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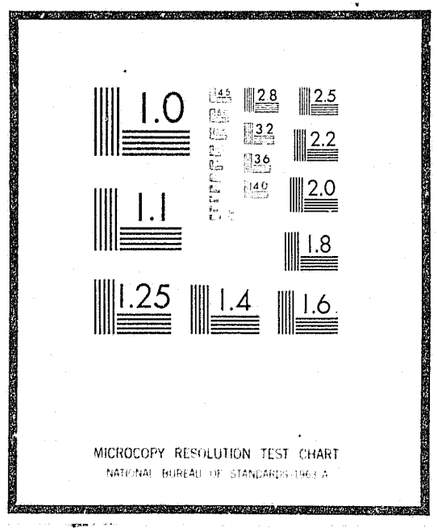

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387 N.Y.S.2d No. 2
393 N.Y.S.2d No. 1 DECEMBER 7, 1976 Pages 1201-1328
Pages 1-88

40 N.Y.2d 852-883
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Article of Special Interest

The Effect of Right to Treatment Litigation Upon the Relationship of Juvenile Offender Institutions and the Family Court

by

MALCOLM S. GODDARD*

NCJRS

JUN 24 1977

ACQUISITIONS

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FOREWORD

This article analyzes the effect right to treatment litigation had upon New York's juvenile correction system over the past five years. Mr. Goddard, who served as General Counsel to the State's Juvenile Correction Agency during this period, traces the growth of this litigation and how the courts, the legislature and the New York State Division for Youth responded to the conflicts the litigation caused.

PART I HISTORICAL PROSPECTIVE

Introduction

In general, right to treatment is the concept that when institutionalized for criminal or status offenses,[1] a juvenile has a right to humane care and sufficient therapeutic resources to provide a reasonable chance for rehabilitation.[2] This concept is often coupled with the argument that juveniles have given up certain constitutional safeguards afforded adult offenders and the quid pro quo for this diminution of rights is a guarantee by society that the children will be helped and not merely held in custody.[3]

In New York State today children have right to counsel,[4] right to proof of the charges against them beyond a reasonable doubt,[5] right to appeal,[6] right to a judicial review of their institutionalization at the end of 18 months with the burden on the State to prove the need for continuing treatment,[7] right to mandatory release at 18,[8] right to petition for judicial release at any time,[9] no revocation of parole without a full due process hearing,[10] etc. etc. Legislation just enacted (Chapter 878, Laws of 1976) has

[1] New York Family Court Act § 712 (McKinney, 1975) is New York's status offense statute. The offenses enumerated in the statute include persons who are incorrigible, ungovernable or habitually disobedient and beyond the lawful control of their parents.

[2] S. Davis, Rights of Juveniles, 168 (1974).

[3] 27 Oklahoma Law Review 238 (spring 1974).

[4] *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); New York Family Court Act §§ 241-249 (McKinney 1975).

[5] *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Ivan v. City of New York*, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972); *In re R.*, 73 Misc. 2d 390, 341 N.Y.S.2d 998 (1973).

[6] New York Family Court Act § 1112 (McKinney, 1975).

[7] *People ex rel. Arthur F. v. Hill*, 29 N.Y.2d 17, 323 N.Y.S.2d 426, 271 N.E.2d 911 (1971).

[8] New York Family Court Act § 756 (placement); see also New York Family Court Act § 758 (commitment). § 758 was amended in 1971 to prohibit commitments to State training schools. See Chapter 947, § 11, Laws of 1971 and Public Papers of Governor Rockefeller, Memorandum of Legislative Bills approved, 1971, pp. 534-535 and 1971 New York Legislative Annual pp. 506-507.

[9] New York Family Court Act § 764 (McKinney, 1975).

[10] *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 323 N.Y.S.2d 422, 271 N.E.2d 908 (1971).

increased the period of placement for juveniles fourteen and fifteen years of age who commit the most heinous A and B felonies; however, it also prohibits the transfer of these children to the Department of Correctional Services as authorized under present law, and limits mandatory placement in a "secure facility" to one year.

The expansion of these rights makes the argument less meaningful that juveniles have a right to therapeutic treatment because they are protected less than adult offenders. It would be more honest for us to say that children have a right to "treatment" because they are children and society, in its belief that the young have a greater chance for redemption, has provided that they should receive an extra measure, a last chance, to avoid the more custodial nature of our adult correctional system.

Right to treatment is also argued on the basis of the eighth amendment prohibition against cruel and unusual punishment. Where the lack of proper care and treatment is gross and shocking, the eighth amendment is easy to apply; however, its application is much more difficult as right to treatment cases becomes more sophisticated and issues, such as the minimum number of child care workers needed to care for a given number of residents, are litigated. On issues of the latter type, even the experts disagree.

Whatever the rationale for right to treatment cases, there is no denying their growth and importance, nor that they have resulted in major changes in the juvenile institutions of Texas, Rhode Island, Indiana and New York.[11]

Types of Right to Treatment Cases

Right to treatment cases are generally separated into two types: first, there are cases involving right to treatment, in accordance with basic concepts of human decency, which parallel in many ways the Geneva Convention relative to the treatment of prisoners of war.[12] To wit, the issues here involve humane treatment, adverse distinctions based on race or creed, right to minimum standards of medical care, prohibition against close confinement, right to compensation for work performed, prohibitions against corporal and collective punishment, etc.[13]

[11] *Morales v. Turman*, D.C., 364 F.Supp. 166 (1973); *Inmates v. Affleck*, D.C., 346 F.Supp. 1354 (1972); *Nelson v. Heyne*, 355 F.Supp. 451, D.C. (1972); *Martarella v. Kelley*, D.C., 349 F.Supp. 575 (1973).

[12] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949; The Red Cross Conventions, G.I.A.D. Draper, Praeger, Inc., 49-71, 149-80 (1958).

[13] Ibid., Convention III, Articles: 3 (racial distinctions, humane treatment), 12, 46 (transfers among and close confinement jurisdictions), 13 (medical care), 16 (racial distinctions), 25 (adequate heat and light), 26 (adequate food), 34 (religious freedom). Compare those articles with the issues raised in the following right to treatment cases: [illegible] (racial discrimination); *King v. Carey*, D.C., 405 F.Supp. 41 (W.D.N.Y.) (work and compensation); *Lollis v. N.Y.S. Dept. of Social Services*, D.C., 322 F.Supp. 473 (humane treatment); *Pena v. N.Y.S. Division for Youth*, 322 F.Supp. 473 (S.D.N.Y.) (close confinement and use of psychiatric medication).

Secondly, there are cases involving right to treatment in a quasi-medical context.[14] Here the litigation involves allegations that the various components of the rehabilitative program, including psychiatric and psychological services, group and individual counseling, child care services, educational services, etc., are quantitatively or qualitatively inadequate to reasonably effectuate rehabilitation. In New York State right to treatment cases, whether involving quasi-medical issues, issues of human decency or conditions, have generally surfaced in two ways:

1. Class action litigation, in the Federal district courts, which seek sweeping judicial orders affecting the entire system.[15] These are authorized pursuant to Title 42 U.S.C. § 1983.
2. Appeals from dispositional hearings of the family court, which seek release of a child based on lack of appropriate treatment, but, as the Division has learned, can result in decisions going beyond the petitioner, which affect all adjudicated juveniles.[16] These are authorized pursuant to § 1112 of the Family Court Act.

The Dispositional Appeal

Federal right to treatment cases has been covered by others;[17] whereas, the dispositional appeal is novel to New York and little has been written about it. Therefore, at this point, we will concentrate on right to treatment cases arising through challenges to orders of placement issued as a result of family court dispositional hearings.

The family court act provides that after an adjudication determining a child to be delinquent, or in need of supervision, the judge must hold a dispositional hearing[18] to determine whether a placement is necessary; and if so, that the "appropriate" placement is chosen.[19]

Appeals challenging the appropriateness of placement orders have greatly increased in recent years. In most cases the appeals involved persons in need of supervision (status offenders) who were placed in State training schools. In reality these are right to treatment cases. The law guardian is alleging that the family court judge has exceeded his discretionary authority to place by selecting a program that does not meet the child's treatment needs.

[14] *McRedmond v. Wilson*, D.C., 402 F.Supp. 1087 (S.D.N.Y.); *Martarella v. Kelley*, 349 F.Supp. 575 (S.D.N.Y.1972); *In re Maurice C.*, 35 N.Y.2d 136, 359 N.Y.S.2d 20, 316 N.E.2d 314; *In re Lavette M.*, 35 N.Y.2d 136, 359 N.Y.S.2d 20, 316 N.E.2d 314.

[15] *Martarella v. Kelley*, supra, note 14; *McRedmond v. Wilson*, supra, note 14; *Pena v. N.Y.S. Division for Youth*, supra, note 13; *King v. Carey*, supra, note 13.

[16] *Ellery C. v. Redlich*, 32 N.Y.2d 588, 347 N.Y.S.2d 51, 300 N.E.2d 424; *In re Maurice C.*, supra, note 14; *In re Lavette M.*, supra, note 14.

[17] 27 Oklahoma Law Review, 258 (spring 1974) 57 Georgetown Law Review, 673 (March 1969); Juvenile Justice Confounded; Pretensions and Realities of Treatment Services, pp. 1–15, National Council on Crime and Delinquency, 1972; and in the related area of right to treatment for civilly committed mental patients, see Harvard Law Review 87:1190–1398, 1973–74; Harvard Civil Rights—Civil Liberties Law Review, 8:514–535, May 1973.

[18] New York Family Court Act §§ 743, 745, 746 (McKinney, 1975).

[19] New York Family Court Act § 711(b).

Effects of Dispositional Appeals

Although none of the appellate decisions resulting from dispositional appeals, during 1971–1974, held that PINS could not be placed in training schools because these programs were inappropriate for this class of children, many judges with whom we spoke at the time began to interpret them this way. The Division's worry, during that period, was that even though State statute authorized PINS placements in training schools and no appellate court had prohibited such placements, a de facto prohibition was developing based upon the increased efforts of law guardians to challenge PINS placements in training schools and the high likelihood of reversal on appeal.

We were also aware that efforts to develop alternate programs to remove children from training schools, which the Division had undertaken when the legislature transferred jurisdiction over the training schools to it in 1971, were not yet complete. The closing of the training schools to PINS at that time would therefore have resulted in large numbers of children being inappropriately thrown back on the streets.

In response, counsel to the New York State Division for Youth wrote to the State's family court judges stating in part that:

> "It is true that a series of appellate cases, including '*Matter of Lloyd*' (33 A.D.2d 385, 308 N.Y.S.2d 419), '*Matter of Arlene H.*' (38 A.D.2d 570, 328 N.Y.S.2d 251) and '*Matter of Jeannette P.*' (34 A.D.2d 661, 310 N.Y.S.2d 125) have reversed family court orders, placing adjudicated PINS in the State training schools. However, these decisions were based on various grounds, none of which included a finding that State laws authorizing the rehabilitation of adjudicated PINS in Division facilities, including State schools, was unconstitutional or otherwise illegal."[20]

In July 1973 one of these appeals, from a dispositional hearing, was heard by the Court of Appeals and resulted in the landmark, *Ellery C.* decision.[21] In that case the New York Court of Appeals held that the Division could no longer provide joint programming for JD's and PINS in the State training schools. This necessitated a complete reorganization of the Division's facility program including the development of two separate tracts of training schools one solely for delinquents and one solely for persons in need of supervision. Although the decision was based upon statutory interpretation, the briefs in both the court of appeals and the court below were couched in terms of the adequacy of treatment offered. In addition, the decision contained the following right to treatment dicta.

> "The conclusion is clear. Proper facilities must be made available to provide adequate supervision and treatment for children found to be persons in need of supervision."

This 1973 decision resulted in the return of hundreds of children to the family court, the closing of intake at all the State schools under the

[20] Letter from the Division's general counsel to the State's family court judges, December 1, 1972.

[21] *Ellery C. v. Redlich*, supra, note 16.

Division's jurisdiction for three months, mass transfers of children among facilities, etc.[22] This was a turning point for the Division because it brought home very explicitly the implications of right to treatment cases emanating from challenges to placement orders.

Procedural difficulties posed by right to treatment cases emanating from dispositional appeals

These difficulties were based on the following factors:

1. Prior to the *Ellery C.* decision challenges to dispositions had resulted in reversals holding that placements were inappropriate; however, these decisions had been based upon the facts in the individual case and, therefore, had limited application.[23] In contrast the *Ellery C.* decision, which was also an appeal from a dispositional placement, went much further and resulted in a decision necessitating the reorganization of an entire State agency. The possibility that any one of numerous appeals from dispositional placements, arising all over the State, could result in another dramatic reorganization was a matter of concern.
2. Appeals from family court dispositional hearings were initiated by the child's law guardian with the county attorney or corporation counsel responding for the family court.[24] The State juvenile correction agency which based the possibility of being dramatically affected by the outcome of these appeals had no standing as a party,[25] was therefore not served and had no notice of the appeals.
3. The State agency administering the program, whose adequacy was being challenged, was not represented at the dispositional hearing in family court and had no opportunity to offer evidence as to the quality of its program,[26] with the result that the appellate division was often forced to consider right to treatment cases upon a transcript which we felt did not fully develop the underlying facts.

Aside from the procedural difficulties posed by these right to treatment cases, there were equally important program effects, especially in terms of staff morale. The Division had jurisdiction over the State training schools transferred to it in June 1971,[27] at a time when there was much public criticism of the quality of care provided in those institutions. The Division immediately undertook steps to improve conditions and asked

[22] A study of the impact of the *Ellery C.* decision commissioned by the New York State Division of Criminal Justice Services: Contract, DCJS 71388; title, "Ellery C. Study"; Grantee, Institute of Judicial Administration.

[23] *Matter of Lloyd*, 33 A.D.2d 385, 308 N.Y.S.2d 419; *Matter of Arlene H.*, 38 A.D.2d 570, 328 N.Y.S.2d 251; *Matter of Jeanette P.*, 34 A.D.2d 661, 310 N.Y.S.2d 125.

[24] New York Family Court Act §§ 243–249, 254 (McKinney, 1975).

[25] New York Law Journal, February 7, 1974, p. 19, Division's motion to intervene as a party denied, motion [illegible] to extent of allowing filing of amicus br.

[26] Ibid 24 and 25.

[27] In the *Matter of Shirley G.*, 45 A.D.2d 876, 358 N.Y.S.2d 9; *Matter of Kevin M.*, 45 A.D.2d 849, 358 N.Y.S.2d 965.

staff to change methods of operation which had been in existence for decades.[28] The problem was that the agency had no way of making the courts aware of these changes, either at the dispositional hearing or on appeal. This caused staff frustration and a genuine feeling that however hard they tried, their efforts would not be recognized.

Status Offender Legislation

Legislation has recently been enacted, in New York, terminating placement of persons in need of supervision in State training schools effective April 1, 1977[29] and administrative steps have been taken, by Peter Edelman, the Division's new Director, to close PINS intake at training schools; however, the issue is not resolved. In *McRedmond v. Wilson*[30] which involves the legality of placing PINS in training schools, the plaintiffs considered these developments and immediately demanded the removal of PINS from Division for Youth camps and youth centers located in rural areas, except when the child agrees to attend these programs on a voluntary basis. The State has rejected this approach and the parties are continuing their negotiations. The importance of this litigation lies in the fact that it is a precursor of the ultimate issue—should PINS children ever be placed, except on a voluntary basis? Right to treatment litigation and the issue of appropriateness of placement will clearly be with us for an indefinite period.

PART II EFFORTS TO RESPOND TO RIGHT TO TREATMENT LITIGATION

Introduction

In the first part of this article we discussed right to treatment cases in general and then concentrated on cases, of this type, arising through appeals from family court placement orders. We pointed out the difficulty these cases posed for the State's juvenile correction agency because we could be drastically affected by the outcome,[31] but were not a party and had no notice of the appeal.[32] Here we will explore efforts by the Division for Youth to resolve this problem.

The Dilemma

In entering right to treatment cases, resulting from dispositional appeals, juvenile correction agencies face the dilemma of being considered vil-

[28] Milton Luger, Tomorrow's Training Schools, Crime and Delinquency, National Council on Crime and Delinquency, Vol. 19, October 1973; Malcolm S. Goddard, The Role of Legal Services in the Evolution of the State Training Schools, New York State Bar Journal, Vol. 48, No. 1, January 1976.

[29] Chapter 515, Laws of 1976.

[30] *McRedmond v. Wilson*, S.D.N.Y., 402 F.Supp. 1087.

[31] The *Ellery C.* decision: A case study of judicial regulation of juvenile status offenders, Institute of Judicial Administration, September 1975.

[32] New York Law Journal, Feb. 7, 1974, p. 19, Division's motion to intervene as a party denied, motion granted to extent of allowing filing of amicus brief, ibid footnote 31 at p. 12.

lains whatever they do. If they enter the litigation, it is looked upon as an act in opposition to a child's right to treatment and if they stay out, it is viewed as an admission that allegations of lack of treatment are true. The strategy we developed was to intervene to present specific program information so that the courts could reach decisions on a balanced basis. Where possible, we sought independent evaluations of our programs for inclusion in our briefs.

Our participation was necessary because all too often the words, "training school", have been raised indiscriminately. All training schools have been lumped together and the words are used as synonyms for evil. By not being in a position to offer an alternative view, in disposition appeals, the juvenile agencies have added to this perception. That is not to say that all training schools are good—many are horrendous, but others have made valiant efforts to offer humane, caring programs. By coming forward the juvenile agencies can assist the courts in identifying where good programs exist and where judicially mandated changes are needed—changes which may be beyond the power of the agencies' administrators to bring no matter how much they would like them.

Entering the appellate process

The first step the Division took involved eliciting the cooperation of corporation counsel in providing us with notice of the fact that an order of placement of the family court involving a Division facility was being appealed.[33] This procedure worked and we began to receive informal notice with which we commenced filing amicus briefs. The Legal Aid Society, which represented the children in these appeals, moved in opposition to the Division's filing amicus briefs, but the appellate division held in our favor, while denying us standing as a party.[34]

The Division's efforts to file amicus briefs in these cases coincided with a movement by legal aid attorneys to preclude the placement of persons in need of supervision in the State training schools, on the grounds that they did not offer adequate treatment. This involved efforts to expand the *Ellery C.* decision[35] which had mandated that persons in need of supervision and juvenile delinquents be placed in separate training schools.

The Division was opposed to a judicial solution to the PINS issue, however well-intentional, because we were dedicated to evolutionary change; a process through which the Division, between 1972 and 1975, reduced the number of training school beds from 2054 to 932 while increasing the num-

[33] This cooperation was exemplified by the correspondence from Division for Youth General Counsel to Assistant Corporation Counsel Stanley Buchsbaum (Chief, Appeals Division, New York City Department of Law) dated December 12, 1973 reads in part:

> "Mr. Gerstman (Assistant Corporation Counsel, Family Court Section) has agreed that as soon as he has information pertaining to any appeal relating to the Division, he will forward this information either to me or Gary Glaser, our senior attorney in charge of the New York City office."

[34] Ibid footnote 32.

[35] *Matter of Ellery C.*, 32 N.Y.2d 588, 347 N.Y.S.2d 51, 300 N.E.2d 424 (1973).

The legislature was enacted just two days before the Court of Appeals was scheduled to hear arguments on Matter of [illegible] and Laverne M.[36] A key question arose as to whether the stay should apply to court to treatment cases already in the appellate process or to appeals arising after the effective date of the statute. The Division had originally opposed applications to intervene in Laverne M. and Maurice C. in the Court of Appeals. The request was denied by the Court of Appeals, however, our amicus briefs were accepted and we were given the additional privilege of making oral arguments. In Maurice C. the Court of Appeals upheld the right of the family court to place persons in need of supervision in the State training schools, and acknowledged the efforts the Division had undertaken during

36 *Matter of Maurice C.*, 44 A.D.2d 113, 354 N.Y.S.2d 18; *Matter of Laverne M.*, 44 A.D.2d 666, 354 N.Y.S.2d 636; *Matter of Susan B.*, 45 A.D.2d 650, 356 N.Y.S.2d 55.

37 *Matter of Maurice C.*, 44 A.D.2d 114, 354 N.Y.S.2d 18 (1974).

38 *Matter of Laverne M.*, 44 A.D.2d 666, 354 N.Y.S.2d 636 (1974).

39 *Matter of Susan B.*, 45 A.D.2d 650, 356 N.Y.S.2d 55 (1st Dep't 1974).

40 Ibid. footnote 32.

See also New York State Executive Law § 501 b.

42 Ibid. 37 and 38, cases consolidated in court of appeals: *Matter of Laverne M. and Maurice C. v. Corporation Counsel of the City of New York.*

the two years that the training schools had been under its jurisdiction to improve the quality of treatment in those institutions.

> ". . . On the total record before us, we cannot assume that the necessary initiatives to establish a fully adequate program of supervision and treatment for PINS children at the Training Schools, already begun, will not be carried to fruition . . . for the present, we note that the Division for Youth has made a commendable start toward upgrading the Tryon and Hudson Training Schools and implementing the PINS child's right to necessary care and treatment. . . ." [43]

For us the significance of the decision revolved around the fact that the obligation of the State juvenile agency to participate in dispositional appeals involving the quality of its programs had been recognized.

Need for involvement at the hearing stage

The events which occurred between the *Ellery C.* decision in 1973 [44] and the *Maurice C.* decision in 1974 [45] clearly showed that juvenile institutions under direct attack in right to treatment cases could no longer stay on the side lines. It was now necessary for these institutions to come forward and explain their programs within the judicial process.

By 1974, through our own efforts and then by legislation, the principle of agency participating in right to treatment cases, arising as a result of dispositional appeals, had been established. However, there were severe limitations on the effectiveness of intervening at the appellate level and trying to explain complex programs in briefs. We had to become involved at the trial stage, at the dispositional hearing itself, where we could introduce expert witnesses and fully explain the strengths and weaknesses of our programs in terms of the needs of the child before the family court.

This approach is new within the juvenile justice structure of this country; it is also a controversial one. The crux of the controversy is whether a State juvenile agency whose facilities are being considered for placement, should participate as a party at the dispositional hearing in family court?

INTERVENTION LEGISLATION

Legislation was introduced, during the 1976 session of the legislature, authorizing the Division for Youth to participate in special family court dispositional hearings involving juveniles adjudicated for: murder in the first degree, murder in the second degree, manslaughter in the first degree, arson in the second degree, and robbery in the first degree, where there

[43] *Matter of Maurice C.*, 35 N.Y.2d 136, 359 N.Y.S.2d 20 at p. 23, 316 N.E.2d 314 at p. 317.

[44] Ibid 35.

[45] Ibid. 43.

had been a previous serious adjudication.[46] The pertinent provision reads as follows:

> "§ 750-g. Division for Youth's right to intervene. The Division for Youth shall have prior written notice of all dispositional hearings under this part. The Division shall present evidence of available resources and be afforded an opportunity to be heard regarding the availability of each disposition provided for by law."

Unfortunately this Bill did not pass and the Juvenile Offenders legislation that was enacted did not contain a similar provision.[47]

PART III THE FAIR HEARINGS PROJECT

Introduction

In the first two parts of this article we considered the growing necessity for juvenile correction agencies whose treatment programs are being challenged to come forward, at the family court dispositional hearing, to provide detailed program information. Here we will describe an experimental program developed by the State Division for Youth in an effort to establish a procedure whereby the State's juvenile agency could participate in dispositional hearings.

The Project

The juvenile fair hearings project was funded by the Law Enforcement Association Administration through the New York State Division of Criminal Justice Services.[48] The program, which commenced in 1974, called for the State Division for Youth to establish liaison offices within the Brooklyn and Manhattan family courts; each office to be staffed with an attorney, a social worker, and a secretary.[49] One of the primary responsibilities of these teams was to develop detailed program descriptions for the facilities under the Division's jurisdiction with emphasis upon State training schools, which had been the facilities whose programs had been most frequently challenged. Further information was provided by the teams appearing at the dispositional hearing, upon the request of the judge,[50] to testify as to program aspects they witnessed during their site visitations.

[46] Assembly Bill 12584, 1976.

[47] Chapter 878, Laws of 1976.

[48] The Law Enforcement Assistance Administration was established pursuant to the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351). Part C, § 301 of the Safe Streets Act provides grants for law enforcement purposes, Part C, § 302 provides that: "Any State desiring to participate in the grant program under this Part shall establish a State planning agency. . . . ." The New York State Division of Criminal Justice Services was created by the Laws of 1972, C. 399, § 1 and designated as the official State planning agency pursuant to the Federal acts (Executive Law § 837 sub. 3).

[49] New York State Division of Criminal Justice Services: proposal 1489; contract C73964; title, "Fair Juvenile Hearings".

[50] The Division for Youth has no statutory authority to appear at dispositional hearings; however, the court may compel the attendance of any person whose testimony or presence is deemed necessary pursuant to § 153 of the Family Court Act.

Project Functions

From the beginning we had the support of the family court.[51] The teams were requested to appear at dispositional hearings; corporation counsel cited team testimony on appeal[52] and the appellate division, first and second departments, reviewed the program descriptions as included in Division amicus briefs.[53] The appellate division, fourth department, made the following statement based upon the teams' descriptions:

> ". . . We are impressed from the detailed description of the Hudson School for Girls, which is an appendix to the County Attorney's and amicus briefs, that a substantial and earnest effort has now been made, and is continuing, at Hudson to assume the responsibility for treatment and care of PINS and that Hudson meets the guidelines enunciated in *Ellery C.* The semi-autonomous cottage program, the group counseling and therapy, the educational program which includes vocational training assistance, the implementation of an extensive and innovative program of juvenile rights, with the availability of an ombudsman, the presence on the staff of a psychiatrist and psychologist and many other helpful programs impress us as a genuine and sincere effort at Hudson to help youngsters such as Susan. . . ." [54]

The New York Court of Appeals reviewed the team's program descriptions in *Maurice C. and Lavette M.*; [55] at which time the Office of Children's Services of the Judicial Conference independently verified the accuracy

[51] Florence M. Kelley, administrative judge for the City of New York (1973-1974) endorsed the project in correspondence of December 6, 1973 to the Division for Youth and the Division of Criminal Justice Services; the Family Court Advisory and Rules Committee favorably reviewed the project at their December 7, 1973 meeting and Judge Joseph B. Williams, administrative judge for the City of New York (1974–present) assisted in many practical ways, including the designation of hard to find office space within the courts.

[52] For example, corporation counsel's brief in *Matter of Kevin M.*, 45 A.D.2d 849, 358 N.Y.S.2d 965 extensively cited team testimony at the dispositional hearing; see respondent's brief pp. 4, 5, 6, 7, commencing at "Ms. JoAnn DeFrancesca of the Division for Youth, was asked by the court to advise with respect to the treatment offered at a Division for Youth Title III facility."

[53] *Matter of Maurice C.*, 44 A.D.2d 114, 354 N.Y.S.2d 18; *In re Lavette M.*, 44 A.D.2d 666, 354 N.Y.S.2d 636.

[54] *Matter of Susan B.*, 45 A.D.2d 920, 357 N.Y.S.2d 313.

[55] *Matter of Lavette M. and Maurice C.*, 35 N.Y.2d 136, 359 N.Y.S.2d 20, 316 N.E. 2d 314.

of the team's work.[56] Although the project's emphasis was upon the preparation of program descriptions and appearances at the dispositional hearings, the project evaluators pointed out three additional functions for projects of this type:[57]

1. To identify antagonisms developing between the family court and the State's juvenile correction agency over each others policies and procedures, so that corrective steps can be taken.
2. To search among the agency's facilities to identify, for the court, the least restrictive program that fits the juvenile's needs.
3. To overcome stereotype images of the agency's juvenile facilities by presenting specific information, including: staff resident ratios, living accommodations, agency policies on such matters as corporal punishment and censorship, availability of psychiatric services, range of programs offered, etc.

It should be noted that this latter information will not always show the agency as having all the resources it would like. An example of this occurred in *Matter of Maurice C.* where the appellate division reviewed the program description for the Tryon School prepared by the Brooklyn team and concluded:

> ". . . in the instant case the training school has one-half time psychiatrist for one hundred children. The record in this case does not demonstrate that the institution in which this infant has been confined meets the standards set in Ellery C. (supra) for the care and treatment of PINS children. . . ." [58]

Difficulties

The social worker's component was easily accepted as a resource providing valuable information, while not posing a threat to the traditional components of the family court. The attorneys, on the other hand, had a

[56] The New York State Division for Youth's amicus brief in *Matter of Lavette and Maurice C.*, supra, pp. 6–16 reproduces the program description for the Tryon Training School prepared by the Brooklyn Fair Hearings team. Exhibit B of that Brief is a statement of the Office of Children's Services, then a unit of the Judicial Conference of the State of New York (The Judicial Conference was subsequently redesignated the Office of Court Administration, Chapter 496 Laws of 1974.) The statement reads in part, "On May 21, 1974, two members of the staff of the Office of Children's Services visited the Tryon School for Boys. . . . The program appears to conform to the description in the *Amicus* brief filed by the Division for Youth in *In the Matter of Maurice C.*, Supreme Court of New York, Appellate Division, Second Department with one exception. On that day there were two social workers on our staff and assigned to some, but not all cottages. We are informed that the additional workers have been [illegible] and will be on grounds by June 6." The Appellate Division had [illegible] Children's Services to intervene, see *In re Lavette M.*, 44 A[illegible] p. 667, 35[illegible] 636 at p. 637: ". . . file an amicus brief in [illegible] to advise us. Now [illegible] to it for the Court of Appeals."

[57] Evaluation report prepared by Joseph P. Lobenthal, Esq., and Stephen Mark David, Esq., project evaluators, pursuant to Grant award agreement, New York State comptroller's contract CS1233 and agreement between New York State Division for Youth and the New School for Social Research.

[58] *Matter of Maurice C.*, 44 A.D.2d 114, 354 N.Y.S.2d 18 at p. 20.

more controversial role; they objected to placements with the Division which they felt were inappropriate and challenged judicial orders affecting the agency, which in the agency's opinion conflicted with statutes governing its operation. Specific conflicts involved:

1. Orders of placement bearing endorsements which, for example, prohibited the agency from granting parole; and
2. The placement of children with long histories of mental illness for whom the agency had neither the statutory authority nor resources to help.

Some of these issues, with which our attorneys struggled, have now been resolved. The appellate division has ruled that endorsements on placement orders are "precatory not mandatory" [59] and the legislature has authorized the family court to place delinquent children, who are violent and mentally ill, with the Division for Youth and order their immediate transfer to the Department of Mental Hygiene.[60] Other areas of potential conflict remain.[61]

You may ask why the juvenile's attorney cannot raise the objections referred to above. The answer is that they often do; however, there are notable exceptions. An attorney may reluctantly agree to a placement with the Division for Youth for the maximum statutory period and waive his client's right to parole.[62] Here, for example, he knows the juvenile's age and the seriousness of the act he committed has given the judge cause to consider using his alternate authority to place directly with the Department

[59] *Matter of Terrance C.*, 45 A.D.2d 825, 357 N.Y.S.2d 96.

[60] Family Court Act § 760.

[61] a) Courts continue to place children inappropriate for Division programs. For example, tests administered in 1975 indicated that eight children at the Highland training school for PINS were retarded—one having an I.Q. below 59. Nine children had prior histories of hospitalization for mental illness and three of these children had each been hospitalized on three separate occasions prior to placement with Division for Youth.

b) Courts continue to issue orders restricting the agency's discretion to parole, see Buffalo Evening News, 12/17/75, Section IV, p. 79: "Four boys tried before Judge Trost were sentenced to the state training school, three with notices that they were not to be released by the State Youth Division without the court's permission."

c) Courts continue to commit delinquents to Division for Youth facilities even though such commitments were repealed in 1971 (Laws of 1971, Chapter 947, § 11, see also New York State Legislative Annual, 1971, pp. 306-307; however, legislation is now being considered to restore commitments for the eight most violent felonies).

[62] In *Terrance C.* supra, footnote 59, the Division appealed the order not the child's attorney. The State School at Industry presently has eleven placements with orders prohibiting parole without further orders of the court (Anthony B. Docket D58275; Demetrius C. Docket D2275; Winfred C. Docket D61075; Dennis F. Docket D122775; Malcolm F. Docket D162075; Duane G. Docket D127975; Robert L. Docket D7775; Thomas R. Docket D80[illegible]; [illegible] W. Docket D[illegible]; Keith R. Docket D876). In none of these cases has the child's counsel appealed.

of Correctional Services or in a Maximum Security Juvenile facility.[63] In another situation a young retarded delinquent with a 55 I.Q. is placed in the Division for Youth with the acquiescence of his attorney. The attorney feels that his client would be better treated, and less stigmatized, in a juvenile facility than a State school for the retarded.

In each of these cases the attorney has done the best for his client; however, the Division has to look beyond the individual child and act to safeguard all the children in its custody. The inappropriate presence of a retarded child draws inordinately on staff time thereby severely reducing staff availability to help children appropriately in program. The presence of an older violent juvenile, who should have been placed in a facility for youthful offenders pursuant to § 758(b) of the Family Court Act or a secure juvenile facility, poses a danger to the less violent children with whom he will come in contact.[64]

The differences are clear, the child's attorney acts to protect his client's interest while the fair hearings project acted to protect the integrity of the agency and represent the best interest of all the children in its custody.

Separatism

It has been traditional for the Division for Youth, and juvenile correction agencies in general, not to get involved in the juvenile justice process until the decision to institutionalize has been made. It was this separatism within the juvenile justice system that the fair hearings project attempted to bridge.

[63] § 758(c) of the Family Court Act authorizes three year commitments to the Elmira Reception Center and the Westfield State Farm, i.e. the Department of Correctional Services Facilities, when a juvenile delinquent is adjudicated for an A or B felony provided they were at least 15 at the time the acts were committed.

Legislation enacted during 1976 repeals the authority of the Family Court to commit delinquents to the Department of Correctional Services (Chapt. 878, Laws of 1976, § 15; effective date February 1, 1977). The legislation also provides that those juveniles who commit the most serious A and B felonies and are at least fourteen at the time, can be placed in special "secure" facilities to be established by the Division for Youth. These placements are for indefinite periods of either three or five years depending on whether the offense is one of the enumerated A or B felonies; and in either case, at least one year must be served in a secure facility. This legislation will eliminate plea bargaining to prevent a juvenile from being placed in the Department of Correctional Services; however, a new form of plea bargaining may now arise whereby the juvenile and his attorney are willing to plead guilty in a non-enumerated felony, thereby avoiding the mandatory one year sentence to a secure facility.

[64] See report to the Governor from Kevin M. Cahill, M.D., Special Assistant to the Governor on Health Affairs and the Governor's Panel on Juvenile Violence, dated January 5, 1976. Cited in the Governor's Annual Message to the Legislature, January 7, 1976, at p. 16. The report recommends repeal of Family Court Act § 758(b); however, it recognizes that delinquents who commit the most violent crimes should not be placed with less violent juveniles until the family court or an administrative panel has determined that they will not pose a danger to others. They further recommend that the Division for Youth develop small, secure intensive care facilities for these children.

The trend today is towards greater cooperation and interaction between the judiciary and juvenile corrections. The Family Court Act gave the judiciary power to monitor juveniles after they left the court for residential care[65] and the legislature is expanding the court's authority in this area.[66] The legislature has authorized the Division for Youth to intervene in appeals from family court placements involving the quality of its residential programs.[67] In addition, legislation drafted to implement the proposals of the Governor's Panel on Juvenile Violence required participation by the Division for Youth at dispositional hearings where special services for severely violent juveniles are being sought.[68] This legislation, which was introduced for the first time this year did not pass; however, support for such participation is growing. The latter legislation is particularly important in New York because its juvenile correction agency, the Division for Youth, is the only agency for delinquents which does not have the right to refuse a placement.[69] Lacking the right to refuse placement, the Division should participate, as of right, in proceedings leading to placement.

Effect on Juvenile Proceedings

The project's purpose was to make juvenile hearings "Fair"; this carries the implication that they are now in some way unfair, the implication was intended. The extension of rights of adult criminal offenders to juveniles has made juvenile proceedings more and more adversarial in nature.[70] The problem is that the advocacy is one-sided with the child being represented by counsel at each stage, adjudicatory and dispositional,

[65] Family Court Act §§ 142, 249, 255, 761.

[66] Executive Law § 524 sub. 1-a, Family Court Act § 760.

[67] Executive Law § 501-b.

[68] Assembly Bill 12584, 1976; See § 750-g.

[69] § 519 of the Executive Law provides that the only requisite for placement with Division schools and centers is an order of placement which shall not be deemed invalid by reason of any imperfection or defect in form. § 520 authorizes return to court after placement for mental or physical incapacity; however, this has been notoriously ineffective as a means of finding alternate placements for inappropriately placed children. The Division seldom utilizes this section as the family court lacks other resources for these children and therefore routinely denies such requests. In contrast the voluntary child caring agencies have the right to refuse placements, as do the Division's youth center programs under § 502, sub. 4 of the Executive Law.

[70] See Part I of this article, footnotes 4–10.

while in New York City, for example, society is only represented by counsel at the adjudicatory stage of delinquency proceedings.[71]

Prior to *Gault*[72] the juvenile justice system was too heavily weighed against the juvenile. It was unfair that a child should appear at a hearing to decide loss of liberty without legal counsel; however, it is equally unfair today that society, which has a legitimate interest in seeing that seriously disturbed children are placed, should, in many cases, not be represented by counsel. It is also unfair to force the judges, in their neutral role, to present society's case.

The law guardians in New York City see their role as representing a client. They explain the options to the child, offer their advice, but in the final analysis, follow the wishes of their client. If, after hearing the advice, the choice of the child is to return to the street, the law guardian does all in his power to carry out these wishes.[73] If the judge believes that institutionalization is necessary, he is required to develop his own case for institutionalization to overcome the objections of the law guardian and establish a record justifying his decision which is of sufficient weight to sustain his order on appeal. It has long appeared to me that this creates an inherent conflict. This project allows the judge to let the agency under consideration come forward, with evidence of its treatment program. The agency could answer questions put to it by the judge and the law guardian. The law guardian could present alternate options and examine the agency's witnesses as to accuracy. In this way the judge can let the interested parties develop the options and then he can make a choice. The Fair Hearings Project was an attempt to restore balance and thereby fairness to juvenile proceedings, while at the same time, stopping short of a full adversarial system.

[71] It is interesting to note that the report of the Governor's Panel on Juvenile Violence has recognized this problem and recommended legislation mandating the presence of corporation counsel or county attorney at all juvenile proceedings where the eight most violent felonies are involved. See Cahill Report, supra footnote 17, p. 10: "The complainant shall be represented by either the corporation counsel or a county attorney at both the fact finding and special dispositional hearing under the new legislation." Assembly Bill 12584, introduced during the 1976 legislative session, mandated that the county attorney or corporation counsel represent society at both the adjudicatory and dispositional stages of delinquency proceedings involving murder in the first and second degree, manslaughter in the first degree, arson in the second degree and robbery in the first degree where there has been a previous adjudication of the first degree for any enumerated felony. The juvenile legislation that was enacted (Chapt. 878, Laws of 1976, Section 22c) merely provides that counties "may" assign assistant district attorneys to delinquency proceedings.

[72] *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

[73] See *Manual for New Attorneys*. The Legal Aid Society of New York City, Juvenile Rights Division, Chapter I "Implementing the Right to Counsel," see also respondent's brief in *Rapport v. Berman*, 49 A.D.2d 930, 373 N.Y.S.2d 652; also see McKinney's Consolidated Laws, 29A, Part 1, Practice Commentaries to Section 241 of the Family Court Act, p. 156.

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