

THE SERIOUS YOUNG OFFENDER UNDER VERMONT'S JUVENILE LAW: BEYOND THE REACH OF *PARENS PATRIAE*

INTRODUCTION

On July 15, 1981, Vermont lawmakers convened for their first special legislative session in six years. Governor Snelling called the session in response to a demand by the Vermont public, which was outraged by the surge of violent crimes committed by youth.¹ Vermonters were especially alarmed by the realization that a fifteen-year-old found guilty of murder could be released from detention in three years under the existing juvenile laws.² They demanded a change, insisting that juveniles under sixteen accused of serious offenses be processed in criminal court as adults. The session's finished product—a bill³ which has been criticized as having been enacted in the heat of passion⁴—emerged two days later, ready for the governor's signature.⁵

This note centers on the resulting act, highlighting the main differences between the old and the new laws on juvenile delinquency.⁶ The history and underlying philosophy of juvenile justice, in terms of both general background and specific developments in Vermont, will be discussed first in order to provide the framework for an analysis of Vermont's amended juvenile laws.

Historically, the foundation of the juvenile justice system has

1. In May, 1981, two twelve-year-old girls were raped and repeatedly stabbed in a public park in Essex Junction. One died. See generally *The Burlington Free Press*, Oct. 4, 1981, (Vermont). Only months before, an elderly couple had been murdered by youths at their home in Danville, Vermont. *Id.* Jan. 22, 1981, at 6B, col. 1. These incidents triggered the special session.

2. *Id.* Oct. 4, 1981, (Vermont), at 18.

3. H.R. 1, An Act Relating to Juvenile Crimes, Bien. Sess. (1981) (codified at VT. STAT. ANN. tit. 33, §§ 632-667 (Supp. 1981)).

4. *The Burlington Free Press*, Jan. 6, 1982, at 12A, col. 1.

5. *The Burlington Free Press*, Oct. 4, 1981, (Vermont) at 19.

6. The statute was amended in respect to both delinquents and children in need of care or supervision. See VT. STAT. ANN. tit. 33, § 632(a)(1), (12) (1981). This note will address only those changes which affect delinquents. "Delinquent" means a child who has committed a delinquent act. *Id.* § 632(a)(4). Furthermore, this note does not deal with the various programs which exist as alternatives to incarceration. For a comprehensive overview of these alternative programs, which are being experimented with throughout the nation, see generally *Violent Juvenile Crime, 1981: Hearings on the Problem of Juvenile Crime before the Senate Comm. on the Judiciary, Subcomm. on Juvenile Justice*, 97th Cong., 1st Sess. (July 9, 1981).

been the doctrine of *parens patriae*.⁷ According to this doctrine, the state is justified in intruding into the lives of crime-prone children.⁸ Since the nineteenth century this intervention has been condoned on the premise that the state's overriding concern is always the best interest of the child.⁹ However, as will be discussed, with the passage of Vermont's new law, the child's best interest no longer seems to be the focus of concern in adjudications of youths accused of serious crimes. Although the amended statute still mentions the child's best interest, the statute when read as a whole runs contrary to this. That is, juveniles who commit serious crimes may now be treated as criminals with no special favors at all. Thus, a fundamental premise of *parens patriae* has been abandoned. One object of this note is to encourage readers to reflect on whether this trend away from the old philosophy is for the better.

Certain aspects of the new law have been pinpointed as potential problem areas, and these will be addressed. They include confidentiality, the present lack of facilities in Vermont for juvenile offenders, and the extension of jurisdiction until age twenty-one. Finally, issues of policy will be raised. The pros and cons of treating violent juveniles within the adult court system and the proper role of the juvenile court in regard to these offenders will be considered with an eye toward future legislation.

I. HISTORY AND PHILOSOPHY

A. General Background

The juvenile justice system had its origin in the nineteenth century. Over the course of the century various states were developing the idea of a system of justice, separate from the adult criminal system, to handle juvenile offenders.¹⁰ Illinois is credited with having formalized the juvenile justice system; it was the first state

7. See Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 5 FAM. L.Q. 64, 66 (1971).

8. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193 (1970). This state action has been justified by analogy to the "wise and merciful father" who intervenes into the life of his recalcitrant child. See Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

9. Note, *A Chance to be Heard: An Application of Bellotti v. Baird to the Civil Commitment of Minors*, 32 HASTINGS L.J. 1285, 1289-90 (1981).

10. See Mack, *supra* note 8, at 107-08. See also Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L.J. 1, 3 (1980), for a description of New York's first experiment with juvenile reform, the New York House of Refuge.

to create a separate juvenile court.¹¹ Underlying the institution of this court was the rehabilitative ideal of *parens patriae*.

The doctrine of *parens patriae* refers to the the state assuming a role as protector of and provider for persons with legal disabilities, such as minors.¹² A state may exercise this prerogative and step in as surrogate parent when a child's natural parents have not been successful in keeping the child's behavior socially acceptable.¹³ In fact, it is the duty of the state to assume this role in an effort to save a deviant child from a life of crime,¹⁴ and to protect society from the deviant child.¹⁵ This state intervention has been rationalized by Julian Mack, a frequently cited authority on juvenile justice:¹⁶

[T]he child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities. . . .¹⁷

The juvenile court was an invention which followed quite naturally from this sentiment. The nineteenth century reformers felt that the criminal court, with its "brand of criminality" that could stigmatize a youth for life, was to be avoided.¹⁸ Rather than a criminal's trial, an erring youth was deserving of the understanding and solicitous treatment expected from a "wise and merciful father."¹⁹ Because the state was intervening to save the child from a life of crime, and because it was felt that the ordeal of a trial was not in the best interest of the child, it was assumed that juvenile

11. See Woods, *supra* note 10, at 3-4. The court was established on July 1, 1899. 1899 Ill. Laws §§ 1, 21.

12. The literal interpretation is "parent of the country". BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). See also ADVISORY COUNCIL OF JUDGES OF THE NATIONAL PROBATION AND PAROLE ASSOCIATION IN COOPERATION WITH THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES, GUIDES FOR JUVENILE COURT JUDGES 1 (1957).

13. Mill v. Brown, 31 Utah 473, 482-85, 88 P. 609, 613-14 (1907).

14. See Fox, *supra* note 8, at 1193.

15. See Note, *supra* note 9, at 1289-90. See also *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1221 (1980) [hereinafter cited as *Constitution and the Family*].

16. See e.g., Fox, *supra* note 8; Holden, *The Juvenile and the Judicial Function*, 31 ALB. L. REV. 197 (1967); McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457 (1981); Woods, *supra* note 10.

17. Mack, *supra* note 8, at 107.

18. *Id.* at 109.

19. *Id.* at 107.

proceedings should be kept very informal.²⁰ The term "juvenile delinquent" was also invented in an effort to avoid stigma; it was to be used instead of "criminal" in reference to a minor who commits a crime.²¹

Following from the premise that the wayward youths were not criminals, the early reformers envisioned a plan of rehabilitation rather than punishment.²² According to Mack, the ideal setting for them would be a home-like environment, preferably in the country,

because these children require the fresh air and contact with the soil even more than does the normal child,—laid out on the cottage plan, giving opportunity for family life, and in each cottage some good man and woman who will live with and for the children. Locks and bars and other indicia of prisons must be avoided; human love, supplemented by human interests and vigilance, must replace them.²³

A more noble vision can hardly be imagined. It "received near universal acclaim, legislative and judicial abdication, and very little financial support."²⁴ This lack of financial support is probably a major cause for the vision never materializing.²⁵

In return for the promises of *parens patriae*—the rehabilitation and the informal proceeding with the judge assuming the role of wise father—the young paid a high price.²⁶ They were afforded only summary adjudications, where rules of evidence were relaxed,²⁷ and where many of the constitutional protections were withheld.²⁸ In 1966, the Supreme Court began to voice its disappointment with the juvenile system in a series of cases, beginning with *Kent v. United States*.²⁹

20. See *id.* at 109-10 (citing *Commonwealth v. Fisher*, 213 Pa. St. 48, 53-54, 62 A. 198, 200 (1905)). See also *Constitution and the Family*, *supra* note 15, at 1226-27.

21. Woods, *supra* note 10, at 4. See Mack, *supra* note 8, at 108.

22. See *e.g.*, Woods, *supra* note 10, at 3; Mack, *supra* note 8, at 107.

23. Mack, *supra* note 8, at 114.

24. Hopson, *Symposium on Juvenile Problems: In re Gault: Introduction*, 43 IND. L.J. 523, 523 (1968)(footnotes omitted).

25. See *infra* note 35 and accompanying text. *But cf.* White, *Statement of William S. White*, 6 PEPPERDINE L. REV. 597, 598-603 (1979) (The juvenile system has been successful in reducing juvenile delinquency.).

26. See, *e.g.*, N. WEINSTEIN, LEGAL RIGHTS OF CHILDREN 2 (National Council of Juvenile Court Judges 1974).

27. Woods, *supra* note 10, at 5.

28. See *Mill v. Brown*, 31 Utah 473, 480, 88 P. 609, 612 (1907).

29. 383 U.S. 541 (1966).

At issue in *Kent* was the validity of the juvenile court's waiver of jurisdiction over the sixteen year old defendant.³⁰ Waiver, or transfer, refers to the process whereby the juvenile court gives up its jurisdiction over a juvenile and subjects him to the jurisdiction of the criminal court to be prosecuted as an adult.³¹ The Court in *Kent* referred to this decision to transfer as "critically important"³² to the outcome of a juvenile's case, and enumerated standards to guide juvenile judges in making this determination.³³ Prior to this opinion, juvenile judges had virtually unlimited discretion in conducting every aspect of juvenile proceedings. By setting limits on this "unbridled discretion,"³⁴ that had been exercised under the guise of "wise fathers," the Supreme Court cracked the foundation of the juvenile justice system. The Court expressed its misgivings about the system unequivocally:

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. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity. . . . There is evidence in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.³⁵

Next in the series of cases to attack the juvenile system was *In re Gault*.³⁶ Extending *Kent's* holding that a juvenile is entitled to due process in a waiver hearing,³⁷ the Court established that due process safeguards are also required in an adjudication of delinquency.³⁸ In this lengthy landmark opinion, the Court found many of the informal procedures of the system to be in violation of the Constitution. Specifically, the Court ruled that:

30. *Id.* at 552.

31. S. DAVIS, RIGHTS OF JUVENILES § 4.1 at 4-1 (2d ed. 1981).

32. *Kent*, 383 U.S. at 560.

33. *Id.* at 556-67.

34. *In re Gault*, 387 U.S. 1, 18 (1966).

35. 383 U.S. at 555-56 (footnotes omitted).

36. 387 U.S. 1 (1966).

37. *Kent*, 383 U.S. at 557.

38. *In re Gault*, 387 U.S. 1 (1966).

- 1) juvenile proceedings "must measure up to the essentials of due process and fair treatment;"³⁹
- 2) due process requires that timely notice of specific charges be given "so that reasonable opportunity to prepare will be afforded;"⁴⁰
- 3) in proceedings "which may result in commitment . . . the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed;"⁴¹ and
- 4) the constitutional privilege against self-incrimination and the right to be confronted by witnesses are applicable.⁴²

The decision leaves unanswered what distinction, if any, is left between the rights of an accused adult and those of an accused juvenile.

The Court gave more insight into this inquiry in *In re Winship*,⁴³ where it further expanded the due process rights of delinquents. In *Winship*, a twelve-year-old was accused of larceny and adjudged delinquent under section 744(b) of the New York Family Court Act, which required proof beyond a preponderance of the evidence.⁴⁴ Continuing its trend of extending the rights of juveniles, the Court held that the standard of proof required in juvenile delinquency adjudications is the constitutional standard of proof beyond a reasonable doubt.⁴⁵ In general, *Winship* stands for the proposition that the constitutional standard of proof beyond a reasonable doubt is among the "essentials of due process and fair treatment."⁴⁶ Furthermore, every fact necessary to constitute the offense in juvenile adjudications must meet this standard of proof.⁴⁷

In both *Gault* and *Winship* the Court expressed concern over the possibility that the accused faced the loss of his liberty if con-

39. *Id.* at 30 (citing *Kent*, 383 U.S. at 562).

40. *Id.* at 33.

41. *Id.* at 41.

42. *Id.* at 55-56.

43. 397 U.S. 358 (1970).

44. *Id.* at 360; N.Y. FAM. CT. ACT § 744(b) (McKinney 1975). The statute was amended in 1976 to incorporate the holding of *Winship* that proof beyond a reasonable doubt is required. See N.Y. FAM. CT. ACT § 744(b) (McKinney Supp. 1976-1982).

45. 397 U.S. at 368.

46. *Id.* at 359 (quoting *Gault*, 387 U.S. at 30), 368.

47. *Id.* at 364-67.

victed.⁴⁸ This language suggests that the Court does not share Mack's vision of the cottage in the country,⁴⁹ but instead views juvenile detention as a serious infringement of liberty analogous to that of adult imprisonment.

In view of the Court's consistency in upholding the constitutional protections in juvenile proceedings, as evidenced in the above cases, the decision in *McKeiver v. Pennsylvania*⁵⁰ seems somewhat anomalous. Presented with the issue of whether juveniles are entitled to jury trials,⁵¹ the Court held that they are not: "one cannot say that . . . the jury is a necessary component of accurate factfinding."⁵² From this it is apparent that the court still endorses a separate system of justice for juvenile offenders.⁵³ It continued to voice its disappointment, however, over the system's failure to realize its aspirations: "[w]e must recognize . . . that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized."⁵⁴

In summary, due to the humanitarian efforts of the nineteenth century reformers, a model system of juvenile justice evolved in which the young were to be treated not as criminals, but with compassionate understanding. In recent years, however, the system has come under attack by the Supreme Court, which has referred to it as a disappointing experiment.⁵⁵ As illustrated by the previous cases, the Court seems concerned that juveniles have been short-changed. The loss of basic constitutional liberties is too great a price to pay for compassion and rehabilitation, which the Court has intimated are often more myth than reality.⁵⁶ More than merely indicating a dissatisfaction with the system, these opinions, taken together, may be delivering a warning "that the promise of the juvenile court must soon materialize if the court [is] to retain its broad authority in dealing with juveniles."⁵⁷

48. *Id.* at 363; *In re Gault*, 387 U.S. at 41.

49. See *supra* note 23 and accompanying text.

50. 403 U.S. 528 (1971).

51. *Id.* at 530.

52. *Id.* at 543.

53. This conclusion is directly supported later in the opinion: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." *Id.* at 551.

54. *Id.* at 543-44.

55. See *id.* at 544.

56. See *id.*; see also *Kent*, 383 U.S. at 555-56.

57. E. BROWNE, THE RIGHT TO TREATMENT 2-3 (National Council of Juvenile Court

B. Vermont Developments

The evolution of Vermont's juvenile justice system has been directed by an overriding philosophy of nurturance and rehabilitation, which also can be traced back to the nineteenth century.⁵⁸ In fact, Vermont evinced this dedication to rehabilitation, as opposed to punishment, long before Illinois enacted its Juvenile Court Act.⁵⁹ Illinois has been credited with having first formalized the juvenile system because it was the first to establish a separate juvenile court. In contrast, Vermont has never established a separate juvenile court, but has always treated juveniles within the established judiciary.⁶⁰ The district court judge presides over the proceedings⁶¹ and applies Vermont's juvenile laws.⁶²

Until the second half of the nineteenth century, young offenders in Vermont were confined with adults in jails or state prisons.⁶³ Around mid-century the *parens patriae* ideology began to surface, as evidenced by the legislature's proposal in 1857 to establish a reform school.⁶⁴ Realizing that the young do not belong in, and cannot benefit from prison, the early Vermont reformers endeavored to improve the lot of youthful offenders. Their objective was "reform, not punishment, and in reforming the wayward and erring, the law of kindness is found to be the only effective power. . . ."⁶⁵

Plans were made to build a new facility to reform and educate boys under the age of sixteen, who were "often more sinned against than sinning, unfortunate more than guilty, victims of crime more than criminals."⁶⁶ When the Civil War broke out, the idea was temporarily abandoned; but with the war behind them, the legisla-

Judges 1975).

58. See generally REPORT OF THE COMMISSIONER RELATING TO JUVENILE OFFENDERS AND THE ESTABLISHMENT OF A REFORM SCHOOL, (1858) reprinted in 1 VT. REFORM SCHOOL (1865-1880) [hereinafter cited as 1858 REPORT].

59. See *infra* notes 63-69 and accompanying text; see also *supra* note 11 and accompanying text.

60. L. D'AGOSTINO, THE HISTORY OF PUBLIC WELFARE IN VERMONT 260-61 (1948).

61. See VT. STAT. ANN. tit. 33, § 632(a)(8) (1981).

62. See *id.*, §§ 631-667.

63. REPORT OF THE SPECIAL COMMITTEE ON THE SUBJECT OF JUVENILE OFFENDERS, WITH A BILL TO ESTABLISH THE VERMONT REFORM SCHOOL 7 (1865), reprinted in 1 VT. REFORM SCHOOL (1865-1880) [hereinafter cited as 1865 REPORT].

64. See generally 1858 REPORT, *supra* note 58.

65. *Id.* at 6.

66. 1865 REPORT, *supra* note 63, at 5.

tors returned to their plans.⁶⁷ Finally chosen was a farm of well over a hundred acres in Waterbury,⁶⁸ a site which mirrored closely the prototype proposed by Mack.⁶⁹ At this reform school farm the children were taught to labor in the fresh air, in "contact with the soil,"⁷⁰ a live-in matron performed the domestic chores, and a superintendent oversaw the total operation.⁷¹ Considered by some as Vermont's greatest success in the area of juvenile reform,⁷² this farm lasted only six years. Not one ward attempted to escape detention when it burned to the ground on the night of December 12, 1874.⁷³ Rather than rebuild the school in Waterbury, it was decided that the new facility would be located in Vergennes.⁷⁴ The legislature, in a special session in 1875, passed an act which provided for the admission of girls at this new Vermont Reform School.⁷⁵ In 1900 the name of the school was changed to the Vermont Industrial School,⁷⁶ and in 1937 it was changed again to Weeks School.⁷⁷ Governor Snelling closed the Weeks School in 1979,⁷⁸ leaving Vermont with no equivalent facility in which to house juvenile offenders. The closing of Weeks was the result of a determination that deinstitutionalization was in the best interest of children; alternative arrangements such as foster care and group homes were considered superior to institutions.⁷⁹ This sentiment, too, suggests a *parens patriae* mentality: concern with the child's best interest was a prime motivator.

67. D'AGOSTINO, *supra* note 60, at 246.

68. FIRST ANNUAL REPORT OF THE BOARD OF COMMISSIONERS OF THE VERMONT REFORM SCHOOL TO THE GOVERNOR OF THE STATE OF VERMONT 14 (1866), reprinted in 1 VT. REFORM SCHOOL (1865-1880).

69. See *supra* note 23 and accompanying text.

70. *Id.*

71. AN ACT FOR THE REGULATION AND GOVERNMENT OF THE VERMONT REFORM SCHOOL, AT WATERBURY 15-16 (1866), reprinted in 1 VT. REFORM SCHOOL; see also Burlington Free Press, Nov. 16, 1981, at 2B, col. 1.

72. The Burlington Free Press, *supra* note 71, at 1B, col. 1.

73. *Id.* at 2B, cols. 2 and 3; see also BIENNIAL REPORT OF THE TRUSTEES AND OFFICERS OF THE VERMONT REFORM SCHOOL, TO THE GOVERNOR OF THE STATE 3 (Aug. 1, 1876), 1 VT. REFORM SCHOOL (1865-1880) [hereinafter cited as BIENNIAL REPORT].

74. BIENNIAL REPORT, *supra* note 73, at 4; see also D'AGOSTINO, *supra* note 60, at 251.

75. 1875 Vt. Acts, No. 3.

76. 1900 Vt. Acts, No. 130; see also D'AGOSTINO, *supra* note 60, at 257.

77. 1937 Vt. Acts, No. 137; see also D'AGOSTINO, *supra* note 60, at 257.

78. The Burlington Free Press, Nov. 16, 1981, at 2B, col. 3.

79. There were two other reasons for closing Weeks. It was determined that alternative arrangements would be much cheaper, and also, that only a very small percentage of the children at the school actually required secure detention. Telephone interview with Joseph Patrissi, Deputy Commissioner of Corrections, Waterbury, Vt. (Feb. 18, 1981).

In conclusion, *parens patriae* can be seen as the moving force behind the evolution of Vermont's juvenile justice system as far back as the 1850's, and as recently as 1979 when the Weeks School closed.⁸⁰ The true spirit of *parens patriae* was captured best by the early Vermont reformers, when in 1865 they said, "[o]ur legislation ought to proceed on the principle, that there is no child or youth who is utterly incorrigible. The existence of redeeming qualities in every youthful criminal should be assumed. . . ."⁸¹

This spirit, however, appears to be waning. As will be discussed, the recent changes in Vermont's juvenile laws do not emphasize the best interests of the serious juvenile offender above all else. These changes denote a digression from the *parens patriae* ideal, which Vermont seemingly has held immutable for over a century. The following section will construe the current juvenile statute and compare it with its predecessor. Such a comparison suggests that the *parens patriae* doctrine is losing credibility.

II. CHANGES IN VERMONT'S JUVENILE LAW

A. Structural Aspects

The most obvious and significant change in the new law is found in the definition of "child," that is, "an individual who has committed an act of delinquency⁸² after becoming ten years of age and prior to becoming sixteen years of age. . . ."⁸³ The age at which a youthful offender may be adjudicated as a delinquent has been lowered from twelve to ten.⁸⁴ The addition of subsections (A)-

80. This is also evidenced by case law. See e.g., *In re Certain Juvenile*, 129 Vt. 185, 190, 274 A.2d 506, 510 (1970); *In re Rich*, 125 Vt. 373, 377, 216 A.2d 266, 267-68 (1966); *In Re Gomez*, 113 Vt. 224, 225, 32 A.2d 138, 139-40 (1943); *In re Hook*, 95 Vt. 497, 499, 115 A. 730, 731 (1922).

81. 1865 REPORT, *supra* note 63, at 4.

Vermont's belief in, and dedication to this ideal of rehabilitation for all juvenile offenders perhaps was anomalous, as compared to other jurisdictions. For instance, early reform in New York was discriminating in that only "proper objects" were to be admitted to the House of Refuge. "Proper objects" referred to those youths whom the legislature considered capable of rehabilitation, i.e., not truly criminal, but more aptly characterized as predelinquent. The serious youthful offender was left in the criminal system. This segregation of predelinquents from non-reformables characterized juvenile reform movements throughout the country from the outset. See Fox, *supra* note 8, at 1191-92; Woods, *supra* note 10, at 5.

82. "'Delinquent act' means an act designated a crime under the laws of this state, or of another state if the act occurred in another state, or under federal law, provided, however, that (certain) traffic offenses committed by an individual after becoming 16 years of age shall not be deemed delinquent acts" VT. STAT. ANN. tit. 33, § 632(a)(3) (1981).

83. *Id.* § 632(a)(1) (1981).

84. Compare *id.* with VT. STAT. ANN. tit. 33, § 632(a)(1) (Supp. 1981), amended by 1981

(D) to this definition of "child"⁸⁵ adds a great deal of complexity to what was formerly very straightforward: "child" had meant "an individual who [had] committed an act of delinquency after becoming twelve years of age and prior to becoming sixteen. . . ."⁸⁶ Prior to the amendments, any offender, regardless of the nature of the offense, between the ages of twelve and fifteen was to be subject to the jurisdiction of the juvenile court as a delinquent child.⁸⁷ Under the new law, things are not as clear-cut, because the broad definition of child has been modified by subsections (A)-(D), which carve out certain exceptions.⁸⁸

Subsections (A) and (B) have the effect of restricting the jurisdiction of the juvenile court; certain offenders under the age of sixteen will be excepted from the class of children and will be categorized and treated as adults. For example, an offender between the ages of ten and thirteen who allegedly commits a serious offense⁸⁹

Vt. Acts No. 1 (Sp. Sess.).

85. 'Child' means . . . an individual who has committed an act of delinquency after becoming ten years of age and prior to becoming sixteen years of age . . . provided however:

(A) that an individual who is alleged to have committed an act specified in section 635a(a) . . . after attaining the age of 10 but not the age of 14 may be treated as an adult as provided therein;

(B) that an individual who is alleged to have committed an act specified in section 635a(a) . . . after attaining the age of 14 but not the age of 16 shall be subject to criminal proceedings as in cases commenced against adults, unless transferred to juvenile court . . . ;

(C) that an individual who is alleged to have committed an act, before attaining the age of 10, which would be murder . . . if committed by an adult may be subject to delinquency proceedings; and

(D) that an individual may be considered a child for the period of time the juvenile court retains jurisdiction under section 634 of this title.

Vt. STAT. ANN. tit. 33, § 632(a)(1) (1981).

86. *Id.* § 632(a)(1) (Supp. 1981), amended by 1981 Vt. Acts No. 1 (Sp. Sess.).

87. *See id.*

88. *See supra* note 85.

89. "Serious offenses," or "target offenses," refers to those listed in section 635a(a).

These are:

- (1) arson causing death . . . ;
- (2) assault and robbery with a dangerous weapon . . . ;
- (3) assault and robbery causing bodily injury . . . ;
- (4) aggravated assault . . . ;
- (5) murder . . . ;
- (6) manslaughter . . . ;
- (7) kidnapping . . . ;
- (8) maiming . . . ;
- (9) sexual assault . . . ;
- (10) aggravated sexual assault . . . ;
- (11) burglary of sleeping apartments in nighttime

such as murder or aggravated assault, may be treated as an adult.⁹⁰ Also, a fourteen- or fifteen-year-old who allegedly commits one of the many serious offenses, or target offenses, enumerated in section 635a(a)⁹¹ must be treated as an adult in criminal court, unless the court decides to transfer the case to juvenile court.⁹²

In contrast to subsections (A) and (B), subsections (C) and (D) expand the jurisdiction of the juvenile court. Under subsection (C), a child under the age of ten who is accused of murder may now be subject to delinquency proceedings.⁹³ The combination of subsections (A) and (C) represents a radical departure from the former law, and the ramifications for the under-twelve age group are significant. Whereas before the 1981 special session no one under twelve could be brought into juvenile court,⁹⁴ now the court may find children younger than ten within its jurisdiction.⁹⁵ Equally, if not more, controversial is the possibility that those between the ages of ten and twelve might be processed in criminal court.⁹⁶ This is certainly a far cry from the intentions of the Vermont Legislature in 1856 when it repudiated the idea of treating young offenders as criminals.⁹⁷

The juvenile court's jurisdiction is also extended by subsection (D), which must be read in conjunction with section 634.⁹⁸ Together they provide that an offender may be considered a child, that is, subject to the jurisdiction of the juvenile court, until his twenty-first birthday.⁹⁹ This is in contrast to the old statute which only conferred jurisdiction over individuals under the age of eighteen.¹⁰⁰

In short, section 632, defining child, enumerates guidelines for determining whether to process a child in juvenile court as a delinquent, or in criminal court as an adult. The combination of two key variables, the severity of the offense and the age of the of-

VT. STAT. ANN. tit. 33, § 635a(a) (1981).

90. *Id.* § 632(a)(1)(A).

91. *See supra* note 89.

92. VT. STAT. ANN. tit. 33, § 632(a)(1)(B) (1981).

93. *Id.* § 632(a)(1)(C).

94. *See id.* § 632(a)(1) (Supp. 1981), amended by 1981 Vt. Acts No. 1 (Sp. Sess.).

95. *Id.* § 632(a)(1)(C) (1981).

96. *See id.* § 632(a)(1)(C) in conjunction with *id.* § 635a(a).

97. *See supra* notes 63-81 and accompanying text.

98. VT. STAT. ANN. tit. 33, §§ 632(a)(1)(D), 634 (1981).

99. *See id.* § 634(b).

100. *See id.* § 634 (Supp. 1981), amended by 1981 Vt. Acts No. 1 (Sp. Sess.).

fender, are considered in making this very crucial choice.

Once this threshold determination establishing jurisdiction is made, there is still the possibility that the suit could be transferred to (or from) criminal court.¹⁰¹ Before explaining this transfer mechanism, it should be reiterated for the purpose of clarity that Vermont actually has no juvenile court per se—no separate entity as exists in some other jurisdictions. Juvenile court in Vermont refers to the district court in the setting of a juvenile proceeding, applying juvenile law.

The common understanding of transfer, or waiver as it is often referred to, "is the process whereby the court relinquishes its jurisdiction over a child and transfers the case to a court of criminal jurisdiction for prosecution as in the case of an adult."¹⁰² Vermont's statute also provides for the reverse procedure of initiating certain young offenders' cases in criminal court, with the suit ultimately being transferred to the juvenile court.¹⁰³ In fact, prior to the amendment, Vermont law was somewhat anomalous in that it

101. *Id.* § 635 (1981):

(a) If it appears to any court of this state in a criminal proceeding that the defendant was under the age of sixteen years at the time the offense charged was alleged to have been committed and the offense charged is not one of those specified in section 635a(a) of this title that court shall forthwith transfer the case to the juvenile court under the authority of this chapter.

(b) If it appears to any court of this state in a criminal proceeding that the defendant was over the age of sixteen years and under the age of eighteen years at the time the offense charged was alleged to have been committed, or that the defendant had attained the age of 14 but not the age of 16 at the time an offense specified in section 635a(a) of this title was alleged to have been committed, that court may forthwith transfer the proceeding to the juvenile court

(c) If it appears to the state's attorney that the defendant was over the age of sixteen and under the age of eighteen at the time the offense charged was alleged to have been committed and the offense charged is not an offense specified in section 635a(a) of this title, the state's attorney may file charges in a juvenile court or a court of criminal jurisdiction. If charges in such a matter are filed in a court of criminal jurisdiction, that court may forthwith transfer the proceeding to the juvenile court

Id. § 635a:

(a) After a petition has been filed alleging delinquency, upon motion of the state's attorney and after hearing, the juvenile court may transfer jurisdiction of the proceeding to a court of criminal jurisdiction, if the child had attained the age of 10 but not the age of 14 at the time the act was alleged to have occurred, and if the delinquent act set forth in the petition was any of the [target offenses]

For the list of the target offenses, see *supra* note 89.

102. DAVIS, *supra* note 31, at § 4.1.

103. See VT. STAT. ANN. tit. 33, § 635 (1981).

provided only for this reverse transfer procedure.¹⁰⁴

The transfer process adopted in the new legislation cannot be reduced to any simplistic, concise description. It represents a radical change from the previous law, and the applicability of this mechanism hinges on a combination of factors, namely, the age of the offender and the severity of the offense.

For purposes of reverse transfer, the law first classifies offenders according to age. The old law had a classification according to age also, but it was a much simpler scheme; it mandated transfer from criminal court to juvenile court for any offender who was younger than sixteen at the time of the alleged crime.¹⁰⁵

In contrast, the new act, subdivides offenders under sixteen into two groups: those under fourteen, and those either fourteen or fifteen.¹⁰⁶ For those under fourteen, proceedings will always be brought in juvenile court,¹⁰⁷ and that court is given the discretion to transfer the suit to criminal court.¹⁰⁸ However, the fourteen/fifteen age group is further classified according to the severity of the offense.¹⁰⁹ That is, proceedings will be originated in juvenile court for the fourteen- or fifteen-year-old accused of an offense not listed in section 635a(a).¹¹⁰ If the offense charged is a target offense, a proceeding involving this age group must be brought originally in criminal court.¹¹¹ But the criminal court is given the discretion to transfer the case to the juvenile court.¹¹²

Stated simply, the fourteen- and fifteen-year-old serious offender is now on an even-footing with the sixteen- and seventeen-year-old serious offender. For this latter group, both the old and

104. See *id.* § 635 (Supp. 1981), amended by 1981 Vt. Acts No. 1 (Sp. Sess.).

Other states which do not provide for waiver to criminal court from juvenile court, but provide for reverse waiver include: Arkansas, ARK. STAT. ANN. § 45-420 (Supp. 1981); Nebraska, NEB. REV. STAT. §§ 43-202(3)(b)-(c), 43-202.02 (1978); New York, N.Y. PENAL LAW §§ 10(18), 30 (McKinney Supp. 1981), N.Y. CRIM. PROC. LAW §§ 180.75, 190.71, 210.43, 220.10(5)(g), 725 (McKinney Supp. 1981). See DAVIS, *supra* note 31, at § 4.1, for an interesting comparison of various states' transfer provisions.

105. See Vt. STAT. ANN. tit. 33, § 635(a) (Supp. 1981), amended by 1981 Vt. Acts No. 1 (Sp. Sess.).

106. See *id.* §§ 632(a)(1)(A), (B), 635(b), 635a(a) (1981).

107. See *id.* §§ 632(a)(1)(A) and 635a(a).

108. *Id.* § 635a(a).

109. See *id.* § 632(a)(1)(B).

110. See *id.*

111. See *id.* in conjunction with *id.* § 635(b).

112. See *id.* § 635(b).

the new acts provide for a discretionary transfer from criminal to juvenile court.¹¹³ By providing in section 632(a)(1)(B) that a fourteen or fifteen-year-old who commits a target offense shall be subject to criminal court proceedings,¹¹⁴ and further providing that the court, in its discretion, may transfer jurisdiction to the juvenile court,¹¹⁵ the amended statute in effect treats all serious offenders, fourteen through seventeen, alike. This, in fact, was the change sought by the people of Vermont in the wake of the Essex Junction murders.¹¹⁶

As previously mentioned, with the passage of the new act, Vermont for the first time provides for the more common transfer, from juvenile to criminal court.¹¹⁷ Section 635a in conjunction with section 632(a)(1)(A) delineates this process. If a child between the ages of ten and thirteen commits any delinquent act, proceedings are to be initiated in juvenile court.¹¹⁸ If, however, the alleged act is one of the target offenses, then the juvenile court has the discretion to transfer the proceeding to the criminal court.¹¹⁹ The court is given guidelines for making this determination¹²⁰ which are very

113. *Id.* § 635(b) (Supp. 1981), amended by 1981 Vt. Acts No. 1 (Sp. Sess.):

If it appears to any court of this state in a criminal proceeding that the defendant was over the age of sixteen years and under the age of eighteen years at the time the offense charged was alleged to have been committed, that court may forthwith transfer the proceeding to the juvenile court under the authority of this chapter, and the minor shall thereupon be considered to be subject to this chapter as a delinquent child.

For the text of this section as amended, see *supra* note 101.

114. VT. STAT. ANN. tit. 33, § 632(a)(1)(B) (1981).

115. *Id.* § 635(b).

116. See *supra* notes 1-5 and accompanying text.

117. For a list of states which provide for a transfer from juvenile to criminal court, see DAVIS, *supra* note 31, at § 4.1, at 4-3 n.5.

118. VT. STAT. ANN. tit. 33, § 632(a)(1)(B) (1981) provides merely that a juvenile between the ages of ten and thirteen charged with a target offense may be treated as an adult. However, *id.* § 635a(a) makes it clear that the proceeding will be originated in the juvenile court. See *id.* § 635a(a).

119. *Id.* § 635a(a).

120. The court may consider:

- (1) the maturity of the child as determined by consideration of his age; home; environment; emotional, psychological and physical maturity, and relationship with and adjustment to school and the community;
- (2) the extent and nature of the child's prior record of delinquency;
- (3) the nature of past treatment efforts and the nature of the child's response to them;
- (4) whether the alleged offense was committed in an aggressive, violent, pre-meditated or willful manner;
- (5) the nature of any personal injuries resulting from or intended to be caused by the alleged act;

similar to those enunciated in *Kent*.¹²¹ This is in contrast to the reverse transfer provisions, for which no guidelines are given.¹²² The fact that the drafters set out standards to guide the juvenile court in its decision to transfer to criminal court, but did not give guidelines for the reverse transfer process, suggests that they were more sensitive to the plight of the juvenile offender facing a transfer to criminal court. This decision to transfer, however, seems crucial whether it be to or from criminal court.

In order to make sense of this type of inconsistency, it is necessary to consider the revised act in light of the legislature's purpose when it convened for the special session. The people of Vermont were reacting to the fact that a fifteen-year-old could be adjudicated in juvenile court for rape and murder and yet be free of the court's jurisdiction on his eighteenth birthday.¹²³ This was the immediate and main concern, and the lawmakers were successful in redressing this issue. Notwithstanding its long-winded complication, the act accomplished the goals of the legislature. Furthermore, it accomplished these goals equitably in that it left room for flexibility. If certain mitigating circumstances exist which tend to indicate that a particular serious offender might be a good candidate for treatment within the juvenile system, juvenile court jurisdiction remains an option.¹²⁴

This flexibility within the law, however, could also prove to be a weakness. Section 635(b) (which provides for the waiver of fourteen- and fifteen-year-olds to juvenile court)¹²⁵ could be criticized

(6) the prospects for rehabilitation of the child by use of procedures, services and facilities available through juvenile proceedings;

(7) whether the protection of the community would be better served by transferring jurisdiction from the juvenile court to a court of criminal jurisdiction.

Id. § 635a(d)(1)-(7).

121. See *Kent*, 383 U.S. 541, 566-67 (1966).

122. See VT. STAT. ANN. tit. 33, § 635 (1981). This suggests a potential problem of arbitrary enforcement. The same judge sits in the district court, whether the case be within the jurisdiction of the criminal court or the juvenile court; it is just a matter of his switching hats. Thus, a judge might not give this crucial decision the attention it deserves, feeling that he will be hearing the case regardless of the setting. Rather than take the added time and bother to transfer to juvenile court, he might decide to keep it in criminal court and take the offender's age into account at the disposition hearing. However well-intentioned the judge is though, this situation smacks of the "unbridled discretion" warned against by the Court in *Gault*. See 387 U.S. 1, 18 (1966).

123. See *supra* notes 1-5 and accompanying text.

124. See VT. STAT. ANN. tit. 33, § 635(b) (1981).

125. *Id.*

as sapping section 632(A)(1)(B) (which provides for the processing of these youths in criminal court originally)¹²⁶ of any vitality of deterrent value. Experience may prove this to be the case; the legal machinery may seize upon any opportunity to be lenient and waive these children into juvenile court.¹²⁷ If that happens, all of the work of the legislature will have been for naught.

One valid, although not fatal, criticism of the recent enactment is its extreme complexity. As discussed, various sections, each of which is confusing, must be read in conjunction. The first is the definition of child, section 632(a)(1). The others are the provisions dealing with transfer, section 635 and 635(a). The practical problems, if any, inherent in this intricate legislation are yet to be seen. At this point, however, certain aspects of the act have been identified as potential problem areas. They include: problems related to the confidentiality protection; the extension of jurisdiction over juvenile offenders until age twenty-one; and the present lack of facilities for the housing of juvenile offenders in Vermont.

B. Confidentiality

The protection of confidentiality has been a cornerstone of the juvenile system since its inception.¹²⁸ "This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and 'bury them in the graveyard of the forgotten past.'"¹²⁹ In Vermont, statutory support for this protection is found in title 33, section 651 of Vermont Statutes Annotated.¹³⁰ The *parens patriae* ideology has been incorporated into section 651; it embraces the principle that the juvenile court serves a rehabilitative, protective function.¹³¹ Certain revisions in the new law, however, seem to indicate a trend away from absolute confidentiality in juvenile proceedings.

Under both the previous and the current juvenile statutes, sixteen- and seventeen-year-olds could be processed in juvenile court

126. *Id.* § 632(a)(1)(B).

127. This in fact was the experience in New York after the enactment of a "tough" juvenile statute. See Woods, *supra* note 10, at 45-46.

128. *In re J.S.*, 140 Vt. 458, 467, 438 A.2d 1125, 1128 (1981) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring)).

129. *Id.* (quoting *In re Gault*, 387 U.S. 1, 24 (1966)).

130. Vt. STAT. ANN. tit. 33, § 651(d) (1981) provides "There shall be no publicity given by any person to any proceeding under the authority of this chapter except with the consent of the child and his parent or guardian."

131. See *supra* notes 12-23 and accompanying text.

after being waived from criminal court.¹³² Having been in criminal court initially, the offender's identity might have been made public. If so, a major confidentiality safeguard would have been lost. Under the current law, more and younger juveniles could have complaints filed against them initially in criminal court, with the case ultimately being transferred to juvenile court.¹³³ Thus, more youths may now suffer the stigma of having been associated with criminal activity, a stigma which the juvenile system specifically intended to prevent.¹³⁴ This inherent shortcoming of the statutory process is totally at odds with the *parens patriae* philosophy of protecting the youthful offender. Two situations which might arise demonstrate the inconsistency between the theory and the practice of the juvenile system.

First, according to section 635a(h), the records of a child under sixteen who has been tried in an adult court and found innocent of a target offense, but convicted of a lesser offense, are to be transferred to juvenile court and sealed.¹³⁵ The adjudication is to be considered one of delinquency, as if it had never left the juvenile court.¹³⁶ Possibly this offender will derive some benefit from the sealing of his records at this point, but he has already been stigmatized by having been tried for a felony regardless of the fact that he was acquitted. Thus, a youth could be publicly charged with a very serious crime and in fact be innocent. The *parens patriae* doctrine, intended to shield even guilty youth from public scorn, surely was intended for the benefit of the wrongly accused. But the protection formerly provided to all juveniles—indiscriminately, across the board—is now meted out more sparingly, and may well be denied to those most deserving of it.

Another example of how the protection surrounding confidentiality has been comprised is found in section 663(a). The section provides for the release of an alleged felon's name to the victim upon the victim's request.¹³⁷ Although the name is not being released to the general public, the reality of life in small Vermont communities is that it easily becomes general knowledge.

132. For the relevant text of the revised statute, see VT. STAT. ANN. tit. 33, § 635(b) (1981); for the relevant text of the former statute, see VT. STAT. ANN. tit. 33, § 635(b) (Supp. 1981) amended by 1981 Vt. Acts No. 1 (Sp. Sess.).

133. See *supra* notes 113-16 and accompanying text.

134. See *supra* notes 18-21 and accompanying text.

135. VT. STAT. ANN. tit. 33, § 635a(h) (1981).

136. *Id.*

137. *Id.* § 663(a).

In the recent case of *In re J.S.*,¹³⁸ the many reasons in support of confidentiality were very well articulated by Justice Underwood.¹³⁹ The defendant, J.S., was the fifteen-year-old accused of murder and sexual assault in the Essex Junction tragedy.¹⁴⁰ The issue on appeal was whether the first amendment right of access to criminal trials extends to juvenile proceedings.¹⁴¹ While this issue is very narrow, Justice Underwood's language is extremely broad, discussing confidentiality in its most general sense:

Confidential proceedings protect the delinquent from the stigma of conduct which may be outgrown and avoids the possibility that the adult is penalized for what he used to be, or worse yet, the possibility that the stigma becomes self-perpetuating, thereby making change and growth impossible. Publication of a delinquent's name may handicap his prospects for adjustment into society, for acceptance by the public, or it may cause him to lose employment opportunities. Public proceedings could so embarrass the youth's family members that they withhold their support in rehabilitative efforts.¹⁴²

This language sounds incongruous with Vermont's amended juvenile law which limits the confidentiality umbrella as discussed above. Such inconsistency suggests that the Judiciary is not as willing as the legislature to curtail the protection of *parens patriae*. The court in *In re J.S.* could have held that the first amendment right is more compelling than the juvenile's right to confidentiality by reading the statute as a whole and reasoning that the legislature intended to cut-back on the protection. Alternatively, the court could have justified an opposite holding by emphasizing the fact that J.S. had been charged with a 635a(a) offense.¹⁴³ The case is clearly one in which the legislators would favor the withholding of the benefits of *parens patriae* in view of their primary purpose in redrafting the juvenile law, that is, to get tough on juveniles charged with serious crimes.¹⁴⁴ Yet the court seemed blinded to the obvious intent of the statute. Upon reconsideration of the juvenile laws, the legislature may realize that its steps away

138. 140 Vt. 458, 438 A.2d 1125 (1981).

139. *Id.* at 468, 438 A.2d at 1129.

140. *Id.* at 462, 438 A.2d at 1125; see also *supra* notes 1-2 and accompanying text.

141. 140 Vt. at 462, 438 A.2d at 1126.

142. *Id.* at 468, 438 A.2d at 1129.

143. *Id.* at 462, 438 A.2d at 1125. (J.S. was charged with murder and sexual assault.).

144. See *supra* notes 1-5 and accompanying text.

from the *parens patriae* doctrine were made hastily, and perhaps should be retraced.

C. *Extending Jurisdiction*

Section 634(c) of the revised law authorizes the juvenile court, in its discretion, to retain jurisdiction over a delinquent child until he attains the age of twenty-one.¹⁴⁵ A hearing may be requested by the court on its own motion, or by that of any interested party, to determine the propriety of extending the jurisdiction. This hearing shall be held within the three months prior to the child's eighteenth birthday. The court will be the final arbiter, and must evaluate various considerations in arriving at its decision.¹⁴⁶

This provision is in keeping with the objective of the special legislative session: incarcerated delinquents need not be released from the juvenile court's jurisdiction and returned to society upon turning eighteen. The fears of the people have been addressed; however, this provision invites constitutional attack. Arguably, this extended jurisdiction is a denial of due process. Such deprivation of liberty, where a party has never been afforded a trial by jury, contravenes the fourteenth amendment.

The court in *In re Gault* emphatically upheld the right to adequate due process safeguards in proceedings "which may result in commitment."¹⁴⁷ An attempt could be made to distinguish between *Gault*, where the defendant was faced with a possible commitment, and the case of a juvenile facing a section 634(c) hearing. In the latter case, where the youth is already committed, a decision to retain jurisdiction might result in what would be more accurately characterized as a continued commitment, rather than an initial commitment.

Such a distinction is of no consequence however, in light of two cases which decided issues analogous to that of continued commitment. *Gagnon v. Scarpelli* involved the question of minimum due process standards in probation revocation;¹⁴⁸ *Morrissey v. Brewer* addressed the issue of whether due process requirements apply in parole revocation hearings.¹⁴⁹ Because in both cases the

145. VT. STAT. ANN. tit. 33, § 634(b) (1981).

146. *Id.* § 634(c) (1981).

147. 387 U.S. 1, 41 (1967).

148. 411 U.S. 778, 779 (1973).

149. 408 U.S. 471, 472 (1972).

liberty at stake was similar to the unqualified liberty of the general population, the Court held that the respective parties were entitled to due process.¹⁵⁰ By comparison, juveniles retained by the juvenile court beyond their eighteenth birthday are also subjected to a grievous loss of their liberty, and therefore are entitled to due process.

Certain minimum requirements of due process were enumerated by the Court in *Morrissey* as applying to hearings which may result in revocation of parole. These are:

- (a) written notice of the claimed violations of parole; (b) disclosure . . . of evidence against him; (c) opportunity to be heard . . . and to present witnesses . . . (d) The right to confront . . . adverse witnesses . . . (e) a "neutral and detached" hearing body . . . (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole.¹⁵¹

Although these requirements are couched in terms of parole revocation, they sound very much like those set out in *Gault* as "the essentials of due process" which must be afforded juveniles.¹⁵²

To summarize, *Gault* stands for the proposition that all juvenile proceedings which may result in commitment must be consistent with due process and fair treatment. The continued commitment to which a juvenile may be subjected following a section 634(c) hearing is virtually indistinguishable from any other commitment. The effect is a grievous loss of a liberty. Therefore, the hearing provided for in section 634(c), which allows the juvenile court the discretion to retain jurisdiction, would not pass constitutional muster.

Even on the basis of *Gault* alone, section 634(c) could be seriously criticized. The criteria in this section which must be considered by the court are quite nebulous, and the court is not required to disclose its findings.¹⁵³ The language of the statute is merely that "the court shall consider"¹⁵⁴ certain criteria, but there are no specific standards by which to judge those criteria. Thus, the court

150. *Id.* at 488-89; *Gagnon*, 411 U.S. at 782.

151. 408 U.S. at 489.

152. 387 U.S. 1, 30 (quoting *Kent v. United States*, 383 U.S. 541, 562 (1966)); see also *supra* notes 39-42 and accompanying text.

153. See generally VT. STAT. ANN. tit. 33, § 634(c) (1981).

154. *Id.*

is given great discretion in weighing these factors. Exactly this type of situation was addressed by the Court in *Gault*: "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."¹⁵⁵

D. Out-of-State Placement

According to section 657a(a), a minor under the age of sixteen shall not be housed with offenders aged eighteen or over in an institution used primarily to house the latter age group, except on a temporary basis.¹⁵⁶ This provision poses a practical problem: since the Weeks School closed in 1979, Vermont no longer has an institution solely for juvenile offenders. This lack of any secure facility for juveniles is a problem which must be addressed in the near future. The passage of the new law may result in an increase in the number of juveniles requiring secure detention. Legislating in the "heat of the moment,"¹⁵⁷ the lawmakers focused on their constituents' demand that more juvenile offenders be incarcerated, and they succeeded in drafting a statute which may have this effect. However, the drafters failed to see the total picture; it should have occurred to them that a provision for facilities to house these offenders is a necessary adjunct to the legislation. Since the 1981 special session, public attention has been focused on the location and size of a juvenile facility,¹⁵⁸ but the most important issue is not being addressed by the legislature: namely, where to house these offenders until such a facility exists.¹⁵⁹

Section 657a(a) provides further that "[t]his provision shall apply to the commitment of minors under the age of 16 to institutions within or outside the state of Vermont."¹⁶⁰ This language implies that institutions outside the state would be used to retain juveniles should the need arise, and the present situation suggests such a need.¹⁶¹ The possibility of incarcerating juveniles as young

155. 387 U.S. at 18.

156. VT. STAT. ANN. tit. 33, § 657a(a) (1981).

157. The Burlington Free Press, Jan. 6, 1982, at 12A, col. 1.

158. See, e.g., *id.*, Nov. 11, 1981 at 1A, col. 1; *id.*, Jan. 20, 1982, at 6B, col. 1; *id.*, Jan. 21, 1982, at 1B, col. 1; *id.*, Jan. 22, 1982, at 1B, col. 1; *id.*, Mar. 30, 1982, at 3B, col. 1.

159. The United States Supreme Court has expressed concern with this issue. In *Kent v. United States* the Court identified the lack of adequate juvenile facilities in a state as a potential impediment to that state's ability to function effectively in the *parens patriae* capacity. 383 U.S. 541 (1966). See *supra* note 35 and accompanying text.

160. VT. STAT. ANN. tit. 33, § 657a(a) (1981).

161. Jamie Savage, the juvenile defendant involved in the Essex Junction slayings is presently being housed in Texas. Burlington Free Press, Aug. 31, 1982, at 1B, col. 1.

as ten¹⁶² raises serious questions. The idea of incarcerating these children outside the state of Vermont is even more repugnant, and inconsistent with the underlying philosophy of *parens patriae* as embodied in Vermont's juvenile system.

As previously suggested, the intent behind the juvenile offender law since its revision is unclear. Under the prior statute, the purpose of the juvenile law clearly was to provide for the care of the children, and the overriding consideration was always the offender's best interest.¹⁶³ Ample support for this proposition can be found throughout Vermont case law.¹⁶⁴ Even the recent case of *In re J.S.*, decided after the statutory revision, suggests that this "great concern for the welfare of the child . . . should [still] prevail."¹⁶⁵ The language of the amended statute, however, taken as a whole and read in light of the legislature's purpose, does not convey this concern with any degree of certainty. There seems to exist a tension between legislative intent and judicial construction since the statute's amendment.

In addition to this commitment to act in the best interests of the child, the state also has a duty to refrain from unreasonably interfering with the rights of parents to raise their children.¹⁶⁶ Section 631(a) seems to combine these two considerations: The purpose of the juvenile laws is to provide for the care and protection of children,¹⁶⁷ whenever possible, in a family environment, "separating the child from his parents only when necessary."¹⁶⁸ It is difficult, if not impossible, to reconcile these two considerations in the context of a juvenile detention placement outside the state of Vermont.

Although it has been provided that the child can be separated from his parents in the interest of public safety,¹⁶⁹ to place the child at such a distance from his parents and family that contact is precluded runs contrary to both of the above considerations. Out-of-state placement is also difficult to reconcile with the language of

162. See VT. STAT. ANN. tit. 33, § 632(a)(1)(A), 635a (1981).

163. See VT. STAT. ANN. tit. 33, § 631(a) (Supp. 1981).

164. See *supra* note 80.

165. 140 Vt. at 466, 438 A.2d at 1128.

166. *Gonyaw v. Gray*, 361 F. Supp. 366, 369 (D. Vt. 1973) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

167. VT. STAT. ANN. tit. 33, § 631(a)(1) (1981).

168. *Id.* § 631(a)(3).

169. *Id.*

section 667(4). This section provides that a court must consider "[w]hether the natural parent has played and continues to play a constructive role, including *personal contact*" in fostering the best interests of the child.¹⁷⁰ The effect in many instances of sending a juvenile offender out of state could be to limit severely the opportunities for parent and child to maintain personal contact. This is especially true in the case of low-income families, the very families from which the majority of offenders come.¹⁷¹

The right of parents to direct the upbringing of their children, although not absolute,¹⁷² has long been recognized as a basic constitutional liberty.¹⁷³ This right derives from the due process clause and is embodied within the constitutionally protected interest of "a private realm of family life."¹⁷⁴ A right to family integrity has evolved through a line of cases stretching back over most of this century: It was established by the Court in *Meyer v. Nebraska*¹⁷⁵ and was reinforced in *Pierce v. Society of Sisters*¹⁷⁶ and again in *Prince v. Massachusetts*.¹⁷⁷ In *Prince* the Court articulated this right to family privacy clearly:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . [I]t is in recognition of this that [we] have respected the private realm of family life which the state cannot enter.¹⁷⁸

Section 631(a)(4) provides that any juvenile procedures assure that the parties' constitutional rights are recognized and enforced.¹⁷⁹ A court "is not free to . . . compare the merits of various possible solutions free of any regard for compelling parental rights."¹⁸⁰ Yet, placing a child at such a great distance from his parents that visitation is difficult, if not impossible, does seem to

170. *Id.* § 667(4) (emphasis added).

171. White, *Statement of William S. White*, 6 PEPPERDINE L. REV. 597, 599 (1979); see also Mack, *supra* note 8, at 116.

172. *Gonyaw*, 361 F. Supp. at 369 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

173. See *In re N.H.*, 135 Vt. 230, 236, 373 A.2d 851, 856 (1977).

174. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

175. 262 U.S. 390 (1923).

176. 268 U.S. 510 (1925).

177. 321 U.S. 158 (1944).

178. *Id.* at 166.

179. VT. STAT. ANN. tit. 33, § 631(a)(4) (1981).

180. *In re N.H.*, 135 Vt. 230, 237, 373 A.2d 851, 856 (1977).

disregard parents' constitutional right to direct the upbringing of their children. Thus, out-of-state placement runs afoul of both the due process clause of the fourteenth amendment, and section 631 of Vermont's juvenile law.

III. THE JUVENILE COURT: A HYBRID INSTITUTION

In recent years the juvenile court has come under attack, not only by the United States Supreme Court,¹⁸¹ but by the public in general. The main reason for this negative attitude is that too much has been expected from the court.¹⁸² "It needs to be recognized that the juvenile courts are being asked to do an impossible task, that is, prevent and control juvenile crime and delinquency."¹⁸³ The courts are being asked to function as a social agency, and to be successful in this role, when the traditional socializing institutions are breaking down.¹⁸⁴

Indeed it is an impossible task. The role of the juvenile court needs to be defined. The system was "created as a quasi-social agency with access to judicial power, designed principally for non-violent petty offenders."¹⁸⁵ The time has come to admit that it cannot cope with the problem of the serious offender. The majority of the adolescents who commit violent crimes elude the court's reformative capabilities.¹⁸⁶ What these delinquents suffer from is a complex of behavioral aberrations, the result of a "multitude of persuasive societal influences well beyond the reach . . . of any judge."¹⁸⁷ This limitation must be recognized if the system is to continue to provide for rehabilitation and to function as a quasi-social agency, rather than as a criminal justice system. It must be made perfectly clear that there is no room within the system for the violent offender.

The Vermont Legislature seemingly has adopted this view. It has provided that charges against children—who happen to be violent criminals—may now be brought in criminal court. In this way

181. See *supra* notes 29-54 and accompanying text.

182. Pena, *Introduction: The Role of the Juvenile Court—Social or Legal Institution?*, 5 PEPPERDINE L. REV. 633, 634 (1978).

183. *Id.* at 636.

184. *Id.*

185. White, *supra* note 171, at 600.

186. Pena, *supra* note 182, at 637.

187. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 78, 80 (1967) (quoted in Pena, *supra* note 182, at 636-37).

it has limited the reach of the court as a social agency; those beyond rehabilitation are beyond its reach, and will be treated within the criminal justice system.

There is much to be said in favor of the decision to treat violent juvenile offenders as adults. In the criminal system the youth would be entitled to a jury trial.¹⁸⁸ He would have the advantage of a full adversary proceeding, rather than the summary hearing now afforded delinquents. In this adversary setting, evidence could be introduced attesting to his unfortunate circumstances and his redeeming qualities.

Society also benefits from this decision to prosecute these juveniles in criminal court. Every crime listed in section 635a(a) is a serious felony,¹⁸⁹ possibly involving personal injury or death. The people of Vermont are entitled to laws protecting them from this type of offense. Furthermore, they are entitled to the maximum protection which the criminal laws provide. Releasing these delinquents back into society at age eighteen, or even twenty-one, falls short of the protection which the public deserves. If the juvenile system cannot control delinquency, then the criminal system must be substituted in its place to assure that society is protected.

There are, however, those who are troubled by the practice of treating juveniles as adults. But, "[t]he objection that children do not possess the requisite moral judgment and should be treated differently from adults ignores the point that most of the youths over whom the juvenile court exercises its jurisdiction probably do have the ability to distinguish between right and wrong."¹⁹⁰

This question of criminal responsibility of minors is an important consideration in developing any philosophy of juvenile justice. It was recently discussed by the Supreme Court in the case of *Edwards v. Oklahoma*.¹⁹¹ The issue on appeal was "whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was sixteen years old

188. The right to a jury trial in juvenile proceedings has been endorsed in the recent collection of INSTITUTION OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS, ADJUDICATION 51 (1980). For a list of states which do provide for jury trials in juvenile cases see DAVIS, *supra* note 31, at § 5.3 n.54.

189. See VT. STAT. ANN. tit. 33, § 635a(a) (1981).

190. McCarthy, *The Role of the Concept of Responsibility in Juvenile Proceedings*, 10 U. MICH. J.L. REF. 181, 215 (1977).

191. 455 U.S. 104 (1982).

. . . at the time he committed the offense."¹⁹² Perhaps the greatest significance of the case lies in the fact that the Court totally skirted the issue and remanded the case on a procedural technicality¹⁹³—indicating that the Court may not yet be prepared to deal with this controversial issue. Although disappointing in that respect, the opinion is interesting for the insight it gives into the dissension within the Court on the issue of the violent youthful offender.

The majority opinion indicates that the *parens patriae* doctrine still elicits strong support. In one sentence the majority noted that the evidence indicated that "he knew the difference between right and wrong . . . and that is the test of criminal responsibility."¹⁹⁴ According to the lower court's opinion, Eddings' turbulent family history did not excuse his behavior.¹⁹⁵ Nonetheless, the Court continued to dwell on this mitigating circumstance,¹⁹⁶ like a merciful father relentlessly making excuses for a child who has committed a grave wrong. In support of this sentiment, the majority relied on a 1978 study by the Twentieth Century Fund Task Force study on young offenders: "Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults."¹⁹⁷ Also relied on was a statement from Justice Frankfurter's concurrence in *May v. Anderson*, which echoes clearly the reformers of a century ago: "[c]hildren have a very special place in life which law should reflect."¹⁹⁸

In contrast to this mollicoddling position taken by the majority, the four dissenting justices advocated deciding the issue as presented and thereby upholding imposition of the death penalty.¹⁹⁹ "[T]he Constitution does not authorize us to determine

192. *Id.* at 120 (Burger, C.J., dissenting).

193. *Id.* at 117. The case was remanded with directions to weigh all mitigating evidence against all evidence of aggravating circumstances. This was necessary because ". . . the fact of [Eddings'] violent background" was not considered by the trial judge. *Id.* at 112-13.

194. *Id.* at 109, 113.

195. *See id.* at 113.

196. *See id.* at 113-16.

197. *Id.* at 115 n.11 (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)).

198. *Eddings*, 455 U.S. at 116 n.12 (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)).

199. 455 U.S. at 128 (Burger, C.J., dissenting).

whether sentences imposed by the state courts are sentences we consider 'appropriate'; our only authority is to decide whether they are constitutional under the Eighth Amendment."²⁰⁰ And neither the majority nor the minority suggests that the Constitution proscribes imposing the death penalty on a minor.²⁰¹ The language of the minority opinion hints that perhaps the time has come, at least in the case of serious offenders, to set aside the old doctrine of *parens patriae* and begin anew: "It can never be less than the most painful of our duties to pass on . . . cases . . . such as this However, there comes a time in every case when a court must 'bite the bullet.'"²⁰²

Although the issue in *Eddings* is worded very narrowly, the decision's ramifications may be farther reaching than the issue suggests for two reasons. First, the language of the case is broad, indicating possible relevance for youths younger than sixteen. For instance, the opinion makes reference to minors, and "the formative years of childhood and adolescence."²⁰³ Second, the issue of sentencing a minor as an adult is encompassed within the more general issue of treating a minor as an adult. Thus, *Eddings v. Oklahoma* provides insight into the Supreme Court Justices' feelings on statutory provisions, such as Vermont's, which curtail the protections of *parens patriae*. As discussed, the majority and minority have differing views on the issue of treating violent youths as adults, and on the weight to be accorded evidence of a youth's troubled childhood. Undoubtedly the case could be used to argue both sides of the issue. But regardless of the meaning one derives from the case, this five-to-four opinion undeniably stands the doctrine of *parens patriae* on shaky ground.

CONCLUSION

The special legislative session in July of 1981 was in response to a small number of violent offenders. In view of their objectives for the session, the legislators deserve credit for having succeeded; the immediate problem was redressed. The heat of the moment was so intense, however, that one wonders whether all of the ramifications were considered fully. Time will be the ultimate judge of the quality of the legislation.

200. *Id.*

201. *Id.*

202. *Id.* at 127.

203. *Id.* at 115-16 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

What can be said with certainty at this point about the law is that it is a turning away from the doctrine of *parens patriae*. Before the revision, the law offered this protective shield absolutely and indiscriminately to all children. The juvenile system can now pick and choose which youths it will accommodate. Surely Vermont's early reformers, who believed that "there is no child or youth who is utterly incorrigible,"²⁰⁴ would oppose this legislation that provides for violent offenders as young as ten to be tried in criminal court as adults.

Yet today, roughly one hundred years after the juvenile system was founded, many would agree with Vermont's recent departure from the old ideal. It has been suggested, in fact, that *parens patriae* is nothing more than "a fairy tale that never came true."²⁰⁵ Although the Supreme Court's position on the propriety of Vermont's recent enactments is not altogether clear, based on the reasoning in *Eddings v. Oklahoma*, one gets a sense that at least four of the justices would have no qualms with them. And, more importantly, all of them would agree that there is nothing unconstitutional about treating youths within the criminal system.²⁰⁶

As the issue of juvenile law reform will continue to be one of importance for some time to come, it is important that the legislature and the public look at the total picture, at all the issues involved in the juvenile justice quandary. This will ensure that in the future equitable and rational policies will guide our lawmakers in their drafting. If, when the fury which led to the special session dies down, the Vermont Legislature remains firm in its decision to withhold the protection of *parens patriae* from juveniles who commit serious crimes, it should make its position more explicit. The statute could be greatly simplified, and its deterrent value magnified, by providing merely that juveniles who commit any offense listed in section 635a(a) will be treated as adults within the criminal justice system. Such revision would provide violent juvenile defendants with the right to a jury trial. They would be tried in criminal court, and the court's role would be clearly defined in relation to these criminals. Finally, the juvenile court could continue in its

204. 1865 REPORT, *supra* note 63, at 4; see also *supra* text accompanying note 81.

205. THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, 9 CRIMINAL JUSTICE NEWSLETTER, No. 8 at 1 (Apr. 10, 1978) (discussing TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME (1978)) [hereinafter cited as NEWSLETTER].

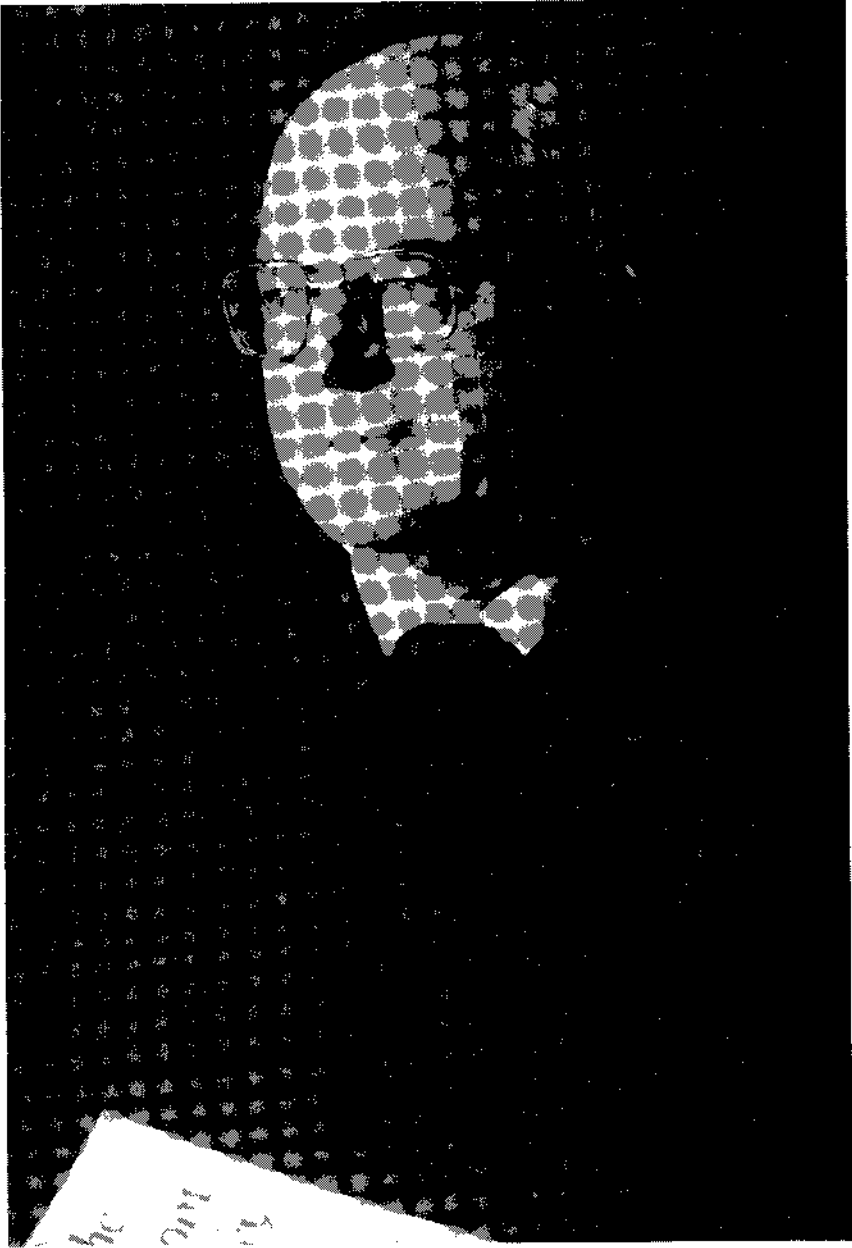
206. See *supra* notes 199-201 and accompanying text.

multifaceted role of social agency without the burden of offenders who are beyond its rehabilitative capacity.

The Twentieth Century Fund Task Force is said to have "hammered another nail into the coffin of the juvenile court's *parens patriae* doctrine."²⁰⁷ Seemingly, Vermonters take a similarly grim view of the efficacy of the ideology, at least in relation to juveniles who commit violent crimes. If, in fact, the legislature does believe that the doctrine has exhausted its useful life, then it should simplify the statute as suggested, thereby laying the *parens patriae* doctrine to rest.

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207. NEWSLETTER, *supra* note 205, at 1.



THE HONORABLE ALBERT W. BARNEY, JR.

Chief Justice	1974-1982
Associate Justice	1959-1974
Superior Judge	1952-1959
Municipal Judge	1951-1952