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Joe A. Cannon

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FEDERAL COURT INTERVENTION IN JUVENILE PROCEEDINGS

BY JOE A. CANNON*

IN the wake of the increased attention focused on juvenile courts by *In re Gault*,[1] resort to federal injunctive and declaratory relief as a means of testing the constitutionality of juvenile statutes and processes has become increasingly common.[2] It is the purpose of this article to examine the viability of this course of action.

I. TACTICAL ADVANTAGES

There are a number of compelling reasons for electing a federal over a state forum in cases involving the validity of juvenile statutes and processes. An initial consideration is the inadequacy of relief available in state courts. Overloaded state appellate dockets produce inordinate delay; and, since few courts are willing to grant stays of execution or bail pending appeal in juvenile proceedings, such delay inevitably reduces the value of a favorable decision for the juvenile.

A second reason for seeking federal intervention is that a favorable decision by a state appellate court does not have the direct, broad effect on the field of law that is characteristic of

* Associate Director of the National Juvenile Law Center, St. Louis University; B.A., Oklahoma State University, 1961; J.D., Tulsa University School of Law, 1966.

[1] 387 U.S. 1 (1967). *Gault* is the first Supreme Court case to consider the major questions of fundamental fairness and procedural due process and resolve them in favor of the juvenile.

[2] Mailliard v. Gonzales, 39 U.S.L.W. 3500 (N.D. Cal. Feb. 9, 1971), *appeal filed*, (U.S. April 9, 1971) (No. 1565). This case challenges the constitutionality of a statute bringing within the jurisdiction of the juvenile court any person under age 21 "who from any cause is in danger of leading an idle, dissolute, lewd or immoral life." The state is appealing an adverse decision of a three-judge court. At the time of this writing, no decision has been made on probable jurisdiction. *Compare* Palmer v. City of Euclid, 402 U.S. 544 (1971) (decided on the vagueness issue).

In Phillips v. Cole, 298 F. Supp. 1049 (N.D. Miss. 1968) the plaintiff sought to enjoin the trial of juveniles for delinquency under 42 U.S.C. § 1983 (1970) unless they were properly advised of their right to counsel and counsel was appointed in appropriate cases. The court found federal intervention appropriate and enjoined court proceedings after consideration, and rejection, of the limits of 28 U.S.C. § 2283 (1970). Using In re Gault, 387 U.S. 1 (1967) as its base, the court required proper advisements of the right to counsel in the Mississippi Youth Court.

In Conover v. Montemuro, 304 F. Supp. 259 (E.D. Pa. 1969) the failure of a juvenile court to provide constitutional standards at intake was attacked. The court found that the complaint stated a substantial federal claim under 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970) and denied a motion to dismiss.

federal declaratory or injunctive relief.[3] Thus, although a decision by a state appellate court may set out requirements for its juvenile courts or release a child from wrongful detention, the actual malpractice in the reversed court may continue, requiring correction on a case by case basis.

A third consideration is that direct appeal within the state system wastes the legal resources of various defense and legal services agencies by requiring repetitious representation. In contrast, one successful declaratory judgment or class action injunction consolidates the work of many lawyers representing individual children in direct appeals.

Finally, resort to federal relief provides direct access to the federal appellate courts.[4] Here, one is more likely to find a sympathetic and attentive forum when challenging governmental practices which abuse the constitutional rights of children.

In summary, for those concerned with the reform of juvenile law, federal injunctive and declaratory relief is desirable because it offers a speedy, adequate remedy and provides a direct avenue to the federal appellate courts. Whether such relief is available under the present law of federal intervention is considered below.

II. THE LAW OF FEDERAL COURT INTERVENTION IN STATE CRIMINAL PROCEEDINGS — *Younger v. Harris*

The most recent expression by the Supreme Court on the law of federal court intervention in state criminal proceedings is *Younger v. Harris*.[5] This case, together with its companion cases,[6] seems to foreclose the possibility of federal intervention in juvenile proceedings. However, a close comparison of the facts of these cases with the nature of juvenile proceedings reveals the inapplicability of the reasoning of the *Younger* series to juvenile cases.

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[3] A prime example has been the continuing problem of *In re Gault*. *See* Glen, *Juvenile Court Reform: Procedural Process and Substantive Stasis*, 1970 WIS. L. REV. 431.

[4] If a federal complaint is filed seeking to enjoin the operation of a state statute on grounds of conflict with the Federal Constitution, it may be necessary to convene a three-judge court. 28 U.S.C. § 2281 (1970). Appeals from decisions of three-judge panels are made directly to the U.S. Supreme Court. 28 U.S.C. § 1253 (1970). If a three-judge court is not required to hear the action, appeal proceeds to the court of appeals for that federal circuit. On the question of when a three-judge panel must be convened *see generally* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

[5] 401 U.S. 37 (1971).

[6] Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Bryne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

A. *Injunctive Relief Under Younger*

Decided February 23, 1971, *Younger* involved a challenge to the California Criminal Syndicalism Act[7] on grounds of vagueness and overbreadth. Plaintiff, Harris, while being prosecuted for a violation of the Act, brought a complaint in federal court praying for injunctive relief. He alleged that the California statute was unconstitutional and, therefore, further prosecution under it should be enjoined. Several plaintiff-intervenors entered the case claiming that possible prosecution under the statute inhibited their constitutional rights to engage in political activity and to teach.

Pursuant to the federal anti-injunction statutes, a three-judge district court was convened to consider the constitutionality of the Act.[8] The court concluded that the Act was unconstitutionally vague and overbroad and enjoined the defendant-prosecutor from further prosecutions under it.[9] Utilizing the direct appeal statute,[10] the defendant proceeded to the Supreme Court. After considering issues of comity[11] and abstention[12] not raised by the appellant, the Court ruled that:

> [T]he judgment of the District Court, enjoining appellant, Younger, from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.[13]

The plaintiff-appellees who had not actually been charged with violations of the California Act were denied standing to challenge it, the Court considering it a small likelihood that they

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[7] CAL. PEN. CODE §§ 11400, 11402 (West 1970). *See* Whitney v. California, 274 U.S. 357 (1927), dealing with the same statute and overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969).

[8] 28 U.S.C. §§ 2281-84 (1970), provides for the convening of a three-judge district court in cases challenging the constitutionality of a state statute. For a general discussion of the pre-*Younger* requirements for convening a three-judge court *see* D. CURRIE, FEDERAL COURTS CASES AND MATERIALS 530 (1968); Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932); Comment, *Federal Injunctions Against Proceedings in State Courts*, 35 CAL. L. REV. 545 (1947); Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471 (1965).

[9] Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968).

[10] 28 U.S.C. § 1253 (1966).

[11] The doctrine of comity is a policy of non-interference based on the concept that "federal courts, in exercising their jurisdiction, should give consideration to the sovereign status of the individual state." Maraist, *Federal Injuctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 541 (1970).

[12] The doctrine of abstention is a doctrine of judicial self-restraint. Under it, a federal court whose jurisdiction has been properly invoked, may postpone its decision pending disposition in the state court. *See* Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604, 607 (1967).

[13] Younger v. Harris, 401 U.S. at 41 (1971).

would ever be prosecuted under the statute.[14] Harris, however, was found to have sufficient standing by virtue of his prosecution, and the Court discussed the issues on the bases of his case.

Justice Black in delivering the opinion of the Court stated that the underlying reason for limited intervention in state prosecutions was the prevention of unnecessary conflict between state and federal governments in accordance with the concept of federalism.[15] Only in those cases where irreparable injury would result should the federal courts take jurisdiction to enjoin pending state criminal prosecutions. The irreparable injury

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[14] The Court summarized:

> But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited." We do not think this allegation even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be excepted as appropriate plaintiffs in such cases.

Id. at 42.

[15] While the historical precedent for such reasoning is clear enough, it is the author's belief that the conflict is three-sided. The people as a third entity must be considered in terms of present day effect and in the historical perspective. The widespread use of 42 U.S.C. § 1983 (1970) as a device to provide a federal forum for state-people conflicts cannot be overlooked when considering modern practice. Historically, the thrust of the thirteenth, fourteenth, and fifteenth amendments was the protection of the people against the acts of the states rather than the federal government. To limit the role of the federal courts in such disputes may result in more conflict than might result in federal-state relations by allowing broader intervention. Justice Douglas in his dissent to *Younger* adopted the view that the constitutional perspective was changed by the events of the Civil War and thereafter:

> There is no more good reason for allowing a general statute dealing with federalism passed at the end of the 18th century to control another statute also dealing with federalism, passed almost 80 years later, than to conclude that the early concepts of federalism were not changed by the Civil War.

401 U.S. at 62.

That was the view of Judge Will in Landry v. Daley, 288 F. Supp. 200, 223 (N.D. Ill. 1968):

> This revolution, in turn, represents a historical judgment. It emphasizes the overwhelming concern of the Reconstruction Congresses for the protection of the newly won rights of freedmen. By interposing the federal government between the states and their inhabitants, these Congresses sought to avoid the risk of nullification of these rights by the states. With the subsequent passage of the Act of 1871, Congress sought to implement this plan by expanding the federal judicial power. Section 1983 is, therefore, not only an expression of the importance of protecting federal rights from infringement by the states but also, where necessary, the Congressional desire to place the national government between the state and its citizens.

See, Note, *The Dombrowski Remedy — Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights,* 21 RUTGERS L. REV. 92 (1966), which supports Justice Douglas' view that 42 U.S.C. § 1983 is an expressly authorized exception to the Anti-Injunction Statutes.

threatened must be "both great and immediate" and beyond the injury one might risk by the mere fact of being prosecuted in the state court. The Court concluded that:

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.[16]

In an attempt to clarify this standard, the Court indicated that the threat of multiple prosecutions might present the injury required by *Younger* if the prosecution is coupled with bad faith. However, whether a single or multiple prosecution is threatened, the additional factor of bad faith was seen as a requirement in most cases.[17]

The court went on to conclude that it is the quality of bad faith which distinguishes *Younger* from *Dombrowski v. Pfister,*[18] an earlier Supreme Court case relied upon by the lower court in granting the original injunction. The element of bad faith in *Dombrowski* was the intent of the Louisiana prosecutor to prevent the plaintiffs from exercising their constitutional rights by instituting prosecutions without legitimate hope of securing convictions. Although Justice Black believed *Dombrowski* was correct in this narrow sense, he noted that the case had subsequently been too broadly construed on the issue of whether the unconstitutionality of a state statute on its face is sufficient to meet federal equitable requirements of irreparable injury. According to Justice Black:

> It is undoubtedly true, as the Court stated in *Dombrowski,* that "[a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." But this sort of "chilling effect," as the Court called it, should not by itself justify federal intervention.[19]

It appears that with respect to injunctive relief, *Younger* stands for the proposition that federal courts may not intervene in state criminal proceedings without a clear showing of irreparable injury. While what constitutes irreparable injury is

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[16] 401 U.S. at 46 (footnotes omitted).

[17] At the end of his opinion in *Younger,* Justice Black did indicate that "[t]here may be . . . extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." 401 U.S. at 53. *See also* Perez v. Ledesma, 401 U.S. 82, 93 (1971) (Justice Brennan's dissent).

[18] 380 U.S. 479 (1965).

[19] 401 U.S. at 50.

not precisely defined, bad faith prosecution under a challenged law clearly falls within the standard.

B. *Declaratory Relief Under Younger*

A request for declaratory relief commonly accompanies a prayer for injunctive relief.[20] Consequently, a collateral question is raised concerning the applicability of the standards announced in *Younger* to cases brought under the Declaratory Judgment statute.[21] Consideration of this issue is necessary when seeking to avoid the possible restrictive application of *Younger.*

In *Samuels v. Mackell,*[22] a companion case to *Younger,* it was reasoned that the practical effect of a declaratory judgment is the same as an injunction, since under a declaratory judgment statute a court can effectuate and protect its own orders (the declaratory judgment) by means of an injunction. In this circuitous manner, federal courts may intervene in state court prosecutions. This being so, to apply different standards to declaratory judgment actions and injunction cases would operate to frustrate the questionable policy of noninterference with state criminal prosecutions.[23] Nevertheless, the language of *Samuels* suggests that declaratory judgment actions may enjoy a greater flexibility than injunctive cases. The Court carefully pointed out that:

> We do not mean to suggest that a declaratory judgment should never be issued in cases of this type if it has been concluded that injunctive relief would be improper. There may be improper. There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief.[24]

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[20] Such a claim was not joined in *Younger,* although the Court indicated that a prayer asking "such other and further relief as to the Court may seem just and proper," might include a declaratory judgment. 401 U.S. at 42 n.2.

[21] 28 U.S.C. §§ 2201, 2202 (1970).

[22] 401 U.S. 66 (1971). The plaintiffs had been indicted for violations of the New York Anarchy statute prior to filing their suit.

[23] The *Younger* court ruled that the injunctive relief sought actually existed as a remedy not by virtue of 28 U.S.C. § 2283, but as a judicially fashioned exception to that statute. *See Ex parte* Young, 209 U.S. 123 (1908). Also, the Court dismissed the argument that, because declaratory judgment relief is founded upon a statute unlike the injunctive remedy, the traditional requirements for irreparable injury and standing are not applicable. It reiterated that the actions were quite similar in nature and effect, and that the legislative history of the declaratory judgment statute indicated "traditional equitable principles" were intended to apply.

[24] 401 U.S. at 73.

Obviously, this is a restrictively worded exception; nevertheless, it indicates that where an injunction is not an appropriate remedy, declaratory relief will not necessarily be barred as a device for entry into a federal court. What would constitute the requisite "unusual circumstances" to justify declaratory relief is left for future consideration by the courts.

Even if the same stringent standards apply to the propriety of declaratory relief where state prosecution is pending, it may be possible to draw a distinction between pending and threatened proceedings and argue that in the latter situation an allegation of an overbroad or vague law[25] is sufficient to warrant declaratory relief. Such was the tack taken by Justice Brennan dissenting in *Perez v. Ledesma*.[26] He argued that, if the state prosecution has been filed prior to the federal action, the state "provides an adequate forum for the adjudication of constitutional rights, [and] the federal courts should not ordinarily intervene."[27] If, however, the state criminal prosecution has not been filed, or has been terminated by *nolle prosequi*, then no forum exists in which the plaintiff may assert his constitutional objections. Under such facts, the compelling reasons for nonintervention have not arisen.

Arguably, then, the federal forum may be sought where no active state prosecution is in progress at the time of the federal hearing, because the basis for nonintervention, *i.e.*, interference with the state criminal process and the supposed resultant federal-state friction, no longer exists. In such cases declaratory relief would be a proper remedy since it is unnecessary to risk prosecution under a criminal statute to avail oneself of the protection of the Declaratory Judgment Act. These were issues not considered by the majority in *Perez*.

III. Juvenile Proceedings and Federal Court Intervention in Civil Actions

It seems clear that the rules involving federal intervention in state civil proceedings do not fall within the purview of *Younger* and its companion decisions. Thus, if a case can be

[25] It is important to note that an allegation of "overbreath" is preferable to one of "vagueness" when attempting to gain federal intervention. The decision of Justice Brennan in Zwickler v. Koota, 389 U.S. 241 (1967) illustrated that, in an overbreadth situation, there is no possibility of the state court remedying the federal question; while, if the claim was one of vagueness, the state court could resolve the issue. Because of this, federal court abstention is less appropriate in an overbreadth situation, and intervention is more palatable for the state courts.

[26] 401 U.S. 82 (1971).

[27] *Id.* at 103.

categorized as civil, it is legitimate to assume that *Younger* may be successfully avoided. Obviously, this approach must be taken in a federal suit attacking juvenile statutes and proceedings if the bad faith requirement is to be avoided and the irreparable injury requirement minimized.

In the same term as the *Younger* case, the Supreme Court in *Wisconsin v. Constantineau*[28] affirmed a three-judge court decision which struck down a state statute requiring the posting of the names of excessive drinkers and forbidding the sale of liquor to them. The statute[29] made no provision for a hearing prior to such posting. Justice Douglas in delivering the majority opinion (Justice Black and others dissented) considered whether or not the three-judge court should have abstained from making a decision and thereby allowed the state judicial machinery to consider the constitutionality of the statute in question. The Court said:

> Congress could, of course, have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it came to review of the state court judgments. But our First Congress resolved differently and created the federal court system and in time granted the federal courts various heads of jurisdiction, which today involve most federal constitutional rights. Once that jurisdiction was granted, the federal courts resolved those questions even when they were enmeshed with state law questions.[30]

Clearly, the issues of federalism raised in the criminal context of *Younger* were more liberally treated in the civil context of *Constantineau*.

A. *The Noncriminal Nature of Juvenile Proceedings*

Whether juvenile proceedings are to be characterized as criminal or civil creates an immediate dilemma. Many of the major reforms accomplished in the juvenile field have been attained by analogizing juvenile cases to the criminal process. As pointed out in *Gault*, "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[31] The Court slipped easily into the criminal analogy, as evidenced by this statement: "The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's

[28] 400 U.S. 433 (1971).
[29] WIS. STAT. ANN. § 176.26 (1957).
[30] 400 U.S. at 438.
[31] 387 U.S. 1, 36 (1967).
[32] *Id.* at 29.

case."[32] On the other hand, when speaking of the due process notice requirement, the Court indicated that the petition must inform the parties of the charges in a manner "which would be deemed constitutionally adequate in a civil or criminal proceeding."[33]

For the purpose of interjecting fifth amendment self-incrimination privileges into the juvenile court process the Court stated:

> [J]uvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals."[34]

A similar attitude is reflected in Justice Black's separate concurrence in *Gault*. He pointed out that the goals of treatment and rehabilitation had not been attained in the juvenile court process, and, therefore, because incarceration in an institution penal in nature was possible, the guarantees of the Bill of Rights should uniformly apply to juvenile proceedings. He dismissed the civil label generally attached to juvenile proceedings stating:

> [B]oth courts and legislators have shrunk back from labeling these laws as "criminal" and have preferred to call them "civil." This, in part, was to prevent the full application to juvenile court cases of the Bill of Rights safeguards . . . .[35]

Criticism of the use of the civil designation also appears in *Kent v. United States*.[36] Here, a cursory waiver of jurisdiction over a child resulted in the transfer of the case to a district court for an adult criminal trial. In reversing, the Supreme Court questioned the civil status of the proceeding but did not preclude that characterization. The majority stated:

> The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct.[37]

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[33] *Id.* at 33.
[34] *Id.* at 49-50.
[35] *Id.* at 59.
[36] 383 U.S. 541 (1966).
[37] *Id.* at 554. This case was the harbinger of *Gault*:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.

Id. at 555.

Kent suggests that the failings of the juvenile court process have been recognized and that a label will no longer insulate the juvenile system from the Bill of Rights where these inadequacies have remained unremedied.

While *Gault* rejected the value of nomenclature such as "civil" and "criminal," *In re Winship*[38] indicated that the label of delinquency might also lack significance. In that case, the appellant had been adjudicated a delinquent for violation of New York's larceny statute. The standard of proof applied by the juvenile court was a preponderence of the evidence rather than beyond a reasonable doubt. The Supreme Court held that due process requires the reasonable doubt standard to be applied in delinquency cases. The reasoning was similar to *Gault* in that emphasis was placed on the possibility of incarceration after adjudication. The Court, however, did not take the absolutist view that all adult criminal safeguards were required in juvenile cases. Rather, as established in *Gault*, a pattern of selection and adoption under the due process clause was continued. Justice Harlan squarely faced the selective application question in his concurrence:

> I wish to emphasize, as I did in my separate opinion in *Gault* . . . that there is no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in juvenile cases. It is of great importance, in my view, that procedural strictures not be constitutionally imposed that jeopardize "the essential elements of the State's purpose" in creating juvenile courts . . . .[39]

Justice Harlan's admonition that the original purpose of juvenile courts not be forgotten in the process of giving juveniles greater procedural safeguards is echoed loudly in *Mc Keiver v. Pennsylvania.*[40] This case represents a significant shift away from *Kent, Gault, and Winship* where the emphasis had been on procedural fairness and the assurance of fair treatment through the application of procedural safeguards.

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[38] 397 U.S. 358 (1970). Mr. Chief Justice Burger, joined by Justice Stewart, dissented:

> The Court's opinion today rests entirely on the assumption that all juvenile proceedings are "criminal prosecutions," hence subject to constitutional limitations. This derives from earlier holdings, which, like today's holding, were steps eroding the differences between juvenile courts and traditional criminal courts.
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> . . . .
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> . . . I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts . . . .

Id. at 375-76. The Chief Justice's view became the majority view in McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[39] 397 U.S. 374-75 (1970).

[40] 403 U.S. 528 (1971).

McKeiver eliminates the possibility of an absolutist view prevailing in applying criminal safeguards to juvenile proceedings. The opinion reflects the philosophy of earlier juvenile reformers, such as Judge Julian Mack,[41] and reaffirms the traditional notion of the juvenile court as a surrogate father figure. However, *McKeiver* can be strongly criticized for its failure to suggest any remedy for the unfortunate child who is shuffled through the juvenile process only to receive little of what was

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[41] Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909). This article has been widely quoted as a statement of the original philosophy of the juvenile court system. An excerpt will amply demonstrate the thrust of this view:

> The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work . . . .

Id. at 120. *See also* FOX, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME AND DELINQUENCY 97 (1971).

Two patterns of change are presently operating in the field. One is the major thrust of *Kent*, *Gault* and *Winship* providing adult criminal safeguards in juvenile cases. *See In re* Robert T., 8 Cal. App. 3d 990, 88 Cal. Rptr. 37 (1970); *In re* Marsh, 40 Ill. 2d 53, 237 N.E.2d 529 (1968); *In re* the Interest of B., 95 N.J. Super. 307, 230 A.2d 907 (1967); *In re* R., 60 Misc. 2d 355, 303 N.Y.S.2d 406 (N.Y. Fam. Ct. 1969); Ciulla v. State, 434 S.W.2d 948 (Tex. Civ. App. 1968) applying the fourth amendment exclusionary rule to juvenile proceedings. The requirement to hold probable cause hearings was discussed in Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); and Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969). Lineup requirements for juvenile proceedings were set out in *In re* Spencer, 288 Minn. 119, 179 N.W.2d 95 (1970). On double jeopardy, consider Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968); and on free transcript for appeal see *In re* Karren, 280 Minn. 377, 159 N.W.2d 402 (1968).

On the other hand, there has been a significant effort to require the court to provide treatment as prescribed by the underpinnings of juvenile court philosophy. In support of a right to treatment, *see* Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968); Lollis v. New York, 322 F. Supp. 473 (S.D.N.Y. 1970); White v. Reid, 125 F. Supp. 647 (D.D.C. 1954); *In re* Vasko, 238 App. Div. 128, 263 N.Y.S. 552 (1933); Smith v. State, 444 S.W.2d 941 (Tex. Civ. App. 1969); Bazelon, *Forward, A Symposium — The Right to Treatment*, 57 GEO. L.J. 675 (1969); Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process*, 57 GEO. L.J. 848 (1969); Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967).

Do the attempts to provide treatment and incorporate criminal safeguards collide? There is no legal reason why one must exclude the other. The hopes of Judge Mack, at least with respect to courtroom decorum, have been dashed. However, procedural fairness as pointed out by Justice Harlan in *Winship* need not interfere with the treatment aspects of the procedure. Rather, it seems fairness in the courtroom would aid whatever treatment came later. This may be so even though Justice Fortas in *Gault* at footnote 30 indicated treatment might be a *quid pro quo* for the lack of procedural safeguards.

promised. The "worst of both worlds" philosophy is reinforced and given renewed vitality in *McKeiver*.[42]

The selective approach to the application of constitutional safeguards taken by *McKeiver* is based upon a laissez-faire concept of the federal judiciary; *i.e.*, the states should be free to experiment in order to achieve high goals in the juvenile court process. Consequently, the requirement of jury trials was felt to impede this self-correcting process by compelling the use of a full adversary procedure and thereby defeating what the Court described as an "intimate, informal protective proceeding."[43] This view was adopted even though the Court recognized that the history of the juvenile court is replete with failure.

On the other hand, for all of its shortcomings, *McKeiver* does support the proposition that *Younger* should not apply to juvenile court proceedings because they are essentially non-criminal in nature. As stated by the Court:

> [T]he juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label.[44]

In addition to case law, some juvenile jurisdictional statutes clearly indicate the unique nature of the juvenile institution. A typical example of such a statute found in every state is the CHINS, PINS or wayward child provision.[45] Dealing only with

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[42] 403 U.S. 528 (1971).

> There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities, and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Kent v. United States, 383 U.S. 541, 555-56 (1966).

While *McKeiver* states a declaration of delinquency is significantly different from a criminal conviction, it is interesting to note the provisions of the Proposed RULES OF EVIDENCE FOR COURTS, Vol. 91, No. 12 S. Ct. Rptr. Advanced Sheets in the same regard. Rule 609(d) states evidence of a juvenile adjudication is generally not admissible under this rule. The judge may, however, allow evidence of juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

It will be interesting to see whether or not this version of the rule remains in the draft finally adopted by the Supreme Court.

[43] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

[44] *Id.* at 541.

[45] *See, e.g.*, COLO. REV. STAT. ANN. § 22-1-2 (Supp. 1967).

children who are "beyond control" or are in danger of "leading an immoral life," such statutes do not effect the adult criminal law enforcement scheme. No particular act is proscribed by such statutes; rather, the crime is one of status which, if applied to adults, would be impermissible.[46] Additionally, most state statutes declare that the proceedings in juvenile court are "civil."[47]

The scope and purpose of juvenile statutes indicate a far different objective from that evidenced in criminal statutes. The aim of the latter is to protect society by stigmatizing certain conduct, while the goal of the former is to enhance and improve the well-being of the child, the benefit to society being only consequential. Therefore, the concern shown in the *Younger* series to the potential disruption of the state's scheme of criminal law enforcement is arguably inapplicable to juvenile proceedings because the ramifications are not the same. Thus, it is not unreasonable to conclude that challenges to juvenile statutes can escape the procedural limitations imposed by *Younger* since such statutes deal with the status of a child rather than criminal conduct per se.

B. *The Existence of Irreparable Injury*

Regardless of whether the proceeding is criminal or civil in nature, irreparable injury prevails as a threshold requirement before an injunctive remedy can be granted. In *Younger,* the Court indicated that the standard for irreparable injury in criminal proceedings must be greater than the normal injury incidental to a single state criminal prosecution, even though the state prosecution includes the threat of imprisonment and the expense of a defense. However, in a civil proceeding the standard is clearly less stringent. In *Wisconsin v. Constantineau*[48] the injury consisted of the infamy and embarrassment of having one's name posted publicly as an excessive drinker. The Court held that this injury presented a sufficient federal question and, therefore, federal court intervention was deemed proper. It would seem appropriate that cases involving injunctions in juvenile proceedings should be judged by a similar standard.[49]

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[46] Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962).

[47] *See, e.g.,* COLO. R. JUV. P. 1 (1970); COLO. REV. STAT. ANN. §§ 22-1-7, 22-1-12 (Supp. 1969).

[48] 400 U.S. 433 (1971).

[49] Note, however, the limitations of 28 U.S.C. § 2283 (1970) concerning staying pending state court proceedings.

In the typical juvenile case the injury that can be incurred through subjection to the juvenile processes can be extremely grave. Institutionalization itself may be sufficient irreparable injury to justify federal intervention. Rehabilitation and treatment are the goals sought; however, the juvenile institutional system has many critics who believe it fails to achieve those goals on a grand scale.[50] Thus, in *Gault* the Court noted:

> A boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." Instead of a mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from "waywardness" to rape and homicide.[51]

Generally, no bail is granted or allowed in juvenile cases pending appeal,[52] and some states do not even provide a direct appeal system.[53] Thus, the child suffers incarceration while an appeal or collateral attack is pending. As a result, before an appeal can be heard, the child will often have completed the term of incarceration prescribed by the court. Therefore, it would appear that the lack of bail pending appeal and the conditions of incarceration would be sufficient to show irreparable injury in a juvenile context.

Even temporary incarceration has been condemned as seriously injurious to a child.[54] If the system of incarceration is demonstrably punitive, the injury to a child is far more serious than the incidental injury to an adult in a normal criminal prosecution. The association with institutional personnel and other more sophisticated delinquents has been criticized as causing the child to identify himself as a delinquent and "no

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[50] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967) [hereinafter cited as TASK FORCE REPORT].

[51] 387 U.S. 1, 27 (1967).

[52] Colorado appears unique in this aspect. Bail, and perhaps bail pending appeal, is provided for in COLO. R. JUV. P. 59(c) (1970).

[53] 387 U.S. 1, 58 (1967). This situation, however, makes the avenue of federal habeas corpus more attractive since the exhaustion of state remedies has been accomplished. *See* Comment, *Appellate Review of Juvenile Court Proceedings and the Role of the Attorney*, 13 ST. L.U.L.J. 90 (1968).

[54] S. NORMAN, DETENTION PRACTICE (National Parole and Probation Association 1960).

good."[55] It would seem that such danger to the child, given the unfulfilled promise of homelike surroundings in such institutions, would support a finding of immediate and irreparable injury.[56]

CONCLUSION

Younger v. Harris and its companions create problems in seeking federal injunctive and declaratory relief in pending juvenile proceedings. The problems appear, however, to be surmountable by careful pleading according to the scope of the cases noted in this article. The ultimate question of whether or not juvenile proceedings are criminal, for federal injunctive purposes, must be resolved. By analyzing the recent juvenile cases considered by the Supreme Court, it does appear that these proceedings are to remain classified as civil. Upon this premise, most of the inhibiting factors found in *Younger* may be dismissed as inapplicable to federal actions challenging juvenile statutes and practices. Hopefully, however, juveniles will not receive the "worst of both worlds" in the resolution of this issue.

Where desirable, the federal courts offer an excellent forum for the redress of constitutional grievances occurring in juvenile court. Although the pitfalls of lack of federal jurisdiction are plentiful, they may generally be successfully avoided. With due consideration of those problems, federal courts can provide a workable avenue for sophisticated juvenile law reform.

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[55] *In re* William M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970). In the TASK FORCE REPORT it is stated:

> Detention facilities for youngsters in many communities do little to include law-abiding behavior on their part and in many instances may actually contribute to later violations of the law. The National Survey found that an estimated 100,000 juveniles are detained in jails and similar facilities for adults in the United States each year. Only three jurisdictions — Connecticut, Puerto Rico and Vermont — can actually claim that their jails are never used for children, though many States have laws forbidding such practices.

[56] The failure of a juvenile court to advise children of their right to counsel was considered irreparable injury in Phillips v. Cole, 298 F. Supp. 1049 (N.D. Miss. 1968).