

## The Devil's Advocate

Dennis the Menace is achieving adult status under the law. He has come of age. Some of us had hoped that rights and privileges would be extended to minors first and that self-assumed responsibilities would follow.<sup>1</sup> Instead, legal duties and liabilities are taking precedence, even though that may be putting the cart before the horse. In many urban areas, teen-age lifestyle, drug habits, muggings, and assaults upon the elderly have generated tremendous pressures for punitive action.

The juvenile court system, as we have known it for three-quarters of a century, is in jeopardy, and the trend towards waiver over to the criminal courts, or making the juvenile court into a junior grade criminal court, may be irresistible. Some will view this development as a logical outgrowth of *Gault*<sup>2</sup> and as symptomatic of the demise of the rehabilitative ideal. The facts, however, are that the fair treatment mandated by *Gault* applies a *fortiori* to the adult criminal process, where plea bargaining is so rampant that the juvenile delinquent may have even a better chance of "beating the rap" than he has under the juvenile system. Moreover, it is the "revolving door" phenomenon that has intensified the public demand for retribution which is inflamed by the media. When there are no wars close at hand, commentators must find a substitute for martial violence in order to whet the prurient appetites of readers and viewers. Of course, although the violence of youth is a serious problem, some of the coverage by the media reminds one of Theodore Roosevelt's crime wave as reported by Lincoln Steffens.<sup>3</sup>

Violence begets violence, so there is overkill, overreacting, to juvenile violence. Thomas Szasz is said to have recommended the shooting of kid muggers in his latest publicized hyperbole. More important, liberal legislators are on the defensive, and the voices of moderation can scarcely be heard in the clamor to "get tough." In New York, it is likely that the new, stiffer juvenile law, which went into effect February 1, 1977,<sup>4</sup> will be amended at this session of the legislature to lower the ages for processing delinquency cases, to give the option of waiver to the criminal rather than to the family court, and to make penalties more severe.

There is a recent precedent for such a "get tough" policy, although the results should give us pause. Then Governor Rockefeller took essentially the same approach to the drug problem. No matter that it failed.<sup>5</sup> The side effects were beneficial. "Rocky's" liberal image, tarnished by Attica, all but evaporated when he "got tough" with addicts and pushers. He became acceptable for elevation to the vice-presidency, a political feat which did not go unnoticed by lesser politicians who are conditioned to appreciate boot-strap operations.

Of course, politically speaking, there may be an advantage in dealing with symptoms rather than causes, even though chickens eventually come home to roost. The conservative legislators backing a "hard hat" philosophy need not for the moment reckon with the cost of their programs nor with the additional criminalization of youth it inevitably will produce. No matter that it costs more to institutionalize (whether for rehabilitation or for revenge) a minor than it would to send him to Harvard with an ample allowance,<sup>6</sup> criminals (especially young ones) should not be molly-coddled as soft-headed "bleeding hearts" would have it. Young punks must be taught a lesson, even though state institutions really provide post-graduate education in crime, and more hardened criminals will be turned loose after the stiffer penalties are served.

The only thing that Dennis the Menace salvages out of such "reform" is that he should and probably must get the full panoply of constitutional due process. It is ironic that the adult criminal system thus becomes the model for juvenile justice. Bad as the juvenile system is at its worst, in most states it has a far better record than the adult criminal justice system.

If legislatures were rational and really interested in attacking causes of delinquency, there would be an expanded effort to deal with the criminalizing conditions at home and at school. Although every state has child abuse legislation, and most have "battered child" statutes which require the reporting of suspected cases of child abuse, such statutes are unevenly applied. Severe psychological abuse or emotional deprivation usually is not covered nor implemented by legal action. The most recent study, adopting a legalistic approach, recommends that physical rather than psychological abuse should be the limited objective.<sup>7</sup>

A legalistic approach also is made in the first volume published by the Juvenile Justice Standards Project, entitled "Counsel for Private Parties."<sup>8</sup> This volume articulates a lawyer-client role for counsel representing minors in any kind of court proceedings and "goes whole hog" in assimilating the adult client model. No allowance is made for age differentials, maturation, or situational factors, and the advocate is expected to elicit, accept, and follow the minor's own decision on all crucial matters. The only concession made to minority is that the report asserts that it is the professional responsibility of the attorney representing the minor to keep the file alive and to follow up on what happens during incarceration or treatment to make sure that due process has been observed and that the rights of the minor have been respected.

This is an odd marriage of convenience. The hard hats and the bleeding hearts have become bed fellows. Since they are entitled to privacy, one may not be sure who does what to whom. If rehabilitation is abandoned, either because it is a cruel hoax or because it is molly-coddling, it follows that criminal due process must be provided. The Constitution requires it. If criminal due process is imposed upon juvenile court proceedings, then, as in the case of adults, punishment and the protection of the public are the goals of juvenile institutionalization. At this point, some of us may experience *déjà vu*. After all, children over the age of seven were processed through the criminal courts before the establishment of juvenile courts and formerly received adult penalties. Perkins reports that a year-old baby was once indicted for nuisance in New York; an English two-year old was once charged with vagrancy; Georgia once held that a person only three and one-half was not accountable; and England imposed the death penalty on children of 10 and 13.<sup>9</sup> Lest one condemn the British as bloodthirsty, we should remember that Alabama in 1858, and New Jersey in 1828, executed boys of 12 for murder.<sup>10</sup>

The sad fact is that for centuries we followed what is now characterized as the "hard hat" philosophy and the incidence of crime went undiminished. It also is true that only during the period from around 1900 through World War II was there relative law and order so that the streets were safe. Historically, violence and danger have been ubiquitous, in both England and America. The King's Peace, and similar devices, merely gave temporary respites, and highwaymen were as bad as the highways.<sup>11</sup>

Tragically, while the public and the media clamor for the death penalty and other forms of retribution, attention is diverted from some of the basic causes of violence which might be attacked. A small start might be ventured if we had the courage to enact decent gun control legislation, to overhaul our metropolitan school and police systems, and to reconsider child labor laws. If some progress were made in those areas, it might give us the impetus to eliminate slum conditions, provide job opportunities, and reconstitute the welfare system. Given current attitudes, amelioration or elimination of the causes of crime and violence are unlikely. As yet, we are not prepared to pay the price in social reform even though the present criminal justice system is a poor and costly

investment. The obvious danger is that authoritarian measures will be adopted out of frustration and anger, polarization will occur, and the juvenile will be thrown out with the wrath water.

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### References

- 1 See Foster HH: A "Bill of Rights" for Children. Charles C. Thomas, Springfield, Ill., 1974, ch. 5.
- 2 *In re Gault*, 387 U.S. 1 (1967)
- 3 The Autobiography of Lincoln Steffens relates how then Police Commissioner Roosevelt made political capital by having newspapers merely report all crime occurring in New York City, as had not been done previously, so that it appeared that there was a current crime wave.
- 4 Laws 1976, Chap. 878, eff. February 1, 1977, focuses on 14 and 15 year olds who commit serious or violent felonies and empowers the Family Court to mandate a five-year placement with the state Division of Youth, extendable up to age twenty-one. At least two years must be spent in confinement, the first year in a secure facility, and the additional year in a residential facility. There are strict controls over release, and the protection of the community as well as the needs of the child must be considered. The same judge is to hear the case from beginning to end, and a serious felony case may not be "adjusted" or settled by probation without approval of a judge.
- 5 See New York Times, Sept. 5, 1976, p. 1, for a story on the failure of the Rockefeller 1973 program, which resulted in "fewer dispositions, convictions and prison sentences for drug offenses" than there were under the old laws. The government-sponsored report was by the Drug Law Evaluation Project, working under a grant from the Justice Department's Law Enforcement Assistance Administration. The report also stated that approximately 55 million dollars had been spent on court-related resources to implement the 1973 law.
- 6 See Committee on Mental Health Services Inside and Outside the Family Court in the City of New York, *Juvenile Justice Confounded: Pretensions and Realities of Treatment Service* (1972), p. 37, which reports that the median annual expenditure per child in New York juvenile institutions was slightly over \$10,000 in the fiscal year 1970-71, and that the figure for Overbrook was over \$17,000. In addition, voluntary agencies receiving public funds had a per capita cost that ranged between \$16,000 and \$24,000 per year. *Id.* at p. 109.
- 7 See Sussman A, Cohen SJ: *Reporting Child Abuse and Neglect*, Ballinger Pub. Co., Cambridge, 1975, pp. 16-17, 20-22, 73-78.
- 8 Institute of Judicial Administration and American Bar Association, *Standards Relating to Counsel for Private Parties* (Tentative Draft, 1976)
- 9 Perkins RM: *Criminal Law*, Foundation Press, Brooklyn, 1957, pp. 729-730
- 10 *Godfrey v. State*, 31 Ala. 323 (1858); and *State v. Guild*, 4 N.J.L. 163 (1828)
- 11 For example, consider the activities of Jonathan Wild which caught the imagination of Fielding and Defoe. There is a brief description in Hall J: *Theft, Law & Society*, Bobbs Merrill, Indianapolis, 1952, pp. 70-76