Prescriptions for Reform — Doing What We Set Out to Do? Juvenile Justice: Changes in Goals, Procedures and Semantics*

JUSTINE WISE POLIER**

> It is no evil for things to undergo change, and no good for things to subsist in consequence of change . . .
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> *Meditations* of Marcus Aurelius

American "populism," a bad word in the current political vocabulary, is described by C. Vann Woodward as a movement that was "too advanced to be accepted by a complacent Gilded Age," but an effort that deserved "a serious hearing from posterity."[1]

At its inception, the juvenile court movement was, likewise, daringly innovative. Child welfare and the first White House Conference were still a decade away. Social work had not become a recognized profession. Freud had not yet loomed on the horizon. The use of psychological tests and psychiatric treatment was unknown. It was not until over thirty years later, in depression days, that this country began to accept responsibility for providing aid to children in their own homes.

Like populism, the juvenile court movement was too advanced both for the complacent Gilded Age and for the materialistic ages that have followed. While the aspirations and mistakes of both movements have much to teach, there is one vast difference. The juvenile court movement succeeded in securing state laws that created a new judicial institution,*** so that consequences can be measured against the original concepts.

A serious "hearing" of the juvenile justice movement demands questions about its unfinished agenda as well as about its shortcomings or failures, and of how new prescriptions for reform deal with this agenda: What do new and old prescriptions have in common? Where does the sharpest cleavage arise and what are the reasons for such cleavage? Are there values in past prescriptions that should be incorporated in new reforms? To what extent are new prescriptions overlooking or discarding what has been learned from medicine, from mental health, from knowledge about child development,

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**Judge Polier is Judge of the New York State Family Court, Retired. Her deep and long-standing interest in the legal concerns of children is reflected in her recent presentation at the Governors' Conference on Children, which took place in Idaho in 1977, entitled "Children in a Changing World: The Role of the Community and the Need for Child and Family Advocacy." See also the introductory list of Isaac Ray Award winners.

***While all states eventually enacted laws authorizing the creation of juvenile courts, special courts with specialized personnel have generally been established in only large metropolitan areas.

and from the juvenile court movement? Are today's reformers, intent on criticism of old dogmas, avoiding reexamination of dogmas of more recent vintage, including their own? To what extent are today's reform prescriptions a response to widespread disillusionment during the past decade about governmental failures and abuses in regard to human needs? Finally, how ready is America now to take new and positive steps to change attitudes toward children, to provide needed resources for their well-being, and to begin a hard upward climb to provide justice for children in its broadest meaning?

"Child-savers" of an earlier period sought to save children from the cruelty and harms of the criminal justice system, from contamination by being placed with adult offenders in jails and prisons. Now they are held up to criticism, if not contempt, by the modern "child-savers" who seek to save children from the ineptitude of juvenile courts and from the cruelty and barren alienation characteristic of juvenile institutions.

Both groups share the virtue of seeking better ways of meeting the problem of deviant youth. Both share the error of selecting too narrow targets for their efforts. The pioneers of the juvenile court system did not realize that no single institution could successfully rise above the level of the social conditions which society imposed on children. Nor did they face the reality that in an acquisitive society, where wealth was equated with special rights and privileges, a court dealing with the problems of the poor would, together with other institutions developed for the poor, become a poor and denigrated institution. Today's reformers have in similar fashion also selected too narrow targets for basic reforms as they concentrate on the juvenile court as "the enemy" instead of the larger social and economic conditions that provide child fodder for inadequate public schools, health services, mental hospitals, and child caring facilities which primarily serve poor children.

Within the juvenile court system, a still narrower target, "the status offender," has been selected as a prime beneficiary of many new efforts. In doing so, today's reformers consciously or unconsciously overlook the fact that the original juvenile court proponents had attempted to have all children brought before the courts treated as status offenders – non-criminals – whose problems rather than whose acts were to be the center of concern.

In the need to distinguish present reformers from past reformers, the "Progressives" who established the juvenile courts are treated with condescension for having believed that the welfare of individual children coincided with the well-being of the state and that of the juvenile court. That they were overly optimistic about the ability of any one institution to achieve such unity cannot be denied. But I would submit that this goal is and will continue to be the lodestar for present and future reformers, including today's critics of the juvenile court, and the future critics of today's critics in any democratic society.

I. Historic Concepts and Tasks

The initial concept of juvenile justice is ofttimes described as romantic, simplistic, elitist, and even as the brainchild or device of club women and

settlement house workers. It is asserted that the purpose of the originators was to transform poor, illiterate, non-conforming children of immigrants into good, god-fearing, and therefore, assimilated upright Americans.*

The pioneers of the juvenile court movement included some few persons of distinction and wealth, as have all revolutionary and reform movements of the past centuries. Far more relevant is the fact that they were living in this country at a time when hordes of immigrants were pouring into or being brought to American shores as cheap labor to build railroads and industry. There were no restraints on the exploitation of laborers or their children. There was no protective legislation to require safety devices or compensation for accidents. Minimum wages and maximum hours were not yet a matter for serious consideration. Unionization was a criminal offense. Children were regarded as the property of parents, and there were no protections against cruelty to children. Poverty of parents led to placement of children in almshouses and asylums or to their removal from their families to work with farmers as free boarders and unpaid hands. Children charged with misconduct or violations of law were treated as adult criminals, tried without counsel and sentenced to adult jails and prisons.

More significant than the economic or social background of individual supporters of the juvenile court movement is the fact that they were among a comparatively small group who opposed exploitation of adults and children by the robber barons of their day. They supported the right of workers to organize and were among the first to support legislation to protect women and children in industry. This was true of Julian W. Mack, the first juvenile court judge in Cook County, Illinois. Even more dramatically it was true of Judge Ben Lindsay, who, in addition to his participation in the battle for unpopular social legislation, anticipated the idea of trial marriages for persons without children, and was subsequently removed from office.

So much for the *dramatis personae* apart from the concepts that lay behind the juvenile court movement. There were three basic concepts:

First, a child is not a miniature adult and should be treated as a changing, growing human being, more responsive to guidance than an adult.

Second, a child, whether brought before a court as dependent, neglected or delinquent, should be studied and seen as a whole human being with unique strengths, weaknesses, and a potential for growth and given appropriate help.

Third, as the needs of children before the court were made known to the larger community, it would provide care, support and rehabilitative services as needed.

True, the early "reformers" did not foresee that juvenile courts would be relegated to an inferior status by bench, bar, and politicians, as property rights were assigned a place far superior to that of human rights under law.

*It is true that the reformers in the juvenile court movement, like other persons in America, became enamoured of the melting pot theory. But this was not special to the juvenile court supporters. It is to be found in any discussion of education, religion, politics, or general welfare of that period.

They did not foresee the woefully inadequate concern for the welfare of children at local, state, and federal levels of government. They did not foresee the urbanization of America or the extent to which racism would be institutionalized in every area of life that affected the growth and well-being of children. They did not foresee that the development of new knowledge and skills concerning child development would not be made available to the children of the poor (the court population). Finally, they did not foresee that their faith in the will and ability of America to create a brave new world would be replaced by widespread disillusionment and doubts about government and its capacity to do more good than harm when it intervened in the lives of children. Their work may be seen as "part of an historic aspiration in its innocent and necessary striving."[2]

It is now over a decade since varied spotlights have been played on the juvenile justice system by many critics. The lights have varied in color according to those who managed the display: from white with promise, to red with anger, and on to the now fashionable black of despair. It is right that the faults and failures of juvenile justice should be exposed. Even some distortions are more encouraging than the decades of indifference that characterized the attitude of bench, bar, community, and even academia toward the juvenile justice system until recently. Whether the interest will be sustained is hard to guess. Policies in regard to child welfare and juvenile justice, like American policy toward the Indians, have been subjected to *ad hoc* decisions and an on-again, off-again interest that makes for uncertainty, as well as confusion.

It is unfortunate that even in contemporary studies, juvenile justice is seen as primarily dealing with juvenile delinquents who violate criminal laws and with the "status offender." Too little attention is paid to the significant proportion of juvenile court work that deals with protection of children from neglect or abuse, with the releasing of children from harmful or woefully inadequate parental ties, with the freeing of children for adoption, and with custody battles. Yet these are among the most difficult areas where the court plays a significant role in modifying traditional values about the rights of biological parents and the rights of children as persons.* How far such issues involving the rights of children, parents and substitute parents can or should be delegated to administrative agencies raises serious questions including how to safeguard slowly won rights to due process and other constitutional rights for children.

II. Old Failures: Inadequate Prescriptions

The purpose of this chapter is to examine recent prescriptions for reform of the juvenile justice system. No one familiar with the failures, the limitations, and the shortcomings of the juvenile court, as it has evolved or staggered along, can fail to welcome prescriptions for reform. The need is rather to examine recent prescriptions to discover how far they correct old wrongs to children and offer better ways of achieving benefits. It is time to

*The Comptroller for New York State recently reported that delays in moving mentally retarded persons from Willowbrook State Hospital had resulted from the Federal Court requirement for parental consent and due process as well as community resistance to establishing community residences. *New York Times*, May 25, 1977.

III. Prescription for Reform: From Opposite Poles

Juvenile courts are under attack both by what may loosely be categorized as the political right and "liberal" proponents for reform.

From the right, juvenile courts are attacked as too permissive toward juveniles and insufficiently concerned about protection of the community. The adult criminal justice system is applauded as aimed at achieving public protection, despite its dismal failures. The juvenile justice system is attacked because public protection is not its primary purpose. In the words of Lord Chief Justice Widgery of England, "the public is less troubled by the threat to life, liberty, and pursuit of happiness, and by disregard of law in high places, than by the forces of evil in the streets where they live." He saw law and order "slipping away again through fingers which seem powerless to resist the slide." He concluded that the prescription for achieving law and order required above all that society should rid itself of "the canker inherent in an over-permissive society."[5]

In this country, the current prescription from the right is to lock up and throw the key away for juveniles who commit serious offenses. Legislation, responsive to this prescription, authorizes the transfer or waiver of children to the criminal justice system in almost every state.* This prescription is also welcomed by those who see the juvenile court, with its requirements for services to juveniles, as one more costly extension of the welfare state. "Violent juveniles" are regarded as expendable and not entitled to services.

The new bottom line that capitalizes on community fear and hostility toward crime in the streets has strangely affected, if not infected, even some of the "liberal" reformers, although their motivation and rationale are far different. In seeking to reduce the jurisdiction of juvenile courts, the removal of status offenders, and the abandonment of the medical model, the supporters of these prescriptions for reform have largely given up on the "violent juvenile." Few prescriptions against waivers to the criminal courts have emerged. Requirements for ascertaining what happens to juveniles when incarcerated in adult jails or prisons are lacking in the prescriptions.[6] When challenged about joining with those who favor custodial care for serious offenders, the "liberals" offer rationalizations about limited professional time and the need for husbanding its use for where it will do most good, and skepticism that professional skills are effective for multi-problem children. (Economy of effort has always been reserved for those most in need!)

In the steady march by "liberal" reformers toward due process for children, some lock-step movements are prescribed which seem to be at odds with the purpose of protecting children or respecting their sensibilities. Among these is the demand that juvenile courts be opened to the public and the media. It is argued that "the right to know" is essential to uncovering injustice and to the protection of children subject to the deprivation of freedom. This position is supported not only by those concerned with due process, but by legislators who have found promises of swift punishment and exposure of permissiveness by courts the politician's vote-getting dream.

*In some states authorization for transfer is limited to juveniles who are charged with serious felonies; in others it is extended to children charged with any felony. In still others, the power is vested in the prosecutor. The age of children who may be transferred ranges from 18 down to 13 years.

Sadly lacking is understanding of the juvenile brought before the court or of how judges will use the discretionary power to close or open their courts.

Judges have not always been known for heroic independence. Few can be expected to close their courts without anxiety that they will be subjected to media censure when they face reappointment or re-election. No judge has a crystal ball to warn how destructive evidence about a child or family will prove, if made public. Possibly even more significant for anyone who has observed children brought before a court is the effect of the absence of privacy in the courtroom. Even the coming or going of probation officers in a courtroom affects a child's response to questioning and how he speaks or explains his actions. Whether parents appear when a child is on trial may seem a colorless, harmless "fact" to the media, but has awesome significance to a child, deeply hurt by the lack of "family."

The safeguards proposed, apart from the limits of self-policing by the American press, raise constitutional questions, including protection against pre-publication censorship.

IV. Prescriptions for Justice: Substantive and Procedural Rights

It is significant that *Brown v. Board of Education*[7] preceded *In re Gault*[8] by some thirteen years. The Supreme Court in *Brown* rejected the segregation of school children by governmental action and the doctrine of "equal but separate" as violative of the substantive right of children to equal protection. It encouraged efforts to demand substantive rights of children under law. It required that government services be rendered so that they would not violate a child's right to equal services or diminish a child's sense of worth. *Brown* thus first laid the groundwork for subsequent federal actions that won the right to education, recreation, and treatment plans, and for federal action to enjoin the abuse of children in archaic institutions by solitary confinement, denial of reading material, and denial of appropriate treatment in hospitals and institutions. It also laid the groundwork for prohibitions against state use of private facilities that rejected children on the basis of race.

Gault made a different contribution toward assuring justice for children by asserting the right to due process of children when charged with delinquency. And a series of steps has been taken by legislatures and courts to require due process protections for children. *Brown* and *Gault* together constitute the cornerstone for a new architecture designed to achieve justice for children.*

The progress made during the days of the Warren court is now endangered by the Burger court.[9] In addition to narrowing access to the federal courts to protect constitutional rights, the "paddling" decision in *Ingraham v. Wright* threatens the substantive rights of children, subject to government control. That 5 to 4 decision holds that protection against cruel and unusual punishment is to be reserved only for offenders convicted of and incarcerated for violating the criminal law.

Juvenile justice was a latecomer to the area of constitutional rights

*Yet prescriptions for reform too often emphasize *Gault* only. In a recent volume, *Pursuing Justice for the Child* (Margaret K. Rosenheim, ed., Univ. of Chicago Press, 1976), one finds no reference to *Brown*.

accepted for Supreme Court scrutiny, so that the restrictions imposed on lower federal courts to hear and fashion appropriate remedies against violations of constitutional rights for children present a special threat. It is still too early to predict how far or how long the Supreme Court will seek to limit federal courts in protecting children against cruel and unusual punishment, coercive medical intrusions, the absence of educational opportunities, the denial of appropriate treatment for institutionalized children, or the use of unnecessarily restrictive placements.

A. Due Process and Formality Confused

In the prescriptions for reform that have focused on procedure, there is a questionable assumption that increased formality assures greater justice. This prescription is based in part on fear that a judge will have too direct involvement with a child, and may use what he learns from a child to engage in dispositional decisions for which he is not competent.

The old argument that a child's honesty was good for his soul has yielded to recognition that the lack of due process provided an all too easy way of securing a confession without a child being aware of its possible consequences. But the sound prescription for change has been encumbered by a new-found faith in formality. Raised benches that elevate the judges above child and family, judicial robes to add remoteness and dignity to the judge, are embraced both by those who prescribe reforms and by many judges. Such agreement raises questions as to whether the prescriptions are more appealing to the legal fraternity and judges than they are relevant to the promotion of justice for children. While there need be no relation between physical or visual proximity to a child and greater justice, there is surely no evidence that remote, detached postures generate greater understanding or wisdom among those ensconced in high places.

When prescriptions for formality are joined with prescriptions to restrict considerations of other than the offense by the juvenile court at dispositional hearings, two other questions arise: Will they together create one more wall to obscure the state's obligation when courts intervene in the lives of children? Will they further justify blindness or silence on the part of judges to the discrepancy between the rhetoric and realities of correctional services?

B. Prescription for Certainty

Endless efforts have been made throughout history to achieve justice or order through codes, regulations or other prescriptions for the control of human behavior. Hammurabi, Justinian, Jeremy Bentham and more recently, Goldstein, Freud and Solnit, as well as the National Standards Project, have sought to bring light and order to the handling of deviance. None provides certain or immutable answers to the questions raised by the endless variations in complex and ever-changing human relations that resist control by general answers or prescriptions for justice through scheduled punishment.

Abuses of judicial power, as exposed and condemned in *Gault*, led to adversarial procedures to protect due process rights. They also properly led to restricting the issues in a juvenile case to the facts as alleged in a petition.

Paradoxically, this beneficial result for many children has also prevented benefits children received from earlier approaches. As an example, in 1941, when a probation investigation revealed a long history of past neglect of a child since her mother's death, the court vacated its finding of delinquency and made a finding of neglect stating:

> The trend of the times and the trend of the law is away from straight-jacketed interpretations of the law, and rather in the direction of so interpreting the law as to mete out justice as the circumstances require and compel.[10]

That was in 1941. It could not happen today under the prescription that a finding must be based solely on the offense.

In the search for certainty today, new prescriptions would institute legislative codes fixing penalties to restrict discretion by judges in dispositions in juvenile as well as in adult courts. In doing so, the focus is placed on the offense. The child's past history, problems and potential for change are largely removed as reasons for variations in dispositions. Too little attention has been paid to "the impact of living under conditions of social injustice,"[11] and there has been far too little recognition that where this impact is lightened, a child may respond to a far greater extent than another child who has committed the same offense without having suffered from social injustice.

These prescriptions accept or go along with unproved assumptions by prosecutors, political figures and the general public that fixed and sure punishments will provide general deterrents to juvenile delinquents and so protect the public. The one nod to revulsion against too harsh punishment of a juvenile is that the penal codes for adult crimes are to be reduced by sub-codes that fix lesser penalties for children. This is, in sum, the new accountability prescription with its emphasis on certain punishment as *the* answer to deterrence of juvenile offenses.

A further claim for certainty through the new prescriptions for accountability is that fixed penalties based solely on the offense would allow identification and incapacitation of offenders who are likely to commit future serious crimes. It is contended that elaborate techniques have been devised to identify the dangerous offender. This promise of certainty is unfounded and contains an inherent contradiction. First, those who have studied prediction of future dangerousness acknowledge that prediction is in a primitive state, and that attempts to use it show that many non-dangerous offenders would be incarcerated in order to identify one "dangerous" offender.[12] Also, there is a contradiction between the doctrine that the punishment shall fit the crime and the basing of punishment on prediction concerning future acts of the offender so as to warrant longer incarceration.

Reduction of casual, haphazard, *ad hoc* decisions through limiting judicial discretion is too often offered as a means of also providing objective and certain standards for juvenile justice. The false promise that I.Q. tests would provide objective certainty for the classification of children should ring an alert to how "certain, objective standards" established by one generation are found flawed by succeeding generations. As Binet warned against the "brutal

pessimism" of those who saw intelligence as a fixed quantity, there is reason to question the "brutal pessimism" of those who now propose that fixed punishments based on the offense committed will provide certain, objective standards, and so assure justice.

V. Restrictive Prescriptions for Neglected and Abused Children

As previously noted, most of the prescriptions for reform have been focused on the delinquent and the status offender. However, in recent years (including the IJA-ABA proposed standards) child abuse and neglect statutes have been criticized as vague and unfair in that they fail to specify the exact limits of permissible parental conduct. Some prescriptions would limit juvenile court jurisdiction to cases in which physical harm has been done or there is imminent danger of serious physical injury to a child.

Although the proponents of these prescriptions generally acknowledge the right of a child to a stable, nurturing relationship with a parent, little consideration is given to the erosive destruction wreaked on children by continuing emotional injury or deprivation. To cast such a coarse net is often politically acceptable; public fury is aroused only when a specific case of *physical* brutality by a parent is reported in the press. It is all too reminiscent of the criticism by Jeremy Bentham of punishment meted out on an emotional basis:

> If you hate much, punish much; if you hate little, punish little; punish as you hate . . .

The restrictive prescription against intervention on behalf of neglected or abused children, combined with the prescription against the "medical model," would also exclude or drastically limit the use of clinical observations by physicians to identify children at risk. It has been contended that for a physician at a pre-natal clinic or at the time of delivery to note parental reactions which indicate that a child is at risk constitutes a wrongful invasion of privacy. Here, abstract theory would lead to denial of preventive services or action to protect the small percentage of children for whom removal from natural parents is essential to life or health.*

Without so intending, the prescription for reducing intervention in neglect and abuse cases plays into the apathy and indifference toward conditions in which children on welfare are left to survive. Three examples are illustrative: In the case of a child seriously abused by a parent, when study of the welfare record showed previous episodes of serious neglect, the worker was questioned as to why no earlier action had been taken to protect the child. In justification the worker replied, "This is the culture of poverty." On another occasion, a Commissioner of Welfare stated that when he had no facilities for neglected children, the District Offices were notified not to report cases. In another geographical area, welfare workers were told not to bring neglect actions on behalf of minority children since no facilities were available.

*After twenty years of study and work, Dr. Henry Kempe reports that even in cases involving service to parents, approximately 10 per cent of children abused or at risk of abuse need to be removed from their biological families.

Prescriptions for reducing jurisdiction in neglect and abuse cases have come largely from lawyers concerned with violations of human rights. Their stance is not inconsistent with the behavior of counsel assigned to neglect and abuse cases who show less ardor and involvement than when they represent a child charged with delinquency. It may be that such assignments seem less adversarial and less a lawyer's meat. At times, it seems that counsel prefer to defend the parent charged with an offense rather than the child alleged to be in need of protection.

Despite such reservations about prescriptions that would narrow neglect and abuse jurisdiction, it is only fair to note that they are not only based on non-interventionist abstract principles. They are also based on the tragic life experiences of children removed from their homes by reason of court findings or placed "voluntarily" by parents because of fear of court action. Woefully inadequate care following removal, the endless limbo of foster care, and a failure either to work with the natural family or to secure a permanent substitute family have provided impetus for these prescriptions.

Yet, the negative aspects of the prescriptions are also woefully inadequate to meet pervasive non-feasance concerning poor children. They reject the use of knowledge and preventive skills to protect children, and limit the scope of concern to cases where severe "dangerousness" is involved.

VI. The Medical Model — Discarded by Prescription

After a short boom and grandiose expectations of what psychiatry could do to rehabilitate deviant children, present prescriptions would all but outlaw its use by the juvenile courts. The mental health professions, now often derisively held responsible for "the medical model" (as though there were one), have played many roles in the history of the juvenile court. Little recognition has been given to the birth of community psychiatry and its contributions through attention to the social conditions that contribute to emotional disturbance, barriers to learning and mental disabilities.

By turn, mental health services have been bitterly opposed as endangering sexual morality, leaned on all too heavily in dispositional orders, and used as a ceremonial sanction for whatever decisions courts render. The reasons for current prescriptions for rejection also vary greatly.

To some, the imposition of mental health services is only one more invasion of privacy without informed consent. No valid difference is recognized between ordering surgery without consent of a patient and requiring a diagnostic study of a child or that child's attendance at counseling, vocational training or therapy sessions either while in placement or as a condition of probation. All are grouped together under the rubric of "coercion by the state" if ordered by a court.

To others, the absence of good mental health diagnostic or treatment services warrants characterizing them largely as pretension, fraud or cover-up to rationalize punishment. For them, opposition to "the medical model" and the use of psychiatry in treatment is based in part on the low level of such services available to children both in courts and in institutions. They point to evidence that mental health services have never been available to or used by juvenile courts or agencies in more than haphazard, fragmented and minimal fashion. The few clinics that have been established within juvenile courts are

regarded by such critics as resembling the proverbial geraniums planted in front of houses of ill-repute – that is, as embellishments used to obscure dispostional actions that ultimately assign children to the dumping grounds of custodial institutions.

The mental health professions must also share responsibility for the hostility underlying present prescriptions that would outlaw or reduce their role in the juvenile justice system. Professionals have generally resisted working in the courts or child-caring agencies. They have preferred private practice or work in voluntary agencies, where conditions of work and the choice of patients have been more to their liking or more promising from a professional point of view.

The scornful prescriptions of today may be the price for frauds practised against the majority of children who continued to be placed in custodial, impersonal institutions, untouched by any knowledge, understanding or use of mental health services. Even where diagnostic services in juvenile courts were provided, they were reduced all too often to a belt-line production of psychometrics to separate the retarded, the psychotic and the "normal." Early efforts to identify problems of individual children diminished. Psychometrics to label children were required by treatment agencies so that they could reject "too difficult children." This procedure, under which least was provided for the children who needed most help, provided one more justification for discarding "the medical model."

"The medical model" is also under attack by a third group which holds that since "the medical model" has been unable to affect criminal behavior through treatment, and since it undermines the general deterrent effect of the criminal law, general deterrence through punishment should be the legitimate, if not first, concern of the juvenile court. It is also contended that retribution, condemnation, and incapacitation, along with *general* deterrence, are appropriate functions of the juvenile court. For opposite reasons and with different verbiage, other supporters of prescriptions for doing away with the medical model claim it is used to justify or to extend coercive punishment in the name of rehabilitation.

Apart from the general theory underlying prescriptions for reform through minimizing governmental intervention, there are, therefore, many reasons for current attacks on mental health services as part of a "failed" experiment. Whether past failed expectations justify such prescriptions for the future or how the elimination of the medical model will help rather than hurt juveniles is highly questionable. Confusion also arises from the conflict between the prescription to discard the medical model and the emerging concept that when a juvenile or adult is deprived of freedom in the name of treatment, the right to and the duty to provide appropriate treatment are created.

Ignoring and failing to identify neurological problems are justified by the rationalization of "reformers" who see the juvenile courts as having failed. Such justification is once more being questioned by those seriously working with children, with child development problems, and with the extensive physical and mental disabilities often discernible in child offenders when rigorously assessed. Personal concern for individual children and their families by professionals in psychiatry and psychology is challenging the

conclusion that depersonalized justice is all that is possible.[13] Bearing this challenge, some of the best professionals are once more appearing in the field of juvenile justice.

VII. The Three D's: Prescriptions at Risk

Among all the prescriptions for reform, the three D's – deinstitutionalization, diversion, and detention – have become the most emphasized. These prescriptions have been hard to implement. Of the three, more has been accomplished in deinstitutionalization than in diversion, and far more than in reducing or improving detention. There is danger that while the public rhetoric approving the three D's continues, the process of recriminalization and increased institutionalization of juveniles is outstripping achievements in accord with these prescriptions.

A. Detention

The prescription for reducing detention was too narrowly focused. It failed to challenge the use of adult jails to hold children, regardless of the category to which they were assigned. The horrendous conditions in the jails were not made the center of attack. Instead, detention was described as a police/court processing for social control, and criticism was addressed largely to the more frequent use and the lengthening of detention for status offenders. Those who prescribed reforms to remove the status offender from jails or from their commingling with juvenile delinquents did not come to grips with the harsh reality that police, probation officers and judges are not provided with alternative facilities, when parents cannot or will not cope with difficult juveniles, or when juveniles refuse to return to their parents.

After early positive legislative responses to the prescription, the realistic problems, including the lack of alternative facilities, cooled legislation efforts and led to the postponement of effective dates for change for both status offenders and juvenile delinquents. And the use of adult jails for children continues at the rate of some 500,000 admissions each year.

B. Diversion

The central target for diversion has also too often been limited to the status offender. Since he is generally described as the child who is disobedient, stays out late at night or truants from school, the real problems between parents and children before court action are played down, as are the problems of the children.

Contrary to general misconceptions, in a high proportion of these children, as among juvenile delinquents, the case histories, social investigations, and diagnostic studies reveal many serious problems. Behind the word "incorrigilibity," as behind the word "delinquent," one finds the long history of a troubled child, left without help until he becomes so troubling that a crisis forces parental or community action. High incidences of persistent truancy, failure in school, late hours, poor peer relationships, drug abuse, addiction, emotional disturbance, alcoholism, and in some cases, mental retardation or mental illness are present in both categories. In addition, family relationships have often become so strained in the status offender group that there is less possibility of return to the family than

where the child's delinquent act is against someone outside the family. In both groups, there are a disproportionate number of children who are members of minority groups and come from the most deprived families and neighborhoods of the inner cities.

Characterizing parents as unloving, uncaring custodians who wish to rid themselves of incorrigible children fails to portray the problems of either parents or children, except in a small fraction of the cases. The parent who files a "status" petition is frequently frightened and even desperate about what is going to happen to a child. Feeling inadequate, unable to cope or to secure help on a voluntary basis, the parent finally turns to the court. Concern about stealing, late hours, joy-riding in borrowed cars, drinking, use of drugs, is reduced to a complaint of late hours so as not to hurt the child, together with a plea for help. With the provision of counsel for the child, cross-examination lays bare parental inadequacies and faults. It also may widen the breach between parent and child so that it becomes irremediable. This prescription is leading to more delinquency petitions and fewer status petitions in some areas, and one must question whether the new prescriptions are geared to meeting the complex problems of either the youths or their families.

Harder thinking is also needed about the prescriptions for excluding truancy from juvenile court jurisdiction. The correlation between school truancy and school failures, school suspensions, expulsions from school, and consequent delinquency, has been shown over and over again. Whether a child is labeled by court action or not, absence from school and the inability to master basic skills causes the child to label himself, and causes society to pigeon-hole the child for later failure.

Diversion has correctly been described as "the overture of the 'new correction'."[14] The prescription calls for the creation of services and facilities to which a juvenile could be referred for help without being subjected to formal court action, labeling, and the risk of commitment to an institution. In some areas, local efforts have achieved a substantial decrease in the number of court petitions. However, a national survey reports that only 25 per cent of the youths accepted by youth service bureau programs were in immediate jeopardy of the juvenile justice system. As Nejelski notes, the "youth service bureaus may be following the established pattern of . . . increasingly turn[ing] their attention to more malleable children. . . ."[15] Communities have been slow to set up alternative services and establishment agencies have been reluctant to accept difficult youths. Diversion of children from state hospitals has not been accompanied by reallocation of institutional funds for community-based services.

In addition, the federal government, which has endorsed the concept of diversion through legislation and some funding, has shown ambivalence toward its use for other than status or minor offenders. Thus, in one community, funds were granted by LEAA to a local accountability board to which youths charged with minor or status offenses were referred by police and the Juvenile Court Intake. Simultaneously, federal funds were granted by another division of LEAA to add more prosecutors in the juvenile court. The net result, found in a report from the prosecutor's office, showed an increase in the number of children prosecuted for delinquent acts, increased

promptness of trials, and an increase in the number of juvenile delinquents committed to state institutions.

Three major questions about the present prescriptions for diversion remain.

First, it is not clear whether the singling out of the status offender was based on what was regarded as a new concept about status offenders or seen as a pragmatic strategy toward reducing juvenile court jurisdiction. Those intent on reform could not have foreseen the present tendency to label status offenders as the "good" youths and the delinquents as the "bad" youths, incapable of rehabilitation and not entitled to services. Yet that is just how the prescription for reform is being increasingly used.

Second, without any real research, including follow-up, on juveniles for whom responsibility is assigned to schools, welfare departments, community based facilities (public and private), and other voluntary agencies, there is the question of how to secure effective monitoring of the consequences of diversion.

Third, there is the question of the extent to which prescriptions for diversion are imposing new threats to due process for juveniles referred for supervision by the police or other agencies without benefit of counsel or court review.

C. Deinstitutionalization

Prescriptions for deinstitutionalization have given a significant push to the slow movement, begun some 50 years ago, to remove children from large custodial institutions. At variance with many other prescriptions for reform, these rely heavily on what has been learned from the mental health professions and students of early child development. They stress the importance to children of their sense of identity with a caring adult and of stability in a family with a sense of belonging. In contrast to prescriptions regarding neglect and abuse, these recognize the emotional needs of children.

These prescriptions for reform have achieved and continue to achieve direct benefits for more children than any other prescription.

"Deinstitutionalization" has become a rallying cry for those who with good reason have come to abhor institutions, for those disillusioned about the benefits of government intervention, for those who have suffered hurt and humiliation in institutions, and for well-intentioned reformers who have picked up the cry. Now, however, the word deinstitutionalization is used with too little differentiation; it is applied to a range of institutions and programs, including jails, prisons, state hospitals for the mentally ill, clinic examinations, medication imposed without informed consent, probation, and the public schools. It has even been used in regard to foster home care for children removed from their families by reason of serious neglect or abuse.

In response to demands for deinstitutionalization, state institutions, voluntary agencies, and the courts discharge children prematurely and without sufficient regard to what will happen to the children after discharge. Determining where responsibility will be placed for continuity of care has not been made a mandatory part of the prescription for deinstitutionalization. As a result, another turnstile child has emerged. This

is the child for whom deinstitutionalization has been ordered without assurance of a place to live which can provide appropriate care. The child may be dumped in a shelter or a detention home, returned to an unfit family setting, placed in foster care, or sent to an institution in another state far from home. When the child offends again or acts out, hospitalization or custodial institutionalization of some other kind is ordered. Failure of the child in his natural family or in out-of-home placements, followed by reinstitutionalization, adds up to misery upon misery for the child, but such failures are too rarely subtracted from the triumphs chalked up for deinstitutionalization.*

There is one more deeply troubling deficit in the present prescription for deinstitutionalization. This is the omission of a clearly articulated and integral injunction against the recriminalization of juveniles. Recriminalization and more institutionalization of juveniles through the use of adult jails, waivers and transfers to the criminal courts are proceeding on tracks parallel to those that support deinstitutionalization. Despite federal funding and private grants, neither LEAA nor independent researchers have studied what happens to adolescents who are recriminalized. The statutes have been summarized, but there are no studies on what happens to adolescents in jail awaiting criminal trials, how long they wait, what sentences are imposed, where they are incarcerated, to what extent they are mingled with adult offenders, what programs are provided, or what happens to them after parole or discharge.

D. Purchase of Services: Dangerous Prescription

It is not clear why purchase of services has been tied to the reforms of diversion and deinstitutionalization, except as part of an assumption that anything government buys is better than what it is capable of doing. This prescription distances the state further from responsibility for the quality or quantity of services, indeed, from the quality of life for children, except as a bursar. Yet this prescription has not been modified even after the uncovering of cruelty, abuse, and mistreatment of children sent to institutions in Texas by Illinois and Louisiana, or by exposés concerning abuse in private day care programs purchased with public funds.

VIII. Prescriptions for Reform and Child Advocacy

> It is extraordinarily difficult to love children in the abstract . . . . It is only through precise, attentive knowledge of particular children that we can become as we must – informed advocates for the needs of children.[16]

Prescriptions for reform have been supported by child advocacy on many fronts, and in turn have been strengthened and modified by the involvement of child advocates who learn from real life situations.

After *Brown* and *Gault* it was hoped that the Bill of Rights would no

*In New York, the Director of Special Services for Children recently reported: "We have 400 children placed all over the country. At least half of them are discharged from state mental hospitals. In the name of deinstitutionalization we took a child from one institution and placed him in another." *New York Coalition for Juvenile Justice and Youth Services Newsletter*, May 1977, p. 5.

longer be regarded as for adults only. Child advocates began to present facts that had not previously confronted juvenile courts, state and federal courts, administrative agencies, voluntary agencies or the public. Findings such as those about children suspended from school, expelled or not registered, about children denied health services, about children incarcerated in adult jails, raised the consciousness of those concerned with what was actually happening to children. More demands were heard for monitoring.

Child advocates at the community level became a source of political strength as they came to know what was happening to children. Aided by prescriptions for reform to restrict the use of detention, institutionalization, and other hurtful practices including discriminatory treatment of minority children, they brought a new impact to the support of prescriptions for reform. Child advocacy also raised questions about some prescriptions, such as non-intervention where children are at risk, as actual case histories about what actually happens to children caused revisions based on experience.

As advocates become more involved with children, there is a new growth of concern about the need for adult/child relationships that were considered so important in the early days of the juveniles courts. For a while such concern was played down as sentimental or middle-class, but now comes the re-recognition that children who have suffered many deprivations desperately need a sense that some adult cares, has confidence in them, and stands ready to help. Whether such adults are to be professionals, paraprofessionals or volunteers, the rediscovery of this reality needs to inform present prescriptions to a far greater degree.

Advocacy within communities must then include not only a challenge to systems that are hurtful to children, but advocacy on behalf of individual children. Such comprehensive advocacy is needed to expand prescriptions to embrace the full entitlements of children and examine what local, state and federal governments omit in programs for children. Such advocacy is needed to challenge inadequate services that result in children being lost in the limbo of foster care, subjected to racial discrimination, or being recriminalized.

IX. Limits of Prescriptions for Reform: Needed — A Jurisprudence for Children

Fashions in what has been described as juvenile justice have come and gone swiftly during the past 75 years of this century.

During the first two decades, the focus was on the ideal of individualized justice. The juvenile court movement, however, was unable to translate a jurisprudence based on the idea of the uniqueness of childhood into laws and procedures that safeguarded children from harm and enhanced their opportunities to develop and fulfill their potential. The movement was unable to secure the rights of children not just to separate or different services, but to something more than is accorded to adults. Those implementing the movement did not recognize that such concepts could not succeed in one institution separate and apart from, yet dependent on, the other public and private institutions that dominated the lives of children: family, education, health, employment or the emerging welfare world. They failed to confront the gaps between law on the books and the realities for children and youth that would undermine their insular structure.

Between World Wars I and II, sociological and psychological explanations of deviant behavior and greater concern for human rights led to scrutiny of the discrepancies between what judges said and what they did. Sociological or experimental jurisprudence, the growth of legal realism, legal fact-finding as an essential tool of jurisprudence, and the concept of law as an instrument of social action flourished in this period and into the 1950's. It was in the mid-1940's that a great scholar, Alexander Pekelis, described three main characteristics of jurisprudence as the outcome of modern schools of thought dealing with law and social sciences:

> These are: an insistence on the gap between what the law appears to be in the books and what it is in reality; a feeling for the dissonance between the abstractness of general rules and the individuality of concrete cases; and an awareness of the creative nature of the judicial function.[17]

The description of and comments on these characteristics of welfare jurisprudence, written nearly 40 years ago, raise questions that are still relevant to issues of juvenile jurisprudence and current prescriptions for reform: What are the gaps between the law on the books and the realities for children and their families? Is there sufficient concern for the dissonance between abstract generalities and the concrete needs in individual cases? Is there awareness of or need for the creative nature of the judicial function? Are courts still needed to exercise intelligent lay control over experts and administrative decisions as "the best defense against the tyranny of experts"?[18] It is worth noting that in this same paper, Pekelis held that the balanced coexistence of legislative or administrative action and intelligent judicial review thereof is feasible and is the essence of constitutional government. He saw welfare jurisprudence as an essential foundation for judicial review if it were not to perish from either atrophy or over-exertion.[19]

Within ten years after the writings of Pekelis, the *Brown* decision of the Supreme Court, relying, in part, on social science findings, brought children within the horizon of the Bill of Rights and broadened the concept of justice for juveniles. It was followed by *Gault* and other decisions of the Supreme Court and lower federal courts, and juvenile jurisprudence was given promise of new meaning. But, by the late 1960's, the high expectations of unending progress in securing the constitutional rights of adults or children were dimmed. There was rising skepticism about the implementation of rights even when asserted by the courts, about abuses of judicial discretion, about the effectiveness of rehabilitation methods, as well as serious question as to whether governmental intervention could or would do more harm than good to children and families.

This skepticism led to acceptance of a dogma supporting abstention by government from intervention in the lives of children, although children in this country have been far more subject to denials of aid as a result of this doctrine than in other western countries. Only recently, Gilbert Steiner quoted words written by Grace Abbott in 1908: "All children are dependent but only a small number are dependent on the state . . . ." Some 70 years

later, he found "that description of governmental reticence remains valid."[20]

The skepticism also led to a turning away from questions of philosophy or jurisprudence, towards concentration on pragmatic prescriptions for reducing specific wrongs inflicted on children within various systems, and especially within the jurisdiction of juvenile courts. As one reviews the series of prescriptions for reform of juvenile justice developed in this period, the sum total of these prescriptions falls short of what might be regarded as a new jurisprudence for juveniles. Ongoing adherence in this country to traditions that support rugged individualism, parental rights, and a pragmatic approach to the solution of social programs does not provide fertile soil for conceptual approaches to meeting the complex problems of children or families. In addition, widespread indifference and hostility toward those who are deviant and those who are poor have created all but insuperable barriers to social change that challenges such attitudes.

Whatever the causes, the absence of an effective juvenile jurisprudence in this period not only has invited but has made necessary prescriptions for overcoming specific wrongs done to children, one by one as they are recognized – prescriptions with notable achievements to their credit. Despite these achievements, without a core philosophy that demands an ongoing commitment toward a larger goal, even effective efforts addressed to specific problems come and go, like staccato notes, with little holding power. Thus, separate efforts to concentrate on child abuse, on alcoholism, on violence among juveniles, successively compete for interest and funding. Even the right of children to counsel, as established by the Supreme Court, is ignored or left without implementation in many areas. Segregation of and discrimination against children of minority groups continues. Separation of poor from non-poor by various programs and procedures, with resulting denigration of the quality of services that affect many children in the juvenile justice system and more outside, has not yet been challenged as a suspect classification.

In this perspective, efforts to correct wrongs by prescriptions must continue, but hopefully they can be joined with creative efforts to develop a philosophy of law that goes beyond the "don'ts." This is not to suggest that any juvenile justice concepts now developed will give final answers. They can, however, provide goals based on what has been learned from the law and the social sciences and what can be learned through ongoing awareness of the necessity for further fact-finding and further learning.

There are still some advocates for human rights who, despite full awareness of the limitations and failures of legal institutions and government during the past decade, present a positive role for law and legal institutions. Only recently, Professor Thomas Emerson, described by Norman Dorsen as "the founder of civil rights law," challenged the tendency in law schools, universities, editorial offices and courts to denigrate the capacity of law, legal institutions, and government to achieve social reforms. His words go to the essence of the future of juvenile justice:

> The argument that government is not capable of solving our problems is based upon the premise that government is overextended, incompetent,

bureaucratic, responsive only to vested interests, and corrupt. The solution urged is to withdraw government controls and leave much more to private economic forces. Again, there is of course some truth in the proposition. But the indictment against government is overdrawn, particularly in its blanket form, and the solution totally unacceptable. . . .

It is small wonder that people have become disillusioned. But the solution is not to abandon government. The solution is to make a government more like *government* instead of management, to make it represent the community rather than become an elitist system run by technological bureaucrats. . . .

The underlying issue, however, goes further. It is not whether or not we can change our institutions themselves. Can we develop institutions that will be able to learn instead of calcifying: that will have *human* relations with people rather than bureaucratic relations? . . . How can we make our institutions operate in behalf of the people they are supposed to serve? . . . How do we infuse into the structure a sense of moral responsibility for the lives and fortunes of our fellow citizens? [21]

The future of children in the juvenile justice system, like the future of far larger numbers of children, will be determined by how far the people of this country and its government ready themselves to assure the welfare of all children. The same forces that determine what is done for children through child welfare, public welfare, schools, hospitals or community services will determine what can be done for children and youth through the juvenile courts. The essential question for juvenile jurisprudence, as for all governmental structures, is then how fully it meets the needs and respects the rights and liberty of human beings within its jurisdiction. The same test must be applied to prescriptions for reform.

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