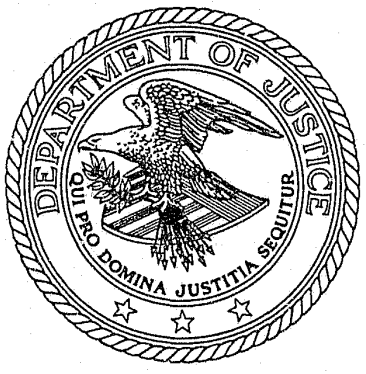

JUSTICE FOR JUVENILES

Charles E. Springer
Vice-Chief Justice
Supreme Court of Nevada

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ıvenile Justice and Delinquency Prevention

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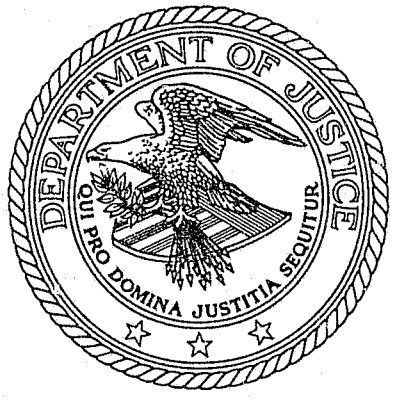

JUSTICE FOR JUVENILES

Charles E. Springer
Vice-Chief Justice
Supreme Court of Nevada

U.S. Department of Justice
Office of Juvenile Justice and Delinquency Prevention

OJJDP

Charles E. Springer is Vice-Chief Justice of the Supreme Court of the State of Nevada. Prior to being commissioned to the Supreme Court, he was Juvenile Court Master for the Second Judicial District Court for the State of Nevada from 1973 to 1980. He has also served the State of Nevada as Attorney General. He received the Outstanding Service Award from the National Council of Juvenile and Family Court Judges in 1980 and has served on the Boards and Commissions of numerous civic and State organizations in an effort to improve the quality of justice for adults and juveniles.

U.S. Department of Justice

Office of Juvenile Justice and Delinquency Prevention

National Institute for Juvenile Justice and Delinquency Prevention

Juvenile Justice Clearinghouse/NCJRS
Box 6000, Rockville, MD 20850

Dear Colleague:

"Justice for Juveniles" is a serious and deliberative look at the juvenile justice system, its philosophical and historical underpinnings, the strengths and weaknesses of today's system, and the implications for its future.

Last year over 35,000 juveniles were arrested in this country for violent crimes, including murder, rape, and aggravated assault. The success of this office's efforts to reduce juvenile crime and create a more secure society depends on the ready exchange of information and ideas among professionals in the field. Seeking learned input and providing information to both the public and private sectors takes a giant leap toward that goal.

Justice Springer brings a unique perspective to the study of our Nation's handling of juvenile offenders. I do not necessarily agree with everything he says, nor does this office necessarily endorse all of his ideas. But we do think that his work is provocative and highly worthwhile. The former Chief Justice of Nevada's highest court, he is a first-string player in the day-to-day scrimmages of the legal system. In addition, he is a student of the system, poking, prodding, and pinching it to see where it's healthy and where it hurts.

Justice Springer's work is a legitimate and lively addition to our continuing examination of the juvenile justice system. Few will argue with his diagnosis. But his prescription for cure is sure to fan the flames of debate so crucial to resolving the issues at hand.

"Justice for Juveniles" is a call for reform. It's a call to action. I commend it to you for thought and discussion.

Alfred S. Regnery

Alfred S. Regnery
Administrator

April 1986

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I. Opening Statement

I. Opening Statement

Fiat justitia ruat coelum.
Let justice be done, though the sky should fall.
Lord Mansfield, Rex v. Wilkes, 1770

That justice be done, for juveniles—in the courts and in their daily lives—is the theme of this publication.

The first step in doing justice for juveniles is to revise juvenile court acts throughout the country so that when juvenile courts deal with delinquent children, they operate under a justice model rather than under the present treatment or the child welfare model. By a justice model is meant a judicial process wherein young people who come in conflict with the law are held responsible and accountable for their behavior.

The juvenile court should be maintained as a special tribunal for children, but when dealing with criminal misconduct, the emphasis and rationale of the court must be changed to reflect the following:

- Although young people who violate the law deserve special treatment because of their youth, they should be held morally and legally accountable for their transgressions and should be subject to prompt, certain, and fair punishment.

- Except for certain mentally disabled and incompetent individuals, young law violators should not be considered by the juvenile courts as being "sick" or as victims of their environments. Generally speaking, young criminals are more wrong than wronged, more the victimizers than the victims.

- Juvenile courts are primarily courts of justice and not social clinics; therefore emphasis in court proceedings should be on the public interest rather than on the welfare and treatment of the child. This does not mean that these ends cannot be successfully carried out by a justice-oriented juvenile court.

- Many environmental factors can contribute to the commission of a criminal act by a young person, but the major factor courts should deal with is the moral decision to violate rather than to obey the law. Law

violators are best dealt with by doing justice—by reproval and punishment.

- To adopt a justice model is not to rule out or diminish the importance of rehabilitative measures employed by juvenile courts. Disapproval of, and punishment for, the wrongful act is probably the single-most important rehabilitative measure available to the court. Additional counseling, education, and the like are easily incorporated into an accountability-punishment disposition for delinquents.

These ideas, however, are incompatible with the basic legal assumptions that ground the present juvenile court structure. What is proposed is a new structure, a model based on justice rather than on the questionable "alegal" social theories that underlie the present system.

It is argued here that the proposed justice model is more

- in harmony with the proper public perceptions of what courts should be about;

- just and fair to juveniles and the public than the present model;

- efficient, because the courts would be engaged principally in judicial work rather than in the endless and often demeaning treatment and life-meddling which presently occupy so much of the juvenile courts' time; and

- effective than the present model because holding juveniles accountable for their misdoings better serves the goals of rehabilitation than the aggregate of nonpunitive "treatment" methods to which most juvenile courts are now necessarily committed.

The idea of basing juvenile courts on the justice model is certainly not presented as a panacea for youth crime. To diminish youth crime to any appreciable degree, society must do justice for juveniles in their daily lives. This is to say that they should be given their *due*, their daily bread; their needs should be fulfilled. Failure to provide for those dependent upon us is an injustice that is both an evil in itself and the basic cause of crime and misery among our youth.

To consider fully the subject of justice for juveniles, then, we must examine justice in both its juridical and extrajuridical meanings. The two are very much related.

Juridical justice: juvenile courts

Juvenile courts as institutions began as a social experiment in Illinois in 1899. As originally set up by the Illinois legislature, juvenile courts were not designed to be courts of justice, but rather were more like coercive social clinics empowered "to regulate the treatment and control of dependent, neglected and delinquent children."[1] The newly created juvenile courts were commanded to treat a criminally active delinquent in the same manner as they would a poor or neglected child and to give to delinquents the same "care, custody and discipline" as "should be given by its parents."[2]

The Illinois act divested the criminal courts of jurisdiction over persons under age 16 and substituted a paternalistic system which viewed criminally active juveniles as victims of their environments who were not responsible for their criminal acts.

As a consequence of this kind of thinking, juvenile courts operated under a medical model, giving "individualized treatment" to the ailing victims of the slings and arrows of a bad environment. The welfare of the child was the guidepost of the new social court, and it was thought that ministering to the welfare of the individual child would cure or rehabilitate the child and, ultimately, benefit society.

The so-called juvenile justice system, spawned in Illinois and copied throughout the United States and most of the world, is rather obviously not a justice system at all. It is proposed here that a true system of justice should be adopted and that the delinquency jurisdiction of the juvenile court system should be radically redesigned to conform to a justice model.

The underlying assumption is this: crime, by definition, is an act or omission liable to punishment by society as a wrong against society. Society sets standards that determine criminal conduct. We must live up to these standards or violate them at our peril. In this case, the term "we" includes young people, who should be held accountable for their actions and punished for their wrongs, subject to some degree of diminished responsibility.

Such an assumption is contrary to the social welfare philosophy of the traditional juvenile court. However, it is not necessarily contrary to the way that juvenile court judges have traditionally handled delinquency cases. Treating and caring for youthful criminals, rather than punishing them, is simply too contrary to our experience and folk

wisdom and too counterintuitive to be accepted by judges or the general public. A philosophy that denies moral guilt, abhors punishment in any form, and views criminals as innocent, hapless victims of bad social environments may be written into law, but this does not mean that it will be followed in practice.

The time has come to adopt a system of justice for juveniles and to say so. The starting point is legislative reenactment of juvenile court acts to reflect the following:

- Purpose clauses should be amended to declare that the primary objective of the legislation is to achieve justice, to preserve order and domestic peace, and to protect the interests of society in general—not to serve the interest and welfare of the criminally offending child.

- Juvenile courts should be clearly defined as judicial institutions charged with the special task of administering justice in matters relating to children on the basis of a theory of diminished juvenile responsibility, not one of juvenile irresponsibility.

- Delinquency jurisdiction should be clearly defined in terms of criminal responsibility, accountability of juveniles for criminal misconduct, and the legitimacy of punishment.

- Delinquency jurisdiction should be divided into two overlapping levels, thereby recognizing, on the basis of age and other factors, varying degrees of diminished criminal responsibility.

- Noncriminal juvenile misbehavior[3] should, when it comes under court cognizance, be treated judicially and not clinically. Where coercive state intervention becomes necessary in the public interest as a last resort, enforcement of the law and of court mandates rather than social manipulation, should be the thrust of judicial action.

- Legislative provisions relating to court procedures, dispositional reports, probation, punitive alternatives, transfer for adult prosecution, institutionalization, continuing jurisdiction, and other pertinent areas should be revised in accordance with the justice model.

- Justice for juveniles should not be seen as a means of excluding youths from beneficial rehabilitative and educative programs. Punishment, deterrence, and rehabilitation go hand in hand. Properly administered juvenile courts can provide an optimal method of dealing with youthful crime.

The need for and the high value of a special tribunal for children is clear. However, there is a danger that the special tribunal, and justice for juveniles, will be lost unless revisions are made in the present system.

Extrajuridical justice

Juridical justice, sometimes called remedial or retributive justice, is the justice administered by courts. However, there is a broader, more inclusive kind of justice that must be considered in order to treat adequately the subject of justice for juveniles.

Simonides (ca. 475 B.C.) defined justice in terms of "giving every man his due." It is right and just that children, the dependent members of society, be given their "due." Denial of this due—injustice—is a much more important cause of social ills and particularly of crime than is denial of juridical justice in our courts.

Although this paper is principally concerned with the institution of retributive justice in the delinquency jurisdiction of juvenile courts, "justice for juveniles" is recognized as being of broader scope and involving justice touching the physical, social, moral, ethical, and spiritual lives of young people.

Notes

1. Statutes of Illinois, *Charities*, ch. 23 (1899).

2. Ibid., ch. 21.

3. Noncriminal misbehavior, sometimes called "status offenses," refers to conduct by minors that is so excessively unruly or beyond control as to require judicial intervention, or to law violations by minors that would not be criminal if committed by an adult.

Part One: Juridical Justice

II. Historical and Philosophical Background of the Juvenile Court

II. Historical and Philosophical Background of the Juvenile Court

My people perish for lack of knowledge.

Hosea (Isee) 4:6

Juvenile court is a very poorly understood institution. Proceedings are held behind closed doors, and too little attention has been given to exposition of what the juvenile court is all about. André Gide said something to the effect that everything has been said before, but last time no one was listening. It is hoped that someone is listening now, for it is very important that the juvenile court be better understood; and it cannot be understood without a rather careful examination of its historical and philosophical antecedents.

Crime and punishment

In arguing for a justice rather than a welfare or treatment model for delinquent juveniles, two assumptions are made. The first is that those who violate criminal laws should be and deserve to be punished for it. The second assumption is that children of the age of reason are also responsible, albeit to a lesser degree, for their criminal acts and also should be subject to a just and deserved punishment.

Throughout most time and in most societies certain behaviors have been considered to be objectionable and subject to disapproval and punishment by the group. As societies developed, customs or unwritten standards of conduct became codified into criminal laws. Parts of these laws were prescribed sanctions or punishments. It was recognized that without the punishment there would be no law. Criminal law without sanction would be merely a pious expression of opinion as to what was acceptable conduct. People who violated laws have traditionally been very much aware of the consequences and have understood punishment as being what was justly coming to them.

In recent years the "old" idea that criminals should be punished for their crimes has been gaining in currency; still, a large body of jurisprudential and criminological opinion holds that punishment for crime is an archaic and barbaric practice arising out of primitive drives for revenge.

It is interesting to see how this came about.

Classical criminology

Until the 18th century, criminal wrongdoers were generally thought of as *deserving* of some kind of punishment from the state and often from the Deity as well. Crime and punishment were thought of as being in the natural order of things. Then, with the onset of 18th-century rationalism, many came to believe that morality, right and wrong, and punishment for crime were much too "unscientific" to provide an acceptable, rational basis to punish criminals. The search was on for some practical justification for punishment, a justification not based on *a priori* first principles of any kind but rather on a claimed and demonstrable utilitarian value to society. Jeremy Bentham (1748–1832) proposed a philosophical doctrine called utilitarianism, which concerned itself not with whether the offender deserved punishment for legal or moral wrongdoing but instead with the question of whether punishment was useful for the good of society, or, as Bentham put it, for "the greatest good of the greatest number." Bentham reasoned that humans act on the basis of seeking pleasure and avoiding pain and that threat of punishment would deter prospective criminals from committing criminal acts.

Blackstone, unlike his contemporary Bentham, believed that the criminal law should be "founded upon principles that are permanent, uniform and universal; and always conformable to the dictates of *justice*, the feelings of humanity, and the indelible rights of mankind."[1] Nevertheless, Blackstone believed that punishment for crime was not a dictate of natural justice, but rather a practical, utilitarian necessity. He rejected retribution, or as he called it, "retaliation." Punishment for crimes, according to Blackstone, does not have as its end "atonement or expiation," for this is to be left to the "Supreme Being." Rather, punishment is inflicted as "a precaution (prevention) against future offenses of the same kind." This prevention is to be brought about in three ways: rehabilitation, deterrence, and incapacitation. "The same one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender" is rehabilitated or deterred or incapacitated.[2]

Blackstone expressed the aims of criminal law in terms of the utilitarian end of achieving civil peace and order and protecting the monarch or the state, rather than in terms of justice or fair treatment being meted to an individual offender or victim.

This thinking represents a shift from a retributive system that would punish criminals in order to uphold the moral and legal force of the criminal law to a utilitarian system interested only in protecting the state and preserving peace and order by whatever practical means might appear effectively to prevent crime.[3]

Contemporaneously (1764), in Italy, Cesare Beccaria, the father of classical criminology, adopted a utilitarian rather than a "justice" theory of criminal law, namely that the purposes of punishment are to defend the liberty and rights of the people by preventing criminals from doing further injury, and to deter others from committing crimes. To accomplish this end, Beccaria believed that for each crime there should be an appropriate penalty, "to make the punishment fit the crime."

Beccaria was outraged at the severity of criminal punishment of the time and believed that it was promptness and certainty of punishment rather than severity that deterred criminality.[4]

The utilitarian theory was humanitarian in approach and emphasized punishments that were proportionate to the crime; still, utilitarians, by the nature of their approach, lost sight of the often mitigating individual traits and attitudes of the offender. This and the classical assumption of an unfettered free will to choose between criminal and noncriminal courses became the principal objects of criticism during the reforms in criminology found in 19th-century positivism to be considered next.

The utilitarian theories of Blackstone, Beccaria, Bentham, and others have been referred to as the classical school of criminology. The classical school is known for humanitarian reforms of the criminal penal system, but its theories were impersonal, amoral, and strictly pragmatic in nature. No concern was expressed about the moral quality of a criminal offense or its rightness or wrongness. There was no assumption that justice required punishment *for* the offense, only that as a matter of practical necessity the state may protect itself or its citizens by trying to deter and prevent criminal conduct. This, they thought, could be achieved by making the consequences of criminality less pleasurable and more painful than compliance with the law.

The classical theories of criminology emerged at the end of the 18th century as the culmination of what was thought to be enlightened political and social theory applied to the problems of crime. The rationalism of the 18th century and adoption of the so-called scientific method led intellectuals of the time to reject as part of criminal law enforcement abstract principles such as right and wrong, good and

bad. Instead, they set themselves to measuring such things as how much punishment, p, would deter a given crime, c.

The utilitarian approach as adopted by the classical school has been the virtually unquestioned premise for criminal "justice" ever since. Justice is placed in quotation marks to stress the meaning of justice in its traditional sense as an abstract principle which involves value judgment and, in a true criminal justice system, assures that offenders are given their due or just deserts.

There can be no true justice system so long as we reject justice as justice and insist that practical, provable results are all that count. Presumably, under a utilitarian system, if punishment were proved "not to work" in any practical or useful sense, it would have to be abolished. This idea, of course, is inconsistent with the idea and ideal of justice espoused here.

Positivistic criminology

At the beginning of the 19th century, most students of crime continued to reject what were looked upon as airy fantasies of morality and ethics, and closely allied themselves to a rational, pragmatic, scientific, and utilitarian approach.

Classical criminology of the 18th century, however, was not scientific enough for 19th-century positivists.[5] Classical criminology was based on the assumption of the existence of free will and choice and on the psychological theory of hedonism—that people would seek pleasure and avoid pain. The most important departure of the positivists, who saw themselves as very scientific, was their denial that persons who committed criminal acts were doing so of their own free will. No one could see, feel, or hear "will power"; therefore, it does not exist. Rather, decisions that formerly had been considered moral in nature were now to be considered as being "determined" by scientifically measurable external forces—biological, psychological, economic, or social forces—beyond the control of the actor. Those who hold this view are considered "determinists."

Under such a theory of scientific determinism there was no "ought," and it was ridiculous to speak of punishment for an act because the act was not within the actor's control. There was no point in using punishment as a deterrent because it could not be established scientifically that deterrence worked. The only remaining alternative was to find out, again scientifically, what the external causes for behavior

were and to manipulate these causes in such a way as to change the behavior in a socially acceptable manner. The medical analogy is immediately evident—we diagnose the behavioral problem; then we *treat* criminals, we do not punish them.

These scientific, positivistic theories were developed during the last third of the 19th century as a reaction to claimed failures of classical criminology. As indicated, the positivists did not believe that criminals possessed freedom of choice; and they began seeking the external sources and causes of criminal behavior. There were two general approaches for this inquiry: constitutional (physical) and social. The two behavioral forces, often alliteratively referred to as "nature and nurture," led to two fairly distinguishable schools of determinism: biological-psychological determinism and social determinism.

The theory of constitutional determinism—we are what we are—is closely linked to the ideas of Darwin. Phrenology is one example of early constitutional determinism. The acknowledged father of constitutional determinism is Cesare Lombroso, who used the scientific method in the second half of the 19th century to argue that the typical criminal can be identified by certain physical characteristics or stigmata such as a slanting forehead, long ear lobes or no ear lobes at all, a large jaw with no chin, prominent eyebrow ridges, excessive hairiness or abnormal absence of hair, and other such physical attributes.

Lombroso claimed to be able to identify the "born criminal," whom he called "*fou moral*," morally insane. Drawing from Darwin, he theorized that the criminal type was a form of unevolved, morally regressive, primitive being. As can be readily seen, such a being is predestined, *predetermined* to a life of criminality. Crime is not a matter of choice for the criminal throwback but rather a matter of constitution.

Although Lombroso's theories were eventually discredited, his position as originator of the Italian or positive school of criminology and his approach of transferring emphasis from the crime itself to the scientific study of the criminal is important to the study of juvenile court origins.

Related to constitutional determinism is psychological determinism. Sigmund Freud was a psychological determinist. Basing their theories on deterministic assumptions that criminals are the product of defective mental states or are compelled by repressed unconscious conflicts and early traumatic sexual experiences, the psychological determinists also attributed crime to causes beyond the control of the actor.

The social determinists, "the nurturists," also took the position that crime does not involve personal moral responsibility and asserted that crime is the product of social organization and social conditions. The social theories of Karl Marx are a key example. Marx believed that the elimination of capitalistic exploitation would result in the disappearance of crime.[6]

Enrico Ferri, a 19th-century Italian criminologist, tied the two schools of determinism together by saying that crime "is the result of manifold causes, which, although found always linked into an intricate network, can be detected, however, by means of careful study. The factors can be divided into *individual* or *anthropological*, *physical* or *natural*, and *social*."[7]

Ferri's position strengthened that of both constitutional and social determinists and their principal premise that free will and individual moral responsibility could never provide the basis for any criminal legal system.

Under Ferri's theory, a combination of external circumstances lay behind all criminality. Criminals were thought of as having little, if any, control over the forces acting upon them—forces such as criminal tendencies that were inborn or that developed unalterably during childhood or forces discoverable in the criminal's social or economic environment. Consequently, moral or retributive punishment was unthinkable, and deterrent punishment was very likely of no use. Led by Ferri, the new criminology held to a position that would abolish criminal responsibility and moral guilt as the foundation of criminal law and replace them with the principle of "social defense." The sole purpose of criminal law under this thinking is to permit society to protect itself against the constitutionally or environmentally determined antisocial behavior of its sick or deviant, but morally irresponsible, members. Thus, when a member of society commits a dangerous or harmful act, this should not be the concern of the law; there is no question of guilt or degree of culpability to be answered, but rather what humane measures should be administered to protect society from future harms brought about by the predetermined behavior. Treatment (and sometimes quarantine and eradication) replaces punishment.

Reservedly accepting the precepts of scientific determinism, American thinkers emphasized the treatment dimension: "We can fix it." If crime is caused not by morally responsible criminals but by biological, developmental, psychological, environmental, or social causes, all that needs to be done is find out what these causes are and change them.

Criminals could be "diagnosed"; and when the cause of the problem was ascertained, it would be addressed, and they could be "treated."

The legal community has successfully resisted complete takeover by the positivists in their attempts to displace a system of law with what has been called the "therapeutic state." We still have a system of laws rather than of men (therapists) in our criminal justice system, but the positivists have made great inroads in the area of corrections and in areas involving mental incompetents and juveniles. The idea that criminal offenders are wrongdoers, that they are morally blameworthy, that they are guilty, and that they deserve punishment is too ingrained and intuitively acceptable to be replaced by scientific or philosophic fad even where virtually universally accepted by the scientific and philosophic communities. However we disguise it, we do punish criminals *for* their crime even though the expressed theoretical framework for such action is often confused and contradictory.

Whenever possible, however, the positivistic-deterministic doctrine has accreted itself to our system of criminal justice. It has given us a "corrections" system instead of a "penal" or punishment system. It has given us an indeterminate sentence system so that the social physicians can treat socially harmful innocents in therapeutic "correctional institutions." Worst of all, it has given confusion and contradiction to our juvenile "justice" system.

On paper and in doctrine, the juvenile court system is clearly based on the positivistic-deterministic principles outlined above. Whereas the adult system still preserves the essence of justice, the juvenile system is, theoretically at least, bound completely to a social-defense system that denies personal moral responsibility as nonexistent and absurd. Personal guilt, individual accountability, and punishment *for* wrong conduct is rejected by the language and philosophy of the juvenile justice system.

Notes

1. Sir William Blackstone, *Commentaries on the Laws of England*, Book the Fourth, Clarendon Press, Oxford, 3 (1769).

2. Ibid., 11–12.

3. It is noted that utilitarian and retributive views of punishment are not inherently or necessarily incompatible. Utilitarians stress the future, preventative value of punishment; whereas retributionists stress punishment as the just desert for past misdeeds. The two views are reconcilable and should be reconciled. Punishment for past acts should also be appreciated for its practical effect in deterring future misconduct.

4. Blackstone, who studied Beccaria, observed that "punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are

more merciful in general... [C]rimes are more effectually prevented by the *certainty* than by the *severity* of punishment. For the excessive severity of laws (says Montesquieu) hinders their execution; when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it." Ibid., 16–17.

5. Positivism is a philosophical doctrine that holds that sense perceptions are the only admissible basis of human knowledge and thought—the scientific approach to crime.

6. Karl Marx, *The Poverty of Philosophy*, Chicago: Imported Publications (1973).

7. *Studies on Criminality in France from 1826 to 1878 (Rome: 1881)*, quoted in *New Horizons in Criminology*, 3rd ed., Prentice Hall, 207 (1959). (Emphasis in original.)

III. Creation of the Juvenile Court, "A Peculiar System"

III. Creation of the Juvenile Court, "A Peculiar System"

[A] peculiar system for juveniles, unknown to our law...
In re Gault, 387 U.S. 1 (1967)

The ideological assumptions that ground the juvenile court acts throughout the country must be understood in order to comprehend the "peculiar system" of juvenile courts.

To begin with, the words "juvenile" and "court" do not go together. Throughout history children have been considered, in the eyes of the law, as no more than property, animals, slaves, or lunatics and not subjects worthy of direct consideration by the law.[1]

Throughout history, the underaged were generally held legally responsible for criminal acts if they were old enough to understand that what they were doing was wrong. There was no middle ground; children were either held responsible as adults or not held responsible at all. The only problem was how to determine *when*, at what age, criminal liability attached.

The common, arbitrary dividing line for criminal liability throughout history, found in Mosaic and Roman law and embodied in our common law, is pubescence. Roman law recognized two kinds of children: *infans*, a child under the age of 7 years (called "*quasi impos fandi*," not having the faculty of speech); and *impubor*, a child 7 years old or older who has not attained the age of puberty, which was set at 14 for boys and 12 for girls. The division is sound biology and sound psychology and provides a model that is useful in today's world.

Catholic doctrine held that a child under age 7 could not commit mortal sin. Accordingly, children under this age were not in the development of the common law subject to criminal prosecution. Persons 14 and over were considered to be adults and subject to adult prosecution. At 14, marriage was allowed, and the responsibilities of adulthood had been assumed. It was the children between ages 7 and 14, the transitional stage, that required accommodation. In this stage, between infancy and puberty, the child was presumed to lack capacity. However, if it could be proved beyond a reasonable doubt that the child had criminal capacity, the child could be convicted of a crime. Under

Roman law[2] these decisions were based on three factors: age, the nature of the offense, and mental capacity. In England, Blackstone explained: "The period between *seven* and *fourteen* is subject to much uncertainty; for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax* (capable of deceit), and could discern between good and evil at the time of offense committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty."[3]

In a system where conviction of a felony resulted in death or "transportation" to Australia or America, the adoption of the principle of *doli incapax* from the Roman law was enlightened and provided a relatively high degree of insulation to children from the ordinary consequences of criminal conviction. Under the age of 14 there was a presumption against criminal capacity, but a child could still be convicted, according to Blackstone, under the applicable legal maxim, "*malitia supplet aetatem* (malice, or intention, makes up for the want of years)."[4] Convicted juveniles frequently avoided punishment, however, by judicial or jury nullification (refusal to convict even where guilt was manifest), and royal pardon was common in such cases. The severity of punishment, although harsh[5] by present-day standards, was consistent with the practice of the times and with the public's perception of the nature of childhood.

During the period in question, children were mixed with adults as soon as they were considered able to do without their mothers or nurses (around age 7). At this time they were considered ready to join the community of adults sharing in the responsibilities of the work-a-day world.[6]

Changing viewpoints on the place of children in society brought about a change in attitude toward juvenile criminality. During the 16th century the idea that children needed a longer period of preparation for life began to be recognized. The acceptance of children's need for education changed the perception of childhood. Increasingly, a child was thought to have reached adulthood not when he or she was physically able to work, but only after the child was prepared for life by schooling. As society became more urban and more industrialized, the need increased for a period of preparation and therefore a longer period of childhood.

The common law rule of *doli incapax* provided an all-or-none rule for determining criminal liability of the young and immature. Immaturity can have two kinds of significance in the criminal law: one is to draw

a line separating criminal from noncriminal behavior; the other is as a factor mitigating the severity of punishment. The common law, formally at least, recognized only the division between capacity and noncapacity, *doli capax* and *doli incapax*. So we find Blackstone citing instances of "a girl of thirteen, who has burned for killing her mistress; another of a boy still younger, that had killed his companion, and hid himself, who was hanged."[7] Such eventualities seem to call for a more compassionate approach, one in which prepubescent children would not be subject to such Herodian punishments.

An interesting and very significant response to this need was the so-called child-saving movement in America during the early 19th century, when private organizations were formed to receive and protect children who were abandoned, neglected, abused, or involved in infractions of the law. Institutions called houses of refuge, and the like, were created to house the rescued children.

Social reformers, often called "child savers," sought successfully to have legislation passed that would create a liaison between the courts and the private social services offered by the reformers.[8] The legislation authorized the court, on complaint by any "reputable" person, to bring about the judicial declaration of a child's status as "dependent" or "neglected," and the consequent institutionalization of the child. These jurisdictional definitions were taken from the English "poor laws."[9]

Often, significantly, the definition of "dependent and neglected" included criminal activity, called "delinquency." The so-called child-saving movement resulted in poor, criminally active "delinquents" being swept into the houses of refuge and similar institutions so that they could be "protected" through their detention in secured residential institutions. However, although children were certainly better off in houses of refuge than in adult prisons, this transfer was achieved absent the due process ordinarily accorded to the criminally accused. All this was done unceremoniously in the name of the state as father, *parens patriae*.

The Juvenile Court Act

The first juvenile court act was passed in Illinois in 1899. It adopted much of the practice and legislation that had resulted from the child-saving, house-of-refuge movement. It created a special court to deal

exclusively with juveniles and incorporated a number of other special procedures for juveniles. Each of these special procedures had already been in practice in one or more jurisdictions—with the exception of one extremely important and radical departure from the past: the circuit and county courts of Illinois were given "original jurisdiction in *all* cases coming within the terms of this act." This important change divested the adult criminal courts of all criminal jurisdiction over children under age 16.

Cases that fell within the terms of the act included the "disposition of delinquent children," defined as "any child under the age of sixteen years who violates any law of this State or any City or Village ordinance." The courts were given powers of disposition, "in the case of a delinquent child," and the power to commit such a child to a probation officer or to a variety of institutions. It is important to note that jurisdiction over all criminal offenders under age 16 was placed in the juvenile court. From July 1, 1899, there were no more criminals under 16 in Illinois. The juvenile court lost jurisdiction when the child reached 21; and the courts were required to accord to all juvenile criminal law violators, "care, custody and discipline," not punishment.

A second important feature of the act, as its title reveals, was that its purpose was to regulate the treatment and control of *dependent*, *neglected*, and *delinquent* children, thereby equating poor children with criminal children and insisting that they be treated in substantially the same manner. This became more significant when, in 1905, the Illinois act was amended so that the definition of "delinquent" included, in addition to criminal children, children who were incorrigible or who did any number of objectionable, noncriminal things such as knowingly associating with vicious persons, being absent from home without permission, growing up in idleness, visiting any public poolroom, habitually wandering about any railroad yard, and other such knavery.

The act does not mention punishment of a child for criminal conduct—only treatment and control of the kind a parent would give to a child. A reading of the act shows that a 15 year old who committed the most violent and vicious criminal act imaginable would have to be treated in essentially the same benign manner as a poor child or a youthful poolroom visitor, and that at the very most such a child could be treated only until his or her 21st birthday.[10] Understanding this seeming madness is understanding a lot about the juvenile "justice" system.

Notes

1. "*Infans non multum a furioso distat.*" An infant does not differ much from a lunatic. Black's Law Dictionary.

2. See Justinian, *Digest* 3. 19. 10; 4. 1. 18.

3. Blackstone, *Commentaries*, 22–23.

4. Ibid., 465.

5. Compare for example, the severity of punishment under Roman law for parricide, murder of one's parents. According to Blackstone, "parricide was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sock, with a live dog, a cock, a viper, and an ape, and so cast into the sea." Ibid. 202–203.

6. P. Aries, *Centuries of Childhood: A Social History of Family Life and Law*, New York: Random House (1965).

7. Blackstone, *Commentaries*, 23.

8. "Child-savers" is a term coined by Anthony Platt to refer to a group of reformers, mostly women, active at the end of the 19th century. *See* Anthony Platt, "The Rise of the Child Saving Movement: A Study in Social Policy and Correctional Reform," *The Annals of the American Academy of Political and Social Science*, vol. 381. The child-savers believed that "troublesome" youth could be "saved" by removing them from corruption and placing them in a proper environment. According to Platt, this idea led to legislation authorizing widespread governmental intervention into the lives of families. The inclusion of the so-called "status offenders" in juvenile court legislation is an example of this.

9. Poor laws were 16th-century legislative responses by English Parliament to the increasing numbers of urban poor in English society. They provided, among other things, that the children of pauper parents could be involuntarily separated from their parents and apprenticed to others or placed in institutions in the manner of Oliver Twist.

10. Although this is true in theory, as now, it was not true in application. Young criminals were "treated" by being locked up in juvenile prisons called "industrial schools" or "training schools." Later statutes allowed for transfer of the older, more serious offenders to adult court; and some statutes excluded murder and other heinous crimes from juvenile court jurisdiction.

IV. Justice for Juveniles

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From injustice—never justice.
From justice—never injustice.

Dag Hammarskjöld, 1956

It will now be argued that there should be a return to justice for its own sake and that true justice should be made the soul of the juvenile justice system. Making this argument requires further exploration of the nature of juridical or remedial justice and of crime and punishment.

Crime is defined as an act or omission forbidden by law under pain of punishment. Crime is a public offense—an offense against all of us.

The concept of crime as a public wrong is an evolutionary concept. In less developed societies, the response to what we know as crime was an individual or family matter rather than a response of the tribe or community as a whole. Private revenge and family feuds were still the rule in Europe during the Middle Ages; however, as society became more complex and sophisticated, the disorder of such a system became apparent, and the need for some kind of societal control over criminal conduct was recognized.

In England, religion provided impetus for a change from private revenge to public intervention. Before the enlightenment, and at a time when justice and morality were unchallenged virtues, the law assumed that punishment was a natural and proper consequence of crime. Crime was equated with sin, and public punishment was seen as a means to assuage the sensibilities of the victim, the victim's family, and the community and as an expiating, temporal purgatory. From this evolved the idea that offenses against worldly vicars of God represented by the crown should be subject to punishment emanating from the crown.

The religious imperative and the growing distaste for the disorder of private and family feud led to a system in medieval England whereby money payment enforced by feudal lords took the place of private violence and vengeance. The *wergeld* (sometimes *wergild*) system (*wer*, man; *geld*, money) required different sums of money to be paid *for* certain kinds of injury to different kinds of men. So much was paid for the loss of an eye, so much for a limb, so much for a life—the principal idea being compensation, money *for* injury, something paid for something done—that is to say, justice.

The aim of such a system was to appease the victim or the family and to discourage violence and disorder in the realm. At first, *wergeld* was optional: "Buy off the spear or bear it."

This evolved, toward the end of the Anglo-Saxon era, into a compulsory system: no longer could one pay or fight; the offender had to pay, and the victim and his family had to remain silent. Failure to pay resulted in outlawry, a very undesirable and precarious condition wherein one was put outside the protection of the law.

The compulsory *wergeld* was administered by local lords in local courts; administration of justice was not a royal function until the Normans arrived. The feudal lords administering such a system soon learned that crime control and law and order could be profitable as they added to the *wergeld* a commission, an additional fine called a *wite*, to be paid to them for their peacekeeping functions.

Collection of these fines became the prerogative of the crown as the power of the central government, that is the crown, increased. Eventually forfeiture of all property by convicted felons became an important source of royal income.

In this manner, a system of public justice developed: justice administered by the king. The public law, or criminal law, was developed to correct injustices and to vindicate offenses against the public welfare as represented by the king. Generally speaking, the punishment for criminal acts was looked upon as a matter of justice; society was repaying the offender for the crime, and the criminal was repaying society.

Punishment

Punishment can be viewed in two ways: first, as a matter of justice, that is, as a due or consequence for past action, as justice rendered, as payment for past misconduct, and, second, strictly as a matter of utility, whereby pain is inflicted only to prevent future criminal behavior.

The previously mentioned adoption of utility and prevention as the sole justification of criminal punishment was not accepted by all enlightened thinkers of the 18th century. One important enlightenment philosopher who did not adopt the mechanistic views of the utilitarians was Immanuel Kant (1724–1804). Kant rejected the utilitarian idea that the punishment had little to do with the offender and was useful

only as a means for public protection. Punishment, Kant believed, could only be properly inflicted because someone had done wrong, not because it might affect how others act in the future:

> Punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For a man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. Against such treatment, his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefits for himself or his fellow citizens.[1]

According to Kant, punishment is an end in itself; this contrasts with the utilitarians, who see punishment only as a means to an end. Kant was a retributionist; and he defended the moral connection between crime and punishment, making punishment a question of accountability of the offender *for* his or her offense, rather than merely a useful device employed for the good of society as a whole.

According to Grotius, punishment is the "infliction of an ill suffered for an ill done." Infliction of an ill suffered for an ill done is the very essence of any criminal justice system. Punishment as punishment is central to any definition of crime. Criminal laws do not merely suggest that certain acts not be done; they command it and prescribe punishment if the command is violated. This is true independent entirely of the deterrent, rehabilitative, or incapacitating dividends of punishment.

Justice implies, in its broadest sense, the quality of proportions, impartiality, and the giving of one's rightful due. When applied to criminal law, punishment becomes part of the justice equation—punishment due to the offender, due to the victim, and due to society as a whole. Without punishment there is no criminal justice, and there is no juvenile justice.

It is true that the inherent justice of punishment for crime cannot be established empirically or by scientific experiment; still, it is a reality that, try as we will to disguise it, does not go away. It is time to recognize legal punishment for what it is—the direct and deserved "pain or inconvenience" inflicted by the state *for* violation of its laws.

Blurred as the concept has become in its consideration by modern theorists, justice is still quite evident in our criminal system and only vainly and ludicrously masked in the juvenile system. There is really no need any longer to disguise punishment as deterrence, treatment, or anything else. It should be seen and called for what it is.

The main reason that we have rejected principles of justice in punishing criminals is because it is "unscientific." According to such reasoning, moral values are not demonstrable, therefore they are meaningless. Thus, punishment for wrong is meaningless and unjustified. If, however, punishment could be "justified" by its usefulness in protecting society as a part of the "social defense," then it would be acceptable. The time has come when we no longer have to be afraid of morality and no longer have to bow in homage to reductionistic science. We can punish criminals and safely say that we are doing so because it is rationally and morally correct to do so.

An enlightening and eloquent elaboration by a lay writer on the subject of punishment is found in *The Craft of Power*, by R.G.H. Siu.[2] Mr. Siu tells us that punishment must be "more than mere infliction of pain":

> There must be concomitant blame. As John Rikaby commented nearly two centuries ago, "To punish is not simply to pain: it is to put pain and blame together. Though it be sometimes just, for a man's own benefit and for the protection of others, to make him suffer pains for what he cannot help, it can never be just to blame him for what he cannot help." The term punishment is improperly used when children and animals are involved, since moral reproach is not understood by them. It is from an exclusive study of this improper sense that utilitarians have evolved their theory of punishment, a theory supposing that a wicked man, a "naughty boy," and a restive horse, are all on a level as objects of punishment. Man, boy, and horse receive stripes alike; but man is blamed severely, the boy perhaps slightly, and the horse not at all.

Siu then goes on to point out that moral condemnation—blame—is the essence of punishment. "The attaching of blame and the administering of pain must both be felt and accepted by the person punished," he asserts. He concludes:

> [T]he modern penal system in America is not compulsion but vengeance. When apprehended, blame is not attached; when attached, often not just, and when attached and just, usually not

> acknowledged. For the inmate it is not punishment, just torture. There is no rehabilitating—just hardening.

Siu speaks of attaching blame and "administering pain."[3] The thought of intentionally administering pain is a repugnant thought, and we must pause to think about it a moment. Pain is hard to define. The medical definition of pain is a "feeling of distress, suffering, or agony, caused by stimulation of specialized nerve endings." Generally, we no longer look upon criminal punishment in terms of stimulating specialized nerve endings, and we would find Webster's meaning far more acceptable: "a form of consciousness characterized by desire of escape or avoidance." Pain can, as recognized by Webster, vary from "slight uneasiness to extreme distress." It is submitted that some kind of distress, some degree of discomfort, some form of consciousness involving a desire of avoidance should follow, whenever possible, every criminal event.

There is nothing vengeful or sadistic about this view—punishment, pain, and inconvenience are part of the bargain, something that the criminal wrongdoer should expect, and something that would normally and naturally be expected today if modern social science had not instructed the wrongdoer to the contrary.

Judicial punishment is not vengefulness. It is an expression of social indignation, condemnation, and blame. It is based on principles of justice. It is wrong for criminals to commit crimes; it is right for society to distress criminals when they do. This is not the same as the victim or victim's family returning evil for evil. It is the necessary action by the state in maintaining its laws.

Punishment for crime is self-justifying; it need not be disguised. The state is keeping its promise: "If you commit a crime, the state will punish you." It is a promise that must be kept. Crime and punishment are correlatives. They are part of the same thing. They are inextricable in the criminal law, and no additional rationalization or utilitarian apology is necessary.

Punishment for crime is morally justified. There is a moral need for assessment of blame as mentioned by Mr. Siu. This is not speaking of blame of a theological or metaphysical nature, but rather of blame due to one who violates the rules. Human society is replete with rules of all kinds; we disfavor those who violate its rules and customs; we blame them, and usually some kind of punishment or distress is imposed upon rule violators. The same applies to the formalized, codified rules

of the criminal law. Violators have done wrong, and we should candidly recognize this notwithstanding our inability to make in vitro analysis of the concept of wrongness.

In sum, then, there are compelling reasons for a return generally to fundamental principles of criminal justice—that persons who commit crimes should be held accountable for their acts and punished proportionately. These principles should apply to the juvenile justice system; this may eventually lead to a return to justice by our whole society.

Justice in juvenile court

Law violators, young and old, should be punished for their crimes. Even at a very early age, young people are not the guileless, plastic, and pliable people they are portrayed to be by those who would free them from all moral and legal responsibility. Children understand punishment and they understand fairness. Most of the juvenile justice system's faults can be improved by an honest return to undisguised punishment as the natural and just consequence of criminal behavior.

Of course, this does not mean that juvenile court action should be limited to the infliction of pain on children. What it means is that criminally active children should be held responsible and accountable for their crimes. After this is done, many other benefits can flow from a special court created and operated solely for young people. A punishment and accountability regimen promises enhanced expectations from rehabilitation programs and an added measure to deterrence.

Making due punishment the core of the juvenile justice system actually expands the traditional, individual rehabilitation orientation of the juvenile court. Blame and pain, to borrow from Mr. Siu's essay on punishment, are the most important ingredients of moral education. Whatever other form rehabilitative efforts might take—counseling, "rap" sessions, psychotherapy, wilderness training, or whatever—the principal object of such activity is to socialize the offender and to eliminate future criminal behavior. This goal can be furthered by the force of the moral authority of the court. The child can be told of the wrongness and unacceptability of criminal conduct. The child can be made aware that when the law is violated, the child, like every other law violator, must pay for it, must receive some kind of punishment in order to be held accountable for the criminal violation.

Taking this position is not to ignore the known and accepted causal relationships between family, neighborhood, and peer influences and

youthful criminality. The juvenile court is in a particularly good position to evaluate and deal with these causal factors and to order, in certain cases, participation in specialized rehabilitative programs that may tend to alter these factors. The point is that these things are secondary.

The juvenile courts' principal responsibility is to the public and to society as a whole, not to each individual child. It so happens that juvenile courts, after doing "justice" and keeping a vigilant eye on what is best for us all, are in a position to do much to require that valuable, efficacious, but secondary and incidental, benefits be made available to erring juveniles.

Used by itself, the care and treatment model has a very serious drawback which deserves mention. Reference is made to the anomalous situation in which a child might not be eligible to receive needed kinds of social services until he or she commits a crime. ("Want to learn a trade, want the attention of some thoughtful, kind counselor? Go commit a burglary.") If punishment comes first, it is not so bad; but if a wilderness trip or a course in wildlife management is the principal visible consequence of the burglary, it seems that we are rewarding crime rather than punishing it.

Punishment by definition is painful and unpleasant. This certainly does not mean that juvenile courts should be preoccupied with incarceration and other forms of severe punishment. There is too great a tendency already, in our adult criminal justice system, to withhold punishment until multiple offenses have been committed and then, often to the surprise of the offender, impose a long, excessive, and draconian prison sentence. This need not be the case in the juvenile justice system.

The proper way to punish an offender is to impose speedy, certain, proportionate,[4] and relatively benign punishment, and to increase the level of severity if repeated offenses are committed. This concept, "progressive discomfiture," is based on principles of punitive economy (no more punishment than necessary) and early intervention (early disapproval and punishment preferred over late, severe punishment). The idea is that the "intense distress" end of the punishment spectrum is not appropriate or necessary for most youthful offenders except in cases of very serious or multiple offenses.

One of the greatest advantages of a juvenile court is the broad range of punitive sanctions available to it. There are many and diverse ways for juvenile court judges to induce in their wards "a form of consciousness characterized by desire of escape or avoidance," which can vary

from "slight uneasiness to extreme distress." In many cases, for example, a mere "grounding" or house restriction will create a form of consciousness characterized by desire of escape.

In the case of repeated offenses, the principle of progressive discomfiture requires the court to move from the slight-uneasiness end of the scale toward the extreme-distress end. This is justified from both the retributive and deterrent standpoints. One who continues to flout society's rules is more culpable and deserving of more severe punishment. Also, the mere fact that first offenders continue to repeat their wrongdoing is indicative of the first punishment's failure to deter and the need for imposition of more discomfiture.

The following exemplifies the possible consequences that might follow from juvenile criminal conduct under the principles stated above:

A juvenile commits his first burglary. He entered the house of an elderly widow in the late afternoon. He damaged her storm door and stole her television set and three $20.00 bills found in her dresser drawer.

A suitable disposition on this first offense might include the following:

- A clear explanation of the wrongness and seriousness and of the consequences of housebreaking, with emphasis on the effect upon the victim. Wrong conduct must be defined as wrong—*labeled* as wrong.

- A firm declaration that a repetition will result in certain incarceration.

- An accountability program possibly including:

  - –up to 30 days confinement in a juvenile detention facility, depending on the circumstances of the crime,
  - –written essay on the history of burglary and its punishment,
  - –written apology to the victim,
  - –payment of $100 to the victim in cash or equivalent for the mental suffering inflicted,
  - –victim restitution for actual damage,
  - –deprivation of driving or other privileges,
  - –house detention or "grounding,"
  - –mandatory "sample" detention.[5]

In the event of a second offense, the juvenile should be required to serve a mandatory detention period of at least 1 week followed by a period of home detention of at least 30 days. By house detention is meant supervised restriction to home or school, with no exceptions.

Consequences of future criminal behavior should be explained in terms of relatively long-term institutionalization and possible transfer to adult court.

Third and subsequent offenses obviously call for more severe punishment. Great changes in youths' attitudes can come about by placing 16- and 17-year-olds in jail for a weekend, separated physically but not necessarily visually, from other inmates. Institutional placement may not yet be necessary, but certainly a suspended commitment would be in order. Local detention for up to 60 days can frequently be effective in these kinds of cases if institutional commitment can be safely and justly deferred.

Compulsory educational programs, compulsory counseling, and psychological examination may play a part in this kind of disposition, where indicated.

The above outline is intended to show, in a general way, a manner of providing swift and certain punishment. Instead of putting first-term offenders on probation, it would be preferable, in most cases, to impose punitive sanctions and, when the sanction is completed, the youth should ordinarily be released from court surveillance. This has two advantages: first, too frequently, "on probation" means no sanction at all other than a weekly phone call to a harried probation officer with a giant caseload; second, there is a terrible waste of human resources that results from probation officers having to write out detailed social reports filled with irrelevant minutiae, setting out names and addresses of people, who often are not even involved, and cataloging masses of useless information. Most cases can be disposed of by ordering a punitive disposition and seeing to it that the disposition is carried out. This requires significantly less time, attention, and money than the endless investigating, reporting, planning, chatting, snooping, and jawboning that is going on now.

Gault[6] brought the "peculiar" juvenile court system a step closer to reality by insisting that locking up young people was a juridical function, not a clinical one, thus recognizing the judicial necessity for procedural due process of law.

Now, it is essential to take the next step: adopting a justice model that takes the administration of justice for delinquent juveniles out of the hands of the clinician and social scientist and puts it back in the judicial system where it belongs.

We have seen how the scientists and experimenters have taken young criminals out of the judicial process and placed them into a social clinic misnamed "juvenile court." Under their theory, of course, courts are not necessary. No adjudication of guilt or innocence is called for and young criminals are to be "treated" and cared for, not punished. Under such an assumption, there is no need for the legal protections commonly referred to as "due process." Thus, what had been, historically, essentially a criminal law process could be turned over to new, and indeed peculiar, clinic-courts, which for historical convenience and necessity remained within the judicial branch of government.[7]

Throughout most of this century we have had much more of a *clinic*-court than a *court*-clinic. The move back to *court* began in the 1960's, primarily with regard to procedural matters. In 1967, the U.S. Supreme Court in *Gault* moved the juvenile court toward the judicial end of the spectrum by prohibiting treatment-punishment by incarceration without first affording due process procedural protections.

It is now time to take the next step, one which would make juvenile courts into true courts, or at least *court*-clinics. Judges, then, could perform as judges and not as physicians, diagnosticians, prognosticians, therapists, and social clinicians. Judges should judge; that is the purpose of the justice model. Judges should not be poring over volumes of clinical charts hanging, so to speak, in clipboards attached to the bed of the disabled victim of society's barbs—the sick, troubled, and highly romanticized juvenile delinquent.

It is time that we recognize the impossible double bind our juvenile judges are placed in when they, judicial officers, are commanded to diagnose the "problem" of some young offender, when in most cases it is obvious that the criminal youth does not have a problem—he or she *is* the problem.

Of course there is no reason why a juvenile court judge cannot, in addition to judging, take an active interest in the lives of the young people who come before the court. Specially trained and experienced juvenile court judges can, as they have done in the past, wisely represent the moral good and authority of the community and be the directing

force in providing the care, treatment, and control that will improve the lives of erring children, thereby diminishing the likelihood of future criminal misconduct.

Justice for parents

Consideration of the subject of justice for juveniles cannot be complete without examining the role of parents and legal custodians in the juridical justice scheme. Much of the blame and pain for juvenile criminality has been cast upon the offenders' parents. Juvenile court idealogues have very successfully promoted the idea that since the child is not at fault, it must be the parent. This is the antithesis of juvenile justice. There can be no justice for juveniles if we blame the parents; if the child has done wrong, it must be the child who bears the blame.

As will be discussed below, there are a myriad of causes of juvenile crime; bad parenting is one such cause as may be poverty, bad companions, and a crime-ridden neighborhood. Still, under a justice model, the young offender is responsible for his or her acts and should be held responsible—to a lesser degree yes, but responsible nevertheless.

However much a parent may be at fault, the more responsibility is shifted to the parent, the more it is shifted away from the person who did the misdeed. A familiar melodrama portrays the young burglar whining, "I only did it to get Mommie's attention." The court of justice will tell this young person: "Well now, you've got Mommie's attention, all right, and you've got the court's attention also. This is what your punishment is going to be..."

Of course, parents have an important role to play in juvenile court proceedings, but it is not—except in extraordinary cases—to accept the blame for their children's crimes. After the justice part is over, that is, after the child has accepted the blame and just punishment for the wrongdoing, then the parents fit into the picture. If parental fault contributes to the likelihood of future child criminality, let the court do its part in trying to remedy that fault. Parents can be called upon to assist in enforcing the punitive dispositional program. The court may inquire into the question of whether a child was motivated by a desire to get "Mommie's" attention or to add to the record collection without having to pay for it. Parents can be called on to exert a stronger moral force on their children; they can be called on for a lot of things, but not to take the blame.

Justice should be done, but only to the one who deserves it. There are, of course, cases in which a parent also deserves punishment. In such cases, punishment is in order; in the typical case, however, the eyes of the court should fall on the person responsible: the guilty child.

Repudiation of justice by the so-called juvenile justice system has brought chaos and confusion to our courts. Some juvenile courts accept the treatment doctrine and apply it; others reject it and administer justice insofar as this is not prohibited by legislative or appellate-court edict. The result is a complete lack of homogeneity among juvenile courts with a wide distribution in the degree with which the two poles of treatment and justice are accepted or rejected by each juvenile court judge.

The argument here is for homogeneity, uniformity, and fair administration of justice. After a brief discussion of the need for justice for noncriminal juvenile offenders, the so-called status offenders, this argument will be augmented and exemplified by the inclusion in Chapter VII of proposed legislative provisions designed to engender a uniform system of true juvenile justice.

Notes

1. Immanuel Kant, *Philosophy of the Law*, (reprint of 1887 ed.) trans. by Heastie, New York: Augusta M. Kelley (1950).

2. R.G.H. Siu, *The Craft of Power*, John Wiley & Sons, Inc., 170, 171 (1979).

3. Ibid.

4. Proportionality is a difficult concept. There is certainly no derivable equation whereby a certain dollop of punishment can be matched to a misdeed of a certain severity. The tendency is to overpunish. This should be avoided as being unjust and practically counterproductive. The justice model advocated here allows for a very wide range of discretion in imposing punishments at the lower levels of age and seriousness of offense and rather tightly regulated discretion at the upper levels of age and seriousness. The idea is that serious judicial abuses are unlikely at the lower end of the scale; and abuses are prevented or at least diminished by tighter controls over judicial discretion at the upper end of the scale.

5. There is nothing wrong, under a justice model, with having all young burglars sample the inside of a detention facility for 24 to 48 hours.

6. *In re Gault*, 387 U.S. 1 (1967).

7. It would have been theoretically consistent for the Illinois legislature to have created a new executive agency called the "Juvenile Clinic" or even the "Juvenile Sanitarium," and to have placed the brave new plan outside of the judicial branch entirely. Politics, being the art of the possible, dictated that such a wild scheme was more than any legislature could adopt. So the clinic was grafted to the court, giving us the juvenile-court.

V. Justice for Young Persons Beyond Adult Control: The Status Offenders

V. Justice for Young Persons Beyond Adult Control: The Status Offenders

We don't need no education;
We don't need no thought-control.

Pink Floyd

Discussion has centered on the need for justice for criminally active juveniles. There is also a need for justice with respect to another kind of juvenile coming within the jurisdiction of juvenile courts; namely, the child who has not committed a crime but who is so far beyond parental or other adult control that the child requires, for the social good, coercive judicial intervention. These young people are called, among other things, status offenders, CHINS (children in need of supervision), incorrigible, rebellious, and out of control. The courts can and should be used as a last resort in exercising control over this kind of conduct; and, furthermore, the justice model is appropriate for this kind of situation. A look at the background of this kind of juvenile court jurisdiction is in order.

It is helpful to recognize a dominant theme that runs through positivistic juvenile court composition. By its nature, the business of the juvenile court has been to adjudicate the status of children. It is not what the child does but what the child is. For example, the court's jurisdiction can be invoked when a child is "found to be dependent or neglected." "Dependent and neglected" refers to the status of a child, namely being poor, "destitute or homeless or abandoned, dependent upon the public for support, or as not having proper parental care or guardianship."[1]

Although in the 1899 Illinois act a delinquent was a person under age 16 who "violates any law," the 1905 amendment included among delinquents a child who "is incorrigible" (no act specified), "is growing up in idleness and crime,"[2] and other such status descriptions. Operation of the statute turns on what the child is, the child's status, not on what the child does. Later, under some juvenile court acts and consistent with the underlying philosophy, delinquency was also defined in terms of status. For example, The Uniform Juvenile Court Act in §2(3) and (4), and the Legislative Guide of the Children's Bureau in §2(o) defined

a delinquent in status terms, as one who "has committed a delinquent act and is in need of care or rehabilitation."[3]

Although the idea of making delinquency a status offense, with need of treatment as an element of the status to be proved, did not gain great acceptance, it received some.[4] This is a very good example of the tension created by positivistic theory. Carried to extremes, a 17-year-old armed robber could defeat juvenile court intervention by proving that "care or treatment" is not needed. Of course, such a determination is one that would not be accepted by the courts or the public; still, such a conclusion is logically justified by the basic philosophy outlined above and by the words of the act.

This writing repeatedly urges that juvenile court acts be revised to make a clear distinction between criminal and civil jurisdiction, principally so that delinquent children are held responsible for what they do. There still remains the question of what to do with the two kinds of cases that clearly require status adjudications under the civil as distinguished from the criminal or delinquency jurisdiction of the court. These two kinds of cases are children who are not at fault, the neglected and abused children; and children who are at fault, the misbehaving children who have gotten beyond adult control yet have not been found guilty of criminal offenses.

Juvenile courts are involved in matters relating to abused, neglected, and endangered children because of the need for judicial coercion and decisionmaking in matters relating to the duties of parents to provide a reasonable degree of support and nurture to children.[5] In many foreign jurisdictions, the executive branch of government attends to such matters. In the United States, however, it is generally accepted that where government intervention is of the degree and consequence found in juvenile court matters— especially the separation of parents from children—only the judicial branch should be entrusted with such function.

The misbehaving children, often called, perhaps inappropriately, "status offenders," are quite another problem. The Illinois Juvenile Court Act was amended in 1905 to include within the definition of delinquency a long list of kinds of children, including the poor, immigrants, vagrants, those who would not obey their parents, and those found "habitually begging" or "playing musical instruments on the streets."[6] There are two explanations for the inclusion of these kinds of children among delinquents. One is the carrythrough of English

poor law legislation; another is the positivistic theory of "predelinquency," the idea that singing, dancing, and begging children would probably get into trouble eventually, so they may as well be locked up in advance.

These theories have been generally and properly discredited, and the question remains as to whether any such children should remain under the aegis of the court at all. Many authorities say that they should not.[7] This treatise argues for retention of the jurisdiction because it bears on the overall theme of justice for juveniles. The entry of noncriminal, beyond-control minors into the juvenile court system can no longer be justified under either a streetsweeping or predelinquent rationale; but there is a basis for making the coercive forces of the court available to such minors, to society, and to families in cases where all other resources have been exhausted. Minors, who by law must be under the management and control of someone, in some instances get beyond all extrajudicial means of control. Without the availability of some ultimate "last resort" for control, we have simply the emancipation of all such children. Without an ultimate control device, the rebellious minor wins out over family, law, and society simply by repeating his or her long familiar, "No, I won't."

This is something we have to deal with in today's society. There are countless families who want to control their children, but who, for a variety of reasons, are unable to do so.

As proposed, civil jurisdiction would be divided into two categories. One category of jurisdiction would include endangered, abused, and neglected children; the other category would include so-called status offenders, unruly and beyond-control children, and children who violate laws to which adults are not subject, for example, truancy and curfew laws. Such cases by their nature should be kept in the civil rather than the delinquency jurisdiction of the court and subject to civil sanctions only.

Civil jurisdiction over the kind of "misbehaving" status described would be exercised primarily by declaration of wardship and by court-ordered directives or by staff-supervised sanctions or behavior contracts. Probation would be employed where necessary but not in all cases.[8]

This is where *justice* comes in. A child who is a ward and under direct court order and supervision is indeed of a different status than his or her cohort who is not under such control. In the civil proceedings relating to these wards, there should be available a variety of sanctions

short of institutional commitment. Sanctions could include house confinement and limited detention of up to no more than perhaps 5 days.

Institutionalization would not be among permissible dispositions for these minors although there should be a provision allowing for delinquency adjudication based on contempt of lawful court orders. There will occasionally be minors who will not respond to civil sanctions and who therefore must eventually be dealt with by the sanctions that can result only from adjudication of delinquency.

Punitive sanctions should not be used as initial or primary instruments of control for noncriminal, beyond-control young people. The greatest abuse in this regard is found among female juveniles, who are too frequently subjected to detention as a first response. This practice clearly should be discontinued. The proposed procedures would alleviate this problem to some degree.

Young people under status jurisdiction should be subject to institutionalization only as a highly unusual exception and then only after proven or admitted delinquency jurisdiction has been taken by the court.

The following procedures are suggested. Where a minor under status jurisdiction remains rebellious and beyond the control of the court, such a minor would be subject to a delinquency petition charging contempt delinquency. The elements of this delinquency would be:

a. a clear, direct, and knowing violation of a court order (or perhaps two violations); and

b. a finding by the court that the minor's contemptuous conduct was of such a serious and aggravated nature that institutionalization would be a fair and proper punishment for the minor's continued course of rebellious conduct and necessary in order to bring the minor within the court's control.

Under this proposal, courts would obviously be more interested in justice and control than in treatment and rehabilitation, but again, this does not mean that we exclude such measures. The rebelliousness may well be the product of treatable social or psychological factors, but still, the emphasis is on what courts do best: administer the law.

Treatment, counseling, and education are certainly desirable adjuncts in the process of gaining control over out-of-control youths. As in the case of delinquency, emphasis is on the judicial, not the clinical.

It should be emphasized that justice for out-of-control juveniles does not mean oppression or overcontrol. Emancipation and supervised independent living arrangements are desirable alternatives to ironfisted, military types of controls. Again, age and maturity are key factors. The temptation to overcontrol youths should be avoided; still, in some cases the courts simply must come to the rescue of society and particularly families who have lost control of their children.

Notes

1. Statutes of Illinois, ch. 23, §§1, 7 (1899).

2. The Revised Statutes of the State of Illinois, § 1 (1905).

3. Paulsen and Whitebread, *Juvenile Law and Procedure*, Juvenile Justice Textbook Series, National Council of Juvenile and Family Court Judges, 39.

4. Maryland requires proof in delinquency cases that the criminal child was "in need of care or treatment." Ibid., 39.

5. Discussion of juvenile justice as it relates to these kinds of children is beyond the scope of this paper.

6. For an interesting list of the kinds of children who could be found to have the objectionable status of delinquent, see Harvey H. Baker, *Procedure of the Boston Juvenile Court*, 1910, reprinted in *Juvenile Justice Philosophy*, Faust and Brantingham, West Publishers, 91 (1978).

7. See, for example, "Institute for Judicial Administration/American Bar Association Juvenile Justice Standards."

8. For example, in a truancy case, the child could, where proper, be ordered to attend school. This could be monitored and reported by school officials without the necessary participation of a probation officer, at least during the initial stages of intervention.

VI. Juvenile Court Legislation

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The juvenile court is a creature of statute. Juvenile justice reform should start with statutory revision.

To install a justice model for juvenile courts, consideration must be given to purpose clauses, definitions, jurisdiction, dispositional reporting, the dispositional process, and transfer or certification proceedings.

The purpose clause

Much confusion and contradiction in juvenile court legislation can be cured by giving careful attention to the purpose or policy clause.

The general purpose of the juvenile court is to do justice. This means that "the best interests of the child" can no longer be stated as the alpha and omega of the juvenile system. The following are the special purposes of the court:

- To settle civil controversies that relate to the protection, care, and custody of abused, neglected, and endangered children.

- To settle civil controversies that relate to minors who are beyond parental or adult control or who commit "minor offenses."

- To protect abused, neglected, and endangered minors by means of placement and protective orders.

- To establish authority over beyond-control minors and those who commit minor offenses by placement and control orders.

- To adjudicate the guilt or innocence of minors accused of committing criminal offenses.

- To punish justly those who have committed criminal offenses and, where possible, to rehabilitate and reeducate such minors.

Properly includable in a purpose clause is a statement to the effect that the best interests of the child are also a proper consideration and that rehabilitation and deterrence are not irreconcilable with justice; they

are important but secondary purposes and functions of the juvenile court.

Jurisdiction

The most critical amendments necessary for a juvenile justice act refer to jurisdiction of the court. There are two major areas of concern:

- a clear division between civil and delinquency (criminal) jurisdiction;

- a three-tiered division separating criminally active minors, mainly by age, but also by offense and past record.

Civil vs. delinquency jurisdiction

One of the major failings in the juvenile court system is what can be referred to as the "one-pot" jurisdictional approach—putting poor, rebellious, and criminal children in the same jurisdictional pot. The "pot" was called "wardship" and into it went dependent and neglected children, delinquent children, and rebellious and beyond-control (considered delinquent) children. All three kinds of children were thought to be the products or victims of bad family and social environments; consequently, it was thought, they should be subject, as wards of the court, to the same kind of solicitous, helpful care. Herein lies the major evidence of the complete positivistic-deterministic takeover of the theoretical and legislative base for the juvenile court system. Thus, the common declaration of status was that of wardship; and, as mentioned above, street dancers, grave robbers, and murderers wind up, theoretically at least, in the same "pot," namely, as wards of the court, subject to being treated by the paternal court in the manner that loving parents would or should treat their child.

During the 1950's, a series of legislative reforms starting in New York and California recognized problems inherent in "one-pot" jurisdiction, and a three-part jurisdiction was provided for. Today, most States recognize basic jurisdictional differences among the three classes of juveniles: the poor, abused, and neglected; the delinquent; and the so-called status offenders. A graver distinction than this tripartite division is the more basic distinction between criminal and civil jurisdiction. This distinction is still blurred and needs clarification. The need for differentiation between criminal and civil was exquisitely expressed in 1926 by Professor John H. Wigmore in language which is extremely relevant to the issues under discussion.

> We recognize the beneficent function of the juvenile court. We have always supported it, and we are proud that Illinois invented it. But its devoted advocates, in their zeal, have lost their balance. And, as usual in other fields of science that have been awakening to their interest in the crime problem, their error is due to their narrow and imperfect conception of the criminal law...
>
> They are ignoring...two functions of the criminal law (affirmation of moral law and deterrence), and they are virtually on the way to abolish criminal law and undermine social morality, by ignoring those other two functions...The courtroom is *the only place in the community today where the moral law is laid down* to the people with the voice of authority...
>
> But the social workers and the psychologists know nothing of crime or wrong...And so we say to the devoted social workers and the cold scientists: "Do not think that you have a right to demand that all crimes be handed over to your charge until you have looked a little more deeply into the criminal law and have a better comprehension of the whole of its functions."[1]

Once we have clearly separated the civil from the criminal we are better prepared to apply our knowledge of the jurisprudence of each to problems arising in the civil or the criminal area.

Jurisdictional age: A three-tiered approach

This is a delicate and difficult subject. From time immemorial there has been an immunity from criminal liability for certain kinds of persons, principally those who act justifiably in self-defense, those who are coerced or compelled by life-endangering force to commit an act which is prohibited by the criminal law, those who are so mentally disturbed as to be unable to understand the nature and wrongness of their acts, and those who are so young as to lack such understanding.

For centuries, children were divided by the common law into three categories: children who are so young as to be generally thought of as being beyond the proper reach of criminal punishment, prepubescent children who are hard to classify in terms of criminal responsibility, and children over the age of puberty.

The scheme is a reasonable one. The rationale can be applied with some modification to today's world. As noted before, economic and social conditions have radically changed the nature of childhood; thus a developmental stage unknown to the past must be reckoned with, namely, adolescence.

There is every reason to recognize some degree of diminished responsibility of, and give some grace to, postpubescent adolescents in today's world, except in cases of egregious and life-threatening offenses. It makes no sense under present-day conditions to have a law that makes a 14-year-old law violator liable as an adult and subject to the same kinds of sanctions that are imposed in the adult criminal system. Neither does it make any sense to have the rebuttable presumption of *doli incapax* under which children over a given age, say 14, would face a criminal prosecution in which they would either be set free as children or convicted and condemned as adults, depending on a jury's estimation of their level of maturity. A law that would make sense would be a law that allowed for diminished responsibility for younger offenders in a manner that took into consideration the immaturity, impulsiveness, lack of experience, and difference of world view generally associated with young people today. This is reason alone, in a society that professes a great love and regard for its young, to justify the establishment and maintenance of a special court for the young.[2]

We do not want to expose young people of today to the travails of the adult penal system. Neither do we want to, nor can we afford to, permit young criminal offenders to violate our laws without sanction—without pain or blame.

The answer is to set out some overlapping age brackets of diminished responsibility for all but the most vicious of youthful offenders. As has always been the case, three levels present themselves. At the first level—the child level—are infants, the real children; they would fall into the civil jurisdiction of the court. Although court officials coming in contact with such children should certainly not be discouraged from expressing disapproval and using mild punishments in the treatment of children under say, age 9, such children would not be subject to the delinquency jurisdiction of the court.

The second of the three levels would involve juveniles between age 9 and 14 or 15. This level, to be called the juvenile-offender level, would be roughly comparable to the *impubors*, the 7-through-13 age group under the common law *doli incapax* rule. Except in cases of very serious or repetitive criminality, the court would deal with this level of offenders with relative leniency. Although, as stated, doing justice by holding the offender accountable is the first duty of the court, there is much room at this second level for the understanding and parental-like concern for rehabilitating and reeducating the offender—as long as the offender is made to understand the wrongness and seriousness of violation of the law.

The next level, to be called the youth-offender level, will cover youths of ages 14 or 15 to ages 18 or 19 or possibly 21. Some latitude is given in defining age brackets here because this will be a matter to be decided legislatively, and differences of opinion are certainly allowable as long as the concept of a third level of youth jurisdiction is put into effect.

There is much criminality within this third youth level; and at this point it should be said that very serious and persistent offenders cannot justly be given the grace of juvenile court treatment. As will be seen from the proposed legislative sections in Chapter VII, youths who are charged with certain extremely serious or violent offenses will be charged in the adult court. Likewise, juveniles committing such crimes will be graduated to youth-offender jurisdiction, where more severe punitive sanctions will be available to the court.

The main feature of the youth-offender jurisdiction is the availability of more severe sanctions. This does not necessarily mean institutional incarceration, but certainly rather severe determinate periods of incarceration would be available at the upper end of the age, culpability, and persistency scale.

Definitions

A number of new definitions are included in a statutory-definitions section set out in the next chapter. They are intended to be in accord with the basic concepts of this writing.

Reporting to the court

Adoption of a system of juvenile justice would bring about important changes in the present practice of presenting voluminous "social reports" to the court so it can "diagnose" and then cure the ailing delinquent. As pointed out above, in a justice system judges would no longer be cast in the role of physicians, courts would no longer be clinics, and probation officers would not be nurses.[3] In cases involving violations of the law, reports to the court should differ substantially from the clinical report and treatment recommendation still so prevalent in juvenile courts.

In order to do justice, the court will be primarily interested in knowing what the young offender has done and less in who or what the offender is. Surely the court will be interested also in social, mental, emotional,

educational, occupational, and other individual or environmental factors that might have contributed to the minor's behavior, but 17 pages of pseudoscientific jargon are not necessary to apprise the judge (who is neither diagnostician nor therapist) as to what action should be taken.[4]

The purpose of the reporting process in delinquency matters should be to enable the court both to do justice and to effect such rehabilitative and educative measures as are possible. To carry out this purpose, a new, three-phase report is recommended, the report to be made up as follows:

a. *First phase: Intake.* Except in cases of summary release to parents without intended followup, the court report should be commenced with a first phase that includes all relevant personal background information. The first-phase report will be made up of three parts: the statistical format, the offense summary, and the professional evaluation. The background report will be largely a clerical effort. Too frequently, valuable professional time is taken up with dictating or typing routine statistical data. Nonessential data should be avoided. The gathering of personal data should be augmented by form-letter requests for school records and physical and psychological data where called for. The offense report should consist of the police report, victim and witness narration, and other relevant data. The professional evaluation should consist of a court-service officer's summary of the offender interview and a brief statement and evaluation of the recommended court action.

b. *Second phase: Disposition.* Most of the information reasonably required for the court to make a just disposition will be contained in the first-phase intake report. At the time of the dispositional hearing, the court-services officer need only append to the first phase of the report a second-phase report which will briefly review the intake report, summarize a second, predispositional interview, and present for the court's consideration a recommended dispositional order.

c. *Third phase: Compliance.* The third, or postdispositional phase, is the most important phase in the shift to justice in juvenile courts. If orders are solemnly laid down and then ignored, it is obvious that justice is not being done. If the court can be assured with regard to each disposition that its orders are being carried out, not only will young people be held accountable for their criminal acts, they will be receiving the benefit of the variety of remedial and

educative activities which form an essential part of dispositions called for under a justice model.

For reasons previously stated, the third phase of delinquency disposition reporting is critical. This is the phase that assures the court and other parties that the court's orders are being carried out. It is also the phase that triggers dismissal and termination of the court's jurisdiction.

When the dispositional order has been complied with, the court's function will have been fulfilled in almost all cases. The possibility of fairly extensive postdispositional, probationary conditions being imposed in unusual cases should not be ruled out. This should not be the rule, however. Untold court resources are squandered on grandmotherly and meddling solicitude in the cases of young offenders who merely have to be told firmly and decisively that their pranks will no longer be tolerated.

The compliance report will tell the court that the offender has complied with each of the provisions of the dispositional order and that the matter should be dismissed. Absent objections by an interested party, a *pro forma* dismissal order will be issued by the court.

In status cases, a new and different approach to reporting is also indicated. Reports in beyond-control cases will emphasize the actions of the minor, the nonjudicial methods employed in attempts to gain control, and the recommendation to the court. The three-phase form of reporting used in delinquency cases can be easily adapted to beyond-control cases.

Disposition

Disposition, called the "heartbeat of the juvenile court,"[5] is the euphemism used in juvenile court parlance to describe what is to be done for or to a child, once the child's status as poor, naughty, or criminal has been adjudicated by the court. Although the term was adopted under the philosophy of absolving youthful offenders from blame or fault, the term is a useful one even under a system of justice and individual responsibility because it distinguishes juvenile court diminished responsibility from the full adult responsibility.

What should the disposition process involve if a true justice system is to be adopted? As would be expected, there will be considerable variance in the concept of reporting as here proposed when compared to

reporting as it is presently done. A fairly good perspective of present-day, accepted practices may be seen by examining the May 1983 edition of the *Juvenile and Family Court Journal*, which is completely devoted to the subject of dispositions. In harmony with the basic treatment philosophy discussed throughout, no real distinction is made by most of the writers between the civil and delinquent jurisdiction of the juvenile court, and discussions range from complete acceptance of the treatment philosophy to a justice-model approach referred to as the "accountability of the juvenile court."[6] One judge writing about dispositions mentions the importance of "making the diagnosis"[7] and concludes that the "individual treatment approach permeates the dispositional concepts available to the juvenile court judge, even when the legislature mandates harsh 'punishment.'"[8] (Punishment must always be put in quotes by believers in the benevolent, child-centered, traditional approach.)

Contrary but not necessarily contradictory to the traditional view is the sage observation of Judge Carl E. Guernsey, past president of the National Council of Juvenile and Family Court Judges:

> In recent years there has been, first tacitly, and then as part of written policy, the added mandate that such treatment should be consistent with public safety. The once myopic view from the bench has been broadened from focusing on the child alone to a more peripheral look at the child and his victims and potential victims.[9]

Judge Guernsey's views make sense and are in harmony with some recent legislative enactments that have added to the purpose clauses of juvenile court acts a requirement that in addition to considering the welfare or best interests of the child, the court should also consider the interest and welfare of the public. Judge Guernsey believes that we should try to "balance the traditional view (welfare of the child) with the new expectations (public safety)."[10]

The views expressed in this treatise simply carry these ideas a step further and advocate a clear statement of legislative intent that in criminal matters public interest comes before individual interest. Justice means public justice when it comes to enforcement of the criminal law.

Although many of the more liberal reformers have advocated it, our adult criminal justice system, when viewed realistically, is not based on treatment and reform of each individual criminal but rather on the assumption, implied or expressed, that those who violate the law should

be punished. Most criminal statutes still provide something to the effect that every person who commits a designated criminal act "shall be punished" by imprisonment or fine.

We have never reached the stage in our criminal law at which it has been stated, "Any person who violates the criminal law shall be considered socially deviant and may be subjected to such care and treatment as would be received from his or her own therapists." The Model Penal Code[11] will not use the ugly word punishment; but persons who commit crimes may under this code still be "sentenced to imprisonment for a term," and that, in reality, means that they are being punished, whether for retributive, deterrent, or other reasons.

With due respect to Judge Guernsey, it seems that we are asking too much of juvenile court judges to ask them to balance the child's interest with the public's interest. These interests are always out of balance and always will be. The best interest of the child may frequently coincide with the best interests of the public, but this does not mean that we should lose sight of the purpose of a justice system. This principle should be clearly incorporated into the dispositional process by the juvenile court act.

The following dispositional message of the juvenile court is offered as consistent with the views herein expressed:

> Young violator of our criminal laws, you have done wrong; and you are legally accountable for what you have done—you must pay. You are still young, and we are not now going to hold you fully responsible for your misdeeds by sending you away to serve a miserable term in prison. But understand that we are going to punish you and try to convince you that it is wrong and certainly, in the long run at least, very unprofitable to continue as you have been doing. Because of your age we are going to try to include in your punishment certain programs and certain duties which you will have to perform. These are designed to help you in life, to give you a better opinion of your own worth and show to you the wrongness and stupidity of criminality. With this in mind, this is what we are going to do...

The foregoing should not sound like a sermonette. It is a way of trying to impress young criminals with their accountability to all of us for what they have done wrong. Once the young offender knows why he or she is in court and understands the meaning of the situation, then programs can be designed as part of a punishment-and-accountability scheme that will not be perceived as some kind of reward for misconduct rather than as punishment.

For example, very many young criminals are substantially behind their age group in reading skills. Requiring reading instruction or achievement of a certain reasonably attainable goal in reading proficiency would make a very good punitive[12] item in a delinquency dispositional order. The same reasoning would apply to an unlimited number of other goals which could be usefully attained by young persons coming before the court to receive their "just deserts."

This approach is not by any means "antitreatment" or "antirehabilitation"; rather, it strongly favors such measures as a highly efficacious and necessary part of any disposition. The younger the minor the more likely this is to be true.

Nor is it meant that the juvenile court should adopt the formal and austere environment associated with the criminal courts. What is clear is that society's disapproval of juvenile criminality should be firmly expressed by a judicial institution suitably equipped to communicate such disapproval with authority and dignity.

Justice for status wards will also require, in the dispositional process, more of an accountability than a poor-baby approach. If we choose not to emancipate all children and agree that judicial resources should be available as a last resort to control otherwise uncontrollable minors, then we should be frank about their situation. Their situation is simply that our society does not allow the same relatively unrestricted liberty for children that it allows for adults. The law, for example, requires persons of a certain age to go to school; it also requires that underaged children be subject to adult supervision. These requirements are to be found in our law; and if there is law, the law has to be enforced.

Of course, there will always be minors who refuse in an intolerable manner to conform to any adult control. What do we do with such children? We must try to control them and to do so a sanction is necessary. This may be done by making civil court proceedings available in which a determination is first made that the child is unreasonably beyond adult control. Once the determination is made, disposition of the minors can proceed along justice and accountability lines. These youngsters have to be made to understand what courts are all about. Courts make orders and enforce them. A policy decision has to be made as to whether children are to be set free or kept under some kind of control.

If control is the answer, then we should have court proceedings that mean business.

It should be carefully explained to these minors that violation of court orders could result in delinquency adjudication and lockup. It should also be explained that violation of the civil-dispositional order may result in severe sanctions. Again, we want to help and to "treat," but we do not lose sight of the nature and purpose of the courts. Courts are coercive decisionmaking institutions. The red cross should be removed from the door. Out-of-control youths may be helped and treated, but first they must be captured. This needs to be expressed legislatively.

Transfer or certification of juveniles to adult criminal court

The matter of transferring certain juvenile offenders to adult court is very much affected by adoption of justice principles. Following the deterministic principle that individualized treatment should be given to each ailing, underaged victim of society, the long recognized discretionary right of the juvenile court to "waive" its jurisdiction and send a child off to criminal court has traditionally been determined by asking the question, "Is the child treatable in juvenile court?" If the answer was "yes," the child was kept in juvenile court; if the answer was "no," off he or she went to the adult system.

The problem with this logic is that to follow it strictly would be to allow the most vicious and culpable youthful offender to remain within the benign confines of the juvenile court if the judge could be convinced that the child was treatable; or, in the words of the trade, that the child was "amenable to treatment."

The traditional standard, then, has been whether the juvenile court still had something to offer the child. If the child still showed prospects of being able to be "helped," such a child would be immune from transfer. This is very much consistent with the child-oriented system but not consistent with a society-oriented justice system.

As stated, the statutory mandate to juvenile courts has been to give primary concern to the child's interests; and the courts have centered their concern on what the child *is* rather than what the child has done. It follows that in making the transfer decision, courts have been required to make a very subjective and predictive, often conjectural, decision based on what the judge perceived were the chances that the juvenile court's limited resources could rehabilitate the child offender.

To base the decision to transfer on a subjective evaluation as to whether a youth is treatable or not is certainly not a standard based on justice.

It is not justice, for example, to permit a youth who has committed a series of serious and vicious crimes to avoid transfer simply by convincing a judge that he is a nice young man who is quite amenable to staying within the gentle confines of the juvenile court instead of going to prison. Similarly it is not justice to transfer a youth who has committed an isolated, relatively minor offense, but who, because of attitude or impression on the judge, is found unamenable to juvenile court treatment. Transfer should be based on justice—on what the youth has done—not on what a judge thinks the youth might be or become.

Surely, in making decisions under the "amenability" standard, courts do consider the nature and seriousness of the offender's crime, but they do so under the treatment approach, in the context of making subjective evaluations of treatability. As in so many other areas of juvenile court jurisprudence, what is said differs markedly from what is done. As a result, many transfers occur with little regard to the extant amenability standard, and are based on a perceived need to send serious and persistent offenders to the adult system where appropriate punishments for egregious behavior are available.

As part of the general trend toward a return to a justice model and toward punishment for the crime rather than treatment for the individual, various State legislatures have been enacting transfer statutes that set objective conduct standards for transfer rather than subjective, individual evaluations.

Purpose clauses have been amended to include the interests of the State as well as the interests of the child, although priorities between the two are not always established.[13]

Justice for juveniles requires that youths who face transfer to adult court be judged on what they have done rather than on a subjective prediction as to what might happen if they remain in, or are transferred from, the juvenile system. Justice for society requires that those older youths who commit crimes deserving of severe punishment or who have persistently violated the law be removed from the juvenile justice system.

The question of when transfer to adult court is required should be resolved by application of justice principles. There are certain kinds of crimes and certain levels of persistency in criminality that cry out in the name of justice for more severe sanctions than can be meted out in a system designed for the special consideration of the relatively innocent and immature.

The subjective principle of amenability to juvenile court treatment should be rejected and an objective standard related to the youth's conduct should be established. There are surely certain offenses that, in the case of youths over the age of 14 or 15, should never be cognizable in juvenile court. Such offenses should be specified legislatively to alert prospective perpetrators that juvenile court is no longer available in such cases. Other candidates for transfer should be considered on the basis of offense and past criminal record. If justice and the public interest clearly require that the grace of the juvenile court be denied and that severe adult punishment be imposed, transfer should be effected.

Legislation should specify that these two considerations—seriousness and persistency—be the primary standards for transfer, and that additional consideration be given to the youth's maturity, sophistication, attitude, and other personal attributes. However, such consideration should be employed only as a basis for denying transfer and not as a basis for granting it.[14]

The suggested procedure outlined in Chapter VII for discretionary transfer is limited to youths who commit more than one felonious criminal offense. Youths who commit a "major offense" do not fall within juvenile court jurisdiction. Some accommodation should be made in the adult criminal code for return of youth major offenders to the juvenile court under certain rare and extraordinary circumstances.

Notes

1. John H. Wigmore, *Illinois Law Review*, (1926). (Emphasis supplied.)

2. These assertions presuppose certain developmental and sociological changes in children and their present-day role in society. On this see, for example, Franklin E. Zimring, *The Changing Legal World of Adolescence*, The Free Press: New York (1982), in which the author explains the dramatic legal and sociological changes in the lives of adolescents. Zimring recognizes that adolescents can be treated neither as children nor as adults and urges that they must be subject to moral and legal accountability while at the same time being protected from the full burdens of adult responsibility. He wisely advocates a legal system which recognizes that growing up requires some freedom to make mistakes without incurring all of the adult consequences for the making of harmful decisions.

3. Witness the extremes to which the medical model can be taken: "In determining the disposition to be made of the case the procedure of the physician is closely followed...The judge and the probation officer consider (the case) like a physician and his junior...and then they address themselves to the question of how permanently to prevent the recurrence...If the offense is serious and likely to be repeated...or if the cause of the difficulty is obscure, he is seen by the judge at frequent intervals,

monthly, weekly or sometimes even daily, just as with the patient and the physician in cases of tuberculosis or typhoid." Harvey H. Baker, *Procedure of the Boston Juvenile Court*, 1910, reprinted in *Juvenile Justice Philosophy*, Faust and Brantingham, West Publishers (1978).

4. A most illuminating example of the type of reporting that has been advocated under the clinical approach can be seen in the May 1983 edition of the *Juvenile and Family Court Journal*, published by the National Council of Juvenile and Family Court Judges, on page 84. A model detention report is offered in which the reporter is required to report in six different categories: "manner of thinking," "mood tone," "methods of expressing anger," "sexual reactions," "physical self-interest," and "social interaction." To save time for the busy court official, a variety of applicable phrases may be circled; some examples: "one-track mind; fantasizes and dreams; laughs, jokes and continually runs in high gear; cynical; avoids sex talk; initiates sex play; handles other boys frequently; interested in attractive women or their pictures; combs hair unusually often; too independent." Does the judge really have to know these things?

5. Arthur and Gauger, *Dispositional Hearings: The Heartbeat of the Juvenile Court*, Juvenile Justice Textbook Series, Reno, Nevada: National Council of Juvenile and Family Court Judges (1974).

6. Carl E. Guernsey, "Accountability of the Juvenile Court," *Juvenile and Family Court Journal*, Reno, Nevada: National Council of Juvenile and Family Court Judges, 67 (May 1983).

7. Romae T. Powell, "Disposition Concepts," *Juvenile and Family Court Journal*, Reno, Nevada: National Council of Juvenile and Family Court Judges, 2 (May 1983).

8. Ibid., 6.

9. Guernsey, "Accountability," 68.

10. Ibid. (Parenthetical phrases supplied.)

11. "Penal" is defined as "of or pertaining to punishment" in *Webster's New International Dictionary*.

12. Creating a form of consciousness characterized by a desire of escape or avoidance.

13. As indicated above, the legislative inclusion of the public interest as a proper purpose of consideration of juvenile courts has not generally included the mandate that the public interest was the primary consideration.

14. Use of a subjective or predictive standard unfairly allows for transfer of minor offenders who "flunk the attitude test"; and, as well, prevents transfer of serious and repetitive offenders who might be able to convince the court of their "amenability to treatment." See *In the Matter of Seven Minors*, 99 Nev. 427, 664 P. 2d 947 (1983).

VII. Proposed Legislation

VII. Proposed Legislation

The following proposed legislative provisions are offered as an example of language that might be employed in the process of adopting a justice model for juvenile courts in the area of delinquency jurisdiction.

§100 Legislative intents and purposes.

The legislature deems it to be in the public interest that special juvenile courts be maintained for adjudicating the rights, liabilities, and interests of minors.

The general purpose of this act is to do justice for the people of this State and for minors.

Minors coming within the delinquent jurisdiction of the court by reason of having been charged with the commission of a public offense must be treated justly. By justly is meant being accorded all procedural protections and due process afforded to adults who are charged with crimes, with the exception of the right to jury trial. By justly is also meant the providing of substantive justice to both the public and the offender, which means that accused violators of the criminal law must be given a fair, speedy, and proportionate punishment, having due consideration for the diminished responsibility which is a natural and proper incident of their youth and immaturity.

§101 Definitions.

§101.1 **"Adjudication" defined.** "Adjudication" means the formal court determination of a minor's guilt of a criminal offense or of a minor's coming within the civil jurisdiction of the court.

§101.2 **"Beyond control" defined.** A minor is "beyond control" if his or her behavior is shown to be beyond the reasonably expected control normally exercised by the minor's custodian, family, school, or other proper adult authority to a degree that court intervention and supervision are necessary in order to protect the interests of the minor or society as a whole.

§101.3 **"Chief of court services" defined.** "Chief of court services" means the person designated to be responsible for reporting, probation, and other court services mentioned in this act. Chief of court services refers to the chief in person and all court service officers appointed by the chief.

§101.4 **"Child" defined.** "Child" means a minor of the age of 8 years or younger.

§101.5 **"Court" defined.** "Court" means juvenile court.

§101.6 **"Court services officer" defined.** "Court services officer" means an officer of the court appointed by the court as a deputy to the chief of court services.

§101.7 **"Criminal offense" defined.** "Criminal offense" means any violation of State or local law other than one which only a minor can commit, such as truancy or breaking curfew.

§101.8 **"Delinquent" defined.** "Delinquent" used as a noun means any minor of the age of 9 to 17, inclusive, who has committed a criminal offense.

§101.9 **"Felonious criminal offense" defined.** "Felonious criminal offense" means a criminal offense which would be a felony if committed by an adult.

§101.10 **"Judge" defined.** "Judge" means a judge, master, referee, or other person performing judicial functions in the juvenile court.

§101.11 **"Juvenile" defined.** "Juvenile" used as a noun means a minor of the age of 9 to 14, inclusive.

§101.12 **"Juvenile offender" defined.** "Juvenile offender" means any juvenile who has committed a criminal offense other than a major offense except a juvenile who has been twice adjudicated guilty of an offense which would be a felony if committed by an adult.[1]

§101.13 **"Major offense" defined.** "Major offense" means any of the following criminal offenses: murder, attempted murder, robbery, attempted robbery, rape, attempted rape, arson, attempted arson,

mayhem, attempted mayhem, kidnaping, attempted kidnaping, injury to a person or property by explosives, and attempted injury to a person or property by explosives.[2]

§101.14 **"Minor" defined.** "Minor" means any person under the age of 18 years.

§101.15 **"Penal institution for youth" defined.** "Penal institution for youth" means a secure facility which houses youthful offenders committed by the court for definite punitive terms.

§ 101.16 **"Probation officer" defined.** "Probation officer" means a court service officer assigned to probationary supervision.

§101.17 **"Prosecuting official" defined.** "Prosecuting official" means any public official having authority to prosecute a minor for the commission of a criminal offense.

§101.18 **"Transfer" defined.** "Transfer" means the process whereby youthful offenders are judicially removed from juvenile court jurisdiction and are transferred to adult court.

§101.19 **"Youth" defined.** "Youth" means a minor of the age of 15 to 17, inclusive.[3]

§101.20 **"Youthful offender" defined.** "Youthful offender" means any youth who has committed a criminal offense other than a major offense and any juvenile who has committed a major offense or has been twice adjudicated guilty of an offense which would be a felony if committed by an adult.

§102 Jurisdiction.

The court has exclusive jurisdiction over minors except to the extent otherwise provided in this act.

§102.1 **Civil jurisdiction.** Civil jurisdiction is all jurisdiction of the court except jurisdiction over the commission of criminal offenses. It consists of:

a. Protective jurisdiction over minors who are endangered or who are abused, neglected, or abandoned.

b. Jurisdiction over minors who commit offenses which only a minor can commit such as truancy or breaking curfew.

c. Jurisdiction over minors who are beyond control.

§102.2 **Delinquent jurisdiction.** Delinquent jurisdiction is jurisdiction over criminal offenses committed by minors. It exists in all cases involving:

a. The commission of a criminal offense by a juvenile.

b. The commission by a youth of a criminal offense other than a major offense. A youth who has committed a major offense is not within the jurisdiction of the juvenile court and must be prosecuted as an adult.

§103 Hearings: Jury.

All hearings to determine the guilt or innocence of a juvenile charged with a criminal offense must be held before the court without a jury. A youthful offender charged with a criminal offense has the option of waiving trial in the juvenile court and being tried before a jury in the adult court as an adult offender.

§104 Disposition.

§104.1 **Civil disposition.**

a. In all cases in which a minor has been adjudicated to be within the civil jurisdiction of the court, the court shall conduct a dispositional hearing within a reasonable time after the adjudication to determine what action should be taken with respect to the minor. A minor within the civil jurisdiction of the court is entitled to receive care, guidance, and control within the minor's own home unless his or her best interest otherwise requires.

b. When a minor is removed from his or her home or from the control of his or her parents, the court shall secure as nearly as possible the equivalent to the care which should have been given in the home by the parents.

c. Except for emergency protective detention, a minor coming within the civil jurisdiction of the court shall not be detained except for violation of probation or a direct court order. In no event may any minor under the civil jurisdiction of the court be placed in or committed to any penal institution for youth or any reformatory, training center, general penal institution, or any secure residential

facility designed or employed for the housing or punishment of criminal offenders or delinquents.

§104.2 **Delinquent disposition.**

a. In all cases in which a juvenile offender or youthful offender has been adjudicated a delinquent, the court shall hold a separate delinquent dispositional hearing within 15 days after the date of adjudication, except in cases where this limit is waived by the minor or there is just and reasonable cause for delay.

b. At the dispositional hearing the court shall hear all matters relating to the nature of the offense, the offender's past record, matters relating to special needs of the offender, recommendations for punitive measures to be taken, and matters relating to recommended care, custody, rehabilitation, education, and treatment of the offender.

c. Following the dispositional hearing, the court shall make its written delinquent dispositional order, which must specify the placement of the minor and set out each dispositional order in a clear and understandable manner.

d. The order must specify custody, wardship, and placement of the offender. Unless clearly contrary to the interests of justice, the offender must be placed with his or her parents. Unless the interests of justice require otherwise, the court may place the offender outside the home in a suitable family or group home, in a community residential center, or in an institution for the punishment of delinquents.

e. Conditional orders may be entered whereby refusal to obey a dispositional order or unreasonable neglect in timely performance of the order results in automatic punishment imposed by a court service officer. Such punitive measures must be prescribed, supervised, and reviewed by the judge and may include brief periods of local detention not to exceed 3 days.

§105 Delinquent dispositional alternatives.

§105.1 **General policy.** All delinquents are to be held accountable for their criminal offenses and must receive just punishments and sanctions which are fairly related to the seriousness of the offense

or offenses and to any record of past adjudicated or admitted offenses. Insofar as possible, speed and certainty are to be considered as the most important factors in providing just and effective punishment. Secure incarceration and placement in penal-type institutions are to be employed only in exceptional and necessary circumstances.

§105.2 **Delinquent juvenile offenders.** Delinquent juvenile offenders may not be committed to any jail or other penal institution. The maximum punishment for a juvenile offender is placement in a residential center where the offender is not physically restrained from leaving or in a local, secure detention center where the offender is physically restrained from leaving for no more than 90 days. No juvenile offender may be required to spend more than an aggregate of 90 days in detention as a juvenile offender. Punitive dispositions must include, whenever possible, measures that serve the function of both punishment and rehabilitation. Dispositional alternatives for juveniles may include:

a. Restitution, which may include payment in money or service for property damage and personal injury and also for intangible injuries, including mental anguish and emotional trauma, suffered by the victim.

b. Detention and restriction at home.

c. Service to the community.

d. Compulsory individual or family counseling.

e. Withholding of driving and other privileges.

f. Curfew.

g. Additional attendance at school and tutoring.

h. Probation.

i. Confrontation with and apology to the victim.

j. Residential placement in an open setting.

k. Secure detention in a local detention center for no more than 90 days.

l. Other reasonable punitive measures which may be imposed as a consequence of the commission of a criminal offense.

§105.3 **Delinquent youthful offenders.**

a. Delinquent youthful offenders have a greater degree of culpability and responsibility for the commission of criminal offenses than juvenile offenders. In addition to the dispositional alternatives listed in the previous section, a youthful offender may be committed to secure juvenile institutions of a penal type for a determinate period not to extend beyond the offender's 23rd birthday. Time served in such an institution is limited by the following schedule.[4]

§105.4 **Incarceration limitations.** Youthful offenders of the age of 16 or older may be placed in an adult jail or penal facility for no more than 5 days, if the youth is kept physically separated from other prisoners.

§106 Delinquency disposition: Compliance and enforcement.

§106.1 **General policy.** Desired speed and certainty of punishment requires that all dispositional orders be carried out completely and promptly. When justice has so been carried out, jurisdiction of the court ceases except under exceptional circumstances as determined by the court.

§ 106.2 **Compliance; Enforcement; Dismissal.**

a. The court service officer shall verify compliance by each delinquent with the court's dispositional order. After the entry of each delinquent dispositional order, a court service officer or probation officer shall meet with the delinquent and determine the manner in which compliance with the court's order can be completed.

b. A court service officer or probation officer must be available to assist or counsel with the delinquent at the request of the delinquent or the delinquent's parents.

c. In the case of a delinquent's refusal or unreasonable neglect to comply with a dispositional order, the chief of court services shall file with the court a request for review of compliance. The request must set out the nature of the violation and request that the matter be heard before the court.

d. In the case of timely compliance, the chief of court services must file with the court a notice of compliance and request for dismissal and exoneration. The request must outline factually the offender's compliance. Upon receipt of the notice and request the court shall, unless good cause appears to the contrary, dismiss the proceedings and notify the delinquent, his or her parents, and his or her attorney of the court's action.

§107 Parole, probation, and suspended commitments.

§107.1 [The subject of parole supervision is beyond the scope of this writing.]

§107.2 **Probation.**

a. Juvenile offenders may be placed on probation only under exceptional circumstances whereunder the offender is perceived to be in need of intensive supervision and counseling.

b. Youthful offenders may be placed on probation under the same exceptional circumstances as juvenile offenders; and additionally, in cases where conditional, suspended commitments are made, youthful offenders may be committed to a youth penal institution for violation of probation.

§107.3 **Suspended commitments.** The court may commit a youth to a penal institution for youths and suspend execution of the commitment on the condition of the youth's performance of certain probationary or other requirements. If there appears probable cause to believe that such requirements have not been complied with, the youth may be committed to a youth penal institution.

§108 Transfer.

§108.1 **General policy.** Any youth who commits more than one felonious criminal offense may, in the discretion of the court, be transferred to the adult court when the interests of justice and the public require that a youth no longer be judged by the standard of diminished responsibility available in juvenile court and must, accordingly, be transferred to the adult court.

§108.2 **Procedural standards for transfer.**

a. A proceeding for transfer must be commenced by a verified petition signed by a prosecuting official. The petition must contain:

i. a clear statement of the offense or offenses charged so that the youth receives notice of the time, place, and nature of the offense;

ii. a statement of all past criminal offenses which have been adjudicated or voluntarily admitted by the youth;

iii. a statement why the interests of justice require that the youth be transferred to adult court; and

iv. a statement of the personal character and qualities of the youth, including reference to any special good or bad qualities of character and any other material which might be of use to the court in making the decision whether to transfer.

b. A youthful offender subject to a proceeding for transfer is entitled to have the matter heard and to be represented by counsel. The court must be clearly convinced that transfer is in the interest of justice and in the public interest; and if the court decides to transfer the youth, the youth must be provided with a statement of the reasons for transfer.

§108.3 **Substantive standards for transfer.**

a. The court must find as a condition for transfer that there is probable cause to believe that the youthful offender committed the offense out of which transfer proceedings originated. The court's finding may be based on admissions of the offender or on police and court records. Where probable cause is denied and a request for hearing on this issue is made by the offender, the court must hold a hearing on the issue.

b. The decision to transfer must be based on the court's consideration of the nature and seriousness of the charged offense, the past record of admitted or adjudicated delinquencies, the character and personal qualities of the youth, and any other relevant factors.

c. The decision to transfer may be made on the basis of the nature and seriousness of the offense alone or on the basis of past criminal record alone or on a combination of these two primary factors. The

character or personal qualities of the youth may not of themselves be used to support a decision to transfer; these factors are to be considered in combination with the primary factors and may constitute a basis for denial of the petition for transfer because the character, personality, or attitude of the youth convinces the court that the interests of justice do not require transfer even though the primary factors by themselves might support such a conclusion.

Notes

1. It bears noting at this point that an entirely new and restrictive definition of "juvenile" is being employed in the definition of "juvenile offender." In an attempt to divide delinquency jurisdiction into two tiers, the designations "juvenile offender" and "youthful offender" were decided upon. Although a juvenile is generally thought of as any underaged person, a juvenile offender has a special meaning as proposed here: a person who is of the age of 8 through 14 who commits a criminal offense other than a major offense. A person of these ages who commits a major offense is not to be considered as a juvenile offender but rather as a youthful offender, to be punished accordingly.

2. Inclusion in the list of major offenses, like age bracketing, is a matter of broad legislative discretion. The list is suggestive only.

3. Youthful offenders include minors of the ages 15, 16, and 17. There is much to be said for extending youth jurisdiction to 19, 20, or 21, but this subject matter, although closely related to the discussion at hand, is beyond the scope of this writing.

4. Here would be inserted a sentencing schedule along the lines developed by statute in California, New York, Washington, and other States which have approved determinate sentencing for serious and repetitive youth offenders.

Part Two: Extrajuridical Justice

VIII. Fairness for Juveniles

VIII. Fairness for Juveniles

The just is the lawful and the fair.

Aristotle

Aristotle recognized that justice encompasses more than merely the lawful—the justice administered by the courts—and includes in its broadest meaning all that is fair. A discussion of justice for juveniles cannot be complete without a consideration of fairness for juveniles. From justice as the lawful, juridical justice, we pass to justice as the fair, extrajuridical or distributive justice.

Our original definition still obtains; justice refers to what is due. In discussing juridical justice the point was made that, where society prohibits certain conduct and prescribes punishment for commission of such conduct, justice requires that the law be followed and that the offender get his or her due. Justice as what is fair and due is a much broader concept, one that goes beyond the system of criminal justice and commands that all citizens act for the good of others and treat each other fairly.

When Thomas Jefferson wrote in the Declaration of Independence of certain unalienable rights which were due to each of us because we are equal by nature, he was writing of this kind of justice. These rights—life, liberty, and pursuit of happiness—can and should be secured by just governments and just laws. They are rights that can and should be secured for children.

What of these unalienable rights for children? What is their due? Their due is the unalienable right to life, and this right to life includes, at a very minimum, (1) the right to nurture, (2) the right to an environment in which they can have some reasonable expectation of normal growth and human fulfillment, and (3) the right to be civilized, that is, the right to the moral training which will enable them to function as integral members of society and to give them the capacity for moral and spiritual growth.

Depriving the young of their right to life is the greatest of all injustices: it dwarfs the injustices endemic to all juridical justice systems. Such injustice is an evil in itself and also the cause of most crime and social malaise.

In a treatise of this kind it is possible to deal only at a very general level with the subject of injustice in the form of unfairness to those who rightfully depend upon us to provide for them. Three distinct but interrelated fields of injustice to juveniles have been mentioned and will now be discussed.

The right to nurture

Children have a right to nurture—to be provided for, to be reared, fostered, and cared for. This is something they cannot do for themselves. Injustice to children in this regard is perhaps the most important and certainly the most overlooked factor in the etiology of crime and other social indesiderata.

Theodesius Dobzhansky, a geneticist, is credited by Ashley Montagu[1] with using the word "groceries" to describe all the materials that a human needs from the world around to be used for individual growth and development. It is the grossest of injustices to deprive our children of their necessary groceries. That we do so is probably the greatest disaster of our times.

Of prime importance on the grocery list are those items that are indispensable for the growth and development of a normal human organism, particularly the central nervous system. The importance of these kinds of groceries and the effect of their deprivation on behavior has been, until very recently, almost completely neglected by the investigators of human behavior.[2] The medical scientists have left the study of human behavior to the Freudian psychologists, who believe that behavior is caused by subtle, unconscious sexual patterns and that behavioral aberrations are "functional" rather than organic. Mark and Ervin[3] list two factors they believe are responsible for deterring the medical profession from any considered effort to understand the relationship of organic brain mechanisms to violence and antisocial conduct. One factor is that the medical scientists "have assumed that the causes lie largely in the social environment," and the other is that they "have preferred to have nothing to do with these ill-tempered, dangerous people."[4] Whatever the reasons may be, historically, the biological connection to human behavior has not received the attention it deserves from the medical profession.

Classical criminologists have also been loathe to accept the biological connection to criminal conduct because this was thought to argue against free will and individual responsibility, the cornerstone of classical

criminology. The social scientists have looked almost exclusively to the social milieu for the sources of criminal misconduct, another reason why this important field of investigation has been greatly neglected.

Mark and Ervin argue that, since all behavior "filters through the central nervous system," studying the relationship between the brain and violence, for example, is the best way to understand this kind of behavior.[5] They then explain that, because some stages of brain development occur normally only within certain time limits, if environmental conditions are wrong (if necessary groceries are unavailable), "the resulting anatomical maldevelopment is irreversible." Once the maldevelopment occurs, "the brain structure has been permanently affected, [and] the violent behavior can no longer be modified by manipulating psychological or social influence."[6]

The point is that the organic condition of the brain may be the largest single contributing factor in serious and violent criminal behavior. As one psychiatrist said, "I can't counsel lead poisoning out of this young man's brain." It is difficult to counsel a poisoned brain; and it is difficult to counsel a maldeveloped brain that exists because of deprivation or insufficiency of groceries during childhood, a result of failure to give to children what is their due.

The frequent and predictable consequence of this failure to nurture properly is some degree of neurological maldevelopment which in turn can create what can be accurately described as "neurological cripples." It is from among these neurological cripples that a large proportion of serious, violent, and repetitive juvenile offenders come.

The exact and direct cause of this kind of crippling is often hard to trace. As observed by Lewis and Balla,[7]

> The number of different kinds of central nervous system disorders that ultimately result in antisocial behavior and juvenile court referral never ceased to amaze us. Sometimes there was reason to believe that injury to the central nervous system had taken place in utero or shortly thereafter. Often, however, the rough and tumble atmosphere of a tough environment without adequate parental protection took its toll, the punch of an uncontrolled father, uncle, or sibling. The fall from an unguarded window, an untreated ear infection that turned into meningitis—all of these kinds of experiences, and more, befall many of the children whose paths merged at the juvenile court.

It may not always be said these sad people have grocery problems, but this is usually the case. Ashley Montagu[8] makes an excellent case linking biological aberrations to behavioral disturbances. He shows that as one goes down the socioeconomic ladder, the probability of malfunction dramatically increases. Risk factors, starting with malformed sperm and ova and progressing through such factors as maternal malnutrition, maternal drug abuse (including nicotine and alcohol), birth trauma, infant malnutrition, abuse, neglect, and a long list of early-life injustices, combine in varying degrees and proportions to produce a whole array of undesirable neurological manifestations that might include a predisposition to uncontrolled violent outbursts, learning disabilities, bedwetting, distractability, hyperactivity, and even criminality.

The risk factors that lead to neurological crippling are not necessarily limited to direct physical and chemical influences. It is generally accepted that maternal deprivation and infant neglect can result in neurological maldevelopment. Even given fulfillment of all chemical needs, mammalian nervous systems fail to develop properly absent appropriate sensory and emotional stimulation. Surrogate mothers in the form of colored television sets tending to captive infants in cages called playpens can result in the same kind of crippling that results from deprivation of chemical nutrients.

The human brain is undeveloped at birth. For it to develop properly the infant must be fondled, touched, picked up, rocked, and carried.

> Human infants and animals who are deprived of sensory stimulation during the formal period of brain development develop a biological system of brain functioning and structure which predisposes these organisms—these animals, these children—to pathologically violent behavior.[9]

Children have a well-established, continuing, and indispensable need, especially in their very early years, for a minimum quantum of love and care. Whether or not there is an identifiable neurological basis for it, unloved children do not develop properly and are higher-risk candidates for entry into the juridical justice system. There can be no doubt that neglect and abuse of children have a very large impact on their future behavior.

Robert ten Bensel, a leading national expert on child abuse and neglect, has amassed a great collection of evidence to support the connection of child neglect and abuse to later violent criminality.[10]

"Studies have shown that virtually 'all violent juvenile delinquents have been abused children,' that 'all criminals at San Quentin prison...studied had violent upbringings as children,' and that 'all assassins...in the United States during the past 20 years had been victims of child abuse. That is quite a toll for society to pay for not intervening.'"[11] Quite a toll, indeed, for failure to provide groceries and for doing injustice to children.

This is not intended to be a treatise on the biological and ecological causes of crime; it is intended to show that by denying children the groceries they need, society is probably creating (as it has for centuries) a special population of "droids" who are uniquely equipped to do harm and are doing so. Much can be done to remedy this kind of injustice. We fail to do so at great peril to us all.

The right to fairness in the social environment

It is beyond the scope of this paper to discuss social justice, what Aristotle called distributive justice, but it is within its scope to make mention of the sad consequences of our inability to provide a decent social environment for what would appear to be a growing segment of our youthful society.

This is not the place to engage in discourse on the dire ends of poverty, class divisions, urbanization, industrialization, urban blight, unemployment, breakdown of religion, breakdown of the family, and all of the other established criminogenic factors. It is the place, however, to recognize, at least, that the criminal justice system is the least effective means of crime prevention and social control. If we are interested in a relatively crime-free society, we must look elsewhere than the courts.

In a society that recognizes an unalienable right to the pursuit of happiness, its members have a reasonable expectation of receiving their basic social groceries. These groceries consist of the needs that we all have in order to grow and to be happy, fulfilled human beings. Abraham Maslow stated this well when he wrote of a person's basic drive toward "self-actualization" for which certain needs had to be supplied by society. These needs include "the needs for meaningful work, for responsibility, for creativeness, for being fair and just, for doing what is worthwhile and for preferring to do it well."[12]

Frustration of these needs is, according to many writers, a major cause of criminality. Robert K. Merton,[13] for example, sees crime as being

caused by the frustration of the lower socioeconomic sectors within an affluent society that denies them legal access to social status and material goods. Denial of basic social needs is unjust and another important root branch of many social ills, including crime. This is especially true of the youthful, undeveloped members of our society who have a just claim that we provide them with "groceries for growing."

The right to moral, ethical, and social training

We have widespread unhappiness and criminality as likely consequences following from neurological, emotional, and social deprivation. A third, comparable source of youthful malaise is moral disability, or retarded character development, also brought about by denial of certain necessary groceries. It is generally accepted that children learn how to distinguish right from wrong at a very early age, even before they can talk. When parents say, "no," a child becomes aware that he or she must not succumb to all kinds of whims and impulses.

As children approach the age of reason and understanding and learn to talk, they gradually accept certain standards of behavior relative to what is right and what is wrong. These critical values are sometimes said to become internalized so that behavior is controlled not by the supervising, overseeing parent but by internal controls. This desirable condition is reached only by externally imposed training. Those who do not receive this training are missing some very important groceries, a deficit that will eventually affect their moral growth and is likely to affect society as a whole.

The interrelation of physical, social, and moral factors, is plain to see. It is common indeed to see the effects of the three interlocking in the lives of the same kinds of deprived children. The result was well described in the following proposition expressed by Harvard University Professor James Q. Wilson:

> [W]e now have available an impressive number of studies that, taken together, support the following view: Some combination of constitutional traits and early family experiences account for more of the variation among young persons in their serious criminality than any other factors, and serious misconduct that appears relatively early in life tends to persist into adulthood. What happens on the street corner, in the school, or in the job market can still

> make a difference, but it will not be as influential as what has gone before.[14]

Based on the expressed view, Professor Wilson sees the criminal and delinquent as "rational persons with values different from the rest of us," whose "temperament and family experiences" are the most critical of all contributors to criminality.[15]

The adverse "temperament and family experiences" that cause most crime results from an unjust deprivation of groceries that should be provided to all children. The major cause of crime is to be found in injustice.

Resolution

This chapter cannot conclude without recognizing and attempting to resolve an apparent contradiction that is built into this treatise as a whole. Great stress has been placed on individual moral and legal responsibility. Young offenders are accountable to society for their criminal offenses. Yet, we continue to manufacture, in our "psychopath factories," neurological cripples who in some cases are practically incapable of coping with their environment and of avoiding impulsive, criminal behavior. We have also morally handicapped individuals who are trained to be criminals and know no other moral or social environment than criminality. One may question how it can possibly be argued that these unaccountable, irresponsible persons should be held accountable and responsible and punished for their almost totally predictable conduct. The only answer that can be given is, "We must."

The mere fact that we are gaining in understanding the factors that predispose persons to commit crimes cannot mean that we excuse such persons, even when highly predisposed, from criminal liability.

The juridical justice system in its function as an arbiter and enforcer of criminal law must, in justice, operate at a high level of certainty and predictability. Even if we were to assume, which we cannot, that some of the neurologically crippled or morally deformed reached a point at which it could be said that they had no internal controls over their actions, such persons could not be granted immunity from criminal responsibility. There are two reasons why this must be so. First, at the present time, there is no way of accurately measuring or identifying such a condition. Second, the very nature of the criminal process is such that certain actions call for certain consequences. The whole system fails when it loses this quality by making ill-defined exceptions.

We may be able to prevent a lot of the causes that generate the type of vulnerable personalities described, but if we are going to maintain any kind of criminal law enforcement by juridical bodies, we must enforce the law, and we must hold even the most predictable offender accountable for violation of our criminal laws.

Notes

1. Ashley Montagu, *Life Before Birth*, New American Library, New York: 21 (1977).

2. The study of biologic factors in shaping personality has been well summarized in the following terms:

Biological theories of crime have never been well received by American criminologists. Tappan said that the little attention given—except in a negative and critical way—was in large part due to the "strongly environmentalist orientation of the sociological criminologists because of the preoccupation of the dynamic psychiatrists with their postulated processes of psychogenesis." To this may be added the all-pervading impact of the American image in sociology and psychology. Sociologically, life was epitomized in a conception of success in which initiative, opportunity, and change played the main role. Manuel Lopez-Rey, *Crime: Analytical Appraisal*, New York: Praeger (1970) cited in *The Criminal Personality*, vol. 1, New York: Jason Aronson, 59 (1976).

The author recognizes that in recent years the thrust of much psychiatric and psychological research has been biological, and much attention in obstetrics and pediatrics is being devoted to prenatal and early childhood development.

3. Mark and Ervin, *Violence and the Brain*, Hagerstown, Maryland: Harper & Row (1970).

4. Ibid., viii.

5. Ibid., 2.

6. Ibid., 7.

7. Lewis and Balla, *Delinquency and Psychopathology*, Grune & Stratton, 56 (1976).

8. Montagu, *Life Before Birth*.

9. Testimony of James W. Prescott, before the Standing Senate Committee on Health, Welfare, and Science, Senate of Canada, reported in *Child at Risk*, Canadian Government Publishing Centre (1980).

10. Ibid., 36.

11. Testimony of Robert ten Bensel, quoted in *Child at Risk*, 41.

12. Abraham Maslow, *Toward a Psychology of Being*, Nostrand Reinhold Company, 222 (1968).

13. Robert K. Merton, *Social Theory and Social Structure*, Rev. Ed., New York Free Press (1957).

14. James Q. Wilson, "Thinking About Crime," *The Atlantic*, 86 (September, 1983).

15. Ibid.

IX. Summary and Conclusions

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Summary

Aristotle tells us that no government can stand which is not founded on justice. As a Nation we are firmly committed to liberty and justice for all. Justice for juveniles calls for a special kind of justice. Children are dependent upon us not only for life sustenance but for nurture, training, and guidance. The greatest of injustices is to deny our children. Although this book is addressed principally to the argument that a model of juridical justice should be installed in the law courts that judge juveniles who violate the criminal law, it maintains that even a perfect system of juvenile justice will do little good in a society that fails to attend to what is due to its children.

A number of reasons are advanced in favor of adopting a justice model in dealing with young people who violate the law. The main idea is that committing a crime, whether as an adult or a child, is wrong and deserves punishment. Most of us understand this; and certainly young delinquents do—except insofar as they have been told otherwise by the juvenile court.

Here is a call for an end to the practice of prescribing treatment and care for young criminals who are called sick and unaccountable for their iniquities. Here is a call for a juvenile *justice* system that puts moral and legal accountability first and all other court-related processes second. Let the juvenile courts go about whatever educative and rehabilitative business its resources permit; justice comes first. The message of the juvenile court that should be heard by the community and, most importantly, by the delinquent youth is this: "Young citizen, you must obey the law; if you violate the law, you are accountable for your deeds. You are to be blamed and punished for it; still, we will do the best we can to help you so that it does not happen again." This is certainly a far cry from saying, as has often been the case: "Young citizen, you must obey the law; but if you violate the law, we will understand that it is really not your fault. We will diminish your dignity as a person and treat you as if you are sick and disabled. Even though you believe that you have done wrong, we will tell you that this is not so. We are not punishing you, because you do not deserve punishment. We are going to submit you to a series of untested 'treatments' and programs for your own good, after which you will be well again."

Putting justice first is not to demean or diminish the role of education and rehabilitation in the juvenile court process. The truth of the matter is that the single most effective rehabilitative factor in the lives of most juvenile offenders is their being held accountable, being punished, being blamed, and being warned of the consequences of future law violations.

Putting justice first does not mean that juvenile court judges will be ignoring the individual, family, community, and other environmental factors that contribute to youthful criminality. The genius of the juvenile court has been its ability to consider these variables in tailoring dispositions for delinquent offenders. The problem has been that juvenile court judges have been hobbled by the juvenile court's theoretical framework and its taboo on punishment, accountability, and justice system for juveniles, unknown to our law," judges will be well able to formulate fair, proportionate, and responsible dispositions which will hold youths accountable for their misdeeds.

Officially recognizing justice as the legitimate end of the juvenile justice process certainly does not mean that every lollipop thief will be brought before the bar of justice; it does not mean a palpable move from "tears to teargas" in juvenile court jurisprudence. The call for justice is not a call for thumbscrews; rather, it is a call for a more certain, prompt, proportionate response to criminal misconduct. A wide degree of discretion will be allowed at the lower end of the age-seriousness spectrum because the relatively slight punishments and discomfitures appropriate for venial offenses by young offenders present only slight potential of injury to the child and because society is not greatly endangered. At the upper end of the same scale, discretion must be reduced, emphasis on individual treatment and paternal care must diminish, and due process and the punitive consequences of the adult criminal justice system must be more nearly approximated.

Suggested legislative provisions to be incorporated into a justice model for juvenile courts are tentatively offered, but no claims for resulting, dramatic future reductions in juvenile crime are made; rather, it is postulated that the major causes of juvenile crime must be sought elsewhere.

Conclusions

Our system of special courts for young people should be preserved. Yet, it cannot be preserved if it remains in its present condition. Presently, the juvenile justice system is not a justice system but, rather, a