Juvenile Status Offender Statutes — New Perspectives on an Old Problem

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INTRODUCTION

Juvenile status offender statutes[1] allow judicial intervention in the lives of children who commit noncriminal offenses such as disobeying parental orders, staying out late, or running away from home. These laws are often vague, and permit the state to impose sanctions, including incarceration, for almost any misconduct by a child.[2] Analogous legislation prohibiting adults from engaging in "indecent or immoral conduct"[3] clearly would be unconstitutional.[4] Yet juvenile status offender

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[1] *See generally* INSTITUTE OF JUDICIAL ADMINISTRATION-AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO NON-CRIMINAL MISBEHAVIOR (1982) [hereafter IJA/ABA STANDARDS: NON-CRIMINAL MISBEHAVIOR]; LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, REPORTS OF THE NATIONAL JUVENILE JUSTICE ASSESSMENT CENTERS, A PRELIMINARY NATIONAL ASSESSMENT OF THE STATUS OFFENDER AND THE JUVENILE JUSTICE SYSTEM: ROLE CONFLICTS, CONSTRAINTS, AND INFORMATION GAPS (1980); L. TEITELBAUM & A. GOUGH, BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT (1977). Juvenile status offender statutes are also known as ungovernability laws (*see* Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974) [hereafter Yale Ungovernability Study]); incorrigibility laws (*see, e.g.*, ARIZ. REV. STAT. ANN. § 8-201(13) (West Supp. 1982)); beyond parental control laws (*see, e.g.*, N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1981-82)); and minors in need of supervision laws (*see, e.g.*, ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd 1972)). Because many statutes employ the terminology "in need of supervision," juvenile court personnel often use acronyms derived from this phrase to describe children adjudicated status offenders. Thus, depending on the noun preceding the definitional phrase, minors, children, persons, juveniles or youths in need of supervision are often known as MINS, CHINS (or CINS), PINS, JINS, or YINS. *See* NEWSWEEK, Sept. 8, 1975, at 66.

[2] *See In re* Lavette M., 35 N.Y.2d 136, 316 N.E.2d 314, 359 N.Y.S.2d 20 (1974); N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1981-82).

[3] *E.g.*, CONN. GEN. STAT. ANN. § 46b-120(C) (West Supp. 1982).

[4] Papachristou v. Jacksonville, 405 U.S. 156 (1972) (holding unconstitutional on

statutes have proved to be remarkably tenacious. Most scholars and commentators recommend their abolition.[5] There is little proof that the existence or use of such codes helps troubled children,[6] and indeed strong arguments can be made that these laws are harmful.[7] Alternatives to them exist.[8] And still they remain. The statutes may get mod-

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vagueness grounds, vagrancy ordinance directed at "rogues and vagabonds . . . common night walkers . . . lewd, wanton or lascivious persons . . . habitual loafers, disorderly persons . . . .").

[5] *See* IJA/ABA STANDARDS: NON-CRIMINAL MISBEHAVIOR, note 1 *supra*, at 23; Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42 (1970); Ketcham, *Why Jurisdiction Over Status Offenders Should Be Eliminated from Juvenile Courts*, 57 B.U.L. REV. 645 (1977); National Council on Crime and Delinquency, *Jurisdiction Over Status Offenses Should Be Removed from the Juvenile Court*, 21 CRIME AND DELINQ. 97 (1975); Yale Ungovernability Study, note 1 *supra*. *But see* Gregory, *Juvenile Court Jurisdiction Over Noncriminal Misbehavior: The Argument Against Abolition*, 39 OHIO ST. L.J. 242 (1978); Martin & Snyder, *Jurisdiction Should Not Be Removed from the Juvenile Court*, 22 CRIME AND DELINQ. 44 (1976).

[6] *See* IJA/ABA STANDARDS: NON-CRIMINAL MISBEHAVIOR, note 1 *supra*, at 3 (quoting a 1971 California Assembly Interim Committee Report on Juvenile Court Processes: "Not a single shred of evidence exists to indicate that any significant number of ["beyond control" children] have benefited [from juvenile court intervention]. In fact, what evidence does exist points to the contrary."); *cf.* Houston Post, Aug. 30, 1982, § A, at 1, col. 2 (in reporting the conclusions of a six-year study commissioned by the Justice Department, the researchers found, *inter alia*, that "the juvenile justice system often fails to reform young offenders, and those who go through the system often react by committing more crimes").

[7] *See* E. SCHUR, RADICAL NON-INTERVENTION 118-26 (1973). *But see* IJA/ABA STANDARDS: NON-CRIMINAL MISBEHAVIOR, note 1 *supra*, at 67 (dissenting view of former New York City juvenile court judge, Justine Wise Polier).

[8] For example, private voluntary agencies can provide counselling services and treatment facilities. If a child abuses drugs or otherwise violates the penal code, the delinquency provisions of the juvenile laws prohibiting criminal acts can be invoked. Similarly, if the child's problems stem from parental neglect or abuse, as does some running away behavior, the neglect provisions of the juvenile code can be used. Finally, severe mental illness can be treated by invoking the state's civil commitment statute. *See* Parham v. J.R., 442 U.S. 584 (1979), discussed in notes 122, 138-40 and accompanying text *infra*; *see also* IJA/ABA STANDARDS: NON-CRIMINAL MISBEHAVIOR, note 1 *supra*, at 23-34.

However, elimination of the status offender jurisdiction may mean that a residuum of children, who could perhaps be helped by the court's intervention, will not be. Thus, the institutional damage caused by the status offender jurisdiction must be weighed against the possibility that it may aid some children. *See* Yale Ungovernability Study, note 1 *supra*, at 1406-07. Such damage is not limited to status offenders; it also relates to the courts' ability to deal effectively with neglected children and violent, delinquent children.

ernized, narrowed and humanized,[9] but they do not get repealed[10] — they are simply too useful.[11]

A number of broad-based constitutional challenges to the juvenile status offender laws have been made over the years.[12] Ultimately, all have failed.[13] However, a fascinating case is now working its way through the Illinois courts, generating international publicity and heated debate, and pitting civil libertarians against one another.[14] *In re Polovchak*[15] may force us to view these laws from a different perspective. For if the state can remove Walter Polovchak from his parents' custody for running away from home to avoid his forced return to the Ukraine, the underpinning of the status offense laws will be exposed. Rather than simply upholding parental authority as they purport to do, these statutes may also be used to permit massive state intervention in family life and to undermine parental rights.

I. A STATUS OFFENSE PRIMER

The original juvenile status offender statute in Deuteronomy prescribes stoning as the ultimate sanction for a "stubborn and rebel-

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[9] For example, in recent years there has been a statutory trend toward specifying what acts a child must commit to come within the jurisdiction of the juvenile court. Until 1973, Texas had one of the most amorphous status offender laws, giving its courts jurisdiction over children "in danger of leading an idle and dissolute life," *see* E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970). In 1973 Texas adopted a very specific statute detailing what particular acts were necessary to confer jurisdiction. *See* TEX. FAM. CODE ANN. § 51.03(b) (Vernon Supp. 1982), cited in note 18 *infra*.

In some jurisdictions children in need of supervision are either not placed in secure facilities, or at least not in secure facilities that also house delinquent children. *See* notes 52-53, 61 and accompanying text *infra*; *see also In re* Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973); Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5601-5638 (1976) (authorizing federal funding for jurisdictions with programs to de-institutionalize status offenders); MASS. GEN. LAWS ANN. ch. 119, § 39G (West Supp. 1982). In addition, most states now statutorily categorize status offenders separately from delinquents who have violated the criminal law, although in reality there is much overlapping. *See, e.g.*, CAL. WELF. & INST. CODE § 601 (West Supp. 1980); N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1981-82); *see also* notes 19-24 and accompanying text *infra*.

[10] *See* note 18 and accompanying text *infra*.

[11] *See* notes 25-38 and accompanying text *infra*.

[12] *See* notes 42-60 and accompanying text *infra*.

[13] *Id.*

[14] *See* part III *infra*.

[15] 104 Ill. App. 3d 203, 432 N.E.2d 873 (1981).

lious son."[16] The substance and language of this Biblical law, including the death penalty, were adopted in 1646 by the Massachusetts Bay Colony.[17] Today, over three centuries later, all fifty states and the District of Columbia still have statutes that give their courts jurisdiction over children who have committed noncriminal offenses such as truancy, running away from home, or endangering their morals or welfare.[18]

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[16] If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them; then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city: "This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton, and a drunkard." And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.

Deuteronomy 21:18-21. Restrictive interpretations of this law effectively prevented utilization of its death penalty provisions. *See Babylonian Talmud, Sanhedrin* 8:1, 2, 3, 4, 5 at 473-88 (Soncino ed. 1935).

[17] *See* Laws of the Mass. Bay Colony (1646). Although the Massachusetts law applied to children who were at least 15 years of age, many modern status offender laws contain no lower age limit. *See, e.g.*, N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1981-82).

[18] A few states purport to have eliminated their status offender laws. In fact, however, no state has completely abandoned jurisdiction over children who are guilty only of noncriminal misbehavior. When reform legislation has been enacted, power over such children is still retained, either in a very narrow set of circumstances, *see* ME. REV. STAT. ANN. tit. 15, §§ 3103, 3501 (1980 & Supp. 1982) (described *infra* this note), or under a different guise, *see* DEL. CODE ANN. tit. 10, § 921(6) (Supp. 1980) (giving the court jurisdiction when "[a] member of a family alleges that some other member of the family is by his conduct imperiling any family relationship . . . ."). Some statutes are not facially clear in this regard. For example, the Idaho law confers jurisdiction when "the child's act, omission or status is prohibited by federal, state, local or municipal law or ordinance by reason of minority only, ..." IDAHO CODE § 16-1803(1) (Supp. 1981). County ordinances in turn often include as juvenile status offenses curfew violations, running away, and being beyond parental control. Telephone conversation with Steven Emerson, Office of the District Attorney, Boise, Idaho (Apr. 15, 1982).

Thus, it appears that, in one form or another, children are subject in every state to the jurisdiction of the courts whether or not they have committed criminal acts and whether or not their parents are guilty of neglect or abuse. *See* Fisher, *Families with Service Needs: The Newest Euphemism?*, 18 J. FAM. L. 1, 21-34 (1979). However, there is now greater movement toward curtailing or even eliminating the status offender jurisdiction.

The juvenile status offender laws in the United States are as follows: ALA. CODE § 12-15-1(4) (1977) (child in need of supervision is one who is habitually truant, or who is disobedient and beyond parental control, or who violates a noncriminal offense, or an

The juvenile courts also have jurisdiction over children who are de-

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offense applicable only to children); ALASKA STAT. § 47.10.010(2)(A) (1979) (child in need of aid is one who is habitually absent from home or who refuses to accept available care); ARIZ. REV. STAT. ANN. § 8-201(13) (West Supp. 1982) (incorrigible child is defined as one who refuses to obey reasonable parental orders and who is beyond parental control, or who is habitually truant, a runaway, or habitually so deports himself as to injure or endanger the morals or health of himself or others, or who violates any offense applicable only to minors, or who fails to obey lawful juvenile court orders); ARK. STAT. ANN. § 45-403(3) (1977) (juvenile in need of supervision is one who is habitually truant, habitually disobeys parental commands, or runs away from home without cause); CAL. WELF. & INST. CODE § 601(a) (West Supp. 1982) (gives court jurisdiction over minors who habitually refuse to obey reasonable parental orders, or who are beyond parental control, or who violate curfew ordinances); COLO. REV. STAT. § 19-1-103(5), (20)(f) (Supp. 1981) ("child needing oversight" is defined as one "whose behavior or condition is such as to endanger his own or others' welfare;" another provision gives the court jurisdiction over runaways and children beyond parental control); CONN. GEN. STAT. ANN. § 46b-120 (West Supp. 1982) (defining a "family with service needs" as a family including a child who has unjustifiably run away from home, or who is beyond parental control, or who has engaged in indecent or immoral conduct, or who has been habitually truant or continuously and overtly defiant of school rules); DEL. CODE ANN. tit. 10, § 921(6) (Supp. 1980) (gives the court jurisdiction if a family member or youth agency alleges that the conduct of a child or some other family member is imperiling any family relationship or the morals, health, or care of a child); D.C. CODE ANN. § 16-2301(8)(A) (1981) (a child in need of supervision is one who is habitually truant, or who commits an offense committable only by children, or who is habitually disobedient and ungovernable); FLA. STAT. ANN. § 39.01(8), (9) (West Supp. 1982) (defines delinquent child as one who, *inter alia*, has been found in contempt of court; and defines dependent child as one who, *inter alia*, persistently runs away from parents, is habitually truant, or persistently disobeys parental commands and is beyond their control); GA. CODE ANN. § 24A-401(g) (Supp. 1982) (unruly child is one who is habitually truant, or who habitually disobeys parental commands, or who commits an offense applicable only to children, or who runs away from home, or who wanders the streets at night, or who violates a court order, or who patronizes a bar where alcohol is served without the presence of parents, or who possesses alcoholic beverages); HAWAII REV. STAT. § 571-11(2)(D), (E) (Supp. 1981) (gives the court jurisdiction over children who are beyond parental control or whose behavior is injurious to his own or others' welfare or who is truant from school); IDAHO CODE § 16-1803(1) (Supp. 1982) (gives the court jurisdiction over any child whose act, omission or status is prohibited by law or ordinance by reason of minority only); ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd 1972) (minor in need of supervision is one who is beyond parental control, habitually truant, or who is an addict or who violates a lawful court order) (discussed in notes 76-78 and accompanying text *infra*); IND. CODE ANN. §§ 31-6-4-1(a)(2)-(5), 31-6-4-3(a)(6) (West Supp. 1982) (includes as a delinquent child one who runs away from home, or who is truant, or who habitually disobeys parental commands, or who commits a curfew violation; a child in need of services includes one who substantially endangers his own health or the health of another); IOWA CODE ANN. § 232.2(5)(c)(1), (17) (West Supp. 1982-83) (defines a child in need of assistance (a neglect category) as one who, *inter alia*, for good cause desires to have his or her parents relieved of custody;

linquent, neglected, or dependent. Delinquency definitions are gener-

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and defines a family in need of assistance as a family in which there has been a breakdown in the relationship between a child and parent); KAN. STAT. ANN. § 38-802 (c)(2), (d), (f) (1981) (defining miscreant child as one who runs away from court-ordered placement; wayward child is one whose behavior is injurious to his or her welfare, or who runs away from home or who is habitually disobedient, or who violates a law applicable only to children; a truant child is one who violates the compulsory education law); KY. REV. STAT. § 208A.020(38) (1982) (defines status offense child as one "who is accused of committing acts, which if committed by an adult would not be a crime," including a child who violates a court order; *id.* § 208D.030, another definitional section, gives the court jurisdiction over habitual runaways, children beyond parental control, habitual truants, and children who violate court orders); LA. CODE JUV. PROC. art. 13(13) (West 1982) (defines a child in need of supervision as one who is habitually truant, or who is habitually disobedient and ungovernable and beyond parental control, or who runs away from home, or who lies about his or her age to buy alcoholic beverages or who loiters in a place which sells liquor, or whose occupation, conduct, environment or associations are injurious, or who has committed an offense applicable only to children); ME. REV. STAT. ANN. tit. 15, §§ 3103(1)(C), 3501 (1980 & Supp. 1982) (Maine purported to repeal its juvenile status offender statute in 1977, *see* Commentary to *id.* § 3501 and § 3103, *supra* this note. In its stead, Maine enacted an "interim care" statute (*id.* § 3501) which permits temporary state intervention for children who are runaways and children who are abandoned, lost or seriously endangered, necessitating immediate removal. Because this new proceeding, which appears to be based on the IJA/ABA Standards, determines only custody and does not involve the adjudication of an offense, it is not viewed as a status offense law. The new legislation prohibits the child from being kept in secure correctional facilities unless no other facility is available. A child may only be kept in custody for up to six hours. A child can, however, be found guilty of committing a "juvenile crime," based on civil offenses involving the possession of small amounts of marijuana or of alcoholic beverages, *id.* § 3103(1)(B), (C)); MD. CTS. & JUD. PROC. CODE ANN. § 3-801(f) (1980) (defines child in need of supervision as one who is habitually truant, who is disobedient, ungovernable and beyond parental control, or who deports himself so as to injure or endanger himself or others, or who commits an offense applicable only to children); MASS. GEN. LAWS ANN. ch. 119, §§ 21, 39E (West Supp. 1982-83) (defining a child in need of services to include habitual truants and violators of school regulations, persistent runaways, and children whose persistent disobedience results in parents' inability to adequately care for and protect the child); MICH. COMP. LAWS ANN. § 712A.2(a)(2)-(6) (1979) (gives juvenile courts jurisdiction over children who run away from home or who are repeatedly disobedent, or who repeatedly associate with immoral persons or who lead an immoral life or who are found on premises used for illegal purposes, or who are habitually truant, or who habitually idle away their time or who repeatedly patronize bars); MINN. STAT. ANN. § 260.015(5) (West 1982) (includes within the delinquency section children who are habitually truant or who are uncontrolled by their parents by reason of being wayward or habitually disobedient or who habitually deport themselves in a manner injurious or dangerous to themselves or others); MISS. CODE ANN. § 43-21-105(k) (1981) (children in need of supervision are those who are habitually disobedient, habitually truant, runaways and those who commit a delinquent act); MO. ANN. STAT. § 211.031(1)(2) (Vernon Supp. 1982) (giving the court jurisdic-

ally reserved for minors who commit acts which, if committed by

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tion over children who are habitual truants, runaways, disobedient or whose behavior and associates are injurious to the welfare of the child or others, or who violate laws applicable only to children); MONT. CODE ANN. § 41-5-103(13) (1981) (youth in need of supervision is a "youth who commits an offense prohibited by law which, if committed by an adult, would not constitute a criminal offense," including youths who violate laws regarding use of alcoholic beverages by minors, children who are habitually disobedient or who are ungovernable and beyond parental control, habitual truants, or youths who have committed delinquent acts whom the court decides to treat as in need of supervision); NEB. REV. STAT. § 43-247(3)(b) (Supp. 1981) (gives the court jurisdiction over children who, because they are wayward or habitually disobedient, are beyond parental control, or who deport themselves so as to injure or endanger seriously the morals or health of themselves or others, or who are habitually truant from home or school); NEV. REV. STAT. § 62.040(1)(b) (1981) (children in need of supervision are those who are habitual truants, or who habitually disobey parental commands and are unmanageable, or who run away from home); N.H. REV. STAT. ANN. § 169-D:2(IV) (Supp. 1981) (defining a child in need of services as one who is habitually truant, or who habitually runs away from home or otherwise repeatedly disobeys parental commands, or who has committed petty offenses); N.J. STAT. ANN. § 2A:4-45 (West Supp. 1981-82) (defines a juvenile in need of supervision as one who is habitually disobedient to parents, or who is ungovernable or incorrigible, or who is habitually truant or who has violated a law applicable only to children; incorrigibility may be proved by habitual vagrancy, immorality, patronizing gambling places, habitual idle roaming of the streets at night and deportment which endangers the juvenile's morals, health or general welfare); N.M. STAT. ANN. § 32-1-3(N) (1981) (defines a child in need of supervision as one who is habitually truant, habitually disobedient and ungovernable and beyond control, or who has violated a law applicable only to children); N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1981-82) (defines a person in need of supervision as a child who does not attend school, or who is incorrigible, ungovernable or habitually disobedient and beyond parental control, or who violates a provision of the penal law, making possession of marijuana a violation punishable by fine); N.C. GEN. STAT. § 7A-517(28) (1981) (defining an undisciplined juvenile as one who is unlawfully absent from school, or who is regularly disobedient to his or her parents and beyond parental control, or who is regularly found in places where it is unlawful for juveniles to be, or who has run away from home); N.D. CENT. CODE § 27-20-02(10) (Supp. 1981) (defines an unruly child as one who is habitually truant or who is habitually disobedient to his or her parents and ungovernable, or who is willfully in a situation dangerous or injurious to the health, safety or morals of himself or others, or who has committed an offense applicable only to children or who has committed a noncriminal traffic offense while driving without a license); OHIO REV. CODE ANN. § 2151.02.2 (Page 1976) (defines an unruly child as one who is wayward or habitually disobedient, or who is habitually truant from home or school, or who deports himself so as to injure or endanger the health or morals of himself or others, or who attempts to enter a marital relation without parental consent, or who is found in disreputable places or associates with vicious or immoral persons, or who is in a situation dangerous to the health or morals of himself or others, or who engages in an occupation prohibited by law, or who violates a law applicable only to a child); OKLA. STAT. ANN. tit. 10, § 1101(c) (West Supp. 1981-82) (child in need of supervision includes a child who repeatedly disobeys parental

commands, or who is a willful runaway, or who is a habitual truant); OR. REV. STAT. § 419.476 (1981) (gives the court jurisdiction over children who are beyond parental control or whose behavior, condition or circumstances are such as to endanger their own welfare or the welfare of others, or who have run away from home, or who have filed petitions for emancipation); PA. CONS. STAT. ANN. tit. 42, § 6302 (Purdon 1982) (gives the court jurisdiction over children who are habitually truant, or who are habitually disobedient and ungovernable, or who are under 10 years of age and have committed delinquent acts, or who were previously within the court's jurisdiction and thereafter committed acts of ungovernability); R.I. GEN. LAWS § 14-1-3(G) (1981) (includes as wayward, children who are runaways, or who habitually associate with dissolute, vicious or immoral persons, or who are leading immoral or vicious lives, or who are habitually disobedient, or who are habitually truant or habitually in violation of school rules, or who violate any law); S.C. CODE ANN. § 20-7-400(A)(1)(b), (c) (Law. Co-op. Supp. 1981) (gives the court jurisdiction over children who are beyond parental control or whose occupation, condition, environment or associations are such as to injure or endanger their welfare or that of others; a separate statute gives the court power to declare habitual truants delinquent, *see id.* § 59-65-70 (Law Co-op. 1977)); S.D. CODIFIED LAWS ANN. §§ 26-8-7.1, 26-8-9 (1976) (defines child in need of supervision as one who is habitually truant, or who is a runaway, or who is otherwise beyond parental control, or one whose behavior or condition is such as to endanger his own or others' welfare); TENN. CODE ANN. § 37-202(5) (Supp. 1981) (defines unruly children as those who are habitual truants, or who are habitually disobedient to parents and ungovernable, or who have committed an offense applicable only to children, or who are runaways); TEX. FAM. CODE ANN. § 51.03(b) (Vernon Supp. 1982) (includes as children in need of supervision, those who on three or more occasions violate minor penal laws or ordinances, or who are habitually truant for specified periods of time, or who are runaways, or who are guilty of driving while intoxicated or under the influence of drugs, or who inhale vapors); UTAH CODE ANN. § 78-3a-16(2)(b) (Supp. 1981), § 78-3a-16.5 (1977) (gives the court jurisdiction over habitual truants and those children referred by agencies because they are beyond parental control to the point that their behavior or condition is such as to endanger their welfare or that of others or because they are runaways); VT. STAT. ANN. tit. 33, § 632(a)(12)(C) (Supp. 1980-81) (defines a child in need of supervision as one beyond parental control); VA. CODE § 16.1-228(F) (1982) (defines a child in need of services as one who is habitually truant or who is habitually disobedient to parents, or who is a runaway, provided that the child's acts present a clear and substantial danger to the child's life or health, or who violates a law applicable only to children); WASH. REV. CODE ANN. § 13.32A.050 (Supp. 1982) (giving the court jurisdiction over "Families in Conflict," and authorizing police to take into custody for short periods runaways as well as those children whom the police reasonably believe are in circumstances which are a serious danger to their physical safety; the parent or child may petition for alternative residential placement; there is a separate provision permitting the juvenile court to assume jurisdiction over habitual truants, *see id.* § 28A.27.022 (Supp. 1982)); W. VA. CODE § 49-1-4 (1980) (defines delinquent child to include one who continually refuses to respond to parental supervision, or who is habitually truant or who wilfully violates a condition of probation or a contempt order of any court); WIS. STAT. ANN. § 48.13(6), (7) (West Supp. 1982-83) (children in need of services include those who are habitually truant from school or from home); WYO. STAT. ANN. § 14-6-201(a)(iv) (1980) (defines a child in need of

adults, would constitute crimes.[19] Neglected or dependent children are those youngsters whose parents are unable or unwilling to care for them properly.[20] Thus, in delinquency and incorrigibility proceedings the child is viewed as the miscreant, while in neglect cases the parent is charged with misconduct.

These three categories are only grossly discrete;[21] they overlap both legally and factually. For example, some delinquency laws include certain noncriminal behavior within their ambit,[22] while some juvenile sta-

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supervision as one who is habitually truant, or who is a runaway, or who habitually disobeys parental commands and is ungovernable and beyond control).

[19] *See* DEL. CODE ANN. tit. 10, § 901(7) (Supp. 1980).

[20] *See* MINN. STAT. ANN. § 260.015(10)(b), (c) (West Supp. 1982) (neglected child is one who, *inter alia*, "is without proper parental care because of the faults or habits of his parent," or is "without necessary subsistence, education or other care necessary for his physical or mental health or morals because his parent . . . neglects or refuses to provide it").

[21] *See In re* Spalding, 273 Md. 690, 332 A.2d 246 (1975) (child charged with sexual perversion and drug use, criminal acts, could be prosecuted as status offender, thus preventing application of privilege against self-incrimination); *In re* Kenneth J., 102 Misc. 2d 415, 423 N.Y.S.2d 821 (Fam. Ct. 1980) (parents who filed status offender petition against their son and demanded his placement could not participate in dispositional hearing because of the behavior of the parents and their attorney; parents retained attorney when trial judge advised them he was considering substituting a neglect petition); *In re* Tracey B., 94 Misc. 2d 827, 405 N.Y.S.2d 609 (Fam. Ct. 1978) (juvenile status offender could make an "Alford" plea notwithstanding parental objection that such a plea was tantamount to accusation of parental neglect) (*See* North Carolina v. Alford, 400 U.S. 25 (1970), holding that in a capital punishment case defendant may plead guilty to murder, despite his claim of innocence, when the record shows strong evidence of actual guilt).

[22] *See* IND. CODE ANN. § 31-6-4-1(a) (West Supp. 1982-83) (defining a delinquent not only as a child who "commits an act that would be an offense if committed by an adult," but also as one who leaves home without reasonable cause and without permission of his parent, or who violates the compulsory school attendance law, or who habitually disobeys the reasonable and lawful commands of his parent or commits a curfew violation).

Some statutes are narrower and define delinquents to include both criminal law violators and status offenders who violate probation by committing non-criminal acts, thus effectively permitting status offenders to be considered as delinquents without having committed a penal law violation. *See* MONT. CODE ANN. § 41-5-103(12) (1981) (defining delinquent youth to include "criminal law violator or one who, having been placed on probation as a delinquent youth or a youth in need of supervision, violates any condition of his probation").

Even when the delinquency statutes are reserved solely for criminal law violators, prosecutors sometimes try to characterize incorrigibles as delinquents by charging status offenders with either criminal contempt or escape from placement facilities. *See* L.A.M. v. State, 547 P.2d 827 (Alaska 1976) (criminal contempt upheld); *In re* Mary D., 95 Cal. App. 3d 34, 156 Cal. Rptr. 829 (4th Dist. 1979) (reversing criminal contempt);

tus offender statutes permit court intervention on the basis of criminal conduct.[23] Similarly, certain activity by a child can sometimes support a finding of either incorrigibility or neglect.[24]

The overlap among these categories is critical to an understanding of how juvenile status offender statutes are used and perhaps why they persist. In a line of cases starting with *In re Gault*[25] in 1967, the United States Supreme Court has held that children who are charged with criminal acts, and who may be incarcerated after a delinquency adjudication, are entitled to some constitutional due process protections. Included are the rights to counsel, notice, confrontation and cross-examination, the privilege against self-incrimination,[26] the beyond a reasonable doubt standard of proof,[27] and the prohibition against double jeopardy.[28]

State *ex rel.* L.E.A. v. Hammergren, 294 N.W.2d 705 (Minn. 1980) (permitting status offenders to be held in contempt for violating a court order, but prohibiting such children from being held in secure detention unless no less restrictive alternative is available); *In re* M.S., 73 N.J. 238, 374 A.2d 445 (1977) (reversing delinquency finding based on escape charge). *Compare In re* Gras, 337 So. 2d 641 (La. Ct. App. 1976) (upholding delinquency finding based on escape charge), *with In re* Bellanger, 357 So. 2d 634 (La. Ct. App. 1978) (reversing delinquency finding based on truancy charge).

[23] *See* TEX. FAM. CODE ANN. §§ 51.03(a), (b) (Vernon 1982-83). The Texas law defines delinquents as either criminal law violators or children adjudicated in need of supervision who are alleged to have violated a court order. Conversely, the child in need of supervision provision includes, *inter alia*, not only minors who are truant or who run away from home, but also those who commit three violations of petty criminal misdemeanor laws.

[24] *See* NEB. REV. STAT. § 43-247(3)(b) (Supp. 1981) (including within its category of child in need of supervision one who "deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself or others"); NEB. REV. STAT. § 43-247(3)(a) (Supp. 1981) (including as a neglected child "one who engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile"); OHIO REV. CODE ANN. § 2151.022(F) (Page 1976) (including within its definition of unruly child one who is in "a situation dangerous to life or limb or injurious to the health or morals of himself or others") and OHIO REV. CODE ANN. § 2151.03(C) (Page 1976) (including as a neglected child one whose parents refuse to provide "care necessary for his health, morals, or well being"); *see also In re* J.L.M., 139 Vt. 448, 430 A.2d 448 (1981).

[25] 387 U.S. 1 (1967).

[26] *Id.* at 33-34, 41, 55, 57.

[27] *In re* Winship, 397 U.S. 358, 364 (1970). The *Winship* holding was made retroactive in Ivan V. v. City of New York, 407 U.S. 203, 203-05 (1972) (per curiam).

[28] Breed v. Jones, 421 U.S. 519, 531, 541 (1975); *see also* Fare v. Michael C., 442 U.S. 707, 722-25 (1979) (a juvenile's request during interrogation to speak to his probation officer is not a per se invocation of *Miranda* rights); Swisher v. Brady, 438 U.S. 204, 219 (1978) (double jeopardy not violated by procedure permitting the state to file exceptions to a master's proposed findings); McKeiver v. Pennsylvania, 403 U.S. 528,

The Court has not thus far ruled on such rights with respect to incorrigible children.[29] Since such children are not yet constitutionally entitled to these safeguards,[30] the juvenile status offender proceedings are an attractive and streamlined alternative to delinquency actions. It is very easy to prove that a child is in need of supervision, because almost any conduct will satisfy the usually vague statutory definitions of ungovernability.[31] Using the incorrigibility jurisdiction instead of the delinquency provisions obviates the need to establish the material elements of a crime[32] in much the same way that vagrancy and loitering laws are used by prosecutors either in the absence of proof that an "attempt" has been made or as a means of circumventing fourth amendment restrictions.[33]

The ungovernability jurisdiction may also be used against children

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545 (1971) (plurality opinion) (delinquents are not constitutionally entitled to jury trials).

[29] Although a respectable argument can be made that *Gault* was meant to apply to status offenders, *see* Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 662 n.33 (1980), the Court's other delinquency rulings clearly apply only to criminal law violators. *See In re* Winship, 397 U.S. 358, 359 n.1 (1970); *see also* Breed v. Jones, 421 U.S. 519, 531 (1975) (double jeopardy clause precludes the state from prosecuting a child in criminal court as an adult, if the child has been subjected to an adjudicatory hearing on the same charges in juvenile court).

[30] Several state courts have held specifically that these constitutional safeguards are inapplicable in incorrigibility proceedings. *See In re* Potter, 237 N.W.2d 461 (Iowa 1976) (reasonable doubt standard); *In re* Spalding, 273 Md. 690, 332 A.2d 246 (1975) (privilege against self-incrimination); *see also* ILL. REV. STAT. ANN. ch. 37, §§ 701-4, 704-6 (Smith-Hurd 1982-83) (preponderance of the evidence); TENN. CODE ANN. § 37-229(c) (Supp. 1981) (clear and convincing standard of proof). Many states do, however, by statute or decision, grant to children in need of supervision the same protections accorded delinquents, *see In re* Iris R., 33 N.Y.2d 987, 309 N.E.2d 140, 353 N.Y.S.2d 743 (1974) (per curiam) (reasonable doubt standard); TEX. FAM. CODE ANN. §§ 51.17, 54.03(c), (d), (e), (f) (Vernon Supp. 1982-83) (reasonable doubt standard, jury trial, privilege against self-incrimination, accomplice corroboration, and exclusionary rule).

[31] *See* CONN. GEN. STAT. ANN. § 46b-120(c) (West Supp. 1982); N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1981-82).

[32] *See In re* J.P., 32 Ohio Misc. 5, 287 N.E.2d 926, 61 Ohio Op. 2d 24 (1972) (fifteen-year-old youth adjudicated "an unruly boy" for committing statutory rape, a crime with which he could not be charged as a delinquent, since the delinquency provision required a criminal law violation and the penal law prescribed that only persons eighteen years old or over could be guilty of such an offense).

[33] *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972) (invalidating vagrancy ordinance on vagueness grounds); People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33 (invalidating loitering statute on vagueness grounds), *cert. denied*, 414 U.S. 1093 (1973).

who are neglected.[34] Parental neglect is generally more difficult to prove than that a child ran away from home, refused to obey parental commands or was otherwise incorrigible. This is particularly true when the child is an adolescent, because in many such cases parental neglect may be longstanding but no longer obvious.[35] In addition, courts are more hesitant to brand parents as neglectful than to stigmatize juveniles as incorrigible. On balance, the ungovernability action is viewed as more expedient than the protracted neglect proceeding.[36]

The status offender jurisdiction also increases placement options beyond those available for neglected children. Unlike a neglect determination, a finding of incorrigibility may permit the court to commit children to the secure confines of state training schools that very often house delinquents who may have committed violent and serious crimes.[37] Thus, the dearth of appropriate placement facilities for dependent and neglected youths may prompt the courts to classify these children as incorrigibles or even delinquents.[38]

The failure to extend due process rights to incorrigibility cases, together with the vague and conclusory language in the definitional portions of these statutes, have combined to create a jurisdiction so malleable that it gives judges the power to intervene expeditiously and efficiently in the lives of children on the basis of almost any misbehavior by them. It is no wonder that such pliant laws have proved irresistible to the courts.

II. CONSTITUTIONAL CHALLENGES

There have been successful challenges to individual findings of incorrigibility[39] and to particular placements of incorrigible children in

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[34] *See In re* L.L., 39 Cal. App. 3d 205, 114 Cal. Rptr. 11 (1st Dist. 1974); *In re* Arlene H., 38 A.D.2d 570, 571, 328 N.Y.S.2d 251, 253 (1971); Yale Ungovernability Study, note 1 *supra*, at 1387-88 n.33.

[35] *See* Yale Ungovernability Study, note 1 *supra*, at 1393.

[36] *See* Rosenberg & Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 MICH. L. REV. 1097, 1110-14 (1976).

[37] *See In re* Potter, 237 N.W.2d 461, 462 (Iowa 1976) (adolescent, whose parents were unable to provide supervision and guidance, was placed in state training school); ILL. REV. STAT. ANN. ch. 37, § 705-7(1)(e) (Smith-Hurd Supp. 1982-83).

[38] *See In re* Butterfield, 253 Cal. App. 2d 794, 61 Cal. Rptr. 874 (3d Dist. 1967); *In re* Dennis M., 82 Misc. 2d 802, 370 N.Y.S.2d 458 (Fam. Ct. 1975).

[39] *See In re* Henry G., 28 Cal. App. 3d 276, 104 Cal. Rptr. 585 (2d Dist. 1972); *In re* Paul H., 47 A.D.2d 853, 365 N.Y.S.2d 900 (1975) (per curiam); *In re* Kathie L., 100 Misc. 2d 173, 418 N.Y.S.2d 859 (Fam. Ct. 1979); *In re* Price, 94 Misc. 2d 345, 404 N.Y.S.2d 821 (Fam. Ct. 1978).

training schools,[40] as well as federal class actions to compel treatment and prevent abuses in some of these prison-like facilities.[41] But broad frontal attacks on the validity of the juvenile status offender statutes themselves have generally failed.

A. Vagueness

The narrowest constitutional challenge, and the one having the greatest potential for success, has fared the worst. The amorphous language in many of the incorrigibility laws appeared to offer a good opportunity for a vagueness attack. These provisions used terminology so conclusory that any act of commission or omission could satisfy the statutory definitions.[42] Thus these statutes arguably failed to give adequate notice and encouraged arbitrary enforcement of the law.[43] This vagueness challenge, even if successful, would not preclude the state from using incorrigibility legislation. The state would merely be required to set forth with some particularity and specificity the acts that could bring a child within the court's jurisdiction — as constitutional challenges go, a very modest proposal indeed. However, the United States Supreme Court has upheld at least the facial validity of the New York "Person In Need of Supervision" law,[44] which permitted court intervention if a child were "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful author-

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[40] *See In re* Terry UU, 52 A.D.2d 683, 382 N.Y.S.2d 373 (1976) (mem.); *In re* John H., 48 A.D.2d 879, 369 N.Y.S.2d 196 (1975); *In re* Lloyd, 33 A.D.2d 385, 308 N.Y.S.2d 419 (1970); *In re* C.A.H., 251 S.E.2d 222 (W. Va. 1979).

[41] *See* Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd per curiam*, 430 U.S. 322 (1977), *on remand*, 562 F.2d 993 (5th Cir. 1977); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), *as amended*, 359 F. Supp. 478 (S.D.N.Y. 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

[42] *See* COLO. REV. STAT. ANN. § 19-1-103(5), (20)(f) (Supp. 1981); *see also* IJA/ABA STANDARDS: NON-CRIMINAL MISBEHAVIOR, note 1 *supra*, at 8: "Given the overbreadth of these statutes, every child in the United States could theoretically be made out to be a status offender."

[43] *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972); Gesicki v. Oswald, 336 F. Supp. 365 (S.D.N.Y. 1971) (invalidating New York's Wayward Minor Act on grounds of vagueness and cruel and unusual punishment; the statute, which was part of the state's criminal code, was directed at adolescents over sixteen years of age who were "morally depraved" or "in danger of becoming morally depraved"), *aff'd mem.*, 406 U.S. 913 (1972).

[44] N.Y. FAM. CT. ACT. § 712(b) (McKinney Supp. 1981-82).

ity."[45] Vagueness attacks against similar statutes in the state courts generally have yielded no more favorable results.[46]

Retention of vague laws permits the legislature to delegate to parents, state officials, and trial courts power to decide what behavior will bring a child within the court's jurisdiction. Because almost any misconduct may place the child within the statutory definition,[47] incorrigibility laws render illusory procedural safeguards, such as the right to counsel. Vagueness also diminishes the possibility of effective appellate review, which in turn increases the risk of arbitrary and discriminatory enforcement of the laws.[48]

B. Cruel and Unusual Punishment

Some litigants have attacked the incorrigibility laws on eighth amendment grounds. Challengers have relied on the Supreme Court

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[45] *In re* Negron, 409 U.S. 1052 (1972) (mem.) (dismissing for want of a substantial federal question an appeal challenging the New York incorrigibility law (N.Y. FAM. CT. § 712(b) (McKinney 1975)) on several grounds including vagueness). The Second Circuit has ruled that this summary disposition is a decision on the merits. Mercado v. Rockefeller, 502 F.2d 666, 672-73 (2d Cir. 1974), *cert. denied sub nom.* Mercado v. Carey, 420 U.S. 925 (1975); *see* Hicks v. Miranda, 422 U.S. 332 (1975). For a comprehensive discussion of the binding precedential effect of summary disposition by the Supreme Court, see Y. Rosenberg, *Notes from the Underground: A Substantive Analysis of Summary Adjudication by the Burger Court: Part I*, 19 HOUS. L. REV. 607, 610-18 (1982).

[46] *See In re* Hutchins, 345 So. 2d 703 (Fla. 1977); *In re* Gras, 337 So. 2d 641 (La. App. 1976); *In re* Napier, 532 P.2d 423 (Okla. 1975); *In re* E.B., 287 N.W.2d 462 (N.D. 1980); E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970); *see also* Napier v. Gertrude, 542 F.2d 825 (10th Cir.), *cert. denied*, 429 U.S. 1049 (1976) (minor who had unsuccessfully challenged Oklahoma incorrigibility statutes on grounds of vagueness (*see In re Napier, supra* this note) sought federal habeas relief, which was denied on basis of mootness). *But see In re* Doe, 54 Hawaii 647, 513 P.2d 1385 (1973) (invalidating portions of a curfew ordinance on vagueness grounds); State v. Hodges, 254 Or. 21, 457 P.2d 491 (1969) (invalidating, on vagueness grounds, statute against contributing to the delinquency of a minor).

[47] *See* Gesicki v. Oswald, 336 F. Supp. 365 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972), described in note 43 *supra*; *see also* Gonzalez v. Mailliard, No. 50424 (N.D. Cal. Feb. 9, 1971) (three-judge court), *vacated on grounds of mootness and the propriety of injunctive relief*, 416 U.S. 918 (1974). In an unpublished opinion, the three-judge district court had invalidated on vagueness grounds a portion of the California MINS law which was, at the time, directed at children "who from any cause . . . [are] in danger of leading an idle, dissolute, lewd or immoral life."

[48] *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972); Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971) (three-judge court), *aff'd mem.*, 406 U.S. 913 (1972). *See generally* Todd, *Vagueness Doctrine in the Federal Courts*, 26 STAN. L. REV. 855 (1974).

decision in *Robinson v. California*[49] to assert that, because incorrigibility legislation punishes status, it constitutes cruel and unusual punishment. Courts have rejected this argument on the theory that the statutes punish the commission of specific acts rather than the status of incorrigibility itself.[50] A variant eighth amendment contention, that being unmanageable or beyond parental control is merely a symptom of psychological disturbance or the normal *Sturm und Drang* of adolescence, has also been rejected.[51]

The only eighth amendment argument that has gained some acceptance is that to incarcerate ungovernable children in secure training schools that also house delinquents constitutes cruel and unusual punishment.[52] However, when juvenile status offenders asserted that it was unlawful to place them even in separate secure training schools housing only incorrigibles, their contention was rejected.[53]

C. Equal Protection

Some advocates have urged that the state denies equal protection of the laws by punishing children for acts that are not criminal for adults.[54] Courts have rejected this position, noting that children's imma-

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[49] 370 U.S. 660 (1962) (holding unconstitutional on eighth amendment grounds a law making it criminal for a person to be addicted to the use of drugs).

[50] *See, e.g.*, Blondheim v. State, 84 Wash. 2d 874, 880, 529 P.2d 1096, 1101 (1975). The Supreme Court's decision in Powell v. Texas, 392 U.S. 514 (1968) (plurality opinion), upholding the validity of a state law punishing intoxicated persons who are found "in any public place," indicated that an eighth amendment argument with respect to incorrigibles based on Robinson v. California, 370 U.S. 660 (1962) would almost certainly fail. *Cf.* Gesicki v. Oswald, 336 F. Supp. 371, 376 (S.D.N.Y. 1971) (three-judge court), *aff'd mem.*, 406 U.S. 913 (1972) (discussed in note 43 *supra*).

[51] Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389, 394-95 (1971).

[52] *See, e.g., In re* Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973); *cf. In re* Shrewsbury, 52 Or. App. 81, 627 P.2d 910 (1981) (commingling of status offenders and delinquents in private residential facility not a basis for issuance of a writ of habeas corpus); State *ex rel.* Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977) (holding that such commingling also violates state constitution equal protection and substantive due process provisions).

[53] *In re* Lavette M., 35 N.Y.2d 136, 316 N.E.2d 314, 359 N.Y.S.2d 20 (1974). In State *ex rel.* Harris v. Calendine, 233 S.E.2d 318, 331 (W. Va. 1977), note 52 *supra*, although the court concluded that status offenders could be placed in secure institutions housing only other incorrigibles, the court required that such placements be restricted to situations in which the child was totally unmanageable and no other reasonable alternative was available. *See also* McRedmond v. Wilson, 533 F.2d 757 (2d Cir. 1976) (placement of incorrigible children in rural state training schools did not violate either the eighth amendment, the equal protection clause or rights of association and travel).

[54] *See, e.g.*, S.S. v. State, 299 A.2d 560, 570 (Me. 1973); *cf.* Smith v. State, 444

turity, vulnerability, and need for protection and rehabilitation are factors reasonably related to the need for different treatment. Buttressed by the failure of the Supreme Court to decide any of its delinquency decisions on an equal protection basis,[55] lower courts have not viewed this claim with favor.[56]

D. Substantive Due Process

The most fundamental challenge to the juvenile status offender jurisdiction is based on the substantive due process claim that children are being deprived of liberty in excess of both the state's police power authority and its authority to act as *parens patriae*.[57] Since there is little proof that incorrigible children will ultimately commit crimes,[58] the state acts outside its police power by punishing such children for commission of noncriminal offenses. In addition, there is scant evidence that the state is helping incorrigible children,[59] and thus it is not properly exercising its *parens patriae* power to aid and rehabilitate minors in need of assistance.

The substantive due process argument would deprive the state of its authority to intervene in the lives of incorrigible children unless the state could either establish a relationship between acts of incorrigibility and subsequent crimes, or demonstrate that its facilities and services rehabilitate children. Such reasoning has, however, also been rejected

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S.W.2d 941 (Tex. Civ. App. 1969) (rejecting equal protection claim for delinquent child incarcerated for longer period of time than adult would be if convicted of the same offense).

[55] *See, e.g., In re* Winship, 397 U.S. 358, 359 n.1 (1970); *see also In re* Patricia A., 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972) (invalidating a portion of New York PINS law that effected gender discrimination by subjecting females to court jurisdiction until age 18 while subjecting males to jurisdiction until age 16). *Contra* Michael M. v. Superior Court, 450 U.S. 464 (1981) (plurality upholding CAL. PENAL CODE § 261.5 (West Supp. 1982), which punishes only males for statutory rape).

[56] *See* cases cited in note 54 *supra*; *cf.* Vann v. Scott, 467 F.2d 1235, 1238-39 (7th Cir. 1972) (neither the eighth amendment nor the equal protection clause is violated when a state classifies as delinquents status offenders who have violated a condition of probation).

[57] *See* Mercado v. Rockefeller, 363 F. Supp. 489, 490 (S.D.N.Y. 1973), *rev'd on other grounds*, 502 F.2d 666 (2d Cir. 1974) *cert. denied sub nom.* Mercado v. Carey, 420 U.S. 925 (1975); S.S. v. State, 299 A.2d 560 (Me. 1973); Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389 (1971).

[58] *See* IJA/ABA STANDARDS: NON-CRIMINAL BEHAVIOR, note 1 *supra*, at 3: "[I]t simply cannot be established that the behavior encompassed by the status offense jurisdiction is accurately 'proto-criminal.'"

[59] *See* note 6 *supra*.

by the courts.[60]

This is not to say that there has been no amelioration in the harshness of these juvenile status offense laws. Some states have moved to separate incorrigibles from delinquents in placement facilities, and to use less secure incarceration for such children.[61] In addition, certain states by legislation or by statutory interpretation, have narrowed the scope of the incorrigibility laws or created defenses to their application.[62] Some jurisdictions have also given incorrigibles the same procedural protections as delinquents.[63] Despite these reforms, however, the basic power of the state to intervene in the lives of children on the basis of noncriminal acts remains.

This power is substantial and not subject to significant judicial control. Even in states that have improved their incorrigibility laws, reforms are often more apparent than real. Most status offender cases are disposed of without contested adjudicatory hearings, by the functional equivalent of a guilty plea.[64] As a result, relatively few of these cases are appealed, and appellate courts are unable to exercise effective review. The vague terminology of these statutes and the pervasive influence of the "best-interests-of-the-child" doctrine, which often cuts against adversarial representation, insulates the process from internal or external supervision.[65]

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[60] *See* S.S. v. State, 299 A.2d 560, 568 (Me. 1973); Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389, 393-94 (1971).

[61] *See, e.g., In re* Mary D., 95 Cal. App. 3d 34, 156 Cal. Rptr. 829 (4th Dist. 1979); *In re* Ronald S., 69 Cal. App. 3d 866, 138 Cal. Rptr. 387 (4th Dist. 1977); *In re* Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973); State *ex rel.* Hockett v. Hatler, 567 S.W.2d 472 (Tenn. Ct. App. 1978); MASS. GEN. LAWS ANN. ch. 119, § 39G (West 1982-83). *But see* INSTITUTE OF JUDICIAL ADMIN., THE ELLERY C. DECISION: A CASE STUDY OF JUDICIAL REGULATION OF JUVENILE STATUS OFFENDERS, 42-47 (1975) (finding that although incorrigibles and delinquents in New York are placed in separate facilities, the juvenile status offenders have not received better care or treatment).

[62] *See, e.g., In re* D.J.B., 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (1st Dist. 1971); People v. Y.D.M., 197 Colo. 403, 593 P.2d 1356 (1979); *In re* McMillan, 21 N.C. App. 712, 205 S.E.2d 541 (1974); TEX. FAM. CODE ANN. § 51.03(b) (Vernon 1975).

[63] *See, e.g., In re* Iris R., 33 N.Y.2d 987, 309 N.E.2d 140, 353 N.Y.S.2d 743 (1974) (per curiam); State *ex rel.* Wilson v. Bambrick, 195 S.E.2d 721 (W. Va. 1973); TEX. FAM. CODE ANN. §§ 51.17, 54.03(c), (d), (e), (f) (Supp. 1981).

[64] *See* Yale Ungovernability Study, note 1 *supra*, at 1389 n.50; *see also* note 65 *infra*.

[65] *See* Rosenberg & Rosenberg, note 36 *supra*, at 1134-44; *see also* State *ex rel.* C.A.H. v. Strickler, 251 S.E.2d 222, 226 (W. Va. 1979) ("[M]ost juvenile cases are resolved by guilty pleas.").

III. THE POLOVCHAK BOY, THE "MINS" LAW, AND THE CONSTITUTIONAL DILEMMA

A. The Polovchak *Case*

On July 14, 1980, twelve-year-old Walter Polovchak and his seventeen-year-old sister Natalie ran away from home in Chicago, when their parents, who had been residing in the United States for less than a year, decided to return with their three children to the Soviet Union.[66] Four days later, Mr. Polovchak called the police, who located Walter and Natalie at their cousin's apartment.[67] The police detained Walter overnight, apparently on the recommendation of a juvenile court judge and an official of the State Department.[68]

The next day, July 19, 1980, pursuant to a petition filed by the state

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[66] *See In re* Polovchak, 104 Ill. App. 3d 203, 205, 432 N.E.2d 873, 875 (1981). The Polovchak's third child was six-year-old Michael. Chicago Tribune, July 19, 1980, § 1, at 1, col. 3.

Newspaper accounts indicated that Mr. Polovchak was a bus driver in the Ukraine, and that for years he had, with the assistance of relatives in the United States, attempted to emigrate to the United States. The Polovchaks finally arrived in Chicago in January 1980, and the parents thereafter secured janitorial positions. They almost immediately began to complain about life in the United States, expressing particular concern that the air and food were poisoned with pollutants. The Polovchaks apparently did not form close ties with the Ukrainian community in Chicago, and there was friction with the Polovchaks' Baptist relatives. The Polovchaks are Eastern Rite Catholics.

Apparently, some members of the Chicago Ukrainian community viewed the Polovchaks with suspicion, suggesting that it was unusual for an entire family, particularly non-Jews, to be allowed to emigrate from Russia. The Polovchaks' precipitous decision to return to the Ukraine deepened community doubts about their motivations. *See* N.Y. Times, July 25, 1980, at A6, col. 1; Chicago Tribune, July 24, 1980, § 1, at 1, col. 2.

[67] *See In re* Polovchak, 104 Ill. App. 3d 203, 205, 432 N.E.2d 873, 875.

[68] *See* Brief for Appellants at xi-xii, *In re* Polovchak, 104 Ill. App. 3d 203, 432 N.E.2d 873 (1981) [hereafter Brief for Appellant] (copy on file at U.C. Davis Law Review office); Brief for Appellee at 8, *In re* Polovchak, 104 Ill. App. 3d 203, 432 N.E. 2d 873 (1981) [hereafter Brief for Appellee] (copy on file at U.C. Davis Law Review office). Appellants were Anna and Michael Polovchak, and Appellee was the State of Illinois. A separate brief for the minor Walter Polovchak was also filed (copy on file at U.C. Davis Law Review office), as was an amicus brief by the United States. The latter argued that the Supremacy Clause precluded the state court from entering any custody order that would conflict with the federal government's grant of asylum. The amicus brief also advised the Illinois appellate court that Walter had petitioned for permanent resident status and that the United States Government was, "if circumstances warrant it," prepared to issue a departure control order to prevent Walter's departure from the country during the pendency of all proceedings. *See* Brief for Amicus Curiae, *supra*, at 1 (copy on file at U.C. Davis Law Review office).

alleging that Walter was a minor in need of supervision (MINS),[69] the juvenile court conducted a hearing to determine temporary custody pending a full adjudicatory trial.[70] Over the objections of the parents, not then represented by counsel, Walter was temporarily removed from their custody.[71] Later that same day Walter, through his attorney, applied to the Immigration and Naturalization Service for asylum, which was subsequently granted.[72] The asylum determination does not, however, decide custody.[73] It was therefore necessary for the MINS proceeding to continue.

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[69] Neither the appellate court opinion nor the briefs of the parties state the identity of the person who filed the MINS petition against Walter. Presumably, however, a police or court official filed a petition at the direction of a juvenile court judge. It seems clear that the Polovchaks were not the petitioners in the MINS proceeding. *See* Brief for Appellee, note 68 *supra*, at 8-9; Brief for Appellants, note 68 *supra*, at xii; Brief for Walter Polovchak, note 68 *supra*, at 17-19; *see also* note 102 *infra*.

[70] Brief for Appellants, note 68 *supra*, at xii-xiii; Brief for Appellee, note 68 *supra*, at 8-9. At this hearing, the juvenile court judge appointed two attorneys to represent Walter. *Id.* One of these attorneys was Julian Kulas, a well-known member of the Chicago Ukrainian community. *See* Houston Post, Jan. 25, 1981, § A, at 18, col. 1.

[71] Brief for Appellants, note 68 *supra*, at xii-xiii; Brief for Appellee, note 68 *supra*, at 8-9. The parents also did not speak English, although an interpreter was present. *Id.* Walter was placed in a foster home where Ukrainian was spoken. Brief for Walter Polovchak, note 68 *supra*, at 19.

[72] *See* Chicago Tribune, July 22, 1980, § 1, at 1, col. 4; N.Y. Times, July 27, 1980, at E20, col. 1. Walter was granted permanent residency status in October 1981. Houston Chronicle, Oct. 19, 1981, § 1, at 8, col. 3.

The Polovchaks have filed a class action in federal district court against the Immigration and Naturalization Service, seeking declaratory and injunctive relief as well as damages. The suit alleges that the parents were given neither notice of, nor an opportunity to object to, Walter's asylum application and that the grant of asylum impermissibly infringed on parental rights and was based on political grounds. *See* Complaint, Polovchak v. Landon, No. 80-C-5595 (N.D. Ill. filed Oct. 17, 1980); Chicago Tribune, Oct. 21, 1980, § 1, at 3, col. 1.

Walter, on the other hand, filed suit against his parents in federal district court, claiming that his civil rights would be violated if he were forced to return to the Soviet Union. In particular, Walter asserted that he would be denied freedom of religion and that he might be charged with treason for initially seeking asylum. Polovchak v. Polovchak, No. 82-C-2327 (N.D. Ill. filed Apr. 15, 1982). *See* Houston Post, Oct. 22, 1981, § B, at 1, col. 6. Walter has also filed an action in state court asking that his aunt and uncle be permitted to adopt him. The suit alleges that his parents abandoned and deserted him when they returned to the Soviet Union. *See* Houston Post, Nov. 19, 1981, § A, at 25, col. 1.

[73] *See* 8 U.S.C. §§ 1158, 1159 (Supp. IV 1980); 8 C.F.R. §§ 209-2, 215-2, 215-3(h) (1982); *see also* TIME, Aug. 4, 1980, at 26; Chicago Tribune, Oct. 22, 1980, § 6, at 2, col. 1; Chicago Tribune, July 27, 1980, § 2, at 12, col. 1.

Although most petitioners in incorrigibility actions are parents,[74] under Illinois law "[a]ny adult person, any agency or association by its representative may file, or the court on its own motion may direct the filing through the State's Attorney of a petition" alleging that a child is a minor in need of supervision.[75] A minor in need of supervision includes any child "under 18 years of age who is beyond the control of his parents, guardian or other custodian."[76] If, by a preponderance of the evidence, a child is found to be in need of supervision at the adjudicatory hearing, the juvenile court may adjudge the minor a ward of the court,[77] and thereafter may hear evidence to determine "the proper disposition best serving the interests of the minor and the public."[78] This

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[74] *See* Yale Ungovernability Study, note 1 *supra*, at 1385; *see also* N.Y. Times, Sept. 9, 1980, § B8, col. 1.

[75] ILL. ANN. STAT. ch. 37, § 704-1 (Smith-Hurd Supp. 1982-83). The *Polovchak* case does not appear to present any substantial choice of law questions that would require the application of any contrary Russian law. The MINS law, with its combined police power and *parens patriae* aspects, does present an unusual context. Nonetheless, if the incorrigibility proceeding is viewed as criminal in nature, Illinois law clearly would apply, because all parties reside therein and subject themselves to its criminal laws. If the MINS law is instead viewed as a custody matter, traditional choice of law principles permit modifications of custody decrees based on the best interests of the child. Increasingly, however, deference is being given to the original award of custody.

The child's domicile is generally that of his or her parents. The state of the child's domicile, particularly when the child is physically present and there is jurisdiction over both parents, has power to enter a custody award. To the extent that the 1961 Hague Convention on the Protection of Minors, or the 1980 Hague Convention on Civil Aspects of International Child Abduction would be relevant, neither the United States nor Russia is a signatory. *See generally* E. SCOLES & P. HAY, CONFLICT OF LAWS, §§ 4.37, 15.41, 15.45, 15.46 (1982).

[76] ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd 1972). The statute also defines MINS so as to include truants, drug addicts and children who violate lawful court orders. *Id.*

[77] ILL. ANN. STAT. ch. 37, §§ 701-4, 701-18 (Smith-Hurd 1972); *id.* § 704-8 (Smith-Hurd Supp. 1982-83); *see also id.* § 704-6 (Smith-Hurd 1972). The court must, therefore, find not only that the child is a minor in need of supervision as defined by the statute, *id.* § 702-3, but also that it is in the best interests of the minor and the public to adjudge the child a ward of the court. *Id.* § 704-8(2). These dual findings are required before the court can go on to determine the proper disposition.

[78] ILL. ANN. STAT. ch. 37, §§ 705-1, 705-2(b) (Smith-Hurd Supp. 1982-83). The Illinois law provides that "[i]f the court finds that the parents, guardian, or legal custodian of a minor adjudged a ward of the court are unfit or unable, for some reason other than financial circumstances alone, to care for, protect, train or discipline the minor or are unwilling to do so . . . and that it is in the best interest of the minor to take him from the custody of his parents . . . the court may [either] place him in the custody of a suitable relative or other person . . . [or] under the guardianship of a probation of-

Illinois statutory scheme governing MINS proceedings is fairly typical of status offender legislation throughout the country.[79]

Walter's[80] adjudicatory hearing was, however, atypical. Mr. and Mrs. Polovchak, represented by the Illinois affiliate of the American Civil Liberties Union,[81] challenged the constitutionality of the proceed-

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ficer" or the court may place the child in institutional care. *Id.* § 705-7(1). Under Illinois law, the court is directed to ascertain and consider "to the extent appropriate in the particular case, the views and preferences of the minor" whenever alternative plans for placement are available. *Id* § 706-7(2). If such a child is placed with a relative, that person is made legal guardian until the child reaches age 21. *Id.* § 705-7(3). Of course, the court may simply place the child on supervision (probation) and direct the minor to live with her or his parents. No disposition was ever made in the *Polovchak* case, because an interlocutory appeal was taken after the adjudicatory hearing. *See* note 92 and accompanying text *infra*.

[79] *See* CAL. WELF. & INST. CODE §§ 701, 702, 706, 725-27 (West Supp. 1982); TEX. FAM. CODE ANN. § 54.03-.05 (Vernon Supp. 1982-83); Rosenberg & Rosenberg, note 36 *supra*, at 1106-07.

[80] Natalie was also charged and found to be a MINS, but because she became eighteen during the pendency of the proceedings, she was no longer subject to the court's jurisdiction. *See In re* Polovchak, 104 Ill. App. 3d 203, 205 n.2, 432 N.E.2d 873, 875 n.2 (1981).

[81] According to a press release of the American Civil Liberties Union (ACLU), the Illinois affiliate of the ACLU undertook to represent the Polovchaks although it was "a difficult decision." The Illinois affiliate viewed the "hasty and improper proceedings" as a reflection of political considerations. As the local chapter put it, "[t]raditionally, the ACLU has advocated the expansion of the rights of children and supported political asylum, especially when flight is from a totalitarian country. However, we have never taken the position that parents' rights to the care and custody of their children can be denied absent serious misconduct — which is simply not present in this case." The ACLU affiliate thought the MINS action was "a wholly inappropriate proceeding when a child has allegedly run away only once." The affiliate also alleged that the parents did not have a proper due process hearing before custody was given to the state and that custody was removed from the parents without any showing of neglect. ACLU Press Release 80-10, July 28, 1980 (copy on file at U.C. Davis Law Review office).

Many other affiliates of the ACLU were nevertheless concerned about the role of the Illinois affiliate, and the national ACLU circulated a memorandum explaining the affiliate's position in terms of national ACLU policy. Letter from Ira Glasser et al., to ACLU affiliates, Board of Directors (July 30, 1980) (copy on file at U.C. Davis Law Review office).

The state ACLU chapter did not, however, make it entirely clear that Walter Polovchak also had several civil liberties claims. The Illinois affiliate viewed his desire to stay in the United States as influenced by "American ice cream, bicycles and toys," and thought "a decision as far-reaching as political asylum is not one that a twelve-year old should be presumed competent to make." ACLU Press Release 80-10, July 28, 1980.

Even if such material considerations were motivating Walter, it is unclear why these factors, which have always influenced immigrants to this country, including, appar-

ing and the earlier temporary custody order that had placed Walter in foster care. The court denied a rehearing on the temporary custody order and proceeded with the adjudicatory phase of the case.[82] Over objections of his parents, Walter entered an admission to the allegations of the MINS petition.[83] The juvenile court nonetheless heard evidence on whether Walter was a minor in need of supervision.[84]

Walter testified that he left home because he did not want to return to the Ukraine and because his parents did not talk to him.[85] He stated

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ently, Walter's parents, should be considered illegitimate in Walter's case. I have no qualms about the ACLU representing the parents, although I do not believe that it was necessary to denigrate Walter's substantive due process claim in order to do so. Both sides of this controversy have substantial legal and equitable claims, and it is perfectly reasonable for the ACLU to choose to represent whom it views as the underdog in particular cases. Since the state sided with Walter in this case, the parents can certainly be viewed in that light. And indeed, a respectable argument can be made that representing the parental interests in this context may have a greater long-term impact on civil liberties than the seemingly aberrational issues raised by Walter. *See* notes 108-57 and accompanying text *infra*.

Other ACLU affiliates thought that the Illinois chapter was "on the wrong side in this case"; that the ACLU has no "business trying to send Walter back to the Soviet Union"; that the issue was one of childrens' rights; and that the children needed the ACLU more than the parents. *See* Simon, *ACLU Critics Say Rights of Soviet Boy Violated if He's Forced to Leave U.S.*, Houston Post, Jan. 7, 1982, § B, at 3, col. 3.

The Illinois affiliate may consider it appropriate to represent the Polovchaks in this matter because it appears exceedingly unlikely that Walter will in fact ever be returned to the Soviet Union. Given the pace of the judicial process, time is on his side. *See* Houston Post, Jan. 25, 1981, § A, at 18, col. 1. And fortunately so, for the thought of Walter being placed in a juvenile verson of the Gulag as a result of the ACLU's efforts is not a pretty one. *See* Simon, *'Re-education Camp' Answer to Non-Conformity in Russia*, Houston Post, July 5, 1982, § B, at 3, col. 3 (describing Jewish dissident Alexander Temkin's 10-year unsuccessful attempt to extricate his adolescent daughter from a Soviet "re-education" camp).

[82] *See* Brief for Appellants, note 68 *supra*, at xiii-xiv.

[83] Brief for Appellants, note 68 *supra*, at ii. The MINS petition alleged that Walter was beyond parental control in that he "did . . . absent himself from his home without the expressed consent of his parents." *Id.* at xii.

[84] On appeal the Polovchaks claimed that the trial judge did not really hold an adjudicatory hearing, but rather conducted a summary proceeding to determine if there was a factual basis for the plea. Thus, the Polovchaks argued that the court denied them a trial on the issue of whether Walter was beyond their control. The appellate court determined that the trial judge had held a full and fair adjudicatory hearing. *In re* Polovchak, 104 Ill. App. 3d 203, 208-09, 432 N.E.2d 873, 877-78 (1981).

[85] Walter's assertion of lack of parental involvement was supported by newspaper interviews with relatives. Mr. Polovchak's sister in California, who allegedly had helped him emigrate to this country, told reporters that none of the children was close to the father, that he was not at home much, and that the children spent a great deal of time with relatives. Chicago Tribune, July 24, 1980, § 1, at 1, col. 2. Natalie, Walter's

that he would not return home even if the court dismissed the proceedings.[86] Walter acknowledged that his parents had provided for him when he lived in the Ukraine but that he did not like living there because of the paucity of consumer goods.[87] His father testified that Walter had not presented any problem until the Polovchaks decided to return to the Ukraine. The evidence indicated that Walter's mother was unable to prevent his departure from the family home, and the parents found it necessary to call on the police.[88]

The parents' expert witness, a children's psychiatrist, testified that Walter was not really a runaway. The Polovchaks, in fact, could control Walter because his acts were merely examples of defiance and rebellion and not the exercise of independent judgment. The psychiatrist opined that no twelve-year-old had the intellectual or emotional capacity to decide where, or with whom, he or she should live, and that no child should be removed from his or her parents unless there was physical or sexual abuse.[89]

The state's expert witness, the director of clinical services for the juvenile court, testified that twelve-year-olds can make decisions regarding their own welfare and can form preferences for one country over another. The state's expert acknowledged that the parents could control Walter because of their physical size, but he expressed some concern about their ability to raise him in the Ukraine. He concluded that Wal-

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sister, told reporters that her father ignored his children and that her mother was rarely at home. The children, she said, were raised by a grandmother who died in the fall of 1981. Relations became even more strained when the family came to the United States, and Natalie asserted that her parents did not support her or Walter. Houston Chronicle, Feb. 21, 1982, § 2, at 1, col. 1. During the adjudicatory hearing, Natalie apparently testified that her father had threatened to kill her and Walter when they ran away. Chicago Tribune, July 31, 1980, § 1, at 1, col. 3. The Polovchaks did not, however, oppose Natalie's decision to stay in the United States. *Id.*

Mr. Polovchak, on the other hand, was reported as saying "Am I [a] drunkard? . . . I am not. Do I starve my children? I do not. Have I broken any laws? I have not. So who is the government to take away my child?" Chicago Tribune, July 21, 1980, § 1, at 1, col. 2. *Compare* ILL. REV. STAT. ANN. ch. 37, § 702-4 (Smith-Hurd Supp. 1982-83) (defining neglected or abused minor to include any child "under 13 years of age . . . whose parent . . . does not provide the proper or necessary support, . . . or other remedial care necessary for his well-being, . . . or who is abandoned by his or her parents . . . or whose environment is injurious to his or her welfare").

[86] *In re* Polovchak, 104 Ill. App. 3d 203, 205-06, 432 N.E.2d 873, 876 (1981).

[87] *Id.*

[88] *Id.* at 205, 432 N.E.2d at 875.

[89] *Id.* at 206-07, 432 N.E.2d at 876-77. The psychiatrist testified that he had not spoken to either Walter or his parents and that he did not know about the family relationships. *Id.*

ter would not be irreparably harmed if allowed to remain away from his parents.[90]

The juvenile court found Walter to be a minor in need of supervision and made him a ward of the court.[91] The Polovchaks filed an interlocutory appeal from these findings.[92] The Illinois intermediate appellate court reversed in a two-to-one ruling, holding that the lower court finding that Walter was beyond the control of his parents was against the weight of the evidence.[93] The court concluded that the boy's single act of leaving the family home was an "exaggerated manifestation of parent-child conflict" and insufficient to bring him within the jurisdiction of the juvenile court.[94] Because Walter had gone to live with his cousin and sister, the court further found that he had not placed himself in such danger as to require care and guidance from the state.[95]

The appellate court viewed the situation as one of family discord caused by a child's disagreement with his parents' decision to return to the Ukraine.[96] Justice McGillicuddy wrote for the majority, "We have

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[90] *Id.* at 207, 432 N.E.2d at 877. The state's witness was unable to give an opinion regarding long-term effects on Walter, because he did not know Walter. *Id.*

[91] *Id.*

[92] *Id.* at 204, 432 N.E.2d at 874.

[93] *In re* Polovchak, 104 Ill. App. 3d 203, 210-11, 432 N.E.2d 873, 878-79 (1981). The Polovchaks raised four issues on appeal: (1) whether the adjudication of wardship was an unconstitutional state intrusion into the privacy of the family; (2) whether the MINS statute was unconstitutionally vague; (3) whether the proceeding below violated the parents' constitutional and statutory rights to a trial; and (4) whether the evidence was sufficient to support the finding that Walter should be made a ward of the court. The Polovchaks raised a variant evidentiary contention that there was insufficient evidence that the adjudication was in the best interest of Walter and the public. *Id.* at 204, 432 N.E.2d at 874-75. The court did not address either this issue or the Polovchaks' constitutional claims. *Id.* at 211, 432 N.E.2d at 879-80. The right to trial issue was reached by the court but decided adversely to the Polovchaks. *See* note 84 *supra.*

[94] *In re* Polovchak, 104 Ill. App. 3d 203, 211, 432 N.E.2d 873, 870 (1981).

[95] *Id.* Although the court acknowledged that a single isolated act could establish that a minor was beyond parental control if the conduct was seriously harmful and dangerous, it did not consider Walter's conduct in going to live with his sister and cousin sufficient to jeopardize his health, safety, or welfare. *Id.* at 211, 432 N.E.2d at 879.

The dissenting judge thought the evidence below was sufficient to show that Walter was in need of supervision, stressing Walter's absence from home, the mother's inability to prevent his leaving, the parents' need to call in the police for assistance, and Walter's assertion at trial that he would continue to run away if returned home. The dissenting judge also disagreed with the majority's reliance on *In re* Henry G., *see* note 39 and accompanying text *supra*, because he viewed the California statute (CAL. WELF. & INST. CODE § 601 (West Supp. 1982)) as differing significantly from its Illinois counterpart. *Id.* at 212, 432 N.E.2d at 880-81 (McNamara, J., dissenting).

[96] *Id.* at 208-09, 432 N.E.2d at 878-79.

serious doubt as to whether the State would have intervened in this realm of family life and privacy had the parents' decision to relocate involved a move to another city or state."[97] The decision to return to the Soviet Union did not "compel a different result."[98]

The Illinois Supreme Court will have the next say in the *Polovchak* case.[99] The intermediate appellate court decision avoided the constitutional issues,[100] but it nevertheless provides grist for considering the vagaries of the incorrigibility statutes. The constitutionality of such laws is an issue of some importance. It may not always be possible to dispose of these "aberrant" cases on evidentiary grounds,[101] and the existence and use of ungovernability statutes present dangers not only to the rights of children, but also to the interests of parents.

B. Variations on Polovchak*: When Parents File MINS Charges Against Their Children*

One way of analyzing the *Polovchak* case is by asking what the

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[97] *Id.* at 210, 432 N.E.2d at 879.

[98] *Id.* The court suggested that the MINS statute was being used as a subterfuge to decide the question of asylum. *Id.* Several newspaper stories expressed concern that a ruling supporting Walter would set a dangerous precedent and allow children to challenge interstate moves by their parents. *See, e.g.*, Chicago Tribune, July 27, 1980, § 2, at 12, col. 1; Houston Post, Jan. 25, 1981, § A, at 18, col. 1. It appears, however, that Walter's civil liberties claim is of a somewhat different nature. Unlike a move to another state, forcible return of Walter to the Soviet Union can be seen as permanently precluding him from returning to the United States and enjoying the political and religious rights of a democratic society. Viewed in this manner, Walter's claim is more analogous to the right of privacy asserted in abortion cases, a right which the Supreme Court views as unique, in part because the decision is irrevocable, and which the Supreme Court protects even against parental opposition. *See* notes 133-37 and accompanying text *infra*.

It seems clear that Walter would not fare well in the Soviet Union if he were returned there now. *See* Chicago Tribune, Aug. 10, 1980, § 1, at 10, col. 1; Houston Post, June 26, 1982, § B, at 8, col. 1; *see also* note 81 *supra*.

[99] An application for discretionary review by the Illinois Supreme Court was filed on April 28, 1982. On October 5, 1982, the Illinois Supreme Court agreed to review the case. Oral argument is scheduled for March 1983. Telephone interview with Wayne Russell, Chief Clerk of the Supreme Court of Illinois (Jan. 24, 1983).

[100] *See* note 93 *supra*.

[101] The Illinois intermediate court noted that while some state MINS laws (such as Illinois') are framed in the disjunctive, permitting a finding based on either habitual disobedience or one seriously harmful act of disobedience, other MINS statutes (such as New York's) are framed in the conjunctive, thus requiring habitual disobedience in order to establish that the child is beyond parental control. *See In re* Polovchak, 104 Ill. App. 3d 203, 209-10 & n.3, 432 N.E.2d 873, 878-79 & n.3 (1981).

courts would have done if the MINS proceeding had been initiated by Mr. and Mrs. Polovchak instead of by the state.[102] If we disregard Walter's assertion that he had a right to remain in the United States, and view the situation simply as one of a twelve-year-old child leaving home without permission and refusing to return, Walter would, without question, be adjudicated a MINS.[103] Any argument that his running away was symptomatic of rebelliousness, or was a manifestation of parent-child conflict, would have led the juvenile court judge to point out that the incorrigibility jurisdiction existed for just such situations.[104]

Judges would probably make such decisions even when the child ran away in response to beatings, marital discord, parental alcoholism, or a variety of other factors.[105] In these cases, the court might see the minor in a more benevolent light, and the exercise of its jurisdiction would be considered essential to the welfare of the child, but the idea that the juvenile was not in need of any court supervision usually would be viewed as frivolous.[106] In these circumstances, a parent's attempt to

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[102] Indeed, the state's brief emphasized that the Polovchaks had specifically enlisted the aid of the state and not vice versa, and that once the state was involved it was required to protect the best interests of the child. *See* Brief for Appellee, note 68 *supra*, at 26, 28, 30. The state was thus attempting to treat this as a traditional MINS case brought by the parents. *See* note 69 *supra*.

[103] I was a practitioner in the juvenile courts in New York City between 1967 and 1972, and I have represented numerous children alleged to be in need of supervision, many of whom were so adjudicated on the basis of just such facts, or even less. As Justice McNamara noted in his dissent in *Polovchak*, "I am convinced that in a matter where a boy fled home under circumstances such as these but because his family was moving to another state, a juvenile court's decision that supervision over the child was required never would be disturbed by a reviewing court." 104 Ill. App. 203, 212-13, 432 N.E.2d 873, 881 (McNamara, J., dissenting).

[104] *See, e.g.*, Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389, 395 (1971) (upholding stubborn child adjudication of an adolescent girl who refused to submit to a medical examination, used vulgar language, slammed doors and stayed outside "probably talking with the boys").

[105] *See* Yale Ungovernability Study, note 1 *supra*, at 1392-93 & n. 67 (concluding that approximately one-half of the incorrigibles in the study were actually neglected children). When, however, parental misconduct is egregious, the courts are sometimes willing to consider such neglect or abuse as a defense to incorrigibility charges and to substitute a neglect petition. Even in such cases, however, some courts are loathe to proceed against the parent and prefer instead to continue with an incorrigibility action against the child. *See* notes 34-36 and accompanying text *supra*.

[106] *See, e.g., In re* Lloyd, 33 A.D.2d 385, 386, 308 N.Y.S.2d 419, 420 (1970) (intermediate appellate court merely reversed the dispositional order of a child adjudicated in need of supervision and committed to a secure state training school, although noting that the boy was "living in rooms . . . reeking with the effluvia of neglect," and that his parents were "inebriates"); *see also In re* L.L., 39 Cal. App. 3d 205, 207, 114 Cal.

withdraw the petition might prove fruitless. Having given the court jurisdiction over the child, parents often find, to their surprise, that they cannot control the course of the proceeding. This lack of parental control gives the lie to the assertion that MINS statutes merely provide necessary back-up assistance to parents.[107]

Would the result be any different because Walter ran away to avoid returning to the Soviet Union? What if Walter asserted as a defense to MINS charges brought by his parents, that he fled in order to protect a liberty interest in not being forcibly removed from the United States? He might argue that returning to the Ukraine under these circumstances could irreversibly preclude his ability to live freely in either the Ukraine or the United States.[108] To answer that question requires an

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Rptr. 11, 13 (1st Dist. 1974).

[107] *See, e.g., In re* Robert H., 87 Misc. 2d 26, 383 N.Y.S.2d 813 (Fam. Ct. 1976). The court held that the petitioning parent in an incorrigibility case had no right to withdraw his petition in order to terminate the child's placement. The child claimed that he was being physically and sexually abused at the state institution. The court's opinion is a revealing explication of the way some judges view status offender laws:

> A PINS [person in need of supervision] petition is not a device by which parents may summarily have their children disposed of by the Court . . . . In a PINS proceeding, it is the State which is the true party in interest, not the parent-petitioners who are a nominal party representing the interests of the community . . . . The State's interest in the child's welfare and moral development is the basis for PINS legislation. Allowing parent-petitioners to withdraw a PINS petition on a whim and abruptly put a halt to any beneficial treatment which the child is receiving would make a farce of such noble aims.

Id. at 29, 383 N.Y.S.2d at 816-17 (citations omitted). *See also In re* Snyder, 85 Wash. 2d 182, 532 P.2d 278 (1975), discussed in note 171 *infra*.

[108] *See* notes 81, 98 *supra*; Note, *State Intrusion Into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1398-99 (1974) (arguing that the state can justify intervention on the child's behalf in situations in which the parent's conduct severely and irreversibly injures the juvenile); *cf.* People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (4th Dist. 1974) (inmates charged with escape from prison may in certain circumstances assert necessity as a defense based on evidence that they were in imminent danger of serious bodily injury from other prisoners). *Compare* United States v. Bailey, 444 U.S. 394 (1980) (inmates failed to present sufficient evidence of duress or necessity as defense to escape charge).

In one of its newsletters, the Illinois affiliate of the ACLU, which is counsel for the Polovchak parents, asserted that the Polovchaks, who were Ukrainian Catholics, had feuded with their relatives in Chicago, who had tried to convert them to the Baptist faith. The newsletter stated that the religious controversy had escalated when the cousin with whom Walter stayed when he ran away, took Walter to church over parental objections. The newsletter further stated that Walter had received "religious asylum" from the immigration authorities and had designated himself a Baptist on the form petitioning for asylum. *See ACLU Illinois Division*, 38 THE BRIEF 1 (Jan.-Feb.

examination of the interests of all parties to the controversy, including Walter, the Polovchaks, and the state. A court must consider Walter's arguable right to remain in a democratic society with its attendant political, economic and religious freedoms; the Polovchaks' right to rear their children as they think best in a country whose values they prefer; and the state's right to assure the welfare of minors.

C. Children and Parents: The Unresolved Constitutional Questions

1. Parents' Rights

Beginning in 1923 the United States Supreme Court used the substantive due process doctrine to carve out areas of parental primacy in childrearing, in which the state could not meddle.[109] In *Meyer v. Nebraska*,[110] the Court held unconstitutional a state law barring instruction of modern foreign languages in schools, and in *Pierce v. Society of Sisters*,[111] the Court invalidated legislation requiring all students to attend only public schools. These laws were viewed as an unreasonable interference both with the liberty of parents to decide how their children should be educated and reared, and with the liberty of children to acquire knowledge. The modern Court has relied on these earlier cases, at least in part, to invalidate compulsory education laws that unduly abridged parental rights to free exercise of religion guaranteed by the first amendment.[112]

Parents' rights to control the upbringing of their children are not absolute. In *Prince v. Massachusetts*,[113] the Court upheld the conviction

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1982). To the extent that these allegations are true, first amendment religious and associational rights are also implicated.

[109] In later years, the Court denied that the *Meyer* and *Pierce* cases, *see* notes 110-11 and accompanying text *infra*, were based on substantive due process. Justice Douglas, writing for the majority in Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965) insisted that *Meyer* and *Pierce* were first amendment decisions.

[110] 262 U.S. 390 (1923).

[111] 268 U.S. 510 (1925).

[112] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). Justice Douglas, dissenting in part, decried that no one had ascertained whether all the Amish children of junior high school age involved in the *Yoder* case wanted to go to school or not, and that the decision to take them out of school was based on the parents' religious views, not necessarily the children's. *See id.* at 242: "[I]f an Amish child desires to attend high school and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections." (Douglas, J., dissenting in part).

[113] 321 U.S. 158 (1944).

under state child labor laws of an aunt who permitted her nine-year-old ward to sell religious tracts on the streets in the evening. Thus, the state has power to intrude in family life when parental conduct, even if religiously motivated, is sufficiently detrimental to the child.

To what extent the state may intervene, and on what basis is, however, unclear. The Court has not yet decided, for example, what acts of a parent are so egregious as to permit permanent termination of parental rights, or even temporary removal of parents' guardianship and possession pursuant to neglect proceedings.[114] A recent case, *Santosky v. Kramer*,[115] requires the state to meet a clear and convincing standard of proof in termination cases, but the Court's earlier ruling in *Lassiter v. Department of Social Services* [116] held that indigent parents facing termination of parental rights are not automatically entitled to the assistance of counsel. *Lassiter*, especially, makes protection of parental interests and indeed the scope of their interests, problematic.

The contours of parental primacy in child rearing have been made even fuzzier by several other Supreme Court decisions. In *Baker v. Owen*,[117] the Court summarily affirmed without opinion a district court determination upholding the constitutionality of reasonable corporal

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[114] In 1980 the Supreme Court noted probable jurisdiction in Doe v. Delaware, 445 U.S. 942 (1980) (mem.), a termination case that raised three issues: vagueness, the standard of proof and the grounds for termination. *See* Jurisdictional Statement at 2-3, Doe v. Delaware, 450 U.S. 382 (1980). Over the dissents of Justices Brennan and Stevens, the Court subsequently dismissed the appeal for want of a properly presented federal question. *Id.* Similarly, in Moore v. Sims, 442 U.S. 415 (1979) the Court invoked the abstention doctrine to avoid deciding the constitutionality of the Texas procedures for temporarily removing children from parental custody; *see also* Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (Court upheld state procedures for removing children from foster parents, without deciding whether foster parents, like natural parents, had a liberty interest in preserving the "family" relationship; natural parents argued that stringent due process protections would often work to deprive them of the right to be reunited with their children).

[115] 455 U.S. 745 (1982).

[116] 452 U.S. 18 (1981). The Court held that although both the state and the parents shared a common interest in accurate fact-finding, due process did not always require that the parents be furnished with counsel. The Court delegated the determination to the trial courts, who were to consider the complexity of the case, the capacity of the parents and the possibility of subsequent criminal proceedings. *Id.* at 32; *see* Comment, *Alone Against the State*: Lassiter v. Department of Social Services, 15 U.C. DAVIS L. REV. 1123 (1982); *see also* Little v. Streater, 452 U.S. 1 (1981) (requiring that the state pay for blood tests of an indigent alleged to be the father in a paternity action which the state induced the mother to file).

[117] 423 U.S. 907 (mem.), *aff'g* 395 F. Supp. 294 (M.D.N.C. 1975) (three-judge district court).

punishment by public school officials, even over the objection of the child's parents. The Court cited *Baker* with approval in its subsequent ruling in *Ingraham v. Wright.*[118] In *Ingraham*, the Court held that the eighth amendment did not bar school officials from inflicting severe corporal punishment on public school students. In addition, the Court ruled that while a child had a liberty interest in freedom from the infliction of appreciable physical pain, procedural due process did not, because of the availability of state tort and criminal remedies, require a prepunishment hearing.[119] Although *Planned Parenthood v. Danforth*[120] and *Bellotti v. Baird*[121] prohibit the state from authorizing parents to veto absolutely their minor child's abortion decision, *Parham v. J.R.*[122] holds that the state may permit parents to commit their minor children to state mental hospitals "voluntarily," without a formal due process hearing.

2. Children's Rights

The child is also not without some constitutional safeguards. In the 1960s, the Court began outlining the constitutional rights of juveniles in a variety of contexts.[123] Minors were held to have constitutional protections separate and apart from their parents, although in many of these cases there appears to have been no conflict between parent and child. Thus, in *In re Gault*,[124] Gerald Gault and his parents agreed that he should not be labeled a delinquent and committed to a state correctional facility for his minority without certain procedural due process guarantees.[125] In *Tinker v. Des Moines Independent Community School Board*,[126] Tinker's parents apparently supported his first amendment right to wear a black armband to school to protest the Viet-

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[118] 430 U.S. 651 (1977).

[119] The *Ingraham* majority cited *Baker v. Owen* and stated: "This Court has held in a summary affirmance that parental approval of corporal punishment is not constitutionally required." *Id.* at 662 n.22.

[120] 428 U.S. 52 (1976).

[121] 443 U.S. 622 (1979) (plurality opinion).

[122] 442 U.S. 584 (1979).

[123] *See, e.g., In re* Gault, 387 U.S. 1 (1967). *Gault* is viewed as the seminal case in the development of the law regarding the rights of juveniles. One year earlier in Kent v. United States, 383 U.S. 541 (1966), the Court, in a decision involving the transfer of a juvenile to adult criminal court, had intimated that due process rights would be applied in juvenile court proceedings.

[124] 387 U.S. 1 (1967).

[125] *Id.* at 33-34.

[126] 393 U.S. 503 (1969).

nam War.[127] Similarly, in *Goss v. Lopez*,[128] Lopez and his parent challenged the right of public school officials to suspend students for disciplinary infractions without at least a minimal due process hearing.[129] The Court's support of the child's constitutional rights in these cases was not dependent on the presence of dovetailing parental interests, although the accord between parent and child may have influenced the ultimate rulings. For example, Justice Fortas, writing for the majority in *Gault*, noted that a consequence of the juvenile court proceedings was Gerald's loss of freedom *and* his parents' loss of custody.[130]

Notwithstanding the confluence of rights in these cases, and the success of the children's claims, the Court has indicated that the constitutional rights of minors are not as extensive as those of adults, and that the state possesses considerably more power to regulate the lives of juveniles. Thus, youths alleged to be delinquent are not *automatically* entitled to the same due process protections as their adult counterparts in criminal court,[131] and the *Tinker* Court indicated that the state had greater freedom to curtail a child's first amendment rights (at least in the school context) than an adult's.[132]

The critical issue is what the Court does when parent and child present conflicting positions. *Danforth*[133] and *Bellotti*[134] support the child's privacy right to an abortion, and, using a delegation theory,[135] do not

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[127] *Id.* at 504.

[128] 419 U.S. 565 (1975), *aff'g* 372 F. Supp. 1279 (S.D. Ohio 1973) (three-judge district court).

[129] 372 F. Supp. at 1285 n.2.

[130] *In re* Gault, 387 U.S. 1, 33-34 (1967). Indeed, the case was pursued by Gerald's parents on Gerald's behalf.

[131] *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1970) (plurality opinion) (right to jury trial does not apply to delinquency proceedings). *See generally* Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656 (1980).

[132] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969) (dictum); *see also* Board of Educ. v. Pico, 102 S. Ct. 2799 (1982) (plurality opinion). In *Pico*, the Court recognized that the first amendment limits the discretion of school board officials to remove library books from junior and senior high schools. The Court recognized that access to ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members," but, citing *Tinker*, it also noted that "all First Amendment rights accorded to students must be construed in light of the special characteristics of the school environment." *Id.* at 2806-07.

[133] Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[134] Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion).

[135] In both cases, the majority viewed the legislation as an attempt by the state to delegate power to parents, which power the state itself did not possess and which pre-

permit an absolute parental veto power. The Court reached this conclusion even though it used the ostensibly less stringent significant state interest test, rather than the compelling state interest standard used for adult women in privacy cases.[136] The Court, however, made it quite clear in *Bellotti* that the abortion decision was unique because of its urgency, gravity, and enduring impact. In other contexts the child's constitutional rights were not co-extensive with the rights of adults, because of the child's vulnerability, age, and competency differentials, and because of the parental role in child rearing.[137] These distinctions were reinforced by the Court's ruling in *Parham*, which upheld statutory authorization for parents to commit their minor children to state mental hospitals without a formal due process hearing.[138]

It appears therefore that, outside the abortion area, parents prevail when parent and child conflict, if the state sides with the parents. *Parham*, however, should not be viewed as establishing the primacy of parental rights. The *Parham* Court granted these same commitment rights to state welfare officials who had custody of children.[139] The Court also stressed that a state was not *required* to allow parents summarily to commit their children to mental institutions. The state instead could require formal due process hearings for the minor prior to commitment.[140] Viewing *Parham* from that perspective, the state was the winner, not the parents. Indeed, even when both parent and child objected to the infliction of mild corporal punishment in *Baker v.*

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sumably the parents themselves did not possess. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); Bellotti v. Baird, 443 U.S. 622, 643 (1979).

[136] *Compare* Roe v. Wade, 410 U.S. 113, 115 (1973) *with* Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 691 n.12, 693 n.15 (1977) (plurality opinion on issue of minor's privacy rights).

[137] Bellotti v. Baird, 443 U.S. 622, 634-35 (1979) (plurality opinion). *See* Justice Brennan's opinion concurring in part and dissenting in part in Parham v. J.R., 442 U.S. 584, 627-28 (1979) (arguing that, in view of these same competency factors, children may well be entitled to greater constitutional protection than adults); *see also* Keiter, *Privacy, Children and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 517 (1982): "[T]he Constitution only protects children's privacy when they must resolve vitally important personal matters involving serious and enduring consequences and requiring prompt resolutions."

[138] Parham v. J.R., 442 U.S. 584 (1979). The informal due process hearing is provided by the staff psychiatrist's evaluation of the need for hospitalization. The Court's ruling rested in large part on the medical context and on the fear of irreparable injury to the parent-child relationship if a formal hearing were required.

[139] *Id.* at 617-20. The Court upheld this power as applied to welfare workers acting *in loco parentis*, because state law required them to act in the child's best interests.

[140] *Id.* at 610-11 n.18.

Owen,[141] the state's right to maintain discipline in the schools was apparently viewed as paramount.[142]

Some combinations of parent-child interests can, however, overcome some state interests. For example, the state's fiscal and administrative interests, asserted to deny parents procedural due process rights in parental termination cases, are overshadowed by the child's and the parents' need to assure an accurate determination of parental fitness.[143] The state, which is adverse to the parent in such cases, may not assert its *parens patriae* interest in the welfare of the child separately from the parents, since the interests of parent and child in maintaining the family relationship coincide. There can be no divergence of parent and child interests until there has been an accurate adjudication that the parent is unfit.[144] However, that combined interest is unique because, as the Court has emphatically noted, the decision to terminate parental rights is final and irrevocable.[145]

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[141] 423 U.S. 907 (mem.), *aff'g* 395 F. Supp. 294 (M.D.N.C. 1975) (three-judge district court).

[142] Because *Baker* was summarily decided, the Court's rationale remains unknown.

[143] *See* Santosky v. Kramer, 455 U.S. 745, 766-67 (1982); Lassiter v. Department of Social Servs., 452 U.S. 18 (1981). The interests of the parent and child in accurate fact-finding are not, however, equal. Erroneous terminations work a greater deprivation of parental rights, since erroneous refusals to terminate merely preserve the status quo. *See* Santosky v. Kramer, 455 U.S. at 765-66. *See generally* Comment, *Alone Against the State*: Lassiter v. Department of Social Services, 15 U.C. DAVIS L. REV. 1123 (1982).

[144] The state of course shares this interest in maintaining the family relationship with the parent and child, because the state interest in the child's welfare can only be served by an accurate finding regarding parental fitness. Until that finding is made, all parties share a common interest in maintaining the family relationship.

In Smith v. Organization of Foster Families, 431 U.S. 816 (1977), the Court approved the appointment of independent counsel to represent the children in what amounted to a four-way battle between foster parents, natural parents, their children, and the state. The Court acknowledged that ordinarily children, because of their incapacity, could not decide how best to protect their interests, and thus were usually represented by parents or guardians in litigation. In *Smith*, however, the adult parties all shared some attributes of guardianship, and all contended that they represented the children's best interests. Still the Court held that independent counsel was not thereby solely authorized to determine the best interests of the children, and that the courts in such cases should hear the views of all parties who have sufficient attributes of guardianship. *Id.* at 841-42 & n.33.

[145] *See* Santosky v. Kramer, 455 U.S. 745, 758-61 (1982); Lassiter v. Department of Social Servs., 452 U.S. 18 (1981).

The Court's recent decision in Lehman v. Lycoming County Children's Servs. Agency, 102 S. Ct. 3231 (1982), that federal habeas corpus does not lie in parental termination cases, is not at odds with the concept that the decision to terminate parental

Thus, in both the privacy and termination cases, the private interests are unique, and the state cannot legitimately assert that its acts serve or secure valid interests of either parent or child.[146] But even in cases when the state's interest is subservient to that of parent and child, the private interests are not absolute. In the parental termination cases, notwithstanding the combined parent-child interests, the Court has rejected claims of greater procedural due process safeguards, such as an automatic right to counsel[147] and a reasonable doubt standard of proof.[148] Similarly, in the privacy area, the Court recently upheld in *H.L. v. Mathieson*[149] a statute requiring doctors to give "notice if possible," to parents of unemancipated, dependent minors who were about to undergo abortions. Thus, even in privacy matters, the state retains significant authority if it will merely refrain from attempting to authorize an absolute veto of a competent minor's decision.[150]

D. Polovchak *and the Supreme Court Decisions: Proposed Resolutions of the Competing Constitutional Claims — Or, "What's Sauce for the Goose . . ."*

In one sense, incorrigibility laws like the one in *Polovchak* are much like the commitment statute involved in *Parham*; both permit parents to invoke the state's authority as an adjunct to their own power to rehabil-

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rights is unique and thus entitled to enhanced constitutional protection. The Court's decision in *Lehman* turned on interpretation of 28 U.S.C. § 2254 (Supp. III 1979), concerns of federalism, and the state's need for finality in child custody disputes. Indeed, the Court may have viewed the need for federal court intervention in such matters as less compelling, in view of its recent rulings requiring the states to give greater procedural due process protection to parents in termination actions.

[146] For example, in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (plurality opinion on that portion invalidating ban on minor's access to contraceptives), the state argued that it was acting in the child's welfare to prevent adolescent promiscuity. The Court refused to accept as a legitimate state aim, the infliction of venereal disease and pregnancy as a means of preventing promiscuity in children. Similarly, in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court rejected the argument that requiring parental consent to an abortion would preserve family unity and enhance parental authority, because the family relationship and power structure had already been ruptured.

[147] *See* Lassiter v. Department of Social Servs., 452 U.S. 18 (1981).

[148] *See* Santosky v. Kramer, 455 U.S. 745, 764-70 (1982).

[149] 450 U.S. 398 (1981).

[150] Perhaps the state's support of the parents can overcome the minor's privacy interest, because the state is, or appears to be, asserting the interests of both parent and child — the parent's interest in childrearing, and the minor's interest in assuring parental support to reach a correct abortion decision.

itate their children. Presumably, however, the distinction between the medical commitment statute in *Parham* and the quasi-correctional MINS statute might not permit the state to impose discipline on the incorrigible child unless formal procedural due process guarantees, similar to those afforded delinquent children, are also provided for MINS children.[151] Nonetheless, the constitutionality of the commitment statute in *Parham* is strong support for the constitutionality of the MINS laws because in both cases the state is aligned with parents who are attempting to assist their troubled children. When the state provides procedural due process safeguards in incorrigibility cases, the MINS laws appear even less vulnerable to attack.

Assuming the validity of the typical MINS statute when the parents invoke the law, does its constitutionality depend on the parent being the initiator of an incorrigibility proceeding? What if the state allows such cases to be brought by state officials or by any person (including the child) alleging that the minor is beyond parental control? A strong argument can be made that MINS laws (aside perhaps from truancy provisions)[152] are valid only when the parents assert that the state's aid is necessary. Absent parental neglect or criminal conduct by the child, the state's intervention in the family can occur only if the parents allege and prove that the child is beyond their control. Under this theory, the MINS laws exist to help the parent control an otherwise uncontrollable child.

An even stronger argument can, however, be made on the other side. The state, whether viewed as acting in its *parens patriae* capacity, in its police power role, or in a combination thereof, may contend that parental permission to intervene in family life is unnecessary if the child is in fact beyond parental control.[153] Because incorrigibility is as detrimental

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[151] *Compare* Parham v. J.R., 442 U.S. 584 (1979) *and* Addington v. Texas, 441 U.S. 418 (1979), *with In re* Gault, 387 U.S. 1 (1967) *and In re* Winship, 397 U.S. 358 (1970). *Cf.* Vitek v. Jones, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital requires procedural due process protection).

[152] Presumably the state's interest in compulsory education would override parental desires to permit truancy, and such laws could be invoked by state educational officials. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("A State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests. . . .").

[153] *Cf.* Santosky v. Kramer, 455 U.S. 745, 758 (1982) (dictum) (when state intervention in an ongoing family relationship is less severe than termination of parental rights, the amount of procedural due process protection decreases).

During its October 1981 Term, the Court asserted that the state's interest in "safeguarding the physical and psychological well being of a minor . . . is a compelling one." Globe Newspaper Co. v. Superior Ct., 102 S. Ct. 2613, 2621 (1982) (invalidat-

to a child's welfare as parental neglect, and may also be a precursor to criminal behavior, the state may have the right to demand a due process hearing to determine whether a child is beyond control. The state may be entitled to independent verification of the child's behavior and of parental capacity for discipline.

Once the power of the state to intervene in a child's life is validated when the parent invokes state authority, it then becomes difficult to argue that the power does not exist *unless* and *until* the parent invokes it. When the parent initiates an incorrigibility proceeding, the state aligns itself with the parent, and that combination of interests may be deemed paramount to the child's liberty interest, as in *Parham.*[154] When the state institutes the ungovernability action over both the parents' and child's opposition, the state may override the interests of both parent and child, as in *Baker v. Owen.*[155] In the *Polovchak* variant, the state's case is even stronger because the state is supporting the child against the parent, consistent with the Court's analysis in *Parham.*[156]

Prohibiting the state to act over parental objection in the MINS context would permit the parents' subjective determination of when their child was beyond control to govern the validity of such laws. Thus, any MINS statute that permitted "any person," including a state agent or the child, to initiate ungovernability cases would be suspect; similarly, the state's authority to proceed despite parental attempts to withdraw MINS charges could be viewed as constitutionally dubious.

However, theoretically at least, parental determinations that a child

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ing, on first amendment grounds, state law requiring trial judges to exclude press and public from courtroom while minor sex victim testifies). The Court's willingness to allow the state greater freedom to protect the welfare of children was reflected in its decision holding that child pornography, even if not obscene, is not within the protection of the first amendment. *See* New York v. Ferber, 102 S. Ct. 3348 (1982); *see also* Ginsburg v. New York, 390 U.S. 629 (1968).

[154] *See* notes 122, 138-40 and accompanying text *supra.*

[155] 423 U.S. 907, (mem.), *aff'g* 395 F. Supp. 294 (M.D.N.C. 1975) (three-judge district court). *See* notes 117-18 and accompanying text *supra.* While parent and child have an interest in an ongoing family relationship that the state is seeking to disrupt, state intervention by a MINS proceeding, unlike a parental termination action, arguably does not work an irrevocable or unique deprivation of rights, *see* notes 143-45 and accompanying text *supra.* Thus, the combined interests of parent and child may be viewed as more akin to those asserted in *Baker v. Owen.*

[156] *See* notes 138-40 and accompanying text *supra*; *see also Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1383 (1980): "Where the rights of mature children to make critical decisions or the rights of parents to perform the initial education of the very young are not at stake, it thus appears that the outcome of conflicts between parent and child will often turn on whether the state chooses to favor one side or the other."

is beyond their control do not *require* a finding of incorrigibility by the juvenile court; conversely, conclusory parental determinations that their child is controllable arguably should not, ipso facto, require dismissal of the MINS proceeding. Although parental conclusions may be entitled to great weight in such cases, they are an evidentiary concern, not a jurisdictional one of constitutional proportions.

Therefore, based on the above analysis, the probable answers to the questions posed earlier are:

1. If the Polovchaks initiated the MINS case simply because their son ran away from home and refused to return, and if Walter's constitutional claim were not interposed as a defense, Walter would lose. The confluence of strong interests arrayed against Walter, namely, the parental interest in child rearing and the state's interest in aiding the rehabilitation of errant children, would overcome the minor's liberty interest.

2. If the Polovchaks initiated the MINS case, and if Walter asserted his constitutional claim in defense, the result would be determined by balancing the interests. The state's support of the parents would probably result in their victory, unless Walter's claim was viewed as a privacy right entitled to the same heightened protection as a minor's right of access to an abortion. On the one hand, Walter's claim arguably involves an irrevocable and enduring loss like that suffered in the abortion cases. On the other hand, because return of a child to the Soviet Union is arguably not as final as an abortion, which the Court views as sui generis, and particularly because the family relationship would not thereby be severed, Walter's prospects for victory would remain problematic.[157]

3. If the state initiated the MINS case over parental objection, and if Walter asserted his constitutional claims, the confluence of interests could overcome the Polovchaks' parental rights. The state's interest in rehabilitating incorrigible children, together with Walter's interest in remaining in the United States, particularly if it is viewed as akin to the privacy right of access to an abortion, could override parental primacy in child rearing. The likelihood of such a result would be en-

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[157] If, on the other hand, the state sided with Walter in such a case, the result might be different. Although the parental interests in maintaining the family unit are of course substantial, Walter's constitutional claims and the additional support derived from the state's determination that he is not a MINS would, in this situation, arguably override the parental interests. *But see* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 820 (1978) (arguing that state intervention on any side other than that of the parents is counterproductive, even for the child).

hanced by two factors: first, the MINS proceeding does not result in an irrevocable and final termination of parental rights, and second, the Polovchaks could maintain the family relationship by remaining in the United States.

CONCLUSION

A consensus appears to be emerging on the Supreme Court that "taking the bitter with the sweet" is an appropriate conceptual approach for determining the scope of procedural due process protections.[158] Such an interpretive theory ultimately permits the state to create the impression that it is protecting rights when in fact it is not. The danger lies in the creation of illusion. In that sense MINS laws are perhaps the ultimate *trompe l'oeil,* purporting to protect the interests of the family, but instead authorizing broad state intervention. On their face the incorrigibility statutes appear to enhance parental authority by allowing parents to ask the state for assistance in coping with ungovernable children. The MINS laws assume that the state may intervene in the life of a family, even though the child has not committed a criminal act, and even though the parent has not abused or neglected the child. After all, it is the parent who is asking for help.

Children's rights advocates know, however, that the incorrigibility statutes are often subverted and used as an expedient substitute for delinquency,[159] neglect,[160] custody[161] and civil commitment proceed-

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[158] *See* Bishop v. Wood, 426 U.S. 341, 355 (1976) (White, J., dissenting). The doctrine permits the legislature to determine the extent of procedural due process protection, a function normally reserved to the judiciary, by writing a statute purportedly creating a liberty or property interest and, at the same time, setting forth the procedures for protecting that interest. The "sweet" is the creation of the interest and the "bitter" is the procedure for its elimination, a procedure which might not otherwise pass constitutional muster. *See also* Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (plurality opinion).

[159] *See, e.g., In re* J.M., 57 N.J. 442, 273 A.2d 355 (1971) (affirming MINS finding based on possession of eyedroppper and hypodermic needle); *see also In re* William S., 10 Cal. App. 3d 944, 949, 89 Cal. Rptr. 685, 688-89 (4th Dist. 1970) (affirming MINS finding because there was insufficient proof concerning a drug-related crime).

[160] *See, e.g., In re* Paul H., 47 A.D.2d 853, 854, 365 N.Y.S.2d 900, 902 (1975) (per curiam) (truancy finding reversed when home was filthy and parent admitted inability to supervise).

[161] *See, e.g., In re* Galvan, 384 So. 2d 1000 (La. Ct. App. 1980) (dismissing incorrigibility charges against fourteen-year-old youth who ran away from his mother's home to be with his father); *In re* Price, 94 Misc. 2d 345, 404 N.Y.S.2d 821, 824 (Fam. Ct. 1978) (dismissing incorrigibility charge against eleven-year-old girl who resided with her grandparents notwithstanding parental objection, because "the real purpose in

ings.[162] However, juvenile courts have persisted in using ungovernability statutes, claiming that the statutes are necessary to aid in the rehabilitation of troubled children.[163]

Lawyers representing juvenile status offenders, particularly institutional lawyers, have sometimes advised parents against initiating or continuing incorrigibility cases because of the paucity of services and facilities available for such children.[164] Many parents, either in response to that advice or based on their own experiences with the juvenile court, tried to terminate the proceedings.[165] Some judges allowed such withdrawals because of the crowded docket, and because they viewed the MINS jurisdiction of the court as largely dependent on parental wishes. Other judges refused to permit such withdrawals on the theory that once the parent had filed the action and invoked the court's jurisdiction, the court could proceed over the parents' objections to protect the child.[166]

On a more subtle level, the state is very often the actual initiator and perpetuator of MINS proceedings. The incorrigibility statutes are used primarily by the poor, who have few alternatives and no resources for dealing with their troubled children.[167] State officials frequently refer

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bringing this proceeding is to obtain custody").

[162] *See, e.g., In re* Butterfield, 253 Cal. App. 2d 794, 61 Cal. Rptr. 874 (3d Dist. 1967) (girl who had unstable home life tried to kill herself; she later ran away from home and was brought to court as a MINS; as a result of that petition, she was committed to a state mental hospital); *see also In re* L.L., 39 Cal. App. 3d 205, 114 Cal. Rptr. 11 (1st Dist. 1974).

[163] Or, as the Supreme Court of Maine colorfully put it in upholding the constitutionality of its MINS law: "We think no reasonable man would shoot a sound horse because his saddle stirrup needs repairs." S.S. v. State, 299 A.2d 560, 570 (Me. 1973). Most of the Maine status offender law was subsequently repealed. *See* note 18 *supra*; *see also* Yale Ungovernability Study, note 1 *supra*, at 1395 n.82.

[164] *See* Yale Ungovernability Study, note 1 *supra*, at 1399, 1405 n.132.

[165] *See id.* at 1389 n.47, 1399; *cf. In re* Jose D., 50 A.D.2d 520, 374 N.Y.S.2d 658 (1975) (reversing training school placement of PINS child and ordering new dispositional hearing because, *inter alia*, mother, who was working with child's attorney to arrange special school program, did not want juvenile to be incarcerated).

[166] *See* note 107 and accompanying text *supra*. Some of these judges would none too subtly coerce the parent into proceeding with the action. Others blamed such attempted withdrawals on the child's lawyer and premised their refusal to grant the dismissal on the theory that the parents were being influenced and given erroneous information by the child's lawyer. *Cf.* Rapoport v. Berman, 49 A.D.2d 930, 373 N.Y.S.2d 652 (1975) (reversing as moot, a temporary order restraining enforcement of a New York City Family Court judge's directive to a child's attorney, prohibiting the latter from interviewing or speaking with the alleged status offender's parents).

[167] *See* IJA/ABA STANDARDS: NON-CRIMINAL MISBEHAVIOR, note 1 *supra*, at 12.

poor parents to the juvenile courts with the assurance that their children will be helped, an assurance that may be reiterated by juvenile court personnel. Often implicit, however, in these referrals and assurances are coercive undertones that may lead the parents to believe that they have no choice other than to proceed against their child in juvenile court. Therefore, to view parental invocation of these laws as voluntary action by the parent is often unrealistic.

Polovchak may be troubling because it explicitly reflects the way many MINS cases are in reality initiated and processed. The Illinois appellate court did not hold that it was unconstitutional for the state to intervene in the Polovchaks' lives; it merely said that there was insufficient evidence to conclude that Walter was beyond parental control. The state's power is not really threatened by the decision. The MINS law remains a source of governmental authority which permits interference in family life without proof of criminal acts or neglect.[168]

It may be true, as Chief Justice Burger has suggested, that parents' and child's interests are unitary and that it is only through the parents that the child's rights can be asserted and protected.[169] It is also true, however, that restrictions or invasions of the child's rights often operate to diminish parental rights. The school corporal punishment cases are a stark example of that possibility.[170]

The MINS laws have always been a source of danger to both parent and child. It seemed, however, that as long as the MINS laws were being invoked by parents and applied to children, they merely enhanced

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[168] This power is maintained in the so-called reform legislation superseding MINS laws in some states with statutes regulating "families in need of assistance." The reform legislation gives courts jurisdiction to intervene in a broad variety of situations in which family relationships create conflict. *See, e.g.*, DEL. CODE ANN. tit 10, § 921(6) (Supp. 1980); IOWA CODE ANN. § 232.2(17) (West Supp. 1981-82). The new reform legislation has been criticized as being just another label for status offender laws. *See* Fisher, *"Families With Service Needs:" The Newest Euphemism?*, 18 J. FAM. L. 1 (1979-80).

[169] *See* Parham v. J.R., 442 U.S. 584, 600 (1979); *see also* Bellotti v. Baird, 443 U.S. 622, 638 (1979): "[T]he tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter."

[170] *See* Ingraham v. Wright, 430 U.S. 651 (1977); Baker v. Owen, 423 U.S. 907 (mem.), *aff'g* 395 F. Supp. 294 (M.D.N.C. 1975) (three-judge district court). *See also Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1379 (1980) (noting that often parents have constitutional rights regarding childrearing but choose not to exercise them; in such cases the state should not intervene, because "by limiting the child's rights, the state may be interfering with the parents' prerogative . . . .").

parental power. *Polovchak* makes clear that the power of the state is not so easily contained.[171]

Whether invoked against parents or their children, juvenile status offender laws possess an unquestionably destructive potential. The typical MINS child haled into court by his or her parents suffers humiliation, stigmatization, and a possible loss of liberty without being afforded any meaningful rehabilitation. When children like Walter Polovchak initiate MINS actions against their parents, the parents are likewise offered no real guidance in dealing with their ostensibly disturbed offspring, but rather are deprived of the right to raise their children in the manner they think best.

Initiation of an incorrigibility proceeding may only worsen an already deteriorating family relationship. When the political and judicial brouhaha finally subsides, Walter Polovchak may emerge as a free person in a democratic society; but his successors in interest, as well as their parents, cannot expect to fare so well.

[171] *See In re* Snyder, 85 Wash. 2d 182, 532 P.2d 278 (1975). *Snyder* was an incorrigibility case similar to the *Polovchak* matter but without its political overtones. The parents, apparently rigid disciplinarians, brought their daughter to juvenile court. The girl, in an effort to avoid returning home, charged her parents with neglect. Those charges were dismissed. She later had a state official file incorrigibility charges against herself. She testified that she would not return home, expert testimony was presented, a finding of incorrigibility was made, and she was placed in foster care. The parents appealed, contending that there was insufficient evidence of incorrigibility. The Supreme Court of Washington affirmed the judgment below, denying that the juvenile court had "given sympathy and support to [the girl's] problems in disregard of parental rights." *Id.* at 188, 532 P.2d at 282.