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The Relationship Between Promise and Performance in State Intervention in Family Life

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The Relationship Between Promise and Performance in State Intervention in Family Life

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JUDGE MIDONICK: We have a fantastic representation of our alumni here and we've overdone our 10:00 starting time and we're supposed to stop at 12:00 promptly in order for us to go to the Low Memorial Library for lunch, for those who are having lunch with us. In order to be on time for this afternoon's extravaganza we really ought to begin now. You must understand this program is entirely unrehearsed and therefore will be more interesting. We have with us today a panel of four whom I will introduce as they are to speak. The first speaker will speak for about forty-five minutes and he has a paper to present; and then we will have the others. At the end of that time, there will be a forty minute fun and games period when everyone here is entitled to make remarks. We are fortunate to have with us Dean Monrad Paulsen of the University of Virginia School of Law whom we hadn't expected and who will be able not only to ask questions but give answers during the last forty minute period. I myself am eagerly awaiting an answer or two. Now, to begin, the paper which is to be given on the subject of the relationship between promise and performances in state intervention in family life will be given by Peter L. Strauss, Associate Professor of Law, Columbia Law School. His background is Harvard '61 in physics and chemistry, strangely, and so we have a person who is very well rounded and his
law degree comes from Yale in 1964. He was editor-in-chief of the Yale Law Journal—he clerked as a law assistant for not only the Chief Judge of the Court of Appeals in the District of Columbia, David Bazelon, who is a great expert on child problems in the court himself, but Professor Strauss clerked after that for United States Supreme Court Justice William Brennan. He taught law for two years at the Haile Sellassie I University in Addis Ababa, Ethiopia, and for three years was assistant to the Solicitor General of the United States. He joined Columbia's faculty this fall, so be very gentle with him.

PROFESSOR STRAUSS: I don't know how many of you saw a play that recently ran at the Vivian Baumont theater—"Narrow Road to the Deep North." As that play opens, a poet sets out on a journey to seek enlightenment. He comes across a child that has been set out on the river bank by his parents to die. He stops, looks at the child, and says a few eloquent words about what a terrible situation this is for the child; then he walks on. We have among us children who are set out by their parents or by the circumstances of their life to a wretched fate if not to death itself and, in the name of social change, which is the governing theme of all these panels today, the law talks about their plight and promises on our behalf to see that the children's needs are met. The problem is, as I see it, that there is too often a very substantial gulf between those promises and our performance, between what we say we do for children and what we actually do for many of them. And the questions which I mean to talk about are whether courts should notice that gulf, and what kind of consequences would follow from their noticing it? Is the promise of social change in any sense an enforceable one?

There are basically two grounds on which the law may forcibly remove a child from his home and put him someplace else. First, the familiar one of juvenile delinquency, in which the child may be removed if he is found to have committed any act which would have been a crime on the part of an adult. Associated with delinquency—and of greater concern to me this morning—is the group of children called "Persons in Need of Supervision" (PINS). More children are taken from their home into state institutions on this basis than on the basis of juvenile delinquency. The label "need of supervision" requires no criminal act. It applies to children who are "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other lawful authority." And those of you who have children can remember times when all of those words flashed through your mind thinking about your own child. Of course neither a finding of de-

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linquency nor one of need for supervision must result in removal to a state institution. Very frequently, lesser restraints such as probation are imposed. But complete removal from family to a state institution does happen very frequently—in about one quarter of all PINS cases.3

The other group of children that I mean to talk about are children who are taken from their homes, although their behavior is in no sense disturbing. Article 10 of the Family Court Act establishes child protective proceedings to determine whether a child’s parents have abused or neglected him. Abuse and neglect, like need for supervision, include a wide range of conduct—in this case, conduct by the child’s parents and not the child himself. And in about half of the cases of abuse or neglect the child is taken from its home.4 In some cases, that comes as welcome relief; in many others, however, children are removed against their apparent will and against the apparent wishes of their parents.

It is easy to understand the good intentions of both types of law. A Person in Need of Supervision, like an adult committed for psychiatric disturbance, appears not only to present particular danger to himself and to others, but also to need special care and treatment. Indeed, in contrast to juvenile delinquency, the treatment aspect of the need for supervision statute is constitutionally quite essential. It is inconceivable that one could be convicted of a crime or punished for having a status as vaguely defined as “ungovernable” or “incorrigible” or “habitually disobedient”;5 if need-supervision is any ground for intervention in a child’s life at all, it has to be an essentially civil ground. And the Family Court Act recognizes as much by limiting the purposes of disposition to assuring needed “supervision or treatment” of the child involved.6

The basis for abuse and neglect laws, on the other hand, lies principally in the horror we all feel in confronting the child whose parents contribute more injury than nurture to his formative years. While identifying those situations carries its own risks, none would say that society means to punish the children involved. The statutory aim of removal is “to help protect children from injury or mistreatment and to help guard their physical, mental and emotional well-being. The Act is designed to provide a due process of law for determining when the state “may intervene against the wishes of a parent so that [the child’s] needs are properly met.”7

Both the abuse law and the supervision law seem to recognize that these

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5. Since these words were spoken, the New York Court of Appeals seems to have held otherwise. In re Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972) finds the terms “easily understood,” even by a child; without pausing to consider whether they reflect matters of status or, as seems to be assumed, acts which could be made the subject of criminal regulation.
children will be with us as adults; indeed, for one intent on bringing about
social change that must be the governing consideration. While there may be
a degree of fear, or desire to cloak less pleasant aspects of community life
beneath their surface, on the whole the purpose to accomplish such change
has to be accepted as genuine. Yet the problem of using good intentions for
paving-stones is well known. If we look at how these laws operate in fact,
particularly as they involve commitments to institutional care, a quite dif-
ferent picture emerges.

Even if all the necessary resources were at hand, there would be a sub-
stantial question how much institutions could do to improve children's
welfare. To be sure, no one doubts that the diet, shelter and clothing of
many children can be vastly improved over what they experience at home.
But administering to their emotional and mental well-being, or shaping a
personality now marked perhaps by incorrigibility or ungovernability pre-
sents much more difficult problems.

Not the least of these is enlisting the cooperation of the child. From
his point of view, removal from his parents may appear not as a rescue but
as yet further punishment, abuse, or neglect—a particularly harsh punish-
ment if it is followed not by the warm and caring atmosphere of a home but
by the cold, impersonal setting of a large shelter or training school. "The
mere deprivation of liberty, however benign the administration of the place
of confinement, is undeniably punishment,"8 and especially so in a child's
eyes. As Professor Francis Allen once wrote, "It is important . . . to recognize
that when, in an authoritative setting, we attempt to do something for a child
'because of what he is and needs,' we are also doing something to him. . . .
Whatever one's motivations, however elevated one's objectives, if the mea-
sures taken result in a compulsory loss of the child's liberty, the involuntary
separation of a child from his family, or even the supervision of a child's
activities by a probation worker, the impact on the affected individuals is
essentially a punitive one. Good intentions and a flexible vocabulary do not
alter this reality."9

Further, psychiatrists have said of civil commitment that involuntary
treatment is essentially unworkable. If the patient's cooperation cannot be
enlisted, and quickly, the chance for improvement rather than decay is
quite slim. For children, again, one must add the crucial importance of
family—even some dreadful families. They provide a continuity and consis-
tency of experience which is virtually essential for emotional growth.
Judge Dembitz and other judges of the Family Court have too often had
occasion to note how terrible the absence of belonging can make even pro-
longed foster care for child development. An institutional setting renders
that problem all the more severe. Over the whole is the further shadow that
we just don't know that much about psychological growth. Any structured

9. Id. at 18.
environment meant to replace the family will have been built in the dark. In sum, the certainty that our institutions can do all that the law calls upon them to do is far from great, and particularly so with respect to total care institutions other than substitute families.

That is an essentially theoretical description; the more substantial limitations I think, are not on society's ability to work social change through institutions but, rather, on its will to do so. These laws undoubtedly have humane and therapeutic goals. But, to restate a trenchant observation of the psychoanalyst Jay Katz, society's humanitarian impulses are readily prone to compromise and corruption once wishes to love and care meet the demands for allocation of resources.\(^\text{10}\) When it comes to carrying out the promises in fact, there is a substantial and inevitable risk that our willingness to pay will end at the point of mere custody. More than we wish to admit, in the actual operation of institutions we lose sight of the fact that these children will return to live among us, and we satisfy ourselves with what are essentially holding operations. In the competition for slices of the state budget pie, these institutions tend to fall to a low level—to the level of hiding for today with problems that we would rather not face. I am sure Professor Rothman will have more to say about that risk later on.

For the next few minutes I mean to talk about some ways in which we know the risk has matured. When we look at the state's actual performance of its rehabilitative and protective promises, the evidence is that the state isn't doing its job.

Just last month, for example, a committee under the chairmanship of Judge Polier delivered a comprehensive study of the treatment services accorded to juvenile delinquents and Persons in Need of Supervision placed in institutions by the New York City Family Court.\(^\text{11}\) The services actually given many of these youths, the study found, were essentially custodial detention. In Judge Polier's words: "Treatment services have been made least available for those who are in greatest need—hitting hardest the poor children, children coming from broken families, and non-whites."\(^\text{12}\)

To a substantial extent, both New York City and New York State depend on voluntary agencies, operating under contract, to supply needed treatment services to juvenile delinquents and Persons in Need of Supervision. Those agencies, by and large, get more money per child per day than do the state's own institutions. But no such agency could be found to accept even one of the girls adjudicated "delinquent" by Family Court during 1970.\(^\text{13}\) The children who were rejected were markedly those with the most


\(^{11}\) Committee on Mental Health Services, Juvenile Justice Conounded: Pretensions and Realities of Treatment Services (1972) [hereinafter cited as Juvenile Justice Conounded].

\(^{12}\) Id. at 4.

\(^{13}\) Id. at 24.
severe emotional problems and learning handicaps. Over half of the 173 children in the sample who were most in need of therapeutic settings, for example, had to be placed in training schools or shelters. Nor do the training schools provide the promised care. Even before the havoc introduced by the recent budget cuts, not one of these schools was equipped to provide even minimal mental treatment for the seriously disturbed children it received. Only one was thought by the committee to have an effective drug abuse program, and the educational program at most was sorely deficient.

Carla H, for example, was a thirteen year old Person in Need of Supervision who was transferred to the Brockwood Center for Girls. Brockwood is a maximum security facility for the most aggressive, assaultive and disturbed girls placed with the schools. As the Family Court Act permits, Brockwood accepts delinquents, and Persons in Need of Supervision without any distinction. Carla was diagnosed as presenting a runaway reaction, adolescent adjustment. She had spent part of her life in a school for the retarded and had been recommended by the Family Court for placement in a therapeutically-oriented setting. She nonetheless arrived in Brockwood. One agency found that “because of her impulsiveness, hostility and lack of control, she is not a suitable candidate”; another found that “her borderline intelligence made it doubtful she would profit from our program.” At Brockwood, her treatment was solitary confinement on four occasions, each time for three consecutive days.

Too often the picture for abused and neglected children is little brighter. Such children are not subject to placement in training schools, but they may be placed in institutional care through the Commissioner of Social Services. Seven thousand of these children, according to this morning’s Times, are in large, impersonal shelters in this city. Again, there is every indication that these children do not always receive the emotional support, attention and care which they need and which the law has promised them. Temporary emergency removal from the home, which the Family Court Act permits, under provisions for expedited hearings, often results in lengthy stays in the shelters. Almost half of the children removed from their homes to temporary care last year spent over ninety days in one of those shelters before their case was finally settled.

Nor is help for the child assured once a hearing has been held and a placement ordered. Again, the Polier Report suggests that the children most in need of psychiatric and other services are those most likely to be placed in the large shelters, where psychiatric treatment and special education

14. Id. at 23.
15. Id. at 24-25.
16. Id. at 37.
17. Id. at 38.
18. Id. at 51-59.
19. JUDICIAL CONFERENCE REPORT, supra note 1, at 370-73.
services are virtually non-existent. For these children, institutionalization is a positive evil. Deprived of their home without a substitute provided, set into a cold and impersonal surrounding, they must see what is happening to them as punishment added to that which their parents may have already visited on them. Rather than improve, they regress.

There is then, an enormous gulf between the promise of care and protection which the law makes to these children, and society's performance of that promise. Since the promise is the basis for the state's intrusion into their homes and their removal from their families, what effect are we to give to the failure to keep it? Ought judges, indeed, even to notice that it exists?

Judicial fact-finding on this broad a scale, to be sure, is a very chancy proposition. As in the case of school administration or legislative districting, adequacy of treatment in a mental hospital or reformatory is an issue as to which there are no obvious standards. What begins as an apparently simple proposition—that children are entitled to the care and protection promised them by the law—threatens to take judges out of their depths by imposing essentially administrative responsibilities. Yet how can judges pretend ignorance of what all know—whether it is that black children are receiving education inferior to whites, or that legislatures are controlled by rotten boroughs; or that persons committed to involuntary detention on the basis of a promise to treat or aid them are merely being stored there? If the issue is clear enough, judges, too, must acknowledge reality.

The Supreme Court first took notice of the distance between promise and performance in juvenile cases in Kent v. United States, decided in the 1965 term. The case challenged the informality of certain procedures applicable to children in the District of Columbia. In reversing, the Court rested heavily on its view of the failures of juvenile process. "While there can be no doubt of the original laudable purpose of juvenile courts," it said, "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."

In its Gault decision the following year, the Court again confronted challenges to the informal processes of juvenile court. Gerald Gault was challenged with having made an obscene phone call, an offense which if committed by an adult would have led to a few weeks imprisonment at most. Found a juvenile delinquent in proceedings in which most safeguards attaching to criminal trials were denied, Gault had been committed to an Arizona industrial school for a period which might have lasted for up to six

20. JUVENILE JUSTICE CONFOUNDED, supra note 11, at 63.
22. Id. at 555 (footnote omitted).
years, until he reached twenty-one. As you know, the Court rejected the argument that informal procedures were necessary to or justified by the protection and special treatment promised the child by the law. "[T]o the extent that the special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them," it said, "there is reason to doubt that juveniles always receive the benefits of such a quid pro quo." 24 "[I]t is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes" to the reality of recidivism rates which imply that no such benefits have been received. 25

With its recent changes in membership, the Court has been closing its eyes. Thus, in deciding last spring in McKiever v. Pennsylvania that juveniles, unlike criminal defendants, have no right to jury trial, the Court stated:

We are reluctant to say that, despite disappointments of grave dimensions, [the juvenile court does not still] hold promise, and ... cannot accomplish its rehabilitative goals. ... Of course there have been abuses. ... We refrain from saying at this point that those abuses are of constitutional dimension. They relate to the lack of resources and of dedication rather than to inherent unfairness. 26

On this issue, at least, the Court seemed to be satisfied that the promise had been made. Whether it had been kept—the failure to commit resources and dedication—was not of constitutional dimension.

In Wyman v. James, 27 the issue was much different—whether New York could terminate welfare payments to a woman who refused to permit a caseworker to visit her home without a search warrant. But the Court concluded that New York could end the payments. One decisive issue was the visit's purpose: if to provide needed social services, some form of therapy, it obviously had a different aspect than if it is was made to find out about possible welfare fraud, child abuse, or other criminal behavior. The official theory, reflected in statutory language to some extent, was social service; the practice, reflected in the State's briefs and elsewhere, was to emphasize investigative aspects. Caseworkers had neither the training nor the time to offer significant social services on their visits.

The Court was happy to stop with theory, to the point of ignoring the information on practice. The visit, the Court said, "is made by a caseworker of some training whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound

24. Id. at 22-23 n.30.
25. Id. at 21.
For children in need of supervision such "trust" is not enough. Assuring appropriate treatment is the only way I see—if any at all will do—of upholding the statute's constitutionality. We have already talked about the vagueness of the statute's terms—"incorrigibility," "governability," "habitual disobedience." There are a couple of concrete indications that that vagueness has its effect. First, the Polier Report notes, incredibly, that in 1970 there was twice as much use of total deprivation of liberty in cases of children who were in need of supervision than in cases of children who had committed crime—that is, juvenile delinquents. The second effect was suggested twenty-five years ago by Paul Tappan in studying the Wayward Minor Act, an Act recently held unconstitutional by a three-judge United States court. Tappan concluded that parents often use the Act, and the courts administering it, as an extension of parental discipline—a weapon invoked at the parents' pleasure when they themselves had failed at the job. The looseness of the present statute also invites that abuse, and the statistics of the New York Judicial Conference suggest that it still occurs. Although only one percent of juvenile delinquency cases are brought by parents, and only thirty percent of neglect cases are brought by parents, fifty-four percent of all cases under the Need for Supervision statute—sixty-five percent of those cases where they involve girls—are initiated by the parents of the minors involved. In a busy, overworked court, dealing with statutes of unmanageable dimensions, misuses of a vague statute are all too possible.

Unlike the juvenile delinquency problem, these problems cannot be dealt with by adding to trial procedures. These children are not said to have committed any crimes, and their status—even if it was more precisely defined—should not be punished, no matter what procedures were adopted. The status can only be justified, as civil commitment is justified, by the child's need for ameliorative treatment. To be sure, one may add our wishes for protection from the source of supposed dangers but we have not yet endorsed the notion of preventive detention and I certainly am not going to suggest that harsh judgment today. Unless we're prepared to do that—facing the constitutional obstacles which follow—closing the gap between promise and performance is an utter necessity.

Judge Polier seems not to agree. She remarks that "to release the child into the community because of a lack of appropriate services may in effect be just one more way of temporarily giving him his freedom despite the risk to himself and to the community." But as Justice Brandeis warned us in

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28. Id. at 322-23 (footnote omitted).
29. JUVENILE JUSTICE CONFOUNDED, supra note 11, at 31.
30. P. TAPPAN, DELINQUENT GIRLS IN COURT 95, 121 (1947).
32. JUDICIAL CONFERENCE REPORT, supra note 1, at 343.
33. JUVENILE JUSTICE CONFOUNDED, supra note 11, at 14.
an oft-quoted passage, "Experience should teach us to be most on our guard
to protect liberty when the Government's purposes are beneficent."\textsuperscript{34} A
judge's recognition of the practical limits on what he can do for children
ought to make him restrict the class of children to whom he applies the law.
The community's failure to provide appropriate services must be taken as
its statement that it prefers the risk of leaving a child free. Judges apparently
believe that they must make some placement even if the facilities are not
available to satisfy the child's needs. Why? If the state cannot better his
condition, what valid purpose is served by interfering in it at all?

One possible response would be to require that any long-term residence
in a state institution must be voluntary on the child's part. Thus, one pro-
posal for dealing with involuntary civil commitment of adults has been to
limit its duration to a few weeks or months, during which time the hospital
must engage the patient's cooperation in his treatment. Failing that, he is
to be released. Hospitals confronted with rules of this sort will find in
them a significant incentive to effective treatment. Might not the training
schools find the same effect?

In one significant case Judge Dembitz seems to have illustrated this
approach. She committed a truant to training school, but with specific in-
structions that discipline could not be imposed there, and that if he ran
away he was not to be chased and returned.\textsuperscript{35} In effect, she made his commit-
tment to the school a voluntary one, in which the school would be forced to
enlist his cooperation rather than use coercive measures. Could we not
design similar rules for all such commitments?

Community-based care also presents problems of civil liberties, espe-
cially where periodic visits to the child and his home seem called for. Here
the Supreme Court's decision in \textit{Wyman v. James} may provide a somewhat
more acceptable solution. It is one thing to say, as the Court seems to, that
even absent proof of disturbing conduct by parent or child the incidence
of family trouble in welfare homes is sufficiently high—higher than in other
community homes—to warrant such intrusions for the child's protection.
But once such conduct has been determined it is easier to argue for such
visits. Many cases of parent neglect and abuse are characterized by intense
longing of child and parent to remain with each other. While consent to
have visits, built on the parents' desire to keep their child, may be no less
coerced than the consent in \textit{Wyman v. James}, and presents its own obstacles
to treatment, the case does offer some hope for alternatives which might be
able to build on the remaining strength of the family structure.

For the remaining time I'd like to talk briefly about the right to treat-
ment, the subject of the other article in this morning's \textit{New York Times}.
Even when the parents wish to keep an abused or neglected child at home,
it may seem to us terribly cruel to permit them to do so. Yet the gap between

\textsuperscript{34} Olmstead v. United States, 277 U.S. 438, 479 (1928).
\textsuperscript{35} \textit{In re Mario}, 65 Misc. 2d 208, 517 N.Y.S.2d 659 (Family Ct. 1971).
promise and performance for these children may be equally great. The promise is extracted from us by the very desperation of the child's life; the performance is too easily hidden behind institutional walls and under wishes not to know.

New York State has largely managed to avoid the vagueness problem regarding abuse statutes which crops up in other states, where they are often no more than a vehicle for imposing conventional morality on less fortunate or disfavored classes. But there has sometimes, nonetheless, been a tone of complacency about the alternatives to parental custody provided by the State. It seems to me that what those alternatives really are must be firmly in the court's mind when it passes upon any question of abuse or neglect. One cannot justify taking a child from where he is, attempting to plan his life for him, without some ability to carry out the plan. If the laws must be construed with an eye to consequences as well as to promises, a child once institutionalized under a theory and promise of help would seem to have a continuing claim to freedom, unless that assistance is forthcoming.

And since return to his home isn't realistic in this kind of case, the result may be to force the provision of the promised aid.

The analogy to be drawn in this setting is from the recent and widespread litigation concerning the treatment rights of involuntary patients in mental hospitals. By and large, this litigation has not been concerned with the procedures and standards by which such persons are committed, but rather with the conditions in which they are being held. The claim has been that those conditions fail to keep the state's promises. Indeed, that is the claim being made today concerning Willowbrook. To an increasing extent, those promises are being enforced.

Recognition of the right first arose in sexual psychopathy cases, where the issue was fairly simple. Such statutes typically provide for a choice between a definite prison term and an indefinite term plus treatment; what the courts soon found was that indefinite terms were being imposed but no treatment given. In such situations it was easy enough to say "either/or"; one has one's choice, and the parameters of the choice will be enforced.30

What one now finds is that the same reasoning is being applied to civil commitment cases, where the only asserted basis for detention is the aberrant mental condition which the state undertakes to treat. The development seems to have begun in the District of Columbia, which is graced with not only its somewhat activist court, but also with an enormous public mental hospital, St. Elizabeth's, which Congress seems willing to permit to decline into a mere holding institution. In Rouse v. Cameron,37 by now a somewhat famous case, the Court considered a petition for habeas corpus filed by a patient committed there, who alleged that he received no more treatment under his commitment than might be reflected in the assignment to him of

37. 373 F.2d 451 (D.C. Cir. 1967).
occasional menial work. The statute requires treatment, as the neglect and abuse laws in this State seem to require the State to assure that children's needs are properly met. The Court found in it a right to release, unless that treatment were provided. The absence of the treatment undercut the justification for intervention.

To find that treatment must be provided to warrant detention carries with it the eventual burden of deciding whether treatment has been provided, or is being provided—what is treatment, and what is adequate treatment. Will the court inquire into facilities to see whether they meet professional standards? Will it examine the programs for particular individuals? Attempt to assess whether or not he's being cured? One rapidly approaches the stage at which the judge must assimilate to his other roles that of public health administrator, a role for which he's not especially well qualified.

In Rouse and other District of Columbia cases the court sought to avoid such deep involvement by posing the issue as one of good faith, stating that it would respect medical judgment so long as it could see that efforts were being made. But a failure to provide resources and effort—even if compelled by budgetary restraints—would lead to the conclusion that treatment was not being provided and accordingly to an order for release.

Perhaps the most striking current example of this kind of approach is presented by a case heard by Judge Frank Johnson in the Middle District of Alabama, where the state mental hospitals conformed to no known minimum standards of care.38 "The purpose of involuntary hospitalization for treatment purposes," Judge Johnson wrote, "is treatment and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions . . . ."39 If appropriate treatment were not forthcoming, he warned, his response would have to be to order the release of all who did not wish to stay.

The right to treatment is no easy panacea. Once past the crudest situations of failure and neglect, it rapidly encounters wide areas of professional dispute about what constitutes proper or effective treatment. In addition to these strains on available knowledge, there is the ever-present risk of exceeding what judges can reasonably be expected to do, especially if, as in Alabama, it appears necessary to appoint a continuing panel of masters, to see that standards are not only met, but kept up. As we've learned in many contexts, the practical ability of courts to affect official behavior on a broad scale is quite limited, so that the likelihood of assuring treatment for all through the law suits of a few is not overwhelming. There are powerful reasons why the history of large, humanitarian institutions has been one of decay, and it is not at all certain that the efforts of a few courts, and a few

39. 325 F. Supp. at 784.
lawyers who can be found to bring cases in them to counter that trend, can be effective.

I don't think we can pretend, then, that the right to treatment is an entirely satisfactory answer. But the alternative would seem to be to say: let us have no more such institutions. And if we will not go that far, I do not see how we can stop short of insistence that the humanitarian purposes our laws proclaim as the justification for forced detention or removal from the family must in fact be served by them. To say, as the Supreme Court did in McKiefer, that failures of resources and dedication in such circumstances are not failures of constitutional dimension, is to foster deception which a democratic society valuing freedom, dignity, and minimal involvement of the state in its members' lives cannot afford.

To return, as I began, to the child in that play, left on the river bank to die—one might believe that the truly enlightened man would have taken the child and raised it as his own. Short of that, was it not the wisest course, recognizing his limitations, for the poet to leave it be? Is it not the cruelest of steps to take the child, promising to meet its needs, and then abandon it once again?

Thank you.

JUDGE MIDONICK: Thank you, Professor Strauss. I think perhaps this sets the tone of our problem as to whether improper state action can be improved or whether abdication of state action must be the alternative. I think perhaps our second speaker can very cogently present the alternatives. She is my colleague, my distinguished and loved colleague—loved by everybody—Judge Nanette Dembitz of the Family Court. She has served with great distinction and dedication in that court for many years, and apart from that she was the graduating member of the Class of 1937, I believe, in this law school and a member of the Law Review Editorial Board at the time here; and among her many other accomplishments in the professional field, she was in the Department of Justice for ten years and she also served as counsel to the New York Civil Liberties Union for any number of years on a voluntary basis and did remarkable work for them. She was appellate counsel for the Family Court branch of the Legal Aid Society, and now she is in a position of defending the courts, especially the Family Court, Children's Division.

JUDGE DEMBITZ: Good morning to everybody. I think first I should express my regrets to anyone who is looking forward to a pitched battle between Professor Strauss and me, because in fact there are no fundamental differences between us, as to the right to treatment, although there are some differences in emphasis. Within the short time allotted me, I have to be
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mindful of the fact that you are a captive audience as far as I am concerned, because you have to get rid of me before you can hear Professor Rothman and Harriet Philpell. So I feel that I have to be particularly restrained in the amount of time I take, and in this short time I will not make any effort to set forth a conceptual framework, but I will simply make a few observations on the nuances of the right to treatment.

Now, the first question in implementing the right to treatment, is, as Professor Strauss indicated, “What is treatment?” This question has been a particularly poignant one in our court, with respect to thirteen, fourteen, and fifteen-year old heroin addicts and heavy users of heroin, who are brought to court by a parent as Persons in Need of Supervision, the jurisdictional category with which Professor Strauss was mainly concerned. I would estimate, in fact, that perhaps not a majority, but certainly a very, very large proportion of the children brought by their parents to our court as Persons in Need of Supervision are heavy users of heroin.

I agree passionately with Professor Strauss' view that we must look at the facts, and in order to do so, I made a trip two weeks ago to the Otisville State Training School. Otisville is located in the lower Catskills, in a rural area, about two hours from New York. I drove up there in a station wagon which was taking two fifteen year-old boys who had been committed to Otisville by our court. They had both been brought in by their mothers as Persons in Need of Supervision. They were both heavily on heroin.

One was an addict, judging from his acute withdrawal symptoms when he was in the Juvenile Detention Center—for which, in fact, he was in the infirmary at the Center for a short time. He told me that he'd been on heroin for two years, and that his habit cost him about sixty dollars a day. He may have been exaggerating. He told me that he got the sixty dollars a day “fixing cars.” I didn't press the point, of course, since my purpose was to hear what he had to say, not to give lectures to him. He had been in Phoenix House and Odyssey House, which are both urban, open drug rehabilitation centers here in the city, in the slums; he had left each of them after two days. I will have a little more to say later on about the point of keeping juvenile drug users in centers of this sort, since I gather that this is a type of treatment which Professor Strauss would favor, and that Professor Rothman also favors.

Otisville is a campus of some hundreds of acres. There are two hundred and fifty boys there. About half of them live and eat their meals in housekeeping cottages. About half live in two-story buildings, each of which has a capacity for forty boys. The separation between these cottages and these groups is primarily on the basis of whether the boy is aggressive—that is, aggressive towards his peers—or dependent or passive. In other words, obviously their first effort is to see that a weak, passive, clinging, dependent boy is not thrown into intimate contact with an aggressive boy.

There are no walls in Otisville; indeed, there isn't even a hedge. There
are no bars at Otisville, and there is nothing resembling a guard at Otisville. I spent considerable time in the classes, in the shiny, new school building—considerable money, very large amounts of money, have been poured into new buildings at Otisville. Most of the fifteen year-olds there have a reading level between the second and fourth grades, that is, seven to nine year-old age level, and the big effort is to improve reading. I was very glad to hear, in one of the classes, the boys reading, with some amount of zest, aloud, from a tabloid newspaper which presents sports and simple current events in language appropriate to their reading level—a weekly newspaper which is published by remedial reading specialists for ghetto children. I should say that this class contrasted with a class at the Juvenile Detention Center here in the city, where a black teacher was reading to a group of ghetto teenage boys from the legend of King Arthur's Court, and was explaining, when one of them complained that it was a "drag," that Merlin the Magician was really a very interesting man. I called this inappropriate reading material to the attention of the principal of the school at the Detention Center and it certainly deserves the attention of the administrators.

At Otisville, after seeing something of the print shop used for vocational training, the skating rink, the camp up the hill that's used in the summer for sleep-outs, and the various athletic facilities of the usual sort, I had dinner with the boys in the Drug Abuse Cottage. Charley, age fifteen, was particularly anxious to talk. He was desperately hopeful of making it when he left Otisville. He said, "You don't know what it's like to get up every day and have to figure out where to rob. I think I can make it when I go back."

He also said that out of the eight boys who had left this Cottage, only two are back on drugs. How did he know? "Well, they come back here once in a while, for a few days or for a week, when things get too rough. Also, sometimes they call up and speak to the counselor, or to Mr. Diaz." (Mr. and Mrs. Diaz were the house parents.)

Now, this Drug Abuse Cottage had a number of empty beds. In fact, with a capacity for twenty-five, there were only about twelve or thirteen boys there. The reason is that although, of course, there are many, many more boys at Otisville who have been heavy drug users, the boys are given a choice of whether or not to go into this special Drug Abuse Cottage at which there are daily group therapy sessions. Apparently many of the heavy drug-using boys at Otisville—heavy heroin-using boys (I want to make it crystal clear we're not talking about a kid who smokes marijuana occasionally)—apparently many of these boys believe instinctively what some experts believe, and what I as a judge-observer believe, that sometimes segregation with other drug-users is not good but is indeed bad, and that participation, instead, in a normal program, with non-drug-using boys is preferable.

I agree with Professor Strauss that all that a judge can do, and should do—should do because that's all he can do—in evaluating whether an institution is meeting the state's obligation to give treatment—is to consider
whether the treatment that the institution is giving can in good faith and reasonably be considered the best treatment for that type of child. And I believe that by this standard Otisville's approach to the drug abuse problem meets this test.

Now, going on from the question of whether the state satisfies the right to treatment, we come to the question of a conflict between the right to treatment and other rights, especially the collision with the right to freedom from restraint.

Drug-using or drug-addicted boys who are sent to Otisville, like the other boys at Otisville, generally are sent home after an eight to ten months' stay. I take it that as a matter of constitutional right, the restraint on the boy should not only be the least in kind, but the least in time that is possible, and as a matter of constructive social approach, I take it that the institution believes that the longer the boy is in this sterilized environment, the harder will be his re-entry adjustment when he returns to the community. But when a drug-addicted boy of fifteen is returned after nine months to what may be a drug-ridden home (that is, there is often an eighteen or nineteen year-old brother addict), returned to a lack of parental control, and returned to a drug-ridden neighborhood, the predictable result—his return to drugs—frequently occurs.

I think a longer restraint, rather than less restraint, is essential, with graduation, of course, to halfway-houses as soon as this is feasible. But the results, our observations of the results, of keeping drug-using teenagers in the urban community or returning them quickly to the urban community are very poor. Gertrude Samuels, reporting in the New York Times on an interview with a fifteen-year old who was going to Otisville, quoted him as saying: "I was at Phoenix House (urban open center) but I split. I couldn't dig the time you had put in there—eighteen months," (in contrast to the ten months the training school keeps most of these boys). Indeed, the boy quoted by Gertrude Samuels was wrong—my understanding is that these centers believe that two years is the least that a drug-addicted or heavy-user boy should remain there. "I couldn't dig it—I split" the boy reported, according to Miss Samuels. "I tried to stay off the stuff but I was coming in the house, heavy nods, sleeping on the couch all the time. My mother committed me here."

Now, I'll have to upgrade my statement that I have only minor differences in emphasis with Professor Strauss, to say that on the point of freedom for drug-addicted youths I have a passionate disagreement with Professor Strauss, or Professor Rothman if he's of the same view. I feel that the state, in subordinating the right to treatment to the right to freedom from restraint, by a short and insufficient period of removal of a boy from a drug-surrounded home, is neglecting its obligation for treatment and indeed is committing a crime against these boys.

One more short point. I hope that I can bribe somebody in the audience
to ask me questions about the others that I wanted to make—I guess that's my only recourse. But there is one thorny constitutional problem about the right to treatment I would like to bring up briefly; I'll eschew the others that I wanted to talk about.

The difficult constitutional question is whether the right to treatment turns into an obligation to accept treatment—that is, is there an obligation by the child to accept treatment together with the obligation of the state to give treatment? The child's treatment is, of course, not only for his welfare, but to the extent that it is for his welfare it is also for the public good. Now the Second Circuit recently held, in the case of a Christian Scientist who had been committed for mental illness, that she could refuse prescribed medication because of her first amendment right to religious liberty and her religious objections to medication. I have a variation of that problem, in a juvenile case.

Jose is a thirteen-year old boy who raped three young girls. A psychiatrist friend asked me: Is Jose tall? Is he thin? Is he mentally dull? Is he apathetic except for such aggressive outbursts? Jose fits that picture, and that was a picture, according to the psychiatrist, of a person with an XYY chromosome imbalance, an imbalance which is thought to be related to crimes of sexual aggression. I would like to have Jose tested to determine whether he has this condition. The test itself is simple and innocuous. But if he has, I would also like him to get treatment, if there is any, for this condition, assuming that the treatment is with certainty harmless.

Now suppose that Jose and his mother don't like this idea. Here there isn't any question of religious liberty. But there is a question of the right to use one's own body and the right to control one's body, a right which Harriet Pilpel is busily putting on the constitutional map.

A more ordinary example of this same problem, of right to treatment leading perhaps to the obligation to accept treatment, is in the field of birth control, on which Harriet is also the specialist. Is the teenager's right to birth control also an obligation to accept the use of birth control if it's clearly to her welfare and the welfare of her children that she do so, as for example in the case of the fourteen year-old who already has two out-of-wedlock children. I won't try to answer this because Will wants me to sit down, and also this, I think, would be a topic for another seminar, say, on Scientists versus the Constitution.

JUDGE MIDONICK: I'm sure Dean Paulsen is going to ask one of us at the end where society's right to protection comes in. It's not that I disagree with all these rights for children, but the one example that Judge Dembitz gave, about a boy who woke up each morning wondering whom he was going to rob—it may not be for his best interests to be at Otisville, although Judge Dembitz thought it so, but there are times when you have to
injure a child in order to save society and indeed the child himself from being killed in a series of robberies or burglaries. I want you to know also that there are a number of published opinions not only by Judge Dembitz and Judge Thurston, who's here, and me, which have to do with (and I'll take only a minute as an interruption) which have to do with not incarcerating children. I was interested in Professor Strauss's remark that probation is so heavy-handed. Well, it really isn't, most of the time, especially if it's used in the right way. We have, in the Family Court in this state, and in many other states which have copied us and which we've copied, not only probationary discipline but also, since probation officers are overworked, we have injunctive relief. In a situation where a child isn't injuring society but only himself, he can be left in the home all right—and I've done it, in Irving S. v. Larry S., 60 Misc. 2d 359, 303 N.Y.S.2d 166 (Family Ct. 1969). They all laughed at me when I began to do it, three years ago. A boy was heavily heroin-addicted (since we seem to be talking heroin addicts), and our psychiatrist urged us, since the boy had an "addict personality," to send him to a Narcotic Addiction Control center. He was seventeen; he wasn't within our delinquency jurisdiction, but he had attacked his father for more barbiturates to get off heroin and his father and the police brought him in, for a family dispute and disturbance; luckily, although our psychiatrist had never heard of such a thing (he wanted him locked up for three years in Governor Rockefeller's Addiction Control Center), I arranged an entirely different program, because this boy wasn't hurting society at all. He was working in his father's restaurant, spending his money on bags of heroin. And he was well addicted, all right—four months of intravenous "shooting." So I asked the doctor, and I asked him, and I asked his father, if we couldn't try an injunction in which he would have three built-in probation officers in his home—his mother, his father, and his grandmother, where he was going to stay—and he was ordered not to use any drugs without a doctor's permission, not to have hypodermic equipment of any kind, either to work or go back to school, and to go to an outpatient therapy program, not to do anything unlawful, to obey his father and mother, not to live at home with the younger children but to stay with his grandmother nearby until permitted by his parents to return home, etc., etc. Well, everybody laughed, and said that you can't stop heroin addiction with an order; but I did, and the reason for the effectiveness is, that at the foot of the order, which is carried around (it's a sort of ambulatory injunction), it provides: "All police of the State of New York will bring this child back [or this wife,—it works in a husband-wife conflict too, as long as one person is executing it]—will bring this person back to the Family Court, immediately, day or night, in the event of complaint by the person who is protected by this order." Well, it stopped the child; he knew he couldn't act up any more like this. To check on his good progress, I myself followed up on it by a hearing two months later and I found the boy and family all smiles, and living together in
reasonable readjustment—and he never went to the Narcotic Addiction Control Program. It's just untrue that probation is so heavy-handed. And neither is an injunction so heavy-handed. And indeed, while you may believe it to be wrong, in *Frank v. United States*, 395 U.S. 147 (1969), they held, in an entirely different context, that five years of probation does not require a jury trial. Probation isn't considered, by the Supreme Court of the United States, that heavy-handed; and if people behave themselves, they seem to come out of it just as well.

And I must say one more little thing, although I'm impinging upon the time of much more expert persons than myself. In *Matter of Three John Children, et al.*, 61 Misc. 2d 347, 306 N.Y.S.2d 797 (Family Ct. 1969), where I had five different cases of child neglect or, as it was then called, abuse, because parents were addicted, I left one fifteen year-old in his addictive home—his addicted mother wanted him and he wanted to live with his mother—despite a statutory provision that he had to be taken away until the mother was cured of addiction. I found the statute to be partially unconstitutional, and they changed the statute thereafter to agree with my holding, because the boy was taking care of his addicted mother, and he wasn't subject to bad influence. He was old enough; he was a pre-dental student; and the attorney for that boy came to see me only a few days ago saying that after two or three years everything's working out fine. This was a child-neglect case where he wasn't removed from the family, but supervision was imposed on the mother, in a probationary-supervision way.

PROFESSOR STRAUSS: Before we get to Professor Rothman, I would say that not only do I not feel terribly heavy-handed about probation, but *Frank* was the first case I argued for the government.

JUDGE MIDONICK: Well, I'm glad you won. And it's a landmark case that nobody seems to know about except the winner—me. Now all of you know.

We have next Professor David J. Rothman, whom I haven't had the pleasure of meeting until today, but who is a very distinguished professor indeed. He's Professor of History at Columbia, at the moment, and he's written several books, one of which I've had the pleasure of looking at, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. He has had many distinctions, of which one of the chief and most recent is that he won the American Historical Society Prize for best historical work of 1971. He also, and this is why he says he's here (but I'm sure he's here because of his general expertise and distinction)—is actively engaged in a Field Foundation project at the moment, a committee to study incarceration.
PROFESSOR ROTHMAN: I have two things that I want to get across this morning, speaking both as an historian and as someone who has become more and more involved with the issue of incarceration. What I would like to do is to spend a few minutes talking with you as an historian about the origins of incarceration in this country, and then briefly draw out what I think are some of the present-day implications of this historical analysis.

If you can leave the particulars that you've been hearing about this type of center or that type of center, and just think openly for a moment, I think you will realize that incarceration as such—the reliance on these enormous institutions—is an incredible phenomenon. I find it so myself. Why was it that at a certain point in time, Americans begin to build incarcerating institutions? They were not always with us. Indeed, as an historian I can give you a very specific date for their popularization: the decade of the 1820's. Prior to 1820 there were almost no institutions of this sort. We discovered them, indeed, more quickly than Europe, and most often we initiated their widespread use. (Europeans, in fact, flocked to the United States to learn about them.) And the institutions have been with us ever since. I was recently reading a volume by psychiatrist Willard Gaylin in which he quotes a convict as saying that he would love to meet the man who invented this institution. "He must have come from Mars." Well, in a sense the convict was right. The institutions do have a "made on Mars" quality about them. And how we arrive at them—why it is that at a moment in time we launch this phenomenon of incarceration, is something that I want to sketch briefly with you now.

In the eighteenth century, when the colonists were under British rule, there were almost no incarcerating institutions. There was a localistic system, with small communities more or less self-policing. Indeed, given the nature of these societies, there was not any kind of efficient regulatory police apparatus. Instead, the communities were self-disciplining, neighbor keeping check on neighbor. There was a major distinction in the way the criminal law operated on the colonists. You are probably familiar with the notion that the rich received one kind of treatment and the poor received another. That was in fact true in many ways. You would not whip an offender who was a member of the upper classes, but you would whip one of the poor.

But there was another distinction, which was very critical, and which is often overlooked, and that is, the differentiation between those who were town and community residents and those who were not town and community residents: the insiders versus the outsiders. Toward insiders the community behaved, wherever possible, with a certain degree of informality and coolness. An insider who was poor could be given town funds without elaborate investigation. An insider who committed a crime, if it was not too serious, would be shamed by being placed in the stocks, or would be fined, or might be whipped. The operation of the law proceeded on the assumption that through neighborly suasion residents would be kept in line. Outsiders, on
the other hand, received a very different kind of treatment. They were pushed beyond town boundaries as quickly as possible, with a whipping to make sure they did not return. If you were a poor outsider, off you went, no matter how worthy you might be. If you were a petty criminal, off you went as quickly as possible.

The one exception to this procedure, of course, was the frequent use of capital punishment. For this was a very fragile and inflexible system of control. You had light punishments, and then severe ones, with nothing in between. The frequent resort to the gallows pointed to the regular breakdown of the informal sanctions or the mechanisms of shame. But even so, the system worked well enough to avoid social crises. Incarceration, throughout the eighteenth century was not a typical mode of punishment.

Beginning in the nineteenth century, a confluence of intellectual and social changes promoted institutionalization. In the first instance, there occurred a breakdown of localistic communities, under the pressure of mobility,—social mobility, people changing jobs, and concomitantly, geographic mobility, people changing residence. A localistic system, very dependent upon shame and that kind of control, cannot operate with any degree of effectiveness in this situation. But something else happened to promote incarceration. It was in a sense perceptive (Americans' definition of what they're seeing) rather than simply a social change which brings about a logical response; and that intellectual perception reflected both a kind of incredible optimism in the potential of republican government, and some rather incredible social fears.

The optimistic side is probably the side that is familiar to you. We were suffused with Enlightenment ideology; we were a new nation and we were the first Republic. We were going to demonstrate to corrupt, old world Europe exactly how one improves the human race. We were convinced that man is perfectible, plastic, malleable; and we were also convinced that here, in this country, within the blessings of republican government, we could accomplish what no one else had ever done.

That optimism side, I do think, you remember. The more interesting side, in a sense—and the side that is often ignored, is the darker one—the incredible tension about what would keep the society orderly. There was the inherited notion that orderly societies are localistic, stable, and fixed—that's what the colonists had conceived of as fixed, and stable and cohesive societies, and that's all Jacksonian Americans really had to go on. What they saw, however, was mobility; sons no longer following fathers' occupations; movement in and out of cities, off the farms;—and they interpreted this not with the later nineteenth century glorification (this was what made America distinctive), but with panic.

With all this kind of movement, they wondered, how would the United States maintain a cohesive and orderly society? Defining an orderly society as fixed, they looked at their own reality and found it to be corrupting.
Then their next step—and it really was an incredible step—was to decide to build incarcerating institutions as the perfect way out—or to put it another way, to satisfy both their hopes and their fears.

The incarcerating institutions, in origin, were reforms. Jacksonians would construct perfect, miniature, semi-Utopian communities, which they called penitentiaries, insane asylums, poorhouses, and reformatories. Each of these would be a mirror-image to the disorderly society, the society in which deviants and defendants had been corrupted by the chaos. They were to retreat to the asylums and there undergo a rehabilitative, reformatory discipline, which was defined, of course, as a fixed, orderly, precise and regular routine. We were so terribly enthusiastic about all this, that in fact we found it unnecessary to build up legal protections of any significance about incarcerating the insane, or incarcerating the young.

I cannot trace with you here all the ways in which these institutions were designed in accord with this ideology—but note that they were located far away from population centers; mail and visitors were discouraged, and courts and judges were reluctant to build up protections about the commitment of the insane (the quicker in the institution the better). What is more astonishing, of course, is how many of these practices continue. Wardens still don’t quite know why they don’t let more mail in. They remember, somewhere along the line, that maybe it had a reason (by now it’s defunct)—but the ability of society to maintain practices long after they have lost rationale is incredible. What happened was that within thirty years—by 1850 one can see it, by 1870 it’s even clearer—these institutions, for all the reformatory rhetoric—bore little relationship to the reality of life in the institutions.

Most significant, perhaps, is that at their moment of creation, incarcerating institutions were legitimated by this powerful reform rhetoric—there was not a dissenting voice to incarceration when it was conceived of and first enacted—so by the time corruption came, in many ways it was too late. Too late because a society examines its new institutions most closely when they are created, and these had received legitimization. Too late because something else happened, too. We experienced an influx of immigrants. Hence what perpetuated these institutions was not simply the fact that they were in operation, but that they also seemed functional. They were functional in the sense that they offered an apt place to confine the Irish; later they seemed an apt place to put the Eastern Europeans and still later they seemed an apt place to confine the Blacks.

There were periodic rediscoveries of the corruptions of institutions. Prison riots in the 1920’s led to intense newspaper coverage and pleas to improve the institutions. Without tracing the detail of it, allow me to declare that throughout our history there has been constant rhetoric to improve, upgrade, supervise and oversee the institutions, but at best these programs work for six months, nine months—and then disappear. Our
record of periodic attention and sustained failure, is, I think, really beyond dispute.

Hence, I find that much of what Professor Strauss says I agree with. I think due process changes are important. I think the right to treatment doctrine is important. I think the courts should look more closely at what goes on within these institutions. However, I think we differ—maybe not so much here today as we have in past conversations—on the point at which one rings the bell. Professor Strauss, I think, still believes that these kinds of changes can work. He qualifies it, he's hesitant about it—but I still think he has some little nub of optimism left—that the courts can do the job, that it is not yet time to ring the bell on the whole enterprise. From my perspective, it is time to ring the bell. I can't think of any experiment that has a longer, more intellectually valid critique about it than incarcerating institutions. If we don't ring the bell on this one, I can't imagine we'll ever ring the bell on anything.

We don't have time to go through all of the various arguments against incarceration. I think Professor Strauss went through most of them. The dismal historical record, I have described; there is an enormous social science literature faulting these institutions. If you have any inclination, perhaps the classic volume here would be Erving Goffman's, *Asylums*. A compelling critique can be made of these institutions around the failure of allocation of social resources. Professor Strauss alluded to that. Remember too the brutality periodically uncovered; no matter how steeled one gets from horror stories, one still is amazed at the newest one. Not only can't we run an institution, in Philadelphia we can't even get kids to an institution in a van without horror stories. The vans, that transport the child from the court to the institution were absolutely horror places—rapes, assaults, you name it and it went on in the van.

Let me close with a statement of what sorts of specific proposals and what kind of outlook I think would be most appropriate in an effort at massive decarceration. I talked several times on the issue of decarceration to different types of audiences. Inevitably, if I'm talking about decarceration of the criminal, there is always a question from the audience to the effect: look, here is this case that I know—now don't you want to incarcerate him? What about the four-time rapist, the three-time murderer; each of us can imagine someone whom we may have to incarcerate. The trouble is that we begin with that kind of question and then we go on, all too often, to erect an incredible network of institutions. We begin with the point that there is this one person we think has to be incarcerated, and we end with a network of institutions which incarcerate all kinds of people who, by no stretch of the imagination, need to be incarcerated. Judge Dembitz has raised, in a sense, horror stories. She can conceive of—indeed, she knows—she deals with each day—someone who seems to need incarceration. Her strategy too is to suggest, look, you know, if we're talking about incarceration, here is
this horror story, this kid who's been into drugs, etc., etc.—and that, in a way, becomes her method of telling us that incarceration as a whole is necessary. Now, my approach would be quite different. I overstated her point, but I think you understand.

JUDGE DEMBITZ: I'm glad you moderated that; I was going to have to say something.

PROFESSOR ROTHMAN: I have overstated it—but you can understand, from the brevity of time that I have, why I took that license.

JUDGE DEMBITZ: My general conclusion about incarceration, I'm generally opposed to . . .

PROFESSOR ROTHMAN: But allowing me that overstatement, let me suggest another way of looking at this, which is not to begin with your horror story of who has to be incarcerated, not to look at the end of the road of decarceration, but to start at the beginning by saying: look, how many can we get out?

Stop worrying about the end of the road where there may be someone left, but begin where you can begin by saying: look, under the kinds of conditions that we have now, how many people can we let out? How many can go?

When we come to the end, to that last horror story, perhaps at that point we'll have to sit down and say: well, look, maybe we need some remnant of an institution left. But don't let that end of the tale, in a sense, color your sense of where we begin.

It happens to be, when one deals with decarceration, a very nice area for reform, because there is nothing quite so expensive as institutionalization. The New York State Training Schools cost us, per child per year, ten thousand dollars. Now, that's a lot of money on each kid per year. (It doesn't even include, by the way, cost of capital construction.) Ten thousand dollars a year—can we begin to imagine other ways of spending ten thousand dollars a year per child who faces the kinds of problems that come up?

The heroin addict—just to take the example that seems to be on the floor most today—can we conceive of ways of spending ten thousand dollars and not incarcerating him? Well, possibly we should give him his dosage, and some funds so that he doesn't have to rob anybody. That that would be less costly goes without saying. Not only do we save the costs of his incarceration, but we'd also save the sixty dollars a day he's getting through crime.
What about battered children? Well, again, Professor Strauss has his point: what do you do with that twelve month old who comes in battered? Do you really want to put him through the rigmarole of criminal procedures? But turn the question around a bit—with ten thousand dollars a year, do you think, in fact, that you could change that home so that it might not occur? Yes, it's difficult; perhaps there's such a level of social pathology that you can't affect it; but in many other instances, a changed allocation of ten thousand dollars per year per child will very much help move us to decarceration. If, in the end, there are some remnants left who must go in, then we have to define that as the bankruptcy of our social imagination. We may have to put someone away because we just aren't wise enough to be able to know what else to do with him.

In conclusion, I would want to say that the heritage that we have received from former generations in incarceration is so absolutely terrible and so incredible, that for all the dangers of experimentation, I think we ought to go ahead and try alternatives. No matter how badly we fare, I think in the end the heritage that we would leave the next generation with would be better than the one we live with.

JUDGE MIDONICK: Thank you, Professor Rothman. Now we're impinging upon either our lunch period (which is supposed to begin in twenty-two minutes) or our question period, and we'll have to decide after the next speaker which you'd rather do—delay your lunch or decrease your questions.

At the moment, we have to expect an entirely different approach on a collateral topic from Harriet Pilpel, whose many distinctions are of such number that I can't dwell upon them. We all know that she is one of the leading members of the bar, especially in the field of copyright and publication problems; she's a member of one of the leading law firms in the City; and she's distinguished general counsel to either the world-wide, or the nation-wide Planned Parenthood, and as such she brings to us an entirely different viewpoint of the right to treatment. Harriet?

MS. PILPEL: I too am going to talk about the right to treatment, but I am not going to talk about the right to treatment of those people who are already in the toils of the law. And I'm not going to talk about massive decarceration. It seems to me the basic question is—not what Professor Rothman said: how many can we get out—but how many can we keep from going in in the first place?

We've been talking about thousands of children and young people, who are already in trouble, and we are discussing what to do about them. But I'd like to talk, for a few moments, about the hundreds of thousands, if not millions, of young people, who are going to get into trouble because of the
legal restrictions preventing them from having access to vitally needed social and health services.

Judge Dembitz—in fact, all of the speakers talked of a right to treatment as against a right to freedom. To me the right to freedom and the right to treatment are often synonymous. Because of our laws with reference to treatment (I'm now talking primarily of medical treatment to teenagers), we are forcing teenagers into positions where they can't get treatment, so they have a freedom only not to get treatment, but no freedom to get treatment.

I am reminded of an article which appeared in the *American Bar Association Journal* a couple of years ago, under the inviting title of "Compulsory Contraception for Teenagers." The article was written by three members of the same family—a social worker, a lawyer, and a doctor, I believe. Their position was that any teenage girl who had one or more out-of-wedlock pregnancies should be forced to have an I.U.D. inserted, i.e., compelled to use an I.U.D. Yet at that time the law of the State of Ohio was such that there was grave question as to whether a teenager would be allowed to have an I.U.D. inserted even if she asked for it.

There's apparently something in our entire heritage (and here I go with Professor Rothman and decry) that makes us prefer compulsion to voluntarism. Why this is so, I don't know; I do know that we've preserved on our statute books, and there have existed under our common law, rules which preclude teenagers from getting absolutely necessary medical treatment, regardless of what the treatment is for, unless they can first get the consent of their parents.

I recognize that involved in any problem of supplying needed health services to minors there are at least three interested parties, namely the children, the parents, and the state. But unfortunately, all too often our attempts to work out a balance between these three interests seem to be downright schizophrenic.

Let us look for a moment at the basic rules or at least what it is assumed the basic rules are. It is assumed that at common law (no statute in New York or in so far as I know, none in any other state so provides) minors (meaning people under twenty-one) may not get medical treatment of any kind without parental consent. To the extent this was the rule (and there were exceptions to it) it derives from a time when children were viewed primarily as the property of their parents, when the Latin maxim was *parens potestas*. Subsequently, the element of *parens patriae* came into being and increasingly the state has come to be regarded as the ultimate protector of the rights of children.

A few years ago, the American Medical Association became one of the chief exponents of a kind of civil disobedience (a most unlikely ally, I admit, for some of the other exponents of civil disobedience). In both the *American Medical Association Journal* and in the news, the official Association
position was that except for a very few states, there was considerable doubt as to whether doctors could, without parental consent, examine or prescribe for minors as to venereal disease. We urge physicians, whatever the law, to give V.D. treatment and diagnosis to minors whether or not they have parental consent. In sum, the Association's stand was that whatever the law, the physician's primary obligation is to protect and preserve the patient's health.

Well, apparently the country has agreed with the AMA, at least so far as treatment of minors for venereal disease, without parental consent, is concerned. Although there were only eight states which explicitly so provided three years ago, there are now at least forty-seven states, including New York, which permit minors to obtain diagnosis and treatment for venereal disease without parental knowledge or consent.

However, we have no such clear rule with reference to medical treatment for a variety of other things. Yesterday in the New York Times account of the Report of the Population Commission, the Commission is quoted as saying that "adolescent pregnancy offers a generally bleak picture of serious physical, psychological, and social implications for the teenager and the child. Once a teenager becomes pregnant, her chances of enjoying a rewarding, satisfying life are diminished. Pregnancy is the number one cause of school dropout among females in the United States. The psychological effects of adolescent pregnancy are indicated by a recent study that estimated that teenage mothers have a suicide attempt rate ten times that of the general population."

That's only a small part of what the Commission Report has to say with reference to the disastrous results, to society and the individuals involved, of the lack of a clear rule entitling teenagers to family planning information and services without parental consent.

Of course, there have always been exceptions to the common law rule about rendering medical service to minors without parental consent. Emergency was one exception. (I personally think a sexually active teenager with no access to contraceptives presents an emergency situation, but it hasn't yet been so held.) Emancipation has also always been an exception. More recently, some courts, sensitive to the pressing realities and needs of today in the family planning area, have developed a "mature minor" rule, to the effect that a minor, who understands the nature of the treatment which he requests and which treatment is for his benefit, may be given such treatment without parental knowledge and consent.

However, the legislatures of the State of New York and of about half of the other states have not yet passed laws dispensing with parental consent for minors' medical treatment in numerous contexts where the minor's needs are urgent and the requirement of parental consent stands in the way of their being met. There are, however, twenty-four states which have now amended their laws to permit minors to obtain a variety of medical services
in addition to treatment for venereal disease without parental consent. From the standpoint of health and welfare, an unwanted pregnancy may be at least as damaging to the present and future welfare of a young girl as venereal disease. A number of states do now permit, by a specific statute, contraceptive services to be rendered to minors without parental consent. Some states dispense with parental consent, in connection with drugs, giving blood, and voluntary commitment to mental institutions. A few states have adopted overall Medical Practice Acts for Minors, which permit all minors or all minors over a certain age (e.g., in Alabama, over 14) to give effective consent to needed medical treatment without involving a parent. Minors under the age specified may also give effective consent where, in the opinion of a physician or social agency his or her health need so requires.

It seems to me absolutely insane for the law to require parental consent for health treatment which, if the parent denied consent, would be ordered to be given to the minor. We do not require parental consent to a child’s attending school. Indeed, if a parent doesn’t consent, in the absence of specific circumstances his refusal of consent will be overridden. A minor surely has as much right to health as to education and requiring parental consent results only in infinitely greater jeopardy to the child who refuses to involve the parent. In the family planning area, such results can be anything from self-abortion to illegal abortion, to suicide or attempted suicide, unwanted, battered or neglected babies, etc.

To the extent that under our present law young people are denied the right to medical services they request and need, they may become part of that unfortunate group of children in need of supervision or that state regulation which the preceding speakers have shown the state is incapable of in any way which really meets their interests. The young people whom this myopia affects are far more numerous than are those of the much smaller population to which the other speakers have addressed themselves.

JUDGE MIDONICK: Now, please address yourself to the member of the panel you wish to answer the question. Sir?

QUESTION: Judge Dembitz, this is for you. In the “crash approach,” you defended, so far, the institutions for doing something—rehabilitating and treating minors. Wouldn’t the proper thing to do be not to make an adjudication in the first place?

JUDGE DEMBITZ: I don’t accept your premise. I tried, though I didn’t originally plan, to give a story of my visit upstate. I realized it might be rather dull simply to come down with facts; that’s always rather uninter-
esting, to talk about what's actually going on rather than on interesting theories—but I decided to describe my visit to Otisville because Professor Strauss was addressing himself to the need to look at the facts. I know that we burnt witches under the formula of saving souls and I know that we bombed Viet Nam under the formula of saving democracy, and I agree that the mere formula that the state is acting to save children, is no protection to anyone. I feel emphatically that those who are interested in the gap between promise and performance have to keep on looking at the facts, reporting the facts, and litigating and agitating. And it was because of that, that I decided to come down to the facts with regard to my narration of what I saw at Otisville.

Professor Strauss pointed to the fact that there are needs for improvement, which of course nobody could possibly question, at any point, at any institution, in any society.

JUDGE MIDONICK: I think the gentleman has put his finger on the nub—should the courts lose jurisdiction altogether over ungovernable children, because they can’t do much about them, is what I understand the question to be.

JUDGE DEMBITZ:—if they can’t.

JUDGE MIDONICK: If they can’t. But I want to remind you that in New York at least, and I assume by the decisional law in other states, past and future, it’s coming to be quite evident that just because the child is in the toils of the power of the court doesn’t mean that the court can do anything it wants with him. There are three Appellate decisions to that effect, one (which Professor Paulsen has in his book) way back in 1953, called In re Sippy, 97 A.2d 455 (D.C. Mun. Ct. App. 1953) where a seventeen year-old or eighteen year-old girl wouldn’t take psychiatric treatment that her mother insisted upon and was spiteful to her mother, and for these minor aberrations she was considered ungovernable—that might be a proper jurisdictional basis, but it doesn’t mean the court can do what they did. They took her away from her job and put her in a home for disturbed children. And the appellate court dismissed the case, saying that the court had abused its discretion in what you know as sentencing in the adult courts, but what’s known as disposition in the juvenile courts.

I think that the courts ought, and the legislatures ought, to take more account (I think Judge Dembitz agrees with me) of how to handle, and what to do to, or for, these youngsters, rather than just to have a hands-off attitude. There are many cases where you can do a lot of good by talking to a
child in a court setting, or having an intake probation officer settle matters, or controlling a parent who's misusing a child by insisting that the child have no companions at all, good or bad, and by setting an unreasonable curfew. Many times, when a parent has brought a child into court, I have ordered the parent to permit the child more liberty, and straightened it out; and even insufficient probation supervision and mere psychiatric evaluation has helped frequently and considerably. And if I had more time I'd tell you some stories, including the one Harriet knows about—how I was kissed in open court by a fourteen year-old girl who was in deep trouble, which we were able to solve by jurisdictional processes of the court which were not heavy-handedly used. Next question?

QUESTION: The right to treatment versus the obligation to accept treatment was an issue that was raised and touched upon. Would there be some guidelines in regard to cases, that some members of the panel might put up?

There have been other issues, in terms of birth control for teenagers, and Judge Dembitz addressed herself to treatment for a kind of medical condition where it's questionable whether the state can give this kind of treatment. On very specific health issues, there have been some designations made, but there's a lot of open area that's still quite touchy and I was wondering whether there might be some guidelines?

JUDGE MIDONICK: Is there someone who wishes to comment on the power of the state to compel treatment for those youngsters who don't want it?

JUDGE DEMBITZ: I would say that I certainly agree entirely with Harriet that volitional treatment is better than compulsory and that the first step, of course, in all these matters, is to extend amply and fully the possibilities of voluntary treatment to minors.

MS. PILPEL: I was going to say the same thing. The fact is that, in addition to the legal barriers, to which I referred before, there are all kinds of factual barriers. Very often a teenager will seek service but there is no place where the service is available. For example, we don't have, by and large, teenage clinics for kids with special problems. The family planning associations are developing special services for teenagers in that area, but very little, as far as I know, is being done to set up such services in the mental health area—not very much in the drug addiction area—and virtually noth-
ing in the area of general medicine except insofar as the Society for Adolescent Medicine is able to get its membership, in the various hospitals, to set up "teenage clinics." When such clinics are set up and are run in a way that is acceptable to the teenager, there's real communication between the clinic physicians and the young people who come to the clinic. By and large they're not sent home by such clinics, and told to come back with a consent form which the parent has to sign (in which case some go home and return with forms they've signed themselves and many don't come back at all). Where there is a welcoming set up, there has been no problem, as far as I know, in getting teenagers to accept medical treatment. So I think that it's almost a red herring to talk about the obligation on teenagers or young people to accept treatment. As far as anything from psychiatric to purely physiological treatment is concerned, give them a chance—give them the legal right to such treatment—and all the experience in the field indicates not only that they don't have to be pushed but that they will enthusiastically seek it.

JUDGE MIDONICK: We've had many cases about compulsory treatment of teenagers. A seventeen year-old girl who was addicted for two years with heroin didn't want to be treated, and had to be arrested and brought in because her child of one year had to be removed from her and the court had jurisdiction over her as a neglecting parent. She was frightened of treatment—she was frightened of withdrawal symptoms—and I compelled her to go to Bellevue for detoxification for nine days, and it was so simple that she thanked me afterwards. It took only three days to detoxify her, and the psychiatrist there said that she would immediately, although physically detoxified, go back to "needle" use, because of her psychological condition, and it was a question of forcing her to take treatment now for the sake of her baby, who also is a human being with rights, which people seem to forget. And this girl didn't want to, really, but she was now in a condition where she could, and the Salvation Army came to her rescue by giving her the open setting of the Stuyvesant Residential Treatment Center (there are many such resources) and I placed her under an injunction and told her to stay at the Center until I let her out. And her only request at this point was that her mother, who was also an addict at age 36, go with her, which we arranged too, and two months later they were both happy and under residential treatment. So while they're forced to do this, on pain of being locked up, once they get there they seem to be all right and they say they're happy and they come in and they're in an open setting where they're required by an injunction not to leave, and it's not a prison and they're not with rapists and purse-snatchers and what-not, less desirable people for them to associate with, who are the hard core addicts frequently found in the narcotic addiction program. That program is and should be the last resort of intensive and confining compulsion for treatment. Yes, Sir?
QUESTION: I was wondering if Judge Dembitz would address herself to an issue that Professor Rothman raised. You've both raised situations, and I'm sure there are many, in which you talk about people who are grossly addicted or people who have committed rape—and these cases are extreme cases—these people require facilities which are exceptional facilities. Are there cases—are there types of cases—where you, Judge Dembitz, would start decarcerating—decarcerating rapidly?

JUDGE DEMBITZ: The sending of a child to a State Training School is the absolute last step after every other possibility has been tried by the family court. The entire emphasis of the family court is on decarceration. I didn't address myself to that because, as far as we're concerned, this is routine, basic, undeniable—and never challenged—by a judge, by a lawyer, by anyone. The first step is always—and there are few statements I would make unequivocally about our courts because one judge isn't sure of what some other judge is doing—but one statement I can make unequivocally is that the first step in the treatment of a child is always to see whether he can make it on parole or probation—with a very rare exception, in that if a child is very heavily addicted to drugs, he will frequently himself wish to be immediately in the juvenile detention center, and if he does not wish to be, the court may send him there, or for detoxification to the Harlem Hospital Drug Fighters, or to some other place where he can't walk out. But with that exception, which I would consider—which is considered—an emergency situation, the first step in treatment is invariably to see whether that child can succeed in his own home. Does that answer the question?

QUESTION: I don't believe that there are any children who are presently being sent away for treatment that could be kept from being sent there.

JUDGE DEMBITZ: No, that isn't true. I think that there are facilities that we should have—and, which incidentally, we are getting under federal funds, even though not under state funds—which, if they were built up sufficiently—if the program was built up sufficiently—there are children that we could put there instead of at the State Training School, so that I think it is true that there is a lack of facility for a certain type of child, who could be kept in the community in a residence, but not for the type I was talking about. As I said, I think that many children who are placed in the Training School are of the type that would not—have not succeeded, and predictably will not succeed in an open, urban facility. That's why I quite boringly specified exactly where my boy, whom I was riding up to Otisville with, had been. And that I just gave as an example. Those cases
are legion. They are *not* horror stories. They *are* the bulk of the training school placements that we deal with. It is not any individual horror story that we have a teenage heroin addict who has been at Phoenix House and has split. That's typical.

**JUDGE MIDONICK:** Now, it's past noon and I've been asked to say that anyone who wishes to leave—I know, we're going to have further enlightenment, and questions too if anyone wants to stay, but if there are those of you who wish to be in on the beginnings of the luncheon at Low Memorial Library, it will not be a discourtesy for you to leave now, and since all of the professors here are interested in remarking about the last question, anyone who wants to delay lunch for a few minutes can stay with us, because we'll all stay with you!

**JUDGE DEMBITZ:** Professor Rothman's suggestion that we give heroin or methadone to teenagers is a horrible suggestion. An accusation that this is race genocide would be very well placed. I don't think that fifteen year-olds can be abandoned to the use of heroin or even to the use of methadone. It may be that in an individual case it is so impossible to do anything with that boy, even though he's fifteen, that you would resort to this. But certainly to prescribe heroin for a fifteen year-old horrified me and I hope we don't come to that counsel of despair on a broad scale.

**PROFESSOR ROTHMAN:** First, Judge Dembitz's plea for institutions would be more persuasive if we knew what to do for addicts we incarcerate. We have no effective treatment for them. And note too how distribution of the drug would at least minimize the number of addicts who die from contaminated drugs, or diseases like hepatitis, or from a policeman's gun. Secondly, a lot of the argument is, of course, as Judge Dembitz says, definitional. We always send those "who have not succeeded and will not succeed." Well, how does one define "have not succeeded?" Failure once on probation? Twice on probation? Three times or four times or five times?

**JUDGE DEMBITZ:** Five times is more like it.

**PROFESSOR ROTHMAN:** Well, the Scandanavians really do it that way, but when they talk about failure they really mean failure—you know, very high recidivism rates—there's no guess there, short of purely massive failure.

**JUDGE DEMBITZ:** May I interject one word? The question is how long are you going to let this child deteriorate. If you're talking about an
adult, that is one story. If you're talking about a kid, who is going in and out of drug facilities, and growing more and more addicted, I think that's something else. And I don't think you can wait until the kid takes an overdose—and I'm not telling a "horror story." We have those.

JUDGE MIDONICK: Professor Strauss has been asking to come forward for a moment—or more than that. Please do.

PROFESSOR STRAUSS: It is not fashionable to try to pour oil on waters any more these days. But there's one thing that it seems to me I ought to make clear, if it isn't clear already, about the gap between promise and performance. What I've been talking about is not a gap which is in any way attributable to the judges of the family court of New York State. It is a gap which is attributable, if anywhere, to the legislature of this State, or to the more or less theoretical deficiencies in what we can do, through institutions. The judges of that court are faced with what is a Hobson’s choice—in all of these cases it’s unavoidable. What shall we do with a child who is in utterly terrible straits—and I have a place to send him—the only place I have to send him, because other places have been tried and have not worked. It may not do any good for him. Or else I may put him back on the street where he may take an overdose. And I suppose what I was trying to suggest, if I may return to the comments which have been made lately about extreme social planning, is that there is a certain amount of hubris in a society that says we can’t do anything for a child; without knowing whether we can do anything for a child, we will nonetheless take him in and hide him away.

Judge Midonick said at an earlier point that he wondered—where does society’s right to protection arise? I think that underlies much of the dilemma. I think that in fact what we intend to do with these laws is to protect ourselves from these children, and I ask whether that does not restrain us to the criminal area, where if we’re not comfortable with this notion we’re at least used to it? Let us not pose to the family court judges these agonizing choices of having to send children to places where they know, in all likelihood, they won't be able to get very much help.

JUDGE MIDONICK: Society's right to protection really comes in another area entirely, it seems to me, if you want to get down to the bottom of it all, and that is to teach children to read, write, and earn a living. And that, the schools are failing to do, and that, the children and the juvenile court judges all over the country have to deal with. It's probably a worse problem than any, other than the problem of truancy, the reasons for it and the way to cure it. It's too big a topic for us now, but I must tell you if children weren't ashamed to go to school and weren't failing to learn how to read, we wouldn't have all this trouble, and while we could talk for
hours about saving the lost generation, I'd like to prevent another, the next, generation from being lost, myself—that's where the real trouble lies.

Excuse me—Dean Paulsen, would you like to help us?

DEAN PAULSEN: I speak with subjectivity, but I would like to say that this has been an unusual meeting. I have attended more meetings on this subject than I care to remember, and what I hear people saying in different ways—it was a theme that I tried (you'll pardon the autobiography) that maybe we should turn our attention to our kind of concern about what we can do to help children—is what kinds of techniques do we have, what kinds of money can we get to affirmatively interfere with their lives to make them better. That's been the theme of the juvenile court world for sixty years and more.

And what I hear this morning is something I find quite refreshing—and I'm very glad I made the trip from Charlottesville to hear this—and is what we ought to concentrate on for ten years—it is simply how to minimize the harm the system does.

JUDGE MIDONICK: I must say, before Professor Strauss resumes, that the book by Professor Rothman, if you wish to find it, is published by Little, Brown (1971) and it's entitled The Discovery of the Asylum. I must tell you also there's an unpublished book of my own which will be published next week by the Practicing Law Institute, 1133 Avenue of the Americas, NYC 10036 entitled Children, Parents, and the Courts: Juvenile Delinquency, Ungovernability and Neglect, which has much of the information that has been given here today, plus 600 footnotes, which is helpful, and since I'm announcing it here, and there are order forms here ($15, Order #C11130), I must say that anybody who wants to order this book, the royalties thereof will go to the interests of Columbia Law School—at least today's orders! And as much as I can have my assistant author agree also, to the University of Virginia Law School too, if they're not so rich they don't need any money! Yes, Professor Strauss?

PROFESSOR STRAUSS: Well, in response to what you said, I think it's the answer to the lady's question about voluntary treatment—in some sense what we have to do is turn these institutions around to the point where there is discontent about their ability to help kids rather than in their ability to hide them away.

JUDGE MIDONICK: Thank you all very much.