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SEEN AND NOT HEARD: RECENT LEGISLATION AFFECTING CHILD WELFARE IN WEST VIRGINIA

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Recent legislation (in particular, revisions in child-welfare law passed during the 1977-78 session of the West Virginia Legislature) and recent judicial decisions have raised, but left unanswered, fundamental questions about the proper relationship between the institutions of government and the institution of the family. Rights to familial privacy and parenthood have been

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2 Those questions may best be explored in light of the historical development of child or infant status and in light of the judicial and statutory context in which child-welfare revisions have been placed. Discussion of the requirements and expectations the legislature has placed upon the judicial and executive branches may reveal potential deficiencies in legislative consideration of child-welfare law. Under the revised statutes, it is easy to determine the class of persons which comes within the definition of “child” for child-welfare purposes because age alone is now the determining factor. In the past, age was only one factor to be considered. W. VA. CODE § 49-1-2 (Cum. Supp. 1977) (amending W. VA. CODE § 49-1-2 (1976 Replacement Vol.)) provided a definition of “child” that specifically included an element of need.

“Child” means any minor who is crippled or any minor under the age of eighteen years who, because of lack of a home, inadequate care, neglect, illegitimate birth, mental or physical disability or undesirable or delinquent conduct is in need of services, protection or care. This definition may have raised serious questions concerning the applicability of certain licensing standards established under the chapter for child-care facilities. See, e.g., the provisions of W. VA. CODE §§ 49-2-4 to -12 (1976 Replacement Vol.) authorizing day care, foster care and other licensing and certification procedures. By contrast, Senate Bill 364, supra note 1, now provides in §§ 49-1-2:
declared to be constitutionally based. Public awareness of and interest in the problems of child abuse and neglect have increased. The inability of many parents to deal with runaway children, problem behavior and potentially criminal activity of their children has led to various demands for more tools and alternatives with which to work. Initial legislative attempts at establishing a new and comprehensive system of child welfare and delinquency services cannot help but be imperfect. Even so, after an examination of the procedural problems created by the juvenile revisions, one wonders if the legislature does not need to find some new apparatus for chewing what it has bitten off.

I. HISTORICAL DEVELOPMENT

Current child-welfare issues may best be understood by noting developments over the last century which have contributed to changes in the treatment of children under laws governing care, custody, and control and under laws governing delinquency. Three basic processes have been involved: first, the development of authorization for state intervention in family relationships where a child's welfare is endangered because parents are unfit or are unavailable; second, the development of rules for the proper disposition of child custody between fit and capable competitors for cus-

“Child” means any person under eighteen years of age. Once a child is transferred to a court with criminal jurisdiction pursuant to section ten, article five of this chapter, he nevertheless remains a child for the purposes of the applicability of the provisions of this chapter with the exception of sections one through seventeen of article five of this chapter. Perhaps a brief discussion of several basic problems related to the legal status of children and the administration of child-welfare law will spur further research and inquiry.

The public has been primarily concerned with definitions of juvenile delinquency (W. Va. Code § 49-1-4 (Cum. Supp. 1977)), procedures (W. Va. Code §§ 49-5-1 to -7 (Cum. Supp. 1977)), and remedies (W. Va. Code §§ 49-5-8 to -13 (Cum. Supp. 1977)). I will address the legislative response to those concerns with particular attention paid to juvenile procedures in the context of the child-welfare revisions. The practical problems involved in administering the revised juvenile laws appears to have been the primary focus of the 1978 revisions.

tody (as upon the dissolution of marriage); third, the establish-
ment and development of the juvenile court and corrections sys-
tem. The 1977 and 1978 welfare revisions have amended chapter 49 of the West Virginia Code, which deals primarily with state intervention and not with settlement of custody disputes among private citizens. The development of current child-welfare con-
cepts and especially the best-interests-of-the-child doctrine has been substantially affected by the rules developed to resolve cus-
tody questions in domestic disputes.

A. Child Custody Considerations

Active state intervention in situations of child abuse and neg-
lect sufficient to alter the legal structure of the family is a modern development initiated by the West Virginia Legislature in 1941. Prior to 1941 the fitness of a parent was a consideration generally raised in the courts only by private parties competing for custody. Recognition by the state legislature of a need to sanction certain private and public care and custody of orphans and other destitute children has existed, however, nearly from statehood. The limitations of state agency intervention in family relationships and the responsibilities assumed by state agencies upon obtaining custody of a child have been addressed by the courts only recently. Court

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9 In re Willis, 207 S.E.2d 129 (W. Va. 1973).
10 In chapter 73 of the Acts of the Legislature of 1941, procedures were established allowing state initiation of an action to intervene in and alter family structures including the power to remove children from the family and the power to terminate all parental rights thus theoretically leaving a child free for adoption; codified at W. Va. Code § 49-6-1 (Cum. Supp. 1977).
12 Neider v. Reuffs, 29 W. Va. 751, 2 S.E. 801 (1887), provides an early discus-
sion of the state interest in the care and custody of children. Brief mention is made of several legislative enactments such as that passed in 1870 entitled “An act to provide for orphans and destitute children,” id. at 755, 2 S.E. at 803. These enactments actually did little more than to authorize private and local care.
13 West Virginia Dep't of Pub. Assistance v. See, 145 W. Va. 322, 115 S.E. 2d 144 (1960). The court here declares that a parent may not be deprived of the legal custody of a child absent any neglect, mistreatment or voluntary act on the part of the parent. In the case of In re Johnson's Adoption, 144 W. Va. 625, 110 S.E.2d 377 (1959), the court declared that the legal custody of an infant relinquished to the Department of Public Assistance by its parent was sufficient to give the Depart-
decisions appear to have been incorporated into many of the child abuse and neglect procedures outlined in chapter 49.14

One of the more interesting developments in domestic law over the last century has been the shift away from exclusive patriarchal primacy in family matters.15 The case of Neider v. Reuff, decided in 1887, established the father's right to custody of all infant children against any claim of right in the mother.16 In 1901, in the case of Cariens v. Cariens, the court turned the tables in favor of mothers in an emotional appeal to humanity and civilization.17 Boos v. Boos declared another modification of the rule in 1923.18 There the court cited changes in the West Virginia Code of 1921 and 1923 which provided that if parents are living together, neither has a paramount right to custody, control, services, and earnings of the child.19 The courts have attempted to sort out com-

15 The case of Rust v. Vanvacter, 9 W. Va. 600, 601, 612 (1876), declares the father to be the natural guardian of his infant children and therefore legally entitled to the child's care, custody, control and services.
17 50 W. Va. 113, 40 S.E. 335 (1901). The court provides the following:

The mother will need the help of this boy when he shall become older; the father does not. The boy is but seven years of age. The law as to the custody of the children has been greatly modified. Formerly, the right of the father to its custody was almost an inflexible rule. That rule forgot that a mother had a heart. The real owner of the child, be it even a baby, must give it up. But civilization, advanced thought and human kindness have bent this iron rule and opened the ears of the courts to the pleading of the true friend and owner of the child. Id. at 118, 40 S.E. at 337.

18 93 W. Va. 727, 117 S.E. 616 (1923).
19 Id. at 735, 117 S.E. at 619. The court relies upon legislation passed in 1921 and 1923 amending W. VA. CODE § 44-10-7 (Cum. Supp. 1977), which section now contains the following pertinent language:

Every guardian . . . shall have the possession, care and management of his ward's estate, real and personal, and out of the proceeds of such estate shall provide for his maintenance and education; and shall have also, except as otherwise provided in this article the custody of his ward. . . .
plex social questions to arrive at solutions to custody disputes by weighing the relative fitness of the contestants and the welfare of the child rather than by relying upon mere ownership rights. The Supreme Court of Appeals of West Virginia is still struggling with this problem as noted in *J.B. v. A.B.*, which reaffirmed the application of the child-of-tender-years presumption favoring custody by mothers. In another important application of sociologically

But the father or mother of any minor child or children shall be entitled to the custody of the person of such child or children, and to the care of his or their education. If living together, the father and mother shall be the joint guardians of the person of their minor child or children, with equal powers, rights and duties in respect to the custody, control, services, earnings, and care of the education of such minor child or children; and neither the father nor the mother shall have any right paramount to that of the other in respect to such custody, control, services or earnings, and care of the education of such minor child or children. If the father and mother be living apart, the court to which application is made for the appointment of a guardian, or before which any such matter comes in question, shall appoint, as guardian of the person of the minor child or children, that parent who is, in the court's opinion, best suited for the trust considering the welfare and best interests of such minor child or children.

It is the experience of the author that conflicts often arise in situations where the circuit court has awarded custody and control to a party or agency under chapter 49 and guardianship has been granted to a different party by appointment of the county commission under the provisions of W. Va. Code § 44-10-3 (1966) last amended in 1923, years before custody provisions were developed in chapter 49. Often, appointments of guardianship under chapter 44 are made merely by filing a form with the county clerk and the posting of a bond. See W. Va. Code § 44-10-5 (1966). These provisions were developed primarily in contemplation of the death of both parents and the failure of the parents to appoint a testamentary guardian. See W. Va. Code § 44-10-1, -4, -6 (1966). The authority of the courts to terminate parental rights under chapter 49 allows for the use of chapter 44 guardianship in a manner never contemplated by the legislature. Termination of parental rights often leaves a void not adequately met by the provisions of chapter 49.

20 *Boos v. Boos*, 93 W. Va. 727, 736, 117 S.E. 616 (1923). General presumptions have been established to help in sorting out the respective rights to custody in divorce proceedings. One of the most controversial has been the child-of-tender-years presumption favoring maternal custody. See Funkhouser v. Funkhouser, 216 S.E. 2d 570 (1975); Settle v. Settle, 117 W. Va. 476, 185 S.E. 859 (1936). One of the more important presumptions is that in favor of the express wishes of a child at an age of discretion. See Murredu v. Murredu, 236 S.E.2d 452 (W. Va. 1977); Holstein v. Holstein, 152 W. Va. 119, 160 S.E.2d 177 (1969); Rust v. Vancaster, 9 W. Va. 600, 612 (1876).

21 242 S.E.2d 248 (W. Va. 1978). Footnote 4 of the decision by Justice Neely suggests the problems faced by the courts where, on the one hand, rules of evidence and construction are necessary for the efficient administration of justice and where, on the other hand, such rules may distort the proper outcome of individual cases.

22 *Id.* Syllabus, Point 2. This discussion of the child-of-tender-years presump-
derived assumptions, the court in *Arnold v. Arnold*\textsuperscript{23} declared a general rule that division of custody between divorced parents is not conducive to the best interests of the child and ordinarily should be avoided.\textsuperscript{24} To gain a clear appreciation of the considerations woven together to form a method of custody resolution in situations which may or may not involve the state as an active party, it is important to note that parental rights and responsibilities are best defined by the legislature, chapter 44, article 10 of the West Virginia Code.\textsuperscript{25} These provisions are generally derived from common law concepts surrounding guardianship of a child's estate.\textsuperscript{26} Chapter 49, however, provides that appointment of a guardian under any provisions of the chapter, entitled "Child Welfare," shall not affect guardianship of the estate of a child.\textsuperscript{27} Note, however, that all parental rights may be terminated under chapter 49 and the child released for adoption.\textsuperscript{28} It would be easy to apply the provisions of chapter 44 in terms of guardianship of the estate and the provisions of chapter 49 in terms of guardianship of the person. Certainly the legislature has not deemed fit to restrict each chapter to such terms. Furthermore, specific statutory provisions dealing with the emancipation of minors, logically an adjunct to the parent-child relationship established in chapter 44, or at least con-

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\textsuperscript{23} 112 W. Va. 481, 164 S.E. 850 (1932).

\textsuperscript{24} Id. at 485, 164 S.E. at 852.


\textsuperscript{26} Section 7 of the article goes well beyond estate considerations covering and defining those rights and responsibilities inherent in the concept of guardian of the person of a child. This range of rights and responsibilities was established in section 7 long before the state had developed its own devices for obtaining custody, care or control of children. See notes & text accompanying notes 9-13, supra. It is therefore probable that distinctions between guardianship of the estate and guardianship of the person of a child were less useful at the time these provisions were developed.

\textsuperscript{27} W. VA. CODE § 49-7-2 (1966).

\textsuperscript{28} W. VA. CODE § 49-6-5(a)(6) (Cum. Supp. 1977) provides for termination of parental rights in neglect and abuse proceedings with commitment of the child to the permanent guardianship of the state department. This creates an anomalous situation when read with section 49-7-2, leaving open the question of the existence of guardianship of the estate of a child so committed. A review of cases where parental rights have been terminated reveals that poverty is almost universally involved limiting the possibility of a practical dispute arising over questions of the child's estate. \textit{See, e.g.}, \textit{In Re Willis}, 207 S.E.2d 129 (W. Va. 1973).
sistent with the provisions of chapter 48 governing domestic relations, have instead been placed in chapter 49 under "General Provisions." An important and thought provoking development is the addition of a definition of "guardian" to Senate Bill 364. No definition of "guardian" has been previously provided in chapter 49. "Guardian" is now defined as "a person who has care and custody of a child as a result of any contract, agreement or legal proceeding." This definition raises serious questions about the extent to which traditional powers of guardianship have been modified. For example, foster parents or friends of the family who receive temporary care and custody by agreement are now guardians under this definition. It cannot be assumed, however, that the legislature intended this kind of guardianship to give rise to powers such as the power to consent to major medical treatment or to consent to early induction into the armed services or even the power to consent to marriage. It will therefore be provident for persons, agencies, and courts which deal with custody matters to spell out clearly in any agreements or orders those powers and responsibilities which are intended to be conferred upon the party or parties obtaining care and control. Failure to do so may place guardians at risk for damages not only in situations where they have overreached their contemplated authority but also in situations where a guardian could be accused of neglect.

B. Juvenile Courts; Children in Need of Services; and the Demise of Parens Patriae

The primary focus of the 1977 and 1978 revisions (i.e., Senate Bill 200 and Senate Bill 364 respectively) was modernization of the approach to problems of juvenile delinquency and related procedures and practices. The juvenile court system was initially conceived in an idealistic climate nationwide. It emerged as a sepa-

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23 W. VA. CODE § 49-1-5(9), ENR. COM. SUB. S.B. 364, at p. 5. This Bill was passed by both houses on March 11, 1978, the last day of the regular session. The House and Senate versions contained no reference to a definition of "guardian" prior to the deliberations of the conference committee. The author was fortunate to have the opportunity to observe conference activities and activities on the floor of both houses resulting in passage late in the evening of March 11. The author notes here that there was no discussion on the floor of either house concerning the addition of this definition by the conference committee.
24 Id.
25 Senate Bill 364, pp. 3-4.
26 M. WHITEBREAD, JUVENILE LAW AND PROCEDURE 1 (1974). See also Comment,
rate judicial hybrid court at the turn of the century and rapidly grew throughout the country, fostered by an interest in sociological principles as an answer to the problems of delinquency. Part of the impetus behind the establishment of the juvenile court system was the removal of children from what was perceived to be a brutal criminal process. The juvenile court also offered a mechanism for handling children whose behavior, though not criminal, was otherwise unacceptable, such as incorrigibility and truancy. It apparently was assumed that children or juveniles were not fully responsible for their conduct and, as wards of the state, would be susceptible to complete rehabilitation.

_Parens patriae_ has become the doctrinal justification for an informal adjudicatory process. Until 1966 there was no case law extending the constitutional rights afforded adults in the criminal process to juveniles in the juvenile system. In _Kent v. United States_ the United States Supreme Court declared that benevolent purpose "is not an invitation to procedural arbitrariness." The Court also noted that, in practice, a juvenile "receives neither the protections afforded adults nor the solicitous care and regenerative treatment postulated for children." A series of due process cases followed _Kent_ extending to juveniles most of the protections and rights afforded adults in the criminal process. The last decade has seen the development of a juvenile court system which embodies a legalistic as well as a rehabilitative orientation. The dual philosophy of fair treatment and the provisions of services has

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36 The power of the sovereign to act as a parent to subjects under disability such as children or the mentally ill.


38 Id. at 555.

39 Id. at 556.


CHILD WELFARE contributed to the increased burdens already placed upon court dockets and has taxed government resources to the limit.\(^2\) Several solutions to the problem have been proposed including the diversion of youths from the judicial process,\(^3\) the elimination or reduction of status offenses cognizable in the juvenile system,\(^4\) and the development of community based alternatives.\(^5\) Elements of all of these proposals appear in Senate Bill 200 and Senate Bill 364.


\(^{43}\) Current planning of youth services organizations and agencies appears to be predicated on the assumption that once a youth actually appears in a juvenile court proceeding society has already failed. A heavy emphasis is placed upon pre-delinquency programs, counseling and other measures aimed at diverting youths from the juvenile system. See Center for Action Research, Inc., A Design for Youth Development Policy (1976).

\(^{44}\) Ketcham, National Standards for Juvenile Justice, 63 VA. L. Rev. 201 (1977). In this article Judge Ketcham describes the basic recommendations of the Institute of Judicial Administration of New York City and the American Bar Association in the report of the IJA/ABA Joint Commission on Juvenile Justice Standards. The Joint Commission recommends eliminating status offense jurisdiction. Judge Ketcham summarizes:

Under the Standards the juvenile court will retain jurisdiction to intervene in a child-parent relationship only
1. to adjudicate and dispose of criminal offenses committed by juveniles between ten and eighteen that, if committed by an adult, would be punishable by imprisonment;
2. to adjudicate and impose sanctions for serious juvenile traffic offenses;
3. to protect a child from abuse or neglect by a parent or custodian; and
4. to protect a child temporarily from imminent physical danger caused by a serious psychological disability (suicidal tendencies, for example) or by the child being homeless or in conflict with parents so as temporarily to deprive the child of custody and support.

To insure that juvenile courts do not overuse the last category, the Standards limit confinement for involuntary protective custody to six hours, for emergency medical services to seventy-two hours, and for voluntary protective placement of a runaway juvenile to twenty-one days. Id. at 204.

\(^{45}\) See The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 55-89 (1967). The President's Commission recommended the establishment of Youth Services Bureaus to provide integrated, community based programs. Id. at 83. One of the first major developments in West Virginia in response to this recommendation was a publication of a detailed model for a youth services system serving the Charleston community, D. Sutton, P. White, D. Rubenstein, Model of a Youth Service System for the City of Charleston, West Virginia (West Virginia College of Graduate Studies 1973).
II. JUVENILE REVISIONS: STATUTORY IMPACT AND REMAINING QUESTIONS

Legislative consideration of juvenile law reform must take into account at least three competing views held by reformers. First, those with a law-enforcement orientation insist that too much attention has been paid to the *parens patriae* philosophy of the juvenile court and not enough attention has been paid to the victims of delinquency. Proponents of this position argue that society requires certain protections from destructive behavior and that the more serious offenders should be punished rather than treated. A second view, based on the social welfare origins of the juvenile court system, suggests that necessary reform can be accomplished by emphasizing the role of the juvenile court as "a treatment agency dispensing personalized, individual justice." A third approach to juvenile justice reform is based partially on the notion that involvement of a youth in the juvenile system produces more negative results than positive. Reformers holding this view generally insist upon the extending of all procedural and evidentiary protections to youths who have contact with the juvenile system. The establishment of such procedural protection will help to divert youths from the system. Analysis of Senate Bill 200 and Senate Bill 364 indicates that the former act reflects the due-process emphasis favored by the third category of reformers, whereas the latter act appears to be a response by persons with a law-enforcement or judicial orientation.

A. What is a Juvenile Delinquent?

Prior to 1977, the Code provided for nine categories of delinquency. The definition of a delinquent child included any child

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46 *W. Va. Code* § 49-1-1 (Cum. Supp. 1977) must be read as implying that the only function of the juvenile delinquency system is to provide care and rehabilitation for offenders. The 1978 revisions provided by Senate Bill 364, *supra* note 1, at 3, now declares as a purpose the provision of "a system for the rehabilitation or detention of juvenile delinquents" (emphasis added).


48 *W. Va. Code* § 49-5-1(d) (1977) extended procedural and evidentiary protections to children under juvenile court jurisdiction. Limitation on the availability of extra-judicial statements (confessions) probably resulted in the processing of fewer cases. The 1978 revisions of this section relaxed these restrictions to some extent. For instance, the protection against admission of certain extra-judicial statements was removed from youths sixteen or over.

49 *W. Va. Code* § 49-1-4 (1976 Replacement Vol.). This section provided as follows:
who violated a law (whether or not criminal in nature), any incorrigible or ungovernable child, and any child who was habitually truant. The number of youths involved in the juvenile system was often, therefore, a matter of administrative choice and institutional capacity. Senate Bill 200 placed four types of activities within the definition of delinquent child. The first two have been described as "crime with time" and "crime with fine;" the third as a restatement of the "incorrigibility" status offense with an interesting twist. The language bears close scrutiny as it narrows the offense to "habitually and continually" refusing "to respond to the supervision legally required of such child's parents or custodian." The threshold question necessarily becomes determining what type of supervision is legally required of parents. No clear answer is available, but two possible sources for an answer lie in

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"Delinquent child" means a person under the age of eighteen years who:

1. Violates a law or municipal ordinance;
2. Commits an act which if committed by an adult would be a crime not punishable by death or life imprisonment;
3. Is incorrigible, ungovernable, or habitually disobedient and beyond the control of his parent, guardian, or other custodian;
4. Is habitually truant;
5. Without just cause and without the consent of his parent, guardian, or other custodian, repeatedly deserts his home or place of abode;
6. Engages in an occupation which is in violation of the law;
7. Associated with immoral or vicious persons;
8. Frequent a place, the existence of which is in violation of law;
9. Deports himself so as to wilfully injure or endanger the morals or health of himself or others.

Subsections (7) and (9) were held void under the due process clauses of both the state and federal constitutions in the case of State v. Flinn, 208 S.E.2d 538 (W. Va. 1974).

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"Delinquent child" means a child:

1. Who commits an act which would be a crime under state law or a municipal ordinance if committed by an adult punishable by confinement in the county jail or imprisonment;
2. Who commits an act designated a crime under a municipal ordinance or state law not punishable by confinement in the county jail or imprisonment;
3. Who, without just cause, habitually and continually refuses to respond to the supervision legally required of such child's parents or custodians; or
4. Who is habitually absent from school without good cause.

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Id.

Id. (emphasis added).
examination of common-law responsibilities of parents for certain
torts of their children and examination of the definition of
"neglected child." The former merely aids in determining the level
of supervision required to prevent a parent from being held negli-
gent. Tort concepts of parental responsibility for supervision as-
sume that a parent will exercise a level of supervision reasonably
necessary to prevent harmful conduct by his child. A statutory
definition of "neglected child" which placed supervisory burdens
upon parents, guardians and custodians would clearly establish a
yardstick for determining what level or type of supervision is le-
gally required. Refusal, failure or inability to provide supervision
of any kind was not considered in the definition of "neglected
child" provided in Senate Bill 200, however, except as lack of
supervision may be a factor in the total abandonment of the
child. The lack of a clear definition of what constitutes legally
required supervision led to a subtle but important change in the
wording of the incorrigibility section of Senate Bill 364. That sec-
tion now provides that a delinquent child is one "who, without just
cause, habitually and continually refuses to respond to the lawful
supervision by such child's parents, guardian or custodian"

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24 For a general discussion of parental liability for the acts of children, see 14

25 Senate Bill 200 provided in pertinent part as follows:

"Neglected child" means a child:

1. Whose physical or mental condition is impaired or endangered
   as a result of the present refusal, failure or inability of the child's
   parent or custodian to supply the child with necessary food, clo-
   thing, shelter, medical care or education, notwithstanding efforts
   of the state department to remedy the inadequacy, and the condi-
   tion is not due primarily to the lack of financial means of the
   parent or guardian. . . .

Senate Bill 364 removes from the neglect definition any reference to the state's
efforts to remedy the inadequacy and provides the following:

"Neglected child" means a child:

1. Whose physical or mental condition is impaired or endangered
   as a result of the present refusal, failure or inability of the child's
   parent, guardian or custodian to supply the child with necessary
   food, clothing, shelter, medical care or education and
   medical care or education and
   the condition is not due primarily to the lack of financial means
   of the parent, guardian or custodian. . . .

(emphasis added to new language).

26 The definition of neglected child in Senate Bill 200 also included the follow-
ing category of children: "(2) Who is presently without necessary food, clothing,
shelter, medical care, education or supervision because of the disappearance or
absence of the child's parent or custodian." Senate Bill 364 did not substantially
alter this language.
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Consequently, it appears that, to be excused from the supervision contemplated by Senate Bill 364, a juvenile must show that such supervision was unlawful. This standard is arguably as broad or broader than the language provided prior to Senate Bill 200.

A fifth category has been added by Senate Bill 364 to the list of juvenile offenses so that any child "who willfully violates a condition of a probation order or a contempt order of any court" is now a delinquent child. Important questions arise concerning the implications of this additional category especially when considering the proper disposition of a child found to be delinquent under this provision. Particularly troublesome is the problem of placing "category five" offenders in secure custody. Placement of juveniles in secure facilities often turns on the distinction between "status" and "criminal" offenders. Most of the children who might fall within a "category five" offense are those already determined to be delinquent under one of the other categories. Unless the child commits an act which would amount to criminal contempt, it would appear that "category five" has little utility beyond that obtainable by a simple modification of a prior delinquency order. "Category five" might be used, however, to buttress a heretofore much ignored section found in the "General Provisions" article of

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58 See statutory language as quoted in note 49.


60 See W. Va. Code §§ 49-5-13, -16 as provided by Senate Bill 364.

61 Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977). Item 4 of the syllabus provides: "Under no circumstances can a child adjudged delinquent because of a status offense, i.e., an act which if committed by an adult would not be a crime, be incarcerated in a secure, prison-like facility with children adjudged delinquent because of criminal activity." Item 6 of the syllabus provides that a status offender may not be held in a secure, prison-like facility unless found to be "so ungovernable or anti-social that no other reasonable alternative exists, or . . . could exist . . . ."

The court's limitations on the secure custody of status offenders were incorporated into the language of Senate Bill 200, W. Va. Code §§ 49-5-13, -16 (Cum. Supp. 1977). These sections also cover pre-adjudicatory custody which was not before the court in the Harris case.

62 W. Va. Code § 49-5-14 (S.B. 364, 1978) provides for modification of dispositional orders to more restrictive alternatives upon clear and convincing proof of a substantial violation of a court order. The modification process is much simpler than the original petition process necessary to a determination of delinquency.

One application of "category five" which might be useful would involve probation violations and contempt of court by children found guilty of a crime following transfer to criminal jurisdiction. W. Va. Code § 49-5-10 (S.B. 364, 1978).
Chapter 49 establishing criminal penalties for failure to comply with a court order issued under the authority of the chapter.43

Unlike criminal law, the law of juvenile delinquency has always been a purely legislative creation.44 The incidence of juvenile delinquency, of course, depends upon how the legislature defines delinquency and the resources available to discover it. Public perceptions often define delinquency in terms of what the community perceives to be undesirable behavior. This has probably contributed to a tendency to treat runaway children in the same manner as delinquent children. Runaway children, as such, have not been defined as delinquent children under West Virginia law although prior to Senate Bill 200 a child who repeatedly, without just cause, and without consent, deserted his home fell within the definition of delinquency. The first-time runaway was not per se a neglected child45 and under the revisions is not necessarily a neglected child either. Senate Bill 364 extends to the police, however, certain powers of custody over runaways under the juvenile procedures provisions but only pending receipt of an appropriate court order, which must be applied for immediately upon taking a child into custody.46 Except for the possibility of an order pursuant to the Interstate Compact On Juveniles,47 no such order may actually be obtainable unless based upon grounds other than running away. It would be a simpler matter conceptually to treat runaways completely outside the juvenile-delinquency system.48

43 W. VA. CODE § 49-7-20 (1976 Replacement Vol.). This section is extremely broad as it penalizes any person "who violates an order, rule, or regulation made under authority of this chapter." Even after reading into the language the requisite willfulness of the activity and the necessary lawfulness of the order, the coverage is broad enough to allow for serious abuse. For example, in the area of juvenile procedures, it would be a simple matter to dispose of a minor status offense by placing a child under a probation order setting out rigid conditions. Failure to comply with such conditions would subject the child to potential delinquency charges under both "category one" and "category five" offenses.


45 See statutory language at notes 55 and 56.

46 W. VA. CODE §§ 49-5-8(b), (c) and (d) (Cum. Supp. 1977).

47 W. VA. CODE §§ 49-8-1 et seq. (1976 Replacement Vol.). It appears that the purposes and procedures established under the Interstate Compact On Juveniles are in some respects contradictory to the extent and procedures provided by the 1977 and 1978 revisions of other portions chapter 49. The length of custody provisions of the Compact, for instance, far exceed the custody powers conferred by article 5, chapter 49. Compare W. VA. CODE § 49-8-2 with § 49-4-1 to -6 (1976 Replacement Vol.) (return of runaways).

Defining delinquency is more complicated than relying on the truism that delinquency is whatever the legislature says it is. The public demand to invoke the coercive powers of the juvenile court to restrain undesirable behavior will undoubtedly continue to influence judicial constructions of these definitions, just as that demand has led to the legislative response in Senate Bill 364 authorizing the police to take custody of runaways under the juvenile provisions.

B. Entry into the Juvenile Process

The circuit courts have had and still do retain primary jurisdiction over juvenile proceedings. The role of other courts in the juvenile process has been clarified by Senate Bill 200 and Senate Bill 364 so that certain traffic violations and offenses for which a sentence of confinement is not sought may be handled by inferior courts having concurrent jurisdiction with the circuit courts. According to both revisions, a child may be brought before the circuit court only by three methods: juvenile petition based on allegations of neglect or delinquency; certification from courts having criminal jurisdiction or from other courts; or warrant or similar process. Both certification and warrant procedures are designed ultimately to result in the filing of a juvenile petition, which is the basis of any further judicial procedure.

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99 Id. at 650.
13 W. Va. Code § 49-5-2 (Cum. Supp. 1977); W. Va. Code (S.B. 364, supra 1978). Besides clarifying prior language, Senate Bill 364, supra note 1, extends the power of issuing warrants in juvenile matters to magistrates excluded under the prior bill. A warrant, capias or attachment issued by judge, referee or magistrate charging a child with an act of delinquency is not returnable to the circuit court under the new bill. Although the language of section 49-5-2 in both bills purports to set out the three exclusive means for bringing a child before the circuit court, both also provide a fourth method for bringing children before the circuit court in section 49-5-9(d) which requires that a child in custody be immediately taken before a referee or a judge for a detention hearing. The logical resolution of the apparent conflict between these sections would be to release the child in a detention hearing, if no petition, certification, warrant or similar process were outstanding.
14 W. Va. Code § 49-5-7(e) (Cum. Supp. 1977); W. Va. Code § 49-5-7(d) (S.B. 364, supra 1978). Both acts also provide that, if a child is in custody, a petition must be served within ninety-six hours of the time custody began. Senate Bill 364, supra note 1, specifies that it is the child who is to be served when in custody.
The revisions, however, have incorporated into the juvenile sections specific procedures and devices for diverting youths from the judicial process. Methods have been introduced for referring children alleged to be delinquent to various counseling services, among which is the threat of a noncustodial-counseling order. The "category five" offense may find its greatest utility as a sanction for a child's failure to comply with a noncustodial-counseling order. Senate Bill 364 expressly allows probation officers discretion to enter into informal adjustment counseling or to file a juvenile petition. This alternative has arguably been available prior to Senate Bill 364. The addition of this provision not only represents deference to the judiciary, which supervises probation officers and staff, but also indicates legislative emphasis on informal resolution of problem behavior. Even upon the filing of a juvenile petition, the court has the power to direct a preliminary inquiry to determine whether the matter can be resolved informally.

Besides entering the juvenile process by petition or informal counseling, a child may initially enter it by being taken into custody by a law-enforcement official without a warrant or court order. Senate Bill 200 declared that "(a)bSENT a court order, a child [COULD] be taken into custody by a law-enforcement official only if grounds exist[ed] for the arrest of an adult in identical circumstances." This limitation announced a dramatic departure from past practice: it destroyed the effectiveness of juvenile-curfew laws and ordinances. Under Senate Bill 200 status offenders and runaways are no longer immediately detainable. Community ex-

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72 W. VA. CODE § 49-5-3 (Cum. Supp. 1977), as amended by W. VA. CODE § 49-5-3 (S.B. 364, supra 1978). Although the language provided by Senate Bill 364, supra note 1, was intended to simplify and to clarify the noncustodial counseling initiated by Senate Bill 200, supra note 1, several problems remain. First, any notice must state that a noncustodial-counseling order will be sought from a court, but subsequent language suggests that either a court or a referee may direct a child to participate in counseling. This discrepancy is partially resolved by assuming that, if the court is requested to issue a noncustodial order, the court may delegate the matter entirely to a referee. Second, information "obtained as the result of such counseling" is not admissible in subsequent proceedings under the article. It is not evident that "such counseling" refers to counseling under a noncustodial order or to any counseling contemplated under the section.

73 W. VA. CODE § 49-5-3a (S.B. 364, supra, note 1, 1978).

74 W. VA. CODE § 49-5-7(a) (Cum. Supp. 1977); W. VA. CODE § 49-5-7(a) (S.B. 364, supra, note 1, 1978).

75 W. VA. CODE § 49-5-8(b) (Cum. Supp. 1977); W. VA. CODE § 49-5-8(b) (S.B. 364, supra, note 1, 1978).

76 Id.
pectations that law-enforcement personnel will be able to pick up status offenders and runaways led to rediscovery of the emergency provisions of chapter 49. Article two provides, *inter alia*, that the State Department of Welfare may accept custody of a child from a police officer in an emergency situation until a temporary custody order can be obtained. Although these provisions do not speak directly to the authority of a police officer to obtain custody of a child initially, they have been used to justify such custody through varying interpretations of "emergency situation." Senate Bill 364 alleviates the vagueness and the broadness of that phrase by providing that in the absence of a warrant or a court order a law-enforcement official may take a child into custody if "emergency conditions exist which, in the judgment of the officer, pose imminent danger to the health, safety and welfare of the child." Law-enforcement personnel are also given the authority to take runaways into custody if there are reasonable grounds to believe that the child has run away without just cause and that the child's health, safety, and welfare are endangered.

Under the provisions of Senate Bill 200 a child taken into custody must be immediately brought before a judge or a referee for a detention hearing, which must be held by the end of the next succeeding judicial day, excluding Saturday, or the child must be released. Because it adds runaways to those children who may be taken into custody without a warrant or an order, Senate Bill 364 has also created some procedural problems. Upon taking any child into custody without a warrant or an order, a law-enforcement official must immediately cause to issue a warrant, a petition or an order authorizing the detention of the child. Except for neglect petitions, no such warrant, petition or order is available to authorize detention of an in-state runaway. Senate Bill 364 further limits custody of a runaway to no more than forty-eight hours without a court order or no more than seven days in any event. A child in custody must be afforded a detention hearing by the end of the next succeeding judicial day following placement into custody.

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50 *Id.* § 49-2-16 (1976 Replacement Vol.).
51 *Id.*
52 *Id.* § 49-5-8(b)(2).
53 *Id.* § 49-5-8(b)(3).
55 *Id.* § 49-5-8(b)(iv) (1978).
56 *Id.* § 49-5-8(b) (1978).
57 *Id.* § 49-5-8(d). This section no longer excludes Saturdays from the time computation even though section 49-5-8(c) continues to exclude Saturdays for pur-
The sole issue at these hearings is whether the child should be detained pending further court proceedings. Handling runaway children becomes a complicated problem under Senate Bill 364. The easy solution for law-enforcement officials under the bill is to pick up runaways and return them either to their home or to the police station where parents or guardians may be contacted. Detaining runaways longer than is necessary for placing them in a home or in alternative non-detention facilities may be questioned on the ground of insufficient authority even prior to the expiration of the maximum forty-eight hour period allowed without court order, especially in cases where there may not be any appropriate judicial authorization available. The complexity and apparent contradictions in these custodial provisions will undoubtedly encourage the diversion of youths from the juvenile system. It is not apparent, however, that this result was intended by the legislature.

My discussion is not an exhaustive survey of the intricacies involved in entering the juvenile system, but it is representative of the problems faced by the legislature as it attempts to define the interface between governmental activity and private, community, and social behavior.

C. Substantive and Procedural Rights and the Limits of Available Resources

In *Harris v. Calendine* the West Virginia Supreme Court of Appeals held that, when determining the appropriate disposition of status offenders, the test is not what alternatives are actually available but rather what alternatives “could reasonably be made available in an enlightened and humane state solicitous of the welfare of its children but also mindful of other demands upon the state budget for humanitarian purposes.” Courts must first estimate the potential resources of the state and then strike a balance among humanitarian services. This balance must be based on

poses of time limits prior to release by sheriffs and detention directors. This discrepancy is probably the result of the “cutting and pasting” which took place in conference committee so that the language of sub-section (d) was taken from the House version and the language of the sub-section (c) was taken from the Senate version.

**Id.** Senate Bill 200, *supra* note 1, required determinations of “sufficient grounds for the arrest” [sic] and “probable cause for the offense.”

233 S.E.2d 318, 331 (W. Va. 1977). At this point in its opinion, the court discussed institutional alternatives and based its holding on the theory that a person should not be undeservedly punished due to state interest in conserving its resources.
priorities according to what the courts think an enlightened and humane state would favor. Those who fear judicial encroachment of legislative functions will find no solace in the *Harris* decision. That decision, however, was closely followed by the passage of Senate Bill 200 by which the legislature reestablished its primary role by setting standards and goals for juvenile justice.

The *Harris* court inferred from the development of the juvenile-court system in the United States that its adoption in West Virginia was for benevolent and humanitarian purposes. Senate Bill 200 provides an express statement of purpose beyond the mere establishment of a comprehensive child-welfare system and incorporates the "enlightened" goals suggested by *Harris*.

Specifically, the purpose of the child-welfare system is:

[to] assure to each child such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental and physical welfare of the child; . . . to provide for removing the child from the custody of parents only when the child's welfare or the safety and protection of the public cannot be adequately safeguarded without removal; and, . . . to secure for him custody, care and discipline consistent with the child's best interests. . . .

No distinction is made between the child who is neglected and the child who is delinquent, at least with regard to custodial alternatives. This expansive statement of purpose may result in its own demise, especially if state government should discover it cannot deliver the contemplated results. The substantive due process analysis, of which the Supreme Court of Appeals is becoming fond, poses the greatest threat to existing juvenile institutions and programs which fail to provide "custody, care and discipline as nearly as possible equivalent" to that which the child should have received in his own home. Senate Bill 364, however, signals a retreat from these standards: first, it avows as its purpose "to reduce the rate of juvenile delinquency and to provide a system for the rehabilitation or detention of juvenile delinquents;" and, second, where children are removed from parental custody, the care, custody, and discipline a child is to receive is no longer that which is nearly equivalent to what he should have received but is the

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90 *Id.*
92 *Id.*
"custody, care and discipline consistent with the child's best interests." The "consistent-with-best-interests" test of Senate Bill 364 blunts any substantive due process attack on institutional programs, practices and services. The question remains whether the direction taken by the *Harris* court is affected by an expression of legislative intent which sets lesser standards than does Senate Bill 200 for child-welfare services. The change must be justified under the language quoted from *Harris* which suggests that the legislature must also be mindful of budgetary limitations.

The legislature matched the *Harris* court ban on incarcerating status offenders with criminal offenders in the express language of Senate Bill 200 and in addition provided the same protection to children charged with status offenses but not yet found to be delinquent.

Senate Bill 364 extends the protection of status offenders to the new "category five" violators (children who violate probation or court orders) except that such violators who have also been found delinquent for an offense which would be a crime if committed by an adult may not be detained with other status offenders.

Institutions established for the secure detention of juveniles have been left in a posture of housing either criminal or status offenders and, as a practical matter, have chosen to detain criminal offenders alone. Following passage of Senate Bill 200, no facilities existed in the state for the secure detention of status offenders. Non-secure facilities, such as group homes and emergency shelters, began to take and are currently taking children who formerly were held in secure-detention institutions. No appropriations were passed either in 1977 or 1978 aimed at developing or maintaining the necessary alternatives to secure detention for criminal offenders.

When juveniles were detained under Senate Bill 200, three

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15 *Id.* (emphasis added).
16 *Id.* § 49-5-16(a).
17 *Id.* This sub-section provides in pertinent part as follows:
   A child charged with or found to be delinquent under subdivision (3) or (4), section four article one of this chapter, shall not be housed in a detention or other facility wherein persons are detained for criminal offenses or for delinquency involving offenses which would be crimes if committed by an adult.
18 W. Va. Code § 49-5-16(a) (Cum. Supp. 1978). A close reading of this provision suggests that some "category five" offenders or alleged offenders may not be incarcerated with "status" offenders or with "criminal" offenders.
CHILD WELFARE

Evidentiary hearings were required prior to disposition: first, a detention hearing where probable cause for the arrest and for the offense were in issue; second, a preliminary hearing where probable cause to believe the child to be delinquent was in issue; and, third, an adjudicatory hearing where the charges were to be proved beyond a reasonable doubt. Jurisdictions which did not have juvenile referees were faced with the problem of requiring circuit-court judges to hear the same evidence three different times. Such a system created problems of bias and partial review of evidence. No provisions were made for the appointment or the remuneration of new juvenile referees. One option considered by courts pressed with the constraints of time or concerned about the impartial review of evidence was the appointment of magistrates as referees without additional salary. The position of referee or magistrate-referee is important where juvenile judges are not available because detention hearings must take place within one judicial day from the inception of custody. Two changes accomplished by the passage of Senate Bill 364 may alleviate these problems. The scope of detention hearings has been narrowed to the sole issue of whether the child should be detained pending further proceedings. Where a judge or referee is unavailable, a detention hearing may now be held by a magistrate.


101 Id. § 49-5-9.

102 Id. § 49-5-11.

103 Id. §§ 49-5A-1 to -6 (1976 Replacement Vol. & Cum. Supp. 1977). First enacted in 1972 these provisions create a juvenile-referee system whereby referees may be appointed by the circuit courts to be paid out of the state treasury under guidance from the highest court of this state. Though referees cannot conduct hearings on the merits of any case, they are empowered to conduct detention hearings and to order the detention of juveniles. The 1978 amendments include a change in section 49-5A-5 governing detention in other counties. The original provision (1976 Replacement Volume) only allowed detention in other counties with the consent of the child or child's counsel. The consent requirement was subsequently eliminated. (Cum. Supp. 1978) or (Enr. Comm. Sub. S.B. 364, 1978). Where children could not be incarcerated in a jail facility and no other facility was available in a county, a child could technically force authorities to release him by refusing consent. This posed a serious problem for those counties, usually rural, with inadequate resources.


105 Id.; W. Va. Code § 49-5A-3 (Enr. Com. Sub. S.B. 364) or W. Va. Code § 49-5A-3 (Cum. Supp. 1978). Another change in section 49-5-8(d) aimed at economy is a new provision under Senate Bill 364, supra note 1, allowing preliminary hearings to be held in conjunction with detention hearings provided that all parties are prepared and that the child has counsel.
Although Senate Bill 364 includes several provisions which may reduce expenses of juvenile proceedings and allow for practical use of existing facilities, the act also creates problems in its allocation of resources. For instance, the Department of Welfare bears the responsibility for juvenile parole without any extra funding, personnel, or other resources.\(^{106}\) The bill also provides that all juvenile records expunged "by operation of law" must be returned to the juvenile court for safekeeping.\(^{107}\) It seems unnecessary to go to the expense of preserving the records from all agencies involved with juvenile proceedings when "[e]xpungement shall have the legal effect as if the offense never occurred."\(^{108}\) The tension between procedural and substantive requirements and the limits of available resources creates a risk of unequal treatment of youths throughout the state. The lack of locally available resources, including appropriate facilities, will contribute to the diversion of youths from the juvenile system but may also contribute to inappropriate placements and to the use of inappropriate services.

D. Loose Ends

Several peculiar problems and anomalous situations besides those already mentioned may need further legislative attention. Picking and choosing between House and Senate versions in conference committee has resulted in some contradictory and conflicting language.\(^{109}\) For example, under Senate Bill 200 any person filing a juvenile petition had to include the name and address of the child's parents, guardians or custodians in the petition\(^{110}\) and it then had to be served on them even in cases where they were also petitioners.\(^{111}\) Senate Bill 364 removed the requirement that parents, guardians or custodians include in petitions their own names and addresses when they were petitioning but failed to eliminate


\(^{107}\) Id. § 49-5-17. Black's Law Dictionary 693 (4th ed., 1951) defines "expunge" to mean "to destroy or obliterate; it implies not a legal act, but a physical annihilation."

\(^{108}\) Id. at sub-section (b).

\(^{109}\) Section 49-5-7(a) of Senate Bill 200 authorized the court or referee to set a time and a place for a preliminary hearing and appointment of counsel, whereas only the court is so authorized under the amendment to that section. This may have been an oversight. See note 87 supra, for discussion of language discrepancy in detention procedures.


\(^{111}\) Id. § 49-5-7(b).
the requirement that they be named respondents and served with notice when they were also petitioning.\textsuperscript{112}

Children's and families' rights of privacy is another problem area. The legislature has provided criminal penalties for the unauthorized release of juvenile or other records of children,\textsuperscript{113} but has not defined the term "record." In fact, no provision is made for preventing the release of information concerning a child by anyone with personal knowledge of the child's case.\textsuperscript{114} The language of these confidentiality provisions literally apply to all state and private agencies and facilities, including educational and health institutions.\textsuperscript{115} Perhaps the legislature did not intend to extend the protection of children's records this far.\textsuperscript{116}

In general, many of the changes made by Senate Bill 364 in amending Senate Bill 200 have clarified or eliminated confusing or contradictory material. Such major revisions must be expected to leave problems in their wake to which future legislatures will need to address technical modifications. The system will not be able to achieve harmony, however, if each amendment also involves shifts in philosophy and ultimate goals.

\section{Conclusion: Legislation Without Representation}

When society, especially through legislation, classifies its


\textsuperscript{113} An additional problem under section 49-7-1 includes the proper definition of "parent" for purposes of the release of information; for example, may a natural parent request and obtain release of information following relinquishment or termination of parental rights? Another conceptual problem also arises where the child becomes an adult; for example, is a record developed prior to emancipation or majority still a record "concerning a child" after emancipation or majority? What about the availability of adoption records to an adoptee who is now an adult? The provisions of section 49-7-1 are either too vague or too broad to allow adequate answers to these questions.

\textsuperscript{114} W. Va. Code § 49-7-1 (Cum. Supp. 1978). This section provides in pertinent part that "[a]ll records of the state department, the court and its officials, law-enforcement agencies and other agencies or facilities concerning a child as defined in this chapter shall be kept confidential and shall not be released." (emphasis added).

\textsuperscript{115} Id. The language of the section infers consideration by the legislature of abuse and neglect situations and juvenile proceedings. Other types of record collecting situations are not specifically discussed, such as school records or hospital records. Furthermore, the language of this section is substantially the same as was first introduced by Senate Bill 200 which placed primary emphasis on revising juvenile procedures and neglect and abuse procedures.
members according to age, race, sex, and other factors, it often uses those labels to limit the legal and social options of the class at the expense of capable or unique individuals. Legislative and judicial processes provide a forum in which individual rights and freedoms may be established and enforced. The one class most uniformly and thoroughly denied access to legislative and judicial processes is that of children. This denial of access results largely from legal devices intended to protect children who, by reason of immaturity, lack of experience and even physical size, may be especially vulnerable. In the various hearings and discussions held during the legislative session when the various bills which culminated in Senate Bill 364 were considered, the legislature heard from teachers and lawyers, newspapermen and judges, law-enforcement personnel and social workers, government administrators and private citizens—but no children either attended or testified, not even an honorary Senate page. It is interesting to note that after passage of Senate Bill 200 prosecutors and judges alike raised initial complaints about the complexity and confusion of its many new provisions. Law-enforcement personnel complained that as soon as the bill went into effect, the “kids” knew all the loopholes. Juxtaposition of these two observations suggests that the real experts on children may be children. They often suffer the evil consequences of our good intentions. The programs and procedures initiated on their behalf have not been informed by feedback from children. Even the best system of procedures and safeguards and an abundance of resources will not result in success where children’s needs are poorly defined and the causes of delinquent behavior are indistinct. Future legislative attempts at child-welfare reform must be accompanied by circumspect analysis of family and government relationships and must be accompanied by encouragement of youthful participation in the development of appropriate alternatives.