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PINS JURISDICTION, THE VAGUENESS DOCTRINE, AND THE RULE OF LAW†

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Statutes governing Persons in Need of Supervision[1] (PINS) often include a wide variety of conduct or circumstances from which courts may infer the need for intervention in a child's career. The Ohio "Unruly Child" provision illustrates the breadth that such legislation may attain:

> As used in . . . the Revised Code, 'Unruly Child' includes any child:
>
> (A) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of his being wayward or disobedient;
>
> (B) Who is an habitual truant from home or school;
>
> (C) Who so deports himself as to injure or endanger the health or morals of himself or others;
>
> (D) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority;

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1"Persons in Need of Supervision," or PINS, is but one of the statutory labels used to describe children who disobey parental commands or otherwise behave in a manner illegal only for children. *See, e.g.*, N.Y. FAM. CT. ACT § 712(b) (McKinney Supp. 1973-74). In Illinois they are called "Minors in Need of Supervision," ILL. REV. STAT. ch. 37, § 702-3 (1972); in Florida "Children in Need of Supervision," FLA. STAT. ANN. tit. 5, § 39.01(11)(a)-(c) (Supp. 1974). Each label has generated its own acronym, but PINS will be used to describe this jurisdictional category throughout this discussion.

A substantial number of jurisdictions, including Indiana, do not recognize a separate jurisdictional category for youths who engage in non-criminal misconduct, but include such behavior in their definitions of juvenile delinquency. Indiana Code § 31-5-7-4.1 describes delinquency as follows:

(E) Who is found in a disreputable place, visits or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others;

(G) Who has violated a law applicable only to a child.[2]

As do most laws of this type,[3] the statute covers conduct that is defined with great specificity,[4] with some specificity,[5] and entirely without specificity.[6] It is, moreover, addressed to a wide range of potential complainants, among them parents who think a child has failed to accept their control, neighbors who find a juvenile engaging in dangerous activity, police officers who see a child in company with criminal or notorious persons, and social workers who conclude that a young person is in circumstances dangerous to her health or

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"Delinquent child" defined.—The words "delinquent child" shall include any person under the age of eighteen [18] years who:

(a) Commits an act which, if committed by an adult, would be a crime, except:

(1) first degree murder or a lesser included offense in a case in which the offender was charged with first degree murder; or

(2) violations of any of the traffic laws of the state or of any traffic ordinances of a subdivision of the state if committed by a person sixteen [16] years of age or older;

(b) Is incorrigible, ungovernable or habitually disobedient and beyond the control of his parent, guardian, or other custodian;

(c) Is habitually truant;

(d) Being under the age of thirteen [13] years is present upon any street, highway, park, public building or other public place between the hours of 10:01 p.m. and 5:00 a.m. unless he is accompanied or supervised by his parent or legal guardian or other responsible companion at least eighteen [18] years of age delegated by said parent or legal guardian to accompany him; or having attained the age of thirteen [13] years but not the age of eighteen [18] years is wandering, standing or loitering about any street, highway, park, public building or other public place between the hours of 11:01 p.m. on Sunday through Thursday and 5:00 a.m. on Monday through Friday or between the hours of 1:01 a.m. and 5:00 a.m. on Saturday and Sunday, unless he is accompanied or supervised by his parent or legal guardian or other responsible companion at least eighteen [18] years of age delegated by said parent or legal guardian to accompany him. This subsection does not apply to a child while in a public building or place attending or participating in or returning home from a religious, educational, entertainment, social or athletic event or lawful employment . . . .

IND. CODE § 31-5-7-4.1 (1976). As will appear, the points made in this article apply with equal, if not greater, force to statutes of this type.

[2]OHIO REV. CODE ANN. § 2151.022 (Page 1976).

[3]As of July, 1975, twenty-seven jurisdictions employed "omnibus clauses" making presentation of unspecified danger to oneself or others a ground for PINS jurisdiction and at least three included living an idle or dissolute life or being in danger of doing so. *See* IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR, Appendix A (1977).

[4]*E.g.*, marriage without parental consent.

[5]*E.g.*, failure to subject oneself to the reasonable control of one's parents.

[6]*E.g.*, so deporting oneself as to endanger one's own or another's morals.

morals. The statute also allows broad charges to justify action by the court when narrower allegations cannot for some reason be proved; thus, if a child alleged to have been a party to burglary cannot be shown to have participated knowingly in the theft, the petition may be amended to charge her with associating with criminals.[7]

It is also plain that the Ohio statute embodies not only broad and ambiguous but potentially inconsistent standards with respect to behavior that makes children "unruly." A child who conforms passively to her parent's expectations may nevertheless be said by police officers, social workers, or judges to be "in morally dangerous circumstances" where, for example, the parents are unmarried, drink heavily, or gamble in the home. The potential for inconsistency arises from the grant of authority to various sources. Those subject to multiple grants of such authority can only hope that each grantee will construe similarly what is proper behavior on his or her part.

The breadth, ambiguity, and potential inconsistency of the Ohio statute is not accidental. For reasons that will be discussed below,[8] these characteristics have traditionally been thought necessary and desirable in juvenile court legislation. At the same time, these characteristics have of late led to the claim that such laws violate due process because they are "void for vagueness." The following discussion will analyze the relationship between the legal notion of vagueness and that aspect of juvenile court jurisdiction concerning respondents who are "ungovernable," "beyond the control of their parents," or the like. Such provisions are found in most juvenile codes, although in some states they are included within the definition of delinquency while in others incorrigible children are classified as "Persons in Need of Supervision" or some similar description.[9] Since this article is concerned with the regulation of parent-child relationships rather than with the jurisdictional category in which it appears, the following analysis is generally applicable to both delinquency and PINS statutes dealing with ungovernable children. Its purpose is to demonstrate that legal supervision of the parent-child relationship cannot be undertaken consistently with the rule of law.

The argument will proceed as follows. The first part will review the relatively well understood connection between statutory definiteness, legal justice and the rule of law. This traditional approach to criminal justice will

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[7]Gonzales v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), *judgment vacated and remanded,* 416 U.S. 918 (1974) illustrates this strategy. Eight children were taken into custody in connection with an assault on a young girl, which would ordinarily make out a delinquency charge. They were, however, ultimately charged with being in "danger of leading a lewd and dissolute life" under California's equivalent of a PINS statute. Moreover, many juvenile codes freely allow amendment of petitions, not only from one charge to another, but from one jurisdictional category to another. On this practice, *see* W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH 128-29 (1972); Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 COLUM. L. REV. 281, 308 (1967); Note, *Minnesota Juvenile Court Rules: Brightening One World for Juveniles,* 54 MINN. L. REV. 303, 326 (1969).

[8]See text at notes 35-40 *infra.*

[9]See note 1 *supra.*

then be compared with a type of order characterized by imprecise directives, substantive justice, and status relationships, which was largely reflected in the juvenile court's belief in the need to focus on the child rather than her acts, and derived from a vision of the parent-child relationship as essentially one of status. This comparison will reveal that the juvenile court undertook an inherently contradictory enterprise by attempting to supervise the parent-child relationship through forms drawn from legal justice and the rule of law while seeking at the same time to secure substantive justice. The effort to resolve this contradiction created the problem of vagueness in PINS laws.

The second part of this essay works toward a similar point using a different method. The essence of the argument is that there are contradictions within the parent-child relationship itself and within the rule of law. These contradictions confront each other within the PINS jurisdiction and generate an unbreakable paradox.

The paradox leads to consideration, in the final part, of whether supervision of the parent-child relationship according to the rule of law has consequences fundamentally different from a similar effort at supervision by an inquiry directly into dangerousness. The conclusion argues that, traditional theory to the contrary, the two models are not antinomies and that the paradox discovered in the initial analysis arises again at this somewhat higher level of abstraction.

STATUTORY DEFINITENESS, LEGAL JUSTICE, AND THE RULE OF LAW

It is a commonplace of Anglo-American law that a statute may not be so indefinite in its language "that men of common intelligence must necessarily guess at its meaning and differ as to its application."[10] Failure to satisfy this requirement not only offends notions of wise legislative policy,[11] but may lead to the invalidation of both civil and criminal laws as "void for vagueness."[12] Imprecision offends a number of principles relating both to fairness to individuals who may run afoul of the law and to the manner of political organization. The rule of statutory definiteness is designed to assure that persons will be free from coercive intervention for their behavior unless their conduct has been previously proscribed and the fact of proscription was knowable. More generally, requirements of definiteness are related to the notion that governments operate by rules; that the rules are known or at least knowable provides security for the fact of their existence in the first instance.

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[10]Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[11]*See, e.g.*, L. FULLER, THE MORALITY OF LAW 33-94 (1964). *See also*, E. FREUND, STANDARDS OF AMERICAN LEGISLATION 222-23 (2d ed. 1965), for evidence that even a constitutional but vague statute may not serve the legislative purpose.

[12]*See generally*, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

Correlatively, requirements of specificity serve to protect the autonomy of the governed by setting forth, publicly and in advance, the areas of proscribed activity. The proscription of specific acts and the remaining area of autonomy together constitute the relationship of citizen to state.[13]

Requirements of certainty, prior existence and notice of rules are indeed a logical corollary of the rule of law or principle of legal justice which operates throughout Anglo-American law.[14] The rule of law implies that legal commands are uniform and general; that they cover all situations within the class they define and apply to all persons within those situations. The conditions of statutory definiteness serve these same functions, and to the extent they are fulfilled, justice is impersonal and abstracted from the immediate source of authority. If a law is certain, the exercise of power can be considered separate from the person or the authority exercising the power; accordingly, individuals before the court may be satisfied that their conduct is punished because of previously established rules and not on the basis of rules fashioned on the instant for their particular disadvantage. By the same token, their punishment is not the product of the judge's greater social or political power but rather of rules that govern both the individual and the judge's exercise of power.

On the other hand, if a law is uncertain in its meaning, the distinction between law-maker and law-enforcer collapses. The process of interpretation becomes indistinguishable from the process of law-making and the exercise of judicial authority becomes legislative in character.[15] Lack of specificity in the rules obscures the controlling force of those rules independent of the judge. Rules which do not satisfy a minimum degree of specificity fail, therefore, to eliminate to both the experience and the fact of personal domination because their application appears to and may depend entirely on the subjective judgment of officials.[16]

Finally a regime of rules or of legal justice can be contrasted with substantial justice, in which specific rules for decision-making do not pre-exist the time of decision and the rule applied at the time is wholly instrumental in

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[13]Fuller expresses this notion:

> [T]here can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible. . . . As the sociologist Simmel has observed, there is a kind of reciprocity between government and the citizen with respect to the observance of rules. Government says to the citizen in effect, 'These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.'

L. FULLER, THE MORALITY OF LAW 39-40 (1964).

[14]*See* R. UNGER, KNOWLEDGE AND POLITICS 89 (1975).

[15]*See id.* at 89-91.

[16]That government by personal domination is fundamentally inconsistent with our most cherished political values hardly requires stating. As the Supreme Court remarked long ago in striking down a statute giving certain officials an unlimited power to grant or deny licenses, "[T]he very idea that one may be compelled to hold his life, or the means of living, at the mere will of another, seems intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

character. Under substantive justice, each decision is justified because it is best calculated to advance some accepted objective, such as prevention of future wrongdoing by a person. By contrast, in a system of legal justice the function of law-making must antedate adjudication because the latter operates by applying previously established rules of prescriptive quality to a given case, whether or not reliance on those rules will under immediate circumstances best serve the general objective.[17] The contrast between law ordered by prescriptive rules and law ordered by instrumental rules is commonly understood as, at base, a contrast between the goal or value of individual freedom and the goal or value of social protection. For example, an inquiry directly addressed to whether a person is dangerous rather than whether she has acted in a given way may in fact better facilitate discovery of persons who require intervention than a regime of prescriptive rules. It can only do so, however, at the price of great intrusiveness into the lives of those who are subject to the inquiry and of great insecurity as a result of the lack of notice of the circumstances that will lead to official intervention. In this respect, adherence to the rule of law is though to define the distance between state and individual in such a way as to limit sharply the government's control over its subjects.

Requirements of definiteness also preserve the relationship of individual to authority in non-judicial circumstances. An imprecise statute not only fails to define the appropriate scope of governmental intervention when a case comes to court but, regardless of the construction actually applied by courts, compromises the exercise of autonomy by citizens who wish to avoid arrest by the police and trial at the instance of prosecutors. The cautious person gives the law a wide berth, realizing that the costs of approaching the margin are very great. Moreover, the principle that laws be impersonal is severely compromised at the police level, since vague statutes are likely to be enforced against those whose personal characteristics excite official disapproval.[18]

Substantive Justice and Status: The Juvenile Court Ideal

The function of the vagueness doctrine—control of official power and provision of notice to citizens—thus appears as the antithesis of the ex-

[17] R. UNGER, KNOWLEDGE AND POLITICS 88-91 (1975). The insistence on legal justice in criminal cases is reflected not only in the vagueness doctrine itself, but in the prohibitions against ex post facto legislation and bills of attainder. U.S. CONST. art. I, § 9. In civil cases, the vagueness doctrine also applies, and—while there is a greater scope for creation of rights or obligations—the common law process itself tends to restrain such occurrences.

[18] As the Supreme Court observed in declaring unconstitutional a Jacksonville, Florida vagrancy ordinance:

> Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts . . . . It results in a regime in which the poor and the unpopular are permitted to stand on a public sidewalk . . . only at the whim of any police officer.

Papachristou v. Jacksonville, 405 U.S. 156, 170 (1972). *See also* Thornhill v. Alabama, 310 U.S. 88 (1940); Grayned v. Rockford, 408 U.S. 104 (1972).

perience of personal domination. The doctrine itself comes as close as law can come to a definition of what is not law.[19] In most contexts, both the rule of law and its corollary requirement of statutory definiteness are accepted without question, although their precise meaning in any given instance may be disputed. General acceptance flows from the conviction that social order achieved by personal domination is intolerable. This conviction has not, however, been universally held. Domination is the organizing principle of status relationships, in which law serves principally to confirm the existence of the relationship and perhaps to limit the exercise of domination in matters of detail. The archtypal status relationship was that of the early Roman father over his children,[20] and it was this relationship which Sir Henry Maine used to identify the existence of status relationships in other areas.[21] The opposition of status or personal condition to the rule of law and to the doctrine of vagueness in particular was explicitly stated by Hayek:

> In fact, as planning becomes more and more extensive, it becomes regularly necessary to qualify legal provisions increasingly by reference to what is 'fair' or 'reasonable'; this means that it becomes necessary to leave the decision of the concrete case more and more to the discretion of the judge or authority in question. One could write a history of the decline of the Rule of Law, the disappearance of the Rechtsstaat, in terms of the progressive introduction of these vague formulas into legislation and jurisdiction . . . . It means in effect a return to the rule of status, a reversal of the 'movement of progressive societies' which, in the famous phrase of Sir Henry Maine, 'has hitherto been a movement from status to contract.' Indeed, the Rule of Law, more than the rule of contract, should probably be regarded as the true opposite of the rule of status.[22]

To the extent, then, that notions of personal domination are valued, the application of the rule of law is problematic, and it is clear that they have not wholly disappeared. The idea of status has certainly not been rejected in perceptions of the family, the institution which typifies the rule of status. Courts still use that term, albeit metaphorically rather than strictly, in talking

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[19] *Cf.* L. FULLER, THE MORALITY OF LAW 63 n.21 (1964).

[20] Maine describes the Roman doctrine of *potestas* in the following way:

> [I]n all the relations created by Private Law, the son lived under a domestic despotism which, considering the severity it retained to the last, and the number of centuries through which it endured, constitutes one of the strangest problems in legal history. . . . [T]he parent, when our information commences, has over his children the *jus vitae necisque,* the power of life and death, and *a fortiori* of uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them.

H. MAINE, ANCIENT LAW 133 (1864).

[21] *E.g., id.* at 156-57, 163-65. Relations within the family have also been offered as the model for the relationship between king and subject in feudal England. *See* Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance,* 18 AM. J. LEGAL HISTORY 208, 208-09 (1974).

[22] F. HAYEK, THE ROAD TO SERFDOM 78-79 (1944).

about the marital relationship[23] and it is directly reflected in juvenile court jurisdictional provisions concerning children who behave so as to excite adult disapproval. The general domination of adults over children is firmly rooted in social theory and in juvenile court theory specifically.[24] Equally important, this dependent status is most significantly political rather than social or economic;[25] it is a deficiency in citizenship before it is one of wealth or prestige. While it may be true that the dependent status of children has been ameliorated in some degree since the turn of this century, adult domination remains the principal characteristic of parent-child relationships.[26] Dependency places young people generally under the care and control of adults. In most instances, the superintending power lies with parents, whose power to regulate their children's lives as they see fit enjoys constitutional protection and is in theory subject to state regulation only in extreme circumstances.[27] The rule of law is by definition external to this relationship; it operates, if at all, only as an analogy.

The principle of the dependency of children to their parents, used by Maine to exemplify status, was adopted by proponents of the juvenile court as the operative model for its activity.[28] In their view, the court would assume

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[23]*See, e.g.*, Bove v. Pinciotti, 46 Pa. D. & C. 159 (1942) ("marriage is not only a contract but a status and a kind of fealty to the State as well").

[24]To be classified as a child, both in law and custom, is to fall into the somewhat ambiguous category of "non-" or "developing-" person, in which one is dependent upon adults rather than autonomous in determining one's course of action. *See* Matza, *Position and Behavior Patterns of Youth*, in HANDBOOK OF MODERN SOCIOLOGY 191 (R. Faris ed. 1964). Youth are, it has been said, not only a minority group but, as for Maine, represent *the* minority group in the sense that their treatment has provided "a paradigm for imputations and policy regarding disliked ethnic factions." *Id.* at 194.

[25]*Id.* at 193. *See generally* T. MARSHALL, CITIZENSHIP AND SOCIAL CLASS (1950).

[26]It has often been observed that techniques of parental domination have generally shifted from physical coercion to psychological manipulation of various kinds, and it may be that the shift coincides with the establishment of juvenile courts in the early part of this century. *See id.* at 193; Bronfenbrenner, *The Changing American Child*, in VALUES AND IDEALS OF AMERICAN YOUTH 71 (E. Ginzberg ed. 1961). This trend has tended to produce greater indulgence and, consequently, greater freedom for children. However, such amelioration does not remove their dependency nor, indeed, substantially modify it as a legal matter.

[27]*See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection . . . .
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> The rights to conceive and to raise one's children have been deemed 'essential' . . ., 'basic civil rights of man' . . . and [r]ights far more precious than property rights.
>
> . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'

Id. at 651.

[28]The principle of youthful dependency was used to justify traditional juvenile court theory by the National Council of Juvenile Court Judges as recently as 1967, in an amicus curiae brief.

> Some of the vociferous critics of the juvenile courts seem to forget what the wise parent knows, for example, that children really are not adults. They do not come to life fully equipped with knowledge and wisdom, like Minerva springing full-panoplied

the traditional parental function of guiding and controlling the youth in the way that a wise parent should have done.[29] In all cases involving children, whether predicated upon criminal conduct, misbehavior wrongful only because of the actor's youth, or parental neglect, the court would assume responsibility for the respondent's socialization.[30]

Reliance on family relationships as a model for official action was perhaps most regularly emphasized with respect to procedural matters. Since parents were not required to use formal process to discipline their children, juvenile courts were held similarly exempt from such requirements; since rules of evidence and procedure were not demanded of natural parents, their

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> from the brow of Jove. They are not like insects which are hatched complete with all the instincts they need to complete their life cycle. On the contrary, human children start life completely helpless and must come to the rights and privileges of adulthood by slow degrees. It is not difficult to see in this failure to recognize that there is a real difference between children and adults the explanation of much of the difficulty which underlies our present problems of delinquency and youth crime. If a child is to be accorded all the rights and privileges of adulthood, what necessity is there for the child to mature? Adults who are themselves immature, children who have never had to grow up, are unable to lead their own children to maturity, in a vicious circle which is nowhere so apparent as in juvenile courts.

Brief for National Council of Juvenile Court Judges as amicus curiae, *In re Gault* 387 U.S. 1 (1967).

[29] *See, e.g.*, Cabot, *The Detention of Children as Part of Treatment,* in THE CHILD, THE CLINIC, AND THE COURT 246 (J. Addams ed. 1925): "Remember the fathers and mothers have failed, or the child has no business [in the juvenile court], and it is when they failed that the state opened this way to receive them, into the court, and said, 'This is the way in which we want you to grow up.' " *Id.* at 249. Similar expressions are found throughout the "child-saving" literature. *See generally* A. PLATT, THE CHILD SAVERS (1969); W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH 5-48 (1972).

This concern was not "libertarian" in complexion. The primary justifying goal of the movement was prevention of future misconduct; those espousing the juvenile court, like those who argued for use of reformatories rather than penitentiaries, assumed that this goal could best be accomplished by rehabilitative rather than retributive devices. Creation of special courts for children was expected to end the "miscarriages of justice" whereby, at the end of the 19th century, youthful offenders "were let off [in criminal prosecutions] because often justices could neither tolerate sending children to the bridewell nor bear to be themselves guilty of the harsh folly of compelling poverty-stricken parents to pay fines." Lathrop, *The Background of the Juvenile Court in Illinois,* in THE CHILD, THE CLINIC, AND THE COURT 290, 290-91 (J. Addams ed. 1957). Moreover, reformation—implying resocialization in a broad sense—was a considerably more taxing process than simple, if highly unpleasant, incarceration in prison. As one of the leaders of the reformatory movement said, "in [many penitentiaries] it is far easier for a prisoner to adapt himself to rules and regulations, preserve correct deportment, and perform a certain amount of labor than to submit to the discipline of institutions which make a constant draft upon his mental, moral and physical powers." S. BARROWS, THE REFORMATORY SYSTEM IN THE UNITED STATES 9 (1900).

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> [T]he proceedings under this law are in no sense criminal proceedings . . . [t]hey are simply statutory proceedings by which the state, in the legitimate exercise of its police power, or, in other words, its right to preserve its own integrity and future existence, reaches out its arm in a kindly way and provides for the protection of its children from parental neglect or from vicious influences and surroundings, either by keeping watch over the child while in its natural home, or where that seems impracticable, by placing it in an institution designed for that purpose.

State v. Scholl, 167 Wis. 504, 509, 167 N.W. 830, 832 (1918).

judicial surrogates were also free to decide matters without regard to strictures applicable in either civil or criminal cases.[31] But viewing the court as a surrogate parent also had a substantive impact. Traditional juvenile court theory extended official concern beyond discrete misbehavior to the condition of the whole child. Those responsible for the creation of juvenile court legislation as well as a considerable number of persons administering juvenile courts believed that official action should reflect the necessities of the child's condition rather than a narrow legal conception of guilt or liability. This "new attitude toward human beings in conflict with the law" was articulated by Judge Miriam Van Waters, among others. The juvenile court, in her view, operated from the belief that "[i]f the offender is *young* the object of court procedure is not to discover whether he has committed a specific offense; but to determine if he is in such a condition that he has lost or has never known the fundamental rights of childhood to parental shelter, guidance, and control."[32] Accordingly, intervention could not depend on establishment of a narrow jurisdictional predicate. The exercise of power would adhere less to what is ordinarily considered the rule of law, but should reflect instead an assessment of dangerousness independent of violation of specific, previously announced norms.

In a real sense, the juvenile court was originally conceived as a system of substantive justice rather than of legal justice.[33] The difference between these two ideal types may be illustrated by supposing the case of a child who engages in disorderly conduct. If she is charged with delinquency, the court would do legal justice by determining whether her behavior violated some law and whether violation of that law constitutes delinquency as that category is defined in the juvenile code. Where delinquency is, for example, defined as conduct that would be a *crime* if done by an adult, the court would adjudicate the child a delinquent only if (1) it is satisfactorily established that she engaged in disorderly conduct, as that term is treated under the general law, and (2) if disorderly conduct is a *crime* if committed by an adult. If, however, under local law disorderly conduct is a *violation* but not a *crime* a delinquency finding cannot be made.[34] In contrast, judicial action engages

[31]The use of the parental model was frequently made explicit by courts reviewing juvenile legislation. The opinion of the Pennsylvania Supreme Court, holding *inter alia* that a summons was not necessary to initiate juvenile court proceedings, can stand for many others: "The natural parent needs no process to temporarily deprive his child of its liberty by confining it in its own home to save and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as parens patriae, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts." Commonwealth v. Fisher, 213 Pa. 48, 53, 62 A. 198, 200 (1905).

[32]Van Waters, *The Juvenile Court from the Child's Viewpoint*, in THE CHILD, THE CLINIC, AND THE COURT 217, 218 (J. Addams ed. 1925). *See also*, Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

[33]For this distinction, *see* R. UNGER, KNOWLEDGE AND POLITICS 88-91 (1975).

[34]This result is by no means hypothetical. In New York, a juvenile delinquent is a person of appropriate age "who does any act which, if done by an adult, would constitute a crime." N.Y.

in substantive justice when its direct focus is on the welfare of the child and the safety of society and is unconstrained by prior rules. The respondent in our hypothetical case would be adjudicated delinquent under such a system if that decision would promote the welfare of the public or the child, without resort to technical statutory requirements. It is plain that the latter mode (substantive justice) reflects the expectations of those who urged creation of the juvenile court.

Vagueness and the Mediation of Standards

Had the juvenile court frankly been established as its proponents wished, it would have presented a significant reconstitution of the justice system. The jurisdictional inquiry and scope of material proof would have been radically broadened.[35] As it happened, however, this conception was never fully implemented. The statutes ultimately enacted were the work of lawyers who defined the occasion for intervention conventionally, in terms of specific conduct rather than in terms of general dangerousness.[36] The drafters did, however, go some distance toward accommodating the goals of their constituents by employing expansive definitions of delinquency and neglect. Open-ended categories such as "incorrigibility" or "growing up in idleness" were added to virtually exhaustive lists of specifically proscribed behavior in an effort to stretch as broadly as possible the conventional conduct requirement.[37]

FAM. CT. ACT § 712(a) (1975). Disorderly conduct is, like other offenses against public safety, classified as a "violation" by the Penal Code and not as a crime (which category is limited to felonies and misdemeanors). Accordingly, New York courts have consistently held that conduct which, if done by an adult, would amount to a "violation" cannot be made the basis of an adjudication of delinquency. *E.g.*, Carter v. Family Court, 22 A.D.2d 888, 255 N.Y.S.2d 385 (1964); *In re* John M., 318 N.Y.S.2d 904 (1971). Nor can a child who is charged with a single instance of a "violation" be found a "Person in Need of Supervision," since the statute requires that there be more than a single incident to support such a determination. *In re* David W., 28 N.Y.2d 589, 268 N.E.2d 642, 319 N.Y.S.2d 845 (1971).

[35]If the child's "need for treatment," "dangerousness," or some similar standard embodied the jurisdictional issue all evidence concerning her circumstances or behavior at any time would be relevant on the question of delinquency or need for supervision. Proof ordinarily admissible only for sentencing or dispositional purposes would thus plainly be appropriate at the adjudicative stage. Requirements that dangerousness be proved by instances of specific conduct account for familiar limitations on evidence receivable prior to conviction; once that requirement is removed and the "whole child" is considered, restriction of proof to matters more or less directly related to the specifically alleged misbehavior would likewise disappear.

[36]*E.g.*, Law of April 21, 1899, 1899 Ill. Laws § 1; 1909 Mo. Laws § 1, p. 423. *See* Teitelbaum, *Book Review*, 4 FAM. L.Q. 444, 447-48 (1970).

[37]The early definitions of neglect and delinquency in the Illinois juvenile court law illustrate both open-endedness and specificity as devices for achieving broad coverage.

> § 169 DEFINITION § 2. [1] That all persons under the age of twenty-one (21) years shall for the purpose of this act only, be considered wards of the State and their persons shall be subject to the care, guardianship and control of the court as hereinafter provided.
>
> For the purpose of this act, the words "dependent child" and "neglected child" shall mean any male child who while under the age of seventeen years or any female child who while under the age of eighteen years, for any reason, is destitute, homeless or

In practice, the combination of expansive statutory language and relaxed rules of evidence and procedure combined to approximate a system of substantive justice of the kind initially contemplated but not formally enacted. Allegations that a child was "incorrigible" or "growing up in idleness" made evidence bearing on the child's general history relevant at adjudication;[38] moreover, reception of such evidence was not constrained by rules of first hand knowledge and the like.[39] This information, in turn, would support an adjudication of wardship which did not reflect any special concern for the strength of proof of particular misconduct. In most juvenile courts, Judge Mack's dictum was literally followed: "The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[40]

The discussion thus far demonstrates that PINS jurisdiction embodies a set of fundamental conceptual contradictions, which it seeks to resolve

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abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or habitually begs or receives alms; or is found living in any house of ill-fame or with any vicious or disreputable person; or has a home which by reason of neglect, cruelty or depravity, on the part of its parents, guardian or any other person in whose care it may be, is an unfit place for such a child; and any child who while under the age of ten (10) years is found begging, peddling or selling any articles or singing or playing any musical instrument for gain upon the street or giving any public entertainments or accompanies or is used in aid of any person so doing.

The words "delinquent child" shall mean any male child who while under the age of seventeen years or any female child who while under the age of eighteen years, violates any law of this State; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons, or without just cause and without that [the] consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly frequents a house of ill repute; or knowingly frequents any policy ship or place where any gaming device is operated; or frequents any saloon or drama show where intoxicating liquors are sold; or patronizes or visits any public pool room or basket shop; or wanders about the streets in the night time without being on any lawful business or lawful occupation; or habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto [any] moving train, or enters any car or engine without lawful authority; or uses vile, obscene, vulgar, profane or indecent language in [any] public place or about any school house; or is guilty of indecent or lascivious conduct; any child committing any of these acts herein mentioned shall be deemed a delinquent child and shall be cared for as such in the manner hereinafter provided.

Law of June 4, 1907, 1907 Ill. Laws, p. 70. For another instance, see 1909 Mo. Laws, § 1, p. 423.

[38]It was common practice, for example, to prepare and submit a social investigation report to the judge prior to adjudication, which would contain virtually all available information concerning the child's behavior, his relations with his family, his record at school and with the police, and his attitudes in general. *See* Teitelbaum, *The Use of Social Reports in Juvenile Court Adjudications,* 7 J. FAM. L. 425 (1967).

[39]*E.g., In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied,* 348 U.S. 973 (1955). *See also* State *ex rel.* Christensen v. Christensen, 227 P.2d 760 (Utah 1951).

[40]Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 119-20 (1909). *See also,* Lindsey, *The Juvenile Court of Denver,* in S. BARROWS, CHILDREN'S COURTS IN THE UNITED STATES 107 (1904).

through the mediating device of general standards. On the one hand, PINS laws attempt to apply the rule of law to a relationship of status governed essentially by personal domination while, on the other, it reflects a desire to do substantive justice without abandoning the formal requirements of legal justice. Broad, imprecise legislative standards were introduced in an effort to mediate these contradictions.

In view of the conceptual inconsistencies underlying PINS jurisdiction, the "vagueness" of PINS statutes cannot be considered accidental. Whether the resulting breadth and imprecision of some PINS statutes is of constitutional dimension has been the subject of considerable discussion[41] and a number of decisions.[42] If ordinary vagueness tests are applied, many of these laws are subject to challenge. Returning to the Ohio statute quoted above,[43] a rule prohibiting a person from behaving so "as to injure or endanger the health or morals of himself or others" can guide neither the conduct of citizens nor of officials.[44] A law that purports to attach sanctions, not only to immoral conduct but also to conduct that "endangers the morals" of the actor or of others, is even more unclear in its meaning. The same can be said of the provision in the Ohio statute recognizing jurisdiction over a child who is in a "situation dangerous to life or limb or injurious to the health or morals of himself or another."[45] It is unclear whether anything more than wholly innocent conduct by the child is required to make him "unruly," and the "situations injurious to health or morals" may, in the eyes of the police and possibly the courts, include presence at rock concerts, Unification Church meetings, busing demonstrations, pool halls, street corners, or in the limb of a tree. Thus the child, like an adult under a vagrancy statute, may be suffered to engage in a great number of activities "only at the whim of any police officer."[46]

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[41]*See, e.g.*, Stiller & Elder, PINS—*A Concept in Need of Supervision*, 12 AM. CRIM. L. REV. 33 (1974); Note, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-for-Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972); Note, *Juvenile Court Jurisdiction Over "Immoral". Youth in California*, 24 STAN. L. REV. 568 (1972); Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745 (1973).

[42]*See, e.g.*, Gonzales v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), *vacated* 416 U.S. 918 (1974); State v. Mattiello, 4 Conn. Cir. Ct. 55, 225 A.2d 507 (1966); E.S.G. v. State, 447 S.W.2d 225 (Tex. Ct. App. 1969), *cert. denied* 398 U.S. 956 (1970). *Cf.* Gesicki v. Oswald, 336 F. Supp. 365 (S.D.N.Y. 1971), *aff'd* 406 U.S. 913 (1972).

[43]See note 2 *supra* & text accompanying.

[44]Jurisdictional categories such as "vagrancy" and "immorality" have regularly been held unconstitutionally indefinite. *See, e.g.*, Papachristou v. Jacksonville, 405 U.S. 156 (1972) ("lewd, wanton and lascivious persons," "dissolute persons"); Musser v. Utah, 333 U.S. 95 (1948) ("injurious to public morals"); Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968) ("leading an immoral and profligate life"); Gesicki v. Oswald, 336 F. Supp. 365 (S.D.N.Y. 1971), *aff'd* 406 U.S. 913 (1972) ("morally depraved"; "in danger of becoming morally depraved"; Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969) (defining a vagrant as a person who leads "an idle, immoral, or profligate course of life"). *Cf.* Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (holding unconstitutional a statute allowing a jury to assess a civil penalty if it found an acquitted criminal defendant nevertheless guilty of "some misconduct").

[45]See note 2 *supra* & text accompanying.

[46]See note 18 *supra*.

That this circumstance is no more tolerable with respect to children facing substantial deprivation of their freedom than it is with respect to adults has occasionally been recognized[47] but, more commonly, denied by state and lower federal courts.[48] This rejection of vagueness challenges, especially in connection with statutes covering "immorality" or the like, has been severely criticized by a number of authorities.[49] These critics convincingly apply usual vagueness standards to provisions of the kind just mentioned, and their arguments require no repetition. There are, however, some incorrigibility statutes that could, if one looks only to ordinary vagueness standards, survive a constitutional challenge or could, without violence to the overall legislative design, be amended so as to satisfy usual constitutional standards. Because this article is concerned with the function of the rule of law in connection with state regulation of parent-child relations, it examines in the second part the consequences associated with adopting a PINS law that in terms will probably or certainly survive an orthodox vagueness challenge even assuming, as is likely, that the consequences of delinquency or PINS proceedings on the ground of incorrigibility are such that ordinary vagueness standards apply despite the "non-criminal" denomination of such proceedings.[50]

Three such formulations are considered for this purpose. The first defines incorrigibility in terms of disobedience to parental commands, without fur-

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[47]*See, e.g.*, Gonzales v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), *vacated* 416 U.S. 918 (1974).

[48]*See, e.g.*, Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389 (1971); State *in re* L.N., 109 N.J. Super. 278, 263 A.2d 150, *aff'd per curiam* 57 N.J. 165, 270 A.2d 409 (1970), *cert. denied* 402 U.S. 1009 (1971); E.S.G. v. State, 447 S.W.2d 225 (Tex. Ct. App. 1969), *cert. denied* 398 U.S. 956 (1970).

[49]*See* authorities cited in note 41 *supra*.

[50]Juvenile court proceedings have always been formally denominated civil rather than criminal in nature. Use of such a label should not, however, either remove incorrigibility statutes from the ambit of constitutional concern or significantly diminish the level of scrutiny to which they will be exposed. That civil laws may offend due process because of their vagueness has long been recognized, and recently reaffirmed. Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Jordan v. DeGeorge, 341 U.S. 223 (1951); A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925). If, as has sometimes been suggested, civil statutes are less likely than criminal laws to be struck down on this basis, that is because the sanction involved is ordinarily less onerous and, concomitantly, the costs of ambiguity are lower. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 69-70, n.16 (1960). Where, however, the civil penalty is severe, it will be measured by the same standard of definiteness that applies to criminal provisions. As the Supreme Court said in Jordan v. DeGeorge, 341 U.S. 223 (1951), with respect to a civil deportation proceeding:

> Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. The Court has stated that deportation is a drastic measure . . . . We shall, therefore, test this statute under the established criteria of the "void-for-vagueness" doctrine.

Id. at 231. The drastic nature of intervention in delinquency cases has been recognized by the Supreme Court and has been specifically equated with criminal conviction. *See In re* Gault, 387 U.S. 1, 49-50 (1967). The consequences of adjudication as a delinquent by reason of incorrigibility are not materially different from those of adjudication by reason of conduct that would be criminal if done by an adult. Courts have available the same remedies for delinquent children,

ther qualification. A provision so phrased removes ambiguity from the definition of misconduct. Children are effectively placed on notice concerning the behavior expected of them: obedience to *all* parental commands. Judges, police, and other officials are likewise informed of the occasions for legitimate intervention; occasions when it is claimed or proved that the child has disobeyed her parents. Thus, the criteria upon which statutes are upheld against constitutional vagueness attacks seem to be satisfied.

The second formulation qualifies the child's duty of obedience by introducing a requirement that legal intervention occur only when the command disobeyed was *reasonable*. Although introduction of such a condition, which is commonly found in existing laws,[51] imports a degree of ambiguity into the definition of wrongdoing, statutes penalizing "unreasonable" conduct have often been sustained.[52] While some statutes employing reasonableness as the test for legality have been invalidated,[53] the impossibility of achieving true precision in incorrigibility statutes, together with the general knowledge of children that they are obliged to obey their parents, suggest that the degree of indefiniteness may not be fatal.[54]

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whatever the underlying charge. Where incorrigibility is treated as a PINS rather than as a delinquency offense, it remains the case that a child may be deprived of his liberty until he reaches majority. He may, as well, be placed in an institution that houses delinquents or which, although delinquents are not there committed, is indistinguishable in facilities and programs from institutions for delinquents. *See, e.g.*, INSTITUTE OF JUDICIAL ADMINISTRATION, THE ELLERY C. DECISION 42-47, 69 (1975). The civil "label-of-convenience" will no more insulate PINS provisions from requirements of statutory definiteness than it insulated delinquency proceedings from procedural due process requirements.

[51] *See, e.g.*, CALIF. WELF. & INST. CODE § 601; MASS. GEN. LAWS c.119, § 21; N.M. STAT. ANN. § 13-14-3(M).

[52] In United States v. Ragen, 314 U.S. 513 (1942), the Supreme Court upheld the conviction of a taxpayer for violation of a provision making illegal the taking of an "unreasonable allowance" for salaries on an income tax return. In the course of its decision, the Court remarked that "[t]he mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." *Id.* at 523. Perhaps even more closely in point is Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922), sustaining rent control legislation which treated reasonableness as a matter of excuse by allowing a tenant to defeat his landlord's action by showing that the rent charged was "unjust and unreasonable." And, of course, statutes proscribing "negligent," "careless," or "reckless" behavior have routinely been upheld. *See, e.g.*, People v. Garman, 411 Ill. 279, 103 N.E.2d 636 (1952) ("reckless"); State v. Beckman, 219 Ind. 176, 37 N.E.2d 531 (1941) ("reckless"); State v. Bolsinger, 221 Minn. 154, 21 N.W.2d 480 (1946) ("reckless, grossly negligent"); State v. Wojahn, 204 Ore. 84, 282 P.2d 675 (1955) (negligent). On the matter of excuse, see note 78 *infra*.

[53] *See, e.g.*, Cline v. Frink Dairy Co., 274 U.S. 445 (1927); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[54] As Fuller has remarked:

> To put a high value on legislative clarity is not to condemn out of hand rules that make legal consequences depend on standards such as "good faith" and "due care". Sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgment that have grown up in the ordinary life lived outside legislative halls.

L. FULLER, THE MORALITY OF LAW 64 (1964).

The third formulation, also currently employed in a number of laws,[55] defines incorrigibility as *habitual* or *persistent* disobedience to parental commands. In some jurisdictions, this qualification has been interpreted to mean only that more than one instance of misconduct be proved.[56] Where this is so, the definition is as precise as that of the unconditional rule discussed above, and no vagueness problem arises. Even if a less precise meaning is given to the term "habitual," it does not follow that the statute is constitutionally vague under traditional doctrine. The nature of the duty expressed is known to those affected by it and is generally accepted by society as important. While the court may be required to make judgments of degree under this rule, standard doctrine suggests that such judgments may constitutionally be incorporated into a penal or regulatory statute.[57]

THE RULE OF LAW AND PINS STATUTES: A DIALECTIC OF FORM AND SUBSTANCE

It has been argued that the problem of vagueness arose as a consequence of attempting to apply the rule of law to a status relationship governed essentially by personal domination. Vagueness appeared in the form of those imprecise standards which carried the burden of mediating between the demands of legal formality and the desire for substantive justice. The remedy for vagueness in PINS statutes lies not in narrow specification of proscribed conduct as criminal laws attempt but in global regulation of children. Two factors make it impossible to achieve statutory definiteness by specifying the kinds of behavior giving rise to need for supervision. The first is that the particular forms of misbehavior are virtually infinite since the particular commands that parents may give, disobedience to which justifies intervention, are virtually infinite. The second is that the particular commands uttered by various parents to their children may be inconsistent in content. One parent might tell his child to come home after school to do his homework; another may order the child to help mind the store after school: failure to do either may found an incorrigibility complaint. Since it is youthful disobedience rather than an act itself that causes the social concern expressed in PINS laws, definiteness concerning the underlying conduct cannot be had.

Achieving statutory definiteness through increasing the ambit of control in this global way could be contemplated only with respect to children and is accepted in their case only because of their dependent status. Significantly,

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[55]*See, e.g.*, MASS. GEN. LAWS c.119, § 21, N.Y. FAM. CT. ACT § 712(b); N.J. REV. STAT. § 2A:4-45(a).

[56]*See In re* D.J.B., 18 Cal. App. 3d 782, 96 Cal. Reptr. 146 (1971); *In re* David W., 28 N.Y.2d 589, 268 N.E.2d 642, 319 N.Y.S.2d 845 (1971). *See also*, Andrews & Cohn, *PINS Processing in New York: An Evaluation*, in L. TEITELBAUM & A. GOUGH, BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 45, 58 (1977).

[57]United States v. Ragen, 313 U.S. 514 (1942); Nash v. United States, 229 U.S. 373 (1913).

analogous control over adults is found only in association with institutionally recognized and general deprivations of citizenship, such as imprisonment for crime and commitment as an insane or mentally deficient person. It is not otherwise attempted because liberal political principles and the rule of law demand that persons be left free except to the extent specific justification for infringement is present and the nature of this infringement is thought sufficiently clear that persons may avoid official intervention in their lives. The following discussion will address the problem of definiteness in PINS laws by considering in more detail the nature of the parent-child relationship and the consequences, both inside the family and in society generally, of attempting to supervise that relationship through forms derived from the rule of law.

Socialization to Authority and Development of Autonomy

In its ideal form the rule of law in modern society mediates between the domination of personal authority and the experience of pure autonomy. Because it must rely on language, this mediation is generally unstable and problematic,[58] but in the context of a legal jurisdiction supervising the relations between parents and children the difficulty is particularly severe precisely because there are strong interests both in maintaining a regime of personal parental domination and in facilitating the development of the child's sense of and capacity for autonomy. The problem of the mediation of the rule of law in this context may be considered from several perspectives, each of which locates the doctrine of vagueness at the center of a legal regime concerned with relations between parents and their children. The first of these perspectives focuses on socialization to authority and development of autonomy.

It is systematically expected that parents will acculturate and socialize their children.[59] Indeed, the perception that parents in any given case are not willing or able to do so is the principal occasion for juvenile court intervention. On the one hand, these processes imply that children will learn and accept cultural goals in general and will conform their conduct to rules in particular. At the same time, the end point of these processes is adulthood, upon which the person becomes a full citizen whose behavior is autonomous except as limited by the rule of law. Proper child rearing must accordingly facilitate the development of a capacity for choice and autonomous action within existing norms. A child who does not learn social values and rules has not been

[58]The problem of language is considered in more detail in the text section entitled THE RULE OF LAW AND THE INQUIRY INTO DANGEROUSNESS.

[59]The second year is said to be the time when parents initiate major socialization training. "[A]s agents of socialization, the parents direct the child's learning of what the culture defines as desirable characteristics and behavior, at the same time encouraging him to inhibit undesirable motives and behavior." P. MUSSEN, J. CONGER & J. KAGAN, CHILD DEVELOPMENT AND PERSONALITY 259 (3d ed. 1969).

properly raised; equally a person without capacity for autonomous behavior remains an infant. Thus, the complex of authority, rules, and autonomy is a fundamental aspect of parental responsibility for children.

Within the family, authority is essentially personal; for the child the experience of authority is the experience of the personal domination of parents. As the child grows, the level or degree of parental authority is reduced, and this reduction corresponds to growth in the child's capacity for autonomous action and choice. Unless both parents and children agree with respect to the appropriate ambits of control and autonomy, however, the parents will regard the child as ungovernable (excessively or prematurely autonomous) or the child will regard parental authority as unjustified, or both.

This synchronous process is complicated by the principle that beyond early childhood the domination of personal authority is generally unjustified. Coercive authority in modern society must be embodied in rules, which implies that, for reasons of socialization and of development, the personal authority of parents must gradually be replaced by the impersonal authority of rules. A child who fails to learn that the exercise of personal domination is unjustified and that the experience of personal domination is oppressive has not been properly socialized. In addition, the absence of a capacity for autonomous action constitutes infantalization. The significance of this necessary process of introducing rules in the relations between parents and children should not be underestimated. It undermines the personal domination of parental authority without replacing it, and facilitates the development of autonomy without literally requiring it. The period in the child's life when the mediation of rules is most consciously present is generally a difficult one, and it is at just this time that PINS jurisdiction tends to be invoked. The court under that jurisdiction intervenes in a family dispute by virtue of a rule which specifies the limits of parental authority, the level of obedience required of the child, or both.[60] The fact of intervention by rule, however, is as significant as the substance of the particular rule, and such intervention—occurring at that point in the history of the family when the distribution of emphasis within the complex of parental authority, rules and child autonomy is most unstable—underscores the salience of rules at the expense of parental authority. It does so, moreover, in a way that denies youthful autonomy as well.

To demonstrate why this is so, it is useful to consider the operation of an unconditional PINS statute. The parents complain that their child is ungovernable in that she refuses to obey their commands. The child asserts that her parents' commands are incoherent, unreasonable or oppressive. The

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[60]In New York, for example, almost two-thirds of the respondents charged with being in need of supervision are 14 years of age or older, and over forty percent are 15 years of age or more. Andrews & Cohn, *PINS Processing in New York: An Evaluation*, in L. TEITELBAUM & A. GOUGH, BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 45, 55 (1977).

judge informs the child of the legal requirement that she obey *all* parental commands, and that if she fails to do so she will be placed under some other form of supervision. Viewed from within the family it is supposed to regulate, the consequence of intervention is that the obedience of the child is now a direct consequence of the external rule of law which requires unconditional obedience by the child. Though the substance of the legal command reenforces the personal domination of parental authority, the form of a rule of law undermines that authority in favor of obedience to rules.[61] Intervention by rule of law moves the child in the direction of autonomy by undermining the personal authority of parents, while it supports that authority by ordering unconditional obedience.

If one turns from the meaning of intervention within the family to its meaning for a social order governed by the rule of law, the consequence of intervention is the converse of its effect within the family. The court has intervened by invoking a general and fairly precise rule. No substantial claim can be made that the application of the rule to this case is a result of uncontrolled judicial discretion or could not have been foreseen by the parties. To this extent the requirements of social order are satisfied by a formally adequate rule. According to traditional theory, such a statute facilitates the experience of autonomy by specifying the ambit of choice.[62] In this instance, however, the rule in substance negates the experience of autonomy by stating that the child must obey her parents unconditionally. Thus, the experience of personal domination is only partially eliminated by this rule. The illustration makes clear that formal adequacy is a necessary but not a sufficient condition of autonomy within the social order.[63]

The application of an unambiguous rule requiring unconditional obedience gives rise to a set of paradoxes. The substance of the rule supports parental authority at the expense of autonomy, while the fact that it is an external rule undermines that authority in the service of the development of autonomy. Simultaneously, although the unconditional rule satisfies the formal requirements set forth by the vagueness doctrine, its content undermines the child's capacity for autonomous action and thus frustrates one of the

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[61]Our analysis here relates to wider concerns with the relationship of social wholes to social parts. Max Gluckman, for example, has argued that wider kinship groupings both support the family and are inimical to it. *See* M. GLUCKMAN, CUSTOM AND CONFLICT IN AFRICA 57 (1955). Slater has hypothesized that social interference with the family, regardless of its content, tends to democratize the family and make it child centered. *See Social Change and the Democratic Family,* in W. BENNIS & P. SLATER, THE TEMPORARY SOCIETY 20, 37 (1968). Walzer has noted: "It is a commonplace of political history that despotism often plays an important part in clearing the way for democracy. A despot destroys the structure of intermediate powers and makes possible a politics based on individual interests." M. WALZER, THE REVOLUTION OF THE SAINTS 151 (1965).

[62]*See* text accompanying note 13 *supra.*

[63]*See generally* the Hart-Fuller exchange contained in Hart, *Positivism and the Separation of Morals,* 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law,* 71 HARV. L. REV. 630 (1958). *See also* the trenchant demystification of these issues in Kennedy, *Legal Formality,* 2 J. LEGAL STUD. 351 (1973).

principal values associated with a social order based on rules. If, as one assumes, it is preservation of those values which warrants invocation of the due process clause, this analysis collaterally suggests that reliance on the traditional vagueness doctrine may be dysfunctional, at least when the law seeks definiteness through global rather than specific description of the proscribed behavior. Certainly that seems to be the case here, where the most precisely drafted statute and the one which would be most readily sustained under ordinary vagueness standards most directly compromises the values of the rule of law.

Control and Responsibility

The paradoxes revealed by the perspective of authority and autonomy arise from the nature of the PINS enterprise itself—reliance on the rule of law, which presupposes a relationship of the kind that exists between citizen and state, in a relationship which values personal domination and which resembles status rather than citizenship. The question now is whether this set of paradoxes may be eliminated by modifying the content of the rule within the bounds of the vagueness doctrine or whether any formulation consistent with the rule of law produces contradictions of the sort already observed. Initially, consideration will be given to the result under a rule requiring obedience only to reasonable parental commands; and in the course of that inquiry a second perspective, one of control and responsibility, will be added to that of socialization and development.

At first glance, a rule of obedience qualified by reasonableness seems to reduce the paradox demonstrated by the perspective of socialization and development. On the one hand, the substance of the rule supports only a limited ambit of parental authority and to that extent permits the development of autonomy, and, as was true of the unconditional formulation, the rule is external to the parental authority it supposedly asserts, pushing in the direction of autonomy. On the other hand, while the substance of the rule supports the development of autonomy to a greater extent than an unqualified rule, it reduces both the general level of autonomy in society and the child's experience of freedom from personal domination by introducing a measure of uncertainty in the reach of the rule. The result of qualifying the requirement of obedience is not so much to remove the experience of personal domination but to substitute judicial for parental domination. A qualified rule accordingly perpetuates the initial paradox, but in somewhat different form. As between parent and child it intervenes on the side of developmental autonomy, but does so by sacrificing the clarity of rules upon which general social autonomy is said to depend.

The nature of this contradiction is clarified when attention is directed to the allocation of control and responsibility effected by the qualified rule of obedience. As a general proposition, control and responsibility are mutually

exclusive notions. All members of society are deemed either capable of assuming responsibility for their acts or they are not.[64] In the latter event, they may properly be subjected to the control of others. Because control is predicated upon lack of capacity, usually for reasons of mental disease or defect, for responsible action, those who are deemed subject to control will not be held responsible for their acts, at least when those acts relate to the sphere of control.[65] It is only the person who is not under control that may be held responsible for her acts in this scheme.

The position of children, however, under incorrigibility laws falls into neither category. An unconditional rule of obedience would say that all children are under parental control with respect to the infinite range of matters parents might choose to regulate. At the same time, most older children would be held responsible for precisely the same range of conduct; that is, they would be adjudicated delinquent or in need of supervision for choosing to act in a manner contrary to their parents' commands.[66] Thus, children are simultaneously subject to control and responsible for their acts relating to the

[64]*See* Katz, *Dangerousness: A Theoretical Reconstruction of the Criminal Law: I,* 19 BUFFALO L. REV. 1, 28-30 (1970). *See also* Szasz, *Politics and Mental Health,* 115 AM. J. PSYCH. 508, 509 (1958).

[65]Thus, the legal condition of an insane person will not change because he escapes and does harm. The same may be said of the incompetent who purports to enter into a business arrangement; he will not be held responsible for his act precisely because of his legal irresponsibility in business matters. This is, moreover, the situation in matters involving children apart from the juvenile court. Contracts entered into by minors are ordinarily voidable because of their presumed incapacity for responsible judgment in such transactions, and the same is true with regard to most other areas of law. *See* Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation,* 3 L. & SOC'Y REV. 491, 553-58 (1969).

[66]At least where incorrigibility is included within delinquency statutes, responsibility in the ordinary sense seems to be required before an adjudication can be made. This is true even with respect to formal notions of responsibility derived from the criminal law; with few exceptions, courts that have recently considered the issue hold that children may raise defenses of mental incapacity in connection with delinquency prosecutions. In Winburn v. State, 32 Wis. 2d 152, 145 N.W.2d 178 (1966), the court rejected an argument that the rehabilitative purposes of the juvenile court made such defenses inappropriate:

> Irrespective of what we call the juvenile procedure, and no matter how benign and well-intended the judge who administers the system, the juvenile procedures, to some degree at least, smack of "crime and punishment." While the primary statutory goal is the best interest of the child, that interest is, as it should be, conditioned by the consideration of "the interest of the public." . . . The interest of the public is served not only by rehabilitating juveniles when that is possible, but the interest of the public is also served by removing some juveniles from environments where they are likely to harm their fellow citizens. Retribution, in practice, plays a role in the function of the juvenile court. The judgments of juvenile courts do serve as deterrents. . . .

Id. at 161, 145 N.W.2d at 182. Courts in California and Florida have held that statutory and common law defenses of infancy likewise operate in delinquency matters. *In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970); State v. D.H., 309 So. 2d 601 (Fla. Dist. Ct. App. 1975). *Cf. In re* H.C., 106 N.J. Super. 583, 256 A.2d 322 (1969). *Contra,* Borders v. United States, 256 F.2d 458 (5th Cir. 1958).

No cases involving defenses of mental capacity in respect of PINS proceedings appear to be reported. The issue would only rarely arise because the imprecision of the definition allows courts to decide whether the child is in need of supervision by implicitly incorporating a scienter or wilfulness requirement—*e.g.,* that the child has intentionally or knowingly disobeyed his parents.

potentially infinite sphere of control. Specifically, the child's wrongdoing lies in her failure to obey, an "omission" in standard criminal law terms, for which she will be held responsible.[67]

While the contradiction in ideas of control and responsibility is clear in connection with an unconditional rule, its special significance becomes apparent in considering the rule of obedience to reasonable commands. Such a rule tells the child that the ambit of parental authority and control is limited to commands which are "reasonable;" that is, which accurately reflect the child's own limitations. Implicitly, if not expressly, the qualified rule also tells the child that she is autonomous with respect to unreasonable parental commands—presumably those which impose limitations more stringent than her own capacity justifies. She will, therefore, be held responsible for judging correctly whether a parental command was reasonable, which judgment must necessarily be independent of the parent's own determination implicit in the act of commanding obedience. In effect, the child will be held responsible for going beyond the limits of her sphere of responsibility.

The relationship between the contradictions apparent under this perspective and those associated with socialization and autonomy is evident. The degree of autonomy available under a reasonable command rule is a function of the child's capacity for responsible action. While qualification of the duty of obedience formally provides the youth some sphere of freedom, that sphere is simultaneously limited by the nature of the decision she must make. A determination that a given command is reasonable, taking into account the child's age, maturity, prior experience, school history, psychological characteristics, and special needs and the family's strength, mutual relationships, values, aspirations, psychological needs, comprises all that there is to be said about both child and family. The child cannot well rely on her capacity to assess these variables in the same way as the judge and, therefore, cannot safely assert freedom from parental commands. Moreover, the less able she is to make such an evaluation, the more likely it is that she will be held properly under control and responsible for her omission to submit to that control. Nor will intervention under such a standard clarify the parent-child relationship for the future. The generality of the governing standard and the impermanent character of the circumstances taken into account suggest that each decision will be a new one.

The qualified rule also complicates the situations outside the context of the particular family. The court must intervene either on the side of the parent who complains that the child has disobeyed a reasonable command or on the side of the child who claims the command was unreasonable, but it can no longer do so with perfect assurance that it is mediating authority and

[67]In the general criminal law, offenses characterized as omissions are problematic on two grounds: the character of the duty or its scope is frequently obscure and the absence of an affirmative act makes assessment of culpability difficult. Both of these are varieties of the problem of vagueness and hence give rise to analysis in terms of the rule of law.

autonomy with precise rules.[68] Consequently, intervention may be experienced by the losing party as an unjustified exercise of personal domination by the judge.

In summary, we have noted that the paradox of autonomy and authority tends to be ameliorated when an unconditional rule is made conditional; the modification pushes in the direction of autonomy. However, introducing the perspective of control and responsibility indicates that a qualified rule undermines the mediating capacity of rules both within the particular family and in society generally. Within the family, introducing a standard of reasonableness produces a direct confrontation of authority with autonomy when it reduces the mediating power of a clear rule by making the child responsible for determining the reasonable limits of control over her. Outside the particular family, the introduction of a qualified rule makes judicial discriminations more obviously subjective and idiosyncratic, and thus opens up the possibility that public authority will be experienced as personal (judicial) domination rather than as a social order open to autonomous action and choice within general, impersonal rules. While the qualified or conditional rule mitigates the paradox of authority and autonomy which the conditional rule generates by its contradiction of form and substance, it simultaneously undermines the child's development of rule-oriented autonomy within the family and the general social experience of freedom from unjustified authority which the rule of law otherwise assures.

Character and Choice

The third PINS formulation that appears facially consistent with the requirements of statutory definiteness is a rule which subjects a child to coercive disposition only if she *habitually* disobeys the (reasonable) commands of her parents. In conjunction with this standard, a third perspective, that of character and choice, will be added.

The perspective of character and choice is directly related to an essential function of PINS laws—distinguishing those children who ought to be subject

[68]The characterization of the failure of obedience as an act of omission complicates the situation outside the family in yet another way. The PINS jurisdiction does not exist simply to resolve minor squabbles within the family, but to deal with behavior problems with which the parents appear unable to cope. This implies that the judge must distinguish those cases in which the child is in need of supervision from those cases in which she is not. The character of failure of obedience as a type of omission "offense," in combination with obscurity in the scope of the duty to obey *reasonable* commands, makes this distinction particularly difficult. Together they open up several possibilities: the child may have honestly and sincerely believed that the command was unreasonable, and otherwise stands ready to obey all reasonable commands; or disobedience may mean that the child never bothered to determine with any degree of care or seriousness whether the command was or was not reasonable; or the child may have known full well that the command was reasonable but chose to exploit the ambiguity of the qualified rule of obedience to her own advantage or simply to drive her parents crazy. The absence of an affirmative act and the absence of certainty in the rule combine to make judicial selection among these alternatives especially difficult.

to coercive disposition from those who should not. If the original juvenile court theory had been formally adopted, this determination could have been reached by consideration of all information bearing on the respondent's character, without necessary reliance on concrete instances of behavior.[69] The inclusion of an act requirement in both delinquency and PINS statutes requires, however, that dangerousness in children be predicted from behavior,[70] and evidentiary rules further require that, where jurisdiction is defined entirely in terms of disobedience, only evidence related to the child's conduct or omission be admitted.[71] Thus, a decision that a given child needs supervision beyond that to which she is accustomed must initially depend on proved misbehavior. However, behavior by itself says little about the actor's character or particularly her dangerousness. It is neutral unless the actor was aware that her conduct was wrongful and chose nevertheless to engage in it. In this respect, the judgment which distinguishes children on the basis of behavior presupposes that children retain some general capacity for choice and have exercised that capacity on one or more occasions. Operationally, behavior is evidence that choices have been made, and the way choices are made says something but not everything about character. Thus, the perspective of character and choice is directly related to the judicial need to differentiate among children.

Since behavior is the basis for inferring choice, the importance of statutory definiteness is obvious. The area of proscribed activity must be sufficiently unambiguous that one may know of its existence for any inference about choice to be permissible. This is important for the citizen, who is entitled to remain free of authority unless she could have chosen to stay within the law; it is equally important from an institutional perspective since, without adequate precision, the central inference justifying intervention cannot be made. The clearer the law, it is thought, the more confidence one may have that offenders knew what their choices were and chose to violate the law.[72] Correlatively, the more confident one is that the actor so chose, the clearer the inference about her character.

The perspective of character and choice builds upon the two previous perspectives in the following way. It is related in an obvious way to the perspective of control and responsibility. To the extent the child chooses among options she may be held responsible for her choices. Holding her

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[69]See note 35 *supra*.

[70]See text accompanying notes 34-37 *supra*.

[71]Traditionally, juvenile court proceedings were conducted informally and without strict regard to rules of evidence. *See* notes 38-39 *supra* & text accompanying. Most, if not all, current laws and decisions require that adjudicative hearings be conducted according to generally prevailing rules of evidence. *See, e.g.*, N.M. STAT. ANN. § 13-14A-14 (1976); N.Y. FAM. CT. ACT § 744(a) (1975); WIS. STAT. ANN. § 48.25(3) (West 1957) (customary civil rules of evidence apply).

[72]This function of the definiteness doctrine is not ordinarily mentioned in connection with constitutional claims but is central to the theoretical basis for punishing under traditional theory.

responsible for her choices means making an assessment of her character; making a judgment about the degree of control she needs must necessarily take her past choices into account. In turn, a judicial assessment of character and need for control will determine the distribution of authority and autonomy in the child's immediate future. Put another way, character and choice, control and responsibility, both determine and are determined by the socialization of authority and the development of autonomy. Socialization, control, and character are thus related to each other in the way development, responsibility, and choice are related to each other.[73]

The introduction of a requirement that the child must *habitually* disobey the reasonable commands of her parents before becoming subject to legal control may ameliorate the contradictions in notions of socialization and development and control and responsibility discussed above. The extent to which it does so is, however, inversely proportional to the clarity of the term "habitual." If that term means, as it commonly does, that there need only be more than one instance of disobedience, the resulting ambit of choice is virtually valueless. In order to supply a significant range of autonomy for children, the condition for intervention must be made not more precise but more ambiguous by, for example, interpreting it to mean an extended course of defiance or multiple occasion of serious wrongdoing. An habitualness qualification, so interpreted, does not communicate a mixed message of the sort which results from the unconditional or reasonableness rules. The unconditional rule substantively affirms parental authority while formally undermining it; the rule qualified by reasonableness tends to distribute its emphasis in the direction of developmental autonomy but undercuts this autonomy, within the family, by forcing the child to make judgments she is, by definition, poorly equipped to make. A rule qualified further to cover only *habitual* disobedience of reasonable commands distributes its emphasis in the direction of increased developmental autonomy by refusing to intervene except in the more extraordinary cases, and it lifts some of the burden of choice from the child by allowing her greater margin of error in making judgments of reasonableness before external coercive intervention will be regarded as necessary. Within the family, then, the doubly qualified rule may push in the direction of autonomy by refusing to intervene in what the rule describes substantively as instances of minor disobedience.

Outside the family context, however, the situation is not so hopeful. The doubly qualified rule indicates that when a child is made subject to the PINS jurisdiction, the appropriateness of coercive disposition is to be determined on

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[73]The relationships would appear as follows in tabular form:

Perspective	*Authority*	*Autonomy*
First	Socialization	Development
Second	Control	Responsibility
Third	Character	Choice

the basis of a history of choices made over time. The doubly qualified rule does not permit any single choice to be made the basis of a judgment of character, and prior to actual litigation there is no way to predict which choices will be considered relevant to the assessment of character, or how many such choices are either necessary or sufficient.

The situation might be compared with profit to the adult criminal process. The criminal law presupposes that adults have a matured capacity for choice so that a discrete instance of behavior may be made the basis for a legal judgment which carries serious consequences for the adult. In a real sense the criminal law assesses character on the basis of one particular exercise of choice,[74] but it may do so only so long as its presupposition of a mature cognitive and effective capacity for choice is firmly tied to reality.

This presupposed capacity for choice must be weaker in the case of children. An assessment of their character cannot and should not be made on the basis of isolated instances of behavior; one needs a history or pattern of behavior. However, reliance on a history or pattern of behavior reduces the relative significance of any particular exercise of choice. Where the criminal law demands that the facts which constitute a particular event be meticulously examined because all judgments depend on those facts, under the doubly qualified rule a rigorous factual inquiry with respect to any particular event is considerably less important precisely because no single event has dispositive significance.

The doubly qualified rule produces the following situation. Within the family it pushes in the direction of autonomy and places considerably less emphasis on socialization; it also reduces the child's burden of responsibility by eliminating the need for her to make an accurate assessment of reasonableness in each instance. But outside the family, the doubly qualified rule undermines the social level of autonomy within rules by fracturing the clarity and simplicity of rule-based judgments, leaving obscure which exercises of choice will be subsequently considered relevant in an assessment of character. Correlatively, this formulation makes impossible any confident prediction of the number or seriousness of acts which will occasion intervention. Since the relative significance of any particular instance of behavior is reduced by its inclusion in a history or pattern of behavior, an accurate, careful or complete determination of the factual circumstances of each instance becomes unnecessary. In short, the doubly qualified rule intensifies the experience of personal (judicial) domination, and thus weakens the social sense of autonomy within impersonal, general rules. The measure of developmental autonomy

[74] *See* A. Katz, Studies in Boundary Theory 45-51 (unpublished 1976) for a more intensive discussion of the Principle of Offense and the Principle of Character in the general criminal law.

The scope of inquiry justified and required by the "habitual" PINS formulation falls between the sharply confined ordinary criminal process and the completely open-ended practice in the case of institutionalized mental patients. With regard to the latter, *see* E. GOFFMAN, ASYLUMS 155-56, 163 (1961).

within the family which the doubly qualified rule permits is reversed outside the family by a reduction of general social autonomy within the rule of law.

This analysis leads to the following observation. A PINS jurisdiction can maintain the rule of law only at the cost of communicating to parents and children an ambiguous social message regarding the proper mix of socialization and development, authority and autonomy within the family. This confusion can be reduced by introducing qualified rules which tend to push in the direction of developmental autonomy *within* the family, but simultaneously do violence to the rule of law in society. Consequently, these rules cut against the general social experience of autonomy within rules. A more concise formulation of this observation is that a PINS jurisdiction which respects autonomy is incompatible with the rule of law in society; a PINS jurisdiction based on the rule of law interferes with the socialization of authority and the development of autonomy mediated by rules within the family.[75]

THE RULE OF LAW AND THE INQUIRY INTO DANGEROUSNESS

The foregoing analysis throws into serious doubt the traditional assumption that a social order based on rules necessarily provides those governed by it with a knowable area of autonomy, responsibility and choice. Indeed, it has appeared that the more PINS laws conform to the rule of law through definiteness of language, the more severely autonomy, responsibility and choice are compromised. This conclusion leads to further doubt concerning a fundamental tenet of criminal law theory discussed throughout this essay: that a social order based on rules and one founded on an inquiry directly into dangerousness, not mediated by prescriptive rules, present an antinomy.[76]

Normal version theory assumes that a sharp contrast can be drawn between a society ordered by specific prescriptive rules and one in which rules are instrumental and directly oriented to goals.[77] This is the political meaning of the difference between legal and substantive justice. As generally understood, the vagueness doctrine is a logical corollary of government by legal justice or by the rule of law. Statutory definiteness is thought to assure the uniformity and generality of legal rules which in turn are expected to mediate between the experience of personal domination and that of perfect autonomy. Rules which do not meet a minimum degree of specificity fail to eliminate the experience of domination because their application depends on the sub-

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[75]Our analysis of the differential impact of norms inside and outside the family, and the variations across three degrees of statutory precision, should be compared with Gluckman's utilitarian belief in the adaptation value of flexible and inconsistent social norms. *See* M. GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (1955).

[76]A recent expression of this view can be found in Fletcher, *The Right Deed for the Wrong Reason*, 23 U.C.L.A. L. REV. 293, 301 (1975).

[77]See notes 10-18 *supra* & text accompanying.

jective judgment of those exercising authority. The vagueness doctrine attempts to identify those rules which are not law.[78]

Contrast with this model a PINS law that is facially inconsistent with the rule of law, one that focuses directly on the child's dangerousness. It has the same general goal as the three formulations discussed in Part II: identification of that excessive assertion of youthful autonomy which creates concern for the child's future behavior. Unlike those formulations, however, the proposed statute would abandon jurisdictional definitions referring to particular behavior (disobedience of parental commands of whatever quality and with whatever regularity) and authorize intervention upon a finding that the child is dangerous in the same sense assumed by current statutes: that her disobedience is manifested within a universe of circumstances which suggest that, without intervention, she is likely to become an adult deviant.

Lawyers will quickly say that such a statute is contrary to what is meant by law. The dangerousness inquiry gives no notice of the conduct that occasions official intervention, nor does it confine the exercise of authority by public officials. Moreover, the law provides no assurance of uniform and equal application, because the exercise of power in any individual case does not depend on objective behavior that can be evaluated for its similarity to behavior in other cases. All these objections are ultimately directed toward the single claim that the term "dangerousness," as used here, is vague.

Initially it should be apparent that the difference between the rule of law and the dangerousness formulation in this respect must be at most one of degree. The generality and uniformity of the rule of law depend heavily on language. The meaning of a rule must be sufficiently clear to citizens that they might exercise a margin of autonomy free of concern for the potential illegality of their conduct. The extent to which they may be secure in this freedom further depends on the degree of assurance that officials will not read the language of a rule in such a way that their conduct will be included within it. In general, acceptance of a regime of rules implies a belief that the language of rules exercises real control over the officials charged with their enforcement; in no other way can the experience of personal domination be eliminated. The rule of law is, therefore, weakened to the extent there is no substantial unanimity on the meaning of a particular set of words. That is the precise significance of the vagueness doctrine.

It appears, however, intuitively or as a matter of common experience, that substantial unanimity on the meaning of a particular set of words is

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[78]To the extent the rule of law seeks to eliminate the experience of personal domination, and vagueness is understood as the doctrinal specification of the point at which this effort has failed, it is doubtful that Professor Fletcher's distinction between "definitional" vagueness and "justification" vagueness is or should be persuasive. Fletcher, *The Right Deed for the Wrong Reason*, 23 U.C.L.A. L. REV. 293, 308-16 (1975). Uncertainty as to whether or not an act which meets the formal definition of an offense is justified gives rise to the experience of personal domination no less than uncertainty in the definition of the offense. *See generally* R. UNGER, KNOWLEDGE AND POLITICS 80, 92-94 (1975).

highly problematic. Moreover, the problem cannot be avoided by choosing words that are clear and avoiding words that are not. Ambiguity or vagueness is not a problem of language as such; some words are not inherently more clear or more ambiguous than others. Rather, the precision of language is relational.[79] If a given locution corresponds to a common experience or shared value, it is clear; otherwise it is not. Accordingly, adherence to the rule of law requires that a given locution correspond to common experience or shared values. This judgment of correspondence is what is required by the legal doctrine of vagueness.

Perhaps the most common method of dealing with the problem of determining the existence of shared meaning is to distinguish between the core meaning of a legal proposition expressed in words and its potential or penumbral meanings. The core meaning is said to be that reading of legal language which would produce substantial unanimity.[80] The notion of core meaning serves, however, only to expose and not to remove the central difficulty posed by the rule of law's entire dependence on language.

The determination of correspondence between statutory language and core meaning must be made by a judge who must initially determine what the core meaning is and then decide whether that core meaning corresponds to common experience or shared values. Actually, however, what seem to be two steps is a single operation, for the judge cannot subjectively determine the core meaning of the language; he must determine whether the given set of words has a core meaning in common experience or shared values. Plainly this is an empirical question of some difficulty. There is no little irony in the observation that the most politically defensible method for resolving the question is through popular representation in the legislature. As representatives of the people, the legislature should be in the best position to know whether a set of words has a core meaning. But, of course, the problem of vagueness only arises in the context of legislative products.

If the doctrine of vagueness requires a judgment of correspondence between a set of words and common experience or shared values, and if there appears to be no way for the judge to have ready access to the information he needs to make this decision, on what basis are these decisions actually made? At best, the judgment must be made on the basis of a judicial assessment of the character of common experience or the nature of shared values, and the general absence of the data essential to the making of such an assessment leads one to believe that judgments of correspondence are entirely subjective.

A fundamental weakness remains, therefore, in the capacity of the rule of law to accomplish its fundamental purpose: the accurate and precise statement, beforehand, of the circumstances in which intervention is justified.

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[79] *See* C. HILL, CHANGE AND CONTINUITY IN SEVENTEENTH CENTURY ENGLAND 103-23 (1974).

[80] *See* Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 CORNELL L. REV. 409, 426-30 (1971).

Ultimately, judgments concerning the meaning and enforceability of a statute depend on subjective decisions by the judge concerning the nature of common experience or shared values. This is precisely what the rule of law is supposed to avoid, and precisely what, as the vagueness doctrine makes clear, it cannot successfully avoid.

It should also be observed that if a given set of words expresses a core meaning, the expression necessarily reflects very common experience or broadly shared values. To the extent an experience is common or a value broadly shared, it is fair to ask why a rule expressed in clear language is necessary at all. In this situation, it is surely not the language of the rule which provides citizens with notice and which constrains official behavior, but the shared understanding of the experience or value. In a real sense, therefore, adherence to the rule of law does not account for and is unnecessary to compliance; there is no reason to expect less obedience to a more imprecise rule or, perhaps, even to a non-prescriptive rule. Recall, for example, the earlier illustration of a relatively precise legal rule: a child must obey all parental commands.[81] The duty of obedience children owe to their parents is surely within common experience and we may assume it is a shared value. To this extent, the language has a core meaning. That meaning, however, lies embedded in common experience and shared values; it is not elaborated by the legal language. Would the absence of a rule change anything of consequence? Plainly the common experience or shared value would not vanish. It may, of course, be said that a rule is necessary since not all shared experiences and values are legally cognizable, and therefore notice must be given that this one is and authority to enforce it must be conferred. But notice could be given and authority conferred by a rule which stated that the duty of children to obey their parents will be enforced. If youthful disobedience is the product of children's common understanding of their duty in this regard, as seems likely, they will comply with such a rule independently of technical legal specification.

Thus, because the rule of law is entirely at the mercy of the signifying capacity of language, its capacity and indispensability to achieve its own purposes is impeached. Statutory commands are neither objective guides to compliance with legal rules nor necessary to accomplishment of their social meaning. Furthermore, the doctrine of vagueness requires a judgment of correspondence between a set of words and common experience or shared values, and if there appears to be no way for the judge to have ready access to the information required to make this judgment, it must be made on the basis of a subjective assessment of the character of common experience or the nature of shared values. This is a critical point. The *attitude* which allows participants in the legal process to behave as though legal language is generally clear (i.e., that it corresponds to common experience or shared values) and as

[81]See notes 58-63 *supra* & text accompanying.

if, when there is doubt on the matter, an objective judgment can be made, *stands between* the application of legal terms to concrete cases and the actual existence of common experience or shared values. In other words, the *attitude* which assumes an ability to distinguish between those legal locutions which have a core meaning and those which do not *mediates* between the application of legal terms in concrete cases and the unknown common experience or shared values.[82]

If, as it now appears, traditional vagueness doctrine claims too much for the rule of law, our analysis of PINS laws further reveals that even relatively definite statutes may fail to accomplish their purposes and relatively less definite statutes may be as well suited to that end. Given the values served by the rule of law, the following ought to be true if the distinction between it and an inquiry into dangerousness is valid: the PINS formulations consistent with the rule of law should (1) eliminate or ameliorate the experience of personal domination, whereas a dangerousness formulation should heighten it; (2) provide for a significant range of autonomy by citizens, whereas a dangerousness formulation should contract the ambit of autonomy; (3) limit the scope of governmental intrusiveness into individual and group activities, whereas the dangerousness approach should increase intrusiveness.

None of these propositions is true. The formulation that most closely conforms to the rule of law creates a duty of absolute obedience on the part of children. This statute has a clear meaning insofar as any has, since none of its key terms (child, parent, obey, command) fails to correspond with common experience or shared values. Moreover, these terms are relatively precise, clearly notifying parents, children, and officials of what the law will enforce. This very clarity, however, increases for the child both the fact and the perception of personal domination. Within the family, it makes children subject to universal regulation of their activities by a source of authority identical to the source of its exercise. Parents are both rule-makers and rule-enforcers, and the rules they apply need not have general application. It would be no defense for the respondent to argue that, while she has to carry out the garbage, her siblings have no chores. Nor do qualified rules of obedience resolve this difficulty. A duty of obedience to reasonable commands only shifts the source of personal domination from parents to judge. While such a rule continues the presence of external rules governing parental domination, the condition of its operation is sufficiently unclear that no limits on judicial deter-

[82]To the extent this attitude which assumes an ability to distinguish legal locutions which have a core meaning from those which do not mediates—outside the family—between the claim for autonomy of individual persons in concrete cases and the general authority of community consensus, it corresponds to the mediation of rules in the socialization of authority and the development of autonomy within the family. That is, the child's gradual movement from the personal domination of parents toward the development of autonomy is mediated by rules: the personal domination of parents is progressively replaced by the impersonal authority of rules; the development of autonomy takes place alongside a growing appreciation of the collective significance of rules. *See generally* J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1965).

mination of deviance can be perceived. Thus, the judge becomes the maker and enforcer of rules, and the generality of the inquiry into reasonableness militates against the notion that the rules ultimately applied are necessarily uniform. Finally, reliance on a definition of habitual disobedience also raises serious problems. If habitual means only "more than once," it in no way relieves the child's experience of personal domination by parents. If, on the other hand, this formulation is taken to imply some higher level of deviance it goes well beyond the uncertainty of a reasonableness standard. Here judicial action is unpredictable; both formally and practically, intervention will turn on highly individualized rather than general criteria. Thus, the function of the rule of law in eliminating the experience of personal domination by separating authority from its exercise is incompatible with legal regulation of incorrigibility.

Precision of language in PINS laws also has the effect of increasing the law's intrusiveness into individual careers rather than of limiting such intrusion as the rule of law contemplates. The more definite the formulation, the more this is true. Under a standard of unconditional obedience, any instance of defiance by the child, however trivial or atypical it may be, is sufficient to authorize societal intervention if the parent chooses to complain. Nor is this intervention simply that of a surrogate parent, since the court upon assuming jurisdiction may remove the child from its home, place him on probation, inquire into his entire history, or take any other statutorily authorized step, whatever the natural parents may have had in mind when they invoked that jurisdiction.

An inquiry directly into dangerousness, by contrast, may, despite its lack of guidance to actors and officials, provide a greater range of autonomy to children than do incorrigibility statutes which attempt to comply with the rule of law. The dangerousness formulation itself conveys no particular duty to children and it can further be assumed that actual intervention under the rule will be limited to children with a significant history of ungovernable behavior or who engage in some particularly serious but isolated kind of misconduct. Minors, accordingly, have a range of choice concerning conduct within the family bounded by these limits rather than by each and every command given them. Correlatively, the judge is able to determine directly whether one or more instances of disobedience reflects a simple disagreement about a tolerable level of autonomy for the child and her capacity for responsibility, or a more serious problem in the child's socialization.

By the same token, a dangerousness statute without apparent limits may in fact be less intrusive than existing incorrigibility laws. The latter contemplate constant intervention; the former asserts openly that the public interest requires intervention only when matters are grave. Parental discretion to invoke the process will be reduced because no rational parent can expect judicial review of trivial complaints. Finally, while the substance of the provision is not directly addressed to parental authority, it implicitly supports that

authority, but does so only at the point where the weakening of authority seems to involve serious consequences.

CONCLUSION

At least in the area discussed here, the rule of law and an inquiry into dangerousness are not antinomies. Rather, the real distinction between the two lies in their differential distribution of vagueness and precision.[83] The inquiry into dangerousness is less precise about the sort of conduct proscribed, but considerably more precise about how bad a child must be before she becomes an object of legal concern. The rule of law provision, on the other hand, is more precise about the sort of conduct proscribed but gives greater discretion to parents to invoke the legal process for trivial or improper reasons.

More generally, detailing the operational characteristics of these two types of PINS jurisdiction leads us to the same point as did our analysis from the three perspectives of socialization and development, control and responsibility, and character and choice: a PINS jurisdiction based on rules generates a paradox. On the one hand, it attempts to reenforce parental authority, but it must do so by rules; the child must obey the parent because the rule says so. This proposition has the alternative meaning that children are to be autonomous unless that autonomy is qualified by a rule. In attempting to reenforce the personal domination of parental authority, this type of PINS jurisdiction undermines it in favor of the authority of impersonal rules. On the other hand, in generating broad parental discretion to invoke the legal process and in requiring a broad range of dispositional alternatives scaled by severity, the rule of law model undermines the salience of rules and hence the development of autonomy. Children can never know when parents will decide to take them to court or how seriously the judge will regard their behavior.

A PINS jurisdiction based on dangerousness, in contrast, respects the autonomy of children because it withholds intervention until there is a serious problem of public order. In the meanwhile it leaves the family to work through its problems internally. However, the inquiry into dangerousness depends directly on the existence of common experience and shared values to give notice to parents and children, and to control official discretion. Since the statute does not rely on the mediation of legal assumptions regarding language, the inquiry into dangerousness appears inconsistent with the rule of law.

It is now clear from variety of perspectives that PINS jurisdiction based on the rule of law interferes with the socialization to authority and the

[83]This notion is borrowed from P. DIESING, PATTERNS OF DISCOVERY IN THE SOCIAL SCIENCES 221 (1971). For a discussion of this idea in terms of the radical separation of universals and particulars, *see* R. UNGER, KNOWLEDGE AND POLITICS (1975).

development of autonomy mediated by rules, whereas a PINS jurisdiction which respects autonomy and a narrower vision of the public interest is inconsistent with the rule of law. The rule of law generates an unbreakable paradox of authority and autonomy, while dangerousness fails to satisfy the requirements of legal justice.