (5) very real practical inconveniences, particularly (a) the added expense to taxpayers of conducting trials and enforcing sentences and judgments, coupled with possible overcrowding of dockets by unnecessarily imported suits, (b) expense and hardship to the defendant from having to appear with witnesses at a distance from the place where the events in question occurred, (c) possibly increased difficulty of reliable proof of facts at a distance from the place of their occurrence, and (d) possible ignorance and difficulty of proof of foreign law as such; (6) American constitutional guaranties to criminal defendants of the right to trial by jury in the vicinity of the offense.

Leflar, supra note 34, at 201-02.


Leflar, Conflict of Laws: Choice of Law in Criminal Cases, 25 Case W. Res. L. Rev. 44 (1974). Professor Leflar also argues that criminal claims are “local” rather than “transitory” actions. Id. at 48.

While it is generally said that citizenship is sufficient to establish jurisdiction in the context of international law, it is not plain that the same basis will suffice for domestic purposes. Moreover, the Indiana Juvenile Code nowhere requires that a child, to be subject to juvenile court jurisdiction, be a citizen or resident of Indiana. The venue provision re-
Another set of problems concerns the procedural due process claims of an accused, who may be hard put to investigate and prepare a defense against a charge of crime which took place elsewhere. In the area of criminal proceedings, it has been suggested, a statute allowing such a prosecution may offend federal and state constitutional rights to trial by jury in the state or county where the crime was committed. It is a nice and novel question whether that proposition, if it indeed applies in the criminal arena, would operate with respect to delinquency proceedings. The United States Supreme Court has held that there is no federal constitutional right to trial by jury in such matters, and the Indiana Supreme Court has reached the same conclusion with respect to the state constitutional jury trial provision. At first glance, therefore, it seems that since there is no right to jury trial at all in delinquency cases, there cannot be a right to jury trial in any particular venue. It might, however, be suggested that the right to trial by jury and the right to trial in the locality where the crime was committed are separate, or at least separable. The “jury” aspect involves a right to a trier of fact drawn from the community rather than from the ranks of governmental employees. This, it has been held, is both unnecessary to accurate fact-finding and destructive of certain traditional values which ought be preserved in juvenile court proceedings. The locality aspect, on the other hand, protects the respondent from removal from a friendly and supportive community to a potentially hostile one (which will not happen under the Indiana law), and also provides some assurance that the accused will have access to witnesses and evidence necessary to preparation of his defense. The latter interest is surely compromised by the extraterritoriality provision of the juvenile code. The poverty of most juvenile court clients and the budgetary limitations characteristic of public defender offices and appointed counsel arrangements make it unlikely

quires, however, that juvenile court proceedings be brought in the county where the child resides or the act occurred, IND. CODE § 31-6-7-7(a) (Cum. Supp. 1979), which may act as a residence requirement in this situation.

The 6th amendment entitles a defendant to trial by “an impartial jury of the State and district wherein the crime shall have been committed . . . .” U.S. CONST. amend. VI. Recalling that the Bill of Rights only limited the powers of Congress until passage of the 14th amendment, it seems that the primary concern of the 6th amendment lay with placement of venue for federal crimes in federal courts sitting far distant from the locus of the criminal activity. However, the reason for this concern seems applicable to prosecutions by states as well: As Mr. Justice Story observed, in discussing this amendment, “a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence.” 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 528 (2d ed. 1851).

The Indiana Constitution provides that “[i]n all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed. . . .” IND. CONST. art. 1, § 13.


See note 42 supra.
that juvenile respondents would ordinarily be able to investigate and prepare to defend against charges arising out of state, which in turn necessarily prejudices the process by which factual determinations will be made. To the extent that substantial interference with the accuracy of the adjudicative process is implicated, the statute presents grave due process problems in precisely the area that has given the Supreme Court most concern.48

The same points can be made in connection with the child’s right to the effective assistance of counsel, which is unambiguously secured by constitutional doctrine.49 Failure or inability to investigate the crime charged and prepare a defense may in itself deny the client effective assistance or greatly contribute to inadequacy in that respect, as Indiana courts have consistently recognized.50 While most of the Indiana cases deal with lack of time to prepare a defense, a statutory scheme which makes investigation and preparation practically impossible in a great number of cases would seem to present due process concerns of the same kind.51

Noncriminal Misbehavior

The juvenile law retains the traditional view in labeling “delinquent”
children who have not committed crimes as well as those who have. Its
departure from the revisionist position, which finds application of that
label inappropriately stigmatizing for children who engage only in non-
criminal forms of misbehavior, is at least initially surprising, since dif-
f ferentiation occurs in other respects. Several rationales for this decision
can, however, be hypothesized. It might be that (1) the legislature did not
think the “delinquency” label stigmatizing; (2) the legislature may have
thought that any label would, immediately or over time, come to be as
disadvantageous as “delinquency” and, therefore, creation of a new label
for noncriminal misconduct would be futile; (3) the legislature thought
the label to be as appropriate for children who are incorrigible or truant
as for those who commit crimes, even if it is stigmatizing; or (4) the
legislature might have decided that, for reasons apart from stigma, it is
more desirable to classify all misbehaving children as a single group than
to differentiate among them.

The first three of these rationales focus on the existence and
significance of stigma for juvenile offenders. The initial hypothesis—that
adjudication as delinquent is not a stigmatizing occurrence—would in-
deed firmly commit the juvenile law to a traditional view. It was an
article of faith for those who created the juvenile court that its operation
would not create the hostility, fear, and social disadvantage associated
with prosecution in the criminal justice system.\textsuperscript{62} To this end, a new
vocabulary for the juvenile court was adopted and is still in use. A child
was a “delinquent” rather than a “criminal,” and was so “adjudicated”
rather than “convicted.” Institutionalization involved a “disposition”
rather than a “sentence,” and the “respondent” (not “defendant”) was
placed in a “school” or, at worst, a “reformatory” rather than a jail,
prison or penitentiary.\textsuperscript{63} Moreover, records and hearings of the juvenile
court were usually treated as confidential and available only to persons
specifically named by law or having a special interest in the case.\textsuperscript{64}

It is easy to be cynical about the prospects for success of so mild and
well-intentioned an approach, but that would overlook a genuine concern
avoid the social disadvantage—both formal and informal—intimately
associated with conviction for crime. At the same time, it is by now
tolerably clear that these expectations have been refuted by practical ex-
perience. The public is thought to associate delinquency with “junior
criminality” and few persons are misled about the nature of an “in-

\textsuperscript{62}“[I]n this new court we tear down primitive prejudice, hatred, and hostility toward the
lawbreaker . . . and we attempt, as far as possible, to administer justice in the name of
truth, love, and understanding.” H. Lou, Juvenile Court in the United States 2 (1927).
\textsuperscript{63}See W. Stapleton & L. Teitelbaum, supra note 11, at 15.
\textsuperscript{64}The original Indiana Juvenile Code treated hearings as confidential, but was amended
in 1957 to leave the question of publicity to the judge’s discretion. Ind. Code § 31-5-7-15
(1976)(repealed 1979). The new juvenile law goes even further in the direction of disclosure
of information by recommending that hearings be public in certain cases. Id. § 31-6-7-10
dustrial school." Nor, as the Supreme Court observed more than ten years ago in *In re Gault*, have legislative confidentiality provisions been effective in maintaining the secrecy of juvenile court proceedings.

It is true that much of the research concerning the operation of stigma cannot be considered conclusive on the direction or extent of effects; however, its existence cannot reasonably be denied. And, it should be added, the new juvenile law does not seem overconcerned with minimizing the danger of disadvantageous labeling, since it allows and indeed apparently encourages publicity in connection with certain kinds of delinquency proceedings.

The second rationale—that the legislature might have thought that any label attached to juvenile misbehavior would engender stigma sooner or later—is more difficult to evaluate. Certainly that assumption cannot be rejected categorically, and no systematic studies of the effects of labeling in jurisdictions with separate jurisdictional categories for non-criminal misbehavior exist. It seems possible and even likely, however, that the disadvantage associated with a label such as "PINS" or even "incorrigible" might be different from that accompanying a label of "delinquency." The community, to the extent that it is aware of the label at all, might think differently of the child whose behavior does not involve seriously antisocial acts than it does of one whose conduct they would classify as "criminal," even if the court does not. The child's peers might, even more probably, make such a distinction in the way they view the respondent. That is not to say that no social disadvantage occurs in consequence of court action for the *soi-disant* status offender, but that the disadvantage may be less grave and, perhaps, less permanent.

The third explanation advanced above is not empirically based. The legislature may have taken the view that refusal to obey or running away is wrongful and seriously so, which we take to be true of criminal misconduct. This premise seems, however, increasingly untenable on a number of grounds. In the first place, family conflict may say quite as much about parents as it does about children. As Sol Rubin observed some time ago:

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57 387 U.S. 1, 24 (1967).
59 See note 54 supra.
We have all seen situations... in which the child beyond control is sound and healthy, and the lack of control is due to attempts at excessive control, to highly disciplinary or authoritarian attitudes in control, or to some ignorance or neurotic need on the part of the parent that a normal child may naturally resist.

True, the Indiana law—like many others—limits incorrigibility to disobedience of “reasonable and lawful” parental commands and, with respect to running away, requires that the child have no “reasonable cause” for absenting himself from home. These notions are, however, so indefinable that they cannot be effective instruments for determining when a child is very wrong and when he is not. A given command or set of commands may be “reasonable” in light of parental views about how their child should grow up, which the juvenile court would (and should) only rarely contradict, and yet be so unusually strict as to provoke understandable (if not strictly justifiable) reaction from the child. The same may be said of the “good cause” qualification on jurisdiction over children who run away. One suspects, although there is little decisional guidance in this area, that “good cause” for leaving home implies severe parental abuse or neglect. Yet the attitudes described by Rubin, which will only rarely rise to the level of abuse or neglect, may lead children to leave home briefly without indicating serious character disorders on their part.

A second reason for doubting the proposition that noncriminal misbehavior involves wrongfulness as serious as criminal activity lies in the nature of the parent-child relationship, within which incorrigibility and running away take on meaning. This relationship is frequently and probably universally accompanied by stress and conflict at some point. Both parents and child seek an accommodation between two legitimate and interrelated goals: continued socialization and development of autonomy. The former is a value operational since infancy and for a long period implies frank control of decisionmaking by the child. As time goes on, however, socialization also implies facilitating the development of a capacity for choice if, at some point, meaningful adulthood is to be attained. The resulting dynamic has been described in the following way:

As the child grows, the level or degree of parental authority is reduced, and this reduction corresponds to growth in the child’s capacity for autonomous action and choice. Unless both parents and children agree with respect to the appropriate am-bits of control and autonomy, however, the parents will regard

6Rubin, supra note 14, at 514.
6IND. CODE § 31-6-4-1(a) (Cum. Supp. 1979).
Katz & Teitelbaum, supra note 5, at 17.
the child as ungovernable (excessively or prematurely autonomous), or the child will regard parental authority as unjustified, or both.65

If, as seems to be true, conflict between parent and child is universal, it cannot serve as the basis for a judgment that disobedient conduct indicates something seriously wrong with the child. It is not true that the vast majority of adults, most of whom engaged at some time in repeated instances of misbehavior at home, are poorly socialized or even dangerous, which would be true if youthful misconduct within the family justified grave concern for the child's future. Rather, most behavior of this kind is transitory in character, and will be outgrown or rendered irrelevant by the achievement of majority. To treat such behavior in the same way one treats serious crime is both inept and potentially harmful.66

Indeed, something of these doubts seems to be reflected in the dispositional provisions of the new Code. Under former law, the judge could, once a youth was found delinquent, choose any disposition for the respondent, guided only by the child's needs and the largely theoretical limits of sound discretion. Juveniles who committed crimes could be and doubtless were released to their families on probation, and others who were incorrigible could be and frequently were committed to the care of the Department of Corrections and a secure facility.66 Under the new law, however, a child who has engaged only in noncriminal misconduct can not be placed in a secure institution of any kind.67 This approach seems

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65Id. at 18.
66See Rosenheim, Notes on Helping Juvenile Nuisances, in PURSUING JUSTICE FOR THE CHILD 43 (1976). Youth after youth, bewildered by the incapacity to assume a role forced on him by the inexorable standardization of American adolescence, runs away in one form or another, dropping out of school, leaving jobs, staying out all night, or withdrawing into bizarre and inaccessible moods. Once "delinquent," his greatest need and often his only salvation is the refusal on the part of older friends, advisers, and judiciary personnel to type him further by pat diagnoses and social judgments which ignore the special dynamic conditions of adolescence.


66In 1973, it appeared that one-third of the residents of the Indiana Boys School, described as "a medium security state correctional facility for boys 12 to 18 years of age," were not guilty of any criminal offense. Nelson v. Heyne, 355 F. Supp. 451, 459 (N.D. Ind. 1972), aff'd, 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974). The severity of this sanction is indicated by the opinion in Heyne where the court condemned the use of corporal punishment, solitary confinement, overcrowding, inadequate staff training, and lack of program at the Boys School. For a recent instance, see Simmons v. State, ___ Ind. App. ___ 371 N.E.2d 1316 (1978) (commitment of 14-year-old girl who was truant and incorrigible to Indiana Girls School).

67IND. CODE § 31-6-4-16(g) (Cum. Supp. 1979). A delinquent child who engages in noncriminal misbehavior may be placed on probation, ordered to receive out-patient treatment at a medical, psychiatric, psychological or educational facility, or placed outside the home in a foster home or (non-secure) shelter care facility. Id. § 31-6-4-16(a), -16(d). In addition, any delinquent child may be wholly or partially emancipated where the court finds that he or she wishes to be free to parental control, is socially and financially capable of independence, and can present an acceptable plan for living away from his or her parents. Id. § 31-6-4-16(e).
consistent with the revisionist approach to noncriminal juvenile misconduct and difficult to reconcile with maintenance of the traditional view concerning labeling of offenders. Surely prohibition of secure facilities for youths who are incorrigible or runaway suggests that their behavior does not require close control and that it is not as dangerous, nor as suggestive of future dangerousness, as violation of a criminal law. While there is much to be said for this view of noncriminal conduct, its consistency with application of the delinquency label is far from obvious.

If notions of labeling and stigma do not warrant equivalent treatment of criminal and noncriminal misbehavior, one must look to other explanations for such an approach. It may be that equivalent treatment for purposes of the definition of delinquency is designed not to protect the interests of the noncriminal offenders but of children who do commit crimes. When “serious” misconduct is removed from the definition of delinquency jurisdiction, there may be some tendency to lose concern for delinquents since they appear to be—and are in fact defined as—young criminals. Sympathy and perhaps services may be reserved for the new category of children who can be thought of as being victims as often as they are offenders. For “delinquents,” secure detention facilities and industrial schools will suffice.

This concern, if it does motivate the legislative definition of delinquency, is certainly appropriate. Criminality is hardly an undifferentiated category; there are children who have committed serious offenses and those who have not. A child who puts a BB through his neighbor’s window has committed an act which, when translated into the humorless language of the criminal code (e.g., Criminal Damage to Property), seems far more serious than the underlying behavior suggests. Moreover, age and maturity matter; a thirteen-year-old who rides in a stolen car has doubtless done something wrong, but may nevertheless be far from a hardened criminal. And, it should be remembered, there is an avenue for transferring to adult courts those children whose crimes are very serious indeed and who do seem committed to antisocial behavior. Accordingly, the children who remain in the juvenile court system and may be adjudicated delinquent are presumably (and frequently in fact) amenable to more constructive and less damaging forms of treatment than we employ for adult offenders.

Indeed, the new Code goes farther in the revisionist direction than do many states which have unreservedly adopted that view. While those jurisdictions have separate labels for status offenders, the vast majority allow both “delinquents” and “Persons in Need of Supervision” to be committed to training or industrial schools, in which they receive identical treatment. IJA-ABA, JUVENILE JUSTICE STANDARDS PROJECTS, STANDARDS RELATING TO NON-CRIMINAL MISBEHAVIOR 5 (Tent. Dr. 1977) [hereinafter cited as NON-CRIMINAL MISBEHAVIOR]. And, in even the handful of states which prohibit the commitment of children who do not commit crimes to institutions housing delinquents, they are commonly subject to placement in other secure institutions which are pretty much indistinguishable from industrial schools in facilities and program. See, e.g., IJA, THE ELLERY C. DECISION: A CASE STUDY OF JUDICIAL REGULATION OF JUVENILE STATUS OFFENDERS (1975).
It is, however, a troubling political compromise which says that we may treat one group of children inappropriately in order to prevent inappropriate treatment of another group. There is first an ethical question about whether trading of this sort is legitimate, and there is next the question of efficacy. Will it reduce the stigma and social disadvantage visited upon criminal delinquents to make it unclear whether “delinquency” connotes criminal misconduct? Or will it simply result in social disadvantage to all children labeled “delinquent”? Bad money may drive out good here as well as in classical economics. The net gain in resources for the law-violating children may, therefore, be slight, particularly since service providers are unlikely to be confused about the various meanings of delinquency.

The Dual Condition

The new juvenile law remains traditional, therefore, in treating both criminal and noncriminal misconduct as “delinquent acts” and in providing that a youth who engages in either may be labeled a “delinquent child.” However, the law does differentiate according to the nature of the conduct with respect to the basis upon which a child who commits a delinquent act will be labeled a “delinquent child.” Under the former law, commission of a delinquent act made a delinquent child; no inquiry beyond behavior was required for an assertion of jurisdiction.\(^7\) The new law imports, for some children, what may be called a “dual condition”: the respondent will only be adjudicated a “delinquent child” upon a showing that he or she not only committed a “delinquent act” but is presently in need of care, rehabilitation or treatment that will not otherwise be available or accepted.\(^8\) However, this dual condition operates only with respect to children whose delinquent acts are noncriminal in nature; those who commit crimes are for that reason alone delinquent children, as they were under the previous statute.

Now, it is not unusual for a juvenile code to incorporate a dual condition. Indeed, to do so is perfectly consistent with traditional juvenile court theory, which has always been more interested in the child’s condition than in the specific acts of misconduct that brought him before the court. Most commonly, this emphasis has resulted in the assertion of jurisdiction whenever treatment seemed necessary without strict regard to the competence or sufficiency of proof of particular misconduct.\(^9\) However, direction of attention to the child’s condition has also led to the view that, since the occasion for intervention is need for treatment, jurisdiction will not be asserted where no such need exists, even where some misbehavior can be established. Accordingly, a number of jurisidic-

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\(^7\) *Id.* § 31-5-7-4.1 (repealed 1979).

\(^8\) *Id.* § 31-6-4-1(b).

uctions have adopted a definition of delinquency that requires proof both of a delinquent act and of a present need for coercive intervention,\textsuperscript{73} such adoption usually, but not always, accomplished by statute.

What is unusual about the Indiana version of the dual condition is that it is imposed only in respect of children whose "delinquent acts" are non-criminal in nature. This limitation may reveal some acceptance of the revisionist view that not all juvenile misconduct is equal in significance and that there are cases involving incorrigibility, truancy, running away or curfew violation in which the child's misconduct does not justify a prediction of future dangerousness and need for rehabilitation. It is a recognition that noncriminal misbehavior is ambiguous in what it says about children, unlike (it seems to follow) behavior in violation of the criminal law.

In one sense, this is a sensible accommodation of revisionist thought and traditional labeling. That disobedience may be attributable more to parental intransigence than to youthful error, and that even habitual disobedience may be transitory, is recognized through the requirement that something beyond misconduct be shown to justify an adjudication. However, once it can be said that there is some ground for concern and intervention, the respondent is in the same position as the child whose behavior is presumed to be unambiguous, and will be labeled in the same way.

One wonders, nevertheless, whether this approach does not make both too little and too much of the distinction between criminal and non-criminal misconduct. It may make too little of it in assuming that the only difference between them lies in the ambiguity of the conduct. From the labeling perspective, it is still doubtful that a child whose only conflict is within the home ought to be identified in the same way as a child who robs, assaults, or kills, as will happen with the child who is incorrigible and is in need of care, supervision or treatment. From a family function perspective,\textsuperscript{74} it should be observed that the existence of a need for care on the child's part does not necessarily mean that the child's conduct is wrongful and the parent's righteous. Such a finding may simply mean that the family is sufficiently disrupted that some kind of care is called for, given the child's circumstances.

In a considerable number of cases, indeed, it may be largely fortuitous that the matter arises as a delinquency proceeding. A large-scale study of the processing of incorrigibility (PINS) cases in New York revealed that about a third of those cases, in most of which the child was incorrigible or had run away, the facts would equally well have supported a neglect petition against the parents.\textsuperscript{75} Whether a disrupted family comes to court

\textsuperscript{73}E.g., In re Johnson, 30 Ill. App. 2d 439, 174 N.E.2d 907 (1961); N.Y. FAM. CT. ACT. § 731 (McKinney Supp. 1978-79); N.M. STAT. ANN. § 32-1-3(0) (1978).

through a petition initiated by the parents or one directed against them may depend on nothing more than whether a social worker is already involved with the family (making neglect more likely). In a large number of other cases, severe neglect may not be present, but the child's behavior is an improper yet understandable reaction to great parental pressure or demand. Intervention may be desirable simply because communication within the family has broken down, although without serious wrongdoing on anyone's part.

Requiring proof of need for care and rehabilitation only in cases involving noncriminal misbehavior seems as well to make too much of the commission of crime by a young person. Criminal conduct can also be an uncertain predictor of need for coercive intervention. It has already been observed that criminal laws describe a wide variety of behavior, always in very severe language.66 The BB through the window, the inscription of a sign on a public street, the theft of a candy bar or toy are all doubtless crimes and wrongful. But to say that one may confidently conclude that every child of whatever age who engages in such behavior thereby unambiguously establishes his need for coercive intervention surely goes too far. It is no answer, although it is true, that proof of a crime is a sufficient basis for intervention in adult cases. Conviction in the criminal process is, for one thing, designed to serve purposes beyond providing an occasion for rehabilitation. Principles of retribution and general deterrence require public denunciation of the criminal act and its perpetrator, quite without respect to the latter's dangerousness in the future. There are, indeed, instances in which punishment is levied when it is plain that the actor will never again commit a crime.77 Moreover, to the extent that a prediction of dangerousness is undertaken for adults who violate the law, this prediction presupposes a mature understanding of the choices available, from which one may infer something about their character from the choice to engage in crime. The existence of a capacity for mature choice is surely more doubtful in the case of a thirteen-year-old and, therefore, the consequent assessment of character based on conduct cannot as confidently be made.78

Nor, finally, could it be said that the dual condition would practically operate only in cases of noncriminal misconduct, at least if experience in other jurisdictions is a guide. A study of delinquency cases in two large juvenile courts revealed that one-third of all cases in one court and ten percent in the other were resolved by an order contemplating dismissal despite proof or admission of a delinquent act.79 More dramatic (and doubtless more unusual) was the result in a New York case, in which

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66See text prior to note 69 supra.
67For a critique of this position even within the criminal law, see Katz, Dangerousness: A Theoretical Reconstruction of the Criminal Law (pt. 1) 19 BUFFALO L. REV. 1, 10 (1970).
68Katz & Teitelbaum, supra note 5, at 26.
69W. STAPLETON & L. TEITELBAUM. supra note 11, at 66, Table III.1.
charges of murder were dismissed against all members of a gang who, the Family Court found, were not in need of "supervision, treatment, or confinement" by the court at the time the matter came to trial.\textsuperscript{80}

Provision of the dual condition to children involved in noncriminal misconduct cannot, accordingly, justify the application of a "delinquency" label to those children, nor does its limitation to such children seem appropriate. This does not, however, detract from the real benefits that may accompany its adoption, even in limited form. Indeed, the fact that an ungovernable, truant or runaway child may be adjudicated delinquent gives special point to the potential importance of the dual condition. For this potential to be realized, however, lawyers will have to prepare as carefully for presentation of evidence concerning need for care, supervision and rehabilitation as they do with respect to commission of the delinquent act in question.\textsuperscript{81} This requires investigation of the child's condition and his relations with family members, and of the resources and services available in the community.\textsuperscript{82} Effective use of the dual condition also presupposes willingness on the part of the juvenile court to hold authentic hearings on this aspect of jurisdiction, which may indeed be required to support a finding that a child who engages in noncriminal misconduct is in need of care.

\textbf{JURISDICTION OVER PARENTS OF DELINQUENT CHILDREN}

The new Code extends juvenile court jurisdiction to the parents of delinquent children as well as to the juveniles themselves. Section 17 of the law authorizes a prosecutor, probation officer or caseworker to file a petition "to require the participation of a [delinquent child's] parent, guardian, or custodian in a program of care, treatment, or rehabilitation for his child."\textsuperscript{83} If, upon such a petition, the court determines that the parent should participate in such a program, it may order him to (1) obtain assistance in fulfilling his parental obligations; (2) provide specified care or treatment for the child; or (3) work with a person providing care or treatment for the child.\textsuperscript{84} On a theoretical plane, there is nothing very novel about this addition to juvenile court jurisdiction. It seems, rather, a belated recognition of what traditional doctrine presupposed—that the prime cause of juvenile crime or other misconduct lies in parental failure. Judge Ben Lindsey, one of the founders of the juvenile court movement, observed in 1906 that "over half of the criminal inmates of prisons and institutions are from the youth of the nation, who arrive at the prison

\textsuperscript{80}\textit{In re R.}, 67 Misc. 2d 452, 323 N.Y.S.2d 909 (Fam. Ct. 1971).
\textsuperscript{81}\textit{IJA-ABA, Juvenile Justice Standards Project, Standards Relating to Council for Private Parties} § 4.3(b) commentary (Tent. Dr. 1976).
\textsuperscript{82}\textit{Id.}
\textsuperscript{83}\textit{IND. CODE} § 31-6-4-17 (Cum. Supp. 1979).
\textsuperscript{84}\textit{Id.} § 31-6-4-16(i).
through neglect in childhood, and bad habits formed at the formative period of life . . . .”85 Twenty years later, another prominent juvenile judge reiterated that central theme: “Remember the fathers and mothers have failed, or the child has no business [in the juvenile court], and it is when they failed that the state opened this way to receive them, into the court, and said, ‘This is the way in which we want you to grow up.’ ”86

These views of parental responsibility were often reflected in laws concerning “contributing” to the delinquency of a minor. Judge Lindsey’s efforts for example, led to enactment in Colorado of a statute providing that a parent responsible for “encouraging, causing or contributing to the delinquency of [his minor] child” was guilty of a misdemeanor and subject to fine or imprisonment.87 Indeed, imposition of responsibility on the parents of delinquent children came sometimes to be viewed as a necessary corollary of juvenile court jurisdiction.

The crime committed by the child is the same crime perhaps as that committed by an adult, and in its effect upon society or upon the injured persons may be identical, but we have said that we will withhold punishment from the child for his offense in recognition of the fact that he is not entirely responsible for its commission, that heredity or environment, or the lack of appreciation of the consequences of his act . . . may have conspired to bring about its commission. May it not be said to be a corollary to this proposition that just in so far as the responsibility of the child is reduced, the responsibility of some other person or agency in increased?88

“Contributing” laws, however widely adopted,89 have rarely become an integral part of juvenile court jurisdiction. In eleven states, their enforcement was left to the criminal rather than the juvenile court89 and the sanctions available were usually limited to fine or imprisonment.90 Although a number of states allow suspension of sentence upon conditions,91 this device has not often served as a successful vehicle for direct regulation of parental behavior. And, without such regulation, the imposition of criminal sanctions seemed unlikely to strengthen the family

85Lindsey, The Juvenile Laws of Colorado, 18 GREEN BAG 126, 130 (1906).
87An Act to provide for the punishment of persons responsible for or contributing to the delinquency of children, ch. 94, 1903 Colo. Sess. Laws 198.
90Ludwig, supra note 89, at 725. Indeed, legislative efforts to vest jurisdiction in courts without general criminal jurisdiction were subject to constitutional challenge. Bates, supra note 88, at 65-67.
91Ludwig, supra note 89, at 726.
92Id.
or the child within it. Judge Paul Alexander, for one, concluded after an extensive survey of prosecutions of parents in Toledo, that "to punish parents who contribute to the delinquency or neglect of their children accomplishes very few, if any, of the things claimed for it except revenge . . . ." At a different level, criminal jurisdiction over the parents of delinquent children has presented jurisdictional difficulties. Because it cannot routinely be assumed that bad behavior by children is caused by bad parenting, the nexus between act and harm that criminal law ordinarily presupposes is obscure. There are also problems of culpability apart from causation. Ordinarily, criminal liability requires some blameworthy state of mind—at least negligence—which cannot be established in the case of many parents. Although there are exceptions to the requirements of culpability, the necessity and fairness of such departures is always viewed with suspicion.

The Indiana parental participation provision, like its analogue in California, can be seen as an attempt to accomplish the goals sought under the punitive approach first advocated by Judge Lindsey without the difficulties and limitations inherent in the criminal law. It is a change in strategy based upon experience, rather than a novel principle. The parental participation provision is also consistent with the revisionist approach to noncriminal misbehavior in its apparent recognition that the parents of an ungovernable or runaway child may be as responsible for that situation as the youth who is the formal respondent in the proceeding. The report of the National Advisory Committee on Criminal Justice Standards and Goals, for example, recommends that status offense jurisdiction over the child be replaced by “Family in Need of Service Proceedings,” with judicial power reaching not only the misbehaving child but his or her parents and any public institution or agency with a legal responsibility to provide services to the child or the parents. Much the same effective range of power is contemplated by the new Indiana Code.

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Alexander, What's This About Punishing Parents? FED. PROBATION. March 1948, 23, 29. He does, however, suggest that the contributing law is sometimes useful "where the parent is refractory." Id.

Ludwig, supra note 89, at 727-31.


CAL. WELF. & INST. CODE § 727(2) (West Supp. 1979) provides: "The juvenile court may direct any and all reasonable orders to the parents and guardians of the minor who is the subject of any proceedings under this chapter as the court deems necessary and proper . . . ."

"See Vincent, Expanding the Neglected Role of the Parent in the Juvenile Court, 4 Pepperdine L. Rev. 523, 534 (1977).

"See, e.g., text in note 14 supra; Andrews & Cohn, supra note 75, at 73-76. Parental neglect has also been raised as an affirmative defense in juvenile cases alleging incorrigibility. See, e.g., In re G., 28 Cal. App. 3d 276, 104 Cal. Rptr. 686 (1972).

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Despite these broad roots, however, the parental responsibility section of the new law presents substantive and procedural issues that warrant attention.

**Substantive Issues**

The juvenile law in substance authorizes a court to require parents to cooperate with agencies providing services, to accept assistance themselves (presumably in the form of individual or group counseling, therapy and the like) and to provide through, one supposes, purchase or cooperation, services that, in the court's opinion, are needed by the child. The only basis for such an order is a finding that the parent of a delinquent child should participate in one or more of the designated ways.\(^1\) No particular reason for this conclusion is required of the judge; it will apparently suffice that he or she believes parental participation a desirable adjunct to the disposition imposed on the delinquent child.

So written, the Indiana provision goes well beyond the traditional occasions for juvenile court jurisdiction over parents. The problems associated with "contributing" laws are dealt with simply by abandoning both penal sanctions and any requirement that the parent be shown to have caused the delinquent act or have been legally culpable (intended, knew or was negligent) in respect of the child's behavior. The obvious alternative to basing jurisdiction over the parents of a delinquent child on a showing of neglect, for which there is also authority,\(^2\) has likewise seemingly been rejected. Whereas a neglect finding requires specific evidence of parental failure,\(^3\) no allegation of inadequacy or unfitness is contemplated by the parental participation provision. It may be, of course, that such participation will in some way serve the child's "interests," but this fact—even if demonstrable—would not itself support an adjudication of parental neglect.\(^4\)


\(^2\) JUVENILE JUSTICE AND DELINQUENCY PREVENTION 320-21 (1976). At disposition, the court could order the parent, child, or family to cooperate with services offered by public or private agencies. Id. at 480. For a similar proposal, see Gough & Grilli, *The Unruly Child and the Law: Toward a Focus on the Family*, JUV. JUST., Nov. 1972, at 9.

\(^3\) IND. CODE § 31-6-6-16(i) (Cum. Supp. 1979).

\(^4\) The "best interests" test, despite the frequency of its invocation, is a dispositional rather than an adjudicative standard. The definition of "child in need of services," quoted in the preceding footnote, makes clear that this remains true under the new Code. The Holding of the court in *In re Bryant's Adoption*, 134 Ind. App. 480, 493-94, 189 N.E.2d 593, 600 (1963), although uttered in connection with adoption proceedings, would apply as
If jurisdiction over parents is not formally founded on misconduct that would amount to neglect nor on some other causal responsibility for the child’s misconduct, on what is it based? The only apparent answer lies in a power of the state to do things which are appropriate to assure to proper care and treatment of its children—in other words, that aspect of police power which is called "parens patriae" jurisdiction. Whether this doctrine, described by the Supreme Court as "murkey" in meaning and with historic credentials of "dubious relevance," will support the proposed intervention presents an issue of considerable difficulty. In part, the result will depend on a calculus involving the importance of the state interest, on the one hand, and the importance and degree of invasion of the parental interest, on the other.

The state interest has already been described in categorical terms—promoting the welfare of, and preventing further misconduct by, children. Determination of the strength of this interest is less easy. The suggestion has been made that intervention involving the parents of delinquent children offers the best and perhaps the only hope for preventing future wrongdoing:

The point is that if the juveniles who come to the attention of the court are to be helped to stay out of further trouble that some form of intervention with their families is necessary. . . . It is not only important, but necessary to intervene in family systems in ways that will promote the development of more effective and more socially functional systems. For unless the family is able to see itself in a new light and alter its system of functioning one may expect a continuation of problems. To take a youthful offender out of his family setting where he is subject to the family system and deal with him by placing him in detention, in a disciplinary school, or other setting may be useful, even necessary. But from the point of view of helping him keep clear of the law in the future such action is almost irrelevant. . . . In psychology we learned long ago the futility of treating symptoms. The delinquent youngster is truly a symptom. He is the symptom of a distressed family.

In this view, parental adequacy is largely a functional matter rather than one defined by the existence of specific, categorical forms of failure. Where there is delinquency, there is a need for improvement in the family

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well to neglect cases: "[T]he 'child's best interest rule' . . . is never an issue for judicial determination in an adversary adoption proceeding until the ultimate fact of 'abandonment or desertion' or 'failure to support,' has been first established by clear, cogent and indubitable evidence." See also Note, Neglected Children and Their Parents in Indiana, 7 Ind. L. Rev. 1048, 1055 (1974).

Vincent, supra note 98, at 536.

which can only be accomplished through intervention in respect of parents as well as their children.

There is, indeed, a common sense basis for saying that parents of delinquent children may need help in dealing with the latter's misbehavior, even when they have neither neglected him nor causally contributed to his misconduct. This may, indeed, be true even where the court removes the child from the home for some period of time; if the parents can better deal with him upon his return the chances of avoiding future delinquency may be improved to that extent. What is unclear, however, is the extent to which improvement can genuinely be expected. Where parents are inadequate and irresponsible a law aimed at reforming their behavior would doubtless serve some plain purpose, but the Code contemplates treatment for parents who may already have tried a variety of services and remedies. There is, as well, reason to question the extent to which court-imposed requirements of counseling and the like are generally effective, even where some need could be demonstrated. Despite some seventy years of experience, there is little evidence to support the belief that coercively imposed services of this kind are useful in any setting. Lack of adequate training, high staff turnover, and difficulty in attracting and retaining sufficient numbers of qualified minority group professionals have all contributed to this doubtful record of success. To the extent these conditions obtain in Indiana, the value of yet further reliance on undesired intervention through social work and allied services must be questioned.

Against this state interest, one must consider the extent to which the parental participation provision affects the interests of parents. To the extent that relatively unimportant interests are involved or that even important interests are little affected, the statute would stand on relatively firm ground. Three categories of parental interests seem to be implicated by the court's dispositional power. One is a financial interest, to the extent parents may be called upon to pay for whatever counseling or therapy they are ordered to provide or receive. The second is a form of privacy or liberty interest, to the extent parents are required personally to participate in counseling or therapy. The third is an interest in the custody and society of their children, to the extent that custody is conditioned upon cooperation with a dispositional order directed to them.

The financial interest of parents has frequently been considered in connection with laws requiring them to pay for treatment or services rendered their children incident to juvenile court proceedings. An obliga-

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109 IND. CODE § 31-6-4-18 (Cum. Supp. 1979) provides that the county shall pay for any services ordered “by the juvenile court for any child or his parent, guardian, or custodian,” but that the parent will be financially responsible for those services “unless . . . [he is unable to pay for them; . . . ]payment would force an unreasonable hardship, . . . or justice would not be served by ordering payment.”
tion to pay for those services has usually been upheld, typically on the theory that the services were "necessaries" which parents are customarily required to provide.\textsuperscript{10} The same theory might support an order directing the parents to purchase services or treatment for the child. It would not, however, so clearly justify an order to the parents to purchase services for themselves, even on the theory that counseling or therapy rendered to parents will ultimately redound to the benefit of their offspring. The requirement that a parent pay for his child's "necessaries" is ordinarily considered a form of agency created by facts or law, and would have no obvious applicability where no services or goods were provided the child.

A requirement that parents undergo counseling or therapy also implicates interests of privacy and liberty. The strength of this interest is difficult to weigh, simply because laws compelling submission to outpatient therapeutic treatment are extremely uncommon.\textsuperscript{11} Perhaps the closest common analogue is probation, but this is distinguishable since it is coupled with the possibility and threat of incarceration. Comparison might also be made with referral to drug abuse counseling or driver education programs for first offenders, but these also differ in the onus they place on the respondent. Surely a regime of treatment requiring relatively formalized education is less intrusive than one which contemplates psychological counseling, particularly with respect to such intimate matters as relations among family members.\textsuperscript{12} While such treatment can doubtless be required of parents who have demonstrated failure or inadequacy, its imposition without such a showing presents significant questions about the appropriate reach of the law.\textsuperscript{13}


\textsuperscript{11}Laws providing for involuntary outpatient treatment are usually recent responses emerging from the least restrictive alternative doctrine in civil commitment litigation. \textit{Legal Issues in State Mental Health Care: Proposals for Change: Civil Commitment}, [July-Aug. 1977] \textit{Mental Disability L. Rep.} 73, 110. They often incorporate the same substantive requirements as secure commitment provisions.

\textsuperscript{12}The emphasis given to confidentiality of therapist-patient communications reveals much about the effect of counseling or therapy upon the latter's privacy. Ralph Slovenko has observed that "[t]he very essence of psychotherapy is confidential personal revelations about matters which the patient is (and should be) normally reluctant to reveal or discuss." \textit{R. Solvenko, Psychotherapy, Confidentiality, and Privileged Communication} 40 (1966). The essence of imposed therapy or counseling is, therefore, a requirement that parents reveal highly personal matters which they would ordinarily and understandably be reluctant to discuss.

\textsuperscript{13}The traditional nature of the parental participation requirement is revealed by reference to the basic premises of juvenile court jurisdiction. Whereas criminal law intervened only when minimum standards of behavior are violated, juvenile courts sought to do so when it seemed necessary to lead children to become good and useful citizens. \textit{See} \textit{W. Stapleton & L. Teitelbaum, In Defense of Youth} 9-10 (1972). The morality of American law has been described as that "of the Old Testament and the Ten Commandments ... It does not condemn men for failing to embrace opportunities for the fullest realization of
In addition to its impact on personal privacy, the parental participation order affects the parent-child relationship in ways that touch on the former's long-recognized interests in "maintaining the integrity of [the] family unit." It is, of course, true that any juvenile court jurisdictional order interferes with that relationship in some respect, perhaps by requiring the child to counsel with a stranger (probation officer) or even by removing him from the home. Since, however, delinquency (or status offense) dispositions are aimed at the child and do not normally presume parental failure, only limited interference with parental rights is contemplated. Even commitment to a "Boys School" or "Girls School" does not permanently or totally remove parental rights; it only temporarily transfers guardianship for some purposes. Moreover, the principal thrust of intervention is to support parental authority rather than to supplant it or to require changes on the part of adult family members.

The effects of a delinquency finding coupled with a parental participation order under the new Code go considerably farther than conventional delinquency dispositions. Indeed, they are—except for application of a formal label—identical in practice with those accompanying a neglect adjudication. The child, whether delinquent or "in need of services," may be placed under probation supervision, ordered to receive out-patient treatment of various kinds, or placed in a foster home or shelter care facility. The parents may be required to participate in the disposition in either proceeding. Thus a case initiated because of the child's law violation, or even his disobedience and truancy, may for all functional purposes be converted into what is in substance a neglect action.

Viewed in this way, the parental participation section presents hard questions concerning the basis for regulating parental behavior within the family. It is at least questionable whether a bare finding that such intervention is desirable and, perhaps, that it is in the child's interests would alone serve as an adequate basis for assertion of neglect jurisdiction. Although there is little constitutional authority concerning the limits of state power in this respect, the Supreme Court has on at least one recent occasion suggested that "the Due Process Clause would be offended [i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was..."

114 Alsager v. District Court of Polk County, 406 F. Supp. 10, 16 (S.D. Iowa 1975). See also Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") (citation omitted).

thought to be in the children's best interest." 116 The Court has also indicated that the parental interests in custody of a child are "essential" . . ., "basic civil rights of man" . . . and "[r]ights far more precious . . . than property rights," 17 which are entitled to "deference and, absent a powerful countervailing interest, protection." 17

Two qualifications on the thrust of these opinions warrant attention. The first is that the Indiana parental participation provision is not triggered solely by a finding of "best interests" but by such a finding in connection with a delinquency adjudication. While there is no showing of parental failure rising to the level of statutory neglect, there is an adjudication of juvenile deviance giving rise to governmental concern. Whether such a basis will suffice to justify authority over the parents as well as the child is an issue yet to be seriously considered, much less resolved.

The second qualification goes to the extent of intervention undertaken. Most recent decisions announcing strong or even fundamental parental interests in the rearing of their children have involved governmental action resulting in permanent and total disruption of parental rights. 118 To the extent that less drastic intervention in the parent-child relation is undertaken, less in the way of fault or failure on the parent's part may be required. It is not clear, however, that these cases are limited in significance to instances of permanent disruption of the parent-child relation. The Court has manifested solicitude for parental rights in a variety of areas apart from termination, 119 which may surely be affected even by more limited forms of intrusion.

For that matter, it is not even clear that a delinquency adjudication coupled with a parental participation order cannot lead to total abrogation of parental rights. Parental rights can be terminated with respect to delinquent children as well as those in need of services as the new Code reads. 120 There must be a showing that the child has been removed from his parent for at least six months under a dispositional decree; there is a reasonable probability that the conditions resulting in his removal have not been remedied; reasonable services have been offered or provided the parent to assist him in fulfilling parental obligations, which have been rejected or proved ineffective; termination is in the child's best interests; and some satisfactory alternative plan has been developed by the county. It appears that all of these conditions might be satisfied in respect of a delinquent child who has been placed in shelter care (or, presumably, in

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118In both Quillion v. Walcott, 434 U.S. 246 (1978) and Stanley v. Illinois, 405 U.S. 645 (1972), for example, the proceedings would lead, immediately or sequentially, to termination of parental rights.
an Industrial School, and whose parents have failed to take advantage of some dispositional decree directed to them. Whether non-participation or incomplete participation in such an order—which was never itself founded on a finding of parental inadequacy or failure—could justify termination of parental rights obviously presents a genuine constitutional problem.

Procedural Issues

Full exploration of the procedural rights that may be maintainable by a parent subject to a participation order is beyond the scope of this discussion. A few issues may be worth raising, however, even if only briefly and inconclusively.

Party Status

The notion of "party status" is used here to describe the right to participate in the determination which justifies exertion of authority over a person. It includes, for example, notice, the right to attend hearings and an opportunity to present and challenge evidence upon which an adjudication will be based. It will immediately be obvious that the parent in a delinquency case has only a qualified party status, even where he may be required to participate in the dispositional scheme. He is entitled to notice of the possibility that such an obligation will be imposed upon him and, in proceedings to determine whether participation should be ordered, to confront and cross-examine witnesses against him and to obtain and present testimony on his own behalf. The parent apparently is not, however, entitled to participate at any stage prior to entrance of an adjudication of the child's delinquency.

There are good reasons to support the decision not to allow parental participation at the adjudication stage. The costs associated with such a procedure, whether the parent was sympathetic or antagonistic to the child's position, have neatly been summarized by the IJA-ABA Juvenile Justice Standards Project in its Standards Relating to Pretrial Court Proceedings:

Presumably, the parent could demand a trial when the juvenile and counsel for the juvenile had decided (as a result, perhaps, of bargaining with the prosecutor) to admit to the allegations of the petition. The parent could call witnesses whom neither the prosecution nor the defense desired to call, or the parent

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111IJA-ABA, Juvenile Justice Standards Project, Standards Relating to Pretrial Court Proceedings 112-13 (Tent. Dr. 1977) [hereinafter cited as Pretrial Court Proceedings].
112Ind. Code § 31-6-7-4(b) (Cum. Supp. 1979).
113Id. § 31-6-3-2(a).
114Id. § 31-6-3-2(a), -2(b).
could ask questions of the prosecution witnesses that defense
counsel, for strategic reasons, chose not to ask. These and
other possible conflicts in strategy between the parent and the
juvenile could pose substantial risks to the freedom of counsel
for the juvenile to conduct the defense. . . .

On the other hand, "competition" between the parent and
the petitioner [sic] could occur if a hostile parent were a party
and called witnesses, made motions, and took other steps in-
tended to establish the allegations of delinquency. This might
be attempted, for example, by a party who was the com-
plainant in the case.\textsuperscript{125}

One might add as well the prospect of the parent "defending" his child
while at the same time seeking to make clear his own lack of responsi-
bility for what occurred, thereby confusing the proceedings considerably
and resulting in additional consumption of time and personnel made
necessary by a tripartite proceeding.

It cannot be forgotten, however that adjudication of the child's delin-
quency is also an essential element of the parental participation pro-
ceeding, and one the parent cannot challenge. The plea bargain situation,
used above to illustrate the difficulties with allowing the parents to play
a full role at adjudication, also reveal the effects of qualified participation
on the parent's position. A child may well be advised by competent
counsel that, although some defense can be raised, its success is so
unlikely that acceptance of a bargain to admit responsibility in exchange
for a recommendation of probation (or less) would be desirable. If the
child agrees to that bargain, the effect of his plea will be to establish the
critical element upon which authority over the parent is based. All that is
further required is a showing that the parent "should" participate in the
dispositional scheme, a matter seemingly entrusted as a practical matter
to the judge's discretion.

This limitation on the role of the parent subject to a dispositional order
raises a significant constitutional question. The Juvenile Justice Stan-
ards Project, dealing only with traditional dispositions such as proba-
tion or commitment, came to the conclusion that some form of participa-
tion was required but that restricting the parent's role to the disposition
stage of delinquency cases would satisfy the requirements of \textit{Stanley v. Illinois}\textsuperscript{126} and other cases establishing procedural requirements for pro-
cedings affecting a parent's right to the custody and care of his
children.\textsuperscript{127} In doing so, however, the Project distinguished dispositions
in delinquency cases from those in neglect or termination of parental
rights proceedings on the grounds that (1) the primary impact of delin-
quency decisions is on the child rather than on the parents, and (2) the

\textsuperscript{125}\textsc{Pretrial Court Proceedings} at 112.
\textsuperscript{126}405 U.S. 645 (1972).
\textsuperscript{127}\textsc{Pretrial Court Proceedings} at 114-16.
parent in a delinquency matter will lose only physical custody and that for only a short period, whereas a more grievous loss is involved at least in termination actions. Assuming arguendo that these distinctions are indeed sufficient to reduce the procedural protections applicable to parents in conventional delinquency matters, the Indiana parental participation provision includes a direct impact on the parents which is, except for stigma, quite the same as that which would be associated with a neglect proceeding. Moreover, as we have also seen, the adjudication of delinquency coupled with a parental participation order may establish a foundation for termination of parental rights. Accordingly, it is at least arguable that—having regard to the dispositional power over parents vested by the Code in the trial judge—denial of a right to be heard with respect to a critical element of that power creates procedural due process problems beyond those presented by traditional laws.

Counsel

The parent occupies not only a qualified party status with respect to delinquency proceedings from which some obligations on his own part may derive, but has no right to appointed counsel at the dispositional stage where he may participate. Here, it should be said, his position under the Code is the same as if a proceeding to declare a child “in need of services” had been initiated. Whether a parent faced with neglect proceedings is constitutionally entitled to the assistance of counsel is still to be decided by the United States Supreme Court. Under the traditional view, “neglect” and “dependency” cases were civil matters to which the right to counsel did not attach. With In re Gault, however, entire reliance on the civil-criminal distinction was no longer tenable, as the Supreme Court itself observed in connection with juveniles facing so-called “civil” delinquency proceedings. A number of state and lower federal courts have since looked behind the “civil” label associated with neglect actions and concluded that, in view of the importance of the parental interest in the custody of his child and the potentially over-

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18See note 115 & accompanying text supra.
19See note 120 & accompanying text supra.
20IND. CODE § 31-6-3-2(c) (Cum. Supp. 1979) provides only that a parent is entitled to representation by counsel “in proceedings to terminate the parent-child relationship.”
21Id. § 31-6-3-2.
22387 U.S. 1 (1967).
23Id. at 49-50.
24The importance of the parental interest in the rearing of his children was most forcefully stated in Stanley v. Illinois, 405 U.S. 645 (1972). For other cases recognizing this interest in the content of neglect proceedings, see Danforth v. State Department of Health & Welfare, 303 A.2d 794 (Me. 1973); In re Ella B., 30 N.Y.2d 352, 356-57, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972); Cleaver v. Wilcon, 40 U.S.L.W. 2658, 2659 (N.D. Cal. 1972) (otherwise unreported), rev’d on other grounds, 499 F.2d 940 (9th Cir. 1974).
whelming power of the state brought to bear against the parent in child protective proceedings, access to the assistance of counsel is constitutionally required.

While certain resolution of the constitutional issue must await Supreme Court action, it ought also be asked whether, in point of policy, it is desirable to deny indigent parents access to legal representation in cases which may both affect their relationship with their children and impose affirmative obligations of cooperation upon them. There are powerful reasons for providing such assistance and few reasons, other than financial, for refusing to do so. And, indeed, a considerable number of states have moved to make legal assistance available to parents in neglect cases as a matter of sound policy.

SOME GENERAL THOUGHTS ABOUT THE NONCRIMINAL DELINQUENT

Much of the discussion to this point has concerned specific provisions which affect the scope of delinquency jurisdiction over both children and parents. The much disputed general question of how the law ought to deal with children who are incorrigible or have run away has been held in abeyance. This issue should, however, be addressed briefly, not only because it is the focus of most recent discussions of juvenile court jurisdiction but because the Code's approach will add yet more impetus to that discussion.

Three models for dealing with children who commit noncriminal acts have been widely used or considered. The first—employed in Indiana until now—is the traditional approach under which no distinction is drawn between criminal and noncriminal misbehavior for adjudicative or dispositional purposes. A second view, approximated but not completely adopted by the new Code, is to differentiate treatment at some or all stages of the juvenile justice system. A third approach, much discussed but not yet adopted, removes jurisdiction over noncriminal misbehavior from juvenile courts and allocates responsibility for working with families in conflict to (voluntary) community services. The Indiana Code introduces a modification of the first two approaches. Like

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139 It appears that, as of 1975, 35 jurisdictions provided for appointed counsel in neglect cases. Katz, Howe & McGrath, Child Neglect Laws in America, 9 FAM. L. Q. 1, 10-11 (1975).
140 See notes 10-12 & accompanying text supra.
141 See notes 13-18 & accompanying text supra.
142 See NON-CRIMINAL MISBEHAVIOR, supra note 68.
the revisionist view, it differentiates the dispositional treatment of status offenders from that of law violators and provides that jurisdiction can only be asserted upon a specific showing of need for judicial intervention. On the other, the Code retains the traditional “delinquency” label for all misbehaving children. Finally, it extends both traditional and revisionist views by allowing the court to exercise power over the parents as well as the child once an adjudication of delinquency is entered.

On balance, the approach to noncriminal misconduct taken by the Code reaffirms traditional juvenile court theory even where its practice differs from the original statute. Parental failure, as we have seen, has long been identified as a prime cause of youthful misbehavior and as a causative element in status offenses. Accordingly, incorporation of a mechanism for direct intervention—the parental participation provision—is only a further (and indeed obvious) step along a well-beaten path. The one real departure from the original view, prohibition of commitment of status offenders to secure institutions, may also be an effort to re-create the juvenile court ideal for at least some children. Since “Boys Schools” and “Girls Schools” seem frequently if not inevitably to assume the characteristics of an adult prison, separate treatment for noncriminal youths serves as a vehicle for providing them the kind of treatment once hoped for all children.¹⁴³

The new Code thus rests upon much the same premises as those which led to creation of the juvenile court. Certainly it maintains the assumptions that (1) incorrigibility and like misconduct reveal some failure in socialization that, without correction, will lead to further and more serious wrongdoing, and (2) that judicial intervention can correct these failures. The balance of this discussion will focus on criticisms of these assumptions and, therefore, on the validity of status offense jurisdiction itself.

The Significance of Youthful Disobedience

Most simply, traditional juvenile court theory treats youthful disobedience as proto-criminal behavior. The child who does not respect the authority of his family will not, it is feared, respect the laws of the larger society. The proof of this proposition is found in widely held beliefs that the family constitutes a microcosm of the general community and in evidence suggesting that many delinquents and adult criminals were at some time incorrigible, truant or the like.

¹⁴³A proponent of the New York Family Court Act of 1963 wrote of its provision separating noncriminal from criminal misconduct in terms her grandmother might have used for all juvenile court jurisdiction: “In this class of cases there is no need for judicial power, as in the case of crimes, in order to protect the community. . . . The goal is only to help the child. . . .” Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court, 48 CORNELL L.Q. 499, 506 (1963) (emphasis added).
Neither of these sources of belief is, however, unimpeachable. Like most truisms, they have some real basis and, like many, they are not as conclusive as they sometimes seem. The view of the family as a “little commonwealth” was surely a central article of faith in Puritan ideology, but—except rhetorically—has long been abandoned as a viable theory. The Puritan world view was essentially static, with both government and family serving as vehicles for enforcing received truth through inculcation of prevailing values on their respective memberships. The entire thrust of progressive thought, from which juvenile court sprang, was in the other direction. Progress in the world would be achieved through rejection of existing social conditions and values by the young. To this end, progressive education was substituted for mastery of present knowledge and enlightened child-rearing was undertaken where parents were found—as they often were—to be inadequate. Indeed, a dominant theme of 18th and 19th century social theory was the necessity of government intervention to replace the authority of families, in part because parents were in any event losing their effectiveness and in part because they were representatives of those existing social conditions which, it was expected, their children would leave behind.

The curious thing is that juvenile court theory never fully recognized the gulf between the Puritan views embodied in colonial incorrigibility laws and the progressive ideology it sought to advance. Consequently, it adopted from Puritan sources a body of laws declaring that disobedience to parental authority is, almost ipso facto, bad and at the same moment encouraged governmental intervention in education and child-rearing on the assumption that parental authority was of doubtful value. This contradiction has never since been resolved successfully.

The other basis for considering incorrigibility an indication of future dangerousness—the observation that many criminals were once in con-

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14 See Teitelbaum & Harris, Some Historical Perspectives on Governmental Regulation of Children and Parents, in BEYOND CONTROL 1 (1977).
14 Id. at 5-14.
14 Concern about the adequacy of immigrant parents had been expressed since the middle of the 18th century, and was no less salient at the turn of the 20th century. Judge Mack, whose humanitarianism is unquestionable, observed that “[m]ost of the children who come before the [juvenile] court are, naturally, the children of the poor. In many cases the parents are foreigners, frequently unable to speak English, and without an understanding of American methods and views.” Mack, The Juvenile Court, 23 HARV. L. REV. 104, 116-17 (1909). For a less gentle view of this phenomenon, see Henderson, Are Modern Industry and City Life Unfavorable to the Family?, in AMERICAN SOCIOLOGICAL SOCIETY, THE FAMILY 93, 104-05 (1972) (reprint of 3 Papers and Proceedings of the American Sociological Society (1908)).
17 For an expression of this view in connection with education, consider Richard Hofstadter’s description of John Dewey’s Theory: “If a democratic society is truly to serve all its members, it must devise schools in which, at the germinal point in childhood, these members will be able to cultivate their capacities and, instead of simply reproducing the qualities of the larger society, will learn how to improve them.” R. HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 362-63 (1963).
14 See Teitelbaum & Harris, supra note 144, at 31-35.
conflict with their parents—provides a textbook illustration of the logical
fallacy, post hoc ergo propter hoc. In general, predicting delinquency and
criminality is an uncertain and often unsuccessful business. In par-

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ticular, predicting criminality from intra-family conflict proves far too
much. While it may well be true that most adult criminals were fre-

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quently disobedient to parental commands, the same can be said of most
adult noncriminals. Given that incorrigibility means “habitual” disobe-
dience to parental commands and that “habitual” usually means “more
than once,” few among us can deny having been incorrigible at some
point. The condition of adolescence makes this virtually inevitable.

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These points have already been raised in connection with the “dual con-

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dition” for jurisdiction and differentiation of the treatment of status off-

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enders from that of other delinquents. Does, however, inclusion of a re-

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quirement that the child be found “in need of care, rehabilitation, or
treatment” meet these objections to inferring dangerousness from diso-

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bedience? Certainly it might, if one could be sure of what such a finding
embodied and if one knew that a disobedient child in need of care would,
absent intervention, become a deviant adult. The difficulty is, of course,
that the term “in need of care” is so unclear as not to mean anything to
any judge. Nor, one suspects, could the term be made much clearer, as
long as we do not know under what circumstances a child in conflict with
his parents comes to be in conflict with the larger community or if, for
that matter, any relation exists between these phenomena.

The Effectiveness of Court Intervention

Even if some degree of future dangerousness could be inferred from
disobedient behavior, it remains to be asked whether court intervention
is likely to be successful in dealing with incorrigible or runaway children.
There is increasing belief that it is not. A California legislative committee
found some years ago that “[n]ot a single shred of evidence exists to in-
dicate that any significant number of [beyond control children] have
benefited [by juvenile court intervention]. In fact, what evidence does ex-

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ist points to the contrary.” Recently, the Institute for Judicial
Administration-American Bar Association Juvenile Justice Standards
Project came to the same conclusion:

[U]ngovernability cases present for resolution issues that are
peculiarly ill-suited for, and unbefitted by, legal analysis and
judicial fact finding. . . . The law is simply inept as a corrective


149For a discussion of various formulations of incorrigibility laws, see Katz & Teitelbaum,
PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law, 53 IND. L.J. 1, 11-16
(1978).

150See notes 67-68 & accompanying text supra.

151Report of the California Assembly Interim Committee on Criminal Procedure,
JUVENILE COURT PROCESSES 7 (1971), quoted in NON-CRIMINAL MISBEHAVIOR at 3.
of the kinds of family dysfunction that these cases most frequently involve, which are "of vastly greater duration, intimacy, complexity, and (frequently) emotional intensity" than other cases in the justice system.\(^{153}\)

A variety of observations explain these pessimistic verdicts about the utility of intervention in status offense matters. One, already articulated, is that intra-family conflict presents problems for which judicial action is singularly inappropriate. Parent-child cases involve long-term disputes which mean different things within each family. The circumstances which lead to a petition suggest the complexity of such matters. One set of parents may want a child removed from the home because he is a financial burden or social embarrassment; a second may be seeking help through the court which, at least for the wealthy, would be available through private sources, and a third may simply wish the court to supply an authority it cannot, or can no longer, exercise.\(^{154}\) However excellent courts may be at determining whether a single incident, such as the taking of property, offends some generally accepted norm of conduct, they are far less so in ascertaining the significance of disobedience to particularistic rules which differ from family to family.\(^{155}\) This is even more the case since disobedience at some point characterizes, perhaps necessarily, the process by which a child moves toward that independence which is indispensable to adulthood.

Resort to judicial intervention may, indeed, be harmful as well as inept in these case. The process by which incorrigibility cases are presented and resolved itself gives reason for this concern. A parent who goes to court is required to make a public denunciation of his or her child. The child must either accede to that attack on his worth or reject it and, thereby, the parent who initiated the denunciation. It is hard to believe that strengthening of the parent-child relationship will routinely result from such a confrontation and there is considerable reason to fear that the cycle of public deprecation and disrespect will deepen antagonisms within the family.\(^{156}\) However, the proceeding may ultimately force other family members to align themselves with either the complaining parent or the respondent child, thereby isolating even members who are formally noncombatant in the official conflict.\(^{157}\)

\(^{153}\)Emmanuel, "NON-CRIMINAL MISBEHAVIOR at 11.

\(^{154}\)Mahoney, PINS and Parents, in BEYOND CONTROL supra note 144, at 161, 162-67.

\(^{155}\)Cf. J. GOLDSTEIN, A FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 8 (1973)(remarking that courts are "incapable... of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between parent and child").

\(^{156}\)Mahoney, supra note 154, at 168. That resort to law may not strengthen parental authority or familial unity was explicitly recognized in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), where the Court observed that a parental veto over the abortion decision was unlikely to "enhance parental authority or control where the minor and the non-consenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure." Id. at 175.

\(^{157}\)Id.
There are further possibilities of harm which must be considered if, as is almost always the case, the petition is ultimately sustained. The child has formally been labeled a wrongdoer. Under the new Code, moreover, he is formally labeled a "delinquent." The potential effects of such labeling have already been mentioned, and need little further discussion. There is, however, a further effect in incorrigibility proceedings which deserves brief attention: the negative perception of the child by himself and his own family. In these cases, the parent has selected the child for public disapproval and will therefore be committed to that view of the child. Accordingly, family support which might counteract a label instigated by a stranger will probably be absent, leaving the child to deal alone with the perception of his wrongfulness.

Finally, there is systematic reason to think that reliance on court proceedings will diminish the parental authority it purports to strengthen. We have already observed that the process by which cases are presented has some tendency to undermine family unity. The very resort to outside authority may have the same effect. Philip Slater has observed that whenever one appeals to a source of authority outside the family to resolve intrafamilial conflict, the result must be to "democratize" the family—that is, to weaken the authority of parents over their child. Consideration of the meaning of court intervention suggests why this is so. Parental authority is essentially personal: it amounts to a requirement that the child will obey because the parent says so, and not because of the importance of any particular command. The authority of the court, by contrast, is necessarily rule-oriented in some degree; the law will intervene only if a rule of obedience has been violated by a showing that, for example, the command was lawful and reasonable. This the child is free to contest, placing him for purposes of court action on a level of equality with the parent. Moreover, even where the court ultimately sustains the parental command, the lesson learned by the child is that parental authority is not general and uncontrolled, although its limits will remain obscure. The result is a double bind of no mean proportions. The substance of the court's decision—"obey commands that are reasonable"—purports to uphold parental authority, but because it is a decision based on a rule independent of parental desire, it necessarily suggests some range of freedom to disobey. This in effect contradicts the meaning of authority from the parental perspective. However, the range

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158 Successful denials of incorrigibility complaints are so uncommon as to be practically unheard of. See, e.g., Andrews & Cohn, supra note 75, at 58 (no observed instance of a successful defense in an extensive study of the New York City Family Court).
159 See notes 55-58 & accompanying text supra.
160 See Mahoney, supra note 154, at 167-68.
162 IND. CODE § 31-6-4-1(a)(4) (Cum. Supp. 1979) ("habitually disobedies the reasonable and lawful commands of his parents").
of freedom conferred is necessarily unknowable. Because no child can predict what a court would consider "reasonable" under future circumstances, he must therefore guess at what his proper ambit of choice will be at any future time. This paradox illustrates why incorrigibility jurisdiction can neither support parental authority nor enhance the child's development toward adulthood.163

Because of these difficulties, and because attention to cases involving noncriminal misbehavior is expensive and diverts scarce resources needed in other areas,164 a number of authorities have urged abolition of court jurisdiction over status offenses.165 This does not mean, it should be said, elimination of state concern for and assistance to families in conflict. Rather, it calls for substitution of voluntary services to families, in the belief that such services will more likely be effective than coercively imposed requirements and that, by avoiding the court process, some harm to participants can be avoided.166 Two practical questions are raised by such proposals. One is whether community services will be utilized unless there is some residual power to require cooperation by children who disobey their parents or run away; the other is whether elimination of court power will not in some cases expose a child to grave risks. At this point, no confident answer can be given, simply because no jurisdiction has yet entirely abolished court authority over noncriminal misbehavior. Some things can, however, be said. One is that there is evidence suggesting that coercively imposed services are not generally helpful in parent-child conflict situations, so the problem is not one of replacing one reasonably successful program with a speculative alternative. A second point is that, where experiments with diversion of status offenders have been conducted, a significant level of cooperation with voluntary agencies was achieved and at a significant savings in cost.167 Thus, it is not irresponsible to consider, at least experimentally, non-judicial methods of delivering services to children in conflict with their families.

The extent of danger to those youths whose rupture with their families has become severe or permanent is harder to resolve satisfactorily. Many of these children can in fact be reached by the court, where they are

163See generally Katz & Teitelbaum, supra note 150.

164Nationally, status offense cases probably comprise somewhere between one-third and one-half of the workload of juvenile courts. NON-CRIMINAL MISBEHAVIOR, supra note 68, at 1. Moreover, it appears that status offenders are more likely than law violators to be detained and processed through the courts, which means that they will consume proportionately more services and time. Id. at 6; Andrews & Cohn, supra note 75, at 70, 75-76.

165E.g., NON-CRIMINAL MISBEHAVIOR; NATIONAL COUNCIL ON CRIME AND DELINQUENCY, JURISDICTION OVER STATUS OFFENSES SHOULD BE REMOVED FROM THE JUVENILE COURT (Policy Statement, Oct. 22, 1974); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 27 (1967); CALIFORNIA ASSEMBLY SELECT COMMITTEE, REPORT ON JUVENILE VIOLENCE 56-57 (1974).

166NON-CRIMINAL MISBEHAVIOR, supra note 68, at 15.

167For descriptions of two such experiments and their results, see NON-CRIMINAL MISBEHAVIOR, supra note 68, at 16-19.
neglected (as are many children treated as status offenders)\textsuperscript{168} or commit criminal acts. There are nevertheless some runaways, unknown in number, who will live in dangerous circumstances and will not choose to participate in voluntary services. What must be decided is whether any program, coercive or not, will help these children and, if so, at what cost. True, maintenance of court jurisdiction will allow them to be placed on probation, but this seems of doubtful value for the truly intransigent child. Placement in a shelter care facility or foster home would seem to help only those children who might voluntarily accept such placement; the confirmed incorrigible or run away would probably leave these non-secure facilities almost as quickly as he would leave his own home. Nor would commitment to a secure institution, now prohibited by the Code, seem a better solution. Incarceration removes him from one undesirable environment in favor of another which may be, in different ways, almost as undesirable and without any great promise of improving the child’s ability to function at home or in the larger community. Against these doubts must, however, be placed the costs generally associated with assertion of court jurisdiction over status offenders. In short, maintenance of jurisdiction in order to respond to an admittedly difficult class of cases may not be justified either in terms of help to that class or of the effect on other cases which will predictably be brought to the court.

CONCLUSION

The new Indiana juvenile law is at the same time bold and conservative. Where the Code extends court power, as it does with respect to parents of delinquent children, it does so in order to pursue goals traditionally served by juvenile court theory. Where the Code contracts court power, as it does with respect to commitment of children who engage in noncriminal misbehavior, it also does so in the service of traditional values. Thus, while the new law contains a variety of changes in juvenile court jurisdiction, these changes are ultimately designed to reaffirm and strengthen the competence of that agency for dealing with children.

The Code accordingly presents both new and old business for consideration. To the extent that it creates new areas of judicial authority, the propriety of such power—even justified by reference to traditional \textit{parens patriae} doctrine—must be determined. And, to the extent that the law reaffirms old strategies for dealing with misbehaving children, recurring questions about the effectiveness of those strategies will again be asked.

\textsuperscript{168}See note 75 \& accompanying text \textit{supra}. 