Parens Patriae and Statutory Vagueness in the Juvenile Court

On October 9, 1968, the San Francisco police, responding to a reported assault on a young girl, arrested eight boys on the ground that they were in "danger of leading a lewd and dangerous life" within the meaning of § 601 of California's *Welfare and Institutions Code*.[1] Similar juvenile statutes, containing an "omnibus clause" defining "delinquent" or an equivalent term so broadly that it covers some behavior of most children,[2] existed in forty-one states in 1969;[3] a child could be adjudicated a delinquent in thirty-three of those states on the mere finding that he was guilty of "immoral" conduct.[4]

1. Any person under the age of 21 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person or any person who is a habitual truant from school within the meaning of any law of this state, or who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

CAL. WELF. & INST. CODE § 601 (West 1966). These eight boys and two others were later booked for violating the juvenile code and on suspicion of robbery. CAL. WELF. & INST. CODE § 602; CAL. PENAL CODE § 211 (West 1970).

Similar statutory language has provided the jurisdictional basis for juvenile court scrutiny of noncriminal acts. *See* Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971) (three-judge court), *aff'd mem.*, 406 U.S. 913 (1972), discussed in note 64 *infra*.

2. *See* N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 146-47 (1970):

Conditions included in the various statutory descriptions of delinquent behavior comprise a medley consisting of anything from smoking cigarettes, truancy, sleeping in alleys, and using vulgar language to major felonies such as rape and homicide. Moreover, such vague, imprecise, and subjective terms as idleness, loitering, waywardness, stubbornness, incorrigibility, and immoral conduct are commonly employed; concepts so loose that, as Paul Tappan has observed, "to many they may appear to describe the normal behavior of the little-inhibited and non-neurotic child." Indeed, there must be few children who do not at one time or another engage in behavior that is somewhere defined as delinquent . . . .

Thus, Washington's juvenile court jurisdictional statute authorizes intervention in cases where the juvenile is in "danger of being brought up to lead an idle, dissolute or immoral life." WASH. REV. CODE ANN. § 13.04.010 (1962). New Jersey's delinquency statute is concerned with "incorrigibility," "immorality," and "growing up in idleness or delinquency." N.J. REV. STAT. § 2A:4-14(f), (g), (i) (1969).

3. Comment, *"Delinquent Child": A Legal Term Without Meaning*, 21 BAYLOR L. REV. 352, 369-71 (1969).

4. *See* E.S.G. v. State, 447 S.W.2d 225, 226 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970).

Further, juvenile authorities demonstrate little reluctance to invoke juvenile court intervention under such authority. *See* Gonion, *Section 601 California Welfare and Institutions Code: A Need for a Change*, 9 SAN DIEGO L. REV. 294, 299-300 (1972). The trial judge in E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970) (involving a fourteen-year-old girl committed to state training school for an indefinite period or until age twenty-one for "habitually so deport[ing herself] as to injure or endanger the morals or health of [herself] or others." TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3(f) (Vernon's 1971)) "observed that most girls who came before said court were charged with violation of this [morals] section." 447 S.W.2d at 226. *See* Wheeler, Cottrell & Romasco, *Juvenile Delinquency, Its Prevention and Control*, in U.S. PRESIDENT'S

When the San Francisco youths challenged the California statute, a three-judge federal court in *Gonzalez v. Maillard*[5] found it unconstitutionally vague and enjoined its enforcement. In reviewing that decision this Term,[6] the Supreme Court will have an opportunity to settle the issue of statutory vagueness in juvenile law and to clarify its approach to juvenile rights generally.

If the California statute were applied to adult criminals, it would undoubtedly be void for vagueness.[7] Juvenile courts, however, have historically enjoyed substantial immunity from constitutional requirements, and a redirected Supreme Court philosophy toward juvenile courts evidenced by Justice Blackmun's plurality opinion in *McKeiver v. Pennsylvania*[8] appears to have limited efforts toward the "constitutional domestication"[9] of juvenile court procedures begun during the Warren Court years. Despite this shift in the high Court's attitude toward the juvenile process, compelling arguments against overbroad "omnibus" clauses would seem to render the California statute and others like it unconstitutional even in the *McKeiver* framework.

I. Statutory Vagueness: Basic Doctrine

Fair warning is the first and central concept of the vagueness doctrine.[10] Determining whether language is sufficiently vague to invoke the void-for-vagueness doctrine is not always an easy matter,[11] but it

COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, app. T, at 418 (1967) [hereinafter cited as TASK FORCE REPORT].

5. No. 50424 (N.D. Cal., Feb. 9, 1971). *See* pp. 754-56 & notes 63-72 *infra*.

6. *Appeal docketed,* 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 1565, 1970-71 Term; renumbered No. 70-120, 1971-72 Term).

7. *See* pp. 746-48 *infra*.

8. 403 U.S. 528 (1971).

9. *In re* Gault, 387 U.S. 1, 22 (1967).

10. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." United States v. National Dairy Products Corp., 372 U.S. 29, 32-33 (1963), citing United States v. Harriss, 347 U.S. 612, 617 (1954). Mr. Justice Holmes explained this fair warning idea:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

McBoyle v. United States, 238 U.S. 25, 27 (1931). *See* Grayned v. Rockford, 408 U.S. 104, 108 (1972); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972); Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Palmer v. Euclid, 402 U.S. 544, 545 (1971).

11. *See* Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting):

> [I]ndefiniteness is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as indefiniteness in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained. The requirement is fair notice that conduct

is fairly clear that an adult criminal statute containing the type of omnibus clause language considered in *Gonzalez*[12] would be deemed "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"[13] and therefore unable to give fair warning. Juvenile statutes aimed at "incorrigibility" are not unlike adult statutes penalizing vagrancy,[14] "misconduct,"[15] or "reprehensible,"[16] "offensive"[17] or "annoying"[18] conduct which have been struck down by federal courts on this ground. Nor have state courts succeeded in applying a clarifying gloss to such statutes.[19]

The second requirement of the vagueness doctrine is that criminal statutes provide judges and administrators with clear guidelines for enforcement.[20] Omnibus clause language, encouraging officials to evaluate conduct "on an *ad hoc* and subjective basis,"[21] invites arbitrary and discriminatory enforcement.[22] In omnibus clauses, juvenile authorities have discretion to impose on youths whatever standard of behavior they may deem appropriate.[23] Similar discretion vested in police by a vagrancy statute has recently been held to render that statute unconstitutionally vague.[24]

> may entail punishment. But whether notice is or is not "fair" depends upon the subject matter to which it relates.

For a thorough analysis of this difficult doctrine, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

12. *See* note 1 *supra.*

13. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). This is perhaps the best known formulation of the doctrine.

14. *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972) ("lewd, wanton and lascivious persons" and "dissolute persons"); Ricks v. United States, 414 F.2d 1097 (D.C. Cir. 1968) ("leading an immoral and profligate life"); Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969) ("idle, immoral or profligate course of life"). The New York Court of Appeals has taken note of the relationship between arguments for invalidating vagrancy statutes and a vagueness challenge in the juvenile context. *See* People v. Allen, 22 N.Y.2d 465, 470, 239 N.E.2d 879, 881, 293 N.Y.S.2d 280, 282 (1968).

15. Giaccio v. Pennsylvania, 382 U.S. 399, 404 (1966).

16. *Id.*

17. Pritkin v. Thurman, 311 F. Supp. 1400, 1401 (S.D. Fla. 1970).

18. Coates v. Cincinnati, 402 U.S. 611 (1971).

19. Thus, efforts by California courts to breathe meaning into the phrase "in danger of leading an idle, dissolute, lewd or immoral life," CAL. WELF. & INST. CODE § 601 (West 1966), have produced such definitions as "inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or . . . willful, flagrant or shameless conduct showing moral indifference to the opinions of respectable members of the community and . . . an inconsiderate attitude toward good order and the public welfare" (Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 740, 227 P.2d 449, 453 (1951)); "any practice the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it" (People v. Scott, 113 Cal. App. 778, 780, 296 P. 601 (App. Dept. Supr. Ct., L.A. Co., 1931)); and "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched" (*id.* at 783, 296 P. at 603).

20. Grayned v. Rockford, 408 U.S. 104, 108 (1972); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972); Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966).

21. Grayned v. Rockford, 408 U.S. 104, 109 (1972).

22. *Id.* at 108.

23. *See* TASK FORCE REPORT, *supra* note 4, at 25.

24. Papachristou v. Jacksonville, 405 U.S. 156, 168 (1972). The holding also rested in part on lack of fair warning. *Id.* at 162.

Finally, the doctrine requires that statutes not be couched in such broad language that lawful as well as unlawful activities may be prosecuted under them.[25] Juvenile statutes are clearly overbroad, providing authority for incarcerating not only serious offenders but also those "who are vaguely undesirable in the eyes of police . . . , although not chargeable with any particular offense."[26] Long hair, unconventional clothing, and the exercise of First Amendment rights may be discouraged by juvenile court enforcement of omnibus clause provisions.[27]

Thus, in terms of the standards of statutory clarity generally applied to criminal statutes, omnibus clauses in juvenile statutes are unconstitutionally vague: they fail to provide fair warning, they permit arbitrary application, and they encroach upon constitutionally protected areas of behavior.

II. The Juvenile Court: Exemption From Constitutional Standards

The inquiry thus turns to the crucial question: In view of the unique constitutional status of juvenile courts, does the criminal standard of vagueness apply to juvenile statutes? The answer to that question turns on an analysis of the manner in which the juvenile process differs from the adult criminal process and the degree to which the constitutional rights of juveniles may vary as a result.

Established as special "non-criminal" tribunals to deal in special ways with the problems of young people,[28] state juvenile courts have always enjoyed some measure of exemption from ordinary procedural due process requirements. They purport to be motivated by the protective ethic of *parens patriae* rather than the punitive approach of the criminal process. They base their adjudication and disposition, it is said, on the assumption that, with proper guidance from a benevolent court, the erring child can be protected from himself and his environment and will grow into responsible adulthood.[29] In keeping

25. Grayned v. Rockford, 408 U.S. 104, 108 (1972); Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Baggett v. Bullitt, 377 U.S. 360, 368 (1964).

26. Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting).

27. *See* pp. 765-66 *infra*.

28. For additional historical materials, see Rosenheim, *Perennial Problems in the Juvenile Court*, in JUSTICE FOR THE CHILD 1 (Rosenheim ed. 1962).

29. *See* TASK FORCE REPORT, *supra* note 4, at 22-23 (footnote omitted):

> Children, assumed to be malleable, seem eminently salvageable; as the rehabilitative theme crept into the criminal law, it naturally appeared most applicable to children. Thus the juvenile court was to arrest the development of full-fledged criminals by catching them early and uncovering and ameliorating the causes of their disaf-

with this philosophy, juvenile courts substitute procedural informality for the adversary system[30] and exercise astonishingly broad discretion[31] in their efforts toward rehabilitation.[32]

For a time, it appeared that the juvenile system's exemption from constitutional requirements might be curtailed, as its failure to fulfill the high hopes of *parens patriae*[33] created pressure for judicial intervention to protect the rights of young people. In *In re Gault*[34] and a

fection. Symptoms take many shapes, some of them only indirectly related to the disease. The "child savers" saw in youthful cursing and carousing the beginnings of a life of crime, and they feared that the conditions of the neglected were all too likely to breed the behavior of the delinquent. The practicality of a stitch in time combined with an idealistic faith in the social sciences and treatment to give them a zealous desire to extend the juvenile court's helping hand as far as it could reach and a somewhat uncritical conviction that whatever the court did, as long as it meant well, was in the child's best interest.

30. The formalities of criminal procedure were rejected as being destructive of the rehabilitative goals of juvenile proceedings since the juvenile may not understand the discussion of his reprehensibility. "[S]ome courts developed what must have been a most comforting theory that to commit a child to an institution was an act entirely for the child's own interest and, therefore, involved no element of restraint or loss of freedom." U.S. SOCIAL AND REHABILITATION SERVICE, DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILDREN'S BUREAU PUB. NO. 437-1966, STANDARDS FOR JUVENILE COURTS 4 (prepared by W. Sheridan 1966) [hereinafter cited as STANDARDS]. *See Ex parte* Sharp, 15 Idaho 120, 96 P. 563 (1908).

Early efforts to challenge procedural informality were summarily rebuffed by courts, obviously attuned to the ideals of the "child savers," which insisted that the proceedings were civil rather than criminal in nature and that the state was merely substituting its authority for that of the parent. *See* cases cited in Pee v. United States, 274 F.2d 556, 561-62 (D.C. Cir. 1959); Commonwealth v. Fisher, 213 Pa. 48, 53-54 (1905).

31. Roscoe Pound once observed that "[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . ." Pound, *Foreword* to P. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY at xv (1952).

32. TASK FORCE REPORT, *supra* note 4, at 1.

33. The catalogue of failures is long and discouraging. Rehabilitative goals have not been achieved and recidivism is a serious and growing problem. *See* TASK FORCE REPORT, *supra* note 4, at 23. To many youths institutionalized under juvenile law, "rehabilitation" in state training schools is a cruel hoax. The TASK FORCE REPORT notes that "[i]nstitutionalization too often means storage—isolation from the outside world—in an overcrowded, understaffed, high-security institution with little education, little vocational training, little counseling or job placement or other guidance upon release." *Id.* at 8. One penologist has observed that "there are things going on, methods of discipline being used in the state training schools of this country that would cause a warden of Alcatraz to lose his job if he used them on his prisoners." MacCormick, *The Essentials of a Training School Program*, in MATCHING SCIENTIFIC ADVANCE WITH HUMAN PROGRESS 15 (National Council of Juvenile Court Judges, Pittsburgh Conference, May 1950), quoted in Gluek, *Some "Unfinished Business" in the Management of Juvenile Delinquency*, 15 SYRACUSE L. REV. 628, 630 (1964).

Personnel handling juvenile offenders are too often not up to the task. Thus, the system requires a patient, sophisticated and knowledgeable judge to dispense benevolent justice to erring but salvageable youths; such nonpareils only infrequently occupy juvenile court chambers. *See* TASK FORCE REPORT, *supra* note 4, at 7; McKeiver v. Pennsylvania, 403 U.S. 528, 560 (1971) (Douglas, J., dissenting).

Juvenile court adjudications have begun to serve penal purposes in the face of public concern about rising juvenile crime. *See* TASK FORCE REPORT, *supra* note 4, at 31.

Finally, even the philosophical underpinnings of the juvenile court mandate have come under attack. *See* Lemert, *The Juvenile Court—Quest and Realities*, in TASK FORCE REPORT, *supra* note 4, app. D. at 93.

34. 387 U.S. 1 (1967). Gerald Gault was a fifteen-year-old resident of Arizona who was adjudicated a delinquent for allegedly making obscene telephone calls. He was committed to a reformatory until he reached his majority—a sentence of *six years* in

series of cases in the 1960's, the Supreme Court restricted the abusive exercise of discretion by juvenile authorities and instituted minimal procedural regularity.[35] Commentators greeted *Gault* with considerable enthusiasm, scrambling to predict the long-range prospects for further "constitutional domestication" of juvenile courts.[36] *In re Winship*,[37] prescribing the "beyond a reasonable doubt" evidentiary standard for juvenile court adjudications in which the youth is charged with an act which would be a crime if committed by an adult, seemed another step in the process of judicially mandated change.

In 1971, however, the decision in *McKeiver v. Pennsylvania*[38] indicated that the Court's attitude toward juvenile rights questions had shifted once again.[39] The Court's specific holding was that "trial by

a state where aggravated assault (first offense) carries a sentence of only one to five years. ARIZ. REV. STAT. ANN. § 13-245 (West Supp. 1972). In fact, if Gault had been eighteen, the conduct of which he was accused would have subjected him to the maximum punishment of a $50 fine and two months in jail. *Gault, supra,* at 29. In reversing the Arizona juvenile court, the Supreme Court held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," 387 U.S. at 13. Justice Fortas, writing for the Court, was extremely critical of juvenile court performance and found that failure to achieve rehabilitative and nonstigmatizing goals had seriously undercut the exemption of such courts from ordinary due process guarantees. *Id.* at 24-27. Indeed, as Justice Fortas had observed in a previous case, it appears that juveniles suffer "the worst of both worlds: . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 556 (1966) (footnote omitted). In *Gault* "fundamental fairness" was found to require the imposition of the following minimum procedural rights in delinquency adjudicatory proceedings:

(1) Adequate notice of specific charges;
(2) Advisement of right to counsel and appointment of counsel in the case of indigency;
(3) Privilege against self-incrimination; and
(4) Opportunity for confrontation and cross-examination.

387 U.S. at 33, 41, 55, 57.

35. *See* Kent v. United States, 383 U.S. 541 (1966). The Court found that the District of Columbia juvenile court had abused its discretion to waive jurisdiction over a youthful offender and commit him for trial to an adult criminal court, since it had not followed provisions of the Juvenile Court Act which were construed to require a full investigation of circumstances surrounding the case to determine if waiver of jurisdiction would be appropriate. *See In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

36. *See, e.g.,* Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal,* 53 U. VA. L. REV. 1700 (1967); Milton, *Post* Gault: *A New Prospectus for the Juvenile Court,* 16 N.Y.L.F. 57, 59 (1970) ("[*Gault* represents] a reconsideration of the rationale and basic premises of the entire juvenile court system. This change is manifested by a new philosophy; a pragmatic realization that an infant is a citizen in his own right and entitled to the full benefit and protection of the Constitution."); Paulson, *Children's Court: Gateway or Last Resort?,* 10 COLUM. L.F. 4 (1967) ("The *Gault* decision works a revolutionary change in the law applicable to erring children . . . . The decision is built upon the premise that the juvenile court system has failed to provide the care and treatment that the theory underlying it had posited.").

37. 397 U.S. 358 (1970).

38. 403 U.S. 528 (1971).

39. The extent to which the Court's treatment has changed is apparent in Justice Douglas' dissenting opinion (joined by Justices Marshall and Black) in *McKeiver.* Essentially this opinion was in the *Kent-Gault-Winship* tradition. Justice Douglas noted that the state was using its juvenile court to prosecute violation of a criminal statute and that an adjudication of delinquency could result in an order to confine the juvenile

jury in the juvenile court's adjudicative stage is not a constitutional requirement,"[40] but Justice Blackmun's plurality opinion contained significant implications for the entire juvenile court process. First, it apparently adopted the reasoning of the Supreme Court of Pennsylvania below,[41] which praised the informality of juvenile court procedure, although conceding that such informality had to be limited at some point in order to impress the juvenile with the orderliness and impartiality of the proceeding. The state court had thus attempted to strike a balance between procedural orderliness and the unique requirements of the juvenile process.[42] Implicit in this argument was

until his twenty-first birthday. Under those circumstances, juveniles are entitled to the same procedural protections as adults. 403 U.S. at 559.

The degree to which the new Court has rejected this reasoning was recognized by the Ninth Circuit in United States v. James, 464 F.2d 1228 (9th Cir. 1972), a case involving the constitutionality of the jury waiver provision of the Federal Juvenile Delinquency Act, 18 U.S.C. § 5033 (1970). Defendant James relied upon Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968), which in turn had rested upon the recently decided *Gault*. In rejecting the challenge to jury waiver provisions of the federal act, the court made the following observation:

> However, the law has developed, *if not changed,* since *Nieves* was decided. Most notably, the Supreme Court in McKeiver v. Pennsylvania . . . held that, *despite* Gault, a jury is not required in state juvenile proceedings . . . .

Id. at 1229 (emphasis added).

It is important to note that two members of the *McKeiver* plurality, the Chief Justice and Justice Stewart, had previously registered their disagreement with the Court's activist approach to juvenile rights issues:

> What the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.

In re Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting). Justice Stewart joined in the Chief Justice's dissent in *Winship* and also wrote a vigorous dissent in *In re* Gault, 387 U.S. 1, 78-81 (1967).

40. 403 U.S. at 545.

41. *Id.* at 539-40, citing *In re* Terry, 438 Pa. 339, 265 A.2d 350 (1970) (companion case). *See* Ketcham, McKeiver v. Pennsylvania: *The Last Word in Juvenile Court Adjudications?,* 57 CORNELL L. REV. 561, 563 (1972).

42. The Pennsylvania court determined that the procedural requirements imposed by *Gault* were designed to "insure that the juvenile court will operate in an atmosphere which is orderly enough to impress the juvenile with the gravity of the situation and the impartiality of the tribunal and at the same time informal enough to permit the benefits of the juvenile system to operate." *In re* Terry, 438 Pa. 339, 347, 265 A.2d 350, 354 (1970). In performing this balancing test, the Pennsylvania court observed that a jury was not as essential in a juvenile adjudication as in a criminal trial because (1) juvenile judges take a different, more benevolent, view of their roles than criminal court judges; (2) the juvenile court system has superior diagnostic and rehabilitative facilities; and (3) the outcome of a juvenile adjudication (child declared a "delinquent") is less onerous than a criminal prosecution. Further, the court declared that, of all possible due process rights, the jury trial would be most likely to disrupt the unique nature of the juvenile proceeding by introducing great changes in courtroom procedure. 438 Pa. 339, 350, 265 A.2d at 355. On balance, weighing the juvenile's need for the protection of procedural regularity against potential disruption of the proceeding, the court decided that justice was best served by denying the right to a jury trial.

For other examples of a similar balancing approach in the due process area, see Morrissey v. Brewer, 408 U.S. 471, 481-84 (1972); Bell v. Burson, 402 U.S. 535, 540 (1971); Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970).

a limitation on the rationale of *Gault*[43] and an endorsement of the value to be derived from the informal nature of juvenile court proceedings.

Justice Blackmun then proceeded to perform his own balance between the interests of the state in its juvenile process and those of the juvenile in a jury trial.[44] In so doing, he examined the value and constitutional status of the jury trial, the potential and requirements of the unique juvenile court adjudicatory process, and the division of case law and scholarly opinion on the juvenile jury trial question. He observed that the jury trial is neither a necessary prerequisite for a fair trial[45] nor a particularly efficacious device for curing any of the acknowledged ills of the juvenile system.[46] On the other hand, he found the concept of the juvenile court to be a "promising" one,[47] deserving of further encouragement.[48] He did not deny the existence of the many ills of the juvenile system which moved the Warren Court to judicial activism in this field, but he attributed them to insufficient resources and commitment rather than to inherent unfairness.[49] He expressed special concern that the imposition of a jury trial requirement might change the "idealistic prospect of an intimate, informal protective proceeding" into little more than an ordinary adult court[50] by introducing the delay, clamor, and adversary nature of the public trial.[51] Finally, he noted that there was no significant case law

43. 387 U.S. 1 (1967). The Pennsylvania court had found itself "confronted with a sweeping rationale and a carefully tailored holding" in *Gault. In re* Terry, 438 Pa. 339, 345, 265 A.2d 350, 353 (1970) (companion case). In arriving at its own carefully tailored holding, the Pennsylvania court espoused an approach alien to *Gault:* the notion that, at least where juveniles are concerned, the appearance of due process is more important than its reality, a somewhat disturbing idea. When Justice Fortas said that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," *In re* Gault, 387 U.S. 1, 13 (1967), he was not talking about the "appearance" of due process.

44. Every previous Supreme Court case involving juvenile rights had been determined implicitly on the basis of such a balancing test. In *McKeiver,* Justice Blackmun made use of such a test explicit:

> The Court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding. What was done in *Gault* and in *Winship* is aptly described in *Commonwealth v. Johnson,* 211 Pa. Super. 62, 234 A.2d 9, 15 (1967):
>
> > "It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend [pointed out in *Kent,* 383 U.S. at 556] whereby 'the child receives the worst of both worlds: . . . .'"

403 U.S. at 545.

45. 403 U.S. at 547; *see* Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14, 158 (1968).

46. 403 U.S. at 547. The ills acknowledged by Justice Blackmun are those catalogued in TASK FORCE REPORT, *supra* note 4.

47. 403 U.S. 547.

48. *Id.*

49. *Id.* at 547-48: "We refrain from saying at this point that those abuses are of constitutional dimension."

50. *Id.* at 545.

51. *Id.* at 550.

in state courts[52] which supported the introduction of the jury trial as a constitutional requirement and, in fact, that most authorities on juvenile courts opposed such a proposal.[53]

Justice Blackmun's arguments suggested that future juvenile rights questions reaching the Court will be subjected to a balancing test in which the juvenile's interest in the alleged constitutional right will be weighed against certain systemic interests, notably informal procedure and rehabilitation,[54] which are implicit in the doctrine of *parens patriae*. He also gave some indication of which side of that balance will be favored by the Court:

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.[55]

McKeiver was criticized by commentators[56] on a number of grounds. The decision minimized all of the shortcoming of the juvenile system which so impressed the Warren Court[57] by noting that they were not "of constitutional dimension."[58] To say that these shortcomings resulted from lack of resources rather than inherent unfairness[59] seemed irrelevant to those who realized that until such shortcomings were rectified, regardless of their source or cause, there could be no justification for failing to afford juveniles facing incarceration and stigma the same procedural rights accorded adults accused of crime.[60] Further, there

52. The juvenile jury trial issue had been intensely litigated in state courts and the verdict was overwhelmingly negative. *Id.* at 549. Indeed, the majority of states deny this right by law. *Id.* at 548.

53. Justice Blackmun cites TASK FORCE REPORT, *supra* note 4, at 38; NATIONAL CONFERENCE OF COMMR'S ON UNIFORM STATE LAWS, UNIFORM JUVENILE COURT ACT § 24(a) (1968), 77 HANDBOOK OF THE NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE 246 (1968) [hereinafter cited as UNIFORM ACT]; NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT art. V, § 19 (1959), discussed in STANDARDS, *supra* note 30, at 73; and U.S. SOCIAL AND REHABILITATION SERVICE, DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILDREN'S BUREAU PUB. NO. 472-1969, LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS § 29(a) (prepared by W. Sheridan 1969) [hereinafter cited as GUIDE].

54. *See* 403 U.S. at 547:

> The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania petitioners here, that the system cannot accomplish its rehabilitative goals.

55. *Id.* at 550-51.

56. For a detailed and systematic refutation of the Court's reasoning, see Note, *Recent Developments—Juveniles in Delinquency Proceedings Are Not Constitutionally Entitled to the Right of Trial by Jury*—McKeiver v. Pennsylvania, 70 MICH. L. REV. 171 (1971).

57. *See* note 33 *supra*.

58. 403 U.S. at 547-48.

59. *Id.* at 548.

60. This is the argument, in substance, that Justice Douglas made in dissent. *See* note 39 *supra*.

was some doubt as to whether the reasoning of Justice Blackmun's plurality opinion, as opposed to its narrow holding, enjoyed majority support.[61] Nevertheless, the case and its analytic framework must be confronted by anyone wishing to make a constitutional assault on vague and overbroad juvenile statutes.[62]

III. Statutory Vagueness in the Juvenile Context

A. *The Pre-*McKeiver *Analysis*

The *Gonzalez* case,[63] in which the Supreme Court will soon confront such an assault,[64] is not presently couched in the *McKeiver* frame-

61. Only the Chief Justice and Justices Stewart and White joined in Justice Blackmun's opinion. Justice Harlan provided the necessary fifth vote in support of the judgments but based his concurrence solely upon the ground that states are not required by the Constitution to provide adult criminals with jury trials. He added that if he were constrained to follow Duncan v. Louisiana, 391 U.S. 145 (1968), on the state jury trial question and if he accepted Justice Blackmun's recognition of the serious shortcomings of the juvenile system, he "would have great difficulty . . . in holding that the jury trial right does not extend to state juvenile proceedings." 403 U.S. at 557.

62. *But see* Comment, *Juvenile Delinquency Laws: Juvenile Women and the Double Standard of Morality,* 19 U.C.L.A.L. REV. 313 (1971) (deals with a variety of vagueness and equal protection questions but confines consideration of *McKeiver* to footnotes). Another examination of the vagueness challenge to juvenile statutes, Note, *Statutory Vagueness in Juvenile Law: The Supreme Court and* Mattiello v. Connecticut, 118 U. PA. L. REV. 143 (1969), was written before *McKeiver.*

63. Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), *appeal docketed,* 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 70-120).

64. The issue of vague juvenile statutes has reached the Supreme Court on two previous occasions, but the Court's summary dispositions provide little guidance on the substance of the question. In 1969, the Court dismissed per curiam and without opinion a case raising much the same issues for want of a properly presented federal question. Mattiello v. Connecticut, 4 Conn. Cir. 55, 225 A.2d 507 (App. Div. 1966), *cert. denied,* 154 Conn. 737, 225 A.2d 201 (1966), *prob. juris. noted,* 391 U.S. 963 (1968), *appeal dismissed,* 395 U.S. 209 (1969). At age seventeen, Frances Mattiello had been sentenced to the Connecticut State Farm for Women until age twenty-one under a criminal statute, CONN. GEN. STAT. § 53-219 (1968) (lascivious carriage), and under a juvenile statute, CONN. GEN. STAT. § 17-379 (1968). Violation of the juvenile statute was premised on the charge that Mattiello was "in manifest danger of falling into habits of vice," said vice evidently consisting of "bizarre and promiscuous sexual conduct involving many men and much drinking." Brief for Appellee at 3, Mattiello v. Connecticut, 395 U.S. 209 (1969). Mattiello challenged the juvenile conviction but failed to appeal her conviction under the criminal statute, which carried a concurrent sentence. *Id.* at 4-6. In circumstances where only one of several counts of the conviction is appealed, the Supreme Court frequently has declined to review the conviction on that count for constitutional infirmity. *See* United States v. Ramano, 382 U.S. 136, 138 (1965); Lanza v. United States, 370 U.S. 139, 146 (1962); Lawn v. United States, 355 U.S. 339, 362 (1958); Pinkerton v. United States, 328 U.S. 640, 643 (1946); Hirabayashi v. United States, 320 U.S. 81, 105 (1943). The dismissal of *Mattiello* was thus almost certainly not an adjudication on the merits of the vagueness question.

Gesicki v. Oswald, 336 F. Supp. 365 (S.D.N.Y. 1971) (three-judge court), *aff'd mem.,* 406 U.S. 913 (1972), involved three young women found to be "morally depraved" or "in danger of becoming morally depraved" and sentenced to terms at adult penal institutions under New York's Wayward Minor statute, N.Y. CODE CRIM. PROC. § 913-a (McKinney 1958). A three-judge court enjoined enforcement of the law on the grounds that the statute was unconstitutionally vague and that it imposed cruel and unusual punishment

work, and the holding below would seem in serious danger of reversal unless it can be adapted to Justice Blackmun's rationale. The case was decided prior to *McKeiver*, and the three-judge court's opinion declaring California's juvenile statute to be unconstitutionally vague and overbroad[65] relied instead on traditional void-for-vagueness doctrine and the logic of the Warren Court cases.[66] This was particularly evident in the manner in which the court rejected the crucial state claim that traditional vagueness arguments imported from criminal cases are not applicable to juvenile statutes because the juvenile courts dispense *civil* justice under the philosophy of *parens patriae*.[67]

The *Gonzalez* court spurned this claim for three reasons. First, it argued that if a statute may subject the juvenile to deprivations comparable to those imposed upon convicted adults,[68] the statute should not escape scrutiny merely because the state legislature "deemed" it to be noncriminal in nature.[69] Second, the court pointed out that statutory clarity is necessary if the procedural protections secured by *Kent, Gault,* and *Winship*[70] are to be preserved: "It is recognized that

by punishing the status of "moral depravity" much like California had punished the status of being a narcotics addict in Robinson v. California, 370 U.S. 660 (1962). Since both grounds involved important new law, it is unlikely that the Supreme Court's memorandum affirmance went to the merits of either ground for purposes of this Note. Once again, collateral issues were involved. First, § 913-a expired August 31, 1971, and was not renewed. Second, and more importantly, § 913-a was a juvenile statute in name only: it was part of the criminal code, trials under it were conducted in courts of general criminal jurisdiction, and it permitted incarceration in facilities for adult criminals. 336 F. Supp. at 377-78. New York's real juvenile program is contained in the FAMILY COURT ACT art. 7 (McKinney 1963), which is quite apart from the criminal code. With minor exceptions, juvenile offenders are tried in special Family Courts and may not be incarcerated in adult prisons. These considerations led the three-judge court to hold that the act is "indistinguishable in any substantial respect from a criminal provision." 336 F. Supp. at 379. Indeed, the court emphasized that it had no quarrel with a genuine juvenile statute aimed at "special supervision" and "bona fide treatment" for juveniles. *Id.* at 377 n.7. In affirming the judgment, the Supreme Court was probably endorsing the view that a statute which fails to qualify as a genuine juvenile statute will not be construed with any of the relaxed constitutional standards ordinarily applied to juvenile programs. *See* United States v. James, 464 F.2d 1228, 1231 n.4 (9th Cir. 1972) (Hufstedler, J., dissenting).

65. *See* pp. 745-46 *supra*. The court based its decision on the traditional vagueness criteria: It ruled that the California statute failed to give the juvenile fair warning of proscribed conduct and the factfinder adequate guidance in recognizing such conduct. Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) at 6-7, 12.

66. Kent v. United States, 383 U.S. 541 (1966); *In re* Gault, 387 U.S. 1 (1967); *In re* Winship, 397 U.S. 358 (1970).

67. Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) at 8. *See* Connecticut v. Mattiello, 4 Conn. Cir. 55, 62, 225 A.2d 507, 511 (App. Div. 1966).

68. Thus the juveniles in Gonzalez suffered loss of freedom and stigma. Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), at 8-9.

69. *Id.* at 8 n.9. *Cf.* N.Y. CODE CIV. PROC. § 913-dd (McKinney 1958): A "wayward minor" under § 913-a is not to be "denominated a criminal . . . nor shall such [adjudication] be deemed a conviction."

70. Kent v. United States, 383 U.S. 541 (1966); *In re* Gault, 387 U.S. 1 (1967); *In re* Winship, 397 U.S. 358 (1970).

a central infirmity of a vague statute is that its vagueness makes other due process guarantees meaningless."[71] Finally, the court confronted the "civil proceeding" argument squarely, deciding that there is ample precedent for resort to the void-for-vagueness doctrine in a "civil" case, at least if that case involves state invocation of a statute which threatens the "civil" defendant with substantial deprivation.[72]

71. Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) at 10. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). *Kent* and *Gault* established rights to a fair hearing, to counsel, to notice, to confrontation of adverse witnesses, and to freedom from self-incrimination—all important in the preparation of an adequate defense to a juvenile charge. But how does counsel prepare a defense against the charge that his client is "in danger of leading an immoral life"? In *Winship*, the Supreme Court established a "proof beyond a reasonable doubt" standard for adjudications based on violation of a criminal statute. If police suspect that a juvenile has committed a crime but have insufficient evidence to sustain a "beyond a reasonable doubt" burden, they can bring a charge under California's WELFARE AND INSTITUTIONS CODE § 601 (West 1966) and claim that the youth is leading an immoral life, a charge that does not appear in the criminal code and one for which the state's burden is, at this point at least, merely a "preponderance of the evidence." And even if the "beyond a reasonable doubt" standard were required in all juvenile adjudications, the state would have little difficulty meeting its evidentiary burden "because § 601 defines the substance of the offense so broadly that the procedural safeguard of proof beyond a reasonable doubt becomes meaningless. Standards of proof depend upon standards of relevance and probativeness, and these are precluded when the substantive offense covers the entire moral dimension of one's life." Gonzalez v. Mailliard, *supra*, at 12.

72. Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) at 8. During the era of economic due process, such a notion enjoyed considerable stature in federal and state courts, but thereafter it seems to have fallen out of favor. The first Supreme Court application of the vagueness doctrine in a civil setting appears to have been in A.B. Small Co. v. American Sugar Refining Company, 267 U.S. 233 (1925). This was a contract action in which the defendant/buyer's answer included a defense under the Lever Act, ch. 80, 41 Stat. 297 (1919), *amending* Ch. 53, 40 Stat. 277 (1919), that the plaintiff/seller would make an "unreasonable profit" in the transaction. Four years earlier, however, the Supreme Court in a criminal proceeding had voided the section of the Lever Act relied upon by the defendant, noting that it "forbids no specific or definite act," United States v. L. Cohen Groc. Co., 255 U.S. 81, 89 (1921), thus requiring the trial court to make "the widest conceivable inquiry." *Id.* When the defendant in *Small* attempted to distinguish that earlier case on the ground that it involved a criminal prosecution, the Supreme Court found the distinction inadequate:

> The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases.

A.B. Small Co. v. American Sugar Refining Co., *supra*, at 239. In an earlier case the New York Court of Appeals reached the same conclusion:

> The ground on which [the United States Supreme Court in *Cohen*] placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. . . . The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty.

Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N.Y. 51, 54, 131 N.E. 566, 567 (1921). *See* Boshuizen v. Thompson & Taylor Co., 360 Ill. 160, 195 N.E. 625 (1935).

After these early cases, the doctrine had a checkered history. *Compare* Anuchick v. Transamerican Freight Lines, 46 F. Supp. 861, 867 (E.D. Mich. 1942), *with* Hall v. Union Light, Heat & Power Co., 53 F. Supp. 817, 820 (E.D. Ky. 1944).

These arguments reveal the substantial gap between *Gonzalez* and *McKeiver*: the former, in the *Gault* tradition, emphasized the essentially criminal nature of the juvenile process,[73] while the latter pointed out that no Court has yet held the juvenile process to be in fact criminal.[74] *Gonzalez* focused in particular on the stigmatizing aspect of the process[75] and the likelihood of significant loss of freedom,[76]

Courts often acknowledged the continuing vitality of the *Small* doctrine in passing, *see, e.g.*, Cline v. Frink Dairy Co., 274 U.S. 445, 463 (1927); Morrison v. State Board of Education, 1 Cal. 3d 214, 231, 82 Cal. Rptr. 175, 187, 461 P.2d 375, 387 (1969); Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19, 22 (Del. 1971), *cert. denied*, 404 U.S. 873 (1972); People v. Mancuso, 255 N.Y. 463, 471, 175 N.E. 177, 179 (1931). Yet vagueness attacks on noncriminal statutes rarely succeeded, *see, e.g.*, Adler v. Bd. of Ed., 342 U.S. 485 (1952); Jordan v. DeGeorge, 341 U.S. 223 (1951); Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940); Old Dearborn Distrib. Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936). Even when courts gave the doctrine careful consideration, they ordinarily succeeded in construing the civil statute so as to save it from destruction, *see, e.g.*, Jordan v. DeGeorge, 341 U.S. 223 (1951); Larkin v. Consolidated Tel. & Elec. Subway Co., 193 Misc. 1001, 85 N.Y.S. 2d 631 (1949), leading one commentator in 1960 to pronounce the doctrine moribund. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 70 n.16 (1960).

In Giaccio v. Pennsylvania, 382 U.S. 299 (1966), however, the Supreme Court reinvigorated the use of the vagueness challenge in a "civil" context. Giaccio was charged with wantonly pointing or discharging a firearm at another person. When he testified that the weapon was only a starter pistol, he was found not guilty by the jury, but he was assessed court costs of $230.95 under a statute which permitted the jury to assign such costs to acquitted defendants. The statute itself provided no standards for the assessment of costs to defendants but state courts had interpreted the statute to permit such an assessment when juries found defendants not guilty of the crime charged but guilty of conduct which, though not itself unlawful, is nevertheless "reprehensible," "improper," outrageous to morality, or such that "his innocence may have been doubtful." *Id.* at 404. The trial judge instructed Giaccio's jury to assess costs if "he has been guilty of some misconduct . . . ." *Id.* The state appellate court had justified assessment of court costs against a defendant found not guilty of a criminal charge but nonetheless "guilty" of "some misconduct" on the ground that the statute authorizing such assessment was not really penal but merely provided a means for collecting costs of a "civil character" much like those imposed in ordinary civil suits. Justice Black was not convinced:

> Whatever label be given the 1860 Act, there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and property. Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague.

Id. at 402. Noting that "[i]t would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct,' or 'reprehensible conduct,'" *id.* at 404, he held that the statute "is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs." *Id.* at 402.

A vagueness challenge to an allegedly "civil" statute should succeed, then, if: (1) the statute is imprecise; (2) it imposes a forfeiture or some other serious deprivation; and (3) the forfeiture or other deprivation is imposed at the request of state authorities. The second branch of this proposition may be little more than recognition that the statute may not really be "civil" at all, in which case it merely restates *Gault*'s rejection of "the feeble enticement of the 'civil' label-of-convenience." *In re* Gault, 387 U.S. 1, 50 (1967).

73. Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) at 8 n.9.
74. 403 U.S. at 541.
75. Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) at 8-9.
76. *Id.* at 9.

while *McKeiver* found such aspects of the juvenile system not to be "of constitutional dimensions."[77] More to the point, *McKeiver* acknowledged the sweeping rationale of *Gault* but impliedly limited it,[78] praising the potential benefits of special treatment for children and calling attention to the "fairness, . . . concern, . . . sympathy, and . . . paternal attention that the juvenile court contemplates."[79] If a vagueness challenge to a juvenile statute is to succeed, then, other arguments carefully attuned to the reasoning of *McKeiver* must be advanced.

B. *A Vagueness Argument in the Analytic Framework of* McKeiver

The *McKeiver* plurality construed the due process clause in the juvenile context by engaging in a balancing process in order to determine the compatibility of the right to trial by jury with the perceived advantages of the juvenile process. It then buttressed its conclusion with references to state practice and scholarly opinion. The same mode of analysis may be applied to the statutory vagueness defense. In attempting to discern the likely contours of the *McKeiver* approach applied to a vagueness challenge, however, it is necessary to recall that *McKeiver* and other principal cases[80] involved procedural due process. Reasoning from these cases is unavoidable since there are no others in the juvenile field, but the structure of their arguments should not be lifted *in toto* from their procedural context into the substantive context of the vagueness doctrine. Rather, the line of cases from *Kent v. United States*[81] in 1966 through *McKeiver* in 1971 should be seen as evidence of the changing fortunes of the doctrine of *parens patriae*,[82] which now enjoys a limited renaissance after weathering serious attack during the Warren Court years.[83]

1. *The Balance*

a. *Interests of the State*

The interests of the state in statutory vagueness relate to the benefits derived from implementation of *parens patriae* which accrue

77. 403 U.S. at 547-48.
78. *See* pp. 751-52 *supra*. Justice Blackmun appeared to quote the Pennsylvania court (which limited *Gault* implicitly) with approval. *See* Ketcham, McKeiver v. Pennsylvania: *The Last Word in Juvenile Court Adjudications?*, 57 CORNELL L. REV. 561, 562-63 (1972).
79. 403 U.S. at 550.
80. *See* pp. 749-50 *supra*.
81. 383 U.S. 541 (1966).
82. *See* pp. 748-49 *supra*.
83. *See* note 36 *supra*.

throughout the juvenile process.[84] With reference to the jury trial question, the crucial stage of the process was adjudication and the value to be protected was informal procedure.[85] Successful litigation of a vagueness challenge, on the other hand, will primarily affect implementation of *parens patriae* values in the post-adjudicatory stage when the juvenile process concentrates on rehabilitation. If the state is required to define proscribed acts with greater specificity and clarity, some juveniles who are now subject to juvenile court intervention only under omnibus clauses will probably escape juvenile court jurisdiction altogether and thus be deprived of the benefits of rehabilitation.[86] Since *McKeiver* recognizes the potential value of rehabilitation as well as that of informal procedure,[87] the primary state interest to be balanced in a vagueness challenge is preservation of authority over a maximum number of youths whose behavior is seen as aberrant. Protection of procedural informality remains of significant, though lesser, importance.

b. *Interests of the Juvenile*

In a juvenile court adjudication, the juvenile's interests are served by procedures which help guarantee a fair trial. Since, in the opinion

84. In discussing the meaning of *McKeiver*, Judge Lumbard made the following observation:

> Here we think the Supreme Court has indicated that the goals of the juvenile court system, *which include benefits accruing before and during as well as after the adjudicatory proceeding*, are reasonably furthered by trials without a jury.

United States *ex rel.* Murray v. Owens, 465 F.2d 289, 294 (2d Cir. 1972) (emphasis added).

Benefits accruing before adjudication occur at the intake stage, where juvenile authorities have considerable discretion to make various off-the-record dispositions of criminal violations short of adjudication. Thus an erring child who would otherwise have faced the trauma and potential stigma of an adjudicatory proceeding on a criminal charge instead is referred to some social agency or placed on probation. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). Since a challenge to statutory vagueness is concerned not with the violator of criminal law who will confront juvenile authorities in any event but with juveniles who would escape the court's authority *but for* vague and overbroad omnibus clauses, imposition of statutory clarity requirements would not impinge upon the value of pre-adjudicatory benefits.

85. The importance of informal procedure is apparent throughout Justice Blackmun's opinion. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("the idealistic prospect of an intimate, informal protective proceeding"); *id.* at 547 (jury trial as reducing the capability of the adjudicatory system to operate in its unique manner); *id.* at 550 (fear that the jury trial will introduce the delay, clamor, and adversary nature of the public criminal trial).

See United States *ex rel.* Murray v. Owens, 465 F.2d 289, 294 (2d Cir. 1972) ("An informal proceeding informed by sympathy and concern was itself considered sufficiently desirable [in *McKeiver*] . . . to outweigh the argument in favor of jury trials."); *Recent Developments—Juvenile Courts—Juveniles in Delinquency Proceedings Are Not Constitutionally Entitled to the Right of Trial by Jury*—McKeiver v. Pennsylvania, 70 MICH. L. REV. 171, 190 (1971).

86. Some youthful behavior seen as aberrant is probably not subject to explicit definition: loitering, vagrancy, and youthful sexuality in general come to mind.

87. 403 U.S. at 547: "[W]e are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative goals."

of Justice Blackmun, the jury is not necessary for a fair trial, the juvenile's interest in securing jury trial as of right was accorded little weight in the balance.

By comparison, the juvenile's interests in statutory clarity are substantive rather than procedural and include the advantages inherent in clear criminal statutes which were discussed earlier: fair warning, objective standards for courts, protection of lawful activity which overbroad statutes might discourage, and preservation of existing procedural due process rights.[88] Here the question will be whether these otherwise legitimate interests are somehow less important for juveniles than for adults.

c. *Balancing the Interests*

The state's interest in procedural informality would not be compromised by the requirement of statutory clarity because no additional formalities would be introduced into the adjudicatory stage. Juvenile authorities would have to allege and prove instances of clearly defined proscribed acts, but even under omnibus clause jurisdiction they must ordinarily allege and prove specific instances of "immoral conduct."[89] Further, it should be noted that some charges brought under noncriminal juvenile statutes are often based upon suspected criminal acts.[90] If juvenile authorities lost noncriminal omnibus clause authority, they would simply be forced to bring charges under the appropriate criminal provision. Adjudication, however, would still occur in the juvenile court, with the same procedures applied.

As for limits on the system's coverage, the requirement of statutory clarity would not remove all juveniles from juvenile court jurisdiction, but only those now subjected to state intervention and rehabilitation solely on the basis of omnibus clause authority.[91] Juveniles who commit criminal acts or even clearly defined noncriminal acts will continue to "benefit" from whatever rehabilitative services the juvenile system offers regardless of whether a vagueness challenge succeeds. *Parens patriae* doctrine, however, is concerned as well with the rehabilitation of juveniles whose noncriminal but difficult to define

88. *See* pp. 746-48 *supra.*

89. *See, e.g.,* TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3(f) (Vernon's 1971), as interpreted in E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969).

90. *See, e.g., In re* Donnie H., 5 Cal. App. 3d 781, 85 Cal. Rptr. 359 (1970); *In re* Daniel R., 274 Cal. App. 2d 749, 79 Cal. Rptr. 247 (1969); *In re* Geiger, 184 Neb. 581, 169 N.W.2d 431 (1969); *In re* Dahlberg, 184 Neb. 303, 167 N.W.2d 190 (1969).

91. *See* p. 759 & note 86 *supra.*

behavior is seen as carrying the seeds of adult antisocial behavior.[92] These are the juveniles who would escape state's rehabilitative net if vagueness were eliminated. For some of them, the seeds of criminal action might actually ripen into criminal adult behavior. But for many, perhaps even the majority, the risk of this outcome would be quite small. Subjecting all juveniles to such statutes hardly seems consonant with the Court's rejection of the "seeds of antisocial behavior" theory in other contexts.[93] As a practical matter, it vastly increases the costs—and minimizes the chances of success—of "rehabilitation" for those who really need it. But most important, as a constitutional matter, it is clearly challengeable on the grounds that "less drastic means" are available to protect the same interest.[94] Even if there is a legitimate state interest in rehabilitating juveniles prone to antisociol action, the legislature should be able to spell out explicitly which acts—criminal or noncriminal—will subject juveniles to juvenile court intervention.[95]

Further, nothing in *McKeiver* sanctioned or encouraged the use of broad statutory language in order to effectuate the rehabilitative purposes of the juvenile system. In *McKeiver,* as well as in later federal cases, those purposes were uniformly discussed in the context of the juvenile offender of criminal statutes.[96] No mention was

92. *See* pp. 748-49 & note 29 *supra.*

93. The notion that certain sorts of noncriminal behavior are the precursors of later criminality and therefore must be corrected at an early stage has also been raised to justify vagrancy statutes. In voiding for vagueness a city vagrancy ordinance inflicting criminal penalties on "rogues and vagabonds," "dissolute persons" and other undesirables, Justice Douglas, writing for a unanimous court, dismissed such a notion summarily:

> A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment.

Papachristou v. Jacksonville, 405 U.S. 156, 171 (1972).

94. The Supreme Court has voided vague and overbroad statutes aimed at a legitimate state goal if that goal could be achieved with less drastic means. *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972); United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

For an application of the "less drastic means" test in the context of military law, where void-for-vagueness arguments have thus far fallen on deaf ears, see Note, *Taps for the Real Catch 22,* 81 YALE L.J. 1518, 1536 (1972).

95. But we do not see why the state cannot specify the conduct which it wishes to take as a ground for initiating its rehabilitative efforts. The state has had over 50 years of experience with the juvenile court system and should by now be able to give fair warning of the conduct which it wishes to single out for treatment in confining state institutions.

Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) at 10 n.10, *appeal docketed,* 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 70-120). *See* E.S.G. v. State, 477 S.W.2d 225, 232 (Tex. Civ. App. 1969) (Cadena, J., dissenting), *cert. denied,* 389 U.S. 956 (1970):

> Nor is there any overriding need for such vagueness. In the case of appellant, a sufficiently clear warning could have been formulated . . . without calling in the English faculty of a university.

96. The evidence on this point is far from complete but nevertheless suggestive. Since young McKeiver, principal appellant in the case bearing his name, was charged with

made of the prospect or desirability of rehabilitating the juvenile who escapes the criminal law but may be caught by the wide-flung net of an "immoral life" statute.[97] In fact, Justice Blackmun was cautious about the entire issue of rehabilitation in the juvenile process. While expressing considerable faith in the value of procedural informality in juvenile courts,[98] he observed that the rehabilitative benefits of that system had yet to be adequately realized.[99]

Thus, the state's interest in vague statutes (jurisdiction over a maximum number of juveniles for rehabilitative purposes) seems substantially weaker than its interest in trial before a judge (procedural informality) and in any event may be largely satisfied by less drastic means. On the other hand, it can be shown that the juvenile's interests in statutory clarity are stronger than his interest in trial by jury.

In *McKeiver,* Justice Blackmun explicitly assessed the strength of a juvenile's interest in jury trial. Citing dictum from *Duncan v.*

robbery, larceny, and receiving stolen goods, all felonies under Pennsylvania law, 403 U.S. at 534, Justice Blackmun had no occasion to address the issue of rehabilitation of the noncriminal juvenile. However, in discussing the TASK FORCE REPORT'S, *supra* note 4, handling of the jury trial question, he approvingly paraphrased the REPORT'S treatment of the continued maintenance of the juvenile system as the alternative to "return of the juvenile to the criminal courts." 403 U.S. at 546 (footnote omitted). *See id.* n.6. Criminal courts clearly could not reach the marginally antisocial behavior at issue in a challenge to "immoral life" statute.

See United States *ex rel.* Murray v. Owens, 465 F.2d 289, 292 (2d Cir. 1972). In *Murray,* which contains an extensive discussion of *McKeiver,* the court also assumes that the alternative to the juvenile system is "in effect [to] return the juvenile to the criminal courts." *See* United States v. James, 464 F.2d 1228 (9th Cir. 1972). In construing *McKeiver,* one judge of the *James* court notes that

> There can be no doubt that the Government has a legitimate, compelling, and even vital interest in fostering a system of juvenile justice in which young offenders, who may profit from less punitive correctional methods, will receive penalties that are not as severe *as those imposed upon adults who were guilty of similar offenses.*

Id. at 1234 (Hufstedler, J., dissenting) (emphasis added). Again, the assumption is that the juvenile court ought to be concerned with the rehabilitation of young offenders of criminal statutes.

97. *Cf.* People v. Allen, 22 N.Y.2d 465, 471, 239 N.E.2d 879, 881, 293 N.Y.S.2d 280, 282 (1968): "[P]articular care should be taken that . . . the conduct inquired into is seriously harmful and not merely an exaggerated manifestation of intra-family parent-child conflict."

98. *See* note 85 *supra.* Indeed, one commentator has explained *McKeiver* on the basis of the new Court's commitment to procedural informality quite apart from the juvenile court context, noting that lack of enthusiasm for the institution of the jury in any setting and fear of swamping already choked judicial machinery probably played an important part in the outcome. Ketcham, McKeiver v. Pennsylvania: *The Last Word on Juvenile Court Adjudications?,* 57 CORNELL L. REV. 561, 566-67 (1972). *See* United States *ex rel.* Murray v. Owens, 465 F.2d 289, 292-93 (2d Cir. 1972).

99. Justice Blackmun noted that past attempts at rehabilitation in the juvenile system had been beset by "disappointments of grave dimensions" and expressed hope that through experimentation the states may eventually develop some "understanding as to cause and effect and cure." 403 U.S. at 547.

Louisiana,[100] he reasoned that since a judgment against an adult arrived at without the benefit of a jury's deliberation is not necessarily unfair, the right to a jury trial need not be accorded to juveniles on the basis of its alleged ability to ensure a fair trial.[101] In this respect, however, the juvenile's interests in statutory clarity are clearly distinguishable from those he had in trial by jury: In the vagueness context there is no precedent comparable to *Duncan* to act as a limit on the significance to be accorded to the value of statutory clarity in a due process balance. It is difficult to conceive of a court holding that an adult criminal judgment based on an admittedly vague statute is not inherently unfair.[102] Indeed, the Supreme Court has called the vagueness doctrine a "basic principle"[103] and "the first essential"[104] of due process. And *Giaccio v. Pennsylvania*,[105] which reinvigorated use of the vagueness doctrine in "civil" court actions involving serious deprivations,[106] suggested an expansive rather than restrictive view of the importance of statutory clarity.

Thus, in general, statutory clarity enjoys greater protection under the due process clause than does the right to jury trial. The remaining question is whether the interests associated with statutory clarity[107] are of lesser importance to a child in a juvenile court than to an adult in a criminal court.

If engaging in certain sorts of behavior can result in serious deprivations, whether labeled "nonpenal" or not, presumably juveniles as well as adults deserve some fair warning. *McKeiver* surely does not suggest a willingness to permit the unavoidably unwary to fall into the hands of even benevolent jailers. The fair warning problem is especially acute when a statute addresses itself to the individual's moral life, as is true of the juvenile statutes in most states.[108] In confronting New York's Wayward Minor Statute,[109] which was aimed at minors who were "morally depraved" or "in

100. 391 U.S. 145, 149-50 n.14, 158 (1968).
101. 403 U.S. at 547.
102. Perhaps the closest approach to such a holding is Winters v. New York, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is [sic] higher than those depending primarily upon civil sanction for enforcement.") *Winters* was seriously undercut, however, by Giaccio v. Pennsylvania, 382 U.S. 399 (1966). *See* note 72 *supra*.
103. Grayned v. Rockford, 408 U.S. 104, 108 (1972).
104. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).
105. 382 U.S. 399 (1966).
106. *See* note 72 *supra*.
107. *See* pp. 746-48 *supra*.
108. *See* p. 745 *supra*.
109. N.Y. CODE CRIM. PROC. § 913-a (McKinney 1958). *See* note 64 *supra*.

danger of becoming" so, a three-judge federal court observed that "[t]he concept of morality has occupied men of extraordinary intelligence for centuries, without notable progress (among even philosophers and theologians) toward a common understanding."[110] And difficult as it may be for an adult to determine what behavior constitutes moral depravity,[111] the problem is even greater for a child.[112]

The vagueness doctrine requires explicit definitions of proscribed conduct so that enforcement officials may not use statutes arbitrarily or discriminatorily.[113] Explicitness is perhaps even more necessary in the juvenile system than in the criminal courts. First, the fact that the juvenile possesses fewer procedural rights than an adult accused renders him an easier target for arbitrary action.[114] Beyond this greater potential for arbitrary action, there is the empirical fact of discriminatory enforcement. Several authors have found that race plays a role in juvenile court adjudications.[115] Omnibus clauses are so general that they invite juvenile authorities to impose arbitrarily their own standards of conduct on unwilling juveniles.[116] In fact,

110. Gesicki v. Oswald, 336 F. Supp. 371, 374 (S.D.N.Y. 1971) (three-judge court), *aff'd mem.*, 406 U.S. 913 (1972).

111. *See* Gesicki v. Oswald, 336 F. Supp. 365, 369 (S.D.N.Y. 1971).

112. *See* E.S.G. v. State, 447 S.W.2d 225, 231 (Tex. Civ. App. 1969) (Cadena, J., dissenting), *cert. denied*, 398 U.S. 956 (1970):

> In any event, cases where judges profess to understand perfectly the meaning of such terms as "morals" are instances where the statutory language is directed to adults. Here, a directive addressed to children is couched in terms which have been the source of controversy among theologians, philosophers and judges for centuries. It is one thing to say that a judge, drawing upon his experience and knowledge of the law and of "meanings" attached to nebulous terms at common law, should understand what is moral and what is not. It is another thing to expect a child of ten or, as in this case, of fourteen to understand the meaning of words which judges are unable to define while assuring us that the language is "perfectly clear."

Unfortunately, the majority of this Texas court disagreed with Judge Cadena. *See* note 137 *infra*.

113. Grayned v. Rockford, 408 U.S. 104, 108 (1972). Thus, vague statutes encourage evaluation of conduct "on an *ad hoc* and subjective basis." *Id.* at 109.

114. *See In re* Gault, 387 U.S. 1, 26 (1967); D. MATZA, DELINQUENCY AND DRIFT 136 (1964).

115. Perhaps in part because of this excessive leeway given to judges, black juveniles are committed to incarceration facilities at an earlier age, for less serious offenses, and with less significant previous involvement with juvenile authorities than white juveniles. N. KITTRIE, THE RIGHT TO BE DIFFERENT 120 (1971). *See id.* at 121-22, quoting *Governor's Special Study Commission on Juvenile Justice*, A STUDY OF THE ADMINISTRATION OF JUVENILE JUSTICE IN CALIFORNIA, pt. 1, at 12 (1960):

> There is an absence of well-defined empirically derived standards and norms to guide juvenile court judges, probation, and law enforcement officials in their decision making. . . . Basic legal rights are neither being uniformly nor adequately protected under present juvenile court provisions and procedures.

See Piliavin & Briar, *Police Encounters with Juveniles*, 70 AM. J. SOC. 206 (1964); N. GOLDMAN, THE DIFFERENTIAL SELECTION OF JUVENILE OFFENDERS FOR COURT APPEARANCE 42-44 (NCCD ed. 1963).

116. *See* P. TAPPAN, JUVENILE DELINQUENCY 210 (1949); TASK FORCE REPORT, *supra* note 4, at 25 (footnote omitted):

> The provisions on which intervention . . . is based . . . establish the judge as

language in *McKeiver* demonstrates recognition of this problem. Justice Brennan, who concurred in part, declared that his concern under the due process clause was not that a particular procedural form be observed, but that whatever procedure exists will " 'protect the [juvenile] from oppression by the Government' . . . and . . . protect him against 'the compliant, biased, or eccentric judge.' "[117] Justice Blackmun's plurality opinion also called attention to the sad state of qualifications of the juvenile court bench.[118] Given the current population of juvenile court judges, then, statutory definitions of conduct which brings juveniles under the authority of juvenile courts need rigorous clarity and precision.

Statutory overbreadth, which is closely related to the problem of inadequate standards for the decision-maker, is a particularly significant danger in juvenile cases because of the considerable differences in life style that are likely to separate the accused from the judge. Long hair and unconventional clothing are commonly discouraged by juvenile courts,[119] despite the fact that personal appearance may have constitutional overtones.[120] More importantly, as political activity spreads to even younger segments of the population, juvenile court adjudications may have a chilling effect[121] on the exercise of First Amendment rights, particularly those of speech[122] and associa-

arbiter not only of the behavior but also of the morals of every child . . . . The situation is ripe for over-reaching, for imposition of the judge's own code of youthful conduct.

117. 403 U.S. at 554 (brackets in original).

118. "Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged." *Id.* at 544.

119. *See* TASK FORCE REPORT, *supra* note 4, at 25:

One frequent consequence [of overbroad juvenile statutes] has been the use of general protective statutes about leading an immoral life and engaging in endangering conduct as a means of enforcing conformity—eliminating long hair, levis, and other transitory adolescent foibles so unsettling to adults.

Cf. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 782 (1966).

120. The cases are in conflict and the Supreme Court has declined to clarify the matter. *Compare* Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (Due process clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual (here a high school student) which includes the right to wear hair at a chosen length subject only to reasonable intrusions by the state) and Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970) (Right to wear hair as desired is protected by First and Fourteenth Amendments), *with* Ferrell v. Dallas Ind. Sch. Dist., 392 F.2d 697 (5th Cir. 1968) and Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970)..There are over fifty reported cases in which this question has been squarely raised; students have won "in about half of them." Olff v. East Side Union High Sch. Dist., 404 U.S. 1042, 1046 n.5 (1972) (Douglas, J., dissenting). *See* Note, *Constitutional Law—School Districts*, 84 HARV. L. REV. 1702 (1971).

121. *See* Grayned v. Rockford, 408 U.S. 104, 109 (1972).

122. *See* Starrs, *A Sense of Irony in Southern Juvenile Courts*, 1 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 129, 130-31 (1966):

[T]he Juvenile Court, like other legal processes in the South, may be no more than another strong arm of segregation. It can . . . intimidate civil rights demon-

tion.[123] In fact, the extraordinarily broad language of omnibus clauses indicates that the real sources of legislative concern in their drafting may be disapproved beliefs, statuses, and lifestyles rather than specific acts.[124]

Last among the juvenile's interests in statutory clarity is protection of previously secured procedural due process rights. While it is true that juveniles have fewer such rights than adults, nevertheless those rights which have been secured in constitutional litigation surely deserve protection. Part of Justice Blackmun's analysis in *McKeiver* provides support for this proposition. He indicated a willingness to accord greater weight in the balance to a proposed right which also assists in the amelioration of the various problems and abuses connected with the juvenile system.[125] Requiring statutory clarity would not, of course, solve such problems as inadequate resources and public commitment[126] or unsatisfactory rehabilitative

strators and their parents by long periods of inhuman confinement without recourse to bail. . . . It can, with telling impact, browbeat them into disbelief or uncertainty in the rightness of their cause. And it can in ominous tones threaten to invoke its continuing jurisdiction to recall and redetermine the case of any juvenile upon his breach of elaborate and obscure probationary conditions. . . . On occasion, children have been adjudged delinquent when their parents, not they, were active civil rights workers.

In *In re* Burrus, 4 N.C. App. 523, 167 S.E.2d 454 (1969), *modified*, 275 N.C. 517, 169 S.E.2d 879 (1969), which was consolidated with McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the delinquency proceedings were initiated as a result of protest activities by black adults and students. *Id.* at 536.

123. In *Gonzalez*, the eight boys were arrested not because they had been identified by the victim as the persons who had assaulted her but because, like persons responsible for the assault, the eight boys were members of the "24th Street Gang." Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971) at 2, *appeal docketed*, 39 U.S.L.W. 3500 (U.S. April 9, 1971) (No. 70-120). *See* Lemert, *The Juvenile Court—Quest and Realities*, in TASK FORCE REPORT, *supra* note 4, app. D, at 94-95.

124. In construing New York's now defunct Wayward Minor statute, N.Y. CODE CRIM. PROC. § 913-9 (McKinney 1958) (statute aimed at young people alleged to be "morally depraved or in danger of becoming morally depraved") which had previously been characterized as overbroad, Gesicki v. Oswald, 336 F. Supp. 365, 371 (S.D.N.Y. 1971), a three-judge federal court made the following observation:

> In a sense, the question whether the statute is sufficiently precise to guide the actions of men of ordinary intelligence and understanding hearts misses the core of the issue raised by the language in question. By its terms, "morally depraved" does not refer to conduct at all, but to a condition or status of immorality. Thus, [the statute permits] the unconstitutional punishment of a minor's condition, rather than of any specific actions, as did the statute penalizing narcotics addiction condemned in Robinson v. California, 370 U.S. 660 . . . (1962). In *Robinson*, the Court held "that a state law which imprisons a person [afflicted with narcotics addiction] . . . as a criminal . . . inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment . . . .

Gesicki v. Oswald, 336 F. Supp. 371, 376 (S.D.N.Y. 1971) (three-judge court), *aff'd mem.*, 406 U.S. 913 (1972). *Robinson* voided a California statute which made the status of narcotics addiction a misdemeanor.

125. 403 U.S. at 547. *See* Ketcham, McKeiver v. Pennsylvania: *The Last Word on Juvenile Court Adjudications?*, 57 CORNELL L. REV. 561, 565 (1972).

126. Discussed in 403 U.S. at 547.

records.[127] Other abuses which have previously come to the attention of the Supreme Court, however, are barred by the imposition of statutory clarity requirements. Thus, in the *Kent-Gault-Winship*[128] line of cases, the Court expressed disapproval of juvenile courts' failure to accord juveniles minimal procedural rights, notably notice of charges and a meaningful standard of proof, which are necessary for preparation and defense against a delinquency petition. Yet, without clear statutes, those procedural rights are "meaningless."[129] Clear statutes are necessary, then, if such past abuses are to be restrained. Further, Justice White, whose concurrence was crucial for the plurality opinion, suggested that "vague and overbroad grounds for delinquency adjudications"[130] are in themselves a significant abuse in juvenile court programs. By definition, requiring clear and narrowly drafted statutes would solve this problem.

In summary, balancing the juvenile's interest in statutory clarity against the system's interest in vague statutes, the case for voiding vague juvenile statutes seems much stronger within the *McKeiver* framework of analysis than was the case for the asserted right to trial by jury.

2. *State Practice and Scholarly Opinion*

In *McKeiver,* Justice Blackmun was able to point to case law and statutes in most states as well as to a preponderance of scholarly opinion supporting his determination that juveniles should not be given a right to trial by jury in the adjudicatory stage of a juvenile proceeding. With reference to the statutory vagueness issue, however, there is neither clear state practice endorsement nor any significant scholarly opinion supporting broad omnibus juvenile statutes.

It may be argued that the fact that a child can be adjudicated a delinquent (or some equivalent term) for "immoral conduct" in thirty-three states[131] is somewhat comparable to Justice Blackmun's observation that twenty-eight states and the District of Columbia deny by law the right to jury trial in juvenile courts.[132] Yet the significance of this analogy is undercut by several considerations. First, it

127. *Id.* Arguably, however, a juvenile who feels that he has been "railroaded" into an institution under a meaningless law by a seemingly capricious judge will not be a very favorable subject for rehabilitation. *Cf. In re* Gault, 387 U.S. 1, 26 (1967).
128. *See* pp. 749-50 *supra.*
129. *See* pp. 755-56 *supra.*
130. 403 U.S. at 553 (White, J., concurring).
131. E.S.G. v. State, 447 S.W.2d 225, 226 (Tex. Civ. App. 1969), *cert. denied,* 398 U.S. 956 (1970).
132. McKeiver v. Pennsylvania, 403 U.S. 528, 548-49 (1971).

should be noted that the jury trial question is, for analytic purposes at least, an either/or proposition. States either deliberately prohibit jury trials in juvenile courts or they permit them. Vagueness, on the other hand, is a relative concept. It is doubtful that any legislature has deliberately enacted a juvenile statute which it thought to be vague and overbroad. More often the statutes are perceived as being "perfectly clear,"[133] although more precise explication of their meaning is avoided. Further, there appears to be a trend away from incorporating such language into juvenile statutes, several states having recently revised their statutes to omit reference to the morality of conduct.[134] Finally, judicial resistance to enforcement of vague statutes is apparent in some states where the highest court of that state has refused to strike the statute down as unconstitutionally vague.[135]

McKeiver also noted that the jury trial question had been heavily litigated by courts in the various states and that in the clear majority of states the claimed right was denied.[136] The vagueness question, on the other hand, has been litigated in only a few states and the record on the basis of this litigation is murky.[137] Certainly there is not in

133. *See, e.g.,* United States v. Meyers, 16 Alaska 368, 143 F. Supp. 1 (D. Alaska 1956).

134. *See, e.g.,* ILL. JUV. CT. ACT § 702 (1966); N.Y. FAM. CT. ACT § 712 (1962); TENN. CODE ANN. § 37-202(3)&(5) (Cum. Supp. 1971); VT. STAT. ANN. tit. 33, § 632(3)&(18) (Cum. Supp. 1971).

135. *See* note 137 *infra.*

136. 403 U.S. at 549.

137. In the following cases, states' juvenile court morals statutes withstood constitutional challenge: United States v. Meyers, 16 Alaska 368, 143 F. Supp. 1 (D. Alaska 1956) (ALASKA COMP. LAWS ANN. § 65-9-11 (1949)); Mattiello v. Connecticut, 4 Conn. Cir. 55, 225 A.2d 507 (1966) (CONN. GEN. STAT. ANN. § 17-379 (1960)); State *ex rel.* L.N., 109 N.J. Super. 278, 263 A.2d 150, *aff'd per curiam,* 57 N.J. 165 (1970), *cert. denied,* 402 U.S. 1009 (1971) (N.J. REV. STAT. § 2A:4-14 (1969)); E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied,* 398 U.S. 956 (1970) (TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3(f) (Vernon's 1971)).

But see Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971). *Cf.* Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971) (three-judge court), *aff'd mem.,* 406 U.S. 913 (1972); People v. Allen, 22 N.Y.2d 456, 469, 239 N.E.2d 879, 880, 293 N.Y.S.2d 280, 282 (1968) (dictum); Leach v. State, 428 S.W.2d 817, 821 (Tex. Civ. App. 1968) (Johnson, J., concurring); *In re* Donna G., 6 Cal. App. 3d 890, 894, 86 Cal. Rptr. 421, 423 (2d Dist. 1970) ("We agree with petitioner that the test of vagueness applicable to a criminal proceeding must be applied" in the instant juvenile action).

The approach of the New York Court of Appeals to the statute eventually struck down by the *Gesicki* federal panel is a paradigm of judicial uncertainty. In a case decided before *In re* Gault, 387 U.S. 1 (1967), the Court of Appeals sustained the statute, N.Y. CODE CRIM. PROC. § 913-a(5)&(6) (McKinney 1958), without opinion against a vagueness challenge. People v. Salisbury, 18 N.Y.2d 899, 223 N.E.2d 43, 276 N.Y.S.2d 634 (1966). In every case challenging the statute on similar grounds since *Gault,* the Court of Appeals has refused to reconsider its holding but it has also refused to sustain the adjudications against the juveniles on the ground of insufficient evidence. People v. Gregory E. (anon.), 26 N.Y.2d 622, 255 N.E.2d 721, 307 N.Y.S.2d 465 (1970); People v. Martinez, 23 N.Y.2d 780, 244 N.E.2d 711, 297 N.Y.S.2d 144 (1968); People v. Allen, 22 N.Y.2d 465, 239 N.E.2d 879, 293 N.Y.S.2d 280 (1968). On the other hand, in E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969) a Texas court gave approval to a statute defining "delinquent child" as

these few cases the clear support for one side of the controversy which the *McKeiver* Court found so comforting.

Scholarly opinion on the jury trial question was substantially divided. Justice Blackmun's four authorities,[138] probably the most prestigious groups which render opinions on all aspects of juvenile law and administration, specifically rejected juvenile jury trials,[139] while other commentators disagreed.[140] With reference to the statutory clarity question, on the other hand, there is no such split in scholarly opinion. Statutes permitting the incarceration of juveniles for allegedly leading "immoral lives" are nowhere recommended in the literature. More specifically, the four authorities cited by Justice Blackmun provide little support for sustaining such statutes.[141]

The oldest of the four authorities he cited, the *Standard Juvenile Court Act*,[142] which was last revised in 1959, contains a provision which most nearly approximates those found objectionable in state statutes previously reviewed: the juvenile court is to exercise jurisdiction over a child "whose environment is injurious to his welfare."[143] While this provision avoids reference to "moral depravity" or the like, it invites much the same criticism.[144] Yet the very fact the *Standard Act* is fourteen years old[145] and that its publishing predates

one who "habitually so deports himself as to injure or endanger the morals or health of himself or others," TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3(f) (Vernon 1971), but the decision rested in part on very questionable constitutional grounds. The court conceded that the statute "defines a delinquent child in general terms. However, the petition filed under the same [statute] must allege the specific acts or conduct which brings the child within the prohibited behavior. . . . This protects the rights of the child in the adjudicatory state of the proceedings. We do not believe that the section in question is unconstitutionally vague." *Id.* at 227. *But see* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939): "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

138. TASK FORCE REPORT, *supra* note 4; NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM JUVENILE COURT ACT (1968); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT, in 5 NPPA J. 333 (1959) [hereinafter cited as STANDARD ACT]; U.S. SOCIAL AND REHABILITATION SERVICE, DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILDREN'S BUREAU PUB. NO. 472-1969, LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS § 29(a) (prepared by W. Sheridan 1969).

139. These authorities do not confine themselves to consideration of procedure only. Each examines substantive questions at great length, including the issue of jurisdictional breadth.

140. *See, e.g.*, Note, McKeiver v. Pennsylvania: *A Retreat in Juvenile Justice*, 38 BROOKLYN L. REV. 650 (1972); *Recent Developments—Juvenile Courts—Juveniles in Delinquency Proceedings Are Not Constitutionally Entitled to the Right to Trial by Jury*—McKeiver v. Pennsylvania, 70 MICH. L. REV. 171 (1971).

141. In a sense, of course, using Justice Blackmun's "witnesses" against him is not an airtight argument, since he never indicated any intent to endorse their recommendations in toto, but his use of them does indicate some degree of faith in their judgments.

142. STANDARD ACT, *supra* note 138, at 322.

143. *Id.* § 8(2)(b).

144. *See* pp. 746-48 *supra*.

145. The other authorities cited by Justice Blackmun in *McKeiver* were published in the era of growing awareness about juvenile court problems since Kent v. United States, 383 U.S. 541 (1966).

both the *Gault* revolution and a recent spate of successful attacks on vague and overbroad statutes[146] suggests that if the National Council on Crime and Delinquency were to prepare a newer version of its statute, the jurisdictional bases of juvenile court intervention would probably be substantially limited.[147] There is in fact evidence that the Council's staff has come to recognize the vulnerability of its statute to constitutional attack on vagueness grounds.[148]

Blackmun's other three authorities—the *Task Force Report*,[149] the *Uniform Juvenile Court Act*,[150] and the *Legislative Guide for Drafting Family and Juvenile Court Acts*[151]—are even less hospitable to the kind of language struck down in *Gonzalez*. None of them suggests making "moral depravity," "immoral life," or "potentially injurious environment" a ground for juvenile court intervention,[152] and two specifically express concern about vaguely worded jurisdictional statutes.[153] While the *Uniform Act* and the *Legislative Guide* do propose that juvenile courts retain some limited jurisdiction over truants and children guilty of other noncriminal conduct,[154] a number

146. *See* Grayned v. Rockford, 408 U.S. 104 (1972); Papachristou v. Jacksonville, 405 U.S. 156 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971); Palmer v. Euclid, 402 U.S. 544 (1971); Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964); United States v. Nat'l Dairy Products Corp., 372 U.S. 29 (1963); Flynn v. Giarrusso, 321 F. Supp. 1295 (E.D. La. 1971); Oestreich v. Hale, 321 F. Supp. 445 (E.D. Wis. 1970); Pritkin v. Thurman, 311 F. Supp. 1400 (S.D. Fla. 1970); Scott v. District Attorney, 309 F. Supp. 833 (E.D. La. 1970), *aff'd per curiam*, 437 F.2d 500 (5th Cir. 1971).

147. Indeed, *McKeiver*, while making reference to a section in the STANDARD ACT, *supra* note 138, cited not the STANDARD ACT itself but rather a 1966 HEW publication, STANDARDS, *supra* note 32, which was largely based on the STANDARD ACT and advised states on juvenile court matters. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 549 (1971). This publication was authored by the same person who prepared the GUIDE, *supra* note 53. In the latter publication reference to endangering environments was omitted altogether.

148. *See* Glen, *Developments in Juvenile and Family Court Law*, 15 CRIME & DEL. 295 (1969). Mr. Glen is Associate Counsel of the National Council on Crime and Delinquency. Speaking of a provision of the new South Carolina Family Court Act (S.C. CODE § 15-1095.9(A)(1)(b) (Michie Supp. 1971)), which establishes jurisdiction over children "[w]hose occupation, behavior, condition, environment or associations are such as to injure or endanger his welfare or that of others," he noted: "The South Carolina and Standard Act provisions are also, arguably, unconstitutionally vague . . . in condemning a similar Texas statute, one judge wrote:

> The manner of conduct necessary to indicate whether a juvenile is habitually injuring or endangering the morals or health of himself or others is not expressed or defined by statute. The . . . statute defines delinquency in such broad, general, vague and indefinite terms that under its provisions a juvenile might be charged as delinquent under almost any set of circumstances.

Leach v. State, 428 S.W.2d 817, 822 (Tex. Civ. App. 1968) (concurring opinion). These arguments against taking judicial action against children who have not violated the criminal law are also applicable . . . to most existing juvenile and family court laws." *Id.* at 296.

149. *See* note 23 *supra*.

150. *See* note 53 *supra*.

151. *See* note 53 *supra*.

152. TASK FORCE REPORT, *supra* note 4, at 26-27; UNIFORM ACT, *supra* note 53, §§ 2&3; GUIDE, *supra* note 53, § 2.

153. TASK FORCE REPORT, *supra* note 4; GUIDE, *supra* note 53, § 1, comment at 2.

154. UNIFORM ACT, *supra* note 53, § 2(4); GUIDE, *supra* note 53, § 2(p).

of protective requirements are built into the system, including strict proof requirements,[155] noncriminal dispositions (no confinement),[156] and clear conduct definitions.[157] The *Task Force Report* rejects even these compromises, questioning the need for such jurisdictional breadth[158] and suggesting that juvenile courts confine themselves to adjudicating violations of criminal statutes.[159] In short, the leading authorities in the field, the very ones relied upon in *McKeiver,* are strong authority for statutory clarity and fair warning.

Conclusion

That no court of law should be able to order the incarceration of a juvenile on the basis of a charge that he is in "danger of leading an idle, dissolute, lewd, or immoral life" would seem to be an assertion of elementary justice, and the *Gonzalez* court so held. Yet the juvenile process has enjoyed a peculiar immunity from constitutional requirements under the doctrine of *parens patriae,* and any attempt to extend constitutional rights to juvenile courts must confront the modern manifestations of that doctrine. *McKeiver v. Pennsylvania* expressed a qualified reaffirmation of *parens patriae* in the context of procedural due process. Nevertheless, measuring the arguments for requiring juvenile statutes to satisfy ordinary standards of clarity within the analytic framework suggested by *McKeiver,* there remains ample justification for affirming the outcome in *Gonzalez.*

155. *See* GUIDE, *supra* note 53, § 32(c), which requires proof beyond a reasonable doubt of acts alleged to be the basis for adjudicating a juvenile to be a person "in need of supervision" (PINS). Since these acts are not violations of any criminal code, the Court's decision in *In re* Winship, 397 U.S. 358 (1970), would not itself require that stricter standard. Allegations under an omnibus clause charge need not be proved beyond a reasonable doubt, so that juvenile authorities, if unable to muster sufficient evidence with reference to a suspected criminal violation, can instead charge a juvenile with being "in danger of leading an immoral life" and thereby circumvent what would otherwise be a constitutionally protected right.

156. The UNIFORM ACT explains that:

> The "unruly child" category is needed to limit the disposition that can be made of a child who is in need of treatment or rehabilitation, but who has committed no offense applicable to adults. The "unruly child" is usually unmanageable and in need of supervision but not to the extent that he should be institutionalized with delinquent children.

UNIFORM ACT, *supra* note 53, § 2(4), comment at 249. The recommended version provides that an unruly child may be referred to social agencies or at most placed on probation, *id.* § 32, while a delinquent child (one who committed an adult crime) may in addition to the above be incarcerated in a state facility for delinquent children, *id.* § 31. An optional version of § 32 permits the commitment of children who are adjudicated "unruly" to institutions for delinquent children, but only after other efforts at rehabilitation have failed and a court determines that such commitment will assist a course of treatment.

157. *See* GUIDE, *supra* note 53, § 1, comment at 2.

158. *See* TASK FORCE REPORT, *supra* note 23, at 22.

159. *Id.* at 27.