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THE UNIVERSITY OF OKLAHOMA

GRADUATE COLLEGE

# ALICIA MORALES, ET AL. V. JAMES TURMAN, ET AL.:

# A CASE STUDY OF JUVENILE JUSTICE

A DISSERTATION

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degree of

DOCTOR OF PHILOSOPHY

BY

SUSAN HERBEL FINLEY

Norman, Oklahoma

1977

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A CASE STUDY OF JUVENILE JUSTICE

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## PREFACE

The idea for the study began to germinate when I became aware of the case, Morales v. Turman, which established a constitutional right to treatment for incarcerated juvenile delinquents. I believed the district court's treatment of Morales to be courageous, as well as imaginative, and was curious about the policy-making process that had taken place and its effectiveness.

I began this study, even though the case was on appeal, because I felt whatever happened at the appellate level would affect neither the process nor the immediate results of the original court's opinion. At this time (April 1, 1977) the case has been reviewed by the Fifth Circuit Court of Appeals and the Supreme Court on a procedural issue but not on the merits. The procedural issue was concerned with what types of cases are properly heard by three-judge courts at the district court level. The District Court for the Eastern District of Texas found a three-judge court to be unnecessary, but the Fifth Circuit disagreed and reversed the case on that issue.

On March 21, 1977, following the completion of this study, the Supreme Court issued a per curiam opinion on the

three-judge court procedural issue (No. 76-5881). The Court reversed the Fifth Circuit and remanded the case for further consideration on the merits.

The issue under contention was the interpretation of "a statute with statewide applicability." If the prevailing conditions and practices in the institutions housing juvenile delinquents, under the supervision of the Texas Youth Council, are construed to fall within the definition of statutes with statewide applicability, then a three-judge court should have been convened. "The appellate court reasoned that the challenged, unwritten practices of the juvenile institutions administered by the Texas Youth Council were revealed during the trial to be statewide in impact and that, therefore, they were equivalent to a statute with statewide applicability . . ."

The Supreme Court disagreed, saying "the three-judge court procedure is not 'a measure of broad social policy . . . but . . . an enactment technical in the strict sense of the term and to be applied as such.'" The Court said the relevant criteria for convening a three-judge court, according to the Fifth Circuit, were "not properly apparent until considerable factual development of the breadth and content of the Texas Youth Council's administrative practices had taken place." The opinion held, under these circumstances, the Fifth Circuit had "transformed the jurisdictional inquiry from a threshold question to one depending

upon the shifting proof during litigation," and that such a transformation injected "intolerable uncertainty and potential delay into important litigation."

The Supreme Court concluded that a single-judge court was the proper forum for consideration of this case and, therefore, the Fifth Circuit's reversal on the procedural issue was incorrect. However, the opinion recognized that the district court's judgment was "reviewable on the merits in the Court of Appeals."

The State of Texas may then proceed again before the Fifth Circuit on the issues of the case, such as the right to treatment. Whether the state will continue in its attempt to overturn Morales is uncertain at present, but it appears there is a possibility the Supreme Court is prepared to discuss the issues concerning the circumstances and practices relevant to incarcerated juvenile delinquents. Otherwise, the Court would presumably have simply reversed, rather than remanded, the case for further deliberation on the merits.

## ACKNOWLEDGMENTS

Acknowledgment is due a number of persons at the completion of this study. Special consideration goes to Judge William Wayne Justice of the Federal District Court, Eastern District of Texas, for his treatment of the Morales case. His decision was the germinating influence and the continuing inspiration for this dissertation.

The committee that directed the study included Dick Wells (chairman), Ted Hebert, Joe Pray, Sam Chapman, and John Wood. The study could not have been completed without their advice and assistance. I would like to express sincere appreciation to Dick Wells, my friend and tutor, who has helped me to know better my limits and abilities. I am also grateful for Geri Rowden's typing and manuscript assistance.

There is not room to mention all those who provided inspiration and friendship during this project, but I would like to thank my parents: Olive Herbel, who read parts of the study and offered advice on style and form; and my father, H. L. Herbel, who has always encouraged me to venture forth. Finally, and importantly, a considerable debt is owed to three very special people: Keith, my husband;

Hellen, my sister; and Elaine, my good friend. Keith was generously supportive and never complained about his frequently absent and often disgruntled mate. Hellen, who is so special, remained calm while listening to the rantings of a graduate student, in addition to helping proofread the manuscript. Elaine, my roommate during the "final days," gave sound intellectual advice and assistance. Having a friend in residence, who understands and cares, provided invaluable support in coping with the trials of dissertation writing.

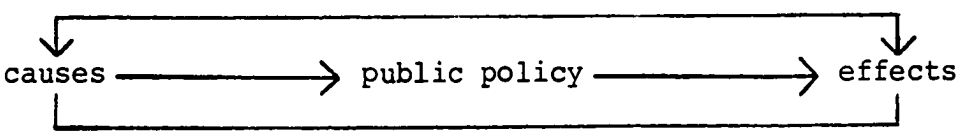
# ALICIA MORALES, ET AL. V. JAMES TURMAN, ET AL.:

# A CASE STUDY OF JUVENILE JUSTICE

## INTRODUCTION

In September of 1974, Judge William Wayne Justice of the Federal District Court for the Eastern District of Texas announced the case of Morales v. Turman. The main thrust of the opinion was the incarceration phase of the Texas juvenile justice system. Some attention was also given to the procedures by which juvenile delinquency is adjudicated as well as matters involving probation and parole. Morales did not come about in isolation. Prior to Morales, the main subject for attention had been the due process rights of juveniles during adjudication. There had also been some discussion of procedural rights even at the Supreme Court level. More recently, the federal judiciary has begun to investigate the circumstances and conditions surrounding incarceration or institutionalization of juveniles. Morales stands out because of its unique attempt to set standards for incarceration of Texas juveniles and its demand that Texas authorities comply with those standards.

This dissertation is a case study of the Morales decision, including the setting in which it took place. The analysis utilizes, in broad form, the standard systemic approach of the Policy Studies Organization in the Policy Studies Journal.[1] It is, in other words, a policy study--one which recognizes that policy cannot realistically be studied in isolation. The causes or events which precipitated the creation of policy and the effects of that policy must be taken into consideration before the study can be meaningful or complete. The model of this approach is diagrammed as follows:




Consideration of the causes of judicial intervention in the juvenile justice system requires a study of more than the immediate causes of this particular case. It is asserted in this study that three important impediments existed which had to be dealt with before the Morales decision was possible. These were the parens patriae doctrine, the "hands-off" doctrine and the lack of a constitutional principle upon which to proceed. The first chapter explains the history and philosophy of these stumbling blocks. The second chaper provides a "road" to Morales in that it explains and

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[1]See eg. 5 Policy Studies Journal (Urbana, Ill.: Political Science Department, University of Illinois, Winter, 1976), cover.

describes the reevaluation and reinterpretation of the previously mentioned impediments.

Chapter three explains the "cause" phase of the diagram as it applies specifically to the Morales decision. At this stage it becomes necessary to examine the juvenile justice system as it exists in the State of Texas and point out those qualities that have made it ripe for investigation and adjudication.

The fourth chapter is an analysis of the policies established in the Morales decision. Not only are the policies explained, but also there is an attempt to indicate what is original in Morales as compared to what policies had previously been set down in other cases.

The final chapter examines the effect of judicial intervention. The question here is whether the courts can, in a realistic sense, intervene effectively in the administration of juvenile institutions. In other words, the question is whether or not courts, with their restricted enforcement ability, can bring about change in society's penal institutions. Investigation of the actual change in the structural and procedural operation of the Texas Youth Council, and the institutions under its supervision, as a result of Morales is instructive, not only to the courts, but also to those who study the judiciary, whether they advocate judicial activism or self-restraint. As the General Counsel for the Texas Youth Council stated, "I

don't believe judicial activism is a good thing. Courts shouldn't write policy. On the flipside, in this instance, thank God Judge Justice was there!"

The discipline of political science has, for a long time, been concerned with the processes which bring about change and the policies that emerge in response to change. A more recent concern has been with the effect of those policies on society's institutions. The question in this study is whether courts, announcing policy through judicial decision-making processes, can effect change in institutions designed to house juvenile delinquents. There is also an attempt to analyze institutional change in terms of the degree to which it is in accord with the pronounced policies.

It is apparent that if change does not occur as a result of public policy pronouncements, then the study of forces of change and the analysis of policy itself is an isolated and limited experience. Therefore, policy studies must discover the actual changes that take place as a result of policy pronouncement and those that are mandated but do not occur. Also it must be taken into account to what extent the policy's decree is modified by institutional needs and implementation. When these questions have been dealt with, policy can be analyzed in terms of effectiveness which is far more informative than a simple statement of what the policy calls for.

As mentioned earlier, there is a serious question as to whether or not courts, with their limited enforcement capabilities, can realistically accomplish change. This study is an attempt to answer that question through close examination of Morales v. Turman. It is obvious that the "truth" of the matter will not be discerned from such a limited endeavor as this one. However, it is a building block in the overall research. Many such studies may someday provide linked answers to the questions surrounding judicial intervention and its effectiveness.

# CHAPTER ONE

## THE HISTORY AND PHILOSOPHY OF JUVENILE JUSTICE

The study of juvenile justice is one part of a major American dilemma--that of crime. The promise to bring about change in this problem area has been a major political platform commitment at least since 1960 and, more specifically, since President Johnson's request in 1967 for a thorough investigation of the prevailing methods and institutions in American society that deal with crime. This chapter not only provides a general understanding of why the system is as it is and how it works, but it also singles out those factors within the system which have impeded growth or change in the traditional methods of dealing with juvenile crime.

The term "juvenile" is commonly defined as one who is under 18 years of age. However, some jurisdictions use other age limits such as 17 or 16. Juveniles have long, if not always, been accorded different treatment than adults when suspected of socially deviant or norm violating behavior. However, the difference apparently has been due to the prevailing circumstances and the presiding judge's personality rather than to statutory or constitutional decree.

Furthermore, the difference has historically been more or less limited to the imposition of sentence rather than the entire character of the proceeding.[1] The statutory basis for proceeding against a juvenile in a manner different from an adult is historically a rather recent innovation. Primary responsibility for the establishment of institutions specifically designed for dealing with juveniles rests with the Quakers. "Quakers were active participants and leaders in virtually every humanitarian scheme undertaken in New York in the decades following the Revolution."[2]

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[1]Lewis Mayers, The American Legal System (New York: Harper and Row, 1964), p. 146. According to Mayers:

> "Even in the early centuries of the development of the English criminal law, there appears occasionally a recognition that a youth is not to be dealt with as harshly as an adult, or near-adult; and our colonial legislation reflected this recognition quite clearly at specific points. Speaking generally, however, neither in the English law, as it existed in the seventeenth century and as it was transported to this country, nor in the laws of the colonies was express recognition given to the youthful offender as a separate category. For the most part, only official and judicial mercy, exercised without any express legal warrant, stood between the youthful defendant and the extreme rigors of the criminal law. But the power of the court at common law to suspend judgment and release the defendant, his sureties guaranteeing to produce him for sentence on order of the court, was early used more frequently in the case of youthful than adult offenders; and its use in our courts in the case of youthful offenders emerges as a regular practice early in the last century, receiving statutory recognition for the first time, apparently, in 1869."

[2]Sanford J. Fox, "Juvenile Justice Reform: An Historical Perspective," 22 Stanford Law Review 1202 (1970).

A report dated 1822 compiled by this group of reformers and entitled Report on the Penitentiary System in the United States ". . . called public attention to the corruptive results of locking up children with mature criminals, citing this contamination of innocence as one of the major evils that had resulted from prison reform."[3] The "prison reform" being mentioned here refers to the early establishment of prisons to take the place of corporal punishment and, in many cases, capital punishment as practiced by earlier colonists. This reform was also the work of the Quakers.

The result of the 1822 Report was the establishment in 1824 of the House of Refuge in New York. The emphasis was primarily on predelinquency. Only those who could be "saved" were to be committed here. Juveniles who were considered criminals were still to be dealt with by the criminal courts. "Major offenders were, from the beginning, left in the adult criminal system."[4]

The change in penal institutions in the early 1800's was due to a change in the theoretical foundations concerning the criminal. American ideology had begun to reject the retributive theory of punishment which was based on the idea that people commit crimes because they choose to do so with no attention to societal conditions as the cause of crime.

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[3] Ibid. at 1189.

[4] Ibid. at 1191.

The Quakers recognized causes of crime other than personal choice. Their primary focus was on poverty or pauperism as a contributing factor to a life of crime. Further, they felt that being reared under conditions of poverty was a certain indicator of a future criminal. Therefore, taking the poor child out of the home and placing him in an institution, such as the House of Refuge, was a crime prevention or predelinquency technique.

The primary focus of the reformers was a "help the young" attitude. There were, however, other contributing motives which help account for the system as it grew and took shape. Other than the reformers were those businessmen, politicians, and others who sought to emphasize control and resocialization rather than a "help the young" attitude.

These groups were motivated by a number of not so idealistic social needs. One was the need as seen by the police and others to keep idle children off the streets. A second motive was the socialization of immigrant children to accept American values as determined by upper-class leadership. Thirdly, business leaders were interested in developing a process whereby young people would develop the skills necessary for making them a viable part of the expanding factory system. Another motive for taking children out of the home was apparently to fulfill the need, on the part of some women, to find a proper role in an industrializing, urbanizing society. Also, society was somewhat concerned

with aiding children in developing a capacity to earn a living.[5]

There is a final and extremely important factor involved in the evolution and expansion of the juvenile system. It involves ". . . the natural inclination of agencies to expand their power and their staff."[6]

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[5]Jameson W. Doig, "Juvenile Justice: Discretionary Power and the Control of Youth," 3 Policy Studies Journal (Autumn, 1974): 68-69. According to Doig:

> "Recent research suggests that five motives were especially important in the creation and evolving powers of the juvenile courts, boys' and girls' homes, and probation officers, and in the passage of laws to expand their domain:
>
> (1) an interest (on the part of police and other community officials) in removing idle youth from the street, where they might cause trouble or commit crimes;
>
> (2) a desire (especially among upper-class leaders) to have ways to remove the child from the home (particularly immigrant homes), in order to educate and socialize the young to accept 'American' values;
>
> (3) a demand (by business leaders) that young people be taught the discipline and minimal skills necessary to permit the expanding factory system to absorb them and operate efficiently;
>
> (4) a need (on the part of some women in the "child-saving" movement) to find acceptable social and professional roles in an industrializing, urbanizing society;
>
> (5) perhaps least important, a concern that young people be given the tools and education needed to earn a living within the existing economic and social structure."

[6]Ibid. at 69.

Whatever the predominant motives were, the reformers were primarily responsible for the establishment of the resultant institutions. They were uncertain and not in agreement as to a replacement for the retributive theory of punishment. But, whether they focused on deterrence or rehabilitation, the result was the development of institutions such as the House of Refuge. The idea was that children should be treated, not punished, but the emphasis was on discipline and submissiveness, and punishment was often severe.[7] "For many of the boys who had committed punishable offenses, the reform meant the change from freedom to incarceration, rather than a transfer from prison to House."[8]

Also the House of Refuge and other similar establishments usually practiced religious intolerance. Since the Quakers and their counterparts were almost entirely Protestant, Catholic children who were committed to these institutions were forced to practice coerced heresy.

The point is this: it is highly questionable whether the establishment of such "Houses of Refuge" can be

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[7]Fox at 1195, note #43. For instance, Professor Fox said, "Inmates who betrayed a trust, for example, faced the following consequences: 'This punishment consists in flagellation with a whip of strings, in solitary confinement to their cells, either with or without the accompaniment of a low diet; in forbidding anyone to hold communication with the offender without permission, and in extraordinary cases of flagitious conduct, in wearing an iron on one side, fastened to the waist at one end and to the ankle at the other.'"

[8]Ibid. at 1194.

classified as humanitarian reform. However, the movement was apparently totally accepted by society and the courts as a matter of humanitarian progress.[9]

The New York House of Refuge was the archetype of the congregate system for dealing with delinquent youths. In the mid-1800's, a new attitude began to prevail which put emphasis on family life. The idea was the juveniles should be placed with families, rather than institutionalized.[10] Instead of placing children in institutions, these reformers argued for the development of a system of foster homes. Preferably the children would be sent out of the city and into the country. It began in New York in 1853 with the establishment of the New York Children's Society. By 1889, "it was reported that 48,000 children had already been sent out of New York by the Children's Aid Society."[11]

The culmination of this period of reform was the 1899 Juvenile Court Act in Illinois, which established the

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[9] Ibid. at 1204. Fox said, "The unqualified adoption by the courts of the philanthropic protestations of the reformers and their disregard of any punitive purpose were major factors contributing to the creation of the myth that the New York House of Refuge marked a noble triumph in child welfare rather than the complex and ambivalent development that it was."

[10] Ibid. at 1208. Fox explained that, "By the 1850's a new outlook for juvenile corrections had developed. The emphasis of the Chicago Reform School was on creating a family life for children rather than on education and religion as in the House of Refuge."

[11] Ibid. at 1210.

first court for juveniles separate from adults. The systematic development of the idea of a juvenile court took place in the United States. Forerunners of the Illinois Act can be found in Massachusetts law.[12] According to Jameson Doig:

> During the 19th and early 20th centuries, a system of special courts, probation officers, juvenile-aid units in police departments, and juvenile "homes" was created to identify and treat delinquent youth; and the reach of these institutions was extended well beyond the range of governmental power over adults accused of crime--involving the adoption of laws that applied only to juveniles (e.g., truancy and incorrigibility statutes), and judicial acceptance of a lower standard of proof needed to justify coercive control over errant youth. To simplify somewhat, the motivations for creating and expanding this juvenile-justice system have been interpreted in two divergent ways: first, as shaped by reformers who sought to help young people develop into emotionally and intellectually competent, productive adults; or alternatively, as generated by the demands of business and political leaders and others, whose concerns were varied, but with little attention to providing a positive outcome for young people themselves.[13]

Apparently the first court for dealing specifically with juveniles was established in Cook County, Illinois in 1899.

Juvenile courts were to serve the purpose of separating juveniles from the hard core adult criminals and the

---

[12]Edward Eldefonso, Law Enforcement and the Youthful Offender: Juvenile Procedures (New York: John Wiley and Sons, Inc., 1967), p. 158. According to Eldefonso, "In 1869, a Massachusetts law provided for the presence of an agent or officer of the State Board of Charity in all criminal proceedings against a child under 16 to 'protect their interest.' In 1877, another Massachusetts law provided for the use of the term 'Session for juvenile offenders' wherein a separate record and docket should be kept."

[13]Doig at 67.

resulting influence such hardened types would have on children. In 1899 Illinois passed the Juvenile Delinquency Act which established the first juvenile court in Chicago. The Act called for a number of procedural changes in dealing with youth. "Hearings were supposed to be informal and nonpublic. Records were confidential, and children were detained not in adult prisons but in facilities of their own."[14]

These changes, however, were not the only nor the major deviation from the adult criminal procedure. The legal basis for dealing with errant youth was altogether a different philosophy from that which governed the procedures and attitudes governing adult procedures. The legal theory which underlies the juvenile justice system from apprehension through adjudication and finally, in some cases, institutionalization, is the common law doctrine of parens patriae. Under this doctrine, juvenile courts proceed with the judge acting in the role of a kindly parent with neither crime nor punishment in mind, but only the best interest of the child.[15] The duty of the juvenile court was not to

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[14]Patrick T. Murphy, Our Kindly Parent . . . The State: The Juvenile Justice System and How It Works (New York: The Viking Press, 1974), p. 4.

[15]Eldephonso (1967) at 159, explained the early theory of "parens patriae." "'Parens Patriae' describes a doctrine of the English Court of Chancery, by which the king, through his chancellors, assumed the general protection of all infants in the realm. The theory . . . was that the sovereign as a 'pater patriae,' possessed an obligation to oversee the welfare of the children in his kingdom, who,

determine guilt but merely to intervene in order to save the youth from a downward career. The child, under the parens patriae doctrine, was viewed as essentially good. Therefore, the state was interested solely in his nurture and care, not in arrest and trial.

The consequence of this attitude was that juvenile cases proceeded as civil cases and the rules of criminal procedure were deemed altogether inapplicable. The juvenile was without any of the procedural protections enjoyed by adults who had committed criminal acts. "These results were to be achieved without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding 'parens patriae.'"[16]

Parens patriae was not the sole stumbling block to judicial intervention into the incarceration and subsequent treatment of juveniles. Change was further hampered by what has become known as the "hands-off" doctrine. "Courts have traditionally abstained from hearing suits brought by inmates against their keepers. This practice became so prevalent that it acquired its own name--the 'hands-off doctrine.'"[17]

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because of the frailties intrinsic to the minority, might be abused, neglected, or abandoned by their parents or other guardians. The king, through his Court of Chancery, could thereby step in and provide the requisite parental protection and care."

[16] In re Gault, 387 U.S. 16, 1967.

[17] John W. Palmer, Constitutional Rights of Prisoners (Cincinnati: The W.H. Anderson Company, 1973), p. 136.

Stated simply, this means that "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."[18]

Apparently the source of this doctrine is not interpreted as a rule of law but as a policy of judicial abstension in line with the overall judicial philosophy of judicial self-restraint. Reasons for the "hands-off" doctrine are varied but they include separation of powers, states' rights, the doctrine of sovereign immunity, lack of judicial expertise in penology, the fear that judicial intervention will undermine prison discipline, reluctance to overburden the courts and, of course, the cost of judicially mandated change.

It has been argued that the administration of correctional institutions is the responsibility of the executive branch of government; consequently, if change is to take place, it must be initiated and directed by that branch. According to Palmer, "it was thought that the administration of penal institutions was a function of the executive branch.

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[18]"Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review Complaints of Convicts," 72 Yale Law Journal (1963): 506. See also Fred Cohen, The Legal Challenge to Corrections: Implications for Manpower and Training (College Park, Maryland: 1969), p. 1. Cohen says, "Until quite recently those who administer our correctional systems could confidently pursue their varied goals by virtually any technique deemed satisfactory to them. True, there existed external scrutiny and review; legislative committees or citizens groups might ask occasional questions, but the courts rarely interfered and legislative guidelines on basic policy and decision-making criteria either were nonexistent or so vague as to be nonexistent."

Review then should be by the executive branch of government. . . ."[19] Stated in another manner relating specifically to the federal government, "The prison system is under the administration of the Attorney General . . . and not of the district courts. The court has no power to interfere with the conduct of the prison or its discipline."[20]

It is also believed, according to the concept of reserved powers, that it is the state's responsibility to proscribe an act as criminal and set the punishment for such acts.[21] Thus, the states should be immune from federal intervention into state penal affairs. Not only does this immunity apply to federal intervention, but also, so the arguments go, to individual citizens of the state. The doctrine of sovereign immunity refers to an individual's inability to sue the state for relief without that state's stated permission to do so.[22]

Another argument supporting the "hands-off" doctrine is that judges have no expertise in the area of penology.

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[19]Palmer at 95.

[20]"Beyond the Ken. . . ." at 515.

[21]Philip J. Hirschkop and Mike Millemann, "The Unconstitutionality of Prison Life," 55 Virginia Law Review (1969): 812.

[22]Palmer at 135 explains this. "Various reasons advanced in support of the doctrine are: the idea that 'the King can do no wrong'; that public funds should not be dissipated to compensate private injuries; and that government officials need to be free from the threat of suit to function most effectively for the common good."

This argument is directly related to another which is that if the courts do interfere, their lack of knowledge and expertise may cause disruption in prison discipline or worse, that judicial intervention will create disciplinary problems.[23]

The federal courts have been particularly reluctant to intervene in penal affairs for fear the result will be an overwhelming number of cases followed by a severe overburdening of the docket.[24] Some courts fear financial expenditures as well as unrealistic caseloads. The cost of judicial intervention is a relevant issue. Of course, courts are unable to appropriate funds, and it is becoming increasingly obvious that penal reform is an expensive project.

With regard to juveniles then, judicial intervention in the juvenile justice system, except for those instances where the juvenile court judge intervenes, has been especially hindered. First, because of the parens patriae

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[23]"Beyond the Ken. . ." at pp. 508-9 says, "The reason underlying refusal to review the administrative decisions of prison officials is the unquestioning acceptance by courts of the assertion repeatedly made that judicial review of such administrative decisions will subvert the authority of prison officials, the discipline of prisons, and the efforts of prison administrators to accomplish the objectives of the system which is entrusted to their care and management."

[24]Daniel Sheehan, Jr. "Prisoners' Redress for Deprivation of a Federal Right: Federal Habeas Corpus and the Civil Rights Act," 4 St. Mary's Law Review (1972): 339.

doctrine, juveniles have lacked traditional due process safeguards and, therefore, the necessary weapons for questioning the manner in which their cases are brought before the court, adjudicated, and disposed of. Without notice of charges, right to counsel, right to confrontation and cross-examination, the privilege against self-incrimination, right to a transcript of the proceedings and the right to appellate review; the arrest, adjudication and incarceration is a closed system leaving little open for examination, criticism, and change. The "hands-off" doctrine has further hindered judicial investigation by closing the post-conviction institutions to judicial scrutiny.

It is not certain, of course, that the juvenile justice system would be any more successful without the parens patriae and the "hands-off" doctrines to prevent judicial supervision of the system. The attempt is made to look at that question in later chapters. It is possible based on what little research is available to make some observations about the system as it functions in contemporary American society.

On examination, it becomes apparent that the differences between the adult criminal justice system and the juvenile justice system are more semantic than real. There are, in reality, procedures for arrest, trial, and incarceration. Only the vocabulary is different.[25]

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[25]Murphy at 4-5 explained:

"A new vocabulary was improvised to symbolize this new social order. There were no criminal complaints

Upon committing certain socially unacceptable acts the child is processed through a system remarkably parallel to the adult criminal justice system. The most obvious difference between the two systems is the lack of procedural safeguards available to the juvenile due to the doctrine of parens patriae and the civil nature of the proceedings. This system has dominated American thought and practice for nearly 75 years. Only recently has there been serious concern as to the reliability of the system. Cautious glances into the system have been taken by a few lawyers, fewer courts, and probably even fewer interested citizens. The revelations that have come as a result of these inquiries have been, for the most part, unfortunate.

The problem is aptly explained by Morris and Hawkins who say,

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> filed against the children--merely petitions. There were no warrants--only summonses. There were no arraignments--but hearings. There would be no juries and no real trials. There was no need for lawyers, because there were no adversaries, inasmuch as the mutual aim of everyone involved was not to contest, object, or even seek the truth of the charges against the juvenile and or his family, but simply to treat the juvenile and his family, regardless of guilt. . . . When a child is convicted of an offense and his removal from society is deemed necessary, he is not imprisoned with a correctional agency but, instead, committed to a Youth Commission or a State Juvenile Correctional Division--where, of course, he may not be punished. He is sent not to a jail but to a training school or camp where he learns from his kindly parent the state how to lead a good life. There are no 'cells' but 'rooms,' and there are, naturally, none of the accoutrements of adult prisons such as facilities for solitary confinement."

> Nobody doubts the benevolence and good will behind the efforts of the juvenile courts and the state youth commissions. Nor is it possible to doubt the great power they wield over the lives of children and their families. What we should have doubts and also anxiety about are the problems which develop when these types of rescue operations become institutionalized. Too often what happens is the rescue operations ignore the preferences of those who are being rescued. And this is a crucial reason for reconsidering what is being done in this area.[26]

In studying the juvenile system of justice, whether philosophically, historically or empirically, the central focus has been the juvenile courts. It should be obvious, however, that juvenile courts cannot be adequately dealt with nor realistically appraised without including those procedures by which a child is brought to the court's attention, as well as the institutions that deal with the child following the court's pronouncement.

Only two such thorough research attempts have been made to date. One was undertaken by the National Council of Jewish Women (NCJW); the other was included in the study by the President's Commission on Law Enforcement and Administration of Justice.

The NCJW study was a penetrating examination covering 34 states. According to Edward Wakin:

> The survey was no mere sampling; it was a penetrating examination of one of our most basic and most vital democratic institutions, and its effect on those it was created to serve: children and

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[26]Norval Morris and Gordon Hawkins, The Honest Politican's Guide to Crime Control (Chicago: The University of Chicago Press, 1970), pp. 157-158.

> society. Two very startling basic facts emerged: First, most citizens, even those who have been active in their communities, do not concern themselves with the problems and issues of our juvenile justice system. Second, most communities do not deal adequately with the needs of either children in trouble or their families.[27]

The result of the study was a stark, agonizing and thorough condemnation of the system by which American society deals with errant youths. Wakin found that:

> By the time of the NCJW study, the optimism of 75 years ago had changed to concern about the enormous discretionary powers of the courts and about decisions affecting a child's entire life that could be made in three to five minutes by a busy judge. A system created to protect children was not only failing in its mandate; it was operating to their detriment.[28]

In 1967, the President's Commission on Law Enforcement and Administration of Justice summarized its findings on the administration of juvenile justice. It found a wide discrepancy between theory and fact.

> In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears, not only because of the absence of facilities and personnel but also because of the limits of knowledge and technique. In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services--by society generally--as a criminal. In theory the court was to treat children guilty of criminal acts in noncriminal ways. In fact it labels truants and runaways as junior criminals.

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[27] Edward Wakin, Children Without Justice (New York: National Council of Jewish Women, Inc., 1975), p. x.

[28] Ibid. at 24.

> In theory the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law--knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back to the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn, loathe to cooperate with innovative programs or avail itself of forward-looking methods.[29]

The results of the system described in these two studies present cause for reconsideration. Further cause stems from the realization that the system does not work. In mid-November, 1975, newspapers and magazines across the nation announced the latest statistics on crime gathered, compiled and released by the Federal Bureau of Investigation. As has for some time been the trend, an increase in criminal activity was reported. A particularly awesome element of this situation is that of juvenile crime. The FBI's annual report shows sharp increases in the number of teenagers arrested.

The FBI report arbitrarily classifies particular crimes as "major." These include criminal homicide, forcible rape, aggravated assault, robbery, burglary, larceny-theft

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[29] Task Force Report: Juvenile Delinquency and Youth Crime, The President's Commission on Law Enforcement and Administration of Justice (Washington, D.C.: United States Government Printing Office, 1967), p. 9.

and motor vehicle theft. The number of teenagers charged with these seven crimes was nine percent higher in 1974 than in the previous year. By way of comparison, the adult statistics showed a rise of only one percent. The report also points out that about one-half of all those arrested for burglary, larceny and motor vehicle theft were teenagers. Perhaps even more disturbing is the fact that 10 percent of the 16,000 persons charged with criminal homicide were under 18. Furthermore, the overall picture shows that, "Nationally, persons under 15 years of age made up 10 percent of the total police arrests; under 18, 27 percent; under 21, 43 percent; and under 25, 58 percent."[30] A Newsweek article elaborated further on the dilemma:

> Juvenile crime has risen by 1,600 per cent in twenty years. More crimes are committed by children under 15 than by adults over 25--indeed, some authorities calculate that half of all crimes in the nation are committed by juveniles. Last year, police arrested 2.5 million youngsters under 18. In Los Angeles, juveniles account for more than one-third of all major crimes, and in Phoenix, officials estimate that juveniles are responsible for 80 per cent of law violations. In Atlanta, juvenile arrests for arson have tripled since 1970, and in New York, since 1972, burglary and rape charges against juveniles have nearly doubled.[31]

One means of dealing with juvenile crime has been to institutionalize children who commit criminal acts. Prior

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[30] Crime in the United States, FBI Report (Washington, D.C.: United States Government Printing Office, 1975).

[31] Jerrold K. Footlick, Lucy Howard, Susan Agrest, and Peter S. Greenberg, "Children and the Law," 86 Newsweek (1976): 66.

to the Morales decision, there were in fact no judicial alternatives in Texas to institutional commitment or total release. The commitment of juveniles to institutions has been questioned in recent years by a variety of sources, including the federal judiciary. The focus of this dissertation is on judicial intervention in order to provide change, specifically within the correctional phase of juvenile justice. There are not, as yet, foolproof suggestions as to the reliability of judicially mandated change. However, some have suggested that this means may not be a viable one. According to Doig, the judiciary has not been able to create change effectively.

> Lack of effective treatment in such institutions, as well as staff brutality, have been the subject of a number of court suits and judicial decrees mandating change. . . . Preliminary information indicates, however, that very little effective change is actually produced by such judicial intervention.[32]

There is another study that agrees with Doig's view. In the summer of 1970, the Center for Criminal Justice of the Harvard Law School undertook a study of the effects of judicially mandated change. Specifically, the research focused on the case of Morris v. Travisono[33] and its effect on the Rhode Island Adult Correctional Institution. In this case, Federal Judge Raymond J. Pettine set forth

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[32] Doig at 70.

[33] 310 F. Supp. 857 (D.R.I. 1970).

specific procedural standards for the handling of disciplinary matters.[34]

In summarizing the effects of judicial intervention, the study concedes that courts are not particularly well suited for such a role. The reasons given for such a conclusion include the lack of judicial expertise and the fact that courts are not well enough staffed to provide the sort of supervision required by such cases. Furthermore, development of prison regulations involves a great deal more than the simple resolution of factual controversies.[35]

However, these conditions have not, at least in recent years, precluded judicial intervention. Courts have used the devices of class action suits, declaratory judgments and the advice of experts to overcome the obstacles. The most compelling reason for judicial intervention may be the lack of viable alternatives. Legislatures and citizens groups have simply not fulfilled the promises of social protection and rehabilitation. The Harvard study points out that despite some limits to the effectiveness of judicial intervention, "at least they may succeed in eliminating extreme abuses, or perhaps more optimistically, in setting a model and a tone for eventual internal reform . . ."[36]

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[34]"Criminology: Judicial Intervention in Prison Discipline," 63 The Journal of Criminal Law, Criminology and Police Science (1972): 200.

[35]Ibid. at 227.

[36]Ibid. at 228.

The primary impetus for change has come from the federal courts where adult prisoners have successfully claimed a violation of constitutional rights. The relevance of these cases for litigation involving juveniles is not clear. The primary question remains, "What right is being claimed?" The justification for judicial intervention in juvenile institutions has been that these institutions do not "treat" the youthful offenders. However, there is no constitutional right to treatment for juvenile offenders; at least this was the case prior to the Morales decision. Because Morales held that incarcerated juveniles have a constitutional right to treatment, it has been heralded as a major turning point in the law as it applies to youthful offenders.[37]

It has been asserted in this chapter that historically there have been three important impediments to judicial intervention in the juvenile justice system.

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[37]The Newsweek article said at 69-70:

> "In what could be the most significant juvenile decision since Gault, U.S. District Judge William W. Justice last fall condemned the entire Texas Institutional structure for its 'widespread physical and psychological brutality.' Juveniles were not rehabilitated but 'warehoused,' Justice charged in a 204-page opinion. He said they were beaten and tear-gassed as punishment and given tranquilizers to quiet them without medical supervision. The judge ordered the state to close two of its reform schools and convert the rest to halfway houses and group homes. Texas officials have responded that the total cost of such changes makes them impossible, and the state is appealing. Eventually the U.S.

These are the parens patriae doctrine, the "hands-off" doctrine, and the lack of an effective constitutional claim on the part of youthful offenders. The next chapter reveals the road that led to the Morales decision by analyzing the reinterpretation that has taken place with regard to these stumbling blocks.

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Supreme Court will be asked to pronounce a judgment on the conditions of juvenile incarceration that would apply to every state."

## CHAPTER TWO

## PARENS PATRIAE, THE "HANDS-OFF" DOCTRINE AND RIGHT TO TREATMENT: THE ROAD TO MORALES

It is apparent, following an historical view of juvenile justice, that the Morales opinion would not have become a part of the case law ten years ago. It is currently an accepted fact that conditions in juvenile institutions have always been, at best, lacking in standards, and, in many instances, extraordinarily inhumane. Judicial intervention did not occur, however, because the issue was simply not "ripe" for investigation. The parens patriae theory prevented the application of due process standards and kept the process by which juveniles are institutionalized from public and appellate court scrutiny. The "hands-off" doctrine prevented judges from mandating standards for the operation of penal institutions. Finally, the notion that juveniles were institutionalized for the sole purpose of treatment prevented judges in particular, and the public in general, from questioning a child's loss of liberty as a constitutional or legal issue.

Within the last decade, these stumbling blocks have begun to crumble. There has been a thorough reevaluation and reinterpretation of the parens patriae theory as it applies to juveniles. The "hands-off" doctrine has been successfully challenged with respect to a number of penal institutions, particularly adult facilities. The final breakthrough involves instances where persons have been involuntarily committed to institutions for mental health reasons. The justification of institutionalization in these cases, as with juveniles, is the need for treatment. However, courts have begun to question that philosophy. They have, at a minimum, been saying that if the justification for incarceration is treatment, then the state must act on its promise to treat.

This chapter analyzes these legal/philosophical developments in detail. In general, they comprise the environment in which Morales occurred. In that sense, this chapter is a general discussion of the "cause" phase of the diagram developed in the introduction. The specific causes of Morales are dealt with in the following chapter.

## The Parens Patriae Doctrine

Reinterpretation of the parens patriae theory has resulted in a general realization that the doctrine has gone far beyond the original intent. It was established in the early common law as a legal means for the government to assume parental authority over dependent and neglected children. It was not originally intended to become a judicial

tool for depriving juveniles of liberty because they had committed criminal acts.

The doctrine's authority was, of course, extended to include juvenile delinquents but with that extension came no procedural changes. The legal procedure remained civil in nature with no allowance for the protection of traditional due process rights. In recent years, this has been the subject of judicial consideration. The first statement came in Kent v. United States, which altered nothing in the constitutional sense, but provided dicta that had profound future implications. The next and major decision was In re Gault which began to suggest that juvenile cases, whether civil or criminal, must meet constitutional due process standards. Gault left a number of questions unanswered partly because there were five separate opinions suggesting five different formulas for the reinterpretation of parens patriae. Since Gault, the courts have proceeded on a case by case basis taking due process protections one point at a time. To date, the Supreme Court has considered the necessary standards of proof for a finding of delinquency in In re Winship; the right to a jury trial in McKeiver v. Pennsylvania; and the right to protection from double jeopardy in Breed v. Jones. Although these five cases provide guidelines for the reinterpretation of parens patriae there remain a number of unanswered questions in terms of both the disagreement among the Supreme Court Justices in the above cases as well as

the procedural rights not yet considered. Furthermore, there is some question as to the practical effects of the juvenile delinquency cases.

## Historical Interpretation of the Parens Patriae Doctrine

As discussed in the previous chapter, the parens patriae theory has served as the central theory and justification underlying the prevailing system for dealing with juvenile delinquents, as well as children who are for various other reasons in need of supervision. Since their inception, juvenile courts have assumed responsibility for dealing with and providing care for large numbers of young people 18 years old or younger. Although parens patriae has been explained on the basis of English common law theory, there are historical inconsistencies involved.

First of all, it is questionable whether or not this doctrine is contained in the common law as it applies to juveniles who have committed what would otherwise be considered criminal acts. The parens patriae theory was developed to protect the property interests and the person of a child, not to direct the care and training of children who had committed criminal acts. These children were subject to arrest, trial and punishment in the same manner as adult defendants unless they were under seven years of age. Children under seven were considered to be incapable of criminal intent. According to Mr. Justice Fortas, in the Gault

decision, the parens patriae doctrine as it has been practiced in the twentieth century lacks historical validity. Fortas said,

> . . . its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders. In these old days, . . . the state was not deemed to have authority to accord them fewer procedural rights than adults.[1]

Therefore, it should be noted that the doctrine, as interpreted presently, in all probability stands on a shakey foundation.

Furthermore, those instances under English common law when a child did come under the government's supervision were far less frequent than is evident today. The Chancery Court rarely performed in its capacity because English common law imposed a duty on parents to give proper care to their children and the law presumed such was the case. Therefore, an incredibly strong case had to be made that a child was being neglected or deprived before the Court would step in. Also, the Chancery Court lacked the effective means to carry out its promise of providing care for most children and, therefore, restricted its supervision, in most

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[1] In re Gault, 387 U.S. 16 (1967).

cases, to wealthy minors. Finally the Court's jurisdiction was confined simply to the welfare of the child. Assuming the responsibility of a child for the purpose of protecting society was not a legitimate function of the Chancery Court.[2] The point is that the use of parens patriae as a justification for incarcerating juveniles, who have committed criminal acts, is a rather recent interpretation of the theory and does not, in fact, stem from the English common law.

## Recent Supreme Court Decisions Affecting the Parens Patriae Doctrine and Juvenile Court Proceedings

More recently, the doctrine of parens patriae has undergone what appears to be a thorough reevaluation and reinterpretation. Restatement of the doctrine has been the responsibility primarily of the federal courts, particularly the United States Supreme Court. Prior to March 21, 1966, the Supreme Court had refused to intervene in the system of juvenile justice in order to mandate standards for dealing with errant youths. The initial glance into the system came, in all probability, as a result of an increasing willingness by courts, lawyers and interested citizens to question the reliability of parens patriae in the prevention of crime and the rehabilitation of incarcerated juveniles.

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[2]Edward Eldefonso, Law Enforcement and the Youthful Offender: Juvenile Procedures (New York: John Wiley and Sons, Inc., 1967), pp. 159-60.

Kent v. United States

The first opportunity seized by the Court to question the "civil" nature of juvenile proceedings and the consequent denial of procedural safeguards came in Morris A. Kent, Jr. v. United States.[3] According to a juvenile court judge, David Bazelon,

> Since Illinois established the nation's first juvenile court at the turn of the century, the Supreme Court has never reviewed a case coming from any children's court. But the Supreme Court agreed to hear Kent's case. For the first time in more than 60 years of juvenile courts, the Supreme Court of the United States decided to look into the record of juvenile proceedings. The Justices opened the door cautiously, and judging from their opinion, they recoiled from what they saw within . . .[4]

Although this case did not reach the issue of procedural rights for juveniles based on the Constitution, it is an instructive forerunner. Justice Fortas, in writing for the majority, began by summarizing the juvenile justice system in a manner that has since often been quoted. He explained that,

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitious care and regenerative treatment postulated for children.[5]

The facts of the case were as follows:

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[3] 383 U.S. 541 (1966).

[4] David Bazelon, "Justice for Juveniles," The New Republic (April 22, 1967), p. 14.

[5] Kent at 556.

> On September 2, 1961, an intruder entered the apartment of a woman in the District of Columbia. He took her wallet. He raped her. The police found in the apartment latent fingerprints. They were developed and processed. They matched the fingerprints of Morris Kent, taken when he was 14 years old and under the jurisdiction of the Juvenile Court. At about 3 p.m. on September 4, 1961, Kent was taken into custody by the police. Kent was then 16 and therefore subject to the 'exclusive jurisdiction' of the Juvenile Court. . . . He was still on probation to that court as a result of the 1959 proceedings.[6]

Kent was taken to police headquarters and questioned. Apparently, at that time, he confessed not only to these particular crimes but to others as well. He was further questioned on the next day. On that day (September 6) petitioner's mother retained counsel and together they went to discuss the matter with the Social Services Director of the juvenile court. They learned that the juvenile court was considering the possibility of waiving jurisdiction to the District Court where Kent would be tried as an adult. Petitioner's counsel, at that time, made known his opposition to such a waiver.[7]

Despite counsel's attempts to prevent the waiver of jurisdiction by the juvenile court to the District Court, the juvenile court judge claimed that he had made a "full investigation," and entered an order waiving jurisdiction to the U.S. District Court for the District of Columbia where Kent would be tried by regular criminal procedures. The

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[6] Ibid. at 543.

[7] Ibid. at 544.

judge was presumably influenced in his decision by a social service file on Morris Kent prepared by the staff of the juvenile court. Counsel was never given access to the file.[8]

In late September, 1961, Kent was indicted by a grand jury on eight courts of housebreaking, robbery and rape. At his trial, Morris Kent was found not guilty by reason of insanity on the rape charges and found guilty on the counts of housebreaking and robbery. He was sentenced to five to 15 years on each count of housebreaking and robbery or a total of 30 to 50 years in prison.[9]

The Supreme Court agreed to hear the case on a writ of certiorari. It reversed and remanded the case to the district court, instructing that court to hold a de novo hearing on the issue of waiver.[10] The central question, in the Court's opinion, concerned the conditions under which the waiver was issued. These conditions included the facts that no hearing on the waiver was held, no findings were made by the juvenile court, no reasons were stated by the juvenile court for the waiver, and that counsel was denied access to the social services file which was apparently the compelling reason for the judge's decision.[11] The Court

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[8] Ibid. at 546.

[9] Ibid. at 550.

[10] Ibid. at 565.

[11] Ibid. at 546.

affirmed three of counsel's arguments but did not rule on whether findings must be made. The opinion concluded,

> . . . that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision.[12]

The Court based this decision on statute rather than constitutional principles. The opinion relied on The Juvenile Court Act. (DC Code Section 11-914 1961, now Section 11-1553, Supp IV, 1965).[13] The Court explained that the statute in question lacked specific standards for waiver of jurisdiction.[14] However, the Court did say that the juvenile court did, in fact, have the power to grant waiver in such cases. The point is that such an act must not be committed arbitrarily.[15]

The Court ruled that, although waiver of jurisdiction from juvenile court to adult criminal court was a

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[12] Kent v. United States at 557.

[13] Ibid. at 548, note #6.

[14] Ibid. at 547. The opinion stated that, "The provision of the Juvenile Court Act governing waiver expressly provides only for 'full investigation." It states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures, but it does not state standards to govern the juvenile court's decision as to waiver.

[15] Ibid. at p. 553. For example, the Court said, "The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for abritrary procedure."

legitimate act in some cases, it could not be carried out in the absence of a full investigation. In order to prevent arbitrariness and provide a full investigation into the Kent case, the Court said specifically that there should have been a hearing; Kent's attorney should have had access to the records upon which the judge's decision was based; and the judge should have produced a written statement giving reasons for his decision.

Although four justices dissented in this case, they did not disagree with the result. They simply denounced the procedure. They said that the court of appeals had since adjusted its construction of the statute in question and that it was this court which should be given the chance to reconsider the case in light of its subsequent decisions. The dissenters preferred this route to overruling a decision by the Court of Appeals for the District of Columbia Circuit.[16]

For purposes of this study, the Kent case is more interesting for what it implies than what it decides. Counsel for Morris Kent argued other issues on statutory, as well as constitutional, grounds. Among these other issues were adequate notice, protection from self-incrimination, and right to counsel. The Court recognized that the petitioner had raised basic questions concerning the constitutional rights of juveniles. "However," the Court said,

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[16]Ibid. at 568.

"because we remand the case on account of procedural error with respect to waiver of jurisdiction, we do not pass upon these questions."[17]

It appears reasonable to assume that Justice Fortas might have wanted to add, "but we will consider these questions on constitutional grounds in the future when given the proper opportunity!" Even when announcing the precise judgment of the Court, he could not resist suggesting the constitutional overtones of the opinion. "We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel."[18] [emphasis supplied]

In re Gault

In 1967, the Supreme Court, for the first time, decided a juvenile case based on the United States Constitution, specifically the Due Process Clause of the Fourteenth Amendment. The title of the case was In re Gault.

Gault does not say that the state may not assume responsibility for the child in certain circumstances, but it does question the manner in which the state assumes that responsibility.

The majority opinion constitutes a two-pronged attack on juvenile court proceedings. In the first place, it

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[17] Ibid. at 552.

[18] Ibid.

thoroughly questions the underlying justifications for the manner in which juvenile courts proceed. Secondly, after having considered and rejected those justifications, the Court deals with the procedural requirements of juvenile court proceedings. Specifically, the Court considered the questions of notice of charges, right to counsel, right to confrontation and cross-examination, right to a transcript of the proceedings, and right to appellate review.

Jurisdictional Limits

These procedural considerations were limited in scope. Although the Gault decision specifically mandated that a juvenile has a right to the same procedural requirements as an adult with respect to notice, counsel, self-incrimination, confrontation and cross-examination, there were other questions left undecided. In limiting the reach of this case, Justice Fortas announced, first of all, that the case applied only to the adjudication stage of the juvenile justice system.[19]

Fortas also said that the case pertained only to delinquency proceedings and applied only to those cases where, if adjudged delinquent, the juvenile could be committed to an institution. These limitations are repeatedly stated and implied throughout the majority opinion.[20]

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[19] In re Gault at 13.

[20] Ibid.

The reason for this limitation was apparently because of a recommendation of the President's Crime Commission Report that full use of preliminary conferences be made prior to adjudication. The Court chose not to put limits, in the form of procedural requirements, on any opportunities for dealing with a child short of adjudication or in the event of institutionalization.[21]

Juvenile Delinquency Proceedings:
General Questions

Recognizing the enormous impact the Gault case would have on philosophy as well as procedure, Fortas first moved to strike down the myths which surround the parens patriae justification for adjudication of juveniles in a manner different from adults. The following fundamental ideas are at least in part distortions of the truth, according to the majority opinion: (1) the juvenile justice system rehabilitates errant youths; (2) the system protects the juvenile from being labeled a criminal for life; (3) the system protects the juvenile from disclosure of acts he committed while young and irresponsible; and (4) the system creates a benevolent trusting relationship between the juvenile and the judge which is considered conducive to rehabilitation.

According to Justice Fortas, the statistics are clear on the issue of rehabilitation. The system is a

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[21] Ibid. at 31, note #48.

failure. The percentage of those adjudged delinquent who become repeaters or recidivists is apparently enormous.[22] He dispensed with the myths concerning classification by saying that if the term delinquent means less than criminal, it is only slightly less so.[23] The claim of secrecy or protection from disclosure is also apparently more rhetoric than reality.[24]

Finally the opinion denies the existence or the benefit of an element of trust created by the informality in juvenile proceedings. On the contrary, he pointed out that informal surroundings followed by severe discipline

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[22] In re Gault at 22. In his discussion of youthful recidivism, Fortas quoted the report of the Stanford Research Institute for the President's Commission on Crime in the District of Columbia. "This Commission's Report states: 'In fiscal 1966 approximately 66 percent of the 16- and 17-year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at least twice before.'"

Commenting on these statistics, Fortas said, "Certainly these figures and the high crime rates among juveniles. . . could not lead us to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders."

[23] Ibid. at 24.

[24] Ibid. at 24-25. According to Justice Fortas, "This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to

such as incarceration often leads the juvenile to feel that he has been deceived and mistreated.[25]

Along with a frontal attack on the mythical benefits of the juvenile justice system, Fortas reassuringly pointed out that those real benefits assured the juvenile as a result of the system would not be disturbed by according juveniles certain due process rights.

Because of the lengthy discussion of parens patriae and the myths which surround it, Gault was later claimed to have created a spirit or a mandate that goes beyond the actual specific policy statements enumerated in the opinion.[26] The Court's majority clearly demonstrated that the philosophical underpinnings of parens patriae and the resulting lack of due process protections for juveniles is highly questionable in terms of theory as well as practice. In

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those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers. Of most importance are police records. . . . Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generously comply."

[25] Ibid. at 26. Justice Fortas took notice of a study of Wheeler and Cottrell and concluded, "When the procedural laxness of the 'parens patriae' attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child who feels that he has been deceived or enticed. They conclude as follows: 'Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.'"

[26] Ibid.

light of these findings the opinion mandated certain changes in the adjudicatory stage of juvenile justice. The opinion pronounced that certain due process rights must be made available to children as well as adults.

## Juvenile Delinquency Proceedings: Specific Questions

The facts of the Gault case are instructive because they illuminate the lack of procedural protections afforded juveniles in delinquency proceedings.

### -Facts

On June 15, 1964, Gerald Gault was adjudged a delinquent child and committed to the State Industrial School by the Juvenile Court of Gila County, Arizona. The background of Gault's "delinquent" tendencies was fairly simple. Apparently, the boy first came to the attention of the police in July, 1962, when it was alleged that he had stolen a baseball glove and lied to the police department about it. However, there was no hearing held because of a lack of evidence.[27] In February, 1964, Gerald was placed on probation because he had been with another boy who had stolen a wallet from a lady's purse.[28] His final involvement with the police occurred when he allegedly placed a lewd telephone call to a neighbor, a woman. On June 8, 1964, Gerald was picked up by

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[27] Ibid. at 9.

[28] Ibid. at 4.

the police and taken to the Children's Detention Home. His parents, who were both working when he was picked up, learned of his whereabouts from the family of one of Gerald's friends who had also been taken into custody. "No notice that Gerald was being taken into custody was left at the home. No other steps were taken to advise them that their son had, in effect, been arrested."[29]

When Mrs. Gault learned where Gerald was, she went to the Children's Detention Home and was told by a man, Officer Flagg, that there would be a hearing the next day. The same officer filed a petition with the court naming Gerald a delinquent minor, but the Gault's did not see it until two months later. Again, this illustrates lack of proper notice.

The hearing took place without the neighbor, the complainant, being present. Therefore, the Gault's were denied the opportunity to confront and cross-examine the witness against their son. Apparently Mrs. Gault requested that the complaining neighbor be present in order to determine which boy had done the talking over the phone. "The Juvenile Judge said 'she didn't have to be present at the hearing.'"[30]

Gault was provided with neither a statement of the reasons for a finding of delinquency nor a transcript of record of the proceeding. The Court found that, "No

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[29] Ibid. at 5.

[30] Ibid. at 7.

transcript or recording was made. No memorandum or record of the substance of the proceeding was prepared."[31]

On June 15, another hearing was held. This hearing resulted in the declaration of Gault as a delinquent child and commitment of him to the State Industrial School for six years (until age 21) unless sooner discharged by due process of law.[32]

The consequence of this is that Gerald was committed to an institution for a maximum of six years. The situation is ironic because if Gerald had been over 18, and thus subject to regular adult criminal proceedings, the maximum penalty for his alleged behavior, "would have been a fine of $5 to $50, or imprisonment in jail for not more than two months."[33]

Since no appeal is permitted in juvenile cases in Arizona, counsel for the Gault's filed a writ of habeas corpus with that state's Supreme Court which referred it to the Superior Court for a hearing. The Superior Court dismissed the writ and appellants asked the Arizona Supreme Court for review. This Court also dismissed the writ, whereupon appellants sought review by the U.S. Supreme Court. Since no records were kept at the initial hearings, the Supreme Court was reliant for information upon the testimony

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[31] Ibid. at 5.

[32] Ibid. at 7-8.

[33] Ibid. at 29.

given at the habeas corpus proceedings. Those present at the hearing were the Juvenile Court Judge, Mr. and Mrs. Gault and Officer Flagg. There was conflicting testimony during these proceedings as to what had transpired at the previous hearings, particularly as to what degree Gault admitted complicity.

-Majority Opinion

As in Kent, Mr. Justice Fortas wrote the majority opinion. There were four additional opinions: two concurring, one concurring in part and dissenting in part, and one dissenting opinion. The majority opinion is a wide-ranging discussion of the constitutional rights of juveniles.

-Notice

The first issue considered was notice of charges. Notice, in the usual sense, was not afforded juveniles in Arizona and other states because it was argued that such a procedure would subject the child to the glare of publicity and public knowledge of his alleged crime. Fortas, of course, had already exposed this justification as a myth. The opinion flatly declares that juveniles have the same right to notice as would be proper in any civil or criminal proceeding as mandated by the Fourteenth Amendment Due Process Clause. The rule as stated is, "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable

opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'"[34]

-Counsel

The second issue was right to counsel. Again the Court imposed upon the juvenile system the already recognized understanding of the Fourteenth Amendment due process right to counsel from cases involving adult criminal proceedings. The opinion, however, falls short of the recommendation of the National Crime Commission Report which was that, "Counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."[35] The Gault decision left open the option to waive right to counsel as with adult cases. It concluded,

> . . . that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[36]

-Self-incrimination

The third issue was self-incrimination. The alleged confession made by Gault was the sole basis for his being

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[34] Ibid. at 33.

[35] Ibid. at 40, note #65.

[36] Ibid. at 41.

adjudged a delinquent child. Although he was questioned by both Officer Flagg and the Judge, there was, as has already been pointed out, conflict in testimony at the habeas corpus proceeding before the Superior Court as to what he had said and not said. At any rate, there was no record kept of any admission either before or during the initial hearings. In connection with this specific issue, the Court considered,

> . . . whether, in such a proceeding, an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with the knowledge that he was not obliged to speak and would not be penalized for remaining silent."[37]

Furthermore, the Court said, "We must also consider whether, if the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived."[38]

The Court argued that any person is entitled to this privilege when placed in a situation that may result in the curtailment of his liberty, i.e., commitment to an institution. Furthermore, the Court recognized the very real possibility, as happened in the Kent case, that the child, in most states, can end up in adult criminal proceedings where he would (after the fact) be entitled to the protections against self-incrimination.[39]

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[37] Ibid. at 44.

[38] Ibid.

[39] Ibid. at 50.

Finally, the Court felt compelled to answer the old parens patriae idea that confession is good for the child and, in effect, constitutes therapy related to rehabilitation;

> . . . it seems probable that where children are induced to confess by "parental" urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse--the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.[40]

The Court went on to say that often times the confessions of children are neither reliable nor trustworthy.[41] In other words, there is evidence to indicate that children will confess to acts they have not committed for a variety of reasons. According to Judge Ketcham, who had served four years on the bench of the Juvenile Court of the District of Columbia, when he made the statement, "the statement of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy and often distort the truth."[42]

The Court concluded that the privilege against self-incrimination applies to juveniles as it does to adults. It recognized that there could be special problems for children with regard to waiving the privilege. However, if there are

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[40] Ibid. at 51-52.

[41] Ibid. at 52.

[42] Ibid. at 55.

differences, they must rest on technique and not on principle. Furthermore, if confessions are made in the absence of counsel,

> . . . the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.[43]

-Confrontation and Cross-examination

The fourth question confronted in Gault concerns confrontation and cross-examination. Of course, the complainant in Gault was not present at either of the two hearings so Gerald Gault was never given the opportunity to confront, or have his counsel confront, or question the witness against him.[44]

Again on this issue the Court held that the Fourteenth Amendment Due Process Clause requires the protection of these rights in the case of juveniles as well as adults. The mandate was that:

> . . . absent a valid confession, a determination of delinquency and an order to commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.[45]

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[43] Ibid.

[44] Ibid. at 535.

[45] Ibid. at 57.

-Transcript and Appellate Review

The final issues argued by appellants were the right to a transcript of the proceedings and the right to appellate review. By way of dicta, the Court included here a discussion of the juvenile's right to a judge's statement of reasons for the conclusion. The opinion recalled that in the Kent decision, this was declared a necessary condition for waiver of a case from juvenile court to adult criminal court.

In the Gault case, the majority opinion chose not to pronounce on these issues as there were other grounds for reversing the Arizona Supreme Court. However the opinion warned:

> . . . the consequences of failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery of habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him.[46]

It is obvious, although the Court refused to decide on these issues, the majority believed the rights in question to be, in all probability, mandatory. Perhaps more pointedly, Mr. Justice Harlan disagreed in his opinion which concurred in part and dissented in part. He thought that the right to a written record of some sort and appeal were obvious and essential ingredients of a fair hearing.

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[46] Ibid. at 58.

Concurring and Dissenting Opinions

-Harlan

Harlan's opinion rests on a lengthy examination of the overall meaning of due process and, "the method by which the procedural requirements should be measured."[47] His chief concern apparently was with the concept of "compelling public interest." Justice Harlan felt that when legislatures can show such an interest in denying a procedural or substantive right, their position should remain untouched. He assumed that, "Such interests would never warrant arbitrariness or the diminution of any specifically assured constitutional right."[48]

The essential difference between the majority opinion and Justice Harlan's opinion is that the first uses the "essentials of due process and fair treatment" Fourteenth Amendment standard relying upon specific provisions of the Bill of Rights as a reference point for determining the requirements of due process. Harlan used an underlying theoretical view of due process which cautions against judicial intervention and urges self-restraint.[49] Consequently,

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[47] Ibid. at 68.

[48] Ibid. at 69.

[49] Ibid. at 72. Following a rather thorough judicial history concerning the meaning of due process, Harlan concluded that proper measurement of procedural requirements depends upon three essential criteria: "first, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so

he felt that the states should be left to pursue their purposes as freely as possible. He not only used legal argument to support his view but mentioned surrounding conditions and circumstances as well.[50] He pointed out that, in the first place, a substantial number of those children brought before juvenile courts are not even being accused of criminal conduct,[51] such as truants, runaways, incorrigibles and/or children who are for some other reason in need of supervision. He implied that due process requirements for criminals are not applicable here. However, these children are still subject to commitment to an institution, which Harlan did not mention. Furthermore, this decision pointedly did not deal with such children.[52]

Therefore, according to the Harlan opinion, only notice, counsel, and written record are the essential requirements. Although he does not pronounce on right to appeal, he implied that it is also a necessity.[53] Protections for the

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far as possible, the essential elements of the State's purpose, and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary.

[50] Ibid. at 70. He said, "it should not be forgotten that juvenile crime and juvenile courts are both now under earnest study throughout the country." and that, "imposing these rigid procedural requirements, may inadvertently have served to discourage these efforts to find more satisfactory solutions for the problems of juvenile crime, . . ."

[51] Ibid.

[52] Ibid. at 13.

[53] Ibid. at 72.

privilege of self-incrimination, confrontation and cross-examination, he felt, would impose unnecessarily rigid restrictions on the state's ability to devise innovative means for dealing with juvenile crime.

-Black

Mr. Justice Black also wrote a separate opinion in this case. He concurred with the conclusions of the Court but offered a different view as to the constitutional basis for the ruling. Rather than basing his decision on the Fourteenth Amendment Due Process Clause, he claimed the procedural requirements were mandatory, "because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States."[54] Black felt that the only relevance of the Fourteenth Amendment was that it makes the particular provisions of the Bill of Rights mandatory upon the states. Justice Black's concern with the tendency of the Court to make the Fourteenth Amendment Due Process Clause a discretionary judicial tool was that he did not believe that the Clause gave courts the power to fashion new laws. Presumably his fear was for what such an interpretation of the Clause could take away from the people's liberties.

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[54] Ibid. at 61.

[55] Ibid. at 62-63. Black said, "Freedom in this Nation will be far less secure the very moment that it is decided that judges can determine which of these safeguards 'should' or 'should not be imposed.' According to their notions of what constitutional provisions are consistent with the

-White

Mr. Justice White also wrote a concurring opinion in this case. However, his only disagreement was with the facts. He did not agree that there were adequate grounds for determining the question on self-incrimination, confrontation and cross-examination.[56]

-Stewart

The only purely dissenting opinion was presented by Mr. Justice Stewart. Since juvenile proceedings are not criminal trials, Stewart said the procedural requirements are not only unnecessary but also could prove detrimental. He explained that mandating such requirements would eventually result in creating a reactionary situation where children would be treated like adults.[57]

He hedged the opinion by "supposing" some requirements may be necessary but not in this case. He saw no reason, according to the facts, for deciding the issues at question.[58]

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'traditions and conscience of our people.' Judges with such power will be above the Constitution . . ."

[56] Ibid. at 64-65.

[57] Ibid. at 79.

[58] Ibid. at 81. Stewart said, "The Supreme Court of Arizona found that the parents of Gerald Gault 'knew of their right to counsel, to subpoena and cross-examine witnesses, of the right to confront the witnesses against Gerald and the possible consequences of a finding of delinquency!' It further found that 'Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home.'"

Remaining Questions

The Gault decision does not resolve several questions. What procedural protections do juveniles have with respect to the police and various social agencies which are involved with preventive delinquency practices or, once adjudged delinquent, after institutionalization? What rights do juveniles possess which are before a court on charges not criminal in nature such as truancy, incorrigibility or in need of supervision? And, finally, does the child have any protections when faced with circumstances in which he could be fined or placed on probation?

With respect to right to counsel, the case leaves broad questions unanswered.[59] Questions also remain with regard to the privilege against self-incrimination.[60]

Although a careful reading of the Gault decision suggests answers to three more questions, there is no

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[59] O. W. Ketcham, "Guidelines from Gault: Revolutionary Requirements and Reappraisal," 53 Virginia Law Review (1967): 1703. Includes among these questions, according to Judge Ketcham, are, "Who must notify the child and parent of the right to counsel, and how should they be apprised of this right? Should the right be explained at the time of arrest or apprehension, according to an agreed formula of words, or can it be done more thoughtfully and with greater significance at a later time by intake personnel or the judge? . . . Can the right to counsel be waived? If so, by whom and upon what conditions? . . . Where will the courts find knowledgeable attorneys for juveniles, and how will they be compensated?"

[60] Ibid. at 1705. Ketcham said the fundamental questions in this matter are, "Who is responsible for advising the juvenile of his right to remain silent, and when is this advice to be given. . . . Should this responsibility fall to the police (as in adult proceedings), to the court's intake worker, or to the juvenile court judge at the time of hearing?"

specific pronouncement. These are whether or not a juvenile has a right to: "(a) a written record of the proceedings for review, (b) a written statement by the judge of the grounds for finding of delinquency, and (c) an orderly procedure for appealing juvenile court judgments."[61]

In summary then, although much is decided about the juvenile justice system by In re Gault, the decision opens up many other areas of prevailing law and practice as it applies to young people.

The possible impact of the Gault decision is enormous. There are many questions left unanswered by the decision, but subsequent cases provide some clues to the future trend established by In re Gault.

### In re Winship: Majority Opinion

The next important case dealing with juvenile rights was In re Winship.[62] In this case the Supreme Court declared that juveniles have a constitutional right to the requirement of proof beyond a reasonable doubt in cases where a juvenile is charged with an act that would be a crime if committed by an adult. Prior to this case, courts used the "preponderance of evidence" standard which required less certainty in finding of delinquency than in a finding of guilt in adult criminal cases.

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[61] Ibid. at 1717.

[62] 497 U.S. 358 (1970).

Winship, a 12-year old boy, was accused of entering a locker room and stealing $112 from a woman's purse. He was charged with an act of delinquency and found "guilty." The judge used the "preponderance of evidence" standard in his determination. He acknowledged that the evidence possibly did not measure up to a standard of proof "beyond a reasonable doubt." But he said such a standard of proof was not necessary according to the New York statutes.[63]

As a result of being found delinquent, Winship was sentenced to a training school for 18 months, "subject to annual extensions of his commitment until his 18th birthday --six years in appellant's case."[64]

The decision, written by Mr. Justice Brennan, initially traced the historical foundations of the "proof beyond a reasonable doubt standard."[65] It then turned to the matter of juveniles in order to determine whether or not they too were entitled to the protection of this standard according to due process of law.

The Court pointed out that the reasonable doubt standard served a two-fold purpose: (1) it protects the individual against loss of liberty and (2) it protects him from the social stigmatization and loss of civil rights that are a consequence of conviction.[66]

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[63] Ibid. at 359.
[64] Ibid.
[65] Ibid. at 361-385.
[66] Ibid. at 363.

In the case of juveniles, the state pointed out that there could be no stigma since the "conviction" is civil not criminal; the proceedings are cloaked in confidentiality; and there is no loss of rights issue involved.[67] The Supreme Court rejected the arguments on the basis of In re Gault and further pointed out that, whatever was or was not involved, the case still involved a serious loss of liberty. Such a loss, the Court said, "is comparable in seriousness to a felony prosecution."[68]

The majority opinion also pointed out that adoption of the reasonable doubt standard would in no way upset the operation of the juvenile justice system nor disturb any of its benefits. The Court said, "In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in Gault. . ."[69]

Dissenting Opinions

Chief Justice Burger and Mr. Justice Stewart dissented in Winship believing that including another due process standard with those already applied by Gault was simply another step toward that transformation of juvenile courts into

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[67] Ibid. at 365.

[68] Ibid. at 366.

[69] Ibid. at 368.

criminal courts. In their view the real problems are inadequate staffs and facilities, and those problems will not be relieved by reducing the flexibility of juvenile courts by imposing due process standards on them.[70]

Mr. Justice Black also dissented in the case. His complaint with the majority's opinion was that the reasonable doubt standard, in his opinion, is not to be found in the Constitution. As he had said in other previous cases, the actual words of the Constitution should determine the meaning of due process and the Court should not "rely on the shifting day-to-day standards of fairness of individual judges."[71]

The decision in Winship represents a return to the broader interpretation of due process contained in Justice Harlan's concurring opinion in the Gault case. Since the requirement of proof beyond a reasonable doubt is not found in the Bill of Rights, the formula established by the majority opinion for determining which rights are obligatory for juveniles was not appropriate in this case.

McKeiver v. Pennsylvania: Majority Opinion

Another major step in determining what due process rights are mandatory in juvenile proceedings came in the

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[70] Ibid. at 376.

[71] Ibid. at 378.

case of McKeiver v. Pennsylvania.[72] In this case, the Supreme Court determined that juveniles do not have a right to a jury trial. The general thrust of the majority opinion in McKeiver was the Court's concern that the imposition of trial by jury on the juvenile system would be detrimental to the informal, nonadversary setting in the juvenile court.[73]

The Court expressed the concern that implementation of a juvenile right to trial by jury "would bring with it into that system the traditional delay, the formality and the clamor of the adversary system and, possibly, the public trial."[74]

McKeiver presented, in reality, as many questions as answers about the meaning of due process in juvenile cases because the opinion was far from unanimous. Only the Chief Justice and Justices White and Stewart concurred with Mr. Justice Blackmun's majority opinion.

The case involved juveniles from two different states with different sets of facts. The parties included the State of Pennsylvania; two juveniles from that state accused of acts of delinquency such as larceny, robbery, receiving stolen goods, conspiracy, and an assault on a police officer; the State of North Carolina; and juveniles from that state

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[72] 403 U.S. 528 (1971).

[73] Ibid. at 545-51.

[74] Ibid. at 550.

accused of acts of delinquency including disorderly conduct and "obstructing the flow of traffic on a highway or street."[75] The fundamental factual differences were that the Pennsylvania juveniles were accused simply of acts of delinquency, while the North Carolina juveniles were accused of delinquency acts as a result of participation in demonstrations concerning school desegregation; and, the proceedings in the Pennsylvania cases were open to the public and members of the press while the North Carolina proceedings were closed to all but the involved parties.

The Court combined the cases in order to squarely face the narrow issue of whether or not "the Due Process Clause of the Fourteenth Amendment assures the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding."[76]

The majority opinion claimed the right does not exist. It referred to Gault, Winship and other cases where the dicta clearly indicated that not all procedural restrictions applied in adult criminal proceedings were applicable to juvenile proceedings.[77] Justice Blackmun pointed out that "fundamental fairness" was the standard to be used in determining what due process guarantees were necessary for

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[75] McKeiver at 558.

[76] Ibid. at 530.

[77] Ibid. at 531-4.

juvenile proceedings. He said that the emphasis in Gault and Winship was on factfinding procedures. The majority opinion did not find trial by jury to be "a necessary component of accurate factfinding."[78] The opinion reminded the reader that there were a variety of circumstances, such as workmen's compensation cases, where the Court had decided trial by jury was unnecessary.[79]

The Court agreed that the juvenile justice system, as originally envisioned, was not particularly successful. It was unwilling, however, to agree that the situation was hopeless and refused to take another step in the direction of returning juveniles to "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial."[80]

Concurring and Dissenting Opinions

Mr. Justice White wrote a concurring opinion in which he emphasized the differences between criminal trials and delinquency proceedings both in theory and practice. He said that the elements of condemnation, punishment and deterrence, while part of the theory embracing criminal trials, are not a part of the juvenile justice system. That system rests on ideas of benevolence and rehabilitation. The theoretical

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[78] Ibid. at 543.

[79] Ibid.

[80] Ibid. at 550.

elements of criminal trials, whether or not embraced in the individual states' juvenile courts, are not required by due process.[81]

Both the majority opinion and White's concurring opinion emphasized that the states are free to use jury trials in juvenile proceedings if they so choose but they are not required to do so by the Fourteenth Amendment.[82]

Mr. Justice Brennan wrote an opinion in which he concurred with the majority opinion in the cases involving the Pennsylvania youths but disagreed with the conclusions as applied to the North Carolina juveniles. The difference, in his opinion, was the element of allowing or not allowing the public to be present at the proceedings. He said that juveniles must be able to focus "community attention upon the trial of their cases" in order to alleviate the fear of judicial oppression.[83] Where the community is not allowed to view the proceedings, a jury trial is necessary in order to assure that the court is not being used for political or other nonjudicial purposes.[84]

Mr. Justice Harlan concurred with the majority opinion for an entirely different reason. In his opinion,

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[81] Ibid. at 551-3.

[82] Ibid. at 547 and 553.

[83] Ibid. at 555.

[84] Ibid. at 556-7.

"criminal jury trials are not constitutionally required of the States, either as a matter of Sixth Amendment law or due process."[85] He said, however, that if jury trials were mandatory for adults then they would also be mandatory for juveniles.[86]

Mr. Justice Douglas wrote a dissenting opinion in which he was joined by Justices Black and Marshall. Douglas said simply that where juvenile court proceedings are used "to prosecute a juvenile for a criminal act and to order 'confinement,'" the juvenile "is entitled to the same procedural proections as an adult."[87] The opinion emphasized that juveniles can be, and in fact often are, incarcerated under prisonlike conditions for long periods of time.[88] Jury trials protect a juvenile from a judge who has been prejudiced by information provided by court personnel.[89] Finally, jury trials may convince a child that he has received fair and unbiased treatment. Only then, in some cases, can the rehabilitative process begin.[90]

McKeiver does not necessarily mean a return to pre-Gault days. It is, in reality, again an extension of the

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[85] Ibid. at 557.

[86] Ibid.

[87] Ibid. at 559.

[88] Ibid. at 560.

[89] Ibid. at 563.

[90] Ibid. at 562.

Gault formula. The Court said in both Kent and Gault that all procedural protections afforded adults were not necessarily obligatory in the juvenile adjudication process. McKeiver is an example of the case by case formula set forth in Gault where "each claimed right in turn would have to be subjected to the constitutional standards of due process and fair treatment, and an independent determination made in each case whether those standards demanded application of the right to the juvenile process."[91]

Breed v. Jones

The most recent Supreme Court announcement with respect to juvenile rights during the adjudicatory stage of the juvenile justice system is Breed v. Jones.[92] In May of 1975, the Court decided that juveniles have the right to the Fifth Amendment's prohibition against double jeopardy, applicable to the states by the Due Process Clause of the Fourteenth Amendment. Juveniles may no longer be prosecuted in a criminal court for the same act already proceeded upon in a juvenile court.

The Breed case concerned a 17-year old boy who had committed acts that would have amounted to robbery if he had been an adult. Since he was not an adult, according to

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[91]Samuel M. Davis, Rights of Juveniles: The Juvenile Justice System (New York: Clark Broadman Company, Ltd., 1974), p. 185.

[92]421 U.S. 519 (1975).

California law, he was dealt with in juvenile court. In considering the petition claiming Jones had committed acts of delinquency, the juvenile court judge found the allegations to be true after hearing the testimony of two prosecution witnesses and the defendant. Jones was held in custody while awaiting a dispositional hearing. At the dispositional hearing, the judge, taking notice of a probation officer's testimony, decided that Jones was "'not . . . amenable to the care, treatment and training program available through the facilities of the juvenile court,'" and ordered that he be prosecuted in an adult criminal court.[93]

Jones contended that an adjudicatory hearing in juvenile court followed by a trial in adult court constituted double jeopardy and claimed that this practice was in violation of the Sixth Amendment as applied to the states through the Fourteenth Amendment. Breed contended that the defendant "'never faced the risk of more than one punishment,'" and, furthermore, imposition of the double jeopardy prohibition on the juvenile process would only serve to diminish the unique flexibility of the juvenile court.[94]

Chief Justice Burger, writing for a unanimous Court, explained double jeopardy in terms of "risk" as opposed to punishment. "Risk," in the constitutional sense, is the

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[93] Breed v. Jones, 43 The United States Law Week 4645 (1975).

[94] Ibid. at 4648.

burden imposed on the individual by the state in essentially criminal cases. The intent of the burden is "to authorize criminal punishment to vindicate public justice." Because of this intent, the possible consequences, and the overwhelming power of the state, the burden of a criminal trial imposes severe hardship on the individual in terms of psychological and physical well-being and financial resources.[95]

The Court found that Jones had been subjected to this burden and the risk involved in the adjudicatory hearing, and it would be in violation of the double jeopardy prohibition to impose upon him a further trial. The Court recognized that not all youthful offenders are amenable to rehabilitation through the juvenile justice system but said the decision to transfer a case to adult criminal court must be made prior to a juvenile adjudicatory hearing.[96]

In response to the argument that such a determination would affect the uniqueness of the juvenile court, the Supreme Court said that the risk of transfer, another trial, and conviction following an adjudicatory hearing forces an attorney into a totally adversary position in order to protect his client. This destroys the notion that juvenile hearings should be informal and flexible with only the best interests of the juvenile in question. Chief Justice Burger

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[95] Ibid. at 4647.

[96] Ibid. at 4649.

explained, "Knowledge of the risk of transfer after an adjudicatory hearing can only undermine the potential for informality and cooperation which was intended to be the hallmark of the juvenile court system.[97]

General Effects of Judicial Intervention in Juvenile Delinquency Cases

Although the number of cases involving juvenile due process rights is obviously limited, the state courts have apparently been very responsive. Subsequent to the Court's decision in Gault, "there was a tremendous constitutional mandate, expanding its scope to embrace other rights not included in its mandate, and extending its applicability to other stages of the process."[98]

There appears to be disagreement as to the effects of Gault and other such decisions. Judge Orman W. Ketcham, Juvenile Court Judge of the District of Columbia, believes that the decision is profound and calls for revolutionary change in proceedings against juveniles. He has pointed out that the case requires a change in the emphasis of the juvenile court procedure.[99] He also sees a change in discipline

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[97] Ibid. at 4650.

[98] Davis at 186 (1974).

[99] Ketcham at 1701. For example, he said, "No longer is the hearing to be simply a friendly conference, marked chiefly by its informality. Hereafter it should be a legal proceeding at which evidence is taken and an adjudication made upon the facts found . . ."

emphasis from social and behavioral science to law.[100] Finally, he believes that Gault will result in a narrowing of the juvenile court's jurisdiction, whether by law or in practice. The courts will no longer be expected by the public to concern themselves with all aspects of errant behavior but only those aspects which involve criminal behavior.[101]

Judge Ketcham's conclusion is an exemplary statement of one who greeted Gault with optimism and excitement:

> There is no doubt that the decision of In re Gault revolutionizes the law relating to juveniles. Provided its guidelines are sincerely followed and implemented at the state and local level, Gault will change for the better the operation of the Nation's juvenile court system. Instead of appearing before quasi-social agencies, which often have been ineffective, juveniles charged with law violations will face courts of law which provide orderly protection and individual justice. Compassion and goodwill for the juvenile will be balanced by due concern for the safety of the public. As practice and procedure develop, the intellectual foundations of juvenile court philosophy, especially the doctrine of "parens patriae," will undergo a rigorous reappraisal. In

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[100] Ibid. Ketcham said, "Whereas social work and the concepts of behavioral science have been in the forefront of juvenile court proceedings, with lawyers and the legal aspects recognized only grudgingly, the Gault decision will reverse this order. Hereafter the juvenile court will be first and foremost a court of law."

[101] Ibid. Ketcham explained that "the public must divest itself of any notion that these courts are concerned with unpleasant children who hitch rides on streetcars and sass their teachers. The knowledge that urban juvenile courts are dealing with large numbers of serious and ugly crimes should set a more accurate perspective. Making it clear that the juvenile court's primary responsibility is law enforcement, not teaching manners, will also help to focus attention on its new role."

> prospect is a new, fairer and more effective form of juvenile court proceeding, based upon traditional American legal principles; it should both protect the public and preserve the foremost goals of the juvenile court system.[102]

The optimistic appraisal accorded the Gault decision by Judge Ketcham is not universally shared. Sanford J. Fox, Professor of Law at Boston College, concludes that Gault and its effects are, at best, a mixed blessing.[103] Professor Fox's observations stem from a seminar he taught for at least five years, together with a practicing lawyer and a social psychologist, on juvenile court practice. The students in the seminar were "assigned to defend and prosecute juvenile delinquency cases in the Boston Juvenile Court, as well as to represent children, parents or the Commonwealth in neglect cases.[104]

Based on this experience, Professor Fox has found reason to believe that Gault and its effect stopped short of being revolutionary. In the first place, procedural requirements in juvenile courts mark a restoration of practices adhered to before the establishment of juvenile courts, not a new, revolutionary change. Furthermore, he found it difficult to believe that the public will be willing to bear the

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[102] Ibid. at 1718.

[103] Sanford J. Fox, "Juvenile Justice Reform: An Historical Perspective, 22 Stanford Law Review (1970): 1235-9.

[104] Ibid. at 1236, note #234.

costs of implementing Gault in an effective manner. He points out that in order to give valid meaning to the Gault decision, lawyers would have to be hired for indigent children, courtroom staffs would have to be increased, more courtrooms would have to be constructed, and training programs for the lawyers would have to be established.[105]

Based on his observations, Professor Fox found questionable or negative attitudes in both the lawyers and their youthful clients. He said that the lawyers have reservations when it comes to vigorously protecting the procedural rights of children who are probably guilty. When it is obvious that a juvenile's friends, family and general environment are conducive to a life of crime, an adult has reservations toward carrying out the expected role of helping the child "beat the rap" and return to that environment.

Also Fox found that, because the lawyers are of a different social, economic, or racial background, the child tends to see the attorney as part of the establishment and rejects his help in one way or another.[106] The lawyer is

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[105] Ibid. at 1238.

[106] Ibid. at 1236. Fox explained, "Not only does the child identify the lawyer as part of the organization that is after him, but the recognition is fused with elements of hostility and resentment based on perceptions of a more broadly based attempt to impose one culture on another. With the uninhibited candor of childhood, the client manages to communicate his alienation and hostility--he fails to keep appointments, he lies, in a hundred different ways he shows that he does not believe the lawyer is on his side."

human. It is difficult for any human to understand and accept behavior which is personally hostile.[107]

Professor Fox also observed that generally the lawyers who are appointed to represent juveniles are unskilled and untrained, but even if the attorney is adequate, there are institutional pressures on him to cooperate with the court officials. Because the system has, for a long time, assumed that the juvenile court carries with it an aura of expertise, the attorney is expected to help institutionalize "bad" children and only "get off" the "good" ones. The most damaging circumstances about having an attorney present who is either unskilled or subject to institutional pressure is that the judge is also effected. When there is no counsel present to represent a juvenile, the judge is inclined to assume the role of protecting the child against kangaroo court tactics. But when a lawyer is present, whether competent or not, the judge is likely to assume a passive role.

Despite the pessimistic appraisal of Professor Fox, the previously mentioned study and survey undertaken by the National Council of Jewish Women found encouraging results with respect to right to counsel. They announced that

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[107] Ibid. Fox further explained, "It is difficult to be despised and not to do a little despising back, or to be rejected and not reject back. There is much, in short, that gives the lawyer cause to be angry, although he rarely recognizes himself to be in that state. Suppressed anger against the one to be helped necessarily detracts from the effectiveness of the helper."

"almost 70 percent found that children were provided with counsel. Of the remainder, half found that counsel was provi.ed when requested."[108]

The NCJW also announced, however, that the findings were not totally positive. The implementation of right to counsel apparently varies greatly from jurisdiction to jurisdiction. The survey showed that it varied "from those courts where counsel was 'automatic' to those where it is 'offered but not often used' to those where it is 'not provided' at all.[109] The survey also found caseloads and the competency of counsel to be problems.[110]

The State of Texas: Specific Effects of Judicial Intervention in Juvenile Delinquency Cases

Since the subject of this dissertation, Morales v. Turman, is a study of Texas juvenile justice, the effects of the Gault decision on that state are instructive. The Texas system of juvenile justice provides an example of change as mandated by Gault. With regard to notice, it was found that

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[108] Edward Wakin, Children Without Justice (New York: National Council of Jewish Women, 1975), p. 63.

[109] Ibid.

[110] Ibid. The study found for example that "in one major city a lack of funds for lawyers coupled with the requirement that lawyers be assigned in court led to a backlog of more than 4,000 cases. This situation creates two serious problems: large numbers of children are warehoused in detention facilities awaiting trial, and lawyers have inadequate time to meet with their clients to prepare for court."

two standards must be met in order to comply with the Supreme Court's mandate--particularity and timeliness. Although a study of Texas statutes and case law reveals that the requirement of particularity is met in Texas, neither met the requirement of timeliness.[111] Texas law allowed the child and his parents or guardian to appear voluntarily before the court without issuing of a summons. (art. 2338-1, Sec. 8, Tex. Rev. Civ. Stat. 1925) Therefore, Texas law had to be changed and the provision for voluntary appearance, without first having been informed of the accusations, had to be eliminated.

The Texas Juvenile Delinquency Act, as amended, provides counsel for juveniles in cases of waiver to a state district court. The waiver is limited to cases where the juvenile is at least fifteen years of age and has been accused of committing a felony.[112] However, there was no provision in the Texas statutes nor in the case law for appointing counsel to represent indigent juveniles before the juvenile court in a delinquency proceeding. Neither was there any provision which mandated that the child and his parents had to be expressly informed that they had a right to counsel and, if without funds, counsel would be appointed for them. These provisions had to be accepted into Texas law.

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[111] William K. Kimble, "Application of Gault: Its Effect in Juvenile Delinquency Proceedings in Texas," 20 Baylor Law Review (1968): 114.

[112] Ibid.

Although Texas statutory law does not mention the privilege against self-incrimination, the case law has held that a juvenile cannot be compelled to testify against himself. However, prior to Gault, there was no provision for assuring that a juvenile must be informed, prior to the admission of any wrongdoing, that he has a right to counsel. Presumably the Gault decision makes mandatory this procedure in present and future cases.[113]

There is no apparent discrepancy between the Gault decision and Texas case law on the issues of confrontation and cross-examination, although Texas statutory law is silent on these questions.[114]

Even though the Court in Gault did not reach a conclusion on the questions of right to a transcript or appeal, it was suggested earlier that they would rule in favor of these procedures when the proper opportunity is presented. This will not be a problem in Texas, as juvenile courts in that state are courts of record, and juveniles have a right to appeal to the Courts of Civil Appeals and the Texas Supreme Court.

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[113] Ibid. at 118-9.

[114] Ibid. at 119-20. According to Kimble, "The only Texas case in this area which involves a juvenile delinquency proceeding is in accord with the Gault case. In Ballard v. State the court held that the accused in a juvenile delinquency case should be faced by the witnesses who give evidence against him and should be permitted to hear such evidence and have an opportunity to cross-examine the witness."

Summary: Parens Patriae

In summary, the adjudication stage of the juvenile justice system has received scrutiny at all levels of the judiciary, and revolutionary change in the law has been the result. The Supreme Court has not yet, however, granted certiorari in a case involving the rights of juveniles in a posthearing setting. (The major concern of this study is the rights of juveniles who have been adjudged delinquent and incarcerated in an institution.) As noted in the previous chapter, the parens patriae doctrine does not constitute the sole stumbling block in such cases. Besides being generally reluctant to interfere with the juvenile justice system, the courts have been historically particularly apprehensive about intervening in the treatment of institutionalized persons, whatever their age.

## The "Hands-Off" Doctrine

The "hands-off" philosophy remains the same with respect to Supreme Court cases involving incarcerated juveniles. However, imprisoned adults have, in recent years, received Supreme Court attention. Dispelling with the notion that the courts should not, under any circumstances, interfere in the day-to-day operation of facilities designed to house convicted criminals may or may not result in a Supreme Court case involving the rights of incarcerated juveniles. If this is to happen, in all probability, the "hands-off" doctrine had to be dealt with first. As noted in the

previous chapter, the judiciary refused to become involved in the administration of prisons for a variety of reasons. The central theme of nonintervention has been, in all cases, lack of jurisdiction.

## Historical Basis for "Hands-Off" Doctrine

Until recently, prisoners were deemed civilly dead and without constitutional rights. The often quoted rule of law governing this principle is that "every person convicted of the crime of larceny, etc., shall be deemed infamous and shall forever thereafter be rendered incapable of holding office, voting, serving as a juror, etc."[115] The prisoner was considered "an alien in his own country, and worse, for he can be restored only as a matter of grace, while an alien may acquire citizenship as a matter of right."[116]

## Reinterpretation of the "Hands-Off" Doctrine

The notion that a convicted and incarcerated criminal has no rights remained good law until 1944 when, in Coffin v. Reichard, a federal appellate court suggested that

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[115] People v. Russell, 245 Ill. 268, 91 N.E. (1910), at 1075.

[116] Ibid. at 1076. See also Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871). This case held that the prisoner "has, as a consequence of his crime, not only forefeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is civiliter mortuus; and his estate, if he has any, is administered like that of a dead man."

this was not entirely the case. The Sixth Circuit Court established the writ of habeas corpus as a legitimate instrument available to prisoners whose rights had been denied. In speaking of these rights, the Court said,

> "A prisoner retains all rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion.[117]

Although in 1944 it was suggested that prisoners retain some rights, it was not until the mid-1960's that a series of cases began to deal with the matter.[118] The "hands-off" doctrine cannot be proclaimed dead by any means because the judiciary at all levels is still reluctant to interfere. It is apparent, however, that when denial of a fundamental constitutional or statutory right is claimed, the federal courts will shed the doctrine and hear the complaint.[119]

The federal courts have apparently recognized that protection of fundamental rights, and the consequent recognition on the part of the prisoner of applied fairness, is a necessary ingredient in the rehabilitation

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[117]John W. Palmer, Constitutional Rights of Prisoners (Cincinnati: The W. H. Anderson Company, 1973), p. 536.

[118]Norman Dorson, ed., The Rights of Americans: What They Are--What They Should Be (New York: Random House, Inc., 1970), p. 456.

[119]Palmer at 137.

process.[120] It is, of course, to be recognized that prison reform is primarily the job of the executive and legislative branches. When these branches refuse to act, however, the judiciary must intervene or it runs the risk of legitimizing executive and legislative inaction.[121]

## The Right to Treatment

Along with the rethinking and reinterpretation of parens patriae and the decline in the rigid application of the "hands-off" doctrine, the Morales case was preceded by the development of a unique constitutional doctrine--the right to treatment. Generally stated, this newly established constitutional right proclaims that when the

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[120] See Barnett v. Rodgers, 410 F. 2d 995, 1002 (D.C. Cir. 1969). "That penal as well as judicial authorities respond to constitutional duties is vastly important to society as well as the prisoner. Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life."

[121] Phillip J. Hirschkop and Mike Millemann, "The Unconstitutionality of Prison Life," 55 Virginia Law Review (1969): 836. "A most persuasive argument in favor of judicial intervention into penal institutions is given by penal law experts Hirschkop and Millemann. "No organ of government is better suited than the legislature to consider the penological developments of the last few decades in order to determine the extent to which restrictive practices are warranted. But after legislative command or in its absence, the courts must decide whether the balance of competing interests effected by legislative compromise or executive fiat comports with specific constitutional guarantees and traditional notions of due process. In this context the 'hands-off' doctrine has no place. The judiciary functions as more than a final arbiter; it has a responsibility for educating the public and where it fails to act, it functions to legitimize the status quo."

government incarcerates or institutionalizes an individual for the purpose of treatment, it is obligated to provide that treatment. In other words, if an individual is institutionalized, against his will, for the purpose of treatment, then he has a constitutional right to receive that treatment.

This concept does not originate, as before, from the law of criminal procedures and corrections as applied to adults. It is found in the law as it is applied to the mentally ill. In 1966, the right to treatment was first recognized in the case of Rouse v. Cameron.[122] Rouse concluded that when one is acquitted of a criminal offense by reason of insanity, and involuntarily committed to a mental hospital, he has a right to treatment. This case was not based on the Constitution. It relied on a federal statute regulating mental hospitals. However, the dicta provided a clue as to future possibilities. It suggested that denial of treatment could raise a question of due process of law. The Court said:

> Had appellant been found criminally responsible he could have been confined a year, at most, however dangerous he might have been. He has been confined four years and the end is not in sight. Since this difference rests only on a need for treatment, a failure to supply treatment may raise a question of due process of law.[123]

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[122] 373 F. 2d 451 (D.C. Cir. 1966)

[123] Rouse at 453.

The statutory right guaranteed in Rouse was expanded into a constitutional right in Wyatt v. Stickney in 1971.[124] The Court said,

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.[125]

This was the first federal case endorsing the notion of a constitutional right to treatment using Fourteenth Amendment due process as the source of the right. The Court cited cases such as Rouse as precedent. But it must be remembered that previous such cases were based on statute rather than the Constitution. The Supreme Court has never ruled on this question, having denied certiorari in several such cases.[126]

It should be noted that the Fourteenth Amendment Due Process Clause or the notion of "fundamental fairness" is not the only available constitutional basis for the establishment of a right to treatment. It has been suggested that the Fourteenth Amendment guarantee of equal protection might also provide an avenue of redress. Although parens patriae is invoked to relieve errant youths, drug addicts, mental patients and others from the criminal process, they

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[124] 344 F. Supp. 387 (M.D. Ala. 1972).

[125] Wyatt at 781.

[126] Douglas W. Skemp, "Establishment of a Constitutional Right to Treatment for Delinquent Children," 26 Baylor Law Review (1974): 368, Note #15.

are still subject to confinement and loss of liberty. This deprivation often extends far beyond what it would have been if the individual had been subjected to the regular criminal process.

> This disparity between penal and nonpenal sanctions is predicated on the individual's need for treatment: failure to supply such treatment would therefore render the confinement violative of equal protection.[127]

The Eighth Amendment prohibition of cruel and unusual punishment might also be the basis of a constitutional right to treatment. In the Rouse decision Judge Bazelon said, "indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual.'"[128]

A corollary case to the mental health cases was Nelson v. Heyne[129] decided in 1972 and affirmed by a U.S. Court of Appeals in 1974. The decision granted declarative and injunctive relief to juveniles incarcerated in an Indian boys' reformatory. The court used for the basis of its decision the assumption stated in cases dealing with procedural rights such as Kent and Gault: the assumption being that states will provide programs of treatment and rehabilitation

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[127] Nicholas N. Kittrie, "Can the Right to Treatment Remedy the Ills of the Juvenile Process?" 57 Georgetown Law Journal (1969): 864.

[128] Rouse at 453.

[129] 491 F. 2d 352 (7th Cir. 1974).

for juveniles declared delinquent and institutionalized. "In basing its decision on this assumption the court has implied that the juvenile offender is entitled to rehabilitative efforts."[130]

The standard suggested by the juvenile cases concerning procedural rights is that a procedural right will only be denied when it is thought to infringe upon or interfere with the benefits of the juvenile system or the protective nature of the juvenile court. It has been suggested that the converse of this idea is also true. "The juvenile court may deny those procedural rights only if a program of care and treatment is being provided."[131] Judge Orman Ketcham calls this a

> . . . mutual compact theory of 'parens patriae.' Under Judge Ketcham's theory the state is bound by compact to rehabilitate the delinquent child, based on the premise that the child has bargained away some of his constitutional rights in consideration of the state's promise of rehabilitative treatment. Unless the state satisfactorily performs its obligation under the compact, the juvenile and his parents should have the right to consider the agreement broken and insist upon full restoration of the child's full constitutional rights.[132]

Thus, although a constitutional right to treatment has never been established by the Supreme Court, there was precedent prior to Morales for suggesting the possibility.

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[130] Skemp at 368.

[131] Ibid. at 369.

[132] Davis at 168.

The recent O'Conner v. Donaldson case[133] could provide a clue as to future Supreme Court action on this question. Chief Justice Burger, in a concurring opinion directly addressed the issue of right to treatment. He denied the existence of such a right and claimed that "there is no historical basis for imposing such a limitation on state power." His argument was that there are situations when the state may confine a person against his will without promise of rehabilitation and treatment, so as to protect society against antisocial acts and communicable diseases and "persons under legal disabilities to act for themselves."[134]

Basically Chief Justice Burger does not feel it is the responsibility of the courts to supervise institutions and determine whether or not rehabilitative treatment is adequate. He explained that "courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity of the methods which the legislature has selected."[135]

The majority opinion in O'Conner skipped the issue of right to treatment altogether, even though the Fifth Circuit, from which the case arose, broadly approved a right

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[133] 422 U.S. 563 (1975).

[134] O'Connor at 583.

[135] Ibid.

to treatment concept in its opinion. That court even awarded monetary damages to an involuntarily committed mental patient who had been denied treatment.

The Supreme Court upheld the notion that the individual could not be confined under such circumstances but maintained that the constitutional right involved was freedom, not treatment. The Court decided the case

> . . . on the very narrow ground of whether a state may confine, against his will, an individual who is neither dangerous to himself nor to others. . . . The Court concluded that a state may not lawfully confine such a person, but held that the award of monetary damages against defendant was improper . . ."[136]

In spite of the Chief Justice's concurring opinion in the O'Connor case, it should be remembered that only one justice in that case denied the establishment of a constitutional right to treatment. As previously stated, the Court, as a whole, refused to consider the right to treatment. In concluding that freedom, not treatment, was the issue, the Court narrowed the thrust of the case by applying its philosophy to those individuals who are neither harmful to themselves nor to others. This narrow interpretation leaves the Morales case relatively untouched because it can be argued that some of the juveniles "convicted" of delinquency are, in fact, dangerous to themselves and/or to others. Morales

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[136]Samuel M. Davis, 1976 Supplement to Rights of Juveniles: The Juvenile Justice System (New York: Clark Broadman Company, Ltd., 1976), p. 74.

claims that even though this may be true, the children still have a constitutional right to treatment.

The right to treatment and the cases preceding Morales on that issue will be discussed in greater detail in Chapter Four. That chapter discusses the policies that were established by Morales. In terms of the right to treatment, policy was announced through a series of standards established to guarantee the fulfillment of that right. Some of these standards were mentioned in the preceding cases but, as will be seen, many of them create new law.

Before approaching the subject of policy, it is necessary to deal with the immediate and specific causes which led to the Morales decision. That subject is treated in the following chapter.

## CHAPTER THREE

## THE NEED FOR CHANGE: CONDITIONS AND PRACTICES IN THE TEXAS JUVENILE INSTITUTIONS

This chapter is an examination of the specific causes or circumstances which brought the Texas juvenile justice system to the district court's attention. It can readily be understood from the previous chapters that judicial intervention in a case such as this one is indeed rare. Morales is especially unique because the judge saw fit, not only to intervene, but also to establish a set of standards with which the state was ordered to comply. The case examines a number of causes or conditions which brought about the decision. These include the decision-making procedures of the Texas Youth Council; the quality of life both in general and in particular in Texas juvenile institutions; physical, mental, and emotional brutality; disciplinary procedures; the methods used for making assessment and placement decisions; academic and vocational education programs; the quality of personnel hired to care for the youths; and the medical and psychiatric care afforded the juveniles. The prevailing circumstances and practices in each of these categories created

an overall environment that was conducive to judicial intervention.

## Structure and Responsibilities of the Texas Youth Council

Institutionalized juvenile delinquents in the State of Texas are the responsibility of the Texas Youth Council. This council was established by a unanimous vote of both Houses of the Texas Legislature in 1957. The policy decisions are made by a six-member Board of Directors who are appointed by the governor with the approval of the state senate. These members are not paid for their services, and there are no specific qualifications which must be met in order to receive an appointment. However, they are expected to be "influential citizens in their respective communities who are recognized for their interest in children and youth."[1] The day-to-day operating decisions are the responsibility of an Executive Director who serves at the pleasure of the Board.[2]

The TYC is charged with four essential responsibilities. One is to administer and operate the state's homes for dependent and neglected children. The situation with respect to these children has been confused because of questions that remain with regard to status offenders. Status

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[1] Institute on Juvenile Delinquency (Springfield, Ill.: Charles C. Thomas, 1962), p. 55.

[2] Texas Youth Council: An Overview (Austin: The Texas Youth Council, December, 1976), p. 1.

offenders are those children who have committed acts which bring them to the juvenile court's attention but which are not violations of the criminal law. Such acts include truancy and running away from home. These acts are adjudicable only in the case of minor children.

Status offenders were initially dealt with by the Texas Youth Council much in the same manner as delinquents. By the time the 1974 Morales decision was handed down, status offenders were being treated separately as dependent or neglected children, rather than as delinquents.

Recently, the TYC has supported legislation introduced in both the Texas House of Representatives and the Texas Senate that would remove the status offenders from TYC jurisdiction. The Council finds it difficult to deal with these children in a manner that satisfies anyone. In the first place, public opinion objects to the placement of runaways in institutions housing juveniles who have committed criminal acts. In addition, the status offenders tend to be disruptive in the homes designed for dependent and neglected children.

In the TYC's opinion the majority of the status offenders are, in fact, hard core delinquents. In many instances, the affluence of their families have enabled these youths to plea-bargain for a less offensive designation. The TYC believes that elimination of these offenders from TYC

responsibility would force juvenile court judges to bring a halt to such plea-bargaining tactics.[3]

This study does not attempt to elaborate further on the question of status offenders. The situation is obviously in a state of flux as of this date (March 1, 1977), and definitive statements are impossible until the results of the current legislative session are known.

The three remaining duties of the TYC constitute an obligation to delinquent children. One is to administer the correctional facilities where these children are housed. There were six such institutions in Texas. They included Giddings State Home and School for Boys, Gatesville State School for Boys, Mountain View State School for Boys, Brownwood State Homes and School for Girls, Crockett State School for Girls, and Gainesville State School for Girls.

A second responsibility is to provide "programs of constructive care, treatment, education, training, and rehabilitation" for delinquent children.[4] Finally, the TYC is charged with the duty of "providing active parole supervision of all delinquent children released from the state training schools."[5]

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[3]Mary Elson, "The Muddled Question of Status Offenders," The Dallas Morning News, February 13, 1977, p. 6G.

[4]Overview at 4.

[5]Ibid. at 5.

In the late 50's, the TYC conducted a complete study of the Texas facilities and programs and found them to be inadequate. The members consulted with a variety of experts and presented plans to the legislature. The result was a 500% increase in appropriations to the TYC from 1957 to 1963. The environment which resulted from this early study remained essentially unchanged until the Morales investigation began in 1972.

## The Role of Plaintiffs' Counsel

The Morales investigation was initiated by Steven Bercu, an El Paso attorney. His concern, in the beginning, was more specific than it eventually became. The questions that he first brought to the court included right to counsel, access to the courts, and First Amendment liberties.

### Right to Counsel and Access to the Courts

Initial action in the case of Morales v. Turman began when Bercu discovered significant reason to believe that minor children had been committed to TYC institutions without benefit of a court hearing or other regular due process protections. Bercu had been retained as counsel on behalf of a TYC inmate, Johnny W. Brown. He filed a habeas corpus petition on behalf of Brown with the Juvenile Court in El Paso County. At the same time, he obtained a discovery order enabling him to interview other TYC inmates in order to

ascertain whether they had been denied due process protections to which they were entitled.[6]

Bercu and his associate, Peter Sandmann, of the Youth Law Center in San Francisco, attempted to interview inmates at the Gainsville State School for Girls, the Gatesville State School for Boys and the Brownwood State Home and School for Girls. They were allowed to interview inmates in each of the institutions, but they were required to do so in the presence of supervisory personnel.[7] Bercu objected to the presence of the administrators and maintained that he and his clients had the right to confer privately. The supervisors remained adamant following the legal advice of Roland Daniel Green, III, Esq., who was at that time an Assistant Attorney General for the State of Texas. "One of his duties was to give legal advice to the TYC and its employees and to represent that agency in court."[8]

Green discussed his position with Dr. James Turman, Executive Director of TYC, and found him in agreement on the policy. Turman justified the policy of having institutional personnel present during attorney-inmate interviews for the following reasons:

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[6]Morales v. Turman, 383 F. Supp. 64 (1974).

[7]Ibid. at 64-5.

[8]Ibid. at 64.

> . . . concern about solicitation of clients, concern that the children's families knew of no relationship between their children and an attorney, the possibility that NBC television might be involved, concern that the children might be obtaining drugs, and a general concern for the welfare of the children.[9]

Following the conversation with Dr. Turman, Green sought and received support for his position from Robert Flowers, Esq., the Chief of the Enforcement Division of the Office of the Attorney General of the State of Texas.[10] Bercu then turned for help to the Chairman and Vice-Chairman of the Youth Affairs Committee of the Texas Senate. This tactic was not successful.[11]

Along with the problem of not being allowed to confer privately with his clients, Bercu objected to mail censorship. All incoming and outgoing mail to and from TYC institutions was censored, including communications between the inmates and their attorneys or judges. Furthermore, it was found that sometimes mail was withheld altogether and that the inmates were limited as to whom they could correspond with, as well as the number of letters they could write.[12] The students were allowed to write letters only on certain

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[9] Ibid. at 65.

[10] Ibid.

[11] Ibid.

[12] Amici Curiae, unpublished pre-trial brief (presented to the U.S. District Court, E.D. Tex., 1973), p. 27.

designated days and they were not provided with sufficient writing paper and postage.[13]

As a result of these practices, Bercu filed a civil action in the United States District Court of Judge William Wayne Justice in the Eastern District of Texas.

> On February 16, 1971, plaintiffs filed a motion for preliminary injunction, seeking to enjoin the TYC and their agents from interfering with the children's right to confer privately with counsel and from impeding in any manner their correspondence with counsel through the mail.[14]

Attorneys for the plaintiffs complained that mail censorship or the denial of any important constitutional right could be practiced only if the state could show a compelling interest. Bercu pointed out that there was no "compelling" state interest involved here. In fact, the censorship practice was considered so trivial that a number of TYC institutions had voluntarily abandoned the practice prior to the trial.[15]

Deprivation of Other Civil Liberties

It was found that the practice of speaking Spanish was discouraged and, in some cases, prohibited.[16] Limitations on the use of Spanish, whether in speaking or in writing, was sometimes enforced even though a student's English

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[13]Peter B. Sandmann and Steven Bercu, unpublished Plaintiff's Memorandum of Law (presented to the U.S. District Court, E.D. Tex., 1974), p. 24.

[14]Ibid.

[15]Sandmann at 24.

[16]Amici at 27-28.

speaking capacity was limited or non-existent.[17] In possible further violation of free expression were TYC policies that did not "permit the boy or girl to wear his or her hair or to dress as they please within limits of decency."[18] Finally, there was a policy of enforced silence practiced at Mountain View. The boys were not allowed to "speak for days on end unless spoken to by their custodians."[19]

Another questionable practice in the TYC institutions with regard to civil liberties was infringement of religious freedom. It was found that, with the exception of Mountain View, all TYC institutions practiced a policy of forced attendance at religious services regardless of the desires or the religious preferences of the children or their parents.

The students at these TYC institutions were subject to disciplinary measures or punishment for failure to attend church services.[20] Enforced heresy could also have been a practice. One witness pointed out that a Jewish girl was "required to attend Protestant services because her behavior was not considered meritorious enough to warrant being allowed to go to Dallas to attend Jewish services."[21]

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[17] Sandmann at 32.

[18] Amici at 28.

[19] Ibid. at 28-29.

[20] Ibid. at 36-39.

[21] Ibid. at 37.

## The Role of Amicus Curiae

"Groups can and often do use amicus curiae techniques to gain access to courts."[22] The role of amicus curiae originally involved neutral parties participating in a case as a "friend of the court," in order to simply provide information. These parties ordinarily had no special interest in the cause. By the twentieth century, it has been argued, the neutral friendship role had changed to that of an active advocate. Today "the amicus is no longer a neutral amorphous embodiment of justice but an active participant. . . ."[23]

Counsel for the plaintiffs filed a motion requesting that the United States be joined in the case as amicus curiae. The Court granted the motion because of the "size and complexity of this case, along with the gravity of plaintiffs' allegations regarding the deprivations of their constitutional rights . . ."[24] Other parties who were joined as amicus curiae included: the American Orthopsychiatric Association, the American Psychological Association, the American Association on Mental Deficiency, the National Council on Crime and Delinquency and the Child Welfare League.

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[22]Charles H. Sheldon, The American Judicial Process: Models and Approaches (New York: Dodd, Mead & Company, 1974), p. 115.

[23]Samuel Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy," 72 Yale Law Journal (March, 1963): 694.

[24]Amici at 1.

The case was filed in May, 1972, and participation of the various representatives began in August of that year. The "representatives toured five of the six TYC facilities . . . attended and participated in depositions of witnesses and in discovery and pretrial proceedings," and presented "six witnesses at the trial."[25] These witnesses included Harold Gohen, Institute for Behavioral Research; Ms. Guadalupe Gibson, M.S.W., San Antonio; Dr. Leonard Lawrence, San Antonio Children's Center; Dr. Gisela Konopka, D.S.W., Director, Center for Youth Development and Research; Dr. Cervando Martinez, San Antonio; and Mr. Bill Ryan, Deputy Commissioner, Kentucky Department of Child Welfare.[26]

Because of the participation of the various parties as amicus curiae, the Court was able to rely on the expert witness testimony. This added a somewhat unique dimension to the Morales trial. Judge Justice was not limited to evidence presented by the opposing attorneys and, thus, was able to greatly expand the amount of evidence introduced. It is highly unlikely that the Court would have been able to examine the circumstances and practices with such specificity without the investigations and testimony of the expert witnesses.

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[25] Ibid. at 2.

[26] Ibid.

## The TYC Institutional Environment

### Quality of Life

The expert witnesses found life inside the TYC institutions to be rigid and inflexible with little allowance for individualism. In their opinion the goal of the treatment afforded juveniles by the TYC "is to enable him to function in the community without breaking the law."[27] Such a goal cannot be achieved without allowing the juvenile the maximum possible opportunity to be independent, self-sufficient and a good decision-maker for himself. They found at the institutions that the children "rise, toilet, go to school, eat, vegetate, and go to bed at the same time. . . . Even their haircuts and clothes are the same."[28] They found in all institutions, with the exceptions of Brownwood and Giddings, that behavior deviant from the group in any form was completely and inhumanely repressed and concluded that this anti-individual philosophy "permeates TYC and makes individual sensitivity to the problems and needs of particular children well nigh impossible."[29]

The environment in which the children existed was void of stimuli. All of the childen were segregated according to sex, which led to an abnormal preoccupation with the

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[27] Ibid. at 47.

[28] Ibid. at 10.

[29] Ibid. at 11.

subject. The regimentation of daily routine precluded any opportunity for personal decision-making and halted the maturation process. The expert witnesses explained that ". . . no amount of professional skill can compensate for the arid environment that denies adolescents their most basic socialization and growth needs."[30]

The environment was further hampered by its isolation from communities and the normal stimuli stemming from them, such as friends and families. There were few alternatives available in Texas to institutionalization. The TYC has authority to create community-based alternatives to incarceration but, prior to the Morales trial, had an extremely poor record in doing so. The meager facilities available were reserved for paroles.[31] When a Texas judge determined that a child should be removed from the home, the youth was generally sent to one of the institutions located in a remote area of the state. The child's chances of receiving alternative treatment were dependent on the creative talents of individual judges. In this regard, expert witnesses testified that a mere five to twenty percent of the children were truly in need of the type of secure institutional setting to which the TYC assigned all of the children in its custody.[32]

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[30] Ibid. at 13.

[31] Ibid.

[32] Sandmann at 69.

This remoteness from the community worked a special hardship on Mexican American children. One of the witnesses, Ms. Gibson, testified that many of the Mexican American girls were in the institution basically because of "cultural integrational conflicts between the old ways and the new ways."[33] She said that because the institutions were operated on an Anglo-Protestant ethic and the girls were "afforded no bilingual or bicultural links to their past," they were "confused, resentful, psychologically isolated and not amenable to treatment of any kind."[34]

The expert witnesses testified that generally the younger children received better treatment. They found this practice to be arbitrary and irrational. The age of a juvenile apparently is not a relevant factor when determining the treatment he or she needs. In the case of those inmates diagnosed as emotionally ill, for example, it was found that Mountain View housed the greatest number of boys diagnosed as such. Mountain View was the maximum security facility for older boys adjudged delinquent. It contained 158 diagnosed as emotionally ill while Gatesville, a medium security facility, had 117 such boys. Yet, the situation in 1973 was that "Mountain View with the greatest number of disturbed boys" received "less than a third of the psychiatric time

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[33] Amici at 14.

[34] Ibid.

spent at Gatesville."[35] This was found to be true throughout the system even though, as Dr. Knopka testified, the older children were in greater need of treatment than the younger ones. As she said, "the greater the past deprivation, the greater the present need for supplementary nourishment."[36] The experts concluded that, "The contrast between the philosophy and spirit in the newer TYC facilities as compared to their older stepsisters and brothers institutions" was "truly a Cinderella story in reverse . . ."[37]

In summary, the quality of life in TYC institutions was found to be the antithesis of an environment insuring that an individual becomes an independent, self-sufficient citizen in society. The environment in which these children were compelled to live was abnormal, without benefit of the social stimuli non-institutionalized juveniles receive from the community, the home, intersexual relations, family and friends. Perhaps the prevailing quality of life in the TYC institutions would have been reason enough for judicial intervention but the district court took notice as well of a wide variety of specific findings of fact regarding juveniles incarcerated in Texas institutions.

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[35] Ibid. at 46.

[36] Ibid. at 45.

[37] Ibid.

Physical Brutality

A major area of contention in this case involved physical brutality or violations of cruel and unusual punishment. In testifying about staff treatment of the TYC inmates, witnesses presented evidence concerning a number of instances where the staff had exerted excessive force in disciplining the juveniles. Mention of a few of these widespread practices is sufficient to prove the point.

The Court found the practice of striking and slapping the inmates to be widespread. The worst infractions apparently took place at Mountain View. At that school, "evidence of physical brutality inflicted by staff members on virtually every student was overwhelming."[38] One example involved a school principal instructing a new physical education teacher to "slap any student who did not follow instructions."[39] In one document, a staff member reported "that a correctional officer had struck R.C. (an inmate) several times without justification."[40] Although not as frequently, instances of physical abuse were also found at the girls' institutions.[41]

Many of the brutal practices were so prevalent that they acquired nicknames. "Fresh fish" was the name applied

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[38] Sandmann at 9.

[39] Morales at 74-75.

[40] Ibid. at 75.

[41] Ibid. at 76.

to new boys placed at Mountain View. They were apparently "initiated" or "'tested' by various forms of physical abuse, applied by staff or other boys with the encouragement of staff."[42] "Racking" was another practice so commonly used that it became a part of the vocabulary at Mountain View. This was the practice of lining a boy up against the wall with his hands in his pockets. The correctional officer then administered punishment or "racked" him by punching him in the stomach."[43] Another word, contained in the jargon at Gatesville, was "peel." This practice was "administered by forcing a boy to bend over, then striking him hard on the back with a fist or open hand."[44] Other vocabulary words peculiar to Gatesville included "tight" and "brogueing." A "tight" involved ordering a boy to grab his ankles and beating him on the buttocks, while "brogueing" was accomplished by kicking the boy in the shins.[45] Another practice was called "crumb." When assigned this punishment, a boy was "required to sit on a chair in the dormitory day room all

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[42] Ibid. at 73. An example of this given in testimony explained, "For example, one entering boy, identified as C.W., was initially beaten by the other boys in his cottage with the tacit approval of Correctional Officer Flores. . . . On the following day C.W. was hit and kicked by seven or eight boys in the corner of the cottage day room for more than an hour. After C.W. was knocked unconscious, Stovall," another correctional officer, "stopped further abuse, announcing that he did not want any 'dead fish' on his hands."

[43] Ibid.

[44] Ibid. at 76.

[45] Ibid.

day long, facing the wall, unable to talk or participate in any activities."[46]

Tear gassing was another commonly used means of control or punishment and a number of incidents were reported concerning the practice. It was so widespread that it was the subject, in a number of cases, of "'incident reports,' which are designed to record instances of the use of physical force by both inmates and staff of TYC."[47] For example, a casework supervisor, Clarence Stephens, filed two such reports on consecutive days stating that a boy had been subjected to tear gassing for refusal to work.[48] Counsel for the plaintiffs said that in many instances at Mountain View, tear gas was "sprayed in the faces of students, and . . . thrown into the cells of students who were not and could not have been threatening physical injury to other persons."[49]

Another instance of "brutal" treatment concerns the homosexual or "punk" dormitories at Mountain View. Dormitory One was reserved for black students who were allegedly homosexual. Dormitory Nine housed "homosexual" Anglos and Mexican Americans. Reasons for placement in these dormitories included having homosexual tendencies, being under "pressure" from other boys and causing friction or not getting

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[46]Sandmann at 11.

[47]Morales at 74.

[48]Ibid.

[49]Sandmann at 9.

along in the other dorms. The decision to place the juveniles in homosexual dormitories was made by "correctional officers, who are the least qualified and least educated of the staff and who have no special training in this regard."[50]

The Court found that certain "make work" tasks also constituted physical brutality, when the work was performed solely for punishment reasons and was "repetitive, nonfunctional, degrading and unnecessary."[51] Such tasks practiced in the TYC institutions included:

> . . . requiring the juvenile to pull grass without bending his knees on a large tract of ground not intended for cultivation or any other purpose; forcing him to move dirt with a shovel from one place on the ground to another and then back again many times; and making him buff a small area of the floor for a period of time exceeding that in which any reasonable person would conclude that the floor was sufficiently buffed.[52]

These various practices and others continued for several reasons, despite changes in case law, Texas statutes and correctional philosophy. Although there were procedures available for voicing complaints against the use of physical brutality, inmates seldom took advantage of them. In many cases, the boys and girls were unaware of the procedures. In others, they withheld complaints for fear of retaliation. In Gatesville, "Retaliation for filing a report has included

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[50] Morales at 75.

[51] Ibid. at 77.

[52] Ibid.

the assignment of extra duty to the complainant or his transfer to Mountain View for an eighteen month stay."[53] Transfer to Mountain View was possibly the most brutal form of treatment available to the correctional officers at Gatesville.

Even though there was an established procedure instructing the staff personnel to report any incidents of physical abuse, the reports were routinely ignored or falsified. The Court said that the reports were deliberately falsified in order to protect the correctional officers and that "witnesses do not file incident reports of staff brutality for fear of retaliation. Even boys who testified about Mountain View" during the Morales trial "feared for their physical safety upon returning."[54] Not only the correctional officers were involved in this deception, but also certain of the inmates known as "office boys." In return for special favors or out of fear, these boys acted as enforcers for the officers. Testimony on the part of some of the inmates revealed that office boys would "falsify reports to protect an officer, and . . . provoke an incident with a boy who has 'snitched' to injure him or prejudice his changes for release."[55]

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[53] Morales at 76.

[54] Ibid. at 74.

[55] Ibid.

Another regular practice at the TYC institutions considered inhumane by plaintiffs' counsel and the expert witnesses was locking girls in the rooms at Gainesville and Crockett. "During the approximately sixteen hours these girls" were confined to "their cottages each weekday, and the almost twenty-four hours (per day) each weekend," the vast majority of the time they were "locked or chained in their rooms."[56]

It was found that all children at TYC institutions were denied sufficient exercise and recreation. Counsel suggested that this practice constituted brutal and harmful treatment.[57]

Not only were certain forms of punishment physically brutal, they also often left the child so confused and frustrated as to constitute emotional and mental brutality. The students existed in a constant state of uncertainty because of a lack of clearly defined rules governing behavior. Students often learned of rules only after they had violated them and were facing punishment. Counsel for the plaintiffs pointed out that the students were "often subjected to harsh punishments, including beatings, for actions which were not known to be violative of any rules."[58]

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[56] Sandmann at 19.

[57] Ibid. at 15.

[58] Ibid.

Maximum Security Confinement

In some instances, the use of solitary confinement was claimed to constitute cruel and unusual punishment. The expert witnesses testified that "lengthy periods of sensory-depriving isolation" is a brutal form of punishment particularly for those young people who are emotionally disturbed.[59] In one interrogatory it was discovered that 44 of the inmates attempted suicide at TYC institutions from January 1, 1972 until the time that witnesses' testimony was taken, and that "Several of these suicide attempts were made while the young people were in isolation cells."[60] Dr. Konopka testified that isolation for the emotionally disturbed has a particularly destructive effect because they possess a "terrible need for human contact, the sound of other human voices and the sense of touch . . ."[61]

The use of solitary confinement at Mountain View was found to be especially brutal. Counsel for the plaintiffs pointed out that, for relatively minor rule infractions such as "gambling for candy," inmates were locked in their cells for many hours each day and released only to work at hard labor in the morning. They were totally deprived of any social interaction, such as eating with other inmates or

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[59] Amici at 22.

[60] Ibid.

[61] Ibid.

speaking to staff members unless required to do so. Although placed in a situation of enforced boredom, the inmates were not allowed to sleep before 10:00 p.m. even though some of them had previously been placed on sleep-inducing medication. If they refused to work, the supervisors in the solitary confinement section beat or tear gassed them and, occasionally, beat them for no other reason than their own personal amusement.[62]

In summary, the practices at TYC institutions which constituted brutal or cruel and unusual punishment included:

> . . . the arbitrary use of solitary confinement and its attendant deprivations for punitive purposes with no prior procedural safeguards, the physical beatings and physically destructive punishment to which children have been subjected, the denial of necessary periods of recreation, the intentional denial of needed medical care, the use of tear gas, the lack of clear and known rules, and the practice of using night chains to lock girls into their rooms during much of the day. . .[63]

Disciplinary Procedures

The Court found that disciplinary practices and procedures at TYC institutions took place in an atmosphere void of regular procedural protections. In most instances the inmates were not even made aware of what specific actions would be considered in violation of the institutional rules.

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[62] Sandmann at 10.

[63] Ibid. at 22.

These "rules" varied from one facility to the next as did the punishment meted out for rule infractions.[64]

Mountain View

At Mountain View, there was a security wing (STC) where the boys were sent for disciplinary reasons. Ordinarily boys were not confined there for longer than seventeen days but some were sent for as long as thirty days. The boys at Mountain View were not made aware of the conduct that would result in a transfer to the security wing, and the decision to send a boy there was usually left to the discretion of a correctional officer.[65] Instances were found in the institutional records where the boys had received from twelve to twenty-five days in the security wing for infractions such as "not doing exercises," "trying to slip letters out," "writing love notes to another boy," "writing love letters to a lady academic teacher," "refusing to work," "throwing a bar of soap at a boy," and "masturbation."[66]

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[64] Ibid. at 37. According to counsel for the plaintiff, "The record in this case established that TYC students are not informed of the rules of the institutions, that those rules which do exist are sometimes enforced and sometimes ignored, and that the punishment for unacceptable behavior or infractions of the rules is not dispensed evenly but instead varies from one staff member to another."

[65] Morales at 78.

[66] Ibid.

Conditions in the security wing, at the time of the Morales trial, were as follows:

> Each cell in the STC is a six-by-twelve foot locked room with a solid door. The door has a small window which is painted over, and a narrow slit for food trays. The cell's only artificial light resembles the headlamp on a car and is located in a wall near the door. The light is never turned off and is presumably intended to keep the room's occupant awake. Moreover, the cell is poorly ventilated; it is hot in summer and cold in winter. On weekends and after 3:30 o'clock, p.m., the guard does not have a key to the locked security cells. In an emergency, he must call out to a supervisor outside the unit to come and open a door.[67]

Treatment of the juveniles while confined in the security wing was especially brutal and degrading, and any rule infraction taking place, while so confined, resulted in extreme punishment.[68] A work detail practiced in the security wing involved "picking," where the boys were lined up and required to swing a heavy pick over their heads and then strike the ground, moving forward after each "pick." This work detail lasted five hours with a fifteen minute break every hour and a half.[69]

Placement in the security wing was reviewed by a committee of supervisors twice a week. The boys appeared before

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[67] Ibid. at 79.

[68] Ibid.

[69] Ibid. "For the less than heinous offense of talking while picking, one boy was punched in the chest by a correctional officer until he doubled over, and was then hit in the mouth. Others were beaten because they dropped their picks or became ill."

the committee, often after violent treatment. "A boy under review by the discipline committee was required to run in his bare feet--at top speed--from the security wing to the committee meeting room. If the boy didn't run fast enough, he was 'racked' or beaten by a correctional officer."[70] The boys appeared before the committee without the advantage of an advocate. After the committee meeting, they were either sent back to the STC or released with no explanation of the decision by the committee.

Boys at Mountain View who were punished for disciplinary infractions but not sent to the security treatment wing were ordinarily given "extra duty." These duties involved senseless, make-work tasks such as pulling grass. Dispositions taken from inmates and testimony of witnesses showed that the boys were brutally punished for any infraction taking place during work duty.[71] Another frequently used punishment was being placed "on shovel." The boys were made to run around in a circle carrying a shovelful of dirt, shifting the dirt from one pile to another. The duty lasted

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[70] Ibid.

[71] Ibid. Judge Justice pointed out an example of this in the body of his opinion. One boy, R.J., grew fatigued after three hours of pulling and bent his knees. For this he was "kicked in the back and punched in the mouth." When he tried to stand up he was kicked in the head by a correctional officer who had boots on. Later, after complaining of a sideache, he was kicked twice more. Finally, he ran from the work detail but was apprehended by another officer who struck him many times in the mouth and stomach and kicked him when he fell to the floor.

as long as six hours per day.[72] Typical offenses for drawing extra duty included "talking back, talking in the 'chow line,' 'not finishing all the food on their plate,' 'wearing shoes in the dormitory,' 'not changing their pants,' 'just irritating an officer."[73]

Gatesville

At Gatesville, as at Mountain View, there was no published set of rules or procedures for instructing a boy as to the institutional rules. A typical punishment for infraction of the nonexistent rules was placing a boy "on crumb." This practice was previously described. Failure to follow the required procedure again resulted in brutal beatings.[74] Other punishments included head shaving, face shaving with a pocketknife, and forcing a boy to stand and hold a chair at arm's length for long periods of time.[75] A particularly gruesome extra duty at Gatesville was forcing a boy to work in a sewage or garbage ditch. "After working in this ditch, up to the waist in garbage and stench for four hours, a boy would then be required to go to lunch without changing his clothes or taking a shower."[76]

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[72] Ibid. at 81.

[73] Ibid. at 80.

[74] Ibid. at 81.

[75] Ibid.

[76] Ibid.

Crockett

Although the girls at Crockett State School for Girls received a copy of some of the rules, they were not fully informed. Violation of the institutional rules sometimes resulted in placement in the Security Treatment Cottage (STC) or in "room lockup." The records showed that it was not uncommon for a girl to be confined in the STC unit for more than thirty days. In the superintendent's opinion, there was no violation of TYC policy when a girl was placed in STC for thirty days and returned to the confinement, after having been released for a few hours, for an additional number of days.[77] "Room lockup" involved placing a girl in a room stripped of furnishings for several days. She was forced to sleep on the floor, sometimes denied clothes and shoes and had little opportunity for communication with anyone.[78]

Gainesville

Gainesville, like Gatesville and Mountain View, offered no introductory instruction as to the rules and regulations of the institution, and the decision to punish was totally at the staff's discretion. Disciplinary measures at Gainesville involved a procedure similar to the STC concept at Crockett, except all of the locked rooms were furnished at least with a bed. On the average, the girls spent

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[77] Ibid. at 82.

[78] Ibid.

fourteen days in the STC and would be allowed to communicate with no one except the disciplinary committee. Some examples of misconduct resulting in STC placement were "whispering," 'lagging' in line, calling a houseparent 'honey,' and chewing gum."[79]

Brownwood

The Brownwood facility had made provision for security confinement similar to that of Crockett and Gainesville. However, girls confined in isolation were regularly visited by institutional personnel and, if placed in a stripped cell, provided with pajamas and a blanket. The Court took notice with approval that isolated confinement was rarely used at Brownwood and that girls who posed problems were usually dealt with in their regular rooms.[80]

In summary, the decision to punish or discipline the students was made without notice of the rules, a hearing, opportunity to confront the accusers or present evidence, a neutral fact-finder, a written record, or an opportunity to appeal the decision.[81] It was suggested by plaintiff's counsel that regular due process procedures should be followed, prior to decision-making, which would result in disciplinary punishment; transfer to a more secure institution;

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[79] Ibid.

[80] Ibid. at 83.

[81] Sandmann at 42.

a decision to continue custody of a child after he has become eligible for parole; a decision to lengthen a child's period of confinement beyond the committing Court's recommendation and a decision concerning parole revocation.[82]

Assessment and Placement

Assessment and placement of Texas juveniles took place at one of two centers operated by the TYC. Boys were dealt with at the Statewide Reception Center for Boys located at Gatesville, and girls, at the Statewide Reception Center for Girls located at Brownwood. At Gatesville, placement decisions were made by a classification committee which included "the Director of Admissions, the Director of the Reception Center, a clinical psychologist, a medical psychiatric social worker, a chaplin, a casework coordinator, and an academic superintendent."[83] The equivalent group at Brownwood included "the medical psychiatric caseworker, the girl's caseworker, the academic educational-vocational counselor, the houseparent supervisor, the chaplin, a school teacher, and, sometimes, the psychologist."[84] In neither case was the boy or girl present at the hearing which determined placement, nor were they or their families allowed to

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[82] Ibid. at 34.

[83] Morales at 85.

[84] Ibid. at 87.

participate in the decision. Also, there was no one on either committee acting in the role of advocate for the child.

Brownwood provided special attention to Mexican American girls by including two Spanish-speaking caseworkers on the staff.[85] However, at Gatesville there were neither Spanish-speaking caseworkers nor Blacks on the staff, even though it was often the case that the child was a Mexican National or a Mexican American and "approximately one-third of the new admissions . . ." were Black.[86] The Mexican American girls at Brownwood were disgnosed through tests which were adjusted by a bilingual index but expert witnesses testified that such an index is inadequate and inaccurate; therefore, even though an attempt was made at Brownwood to recognize cultural difference, it did not adequately compensate for them.[87]

Both of the intake centers attempted to provide for psychiatric examinations. These were not always available to the boys.[88] When the boys were tested, the person who had done the testing was frequently unavailable at the time the placement decision was made because of "the frequent turnover of personnel on the classification committee."[89]

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[85] Ibid.

[86] Ibid. at 85.

[87] Ibid. at 87.

[88] Ibid. at 86.

[89] Ibid.

In fact, it was found unlikely that any member of the classification committee had had previous personal contact with the child. When psychological recommendations were available to the committee, there was apparently little or no follow-up or feedback to determine whether the child was receiving the recommended treatment.[90] It was found that generally those who recommended specific treatment were not even aware of whether that treatment was available at the institution to which the youths were assigned.[91]

There was some attempt at rational classification for the girls. At Brownwood, they were divided into categories: "immature delinquent, neurotics, unsocialized delinquents, and subcultural delinquents."[92] These categories were significant only at the Brownwood institution. They were not used at Crockett and Gainesville.

It appeared, in fact, that there were no formal written criteria for determining institutional placement of a child, for providing recommendations as to the necessary rehabilitative treatment, or for feedback in order to assure that the treatment was being provided. Placement decisions were made in a few minutes by a classification committee with the child's offense being the main criteria in deciding where

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[90] Ibid.

[91] Amici at 9.

[92] Morales at 86.

to send him.[93] "Assignment to a particular institution" was based "almost entirely on age, size, and prior record."[94] Other relevant criteria included aggressiveness, educational level, and institutional vacancies.[95] In summary on the question of assessment and placement, Judge Justice stated:

> First, since so few choices in placement are presently available to the classification committee at the Gatesville Reception Center, the classification procedure itself is practically meaningless. . . . the present placement system accomplishes no more than would random placement on a space-available basis. Secondly, though the Brownwood classification procedures provide more opportunities for meaningful placement, these recommendations cannot be carried out at the receiving schools.[96]

One of the superintendents stated, matter of factly, that despite test results or recommendations, the institutions do as they please with a child once they receive him.[97]

Academic Education

The academic testing procedure used for the purpose of assigning children to academic programs was found to be "inaccurate, outdated, and discriminatory."[98] Even the TYC staff agreed that the particular tests used were not

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[93] Ibid. at 85-8.

[94] Amici at 9.

[95] Morales at 87.

[96] Ibid.

[97] Amici at 9.

[98] Sandemann at 103.

individualized and were inaccurate. Because the IQ tests used were based to a great extent on verbal comprehension, they were also discriminatory against Blacks and Mexican Americans because their verbal comprehension is ordinarily lower than that of Anglo students.[99] This problem was compounded by almost exclusive reliance on these test scores for academic placement. Little or no attempt was made to justify the placement decisions on other grounds. For example, there were no tests given for detecting "minimal brain dysfunction or dyslexia."[100]

Plaintiff's counsel argued that the educational program provided for TYC students was in violation of the Fourteenth Amendment Equal Protection Clause. The reason for this argument was that, although there were academic educational programs available, only a few of the students could benefit from them. The only ones who could benefit were the "normal" students who could have functioned in an average situation in a regular public school. For those students with educational and/or emotional handicaps, there was little or no academic education available.[101] Specific figures point out the enormity of this lack. On May 1, 1973, the following

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[99] Ibid.

[100] Ibid. at 105.

[101] Ibid. at 91.

numbers of children were diagnosed as being seriously emotionally disturbed:[102]

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|---|---|
| Giddings | 18 |
| Gatesville | 117 |
| Mountain View | 158 |
| Brownwood | 13 |
| Crockett | 35 |
| Gainesville | 31 |

In addition, there were found to be many students in TYC institutions suffering from educational handicaps. The following numbers of children were diagnosed, on the same date, as having intelligence quotients lower than 70:[103]

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|---|---|
| Brownwood | 17 |
| Crockett | 38 |
| Gainesville | 11 |
| Giddings | 5 |
| Gatesville | 102 |
| Mountain View | 36 |

At least these children, and probably more, were in need of some form of special education. In general, expert witnesses testified "that only four and six-tenths per cent of all juveniles incarcerated by the TYC are at their proper educational grade level."[104] They also found that, on the average, TYC students are five years behind the normal reading level for their age group.[105]

Plaintiffs' counsel pointed out that, "With proper testing and diagnosis, approximately 80% of the TYC students

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[102] Morales at 88.

[103] Ibid. at 89.

[104] Ibid. at 88.

[105] Ibid.

would be found to require special educational programs ranging from classes for mentally retarded children to programs for dyslexic children."[106]

In spite of these statistics, the TYC at the time of the Morales trial employed no certified special education teachers at Gatesville or Gainesville, one such teacher at Mountain View and Crockett, and two at Brownwood.[107]

Although a substantial number of Mexican American students are institutionalized in TYC facilities, there were no bilingual programs offered at any of the institutions. This situation existed despite the fact that approximately 25 percent of the juveniles were Mexican American and many of them could speak little or no English.[108] The practice of offering education only in English resulted in Mexican American students being placed in the same classes as retarded children because the testing procedures did not adequately deal with cultural differences. In other words, if a child could not read English, for whatever reason, he was placed in a separate class, even though these "special classes" were not taught by certified teachers of special education.[109]

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[106] Sandmann at 87.

[107] Morales at 88.

[108] Sandmann at 105.

[109] Morales at 89.

Vocational Education

The facilities for providing vocational training at the TYC institutions were also found to be inadequate. Training in useful job skills constitutes what has long been recognized as a successful rehabilitative technique.

The evidence presented with reference to vocational training, for the most part, referred to the prevailing situation at Gatesville. It was found, to begin with, that there were no provisions for counseling or testing.[110] There was one vocational rehabilitation counselor, but his job consisted mainly of "recommending students for vocational rehabilitation after their release from TYC."[111] (emphasis supplied)

The vocational program at Gatesville was divided into two parts. One involved educational courses which took boys on a space available basis. The other involved "work experience." The work experience served mainly the purpose of institutional maintenance. The instructors were not accredited teachers and the boys received no school credit for their endeavors. They were not paid any wages for their work even though the institution was able to hire fewer employees as a result. The tasks undertaken by the boys consisted mainly of laundry and maintenance work. They also worked in a

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[110] Ibid. at 91.

[111] Ibid.

warehouse, the food service division, the dormitory clothing room or other areas.[112]

The vocational education programs were fashioned with no input from employers or unions. Part of the reason for this was the physical distance of the TYC plants from the major Texas employers and union headquarters. There were no means provided for follow-up or feedback on the students who had participated in the vocational program in order to evaluate the vocational training's effectiveness. No one knew whether the programs were preparing the students in marketable skills, but it was doubtful because of the absence of employer or union participation.[113]

Institutional Life

Institutional life includes those factors which are deemed necessary for "normal" adolescent growth. According to the Court:

> The essential ingredients of normality for a youth are a sense of self-respect, warm and understanding adults, a chance to participate in decisions that affect him, adequate diet and recreation, opportunity for adventure and challenge, and legitimate outlets for tension, anger and anxiety.[114]

These factors enable a youth to engage in the tasks necessary to become an independent adult. The Court said:

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[112] Ibid.

[113] Ibid.

[114] Ibid. at 92.

> These tasks include establishing sexual identity, developing intellectual and occupational skills, achieving independence from parental authority, developing a capacity for genuinely intimate relationships and, finally, evolving a moral code to govern future actions.[115]

On an account by account basis, the Court recognized that various factors of institutional life are probably not paramount in the rehabilitation of youthful offenders. Taken as a whole, however, these factors of "normal" everyday living were deemed to be important. These factors include life in general in the institutions, placement inside the institutions, dormitories, regimentation, institutional indignities, diets and mealtime, recreation, personal identity, and the socialization process.

The Court recognized that without these normal ingredients, no treatment program would be adequate or effective in the overall rehabilitation of the inmates. Any adolescent is dependent on these factors in order to become an independent adult. Most of the youths incarcerated at TYC institutions have been deprived of many or all of the requirements of normal growth even before they came to the court's attention and, therefore, may have even greater needs than one who has not been institutionalized.

Personnel

Theoretically, each juvenile should be assigned one person who is responsible for the overall program designed

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[115] Ibid.

for his rehabilitation. This includes the decision as to which cottage or dormitory the juvenile is assigned. At Gainesville, Crockett, Gatesville and Mountain View there was no opportunity afforded the boys and girls to provide an input in the institutional placement decision and no attempt to place the juveniles in cottages where the houseparents' personalities would be compatible with the child's. Furthermore, in these four institutions, no one person is assigned responsibility for a particular juvenile's treatment plan.[116] As mentioned previously, the younger juveniles are sent to Brownwood for girls or Giddings for boys. Life in these institutions was found to be a very different proposition. They had a more qualified staff and a more reasonable staff/student ratio. They allowed a great deal more individual freedom to the children to make choices for themselves and to participate in the decisions that affect their lives.[117]

The expert witnesses unanimously felt that a team treatment approach was crucial in the rehabilitative process. But at the four earlier mentioned institutions, the various staff members operated under separate lines of supervisory authority with little or no communication among them as to a particular child's program or needs.[118]

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[116] Ibid. at 93.

[117] Amici at 42-5.

[118] Morales at 93.

Dormitories

In order to insure that the juveniles have adequate opportunity for personal growth, certain dormitory characteristics were deemed important. A child needs a certain amount of privacy and solitude. He needs to feel secure, and he needs the warmth provided by a "normal" home. The dormitories at some of the institutions were open, designed to house thirty to forty boys in one room, with end to end cots. The expert witnesses testified that "it is necessary to have single rooms or rooms for 2-4 children for rehabilitative purposes, and that the use of open dorms does not provide a sense of security for the children and is 'inexcusable.'"[119] There was found to be a lack of security in at least two areas: one in regard to personal security; the other, in regard to the mental and emotional security that comes from knowing what behavior is expected. In terms of personal security the juveniles in some of the dormitories were supervised and "protected" by a single guard who sat in a wire mesh cage. If an attack on one of the juveniles, or some other sort of emergency arose, the guard was not allowed to leave the cage until assistance arrived. This situation was deemed to be expecially insecure in dormitories which houses the hard core delinquent population. As far as dormitory rules and customs were concerned, it was found they varied from dorm to dorm

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[119]Sandmann at 33.

and, in some cases, changed from day-to-day depending on the duty officer's personality. A normal home situation is, in all probability, impossible to achieve in institutional life, but most of the dormitories under TYC jurisdiction were found to be "cold, impersonal, and insecure."[120]

Daily Life

The Court found that, "The most striking characteristic of daily life in most TYC institutions is overwhelming monotony and regimentation."[121] Even though it is agreed, as before mentioned, that the opportunity to make personal decisions, be creative, meet challenges and act independently is imperative for rehabilitation purposes, there was little such opportunity available at the TYC institutions. Daily life was strictly routinized, though some institutions were found to be stricter than others. There was provision for a small amount of unsupervised recreation but various restrictions cancelled most of the opportunity for individuality. Television, smoking, and, in some cases, board games, were apparently the only recreational opportunities available. Horrifyingly, one of the expert witnesses, on one occasion, found a dormitory room filled with boys numbly watching a broken television set![122]

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[120] *Morales* at 95.

[121] *Ibid.*

[122] *Ibid.* at 96.

Development of the full human potential of each child was made impossible by various practices which degraded his self-respect and led him to feel subhuman. Probably even more destructive was the fact that these practices taught that it is proper behavior for those in power to abuse others who are weaker and more gentle.[123] These practices included derogatory name calling, forcing girls to use chamber pots instead of letting them leave their rooms during the night to use the restrooms, and abuse of the inmates' personal possessions through unannounced, unjustified room searches.[124]

Diet and Mealtime

A normal part of human environment is the need for adequate nourishment taken under pleasant conditions. It was found at some of the institutions that meals were starchy and tasteless, and the girls particularly suffered excess weight gain as a result of the diet and too little exercise. Part of the reason for the lackluster meals was that the TYC employed no dieticians.[125]

In addition to the complaints of lack of balanced nutrition and tastelessness, there were others given in depositions. The girls complained of finding bugs in their food. The boys apparently perceived their food as being

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[123] Ibid. at 97.

[124] Ibid. at 96.

[125] Ibid. at 97.

"contaminated by other boys having urinated, spit, or defecated in it."[126] The inmates were severely regimented upon entering the dining room, eating their food, and leaving the premises. In some institutions they were made to eat in haste, making the atmosphere tense and unnatural. Expert witnesses felt that this practice, as with many others, served to increase the disrespect the inmates held for themselves and others.[127]

Recreation

At the TYC institutions, again with the exceptions of Giddings and Brownwood, which were reserved for the younger, "less sophisticated" children, there was little opportunity for recreation, especially outdoor types of activities. Smoking and watching television, as mentioned before, appeared to be the primary forms of recreation available. Some team sports were organized for the boys but this was left to the discretion of the correctional officer in charge. Indoor activities were occasionally planned for the girls but they were ordinarily childish and uninteresting. These games included such peurile activities as "hot potato," "musical chairs," and "poor kitty." For example, "poor kitty" is a game where "one girl crawls around on the floor

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[126] Ibid.

[127] Ibid.

and other girls pat her three times on the head and try to say 'poor kitty' without laughing."[128]

Expert witnesses testified that physical activity serves as a natural outlet for hostility and aggression, and the lack of provisions for such an outlet could be a basic cause of fights among inmates as well as depression and suicidal tendencies.[129]

Identity

Judge Justice quoted Emerson in order to define what is meant by a sense of identity. He said it is "the reflection of a man's own worthiness from other men."[130] In other words, it is a primary task of humankind to establish a positive self-image. It follows that practices which diminish the individual's self-respect work against the rehabilitative process. Regular institutional practices were found to degrade the self-image of the inmates. Some of these included calling the children by numbers or degrading nicknames, enforcing stereotyped dress codes, and refusing to permit individualized hair styles.[131]

Segregation According to Sex

It was unanimously agreed by the plaintiffs, defendants, and expert witnesses that coeducational institutions

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[128] Ibid. at 98, note #24.

[129] Ibid.

[130] Ibid.

[131] Ibid. at 99.

are better then sex-segregated facilities, because the former offer an opportunity for contact with the opposite sex, a mandatory element in the normal growth and socialization process of adolescents. The TYC institutions were found to be almost totally segregated according to sex with little or no opportunity for heterosexual contact. Only one student out of many who testified at this trial said that he had "participated in a coeducational activity, and he did so only the one time."[132] There was no sex education or counseling at any of the TYC institutions. Any form of emotional expression between members of the same sex was severely repressed. "At the girls' institutions, . . . actions such as holding another girl's hand, borrowing her clothes, combing her hair or sitting on her bed," were punished.[133] Sexial experimentation, considered normal adolescent behavior by the expert witnesses, such as masturbation and exhibitionism, was also repressed and punished.[134] It was pointed out that the fear of homosexual behavior was so profound on the part of the staff, that the girls practiced a sort of "underground

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[132] Ibid.

[133] Ibid. at 100.

[134] Ibid. at 99-100. As mentioned previously, at Mountain View, placement in the homosexual or "punk" dorms was a form of punishment. This resulted in active, aggressive homosexuals being housed in the same dormitory with smaller, weaker boys and those boys simply confused about their sexual identity. This practice was considered so appalling that expert witnesses didn't even try to justify it.

culture" in order to irritate the staff as a form of rebellion.[135]

Judge Justice concluded that these various aspects of institutional life amounted to a travesty because:

> No matter how well intentioned and professional a juvenile's treatment plan, it will be rendered worthless by an accumulation of daily indignities, discomforts, and harassments, such as were documented at the trial. Moreover, many of the practices described at the trial force juveniles confined by the TYC to exist in an environment that is exceedingly deprived--psychologically, emotionally, and physically.[136]

Medical and Psychiatric Care

The medical and psychiatric care afforded juveniles under TYC jurisdiction was found to be lacking in quantity, as well as quality. In order to examine quantitive medical care standards, the Court took notice of a medical expert's testimony. He stated that minimal care demanded a nurse on duty 24 hours a day for every hundred students, and a doctor on duty during the day, and on call all other times, for every hundred students. He further testified that all medical personnel should have special training in the field of adolescent medicine.[137]

To begin with, there were no medical doctors employed full time by the TYC.[138] It was noted that a doctor visited

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[135] Ibid. at 100.

[136] Ibid.

[137] Ibid. at 101.

[138] Ibid. at 102.

Gainesville and Crockett one day each week; Gatesville, two days per week; and Mountain View, three days each week. Although all the institutions hired registered nurses, they were not on duty at all times, particularly nights and weekends. This left important medical decisions to licensed vocational nurses or to infirmary aides. These aides were correctional officers with no mandatory medical training.[139]

Many instances were reported at the trial where students, in need of medical attention, received treatment long after it was called for or not at all. For example, a student at Crocket testified that she had been taking penicillin when she attempted to escape and was placed in solitary confinement. She subsequently began to vomit blood. A nurse checked her more than an hour later, but she never saw a doctor nor received any medication. Another student reported being delayed in seeing a doctor for approximately two days after having a miscarriage. A third incident reported at Crockett involved the death of a girl who had inhaled the contents of an aerosol can. There were no medically trained personnel on hand at the time.[140]

Experts testified that besides regular medical care, there should also be a full-time psychiatrist available for every one hundred children. They also believed that, for

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[139] Ibid. at 101-2.

[140] Ibid. at 102.

the same number of students, minimal standards required one psychologist with a Doctorate, two with Master's degrees, and psychiatric nurses. None of the TYC institutions met these standards. They were all found to be extremely inadequate in terms of available psychiatric care.[141] This was in part due to the remoteness of the TYC institutions from urban settings. Under these circumstances, it is difficult to recruit qualified people. Psychological services were also found to be inadequate.

In discussing medical and psychiatric services, the Court took notice of abusive practices relating to psychotropic medication. Major tranquilizers, such as Thorazine, were being dispensed for a variety of reasons including sleep induction. These medicines were often prescribed and administered by personnel lacking the necessary knowledge and experience of the drugs' expected results and possible side effects. The houseparents, dormitory supervisors, teachers, correctional officers and other staff members were not kept informed of a student's medication by any systematic procedure. As a result of this communication gap, students taking sleep-inducing drugs were often punished for falling asleep.[142]

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[141] Ibid. at 102-3.

[142] Ibid. at 103-4.

Houseparents and Correctional Officers

Staff members who spend the greatest amount of time with the juveniles are the houseparents and correctional officers, or other staff members, assigned to the position of supervising dormitories. The expert witnesses agreed that these particular people should be able to help the children express their anxieties and other emotions in a constructive manner, and certainly not simply suppress them.[143] They are also important as role models, particularly because many of the juveniles come from homes where there is no role model, or the choice of models has been unfortunate.[144] The majority of supervisory personnel questioned, however, viewed their role as one of maintaining control and little else. For example, it was observed at Gainesville that the houseparents perform no treatment role, discourage the expression of emotion, and believe the "best" girls to be the ones who were quiet and passive.[145]

Psychological Screening

In recruiting the dormitory supervisors and houseparents there was no attempt made at psychological screening; even though it is known that corrections work, for an unexplained reason, is particularly attractive to violent

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[143] Ibid. at 106.

[144] Ibid.

[145] Ibid. at 107.

and sadistic people.[146] At least in part because there was no provision for psychological screening of prospective staff members, in 1972 there were eleven staff members at Gatesville and six at Mountain View discharged for use of excessive force. Based on the testimony given at this trial, the court learned that there were undoubtedly many others who should or could be discharged for the same reason.

Educational Background and Training

Educational background was another characteristic taken into account in assessing the quality of these staff members. "Some experts thought houseparents should have a minimum of two years of college training, because of their prime importance in the treatment process."[147] Ideally, the houseparents should also have an interest in, as well as prior experience in, working with children.

Although state law requires that these staff members have a high school education or its equivalent, it was found that at least one houseparent supervisor at Gainesville did not have a diploma. It was not determined at the trial whether or not the houseparents at Crockett had degrees because the superintendent was unable to supply that information. Employees at Gatesville and Mountain View generally tended to have no prior experience working with juveniles. They

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[146] Ibid. at 106.

[147] Ibid.

were often retired military personnel or citizens of the local community who held other full-time jobs. The Court said that "minimally, houseparents should have both pre-job training and in-service training and supervision."[148] Houseparents should be given a basic understanding of the institutional goals and purposes, and should have some knowledge of the principles of child care. They should be supervised by trained and qualified personnel. The Court observed that each newly hired staff member's training should last three to four months with a minimum of thirty hours devoted to sensitivity training.[149]

The training situation at Brownwood was described as model. It included in-service training for houseparents which consisted of lectures discussing work "with Mexican American children, drug abuse, normal adolescent behavior, family therapy, and discipline techniques." For some unexplained reason, however, this training was not persued at the other institutions. The best circumstances available, elsewhere in the system, afforded the houseparents and correctional officers "several hours of lecture and one or two weeks of on-the-job training." Although there had been a few sporadic attempts at in-service training, it was provided only when funds were available and had been stopped altogether in 1972.[150]

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[148] Ibid. at 109.

[149] Ibid. at 109-10.

[150] Ibid. at 110.

Much of the so-called training of correctional employees was determined to be worse than none at all. The instruction was rigid, haphazard, and difficult to interpret, leaving the employee confused and frustrated. For example, at Gainesville, the houseparents were presented with a memorandum explaining the delinquent sub-cultures that develop within institutions. They were instructed to discourage the development of these sub-cultures. As a result, "This mandate was interpreted by houseparents as a directive to discourage any show of leadership or ability by a girl."[151] "At Gatesville, training for new correctional officers consisted exclusively of having them sit in dormitories and watch other correctional officers at work. They were also provided with a book entitled 'Manual for Control.'"[152] Mountain View officers received no prior training, and there was no in-service training at either Gatesville or Mountain View. At the boys' institutions, the officers were instructed to use force when the boys were "out of control." There were no instructions concerning what kind of force, when to use it, or what "out of control" meant.[153] The result was the abusive and brutal treatment discussed earlier in this chapter. As a result of poor training and

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[151] Ibid.

[152] Ibid.

[153] Ibid.

the lack of consistent discipline techniques, the juvenile developed a distrust and disrespect for the law.[154]

Environment and Racial Background

Expert witnesses testified as to the importance of staff members understanding the environment from which a juvenile comes. It was found, that despite many of the students coming from urban settings, most of the staff was of a rural orientation.[155] Also, it was deemed important by the experts that the racial mix of the staff adequately reflect that of the students. It is necessary for one thing to the rehabilitative process that all the children see members of their own race, particularly the minorities, in positions of respect, status, and authority.[156] There was no apparent attempt to hire Blacks or Mexican Americans, which would have been difficult to do because of the geographical location of the institutions. In the TYC institutions, at the time of this trial, 41.9 per cent of the students were Anglo; 34.1 per cent were Black; and 23.9 per cent were Mexican American. The staff percentages were as follows: 83.5 per cent -- Anglo, 13.7 per cent--Black, and 2.5 per cent--Mexican American. At Mountain View, in particular, 68.7 per cent of the students were non-Anglo, but 88.6 per cent of the staff

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[154] Ibid. at 111.

[155] Ibid. at 108.

[156] Ibid. at 106.

were Anglo. At Gatesville, 61 per cent of the students were non-Anglo but 85.7 per cent of the staff was Anglo.[157]

In terms of those individuals who work the most closely with the children, the recruitment and training programs were far below the requirements for development of a professional treatment approach. Even if the staff had been properly recruited and trained, the evidence indicated that their numbers were inadequate for treating each child individually. There is no agreed upon formula for staff/student ratios, but the experts suggested that one staff member to every twelve inmates is minimal. A one-to-six ratio was even suggested as the best figure. The TYC institutions were again found inadequate in this matter. For example, there was one correctional officer to supervise every thirty boys at Gatesville. The ratio at Gainesville was approximately one to sixteen or seventeen. This problem was further complicated by a high rate of staff turnover; fifty-two per cent annually at Mountain View, for instance.[158]

Caseworkers

While the houseparents and correctional officers have the greatest amount of day-to-day contact with the children, the caseworkers are also vital to the rehabilitative process. They are responsible for coordinating the

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[157] Ibid. at 108.

[158] Ibid. at 111.

overall treatment plan and assuring that all staff members who deal with a particular child understand the purpose and goals of each individualized plan. Inadequacies concerning the caseworkers closely paralleled those of houseparents and correctional officers. Except at Brownwood, the caseworkers were found to be understaffed and undertrained. In most cases, a juvenile saw his caseworker about once a month, if that. The caseworkers were responsible for more than a satisfactory number of children.[159] Their office hours usually did not coincide with hours that were convenient for the children, and there was no apparent attempt on the part of the caseworkers to actively seek contact with the children. They passively waited in their offices for the children to initiate contact.[160] The caseworkers were, in general, poorly trained in the relevant knowledge and experience necessary to carry out their jobs.[161] It was again agreed by

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[159] Ibid. at 112. Several of the experts testified that a one-to-twenty ratio was minimal. Yet, the caseloads at the institutions were one caseworker to "twenty-five to thirty-five girls at Gainesville; at Crockett, thirty to forty girls; at Brownwood, twenty to twenty-five girls; at Gatesville, forty to forty-five boys; and at Mountain View, forty to fifty boys."

[160] Ibid. "Expert witnesses agreed that most children are not aware of the potential uses of a caseworker and will not initiate a contact."

[161] Ibid. Expert witnesses testified that minimally the caseworkers should have a Bachelor of Arts degree in psychology or social work and preferably a Master's of Social Work. "At the time of the trial there was only one caseworker at Gainesville with a Master's degree. Others had college degrees, but in subjects unrelated to social work. None of

the expert witnesses that the minority children should have caseworkers of their own race in order to improve communication. The percentage of minority caseworkers was found, however, to be extremely inadequate.[162] Finally, expert witnesses testified that high quality supervision of the caseworkers was imperative in order to provide consultation and expert advice, especially on difficult cases. It was found that in no TYC institution did the caseworkers receive aid and supervision from a staff member with a Master's degree.[163]

The contact between caseworker and child was not considered to be a therapeutic relationship. The children's perception was that going to a caseworker did not alleviate any of their problems. They were often afraid to approach their caseworkers for fear of retaliation by the correctional officers.[164]

The conclusion of the Court regarding the quality of casework care was that:

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the caseworkers at Mountain View had any formal training in group work. . . . No caseworker with a Master's degree in social work was employed in any of the seven subschools at Gatesville."

[162] Ibid. at 113. There were no Mexican-American caseworkers at Crockett, Gatesville, and Mountain View. There was a temporary one at Gainesville. In terms of Black caseworkers, there were two at Crockett, three at Gatesville and one each at Mountain View and Gainesville.

[163] Ibid.

[164] Ibid. at 115.

> . . . caseworkers throughout TYC institutions are not capable of doing their assigned tasks, have inadequate knowledge of the modalities of treatment and the dynamics of adolescent behavior, and do not receive adequate supervision or in-service training.[165]

Families and Friends

Aside from the important role that houseparents, correctional officers and caseworkers play in a child's chances for rehabilitation, the court recognized two other important sources of human contact--the family and the peer group. "Expert witnesses were in entire agreement as to the vital importance of involving the juvenile's family in his treatment."[166] The family is important to a child, regardless of how it has treated him, for emotional support. Mexican American children are especially in need of contact from family and friends because of the lack of Mexican American role models available on the institutional staffs.[167]

Aside from Brownwood, there was little or no apparent attempt in the other institutions to involve the family in a child's treatment program. The superintendent at Gainesville testified that only thirty to forty per cent of the girls there receive any visitors from the outside community during their stay.[168] Part of the reason for this is the

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[165] Ibid.

[166] Ibid.

[167] Ibid. at 116.

[168] Ibid. at 117.

geographical remoteness of the facilities. El Paso, for example, is approximately 600 miles away from Gainesville. Most of the juveniles incarcerated in TYC institutions are the products of poor or low income families.[169] The cost of financing a visit to a child in one of the remote institutions is frequently impossible for such families. A second reason for the infrequent family visitations was institutional restrictions on such contacts. For example, Gainesville allowed visitation only on Sundays, and Gatesville invited families to visit one Sunday per month.[170]

Despite the hardships faced by families desirous of visiting their children, it was even more impossible for friends to visit the TYC inmates. The Court found evidence that visits from friends were rarely allowed even though the experts testified that such visits would aid in the rehabilitation of the child.[171]

Allowing the inmates an opportunity for home visits on furloughs was an even rarer practice. The boys at Gatesville and Mountain View were allowed no furloughs except in emergencies. The girls at Crockett and Gainesville had to wait nine months before they were considered eligible to apply for a furlough. Even if granted such a leave, the

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[169] Ibid.

[170] Ibid.

[171] Ibid.

girls were not allowed to go home if they or their families could not afford to pay for the trips.[172]

## Conclusions

The Morales case began essentially as an inquiry about the procedures by which Texas juveniles are institutionalized. The use of investigation and expert witness testimony, however, expanded the subject of the case to include many questions about the institutional circumstances and practices which govern the juveniles' quality of life while residing in a Texas institution for delinquents.

It appears from a reading of the court's opinion in Morales that Judge Justice was especially disturbed by the physical, mental, and emotional brutality inflicted on the inmates. As a result of that concern, he discovered a wide variety of other circumstances which had created an environment that was conducive to brutality. The conditions and practices found in the TYC institutions were not conducive to rehabilitation and were, in many instances, harmful to the children.

Judge Justice felt compelled, as a result of his discoveries, to order fundamental changes in the entire system of juvenile justice in Texas. The next chapter presents the policy pronouncements of the district court. It is a positive and active example of judicial intervention in an attempt to bring about change.

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[172] Ibid.

# CHAPTER FOUR

## MORALES V. TURMAN: THE STATEMENT OF PUBLIC POLICY

The policy statements that emerged from Morales v. Turman came in essentially four stages. The first was a Declaratory Judgment entered by the United States District Court for the Eastern District of Texas on December 27, 1972. The second stage involved the same court's decision to grant an emergency interim relief order on August 31, 1973. The third policy announcement was the final opinion of this court, entered August 30, 1974. The fourth and final stage, to date, was handed down by the United States Court of Appeals, Fifth Circuit in July, 1976. The case has not yet reached finality as it is on appeal to the United States Supreme Court.

### Declaratory Judgment

The Declaratory Judgment was concerned with the adjudicatory stage of juvenile justice. The focus of the judgment was on the failure of the Texas juvenile system "to provide constitutionally required due process protections

for minor children."[1] Judge William Justice said that several nonexistent protections must be implemented. These included the right to be fully informed as to the charges against the juvenile. The court said that minor children are entitled to the protections stated in Miranda v. Arizona[2] which include the right to remain silent; to be informed that anything said can be used against the defendant; the right to have an attorney present during interrogation or any discussion with law enforcement personnel; the obligation of the state to provide an attorney for those who are unable to afford one; the right to discontinue answering questions when one chooses to do so; and the right not to be penalized for failure to answer questions or make a statement. Other rights not to be denied minor children in Texas, according to the Declaratory Judgment, include: the right to a hearing; the right to a trial by jury; the rights of confrontation and cross-examination; the right to present evidence on ones own behalf; the right to a transcript of the proceedings; the right to be informed about the implications of the proceedings; and the right to appeal.[3]

The evidence agreed to by both the plaintiffs and the defendants in this case showed that, in some cases, the

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[1] 383 F. Supp. 53 (E.D. Tex. 1974), at 69, note #12.

[2] 384 U.S. 436 (1966).

[3] Ibid. at 69-70, note #12.

right to counsel was ignored altogether. In many others, the minors or their parents or guardians were allowed to waive the right to be represented by an attorney. None of the minor children who were named in this action had ever had a court hearing, appeared before a judge, or had an opportunity to consult with a lawyer before being institutionalized.[4] A specific incident stated in the agreed upon evidence involved a Texas juvenile court judge who, between January 1, 1967 and March 30, 1971, ordered seventy-five minor children incarcerated without benefit of a court hearing or appearance before a judge. This same judge ordered 124 minors incarcerated who had never been represented by an attorney with regard to their adjudication.[5] This situation was not found to be unique; there were others stated in the evidence.

Judge Justice stated that every minor child must be represented by counsel at every critical stage of adjudication. He defined "critical stages" as including but not limited to "any juvenile court hearing, whether it be for the purpose of detention, adjudication or disposition."[6] The Declaratory Judgment simply stated that this right may not be waived, and public monies must be expended in order

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[4] Ibid. at 68, note #11.

[5] Ibid.

[6] Ibid. at 69-70, note #12.

to hire attorneys for those who cannot afford to hire their own.[7]

Rather than issue an injunction enforcing the Declaratory Judgment, Judge Justice relied on a directive requiring information periodically as to what steps were being taken to assure that all minors in the State of Texas are provided with counsel at the critical stages of adjudication. The court recognized that there were "over 250 juvenile court jurisdictions in Texas," and that, for the most part, there had existed "a longstanding practice of not providing counsel to minor children in juvenile court proceedings."[8] As a result of this knowledge, the court realized that imposition of the order would be difficult and would require the creation of new approaches. Judge Justice, therefore, allowed sixty days for the defendants to prepare "a plan for the provision of legal representation and due process protections to minor children."[9]

The directive ordered defendants to report to the court every sixty days on the progress of the implementation of the Declaratory Judgment. After one hundred twenty days, the defendants were ordered to contain in the reports the names of all minor children "adjudicated delinquent in

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[7] Ibid.

[8] Ibid. at 69, note #12.

[9] Ibid. at 70.

derogation of the constitutional and statutory rights," as enumerated in the Declaratory Judgment. These reports were also to include "the name of the juvenile court which adjudicated the delinquency of each said child" without benefit of the mandated due process protections.[10]

Judge Justice said that his court would retain continuing jurisdiction over this matter and warned that further relief would be entered if it were revealed, after 180 days, that the Declaratory Judgment was not being implemented.[11] Finally, the court ordered the Attorney General to assume the responsibility for notifying all the juvenile courts in Texas as to the provisions of this order.[12]

Emergency Interim Relief Order

On August 31, 1973, the second stage of this action evolved. On that day, Judge Justice entered an emergency interim relief order. The purpose of this order was to halt certain practices within the TYC institutions immediately, without waiting for the final court decision in the case. These practices were found by the court to be in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. Using Furman v. Georgia[13] and Jackson v.

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[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] 408 U.S. 238 (1972).

Bishop[14] as precedent, Judge Justice listed four grounds for enjoining these practices. The grounds were that: (1) "such practices were so severe as to degrade human dignity"; (2) the practices "were inflicted in a wholly arbitrary fashion"; (3) they "were so severe as to be unacceptable to contemporary society"; and (4) they "were not justified as serving any necessary purpose."[15]

Jackson v. Bishop was a case brought by three adult prisoners of the Arkansas penal system who asked for an injunction against whipping with a strap for disciplinary purposes. The Eighth Circuit agreed with the prisoners and ordered that the personnel of the penitentiary system be restrained from using the strap, or any other form of corporal punishment, as a disciplinary measure.

The court recognized that a thorough analysis of the Eighth Amendment's prohibition of cruel and unusual punishment is a most difficult task. However, it said that the use of the strap "offends contemporary concepts of decency and human dignity and precepts of civilization . . ." and also that it "violates those standards of good conscience and fundamental fairness . . ."[16]

Following a general discussion of a definition of cruel and unusual punishment, the Eighth Circuit narrowed

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[14] 404 F. 2d 571 (8th Cir. 1968).

[15] Morales at 77.

[16] Jackson at 579.

its decision by naming specific problems raised by the use of the strap. Of the nine specific objections raised, six of them dealt with the problem of standards. The court explained, generally speaking, that it is simply impossible to establish rules and regulations that would assure the disciplinary measure would not be abused. Even though the State of Arkansas had attempted to prevent abuses by establishing certain standards, the court found that the standards were easily circumvented and not successful in achieving the goal.[17]

The court further explained that whipping degrades both the punisher and the punished and found the total impact on attitudes and discipline to be a negative one. Finally the court found public opinion to be adverse toward whipping inmates since only two states even allowed it at that time--Arkansas and Mississippi.[18] The distinction between Jackson and Morales is not difficult to find; it is age. While many would agree that whipping a grown man on the buttocks is so seriously degrading as to be counterrehabilitative, there is no such consensus when it comes to children.

Judge Justice relied also on Furman v. Georgia in his attempt to analyze the Eighth Amendment prohibitions.

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[17] Ibid.

[18] Ibid. at 580.

This case also dealt with adults but its subject was capital punishment which was never a question in Morales. Nevertheless, there was a serious attempt to define the concept of cruel and unusual punishment in the Furman case. The fact of the matter is that there were nine separate opinions filed in this case, and it is somewhat difficult to determine what the law truly is with respect to cruel and unusual punishment as a result of Furman. Generally speaking, the Court did not declare capital punishment per se unconstitutional but said that the manner in which it is applied may violate the Constitution.

The district court appears to have relied heavily on the opinion of Mr. Justice Brennan in that it lists the identical components in the same order. Justice Brennan admitted to the difficulty of defining cruel and unusual punishment. Yet he recognized that the values embodied in the clause force upon the Court "the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment."[19]

The Court never assumed that the state does not have the power to punish but rather certain limits were stated within which punishment must fall. Brennan said that the basic concept to be considered is the dignity of man. "A punishment is 'cruel and unusual' if it does not comport

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[19] Furman at 360.

with human dignity."[20] Judge Justice was then correct on the basis of both Jackson and Furman when he named human dignity as a basic component in the proscription of certain punishments. This component means simply that, regardless of the crime, a state may not treat an individual as less than human.

A second component announced in Brennan's opinion is the idea of arbitrariness. A state is not allowed to inflict punishment arbitrarily because, if it inflicts severe punishment on some and not on others, it shows lack of respect for human dignity.[21] This was the primary concern of the Furman case. The question was whether or not the state may impose capital punishment on some and not on others even though both groups have committed the same crime. The Court, of course, answered in the negative. The question of arbitrariness or lack of standards to assure fairness was a consideration in both cases and constituted the basis for Judge Justice's listing of it as the second important criteria in the definition of cruel and unusual punishment.

The third component, according to Justice Brennan, is that of societal rejection. When punishment is so severe that it is found not acceptable by contemporary society,

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[20] Ibid. at 367.

[21] Ibid. at 369.

there is a "strong indication" that it is believed not to "comport with human dignity."[22] Brennan said the key factor in determining whether or not a punishment is objectionable throughout society is not availability but use. Again both the Jackson and Furman cases give the basis for the district court's third component--unacceptability by contemporary society.

Judge Justice's fourth component was the idea that punishments are cruel and unusual when they do not serve a necessary purpose. This component was not a primary object of consideration in Jackson, but it was in Furman, although Justice Brennan stated it in terms of excessiveness. However, he defined excessive as unnecessary. He said, "If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, . . . the punishment inflicted is unnecessary and therefore excessive."[23]

Physical Abuse

Specific actions prohibited by the emergency interim relief order included various forms of violent and brutal physical abuse inflicted on the inmates such as kicking, beating, and slapping them without necessity or tear

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[22] Ibid. at 371.

[23] Ibid. at 372.

gassing them when no threat to human life or property was imminent.[24]

In prohibiting these actions as being in violation of the Eighth Amendment, the court referred to Ingraham v. Wright.[25] However, there is a major difference to be found in the two cases. The Ingraham case involved the paddling of students at Charles R. Drew Junior High School in Dade County, Florida. The Fifth Circuit found that, in this particular instance, there was an Eighth Amendment violation. The evidence showed that at that particular school, punishments were often severe, excessive and unnecessary. However, the Fifth Circuit stopped far short of declaring paddling as a form of discipline or punishment for school children as violative of cruel and unusual punishment. It maintained that paddling, in mild or moderate form, was neither excessive nor degrading to the dignity of school children in the constitutional sense. It further stated that corporal punishment in the schools is not considered abhorant by society as "a large number of states continue to authorize the use of moderate corporal punishment, and that corporal punishment apparently is still utilized in many school systems."[26]

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[24] 364 F. Supp. 176 (E.D. Tex. 1973).

[25] 498 F. 2d 248 (5th Cir. 1974).

[26] Ibid. at 260.

While the Fifth Circuit distinguished between corporal punishment that violates the Eighth Amendment and corporal punishment that does not, the district court in Morales made no such distinction. It simply said that kicking, beating or slapping the inmates of TYC institutions, when there is no imminent threat to human life or property, is unconstitutional because it violates the precepts of cruel and unusual punishment. Morales, unlike Ingraham, does not imply that as long as there is a set of standards governing the infliction of corporal punishment, it is permissible.

Solitary Confinement

Solitary confinement was also a subject of the emergency relief order. The district court pointed out that certain types of confinement may require due process protections. Judge Justice relied on the case of Board of Regents v. Roth[27] for a determination of what types of liberty fall under the Fourteenth Amendment due process protections. The Supreme Court said that it was stretching the concept of due process "too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[28] The Court did recognize that liberty is a broad term and that there must

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[27] 408 U.S. 564 (1972).

[28] Ibid. at 572.

be substantial procedural protection afforded, in some instances, before a deprivation can be justified. It included "freedom from bodily restraint. . . . and generally to enjoy those privileges long recognized. . . . as essential to the orderly pursuit of happiness by free men."[29] Judge Justice used the dicta in Roth in order to question the extraordinary restrictions sometimes placed on the TYC inmates, such as solitary confinement.

In the relief order, the court identified three types of intrainstitutional confinement which constituted "a substantial deprivation of liberty requiring invocation of certain due process procedures."[30] One was solitary confinement which is placing an inmate alone in a room other than his own. The order prohibited this practice except under circumstances where it is "clearly necessary to prevent imminent physical harm to the inmate or to other persons or clearly necessary to prevent imminent and substantial destruction of property."[31] Another form of intrainstitutional confinement was identified as "security" or the placement of an inmate in a locked building possibly having several solitary confinement cells. This practice was limited in the relief order to those circumstances where necessary to prevent escape or "to restrain behavior that

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[29] Ibid.

[30] Morales at 177.

[31] Ibid.

creates substantial disruption of the routine of the institution."[32] The third category of confinement within the institutions was identified as "dormitory confinement," which is locking an inmate in his dormitory room. This was suggested as an alternative to solitary or security confinement, but one that should be subjected to the same standards as the other two.[33]

The relief order went on to enumerate more specific standards that must be applied to these types of confinement. It said no inmate could be kept for longer than three days in confinement without a written justification for the practice by the child's caseworker. After five consecutive days of solitary confinement, the Executive Director of the TYC must assume the responsibility of preparing a justification report. The same is true after ten consecutive days of security confinement.[34]

Other Relief Order Pronouncements

The emergency relief order also prohibited enforced silence as a punishment and "the performance of repetitive, nonfunctional, degrading and unnecessary tasks."[35] These tasks, as discussed in chapter three, included grass pulling

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[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

duty, dirt shoveling duty and floor buffing duty. The court denounced and prohibited situations where an inmate is confined under conditions where physical danger to him is a probability. The court found that such conditions may be a violation of cruel and unusual punishment according to New York State Association for Retarded Children v. Rockefeller.[36] That case involved the rights of patients in the Willowbrook State School for the Mentally Retarded in New York. A major focus of the case was on the lack of personnel in sufficient numbers to adequately care for the children. The district judge argued that the children had "the right to protection from harm." He said this included "protection from assaults by fellow inmates or by staff."[37]

Although the Morales decision implies that the Cruel and Unusual Punishment Clause mandates an adequate staff/student ratio in order to protect the inmates from harm, the New York decision did not lay the groundwork for such an assumption. The judge, in that case, said that the basis for the right to be protected from harm could be the Eighth Amendment, but he also said it could be either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. He claimed, in fact, that it was not necessary to determine the basis of the right.[38]

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[36] 357 F. Supp. 752 (E.D.N.W. 1973).

[37] Ibid. at 764.

[38] Ibid.

The interesting aspect of Judge Justice's inclusion of the case as precedent in the Morales decision is that the New York decision thoroughly discusses the so-called right to treatment and ultimately determines there is no such right.[39] As will be seen later in this chapter, Judge Justice reached a different conclusion.

In the relief order, the court found harmful conditions with respect to two practices. One practice prohibited by the court was housing up to forty boys in an open dormitory with a single supervisor on duty. If a boy were attacked or became ill, the supervisor was prevented from assisting him because he was locked in an elevated cage. The supervisor's only alternative during an emergency was to call by telephone for outside assistance. The other prohibited practice was hiring correctional officers who had not been properly screened through psychological testing, making it possible for sick and sadistic people to assume staff positions.[40]

The most blatant violations of cruel and unusual punishment were found at Mountain View, the maximum security institution for older boys. Because the changes to take place there were drastic and difficult, the court appointed a monitor, Charles Derrick, to aid in the process.

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[39] Ibid. at 762, 764.

[40] 383 F. Supp. 77-8.

## Morales v. Turman

The third phase of this case was the court's decision in Morales v. Turman following a trial of six weeks' duration. Judge Justice first disposed of two points stressed by the defendants; one of which became important at the appellate level.

### Eleventh Amendment

The defense argued that if the court granted the relief asked for by the plaintiffs, it would require the expenditure of state funds. The contention was that this constituted a "raid on the treasury" of the State of Texas and, therefore, a violation of the Eleventh Amendment. The court dismissed the argument both because of the evidence and legal precedent. The decision said that there was little or no evidence presented that might lead one to conclude that implementation of the court's pronouncements would be more costly than the system already in effect. In fact, the court pointed out that, by implementing the decision, there was some evidence to show the state could eventually save considerable sums of money.[41] The court discussed several cases with respect to the Eleventh Amendment argument.

#### Edelman v. Jordan

The court said it was not necessary to determine whether the decision would require additional expenditure

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[41] Ibid. at 60.

of state funds. It referred without explanation to a Supreme Court case, Edelman v. Jordan.[42] That case involved a group of welfare recipients in Illinois who were receiving less aid than was required by federal regulations. A federal district court issued an injunction in order to compel Illinois to comply with the federal regulations. The case went to the Supreme Court squarely on the issue of the Eleventh Amendment. The court did not overturn the injunctive relief which compelled Illinois to comply with the federal regulations. However, the case was remanded, on the basis of the Eleventh Amendment, because the district court also granted relief in the form of retroactive payments. The Supreme Court felt that the granting of retroactive relief constituted an award of damages against the state, while a proscriptive order which forced the state to comply with federal regulations did not. Although the case was remanded for further consideration, Judge Justice was correct in citing it as precedent because that part of the district court's decision which required the future expenditure of additional state funds was left untouched by the Supreme Court.

Graham v. Richardson

The district court in Morales cited additional cases such as Graham v. Richardson.[43] That case involved the

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[42] 415 U.S. 651 (1974).

[43] 403 U.S. 365 (1971).

denial of welfare benefits to "resident aliens or to aliens who have not resided in the United States for a specified number of years."[44] The Supreme Court said that such statutes were in violation of the Equal Protection Clause of the Fourteenth Amendment and, therefore, the state must pay the benefits. This decision obviously involved the expenditure of vast sums of money particularly in those states such as Arizona and Texas where a large number of aliens from Mexico reside.

Gaither v. Sterrett

The district court concluded that if the Eleventh Amendment constituted an obstacle, a large number of federal district court decisions, already affirmed by the Supreme Court, would be void, such as Gaither v. Sterrett.[45] In the Gaither case, the district court declared unconstitutional a state statute terminating AFDC benefits to certain children when a stepfather is in the home. The Supreme Court affirmed that case; however, the situation was somewhat different than Morales. In Gaither, the court was not ordering the expenditure of any funds. It was instead claiming that the expenditure of funds may not be reduced or terminated "under the auspices of an unconstitutional

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[44] Ibid.

[45] 346 F. Supp. 1095 (N.D. Ind.), aff'd 409 U.S. 809 (1972).

state statute. . ."[46] The result, of course, would be increased expenditure but the facts were different because the constitutionality of a state statute was not challenged in Morales.

Three-Judge Courts

The other point dismissed by the court was the defendant's position that the case should have been heard by a three-judge court. The statute in question is 28 U.S.C. Sect. 2281 (1970) which describes the circumstances that require the convening of a three-judge court. It reads as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2284 of this title.[47]

The Fifth Circuit summarized the essential conditions requiring a three-judge court in its appellate decision concerning this case. That court determined that a three-judge court is not necessary unless:

> (1) a state statute with state-wide applicability is challenged, (2) an "officer of such" state is

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[46] Ibid. at 1099.

[47] 28 U.S.C. Sect. 2281 (1970).

> sought to be restrained, (3) injunctive relief is sought, and (4) there is a substantial question as to the validity of the statute under the Federal Constitution.[48]

The district court agreed that two of the essential elements were present in this case. A state officer was present as a defendant, and the plaintiffs were asking for an injunction. However, it disagreed, supported by the plaintiffs, the United States and other amici, that the other two requirements were present in this case. According to the court's position, there was no statute with statewide applicability being challenged and no question as to the validity of any statute under the Federal Constitution.

The only statutes involved in this case, by the time it came to trial, were those giving general grants of authority to the TYC. There was no quarrel on the part of the plaintiffs with these statutes. On the contrary, it was these statutes upon which the plaintiffs based their argument that juveniles, according to Texas law, have a right to treatment. According to Tex. Rev. Civ. Stat. Ann. art. 5143d (1971), the purpose of the TYC is "to provide a program of constructive training aimed at rehabilitation and reestablishment in society of children adjudged delinquent . . ."[49] The court said that the plaintiffs were attempting

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[48] 535 F.2d 870 (5th Cir. 1976).

[49] Tex. Rev. Civ. Stat. Ann. art 5143d (1971).

to force implementation of the statute and certainly not questioning its validity or constitutionality.

Baker v. Estelle

The court agreed that plaintiffs were questioning the validity of a number of institutional practices and procedures. It noted the similarity, as pointed out by the defendants, of this case to Baker v. Estelle, sub nom. Sands v. Wainwright.[50] The court found a significant difference between the two cases. In Baker, a prisoner was questioning the procedures followed by the Texas Department of Corrections involving loss of good time, commitment to solitary confinement, and attorney-client mail censorship. The Fifth Circuit remanded this case for hearing by a three-judge court. The appellee argued in Baker that a three-judge court was unnecessary because he was objecting to practices, not regulations. The Fifth Circuit disagreed saying that the practices to which he was objecting were "in reality, the Rules and Regulations of the Texas Department of Corrections, as applied."[51]

The district court said that Morales was different from Baker because there were apparently no rules and regulations that applied to all the TYC institutions as were found in the adult penal system. In describing the "central

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[50] 491 F. 2d 417 (5th Cir. 1973).

[51] Ibid. at 428.

policy" of the TYC, the court used adjectives such as "ephemeral, mythical, and, indeed, almost non-existent."[52]

The defendants referred to the minutes of the TYC board meetings as the source of policy for operation of the institutions. However, Judge Justice pointed out that this was a rather haphazard means of establishing policy since, "There is apparently no stenographer who makes a verbatim transcript of the meetings," and, "The minutes are bound in a volume which is not codified, indexed by subject, or updated . . ." Judge Justice took it upon himself to study these minutes from 1957 to 1972. He found only "the most general discussion of issues," most of it concerned with such matters as "budget planning, building and construction projects, public relations, and other matters . . ." The court said that such discussions were "only tenuously related to the task of rehabilitating individual children."[53] The defense could, of course, point to the manuals for employees and students as an embodiment of rules and regulations. However, the evidence showed that these manuals were not distributed at all institutions. Where they were distributed, they amounted to policy for that particular institution only. In fact, it was established that policy often differed within institutions because the rules varied

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[52] 383 F. Supp. 61.

[53] Ibid. at 62.

"from dormitory to dormitory or cottage to cottage within the same institution."[54] (emphasis in original)

Based on his own careful observations, the judge concluded that it was "impossible to construe the minutes as 'rules and regulations'."[55] He said, "TYC 'policy' as embodied in the minutes is close to undiscoverable and does not constitute a coherent body of regulations that are applied throughout the system; such rules and regulations as exist are local to single institutions or subdivisions thereof."[56] Therefore, the case was not considered to be one involving state statutes or policies for which three-judge courts were designed to consider.

Dorado, Neives, and Board of Regents

In reaching this final conclusion, Judge Justice compared three cases. They were Dorado v. Kerr,[57] Nieves v. Oswald,[58] and Board of Regents v. New Left Education Project.[59] The Neives case involved the infamous Attica prison revolt in September of 1971. As a result of alleged involvement in that riot, a group of prisoners were facing disciplinary hearings, and they claimed that the manner in which

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[54] Ibid. at 64.

[55] Ibid. at 62.

[56] Ibid. at 64.

[57] 454 F. 2d 892 (9th Cir. 1972).

[58] 477 F. 2d 1109 (2d Cir. 1973).

[59] 404 U.S. 541 (1972).

these hearings would be conducted was violative of their constitutional rights.[60] The complainants claimed that the procedures followed at disciplinary hearings were constitutionally deficient for a number of procedural reasons. The Second Circuit remanded this case for hearing by a three-judge court at the district court level because it determined that this case met the requirements of such a panel. It held that "this challenge to the regulations sufficiently implicates well-considered state policy of state-wide application to require three-judge court adjudication . . ."[61]

The Dorado decision was a case where the necessity for a three-judge court was denied in a prisoner's claim. The setting involved not disciplinary hearings but hearings of the California Adult Authority. This board makes decisions regarding paroles in the California penal system. Again in this case, the prisoner challenged the procedure used in reaching a parole decision, such as the fact that the Authority "denied prisoners the assistance of counsel at these annual hearings . . ."[62] The Ninth Circuit denied the prayer for a three-judge court claiming that the procedures in question "were not set forth in any formally

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[60] Nieves at 1111.

[61] Ibid. at 1114.

[62] Dorado at 894.

adopted resolution or order and, at most, represented the Authority's informally established procedural policies."[63]

The difference in these two cases is the different interpretation of what actually constitutes a policy. The court in Nieves felt the three-judge court was a necessity because there was a specific statute involved which governed procedures in state penal disciplinary proceedings.[64] The court in Dorado could make no such reference to statute and said the policy was informal and could not be considered a policy or regulation in the meaning of the three-judge court statute.

In Board of Regents v. New Left Education Project the question was statewide application. Such, of course, is not the case in Nieves, Dorado or Morales. All of those cases involved policy as applied to an entire class of individuals within the state. Certain university policies were in question in the Regents case. The Supreme Court found it unnecessary for the case to be heard by a three-judge court because the Board of Regents' authority extended to only three of the more than fifty state colleges, universities and junior colleges.[65] Therefore, any policy established by that particular Board did not fulfill the requirement of

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[63] Ibid. at 892.

[64] Nieves at 1111, note #3.

[65] Board of Regents, at 543.

statewide application. Inclusion of this case as precedent is curious, if not inapplicable.

## Morales: Fifth Circuit

For the sake of clarity, it is pointed out here that the fourth stage of the policy pronouncement process was concerned with the procedural issue of whether Morales should have been heard by a three-judge court. Following the handing down of the decision by the district court, the state appealed to the Fifth District Circuit Court of Appeals. That court overturned the decision on the procedural issue and remanded the case for a new trial to be heard by a three-judge court.

The Fifth Circuit said that the central question involved was whether the action seeks "to restrain the enforcement, operation or execution of a state policy with statewide applicability."[66] The court defined a statute as "a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction."[67]

The court found that there were in fact a number of state policies being challenged by plaintiffs' action regardless of whether they were written down in any formal manner. It listed some of those policies including: treatment and

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[66] 535 F. 2d 870.

[67] Ibid.

placement; allowing, in the absence of procedural safeguards, extensive corporal punishment and extended periods of solitary confinement; not providing adequate academic and vocational education; staffing and hiring practices; the building of juvenile institutions in isolated rural settings and not providing treatment programs in the communities; mail censorship; segregating the inmates according to sex; and allowing institutional superintendents and other personnel wide discretion in developing and implementing programs.[68]

In other words, the Fifth Circuit found that there were, in fact, certain policies in operation to which plaintiffs had objected. Furthermore, the court said, the failure to do certain things in itself constitutes a policy. The court summarized that:

> Overall, then despite the fact that many of these programs and policies have not been reduced to writing or otherwise formalized, it is apparent that plaintiffs have launched an exhaustive attack on a set of policies and practices which, taken as a whole, constitute Texas' statewide program for dealing with juvenile delinquents.[69]

In the Fifth Circuit's opinion this is precisely the type of case which "warrants the added deliberation and procedural protections provided by the three-judge court statute,"[70] because the decision, if implemented, would be thoroughly disruptive of the state's legislative and

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[68] Ibid. at 871.

[69] Ibid.

[70] Ibid. at 873.

administrative policies. At present the Fifth Circuit's decision is on appeal to the United States Supreme Court.[71] At this writing (March 1, 1977), certiorari had neither been granted nor denied.

Morales v. Turman (continued)

Following the district court's discussion of the Eleventh Amendment and the necessity of a three-judge court, it proceeded to specific policy pronouncements.

Right to Counsel and Access to the Courts

The district court had discussed right to counsel and access to the courts, including the question of mail censorship, rather thoroughly in the emergency interim relief order and was not persuaded to modify that decision at this stage. It did, however, deliver additional information on these questions in order to further clarify the situation.

In light of a Supreme Court decision which postdated the emergency relief order, the court pointed out that there were two criteria which might justify mail censorship. The court noted that these criteria were established in the case of Procunier v. Martinez.[72] In that case the Supreme Court said that mail censorship could be imposed if (1) the

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[71]Bercu, Steven, personal correspondence, 10/4/76.

[72]414 U.S. 973 (1974).

regulation furthered "an important or substantial governmental interest unrelated to the suppression of expression," and (2) the limitation was "no greater than is necessary or essential to the protection of the particular governmental interest involved."[73]

The court saw, on the basis of Procunier, no reason to modify its prior decision as no important governmental interest seemed to be involved. This was proven, the court felt, by the actual practices that had evolved in the TYC system since the relief order was granted. First of all, there was no longer any policy existing which provided for censorship of outgoing mail. Secondly, the testimony given at the trial by the superintendents showed that several of them had discontinued censoring incoming mail with no unhappy consequences.

The court elaborated on its mandate concerning right to counsel discussed earlier in this chapter. It explained that, on the basis of Negron v. Wallace,[74] there are certain instances where the right could be restricted by the state except in the event of a legitimate emergency. Otherwise the state may restrict the right to counsel when the juveniles have not expressed a desire to consult with an attorney

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[73] 383 F. Supp. 67.

[74] 436 F. 2d 1139 (2d Circuit 1971).

or when the attorney had not established his authority to speak for a juvenile.[75]

More specifically, the Negron case involved a sixteen year old girl in New York who was declared "in need of supervision" as opposed to delinquent. The "supervision" statutes involve status crimes such as truancy and running away from home which, if committed by an adult, would not be considered criminal acts. There were certain procedures required of an attorney who wished to visit an institutionalized child who had been confined because of such status offenses. The requirements included that the attorney receive permission to visit the child from one of the judges of the Family Court or one of the parents. This was required in order to protect a child from unwanted visits from attorneys who had no established authority to speak for the child.[76] The second requirement was that the attorney make an appointment in advance. Supposedly the "visiting hours" were from 9:00 a.m. to 5:00 p.m. on weekdays, in the absence of an emergency.[77] This time schedule could be restricted by the state except in the event of a legitimate emergency. The time schedule and advance notice requirement apparently insured the availability of the child when the attorney

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[75] Morales at 68.

[76] Negron at 1144.

[77] Ibid. at 1143-1144, note #2.

arrived. The third requirement was that an inmate desirous of contacting an attorney should do so by mail rather than by phone. While the court said that juveniles should be given access to the telephone, "under reasonable regulations designed to prevent abuse," the evidence in this case did not show that such a privilege had been denied.[78] The district court in Morales upheld these requirements as being reasonable in ordinary cases.

Damages

The plaintiffs had asked for damages against Assistant Attorney General Green and Executive Director Turman based on the alleged denial of right to counsel and access to the courts, but the court in Morales denied the claim. The claim was based on a federal statute, 42 U.S.C.A. Sec. 1983. The court said that Green was not liable because he acted at all times as a quasi-judicial officer and was within the scope of his authority. Turman was also found to be immune from suit because it was established that he "was at all times acting pursuant to the advice of Green. . . ."[79]

Secure Confinement and Transfers

In this decision the Court again dealt with due process considerations in relation to solitary or security

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[78] Ibid. at 1145.

[79] Morales at 68.

confinement and transfers to Mountain View. Although it had placed limitations on these practices in its emergency interim relief order, the court felt that further restrictions were necessary in order to make certain that there would be "a constitutionally sufficient check on potential abuse."[80] In order to determine the meaning of "a constitutionally sufficient check" the court referred to a number of judicial decisions.

Morris v. Travisano

In general, the court concluded that the placement of a juvenile in a secure setting requires procedural due process. It referred to the case of Morris v. Travisano,[81] which involved a group of Rhode Island prisoners who had been segregated from the rest of the prisoners in a special unit. Because of such segregation, the prisoners lost a variety of privileges and were forced to live under conditions which, it was claimed, constituted a health hazard.

The court in Morris agreed with the necessity in some cases of classifying prisoners according to the amount of supervision they need. However, such classification procedures were not found to be without limitation. In this particular case, the parties to the suit negotiated a lengthy

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[80] Ibid. at 83.

[81] 310 F. Supp. 857 (D.R.I. 1970).

and specific set of rules and regulations to govern the classification system. These regulations included a number of procedural rights such as notice, hearing and review procedures. However, the judge did not give lengthy treatment to the constitutional rights of prisoners. He was content to allow the negotiation process to work out the details and adopt the document as interim decree, retaining jurisdiction for 18 months.[82]

The court in Morales referred to three additional cases in determining the necessity of attention to procedural guarantees in the matter of solitary confinement. These cases were Nelson v. Heyne,[83] Inmates of Boys Training School v. Affleck,[84] and Lollis v. New York State Department of Social Services.[85] Because Nelson v. Heyne did not specifically deal with placing children in a secure setting, treatment of that case follows later in this chapter.

Lollis v. New York

The Lollis case dealt directly with the question of solitary confinement. Although the facts were somewhat in dispute, the court found that solitary confinement at the Brookwood Annex, a correctional institution for girls in

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[82] Ibid. at 857.

[83] 491 F. 2d 352 (7th Cir. 1974).

[84] 346 F. Supp. 1354 (D.R.I. 1972).

[85] 322 F. Supp. 473 (S.D.N.Y. 1970), 328 F. Supp. 1115 (S.D.N.Y. 1971).

New York, consisted, at a minimum, of isolation "in a room stripped of everything but a wooden bunk bed, without a mattress. . . ." at least during the daytime, "with a largely blocked window."[86] Other allegations asserting conditions of solitary confinement at Brookwood were denied by the superintendent, but the judge found it unnecessary to rule on the disputed facts. He said that isolation of children per se was not unconstitutional; however, the length of confinement and the circumstances surrounding the confinement may raise questions of cruel and unusual punishment. He found that, in this particular case, the Constitution had been violated. Specifically, he determined that "a two-week confinement of a fourteen-year old girl in a stripped room in night clothes with no recreational facilities or even reading matter must be held to violate the Constitution's ban on cruel and unusual punishment."[87]

The court granted a preliminary injunction and ordered the superintendent to submit, within ten days, standards for the use of confinement which would bring the practice in line with the Eighth Amendment.[88] These standards were to govern such matters as the maximum duration of

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[86] 322 F. Supp. 477.

[87] Ibid. at 482.

[88] Ibid. at 483.

confinement, "the place of confinement, conditions of confinement, and reports as to confinement."[89]

Inmates v. Affleck

Inmates v. Affleck was a wide-ranging case dealing with confinement of juveniles in Indiana in general and, only incidentally, with the question of solitary confinement. However, there was one instance where the practice received attention. It involved two particular cells in one unit called "bugout" rooms that were used for solitary confinement. These cells were stripped. They contained only a mattress on the floor, a toilet and they were, at times, devoid of artificial lighting. In one of the cells the window was boarded over rendering no light whatsoever.[90]

Counsel for the plaintiffs requested the court to grant an injunction forbidding isolation of a juvenile for more than two hours in the absence of a psychiatrist's written certification to both the court and plaintiff's counsel. It was further requested that the injunction include a prohibition against isolating a juvenile for any reason for more than twenty-four hours a week.[91]

Although the court expressed the belief that " . . . solitary confinement may be psychologically damaging,

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[89] 328 F. Supp. 1116.

[90] Inmates v. Affleck at 1359.

[91] Ibid. at 1372.

antirehabilitative, and at times inhumane . . ." it granted no relief.[92] The court said there was insufficient evidence to determine what constitutes solitary confinement and under what conditions it is destructive; therefore, it found itself unable to frame an equitable order. It urged, however, that defendants try "to find individualized methods of treatment for problem boys."[93]

Morales Standards

The Morales decision is highly creative in terms of precedent. The cases referred to did, in some instances, deal with the question of solitary or secure confinement within the institutional setting. However, the major areas of concern were the length of time an individual may be confined and the conditions surrounding his confinement. Where the courts issued orders of any kind, they referred to parties other than the court for making the particular decisions and establishing standards.

In Morales, the court concentrated on the procedures by which a juvenile may be placed in solitary rather than the conditions while there. Specific procedural duties were imposed upon TYC personnel in order to assure that the juvenile's procedural guarantees under the Fourteenth Amendment would be fulfilled. The district court announced that

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[92] Ibid.

[93] Ibid.

certain procedures must be invoked after five consecutive days in solitary confinement or ten consecutive days in security confinement beyond those already imposed in the emergency relief order. It said that due process requires that a juvenile be given a hearing before an impartial tribunal. The judge did not designate the parties who were to make up this tribunal, leaving the matter to be decided by plaintiffs and defendants in their post-decision negotiations. (These negotiations will be described in more detail later in this chapter.) The court declared that the juvenile has a right to have his caseworker, or any other advocate of his choice present, and the right to call witnesses on his own behalf and cross-examine those witnesses who give evidence against him. The court required that the tribunal prepare a written record within forty-eight hours of the hearing and file it with the Executive Director of the TYC. The Executive Director must in turn prepare and distribute the written record with the court and all counsel involved in the case. The court said this practice would continue until it was otherwise announced.[94]

The Morales decision did more than elaborate on the relief order in connection with transfer to Mountain View; it actually changed its mind. In the relief order, it announced that, prior to such a transfer, it must be

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[94]383 F. Supp. 84.

determined that the juvenile had committed an act that would amount to a serious offense if committed by an adult. In Morales, it was decided that the requirements should be more stringent. One such offense, the court said, did not justify transfer to a maximum security institution. The new standard was to be that the juvenile must be determined "exceptionally dangerous." Furthermore, that decision was to be made by a council of "well-qualified psychiatrists and psychologists," not ordinary laymen.[95] The court implied at this point in the decision that the psychiatrists and psychologists employed by the TYC at the time of the trial were not "well-qualified." It pointed out that none of the psychiatrists were Diplomats of the American Board of Psychiatry and Neurology and none of the psychologists were members of the American Psychological Association.[96]

For a finding of "exceptional dangerousness" and a consequent authorization for transfer, the board or council was ordered to make use of psychological testing, the juvenile's history and psychiatric diagnosis.[97] Procedurally, prior to transfer, the juvenile is entitled to three procedural guarantees: a hearing at which he may be present and represented; to ask questions and make comments; and a

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[95] Ibid. at 84.

[96] Ibid., note #17.

[97] Ibid. at 84-5.

copy of a written statement justifying the decision.[98] In the case of juveniles entering TYC custody, the court said if it were suspected that he is exceptionally dangerous, the officials could place him in the maximum security facility for a period not to exceed seven days before making a final placement decision.[99]

Right to Treatment

The district court declared that juveniles committed to institutions in Texas on the basis of delinquency have a statutory and constitutional right to treatment. The statutory right is to be found in the Texas Revised Civil Statutes Ann. Art. 5143d, et seq. The defendants agreed to this decision in their Post-Trial Brief and Memorandum of Law.[100]

Dr. Morton Birnbaum

The most frequently acknowledged statement on the concept known as "right to treatment" was given in 1960 by Dr. Morton Birnbaum of New York. Birnbaum's article argued specifically for the development of a constitutional right to treatment for patients involuntarily committed to mental institutions. The article, published in the American Bar Association Journal, concentrated on the compelling social

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[98] Ibid. at 85.

[99] Ibid.

[100] Ibid. at 66-7.

and humanitarian reasons for the development of such a right rather than an extensive investigation of the Due Process Clause.

The article points out that, for the most part, patients in public mental institutions receive inadequate medical treatment and that the trend is likely to continue.[101] The condition is enforced by the state because of two practices. One is that the state compels "the institutionalization of those persons whom it considers to be sufficiently mentally ill to require institutionalization for care and treatment."[102] The second reason is that the state does not then appropriate adequate funds for providing therapeutic treatment.[103] In other words, the state forces certain people to live in institutions which have been provided only the amount of funds adequate to provide custodial care rather than therapeutic treatment.

Dr. Birnbaum complained that the legal problem is one of focus. Lawyers for the mentally ill focus primarily on preinstitutionalization questions. The first focus is on protecting the right of the individual not to be institutionalized unless he is proven, according to the standards of due process, to be "sufficiently mentally ill to require

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[101] Morton Birnbaum, M.D., "The Right to Treatment," 46 American Bar Association Journal (May 1960): 499.

[102] Ibid.

[103] Ibid.

institutionalization."[104] The second focus of the legal profession is the concern that, once proven mentally ill, the individual be treated as a sick person rather than as a criminal. In other words, the mentally ill have a right to be segregated from criminals in mental institutions rather than placed in prisons.[105]

Of course these two concentrations constitute reforms compared to historical treatment of the mentally ill. The problem, according to Dr. Birnbaum, is that the law needs to be reformed further. Once the individual is assured, by due process standards, protection from illegal involuntary commitment due to mental illness and guaranteed the right to be institutionalized in a mental hospital, he then needs assurance that he will receive proper medical treatment in order to guarantee his return to society as quickly as possible.[106] It becomes then a matter of liberty in the very basic physical sense of the word. A person who does not receive treatment must ordinarily remain in an institution and, therefore, is deprived of his liberty.

Birnbaum said that the right to treatment, if judicially recognized, would mean an addition to the substantive connotation of due process of law. The included concepts

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[104] Ibid. at 502.

[105] Ibid.

[106] Ibid. at 502-503.

recommended were: (1) that a person committed to an institution because of mental illness has a right to expect proper medical treatment; (2) that he is not considered a criminal; (3) that an institution not providing treatment is a mental prison rather than a hospital; and (4) "that substantive due process of law does not allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him. . . . "[107]

He maintained that if the development of adequate treatment for the mentally ill was to become a reality, the necessary ingredient was judicial action. He said that courts must be willing to grant the unconditional release of a person being held against his will under the guise of treatment if he is, in fact, not receiving any treatment. In his view, the only power this would subtract from the state would be "the absolute discretion to decide the standard of medical care for the inmates of public mental institutions."[108]

The article acknowledged at the conclusion that there would be problems involved with the establishment of such a right and recommended solutions to the dilemma. Since, in the Morales case, all of the problems were present at some time, they are worth listing.

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[107] Ibid. at 503.

[108] Ibid.

To begin with, Birnbaum acknowledged that courts would have to allow a reasonable length of time before enforcement of the right could become a reality. This situation is not new. Courts have been faced with this problem before and have managed to deal with it, such as in the case of school desegregation.[109] Secondly, the establishment of such a right would surely increase litigation and create a burden on the courts. Birnbaum suggested simply that additional court personnel be hired.[110] The third problem, and the one most often raised by those who object to a constitutionally guaranteed right to treatment, is lack of judicial expertise in developing standards. Birnbaum suggested that the courts could consult the experts in whatever field the case arose.[111]

Perhaps the most insoluble practical problem mentioned was the difficulty of hiring the additional personnel needed to work in the institutions in order to provide the patients with a qualified staff and allow for individually-based treatment. Here Birnbaum suggested there might be a serious problem but it could be greatly alleviated, if not overcome, by the hiring of support personnel when more highly trained people are not available.[112] Finally, of course,

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[109] Ibid. at 504.

[110] Ibid.

[111] Ibid.

[112] Ibid. at 504-505.

there is the problem of how to finance the treatment programs mandated by the courts. Birnbaum suggested federal aid should allow adequate funding.[113]

The problem of treatment for the mentally ill, Birnbaum summarized, is legal, not medical, and it calls for a legal solution. His answer was the establishment, through the judiciary, of a constitutional right to treatment to be enforced by the courts.

Morales relies on a series of cases for explanation and establishment of a constitutional right to treatment for incarcerated juvenile delinquents. Cases involving the mentally ill, as well as delinquents, were mentioned. Generally speaking, the right to treatment has been judicially acknowledged in a variety of settings. The meaning of the doctrine, as explained by Judge Justice, is, however, creative in terms of specificity and established standards. In order to ascertain what, in Morales, is unique, it is first necessary to review the major cases cited as precedent.

Donaldson v. O'Connor

Judge Justice relied heavily on the case of Donaldson v. O'Connor[114] for justification of the concept of a constitutional right to treatment. Kenneth Donaldson was a mental patient in the Florida State Hospital for fourteen and a

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[113] Ibid. at 505.

[114] 493 F. 2d 507 (5th Cir. 1974).

half years. Although there are distinctions to be made between persons confined for medical reasons and those confined because of a finding of delinquency, it is not necessary to point out those distinctions here. The point is that the first discussions to take place involving right to treatment were related to mental patients, and it was not until later that delinquents became a subject of the doctrine's concern.

While confined, Donaldson's "treatment" consisted of religious and recreational therapy. This apparently amounted to no more than attendance at church and the opportunity to engage in some recreation. These are privileges he would ordinarily have been allowed in a prison. He was denied any other form of therapy, for the most part, while confined. The denial of medication and electroshock treatments was by his own request because those forms of therapy violated his religious beliefs as a Christian Scientist.[115] But, he was also denied grounds privileges, occupational therapy and sessions with a psychiatrist. All of these were deemed advisable and necessary by expert witnesses. The reasons given for denial of these forms of therapy varied from being incomprehensible to absolutely unfounded.[116] The fact of the matter was that Donaldson "received only the kind of

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[115] Ibid. at 511.

[116] Ibid. at 513-514.

subsistence level custodial care he would have received in a prison, and perhaps less psychiatric treatment than a criminally committed inmate would have received."[117]

Although there were other questions involved in the case, the central question was whether a civilly committed mental patient has a constitutional right to treatment. The Fifth Circuit recognized that such a right had never before been recognized by any federal appellate court. It pointed out, however, that three district courts had held that there is such a right. The court held that "a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition."[118]

The Donaldson case announced a two part theory underlying the right to treatment doctrine which is a due process guarantee under the Fourteenth Amendment. The first part of this theory mandates that the government justify its actions in terms of some allowable goal when it seeks to enforce any "non-trivial" denial of liberty. "The governmental goals or interests typically advanced are danger to self, danger to others, and the need for treatment, care, custody, or supervision."[119] According to previously mentioned

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[117] Ibid. at 512.

[118] Ibid. at 520.

[119] Morales, 383 F. Supp. 71.

statutory law, the State of Texas attempts to justify institutionalizing of juveniles by declaring its purpose to be rehabilitation and reestablishment of the juvenile in society. This practice is, of course, based in the rationale of the parens patriae doctrine, already discussed in the second chapter of this paper. The first part, of the two part theory, postulates that if rehabilitative treatment is not offered, the act of commitment becomes an arbitrary abridgement of individual liberty and, consequently, "an arbitrary exercise of governmental power proscribed by the due process clause."[120]

The second part of the due process right to treatment theory is that the government must offer a quid pro quo or something in return when it involuntarily confines an individual without the usual due process protections of the criminal process. According to the district court in Morales, there are three basic limitations on the government's ability to deny an individual his freedom. These are that a specific offense be the reason for detention, that the detention be for a specific amount of time, and that, prior to detention, the individual has the benefit of "a proceeding where fundamental procedural safeguards are observed."[121] When these criteria are not met, then the

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[120] Donaldson at 521.

[121] Morales at 71.

government must provide a quid pro quo in order to justify confinement.[122] The quid pro quo for detention of juveniles in Texas is the promise of rehabilitative treatment.

The Fifth Circuit in Donaldson explained the quid pro quo theory on the basis of five groups of cases. The relevant cases fall into procedural categories. The earliest group of cases involved persons confined in regular penal institutions who had not been convicted of crimes against society. These included mental patients.[123] As explained earlier in this chapter by Dr. Birnbaum, such is no longer the case. It is now considered a due process violation to confine an individual, who has committed no crime, in a penal institution. The court, in Donaldson, referred secondly to a group of cases where it was held not only that the mentally ill be held in places other than prisons but also that "they must be held in places where the conditions are actually therapeutic.[124] (emphasis in original)

The third approach was to challenge the constitutionality of state statutes which legalize the incarceration of nonconvicted criminals, such as delinquents, in order to provide rehabilitative care and protect society. In general, the courts have upheld these statutes but have at the same

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[122] Donaldson at 522.

[123] Ibid.

[124] Ibid. at 523.

time reminded the states that "the constitutionality of the statute is conditioned upon the realization of the statutory promise of rehabilitative treatment."[125]

The fourth approach or group of cases dealt with challenges to confinement upon the grounds that treatment was being denied. Although the courts did not pronounce in any of these cases that there is a constitutional right to treatment, they did not say that there is no such right. In all of these instances, the courts did agree that the plaintiff has a right to a hearing in order to determine whether or not he is receiving proper treatment.[126]

According to Donaldson, the fifth group of cases amounts to the final approach to date in the development of the right to treatment doctrine. These cases have come from all court levels and involve the major forms of nonpenal commitment. Taken together, there is nearly unanimous agreement that commitment to an institution must be accompanied by a governmental quid pro quo when the confinement circumstances include inattention to the "conventional limitations of the criminal process."[127]

In summary, Donaldson answered the claim that a constitutional right to treatment should not be recognized because of the limited ability of the judiciary to set

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[125] Ibid.

[126] Ibid. at 523-524.

[127] Ibid. at 524.

standards for such a right. Although the Fifth Circuit did not attempt to establish standards, it disagreed that such an attempt was beyond the competence of the judiciary. In the first place, the court said, many judgments on this matter will not require courts to deal with the question of standards of adequate treatment. On the other hand, if such is a requirement, the task is not beyond them. The court mentioned two practical means of devising such standards; making use of the advice and counsel of the parties involved in the case, when they are able to agree, and the summoning of expert witnesses.[128]

Rouse v. Cameron

The major cases preceding Donaldson which established the idea of a right to treatment were concerned, as previously mentioned, with the mentally ill. The landmark case was Rouse v. Cameron.[129] This case involved a man who had been found not guilty, by reason of insanity, of carrying a dangerous weapon, a misdemeanor. Rouse asked a federal district court to free him on a writ of habeas corpus, but the court refused because it was not convinced that recovery had been achieved. The judge rejected consideration of Rouse's contention that he was not receiving adequate treatment by

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[128] Ibid. at 526.

[129] 373 F. 2d 451 (D.C. Cir. 1966).

commenting that he did not think he had "a right to consider whether" Rouse was receiving adequate treatment.[130]

Rouse appealed his case to the District of Columbia Circuit Court of Appeals. That court decided that the main issue involved was whether the plaintiff had a right to treatment. The Circuit Court remanded the case for reconsideration. It ordered the district court to determine whether, in fact, Rouse was receiving treatment. The court said, if not, his rights had been violated. The court found the basis for a right to treatment in statutory law rather than the Constitution. The law recognized was the 1964 Hospitalization of the Mentally Ill Act. The court said Congress passed the act out of concern for the number of constitutional problems that had been raised by noncriminal inmates of institutions which provide only custodial care.[131]

Although the Rouse case based its claim for a right to treatment on statutory law, the decision suggested that the right may also be found in the Constitution. In quoting Sam Ervin who sponsored the Hospitalization Act in the Senate, the court said, "Several experts advanced the opinion that to deprive a person of liberty on the basis that he is in need of treatment, without supplying the needed treatment, is tantamount to a denial of due process."[132]

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[130] Ibid. at 452.

[131] Ibid. at 453.

[132] Ibid. at 455.

Although Rouse did not explain in detail the conditions which comply with right to treatment, Judge Bazelon did attempt to establish some standards for cases such as this one. He said, in the first place, the institutions do not have to be able to guarantee success in their treatment, only that they are making a good faith effort to treat their patients. Secondly, the decision as to whether or not treatment is adequate should be determined on the basis of current knowledge. A third standard was that lack of staff and facilities should not be allowed as an excuse for lack of adequate treatment. Finally, Bazelon said that courts must continue to render judgments in these cases even though there is no final scientific answer as to the constitution of effective therapy.[133]

In the Donaldson opinion, the court mentioned cases in connection with the "fifth approach" that dealt specifically with juveniles and the right to treatment. These included In re Gault, Inmates v. Affleck, Martarella v. Kelley, Nelson v. Heyne and Morales v. Turman (interim emergency relief order).

In re Gault

Although the Supreme Court has never specifically dealt with the question of a constitutional right to treatment for juveniles, the district court, in Morales, claimed

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[133]Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), quoting from Rouse at p. 601.

that the Supreme Court spoke on the matter in the case of In re Gault. Judge Justice referred to a portion of that case where the Court recognized that other courts had claimed that juvenile custody is invalid in the absence of appropriate treatment and, as a consequence, "a juvenile may challenge the validity of his custody on the ground that he is not in fact receiving any special treatment."[134] The district court implied that the Supreme Court had, in fact, dealt with the second part of the due process right to treatment theory in Gault. The case, of course, did not establish a constitutional right to treatment. The basis of that case, in fact, did not concern itself with the treatment Gault received while incarcerated but rather the conditions and procedures surrounding his commitment to a juvenile institution.

Inmates v. Affleck

Taking the remaining cases in chronological order, the first was Inmates v. Affleck. The case was briefly mentioned earlier in this chapter with reference to solitary confinement.[135] The right to treatment statement in this case is explained somewhat differently than it was in Morales or Donaldson. In this case the United States District Court for the District of Rhode Island concentrated

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[134] Morales at 71.

[135] See p. 185, supra.

on the difference in purpose of incarceration rather than the theoretical justification for commitment. The court pointed out that society incarcerates adult prisoners for goals which include punishment, deterrence and retribution; while the stated purpose behind the institutionalization of juveniles is rehabilitation. Because the goals differ, the procedures differ and the adjudicative stage is understood differently in terms of due process. Thus, the court said, "due process in the juvenile justice system requires that the post-adjudicative stage of institutionalization further this goal of rehabilitation."[136]

The court in Inmates drew an interesting distinction between children incarcerated for conviction of criminal law violations and those institutionalized for other reasons, such as truancy or incorrigibility. The decision implied that a lesser standard may be applied to the first category of juveniles. The court said, "whatever deviations, if any, from this goal of rehabilitation which might be tolerated as to those incarcerated juveniles convicted of violations of the criminal laws, such deviations are far less tolerable for the other classes of children incarcerated by the state."[137] There was no real attempt to delineate standards of treatment in this case.

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[136] Inmates v. Affleck at 1364.

[137] Ibid. at 1364-1365.

Martarella v. Kelley

Martarella v. Kelley was a case that dealt with "persons in need of supervision." These are children who are institutionalized but have not committed any criminal acts. Martarella and others claimed that their constitutional rights were violated because they were placed in maximum security facilities operated by the City of New York.[138]

Although this case did not specifically deal with delinquent children, as Morales does, its thrust was the same. The United States District Court for the Southern District of New York said that adequate treatment was the sine qua non for incarceration of juveniles. Without adequate treatment, the state is in violation of the juvenile's due process and cruel and unusual punishment rights.[139]

Although the court did not distinguish between delinquent and nondelinquent children in terms of the right to treatment, it did distinguish between those temporarily detained and those held for longer periods of time. In trying to explain right to treatment standards, the court observed the difficulty of such a task. It pointed out that expert opinion on the subject was often in sharp contrast and that the economic problems involved in providing adequate treatment programs were enormous. However, the Court said,

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[138] Martarella at 577.

[139] Ibid. at 585.

"These limitations may be constitutionally acceptable for those who are in fact temporarily detained but not for those who are actually held for long periods."[140] The judge did not grant relief to the class of children who brought this case before the court. He found that it is constitutionally permissible to confine persons in need of supervision along with those adjudged delinquent. The irony of the case is that relief asked for by the persons in need of supervision as a class was generally denied to them but granted to the long-term detainees.

The court discussed at length the constitutional right to treatment and agreed that the concept is legitimate. In fact, although the Supreme Court has never considered the issue in any direct manner, the district court implied such by saying, "There can be no doubt that the right to treatment, generally, for those held in noncriminal custody . . . has by now been recognized by the Supreme Court, the lower federal courts and the courts of New York."[141]

As to the meaning of right to treatment and the mandatory standards involved, the court set standards of a very general nature and ordered a conference of the parties involved in order to determine what specific changes were to be made. In speaking of standards, the judge referred to

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[140] Ibid.

[141] Ibid. at 599.

the Rouse case, discussed earlier,[142] and applied the same general standards to this case.[143] Martarella provided additional standards, however, with respect to the quality of treatment. The decision emphasized the "tone" of institutions and explained that treatment can begin as soon as the child feels that the staff members who deal with him are concerned. In order to establish this "tone," the court set two standards to be met with regard to the staff. These were: (1) adequate numbers in order to provide individualized treatment and (2) that the staff be properly trained, knowledgeable about adolescent behavior, and have good relations with the children.[144] Other than these two general attempts to set standards for right to treatment, the court was moot on the subject; even though there was a wide range of issues noted in the decision. For example, the court discussed psychiatric services, physical facilities, and recreational activities. Still it cannot be determined by this case that standards were mandated beyond what has already been mentioned.

Nelson v. Heyne

Nelson v. Heyne was concerned with a medium security facility for boys in Indiana. The Seventh Circuit Court of

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[142] See p. 200, supra.

[143] Martarella at 601.

[144] Ibid. at 586.

Appeals agreed in this case that juveniles have a constitutional right to treatment. The court found the beginnings of the development of the right in the social reform movements of the nineteenth century and claimed it had been nurtured and developed continuously since then.[145]

The Seventh Circuit recognized explicitly that the Supreme Court had "never definitively decided that a youth confined under the jurisdiction of a juvenile court has a constitutionally guaranteed right to treatment.[146] However, it pointed to In re Gault and Kent v. United States as precedent. Although these cases concerned procedural due process matters rather than rehabilitative treatment, the Nelson decision claims they constitute precedent through their discussions of the theory and practice of juvenile courts and their emphasis on the fact that juveniles must be provided with fair treatment.[147]

The Nelson decision relies on Martarella and the Morales emergency relief order specifically. It does not pronounce right to treatment standards in any discernable manner. However, there are two recognizable conditions set down in this case. The first is that treatment "includes the right to, at a minimum, acceptable standards of care and

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[145] Nelson at 358.

[146] Ibid. at 359.

[147] Ibid. See also Chapter Two of this study.

treatment for juveniles . . ."[148] This is the point made repeatedly in Morales. Secondly, the Nelson court said that juveniles have a right to individualized treatment.[149]

Morales Standards

Morales set standards of right to treatment that are without precedent. They are intentionally specific and far-reaching. It should not be assumed that the statement is entirely without precedent even though the previous cases dealing with right to treatment for juveniles set standards of only a general nature.

Wyatt v. Stickney

The important precedent for the manner in which Judge Justice proceeded is to be found in Wyatt v. Stickney.[150] This case dealt with the rights of those institutionalized because of mental retardation. The district court said that mental retardates, who have been committed to institutions because of their status condition, are possessed of "an inviolable constitutional right to habilitation."[151]

The court used the devices of party negotiation and expert witness testimony to arrive at a comprehensive set of

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[148] Ibid. at 360.

[149] Ibid.

[150] 344 F. Supp. 387 (1972).

[151] Ibid. at 390.

standards. It allowed the parties involved six months to submit plans for the implementation of these standards. The forty-nine standards are unusually specific and cover all phases of institutional life. To point out the specificity, an example of one standard is shown here:

> 37. a. Each resident shall be assisted in learning normal grooming practices with individual toilet articles, including soap and toothbrush, that are available to each resident.
>
> b. Teeth shall be brushed daily with an effective dentrifice. Individual brushes shall be properly marked, used, and stored.
>
> c. Each resident shall have a shower or tub bath, at least daily, unless medically contraindicated.
>
> d. Residents shall be regularly scheduled for hair cutting and styling, in an individualized manner, by trained personnel.
>
> e. For residents who require such assistance, cutting of toe nails and fingernails shall be scheduled at regular intervals.[152]

Since the subjects of Wyatt and Morales are not the same, the mandated standards are necessarily different. However, Morales followed the same basic procedures that were developed in Wyatt for establishing right to treatment standards for involuntarily committed persons who have not been convicted of a violation of the criminal laws.

Assessment and Placement

The court said that adequate provisions for assessment and placement are a mandate of the right to treatment.

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[152] Ibid. at 404.

The inadequacies of these procedures were discussed thoroughly in chapter three. In describing the standards regarding assessment and placement, the judge set specific procedures to be followed.[153] In the first place, he said that all juveniles are entitled to an individual assessment after commitment to the TYC by a juvenile court. Individual treatment plans are to be based on that assessment. The plans should include, among other things, "a family history, a developmental history, a physical examination, psychological testing, a psychiatric interview, community evaluation, and a language and education analysis evaluation."[154] The language and education analysis is to be based on the Weschler individualized intelligence quotient test. In the case of racial minorities, the Leiter and Weschler tests are to be used because they are "standardized for Blacks and Mexican Americans and are calculated to better alleviate the discrimination factor . . ."[155]

The court required approximately fifteen hours of psychological testing for each child and limited the number of children a psychologist could test to three per week. This testing was to be done by, at the very least, a psychologist with a Master's degree and trained in proper testing procedures. All psychologists are to be under the

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[153] *Morales* at 88.

[154] *Ibid.*

[155] *Ibid.*

supervision of a Doctoral-level psychologist. The psychiatric interview, however, must be conducted by a qualified psychiatrist.[156] Any members of the social work staff involved in the assessment process must have at least a Master's degree in a field related to social welfare. These individuals' caseloads must not exceed fifteen cases per week.[157] Finally, in order to evaluate a child's potential responsiveness to guidance and counseling, the court said, caseworkers and juveniles must be in daily contact.[158]

Academic Education

With regard to academic educational standards, the court declared that the juvenile's right to treatment requires several specific elements. Included in these are the use of the Weschler IQ Test, rather than the Lorge-Thorndike IQ Test or the Gray-Votow-Rogers Achievement Test, and "special emphasis on tests which are appropriate for the student's background."[159]

In order to detect mental retardation and provide appropriate academic education for such children, the court ordered the TYC to provide proper testing; include personnel on the staff who are familiar with the juvenile's background,

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[156] Ibid.

[157] Ibid.

[158] Ibid.

[159] Ibid. at 89-90.

culture and language; and obtain information on family background, emotional status, and the student's behavior. Special education teachers who are certified by the state must be hired for the mentally and/or emotionally handicapped. These teachers are to be provided with in-service training by an outside consultant at least once a week. They are to have a student load of no more than eight, and supporting personnel are to be hired. "Supporting personnel" was defined by the court to include one educational "diagnostician for every 150-200 children and a language pathologist or speech therapist."[160]

Bilingual Education

Finally, the court found that right to treatment requires the establishment of a bilingual education program as announced in United States v. Texas.[161] This case was, in general, similar to Morales in two respects. One is that the same judge decided the case. The other is that it sets specific standards to be met by the State of Texas. Initially, it required desegregation of school facilities. The case further required that bilingual educational programs be developed in order to help Spanish speaking students and recognize their culture in order to promote their own self-esteem. The court said bilingual education is a necessity

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[160] Ibid. at 90.

[161] 342 F. Supp. 24 (E.D. Tex. 1971), aff'd 466 F. 2d 518 (5th Cir. 1972).

for achievement of the goal "of true integration as opposed to mere desegregation . . ."[162]

The court announced a comprehensive set of practices to be implemented in the Texas schools which would achieve the overall purposes of curriculum development; which reflects "the learning styles, background and behavior of all segments of the student community"; which incorporates, recognizes and values "the cultural environment and language background of all of its children so that the development of positive self-concepts in all children of the district can proceed apace . . ."; and which implements language programs that develop language skills in both a primary and secondary language "so that neither English nor Spanish is presented as a more valued language . . ."[163]

The standards were an attempt to eliminate some of the problems Texas schools face with Mexican American students. Perhaps the main problem is the Mexican Americans view the school system as having no relevance for them. Judge Justice obviously agreed with the mandate that "Social justice can no longer tolerate treatment of the Chicano people as strangers in their own land."[164] In Morales, the court was simply saying what cannot be tolerated in the

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[162] Ibid. at 28.

[163] Ibid. at 30.

[164] Jorge C. Rangel and Carlos M. Alcala, "Project Report: De Jure Segregation of Chicanos in Texas Schools," 7 Harvard Civil Rights-Civil Liberties Law Review (1972): 391.

public schools for nondelinquent children cannot be tolerated in the public institutions for delinquent children.

Vocational Education

The right to treatment doctrine required certain minimal professional standards with regard to the vocational education program discussed in Chapter Three. The court said that an "employability plan" should be created for each student. There should be emphasis placed on assuring that a juvenile can be eventually placed with a prospective employer. Work release programs must exist to provide on-the-job training. Training in academic areas such as remedial reading and mathematics skills must be provided. The work experience programs, which are essentially concerned with institutional maintenance, must be limited to assure that they do not dominate the daily activities of the students.[165]

Institutional Life: The Least Restrictive Alternative

The court made a variety of pronouncements concerning the milieu in which the juveniles under TYC jurisdiction exist. Although the mandates were justified as being essential to a minimally adequate "professional treatment plan" (emphasis supplied), they were also found to be necessary

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[165] Morales at 92.

in order to meet the "least restrictive alternative" doctrine as announced in Covington v. Harris[166] and Lake v. Cameron.[167]

Throughout the decision, Judge Justice referred to the "least restrictive alternative" doctrine as being an inseparable condition of right to treatment. He believes that juveniles have a right to liberty and that, if the state takes that liberty from them, it must do so in the least amount possible. Otherwise, their right to adequate treatment has been denied. The least restrictive alternative theory is important to Morales in the areas of solitary confinement, general living conditions in the institutions, and the order to abandon Mountain View and Gatesville. It is also the major consideration in the court's condemnation of the Texas policy which incarcerated nearly all of its juveniles who had been adjudged delinquent.

Sheldon v. Tucker

The earliest case cited in Morales with respect to the doctrine is Shelton v. Tucker.[168] That case probably contains the most familiar statement of the least restrictive alternative doctrine, but the doctrine had been used previously in relation to the commerce clause, economic

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[166] 419 F. 2d 617 (D.C. Cir. 1969).

[167] 364 F. 2d 657 (D.C. Cir. 1966).

[168] 364 U.S. 479 (1966).

regulation, First Amendment rights, the right to vote, the right to travel and the right to procreate.[169]

The Sheldon case arose because of an Arkansas statute that required teachers to file an annual list of all organizations they had belonged to or contributed to in the past five years. The filing of this list was a condition of employment in the Arkansas schools. The Supreme Court found the law to be unconstitutional because it abridged the First Amendment right of associational freedom as applied to the states through the Fourteenth Amendment. The Court agreed that the state has the responsibility, as well as the right, to inquire into the matter of a teacher's fitness and competence to educate its children. However, the manner in which the state acted in this case was found to be overly broad. Even though the purpose was legitimate, the Court said, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[170]

Lake v. Cameron

The doctrine was first applied to the civil commitment process in Lake v. Cameron. The District of Columbia Circuit Court remanded the case to the district court

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[169]"Developments in the Law: Civil Commitment of the Mentally Ill," 87 Harvard Law Review (1974): 1246, notes #235-241.

[170]Shelton at 488.

ordering it to explore the possibility of finding a less restrictive facility for the patient.[171] Lake, the appellant, was being confined in a hospital for the insane, but the pertinent characteristics in her case were mainly based on age or senility, not insanity.[172] The circuit court ordered the district court to attempt to find a less restrictive environment for her. The court made this decision on the basis of a statute which was applicable only to the District of Columbia. However, in a later case, Covington v. Harris,[173] the same court said that failure to consider less restrictive alternatives before civilly commiting a person was a violation of his Fourteenth Amendment due process rights.

Lessard v. Schmidt

Going a step further was a case especially pertinent to Morales. The case was Lessard v. Schmidt,[174] which stated that the state could not constitutionally commit an individual to full-time hospitalization until it had first established that other less restrictive alternatives were unsuitable. Virtually all of the cases mentioned in this study which deal with the incarcerated juvenile's right to

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[171] Lake at 662.

[172] Ibid. at 657.

[173] 419 F. 2d 617 (D.C. Cir. 1969).

[174] 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded on other grounds 94 S.Ct. 713 (1974).

treatment mention the least restrictive alternative doctrine as a standard in interpreting right to treatment.

The court, in Morales, discussed institutional living conditions in terms of basic rights and ordered the parties involved to discuss and agree upon the proper means for assuring that these rights are upheld in whatever environment a child, under TYC jurisdiction, must exist.[175]

In terms of the TYC personnel who are responsible for the individual child, primarily the caseworkers, the court said that their numbers must be adequate and they must have experience and training in coping with the unique problems of juveniles. The court also announced that meal preparation should be supervised by a licensed dietician to assure that the food is "adequate, well-prepared, and well-served . . ."[176]

The decision concentrated on the concept of personal freedom. It discussed security, dignity and, especially, privacy. It referred to the need for adequate recreational opportunities and exercise. The children, according to Judge Justice, must be allowed to exercise personal freedom in such matters as hair style and the choice of friends and, furthermore, they have a right to at least frequent contact with the opposite sex, if not a coeducational living environment.

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[175] Morales at 100.

[176] Ibid.

Also they must be afforded free communication by mail and telephone with persons not in the institution. Finally, the decision announced that children have a right to free expression even if the emotions expressed are anger and hostility, as long as such expression is not "harmful or destructive."[177]

Medical and Psychiatric Care

As was discussed in the previous chapter, the evidence showed that the medical and psychiatric care afforded juveniles under TYC jurisdiction was inadequate. The court found two violations of the right to treatment philosophy in this respect. They are the right to adequate treatment and the right not to be treated indiscriminately, but individually. The basis given for these proclaimed rights consisted of several federal court cases, all mentioned before in this dissertation. These were Donaldson v. O'Connor, Nelson v. Heyne, Rouse v. Cameron, Wyatt v. Stickney.

In Nelson v. Heyne, for example, the evidence showed occasional abuse of drugs such as Thorazine and Sparine. These tranquilizers were administered in intramuscular doses as part of no "ongoing psychotherapeutic program, but for the purpose of controlling excited behavior."[178] These injections were not prescribed by a doctor's orders. The

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[177] Ibid. at 100-101.

[178] Nelson at 356.

doctors merely left standing orders for dosages based on a boy's weight, and the decision of whether to administer the drug was left to the nurses or the custodial staff. The boys were never checked, either before or after the injections, "by medically competent staff members to determine their tolerances."[179] The Nelson court found this practice to be in violation of the Eighth Amendment's proscription of cruel and unusual punishment and mentioned specific standards for the administration of drugs. The court implied that medication other than drugs must first be tried and, if drugs are to be administered, there must be "adequate medical guidance and prescription."[180]

On the basis of the law as established by these cases, the Morales court declared that the children under TYC jurisdiction have the right to certain minimal professional standards. Again with respect to the standards, the court was content to state them. It left the specific details of how this was to be accomplished to the parties involved but warned that there appeared to be a great deal of agreement among the expert witnesses "with respect to professional criteria."[181]

The minimal professional standards set down by the court included adequate infirmary facilities and personnel.

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[179] Ibid.

[180] Ibid. at 357.

[181] Morales at 105.

The personnel must include medical staff; psychiatric staff who are "certified by the American Board of Psychiatry and Neurology as qualified in the field of child psychiatry"; psychological staff who have minimally a Master's degree and are "experienced in work with adolescents"; and psychiatric nurses. Staff personnel must exist in numbers adequate to provide psychotherapy when the need is indicated, and also to provide an effective program of "preventive and curative" health care.[182] Furthermore, the court said, medication must not be dispensed in an indiscriminate manner but must be a supervised procedure and given to a child only when, and in the amount, needed.

Casework and Childcare

With respect to the related topics of casework and childcare, the court again stated the minimal standards which must be met and ordered the involved parties to negotiate and agree upon a formula for achieving at least those standards. For the legal basis of these right to treatment standards, the court again referred to the Donaldson, Rouse, and Nelson cases.

The decision demands that the TYC hire childcare workers, those persons responsible for daily supervision of the children, in sufficient numbers to assure that each juvenile receives individual attention. These persons must

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[182] Ibid.

have a high school education, receive both pre-service and in-service training, and be tested for psychological fitness for dealing with children. Furthermore, the caseworkers as a whole "should reflect a diversity of ages, sexes and ethnic origins" in order to meet the diverse needs of the children.[183]

Caseworkers, those persons responsible for the child's individual and overall treatment plan, are required to have a Bachelor's degree. There must be a sufficient number of caseworkers to assure individual attention to each juvenile. These staff members are to be closely supervised by a casework supervisor, who is required to have minimally a Master's degree in the field of social work or an equivalent in education and experience. The judge even found it necessary to require professionally standard record keeping. Again he reiterated that these caseworkers should also reflect diversity in age, sex, and race.[184]

The family and friends of the juvenile must be included in the treatment program. Particularly, this requires the allowance of increased family visits, home furloughs, and some provision for family therapy.[185]

The most disturbed juveniles are to be afforded the most intensive care. The ratio of staff personnel, including

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[183] Ibid. at 119.

[184] Ibid. at 120.

[185] Ibid.

psychologists, psychiatrists, caseworkers and childcare workers, to juveniles was ordered to be "greatly enhanced."[186]

The Monitor

The court advised that the parties in the suit discuss and reach agreement for the implementation of a monitoring system of all TYC institutions. Judge Justice had appointed a monitor to aid in implementing the emergency interim relief order at Mountain View and determined the experiment to be successful enough to warrant system-wide expansion. This monitor or group of monitors is to have wide discretion in several matters. They are to hear grievances on the part of inmates and report them to the court; investigate and try to resolve juvenile and staff complaints; report to the court on any matters thought appropriate, such as violations of the court's orders; advise the TYC staff on matters deemed appropriate stemming from their independently gathered information; advise and communicate with counsel for all parties in this suit. The monitors are responsible directly to the court rather than the TYC.[187]

Abandonment of Physical Plants

Counsel for plaintiffs and *amici* requested the court to order the abandonment of all large, geographically

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[186] *Ibid.*

[187] *Ibid.* at 121.

isolated physical plants. Their argument stemmed, in part, from the evidence of repression and brutality, but also they claimed that these institutions were violative of the constitutional principle that individuals have a right to expect the government "to seek to accomplish its ends in the manner that is least inimical to the liberty of those whom it affects."[188] The court was convinced by the evidence and expert testimony that the history of aggression, brutality and repression was so ingrained at Mountain View and Gatesville that rehabilitation of these institutions was an impossibility. Conditions at these two institutions, taken as a whole, were found to be in violation of the juveniles' Eighth Amendment rights as well as the right to treatment. The judge pointed out that this approach was not entirely without precedent, and that courts had previously ordered the abandonment of physical plants because they "were incapable of being used for humane treatment, and that confinement in them constituted punishment of a kind forbidden by the Constitution."[189]

For example, in both Martarella and Inmates v. Affleck the courts ordered the abandonment of specific units of detention as unsuitable for housing juveniles. Inmates v. Eisenstadt,[190] another case referred to in Morales,

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[188] Morales at 121.

[189] Ibid. at 122.

[190] 360 F. Supp. 676 (D. Mass. 1973).

involved the partial closing of a county jail. The court found conditions so inadequate at this facility that incarceration amounted to punishment. It was declared unsuitable, at least for the pretrial detainees who made up the majority of the population.[191]

Using the formula announced in Trop v. Dulles,[192] the court decided that the "evolving standards of decency that mark the progress of a maturing society" required the closing down of Gatesville and Mountain View. According to expert testimony, conditions at Mountain View compared unfavorably with Angola Prison in Louisiana, often characterized as "the worst prison in America."[193] The court said, "the confinement of juveniles in a facility that compares unfavorably with one of the most notorious prisons in America is shocking and senseless."[194]

The court went on to suggest that institutionalizing juveniles in large, geographically remote physical plants might also be in violation of their fundamental constitutional rights. It assured, however, that it was not finding institutionalization, as a manner of dealing with delinquent children, altogether unconstitutional, but rather that

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[191] Ibid. at 686.

[192] 356 U.S. 86, 101 (1958).

[193] Morales at 122.

[194] Ibid.

certain kinds of institutions have characteristics which raise serious questions.[195] One characteristic mentioned was simply that of size. "Large institutions oppress their residents by virtually forcing the staff to ignore the individual needs of each child."[196] The rural setting of Texas institutions was another questionable characteristic. Their remoteness generally prevents any family involvement in the rehabilitative process and makes it nearly impossible to attract the highly qualified personnel needed to help the children. The lack of any sort of systematic furlough plan results in the juveniles being released back into society without the aid of any sort of transition process. The setting of TYC institutions also precludes the possibility of using community resources such as the educational, vocational, and medical facilities more readily available in an urban atmosphere. Finally, the remoteness forces the TYC to hire local residents who generally "have no understanding whatever of the urban, tension-filled lives from which most of the institutions' inmates have been torn."[197] In light of size, history, location and other factors, the court implied that Texas youth institutions may be unconstitutional regardless of other factors.

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[195] Ibid. at 124.

[196] Ibid.

[197] Ibid.

Another category of questionable TYC policy is the tendency to incarcerate all juveniles adjudged delinquent. The judge reiterated his prior opinion that such a policy violates the least restrictive alternative doctrine.

In summary, the court declared the abandonment of Gatesville and Mountain View "as quickly as possible"; the discontinuation of TYC policy which incarcerates nearly all delinquent children "within a reasonable period, making allowance for careful planning but not for foot-dragging"; the creation, within the same period of time of "a system of community-based treatment alternatives adequate to serve the needs of those juveniles for whom the institution is not appropriate"; and "the actual treatment, not simply warehousing, of those juveniles for whom institutionalization is deemed appropriate."[198]

Submission of Plans

The court ordered all parties to this case to begin meeting within thirty days to create a juvenile justice system consistent with this opinion. Judge Justice expressed the desire to have experts, persons with a Master's or Doctorate in a field related to social work or a medical degree with psychiatric certification, participate in the planning sessions. Accordingly, the court said, the planning group should consist of one attorney and one expert for

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[198]Ibid. at 125-6.

each of three parties, the plaintiffs, the United States, and amici. The defense is entitled to two attorneys and three experts. To date, plans for the implementation of the Morales decision have not been submitted because the appellate process has not yet reached a conclusion. However, due to the emergency relief order and this decision, certain changes have already taken place. The final chapter of this study deals with the effects of Morales v. Turman on the Texas system of juvenile justice.

# CHAPTER FIVE

## THE AFTERMATH OF MORALES V. TURMAN AND THE EFFECTS OF JUDICIAL INTERVENTION

The purpose of this fifth, and last, chapter is twofold. The first is to examine the TYC policies and practices in the aftermath of Morales. The attempt is to analyze the effects of the decision in the practical sense of what judicially mandated changes did, and did not, take place. The second purpose is to reexamine and evaluate this study as a whole in terms of what it contributes to an understanding of judicial policy-making and its potential for effective change.

### The Impact of Morales v. Turman on TYC Policies and Practices

In order to estimate the effect or impact of Morales, a series of interviews was conducted with the following Texas Youth Council administrative staff members: Ron Jackson, Executive Director; Mart Hoffman, Deputy Executive Director; Dick Kiekbusch, Director of Evaluation and Research; Neil Nichols, General Counsel and Ombudsman; and Hy Steinberg,

Director of Human Resource Development.[1] Budget comparisons were considered, and a variety of reports and documents were gathered. These sources helped to clarify the previously mentioned "effect question." Generally speaking, the effects of Morales were vast in some areas and minimal in others.

There are no systematic measurements for studying the effect or impact of court decisions. It is not possible to know, with certainty, which events took place precisely because of the decision and which occurred for other reasons. In the introduction to this study, it was suggested that a case's effects could be divided into three categories: (1) the judicial pronouncements which have been implemented, (2) those which have been ignored, and (3) changes that have occurred since the judicial pronouncement, but not specifically mandated by the judge's decree. The findings, as might be expected, do not fit neatly into these categories. Nevertheless, the outline remains useful and appropriate.

The three categories are used here as a type of measurement. Those standards implemented immediately were directly related to the judicial decree. The standards not implemented measure a degree of noncompliance. The third category reflects implemented standards which are especially difficult to relate to the Morales decision. However, it

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[1]The author is indebted to these administrative officials for their time and patience on February 22, 1977. A copy of the questions around which the interviews were structured appears in the appendix.

cannot be assumed that the decision played no role in the process of change simply because the implemented standards do not square with the policies enumerated by Morales.

## Immediate Aftermath

Within a few days of the decision, there was a riot at Gatesville. It is not possible to find a direct correlation between the riot and the Morales decision from the available information. The riot marked the final days of James Turman in the position of Executive Director. His inability to control the situation appeared to result in a forced resignation and the appointment of Ron Jackson in his place. Jackson began an entire reshuffling of personnel at the administative level of the TYC which lasted several months. He also hired a number of additional assistants in order to develop and implement a master plan for juvenile justice in Texas.

## Implemented Judicial Pronouncements

It was mentioned earlier in this dissertation that Judge Justice found certain conditions at the TYC institutions, particularly Mountain View and Gatesville, so unacceptable that he saw fit to issue an emergency interim relief order in August, 1973, preceding the actual Morales trial by nearly a year. In the opinion of both Ron Jackson, Executive Director, and Neil Nichols, General Counsel, that particular mandate has met with full compliance and remains operational.

Physical Force

The widespread use of corporal punishment and physical brutality was a major concern of the court. Those practices, according to Nichols, are no longer tolerated, at least as a matter of policy. He pointed out that it is probably not possible totally to eliminate all such abuses. When an abuse does occur, however, it is believed to be an exception to regular practices. In order to assure the discontinuation of physical abuse, procedures have been developed and implemented which allow a juvenile to register a formal complaint with the Executive Director about his mistreatment. This system will be discussed in more detail later in the chapter as it applies to all decisions affecting the inmates, not merely punishment decisions.

In the emergency order, the court criticized the lack of a uniform set of rules governing inmate behavior. Judge Justice said the circumstance of not knowing what behavior is punishable constitutes mental and emotional cruelty. TYC policy now requires that all institutions provide to each inmate a list of institutional rules and the corresponding punishment for infraction of the rules. However, these lists are not uniform throughout the institutions. According to Nichols, all of the rules booklets contain a "catch 22" clause which allows punishment for "any behavior which is disruptive of the routine of the institution." He did not view this situation as satisfactory and believed

this clause would eventually be eliminated as a result of the planning and systemization going on under his supervision.

Segregation

Prior to the Morales decision, all institutions were segregated according to sex. Since that time, Brownwood, Gainesville, and Giddings have been converted to coeducational facilities. Crockett has responsibility for both boys and girls, but they reside in campsites and the individual sites are sexually segregated. Gatesville remains segregated, housing only boys. It operates as an institution for the more serious offenders. Segregation by race, color, national origin, and sexual preference tendencies has also been stopped within institutions, as well as individual dormitories.

Solitary, Security and Dormitory Confinement

TYC policy has changed to eliminate any sort of general room lockup at night. If there is an imminent threat to person or property involved, a juvenile can be placed in a secure setting but only according to specific standards. These standards include: a written statement by the child's caseworker, within one hour of confinement, assuring that the setting meets certain standards such as providing the youth with a bed, mattress, bedding, toilet, one hour recreation per day, school books and daily lesson

plans; a caseworker visitation for ten minutes every hour except between 10:00 p.m. and 7:00 a.m.; visitation by a registered nurse once a day; visitation by a psychiatrist or psychologist once a day beginning with the second day; a written report prepared by the caseworker and sent to the Executive Director after three consecutive days of "lock-up" giving in detail a justification for the confinement; and written reports prepared and filed by the Executive Director justifying any extra confinement lasting longer than five days. In addition to these standards, TYC policy has eliminated the enforced silence of juveniles in lockup and make-work practices, and has mandated that a member of the institutional staff, with a key to the secure room or cell, be within calling distance at all times.

Despite these restrictions on the use of solitary/security confinement, it remains the principal form of punishment in use at all TYC institutions. According to Nichols, this situation, even though it fully complies with the relief order, remains unsatisfactory. He explained that solitary confinement is not a rational punishment because it separates the punisher from the punished. In other words, the individual who actually inflicts and supervises the punishment is not the same person as the individual who makes the decision to punish. This, in Nichol's opinion, is not a meaningful form of punishment because the juvenile does not relate his condition of punishment to any particular act he has committed.

Nichol's office is presently compiling reports on the use of solitary, the rehabilitative results, alternative punishment methods in use, and further suggestions of the staff personnel. He said the problem at present is quite simply that no one knows the answer to this dilemma. Further alternatives must be created before a more effective punishment scheme can be devised.

Communication

According to Nichols, there is essentially no longer any mail censorship at the TYC institutions. The only exception to this rule involves an inmate's receiving a package. In that event, the package is examined for contraband in the presence of the juvenile, but no written material may be read by the staff personnel. Contraband, those items denied an inmate, includes things considered dangerous and things of which possession constitutes a crime.

The inmates are allowed to correspond with anyone they please. They are supplied with pens, pencils, paper, envelopes and a minimum of three stamps each week. Correspondence to and from the inmates is allowed in any language. Previous policy allowed communication only in English.

Visitation

TYC policy requires all institutions to provide reasonable visitation privileges for the inmates. Minimally, this means that each institution allows the inmates

visitation privileges at least two hours a day on two separate week days and from 9:00 a.m. to 5:00 p.m. on Saturdays, Sundays, and holidays.

Nursing Care

Since the Morales decision, the TYC has implemented the court's order that at least one registered nurse be available at each institution on a 24 hour-a-day basis.

TYC Personnel Screening

TYC policy requires that all prospective personnel be psychologically evaluated for fitness to work with children. It further requires that persons hired, rehired, or promoted to any position meet the standards established by the Texas State Auditor in the Texas Position Classification Plan.

Reduction of Inmate Populations

According to TYC personnel there was a tremendous reduction in inmate population figures in the aftermath of the emergency interim relief order and the final Morales decision. However, juvenile court judges have, in the past year, begun again to require TYC jurisdiction of an increasing number of juveniles and the figures have begun to rise. For example, the institutional population in June, 1976 was 1232. It rose to 1374 by November 29, 1976. By that time, the TYC institutions were housing 300 more delinquents than

had been predicted or planned for.[2] Ron Jackson explained that the fluctuations, at least initially, had little to do with TYC policy. In his opinion the reduction in inmate population figures was a result of the fear instilled by Morales. He believes that juvenile court judges in Texas were so horrified by the conditions and practices revealed in the relief order, the trial, and the final opinion that they simply refused to commit juveniles to TYC jurisdiction.

Assessment and Placement Decisions

The reception center for boys at Gatesville was closed, and all incoming delinquents are currently received at Brownwood. The major factor involved in placement decisions is location of the family. According to Mart Hoffman, placement decisions follow a "regional concept," and the initial consideration is whether or not it is possible to place a child near his family. Where that is possible, it is done. The only exception to this general rule is the decision to place a boy in Gatesville or the Hackberry Unit of Gatesville. Those decisions are made on the basis of the juvenile's committed offense. Boys who commit serious criminal offenses are automatically sent to Gatesville, and the Hackberry Unit is reserved for the most serious offenders.

Juvenile court judges are no longer allowed by TYC policy to commit a child and send him to a reception center

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[2]"Population," TYC Notes (Austin, Texas: December, 1976), p. 3.

accompanied merely by a court order. The judges must now provide the TYC with the child's medical records, school records, an updated social history, and, if available, a psychological or psychiatric evaluation.[3]

In addition to using the records which accompany the child to the reception center, the staff there conducts thorough medical, dental and psychological examinations and evaluates the results. Where the need is indicated, a psychiatric interview and evaluation is also arranged. The center attempts to measure, at this point, a number of interpersonal skills. This program is still in the developmental stages and will be further discussed later in this chapter.[4] With the regional concept in mind, together with the court produced records and the center's evaluations, the staff makes a placement decision based on each child's rehabilitative needs.

The assessment and placement practices of the TYC are in general compliance with the court's order, but there are some exceptions. In the first place, the mandated number of psychologists at the reception center has not been hired because, according to Hoffman, the legislature has not appropriated the necessary funds. Secondly, the standardized tests objected to in the Morales decision remain in use,

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[3] Texas Youth Council: An Overview (Austin, Texas: Texas Youth Council, December 1, 1976), p. 1.

[4] Ibid. at 2.

although they are being reevaluated and change is expected. Finally, Hoffman admitted that although every effort is made to follow the agreed upon procedures for making placement decisions, the factor of open bed space remains important. In other words, in some cases, regardless of a child's assessed rehabilitative needs he is placed in an institution on a space available basis.

Abandonment of Mountain View

The court ordered the abandonment of Mountain View altogether, saying that the degradation and brutality there were so ingrained, no amount of reform could make it an acceptable place for children to reside. The institution has been abandoned in terms of juvenile delinquents and is now used as a medium security prison for adult female offenders. According to Jackson, this change resulted from the reduction of TYC inmate populations, not as a result of Morales. He simply believes that the space provided by the institution became unnecessary, so it was abandoned. On the other hand, he did agree that Morales caused the population reduction so the two results are entertwined. The implication appeared to be that, if Mountain View were needed to house juveniles delinquents, it would be used, regardless of the court order.

The Creation of Alternatives

Judge Justice was particularly alarmed by the total lack of alternatives available to juvenile court judges.

Prior to Morales, a judge's choice was essentially twofold: either the child was released from custody, at best under the supervision of a poorly funded and inadequate probation system; or he was incarcerated in a large, geographically remote institution. The court ordered the TYC to develop alternatives.

This pronouncement was taken quite seriously by the TYC. At least five new programs have been developed. Four of these have been developed within Texas communities. A fifth new program is the Wilderness Program at Crockett. In terms of the central office budget, the difference in expenditures for community treatment services is profound. In fiscal 1974, before Morales, the TYC spent $891,679 for community services. This amount provided only for personnel in the area of parole. For 1977, the legislature has budgeted $9,183,513 for personnel in the community services division. The increase in expenditure for fiscal 1977 amounts to more than eight million dollars as compared to fiscal 1974. These funds have provided for the development of a number of community-based facilities including the residential contract program, halfway houses, the community assistance program, and the youth resource development program. The Crockett Wilderness program is an alternative to the conventional form of institutionalizing juveniles in Texas prior to Morales, but it is not funded under the community services program.

Residential Contract Program

The residential contract program, operated by the TYC, involves arrangements with 50 to 60 privately-owned childcare facilities. The TYC, as it sees fit, places children committed to its care in these private facilities located in the child's community wherever possible. In return the residential treatment facility receives from $30.00 to $33.00 a day per child depending on the particular facility. This program is primarily for those juveniles adjudged delinquent. Some go to a residential center following a period of institutional confinement; others, however, are sent to a residential center directly from the reception center at Brownwood. This program alone shows that juvenile delinquents are no longer automatically incarcerated in the sense of placing them in large, geographically remote institutions.

All children in residential treatment facilities are considered a part of the field placement program. This is equivalent to the probation and parole division in adult corrections. Each juvenile is assigned a field service counselor, the equivalent of a probation officer, who oversees the child's development. To insure that the treatment plans contracted for are delivered "on a regular basis, TYC conducts fiscal and program audits of residential contract programs . . ."[5]

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[5] Ibid. at 4.

There were no funds appropriated for a residential contract program for delinquents prior to fiscal 1976. The legislature provided $803,000 for fiscal 1976-77. This pilot program is designed to provide services for an average of 30 delinquents in 1976 and 50 in 1977 in the El Paso and Valley regions of Texas. The need is especially essential for these juveniles because of the distance of the regions from the existing TYC institutions and the resulting inability of the parents to visit their children and take part in their rehabilitation program. Furthermore, a large proportion of these juveniles are of Mexican American descent, and they have special language and cultural background differences and needs which are not met by existing TYC facilities.[6]

In addition to payment for room and board, the residential facilities are expected to provide group and individual counseling, educational programs, and some sort of recreation for at least nine hours per week. As the program grows and becomes operational, the budget provides an additional $10.00 per day for each child committed in 1976 and $11.00 per day for each child committed in 1977 in order to provide expanded services. It is expected that this program will reduce recidivism rates in these areas by 40 percent.[7]

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[6] Budget Estimates: Fiscal Years 1976 and 1977 (Austin: Texas Youth Council, August 1, 1974), pp. 109-12.

[7] Budget at 110-112.

Halfway Houses

Halfway houses provide much the same service as residential contract centers, but the environment is generally more structured, and they operate in communities where residential contract facilities are not available. There are four halfway houses in operation with an average population of 14 to 24.[8] The locations include Nueces House in Corpus Christi; Travis House in Austin; Chelsea Hall in Houston; and Dallas House in Dallas.

The Texas legislature appropriated $273,957 in fiscal 1974-75 for the purpose of establishing these halfway houses. It is unclear from the 76-77 budget what level of expenditure is currently being provided.[9] The TYC has recommended to the legislature that additional halfway houses be developed in 1978-79. The Legislative Budget Board, however, has recommended that the legislature deny the request.[10]

Community Assistance Program

The TYC asked for, and received, $2,500,000 in fiscal 1976 and $5,000,000 in fiscal 1977 for development of a community assistance program.[11] This project pays communities

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[8] Overview at 4-5.

[9] Budget at 77.

[10] "Budget Board Approves Reduced TYC Appropriations," TYC Notes (Austin, Texas: January, 1977), p. 1.

[11] Budget at 76.

not to commit children to the TYC. The purpose is to encourage local communities to develop their own unique programs for dealing with juveniles, and the effort constitutes the TYC's principal means of reducing commitments to the Council.

County juvenile probation departments receive approximately 80 percent of these funds, while the other 20 percent goes to private childcare agencies. The TYC has established a base commitment rate for each county by taking into consideration the juvenile population and the number of committed juveniles from a particular county over the past ten years. On a monthly basis, it then pays the county $4,050 for each commitment below the base rate. This figure is reached by consideration of the costs of placing a child in a community placement facility with field supervision for 7.7 months.[12]

According to Mart Hoffman, as of January, 1977, only 50 of the 250 counties in Texas were involved in this program. He blamed the lack of county acceptance on poor relations between the county judges and the TYC and pointed out that there are plans being developed for public relations efforts with the local county governments.

Youth Resource Development Program

In addition to programs developed for those juvenile delinquents already committed to TYC supervision, a program

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[12] Overview at 11.

of preventive delinquency has been developed to divert young people from the Texas juvenile justice system. It is known as the Youth Resource Development (YRD) Diversion Program, and $6,064,717 was appropriated for fiscal 1976-77 to implement its goals. The program contracts community services for juveniles identified as potentially delinquent. The emphasis is on providing help for the juveniles in learning skills, career skills and recreational skills. In addition, there are programs for helping parents improve their parenting skills. The program expects to reduce juvenile absenteeism from school and work by 33-40 percent. It expects to divert 40-50 percent of the young people it works with from the juvenile court's attention. When the program is fully developed, it will offer services to 35,000 young people throughout the State of Texas.[13]

Crockett Wilderness Camp

The Crockett school has been transformed into a series of campsites, all located near the main campus in the Davy Crockett National Forest. One of the campsites is for female status offenders. The other is for boys, both delinquents and status offenders, although these categories are segregated in the individual camps. The emphasis in this program is on "self-reliance, team work, and the immediate experiencing of the consequences of ones acts."[14]

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[13] Budget at 86-^3.

[14] Overview at 3.

The juveniles in the camps live under extraordinarily primitive conditions. They reside in plastic tents and their days consist of cleaning, cooking, building and group therapy sessions. Living in the camps forces the inmates to learn to get along with one another because there is no outside contact. When a problem arises, the youths "huddle-up" and are required to work out a solution. Some parents have objected to the Wilderness Program because of the harsh conditions and are threatening to file suit. As of March, 1977, however, the program was still in operation, and staff members are generally optimistic about the expected results.

Family Involvement

There is no formally stated program concerning involvement of a juvenile's family in the rehabilitation process. However, the court order on this issue has been at least partially met by a variety of methods. Family visitation privileges have been expanded and the ability of families to visit the juveniles has increased as a result of the efforts to place all juveniles as close to their geographical homes as possible. Although there is no perceptible standard, all institutions have some sort of home furlough program which allows those considered deserving to leave the institution for a designated period of time and visit their families. All of the institutions, according to Ron Jackson, allow Christmas furloughs for the majority of their inmates. Finally the field placement supervisors

(probation/parole officers) are directed to contact and begin working with the parents of a juvenile from the time he comes to the court's attention, whether he is awaiting a hearing, committed to a TYC institution or some other program, or on probation or parole.

Statewide Ombudsman System

The court ordered the TYC to establish a statewide ombudsman system based on the Mountain View program that resulted from the emergency relief order. The Mountain View Ombudsman was established primarily to hear inmate grievances concerning staff brutality and other forms of mistreatment and to report to the court on matters concerning the implementation of the relief order.

Judge Justice ordered the expansion of the Mountain View program to a statewide system and suggested that TYC hire Charles Derrick, the Mountain View Ombudsman, for that position. Ron Jackson instead hired Neil Nichols, an attorney. Mr. Derrick has since been dismissed by the TYC.

There are two aspects to Nichols' job. He is responsible for supervising a group of hearing examiners throughout the state. These people preside at field placement revocation hearings. Each juvenile who is in the process of having his field placement status revoked, and being sent or returned to an institution, is entitled to a hearing at which a trained TYC examiner presides. Third year law students are hired to preside at the hearings.

The second aspect involves development of a standardized list of procedures by which administrative decisions are made that affect the juveniles' lives, and a procedural format to be utilized by the juvenile for appealing any decision which affects him. The use of grievance procedures is not limited to disciplinary decisions but applies to all administratively formulated decisions. The second phase of Nichols' job is funded by a federal grant not included in the 1976-77 biennium budget.

The second phase remains in the developmental stage, but procedures for the airing of grievances have been established. Although Judge Justice recommended that juveniles be allowed full procedural rights in order to protect them against abuse of administrative discretion, the system as implemented allows only appeal. In other words, the juvenile has no rights which enable him to question an administrative decision prior to its being made; but afterward, he has a right to appeal the decision.

The subjects of grievance procedures may include: personnel in instances of neglect, harassment, the use of unnecessary force, etc.; conditions concerning food, clothing, medical care, etc.; and programs including rules and practices.[15] The TYC staff has been informed by the Executive Director that ignoring any complaint as frivolous is not acceptable behavior.

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[15]Ron Jackson, Memorandum to TYC Staff Concerning Grievance Procedures, October 5, 1976, p. 2.

The procedure for filing a grievance must be implemented within 60 days of a particular decision. The juvenile's caseworker files the appeal on his behalf and acts as his advocate. The Executive Director, within two days, is required to distribute copies of the appeal to the responding party and other interested persons. These parties are allowed to submit a response to the appeal if they so desire. The appeal is evaluated by the Executive Committee which includes the Deputy Executive Director, the Director of Community Services and the Director of Institutional Services. The Committee makes a recommendation to the Executive Director, who makes the final decision. If the Executive Director is not satisfied with the recommendation, he may call for an investigation, which is the responsibility of the Ombudsman, Neil Nichols. The Executive Director is expected to make a decision within 15 days of the time he receives the appeal. The opinion must be in writing and include reasons for the decision. Copies are distributed to the involved parties and other interested persons. All such decisions are kept on file at the TYC's central office. There are provisions in the procedures for oral argument and rehearing; however, once the Executive Director files his decision, the juvenile's administrative remedies are considered exhausted.[16]

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[16] Texas Youth Council Procedure for Appeals to the Executive Director, mimeographed memorandum to TYC staff, 1976, pp. 1-6.

According to Nichols, the grievance procedures are successful. Based on visits by himself and his staff to the institutions, he believes that the inmates have a good attitude toward the procedures and feel free to use them. On the other hand, since the procedures were implemented (October, 1976) only 30 appeals have been filed. Therefore, it is difficult to make an assessment at this point about the program's effectiveness. The long range desired result of Nichol's office, The Office of Youth Justice, is the establishment of procedural guidelines for administrative decision-making which apply to all institutions. This, in Nichol's opinion, should eliminate, as nearly as possible, unfair administrative discretionary practices.

The general effect of the statewide ombudsman system is, it appears, in concurrence with the court order even though due process requirements do not govern the procedure by which decisions affecting the juveniles are made. According to Nichols, an interesting effect of the appeals procedure is the caseworkers' comments. In helping the child prepare his appeal, the caseworkers often include comments. In effect, this provides an appeals procedure or an outlet for the caseworker to criticize institutional policies and suggest alternatives, without having to go through the superintendent of the institution where they are employed.

Nonimplemented Justicial Pronouncements

There are certain policy pronouncements in Morales which have not been implemented. The reasons given for this noncompliance, by Ron Jackson and members of his administrative staff, were: (1) the legislature has not appropriated the necessary funds; (2) the policies are unwise or unnecessary, in the TYC staff's opinion; or (3) there has not been sufficient knowledge generated or time allowed to accomplish some of the court's directives.

TYC Policy Procedures

In the Morales decision, Judge Justice was disturbed by the fact that there was no ascertainable set of policies which govern the TYC's operations. This situation remains unchanged. TYC policy is still established by a Board of Directors, which meets every two months. Policy is then made operational by an Executive Director. The only written source of policy statements remains the minutes of the bi-monthly meetings which are taken by a secretary. There is an ongoing attempt to develop policy papers at the present time. For example, there was a policy statement drawn up in January, 1977, involving the rehabilitation programs for juveniles committed to the TYC. The paper is extremely general in direction and scope. It was the Executive Director's request that the paper not be copied or quoted as he considered it unfinished and not particularly useful.

Abandonment of Gatesville

The court ordered that the Gatesville facility be abandoned. Here again, as in the case of Mountain View, the judge found conditions and practices there so ingrained and intolerable as to be unsuitable, under any circumstances, to serve as a juvenile institution. There has been no attempt to implement that order. Gatesville is an institution, consisting of four units, designed to house the more serious male offenders. The most aggressive of the boys are placed in a special unit, Hackberry.[17]

There has been some attempt to improve the Gatesville institution. Of the $4,020,712 appropriated in 1976 for physical improvements of the institutions, nearly one half, $1,956,180, was designated to be used at Gatesville.[18] The major budgetary expenditure was for dormitory remodeling ($1,400,000). The purpose, among other things, was to partition the open dorms, provide privacy in bathroom facilities, and install air conditioning.[19] Since the vocational training facility had been destroyed by fire, $513,250 was appropriated for its replacement.[20] It is obvious from a reading of the budget analysis and expenditures that the TYC

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[17] Overview at 3.

[18] Budget at 170-6.

[19] Ibid. at 174.

[20] Ibid. at 176.

has considered no alternatives to the maintenance of an institution at Gatesville.

### Academic and Vocational Education Programs

Academic and vocational education program appropriations are contained in the budgets for each individual institution. These were not made available during the course of this research effort. Ron Jackson pointed out that little, if any, emphasis has been placed on the improvement of existing programs or the development of new ones in this area. He said, in fact, that the educational programs are currently weaker, for the most part, than they were at the time of the Morales decision. He explained that the emphasis has changed from developing educational skills to developing "interpersonal" skills and that all efforts had been in the direction of developing guided group interaction programs.

With respect to the court's order to establish bilingual educational programs, nothing has been done to date. When questioned about this, Jackson's answer was somewhat evasive. He said that nothing had been done primarily because the term "bilingual" is not definable.

## TYC Policy Changes: Beyond Morales

There have been many changes in TYC policy since the Morales decision which appear on the surface, at least, not to have been based on the court order. These changes, however, appear to have resulted from the general thrust of

Morales. They are all included in an ongoing process to improve the practices and circumstances surrounding the prevention and treatment of juvenile delinquency.

Medical and Psychiatric Care

Medical care is an area included in this section because the overall program appears to be in line with the court order even though some of the specifically mandated changes have not been implemented. In June, 1976, the Texas State Department of Public Welfare published a set of medical and psychiatric care standards which are applicable to TYC institutions. According to Jackson, it is these standards that are followed by the TYC rather than the Morales standards.

Mart Hoffman explained that TYC personnel found the Morales standards to be, in some instances, unrealistic and unnecessary. In terms of psychiatric services, for example, consultants are used in preference to the hiring of full-time psychiatrists. He said hiring full-time personnel was not only unnecessary but also too expensive. All of the institutions do have, however, registered nurses on the staff and a medical doctor on call 24 hours a day. Hoffman said that all institutions now have adeuqate infirmary facilities.

Judge Justice also expressed concern about the dispensation of medication that is too potent or unnecessary. Currently, all institutions are working on a set of guidelines to set standards for medication. According to Nichols,

each institution is required to submit a monthly report to the TYC listing the children taking prescribed medication, what medicine he is taking, and the purpose of the medication. This report is examined on a monthly basis by the Executive Director.

The Carkhuff Theory

Following the Morales instigated investigation, the TYC hired Carkhuff Associates, Inc. to assess the needs of juvenile justice on a statewide basis and develop a master plan for juvenile correctional services. According to Hy Steinberg, the man primarily responsible for implementing the Carkhuff plan, many of Jackson's program ideas are based on Carkhuff's theories.

Simply stated the Carkhuff theory is: in order to be a productive citizen, one must acquire certain skills--living, learning and working skills. Carkhuff defines skills as "the quantity and quality of responses to a given situation that an individual has in his repertoire at a given point of time."[21] He says these skills are observable, measurable, trainable, repeatable and, within limits, predictable.[22]

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[21]Robert R. Carkhuff, Living, Learning and Working: The Effective Ingredients of Human Resource Development, unpublished keynote address to the American Education Research Association, February 26, 1973) p. 4.

[22]Ibid. at 4.

According to the Carkhuff's theory, the teaching of skills is equivalent to rehabilitation. A child is rehabilitated in three essential stages: teaching him to explore or "see" his situation and understand his experiences; helping him to understand "where he is in relation to where he wants to be," and teaching him to act "upon how to get from where he is to where he wants to be."[23] Skills in these areas need to be developed with respect to interpersonal relationships or "human achievement," "educational achievement" and "career achievement."

The practical impact of Carkhuff on the Texas juvenile justice system is that an extraordinary proportion of the post-1974 resources available to the TYC has been allocated to employee training programs. The emphasis in training is on individual staff members because the belief is that trained staff can rehabilitate juvenile delinquents regardless of their individual characteristics. Jackson expressed the opinion that 90 percent of all incarcerated youth in Texas were amenable to rehabilitation through the use of the Carkhuff methods.

The current emphasis, then, of the TYC is on the development of training programs in the communities as well as in the institutions for people who work with and teach the children. Also, TYC personnel are attempting to devise

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[23] Ibid.

methods for measuring the taught skills. The ultimate goal is a computer-based means for evaluating the success of individual staff members in their ability to teach the children the skills which enable them to become productive citizens.

Personnel Training Programs

A program by which teaching skills can be measured and evaluated has not yet been developed, but pre-service and in-service training at the institutions is currently being practiced. Each employee is required to attend pre-service training for a minimum of 104 hours. Three days are devoted to a general orientation, and eight days are used for the teaching of teaching skills. In addition, in-service training is provided at all institutions. The amount varies at each one depending on the attitude of the superintendent and the funds available, but according to Steinberg, it is increasingly becoming a standardized program.

TYC Growth and Expansion

The Morales decision called for personnel expansion at the institutional level in terms of caseworkers and houseparents. This has not been accomplished. Judge Justice said, at the minimum, there should be one caseworker and houseparent for every 20 inmates. Currently, according to Hoffman, the ratio is one to 36 or 38. However, the expansion of personnel at the higher administrative levels has

been extraordinary because of the attempt to develop programs which fully implement the master plan developed by Carkhuff Associates, Inc. The number of paid TYC positions in 1973 was 99. By 1977, that number had increased to 679 1/2. In order to attract top level talent, the salaries of TYC administrators have also become more attractive. For example, in 1973, the Executive Director and Deputy Executive Director were paid $27,500 and $23,000 respectively. In fiscal 1977, $42,900 and $37,400 were appropriated for those positions. Two other sets of figures will serve to illuminate and prove the point concerning TYC growth and expansion. One involves central office operating expenses such as rent, telephones and postage. In 1974, the expenditure for this purpose was $30,417; by fiscal 1977, the requirement had grown to $604,164. For rented office space, the TYC paid $2,400 in 1973, 1974 and 1975. In 1976, the cost was $78,485, and in 1977 it rose to $86,988. The other set of figures involves a comparison of the total TYC appropriations. For fiscal 1974, the total TYC budget was $1,710,949. This figure refers to central office expenses only--not including the individual institutional budgets. The 1976-77 biennium budget requested and received $9,959,608 and $15,429,568, respectively, for the two years. The central office budget, institutional budgets, and additional administrative appropriation requests amounted to $31,978, 860 for fiscal

1977.[24] At the time of this writing, however, the legislature was considering a reduction in TYC appropriations for fiscal 1978-79. The figure recommended by the Legislative Budget Board was slightly less than 95 percent of the 1977 budget.[25]

General Impressions: The Effects of Morales

It is obvious from the above discussion that TYC policies are not yet fully defined or implemented and that fact prohibits data-based measurement of the effects. For example, it is impossible to tell whether the innovative programs have affected the rearrest or recidivism rates. First of all, the statistics are not available and, secondly, there are plans that have not yet been implemented in terms of dealing with recidivism. Even the TYC administrative personnel who were interviewed were not in agreement as to the specific impact of the case itself, but all did agree that it made a crucial difference and that the difference was a positive one.

Neil Nichols compared Morales to a "sunset law," or a law that requires governmental agencies to, in effect, prove their need every five to ten years or face abolishment. He called the decision a "reformation suit." Nichols viewed

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[24] "TYC Requests Increased 1978-79 Appropriation," TYC Notes (Austin, Texas, February, 1977), p 1.

[25] "Budget Board Approves . . . " at 1.

this as a positive approach and thought such court action was probably needed every five years with respect to juvenile justice systems, as well as other bureaucracies.

However, Nichols criticized the decision for not being progressive enough in terms of procedural rights. In his opinion, children should be "sentenced" like adults with a specific amount of time involved. He pointed out that adult and juvenile sentences need not be equivalent because "doing time" is more difficult for a child. He indicated that an adult can cope with five years of incarceration more easily than a child can cope with six months. However, he believes the child has a right to "know where he stands" and sentences which are merely based on statements such as "until he is rehabilitated or until he reaches majority age" confuse and frustrate the juveniles and are counterrehabilitative.

Nichols said the problem was that Morales, like other juvenile suits, borrows from other areas--mental health law, adult penal law, and school law. In his view there is a need for a unique set of laws which apply to juveniles who, because they have committed criminal acts, have come to the attention of law enforcement agencies.

The TYC administrators in general played down the effects of Morales in terms of specific accomplishments; however, they were all quick to point out that the real changes that have taken place would probably not have

happened in its absence. Ron Jackson believes that the direction of change stemmed from himself and Carkhuff Associates, not Morales. On the other hand, he admitted to using the decision as a "hammer." He explained that when he faced difficulties with other governmental agencies or the legislature, he could add weight to his program justifications by pointing out that the TYC was under a court order to change. Furthermore, Hy Steinberg revealed that when the Fifth Circuit overturned the Morales decision, Jackson quickly informed the TYC staff that, regardless of the new decision, TYC policy and direction would continue as before. In summary, the overall attitude of those interviewed was that Morales induced changes in TYC policy but the specific changes that occurred were the result of Ron Jackson, as guided by Carkhuff Associates, not Judge Justice.

Regardless of the TYC administrative staff's opinions, it is apparent that three fundamental changes occurred in the aftermath of Morales that would not have occurred otherwise. The first is that inmate populations were reduced. That produced the second overall change which was the forced development of alternatives by the TYC staff, juvenile court judges, and county probation officers. Automatic institutionalization of juvenile delinquents is no longer acceptable in Texas. Finally, the tremendous growth of the TYC as a government bureaucracy must be attributed to Morales. The leap in legislative appropriations from

1974 to 1976 could not have been a result of mere bureaucratic incrementalism.

## Overview: The Limits and Contributions of the Study

The preceding analysis has been a case study of judicial policy-making and the potential of courts to effect change. Obviously, there are limits to the generalizations that can be made from any case study such as this one. Each "case" is, by definition, a unique set of events; however, there are certain contributions this case makes to an understanding of the judicial process.

### Contributions of the Study

This study examines the judiciary from a political perspective. There are a number of elements which must be discussed in order to understand such a perspective. One element is the environment in which policy decisions are made. The environment provides certain kinds of input which ultimately affects the form and substance of the decision. Another element is the view that judges, in their policy-making role, are affected by their personal beliefs and values as well as the opinions of others. Finally the impact element is important in studying the judiciary from a political perspective. It is necessary to study impact, or the effectiveness of judicial decision-making, in order to understand realistically whether change occurs as a result of judicial pronouncements.

There is, at present, no general theory of judicial impact. Stephen Wasby[26] has approached the task by outlining a set of hypotheses that have resulted from various case studies such as this one. He believes that a major theoretical problem is this "after the fact" approach. The studies have come first followed by the hypothesis. Wasby believes there is a need for general, nationwide studies in order fully to test the hypotheses. This study, of course, makes no such attempt. However, where relevant, the Wasby outline is discussed. For the most part, it is not relevant because the available research deals almost exclusively with Supreme Court impact and, consequently, the hypotheses are related to that particular institution. There are some, however, that can be related to judicial policy-making at all levels.

The Environment

The first three chapters of this study clearly portrayed the environmental characteristics which may have affected the judge's willingness to hear the case, the form in which it was heard, the ultimate judicial pronouncements or outputs of the case, and the resulting impact, including the degree of compliance or noncompliance. The environmental

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[26]Stephen L. Wasby, The Impact of the United States Supreme Court: Some Perspectives (Homewood, Illinois: The Dorsey Press, 1970).

characteristics surrounding Morales are not necessarily unique consequences of juvenile delinquency. The national concern with crime and delinquency has increasingly caused courts to participate in the resolution of the issue. They have been asked to support "law and order" as well as to protect individual liberties; tasks which are often in conflict. Reports like the President's Commission on Law Enforcement and Administration of Justice, together with prior delinquency cases, clearly showed that the prevailing methods for the prevention and treatment of delinquency have not been successful.

Paralleling these developments was growing judicial interest in the treatment of adult prisoners and involuntarily committed mental health patients. In both instances, although clearly established standards are generally lacking, the courts have increasingly placed limits on the discretionary power of administrative officials to control the lives of their clients.

The case adds to an understanding of the procedures involved in judicial investigation. The information provided is contrary to the notion that judges are unable to decide certain types of cases because they lack expertise about the subject matter involved in a case. Morales shows that judges, through testimony by expert witnesses and party negotiation, are able to expand their knowledge of a situation without becoming "experts." Consequently, the

availability of expert witnesses is an important environmental factor.

Knowledge of these environmental factors aid in an understanding of the timeliness of judicial intervention. Although available research methodology does not allow, at this time, precise measurement of the weight of environmental factors, they can be isolated to some extent. The assumption is that certain general environmental conditions must be met before judicial intervention will occur.

This study also isolates and examines the specific elements, in a particular environment, which resulted in judicial intervention. Knowledge of these elements increases understanding of environmental characteristics which result in intervention. Of course, it is necessary to study this subject further, taking into account other cases of judicial intervention into penal institutions, in order to isolate those factors which, when present, will result in judicially mandated change.

The influence of these environmental factors is, perhaps, obvious. To recapitulate, they affect the timeliness of judicial intervention, the information gathering techniques available, the output, and the effects of the output of a decision.

Judicial Policy-Making

Morales contributes to an understanding of judicial policy-making in a number of respects. Research in this

area has been primarily confined to the higher appellate courts and, particularly, the Supreme Court. This is because of the "upper-court myth," a notion that "the only place to look for 'the law' is in the doctrine of Supreme Court decisions."[27] It appears that the prevailing research on judicial policy-making and its effect or impact continues to be influenced by the "myth." The predominance of judicial research available investigates the higher courts, not the "lower courts where the bulk of cases are decided."[28]

Accordingly, Morales adds to the prevailing knowledge in two respects. First, it is a study of a nonappellate level court. It then, perhaps, begins to fill a gap in the knowledge about those particular institutions. Secondly, the "upper-court myth" is clearly refuted in this study. The case has been made that Morales did, in fact, create new law through the establishment of a constitutional right to treatment for incarcerated juvenile delinquents and the pronouncement of standards that define the right. These pronouncements were made even though, in at least one instance, the Supreme Court has denied the existence of a constitutionally-based right to treatment in the case of mental patients. Extensive investigation of lower court decisions might reveal that judicial policy-making is not necessarily a function of a hierarchical decision-making

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[27] Ibid. at 23.

[28] Ibid.

structure, in which opinions flow downward from the Supreme Court. Rather it might be hypothesized that judges at all levels create new law, or, possibly, that judicial decisions flow upward in addition to, or rather than, downward in the judicial process.

Morales contributes to an understanding of judges as humans, rather than mechanical robots who "find" the law. It is not important whether one believes Judge Justice to be a hero or a villain, depending on individual beliefs concerning activism and self-restraint. What is important is acknowledgement of the values and beliefs that affected his decision. In at least two respects, these factors appear important. The first is, his view of the proper judicial role follows that of an activist philosophy. This decision is at least as activist as Miranda in that Judge Justice not only created new law, he also literally wrote a manual governing the relationship between incarcerated juvenile delinquents and the State of Texas.

Secondly, although there is ongoing debate in the area of penal philosophy, it is obvious from this decision that the judge believed the state's responsibility is to rehabilitate rather than to punish. The impact of this belief deserves further study. There has been a large number of cases, in recent years, involving the rights of incarcerated persons. Litigation in this field is often followed by confused and contradictory opinions. Morales appears to

indicate that the penal philosophy of a judge affects the amount of satisfaction an institutionalized person receives.

Finally, Morales contributes to the knowledge about judicial policy-makers in relation to groups. The role of amicus curiae in this case contributes to an awareness that there are often other personalities and opinions involved in a case besides the judge, the prosecutor, and the defense. The degree to which the "friends of the court" influenced the actual output is not measurable, but it is obvious from this study that amici's participation can be a dominant--if not the dominant--controlling factor in a judicial decree.

Impact

Research concerned with the effect or impact of judicial decisions is of a fairly recent vintage, and less is known in this area than with respect to environmental and policy-making factors. This study examined effects in three categories: those involving compliance, noncompliance, and actions taken that were not mandated. Perhaps the most valuable contribution of this viewpoint is, it shows that impact is not simply a matter of compliance or noncompliance. The study of reaction to judicial decisions, in any systematic manner, is not possible at the present time because the tools of political science research are not capable of accomplishing an exact determination of a cause-effect relationship. For one thing, as mentioned earlier, it is never obvious

what actions were taken as a direct result of a judicial decision. In many instances, there were clearly other factors involved, such as the intent of the actors prior to the decision. Another factor could be the degree to which the court's intent was misunderstood.

It was earlier pointed out that, in Ron Jackson's opinion, the Morales decision so horrified juvenile judges that they simply, for a time, refused to commit juvenile delinquents to TYC institutions. If time and financial resources had permitted, it would have been revealing to discuss Morales with the Texas juvenile judges. One casual conversation with the district judge in Howard County revealed, not a sense of guilt about the mistreatment of juveniles, but a resigned and angry acceptance. That particular judge's understanding of Morales was, he had no choice. He thought he had, in fact, been ordered not to commit juvenile delinquents to TYC institutions, and he was somewhat disgruntled and confused about what to do with them. There followed, in Howard County, a frequent attempt to transfer juveniles who had committed crimes to adult criminal court.

## Limits of the Study

Morales is unique for a number of reasons. Such uniqueness precludes, to some extent, the ability to generalize from Morales about other judicial decisions. On the other hand, analysis of the unique characteristics of this

case contributes to an understanding of the limitations of the available knowledge and points the direction for future research. This case is unique in terms of the nature of the policy statement; the information gathering techniques employed; the establishment of an Ombudsman, allowing for continued judicial supervision; and the threat of judicial sanction.

Policy Statement

The most obvious and important quality of uniqueness in Morales is that it provides a forceful and positive policy statement. Consideration of Chapter Four of this dissertation reveals that the decision was more than a mere statement of Fourteenth Amendment due process guarantees. It is a specific and detailed statement of what Texas officials must do, and how they must behave, in relation to incarcerated delinquents. Most court decisions do not state policy in such a definitive manner.

Wasby hypothesizes that the impact of a decision will be greater when there was no policy, or no well developed policy, prior to the judicial mandate.[29] Morales appears to support this hypothesis because, although there were clearly certain policies and practices in operation, there was no available set of rules and regulations that applied to all of the institutions. However, Wasby also

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[29] Ibid. at 254.

says that when a decision generally reinforces existing state policy, there will be greater compliance.[30] Obviously, in this study, the criticism of state policy was widespread, but there appears to be a high degree of compliance. The Morales decision tends to support the reverse of this hypothesis.

It is reasonable to assume that, in instances where policy is clearly stated, the degree of compliance will be greater than in cases where a wide degree of latitude is allowed. Wasby hypothesizes that the degree of ambiguity is an important factor because noncompliance is greater when a decision is ambiguous.[31] He also says that compliance will be greater and more immediate when clear guidelines are provided by a judicial decree.[32] The ambiguity factor is particularly important with respect to the right to treatment. Since this is a constitutional doctrine of fairly recent vintage, never having been upheld or thoroughly discussed at the Supreme Court level, it is particularly difficult to define. The opinion in Morales attempts to define the right to treatment as it applies to incarcerated juveniles in clearly stated terms. This effort may in part explain the high degree of compliance with Morales. A

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[30] Ibid. at 255.

[31] Ibid. at 250.

[32] Ibid. at 249.

thorough study of cases involving detailed policy pronouncements is needed in order to determine further the reliability of these hypotheses.

Information Gathering Techniques

Morales is also unique in terms of the information gathering techniques used. Courts must generally rely on the evidence presented by opposing attorneys at a trial. Judge Justice ordered a thorough investigation of all TYC institutions. He appointed recognized experts to conduct the investigation and asked that they present the evidence as amicus curiae. This practice is not unprecedented but it is unusual. It would be useful to study other such cases by asking two questions. The obvious questions are: When judges consult with expert witnesses, are the resulting decisons more likely to be specific policy pronouncements than mere statements of law? and, When judges consult with expert witnesses, is there likely to be a high or low degree of compliance?

Continued Judicial Supervision

A third and important degree of uniqueness accompanies this case with respect to the establishment of the Ombudsman. Although the Ombudsman is no longer directly responsible to the court, he may report to that institution if he feels it is necessary in order to assure compliance. This involves a degree of continued judicial supervision,

a somewhat uncommon characteristic of court decisions. Wasby says that compliance with court decisions is more likely when there is a reviewing body available to hear complaints concerning noncompliance.[33] The Morales decision requests the parties to report to the court on a number of factors. Ultimately, it directs the parties to submit to the court formalized and detailed statements of policy concerning the implementation of the court's decision. It would be revealing to study other such cases involving continued judicial supervision to determine whether or not it affects the degree of compliance.

This final report has not been presented because the case has been on appeal. Nevertheless, it has been pointed out that there is an ongoing attempt by the TYC to develop such policy statements. It is hypothesized that compliance is likely to be delayed if there is a chance of reversal.[34] The aftermath of Morales tends to disagree with that hypothesis because of the high degree of compliance, but, with respect to the court ordered submission of plans, there has clearly been a delay because of the appellate process.

Judicial Sanction

Finally Morales is unique because it includes the threat of specific judicial sanction if compliance does not

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[33] Ibid. at 259.

[34] Ibid. at 253.

occur. Judge Justice clearly indicated in the opinion that he would consider ordering the abandonment of all TYC delinquent institutions if they did not follow the Morales mandates. This author found no attempt in the impact literature to deal, in a theoretical manner, with the subject of judicial sanctions. Instances where judges have threatened that specific judicial action will be the result of noncompliance should be further studied.

Summary

The degree of compliance with Morales appears to be high. However, as stated before, it is impossible to know exactly what happened specifically because of the opinion. Morales is an example of courts attempting to provide moral leadership. It is an attempt to create behavioral changes, both procedurally and substantively. Ron Jackson said the most obvious effect of Morales was an overall change in attitudes. He said the attitudes of the legislators, the governor, the juvenile court judges and the TYC staff members had taken an 180° turn on the issue of juvenile justice. Governmental policy-makers in Texas are now searching for the least, rather than the most, restrictive alternative for dealing with children.

In the introduction, Morales was described as a "building block." The case has been made that the study contributes to an understanding of judicial policy-making and its effects. Furthermore, given the unique

characteristics of this decision, a comparative study of other decisions with similar characteristics would add considerably to the knowledge of judicial decision-making and its potential for effective change.

## APPENDIX

Interview: TYC Administrative Staff

Introduction:

In September of 1974, Judge William Wayne Justice of the Federal District Court for the Eastern District of Texas announced the decision of Morales v. Turman which demanded a number of policy changes and imposed certain standards on the Texas Youth Council and the institutions under its jurisdiction. The following questions represent an attempt to obtain research data concerning the effects of Morales on the Texas system of juvenile justice.

I. TYC policy

How is TYC policy established? In what form is this policy set down? (obtain copy if possible)

II. Assessment and Placement

Morales ordered the abandonment of Mountain View and Gatesville. Mountain View is no longer listed as an institution under TYC jurisdiction. What happened to it? Are there any plans for abandoning Gatesville?

Judge Justice questioned the policy, if not the legality, of placing adjudged delinquents in large, geographically remote physical plants. What has been done to alleviate this situation?

There are apparently three new institutions for housing children under TYC jurisdictions--Corsicana State Home, Waco State Home, and West Texas Children's Home. What types and ages of children are sent to these homes? Are these institutions in any way a result of the Morales decision?

Has the situation with respect to the availability of halfway houses, foster home care, and other community-

based housing changed in any manner since the Morales decision?

In terms of official TYC policy, where, how and by whom, are the decisions made as to what institution a particular child will be sent?

Which of the following elements are relevant factors in the decision to place a child in a particular institution? Please comment on the weight given to the specific factors in the decision-making process: sex, age, race, family history, developmental history, physical examination, language and educational analysis evaluation.

How many psychologists are available per inmate at each of the assessment and placement centers?

Which of the following tests are utilized in determining child placement? Weschler, Leiter, Lorge-Thorndike? What other tests are in use?

III. Institutional Characteristics

Name of Institution_____

A. Student Demographic Data

Number of inmates for which the institution was intended.

How many students are housed here?

What is the breakdown of the students in terms of age and race?

B. Educational Policies

How is the educational level of the students determined? Is there an educational program in operation at this institution? How is this program made operational?

Is there a special program for the mentally/emotionally handicapped students? How is the determination made as to what students will participate in these programs? How many students are involved in this program? How many special education teachers are employed at this institution? Are the special education students segregated from those in the regular academic program in all phases of their educational experiences?

Is there a vocational education program available at this institution? How is the determination made as to what students will participate in the program? How many students are involved in vocational training at this institution? Is there a remedial mathematics and reading program to accompany the vocational training program? How many teachers are involved in the vocational program and the remedial program? Is there any employability plan for these students? How is it carried out?

C. Family Involvement

Are families allowed to visit inmates in this institution? When are the visiting hours? How often are they allowed to visit? Are there any special facilities made available for family visitation?

Are the inmates' friends allowed to visit? When are the visiting hours? How often are they allowed to visit? Are there any special facilities made available for visits with friends on the outside?

Are the students allowed to go home on furloughs? Under what conditions? Who pays for their trip home?

Are the families of the students involved in the students' rehabilitative therapy programs? If so, please explain in what manner.

D. Medical Care

Which of the following and in what numbers are available at each of the institutions: a psychiatrist, psychologists, psychologists with Masters' degrees, psychiatric nurses, a licensed dietician, speech therapists?

Are the infirmary facilities adequate at this institution?

Are there written guidelines for the dispensation of medication? (obtain copy if possible)

E. Personnel

What is the total number of supervisory personnel at this institution? (houseparents, dormitory supervisors, and correctional officers) Please give a breakdown on these people according to education, race, and age. In what manner are these people

pretrained for working with the children? Are they required to attend any in-service training? Please explain this program.

What is the total number of caseworkers at this institution? Please give a breakdown on these people according to education, race and age. In what manner are these people pretrained for working with the children? Are they required to attend any in-service training? Please explain. How many caseworker supervisors are employed at this institution? How many of those people are equipped with a Master's degree?

To what degree is there mobility of the personnel between the institutions?

F. Punishment

Please discuss TYC policy with respect to the following practices: (Primarily the concern is whether or not they are in use and, if so, what standards govern their use.) Corporal punishment (including paddling), solitary/security confinement, dormitory confinement, transfer to a more secure institution, tear gassing.

Which of the following elements of due process are made available to students at the time punishment decisions are made: a hearing (if so, before whom?), provisions for calling witnesses and cross examining witnesses, provision for an inmate advocate to be present, a written record of the hearing?

In what, if any, instances are punishment incidents to be reported to the executive director?

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