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PARENS PATRIAE: FICTION OF THE JUVENILE COURT

by

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PARENS PATRIAE: FICTION OF THE JUVENILE COURT

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PARENS PATRIAE: FICTION OF THE JUVENILE COURT

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INTRODUCTION

The modern juvenile court, as a distinct entity, has existed in the United States for seventy two years. It was conceived in a spirit of social benevolence and born under the highly idealistic theory of parens patriae.

Theory has often given way to expediency and practicality. So it is with the juvenile court. Promises of individual justice, protection, and care for children have become lost in overcrowded industrial schools, improperly administered courts, and tragic failure by the state to provide essential funds and material. The welfare of the child fades in importance as legal and procedural considerations grow ever more dominent and confusing. The juvenile court has been, and is, a failure. Yet the theory remains.

This paper briefly examines two functions of the juvenile court, contrasting theory and practice. It will be shown that in handling juvenile delinquency cases the parens patriae concept has been virtually discarded. The second area examined, that involving abused children, has to some

extent functioned within the original theoretical framework.

This paper presents the following basic question: Could the parens patriae theory be better implemented through a social rather than legal institution?

The approach to an answer is necessarily based upon sociological as well as legal references. Only the key problems faced by juvenile courts are presented here. This approach, it is hoped, will at least give some insight into possible future developments in the juvenile court system.

I

JUVENILE DELINQUENCY: A PROBLEM OF DEFINITION

In approaching the problem of juvenile delinquency from a socio-legal basis, one is immediately confronted with defining the term "delinquent." Sociologists have tended to direct a large part of their studies toward youths who have been declared delinquent by the courts. This would perhaps suggest that sociological usage of the term would correspond to legal usage. Indeed, this is true in many instances. However, there is basically a distinction in the term as used by the two professional communities. This distinction is of vital importance when examining the parens patriae theory.

For the purpose of this paper, the operational definition developed by Daniel Glaser[1] has been selected as representative of the sociological concept of juvenile delinquency. This definition is composed of five factors.[2]

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[1] D. Glaser, Dimensions of the Problem, in Juvenile Delinquency 1 (J. Rauch ed. 1958).

[2] Id. at 8-10

The first factor concerns the tolerance level of the community. Different communities will tolerate different degrees of deviance from conventional behavior. As the tolerance level changes, so does the designation of delinquency.

The second factor is the visibility of the misbehavior. Obviously, acts committed in public can be more readily identified; therefore, they may be more quickly designated as delinquent than are acts committed in private.

The third factor concerns the status of the complaining party. As a matter of reality, complaints originating in persons of a high socio-economic group will be acted upon more readily than complaints originating in persons from lower socio-economic groups.

The fourth factor is the status of the misbehaving youth. The assertion is that acts committed by a lower class youth will be classified "delinquent" more quickly than the same act committed by a child of higher social standing. This aspect of Glaser's definition is an assertion that the legal system does not treat all persons with equality, that the attitudes of those officials who administer the criminal justice system are more punitive toward the poor

than toward the rich.

The final factor is idiosyncratic characteristics of officials. This is a recognition of the inherent differences in the personal make up and attitudes of those designated officials who are in a capacity to declare whether or not certain acts are delinquent.

Once combined, these factors lead to the following definition which is acceptable to the sociological community: delinquency is deviant behavior, behavior which violates basic norms of society, and when oficially known it evokes a judgment by agents of criminal justice that such norms have been violated.[3]

Sociologists have developed other, and more refined, definitions for use in various studies.[4] The one cited is general in nature and lends itself well to comparison with the legal definition.

A survey of modern statutes defining juvenile

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[3] R. Cloward and E. Ohlin, Delinquency and Opportunity 3 (1960) [hereinafter cited as Cloward and Ohlin].

[4] See, e.g., T. Hirschi, Causes of Delinquency 47 (1969). Delinquency is defined by acts, the detection of which is thought to result in punishment of the person committing them by agents of the larger society.

delinquency shows that the legal definition is consistently characterized by the inclusion of two separate categories of children: those who have violated the criminal law and those who have not violated the criminal law, but who are in need of supervision. The following is taken from New York's juvenile court statutes and is typical of most legal definitions:

> (a) "Juvenile delinquent" means a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime.
>
> (b) "Person in need of supervision" means a male less than sixteen years of age and a female less than eighteen years of age who is a habitual truant or who is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of parent or other lawful authority.[5]

While a distinction appears to be drawn between "delinquent" and "person in need of supervision," it has no practical affect. Children from both groups are brought before the court and many times the remedies administered

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[5] N.Y. Fam. Ct. Act § 712(a) and (b) (McKinney 1963). It should be noted that statutes have not always separated "juvenile delinquent" from "person in need of supervision." E.g. compare S.C. Code § 15-1304 (1952). "Delinquent child" means one under sixteen years of age who violates any state or municipal law or ordinance, excepting those charged with murder, rape, manslaughter, attempted rape, arson, common law burglary, bribery, or perjury or who is (a) truant, unruly, wayward, or misdirected (b) given to sexual irregularities or (c) disobedient to parents or beyond their control or in danger of becoming so.

are exactly the same. The stigma of having appeared in court, whether the basis is a violation of criminal law or incorrigibility, is always the same.[6]

The confusion concerning the meaning of delinquency has not resulted from a question of whose definition is correct. Obviously any definition would suffice so long as all the people concerned with or involved in its application agree.[7] The conflict is that there is no consistent agreement between the legal and sociological communities. The problem is one which arises naturally from attempts to define in a few descriptive sentences a form of social problem which is neither entirely a legal nor behavioral entity. It is by necessity a combination of both. Since only the courts may deal with violations of the criminal law there has been a trend to accept the legal definition. One eminent scholar would appear to have solved the definitional problem when he stated, "delinquency is what the law

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[6] M. Haskell and L. Yablonski, Crime and Delinquency 247 (1970) [hereinafter cited as Haskel and Yablonski].

[7] T. Gibbens and R. Ahrenfeldt, Cultural Factors in Delinquency 8-35 (1966).

says it is."[8]

Perhaps the definitional problem would never have arisen if operation of the juvenile courts had corresponded to the theory under which they were established. However, as will be pointed out in this paper, the operation and theory of the juvenile courts are worlds apart. The function of the juvenile court system has been an exercise in futility and legal hypocrisy.

II

PARENS PATRIAE: THEORY OF THE JUVENILE COURT

Children have always had a special place in the law. However, until the modern philosophy of treatment-oriented programs was developed, child violators of the criminal law were treated in much the same manner as adults.[9]

While the juvenile court theory is often thought of

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[8]S. Rubin, The Legal Character of Juvenile Delinquency, 261 The Annals of the American Academy of Political and Social Science 1 (Jan. 1941).

[9]For a concise treatment of the historical development of parens patriae, see N. Cogan, Juvenile Law, Before and After the Entrance of Parens Patriae, 22 S.C.L. Rev. 2 (1970).

as new, it can be traced back at least to the 1300's and the chancery courts of England. In its earliest form, the parens patriae theory was used to give the king authority to protect those individuals who were incapable of caring for themselves. Among those so designated were idiots,[10] lunatics,[11] charities,[12] and infants.[13] From this early beginning the "parental" relationship between the state and children in need of protection has developed into an entire legal system personified by modern juvenile courts. The essence of this system is characterized by a separation of children and adults in relation to the state's role in the operation of the criminal justice system. However, the classification does not end there, for in addition to children who violate the criminal law, all other children who are in need of supervision are also included.

The avowed goals of the state, operating through

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[10] 4 Holdsworth 387 and E. Leonard, The Early History of English Poor Law (1965). See also 1 Holdsworth 474.

[11] 1 Holdsworth 474-75.

[12] 4 Holdsworth 387-402.

[13] Falkland v. Bertie, 2 Vern. 333, 23 Eng. Rep. 814 (Ch. 1696).

juvenile courts, are to protect rather than punish,[14] to rehabilitate, to take the child out of the formal and prosecutorial arena of criminal courts and place him in an informal atmosphere. Here he can discuss his problems with an understanding judge, and through other state agencies, he can be returned to society as a useful young citizen. Thus, the juvenile court was designed to be civil, rather than criminal, in nature.[15] The child, rather than the act, was to be the focal point. In keeping with the benevolent philosophy, the common terms used in processing adult criminals were gradually replaced by new terms: children are not arrested, they are taken into custody; children are not subjected to trials, they are faced with hearings; children are not incarcerated, they are sent to industrial schools for training; children are not designated criminals, they are deemed to be delinquent.[16]

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[14] See, e.g., In re Gault, 387 U.S. 1 at 15.

[15] Id. at 17.

[16] Van Waters, The Socialization of Juvenile Court Procedure, in Crime, Abnormal Minds and the Law 167 (Hoag and Williams, eds. 1923). "The chief obstacles to socialization of Juvenile Court procedure are lingering shreds of penal terminology and criminal law usage."

Thus the state as parens patriae theoretically extended its full powers to protect children which it deemed to be in need of help. This effectively removed children from the criminal courts. However, the removal was not without flaws. Once children were confined to hearings which were civil rather than criminal, they had no need for constitutional safeguards normally associated with criminal courts. This rationalization was somewhat illogical since the parens patriae concept purported to extend the full protection of the state. After all, the state had assumed the role of parent. However, by merely designating juvenile court proceedings civil, the legal distinction was drawn, and the most fundamental protections the state could offer were withheld. The result was that statutes relating to children were allowed to be vague, indefinite, and broad.[17] The jurisdiction extended to juvenile courts was all-inclusive, and most states had no appellate procedure for children.[18]

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[17] See, e.g. People v. Bergerson, 17 N.Y.2d 236, 218 N.E.2d 288 (1966).

[18] See, e.g., ex parte Naccarat, 282 Mo. 722, 41 S.W.2d 176 (1931).

Children had no right to legal representation, to notice of the hearing, cross examination, or confrontation of the accuser.[19] These were the elements which were built into the juvenile court system when it began in 1899. It would take sixty eight years to bring the constitution to juvenile courts, and then only in limited form.[20]

This paper is not concerned with the constitutional question per se; however, this brief statement of the development of the court system is necessary if one is to perceive the total misconception of parens patriae under which the system currently operates.

Parens patriae is more than a legal concept.[21] The theory encompasses basic social policy which is aimed at special treatment of children who, for various reasons, are in need of help. The state has assumed the burden of stepping into such situations and acts as a substitute

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[19] See e.g., Cinque v. Boyd, 99 Conn. 70, 121 A 678 (1923).

[20] In re Gault, 387 U.S.1. The Gault case did not extend full constitutional protection to children. It did establish the right to counsel, notice of hearing, confrontation, cross examination, and privilege against self incrimination. These protections only apply to the adjudicatory stage of the proceedings and then only when there is a charge of delinquency and a chance of committment.

[21] In re Gault, 387 U.S. 1, at 16.

parent. This, as Judge Orman W. Ketcham[22] points out, implies a mutual contract between the child and the state. The state, however, is not required to fulfill its promise to the child. The child is regarded as an asset of the state.

There is general agreement that the juvenile court system, operating under the parens patriae concept, has failed.[23] Juvenile delinquency rates continue to climb, and the rate of recidivism is increasing.[24]

In order to arrive at some conclusions as to why the system has failed, an examination of juvenile court procedure is in order. The various contrasts between theory and actual practice of the court may indicate why some basic changes in procedure are needed. While the procedure of these courts is filled with problems and confusion, only a few of the most outstanding problems are pointed out in this paper.

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[22] O. Ketcham, The Unfulfilled Promise of the Juvenile Court in Justice for the Child 22 (M. Rosenheim ed., 1962).

[23] Id. at 22-43.

[24] Haskel and Yablonski, supra note 6, at 256-69.

III

SUMMARY OF PROCEDURE IN THE JUVENILE COURT

Juvenile courts have three outstanding characteristics which form the basis for their operation. First, they are "special" courts which are to be distinct in function and operation from other courts.[25] Second, the juvenile court has as a primary function, the prevention of juvenile delinquency.[26] Third, the jurisdiction of the court continues until the majority (age 21) of those who appear before it.[27]

Perhaps the best method to examine the actual procedure of the court is to follow a hypothetical case through the current procedures used in most juvenile courts. The reader should keep in mind that the asserted goal of the state as parens patriae is to protect the child.

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[25] For a discussion of the special nature of the juvenile court, see, e.g., In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).

[26] See, e.g., People v. Diebert, 117 Cal. App. 2d 410, 256 P.2d 355 (1953).

[27] See, e.g., Ex parte Birthfield, 90 Okla. 197, 212 P.2d 145 (1949).

Assume that the subject is a twelve year-old male from a low socio-economic standing, and he has been taken into custody for shoplifting. The following is typical of what the child may expect when going through the juvenile court system from "arrest" to disposition:

Stage I . . . The arresting officer may take the child into custody without any of the formality normally associated with arrests. The general law of arrest does not apply to the taking into custody of minors.[28] The child may be questioned and returned to the custody of his family to await hearing. Or he may, instead, be retained in the county jail for a period of time, supposedly being kept separate from adults. The child may or may not be informed of the charges against him at this point. He will be notified later that he is charged with shoplifting and that he must appear in court on a designated day.[29]

Ignoring for the moment the legal aspects of

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[28] In re James L_____, Jr., 25 Ohio Ops. 2d 369, 194 N.E.2d 797 (1963).

[29] In re Gault, 387 U.S. 1, at 33.

arrest, a sociological examination of stage I is in order.

The police officer makes the first and perhaps most important of a series of decisions regarding the child.[30] The officer has several options in most instances and in effect his final choice is a key factor in the child's future. Arrest, the most severe disposition available to the officer, may not only lead to confinement, but may also result in a loss of social status, restriction of educational and employment opportunities and future harassment by law enforcement personnel.[31] The arrest may even reinforce deviant behavior due to the unavoidable stigma.[32] Generally there are five options available to the police officer when confronted with a possible case of delinquency. He may release the child, release the child and make an informal report of the incident to headquarters, reprimand the child and release him to his parents, cite the child to juvenile

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[30] I. Piliavin and S. Briar, Police Encounters With Juveniles, in Juvenile Delinquency 27 (J. Teele ed. 1970) [hereinafter cited as Piliavin and Briar].

[31] Id. at 27-28.

[32] Cloward and Ohlin, supra note 3, at 124.

court, or arrest the child.[33]

Police officers have reported that the key factors they consider when faced with this decision are the demeanor of the child, his past record, and the officers' attitude concerning the value of the juvenile court process.[34] The child's demeanor was most important. Officers admitted that a child who was neatly dressed and responded in a polite manner would be far less likely to be arrested than a child poorly dressed and exhibiting a hostile attitude.[35] Perhaps this is an extension of the juvenile court theory. More weight appears to be given to the child's character and attitude than to his act. This would also appear to reinforce the fourth factor in the sociological definition of delinquency, concerning the social status of the child, set forth at the beginning of this paper.

The most severe sociological consequence of arrest is the stigma attached. The arrested child, whether guilty

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[33] Piliavin and Briar, supra note 30, at 29.

[34] Id. at 27.

[35] Id.

of a delinquent act or not, will to some degree be stereotyped as deviant. He is literally prejudged and is helpless to alter the evaluations or treatment of himself.[36] This role imprisonment leads to social reactions which may make the child's return to conventional, non-deviant behavior very difficult. Of course, even assuming delinquency, the child's future behavior could be conventional and non-delinquent if his attitudes and behavior patterns could be changed by use of competent state supported treatment programs.

The discussion relevant to arrest is not a criticism of police practice. Rather, the intent is to point out the possible consequences of a low level decision which a police officer may have to make quickly. If the officer is poorly trained or does not realize the long range consequences of his decision, the child will be put in an impossible position. While there is no immediate solution to the problem concerning police discretion, there are ways to reduce indiscriminate decision making. Police officers

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[36] J. Simmons, Public Stereotypes of Deviants, in Juvenile Delinquency 75 (J. Teele ed. 1970).

should be specially trained in the area of juvenile delinquency. They should be made aware of the possible consequences resulting from their decisions on encountering juveniles and instructed to follow strict departmental guidelines.

The police officer is a key figure in the juvenile justice process. The process begins with him and his initial decision will determine whether or not it continues.

For illustration purposes, assume that the child was taken into custody and has reached stage II of the process, a petition having been filed.

Stage II . . . The court will cause an investigation to be made of the child's background. This information will be considered by the court at the disposition stage of the hearing. Of particular importance in the investigation is knowledge of the child's family status, income, number of siblings, and whether or not the child has a prior record in the court.

The usual process is for a probation officer or court service worker to gather information about the child and his family. This information is concentrated on the

child's background and not on the offense with which he is charged. It is gathered from police records, school records, welfare agencies, and visits to the child's home and neighborhood. The report also includes, if possible, the results of intelligence tests, medical examinations, psychiatric evaluation, and any other information available.[37] The nature of this social study is derived largely from its essential function, namely, to guide the court in its disposition. Because of this essential function, the report should be of a diagnostic nature rather than a mere assembling of data.[38] However, in order to be diagnostic, the material must be gathered and interpreted by people trained in the area of social science. Unfortunately, most probation officers are unskilled in this respect.[39] In addition, they are generally over-worked and underpaid, resulting in gross inefficiency.[40] In view of this it is understandable that

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[37] Haskel and Yablonski, supra note 6, at 239.

[38] H. Bloch and F. Flynn, Delinquency 346-50 (1964).

[39] Id. at 348.

[40] Id. at 368. It is not uncommon for a probation officer to carry three times the normal case load. Fifty children has been considered a normal case load.

many social reports cannot properly be used since there can be no realistic recommendation made to the court. The situation would not be as bad if judges were able to make competent diagnosis from the information. Unfortunately, judges are rarely trained behavioral scientists.[41] The end result is that, through the state's failure to provide adequate personnel, the child will be subjected to a disposition which may be entirely wrong for him.

Stage III . . . The hearing is conducted in conformity with the Gault decision since there is the possibility of commitment to an industrial school. The child may have an attorney representing him, the state may have a prosecuting attorney present, or the judge may serve as the only legally trained person present, acting as judge, jury, defense, and prosecution.

The normal rules of evidence do not apply in juvenile hearings,[42] since there will be no conviction. The idea is

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[41] Haskel and Yablonski, supra note 6, at 239. Even when psychological and psychiatric advisers are available, he (the judge) has to be able to evaluate their reports properly. The training required to do this is not usually provided in law schools.

[42] In re Gault, 387 U.S. 1, at 15 (dictum).

to talk to the child and help him with his problems, specifically those which gave rise to the delinquent act. Although the hearing is private rather than public, the court will hear testimony from virtually anyone who knows the child and can give information relative to his conduct. It is not uncommon, for example, for the child's school teacher to be present at the hearing.

Under the theory of the court, the hearing is not an adversary proceeding. However, since the Gault decision, lawyers are becoming more active in juvenile courts. The inevitable result is that hearings are becoming adversary, and the focal point is shifting from the child to the act. The appearance of lawyers in juvenile court has been one of the most significant developments in recent years. The emergence of the lawyer has created a frontal attack on the juvenile court theory.

Attorneys have always been faced with the question of what approach to take when representing a child in juvenile court. On the one hand they are trained to be objective, to look for equal treatment before the bar and to see some correlation between offense and disposition. On

the other hand they are faced with a court which operates under a treatment-oriented, non-adversary philosophy. The appearance of attorneys has presented new problems which reach to the very heart of the juvenile court philosophy. For example, if the child is represented by counsel and the state does not provide a prosecuting attorney, the judge may be forced into the role of prosecutor. This could have an effect on disposition.[43] Another problem arises when the attorney believes that the child was involved in the matter alleged and the child needs psychiatric help. Should the attorney assume the role of trial lawyer and attempt to have the petition dismissed, or should he persuade the child to admit involvement and be put under protection of the court? This problem was presented to the National Council of Juvenile Court Judges in 1966. The Council unanimously advised that counsel conduct himself as a trial lawyer.[44]

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[43] J. F. X. Irving, On Going Into Juvenile Court (National Counsel of Juvenile Court Judges 1967).

[44] Id. at 4. The reasoning of the Council was thus: "If psychiatric testing or other treatment is required, it can often be obtained privately, thereby avoiding the stigma of a delinquency adjudication. If the state needs to be represented, it should be, but counsel's obligation to the child should not be diluted by such considerations."

Trial lawyers are trained to be advocates and to contest cases in an adversary proceeding. Clearly this is inconsistent with the original juvenile court theory under which the proceedings were to be informal,[45] non-adversary,[46] and confidential.[47]

The inconsistency between theory and practice does not end with the appearance of attorneys. There are other legal procedures, such as trial by jury,[48] which are beginning to surface in juvenile court operations. The trend is toward full legal treatment of juveniles and many juvenile court judges are avid proponents of the trend. One juvenile court judge has perhaps summarized the attitude behind the legalistic trend. His comments are worth repeating here.

> I am convinced that unless there is a separation of civil process from criminal process, the system of

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[45] See note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 775, 790 (1966).

[46] See, e.g., In re Santillanes, 47 N.M.140, 138 P.2d 503 (1943).

[47] See note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 799 (1966).

[48] Comment, Minnesota Juvenile Court Rules: Brightning One World For Juveniles, 54 Minn. L. Rev. 303 (1969).

> juvenile methods will remain congested with many theories, philosophies, and inflated dreams of social minded reformers, which is detrimental to the juvenile in that it deprives him of his constitutional guarantees and individual liberty. All of the safeguards that are afforded to an adult criminal trial should be, and constitutionally must be applied to a juvenile case, even including that of the right to trial by jury of his peers, as well as a finding of guilty beyond a reasonable doubt, rather than by a preponderance of the evidence. Then, and only then, will conformity and due process prevail, and the juvenile, the police, the court, and everyone else concerned will know where they are headed.[49]

Extending full constitutional safeguards to children accused of crime would most certainly end much of the confusion surrounding juvenile courts. However, the main consideration should not be the constitutional issue. Of far greater importance is a re-evaluation of the state's role and purpose in assuming the position of parent. The constitutional issue would never come into focus, for example, if the determination was made to treat delinquents through social programs completely outside the legal system. Of course there must always be some method of determining whether or not the subject child has been delinquent. In the present case our twlve year old shoplifter will be adjuged delinquent or non-delinquent on the basis of a

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[49] In re Rindell, 2 Crim L. Rep. 18 (1968).

hearing conducted essentially in the manner of a trial.

Stage IV . . . After determining whether or not the child is delinquent, the court is faced with deciding what to do with him. If the hearing resulted in a determination of delinquency, the court has several options as to disposition. The child may be placed on probation, placed in a foster home, returned to his parents, or committed to an industrial school.[50]

Disposition is the most vital stage in the process. At this point the state assumes the role of parent and decides how to treat the child. The alternatives presently employed by the state are all to a large degree ineffective.

Probation is ideally designed to give guidance to a child while leaving him in his own home.[51] Normally the child on probation will resume his usual daily activities, the only difference being a weekly or monthly visit to the probation officer. Since, as pointed out above, the probation officers are burdened with excessive numbers of children, the

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[50] Haskel and Yablonski, supra note 6, at 231.

[51] Bloch and Flynn, supra note 38, at 364.

probation system has little rehabilitative effect. The child is in the same environment, doing the same things he did before encountering the juvenile court. In view of this it is safe to say that the probation system taken as a whole is not living up to its potential in curbing delinquency. New ideas are being explored relative to improving the probation system. One of the most creative ideas in this area comes from Orman W. Katcham, a juvenile court judge, who would completely restructure the juvenile court and replace the probation officers with a rehabilitation department.[52] Again, the essential improvement would be trained personnel with realistic case loads and substantial programs available for treating delinquent youths. Clearly, if such a probation system did exist there would be fewer children committed to industrial schools.

The typical industrial school is the antithesis of modern rehabilitative theory. It is historically over-crowded, regimented, and poorly equipped.[53] In many

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[52]Ketcham, The Juvenile Court for 1975, 40 Soc. Serv. Rev. 283 (1966).

[53]A. Platt, The Child Savers 150 (1969) [hereinafter cited as Platt].

industrial schools punishment is the basic mechanism of day by day management.[54] Solitary confinement is common. Physical punishment, including beatings, is not uncommon. In an effort to gain first hand information, the author visited several industrial schools and noted the following observations.[55]

- All six schools were overcrowded.
- Four of the six schools were enclosed by barbed wire, three had bars at the windows, and all six had security guards.
- All schools had solitary confinement areas. Only one of such areas had toilet facilities, one was outside and enclosed by barbed wire, five were small rooms which were dirty and odorous. The period of solitary confinement varied from one day to "no limit."
- In one institution for boys an employee admitted striking the children with a leather strap.

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[54] E. Rolde, The Maximum Security Institution As A Treatment Facility for Juveniles, in Juvenile Delinquency 439 (J. Teele ed. 1970).

[55] The author visited six industrial schools in three southern states as part of the research for this paper. The states were North Carolina, South Carolina, and Georgia. The specific names of the institutions must remain anonymous.

- In four institutions, all for boys, the children were dressed alike and hair was kept extremely short.
- In two institutions where the school grade range was from grade four to grade twelve, there was only one school teacher. At one of these institutions the teacher was not present on a daily basis.
- Treatment programs and trained personnel were generally described by the superintendants as inadequate.
- Most buildings were in need of repair.
- Recreational facilities were excellent at one school, poor at one school, and non existant at four schools.

The observations noted above are all on the negative side. There were many positive aspects observed at some of the schools; however, the focus of attention should be on the areas that need improvement. The sample taken was exceedingly small and no broad conclusions may validly be drawn from this alone. However, other researchers have indicated the existence of similar conditions in industrial schools located through the United States.[56]

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[56] Platt, supra note 53, at 117.

Assuming the conditions described here are widespread in industrial schools, or even that they exist in a minority of schools, the obvious conclusion is that the industrial school is another in a series of failures. It has been demonstrated that an industrial school can accomplish the goals of rehabilitation and socialization without the harsh and crude tactics that characterize some institutions. It can be done in a minimum amount of time, given the proper facilities and trained people to administer the programs.[57]

The industrial school is the final step in the process which began with arrest. It is the last resort of most juvenile courts, the final resignation to the belief that nothing else can be done for the child.[58] This attitude is not shared by all juvenile court judges however; there are some who are described as "antagonistic" and who do not

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[57] H. Weeks, The Highfields Project, in Juvenile Delinquency 391 (J. Teele ed. 1970).

[58] In a speech delivered to the South Carolina Juvenile Court Judges Conference, May 26, 1971, Judge J. McNairy Spigner of the Richland County Family Court had this to say about industrial schools: "I will not commit a child to an industrial school in this state unless all else has been tried and has failed, and tried again, and again."

hesitate to commit children to industrial schools.[59] This at least gets the kid off the street. He will not bother anyone for a while, and for the moment at least the problem is solved. The only trouble with such an act is that the welfare of the child appears to be the least consideration, and statistics indicate that once a child is committed to an industrial school there is a high probability that he will, upon release, again be involved in delinquent acts. The industrial school may even contribute to the creation of anti-social attitudes.[60]

The stages briefly outlined above--arrest, investigation, adjudication, and disposition--are basically the same in all juvenile delinquency proceedings. With the exception of Stage II, the entire process is legal in nature and subject to the personal discretion of individuals who are generally not trained for dealing with children on a sociological basis. Indeed, the most prominent figure of all in the process is the judge, a person trained in the

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[59] Haskel and Yablonski, supra note 6, at 240.

[60] Alexander, Corrections in Transition, 45 Neb. L. Rev. 10-13 (1966). See also, D. Gibbons, Delinquent Behavior 247-56 (1970).

law. Or is he? Implementation of the parens patriae philosophy has clearly been through the legal system. This would indicate that, most certainly, the men appointed or elected to serve as judges in the juvenile courts would be trained in the legal profession. However, a recent survey of juvenile court judges in the United States revealed that half of all juvenile court judges have no undergraduate degree; one fifth have no college training at all; one fifth are not members of the bar; and nearly three quarters devote less than one fourth of their time to juvenile matters.[61]

The problems and inconsistencies pointed out here have been concerned with operation of the juvenile court theory in dealing with children charged with delinquent conduct. The second essential function of the juvenile court is related to neglected or abused children. These are the children who appear before the court as a result of the abusive acts of others. These children are victims. They are in need of care and supervision, but are to be

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[61] The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice 80.

distinguished from those children who are in need of supervision due to delinquent acts. The neglected or abused child literally needs to be protected for his own welfare. The conduct of the child plays no part in the proceedings. The dilemma presented by the first category of children--enforcing the law to protect citizens while also protecting the violator--is not present here.

IV

NEGLECTED AND ABUSED CHILDREN

It may seem incomprehensible to the average person that anyone, especially parents, would purposely and maliciously neglect or physically abuse an infant. The idea is repugnant on its face. However, society has not only tolerated such conduct but has historically condoned it. Maltreatment of children has been justified for centuries by the belief that severe physical punishment was necessary either to maintain discipline, to educate, to please the Gods, or to expel evil spirits.[62] Methods used have varied

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[62] S. Radbill, A History of Child Abuse and Infanticide, in The Battered Child 1-9 (R. Helfer ed. 1968) [hereinafter cited as Radbill].

from severe whipping to mutilation to infanticide, with various reasons and excuses created to avoid guilt.[63] The age of urbanization and industrialization brought with it new methods of child abuse. Infants were subjected to terrible inhumanity by the factory system where they created a virtually endless supply of slave labor. Children from five years of age upward were worked sixteen hours a day, sometimes with irons riveted around their ankles to keep them from running away.[64] The same period saw children being used as chimney sweeps. Working night and day these children were subjected to all kinds of brutality. They quickly deteriorated both mentally and physically while the public appeared to take little interest in their plight.[65] While such labor practices have ended in the modern world, other forms of maltreatment including infanticide still

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[63] Id. at 6. Reasons for the use of infanticide include: population control; control of family size; illegitimacy; inability of the mother to care for the child; lack of food; greed for money or power; to rid society of unhealthy children.

[64] J. Spargo, The Bitter Cry of the Children 140 (1908).

[65] Radbill, supra note 62, at 12.

exist,[66] though infanticide occurs only in primitive societies. The abuses listed above are those which have generally been condoned by society. There are other types which have not been condoned and which continue today. These include brutal assault, starving, and various other acts directed toward children for no socially acceptable reason. It is this category of abuse and neglect that poses problems for the juvenile court and a challenge to the parens patriae concept.

The legal response to child abuse has varied from jurisdiction to jurisdiction, however there does appear to be some basic outline encompassing child abuse laws. Paulsen indicates that there are essentially four sets of legal provisions which are of primary significance in this area.[67] They are:

1. Provisions of the criminal law which can be invoked to punish persons who have inflicted harm upon children.

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[66] E. Hoebel, Man in the Primitive World 327 (1958).

[67] M. Paulsen, The Law and Abused Children, in The Battered Child 175-76 (R. Helfer ed. 1968) hereinafter cited as Paulsen .

2. Juvenile court acts, which universally provide that when there is evidence of abuse, parents or other caretakers may be found to have neglected the child. After an adjudication of neglect the juvenile court may institute protective supervision of the child or order his removal from the home.

3. Legislation, in many states, which authorizes or establishes "protective services" for abused and neglected children as part of a comprehensive program of public child welfare services.

4. Child abuse reporting laws, now existing in every state, encouraging the reporting of suspected child abuse so that the other provisions for the protection of children can be called into play.

The criminal law operates only to punish the wrongdoer, the adult who inflicts harm on a child. It cannot operate to aid the child, to improve his condition, or to change his environment. Because of this, criminal law provisions have little value from the child's point of view.

The juvenile court is faced with confusing legis-

lation relating to standards of proof in neglect-abuse cases. Proff of physical abuse, done intentionally, is extremely difficult to establish. Juvenile courts have adopted virtually every conceivable standard in attempting to cope with this problem from a mere preponderance of evidence to res ipsa loquitur.[68] The court is faced with the problem of balancing the interest of the parents with the child's welfare. In cases where the injuries leave doubt as to their cause, the conflict may be impossible to resolve and the child will return home. This result is open to attack under the parens patriae theory. If the welfare of the child is the main consideration, as it must be under the theory, then all doubts should not be resolved in favor of the parents.[69] Obviously there can never be any assurance of future protection for the child. The problem is compounded however because the use of legal procedures requiring confusing standards of proof--aimed at establishing guilt--are focused on the adults and not

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[68] See, e.g., In the Matter of S, 259 N.Y.S.2d 16Y. (Fam. Ct. 1965).

[69] Paulsen, supra note 67, at 179.

on the child.

Child welfare services have emerged in recent years and have helped to eliminate some child abuse problems. The emphasis here is on remolding the family structure. These services are usually available without a court order. But before any services can be rendered, before any help can be extended to the child, there must be a report of the circumstances. Someone must know that a child is being abused or neglected and report it. This is the key stumbling block in any attempt to deal with child abuse. The simple fact is no one wants to get involved. Doctors, neighbors, friends of the family and people in general are hesitant to report a suspected child abuse case. Statutes requiring the reporting of such cases exist in every state.[70] Even so, few cases are reported. When a case is reported there follows a series of confused acts and conflicting efforts to shift the handling of the case from one agency to another.

An investigation into the procedure for handling

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[70] See Addendum, exhibit #1.

abuse cases was made in Columbia, South Carolina. The investigation revealed the following facts, which may be typical in other areas.

Reports were usually made to the police department, and usually at night. Most, but not all, reported cases were investigated. Many times the police advised the caller to report the case to the welfare department or the juvenile court. The main consideration of the police was gathering information to be used against the abuser in criminal court. As far as the welfare of the child was concerned, the general police attitude was that such considerations were the responsibility of some other agency. The sheriff's department exhibited a similar approach. Both departments had rotating "juvenile officers" to deal with child related problems. Neither department had ever given any formal instruction to its officers on how to handle abuse cases.

The juvenile court was not equipeed to cope with reports of abuse. When such reports were made they were generally referred to the welfare department and the caller was advised that he could file a petition in order to instigate legal action. The welfare department eventually

received all reports of abuse. However, if the report was made at night, no action would be taken until the following day. Social workers would then investigate and if necessary secure a court order to remove the child on a temporary basis. The result of all this is that no clear-cut procedure existed for dealing with child abuse cases. The very nature of such cases is one of emergency; it demands immediate action by trained people. In areas such as Columbia where confusion reigns, the results can often be tragic. An example case from Columbia is illustrative.

In January, 1970, a suspected child abuse case was reported to a public agency at approximately 4:00 p.m. on Friday. The caller indicated that he had seen his neighbors' child, age 14 months, outside naked and bruised. The temperature was below 30 degrees.

The following Monday, a medical doctor reported that he had just treated a child for severe bruises, a skull fracture, and exposure. The doctor indicated that he was sure the child had been abused. After an investigation by the welfare department it was determined that the case reported on Friday and the case reported by the doctor on

Monday concerned the same child. No action was taken following the Friday report. The skull fracture was inflicted on Monday morning. X-rays revealed other fractures had been received earlier and has healed. Eventually the child recovered from his injuries and was returned to his parents.[71]

The point of this illustration is simple. The child would have been protected if only a clear procedure had been in existence. However, due to unconcern, ignorance, and apathy on the part of all agencies involved, the child was brutally battered, then sent home for more.

Child abuse statutes range from well drawn legalities to placing children in the same category as animals.[72] In attempts to prod the public into reporting abuse cases many statutes provide for immunity from liability for reporting. Others are not only permissive but mandatory and require certain persons to report.[73] There are, of course, many

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[71] In re E_____, No. 12121 (Richland, S.C., Fam. Ct. 1970).

[72] See, e.g., S.C. Code § 20-302 (1962).

[73] See Addendum, exhibit # 1.

problems involved when attempts are made to circumvent all the legal implications which could arise due to reporting an abuse case.[74] The reporter may be afraid of slander, libel, malicious prosecution, or of violating a confidence. However, carefully drawn statutes can remedy such problems.[75]

Assuming the hazards of poor procedure and vague statutes have been traversed, the case will eventually wind up in juvenile court. Again under the parens patriae theory the central focus is on the welfare of the child. No other issue exists. The child has violated no law nor acted in any way which might create a legal conflict. He has been the victim. The sole concern of the court is how to best provide for the immediate welfare of the child. The court may order medical treatment if necessary, or treatment for mental or emotional ills.[76] The child may be removed from the home in order to provide protection.[77] In respect to the

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[75] See Addendum, exhibit # 2. This statute was drafted by the author and is currently before the S.C. General Assembly. (H.B. 506).

[76] In re Carstairs, 115 N.Y.S.2d 314 (Dom. Rel. Ct. 1952).

[77] Patterson v. Phoenix, 103 Ariz. 64, 436 P.2d 613 (1968).

overall power granted to the court, the parens patriae concept does indeed function in the area of child abuse. However, again the state has stopped short of full protection for its children. The juvenile court usually has no authority over the parents. In the abuse situation such authority to order parental participation in psychiatric treatment is necessary. The court should be able to order the parents to cooperate in family counseling or other efforts to influence a change in the family situation. Studies have indicated the basic problems in child abusing families are relatively constant.[78] Most of the problems which cause internal family conflict and lead to child abuse are social in nature. Treatment programs are available and highly successful. However, parents in an abuse situation rarely volunteer themselves for treatment. Most such parents are not aware that they need any treatment. The approach of criminal courts, which have jurisdiction over the parents, is to punish them for their acts. This is the antithesis of a logical approach to the problem. Such legal action may even add fuel to an already unstable and

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[78] E. Elmer, Children in Jeopardy 18-42 (1967).

deteriorating family unit. Assuming the goal is to reunite the family in a stable situation conducive to the welfare of the child, the approach to such a solution must be basically social rather than legal. The juvenile court, operating as a family court, could solve this socio-legal conflict if given the authority to do so. The parens patriae theory is an ideal basis for a family oriented court. The parent-child jurisdictional split undermines the theory as does the invasion of criminal law sanctions.

Under current operational procedures in abuse cases the court may be ultimately faced with the question of whether or not to return the abused child to its parents. The decision is critical. The family is the basic social unit of any culture. To separate children from their parents is to create an unnatural relationship, the effects of which reach the very foundations of society. Yet, juvenile courts are often called upon to make such a decision with a minimum of information or available social aid to influence them.

V

CONCLUSION

It is possible that the key reason for the failure of juvenile courts is that implementation of their philosophy has been through the legal system. Perhaps the parens patriae theory could best be put into operation outside the legal institution. Complete divorce from the law is of course impossible. The juvenile delinquency problem as well as that of abused children is integrated historically with criminal law. However, administration of any social agency designed to cope with these problems could be greatly improved by launching a new approach to the search for solutions.

More reliance on sociology, psychology, and psychiatry as well as improved facilities would be a step in the right direction. Less reliance on confusing legalities and uninformed judges would be in order.

The problem has perhaps been too narrowly defined. The view has been, at least in theory, focused on the child. A broader look reveals that nearly every instance is in actuality a family problem. Logically the solution lies

ADDENDUM

Exhibit 1

Column 1 - minor age requirement
Column 2 - who must report
Column 3 - type of injury to be reported
Column 4 - to whom reports are made
Column 5 - to whom immunity from liability applies
Column 6 - Abrogation of evidentiary privileges
Column 7 - Penalty for violation

STATE	1	2	3	4	5	6	7
Alabama	16	Anyone	Physical	Police Welfare		Dr.-Patient	6 mo/$500
Alaska	16	None	Physical	Welfare	Good Faith	Dr.-Patient H-W	10 Days/$100
Arizona	16	Medical Field	Physical	Police		Dr.-Patient H-W	
Arkansas	16	Medical Field	Physical	Police	Good Faith	Dr.-Patient H-W	
California	M	Medical Field	Physical	Police			Misdemeanor
Colorado	12	Doctor	Injury	Police		Dr.-Patient	
Connecticut	18	Doctor	Injury	Police Welfare	Good Faith		

STATE	1	2	3	4	5	6	7
Delaware	18	Doctor	Injury	Police Welfare	Good Faith	Dr.-Patient H-W	$50
Florida	16	Doctor	Injury	Family Court	Good Faith	Dr.-Patient	Misdemeanor
Georgia	12	Doctor D.P.W.	Injury	Welfare	Good Faith		
Idaho	18	Doctor Hospital	Physical	Dept. of Public Ast.		H-W	
Illinois	16	Medical Field	Physical	Police	Good Faith	Dr.-Patient H-W	
Indiana	16	Doctor	Injury	Welfare	Good Faith	Dr.-Patient H-W	
Iowa	18	Medical Field	Physical	Welfare	Good Faith	Dr.-Patient H-W	
Kansas	16	Medical Field	Injury	Family Court	Without Malice	Dr.-Patient H-W	Misdemeanor
Kentucky	18	Anyone	Injury	Police	Anyone	Dr.-Patient H-W	$100
Louisiana	17	Doctor	Injury	Police	Good Faith	Dr.-Patient H-W	10 Days/$100
Maine	16	Doctor	Injury	Welfare	Good Faith		6 mo/$100
Maryland	16	Med. Police Welfare	Physical	Welfare Police			Note- Central Registry

STATE	1	2	3	4	5	6	7
Massachusetts	16	Doctor	Physical	Welfare	Good Faith		
Michigan	17	Doctor	Physical	District Attorney Welfare	Good Faith	Dr.-Patient H-W	Misdemeanor
Minnesota	M	Medical Field	Physical	Police	Good Faith	Dr.-Patient H-W	Misdemeanor
Mississippi	18	Doctor	Physical	As Court Directs	Good Faith		
Missouri	12		Injury	Police	Good Faith	Dr.-Patient H-W	
Montana	18	Doctor Teacher Welfare	Injury	District Attorney	Good Faith	Dr.-Patient H-W	
Nebraska	Any Child	Anyone	Physical	District Attorney		Dr.-Patient	$100
Nevada	18	Dr Teacher Minister Welfare	Injury	Police	Good Faith	Dr.-Patient	Misdemeanor
New Hampshire	16	Doctor	Injury	Welfare	Good Faith	Dr.-Patient H-W	$500
New Jersey	18	Doctor	Injury	District Attorney			Misdemeanor
New Mexico	16		Injury	District Attorney			Misdemeanor

STATE	1	2	3	4	5	6	7
New York	16	Doctor Welfare	Injury	Welfare	Good Faith		
North Carolina	16		Illness Injury	Welfare	Good Faith	Dr.-Patient	Note- No Mandatory Reporting
North Dakota	18	Medical Field	Injury	Welfare	Good Faith	Dr.-Patient H-W	
Ohio	18	Doctor Teacher Welfare	Condition or Injury	Police		Dr.-Patient	
Oklahoma	17	Medical Field	Injury	Welfare	Good Faith	Dr.-Patient	Misdemeanor
Oregon	12	Doctor	Physical	Medical Investi-gator	Good Faith	Dr.-Patient H-W	Misdemeanor
Pennsylvania	18	Doctor	Physical	Juvenile Court		Dr.-Patient	$500/one year
Rhode Island	18	Doctor	Injury	Welfare	Good Faith		
South Dakota	16	Medical Field	Injury	Juvenile Court	Good Faith	Dr.-Patient H-W	Misdemeanor
Tennessee	16	Anyone	Condition	Juvenile Court	Good Faith		Misdemeanor
Texas	18		Injury	Juvenile Court	Good Faith		

STATE	1	2	3	4	5	6	7
Utah	M	Anyone	Physical	Police	Good Faith	Dr.-Patient	Misdemeanor
Vermont	16	Doctor	Physical	Welfare	Good Faith		$25
Virginia	16	Medical Field	Injury	Juvenile Court	Good Faith	Dr.-Patient H-W	Central Reg.
Washington	18		Physical	Police		Dr.-Patient H-W	
West Virginia	18	Doctor Teacher Welfare	Injury	District Attorney	Good Faith		
Wisconsin	M	Doctor Teacher Welfare	Abuse	Welfare	Good Faith	Dr.-Patient	6 Mo/$100
Wyoming	19	Anyone	Injury	Police	Good Faith	Dr.-Patient H-W	$500/One year

Exhibit 2

-PURPOSE-

The purpose of this Act is

A. To provide for the protection of children under the age of 17 years who have been subjected to physical injury by way of abuse or neglect,

B. To provide protection for such children who are further threatened by the conduct or neglect of those responsible for their care,

C. To set forth the action to be taken in regard to those persons who inflict such injury,

D. To provide for the reporting of child abuse or neglect resulting in physical injury to such children.

ARTICLE I JURISDICTION

The Family Court and Circuit Court of the County where the injured child resides or is found shall have jurisdiction over proceedings brought pursuant to this Act.

ARTICLE II REPORTING

A. All practioners of the healing arts, and any other person having reasonable cause to believe that a child under the age of 17 years has been subjected to physical inuury by the person responsible for his care shall report or cause a report to be made in accordance with this Act.

B. An oral report, by telephone or otherwise, shall be made immediately to the County Department of Public Welfare or the County Sheriff's office in the county where the child resides or is found.

C. Such oral report shall be followed within three (3) days by a report in writing to the County Department of Public Welfare. Written reports shall contain, but are not limited to, the following:

(1) name, age, and address of child and parent-guardian,

(2) nature and extent of injury suffered by the child including any evidence of previous

previous injury,

(3) any other facts or circumstances which may aid in the future determination of guilt of the parent-guardian known to the reporter.

All reports received by the County Sheriff's Department shall be forwarded to the County Department of Welfare within twenty-four (24) hours.

D. Any person who in good faith makes reports pursuant to this Act, or testifies in judicial proceedings resulting therefrom, shall be immune from liability, either civil or criminal, or both, for any statements contained in such reports or testimony or for alienation of affection of parties to the proceeding.

ARTICLE III PROCEDURE

Upon receit of a report as set forth in ARTICLE II the Sheriff, with reasonable cause to believe that the child is in danger if left with the parents, may remove the child to the nearest hospital.

Within twenty-four (24) hours of such removal, the Sheriff shall, with notice to the parents, make application for a temporary order remanding custody of the child to the County Department of Public Welfare.

The parents of said child may at any time prior to final disposition apply to the court to vacate the temporary order. A prelimilary hearing on the application shall be held within five (5) days of such application.

Parents shall be notified of the time and place of the Final Hearing. Upon such hearing, if the Court determines by clear and convincing evidence that the child will suffer abuse if returned to the home, the court may order the child treated as a dependent and neglected child under provisions of the Family Court Act, and may terminate parental rights if:

(1) there is repeated abuse or neglect resulting in physical injury to the child,

(2) the parent or guardian guilty of abuse-neglect refuses to comply with an order for psychiatric examination and or treatment,

(3) after examination by a competent psychiatrist

the parent-guardian is declared to be infirmed with a mental illness for which there is no adequate treatment, or there can be no reasonable assurance that the said parent-guardian will not further abuse or neglect the child due to such mental infirmity or deficiency.

ARTICLE IV ABROGATION OF PRIVILEGED COMMUNICATION

In any judicial proceeding resulting from the provisions of this Act, there shall be no privileged communication between husband and wife.

In the evaluation process there shall be no privileged communication between doctor and patient.

ARTICLE V DUTIES OF DEPARTMENT OF PUBLIC WELFARE

Upon receit of a report as set out by this Act, the County Department of Public Welfare shall:

(1) cause an immediate investigation to be made into the case as reported,

(2) apply to the Family Court or Circuit Court of the County for an order to remove the injured child if such action is indicated by the investi-

gation, upon receit of such order,

(3) temporarily place the child in an environment to prevent further abuse-neglect,

(4) maintain a Central Registry of all cases reported pursuant to this Act.

ARTICLE VI PENALTY

Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than Five Hundred ($500) Dollars or imprisoned for not more than six (6) months.