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TREATMENT RHETORIC VERSUS WAIVER DECISIONS

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I. JUVENILE DELINQUENCY AND THE REHABILITATIVE IDEAL

The present sociolegal perspective of sympathetic protection of children by adults in Anglo-American jurisprudence is a relatively recent innovation which emerged as a consequence of the introduction of humanitarianism during the eighteenth century.[1] That perspective regards the child within an empathetic doctrine which inextricably altered the social structure, ultimately restructuring the organization of the family. The earlier grim parental attitudes of aloof indifference and personal exploitation toward offspring dissipated over time as the family structure underwent a change from a communal household to a more closely knit nuclear unit. As a result, intimate intrafamilial relationships and reciprocal affection replaced the previous apathetic social attitudes toward children and their welfare.[2]

This systemic alteration in the social perspective toward the personal needs of youth contained unforeseen consequences which two centuries later have led us to our present attitudinal dilemma toward delinquents. As the previously harsh community views relative to children receded in the face of attentive solicitude for their well-being, society sought to moralize about youthful misbehavior.[3] Parents attempted to coerce their children into conformity through parental discipline and community control, thereby diminishing tolerance toward juvenile misbehavior. Thus, the introduction of sympathetic understanding toward children inadvertently led to the concept of delinquency through the

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The authors' names are listed alphabetically and do not imply status differentials. The use of masculine gender pronouns throughout the article is intended generically, and the authors disavow any unintended ramifications regarding gender.

1 L. EMPEY, AMERICAN DELINQUENCY 1-95 (1978).

2 A. PLATT, THE CHILD SAVERS 3-14 (1969).

3 L. EMPEY, *supra* note 1.

application and enforcement of mores upon children whose misbehavior had previously been of little if any concern. This introduced the nuance of capricious adult authority (via home, school, church and community) as a means for the control over—and correction of—youthful dereliction of responsibility.

Juvenile justice reformers subsequently expanded their intermittent but eternally optimistic notions about rehabilitating delinquents throughout the nineteenth century. Their buoyant sanguinity blossomed with the establishment of the first juvenile court in Cook County, Illinois in 1899. The new court's early treatment of delinquents paralleled the policies applied in the mental health field, which at that time was experiencing the impact of Freudian psychoanalysis.[4] This form of psychological determinism defined the delinquent's behavior as a manifestation of individual psychopathology which, they felt, should be subjected to scientific diagnosis followed by treatment designed to "cure" the malady of misbehavior. The mental health approach provided the foundation for the medical model of delinquency treatment which since has vexed even the most progressive juvenile courts. Thus the clinical view has consistently attempted to adjust offenders to their enviornmental milieu regardless of the pathological social conditions which may have existed. In short, delinquents, like patients, were seen as "ill." In order to restore them to health, treatment must ensue based on the psychological principles of human growth and behavior.

This type of philosophical reasoning, though presented in rhetorically differing terms, has been prominent in the thinking of persons interested in the rehabilitation of "criminal" and "incorrigible" youth ever since the juvenile court began.[5] Indeed, the philosophical justification for "helping" youthful offenders exists today. Thus Coleman advocates a variety of individual and group-oriented psychotherapeutic techniques to justify correctional intervention in the lives of identified delinquents including psychoanalysis, supportive counseling, non-directive therapy, crisis intervention, assertive training, etc.[6] Cohen and others support a behavioristic model using a behavior modification theme,[7] and Ankersmit augments this by introducing the behavioral contract.[8] The humanistic approach is used by Rogers,[9] while Glaser

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[4] H. ABADINSKY, PROBATION AND PAROLE: THEORY AND PRACTICE 240 (1977).

[5] Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

[6] J. COLEMAN, ABNORMAL PSYCHOLOGY AND MODERN LIFE 664 (4th ed. 1972).

[7] H. COHEN, J. FILIPCZAK, J. BIX, J. COHN, I. GOLDIAMOND & P. LARKIN, CASE II MODEL: A CONTINGENCY-ORIENTED 24-HOUR LEARNING ENVIRONMENT IN A JUVENILE CORRECTIONAL INSTITUTION 3-78 (1968).

[8] Ankersmit, *Setting the Contract in Probation*, 40 FED. PROBATION 28 (1976).

[9] C. ROGERS, CLIENT-CENTERED THERAPY 483-524 (1951).

varies this existentially through "Reality Therapy."[10] Sullivan cites the social process of interaction and self-direction as a primary determinant of behavior,[11] while "game-playing" is identified by Berne as a critical factor in faulty interpersonal communication.[12] While some voices in opposition to this medical model have been heard from time to time,[13] shifts away from the medical model have been limited and difficult to discern in practice.

Francis Allen's illuminating essay on the treatment of the juvenile offender struck a rare balance between the personal problems existing within individuals and the social problems which afflict entire communities. He acknowledged the political roots of juvenile law but also recognized the bewildering complex of social service functions which the juvenile court was expected to fulfill.[14] For example, part of the court's responsibility revolves around its welfare functions including a wide variety of client problems concerned with dependency and neglect. As an agency of government, it has administrative responsibility, and some courts even become involved in the delivery of clinical services. In some jurisdictions, adults accused of contributing to the delinquency of a minor are prosecuted in juvenile court. Meanwhile the court is expected to prevent delinquency in the local community. Where this fails, it must divert selected minor offenders out of the juvenile justice system while arranging for the therapeutic counseling of those who remain and are adjudicated as delinquents. Allen stressed that the need to know and to understand, while fundamental, also requires the courage to challenge untested ideas through empirical research.

Allen's goal of testing suppositions about juvenile delinquency through research has rarely been undertaken by those associated with the courts. Instead, the preference is to maintain such cherished assumptions as those expressed by Judge Mack, who wrote a decade after the first juvenile court began.[15] He believed that when a court determines that a juvenile:

> is treading the path that leads to criminality, [it should] . . . take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.[16]

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[10] W. GLASER, REALITY THERAPY (1965).

[11] H. SULLIVAN, THE INTERPERSONAL THEORY OF PSYCHIATRY (1953).

[12] E. BERNE, GAMES PEOPLE PLAY (1964).

[13] Lehman, *The Medical Model of Treatment*, 18 CRIME & DELINQUENCY 204-12 (1972); Rose, *The Fallacy of the Medical Model as Applied to Corrections*, 1 CRIME & CORRECTIONS 27-29 (1973).

[14] F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 44-51 (1964).

[15] Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

[16] *Id.* at 107.

Such unbridled optimism, embracing as it then did the rehabilitative ideal advanced by positivist criminologists, subsequently suffered from public neglect and professional apathy. Gradually the presumed fatherly benevolence of *parens patriae* eroded. This gave rise in many jurisdictions to a tarnished super-stepparent whose indifference and occasional disparagement produced an unwholesome milieu for the development of its bewildered progeny.[17]

As the court's therapeutic leanings waned, a tension arose between court and community as other priorities replaced the earlier dedication to the rehabilitative ideal. The language reflecting this redefined value hierarchy exists today in the state statutes which refer to "the best interest of the state."[18] This phraseology permits courts to recognize that certain serious delinquents' social alienation, evidenced by their severe sociopsychological problems, exceeds the ability or resources of the community to deal with them.

How, then, is the court to cope with these serious or repetitive delinquents whose rehabilitative prognosis within accessible local programs is so unfavorable? Allen's response is temporarily to incapacitate such individuals if their intolerable misbehavior constitutes a community threat. He concludes:

> the value advanced is not primarily that of the welfare of the child adjudicated a delinquent. This is due not so much to the court's lack of commitment to the rehabilitative ideal as to the incapacity of the court and its instrumentalities to deal effectively with the conditions giving rise to delinquent behavior. . . . [T]he tendency to describe the court only by reference to its therapeutic or rehabilitative potential creates the peril of unrealistic and unrealizable expectations.[19]

The juvenile justice system must provide criteria for excluding certain serious delinquents from the system based on a community protection rationale. The traditional approach has been for the court to consider the age, offense and arrest history of the alleged offender. Where these factors indicate a negative prognosis, the goals of incapacitation and deterrence become more important than rehabilitation. This approach to treating juveniles suggests that courts consider individual factors in assigning certain youths to adult court jurisdiction. This article suggests the contrary, *i.e.*, that current classification processes are not individualized but rather are quite superficial in identifying and punishing these serious juvenile offenders.

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[17] P. MURPHY, OUR KINDLY PARENT . . . THE STATE 164-79 (1974).

[18] *See, e.g.*, MICH. COMP. LAWS § 712A.1 (MICH. STAT. ANN. § 27.3178 (598.1) (Callaghan 1948)).

[19] F. ALLEN, *supra* note 14, at 53, 56.

II. INDIVIDUAL TREATMENT: RHETORIC OR REALITY?

The juvenile court maintains exclusive jurisdiction where the allegation of delinquency attaches to a minor under the maximum age of juvenile court venue.[20] However, most statutes contained in the juvenile codes of the various states permit concurrent (*i.e.*, alternative) jurisdiction with the criminal court for those delinquents whose age falls within a specified range. This age range is always lower than the age at which the jurisdiction of the juvenile court terminates.[21]

Thus, the decisions to refer precocious delinquents to the adult court rests within the discretion of the juvenile court judge.[22] The judge's decision may be related to an earlier recommendation submitted to him by the prosecutor or it may reflect the prehearing report which the probation officer submits. The report typically focuses on the relation between the client's sociopsychological development and the alleged offense, including his arrest history.

In reality, however, the report's references to the delinquent's personal and social-etiological background diminish as the focus shifts to his volitional culpability and the seriousness of his offense.[23] Thus, the more severe the recommendation of the probation officer, the greater the likelihood that the probation officer will try to justify it by attributing blame (free will) to the delinquent. This distortion is usually achieved by emphasizing the alleged offender's delinquent sophistication, which presumably explains how he could have perpetrated so serious an offense as that which he is now accused of commiting. The rhetorical elaboration of the delinquent's culpability is done at the expense of describing any extenuating circumstances which might mitigate the apparent seriousness of his present predicament. The stage is thereby set for the expected treatment plan (*e.g.*, waiver) which concludes the report. David Fogel analyzed this phenomenon in California and concluded, "[t]he probation officer is driven into a sort of deviant procedure to maintain the myth of rehabilitation while actually sending children into custody."[24]

A criterion which governs venue in juvenile courts is the delinquent's age, which the law presumes is a prime indicator of the presence

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20 B. GEORGE, GAULT AND THE JUVENILE COURT REVOLUTION 25-26 (1968).

21 Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; Rubin & Shaffer, *Constitutional Protections for the Juvenile*, 44 DEN. L.J. 66, 75, 82 (1967); Comment, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure*, 40 S. CAL. L. REV. 158 (1967).

22 Elson, *Juvenile Courts and Due Process*, in JUSTICE FOR THE CHILD (M. Rosenheim ed. 1962).

23 Fogel, *The Fate of the Rehabilitative Ideal in California Youth Authority Dispositions*, 15 CRIME & DELINQUENCY 497, 493 (1969).

24 *Id.* at 494.

of *mens rea*.[25] While age sets the limits of the court's jurisdiction in general, it is particularly important when the court considers a waiver of juvenile status. The age at which a juvenile becomes an adult varies greatly from jurisdiction to jurisdiction, as well as between American and other Western nations. The juvenile courts in the Federal Republic of Germany adhere rigidly to an age range of fourteen to eighteen for determining jurisdiction. In contrast, there is only limited agreement within the United States as to when a developing juvenile is able to differentiate between right and wrong. Most states accept the common law rule that children under seven years of age cannot form intent. A majority of jurisdictions consider a thirteen or fourteen year old partially responsible for whatever harm he causes.

The principles laid down by British jurisprudence relative to the rules of evidence and procedure during the first half of the nineteenth century may have had some influence on the dispositions of child defendants in American criminal courts.[26] A child of six or less in England could not form the required intent necessary to prove criminal responsibility. However, while those aged from seven to under fifteen were presumed also to lack this capacity, the prosecution could rebut this where *mens rea* could be definitely demonstrated. Where uncertainty remained, the issue was usually resolved in the child's favor.[27] In 1830 an English jurist stated this principle quite clearly to the jury in a theft case involving a ten year old girl:

> Whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know it is wrong; and such a person ought not to be convicted, unless there be evidence to satisfy the jury that the party, at the time of the offense, had a guilty knowledge that he or she was doing wrong.[28]

While a number of legal treatises have been published which implied that it was not uncommon to convict children of capital crimes and to obtain the death sentence upon the acquisition of such a verdict, sentences of this type were not necessarily carried out. The felony cases most frequently cited between 1801-1831 which resulted in death sentences for five children between the ages of seven and thirteen produced only one known execution.[29] During the same approximate period, 103 juvenile offenders within the same age range were sentenced to death for property offenses; none were executed.[30] Thus, wherever mitigrating circumstances could be discerned, the benefit of doubt in capi-

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25 G. SYKES, CRIME AND SOCIETY 32-34 (1967).

26 A. PLATT, *supra* note 2, at 188-89.

27 D. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 724 (1816).

28 R. v. Owen, 4 C. & P. 236 (1830).

29 Knell, *Capital Punishment*, 5 BRIT. J. CRIMINOLOGY 198 (1965).

30 *Id.* at 206.

tal cases involving children of fourteen or less was typically given to these defendants.

The American experience in criminal cases involving children was somewhat more refined than that of England. Platt identified fourteen such leading cases between 1806 and 1882.[31] Ten of these children were acquitted.[32] Of those who were convicted, one was sentenced to a three year prison term for grand larceny,[33] two were executed, and the outcome of the sentence in one case was not specified.[34] The legal principle in these early American cases clearly reflects those cited above under the English common law. Thus in the first of these acquittals in this country, the presiding judge informed the trial jury:

> If a person of fourteen years of age does an act, . . . the presumption of law is that the person is *doli capax*. If under fourteen and not less than seven, the presumption of law is that the person cannot discern between right and wrong. But this presumption is removed, if from the circumstances it appears that the person discovered a consciousness of wrong.[35]

Thus, it is clear that in the absence of convincing evidence to prove that children of tender years (*i.e.*, from seven to fourteen) were not criminally responsible (*i.e.*, could not form the intent necessary), the criminal court (later the juvenile court) considers such children proper subjects for treatment or punishment.

The law presumes that as juveniles grow older, they become more culpable. For atrocious crimes involving victim violence, especially if committed by older, hard core delinquents, the juvenile's intent is presumed despite the lack of support for the notion that all older juveniles have reached judgmental maturity. Thus, intent substitutes for immaturity. Perhaps this served as the rationale which permitted the state of New Jersey to hang a boy of twelve for murder in 1828.[36] This served as precedent for Alabama to do likewise in 1858 in another murder case which involved an eleven year old defendant.[37] It may be of more than passing interest to note that both of these executed defendants were male Negro slaves.

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31 A. PLATT, *supra* note 2, at 198-99.

32 State v. Adams, 76 Mo. 355 (1882); Angelo v. People, 96 Ill. 209 (1880); State v. Learnard, 41 Vt. 585 (1869); State v. Bostwick, 4 Del. 563 (1845); Commonwealth v. Elliott, 4 LAW REP. 329 (1842); People v. Davis, I WHEELER CRIMINAL LAW CASES 230 (1823); People v. Teller, I WHEELER CRIMINAL LAW CASES 231 (1823); Walker Case, 5 City-Hall Register (New York City) 137 (1820); State v. Aaron, 4 N.J.L. 263 (1818); State v. Doherty, 2 Tenn. 79 (1806). These cases are taken from A. PLATT, *supra* note 2, at 190-201 nn.56, 51, 46, 25, 35, 31, 33, 27, 20, 17, respectively.

33 Stage's Case, 5 City-Hall Recorder (New York City) 177 (1820).

34 State v. Toney, 15 S.C. 409 (1881).

35 State v. Doherty, 2 Tenn. at 87.

36 State v. Guild, 10 N.J.L. 163 (1828).

37 Godrey v. State, 31 Ala. 323 (1858).

Today each state establishes the maximum age for juvenile court jurisdiction in accordance with its legislature's conception of when criminal responsibility attaches. As a result, a child may be adjudicated a delinquent at age eighteen in Wyoming, while fifteen is the maximum age in Connecticut, New York, North Carolina and Vermont. The majority (37) of state juvenile codes set the maximum age at seventeen; Michigan and eight other states confer adult accountability on all youths over sixteen years of age.[38]

The historic variation in the maximum age for juvenile court jurisdiction reflects the continuing indecisiveness as to what is the optimal upper age limit of the juvenile court's jurisdiction. No single rationale for these continuing alterations in the age surfaces.

The National Advisory Committee for Juvenile Justice and Delinquency Prevention finally settled on age eighteen as the cutoff for juvenile treatment.[39] The committee reasoned that at age eighteen, adolescents become more independent of their families following high school graduation, and become eligible for military enlistment, marriage, voting, and other social responsibilities. The selection of this or any other age is arbitrary since the age at which biological puberty occurs has been decreasing while adult social responsibility has been postponed through lengthened schooling and delayed entry into the work force. Maturity of adolescents varies considerably between individuals, and does not occur at a given age.

Understandably, establishing a lower maximum age for juvenile court jurisdiction results in fewer adolescent cases being considered for waiver to the adult court. Ted Rubin's study revealed wide variations in the age and number of youths removed to adult court in Salt Lake City, Atlanta and Seattle.[40] Elsewhere, he has concurred with the observation that legal factors (*e.g.*, offense severity, arrest history and age) are more likely to influence the judge's decision to waive jurisdiction than are social factors.[41] He noted that judges had increasing discretionary latitude with regard to waivers in eleven other states as well. He was, however, puzzled by the fact that these variations were not patterned in any single direction.[42] These legal and social factors, when combined with the absence of any consistent rationale to justify the jurisdictional inconsistencies in waiver policy, suggest that the factors which will de-

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38 M. HINDELANG, M. GOTTFREDSON & T. FLANAGAN, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1980 123 (1981).

39 NAT'L ADVISORY COMM. FOR JUVENILE JUST. AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 260 (1980).

40 T. RUBIN, THREE JUVENILE COURTS: A COMPARATIVE STUDY 344 (1972).

41 T. RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW 30 (1979).

42 Rubin, *Retain the Juvenile Court?* 25 CRIME & DELINQUENCY 286 (1979).

termine whether an adolescent is removed to adult court must remain unpredictable.

The efficacious disposition of certain sophisticated young lawbreakers continues as a widespread, persisting problem in most judicial circles today. The Twentieth Century Fund Task Force suggested that the most judicious method for handling adolescents aged fifteen through eighteen who are repeatedly accused of violent crimes is to waive such cases to the adult court. Two alternatives which they considered were: first, reducing the maximum age of jurisdiction to sixteen or seventeen; or second, strengthening the juvenile court's authority to selectively place such offenders in juvenile facilities for longer terms.

The task force emphasized, however, that the judge should have the authority to decide that: (1) a violent offense has occurred; and (2) if the accused juvenile is adjudicated responsible for the crime, the adult court can better provide the degree of punishment most proportionate to its seriousness. Furthermore, providing for automatic appellate review would allow a tribunal to nullify the waiver decision if the lower court's rationale for remanding the juvenile was unclear or unconvincing.[43]

The Task Force's recommendation does not, however, solve the dilemma over the specific minimum age below which waiver should not legally be permitted. Some criminologists believe that severe sentences reduce crime and that juveniles as young as thirteen should be sentenced as adults.[44] Georgia has permitted this since 1974 in capital cases. Likewise, the New York Omnibus Crime Control Public Safety Act of 1978[45] authorized courts to process thirteen year olds charged with either rape or murder in adult court. A similar statute passed the same year allowed fourteen year olds to be tried in New Jersey's criminal courts.[46] Although a juvenile rarely confronts adversary proceedings in Canada, it is legally possible to be tried in an adult criminal court where the child is over fourteen.[47] It is also legally permissable to waive a fourteen year old to an adult court in New Mexico since 1975 if the crime involves murder. Finding a common denominator among these varying provisions is difficult.

It is apparent that the proper conditions under which a juvenile is appropriately waived beyond juvenile court jurisdiction remain incon-

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43 Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime*, in JUVENILES IN JUSTICE 108 (T. Rubin ed. 1980).

44 E. VAN DEN HAAG, PUNISHING CRIMINALS 249 (1975).

45 T. RUBIN, *supra* note 41, at 26.

46 *Id.*

47 Prefontaine & Goulard, *Juvenile Justice in Canada*, 42 CORRECTIONS TODAY 50, 51 (1980).

sistent. Factors such as age, history and type of offense appear to be weighted the heaviest, but even here agreement between states is lacking. John Conrad's review of this problem of inconsistency produced no resolution, leading him to conclude that a conceptual vaccum in the law has arisen relative to waiver policies which he attributed to the persistent uncertainty relative to the propriety of such waivers.[48] While Conrad's interpretation seems accurate, the latent functions (*e.g.*, the righteous indignation which leads to the desire to punish) underlying such decisions appear more dynamic to us than do the manifest ones (*i.e.*, the legal rationale which is used to justify the waiver).[49] Therefore, further scrutiny of this legal procedure becomes necessary.

The intention is not to imply that youth services personnel are naive or gullible. Although the notion of individualized treatment of young offenders appeals on an emotional level to many professional caseworkers, a review of certain juvenile court programs and operations reveals that the ostensible ideal of individuality in correctional programming is flawed. The literature on correctional service delivery simply glosses over the "systematic" handling of clients which actually occurs in the juvenile justice system. The paradigm introduced below demonstrates that the ideal of individualized decision-making as to a juvenile's status reflects rhetoric more than reality.

III. THE GRADUATED JUVENILE JUSTICE SYSTEM

There are four tiers in the juvenile justice system through which youths evolve as they advance into more serious criminality both quantitatively and qualitatively.[50] In the final chapter of his text, Dennis Romig presents a paradigm similar to the one outlined in this article.[51] Like Coffey[52] however, Romig discusses more than just the major tiers in the system. Our Figure 1 is based on the ideas presented earlier by these authors.

The effectiveness and prominence of the four tier analysis should not be overestimated; in fact, alternative programs such as deferred prosecution and status diversion are well-developed and utilized in selected jurisdictions. While deferred prosecution and status diversion might have been included in the initial steps in the paradigm below, they were not because doing so would require discussion of other alternative programs, thus diverging from the focus of this article. Furthermore, inclusion of alternative programs would be repetitious since they

48 Conrad, *When the State is the Teacher*, in JUVENILES IN JUSTICE 89 (T. Rubin ed. 1980).
49 R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 60-64 (2d ed. 1957).
50 A. COFFEY, JUVENILE JUSTICE AS A SYSTEM 43-49 (1974).
51 D. ROMIG, JUSTICE FOR OUR CHILDREN, ch. 17 (1978).
52 A. COFFEY, *supra* note 50.

effect offenders in the same manner as the major tiers. Figure I illustrates the major tiers:

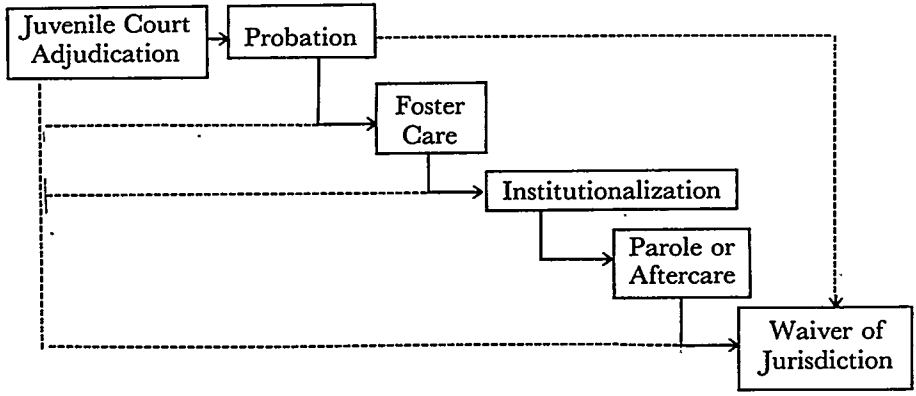

FIGURE I

SEQUENTIAL STEPS IN JUVENILE COURT ADJUDICATION

All delinquents who enter this system do not necessarily progress sequentially through each tier, indicated by the solid line. Entrance into and exit from the system can occur at or between any of the tiers, indicated by the dotted line. For example, violent offenders or those with special problems such as mental illness, may bypass the initial two tiers; they would be placed directly in an institution following their adjudication. At the opposite extreme, many lesser offenders begin at the probationary tier (or a diversionary tier prior to probation) and advance no further in the system. Customarily, however, these few offenders who are ultimately waived to the criminal court experience each of the tiers in sequence.

The final tier, "waiver of jurisdiction," is not used as often as this description suggests. Only offenders who possess certain characteristics advance to the waiver stage. Nevertheless, the waiver of jurisdiction tier affects the overall operation of the system. Accepting the limited functionality of each tier does not answer the question whether the programs are innately limited or whether their restriction results entirely from the process itself.

IV. WAIVER OF JURISDICTION

A delinquent who becomes a formal ward of the court ordinarily expects to receive a grant of probation following his first appearance before the juvenile court judge. Domestic frictions or repeated delinquency may subsequently necessitate either foster home placement or

incarceration in a private or public institutional setting. Where the court commits the delinquent to a state training school, the delinquent customarily will be released after serving an indefinite term of probably six to twelve months, the length of which depends upon a multitude of factors pertaining to his personal situation. The subsequent period of supervision or aftercare varies from a few months to two or more years.

Waiving the minor to an adult criminal court comprises the ultimate tier in the juvenile justice system. If the youth steps beyond the limits of community tolerance, then the system responds by abandoning the pretence of rehabilitation.[53] Due process requirements guard against violations of the youth's civil rights as he progresses through a sequence of juvenile court hearings.[54] If the judge's final decision is that the case is a serious one with chances for successful prosecution, the judge transfers (waives) it out of the probate (juvenile) court and into the criminal (adult) court. In adult court the youth may be subject to the penalties an adult receives for the same offense. Referring a juvenile to adult court reflects the juvenile court's recognition that this particular delinquent is incompatible with the traditional rehabilitative programs.

William Sheridan, in cooperation with the National Council on Crime and Delinquency and the National Council of Juvenile Court Judges, presented the following criteria as the basis for the transfer of juveniles to the criminal court:[55]

> The court should be empowered to transfer or waive its jurisdiction to a criminal court when the case involves a child who is 16 years of age or older and who has committed an act which would be a felony if committed by an adult. Waiver should be authorized in such cases only after a social study of the child is made, a hearing held, and the court finds that the child is not commitable to an institution for the mentally deficient or the mentally ill and is not treatable in any institutional or facility of the State designed for the care and treatment of children, or where the court finds that the safety of the community clearly requires that the child continue under restraint for a period extending beyond his minority or the facilities of the criminal court provide a more effective setting for disposition.

Sheridan's view represents the traditional perspective applied by Michigan and most other states. In the same year the United States Supreme Court adopted Sheridan's view in the now famous case of *Kent v. United States*.[56] The Court established the following factors which determine the advisability of waiving jurisdiction:

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53 R. CAVAN & T. FERDINAND, JUVENILE DELINQUENCY 29-30 (4th ed. 1981).

54 People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956).

55 W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS 34-35 (HEW Children's Bureau Report No. 437 1966).

56 Kent v. United States, 383 U.S. 541 (1966).

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.[57]

V. INDIVIDUAL TREATMENT REVISITED

The public often fears further victimization from certain recalcitrant and potentially dangerous youths who are released after they have reached the mandatory maximum age for retention in juvenile institutions. Juvenile court judges are cognizant of this community concern, and thus may be reluctant to commit or retain such youthful, serious offenders in the juvenile justice system. To do so may be socially dangerous and politically unwise. Therefore, the decision to waive such youths is a serious one for judges who are sensitive to the potential victimization, however remote in fact that may be.

Of even greater concern is the notion that the system can help or rehabilitate every youth whom it treats. Douglas Besharov's critique of this view warrants attention.[58] In essence he believes that many youthful offenders are swept into the juvenile court unnecessarily either because: (1) the community is hypersensitive to the particular act of delinquency alleged against him, (*e.g.*, certain morals offenses); or

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[57] *Id.* at 566-67.

[58] D. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT 256-57 (1974).

(2) because they discriminate against persons of his ilk (*e.g.*, poor, lower class, minority group, etc.). At the other extreme are seriously maladjusted delinquents whose problems are so overwhelming that the existing resources of the court have little or no impact in reducing such problems. Incongruously, the ability of the system to achieve the rehabilitative ideal appears to rest more on the seriousness of the offense than on the basis of the potency of these programs to resolve the adjustment problems of disturbed youths.

As indicated earlier, a dual-reality, the goal of treatment *vis-a-vis* punishment, appears to function within the juvenile justice system which produces confusion and inconsistency in the court's operating procedures and policies. There is uncertainty as to whether an individualized program should be specifically planned for a juvenile's potential rehabilitation or whether the court should exercise all its optional alternative resources in anticipation of a prospective waiver to the criminal court.

The rhetoric of individual rehabilitation has too frequently been substituted for an impersonalized correctional program. This creates an illusion of individualized treatment, disguising the pattern of standardized bureaucratic processing in accordance with the predetermined court policy. Routine processing produces the illusion of individuality (rhetorical rehabilitation) while protecting the court from public or professional criticism at some future date should waiver to the adult court be deemed necessary.

Four questions arise out of the existing juvenile justice system. First, why does this underlying impersonalized system exist? Second, why is the illusion of individuality presented? Third, does this dual-reality affect the results of the philosophical ideal of individual help; if so, are the effects injurious to the ideal? Fourth, what changes might mitigate these consequences?

A. THE UNDERLYING SYSTEM

Once an individual enters the juvenile justice system, that client must conform to it and thus is processed through each tier before a waiver can be initiated. The largely inflexible tier process arose from the courts' attempts systematically to define the point at which a youth is beyond the rehabilitative capabilities of the juvenile justice system. In other words, the statutory procedure delineating waiver of jurisdiction requires that certain aspects (tiers) be incorporated into the system, and that each individual duly entering that system be subjected to each tier progressively. Significantly, the tier process is followed religiously. The importance of the ability of the juvenile process to rehabilitate youths in

determining waiver is reflected in Michigan's statute governing waiver, Section 3, Rule 11:[59]

> (3) Even though less serious [referring to the seriousness of the pending offense(s) in comparison with past offenses if any exists], if the offense is part of a repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under the *regular statutory juvenile procedures*.

The statue's reference to "regular statutory juvenile procedures" represents the unanimity requirement. This section's terminology requires *not* that the system use all rehabilitation efforts in the best interest of the youth; instead, it *does* require, in effect, that all rehabilitation programs *designated by statute* be considered. This practice follows logically from the statutory language; otherwise, if the youth is not given the "benefit" of the statutorily provided programs, there is a "reasonable doubt" as to whether or not the juvenile court has offered all its rehabilitative possibilities to the youth. Consequently, a youth enters the juvenile system and, because no one can accurately determine if the youth will ever commit a crime again, that client typically begins at the first tier of the system (probation), thereby satisfying the "regular statutory juvenile procedures." This procedural step is administratively justified on the basis that if it ever becomes necessary in the future to waive jurisdiction to adult court, the legally referred preliminary effects can serve as evidence of the court's sincere efforts at rehabilitation. In the event of a violation of probation, the juvenile may be reinstated to probation two, three or more times at the judge's discretion. This strengthens the court's self-righteous contention that it attempted everything possible to retain the youth within its jurisdiction.

Exceptions to this step-by-step process exist. For example, violent offenders who commit serious crimes may be waived without ever being exposed to any of the routine programs designed for their rehabilitation. The court is practicularly likely to waive a juvenile to adult court for heinous crimes such as first degree murder. By waiving the youth to adult court, the juvenile court demonstrates its concern for community protection, thereby placing public safety first and incapacitating the youth in an adult prison or some similar kind of restrictive facility or setting.

The rationale for the continuing existence of this policy system goes much deeper than a mere ineffective or inappropriate statutory process. To better understand why this regularized process exists, one must first understand the public's conception of how to handle crime and criminals.

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[59] *See Waiver of Jurisdiction*, in MICHIGAN JUVENILE COURT PROCEDURE SOURCEBOOK 33-35 (1975) (emphasis added).

The public has feared criminal behavior for some time.[60] When a crime occurs, especially if it happens locally and is serious, there is considerable pressure to apprehend and punish the individual actor. The punishment serves two purposes: retribution[61] and deterrence.[62] Thus, the public's fear of criminal behavior has made it prone to issue immediate punishment for serious crimes. Where both retribution and deterrence are simutaneously achieved, the community applauds the court's wisdom in its manifest ability to administer what the public perceives as justice.

Due process standards generally play a larger role in adult court than in juvenile court. Adherence to due process safeguards assures that the punished offender is guilty beyond a reasonable doubt. The adult system serves a retributive more than it does a deterrent purpose, although deterrence presumably follows from publicized punishment.

In contrast, because the public believes youths have less control over their actions (and hence are generally less culpable), they have typically been accorded fewer procedural safeguards. The intent is to reduce stigmatization and enhance adjudicatory flexibility so that rehabilitative programs have their anticipated salutary impact. The juvenile justice system's initial desire for deterrence postpones retributive punishment until after the efforts to rehabilitate, deter or intimidate have demonstratively failed.

The public's willingness to appear lenient toward certain youthful offenders has its limitations. When a juvenile's record becomes extensive and the public perceives that youth as dangerous, the ideals of deterrence and vengeance predominate. Society punishes the youth as an adult, thus utilizing its power of intimidation and relegating deterrence functions to a secondary stance. If waiver could not occur because the youth was not subject to "statutorily" required rehabilitative programs, public pressure to treat the juvenile as an adult would be enormous. Society's retributive reactions provide a powerful justification for the systematic handling of youthful offenders.

B. THE ILLUSION OF INDIVIDUALITY

The second question examines the pretense of the claim that juvenile programs are individualized, when in reality the process is, if anything, over-systematized. There are two explanations for this phenomenon. First, the notion that individualized programs are used

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60 Gallup Opinion Index, *Perceptions of Local Crime Are Declining* 24-30 (May, 1978); Gallup Opinion Index, *Public Opinion and Capital Punishment* 20-25 (September, 1978).

61 S. RANULF, MORAL INDIGNATION AND MIDDLE CLASS SOCIETY 1-7 (1964).

62 W. Archambeault, The Theory of Differential Deterrence (1979) (unpublished paper presented before the American Society of Criminology).

by juvenile courts on occasion is not total illusion. Second, political accountability makes that which is illusionary necessary for the continued maintenance of the underlying system.

It appears that the illusion represents reality to some extent, since a degree of individualization in correctional programming indeed exists. There is evidence that individualized juvenile programming exists in the current system. The more progressive juvenile court staffs do devise individual programs for many of their clients. Professional probation officers probably played a major role in the development of the more imaginative programs which currently exist such as wilderness training and status diversion.[63] Thus, it would be misleading to imply that individualized rehabilitative programs are altogether absent from the juvenile court setting.

However, the routine systematic handling of youths through the standard programs (probation, foster care, institutionalization, aftercare, waiver) discourages the development of any truly individualized plan. It may be the case, for example, that a youth's problem can best be handled on probation even though the youth continues to violate the law. The juvenile justice system probably could not permit such a correctional plan to continue, even though probation may be in "the best interests of the child." Rather, under such circumstances, a routine progression through the system would be initiated and justified under the rationale of public safety.

Most juvenile courts feel that they cannot afford politically to "let the client get worse before he gets better." As a result, courts ignore individualized treatment concerns and mental health considerations in preference for a political sensitivity to the youth's behavior. Any number of illustrations may be interjected here to support the point made by Langley *et al.* that "even the concept of individualized treatment is qualified by the political control functions of the court."[64]

Two factors cause juvenile court personnel to deliberately create the illusion of individuality in treatment. First, the organizations involved in processing delinquent youths are financed in whole or in part by public monies. The administrators of such public organizations are directly accountable to elected officials for the expenditure of funds, thus making the juvenile system susceptible to political manipulation. The community influences officials to punish youths when punishment seems appropriate. That is, when a youth commits a particularly heinous crime or compiles a severe record of offenses, society vindictively

63 P. KEVE, IMAGINATIVE PROGRAMMING IN PROBATION AND PAROLE 107-36 (1967).

64 Langley, Graves, & Norris, *Juvenile Court and Individualized Treatment*, 18 CRIME & DELINQUENCY 79, 84 (1972).

seeks his punishment. If a youth reaches the point of requiring "maximum" punitive response (waiver of jurisdiction) and the justice system cannot give the maximum response because the youth did not previously utilize all of the "regular statutory juvenile procedures" for rehabilitation, an angry electoral response could occur. In such a situation, the public official may become the scapegoat for the community's accumulated anger toward the offending youth. The official values his position and organization, and realizes that he exposes these to the risk of destructive fund cutting by making unpopular decisions. One means to avoid such cuts in funding is to ensure that the juvenile justice process does not over-deviate from the expectations of the elected officials and their constituency. The result is conservative court policies designed to preserve the status quo.

As has been observed elsewhere by Clemons Bartollas and Stuart Miller, a judge who refuses to transfer a publicized case to the criminal court may place his political future in jeopardy.[65] For example, Lamar Empey described how a permissive judge in a community grown intolerant of increasing juvenile violence was defeated for reelection because he refused to waive a murder case to the adult court. The judge believed the youth concerned could better be rehabilitated in the juvenile justice system. Meanwhile, another judge who routinely detained juveniles in detention following arrest gained great support and popularity from his constituency despite the fact that many of his decisions were subsequently reversed on appeal due to insufficiency of evidence.[66]

Irrespective of whether one approves or opposes the waiver of jurisdiction for juveniles, in reality juvenile court judges are expected to selectively punish young criminals wherever such action seems appropriate. Therefore the court personnel must assure that all youths in their jurisdiction who *might* someday require waiver to adult court must begin satisfying the "regular statutory juvenile procedures" early in the process. Since no one is certain who the youths requiring waiver may be, nearly all such clients are routinely fitted into the tiered sequence discussed in Figure I.

A second factor contributing to the creation of an illusion of individualized juvenile treatment is the perpetuation of a misleading analogy of corrections to medicine. This comparison is inappropriate because offenders are not "sick" and hence are not necessarily in need of "treatment." As indicated earlier, the medical model is now generally considered to be obsolete in its application to corrections. The analogy involves the misplaced notion that the best treatment for youthful of-

65 C. BARTOLLAS & S. MILLER, THE JUVENILE OFFENDER 105 (1978).

66 L. EMPEY, *supra* note 1, at 472.

fenders should nearly always involve individual counseling and casework in one form or another. Until recently both professional and volunteer lay personnel overemphasized the evils of systematically handling clients, especially young criminals, and overemphasized the alleged benefits of individualized programming. A careful examination of the facts suggests that the public still embraces a repressive philosophy, particularly for serious, persistent offenders. Thus the "individualized treatment" ideal sounds much better in theory than it actually exists in field practice.

Individualized treatment understandably calls for a more flexible structure and accordingly requires additional funds for operation. Fiscal concerns thus assume as much importance as retributive and intimidatory punitive desires. Not surprisingly, this niggardly approach to budgetary expenditures produces an impersonalized, collective approach to the delivery of services to delinquents which, while economically efficient, jeopardizes the stated objectives of individualized treatment as publicly enunciated in court policy. This is exactly what the public expects and often receives from the juvenile justice process. Externally, the juvenile justice process radiates individuality (*i.e.*, personalized counseling of clients with problems). Internally, however, the system continues to be one of routinized, bureaucratic procedures produced by courts in anticipation of society's demands for retributive justice.

C. THE EFFECTS OF DUAL REALITY

It should now be apparent how the appearance of individual treatment and the reality of systematized processing affects the rehabilitative ideal. The effects of individually-oriented programs upon bureaucratic organization have been noted by others. Judith Mearig, for example, observed that:

> the professional [counselor] functioning in a bureaucracy may confront many situations in which organizational needs conflict with, or overwhelm, the professional commitment to client interests. If these conflicts were always resolved in favor of the client, there would be little reason for concern. . . . However, because of the relative power of organizations, professions, and clients, such conflicts tend to get resolved, first, in favor of the organization and, second, in favor of the professional group. Client interests usually come last.[67]

Later, Mearig elaborated further on this point. Here she echoed the idea that:

> Children's service professionals are generally quite sophisticated about the need to develop differential treatment plans to meet the needs of individ-

[67] J. MEARIG, WORKING FOR CHILDREN 160 (1978).

> ual children. However, they often fail to recognize that organizational structures, like treatment techniques, are tools that must be adapted for use in particular situations. Instead, organizational structures are usually viewed as givens to which professionals and clients must adapt. Yet, [this] model of bureaucracy, which is employed in public schools, welfare departments, and some of the other major children's services agencies, is an inefficient and inappropriate mechanism for coping with the idiosyncratic problems presented by human services consumers.[68]

Current research suggests that a "systematic" handling of some youths *is* the most appropriate counseling method. This article's suggestions for changes in the routine handling of juvenile cases does not eliminate the systematic style as a counseling option. A recognition of the fallacy of individualization will enable an increased "real" use of personalization as well as the development of specific, structural programs.

D. PROPOSALS FOR CHANGE

The fourth and final question to address concerns the alterations in the present system which might mitigate the harmful effects of the systematic handling of individual juvenile offenders. Routinized processing should be eliminated or softened so that any potential benefits to be derived from individualized treatment can be determined and implemented.

That no panacea exists cannot be overemphasized. Nothing as minor as the improvement of the juvenile justice process (or the adult criminal process) after the fact will eliminate or even reduce the crime problem which confounds society today. To significantly alter the crime pattern, changes must occur in society's structural factors which contribute to, or at least fail to restrain, the development of criminal behavior patterns. Unfortunately, an analysis of such social reforms lies beyond the scope of this article. It may suffice to merely acknowledge here that society's ability to provide the means by which delinquency can be brought within the bounds of our existing resources depends upon society's ability to identify and reduce the primary source of crime itself. Prevention must precede correction. To treat the belated symptons without first controlling its cause is an exercise in futility.

Regrettably, pervasive basic social reform is unlikely to occur in the near future. Absent fundamental changes, minor reforms will proceed in a milieu which treats delinquency as if it were an amalgamation of individual personal maladjustments rather than as a symptomatic product of endemic social problems. Therefore, rather than to wring our hands in unproductive dismay, the better course is to hope guardedly to ameliorate at least one operational flaw in existing juvenile court proce-

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[68] *Id.* at 161-62.

dure by introducing a more individualized process into the juvenile justice system without eliminating the stabilizing benefits which accrue from a reasonable degree of organizational bureaucracy. This proposed adjustment which we submit here will be more immediately practical than expecting an early acceptance of basic structural changes.

The thesis of this article is that while the public believes itself to be committed to rehabilitating youthful offenders, it still protects itself from perceived threats by incorporating in the required waiver procedures a catchall phrase allowing particular youths to be treated as adults and punished retributively. However, as has been discussed above, an inadvertent by-product of this catchall phrase is that it limits the flexibility, and therefore the effectiveness, of the juvenile justice system. When applied, the catchall provision forces the system to rely on specifically designated preliminary rehabilitative programs (Figure I) to the exclusion of additional, more creative programs which might better meet the "best interests of the child."

The most appropriate way to remedy the present shortcomings is to eliminate the statutory requirement that determines in mechanistic fashion an arbitrary time when a youth is allegedly beyond the rehabilitative efforts of the juvenile justice system. Another alternative is to remove the statutory catch-phrase and, instead of completely ending the waiver procedure, allow individual judges to decide if the child has utilized all available rehabilitative devices. However, that change would probably eventually result in the court's developing a guiding principle for determining whether the child should be waived, merely duplicating the existing problem. Furthermore, as noted earlier, many judges may be unwilling to do this because of the sociopolitical pressures from the community to waive more serious delinquents to the criminal court. This proposal includes the elimination of the legal stipulation requiring rigid adherence to artifically contrived procedural notions (*i.e.*, the sequential steps) which characterize the standardized rehabilitation programs of today.

Obviously this idea cannot be accomplished without making changes throughout the juvenile justice process. For example, the public's hunger for retributive justice and self-protection may preclude allowing the automatic release from custody of all youths upon attainment of a specified maximum age. To meet this objection the maximum age for holding youths who fall within particular statutory definitions of youthful offender should be extended to a higher age, such as twenty-five.

The effect of subjecting anyone to mandatory supervision for an extended period of time is inherently punitive, at least to some degree, just as it is potentially rehabilitative in a propitious context. Therefore,

the statutory revision should specify exactly which offenses are punishable with mandatory, long-term supervision.

Since it is likely certain youths will be held beyond their present age of majority, the courts must guarantee to juveniles due process restrictions similar to those in adult court. Compliance with such due process guarantees would be mandatory where incarceration could extend beyond the maximum age of the court's jurisdiction.

Youths who repeatedly commit relatively minor offenses not serious enough to justify retention beyond the maximum age of juvenile court jurisdiction pose a thorny problem. Establishing a statutory minimum number of *felonious* offenses might be the proper response. Although a mere quantitative tally of offenses is not particularly advisable since it ignores personality dynamics within the offender, the legislature could also set a given number of lesser offenses which could support retention beyond the maximum age. Once this number of offenses has been reached, a youth legally could be retained beyond the otherwise permissible legal age of the court's jurisdiction. The legislature would again determine the length of additional time which the youth would serve.

For those who are unwilling to accept a relatively brief period of juridical control over certain offenders (*e.g.*, only nine years incarceration for a sixteen year-old murderer), an alternative sentencing procedure could be developed. The procedure would transfer a youth to an adult prison after the youth reached the maximum age for incarceration under the juvenile code. The process must be carefully constructed in order to avoid subjecting the youth to fifth amendment double jeopardy, condemned in *Breed v. Jones*,[69] as addressed by Chief Justice Burger:

> Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. . . . We believe it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.[70]

Jones indicates that a special waiver hearing must precede any decision on extending the incarceration period for serious offenders. Should the juvenile court hear accusatory evidence at this session, jeopardy occurs. The procedure should require that the individual be informed at

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[69] 421 U.S. 519 (1975).

[70] *Id.* at 528, 529.

the original adjudication that once he reaches this maximum age of incarceration (*i.e.*, 25), a quasi-judicial administrative board (similar to a parole board) will review his case and determine if he should be released or transferred to an adult institution. The decision would be subject to automatic appellate review.

A special approach should be taken for juveniles beyond the age of original juvenile court jurisdiction whose emotional development is such that they have not benefited from institutional treatment and continue to commit additional crimes (*e.g.*, institutional assaults, property destruction, etc.) which are disruptive to the program or harmful to others. Consideration should be given to the possibility of using grand jury indictments to bring the offending youth before the bar of adult justice. Upon recommendation of the institutional superintendent, the offender should be returned to the juvenile court for review. If the judge agrees that past efforts at treatment have failed and that no other community treatment is available to treat the offender who remains a threat to society, the judge could refer that youthful offender to the local prosecuting attorney. This formal referral would contain a recommendation that he now be legally charged with whatever *new* crimes may have been alleged against him since his most recent appearance in the juvenile court (*i.e.*, new crimes committed during his incarceration).

Under this plan, the age of adulthood need not change. Thus, those over the age of juvenile court jurisdiction at the time of committing the most recent offense(s) would be handled routinely as are other adults. However, young persons under the institutional control of the juvenile court could be retained by the court until their mid-twenties. This system would provide the Department of Corrections with an incentive to develop a reformatory-type correctional institution with emphasis on both vocational training and academic education designed to serve youths in the age bracket of sixteen through twenty-five. Classifying the group into "dangerous" and "non-dangerous" offenders would facilitate development of specialized facilities for the treatment of younger, more responsive offenders, while at the same time providing a more restrictive milieu for the more recalcitrant inmates. This program could also serve youths convicted in adult courts where they have exceeded the maximum jurisdictional age (seventeen through twenty-five) of the juvenile court.

Kenneth Keniston referred to persons in this age range between adolescence and adulthood as "youths."[71] Recently Ruth Cavan and Ted Ferdinand suggested that these delinquent youths represent a separate offender category which is distinguishable from both adult

[71] K. KENISTON, YOUTH AND DISSENT 3-21 (2d ed. 1971).

criminals and juvenile delinquents.[72] To accomodate the needs of this unique group, an intermediate court could be created. Courts after which this intermediate court is modeled presently provide a last resort forum for those youths who exceed the limits of legally defined delinquency but are still amenable to an approach less punitive than adult court. The special court would continue to offer selected offenders the opportunity for correctional treatment in less severe settings. Such an innovation may be an alternative to the traditional indictment procedure in criminal court without compromising the proposed extended age range of twenty-five. At the same time, the intractable, highly sophisticated serious offender would remain subject to transfer.

Assuming these arrangements would be realized in whole or in part, the treatment afforded these more sophisticated juveniles in their late teens might also benefit young adults who are currently being incarcerated in adult prisons with more hardened criminals. The success of the suggested reforms would be undermined by replicating the present errors inherent in the medical model. Every effort must be extended by correctional program administrators to expand and enhance the treatment opportunities (counseling, education, training, etc.) available to their client in a non-coercive manner. The period of rehabilitation should not relate to the client's involvement in—or apparent response to—the program provided, that is, the young adult's release should not be accelerated by reason of his participation nor should it be delayed in the absence of a visible positive response to the program offered. As Norval Morris stated, "[P]ower over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes."[73] Since many young offenders lack knowledge of what they need, they tend to reject that which they do not understand. Therefore this group of clients for whom juvenile court jurisdiction has been extended should be exposed to correctional programs for the specific purpose of familiarizing them with the potential benefits to be derived from the programs. If, after a month or two of such compulsory exposure the offender then rejects such a treatment plan, he should be allowed to resign without prejudice.[74]

It may be argued that the youths subjected to institutionalization under this proposed system are being denied the individualized treatment which they otherwise might have received. This argument is only partially valid. Those incarcerated delinquents will receive correctional program exposure, as described above. But by extracting this group

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[72] R. CAVAN & T. FERDINAND, *supra* note 53, at 31, 333-34.

[73] N. MORRIS & C. HOWARD, STUDIES IN CRIMINAL LAW 175 (1964).

[74] N. MORRIS, THE FUTURE OF IMPRISONMENT 19 (1974).

from the customary juvenile court programs, the administrative paralysis so characteristic of many juvenile justice programs can be relaxed. This would then enhance the potential flexibility of program planning on an individual basis for the remainder of clients retained in the juvenile court caseload.

By diverting serious and/or persistent juvenile offenders elsewhere, younger offenders, and those not yet deeply involved in the system, will receive individualized attention. Under the present system, these youths receive only that which is in the best interest of the system. Too many have been locked into an unvarying, mechanical process as enunciated by rigid, bureaucratic policy.

VI. CONCLUSION

This article has attempted to provide a reasonably accurate description of the traditional operations of the juvenile justice system and how it might operate in the future. Further exploration and future reassessment will be necessary to more accurately determine whether or not these recommended innovations have been effective. Hopefully these reforms will retard the perpetual motion of deviation amplification that seems to propel youths deeper and deeper into the rut of the juvenile justice systems under the guise of helpful, "individual" treatment.