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Book Review of The Rights of Children: Emergent Concepts in Law and Society; Beyond the Best Interest of the Child; and Cases and Materials on Modern Juvenile Justice

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BOOK REVIEWS

THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY. Edited by A.E. WILKERSON. Philadelphia, Pa.: Temple University Press, 1973. Pp. 313. \$10.00.

BEYOND THE BEST INTERESTS OF THE CHILD. By J. GOLDSTEIN, A. FREUD, AND A.J. SOLNIT. New York, N.Y.: The Free Press, 1973. Pp. 170. \$7.95.

CASES AND MATERIALS ON MODERN JUVENILE JUSTICE. By SANFORD J. FOX. St. Paul, Minn.: West Publishing Co., 1972. Pp. 1012. \$16.50.

W. ANTHONY FITCH*

The appearance of *The Rights of Children*, *Beyond the Best Interests of the Child*, and *Modern Juvenile Justice* within the past two years reflects the growing complexity of the laws pertaining to children as well as the increasing attention being afforded this area of the law by a growing number of organizations providing legal and other types of assistance.¹ This intensive activity, part of the larger civil rights "ex-

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1. Organizations currently concentrating on problems in this area include the National Juvenile Law Center and the Youth Law Center (both national research and technical assistance, or "back-up," centers of the Legal Services Program), the Juvenile Justice Standards Project of the Institute of Judicial Administration, the recently established Juvenile Law Center at the University of Pittsburgh funded by the Law Enforcement Assistance Administration, the Mental Health Law Project of the Center for Law and Social Policy (a public interest law firm, located in Washington, D.C.), and the legal aid and public defender services in Washington, D.C., Chicago, and New York.

For examples of issues of current concern in this area, see *Wilson v. Thompson*, 7 CLEARINGHOUSE REV. 621 (S.D.W. Va., filed Dec. 13, 1973) (No. 73-303 CH) (confinement of juveniles in county jail without a prior hearing); *Sheehan v. Scott*, 7 CLEARINGHOUSE REV. 559 (N.D. Ill., filed Nov. 20, 1973) (No. 73-C-2950) (allegation of unconstitutionality of truancy provision of state juvenile code); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973) (interim emergency order, discussed note 109 *infra*); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Martarella v. Kelley*, 359 F. Supp. 478 (S.D.N.Y. 1973); *Nelson v.*

plosion" in the state and especially the federal courts,² probably accounts in large part for the failure of these three books, notwithstanding their varied subject matter, to provide wholly inclusive and up-to-date analysis of this rapidly developing field. Nevertheless, they are, as a group, indispensable to any lawyer seriously concerned about adequately performing his responsibilities as trial counsel, legislator, agency administrator, or judge in matters affecting children.

The problem of timeliness is particularly serious in the collection of essays edited by Albert E. Wilkerson, a member of the faculty of the School of Social Administration at Temple University. In *The Rights of Children*, only six of the 23 pieces—the introduction, the epilogue, and four articles—originally appeared in the 1970's. Such selections as the 1959 United Nations Declaration of the Rights of the Child,³ a 1968

Heyne, 355 F. Supp. 451 (N.D. Ind. 1972, supp. opinion 1973), *aff'd*, 491 F.2d 352 (7th Cir. 1974) (discussed note 109 *infra*); Breed v. R.W., 7 CLEARINGHOUSE REV. 349 (Cal. Ct. App., filed Aug. 31, 1973) (No. 2d Crim. 24029) (order releasing juvenile from training school on ground that school had abused its discretion in not releasing the child); L.L. v. Linn, 7 CLEARINGHOUSE REV. 560 (Cal. Super. Ct., filed Nov. 13, 1973) (No. 307) (challenge to the authority of a juvenile court to commit child to mental hospital without full hearing, including trial by jury); *In re E.M.B.*, 13 CRIM. L. REP. 2328 (D.C. Super. Ct., June 14, 1973) (No. J. 1365-73); *In re P.J.*, 7 CLEARINGHOUSE REV. 108 (D.C. Super. Ct., Mar. 21, 1973) (held on constitutional grounds that a juvenile cannot be denied an abortion solely because of her age or her parents' objection); *In re Savoy*, Nos. 70-4808 and 70-4714 (Juv. Ct. of D.C., Oct. 13, 1970) (discussed note 105 *infra*); Perrone v. Layman, 7 CLEARINGHOUSE REV. 559 (Ill. Cir. Ct., Cook County, Juv. Div., Oct. 13, 1973) (order by juvenile court restricting grounds for preadjudication detention of juveniles and limiting such detention to ten days); *In re Owens*, No. 70 J 21520 (Ill. Cir. Ct., Cook County, Juv. Div., July 9, 1971) (order by juvenile court to Illinois training school to restrict the use of behavior control devices and to establish disciplinary procedures, and appointing a guardian ad litem for all children committed by the court to the institution); O. H. v. French, 504 S.W.2d 269 (Mo. 1973) (involving the constitutional and statutory validity of the transfer of incarcerated juveniles to prisons for adult offenders); *In re Ellery C.*, 32 N.Y.2d 588, 300 N.E.2d 588, 347 N.Y.S.2d 51 (1973). See also Juvenile Justice Standards Project, Juvenile Law Litigation Directory (Institute for Judicial Administration, N.Y.U. School of Law, June 1973); National Juvenile Law Center, Selected Bibliography for Right to Treatment (St. Louis Univ. School of Law, 1973); U.S. Dep't of Justice, LEAA Newsletter, November 1973, at 23; N.Y. Times, Feb. 18, 1973, § 1, at 27, col. 1; Clark, *Troubled Children: The Quest for Help*, NEWSWEEK, April 8, 1974, at 52.

2. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15-27 (1973). Judge Friendly cites a 1346 percent increase in "civil rights actions" filed annually in the United States district courts between 1961 and 1970.

3. *United Nations Declaration of the Rights of the Child*, in THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY 3 (A.E. Wilkerson ed. 1973) [hereinafter cited as Wilkerson].

article⁴ by a social work academician referring to *Miranda v. Arizona*⁵ as a case dealing with "the field of adult corrections"⁶ and speaking of the continuing "trend of the Court . . . toward expanding rather than contracting the rights of the accused";⁷ and a 1969 law review article which, although well written, argues the practical, moral, and constitutional case against abortion⁸ are not very enlightening or helpful to the involved lawyer, planner, administrator, or scholar in 1974.

Other selections are equally questionable. For example, a student note on a 1970 Hawaii case involving the issue whether a parent can be joined as a joint tortfeasor in an action brought by the child⁹ and a 1967 student comment which competently summarizes the decision in *In re Gault*¹⁰ without providing much additional analysis¹¹ fail to meet the editor's own criterion of selecting "pieces which take the definition or implementation of children's rights a step further, or which identify problems and issues that impede movements in this direction."¹²

Wilkerson quite properly points out that "[h]uman rights and legal rights . . . can be relatively useless unless they are supported by a network of human services that reflect a major social policy commitment to health and welfare."¹³ This cursory acknowledgement of harder questions is expanded upon by Justine Wise Polier, Judge of the Family Court of the State of New York.¹⁴ In contrast to Wilkerson's easy assumption that "[t]he protective service agencies have done a commendable job during the past century"¹⁵ and his unhelpful, vague statement that "[o]ne has to concede that the present system of child

4. Coughlin, *The Rights of Children*, in Wilkerson at 7.

5. 348 U.S. 436 (1966).

6. Coughlin, *supra* note 4, in Wilkerson at 11.

7. *Id.*

8. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, in Wilkerson at 47. In *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the Court held most provisions of Texas and Georgia statutes regulating abortion unconstitutional and announced specific criteria with which abortion legislation must comply.

9. Andell, *A Minor Has an Absolute Right to Sue His Parents for a Negligent Tort*, in Wilkerson at 98.

10. 387 U.S. 1 (1967).

11. Stansby, *In Re Gault: Children are People*, in Wilkerson at 285.

12. Wilkerson at ix.

13. *Id.* at vii.

14. Polier, *Introduction*, in Wilkerson at xii.

15. Wilkerson at xi.

protection runs close to violating due process of law for the parent or guardian,"¹⁶ Judge Polier more forthrightly discerns in the collected essays the degree to which those concerned with the rights of children "are imprisoned within a system which denies access to the very goals they seek."¹⁷ Frankly acknowledging the indifference of American society toward children's rights, Judge Polier continues:

While our rhetoric reflects the American mythology about children as our most precious resource, our actions conform to a pathology which allows blindness to deprivations that brand children with the stigmata of feeling neither wanted nor needed. It is this pathological blindness that alienates and destroys the capacity in children for caring for others or having hope for themselves.¹⁸

Citing such scandals as the use of adult jails for the preadjudication incarceration of juveniles and the lack of appropriate treatment services,¹⁹ Judge Polier stresses the "urgent need to confront false promises, to protect individual rights, and at the same time, to exert unrelenting efforts to secure services and facilities without which legal rights can mean little"²⁰ and demands that we face up to the question of "why American society has been least generous toward its children and why the judicial, as well as the legislative and executive branches of government, have been so reluctant and so tardy in protecting the constitutional rights of children."²¹

A number of the remaining essays in the Wilkerson collection respond to this question in terms of more specific issues and provide some thoughtful suggestions concerning their resolution. Two articles deal usefully with the various roles or responsibilities which are, or at least should be, assumed by those who purport to speak for the child²² and with "The

16. *Id.*

17. Polier, *supra* note 14, in Wilkerson at xiii.

18. *Id.* at xiv.

19. *Id.* at xvi. See also JOHN HOWARD ASS'N, COMPREHENSIVE LONG RANGE MASTER PLAN FOR JUVENILE AND YOUTHFUL OFFENDER JUSTICE SYSTEMS IN THE COMMONWEALTH OF VIRGINIA 54, 58-98 (1974) [hereinafter cited as MASTER PLAN]. This study indicates that these problems persist throughout Virginia.

20. Polier, *supra* note 14, in Wilkerson at xix.

21. *Id.* at xvi.

22. Keith-Lucas, "Speaking for the Child": A Role-Analysis and Some Cautions, in Wilkerson at 218.

Role of the Social Worker in Family Court Decision-Making.”²³ In the first essay, Alan Keith-Lucas reminds lawyers, social workers, and others that speaking for the child’s desires, rights, and needs (as one or more persons may perceive them) all involve very differing assumptions, responsibilities, and modes of preparation and presentation.²⁴ Even more importantly, Wilkerson and O. Duane Kroeker convincingly demolish the myths that social workers merely report “objective social data”²⁵ and “that the social worker and lawyer need to learn how to collaborate better and come to a consensus more readily around mutual cases.”²⁶ They emphasize, rather, that value judgments are inherent in the social report and that it inevitably contains biases arising from the practices involved in social work and child welfare, from the social worker’s own values,²⁷ and from the presumption, unvalidated by research, for placement of children of separated parents with the mother.²⁸ The authors also note that the social work profession has long been guilty of “attempting to incorporate psychoanalytic knowledge, but knowing it only cursorily and without possessing appropriate methodology to make it appropriate and consistently meaningful.”²⁹ These are caveats which all lawyers, but especially the young attorneys who in most jurisdictions appear in such a large portion of the cases in juvenile and domestic relations courts, should bear constantly in mind. Deference to social workers is even less appropriate and responsible than the failure to cross-examine diligently other properly qualified expert witnesses representing more fully developed disciplines.

The troubling problem of and legislative response toward child abuse are competently analyzed in a 1965 article³⁰ by Robert E. Shepherd, an assistant attorney general of Virginia. Although dated in some respects, the article does identify and concisely review the conflicting arguments on the basic questions which must be resolved in the drafting of child abuse reporting legislation and would seem to merit reading by the Virginia General Assembly, which was unable at its 1974 session

23. Wilkerson & Kroeker, *The Role of the Social Worker in Family Court Decision-Making*, in Wilkerson at 274.

24. Keith-Lucas, *supra* note 22.

25. Wilkerson & Kroeker, *supra* note 23, in Wilkerson at 283.

26. *Id.* at 277.

27. *Id.* at 282.

28. *Id.* at 279.

29. *Id.* at 278.

30. Shepherd, *The Abused Child and the Law*, in Wilkerson at 174.

to reach any resolution whatsoever.³¹ The common legislative response to child abuse is more forcefully attacked by Lois Forer, Judge of the Common Pleas Court of Philadelphia, who observes: "To date legal consideration of the problems of the abused child has been unimaginative and sterile. Reporting statutes are the only remedy seriously considered. . . . The obvious remedies of appointment of a guardian and counsel for the child to bring suit against those who have abused him are overlooked."³²

Other articles deal with such more or less esoteric topics as the "Legitimacy of Children Born by Artificial Insemination";³³ the constitutionality after *Shapiro v. Thompson*³⁴ of "fiscal clearing" regulations or statutes³⁵ under which a state welfare agency may refuse to accept custody of a child unless the transferring state agrees to continue to provide support;³⁶ the implications³⁷ of *Levy v. Louisiana*³⁸ and *Glon v. American Guarantee and Liability Insurance Co.*,³⁹ and the possible entitlement of foster children to various benefits available to their foster parents pursuant to various federal statutes.⁴⁰

A short, provocative article by Judge Lindsay G. Arthur of Minnesota raises numerous questions about the actual degree, even after *Gault*, to which various constitutional guarantees do and should apply to juveniles in delinquency proceedings.⁴¹ Such issues as the competency of counsel, the scope of fourth and fifth amendment protection, the law

31. See Richmond Times-Dispatch, March 10, 1974, § A, at 1, col. 4.

32. Forer, *Rights of Children: The Legal Vacuum*, in Wilkerson at 24, 33 n.15.

33. Biskind, *Legitimacy of Children Born by Artificial Insemination*, in Wilkerson at 72.

34. 394 U.S. 618 (1969) (holding unconstitutional one-year residency requirements for receipt of welfare assistance).

35. An example is the Uniform Transfer of Dependents Act, which had been adopted by Virginia, VA. CODE ANN. § 63.1-99 (Repl. Vol. 1968), but was repealed by c. 721, Acts of the Virginia General Assembly, 1970.

36. Cox, *Indigent Children and Fiscal Clearing*, in Wilkerson at 106.

37. Krause, *The Bastard Finds His Father*, in Wilkerson at 138.

38. 391 U.S. 68 (1968) (holding unconstitutional the Louisiana wrongful death statute, which had been construed by the state courts to preclude recovery by illegitimate children).

39. 391 U.S. 73 (1968) (holding unconstitutional the Louisiana wrongful death statute which had been construed by the state courts to preclude recovery by the mother of an illegitimate child).

40. Du Fresne, *The Rights of Foster Children to Financial Benefits of Foster Parents Under Federal Statutes*, in Wilkerson at 150.

41. Arthur, *Should Children Be as Equal as People?*, in Wilkerson at 118.

of arrest and detention, the availability of bail, the protection against being twice placed in jeopardy, the utilization of punishment, and the waiver of various constitutional or statutory rights all merit judicial and legislative examination in Virginia.⁴² At a more general level, Judge Arthur's article, like that by Judge Forer, shatters the delusion held by many that "the *Gault* case has had a startling impact on the juvenile court"⁴³ and underscores that, even if *Gault* has significantly changed those few areas of the juvenile process which it addresses (a proposition that can be seriously questioned), it leaves many more questions unresolved.

A number of articles deal with various procedural and substantive issues involved in custody questions arising out of neglect, divorce, foster placement, and adoption proceedings. Several argue for the seemingly undeniable proposition that children in these cases should be represented by court-appointed counsel and should have full party status.⁴⁴ Others raise such issues or suggest such measures as the designation of percentages of income for child support;⁴⁵ governmental withholding of child support payments;⁴⁶ greater detail in child support decrees regarding insurance, higher education, and special education;⁴⁷ and provisions in divorce decrees for the "joint custody of the child, the appointment of a confidential adult ally for the child and a committee chosen by the parents to decide questions on which the parents are unable to agree."⁴⁸

Even more importantly, these same articles call into question in various ways the traditional "best interests of the child" standard. The vagueness of this standard and its consequent lack of guidance are pointed

42. "The Virginia Juvenile and Domestic Relations Code (Title 16.1, Ch. 8) should receive major revision. . . . The present Code is overly complex, vague in meaning, conflicting and in a number of respects, outdated." MASTER PLAN, *supra* note 19, at 45. See also Fitch, *The Need for Revision of Virginia's Juvenile Court Statute*, THE COLONIAL LAWYER, Winter 1973, at 4 (published by the Marshall-Wythe School of Law, The College of William and Mary).

43. *E.g.*, Coughlin, *supra* note 4, in Wilkerson at 21.

44. Coyne, *Who Will Speak for the Child?*, in Wilkerson at 193, 208-11; Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, in Wilkerson at 239, 240. See also VA. CODE ANN. § 16.1-173(f) (Cum. Supp. 1973).

45. Drinan, *The Rights of Children in Modern American Family Law*, in Wilkerson at 37, 43.

46. *Id.*

47. *Id.*

48. Kubic, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, in Wilkerson at 212, 214.

out dramatically;⁴⁹ the conflict, not yet resolved in Virginia,⁵⁰ between the "best interests" standard and the presumption for parental rights is demonstrated; and the uncertain impact of the "best interests" standard on such factors as the age of the child, the preference of the child, community values or standards, and the religious preference of the various parties is underscored.⁵¹

These and other concerns are presented most tellingly and analyzed most carefully in the outstanding article by Sanford Katz of the Boston College Law School.⁵² In driving toward his conclusions and recommendations regarding the "best interests of the child" standard in child custody cases, Katz uses as his vehicle *In re Jewish Child Care Association*,⁵³ involving a story which, he argues, "is similar to that of many other children who are similarly involved in the struggle of foster parents to adopt children over the objections of placement agencies."⁵⁴ After convincingly demonstrating through his analysis of the factual situation that the primary disqualification of the foster parents as potential adoptive parents was that they loved the child at issue too much,⁵⁵ Katz reaches two basic conclusions. First, he observes:

To the majority of the [New York] Court of Appeals, the fact that the Sanders were Laura's *foster*, rather than natural or future adoptive, parents was crucial. The court perceived foster parenthood as something less than full parenthood. . . . In essence, what the majority took as conclusive in the case, namely the "vital fact . . . that Mr. and Mrs. Sanders are not, and presumably will never be, Laura's parents by adoption," was the very issue the court was to decide.

....

. . . It seems safe to say that when courts invoke the parental rights doctrine to award custody to the natural parents, they are

49. Levine, *Child Custody: Iowa Corn and the Avant Garde*, in Wilkerson at 232; Coyne, *supra* note 44.

50. Cf. *Forbes v. Hanley*, 205 Va. 712, 133 S.E.2d 533 (1963); *Judd v. Van Horn*, 195 Va. 988, 81 S.E.2d 432 (1954).

51. Coyne, *supra* note 44, in Wilkerson at 195-97, 199-207.

52. Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, in Wilkerson at 244. This article is also incorporated into the important work, KATZ, *WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN* (1971).

53. 5 N.Y.2d 222, 183 N.Y.S.2d 65, 156 N.E.2d 700 (1959).

54. Katz, *supra* note 52, in Wilkerson at 245.

55. *Id.* at 249-50.

merely articulating an archaic notion, based upon a preference for the continuity of blood ties or the preservation of kinship loyalty, in order to justify a decision. It is a significant aspect of *Child Care* that the majority was more concerned with the *symbol* of natural family loyalty than its *fact*. As indicated previously, Laura's natural mother had seen the child twice in four years, and Laura's loyalty to her would seem, at best, to be more imaginary than real.⁵⁶

Second, and even more fundamentally, the *Child Care* decision, in Katz's view, reflects the prostitution of the court's decisionmaking jurisdiction to an administrative agency and the almost inevitable resolution of custody issues in favor of established institutions and against the position of an individual family:

The integrity of the law, as manifested in the child-placement contract and in the administrative decisions of a private agency, had been challenged. In order to maintain authority, these administrative policies had to be affirmed and the child-placement contract enforced: "[T]he program of agencies such as Child Care . . . may not be subverted by foster parents who breach their trust."

The majority in *Child Care* was again concerned with symbols. Judge Conway seemed compelled to preserve the sanctity of legal doctrines and, indirectly, the reputation of a community institution. The Sanders had been a threat both to the integrity and the stability of the placement contract and to the prestige of the Agency. . . .

Child custody proceedings, more than other litigation, may be merely a cover for the real conflicts: a power struggle between individuals, institutions, or individuals and institutions, which culminates in a decision that indicates a preference for certain social values over others. . . . The important question before the court was not necessarily who should be awarded custody of Laura, although this inevitably was resolved, but whose decision-making power was to be recognized, the welfare agency's or the foster parents'. In *Child Care*, the Agency prevailed, and the decision therefore may be described as one which furthered the best interests of the Agency.⁵⁷

56. *Id.* at 250-52 (footnotes omitted).

57. *Id.* at 252-53.

Having demonstrated that *Child Care* and similar cases⁵⁸ allow a court "to camouflage its own values, provincial community values, or the interests of dominant local institutions,"⁵⁹ Katz, unlike the other authors in the Wilkerson collection, confronts and proceeds to analyze at some length the "best interests of the child" standard in order both to flesh out and to circumscribe that doctrine. With some argument on each point, he suggests that the best interests of the child can be and should only be determined on the basis of four elements: "(1) order, integrity and family loyalty; (2) financial security; (3) health and education; (4) morality and respect."⁶⁰ These "minimum goals of parenthood,"⁶¹ together with such procedures as "widen[ing] the scope of inquiry beyond the immediate claimants" and "requir[ing] concrete plans for a child rather than be[ing] forced into deciding a custody case on the basis of agency assumptions,"⁶² should, Katz suggests, at least prevent such travesties as have occurred in *Child Care*⁶³ and similar cases.⁶⁴

In *Beyond the Best Interests of the Child*, Goldstein, a lawyer, and Freud and Solnit, two psychoanalysts, take the next logical step, arguing for the abolition of the "best interests of the child" standard. Certain to become a classic, this rarest of achievements, a truly interdisciplinary work, is a model of concise, logical, and precise advocacy. All of its operative terms are defined; the strengths of its analytical tools are identified and their limitations acknowledged; and its basic set of underlying values—that the child's needs are paramount and that state intervention in the child-parent relationship should be kept at a minimum⁶⁵—are forthrightly stated, utilized, and adhered to.

The argument of the book is so important and persuasive that a full summary is imperative. As their starting point, the authors sketch the peculiar psychology of children: "Children have their own built-in time sense . . . [resulting in] an intense sensitivity to the length of separations. . . [and] have no psychological conception of relationship

58. See, e.g., *Painter v. Bannister*, 140 N.W.2d 152 (Iowa), *cert. denied*, 385 U.S. 949 (1966), discussed in Katz, *supra* note 52, in Wilkerson at 268-70.

59. Katz, *supra* note 52, in Wilkerson at 270.

60. *Id.* at 256.

61. *Id.* at 270.

62. *Id.* at 271.

63. See notes 53-57 *supra* & accompanying text.

64. See note 58 *supra*.

65. J. GOLDSTEIN, A. FREUD & A.J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7-8 (1973).

by blood-tie until quite late in their development.”⁶⁶ On the basis of these and other special features of children, the authors develop three highly useful concepts: “the wanted child,”⁶⁷ “the psychological parent,”⁶⁸ and “the common-law adoptive parent-child relationship.”⁶⁹ These concepts, in turn, determine the authors’ basic principle: “[C]hildren whose placement becomes the subject of controversy should be provided with an opportunity to be placed with adults who are or are likely to become their psychological parents.”⁷⁰

In accord with this principle, the authors suggest three guidelines reflecting their preceding analysis of available analytical tools and of the state of our current knowledge of childhood. First, “placement decisions should safeguard the child’s need for continuity of relationships.”⁷¹ Thus, “each child placement [should] be final and unconditional . . .”⁷² There should be no waiting periods following custody decisions in adoption or divorce proceedings, visitation rights should be decided not by the court but by the person having custody of the child, and in foster placements, in contrast to adoptions, the child’s ties to the absent parent should be maintained.⁷³

The second guideline is that “placement decisions should reflect the child’s, not the adult’s, sense of time.”⁷⁴ Thus, custody decisions must be made much more quickly than is presently the practice; the authors are confident that much of the customary delay is due more to procrastination and to unjustified pretense about our decisionmaking or predictive abilities than to the requirements of “reasoned judgment.”⁷⁵ Moreover, custody decisions in divorce cases should be made immediately, before the divorce action is officially complete, and statutory periods required for the proof of neglect should be repealed and replaced by a standard postulating that neglect occurs at the point at which the child no longer feels wanted.⁷⁶

Third, “child placement decisions must take into account the law’s in-

66. *Id.* at 11-12.

67. *Id.* at 20-22.

68. *Id.* at 17-20.

69. *Id.* at 27-28.

70. *Id.* at 31.

71. *Id.*

72. *Id.* at 35.

73. *Id.* at 35-39.

74. *Id.* at 40.

75. *Id.* at 43.

76. *Id.* at 46-49.

capacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.”⁷⁷ This guideline repeats to some extent the first standard and is the least helpful or suggestive of the three; nevertheless, the authors do discuss at somewhat greater length the types of predictions which we can and cannot presently make, or justify taking additional time to make.⁷⁸

Incorporating these various value judgments, findings, principles, and guidelines, the authors suggest a replacement for the “best interests of the child” standard: “Placement should provide the least detrimental available alternative for safeguarding the child’s growth and development.”⁷⁹ The authors hope that this standard will insure speedy decisions by reminding the decisionmakers that the child has already been inexorably hurt and also that such a standard will avoid the kinds of situations and decisions reflected in the *Child Care* litigation. Perhaps most importantly, the “least detrimental alternative” standard appears to end any presumption in contested placements for the rights of the natural parents other than whatever position they can establish on an equal footing with other claimants.⁸⁰

In the remainder of their book, after stressing that the child must always be represented by counsel and have party status,⁸¹ Goldstein, Freud, and Solnit utilize their approach to rewrite the decision in a case similar to the *Child Care* litigation⁸² and then reduce their arguments to a basic “Model Child Placement Statute.”⁸³ The book concludes with a reexamination of the premise that the child’s interests should be paramount. This, with the possible exception of the chapter explaining why the “least detrimental alternative” standard is a replacement for, rather than merely an alternative explanation of, the “best interests of the child” standard, is probably the least satisfactory segment of the book. Of course, this is a topic which in many respects is beyond the realm of rational discussion, and the authors’ explanation that their premise does more than any other to “protect future generations of children by increasing the number of adults-to-be who are likely to be adequate parents”⁸⁴ is probably as convincing as any other.

77. *Id.* at 49.

78. *Id.* at 51-52.

79. *Id.* at 53.

80. *Id.* at 54.

81. *Id.* at 65.

82. *Id.* at 71-95.

83. *Id.* at 97-101.

84. *Id.* at 111.

If the Goldstein-Freud-Solnit book is likely to constitute the basic work for some years on the child custody/child placement issue, the scope and comprehensiveness—in most respects—of *Modern Juvenile Justice* by Sanford Fox (like Katz, a member of the Boston College Law School faculty) is likely to make this casebook the standard of comparison among teaching materials on the juvenile justice process and an indispensable reference source in its field.

Fox's casebook is not without some faults. It lacks a complete table of contents, and this, together with the typically inadequate index which seems to plague all such books, makes using it unnecessarily time-consuming until one familiarizes himself with the volume. A piece entitled "Delinquency and the Family" provides a convenient yet comprehensive review of social science theory concerning delinquency with which law students should be familiar;⁸⁵ unfortunately, as so often happens in casebooks, the remainder of the materials rarely require or help the law student to draw upon any insights which the various criminological approaches might provide on legal and administrative issues arising in the juvenile justice process. Similarly, materials in the first section of chapter one seem intended, in part, to paint a realistic, even lurid, picture of day-to-day conditions in many juvenile courts; again, this perspective is not consistently maintained throughout the book.

Other criticisms are more idiosyncratic. In a section entitled "To the Rescue," Fox includes *In re Gault*,⁸⁶ *In re Winship*,⁸⁷ and *McKeiver v. Pennsylvania*,⁸⁸ the Supreme Court's most important decisions concerning the juvenile process. This organization does not serve any readily apparent function; a better structure would have been the placement of these cases in correspondence with the chronological stage of the adjudicatory process (an approach otherwise generally reflected in the casebook) which they directly affect. Also, Fox reproduces his own very important article on "Juvenile Justice Reform: an Historical Perspective";⁸⁹ excerpts from Anthony Platt's *The Child-Savers: The In-*

85. Rodman and Grams, *Delinquency and the Family*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 188 (1967). Because the incomplete table of contents fails to list this article, finding it in Appendix B is a matter of luck or persistence. S. Fox, *MODERN JUVENILE JUSTICE* 935 (1972) [hereinafter cited as Fox].

86. 387 U.S. 1 (1967).

87. 397 U.S. 358 (1970).

88. 403 U.S. 528 (1971).

89. Fox at 15. This article originally appeared at 22 STAN. L. REV. 1187 (1970). Some

vention of *Delinquency*,⁹⁰ or perhaps from Platt's partial summary of that book,⁹¹ would add considerably to analysis of the fundamental issues which Fox raises about the scope and purposes of the juvenile process.

As Fox and especially Platt point out, an essential element of the original movement for a specialized children's court was the perceived need for reinforcement of the family's influence and control over the

aspects of Fox's historical analysis are challenged by Randleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205, 215 (1971).

90. A. PLATT, *THE CHILD-SAVERS: THE INVENTION OF DELINQUENCY* (1969).

91. Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, 381 ANNALS OF THE AM. ACADEMY 821 (1968). Platt argues:

The child-saving movement, like most moral crusades, was characterized by a "rhetoric of legitimization," built on traditional values and imagery. . . .

. . . .

The discovery of problems posed by "delinquent" youth was greatly influenced by the role of feminist reformers in the child-saving movement. . . .

Child-saving was a predominantly feminist movement Child-saving was a reputable task for women who were allowed to extend their house-keeping functions into the community without denying anti-feminist stereotypes of women's nature and place

Child-saving may be understood as a crusade which served symbolic and status functions for native, middle-class Americans, particularly feminist groups. . . . One of the main forces behind the child-saving movement was a concern for the structure of family life and the proper socialization of young persons

. . . .

Although the child-savers were responsible for some minor reforms in jails and reformatories, they were more particularly concerned with extending governmental control over a whole range of youthful activities that had previously been handled on an informal basis. The main aim of the child-savers was to impose sanctions on conduct unbecoming youth and to disqualify youth from enjoying adult privileges. . . .

The child-saving movement was not so much a break with the past as an affirmation of faith in traditional institutions. Parental authority, education at home, and the virtues of rural life were emphasized because they were in decline at this time. . . . The child-savers were prohibitionists, in a general sense, who believed that social progress depended on efficient law enforcement, strict supervision of children's leisure and recreation, and the regulation of illicit pleasures. What seemingly began as a movement to humanize the lives of adolescents soon developed into a program of moral absolutism. . . .

. . . .

. . . It was not by accident that the behavior selected for penalizing by the child-savers—sexual license, drinking, roaming the streets, begging, frequenting dance halls and movies, fighting, and being seen in public late at night—was most directly relevant to the children of lower-class migrant and immigrant families.

Id. at 822, 826-27, 829.

child.⁹² Today, juvenile-only, or "status," offenses are an important component of juvenile court caseloads,⁹³ and the juvenile court's continuing jurisdiction over such situations has been criticized repeatedly.⁹⁴ The section in Fox's casebook devoted to cases and other materials dealing with "Offenses Only for Children" is particularly strong; cases such as *In re Mario*⁹⁵ and *E.S.G. v. State*⁹⁶ allow for discussion at great length of the difficulties of definition, the vagueness, the potential for inconsistent or discriminatory application, and other problems in and potential for abuse of such juvenile status offenses as "behavior, environment, condition, association, habits or practices . . . injurious to his welfare," "habitually disobedient or beyond the control of his parents or other custodian, or is incorrigible," "a willful and habitual truant," or "whose condition or situation is alleged to be such that his welfare demands adjudication as to his disposition, control and custody . . ." ⁹⁷

92. Fox at 29-31; Platt, *supra* note 91.

93. Data available from the Norfolk and Virginia Beach, Virginia, juvenile courts, for example, indicate that up to 25 percent of the courts' caseload consists of such litigation. The John Howard Association, in its February 1974 report on juvenile justice systems in Virginia, notes: "Currently, about 30 percent of juvenile court intake and almost 40 percent of the commitments to the Division of Youth Services are 'status-offenders', i.e., children involved in behavior that would not be a violation of law if committed by an adult." MASTER PLAN, *supra* note 19, at 47.

94. See Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42 (1970); Sheridan, *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?*, FED. PROBATION, March 1967, at 26. Both of these articles are excerpted in Fox at 254-59, 259-64. See also N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 146-47 (1970); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 22-23 (1967); Fitch, *The Need for Revision of Virginia's Juvenile Court Statute*, THE COLONIAL LAWYER, Winter 1973, at 4 (published by the Marshall-Wythe School of Law, The College of William and Mary); Glen, *Juvenile Court Reform: Procedural Process and Substantive Status*, 1970 WISC. L. REV. 352; Comment, *Juvenile Delinquency Laws: Juvenile Women and the Double Standard of Morality*, 19 U.C.L.A.L. REV. 313 (1971).

95. 65 Misc. 2d 708, 317 N.Y.S.2d 659 (1971).

96. 447 S.W.2d 225 (Tex. 1969).

97. VA. CODE ANN. §§ 16.1-158(f), (g), (h), (j) (Repl. Vol. 1960). Similar provisions have been held unconstitutionally vague in *Gonzalez v. Mailliard*, No. 50424 (N.D. Cal., Feb. 9, 1971), *appeal filed*, 42 U.S.L.W. 3016 (U.S. Apr. 9, 1971) (No. 70-120); *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972) (statute authorizing incarceration in adult facilities of juveniles adjudicated "willfully disobedient" or "morally depraved"); *In re E.M.B.*, 13 CRIM. L. REP. 2328 (D.C. Super. Ct., June 14, 1973) (No. J. 1365-73). *Contra*, *United States v. Myers*, 143 F. Supp. 1 (D. Ala. 1956); *In re Daniel R.*, 274 Cal. App. 2d 749, 79 Cal. Rptr. 247 (1969); *State v. Mattiella*, 4 Conn. Cir. 55, 225 A.2d 507 (1966), *appeal dismissed for want of a properly presented federal question*, 395 U.S. 209 (1969); *S.S. v. State*, 299

Although the conclusion that status offenses should be removed from the jurisdiction of the juvenile court is almost inescapable,⁹⁸ at least on conceptual grounds, it is more difficult to say what, if anything, society should do to meet the needs of at least some portion of this group of children who are frequently seriously troubled and desperate for help. The prohibition of the incarceration of such children, preferably by statutory mandate instead of judicial fiat,⁹⁹ would at least alleviate some of the most flagrant and troubling abuses. "Diversion programs," such as those operated in Sacramento, California, and recently implemented in Virginia Beach and Norfolk, Virginia, emphasizing short- or medium-term family counseling, hold great potential in terms of effectiveness and cost-benefit, at least in theory, and seem to be demonstrating their utility in those jurisdictions where they are properly staffed and administered.¹⁰⁰ A more comprehensive variant of the family counseling-oriented diversion units are the Youth Service Bureaus advocated and sometimes funded by the Office of Youth Development of the United States Department of Health, Education and Welfare.¹⁰¹ Unfortunately, the prospects for such alternatives to overly broad juvenile court jurisdiction are not, if one is to be realistic, very bright, due to their inability to offer the parent jurisdictions immediate, short-term cost savings or even tradeoffs (although long-term savings are quite likely) and the reluctance of many juvenile court judges and other personnel to forsake their "responsibility," that is, their broad power over the entire range of juvenile affairs.

Fox's materials on police handling of juveniles are equally comprehensive. The various constitutional issues—arrest, search and seizure, interrogations, lineups, fingerprinting, and official records—are, nearly without exception, covered through well-selected cases, other materials,

A.2d 560 (Me. 1973); *State v. L.N.*, 109 N.J. Super. 278, 263 A.2d 150, *aff'd mem.*, 57 N.J. 165, 270 A.2d 409 (1970). See also Gonion, *Section 601 California Welfare and Institutions Code: A Need for a Change*, 9 SAN DIEGO L. REV. 294 (1972); Note, *Parans Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745 (1973).

98. See articles cited note 94 *supra*.

99. See, e.g., *In re Ellery C.*, 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973) (holding that a child found to be in need of supervision may not be committed to a state training school housing children involved in criminal conduct); cf. *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), *order entered*, 359 F. Supp. 478 (1973).

100. MASTER PLAN, *supra* note 19, at 173-74.

101. See, e.g., OFFICE OF YOUTH DEVELOPMENT, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CHALLENGE, ACTION, CHANGE: A COMMUNITY GUIDE FOR YOUTH DEVELOPMENT (1973); cf. Howlett, *Is the YSB All It's Cracked Up to Be?*, 19 CRIM. AND DELINQUENCY 485 (1973).

and questions which lend themselves to extensive discussion and analysis. The nonlegal materials in this chapter, especially those primarily from the social sciences in the section entitled "The Police and the 'System,'" are even more stimulating. They demonstrate to the reader that many, if not most, incidents which could be formally adjudicated in the juvenile court as alleged delinquencies are, instead, informally disposed of by the police in one way or another. As can a court, the police may do nothing, warn and release a child, place him on "probation," punish him, try to help him, or utilize any combination of these possibilities. The materials make clear that if one is really interested in "reducing" delinquency or "dealing with it" differently, attention must be afforded the hitherto largely unstructured, uncontrolled, and even unknown "juvenile justice system" within the police departments of our cities. The issues of the extent to which and how this "low visibility" ¹⁰² system is to be modified or otherwise reformed reflect the larger question of whether and how the unbridled discretion now exercised by the police in nearly every aspect of their operation is to be structured and controlled. Whether to patrol a neighborhood with one car or two, or on foot, or not at all; whether and how to respond to reported or observed offenses; under what circumstances to use varying degrees of force, including deadly force; whether to arrest a suspect or not—these and numerous other resource allocation, planning, tactical, and enforcement decisions by every member of the department, from the chief to the most inexperienced recruit, are constantly made in every city without the knowledge of or input from the citizenry. They are, moreover, largely unaffected by judicial decisions.¹⁰³

The various problems in structuring, channeling, and controlling police decisionmaking regarding these and other issues presently are receiving substantial attention.¹⁰⁴ Any movement toward surfacing and

102. Cf. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

103. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 785-93 (1970).

104. K. DAVIS, *DISCRETIONARY JUSTICE* (2d ed. 1971) is the seminal work in this area. The author observes:

The police are among the most important policy-making agencies, despite the widespread assumption that they are not . . .

. . . .

The system is atrociously unsound under which an individual policeman has unguided discretionary power to weigh social values in an individual case and make a final decision as to governmental policy for that case, despite a statute to the contrary, without review by any other authority,

systematizing the exercise of discretion by youth bureau members and other police officers in their handling of juveniles, the area in which the police as well as the courts traditionally have exercised their greatest discretion, should have substantial impact on the broader issues just mentioned.

The juvenile system's perennial problem with the alleged delinquent's prehearing status, that is, whether he should be incarcerated pending adjudication of his case, is treated almost as comprehensively by Fox. The book has ample materials for discussion of and reference on such continuously pressing issues as whether children have or should have a right to bail, the proper criteria for deciding whether a child should be detained prior to adjudication, the related question of the reasons for and solutions to overcrowding of detention facilities and the consequent placement of children in adult jails, the constitutional question of the type of hearing, if any, which must be conducted concerning the child's initial and continued placement in detention, and the matter of the living conditions and rehabilitation-oriented treatment services to which a child may be entitled constitutionally or statutorily. The chap-

without recording the facts he finds, without stating reasons and without relating one case to another.

Id. at 81, 88 (emphasis omitted). See also Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROB. 500 (1971); Caplan, *Introduction to Model Rules for Law Enforcement: Release of Arrest and Conviction Records*, 9 CRIM. L. BULL. 407 (1973). Caplan is the former director of the Arizona State University Project on Law Enforcement Policy and Rulemaking. Other work products of the Project include *Eyewitness Identification* (Dec. 1972); *Searches, Seizures, and Inventories of Motor Vehicles* (Jan. 1973), reprinted in 10 CRIM. L. BULL. 15 (1974); *Warrantless Searches of Persons and Places* (March 1973), reprinted in 9 CRIM. L. BULL. 645 (1973); *Stop and Frisk* (June 1973); and *Search Warrant Execution* (Dec. 1973). See also AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION (1973); W. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER, REPORT (1968); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, POLICE 21-25 (1973); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 103 (1967); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967); Kadish, *Legal Norms and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962); LaFave, *The Police and Nonenforcement of the Law* (pts. 1-2), 1962 WISC. L. REV. 104, 179; McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); Note, *Contemporary Studies Project: Administrative Control of Police Discretion*, 58 IOWA L. REV. 894 (1973); Note, *Procedural Due Process in the Context of Informal Administrative Action: The Requirements for Notice, Hearing and Prospective Standards Relating to Police Selective Enforcement Practice*, 53 B.U.L. REV. 1038 (1973).

ter's only deficiency is its lack of any materials on the issue of the judicial remedies available for children who are mistreated while in detention or subjected to unconstitutional or otherwise unacceptable conditions; this weakness is due partly, but not entirely, to the book's publication in mid-1972.¹⁰⁵

Such an oversight might have been a substantial one in light of the explosive developments in "prison law" or "prisoners' rights" resulting from the flurry of litigation, primarily in the federal courts, over first, fifth, sixth, eighth, and fourteenth amendment issues in the prison context.¹⁰⁶ It is remedied partially by the inclusion in the chapter on "Juvenile Corrections" of materials dealing with related problems. In the "Reform Schools" section of that chapter, the issues of the minimal conditions to which even incarcerated children are constitutionally entitled and the constitutional limitations on the punishment to which such juveniles may be subjected are presented quite adequately through the important case of *Lollis v. New York State Department of Social Services*.¹⁰⁷ As a whole, however, this section misses the thrust of the prisoner rights issue, even though a number of fundamentally important cases had been decided prior to the publication of the book.¹⁰⁸ Even in 1971 and early 1972, such cases were clearly harbingers of similar

105. See, e.g., *Juvenile Detention Center, Baltimore City Jail* (Sup. Bench of Baltimore City, Md., Aug. 3, 1971 & Nov. 10, 1971) (memorandum opinion), in which the court found that the conditions under which children were being detained pending adjudication constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments and, relying on its powers as a court of equity, ordered not only that numerous changes be made in operating procedures and physical conditions, regardless of the expense involved, but also that the detention facility cease to be used to house juveniles at all within a year of the court's order. See also *In re Savoy*, Nos. 70-4808 and 70-4714 (Juv. Ct. of D.C., Oct. 13, 1970), in which the chief judge of the court entered an order with similarly sweeping provisions. Subsequent newspaper headlines reflect both the necessity and the difficulties of continued court monitoring of such cases: "Receiving Home Ordered Closed; Judge Scathes D. C. for Inaction," *The Washington Post*, Jan. 13, 1973, § A, at 1; "D. C. Fails to Find New Shelters as Ordered," *id.*, Feb. 18, 1973, § C, at 2; "Juvenile Shelters Unready," *id.*, Oct. 20, 1973, § B, at 1; "30 Juveniles Waiting Trial Freed," *id.*, Feb. 28, 1974, § B, at 3.

106. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 16 (1973).

107. 322 F. Supp. 473 (S.D.N.Y. 1970), *modified*, 328 F. Supp. 1115 (S.D.N.Y. 1971).

108. E.g., *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970); *Palmigiano v. Travisono*, 317 F. Supp. 776 (D.R.I. 1970); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972). Fox, in fact, refers to one aspect of *Sostre* (Fox at 851-52) but neglects the many other aspects of this important case.

challenges to fundamental aspects of day-to-day operations and procedures in juvenile institutions.¹⁰⁹

At a somewhat different, more operational level, the book also fails to present an adequate picture of what might be considered the initial phase of the correctional process—the juvenile court's disposition decision. Fox is to be commended for providing the only widespread dissemination of a study by the Committee on Mental Health Services Inside and Outside the Family Court in the City of New York, entitled "Juvenile Justice Confounded; Pretensions and Realities of Treatment Services."¹¹⁰ This extremely important study devastatingly documents the rampant discrimination by private and voluntary agencies against older children, children involved in serious or drug-related offenses, and children from minority groups, a situation which is by no means confined to New York City. Other than this selection, the book does not really capture or convey to the reader the difficult, crucial decisionmaking process which juvenile court judges and lawyers must undertake daily in the face of the unforgivably limited resources for and knowledge about effective correctional intervention strategies.

The chapter on the depressing topic of juvenile corrections ends the

109. Those germinal cases have since borne fruit in the juvenile system: *Inmates of the Boy's Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972, supp. opinion 1973), *aff'd*, 491 F.2d 352 (7th Cir. 1974). In each case, the courts held that various living conditions, disciplinary sanctions, and administrative procedures involving the use of tranquilizing drugs and mail censorship violated the constitutional rights of the juvenile inmates. The courts also held that incarcerated juveniles are statutorily (346 F. Supp. at 1364; 355 F. Supp. at 459) or constitutionally (355 F. Supp. at 459; 491 F.2d at 358-60) entitled to rehabilitative efforts on the part of the state. The court in *Affleck* further held that purported budget limitations do not provide a valid excuse for failing to remedy unconstitutional conditions and practices. 346 F. Supp. at 1374. In an "interim emergency order" in *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), the court prescribed disciplinary procedures, limited solitary confinement, prohibited mail censorship, appointed an institutional ombudsman, required the psychological screening of prospective employees, and held that incarcerated juveniles have a constitutional right to treatment. It would appear, unfortunately, that *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), establishes a precedent for similar adjudication regarding juvenile institutions in Virginia, if recent newspaper reports are accurate: Brown, "Children Committed by State Merely Confined, Not Helped," *Richmond Times-Dispatch*, May 27, 1973, § A, at 1, col. 3; Brown, "Children's Rights Long Ignored," *id.*, May 28, 1973, § A, at 1, col. 1; "Custodial Care is Inbred," *id.*, May 29, 1973, § A, at 1, col. 3; Brown, "Concentrated Efforts Needed to Solve Problems in Youth Institutions," *id.*, § A, at 1, col. 5.

110. The study committee was chaired by Judge Polier (*see* text accompanying notes 14-21 *supra*). The study was published in 1972 by the National Council on Crime and Delinquency, Hackensack, N.J.

book with a section entitled "Innovations," which competently surveys modern ideas and treatment approaches in juvenile corrections. The primary emphasis on halfway houses and basic clinical evaluation techniques¹¹¹ reflects all too accurately our almost total ignorance of the actual effects any given sanction has on children.¹¹² The minutes from a recent symposium on youth services bureaus with which Fox ends his casebook reflect accurately the real issues facing us at the present time:

One general theme which was touched upon was the difficulty of producing *real* change in a complex, interlocking system such as criminal justice, a system which has an unlimited capacity to absorb and neutralize innovation.

. . . .

[Another] speaker raised the possibility that "diversion for diversion's sake" might be valuable. Perhaps some children are better off the less we do for them, and therefore it might be well to set up a social institution which will enable the community to do less for some children. The key problem here is, of course, the diagnostic one. How do we identify the children for whom minimal intervention is desirable?

The speaker's final point was that talk of diversion can mask assumptions. We must ask whether youth services bureaus will inevitably deal with children who would have been fed into the criminal justice system, or whether one result of the creation of these agencies might be the imposition of controls on children upon whom such controls might not otherwise have been imposed.¹¹³

This, of course, is simply another way of saying, along with Judge Polier, that "those concerned with the rights [or, it might have been added, the treatment or rehabilitation] of children are imprisoned

111. It has been observed that "[t]here has been too heavy a reliance upon the classical, clinical, psychiatric, and medical model for diagnosing juveniles, youthful offenders, and adults in trouble with the law in the Commonwealth of Virginia." MASTER PLAN, *supra* note 19, at 11.

112. Legislatures are notoriously hesitant to allocate funds for the kind of valid correctional research which, in the long run, would avoid the waste of millions of dollars. Cf. MASTER PLAN, *supra* note 19, at 17: "Currently no funds are available within the Division of Youth Services or the Division of Corrections for research and evaluation purposes. Ordinarily, between 2-10 percent of an operating budget is necessary for a viable research and evaluation unit."

113. Seymour, *The Current Status of Youth Service Bureaus: A Report on a Youth Service Bureau Seminar*, in Fox at 895, 897, 896.

within a system which denies access to the very goals they seek."¹¹⁴ That this need not always be so is demonstrated by the Goldstein-Freud-Solnit book. Such hopelessness is also beginning to dissipate in at least one other important area of children's rights which Wilkerson, inexplicably, intentionally omits from his volume—the rights of children (and adults as well) to truly effective treatment and basically humane conditions in institutions for the mentally ill and the mentally retarded, and the closely related issue of the rights of retarded, autistic, learning-disabled, hyperkinetic, and other exceptional children to a public education which meets their needs or at least meets their needs as equally as it meets the needs of supposedly more "normal" children.¹¹⁵ This aspect of the law pertaining to children, which saw important developments before the publication of Wilkerson's book¹¹⁶ and today is one of the most fertile and hopeful in the entire civil rights field,¹¹⁷ alerts us once again, through its inevitable exposure of abuses, to the hypocracies of supposedly benevolent intentions which lead to the excessive use of almost inherently debilitating institutionalization. Similarly, this new area of the law underscores the lesson, implicit in all three of the reviewed volumes, that, given our limited knowledge about treatment and other helping services, the most economical, least harmful, and often most effective way of dealing with troubled children is to work with most of them in the traditional settings—the home, the community, the public school—which are taken for granted by those of us fortunate enough and powerful enough to continue to be labeled "normal."

114. Text accompanying note 17 *supra*.

115. Judge Forer at least identifies these issues in a brief but prescient section of her article, *supra* note 32.

116. *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972); *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1972), 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), *appeal docketed sub nom. Wyatt v. Aderholt*, No. 72-2634, 5th Cir., Aug. 1, 1972; *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972). On the related issue of the suspension or expulsion of children from school, see, for example, *Madera v. Board of Education*, 386 F.2d 778 (2d Cir. 1967). See also *Murdock, Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133 (1971); Symposium, *The Legal Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 991 (1972).

117. Comprehensive review and analysis of recent developments may be found in Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Proposals*, 62 CALIF. L. REV. 40 (1974); Friedman, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 567 (1974).